

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13ABC13071

HECTOR DIAZ PETITIONER, V. ALCOHOLIC BEVERAGE CONTROL RESPONDENT.	FINAL DECISION
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This contested case was heard before J. Randall May, Administrative Law Judge, Office of Administrative Hearings, on August 7, 2013, in Waynesville, North Carolina.

At the conclusion of the case, both parties submitted proposed decisions and the undersigned has considered them as well as the evidence, pleadings, the arguments of counsel, the case law, and statutory submissions.

APPEARANCES

For Petitioner: Derek J. Allen, Esq.
 Hayley R. Wells, Esq.
 Ward and Smith, P.A.

For Respondent: K. Renee Cowick, Assistant Attorney General

ISSUES

1. Whether Respondent deprived Petitioner of property in rejecting Petitioner's application for a Mixed Beverage Restaurant ABC permit?
2. Whether Respondent acted erroneously in rejection Petitioner's application for a Mixed Beverage Restaurant ABC permit?

THE FINDINGS OF FACT are made after careful consideration and observation of the sworn testimony of the witnesses presented at the hearing, either by their audio and/or video presentation and the entire record in this proceeding. In making the findings of fact, the undersigned has weighed all the evidence, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interests, bias, or prejudice the witness may have; the opportunity

of the witness to see, hear, know or remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony and the admitted evidence, or the lack thereof, the undersigned makes the following:

FINDINGS OF FACT

1. On or about October 25, 2012, Petitioner submitted an application for Malt Beverage (on premise), Unfortified Wine (on premise), Fortified Wine (on premise) and Mixed Beverage Restaurant ABC permits for an establishment located at 1 SW Pack Square, Asheville, North Carolina.
2. At time of receipt of an application, Respondent's employees determine the receipt of necessary documentation and not necessarily the veracity of the documentation. The applicant and application are later investigated by an agent with Alcohol Law Enforcement (ALE).
3. For the convenience of applicants, pursuant to Respondent's standard operating procedure and G.S. § 18B-905, Respondent issued temporary permits to Petitioner pending an investigation.
4. On October 25, 2013 a letter was written to the Petitioner by the Respondent regarding the issuance of the temporary permit. It was clear in this letter that further investigation would be conducted by ALE to determine if the Respondent qualified for the permanent permits requested. (P. Exhibit 3).
5. On or about February 2013, ALE Special Agent Bradley Baker (SA Baker) visited Petitioner's establishment to conduct an application investigation. Petitioner was not present at the time of the visit. SA Baker observed only eleven (11) indoor seats at the time of his investigation. SA Baker noted to Petitioner's employee, Megan Camara, that the establishment did not qualify as a Restaurant to hold Mixed Beverage permits.
6. General Statute § 18B-1000(6) define requires a restaurant to have a kitchen "and an inside dining area with seating for at least 36 people." This is the statutory provision which pertains to the Mixed Beverage Permit which is in controversy.
7. As determined by the City of Asheville's Fire Marshall's office, the maximum occupancy for Petitioner's business is twenty-five (25) persons.
8. Due to the unusual configuration of the space for Petitioner's business, there is only a 36-inch wide space that exists to circulate between the front of the counter where the kitchen is, and the bathroom. Therefore, seating is not approved for the location and patrons must stand at counters to consume food and beverage.
9. Petitioner appears to be an astute restaurateur who owns and operates three other restaurants in the Asheville. Although there is somewhat of a language barrier with

Petitioner, he is, or should be, familiar with the food and beverage regulatory system as it applies to him. In fact, he has a reputation of operating his restaurants lawfully.

BASED UPON the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction in this matter.
2. Petitioner failed to prove by a preponderance of the evidence that Respondent deprived Petitioner of a property right.
3. Petitioner failed to prove by a preponderance of the evidence that Respondent acted erroneously in rejection Petitioner's application for a Mixed Beverage Restaurant ABC Permit due to Petitioner not having thirty-six (36) indoor seats as required by G.S. § 18B-1000(6).
4. Pursuant to North Carolina case law, there is no constitutional or property right to sell alcoholic beverages. Alcoholic beverages may only be sold as authorized by a validly issued permit. *S.H. Hursey, Jr. v. Town of Gibsonville*, 284 N.C. 522 (1974) and *AGL, Inc. v. N.C. Alcoholic Beverage Control Commission*, 68 N.C.App. 604 (1984)

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Respondent has not acted erroneously in rejecting Petitioner's application for a Mixed Beverage Restaurant ABC Permit. Therefore, the undersigned DISMISSES the Petitioner's petition.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial

Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 8th day of November, 2013.

J. Randall May
Administrative Law Judge