



*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, MA 02150*

Jean M. Lorizio, Esq.
Chairman

DECISION

**COFFEESHOP LLC D/B/A UPPERWEST
ONE CEDAR STREET, CAMBRIDGE, MA
LICENSE #: NEW
HEARD: 06/13/19; 06/17/19; 06/20/19; and 07/15/19**

This is an appeal pursuant to M.G.L. c. 138, § 67 by Coffee Shop, LLC d/b/a UpperWest ("Applicant" or "UpperWest"), One Cedar Street, Cambridge, Massachusetts. UpperWest is appealing the action of the Cambridge Board of License Commissioners (the "Local Board" or "Cambridge") for denying its M.G.L. c. 138, § 15 Retail Package Store Wines, Malt Beverages, and Cordials License application to be exercised at One Cedar Street, Cambridge, Massachusetts. UpperWest timely appealed the Local Board's action to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and hearings were held on Thursday, June 13, 2019; Monday, June 17, 2019; Thursday, June 20, 2019; and Monday, July 15, 2019.

The following documents are in evidence:

Applicant/Appellant Coffeeshop, LLC d/b/a UpperWest Exhibits:

1. Coffeeshop LLC's application for a new Section 15 wines, malt beverages and cordials license;
2. Amended Floor Plan;
3. Affidavit of Notice to Abutters and return of receipts;
4. Certificate of Service and return receipts;
5. Petition in Support of Coffeeshop, LLC d/b/a UpperWest package store application;
6. Comments in support of UpperWest's package store application;
7. Emails related to Cambridge Licensee Salt & Olive;
8. Article "Giving Veggie Galaxy Expanded Drink Menu, Officials Do Away With 'Public Need' Standard;"
9. Map of Section 15 licenses in Cambridge area;

- 9A. List of Section 15 Licensees as appearing on Exhibit 9 map;
- 10. Notice of Appeal with attached Decision dated February 6, 2019;
- 11. Lease for Coffeeshop LLC, d/b/a UpperWest;
- 12. Emails between UpperWest and Cambridge Local Board;
- 13. Newspaper Advertisement/Publication notice of Local Board hearing;
- 14. Advisory of ABCC regarding Section 12 and Section 15 licenses in same city and town;
- 15. License application page;
- 16. Boston Globe Newspaper Article "Scores of Cambridge Restaurants Paid Six Figures for a Liquor License. Others Got Them for Free;"
- 17. Boston Globe Newspaper Article "State Agency to Investigate Liquor License Practices in Cambridge;"
- 18. UpperWest's video/audio recording of hearings held on January 30, 2019 and February 6, 2019.

Cambridge License Commission Exhibits:

- A. Audio Recording of Local Board hearing on January 30, 2019 and recording of Local Board vote of February 6, 2019;
- B. Audio Recording of Local Board hearings for three Cambridge licensees: Salt & Olive, Café Sushi, and Holiday Inn Express;
- C. Coffeeshop d/b/a UpperWest package store application for a wines, malt beverages, and cordials § 15 license;
- D. Coffeeshop d/b/a UpperWest application for alteration of premises;
- E. Letters from Local Board regarding hearing date of 12/11/18;
- F. Letters from Local Board regarding hearing date of 01/30/19;
- G. Letters from Local Board regarding denials, dated 02/11/19;
- H. Statement of Reasons and letter regarding denial, dated 02/14/19;
- I. Map of Cambridge package store Licensees with one-mile radius of Coffeeshop LLC, d/b/a UpperWest;
- J. Emails between Local Board and Ms. Kim Courtney dated 12/2018 – 01/2019;
- K. Employment density data sheet for City of Cambridge;
- L. Map of Cambridge Package Store Locations with Population Density;

- M. Certified Copy of Coffeeshop d/b/a UpperWest application for a § 15 retail package store wine, malt beverages, and cordials license and alteration of premises;
- N. Copy of Salt & Olive's application for change of location;
- O. Copy of Holiday Inn Express' application for § 15 wines and malt beverages package store license;
- P. Copy of Café Sushi's application for a § 15 wines and malt beverages package store license and application for alteration of premises;
- Q. Map of 2010 population per acre of land by census block of City of Cambridge;
- R. Spreadsheet containing information regarding density/population in areas of applicant and three (3) other licensees in the City of Cambridge.

