



*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**

**YANKEE SPIRITS, INC.**  
**234 COLONY PLACE**  
**PLYMOUTH, MA 02360**  
**LICENSE#: NEW**  
**HEARD: 04/05/2016**

This is an appeal from the action of the Town of Plymouth Licensing Board of Selectmen (the "Local Board" or "Plymouth") in denying the application to transfer a M.G.L. c. 138, § 15 all alcoholic beverages package store license and for a change of location filed by Yankee Spirits, Inc. (the "Applicant" or "Yankee Spirits") to be exercised at 234 Colony Place, Plymouth, MA. The applicant timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC") and a hearing was held on Tuesday, April 5, 2016.

The following documents are in evidence as exhibits:

1. Public Notice for hearing on November 17, 2015;
2. Map of Colony Place;
3. Map of Plymouth with locations of package stores;
4. Local Board Decision dated December 2, 2015;
5. DVD – excerpt of Local Board Meeting held December 1, 2015;
6. ABCC Decision for Village Vineyards, dated July 18, 2007;
7. ABCC Decision for Westborough Beverage Corporation, d/b/a Walmart #2336, dated April 16, 2015;
8. Plymouth County 2010 Census Report;
9. Excerpts of minutes of Local Board hearings, November 17, 2015 and December 1, 2015;
10. DVD of Local Board hearing held November 17, 2015;
11. A. Petitioner's Power Point presentation;
  - b. Letter dated October 26, 2015, from Old Sturbridge Village;
  - c. Letter from Saxon Partners, dated November 25, 2016;
  - d. Memo in support of Yankee Spirits Application, dated November 25, 2015;
  - e. Letter from Alden Park Bar & Grill;
  - f. Letter from Sturbridge Police Department, dated October 23, 2015;
  - g. Letter from Nasr Jewelers;

- h. Letter from A. Viveiros dated November 4, 2015
- 12. Local Board Decision, dated March 29, 2016;
- 13. DVD of excerpt of Local Board meeting dated March 29, 2016;
- 14. Magazine article from Massachusetts Beverage Business regarding Pioppi's Package Store;
- 15. Maps of Phase I and II of Redbrook Development; and
- 16. Second Amended Joint Pre-hearing Memo.

There is one (1) audio recording of this hearing, and three (3) witnesses testified.

The Commission took Administrative Notice of Village Vineyards Inc.'s ("Village Vineyards") Commission Records.

### FINDINGS OF FACT

The Commission makes the following findings based on the evidence presented at the hearing:

1. Village Vineyards, Inc. ("Village Vineyards") holds a §15 all alcoholic beverages license and operates a package store within the Colony Place ("Colony Place") shopping center at 114 Colony Place, Plymouth, Massachusetts. (Testimony, Commission records, Exhibits 5, 6)
2. Village Vineyards has operated its store in Colony Place since 2007. Its package store has approximately 2500 square feet of space. (Testimony, Commission records, Exhibits 6, 7, 9, 10)
3. The Colony Place shopping center is located near the highway interchange of Routes 3 and 44 in Plymouth. Colony Place has an average of 20,000 motor vehicles visiting daily. (Testimony, Exhibits 2, 7, 9, 11A)
4. On September 30, 2015, the applicant, Yankee Spirits, Inc. ("Yankee Spirits") filed an application with the Local Board for a transfer of Village Vineyards' license and location from 114 Colony Place, to the Yankee Spirits proposed location at 224 Colony Place, within the same shopping center. (Testimony, Exhibits 1, 4, 5, 9, 10)
5. Yankee Spirits has been in business for more than 40 years and operates three § 15 retail all alcoholic beverages package store licenses in Massachusetts, located in Attleboro, Sturbridge, and Swansea. (Testimony, Exhibits 5, 9, 11A)
6. Yankee Spirits also holds a state wholesaler license for distilled spirits and wines.<sup>1</sup> (Testimony)

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<sup>1</sup> Pursuant to the Acts and Resolves of 2014, Chapter 287, § 70, this applicant, while the holder of a § 18 wholesale license, is not statutorily precluded from obtaining additional §15 package store licenses.

