



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

**Jean M. Lorizio, Esq.**  
*Chairman*

**DECISION**

**RFS STORE 108, INC. D/B/A RICHDAL FOOD SHOPS  
158 MAIN ST.  
LEOMINSTER, MA 01453  
LICENSE#: NEW  
HEARD: 3/19/2019**

This is an appeal pursuant to M.G.L. c. 138, § 67. RFS Store 108, Inc. d/b/a Richdale Food Shops ("Applicant" or "Richdale" or "RFS"), is appealing the action of the City of Leominster License Commission (the "Local Board" or "Leominster") in denying its M.G.L. c. 138, § 15 Wines and Malt Beverages Retail Package Store License application to be exercised at 158 Main Street, Leominster, Massachusetts. The Applicant timely appealed the Local Board's action to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a hearing was held on Tuesday, March 19, 2019.

The following documents are in evidence:

1. RFS Store 108, Inc. c. 138, § 15 License Application;
2. Local Board's Letter/Notice of Hearing, 11/7/2018, to Applicant;
3. Local Board's Decision, 11/27/2018;
4. Applicant's Notice of Appeal, 12/10/2018;
5. Legal Notice of Hearing published in Local Newspaper, 11/5/2018;
6. Minutes of Local Board's Informational Hearing, 10/22/2018;
7. Minutes of Local Board's Hearing, 11/26/2018;
8. Audio Recording of Local Board's Informational Hearing, 10/22/2018 and Local Board's Hearing, 11/26/18;
9. Letters in Support of RFS's Application;
10. Zoning Map of Leominster;
11. Minutes of Local Board's Meeting, 7/13/2015;
12. Map Showing Proposed Location of Applicant in relation to Existing § 15 licensees and supporting documents;
13. Local Board's Decisions, 11/27/2018, for Applicants New England Farms, Leominster Market, and Aksel Market; and
14. Rules and Regulations of Local Board.

At the close of the hearing, the Commission left the record open until March 26, 2019, for the Local Board to submit a copy of their Rules and Regulations. The Local Board submitted the document in a timely manner, and it has been marked as an exhibit. The Licensee did not submit any additional documents. The record is now closed.

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. RFS Store 108, Inc. d/b/a Richdale Food Shops ("Applicant" or "Richdale" or "RFS"), is a registered Massachusetts corporation with a business address of 158 Main Street, Leominster, Massachusetts. Its sole officer, director, and shareholder is Barznab Khan. (Testimony, Commission records, Exhibits 1)
2. Mr. Khan currently operates Richdale Food Shops as a convenience store and sought to add a wines and malt beverages retail package store license to the operation. (Testimony)
3. Mr. Khan holds an ownership interest in six (6) other Richdale Food Shops, each of which holds a § 15 wines and malt beverages retail package store license. The other locations include: Brockton, Canton, Randolph, Rockland and 2 stores in Boston. (Exhibit 1)
4. It is the Local Board's practice, as outlined in its Regulations, to publish notice in the newspaper of the City's intent to offer a license or licenses, and to seek applicants. As also required by its Regulations, the Local Board schedules an informational hearing upon receipt of a Letter of Intent from any applicant wishing to apply for a license. (Exhibit 14)
5. The Board held such an informational hearing regarding Richdale's interest in applying for a § 15 wines and malt beverages retail package store license on October 22, 2018. Mr. Khan attended this hearing. The informational hearing was held prior to Mr. Khan filing his application. (Exhibits 2, 6, 8, 14)
6. In between the informational hearing on October 22, 2018 and the hearing on November 26, 2018, the board members conducted a site visit wherein they drove together to the existing convenience store at 158 Main Street. (Testimony)
7. On or about November 19, 2018, RFS submitted its application for a § 15 wines and malt beverages retail package store license. (Exhibit 1)
8. The Local Board held a public hearing on RFS's application on November 26, 2018, which the Applicant attended. At the hearing, one person spoke in favor of RFS's application and no individuals spoke in opposition to the application. (Testimony, Exhibit 8)
9. At the conclusion of the hearing, the Local Board voted 3-0 to deny RFS's application. By decision dated November 27, 2018, the Local Board gave its grounds for the denial. The Board cited the: (1) the location of the proposed premises is within close proximity to multiple establishments which sell wines and malt beverages, and/or all alcoholic beverages; (2) a lack of available parking and the difficult ingress and egress to the location is a public safety concern; and (3) the lack of public need for this license. (Exhibits 8, 3)
10. The Applicant timely appealed the Local Board's decision to the ABCC. (Exhibit 1)
11. Three other applicants for retail package store licenses in Leominster had hearings on the same night as RFS. The Local Board visited those locations as well. Those three

