



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

NEW ENGLAND FARMS, INC.
145 MYRICKS STREET
BERKLEY, MA 02779
LICENSE#: NEW
HEARD: 01/30/13 and 05/01/2013

This is an appeal of the action of the Board of Selectmen for the Town of Berkley ("Berkley" or "Local Board") in denying the M.G.L. c. 138, §15 wine and malt beverages retail package store license application of New England Farms, Inc. (the "Applicant" or "NE Farms"), located at 145 Myricks Street, Berkley, Massachusetts. The Applicant timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and hearings were held on Wednesday, January 30, 2013, and Wednesday, May 1, 2013.

The following documents are in evidence as exhibits:

Exhibits of the Applicant:

1. Copy of Court Decision: Ballarin, Inc. v. Licensing Board of Boston, 49 Mass.App.Ct. 506 (2000), 730 N.E.2d 904;
2. Copy of Court Decision: Victoria, Inc. v. Alcoholic Beverages Control Commission, 33 Mass.App.Ct. 507 (1992), 602 N.E.2d 578;
3. Copy of Court Decision: Donovan v. City of Woburn, 65 Mass.App.Ct. 375 (2006), 840 N.E.2d 969;
4. Copy of Court Decision: McDonald's Café, Inc. v. Mackey, 3 Mass.L.Rptr.7, N.E.2d (1994)
5. Copy of Court Decision: INTMB, Inc. v. Town of Westborough, 18 Mass.L.Rptr. 364, N.E.2d (2004);
6. Copy of Court Decision: Ruci v. Clients' Security Board, 53 Mass.App.Ct. 737 (2002), 762 N.E.2d 325;
7. Petitions in Support of New England Farms;
8. Map;
9. Photograph;
10. Photograph;
11. Photograph; and
12. Petitions In Support of New England Farms.

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Exhibits of the Local Board:

- A. Local Board's Decision dated September 27, 2012;
- B. Minutes of Local Board Meeting of August 15, 2012;
- C. Letter dated September 12, 2012 from Town Counsel Lisa Mead to Local Board;
- D. Minutes of Local Board Meeting of September 12, 2012;
- E. Photograph;
- F. Photograph;
- G. Photograph
- H. Photograph;
- I. Petition In Opposition to New England Farms (2 pages); and
- J. Photograph; and
- K. Photograph.

There is one (1) audio recording of this hearing, and two (2) witnesses testified.

FACTS

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

1. New England Farms, Inc., applied for a wine and malt beverages license for off-premises consumption, pursuant to G.L. c. 138, §15. (Commission Application, Testimony)
2. The proposed location where the license is to be exercised is the GetMor Gas Station, located at 145 Myricks Street, in Berkley, Massachusetts. (Commission Application, Testimony)
3. On or about August 15, 2012, the Local Board held an initial public hearing on the application. (Exhibit B, Testimony)
4. At the August 15, 2012 hearing, the Local Board and the applicant discussed the hours of operation, 5:00 a.m. to 11:00 p.m. for the convenience store, with a 24 Hour gas station. (Exhibit B, Testimony)
5. At the August 15, 2012 hearing before the Local Board, no abutters were present. (Exhibit B, Testimony)
6. Ms. Maria Aguiar spoke in opposition to this application. She stated that she operates a store across the street where she sells alcoholic beverages. She testified that her beer and wine sales would be hurt if another license was issued to this applicant across the street from her premises. (Exhibit B, Testimony)
7. Maryann and Ray Smith spoke in opposition to this license. (Exhibit B)
8. Mr. Stephen Castellina, the member of the Local Board who functioned as the Clerk, read a letter submitted by the Aguiars giving the reasons the license application should not be granted. (Exhibit B, Testimony)
9. Andrea Perry testified that the Aguiar's store would be out of business if this license is granted. (Exhibit B)
10. Local Board Chairman Miller stated that the Local Board could not consider competition and personalities in the decision. However, the close proximity of the two stores could be considered as a factor. (Exhibit B)

