

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF 09/20/2023
REFERRED FROM: COUNSEL'S OFFICE

2023- 01118

REASON FOR REFERRAL
REQUEST FOR DIRECTION

REQUEST FOR DECLARATORY
RULING-
795 8th AVENUE
NEW YORK, NY

The Members of the Authority at their regular meeting held at the Zone I New York City Office on 09/20/2023 determined:



May 25, 2023

Via Email Only: shannon.kearneysarfoh@sla.ny.gov

Shannon Kearney Sarfoh, Esq.
General Counsel
New York State Liquor Authority
80 South Swan Street
Albany, NY 12210

*Re: Request for Declaratory Ruling
Premises: 795 8th Avenue, Manhattan
Current Serial No.: 1330158*

Dear Counsel Kearney Sarfoh:

Our firm represents PMACS 9 LLC ("Applicant"), an entity formed for the purpose of operating a bar and restaurant in the entire building known as 795 8th Avenue in Manhattan ("Premises"). The undersigned's Notice of Appearance is enclosed. On May 18, 2023, Applicant entered into a contract to acquire the assets of Bar Fluid, LLC ("Bar Fluid"), an entity that, as of the date of this correspondence, holds an active on-premises liquor license at the premises. On May 22, 2023, Applicant mailed an application ("Application") for an on-premises liquor license to the Authority. The application was received by the Authority on May 23, 2023. As of the date of this correspondence the Application has yet to be booked into the Authority's system. The Applicant hereby seeks a determination from the New York State Liquor Authority ("Authority") with respect to the applicability of the "500 Foot Law" at the Premises.

Various statutes¹ in the Alcoholic Beverage Control Law prohibit the Authority from issuing a retail license for the sale and/or consumption of liquor (an "on-premises" license) for any premises that is within five hundred feet of three establishments that are currently operating with on-premises licenses. This licensing restriction is commonly referred to as the "500 Foot Law". Notwithstanding the general prohibition created by the 500 Foot Law, there are certain statutory exceptions that allow a retail liquor license to be issued even after the 500 Foot Law has been triggered. One of the

¹ See Alcoholic Beverage Control Law §§64(7)(b), 64-a(7)(a)(ii), 64-b(5)(a)(ii), 64-c(II)(a)(ii) & 64-d(8)(b).

exceptions exempts from the 500 Foot Law establishments which are within five hundred feet of three or more existing premises, and which have also been licensed continuously since on, or before, November 1, 1993,² premises protected by this exception are commonly said to enjoy "grandfathered" status.

The Applicant requests the Authority determine whether the ground floor, second floor, third floor, and cellar of the Premises have been "continuously licensed" since on, or before, November 1, 1993, and further requests the Authority consider whether the Premises are "grandfathered" under the circumstances set forth herein. Assuming the premises are grandfathered, Applicant submits that any 500 Foot Rule hearing scheduled in connection with the Application should have no effect on the Application whatsoever.

The Authority has, under circumstances where significant periods of non-licensure have occurred, concluded that premises initially licensed prior to November 1, 1993, were "continuously licensed" notwithstanding a surrender-period (for purposes of this request, the term "surrender-period" shall mean the period of time between the date of a license surrender and the date of the Authority's decision as to the applicability of the 500 Foot Law). In those cases, the Authority ruled that despite surrender-periods continuing for months, and even up to nearly a year, premises nevertheless qualified as "continuously licensed" for purposes of the 500 Foot Law.³ For example, in Declaratory Ruling 2012-00817D, the Authority ruled that the subject premises had been "continuously licensed" despite the fact that the previous licensee had surrendered its license approximately six months earlier. Furthermore, in Declaratory Ruling 2012-01220, the Authority similarly ruled that the premises in question had been "continuously licensed" despite an approximately eleven-month surrender-period. Upon information and belief, the Authority has determined that longer surrender periods, even periods of several years, resulted in continuous licensure for purposes of the 500 Foot Law.

Pursuant to the enclosed Declaratory Ruling dated June 16, 2020, the Authority previously determined the Premises was grandfathered. On July 28, 2020, Bar Fluid's Application for an on-premises liquor license was filed with the Authority. As noted above, Applicant has already submitted its application for an on-premises liquor license and, as of the date of this correspondence, there is currently an active on-premises license sited at the

² See Alcoholic Beverage Control Law §64(7)(c).

³ See New York State Declaratory Ruling 2012-00817D (March 13, 2012); New York State Declaratory Ruling 2012-01220 (April 24, 2012).



