

Creedon, Paul

From: Kim Courtney <kimberly.courtney@gmail.com>
Sent: Monday, June 22, 2015 11:16 AM
To: City Council; Lopez, Donna
Cc: Xavier Dietrich
Subject: Submission for June 22, 2015 City Council Hearing
Attachments: Courtney Dietrich City Council Memo June 22, 2015 .pdf

Dear Ms. Lopez,

Please include this Memo with the materials for the June 22, 2015 City Council Hearing.

Thank you,
Kim Courtney

Memorandum

To: Cambridge City Council, Cambridge City Clerk Donna Lopez

From: Kim Courtney and Xavier Dietrich

Date: June 22, 2015

Re: Awaiting Report 15-30 and 15-41 Regarding License Commission Fees and CAP Areas Dated June 2, 2015 from Andrea Jackson, Chair of the Cambridge License Commission

This Memorandum is requested to be submitted by the City Clerk to the official public record of the June 22, 2015 City Council Meeting, and is signed by Xavier Dietrich, a Resident of Cambridge, and myself, Kim Courtney, a Cambridge Resident, Attorney, and Founder of the Cambridge based Food Business Association.

The following is in reference to a Memorandum from Andrea Jackson, Chair of the Cambridge License Commission, to City Manager Richard Rossi dated June 2, 2015 regarding City Council Policy Order O-6 dated March 30, 2015 sponsored by Councillor Benzan and approved by all nine City Councillors, and City Council Policy Order O-8 dated April 13, 2015 sponsored by Councillor Cheung, and approved by all seven City Councillors present, with two absent.

Background

The March 30, 2015 Order asks the City Manager whether there are any proposed increases to Common Victualer ("CV") and Liquor License fees, whether there is a liquor license CAP in central square, and whether the CAP should be raised in Central Square and other parts of the City.

The April 13, 2015 Order notes past fee increases for no-value liquor licenses, and reports that restaurant owners in Cambridge have indicated that those increases have negatively impacted their businesses, and that any further increases would jeopardize the industry. The Order further states, "Given the direct impact of such fees on the availability of locally-owned restaurants, this is ultimately a policy decision that the Council should decide". The Order requests the City Manager to report on any discussions held regarding fee increases that the License Commission, and "to make the Cambridge License Commission aware of the Council's opposition to any fee increases proposed for no-value liquor licenses due to the undue financial burden they would place on business owners in the City".

Cambridge Has No Quota

The Council's inquiry regarding CAP zones misses the crucial point that Cambridge is not permitted by state law to implement a quota. In the early 1980s a City Council vote resulted in the lifting of the quota that had existed according to state law. The License Commission's attempt to institute its own quota system through what it calls "CAP zones" does not reconcile with the instructions from the state that Cambridge must not implement another quota without a vote by the people, which has not taken place to date. There can be no blanket limitation to the issuance of liquor licenses in specific zones, and the Council should make this clear to the City Manager and License Commission.

Legislative Powers Solely Held by City Council

The CAP regulations created by the License Commission in 1986, and amended by that Commission at various times thereafter, are not valid because the License Commission has no authority to draft regulations regarding liquor licenses - a power which is held solely within the City Council.

Massachusetts General Laws Chapter 43, Section 97 (Plan E Charter) states, "The city council shall have and exercise all the legislative powers of the city ...". The only exceptions to the legislative responsibilities of the City Council are those powers given to the school committee and to voters. There are no other exceptions in the state law governing the City Council's authority, and there is no provision in the law for that power to be delegated. Neither the City Manager, nor any of the City's boards or commissions, can create laws, regulations or policies. Thus, the creation of the CAP regulations without a public process before the City Council, and City Council approval, renders them invalid.

In regard to liquor license fees for no-value licenses, if the City Council is concerned about those fees being too high, it should simply bring forth an Order to lower those fees, which I believe would be a positive discussion to have for local businesses, and is exclusively within the Council's purview.

License Commission's Memorandum

Creation of New Quota

The Memorandum dated June 2, 2015 from Chair Andrea Jackson to City Manager Richard Rossi ("Memo") makes it clear that the License Commission has a serious lack of understanding of state liquor license laws.

The Memo states,

“The cap areas were created in order to encourage food oriented restaurants and eliminate the so called barrooms that were prolific in the City. No new liquor licenses could be issued in those areas.”

As noted above, there is no quota that can be legally implemented in Cambridge, and thus the CAP zones are not in compliance with state law and must not be enforced.

