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

La Base Sports Bar & Grill LLC **Appellant,**	:	
v.	:	**DBR No.: 10-L-0037**
City of Providence, Board of Licenses, **Appellee,**	:	

DECISION

Hearing Officer: Catherine R. Warren, Esquire

Hearing Held: December 20, 2010 and January 5, 2011

Appearances:

For La Base Sports Bar & Grille LLC: Thomas Hanley, Esquire

For Providence Board of Licenses: Maxford Foster, Esquire

I. INTRODUCTION

On or about March 8, 2010, the Providence Board of Licenses ("Board") denied an application by La Base Sports Bar & Grill LLC ("Appellant") for a BX license and for an indoor expansion of its location. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed the Board's decision to the Director of the Department of Business Regulation ("Department"). On June 24, 2010, the matter was remanded to the Board for further consideration and the Board again denied the application on November 24, 2010. A *de novo* hearing on the denial of the expansion and BX application was held on December 20, 2010

and January 5, 2011 before the undersigned sitting as a designee of the Director. On January 19, 2011, the parties notified the undersigned that they would rest on the record.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant R.I. Gen. Laws § 3-7-21 and R.I. Gen. Laws § 42-35-1 *et seq*.

III. ISSUES

Whether to uphold or overturn the Board's decision to deny the expansion of indoor premises and BX License.

IV. MATERIAL FACTS AND TESTIMONY

Yadira Diaz ("Diaz"), the Appellant's owner, testified on behalf of the Appellant. She testified that on March 9, 2009, she received approval from the Board to transfer a Class B liquor license to the Appellant. See Appellant's Exhibit Two (2). She testified that in November 2009, she applied for an indoor expansion of the Class BV license with a new BX license. She testified that she appeared before the Board in December, 2009 at which time the Board approved the expansion pending the necessary approvals (e.g. police, fire, etc.). She testified that because of that approval, she started renovations to expand the inside space including installing fire doors. See Appellant's Exhibit Four (4) (photograph of fire doors). She testified that she installed 90 sheets of 5/8 sheet rock, 75 rolls of sound insulation on the roof, and 60 rolls of insulation in the interior to reduce noise. She testified that in February, 2009, she hired Acoustical Supplies to conduct a noise survey including the potentially new interior space. See Appellant's Exhibit Three (3) (Acoustical Supplies survey dated 3/6/09). Tr1 10-20.[1]

[1] Tr1 refers to the first day of hearing with the transcript pages following. Tr2 will refer to the second day of hearing.

Diaz testified that she received notice in February, 2010 from the Board regarding possible problems with the December, 2009 approval of the Application. She testified that she told the Board in November what she had done about noise but the approval was denied. She testified that there has never been a disc jockey ("DJ") in the bar but there is a computer sound system and an employee, Raphel Perdoma ("Perdoma"), controls the music. She testified that since obtaining the License, she never has been warned about loud music. She testified that she doesn't know Officer Scott McGregor ("McGregor") who is assigned to the substation at Parkis Place (an apartment building) across the street. She testified that no one has ever been called to the establishment for a fight. She testified that the bar has had two (2) minor incidents. She testified that she has parking in front of her establishment. She testified she opens from 4:00 p.m. to 1:00 a.m. and Sundays noon to 1:00 a.m. She testified that Sunday is a family day with sports on television. She testified that the Appellant's immediate vicinity is a mixture of commercial and residential with a laundromat and cemetery next door and Parkis Place and stores across the street. She also testified that if the expansion is approved, she wants to move the entrance door by making it a "tunnel" around to the other street which will require zoning permission and also add more soundproofing. Tr1 20-36, 80-82.

On cross-examination, Diaz testified that she had previously managed the bar before buying it and being approved for the License in 2009. She testified that she performed the noise reduction survey in 2009 to avoid any complaints. She testified she can't remember when the renovation work was performed. She testified she hasn't moved the main entrance but there is a plan to move it from West Friendship to Broad Street. She testified she installed 70 decibel speakers. She testified that she has a

manager and an assistant manager, Perdoma, and she also works at the bar but does not work every night so wouldn't know about every complaint. She testified that she has not spoken to the Parkis residents but is aware that they object to the expansion. Tr1 38-72.

Leonardo Diaz, manager, testified on the Appellant's behalf. He testified that he has been the manager since soon after his sister purchased Appellant's and he has never met or spoke with McGregor. He testified that the bar never has had a disc jockey but has a computer sound system which he and another employee control. On cross-examination, he testified that he is not there every night and wouldn't know who McGregor was and hasn't spoken with any police officers. Tr1 87-89.

