

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

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 COFFEESHOP, LLC d/b/a UPPERWEST, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 ALCOHOLIC BEVERAGES CONTROL )  
 COMMISSION, )  
 )  
 Appellee, )  
 )  
 and, )  
 )  
 CAMBRIDGE BOARD OF LICENSE )  
 COMMISSIONERS, )  
 )  
 Intervenor. )  
 \_\_\_\_\_ )

Docket No. 1984-CV-3415

**INTERVENOR CAMBRIDGE BOARD OF LICENSE COMMISSIONERS’  
MEMORANDUM IN OPPOSITION TO THE APPELLANT COFFEESHOP, LLC D/B/A  
UPPERWEST’S MOTION FOR JUDGMENT ON THE PLEADINGS/MEMORANDUM  
IN SUPPORT OF CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS**

**I. INTRODUCTION**

Pursuant to Superior Court Standing Order 1-96(4) and Mass. R. Civ. P. 12(c), the Intervenor, Cambridge Board of License Commissioners (the “Board”), hereby submits its Memorandum in Opposition to the Appellant CoffeeShop, LLC d/b/a UpperWest’s (the “Appellant’s” or “UpperWest’s”) Motion for Judgment on the Pleadings in the Appellant’s above-captioned appeal of the Alcoholic Beverages Control Commission’s (the “ABCC’s”)

October 3, 2019 Decision affirming the Board’s November 20, 2018 issuance of a three-day suspension to the Appellant. (Administrative Record “A.R.” 365)<sup>1</sup>.

## **II. STANDARD OF REVIEW**

“Judicial review of the [ABCC’s] decision is based on G. L. c. 30A, § 14. Van Munching Co., Inc. v. Alcoholic Beverages Control Commission, 41 Mass. App. Ct. 308, 309 (1996). “We must give due weight to the [ABCC’s] experience, technical competence, and specialized knowledge, as well as to the discretionary authority conferred upon it.” Id. at 309-310 citing Whitehall Co., Ltd. v. Alcoholic Beverages Control Commission, 7 Mass. App. Ct. 538, 540 (1979). “. . . [A] reviewing Court may set aside the decision of an agency such as the ABCC only if that decision is unsupported by substantial evidence” or if based on an error of law. Rum Runners, Inc. v. Alcoholic Beverages Control Commission, 43 Mass. App. Ct. 248, 250 (1997) citing G. L. c. 30A, § 14(7)(e); Van Munching Co., Inc., 41 Mass. App. Ct. at 310.

## **III. BACKGROUND**

In its decision issued on October 3, 2019 in the above-referenced case, the ABCC made the following findings of fact relevant to the Appellant’s appeal.

### **A. The Board’s Authority to Regulate UpperWest.**

1. The Board is a local licensing authority for the City within the meaning of G. L. c. 138, §1, established by St. 1919, c. 83 as amended by St. 1922, c. 95 and St. 1949, c. 84. St. 1949, c. 84 provides in relevant part that: “the authority now or hereafter vested by law in cities or towns, or in the City of Cambridge or any official thereof, to grant, issue, record, suspend or revoke any of the licenses hereinafter mentioned, shall upon its organization be exercised in said City by said board exclusively, except that nothing

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<sup>1</sup>In addition to the arguments outlined herein, the Board supports the arguments asserted by the ABCC in its Opposition to the Appellant’s Motion for Judgment on the Pleadings filed by the Attorney General.

herein contained shall affect the authority of the state fire marshal in respect to the performance of his duties.” St. 1919, c. 83 as amended by St. 1922, c. 95 and St. 1949, c.

8.

2. The Board is authorized to adopt rules and regulations pertaining to, inter alia, licenses for the sale of alcoholic beverages to be consumed on premise. (G. L. c. 138, § 23; A.R. 1445-1446).
3. UpperWest is an establishment with a retail on-premise all-alcoholic beverages and entertainment license (the “UpperWest License”) issued pursuant to G. L. c. 138, § 12 for a premise located at One Cedar Street, Unit B, Cambridge, Massachusetts. (Ex. H; A.R. 1450-1451).
4. The UpperWest License states on its face: “This license is a privilege subject to revocation and suspension as provided by state law and Cambridge City Ordinance.” (Ex. H; A.R. 1450-1451).
5. The UpperWest License lists Ms. Courtney as the manager of record; Ms. Courtney is also a co-owner of UpperWest. (Ex. H; A.R. 1086).
6. The Board Rules were approved by the Board by vote on November 9, 1979 and amended in 1997, 2006, 2008, and 2016. (Ex. G; A.R. 1444-1445).
7. The Board Rules were in effect on August 3, 2018 and September 29, 2018. (Ex. G; A.R. 1446).
8. The Board Rules apply to UpperWest. (A.R. 1446).
9. Board Rule 2.2 states that: “All licensees are expected to comply with the Rules and Regulations herein and any rules, guidelines, notices or advisories that the License Commission may publish separately hereto.” (Ex. G; A.R. 1446-1447).

