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

2012 Sports Bar, Inc.	:	
Appellant,	:	
	:	
v.	:	**DBR No. 12LQ084; 13LQ060**
	:	
The City of Cranston,	:	
Appellee.	:	

DECISION AND ORDER

1. Introduction

This liquor licensing matter between the City of Cranston and 2012 Sport Bar, Inc. ("Appellant"), an establishment located in the City of Cranston, has a long history that begins as described in the first Decision and Order issued by Rhode Island Department of Business Regulation ("Department") on June 22, 2013.[1] In brief, the dispute between the parties arose from a condition imposed on the Appellant's Class B-V liquor license, restricting entertainment to "computerized music only," (referred to herein as the "old restriction").

Pursuant to the Department's June 22 Order, the City of Cranston was required to adopt an Ordinance which the Department subsequently approved as being in satisfaction of R.I. Gen. Laws § 3-7-7.3. With the enactment of the Ordinance, all liquor licensees in the City that currently provide entertainment or are seeking new permission to provide entertainment must appear before the City's Committee on Safety Services and Licenses ("Committee") for issuance

[1] The June 22 Order and all the evidence and arguments presented since the initiation of this case are part of the consolidated Department docket numbers 12LQ084; 13LQ060. The June 22 Order is accessible at http://www.dbr.state.ri.us/documents/decisions/CL-Decision-Order-2012_Sports_Bar.pdf

of a new entertainment license under the new standards established by the Ordinance.[2] On October 7, 2013, the Committee denied the Appellant's new entertainment license application.[3] On appeal to the full Cranston City Council ("Council") on October 28, 2013,[4] the Council rendered a decision granting the Appellant's entertainment license, with the restriction that "entertainment" cease at 11:00 p.m., seven days per week (referred to herein as the "new restriction"), from which the Appellant now appeals to the Department.

The undersigned Hearing Officer, in issuing the below Recommendation, has carefully reviewed the transcripts from the Committee and Council hearings dated October 7 and 28, 2013, respectively, which were admitted into the Administrative Record pursuant to R.I. Gen. Laws § 3-7-21, as well as the evidence and arguments described in the Department's June 22 Order. The Hearing Officer has given counselors for both parties an adequate opportunity to express their respective positions throughout the development of this case, including several conferences and many electronic mail submissions.

2. Jurisdiction

R.I. Gen. Laws § 3-7-21 vests the Department with jurisdiction to hear appeals of decisions made by local liquor licensing authorities. Although utilizing the label "entertainment license," the Ordinance applies *exclusively* to liquor licensees. Because the City is using the Ordinance to impose entertainment restrictions specifically upon liquor licensees, including Class B license holders, R.I. Gen. Laws § 3-7-7.3 applies to decisions made under the Ordinance.

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[2] October 7 Committee Transcript at 54-55.
[3] October 7 Committee Transcript at 55-57; October 28 Council Transcript at 2.
[4] This internal municipal appeals process is specifically provided by new entertainment Ordinance § 5-64-075. In contrast; regarding appeal from Committee decisions resolved by the Department's June 22 Decision, the City did not identify any such provision that would require exhaustion before assumption of the Department's jurisdiction. Id. at 6-7 (referencing relevant statutes and City of Cranston Municipal Code 5.04.020).

The Department's supervisory role in implementing and enforcing R.I. Gen. Laws § 3-7-7.3 supports the Appellant's request that the Department decide this appeal.[5, 6]

3. Standard of Review

The Rhode Island Supreme Court has explained that "§ 3-7-21 contemplates the removal of a cause by operation of law from a local board to the [state liquor] administrator," a role statutorily vested in the Department. *Cesaroni v. Smith*, 98 R.I. 377, 379, 202 A.2d 292, 294 (1964). "Under such removal [,] jurisdiction is de novo, pursuant to which [the Department] independently exercises the licensing function." Id. "[T]he discretion given to the DBR goes as far as to vest the hearing officer with the authority to review the local board partially de novo and partially appellate if he/she sees fit." *Jake & Ella's, Inc. v. Dep't of Bus. Regulation*, 2002 WL 977812 (R.I. Super., 2002).[7]

4. Recommendation and Analysis

The Appellant's argument against the restriction imposed upon it is essentially two-fold: that the Ordinance does not create "objective standards" "applied uniformly" by the Council and that the result reached by the Council was unreasonable. R.I. Gen. Laws § 3-7-7.3 entitled "Class B licenses – Restriction on entertainment" provides, in relevant part: "[i]n the case of any