There is one (1) audio recording of this hearing, and (5) five witnesses testified.

FINDINGS OF FACT

The Commission makes the following findings based on evidence presented at the hearing:

1. Coffeeshop, LLC d/b/a UpperWest ("UpperWest") holds a § 12 Retail General-On-Premise license, located at One Cedar Street, Cambridge, Massachusetts. (Testimony, Exhibits 1, 10, 13, 19, A, E, F)
2. Ms. Kim Courtney and Mr. Xavier Dietrich are the principals of UpperWest, each owning 50% of the Licensee. Ms. Kim Courtney is the license manager. (Testimony, Exhibits 1, 12, 19, A)
3. On November 30, 2018, UpperWest applied for a § 15 wines, malt beverages, and cordials license¹ with the City of Cambridge Local Board. Ms. Kim Courtney applied to be the license manager. (Testimony, Exhibits 1, 10, 13, 19, A, C, E, F, J)
4. The Local Board notified the principals of UpperWest, Ms. Courtney and Mr. Dietrich, orally and in writing, that the type of license for which Upper West applied -- a wine, malt beverages, and cordials category retail package store license -- does not exist pursuant to Massachusetts law. (Testimony, Exhibits 12, A, H, J)

1. Upper West simultaneously applied to the Local Board to alter the premises of its § 12 General-On-Premise license to provide space for the § 15 license, if granted. This application was contingent upon the granting of the underlying package store license application. The Local Board did not decide the alteration of premises application as Upper West's § 15 package store license application was denied. (Testimony, Exhibits 12, 19, A, E, F, G, H)

5. The Local Board advertised UpperWest's application for a § 15 wines, malt beverages, and cordials retail package store license, and held a hearing on the application on Wednesday, January 30, 2019. (Testimony, Exhibits 1, 13, 19, A, E, F, J)
6. On February 6, 2019, the Local Board voted unanimously to deny the application. (Testimony, Exhibits A, G, H)
7. The decision by the Local Board states, in relevant part: "The Board found that the § 15 application as filed lacked merit and denied it. Specifically, the Board found no merit because under G.L. c. 138 § 15, the Board can only grant two types of package store licenses – all alcohol or malt and wine. The only provision in Chapter 138 which allows for a malt and wine license to have a cordials/liqueur permit is under G.L. c. 138, § 12. The applicants, which were informed multiple times prior to the hearing as to the non-existence of the type of license being applied for, ignored the information and the law." (Exhibit H)
8. The applicant, UpperWest, appealed the denial to the Commission. (Testimony, Exhibit 10)

DISCUSSION

Massachusetts General Laws, c. 138 is the statutory scheme which governs the issuance and regulation of alcohol licenses in the Commonwealth of Massachusetts. See M.G.L. c. 138; Beacon Hill Civic Assoc. v. Ristorante Toscano, Inc., 422 Mass. 318, 321 (1996). The Supreme Judicial Court has held that "[t]he legislative history of [the Commission's enabling act], and of G.L. (Ter. Ed.) Ch. 138, as amended, clearly shows that the powers of the commission were not intended to be perfunctory or limited." Connolly v. Alcoholic Beverages Control Commission, 334 Mass. 613, 617 (1956). "In dealing with a trade, which, because of its great potential evils, can be wholly prohibited, wide power is given to the Legislature with respect to the delegation of discretionary powers." Id. at 619.

M.G.L. c. 138 is comprehensive, and the Commission has long held that M.G.L. c. 138 must be read, understood, and taken as a whole. "The statutory language is clear. There is no right to a liquor license of the type specified in M.G.L. c. 138, § 15." Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 378 (2006); see M.G.L. c. 138, § 23. Licenses must be approved by both the local licensing authorities and the ABCC. See M.G.L. c. 138, §§ 15, 67; Ristorante Toscano, 422 Mass. at 321.

