

The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
Boston, Massachusetts 02114

Deborah B. Goldberg
Treasurer and Receiver General

Kim S. Gainstoro, Esq.
Chairman

DECISION

FERNANDEZ BROTHERS LIQUORS, INC.
527 DUDLEY STREET
ROXBURY, MA 02119
LICENSE#: 011601137
HEARD: 11/18/15

This is an appeal from the action of the Licensing Board for the City of Boston (the "Local Board" or "Boston") for imposing a condition ("no nips/no singles") that the new licensee, Fernandez Brothers Liquors, Inc. (the "Licensee" or "Fernandez") not sell "nips or singles" as part of the transfer of the §15 retail package store all alcoholic beverages license from JDudley, Inc. d/b/a Caribbean Liquors ("JDudley") to Fernandez Brothers Liquors, Inc. located at 527 Dudley Street, Roxbury (Boston), MA. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and a hearing was held on Wednesday, November 18, 2015.

The following documents have been entered in evidence as exhibits:

Appellant's Exhibits:

1. Asset Purchase and Sale Agreement;
2. Local Board Docket Sheet for §15 Retail Package Store All Alcoholic Beverages license at 527-531 Dudley Street, Roxbury, MA;
3. Local Board letter and Docket Sheet regarding license transfer at 167-169 Blue Hill Avenue, J&M Liquor Corp.;
4. Transfer application for 527 Dudley Street, Roxbury, MA;
5. Letter dated 8/19/2015, from the Dudley Street Neighborhood Initiative ("DSNI") to Licensee's Attorney;
6. Memorandum of Understanding ("MOU") between Dudley Street Neighborhood Initiative and Fernandez Brothers Liquors, Inc.;
7. Local Board notice of approval of transfer application;
8. Photocopy of retail package store license of Five Star Liquor, Inc. d/b/a Blue Hill Liquors;
9. Witness Summons for Commission Appeal Hearing;
10. Email dated 9/8/2015 from DSNI to Licensee's Attorney;

11. Email dated 9/9/15, from DSNI to Licensee's Attorney;
12. Motion for Reconsideration filed by Fernandez Brothers Liquors, Inc.

Local Board Exhibits:

- A. List of Retail Package Store licensees upon which the Local Board imposed the condition of "no nips/no singles" in 2015.

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

FACTS

The Commission makes the following findings of fact and rulings of law based on the evidence presented at the hearing.

1. Fernandez Brothers Inc. submitted a §15 package store license transfer application in August of 2015, to transfer the license from JDudley, Inc. d/b/a Caribbean Liquors at 527 Dudley Street Boston, Massachusetts. (Testimony, Exhibits 1, 2, 4)
2. The Local Board website advises all license transfer applicants that they are required to meet with the local neighborhood associations prior to the Board taking any action on any license transfer application. (Testimony)
3. In August of 2015, the applicant, Fernandez, met with the Dudley Street Neighborhood Initiative (DSNI) Group, the community organization for the neighborhood within which the package store is located. (Testimony, Exhibits 5, 6)
4. The DSNI Group addressed specific concerns regarding quality of life issues affecting residents in their community, specifically loitering outside the package store; public intoxication; sale of nips; and illegal activity. (Testimony, Exhibits 5, 6)
5. During this meeting, conditions regarding the operation of the package store were discussed, one of which was that, "[t]he owner will not sell products that are less than two (2) ounces in size (i.e. nips) with a retail cost of \$2.99 or less from their inventory." (Exhibits 5, 6)
6. On September 11, 2015, Fernandez and the DSNI Group signed a Memorandum of Understanding whereby the agreed-upon license conditions included, "[t]he owner will not sell products that are less than (2) ounces in size (i.e. nips) with a retail cost of \$2.99 or less, from their inventory." (Exhibit 6)
7. Prior to attending the Local Board hearing, the seller, JDudley voluntarily reduced the sale price for the licensed premises from \$700,000.00 to \$550,000.00, after the MOU was executed between Fernandez and DSNI agreeing not to sell nips (Testimony, Exhibits 1, 4)
8. The Local Board held a hearing on the transfer application on September 16, 2015. (Testimony, Exhibit 2)

