STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE COMPLEX
1511 PONTIAC AVENUE
CRANSTON, RI 02920

Krikor S. Dulgarian Trust,	:	
Appellant,	:	
	:	
v.	:	
	:	
Providence Board of Licenses,	:	
Appellee,	:	**DBR No.: 10-L-0143**
	:	
and	:	
	:	
Chipotle Mexican Grill, LLC.	:	
Intervenor.	:	
	:	

DECISION

Hearing Officer: Catherine R. Warren, Esquire

Hearing Held: January 13 and February 4, 2011

Appearances:

On behalf of Krikor S. Dulgarian Trust:	Keven McKenna, Esquire
On behalf of Providence Board of Licenses:	Maxford O. Foster, Esquire
On behalf of Chipotle Mexican Grill, LLC.:	John Garrahy, Esquire

I. INTRODUCTION

This appeal arose out of the Providence Board of Licenses ("Board") granting a Class BV liquor license ("License") with conditions[1] to Chipotle Mexican Grill, LLC ("Intervenor") located on 235 Thayer Street, Providence, RI. Pursuant to R.I. Gen. Laws §

[1] Said conditions are contained in agreement between the Intervenor and the Board dated October 22, 2010 and made part of the License. See Board's Exhibit One (1) (Board's November 3, 2010 letter with attached conditions).

3-7-21, Grant Dulgarian ("Dulgarian"), Trustee of the Krikor S. Dulgarian Trust ("Appellant"), a 200 foot abutter, appealed the Board's decision to the Director of the Department of Business Regulation ("Department"). A *de novo* hearing was held on January 13 and February 4, 2011 before the undersigned sitting as a designee of the Director. On January 13, 2011, the undersigned granted Intervenor's motion to intervene. Oral closings were made on February 4, 2011 with the parties given the option to file supplemental briefs but none were filed. The record closed on May 26, 2011.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-5-1 *et seq.*, 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. ISSUES

Whether to uphold or overturn the Board's grant of Intervenor's application for said License.

IV. MATERIAL FACTS AND TESTIMONY

Bradley Toothman ("Toothman"), New England and Upstate New York real estate manager for Chipotle's restaurants ("Chipolte"), testified on behalf of the Intervenor. He testified that his responsibility is to find new sites for Chipolte's and to develop, open, and support the sites. He testified that he was particularly involved in the opening of this site. He testified that Chipotle is a national company with over 1050 units in the United States and is concerned with its public image so it is important that there be no problems associated with fighting or alcohol consumption. He testified that Intervenor agreed to stop serving alcohol at 10:00 p.m. since it does not want to be an after-hours hangout. He testified that

he was involved with the Chipotle restaurants in Warwick and Cranston, Rhode Island both of which have full liquor licenses and to date have not had any alcohol related incidents. He testified that alcohol sales represent 4% of Chipolte's national sales and that as of the previous month, the Rhode Island average total sales for alcoholic products was below 3%. He testified that Chipotle has its own liquor policy and procedures in which its employees are trained. See Intervenor's Exhibit One (1). He testified that nearby Brown University was initially opposed to Intervenor's License application since it had concerns with the 2:00 a.m. closing time so that the Intervenor agreed to limit its serving of alcohol. He testified that the Intervenor agreed with the Board to stop serving alcohol at 10:00 p.m. and to only serve beer and margaritas. He testified that its current hours are 11:00 a.m. to 10:00 p.m.

On cross-examination, Toothman testified that not all Chipotles have liquor licenses. He testified the Intervenor does not have a bar and its service is at a counter. He testified that he is expecting, on average, 100 customers daily. He testified that the Intervenor has a total number of 30 seats inside and a seasonal permit for outside seating. He testified that the Intervenor does not have an outside seasonal liquor license; therefore, alcohol may only be consumed inside. He testified that each individual general manager is personally explained Chipotle's manual on alcohol sales. He testified that the Intervenor's manager is certified under Rhode Island statutory law to serve alcohol (under TIPS). He testified that the majority of its customers will likely be Brown University students, and over 70% will likely be walking to because the majority of the students do not have cars. He testified that the Intervenor obtained a parking variance.

Dulgarian testified on behalf of the Appellant. He testified that the commercial stretch of Thayer Street is approximately 4½ blocks. He testified that he believes there are

enough liquor licensees on Thayer Street and that the area should be balanced between retail and food. He testified that there is no parking and that the Intervenor's location is a heavily trafficked intersection so that the Intervenor will cause additional cars on the road. See Appellant's Exhibit One (1) (College Hill Parking Task Force 2008). He testified that he is concerned about underage drinking especially in light of the nearby college students. He testified that at the initial Board hearing, there were enough objectors to the License to total objections from those representing over 50% of the property within the 200 foot radius but a vote wasn't taken and the hearing was continued.

