



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

WAXY'S QUINCY, LLC d/b/a THE TILTED KILT
227 PARKINGWAY
QUINCY, MA 02169
LICENSE#: NEW
HEARD: JANUARY 30, 2013

This is an appeal of the action of the Board of License Commissioners of the City of Quincy ("Quincy" or "Local Board") in denying the application for an original, or "new" M.G.L. c. 138, section 12 all alcoholic beverages restaurant license of Waxy's Quincy, LLC d/b/a The Tilted Kilt (the "Appellant" or "Waxy's"). The Appellant timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, January 30, 2013.

The following documents are in evidence as exhibits:

Jointly Agreed Upon Exhibits:

1. Stipulation of Agreed Facts (2 pages);
2. Minutes and Agenda of the City of Quincy Board of License Commissioners – Tuesday, August 28, 2012 at 4:00 p.m. (5 pages);
3. City of Quincy, Board of License Commissioners' Decision and Vote of the Board (3 pages);
4. Memorandum of emails, letters, and phone calls in opposition to, and in support of, Waxy's application (46 pages);
5. Petitions signed by residents in opposition to the application (20 pages);
6. Letter from Reverend Dooher, Auxiliary Bishop of the Archdiocese of the Catholic Church of Boston, in opposition (1 page); and
7. Two (2) DVD's of Local Board hearing held August 28, 2013.

Licensee's Exhibits:

- A. Photograph of interior of Tilted Kilt restaurant;
- B. Photograph of interior of Tilted Kilt restaurant;
- C. Photograph of Tilted Kilt waitress in uniform;
- D. Photograph of customers and waitress inside a Tilted Kilt restaurant;
- E. Tilted Kilt Menu; and
- F. Google earth photo/image representing area and distance of 227 Parkingway, Quincy, MA (Tilted Kilt proposed location) and St. John's Catholic Church.

There is one (1) audio recording of this hearing, and four (4) witnesses testified.

FACTS

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

1. The Appellant, Waxy's Quincy, LLC doing business as the Tilted Kilt, is a Massachusetts limited liability company with a place of business at 440 Bedford Street, Lexington, Massachusetts. (Exhibit 1)
2. The Appellant, Waxy's, is an applicant for an all alcoholic beverages restaurant license pursuant to M.G.L. c. 138, section 12. (Exhibit 1)
3. On July 17, 2012, the Local Board conducted a hearing on Waxy's application for a new All Alcohol Restaurant License at the premises located at 227 Parkingway, Quincy, Massachusetts. (Exhibits 1, 2, Testimony)
4. After the July 17, 2012 hearing, the Local Board voted 5 to 0 to grant Waxy's application. (Exhibits 1, 2, Testimony)
5. Shortly thereafter, the Local Board learned that notice, statutorily required by M.G.L. ch. 138, sections 15A and 16C, was not provided to St. John the Baptist Catholic Church ("St. John's Church"), which is located within a five (500) hundred foot radius of the proposed premises. (Exhibits 1, 2, F, Testimony)
6. Applying the requirements for measurement of a radius set forth in 204 CMR 2.11, the distance from the nearest point of the building housing St. John's Church to the nearest point of the premises, is 469.2 feet. (Exhibits 1, 2, F)
7. The record is silent as to whether the Local Board made the finding required by M.G.L. ch. 138, section 16C, prior to granting Waxy's application on July 17, 2012.
8. Pursuant to M.G.L. chapter 138, sections 15A and 16C, after the first hearing held by the Local Board on July 17, 2012, Waxy's provided notice to St. John's Church, after which the Local Board scheduled a new hearing. (Exhibit 1, Testimony)
9. On August 28, 2012, the Local Board conducted a new hearing on Waxy's application for a new annual all alcoholic beverages restaurant license. (Exhibits 1, 2, 7, Testimony)
10. A number of residents of Quincy testified in opposition to the application. (Exhibits 2, 7)
11. The Local Board received a number of emails, letters, and phone calls in opposition to this application. (Exhibits 2, 4)
12. The Local Board received a number of petitions signed by residents of Quincy in opposition to this application. (Exhibit 5)
13. After the August 28, 2012 hearing, the Local Board voted to deny Waxy's application by a 3-2 vote. (Exhibits 2, 3, Testimony)
14. On August 30, 2012, The Local Board issued its written decision. (Exhibit 3)
15. The Local Board stated in its decision, referring to M.G.L. c 138, section 16C, that any premises located within 500 feet of a church shall not be licensed to sell alcoholic beverages unless the local licensing authority determines in writing, after a hearing, that the issuance of such a license

for the premises will not be detrimental to the educational and spiritual activities of the church. (Exhibit 3)

