COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
TRIAL COURT

COFFEESHOP LLC, d/b/a UPPERWEST Plaintiff,	)	
v.	)	CIVIL ACTION NO. 19-3415
ALCOHOLIC BEVERAGES CONTROL COMMISSION, Defendant.	)	

PLAINTIFF COFFEESHOP LLC, D/B/A UPPERWEST'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

Introduction

The plaintiff Coffeeshop LLC d/b/a UpperWest ("UpperWest") requests that this Court reverse the decision of the Alcoholic Beverages Control Commission ("ABCC"), in which the ABCC concluded UpperWest violated three criminal statutes and imposed a three-day license suspension, based purely on UpperWest's exercise of the constitutionally protected right verbally to challenge law enforcement officers' misapplication of law. The ABCC decision is legally unsupportable: nothing about UpperWest's conduct amounted to a violation of statutes or applicable rules, and if those laws are interpreted to cover such conduct, as applied here, they violate UpperWest's constitutional rights of free speech. As the United States Supreme Court has made clear, "freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principle characteristics by which we distinguish a free nation from a police state." City of Houston v. Hill, 482 U.S. 451, 463–64 (1987).

Relevant Factual Background[1]

UpperWest was a small eating and drinking establishment located at 1 Cedar Street, Cambridge, Massachusetts with an all alcoholic beverages license, operated by Kim Courtney ("Courtney") and Xavier Dietrich ("Dietrich") (collectively, the "Owners"). AR 0363. At 7:10 p.m. on Saturday, September 29, 2018, during the busiest night of the week, two officials from the Cambridge Fire Department ("CFD")—Deputy Chief Peter Donovan ("Donovan") and Captain Philip Arsenault ("Arsenault")—and one Cambridge police officer—Daniel McGinty ("McGinty") (collectively, the "Cambridge officials")—came to UpperWest with regard to small candles encased in glass on the tables. Id.

UpperWest did nothing to obstruct the Cambridge officials' entry onto the premises. AR 2062. UpperWest did not refuse to provide any requested information or to allow any inspection. Id. Upon entering UpperWest, the Cambridge officials "observed five to ten lighted votive candles in glass on the bar and tables" and "[n]o one was cooking with the candles, and they did not appear to be for cooking purposes." AR 0363. The officers then asked to speak with the license manager and Courtney and Dietrich arrived and began recording. AR 0364, finding 7.

As shown on the resulting video, Ms. Courtney politely asked for the officers' names and calmly suggested they move the discussion outside so that customers could enter. Exhibit 19, September 29, 2018 license commission task Force Inspection UpperWest Courtney ("Sept. 29 Video"), at 00:01.[2]

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[1] The review of an administrative agency's action rests upon the facts established in the Administrative Record (AR), filed by the ABCC as its answer. G.L. c. 30A, § 14(5). Several of the factual findings contained in the ABCC decision are unsupported by the record, including because they conflict with the actual recordings of the events collected in Exhibit 19. Certain of the disputed facts are noted in this Memorandum. In addition, the AR is inaccurate and incomplete in various respects, including, without limitation, that many portions of the transcript state that testimony is inaudible, when it is in fact audible, and incorrectly transcribe actual words that were said. Hence, to the extent portions marked "inaudible" become relevant, the audio recordings of the hearing would serve as a far more accurate and complete record. However, most of the disputes of fact are not material to a decision on the legal issues presented, and, even on the basis of the Administrative Record as it stands, the ABCC's decision below cannot stand.

[2] The video and audio recordings contained in Exhibit 19 were not assigned an Administrative Record bates stamp number by the ABCC. Each of those records are also contained on the Compact Disc submitted as Exhibit 2 to the Complaint. Although not necessarily material to the legal arguments, but emblematic of the decision's unreliability, the ABCC factual finding that the conversation moved outside "[b]ecause Ms. Courtney was becoming confrontational," AR 0364, number 13, is directly contradicted by the video as well as an audio recording also in

After the conversation moved outside, Donovan said "I am verbally telling you to cease and desist." Sept. 29 Video at 0:53. Courtney responded by repeatedly and persistently pointing out to the officers that the rule they were citing was not applicable to the situation and that the officers "have to follow the law."[3] Several other times during the conversation, the officers *asked* whether the Owners were going to extinguish the candles. At approximately minute 9:35 on the video and again at approximately 10:50, Donovan said "I wish you would put out the candles." The Owners did not respond directly to these requests but continued to try to explain to the officers that there was no rule prohibiting the glass-encased candles on the tables for ambience and that the rule on which the officers were relying applied only to portable cooking equipment. AR 0363–64; Sept. 29 Video.[4] At no point did the officers provide the Owners with any written order to extinguish the candles. Sept. 29 Video (referring to "verbal" cease and desist); AR 1906 (Donovan admits UpperWest was never handed a cease and desist notice); AR 2157 (Arsenault unaware of any written cease and desist order); AR 2052 (McGinty has no memory of any official handing UpperWest a cease and desist notice).

At no point during this conversation did the Owners prevent the officers from suspending the conversation and either extinguishing the candles themselves or proceeding to shut down the establishment. AR 2063. Indeed, at one point, Courtney asked Donovan to "hurry up" in his reading of the rule at issue because she needed the conversation to end so she could prepare food, but he said "I do not have to hurry up" and proceeded to slowly read a subsection of the rule under discussion. Sept. 29 Video at 7:00-8:00. Not until minute 9:50 on the video, did Donovan

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Exhibit 19. Exhibit 19, 20180929_task_force2_audio_dietrich.m4v, at 00:25 ("Sept. 29 audio"); Exhibit 2 to Complaint.

