



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

Deborah B. Goldberg
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

DECISION

MASSACHUSETTS FINE WINE & SPIRITS, LLC D/B/A TOTAL WINE & MORE
321 SPEEN STREET
NATICK, MA 01760
LICENSE # 076800021
HEARD: 05/20/2015

Massachusetts Fine Wines & Spirits, LLC, d/b/a Total Wine & More ("Applicant" or "Total Wine & More") applied for a transfer of an existing all-alcohol license issued pursuant to M.G.L. c. 138, §15, at the same location. The Board of Selectmen of the Town of Natick ("Local Board" or "Natick") approved the transfer of the license. Twenty-five or more taxpayers petitioned the Alcoholic Beverages Control Commission ("Commission") pursuant to M.G.L. c. 138, §67, paragraph 4 ("Upon the petition of twenty-five persons who are taxpayers of the city ... in which a license has been granted by such authorities ... the commission shall ... investigate the granting of such a license") opposing Natick's decision to approve of the transfer of the license. The Commission held an informational hearing on Wednesday, May 20, 2015, to determine whether the application under M.G.L. c. 138 should be approved or disapproved.

The following documents are in evidence as exhibits:

1. Application and attachments to the Application;
2. Investigator Bailey's Recommendation and attachments;
3. Sub-folders of the Application, subject to a protective order; and
4. Taxpayer/Voter Petition and related pleadings.

The Commission took administrative notice of the Commission files related to the current licensee Cloverleaf Liquor & Grocery LLC, and the Applicant.

There is one (1) audio recording of this hearing.

FACTS

1. On October 29, 2014, Massachusetts Fine Wines & Spirits, LLC, d/b/a Total Wine & More, applied for a transfer of an M.G.L. c. 138, §15 all alcoholic beverages license from Cloverleaf Liquor & Grocery LLC, located at 321 Speen Street, Natick, Massachusetts.
2. The retail chain Total Wine & More, owned by David Trone and Robert Trone, has 116 stores in 16 states. No Total Wine & More store has ever had a liquor license revoked or otherwise canceled. (Testimony)

3. The proposed license manager, Erika Lynne Rode, currently resides in Vancouver, Washington. Ms. Rode has managed several other Total Wine & More stores, which is why she was picked by the Licensee to manage the Natick location. She will be relocating to Massachusetts prior to the issuance of the license from the Local Board to the Licensee. (Testimony)
4. The manager of the limited liability corporation, William Roche, is the sole Massachusetts resident of the Applicant entity. He will only serve in a temporary role until the Local Board issues the license, after which time the role will be assumed by Ms. Rode. (Testimony)
5. Total Wine & More has had twenty-nine violations of the liquor laws in various states since its opening in 1992. (Testimony)
6. In 2005 in New Jersey, Total Wine & More was charged with failure to produce its books within seven days. Total Wine & More resolved this allegation by signing a consent agreement wherein it pleaded no contest, agreed to a thirty-day suspension of the license to be held in abeyance pending compliance with the consent agreement, and agreed to reimburse the state for the costs of its investigation, a total of \$1,000,000 which was \$250,000 for each store that was alleged to have violated this provision of the law. This matter was disclosed to the Local Board. (Exhibit 2 at Tab 3)
7. In 1992, in Pennsylvania, David Trone was indicted on twenty-three counts as they related to his alcoholic beverage package stores in Pennsylvania. Nineteen of the twenty-three charges were dismissed. After entering into a three-year business plan agreement in 1994 with the Commonwealth of Pennsylvania Attorney General's Office, Total Wine & More paid \$40,000 for reimbursement of its investigation. After three years, the remaining four charges were dismissed and then expunged by court order. This matter was also disclosed to the Local Board. (Exhibit 2 at Tab 4 & 5; Testimony)
8. On January 5, 2015, the Local Board in Natick approved the transfer of the license from Cloverleaf Liquor & Grocery LLC to the Applicant, along with an alteration of premises. (Exhibit 1; Commission File)

DISCUSSION

After an informational hearing, the Commission took the matter under advisement. Investigator Bailey's Recommendation raised four matters of concern for the Commission to consider, which tracked four of the issues raised by the taxpayer/voter petition ("TVP") and its memorandum in support.¹ Therefore, each issue raised by Investigator Bailey is discussed briefly in turn.

Issue One: The residency of the proposed license manager

Erika Lynne Rode is the proposed license manager for the Applicant. She currently resides in Vancouver, Washington, but will be relocating to Massachusetts prior to the issuance of the License to the Applicant. This matter was known to the Local Board when it approved a license for the Applicant. In any event, there is no requirement in §15 or §23 of Chapter 138 that a license manager must be a Massachusetts resident.