applications were denied citing lack of public need given the number of existing package stores. (Testimony)

### DISCUSSION

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.

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.

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.

RFS contends that the Local Board’s decision is arbitrary and capricious, an abuse of discretion and not based on substantial evidence.

RFS argues that the hearing process was deficient given the Local Board considered testimony garnered at the informational hearing. The Local Board’s Regulations in Section 1.21, entitled Applications and Fees, clearly state:

- a. Prior to the City issuing any application for a new alcohol beverage license, the License Authority shall publish in the newspaper, on one occasion, the City’s intent to offer and seek applicants for an available license. Anyone interested in applying for the license shall submit a Letter of Intent by the date posted in the newspaper notice. An Informational Hearing will be scheduled for all parties who submit a Letter of Intent by the prescribed date.
- b. At the Informational Hearing the Authority will determine a date for a Public Hearing and a deadline for the applications to be submitted. Only those parties who are scheduled for the Informational Hearing may submit a formal application.

While this procedure may be somewhat unorthodox,<sup>1</sup> the Local Board has promulgated Regulations which provide each applicant with an understanding of the process. The process was followed. The Commission is persuaded that the Local Board's decision was based on evidence properly obtained during the hearing process.

RFS further argues that the Local Board failed to conduct a specific analysis of RFS'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 RFS's business plan was distinguishable from the other retail package stores in the area. See Donovan, 65 Mass. App. Ct. at 381. RFS argues that the Local Board did not consider the differences between their business model and the existing package stores in the area. The record reflects the opposite as the Chair of the Local Board testified before the Commission and specifically stated that the other businesses were visited and compared with RFS before the Board voted to deny RFS's application.

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 an informational hearing as required by its rules and regulation, along with a second hearing during which public comment was solicited. The Local Board considered testimony from both hearings and reviewed RFS Store 108, Inc.'s application and documentary evidence. The record indicates that in the approximate one-mile radius around the proposed location there are six (6) existing § 15 retail package store licenses. (Exhibit 8., Jt. Pre-hearing memorandum) 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)

The Local Board presented evidence to the Commission of three other applicants for retail package store licenses whose applications were scheduled for hearing on the same night as RFS and whose applications were also denied citing lack of public need given the number of existing package stores. The Commission finds that the record supports the Local Board's decision that there exists an adequate number of §15 dispensaries in this area to satisfy the public need.

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

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<sup>1</sup> The site visit procedure may also raise open meeting law issues, but such issues are not within the purview of the ABCC.

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.

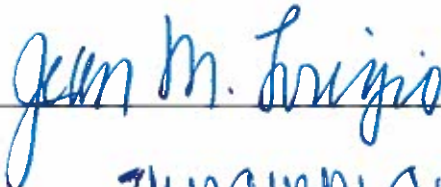
The Local Board considered and applied the factors outlined in the cases of Ballarin and Donovan. The Commission finds the Local Board's decision was based on sufficient evidence presented during the course of the public hearings, and the decision of the Local Board was not based upon an error of law,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

#### CONCLUSION

Based on the evidence and testimony presented at the hearing, the Commission **APPROVES** the action of the City of Leominster in denying the M.G.L. c. 138, § 15 Wines and Malt Beverages Retail Package Store license application of RFS Store 108, Inc.

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

Jean M. Lorizio, Chairman



Elizabeth A. Lashway, Commissioner



Dated: September 13, 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: Jon Aieta, Esq.  
Brian Riley, Esq.  
Frederick G. Mahony, Chief Investigator  
Administration, File