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## **DECISION**

**PRIDE STORES LLC  
167 CHICOPEE ST.  
CHICOPEE, MA 01013  
LICENSE#: 022000135  
HEARD: 05/03/2017**

This is an appeal under M.G.L. c. 138, § 67 by Pride Stores LLC (“Licensee” or “Pride”) located at 167 Chicopee St., Chicopee, Massachusetts. Pride Stores is appealing the action of the City of Chicopee Licensing Board (“Local Board” or “Chicopee”) for denying its M.G.L. c. 138, § 15 Alteration of Premises application.<sup>1</sup> The Licensee timely appealed the Local Board’s action to the Alcoholic Beverages Control Commission (the “Commission” or “ABCC”) and a hearing was held on Wednesday, May 3, 2017.

The following documents have been entered in evidence as exhibits:

1. Copy of Licensee’s M.G.L. c. 138, § 15 Wines and Malt Beverages Package Store License;
2. Form 43 Approval 8/22/2016 for Licensee’s Change of Manager Application;
3. Local Board Meeting Minutes 7/21/2016;
  - a) Photo – Exterior of Wyman’s Citgo gas station;
  - b) Photo – Exterior of Wyman’s Citgo gas station;
  - c) Photo – Interior of Wyman’s Citgo convenience store;
  - d) Photo – Interior of Sam’s convenience store;
  - e) Photo – Interior of Country Trading Post store;
  - f) Photo – Interior of Country Trading Post store;
  - g) Photo – Interior of Country Trading Post store;
  - h) Photo – Interior of BJ’s store;
  - i) Photo – Interior of BJ’s store;
  - j) Photo – Interior of BJ’s store;
4. Local Board’s Decision, 7/25/2016;

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<sup>1</sup> The Licensee simultaneously applied for a change of manager application which the Local Board approved, and the ABCC approved on 8/22/2016. The change of manager application is not the subject matter of this appeal, and therefore is not addressed in this decision. (Exhibits 2, 3)

5. City of Chicopee Planning Board Recommendation, 7/14/2016;
6. City of Chicopee Fire Department Letter;
7. Copy of Licensee's Proposed Floor Plan;
8. Copy of Licensee's Exterior Site Plan;
9. Aerial Photo of the Exterior of Licensee's Premises;
10. Local Board Manual of Regulations, Policies, and Procedures, 12/18/2014;
11. Local Board Meeting Minutes 2/21/2013;
12. Local Board Meeting Minutes, 12/18/2014;
13. Local Board Meeting Minutes, 1/15/2015;
14. City of Chicopee's 2016 Package Store Renewal Applications;
15. List of State Lottery Licensees in Chicopee;
16. Copies of State Lottery Sales Agent Licenses for Pride Stores LLC; and
17. Licensee's Alteration of Premises Application.

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

The Commission took Administrative Notice of the Licensee's Commission Records.

#### FINDINGS OF FACT

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

1. Pride Stores LLC ("Pride") is a registered Massachusetts corporation that has several locations within Massachusetts, with its principal office located at 246 Cottage Street, Springfield, Massachusetts. (Testimony, Exhibits 1, 15, 17, Commission records)
2. In 2013, Pride was granted an M.G.L. c. 138, § 15 Wines and Malt Beverages license to be exercised at its 167 Chicopee Street, Chicopee, Massachusetts location. (Testimony, Exhibits 3, 11, Commission records)
3. At its 167 Chicopee Street location, Pride owns one large building where it operates a gas station. The total size of the building is 8,085 square feet and is divided into two separate stores. One store is a convenience store where the fuel/gasoline pump registers are located, and the second store is the package store. (Testimony, Exhibits 3, 4, 7, 8, 9, 17)
4. Pride was originally granted its package store license pursuant to the agreement that it be operated only as a separate store, apart from the convenience store. The package store occupies 1,382 square feet of space within the building. It has one entrance, one exit, and one delivery door, all located at the rear of the building. (Testimony, Exhibits 3, 4, 7, 17)
5. The convenience store contains a bakery, a café, a deli, a Subway sandwich shop, a Keno machine<sup>2</sup>, and the cash registers for the fuel/gasoline pumps. (Testimony, Exhibits 7, 17)

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<sup>2</sup> There are two Keno machines at this location. One Keno machine is located inside the package store, and one Keno machine is located inside the convenience store. (Testimony, Exhibit 15)

