



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

MORMAX CORPORATION DBA BJ'S WHOLESALERS
650 MEMORIAL DRIVE
CHICOPEE, MA 01020
LICENSE#: 022000106
HEARD: 07/17/2013

This is an appeal of the action of the City of Chicopee Licensing Board (the "Local Board" or "Chicopee") for denying the M.G.L. c. 138 §15 all alcohol package store transfer application (the "Application") of Mormax Corporation dba BJ's Wholesalers (the "Applicant" or "Mormax") to be exercised at 650 Memorial Drive, Chicopee, 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, July 17, 2013.

The following documents are in evidence:

Exhibits of the Applicant:

1. Mormax Retail License Transfer Application dated 2/9/2012;
2. a) Petition of Chicopee Residents, and b) Second Petition in Support of Mormax Application;
3. Local Board's Decision dated 5/22/2012 denying Mormax's Transfer Application;
4. List of Nearby Package Stores with each location noted on map of Chicopee area; and
5. Minutes of the Local Board's Meeting held May 17, 2012.

Exhibits of the Local Board:

- A. CD of Local Board's Meeting;
- B. Petition in Opposition to Mormax Application sent 7/17/2013;
- C. List of Nearby Package Stores with each location noted on map of Chicopee area; and
- D. Minutes of the Local Board's Meeting held May 17, 2012.

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

The Commission took Administrative Notice of the Licensee's file.

FACTS

1. Appellant Mormax Corporation dba BJ's Wholesale Club ("BJ's") and Appellant Winn Liquors, Inc. ("Winn Liquors") collectively the "Applicants" filed an application with the City of Chicopee License Commission (the "Local Board") to transfer Winn Liquors' package store license to BJ's for operation at BJ's existing premises located at 650 Memorial Drive in Chicopee ("BJ's Chicopee" or the "Location"). (Facts not in Dispute)

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2. The Local Board held a public hearing on the Application on May 17, 2012. Representatives of BJ's and Winn Liquors appeared in support of the Application. In addition, BJ's submitted petitions with the names of over 2,000 supporters, including approximately 640 Chicopee residents. Opponents of the Application also testified, and submitted a petition signed by fifty-one persons in opposition. (Facts not in Dispute).
3. In a letter dated May 21, 2012, (the "Decision") the Local Board cited two reasons for denying the Application: (1) "Lack of public need or interest for another liquor store in the immediate area where seven liquor stores exist within an 1.8 mile radius"; and (2) "An overflow crowd in the public hearing room with spoken opposition from fourteen area residents and the submission of a petition with 51 signatures of Chicopee residents living in the same neighborhood in opposition." The Decision further stated: "It is also noted that not a single member of the public spoke in favor of granting the petition of transfer of the license; however, the Applicant submitted a petition signed by 2,000 of which 640 were citizens of Chicopee." (Facts not in Dispute)
4. According to Commission Records, Chicopee has fifteen §15 off-premises licenses, three for wines and malt beverages and the remaining twelve for all-alcohol.
5. The Applicant, Mormax Corporation dba BJ's Wholesalers is a Massachusetts corporation with a usual place of business in Westborough, MA. BJ's currently holds licenses to sell alcoholic beverages for consumption off-premises pursuant to M.G.L. c. 138 §15 at three locations in the Commonwealth. (Commission Records)
6. Appellant Winn Liquors, Inc. dba Winn Liquors ("Winn") is a Massachusetts corporation with a usual place of business in Chicopee, MA. Winn has held a c. 138 §15 ("package store license") issued by the City of Chicopee for over 20 years.
7. On or about April 4, 2012, BJ's filed an application with the Local Board to transfer Winn's license to BJ's for operation at BJ's existing premises located at 650 Memorial Drive, Chicopee, MA.
8. The proposed premises is in an area in Chicopee located at the Massachusetts Turnpike Exit 5 Exchange on Memorial Drive (Route 33) in Chicopee. The location is approximately two and a half miles from the currently approved location for Winn's store.
9. On May 3, 2012, the Chicopee Planning Board voted in favor of the Application.
10. This appeal involves the denial of a transfer of a M.G.L. c. 138 §15 retail package store wines and malt beverages license. The appellant argues that the location in which the BJ's is currently housed and in which the license will be exercised is in a preferred zone for retail package stores in Chicopee, and not in a neighborhood or heavily congested area. The area according to the appellant is in a commercial area where a Wal-Mart, Stop & Shop, and Big Y Supermarket are also located. It is in close proximity to the Massachusetts Turnpike Exit 5 Exchange. The location is less than two miles from the previously approved location for Winn Liquors Store, which was also on Memorial Drive. The area where BJ's is located is in the center developments, excluding a proposed Residence Inn by Marriott, and main commercial thoroughfare in the city. The entire area is a three and one-half acre parcel including businesses covering an area of 18,000 square feet.
11. On Thursday, May 17, 2012, Local Board held a hearing to consider the Application. Proponents and opponents appeared at the hearing.

