

The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
Boston, Massachusetts 02114

Steven Grossman
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

DECISION

ABRACADABRA FLOWER & GIFT SERVICE, INC.
1701 ACUSHNET AVENUE
NEW BEDFORD MA 02746
LICENSE#: NEW
HEARD: JUNE 6, 2012

This is an appeal of the action of the New Bedford Licensing Board (the "Local Board") in denying the M.G.L. c. 138, §15 wine and malt beverages license application of Abracadabra Flower & Gift Service, Inc. (the "Applicant" or "Abracadabra"). On March 26, 2012, the Local Board held a hearing that resulted in a denial of Abracadabra's application. The Applicant timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, June 6, 2012.

The following documents are in evidence as Jointly Agreed upon Exhibits:

1. Minutes of the New Bedford Licensing Board Hearing;
2. Pickup and Delivery Protocol of Abracadabra Flowers & Gift Service, Inc.;
3. Transcript of the New Bedford Licensing Board Hearing of Abracadabra's Application held March 26, 2012;
4. Newspaper/Published Advertisement of Licensing Board Hearing for Abracadabra's license Application;
5. Joint Pre-Hearing Memorandum;
6. Retail Package Store Application of Abracadabra Flower & Gift Shop;
7. Restriction Agreement;
8. New Bedford Licensing Board's Notice of Denial to Abracadabra;
9. Abracadabra's Notice of Appeal; and
10. Commission Notice of Appeal Hearing.

Abracadabra Exhibits:

- A. List and Map of Year Round §15 Retail Package Store Licenses for 2012;
- B. Notice of Public Hearing to be held on March 26, 2012 for the application of Abracadabra Flower & Gift Services, Inc.

There is one (1) audio recording of this hearing, and several witnesses testified.

FACTS

1. Abracadabra is a Massachusetts corporation duly organized by law and has a principal place of business at 1701 Acushnet Avenue, New Bedford, Bristol County, Massachusetts. (Exhibit 5)
2. Abracadabra is in the business of selling specialized and personalized gifts for all occasions such as floral arrangements, balloons, plush animals, and gift baskets. (Exhibit 5)
3. Mrs. Pereira is the sole stockholder and Director of this business. She has owned this business for twenty-two (22) years. (Testimony, Exhibits 1, 3)
4. Eighty-five (85) percent of the business is deliveries. (Testimony)
5. Mrs. Pereira testified that over the years, people have asked her if she could add bottles of alcoholic beverages to her baskets for deliveries. (Testimony)
6. In December, 2011, Mrs. Pereira inquired about obtaining an alcoholic beverages license for her business. On Valentine's Day, 2012, Mrs. Pereira started the process to obtain an alcohol license for her business. (Testimony)
7. Mrs. Pereira called the Local Board and spoke to Mr. Nick Nanopoulos, the Executive Director of the Local Board, about getting a license for her flower shop. (Testimony)
8. Mr. Nanopoulos told her the city of New Bedford has never issued an alcohol license to a business of this type. (Testimony)
9. Abracadabra applied to the Local Board for a new wine and malt beverages only retail package store license. (Exhibit 5)
10. Abracadabra applied for said license as it wished to expand its sales items to include gift baskets with wine or malt products or gift packaged wines or malt beverages, and to provide delivery services of the purchased items. (Exhibit 5).
11. The original draft of the statutorily required publication, of which Mrs. Pereira was given a copy and told would be published as notice for the Local Board hearing, did not contain any language regarding non-transferability of the license. (Testimony, Exhibit B)
12. The actual notice which was published in the local newspaper regarding this application does contain the language, "The intended ('restricted') use of the license is for the sale of wines and malts, which will be included in flower arrangements, gift baskets, and favors only; which, if approved, will be a non-transferable license per agreement with the applicant". (Exhibit 4, Testimony)
13. Mrs. Pereira did not know that this notice regarding non-transferability was going to be published regarding her application. Mrs. Pereira did not agree to this condition. (Exhibit 4, Testimony)

