

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

*Steven Grossman*  
*Treasurer and Receiver General*

*Kim P. Swinboro, Esq.*  
*Chairman*

**DECISION**

**ULTRA MART CONVENIENT STORES, LLC**  
**193 CENTRAL STREET**  
**LEOMINSTER, MA 01453**  
**LICENSE#: NEW**  
**HEARD: 2/27/2013**

This is an appeal of the action of the City of Leominster Licensing Board (the "Local Board" or "Leominster") in denying the M.G.L. c. 138, §15 retail package store wine and malt beverages license of Ultra Mart Convenient Stores, LLC (the "Applicant" or "Ultra Mart") located at 193 Central Street, Leominster, MA. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, February 27, 2013.

The following documents are in evidence:

1. Local Board's Hearing Notice dated July 30, 2012 for Hearing to be held August 13, 2012;
  2. Minutes of the Local Board's Hearing for August 13, 2012;
  3. Local Board's Decision dated August 16, 2012;
  4. Two (2) Photographs of the Outside Area of the Proposed Licensed Premises; and
  5. Map of the City of Leominster.
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- A. Agenda of the Local Board's Meeting held August 13, 2012;
  - B. Correspondence from the Local Board and the Commission to Applicant;
  - C. Seven (7) Photographs of the Interior of the Proposed Premises; and
  - D. Applicant's Petition, Signed by Eighty-six (86) People, in Support of their Beer and Wine License.

There is one (1) audio recording of this hearing.

**FACTS**

1. Ultra Mart Convenient Stores, LLC applied to the Leominster Licensing Board for a beer and wine, off-premises alcoholic beverages license pursuant to M.G.L. c. 138, §15 to be exercised at 193 Center Street, Leominster, MA. (Exhibit 1, Testimony)
2. The owner of the applicant, Tariq Khalil, currently operates a convenience store at the location. Mr. Khalil planned to add beer and wine as part of his offerings to customers. (Exhibit 1, Testimony)
3. Mr. Khalil currently holds two (2) alcoholic beverages licenses in other locales. (Testimony)

4. Prior to the hearing, members of the Local Board visited the proposed premises at 193 Center Street, and made first-hand observations as to the size and layout of the store. (Testimony)
5. On August 13, 2012, the Local Board held a public hearing on Ultra Mart's application as well as other applications for M.G.L. c. 138, §12 licenses. A number of the M.G.L. c. 138, §12 license applications were approved. Mr. Kalil appeared before the Local Board and offered testimony. (Exhibit 2, Testimony)
6. During the hearing before the Local Board, Commissioner Tata discussed his concerns about the amount of parking the applicant had available to its customers. (Testimony)
7. Commissioner Kelly said he was not in favor of a license being issued for that location. He, along with the other commissioners, felt that there were several issues regarding granting a license at this location, including that:
  - the location of the proposed premises is within close proximity to several other establishments that have full liquor licenses;
  - the storage capacity as well as floor space in the store is limited;
  - the store would be catering more towards beer and wine than convenience items;
  - beer and wine are not convenience items, and should not be advertised as such; and
  - granting a license at this location was not in the best interest of the city. (Exhibits 2, 3)
8. There were no citizens who spoke in favor or against the application. Although Mr. Kalil submitted a petition to this Commission during this hearing, it was not part of the record before the Local Board. (Exhibit D, Testimony)
9. There was no discussion surrounding the reputation of Mr. Kalil. (Testimony)
10. A member of the Local Board made a motion, which was subsequently approved 3-0, to deny the beer and wine package store license for Ultra Mart. (Exhibit 2)
11. The Local Board issued its written decision denying the application on August 16, 2012. (Exhibit 3)
12. The written decision states, the denial was based on the following:
  - the location for which the license was applied is within close proximity to several other establishments that not only sell wine and beer, but have full liquor licenses;
  - the storage capacity as well as floor space in the store is limited and will be catering more towards beer and wine than convenience items;
  - the Local Board felt that beer and wine are not convenience items, and should not be advertised as such; and
  - the Local Board felt that granting a license at this location was not in the best interest of the city. (Exhibit 3)

#### 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, 23. "[T]he provisions for the issue of licenses and permits [under c. 138] imply no intention to create rights generally for persons to engage or continue in the transaction of the business authorized by the licenses or permits respectively, but are enacted with a view only to serve the public

need and in such a manner as to protect the common good and, to that end, to provide, in the opinion of the licensing authorities, an adequate number of places at which the public may obtain, in the manner and for the kind of use indicated, the different sorts of beverages for the sale of which provision is made." Donovan v. City of Woburn, 65 Mass.App.Ct. 375, 378-379 (2004).

