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Chairman

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## DECISION

**NANTUCKET MEAT & FISH MARKET, INC.  
21 OLD SOUTH RD.  
NANTUCKET, MA 02554  
LICENSE#: NEW  
HEARD: 04/25/2017**

This is an appeal under M.G.L. c. 138, § 67 by Nantucket Meat & Fish Market, Inc. (“Applicant” or “Market”), 21 Old South Road, Nantucket, Massachusetts. Market is appealing the action of the Town of Nantucket Board of Selectmen (the “Local Board” or “Nantucket”) for denying its M.G.L. c. 138, § 15 Wines and Malt Beverages Seasonal License application. 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, April 25, 2017.

The following documents are in evidence:

1. Nantucket Planning Board Decision 7/13/2015;
2. Local Board’s Meeting Agenda 11/16/2016 and Hearing Agenda Packet;
3. Market’s Seasonal License Application with cover letter 10/11/16;
4. Transcript of Local Board Hearing 11/16/2016;
5. Local Board’s Decision 8/6/2014 for Pour La Table;
6. Pour La Table’s Seasonal License Application 3/14/2014;
7. Local Board’s Decision 11/30/2016 on Market’s Application;
8. Market’s Notice of Appeal to ABCC 11/18/2016;
9. ABCC Notice of Appeal Hearing 1/20/2017; and
10. Minutes of Local Board’s Hearing 11/16/2016.

There is one (1) audio recording of this hearing, and five (5) witnesses testified. The Commission took Administrative Notice of the Licensee’s Commission Records.

## FINDINGS OF FACT

The Commission makes the following findings of fact:

1. Nantucket Meat & Fish Market, Inc. (“Market”) is a registered Massachusetts corporation with a business address of 21 Old South Road, Nantucket, Massachusetts. Sean Ready and John D. Ready, Jr. are each 50% stockholders of the corporation. (Exhibit 3)
2. John D. Ready, Jr. Trust applied for a special permit from the Nantucket Planning Board for a major commercial development and associated zoning relief for construction of a two-story

mixed-use building at 21 Old South Road, Nantucket. The proposed uses included a retail supermarket on the ground floor (for Market's business, which proposed alcohol sales for off-premises consumption), storage in the basement, and four residential apartments on the second floor. The application proposed sharing a driveway with the adjacent building at 2 Amelia Drive. (Exhibit 1; Testimony)

3. On July 13, 2015, the Nantucket Planning Board voted to approve that application. (Exhibit 1)
4. On October 11, 2016, Market submitted to the Local Board a § 15 wines and malt beverages seasonal license application to be exercised at 21 Old South Road, Nantucket (the "Application"). (Exhibit 3)
5. Market's concept is a "small specialty gourmet food market" providing "everything needed to create a meal." (Exhibit 3)
6. The Readys own other meat and fish markets, on Martha's Vineyard and in Vermont. Those locations have liquor licenses, and only 10% of the sales at each location is attributable to alcohol sales. (Testimony)
7. The Readys' reputation in the Martha's Vineyard and Vermont locations is good. (Exhibit 4)
8. Market's Nantucket store has approximately 4,000 square feet total and approximately 100 square feet is proposed to be dedicated to beer and wine sales. (Exhibit 3)
9. While traffic in the area of Market's premises is already congested, there would be no increase in traffic or noise as a result of alcohol sales at the premises. (Testimony; Exhibit 4)
10. Nantucket's current population estimate allows for thirteen seasonal retail package store licenses of which the Local Board has already issued ten. Nantucket is over its annual package store quota with eight licensees. (Testimony; Exhibits 2, 4)
11. There are currently five § 15 licensees within a half-mile of the proposed location. Those stores are:
  - i. Annye's Whole Foods, about a block away from Market on Amelia Drive;
  - ii. The Islander, about a block away from Market on Old South Road;
  - iii. Old South Liquors;
  - iv. Nantucket Wine & Spirits; and
  - v. Lucky's Market.(Exhibit 2; Testimony).
12. All but Annye's Whole Foods are traditional package stores. Annye's Whole Foods is a specialized market with organic foods, a small selection of beer and wine, and homeopathic remedies. (Testimony)
13. Included in a packet of information provided to the Local Board members before the hearing on the Application was the Local Board's "Lemberg Decision," in which the local board, on July 23, 2014, denied the § 15 wines and malt beverages seasonal license application of Pour La Table, LLC ("Pour La Table"). Also included in the packet were the meeting minutes ratifying the local board's vote to deny the Pour La Table application. (Exhibits 2, 5; Testimony)

