



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

*Deborah B. Goldberg*  
*Treasurer and Receiver General*

*Kim J. Gainsboro, Esq.*  
*Chairman*

**DECISION**

**SHAW'S SUPERMARKETS INC.**  
**14 WEST BOYLSTON STREET**  
**WORCESTER, MA 01605**  
**LICENSE#: NEW**  
**HEARD: 05/13/2015**

This is an appeal of the action of the City of Worcester License Commission (the "Local Board" or "Worcester") for denying the M.G.L. c. 138, §15 wines and malt beverages license application of Shaw's Supermarkets Inc. ("Applicant" or "Shaw's") to be exercised at 14 West Boylston Street, Worcester, MA. The Applicant timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and a hearing was held on Tuesday, May 13, 2015.

The following documents are in evidence:

1. Shaw's Application for a M.G.L. c. 138, §15 wines and malt beverages License, 08/04/2014;
  2. Shaw's Presentation Materials for License Hearing, 09/04/2014;
  3. Transcript of Local Board's Hearing, 09/25/2014;
  4. Worcester Department of Planning & Regulatory Services Map, "Number of Off-Premises Liquor Licensees Citywide and by Proposed Location," with approximate distances between licensees and with attached list of licensees and approximate distances between licensees, 08/20/2014;
- A. Local Board's Meeting Minutes, 09/25/2014;
  - B. Worcester Department of Planning & Regulatory Services Map, "Number of Off-Premises Liquor Licensees Citywide and by Proposed Location," 08/20/2014;
  - C. Memorandum from Deborah Steele to Karon Shea regarding Shaw's Supermarkets, Inc. – Request for an Off-Premise Malt & Wine Package Store License, 09/03/2014;
  - D. Worcester's Notice of Decision, 10/06/2014;
  - E. Chart Reflecting Proximity of Development Projects in Relation to Shaw's;
  - F. Affidavit of Stephen S. Rolle, Director, Worcester Department of Planning & Regulatory Services, 5/11/15.

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

The Commission took Administrative Notice of the Applicant's Commission file and of the Commission files for the licensees listed from A to Q on Exhibit 4.

## FACTS

1. Shaw's is a Massachusetts corporation with its principal office located at 750 West Center Street, West Bridgewater, MA.
2. Shaw's has an existing supermarket located at 14 West Boylston Street, Worcester, MA, at the intersection of West Boylston Street and Gold Star Boulevard, near both I-190 and I-290 in central Worcester. (Exhibit 2, Commission Files)
3. The area to the west of Shaw's West Boylston Street is primarily residential with mostly triple decker homes and then single family homes, schools, and gymnasiums as you travel west of that location. (Testimony)
4. There are virtually no package stores in the neighborhood west of Shaw's due to its residential nature. (Testimony, Exhibit 4)
5. On or about August 4, 2014, Shaw's submitted to the Local Board a M.G.L. c. 138, §15 wines and malt beverages retail package store license application (the "Application") to be exercised at this location. (Exhibit 1)
6. Shaw's proposed business model was presented as an "[a]ccessory retail package store section contained inside existing supermarket premises. Section contained within individual aisle secured by aisle doors/cutoff with separate lockable liquor storage area in a back room." (Exhibit 1)
7. Worcester has supermarkets that have §15 licenses located within their establishments and has available licenses under its quota. (Exhibits 4, C)
8. The Local Board viewed the proposed location and held a public hearing on September 4, 2014; however, the Board requested more time to review the Application and continued the matter to September 25, 2014. (Exhibit D)
9. Prior to the September 25<sup>th</sup> hearing, Shaw's provided the Local Board with presentation materials for the Application. (Exhibit 2)
10. The Local Board held the hearing on the Application on September 25, 2014. (Exhibit D)
11. Worcester's license quota allows for thirty-seven (37) §15 all alcoholic beverages and thirty-seven (37) wines and malt beverages licenses to be issued. At the time of the hearing, Worcester had issued thirty-seven (37) all alcoholic beverages and nineteen (19) wines and malt beverages licenses. (Exhibit C)
12. Austin Liquor, an all alcoholic beverages licensee, a large package store on Gold Star Boulevard, is approximately .17 miles away from Shaw's, which translates to 910 feet, more or less, from Shaw's structure to structure, and 705 feet, more or less, from Shaw's lot to Austin Liquor's lot. (Testimony; Exhibits 4, D)
13. There are eight (8) §15 licenses within a one and a half (1.5) mile radius of Shaw's West Boylston Street location. (Exhibit B)
14. Those eight (8) licenses were issued as early as 1935 and as late as 2006. (Commission Files)
15. There are twenty-eight (28) §15 licenses within a two and a half (2.5) mile radius of Shaw's West Boylston Street location. (Exhibit B)

