

Memo

To: Dave DeLuca
From: Lena-Kate Ahern
Re: *Liquor License Transfer Standard and Evidence Requirements*
Date: Tuesday, November 25, 2014

The Board of Selectmen must determine whether a liquor license transfer is in the “public interest.” Mass. Gen. Laws ch. 138, § 23. State liquor license laws are intended 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” for the public to purchase alcoholic beverages. Mass. Gen. Laws ch. 138, § 23. Boards can treat transfer applications almost the same as original license applications. See *In re: EKB Corp., Inc. dba Sully C’s Bar and Grill* (Saugus) (ABCC Decision dated Feb. 5, 2013) (applying same standard for license expansion to license transfer); *In re: Foodmaster Super Markets, Inc.* (Weymouth) (ABCC Decision dated Aug. 29, 2007) (applying same standard for license expansion to license transfer); *but see In re: Drogheda United Corp., d.b.a. The Porter House Pub* (Quincy) (ABCC Decision dated Mar. 9, 1999) (“Although, the Commission finds that licensing authorities may look beyond character and fitness in determining whether or not to grant a transfer of a license, it may not go so far as to hold a hearing similar to that it conducts in deciding whether or not to grant an original license. Such actions would go beyond the plan language of M.G.L. c. 138, s. 23.”).

The Board may consider several different factors in determining whether a transfer is in the “public interest.” The following is a list of factors a local licensing authority may consider according to *Ballarin, Inc. v. Licensing Bd. of Boston*, 49 Mass. App. Ct. 506, 730 N.E.2d 904 (2000):

- Proximity to school
- Number of existing dispensaries in a locality
- Views of the inhabitants of the locality in which a license is sought
- Traffic
- Noise
- Size
- Sort of operation that carries the license
- Reputation of the applicant

Competition with existing licensed establishments is not a valid rationale for denying a license. See *Great Atl. & Pac. Tea Co. v. Bd. of License Comm'rs of Springfield*, 13 Mass. App. Ct. 268, 271, 432 N.E.2d 530, 533 (1982) *rev'd sub nom. Great Atl. & Pac. Tea Co. v. Bd. of License Comm'rs of Springfield*, 387 Mass. 833, 444 N.E.2d 364 (1983) (“It would seem that such competition would serve rather than militate against the common good.”).

An authority’s reasons must be supported by sufficient evidence. It is advisable for a local licensing authority to conduct a thorough analysis of any possible impact of the proposed license transfer. Scientific studies aren’t necessary, but the ABCC is more

likely to overturn a decision stating an overall impact without supporting details. See Tiger, Inc. v. Hargadon, No. CIV.A. 97-01367, 1998 WL 156990, at *3 (Mass. Super. Apr. 2, 1998) (“The testimony at the hearing was based on the personal knowledge of local residents who are familiar with the area. Although, this is not scientific evidence, it fits within the substantial evidence standard.”). For example, in Donovan v. City Of Woburn, 65 Mass. App. Ct. 375, 840 N.E.2d 969 (2006), the Appeals Court found that the local licensing authority’s “failure to engage in a particularized analysis of the business . . . and the location where [the applicant] was seeking to run it” was a fatal flaw to its license denial. See also In re: Foodmaster Super Markets, Inc. (Weymouth) (ABCC Decision dated Aug. 29, 2007) (“It is the Commission's decision that the proposed licensee's deserved a more particularized analysis from the local board in reviewing the business plan, which it presented, to the local board . . .”). Examining specific distances between similarly licensed establishments and municipal residents would support a finding of saturation. See Town of Middleton v. Alcoholic Beverages Control Comm'n, unpublished opinion, listed at 64 Mass. App. Ct. 1108, 833 N.E.2d 1195 (2005) (affirming license denial where local licensing authority looked at numbers and found that almost all residents were within close proximity of off-premises licenses).