Perdomo testified on behalf of the Appellant. He testified he has worked for the Appellant for five (5) months, never has met Officer McGregor, works every day, and that there has never been a disc jockey or live entertainment in the bar. On cross-examination, he testified that the police have not come into the bar and he coordinates the music for the computer. Tr1 90-99.

McGregor testified on behalf of the Board. He testified that he is the site officer for Parkis Place so is aware of the Appellant's bar. He testified the site office is on the second floor of Parkis Place about 100 or 150 feet from the bar. He testified that in 2008 the building residents complained about the noise and that was the biggest complaint in the semi-annual resident meetings. He testified that 2009 after the bar became La Base, the noise began to get louder and he spoke with Perdoma and another manager a couple of times to tell them to turn the music down. He testified that the noise continued into 2010. He testified that he can hear the music from the site office. He testified that the residents are sick of the noise and sick of complaining so have stopped calling the police

since they feel nothing is being done. He testified that twice in the past two (2) years he has gone inside the Appellant's and once saw what seemed like a small disc jockey booth with a DJ playing music. He testified that he went in once for noise and once for a call of a distraught male at the bar. He testified that he let the licensing bureau know about the noise issues. He testified that he has never seen a fight. He testified that at the weekends, the three (3) parking lots are full and both sides of the streets are parked on. He testified that the laundromat which is next door to Appellant's is open late but not all night. He testified that Parkis Place residents showed up at the Board hearing in March 2010 to oppose the transfer. Tr2 11-35. On cross-examination, McGregor testified that he wasn't aware when Diaz took over Appellant's. He testified there is legal parking on Broad Street and on the right-hand side of Friendship Street. Tr2 35-60.

The Appellant's counsel represented that if the expansion is allowed the front door would be moved and some additional soundproofing added. He represented that speakers had also been taken out of the back of the building because there are televisions there since this is to be a sports bar. Tr 68.

V. DISCUSSION

A. Arguments

In closing, the Appellant argued that it does not have a DJ, has abated noise, and there is no evidence of fighting. The Appellant argued that the Board could not legally rescind the approval and it was unfair as it had started work on the building after the first approval.

The Board argued there were statutory issues with the first approval because notice wasn't given to the 200 foot abutters so one (1) week after the initial hearing, the

Appellant was noticed of the need for the new hearing (See Appellant's Exhibit Nine (9)) so the Appellant chose to continue with work on the expansion after finding out there was a need for a new hearing. The Board argued that it has been proved that the Appellant plays loud music, has been fined for entertainment without a license, received a warning for being over capacity, and fined for using unlicensed premises. The Board argued that McGregor's testimony demonstrates that the Appellant continually plays loud music and not background music. The Board argued that the only work apparently left be done is the moving the entrance door and there is no proof that would abate the noise. The Board argued that there was significant opposition to the Application and many residents testified before the Board. The Board argued that an expansion would be a detriment to the community because of the ongoing noise.

B. Standard of Review

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 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).

R.I. Gen. Laws § 3-5-19 governs the transfer or relocation of a liquor license. The transfer of a liquor license pursuant to R.I. Gen. Laws § 5-3-19 is treated the same as a new application. *Ramsay v. Sarkas*, 110 R.I. 590 (1972). See also *Island Beverages v. Town of Jamestown*, DBR No. 03-L-0007 (3/13/03); *BDR v. City of Providence, Board of Licenses*, LCA-PR-00-07 (9/18/00). The application to transfer the License to the Proposed Location is to be treated as a new application for a Class B liquor license.

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.

C. Whether the Expansion and/or BX license Should be Granted

Some of the testimony regarding the timing of events was unclear. The chronology is as follows:

1. At the March 9, 2009 Board hearing, approval was given to transfer the Class B License to Appellant. See Appellant's Exhibit Two (2).

2. On December 21, 2009, the Board held a hearing on the Application for a BX license and approval for expansion. See Appellant's Exhibits Eight (8) and Nine (9).

3. Approval for BX and expansion was given on December 21, 2009. See Appellant's Exhibit Nine (9).

4. By letter dated December 29, 2009, the Board notified the Appellant that there were notice problems for the December 21, 2009 hearing so that a new hearing would be held and a date of a new hearing would be provided. See Appellant's Exhibit Nine (9).