16. There are also package stores located in close proximity to one another. Two package stores – Wine Vine, which has a wines and malt beverages license, and Highland Liquors, which has an all alcoholic beverages license – are 285 feet from one another. Two other package stores – Albino’s Market, which has a wines and malt beverages license, and Belmont Liquor, which has an all alcoholic beverages license – are also 285 feet from one another. (Exhibit 4)
17. All four of those package stores are less than a mile and a half (1.5) from the Shaw’s on West Boylston Street. (Exhibit 4)
18. Other than Shaw’s counsel and representatives, no one appeared at the September 25, 2014 hearing in support of Shaw’s Application. However, Shaw’s submitted a petition with signatures it collected over the course of about a ten day period. The petition contains approximately 528 signatures from its customers supporting the addition of a beer and wine section at this location. (Testimony; Exhibits 2, 3, D)
19. Several people appeared at the hearing in opposition to Shaw’s Application. (Exhibits 3, D)
20. The individuals in opposition included State Representative Jim O’Day, Worcester City Councilor Tony Economou, Ed Breault (President of the Northwest Business Association and practicing CPA), Attorney John Shea (representing certain local package stores), William Kristi (of Renaissance Wine and Spirits), Jim Vasiliadia (of O’Hara’s Wine and Liquors), William Talcott (representing Greendale Liquor and Package Store), and Nick Vasiladis (owner of Lincoln Discount Liquors). (Exhibit 3)
21. In summary, those opposing the Application argued a lack of need in the particular area, the need to support small businesses, public safety (for example, under-aged employees working the registers and the risk of alcoholic beverages being sold during off-hours), and an increase in §15 licenses in the past two years in that area of Worcester. Shaw’s did not present any evidence that the products it intended to sell were different from any of the other dispensaries in the area. (Exhibit 3)
22. The Local Board denied Shaw’s Application and gave Shaw’s written notice of its decision on October 6, 2014. The Local Board found the following with regard to the factors found in Ballarin, Inc. v. Licensing Bd. of Boston, 49 Mass. App. Ct. 506 (2000):
  - (1) Public need: [The Local Board] feels that area is well served by existing stores in the area, specifically Austin Liquors. Austin Liquors is 910 feet, more or less, from Shaw’s structure to structure, and 705 feet, more or less, from Shaw’s lot to lot.
  - (2) Appropriateness: [The Local Board] feels that it is more difficult to regulate and secure alcohol in a large store such as Shaw’s.
  - (3) Traffic: The area is already heavily congested because of the existing store but traffic is not a factor due to the existing stores.
  - (4) Reputation: The [Local Board] agrees that Shaw’s has an excellent reputation as a supermarket. Regarding Shaw’s reputation as a license holder there has only been one violation on record.
  - (5) Want: The petition presented by customers of Shaw’s carries some weight but there was no one at the [hearing] in support of the application. Moreover, the area is more than adequately served by the package store in close proximity as well as others in the area. Within a 2.5 mile radius of the proposed location there are twenty-eight (28) §15 off-premises liquor licenses. (Exhibit D)

23. The Board further stated that “[t]here are adequate liquor establishments in the area to serve the public need, with eight (8) existing establishments within a 2-mile radius of the proposed location and Austin Liquors being less than 900 feet away.” (Exhibit D)

### DISCUSSION

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); See Ballarin, Inc., 49 Mass. App. Ct. at 512 (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, Inc., 49 Mass. App. Ct. at 511.

The Appeals Court has held that a local board may deny a license even if the facts show that a license lawfully could be granted. See Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 379 (2006). “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.” See id. “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)). 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.

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 (Italics added).

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).

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, 65 Mass. App. Ct. at 378-379; Ballarin, Inc., 49 Mass. App. Ct. at 510-511. 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.

A local board's determination to deny an application based on the lack of public need is not contrary to law where the local board considers the need for the particular business that the applicant sought to run and the local board applies its analysis to the applicant's proposed business and to the location of the proposed business. Id. at 380. In Ballarin, the Appeals Court held that "[n]eed 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, Inc., 49 Mass. App. Ct. at 511 (Italics added).

"Consideration of the *number of existing dispensaries in a locality* is a proper concern . . . as are the views of the inhabitants of the locality in which a license is sought . . . In making its discretionary determination, a licensing authority may take 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. (Italics added).

The Ballarin Court further noted that "[t]he 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.

Upon review of the record before the Local Board and the evidence before Commission, the Commission finds that the Local Board fulfilled its responsibility regarding the Application and that the Local Board's decision was not based on an error of law or reflective of arbitrary or capricious action. See Great Atlantic & Pacific Tea Co., Inc., 387 Mass. at 837. The Local Board held a hearing during which it heard testimony and reviewed Shaw's Application and documentary evidence. The Local Board received evidence that there are twenty-eight (28) §15 licensees within a two and a half (2.5) mile radius of Shaw's and eight (8) §15 licensees within a one and a half (1.5) mile radius of Shaw's.

