

DECISION

DONOHUE HOLDINGS, INC. DBA DONOHUE'S
85-87 BIGELOW AVENUE
WATERTOWN, MA 02472
LICENSE#: 133600012
HEARD: 4/25/2012

This is an appeal of the action of the Watertown Licensing Board (the “Local Board”) in denying the application to alter the premises of Donohue Holdings, Inc. dba Donohue's (the “Licensee” or “Donohue’s”). The licensee also sought approval to change the hours of operation for its outdoor seating. The Licensee timely appealed the Local Board’s decision to the Alcoholic Beverages Control Commission (the “Commission”) and a hearing was held on Wednesday, April 25, 2012.

The following exhibits are in evidence:

1. Minutes for the February 16, 2012 Local Board Meeting (5 pages);
2. Licensee’s Application to Local Board, dated January 3, 2012 (13 pages);
3. Local Board’s Proposal of Restrictions, dated February 16, 2012 (2 pages);
4. Four (4) Black and White Photos of Licensee’s Exterior Area (4 pages);
5. Two (2) Color Photo of Licensee’s Building (1 page);
6. Two (2) Color Photos of Exterior Area (1 page);
7. Neighbors’ Petition, dated February 14, 2012 (5 pages);
8. Letter, dated February 10, 2012, from Jean Caloggero to Local Board (1 page);
9. Local Board’s Decision, dated March 6, 2012 (5 pages);
10. Local Board’s Decision, dated June 13, 2011 (4 pages);
11. Revised Minutes for the May 19, 2011 Local Board Meeting (4 pages);
12. Local Board Rules and Regulations dated August 2005 (53 pages);
13. Amendment to Local Board Rules and Regulations, section VII dated June 18, 2009 (1 page);
14. Amendment to Local Board Rules and Regulations, section III dated September 17, 2009 (1 page);
15. Aerial Photograph of Licensed Premises (1 page);
16. Aerial Photograph of Licensed Premises (1 page); and
17. Licensee’s Application to the Commission, dated May 19, 2011 (10 pages).

There is one (1) audio recording of this hearing.

FACTS

The following facts are found:

1. The licensee is a Massachusetts corporation with a business address at 85-87 Bigelow Avenue, Watertown, Massachusetts. (Ex. 2)
2. The licensee holds an annual restaurant type all alcohol beverage license under section 12 of chapter 138 of the General Laws. (Ex. 2)
3. On May 19, 2011, the Local Board met to consider the application of Donohue Holdings, Inc. dba Donohue's for approval of an alteration of its premises at 85-87 Bigelow Avenue licensed for this all alcohol service. (Ex. 10)
4. After the hearing, the Local Board voted unanimously to approve an alteration of the premises to include an outdoor seating area subject to the following conditions: (Ex. 10)
 - a. Outdoor seating shall be limited to the period of May 1st through September 30th;
 - b. The maximum outdoor seating capacity, to be designated patio seating, shall be no more than forty (40) persons, and the total seating capacity shall not exceed two hundred and one (201) persons;
 - c. The area of the license shall be increased by twelve hundred (1,200) square feet for the patio seating;
 - d. The hours of operation for patio seating shall not exceed 8:00 a.m. to 9:00 p.m. Sunday through Thursday, 8:00 a.m. to 10:00 p.m. Friday and Saturday, and no alcohol shall be served prior to 12:00 p.m. noon on Sunday;
 - e. No televisions shall be displayed outside for entertainment purposes and no music shall be permitted in the patio seating area;
 - f. There shall be no bar or service bar in the patio seating area;
 - g. Patrons must enter and exit the patio seating area through the main entrances of the restaurant;
 - h. The only access to the street from the patio seating area shall be for emergencies, via emergency exits, as shown on the plan submitted (Ex. 10);
 - i. No smoking shall be allowed in the patio seating area (Ex. 10); and
 - j. The patio seating area shall be fenced and landscaped, as shown on the sketch plan submitted and described by the applicant, for purposes of sound absorption/reduction. (Ex. 10)
5. Subsequently, the application was approved by the Commission and the Local Board granted a license delineating the "altered premises" which included the patio. (Ex. 17)
6. On or about January 5, 2012, the licensee submitted another application to the Local Board for an alteration of its existing premises at 85-87 Bigelow Avenue, Watertown, Massachusetts (the "Application"). (Ex. 2)
7. The application sought permission to add a service bar and two (2) television sets to be operated without volume¹. (Ex. 2)
8. The application also sought a change in the hours of service in the outdoor seating area to 11:00 p.m., January through December, which was modified by the licensee at the board hearing of February 16, 2012 to an additional hour of service, from 9 p.m. to 10 p.m., and for two (2) additional months of outdoor service, April and October. (Ex. 1, Ex. 2)
9. On February 16, 2012, the Local Board met to consider the application of Donohue Holdings, Inc. dba Donohue's for approval of an alteration of its premises at 85-87 Bigelow Avenue

¹ The disposition regarding the television sets was not appealed by the Licensee and is therefore not addressed in this decision.