Lack of Enforcement

In addition, the above statement exemplifies the License Commission's lack of understanding of state law, or at a minimum its refusal to enforce that law. If the CAP zones were created to “eliminate the so called barrooms” that Chair Jackson claims were “prolific” in Cambridge in 1986, the License Commission at that time demonstrated a clear failure to understand the existing law (still in place today) that already required those establishments to serve food to patrons.

Since there are no "Tavern" licenses in Cambridge since the creation of the current laws in 1933 (which must be voted in by the people), those establishments operated under "Restaurant" licenses, which already required them to serve food to patrons. The same law is still in effect today. The simple solution would have been to enforce the existing state law and either require those bars to serve food, or shut them down. Moreover, there was also a law in effect prohibiting establishments from serving intoxicated individuals or overserving. Again, this law is still in effect today. This was an enforcement issue that did not require the creation of a new quota in order to address it.

The boards of the License Commission since 1986, including the current board, do not have a better track record. The Commission has allowed some of those “barrooms” that do not serve food to remain open to date, purporting to have inspected them every year and certifying on their renewal forms that they are in full legal compliance. The Commission has even granted numerous new establishments licenses to open without requiring compliance with the food service requirement.

The current Chair of the Commission, Andrea Jackson, does not even seem to know the most basic requirements of a "Restaurant" license under Mass. General Laws Chapter 138, Section 12, which states that the holder of such liquor license must have a CV license to serve food as a prerequisite for the license. In a Licensing hearing on March 17, 2015, Chair Jackson stated:

“I think what was interesting in this particular application is that you already have the wine and malt license and that you are actually just looking for the CV piece of it.”

That establishment has been open for many years. This is really an unacceptable statement from Chair Jackson, especially since she is also an attorney. It is also unacceptable that there was no response to this statement from Executive Director and Counsel to the Commission Elizabeth Lint, Police Commissioner Robert Haas, or Fire Chief Gerald Reardon. There was no discussion of this problem, nor was any discipline considered.

This is merely one example of many where the License Commission knowingly fails to enforce state liquor license laws. The Commission has no discretionary authority to allow an establishment in Cambridge to violate state law, and this behavior is a violation of the duties of the Commission as a whole, and its individual members. This lack of enforcement is unfair and burdensome to other establishments in Cambridge that are not afforded such favors and must comply with costly and time consuming legal requirements.

Arbitrary Application of Special CAP Criteria

Chair Jackson's Memo states,

“A category of no value licenses was created to allow the so called “mom and pop operations” or those catering to food oriented, non-bar and non-entertainment operations to afford such licenses.”

This statement does not reflect the true application of the no value CAP criteria to applicants before the License Commission. The Commission regularly issues no value licenses in CAP areas to establishments that are clearly *not* “food oriented”, that are clearly specifically *focused on* “entertainment”, and/or that can clearly *not* be characterized as “mom and pop operations”. There are many examples that I would be happy to provide. These actions can only be explained by either intentional favoritism or incompetence.

It is also important to note that the License Commission does not consistently apply the CAP zones, claiming at times that those CAP zones are no longer enforced, although they have never requested rescission of that regulation by the City Council. For example, in an April 8, 2014 License Commission hearing, Commissioner Robert Haas stated, “Our approach with respect to capped zones is we pretty much abandoned the whole notion of capped zones.” Commissioner Haas' comment was not disputed by other Commissioners or staff at that hearing. Chair Jackson's Memo now reverses positions claiming that CAP zones are still in effect. If the Commissioners themselves can't even get this straight, how is the public supposed to know what criteria to rely upon?

Lack of Data

The Memo provided by Chair Jackson further states:

“Numerous new licenses have been issued in several cap areas throughout the City since 2008.”

This vague statement provides the Council and the public with little information. If Chair Jackson claims that CAP zones are in effect and will be enforced by the License Commission, the public deserves to see data stating what the actual CAP numbers are in each zone, how many licenses have been issued in those zones, and how many licenses remain that are unfilled. Without such data, an applicant must engage in a costly and time consuming process to apply for a liquor license, without knowing whether there are any available in a particular CAP zone. It is incredible to me that this regulation has seemingly been enforced for about 30 years without such data being given to the public.

Creation of Laws, Regulations and Policies

The Memo concludes with:

“The License Commission staff is in the process of reviewing the rules and regulations relating to Alcoholic Beverages and Entertainment to determine, what, if any changes need to be made.”

