



**MINUTES
PUBLIC HEARING
REMOTE PARTICIPATION ONLY**

**Monday, April 26, 2021
5:35 P.M.**

APPROVED

RELEASED

SELECTMEN PARTICIPATING: Larry Ballantine, Donald Howell, Michael MacAskill, Edward McManus.

ALSO PARTICIPATING: Town Administrator Joseph Powers.

CALL TO ORDER

Mr. Ballantine opened the meeting at 5:35 pm, and called to order the Public Hearing. He explained that he first called the meeting to order at 5:00 pm for Executive Session, where they discussed litigation strategy with respect to the case of 3137, LLC, et al. (Ember and Port) v. Town of Harwich, et al., United States District Court, C.A. No. 1:21-CV10473, if discussing the matter in open session will have a detrimental effect on the Town's litigating position and the chair so declares.

Mr. Ballantine said that he would like to read a statement, regarding the rule of necessity, before continuing the hearing. The public hearing is in regards to the Seasonal All Alcoholic Beverages License and the Seasonal Entertainment License, which was issued on March 22, 2021. The Board of Selectmen is the Town's executive authority and no other Board or official can represent the Town in this matter. Therefore, on the advice of Town Council, he is invoking the rule of necessity in order for the Board to act on this matter. As stated, his financial interest is that he is named personally as a defendant. Mr. Ballantine asked that each other member identify their financial interest. He said that once this is done all board members will be eligible to participate in the discussion of this notice.

Mr. Howell said, as stated, his financial interest is that he is named personally as a defendant.

Mr. McManus said that his financial conflict is that he is named personally as a defendant in the lawsuit brought by the applicants.

Mr. MacAskill said that his financial conflict is that he is named personally as a defendant in this lawsuit.

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Mr. Ballantine said that he will ask for the board to continue the notice of public hearing for Ember Pizza and the Port, which was first brought forward on March 22, 2021 and read the notice of public hearing for both the Port Restaurant and Bar and Ember Pizza. He asked for a roll call to open the hearing.

Roll Call Vote: Mr. Howell - Aye, Mr. MacAskill - Aye, Mr. McManus - Aye, Mr. Ballantine - Aye. Motion carried to open the meeting, by unanimous vote.

PUBLIC HEARING

- A. Ember Pizza, 600 Rt. 28 – Public hearing on applications for renewal of the Seasonal All Alcoholic Beverages License and the Annual Entertainment License; discussion and vote and public hearing on reconsideration of January 24, 2021 decision to renew the Annual Wine and Malt Beverage License for said premises; discussion and possible vote to order discipline based on Town Administrator's February 8, 2021 findings and recommendations.

Mr. Ballantine read the public hearing for Ember Pizza and took a roll call vote to open the hearing.

Roll Call Vote: Mr. MacAskill - Aye, Mr. McManus - Aye, Mr. Howell - Aye, Mr. Ballantine - Aye. Motion carried to open the meeting, by unanimous vote.

Mr. Powers said that in regards to the public hearing in regards to Ember Pizza, 600 Rt. 28, for the renewal of the Seasonal All Alcoholic Beverages License and the Annual Entertainment License. He said that they may also entertain discussion and vote in public hearing in reconsideration of their January 24, 2021 decision to renew the Annual Wine and Malt Beverage License for said premises; discussion and possible vote to order discipline based on his report dated February 8, 2021. Mr. Powers said to the Chairman and members of the Board, that they are acting this evening as the Board of Selectmen, as the local licensing authority and as such, they are operating under the Ballarin factors. This evening when reviewing and rendering decisions on these applications for liquor license, the Board will consider the applications for request for renewal of the seasonal all alcoholic beverages license under MGL c.138. In evaluating the renewal application the Board will also use the Ballarin factors in their deliberation.

The Ballarin factor comes from the Massachusetts appeals case; Ballarin, Inc. vs. Licensing Board Of Boston. The Ballarin case clearly articulates the factors that will be used by this board to form a basis in this application to determine the issuance or denial of the requested license. The Ballarin factors are: 1) Public need, meaning a consideration of the public want and the appropriateness of a liquor license at a particular location 2) Consideration of the number of existing dispensaries in a locality; 3) Views of the inhabitants of the locality in which a license is sought; 4) Traffic; 5) Noise; 6) Size; 7) The sort of operation that carries the license; 8) Consideration of the reputation of the applicant

Mr. Powers said that additionally since the Board will also consider request for the Entertainment License, pursuant to MGL c.140 s.183a, because both licenses involve the same facts and circumstances, they will hear testimony on both but will vote separately on each. With regard to the entertainment license, the standard is that the license must be granted, unless the board finds that the license alone or in combination with other licensed activity on the premise would adversely affect the public health, safety or order, because it cannot be conducted in a manner so as to protect employees, patrons, and members of the public inside or outside the premises from disruptive conduct, from criminal activity, or from health, safety or fire hazards; (b) prevent an unreasonable increase in the level of noise in the area caused by the licensed activity or caused by patrons entering or leaving the premises; or (c) prevent an unreasonable increase in the level of pedestrian or vehicular traffic in the area of the premises or an unreasonable increase in the number of vehicles to be parked in the area of the premises.

Mr. Powers stated that the following procedures will be followed:

- 1) Open the public hearing, by a motion;
- 2) Application documentation and comments from responding town departments will be reviewed;
- 3) The applicant will be given the opportunity to offer a presentation;
- 4) The board will have the opportunity to ask questions;
- 5) The board will hear comments from: a. those individuals present in favor of the application, and b. those individuals present in opposition of the application;
- 6) Close the public hearing, by way of a motion;
- 7) Discussion by the Board;
- 8) Motion will be made regarding the application.

Mr. Ray Tomlinson, Attorney for the applicants, spoke up and requested to introduce the council present on behalf of the applicants. He said that with him tonight is Mr. William Kelley, Attorney for the applicant, as well as Mr. Andrew Upton, Attorney for the applicant. Mr. Tomlinson asked to go on record that they had received short notice, on Thursday of last week for this hearing, and the request to produce documents was made to Attorney John Davis, they asked for documents to be produced and it appears that Mr. Powers is presenting documents that were not produced to the applicants and they have not had an opportunity to review them. He said that he is objecting to the use of those documents at this hearing. Mr. Tomlinson said that at this time he would like to have Mr. Kelley make any further objections before they proceed.

Mr. Ballantine said that he would like to proceed at this time and they will have a chance to speak at they move into the hearing.

Mr. Kelley interrupted and said that is not the proper lawful procedure. He said that the licensee, through its counsel has the right to be heard at every stage of this process.

Mr. Kelley and others spoke on top of each other regarding the procedure and the rights to be heard.

Mr. Powers made attempts to mute others and was finally able to be heard to explain that no member of the meeting may be heard without leave of the Chair. He would defer to the Chairman on who has the right to be heard. Mr. Kelley continued to interject that he has the right to speak and be heard with his objections and that it is not the call of the Chairman. He said that Mr. Ballantine does not have carte blanche, and must comport with the law and the constitutional rights of the licensee.

Mr. Ballantine asked for comment from the Town's legal counsel.

Mr. Jeffrey Blake, Attorney, KP Law, said that Mr. Kelley does not have the right to interrupt their meeting and talk whenever he sees fit. Mr. Kelley interrupted and said in rebuttal, that is not right and not correct.

Mr. Ballantine said that they are going to continue. Mr. Kelley said he would like to note his objection and that this is not a lawful procedure. He

said that it violates the constitutional rights of the licensees that are clearly established.

Mr. Ballantine said that he has been heard and they are moving on.

Mr. Blake said in reference to the documents that are being presented, the applicant had notice and opportunity to be heard during the hearing and during the conference that was held by the Town Administrator and applicant. The town attempted to help Mr. Tomlinson attend the hearing, but for some reason he was not able to and the town continued the hearing.

Mr. Kelley interrupted and said that he objected, and that none of this is relevant to the issues that are illegally before this commission, due to lack of a sufficient notice.

Mr. Ballantine asked Mr. Powers to comment on the documents.

Mr. Powers said that the documents he made reference to were the documents that were provided to the Board, in the packets in anticipation of the hearing on March 22nd. It is the Notice of Recommended action following disciplinary hearing, and dated February 8, 2021, which follows the hearing that was held January 12, 2021. Mr. Powers said that he also wanted to mention regarding procedure, that it is necessary to keep non-speakers who have not been recognized by the Chair, in mute mode due to the ambient noise. If an individual wishes to be heard, they can be recognized by the Chair. Otherwise, people will not be able to hear the proceedings.

Mr. Kelley objected and said it is not a lawful procedure to silence the legal counsel for the licensee, that has a right to be heard.

Mr. Powers said that his reference was to non-counsel people, that have had microphones open. He said that the Board has in the packet a memorandum from him dated February 8, 2021, regarding the Ember Pizza's liquor license violations. The statement of findings was that, he found that the licensed establishment did permit a disordered disturbance, or illegality to take place, by violating Governor Baker's order during the COVID-19 State of Emergency, on two dates in question, as described in his statement.

Mr. Kelley interrupted and said that he objected to this incompetent evidence. He said that while they have the right to accept hearsay in proceedings such as this, they do not have the right to have total hearsay.

Mr. Ballantine asked if Mr. Kelley understood the procedures that were outlined, and that he would have ample time. Mr. Kelley said that he understood the unlawful procedures that were urged upon the Board to follow, but he does not have to abide by that. He said his obligation is to object to the unlawful procedure and the introduction to inadmissible and unreliable hearsay, which Mr. Powers was speaking of.

Mr. Ballantine said that he will have ample time to respond to the allegations.

Mr. Kelley said that it is not sufficient to meet the constitutional rights of the licensee, to have an opportunity to respond. He said that the Chair must rule on his objections to the introduction of incompetent and irrelevant evidence.

Mr. Ballantine said they are moving on. Mr. Kelley asked that they note his objection.

Mr. Tomlinson said that the Chairman must rule on each objection and asked if he was refusing to do so.

Mr. Blake said that this is an administrative procedure, and the rules of evidence do not apply. He said that the fact the counsel for Ember are trying to make a rule of evidence argument and objection, they do not apply. The evidence is clearly relevant as the notice said that they were going to take up the Town Administrator's report of February 8th.

Mr. Kelley said that his objection is in regards to totem pole hearsay which is never admissible in any proceeding. Mr. Blake said it is. Mr. Kelley continued that it is not, and should not be admissible because it is unreliable and unreliable evidence is irrelevant. He said that the Board of Selectmen should be comporting themselves like judges which is their function tonight, and they must abide by all lawful procedures. They have not and he objects.

Mr. Ballantine said that his objection is noted, but he is intent on having an orderly discussion of this hearing, as they do with all licensee applications. He said that they are following their normal procedure to hear the notice of intent.

Mr. Kelley responded that if their practice and custom is not to comply with lawful procedures, in full accord with the constitutional rights that are afforded to existing license holders, and that is not any excuse or justification to continue that in this hearing. He said that he has brought to their attention the legal infirmities and the legal errors and the unlawful procedures of their processes.

Mr. Blake said that Mr. Ballantine has said they are moving forward and he is obstructing the process. Do they want the hearing to go forward or not?

Mr. Kelley stated that Mr. Blake should not accuse him of that without foundation, and he has the right, and obligation to make his objections known to this body.

Mr. Ballantine said it is in the best interest of everyone to continue.

Mr. Kelley asked for a ruling on his objection. Mr. Ballantine said the objection is in the record and they are moving forward.

