



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

Jean M. Lorizio, Esq.
Chairman

DECISION

MORMAX CORP. D/B/A BJ'S WHOLESALE CLUB
26 WHITTIER STREET
FRAMINGHAM, MA 01701
LICENSE#: TRANSFER
HEARD: 1/20/2021

This is an appeal of the action of the City of Framingham Licensing Board ("Local Board" or "Framingham") in denying the M.G.L. c. 138, § 15 all alcoholic beverages retail package store Transfer of License and Change of Location application of Mormax Corporation d/b/a BJ's Wholesale Club ("Applicant" or "BJ's") to be exercised at 26 Whittier Street, Framingham, Massachusetts. The Applicant timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission ("Commission" or "ABCC"), and a remote hearing via Microsoft Teams was held on Wednesday, January 20, 2021.

The following documents are in evidence as exhibits:

1. BJ's Notice of Appeal, 10/27/2020;
2. Email from Fifth Avenue Liquors, 9/3/2020;
3. Video recording of 12/21/2020 public hearing regarding Whole Foods Market Group, Inc.'s Transfer Application;
4. Packet prepared for 12/21/2020 Local Board hearing regarding Whole Foods Market Group, Inc.'s Transfer Application;
5. Letter from Ercole and Cathy Ubaldino, 1/4/2021.

- A. Packet prepared for 10/5/2020 Local Board Hearing regarding BJ's Retail Package Store's Transfer Application;
- B. Video Recording of Local Board's Hearing, 10/5/2020;
- C. Enlargement of Map depicting licenses in the vicinity of 680 Worcester Road, Framingham, 12/18/2020;
- D. Enlargement of Map depicting licenses in vicinity of 26 Whittier Street, Framingham, 12/18/2020;
- E. Affidavit of Geoffrey Kovar, City of Framingham Geographic Information System Manager, 1/13/2021;
- F. Local Board's Decision regarding Table & Vine Inc., 4/26/2011;
- G. Local Board's Decision regarding RKTC Corp., 9/11/2018;
- H. Local Board's Decision regarding Mormax Corporation d/b/a BJ's Wholesale Club, 10/19/2020.

On January 19, 2021, the City of Framingham submitted a Motion in Limine to exclude BJ's proposed exhibits 2 - 5. BJ's timely submitted an Opposition to the Local Board's Motion. At the hearing on January 20, 2021, the Commission denied Framingham's Motion.

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

FINDINGS OF FACT

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

1. Mormax Corporation d/b/a/ BJ's Wholesale Club ("Applicant" or "BJ's") is located at 26 Whittier Street, Framingham, Massachusetts. BJ's seeks to add a M.G.L. c. 138, § 15 all alcoholic beverages retail package store license to their existing operation. (Testimony, Exhibit A)
2. BJ's holds seven (7) other retail package store licenses in Massachusetts: Chicopee; Dartmouth, Dedham; Franklin; Northborough; South Attleborough; and Stoughton. Id.
3. In August 2020, BJ's applied for the transfer and change of location of a §15 all alcoholic beverages license from Village Wine & Spirits d/b/a Route 9 Wine and Spirits, located at 680 Worcester Road, Framingham. Id.
4. BJ's is approximately 114,481 square feet in size. BJ's operates as a wholesale club wherein they offer large packs of products in a smaller variety as compared to traditional supermarkets. BJ's offers food, clothing and other goods for purchase. (Testimony, Exhibit A)
5. There are two (2) existing § 15 package stores within .75 miles of the proposed location. Fifth Ave. Liquors, located at 235 Old Connecticut Path, is 275 feet from the proposed location. The Wine Vault, at 2 Fairbanks Street, is .64 miles from the proposed location. (Testimony, Exhibits A, D)
6. On October 5, 2020, the Local Board held a virtual public hearing regarding BJ's application. The applicant was present at the hearing and addressed questions and provided information regarding its planned operations. Five (5) members of the public spoke in opposition to the transfer application and two (2) individuals spoke in favor. (Exhibit B)
7. BJ's alcohol selection would be displayed on four (4) aisles, sixteen (16) pallets long at the rear right of the store, in approximately 78 square feet of space. All alcoholic beverages would be sold at room temperature and BJ's would not offer nips, wine in small bottles, or 4-packs, 6-packs or single cans or bottles of beer. (Exhibits A, B)
8. BJ's is a no-frills operation seeking to add alcoholic beverages to provide one-stop shopping for its customers. BJ's does not provide customer service regarding alcohol beverages sales. BJ's has applied to license the entire premises in order to allow customer to move throughout the store with their selected alcoholic beverages and to purchase all goods at the cashiers at the front of the store. BJ's business plan also includes moving