7. The size of the proposed location for Yankee Spirits at 224 Colony Place is 20,986 square feet. Yankee Spirits petitioned to move locations because Village Vineyards' location is inadequate. Yankee Spirits requires significantly more space to present its selections of 7000 varieties of wines, 3500 brands of spirits, and 2600 types of beers. (Testimony, Exhibits 9, 11A)
8. The Local Board held a hearing on November 17, 2015 regarding Yankee Spirits' application for a transfer of license and location. Four Local Board members, Chairman Tavares, Mr. Mahoney, Mr. Malaguti, and Mr. Provenzano, were present. (Testimony, Exhibits 9, 10)
9. Mr. Thomas Tesauro, the proposed license manager of Yankee Spirits, stated that the Yankee Spirits' signature is a selection of many different types of alcoholic beverages. It is not a convenience store, it is a destination store that will attract shoppers from Plymouth and surrounding communities. (Testimony, Exhibits 9, 10, 11A)
10. The average sale transaction at the Sturbridge location is \$60.00 per sale. Wine sales account for almost one-half of its business transactions. (Testimony, Exhibits 9, 10, 11A)
11. Six (6) letters in support of the Yankee Spirits' application were submitted to the Local Board. (Exhibits 11B, 11C, 11E, 11F, 11G, 11H)
12. Three (3) people spoke in support of this application. One individual is a resident of Plymouth, one individual owns Colony Place shopping center, and one individual is an owner of Village Vineyards. (Testimony, Exhibits 9, 10)
13. Eight (8) people spoke in opposition to this application. Some of those who spoke in opposition were opposed due to the proposed size of the Yankee Spirits' store (20,000 square feet) and that the existing number of package stores in this location satisfies the public need. (Exhibits 9, 10)
14. The Town of Plymouth has a quota of twelve (12) retail package store § 15 all alcoholic beverages licenses. (Testimony, Exhibits 5, 9)
15. Plymouth has currently issued sixteen (16) retail package store § 15 all alcoholic beverages licenses. Plymouth is currently four licenses above its quota. (Testimony, Exhibits 5, 9)
16. Ten of Plymouth's sixteen (16) licenses are issued for locations within six miles of the proposed location. (Testimony, Exhibit 3)
17. The Local Board held a second hearing on December 1, 2015. (Testimony, Exhibits 5, 9)
18. The Local Board discussed the prior applications for package store licenses in Colony Place which it had denied for a lack of public need. (Testimony, Exhibits 5, 6, 7, 9, 12)
19. Local Board Member Mr. Malaguti voted to deny this license because there are too many package store licenses in that area, and there is no public need at this location. (Testimony, Exhibits 4, 5, 9)

20. Local Board Member Mr. Mahoney stated his opposition to this application because Plymouth is four licenses above its quota of § 15 licenses and therefore there is no public need. (Exhibits 5, 9, 12)
21. Selectman Sean Page was not present at the first Yankee Spirits hearing. He has spoken to a number of Plymouth residents, and he is opposed to Yankee Spirits because there is not a public need for a license in this area. (Exhibits 5, 9)
22. The Local Board voted to deny the application. Four (4) Board members (Chairman Tavares, Mr. Malaguti, Mr. Mahoney, and Mr. Page) voted to deny the application. One member (Mr. Provenzano) voted to grant the application. (Testimony, Exhibits 4, 5, 9, 10)
23. The Local Board notified Yankee Spirits by decision dated December 2, 2015, that "The Board found that a public need for a license does not exist in this section of Plymouth." (Exhibit 4)
24. Yankee Spirits appealed the denial to the Alcoholic Beverages Control Commission. (Testimony, Commission records, Exhibit 16)
25. The Commission did not go forward with a hearing at that time. The Commission instead remanded the matter to the Local Board stating that the Local Board's written denial dated December 2, 2016, was insufficient because it lacked specific findings. (Testimony, Exhibit 16)
26. On March 29, 2015, the Local Board held a hearing and reaffirmed its vote to deny Yankee Spirits' application. It issued subsidiary findings and a decision after remand from the Commission. (Testimony, Exhibits 12, 13)
27. The Local Board found that Plymouth is four licenses above its quota and that Colony Place is located in the northern section of Plymouth, which has a high concentration of package store licenses. (Exhibits 12, 13)
28. The population growth and development of Plymouth is occurring significantly in the southern section of Plymouth with the Redbrook development. Only two package store licenses exist in the southern section. (Testimony, Exhibits 12, 13, 15)
29. The Local Board denied Yankee Spirits' application for a transfer and change of location because it found that the public need for this license does not exist in this section of Plymouth. (Testimony, Exhibits 12, 13)
30. The Local Board has denied previous applications for package store licenses in Colony Place. (Testimony, Exhibits 6, 7, 9, 12, 13, 16)
31. In 2006, the Local Board denied an application for an all alcoholic package store license for Sam's Club within Colony Place, due to a lack of public need in that section of Plymouth. Sam's Club did not appeal the matter. (Testimony, Exhibits 12, 16)
32. On or about November 13, 2006, Village Vineyards, the proposed transferor here, first applied for an all alcoholic beverages license to be used at 114 Colony Place. (Exhibits 7, 12)

