

DECISION

**MURFSLIX, INC. D/B/A MURPHY'S PACKAGE STORE
303 MAIN ST
FALMOUTH, MA 02540
LICENSE#: 039000138
HEARD: 10/10/12**

This is an appeal of the action of the Board of Selectmen for the Town of Falmouth ("Falmouth" or "Local Board") in denying the application for a change of location of the M.G.L. c. 138, §15 retail package store all alcohol beverages license of Murfslix, Inc. d/b/a Murphy's Package Store (the "Licensee" or "Murphy's"). 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 10, 2012.

The following documents are in evidence as Exhibits:

Jointly Agreed Upon Exhibits:

1. Falmouth Code §240-108 Minimum Parking Requirements;
2. Falmouth Code §240-102- 112;
3. Memorandum from Town of Falmouth Office of Town Manager and Selectmen, dated June 4, 2012;
4. Email from Deputy Chief of Falmouth Fire Department dated June 5, 2012;
5. Letter from Falmouth Police Chief Riello dated June 5, 2012 ;
6. Memorandum from Eladio R. Gore dated June 11, 2012;
7. Minutes from Hearing dated June 11, 2012;
8. Letter from Gerald M. Leone, dated June 22, 2012, stamped "Received, Selectman's Office June 25, 2012;
9. Memorandum dated July 16, 2012, from Falmouth Building Commissioner Eladio R. Gore to Board of Selectmen;
10. Minutes (Draft) of the July 16, 2012, Falmouth Board of Selectmen's Meeting;
11. Town of Falmouth, Board of Selectmen's Decision, signed by Julian M. Suso, Town Manager, dated July 19, 2012;
12. Applicant Murfsflix, Inc. d/b/a Murphy's Package Store, Notice of Appeal dated July 20, 2012, to the Alcoholic Beverages Control Commission;
13. Photographs of the Parking Area at the Proposed Licensed Premises Location (7 photos).

Town of Falmouth Exhibits:

- A. Town of Falmouth, Local Board's Administrative Record for Murfslix, Inc. d/b/a Murphy's Package Store (135 pages); and
- B. Aerial Photograph of 303 Main Street Neighborhood (1 page).

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

FACTS

The Commission makes the following findings, based on the evidence presented at the hearing:

1. Murfslix, Inc. d/b/a Murphy's Package Store is an existing Massachusetts business located at 303 Main Street, Falmouth, Massachusetts which holds an all alcoholic beverages retail package store license pursuant to M.G.L. c. 138, §15. (Commission Records)
2. On May 29, 2012, Mr. Jeffrey applied to transfer his business location and existing all alcoholic beverages retail package store license to 410 West Falmouth Highway, West Falmouth, Massachusetts (the "Proposed Location"). (Exhibit A)
3. The Proposed Location is owned by Gerald M. Leone of West Falmouth, Massachusetts. The Proposed Location is located in West Falmouth's "B-3" zoning district which provides that "retail" businesses, (such as Jeffrey's proposed business of a less than four thousand square foot liquor store) are an "allowed" use under the town's zoning ordinances, and would not constitute a change of "use" from the previous tenant although that previous tenant did not sell alcoholic beverages. (Exhibits 1, 2,)
4. Pursuant to §§ 240-103 to 109 of the "Falmouth Code", a minimum of six dedicated off-street parking spaces, available during all hours of operation, are required for new businesses the size of the Proposed Location, provided that the new business is for "new construction, additions, or change of use." (Exhibits 1, 2)
5. On June 11, 2012, after proper notice, the Local Board scheduled and held a public hearing on the Licensee's Application to Change its Location from 303 Main Street, Falmouth, Massachusetts, to 410 West Falmouth Highway, West Falmouth, Massachusetts. (Exhibit 7)
6. The hearing was held on two dates:

June 11, 2012 Hearing: at which evidence was introduced, the hearing was then continued to:

July 16, 2012 Hearing: which consisted of additional evidence being introduced, and the Vote of Local Board.

