

**Matter of Marikleve, Inc. v New York State Liquor
Auth.**

2012 NY Slip Op 32690(U)

October 24, 2012

Supreme Court, New York County

Docket Number: 103304/12

Judge: Carol E. Huff

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **CAROLE HUFF**

Justice

PART 32

MARIKLEVE, INC.

INDEX NO.

103304/12

MOTION DATE

THE NEW YORK STATE
LIQUOR AUTHORITY

MOTION SEQ. NO.

01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~

motion is decided in accordance

with accompanying memorandum decision

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

OCT 24 2012

Dated: _____

CAROLE E. HUFF

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

-----X

In the Matter of the Application of MARIKLEVE, INC., : Index No. 103304/12

Petitioner, :

For a Judgment Pursuant to Article 78 of the Civil Practice :
Law and Rules,

- against - :

THE NEW YORK STATE LIQUOR AUTHORITY, :

Respondents. :

-----X

CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner seeks to annul the determination of respondent New York State Liquor Authority, dated May 22, 2012, denying petitioner’s application for an off-premises liquor store license, and also seeks an order directing the Liquor Authority to issue the license.

On May 23, 2011, petitioner applied to open its store at 32-15 33rd Street in Astoria, Queens. After respondent denied the application on December 5, 2011, petitioner requested reconsideration. On May 22, 2012, respondent denied the reconsidered application, attaching a written determination dated May 17, 2012 (the “Determination”).

Petitioner states that its intention was to offer a broader selection of Greek and New York regional wines than was available in the traditionally Greek neighborhood. Four other package stores exist within approximately a quarter mile of the proposed site.

Alcoholic Beverage and Control Law § 63(6) provides: “Determinations . . . with respect

[* 3]

to the issuance of a new license . . . shall be made in accordance with public convenience and advantage.”

“Public convenience” necessarily refers to the accessibility of stores and involves considerations of distance, overcrowding of present facilities, etc. “Public advantage” is a broader term which brings into play social and similar problems, and involves the State's general policy as to the sale of alcoholic beverages for off-premises consumption. That general public policy, as stated in section 2 of the Alcoholic Beverage Control Law, is to regulate the manufacture and distribution of alcoholic beverages for the purpose of fostering and promoting temperance and respect for and obedience to law.

Forman v New York State Liquor Auth., 17 NY2d 224, 230 (1966).

In the Determination, respondent stated that,

To make this determination [as to public convenience and advantage] the Authority considers whether the area is sufficiently served by the existing package stores. As part of that review, the Authority looks, among other things, at the proximity of the existing licensed stores to the applicant's location, the gross sales of the nearest liquor stores, population or demographic changes, and whether the applicant will offer products or services not currently provided by the existing licensees.

Determination at 1.

Petitioner states that it agrees with these standards, but that respondent, when making its decision, failed to consider evidence submitted by petitioner.

For example, the Determination states: “There was nothing submitted with the application to indicate whether the business would offer products or services not available in the package stores that currently serve the area.” Determination at 1. The Determination further states: “The applicant was offered an opportunity to submit a list of products that it would sell that would distinguish the applicant's business from the nearby package stores. The applicant

declined to provide such a list. . . .” Determination at 6, fn 5.

Petitioner points out that, in fact, its attorney offered respondent lists of more than one hundred Greek wines and additional New York regional wines. Transcript, 11/212 at 9. It also contends that respondent ignored evidence that the sales figures of neighboring package stores was increasing, and that the population of the neighborhood was increasing despite a controversial decline reported in the last census report.

With respect to the sales figures, the Determination did cite the figures produced by those businesses in response to petitioner’s application, and accurately found that “there did not appear to be any significant overall increase in the demand for their products in the community.” Determination at 3.

With respect to local population growth, respondent found, “[W]e did not rely on a finding that the population was declining. Instead, we noted that there was no evidence that the population was changing in any manner that would warrant another package store.” Petitioner’s letters from real estate brokers and an unofficial population growth chart are not sufficient to challenge this finding.

With respect to product differentiation, although respondent apparently did disregard petitioner’s evidence regarding its intended list of products, it did find accurately that some Greek wines were offered at the other package stores.

The denial of petitioner’s license application will be upheld unless it is shown that the Determination “was affected by an error of law . . . or was arbitrary and capricious or an abuse of discretion.” CPLR 7803(3). The test is whether the determination is “without sound basis in reason and is generally taken without regard to the facts.” Pell v Board of Educ. of Union Free

School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222, 231 (1974). An administrative agency, “acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record.” Partnership 92 LP & Bld. Mgt. Co. Vv State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 425, 429 (1st Dept 2007), aff'd 11 NY3d 859 (2008).

The underlying rationale of the Determination is that granting a license to petitioner's package store was not “in accordance with public convenience and advantage” when four package stores that already existed within a quarter mile of the site adequately supplied the community's needs. Because the Determination is not lacking in reason or taken without regard to the facts, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: **OCT 24 2012**


CAROL E. HUFF
J.S.C.