16. The Local Board determined, after the hearing, that it could not make the required finding regarding the impact of Waxy's proposed business on St. John's Church. (Exhibit 3, Testimony)
17. The Local Board voted to deny Waxy's application. (Exhibits 2, 3, Testimony)
18. Waxy's filed a timely appeal of the Local Board's decision to the Commission. (Exhibit 1)
19. The Commission held a hearing on January 30, 2013.
20. Deacon Paul Lewis testified before the Commission. He is a permanent Deacon at St. John's Catholic Church, as well as the business manager for St. John's Church. (Testimony)
21. St. John's Catholic Church is the second oldest church in Quincy. It is a full service Church which has existed for 150 years. It conducts baptisms, funerals, communions, weddings, religious education, bible studies, and weekly religious services. (Exhibit 6, Testimony)
22. It is the only Catholic Church in Quincy which is open and operating on a full-time basis. (Testimony)
23. Deacon Lewis testified that he has no objection to hamburgers and beer. The objection of St. John's Church is to the attire worn by the wait staff, which is counter to the teachings of the Catholic Church, its practices and beliefs, and its view on the theology of sex and procreation. (Testimony)
24. City Councilor Brad Croall testified before the Commission. He lives behind St. John's Church, but does not attend it. He represents Ward 2 in Quincy which consists of the largest senior citizen population in Quincy, and many of these citizens attend St. John's Church. The overwhelming sentiment of the residents of this neighborhood is that they are in opposition to this application. (Testimony)
25. Mr. Joseph Shea, the Chairman of the Quincy Licensing Board, testified before the Commission.
26. Chairman Shea testified that the vote of the Board, after the August 28, 2013 hearing, was 3-2 to deny Waxy's application. (Testimony, Exhibits 2, 3)
27. Chairman Shea testified that he was the author of the Local Board's decision to deny this application. (Exhibit 3, Testimony)
28. Chairman Shea testified that the Local Board determined, after the hearing, that Waxy's would be detrimental to the spiritual activities of the Church. (Testimony)
29. Chairman Shea testified that the Local Board determined that it could not make the required finding pursuant to M.G.L. c. 138, section 16 C, that Waxy's would not have a negative or detrimental impact on the spiritual or educational activities of the Church. (Exhibit 3, Testimony)

DISCUSSION

A Local Board must state the reasons for its decision whether or not to grant a license application. 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 ABCC’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.).

Section 15A of chapter 138 of the General Laws requires a specific process for a Board to follow in an application for an original license under M.G.L. ch. 138, section 12, when a church lies within a 500 foot radius of the proposed licensed premises. Under the Liquor Control Act the Board and the applicant have a legal obligation to (1) identify a five hundred (500) feet radius from the licensed premises as measured by 204 C.M.R. 2.11; (2) identify every “church”, and every “school” and every “hospital” within that 500 foot radius; (3) give the notice required by M.G.L. c. 138, §15A to every identified “church”, “school” and “hospital” within that 500 foot radius; (4) conduct a hearing required by M.G.L. c. 138, §16C to determine whether “the premises are not detrimental to the educational and spiritual activities of said school or church”; (5) upon conclusion of that hearing, make a determination in writing that “the premises are not detrimental to the educational and spiritual activities of said school or church”; and (6) grant the license application and submit it timely to the Commission.

The term “church” as used in §15A is defined as “a church or synagogue building dedicated to divine worship and in regular use for that purpose, but not a chapel occupying a minor portion of a building primarily devoted to other uses.” M.G.L. c. 138 §16C, In re: B.A.M.N., LLC, Brockton (ABCC Decision dated June 9, 2008).¹

M.G.L. c. 138, section 16A provides, in pertinent part, that “[p]remises... located within a radius of five hundred feet of a ...church shall not be licensed for the sale of alcoholic beverages unless the local licensing authority determines in writing and after a hearing that the premises are not detrimental to the educational and spiritual activities of said church.”

Waxy’s, the Appellant argues that there was no evidence presented to the Local Board to show how the premises were detrimental to the spiritual activities of the church. The action of the Board, in denying Waxy’s application by basing their decision on opinions of various church members, was tantamount to providing the church with veto power. Waxy’s further argues that the provisions of G.L. ch. 138, section 16C require the Local Board to state, in writing, the reasons why the granting of this license would be detrimental to the spiritual mission of the Church; and in addition, that there was never a discussion of the

¹ The Board should review its procedures to ensure it is complying with M.G.L. c. 138, §§15A, 16C, and 23, regarding any application filed.

merits of how the Local Board found that the placement of this license would interfere with the spiritual activities of the church.

The Local Board argues that it properly applied the provisions of G.L. ch. 138, section 16C to Waxy's application for a license, as the provisions of section 16C, triggered by virtue of the proximity of this premises to St. John's Church, require that the Board, after a hearing, make a determination in writing that the approval of the requested license applicant "will not be detrimental to the educational and spiritual activities of that church...." The Board based its decision to deny this application on the position of St. John's Church, which lies within 500 feet of the proposed location. The former pastor of St. John's Church stated in writing that Waxy's would be detrimental to the spiritual activities of this church, and that it conflicted with the values and activities promoted at the Church.

