

*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**

**FAIRMOUNT WINE & SPIRITS LLC**  
**59-61 FAIRMOUNT AVE.**  
**BOSTON, MA 02136**  
**LICENSE#: NEW**  
**HEARD: 08/22/2012**

This is an appeal of the action of the Licensing Board for the City of Boston (the "Local Board") for denying the M.G.L. c. 138, §15 license of Fairmount Wine & Spirits LLC (the "Applicant", "Licensee" or "Fairmount Wine") located at Boston, MA. The Licensee/Applicant timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, August 22, 2012.

The following documents are in evidence:

1. Local Board's Decision and Statement of Reasons dated May 15, 2012; and
2. Letter from Fairmount Hill Neighborhood Association to Local Board dated February 13, 2012.

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

FACTS

1. Fairmount Wine & Spirits LLC applied to the Local Board for an all alcohol, off-premises alcoholic beverages license pursuant to M.G.L. c. 138, §15 to be exercised at 59-61 Fairmount Ave., Boston, MA. (Ex.1)
2. Joel Nunez, the owner of the applicant, planned to operate a convenience store, which included alcoholic beverages as part of his offerings to customers. (Ex. 1)
3. The Local Board held a hearing regarding the application on Wednesday, February 15, 2012. (Ex. 1)
4. During the hearing, Mr. Nunez testified. (Ex. 1)
5. He was unable to answer any questions from the Local Board regarding his proposed business operation. He did not submit a business plan. (Ex. 1)

6. Further, Mr. Nunez was unable to answer questions from the Local Board about the square footage of the proposed licensed premises. In fact, Mr. Nunez stated that he was unsure of the square footage and could not remember the figure off the top of his head. (Ex. 1)
7. In addition, Mr. Nunez was unable to provide any information to the Local Board about the anticipated percentage of alcohol sales v. non-alcohol sales. Again Mr. Nunez was unsure about how to answer the question. (Ex. 1)
8. When the Local Board asked about the public need for a retail package store at this location, Mr. Nunez acknowledged that there are several existing package stores in the general area of this proposed location. (Ex. 1)
9. The Local Board asked Mr. Nunez about the community's concern with large delivery trucks blocking traffic. He responded that he would only be placing small orders which would be delivered in smaller trucks. (Ex. 1)
10. During the hearing, Brian Clinton, appearing on behalf of Boston City Councilor Rob Consalvo, voiced the Councilor's opposition to the application. Mr. Clinton testified that Councilor Consalvo believes that the public need is being met by the existing retail package stores in the area, which includes one [package store] within walking distance of this proposed location. (Ex. 1)
11. David McNulty, of the Boston Mayor's Office of Neighborhood Services, also testified at the hearing. Mr. McNulty testified that both the Hyde Park Neighborhood Association and the Fairmount Hill Neighborhood Association are opposed to the application. (Ex. 1)
12. Furthermore, Mr. McNulty testified that the location is not appropriate for an off-premises alcoholic beverages license because it is a narrow section of a very busy street. He also testified that there is no parking available. (Ex. 1)
13. The Local Board received a letter from the Fairmount Hill Neighborhood Association stating that they opposed the petition and cited the fact that Mr. Nunez's business plan seemed incomplete and uncertain. (Ex. 1, Ex. 2)
14. The Local Board took into account the applicant's presentation, the concerns and opposition of the residents, the Mayor's Office, and Councilor Consalvo, and voted to reject this application. (Ex. 1)
15. The Local Board found that there is no public need for a retail package store license at this location and that the area is adequately served by existing licenses. (Ex. 1)
16. The Local Board also found that the public good would not be served by granting this application. (Ex. 1)

## DISCUSSION

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, §23. “[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).

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). 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. at 379. 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. Id.

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. at 380. 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, Inc. v. Licensing Board Of Boston, 49 Mass. App. Ct. 506, 511 (2000). 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. “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.” Id. “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). The local board “may exercise judgment about public convenience and public good that is very broad, but it is not untrammelled.” Ballarin, 49 Mass. App. Ct. at 511. 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.” 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.).

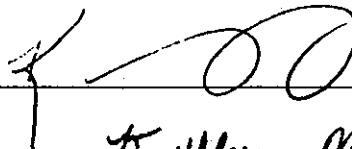
The Boston Licensing Board rejected Fairmount Wine's application, reasoning that "there is no public need for a retail package store license at this location because the area is adequately served by existing licenses. In addition, the public good would not be served by granting this petition." In this case, the Boston Licensing Board fulfilled its obligation to state the reasons for its decision and cited in numbered paragraphs, their subsidiary findings. Moreover, the reasons for denial, insufficient parking, traffic, neighborhood opposition, and an adequate number of dispensaries in the area were based on information presented during the course of the public hearing and grounded in the cases of Ballarin, supra. Donovan, supra.

### CONCLUSION

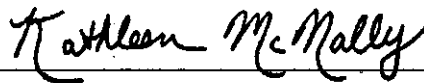
Based on the exhibits and testimony, the Commission **APPROVES** the action of the Local Board in denying the application of FAIRMOUNT Wine and Spirits, LLC for an all-alcoholic beverages license pursuant to M.G.L. c. 138, § 15 to be exercised at 59-61 Fairmount Ave., Boston MA.

### ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman



Kathleen McNally, Commissioner



Dated: September 12, 2012

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: Jean Lorizio, Esq. via Facsimile  
Joel Nunez, applicant  
Administration  
File