The Local Board also received evidence that Austin Liquors, a large package store, is 910 feet, more or less, from Shaw's structure to structure, and 705 feet, more or less, from Shaw's lot to Austin Liquors' lot, or, in other words, .17 of a mile from Shaw's. (Testimony; Exhibits 3, 4, D) It was not erroneous for the Local Board to conclude that the area of Shaw's "is more than adequately served by the package store in close proximity as well as others in the area." (Exhibit D)

Shaw's argues that it would offer the convenience of one stop shopping for its customers who, for example, would be able to purchase a bottle of wine or package of beer when stopping at the supermarket for something to cook for dinner. Shaw's argues that the traditional package stores, like Austin Liquors, do not and cannot offer that type of convenience. Similarly, Shaw's asserts that because it would sell not only wine/beer but also groceries, it is more akin to the type of licensee in Donovan v. City of Woburn, 65 Mass. App. Ct. 375 (2006) and that the Local Board should have given more consideration to the need for a supermarket offering wine/beer as opposed to the need for another general package store.<sup>1</sup>

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<sup>1</sup> Shaw's also points to the ABCC decision of New England Farms, Inc. (August 21, 2013) where the Commission disapproved of the local board's denial of a §15 license. In N.E. Farms, the Commission found that the local board had not properly considered the Ballarin factors or the applicant's type of business under Donovan and instead focused on potential competition between that applicant and an existing nearby licensee. Unlike N.E. Farms, the Local Board in the instant case conducted a thoughtful and thorough analysis of the Ballarin factors with respect to Shaw's Application. Additionally, this Commission finds that Shaw's proposed type of business (a grocery store

However, the transcript of the hearing before the Local Board reveals the Local Board heard evidence about customer convenience and the type of products Shaw's would sell compared to traditional package stores. (Exhibit 3) There was no evidence presented that Shaw's intended to sell different products from those sold at the surrounding off-premises establishments. The fact that Austin Liquors is in such a close proximity to Shaw's and that there are a number of other §15 licensees nearby Shaw's were major factors in the Local Board denying the Application. (Exhibit 3)

Shaw's also points to its customer survey containing about 528 signatures of people who support the Application. As the Local Board indicated in its decision, despite the written support, there was no one at the Local Board's hearing in support of the Application. (Exhibit 3) There were many people in attendance who opposed the Application, although most of them were §15 licensees who would compete with Shaw's were the Application granted. (Exhibit 3) However, the Local Board properly did not consider competition in its denial of the Application, and the Commission does not do so now. Great Atlantic & Pac. Tea Co., 13 Mass. App. Ct. at 271 ) (the statutory standard of public need "affords no protection for licensees against competition but provides only for the service of the public in a way to protect the common good by making provision for an adequate number of places where members of the public may obtain desired beverages"). In any event, a community's opinion concerning an application for a liquor license is not the sole factor in determining whether the application should be granted. Ballarin, Inc., 49 Mass. App. Ct. at 511.

The Local Board properly considered the Ballarin factors<sup>2</sup> when determining that there was not a need for another Section 15 license in this location. The denial was based on information presented during the course of the public hearing and grounded in the cases of Ballarin and Donovan. 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.

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, is not arbitrary and capricious.

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selling alcoholic beverages) is more akin to a traditional package store, unlike the type of service the applicant sought to provide in the Donovan case (sale of gifts containing, in some instances, alcohol).

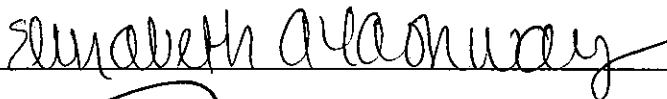
<sup>2</sup> In its analysis of the Ballarin factors, the Local Board also indicated in its decision a concern that it would be "more difficult to regulate and secure alcohol in a large store such as Shaw's." (Exhibit D) The Commission does not share the Local Board's concerns, especially given Shaw's purported reputation, history of selling alcoholic beverages in other Massachusetts stores, and the fact that Worcester granted a similar license to another supermarket. (Testimony; Commission Files) However, there was substantial testimony before the Local Board about possible safety issues in a supermarket selling alcoholic beverages. (Exhibit 3) The Local Board's determination was not clearly erroneous or arbitrary or capricious given that there was evidence to suggest that Shaw's could face additional public safety issues that are not necessarily faced by traditional package stores (for example, under-aged employees working the registers and the risk of alcoholic beverages being sold during off-hours). (Exhibit 3)

CONCLUSION

Based on the evidence and testimony at the hearing, the Commission **APPROVES** the action of the City of Worcester Licensing Board in denying the M.G.L. c. 138, §15 wines and malt beverages license application of Shaw's Supermarkets Inc.

**ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Elizabeth A. Lashway, Commissioner



Kim S. Gainsboro, Chairman,



Dated: June 22, 2015

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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