

JUN - 3 2024

BRISTOL, ss.  
JENNIFER A. SULLIVAN, ESQ.  
CLERK/MAGISTRATE

SUPERIOR COURT  
CIVIL ACTION  
NO. 2473CV0281

CHUCK'S LIQUORS OF NEW BEDFORD LLC & others<sup>1</sup>

vs.

LICENSING BOARD OF NEW BEDFORD & another<sup>2</sup>

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR A  
PRELIMINARY INJUNCTION**

The plaintiffs are owners of liquor stores in the city of New Bedford. After unsuccessfully appealing to the defendant Alcoholic Beverages Control Commission (ABCC) for relief, plaintiffs brought an action for declaratory judgment invalidating the decision of the defendant Licensing Board of New Bedford to adopt Regulation 48, a regulation banning the sale of miniature containers of alcohol (commonly referred to as "nips") within the city, and restraining the ABCC from enforcing the regulation as to license holders. The matter is before this court on the plaintiffs' motion for a preliminary injunction prohibiting the defendants from initiating prosecution or otherwise enforcing the nips regulation pending final determination of the instant action. The licensing board and ABCC oppose, arguing the court lacks jurisdiction to hear the claim, the claim lacks merit, and the plaintiffs cannot show a risk of immediate or irreparable harm. For the reasons set forth below, the motion must be **ALLOWED in part.**

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<sup>1</sup> ICJ Corp., Laxmi Liquors Inc., Laxmiji Corp., Ramdevpir Corp., Expos Liquors Inc., Jalarm Inc., Hari Liquors Inc., County Liquors Inc., NB Liquors Inc., Vidya Inc., Aarav LLC, Yogibapamahant Krupa Corp., Dhurapli Inc., Rudraxi Inc., Shri Gurave LLC, Belleville Liquors Inc., County Street Liquor Corp., Barry's Fine Wine & Spirits Inc., Muskan LLC.

<sup>2</sup> Alcoholic Beverage Control Commission

## DISCUSSION

In determining whether a preliminary injunction should be granted, the court engages in a balancing test. See *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980). Specifically, the court considers “whether the moving party has shown ‘that success is likely on the merits; irreparable harm will result from denial of the injunction; and the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party.’” *Lieber v. President and Fellows of Harvard College*, 488 Mass. 816, 821 (2022), quoting *Doe v. Superintendent of Sch. of Weston*, 461 Mass. 159, 164 (2011). “Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue.” *GTE Products Corp. v. Stewart*, 414 Mass. 721, 722-723 (1993).

The plaintiffs argue they have a high likelihood of success on the merits of the declaratory judgment action because, *inter alia*, members of the licensing board were improperly appointed in violation of governing statutes and thus lacked authority to adopt the regulation, there were significant procedural errors in the hearing at which the licensing board adopted the regulation, the regulation was adopted on the basis of litter concerns that fall outside the scope of the licensing board’s authority, and the ABCC incorrectly abdicated its power to disapprove the licensing board’s decision where such decision exceeds the board’s lawful authority. The plaintiffs further argue that they face a significant risk of irreparable harm if the regulation is enforced starting on August 1, 2024, as anticipated, while the defendants would suffer no meaningful harm from an enforcement delay pending the resolution of this action.

This court will separately consider the plaintiffs’ arguments with respect to each defendant, as these two entities are differently situated on both a factual and procedural basis.

## *1. Licensing Board of New Bedford*

### **a. Irreparable Harm**

The licensing board first argues that the plaintiffs have not demonstrated a risk of irreparable harm and thus this court should deny the preliminary injunction. The board argues that the plaintiffs have not submitted sufficient evidence that they would suffer harm from the regulation before it takes effect on August 1, 2024, or any time after its effective date, where the plaintiffs' affidavits contain only individual assertions without economic data or sales studies to support them. The board further argues that the passage of a year between the adoption of the regulation and its effective date gave the plaintiffs sufficient time to sell off their existing stock of nips and thus avoid financial losses.

