



SHENKER RUSSO & CLARK LLP

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Theresa M. Russo
Theresa.Russo@srclawoffices.com
518.407.5800

Gary Meyerhoff
General Counsel
New York State Liquor Authority
80 South Swan Street, Suite 900
Albany, NY 12210

Re: Request for Declaratory Ruling

Dear Mr. Meyerhoff:

Our firm represents the National Association of Movie Theatre Owners (“NATO”). NATO is a trade organization comprised of major theatre chains, as well as hundreds of independent theater operators; collectively, accounting for over 35,000 motion picture screens across the nation. We hereby respectfully request a Declaratory Ruling regarding the eligibility of motion picture theatres to obtain licenses to sell beer and wine.

Question Presented

Whether motion picture theatres are eligible to obtain licenses to sell beer and wine under Alcoholic Beverage Control Law (“ABCL”) § 81(2) without meeting the definition of a “restaurant”?

Discussion

New York’s courts have scant history of interpreting this section and have never ruled directly on the scope of subdivision 2. As such, our analysis focuses on the plain meaning of the statutory language of ABCL § 81, as well as its legislative history, to understand the intended meaning behind its provisions.

Enacted in 1934, ABCL § 81 provided for a license to sell wine at retail for consumption on the premises. Issuance of a license, however, was initially restricted to only those entities that could obtain a license under ABCL § 64, which currently provides that, “No retail license under this section shall be granted except for such premises as are being conducted as a bona fide hotel provided that a restaurant is operated in such premises, restaurant, catering establishment, club, railroad car, vessel or aircraft being operated on regularly scheduled flights by a United States certificated airline.” (ABCL § 64 [5]).

For many years, the statute's definitions section provided that to qualify as a "restaurant," an establishment must have each of the following: 1) a kitchen suitable for cooking an assortment of foods; 2) a chef; 3) a menu featuring entrée-style meals; and 4) a sufficient amount of refrigeration to support food service. (ABCL § 3 [27], as reproduced in U.S. Dept of Commerce, State Liquor Legislation, vol. 4, pg. 275 [1941] [https://www.google.com/books/edition/State_Liquor_Legislation/FlxqVckd164C?gbpv=1]). This definition excluded most businesses and for decades the law categorically prohibited them from obtaining a license under ABCL § 81.

Recognizing that eligibility should expand to additional types of premises, the Legislature passed and the Governor approved Chapter 666 of the laws of 1987, which amended ABCL § 81 thusly:

"1. The procedure set forth in section sixty-four hereof shall apply so far as applicable to applications for licenses to sell wine at retail for consumption on the premises, except as provided in subdivision two of this section.

2. No such license shall be issued to any person for any premises other than premises for which a license may be issued under section sixty-four of this chapter or a hotel or premises which are kept, used, maintained, advertised or held out to the public to be a place where food is prepared and served for consumption on the premises in such quantities as to satisfy the liquor authority that the sale of wine intended is incidental to and not the prime source of revenue from the operation of such premises. . . ."

(L 1987, ch 666, § 3, [additions italicized]. This text has not been altered by subsequent legislation. See, ABCL § 81).

Again, the courts have never interpreted the boundaries of the additional eligibility conferred by the 1987 amendments. However, a plain reading of the text shows that an establishment may now qualify via ABCL § 64 "or" directly through the new criteria in Subdivision 2. Those criteria include merely (a) being a hotel or other premises that; (b) prepares and serves food on the premises; (c) makes its food service known to the public; and (d) can satisfy the State Liquor Authority that the service of alcoholic beverages will not become its main line of business, including by showing that another revenue stream will remain larger than receipts from the service of alcoholic beverages.

A contrary reading that continues to apply the exclusions of ABCL § 64 to some establishments effectively denies those establishments of the full benefit of the "or" language in the amendment. While some motion picture theaters have operated their establishments in order to comply with the definition of "restaurant" in ABCL § 3(27), which allows them to qualify for a beer and wine license under ABCL § 64, the first "or" of 1987 amendments make that maneuver unnecessary by creating an alternative path to licensure that circumnavigates ABCL § 64.

