



***Commonwealth of Massachusetts  
Alcoholic Beverages Control Commission  
239 Causeway Street  
Boston, Massachusetts 02114  
Tel. (617) 727-3040  
Fax: (617) 727-1510***

**Jean M. Lorizio, Esq.**  
*Chairman*

**DECISION**

**SMITTY'S FILLING STATION, LLC  
1285 BROADWAY  
RAYNHAM, MA 02767  
LICENSE#: NEW  
HEARD: 9/06/2018 and 9/13/2018**

This is an appeal from the action of the Town of Raynham Board of Selectmen (the "Local Board" or "Raynham") in denying the application to transfer a M.G.L. c. 138, § 12 license, as filed by Smitty's Filling Station, LLC (the "Applicant" or "Smitty's") to be exercised at 1285 Broadway, Raynham, Massachusetts. The applicant timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and hearings were held on Thursday, September 6, 2018 and Thursday, September 13, 2018.

The following documents are in evidence as exhibits:

1. Bristol County Sheriff's Office Incident Report, 2/27/2015 with Criminal Complaint;
2. Proposed Seating Plan Drawing, 2/13/2008;
3. Local Board meeting minutes, 4/17/2018;
4. Local Board meeting minutes, 4/24/2018;
5. Local Board meeting minutes, 5/08/2018;
6. Local Board meeting minutes, 5/15/2018;
  
- A. Applicant's Business Entity Summary from the Secretary of the Commonwealth, Corporations Division;
- B. Raynham Building Department, Building Permit, 5/17/2018;
- C. Smitty's Application for an Alcoholic Beverages License, 3/18/2018;
- D. Local Board meeting minutes, 3/27/2018;
- E. Raynham Police Department Incident Report, 2/27/2015;
- F. Raynham Police Department Incident Report, 5/10/2018;
- G. Raynham Police Detective Sergeant Donnelly's Letter with Affidavits, 5/14/2018; and
- H. Local Board's Decision, with attachments, 5/30/2018.

There is one (1) audio recording of each hearing, and five (5) witnesses testified.

## FINDINGS OF FACT

1. Smitty's Filling Station, LLC (the "Applicant" or "Smitty's"), a Massachusetts limited liability company, with an address of 1285 Broadway, Raynham, Massachusetts, filed an application with the Town of Raynham Local Board to transfer to it the all alcoholic beverages restaurant license of Christopher's Seafood and Steakhouse, Inc. ("Christopher's") located at 1285 Broadway, Raynham, Massachusetts. (Exhibits A, C)
2. Smitty's seeks to operate a family restaurant at the same location at which Christopher's operated. (Testimony; Exhibit A)
3. The two principals of Smitty's, Richard Ferreira and Kimberley Brakken, are each 50% shareholders and LLC Managers of Smitty's. (Exhibits A, C; Testimony)
4. Kimberly Brakken is the proposed manager of record. (Exhibit C)
5. Brakken has been certified on and off for the past fifteen to twenty years in the safe sale and service of alcoholic beverages through the TIPS training program. (Testimony) She is currently TIPS certified. Id. She has approximately thirty years of experience in the restaurant industry, and she has never been charged with any liquor license violations. Id.
6. Both Richard Ferreira and Kimberley Brakken are over the age of twenty-one and are United States citizens. (Exhibit C; Testimony)
7. Neither Ferreira nor Brakken has ever been convicted of a state, federal, or, military crime. (Exhibit 5, at 2; Testimony)
8. Ferreira lived in Raynham for approximately thirty-eight years and has also operated businesses in Raynham. His line of business has been trucking, autobody repair, and building custom vehicles. (Testimony)
9. Neither Brakken nor Ferreira ever worked at Christopher's, had any ownership in Christopher's, or has any affiliation with Christopher's. (Testimony)
10. On February 27, 2015, approximately four police officers from the Bristol County Sheriff's Office and approximately three police officers from the Raynham Police Department visited Ferreira's property to assist in the seizure of four trucks over an unpaid fuel debt related to a civil lawsuit. (Exhibits 1, F; Testimony) Ferreira was sick at the time and became agitated and angry. Id. Ferreira stated to the officers something to the effect of, "there is going to be a battle; you guys are going to have to shoot me." Id. One officer testified before the Commission that Ferreira also stated that Ferreira would shoot them. Id. Officers told Ferreira that he should turn around and place his hands behind his back, as he had threatened the officers. Id. Ferreira briefly resisted arrest and was ultimately charged with disorderly conduct. Id. The charge was dismissed. (Testimony) Ferreira was later charged with threatening a police officer, but that charge was also dismissed. Id.
11. The Local Board held hearings on the license transfer application on April 17, 2018, April 24, 2018, May 8, 2018, and May 15, 2018. (Testimony; Exhibits 3, 4, 5, 6)