10. Board Rule 2.3 states that: “All licensees are expected to comply with all of the laws of the Commonwealth of Massachusetts, the City of Cambridge Municipal Code, and all rules and regulations of the other City of Cambridge Departments which regulate the licensee.” (**Ex. G**; A.R. 1447).
11. Board Rule 2.5 states that: “Violation(s) of any law, ordinance, policy, or rules and regulations may result in the suspension, cancellation, revocation or modification of a license.” (**Ex. G**, p. 2; A.R. 1447).
12. Board Rule 2.6 states that “except for when exclusively stated, all licensees must comply with all Rules and Regulations herein.” (**Ex. G**, p. 2; A.R. 1447).
13. Board Rule 5.1 states that: “No licensee shall permit any disorder, disturbance or illegality of any kind to take place in or on the licensed premises. The licensee shall be responsible therefor whether present or not.” (**Ex. G**, p. 3; A.R. 1447).
14. Board Rule 5.2 states that: “The License Commission expects the Manager of Record to be the person in control of the premises on any given day or time and who is there to ensure compliance with all applicable laws and Rules and Regulations. Approved Managers of Record will be held accountable by the License Commission whether or not present at the premises at the time of a disorder, disturbance or illegality of any kind.” (**Ex. G**, p. 3).
15. Board Rule 13.1 states that: “Licenses issued by the Commission are subject to suspension, revocation, modification or cancellation, or further conditions for breach of its conditions or regulations or any law of the Commonwealth of which the licensee has or should have notice.” (**Ex. G**, p. 14; A.R. 1448).

16. Board Rule 13.3 states that: “Any licensed premises shall be subject to inspection by members, agents or representatives of the Cambridge Police, Inspectional Services, Fire, and License Commission Departments and their duly authorized agents. Premises licensed under Chapter 138, shall also be subject to inspection by the Alcoholic Beverages Control Commission and its agents.” (**Ex. G**, p. 14; A.R. 1449).
17. Board Rule 13.5 states that: “Any licensee, its agents or employees who refuse to cooperate with the License Commission or its agents, hinders an investigation, or fails to respond to a request for documents or information from the License Commission or its agents, may have its license suspended and/or revoked.” (**Ex. G**, p. 14; A.R. 1450).
18. Board Rule 14.2 states that: “It is the sole responsibility of the licensee and its employees to be aware and up to date with the Rules and Regulations, and policies of the License Commission, the laws of the Commonwealth and the Cambridge Municipal Code.” (**Ex. G**, p. 14).
19. Board Rule 14.3 states that: “Ignorance of a law, rule and regulation, policy, notice or advisory is not a defense.” (**Ex. G**, p. 14).

**B. The Cambridge Fire Department’s Authority to Enforce the No Lit Candle Rule in the City of Cambridge.**

20. The Chief of the Cambridge Fire Department is an Authority Having Jurisdiction (“AHJ”) within the meaning set forth in 527 CMR § 3.2.2 and the head of a municipal fire department within the meaning of G. L. c. 148, §§ 1 and 28. (**Ex. E**; A.R. 1323-1324).
21. The Cambridge Fire Department enforces the No Lit Candle Rule in licensed establishments throughout the City pursuant to the Chief of the Cambridge Fire

Department's authority under G. L. c. 148, § 28, 527 CMR § 1.7.7.2, 527 CMR § 3.2.2, and 527 CMR § 10.10.2. (**Ex. B, C, D, E, F**; A.R. 1309, 1311, 1323-1327).

22. The danger posed by lit candles in licensed establishments is that the flame or heat from a burning candle can be transferred by conduction, convection, or radiation, to something near to it such as a napkin, tablecloth, or paper plate, which could ignite; or, a patron could burn themselves on the flame. (A.R. 1732).
23. In addition to the dangers listed *supra*, with respect to the UpperWest Premises, the danger posed by lit candles is greater given that the UpperWest Premises is a wood framed structure, below-grade (i.e., a basement), with no egress windows, and no sprinklers, and in that type of structure a building could become engulfed in flames within a short time as a result of an incident involving candles. (**Ex. GG**; A.R. 1732-1733, 2145, 2154-2155).