A local licensing authority 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). The Appeals Court has held that a local board may deny a license even if the facts show that a license could be lawfully granted. Donovan v. City Of Woburn, 65 Mass.App.Ct. at 379. A local board exercises very broad judgment about public convenience and public good, with respect to whether to issue a license to sell alcoholic beverages. Id.

A local board's determination to deny an application based on the lack of public need is not contrary to law where the local board considers the need for the particular business that the applicant sought to run and the local board applies its analysis to the applicant's proposed business and to the location of the proposed business. Donovan v. City Of Woburn, 65 Mass.App.Ct. at 380. It is well-settled that the test for public need includes an assessment of public want and the appropriateness of a liquor license at a particular location. Ballarin, Inc. v. Licensing Board Of Boston, 49 Mass. App. Ct. 506, 511 (2000).

In Ballarin, the Appeals Court held that "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." Ballarin, 49 Mass. App. Ct. at 511-512. "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." Id. "The opposition of the neighborhood, albeit an important factor for a licensing board to consider, does not convert the exercise of a licensing board's adjudicatory function into a plebiscite." Id.

Neither the 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 "may exercise judgment about public convenience and public good that is very broad, but it is not untrammelled." Ballarin, 49 Mass. App. Ct. at 511. Instead, "[w]here the factual premises 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 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.)

The Local Board rejected Ultra Mart's application, reasoning that "granting a license at this location was not in the best interest of the city." The Local Board felt that because the proposed location was "within close proximity to several other establishments that have all alcohol and beer and wine licenses" and thus there were a sufficient number of dispensaries in the area to fulfill the public need. The Local Board also expressed concern about the storage capacity for alcoholic beverages, parking capacity, busy intersection and the sort of operation (i.e. a convenience store) that the applicant was proposing. The Local Board felt that beer and wine are not convenience items, and should not be advertised as such.

The applicant argued that the decision of the Local Board should not be approved because it was inconsistent in its decision-making. The applicant argued the Local Board's granting of on-premises licenses under §12 was inconsistent with its decision to deny the application for a §15 license. But this analogy of comparing §12 licenses to §15 licenses is not appropriate and not persuasive. A 12 license is markedly distinct from a §15 license, not the least of which is the authority given under each license, viz., a §12 license authorizes the sale of alcoholic beverages to be consumed ON the premises where sold, while a §15 license authorizes the sale of alcoholic beverages to be consumed OFF the premises where sold. There was no inconsistency in the Local Board's decision-making.

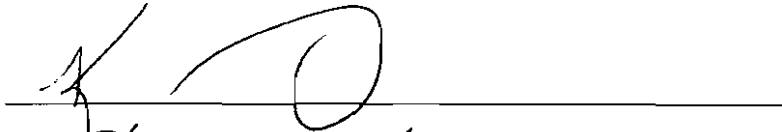
In this case, Leominster fulfilled its obligation to state the reasons for its decision and cited in numbered paragraphs, their subsidiary findings. Moreover, the reasons for denial, insufficient parking, traffic, and an adequate number of dispensaries in the area were based on information presented during the course of the public hearing and grounded in the cases of Ballarin, supra, Donovan, supra.

#### CONCLUSION

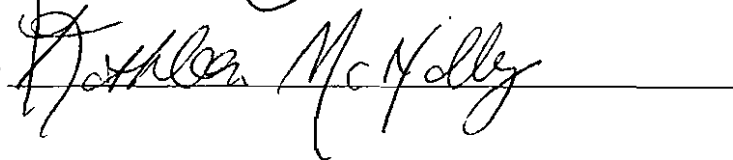
Based on the exhibits and testimony, the Commission **APPROVES** the action of the Local Board in denying the application of Ultra Mart Convenient Stores, LLC for a beer and wine license pursuant to M.G.L. c. 138, §15 to be exercised at 193 Center Street, Leominster, MA.

#### **ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Kim S. Gainsboro, Chairman,



Kathleen McNally, Commissioner



Dated: March 6, 2013

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: Brian W. Riley, Esq. via Facsimile 617-654-1735  
Frederick G. Mahony, Chief Investigator  
Administration  
File