On cross-examination by the Intervenor, Dulgarian testified that he would not object to the Intervenor if it did not serve liquor and provided parking. On cross-examination by the Board, Dulgarian testified that he was aware that Brown University withdrew its initial opposition to the License based on accommodations made by the Intervenor.

V. DISCUSSION

A. The Arguments

In closing, the Appellant argued that there was a legal remonstrance (R.I. Gen. Laws § 3-7-19) at the initial Board hearing as objectors representing over 50% of the 200 feet radius of property objected to the License so that the Board should have denied the application. The Appellant also objects on the ground of health and safety that there are too many liquor licenses on Thayer Street which is near a college. The Appellant also objected on the grounds that the Intervenor will increase traffic because of its number of seats and parking is already not available and the street is already heavily trafficked. The Appellant also argued that a cashier at counter service cannot serve alcohol so the Intervenor cannot obtain a License.

In closing, the Intervenor argued it is limiting its sales of alcohol which only make up a small percentage of its national sales and that it has sufficient internal and external control methods for its alcohol service. It also argued that Dulgarian had general concerns for the areas with nothing specific linked to the Intervenor so based on Departmental precedent, the granting of the License should be upheld.

In closing, the Board argued that there was no evidence of a public hazard at this location. The Board argued that Brown was concerned about the 2:00 a.m. closing so entered into discussions with Intervenor's and certain conditions were agreed to and made part of the License so at the end of the hearing, there was no legal remonstrance.

B. The Standard of Review

R.I. Gen. Laws § 3-7-7[2] provides that a town or city may grant a Class B 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

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[2] R.I. Gen. Laws § 3-7-7 states in part as follows:

> Class B license. – (a)(1) A retailer's Class B license is issued only to a licensed bona fide tavern keeper or victualer whose tavern or victualing house may be open for business and regularly patronized at least from nine o'clock (9:00) a.m. to seven o'clock (7:00) p.m. provided no beverage is sold or served after one o'clock (1:00) a.m., nor before six o'clock (6:00) a.m. Local licensing boards may fix an earlier closing time within their jurisdiction, at their discretion. The East Greenwich town council may, in its discretion, issue full and limited Class B licenses which may not be transferred, but which shall revert to the town of East Greenwich if not renewed by the holder.
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> ********
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> (4) Any holder of a Class B license may, upon the approval of the local licensing board and for the additional payment of two hundred dollars ($200) to five hundred dollars ($500), open for business at twelve o'clock (12:00) p.m. and on Fridays and Saturdays and the night before legal state holidays may close at two o'clock (2:00) a.m. All requests for a two o'clock (2:00) a.m. license shall be advertised by the local licensing board in a newspaper having a circulation in the county where the establishment applying for the license is located.

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 *Hobday v. O'Dowd*, 179 A.2d 319 (R.I. 1962). See also *Domenic J. Galluci, d/b/a Dominic's Log Cabin v. Westerly Town Council*, LCA–WE-00-04 (10/25/00). 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. *Donald Kinniburgh d/b/a Skip's Place v. Cumberland Board of License Commissioners*, LCA–CU-98-02 (8/26/98), at 17.

Furthermore, the Department has 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 Bd. of License Commissioners*, LCA-PR-99-26 (4/5/01), at 10.

Thus, while the Department has the same broad discretion in granting or denying a liquor license application, 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. Such discretion must be based on reasonable inferences drawn from the evidence. Arbitrary and capricious determinations not supported by the evidence are considered suspect. *Infra.*

C. Whether the Granting of the License Should be Upheld

i. Legal Remonstrance

The Appellant argued that there was a legal remonstrance against the application which should have been determined at the Board's initial hearing on August 11, 2010. The undersigned reviewed the transcript of that hearing. See Board's Exhibit 15. At that hearing, some objectors appeared and objected on different grounds: the 2:00 a.m. closing (William Twaddell; Christopher Tomkins)[3] and the liquor license (Dulgarian). The Board received a letter from Brown University which indicated that it opposed the 2:00 a.m. closing but would not object to the hours of 11:00 a.m. to 10:00 p.m. with only service of margaritas and beer. See Board's Exhibit 13. The Board also received two (2) letters from abutters objecting to the License. See Board's Exhibits 11 and 12. On the basis of these various objections, the Board continued the hearing to determine whether an agreement could be reached with the Intervenor agreeing to certain conditions.[4]

The Appellant argues that at the August 11, 2010 hearing a legal remonstrance could have been established. There is no evidence to support such a claim. In fact, the largest abutting landowner, Brown University, did not object to a limited license. See Board's Exhibit Eight (8) (200 foot radius abutters' list). The Appellant implied that the Board was attempting to deter the objectors by continuing the hearing but indeed two (2) of the objectors present only objected to the late night closing. There is no evidence to support such a claim.