5. On March 3, 2010, the Board held a hearing again on the Application. See Board's Exhibit One (1).

6. On March 8, 2010, the Board denied the Application on the basis of a legal remonstrance. See Board's Exhibit One (1). Said denial was appealed to the Department and remanded to the Board by the Department by order dated June 24, 2010.

7. The Board held a hearing on October 28, 2010 on the remand. On November 22, 2010,[2] the Board denied the Application for four (4) reasons but found there no longer was a legal remonstrance. See Board's Exhibit One (1) (transcript and denial letter).

The evidence also shows that the Appellant admitted to a count of overcapacity occurring on January 30, 2010 and serving in unlicensed premises (the proposed expansion) also occurring on January 30, 2010. For those violations, the Appellant received a warning and a $250 administrative penalty respectively. See Board's Exhibit Four (4). There was no evidence introduced of any noise citation given to the Appellant. McGregor testified that in a space of two (2) years, he had only been inside the bar twice in two (2) years with once being for noise. He testified that on occasion he told the manager or security outside the Appellant's to turn the music down. At the October 28, 2010 Board hearing, Detective John St. Lawrence (head of the police licensing unit) told the Board that the police did not have any feelings from a public safety point of view for doubling the capacity (e.g. approving the

[2] The Board transcript states November 30, 2010 on the outside by inside states November 22, 2010 for the date of hearing. The letter of denial states November 23, 2010 but November 22, 2010 was a Monday and the Board meets on Mondays, Wednesdays, and Fridays.

expansion) and "[i]t's very easy to monitor, as far as the police are concerned, if we feel the need." (Board's Exhibit One (1), p. 12). For the Board's March, 2010 hearing, a petition from Parkis residents was submitted objecting to the transfer because of fighting and noise. See Board's Exhibit One (1). None of the residents appeared at the November, 2010 Board hearing (Tr2 48) or the Department appeal hearing.

Diaz testified that she never had noise complaints but also testified that she had an acoustical survey performed in anticipation of noise complaints. Obvoiusly, there was some concern over noise in the building. The survey was performed in February, 2009 at which time Diaz was in the process of applying for the transfer which was granted in March, 2009. She was unclear in her testimony when she had the sheet rock and insulation installed. She testified that she had work performed after the approval was granted despite the fact that she was notified one (1) week after the approval that the approval was rescinded. That work was apparently installing the fire doors. She received a shipment of sheet rock and insulation in March, 2009. See Board's Exhibit Two (2) (invoice).

If the work had been done prior to December, 2009, the evidence is that the soundproofing did not necessarily help. Based on the evidence, it would appear the insulation was installed in the Spring, 2009 (see invoice) with the doors being installed in the Winter, 2009 around time of the expansion approval. The evidence is that there is some soundproofing left to install and a plan to move the door (if allowed by zoning).

The Appellant made an equitable argument that it was unfair to rescind the December, 2009 approval as it had started work on the expansion. However, an administrative proceeding is not an equitable proceeding and there is no equitable

jurisdiction. To find for the Appellant on the basis of an equitable argument would be reversible error. *Nickerson v. Reitsma* , 853 A.2d 1202 (R.I. 2004).[3]

The four (4) reasons for denial contained in November 24, 2010 Board letter are as follows: The first reason is that the Appellant engaged in loud music including employing a DJ without an entertainment license. However, there was no evidence of a DJ being employed at the Appellant's. There was evidence of loud music. The second reason is that the management and ownership had been unwilling to cooperate with police requests regarding controlling the volume of music. The evidence was that the police spoke to security and managers but never to the owner. The evidence also was that the owner never reached out to the police. The third reason is that the opposition although not constituting a legal remonstrance was extensive. The opposition consisted of Parkis residents and their local city councilor on their behalf. The other opposition was from a local restaurateur who felt the Board was treating the Appellant better than she (restaurateur). McGregor testified about noise as it related to Parkis. The other 13 entities listed on the abutters' list did not appear at any hearing. See Board's Exhibit Five (5). The fourth reason is that granting this License would constitute a detriment to the character and quality of the neighborhood and surrounding property owners.

At hearing, there was discussion regarding parking. The evidence was that parking lots were being used and there was legal on-street parking on both sides of Broad Street. There was no evidence introduced that the Appellant did not have adequate legal parking for its proposed expansion or that it was causing illegal parking.

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[3] Since the Department's appeal 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. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984); *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964) (*de novo* hearing is unaffected by any error by local board); and *Hallene v. Smith*, 201 A.2d 921, 925 (R.I. 1964).

