

*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, Massachusetts 02150-2358*

Jean M. Lorizio, Esq.
Chair

DECISION

**RWJ BEVERAGE (MA) LLC
1 HIGHLAND COMMONS WEST
BERLIN, MA 01503
LICENSE#: NEW
HEARD: 2/07/2019, 4/16/19**

This is an appeal of the action of the Town of Berlin Board of Selectmen (the "Local Board" or "Berlin") for denying the M.G.L. c. 138, § 15 all alcoholic beverages retail package store license application of RWJ Beverage (MA) LLC (the "Applicant" or "RWJ") to be exercised at 1 Highland Commons West, Berlin, Massachusetts. The Applicant timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and hearings were held on Thursday, February 7, 2019 and April 16, 2019.

The following documents are in evidence as exhibits:

1. ABCC Decision for Liquor Stores USA Massachusetts 1, Inc., 8/14/2018;
 2. RWJ Beverage (MA) LLC Application;
 3. Petitions in Support of RWJ;
 4. RWJ Memorandum to Local Board, 10/29/2018;
 5. Atty. Furey's Executive Summary, 10/29/2018;
 6. J. Dina's Letter to Local Board, 11/2/2018;
 7. Local Board's Decision, 11/26/2018;
 8. Application of Highland Commons LQR LLC;
 9. Joint Pre-Hearing Memorandum, 2/1/2019;
 10. Applicant's Public Records Request to Local Board, 2/20/2018;
- A. Local Board Meeting Minutes, 10/29/2018; and
B. Local Board Meeting Minutes, 11/5/2018.

At the close of the April 16, 2019, hearing, the Commission left the record open for the Local Board and the Applicant to submit post-hearing memoranda. The Applicant and the Local Board submitted said documents, and the record is now closed.

There is one (1) audio recording of this hearing, and four (4) witnesses testified.

FINDINGS OF FACT

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

1. The Board of Selectmen of the Town of Berlin ("Local Board") is a three-member board. At the relevant time for this appeal, it was made up of Chairman Christine Keefe, Selectman Lisa Wysocki, and Selectman Margaret Stone. Mary Arata is the administrative assistant for the Local Board. (Testimony, Exhibit 9, 10)
2. Based on population, the Town of Berlin can issue two all alcohol § 15 licenses. (Testimony, Exhibit 9)
3. Highland Commons LQR LLC is a Massachusetts entity incorporated on July 30, 2018. Keith Leonard is an LLC member with 50% ownership and Cynthia Leonard is an LLC member with 50% ownership. Ronald Kendall is the LLC manager and proposed manager of record. (Testimony, Exhibit 8)
4. RWJ LLC ("RWJ") is a Massachusetts entity with three owners, each possessing equal ownership rights: James Dina, Richard Kelleher, and Warren Fields. RWJ's license manager is Michael Reardon. (Testimony, Exhibit 2, 9)
5. Since 2013, RWJ has operated a wine and malt beverage § 15 license at the existing BJ's Wholesale Club at 1 Highland Common West. RWJ sought to upgrade its license to all alcohol, while promising to return its wine and malt beverage license to the Local Board. (Testimony, Exhibit 2, 9)
6. Benderson Development is a developer that owns Highland Commons Associates LLC (which operates the Shops at Highland Commons mall) where RWJ is a sub-tenant (with BJ's Wholesale Club the tenant of Highland Commons Associates LLC) and where LQR seeks to be a tenant. James Boglioli is counsel for Benderson Development. (Testimony, Exhibit 2, 8)
7. On August 14, 2018, the Alcoholic Beverages Control Commission revoked the all alcohol § 15 license of Liquor Barn, which then reverted to the Town of Berlin. (Testimony, Exhibit 1, 7, 8F, 9, 10)
8. The other all alcohol § 15 license is not available as it is already issued to another licensee, leaving only one such license available. (Testimony, Exhibit 9)
9. At some point prior to any applications being submitted for the revoked Liquor Barn license, Mr. Reardon was at the Local Board's office. At that time, Ms. Arata told Mr. Reardon that there was going to be a meeting on a Wednesday between Benderson Development, Chairman Keefe, and Ms. Arata. (Testimony)
10. Chairman Keefe, Ms. Arata, and Mr. Boglioli held the meeting discussed above at Mr. Boglioli's request. (Testimony)
11. It is unclear the exact date of this meeting, but it was after Liquor Barn's license was revoked and before any applications were received for that license. (Testimony)
12. The meeting was to discuss the history of Liquor Barn's revoked license. (Testimony)
13. No discussion at the meeting took place regarding LQR's potential application for that license. (Testimony)
14. The Local Board then received two applications for the single available all alcohol § 15 license.