I. Retail Package Store License Category is Not Authorized by Massachusetts Law

This appeal involves the Local Board's denial of an application for a § 15 *wines, malt beverages, and cordials retail package store license* to be exercised at One Cedar Street, Cambridge, Massachusetts. (Testimony, Exhibits 1, 10, 13, 19, A, C, E, F, J) UpperWest, with Ms. Courtney and Mr. Dietrich as principals, holds a § 12 General-On-Premise (G.O.P.) all alcoholic beverages license and operates a cocktail bar at the location of the proposed § 15 premises.

The issue facing the Commission is whether UpperWest's § 15 application is legally valid due to the fact that the category of license it seeks -- a wines, malt beverages, and cordials retail package store license -- does not exist pursuant to Massachusetts General Laws, c. 138, § 15.

The application, advertisement, and hearing notices each state that UpperWest's application is for a section 15 *wines, malt beverages, and cordials retail package store license*. (Testimony, Exhibits 1, 13, 19, A, E, F, J) UpperWest was informed by the Local Board, both orally and in writing, on more than one occasion, that this type of package store license does not exist. (Testimony, Exhibits 12, H, J) The Local Board notified and requested that UpperWest either amend its application prior to advertisement, or, file a new application for a statutorily authorized category of package store license. (Testimony, Exhibits 12, H, J) UpperWest did neither² prior to the hearing date. (Exhibits A, H) The Local Board held the hearing on January 30, 2019. (Exhibit A) The Local Board issued its decision citing the non-existence of this category of license as the first factor in its denial of UpperWest's application.³ (Exhibit H)

M.G.L. c. 138, § 2 states in part,

“No person shall manufacture, with intent to sell, sell or expose or keep for sale, store, transport, import or export alcoholic beverages or alcohol, *except as authorized by this chapter*:” M.G.L. c. 138, § 2. (emphasis supplied.)

The Massachusetts Appeals Court strictly upheld this statute in the case of CellarMaster Wines of Massachusetts, Inc. v. Alcoholic Beverages Control Commission, which held that “Regulation of the liquor industry in Massachusetts is comprehensive and pervasive. See G.L. c. 138.” CellarMaster Wines of Massachusetts, Inc. v. Alcoholic Beverages Control Commission, 27 Mass. App. Ct. 25, 27 (1989). “The powers of the States in dealing with the regulation of the sale of intoxicating liquors are very broad. What they may wholly prohibit, they may permit only on terms and conditions prescribed by the Legislature.” Connolly v. Alcoholic Beverages Control Comm’n., 334 Mass 613, 619 (1956); see CellarMaster Wines of Massachusetts, Inc., 27 Mass. App. Ct. at 27.

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2. During the Local Board hearing, Ms. Courtney stated that the Local Board could consider UpperWest's application to be a wines and malt beverages retail package store application. (Exhibits A, H)
 3. The Local Board denied UpperWest's application for many reasons, the first being that a wine, malt beverages, and cordials license does not exist pursuant to Massachusetts law. (Exhibits A, H) The Local Board also denied the application for a lack of public need due to an adequate number of § 15 retail package store dispensaries (Exhibits A, H) in the area of the proposed location. See Ballarin v. Licensing Board for the City of Boston, 49 Mass. App. Ct. 506, 511-512 (2000). At the Commission hearing, a significant portion of time, through the admission of testimony and documents (Testimony, Exhibits 7, B, I, K, L, N, O, P, Q, R), was devoted to public need and Ballarin factors. Id.

The procedures for the issuance of retail package store licenses to sell alcoholic beverages are governed by M.G.L. c. 138, § 15, which states in part,

The local licensing authorities in any city or town which votes to authorize the granting of licenses for the sale of all alcoholic beverages, and such authorities in any city or town which votes to authorize the granting of licenses for the sale of wines and malt beverages only, may grant licenses for the sale at retail of such alcoholic beverages or wines and malt beverages, as the case may be, not to be drunk on the premises,

M.G.L. c. 138 § 15 (emphasis supplied).

