



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. Gainstore, Esq.
Chairman

DECISION

EXPEDITO DUARTE D/B/A EXPO'S II
309 DARTMOUTH STREET
NEW BEDFORD, MA 02740
LICENSE#: NEW
HEARD: 05/18/2016

This is an appeal of the action of the City of New Bedford Licensing Board ("Local Board" or "New Bedford") for denying the M.G.L. C. 138, § 15 wines and malt beverages license application of Expedito Duarte d/b/a Expo's II (the "Applicant" or "Duarte" or "Expo's") to be exercised at 309 Dartmouth Street, New Bedford, Massachusetts. The Applicant timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and a hearing was held on Wednesday, May 18, 2016.

The following documents are in evidence as exhibits:

1. Photos of the Licensed Premises;
2. Floor Plan of the Licensed Premises;
3. List of § 15 licenses in New Bedford for 2016;
4. New Bedford City Councilor Kerry Winterson's Letter 4/1/2016;
5. Letters of Support from Applicant's Suppliers;
6. Excerpt of New Bedford Zoning Map;
7. Signed Petitions of Support from Approximately 450 Customers;
8. Hi-Lo Gas Location and surrounding package stores;
9. Notice of Appeal;
10. Minutes of Local Board Hearing 2/29/2016;
11. Local Board's Notice of Denial 3/7/16;
12. Map of Licensees in proximity to Duarte location (9 pages) ;
13. Map of Licensees in proximity to Hi-Lo Gas location; and
14. Local Board Denial Letters to other recent section 15 applicants.

There is one (1) audio recording of this hearing, and two (2) witnesses testified.

FINDINGS OF FACT

1. Expedito Duarte d/b/a Expo's II ("Expo's") operates a convenience and grocery store located at 309 Dartmouth Street, New Bedford, Massachusetts. Expo's also operates two other locations in New Bedford with the same type of business. The Dartmouth Street location is Expo's busiest store, with more than 3,000 customers per week. (Testimony, Exhibits 1,2,7,10)
2. The Dartmouth Street location is a two story building. The first floor is currently used as a grocery store. One half of the store is utilized for storage, and this is where Expo's proposes to operate a package store. (Testimony, Exhibits 1,2,10)
3. Expo's is located in the southern part of New Bedford. This area is zoned for mixed use business and permitted to sell alcoholic beverages. Expo's owns the building and has been operating at this location for 16 years, and has been in business for more than 21 years at its other locations. Cigarettes, cigars, and tobacco sales are the bulk of Expo's business (85%) at the Dartmouth Street store. (Testimony, Exhibits 6,10)
4. Mr. Duarte, the owner of Expo's, has an excellent reputation in the New Bedford community. Expo's businesses are well run, the stores are clean, and they offer certain specialty products. Expo's applied for an alcohol license because it wants to sell specialty wines and beer to provide one-stop shopping for its customers. (Testimony, Exhibits 1, 4, 5, 7, 10)
5. On or about February 29, 2016, the Local Board held a hearing to consider Expo's application. Local Board Chairman Beauregard recused himself. (Exhibit 10)
6. Expo's submitted petitions with more than 450 signatures in support of its application from customers of the Dartmouth Street location. (Exhibit 7)
7. Expo's submitted four letters in support of its application, one letter from New Bedford City Councillor Kerry Winterson. The other three letters in support were from companies (J. Polep, James Duffy, and Pine Street Trading Co.) with which Expo's currently conducts business. (Exhibits 4, 5)
8. There was no opposition to Expo's application before Local Board. (Testimony, Exhibit 10)
9. New Bedford's quota allows the issuance of 20 (twenty) § 15 wines and malt beverages package store licenses. New Bedford presently has issued 12 (twelve) wines and malt beverages § 15 package store licenses. (Testimony, Exhibit 3)
10. Little People's College, a daycare center, is located approximately four blocks away from Expo's. Commissioner Almeida considered this day care center in his deliberations. (Testimony, Exhibits 10, 11)