15. LQR submitted its application on August 7, 2018. Its proposed premises is at 24 Highland Commons East. (Testimony, Exhibit 8)¹
16. RWJ applied for the same license the following day, August 8, 2018. (Testimony, Exhibit 2, 8, 9)
17. On October 26, 2018, the Local Board received an email from Mr. Boglioli. Mr. Boglioli also included counsel for RWJ and Mr. Reardon on the email. (Exhibit 10 at pg. 47)
18. In his email, Mr. Boglioli explained that prior to Liquor Barn's license revocation, Benderson had signed a lease agreement with Liquor Mart to operate a package store in its mall, with Liquor Mart assuring Benderson that it was buying Liquor Barn's license. After Liquor Barn's license was revoked, Benderson found a new tenant for its space, LQR. His email did not address the merits of LQR's application before the Local Board. (Testimony, Exhibit 8F, 10 at pg. 47)
19. The Local Board held a public hearing on October 29, 2018, where both applicants gave thorough presentations regarding their respective applications. The Local Board then voted to continue the hearing until November 5, 2018. (Testimony)
20. At the October 29, 2018, hearing, the Local Board did not ask any substantive questions regarding the applications of either RWJ or LQR, nor did the Local Board deliberate publicly. (Testimony)
21. Mr. Dina filed a letter with the Local Board protesting what he believed was unfair and unlawful treatment in the application process. (Testimony, Exhibit 6)
22. At the November 5, 2018, hearing, each applicant was permitted approximately five minutes to make a final presentation on behalf of their license applications. Mr. Dina presented on behalf of RWJ's application. (Testimony)
23. At the conclusion of the applicants' final presentations, without any deliberation from the Local Board, Selectman Wysocki moved to approve LQR's application for the license. The Local Board voted unanimously to approve LQR for the license. (Testimony)
24. After the vote to approve LQR's application, at the request of counsel for RWJ, the Local Board voted unanimously to disapprove the application of RWJ because there was no additional license to grant it. (Testimony, Exhibit 7, 9, B)
25. As Chairman Keefe explained at the Commission hearing, "We weren't voting on Highland Commons first. We had one license. We voted to give that license to Highland Commons and that was it." (Testimony)
26. Subsequent to the November 5th hearing, Ms. Arata drafted a statement of reasons for the Local Board's denial of RWJ's application. On November 26, 2018, the Local Board voted unanimously to approve the statement of reasons. (Testimony)
27. In its statement of reasons, the Local Board gave four reasons for approving LQR's application over RWJ's (Exhibit 7):
 - a. "LQR will locate in a standalone storefront in a high visibility location within the Highland Commons shopping center and next to a heavily used Market Basket supermarket";
 - b. "LQR will broaden the local workforce by hiring new workers";

¹ The Commission held open the record for the submission of copies of the date-stamped applications. The Commission received them but they were not given an exhibit number. They are still considered evidence before the Commission.

- c. “LQR’s square footage will be 7 times greater (14,725 square feet) than RWJ’s present footprint (2,122 square feet) and will be able to stock a wider variety of alcoholic beverages”; and
 - d. “The LLA received testimony that the LQR occupancy within the Highland Commons Shopping Center would result in increased occupancy within the growing mall, which will result in more tax revenue to the Town.”
28. At some point after the hearings, Ms. Reardon of RWJ talked with the owner of the other all alcohol § 15 license in town, who told him that he had talked with Ms. Arata after RWJ was disapproved for the license. Ms. Arata told him something along the lines of, “The landlord of the developer is a partner in the town and we know [RWJ is] going to appeal. [If i]t comes back, they’re going to get approved again. We take care of our partners.” (Testimony)

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, §§ 12, 67; see 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.

A board must state the reasons for its decision to deny the granting of a 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)).

If a local authority’s decision is supported by the evidence and based on “logical analysis,” it is not arbitrary and capricious and must be affirmed. Great Atl. & Pac. Tea Co., Inc., v. Board of License Comm’n of Springfield, 387 Mass. 833, 839-840 (1983); Town of Middleton v. Alcoholic Beverages Control Comm’n, 64 Mass. App. Ct. 1108 (2005). 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 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 v. City of Woburn, 65 Mass. App. Ct. 375, 379 (2006). “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)).

The Local Board issued a statement of reasons on November 26, 2018, providing four grounds for denying a § 15 license to RWJ.² It found that approval of LQR’s application over RWJ’s application would better serve Berlin’s public need.

While none of the grounds the Local Board provides are specified in Ballarin, the so-called “Ballarin factors,” (traffic, noise, size, the sort of operation that carries the license and the reputation of the applicant) are not an exhaustive list of factors that a Local Board can consider in weighing public need. To the contrary, the inquiry is ultimately “an assessment of public want

² The Local Board was only required to issue a statement of reasons denying RWJ’s application, and not for approving LQR’s application. See M.G.L. c. 138, § 23 (“Whenever the local licensing authorities deny an application for a new license . . . the licensing authorities shall mail a notice of such action to the applicant or licensee, stating the reasons for such action and shall at the same time mail a copy of such notice to the commission.”)

and the appropriateness of a liquor license at a particular location.” Ballarin, 49 Mass. App. Ct. at 512. The Local Board’s discretion in considering whether there is public need is indeed broad. Donovan, 65 Mass. App. Ct. at 379. In assessing why LQR’s application would better serve the public of Berlin, it considered the following grounds:

- 1) LQR will locate in a standalone storefront in a high visibility location within the Highland Commons shopping center and next to a heavily used Market Basket supermarket.
- 2) LQR will broaden the local workforce by hiring new workers.
- 3) LQR’s square footage will be 7 times greater (14,725 square feet) than RQJ’s present footprint (2,122 square feet) and will be able to stock a wider variety of alcoholic beverages.
- 4) The LLA received testimony that the LQR occupancy within the Highland Commons Shopping center would result in increased occupancy with the growing mall, which will result in more tax revenue to the Town.

