

Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, Massachusetts 02150

Jean M. Lorizio, Esq.
Chairman

DECISION

MPG INC. D/B/A GARRETT'S FAMILY MARKET
1617 FALMOUTH ROAD
CENTERVILLE, MA 02632
LICENSE#: NEW
HEARD: 12/16/2020

This is an appeal of the action of the Town of Barnstable Licensing Authority ("Local Board") for denying the M.G.L. c. 138, § 15 wine and malt beverages retail package license application of MPG Inc. d/b/a Garrett's Family Market ("Applicant" or "Garrett's") exercised at 1617 Falmouth Road, Centerville, Massachusetts. The Applicant timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission ("Commission" or "ABCC"), and a remote hearing via Microsoft Teams was held on Wednesday, December 16, 2020.

The following documents are in evidence as exhibits:

- A. MPG, Inc. d/b/a Garrett's Family Market's Retail Package Store License Application;
- B. Local Board's Meeting Minutes for 7/20/2020 and 8/17/2020;
- C. Local Board's Decision, 8/24/2020;
- D. Town of Barnstable Licensing Regulations;
- E. Letters in Support of Applicant's Application;
- F. Letters in Opposition to Applicant's Application;
- G. Local Board's Decision [Kappy's Liquor Store], 1/11/2016;
- H. Town of Barnstable Map showing locations of 24 existing § 15 licenses;
- I. Town of Barnstable Map showing Population of Villages;
- J. Traffic Impact Study for Proposed Location, 2/2018;
- K. Massachusetts Department of Transportation Permit, 10/23/2019;
- L. Joint Pre-Hearing Memorandum, 12/11/2020.

There is one (1) audio recording of this hearing, and three (3) witnesses testified.

FINDINGS OF FACT

The Commission makes the following findings of fact based on the evidence presented at the hearing:

1. MPG Inc. d/b/a/ Garrett's Family Market's ("Applicant" or "Garrett's") convenience store and gas station is located at 1617 Falmouth Road, Centerville, Massachusetts. Garrett's seeks to add a M.G.L. c. 138, § 15 wine and malt beverages retail package store license to their existing operation. (Testimony, Exhibit A)
2. MPG Inc. owns and operates twenty (20) Garrett's Family Market locations throughout Massachusetts and New Hampshire. Nine (9) locations have wine and malt retail licenses and three (3) of these locations are in Westford, Plymouth and Falmouth, Massachusetts. Id.
3. Across nine (9) locations, only 5.8% of Garrett's Family Markets' overall sales is attributed to beer and wine. Of merchandise sales, 17% represents beer and wine, exclusive of gasoline. (Testimony, Exhibit B)
4. In June 2020, Garrett's applied for a transfer and change of location of a §15 wine and malt beverages license in an effort to provide one-stop shopping for its customers. The transferor of the license, Peppers Pantry, is located in the Cotuit village of Barnstable. (Testimony, Exhibit A)
5. Garrett's convenience store is approximately 4,565 square feet in size. The store sells fresh foods, lottery, snacks, beverages, and cigarettes. Id.
6. There are twenty-four (24) existing § 15 package stores within the Town of Barnstable, none of which sell gasoline. (Testimony, Exhibit H)
7. The Cape Cod Package Store operates as a traditional package store and holds an all alcoholic beverages retail package store license and is located .2 miles from Garrett's. Id.
8. In or around February 2018, in anticipation of opening its gas station and convenience store, MPG Inc. retained McMahon Associates, Inc. to conduct a Traffic Impact Study of 1617 Falmouth Road, Centerville, MA. (Testimony, Exhibit J)
9. The Traffic Impact Study concluded that "based on the analysis results presented in this report and with the predominantly pass-by nature of the proposed convenience store and gas station, the project is not expected to result in a significant impact on the overall traffic operations of the study area roadways." Id.
10. On October 23, 2019, the Massachusetts Department of Transportation Highway Division granted to Garrett's a permit to:

[E]nter upon the State Highway in the Town of Barnstable on Auto Route 28, locally known as Falmouth Road, for the purpose of reconfiguring two (2) existing driveways to their property at the southerly line of the State Highway Layout (S.H.L.O.) Line, as shown on the approved plans...

