

**STATE OF RHODE ISLAND
TOWN COUNCIL**

**TOWN OF EAST GREENWICH
BOARD OF LICENSES**

**In re: MMLSAJK, Inc.,
d/b/a The Patio on Main,**

Applicant.

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APPLICANT'S MEMORANDUM IN SUPPORT OF APPLICATION

Applicant

MMLSAJK, Inc.,
d/b/a The Patio on Main

By Its Attorneys:

O'Leary Murphy, LLC
4060 Post Road
Warwick, Rhode Island 02886
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I. INTRODUCTION

This matter invokes critical issues of Rights and Responsibilities. Specifically, The Patio on Main restaurant has the Right – pursuant to express State statutory authority – to maintain its current Tent until April 1, 2022. This Right is guaranteed The Patio for the exact reason its owners spent \$50,000 in 2020 purchase and erect the Tent: to provide relief to the residents, and business invitees, of the Town of East Greenwich from the COVID-19 pandemic. Through its misapplied pressure on The Patio to reduce the Tent size, the Town unlawfully endeavors to abridge The Patio’s Rights.

Simultaneously, The Patio has a Responsibility to serve the Town’s residents/invitees. The Patio has become a statewide beacon of Rhode Island’s success in overcoming COVID-19. With the struggle against COVID-19 still incomplete, officials of our State guarantee its residents a dining experience free of COVID-19 worry, at least through April 1, 2022. As such, The Patio changed its business model mid-stream to accommodate Rhode Islanders, who have been promised a COVID-19-free dining options. As evidence of its success on this front, The Patio even unsolicitedly served as the recent forum for the Governor to announce his COVID-19 initiatives, and to hail The Patio as a valued emblem of our collective effort to reduce COVID-19.

This Board/Council need not engage scientific experts to ascertain the specter of COVID-19. The General Assembly has already undertaken such research, and made express findings and statutory determinations, on the issue. The result is Section 45-24-46.5 of the Rhode Island General Laws. In sum, Section 45-24-46.5 gives The Patio the Right and Responsibility – as an essential Rhode Island business – to keep the current Tent in place, to serve patrons, at least

through April 1, 2022.

The Applicant's current application simply seeks entertainment for those patrons within the Tent. The Applicant respectfully requests that this Council/Board grant this application.

II. GERMANE FACTS AND TRAVEL

1. The Applicant commenced business in the Town of East Greenwich, at 431 Main Street, in or about February 2020.

2. In March 2020, the State of Rhode Island (through its Governor) declared a state of emergency due to the outbreak of COVID-19. See, e.g., State of Rhode Island Executive Order 20-03; see also Executive Orders 20-18, 20-31, 20-42 and 20-52.

3. Subsequent State Executive Orders permitted outdoor dining services, to aid restaurants in patronage and survival of their respective businesses.

4. On or about July 31, 2020, the Town (through its Manager), among other things: (i) approved the Applicant's request for outdoor seating for 42 people; and (ii) apprised the Applicant that said approval shall remain in effect until terminated through an Executive Order of the Governor of the State of Rhode Island.

5. In October 2020, the Applicant purchased a tent to cover the Applicant's approved outdoor seating, for 42 patrons, for approximately \$50,000 (the "Tent").

6. Among other Executive Orders, Executive Order 20-108 (dated December 17, 2020) provides, among other things, that "Outdoor dining is still encouraged as long as the restaurant does not service more than its normal operating capacity."

7. Since opening, the Applicant has maintained a victualing and Class B-V liquor

license (the “License”) issued by the Town, including the period of December 2020 through November 2021. During that 2020-21 period, pursuant to the License, the Applicant was permitted to offer the following entertainment:

- Inside and outside non-amplified music Friday-Saturday;
- Monday-Thursday (bingo/trivia);
- Outside amplified sound (only if outdoor seating is available) Friday-Saturday 7-10pm.

8. On July 8, 2021, the State of Rhode Island (through its General Assembly), enacted the following legislation:

§ 45-24-46.5. Special provisions — Emergency declaration modifications.

(a) A moratorium is hereby imposed on the enforcement of any municipal ordinance or zoning regulation that would penalize any food business or food service establishment, as defined in § 21-27-1, or bar as defined in § 23-20.10-2, for any alterations or modifications to its business made in order to comply with any directives, executive orders, or restrictions issued by the governor, principal executive officer of a political subdivision or the director of the department of health based upon an emergency declaration issued pursuant to § 30-15-9 or § 30-15-13.

(b) The moratorium imposed pursuant to this section shall continue throughout the emergency declaration and shall remain effective until April 1, 2022. During this period, all approved nonconforming uses adopted to comply with the emergency declaration shall be permitted to continue.” R.I. Gen. Laws §45-24-46.5 (emphasis added).

9. On or about November 1, 2021, the Applicant submitted an application to renew its License, for the period of December 1, 2021 through November 30, 2022.

10. A portion of this 2021-22 License application included the following entertainment:

- Inside non-amplified sound Monday-Sunday (music):
- Outside amplified sound (only if outdoor seating is available);
 - Sunday (music/comedy) 12pm to 6pm;
 - Monday-Thursday (trivia/karaoke/bingo/comedy) 6-10pm;
 - Friday-Saturday (music) 7-10pm.