7. In advance of the June 11, 2012 hearing, three written letters were sent by residents of West Falmouth, neither in support, nor in opposition to this application, but rather, requesting that a traffic study, or some type of site study, be conducted at the proposed location prior to deciding this application. (Exhibit A – A.R. 42, 44, 52)

- A. The West Falmouth Village Association submitted a letter, dated June 6, 2012, requesting that a traffic study be performed, due to concerns over traffic and safety. (Exhibit A – A.R. pg. 52)
 - B. Linda DeYoung, a resident of West Falmouth, submitted a letter to the Local Board, dated June 7, 2012, stating that she was concerned with traffic and parking at the proposed location, and she requested that a traffic study be conducted. (Exhibit A – A.R. pg. 44)
 - C. Annie Connolly Saganic submitted a letter to the Local Board, dated June 8, 2012, stating that “the proposed location is a dangerous spot to pull a vehicle into and out of,” and “If the liquor store moves to this location I would request that a traffic or parking study be requested. It is my feeling that the landlord, Mr. Leone, should put some funding into improving the parcel for safety concerns, and addressing the parking and traffic flow.” (Exhibit A - A.R. pg. 42)
8. At the June 11, 2012 hearing, the Local Board received five letters in support of the application:
- A. Prior to the June 11, 2012 hearing, the Health Agent for the Town of Falmouth, Mr. David Carigan, submitted his written recommendation regarding Murphy’s application to transfer its location, dated June 4, 2012, to the Falmouth Board of Selectmen stating, “No Objections.” (Exhibit 3; Exhibit A – A.R. 29)
 - B. Deputy Fire Chief Mike Small, on behalf of the Falmouth Fire Department, submitted his written recommendation to the Local Board, dated June 5, 2012, stating, “Looks good here.” (Exhibit 4; Exhibit A – A.R. 28)
 - C. Chief Anthony J. Riello, of the Falmouth Police Department, submitted his written recommendation to the Local Board, dated June 5, 2012, stating “[t]his department has no problem with the change of location.” (Exhibit 5; Exhibit A – A.R. 27)
 - D. Sue Holloway, a resident of West Falmouth, submitted a letter to the Local Board, dated June 6, 2012, in support of Murphy’s application. (Exhibit A – A.R. 45)
 - E. Susan Marlatt of West Falmouth, submitted a letter dated June 7, 2012, in favor of Murphy’s application, asking that the application be granted. (Exhibit A – A.R. 51)
9. At the June 11, 2012 hearing, the Local Board received seven letters in opposition to this application:
- A. Gina White, a resident of West Falmouth, submitted a letter dated June 6, 2012, in opposition to this application due to traffic, parking, and there is no public need for another liquor store in West Falmouth, as we already have one. (Exhibit A – A.R. 46)
 - B. Sue Williamson, of West Falmouth, submitted a letter dated June 6, 2012, in opposition to the application, due to traffic and parking concerns. (Exhibit A – A.R. 47)
 - C. Nina Heald Webber of West Falmouth, submitted a letter dated June 8, 2012. She is opposed to this application due to traffic on a state highway, safety, parking, and there is no need for a second liquor store. (Exhibit A – A.R. 50)
 - D. Anne Wheeler, a resident of West Falmouth, submitted a letter dated June 8, 2012, in

opposition to the application, due to concerns that traffic congestion is extremely heavy at the proposed location; and there is one (1) liquor store in the area, and no need for another one. (Exhibit A – A.R. 43)