Issue Two: The manager of the Corporation is the sole Massachusetts resident of the Applicant entity

William Roche, the manager of the limited liability corporation ("LLC"), is the sole Massachusetts resident of the Applicant entity. He is acting in a temporary capacity until the license issues to the Applicant. Then, Ms. Rode will assume the role of manager of the LLC on a permanent basis.

¹The informational hearing was held to consider the issues of concern which the investigator raised in her recommendation to the Commission for a hearing, and not to address every issue raised by the petitioners in the TVP. See East Squantum T, Inc. (Commission Decision September 10, 2001) (upon the filing of a TVP a hearing will only be held if an investigator finds possible merit to the petitioners' claims).

A majority of LLC managers must be Massachusetts residents under M.G.L. c. 138, §26. The sole manager of the LLC, Mr. Roche, is a Massachusetts resident. Furthermore, the anticipated permanent license manager, Ms. Rode, will become a Massachusetts resident prior to the issuance of the license. Therefore, the Applicant is in compliance with §26.

Issue Three: New Jersey allegations

Pursuant to M.G.L. c. 138, §15, “[n]o such license shall be granted except to an applicant approved by the commission. Such applicant shall be . . . of good moral character in the city or town in which he seeks a license hereunder”; accord Ballarin, Inc. v. Licensing Bd. of Boston, 49 Mass. App. Ct. 506, 511 (2000) (“In making its discretionary determination, a licensing authority may take into account a wide range of factors – such as . . . the reputation of the applicant”).

Total Wine & More was charged with failure to produce books of accounts within seven business days in New Jersey. The charges resulted in a consent agreement in which Total Wine & More pleaded no contest, agreed to a thirty-day license suspension stayed pending compliance with the consent agreement, and reimbursed the state of New Jersey \$1,000,000 for its investigation. This charge and its resolution were known to the Local Board, and it cannot be said that the Local Board acted unreasonably when it approved the granting of a §15 license in light of these known facts.

Issue Four: Twenty-three count indictment charged against David Trone

While David Trone was indicted on twenty-three counts in Pennsylvania as they related to his operation of package stores in that state, nineteen of the counts were readily dismissed. On the remaining four counts, he was never convicted of any count, nor did he have to pay a penalty or fine. Instead, he paid \$40,000 to reimburse the state for its investigation. The charges were then expunged from his record three years after he entered into a business plan agreement with the state.

As discussed in Issue Three, *supra*, these facts were known to the Local Board when it approved the transfer of the §15 license, and it cannot be said that the Local Board acted unreasonably in approving the transfer.

“In the case of liquor licenses, town and city boards may exercise judgment about public convenience and public good that is very broad, but is not untrammelled.” *Id.* at 512. The Commission, upon careful review of the investigator’s recommendation and all testimony and exhibits, including the TVP, finds no basis to disapprove the decision of the Local Board in granting this license transfer to Total Wine & More. As the underlying transaction concerns the transfer of an existing alcoholic beverages license, the Local Board was statutorily obligated to consider whether the transfer was in the “public” interest and met the “public interest” test set forth in M.G.L. c. 138, §23, ¶9. CJ Restaurant Enterprises, Inc. (Commission Decision September 22, 2010). As discussed above, Total Wine & More is in compliance with c. 138 and Commission regulations, and the Local Board was aware of all the concerns that were raised by the taxpayers before the Commission and did not find that they affected the reputation of the Applicant, who has over 100 package store licenses throughout the United States.

Although the signatories of the TVP may disagree with the decision of the Local Board in granting this application for a transfer of license, nothing presented to the Commission suggested that the Commission should disapprove of the Local Board’s actions. “The 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.” Ballarin v. Licensing Bd. of Boston, 49 Mass. App. Ct. 506, 512 (2000). The decision made by the Local Board appears to be a reasonable exercise of its lawful discretion.

CONCLUSION

Based on the evidence heard, the Commission finds that the action of the Local Board was supported by the evidence and was a reasonable exercise of the Board's discretion.

The taxpayer/voter petition is dismissed and the Commission will take administrative action on the Application in the usual process.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman, _____

Kathleen McNally, Commissioner _____

Elizabeth A. Lashway, Commissioner _____

Dated: June 24, 2015

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.

cc: Trish Farnsworth, Esq. via facsimile 617-439-3987
Walter J. Sullivan Jr., Esq. via facsimile 617-226-3801
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Rose Bailey, Investigator
Administration
File