- licensed for all alcohol common victualler service, changes to the outdoor seating area, and for a change in the hours of service provided in the outdoor seating area. (Ex. 9)
10. After this public hearing held on February 16, 2012, the board voted three (3) to zero (0) to deny the application. (Ex. 1)
 11. By decision dated March 6, 2012, the board provided the licensee with written notice and a statement of reasons for its denial of the application, pursuant to M.G.L. c. 138, §23. (Ex. 9)
 12. On March 9, 2012, the licensee duly and timely filed its Notice of Appeal with the Commission.

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 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. 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.)

HOURS OF OPERATION

M.G.L. c. 138, §23 provides, in pertinent part, that “upon application pursuant to §15A ... the description of the licensed premises may be changed with the approval of the licensing authorities.” The standard for this decision to approve or not is expressed in the first paragraph of §23 i.e., will the license

as changed meet a public need and be exercised in a manner so as to protect the common good. The Commission received evidence that the Local Board heard from many inhabitants surrounding the licensed premises, most if not all of whom were opposed to the change of the premises to include a service bar outside. These, and other factors considered by the Local Board in arriving at its decision are appropriate factors to weigh. See Ballarin Inc. v. Licensing Board of Boston, 49 Mass.App.Ct. 506 (2000). Based on these facts and the controlling law, the Commission is persuaded that this decision by the Local Board was based on the facts presented to the Local Board during its public hearing and that this decision was a reasonable exercise of the lawful discretion of the Local Board.

ALTERATION OF PREMISES

When the Local Board approved Donohue's alteration of premises, it limited the hours of operation for patio seating from 8:00 a.m. to 9:00 p.m. Sunday through Thursday, 8:00 a.m. to 10:00 p.m. Friday and Saturday, and required that no alcohol be served prior to 12:00 p.m. noon on Sunday. The Local Board also limited the months that the licensee could operate the outdoor seating area to the period of May 1st through September 30th. This was in contravention of the law.

Although the first sentence of the sixth paragraph of M. G. L. c. 138, §12, as amended through St. 1973, c. 477, provides that the local licensing authorities shall fix the hours during which sales of alcoholic beverages may be made by any licensee, either by a general determination as to all licensees or specially for each licensee; **sales ... must be permitted**, except on certain days (see M.G. L. c. 138, §33), **between 11 a.m. and 11 p.m.** (emphasis supplied) Casa Loma, Inc. v. Alcoholic Beverages Control Com., 377 Mass. 231 (1979).

The Supreme Judicial Court has concluded that the hours of a licensee during the periods from 8 a.m. to 11 a.m. and from 11 p.m. to the statutorily mandated closing time (2 a.m. as to restaurants) are a matter solely of local control..., subject only to judicial review of a local authority's failure to give a proper hearing. Thus the hours from 11 a.m. to 11 p.m. are not subject to local discretion but mandatory hours of operation. See Id. Therefore, the Local Board had no authority to require that the premises close prior to 11:00 p.m.

Moreover, the licensee holds an annual license. Once the Local Board approved the application to alter the premises to include the patio, the patio became part of the licensed premises. As such, the Local Board cannot mandate that the licensee close a portion of its premises for any part of the year. M.G.L. c. 138 §17.

Even if the Local Board had issued a seasonal license that encompassed the outdoor seating area, it could not have achieved its goal of limiting the months of operation in this manner. Id. A seasonal license is effective from April 1st to November 30th or from April 1st to the following January 15th at the discretion of the local licensing authority. Id. The Local Board limited Donohue's outdoor seating area to the period of May 1st through September 30th. Although a Local Board has the authority to impose reasonable conditions, the conditions imposed cannot change the character of the license. Hub Nautical Supply Co., Inc. v. Alcoholic Beverages Control Commission, 11 Mass. App. Ct. 770 (1981).

CONCLUSION

Based on the evidence and testimony at the hearing, the Commission APPROVES the action of the Watertown Licensing Board in denying Donohue Holdings, Inc. dba Donohue's application for an alteration of premises. However, the Commission DISAPPROVES the action of the Local Board in barring the licensee from making sales of alcoholic beverages within the hours, days and months specifically authorized by applicable state law, without exception or limitation. **The Commission**

remands this matter back to the Local Board with the recommendation to issue to the licensee a license that accurately reflects the hours, days and months specifically authorized by applicable state law, without exception or limitation.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman _____

Kathleen McNally, Commissioner _____

Dated: May 25, 2012

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: Patricia Farnsworth, Esq. via Facsimile
David J. Doneski, Esq. via Facsimile
Administration
File

