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

D&J Food Service, LLC d/b/a Bob & Timmy's Grilled Pizza of Smithfield, Appellant,	:	
v.	:	**DBR No.: 11-L-0014**
Smithfield Town Council, Appellee.	:	

DECISION

Hearing Officer: Catherine R. Warren, Esquire

Hearing Held: April 5 and 29, 2011

Appearances:

On behalf of the Appellant: David A. Ursillo, Esquire

On behalf of the Appellee: Edmund L. Alves Jr., Esquire

I. INTRODUCTION

On or about March 1, 2011, the Smithfield Town Council ("Town" or "Council") denied a request by D&J Food Service, LLC d/b/a Bob and Timmy's Grilled Pizza of Smithfield ("Appellant") to obtain a Class B liquor license ("License") from the Town. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed the Town's decision to the Director of the Department of Business Regulation ("Department"). A *de novo* hearing was held on April 5 and 29, 2011 before the undersigned sitting as a designee of the Director. The parties timely filed briefs by June 30, 2011.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 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 Town's decision to deny the Appellant's request for a License.

IV. MATERIAL FACTS AND TESTIMONY

The Appellant is located at 1201 Douglas Pike, Smithfield, RI. The entire building is owned by Peter Sangermano ("Sangermano") and his father. Sangermano and Jose Sanchez ("Sanchez") co-own the Appellant. The Appellant is in the same building as a Dr. Day Care ("Day Care") pre-school facility. The Day Care is co-owned by Sangermano and Dr. Mary Ann Shallcross Smith ("Smith"). The Town approved the Appellant's application for a food license but not for a liquor license.

Sangermano testified on behalf of the Appellant. He testified that he co-owns two (2) other Dr. Day Cares including one in North Smithfield which is next door to another Bob and Timmy's that he also co-owns. He testified that the Appellant will be opened from 11:30 a.m. to 10:30 or 11:00 p.m. every night except Fridays and Saturdays when it will open to 1:00 a.m. He testified that the Day Care will be to the left of building with the restaurant to the right but the Appellant's main entrance will be on the side of the building. See Appellant's Exhibits Three (3) to Six (6) (photographs), and Seven (7) (diagram). He testified that the Day Care will have a secure entrance accessed by a

computer code and parents will pick-up children from their individual classrooms. See Appellant's Exhibit Eight (8) (diagram). He testified that the Appellant's capacity is 136.

Sangermano testified that initially there was only one (1) curb cut for the parking lot that was to be the entrance and exit but the Appellant is in the midst of constructing a second curb cut so that the Appellant's and the Day Care's patrons will have the same entrance but the Day Care's patrons instead of exiting through the initial curb cut where the Appellant's patrons will still exit, will exit from the second curb cut in front of the Day Care and drop-off area. He testified that the parking lot will have directional signs for traffic for exiting and entering. See Appellant's Exhibit Nine (9) (diagram with proposed second curb cut). He testified that a Dr. Day Care and a Bob and Timmy's have been open in the same building in North Smithfield for a year and a half and there have been no complaints and he hopes that the Appellant will attract families and businesses in the area. See Town's Exhibit One (1) (includes proposed menu).

On cross-examination, Sangermano that when he received the permit for the Day Care, the restaurant was not part of the proposal. See Town's Exhibit Two (2) (grant of special use permit for Day Care). He testified that the traffic study submitted for the Day Care permit was based on the rest of the location being an office building so that the traffic study estimated that during the afternoon peak hour of 4:30 p.m. to 5:30 p.m., there would be 189 trips from the Day Care with 18 at the peak hour from the rest of the building. He testified that the pre-school will be for children up to five (5) years old but the Day Care will also provide after-school care for up to 12 years old. He testified that it should be licensed for 215 to 230 children including the after-school program for 39

students who will bussed by the school department. He testified that the Town approved the restaurant to have 83 parking spaces.

Smith testified on the Appellant's behalf. She testified that she has been in early childhood care since 1972 and began operating an early childhood day care in 1987. She testified she owns other Dr. Day Cares as well as the Day Care. She testified she does not have an interest in the Appellant. On cross-examination, Smith testified that the Day Care offers a complete education environmental and will provide homework time for the before- and after-school care. She testified that the Day Care is licensed by the Department of Children, Youth, and Families ("DCYF") for infant, toddler, pre-school, and school-aged care and that DCYF licenses all child care facilities including before- and after-school care. On questioning from the undersigned, Smith testified that the Day Care will open at 6:00 or 6:30 a.m. and close at 6:00 p.m. so that the children will be off the premises by 6:00 p.m.

