

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF FEBRUARY 24, 2015
REFERRED FROM: COUNSEL'S OFFICE

2015-00332

REASON FOR REFERRAL
REQUEST FOR DIRECTION

COSTCO VS. SLA

(REPORT OF LITIGATION)

The Members of the Authority at their regular meeting held at the Zone I New York City office on FEBRUARY 24, 2015 determined:

Matter of Costco Wholesale Corp. v New York State Liq. Auth.
2015 NY Slip Op 01274
Decided on February 11, 2015
Appellate Division, Second Department
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This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on February 11, 2015 SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Second Judicial Department
WILLIAM F. MASTRO, J.P.
SANDRA L. SGROI
JEFFREY A. COHEN
ROBERT J. MILLER, JJ.

2013-10985
(Index No. 6754/13)

[*1]In the Matter of Costco Wholesale Corporation, respondent,

v

New York State Liquor Authority, appellant.

Jacqueline Flug, Albany, N.Y. (Mark D. Frering of counsel), for appellant.

Ruskin Moscou Faltischek P.C., Uniondale, N.Y. (Mark S. Mulholland and Jonathan C. Sullivan of counsel), for respondent.

DECISION & ORDER

In a proceeding pursuant to CPLR article 78 to review a determination of the New York State Liquor Authority dated February 4, 2013, which disapproved the petitioner's

application for an alcoholic beverage control retail license (liquor or wine store), the New York State Liquor Authority appeals from a judgment of the Supreme Court, Nassau County (Winslow, J.), entered October 10, 2013, which granted the petition and annulled the determination.

ORDERED that the judgment is affirmed, with costs.

In March 2012, the petitioner, Costco Wholesale Corporation (hereinafter Costco) submitted an application for a liquor license to the respondent, the New York State Liquor Authority (hereinafter the SLA). The license application was in support of a 2,900-square-foot liquor store which Costco sought to open as an adjunct to one of its "big box" stores in Lawrence. After a hearing conducted in June 2012, the SLA disapproved the application on August 1, 2012. Costco then commenced this CPLR article 78 proceeding seeking review of the determination. The Supreme Court granted the petition and directed that the SLA issue the permit for which Costco had applied.

In reviewing the SLA's determination of whether the public convenience and advantage would be served by granting or denying an application for a retail liquor license, the inquiry of the court is strictly limited to whether the SLA acted arbitrarily and capriciously (*see Matter of Wager v State Liq. Auth.*, 4 NY2d 465, 467; *Matter of Rumors Disco v New York State Liq. Auth.*, 232 AD2d 421, 421). A determination is "arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431; *see Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 652; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231).

Judicial review of a determination by the SLA "is limited to the grounds invoked by [*2]the agency" (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758). "If those grounds are inadequate or improper, the court is powerless to affirm the administrative [determination] by substituting what it considers to be a more adequate or proper basis" (*id.* at 758 [internal quotation marks omitted]; *see Matter of Montauk Improvement v Proccacino*, 41 NY2d 913, 913-914). Furthermore, reliance upon an improper basis for its determination requires that the determination be annulled, regardless of whether the SLA also relied, in part, upon valid considerations (*see Matter of*

P.G.P. Entertainment Corp. v State Liq. Auth., 52 NY2d 886, 888; see also Matter of Fairchild Corp. v Boardman, 56 AD3d 778, 779-780).

Here, the bases proffered by the SLA for its decision to deny the application were without factual support in the record. Accordingly, since the asserted bases did not constitute adequate grounds to support the challenged determination, the Supreme Court's order must be affirmed.

MASTRO, J.P., SGROI, COHEN and MILLER, JJ., concur.

ENTER:

Aprilanne Agostino

Clerk of the Court

[Return to Decision List](#)

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF FEBRUARY 24, 2015
REFERRED FROM: COUNSEL'S OFFICE

2015-00399B

REASON FOR REFERRAL
REQUEST FOR DIRECTION

FOOD CONCESSION ARRANGEMENTS

(PROPOSED ADVISORY)

The Members of the Authority at their regular meeting held at the Zone I New York City office on FEBRUARY 24, 2015 determined:

(Series 1977)
Divisional Order #738
May 17, 1977

STATE OF NEW YORK
LIQUOR AUTHORITY

TO: ZONE OFFICES AND LOCAL BOARDS
SUBJECT: FOOD CONCESSION ARRANGEMENTS BY RESTAURANT LICENSEES

Subject to the provisions of Divisional Order #577 dated December 15, 1966, holders of special on-premises licenses have been permitted to grant to another person a written concession to prepare, serve and sell food in the licensed premises.