**C. The August 3, 2018 Taskforce Inspection.**

24. The Taskforce was created in the fall of 1990 for the purpose of conducting inspections on licensed premises throughout the City in response to a fatal fire at a Howard Johnson's hotel located on Memorial Drive in Cambridge which occurred in the summer of 1990. (**Exhibit DD**; A.R. 1328, 1340-1341).
25. On August 3, 2018, members of the Taskforce including Deputy Donovan, Inspectional Services Building Inspector Brian McMahon, License Commission Chief Licensing Investigator Andrea Boyer, and Cambridge Police Patrol Officer Benny Szeto, conducted an inspection (the "August 3, 2018 Inspection") at the UpperWest premises. (**Ex. T, U, Y**; A.R. 1328, 1401, 1616-1617, 1675-1676).

26. On August 3, 2018, members of the Taskforce observed lit candles in the UpperWest premises. (Ex. T, U, Y; A.R. 1617, 1677).
27. On August 3, 2018, Deputy Donovan asked Ms. Courtney to extinguish the candles in the UpperWest premises multiple times and Ms. Courtney refused to extinguish the candles stating to Deputy Donovan that she believed candles were allowed. (Ex. T, U, Y; A.R. 1402, 1622, 1676-1680, 1683).
28. On August 3, 2018, Deputy Donovan completed a Cambridge Fire Department Bureau of Fire Prevention inspection form noting that “open flame votive candles on premise,” “I advised the manager to extinguish candles,” and “manager refused to extinguish open flames.” (Ex. T; A.R. 1677-1679).
29. On August 3, 2018, Ms. Courtney refused to cooperate with License Commission Taskforce inspectors by behaving aggressively towards the inspectors, stating to Mr. McMahon that “she wasn’t going to sign” the inspection form he completed concerning the August 3, 2018 Inspection, writing her own comments on Mr. McMahon’s inspection form, and by refusing to extinguish candles when asked to do so by Deputy Donovan. (Ex. Y; A.R. 1618, 1621-1622).
30. On August 6, 2018, Deputy Donovan sent a Notice to Ms. Courtney which states “during the August 3, 2018 City Manager’s License Task Force Inspection open flame candles were found to be in use in your establishment,” “a verbal request to cease and desist was denied,” and “the Fire Prevention Bureau has not approved the use of candles for the above noted location.” (Ex. U; A.R. 1680, 1683).

**D. The September 29, 2018 Cambridge Fire Department Inspection.**

31. On September 29, 2018, Deputy Donovan, Captain Philip Arsenault, and Cambridge Police Patrol Officer Daniel McGinty went to the UpperWest Premises in order to conduct a follow-up inspection. (Ex. V, Z, AA; A.R. 1686-1687, 2019-2024, 2026-2027).
32. After it became clear to Officer McGinty that Ms. Courtney would not willingly extinguish the candles and the Premises might have to be closed down, Officer McGinty requested backup from Cambridge Police Sergeant William Bates, and in response, Sergeant Bates reported to the UpperWest Premises. (Exhibit Z, p. 3; A.R. 2023, 2141-2142).
33. During the September 29, 2018 Inspection, Ms. Courtney hindered or delayed Deputy Donovan, Captain Arsenault, Sergeant Bates, and Officer McGinty by engaging them in combative and derisive debate at the UpperWest Premises for approximately thirty-five to forty minutes<sup>2</sup>, refusing to extinguish lit candles when ordered to do so, entering into the personal space of Deputy Donovan and Captain Arsenault, and aggressively pulling papers from Deputy Donovan. (Ex. V, Z, AA; A.R. 1685-1689, 2021-2028, 2032, 2141-2144).
34. During the September 29, 2018 Inspection, Deputy Donovan handed Ms. Courtney a copy of 527 CMR § 10.10.2, a copy of a print-out of the No Lit Candles prohibition from the Cambridge Fire Department's web site, a copy of 527 CMR § 20.1.5.2.4, and a copy of G. L. c. 148, § 28. Deputy Donovan also e-mailed these laws and regulations to Ms. Courtney on October 1, 2018. (Ex. BB, A.R. 1732).

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<sup>2</sup>Deputy Donovan testified on May 7, 2019 that the September 29, 2018 inspection took approximately forty minutes inside the premises. (A.R. 1689). On June 23, 2019, Officer McGinty testified that the September 29, 2018 inspection took at least thirty-five minutes. (A.R. 2028).