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[3] It is unclear whether those objectors are 200 feet abutters.

[4] A second hearing was held on August 25, 2010 at which time the License was approved pending the agreement to the conditions of only limited liquor service of beer and margaritas until 10:00 p.m. See Board's Exhibit 16 (transcript of August 25, 2010 hearing) and Board's Exhibit One (1) (November 3, 2011 Board letter enclosing the October 22, 2010 agreement to conditions).

Furthermore, the hearing before the undersigned is a *de novo* hearing. The Supreme Court held *Hallene v. Smith*, 201 A.2d 921, 925 (R.I. 1964) as follows:

> We conclude then that § 3-7-21 contemplates not an appeal, but a proceeding to transfer or remove a cause from the jurisdiction of a local board to that of the state tribunal that may be invoked whenever a local board acts adversely to the license under consideration. When this provision is properly invoked, it transfers the jurisdiction of the cause from the local board to the administrator by operation of law, and the cause then pending before the administrator is entirely independent of and unrelated to the cause upon which the local board acted. Error of law or fact inhering in the latter proceeding is without legal consequence on the jurisdiction of the administrator. When it is pending before the administrator on a hearing de novo, the cause is precisely the same as when it stood before the local board prior to its removal. The issue therein is the same, and the posture of the parties remains the same as that in which they stood before the local board. In short, the cause, when removed to the jurisdiction of the administrator, stands as if no action thereon had been taken by the local board.

See also *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984) (as the hearing is a *de novo* hearing rather than an appellate review of what occurred at the municipal level, any alleged error of law or fact committed by the municipal agency is of no consequence) and *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964) (*de novo* hearing is unaffected by any error by local board). Thus, even if there were errors by the Board concerning a legal remonstrance (which there were not), this hearing is a *de novo* hearing on Board's decision to grant the conditional License and would be unaffected by such errors. This argument is without merit.

ii. Health and Safety

The Appellant has broad concerns regarding health and safety arguing that there are too many liquor establishments on Thayer Street which is a danger to the community as well as increasing the risk to underage drinking because of the proximity of Brown

University. The Appellant's preference for a balance of retail and food establishments on Thayer Street is a policy argument and is not grounds to overturn the grant of this License. There is no evidence linking Intervenor's to underage drinking. Indeed, the Intervenor will not be a late night drinking establishment but rather will offer limited liquor service in conjunction with its food and based on its Rhode Island and national sales, such liquor sales are a small percentage of its sales.

In addition, there are certain health and safety requirements – state and local - that a licensee must meet before a license is issued. For example, there are statutory requirements regarding compliance with the Fire Safety Code and Fire Alarm Systems. See R.I. Gen. Laws § 23-28.1-1 *et seq.*; R.I. Gen. Laws § 23-28.25-1 *et seq.* The City prohibits the Board from issuing any license until an applicant provides written statements from the Department of Inspection and Standards and the City Fire Department stating that the premises are in compliance with municipal building and fire codes. See City Ordinance Art. I Sec.14-1. No Certificate of Occupancy will issue without the required building and fire code compliance. See R.I. Gen. Laws § 23-27.3-120 *et seq.* The health and safety arguments are without merit.

iii. Traffic and Parking

The Appellant argued that the Intervenor's 30 seats would increase the number of cars on Thayer Street which will create more traffic. However, there was also testimony that many of the Intervenor's customers were expected to be local students who would arrive on foot. The Intervenor has received a parking variance. The evidence is that parking in the area is tight but manageable. See Appellant's Exhibit One (1) (Task Force report). The Appellant's arguments are speculative and without merit.

iv. Cafeteria Style Service

The Appellant argued that the License should not be granted because the cash register personnel (as the Intervenor is counter service) would control the drinking. The Appellant argued that cafeteria-style service of alcohol is prohibited by statute and regulation. It provided no statutory or regulatory cites in support of this argument.

