



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

Steven Grossman
Treasurer and Board President

Kim J. Gustafson, Esq.
Counsel

DECISION

PRICE CHOPPER OPERATING CO. OF MASSACHUSETTS, INC. DBA PRICE CHOPPER #194
72 PULLMAN ST
WORCESTER, MA 01606
LICENSE#: NEW
HEARD: 09/25/2013

This is an appeal of the action of the City of Worcester License Commission (the "Local Board") in denying the application for transfer of location of an all-alcoholic beverages M.G.L. c. 138, §15 license (the "Application") from Millzan, Inc. ("Millzan") to Price Chopper Operating Co. of Massachusetts, Inc. dba Price Chopper #194 (the "Applicant" or "Price Chopper") located at 72 Pullman Street, Worcester, MA. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, October 25, 2013.

The following documents are in evidence:

1. ABCC Hearing Notice dated June 24, 2013;
 2. Minutes of the Local Board Hearing held January 10, 2013;
 3. Minutes of the Local Board Hearing held January 24, 2013 ;
 4. City of Worcester Department of Planning & Regulatory Services Memorandum dated January 9, 2013 Re: Transfer Application;
 5. Decision dated January 16, 2013 of Local Board to Price Chopper;
 6. Map Indicating Other §15 licenses within a half-mile radius of Proposed Location;
 7. Google Maps Printout Showing Distance from Price Chopper Proposed Location, 72 Pullman Street, to 730 West Boylston Street, Worcester;
 8. Petition in Support of License Transfer (128 pages);
 9. Photos Four of Baaron's Liquors.
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- A. Transcript of the Local Board Hearing held January 10, 2013;
 - B. Transcript of the Local Board Hearing held January 24, 2013;
 - C. Transcript of the Local Board Hearing held February 7, 2013;
 - D. Affidavit of Deborah Steele, Staff Assistant to Local Board;
 - E. City of Worcester Department of Planning & Regulatory Services Chart Showing §15 licenses within various radii of the Proposed Location.

There is one audio recording of this hearing. Two witnesses testified before the Commission. The Commission took Administrative Notice of the Commission files for Price Chopper, Millzan, and the Application.

FACTS

1. Pursuant to M.G.L. c. 138, §17, Worcester is allowed 37 annual all alcoholic beverages §15 or off-premises licenses and has issued all 37 licenses. Therefore, Worcester is "at quota" for off-premises all alcoholic beverages licenses.¹ (Commission Records)
2. Pursuant to the same statute, Worcester is also allowed 37 §15 annual wines and malt beverages licenses. Of the 37 allowed, the Local Board has issued 17. (Commission Records)
3. Millzan, Inc. is a Massachusetts corporation with a place of business at 278 Millbury Street in Worcester, Massachusetts. It has held a §15 all alcoholic beverages license for many years. (Commission Records)
4. On or about November 29, 2012, Price Chopper filed the Application to transfer Millzan's all alcoholic beverages §15 license to Price Chopper and to transfer the location to 72 Pullman Street. (Ex. 5)
5. Approximately, one month later, on December 27, 2012, KJ Baarons ("KJ") filed an application with the Local Board to transfer the location of its all alcoholic beverages §15 license from 201 Summer Street to 730 West Boylston Street Worcester. KJ's lease had expired. (Ex. B)
6. KJ's proposed location is approximately 0.5 of a mile from Price Chopper. (Exs. 3, B, E)
7. Individuals seem to believe that these locations (or within close proximity thereto) would be a successful place for a §15 alcoholic beverages license. On two occasions, Bob Vardersian, the owner of Haik, Inc. ("Haik") filed applications to transfer the location of two different §15 all alcoholic beverages licenses to these areas. (Exs. 4, A)
8. On September 6, 2007, the Local Board held a hearing on Haik's request to transfer an all alcoholic beverages §15 license from 62 Franklin St. to 945 West Boylston St. The Local Board denied the application. The Local Board found that "there were adequate liquor establishments in the general area to serve the public need and that an added establishment would add to the traffic conditions in the area." (Ex. 4)
9. Subsequently, on January 25, 2008, Haik filed another application with the Local Board to transfer ownership and location of a §15 all-alcoholic beverages license to Pullman Street. On February 14, 2008, the Local Board denied this application. (Ex. 4, A)
10. The Local Board found that, "There are adequate liquor establishments in the general area to serve the public need. There are three existing establishments within a 2.78 mile (sic) of proposed location." (Ex. 4)
11. On June 11, 2008, the Commission upheld this decision. (Ex. 4)
12. On January 10, 2013, the Local Board held a public hearing and considered Price Chopper's Application. (Exs. 2, 5, A)

¹ Thus in order for an entity to obtain an all alcoholic beverages off-premises license, an existing license must become available through sale, revocation, cancellation, etc.

