

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

R. V. GAS, INC. D/B/A JOE'S GAS
277 NASH ROAD
NEW BEDFORD, MA 02746
LICENSE#: NEW
HEARD: 04/22/2015

This is an appeal from the action of the City of New Bedford Board of Selectmen (the "Local Board" or "New Bedford") in denying the M.G.L. c. 138, §15 wine and malt beverages application filed by R. V. Gas, Inc. d/b/a Joe's Gas (the "Applicant" or "Joe's Gas") to be exercised at 277 Nash Road, 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, April 22, 2015.

The following documents are in evidence as exhibits:

- A. Malt and Wine License Application, dated June 27, 2014;
- B. Petition in Support of Joe's Gas's Application for a Liquor License;
- C. Certified Transcript of Hearing on Petition by Joe's Gas, dated July 28, 2014;
- D. New Bedford Licensing Board's Notice of Denial to Joe's Gas, dated August 5, 2014;
- E. List of Full Liquor Licenses in New Bedford;
- F. List of Wine and Malt Licenses in New Bedford for 2015;
- G. One Mile Radius Location Map for 277 Nash Road, New Bedford, Massachusetts;
- H. Map of All Liquor Licenses in New Bedford;
- I. Fall River Herald Newspaper, dated June 26, 2014;
- J. Minutes of the New Bedford Licensing Board Meeting of July 28, 2014; and
- K. Ballarin, Inc. v. Licensing Board of Boston, 49 Mass. App. Ct. 506 (2000).

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

FACTS

- 1. R. V. Gas, Inc. d/b/a Joe's Gas is a Massachusetts corporation operating a gas station and convenience store at 277 Nash Road, New Bedford, Massachusetts. (Testimony, Exhibit A)
- 2. Joe's Gas applied to the Local Board for an available M.G.L. c. 138, §15 Wines and Malt Beverages license to be exercised at 277 Nash Road, New Bedford. (Testimony, Exhibit A)
- 3. The intended manager for this location is Rafic Matta, who owns 100% of the Applicant's corporate stock and is the Applicant's sole officer and director. (Testimony, Exhibit C at p. 2-17)

4. The Local Board held a public hearing with regard to the application on July 28, 2014. (Testimony, Exhibit C)
5. The Applicant submitted to the Local Board a petition signed by approximately 525 people in support of the application. (Testimony, Exhibit B, Exhibit C at 6-17)
6. No one submitted to the Local Board any letter in opposition to the application. (Testimony, Exhibit C)
7. The only persons who spoke at the hearing were the attorney for the Applicant, Joseph Fingliss, Jr., Esq., and the Local Board members. (Exhibit C)
8. Attorney Fingliss presented evidence at the July 28, 2014 hearing showing that there are six other operations within the one (1) mile location of the Applicant's business, five of which are all alcohol licenses and one of which is a malt and wine liquor license only. (Exhibit C at p. 4-17, l. 8-12)
9. The Local Board voted unanimously (6 to 0) at the hearing to deny Joe's Gas's application. The Local Board focused its decision on whether there was a need for another Section 15 license within a one mile radius of Joe's Gas. (Testimony, Exhibit C)
10. In its Notice of Denial issued on August 5, 2014, the Local Board summarized its findings at the July 28, 2014 hearing by stating,

This Board voted unanimously not to approve your application based on the lack of public need of a new package store license in the area. The Board applied the 7 Ballarin factors that are referenced in Ballarin, Inc. v. Licensing Board of Boston in making this decision. It was the opinion of the majority that a number of off premise liquor licenses (6) exist within a close proximity of your premises and therefore satisfies the public need for that area. The Board also considered the signed petition that you submitted in support of the petition. It was the Board's opinion that a vast majority of those petitioners reside in areas that are in closer proximity to the already existing off premise liquor license locations and therefore the public need is being met. (Testimony, Exhibit D)
11. On appeal, at the April 22, 2015 hearing before the Commission, the parties presented exhibits, which included, among other things, maps showing licenses in the vicinity of the Applicant's proposed license. (Exhibits G and H)
12. Exhibit G indicates the location of the six (6) Section 15 alcoholic beverages licenses within a one (1) mile radius of the Applicant's gas station/ convenience store. (Testimony, Exhibit G)
13. In addition to the six (6) existing Section 15 licenses within a one (1) mile radius of the Applicant's location, there are an additional three (3) licenses within a one and a half (1.5) mile radius of the Applicant's location. (Testimony)
14. The map at Exhibit H indicates the location of all of the alcoholic beverage licenses within the City of New Bedford. (Testimony, Exhibit H)
15. Nick Nanopoulos, Director of the New Bedford Licensing Board, testified before the Commission that the Local Board usually asks him to prepare a map showing the licenses within either a one (1) or one and a half (1.5) mile radius of the proposed license for comparison by the Board. (Testimony)