[3] In the course of discussing with the officers the lawfulness of UpperWest's candles, Courtney directed Arsenault to the relevant language of the fire code that he was reading and at one point took the paper so that she could read the actual language aloud to him. Sept. 29 Video, at 2:21 – 5:00. Although not legally material, the ABCC concluded that Courtney "aggressively pulled papers" out of Arsenault's hand, but the video recording reveals that did not occur. Id.; AR 0364. And, in any event, Courtney's efforts to read the rule to them herself was an obvious attempt to try to move the discussion along to a successful conclusion.

[4] Although the ABCC's decision states that UpperWest "refused" to extinguish the candles, the video from that evening reflects the reality that they did not refuse, and ultimately did extinguish the candles, but simply first tried to convince the officers of the error of their interpretation of the rule they were purporting to enforce.

first say the conversation was over, yet he then proceeded voluntarily to continue to engage in it for several more minutes.

When the officers finally decided to end the discussion and move inside to close down the establishment, the Owners did nothing to prevent them from doing so. Sept. 29 Video at and after 17:30. Arsenault asked an employee of UpperWest to turn the music down or off. At that point, Courtney extinguished the candles "under protest." AR 0364; Sept. 29 Video.

After Courtney extinguished the candles and as the officers were leaving the premises, Courtney asked the officers for their business cards. She then stated, "You guys are going to regret behaving this way." Sept. 29 Video at 20:00. Based on testimony of the Cambridge officials, the ABCC found instead that Courtney said "you will live to regret this." AR 0364. This finding is contrary to the actual video,[5] but the difference is not legally material.[6]

At the hearing, Donovan specifically testified, upon inquiry by the Associate Commissioner of the ABCC, that Courtney did not engage in any criminal behavior. AR 1747–48. In particular, and among other things, Donovan agreed that he was not asserting that Courtney's alleged statement about "regret" was criminal, and further agreed that the statement was "not a threat to commit a crime." Id. Rather, the Cambridge officials only viewed Courtney's statement as a "threat" to take some action with regard to their employment that might have an economic impact. AR 0364.

Procedural History

On October 12, 2018, UpperWest was issued a notice of alleged violations by Cambridge License Commission ("Local Board") arising out of the events on September 29, 2018. On

[5] The ABCC decision speculates that the statement "you will live to regret this" was made after the tape had stopped running. AR0369. But neither the ABCC decision nor the officers' testimony supports a conclusion that Courtney made *two* statements telling the officers they would "regret" their actions, but rather only one. The ABCC conclusion is not supported by the facts. And the officers hearsay recollection is does not bear indicia of reliability given its clear conflict with the actual video and the lack of allegation that two such statements were made.

[6] Courtney's reasonable frustration with the officers was enhanced in part because this enforcement action occurred even though the Owners had pointed out in a prior visit that the law did not prevent their use of candles for reasons other than cooking, the officers left on that occasion with the candles burning and never identified another law that made them unlawful. Sept. 29 video. And, as indicated at the hearing, she reasonably believed that the action was being taken in retaliation for the Owners previously disclosing various illegalities in the way the Local Board was handling distribution of licenses in response to which they were forced to change their practices. AR Exhibit 39.

November 20, 2018, after a hearing, the Local Board found UpperWest in violation of the following charges:

a. Count 1: "Failed to comply with the Massachusetts Comprehensive Fire Safety Code, § 20.1.5.2.4(2), in violation of it and GL c. 148, § 28; GL c. 238 §§ 23 and 64, and Board's Rules 2.2-2.3, 2.5-2.6, 5.1-5.2, and 13.1;"
b. Count 2: "Failed and/or refused to cooperate with agents of the Fire Department, and or hindered an investigation, and/or the enforcement of the law, in violation of GL 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 ;"
c. Count 3: "Threatened/intimidated a witness, to wit, public official(s), in violation of GL c. 268, § 13B, GGL [sic] 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
d. Count 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."

The Local Board ultimately suspended UpperWest's license for five days, including two days based upon Count 1 and one day each on the remaining Counts. AR 0365.

The Owners appealed this decision to the ABCC. Following a hearing and post-hearing briefing, the ABCC held that the Code provision on which the Cambridge officials had relied did not in fact bar UpperWest's use of candles, and, as a result, held that Count 1 of the Local Board action could not be sustained. AR 0366–67. The Local Board did not appeal that ruling.[7]

Nonetheless, the ABCC determined that a three-day suspension should stand because UpperWest had supposedly violated three criminal statutes and/or parallel local rules: G.L. c. 138, § 63A (hindering or delaying an investigator); G.L. c. 268, § 13B (intimidating a witness); and G.L. c. 275, §§ 2–4 (threatening to commit a crime). AR 0367–72. The supposed violations were all based on Courtney's verbal statements on September 29, 2018. AR 0367–72.

