



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

Steven Grossman
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

DECISION

BROKEN WHEEL FARM, LLC DBA PURPLE FEATHER CAFÉ & TREATERY
334 COMMERCIAL ST., P.O. BOX 181
PROVINCETOWN, MA 02657-0181
LICENSE#: NEW
HEARD: 09/12/2012

This is an appeal of the action of the Provincetown Licensing Board (the "Local Board") for denying the M.G.L. c. 138, §12 license application of Broken Wheel Farm, LLC dba Purple Feather Café & Treatery (the "Applicant" or "Purple Feather") located at Provincetown, MA. The Applicant timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, September 12, 2012¹.

The following documents are in evidence:

1. Local Board's Decision dated May 25, 2012;
 2. Joint Pre-Hearing Memorandum; and
 3. List of All Local License Holders.
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- A. Local License Application dated April 12, 2011, for Tiny's Local Food, Inc. located at 336 Commercial Street, Provincetown;
 - B. Local License Application dated March 2, 2010, for Karoo Kafe, Inc. located at 338 Commercial Street;
 - C. Lunch Menu for Purple Feather;
 - D. Photo of Front Entrance of Licensed Premises;
 - E. Photo of Inside the Licensed Premises;
 - F. Photo of Interior Licensed Premises;
 - G. Photo of Menu Board Inside Licensed Premises;
 - H. Photo of Front Counter of Licensed Premises;
 - I. Photo of Tables Inside Licensed Premises;
 - J. Decision dated January 19, 2012, of Provincetown Zoning Board of Appeals for hearing held January 5, 2012, to hear Applicant's Petition for a Special Permit;
 - K. Existing Floor Plan of Licensed Premises;
 - L. Applicant's Sign to Patrons regarding Items Containing Alcohol Cannot Be Removed from Premises;

¹ The record was held open for two (2) weeks to allow the Local Board to submit additional information.

- M. Local License Application dated April 12, 2011, for Coffee Pot and More, Inc. located at 315 Commercial Street;
- N. Local License Application dated February 12, 2012 for Applicant; and
- O. Letters in Support of Applicant's Application.

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

FACTS

1. Broken Wheel Farm, LLC does business at 334 Commercial Street, Provincetown, Massachusetts, as the Purple Feather Café and Treatery which has been in business for 10 years. (Exhibit N)
2. Ann and Peter Okun are the owner/managers, they are residents of Provincetown, and each owns 50% of the stock issued in the company. (Exhibit N)
3. The Purple Feather is approximately 822 square feet, has a seating capacity of twenty (20), and occupancy of forty-five (45). (Exhibit C, Testimony)
4. The Purple Feather is a retail establishment with a café style eatery offering sandwiches, paninis, salad, gelato, baked goods, coffees and chocolates. It has a food service permit. (Exhibit C, Testimony)
5. The majority of revenue is derived from dessert sales, with only fifteen (15) to twenty (20) percent of revenue coming from the sale of food. (Testimony)
6. While families do frequent the Purple Feather, the majority of customers are couples, individuals, groups and friends. The item selection is geared to the adult population and visitors of Provincetown (Testimony)
7. Based upon repeated requests made to them by patrons and review of their existing business plan, the Purple Feather requested a Special Permit for an additional twelve (12) seats before the Provincetown Zoning Board Appeal ("ZBA"). The request specified that six (6) seats would be "flex seats" moving indoor or outdoor as the weather requires and six (6) additional seats for outside. (Exhibit J, Testimony)
8. On January 5, 2012, the ZBA held a public hearing on the Purple Feather's request for a Special Permit for an increase in seating. (Exhibit J, Testimony)
9. The ZBA voted to approve the licensee's petition for a special permit by a vote of five (5) in favor and none (0) opposed. In its decision, the ZBA found, among other things:
 - o appropriate steps would be taken to cordon off the outside seating from the sidewalk, including cordoning off the outside seating area using temporary planters, stanchions, and small fences;
 - o the applicant's proposed controls to limit consumption of alcohol to the inside of the Purple Feather Café and prevent alcohol from being taken to the outside seating area are effective. These measures include:
 - Use of security cameras;
 - Training of staff;
 - TIPS training for appropriate staff;
 - Sales people will be prompted to ask for IDs via the Point of Sale system;
 - Use of signage at the register and at the exits;
 - Beverages containing alcohol will be served in distinctive containers;