The long established rules of statutory construction require that the Commission cannot, and will not, read words into the statute. Commonwealth v. Palmer, (Supreme Judicial Court Docket No. SJC 11225, Slip Opinion dated April 5, 2013) ("Our rules of statutory construction counsel that when the meaning of a word used in a statute is clear, we should interpret it in accordance with that meaning, without more. [Footnote omitted] See G.L. ch. 4, section 6 ("Words and phrases shall be construed according to the common and approved usage of the language"); Commonwealth v. Poissant, 443 Mass. 558, 563 (2005), quoting Civitarese v. Middleborough, 412 Mass. 695, 700 (1992) ("We will not read into the plain words of a statute a legislative intent that is not expressed by those words"). 441 Mass. 273, 277-278 (2004) Compare Commonwealth v. Rahim, 441 Mass. 273, 277 – 278 (2004) (adhering to plain language where meaning of statute was clear), with, e.g., Commonwealth v. Scott, ante at 355, 358 (2013) where meaning of statutory term is ambiguous, appropriate to look at language of statute as whole), and Commonwealth v. Hamilton, 459 Mass. 422, 431-433 (2011) citing 81 Spooner Rd. LLC v. Brookline, 452 Mass. 109, 115 (2008) (where statutory language is ambiguous, appropriate to look to legislative history).") Section 16C does not contain any language that requires evidence be presented to the Local Board to show how the premises were detrimental to the spiritual activities of the church. Section 16C prohibits the premises from being licensed unless the Local Board makes an affirmative written finding in the negative. Section 16C as it exists today does not furnish any veto power to anyone, but does impose on the Local Board an increased duty to make a specific written finding. This is not tantamount to providing the church with veto power. Section 16C does not require the Local Board to state, in writing, the reasons why the granting of this license would be detrimental to the spiritual mission of the Church. As stated above, Section 16C by its plain language is prohibitive, unless a specific written finding is made by the Local Board. Thus, there is no legal requirement created in the language of Section 16C for the Local Board to hold a discussion of the merits of how the Local Board found that the placement of this license would interfere with the spiritual activities of the church. The plain language of this statute prohibits licensing unless a finding in the negative is made.

The Local Board stated in its decision/statement of reasons that it could not make the statutorily required finding regarding the impact of Waxy's proposed business on the community of St. John's Church, and as a result, rejected Waxy's application.

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." Ballarin 49 Mass. App. Ct. 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 taking 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.* “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.” *Id.* at 512.

The local board’s broad discretion, however, does not mean that the [local board] can do whatever it pleases whenever it chooses to do so. *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 Inc.*, 49 Mass. App. Ct. at 511. 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.” *Ruci v. Client’s Sec. Bd.*, 53 Mass. App. Ct. 737, 740 (2002).

Thus, in this case, the Local Board is compelled to deny the application unless the Local Board makes the express, written finding that the location of the proposed licensed premises will not be detrimental to the educational and spiritual activities of the church. In this matter, the Local Board did not make the required finding in writing, therefore, the Local Board is compelled by M.G.L. ch. 138, section 16A, to deny this application for the license.

The Commission finds that St. John’s Catholic Church is a church within the definition of G.L. ch. 138, section 16C. The Commission further finds that the Local Board properly applied the provisions of G.L. ch. 138, section 16C, in denying Waxy’s application, because the Local Board, after a hearing, did not make a finding in writing that Waxy’s application was not detrimental to the spiritual or educational activities of St. John’s Church. The Commission concludes and finds that the Local Board properly denied Waxy’s application.

CONCLUSION AND DISPOSITION

Based on the evidence, the Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board of Quincy in denying the application of Waxy’s Quincy, LLC. d/b/a The Tilted Kilt for an all alcoholic beverages restaurant license issued pursuant to chapter 138, section 12, to be exercised at 227 Parkingway, Quincy, Massachusetts.

CONCLUSION AND DISPOSITION

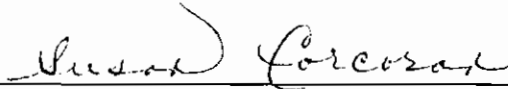
Based on the evidence, the Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board of Quincy in denying the application of Waxy's Quincy, LLC. d/b/a The Tilted Kilt for an all alcoholic beverages restaurant type license issued pursuant to chapter 138, section 12, to be exercised at 227 Parkingway, Quincy, Massachusetts.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner

A handwritten signature in black ink that reads "Kathleen McNally". The signature is written in a cursive style and is positioned above a horizontal line.

Susan Corcoran, Commissioner,

A handwritten signature in black ink that reads "Susan Corcoran". The signature is written in a cursive style and is positioned above a horizontal line.

Dated: April 25, 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.

cc: Louis Cassis, Esq. [Attorney for Licensee]
James Timmons, Esq. [Attorney for the City of Quincy]
The Board of License Commissioners for the City of Quincy
Frederick G. Mahony, Chief Investigator
Administration
File