Argument

A court must set aside an agency decision that is "[i]n violation of constitutional provisions" or "[b]ased upon an error of law." G.L. c. 30A, §§ 14(7)(a) and (c). Further, courts

[7] The ABCC correctly ruled that the only provision of the Fire Safety Code cited by the Local Board in its Notice of Decision as to Count 1 was Section 20.1.5.2.4(2), which applies solely to portable cooking equipment, just as the Owners explained to the officers on September 29, 2018. The ABCC also correctly ruled that other provisions of law cited by the Local Board in support of Count 1 are only administrative in nature and cannot be used to support a violation. AR 0367.

must set aside agency decisions which are "unsupported by substantial evidence." G.L. c. 30A, § 14(7)(e). Indeed here the rights of a party may have been prejudiced because the agency decision is "[u]warranted by facts found by the court on the record as submitted . . . where the court is constitutionally required to make independent findings of fact." G.L. c. 30A, § 14(7)(f).[8]

As to each of the three counts as to which the ABCC affirmed the Local Board's decision, the ABCC's decision is "[b]ased on an error of law"—because UpperWest's conduct did not amount to a violation of the at-issue statutes or rules, as appropriately construed. In addition and/or in the alternative, as to each count, the ABCC decision is in violation of constitutional provisions because it is based on UpperWest's speech, all of which was protected under the First Amendment and Article 16 of the Massachusetts Declaration of Rights.

I. THE COURT SHOULD VACATE THE DECISION BECAUSE IT IS BASED UPON ERRORS OF LAW AND IN VIOLATION OF CONSTITUTIONAL PROVISIONS.

As a matter of law, UpperWest did not violate the relevant statutes or rules relied on by the ABCC. And if those laws are found to cover UpperWest's verbal conduct on September 29, 2018, they are unconstitutional as applied.

A. UpperWest did not "hinder or delay" an "investigation" (Count 2).

The ABCC ruled that UpperWest hindered and delayed an investigation by failing to cooperate and delaying the investigation and the resolution of the investigation, in purported violation of G.L. c. 138, § 63A and Local Rules 13.5 and 5.1. AR 0368. As a matter of fact and law, this conclusion cannot stand.

1. UpperWest's conduct does not violate G.L. c. 138, § 63A.

Chapter 138, § 63A makes it a crime for anyone to "hinder or delay" any investigation of a local licensing authority. The statute does not define "hinder or delay," but prior precedent and

[8] In this case raising serious constitutional questions of free speech, UpperWest submits that the Court is required to make independent findings of fact to the extent that the ABCC findings of fact in dispute are deemed material. *Cf.* Commonwealth v. Rex, 469 Mass. 36, 48 (2014) (where indictment raises free speech issues, court must make independent *de novo* review of the evidence and dismiss when the only conduct charged was protected speech).

constitutional free speech protection limit its scope.[9] The relevant portion of the statute provides:

> Any person who hinders or delays any authorized investigator of the commission or any investigator, inspector or any other authorized agent of local licensing authorities in the performance of his duties, or who refuses to admit to or locks out any such investigator, inspector or agent from any place which such investigator, inspector or agent is authorized to inspect, or who refuses to give to such investigator, inspector or agent such information as may be required for the proper enforcement of this chapter.

G.L. c. 138, § 63A.

The ABCC ruled only that that UpperWest hindered or delayed "the investigation," a ruling that was based purely on the Owners' attempts during the parking lot discussion to convince the officers of their erroneous interpretation of the law. The ABCC's analysis of this alleged violation is as follows:

> Ms. Courtney and Mr. Dietrich undoubtedly hindered and delayed the investigation by the authorized agents of the local board into the use of candles at the licensed premises.[10] For at least 35 minutes[11] they argued with agents of the City of Cambridge and refused to extinguish the candles despite more than 10 or 15 requests that they do so. Ms. Courtney, especially, was 'argumentative,' 'insulting,' 'rude,' 'very loud,' and confrontational throughout the investigation. She repeatedly entered the officers' personal space to the point she was asked to back away from them, and, at one point, she grabbed papers out of Captain Arsenault's hands, making contact with his body. Ms. Courtney escalated the situation so much that there was a discussion about having her arrested for disorderly conduct.

AR 0363.

First, UpperWest did not hinder or delay "the investigation" because "the investigation" was complete at the time of the discussion in the parking lot. Before the discussion ensued, the candles had already been observed. Hence, by definition, the discussion in the parking lot did not

[9] If these words can be interpreted to cover the speech at issue here, the statute as applied not only violates free speech principles but also is void for vagueness. See, e.g., Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–499 (1982) (discussing standards for vagueness, including "the most important factor" of "whether it threatens to inhibit the exercise of constitutionally protected rights").

[10] The ABCC did not find that the UpperWest hindered or delayed an enforcement action – only an investigation.

[11] The discussion did not go on for "at least 35 minutes." As the Sept. 29 Video shows, the entire transaction was over in 20 minutes and 34 seconds.

interfere with "the investigation."[12] UpperWest did not fail to provide any requested information or access to the officers. And, even assuming "the investigation" could be construed to cover the officers' erroneous efforts to enforce the law, rather than investigate the facts, the Owners did nothing to hinder or delay any enforcement. They merely engaged the officers in conversation and did nothing to stop the officers from blowing out the candles themselves or proceeding to close down the establishment earlier than they did. Indeed, Donovan himself prolonged the conversation in spite of Courtney asking him to "hurry up."[13]

Moreover, the officers' *verbal* cease and desist order and periodic *requests* to the Owners to extinguish the candles were not lawful orders.[14] Section 1.7.7.2 of the Massachusetts Comprehensive Fire Safety Code specifically provides that local officials "shall have the authority to order, **in writing**, any person(s) to remove or remedy any dangerous or hazardous condition or material as provided in M.G.L. c. 148 and this Code." AR 1014, Exhibit D (emphasis added). As reflected on the video, the officers only *verbally* asked UpperWest to cease and desist.