Mr. Tomlinson asked to be heard, and said that if it is in the interest of the Town to move forward, as the Chairman had suggested, will he entertain a motion of the applicant to renew the licenses, so that the Board can properly proceed with the public hearing, with respect to modifications. He said that he suggested that the notice of and invocation of the Ballarin Factor is improper procedure, which is not supported by the Statutory Scheme. He said that the Ballarin Factors, as they have it noted for the public, is applicable not to renewal applications, but only to new licenses to be issued by the Town. He asked that the Chairman consider a motion by the applicant, to renew the licenses without objection so that the Board may proceed to properly invoke its regulatory process pursuant to the statutory schemes.

Mr. Ballantine said that he would not, because they have various allegations from neighbors, police and others, that would like to be heard

before they make a decision. He would like to hear Mr. Tomlinson's view and the applicants view at the same time, and does not want to short cut that.

Mr. Tomlinson said that they are not trying to deny the Board the opportunity to hear from the public, however, if the Board is considering whether or not to further expose the individual board members to further liability, he said that perhaps it makes sense to entertain a motion from the applicant to simply renew the licenses, so that the Board may proceed with proper public notice about any modification, or suspension, of those licenses. He asked again if the Chairman would entertain a motion from the applicant with respect to renewing the licenses, and then they may proceed in two-weeks, or later, with a public hearing that properly affords notice and the applicants ability to review the documents that was denied to them, as of Friday of last week.

Mr. Ballantine said that he will ask for guidance from their counsel, but he thinks that is what the public hearing tonight is for.

Mr. Blake said that they can move forward and the applicant will have an opportunity to bring this to the ABCC, or added to any of their court cases. He said that the Board can take the motion, but they are free to go forward, if they choose. He said that it seems the applicant's counsel's intent to prevent them from going forward, it sounds like they will be there all night going back and forth. He said that it is the Board of Selectmen's meeting and under the due process of the US Constitution and the Massachusetts Declaration of Rights and Constitution, they have notice and an opportunity to be heard. They do not have the right to disrupt this proceeding like they are. If they continue to do that, Mr. Ballantine has the right, as the Chairman, to ask them to stop and to be recognized. They can object, but the continuous speaking objections over and over again, it is clear what their purpose is, and it is their meeting and he can ask them to stop.

Mr. Kelley asked to be heard, on what he referred to as, Mr. Blake's intemperate and inaccurate comments, and asked for his objection to be noted.

Mr. Ballantine said he would like to move forward. He asked Mr. Powers to go back to his statement, and then move to the normal course of events for legal counsel's comments, and so forth.

Mr. Powers said that he would continue on from the memo dated February 8th, 2021. He read, "although the initial call log indicated that he observed this individual drinking from the container, during hearing it was clarified that the officers did not observe the container to be open and they did not observe the individual taking a drink. I, therefore, find no violation with respect to this report. These observations are described in greater detail in reports admitted into evidence at the hearing, which reports are consistent with the sworn testimony offered by the witnesses and which I credit as true and which establish that the licensee permitted disorders, disturbances or illegalities to take place on the licensed premises. He said that the recommended disciplinary action, based on the facts admitted into evidence at the public hearing, I find that one (1) violation of the laws of the Commonwealth has been established. The licensee has been found responsible for six (6) violations in the two years prior to the violations described herein. In addition, the Hearing Officer is aware of numerous public complaints about the manner in which the establishment is operated."

Mr. Kelley objected and moved to strike that comment and said it was not properly before them.

Mr. Ballantine asked Mr. Kelley not to interrupt the testimony. Mr. Kelley said that it is his obligation to object to incompetent irrelevant and unlawful procedures. He asked that his objection be noted. Mr. Tomlinson seconded the objection.

Mr. Powers continued and read "if the Board intends to conduct a public hearing to determine whether or not the license should be renewed. Therefore, I will hold my recommendation in abeyance until after that hearing."

Mr. Kelley asked to question Mr. Powers. Mr. Ballantine said that he would like to have their counsel go next. Mr. Kelley said that the licensee has the right to ask questions of anyone who speaks against them. Mr. Blake said that he is right and he can cross examine.

Mr. Kelley asked Mr. Powers if he is currently the Town Administrator for the Town of Harwich, and asked if that is his legal title. Mr. Powers responded that it is.

Mr. Kelley asked how long he has held that position. Mr. Powers said that on November 12, 2019, he was named Interim Town Administrator, then the Board named him Interim Town Administrator, separate from his role as Assistant Town Administrator, on September 1, 2020. He said, then the Board named him the Town Administrator on February 1, 2021.

Mr. Kelley asked if it is accurate to say that the Board of Selectmen, the four members there, have the decision on hiring or firing him. Mr. Powers said that he believes it is accurate to say that the full Board of Selectmen have the appointing authority of the Town Administrator, per their charter.

Mr. Kelley also asked if separate from the appointing authority from the Board of Selectmen does he have a written contract for a specified term of years. Mr. Powers said that he received a written contract on February 1, 2021. Mr. Kelley asked if that is in the public domain since it involves the expenditure of public monies. Mr. Powers said he believed it was. Mr. Kelley asked what the length is of his contract. Mr. Powers said that the contract expires June 30, 2024.

Mr. Kelley thanked him for his testimony and asked when the contract was signed. Mr. Powers answered again, February 1, 2021.

Mr. Kelley said that when the proceeding happened in January of 2021, he had no contract with the town, is that right? Mr. Powers said he had a temporary contract with the Board, that was executed on September 1, 2020, as Interim Town Administrator.

Mr. Kelly said when they had the first proceedings regarding certain allegations, in August of 2020, when Mr. Tomlinson had difficulty hearing and they adjourned that, did he have a contract then? Mr. Powers said that he was the Assistant Town Administrator, and in accordance with the charter, in the absence of the Town Administrator, the Assistant Town Administrator serves as the Town Administrator interim.

Mr. Kelley asked if he had just a single contract as Interim Town Administrator from September 2020, until he signed the contract as Town

Administrator in February 2021. Mr. Powers said yes. Mr. Kelley asked if it was about five to six months. Mr. Powers said that sounded right.

Mr. Kelley asked how many times he had reached out to Mr. Tomlinson to inform him that the hearing would proceed on January 12th, with or without him? Mr. Powers said that he would have to look back through his notes, he does not have that information with him.

Mr. Kelley asked if written notice was sent to the licensee, Ember and The Port, that the hearing was taking place on January 12th? Mr. Powers said he would have to go back through his notes and his information.

Mr. Kelley asked if they were not included in the Selectmen packet that was sent to the four members of the Board of Selectmen, sitting on the Board tonight? Mr. Powers said he would have to go through the packet. Mr. Kelley asked if he did send them a packet at some point? Mr. Powers asked for clarification who is referring to as "them". Mr. Kelley clarified that he was asking if he had sent the four members of the Board of Selectmen a packet that had information concerning tonight's event, which included what he had just read? Mr. Powers said that he does not know that he did, it is customary for staff to do that. Mr. Kelley asked if that would be his staff, acting on his behalf. Mr. Powers said it would be administration staff. Mr. Kelley asked if by administration staff, that would be the Town Administrator's staff. Mr. Powers said it is the Administration Department, and they work for him as the Town Administrator, and the Board of Selectmen.

Mr. Kelley asked if Mr. Powers knows what ex parte communication is? Mr. Powers said no. Mr. Kelley said that he has never been counseled then, on having communications with individuals that are supposed to be fair and impartial fact finders on a particular dispute, and should never be communicated with about the substance of that event, outside of the formal record, when it begins? Mr. Powers said that he does not understand the question.

Mr. Kelley asked if he had any training in proper legal proceedings for hearings in the Commonwealth of Massachusetts? Mr. Powers asked, if he meant formal training, and said that only what the ABCC provided back in 2000 to 2010. Mr. Kelley asked if that was individual for the Town of

Harwich, or for a group of communities? Mr. Powers said for a group of communities.

Mr. Kelley asked if they had discussed in detail with him about the concept of ex parte communication, with the Board of Selectmen, who would be sitting to decide an issue. Mr. Powers said that he would have to defer to him, as one of the presenters previously. Mr. Kelley said that he would suggest that they did not, because you must never engage in ex parte communication with a fact finder, outside of the formal record.

Mr. Blake objected and asked if there was a question.

Mr. Kelley asked the Chairman, if Town Counsel would be subject to the same rules about speaking objections?

Mr. Ballantine said Mr. Kelley could continue, and then Town Counsel can raise his issue.

Mr. Kelley asked if it is fair to say, that he does not have any memory, of any specific instruction, at those ABCC trainings, for any discussion on ex parte communications? Mr. Powers said that he just testified that he is not aware of what is meant by ex parte communications.

Mr. Kelley asked about the proceeding of January 2021, and who administered the oath to the witnesses that they would be telling the truth, the whole truth and nothing but the truth? Mr. Powers said he would have to review his notes, but believed it would have been him, as hearing officer. Mr. Kelley asked if he would have done that from memory or have a written oath to be administered, in front of him at the time. Mr. Powers said that he has it committed to memory.

Mr. Kelley asked if that proceeding was video, or audio taped, or some type of video platform? Mr. Powers said that he believed that GoToMeeting would be considered a type of video platform, and that is how it was done. However, he said that he would have to go through his notes to confirm that he was not mixing up hearings.

Mr. Kelley asked if he had a memory of Channel 18 being present at that meeting in January 2021? Mr. Powers said that staff was present; but he

did not believe that it was Channel 18 recording, but staff working with a videographer.

Mr. Kelley further asked if he could recall if that event was being recorded, the way there was an announcement for this event tonight? Mr. Powers asked for him to repeat the question. Mr. Kelley asked if he had a memory as to whether there was an announcement at the time of the hearing, indicating that the proceeding was being recorded? Mr. Powers said yes, and that he heard that.

Mr. Ballantine said he was not sure where they are going with that, but he wanted to check with legal counsel, because he does not want this to go on all night.

Mr. Blake said that his concern earlier was due to Mr. Kelley testifying, but what he thinks that Mr. Kelley is trying to do here, is to try and explore the veracity of this witness. Mr. Blake said that he understand that there is a limited amount of time, but they do have the right to be heard, and question the witnesses for as long as they want to take. He said that if Mr. Kelley becomes repetitive, then they can speed it up. He said that if they need to continue the hearing, they may have to, but Mr. Kelley needs the opportunity to go through and question this witness.

Mr. Kelley asked for a moment to review his notes, and said that he has no further questions for Mr. Powers.

Mr. Blake said that he will not be long, and that he believes most of the testimony will come from the neighbors and abutters to the establishment. He asked if the Chief was on the call and asked if he could identify himself for the record.

Chief David J. Guillemette, Chief of Police Harwich recognized himself for the record.

Mr. Blake asked Chief Guillemette how long he has been the Chief for Harwich? Chief Guillemette said that he is approaching six years, in July.

Mr. Blake asked if part of his duties include responding to calls or overseeing the response to noise, nuisance and the like. Chief Guillemette said yes.

Mr. Blake asked the Chief if he knows why he is there tonight? Chief Guillemette said that he was there to comment on the public hearing for the entertainment and liquor licenses for the Port and Ember.

Mr. Blake asked if he typically comments on licenses or has been asked to comment on liquor or entertainment licenses in the Town. Chief Guillemette said this may be the first hearing of this type for him. Mr. Blake asked if his input is ever asked for with respect to an establishment's liquor or entertainment licenses. Chief Guillemette said yes, in regards to specific complaints or number of complaints etc.

Mr. Blake asked if the Chief reviewed his files at the Police Station before coming there tonight? Chief Guillemette said that he did review the statistical data, and some of the log entries from the past couple of years.

Mr. Blake asked if he was familiar with the establishment they are there about tonight, naming, Ember Pizza? Chief Guillemette said yes.

Mr. Blake asked if he could give a description to the neighborhood that Ember is part of, if the streets are wide or narrow, and if there is plenty or limited parking?

