

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

*Steven Grossman*  
*Treasurer and Receiver General*

*Kim J. Gainsboro, Esq.*  
*Chairman*

**DECISION**

**PACKAGING CENTER, INC. D/B/A STOP & SHOP SUPERMARKET**  
**111 ROUTE 137**  
**HARWICH, MA 02645**  
**LICENSE#: NEW**  
**HEARD: 06/20/2013**

This is an appeal of the action of the Town of Harwich Board of Selectmen (the "Local Board" or "Harwich") in denying the application for transfer of ownership and transfer of location of an all-alcoholic beverages M.G.L. c. 138, § 15 license from William Coffin & Sons, Inc. to Packaging Center, Inc. d/b/a Stop & Shop Supermarket (the "Licensee" or "Stop & Shop") located at 111 Route 137, Harwich, MA. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, June 20, 2013.

The following documents are in evidence:

1. Local Board's Notice of Public Hearing dated March 4, 2013 for Hearing to be Held March 18, 2013;
2. Harwich Board of Assessor's Map of Parcel 87;
3. Applicant's Pre-Hearing Memorandum for Public Hearing Held March 18, 2013;
4. Applicant's Retail Package Store Application;
5. Memo dated May 3, 2012 from Town Administrator's office to Harwich Board of Selectmen;
6. Letter dated February 25, 2013 from Attorney Riley to Harwich Town Administrator;
7. Cape Cod Times Editorial dated September 29, 2012 entitled, "License to Complain";
8. Memorandum dated March 4, 2013 from Harwich Police Chief to Town Administrator;
9. Letter dated March 14, 2013 from Attorney Alberich to Harwich Board of Selectmen Chairperson, Linda Cebula;
10. Excerpt of Minutes of Public Hearing Held on March 18, 2013;
11. Letter dated March 22, 2013 from Chairperson Cebula to Attorney Crowell;
12. Minutes of the March 18, 2013 Meeting of the Harwich Board of Selectmen;
13. East Harwich Village Center Retail Market Assessment dated January 2008;
14. Applicant's Letter of Appeal to ABCC;
15. Photographs of Stop & Shop's ID scanners, Terminal Displays and Register Receipts;
16. Compact disc Audio Recording of Harwich Board of Selectmen Meeting Held March 18, 2013;
17. Stop & Shop, New England Division Alcohol Safety Policy dated March 4, 2013; and
18. Stop & Shop Alcohol Sales Policy Supplied to Employees.

There is one (1) audio recording of this hearing. No witnesses testified before the Commission.

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## FACTS

1. William R. Coffin & Sons, Inc. d/b/a Plum's Package Store ("Plum's") is a Massachusetts corporation with a place of business at 326 Main Street in Harwich, Massachusetts. Plum's has held an all alcoholic beverages §15 license issued by the Town of Harwich for many years. (Exhibits 12, 16)
2. Packaging Center, Inc. d/b/a Stop & Shop Supermarket is a Massachusetts corporation with a place of business at 111 Route 137 in Harwich, Massachusetts. It has been at this location for over 20 years. (Exhibits 12, 16)
3. In February of 2013, Stop & Shop filed a Petition for Transfer of Ownership and Transfer of Location to transfer the M.G.L. c. 138, §15 license from Plum's to Stop & Shop's store in Harwich. (Exhibits 12, 16)
4. Stop & Shop is located within a commercial district in East Harwich known as the East Harwich Village Center (the "EHVC"). The EHVC is an 100-acre commercial district in East Harwich. It was designed to serve both year round residents of Harwich and the surrounding areas and seasonal residents and visitors to Harwich and the surrounding areas. (Exhibits 12, 13, 16)
5. By population, M.G.L. c. 138, §17 allows Harwich to have eight §15 licenses. The city file indicates that there was special legislation filed by the town and approved by the legislature which affords the town an additional 4 annual all alcohol licenses. (Commission Records as of 6/2013)
6. There are thirteen §15 alcoholic beverages licenses in Harwich, including seven annual all alcohol, two seasonal; and four annual wine and malt. (Commission Records as of 6/2013)
7. There are seven §15 Harwich alcoholic beverages licensees within a four mile radius of the proposed location. Harwich East Liquors is located at 1421 Route 39, Harwich, Massachusetts, also within the EHVC. There are no other Harwich §15 licenses located within the EHVC. (Exhibits 12, 16)
8. Most of the retail alcoholic beverages licenses are located in the center of Harwich. (Exhibits 12, 16)
9. Neither the Harwich Police Chief nor the Harwich Fire Chief objected to the transfer of the license to Stop & Shop. (Exhibits 12, 16)
10. On Monday, March 18, 2013, a public hearing was held before the Harwich Board of Selectmen to consider the Petition. The Local Board received several letters and heard oral statements from residents in opposition to the transfer, in addition to those of other Town businesses licensed to sell alcoholic beverages. Fifteen individuals spoke. (Exhibits 12, 16)
11. Among the individuals who spoke were three attorneys representing Stop and Shop and East Harwich Liquors, a Barnstable State Representative, a Chatham Selectman, an owner of Cape Cod Beer, a member of the West Chatham Association Board of Directors, five competitors both within and outside of Harwich, an employee of the Massachusetts Package Store Association, and three Harwich residents. There appeared to be a large number of individuals in the audience