It is also very important for the Board to rely upon accurate information. Factual inaccuracies can make the ABCC overturn an otherwise acceptable denial. In re: Fresch & Holsum's, LLC (Hyannis) (ABCC Decision dated Feb. 23, 2005) (“Although the applicant argues that there is a greater demand for more brands of organic wine and beer than the variety you may find at Stop & Shop and Blanchards, this Commission is not convinced that this factor alone establishes a public need for a license. However, the faulty fact that was provided with respect to the number of existing establishments (5 instead of 3) in the area of the applicant, clearly undercuts the local board's factual findings of market saturation.”)

Court case summaries:

- Ballarin, Inc. v. Licensing Bd. of Boston, 49 Mass. App. Ct. 506, 730 N.E.2d 904 (2000)
 - Expansion from wine/beer to all-alcohol license
 - Board denied license expansion, citing sufficient licenses in the area and neighborhood opposition
 - The Appeals Court disagreed with the Board, noting the factual errors in the record (there were only 2 all-alcohol licenses in a particular area rather than the 4 stated by the Board) and lack of substantive reasons for public opposition.
 - Inquiry involves looking at “public want and appropriateness of a liquor license at a particular location”
 - Valid factors include:
 - Proximity to school
 - Number of existing dispensaries in a locality
 - Views of the inhabitants of the locality in which a license is sought
 - Traffic

- Noise
 - Size
 - Sort of operation that carries the license
 - Reputation of the applicant
- Great Atl. & Pac. Tea Co. v. Bd. of License Comm'rs of Springfield, 387 Mass. 833, 444 N.E.2d 364 (1983)
 - Transfer case, off-premises license
 - Board denied transfer because municipality already had enough places to buy liquor
 - SJC upheld Board's decision
 - SJC noted that saturation was sufficient reasoning even in a transfer case, at least where the current license-holder was not actively using the license
 - SJC disagreed with Appeals Court below, which had found the Board's reasoning was more about wanting to prevent competition which would hurt, rather than serve, the public interest, the Appeals Court opined
- Town of Middleton v. Alcoholic Beverages Control Comm'n, Unpublished Disposition, listed at 64 Mass. App. Ct. 1108, 833 N.E.2d 1195 (2005)
 - Original, off-premises license
 - Board denied license because of several stated reasons, the first two of which were that the Town's needs were already being met and proximity to a high school.
 - The Appeals Court upheld the Board's decision, finding the first two reasons to be sufficient.
 - The Appeals Court noted that "[t]estimony at the ABCC hearing disclosed that four stores selling alcohol for off-premises consumption were located 0.7, 1.7, 2.8 and 2.9 miles, respectively, from the proposed licensee; these stores are in proximity to 95 percent of the population of Middleton. A. 74. The local authority concluded from this information that Middleton's public need is adequately served by the existing purveyors."
- Donovan v. City Of Woburn, 65 Mass. App. Ct. 375, 840 N.E.2d 969 (2006)
 - Original, off-premises liquor license, for delivery service
 - Board denied the license citing lack of need, concerns that the applicant would later transfer the license to a larger store, and the applicant's ability to ensure his customers were of age.
 - The Appeals Court rejected all of the Board's reasons, finding lack of support in the record and insufficient analysis.
 - "[T]he real problem with the commission's saturation rationale stems from its failure to engage in a particularized analysis of the business Donovan was actually seeking to run and the location where he was seeking to run it."

- “The record reveals that, regardless of the total number of stores in Woburn, no other store is located within two and one-half miles of the location in the northeast corner of Woburn where Donovan seeks to conduct his operation.”
 - The Appeals Court also noted that the applicant had surveyed business residents near the proposed location, which would be substantial portion of his client base, and found that they felt there was a need for the proposed business. The Court noted that the Board did not consider this factor in its decision.
- Tiger, Inc. v. Hargadon, No. CIV.A. 97-01367, 1998 WL 156990 (Mass. Super. Apr. 2, 1998)
 - Original, off-premises license
 - Board denied license “citing the number of similarly licensed establishments in the area, lack of available parking and traffic concerns as reasons for their decision.”
 - The Appeals Court accepted the Board’s reasons and found that the record supported those reasons.
 - “The testimony at the hearing was based on the personal knowledge of local residents who are familiar with the area. Although, this is not scientific evidence, it fits within the substantial evidence standard.”