- Managers and busboys will monitor outside area.
 - no one spoke at the meeting or sent any letter in opposition to the application;
 - the proposed seating expansion and the service of wine and malt beverages and cordials would benefit the town through increased year-round employment and increased revenues;
 - the applicant met the criteria as specified in Section 2460 of the By-Laws for the service of wine, malt beverages, and cordials for indoor consumption only;
 - the social, economic, and other benefits of the proposal outweighed any adverse effects, of which the Zoning Board found none, including hazard, congestion, or environmental degradation. (Exhibit J)
- 10. After the ZBA approved the Purple Feather's Special Permit, on or about February 16, 2012, the Purple Feather applied to the Local Board for an annual wine and malt beverages with cordials license. (Exhibits C and J, Testimony)
- 11. The Local Board held public hearings on the Purple Feather's Application which took place March 13, 2012, March 27, 2012, and May 8, 2012.
- 12. During the hearings, Mr. and Mrs. Okun presented documentation and testimony. (Testimony)
- 13. The Purple Feather has prepared a "savory menu" they will offer from the time they open to the time they close.
- 14. The savory offerings of the Purple Feather make up more than fifty (50) percent of the business revenue in the shoulder and off seasons of the seasons of the Purple Feather.
- 15. The applicant stated that twenty (20) percent of his gross sales during mid-summer are "savory" items. During the shoulder and off-season (eight (8) months of the year), the gross sale of "savory" items is fifty (50) percent. By comparison, a restaurant/bar such as the Governor Bradford in Provincetown, sells only fifty (50) percent or less of "savory" items and that number declines significantly in the off-season.
- 16. Mr. Okun and Mrs. Okun completed a TIPS Course and will have their senior staff, cashiers and drink servers all TIPS trained. (Testimony)
- 17. The Purple Feather will hire a manager and servers experienced and trained in the service of alcoholic beverages. (Testimony)
- 18. Mr. Okun has hired an assistant manager for the busy season who is a person with experience in serving alcohol. (Testimony)
- 19. Any and all customers who order alcoholic beverages will be checked for ID, if they look younger than thirty (30) years old. (Testimony)
- 20. The point of sale system will prompt cashiers to check ID's when alcohol beverages are ordered. (Testimony)
- 21. Mr. Okun testified no alcohol beverage will be allowed beyond their doors, including the patio area. (Testimony)
- 22. The location of the bar area will be in proximity to the door so a bartender will be able to observe where a person may be taking the alcoholic beverage or it will be delivered to their table. (Testimony)
- 23. All of the access points out of the café are easily monitored compared to similar situations at other establishments which were previously approved by the Local Board. (Testimony)
- 24. The Purple Feather will post signs prominently around the café and specifically near the exits reminding customers that they cannot leave with their alcoholic item. (Testimony)

25. The Purple Feather will post signs prominently around the café and specifically near the exits reminding customers that they cannot leave with their alcoholic item. (Testimony)
26. All staff will be trained to watch for customers attempting to leave the café with alcoholic items. To aid in this effort, all alcoholic items will be served in a unique serving glass, dish or cup only used for alcoholic items. (Testimony)
27. During the busy periods, the Applicant will have on the café floor a concierge, who will have, among other tasks, the responsibility to ensure that all alcoholic orders are followed and that no alcohol leaves the establishment. (Testimony)
28. There was no negative testimony regarding the operation of the Purple Feather. At least fifteen (15) individuals submitted letters of support on behalf of the Purple Feather's application for an alcoholic beverages license. (Exhibit O, Testimony)
29. Kristen Hatch, Chairman of the Local Board was not present at the first hearing before the Local Board that was held on March 13, 2012. (Testimony)
30. At the second hearing held on March 27, 2012, Ms. Hatch announced that she was "up to speed" and would take over the hearing. Ms. Hatch then stated that she was opposed to the application. (Testimony)
31. During the third meeting after the applicant's hearing had ended, Ms. Hatch stated that if she allowed the Purple Feather to have a license then she would have to grant totally unrelated businesses, such as gas stations and convenience stores, a license. (Testimony)
32. The Local Board issued its decision dated May 25, 2012 denying Purple Feather's Application.
33. In its decision, the Local Board cited as reasons for the denial:
 - o "No previous experience with handling/serving alcohol;
 - o lack of ability to control people going outside with alcohol;
 - o fast food establishment-no table service or glassware;
 - o mostly families frequenting establishment;
 - o only 20% of business is eating food-majority of business is ice cream and chocolate sales;
 - o Licensing Board is developing criteria for new alcoholic beverage licenses, which would consider applicants with Common Victualler's License a priority over fast food establishments."
34. In 2011, four out of the so-called "fast food establishments" who are competitors of the Applicant were granted licenses.² Each of the establishments has a food service permit. (Testimony)
35. The Local Board has approved many such licenses to other businesses within the last two (2) years, including one (1) license granted just two (2) weeks prior to this denial. (Testimony)
36. The Local Board approved Sanette Groenewald DBA Karoo Kafe, Inc.'s application for a wine and malt beverages alcohol license on January 12, 2010. The Karoo Kafe has a square footage of space similar to the Applicant's and has a seating capacity of nineteen (19). (Exhibit B)