Mr. Kelley interjected and said that Mr. Blake's question is not relevant and said that he is unnecessarily prolonging the hearing that has the sole impact of driving up the cost to defend itself, from being born by the license holders.

Mr. Ballantine said that he allowed Mr. Kelley to make his statements and would like to allow their legal counsel to make his statements as well.

Mr. Kelley said that he understands, but respectfully, Mr. Blake's question is not relevant and therefore should not be allowed to be asked. He said that it is improper and therefore he objects, and asks for the Chair to make a ruling accordingly.

Mr. Ballantine said that he is trying to operate this as fairly as he can, and that Mr. Blake had the same objections to Mr. Kelley's questions, as he has to his. Therefore he would like this to supersede.

Mr. Kelley said that he does not believe that Mr. Blake had the same objections as his, being that they are not relevant. He said that Mr. Blake had acknowledged, as he must, that the license holder has a vested constitutional right to cross exam witnesses. He said that is not his objection. He said that his objection is more fundamentally to the fairness to this procedure, by Mr. Blake, asking irrelevant questions that would solicit irrelevant information and evidence.

Mr. Blake stated that Mr. Ballantine has the ability to overrule or sustain the objection. If he overrules, Mr. Kelley can take it up later. He said that as part of the Ballarin Factors, one of the factors is driving and parking, so therefore his question to the Chief about the nature of the neighborhood is very relevant.

Mr. Kelley said that the Ballarin Factor has no place in their decision of whether to deny renewal for good cause, under the renewal law for alcohol licenses, which is specific to MGL c. 138, s. 16A. He said that the licensee timely filed their application for renewal, there is no dispute about that. He said there is also no dispute that the law provides that the licensee has the right to an automatic renewal. He said that the only way that the automatic right to renewal can be delayed or denied, is if the licensing authority follows lawful procedure and issues a notice that they will have a hearing to determine if there is good cause to deny the renewal. Mr. Kelley said that they have not issued that notice, it is not on their agenda tonight, and that standard does not involve the Ballarin Factors whatsoever. He repeated that Mr. Blake's question is irrelevant, and luring them into committing an error of the law and further action, based upon unlawful procedure, and violations of the constitutional rights of the licensee.

Mr. Ballantine said that they will move ahead, because it affects the overall discussion on the liquor and entertainment license.

Mr. Kelley asked if he is ruling on his objection?

Mr. Ballantine said yes, it is overruled.

Mr. Blake asked Chief Guillemette to answer his question.

Chief Guillemette said that Ember is located on the corner of Bank Street and Route 28. He said that they are two fairly busy streets, and that it is a

mix use area; meaning that there are residential homes, as well as businesses there. He said that some are as close as within 150', and others are well outside of that distance. He said that it has a moderate size parking lot, which is right off of Route 28.

Mr. Blake asked if he knew about the exterior of the establishment, if they are currently allowing patrons in the parking lot now? Chief Guillemette said he does not believe so, they expanded picnic tables on the lawn, not on the parking lot. Mr. Blake asked to confirm that they are outside, Chief Guillemette said correct.

Mr. Blake asked Chief Guillemette, regarding the complaints he had reviewed, if he or any of his officers, had fielded any complaints for Ember Pizza?

Mr. Kelley objected. He said that it was a compound question and in improper form. He said that this witness can only testify as to what he himself knows, what he himself saw. He cannot engage in the speculation as to what others may or may not have seen.

Mr. Blake said that he can, and said that this is an administrative hearing and the rules of evidence do not apply.

Mr. Kelley said he cannot, and can only supply testimony that he has personal knowledge of.

Mr. Ballantine said he is going to go with the judgment of their counsel on this and the objection is overruled. Mr. Kelley said to note his objection.

Chief Guillemette said that they have responded to noise complaints there.

Mr. Kelley objected and moved to strike the answer as nonresponsive.

Mr. Ballantine said he answered the question. He overruled the objection. Mr. Kelley said to note his objection.

Mr. Blake asked Chief Guillemette where the complaints came from, if he knew? Chief Guillemette said from the surrounding neighborhood.

Mr. Blake asked if they were noise complaints?

Mr. Kelley objected. He said that counsel is leading the witness improperly and he knows it, and should not be doing it. He said that Mr. Blake knows how to conduct a proper direct examination. Mr. Kelley said that he objects and moved to strike Mr. Blake's appearance and said that he cannot serve as both counsel to the Board, as an impartial fact finder, and also serve as the prosecuting officer, conducting full examination of the witnesses who purport to present information and testimony against my client. Mr. Kelley said it is a further indication of the unlawful procedures that this Board is following, and has been lured into following. Mr. Kelley said to note his objection, he moved to strike his appearance. He said that they should move on to vote to renew the license.

Mr. Ballantine said he overruled that, and it was a direct question. He asked the Chief to respond to it.

Mr. Blake repeated the question, what were the nature of the complaints they received for Ember? Chief Guillemette said that an overwhelming majority of them were from loud music, from entertainment outside.

Mr. Kelley objected, and moved to strike. He said that it is not responsive and that it is opinion and character without foundation.

Mr. Ballantine asked if Chief Guillemette could respond to that with more information?

Chief Guillemette said that the majority of the nature of the calls were noise complaints.

Mr. Kelley objects to the Chief testifying to matters he did not personally witness. He said if they want that evidence, the proper witnesses would be the officers that responded and have direct information to share.

Mr. Ballantine said that he thinks that officers file a report, which the Chief is referring to. Chief Guillemette said that they do file a report.

Mr. Kelley said in certain circumstances, that type of information may be admitted into an administrative proceeding, but would have to have more explanation of the nature of the material.

Mr. Blake said that Mr. Kelley will have an opportunity to cross examine Chief Guillemette, and he can bring that all out. He said that the way the hearing is going, he doubts that they will vote on this tonight.

Mr. Kelley said that he would like to request the Chairman to direct Mr. Blake to stop issuing opinion regarding the conduct of these proceedings. He said that Mr. Blake knows very well, and has acknowledged that the licensee has the right to confront each and every witness against them, and to conduct cross examination, yet, he speaks against that. Mr. Kelley said that they have in the described procedures an opportunity to make a presentation, it is not a substitution, excuse, or justification to defy a meaningful cross-examination of the witnesses or other aspects of due process, which includes the objection to incompetent, irrelevant, and inadmissible information.

Mr. Ballantine said that they have heard his objection and requested that Mr. Kelley let Mr. Blake ask questions of the Chief, and after he will be allowed to cross examine. He said to interrupt each question is not getting them anywhere.

Mr. Kelley said that it is not his intent to prolong these proceedings, but when an improper question is asked, he is duty bound to bring it to his attention and ask for a ruling.

Mr. Ballantine said that they will move on.

Mr. Blake asked Chief Guillemette again if he could tell the Board what the nature of the complaints were for Ember Pizza? Chief Guillemette said, they were for loud music.

Mr. Blake asked if there were any other complaints with respect to talking or other complaints other than loud music?

Mr. Kelley objected and that he is leading the witness, the question has been asked and answered.

Mr. Blake said that Mr. Ballantine does not have to let him constantly interrupt the proceeding, and said that an overrule or sustain is sufficient.

Mr. Ballantine overruled and would like to move ahead. He said that Mr. Kelley will have a chance to cross examine. Mr. Kelley asked that his objection be noted.

Mr. Blake asked Chief Guillemette what the nature of the complaints were, if there were other complaints besides noise? Chief Guillemette said that the majority were noise.

Mr. Kelley objected that he already answered the question.

Chief Guillemette continued, but there were a handful of disturbance types of calls that had come in with crowd noise, around closing. However, the majority has been loud music for Ember.

Mr. Blake asked about the disturbance complaints around closing and asked if he knows what time the establishment closes?

Chief Guillemette said that they close at 1:00 AM.

Mr. Blake asked if Chief Guillemette could further explain the disturbance type complaints Chief Guillemette said loud, boisterous patrons leaving, loud outcries, and that type of thing.

Mr. Blake asked if there were any for fighting?

Mr. Kelley objected and said that he would ask the Chairman to direct council to stop leading the witnesses. He said that it is inappropriate, and underlines the unlawful proceedings that are happening there.

Mr. Ballantine said that they are trying to understand the situation.

Mr. Kelley said that they all are; however, it is becoming clear that council knows that he cannot lead a witness on direct examination but he continues to do so. He would request the Chair to direct council to stop and follow lawful procedure.

Mr. Ballantine said that he will not, he will allow their council to ask his questions. Mr. Kelley asked that they note his objection.

Mr. Blake said that the Chief had testified about the loud crowd noises around closing time, and that they close at 1:00 AM.

Mr. Kelley objected, and said that it is council's mischaracterization to the witness's testimony, and speaks for itself on the record. He asked that they move forward with proper direct examination.

Mr. Blake asked Chief Guillemette if there were any other complaints that were classified as disturbances?

Mr. Kelley objected, and said that Mr. Blake is now repeating himself when he complained about repetitive questions. He said, let's move on.

Mr. Ballantine said for the Chief to answer the question.

Chief Guillemette said that they do not have a major problem with fighting or anything of that nature. He said that it is the noise related to patrons and music.

Mr. Blake asked who makes the complaints, is it neighbors or abutters?

Mr. Kelley objected and said that Mr. Blake persists in leading the witness. He said that it is improper and is infecting this whole proceeding with its unlawful procedure. Mr. Kelley said that he objects and moved to strike the question, and any answer that may have snuck into the answer afterwards.

Mr. Ballantine said that he overrules, and that it is important to them to know who is making the noise complaints.

Mr. Kelley said that it is not a proper relevant issue before the Board, and he has made the objection. They are compounding the legal error through an improper direct examination.

Mr. Blake said that he will turn it over to the Board to ask questions and Mr. Kelley can object to the Board's questions. He said he is done with this witness.

Mr. Kelley asked if he can inquire of the witness. Mr. Ballantine agreed.

Mr. Kelley asked Chief Guillemette if Ember is located in an area of the town that is zoned for commercial use? Chief Guillemette said yes, there are business there.

Mr. Kelley asked if he was aware, that in fact others have been located in close proximity to Ember? Chief Guillemette asked what he meant by others? Mr. Kelley said other businesses that sell alcoholic beverages, that are in close proximity to Ember? Chief Guillemette asked what he meant by close proximity? Mr. Kelley asked if he was familiar with an establishment called Perks? Chief Guillemette said yes. Mr. Kelley asked where that was located in relation to Ember?

Mr. Blake objected and said it is irrelevant, because they are there for Ember.

Mr. Kelley said it is cross examination, and the credibility of this witnesses, as it relates to what he claims is complaints emanating from Ember. He said that it is clear there are many other licensed establishments, with similar operating hours, located in close proximity to such a degree that he suggested it is virtually impossible to segregate one from the other. Mr. Kelley said that he is entitled to test that, and in fact there are several within walking distance, and council opened this door on direct examination. He is entitled to cross examine the Chief on it.

Mr. Ballantine said he asked the question and he will let the Chief respond, but in his opinion Perks is not that close to Ember.

Chief Guillemette said that he would agree, it is not close. Mr. Kelley asked how close Perks is to Ember, in feet.

Chief Guillemette said that he is not sure. Mr. Kelley asked how far Hot Stove is from Ember? Chief Guillemette said about the same as Perks, he is not sure. Mr. Kelley asked how far in feet Three Monkeys is from Ember? Chief Guillemette said he is not sure the distance.

Mr. Kelley asked if it would be fair to say that those establishments are within walking distance to one another? Chief Guillemette said yes, that would be fair to say.

Mr. Kelley asked if it would be fair to say that those three establishments, Hot Stove, Perks and Three Monkeys, have similar closing times as Ember, of 1:00 AM? Chief Guillemette said that he believed so.