some alcoholic beverages displays to the front of the store during the holidays and for special events. (Testimony, Exhibits A, B)

9. Customers are not required to hold a membership with BJ's Wholesale Club to purchase alcoholic beverages. Id.
10. At the conclusion of the public hearing, the Local Board voted to deny the application. (Exhibit B)
11. In a written decision dated October 19, 2020, the Local Board denied the application citing a lack of public need. The Local Board found:
 - a. there was documented opposition of the public for the license transfer;
 - b. there are four¹ licenses within 400 feet of 26 Whittier Street, including that one existing licensee 170 feet from 26 Whittier Street;
 - c. the applicant's establishment will not offer a variety or uniqueness as compared to offerings by existing, nearby licensees in Framingham at the time of application;
 - d. the alcohol license to the Applicant's establishment will not offer a substantial economic benefit to the City of Framingham; and
 - e. the Applicant's proposed location is near a shopping mall or high-density retail area and duplicates what is presently located in the area. (Exhibit H)
12. BJ's timely appealed the Local Board's decision. (Exhibit 1)
13. In September of 2018, the Local Board denied the application of RKTC Corporation for a transfer and change of location of a wine and malt beverages retail package store license to be exercised at 20 Irving Street. Said denial was based on the fact that there already existed a sufficient number of licensed retail alcohol outlets in the area; two of which were within 400 feet of the proposed premises. (Exhibit G)
14. On December 21, 2020, the Local Board voted in favor of granting a transfer, alteration of premises and change of location for a § 15 all alcoholic beverages package store license to Whole Foods Market Group, Inc. located at 575 Worcester Road Unit 1, Framingham. The transferor, Warehouse Wine and Spirits, Inc., was located in a storefront adjacent to Whole Foods in Unit 2. Whole Foods then took over Unit 2, incorporating that space into the existing Whole Foods Market premises. (Exhibits 3, 4)

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

¹ There was a typographical error in local board decision, there are only 2 licenses in close proximity to the proposed location. (Testimony)

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). Section 23 of c. 138 provides, in pertinent part: “Any 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.” Section 23 of c. 138 further provides, in pertinent part: “[a]ny license issued under this chapter may, upon application pursuant to section fifteen A, be transferred from one location to another ... with the approval of the licensing authorities.”

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). Accordingly, 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); see Ballarin, supra at 512 (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, supra at 511. In the case of Donovan v. City of Woburn, the Appeals Court held, “[n]either 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, supra at 379. “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)).

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, supra at 511. In Ballarin, the Appeals Court held 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, supra 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. Id.

Furthermore, 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.” (Emphasis added) M.G.L. c. 138, § 23.

Despite no right to a liquor license, a local 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., *supra* at 880.

Upon examination of the record of the Local Board proceedings, the Commission finds the Local Board fulfilled its responsibility regarding this application. It held a public hearing and considered statements made by the Applicant as well as from the Framingham community. It deliberated and made particularized and specific findings based upon the information provided. To support its decision, the Local Board considered and relied upon factors cited in Ballarin. As such, the Local Board’s decision was not arbitrary and capricious.

