

STATE OF RHODE ISLAND
DEPARTMENT OF BUSINESS REGULATION
PASTORE COMPLEX
1511 PONTIAC AVENUE
CRANSTON, RHODE ISLAND

Philip Johnston, JFC Auto Sales,	:	
JFC Propane, Johnston’s Enterprises Inc.,	:	
Appellants,	:	
	:	
v.	:	
	:	
Providence Board of Licenses	:	DBR No.: 23LQ004
Appellee	:	
	:	
and	:	
	:	
Shivkrupa Corp. 309 Manton Avenue and	:	
Shivkrupa Corp. 896 Manton Avenue,	:	
Intervenors,	:	

ORDER RE: MOTION FOR STAY

I. INTRODUCTION

This matter arose pursuant to an appeal and motion for stay filed on May 19, 2023 by Philip Johnston, JFC Auto Sales, JFC Propane, and Johnston’s Enterprises Inc. (“Appellants”) with the Department of Business Regulation (“Department”) pursuant to R.I. Gen. Laws § 3-7-21 regarding the decision taken on May 11, 2023 by the Providence Board of Licenses (“Board”) granting Shivkrupa Corp. 309 Manton Avenue’s application to transfer its Class A liquor license (“License”) from Shivkrupa Corp. 309 Manton Avenue to Shivkrupa Corp. 896 Manton Avenue (“Intervenors”).¹ A remote hearing on the motion to stay was heard on May 31, 2023 before the undersigned who was delegated to hear this matter by the Director of the Department. All parties were represented by counsel.

¹ The Intervenors were granted permission to intervene at the hearing on May 31, 2023.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-7-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

III. STANDARD FOR ISSUANCE OF A STAY

Under *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (R.I. 1976), a stay will not be issued unless the party seeking the stay makes a “strong showing” that “(1) it will prevail on the merits of its appeal; (2) it will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to other interested parties; and (4) a stay will not harm the public interest.” Despite the ruling in *Harsch*, the Supreme Court in *Department of Corrections v. Rhode Island State Labor Relations Board*, 658 A.2d 509 (R.I. 1995) found that *Harsch* was not necessarily applicable in all agency actions and the Court could maintain the *status quo* in its discretion when reviewing an administrative decision pursuant to R.I. Gen. Laws § 42-35-15(c). The issue before the undersigned is a motion to stay a decision which is subject to a *de novo* appeal and does not fall under R.I. Gen. Laws § 42-35-15(c).

IV. GRANTING A LIQUOR LICENSE

It is a matter of law that local licensing boards have broad discretion in deciding whether or not to grant a liquor license application. “The granting or denying of such licenses is in no sense an exercise of the judicial process. On the contrary it is purely administrative. In performing that function the board (sic) act as agents of the legislature in the exercise of the police power. . . . [I]t is a matter of discretion whether or not they shall grant the license and this court has no control over their decision.” *Bd. of Police Comm’rs v. Reynolds*, 86 R.I. 172, 176 (1957).

The Department has the same broad discretion in the granting or denying of liquor licenses. *Id.*, at 177. See *Domenic J. Galluci, d/b/a Dominic’s Log Cabin v. Westerly Town Council*, LCA–

WE-00-04 (10/25/00); *Donald Kinniburgh d/b/a Skip's Place v. Cumberland Board of License Comm'rs*, LCA-CU-98-02 (8/26/98). However, the Department will not substitute its opinion for that of the local town but rather will look,

for relevant material evidence rationally related to the decision at the local level. Arbitrary and capricious determinations, unsupported by record evidence, will be considered suspect. Since the consideration of the granting of a license application concerns the wisdom of creating a situation still non-existent, reasonable inferences as to the effect a license will have on a neighborhood must be logically and rationally drawn and related to the evidence presented. A decision by a local board or this Office need not be unassailable, in light of the broad discretion given to make the decision. *Kinniburgh*, at 17.

In discussing the discretionary standard enunciated in *Kinniburgh*, the Department has also found as follows:

[T]he Department, often less familiar than the local board with the individuals and/or neighborhoods associated with the application, will generally hesitate to substitute its opinion on neighborhood and security concerns if there is evidence in the record justifying these concerns. To this end, the Department looks for relevant material evidence supporting the position of the local authority. (citation omitted). *Chapman Street Realty, Inc. v. Providence Board of License Commissioners*, LCA-PR-99-26 (4/5/01), at 10.

As articulated through liquor licensing decisions at the State court level and the Departmental level, the standard of review for a new license or a transfer of license is subject to the discretion of the issuing authority. Arbitrary and capricious determinations not supported by the evidence are considered suspect. *Infra*. See *W&D Parkview Enterprise, Inc. d/b/a Parkview v. City of Providence, Board of Licenses*, DBR No.: 19LQ021 (12/12/19).

In light of the broad discretion given to the Board, the undersigned only reviews the Board's decision for evidence to support it. The Board's decision need not be unassailable but rather there must be evidence to support the Board's decision. Thus, at a full hearing, the issue

will be whether there was competent evidence to support the Board's discretionary decision to grant the transfer of license on May 19, 2023.

V. **DISCUSSION**

The Appellants are next door to the Intervenor's proposed location on Manton Avenue (where it intersects with Chalkstone Avenue). The parties agreed that the prior business in the proposed location was a car dealership. The parties do not dispute that there is a fence between the Intervenor and the Appellants which is between six (6) to eight (8) feet high. The parties agreed that behind the proposed location is a very large Stop and Shop grocery store and on the other side is a Wendy's with a drive through window.

