



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

Deborah B. Goldberg
Treasurer and Receiver General

Kim L. Gainsboro, Esq.
Chairman

**AMENDED
DECISION¹**

**DEDHAM WINGS LLC D/B/A HOOTERS
850 PROVIDENCE HIGHWAY
DEDHAM, MA 02026
LICENSE#: NEW
HEARD: 09/07/2016**

This is an appeal from the action of the Town of Dedham Board of Selectmen (the "Local Board" or "Dedham") in denying the application to transfer a M.G.L. c. 138, § 12 license, as filed by Dedham Wings, LLC d/b/a Hooters (the "Applicant" or "Dedham Wings") to be exercised at 850 Providence Highway, Dedham, Massachusetts. The applicant timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, September 7, 2016.

The following documents are in evidence as exhibits:

- 1a) Dedham Wings LLC application to transfer;
 - b) Asset purchase and sale agreement with exhibits;
 - c) Lease dated 1/24/2011, with exhibits;
 - d) First and second amendments to the lease;
 - e) Sublease, 2/29/2016;
 - f) Guaranty of sublease, 2/29/2016;
 - g) Letter from TD Bank dated 3/15/2016;
2. Competitive analysis showing § 12 licensees within a half mile radius of 850 Providence Highway, Dedham;
3. Chapter 208 of the Acts of 2006;
4. Results of Town election held 4/9/2016;
5. Letter from Attorney Kelley to ABCC, 5/2/2016;
- A. Local Board meeting minutes, 3/28/2016;

¹ The purpose of this Amended Decision is to correct the number of Local Board members who sat on the Local Board hearings and ultimately voted and to clarify that a fifth member recused himself. See *infra* paragraphs 18, 19. This issue does not alter the Commission's analysis or conclusion.

- B. Local Board meeting minutes, 4/28/2016;
- C. Petition with signatures; and
- D. Decision of Local Board, 5/2/2016.

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

The Commission took Administrative Notice of the Commission Records for the three Hooters locations in Massachusetts (Saugus, West Springfield, and Shrewsbury) owned by the same people who own Dedham Wings, and for the § 12 licensees within a half mile radius of 850 Providence Highway, Dedham.

FINDINGS OF FACT

1. Dedham Wings, LLC d/b/a Hooters (the “Applicant” or “Dedham Wings”), a Massachusetts limited liability company, with an address of 1143 Broadway, Saugus, Massachusetts 01906, filed an application with the Dedham Local Board to transfer to it the all alcoholic beverages restaurant license of Shack Foods of America, LLC d/b/a Summer Shack (“Summer Shack”) located at 850 Providence Highway, Dedham, Massachusetts. (Exhibit 1)
2. Dedham Wings seeks to operate Hooters at the same location as the Summer Shack operated. (Testimony; Exhibit 1)
3. Hooters is a franchise. Dedham Wings would operate as a franchisee. (Testimony)
4. The two principals of Dedham Wings, Marc Phaneuf Sr. and Marc Phaneuf Jr., currently hold three licenses to sell alcoholic beverages at Hooters restaurants in Massachusetts. Those Hooters restaurants are located in Saugus, West Springfield, and Shrewsbury, Massachusetts. (Commission Files; Testimony)
5. None of those locations have been charged with violating the alcoholic beverages laws, rules, or regulations, and none of them have been determined to have engaged in unlawful discrimination or unlawful employment practices. (Testimony; Commission Files)
6. The three locations have been successful, have obtained good reviews, and have maintained good relationships with the respective local boards. (Testimony)
7. Marc Phaneuf Sr. and Marc Phaneuf Jr. have six other Hooters franchises outside of Massachusetts. (Testimony)
8. Both Marc Phaneuf Sr. and Marc Phaneuf Jr. are over the age of twenty-one and are United States citizens. (Exhibit 1)
9. Neither Marc Phaneuf Sr. nor Marc Phaneuf Jr. has ever been convicted of a state, federal, or, military crime. (Exhibit 1)
10. Summer Shack has been at the proposed location, 850 Providence Highway, since 2010. Prior to the Summer Shack, Bugaboo Creek operated a restaurant at that location starting in 2000. (Testimony)

11. Summer Shack and Bugaboo Creek were casual restaurants. Dedham Wings considers Hooters to be a casual restaurant and anticipate that a Hooters at 850 Providence Highway, Dedham would compete with other casual restaurants as well as restaurants in the area with a sports/entertainment theme. (Testimony)
12. Providence Highway in Dedham is also known as Route 1. In the direct vicinity of 850 Providence Highway are various companies, stores, restaurants, and a movie theater. (Testimony)
13. The Local Board held a hearing on the license transfer application on Monday, March 28, 2016. (Testimony; Exhibit A)
14. During the March 28, 2016 hearing, the Local Board received a petition signed by approximately 500 individuals in opposition to the transfer of the license to Dedham Wings. (Testimony; Exhibit C)
15. The Local Board received numerous emails, letters, and/or voice messages prior to that hearing, all expressing opposition to a transfer of the license to Dedham Wings. (Testimony; Exhibit A)
16. Fifteen residents spoke in opposition to the proposed license transfer during the March 28, 2015 hearing. (Exhibit A)
17. At the close of the hearing, the Local Board took the matter under advisement. (Testimony; Exhibit A)
18. The Local Board held a second hearing on April 28, 2016 at which time the Local Board voted 4-0 to deny the application. (Exhibit B) The fifth member of the Local Board had recused himself from the discussion on this matter at both the March 28, 2016 and April 28, 2016 hearings as well as from the vote at the April 28, 2016 hearing. (Exhibits A, B)
19. The four voting members adopted the following findings in support of its denial:
 - a. "That the overwhelming public opposition to this transfer, by petition and testimony at the public hearing, supports a denial.
 - b. That the Board finds that the applicant's type of operation, a sports bar, does not serve the public need and that there are sufficient similar license holders of this type already in this area of Town.
 - c. That the Board disapproves of the applicant's inequitable hiring practices based on age and gender inconsistent with the Board's regulations and that this establishment would not be appropriate for the community." (Exhibit B)
20. Those same reasons were recited in the Local Board's May 2, 2016 written decision denying the transfer. (Exhibit D)