33. On January 9, 2007, the Board of Selectmen held a hearing to consider the Village Vineyards application. After hearing and deliberation, the Board held a tie vote, two to two, resulting in the denial of the application. (Exhibits 7, 12)
34. Soon thereafter, Village Vineyards filed a second application requesting an annual all-alcoholic beverages § 15 off-premises license to be exercised at 114 Colony Place shopping plaza. Village Vineyards proposed selling higher priced specialty alcoholic beverages. The Local Board held a hearing on May 15, 2007 and voted three to two (3 to 2) to deny the second application based on a lack of public need due to the concentration of existing package stores in that area, the northern section of Plymouth. (Exhibits 6, 7, 12)
35. Village Vineyards appealed the Local Board denial to the Commission, and the matter was heard on July 11, 2007. (Exhibits 6, 7, 12)
36. On July 18, 2007, the Commission disapproved the action of the Local Board and remanded the matter with a recommendation that the Local Board issue the license. (Exhibit 6)
37. The Local Board issued a license to Village Vineyards. (Testimony, Commission records, Exhibits 6, 7, 12, 16)
38. After one year in operation, Village Vineyards could not support its original business model of selling higher priced specialty alcoholic beverages. Village Vineyards began selling, and presently sells, alcoholic beverages similar to the other liquor stores in Plymouth. (Exhibit 7)
39. On March 14, 2014, Westborough Beverage Corp. d/b/a Walmart ("Walmart") applied to the Local Board for a transfer of Village Vineyards' license and a change of location to Walmart's store at 300 Colony Place shopping center. (Exhibit 7)
40. After two hearings, the Local Board voted unanimously to deny Walmart's application by a vote of five to zero (5-0). (Exhibit 7)
41. Walmart appealed to the Commission. The Commission approved the Local Board action upholding the denial of the transfer to Walmart by decision dated April 16, 2015. (Exhibit 7)

### I. MOTION TO STRIKE

Yankee Spirits moved to strike the second decision issued by the Local Board after remand by the Commission. Yankee Spirits argues that it is prejudiced by the Commission actions of remanding the matter because the Local Board was allowed to correct its original decision. Yankee Spirits asks that the Commission strike the second decision of the Local Board and proceed on the first decision of the Local Board, and the Commission should make the subsidiary findings.

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.). The statute governing alcohol licensing requires a local board to make particularized and specific findings:

*“Whenever the local licensing authorities deny an application for a new license, refuse to issue a license or modify, suspend, revoke or cancel a license, deny an application for transfer of location or between persons or change of a description of the licensed premises, or levy a fine, the licensing authorities shall mail a notice of such action to the applicant or licensee, stating the reasons for such action and shall at the same time mail a copy of such notice to the commission.”*

M.G.L. c. 138 § 23 ¶ 4 (Italics supplied.)

Without adequate written findings from a Local Board, the Commission cannot properly review a Local Board’s denial of a license. The Licensee appears to argue that the lack of adequate findings automatically inures to its benefit, and that the Commission should deny a Local Board’s action and recommend issuance of a license to the applicant whenever a Local Board does not issue sufficient findings. The Commission will not overturn a Local Board and recommend the issuance of a license contrary to a Local Board’s discretion as a de facto punishment for not issuing detailed findings. That is not the purpose or intent of an appeal before the Commission. Rather, the Commission needs before it an adequate record upon which to review a Local Board’s actions.

The Commission’s decision to remand this matter to the Local Board is consistent with past practices of the Commission when the Local Board fails to issue specific subsidiary findings. See Snoford, LLC, (ABCC Decision December 14, 2010) (Commission remanded matter to Local Board to issue subsidiary findings and the statutorily required statement of reasons upon which it made its decision denying the application); Gatherings, Inc. (ABCC Decision February 10, 2010) (Commission remanded matter to Local Board to issue subsidiary findings upon which it made its decision denying the application for a wine and malt beverages license).

