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Alcoholic Beverages Control Commission
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DECISION

**ANTICO FORNO, INC. D/B/A ANTICO FORNO
93-95 SALEM ST
BOSTON, MA 02126
LICENSE#: NEW
HEARD: 09/28/2017**

This is an appeal pursuant to M.G.L. c. 138, § 67 by Antico Forno, Inc. d/b/a Antico Forno ("Applicant" or "Antico Forno"), 93 – 95 Salem Street, Boston, Massachusetts. Antico Forno is appealing the action of the Licensing Board for the City of Boston (the "Local Board" or "Boston") for denying its M.G.L. c. 138, § 12 All Alcoholic Beverages License application to be exercised at 93 – 95 Salem Street, Boston, Massachusetts. The Applicant timely appealed the Local Board's action to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a hearing was held on Thursday, September 28, 2017.

The following documents are in evidence:

1. Antico Forno's c. 138, § 12 License Application;
2. Letter from Local Board to Attorney De Napoli, 10/12/16¹;
3. Antico Forno's Letter of Appeal, 10/21/2016, to ABCC;
4. Local Board's Statement of Reasons, 1/27/2017;
5. Photo of Hanover Street, North End, Boston;
6. Photo of Salem Street, North End, Boston;
7. Map of the Location of North End of Boston's Liquor Licenses Since 1/1/2013;
8. List of § 12 Liquor Licenses in the North End of Boston;
9. General Rules of the Licensing Board for the City of Boston;
10. Local Board's Letter, 2/11/2016, to Antico Forno's Attorney; A
11. Local Board's Statement of Reasons, 3/9/2016.

There is one (1) audio recording of this hearing, and one (1) witness testified.

¹ During the Commission hearing, eleven (11) exhibits were entered in evidence. Exhibit 2 was admitted in evidence but did not pertain to this appeal. The Commission reviewed and considered ten (10) exhibits in this appeal decision.

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. Antico Forno, Inc. d/b/a Antico Forno (“Antico Forno”) is a registered Massachusetts corporation with a business address of 93 – 95 Salem Street, Boston, Massachusetts. (Testimony, Commission records, Exhibits 1, 4)
2. Antico Forno holds a M.G.L. c. 138 § 12 Wines and Malt Beverages with Liqueurs/Cordials (“Cordials”) license. It has operated a full-service restaurant at this location since 1996, with no history of violations. The president of the corporation and principal of Antico Forno is Ms. Carla Agripinna-Gomes. (Testimony, Commission records, Exhibits 1, 4)
3. Antico Forno is a 98-seat restaurant containing a bar and a brick fire oven. Antico Forno was the first restaurant in the North End to operate with a brick fire oven. Antico Forno means “old oven” in Italian, and the premises was built around the oven, which is the restaurant’s centerpiece. (Testimony)
4. The Local Board held a hearing on 9/14/2016 regarding Antico Forno’s application for an all-alcoholic beverages license. There was no opposition to the application. (Testimony, Exhibit 4)
5. Seventeen (17) individuals spoke in support of this application, including elected officials, the Pastor of St. Leonard’s Church, and many residents of the North End. (Testimony, Exhibit 4)
6. The geographic size of the North End is approximately 0.36 of a square mile. (Testimony, Jt. Pre-hearing memorandum, Exhibits 5, 6, 7, 8)
7. There are eighty-four (84) §12 on premise licenses currently issued in the North End neighborhood of Boston. (Testimony, Exhibit 8)
8. On Salem Street, there are twenty (20) § 12 on premise licenses, which include two (2) all alcoholic beverages licenses, four (4) wine and malt beverages licenses, and fourteen (14) cordials licenses. Salem Street is more residential than Hanover Street and runs parallel to Hanover Street. Salem Street is a paved, one-way street where parking is only allowed on one side of the street. (Testimony, Exhibits 6, 8)
9. Bacco at 107 Salem Street and La Famiglia Ristorante at 112 Salem Street are the two all alcoholic beverages licenses located on Salem Street.² (Testimony, Exhibit 8)
10. Hanover Street is a two-way paved street, which allows parking on both sides. Hanover Street is wider, more commercial, and less residential than Salem Street. Thirty-eight (38) § 12 on premise licenses exist on Hanover Street, consisting of fourteen (14) all alcoholic

² The Local Board records for these two licensees are not contained in the Commission record for this appeal proceeding.

beverages licenses, seven (7) wine and malt beverages licenses, and seventeen (17) cordials licenses. (Testimony, Exhibits 5, 8)

11. The Local Board rejected Antico Forno's application. The Local Board's written decision of denial stated "The Board acknowledges that the applicant had support and heard many testify about her being a good neighbor and business woman. Nevertheless, the Board determined that the public need is currently being met and the area is adequately served by the many existing establishments in the area." (Exhibit 4)
12. The Commission was not presented with any evidence that the Local Board has granted any new or additional § 12 all alcoholic beverages licenses on Salem Street in the North End since Antico Forno's application was denied.³

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, § 12. 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

³ Local Board General Counsel and Executive Secretary (Keeper of the Records) represented this fact to the Commission during this appeal hearing and proceeding. (Commission record)

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. (Italics supplied.)

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)).

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.