DISCUSSION

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). The procedure for the issuance of licenses to sell alcoholic beverages is set out in M.G.L. c. 138. Licenses must be approved by both the local licensing authorities and the Commission. M.G.L. c. 138, §§12, 67. See Beacon Hill Civic Assn. v. Ristorante Toscano, Inc., 422 Mass. 318, 321 (1996).

In reviewing the decision of a denial by the Local Board, the Commission gives “reasonable deference to the discretion of the local authorities” and determines whether “the reasons given by the local authorities are based on an error of law or are reflective of arbitrary or capricious action.” Great Atlantic & Pacific Tea Co., Inc. v. Board of License Commissioners of Springfield, 387 Mass. 833, 837, 838 (1983); accord Ballarin, Inc. v. Licensing Board of Boston, 49 Mass. App. Ct. 506, 512 (2000) (when reviewing the Local Board’s authority, court does not assess the evidence but rather “examine[s] the record for errors of law or abuse of discretion that add up to arbitrary and capricious decision-making”).

Where the issue is the denial of a transfer of a license, a local board is statutorily obligated to consider whether the transfer was in the “public interest” and met the public interest test set forth in M.G.L. c. 138, § 23, ¶ 9. The statute provides in relevant part: “[a]ny 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.” M.G.L. c. 138, § 23, ¶ 9.

In this case, the Local Board used the wrong standard. Instead of using the “public interest” standard for a license transfer, the Board used the “public need” standard, which applies to new license applications.² See Ballarin, Inc. v. Licensing Bd. of Boston, 49 Mass. App. Ct. 506 (2000). As this Commission has articulated, “[w]here an application is filed to transfer [] ownership of a license without a change of location, the primary concern of the Commission is the fitness of the proposed new licensee.” Gaelic House, Inc. (ABCC Decision April 12, 1990). In order to determine if the transferee is qualified to receive a license, the local licensing authority shall cause an examination to be made that the applicant is not less than twenty-one years of age, has not been convicted of a violation of a federal or state narcotic drugs law, and is a person of good character in the city or town in which he seeks a license. See M.G.L. c. 138, § 12; CJ Restaurant Enterprises, LLC (ABCC Decision Sept. 22, 2010).

Here, Dedham Wings is owned by Marc Phaneuf Sr. and Marc Phaneuf Jr. (Exhibit 1) Both men are over the age of 21 and are United States citizens. Id. Neither has ever been convicted of a state, federal, or military crime. Id. As for their character, no evidence was presented that either of them was not of good character. In fact, Phaneuf Sr. and Phaneuf Jr. are the principals of three

² Public need for a Section 12 establishment was previously established for this location when the Local Board granted the initial license for this location, to Bugaboo Creek. (Commission Files) It was therefore unnecessary and inaccurate in the present case for the Local Board to base its decision on the view of the inhabitants of Dedham as well as the sort of operation that would carry the license, both of which are “public need” factors under Ballarin, Inc., 49 Mass. App. Ct. at 511. (Exhibit D)

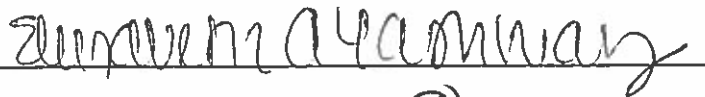
other corporations that do business as Hooters in Massachusetts—in Saugus, West Springfield, and Shrewsbury—and none of those locations has been found to have violated the Commonwealth's liquor control laws. (Testimony; Commission Files) Those three Massachusetts Hooters locations have never been deemed to have engaged in unlawful discrimination or unlawful employment practices. (Testimony) The three locations have been successful, have obtained good reviews, and have maintained good relationships with those respective local boards. (Testimony) Evidence that a transferee owns other Section 12 establishments and operates them well weighs in favor of a transferee's character and fitness. See The Usual Place (ABCC Decision June 16, 2000) (disapproving local board's denial of transfer application where Commission found that transferee had opened two other establishments in two other towns, turned those places around, and the local boards in those two communities were satisfied with the transferee's operation of those establishments). Consequently, for the above-stated reasons, the Commission finds that Dedham Wings meets the public interest requirement for a license transfer and therefore is qualified to receive a license.

CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board in denying the M.G.L. c. 138, § 12 transfer application of Dedham Wings, LLC d/b/a Hooters from Shack Foods of America, LLC d/b/a Summer Shack and remands this matter to the Local Board with the recommendation that the application be granted and forwarded to the Commission in the time-frame required by law.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth A. Lashway, Commissioner



Kathleen McNally, Commissioner



Dated: November 21, 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: William A. Kelley, Esq. via facsimile 617-723-5700
Brian Riley, Esq. via facsimile 617-654-1735
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration, File