



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

Jean M. Lorizio, Esq.
Chairman

DECISION

**LUV KUSH MARKETING INC. D/B/A HOWES STATION MARKET
229 MAPLE STREET
MIDDLETON, MA 01949
LICENSE#: 00015-PK-0704
HEARD: 7/26/2023**

This is an appeal of the action of the Town of Middleton Board of Selectmen (the "Local Board" or "Middleton") denying the M.G.L. c. 138, § 15 all alcoholic beverages retail package store license application of Luv Kush Marketing Inc. d/b/a Howes Station Market ("the "Applicant" or "Howes Station Market") to be exercised at 229 Maple Street, Middleton, Massachusetts. The Applicant timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a remote hearing via Microsoft Teams was held on Wednesday, July 26, 2023.

The following documents are in evidence as exhibits:

1. Middleton Home Rule Petition, Mass. Acts of 2022, Chapter 419;
2. Interim Town Administrator's Memorandum to the Local Board, 2/17/2023;
3. Video of Local Board's Meeting, 2/21/2023;
4. Memorandum from Local Board to All Interested Parties, 3/1/2023;
5. Town Liquors License Application, 4/12/2023;
6. Howes Station Market License Application, 3/31/2023;
7. Sublease of 223 Maple Street;
8. Video of Local Board's Meeting, 5/16/2023;
9. Local Board's Decision, 6/1/2023;
10. Howes Market's Site Plans for Redevelopment;
11. Howes Architectural Plans for Premises.

At the close of the hearing, the Commission left the record open until August 25, 2023, to allow for the submission of additional exhibits. The exhibits were timely received, and 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. Luv Kush Marketing Inc. d/b/a Howes Station Market (“the “Applicant” or “Howes Station Market”) presently holds a § 15 wines and malt beverages retail package store license issued December 6, 2002, and exercised at 229 Maple Street, Middleton, Massachusetts.
2. On January 5, 2023, An Act Authorizing the Town of Middleton to Grant up to 8 Alcoholic Beverages Licenses was signed, Acts of 2022, Chapter 419. Section 1(b)(iii) states “of the 2 licenses for the sale of all alcoholic beverages not to be drunk on the premises, 1 of which shall be issued to an establishment located on South Main Street in the town of Middleton between Forms way and the town of Danvers town line with frontage on South Main street, and 1 of which shall be issued to an establishment located on Maple street in the town of Middleton between Ipswich river and the town of Danvers town line with frontage on Maple street.” (Exhibit 1)
3. On February 21, 2023, the Local Board held a public meeting and approved “...the process and criteria” to be used to “...review and determine the final recipients of the new licenses.” (Exhibit 4)
4. On March 1, 2023, the Interim Town Administrator issued a Memorandum to all interested parties regarding the Local Board’s “Final Policy on Home Rule Liquor License Distribution.” Id.
5. The listed criteria to be used in determining the license recipients as laid out in the Memorandum included: proximity to other applicants and current licenses; availability of parking; proximity to a school or house of worship; size of proposed business, i.e. square footage of retail space, projected sales volume; traffic, noise and other products to be sold at proposed establishment; potential for proposed business to further economic development growth of Middleton; experience of applicant and reputation of applicant. Id.
6. The Local Board accepted applications from March 15, 2023 until the close of business on April 18, 2023. Id.
7. On March 31, 2023, the Applicant filed its application for the § 15 all-alcoholic beverages special legislation retail package store license to be issued to a business on Maple Street. (Exhibit 6)
8. On April 12, 2023, JU Inc. d/b/a Town Liquors, filed its application for the § 15 all-alcoholic beverages special legislation retail package store license to be issued to a location on Maple Street. (Exhibit 5)
9. The Local Board held a public hearing regarding the license applications on May 16, 2023. (Exhibits 8, 13)
10. Howes Station Market has 9 parking spaces, along with on-street parking available. Town Liquors has 30 parking spaces on site. (Testimony)