wearing green stickers. Although it was clear that they represented an organized group opposed to the transfer, it was unclear how many, if any of them, were Harwich residents. (Exhibits 12, 16)

12. All of the individuals who spoke opposed the transfer. (Exhibits 12, 16)
13. All of the opposition testimony was based upon the size of the store and the concomitant issues possible. The Applicant proposed to license its entire store. It is triple the size of Plum's. (Exhibits 4, 16)
14. The individuals were concerned about inventory "shrinkage"<sup>1</sup> by underage employees, a lack of control by the Applicant based upon the size of the corporation as well as its international status, and alcohol sales not going to be a primary concern of the Applicant based on the percentage of sales compared to its food items. (Exhibit 16)
15. The individuals also expressed concerns about the security measures regarding underage sales, and that the Applicant would not be able to control its premises because of its size and business model. Although the alcohol products would be kept in one location, individuals wishing to purchase alcohol could do so at any register including the self checkout. (Exhibit 16)
16. Stop & Shop introduced evidence that it will implement security procedures to prevent theft and the sale of alcoholic beverages to minors. Stop & Shop will check the identification of every purchaser of alcoholic beverages, regardless of apparent age. Only cashiers age eighteen or older will be permitted to engage in a sales transaction with a customer for the purchase of alcoholic beverages. All forms of identification will be checked both physically by the cashier and inserted into an Identification Scanner to detect false or fraudulent identification. In order to proceed with the transaction, the cashier must physically input the customer's date of birth into the register to proceed with the transaction. All cashiers will be TIPS trained and be required to read and sign the Stop & Shop Alcohol Sales Policy. (Exhibit 16)
17. In addition, Stop & Shop introduced evidence that it will:
  - a. install PTZ (pan, tilt, and zoom) cameras in the alcoholic beverages sales locations as well as the parking lot to monitor for theft;
  - b. employ a Uniformed Stop & Shop Detective to patrol the liquor department and self-scan area.
  - c. employ store detectives to monitor the sales floor via cameras located throughout the liquor sales area;
  - d. hire a Liquor Department Manager and part time staff solely to oversee the liquor department;
  - e. physically secure the alcoholic beverages sales area during non-sales hours;
  - f. not cross-merchandise alcoholic beverages throughout this particular store although Stop & Shop has been permitted to do so by the Licensing Boards<sup>2</sup> in the other locations where it has package store licenses. (Exhibits 16, 17)

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<sup>1</sup> The Commission understands this term to be a benign term for theft.

<sup>2</sup> The legality of this trade practice by Stop& Shop has not been reviewed by the Commission in the pending case. The specific facts describing what, exactly, Stop & Shop does was not provided.