Notably, the board does not identify any particular harm it would suffer as a result of delayed enforcement of the nips regulation during the pendency of this action. In contrast, the plaintiffs offer various affidavits of liquor store owners attesting that a significant portion of their gross sales, ranging from 20% to 50%, are comprised of nip-sized items that would be banned by the regulation, and thus their businesses would suffer a significant loss in annual revenue, ranging from \$300,000 to \$700,0000. Papers 3.1-3.4. The plaintiffs further offer the affidavit of the president of a plaintiff entity that owns liquor stores in both New Bedford and Fairhaven, detailing the effect on revenue after Fairhaven adopted a similar ban on nips. Paper 13. This affidavit details a reduction in sales of approximately 14% and a reduction of profit of approximately 20%, accompanied by a sales report containing detailed sales numbers for the Fairhaven store.

The court concludes that the plaintiffs have demonstrated sufficient evidence that they will suffer irreparable lost profits if the regulation is enforced during the pendency of this action,

and that the risk of harm is not limited to the existence of unsold back stock that the plaintiffs would be able to sell before the regulation's effective date. Where a final decision of the court on the merits of this action is exceedingly unlikely to occur within the two months which remain before the effective date of the regulation, this court further concludes that the risk of such harm is immediate and reasonably certain. Thus, question before the court is whether this risk of harm weighs in favor of issuing a preliminary injunction when considered in the context of the plaintiffs' likelihood of success on the merits of the action.

**b. Likelihood of Success**

The board argues that a preliminary injunction is not warranted, regardless of any risk of irreparable harm, where the plaintiffs have a minimal likelihood of success. The board asserts that the appointment of board members and the length of their terms was proper under G. L. c. 138, §§ 4, 5, and that the plaintiffs' information regarding board member political affiliation is not relevant where it did not document the members' affiliation at the time of appointment. The board further argues that the plaintiffs have little likelihood of demonstrating a due process violation on the basis of restrictions on public comment time during the board's hearing, where the meeting was conducted in accordance with the Massachusetts Open Meeting Law, G. L. c. 30A, §§ 18-25 and there is no public right to be heard at a public meeting. Lastly, the board argues that the regulation is a "reasonable requirement [with respect to] the conduct of business by any licensee," as contemplated by G. L. c. 138, § 23, that is properly related to issues within the scope of the board's authority, including reducing litter, public drunkenness, and underage drinking. See *City of Revere v. Aucella*, 369 Mass. 138, 145 (1975) ("local licensing boards have power to make regulations governing the conduct of the license business, and to modify, suspend, revoke or cancel licenses in order to enforce their regulations").

The plaintiffs argue that the licensing board's awareness of the procedural deficiencies in the appointment of at least one member is reflected by the change in the party member's political party enrollment and resubmission of the member for reappointment to the board. Moreover, the plaintiffs' evidence that two board members had "unenrolled" status at the time the regulation was adopted at least plausibly raises the question as to the status of such members at the time of their appointment, the date which the board asserts is the relevant consideration under the statute. Thus, at least as to the plaintiffs' claim that the board was not lawfully constituted at the time of its adoption of the regulation, there are unresolved factual issues which may prove relevant to the legal issue of board authority.

Similarly, the plaintiffs argue that many of their number were not able to address the board during the public hearing due to the time constraint on public comment. While the board asserts that the public comment period was "balanced" in that it permitted those both in favor and against the regulation to speak, the motion record does not permit a detailed evaluation of this assertion, and, at a minimum, the forty-five-minute comment period could be considered brief in light of the broad impact of the proposed regulation and large number of persons present seeking to comment.

In short, on the face of the materials before this court, the plaintiffs have demonstrated an arguable basis for their assertions of procedural error that may ultimately be resolved in favor of the board upon a more complete record, but at this stage cannot be considered minimal. For that reason, this court concludes that the plaintiffs have demonstrated at least a moderate likelihood of success on the merits of their declaratory judgment claim against the board.