Upon review of the record of proceedings before the Local Board and the evidence presented to the Commission, the Commission is persuaded that the Local Board fulfilled its responsibility regarding Antico Forno’s application. The Commission finds that the Local Board’s decision was not based on an error of law or reflective of arbitrary or capricious action. See Great Atlantic & Pacific Tea Co., Inc., 387 Mass. at 837. The Local Board held a hearing during which it heard testimony and reviewed Antico Forno’s application and documentary evidence. The record demonstrates that in approximately 0.36 of a square mile in the North End there are eighty-four (84) existing § 12 on premise liquor licenses. (Exhibit 8., Jt. Pre-hearing memorandum) On Salem Street alone there are twenty (20) § 12 on premise licenses, which include two (2) all alcoholic

beverages licenses. (Exhibit 8) Thirty-eight (38) § 12 on premise licenses exist on Hanover Street, consisting of fourteen (14) § 12 all alcoholic beverages licenses. (Exhibit 8) Salem Street and Hanover Street run parallel to each other. (Testimony, Exhibit 7) The Commission finds that the record clearly demonstrates that the Local Board considered the number of existing dispensaries in this area of the North End which is a Ballarin factor. Ballarin, 49 Mass. App. Ct. at 511. The Massachusetts Appeals Court has held that once a local board determines that an area is adequately served by the number of existing dispensaries, it need go no further. Town of Middleton v. Alcoholic Beverages Control Comm'n, 64 Mass. App. Ct. 1108 (2005) (memo and order pursuant to Rule 1:28)

Antico Forno also argues that the Local Board did not do a specific analysis of Antico Forno's business as required in the Donovan case. Donovan, 65 Mass. App. Ct. 375, 380 (2006). Antico Forno argues that as soon as the Local Board found that this area was saturated with licenses, it finished its analysis. It also argues that Antico Forno is a different type of business/licensee from other licensees in the North End because it was the first restaurant in the North End to have a brick fire oven at its premises. Antico Forno's argument compares and analogizes its application to a similar issue in Donovan, in which the Appeals Court of Massachusetts held that the Local Board denied Donovan's application for a §15 package store license because the area was saturated with §15 package store licenses. Donovan at 380. The Appeals Court in Donovan held that the Local Board did not conduct a particularized analysis because Donovan's application was for deliveries of gift baskets containing alcohol, not a traditional package store, which the Court found was the only business of this kind in Woburn. Donovan at 380. There were no other package stores in Woburn which were delivering gift baskets containing alcohol. Furthermore, the Appeals Court noted that shortly after the commission denied Donovan's application, the commission allowed an existing §15 package store to expand to more than triple its existing retail space. Donovan at 377 n. 3, 378 n. 5. Unlike in the Donovan case, here, the Commission was not presented with any evidence that Antico Forno's restaurant model was distinguishable from the other restaurants on Salem Street and the North End. See Donovan at 381. Antico Forno operates a restaurant with a bar and the very first brick fire oven built in the North End. (Testimony) The Commission does not find that Antico Forno's brick fire oven is the type of difference contemplated in Donovan sufficient to distinguish its operation from other restaurants on Salem Street. Furthermore, in another contrast to the Donovan case, in this matter, the Commission was not presented with any evidence that any other all alcoholic beverages licenses were granted on Salem Street after Antico Forno's application was denied. See Donovan at 384 n. 3, n. 5.

Antico Forno further contends that the Local Board decision is arbitrary and capricious and not based on substantial evidence and that the Local Board abused its discretion in denying Antico Forno's application. Antico Forno argues that dining on Salem Street is very different from dining on Hanover Street. Antico Forno also takes issue with the fact that Salem Street has fewer § 12 licenses in total and fewer § 12 all alcoholic beverages licenses than does Hanover Street. The Commission does not find these arguments persuasive. In Donovan, the Court found that, "[t]he record reveals that, regardless of the total number of stores in Woburn, no other store is located within two and one-half miles of the location in the northeast corner of Woburn where Donovan seeks to conduct his operation." Donovan at 381. These Donovan facts are not analogous to the facts in this application of Antico Forno. Id. The Commission finds that the Local Board decision is not arbitrary and capricious. The evidence clearly demonstrates that Salem Street is more residential, one way, and narrower compared to Hanover Street. (Exhibits 5, 6, 7) The Commission

finds that the record demonstrates that between these two streets alone there are fifty-eight (58) § 12 on premise licenses, and sixteen (16) of these § 12 licenses are all alcoholic beverages licenses. The Commission finds that the record supports the Local Board's decision that there exists an adequate number of §12 all alcoholic dispensaries in this area and on Salem Street to satisfy the public need in this location of the North End.

In issuing its decision, the Local Board made specific and particularized findings, which the Commission determined are supported by the record of these proceedings. As the Supreme Judicial Court has stated,

[t]here was evidence before the [Local Board] that the area had a large number of establishments selling beer and wine, and that the public did not need an additional establishment. The [Local Board] stated the reason for their decision. There is nothing in the record to indicate that the decision was whimsical or not based on logical analysis. On the record, we can only conclude that the decision was founded on reasoned judgment and was not arbitrary or capricious.

Great Atlantic & Pacific Tea Co., Inc., 387 Mass. at 839-840.

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, 65 Mass. App. Ct. at 379. The Local Board found after deliberations that there is no public need for another § 12 all alcoholic beverages license in this neighborhood. The Commission determines that the record clearly supports the decision by the Local Board to deny this application based on the Local Board's consideration and application of an appropriate and relevant Ballarin factor. Ballarin, 49 Mass. App. Ct. at 511.

The Local Board's decision was based on sufficient evidence presented during the course of the public hearing. The Local Board's reliance on these factors was reasonable and appropriate pursuant to the holdings in Ballarin, supra, and Donovan, supra. Therefore, the Commission finds that the decision of the Local Board is supported by the record, was not based upon an error of law, and thus, was not arbitrary and capricious.

CONCLUSION

Based on the evidence and testimony presented at the hearing, the Commission **APPROVES** the action of the Licensing Board for the City of Boston in denying the M.G.L. c. 138, § 12 all alcoholic beverages license application of Antico Forno.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



Elizabeth A. Lashway, Commissioner



Dated: June 21, 2018

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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