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[5] In contrast, in municipalities that issue entertainment licenses that are entirely separate from liquor licenses, *i.e.* standards that apply to all facilities regardless of whether they hold a liquor license, the Department does not assume jurisdiction. *Ada's Creations, Inc. v. City of Providence Board of Licenses*, DBR No. 13LQ056 (June 6, 2013). In its June 22 Decision and Order, the Department stated as follows: "The City of Cranston does provide for separate entertainment licenses, but only for establishments in excess of 100-person capacity. Because the Appellant's capacity is limited to approximately 80 persons, it was not issued a separate entertainment license." Id. at 4. This references Cranston Code of Ordinances § 5.64.010 *et seq.* which appears to be applicable to all facilities over the minimum capacity. The new Ordinance at issue in the instant Decision is a separate municipal law, codified at § 5-64-060 *et seq.*

[6] The Department held a conference with the parties between the Committee and Council hearings at which time the possibility of settlement was discussed. Neither party raised the issue of the Department's jurisdiction over this liquor establishment's entertainment license at that time or in any other manner.

[7] The Department's decision is considered "unaffected by any error inhering in the exercise of the licensing function by a local board acting within its territorial jurisdiction." *Cesaroni*, id. at 379-380. Therefore, the Appellant's arguments regarding procedure and alleged bias at the Committee and Council levels do not affect the Department's decision-making which is "independent" of the Committee.

city or town which issues any retailer's Class B license this city or town may restrict or prohibit entertainment at these licensed facilities, in accordance with objective standards adopted by the municipality and approved by the department of business regulation, provided that any standard shall be applied uniformly to all of these licensed facilities." This provision guarantees uniform standards that will guide the analysis of the local licensing authority in deciding whether to grant an entertainment license at a Class B establishment and under what restrictions. It does not guarantee that in applying those standards to different facts and circumstances, the local authority will reach the same results for every licensee. In other words, the Ordinance complies with the statute because it articulates the factors that the Council will take into account in each and every licensing case before it, providing the requisite transparency in the process and enabling applicants to prepare to support their application at the hearing. The fact that the Council's consideration of those factors has not resulted in imposition of the same exact restriction on every licensee in diverse settings and situations does not justify overturning the Council's decision.

Turning to the reasonableness of the Council's action, a quick review of the proceedings helps clarify exactly what limitations the restriction has placed on the Appellant's day to day operation. First, the Council's procedural posture was appellate review of the decision of the Committee. At the Committee hearing, a motion to grant the new entertainment license without the "old restrictions" was made; however, it appears from the ensuing discussion that that the Committee perceived the argument of counsel for the Appellant to be that the Committee could not restrict the type or hours of entertainment, creating an all-or-nothing ultimatum with respect to the Committee's decision. At the Council proceeding, the members voted to overturn the decision of the Committee and to wholly reconsider the Appellant's entertainment license

application.[8] In so reconsidering, the Council voted to grant the entertainment license, with an 11 p.m. closing time for the entertainment, to be applicable seven days per week.[9]

In summary, at the beginning of this case, the Appellant appeared before the Department with the "old restriction" limiting entertainment on the premises to "computerized music" *only*. The Appellant subsequently exercised its right to appeal to the Department; received a new hearing by the Committee on remand applying uniform standards mandated by the Department; exercised its right to appeal to the Council; and now petitions the Department for review of the outcome of these proceedings. As the Appellant now stands before the Department with the "new restriction," the Appellant is permitted to provide *any* type of entertainment defined by the Ordinance, *e.g.* live music and dancing, music played by a disc jockey, and any other performance permitted under law, up until 11 p.m. Between 11 p.m. and the statutory closing hour,[10] the Appellant is still permitted to provide the following *limited* forms of entertainment: "juke boxes, television, video games, video programs," "recorded music" that is *not* "played on equipment which is operated by an agent or contractor of the establishment for a period exceeding ten (10) minute per hour (*i.e.* DJ)," and "ambient music" defined as pre-recorded music which is audible from a distance of no more than twenty (20) feet from any portion of the exterior of the premises." Ordinance § 5-64-070 "Exceptions."[11]

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[8] October 28 Council Transcript at 20-22.

[9] October 28 Council Transcript at 34. The record also reflects a failed amendment to this motion offering the restriction that no "live entertainment" would be permitted after 10 p.m. on Sunday through Thursday, and no "live entertainment" after midnight on Friday and Saturday. Id. at 24. This motion was originally made at the beginning of the hearing; however, it was withdrawn for the procedural purpose of first making a motion with respect to the appellate posture of the Council. Id. at 2; 14.

[10] The Appellant represented that it is opened until 1:00 a.m., seven days per week. October 7 Committee Transcript at 21.