This Permit is being granted to provide access to raze the existing 2,322 square foot gas station located at #1617 Falmouth Road, and replace it with a proposed 5,000 square foot convenience store with five (5) gasoline pumps (10 fueling positions). (Exhibit K)

11. On July 20, 2020, the Local Board held a public hearing regarding Garrett's transfer application. Mr. Ben Bolen, Director of Operations of MPG Corporation, presented on behalf of Garrett's and described the proposed premises, hours of operation and its business model as a one-stop-shop. Ms. Danette Atsalis, co-owner of the Cape Cod Package Store, testified in opposition to the application. Richard Scali, Director of Licensing, read three letters from members of the public in opposition to the application. Director Scali suggested continuing the discussion on the application to the next hearing to give Garrett's an opportunity to review the public comments. Mr. Bolen requested to be heard at the next meeting. The Local Board voted to continue the hearing to August 17, 2020. (Exhibit B)
12. On August 17, 2020, the Local Board held a second public hearing regarding Garrett's transfer application. David Lawler, counsel for Garrett's, presented at the Local Board hearing and stated the applicant was seeking the license for the need and convenience of store customers, especially residents who travel on Route 28. Attorney Lawler informed the Board that Garrett's is not a liquor store, but an upscale convenience store that also sells gasoline and fast food. They would not be selling high-end beer and wine, nor would they be hosting any wine tastings. Id.
13. Attorney Lawler also presented to the Local Board documents illustrating demographics by villages, and a liquor license map broken down by number per village. The documents show a vast majority of the licenses issued by Barnstable, fifteen (15), are concentrated in Hyannis and only two (2) licenses in Centerville. (Exhibits B, H & I)
14. There were three (3) public comments in opposition to the transfer application offered at the Local Board hearing on August 17, 2020. Two (2) comments were from the owners of Cape Cod Package Store and the other from a resident who voiced their concern regarding traffic and possible car accidents at the proposed location. (Exhibit B)
15. There were two (2) letters supporting the application and approximately sixty-four (64) letters and emails from residents opposing the application. (Exhibits E & F)
16. The Local Board voted at the August 17, 2020 hearing to deny Garrett's transfer application. (Exhibits B & C)
17. In its Notice of Denial issued on August 24, 2020, the Local Board summarized its findings by stating:

The Licensing authority determined by a vote of 3-0, that there is a lack of need for the transfer of this license due to the number of licenses in the area and that the need is for the license to serve the public in its current area; that the transfer is not a matter of convenience for the public as there is a package store .2 miles from the proposed site selling all the same wine and malt products; that there is a traffic issue at the intersection of entrance to the site whereby some customers may have to cross 2-3 lanes of traffic. (Exhibit C)

18. Garrett's timely filed an appeal with the Alcoholic Beverages Control Commission.
(Commission File)

DISCUSSION

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control for which states have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Connolly v. Alcoholic Beverages Control Comm'n, 334 Mass. 613, 619 (1956); Opinion of the Justices, 368 Mass. 857, 861 (1975). The procedure for the issuance of licenses to sell alcoholic beverages is set out in M.G.L. c. 138. Licenses must be approved by both the local licensing authorities and the Commission. M.G.L. c. 138, §§ 15, 67; see e.g. Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc., 422 Mass. 318, 321 (1996).

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. As Section 23 provides in pertinent part,

[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. M.G.L. c. 138, § 23.

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, 378-379 (2006); Ballarin, Inc. v. Licensing Bd. of Boston, 49 Mass. App. Ct. 506, 510-511 (2000). 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. Donovan, 65 Mass. App. Ct. at 379.

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, 49 Mass. App. Ct. at 511. 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.

In Ballarin, the Court identified factors to be considered when determining public need:

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, 49 Mass. App. Ct. at 511.