- E. Jocelyn and Fred Greenman, residents of West Falmouth, sent a letter dated June 9, 2012, in opposition to the application, due to safety issues in the parking lot, and traffic in and out of this parking lot. (Exhibit A – A.R. 41)
 - F. Gilbert and Katherine King, residents of West Falmouth, submitted a letter in opposition, dated June 9, 2012. They are opposed to the application due to parking and traffic. (Exhibit A – A.R. 40)
 - G. Sherly and Fred Gardner, of West Falmouth submitted a letter in opposition, dated June 10, 2012. They are opposed to the application due to concerns that traffic at the proposed location is bad, and there is no need for a second liquor store. (Exhibit A – A.R. 39)
10. Mr. Dan Shearer spoke at the June 11, 2012 hearing. He was neither in favor, nor in opposition to this application. He stated to the Local Board that the area needs to be re-organized by the Building Department to better and more safely accommodate business. (Exhibit 7, Exhibit A – A.R. 13)
11. At the June 11, 2012 Hearing seven residents of West Falmouth spoke in opposition to Murphy's application:
- A. Nancy Hayward spoke in opposition stating that the traffic and the parking at the proposed location are unsafe. (Exhibit 7; Exhibit A – A.R. 13)
 - B. Debra Siegel spoke in opposition due to traffic concerns, and that there exists a propensity for accidents at this location on Route 28A. She is also opposed for litter and noise. (Exhibit 7; Exhibit A – A.R. 13)
 - C. Gustatta Collins stated that she was opposed due to an inadequate traffic design, trash build-up, and that access to this location is blocked by delivery trucks. (Exhibit 7; Exhibit A – A.R. 13)
 - D. Christine Lorrey stated that she was opposed due to concerns of safety due to the traffic, and that this location is on Route 28A. (Exhibit 7; Exhibit A – A.R. 13)
 - E. Maureen Harlow-Hawkes testified that she was opposed due to traffic concerns and the danger of cars backing out onto Route 28A. (Exhibit 7; Exhibit A – A.R. 13)
 - F. Another individual (whose name was unintelligible on the record) spoke in opposition to the application, expressing concerns about a dumpster in the area, odor, and that a liquor store in not a good location for a residential area. (Exhibit 7; Exhibit A – A.R. 13)
 - G. Mr. Stephen Davis, who has a home directly abutting the proposed location in West Falmouth, spoke in opposition at the hearing. He stated that he was opposed to this application due to concerns about traffic and safety for local children in the area who ride their bikes at this location, as the bike path is located here. (Exhibit 7; Exhibit A – A.R. 13)

12. The Falmouth Building Commissioner, Eladio R. Gore, recommended that a minimum of six dedicated off-street parking spaces would be required for the Proposed New Location. He noted that the proposed lease showed only five dedicated parking spaces which were made part of the lease. (Exhibit 6)
13. At the June 11, 2012 hearing, Chairman Kevin Murphy, of the Falmouth Local Board, said that the Building Department needed to obtain and review a “site plan” for the proposed location and, more specifically as follows: “the applicant needs to sit down with the Building Department to work out the issues of parking and traffic patterns, and to resolve the issue of who owns the property.” (Exhibit 7)
14. At the June 11, 2012 hearing, the Local Board voted unanimously to continue the hearing until July 16, 2012. (Exhibit 7)
15. On June 22, 2012, Gerald Leone, the owner of the Proposed Location, submitted a letter to the Local Board addressing the parking issues. In this letter to the Local Board Mr. Leone also writes “Regarding parking, several years ago, in an effort to make the shopping center safer and more environmentally friendly, my wife and I presented a new parking plan to the Falmouth Planning Board. Our plan was to allow parking at a vertical angle across the front of the plaza and add a green space in the square in front of the commercial tenants. This would have eliminated the backing up of automobiles. The plan was denied.” (Exhibit 8)
16. The Building Commissioner for the Town of Falmouth, Mr. Eladio Gore, submitted his recommendation on the parking issue and stated that “[t]he applicant has provided the Building Department with a site plan showing 77 parking spaces, including three handicapped spaces. Six of those spaces have been designated by the lease agreement for the use of the liquor store during the hours of operation.” (Exhibit 9)
17. At the July 16, 2012 hearing, the Local Board received one letter in opposition:
 - A. The West Falmouth Village Association submitted a letter, dated June 27, 2012, signed by Sue Moran, President of the West Falmouth Village Association. The letter stated: “an overwhelming number of residents in opposition, and one member, Dan Shearer pointing out both sides, with absolutely no one in favor. The Association is opposed to this application as there is no evidence of public need, as there is another package store less than one-half mile away on the same highway. Also safety is a concern due to reasons expressed at the hearing and the transfer could endanger the public safety. The Association is opposed to this application.” (Exhibit A – A.R. 35, 36, 37) The letter does not indicate the number of residents who were opposed to this application. Furthermore, Mr. Moran writes that the other package store is less than one-half mile away, yet there is no information before the Commission as to how that distance was verified, calculated, or calibrated.
18. At the July 16, 2012 hearing, the Local Board received two letters requesting a site study of the proposed location.
 - A. Mr. Davis submitted a letter to the Local Board, dated July 13, 2012, requesting a site study and stating his concerns about public safety, traffic with the delivery trucks blocking access to the bike path, safety of cars backing up onto Route 28A from the parking lot, safety of children who use the area for biking, and protecting the public’s interests and safety. (Exhibit A – A.R. 30, 31)
 - B. John Weyand, a resident of West Falmouth, and a member of the Board of