13. Prior to the hearing, the Local Board went to view the proposed license premises. (Exs. 2, 5, A)
14. During the hearing before the Local Board, Price Chopper presented testimony from a number of employees as well as documentation supporting the Application. Among the documents, was a petition with approximately 2,000 signatures supporting the transfer of the license to Price Chopper. (Exs. 2, 5, 8, A)
15. Price Chopper also submitted a Memorandum that the City of Worcester Department of Planning & Regulatory Services ("DPRS") issued on January 9, 2013. The Memorandum provided in pertinent part:
 - a) Price Chopper is "within the Pullman Street industrial park and is not in proximity to a residential use";
 - b) that there were zero package store licenses within a one-mile radius of Price Chopper, and there were three licenses within a two-mile radius of Price Chopper;
 - c) "[t]his area has a relatively low concentration of licenses when compared with other areas of the city";
 - d) "For the city as a whole, in districts where package stores are allowed by the Zoning Ordinance, there are 6.28 licenses per square mile";
 - e) the site meets the zoning requirements;
 - f) regarding the sufficiency of parking, that the "site meets the requirements of the Zoning Ordinance";
 - g) regarding the effect on traffic in the proposed License location, that "[t]here would be minimal impact at this location" and may actually reduce traffic because "[c]o-location of [alcohol and supermarket] sales within a supermarket may reduce vehicle trips in the area";
 - h) regarding the size of the operation, the Local Board should limit the size of this operation to similarly sized areas within other packages stores;
 - i) regarding noise issues, that "[t]here should be minimal impact due to noise because it is not in a residential area"; and
 - j) regarding the reputation of Price Chopper, that "the applicant passed (the) background check". (Ex. 4)
16. The Local Board also heard testimony from individuals who opposed the Application. Some of these individuals were neighbors and neighboring businesses, however the majority of the opposition came from competitors. (Ex. A)
17. After hearing the public comments, the Commission reviewed a map with information regarding the number of recently active liquor licenses, by type, within half mile radius increments of the proposed location. (Ex. E)
18. As of the hearing date, there were:
 - a) zero §15 licensees within a one-mile radius of the proposed location;
 - b) two §15 all alcoholic beverages licensees (Greendale Liquor and O'Hara's) within a two-mile radius of the proposed location; and
 - c) six §15 all alcoholic beverages licensees (Allstar Liquor, Austin Liquor, Avighna Corporation, Greendale Liquor, Lincoln Discount Liquors, and O'Hara's) within a three-mile radius of the proposed location. (Ex. E)

19. At the hearing the Local Board voted 3-0 to approve the license transfer from Millzan to Price Chopper; however, they voted 2-1 to deny the transfer of location from 278 Millbury Street to 72 Pullman Street. (Exs. 5, A)
20. Commissioner Salvidio stated that, "he had read the memo from the Department of Planning and Regulatory services and did not see a need, as there were other full package stores right in the area." (Ex. 2)
21. Commissioner Salvidio also stated that he was new to the Local Board but aware of past decisions for this area, and did not feel the density of the area had changed in the past few years. "There are enough full package stores to service the public need in the area, especially considering the application was for an all-alcohol (sic) license and not just a malt & wine (sic) license." (Ex. 2)
22. Chairwoman Shea stated that, "based on the information presented and the view of the premises, she believes that the area is well served by the existing package stores and does not see the need for another all-alcohol (sic) license in the area." (Ex. 2)
23. On January 16, 2013, the Local Board issued a written Notice of Decision stating its reasons for denying the license transfer. (Ex. 5)
24. The Local Board found that "there is no public need for another package store in the area and that the need is adequately served as you (sic) have two full package stores within close proximity to this location." (Ex. 5)
25. Thereafter, on January 24, 2013, the Local Board held a hearing and considered KJ's application to transfer the location of its §15 all alcoholic beverages license from 201 Summer Street to 730 West Boylston Street, Worcester. (Exs. 3, B)
26. Prior to the hearing, the Local Board went to view the proposed license premises. The space was not finished. (Ex. B)
27. The location is approximately 0.5 of a mile from Price Chopper. (Exs. 3, B, E)
28. The pictures of the outside of KJ's building depict signage consistent with a §15 all alcoholic beverages store. KJ Baaron's Liquors is written in large letters on the awning across the front of the building. Directly below its name are the words: "specialty foods", "fine wine & spirits", and "beer". There are two very large signs mounted to the front of the building advertising loose case bottles of what appears to be Corona Beer for \$22.99, plus deposit and loose case bottles of Heineken Beer for \$23.99, plus deposit. There is also a sign attached to the front of the building advertising cigar sales. Finally, there is a smaller, stand-alone sign near the entrance to the parking lot that says "OPEN" in large capital letters, KJ Baaron's in smaller letters, and fine wine and spirits in even smaller letters below it. The outside of the building appears very similar to other §15 stores. (Ex.9)
29. During the hearing, representatives of KJ stated that the store's focus is and will continue to be on fine wines, gift baskets, gourmet foods, and wine tastings. (Exs. 3, B)
30. In response to Commissioner Mullan's question about whether KJ would be serving a need not currently met in the West Boylston Street area, Ms. Krock, KJ's owner, stated that her package store is different from other package stores, and serves different customers. KJ's attorney,

