

**STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL**

AO 2023-02

IN THE MATTER OF THE)	ADMINISTRATIVE ORDER
SPECIAL CONCESSIONAIRE)	AMENDING FINAL ORDER GRANTING
PERMIT ISSUED TO)	SPECIAL CONCESSIONAIRE PERMIT TO
OTG MANAGEMENT EWR, LLC)	OTG MANAGEMENT EWR, LLC
AT TERMINAL C, NEWARK LIBERTY)	ISSUED NOVEMBER 4, 2016
INTERNATIONAL AIRPORT)	

BY THE DIRECTOR:

This Administrative Order (“Order”) amends the Final Order Granting Special Concessionaire Permit to OTG Management EWR, LLC issued by the Division of Alcoholic Beverage Control (the “Division” or “ABC”) on November 4, 2016 (“November 2016 Order”). The November 2016 Order authorized the Division to issue a single Special Concessionaire Permit (“SCP”) to OTG Management EWR, LLC (“OTG”) for approximately 40 points of sale locations and 70 gate hold areas sited at Terminal C at Newark Liberty International Airport (“Newark Airport”).

The purpose of the instant Order is to revise the current licensing of alcoholic beverages at Terminal C, such that it will conform to the Alcoholic Beverage Control Act (“ABC Act”), notably N.J.S.A. 33:1-26. That statute requires a separate license to be sited at each specific place of business, with the operation and effect of that license confined to the licensed premises. Because the Division views SCPs on public property as the equivalent of plenary retail consumption licenses on private property, the Division concludes that Terminal C must be licensed in compliance with N.J.S.A. 33:1-26, and a separate SCP must be sited at each point of sale location where alcoholic beverages are sold and consumed. This is consistent with the Division’s approach to licensing at

other similar large commercial public venues throughout the State, such as Terminals A and B at Newark Airport and at the American Dream Complex in East Rutherford.

Prior to the issuance of this Order, the Division had stakeholder outreach about its plan to modify the alcohol operations at Terminal C with representatives from OTG, the Port Authority of New York and New Jersey (“PANYNJ”), and United Airlines, to address their questions and concerns. The Division has addressed all concerns expressed by the parties. The Division will work with the parties in revising the manner in which each point of sale location is licensed, and with the cooperation of OTG, the Division will ensure that there will be no interruption in alcohol sales and service during this transition period.

I. Liquor Licensing at Terminal C.

The Division assumed the liquor license function at Terminal C in November 2014. The history of how the Division assumed this authority is detailed in a series of Administrative Orders issued by the Division, culminating in the issuance of the November 2016 Order. In 2014, OTG was chosen as the food and beverage concessionaire at Terminal C. Initially, OTG sought licensure for a few points of sale, and eventually added additional points of sale during the redevelopment of the terminal. By the time the November 2016 Order was issued, OTG was selling and serving alcoholic beverages at approximately 40 distinct points of sale locations within Terminal C and its employees were delivering alcoholic beverages to patrons who ordered drinks from the I-Pads located in approximately 70 gate hold areas. This activity was authorized by a single SCP issued by the Director for an annual fee of \$2,000.

In addition to authorizing alcohol sales, service and consumption of alcoholic beverages at the various points of sale locations and authorizing consumption at the gate holds, the November 2016 Order required OTG to place appropriate signage about permissible alcohol consumption in

the gate hold areas and at particular locations within the terminal. OTG was also required to apply to the Division for an expansion of premises pursuant to regulations, with authorization from the PANYNJ, if it wished to expand or change its point of sale locations and gate hold areas. OTG has not consistently followed the procedures laid out in the November 2016 Order. Consequently, the Division does not have complete and accurate information about the alcohol operations at Terminal C, as it does for other similar SCP locations in the State.

The Division recently conducted an inspection of Terminal C. The Division found that OTG is selling alcoholic beverages at several points of sale locations, which had been modified since the November 2016 Order, and is delivering alcoholic beverages to patrons in approximately 133 gate hold areas. The inspection also revealed that OTG has not placed signs in the gate hold areas clearly delineating licensed from unlicensed areas in the terminal or at the named locations noted in the Order. In addition, it appeared that OTG expanded, delicensed or amended certain licensed areas, without adhering to the Division's regulations and the November 2016 Order. See N.J.A.C. 13:2-2.14, -7.2. Moreover, the Division learned that the current security plan does not provide for adequate oversight and control over the licensed and unlicensed areas to prevent potential underage consumption, pass-offs to underage and sale to intoxicated patrons.

Based on the Division's inspection, a careful review of the ABC Act and the Division's policy of requiring one SCP per point of sale location, the Division is now amending the November 2016 Order to more effectively and efficiently regulate alcohol sales and service at Terminal C. Specifically, through this Order, the Division is now requiring OTG to obtain an SCP for each separate point of sale location within Terminal C, as is required by similar SCP holders in the State. Each SCP that is obtained will be for a one-year term, from July 1 through June 30, and the fee for each permit is \$2,000. See N.J.A.C. 13:2-5.2(b).