The Members of the Authority have ruled that a restaurant licensee may also be permitted to grant such concession.

Effective immediately, the procedures now followed in connection with the granting of a concession by a special on-premises licensee shall be followed in the granting of a concession by a restaurant licensee. Form S-29 shall be used in connection with all petitions for such concession, notwithstanding the fact that the title of such form refers only to special on-premises licensees.

STATE LIQUOR AUTHORITY


Michael Roth, Chairman

(Series 1966)
Divisional Order #577
December 15, 1966

STATE OF NEW YORK
LIQUOR AUTHORITY

TO: ZONE OFFICES AND LOCAL BOARDS

SUBJECT: FOOD CONCESSION ARRANGEMENTS BY SPECIAL ON-PREMISES LICENSEES

Bulletin #422 dated November 30, 1966 (copy annexed) announced the filing of Petitions for approval of Food Concession Arrangement by Special On-premises Licensees. The Zone I Office will mail a copy of said bulletin to all Special On-premises Licensees as follows:

- (A) March 1-S.O.P. licensees together with their renewal applications.
- (B) October 1-S.O.P. licensees - a special mailing is being made.

A supply of the following forms is being distributed to Local Boards and Zone Offices:

- (1) Forms S-29 Petition for Approval of Food Concession Arrangement by Special On-premises Licensee.
- (2) Form Q-14 Personal Questionnaire.
- (3) Bulletin #422 dated November 30, 1966.

Finger print (Form Q-11) is now stocked by Local Boards and Zone Offices.

All persons seeking copies of the aforementioned forms are to be supplied with them. No fee is required with such applications and they are to be initially filed with the Zone Office having jurisdiction over the licensed premises.

NOTE: Only Special On-premises Licensees (including converted RL's and HL's) may file such applications.

PROCESSING OF APPLICATIONS - Zone Office Having Jurisdiction

Upon receipt of an application Form S-29 and related Forms Q-14 and Q-11, the Zone Office will search their file indices for any record of any member of the Concessionaire Firm and establish an index record for each member of the Concessionaire Firm. The related file folder or folders will then be forwarded to the Zone I Office for final review of the Petition for Food Concession Arrangement. A brief memorandum to the Licensing Board should set forth the history, if any, of the members of the Concessionaire Firm. The duplicate copy of Form S-29 and Q-14's shall be sent to local board. No investigation may be necessary - however Zone Office should set forth their recommendation in their memorandum.

PROCESSING - Zone I Office

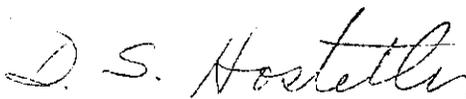
The finger print Form Q-11 will be processed in the same manner as the Forms Q-11 for package "L" stores.

Applications will be submitted to the Licensing Board for final disposition.

Upon approval (or disapproval), form letters will be directed to the licensee and the members of the Concessionaire Firm. The applications together with the file folders and copies of the aforementioned letters will be returned to the Zone Office.

Concessionaire application forms and related papers will be filed with the licensee's file. Folders and indices will be cross-referenced with the file serial number.

STATE LIQUOR AUTHORITY

A handwritten signature in cursive script that reads "D. S. Hostetter".

D. S. HOSTETTER
Chairman



This petition is to be used for a person or firm desiring to enter into a Food Concession arrangement with a Special On-Premise Licensee and to request the approval of the Liquor Authority for such arrangement.

This petition must be executed by both the Food Concessionaire and the Special On-premises licensee and filed with the appropriate zone office.

01) Licensee Name: _____ Serial Number: _____

Premise Address: _____ City: _____ Zip Code: _____

02) Name of Food Concessionaire Firm: _____

Business Address of Food Concessionaire: _____

City: _____ Zip Code: _____

03) List the names and titles of all members of the Food Concessionaire Firm.

Name of Individual	Residence	Social Security Number	Date of Birth
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

04) Are there any disciplinary actions pending against the applicant or license holder? Yes No

05) Are there any Statutory Disqualifications to holding an alcoholic beverage retail license under the A.B.C Law?
Yes No

OFFICE USE ONLY:

Approved or Disapproved

License Board Member

Date:

In addition to the executed petition, submit a copy of the following:

- 1) A copy of the written agreement. Such agreement must specifically provide for the preparation, service and sale of food by the concessionaire on the licensed premises under terms and conditions as stipulated below.
- 2) Personal Questionnaire, Proof of Citizenship, Photo Identification and a recent original color photo for each member of the Concessionaire Firm.
- 3) Applicant's Statement for each member of the Concessionaire Firm.
- 4) If concessionaire is a corporation, submit a Department of State Filing Receipt.
- 5) Certificate of Authority to collect sales tax issued to the Food Concessionaire Firm.
- 6) Submission of fingerprints for each member of the Food Concessionaire Firm. Each applicant principal required to be fingerprinted will be instructed to be fingerprinted after this application has been filed. Instructions will be provided on the application Filing Receipt and are also available on our website, www.sla.ny.gov.