Hence, based on the plain language of the statute and the facts in the record, UpperWest simply did not hinder or delay the investigation.

Most importantly, however, even if the Owners' delay in extinguishing the candles could be considered a violation of the terms of the statute, the SJC in Commonwealth v. Adams has recently made clear that state law cannot constitutionally be interpreted to construe a refusal to comply with a request by law enforcement as interference with efforts of law enforcement officers, consistent with the principle of constitutional avoidance. 482 Mass. 514, 534–35 (2019);

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[12] The ABCC found only that UpperWest hindered or delayed the officers in completing an investigation and did not find that UpperWest hindered the officials in the performance of any other duties.

[13] As the Court can determine for itself by reviewing the actual videotape of the interaction, the ABCC's description of Ms. Courtney's conduct is, in its most favorable light, hyperbolic and mischaracterizes the tone and details of the interaction. Sept. 29 Video. And even accepting the ABCC's version, Ms. Courtney merely attempted to get the officers to read the controlling law so that they would not wrongfully either extinguish the candles or close the establishment. She forcefully argued her point and reached for the papers as part of her effort to point out the controlling language to the officers, in order to assist – not hinder – them in the *lawful* performance of their duties.

[14] Of course, even if they were orders, under the constitutional analysis discussed below, UpperWest was not required to comply with them.

Commonwealth v. Jones, 471 Mass. 138, 143 (2015) (and cases cited) (courts must interpret statutes so as to avoid serious constitutional questions under Article 16 and the First Amendment). The Adams Court explicitly recognized that, to avoid running afoul of First Amendment principles, the common law crime of interference with the lawful duties of a police officer, which includes the concept of hindering an officer in the performance of duties, must be limited in several ways because otherwise "it would be a violation of the law 'to stand near a police officer and persistently attempt to engage the officer in conversation while the officer is directing traffic at a busy intersection'." 482 Mass. at 52–27 (quoting City of Houston v. Hill, 482 U.S. 451, 479 (1987)).

The Adams Court first ruled that to be constitutionally cognizable a finding of hindering an office must include a finding that the accused acted with specific intent. 482 Mass. at 517 (citing and quoting Cocroft v. Smith, 95 F. Supp. 3d 119, 126 (D. Mass. 2015) ("[I]f Massachusetts were to recognize the common-law offense of obstructing a police officer in the performance of his duty, a conviction would require proof that the alleged violator acted with specific intent to intimidate, hinder or interrupt the officer."). The Court also made clear that "hinder[ing] or delay[ing]" "requires proof of a *physical* act that obstructs of hinder a police officer in the lawful performance of his or her duty" or a threat of violence, as such a threat of violence "would have the effect of obstructing or interfering with the officer." Adams, 482 Mass. at 529 (emphasis added). And, finally, for any obstruction to occur, the officers must be acting "in the lawful performance of a duty." Id. at 530.

Applying these principles, the Court held that a repeated, argumentative refusal to surrender firearms and ammunition in compliance with a police officer's demand did not amount to the crime of interference with a police officer because such evidence could not "establish that the defendant physically obstructed or hindered the officer in the performance of a lawful duty. Moreover, the defendant's protestations did not rise to the level of threats of violence against a police officer, which reasonably would have the effect of obstructing or interfering with the police in the performance of a lawful duty." Id. at 535.

In this case, the ABCC made no finding that UpperWest intended, specifically or otherwise, to hinder or delay the officers, as opposed to convince them they were misapplying the law. Certainly, even if UpperWest actually had refused to comply with a proper order, under Adams, construing the statute to cover such conduct would be unconstitutional. Id. And the ABCC made no finding – nor does the record support a finding – of any physical conduct (or any conduct) that prevented the officers from leaving the conversation and proceeding to close down the establishment at any time. Indeed, as noted above, Donovan himself chose repeatedly to extend the conversation. Moreover, on September 29, 2018, the officers were not acting in the performance of a *lawful* duty. Rather, as the ABCC itself found, they were misapplying the law as to the use of candles. Moreover, they failed to provide any written order to extinguish the candles as required for any such order to be valid. Construing the statute as required under Adams and by constitutional principles, the facts of this case cannot sustain a conclusion of "hinder[ing] or delay[ing]."

In addition to all the above, a finding of hindering or delaying here would violate due process because prior ABCC decisions did not put UpperWest on notice that merely arguing with officials about their misapplication of the law could be found to constitute hindering or delaying. In prior cases, including those cited by the ABCC in its decision on this matter, AR 0367–68, courts found violations of Section 63A solely based upon intentional failures to provide information necessary to an investigation or providing false information. For example, in Lion Distributors, Inc. v. Alcoholic Beverages Control Comm'n, the Appeals Court affirmed a decision of the ABCC to suspend a license on the basis of Section 63A where the wholesaler and importer licensee failed to produce records and made affirmative misrepresentations. 15 Mass. App. Ct. 988, 988 (1983). In Lion Distributors, despite the ABCC's requests for documents concerning sales of equipment "[t]he only records ever received from the plaintiff were duplicates of invoices (from a supplier of equipment) which the investigators had given the plaintiff to copy, records relating to equipment sales as to which the plaintiff knew the investigators had independent knowledge, and ledger cards containing misrepresentations." Id. at

989. See also Duca v. Martins, 941 F. Supp. 1281, 1293–94 (D. Mass. 1996) (probable cause existed for criminal complaint under Section 63A where licensee refused to answer investigator's questions). These decisions did not put the Owners on fair notice that their efforts to convince the officers of this misinterpretation of the law could constitute a violation.[15]