35. During the September 29, 2018 Inspection, Ms. Courtney refused to cooperate with Deputy Donovan, Captain Arsenault, Sergeant Bates, and Officer McGinty by behaving aggressively towards them, hindering or delaying them at the UpperWest Premises for approximately thirty-five minutes to forty minutes, refusing to extinguish lit candles when ordered to do so, entering into the person space of Deputy Donovan and Captain Arsenault, and aggressively pulling papers from Deputy Donovan. (Id.).
36. During the September 29, 2018 Inspection, Ms. Courtney attempted to intimidate Deputy Donovan and Captain Arsenault as they were leaving the Premises by stating: “you will live to regret this.” (Ex. V; A.R. 1687, 2028-2031, 2033-2034, 2144-2145).
37. During the September 29, 2018 Inspection, Ms. Courtney threatened Deputy Donovan and Captain Arsenault as they were leaving the Premises by stating: “you will live to regret this.” (Id.).
38. Deputy Donovan and Captain Arsenault did not know exactly what negative action against them Ms. Courtney intended by this comment, but they interpreted Ms. Courtney’s statement threat “you will live to regret this” to mean that she would retaliate against them personally for enforcing the law by attempting to get them fired and thus causing them economic harm. (Ex. V; A.R. 1687, 2144-2145).

**E. The November 8, 2018 Board Hearing.**

39. On October 12, 2018, the Board sent a Notice to Ms. Courtney informing her that a hearing would be held on Wednesday, November 7, 2018 at 3 p.m. to determine whether she violated the following counts:
  - 1) failure to comply with the Massachusetts Comprehensive Fire Safety Code, §20.1.5.2.4(2), in violation of it and G. L. c. 148, § 28, G. L. c.

138, §§ 23 and 64, and Board's Rules 2.2–2.3, 2.5–2.6, 5.1–5.2, and 13.1;

- 2) failure and/or refusal to cooperate with agents of the Fire Department, and/or hindering an investigation, and/or the enforcement of the law, in violation of G. L. c. 138, §§ 23, 63–63A, and 64, and Board's Rules 2.2–2.3, 2.5–2.6, 5.1–5.2, 13.1, 13.3, and 13.5;
- 3) threatening/intimidating a witness, to wit, public official(s), in violation of G. L. c. 268, § 13B, G. L. c 138, §§ 23 and 64, and Board's Rules 2.3, 2.5, 5.1–5.2, 13.1, 13.3 and 13.5; and
- 4) threatening public official(s), in violation of G. L. c. 275, §§ 2–4, G. L. c. 138, §§ 23 and 64, and Board's Rules 2.3, 2.5, 5.1–5.2, 13.1, 13.3, and 13.5. (**Ex. I**; A.R. 1654).

40. The Board held a hearing on November 7, 2018 (the “November 7, 2018 Hearing”) concerning violations stemming from the August 3, 2018 and September 29, 2018 Inspections. (**Ex. J**; A.R. 1654-1655).
41. Ms. Courtney and Mr. Dietrich attended the November 7, 2018 Board hearing, testified during the hearing, and cross-examined witnesses. (**Ex. J**).
42. Ms. Courtney and Mr. Dietrich presented no evidence of mitigating factors at the November 7, 2018 Board Hearing. (**Ex. J, K**; A.R. 1466).
43. At the November 7, 2018 Board hearing, after hearing testimony and evidence, the Board found a violation on Counts 1 through Count 4 *supra*, and issued a three-day suspension as to Counts 2 through 4. (**Id.**; see also A.R. 1456). The Board reserved issuing

discipline as to Count 1 pending resolution of an appeal filed by Ms. Courtney with the Fire Prevention Regulations Appeals Board. (**Ex. J**)

**F. The January 17, 2019 Board Hearing.**

44. On November 28, 2018, the Fire Prevention Regulations Appeals Board issued a Notice of Dismissal dismissing UpperWest’s appeal. (**Ex. K**; A.R. 1458-1459).
45. On January 16, 2019, the Board held a hearing and issued a two-day suspension as to Count 1 *supra* to be served consecutively with the three-day suspension as to Counts 2 through 4, for a collective five-day suspension. (**Ex. M**; 1459-1460).

**IV. LEGAL FRAMEWORK**

**A. Licenses to Sell Alcohol are a Special Privilege Subject to Regulation Pursuant by the States Pursuant to the Twenty-first Amendment.**

Licenses to sell alcoholic beverages are a special privilege subject to regulation and control, and for which states have especially wide latitude pursuant to the Twenty-first Amendment to the United States Constitution. Connolly v. Alcoholic Beverages Control Commission, 334 Mass. 613, 619 (1956); Opinion of the Justices, 368 Mass. 857, 861 (1975); (see also A.R. 365). The Board has the authority to grant, revoke, and suspend licenses and to issue regulations. G. L. c. 138, § 23; Boston Licensing Board v. Alcoholic Beverages Control Commission, 367 Mass. 788, 794–795 (1975).