(Exhibit 7). Local licensing authorities are recognized as having expertise regarding the problems affecting the regulation of alcoholic beverages. Great Atl. & Pac. Tea Co. Inc., v. Board of License Comm’n of Springfield, 387 Mass. 833, 837 (1983). It is not for the Commission to substitute its own views with what the Local Board believes is in the best interest of its town. Because the Local Board’s decision is supported by evidence that was introduced at the October 29, 2018, and November 5, 2018, hearings, and its decision was based on a “logical analysis,” its disapproval of a license for RQJ is not arbitrary and capricious and must be affirmed. Great Atl. & Pac. Tea Co. Inc., v. Board of License Comm’n of Springfield, 387 Mass. 833, 839-840 (1983).

Furthermore, the process the Local Board followed was proper. As advised by its counsel, the Local Board heard both applications for the single license at the same time. It did not vote until the close of the presentation of both applications. As it must in these kinds of situations, the Local Board was constrained to choose only one of two good applicants for this license. The Commission is guided by its decision in Kostas Kargatzis d/b/a Ocean Reef Seafood Restaurant (ABCC Decision May 12, 1992). There, seven applications were received for a single license. The local board approved one of the applicants for the license. The Commission upheld this decision, explaining that:

The grant or denial of new licenses, including the choice between competing qualified applicants where only one license is available is a matter committed primarily to the discretion of the Local Board. The Commission finds that the approval of the Ocean Reef application was made in good faith, on lawful procedure, was supported by the evidence, and was an appropriate exercise of the Board’s discretion. Having approved the Ocean Reef application . . . the Board was obligated to deny the [other applications].

See also Molisardi Inc. d/b/a Stuzzi Restaurant (ABCC Decision May 23, 1996); In re: Sandra Tolman (ABCC Decision September 16, 1992); In re: Dominic’s Liquors, Inc. (ABCC Decision September 30, 1997).

Finally, while the Local Board did not deliberate, there is no requirement that the Local Board deliberate at all – only that, if it does deliberate, it must be done publicly. Therefore, any lack of deliberation of the part of the Local Board does not doom its ultimate vote.³ Accordingly, the Commission approves of the Local Board's denial of RWJ's application for an all alcohol § 15 license.

CONCLUSION

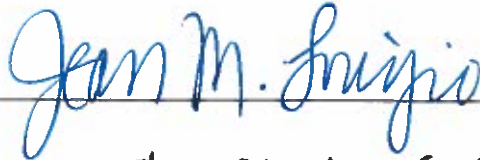
Based on the evidence and testimony at the hearing, the Commission **APPROVES** the action of the Town of Berlin Board of Selectmen for denying the M.G.L. c. 138, § 15 all alcoholic beverages retail package license application of RWJ Beverage (MA) LLC.

The Commission recommends that the Local Board disapprove RWJ's application without prejudice to allow the applicant to reapply within one year if there is an available license and the applicant so chooses. See Molisardi, Inc. d/b/a Stuzzi Restaurant (ABCC Decision May 23, 1996); Brian High Turbity d/b/a Stage Two Cinema Pub (ABCC Decision May 22, 1996).

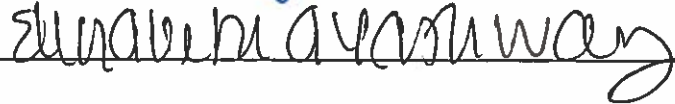
³ RWJ raises several other grounds for why the Local Board's decision was unlawful, including that LQR filed for a "transfer" application as opposed to a new license application, that LQR's application was deficient, and that the meeting that occurred between Benderson, Chairman Keefe, and Ms. Arata was improper. The Commission can dismiss these claims summarily. The application was always treated as a new license application. And as the parties are undoubtedly aware, the Commission routinely receives deficient applications approved by local boards. This does not affect this decision, but instead is a matter that can and will be resolved administratively upon receipt of the application by the Commission, if necessary. In any event, RWJ cannot appeal the granting of the license to LQR, but only the rejection of its application. Finally, there was no evidence introduced that the meeting that took place was improper – the meeting occurred before any applications had been submitted for Liquor Barn's revoked license, and all evidence indicated the meeting was for Benderson to simply learn about the license's history. No discussion of LQR's potential application occurred. And any discussion Ms. Arata had with the owner of the other package store in town after RWJ's disapproval is immaterial as Ms. Arata is not a member of the Local Board and was not representing them in her conversation.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Jean M. Lorizio, Chairman



Elizabeth A. Lashway, Commissioner



Dated: October 4, 2019

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: Alex Furey, Esq.
William Kelley, Esq.
Brian Riley, Esq.
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration, File