Sanchez testified on behalf of the Appellant. He testified that he has co-owned a "Timmy's" in Providence for five (5) years and in North Smithfield[1] for over one (1) year and has been in the restaurant business for 17 years and never has any complaints about any of his restaurants. On cross-examination, Sanchez testified that he works at Timmy's on Federal Hill but will switch his time once the restaurant opens in Smithfield so he will be there every day and will be the Head Chef and would definitely work in the beginning 50 hours a week at Smithfield.

Richard P. St. Sauveur, Jr., ("St. Sauveur"), Chief of the Town Police, testified on behalf of the Town. He testified that he was familiar with Appellant's location and it is a quarter-mile from Bryant University which has approximately 2,700 students on campus.

[1] Apparently, they are called Grilled Pizza of Providence and Grilled Pizza of North Smithfield.

He testified that for the years 2008, 2009, and 2010, the Bryant Department of Public Safety ("BDPS") made a total of 409 calls to the Smithfield Police for service of which 29 of those were alcohol related. See Town's Exhibit Five (5) (copy of the 29 reports). He testified that children can be unpredictable and based on the parking plans and the peak pick-up times for the Day Care, he did not think parking will be available in front of the Day Care so the parents will have to walk across the parking lot with children which is a safety concern with a licensed restaurant next door and there is no margin of error with children's safety. He testified that there are other licensed restaurants nearby as well as large corporate offices for Fidelity Investments, Citizens Bank, and Navigant Credit Union whose employees patronize the local restaurants. He testified he is concerned with local traffic congestion being compounded by the Appellant serving alcohol. Finally, he testified that having a limited liquor license after 6:30 p.m. would be an enforcement problem as no other licenses in the Town are limited and it would be difficult to enforce.

On cross-examination, St. Sauveur testified that he did not provide the BDPS reports to the Town prior to this hearing. He testified that the 29 alcohol related reports are for on-campus alcohol incidents and took place between 11:00 p.m. and 3:30 a.m. He testified that alcohol consumption is generally an issue at Bryant. He testified that he has no knowledge about Sangermano's or Sanchez' ability to run a restaurant or Smith's ability to run a day care. He testified that there are other restaurants with liquor licenses in Smithfield that are located in shopping plazas with other businesses.

Ronald F. Manni ("Manni"), Town Councilor, testified on behalf of the Town. He testified that he was a Town police officer for 23 years and now works at the Tri-Town Community Action Program and was with its alcohol and drug abuse prevention

program for seven (7) years. He testified that at the Council hearing he stated he was concerned about the proximity of a day care to a liquor license. He testified that he also believed that the parking lot would be divided like the building but apparently the parking lot is to be shared. He testified that he is concerned with individuals drinking next door when parents are picking up their children.

On cross-examination, Manni testified that there are other places in Town where establishments serving alcohol are close to facilities catering to children, e.g. a Little Gym is near a Chelo's restaurant. He testified that based on his experience people do not intend to drive drunk, but often end up having more to drink than intended and drive drunk which is a major concern that is exacerbated by the parking lot. He testified that the denial was not based on the Appellant's co-owners' inability to run a restaurant.

V. DISCUSSION

A. The Arguments

In closing, the Town argued that there is ample evidence to justify the denial of License application since the Day Care, Appellant's, and future tenant will cause congestion for parking lot since parents need to park and pick-up children from their classrooms and the numbers using the Day Care for pick up is more than the available parking spaces. The Town argued that the proximity of Bryant to the Appellant's was a reason to deny the application. The Town argued that the proximity of large corporations to another liquor licensee will increase congestion by those workers patronizing Appellant's and will be unsafe. The Town also argued that while R.I. Gen. Laws § 3-7-19(a) only prohibits elementary and secondary schools (K-12) from being within 200 of a

Class B liquor licensee, the statute sets forth a public policy that generally liquor establishments and school children should be separated.