In any event, Yankee Spirits was not prejudiced by the second decision. The first decision denied the application. The second decision after remand did not change the original decision of denial by the Local Board.<sup>2</sup>

Therefore, the Commission **DENIES** the motion of Yankee Spirits to strike the specific findings of the Local Board upon remand.

## II. DISCUSSION

Retail licenses must be approved by both the local licensing authorities and the Commission. M.G.L. c. 138, §§ 15, 67; 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 of the type specified in M.G.L. c. 138, § 15. The procedure for the issuance of licenses to sell alcoholic beverages is set out in M.G.L. c. 138. As § 23 provides in pertinent part:

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<sup>2</sup> Local Board of Selectman Member Page voted to deny the application during the second hearing, which did not change the original Local Board decision to deny the application. The first vote/decision was 3 -1 opposed. The second vote/decision was 4 -1 opposed. The Local Board’s decision did not change with Mr. Page’s vote.

“[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.*” (Italics supplied).

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).

This appeal involves the Local Board’s denial of an application for both a transfer and change of location of a G.L. c. 138, § 15 retail package store all alcoholic beverages license. The applicant, Yankee Spirits, contends that the decision of denial issued by the Local Board was not based on the factual record of these proceedings, but rather was based on arbitrary and capricious decision making. Yankee Spirits claims that the Local Board did not fulfill its obligation because its decision is not supported by the record and is based upon an error of law.

Yankee Spirits argues that the Local Board erroneously considered factors during its deliberations which are not Ballarin factors and cannot be considered during the licensing process or deliberations. Ballarin, Inc. v. Licensing Board of Boston, 49 Mass. App. Ct. 506, 511 (2000). Yankee Spirits asserts that the Local Board erroneously considered competition with existing package store owners in Plymouth during these proceedings. Furthermore, Yankee Spirits avers that the Local Board considered the future development of the southern section of Plymouth at the Redbrook project and that it is complete speculation for the Local Board to find that a license for the Redbrook neighborhood will be needed in the future. Yankee Spirits asserts that the Local Board’s process and revised decision fell far short of its obligation to have properly considered and analyzed the “Ballarin factors” in conjunction with the facts of this case. Id.

The issue for the Commission to determine is whether the Local Board’s decision is based on evidence not supported by the record which is an error of law resulting in an arbitrary and capricious decision denying the application of Yankee Spirits. 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 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 Yankee Spirits to have a § 15 retail package store all alcoholic beverages license transferred to it at a new location in Colony Place. 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. v. Licensing Board of Boston, 49 Mass. App. Ct. 506, 511 - 512 (2000).

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. v. Licensing Board of Boston, 49 Mass. App. Ct. 506, 511 (2000). (Italics supplied.)

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). The Commission finds that the Local Board was consistent with its previous decisions regarding denials of prior applications at Colony Place shopping center. The Commission does not find evidence that the Local Board made its decision based on competition and speculation about future development. The Commission finds that the factors upon which the Local Board denied Yankee Spirits’ application are grounded in Ballarin, Id. The Local Board determined that the northern section of Plymouth, where the proposed location is, already has a high concentration of package store licensees. Indeed, ten of Plymouth’s sixteen licenses are located within six miles of Colony Place. Consideration of the number of existing dispensaries in the locality is a Ballarin factor and a proper concern of the Local Board. Id. Once a local board determines that the 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).

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 Atlantic & Pacific Tea Co., Inc. v. Board of License Comm’rs of Springfield, 387 Mass. 833, 839-840 (1983); Town of Middleton v. Alcoholic Beverages Control Comm’n, 64 Mass. App. Ct. 1108 (2005). 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.

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 Plymouth in denying the application of Yankee Spirits, Inc. for the transfer of the C. 138, § 15 all alcoholic beverages retail package store license and change of location.



**ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Kathleen McNally, Commissioner



Elizabeth A. Lashway, Commissioner



Dated: November 10, 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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cc: Allan Costa, Esq. via facsimile 508-746-9205  
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Local Licensing Board  
Frederick G. Mahony, Chief Investigator  
Administration, File