14. On March 26, 2012, the Local Board held a hearing on the application of Abracadabra. (Exhibits 1, 3, 4, 5)
15. At all times relevant hereto Steven A. Beauregard, Ronald E. Frenette, and Marcelino G. Almeida constituted the Local Board. (Exhibit 5)
16. At the Local Board's hearing, Mrs. Pereira testified that she understood that she could only sell alcohol when inside of a gift basket. (Exhibit 3, pg. 11)
17. There was no testimony in opposition to this application. (Exhibit 3)
18. At the hearing before the Local Board, one (1) person spoke in favor of Mrs. Pereira's application.
19. Mr. Tony Folco, a jeweler in business for seventy-two (72) years, and a business neighbor of Mrs. Pereira for twenty-two (22) years testified that she operates a very good business. (Exhibit 3)
20. There was no evidence presented that the Local Board considered factors such as traffic, noise, size, or the reputation of the applicant. (Exhibits 1,3)
21. There was no evidence introduced at the Local Board hearing as to the number of off-premises §15 licenses which already existed within close proximity to the applicant's premises. (Exhibits 1, 3, 8)
21. Abracadabra introduced into evidence a Delivery Protocol which it intended to use regarding the sale and delivery of those gift items containing alcoholic beverages. (Exhibits 2, 5)
22. Abracadabra also introduced a delivery log which Abracadabra would require its drivers and deliverers complete upon delivery of gift items containing alcoholic beverages. (Exhibits 2, 5)
23. The proposed Delivery Protocol and Delivery Log complied with the requirements of M.G.L. c. 138, §22. (Exhibits 2, 5)
24. Abracadabra also expressed to the Local Board that it would obtain the required transportation permits from the Commission for those vehicles which would be used to transport items containing alcoholic beverages. (Exhibits 1, 2, 3, 5)
25. There are no other businesses holding a M.G.L. c. 138, §15, wine and malt beverages license issued by the Local Board, which engages in the sale of and delivery of gift baskets which contain alcoholic beverages. (Exhibits 1, 3, 5)
26. At the conclusion of the hearing, the Local Board moved to grant the application of Abracadabra subject to a restriction on transferring the license (as well as two other conditions). (Exhibits 1, 3, 7)
27. Abracadabra did not agree to this restriction (although it agreed to the two other conditions). (Exhibits 1, 3, 7)

28. There was no further evidence or testimony introduced after the hearing on Abracadabra's application was closed. (Exhibits 1, 3)
29. Thereafter, Attorney Cabral asked Chairman Beauregard what would happen if the applicant did not agree to this restriction. (Exhibit 3, Transcript page 22)
30. Chairman Beauregard responded, "Okay. We're not going to issue the license." (Exhibit 3, Transcript page 22)
31. Whereupon, Commissioner Frenette stated, "I make a motion to reconsider the vote if the petitioner will not agree to the non-transferability of the license. I make a motion to deny the application at this time." (Exhibit 3, Transcript page 22)
32. After Abracadabra would not agree to the transfer restriction on the license, the Local Board voted to deny the license. (Exhibit 3, Transcript page 22)
33. After the Local Board moved to disapprove the application, Abracadabra's counsel, requested that the Local Board state its findings for disapproving the application. (Exhibits 1, 3)
34. At that time, the Local Board stated that the basis of the denial was public need. (Exhibits 1, 3)
35. This was the first time anyone used the term "public need". The issue was raised only after Abracadabra refused to agree to the transfer restriction as a condition of the license. (Exhibits 1, 3)
36. The Notice of Denial by the Local Board states that the Local Board voted to deny the application because the applicant failed to agree to have all three (3) conditions placed on the license, if granted. (Exhibit 8)
37. This Notice of Denial is defective as Mrs. Pereira agreed to two out of three of the conditions. Mrs. Pereira did not agree to the restriction on transferring the license. (Testimony, Exhibits 1, 3, 8)
38. The quota in New Bedford for M.G.L. c. 138 §15 wine and malt beverages licenses is twenty-one (21).
39. There are currently nine (9) retail package store wine and malt beverages licenses in existence in New Bedford. (Exhibit A, Testimony)

DISCUSSION

The statutory language is clear that there is no right to a liquor license of the type specified in M.G.L. c. 138, §15. A Local Board has discretion to determine public convenience, public need, and public good, with respect to whether to grant a license to sell alcoholic beverages. See Donovan v. City of Woburn, 65 Mass. App. Ct. 375 (2004); Ballarin, Inc. v. Licensing Board of Boston, 49 Mass. App. Ct. 506 (2000).