9. On September 17, 2015, the Local Board approved the transfer of the license with the condition imposed: “no nips/no singles to be sold at the premises.” (Testimony, Exhibit 2)
10. The Local Board sent notice to the applicant that the transfer application was approved, however, the notice failed to mention the condition placed on the license.¹ (Testimony, Exhibit 7)
11. On October 5, 2015, Fernandez filed a Motion for Reconsideration with the Local Board to approve the transfer application, without any conditions. (Exhibit 12)
12. On October 8, 2015, the Local Board denied Fernandez’s Motion for Reconsideration to remove the conditions from the license. (Exhibit 12)
13. J&M Liquor Corp. a retail package store located at 167-169 Blue Hill Avenue, Roxbury, in the same neighborhood as JDudley, Inc. d/b/a Caribbean Liquors, has a condition imposed by the Local Board on April 30, 2015 of, “no sale of nips or singles.” (Exhibits 3, A)
14. Five Stars Liquor, Inc. d/b/a Blue Hill Liquors located at 108 Blue Hill Avenue, Roxbury, has a “No Nips” license condition. (Commission records)
15. In 2015, the Local Board imposed the condition prohibiting the sale of nips and/or singles on 16 (sixteen) retail package store license applications in neighborhoods across the City of Boston, including: Allston, Brighton, Charlestown, Downtown Crossing, East Boston, Fenway, Haymarket Square/City Hall, Roxbury, Seaport District, and South Boston.² (Exhibit A)

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. 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).

This appeal involves the Local Board’s imposition of the condition “no nips/no singles” on a transfer application of a §15 retail package store all alcoholic beverages license to be exercised at the same location. Fernandez, the transferee, opposed the imposition of this condition on this license transfer application. Fernandez argues that it was specifically singled out and detrimentally “forced” by the Local Board and the community into meeting with the neighborhood group and signing the “MOU” resulting in the conditions being imposed. Fernandez contends that the Local Board’s reliance on the neighborhood group’s input was

¹ The Local Board did not issue a Statement of Reasons because the license transfer application was approved.

² Counsel for the Local Board stated that Exhibit A, which lists the 16 applications, is *exclusive for 2015*, as of this hearing date. There are other package stores in additional Boston neighborhoods which have similar conditions imposed by the Local Board.

unlawful, that the Local Board exceeded its statutory authority, and that the Local Board's actions were arbitrary and capricious. Fernandez further alleges that the Local Board discriminated against the Roxbury neighborhood of Boston by imposing these conditions on package stores licensees exclusively located in the Roxbury neighborhood of Boston. Fernandez contends that the Local Board, by imposing these conditions, which it asserts are unreasonable and change the character of the license, has created a new type of license not recognized within M.G.L. c. 138.

The issue for the Commission to determine is whether the Local Board exceeded its authority by the imposition of this condition "No Nips/No Singles" upon the license transfer application of Fernandez.

I. The Licensing of Alcoholic Beverages Involves a Public Process

The procedures for the issuance and transfer of retail package store licenses to sell alcoholic beverages are governed by M.G.L. c. 138, §§15 and 23. Local licensing authorities are recognized as having expertise regarding the problems affecting the regulation of alcoholic beverages. Great Atlantic & Pacific Tea Co., Inc. v. Bd. of License Comm'n of Springfield, 387 Mass. 833, 837, 838 (1983). A local licensing authority exercises very broad discretion about public convenience and public need, with respect to whether to grant a license to sell alcoholic beverages. See Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 379 (2006); Ballarin, Inc. v. Licensing Bd. of Boston, 49 Mass. App. Ct. 506 (2000).

The public scheme is expressly stated throughout the alcoholic beverages licensing statute. M.G.L. c. 138, §23 provides in paragraph 1: "*The 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.*" (Italics supplied.)

The license transfer process pursuant to M.G.L. c. 138, §23, further provides in paragraph 9 "*Any license under this chapter held by an individual, partnership or corporation may be transferred to any individual, partnership or corporation qualified to receive such a license in the first instance, if, in the opinion of the licensing authorities, such transfer is in the public interest.*" (Italics supplied.)

The Massachusetts courts recognize not only a Local Board's expertise regarding the licensing process, they also recognize that alcohol licensing involves a public process and provides for community input. "In seeking to 'serve the public need . . . in such a manner as to protect the common good,' it is obvious that this statutory scheme assumes free and open discussion before the licensing officials. In other words, a public policy of open public participation is implicit in the statutory scheme." Beacon Hill Civic Association v. Ristorante Toscano, Inc., 422 Mass. 318, 322 (1996).

The Massachusetts Appeals Court has considered public need at length, and determined that it should not be interpreted literally. The Court explains that "[n]eed 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, Inc. v. Licensing Bd. of Boston, 49 Mass. App. Ct. 506, 511 - 512 (2000). “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. (Italics supplied.)