The petitioners hereby request the approval of the State Liquor Authority for permission to enter into an agreement whereby the "concessionaire" will prepare, serve and sell food to patrons of the licensed business operated by the "On-Premise Licensee" and for that purpose do hereby acknowledge the following:

1. An On-Premises licensee may grant to another person written concession to prepare, serve and sell food in such licensed premise provided that the written approval of the State Liquor Authority is first obtained.
2. The On-Premises licensee and the privileges thereof shall be available only to the person therein specifically licensed.
3. The obligation of the licensee to comply with the provisions of the Alcoholic Beverage Control Law and the Rule and Regulations of the State Liquor Authority shall in no way be diminished or impaired by such concession. The licensee shall continue to be responsible for the proper, lawful and orderly conduct of the entire licensed premises and shall be liable for all violations in the licensed premises or in connection with the licensed premises occasioned by or resulting from any and all acts committed, suffered or permitted by the concessionaire, any employee or any other person working or permitted to work on the licensed premises.
4. No such concession shall be valid if the concessionaire: (a) is disqualified from holding a license under any provision of the Alcoholic Beverage Control Law (except those pertaining to citizenship) or (b) has been convicted of any of the misdemeanors or offenses specified in Section 102, subdivision 2 of the Alcoholic Beverage Control Law, or (c) has had a license issued by the Authority cancelled, revoked or recalled; and such concession shall become void forthwith should the concessionaire acquire any such disability or be so convicted during the period of the concession.
5. The concession shall not knowingly employ any person of disrepute or a person barred under Section 102, subdivision 2 of the Alcoholic Beverage Control Law. The concessionaire shall not employ any person in any capacity for more than 15 days in any premises licensed under an on-premises license unless an application for Petition of Employment of a Felon and a personal questionnaire of such employee has been filed with the Authority on or before the 15th day of such employment.
6. The licensee shall have the right to require the discharge of any employee of the concessionaire in any instance where such employment or the actions or omissions of such employee are in violation of any Law or the State Liquor Authority Rules. The failure of the concessionaire to discharge any such employees shall invalidate and void the concession.

7. Notwithstanding anything herein contained, the privilege granted to any licensee to utilize a concessionaire in connection with the preparation, service and sale of food in a licensed premises shall terminate and be discontinued within a period of not more than 30 days after the date of notice to the licensee by the Liquor Authority directing such termination; and such licensee shall certify in writing to the Authority not later than 10 days after the termination date set forth in the notice that the utilization of the services of such concession has been discontinued.
8. No concession agreement shall take effect unless and until approved in writing by the Liquor Authority following the receipt of an appropriate application thereof on a form prescribed by the Liquor Authority which shall be accompanied by the appropriate documentation and fingerprints of the concessionaire, or if a partnership, each member of the partnership, or if a corporation, each of the officers, directors and stockholders (10% or more of the stock if 10 or more stockholders) unless such fingerprints have been previously filed with the Liquor Authority.
9. The concession agreement shall not be assignable to any other concessionaire without the prior approval of the Authority and shall be valid only as to the persons filing the appropriate application and obtaining the Authority's approval. It shall not be valid as to their successors nor as to any other corporate officers, directors or stockholders unless approval has been obtained by the Authority.
10. The licensee shall keep and maintain adequate and accurate records of all transactions involving the license business. Such records shall be kept separate and distinct from any records maintained by the concessionaire.

To induce the Authority to permit the concession, the undersigned licensee agrees that he will conform with all the above stated terms and conditions and will assume compliance therewith, both as to himself and as to the concessionaire; that any failure to carry out any of such conditions or terms by either shall constitute a breach upon which the approval of the Authority was granted and shall be cause for the suspension, cancellation, revocation or recall of the On-Premises license. The licensee further agrees that the above stated terms and conditions shall survive any renewal of the application.

