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

JARR Realty, LLC d/b/a DaVinci's Restaurant & Lounge, Appellant,	:	
v.	:	**DBR No. 11-L-0080**
The City of Providence Board of Licenses, Appellee.	:	

MODIFIED DECISION AND ORDER

This decision follows a Motion to Reconsider *JARR Realty, LLC d/b/a Davinci's Restaurant & Lounge v. City of Providence Board of Licenses*, DBR No. 11-L-0080 entered as Administrative Order No. 12-016 (March 29, 2012).

I. Facts and Travel

On July 21, 2011, JARR Realty, LLC d/b/a Davinci's Restaurant & Lounge ("Appellant") had a hearing before of the City of Providence Board of Licenses ("Board") to apply for a new Class BV liquor license at which Youssef Rouhana, principal of Jarr Realty, testified and three letters of remonstrance were read into the record. Legal abutters created a legal remonstrance by objecting to the granting of a liquor license. Due to the legal remonstrance, the Board denied the liquor license application on August 1, 2011. Appellant

appealed the Board's decision to the Department of Business Regulation ("Department") pursuant to R.I. Gen. Laws §3-7-21.

A pre-hearing conference was held before the undersigned, at which point Appellant presented letters from abutters rescinding their objections to granting a liquor license to Appellant so long as their enumerated conditions were met (hereinafter "Rescission Letters"). In lieu of further hearing, the parties agreed to file briefs with the undersigned for consideration in deciding the matter.

On February 22, 2012, after careful consideration of the briefs filed with the undersigned, the Department issued an Order of Remand directing the Board to reconsider whether there still exists a legal remonstrance and/or whether the application should be granted in consideration of the rescission letters of the remonstrance. On March 1, 2012, the Board issued a decision stating that it could not reopen the matter and reaffirmed its initial denial of the application for a new license.

On March 8, 2012, the Department received Appellant's notice of appeal requesting that the Department decide the matter on the merits. The Department issued the original decision on this matter on March 29, 2012, ordering the Board to grant the Appellant an unconditional BV liquor license. On April 19, 2012, the Department received a Request for a Stay and separately a Motion for Reconsideration. The parties mutually agreed to stay the Department's March 29, 2012 decision during pendency of the instant reconsideration, obviating the need for a Department Stay Order. A reconsideration hearing was held before the undersigned on May 25, 2012, from which this decision follows.

II. Motion for Reconsideration

Pursuant to Section 19 of the Rules of Procedure for Administrative Hearings for the Department of Business Regulation, "any Party may, for good cause shown, by motion petition the Director to reconsider the final order…within twenty (20) days of the issuance of the final order…set[ting] forth the grounds upon which he/she relies. The grounds on which the Board's Motion for Reconsideration relies is the alleged failure to include any findings of fact or conclusions of law in its Decision and not holding a de novo hearing.

It is within the Hearing Officer's sole discretion whether to grant a Motion for Reconsideration. Id., Section 19 of the Rules of Procedure for Administrative Hearings (the Hearing Officer has broad discretion to "order such relief as he/she deems appropriate under the circumstances"). As an exercise of this broad discretion, reconsideration is not limited to situations in which the original decision was invalid as a matter of law. Accordingly, the Department granted the Motion to Reconsider in its discretion, without any implication that the original decision was invalid. In abundance of caution, however, this Modified Decision addresses the grounds for reconsideration raised by the Board, including the alleged lack of *de novo* hearing that was resolved at the reconsideration hearing.

The Board challenged the sufficiency of the March 29 decision under R.I. Gen. Laws § 42-35-12 because, though findings of fact and conclusions of law were incorporated within the order's "Facts and Travel" and "Law and Analysis", they were not separately stated therein as "Findings of Fact" and "Conclusions of Law". Though the Board points the Department to *Sobanski v. Providence Employees' Retirement Bd.*, the Rhode Island Supreme Court in that case attacked the lack of sufficient written findings substantively, without reference to any specific formatting requirements. 981 A.2d 1021 (R.I. 2009). While the Department recognizes that the

formatting preference gives clarity to decisions and applies it to the Modified Decision, it does not necessarily imply that the prior decision was invalid as a matter of law.[1]

At the reconsideration hearing, both the hearing officer and the Appellant's counsel informed the newly-appointed counsel for the Board that the Board's prior counsel had agreed that, because there was no dispute as to the facts of the case, submission of legal briefs would suffice in lieu of further hearing on the matter. Without implying that this agreement deprived the parties of any rights, the undersigned, in its discretion, allowed both Appellant and the Board the opportunity to present any and all additional evidence into the record that either party deemed necessary for the clarification of its case. In response to this discretionary grant of further opportunity for a hearing, the Appellant presented new testimony before the undersigned, subject to cross-examination, from Youssef Rouhana, principal of Jarr Realty, on the applicant's character and fitness to hold a liquor license. Other than oral arguments on the legal issues already submitted through the Board's legal briefs, the Board did not present any new evidence for consideration.