Directors of the West Falmouth Village Association, submitted a letter to the Local Board dated July 16, 2012, attaching 12 photographs of the parking lot of the proposed location, discussing his concerns about the parking in the lot, and the delivery trucks in this parking lot, and requesting that a site study be performed. He referenced the aforementioned letter written by Mr. Stephen Davis. (Exhibit A – A.R. 16, 19 – 25)

19. At the July 16, 2012 hearing, Mr. Jeffrey (Principal of the Licensee) presented and submitted a draft lease for the proposed location, together with an Addendum and a Site Drawing showing that he and Mr. Leone, the landlord for the proposed location, had agreed that six (6) dedicated off-street parking spaces would be incorporated into Mr. Jeffrey's lease. (Exhibit 10)
20. At the July 16, 2012 hearing, two people testified in support:
 - A. Mr. Jeffrey, the Licensee, spoke in favor of this application. (Exhibit 10)
 - B. Mr. Leone, the owner/landlord of the property at the proposed location spoke in favor of the application. (Exhibit 10)
21. At the July 16, 2012 hearing, four people testified in opposition:
 - A. Mr. Allen Freer, a neighbor of the proposed location, spoke in opposition to this application and requested a site plan review. (Exhibit 10)
 - B. Two members of the public (one of whom was a neighbor to the proposed location) spoke in opposition to this application to change the location. (Exhibit 10)
 - C. Mr. Michael Angelini, from the West Falmouth Village Association, spoke in opposition, stating that there is no public need for this liquor store, and that it would be "antagonistic to the public good." (Exhibit 10)
22. At the conclusion of the July 16, 2012 hearing, the Local Board voted three to two deny this application to transfer the location of Murphy's package store. (Exhibit 10)
23. The Local Board issued a written decision, dated July 19, 2012, stating that "The Board found there is no demonstrated public need for a package store at the West Falmouth location. At the initial hearing on June 11, 2012, seven persons spoke in opposition and an additional eleven written submissions were opposed to a transfer to the West Falmouth location. At the continued hearing on July 16, 2012, additional persons spoke in opposition. The opposition focused on the apparent lack of adequate parking for the proposed use and the absence of adequate traffic control on site and on neighboring streets. In addition, the Building Commissioner noted in his referral report "during certain hours of the days, the site is heavily used and parking is congested and at times hard to find." (Exhibit 11)
24. The Licensee timely appealed the Local Board's decision to the Commission, by letter dated July 20, 2012. (Exhibit 12)
25. At the October 10, 2012 appeal hearing before the Commission, two (2) people testified in support of the appellant seeking the Commission's disapproval of the Local Board's denial:
 - A. Mr. Jeffrey: At the Commission hearing, Mr. Jeffrey, the principal of the applicant, testified that he is a Law School Graduate, and has previously operated two (2) restaurants. In 2007 he purchased a retail package store in Buzzards Bay, and sold

the package store in 2011. He had no previous violations during his operation of that package store. (Testimony)

Mr. Jeffrey told the Commission that he purchased this license and wants to move to the West Falmouth location because he believes that there is a better opportunity to compete, than the current location. The other package store in West Falmouth is very small, and is not a full service package store. The closest package store to the existing one in West Falmouth, is approximately one mile away in North Falmouth. He looked at this location, and then convenience and need. (Testimony)

The new location is a square space and it is manageable. There is also sufficient parking available with 80 to 85 parking spaces at the proposed location. There are not many parking spaces at the current location of Murphy's package store. (Testimony)

Mr. Jeffrey testified the decision to choose to move to West Falmouth was not done without thought. The proposed location is four miles from the current location. (Testimony)

- B. Mr. Gerald Leone testified in favor of this application. He is the landlord of the proposed location. He has owned and operated it for 50 years. There are several different businesses located in this mall. A beauty shop and the Chappaquoit Grille which holds an on-premises liquor license. He lives on the premises with his wife. He employs a full-time property manager who deals with trash and maintenance. He employs a company for snow removal. The parking lot at this location holds 50 to 60 cars. The Post Office is out front and it closes at 5:00 p.m. The restaurant is open from 5:00 p.m. to 10:00 p.m. (Testimony)

Mr. Leone does not feel that there is a parking problem as there are 50 to 60 parking spaces. A number of different events that take place in this area use his parking spaces. He feels that there is a public need for the package store at this location. (Testimony)

- 26. At the October 10, 2012 appeal hearing before the Commission, four people testified in support of the Local Board decision.