Mr. Kelley asked if would be fair to say that those establishments have also been the source of complaints to the Police Department, in the past three years. Chief Guillemette said that he does not believe that Three Monkeys had any complaints. Mr. Kelley said but Perks did? Chief Guillemette said yes. Mr. Kelley said and the Hot Stove did? Chief Guillemette said a couple.

Mr. Kelley asked if Perks has had their license renewed for calendar year 2021?

Mr. Blake objected.

Mr. Ballantine said he thinks they are getting beyond why they are there tonight, which is for Ember and The Port.

Mr. Kelley said that this is cross examination and he is entitled, as Mr. Blake has acknowledged during this proceeding, to test the credibility of this witness. He said that Chief Guillemette testified, both by being led by council and by appropriate direct questions, as to Ember. He is entitled to test the validity of his information by his knowledge of other similarly situated competitors in the area.

Mr. Blake said that he is not entitled to ask irrelevant questions. He is entitled to test the veracity of the Chief, and he has been doing that, but now he is going down a different path. Mr. Blake said that whether or not a different establishment licenses were renewed is irrelevant, they are not there to litigate that establishment.

Mr. Ballantine said he will sustain the question. Mr. Kelley attempted to repeat the question and Mr. Blake said that the Chairman had sustained the objection. With clarification, Mr. Ballantine said that he overruled the question, because he does not see how his questions are less misleading then their council's.

Mr. Kelley asked to note his objection to the ruling, and the reversal of Mr. Ballantine's earlier ruling which he stated as a misstatement.

Mr. Kelley said that there is a substantial difference in the standard in direct vs cross examination, particularly as it relates to leading questions. He said that leading questions are appropriate during cross, but never appropriate during direct. When council steps over the line, the only thing that can be done is an objection from the opposing side.

Mr. Kelley asked if Chief Guillemette recalled writing a memorandum to the Board of Selectmen, with recommendations or stated concerns about the renewal of licenses for three establishments? Chief Guillemette said yes. Mr. Kelley asked if Perks was one of the three? Chief Guillemette said yes. Mr. Kelley asked if Perks was renewed? Chief Guillemette said that he did not know.

Mr. Kelley checked his notes, and said he had no further questions for Chief Guillemette.

Mr. Ballantine asked if any of the Board of Selectmen members had any questions for the Chief? Mr. Howell, Mr. McManus and MacAskill had no questions at this time.

Mr. Ballantine said that they would ask the public if they had questions.

Mr. Kelley said to note his objection, and stated that they have no relevance in regards to the issue for the renewal of the alcohol license. He said that the participation of the public comes in the appropriate application of the so called Ballarin Factor, which is limited to transactions which involve a new license application, or an application to change the description of the license premises. Mr. Kelley said that public comment tonight is irrelevant and inappropriate and an unlawful procedure that violates the constitutional rights of the license holder.

Mr. Ballantine asked for Mr. Blake's comment.

Mr. Blake said that Mr. Ballantine is well within his rights to have testimony from any witness or testimony is well within his discretion. He said that he thinks their testimony about what they have had to live with, will be very relevant.

Mr. Kelley said that Mr. Blake has over stated the scope of relevant information, and if they have knowledge about a particular violation, it is not properly before this body, because it has not been incorporated into a notice of hearing that comports with the fair notice required of the board by MGL CH. 138, as well as the constitutional rights that are fully vested in the license holder.

Mr. Ballantine thanked him for that, he said he would like to hear from witnesses, that would like to comment. He asked that they keep their remarks brief and if someone has already made a comment, not to repeat it, because they are listening. He opened it up for those that would like to comment, both pro and con.

Mr. Kelley asked to note his objection, and continued his objection in regards to the fact that he has had no fair notice or information provided to him about who will be stepping forward to speak regarding the proceedings tonight, and that is unfair and not proper legal procedure. He said that it is unlawful and he objects.

Mr. Ballantine noted his objection.

Ms. Paula Ribeiro requested to speak, and said that she is an employee of Ember and The Port. She said that she would like to make reference to the event that was discussed earlier, at Ember on May 22nd, when an officer witnessed the outside bar being set up for full service. She said that she was the employee standing at that bar on that day, and her function was to greet patrons arriving to pick up takeout orders, because it was takeout service only. She said there were employees inside preparing orders, and the process for the day was that she would greet customers in that outside area, get their name, and would be the runner to get the food order. She said that the bar service at that time was takeout. Ms. Ribeiro explained that placing cans of beer in a bag is much faster than cooking food, therefore people were holding them outside to take with them. There were people waiting for a long time, because they were understaffed. She said if the police officer witnessed them holding cans, they were not given to the patrons to be consumed on the property. They were given to them to take with their takeout orders. The fire bar was not set up as a full service bar, she was not bartending, she was liaison between patrons and the inside staff. She said that she did not witness any patrons opening a can, which

was given to them closed. Ms. Ribeiro said that she can say that there were not people standing around, congregating and drinking that day.

Mr. Ballantine thanked her for that information.

Mr. Blake said that they were going to keep all people who wanted to speak about complaints and then those in favor. He thinks it will be less confusing to keep them separate.

Mr. Michael Heffernan, 20 Freeman Street, said that he is 800' from Ember and that he listens every day to the music, and it is not acceptable. He said they can run a fine business, but if the bylaws say 150', it is 150', and they should follow the rules.

Mr. Kelley asked to examine Mr. Heffernan. He asked Mr. Heffernan if prior to tonight, he had sent in any communication to the Board of Selectmen, or representative of the Town, regarding Ember? Mr. Heffernan said yes, he has. He said that he has noted the complaints with the Police and to the Board of Selectmen.

Mr. Kelly asked how he sent those complaints in, and if by email? Mr. Heffernan said that some were by phone and some by email. Mr. Heffernan said that it is not his responsibility to monitor the noise coming out of that establishment, and he does not need to hear it all summer long, every night.

Mr. Kelley moved to strike the individual comment as unresponsive to the question. He said that the question was if he knew if the Board of Selectmen has taken any action about his complaints prior to this evening?

Mr. Heffernan said that he knows that the Chief of Police has sent out officers to monitor the situation, and yes, members of the Board of Selectmen have responded to his concerns. Mr. Kelley asked how many Selectmen responded to his concerns? Mr. Heffernan said that he had no idea, he is not monitoring and this is not stuff he has time for.

Mr. Kelley asked if any Selectmen called him on the phone? Mr. Heffernan said no. Mr. Kelley asked if any of them had sent him a letter in the mail. Mr. Heffernan said no. Mr. Kelley asked if any Selectmen sent you an email? Mr. Heffernan said yes. Mr. Kelley asked how many emails?

Mr. Heffernan said that he already told him and that he does not remember, but it was several. Mr. Kelley asked how many email accounts Mr. Heffernan used to send communications to the Board of Selectmen? Mr. Heffernan said he sent emails to all members of the Board of Selectmen and the Chief of Police and he used one email address. Mr. Kelley asked what email address he used?

Mr. Blake objected and said that there is no relevance.

Mr. Kelley said that he is ambushed by the general public being invited into a public hearing, which they have no relevant evidence to offer. He is entitled to a full cross-examination of anyone who steps forward.

Mr. Ballantine said that he believes the question was answered, Mr. Heffernan used one email address. Mr. Kelley said that his question was to know what his email address is. Mr. Blake objected to relevance.

Mr. Heffernan said that he tried to answer but Mr. Kelley was talking.

Mr. Kelley said that he moved for immediate motion for the Board to renew the license. He said that this is a charade. The witness is not cooperating, he is violating the licensees constitutional rights. If he wants to expand this, and get involved in a lawsuit, he will take it there. Mr. Kelley said it was a simple question, what email address did he use to write to the Board of Selectmen?

Mr. Blake objected.

Mr. Ballantine said that it does not do any good for Mr. Kelley to threaten the witness.

Mr. Kelley said he was not threatening. Mr. Heffernan said that he did feel threatened.

Mr. Ballantine said that he would like to continue through the process, and explained that as one member of the Board he has received emails. He said that his personal procedure is to forward them to the Town Administrator and that he does not deal with them personally. Mr.

Ballantine said that he does not know where Mr. Kelley is going with this questioning, but there is not an action with the Board.

Mr. Kelley asked for a ruling on his question, asking Mr. Heffernan to tell us what his email address is. Mr. Ballantine said that Mr. Heffernan does not need to tell him his email address. Mr. Kelley asked to note his objection. Mr. Kelley said that he had no further questions.

Mr. Ballantine asked for further comments from the public. There were none. He then moved it over to Mr. Kelley for his case.

Mr. Kelley asked if the town rests and has nothing further to add to this case? Mr. Blake said they had nothing further.

Mr. Kelley asked if the town then rests their case in regards to presenting information for this licensee.

Mr. Bob Cohn, resident on Pleasant Street, asked to speak and to share his screen.

Mr. Kelley objected due to no prior notice of any screen sharing that would be made, and it is improper and unlawful procedure.

Mr. Ballantine overruled and noted his objection.

Mr. Cohn shared his screen and explained that in 2019 he conducted an informal noise survey, which he presented at a Noise Committee meeting a year ago. He said that the details of this are in the packet. Mr. Cohn said that he was on the Noise Committee, but these comments are his alone as a resident. Mr. Cohn showed on his screen a diagram, titled "Informal Noise Survey Harwich Port 2019 Ember data only, mainly July". He explained that the circles are centered around Ember's performance area and said that the blue circle is 350', which is 150' to the outside of Ember's eastern bounds. He said that is a very generous approximation of Ember's.

Mr. Kelley objected, and asked the Chair to direct the witness to keep his statements to facts, and not opinion.

Mr. Cohn tried to continue his statement. Mr. Kelley objected again.

Mr. Cohn said that he is saying facts. Mr. Kelley continued to object.

Mr. Ballantine said that he is testifying to data that he has recorded. Mr. Kelley said that he objects to his mischaracterization of the standards that he drew as "very generous". He said that it is inappropriate, it has no base, it is not relevant, has no probative value.

Mr. Cohn tried to continue saying "very generous approximation of Ember's". Mr. Kelley objected, and said that Mr. Cohn is continuing unlawful behavior. Mr. Ballantine asked Mr. Cohn to avoid stating "very generous" statement.

Mr. Cohn said the small diamonds on the chart represent individual noise complaints or readings, and the large diamonds represent multiple noise complaints or readings. He said that what is shown on the map are noise readings for Ember only, for the single month of July 2019. Additional readings for other venues and for August and September are included in the spreadsheet in the packet. Mr. Cohn said that the chart shows pretty clearly that Ember's entertainment noise often exceeded their permitted range, and more than that, these are extreme distances.

Mr. Kelley objected and moved to strike, based on opinion.

Mr. Ballantine asked Mr. Cohn to avoid characterization, use of extreme and just give the distances.

Mr. Cohn explained that 750' is extreme, and five times the. Mr. Kelley objected, based on the characterization and stated that the witness continues to engage in improper statements despite a direct ruling from the Chair. He suggests he be dismissed and his entire submission be stricken.

Mr. Ballantine said no, that he wants to hear it. He asked Mr. Cohn to avoid using characterization, so that they can move on.

Mr. Cohn said that 750' is five times the legal limit, simple math.

Mr. Kelley objected and stated that the first words out of his mouth was a characterization, which the Chair had directed him not to make.

Mr. Blake stated that Mr. Kelley is wrong with respect to the rules of evidence at an Administrative Hearing, like this one. Mr. Blake said that you can listen to hearsay, you can listen to the audience. He said that it is clear that the purpose behind these objections are to continue to bully and prevent other witnesses from coming forward. He said that Mr. Ballantine can overrule his objections, and tell him not to continue to interrupt.

Mr. Kelley objected to Mr. Blake's statements, and said that is not due process and not lawful procedure.

