



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

Deborah B. Goldberg
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

DECISION

PJC OF MASSACHUSETTS INC. D/B/A RITE AID
11 PEARL STREET
BRAINTREE, MA 02184
LICENSE#: NEW
HEARD: 05/20/2015

This is an appeal of the action of the Braintree Board of License Commissioners (the "Local Board") in denying the M.G.L. c. 138, §15 wines and malt beverages package store license application of PJC of Massachusetts d/b/a Rite Aid (the "Applicant" or "Rite Aid"). On July 22, 2014 and September 23, 2014 the Local Board held hearings that resulted in a denial of Rite Aid's application. The Applicant timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, May 20, 2015.

The following documents have been entered as exhibits:

Exhibits of Applicant Rite Aid:

1. License Application of PJC, Inc. d/b/a Rite Aid;
2. Notice of Appeal (Decision Attached);
3. Floor Plan of Braintree Rite Aid;
4. Photo of Shades on shelves containing alcohol;
5. Google map of Braintree Rite Aid;
6. City search map of Resendes Market;
7. Google Street map of Resendes Market;
8. Email dated July 2014 from John Twohig;
9. Rite Aid Kid Cents Program;
10. Certificate of Achievement from Rite Aid Employee Alcohol Training Course;
11. Public Desire Example of Sales prior to and after wine and beer in Rite Aid;
12. Minutes for Local Board hearing for ten (10) package store license holders;
13. Current Braintree Town Massachusetts population demographics and statistics in 2014;
14. Availability of package stores to Braintree residents
15. July 10, 2014 Memo from Amy Carey, to Annette McLaughlin;
16. July 15, 2014 Memo from Eric Erskine to Annette McLaughlin;
17. Transcript of July 22, 2014 Local Board hearing; and
18. Transcript of September 23, 2014 Local Board hearing.

Exhibits of Local Board:

- A. Published Notice of Local Board Hearing;
- B. Minutes of Local Board July 22, 2014 hearing;
- C. Minutes of Local Board September 23, 2014 hearing;
- D. October 3, 2014 Decision of Local Board;
- E. Map showing location of section 15 licensees in Braintree.

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. The applicant, PJC Massachusetts, Inc. d/b/a Rite Aid is a Massachusetts corporation with a retail business store and pharmacy located at 11 Pearl Street, Braintree, Massachusetts. (Testimony, Exhibits 1, 17, 18, A, B)
2. Rite Aid applied to the Local Board for an available M.G.L. c. 138, §15, wines and malt beverages license to be exercised at its Braintree location. (Testimony, Exhibits 1, 3, 11, 18, A, B)
3. Rite Aid holds §15 retail package store licenses in three (3) of its other Massachusetts stores located in North Andover, Everett, and Quincy. These locations have no history of liquor law violations. (Testimony, Exhibits 1, 17, B, Commission records)
4. There are no zoning issues regarding a liquor license at this location. The Braintree Rite Aid store is situated within the General Business and Village Zoning Overlay District known as "South Braintree Square." South Braintree Square is part of Braintree's cluster zoning, which encourages businesses to be gathered in a central location. Package stores are permitted in South Braintree Square. (Testimony, Exhibits 2, 18)
5. The Town of Braintree Board of Licensee Commissioners ("Local Board") acting as the Local Licensing Authority held two (2) public hearings on July 22, 2014 and September 23, 2014 regarding this application. (Testimony, Exhibits 17, 18, A, B, C)
6. While an applicant for a liquor license is advised by the Local Board to submit petitions in support of its application, Rite Aid did not submit any petitions in support of its application due to privacy issues regarding its pharmacy customers. (Testimony, Exhibits 17, 18, B, C)
7. No residents spoke in favor of this application. (Testimony, Exhibits 17, 18, B, C)
8. The Braintree Building Division and the Braintree Department of Municipal Licenses and Inspections had no objections to Rite Aid's application. (Exhibits 16, 17, B)
9. Braintree Deputy Police Chief Steven Sawtelle is concerned about increased traffic during the evening rush hour caused by customers stopping to pick up alcoholic beverages on their way home. Furthermore, he is worried that additional motor vehicles exiting Rite Aid onto Pearl Street will further congest the Hancock Street exit. His

concerns are not isolated to Rite Aid's site, but with the continual traffic in this area in general. (Testimony, Exhibits 18, C)

10. The Braintree Fire Department expressed unease with additional traffic and the impact on emergency vehicles in this retail area, which is already congested. (Exhibits 17, B)
11. Thomas Meade, a Braintree resident who lives next door to Rite Aid, testified in opposition to the application. He has had a problem with trash that blows into his yard from the Rite Aid loading dock. He is concerned that if this license is granted trash blowing onto his property will increase, caused by customers leaving alcohol packaging on the ground because Rite Aid has proven in the past that employees will not pick the trash up. He has had to call the police due to "kids" drinking alcohol on the Rite Aid platform and individuals urinating in the loading dock area at all hours of the night. Mr. Meade works from home some days and it is very difficult for him to concentrate on matters. He also generally believes that a pharmacy should not be selling alcohol. (Exhibits 2, 17, B)
12. The Braintree Planning Department is opposed to the application. The area of southern Braintree and the Highlands is sufficiently served by existing retail alcohol establishments, including Pearl Wine and Liquors at 96 Pearl Street, and Resendes Market at 960 Washington Street. (Exhibits 12, 17, B, E)
13. Braintree Assistant Town Engineer, Mr. John Morse, presented a map prepared by the engineering department, using the Town's geographic information system to measure the distance from Rite Aid's location to the existing license package stores in Braintree.¹ (Testimony, Exhibits 2, 17, B, E)
14. Resendes Market holds a § 15 retail package store license located one block (approximately 300 feet) from Rite Aid. (Testimony, Exhibits 2, 6, 7, 12, E)
15. There are ten (10) existing package store licenses in Braintree, of which four are within a two mile radius. Pearl Street Wine and Spirits holds a § 15 retail package store license and is located approximately 530 feet from Rite Aid. Pearl Street Wine and Spirits submitted a letter opposing Rite Aid's application based the on public need being adequately served by two existing package stores (Resendes Market and Pearl Street Wine and Spirits) in the area.² (Exhibits 2, 12, 17, 18, B, C, E)
16. It is the practice of the Braintree Board to articulate the Ballarin³ factors when voting on an alcohol license application. Rite Aid was not treated any differently from any other applicant that applies to the Board. (Testimony, Exhibits 2, 12, 17, 18, C, D)
17. The Local Board voted on the application while discussing and considering the Ballarin factors:

