



*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
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Jean M. Lorizio, Esq.
Chairman

DECISION

**EZ MART FOODS CORP. OF MA, INC.
311 MAIN STREET
DOUGLAS, MA 01516
LICENSE#: NEW
HEARD: 10/04/2018**

This is an appeal of the action of the Town of Douglas Board of Selectmen (the "Local Board" or "Douglas") for denying the M.G.L. c. 138, § 15 wines and malt beverages retail package store license application of EZ Mart Foods Corp. of MA, Inc. (the "Applicant" or "EZ Mart") to be exercised at 311 Main Street, Douglas, Massachusetts. The Applicant timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a hearing was held on Thursday, October 4, 2018.

The following documents are in evidence as exhibits:

1. EZ Mart's Liquor License Application, 5/3/2018;
2. Document Packet for Local Board's Review prior to Hearing, 5/31/2018;
3. Local Board Meeting Minutes, 6/5/2018;
4. Local Board's Decision, 6/6/2018;
5. Map Showing § 15 Licensees near Proposed Location; and
6. Aerial Photo showing Proposed Premises.

There is one (1) audio recording of this hearing, and two (2) witnesses testified.

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. EZ Mart Foods Corp. of MA, Inc ("Applicant" or "EZ Mart") filed a § 15 retail wines and malt beverages retail package store license application to be exercised at 311 Main Street, Douglas, Massachusetts. (Testimony, Exhibits 1, 2, 3)
2. The proposed location is the site of a gas station and a convenience store located in the downtown business district of Douglas. EZ Mart owns other gas station/convenience store businesses in Massachusetts. None of these other Massachusetts locations is licensed to sell alcohol. (Testimony, Exhibits 1, 2, 3, 6)

3. EZ Mart holds liquor licenses in New Hampshire. (Testimony, Exhibit 1)
4. The applicant is applying for a liquor license to generate more revenue at this business location.¹ (Testimony)
5. The Local Board held a hearing on this application on June 5, 2018. The Town of Douglas Police Chief and Fire Chief reported they did not have any issues with this application. (Testimony, Exhibits 2, 3)
6. No one spoke in favor of this application. One individual, who is the owner of nearby Digger's Liquors package store, spoke in opposition². (Testimony, Exhibits 3, 4)
7. Digger's Liquors holds an all-alcohol § 15 retail package store license located at 295 Main Street in Douglas. Digger's Liquors is approximately 115 feet from EZ Mart's location. (Testimony, Exhibits 5, 6)
8. Douglas Village Package Store Liquors holds an all-alcohol § 15 retail package store license located at 392 North East Main Street in Douglas, which is approximately 1,056 feet from the proposed location.³ (Testimony, Exhibits 5, 6)
9. By decision dated June 6, 2018, the Local Board voted unanimously⁴ to deny the application. The Local Board's decision stated, "Finding no public need due to the close proximity of two other All Alcohol Package Stores in the downtown area, the BOS denied EZ Mart's license application by a unanimous vote." (Testimony, Exhibit 4)

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1. In January 2012, prior owner Xtra Mart's application for a §15 package store license at the same location was denied. One of the factors cited was lack of public need due to two existing package stores located nearby. (Exhibit 2)
 2. Douglas Board of Selectman Member Attorney Harold R. Davis testified before the Commission that the Local Board did not consider competition with existing package stores as a factor in the denial of EZ Mart's application. (Testimony)
 3. Additionally, Family Convenience Mart holds a § 15 retail wines and malt beverages package store license and is located at 63 Main Street in Douglas, which is approximately 1.4 miles from the proposed location. (Exhibit 5)
 4. This session was attended by only three of the five members of the Local Board. The EZ Mart was notified that the vote and decision of the Local Board could be postponed to a future meeting attended by the complete board of five members. EZ Mart requested the Board make its decision at that time, with only three members present. (Testimony, Exhibit 3)

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 Ass'n v. Ristorante Toscano, Inc., 422 Mass. 318, 321 (1996).

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. As Section 23 provides in pertinent part,

“[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.”

M.G.L. c. 138, § 23.

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, 378-379 (2006); Ballarin, Inc. v. Licensing Bd. of Boston, 49 Mass. App. Ct. 506, 510-511 (2000). 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. Donovan, 65 Mass. App. Ct. at 379.