That was the intent of the Legislature when it created the 1987 amendments. The Sponsor's Memo makes clear that their purpose was to expand the number of establishments eligible for a beer and wine licenses, despite being unable to meet the requirements of ABCL §§ 64 & 64a. (Sponsor's Mem, Bill Jacket, L 1987, ch 666). But, the scope of that expansionary intent is impossible to divine from the Sponsor's Memo alone, because it only explains that the legislation was meant to make exceptions to the 200-foot law. However, the bill text itself obviously does much more than that. (L1987, ch 666 [adding ABCL § 81 [2] and also containing language to authorize sidewalk cafes and to eliminate the requirement that hotels have restaurants to be eligible for licensure]). In fact, if the sponsors merely intended to carve out wine licenses from the 200-ft. law, then they would have done no more than they did in § 2 of their bill, which repealed another section of law that explicitly subjected wine licenses to the 200-ft. law. (L. 1987, ch 666, § 2 [repealing ABCL § 80, which had read "Restrictions upon location of places licensed. The restrictions contained in subdivision seven of section sixty-four shall apply to premises for which licenses are sought under section eighty-one."]). It is no leap of faith to infer that they intended to expand eligibility much further from the fact that they included additional amendments to the bill that free licenses under ABCL § 81 from other restrictions contained in ABCL § 64. This was evident at the time, and various officials in the state executive recognized that the amendments had the effect of broadening the categories of eligible establishments. (Memorandum from Executive Director of the N.Y. Council on Children and Families Joseph J. Coccozza, Bill Jacket, L 1987, ch 666 ["The above referenced bill would allow the State Liquor Authority to issue an on-premises license to a theater. . . under certain specified circumstances"]; Letter from Counsel to the SLA Gloria M. Dabiri, Bill Jacket, L 1987, ch 666 ["The bill would permit the Authority to issues licenses for the sale of wine at retail for on-premises consumption to . . . restaurants, and businesses engaged in the sale of food for on-premises consumption]).

Moreover, the SLA has carried out that intent; since Chapter 666 of 1987 was enacted, it has granted licenses to numerous other business categories under ABCL § 81, including jewelry stores, antique shops, and even certain doctor's offices. Motion picture theatres should stand on equal footing with these establishments when applying for this breed of license. Based on the text of subdivision 2, it is illogical to maintain that the expanded eligibility analysis jettisons the requirements of ABCL § 64, but that ABCL § 64's exclusions continue to govern. Neither the text nor the legislative history makes such a fine distinction.

The alternative criteria in ABCL § 81(2) also comport with the overall regulatory scheme ordained by the Legislature, which give more liberal treatment to beer and wine licenses. The 1987 amendments included a notable distinction: they expanded eligibility for licenses to sell beer and wine, only. This is distinguished from licenses to sell full liquor. For years, legislation has been introduced to allow additional business categories to also sell spirits but, thus far, both houses of the legislature have been disinclined to pass the measure. The additional hesitation related to spirits highlights that, historically, the legislature has more permissively regulated beer and wine.

Once the list of requirements in ABCL § 81(2) is recognized for what it is—an alternative criteria for beer and wine licensure that disregards the exclusions in ABCL § 64—then the question becomes whether motion picture theatres can satisfy those criteria. They can. Motion picture theatres are indeed establishments that generally serve food, and the average New Yorker is aware of that fact. The association between film and food service is deeply rooted in the public consciousness. (See, e.g., Sarah Stiefvater, *The Best Movie Snacks, Ranked*, PUREWOW.COM [Oct. 30, 2019] [“Everyone knows the best part of going to the movies is the food.”] [<https://www.purewow.com/food/Best-Movie-Theater-Snacks>]). The connection between tubs of popcorn and motion picture theatres dates to the 1930s, and such food and beverage concessions account for up to 85 percent of the revenue at some theaters. (See, Pagan Kennedy, *Who Made Movie Popcorn?*, THE NEW YORK TIMES [Oct. 4, 2013] [<https://www.nytimes.com/2013/10/06/magazine/who-made-movie-popcorn.html?searchResultPosition=2>]).