Premises. In this case, the Premises have historically and continuously been operated as a bar and restaurant serving beer, wine, and liquor and there will be no intervening use of the Premises after the date the prior licensee's license expires on May 31, 2023. Accordingly, the Applicant respectfully requests the Authority rule that the Application is not subject to the 500 Foot Law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Michael J. Paleudis'.

Michael J. Paleudis, Esq.

Encl.

cc: Michael Mcnamee, *via e-mail*



NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF 09/20/2023
REFERRED FROM: COUNSEL'S OFFICE

2023- 01119

REASON FOR REFERRAL
REQUEST FOR DIRECTION

REQUEST FOR DECLARATORY
RULING-
260 6th AVENUE
NEW YORK, NY

The Members of the Authority at their regular meeting held at the Zone I New York City Office on 09/20/2023 determined:



Pesetsky & Bookman, PC

Attorneys at Law

325 Broadway, Suite 501
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Max Bookman | Partner | max@pb.law

August 10, 2023

Shannon Kearney Sarfoh
General Counsel
New York State Liquor Authority
Via email only: Shannon.KearneySarfoh@sla.ny.gov

PETITION FOR A DECLARATORY RULING

Re: Application of 200 and 500 Foot Laws to Premises Located at
260 6th Avenue in Manhattan
Petitioner: MacDougal & Sixth Realty LLC
Our File: LA-2237.1

Dear General Counsel Sarfoh:

We represent petitioner MacDougal & Sixth Realty LLC. Petitioner owns the building located at the above-referenced address. They will soon be leasing the ground floor commercial units of the building to a tenant who will in turn apply to the Authority for an on-premises liquor license under ABCL § 64. The premises is within 200 feet of the Little Red Schoolhouse located at 272 6th Avenue. In addition, the premises is within 500 feet of three or more establishments that currently have on-premises licenses.

On behalf of our client, we submit this petition pursuant to 9 NYCRR § 98.1 *et seq.* for a declaratory ruling that the premises meets the qualifications of the respective grandfather clauses of the 200 and 500 Foot Laws.

Prior Declaratory Ruling

The Members of the Authority issued Declaratory Ruling 2017-01724 on May 15, 2018, addressing the application of the 200 and 500 Foot Laws to the subject premises. *See* Exhibit A. The petitioner was a prospective applicant for an on-premises liquor license at the subject premises.

Regarding the 200 Foot Law, the Members engaged in a detailed analysis of the history of the subject premises and the Little Red School House, both of which had expanded from their original footprints over the years in ways that implicated the 200 Foot Law. *Id.* at 1-2. In that analysis, the Members found that the school's original footprint was confined to Bleecker Street, and did not occupy any position on 6th Avenue. *Id.* The Members further found that renovations undertaken by the school to expand its footprint to include 272 6th Avenue were only completed in 2000, and as such, 2000 was the first year that the premises

and the school both occupied the same street – 6th Avenue. *Id.* at 2. Finally, the Members found that the subject premises was first licensed in 1975, and that the same license was still active in 2000. *Id.*¹

As for the 500 Foot Law, the Members similarly found that the license issued in 1975 was active when the 500 Foot Law went into effect on November 1, 1993. *Id.*

At the conclusion of the declaratory ruling, the Members addressed the issue of continuous licensing. On that point, the Members held, consistent with the Full Board’s modern precedent, that although there was a brief gap in licensing by the time the declaratory ruling was issued, the premises had been used for no other purpose while unlicensed. *Id.* The Members thus conclude the declaratory ruling with a holding that the grandfather clause of the 200 and 500 Foot Laws applied to the subject premises. *Id.*

After the Declaratory Ruling

As noted, the declaratory ruling was issued on May 15, 2018. A month later, the Authority received the anticipated application for an on-premises liquor license at the subject premises, and on January 31, 2019, the license was issued to the applicant, Alta Cucina 2 LLC dba Avena Downtown.²

Avena Downtown has now gone out of business. Its license expired on December 31, 2022. *See* Exhibit B. In the eight months that have since transpired, the premises has remained vacant and unused for any other purpose.³

Petitioner’s tenant intends to apply for an on-premises liquor license at the subject premises.

Question Presented

Has an on-premises liquor license been in existence continuously at the subject premises since Declaratory Ruling 2017-01724 was issued on May 15, 2018, notwithstanding the eight-month gap in licensing since Avena Downtown’s license expired on December 31, 2022?