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, 49 Mass. App. Ct. at 511. 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.

In Ballarin, the Court identified factors to be considered when determining public need:

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.

Ballarin, 49 Mass. App. Ct. at 511 (Italics supplied).

A Board must state the reasons for its decision whether or not to issue the liquor license. M.G.L. c. 138, § 23. “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, 880 (1981) (quoting Westborough v. 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 remain[s] 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 880.

In reviewing the decision of a denial by a local licensing authority, 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 Comm’rs of Springfield, 387 Mass. 833, 837, 838 (1983) (Italics supplied); see Ballarin, Inc. v. Licensing Bd. of Boston, 49 Mass. App. Ct. 506, 512 (2000) (when reviewing the local licensing authority’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”). However, while this discretion of the local licensing authority is broad, “it is not untrammelled.” Ballarin, 49 Mass. App. Ct. at 511. In Donovan, the Appeals Court held, “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). “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.’” Id. (quoting Ruci v. Client’s Sec. Bd., 53 Mass. App. Ct. 737, 740 (2002)).

The Local Board held a hearing during which it heard testimony and reviewed EZ Mart’s application along with documentary evidence. The Commission finds that the record unequivocally demonstrates the Local Board considered a Ballarin factor in determining its decision of denial regarding this application. Ballarin, 49 Mass. App. Ct. at 511. The Local Board considered the number of existing dispensaries in this neighborhood of Douglas Id. The Local Board found that this area is well served by the existing licenses, with two existing retail package stores nearby. One package store is approximately 115 feet away, and the second package store is approximately 1056 feet from EZ Mart’s location. Therefore, the Local Board determined that there is no public need for an additional package store in the proposed location. (Testimony, Exhibits 3, 4, 5, 6) The Massachusetts Appeals Court has held that once a local board determines that an area is adequately served by the number of existing dispensaries, it need go no further. Town of Middleton v. Alcoholic Beverages Control Comm’n, 64 Mass. App. Ct. 1108 (2005) (memo and order pursuant to Rule 1:28).

In issuing its decision, the Local Board made specific and particularized findings, which the Commission determined are supported by the record of these proceedings. As the Supreme Judicial Court has stated,

[t]here was evidence before the [Local Board] that the area had a large number of establishments selling beer and wine, and that the public did not need an additional establishment. The [Local Board] stated the reason for their decision. There is nothing in the record to indicate that the decision was whimsical or not based on logical analysis. On the record, we can only conclude that the decision was founded on reasoned judgment, and was not arbitrary or capricious.

Great Atlantic & Pacific Tea Co., Inc., 387 Mass. at 839-840.

Counsel for EZ Mart argues that this application was denied under the pretext of lack of public need. EZ Mart argues that the genuine reason for this denial is due to the fact that the applicant is an outsider who does not reside in Douglas. The Commission is not persuaded by this argument and finds no evidence in the record supporting this argument. (Testimony, Commission records, Exhibits 3, 4, see Footnote #1)

The Commission finds that the Local Board's decision to deny EZ Mart's application was appropriate and reasonable. The Local Board found after deliberations that this area is adequately served by the two existing package stores within less than 1100 feet, and there is no public need for a package store license at this location. (Testimony, Exhibits 5, 6) The Commission finds that the record clearly supports the decision by the Local Board to deny this application based on the Local Board's consideration and application of the relevant Ballarin factor. Ballarin, 49 Mass. App. Ct. at 511.

The Local Board's decision was based on sufficient 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, 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 AND DISPOSITION

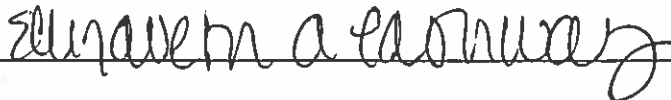
Based on the evidence and testimony at the hearing, the Commission **APPROVES** the action of the Town of Douglas for denying the M.G.L. c. 138, § 15 wines and malt beverages retail package license application of EZ Mart Foods Corporation of MA, Inc.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



Elizabeth A. Lashway, Commissioner



Dated: January 7, 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: Jennifer Breen, Esq.
Richard Bowen, Esq.
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration, File