12. BJ's submitted petitions with the names of over 2,000 supporters of which approximately 652 were residents of Chicopee.
13. Upon the close of public comments, the Local Board voted to deny the Application.
14. On Tuesday, May 22, 2012, BJ's received the Local Board's decision.
15. The site BJ's is seeking to occupy is adjacent to Chicopee crossing and across from a large retail area with a proposed Marriott Residence Inn. The area is being revitalized and new workers are being employed to meet the demand of the businesses that are opening as well as the hotel.

DISCUSSION

The issue before us is a transfer of an existing license, Winn Liquors. The area of the proposed license is at the crossroads of the Massachusetts Turnpike and Route 91. BJ's, according to the license, serves the towns of Bridgewater, Granby, Ludlow, and Palmer, as well as other areas east of the Connecticut River.

The appellant argues that the location in which the BJ's is currently housed and in which the license will be exercised is in a preferred zone for retail package stores in Chicopee, and not in a neighborhood or heavily congested area. The location is less than two miles from the previously approved location for Winn Liquors Store, which was also on Memorial Drive. The area where BJ's is located is in the center developments, excluding a proposed Residence Inn by Marriott, and main commercial thoroughfare in the city. The entire area is a three and one-half acre parcel including businesses covering an area of 18,000 square feet.

The Applicant, BJ's argues that the Local Board failed to consider the "preferred zone" in which the license was to be transferred, failed to consider that BJ's Chicopee is located in an "overwhelmingly commercial district"; that the bulk of BJ's Chicopee customers are not residents of the city, and that the location is only less than two miles from the previously approved location for Winn Liquors.

The applicant, Mormax, argued before the Commission that the Local Board's denial of the application was arbitrary and capricious and cited Ballarin Inc. v. Licensing Board of Boston, 49 Mass. App. Ct. 506, 511 (2000) in support. Under Ballarin the Court found when reviewing the Local Board's authority, the Court does not assess the evidence but rather examines the record for errors of law or abuse of discretion that add up to arbitrary and capricious decision making. Id at 512. In support of its argument, the Applicant further states that Chicopee was arbitrary and capricious because they used the decision to deny the application on improper factors, while failing to consider proper factors under Ballarin. Ballarin Inc. v. Licensing Board of Boston, 49 Mass. App. Ct. 506, 511 (2000).

The test of public need, as Ballarin interprets it, includes a combination of the competing interest of the "public want" and the appropriateness of the location. The test of public need clearly includes a combination of the public want and the appropriateness of the location. In other words, if a licensee were to petition for a liquor license of an establishment near an elementary school, the "public appropriateness" would more than likely outweigh the public need. Ballarin Inc. v. Licensing Board of Boston, 49 Mass. App. Ct. 506, 511 (2000).

The statutory language is clear that there is no right to a liquor license of the type specified in M.G.L. Ch. 138, §15. 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 Id. "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 potential location. Id. at 311. This test then combines both “public want” and appropriateness of the location.

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).

This appeal involves the denial of a transfer of a M.G.L. c. 138 §15 retail package store wines and malt beverages license. The area according to the appellant is in a commercial area where a Wal-Mart, Stop & Shop, and Big Y Supermarket are also located. It is in close proximity to the Massachusetts Turnpike Exit 5 Exchange.