“Need in the literal sense of the requirement is not what the statute is about. Rather the test includes an assessment of public want and the appropriateness of a liquor license at a particular location.” Id. at 311.

The facts in this case and the consideration by the Local Board are analogous to those in the case of Donovan v. City of Woburn, 65 Mass. App. Ct. 375 (2006). In Donovan, the Appeals Court discounted and deemed arbitrary and capricious the same reasons presented by the Woburn licensing authorities in denying the applications. In this case, the Commission finds the Local Board acted in the same manner.

The Local Board “may exercise judgment about public convenience and public good that is very broad, but it is not untrammelled.” Ballarin, supra at 511. Instead, “[w]here the factual premise on which [the board] purports to exercise discretion is not supported by the record, its action is arbitrary and capricious and based upon error of law, and cannot stand.” Ruci v. Client’s Sec. Bd., 53 Mass.App.Ct. 737, 740 (2002). A Local Board must state the reasons for its decision whether or not to issue the liquor license. M.G.L. c. 138, §23; Exotic Restaurants Concept, Inc. v. Boston Licensing Board, Suffolk Superior Court, C.A. No. 07-3287 (Borenstein, J.)

Adjudicatory findings must be “adequate to enable [a court] to determine (a) whether the order and conclusions were warranted by appropriate subsidiary findings, and (b) whether such subsidiary findings were supported by substantial evidence.” Charlesbank Rest. Inc., v. Alcoholic Beverages Control Comm’n, 12 Mass.App.Ct. 879, (1981) quoting Westborough. Dep’t of Pub. Util., 358 Mass. 716, 717-718 (1971). “General findings are insufficient, and if the licensing board does not make sufficient findings, it remains the Commission’s obligation to articulate the findings of fact, which were the basis of the conclusions it drew, and not merely adopt the findings of the board. Charlesbank Rest. Inc., 12 Mass. App.Ct. at 879. Recitals of testimony do not constitute findings. Johnson’s Case, 355 Mass. 782 (1968); Exotic Restaurants Concept, Inc. v. Boston Licensing Board, Suffolk Superior Court, C.A. No. 07-3287 (Borenstein, J.)

“Consideration of the number of existing licenses in the area and the views of the inhabitants in the area can be taken into account when making a determination, as well as taking into account a wide range of factors—such as traffic, noise, size, the sort of operation that carries the license and the reputation of the applicant.” Ballarin, supra. Neither the Local Board’s broad discretion nor the limitations on judicial review, however, mean that the [local board] can do whatever it pleases whenever it chooses to do so. See Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 379 (2006).

The Local Board’s Notice of Decision states that the disapproval was based upon public need. However, a review of the record of the Local Board hearing illustrates that the aforementioned Ballarin factors were never discussed at the hearing, and are not part of the record. This application had no opposition, and there was, in fact, testimony in support of this application. The reputation of the applicant was discussed as being extremely good. Mr. Tony Folco testified at the Local Board hearing in support of Abracadabra’s application. The Local Board heard no opposition to this application from the community.

Moreover, there was no evidence or testimony presented at the hearing as to the number of off-premises §15 liquor licenses already existing within close proximity of the applicant’s business, or the types of business these licensees conducted. Even if, assuming arguendo, such evidence was presented, the Local Board would have been required to consider the need for the business the applicant sought to run, not the need for a business of the type typically run by others. Donovan v. City of Woburn, 65 Mass. App. Ct. 375 at 381 (2006).