The limits on the meaning of "hinder or delay" established both by Adams and the prior interpretations of 63A must be applied here, especially in light of the rule of lenity. "The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." McNally v. United States, 483 U.S. 350, 359–60 (1987). See also United States v. Santos, 553 U.S. 507, 513 (2008) (rule of lenity requires ambiguity in criminal laws to be interpreted in favor of the defendant); Commonwealth v. Hamilton, 459 Mass. 422, 436 (2011) (same); United States v. Sadler, 750 F.3d 585, 592 (6th Cir. 2014) (Congress's "silence also requires us to pick the more lenient reading of the wire-fraud law"); United States v. Bruchhausen, 977 F.2d 464, 468 (9th Cir. 1992) (applying rule of lenity to find that "[i]n the absence of definite language, we must conclude that distributors' truth-in-purchasing concerns do not support a federal criminal conviction").

To uphold the finding that UpperWest "hinder[ed] or delay[ed]" the Cambridge officials would contravene the principles of Adams, the common sense reality that the investigation was complete and, in any event, the Owners did nothing to stop the officers from proceeding with this

[15] Indeed, the ABCC has described and recognized "hinder[ing] or delay[ing]" an investigation to mean actually preventing an investigator from obtaining the information needed to make an assessment about any potential violation. Speakeasy Inc. d/b/a Speakeasy (ABCC Decision March 18, 2015) (violation of Section 63A where licensee failed to produce documents in response to a demand for documents); William J. Chamness d/b/a Chamness Bar & Grill (ABCC Decision August 31, 2004) (violation of Section 63A where licensee refused to allow investigator to examine behind bar); Gerald Ely II d/b/a The Menu (ABCC Decision September 17, 1997) (violation of Section 63A where licensee refused to be interviewed); J.D.T.P. Inc. d/b/a Dineen's (ABCC Decision November 13, 1995) (violation of Section 63A where licensee refused to answer questions and interfered with investigator interviewing patron). In a particularly blatant example, Prudencio Gomez d/b/a Pruddy's, the licensee refused to turn over a video recording of its business practices and further instructed his employees not to answer the questions of investigators. (ABCC Decision January 12, 1999). That refusal was especially problematic where the ABCC was investigating whether the licensee provided service to individuals under 21 years old, and the video recording demonstrated the method in which patrons were admitted. Id.

(unjustified) mission, and ignore the regulation requiring that an effective order had to be in writing. The ABCC finding of a violation of the statute must be reversed.

2. UpperWest did not violate Local Rule 13.5 as constitutionally construed.

The ABCC also found that UpperWest violated Local Rule 13.5, which provides that "[a]ny 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." Based purely on the wrongful conclusion that Rule 13.5 was violated, the ABCC also found that Rule 5.1 was violated.[16] This conclusion is factually and legally flawed.

For all the same reasons noted with regard to the state statute, UpperWest did not hinder an investigation. They also did not fail otherwise to cooperate in any legally cognizable way. Notably, at no time did the officers give UpperWest a written order to extinguish the candles as is required by 527 CMR 1.7.7.2. AR 1014. Although the Owners did ultimately extinguish the candles when it became clear that the officers were going to proceed with closing the establishment, in the absence of a written order, the Owners had no duty to cooperate with mere requests or purported verbal orders to extinguish the candles earlier. And of course, as discussed below, UpperWest also had a constitutional right to try to convince the officers that they were misapplying the law. So, neither under the plain language of the relevant rule, nor the language of the rule as constitutionally construed, did UpperWest violate Rule 13.5, and therefore it did not violate rule 5.1.

3. All of UpperWest's conduct that forms the basis for the "hinder[ing] or delay[ing]" finding constitutes protected free expression.

The ABCC's conclusion that UpperWest violated Section 63A is also unsupportable as a constitutional matter: the language which the ABCC relied upon in its "hinder[ing] or delay[ing]" finding is protected speech under the First Amendment and Article 16. Questioning

[16] Rule 5.1 provides "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."

official government action is at the heart of speech protected by the First Amendment and Article 16. In the words of the Supreme Court, the "freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principle characteristics by which we distinguish a free nation from a police state." City of Houston v. Hill, 482 U.S. at 463–64. Consequently, "[i]n our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights." Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011). Nevertheless, the ABCC found that UpperWest committed the crime of "hinder[ing] or delay[ing]" an investigation by disagreeing with government action in an "agitated," "argumentative," "very loud," and "confrontational" manner. The conclusion violates UpperWest's free speech rights.

The constitutional protection of speech criticizing law enforcement officers is so well-established that courts have repeatedly invalidated statutes that prohibit offensive or abusive speech toward a law enforcement officer. See, e.g., Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974) (ordinance facially overbroad under the First Amendment where it made it a crime to curse at the police while they undertook their duties); New York Times v. Sullivan, 376 U.S. 254, 273 (1964)) ("The right of an American citizen to criticize public officials and policies . . . is the central meaning of the First Amendment."); Jefferson v. Ambroz, 90 F.3d 1291, 1298 (7th Cir. 1996) ("The right to criticize public officials is . . . protected by the First Amendment."); Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir. 1998) ("The First Amendment clearly protects [a person's] right to criticize [a public official] in his role as a public official.").