But what about the requirement to satisfy the SLA that the service of beer and wine will be “incidental to and not the prime source of revenue” for the business? (ABCL § 81 [2]). The singular tense of subdivision 2 suggests this is an individualized inquiry specific to each applicant, rather than a sweeping judgment about entire classes of premises, but nearly every motion picture theatre would meet this standard. The primary business of a motion picture theatre is not the sale of alcohol, but rather to provide a moviegoing experience and food concessions. The sale of alcohol is ancillary to those functions and not the prime source of revenue. (See, AMC Entertainment Holdings, *Annual Report [SEC Form 10-K]*, [March 1, 2018] [stating that while alcohol sales boosted 2017 revenue, their concessions strategy continued to prioritize traditional theatre food “including popcorn, soft drinks, candy and hot dogs” and that box office remained the largest revenue stream] [<https://sec.report/Document/0001411579-18-000014/>]; Regal Entertainment Group, *Annual Report [SEC Form 10-K]*, [March 1, 2018] [stating that “enhancement of our food and alcoholic beverage offerings has had a positive effect on our operating results” but that all food and beverage concessions still accounted for just 29.4% of revenue] [<https://sec.report/Document/0001168696-18-000003/>]).

Important policy considerations also support interpreting the statute to allow beer and wine licensure. Motion picture theatres are often the backbone of downtown areas, drawing foot traffic to surrounding shops and restaurants. (See, Jennifer Duell Popovec, *Strong Box Office Numbers Lead to More Traffic at Shopping Centers*, NATIONAL REAL ESTATE INVESTOR [Nov. 12, 2015] [quoting the president of U.S. development company saying theaters, “not only increase[] foot traffic for the soft and hard goods retailers, but also for the quick and better quality sit-down food services” in shopping centers] [<https://www.nreionline.com/retail/strong-box-office-numbers-lead-more-traffic-shopping-centers>]; Kathryn Cargo, *Historic theaters increase foot traffic in Crossroads' downtowns*, VICTORIA ADVOCATE [Sept. 16, 2018] [quoting a hairdresser in Yoakum, Tex. after a motion picture theatre opened downtown: “I’ve never seen downtown as busy as it is now,” she said. “Because of the theater, the restaurants are full.”]). But in recent years, New York has experienced a trend of motion picture theatre closures, particularly independent and historic theatres, in part because they cannot supplement their revenue with beer

and wine sales. (See, Tanay Warekar, *NYC's lost movie theaters, mapped*, NY.Curbed.com [July 31, 2018]). The motion picture theatre industry faces many challenges stemming from streaming services and sophisticated HD home theaters. It is imperative that theatres search for new ways to enhance the moviegoing experience, enabling them to offset rising costs, and retain employees. Beer and wine sales would create a critical revenue stream to help offset these headwinds.

The SLA should, if reasonable, interpret the law to assist motion picture theatre in those endeavors because among the Legislature's declared purposes for the ABCL is "to the extent possible . . . supporting economic growth, job development . . . and [the] recreation industry . . . provided that such activities do not conflict with the primary regulatory objectives of this chapter." (ABCL § 2). These economy-boosting purposes were added to the SLA's mission as recently as 2014. (See, L 2014, ch 406). Theatres are also eager to offer customers local products from New York State wineries and breweries. Allowing theatres to serve as additional retail channels will not only help drive economic growth among the craft beverage industry, but tourism as well.

For the foregoing reasons, we believe that ABCL § 81(2) allows the SLA to grant beer and wine licensed to motion picture theatres that satisfy the criteria within that subdivision, and without having to demonstrate eligibility under ABCL § 64, such as by satisfying the definition of a "restaurant" in ABCL § 3(27).

We respectfully submit this request for your consideration and thank you for your time and attention given to the matter.

Very truly yours,

SHENKER RUSSO & CLARK LLP



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