11. Chairman Miller stated that the applicant, New England Farms, Inc. might get more business if it was known that they had withdrawn this application to avoid harming the business of the Aguiars. (Exhibit B)
12. The Local Board agreed to continue the hearing to September 12, 2012 at 7:15 p.m. (Exhibit B)
13. The public hearing was continued to September 12, 2012. (Exhibit D)
14. At the September 12, 2012 public hearing, Mr. Stephen Castellina repeated the positions of the applicant, and the owners of the neighboring licensee, the Aguiars. (Exhibits D and I)
15. Castellina read from a petition in opposition submitted by the Aguiars. The petition contained fifty-four (54) signatures in opposition to the application, 19 of those were residents of Berkley. (Exhibits D and I)
16. The operations of the applicant within the store were discussed by the Local Board. (Exhibits B and D)
17. The applicant showed a map of Berkley with the locations of other liquor licenses currently operating in Berkley. (Exhibits 8 and D)
18. Chairman Miller stated that the licenses were spread out, well serving the citizens of Berkley. (Exhibit D)
19. Attorney Walter Frazee, appeared on behalf of Maria Aguiar, the owner of the Country Side Package Store located at 32 Myricks Street, Berkley, across the street from the applicant's proposed location. (Exhibit D)
20. Attorney Frazee stated that it was not appropriate to have two (2) licenses at the very tip of the boundary of the Town, serving mostly drive-by persons; as Chairman Miller stated, the licenses should be spread out. (Exhibit D)
21. The Local Board voted unanimously (3-0) to deny the liquor license application of NE Farms. (Exhibits A, D, Testimony)
22. The Local Board provided written notice of its vote to the applicant in a decision dated September 27, 2012. (Exhibit A)
23. As grounds for the denial, the decision stated that "and after duly considering the factors relative to the surrounding area, the Board of Selectmen finds that there is an adequate number of establishments in the area at which the public can obtain beer and wine. The proposed location for the Applicant's establishment is within four hundred (400) feet of an existing retail establishment holding a similar license under G.L. c. 138, section 15, and which currently serves the public need in such a manner as to protect the common good." (Exhibit A)
24. On or about October 5, 2012, NE Farms appealed the Local Board's Decision to the Commission. (Testimony, Commission File)
25. At the Commission hearing, Mr. Tom Pratt testified. He is the owner of the GetMor/New England Farms, and the applicant. He has been at this location for three (3) years. (Testimony)
26. Mr. Pratt's store is different from the Aguiar's store, Country Side, as his store sells gasoline and diesel fuel, tobacco, coffee, quick meal options, lottery tickets, food, candy, groceries, and provides an ATM. (Testimony)

27. One day in the month of January, his location served 1,163 customers who came inside the store and purchased items inside the store. (Testimony)
28. Mr. Castellina, a member of the Berkley Local Licensing Board, testified that Berkley's quota for Wine and Malt beverage, §15 retail package store licenses is five. Only one §15 wine and malt beverages license has been issued and is currently operating. (Testimony)
29. The applicant submitted multiple petitions containing hundreds of signatures in support of the application of New England Farms, and of these, 122 signatures were identified as residents of Berkley.¹ (Exhibits 7, 12)

DISCUSSION

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 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 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 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, 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, 379 (2006). However, "a board may not deny a permit simply by conjuring up a parade of horrors,

¹ The Commission only considered and counted those signatures as residents of Berkley which indicated the complete address consisting of a street address, and the Town of Berkley. Many of the signatures submitted in the petitions only stated the street address, and did not indicate within which city or town the street was located. The Commission did not consider those signatures as residents of Berkley.

particularly when it has the power to prevent them. Donovan v. City of Woburn, 65 Mass.App.Ct. 375 (2002) citing Britton v. Zoning Bd. of Appeals of Gloucester, 59 Mass.App.Ct. 68, 75, 794 N.E.2d 1198 (2003).

This appeal involves the denial of an application for a G.L. c. 138, §15 retail package store wine and malt beverages license. The Applicant, NE Farms, argues that at two public hearings before the Local Board, NE Farms presented detailed information to distinguish their business operation from the other existing business operations licensed by the Local Board. Specifically, NE Farms noted the distinction of the nearby package store operation which holds an all-alcoholic beverages license, from NE Farms proposal for the limited sale of wine and malt beverages in a gas station convenience store format intended to provide for the convenience of residents.