6. The convenience store and the package store are separated by a glass wall/partition. There is no access from the convenience store into the package store. To access the package store, customers must exit the convenience store and the building and travel to the rear of the building where the package store entrance is located. (Testimony, Exhibits 3, 4, 7, 8, 9, 11)
7. Pride Stores submitted Change of Manager<sup>3</sup> and Alteration of Premises Applications (“Application”) to the Local Board in May 2016. (Exhibits 2, 3, 17, Commission records)
8. Pride filed a petition to alter its premises requesting that it be allowed to insert a door into the middle of the glass partition which separates both stores. The door would allow customers to pass from the convenience store into the package store without having to exit the convenience store outside and walk around to the back of the building to enter the package store. (Testimony, Exhibits 1, 2, 3, 9, 11, 17, Commission records)
9. The Local Board held a hearing July 21, 2016, on the Application. (Testimony, Exhibits 3, 4, 17)
10. The City of Chicopee Planning Board, (a separate agency from the Chicopee Local Licensing Board) held a meeting and recommended a denial of Pride’s application to alter its premises. The Planning Board prefers that Pride keep the package store as a separate store to prevent underage individuals from directly accessing the liquor store. (Testimony, Exhibits 4, 5)
11. The Chicopee Fire Department submitted a letter disapproving Pride’s alteration because the original 2013 application, which was agreed upon after extensive communications between the Fire Department and Pride, was clearly approved for the package store to have a separate store and entrance independent of the convenience store. (Testimony, Exhibits 3, 4, 6, 11)
12. The Chicopee Fire Department agreed to the original approval of this package store license as a separate store due to concerns “based on traffic and parking at the location, and the attention of the employees/cashiers in each store. The gas station/convenience store employees are required to monitor the fuel pumps at ALL times when the fuel is being pumped.” The package store cashiers/employees are responsible for the sale of alcohol and checking identifications, therefore, they cannot simultaneously safely and adequately monitor the fuel pumps. (Testimony, Exhibits 3, 4, 6, 11)
13. The Chicopee Fire Department also opposed Pride’s application because the alteration would adversely impact public safety. The emergency fuel shut-off buttons for the gas pumps are located at the cash registers and the employees operating the fuel pump registers should only be focused on the operation of the gas pumps. Pride’s cashiers should not be distracted while monitoring gas pumps, as this is a public safety issue of legitimate concern. (Testimony, Exhibit 6)
14. Two citizens spoke in opposition to Pride’s petition to alter the premises. No citizens spoke in favor of Pride’s application. (Testimony, Exhibits 3, 4)

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<sup>3</sup> See footnote 1.

15. Mr. Bolduc, the advisor to Pride, was asked at the Local Board hearing if Pride's business at this location was suffering due to the lack of a door in the partition. Mr. Bolduc in response to the Local Board's question said that business at this location was not hurting, in fact, business was going "swimmingly well." (Testimony, Exhibits 3, 4)
16. The Regulations, Policies, and Procedures Manual of the Chicopee License Commission (amended December 18, 2014) Section One, Rule 1.05 pertaining to Physical Premises, states that "any changes in the floor plan or any renovations of any kind shall not be made without notification to the Chicopee License Commission and the approval of the Chicopee License Commission." (Exhibit 10)
17. Also in Chicopee, Wyman's Citgo Station ("Wyman's") holds a § 15 package store license, and it operates a gas station at the same location as its package store. It has been in existence and has operated in Chicopee for more than twenty years. Wyman's operates its § 15 package store and gas station as one store. Wyman's does not have a glass partition or separate stores for its gas station and package store. (Testimony, Exhibits 3A, 3B, 3C, 11)
18. Mormax Corporation d/b/a BJ's Wholesale Club ("BJ's") holds a § 15 package store license in Chicopee. This location also has gas pumps, which are located far away from the store. The Local Board has placed restrictions on BJ's license as to where it can sell alcoholic beverages within its store. (Testimony, Exhibits 3-H, 3-I, 3-J, 12, 13)
19. Chicopee has not issued any new or additional § 15 package store licenses which also operate jointly with gas stations since Pride's original application was granted in 2013. The Local Board has received some applications for package store licenses to be operated in conjunction with gas stations, however, the Local Board imposed the same conditions as imposed on Pride's § 15 license, and the applications were withdrawn. (Testimony)
20. The City of Chicopee Fire Chief, Mr. Dean Desmarais, would make the same recommendation for the glass partition which exists at Pride, for any new applications for a § 15 package store license intending to operate in conjunction with a gas station. (Testimony)
21. By decision dated 7/25/2016, the Local Board voted unanimously (5-0) to deny Pride's alteration of premises application. (Exhibits 3, 4)

## 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 denial of Pride's application to alter the premises of its M.G.L. c. 138, § 15 wines and malt beverages package store license which it operates at the same location as its self-service gas station. Pride argues that the Local Board treated Pride differently than it treated other § 15 licensees in the City of Chicopee. Pride contends that there is another § 15 package store (Wyman's Citgo) licensee in Chicopee which also operates a gas station in the same store as its gas pump registers. It is not separated by a partition into two stores, rather, it operates as one large store. Pride asserts that there is a public need for the partition/pass through door at the premises. However, Pride disputes whether putting a door in the glass partition constitutes an alteration of premises. Furthermore, Pride challenges the jurisdiction of the Local Board to make a decision on this matter. Pride also asserts that the record of the hearing before the Local Board does not support the Local Board's decision denying Pride's application, and that the Local Board exceeded its statutory authority, resulting in an arbitrary and capricious decision.