² The Local Board produced a spreadsheet of all issued alcoholic beverages license. It does not contain all the information that is relevant to the Commission's decision such as dates of issue for each identified license, what type of §12 license was issued, and which holders of restaurant-type §12 licenses hold the required common victuallers license.

37. Although Mr. Groenewald, the owner and license manager of Karoo had a beneficial interest in an alcoholic beverages license over ten (10) years prior to the Local Board approving his license, he had not had any experience for at least ten (10) years with alcoholic beverages prior to his alcoholic beverages license being approved by the Local Board. (Exhibit M)
38. On April 12, 2011, the Local Board approved the Coffee Pot and More, Inc. dba the Coffee Pot's application for an annual wine and malt alcoholic beverages license. (Exhibit M)
39. The Coffee Pot has a seating capacity of forty-four (44). According to its Articles of corporation, the purpose of the Coffee Pot is to conduct the business of operating a coffee shop, including the sale of related items. (Exhibit M)
40. Ms. Vital is the approved license manager for the Coffee Pot. It appears from her application that she had one year of experience with an alcoholic beverages license approximately seventeen (17) years prior to the license application being approved. (Exhibit M)
41. On April 12, 2011, the Local Board approved Tiny's Local Food, Inc. dba Tiny's Local Food's application for a seasonal wine and malt beverages license. (Exhibit A)
42. Tiny's is approximately four hundred and forty (440) square feet and has a seating capacity of twenty-eight (28) and an occupancy capacity of thirty-six (36). (Exhibit A)
43. Kristyn Samok is the approved license manager for Tiny's. She has never held an interest in an alcoholic beverages license, and appears to have no prior experience (at least within the last ten (10) years) with an alcoholic beverages license. (Exhibit A)
44. According to Mr. Okun, a few weeks after the denial of the Applicant's license, a license was granted to another business in Provincetown with only a take-away food permit. (Testimony)
45. The Local Board has never used being a "fast food establishment" as criteria to disapprove a license application. (Testimony)
46. The Local Board had voted on no proposals to limit licenses to restaurant-type §12 license holders.

DISCUSSION

The statutory language is clear that there is no right to a liquor license of the type specified in M.G.L. c. 138, §12. 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 v. City of Woburn, 65 Mass.App.Ct. 375 (2004); Ballarin Inc. v. Licensing Board of Boston, 49 Mass.App.Ct. 506 (2000). "Need 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." Id. at 311.

"Consideration of the number of existing licenses in the area and the views of the inhabitants in the area can be taken into account when making a determination, as well as a wide range of other factors-such as traffic, noise, size, the sort of operation that carries the license and the reputation of the applicant." Id. Neither the 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).

The local board “may exercise judgment about public convenience and public good that is very broad, but it is not untrammelled.” Ballarin, supra at 511. Instead, “[w]here the factual premise 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.” 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; 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. Recitals of testimony do not constitute findings. Johnson’s Case, 355 Mass. 782 (1968). Exotic Restaurants Concept, Inc. v. Boston Licensing Board, Suffolk Superior Court, C.A. No. 07-3287 (Borenstein, J.)

Indeed, the proper assessment of public need requires a particularized inquiry into the sort of business that seeks the license. See Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 381 (2006). In this case, the Local Board rejected Purple Feather’s application, because the Applicant had “No previous experience with handling/serving alcohol; lack of ability to control people going outside with alcohol, fast food establishment-no table service or glassware, mostly families frequenting establishment, only 20% of business is eating food-majority of business is ice cream and chocolate sales, Licensing Board is developing criteria for new alcoholic beverage licenses, which would consider applicants with Common Victualer’s License a priority over fast food establishments.”