III. Decision on the merits

The Department has broad discretion to fashion a remedy upon appeal of a decision of a local liquor licensing board. R.I. Gen. Laws § 3-7-21 authorizes the Department "to make *any* decision or order he or she considers proper." Id. (*emphasis supplied*). While the Department had the authority to decide this case on the merits in the first instance, the Department instead chose to exercise its discretion to issue the February 22, 2012 Order of Remand. *See, e.g. La Base Sports Bar v. City of Providence*, DBR No. 10-L-0037 (Order of Remand following

[1] *See also Town of New Shoreham v. Racine* 1992 WL 813547 (R.I. Super. 1992): "Petitioner contends that the Administrator failed to accompany her findings of fact in the record with an explicit statement of the underlying facts supporting the findings. R.I.G.L. 1956 (1988 Reenactment) 42-35-12 requires that any final order shall include findings of fact and conclusions of law. This Court disagrees with the petitioner and finds ample evidence in the record to support the Administrator's findings of fact."

withdrawal of abutter's remonstrance). The Board erred in its March 1, 2012 decision in which it essentially refused to adhere to the Department's Order of Remand.

When, on March 8, 2012, the Department received Appellant's Notice of Appeal requesting that the Department decide the matter, the Department could have issued a second Order of Remand and required the Board to reconsider the matter per the Rescission Letters discussed in the original remand order. However, after consideration of the need to give this matter finality, the Department instead exercised its discretion to decide the case on the merits on March 29, 2012. At the reconsideration hearing, counsel for the Appellant articulated the encumbrance of facing the Board for the third time on this matter. Again with finality in mind, the Department, after reconsideration, now exercises its discretion to resolve the disputes between the parties on the merits.[2]

V. Jurisdiction

R.I. Gen. Laws § 3-7-21 delineates the Department's jurisdiction in this case: the Department has the "right to review the decision of any local board, and after hearing, to confirm or reverse the decision of the local board in whole or in part, and to make any decision or order he or she considers proper."[3] Notwithstanding the legislature's broad pronouncement of jurisdiction, the Board asserts that when the facts "support a finding of legal remonstrance pursuant to R.I. Gen. Laws § 3-7-19, the Board, as well as the [Department] are statutorily without jurisdiction to entertain the application and thus deliberate as to whether to approve the

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[2] Given the Department's option of a second remand to the Board, the Department does not agree with the Appellant's contention that "due to the Board's decision of March 8, 2012, the Department *must* give this matter finality. Jarr Realty, LLC's Objection to Motion to Reconsider at 2, FN 1 (*emphasis supplied*).

[3] "A decision, as that term is used in [§ 3-7-21], contemplates action taken by the council after it has conducted a hearing referred to in § 3-5-17." *Beacon Restaurant, Inc. v. Adamo*, 241 A.2d 291, 294 (R.I. 1968).[3] The Board's March 1 decision was made "[a]fter a review of the record, and upon the advice of both the attorney for the City of Providence and the attorney for the Board". March 1 Letter from Andrew J. Annaldo to "Joseph Rouhana" (*misspelling as in original*). In "reviewing the record," the Board essentially reconsidered the evidence submitted at the initial July 21, 2011 hearing.

license." Board's January 23 Memorandum at 3. While the Department agrees that where legal remonstrance deprives the Board of jurisdiction to issue a license, the Board errs in its aversion that the Department's jurisdiction is so affected. The Department expressed this position in *Krikor S. Dulgarian Trust v. Providence Board of Licenses*, DBR No. 10-L-0143 (June 15, 2011). The Department held that "even if there were errors by the Board concerning a legal remonstrance," the Department's review of the Board's Decision "would be unaffected by such errors." Id. at 8. The Department now re-affirms its position with the following supporting legal analysis.