The issue for the Commission to determine is whether the Local Board treated Pride differently from other § 15 package store licensees in the City of Chicopee and exceeded its authority in denying Pride's application to alter its premises.

### Local Board Authority

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 procedures for the issuance of retail package store licenses to sell alcoholic beverages are governed by M.G.L. c. 138, §§ 15 and 23. Licenses must be approved by both the local licensing authorities and the Commission. M.G.L. c. 138, §§ 12, 67; see Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc., 422 Mass. 318, 321 (1996).

### Local Board's Discretion To Determine Public Need

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 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." Ballarin, Inc., 49 Mass. App. Ct. at 512. "Neither the [local 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." Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 379 (2006).

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., 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. (Italics supplied.)

The Local Board may exercise judgment about public convenience and public good that is very broad, but it is not untrammelled." Ballarin, supra at 511. Instead, "[w]here the factual premise 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 Bd., 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 v. Department of Public Utilities, 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. The Commission finds that the Local Board was within its lawful discretion in determining Pride's application.

#### Local Board Must Consider Public Need to Determine Alteration of a Licensed Premises

M.G.L. c. 138 § 23, governs the standard for the granting of licenses, and the alteration of licensed premises. M.G.L. c. 138, § 23 paragraph 8 provides, in pertinent part that "upon application pursuant to s. 15A . . . the description of the licensed premises may be changed with the approval of the licensing authorities." The standard for a local board's decision to approve or not is expressed in the first paragraph of § 23 i.e., will the license as changed meet a public need and be exercised in a manner so as to protect the common good. The Commission received evidence that the Local Board heard from two residents in opposition to Pride's alteration of premises petition, in addition to public safety officials of Chicopee, regarding the concerns for the safe operation of a gas station/fuel pumps and a package store at the same location. These, and the other factors considered by the Local Board in arriving at its decision are appropriate factors for the Local Board to weigh. See Ballarin Inc. v. Licensing Board of Boston, 49 Mass. App. Ct. 506 (2000). Based on these facts and the controlling law, the Commission is persuaded that this decision by the Local Board was based on the facts presented to the Local Board during its public hearing and within the statutory authority of the Local Board.

### The Local Board Did Not Treat Pride Differently

Pride argues that it was treated differently from other § 15 licensees in Chicopee, specifically licensees BJ's and Wyman's. Pride argues that it is the only § 15 licensee which has this condition imposed of requiring a separate store for the package store, which must be separated by a glass partition. Chairman Pagel testified that BJ's is not similar to Pride because BJ's has gas pumps, which are a good distance away from the main store. Furthermore, the Local Board did impose restrictions/conditions on BJ's license.

Chairman Pagel and Fire Chief Desmarais each testified that Wyman's, which holds a § 15 package store license, has existed at its current location for more than 20 years. Chairman Pagel testified that the same conditions as imposed on Pride's license would be imposed on any new § 15 applicant with a business model similar to Pride's. Chairman Pagel testified that the Local Board has received applications for § 15 package store licenses to be exercised at gas stations, however, the Local Board imposed the same conditions as those imposed on Pride's § 15 license, and the applicants subsequently withdrew. The Local Board for the City of Chicopee has not granted any new § 15 package store licenses at gas stations since Pride's original license was granted in 2013.

During Pride's original 2013 application process, this condition was agreed upon by Fire Chief Desmarais and Mr. Bolduc after extensive communications. This condition was imposed due to public safety concerns with motor vehicle traffic at the gas pumps, the location of the fuel safety shut-off switches, and Pride's employees not being distracted while operating the gas pump registers. As a result, the Local Board determined that the § 15 package store be operated as a separate store from the gas pump/convenience store.

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. If a local authority's decision is supported by the evidence and based on "logical analysis," it is not arbitrary and capricious and must be affirmed. Great Atl. & Pac. Tea Co. Inc., 387 Mass. at 839-840 (1983); Town of Middleton v. Alcoholic Beverages Control Comm'n, 64 Mass. App. Ct. 1108 (2005) (memo and order pursuant to Rule 1:28). The Local Board's decision was based on evidence presented during the course of the public hearing. The Local Board's reliance on these factors was reasonable and appropriate pursuant to the holdings in Ballarin, supra, and Donovan. 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 and testimony at the hearing, the Commission **APPROVES** the action of the Local Board of Chicopee for denying the M.G.L. c. 138, § 15 alteration of premises application of Pride Stores LLC.

**ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Kathleen McNally, Commissioner



Elizabeth A. Lashway, Commissioner



Dated: September 28, 2017

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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