



Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
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Jean M. Lorizio, Esq.
Chairman

DECISION

PETROGAS GROUP NEW ENGLAND, INC. D/B/A 7-ELEVEN
350 GREENWOOD STREET
WORCESTER, MA 01607
LICENSE#: NEW
HEARD: 07/12/2018

This is an appeal pursuant to M.G.L. c. 138, § 67 by Petrogas Group New England, Inc. d/b/a 7-Eleven ("Applicant" or "Petrogas"). Applicant Petrogas Group New England, Inc. d/b/a 7-Eleven is appealing the action of the License Commission of the City of Worcester (the "Local Board" or "Worcester") in denying its M.G.L. c. 138, § 15 Retail Package Store Wines and Malt Beverages License application to be exercised at 350 Greenwood Street, Worcester, Massachusetts. The Applicant timely appealed the Local Board's action to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a hearing was held on Thursday, July 12, 2018.

The following documents are in evidence as exhibits:

1. Application Packet for Petrogas Group New England, Inc. d/b/a 7-Eleven;
2. Local Board's Notice of Hearing dated 4/30/2018;
3. Local Board's Decision, 5/24/2018;
4. Petrogas Notice of Appeal, 5/21/2018;
5. Map of Section 15 Off-Premises Package Store Licenses in Worcester;
6. List of Section 15 Off-Premises Package Store Licenses in Worcester;
7. DVD of Local Board's Public Hearing, 5/10/2018;
8. Transcript of Local Board's Public Hearing, 5/10/2018;
9. Photographs of Proposed location of Petrogas in relation to Kwik Pik, Inc. d/b/a Kwik Pik;
10. Aerial/Overview Photograph of Proposed Location and two other Section 15 Licensees, Kwik Pik, Inc. d/b/a Kwik Pik Convenience and Swamishrui Corporation d/b/a Boston Liquor Mart;
11. Minutes of Local Board's Public Hearing held 9/15/2011 regarding Kwik Pik Inc. d/b/a Kwik Pik's application for a section 15 package store wines and malt beverages license.

There is one (1) audio recording of this hearing, and two (2) witnesses testified.

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. Petrogas Group New England, Inc. d/b/a 7-Eleven (“Applicant” or “Petrogas”) is a business which operates multiple gas stations throughout New England and New York. Petrogas redeveloped the property at 350 Greenwood Street, in Worcester, Massachusetts, building a gas station with a convenience store at this location. Petrogas applied for a wine and malt beverages package store license as part of its business plan and convenience store. (Exhibits 1, 7, 8)
2. Petrogas is seeking an alcohol license to provide one-stop shopping as a convenience for its customers. It wants its customers to be able to purchase gasoline, some grocery items, and beer and wine in one stop. (Exhibits 7, 8)
3. A public hearing regarding Petrogas’ application for a section 15 retail package store wine and malt beverages license was held before the License Commission of the City of Worcester (the “Local Board” or “Worcester”) on May 10, 2018. (Exhibits 2, 7, 8)
4. Two individuals who are licensees and own nearby package stores (Mr. Anshul Patel – Kwik Pik, Inc. d/b/a Kwik Pik Convenience, and Mr. Jignesh Patel – Swamishrui Corporation d/b/a Boston Liquor Mart) testified in opposition to this application. A third licensee/owner of a package store (Ha Nguyen d/b/a Day Night Store) located nearby, notified the Local Board of her opposition to this application. No one testified in support of this application. (Testimony, Exhibits 7, 8)
5. Kwik Pik Inc. d/b/a Kwik Pik Convenience Store (“Kwik Pik”) at 557 Southwest Cutoff, holds a section 15 retail package store wines and malt beverages license. It is located .2 miles away, or approximately 1000 feet across the street from Petrogas. (Testimony, Exhibits 5, 6, 7, 8, 9, 10)
6. Swamishrui Corporation d/b/a Boston Liquor Mart (“Boston Liquor Mart”) at 566 Southwest Cutoff, holds a section 15 all alcoholic beverages retail package store license and is located .2 miles away from Petrogas, or approximately 1200 feet away in the adjacent shopping plaza. (Testimony, Exhibits 5, 6, 7, 8, 10)
7. Ha Nguyen d/b/a Day Night Store (“Day Night Store”) at 26 Greenwood Street, holds a section 15 wines and malt beverages retail package store license and is located approximately 1.4 miles¹ away from the Petrogas location. (Testimony, Exhibits 5, 6)

¹ During the Local Board hearing statements were made by the Local Board that Ha Nguyen d/b/a Day Night Store was situated .5 miles away from Petrogas’ location. The record reflects that Day Night Store is located 1.4 miles away from Petrogas’ location. (Testimony, Exhibits 5, 6, 7, 8)

9. The Local Board unanimously voted to deny this application. The Local Board's written decision stated that this application was rejected because
- “-the area is adequately served by three existing establishments
 - there is no need for another package store right across the street from an existing package store.” (Exhibit 3)

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 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. As Section 23 provides in pertinent part,

“[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.”