Signature of the Licensee, if partner both must sign	Title of Licensee	Date
Signature of the Licensee, if partner both must sign	Title of Licensee	Date

The concessionaire agrees that he will conform with all the above applicable stated terms and conditions and will assume compliance therewith; that any failure to carry out any of such conditions or terms shall constitute a beach upon which the approval of the Authority was granted and shall be cause for the termination of such concession. The concessionaire further agrees that the above stated terms and conditions shall survive any renewal of the application.

Signature of the Concessionaire, if partner both must sign	Title of Licensee	Date
Signature of the Concessionaire, if partner both must sign	Title of Licensee	Date

STATE LIQUOR AUTHORITY
MEMORANDUM

2010-02304

Rescinded by FB
5/12/10

TO: Members of the Authority
FROM: Thomas J. Donohue, Associate Counsel *TJD*
RE: Review of Circulars, Divisional Orders and Bulletins- Divisional Order #577
(1966)
DATE: April 26 2010

Introduction

Pursuant to a directive from the Chairman, agency staff is reviewing Circulars, Divisional Orders and Bulletins¹ that have been issued by the Full Board to identify those that: were specific to a particular event or time period; have been replaced or superseded by subsequent Full Board directives; have been superseded by subsequent statutory or regulatory changes; or are otherwise obsolete.² Such directives will be brought to the attention of the Members of the Authority with a request that they be deemed "no longer in effect". Upon completion of the review, those directives that are still in effect will be made available on the agency's web site. Directives that are deemed "no longer in effect" will be maintained in the agency's archives.

Divisional Order #577 (1966)

This directive, issued on December 15, 1966, provided zone offices and local boards with the procedures for processing Food Concession Arrangements by special on-premises licensees. The forms and procedures referenced are no longer used and this document appears to have no relevance to current agency operations. Therefore, consideration should be given to making a determination that Divisional Order #577 is no longer in effect and rescinded.

¹ The Authority issued Circulars from 1934 until 1940, when they were replaced by Divisional Orders. Divisional Orders are instructions to agency staff. The agency began issuing Bulletins in 1937. These were primarily used to provide guidance to licensees.

² While some of these documents may have already been determined to be rescinded by the Full Board, this review will include all documents in order to avoid any confusion as to which documents are still in effect.

STATE OF NEW YORK
LIQUOR AUTHORITY

TO: On-Premises Retail Licensees & Applicants

SUBJECT: Food Concession Arrangements

All on-premises retail licensees are required to have food available for purchase and consumption by patrons. Where the licensee will not be preparing the food but will enter into an agreement with another to do so, the licensee or applicant shall notify the Authority that the licensee will be contracting with a food concessionaire. The licensee shall provide the Authority with the food concessionaire's name, business address and certificate of authority, and the names and residence addresses of the concessionaire's principals, as more particularly set forth in the attached revised petition for approval of food concession. Fingerprints shall not be required.

Divisional Order #738 (1977) and by reference Divisional Order #577 (1966), are hereby rescinded.



This petition is to be used for a person or firm desiring to enter into a Food Concession arrangement with a ~~Special~~ On-Premise Licensee and to request the approval of the Liquor Authority for such arrangement.

This petition must be executed by both the Food Concessionaire and the ~~Special~~ On-premises licensee and filed with the appropriate zone office.

01) Licensee Name: _____ Serial Number: _____
Premise Address: _____ City: _____ Zip Code: _____

02) Name of Food Concessionaire Firm: _____
Business Address of Food Concessionaire: _____
City: _____ Zip Code: _____

03) List the names and titles of all members of the Food Concessionaire Firm.

Name of Individual	Residence	Social Security Number	Date of Birth

04) Are there any disciplinary actions pending against the applicant or license holder? Yes No *concessionaire (if licensed elsewhere)*

05) Are there any Statutory Disqualifications to holding an alcoholic beverage retail license under the A.B.C Law?
Yes No

OFFICE USE ONLY:

_____ Approved or Disapproved _____ License Board Member _____ Date:

In addition to the executed petition, submit a copy of the following:

- 1) A copy of the written agreement. Such agreement must specifically provide for the preparation, service and sale of food by the concessionaire on the licensed premises under terms and conditions as stipulated below.
- 2) Personal Questionnaire, Proof of Citizenship, Photo Identification and a recent original color photo for each member of the Concessionaire Firm.
- 3) Applicant's Statement for each member of the Concessionaire Firm.
- 4) If concessionaire is a corporation, submit a Department of State Filing Receipt.
- 5) Certificate of Authority to collect sales tax issued to the Food Concessionaire Firm.
- 6) Submission of fingerprints for each member of the Food Concessionaire Firm. Each applicant principal required to be fingerprinted will be instructed to be fingerprinted after this application has been filed. Instructions will be provided on the application Filing Receipt and are also available on our website, www.sla.ny.gov.