Pursuant to the provisions of M.G.L. c. 138 §23, ¶8, “any licenses issued under this chapter may, upon application pursuant to c. 15A, be transferred to the location to another or the description of the licenses may be changed with the approval of the local licensing authority.”

The local licensing authority of Chicopee argues that its decision to deny BJ’s application to transfer the location of an all alcoholic beverages package store §15 license, was based upon a determination that there is no demonstrated public need for another package store in Chicopee. Pursuant to the pertinent provisions of M.G.L. c. 138, §23, paragraph 8 “[a]ny license issued under this chapter may, upon application pursuant to section fifteen A, be transferred from one location to another or the description of the licensed premises may be changed with the approval of the licensing authorities.” The standard is the same as a new license application, i.e., whether the re-location of the license will meet a public need.

A local licensing authority has very broad discretion to determine public need, 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.” Ballarin, Inc. v. Licensing Board of Boston, 49 Mass. App. Ct. 506, 511 – 512 (2000).

“[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).

The issue before us is a transfer of an existing license, Winn Liquors. The area of the proposed license is at the crossroads of the Massachusetts Turnpike and Route 91. BJ’s, according to the license, serves the towns of Bridgewater, Granby, Ludlow, and Palmer as well as other areas east of the Connecticut River.

“Local boards are capable of considering, in the first instance, these same factors which guide the Commission in the reasonable exercise of the reviewing authority.” Victoria Inc. v. ABCC, 602 NE2d 578 (1992). The test of public need includes the assessment of the “competing interest of the “public want” and the appropriateness of the location in the community. The Local Board must address both when determining the allowance or transfer of a license. Similarly, if a licensee were to petition for a liquor license for an establishment near an elementary school, the “public appropriateness” would more than likely outweigh the public need.

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. 375, 379 (2004). 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. 375, 380 (2004).

"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, Inc. v. Licensing Board of Boston, 49 Mass. App. Ct. 506, 511 – 512 (2000). "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, (2004).

Upon Commission review of the Local Board's decision to deny said Application, the Commission finds, as the Applicant argued, that the decision was inadequate. The Local Board denied BJ's application to transfer the location on the grounds that the transfer did not "serve the public need" due to the "lack of public need or interest for another liquor store in the immediate area where seven liquor stores exist within a 1.8 mile radius."

Chicopee also reasoned that 14 residents opposed the transfer with 51 signatures on a petition. A petition of 2000 signatures favoring the Applicant was submitted as noticed by the city. However, Chicopee failed to mention that at least six residents who spoke in opposition were owners of competing package stores, and two others were current or past employees of competing package stores. Many of them expressed concerns that competition from BJ's would harm their businesses.

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.).

In the case before us, the Applicant argued that the Local Board voted to deny the Application without stating legally sufficient grounds for the denial. It further argues that the Local Board "failed to fulfil its obligation to state the reasons for its denial in its decision." In re: Murfslix, Inc. d/b/a Murphy's Package Store, ABCC Decision (March 21, 2013). The findings set forth by Chicopee lacked legally sufficient grounds in that Chicopee did not set forth anything other than general findings which are insufficient.

In this case, the Local Board reviewed the signatories before it and listened to statements of the audience members. It did not however, make particularized and specific finding based upon the information that was presented to it. In addition, the Local Board heard from several persons, many with competing interests, which should not have been considered. The issue of competition is one that should not be

considered when determining whether or not a license should be granted or transferred. Thus if the Local Board considered the opinions of licensees who voiced concerns due to competition, it would have done so in error.

CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission **DISAPPROVES** the action of City of Chicopee Licensing Board in **DENYING** the application of Winn Liquors to transfer the location of its all alcoholic beverages retail package store license issued pursuant to M.G.L. c. 138 §15 to Mormax Corporation dba BJ's Wholesalers. **The matter is remanded to the Local Board with the recommendation that the application be granted and submitted to this Commission for consideration of approval in the usual administrative course.**

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Susan Corcoran, Commissioner *Susan Corcoran*

Kathleen McNally, Commissioner *Kathleen McNally*

Dated: March 18, 2014

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: Howard J. Wayne, Esq. facsimile 617-720-7877
Thomas Rooke, Esq. facsimile 413-731-1302
Frederick G. Mahony, Chief Investigator
Administration
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