

Mailing Date: APR 25 2012

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATIVE LAW JUDGE
FOR
PENNSYLVANIA LIQUOR CONTROL BOARD

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 10-1181
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-412607
v.	:	
	:	LID - 51631
SIERRA MADRE II, INC.	:	
T/A SIERRA MADRE	:	
4035 MARKET ST.	:	
CAMP HILL, PA 17011-4231	:	
	:	
	:	
CUMBERLAND COUNTY	:	
LICENSE NO. R-AP-SS-20227	:	

**BEFORE JUDGE FLAHERTY
BUREAU COUNSEL PIETRZAK
LICENSEE: JAMES M. PETRASCU, ESQUIRE**

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on June 10, 2010, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against SIERRA MADRE II, INC., License Number R-AP-SS-20227 (hereinafter "Licensee").

The citation charges Licensee with violation of Section 5.32(a) of the Liquor Control Board Regulations [40 Pa. Code §5.32(a)] in that on May 5 and 6, 2010, Licensee, by its servants, agents or employes, used, or permitted to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

The investigation which gave rise to the citation began on May 5, 2010 and was completed on May 18, 2010; and notice of the violation was sent to Licensee by Certified Mail on May 27, 2010. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on January 24, 2012 in the Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania.

Upon review of the transcript of this hearing, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

1. On May 5, 2010, an officer of the Bureau arrived in the area of the licensed premises in a state vehicle at approximately 10:25 p.m. She parked approximately 200 feet from the licensed premises and could hear music with her windows rolled up (N.T. 10).

2. As the officer exited her state vehicle and approached the licensed premises, the music became increasingly loud until she positively identified the source of the music as four speakers located on the outside of the licensed premises (N.T. 10-11).

3. The officer entered the licensed premises through doors that were propped open and determined that the music heard from the exterior speakers was originally coming from a digital jukebox (N.T. 11-12).

4. While the officer was in the licensed premises, the music changed. The music at this point was provided by a DJ known as "DJ Mad Hatter" who was amplifying his music through cabinet speakers located inside the licensed premises (N.T. 12-13).

5. The officer departed the licensed premises at 11:00 p.m. on May 5, 2010. Once outside the licensed premises, she heard a mixture of music from the external speakers as well as music coming from the speakers provided by the DJ. She could still hear the music 220 feet away at her vehicle (N.T. 14-15).

6. On May 6, 2010 at 9:00 p.m., the officer again arrived in the area of the licensed premises and parked her vehicle approximately 220 feet away (N.T. 15-16).

7. While she was still at her vehicle, the officer could hear the sound of music. As she approached the licensed premises the music became louder and louder, and she was able to positively identify the source of the music as speakers mounted on the exterior of the licensed premises (N.T. 16).

8. Upon entering the licensed premises, the officer identified the source of the music as a digital jukebox. The speakers were connected to this jukebox (N.T. 16-17).

9. While the officer was on the licensed premises she observed a five-piece band set up and playing music. The music was amplified through loudspeakers (N.T. 19).

10. The officer exited the licensed premises at 9:40 p.m. As she exited she could hear music coming from the speakers provided by the band on the interior of the licensed premises as well as music coming from the loudspeakers mounted on the exterior of the licensed premises. She could hear the music from the speakers all the way to her car which was parked 220 feet away (N.T. 19-20).

CONCLUSION OF LAW:

The charge in the citation is **sustained**.

DISCUSSION:

The record in this case establishes that on both dates charged in the citation, music was being played on the licensed premises which was amplified through loudspeakers and could be heard outside the licensed premises. This is sufficient to establish a violation of the regulation in question.¹

PRIOR RECORD:

Licensee has been licensed since February 1, 2005, and has had six prior violations:

Citation No. 06-1870. Fine \$100.00.

1. Used loudspeakers or devices whereby music could be heard outside. May 5, 2006.

¹ At the hearing in this case, counsel for Licensee brought to my attention the fact that the Regulation [40 Pa. Code, Section 5.32(a)] has been replaced by a new Section of the Liquor Code [47 P.S. 4-493(34)]. This new statutory section contains additional requirements which must be established before a violation is present. This new section became effective December 22, 2011. Evidence which would meet these new requirements is not present in this case.

Counsel for Licensee has asked that the new Section 493(34) of the Liquor Code (*supra*) be applied retroactively to this case and the citation dismissed. I decline to do so.

The incidents in this case occurred more than eighteen months before Section 493(34) became effective. Further, nothing in the legislation which enacted this section gives any indication that it was to be applied retroactively.

Section 1926 of the Statutory Construction Act [1 Pa. C.S.A. §1926] provides:

No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly.

This principle has been confirmed by the Supreme Court of Pennsylvania. *In re: 1985 Washington Cty Fin Report*, 601 A.2d 1223 (Pa. 1992).

Based on the foregoing, I conclude that the new statutory section should not be applied in this case.

Citation No. 07-1616. Fine \$1,000.00 and RAMP training mandated.

1. Sales to a visibly intoxicated person. April 12, 2007.

Citation No. 08-0527. Fine \$1,750.00.

1. Used loudspeakers or devices whereby music could be heard outside. September 3, 2007.
2. Sales to a visibly intoxicated person. September 16, 2007.

Citation No. 08-1829. Fine \$500.00.

1. Used loudspeakers or devices whereby music could be heard outside. March 20 and April 26, 2008.

Citation No. 09-2528. Fine \$900.00.

1. Used loudspeakers or devices whereby music could be heard outside. June 5, 6, August 2 and September 17, 2009.
2. Failed to appoint a Board approved a full time manager for the licensed premises. August 28, 2008 through August 4, 2009.

Citation No. 10-0324. Fine \$250.00.

1. Permitted a person under 18 years of age to be in a portion of the licensed premises where smoking was permitted. January 24 and February 7, 2010.

PENALTY:

Section 471 of the Liquor Code [47 P.S. §4-471] prescribes a penalty of license suspension or revocation or a fine of not less than \$50.00 or more than \$1,000.00 or both for violations of the type found in this case.

Under the circumstances of this case, the penalty imposed shall be a fine of \$600.00.

ORDER

THEREFORE, it is hereby ordered that Licensee SIERRA MADRE II, INC., pay a fine of \$600.00 within 20 days of the mailing date of this Order. In the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked.

Jurisdiction is retained.

Dated this 18TH day of April, 2012.



Daniel T. Flaherty, Jr., J.

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MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A \$25.00 FILING FEE.

IF YOU WISH TO APPEAL THE DECISION OF THE ADMINISTRATIVE LAW JUDGE'S ORDER, THE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE MAILING DATE OF THE ORDER. PLEASE CONTACT CHIEF COUNSEL'S OFFICE AT 717-783-9454.

Detach here and submit stub with payment

The fine must be paid by Cashier's Check, Certified Check or Money Order. **Personal and business checks are not acceptable unless bank certified.** Make guaranteed check payable to the Commonwealth of Pennsylvania and mail to:

PLCB-Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg PA 17110-9661

Citation No. 10-1181
Sierra Madre II, Inc.