Mr. Ballantine told Mr. Kelley that he ruled with him in asking Mr. Cohn to avoid characterization, however, when Mr. Cohn spoke about it being five times their bylaw limit, that is in fact not a characterization, that is going back to data from their Town, and that needs to be allowed.

Mr. Cohn continued and said that throughout the season he recorded 15 separate nights, where the noise could be heard 1,200' or more away, which is eight times the limit. He said that the noise complaints for the Port are not shown on the map, but on the spreadsheet. He said that it shows that The Port's noise levels are also greatly excessive, and almost as frequently as for Ember. He said that between Ember and the Port, there were almost 40 nights within the 2019 season that he recorded music heard 800' or more away. He said that the noise can be heard loud enough on Pleasant Street, to keep them from sleeping. This would be 1,200' away from Ember and 800' away from The Port. Mr. Cohn said it was worse for the neighbors close to the venues, who had to endure incredible levels of noise.

Mr. Kelley objected stating he is speculating, and that he has no knowledge.

Mr. Ballantine asked Mr. Cohn to continue. Mr. Kelley asked to note his objection.

Mr. Cohn said that none of this includes the issues from last year, with after-hours crowd noises and COVID-19 violations, that others have reported. He said it seems clear that Ember and the Port have made little effort to be good neighbors.

Mr. Kelley objected and moved to strike. He said that Mr. Cohn is now issuing opinion, speculation, and conjecture.

Mr. Cohn tried to continue, Mr. Kelley continued to object.

Mr. Ballantine overruled and stated that he would like Mr. Cohn to continue, and that his testimony is relevant because they take input from the witnesses.

Mr. Kelley said he has made his objection to this unlawful procedure, and that it has no relevance to the question of renewal which was timely applied for.

Mr. Ballantine noted his objection.

Mr. Cohn said that he wants them both to succeed as businesses, however, just as importantly he wants them to succeed as good neighbors. He said that based on their past difficulties, and closeness to neighbors, he thinks it is important for them to be given stricter guidelines for managing their outdoor entertainment. He urges that new entertainment licenses be given certain conditions, such as; speakers be pointed away from neighbors, live outdoor entertainment be limited to evening hours, outdoor entertainment at all other times be limited to ambient background music, that live music be played only through house system. He said that this list is to better help the venues better manage performers, speaker placement, volume, etc. Mr. Cohn said that he believe that Perks had just purchased a house system for this reason.

Mr. Kelley objected. Mr. Ballantine directed Mr. Cohn to continue and noted the objection.

Mr. Cohn said that venues should be required to self-regulate with security details and/or decibel monitors. Lastly, he said that this standard needs to be enforced properly, and he would urge the town to provide Harwich Police Department the policy guidelines and directives to do so.

Mr. Ballantine asked Mr. Kelley if he would like to cross examine the witness. Mr. Kelley reviewed his notes, and said that he does not have any questions.

Mr. Bob Nickerson said it would have been good to know that they were all going to get harassed there. He said there are people that do not want to talk because of what is going on, and that is a sad story. What he will say is that he called a number of times, and some of his calls became approved or agreed to violations. He does not have those dates. He said that he lives 500' from Ember, and he can routinely hear the sound from the drums when he is in his bedroom. He said that they have routinely increased the sound from 9:30 pm - 10:00 pm, because they know the violations will not be taken care of, because police can't get out there in time. Mr. Nickerson said that last summer they were better because of COVID, but the noise is getting worse and worse. He said that he lost a mailbox one time, from a patron at Ember. He said that he does think that they should have their liquor license renewed, however, he does not think that they should have their entertainment license renewed for outside, unless restrictions are put on them. Mr. Nickerson said that he thinks they are being unfair in the way this is being handled. He said that they want to be part of the town, and this is not the way to do it.

Mr. Kelley reviewed his notes, and said that he did not have any questions for Mr. Nickerson.

Ms. Frances Rich, 19 Towhee Lane, said that she lives outside of the farthest circle on the noise map, at the very northeast corner. She said that she is not one that complains, nor has called the police, however, in 2019 she sat outside on her back deck and could sing along with the music coming from Ember. She drove over there to confirm that is where the sound was coming from. She said that if the noise continues she will be calling the police every time she hears noise, because she is way outside of the 1,200' circle.

Mr. Kelley said that he did not have any questions for Ms. Rich.

Mr. Ballantine asked if there were any other comments and hearing none, he turned it back over to Mr. Kelley.

Mr. Kelley said that at this time, he would like to make a motion. He said that there has been no competent evidence shown, through a lawful procedure, and that in fact there is any good cause not to renew the liquor

license, or in fact the entertainment license, for Ember. Mr. Kelley said that in fact, the only lawful action tonight, on the state of the information thus far, which is the only information they are going to get from those that want to take adverse action, the only lawful action is renewal of the alcohol license and the entertainment license. He said, as he mentioned before, they can only deny renewal for good cause. He said that it is not the public needs standard in the Ballarin Factors, and there is no evidence that shows that they have good cause to deny renewal of this timely filed renewal application.

Mr. Kelley said that he also submits, that it is clear from Mr. Powers comments tonight, that each of the Board members received and acted upon ex parte communication, which is unlawful. He said that as they conduct their quasi-judicial function there, the fact that they received the Selectmen packets, with just one side of the case, coming from Mr. Powers and those wanting them to take adverse action against the liquor and entertainment license renewals, that is an unlawful procedure. Mr. Kelley said that they cannot do that, and in fact, their duty is to fastidiously avoid any such ex parte communication, which was not done. He said that each Selectman, that is part of this call, has engaged in that, and in fact that alone suggests that their only lawful action is renewal of the license.

Mr. Kelley also noted that there was absolutely no recommendation from Mr. Powers, contrary to the stated report that had his findings, and recommendations. As he mentioned, Ballarin is not the standard. This is a standard of good cause to deny renewal, and that is not the Ballarin standard. This is not a new license application, it is a renewal to which the licensee has the right of automatic renewal. Mr. Kelley said, last and by no means least, not a single person who provided a statement tonight, did so under oath, and that is a manifest requirement of due process to protect the constitutional rights of the license holder, and in fact is a sine qua non, of a lawful procedure. He said that they did not do that tonight and this can only result of a single action, which is renewal of the liquor license and renewal of the entertainment license. He would ask that the Chair rule on his motion to dismiss any pending adverse action on the liquor license and the entertainment license, and to proceed immediately to vote to renew both licenses.

Mr. Blake said that Mr. Kelley does not have the ability to make a motion. He said that if the members from the public are still present on the call, Mr. Ballantine can swear them in. He said it is not too late.

Mr. Kelley said that it is too late, the case is already closed. If you don't follow lawful procedure, you don't get a do-over. He said the record is clear and they have no competent evidence in front of them to do anything other than renew the licenses.

Mr. Blake asked if the members of the public were on the call, and could turn on their microphones. Mr. Kelley said it was inappropriate and was too late.

Mr. Ballantine said he would follow advice from their counsel. Mr. Kelley said that the advice is luring them into further violations of the constitutional rights of the licensee, and having them act on unlawful procedures. The time to administer the oath is at the start of the hearing, not after the fact. He said, Mr. Ballantine stated himself that their case was closed and it is too late.

Mr. Ballantine said he would follow the advice from their counsel, and asked for the public members that spoke to turn on their microphones.

Mr. Bob Cohn, Mr. Bob Nickerson, Ms. Frances Rich and Mr. Michael Heffernan.

Mr. Ballantine asked for help with the language from Mr. Blake. Mr. Blake asked if they swear to tell the truth, the whole truth, and nothing but the truth, so help you god?

Mr. Kelley said that Mr. Blake had no proper standing to administer an oath in this proceeding. Mr. Ballantine said he asked their counsel for the proper language to make sure it is correct, which he did so on his request.

Mr. Ballantine said for those to testify to swear to their testimony.

Mr. Bob Nickerson, I do; Mr. Bob Cohn, I do; and Mr. Michael Heffernan, I do; Ms. Frances Rich, I do.

Mr. Kelley continued his objection and request to note his objection, that they have not been sworn in, and they had closed their case.

Mr. Blake said it is his case and he had not closed it and told Mr. Ballantine to issue the oath again with the language.

Mr. Ballantine asked the public if they swear to the tell the truth, the whole truth, and nothing but the truth?

Mr. Bob Nickerson, I do; Mr. Bob Cohn, I do; and Mr. Michael Heffernan, I do; Ms. Frances Rich, I do.

Mr. Blake asked Mr. Heffernan that he had testified earlier about being 800' from Ember Restaurant and hearing music every day.

Mr. Kelley objected and said the Town's case is closed; he had made that ruling. He said it is not appropriate, and not lawful procedure to reopen it now.

Mr. Ballantine overruled and said that Mr. Blake can proceed. Mr. Kelley asked to note his objection.

Mr. Blake asked Mr. Heffernan if his earlier testimony was truthful under the pains and penalty of perjury?

Mr. Kelley objected and moved to strike the question. He said it was wholly inappropriate, and that the witness cannot vouch for his own truthfulness and that is for the Board of Selectmen to decide, in a lawfully noticed hearing, conducted under lawful procedure, with full protection of the licensee clearly established constitutional rights.

Mr. Ballantine overruled.

Mr. Blake asked Mr. Heffernan to answer the question. Mr. Heffernan said he was truthful, and that his backyard is 800' and the music is loud and clear.

Mr. Blake asked Mr. Cohn if the testimony he gave earlier was the truth, the whole truth and nothing but the truth? Mr. Cohn said, yes it was.

Mr. Kelley objected and moved to strike on the same grounds. Mr. Ballantine overruled and noted his objection.

Mr. Blake asked Mr. Nickerson if the testimony he gave earlier was the truth, the whole truth and nothing but the truth so help you god? Mr. Nickerson said yes.

Mr. Kelley objected and moved to strike on the same grounds. Mr. Ballantine overruled and noted his objection.

Mr. Blake asked Ms. Rich if the testimony she gave earlier was the truth, the whole truth, and nothing but the truth, so help you god? Ms. Rich said yes.

Mr. Kelley objected and moved to strike on the same grounds. Mr. Ballantine overruled and noted his objection.

Mr. Blake asked Chief David J. Guillemette, Harwich Police Department, if the testimony he gave earlier was the truth, the whole truth, and nothing but the truth, so help you god? Chief Guillemette said yes.

Mr. Kelley objected and moved to strike on the same grounds. Mr. Ballantine overruled and noted his objection.

Mr. Blake said that if there were no questions for the Board, the town will rest its case. Mr. Kelley said it already did.

Mr. Kelley said there is a motion in front of the Board.

Mr. Blake said to Mr. Ballantine that the motion by Mr. Kelley is inappropriate, it is their meeting and they make the motions. He said they listen to the evidence and Mr. Kelley can make an argument, but he cannot make motions for the Board to act on.

Mr. Kelley said that incorrect and the lawful procedure allows the licensee to test the validity and the competence of the evidence that has been submitted thus far, and it falls far short of the legal standard required. Therefore, he said it is highly appropriate for this request to be made to the Board to abandon this unlawful procedure, and the continuing violations

of the constitutional rights of the license holder, and let's get to renewal of the license. They should vote to renew these licenses.

Mr. Ballantine said according to his procedure everyone has had a chance to speak, and he will entertain a motion to close the public hearing.

Mr. Kelley asked when he would get to present his side of the case? Mr. Ballantine said he thought he did. Mr. Kelley said no that it was a motion that suggested that the information in this proceeding was far short.

Mr. Ballantine told him to go ahead, and that the motion will be done after they close the public hearing, and discussed within the Board.

Mr. Kelley asked that they note his objection, and he will proceed.

Mr. Kelley asked if Ms. Paula Ribeiro was still on the call? Ms. Ribeiro said that she was. Mr. Kelley asked if she took the oath administered by the Chairman? Ms. Ribeiro said no, that he did not ask her.