G. L. c. 148, § 28 permits the Chief of the Cambridge Fire Department to make orders or rules to prevent or remedy any condition in or about any building, structure or other premises which may tend to become a fire hazard or to cause a fire. G. L. c. 148, § 28. Under 527 CMR § 1.7.7.2 the Authority Having Jurisdiction (“AHJ”) has the authority to order, in writing, any person(s) to remove or remedy any dangerous or hazardous condition or material as provided in G. L. c. 148 or the Massachusetts Fire Safety Code codified at 527 CMR. 527 CMR §§ 1.7.7.2

and 3.2.2. Under 527 CMR § 10.10.2, the AHJ shall have the authority to prohibit any or all open flames, candles, and open, recreational, and cooking fires or other sources of ignition, or establish special regulations on the use of any form of fire or smoking material where circumstances make such conditions hazardous. 527 CMR 10.10.2. Board Rule 13.5 provides that “any licensee, its agents or employees who refuse to cooperate with the License Commission or its agents, hinders an investigation, or fails to respond to a request for documents or information from the License Commission or its agents, may have its license suspended and/or revoked.

G. L. c. 138, § 63A provides that “any person who hinders or delays . . . any investigator, inspector or any other authorized agent of local licensing authorities in the performance of his duties . . . shall be punished by a fine of not less than fifty nor more than two hundred dollars or by imprisonment for not more than two months, or both.” G. L. c. 138, § 63A; Lion Distributors, Inc. v. Alcoholic Beverages Control Commission, 15 Mass. App. Ct. 988, 989 (1983) (where the Appeals Court found that hindering investigators in the performance of their duties by failing to produce complete records was a violation of G. L. c. 138, § 63A and upheld a two-day suspension for that violation).

G. L. c. 275, § 2 prohibits communication of threats. G. L. c. 275, § 2; Commonwealth v. Valentin V., 83 Mass. App. Ct. 202, 204 (2013). G. L. c. 268, § 13B defines “investigator,” in part, as an individual or group of individuals lawfully authorized by a department or agency of any political subdivision of the Commonwealth to conduct or engage in an investigation of, prosecution for, or defense of a violation of the laws of the United States or of the Commonwealth in the course of such individual’s or group’s official duties. G. L. c. 268, § 13B. G. L. c. 268, § 13B provides in part that whoever willfully, either directly or indirectly threatens,

attempts or causes . . . economic injury or property damage to . . . a witness or potential witness, a police officer, or an investigator, shall be punished by imprisonment in the state prison for not more than ten years or by imprisonment in the house of correction for not more than 2 ½ years or by a fine of not less than \$1,000 or more than \$5,000 or by both such fine and imprisonment. G. L. c. 268, § 13B.

The defendant's subjective intent is not relevant; it is sufficient that a reasonable fact finder could have inferred from the circumstances that he did, indeed, intimidate the witnesses. Commonwealth v. Cohen, 456 Mass. 94, 124 (2010) (where the Supreme Judicial Court reasoned that calling a witness ten times constituted intimidation of a witness).

**B. The Three-Day Suspension Is Supported By the Law and By Substantial Evidence.**

The burden was on UpperWest to prove before the ABCC that the three-day suspension imposed by the Board for failing or refusing to cooperate with investigative officials and hindering an investigation should not be upheld by the ABCC. See generally, Vaspourakan v. Alcoholic Beverages Control Commission, 401 Mass. 347 (1987); see also JMRS Restaurant, Inc. d/b/a Tavern in the Square, (ABCC Decision Aug. 31, 2017) citing Metrowest Tropical Foods, Inc., (ABCC Decision Sept. 20, 2006). Where the Board does not have a progressive discipline policy, the ABCC must consider, in the absence of these regulations, the totality of the evidence, including, but not limited to, the prior violation history of the Licensee, the egregiousness of the violation(s), and the penalties imposed against other licensees by the Local Board for comparable violations. Id.

The Board has previously imposed a six-day suspension to a licensee for overcrowding violations, a five-day suspension for failure to follow directives of the Board and its agents, and indefinitely suspended a license where a beneficial interest in the license and the manager of

record had been transferred without prior approval from the Board. (**Ex. N, R, S**). In cases where a licensee presented mitigating factors to the Board, a lesser penalty such as a one- or two-day suspension was imposed. (**Ex. O, P, Q**). Based on the evidence and testimony below, as a matter of law, this Court must affirm the imposition of a three-day suspension.

