

Re: Wine Nation MA, Inc.  
dba Wine Nation  
Premises: 160 Granite Street  
City/Town: Braintree, MA  
Heard: February 3, 2010

### **DECISION**

This is an appeal of the action of the Local Board of the City of Braintree ("Local Board") in denying the application of Wine Nation MA, Inc., dba Wine Nation ("Applicant" or "Wine Nation") for an annual, all alcoholic beverages license under section 15 of chapter 138 of the General Laws.

The Applicant timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission ("Commission") and a hearing was held on February 3, 2010.

The following exhibits are in evidence:

1. Original Application dated June 5, 2009;
2. Mr. Thomas Trone's resume and background sheets;
3. Taylor Trone's Background;
4. Wine Nation Compliance to Minor Policy Strategy (with Alcohol Service Policy Document);
5. Letter from James A. Hanley, Vice President of the Braintree Business Trust, c/o Wilmington Trust Company, the landlord of the premises;
6. Rendering and Preliminary Drawings dated September 30, 2009 (7 pages);
7. Report of the Principal Planner, dated July 8, 2009, to Annette McLaughlin;
8. Braintree Fire Department Memorandum, dated July 7, 2009, from Deputy Chief John Donahue to Annette McLaughlin;
9. Braintree Police Department Memorandum, dated June 23, 2009, from Lt. Kevin Ware to Chief Paul H. Frazier;
10. Report of Eric C. Erskine, Local Building Inspector, dated July 8, 2009;
11. Report of Sean Collins, Environmental Health Specialist, dated July 1, 2009;
12. Wine Nation Map designating the location of the liquor stores and the street distance between the Wine Nation location and the existing licensees;
13. Curriculum Vitae of Keri Pyke;
14. Report on Traffic Study done by Keri Pyke, Howard, Stein & Hudson;
15. Metro Fire Mutual Aid Agreement, dated November 1, 2001;

16. Metropolitan Law Enforcement Council, Interagency Mutual Aid;
17. Truck Turning Radios Plan (2 pages);
18. License Application, Renewal for Bin Ends and Corporate Records on file with the Board for Bin Ends;
19. Other License Applications;
  - a. BMP Corporation d/b/a Pond Street Variety
  - b. DEEP Convenience, Inc. d/b/a Resendes Market
  - c. Krish Corporation d/b/a Red Apple Food and Liquor
  - d. Granite Package Store, Inc.
  - e. Fish Enterprises, Inc. d/b/a Braintree Package Store
  - f. Cottonwood Beverage, Inc. d/b/a Liberty Wine and Spirits
  - g. Pearl Wine & Spirits, Company, Inc.
20. Photographs of grounds submitted to Board at first hearing (9 photos);
21. Massachusetts Department of Workforce Development Census 2000 Estimated Population;
22. Wine Nation drawing and plans (color-coded);
23. Notice from State of Maryland Department of Public Safety and Correctional Services dated July 20, 2009 RE: Taylor Edward Trone;
24. Town of Braintree Board of License Commissioners letter to Attorney Upton dated August 6, 2009 RE: Decision and Notice of Appeal to Wine Nation;
25. Letter from Richard Valentine to Braintree Licensing Board dated July 27, 2009 with attachments;
26. Letter from John Hafferty to Mayor Sullivan, Braintree Town Council and Braintree Board of License Commissioners;
27. Petition in opposition to Wine Nation application submitted to Mayor Sullivan, Braintree Town Council and Braintree License Commissioners;
28. Wine Nation's minor's policy training material and forms;
29. Interoffice Memo from A. McLaughlin to various departments dated June 18, 2009;
30. Attorney Profile of Frederick W. Riley, Esq;
31. The initial July 28, 2009 Transcript of the Hearing before the Board;
32. Minutes of the Braintree License Commission Meeting dated July 28, 2009;
33. Joint Motion to Postpone ABCC Hearing so that the Town of Braintree will have time to hear a reapplication by Wine Nation, Inc. as approved by the ABCC;
34. The Application of Wine Nation MA, Inc;
35. Second Report of the Braintree Fire Department dated December 17, 2009, from Deputy Chief Donahue to Annette McLaughlin;
36. Second Report of Braintree Police Department, Memorandum from Lt. Kevin Ware dated December 9, 2009 to Paul Frazier;
37. Letter from Michael Modestino dated December 22, 2009 to Joseph F. Powers, Chairman of the Braintree Licensing Board re: Community Outreach Commitments;
38. Memo from Melissa A. Santucci to Annette McLaughlin dated December 16, 2009 (3 pages);
39. Letter from Michael Modestino to Melissa Santucci dated December 21, 2009;
40. Affidavit of Frederick W. Riley dated December 21, 2009;