Boiled down the opposition to the expansion and BX license is the noise from the music inside Appellant's. The Appellant argues that the expansion will diffuse the noise and it is becoming a sports bar. Certainly, one would expect that if the back area has televisions then there wouldn't be need for music or loud music.

While there was testimony that the music was loud, the Appellant has never been cited for loud music. Since there have been no noise citations but clearly concern over noise (e.g. McGregor's testimony, Diaz's steps to address noise in anticipation of transfer application), such concern is easily remedied. The expansion is granted conditioned on the following:

1. The Appellant's music does not go over 50 dB.[4] [5] If the Appellant is able to avoid any noise citations for one (1) year from the issuing of this Decision, this condition shall be lifted. The Appellant can request to the Board that the condition be lifted earlier than one (1) year.

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[4] The undersigned based this condition on Article III of Providence Ordinance Code Section 16-93 which states as follows:

> Radios, television sets, and similar devices.
>
> It shall be unlawful for any person within any residential zone of the city to use or operate any radio receiving set, musical instrument, phonograph, television set, or other machine or device for the producing or reproducing of sound in such a manner as to disturb the peace, quiet and comfort of neighborhood residents or of any reasonable person of normal sensitivity residing in the area. The operation of any such set, instrument, phonograph, machine or device so as to exceed fifty (50) dBA between the hours of 8:00 p.m. and 7:00 a.m. or so as to exceed fifty-five (55) dBA between the hours of 7:00 a.m. and 8:00 p.m. measured at the property line of the building, structure or vehicle in which it is located, or at any hour when the same is audible to a person of reasonably sensitive hearing at a distance of two hundred (200) feet from its source, shall be prima facie evidence of a violation of this section.

[5] The Appellant and the Board may agree to a higher decibel level if the Appellant can provide to the Board's with supporting documentation regarding acceptable decibel levels. Obviously, the Appellant is not residential and the entire area is not residential.

2. A BX license will be granted upon proof to the Board by the Appellant that it used its expanded area without incident for six (6) months from the date of the decision.[6]

3. The Appellant shall provide proof to the Board within three (3) months that it completed installing more soundproofing as testified at hearing.

4. The Appellant shall update the Board as to the moving of the front entrance and said feasibility within six (6) months. (There is no requirement [at this time] that the door be moved but the Appellant shall update the Board regarding the plans that it represented it would undertake and that it represented would minimize noise).

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.[7] See *Newport Checkers Pizza, Inc. d/b/a Scooby's Neighborhood Grille v. Town of Middletown*, LCA-MI-00-10 (12/7/00) (Department upheld Town's condition of

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[6] The Board and Appellant may agree to a shorter time period.

[7] *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 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).

an early closing of 11:00 p.m. as reasonable under *Thompson* to balance interests of neighbors and licensee). See also *Sugar, Inc. and Sharlene Alon v. City of Providence, Board of Licenses*, DBR No.: 09-L-0119 (3/9/10).

This decision reviewed the reason for the Application's denial and found that the concern over noise is not rationally supported by the evidence once the conditions are imposed. The conditions provide for the reasonable control of alcohol by ensuring that the Appellant's noise does not become a detriment to the community. This is the type of issue that should have been resolved by the Appellant and neighbors working together. Hopefully, the conditions imposed on the license by this decision will ensure that noise is no longer an issue for the local residents and the Appellant is able to expand its business without issue.

VI. FINDINGS OF FACT

1. On or about March 8, 2010, the Board denied an Application by the Appellant to expand its Class B License location and for a BX License.

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

8. The appeal was remanded to the Board by the Department by an order dated June 24, 2010. The Board held a hearing on October 28, 2010 on the remand. On November 22, 2010, the Board denied the Application.

3. A *de novo* hearing was held on December 20, 2010 and January 5, 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. § 3-5-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

2. Based on the forgoing, the imposition of conditions on the granting of the license ensures that the music does not arise to an on-going problem.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of the Board denying the License application be overturned and the expansion of premises be granted with the conditions set forth above in Section V.

Dated: 3/18/11

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: 5 April 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 6th day of ~~March~~ April, 2011 that a copy of the within Decision was sent by first class mail, postage prepaid, to

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

Thomas A. Hanley, Esquire
Law Office of Thomas A. Hanley
The Westin Providence Dome Bldg., 3rd Floor
1 West Exchange Street
Providence, RI 02903

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

A B Ellison