## V. **LEGAL ARGUMENT**

### A. **There is Substantial Evidence that UpperWest Refused to Cooperate with the Fire and Police Department.**

Deputy Donovan, Captain Arsenault, and Mr. McMahon testified that they had never encountered a circumstance where they instructed a manager or other staff in a licensed establishment to extinguish lighted candles and that instruction was refused or ignored. (**Ex. W, X, EE, FF**; A.R. 1721-1722). Ms. Courtney's refusal to extinguish the candles created an alarming public safety issue, given that in the case of the UpperWest Premises, the danger posed by candles is heightened due to the premises being a below-grade portion of a wood-framed structure, with no sprinklers and no egress windows, and thus, could this become engulfed by flames in a short period of time in the event a fire occurred in the premises. (**Ex. GG**; A.R. 1732-1733, Tr. 2145, 2154-2155).

Although Ms. Courtney challenged the validity of the No Lit Candles Prohibition on both August 3, 2018 and September 29, 2018, the Cambridge Fire Department can lawfully enforce such a prohibition as to licensed establishments in the City. Indeed, under G. L. c. 148, § 28, the Chief of the Cambridge Fire Department has the authority to make any order or rule to prevent or remedy any condition in or about any building, structure, or other premises or any ship or vessel which may tend to become a fire hazard or to cause a fire. G. L. c. 148, § 28. Furthermore, under 527 CMR § 1.7.7.2, the Chief of the Cambridge Fire Department has the authority to order any person in writing to remove or remedy any dangerous or hazardous condition. 527 CMR §

1.7.7.2. And, under 527 CMR § 10.10.2, the Chief of the Cambridge Fire Department has the authority to prohibit any or all open flames or candles where circumstances make such conditions hazardous. 527 CMR § 10.10.2. Therefore, the Cambridge Fire Department had the authority to enforce the No Lit Candles Prohibition against UpperWest, and as the manager of record, Ms. Courtney was required to promptly comply with an order to extinguish the candles.

**B. There is Substantial Evidence that Ms. Courtney Hindered or Delayed License Commission Taskforce, Cambridge Fire Department, and Cambridge Police Department Staff and Refused to Cooperate.**

The substantial evidence in the record demonstrates that on both August 3, 2018 and September 29, 2018, Ms. Courtney hindered or delayed License Commission Taskforce staff, Cambridge Fire Department officials, and Cambridge Police officers for a substantial period of time. UpperWest hindered or delayed Cambridge Fire Department and the City's Inspectional Services Department staff from performing their duties on August 3, 2018 in violation of G. L. c. 138, § 63A, and Board Rules 2.2–2.3, 2.5–2.6, 13.1, 13.3, and 13.5. UpperWest hindered or delayed Cambridge Fire Department and Cambridge Police Department officers from performing their duties and enforcing the law on September 29, 2018 in violation of G. L. c. 138, § 63A and Board Rules 2.2–2.3, 2.5–2.6, 13.1, 13.3, and 13.5. Specifically, during both the August 3, 2018 and September 29, 2018 Inspections, rather than promptly complying with numerous orders she was given to extinguish the candles, Ms. Courtney became aggressive in demeanor and argued with Deputy Donovan, Captain Arsenault, Mr. McMahon, Sergeant Bates, and Officer McGinty. Ms. Courtney's conduct went to the extreme of aggressively tearing papers from Deputy Donovan's and Mr. McMahon's hands, entering into their personal space and aggressively engaging them in combative dialogue that required them to remain at the premises for thirty-five to forty minutes on September 29, 2018 while she continually refused their lawful orders to

extinguish the lit candles. All of this evidence taken together unequivocally establishes that Ms. Courtney hindered or delayed City staff from conducting the inspections of a licensed premises and enforcing the law on both August 3, 2018 and September 29, 2018, and that she refused to cooperate with them on both dates. (**Ex. T, U, V, Z, Y**; A.R. 1402-1403; A.R. 1621, 1674-1680, 1683, 1685-1690, 1698-1705, 1709, 1818-1821). Where the evidence before the ABCC establishes that UpperWest failed to cooperate with Cambridge Fire Department and the City's Inspectional Services Department staff on August 3, 2018 in violation of Board Rule 13.5, and failed to cooperate with Cambridge Fire Department and Cambridge Police Department staff on September 29, 2018 in violation of Board Rule 13.5, the ABCC's upholding of the three-day suspension is supported by substantial evidence.