41. Article from Massachusetts Beverage Business Journal regarding Bin Ends;
42. Most Current Copies of Photographs of the Property submitted at December, 2009 hearing;
43. Advertisement for Atlas Liquors of Medford, Quincy, and Roslindale in the Braintree Forum (2 pages);
44. E-mail dated December 22, 2009 from Melissa Santucci;
45. Second Memo from Eric Erskine to Annette McLaughlin dated December 11, 2009;
46. Second Memo from Sean Collins to Annette McLaughlin dated December 16, 2009;
47. Blanchard's liquor store advertising in the Braintree Forum on November 18 and 25, 2009 (2 pages);
48. Curtis Liquors advertising in the Braintree Forum on Nov. 18, 2009 and Dec. 16, 2009 (2 pages);
49. Memorandum from Jeff Slavin, Hangtime Wholesale Wine Company, 99 South Street, Medfield, MA 02052 dated December 19, 2009 to the Braintree Planning Board;
50. Letter of the Ford Law, P.C. dated December 22, 2009, to the Board of Licensing Commissioners, Town of Braintree;
51. Additional Petition for new signatures that were received regarding the second application by Wine Nation MA, Inc;
52. Second Letter from Richard J. Valentine dated December 17, 2009 to the Braintree Licensing Board;
53. Letter from Bernie and Phyl's Furniture to the Braintree Licensing Board;
54. Letter from Paul Dan Clifford to the Board of License Commissioners;
55. Article from Boston Business Journal dated November 13, 1997, Area's Busiest Highway Sections, and "Accident Closes Granite Street, Braintree Near Highway" information;
56. Google Map of Locations of Package Stores in Braintree Submitted by Attorney Michael Ford;
57. Supplemental Traffic Study dated December 18, 2009 from Keri Pyke to Melissa Santucci (12 pages);
58. Massachusetts Beverage Business Journal, January 2010, front page and list of wholesalers;
59. Map of Town prepared by Town Engineer showing distances from 160 Granite Street to other licensed establishments in Braintree using GIS;
60. Minutes of December 22, 2009 meeting of Braintree License Commission;
61. Transcript of the December 22, 2009 Hearing before the Licensing Board (150 pages);
62. Letter dated December 31, 2009 from Board of License Commissioners to Attorney; Modestino re: decision and notice of right to appeal;
63. Braintree Market & Deli Application for Wine and Malt Package Store;
  - a. Cover memo and Department Head Comments regarding application (6 pages).
  - b. Excerpt of Minutes of Board of Selectmen meeting June 10, 2002 (2 pages)

- c. Letter from Braintree Executive Secretary to Attorney Pearlman dated June 14, 2002 re: denial of application.
- 64. Deep Convenience, Inc. d/b/a Resendes Market Application for All-Alcoholic Package Store License;
  - a. Cover Member and Department Head Comments (7 pages)
  - b. Excerpt of Minutes of Board of Selectmen Meeting, August 28, 2006 (3 pages)
  - c. Letter from Interim Executive Secretary to Attorney Pearlman dated August 29, 2006 re: denial of application
- 65. Sun Retail d/b/a Luke's Convenience Store Application for Wine & Malt Package Store;
  - a. Cover Memo and Department Head Comments (7 pages)
  - b. Excerpt of Minutes of Board of Selectmen Meeting January 8, 2007 (4 pages).
  - c. Letter from Interim Executive Secretary to Attorney Aieta dated January 10, 2007 re: denial of application.
  - d. ABCC Decision dated February 28, 2007 upholding denial (1 page)
- 66. Dave & Buster's application and approval;
- 67. Patriot Ledger article dated December 23, 2009;
- 68. Newspaper article by Robert Aicardi "Wine Superstore License turned down again"; and
- 69. Forum Newspaper Article regarding Dave & Busters.