12. On May 10, 2018, Detective Sergeant Donnelly and Detective Berry of the Raynham Police Department visited the Applicant's premises to meet with Brakken and Ferreira about their application. The police indicated to Brakken and Ferreira that they had concerns with the application, primarily because of Ferreira's 2015 incident with the police, and the police questioned the type of patrons that Smitty's would attract. Detective Sergeant Donnelly and Detective Berry reported that Brakken and Ferreira kept interrupting them, and likewise, Brakken and Ferreira complained that the police officers interrupted them. The meeting ended prematurely. (Exhibit F; Testimony)
13. The Raynham Police Department reported to the Local Board about the unproductive May 10, 2018 meeting with the Applicant and concerns they had for the safety of the Raynham community if the Application were to be granted. (Exhibits 6, G; Testimony)
14. On May 15, 2018, the Local Board voted unanimously to deny Smitty's transfer application. (Exhibit 6)
15. On May 30, 2018, the Local Board issued its Notice of Decision, focusing on the reputation of the applicant and the sort of operation that carries the license in accordance with Ballarin, Inc. v. Licensing Board of Boston, 49 Mass. App. Ct. 506, 511 (2000). (Exhibit H, at ¶ 8) In explaining the denial of the application on this basis, the Local Board reasoned that:
  - a. The police responded to over three hundred and forty incidents at Christopher's, and Christopher's is the Applicant's landlord;<sup>1</sup>
  - b. Ferreira has had numerous incidents with police, in particular, the incident in 2015;
  - c. Ferreira was the subject of four restraining orders (M.G.L. c. 209A); and
  - d. When police officers met with Brakken and Ferreira on May 10, 2018 about the application, the meeting was unproductive, and Brakken and Ferreira were uncooperative with the police.(Exhibit H)

### 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). The procedure for the issuance of licenses to sell alcoholic beverages is set out in M.G.L. c. 138. Licenses must be approved by both the local licensing authorities and the Commission. M.G.L. c. 138, §§12, 67; see Beacon Hill Civic Assn. v. Ristorante Toscano, Inc., 422 Mass. 318, 321 (1996).

In reviewing the decision of a denial by the Local Board, 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 Commissioners of Springfield, 387

---

<sup>1</sup> Note that the application for Smitty's provides that Twelve Eighty-Five Broadway Trust (Christos Kesaris, Trustee) is the Applicant's landlord, not Christopher's. (Exhibit C)

Mass. 833, 837, 838 (1983); accord Ballarin, Inc. v. Licensing Board of Boston, 49 Mass. App. Ct. 506, 512 (2000) (when reviewing the Local Board'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").

Where the issue is the denial of a transfer of a license, a local board is statutorily obligated to consider whether the transfer was in the "public interest" and met the public interest test set forth in M.G.L. c. 138, § 23, ¶ 9. The statute provides in relevant part: "[a]ny license under this chapter held by an individual, partnership, or corporation may be transferred to any individual, partnership or corporation qualified to receive such a license in the first instance, if, in the opinion of the licensing authorities, such transfer is in the public interest." M.G.L. c. 138, § 23, ¶ 9.

In this case, the Local Board used the wrong standard. Instead of using the "public interest" standard for a license transfer, the Board used the "public need" standard and Ballarin analysis, which applies to new license applications.<sup>2</sup> See Ballarin, Inc., 49 Mass. App. Ct. at 506. As this Commission has articulated, "[w]here an application is filed to transfer [] ownership of a license without a change of location, the primary concern of the Commission is the fitness of the proposed new licensee." Gaelic House, Inc., Waltham (ABCC Decision April 12, 1990); see The Usual Place, Inc., Quincy (ABCC Decision June 16, 2000). In order to determine if the transferee is qualified to receive a license, the local licensing authority shall cause an examination to be made that the applicant is not less than twenty-one years of age, has not been convicted of a violation of a federal or state narcotic drugs law, and is a person of good character in the city or town in which he seeks a license. See M.G.L. c. 138, § 12; CJ Restaurant Enterprises, LLC, Worcester (ABCC Decision Sept. 22, 2010); Codman Square Liquors, LLC d/b/a Crown Liquors II, Boston (ABCC Decision Dec. 14, 2016).