- A. Ms. Mary Pat Flynn testified at the Commission hearing. She did not testify at the Local Board hearing, but rather participated in the voting process, and voted to deny this application. She testified that she lives at 545 West Falmouth Highway. She is a member of the Falmouth Licensing Board and has lived in Falmouth for 33 years. She lived in North Falmouth for 17 years, and has lived in West Falmouth for 17 years. She lives in West Falmouth year-round. (Testimony)

The Board of Selectmen held hearings on June 11, 2012, and July 16, 2012. Ms. Flynn participated in both hearings. (Testimony)

At the June 11, 2012 hearing, each person who testified mentioned problems with the parking, left or right angle parking. (Testimony)

The applicant has designated parking in the rear of the building. There are concerns with delivery trucks in the rear. (Testimony)

The front of the building has a curb-cut, and with the activity at the Post Office there have been incidents. Comments were related to safety. Ms. Flynn lives one-fourth of

a mile away from the proposed location. She testified that the comments made by the people regarding safety are valid. (Testimony)

Due to the seasonal nature of the area, Ms. Flynn feels there is no public need for this license, as she testified that the proposed location is one half of a mile from the West Falmouth Market which holds a \$15 package store license. Ms. Flynn did not testify as to how she verified, calculated, or calibrated the distance to the existing package store. (Testimony)

Ms. Flynn testified that the Board of Selectmen looks at the community which comes before the Board and listens to comments from the residents. The preponderance of structures in this area is residential homes. There are some small businesses. This is a shopping plaza, and the residents did not believe that there was a need for this package store because of another liquor store in the area. (Testimony)

- B. Mr. Stephen Davis testified at the Commission hearing. He resides in Carlisle (during the winter), and has a home at 416 West Falmouth Highway. He resides at this location five months a year. His home is located right next door to the North End of the building, and 150 feet from the proposed location. He has resided for 17 years in this home in this neighborhood. Mr. Davis is an engineer and is a member of the Town of Carlisle Planning Board. His background is as an engineer and a town planner. (Testimony)

He testified that the area around the proposed location is completely residential. It is a close-end community to the north and south of this location. (Testimony)

Mr. Davis has owned and lived at this home in West Falmouth for 17 years and has never made a complaint. The Chappaquoit Grille was present first and he moved in second. The cars back out onto a state highway from the front the plaza. Motor vehicles should not be backing out onto a state highway. Trucks service the restaurant, and they come and go a lot. (Testimony)

Mr. Davis purchased his home in April 1994. His only concern is safety. He attended both hearings regarding this application. He was not paid by the Town to give his opinion about safety. He does not have a personal bias against the liquor store. He is concerned about safety. He is an active member of the West Falmouth Village Association. (Testimony)

- C. Ms. Sue Moran testified at the Commission hearing. She did not testify before the Local Board, at either of the two hearings.¹ Attorney Moran did submit a letter on behalf of the West Falmouth Village Association. She is the vice president of the library association, and she resides at 66 Frasier Road, in West Falmouth. She is an attorney and has a real estate license. She has resided in West Falmouth for 13 years and lives approximately one half mile away from the proposed location. She testified that she goes by it and sees it practically once a day. (Testimony)

Attorney Moran testified that she is the President of the West Falmouth Village Association Civic Organization which is comprised of 320 or more families or businesses, with half of the members being seasonal residents, and half being year round residents. She testified that the population of West Falmouth is approximately

¹ Based on Commission reviews of the Administrative Record, it appears that Ms. Moran did not testify at either of the local board hearings, although there were three people who testified whose names were unintelligible.