Relevant Authorities

The basic prohibition of the 200 Foot Law is found in ABCL § 64(7)(a), which provides:

No retail license for on-premises consumption shall be granted for any premises which shall be (a) on the same street or avenue and within two hundred feet of a building occupied exclusively as a school

¹ Although not referenced in the declaratory ruling, the prior licensee was Da Silvano Corp., Serial No. 1028415, which held an active on-premises liquor license from July 1, 1975 until the license was surrendered on February 24, 2017. *See* Exhibit B, text from LAMP.

² Alta Cucina 2 LLC, Serial No. 1311621. *See* Exhibit B.

³ *See* Affidavit annexed hereto as Exhibit C.

However, the 200 Foot Law's grandfather clause, which is found in ABCL § 64(7)(c), provides:

. . . [N]o license shall be denied to any premises at which a license under this chapter has been in existence continuously from a date prior to the date when a building on the same street or avenue and within two hundred feet of said premises has been occupied exclusively as a school

Turning to the 500 Foot Law, its basic prohibition is found in ABCL § 64(7)(b), which provides:

No retail license for on-premises consumption shall be granted for any premises which shall be . . . (b) in a city, town or village having a population of twenty thousand or more within five hundred feet of three or more existing premises licensed and operating pursuant to this section and sections sixty-four-a, sixty-four-b, sixty-four-c, and/or sixty-four-d of this article

The 500 Foot Law also has a grandfather clause, which, like its 200 Foot Law counterpart, is found in ABCL § 64(7)(c):

. . . [N]o license shall be denied to any premises, which is within five hundred feet of three or more existing premises licensed and operating pursuant to this section and sections sixty-four-a, sixty-four-b, sixty-four-c, and/or sixty-four-d of this article, at which a license under this chapter has been in existence continuously on or prior to November first, nineteen hundred ninety-three

Regarding Declaratory Ruling 2017-01724, section 98.5 of the Rules of the Authority (9 NYCRR § 98.5) provides:

Declaratory rulings shall be binding on the Authority and shall not be retroactively changed.

Finally, regarding the necessity of the subject petition, Advisory 2022-35 provides in relevant part:

Applicants should be aware that, if there is any lapse in the licensing of the premises, the Licensing Board will deem that the premises has not been continuously licensed. The applicant should seek a declaratory ruling from the Members of the Authority for that premises.

Argument

The question presented should be resolved in favor of the petitioner. An on-premises liquor license has been in existence continuously since Declaratory Ruling 2017-01724 was issued on May 15, 2018. Under the Full Board's modern precedent, this conclusion is not altered by the *de minimis* eight-month gap in licensing since Avena Downtown's license expired on December 31, 2022.

I. An on-premises liquor license has been in existence continuously at the subject premises since Declaratory Ruling 2017-01724 was issued on May 15, 2018

The Members ruled in Declaratory Ruling 2017-01724 that an on-premises liquor license had been in existence continuously at the subject premises from 1975 to the date of that declaratory ruling's issuance – such timespan preceding 2000, when the school's footprint was expanded to 6th Avenue, and preceding 1993, when the 500 Foot Law was effective – and as a result, the subject premises was entitled to the grandfather exception of the 200 and 500 Foot Laws. *See* Exhibit A.

That ruling is “binding on the Authority and shall not be retroactively changed.” *See* 9 NYCRR § 98.5. It is therefore unnecessary to engage in a renewed or *de novo* analysis of the continuous licensing considerations for the period up until the issuance of Declaratory Ruling 2017-01724 on May 15, 2018.

A month after that declaratory ruling was issued, a new on-premises liquor license was issued to Avena Downtown at the subject premises. *See* Exhibit B. That license remained in effect until eight months ago, when it expired. *Id.*

The analysis is thus quite straightforward. The prior declaratory ruling covers continuous licensing from 1975 to 2018, and the Avena Downtown license covers continuous licensing the rest of the way, from 2018 to the last day of 2022. Because an on-premises liquor license has been in existence continuously since before the date in 2000 held in the prior declaratory ruling to be the date that the school's footprint expanded to 6th Avenue, the premises remains entitled to the grandfather exception of the 200 Foot Law. And because an on-premises liquor license has been in existence continuously since before November 1, 1993, when the 500 Foot Law was effective, the premises remains entitled to the grandfather exception of the 500 Foot Law.