Mr. Kelley asked Mr. Ballantine to administer the oath to Ms. Ribeiro.

Mr. Ballantine asked if Ms. Ribeiro swears to tell the truth, the whole truth? Ms. Ribeiro said yes she does, and yes she did.

Mr. Kelley asked if Ms. Rebecca Cox was still on the call? No response.

Mr. Kelley asked if Ms. Lucy Brackett was still on the call? Ms. Brackett said she was. Mr. Kelley asked if she had been sworn in. She said she had not.

Mr. Ballantine asked if Ms. Brackett swears her answer is truthful and that she swears to tell the truth, and nothing but the truth? Ms. Brackett said that she is Mrs. Brackett, and she does.

Mr. Kelley asked if she has information she would like to share regarding the matters about the hearing his evening?

Mrs. Brackett said that she does not have anything specific, but would say that it has been very difficult to listen to the distaste coming from a Town that she has lived in for 35 years, and watch her family create businesses

and pour their blood, sweat, and tears, money, time, and family sacrifices, into this town. She said to see their hard work go so unnoticed, and disrespected, by a very small portion of loud people. She said that it takes away from the job of the work, the employment, the pride, and the entrepreneurial spirit, that it brings to the community, and the employees. She said that, as Mrs. Brackett, she gets to see the behind the scenes of the work that is done, the respect for the community, and the investment, both financially, emotionally and mentally.

Mrs. Brackett said that she gets to be the lucky one, that gets to hear people come up to her to share their stories of what the restaurants have meant to them. She has also seen the very hurtful experience by some town's people and town officials that have made it their point to cause disrespect, chaos, and untruths. This has been difficult to listen to, she said that she was not planning to speak, but has had a very difficult time just hearing the disregard for the livelihoods of so many families that these businesses contribute to. She said, including the disregard of Mr. Blake referring it to just a pizzeria, like it is some spot that just causes trouble. She said that she takes offense to the disregard and disconnect of what they represent.

Mrs. Brackett said that they can probably hear the emotion in her voice, but she has been in it, and outside of it, enough to see their family and their hard work really just disgustingly disregarded by a few of the same people. She discussed the earlier caller, who had a lot to say and then claimed that he did not have time to deal with it, and said that if they are investing the time to drag their business through the mud, then they should invest the time to have the details correct. Mrs. Brackett said that this is not just a game, it is much bigger, and it has been really difficult to listen to.

Mr. Kelley thanked Mrs. Brackett, and said that he had no further questions for her.

Mr. Kelley asked if Ms. Jennifer Dixon was on the call still? He said that he did not see her.

Ms. Rebecca Cox came online and explained that she was putting her son to bed, but heard they had called on her. Mr. Kelley explained where they were at in regards those that would like to speak in behalf of Ember. He said that he understood that herself and her husband had sent in a letter of

support. He asked if she wished to take the oath, so that she could tell the Selectmen her thoughts, about Ember.

Mr. Ballantine asked if Ms. Rebecca Cox swears to tell the truth, the whole truth, and nothing but the truth? Ms. Cox said she does.

Mr. Kelley asked about the letter she had submitted in support of Ember and the Port, and if she knew when she had sent in the letter? Ms. Cox, resident on Sea Street, said that she has the letter in front of her, it is not dated, but she said that she sent it in a few weeks ago, when this all came up.

Mr. Kelley asked Ms. Cox if she had a chance to review the Selectmen's packet, dated March 22, 2021? She said that she did look through it.

Mr. Kelley asked if her letter was included in that packet? Ms. Cox said that she did not see it.

Mr. Kelley asked her to read the letter that she wrote. Ms. Cox read her letter of support for the restaurants and the Brackett family.

Mr. Kelley asked if she had any further information to share with the Board of Selectmen, this evening? Ms. Cox said that she did not, she covered it in her letter, and she just feels that this is wrong, intentional, and just really upsetting to see.

Mr. Blake noted for the record, that Mr. Kelley objected to not being given a list of witnesses, and they have not been given a list of witnesses either. For the record, neither side did that.

Mr. Kelley said that they had not been asked for one. He said that if they had been asked, they would have, because they want this to proceed on a fair basis, with lawful proceedings that fully protect the constitutional rights of the license holder. He said that they asked the Town for it, and were told flat out by the attorney, that he was not doing that. Mr. Kelley said that was wrong, illegal and unlawful procedure and violates the constitutional rights of the license holder.

Mr. Ballantine said that he would like Mr. Blake to react to that, and said that he thinks it is a mischaracterization of what the timing allowed them to do.

Mr. Blake said that the Administrative Procedure Act, says under Section 11, (2), "Unless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses." Mr. Blake said that as he has said all along, they are not subject to the rules of evidence. He said that if they were in a court, then Mr. Kelley would be right.

Mr. Kelley asked where Mr. Blake was going with this, and that he interrupted his presentation.

Mr. Ballantine asked Mr. Kelley to show some respect, and allow Mr. Blake to finish his statement.

Mr. Blake continued and said that Mr. Kelley has repeatedly said that they have not been following the law, with respect to the witnesses and evidence being presented, so he was merely giving him a citation to show where he got his contention. His point is that they are not subject to the rules of evidence.

Mr. Kelley asked if Ms. Gabby Swain was on the call? No response.

Mr. Kelley asked if Ms. Marna Bate was on the call? No response.

Mr. Kelley asked if Mr. Gary Sawin was on the call? No response.

Mr. Kelley asked if Mr. Scott McMahon was on the call? Mr. McMahon responded that he was present.

Mr. Ballantine asked Mr. McMahon if he swore to tell the truth, the whole truth, and nothing but the truth? Mr. McMahon said that he does.

Mr. Kelley asked Mr. McMahon where he was employed? Mr. McMahon said he was employed at Ember, as the General Manager.

Mr. Kelley asked him how long he has held that position. Mr. McMahon said nine years, he believed.

Mr. Kelley asked if he was familiar with the alleged incidents that had occurred back in May, 2020? Mr. McMahon said that he was.

Mr. Kelley asked if he had a chance to respond to the Town Administrator, or to the Police Department, regarding those incidents? Mr. McMahon said that he had not.

Mr. Kelley asked what his normal work hours are, that he is at the establishment? Mr. McMahon said probably about 3:00 pm until 2:00 am.

Mr. Kelley asked if he had any communication with the Board of Selectmen, by writing a letter at any time regarding the matters that are before them tonight? Mr. McMahon said that he wrote a letter to the Cape Cod Chronical and the Cape Cod Times.

Mr. Kelley asked if the letter that he wrote to the papers was shared with the Board of Selectmen at any time? Mr. McMahon said he did not know.

Mr. Kelley asked if Mr. McMahon was familiar with the daily operation of Ember? Mr. McMahon said yes he is.

Mr. Kelley asked if he was familiar with the compliance procedures that are in effect for the alcohol and entertainment licenses? Mr. McMahon said yes.

Mr. Kelley asked Mr. McMahon to describe what compliance procedures they have in place, to comply with the requirements for the alcohol and entertainment licenses? Mr. McMahon said that they are always strict telling musicians to be done before 10:00 pm, every night, and they are told and apply that the volume can only be in-house, and not anywhere outside of house.

Mr. Kelley asked what he does to ensure that those directives are being followed, in his capacity as General Manger? Mr. McMahon said that he

speaks with the bands beforehand, and if he thinks that the music is getting too loud he will go over and ask them to turn it down, and they do so immediately. Mr. Kelley asked if they comply with his directive? Mr. McMahon said yes they do.

Mr. Kelley asked if any neighbors in the vicinity of Ember, have ever called him or the restaurant? Mr. McMahon said that he has not received a call from them.

Mr. Kelley asked if he has made any operational changes in the last six months to better facilitate their compliance with the standards to operating their entertainment and liquor license. Mr. McMahon said that he has not personally.

Mr. Kelley asked if anyone else has taken any such steps? Mr. McMahon said that a while ago they built the music structure to deter the noise from going outside of the area. Mr. Kelley asked if he had a memory of when that was done? Mr. McMahon said he believed it was late July, early August, of 2019.

Mr. Kelley asked if they have a process in place to monitor any complaints that they become aware of, for the compliance of their entertainment and liquor licenses. Mr. McMahon said that he did not understand the question. Mr. Kelley asked if he was aware of any liquor license violations that were found to have been committed at Ember? Mr. McMahon said no. Mr. Kelley said that is during his entire nine years at Ember? Mr. McMahon said yes, pretty much.

Mr. Kelley said that he had no further questions for Mr. McMahon.

Mr. Blake said that he has some questions that he would like to ask, and introduced himself to Mr. McMahon.

Mr. Blake asked Mr. McMahon about when he said he has taken action when the music gets too loud, he asked how he determines that the music is too loud? Mr. McMahon said that he just makes sure that it does not get too loud. Mr. Blake asked if he has ever gone back 150' to listen to the music? Mr. McMahon said that he does not leave the premise when he is managing the restaurant. Mr. Blake said that he would not know then if the music is plainly audible at 150'? Mr. McMahon said correct.

Mr. Blake asked Mr. McMahon what the music structure is that he talked about? Mr. McMahon said that it is a built-in structure that helps to protect the noise, so they respect their neighbors. Mr. Blake asked if it was interior? Someone else was speaking in the background, and Mr. McMahon repeated that it is a sound wall, outside.

Mr. Blake asked who was speaking in the background helping with his answer? Mr. McMahon said nobody.

Mr. Blake asked if the sound wall has been in effect since August 2019? Mr. McMahon said yes. Mr. Blake asked him again that he was not aware of any violations or complaints of the entertainment or liquor license, is that true? Mr. Kelley objected and stated it was a compound question.

Mr. Blake asked if Mr. McMahon was not aware of any violations of the liquor license or the entertainment license? Mr. Kelley objected.

Mr. Blake said that the Chairman can overrule it. Mr. Kelley said that he can't because it is an improperly phrased question, it is a compound question.

Mr. Ballantine said that he will overrule it because he wants the question asked. Mr. Kelley said to note his objection, because it is compound, confusing, and has two facts in one question.

Mr. McMahon said that he will not answer the question.

Mr. Blake said that he believes that Mr. McMahon testified that he was not aware of any complaints in the nine years that he has been there, is that correct? Mr. McMahon said that he is aware of the complaints, but they are not valid.

Mr. Blake asked why he said that they are not valid? Mr. McMahon said because they follow all of the rules that they stand by.

Mr. Blake said that he had just told him that he never walks out 150' from the restaurant to see if the noise is actually too loud, does he? Mr. McMahon said no.

Mr. Blake asked when they close the restaurant, what time do they really close? Mr. McMahon said that everyone is out of the building by 1:00 AM.

Mr. Blake asked if they send anyone out into the parking lot to make sure that the patrons are leaving, and not hanging around making loud noises? Mr. McMahon said yes they do. Mr. Blake asked who they send out there? Mr. McMahon said sometimes he does and sometimes it is doormen. Mr. Blake asked if he has ever seen patrons hanging out in the parking lot and have had to ask them to leave? Mr. McMahon said no, never.

Mr. Blake asked how many days per week he works there? Mr. McMahon said that he works six nights. Mr. Blake said, so over the six nights, in nine years. Mr. McMahon said that everyone leaves orderly and in a good fashion. Mr. Blake asked if he has ever heard anyone making noise while leaving. Mr. McMahon said not loud enough to disturb people, no. Mr. Blake asked if he knew if any of the doormen? Mr. McMahon said no, they have had no issues with that.

Mr. Blake said he had one last question, he asked earlier if there was anyone in the background helping to answer questions, because he could hear someone answer the question, it sounded like a woman. He asked Mr. McMahon if he knew he was under oath, and if he still says there was no one with him? Mr. McMahon said yes, and that he is having dinner with his mother, and she is sitting next to him.