14. Pour La Table's proposed location at 16A Amelia Drive would have been approximately 0.2 miles away from Market. Pour La Table described itself as a "package store that specializes in high-end wines, craft beer, and fine cheeses." (Testimony; Exhibit 6)
15. The Local Board held a hearing November 16, 2016 on Market's Application. (Exhibit 2).
16. During the public comment period of the hearing, the only persons who spoke opposed the Application. However, most of those who opposed had interests in other § 15 licenses. (Exhibit 4; Testimony)
17. The Local Board members who participated in the hearing unanimously voted to deny Market's application, and they decided at the hearing to adopt the same reasons for the denial as cited in the Lemberg Decision. (Exhibit 4)
18. The Local Board's written decision, dated November 30, 2016, (the "Decision") reasoned that "a licensed establishment at this location would not serve the public need or convenience. The Board found that there are five annual off-premises licensed establishments within a half-mile of 21 Old South Road. The Board's Rule and Regulations Governing Alcoholic Beverages provide that establishments are to be encouraged where the applicant offers a unique establishment, compared to what exists in Nantucket at the time of the application, and discouraged where the proposed location duplicates what is presently located in the area. The Board's findings do not support the approval of this license. In addition, the Board received one letter and multiple public comments at the hearing in opposition to issuing a new license at this location." (Exhibit 7)

## 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.

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 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 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., 12 Mass. App. Ct. at 880.

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.”

M.G.L. c. 138, § 23. 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).

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, 65 Mass. App. Ct. at 378-379; Ballarin, 49 Mass. App. Ct. at 510-511. 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.

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. Id. at 380. 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, 49 Mass. App. Ct. at 511 (Italics added).

“Consideration of the *number of existing dispensaries in a locality* is a proper concern . . . as are the views of the inhabitants of the locality in which a license is sought . . . 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.”

Id. (italics added). The Ballarin Court further noted that “[t]he opposition of the neighborhood, albeit an important factor for a licensing board to consider, does not convert the exercise of a licensing board’s adjudicatory function into a plebiscite.” Id. at 512.

Upon review of the record before the Local Board and the evidence before Commission, the Commission finds that the Local Board fulfilled its responsibility regarding the Application and that the Local Board’s

decision was not based on an error of law or reflective of arbitrary or capricious action. See Great Atlantic & Pacific Tea Co., Inc., 387 Mass. at 837. The Local Board held a hearing during which it heard testimony and reviewed Market's Application and documentary evidence. The Local Board received evidence that there are five § 15 licensees within a half mile radius of Market. The Local Board also received evidence that Annys's Whole Foods, a store selling organic foods, homeopathic remedies, and a small selection of beer and wine, is about a block away from Market. (Testimony; Exhibit 2) It was not erroneous for the Local Board to conclude that "a licensed establishment at this location would not serve the public need or convenience." (Exhibit 7)

Market takes issue with the fact that the Local Board did not discuss the distinctions between Market's business and that of the existing nearby § 15 licensees. (Joint Pre-Hearing Memo at 11) However, the transcript of the hearing before the Local Board reveals the Local Board heard evidence about the type of products Market would sell compared to traditional package stores as well as Market's goal to provide its customers with the convenience of one-stop-shopping. (Exhibit 4) The fact that there are five § 15 licensees within a half mile radius of Market was the major factor in the Local Board denying the Application. (Testimony; Exhibits 4, 7) In fact, Annys's Whole Foods, which is about a block away from Market, has a relatively similar concept as Market's.<sup>1</sup> (Exhibit 4) Contrary to Market's suggestion, Market's concept (a food market selling some alcoholic beverages) is not comparable to the unique type of services the applicant in Donovan v. City of Woburn, 65 Mass. App. Ct. 375 (2006) sought to provide (sale of gifts containing, in some instances, alcohol).<sup>2</sup>

It was not error for the Local Board to note in its Decision that there were multiple public comments made at the hearing in opposition to the Application. See Ballarin, 49 Mass. App. Ct. at 512 (providing that the opposition of the neighborhood is an important factor for a local board to consider). Notably, most of those who opposed the Application were § 15 licensees who would compete with Market were the Application granted. (Exhibit 4) However, the Local Board properly did not consider competition in its denial of the Application, and the Commission does not do so now. Great Atlantic & Pac. Tea Co., 13 Mass. App. Ct. at 271 (the statutory standard of public need "affords no protection for licensees against competition but provides only for the service of the public in a way to protect the common good by making provision for an adequate number of places where members of the public may obtain desired beverages"). In fact, the two Local Board members who testified at the Commission hearing testified that had there not been five § 15 licensees within a half mile radius of Market's location, they would have voted to approve the license Application. (Testimony)

