



CITY OF SOMERVILLE, MASSACHUSETTS LAW DEPARTMENT

August 9, 2018

Honorable Board of Aldermen
City Hall
93 Highland Avenue
Somerville, MA 02143

Re: That the City Solicitor prepare an opinion on whether liquor licenses may be granted preferentially to woman and minority owned businesses.

Board Order No. 205377

Dear Honorable Board Members:

You have asked this office to provide a legal opinion as to whether liquor licenses may be granted preferentially to woman and minority-owned businesses. In my opinion, in order to establish a preference for the issuance of liquor licenses, a preference program must comply with equal protection and alcohol licensing laws.

Equal Protection Laws

The establishment of a licensing preference based upon gender or race must comport with federal and state equal protection laws in order to survive judicial scrutiny. The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no State shall "deny to any person within its jurisdiction the equal protection of the laws", and a city program must be consistent with this provision. Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989) (city failed to demonstrate compelling interest in apportioning public contracts on basis of race); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (analyzing broadcast license programs designed to increase diversity by creating enhancements and incentives for increased minority ownership of broadcast outlets and licenses.)

Classifications based on race are subject to strict judicial scrutiny, with the test being: such classification must serve a compelling governmental interest, which may include remedying past discrimination, and be narrowly tailored to achieve that interest. Richmond at 493; Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995). The standard for equal protection analysis under the Massachusetts Declaration of Rights is the same as under the Federal Constitution. Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 243 (2006). The city must have a strong basis

in evidence that remedial action is necessary to remedy past discrimination. Richmond at 500. Evidence of discrimination must be specific to the governmental unit seeking to use a racial preference; discrimination in society as a whole will not support a remedial plan. Id. at 485. A classification based upon gender is subject to strict scrutiny under the Massachusetts Declaration of Rights, while subject to lesser "intermediate" scrutiny under federal law. Commonwealth v. Chou, 433 Mass. 229, 237 n.6 (2001). If a compelling government interest is shown, any remedial action must be narrowly tailored to address the particular harm at issue, by establishing that the "means chosen 'fit' [the government's] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate . . . prejudice or stereotype." Richmond at 493. Narrow tailoring does not require exhaustion of every race-neutral alternative, but requires serious, good faith consideration of whether such alternatives could serve the governmental interest. Grutter v. Bollinger, 539 U.S. 306, 339 (2003). Accordingly, a further legal analysis depends upon the specific parameters of a preference program, and the factual circumstances related to alcohol licensing in Somerville, such as whether there is any past discrimination, and any statistical disparities relative to issuance of licenses in Somerville.

Alcohol Licensing Laws

The Somerville Licensing Commission is authorized to issue liquor licenses, subject to the approval of the Alcoholic Beverages Control Commission. See Ch. 191 of the Acts of 1923; MGL c. 138, ss. 1, 12, 15. In my opinion, the authority to adopt and implement a preference program, in a manner consistent with licensing laws, including statutory standards by which the Somerville Licensing Commission issues a liquor license¹, and restrictions upon how licenses may be issued in Somerville pursuant to existing special legislation², will depend upon the specific parameters of a proposed program.

Please contact me if you have any additional questions.

Very truly yours,



Jason D. Grossfield
Assistant City Solicitor

cc: Mayor Joseph A. Curtatone
John Long, City Clerk

¹ Generally, for on-premises liquor licenses, the Licensing Commission must determine whether an applicant establishes compliance with the requirements of MGL c. 138 and the Licensing Commission. *MGL c. 138, s. 23*. Two broad factors are applied to the decision whether to issue a license: (1) the common good and public need; and (2) the character and fitness of the applicant. *MCLE, Alcohol, Food Service and Entertainment Licensing* (2006).

² E.g., Restrictions on the number and location of licenses. Ch. 142 of the Acts of 2016.