16. Steven Beauregard, Chairman of the New Bedford Licensing Board, testified that the Local Board has used the one (1) to one and a half (1.5) mile radius standard for reviewing alcoholic beverages license applications for as long as he has been on the Board, which is approximately twenty (20) years. (Testimony)
17. Mr. Beauregard further testified before the Commission that he felt that considering the number of existing licenses within a one (1) mile radius of the Applicant's proposed license was a fair radius to the applicant. (Testimony)
18. Similarly, Mr. Beauregard previously stated at the July 28, 2014 hearing that, "[a] mile is a generous radius to see how many establishments were in that perimeter." (Exhibit C at 14-17, l. 17-19)
19. Attorney Fingliss stated before the Local Board at the July 28, 2014 hearing, "I would agree I thought a mile was sufficient. I wouldn't argue with that one bit. When you said it, I said that seems fair." (Exhibit C at 14-17, l. 17-19)
20. Mr. Beauregard was not on the Local Board when the six (6) existing licenses within the one (1) mile radius of the Applicant's business were granted. (Testimony)
21. The area of the Applicant's business consists of many three (3) unit tenement houses and is an older, family area that has been completely built out. (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); accord 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, Inc., 49 Mass. App. Ct. at 511.

"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 Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 379 (2006). "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 (*italics added*).

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, Inc.*, 49 Mass. App. Ct. at 510-511. The Appeals Court has held that a local board may deny a license even if the facts show that a license could be lawfully granted. *Donovan*, 65 Mass. App. Ct. at 379. 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. *Id.*

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, Inc.*, 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 of the Local Board proceedings, the Commission finds that the Local Board fulfilled its responsibility regarding this application. The Local Board held a hearing during which it reviewed the application of Joe's Gas, heard testimony, and received documentary evidence. The Local Board received evidence that there already exist six (6) M.G.L. c. 138, §15 wine and malt beverages licenses within a one (1) mile radius of Joe's Gas.¹ The Local Board did not consider any inappropriate testimony or materials.

The Applicant asserts that the petition signed by more than five hundred (500) people in support of the application reflects that there is a public want for a wine and malt beverages license at the Applicant's

¹ In an effort to show that the one (1) mile radius of the Applicant's location is not congested with retail package store alcoholic beverages licenses in comparison to other areas of New Bedford, the Applicant compared the number of alcoholic beverages licenses in the Alan Street one (1) mile radius to those in the Applicant's one (1) mile radius, as shown on Exhibit H. *See* Testimony, Exhibit H. Mr. Nanopoulos testified in response that in the vicinity of Alan Street there were less than half as many Section 15 licenses in a one (1) mile radius than in the Nash Street one (1) mile radius, and Alan Street has more opportunity for development. *See* Testimony.

particular location and therefore that the Local Board should have granted the license. However, as stated above, “the views of the inhabitants of the locality in which [the] license is sought,” is not the only consideration in determining “public need.” See Ballarin, Inc., 49 Mass. App. Ct. at 511. The assessment of public need by the local board also includes “[c]onsideration of the number of existing dispensaries in a locality” and “the appropriateness of a liquor license at a particular location.” See id. It is clear from the record that the Local Board considered both the petition supporting the Applicant’s application as well as the fact that there are already six (6) Section 15 licenses within a one (1) mile radius of the Applicant’s location.² The Local Board had broad discretion, and it was within the Local Board’s authority to deny the license application even if “the facts show[ed] that a permit could [have been] lawfully granted.” See Donovan, 65 Mass. App. Ct. at 379 (quoting ACW Realty Mgmt., Inc. v. Planning Bd. of Westfield, 40 Mass. App. Ct. 242, 246 (1996)).

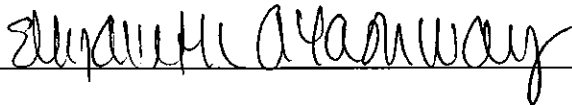
The Local Board properly considered the Ballarin factors when determining that there was not a need for another Section 15 license in this location. The reason for denial was based on information presented during the course of the public hearing and grounded in the cases of Ballarin and Donovan. Therefore, 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, the Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board in denying the M.G.L. c. 138, §15 Wines and Malt Beverages application of R. V. Gas, Inc. d/b/a Joe’s Gas.

² Note that at the appeal hearing, the Applicant made an issue of the fact that at the July 28, 2014 Local Board hearing a Board member misstated the number of existing licenses in the one (1) mile radius of the Applicant’s business by stating that there were seven such licenses. See Testimony; Exhibit C, p. 9-17, l. 15-17. We find that this misstatement is not grounds for remanding the case to the Local Board. This misstatement is unlike the facts of Ballarin, where the local board in that case continued to shift its reasoning for its denial and where the Appeals Court found that “considerations other than rational analysis were driving the licensing board’s decision-making.” See Ballarin, Inc., 49 Mass. App. Ct. at 512. In the present case, the Local Board had before it the full information about the number of licenses in that area, and the Local Board’s analysis during the hearing and in its decision was consistent.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth A. Lashway, Commissioner 

Kathleen McNally, Commissioner 

Dated: May 19, 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: Joseph P. Fingliss, Jr., Esq. via facsimile 508-677-4870
John A. Markey, Jr., Esq. via facsimile 508-979-1515
Frederick G. Mahony, Chief Investigator
Local Board
Administration
File