[11] These types of entertainment are exempted from the licensing requirement. Being granted an entertainment license could not have the effect of depriving the Appellant of its ability to do something that a license was *not* required for in the first place. *See* October 7 Committee Transcript at 21 (comment by City Solicitor to the Appellant's Secretary that "under this ordinance, a jukebox doesn't require you to have an entertainment license and neither does Monday Night Football").

In reviewing the Council's decision on the basis of its reasonableness and fairness, the Department will balance the interests of the licensee and the local liquor licensing authority. The Administrative Record indicates that the City's concerns, expressed through the members of the Committee and the Council, originate from the history of the premises during operation by prior owners (noise, litter, etc.), coupled with the City's consideration of the location of the premises relative to area residences and parking availability. While such concerns certainly do not justify denying the entertainment license altogether, they do present valid grounds for proceeding with some degree of caution. However, the question of how much caution is reasonable, *i.e.* what restrictions are appropriate, must be answered giving due consideration to the Appellant's interest in fully pursuing the potential fruits of its business.

As a *starting point* for granting the entertainment license, the concerns of the community were appropriately addressed without unreasonable detriment to the Appellant's business by permitting *any* type of entertainment until 11 p.m. and permitting a range of limited forms entertainment thereafter. The Appellant did not suggest any reasonable alternative restrictions for the Committee, Council, or undersigned Hearing Officer to consider. However, the Administrative Record does not support imposing such restrictions on a *permanent basis*, especially in light the Appellant's lack of documented Title III violations and compliance efforts such as sound proofing and decibel self-monitoring. Rather, the Appellant should be provided with a fair opportunity to demonstrate that it can distinguish itself from its predecessors and successfully operate within the confines of the law without creating any unlawful disturbance in the neighborhood. If the Appellant is able to make a successful demonstration, the new restrictions should be lifted.

In light of the forgoing, the undersigned recommends that:

1. The entertainment license shall be granted for a sixty day "demonstration period" with the restriction that "entertainment" cease at 11:00 p.m., seven days per week. Closing hours and activities not requiring an entertainment license shall not be affected.
2. On the date of the first regular meeting of the Committee that is scheduled after completion of the sixty day "demonstration period" commencing on the date of the City's issuance of the entertainment license, the Committee shall hold a hearing to evaluate the Appellant's performance during the "demonstration period" and determine whether or not to lift the new restriction.
3. If the Appellant's record is free of any substantiated complaints against the Appellant that would establish violations of law and/or a public nuisance, such as through police citations or documentation of decibel readings beyond legal limits, the Committee should consider lifting the restriction. Allegations pertaining to performance of past operators on the premises should not be held against the Appellant in making this determination.
4. The final decision following this "demonstration period" review shall be appealable to the Department.[12]

As recommended by:

Date: 12-6-2013

Louis A. DeQuattro, Jr., Esq., CPA
Hearing Officer

[12] *See Sugar, Inc. and Sharlene Alon v. City of Providence, Board of Licenses*, DBR No. 09-L-0119 at 29, n. 19 (March 9, 2010); *Habanos Lounge, Inc. d/b/a Habanos Cigar Lounge v. Pawtucket Board of License Commissioners*, DBR No. 10-L-0046 at 21, n. 13 (September 23, 2010). In these cases, the Department granted the Appellant a liquor license with conditions, providing that the Appellant could request said conditions to be lifted upon renewal. The cited footnotes provided that the Appellant would have a right to appeal the denial to lift the conditions to the Department.

Deputy Director & Executive Counsel

I have read the Hearing Officer's recommendation and I hereby (check one)

- [x] Adopt
- [ ] Reject
- [ ] Modify

the recommendation of the Hearing Officer in the above-entitled Decision and Order.

Date: 9 Dec 2013

Paul McGreevy
Director

Entered as an Administrative Order No.: 13-06 this 9th day of December, 2013.

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 December, 2013 that a copy of the within Decision and Order and Notice of Appellate Rights was sent by e-mail and first class mail, postage prepaid to -

For the Appellant:

Gregory P. Piccirilli
Sciacca & Piccirilli
121 Phenix Avenue
Cranston, RI 02920
gregory@splawri.com

For the City of Cranston:

Even M. Kirshenbaum, Esq.
67 Jefferson Boulevard,
Warwick, RI 02888
emk@kirshenbaumlaw.com

Patrick Quinlan
400 Smith Street
Providence, R.I. 02908
quinlaw@verizon.net

and by email to Maria D'Alessandro, Deputy Director, Securities, Commercial Licensing and Racing & Athletics