M.G.L. c. 138, § 23.

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, 378-379 (2006); Ballarin, Inc. v. Licensing Bd. of Boston, 49 Mass. App. Ct. 506, 510-511 (2000). A local board exercises very broad judgment about public convenience and public good with respect to whether to issue a license to sell alcoholic beverages. Donovan, 65 Mass. App. Ct. at 379.

It is well-settled that the test for public need includes an assessment of public want and the appropriateness of a liquor license at a particular location. Ballarin, 49 Mass. App. Ct. at 511. In Ballarin, the Appeals Court held that “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 511, 512.

In Ballarin, the Court identified factors to be considered when determining public need:

“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.” Ballarin, 49 Mass. App. Ct. at 511. (Italics supplied.)

A Board must state the reasons for its decision whether or not to issue the liquor license. M.G.L. c. 138, § 23. “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, 880 (1981) (quoting Westborough v. 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 remain[s] 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 880.

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) (Italics supplied.); see Ballarin, Inc. v. Licensing Bd. of Boston, 49 Mass. App. Ct. 506, 512 (2000) (when reviewing the local licensing authority’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”). However, while this discretion of the local licensing authority is broad, “it is not untrammelled.” Ballarin, 49 Mass. App. Ct. at 511. In Donovan, the Appeals Court held “Neither the [local 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.” Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 379 (2006). “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.’” Id. (quoting Ruci v. Client’s Sec. Bd., 53 Mass. App. Ct. 737, 740 (2002)).

The Local Board held a hearing during which it heard testimony and reviewed Petrogas’ application along with documentary evidence. The Commission finds that the record unequivocally demonstrates the Local Board considered a Ballarin factor in determining its decision of denial regarding this application. Ballarin, 49 Mass. App. Ct. at 511. The Local Board considered the number of existing dispensaries in this neighborhood of Worcester (Exhibits 7, 8) Id. The Local Board found that this area is well served by the existing licenses, with two retail package stores within 1200 feet of Petrogas’ location.² Therefore, the Local Board determined that there is no public need for an additional package store in the proposed location. (Testimony,

² Petrogas asserts that the Local Board’s Decision is not supported by the record of the proceedings wherein a Board Member made a statement at the Local Board hearing regarding the existence of three package stores within 0.5 miles of the proposed location. The Commission finds that the record reflects, and the Local Board written Decision accurately states, that there are 2 package stores within 0.5 miles of the proposed location.

Exhibits 5, 6, 7, 8, 9, 10) The Massachusetts Appeals Court has held that once a local board determines that an 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)

In issuing its decision, the Local Board made specific and particularized findings, which the Commission determined are supported by the record of these proceedings. As the Supreme Judicial Court has stated,

[t]here was evidence before the [Local Board] that the area had a large number of establishments selling beer and wine, and that the public did not need an additional establishment. The [Local Board] stated the reason for their decision. There is nothing in the record to indicate that the decision was whimsical or not based on logical analysis. On the record, we can only conclude that the decision was founded on reasoned judgment, and was not arbitrary or capricious.

Great Atlantic & Pacific Tea Co., Inc., 387 Mass. at 839-840.

The Commission finds that the Local Board's decision to deny Petrogas' application was appropriate and reasonable. The Local Board found after deliberations that this area is adequately served by the existing package stores and there is no public need for a package store license at this location. The Commission finds that the record clearly supports the decision by the Local Board to deny this application based on the Local Board's consideration and application of the relevant Ballarin factor. Ballarin, 49 Mass. App. Ct. at 511.

The Local Board's decision was based on sufficient evidence presented during the course of the public hearing. The Local Board's reliance on these factors was reasonable and appropriate pursuant to the holdings in Ballarin, supra, and Donovan, supra. 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

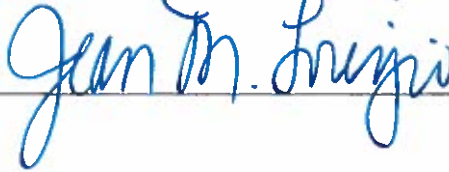
Based on the evidence and testimony presented at the hearing, the Commission **APPROVES** the action of the License Commission for the City of Worcester in denying the M.G.L. c. 138, § 15 wine and malt beverages license application of Petrogas Group New England, Inc. d/b/a 7-Eleven.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



Jean Lorizio, Chairman



Dated: October 4, 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.

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Local Licensing Authority
Frederick G. Mahony, Chief Investigator
Administration, File