The Commission disagrees with the characterization that Fernandez was specifically singled out and coerced by the Local Board to meet with the DSNI Group and to sign the MOU. The Local Board advises all applicants that they are required to meet with the neighborhood groups before the Board will take any action on an application. After the community meeting, Fernandez and DSNI voluntarily entered into the MOU/agreement whereby Fernandez agreed to not sell nips, and thus, received community support. Had Fernandez not met with the community groups and executed the MOU, it potentially ran the risk of neighborhood opposition and disapproval of its application. The governing statutes and case law for alcoholic beverages licensing require a process “of open public participation.” Toscano at 322. Therefore, the Commission finds Fernandez’s argument to be invalid and unpersuasive that they were singled out and forced into meeting with the local neighborhood groups, as all applicants are required to complete this process. The Commission does not find Local Board’s reliance on the neighborhood group’s input was unlawful and beyond its authority.

II. Local Boards’ Authority to Impose Reasonable Conditions on a License

Pursuant to M.G.L. c. 138, §23, Massachusetts licensing authorities (Commission and Local Boards) are statutorily authorized to impose conditions on alcoholic beverages licenses:

Whenever, in the opinion of the local licensing authorities, any applicant for a license under section twelve, fourteen, fifteen or thirty A fails to establish to their satisfaction his compliance with the requirements of this chapter, *or any other reasonable requirements which they may from time to time make with respect to licenses under said sections, respectively...*

M.G.L. c. 138, §23, ¶4 (Italics supplied.)

The Supreme Judicial Court acknowledged the imposition of conditions in the licensing process as described by the Alcoholic Beverages Control Commission:

In reviewing an application for a license, the local licensing authority and [the] commission consider a wide range of factors in determining public need and fitness and suitability of the applicant before making the ultimate determination as to whether to grant the license. The input of local residents, individually and through civic organizations[,] is common in deciding the issue and when appropriate in setting conditions on the license. If local residents wish to have conditions placed on the licensee, the time for seeking such conditions is at the hearing and the place for such conditions is on the license itself.

Beacon Hill Civic Association v. Ristorante Toscano, Inc., 422 Mass. 318, 322 n. 4 (1996) (quotations omitted).

The Superior Court of Massachusetts affirmed the authority of the Local Boards and the Commission to impose “reasonable conditions” on a licensee pursuant to public/community input. Christopher Columbus Italian Mutual Aid and Benevolent Society, Inc., v. Alcoholic Beverages Control Comm’n and the Bd. of Selectmen of the Town of Winchester, No. CIV.A. 99-3214, 2000 WL 1509978, at *3 (Mass. Superior Ct. Sept. 28, 2000).

The Commission has, in prior decisions, approved and enforced “reasonable conditions” imposed by the Local Boards. Reasonable conditions are conditions which relate to the operation and conduct of the licensed premises, so long as they do not conflict with the law or public policy. See Vijeta Corp. d/b/a Prospect Liquors, (ABCC Decision March 20, 2014) (Commission approved Local Board’s revocation of package store license for failure of licensee to comply with reasonable conditions imposed by the Local Board); GM Restaurant Enterprises, Inc. d/b/a Restaurante Bar La Terraza, (ABCC Decision February 8, 2012) (Commission approved Local Board’s decision finding licensee violated the “No Bar” condition on its license); 5 North Square, Inc. (ABCC Decision July 7, 2010) (Commission approved Local Board requirement that all license applicants meet with neighborhood groups and civic associations in the area where premises is located. Commission approved Local Board’s decision imposing condition of “No Bar” on license, and found condition was validly transferred to the licensee); BAA Massachusetts Inc. (ABCC Decision December 17, 1997) (reasonable condition of being open a minimum of 35 hours per week); The Bandar Corp. (ABCC Decision May 4, 1993 (reasonable conditions that a maximum of 15 cars being parked in licensee’s parking lots, always having a valet available, and no car alarms to be used).

III. Local Board Condition Does Not Change the Character of the License

Fernandez contends that the Local Board’s imposition of this condition created a new type of license contrary to statute, analogous to the holding in Hub Nautical Supply Co., Inc. v. Alcoholic Beverages Control Comm’n, 11 Mass. App. Ct. 770 (1981). The Commission is not persuaded by this argument and does not find the holding in Hub Nautical analogous to this matter. In Hub Nautical, the Local Board granted a retail package store license with a condition that the licensee could only sell alcohol to ships and could not sell alcohol to pedestrians (i.e. the public). A retail package store license, by its very definition, authorizes a licensee to sell alcoholic beverages to the public (i.e. pedestrians), to be consumed off the premises. Hub Nautical at 774. The Court held that the condition imposed by the Local Board was illegal and contrary to statute because the “conditions imposed by the board narrow that broad range of permitted purchasers so severely that for all practical purposes the board’s action creates an entirely new type or class of license . . .” not authorized by Chapter 138. Id.