The Local Board found after a public hearing and deliberations, and consistent with the holding in Ballarin, that the area of the proposed location is adequately served by existing package stores and thus, the public need is already being met. In fact, there are two (2) existing package stores in the immediate .75-mile radius of the proposed premises. One of which, Fifth Ave. Liquors, is only 275 feet from BJ’s. (Exhibit D)

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., *supra* at 839-840; Town of Middleton, *supra*. Accordingly, here, the Local Board’s decision, that the area is adequately served by the existing package store licenses within a .75-mile radius of the proposed location, thus meeting the public need, was based on sufficient evidence. The Local Board’s reliance on the City of Framingham’s Geographic Information System’s map as well as their knowledge as to existing § 15 licenses in the area was reasonable and appropriate pursuant to the holdings in several well settled cases. Ballarin, *supra*; Donovan, *supra*; and Town of Middleton, *supra*.

The 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. See Town of Middleton v. Alcoholic Beverages Control Comm’n, 64 Mass. App. Ct. 1108 (2005) (memo and order pursuant to Rule 1:28).

Additionally, a proper assessment of public need involves a particularized inquiry into the sort of business an applicant intends to operate, here the type of business was discussed at the local board hearing. See Donovan supra at 381.

The City of Framingham Rules and Regulations Governing Alcoholic Beverages notes in relevant part: VII. Considerations for Approval of New License or Transfer:

The Board will consider any or all of the following that can be reasonably offered in support of a particular license application ... 3. The applicant offers variety, or uniqueness, in its proposed establishment or shop, in contrast to what exists in Framingham at the time of the application. (Exhibit A)

BJ's contends their business model is unique in the sense that the store is a no-frills warehouse with a small footprint and limited varieties of alcohol products. They are a one-stop shopping destination selling eyeglasses, gas, vacuum cleaners, groceries, clothing, electronics and other goods. However, the Local Board determined BJ's would not offer any special varieties of alcoholic beverages not already available at the retail package store 275 feet away, or at the other existing retail package stores in Framingham. Accordingly, the Local Board's determination that BJ's does not offer a uniqueness the city desires is supported. See e.g. Donovan, supra at 379 (The local board may deny a license even if the facts show that a license could be lawfully granted.).

BJ's further argues that the Local Board's decision is arbitrary and capricious because only 2 months after this transfer was denied, the Local Board granted a section 15 all alcohol beverages license to Whole Foods Market Inc. ("Whole Foods"). BJ's claims Whole Foods marketed themselves as "unique" from a typical package store because it would continue to operate as a grocery store and would have staff on hand to offer advice and wine pairings. BJ's argues these features are not unusual in the retail marketplace and thus, not unique. (Exhibit 3, 4). However, the Local Board determined Whole Foods' business model was unique as it carries local offerings and provides dedicated customer service regarding alcoholic beverages and food pairings. In addition, there was no opposition from the community regarding Whole Foods' application and Whole Foods acquired the license and the space from the licensee adjacent to its existing premises, as such the Local Board found there was no question as to public need at that location. (Testimony)

Finally, the Local Board did not act arbitrarily and capriciously as it decided the outcome of this application consistently with its prior decision denying RKTC Corporation's transfer and change of location application in 2018 on grounds that there was no public need given the existence of a sufficient number of licensed retail alcohol outlets in the area; two of which were within 400 feet of the proposed premises. (Exhibit G) Accordingly, the Local Board's determination is supported by the evidence of prior decisions.

Local licensing authorities are recognized as having expertise regarding the problems affecting the regulation of alcoholic beverages. Great Atl. & Pac. Tea Co., Inc., supra at 837. Because the Local Board's decision is supported by evidence introduced at the October 5, 2020, hearing, and its decision was based on a "logical analysis," its disapproval of the transfer and change of location of a license to BJ's is not arbitrary and capricious and must be affirmed. Id. at 839-840.

CONCLUSION

Based on the evidence and testimony at the hearing, the Commission **APPROVES** the action of the City of Framingham Licensing Board for denying the M.G.L. c. 138, § 15 all alcoholic beverages retail package store Transfer of License and Change of Location application of Mormax Corporation d/b/a BJ's Wholesale Club.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Crystal Matthews, Commissioner 

Deborah Baglio, Commissioner 

Jean M. Lorizio, Chairman 

Dated: July 28, 2022

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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