At two public hearings before the Local Board, NE Farms presented detailed information regarding the factors which support the public need related to their request for the liquor license. Among the factors cited were:

- a. Appropriateness of the business district location;
- b. The current availability of licenses in the Town and the disproportionately low number of licenses to population;
- c. NE Farms particular concept;
- d. Applicant's impeccable character;
- e. Applicant's proven history of successful operation in other jurisdictions of the Commonwealth;
- f. No other business operating within the town exercised a similar license in the convenience store format.

NE Farms argues that at no time during the multiple public hearings, or in its written decision did the Local Board assess any of the factors presented. Rather the Local Board repeatedly cited the proximity of the nearby retail package operation providing all-alcoholic beverages.

NE Farms further argues that at no time during the multiple public hearings, or in its written decision did the Local Board address the distinctions between the existing retail package store operation and the Applicant's proposed convenience store format operation in its assessment of the public need for the liquor license.

The Local Board argues that an all-alcohol license issued pursuant to G.L. c. 138, §15 is being exercised at an establishment located approximately 310 feet from the GetMor Gas Station. The Local Board argues that no demand exists for two licensed establishments, i.e., that of the Aguiars/Country Side Package Store, and that proposed by New England Farms, located fewer than 400 feet apart.

The petition in opposition to NE Farms containing 54 signatures, of which 19 were residents of Berkley, was submitted by Maria Aguiar, owner of the Country Side Package Store. Mr. George Miller, Chairman of the Local Board, even stated at the first hearing that "*N.E. Farms might get more business if it was know that they had withdrawn to avoid harming the business of the Aguiars.*" (Emphasis supplied)

NE Farms submitted petitions in support of their application containing hundreds of signatures, and of these, 122 were residents of Berkley.

The Local Board, as grounds for this denial, issued a decision denying the application which stated that "and after duly considering the factors relative to the surrounding area, the Board of Selectmen finds that there is an adequate number of establishments in the area at which the public can obtain beer and wine.

The proposed location for the Applicant's establishment is within 400 feet of an existing retail establishment holding a similar license under G.L. c. 138, §15, and which currently serves the public need in such a manner as to protect the common good."

The minutes of both public hearings before the Local Board do not reflect a discussion of the Ballarin factors that are appropriately used in determining public need in its denial of this application. Ballarin, Inc. v. Licensing Board of Boston, 49 Mass.App.Ct. 506 (2000). The people who spoke in opposition to this application discussed competition with the other liquor store. The petition in opposition was submitted by this (other liquor store) licensee. The Local Board discusses competition with the neighboring liquor store, and whether this application, if granted, will put the other licensee, Country Side, out of business.

While 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), NE Farms' type of business was discussed in a very limited fashion. According to the Local Board minutes, the hours of operation were discussed, not the distinction about the type of business operated by NE Farms. The people who spoke in opposition to the application of NE Farms discussed the competition that would occur between the Aguiars, licensees of Country Side Package Store, and the applicant NE Farms.

The Commission does not find that the record reflects that the Local Board discussed or participated in a particularized inquiry into the sort of business that seeks the license which is, according to Donovan, supra, a factor which is required in a proper assessment of public need.

The denial by the Local Board, which it claims was based on a determination of public need, is not supported by the record. The Commission finds that the record from the Local Board reflects that NE Farms' application was denied primarily based on the competition with the other licensee in the area. 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 illustrating 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 Licensing Board for the Town of Berkley in denying the license application of New England Farms, Inc. The Commission remands this matter back to the Local Board with the recommendation to grant the application for a retail package store wine and malt beverages license and submit it to this Commission for consideration of approval in the usual administrative course.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner *Kathleen McNally*

Susan Corcoran, Commissioner *Susan Corcoran*

Dated: August 21, 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: Stephen Miller, Esq., via Facsimile 617-946-4624
Karen Simao, Esq., via Facsimile 617-946-4624
Adam Costa, Esq. via Facsimile 978-371-2296
Frederick G. Mahony, Chief Investigator
Administration
File