With respect to the gate hold areas, the Division will continue to authorize patrons to consume alcoholic beverages in each gate hold area, provided they are ordered by the patron via OTG's electronic ordering system and delivered to the patron by an OTG employee, who will verify age and level of intoxication. See November 2016 Order, pages 7-8. To ensure proper oversight of alcoholic beverage consumption in the gate hold areas, the Division will require the alcoholic beverages to be delivered from a point of sale location within the same concourse as the gate hold area. No sales of alcoholic beverages are permitted in the gate hold areas. Appropriate signage must be placed in the gate hold areas to distinguish between the licensed gate hold areas and the unlicensed concourses. This authority will be implemented in the SCP issued to each point of sale location, and will make the SCP holder responsible for monitoring alcohol consumption.

The process and timing for OTG to apply for the SCPs required by this Order are described in Section III below.

II. Legal Analysis.

It is the Director's duty to supervise the manufacture, distribution and sale of alcoholic beverages in a manner that fulfills the public policies and legislative purposes of the ABC Act. N.J.S.A. 33:1-3.1. The Director is vested with broad authority to make rules and regulations to ensure proper regulation and control of the industry across a wide range of subjects that include "such other matters whatsoever as are or may become necessary in the fair, impartial, stringent and comprehensive" administration of Division rules and regulations. N.J.S.A. 33:1-39.

The Legislature granted the Director special powers of administration and control over the entire liquor industry. In re C. Schmidt & Sons, Inc., 79 N.J. 344, at 353, 399 A.2d 637 (1979). Further, the Legislature intended for the Director to have ample implied authority to deal fairly with parties when executing his extensive authority over alcoholic beverage licenses. Circus Liquors,

Inc. v. Middletown Twp., 199 N.J. 1, 13 (2009).

The ABC Act at N.J.S.A. 33:1-26 requires a separate license “for each specific place of business and the operation and effect of every license is confined to the licensed premises.” At N.J.S.A. 33:1-1(s), “premises” is defined as the physical place where a licensee is authorized to manufacture, distribute or sell alcohol. In the context of Terminal C, OTG is selling alcohol from several distinct premises, each of which should have its own license even though they are being operated by a single legal entity. This is consistent with the way retail alcohol is licensed in New Jersey. Moreover, a separate fee is required for each licensed premises.

The Division has been seeing a proliferation in the number of development and redevelopment projects on public property, and as a result, there has been an increasing number of SCP applications submitted to the Division. These annual State permits authorize the applicant to sell and serve alcoholic beverages for immediate, on-premise consumption in public buildings or on public property. See N.J.A.C. 13:2-5.2(a). Although there are slight differences (not relevant here), SCPs generally confer privileges upon their holders that are similar to the holders of plenary retail consumption licenses sited on private property. Therefore, the Division has determined that there is no basis to treat retail licensing on private property any differently than retail licensing on public property. In both contexts, the Division has legitimate concerns that the alcohol vendors are qualified to sell alcohol and that, if they violate the ABC Act and regulations, swift and effective enforcement action can be taken against the licensee. This rationale supports the Division’s view that the one license per licensed premises requirement in N.J.S.A. 33:1-26 should apply equally to SCPs.

This approach comports with the law and allows the Division to thoroughly investigate applicants, including a review of the sketch of the premises, method of operation, and security plan

specific to each location. It allows the Division to place unique special conditions tailored to the specific location on each permit and allows the licensee to file amendments as needed for each separate location. Specific to OTG's operations in Terminal C, this approach will afford OTG the flexibility to account for its frequent openings, closings and modifications to existing point of sale locations.

More importantly, this approach allows the Division to conduct orderly inspections, target enforcement actions, and enforce Title 33 and its implementing regulations against each location. Under the current licensing scheme, OTG's SCP could be in jeopardy and its ability to sell alcohol anywhere in the terminal could be significantly curtailed until an enforcement action is resolved. Under the new plan, an enforcement action may be brought against one or more points of sale locations, depending on the seriousness of the charge.

The Division acknowledges that its adjusted approach to liquor licensing at Terminal C will result in an increase in the fees payable by OTG. However, this increase is justified and places OTG on par with other SCP holders in the State, who pay a \$2,000 fee for each point of sale location at which alcohol is sold. As a self-funded agency, the Division is entitled to reasonable fees for its services. See N.J.S.A. 33:1-74. There are a finite number of Division staff responsible for reviewing thousands of license and permit applications each year, and the review of a typical SCP application requires substantial State resources and time. This is in addition to the costs incurred by the Division to operate and maintain its on-line licensing system, known as POSSE, which all licensees, including OTG, use.

Finally, the Division notes that there were unique circumstances surrounding the assertion of its regulatory authority at Terminal C in 2014. Those circumstances, which do not need to be repeated here, were detailed in the many orders issued by the Division between 2014 and the 2016

Order. Simply because Terminal C was licensed in a certain way in 2014 does not mean that the Division cannot revisit its past approach and make corrections. See Service Armament Company v. Hyland, 70 N.J. 550, 563 (1976). (Where two different constructions are issued out of the same agency, a court can and should give weight to reconsideration and revision). Now, in conformance with N.J.S.A. 33:1-26, the Division believes it is fair and reasonable to require a single SCP at each point of sale location.