Under G. L. c. 138, § 63A, "any person who hinders or delays any . . . inspector or any other authorized agent of local licensing authorities in the performance of his duties . . . shall be punished by a fine of not less than fifty nor more than two hundred dollars or by imprisonment for not more than two months, or both." G. L. c. 138, § 63A; Lion Distributors, Inc. v. Alcoholic Beverages Control Commission, 15 Mass. App. Ct. 988, 989 (1983). By refusing to comply with orders to extinguish candles during both the August 3, 2018 and September 29, 2018 inspections and refusing to cooperate with the Taskforce Investigators, Ms. Courtney violated G. L. c. 138, § 63A. Furthermore, Ms. Courtney's behavior on both dates constitutes a violation of Board Rule 13.5 which provides that "any licensee, its agents or employees who refuse to cooperate with the License Commission or its agents, hinders an investigation . . . may have its license suspended and/or revoked." (**Ex. I**). Given that the evidence clearly demonstrates that Ms. Courtney violated G. L. c. 138, § 63A and Board Rule 13.5, the Board lawfully exercised its discretion in imposing a three-day suspension, and the Board's decision must be upheld as a matter of law.



**C. There is Substantial Evidence that Ms. Courtney Threatened Deputy Donovan and Captain Arsenault.**

There is substantial evidence in the record that unquestionably establishes that on September 29, 2018, Ms. Courtney stated “you will live to regret this” to Deputy Donovan and Captain Arsenault. (**Ex. V**; A.R. 1687, 2028-2031, 2033-2034, 2144-2145). Indeed, in addition to memorializing Ms. Courtney’s threatening remark in a memorandum to the Chief of the Cambridge Fire Department completed just two days after the September 29, 2018 Inspection, both Deputy Donovan and Captain Arsenault testified that they were certain that Ms. Courtney threatened “you will live to regret this.” (**Id.**) Deputy Donovan and Captain Arsenault testified that they interpreted Ms. Courtney’s remark to mean that she intended to retaliate against them by attempting to get them disciplined or terminated from their employment for conducting their inspection and enforcing the law, and in essence, cause them loss of their jobs and economic harm in retaliation for performing their duties. (**Id.**) It is irrelevant that the Board’s hearings to suspend UpperWest’s License had not begun at the time Ms. Courtney made the threat. **Commonwealth v. King**, 69 Mass. App. Ct. 113, 121 (2007).

Under G. L. c. 268, § 13B, it is unlawful to threaten to cause economic injury or property damage to a witness or potential witness or an investigator, or to punish, harm or otherwise retaliate against any person for such person’s participation in an investigation. G. L. c. 268, § 13B. Under G. L. c. 268, § 13B, a criminal investigation need not have commenced, nor must the victim be furnishing information on the day the intimidating action is taken or statement made. **King**, 69 Mass. App. Ct. at 121. In order to prove a defendant is guilty of the offense of intimidating a witness or law enforcement officer, it must be proven that the defendant willfully, either directly or indirectly threatened or attempted to cause economic injury to another person who was a witness or potential witness and did so with the specific intent to punish, harm or

otherwise retaliate against any such persons for participating in a civil proceeding of any type. See Instruction 7.360, Revised April 2019, re “Intimidating a Witness, Juror, Court Official or Law Enforcement Officer under G. L. c. 268, § 13B.” Here, Ms. Courtney threatened two Cambridge Fire Department employees who testified before the Board on November 7, 2018. **(Exhibit J)**. In addition, because threatening to retaliate against someone for participating in a civil proceeding constitutes a crime, Ms. Courtney’s threat to commit such a crime is a violation of G. L. c. 275, § 2 which makes it a crime for threatening to commit a crime. G. L. c. 275, § 2; Commonwealth v. Valentin V, 83 Mass. App. Ct. 202, 205 (2013) (where the Appeals Court stated that threatening someone is a violation of G. L. c. 275, § 2).