The petitioners hereby request the approval of the State Liquor Authority for permission to enter into an agreement whereby the "concessionaire" will prepare, serve and sell food to patrons of the licensed business operated by the "On-Premise Licensee" and for that purpose do hereby acknowledge the following:

1. An On-Premises licensee may grant to another person written concession to prepare, serve and sell food in such licensed premise provided that the written approval of the State Liquor Authority is first obtained.
2. The On-Premises licensee and the privileges thereof shall be available only to the person therein specifically licensed.
3. The obligation of the licensee to comply with the provisions of the Alcoholic Beverage Control Law and the Rule and Regulations of the State Liquor Authority shall in no way be diminished or impaired by such concession. The licensee shall continue to be responsible for the proper, lawful and orderly conduct of the entire licensed premises and shall be liable for all violations in the licensed premises or in connection with the licensed premises occasioned by or resulting from any and all acts committed, suffered or permitted by the concessionaire, any employee or any other person working or permitted to work on the licensed premises.
4. No such concession shall be valid if the concessionaire: (a) is disqualified from holding a license under any provision of the Alcoholic Beverage Control Law (except those pertaining to citizenship) or (b) has been convicted of any of the misdemeanors or offenses specified in Section 102, subdivision 2 of the Alcoholic Beverage Control Law, or (c) has had a license issued by the Authority cancelled, revoked or recalled; and such concession shall become void forthwith should the concessionaire acquire any such disability or be so convicted during the period of the concession.
5. The concession shall not knowingly employ any person of disrepute or a person barred under Section 102, subdivision 2 of the Alcoholic Beverage Control Law. The concessionaire shall not employ any person in any capacity for more than 15 days in any premises licensed under an on-premises license unless an application for Petition of Employment of a Felon and a personal questionnaire of such employee has been filed with the Authority on or before the 15th day of such employment.
6. The licensee shall have the right to require the discharge of any employee of the concessionaire in any instance where such employment or the actions or omissions of such employee are in violation of any Law or the State Liquor Authority Rules. The failure of the concessionaire to discharge any such employees shall invalidate and void the concession.

7. Notwithstanding anything herein contained, the privilege granted to any licensee to utilize a concessionaire in connection with the preparation, service and sale of food in a licensed premises shall terminate and be discontinued within a period of not more than 30 days after the date of notice to the licensee by the Liquor Authority directing such termination; and such licensee shall certify in writing to the Authority not later than 10 days after the termination date set forth in the notice that the utilization of the services of such concession has been discontinued.
8. No concession agreement shall take effect unless and until approved in writing by the Liquor Authority following the receipt of an appropriate application thereof on a form prescribed by the Liquor Authority which shall be accompanied by the appropriate documentation and fingerprints of the concessionaire, or if a partnership, each member of the partnership, or if a corporation, each of the officers, directors and stockholders (10% or more of the stock if 10 or more stockholders) unless such fingerprints have been previously filed with the Liquor Authority.
9. The concession agreement shall not be assignable to any other concessionaire without the prior approval of the Authority and shall be valid only as to the persons filing the appropriate application and obtaining the Authority's approval. It shall not be valid as to their successors nor as to any other corporate officers, directors or stockholders unless approval has been obtained by the Authority.
10. The licensee shall keep and maintain adequate and accurate records of all transactions involving the license business. Such records shall be kept separate and distinct from any records maintained by the concessionaire.

To induce the Authority to permit the concession, the undersigned licensee agrees that he will conform with all the above stated terms and conditions and will assume compliance therewith, both as to himself and as to the concessionaire; that any failure to carry out any of such conditions or terms by either shall constitute a breach upon which the approval of the Authority was granted and shall be cause for the suspension, cancellation, revocation or recall of the On-Premises license. The licensee further agrees that the above stated terms and conditions shall survive any renewal of the application.

Signature of the Licensee, if partner both must sign	Title of Licensee	Date
Signature of the Licensee, if partner both must sign	Title of Licensee	Date

The concessionaire agrees that he will conform with all the above applicable stated terms and conditions and will assume compliance therewith; that any failure to carry out any of such conditions or terms shall constitute a beach upon which the approval of the Authority was granted and shall be cause for the termination of such concession. The concessionaire further agrees that the above stated terms and conditions shall survive any renewal of the application.

Signature of the Concessionaire, if partner both must sign	Title of Licensee	Date
Signature of the Concessionaire, if partner both must sign	Title of Licensee	Date