Attorney Cotton, stated that KJ would not be duplicating what the package stores in the West Boylston Street area already offer. (Ex. B)

31. In response to Commissioner Mullan's question about whether he believed that the area was saturated with alcoholic beverages licenses, Attorney Cotton stated, "Well, I guess I think they [sic] way we address it is we compare it to other parts of the city which are easily, are more saturated in a few locations and those people seem to be serving the needs of whoever they serve and I think, again getting to that specialty area of what she does, I think we are less of a factor in terms of saturation then we might otherwise might be if you felt we directly competed with the other stores in terms of spirits sales and beer sales. Those are just a much smaller part of our business. (Ex. B)
32. Ms. Krock stated that 80% of the sales are wine, and a large part of her sales were due to wine tastings. The store prides itself on selling different wines that typical package stores do not carry. (Ex. B)
33. Local business owners also spoke at KJ's hearing. The general consensus was that there was no public need for another liquor store in the area. (Exs. 3, B)
34. Jim Vasiadis, the owner of O'Hara's Liquors, a §15 all alcoholic beverages licensee located at 402 West Boylston Street in Worcester; spoke in opposition to KJ's application. (Ex. B)
35. Mr. Vasiadis told the Local Board that, "We are a different kind of liquor store along with being a package store we sell high graded wines, high end wines, expensive wines. We sell the wine spectator, [sic] wine and spirits magazines. Our focus is on selling fine wines, fine beers, and fine liquors along with being a package store. We have been doing it for the last 24 years. We have wine tastings every Friday night that serves the community well. We do gift baskets for the holidays. Our sales our [sic] dependent on fine wines also. I believe the need is being served in the neighborhood from that specter (sic) and the fact that there are additional four liquor stores, two beer and wine stores and so forth it is a saturated area as far (sic) service with alcohol, fine wines, fine liquors, fine beers so I would like to think that the neighborhood needs are being served rather well and that you see that there are many other places that could possibly service as well. (Ex. B)
36. Mr. Vasiadis went on to say, "I want to make sure you are aware of that because they (KJ) are weighing in on their specialty end of it and I'm telling you it is being serviced, hopefully, many people throughout Worcester County by O'Hara's and by many other liquor stores in the area. So then it becomes a need and we have to realize there are many liquor stores within a mile and a half, two and a half miles of there. (Ex. B)
37. Subsequently, Minnie McGovern, an owner of McGovern's Greendale Liquor spoke before the Local Board in opposition to KJ's application. She also stated that, "I make gift baskets and whatever they want I put in them and there are special things to make them and we do have wine tastings just like O'Hara's. We have wine tastings and even some of our liquor people and wine people put on displays in the wine tastings. We have cheese and crackers and candy and whatever and that its." [sic] (Ex. B)
38. At the conclusion of the hearing, the Local Board voted 3-0 to approve the transfer of location of KJ's all alcoholic beverages §15 license. (Exs. 3, B)