In City of Houston v. Hill, relied upon by the SJC in Adams, the Supreme Court invalidated under the First Amendment a statute that allowed someone to be prosecuted for interfering with law enforcement officials by speech alone, including speech that was intended to distract the police from their duties. In that case, the defendant intentionally, and by his own admission, sought to interrupt and delay police officers in the execution of their duties. 482 U.S. at 453–54. In particular, he started yelling at police officers in order to divert their attention from his friend, who had been stopping traffic on a busy street. Id. When the police officer asked

"[A]re you interrupting me in my official capacity as a Houston police officer?" the defendant then shouted: "Yes, why don't you pick on somebody my size?" Id. In other words, the defendant's speech was purely and intentionally an attempt to distract and interrupt the police officer in his duties. Id. Nevertheless, the Supreme Court ruled that the defendant's attempt to interrupt the police officer was protected speech and could not be criminalized. Id. The "First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." Id. at 461. The ordinance at issue there broadly prohibited speech that "interrupt[s]" an officer. Id. at 463. It was declared unconstitutional because it swept in "a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement." Id. at 466–67.

As is well-established, including by the Supreme Judicial Court in Adams, constitutional free speech protections do not permit the government to charge individuals with the offense of hindering law enforcement simply because such individuals refuse to do what officers demand or speak constitutionally protected words, even vociferously, to officers. See, e.g., City of Shoreline v. McLemore, 438 P.3d 1161 (Wash. 2019) (a belligerent refusal to do what police are asking protected by both free speech and search and seizure protections; duty not to hinder is not a duty to cooperate with law enforcement); State v. E.J.J., 183 Wash. 2d 497, 506–08 (2015) (en banc) (conviction for obstructing officer based on abusive language to officer violated First Amendment); People v. Baskerville, 963 N.E.2d 898, 904–906 (Ill. 2012) (to comply with free speech requirements, limiting application of state obstruction statute to conduct or false factual statements that cause actual hindrance to a specific duty); State v. Williams, 205 Conn. 456, 472 (1987) (state obstruction statute consistent with free speech requirements because the statute as interpreted "excludes situations in which a defendant merely questions a police officer's authority or protests his or her action"); Bennett v. St. Louis County, 542 S.W.3d 392, 402–403 (Mo. Ct. App. 2017) (interpreting state obstruction statute to apply only to physical hindering and words not protected by constitutional free speech provisions, so as to comport with constitutional free speech protections; the "Ordinance does not extend its prohibition to ordinary

verbal criticism directed at a police officer or county employee, nor does it apply to the mere verbal interruption of a law enforcement officer.").[17]

This Court should conclude that UpperWest did not "hinder or delay" an investigation and also find and declare that the phrase "hinders or delays" as used in G.L. c. 138, § 63A is unconstitutionally overbroad unless it is construed not to encompass constitutionally protected speech and conduct, such as that engaged in by the Owners of UpperWest on September 29, 2018.[18]

B. UpperWest did not make any threat of even economic harm directed at interfering with any administrative hearing or other civil proceeding and did not make a threat that constitutionally may be found to violate G.L. c. 268, § 13B (Count 3).

The ABCC found that Courtney said to the officers after the candles were extinguished and the officers were leaving that the officers would "live to regret this," AR 0364. Because this finding is inconsistent with the video recordings of the actual incident in which Ms. Courtney simply and calmly said "you guys are going to regret behaving this way," Sept. 29 Video at 19:54, the ABCC finding is not supported by substantial evidence. But even assuming Courtney said "you guys will live to regret this," as a matter of law, Section 13B was not violated by this statement or was not violated in a manner that constitutionally can be penalized. Indeed, Donovan himself admitted, and agreed with the ABCC Associate Commissioner, that Courtney's statement did not amount to a crime and was not a threat to commit a crime. AR 1747–48.

1. UpperWest did not violate G.L. c. 268, § 13B because there was no proceeding of the type covered by the statute pending at the time of the statement at issue and no reasonable officer could have viewed her statement as a threat to cause economic harm.

The ABCC found that UpperWest violated G.L. c. 268, §13B, and particularly subsection

[17] The law is clear that these free speech protections apply with full force to liquor licensees. See Mendoza v. Licensing Bd. of Fall River, 444 Mass. 188, 199-201 (2005) (licensing regulation ruled unconstitutionally overbroad); Norfolk 302, LLC v. Vassar, 524 F. Supp. 2d (E.D. Va. 2007) (same).

[18] As discussed with respect to Counts 3 and 4, defendant here alleges that the UpperWest owners made a "threat" to the officers after the candles were extinguished and the officers were leaving. For the reasons discussed below, the words were not a threat under the statute or constitution. For purposes of Count 2, at the time the alleged "threat" was made, the officers' work was completed and they were leaving, so the "threat" is not relevant to the hinder or delay allegation.

(b)(i) thereof, by threatening to report the officials for their conduct, but did not conclude and could not have concluded that those officials were witnesses in a past or ongoing administrative or other proceeding covered by the statute. AR 0368–69. Specifically, the ABCC found that Courtney – simply by (allegedly) saying after the candles were extinguished and the officers were leaving that "you will live to regret this" – "threatened two Cambridge Fire Department officials with retaliation by means of economic injury against their professional careers ...." Id. The officers involved took this to mean only that Ms. Courtney was "threatening" to bring their conduct to the attention of other City officials. AR 0364.