The Board interprets R.I. Gen. Laws § 3-7-19(a) as an absolute bar on the Department's jurisdiction where legal remonstrance is established at the local level. "[S]tatutory language should not be viewed in isolation," however. *In re Brown*, 903 A.2d 147, 149. Instead, "individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections." Id. Careful contextual analysis supports the conclusion that § 3-7-19(a) applies as a jurisdictional bar on local boards, but not on the Department.[4]

Viewed in context of the entire statutory scheme, it becomes evident that § 3-7-19(a) applies only to local board jurisdiction, whereas § 3-7-21 exclusively controls appeals to the Department. Nothing in § 3-7-19(a) applies to appeals to the Department's jurisdiction. Instead, all references are to the local licensing authorities, "the bod[ies] or official[s] having jurisdiction to grant licenses" in the first instance. Id.

[4] Because the undersigned concludes that the Department's jurisdiction is unaffected by legal remonstrance at the local level, the following arguments need not be addressed: (1) whether "a legal remonstrance [can] be removed based on a conditional withdrawal of the objection," whether "the applicant's voluntary acceptance of the conditions precedent [is] sufficient to effectuate the withdrawal of the objections and remove the legal remonstrance," or whether "[t]he fact that the conditions precedent arguably are more applicable to an entertainment license...automatically convert[s] the original opposition to an entertainment rather than liquor license. Board's January 23 Memorandum at 2-6.

Subsection (a) must also be read in context of the specific references to particular local licensing authorities. Subsection (a) carves out an exception for the local licensing authority of the City of East Providence. Additionally, subsection (d) of § 3-7-19, which constitutes the majority of the text of this statutory section, makes no reference to the Department as the appellate body, instead referring only to specific local boards (the "board of license the cit[ies] of" Providence, Newport, Warren, Bristol, Cranston, Pawtucket, Little Compton, Bristol, Smithfield, and Tiverton). Again, this demonstrates the point that the section is concerned with the jurisdictional limits of local boards rather than that of the administrator.

The distinction between limits on local board jurisdiction and limits on the Department's jurisdiction is further supported by the principles set forth in *Hallene v. Smith*, 98 R.I. 360, 365 (R.I. 1964). In *Hallene*, the Rhode Island Supreme Court, interpreting the predecessor to § 3-7-21, held that the Department assumes "original jurisdiction" upon appeal, meaning "the cause then pending before the administrator is entirely *independent of and unrelated to* the cause upon which the local board acted." Id. *(emphasis supplied)*.[5] In absence of objecting interveners at the Department level, the local remonstrance is entirely independent of and unrelated to the Department's decision. *See* Jarr Realty's Objection to the Motion to Reconsider at 2-3 ("When Appellant appealed to the Department, it gained an opportunity to have its case heard *de novo*. A pre-hearing [conference] took place where there were no objectors to the issuance of the license. At that time, the legal remonstrance that existed at the Board's initial hearing, no longer existed before the Department.")

The Board only presented one case to the undersigned in opposition to the construction that § 3-7-19(a) does not limit the Department's discretion. Board's January 23 Memorandum at

[5] In other words, the liquor license application "stands as if no action thereon had been taken by the local board," making local level objections "without materiality" to the Department's original jurisdiction. *Hallene*, id. at *366,* 368.

3, citing *Tryphoon v. Gains*, 1983 WL 486788, *2 (R.I. Super. 1983). In *Tryphoon*, the Rhode Island Superior Court examined § 3-7-19 in its analysis of whether the majority of "land" ownership interest included adjacent waterway ownership interests. Introducing this analysis, the Superior Court stated, without any further discussion, that "[i]t should be noted that where a legal remonstrance has been established pursuant to R.I.G.L. § 3-7-19, then the Administrator is without jurisdiction by force of the statute." This isolated statement has not been evaluated in any subsequent Rhode Island cases or legal literature.

The isolated *Tryphoon* statement relies solely on *Elmwood Tap, Inc. v. Daneker*, where the Rhode Island Supreme Court reviewed the "action of the administrator in refusing to entertain [an] application", *i.e.* his discretion to deny a liquor license appeal. 78 R.I. 408, 409. A careful review of *Eldwood Tap* demonstrates that the issue was not whether the administrator was "without jurisdiction by force of statute". Rather, the Rhode Island Supreme Court clarified that "[t]he controlling issue before [it] [was] whether the administrator was justified in refusing to consider petitioner's appeal". Id. The finding that the administrator has discretion to refuse to hear a case due to remonstrance is completely distinguishable from the implication that the administrator is statutorily prohibited from taking the appeal.[6] This distinction is consistent with the characteristics of "original jurisdiction" because "exercise of original jurisdiction is generally discretionary". AMJUR COURTS § 77.