Indeed, the proper assessment of public need requires a particularized inquiry into the sort of business that seeks the license. See Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 381 (2006). Abracadabra’s type of business was discussed in a very limited fashion. The applicant agreed that she would only sell

alcoholic beverages contained in the gift baskets, and the matter that was discussed during the majority of the hearing was the restriction which the Local Board wanted to place on the license for non-transferability. The Commission finds that the record from the Local Board reflects that Abracadabra's application was denied based on the non-transferability restriction not being agreed upon by Abracadabra.

While the local licensing authorities have the discretion to impose reasonable conditions on a license, M.G.L. c. 138, §23, ¶ 4, a condition that flies in the face of the plain language of chapter 138 is not reasonable. See Boston Gas Company v. City of Somerville, 420 Mass. 702, at 703 (1995). The Local Board's requirement that the license, if approved, would have to be surrendered upon the close of the applicant's business and not be transferable, is unreasonable. The Local Board has never placed such a condition on a license. Assuming the Local Board placed this condition for fear that a future transferee would be able to operate a package store type business, it has the power to prevent any transfer because all liquor license transfers must be approved by the Local Board. M.G.L. c. 138, §23.¹ Accordingly, the Local Board's requirement regarding transferring the license was unreasonable and contrary to law.

A Local Board may not deny a permit simply by conjuring a parade of horrors, particularly when it has the power to prevent them. Donovan v. City of Woburn, et al., 65 Mass. App. Ct. 375, 380 (2006); Britton v. Zoning Bd. of Appeals of Gloucester, 59 Mass App. Ct. 68, 75 (2003). Counsel for Abracadabra argued against the restriction being placed on this license because any future application to transfer this license must go before the Local Board for approval. The Local Board has the authority to decide future actions regarding this license. The Commission is persuaded by this argument, and finds that this is not a valid reason for which to deny this application.


The denial by the Local Board, which it claims was based on a determination of public need, is not supported by the record. The Local Board denied Abracadabra's application because Abracadabra would not agree to the restriction on transferring the license. Therefore, the Commission finds that the Local Board has not met its burden in showing that the denial of this license was based on evidence demonstrating that the public need would not be met by granting this license.

CONCLUSION

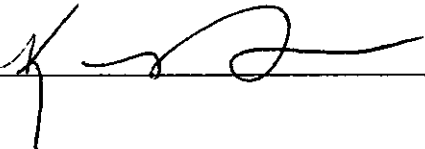
Based on the evidence and testimony at the hearing, the Commission **DISAPPROVES** the action of the Local Board for the City of New Bedford in denying the license application of Abracadabra Flower & Gift Service, Inc. **The Commission remands this matter back to the Local Board with the recommendation to grant the application for M.G.L. c. 138 §15 license and submit the application to this Commission for consideration of approval in the usual administrative course.**

¹ M.G.L. c. 138, § 23, ¶9 provides that "[a]ny license under this chapter held by an individual, partnership or corporation may be transferred to any individual, partnership or corporation qualified to receive such a license in the first instance, if, in the opinion of the licensing authorities, such transfer is in the public interest. If the local licensing authorities determine that an individual, partnership or corporation is not entitled to a transfer as aforesaid of a license granted by them, the applicant for such transfer may appeal to the commission as if such authorities had refused to grant the license to such any individual, partnership or corporation upon an original application therefor, and the decision of the commission upon such appeal shall be final."

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner 

I, the undersigned, hereby certify that I have reviewed the hearing record and concur with the above decision.

Kim S. Gainsboro, Chairman 

Dated: December 4, 2012

You have the right to appeal this decision to the Superior Courts under the provisions of Chapter 30A of the Massachusetts General Laws within thirty (30) days of receipt of this decision.

cc: Bernardo J. Cabral, Esq. via Facsimile
John Flor, Esq. Assistant City Solicitor, City of New Bedford
Local Board for the City of New Bedford
Frederick G. Mahony, Chief Investigator
Administration
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