> This statute, in relevant part, establishes a crime applicable to:
> (b) Whoever willfully, either directly or indirectly: (i) threatens, attempts or causes physical, emotional or economic injury or property damage to … another person who is a: (A) witness or potential witness; … with the intent to or with reckless disregard for the fact that it may; (1) impede, obstruct, delay, prevent or otherwise interfere with: . . . **an administrative hearing . . . or any other civil proceeding** of any type; or (2) punish, harm or otherwise retaliate against any such person described in this section for such person or such person's family member's **participation in any of the proceedings described in this section**.

(emphasis added).

The ABCC did not find and could not have found that UpperWest's conduct satisfied the required statutory elements.[19] At the time of or prior to the alleged "threat," the officers were not, and had previously not been, a witness in an administrative hearing or other civil proceeding of the type covered by the statute. In particular, the ABCC never found and could not have found that UpperWest "willfully tried to influence or interfere with the witness . . . with the purpose of influenc[ing] the . . . witness." Commonwealth v. Cohen, 456 Mass. 94, 120 (2010). Rather, the record shows only that UpperWest suggested that they might report CFD officials to supervising

[19] The SJC has explained that the fundamental elements of the crime set forth in Section 13B, are that "(1) the target of the alleged intimidation was a witness against the defendant in some stage of a [ ] proceeding; (2) the defendant wilfully tried to influence or interfere with the witness; (3) the defendant did so by means of misrepresentation, intimidation, force or express or implied threats of force; and (4) the defendant did so with the purpose of influencing the ... witness." Commonwealth v. Cohen, 456 Mass. 94, 120 (2010) (internal quotations and citations omitted). And under the plain language of the statute, the target of any such threat must at the time be or have been a witness. Hence, a necessary element of this crime is that any alleged threat or intimidation be related to the witness's conduct in an actual administrative hearing or other civil "proceeding."

City officials because of the way they misapplied the law and wrongly interfered with the operation of the establishment.

In ruling that the officers became potential witnesses at an administrative proceeding that "could result" when they saw the lighted candles, AR0369-0370, the ABCC stretched the statute to a situation that it plainly does not cover. The ABCC cited Commonwealth v. Rosario, 83 Mass. App. Ct. 640 (2013), and Commonwealth v. Drumgoole, 49 Mass. App. Ct. 87 (2000), in support of the proposition that a prospective proceeding is sufficient to satisfy the statute. But in Rosario, the defendant had already been arraigned on charges with respect to which an alleged threat was made, so criminal proceedings had commenced, even though indictments had not yet been returned. And in Drumgoole, the threats at issue were made after the defendant had been "formally charged" with prior threats to commit a crime.[20]

In any event, no actual threat to cause even economic harm was made. At most, and as acknowledged by the CFD personnel at the ABCC hearing, Courtney's alleged statement – made after the officers were leaving on September 29, 2018 – was an expression of an intent to exercise her right to petition the government for redress of grievances and report their conduct to supervising officials. From this statement alone, the ABCC incorrectly concluded that Courtney had "willfully threat[ened] or attempted to cause economic injury" to the officers. AR 0369. This conclusion is not supported by substantial evidence because it rests on an unsupported and attenuated series of inferences: among other things, there is no reason to think that the officials would lose their jobs or face other economic consequences if their actions were reported, rather than, and at most, merely being reprimanded or warned not to engage in such conduct again. In other words, just as the officers here did not in fact feel threatened with economic injury, no reasonable person could have felt such harm could result in these circumstances, Commonwealth v. Milo, 433 Mass. 149, 151-152 (2001), including where, according to the officers themselves,

[20] Nor are Commonwealth v. King, 69 Mass. App. Ct. 113, 121 (2007) or Commonwealth v. Belle Isle, 44 Mass. App. Ct. 226, 229 (1998), cited by the ABCC, applicable because they rely on statutory language that no longer is in the statute and, more fundamentally, they involved alleged threats to stop someone from providing information to law enforcement investigators, not complaints to law enforcement officers who had already gathered all relevant information about their own professional conduct.

the Cambridge Legal Department had directed them to take the action they did. Sept. 29 Video at 6:25.[21]

For these reasons, the ABCC's finding of a violation of the statute is not supported on the record and cannot be sustained.

2. Count 3 cannot be sustained because UpperWest made no constitutionally cognizable threat.

Of course, even if a statutory violation were proven, applying the statute to Courtney's statement violates the constitution. The law is clear that threats of economic injury alone do not rise to the level of "true threats" and hence cannot be punished consistently with the First Amendment and Article 16. In O'Brien v. Borowski, 461 Mass. 415, 427 (2012), the Supreme Judicial Court, applying the teachings of Virginia v. Black, expressly ruled that a threat of "economic injury" – as opposed to a threat of "physical harm" or "physical damage to property" – does not constitute a "true threat" that can be punished consistent with constitutional free speech provisions. See also K.G. v. P.C., 94 Mass. App. Ct. 1122, 2019 WL 852302 at *1 (Feb. 21, 2019) (incident where defendant went to plaintiff's workplace and lodged a complaint was to cause "'fear of economic loss,' which is not 'enough to make [the complaint] a 'true threat'" (quoting O'Brien v. Borowski, 461 Mass. at 427)).