There are (2) tapes of this hearing.

### Facts

The Applicant stipulated to many facts including the following: Wine Nation MA, Inc. seeks a license to operate a 20,971 square foot store licensed to sell all alcoholic beverages to be consumed off the premises where sold pursuant to section 15 of chapter 138 of the General Laws. This 20,971 square feet will be consist of the following: 10,683 square feet of shelving for alcoholic beverages, including 6,000 to 7,000 varieties of wine; a 1,720 square foot classroom; 3,825 square feet of chests and shelves for gourmet food<sup>1</sup>, wine related gifts and gift baskets; 4,307 square feet of circulation and displays for wine books, magazines and other similar types of wine-related information; and 2,156 square feet of customer service areas, tasting counters and check-out. As shown from the exhibits in evidence, this proposal was not received with universal support.

Wine Nation concedes that the operation of its proposed business would make "traffic ...difficult during certain times of the year."Wine Nation further acknowledged that the premises it proposed to be licensed had not yet been built and that Wine Nation did not

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<sup>1</sup> The Applicant offered no specific information or specification to support its own characterization of what is "gourmet food." Compare Ballarin, Inc. v. Licensing Board Of Boston, 49 Mass. App. Ct. 506 (2000). ("an appetizer of duck liver pate, rolled in pistachio, lingonberry coulis, served with garlic pita points, followed by an entree of venison au poivre, finished with a dessert of chestnut mousse gateau, apricot glace, is still more rapturous if preceded by a dry martini or ended with a cognac.")(Kass, J.).

now have any construction drawings or plans showing the actual dimensions of the premises which were to be constructed and on which the license was proposed to be exercised.<sup>2</sup> Wine Nation's application dated November 27, 2009 contained inconsistent and conflicting factual statements. See, e.g., Reply to Sections 9(a), 14, 14(a) and the attached Schedule 14(a).

At the Local Board hearing on December 22, 2009, the attorney for Wine Nation described the business plan of Wine Nation to be the operation of a store that offers high end liquors at discount prices, offering national brands of wine, represented that Wine Nation would be selling 65-70% wine for the source of revenue, and that Wine Nation thus needs 1300 customers per week spending \$100-\$150 each. This volume of customer traffic averages out to 186 customers per day, 7 days per week.

At this December 22, 2009 hearing, Thomas Trone acknowledged that Wine Nation would be paying \$42,000.00 per month rent and that stocking the store would cost an additional \$1,000,000.00. Mr. Trone stated to the Local Board that Wine Nation planned to charge \$20-\$25 per person for wine classes and that there would be wine tasting events as well.<sup>3</sup> Mr. Trone represented to the Local Board that Wine Nation would enforce and control the delivery schedule from wholesalers and that late deliveries would be required to be made the next day.<sup>4</sup>

A city councilor stated to the Local Board that traffic would get worse because of this license at this location. The councilor further stated that the traffic analysis grossly understated the impact. The councilor then pointed out that 80,000 transactions per year at \$100 per transaction were required for the applicant to "break even", as admitted by the attorney for Wine Nation. This volume of transactions would require at least 256 trips per day if the license operated 6 days a week and at least 220 trips per day if the license operated 7 days per week. This traffic volume is an increase of over 18% from the traffic volume stated by Mr. Trone.