The condition of “No nips/no singles” is a condition affecting the container, size, and quantity of alcoholic beverages allowed to be sold by the licensee. This condition is not contrary to statute, as it does not impose limitations on the license which change the character of the license contrary to law and public policy. This condition does not restrict to whom the licensee may sell the product, nor does the condition restrict the type of alcoholic beverages the licensee can sell. This license allows for the retail sale of all lawful types and lawful brands of alcoholic beverages. This condition does not preclude the licensee from selling any type of alcoholic beverages or distilled spirits, sales for which the statute expressly provides. The condition of “No nips/No singles” does not run afoul of the express language and intent of the statute.

The Commission has, in prior decisions, disapproved actions by Local Boards finding that a Local Board exceeded its authority by imposing unreasonable conditions. The standard for unreasonable conditions are those conditions pertaining to the operation of the premises, which are contrary to law, “illegal per se”, and fly in the face of the plain language of the M.G.L. c. 138. See Karen McGovern, Inc. d/b/a Puffins Restaurant (ABBC Decision November 13, 2014) (Commission disapproved conditions for hours of operation imposed by Local Board because conditions violated the statute and were “illegal per se”); Abracadabra Flower & Gift Service, Inc. (ABCC Decision December 4, 2012) (Commission disapproved Local Board’s denial of a §15 retail package store license as being contrary to law and public policy, because the applicant would not accept the condition of non-transferability of the license); Donohue Holdings, Inc. d/b/a Donohue’s (ABCC Decision May 25, 2012) (Commission disapproved Local Board decision imposing conditions restricting the months/hours of alcoholic beverage sales in its outdoor seating section, as contrary to those expressly authorized by statute). These Commission decisions are analogous to the holding in Hub Nautical, as the conditions imposed by the Local Board were contrary to law, against public policy, and thus, unreasonable. Hub Nautical at 774. The Commission is not persuaded and does not find that these decisions and the holding in the Hub Nautical case are analogous to the facts in this matter. The Commission finds that the condition of “No nips/No singles” to be reasonable, and one that does not change the character of the license. Therefore, the Commission finds that this condition is not contrary to law or public policy.

IV. The Local Board Did Not Unfairly Impose this Condition in the Roxbury Community

Fernandez further asserts that in the Roxbury neighborhood of Boston the package store licensees are being discriminated against as the Local Board is imposing the “No nips/No singles” (or similar) condition on all retail package store licensees, both transfers and new applications, only in Roxbury, and not throughout other communities in Boston. The Local Board submitted a document (Exhibit A) with a comprehensive list of all of the “No Nips/No singles” or similar conditions, imposed on licensees *exclusively* in calendar year 2015. This condition (or one very similar) was imposed on licensees in most communities throughout the City of Boston, including: Allston, Brighton, Charlestown, Downtown Crossing, East Boston, Fenway, Haymarket Square/City Hall, Roxbury, Seaport District, and South Boston.

The Commission does not find that this condition was discriminately imposed in the Roxbury neighborhood of Boston. The Commission finds, and the record unequivocally supports, that this condition has been imposed on many licensees in many neighborhoods and communities throughout the City of Boston.

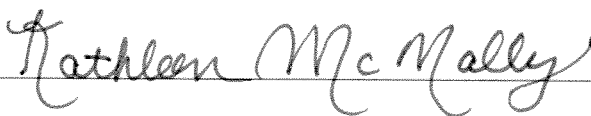
The Commission finds the arguments asserted by Fernandez to be neither valid, nor persuasive. Therefore, the Commission finds that the “No nips/No Singles” condition imposed by the Local Board is reasonable, is not contrary to law or public policy, and finds the action of the Local Board to be a reasonable exercise of its lawful discretion. The Commission finds that the Local Board did not exceed its statutory authority by imposing this condition, and the imposition of this condition was supported by the record, was not discriminately imposed in Fernandez’s proposed location, was not based upon an error of law, and thus, was not arbitrary and capricious.

CONCLUSION

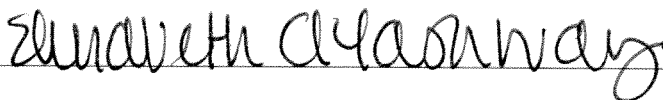
Based on the evidence presented at the hearing, the Commission **APPROVES** the action of the Licensing Board for the City of Boston in imposing the condition of "No nips/No singles to be sold at the premises" on the transfer application of the section 15 all alcoholic beverages retail package store license of Fernandez Brothers, Inc. The Commission finds that the condition imposed by the Licensing Board for the City of Boston is within its lawful discretion and statutory authority.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



Elizabeth A. Lashway, Commissioner



Dated: March, 23, 2016

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: Ethan Schaff, Esq.
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Local Licensing Board
Administration, File