Ms. Courtney’s assertion that the Board’s suspension of the UpperWest License as a result of her threatening statement “you will live to regret this” violates the First Amendment to the U.S. Constitution is an erroneous interpretation of the law. The Twenty-first Amendment to the United States Constitution “conferred upon the individual States the broad powers . . . to regulate the sale of liquor.” Craft Beer Guild, LLC v. Alcoholic Beverages Control Commission, 481 Mass. 506, 512 (2019). “Among other things, the Liquor Control Act authorizes the commission to ‘make regulations not inconsistent with the provisions of this chapter for clarifying, carrying out, enforcing and preventing violation of ... all and any of its provisions ... for the proper and orderly conduct of the licensed business.’” Id. at 514 citing G. L. c. 138, § 24. Furthermore, the utterance of threatening remarks to investigative officials and/or witnesses is not protected by the First Amendment or Article 16 of the Declaration of Rights; indeed, the Supreme Judicial Court has held that “the First Amendment does not protect conduct that threatens another.” Commonwealth v. Sholley, 432 Mass. 721, 726 (2000) citing Commonwealth v. Rabicheau, 421 Mass. 176, 183 (1995). “The free speech issues concerning

the offense of threatening to commit a crime are resolved by defining the elements of the crime in a way that prevents a conviction based on protected speech.” *Id.* at 727. In *Sholley*, the Supreme Judicial Court reviewed whether a defendant’s statement “watch it, counselor” directed at an assistant district attorney, constituted protected speech. *Id.* at 723. In concluding that the defendant’s statements were not protected by the First Amendment or Article 16 of the Commonwealth’s Declaration of Rights, the Supreme Judicial Court held that “by limiting the crime of threats to those cases where the defendant expresses an intention to inflict a crime on another, has the ability to carry out that crime, causes the victim to fear harm, and does so in circumstances that make the victim's fear justifiable, the offense of threatening to commit a crime only reaches cases of ‘true threats’ that would not qualify as protected speech.” *Id.* “Where, as here, the evidence was sufficient to satisfy each element of the crime, there is no violation of *Sholley*’s First Amendment or art[icle] 16 rights.” *Id.* Similarly, here, where Ms. Courtney threatened “you will live to regret this” under the circumstances of an investigation by Cambridge Fire and Police Department staff, her threatening statement is not protected by the First Amendment or Article 16, and the ABCC correctly held that the suspension for threatening investigatory officials was appropriate.

**D. There is Substantial Evidence that the Three-Day Suspension Is Appropriate.**

UpperWest had the burden of establishing and persuading the Commission that the three-day suspension should not be affirmed. *JMRS Restaurant, Inc. d/b/a Tavern in the Square*, p. 9 (ABCC Decision Aug. 31, 2017)<sup>3</sup> citing *Metrowest Tropical Foods, Inc.*, (ABCC Decision Sept. 20, 2006) (A.R. ; see also generally *Olde Towne Liquor Store, Inc. v. Alcoholic Beverages*

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<sup>3</sup>A copy of the ABCC’s August 31, 2017 *JMRS Restaurant, Inc. d/b/a Tavern in the Square* decision is attached hereto as Appendix 1.

Control Commission, 372 Mass. 152 (1976). UpperWest presented no evidence to the Commission in support of its position and to establish that the three-day suspension should not be affirmed. Where the Board has imposed suspensions of five days in one case involving failure to seek Board approval prior to transferring a beneficial interest, and in another matter, a suspension of six days in an overcrowding violation matter, the Board has met its burden in this case by presenting substantial evidence sufficient to support that the penalty imposed in this circumstance was a reasonable and lawful exercise of the Board's discretion in this case. (See **Ex. N, R**). Therefore, the Board's issuance of a three-day suspension to UpperWest for failing to cooperate with investigative officials and hindering or delaying an investigation must be upheld as a matter of law.

## **VI. CONCLUSION.**

UpperWest failed to meet its burden in proving that the three-day suspension issued by the Board should not be upheld. Indeed, apart from cross-examining the Board's witnesses and submitting exhibits, UpperWest rested when it had an opportunity to present its case to the ABCC. Furthermore, UpperWest presented no evidence of mitigating factors to the Commission sufficient to establish that the penalty imposed by the Board was not appropriate.

Given that the three-day suspension the Board issued is supported by substantial evidence in the record and is not based on an error of law, and where UpperWest did not meet its burden in the proceedings before the ABCC in establishing that the Board's Decision should not have been upheld, the Board respectfully requests that this Court affirm the ABCC's Decision upholding the Board's issuance of a three-day suspension to UpperWest.

Respectfully submitted,  
CAMBRIDGE BOARD OF LICENSE  
COMMISSIONERS,  
by its attorney,

/s/ Keplin K. U. Allwaters

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Dated: January 15, 2021

**CERTIFICATE OF SERVICE**

Pursuant to the Supreme Judicial Court’s “Order Concerning Email Service In Cases Under Rule 5(b) of Mass. Rules of Civil Procedure” (dated Mar. 30, 2020), I certify that I caused the foregoing document to be served by e-mail on the plaintiff’s counsel of record as follows:

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January 15, 2021