

Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, Massachusetts 02150-2358

Jean M. Lorizio, Esq.
Chairman

DECISION

PRICE CHOPPER OPERATING CO. OF MASSACHUSETTS, INC.
300 STOCKBRIDGE STREET
GREAT BARRINGTON, MA 01230
LICENSE#: NEW
HEARD: 8/8/2022

This is an appeal pursuant to M.G.L. c. 138, § 67. Price Chopper Operating Co. of Massachusetts, Inc. ("Applicant" or "Price Chopper"), is appealing the action of the Town of Great Barrington Board of Selectmen (the "Local Board" or "Great Barrington") in denying its M.G.L. c. 138, § 15 Wines and Malt Beverages Retail Package Store License application to be exercised at 300 Stockbridge Street, Great Barrington, Massachusetts. The Applicant timely appealed the Local Board's action to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a remote hearing via Microsoft Teams was held on Monday, August 8, 2022.

The following documents are in evidence:

1. Price Chopper's § 15 Wines & Malt Beverages Retail Package Store Application, 3/31/2022;
2. Video Recording of Local Board's Meeting, 5/11/2022;
3. Video Recording of Local Board's Meeting, 5/23/2022;
4. Local Board's Decision, 6/8/2022;
5. Local Board's Decision for I Shree-3 LLC's Application, 6/3/2022;
6. Great Barrington Zoning Map showing § 15 Retail Licenses relative to proposed premises.
 - A. Local Board's Map of Area of Proposed Premises.

At the close of the August 8, 2022, hearing, the Commission left the record open to August 22, 2022, for the submission of additional exhibits. The exhibits were submitted in a timely manner and the record is now closed.

There is one (1) audio recording of this hearing, and four (4) witnesses testified.

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. Price Chopper Operating Co. of Massachusetts, Inc. ("Applicant" or "Price Chopper"), is a Massachusetts corporation headquartered in Schenectady, New York with a business address of 300 Stockbridge Road, Great Barrington, Massachusetts. (Exhibit 1)
2. On or about March 31, 2022, Price Chopper filed a § 15 wines and malt beverages retail package store application with the Local Board. (Exhibit 1)
3. On May 11, 2022, the Local Board held a public hearing on Price Chopper's application. The Local Board continued the hearing on the application to May 23, 2022. (Exhibit 2)
4. On Monday, May 23, 2022, the Local Board continued its consideration of Price Chopper's application. At the conclusion of the hearing, the Board voted on the approval of the application which resulted in a 2-2 tie, with one member having recused himself. Therefore, the Local Board denied Price Chopper's application. (Exhibit 3)
5. By decision dated June 8, 2022, the Local Board denied the application stating:
 - a. Alcohol should not be permitted in another grocery store; and
 - b. At the time of this vote, another recently denied wine and malt package store license application was within the appeal period and only one license remains available.¹ (Exhibit 4)
6. The Applicant timely appealed the Local Board's decision to the ABCC.

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. As M.G.L. Ch. 138, § 23 provides,

[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.

¹ The Commission need not address the Local Board's 2nd reason. The issue is moot as the applicant which was denied prior to Price Chopper did not exercise its right of appeal.

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. 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.

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.

The Appeals Court has held that a local board may deny a license even if the facts show that a license lawfully could be granted. See Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 379 (2006). “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.” See id. “Instead, ‘[w]here the factual premises on which [the board] purports to exercise its 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)). 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 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); 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.

Price Chopper contends that the Local Board’s decision is arbitrary and capricious, an abuse of discretion.

Price Chopper further argues that the Local Board failed to conduct a specific analysis of Price Chopper’s business as required in the Donovan case. Donovan, 65 Mass. App. Ct. 375, 380 (2006). The facts in Donovan are distinguishable from those in this matter. The Appeals Court in Donovan held that the Local Board should have conducted a particularized analysis of the proposed business plan, rather than simply assessing the number of existing retail package stores in the area. The business plan in Donovan was for deliveries of gift baskets containing alcohol, not a traditional package store, which the Court found would have been the only business of its kind in Woburn. Donovan, 65 Mass. App. Ct. at 380. Here, unlike the Donovan case, the Local Board was not presented with any evidence that Price Chopper’s business plan was distinguishable from the existing retail package stores in the area. However, the record reflects the Local Board did, in fact, discuss the need for a retail package store in a business such as Price Chopper’s and based their decision to deny the application on the specific type of business proposed by the applicant. As identified in Ballarin, the “sort of operation that carries the license” is a factor to be considered when weighing the public need for a license. Ballarin, 49 Mass. App. Ct. at 511.

Price Chopper asserts the Local Board should have considered the fact that the other supermarkets in Great Barrington hold licenses, and that puts Price Chopper at a disadvantage. Competition is not an appropriate consideration. See Mormax Corporation (ABCC Decision, March 18, 2014)

The Commission finds that the Local Board was neither arbitrary nor capricious in its decision, nor was the decision an abuse of discretion or based on an error of law. See Great Atlantic & Pacific Tea Co., Inc., 387 Mass. at 837. The Local Board held two public hearings during which public comment was solicited. The Local Board considered Price Chopper’s application and documentary evidence.

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

The Local Board considered and applied the factors outlined in the cases of Ballarin and Donovan. The Commission finds the Local Board’s decision was based on sufficient evidence, and the decision of the Local Board was not based upon an error of law, and thus, was not arbitrary and capricious.

Local licensing authorities are recognized as having expertise regarding the problems affecting the regulation of alcoholic beverages. Great Atl. & Pac. Tea Co, Inc., v. Board of License Comm’n of Springfield, 387 Mass. 833, 837 (1983). A local board may deny a license even if the facts show that a license could be lawfully granted. Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 379 (2006). It is not for the Commission to substitute its own views with what the Local Board believes is in the best interest of its town. Because the Local Board’s decision is supported by the evidence before them at their May 11, 2022 and May 23, 2022 hearings, and was based on a “logical analysis,” its disapproval of a license for Price Chopper is not arbitrary and capricious

and must be affirmed. Great Atl. & Pac. Tea Co., Inc., v. Board of License Comm'n of Springfield, 387 Mass. 833, 839-840 (1983).

CONCLUSION

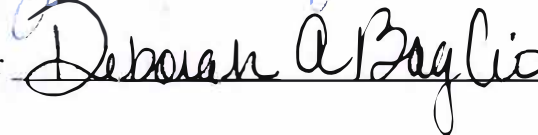
Based on the evidence and testimony presented at the hearing, the Commission **APPROVES** the action of the Town of Great Barrington in denying the M.G.L. c. 138, § 15 Wines and Malt Beverages Retail Package Store license application of Price Chopper Operating Co. of Massachusetts, Inc.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Jean M. Lorizio, Chairman



Deborah Baglio, Commissioner



Dated: September 12, 2023

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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Administration, File