11. The first public Hearing with respect to the Applicant’s License renewal occurred on November 8, 2021.

12. During the November 8, 2021 Hearing, the Applicant, among other things, agreed to the Town suggestion that the Hearing be continued to November 22, 2021 to permit notification to abutters of 431 Main Street of the License application.

13. On November 22, 2021, the Town Solicitor read into the record an electronic-mail message from Ernest Marinaro, a Town Building Official – including his objection to the License application until the Applicant’s tent was reduced in size to 400 square feet.

14. During the November 22, 2021 Hearing, the Applicant, among other things, agreed to the Town suggestion that the Hearing be continued to December 13, 2021 to permit discussion between the Town and the Applicant with respect to the Tent.

15. Also during the November 22, 2021 Hearing, the Town, through its Manager (Andrew Nota) and Solicitor (Andrew Teitz), communicated the following (among other things):

“Mr. Nota: I think the community was passive in terms of its enforcement at that time, due to all of the difficult conditions we found ourselves in at the time, dealing with COVID and providing relief, and truly encouragement of, between the state of local municipalities, in terms of encouraging businesses to gravitate their patrons outside. So I think there was a lot of compromise and relief provided at that time.

“Mr. Teitz: “[I] the year 2020, when everybody was first moving outside, we did not enforce a lot of regulations. Everybody was trying to help everyone survive.”

16. Subsequent to the November 22, 2021 Hearing, the Applicant moved the Tent to permit a ten-foot setback with respect to the northern property boundary (with 427 Main Street).

17. On December 1, 2021, the undersigned (on behalf of the Applicant) and Town representatives (including Mssrs. Teitz, Marinaro and Nota, and Ms. Lea Anthony Hitchen) engaged in a meeting via Zoom.

18. Among other things, the Town collectively indicated an intent to require the

reduction of size of the Tent, to 400 square feet.

19. Upon information and belief, the Town Solicitor recommends denial of that portion of the Applicant's renewal license for expansion of entertainment license.

III. ARGUMENT

Applicant Is Statutorily Entitled to Maintain the Current Size Until April 1, 2022.

The Applicant – as a new Town business in 2020 – went to considerable expense to erect the Tent. The motives of the Applicant were not only to comply with the Governor's Executive Orders promoting outdoor dining, but to provide relief to its patrons. Those patrons sought an outdoor dining space which observed COVID precautions, including social distancing. The Patio, with its current-sized Tent, provided this specific space.

For almost two years, the Patio on Main has been a refuge for those patrons. During that period of time, the State of Rhode Island provided express legislative relief to all restaurants (including The Patio) which relied on said Executive (and municipal) Orders in their provision of outdoor dining. Section 45-24-46.5 of the Rhode Island General Laws provides that the Patio cannot be penalized for any alteration in order to comply with said Executive Orders:

“A moratorium is hereby imposed on the enforcement of any municipal ordinance or zoning regulation that would penalize any food business or food service establishment ... for any alterations or modifications to its business made in order to comply with any directives, executive orders, or restrictions issued by the governor, principal executive officer of a political subdivision ... until April 1, 2022.”

The Town approved The Patio for outdoor dining. Such approval included the erection of the Tent. Since 2020, the Tent sat along Main Street. After the first public Hearing with respect to the License, Mr. Marinaro – who owes his position and any action in such capacity to municipal

ordinance – attempted to compel the reduction of the size of the Tent, through municipal ordinance. In short, Section 45-24-46.5 prohibits Mr. Marinaro’s attempted action to penalize The Patio.

The impropriety of the Building Official’s act will most likely be the subject of a later Municipal Court (and possibly Superior Court) matter(s). The current matter, however, involves the renewal of the License. Perhaps in recognition of the Building Official’s ultra-vires act, the Town Solicitor recommends that the License be renewed. The Town Solicitor does not even recommend removal of the Tent (but some blocking off or painting of an area inside the Tent).

The Applicant respectfully submits that the size of the Tent lies at the very heart of the explicit relief offered The Patio by the Executive and Legislative branches of the State of Rhode Island. That is, the Tent size permits ample spacing between tables of those patrons concerned with the spread of COVID-19. Little has evidently changed since the October 2020 socially-distanced dining originally offered by the Tent (as conceded by the Town’s Manager and Solicitor). The Town is now nevertheless attempting to hold The Patio’s License (and/or its entertainment request for those patrons) hostage to get either this Board of Licenses to order, and/or the Patio to agree to, what the Town cannot do on its own: Tent size reduction.

IV. CONCLUSION

At this juncture, the request before this Council, sitting as a Board of Licenses, is simple: (1) renewal of the existing License; and (2) slight expansion of the entertainment, only until April 1, 2022. Hearing on this matter need not, as the Town Solicitor suggests, become a referendum on “All Things Patio”. Rather, the Applicant respectfully requests that this Council not permit the building official to undo applicable law. Rather, as the Town Board of Licenses, the Applicant implores this Council to approve the increased entertainment – for the betterment of the Town’s citizenry – for the next 108 days, until the expiration (or extension) of the applicable outdoor-dining relief.

Dated: December 13, 2021

Applicant

MMLSAJK, Inc.,
d/b/a The Patio on Main

By Its Attorneys:

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CERTIFICATION OF SERVICE

I hereby certify that, on the 13th day of December 2021, I electronically distributed the within document on the following: Town of East Greenwich Town Council (through Town Clerk); Andrew Nota; and Andrew Teitz.

/s/ Sean T. O’Leary

Sean T. O'Leary, Esq.