III. Application Process and Timeline.

The Division acknowledges that OTG has been the food and beverage (alcoholic and non-alcoholic) concessionaire at Terminal C since November 2014. Since that time, OTG has been qualified by the Division to sell and serve alcoholic beverages. As such, the Division is able to streamline the application process contemplated by this Order. With OTG's cooperation, it is the Division's intention to issue an SCP with Special Conditions for each point of sale location by July 1, 2023, for the 2023-2024 license term, in order to assure the continuous, uninterrupted sales and service of alcoholic beverages at Terminal C.

However, if the Division is unable to issue SCPs for each point of sale location by July 1st, the Division will issue a Temporary Authorization to Operate (TAP) permit with special conditions for each individual location, provided OTG has submitted an SCP application and required information (detailed below) and fee (collectively referred to as the "application"). If the Division issues a TAP for a given location, it reserves the right to add, delete or modify the special conditions imposed on the TAP following a thorough review of the application. Further, the Division reserves the right to request additional information following its review of the application. Provided that the application is submitted no later than Friday, June 23, 2023, the Division will be able to issue a TAP for each location.

In order to implement this Order, OTG shall immediately file a separate SCP application on POSSE for each point of sale location. Each application for a point of sale location must include the following: 1) a method of operation including an alcohol security plan; 2) updated sketch or diagram of each location; 3) identification of the manager(s) with authority over the space and proof that the Transportation Security Administration ("TSA") has fingerprinted and conducted a background check of the manager(s); and 4) fee of \$2,000 per SCP application. The application should also include a list of all the gate hold areas where alcoholic beverages may be delivered.

To simplify the application process, the Division makes the following observations. Because OTG is the sole applicant, it is likely that each location may have the same method of operation and alcohol security plan, which is likely already in place. The Division accepts that several points of sale locations may share a manager. Regarding publication, all of the points of sale locations may be included in a single publication. A site inspection for each location will be conducted, as in the normal course, however, since the Division is aware of the layout of the various points of sale locations and gate hold areas based on its most recent inspection, the lack of a site inspection will not delay the issuance of the permit. The SCP fees for all of the applications may be paid on POSSE in a single transaction.

While the Division is aware that this Order places an initial burden on OTG to file a new SCP application for each point of sale, much of the information required is the same for each application and may be copied from one application to the others. Going forward, OTG will simply be able to renew each SCP on POSSE.

Following the review of each application, the Division will issue a separate SCP certificate with a unique number for each point of sale location. If OTG wishes to add, delete or modify any points of sale locations or gate hold area, a new SCP application will need to be filed, or an

amendment to an existing application may be filed. See N.J.A.C. 13:2-2.14.

As noted above, the authorization for OTG to allow the delivery of alcoholic beverages by its employees and consumption by patrons in the gate hold areas will be addressed in the SCP that is issued for each point of sale location. The Division will permit delivery of alcohol by OTG's employees from a point of sale location within the same concourse as the gate hold area, provided OTG places appropriate signage between the licensed gate hold areas and the unlicensed concourses and is responsible for verifying age and level of intoxication at the time delivery of an alcoholic beverage is made. OTG is also responsible for monitoring alcohol consumption at each gate hold area where alcohol is delivered and consumed.

Accordingly, it is on this 15th day of June 2023,

ORDERED, that OTG is authorized to sell and serve alcohol at Terminal C in accordance with an SCP to be issued for each point of sale location, and its employees are authorized to deliver alcoholic beverages to patrons at the gate hold areas in the manner described in this Order; and it is further

ORDERED, that OTG shall immediately file a separate SCP application with all required information and \$2,000 fee for each point of sale location no later than Friday, June 23, 2023, and renewal application each subsequent year, and pay the \$2,000 annual fee for each renewal application; and it is further

ORDERED, that if the Division is unable to issue a final SCP for each point of sale location by July 1, 2023, the Division may issue a Temporary Authorization to Operate (TAP) permit for each individual location, provided the SCP application and fee have been submitted to the Division, no later than Friday, June 23, 2023; and it is further

ORDERED that each SCP shall contain special conditions specific to each point of sale location, however, if the Division places a special condition on a TAP, it reserves the right to add, delete or modify any special condition based on its final review of each SCP application; and it is further

ORDERED that OTG shall install an appropriate delineation, with signage, at each gate hold area, such that there is a clear separation between the licensed gate hold area and the unlicensed common areas at Terminal C and that no alcoholic beverages are removed from the licensed gate hold area into the unlicensed areas of the concourse; and it is further

ORDERED that OTG shall verify age and level of intoxication when delivering alcoholic

beverages to a gate hold area, and shall monitor alcohol consumption at each gate hold area where alcohol is delivered and consumed; and it is further

ORDERED that the Director may modify or clarify this Order should the facts or circumstances relied upon change.


JAMES B. GRAZIANO
DIRECTOR

JBG/ABC