11. After hearing presentations by both applicants, at the close of the public hearing, the chair instructed the board members that they could award the license to one of the two applicants or neither. (Exhibit 8)
12. A board member made a motion to approve the application of JU, Inc. His motion was seconded, and the Board voted to grant the license to JU, Inc. with a closing hour of 9:00 p.m.¹ Id.
13. In its written decision of June 1, 2023, the Board denied the application citing the difference in parking capacity. (Exhibit 9)
14. The Licensee timely appealed the Local Board's action to the ABCC. (Commission records)

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 e.g. 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 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

¹ JU, Inc.'s application was received by the Commission on May 17, 2023. In June of 2023, a Taxpayer Voter Petition was received by the Commission and the Investigation and Enforcement Division conducted an investigation. The Investigator recommended approval, and the application was approved by the Commission on 10/24/2023.

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. 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.

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, 65 Mass. App. Ct. at 379. “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)).

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”).

Here, the Local Board first conducted a public meeting to discuss the process and criteria for awarding the special legislation licenses. (Exhibit 3) The Local Board set a time within which applications had to be filed. Interested parties were notified as to the process, criteria and deadline for filing. (Exhibit 2)

Two applications were received for one license to “...be issued to an establishment located on Maple street in the town of Middleton between Ipswich river and the town of Danvers town line with frontage on Maple street.” (Exhibits 1, 5, 6)

The Local Board then held a public hearing at which both applicants presented their applications and business plans. The Local Board took comments from the public and subsequently voted to grant the license to JU, Inc. and not Luv Kush Marketing, Inc. (Exhibits 8, 9)

The Local Board’s decision was based on the availability of parking at the applicant’s location, in comparison to parking available at JU, Inc.’s proposed location. (Exhibit 9)

The Commission examined the record of the proceedings before the Local Board and finds the Local Board fulfilled its responsibility and the process it followed was proper. The Commission is guided by its decision in RWJ Beverage (MA) LLC (ABCC Decision October 14, 2019) quoting Kostas Kargatzis d/b/a Ocean Reef Seafood Restaurant (ABCC Decision May 12, 1992).

The grant or denial of new licenses, including the choice between competing qualified applicants where only one license is available is a matter committed primarily to the discretion of the Local Board. The Commission finds that the approval of the Ocean Reef application was made in good faith, on lawful procedure, was supported by the evidence, and was an appropriate exercise of the Board's discretion. Having approved the Ocean Reef application...the Board was obligated to deny the [other applications].

Local licensing authorities are recognized as having expertise regarding the problems affecting the regulation of alcoholic beverages. Great Atl. & Pac. Tea. Co. v. Board of License Comm'n of Springfield, 387 Mass. 833, 837 (1983). Because the Local Board's decision is supported by the evidence introduced at its hearing on May 16, 2023, and was based on a "logical analysis," its disapproval of a license for Luv Kush Marketing, Inc. is not arbitrary and capricious and must be affirmed. *Id.*, at 839-840.

The Commission approves of the Local Board's denial of Luv Kush Marketing Inc.'s application for a § 15 all alcoholic beverages license.

CONCLUSION

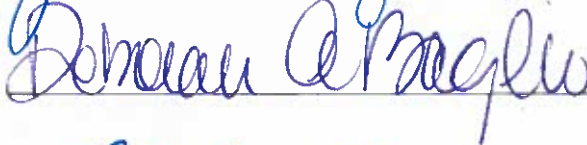
Based on the evidence and testimony at the hearing, the Commission **APPROVES** the action of the Town of Middleton Board of Selectmen in denying the M.G.L. c. 138, § 15 all alcoholic beverages retail package license application of Luv Kush Marketing Inc. d/b/a Howes Station Market.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Jean M. Lorizio, Chairman



Deborah Baglio, Commissioner



Crystal Matthews, Commissioner



Dated: April 8, 2025

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: Eugene R. Richard, Esq.
Samuel B. Richard, Esq.
Stephen J. Chaplin, Esq.
Jason R. Talerman, Esq.
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration, File