11. In this part of New Bedford where Expo's is located, seven (7) package stores¹ presently exist. Three package stores are located approximately one-half mile from Expo's, and four (4) package stores are located less than one mile from Expo's. (Testimony, Exhibits 10, 11, 12)
12. Seven (7) § 15 package store licenses are located in close proximity to Expo's location: (Testimony, Exhibit 12)
 - i. Allen Street Convenience, Inc., 282 Allen Street, holds a wines and malt beverages § 15 package store license which was originally granted on May 19, 2014. It is located 2,311 feet away from Expo's location, which is 0.5 miles away, and is an 11 minute walk to Expo's. (Testimony, Exhibit 12)
 - ii. MM Convenience, 30 Rockdale Avenue, holds a wines and malt beverages § 15 package store license which was originally granted on April 20, 1993. It is located 2,343 feet away from Expo's location, which is 0.6 miles away and is a 12 minute walk to Expo's. (Testimony, Exhibit 12)
 - iii. Talho Portugues (ELN, Inc.), 123 Dartmouth Street, holds a wines and malt beverages § 15 package store license which was originally granted in February 2, 1993. It is located 1,868 feet away from Expo's location, which is 0.4 miles away, and a seven (7) minute walk to Expo's. (Testimony, Exhibit 12)
 - iv. Douglas Wine & Spirits (People's Super Liquor Stores, Inc.), 446 Dartmouth Street, holds an all alcoholic beverages § 15 package store license, which was granted as a transfer on November 18, 1991. It is located 1,298 feet away from Expo's location which is 0.3 miles away and a five (5) minute walk to Expo's. (Testimony, Exhibit 12)
 - v. Seaside Wine & Spirits, 37 Rockdale Avenue, holds an all alcoholic beverages § 15 package store license, which was originally granted on January 8, 1990. It is located 1,846 feet away from Expo's location which is 0.6 miles away and an 11 minute walk to Expo's. (Testimony, Exhibit 12)
 - vi. Freitas Package Store (ICJ Corp.), 1295 Cove Road, holds an all alcoholic beverages § 15 package store license, which was granted as a transfer on October 4, 1982. It is located 2,765 feet away from Expo's location which is 0.8 miles away and a 14 minute walk to Expo's. (Testimony, Exhibit 12)
 - vii. County Street Liquor Store, 111 and ½ half & 113 County Street, holds an all alcoholic beverages § 15 package store license, which was granted originally in 1940. It is located 3,300 feet away from Expo's location which is 0.7 miles away and a 13 minute walk to Expo's. (Testimony, Exhibit 12)

¹ Although the Local Board decision states that six (6) § 15 package stores exist in close proximity to Expo's, the record in these proceedings demonstrates that seven (7) § 15 package stores exist in close proximity to Expo's. (Testimony, Exhibits 10, 11, 12)

13. The Local Board voted unanimously (2-0) to deny the application based on the lack of public need for a new package store in that area. The Board applied the seven (7) Ballarin factors in making its decision. Ballarin, Inc. v. Licensing Board of Boston, 49 Mass. App. Ct. 506, 511 (2000). It was the opinion of the majority that a number of off premises liquor licenses, six (6), exists² within close proximity of Expo's location, which satisfies the public need for that area. In addition, there is a day care center located in close proximity. (Testimony, Exhibits 10, 11)
14. In June 2014, Nar Fuel Inc. d/b/a Hi-Lo Gas, on the northern side of New Bedford, received a § 15 wines and malt beverages package store license. Expo's is located approximately five (5) miles from Hi-Lo Gas Station. Hi-Lo's license was granted because the Local Board believed there was a public need for another license in this area. The two closest § 15 package store licenses located near Hi-Lo Gas were 2.2 miles away in the northerly direction, and 1.2 miles away in the southerly direction. (Testimony)
15. The Local Board recently denied three § 15 package store (in addition to Expo's, which is the fourth denial) applications in New Bedford for a lack of public need.³ (Testimony, Exhibit 14)

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). Local licensing authorities are recognized as having expertise regarding the problems affecting the regulation of alcoholic beverages. Great Atlantic & Pacific Tea Co., Inc. v. Board of License Comm'n of Springfield, 387 Mass. 833, 837 (1983). The Local Board, in its wide discretion, denied Expo's application for a § 15 wines and malt beverages package store license, the appeal of which is now before the Commission.

The procedure for the issuance of licenses to sell alcoholic beverages, M.G.L. c.138, § 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*

² Refer to Footnote 1.

³ St. Elias Mini Market, 75 Rivet Street, New Bedford, March 1, 2010 its application was denied for a § 15 package store wine and malt beverages license, due to two (2) existing § 15 package store licenses located in close proximity, which satisfied the public need. (Exhibit 14)

BoaVida, Five Star Imports, 2242 Purchase Street, February 27, 2013, its application was denied for a § 15 package store license due to a lack of public need – a number of off premise liquor licenses, six (6) licenses, already exists within close proximity to the proposed location. (Exhibit 14)

R.V. Gas, Inc. d/b/a Joe's Gas, 277 Nash Road, August 5, 2014, its § 15 package store application was denied, as six (6) off premise liquor licenses exist in this proposed location, with the public need being met. (Exhibit 14)

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.”

(Italics supplied).