A second city councilor, representing the district in which the premises were proposed to be located, told the Local Board that existing traffic at the area is terrible. At this Local Board hearing, Police Chief Paul Frazier stated this potential use would create 186 more

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<sup>2</sup> M.G.L. c. 138, §15A provides, in pertinent part, "[w]here there are no premises actually in existence at the time the application is made, the applicant may file with the local licensing authorities a plan showing the actual dimensions of premises which are to be constructed on which the license is to be exercised."

<sup>3</sup> M.G.L. c. 138, §15 does authorize a license holder to provide tastings of any alcoholic beverages on the premises that are available for sale, subject to express conditions stated in this statute. One of these statutory conditions is that the tasting must be provided "without charge." Thus the context of Mr. Trone's statement is unclear. Wine tastings to be lawful must be free and therefore are not a legitimate source of revenue for a §15 license holder. Wine classes that are delivered on a §15 licensed premises for which a charge or fee is collected cannot include the consumption of wine. 204 C.M.R. 2.05(5); See M.G.L. c. 138, §15 (wine tastings must be provided "without charge.")

<sup>4</sup> Mr. Trone provided no particulars on how Wine Nation could lawfully accomplish this control of wholesalers who are independent license-holders. This ambition of Wine Nation does not comport with the Commission's experience regarding deliveries by wholesalers.

traffic trips per day to this corridor and that the traffic is even worse during the holiday season.

Wine Nation presented to the Local Board the opinion testimony of Keri Pyke regarding traffic and the traffic impact. Upon questioning from the Local Board, Pyke admitted:

- (a) she had not traveled around Braintree;
- (b) she has not been on Granite Street when there was an accident on Route 128 or Route 93 or Route 3 South;
- (c) Braintree is unique because of its location; and
- (d) That ITE trip rates, used as the data for her traffic analysis, are developed based on national data, not necessarily Massachusetts.

A memo from the Braintree Principal Planner acknowledged that the traffic study for the South Shore Plaza was based on traffic counts taken in 2006, when a large retailer that did not sell alcoholic beverages was operating. Keri Pyke acknowledged in a written report dated December 18, 2009 that traffic volume has decreased over the past 3 years at this location.

The Local Board denied this application in a statement of reasons dated December 31, 2009. The Local Board has also previously denied in a statement of reasons dated August 9, 2009 a first application by this Applicant<sup>5</sup> seeking to operate a store that was close to 50% larger (33,366 square feet) than the one denied by the Local Board in its reasons dated December 31, 2009.

Fire Chief McHugh testified he personally did not find a public need and he also took note of a lot of opposition from local residents groups in that area. This is among the proper factors to consider in determining public need in Braintree. Donovan v. City of Woburn, 65 Mass.App.Ct. 375 (2004). He further noted “he sat on the first hearing only.”

Police Chief Paul Frazier testified he voted to deny the application “based on the testimony of councilors, signatures of residents, and the Granite Park Civic Association against it.” He further stated at the first hearing only the applicant spoke in favor of the application, at the second hearing only one person testified on their behalf. These are among the proper factors to consider in determining public need in Braintree. Donovan v. City of Woburn, 65 Mass.App.Ct. 375 (2004).

Marybeth McGrath testified, “I voted to deny because I did not feel there was a public need..... I thought there were an adequate number of package stores in Braintree ..... The views of the councilors speaking on behalf of their constituents and the opposition of association representative in the community as well as the petition submitted.” These are among the proper factors to consider in determining public need in Braintree. Donovan v. City of Woburn, 65 Mass.App.Ct. 375 (2004).

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<sup>5</sup> Wine Nation, Inc. was the corporate name of this Applicant until it filed on June 22, 2009 articles of amendment changing the corporate name to Wine Nation MA, Inc.

The Local Board denied wine Nation's application and issued a statement of reasons dated December 31, 2009. The Local Board found that the public was not in favor of this application, the inhabitants of the town were not in favor of this application, there was an adequate number of licenses in existence with 6 all alcoholic beverages licenses in addition to other wine and malt beverages only licenses and section 15 licenses. . The closest of the existing section 15 licenses is ½ mile away from this location. The Local Board further found that the area that is the proposed location is a heavily congested area and that the applicant indicated it would require at least 186 traffic trips per day to be profitable. The Local Board found that the proposed site is not appropriate for this application. These are among the proper factors to consider in determining public need in Braintree. Donovan v. City of Woburn, 65 Mass.App.Ct. 375 (2004).