18. The Local Board also took administrative notice of the results for Harwich in the 2006 ballot question regarding the sale of wine in grocery stores. There was a 70% voter turnout of registered voters and 62% of those voting in Harwich opposed the sale of wine in grocery stores. The Local Board extrapolated these results and applied them to all alcoholic beverages. (Exhibits 12, 16)
19. In addition, the Local Board received three petitions from three separate groups. One petition was from the September 2012 Stop & Shop transfer application. It had approximately 2,000 signatures supporting the transfer. (Exhibits 12, 16)
20. The second petition that the Local Board received was from East Harwich Liquors. It had approximately 1,900 signatures. (Exhibits 12, 16)
21. The third petition that the Local Board received was from the West Chatham Association Board of Directors. (Exhibits 12, 16)
22. Stop & Shop's and East Harwich Liquors' petition contained signatures of Harwich residents and residents of nearby towns.
23. Steven MacLean, Stop & Shop's proposed license manager did not appear or offer statements before the Local Board. (Exhibit 16)
24. After hearing all of the statements, prior to deliberating, the Local Board discussed the factors defining public need under the Ballarin decision.<sup>3</sup> (Exhibits 12, 16)
25. The Local Board specifically said that competition among licensees was not an appropriate factor for their consideration under the law, and as such, were not going to consider it as a factor in making their decision regarding whether to approve or disapprove the transfer application. (Exhibit 16)
26. The Local Board went through each factor. (Exhibits 12, 16)
27. They found that the transfer of Plum's License would not increase the traffic, noise, or the size of this existing Stop & Shop that does not hold an alcohol license. (Exhibit 16)
28. They also found that Stop & Shop had a good reputation. (Exhibits 12, 16)
29. The Local Board went on to discuss the view of the inhabitants. The Selectmen noted that on both Stop & Shop's petition and on East Harwich's petition that approximately 50% of the signatures were from Harwich residents. (Exhibits 12, 16)
30. The Local Board gave more weight to the views of the individuals who were present at the meeting than those who signed the petition. Selectman Hughes commented about the importance of the views of the individuals who took the time to come to the meeting. (Exhibits 12, 16)
31. Members of the Local Board found the 2006 ballot results compelling. They felt that the question regarding alcohol in grocery stores was put to the voters, and a majority of the residents in Harwich, whom they represent voted "no". Selectmen Hughes and McManus both agreed that

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<sup>3</sup> Ballarin Inc., v. Licensing Board of Boston, 49 Mass. App. Ct. 506 (2000).

- the vote was still valid, and represents the current viewpoint of Harwich residents. (Exhibits 12, 16)
32. The Local Board went on to discuss the last factor or the “sort of operation” under Ballarin. Selectmen Hughes and McManus agreed that the sort of operation was a very significant factor for them. (Exhibits 12, 16)
  33. The Local Board discussed that they would be transferring a license from a small family owned operation to something much different than that, and it speaks to the character of the Town and begs the question regarding what they expect in Harwich’s business community. (Exhibits 12, 18)
  34. Selectman Hughes went on to say that Harwich is made of small shopkeepers, independent people in their own businesses with one or two employees and that it is a vibrant community and the fabric of our Chamber of Commerce.
  35. Selectman Hughes stated that Harwich’s business community is vibrant and it is the Local Board’s responsibility to do all it can to ensure its continued success.
  36. Harwich residents depend on a vibrant business community and by and large it is comprised of small mom and pop operations. These small businesses are essentially the backbone of the business community economically. (Exhibits 13, 16)
  37. Selectman McManus stated that the staff at the existing §15 licensees consists of career employees who are extremely knowledgeable about the alcoholic beverages industry. He voiced concerns about maintaining vibrant career opportunities for young people to stay on the Cape. (Exhibits 12, 16)
  38. After deliberations, the Local Board unanimously voted to deny the application to transfer the license to Stop & Shop based upon the view of the inhabitants and the sort of operation that would carry the license. (Exhibits 12, 16)

### 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 Commn., 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 G.L. c. 138. Licenses must be approved by both the local licensing authorities and the Commission. 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.”