Market argues that the Local Board should have considered the fact that the Planning Board approved Market's project, with its proposed sale of alcoholic beverages. (Joint Pre-Hearing Memo at 14-15)

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<sup>1</sup> Market's counsel at the Local Board hearing described Market as "a grocery store with a little beer and wine. Not unlike say if you went to Annie's [sic] for your organic food and your organic wine. This is just another concept just like that." (Exhibit 4)

<sup>2</sup> This case is also distinguished from New England Farms, Inc. (ABCC Decision August 21, 2013), which Market cites, where the Commission found that the local board had not properly considered the Ballarin factors or the applicant's type of business under Donovan and instead focused on potential competition between that applicant and an existing nearby licensee. Unlike N.E. Farms, in the present case, Ballarin factors were presented to the Local Board at the hearing. (Exhibit 4) The factors of traffic, noise, size, and reputation weighed in the Applicant's favor. (Exhibit 4) However, the Local Board based its decision primarily on the fact that there are five § 15 licenses within a half mile radius of Applicant's premises. (Testimony; Exhibit 4)



While the Planning Board may have considered issues similar to those considered by the Local Board at the liquor license hearing, the Planning Board's determination on a special permit is separate and distinct from the Local Board's determination of whether to grant a liquor license. A local authority's approval of one type of permit or license does not necessitate the granting of a different license or permit from another authority within that city or town. See MTS, Inc. v. City of Northampton, 73 Mass. App. Ct. 1127, \*2 (March 16, 2009) (memorandum and order pursuant to Mass. R. App. P. 1:28) (hardware store obtained a land use license to sell flammable materials but instead needed a flammable materials permit because the "flammable materials permit is distinct from and serves different purposes than a land use license").

Market also argues that the Local Board improperly relied upon the reasoning in the Lemberg Decision-- Pour La Table's application-- without elaboration or comparison to the instant Application. (Joint Pre-Hearing Memo at 16-19) The Lemberg Decision and the local board meeting minutes ratifying the vote to deny that application were included in the packet of information provided to the Local Board members prior to the hearing on Market's Application. (Exhibit 2; Testimony) It was not improper for the Local Board members to adopt the reasoning in the Lemberg Decision for the instant Decision because: (1) the Local Board members each had a copy of the Lemberg Decision; (2) the Lemberg Decision relates to an application for a seasonal off-premises wine and malt liquor license in the same neighborhood as Market's location; (3) Pour La Table's proposed location was approximately 0.2 miles away from Market's location; (4) the local board in the Lemberg Decision was concerned about Pour La Table's proposed proximity to the same § 15 licensees that are in Market's half mile radius; and (5) Pour La Table proposed selling some food, namely fine cheeses. (Testimony; Exhibit 2) In denying Market's Application for the same reasons as in the Lemberg Decision, the Local Board was treating its applicants equally and consistently.

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 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. 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's denial was based on information presented during the course of the public hearing and grounded in the cases of Ballarin and Donovan.

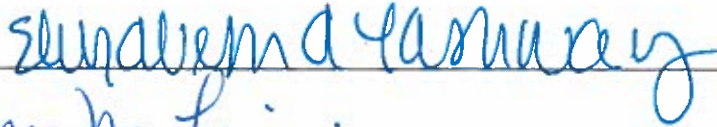
Therefore, the Commission finds that the decision of the Local Board is supported by the record, was not based upon an error of law, and thus, is not arbitrary and capricious.

CONCLUSION

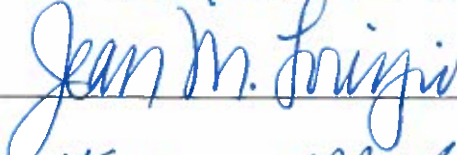
Based on the evidence and testimony at the hearing, the Commission **APPROVES** the action of the Local Board for denying the M.G.L. c. 138, § 15 wines and malt beverages seasonal license application of Nantucket Meat & Fish Market, Inc.

**ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Elizabeth A. Lashway, Commissioner



Jean M. Lorizio, Chairman



Kathleen McNally, Commissioner



Dated: June 14, 2017

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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