A local licensing authority exercises very broad discretion about public convenience and public need, with respect to whether to grant a license to sell alcoholic beverages. Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 379 (2006); Ballarin, Inc. v. Licensing Board of Boston, 49 Mass. App. Ct. 506 (2000). In exercising its discretionary powers, 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.

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. Boston Licensing Board, 49 Mass. App. Ct. 506 (2000).

The Local Board found that there was no public need for Expo’s to have a § 15 wines and malt beverages license. The Massachusetts Appeals Court has considered public need at length, and determined that it should not be interpreted literally. The Court explains 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, Inc., 49 Mass. App. Ct. at 511 - 512. (Italics supplied.)

In Ballarin, the Court identified the factors which are considered to determine public need:

“Consideration of the *number of existing dispensaries in a locality* is a proper concern...” 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.”

Ballarin, Inc., 49 Mass. App. Ct. at 511. (Italics supplied.)

Expo’s contends that the Local Board neither presented nor elicited evidence on which to base its factual findings, and the Local Board made no subsidiary findings. Expo’s further argues that the Local Board wrongfully considered the presence of a daycare center near its location, resulting in an erroneous decision, which is arbitrary and capricious and based upon irrelevant factors. The Local Board may consider “...the *appropriateness of a liquor license at a particular location*” in

making its determination to deny the granting of a liquor license. Ballarin, Inc., 49 Mass. App. Ct. at 511 - 512. (Italics supplied.) Appropriateness of a license at a particular location is a Ballarin factor, and the Commission finds that the Local Board did not erroneously consider Expo's proximity to the daycare center, but rather correctly considered this appropriateness factor in its deliberations and subsequent denial of Expo's application. Id.

Expo's also argues that Hi-Lo's was granted a package store license in 2014 when there were many existing package stores located nearby. Local Board Commissioner Craig testified that Hi-Lo's license was granted because the Local Board found that the public need in this area was not satisfied, as the two closest package stores were located more than one mile away from Hi-Lo.

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 (2006). Upon review of the record of the Local Board proceedings in this matter, the Commission finds that the Local Board fulfilled its responsibility regarding this application. The Local Board denied Expo's application because of a nearby daycare center, as well as a saturation of licenses in the proposed location, with seven (7) existing retail package stores in close proximity to Expo's. (Exhibits 3, 10, 11, 12, 14) The Local Board found that the public need for retail package stores is being adequately met in this proposed location of Dartmouth Street, near Expo's, and these findings are supported by the record of these proceedings.

This case is analogous to the Town of Middleton v. Alcoholic Beverages Control Comm'n, 64 Mass. App. Ct. 1108 (2005) (memo and order pursuant to Rule 1:28). In Middleton, the applicant owned a gas station and a convenience store and applied for a retail package store license. The Town of Middleton denied the application based on the Town's determination that its public need was being adequately served by the existing licensees. After a lengthy appeal process, the Appeals Court affirmed the Town's decision and upheld its denial based on the lack of public need. Town of Middleton, 64 Mass. App. Ct. 1108.

The Commission has reviewed the record of the Local Board proceedings, and the evidence of existing licensees in this area of New Bedford and Dartmouth Street. (Exhibits 3, 8, 10, 11, 12, 13, 14) The Commission finds that the record supports the decision by the Local Board to deny this application based on the saturation of licenses in the proposed location, as well as the lack of appropriateness of a license near a daycare center. (Exhibits 10, 11, 12) The Commission finds that these factors upon which the Local Board denied Expo's application are grounded in Ballarin, Inc., 49 Mass. App. Ct. 506.

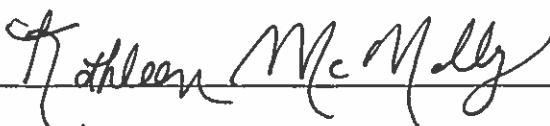
If a local authority's decision is supported by the evidence and based on "logical analysis," it is not arbitrary and capricious and must be affirmed. Great Atl. & Pac. Tea Co., Inc., 387 Mass. at 839-840 (1983); Town of Middleton, 64 Mass. App. Ct. 1108. The Local Board's decision was based on evidence presented during the course of the public hearing. The Local Board's reliance on these factors was reasonable and appropriate pursuant to the holdings in Ballarin, supra, 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, was not arbitrary and capricious.

CONCLUSION

Based on the evidence presented at the hearing, the Commission **APPROVES** the action of the Local Board of New Bedford in denying the § 15 wines and malt beverages package store license application of Expedito Duarte d/b/a Expo's II.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



Elizabeth A. Lashway, Commissioner



Dated: October 7, 2016

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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