It is the responsibility of the City Council to ensure that any changes to the existing Liquor Regulations are done in a public forum before the City Council, not behind closed doors in the License Commission. The License Commission has a long history of drafting its own laws, regulations and policies, and then selectively enforcing them to the detriment of the public. The Commission also has a history of creating final drafts of regulations that are brought forth to the public without participation or comment, in clear violation of the Open Meeting Laws. The most recent example of this is an amendment made by the Commission to the Taxi Regulations in regards to the requirement to accept credit cards on March 5, 2015. That regulation was also not approved by the City Council as required by law, yet is currently being enforced by the License Commission. There are many others.

The Plan E Charter does not permit the License Commission to regulate, and the spirit behind that law is clear. The legislature did not intend for the License Commission to both create and enforce the law. The people of Cambridge elected the City Council members to make those laws, and it is a breach of each member's duties to knowingly allow these activities to continue. The License Commission's role is to fairly and equally apply and enforce the laws created by the Council.

City Manager's Failure to Manage City Boards and Commissions

The City Manager is required under the Plan E Charter, and the terms of his employment contract, to manage and supervise the actions taken by the License Commission. We have met with City Manager Richard Rossi a number of times regarding problems in the License Commission, and he claimed that he can't do anything about the Commission's actions because it is "independent" and he "has no authority" over it. When complaints regarding serious procedural irregularities were brought to his attention, he refused to investigate. When Mr. Rossi was informed of instances where the License Commission was knowingly violating state laws, he refused to take action.

Mr. Rossi's refusal to manage the actions of the License Commission is in direct conflict with state law requirements under the Plan E Charter. City Manager Rossi is the "chief administrative officer of the city and *shall be responsible for the administration of all departments, commissions, boards and officers of the city*". Mass. General Laws Chapter 43, Section 103 (emphasis added). The Charter further states, "it shall be the *duty* of the city manager to act as chief conservator of the peace within the city; to *supervise the administration of the affairs of the city*; to *see that within the city the laws of the commonwealth and the ordinances, resolutions and regulations of the city council are faithfully executed*" (emphasis added). This language could not be more clear.

Mr. Rossi's refusal to manage and hold accountable the License Commission for its actions is also in violation of his employment contract with the City, where he "promises" in Section 2.1 to "exercise the full authority and perform all the functions, duties and responsibilities of the City Manager as specified in Massachusetts General Laws Chapter 43, Sections 93 through 108". Under that same section, the City Council also has the authority to ask Mr. Rossi to perform any duty or function that is permissible by law.

Ultimately any failure of the City Manager, or of the boards and commissions of the City, falls on the City Council members, who have an obligation to take action. The City Council is responsible for "the general management and control of all [the City's] affairs" pursuant to the Charter. Mass. General Laws Chapter 43, Section 95.

On March 13, 2015 we made a request to the City Council to perform the required review of Mr. Rossi's performance as City Manager, with no response to date. Pursuant to Section 2.3 of Mr. Rossi's employment agreement, the "City Council shall review and evaluate the performance of the City Manager at meetings scheduled by the Government Operations Committee of the City Council. Said review and evaluation shall be done in accordance with Massachusetts General Laws Chapter 30A, Sections 18-25 ("the Open Meeting Law")."

It is time for Mr. Rossi's performance review. The City Manager is clearly not faithfully performing his duties if he appoints members of the License Commission

and then walks away, refusing to manage them or take responsibility for the Commission's failure and outright refusal to uphold state law. This is not a problem that is specific to the License Commission, but rather extends to a number of boards and commissions that the City Manager considers to be "independent".

Conclusion

In conclusion, we have CAP zones on the books that do not reconcile with state law, the License Commission picks and chooses when to apply those CAP criteria, giving them broader discretionary powers than permitted by law, and those "powers" are then abused to the detriment of local businesses and residents.

We respectfully request that the City Council:

1. Instruct the License Commission not to apply CAP zones in the future, and to fairly and equally apply all laws of the Commonwealth of Massachusetts and the City of Cambridge in its activities;
2. Advise and instruct the License Commission that it has no authority to create laws, regulations or policies, which is in the sole authority of the City Council;
3. Advise the City Manager of his management responsibilities over the License Commission, and all other boards and commissions, and hold him accountable for any refusals or failures to perform his required duties; and
4. Promptly schedule a performance review of City Manager Rich Rossi pursuant to the requirements of Section 2.3 of his employment agreement.

Respectfully Submitted,

Kim Courtney
Xavier Dietrich