1200 individuals, from approximately 500 hundred families who are all property or home owners. Attorney Moran testified that there are only two commercial associations in West Falmouth. (Testimony)

Attorney Moran testified that there is no need for a second liquor store in West Falmouth. Attorney Moran testified that in her opinion, people would not patronize a liquor store in the Post Office. It is too inconvenient and dangerous due to parking problems. (Testimony)

- D. Mr. Michael Angelini, who is a summer resident of West Falmouth, lives on Snug Harbor Lane in West Falmouth, and has resided in West Falmouth since 1995. He is an attorney, and he is opposed to this application. (Testimony)

DISCUSSION

Pursuant to the pertinent provisions of M.G.L. c. 138, §23, paragraph 8 “[a]ny license issued under this chapter may, upon application pursuant to section fifteen A, be transferred from one location to another or the description of the licensed premises may be changed with the approval of the licensing authorities.” The standard is the same as a new license application, i.e., whether the re-location of the license will meet a public need.

A local licensing authority has very broad discretion to determine public need, 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.” Ballarin, Inc. v. Licensing Board of Boston, 49 Mass. App. Ct. 506, 511 – 512. (2000).

“[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.” Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 378 – 379 (2004).

The Appeals Court has held that a local board may deny a license even if the facts show that a license could be lawfully granted. Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 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. Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 380 (2004).

“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, Inc. v. Licensing Board of Boston, 49 Mass. App. Ct. 506, 511 - 512 (2000). “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). However, “a board may not deny a permit simply by conjuring up a parade of horrors, particularly when it has the power to prevent them. Donovan v. City of Woburn, 65 Mass. App. Ct. 375 (2002) citing Britton v. Zoning Bd. of Appeals of Gloucester, 59 Mass. App. Ct. 68, 75, 794 N.E. 2d 1198 (2003).

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.)

The Local Licensing Authority of Falmouth argues that its decision to deny Murphy’s application to transfer location of an all alcoholic beverages package store, §15 license, was based upon a determination that there is no demonstrated public need for another package store in West Falmouth.

The Local Board, in support of its argument, points to the administrative record of this application process to demonstrate its findings.

The Licensee Murphy’s argues that the Falmouth Local Board failed in this case to meet its obligation to make its decision on the controlling statutory standard based on the facts that were presented to it on the record of their hearings.

Upon Commission review of the Local Board’s decision to deny this application, the Commission finds that the decision is inaccurate and inadequate on its face. The Falmouth Local Board denied the Licensee’s application to transfer the location on the grounds that the transfer did not “serve the public need.” The Local Board issued a written decision, dated July 19, 2012, stating that “The Board found there is no demonstrated public need for a package store at the West Falmouth location. At the initial hearing on June 11, 2012, seven persons spoke in opposition and an additional eleven written submissions were opposed to a transfer to the West Falmouth location. At the continued hearing on July 16, 2012, additional persons spoke in opposition. The opposition focused on the apparent lack of adequate parking for the proposed use and the absence of adequate traffic control on site and on neighboring streets. In addition, the Building Commissioner noted in his referral report “during certain hours of the days, the site is heavily used and parking is congested and at times hard to find.”

The Commission finds that this decision is inaccurate as it states that “eleven written submissions were opposed to a transfer to the West Falmouth location.” The Commission finds that there were eight written submissions in opposition, not eleven, as cited in the Local Board’s decision.

Furthermore, the Commission finds that this decision is inadequate as it merely recited a summation of the opponents who testified about parking and traffic. The Commission finds this decision to be a general

finding. As stated by Justice Borenstein in the case of Exotic Restaurant Concepts “General findings are insufficient, and in the licensing board does not make sufficient findings, it remains the ABCC’s obligation to articulate the findings of fact which were the basis of the conclusions it drew and not to 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, 783 (1968).” Exotic Restaurants Concept, Inc. v. Boston Licensing Board, Suffolk Superior Court, C.A. No. 07-3287 (Borenstein, J.)

The licensee was required by the Local Board to secure six (6) designated parking spaces for this location. The facts presented to the Local Board on the record of its two (2) hearings showed that the parking lot of the proposed location had seventy-seven parking spaces, Murphy’s had secured six of those spaces as dedicated off-street parking as part of his proposed lease. The building commissioner reported in writing that the applicant met his recommendation for six dedicated parking spaces designated by lease for this licensed premises. The Falmouth Police Chief, and the Deputy Fire Chief, on behalf of the Falmouth Fire Department, (who presumably would be concerned with public safety issues caused by traffic at this location) stated in writing respectively that “[t]his department has no problem with the change of location.”; and “looks good here.” The record reflects that there was no official from the Town of Falmouth who had any other objections to the proposed location. The Commission finds, based on the record and exhibits submitted in evidence, that the proposed location is properly zoned for this particular use, and that almost any tenant for a retail business at the proposed location would generate parking and traffic.