Although the Local Board used the "public need" and Ballarin analysis instead of "public interest" analysis, the Commission finds that error did not add up to arbitrary and capricious decision-making and that in this case, the outcome would be the same. The issue here is the fitness of the Applicant and whether the Applicant is of good character. That is a similar question as the factor addressed in Ballarin that the Local Board analyzed – the sort of operation that carries the license and the Applicant's reputation. See Ballarin, Inc., 49 Mass. App. Ct. at 511. In both situations, the fact-finder often considers facts such as prior liquor license violations by the applicant and how the applicant addressed problems at other establishments in which she/he has or had an interest. See Las Brisas, Inc. d/b/a Las Brisas, Somerville (ABCC Decision, November 15, 2011) (with a new application, Commission determined applicant was not the sort of operation which should be approved where applicant failed to call the police after a disturbance on the premises resulting in serious bodily injury and was selling alcoholic beverages in violation of the law); Yu Hua Chen d/b/a Ming Seafood Restaurant, Quincy (ABCC Decision, March 30, 2012) (with a new application, in considering applicant's reputation and sort of operation, Commission disapproved application where applicant sold alcoholic beverages without a license, allowed customers to bring their own bottle of alcohol to the premises, and had safety violations according to the fire department); Tea Garden In Athol, Inc., Athol (ABCC Decision, December 18, 2012) (with a new license application, Commission disapproved application where applicant repeatedly took

---

<sup>2</sup> Public need for a Section 12 establishment was previously established for this location when the Local Board granted the initial license for this location, to Christopher's.

deliberate steps to circumvent the law, including selling alcoholic beverages without a license); Verc Enterprises, Inc., Randolph (ABCC Decision, August 11, 2014) (with a new application, considering applicant's exemplary history of operation in all five of its licensed package stores in two states). Compare The Usual Place, Inc., Quincy (ABCC Decision, June 16, 2000) (with a transfer application, in considering applicant's character and fitness, Commission determined that a 50% owner of applicant had a satisfactory reputation relative to his two other establishments and that he did not have an ownership interest in another former licensee, which did have some problems); Dedham Wings, LLC d/b/a Hooters, Dedham (ABCC Decision, November 21, 2016) (with a transfer application, Commission found that there was no evidence the shareholders of applicant were not of good character and, in fact, they operated three other successful locations maintaining good relationships with those other local boards).

However, the character test is not so narrow as to only focus on the applicant's other businesses. The applicant's "total character [should be] taken into consideration." CJ Restaurant Enterprises, LLC, Northborough (September 22, 2010). In CJ Restaurant Enterprises, LLC, Northborough (September 22, 2010), the Commission considered on appeal a transfer application which the local board had denied on the basis that the sole member of the applicant, who had one conviction over sixteen years earlier, had other interactions with the law and participated in a change of management at the applicant's business for four months with no notice to the local board and no change of manager application. In disapproving the local board's decision and determining that the sole member of the applicant did satisfy the character test of § 12, the Commission considered that the sole member of the applicant admitted to wrongdoing, had no criminal convictions in many years, successfully and legally managed his business interests, had recommendations from law enforcement individuals, and had been appointed as a Reserve Deputy Sheriff. See CJ Restaurant Enterprises, LLC, Northborough (September 22, 2010).