Mr. Blake said that he had nothing further.

Mr. Kelley asked if Mr. Chris Ward was on the call? Mr. Ward confirmed he was on the call.

Mr. Ballantine asked Mr. Ward if he swore to tell the truth, the whole truth and nothing but the truth? Mr. Ward said that he does.

Mr. Kelley asked Mr. Ward if he was familiar with Ember Restaurant? Mr. Ward said he was very familiar with it. Mr. Kelley asked how long he has been familiar with the restaurant? Mr. Ward said since it opened.

Mr. Kelley asked what the nature is of his familiarity, if he was a patron? Mr. Ward said yes, he is a patron.

Mr. Kelley asked if he lived in the vicinity of Ember? Mr. Ward said that he lives on Sea Street, which he would not really consider the vicinity, but it is walking distance, so yes, he would say he is.

Mr. Kelley asked if he has had any correspondence with the Board of Selectmen, or any other representative of the Town, regarding Ember? Mr. Ward said that he wrote an email to the Board of Selectmen, however, it was more specific to The Port.

Mr. Kelley asked if he could describe the nature of the email? Mr. Ward said that the nature of the email was that on his street, the noise concern seems to be less about music and more about people. He said that those people are coming from other places, besides Ember and The Port. He said that he knows people, plenty of people, that go to other bars and restaurants and walk by Ember, where these complaints are being heard. He cannot say they are not coming from Ember, but everyone is within walking distance, and there is plenty of noise that comes through, but it is coming from all of the restaurants.

Mr. Kelley asked if Mr. Ward has ever called Ember to complain about their operation at all? Mr. Ward said no, until the one woman on the north east corner mentioned how far away she lived, he was shocked to hear that anyone could hear Ember from more than 50 yards away. He has walked to the end of his street and has not been able to hear anything from Ember, from where he is at Sea Street.

Mr. Kelley asked if Mr. Ward has been contacted by any representative of the town in regards to problems with the operation of Ember? Mr. Ward said no, not at all, and added that he never got a response to the email he sent to the Board of Selectmen either. He said that he also had sent it to administration, to ensure they received it, and added that he noticed it also was not included in the packet. Mr. Ward said that he has not been contacted, he has seen emails going around from residents trying to mobilize about the noise at Ember, but he has not been contacted directly at all.

Mr. Kelley said that he had no further questions for Mr. Ward.

Mr. Blake said that he had a couple of quick questions for Mr. Ward. He asked Mr. Ward about the noise coming from people, and if he would agree that he is not sure if the noise is coming from other locations, or could be coming all from Ember, or could be none from Ember, he was not sure? Mr. Ward said that is correct, yes. He said that he knows in their neighborhood, people that have ordered an Uber driver, and have been told to meet them in the Sea Street parking lot, but those people had been at Three Monkeys, Hot Stove or Perks. He added that he is surprised that Perks is not on this call, because in his opinion, most of the noise is coming from Perks.

Mr. Blake asked if Mr. Ward was closer to Perks then he is to Ember. Mr. Ward said that he is closer to The Port, and then Perks and then Ember. Mr. Ward added that most of the noise that he hears is from Perks Beer Garden.

Mr. Blake asked how he would know that? Mr. Ward said that he can just tell, he knows which is which, because he lives two houses from The Port, and he can tell when one musician starts and another finishes.

Mr. Blake asked if he knew how far that is in feet? Mr. Ward said probably 30 to 50 yards from the Port parking lot.

Mr. Blake asked if he can hear music from the Port? Mr. Ward said yes, he can hear music from both places, The Port and Perks. He said that he cannot hear a thing from Ember, even if he was standing on Route 28.

Mr. Blake asked how he could distinguish if he was hearing noise coming from Ember? Mr. Ward said he has never heard anything from Ember, and he would know if he was hearing something from that far away. He said they would have to have a concert there for him to hear something.

Mr. Blake asked how far away he was to Ember? Mr. Ward said, he was not sure, maybe a little less than a half mile.

Mr. Blake said that he had no further questions.

Mr. MacAskill asked if the previous speakers, Mr. Ward and Ms. Cox could identify when they sent the emails to the Board, if it was prior to the

packet date of March 22nd? Mr. Ward said that he sent it on April 5th, then corrected himself, and said that he sent it on March 30th.

Mr. MacAskill asked if Ms. Cox was still on the call, but he believed she had stated she sent the email three weeks ago. Ms. Cox did not respond.

Mr. Ward asked if Perks was going through the same process with their renewals for their liquor and entertainment licenses? He said he knows they have received violations recently, and The Port has not, so he was wondering if they were going through the same hearing?

Mr. Ballantine said that the hearing tonight is for Ember and The Port. Mr. Ward asked when the hearing will be for Perks Beer Garden, he would like to make sure he has that date? Mr. Ballantine said that he would have to check with Administration on that.

Mr. Ballantine asked Mr. Kelley if they were getting close to being through the witness list, because they seem to be saying the same things right now.

Mr. Kelley disagreed and said each witness added a different perspective, but directly to his point, he does not believe he has any further witness to call to present any further information regarding Ember.

Mr. Kelley said he was not sure if there was anyone else on the call that would like to speak on behalf of Ember, if it would be the Chairman's practice to do so?

Mr. Jake Domos, Harwich resident, said that he would like to speak.

Mr. Ballantine asked Mr. Domos if he swore to tell the truth, the whole truth and nothing but the truth? Mr. Domos said that he does.

Mr. Howell asked if for the record Mr. Domos could answer what his relationship is with The Port or Ember?

Mr. Domos said that he has worked for the Brackett's at either Ember or the Port for over 10 years now. He said that he feels that this whole entire process has been really hard to watch. He said that all of the Board of Selectmen's body language seems so frustrated. He said that they have been doing everything they can to run respectful, good businesses. He said

he used to bartend and last year he was just the COVID police. Mr. Domos said that Mr. Ballantine was quoted as saying that they ignored COVID, and that is just wrong. He just wanted to second what Mrs. Brackett said, and how disappointed he is in how these two businesses are being treated.

Mr. Ballantine asked if there was anyone else that would like to be heard? There was no reply.

Mr. Ballantine asked Mr. Blake if they had heard from everyone and if it was appropriate to ask for a motion to close the hearing? Mr. Blake asked Mr. Kelley if he would agree with that?

Mr. Kelley asked if he was asking if he agreed with closing the hearing? Mr. Blake asked if he had presented all the evidence that he wanted to present? Mr. Kelley said that he had and had indicated that he had no further witnesses. Mr. Blake told Mr. Ballantine that he could entertain a motion to close the public participation portion of the hearing and move to deliberation.

Mr. McManus moved that they close the public hearing. Seconded by Mr. Howell.

Roll Call Vote: Mr. Howell - Aye, Mr. MacAskill - Aye, Mr. McManus - Aye, Mr. Ballantine - Aye. Motion carried by unanimous vote.

Mr. Blake said that it is important that while they heard the evidence for both licenses, that it is important that they take a vote separately for each license. He said that they have the option to renew, the option to not renew or the option to renew with modifications. He said that Mr. Powers can read them the standards for the liquor license, and they could deliberate on that, and then go on to deliberate on the liquor license. He said that they also have the option to continue this hearing to a specified date to deliberate then.

Mr. Kelley asked to be heard. Mr. Blake said that the public portion was closed. Mr. Kelley said that he is counsel to the licensee and said that they have an obligation to provide the licensee with a fair hearing based upon lawful procedure, that protects their constitutional rights. There was

talking over each other. Mr. Kelley asked for a ruling for the Chairman on his objection and a motion to strike.

Mr. Ballantine overruled, so that they can move forward. Mr. Kelley asked for his objection to be noted.

Mr. Powers re-read the standards that he read in the beginning of the hearing.

Mr. Kelley said that he objected to Mr. Powers statements before, and repeated his objection. Mr. Ballantine said that he is going to ignore that at this point because they closed the public hearing, and are now in the Board of Selectmen's hearing.

Mr. Ballantine said that at this point it seems prudent to go through the eight Ballarin Factors, specifically to see where they stand.

Mr. Blake said that they do not need to go through all eight, to the extent that there was testimony that would implicate one or two, specifically noise. He said that they can certainly deliberate on that particular factor, or deliberate on all of them, it was up to them.

Mr. Ballantine said he likes that idea, and noise being the primary factor.

Mr. MacAskill said that he had a procedural question. He said that this hearing seems much different, then the next one will be, based on information provided. He asked if they have to use the Ballarin Factor on this case, or if they can vote not to use the Ballarin Factor to make a decision?

Mr. Blake said that it is his recommendation to use the Ballarin Factors, as these factors have been articulated by the Supreme Judicial Court, with respect to the denial of a license. He said essentially, that is what they would be doing here, is denying a license. These are the factors that have been tried and true, in a hearing. He said that they can deliberate and they can talk about these factors, he does not know what other factors they would be bringing into play, but these factors need to be considered in any non-renewal.

Mr. Kelley asked that his objection be noted on Attorney Blake's statement and move to strike and asked for a ruling on his objection.

Mr. Blake said that is not appropriate and Mr. Kelley no longer has an opportunity to speak.

Mr. Ballantine said they were moving ahead to the other Board members and asked if Mr. Howell.

Mr. Kelley interrupted, and asked Mr. Ballantine to note his objection. Mr. Ballantine said that he will not, because he is not a part of this discussion.

Mr. Kelley said that the quasi-judicial hearing continues unless and until they arrive at a decision, and said that Mr. Blake is completely misplaced on that position.

Mr. Ballantine said they were moving ahead. Mr. Blake said that he would suggest that they recess, or continue this until next week, and have Mr. Kelley provide them with a legal memo to support his position that he has the right to interject in the Board's deliberation of a license.

Mr. Howell moved to recess until 5:30 pm next Monday night.

Mr. Ballantine asked if there was a second. There was not second and Mr. Blake said that it was up to them, but the continued interruption was not appropriate at this stage of the proceeding. Mr. Ballantine said that he was not going to accept any more interruptions from Mr. Kelley, and if he does, he will recess and that will cost them all time and effort.

Mr. Ballantine asked if Mr. Howell has any comments on the noise issue?

Mr. Howell said that he retains his rights to add some comments later.

Mr. Ballantine asked if Mr. McManus had any comments? Mr. McManus said that it occurs to him that they have several issues they need to make motions on; the issue of the liquor license, the issue of the entertainment license, and the issue of any potential discipline over the complaint from last summer. He asked, if they take them up separately?

Mr. Ballantine said he believed they take up the issues of the liquor and entertainment separately, but they have not talked about the issues of the complaint

Mr. Blake said to discuss each separately, and take a separate vote on each one.

Mr. McManus said that based from the evidence, letters and reports from the noise committee, noise is an issue. He said that he does not think that the noise issue, rises to the level of denying the license. He said that he is not sure given the conflicting evidence, that it is purely music noise. He said if it was, that would indicate they should take care of it when considering the entertainment license, but it also could include the operational noise, which happens at the time that the establishment closes. If that is the case, then certain recommendations or conditions would seem appropriate. He would like to know what how his fellow Board members feel.

Mr. MacAskill asked if they were focusing on noise? Mr. Ballantine said yes, that noise seemed to be rising to the top.