In closing, the Appellant argued that there was no evidence that the proximity of Bryant to the Appellant would be a significant public safety concern. The Appellant argued while there is a broad based public policy concern regarding drunk driving, there was no evidence that the Appellant was a direct safety concern. Indeed, the Appellant argued that its parking plans will minimize and prevent many of the hypothetical issues raised by the Town in that there will be separate exits and signs will be posted directing traffic in the parking lot. The Appellant argued that the parking has been approved by Zoning. Additionally, the Appellant argued that the Town has no evidence that Sangermano or Sanchez are unfit to run a liquor licensee or that their business plan for the restaurant is poor.

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

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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.
> ********
> (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.

in no sense an exercise of the judicial process. On the contrary it is purely administrative. In performing that function the board act (sic) 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 (1975). The Department has the same broad discretion in the granting or denying of liquor licenses. *Id.* at 177. See also *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 Commissioners*, LCA–CU-98-02 (8/26/98).

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.

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 Board 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.*

The Appellant argued that St. Sauveur's testimony was contrived post-Town hearing since it was not presented at the Town hearing and should not be considered. However, the hearing before the undersigned is a *de novo* hearing so such testimony is allowable even if not presented at the local hearing. See *Hallene v. Smith*, 201 A.2d 921, 925 (R.I. 1964). See also *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984); *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964).

C. Whether the Denial of the License Should be Upheld

a. Public Safety

The Town did not find that the Appellant's co-owners were unable to run an establishment with a liquor license or that they did not have a well thought out business plan. Rather the Town had public safety concerns regarding the Appellant's location being in the same building as the Day Care and near Bryant University. The Town presented evidence that of 409 call made by the BDPS in a three (3) year period, 29 calls were for assistance related to late night on-campus alcohol incidences. There was no evidence presented that the Appellant or the co-owners would cater to underage college students or that said college students would drinking at Appellant's rather than at other nearby licensed establishments. As discussed in *Kinniburgh*, reasonable inferences as to the effect a license will have on a neighborhood must be logically and rationally drawn

from evidence presented. In this matter, the evidence regarding what Bryant students may do at the Appellant's is purely speculative.

The Council's evidence in regard to the Day Care and the Appellant being in the same building was that the belief that the parking lot was the too small and children are unpredictable and that the nearby businesses would patronize Appellant's at the end of the day when the Day Care children are being picked up so that the confluence of those events would cause a safety risk. The parking lot is approved by the Zoning board and the Appellant is taking steps to separate the exits between the Day Care and Appellant. Presumably, the concern is that patrons will be drinking at Appellant's prior to 6:00 p.m. and will leave at the same time the Day Care children are picked up during the peak hour.

While it could be considered speculative that the Appellant's patrons would finish dining and drinking or just drinking prior to 6:00 p.m. and leave drunk, the fact is that the General Assembly has already made a policy decision regarding the proximity of schools and Class B licensees. The Appellant argues that the statute cannot be applied to the Day Care because it does not fall under it. However, there is a public policy decision to be considered as localities are allowed to make such public policy decisions.

b. Public Policy

The Town argues that R.I. Gen. Laws § 3-17-19(a) supports a policy decision to deny this application even if the Day Care does not fall under the statutory exclusion. Obviously, the General Assembly could have included day care and pre-school care in the statutory prohibition but chose not to. The argument could be made that the General Assembly chose not to implement that public policy.

In *A Rock and a Hard Place v. City of Woonsocket*, DBR No.: 06-L-016 (5/10/07), the City had decided to adopt a public policy of not issuing 2:00 a.m. Class BV licensees and thus eliminate late closing licenses by attrition. That decision found as follows:

> At hearing, there was evidence regarding the City's policy of eliminating after-hours closing times by attrition. It was not disputed that there has been a decrease in the number of 2:00 a.m. closings over the years the Board has been reducing 2:00 a.m. closing times by attrition. It was not disputed that there are currently only two (2) other liquor licensees with 2:00 closing times within the City and that those licensees already had 2:00 a.m. closing times when the Council began its policy of attrition.
>
> The Council bases its policy of eliminating 2:00 a.m. closing times by attrition on public safety concerns including late night drinking and the impact on the neighborhoods. It was not disputed that towns in the vicinity of Woonsocket do not have 2:00 a.m. closing times. It is not unreasonable to infer that people who want to continue drinking after 1:00 a.m. who live inside or outside the City may then drive to the City to continue to drink. It is not unreasonable to infer that if an establishment only serves liquor from 11:00 p.m. to 2:00 a.m. instead of to 1:00 a.m. that more drinking will take place and thereby increase the chances that patrons may drink too much. It is not unreasonable to infer that an increased amount of drinking could lead to more problems with patrons as people's judgment becomes impaired when they drink too much. It is not unreasonable to infer that there would be an increased number of patrons – either from the City or from the vicinity – who would be drinking more if a bar is allowed to stay open to 2:00 a.m. And it is not unreasonable to infer that as the number of people drinking increases, more problems with safety (e.g. drunk driving, physical altercations, car accidents) would occur whether inside an establishment, in front of an establishment, or driving to or from an establishment. It is not unreasonable to infer that an increased number of problems could negatively impact a residential area's safety and comfort (e.g. noise level).
>
> Therefore, the City's policy is reasonable in light of the evidence in support of its policy to eliminate 2:00 a.m. closing times by attrition in order to minimize potential safety issues with late night drinking in the City. The undersigned will not substitute her judgment for that of a local licensing authority regarding its policy of eliminating 2:00 a.m. closing times by attrition as the City's policy has a reasonable basis in public safety.

In *28 Prospect Hill St., Inc. v. Gaines*, 461 A.2d 923 (RI 1983), the Court found that the local licensing board acting in its legislative capacity could choose to adopt a blanket prohibition against 2:00 a.m. Class B licensee closings which the pertinent statute

provides is within the discretion of local licensing authorities. Since a blanket prohibition was adopted in *Gaines*, no rights of hearing attached to any licensee no longer allowed to close at 2:00 a.m. Similarly in *Volare, Inc. d/b/a Barry's v. City of Warwick Board of Public Safety*, LCA WA95-01 (10/3/96), the City of Warwick, pursuant to R.I. Gen. Laws § 3-7-7, enacted a blanket prohibition on 2:00 a.m. Class B closings rendering any appeals of such denials moot as the City had acted within its legislative authority.

In *A Rock*, the local authority did not enact a blanket prohibition but instead chose to eliminate 2:00 a.m. closings by attrition. Thus, any denial of a 2:00 a.m. closing request resulted in a hearing. The Department found that the local authority had a reasonable basis – e.g. evidence - for Woonsocket's public policy to eliminate 2:00 a.m. closings by attrition. Thus, the issue here is what is the basis for the Town's denial?:

1) Does the Town wish to extend the General Assembly policy of the 200 feet barrier to all day cares/pre-schools and Class B licensees; or
2) Is the shared building and common parking lot a *specific* safety issue for this location and that conclusion is supported by the policy contained in R.I. Gen. Laws § 3-7-19.

The Town argued that the "fatal flaw" in the proposed plan is having a liquor establishment in the same building as a pre-school/day care with a common parking lot for both businesses and if the child care establishment was removed from the Appellant's proposal, the Town would treat the Appellant's business the same as the other neighboring liquor establishments. Thus, it would appear that the Town is not so much interested in establishing an absolute 200 feet barrier to day cares/pre-schools and liquor

licensees but rather has concluded that a day care/pre-school and Class B liquor licensee sharing a building and parking lot is unsafe.[3]

As stated above, the local licensing authority's decision need not be unassailable in light of the broad discretion given the local licensing authority. Rather there just needs to be evidence on the record that supports the local authority's decision. In this matter, there was no evidence supporting the argument regarding the Bryant students as the only

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[3] The undersigned had inquired about a limited license along the lines of after 6:00 p.m. when the Day Care would be closed. Obviously, such a license would not be available if R.I. Gen. Laws § 3-7-19 was at play since that statute is an absolute barrier to any Class B license being within 200 feet of a K-12 school. While the Town is apparently not seeking to adopt a 200 foot rule for day care/pre-schools, the Town argued that a conditional license would be out of the norm so would cause enforcement difficulties. A conditional license might be out of the norm for the town but it is allowed.

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. *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:
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> 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 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). See also *Sugar, Inc., and Sharlene Alon v. City of Providence, Board of Licenses*, DBR No.: 09-L-0119 (8/24/09).