### c. **Balancing**

Having so concluded, this court now weighs the risk of irreparable harm to the plaintiffs against any similar risk of harm to the licensing board or city in general. See *Lieber*, 488 Mass. at 821 (2022). As noted above, the board makes no mention of particular harm to itself or the city from a delay in enforcement of the regulation, and the issuance of a preliminary injunction in this circumstance would merely preserve the city's current status quo. Thus, although the board has an at least moderate likelihood of ultimately prevailing on the merits of the declaratory judgment, the risk of harm in the interim from the issuance of preliminary injunction appears to be minimal. In contrast, the plaintiffs' moderate likelihood of prevailing on the merits of this action as against the board must be considered in light of the apparently substantial financial impact that enforcement of the nip ban would create during the pendency of the suit—sales would be irrevocably lost if the plaintiffs are ultimately vindicated.

Accordingly, this court concludes that, as to the board specifically, "the balance between these risks cuts in favor" of the plaintiffs, and thus "a preliminary injunction [may] properly issue" to preserve the status quo prior to final judgement of the courts on the merits of the plaintiffs' declaratory judgment claim against the board. See *GTE Products Corp*, 414 Mass. at 722-723. The plaintiffs' motion is therefore **ALLOWED** as to the licensing board.

### ***2. Alcoholic Beverages Control Commission***

Such conclusion does not necessarily apply equally to the ABCC, however, as the two entities are not similarly situated. Indeed, the ABCC argues that the plaintiffs have no likelihood of success on the merits because this court lacks jurisdiction to hear a declaratory judgment claim against the ABCC, where the plaintiffs' appeal to the ABCC was dismissed on the grounds that the ABCC lacked authority to invalidate a local licensing authority requirement imposed

under the city's authority under G. L. c. 138, § 23, and thus this court's jurisdiction is limited to reviewing such dismissal under G. L. c. 30A, § 14. The ABCC further argues that even if this court had jurisdiction to review its dismissal decision, the plaintiffs have no likelihood of success in demonstrating that the ABCC has actual authority to invalidate a local regulation like that at issue here. Finally, the ABCC argues that the plaintiffs are unable to demonstrate a risk of irreparable harm where they may still seek relief through a procedurally proper claim against the proper party, that is not the ABCC.

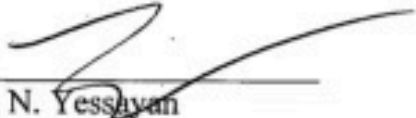
The plaintiffs do not address the ABCC's procedural arguments, including the failure to appeal its dismissal decision pursuant to G. L. c. 30A, § 14. Instead, the plaintiffs merely assert that the ABCC has "abdicat[ed]" its "power of general supervision" and "ignored" the issue of nips as various municipalities adopt conflicting policies, resulting in "unfair competition, loss of revenue, and deprivation without due process, and a regulatory taking without just compensation."

Accordingly, this court concludes that the plaintiffs have not demonstrated anything more than a minimal likelihood of success on the procedural correctness of its declaratory judgment claim against the ABCC. Moreover, the plaintiffs have not specified how the irreparable commercial harm set out in the affidavits is tied to the ABCC, in particular, where relief through a procedurally proper appeal to the ABCC of any local enforcement action would still be available to the plaintiffs at a later date. In these circumstances, "the balance between these risks" does not weigh in favor of the plaintiffs, and thus a preliminary injunction may not properly issue against the ABCC. See *GTE Products Corp.*, 414 Mass. at 722-723. For that reason, the plaintiffs' motion must be **DENIED** as to the ABCC.

**ORDER**

It is hereby **ORDERED** that the plaintiffs' motion for a preliminary injunction is **ALLOWED** as to the Licensing Board of New Bedford, but **DENIED** as to the Alcoholic Beverages Control Commission. The following order shall enter during the pendency of this action: **The Licensing Board of New Bedford and its agents are restrained from initiating prosecution under or otherwise enforcing the provisions of Regulation No. 48, banning the sale of alcoholic beverages in containers less than or equal to 100 milliliters, pending the issuance of a final judgment in this action.**

Dated: June 3, 2024

  
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Raffi N. Yessayan  
Justice of the Superior Court