Mr. MacAskill said he is going to take a different approach, and start from the beginning. He said that he wanted to thank everyone that talked tonight, and apologized and said except for Mr. Kelley, because often he got lost with the objections. However, he said that he understood what he was doing. Mr. MacAskill said that as far as the violations go, it was a violation. However, he also sympathizes with this business, and said that COVID has been tough for a lot of business and there was a lot of frustration. He said that he listened to Ms. Ribeiro's testimony, and that was the most striking to him. He said that is because she was the person on duty, she swore to tell the truth, and her testimony meant something to him. He understood what she was staying about delivering the food and beverages. Mr. MacAskill said absent the social media, which may not be appropriate about the Harwich tea party, this was a violation and they were found guilty of the violation. However, he is not willing to punish them with anymore then a warning. He said that if they polled all the businesses, there were probably more with violations during COVID. He said also as far as the liquor license, he is not willing to take away their liquor license, based on the testimony tonight. Mr. MacAskill said that also regarding to Mrs. Brackett's testimony, he agreed with a lot of it, but he thinks it goes

both ways. He said that he thinks that the Board, as the local licensing authority, has the responsibility to act on resident complaints. He added that the attack on the Board members, as they talk about the attorney's objection to everything, and an email from Attorney Tomlinson trying to present 250 emails to the Board for the record. He said he asked his question to Mr. Ward and Ms. Cox, because they did receive emails, but they were in blocks that were sent to the Town, that were sent after the original hearing date, and after they received their packet. He said that there were several emails that were sent on both sides, before or against and there has been a giant division. There is no mistake, from him at least, on what The Port and Ember have done for the Town and for Harwich Port. He said, to his detriment, he has fought for night life and the bands in Harwich Port. He said that to be attacked saying his against it, people are not reading minutes, or listening to meetings. He is not willing to take any motion against the liquor license, and he will support the license. For the last piece about the entertainment, he said that Mr. McManus outlined it, but there is a noise problem, and those that do not think so, are not paying attention. He does agree with some of the speakers tonight, and said that there are a lot of people that enjoy what is going on with the entertainment. He said there are also some that do not enjoy it, and believe their livelihood and quality of life have been interrupted by what the Board is allowing to happen in Harwich Port. He said that he will save those comments for the next hearing, as they have more to do with The Port.

Mr. MacAskill said that he asked the question prior to the hearing, and there were no noise violations this summer for Ember. He said that tonight's testimony unfortunately does not demonstrate that there is a problem at Ember. He will have a problem supporting anything that is not realistic. He does think that there is a noise problem, and there have been recommendations that have come out by the noise committee. He said that they have been criticized for not taking action, but he pointed out that they are in a pandemic, they all have their own lives, and their own businesses. He said that they may not be as timely as they should, but prior to the lawsuits being filed, it was coming forward for the Board to discuss about the noise throughout Harwich. These businesses have evolved, perhaps more then they should have, but is that something they decide tonight, or perhaps across the board? He reserves the right to make more comments later.

Mr. Howell asked if the current licenses, both liquor and entertainment, are conditioned in what way, in terms of inside/outside? He asked what was approved most recently?

Mr. Powers said that what he has presently, in the packet is the memo on Seasonal Entertainment renewals. He said that he does not have the file in front of him, but the application they were seeking, the Board had approved in 2020 for the annual entertainment, weekday: 6PM - 10PM for outside and Sunday: 10AM - 12AM for inside and 10AM - 10PM for outside. He said that they are requesting for this year: weekday 10AM - 10PM or outside and 10AM - 12AM for inside, and Sunday 10AM - 10PM for outside and 10AM - 12AM for inside.

Mr. Howell asked when the pouring ended inside/outside, the actual conditions for alcoholic beverages. He said that he is not prepared to vote without knowing what the current conditions are for the time, relative to what they had been.

Mr. MacAskill said that he thinks he knows where Mr. Howell is going with this, and when these restaurants were originally approved the outdoor bars did not exist. He said that they were added after the fact. He asked if that is where Mr. Howell was going?

Mr. Howell said yes, and that originally that was a relief that was granted, but not a permanent condition that they anticipated going forward. That is why he wanted to know what they originally agreed to. He said that the entertainment and service is intertwined.

Mr. MacAskill said that they had approved on February 26, 2018, the revised site plans, which shows the bars. However, he said that they never really went through any exercise for what Mr. Howell is talking about. He knows for the other establishment, that entertainment license was granted May 8, 2018 with a very specific criteria. He added that they had not actually come back and that it has completely morphed into something different than what they had actually approved. Mr. MacAskill said that as far as the outside bar, it was outside of their purview, and all they did was approve the revised site plan. He is not sure it makes sense to come back, but will leave that to the Board. A fair amount of anxiety has been created over this, and it has been daunting for those that wanted to speak tonight.

Mr. McManus said he is fine going either way; however, he would like to continue to plow ahead and take care of both of these hearings tonight.

Mr. Ballantine said he would agree, and the focus of their complaints is the noise issue. He agrees with Mr. Howell there are different contributors to it. He always hopes there would be good communication. He would be in favor of moving ahead, and he does not see a reason for digging into the liquor license but would like to hear some suggestions on the noise.

Mr. Joe Ganley expressed his desire to speak and said that there were 90 people on the call. He said that they had not given people the chance to speak. Mr. Ballantine said that he believed they gave everyone a chance to speak before they closed the public hearing. Mr. Ganley said that they did not.

Mr. MacAskill spoke up, through the Chairman, and stated that they had a public hearing going on since about 5:30 pm, about Ember, but have not spoken about The Port. He said that they absolutely, on more than one occasion, and with great objection from Mr. Kelley, they did close the public hearing, but they did offer for people to speak over and over. Mr. Ballantine thanked Mr. MacAskill and said they did offer everyone a chance to speak. Mr. Ganley expressed his disagreement.

Mr. MacAskill moved to approve the Seasonal All Alcoholic Beverages licenses for Ember d/b/a Ember, located at 600 Route 28 in Harwich Port,; for 2021 consisting with all last year's times and any and all restrictions put on the license. Seconded by Mr. McManus.

Roll Call Vote: Mr. McManus - Aye, Mr. Howell - No, Mr. MacAskill - Aye, Mr. Ballantine - Aye. Motion carried by a vote of 3-1-0, with Mr. Howell against.

Mr. Ballantine asked if Mr. Blake could review what their options are, in regards to the entertainment license?

Mr. Blake said that the options are very similar with respect to the liquor license. He also noted that there was a discussion about an earlier violation in regards to COVID, and asked if they were planning to take action on

that, or table it? Mr. Ballantine said they would table it for now, and move onto the entertainment license.

Mr. Blake said that they can deny the renewal, or renew it with conditions. He said that it is important for the Board to know that an entertainment license is a little bit different than the liquor license. He said that the Board can deny a license, and the standard is that the license must be granted, unless the Board finds that the license, taken alone or in connection with other license activity on the premises, would adversely affect the public health, safety or order, because it cannot be conducted in a manner so as to protect employees, patrons, and members of the public inside or outside the premises from disruptive conduct, from criminal activity, or from health, safety or fire hazards; (b) prevent an unreasonable increase in the level of noise in the area caused by the licensed activity or caused by patrons entering or leaving the premises; or (c) prevent an unreasonable increase in the level of pedestrian or vehicular traffic in the area of the premises or an unreasonable increase in the number of vehicles to be parked in the area of the premises. Mr. Blake said the burden of proof is on the Board to show that the license was an issue, due to one of those issues. That being said, a complete non-renewal would have a heavy burden. However, the Board can condition an entertainment license, such that it could issue the license with conditions that it protects the issues listed. He said that the court would typically uphold those.

Mr. Ballantine asked if there were any comments, and stated that in the past, they have discussed in other situations restricting to acoustic only, or inside only, with no music outside and house system with lower volumes. He would like suggestions, comments, or do we do nothing?

Mr. McManus said that he wanted to know what was approved for last year, and the year before. He said that he looked in the application that is in the packet, and the application for the entertainment license, there is no place for showing what the hours of operation is.

Mr. Powers explained that there is a memo from staff in the packet, and that information was compiled from a narrative provided by the applicants. Mr. Powers read through the memo, and stated that; the licensee below was contacted via email to outline the times and location, of whether it is for inside or outside, of where they are requesting to have entertainment. All information below was emailed directly to staff. For 2021, Ember

Pizza was requesting: Weekday 10am - 10pm, outside and 10am - 12am inside; Sunday 10am - 10pm outside, and 10am - 12am inside. This would be for recorded or live music with amplification. Mr. Powers explained that the Board had adopted for 2020, a condensed time with regard to weekday, which included; weekdays: 6pm - 10pm for outside, and Sunday: 10am - 12am inside and 10am - 10pm for outside.

Mr. Howell asked if that was for amplified? Mr. Powers said that was not indicated.

Mr. MacAskill said that the only change, going back two years, was that they are requesting for outdoor to go from 10am - 10pm, that is there request. And yes, both included recorded or live music with amplification.

Mr. Ballantine said that was his point, is that they are actually asking to increase the length of entertainment.

Mr. Howell said that if it is amplified, they have a general restriction about how far from any premise that amplification can go. His recommendation would be to restrict them outside with 6pm - 10pm, with acoustic, and amplified only inside.

Mr. McManus asked for clarification if Mr. Howell's recommendation was for weekday and Sundays, because they were approved last year for 10am - 10pm outside.

Mr. Howell said interestingly it has not come up to anyone that, as Mr. Kelley pointed out, the closeness to Sea Street, and the Church that is there and he thinks it is a mistake to have music going on during church service. He thinks it should be acoustic only starting at 6pm.

Mr. McManus moved that they grant a weekday entertainment license for 10am - 12am inside, and 6pm - 10pm outside, limited to acoustic, non-amplified music. Sunday 6pm - 10pm outside acoustic, non-amplified music and 10am - 12am outside. Seconded by Mr. Howell.

Mr. Macaskill said to clarify, the restriction allows for amplification indoors, but acoustic only outdoors? Mr. Howell said yes, but they will still be restricted with general noise ordinance with how far that can travel.

Mr. McManus said that there are still acoustic instruments that can be quite piercing, and they will have to make sure they will not override the Town's noise standards. He said quite a number of years ago, they went around and around with an establishment, and they wound up having to restrict the instruments that they were allowed to play. He said that this is not without precedence, in this town.

Mr. Howell said just to be clear, that he finds this business different from the other business, with their location. This is about this establishment in this particular place.

Roll Call Vote: Mr. MacAskill - No, Mr. Howell - Aye, Mr. McManus - Aye, Mr. Ballantine - Aye. Motion carried by a vote of 3-1-0, with Mr. MacAskill against.

Mr. Howell expressed his desire to continue the hearing for The Port to another time, as he is not able to continue it this evening due to health issues.

The parties discussed the continuation of the hearing for The Port, and how much time was needed to ensure each party had the time to share the documentation required. Mr. Kelley confirmed his availability, and requested to continue the hearing as soon as possible, for the licensee.

Mr. Howell moved to continue the hearing to time certain of 5:30 pm, on Tuesday, May 4, 2021. Seconded by Mr. McManus.

Roll Call Vote: Mr. Ballantine - Aye, Mr. McManus - Aye, Mr. Howell - Aye, Mr. MacAskill - Aye. Motion carried by unanimous vote.

Mr. McManus asked about the violation that was still in question. Mr. Ballantine said that they could continue that topic till the next hearing.

Mr. MacAskill said that he was going to make a motion that they uphold the hearing officer's finding of facts, for the COVID violation from May 22nd and that it be punishable by a written warning. Seconded by Mr. McManus

Roll Call Vote: Mr. MacAskill - Aye, Mr. Howell - Aye, Mr. McManus - Aye, Mr. Ballantine - Aye. Motion carried by unanimous vote.

ADJOURNMENT

Mr. Howell moved that they adjourn at 9:00 pm. Seconded by Mr. McManus.

Roll Call Vote: Mr. MacAskill - Aye, Mr. Howell - Aye, Mr. McManus - Aye. Mr. Ballantine - Aye. Motion carried by unanimous vote.

Respectfully submitted,

Lisa Schwab
Board Secretary