### Discussion

There is no right to a liquor license of the type specified in G.L. c. 138, § 15. Section 23 of chapter 138 of the General Laws specifically states this public policy. ("[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 board holds broad discretion to determine whether a license to sell alcoholic beverages should issue. 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

[n]eed, in the literal sense of 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. For example, one might hesitate to authorize a license for a bar across the street from a public school. Connolly v. Alcoholic Bevs. Control Commn., 334 Mass.

613, 617-618 (1956). Consideration of the number of existing dispensaries in a locality is a proper concern, Victoria, Inc. v. Alcoholic Bevs. Control Commn., 33 Mass. App. Ct. 507, 514 (1992), as are the views of the inhabitants of the locality in which a license is sought. Beacon Hill Civic Assn. v. Ristorante Toscano, Inc., 422 Mass. 318 (1996). In making its discretionary determination, a licensing authority may take 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. See Connolly v. Alcoholic Bevs. Control Commn., 334 Mass. at 617-618; Great Atlantic & Pac. Tea Co. v. Board of License Commrs. of Springfield, 387 Mass. 833 (1983); Beacon Hill Civic Assn. v. Ristorante Toscano, Inc., 422 Mass. at 322 n. 4; Hub Nautical Supply Co. v. Alcoholic Bevs. Control Commn., 11 Mass. App. Ct. 770, 772-774 (1981). Ballarin, 49 Mass. App. Ct. at 511-512.

Wine Nation conceded that the operation of its proposed business would make “traffic ...difficult during certain times of the year” but argues that “[t]here is no basis for claiming that Wine Nation would have any adverse effect on traffic.” The Local Board was not persuaded by this position and neither is the Commission. Wine Nation also accepts as true that the community has a population surge of 10,000 – 10,500 people per day<sup>6</sup>; but Wine Nation provides no information or argument on how this increased population does not exacerbate existing traffic difficulties. The Local Board was not persuaded by Wine Nation’s position and neither is the Commission.

In this case before the Commission, the Braintree Local Board fulfilled its obligation to state the reasons for its decision. On the basis of the opposition to the application, the Braintree board was persuaded that there was no public need for the license for which the application was filed. See Ballarin, Inc. v. Licensing Board Of Boston, 49 Mass. App. Ct. 506, 512-513 (2000). The reasons for denial were based on the facts found by the Local Board based on information presented during the course of the public hearing and were grounded in the cases of Ballarin, Inc. v. Licensing Board Of Boston, 49 Mass. App. Ct. 506 (2000), Donovan v. City Of Woburn, 65 Mass.App.Ct. 375 (2004) and Town of Middleton v. ABCC, 64 Mass. App. Ct. 1108 (2005)(Rule 1:28 decision).

### Conclusion

Based on the exhibits and testimony of the members of the Local Board, the Commission approves the action of the Local Board in denying the application of Wine Nation MA, Inc dba Wine Nation for an all-alcoholic beverages section 15 license to be exercised at 160 Granite Street, Braintree, MA.

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<sup>6</sup> Wine Nation vacillates between the number 10,000 people and 10,500 people in the Joint Pre-Hearing Memorandum submitted in this case. Whatever the number used, Wine Nation provides no information or argument on how this increased population does not exacerbate existing traffic difficulties.



ALCOHOLIC BEVERAGES CONTROL COMMISSION

Robert H. Cronin, Commissioner \_\_\_\_\_

Kim S. Gainsboro, Chairman \_\_\_\_\_

Dated in Boston, Massachusetts this 14<sup>th</sup> day of September 2010.

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 days of receipt of this decision.

cc: Gerald J. Caruso, Esq.  
Carolyn M. Murray, Esq.  
File