In reviewing the decision of a denial by a local licensing authority, the Commission gives "reasonable deference to the discretion of the local authorities" and determines whether "the reasons given by the local authorities are based on an error of law or are reflective of arbitrary or

capricious action.” Great Atlantic & Pacific Tea Co., Inc. v. Board of License Comm’rs of Springfield, 387 Mass. 833, 837, 838 (1983); see Ballarin, Inc. v. Licensing Bd. of Boston, 49 Mass. App. Ct. 506, 512 (2000) (when reviewing the local licensing authority’s authority, court does not assess the evidence but rather “examine[s] the record for errors of law or abuse of discretion that add up to arbitrary and capricious decision-making”). However, while this discretion of the local licensing authority is broad, “it is not untrammelled.” Ballarin, 49 Mass. App. Ct. at 511. In Donovan, the Appeals Court held “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.” Donovan, 65 Mass. App. Ct. at 379. “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.” Id. (quoting 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. “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, 880 (1981) (quoting Westborough v. 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 remain[s] 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 880.

In issuing its decision, the Local Board made findings which the Commission finds are not supported by the record of the proceedings before the Local Board.

The Applicant presented the Local Board with detailed information to distinguish their business from existing retail package stores in the area. Specifically, Garrett’s Family Market is located in a gas station marketplace and proposes to sell limited wine and malt beverages to provide passers-by the convenience of one-stop shopping. There are no other retail package stores in Barnstable which also operate as a convenience store and gas station. Admittedly there is a retail package store which sells all alcoholic beverages .2 miles from Garrett’s but it is a traditional package store selling a larger variety of alcohol beverages and a very small selection of pre-packaged foods. (Testimony, Exhibit B)

While a proper assessment of public need involves a particularized inquiry into the sort of business an applicant intends to operate, here the type of business was only discussed in a very limited fashion. See Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 381 (2006). The minutes of both hearings before the Local Board illustrate discussions concerning the need to retain the liquor license in the village of Cotuit, the close proximity of the existing retail package store, Cape Cod Package Store, and traffic concerns. (Exhibit B)

Accordingly, the Commission finds the Local Board did not engage in a particularized inquiry into the sort of business the applicant sought to operate, which is, according to Donovan, *supra*, a required factor in a proper assessment of public need.

The Local Board also based their denial on a desire for the license to remain at the Cotuit location, rather than the proposed new location in Centerville. The Local Board found the need existed in

Cotuit, as opposed to Centerville. However, in considering an application for a new license, the Local Board, as laid out in Ballarin, 49 Mass. App. Ct. at 511, is charged with assessing the appropriateness of a particular location and here that location is the Centerville location.

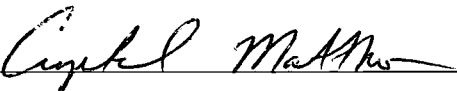
The Local Board's remaining basis for denial was traffic. While traffic is certainly a legitimate concern, the evidence here demonstrates that given the business model of Garrett's, adding a retail package store license at the proposed location would minimally affect traffic. (Exhibit J) When Garrett's originally opened for business at this location, a site plan had been vetted and approved by both Barnstable's Zoning Appeal Board and the Massachusetts Department of Transportation. (Testimony, Exhibit K)

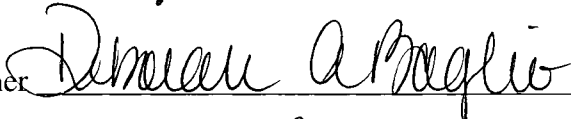
The Commission finds the denial by the Local Board is arbitrary and capricious and not supported by the record.

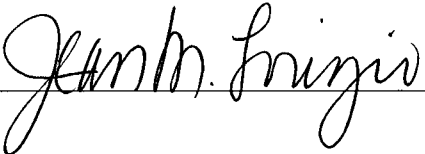
CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board in denying the M.G.L. c. 138, § 15 wines and malt beverages application of MPG, Inc. d/b/a Garrett's Family Market. The Commission remands this matter to the Local Board with the recommendation that the Local Board grant the application for a § 15 wines and malt beverages license and submit it to this Commission for its consideration of approval in the usual administrative course.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Crystal Matthews, Commissioner 

Deborah Baglio, Commissioner 

Jean M. Lorizio, Chairman 

Dated: December 14, 2021

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.

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cc: David Lawler, Esq.
Kathleen Connolly, Esq.
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration, File