While the police might not be used to enforcing such a license, it should be noted that R.I. Gen. Laws § 3-7-7 provides for a limited beer and wine Class B license as well as a full Class B license and presumably such a limited license must be noted in police records in order to be enforced. A notation of an after 6:00 p.m. license can be no different than a notation for a limited beer and wine license.

evidence was about late night on-campus alcohol incidents and there was no evidence linking problem drinking by Bryant students with the Appellant. However, the Board raised safety issues because of the Appellant's location being in the same building as a day care/pre-school. The Department has a long history of deferring to the local licensing authority as long as there is evidence on the record. The Department also has the power to make its own findings. In keeping with the Department's deference, I will remand this matter so that the Board may fully articulate its concerns and basis for denial on the record.[4] Thus, in order to clarify the Board's determination and basis for its public safety concerns, this matter is remanded for further consideration and decision by the Board consistent with the findings of this decision.

In light of the forgoing, this matter is remanded for the following clarification by the Board:

1. Does the Board seek to establish an absolute 200 feet barrier between Class B licensees and day care/pre-schools; or

2. Has the Board made an independent finding that there is a specific safety issue for *this* Day Care and restaurant being in the same building; or

3. Is the Board seeking to adopt a public policy that a day care/pre-school and a (full and/or limited [in the sense of beer and wine]) licensed restaurant can not share a building and/or parking lot [e.g. could a day care and licensed restaurant be in the same shopping plaza in separate buildings]; and

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[4] On the basis of the evidence at hearing, the Department may find that a conditional license is appropriate and impose certain conditions without remand. See *La Base Sports Bar & Grill LLC v. City of Providence, Board of Licenses*, DBR No. 10-L-0037 (4/6/11) which is available at http://www.dbr.ri.gov/documents/decisions/CL-Decision-LaBase.pdf.

In that situation, the Department chose not to remand the matter to the local board but found that on the basis of the articulated reasons, certain conditions could be imposed in order to grant the expansion and late night license.

4. If the Board's findings are solely related to paragraph Two (2), what evidence does the Board rely on to support such specific safety findings: e.g. 1) same building; 2) common parking lot; and 3) shared entrance to parking lot, etc.; and

5. If the Board's findings are solely related to paragraph Three (3), what evidence does the Board rely on to support such a public policy (e.g. like in *A Rock*): e.g. 1) same building; 2) common parking lot; and 3) shared entrance to parking lot, etc., and

6. If the Board's findings are solely based on safety concerns in this instance (e.g. paragraphs Two (2) and Four (4)), does the Board believe the Appellant could satisfactorily mitigate its safety concerns. E.g. 1) separate entrances to the parking lot; 2) differing traffic flow; and 3) restrictions on license or probationary period, etc.[5]

If the Board seeks to adopt a policy that day cares/pre-schools and licensed restaurants cannot share a building, it must provide evidence as in *A Rock*. If a specific public policy is adopted, it would follow that an applicant could not mitigate safety concerns (assuming there was evidence for the adoption of such a broad-based policy).[6] If the Board's concerns are limited to safety issues regarding a shared building and parking lot and only finds support for its concerns in R.I. Gen. Laws § 3-7-19, then presumably the Appellant may be able to overcome such concerns if mitigation is possible.[7]

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[5] *Id.*

[6] If the Town seeks an absolute barrier similar to R.I. Gen. Laws § 3-7-19, presumably it would have to adopt an ordinance as in *Barry's*.

[7] The Board and the Appellant may be able to reach a mutually satisfactory resolution on this application without necessitating such findings and if they do so, they shall notify the undersigned that the appeal is withdrawn.

VI. FINDINGS OF FACT

1. On or about March 1, 2011, the Council denied a request by the Appellant to grant a Class BV liquor license at the proposed plaza.

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

3. A *de novo* hearing was held on April 5 and 29, 2011 before the undersigned sitting as a designee of the Director.

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. Laws § 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, this matter is ripe for remand for the Board to make and clarify its findings on the record.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of the Council denying the Class BV liquor license be remanded as set forth above.

Dated: 9/2/11

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: 7 Sept 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 7th day of ~~August~~ September, 2011 that a copy of the within Decision and the Notice of Appellate Rights was sent by first class mail, postage prepaid, to

Edmund L. Alves, Jr., Esquire
Smithfield Town Solicitor
30 Exchange Terrance
Providence, RI 02903

David A. Ursillo, Esquire
7 Waterman Avenue
North Providence, RI 02911

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