39. The Local Board attempted to distinguish the two decisions by stating that KJ is a specialty store and a "public need" for a store like this exists in the locality. (Exs. 3, B)
40. The Local Board discussed the type of operation that KJ would operate: specifically the high end wines, specialized gift baskets, and wine tastings that would attract a different clientele than the average liquor store. (Exs. 3, B)
41. In an effort to explain his reasoning Commissioner Salvidio said: "I would like to state my reasons on the record. They differentiated from the Price Chopper application. I do believe that is well served but I do believe that the applicant has distinguished, the application, the niche they serve in the marketplace doesn't seem to be as well served as just having another liquor license in the area. So I believe the applicant has shown through testimony and counsel testimony that the product she turns out is differentiated enough from the other two liquor stores in the are[a] that I believe that doesn't effective [sic] the density." (Exs. 3, B)
42. However, both the owners of O'Hara's and McGovern's Greendale Liquor's, which are both less than a mile from KJ testified that they sell fine wines, and gift baskets. They also testified that they hold weekly wine tastings and that their sales are dependent upon fine wines much like KJ's. (Ex. B)
43. Subsequently, Price Chopper filed an application for a \$15 wines and malt beverages license. On February 7, 2013, the Local Board voted 3 – 0 to approve this application.
44. Price Chopper is currently operating a \$15 wines and malt beverages license at the 72 Pullman Street location.

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, §15. 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).

M.G.L. c. 138, §23 provides, in pertinent part that, "[a]ny license under this chapter ... 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." § 23 further provides, in pertinent part that, "[a]ny license issued under this chapter may, upon application pursuant to section fifteen A, be transferred from one location to another ... with the approval of the licensing authorities." 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).

The Appeals Court has discussed the statutory standard to grant a license and the factors that a licensing authority may properly consider in its decision whether to grant or deny a license application. In Ballarin, the Appeals Court held that "the statute authorizing the issuance of liquor licenses speaks in terms of serving 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." Ballarin, supra. "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.

"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. 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.)

In this case, the Local Board denied Price Chopper's Application because it found that "there is no public need for another package store in the area and that the need is adequately served as you (sic) have two full package stores within close proximity to this location." The Local Board's denial in this matter is consistent with its past actions in denying Haik's 2007 transfer application to 945 West Boylston St. and its 2008 §15 all-alcoholic beverages license application to transfer ownership and location to Pullman Street.

Furthermore, the Local Board's findings were consistent in all three matters. The Local Board found that, "there are adequate liquor establishments in the general area to serve the public need. There are three existing establishments within a 2.78 mile (sic) of proposed location." If that was the end of the inquiry, the Local Board's decision may have been supported by the record.

What becomes challenging for the Commission, is the action the Local Board took merely two weeks later when it approved KJ's application for a change of location to a premises only a 0.5 mile from Price Chopper and less than a mile from O'Hara's and Greendale Liquors. Although the Local Board attempted to clarify its position for voting to approve KJ's application after it denied Price Chopper's application, we believe it failed to do so.

The Local Board endeavored to distinguish KJ's type of business from the existing dispensaries in the locale and Price Chopper by discussing the "niche they serve in the marketplace." The Local Board found that KJ's product is differentiated enough from the other two liquor stores in the are[a] (sic) that it doesn't effective [sic] the density." The Local Board was referring to the types of wines and gift baskets that KJ sells.

This is an appropriate discussion for a Local Board. 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). However, both Jim Vasiadis, the owner of O'Hara's Liquors and Minnie McGovern, an owner of McGovern's Greendale Liquor testified that they also sell gift baskets and specialty wines, and rely on these sales for their businesses. Both of these stores are less than a mile from KJ (and within two miles of Price Chopper). Therefore, the determination that KJ's product is different from other dispensaries in the area is not supported by the record.

As the Local Board only focused on the number of alcoholic beverages dispensaries in the area, and did not cite other "Ballarin factors", the Commission presumes that traffic, noise and the size of Price Chopper's operation, were not part of the Local Board's decision to deny the Application. See Ballarin, supra. Moreover, merely, four weeks after the Local Board denied Price Chopper's all alcoholic beverages license, it granted Price Chopper a \$15 wines and malt beverages license. As such, the reputation of the applicant was also not a factor that contributed to the Local Board's decision. Based on the foregoing, 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.

CONCLUSION

The Alcoholic Beverages Control Commission **DISAPPROVES** the action of the City of Worcester License Commission in denying the application of Price Chopper Operating Co. of Massachusetts, Inc. dba Price Chopper #194. The matter is remanded to the Local Board with the recommendation that it grants Price Chopper Operating Co. of Massachusetts, Inc. dba Price Chopper #194 a \$15 all alcoholic beverages license.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman, _____

I, the undersigned, hereby certify that I have reviewed the hearing record and concur with the above decision.

Susan Corcoran, Commissioner _____

Kathleen McNally, Commissioner _____

Dated: January 8, 2014

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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Administration
File