II. Under the Full Board's modern precedent, the grandfathering conclusion is not altered by the de minimis eight-month gap in licensing since Avena Downtown's license expired on December 31, 2022

If Avena Downtown's license had not expired, then in light of the prior declaratory ruling, the subject petition would be unnecessary. However, Advisory 2022-35 instructs applicants to seek a new declaratory ruling whenever “there is *any* lapse in the licensing of the premises.” *See* Advisory 2022-25 (emphasis supplied). The current eight-month gap is what makes the subject petition required.

With that said, this small gap does not alter the grandfathering conclusion. As the Full Board's modern precedent holds, the "in existence continuously" requirement of ABCL § 64(7)(c), which sets eligibility for grandfathering under the 200 and 500 Foot Laws, cannot be interpreted literally, lest any gap "no matter how short . . . would swallow the exemption."⁴ Instead:

[g]enerally, the Authority has allowed new applicants to be grandfathered-in provided: (1) that there was no intervening use of the premises as anything other than a bar or restaurant; and (2) in the absence of special circumstances, that no more than one-year has passed between the prior license becoming inactive and the new applicant filing an application.⁵

Both elements of this analysis are satisfied here. First, there has been no intervening use since the prior license expired on December 31, 2022. Second, well less than a year has transpired since that date.

* * *

For the foregoing reasons, we respectfully request that the Members issue a declaratory ruling that the subject premises is grandfathered under the 200 and 500 Foot Laws.

Very truly yours,

PESETSKY & BOOKMAN, P.C.



By: _____
Max Bookman, Esq.

⁴ See 233 West 4th Street Tenants Association v. NY SLA, Index No. 153773/2022 (Sup. Ct. NY County), Authority's Memorandum of Law in Opposition, NYSCEF doc. 11 at 4.

⁵ *Id.* at 5.

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF 09/20/2023
REFERRED FROM: COUNSEL'S OFFICE

2023- 01147A

REASON FOR REFERRAL
REQUEST FOR DIRECTION

PROPOSED ADVISORY-
TEMPORARY RETAIL (ST) PERMITS-
MULTIPLE EXTENSIONS

(PROPOSED ADVISORY)

The Members of the Authority at their regular meeting held at the Zone I New York City Office on 09/20/2023 determined:



KATHY HOCHUL
Governor

LILY M. FAN
Chair

EDGAR DE LEON
Commissioner

ADVISORY #2023-xx

Subject: Temporary Retail (ST) Permits – Multiple Extensions

Section 97-a of the Alcoholic Beverage Control Law authorizes the Authority to issue Temporary Retail (ST) Permits to certain retail license applicants when specified conditions are met. ST permits issued under Section 97-a give applicants the authority to purchase and sell to consumers the alcoholic beverages permitted under the license sought. See *Advisory #2022-34* for guidance on eligibility, notice requirements, and conditions for ST Permits and *Advisory 2022-30* for guidance on how applications for ST permits are reviewed by the Authority.

The original ST permit applied for by applicants are valid for 90 days. An application for the 90-day ST permit must be accompanied by a **nonrefundable** filing fee of \$128 for retail beer licenses and \$640 for all other retail licenses.

Section 97-a also provides the Authority with the discretion to grant 30-day extensions of the ST permit when requested by the applicant. Each extension comes with a **nonrefundable** filing fee of \$64 for beer licenses and \$96 for all other retail licenses.

In the Authority's ongoing effort to assist applicants and reduce the number of applications that must be filed, the Authority is exercising its discretion under Section 97-a by offering applicants the opportunity to request multiple 30-day extensions at once when renewing their ST permit. The **nonrefundable** filing fee required under Section 97-a will be multiplied by the number of extensions requested by the applicant and the extension periods will be bundled by the Authority.

When renewing their ST permit, applicants may choose from the following options for extensions:

- One (1) 30-day extension at \$64 for beer licenses and \$96 for all other retail licenses.
- Two (2) 30-day extensions at \$128 for beer licenses and \$192 for all other retail licenses.
- Three (3) 30-day extensions at \$192 for beer license and \$288 for all other retail licenses.

Applicants are reminded that they may continue to request additional extensions up to 15-days after the expiration of their ST permit; that their ST permit may be canceled or suspended by the Authority for good cause; and that all filing fees for ST permits are **nonrefundable** even if they do not use their entire extension period.

This matter was heard and determined by the Members of the Authority at a Full Board meeting held on _____ before Chair Lily Fan and Commissioner De Leon. The above written advisory was approved by Chair Fan on behalf of the Members of the Authority on _____.

Dated:

Donald Roper
Secretary to the Authority