¹ The map originally identified nine existing package store licenses in Braintree, there are actually ten. (Exhibit E)

² Competition is not a factor to be considered by the Local Board in the license application process. The Great Atlantic & Pacific Tea Company, Inc. v. Board of License Commissioners of Springfield, 13 Mass. App. Ct. 268, 271 (1982).

³ Ballarin v. The Licensing Board for the City of Boston, 49 Mass. App. Ct. 506, 511 (2000).

- a. *Noise*: the issuance of a liquor license to the applicant would not create any more noise than currently exists at the business: vote was unanimous; (Exhibits 2, 18, C, D)
 - b. *Size*: The size of the applicant's business is not being increased or altered and therefore would not be a deterrent to the issuance of a liquor license: vote was unanimous; (Exhibits 2, 18, C, D)
 - c. *Sort of operation to carry the license*: the type of operation that would hold the liquor license, primarily a pharmacy, was not an appropriate business to carry a liquor license. From a public health perspective, Board member McGrath could not support the request for alcohol to be sold in a pharmacy based on the fact that effective October 1, 2014, the Braintree Board of Health revised their Rules and Regulations prohibiting the sale and distribution of tobacco and nicotine products in pharmacies: vote was 2 to 2; (Exhibits 2, 18, C, D)
 - d. *Reputation of the applicant*: the reputation of the applicant was not an issue that would prohibit the issuance of the liquor license: vote was unanimous; (Exhibits 2, 18, C, D)
 - e. *Traffic*: Local Board discussed traffic in the area of Rite Aid, and noted the Fire Department raised the issue of additional traffic and its impact on a very congested area of town, especially during the height of traffic in the afternoon hours: vote 2 to 2; (Exhibits 2, 18, C, D)
 - f. *Number of existing dispensaries in the area*: two members voted there exists a sufficient number of dispensaries in this location within a two mile radius of Rite Aid, and no less than four (4) dispensaries of liquor are located in this area, and they do not believe that a fifth dispensary is required: vote was 2 to 2; (Exhibits 2, 18, C, D)
 - g. *Views of inhabitants*: vote was 3-1-1 (one opposition); (Exhibits 2, 18, C, D)
 - h. *Public Need*: Public need: vote 2 to 2. (Exhibits 2, 18, C, D)
18. The vote taken by the Local Board was two (2) in favor, and two (2) opposed that Rite Aid has not met demonstrated that a public need exists for a package store license at this location.⁴ (Exhibits 2, 18, C, D)
19. To clarify its vote further, the Local Board explained that since there are two other liquor stores within 500 feet of Rite Aid, there was no public need for another package store license. The citizens are adequately served by the existing facilities, therefore Rite Aid's application was denied as there is no public need for another license in that area. (Testimony, Exhibits 2, 18, C, D)

⁴ Board members Forsberg and McGrath voted to deny the application, Board members Casey and O'Brien voted to grant the application, one (1) Board member was absent. The vote was 2 to 2. The motion to grant the application did not prevail, which means the motion does not carry and the application was not approved, therefore it was denied. (Exhibit 18)

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. “[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 Commission reviewed the minutes and votes of the Local Board for the ten (10) existing package store licenses, admitted as Exhibit 12. The Commission does not find Rite Aid’s argument persuasive that the Local Board treated its application differently from the existing licensees’ applications. 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. 375, 379. The Local Board found after lengthy discussion and deliberation, and applying and voting on the Ballarin factors, that the public need for retail package stores was being met in the proposed location.

Upon review of the record of the Local Board proceedings in this matter, the Commission finds that the Local Board fulfilled its responsibility regarding this application. The record clearly demonstrates that not only did the Local Board discuss the Ballarin factors, but that it held a particular and specific vote for each individual Ballarin factor. Further, the Local Board made particularized and specific findings which are supported by the record.

The Local Board’s decision, that there exist an adequate number of dispensaries in the area, was based on sufficient evidence presented during the course of the public hearings. 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, the Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board in denying the M.G.L. c. 138, §15 wines and malt beverages application of PJC of Massachusetts, Inc. d/b/a Rite Aid.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner

Kathleen McNally

Kim S. Gainsboro, Chairman

Kim S. Gainsboro

Dated: July 21, 2015

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: Pamela Berman, Esq. via facsimile 508-929-3138
Brian Riley, Esq. via facsimile 617-654-1735
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration
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