UpperWest applied pursuant to § 15 for a license to sell “wine, malt beverages and cordials not to be drunk on the premises.” Under M.G.L. c. 138, § 15, a retail package store license holder can *only* be authorized to sell wines and malt beverages, *or* all alcoholic beverages, at retail to the public. See M.G.L. c. 138, § 15. There is no language in § 15 which expressly authorizes the granting of a § 15 retail package store license to sell wines, malt beverages, and cordials. See M.G.L. c. 138 § 15.

The Court in Cellar Master further held that a holder of a § 15 package store retail license “could lawfully conduct business *only in the manner authorized by G.L. c. 138, § 15.*” CellarMaster, 27 Mass. App. Ct. at 27 – 28 (emphasis supplied). The Court found that there is a “sweep” to G.L. c. 138, § 2 which “prohibits a variety of activities involving alcoholic beverages,” ... “*except as authorized by this chapter.*” CellarMaster, 27 Mass. App. Ct. at 28 (emphasis supplied).

II. Statutory Interpretation of M.G.L. c.138 § 15:

In Cleary v. Cardullo’s, the SJC provided that, “The duty of statutory interpretation is for the courts. Nevertheless, particularly under an ambiguous statute . . . the details of legislative policy, not spelt out in the statute, may appropriately be determined, at least in the first instance, by an agency charged with administration of the statute.” Cleary v. Cardullo’s, 347 Mass. 337, 344 (1964). When determining the legislative intent of a statute, “The general and familiar rule is that a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language....” Mass. Insurers Insolvency Fund v. Smith, 458 Mass. 561, 565 (2010).

The Commission correctly identifies the general purpose of the statute, but to determine legislative intent we must look primarily to the statute’s language. See Simon v. State Examiners of Electricians, 395 Mass. 238, 242 (1985). Upon reviewing the statute’s language, the Commission finds that it is unambiguous. The Commission interprets the plain language of c. 138, §§ 2 and 15 and finds a “cordials” package store license does not exist pursuant to Massachusetts law. See Comm’r of Revenue v. Cargill Inc., 429 Mass. 79, 82 (1999) (courts are “constrained to follow” the plain language of a statute when its “language is plain and unambiguous,” and its application would not lead to an “absurd result,” or contravene the Legislature’s clear intent).

The Commission finds that Massachusetts law does not expressly authorize this category of a § 15 retail package store license to sell wines, malt beverages, and cordials in Massachusetts. The Commission approves the decision of the Local Board as it finds that the Local Board did not have discretion to grant UpperWest's application, since such a category of retail package store license does not exist as it runs afoul of the plain meaning of G.L. c. 138, § 15.

CONCLUSION

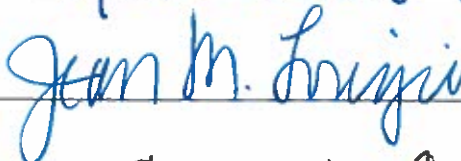
The Commission APPROVES the action of the Cambridge Board of License Commissioners in denying UpperWest's application for a wines, malt beverages, and cordials § 15 license, as this type of license is not expressly authorized pursuant to Massachusetts General Laws.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

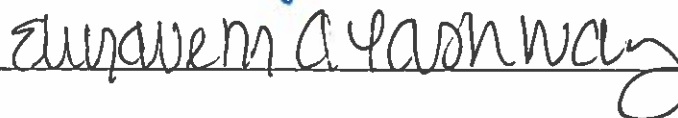
Kathleen McNally, Commissioner



Jean M. Lorizio, Chairman



Elizabeth A. Lashway, Commissioner



Dated: October 2, 2019

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: Kimberly Courtney, Esq.
Xavier Dietrich
Keplin Allwaters, Esq.
Kate Hoffman, Esq.
Administration, File