In Commonwealth v. Bigelow, the SJC held that "true threats" can be the subject of a prosecution under the harassment statute only if "the defendant's words, considered in light of all the surrounding facts that provide context, constituted a direct threat of *imminent physical harm* to the alleged victim or caused the alleged victim to fear *physical* harm now or in the future," and "the defendant intended to cause such fear." 475 Mass. 554, 572 n. 26 (2016) (emphases added). The extent to which the threat must instill a reasonable fear of impending *physical* harm is illustrated by the Supreme Court's decision in Watts v. United States, 394 U.S. 705, 708 (1969), in which the Court held that a statement by an anti-war protester that "[i]f they ever make me

[21] Under the ABCC rationale, any time a member of the public makes a statement that they might report a law enforcement officer to their supervisors for misconduct they could be charged under Section 13B because of the mere possibility that the officer might later seek criminal charges against them for something they allegedly did. This is not what Section 13B says and, if it did, it would be unconstitutionally overbroad.

carry a rifle the first man I want to get in my sights is L.B.J." was "political hyperbole" and not a true threat. Courtney's threat to report the officers to other authorities for this misapplication of the law simply does not constitute a "true threat" that constitutionally can be punished.[22]

For these reasons, Ms. Courtney's words to the officers, implying she would report their misapplication of the law and wrongful interference with her business to their superiors, is not a constitutionally cognizable threat. The First Amendment and Article 16 simply do not permit the government to convert an individual's generalized statement that they intend to try to hold their officials professionally or politically accountable into a threat of harm that may be penalized. Under the ABCC's and Local Board's logic, vast amounts of civic and political discourse could be punishable merely because of its potential economic effect on government officials who rightfully face professional consequences for their actions.[23]

C. UpperWest did not threaten to commit a crime (Count 4).

Under Count 4, the ABCC bootstraps its conclusions under Count 3 with regard to the alleged crime of threatening a witness into a conclusion that UpperWest threatened to commit a crime in violation of G.L. c. 275, §2. The crime she allegedly threatened to commit was exactly the same one covered by Count 3, namely, intimidation of a witness in connection with an administrative hearing or other civil proceeding. Because Count 3 must fall, including because Donovan admitted and a Commissioner agreed at the hearing that Courtney did not threaten a

[22] Unlike the facts here, in each of the cases upon which the ABCC relied to conclude that Courtney's statement could constitutionally be penalized, the defendant threatened *physical* harm, and not some speculative economic injury. AR0369 (Robinson v. Bradley, 300 F. Supp. 665, 666 (D. Mass. 1969) (defendant allegedly said, "If you come outside, I will beat you up."); Commonwealth v. Sholley, 432 Mass. 721, 723 (2000) (defendant shouted, "This means war! There's going to be bloodshed all over the streets!"); United States v. Fulmer, 108 F.3d 1486, 1490 (1st Cir. 1997) (defendant threatened that "[t]he silver bullets are coming"); Commonwealth v. Simeone, 86 Mass. App. Ct. 1116 (2014) (defendant threatened to travel to witness's house and kill her)). The ABCC also cited to Commonwealth v. Cruz, No. 11-684, 2011 WL 3611392 (Mass. Super. Aug. 11, 2011), but that decision does not discuss or reference "threats" in any respect and rather involves willfully misleading an investigator which is irrelevant in this case.

[23] The ABCC focused on the fact that the standard for a threat is an objective one. AR 3072. But it ignored that, where an alleged threat is based on speech alone, the question is whether the threat was a threat to cause physical harm. Here, no reasonable person could have construed Courtney's parting words to constitute a threat of physical harm and, indeed, the ABCC found only that it was a threat potentially to cause economic harm. Indeed, in a reflection of the ABCC's misapprehension about the meaning of a true "threat," at the ABCC hearing, an Associate Commissioner of the ABCC accused Courtney of threatening the ABCC when she noted that it appeared the ABCC was biased. AR 2038.

crime, AR 1747–48, and because no constitutionally cognizable "true threat" was made, Count 4 also cannot stand. Moreover, as the SJC very recently held, convicting someone of two crimes for exactly the same conduct violates double jeopardy. Commonwealth v. Phuon, 2020 WL 6122523 at *3 (October 19, 2020).

For all these reasons, as a legal and constitutional matter, UpperWest's comment that the CFD's officials would "regret" their conduct was simply not a threat to commit a crime; rather, it was an expression of intent to petition the government for redress of grievances, as UpperWest ultimately did with respect to the police officers in March 2019, AR 0365, finding 31, and which the ABCC decision fails to recognize was the Owners' constitutional right to say under the First Amendment. AR 0370.

II. THERE IS NOT SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT ANY FINDINGS OF FACTS THAT WOULD JUSTIFY A RULING THAT UPPERWEST COMMITTED A CRIME OR VIOLATED ANY APPLICABLE RULES ON SEPTEMBER 29, 2018.

For all the reasons set forth above, Plaintiff respectfully suggests that there is no version of the facts either found by the ABCC or supported by the record that would justify, as a matter of law, upholding the ABCC decision. But if this Court finds that some version of the facts in the record could support such a conclusion, including but not limited to the facts in dispute highlighted above and the ABCC's characterizations of UpperWest's actions and words on September 29, 2018, Plaintiff respectfully submits that such facts are not supported by sufficient, substantial and reliable evidence.

Conclusion

Given multiple errors of law, including core violations of UpperWest's constitutional rights, the ABCC decision must be reversed. In addition, pursuant to Count 3 of the Complaint, this Court should enter declarations that the statutes and rules at issue were applied here, and in the future must not be applied, to penalize protected free speech rights.

Respectfully submitted,

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Date: October 26, 2020

CERTIFICATE OF SERVICE

I, Benjamin J. Wish, hereby certify that on October 26, 2020 the foregoing was served via first class mail and email upon:

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