The Appellants represented that they have a 2,000 pound propane tank that has been there for 54 years and is right near the fence between their property and the proposed location. The Appellants represented that they open that tank about a 100 times a day. They argued that there was a safety issue in terms of the fumes from the propane tank which they are concerned could be ignited by a cigarette either being smoked or discarded on the adjoining property. They argued that the fence could not block the fumes. They represent that their usage of the propane tank has been grandfathered in the area.

The Intervenor argued that people smoke at car dealerships, and it is inconceivable that a liquor store being added to that area would suddenly be a risk to the propane tank when a car dealership was not. They argued that there have not been any such issues in that area in the last 54 years so how could it be that a liquor store would be an issue? The Intervenor argued that there is a fence also around the propane tank. The Intervenor argued that people would not be standing in the parking lot smoking. They did represent that they would be selling tobacco products at the liquor store.

The Board argued that there was no evidence at the Board hearing of any public safety issue. The Board argued there were no zoning issues. The Board argued the only evidence was the Appellants' speculation about safety issues. The Board argued that the Appellants need to show a public safety issue to obtain a stay.

In response, the Appellants represented that they have a fire extinguishment expert that would testify at the full hearing that there should be 25 feet from an air duct. The Appellants represented that this matter should be held in the *status quo*. In response, the Intervenor represented that their building's entrance is more than 25 feet from the tank and that the parking lot would be in front of the building and not next to the fence.

In response, the Board pointed out that any license transfer is subject to a fire compliance inspection, and it could ask that the Fire Department evaluate the proximity of the propane tanks as to safety. The Intervenor agreed. The Intervenor represented that they plan to purchase the proposed building, and the closing has been held up due to this appeal.

The information received by the undersigned is based on representations of the parties. The undersigned did not have a transcript of the Board hearing; however, an audio of the Board's hearing for May 11, 2023 was available online, and the undersigned listened to that recording.²

At the Board hearing and at the stay hearing, the Appellants represented a concern that cigarettes from the Intervenor's customers could ignite the propane tank's fumes. The Appellants argued that the Intervenor's customers would buy tobacco products and stay in the parking lot to smoke. The Appellants do not allow smoking on their property. But it seems conjecture that there would be more smoking at liquor store's parking lot than a car dealership's parking lot. Also, if

² See <https://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=14091&Format=Minutes> (audio of Board's May 11, 2023 meeting).

the propane fumes can be set alight by smoking in the next door parking lot, then any passerby smoking could be a danger as well.

Applying the stay criteria, a stay will not be issued if the party seeking the stay cannot make a strong showing that it will prevail on the merits of its appeal. Obviously, there is a public interest in public safety. However, there was not a strong showing that the Appellants will prevail on the merits of its appeal as there was no evidence actually linking a danger from smoking at the Intervenors' property to the Appellants' tank.

As this location is not yet opened and is subject to a fire inspection prior to opening, the Providence Fire Department inspection – as suggested by the Board and agreed to by the Intervenors – shall include an evaluation of the propane tank's proximity to the Intervenors' location and any impact on public safety that could have.

VI. RECOMMENDATION

There has been no showing that a stay should be granted. Therefore, the Appellant's motion for stay is denied. However, the denial of the stay is conditioned as follows: as this location is not yet opened and the License not yet issued and is subject to a fire inspection prior to the License being issued, the Providence Fire Department inspection – as suggested by the Board and agreed to by the Intervenors – shall include an evaluation of the propane tank's proximity to the Intervenors' location and any impact on public safety that could have.³

It is noted that the denial of the stay allows the licensing process to go forward. However, there will be a full hearing scheduled which could result in a different decision.

³ Depending on what the inspection finds, the Board may choose to review the application again and impose any relevant conditions.

Dated: June 1, 2023


Catherine R. Warren
Hearing Officer

INTERIM ORDER

I have read the Hearing Officer’s Recommended Order in this matter, and I hereby take the following action with regard to the Recommendation:

ADOPT
 REJECT
 MODIFY

Dated: June 2, 2023


Elizabeth Kelleher Dwyer, Esquire
Director

A hearing will be scheduled on a mutually convenient date to be determined by the parties.⁴

NOTICE OF APPELLATE RIGHTS

THIS ORDER CONSTITUTES AN INTERLOCUTORY ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-15. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify on this 2nd day of June, 2023 that a copy of the within Order and Notice of Appellate Rights were sent by electronic delivery and first class mail, postage prepaid, and by electronic delivery to the following: Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, R.I. 02903 and mariomartonelaw@gmail.com, Louis A. DeSimone, Jr., Esquire, 1554 Cranston Street, Cranston, R.I. 02920 and ldatty@gmail.com, John J. DeSimone, Esquire, 735 Smith Street, Providence, R.I. 02908 and jjd@desimonelaw.net, and Robert A. Peretti, Esquire, 1140 Reservoir Avenue, Suite 201, Cranston, R.I. 02920 and bob@peretti.legal, and by electronic delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.


Megan J. Mihara

June 2, 2023

⁴ Pursuant to R.I. Gen. Laws § 3-7-21, the Appellants are responsible for the stenographer.