Here, Smitty's is owned by Kimberly Brakken and Richard Ferreira. (Exhibit C) Both individuals are over the age of 21 and are United States citizens. (Testimony; Exhibit C) Neither has ever been convicted of a state, federal, or military crime. (Testimony) As for their character, the Local Board had little issue with Kimberly Brakken but determined that Richard Ferreira did not have a sufficient reputation to hold a license in Raynham. The Local Board justified its denial on four primary facts:

- a. The police responded to over three hundred and forty incidents at Christopher's, and Christopher's is the Applicant's landlord;
- b. Ferreira has had numerous incidents with police, in particular, the incident in 2015;
- c. Ferreira was the subject of four restraining orders (M.G.L. c. 209A); and
- d. When police officers met with Brakken and Ferreira on May 10, 2018 about the application, the meeting was unproductive, and Brakken and Ferreira were uncooperative with the police.

(Exhibit H). The Commission finds that only the 2015 incident can be considered in the fitness/good character analysis. The incidents that occurred at the prior licensee's establishment have nothing to do with Ferreira's character, as Ferreira had no interest in that licensee. (Testimony) The affidavits in support of the four restraining orders (M.G.L. c. 209A) constitute uncorroborated hearsay. (Exhibit G) None of the affiants testified before the Commission, and

Ferreira testified that he never threatened to kill anyone.<sup>3</sup> (Exhibit G; Testimony) Lastly, the unproductive meeting on May 10, 2018 between the police, Brakken, and Ferreira do not necessarily speak to Ferreira's character but to the lingering mutually-ill feelings between Ferreira and the Raynham police about the 2015 incident. (Testimony)

However, the February 27, 2015, incident where approximately four police officers from the Bristol County Sheriff's Office and approximately three police officers from the Raynham Police Department visited Ferreira's property to assist in the seizure of four trucks related to a civil lawsuit over an unpaid fuel debt does reflect negatively on Ferreira's character. (Exhibits 1, F; Testimony) Ferreira acted angrily towards the police officers and said something to the effect of, "there is going to be a battle; you guys are going to have to shoot me." Id. One officer testified that Ferreira also stated that Ferreira would shoot them. Id. When Ferreira was arrested, he briefly resisted. Id.

There is evidence of one incident exhibiting Ferreira's poor character and no positive evidence of Ferreira's character and fitness so as to support him holding a license. Unlike the case of CJ Restaurant Enterprises, LLC, Northborough (September 22, 2010), Ferreira here did not admit to his wrongdoing on February 27, 2015, there is no evidence that he has successfully and legally managed his business interests over the years, no one vouched for his character and fitness, and law enforcement is convinced that Ferreira would not be able to work amicably with them. See CJ Restaurant Enterprises, LLC, Northborough (September 22, 2010); Testimony.

Consequently, for the above-stated reasons, the Commission, giving reasonable deference to the discretion of the Local Board, finds that Ferreira has not satisfied the good character and fitness criteria for a transfer of the license and that the Local Board's decision was 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, § 12 transfer application of Smitty's Filling Station LLC from Christopher's Seafood and Steakhouse, Inc.

---

<sup>3</sup> "[A] decision of a board that rest[s] entirely upon hearsay evidence cannot be sustained, but decisions based upon hearsay evidence that is supported and corroborated by competent legal evidence [may be] sustained." See Moran v. School Committee of Littleton, 317 Mass. 591, 596-597 (1945) (citations omitted); Braintree Brew House LLC d/b/a The Brew House (ABCC Decision March 27, 2013) (violation of § 69 disapproved where all of the evidence presented to the Commission constituted hearsay); Vannak Kann d/b/a The Crown (ABCC Decision August 9, 2016) (disapproving local board's finding of a violation of § 69 where all of the information regarding patron's behavior and consumption of alcoholic beverages while inside of the licensed premises constituted hearsay).

**ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Elizabeth A. Lashway, Commissioner 

Kathleen McNally, Commissioner 

Dated: November 1, 2018

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.

This document is important and should be translated immediately.  
Este documento es importante y debe ser traducido inmediatamente.  
Este documento é importante e deve ser traduzido imediatamente.  
Ce document est important et devrait être traduit immédiatement.  
Questo documento è importante e dovrebbe essere tradotto immediatamente.  
Το έγγραφο αυτό είναι σημαντικό και θα πρέπει να μεταφραστούν αμέσως.  
这份文件是重要的，应立即进行翻译。

cc: Neil A. Mooney, Esq. via facsimile 617-720-7877  
Edward W. Pietnik, Esq. via facsimile 508-824-2396  
Local Licensing Board  
Frederick G. Mahony, Chief Investigator  
Administration, File