The Local Board did not find that the number of dispensaries in the area was a factor that they considered in determining public need and denying the license. See Ballarin, supra. Indeed, the Local Board in its decision did not cite that the “Ballarin factors” which it is required to consider, were a factor in its decision to deny the alcoholic beverages license. For example, the Local Board did not hear any concerns or cite as factors in its decision such as traffic, noise, or the size of the Applicant’s operation. See Id. Moreover, there was no negative testimony regarding the operation of the Purple Feather. Therefore, the reputation of the applicant was not a factor that contributed to the Local Board’s decision. In addition, there was no neighborhood opposition. In fact, fifteen individuals submitted letters of support on behalf of the Purple Feather’s application for an alcoholic beverages license.

The only “Ballarin factor” that the Local Board can be said to have taken into account in its decision is, “the sort of operation that carries the license.” See Id. But given that the Local Board has approved alcoholic beverages licenses for four (4) establishments that the evidence demonstrates have the same “sort of operation”, they have acted arbitrarily and capriciously. The other establishments have food service permits, limited menus, similar exits and entrances and similar seating and occupancy allowances. Although those owners have some experience with alcoholic beverages, the experience is at least ten (10) years old and in some instances over

seventeen (17) years old and approximately one (1) year in length. Thus, the finding that the Okuns' have, "No previous experience with handling/serving alcohol", is curious given the lack of experience that three (3) out of four (4) individuals the Local Board has recently licensed have. Moreover, the Okun are both TIPS trained and have put together a comprehensive plan for addressing the entrances and exits. Given this evidence, the Local Board has not met its burden to show that the denial of this license was based on evidence illustrating that the public need would not be met by granting this license.

Based on this legal standard and the state of the factual record, the Commission would not hesitate to disapprove the action of the Local Board in denying this application. However, the record of this appeal does not contain any evidence that the Applicant holds, or sought, a common victualler's license under M.G.L. c. 140. M.G.L. c.138, §12 creates five (5) different types of licenses: restaurant, hotel, tavern, club, and general on premises.³ Each license type has specific eligibility requirements. An applicant for a restaurant-type §12 license must be a "[a] common victualler duly licensed under chapter one hundred and forty." M.G.L. c. 138, §12, Paragraph 1, sentence 1. M.G.L. c. 140 specifies that "[f]or the purposes of section twelve of chapter one hundred and thirty-eight, a person to whom a license has been granted under this section shall be deemed to be a common victualler duly licensed under this chapter to conduct a restaurant." M.G.L. c. 140, §6, last sentence.

The Local Board's are statutorily obligated to verify that each holder of a restaurant-type §12 license is in fact "in good faith operating a restaurant and that such restaurant is provided with proper equipment for the service of food to travelers and strangers." M.G.L. c. 138, §12A.

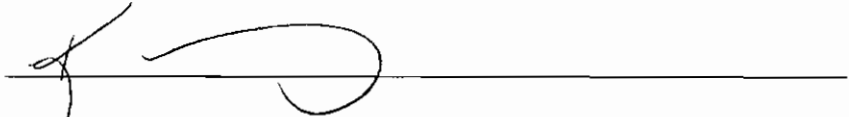
CONCLUSION

Based on the evidence and testimony at the hearing, the Commission **DISAPPROVES** the action of the Town of Provincetown in denying the license of Broken Wheel Farm, LLC dba The Purple Feather Café and Treatery. **The Commission remands this matter back to the Local Board with the recommendation to grant the application for an annual wine and malt beverages with cordials license and submit it to this Commission for consideration of approval in the usual administrative course, provided that the Applicant applies for the Common Victualler's license required by chapter 138 to qualify for a restaurant-type §12 license.**

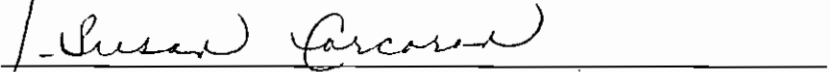
³ §12 also creates a more specialized type of club license for local chapters of war veterans organizations chartered by Congress. This type of license is not germane to the issues in this appeal.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman



Susan Corcoran, Commissioner



Dated: January 17, 2013

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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File