The Appeals Court has discussed the statutory standard to grant a license and the factors that a licensing authority may properly consider in its decision whether to grant or deny a license application. In Ballarin Inc., v. Licensing Board of Boston, 49 Mass. App. Ct. 506 (2000), the Appeals Court held that:

The statute authorizing the issuance of liquor licenses speaks in terms of serving “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.”

G.L. c. 138, § 23, as amended by St. 1965, c. 399.

The Appeals Court has held that 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. A local board’s determination to deny an application based on the lack of public need is not contrary to law where the local board considers the need for the particular business that the applicant sought to run and the local board applies its analysis to the applicant’s proposed business and to the location of the proposed business. Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 380 (2004).

In making its discretionary determination, a licensing authority may take 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. [Emphasis added]. See Connolly v. Alcoholic Bevs. Control Commn., 334 Mass. at 617-618; Great Atlantic & Pac. Tea Co. v. Board of License Commrs. of Springfield, 387 Mass. 833, 837 (1983); Beacon Hill Civic Assn. v. Ristorante Toscano, Inc., 422 Mass. at 322 n. 4; Hub Nautical Supply Co. v. Alcoholic Bevs. Control Commn., 11 Mass. App. Ct. 770, 772-774 (1981). Ballarin Inc., v. Licensing Board of Boston, 49 Mass. App. Ct. 506, 510-512 (2000). 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 Board, 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. 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 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. Recitals of testimony do not constitute findings. Johnson’s Case, 355 Mass. 782 (1968).” Exotic Restaurants Concept, Inc. v. Boston Licensing Board, Suffolk Superior Court, C.A. No. 07-3287 (Borenstein, J.)

In this case, the Local Board fulfilled its responsibility. It reviewed all of the documents before it, and listened to the statements of the audience members. It deliberated over the information that was before it, and made particularized and specific findings based upon the information they were provided. Furthermore, the factors that the Local Board considered and used to support its decision were based upon those cited in Ballarin. See Ballarin, supra. As such, the Local Board’s decision was not arbitrary and capricious<sup>4</sup>.

The Local Board methodically reviewed the factors they may consider under Ballarin. They based their decision to deny the license on the view of the inhabitants as well as the sort of operation that would carry the license. These factors are both appropriate. See Ballarin, supra

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<sup>4</sup> This is not to say that a different Local Board could not have reached a different conclusion based on the same set of facts.

The Local Board decided that they do not want an operation the size of Stop and Shop to sell alcoholic beverages in their community. The Local Board expressed concern about security measures, and the ability of the Applicant to maintain control of its premises. However, the Local Board's primary focus was maintaining its vision and the character of Harwich's business community.

The Local Board that the Harwich business community is comprised mostly of small businesses. The Local Board believes that this economic model has been largely successful for the town. By denying this license transfer, the Local Board decided that they wanted to maintain the character of Harwich and encourage "home-grown, small scale retailers." This is consistent with the East Harwich Village Center Retail Market Assessment. It is also within their discretion as the Local Board.

This decision was bolstered by the view of Harwich residents. Although the petitions essentially cancelled each other, three Harwich residents testified at the hearing in opposition to the license transfer. Moreover, there was a ballot question specifically addressing this issue in 2006. The majority of Harwich voters do not want grocery stores in Harwich selling alcoholic beverages. This was a proper factor for the Local Board to consider. The Local Board's decision was well within their discretion under Ballarin. Id.

#### CONCLUSION

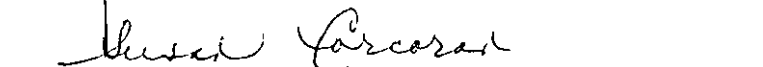
The Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board in denying the application of Packaging Center, Inc.

#### **ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Kim S. Gainsboro, Chairman,



Susan Corcoran, Commissioner



Dated: August 12, 2013

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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