It is well established, that, “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 to a plebiscite.” Ballarin, Inc. v. Licensing Board of Boston, 49 Mass. App. Ct. 506, at 311 (2000). However, Murphy’s requested the change in license location due to a demonstration that was persuasive to the Commission, of a public need for a package store in the new location, and testified to that need. The Commission has concerns that Ms. Sue Moran, in her letter on behalf of the West Falmouth Village Association, states “the Association is opposed to this application as there is no evidence of public need, as there is *another package store less than one-half (1/2) mile away on the same highway.*” Also, Ms. Mary Pat Flynn testified before the Commission that the other package store is *one-half (1/2) mile away.*” This distance between the existing package store and the proposed location of Murphy’s was not verified to the Commission, nor was it explained how this distance was calculated or calibrated. Thus the Commission puts no weight on these statements.

Moreover, the action of the Local Board in denying this application had the effect of continuing in place the monopoly held by the sole §15 license in this section of the town.

Among the factors that may be properly considered by a local board in determining public need is the reputation of the applicant in the community. The Licensee in this case had been operating a package store for ten years and the business is in good standing in the community. Thus, it appears that the Local Board’s decision to deny this application rested on the single basis of a non-specific, opinion among a limited number of residents in the area, (some of them seasonal residents) that traffic might be adversely affected. Counterbalancing these opinions from this small number of residents is the written positions of the fire department and police department, who had no objection or no unresolved concerns with this application to locate the license at this new location. The building commissioner stated that the applicant obtained the designated parking spaces as required by the code and the Local Board.

The Commission finds that while there existed opposition at the Local Board hearings, there was also support for this application. The support included the municipal officers charged with the enforcement of the various fields of law identified to be of concern to the opponents to this application. The representative of this neighborhood association who signed this letter did not testify at either of the two

Local Board hearings. The letter submitted and signed by Attorney Sue Moran as President of the West Falmouth Village Association, dated June 27, 2012, stated: “an overwhelming number of residents in opposition, and one member, Dan Shearer pointing out both sides, with absolutely no one in favor.” The letter does not indicate the specific number of residents who were opposed to this application. This neighborhood representative testified to the Commission that this section of West Falmouth has approximately 1200 residents and the association itself contained over 320 families and businesses. When compared to this total population, the Commission is not persuaded that the position of eleven individuals is overwhelming opposition.

The Commission finds that The Local Board of Falmouth failed to fulfill its obligation to state the reasons for its denial in its decision. Moreover, the reasons for the denial – “traffic, insufficient parking, safety, and an adequate number of existing package stores in the area,” the Local Board apparently failed to consider and did not identify in its statement of reasons the support from the town safety officials that runs contrary to the decision made by the Local Board.

The Commission concludes that in this case, as in the Donovan case, the Local Board denied this application “simply by conjuring a parade of horrors” that it has the power to prevent.

CONCLUSION AND DISPOSITION

Based on the evidence, the Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board of Falmouth in denying the application of Murfslix, Inc. d/b/a Murphy's Package Store to transfer the location of its all alcoholic beverages retail package store license issued pursuant to M.G.L. c. 138, §15, to 410 West Falmouth Highway, West Falmouth, Massachusetts.

The matter is remanded to the Local Board with the recommendation that the application be granted and submitted to the Commission for its consideration of approval in the usual administrative process. The Commission acknowledges that the Local Board still holds the authority to impose reasonable conditions on the granting of the application.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner _____

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

Susan Corcoran, Commissioner, _____

Dated: March 21, 2013

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: John P. Connell, Esq. via Facsimile 617-227-3222 [Attorney for Licensee]
Frank K. Duffy, Jr., Esq. via Facsimile 508-540-0881 [Attorney for the Town of Falmouth]
Frederick G. Mahony, Chief Investigator
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File