R.I. Gen. Laws § 3-7-6.1 and Rule 43 of the Department's *Commercial Licensing Regulation 8 Liquor Control Administration* mandate that all people that sell or serve alcohol or check identifications used to purchase alcohol must receive training in a alcohol server training program. The evidence was that the Intervenor's staff has received said training as well as internal alcohol procedure training. See Intervenor's Exhibit One (1). This argument is without merit.

D. Conditional License

Under *Thompson v. East Greenwich*, 512 A.2d 837 (R.I. 1986), a town may grant a liquor license upon conditions that promote the reasonable control of alcoholic beverages.[6] See *Newport Checkers Pizza, Inc. d/b/a Scooby's Neighborhood Grille v.*

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[6] *Thompson* relied on R.I. Gen. Laws § 3-1-5 and R.I. Gen. Laws § 3-5-21.

R.I. Gen. Laws § 3-1-5 states as follows:

> Liberal construction of title. – This title shall be construed liberally in aid of its declared purpose which declared purpose is the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages.

R.I. Gen. Laws § 3-5-21 states in part as follows:

> Revocation or suspension of licenses – Fines for violating conditions of license. – (a) Every license is subject to revocation or suspension and a licensee is subject to fine by the board, body or official issuing the license, or by the department or by the division of taxation, on its own motion, for breach by the holder of the license of the conditions on which it was issued or for violation by the holder of the license of any rule or regulation applicable, or for breach of any provisions of this section.

Thompson found R.I. Gen. Laws § 3-5-21 allows municipalities to impose conditions on liquor licensees in accordance with R.I. Gen. Laws § 3-5-1 which restricts such conditions to be in the promotion of the control of alcoholic beverages. Subsequent to *Thompson*, the Supreme Court has addressed the issue of whether a town may pass an ordinance that affects liquor licensees as a group. *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228 (R.I. 2000) found that 1997 amendment to R.I. Gen. Laws § 3-7-7.3 specifically endowed all cities and towns with the power to restrict or prohibit entertainment in Class B

Town of Middletown, LCA-MI-00-10 (12/7/00) (Department upheld Town's condition of an early closing of 11:00 p.m. as reasonable under *Thompson* to balance interests of neighbors and licensee). The Intervenor entered into an agreement with the Board regarding limiting its serving hours and limited its liquor service to beer and margaritas. This is permissible and also a commendable way to address neighbors' concerns.

E. Conclusion

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. The Appellant has not presented evidence that would warrant the overturning of this decision. Obviously, once a liquor license is issued, all licensees must abide by the local and State statutory and regulatory obligations or face sanctions if found to have violated such. The record in this *de novo* hearing supports the Board's conclusion to grant the License.

VI. FINDINGS OF FACT

1. On or about August 25, 2010 and November 3, 2010, the Board granted Intervenor's application for a Class BV liquor license with the condition that liquor service be limited to beer and margaritas up to 10:00 p.m.

2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed said decision by the Board to the Director of the Department.

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liquor licensees but that only clarified what had been already authorized in R.I. Gen. Laws § 3-1-5 and R.I. Gen. Laws § 3-5-2. See also *Amico's Inc. v. Mattos*, 789 A.2d 899 (R.I. 2002). *Thompson* related to an individual licensee who agreed as a condition of licensing to abide by certain conditions (which the town was requesting all licensees agree to but had not made part of a liquor ordinance).

3. A *de novo* hearing was held on January 13 and February 4, 2011 before the undersigned sitting as a designee of the Director. The parties chose not file briefs and the record closed on May 26, 2011.

4. The facts contained in Section IV and V are reincorporated by reference herein.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-5-1 *et seq.*, 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.*

2. In this *de novo* hearing, no showing was made by Appellant that would warrant overturning the Board's decision to grant the Intervenor's License with conditions.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of the Board to grant the Intervenor's application for a Class BV License with conditions (see Board's Exhibit One (1)) be affirmed.

Dated: June 10, 2011

Catherine R. Warren
Hearing Officer

ORDER

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

____✓____ ADOPT
_____ REJECT
_____ MODIFY

Dated: 15 June 2011

Paul McGreevy
Director

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. 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 15th day of June, 2011 that a copy of the within Order was sent by first class mail, postage prepaid to -

Maxford O. Foster, Esquire
City of Providence Law Department
275 Westminster Street
Providence, RI 02903

Keven McKenna, Esquire
23 Acorn Street
Providence, RI 02903

John Garrahy, Esquire
160 Westminster Street
Providence, RI 02903

and by hand-delivery to Maria D'Alessandro, Deputy Director, Department of Business Regulation, John Pastore Complex, 1511 Pontiac Avenue, Cranston, RI.

A B Ellison