IV. Grant of license with conditions

The Board agrees that "when acting within the jurisdiction conferred," the Department is "free to approve a license with conditions". Board's January 23 Memorandum at 3. In fact, the City of Providence is no stranger to the Department's practice of granting conditional licenses to

[6] The administrator's opinion was that "he had no jurisdiction in the matter" due to the legal remonstrance that occurred at the local level. Id. The court's opinion does not address the validity of the administrator's opinion that the legal remonstrance removed the appeal from his power of review, however.

address pending concerns. *See, e.g., La Base Sports Bar & Grill v. City of Providence, Board of Licenses*, DBR No. 10-L-0037 (April 4, 2011); *Krikor S. Dulgarian Trust v. Providence Board of Licenses*, DBR No. 10-L-0143 (June 15, 2011); and *Sugar Inc. v. City of Providence, Board of Licenses*, DBR No. 09-L-0119 (March 9, 2010).

Specifically, upon appeal, the Department assumes the local board's authority to issue conditional licenses. In *Thompson v. East Greenwich*, the Rhode Island Supreme Court held that local liquor licensing boards may grant a liquor license upon conditions that promote the "reasonable control of alcoholic beverages". 512 A.2d 837, 841 (R.I. 1986)("the Legislature intended...to implicitly authorize municipalities to attach conditions to the issuance of liquor licenses").[7] Appeal to the Department "transfers jurisdiction of the cause from the local board to the administrator by operation of law". *Hallene*, id. at 201A.2d at 925. Accordingly, upon transfer, the Department assumes the same power to issue conditional grants of liquor licenses. The hearing officer is not limited to upholding conditions imposed by local authorities. Under R.I. Gen. Laws § 3-7-21, the Hearing Officer is empowered "to make *any* decision or order he or she considers proper," including granting a license with conditions generated at the appeal level.

Exercising this power and discretion, the undersigned finds it appropriate to grant the license with the following conditions appearing in the Revised Rescission Letters dated November 8 and 9, 2011:

1. "there will be no second floor balcony or patio"
2. "the music will be limited to a single instrument/singer"
3. "the windows will be closed during the times when music is playing"

[7] R.I. Gen. Laws § 3-5-21 allows imposition of penalties upon "breach by the holder of the license of the conditions on which it was issued". "If [the implication that conditions may be imposed] is not read into the statute, the power to revoke or suspend becomes a nullity since there is no basis upon which it can be exercised" Thompson, Id., citing *Gott v. Norberg*, 417 A.2d 1352 (R.I. 1985). The Rhode Island Supreme Court derived the limitation on the power to impose conditions from R.I. Gen. Laws 3-1-58. Id. at 842.

4. "no outdoor speakers"[8]

Grant of the conditional license to the Appellant is reasonable because (a) no substantive arguments against granting the license justify complete denial, and (b) the conditions reasonably respond to the concerns of the Federal Hill neighborhood to promote the "reasonable control of alcoholic beverages".

A. No substantive arguments against granting the license justify complete denial

At the reconsideration hearing, Appellant's operator testified as to his character and fitness as an operator of an establishment with a liquor license. In the course of his family's 45 years of experience in the restaurant business, the operator gained familiarity with the laws of liquor regulation when operating Tony's Family Restaurant in Massachusetts.

The operator plans to convert a building in dire need of restoration into a "fine dining" establishment. The Federal Hill community has recognized the value of this endeavor. All three Rescission Letters include the following supporting statement: "Jarr Realty, LLC plans to invest substantial funds to renovate this "eye sore" building and create a fine dining restaurant with limited entertainment."

As previously stated, no objectors appeared before the Department and the concerns of the original remonstrants need not be considered by the undersigned. Even assuming that the original remonstrants appeared as objectors at the appellate level, the original remonstrance letters lack any evidence justifying denial of the appellant's license. The general concerns with over-crowding, "less desirable late night crowd", "safety, parking, and crime issues", "public drinking", "loitering", "public urination", "disorderly conduct", "deterioration of the image of Federal Hill", and "other quality of life issues" are not specifically directed at the Appellant's

[8] The vague condition of "1 year probationary period" was removed in the Revised Rescission Letters. See original Rescission Letters dated September 19-29, 2012.

proposed establishment. In fact, language in two of the letters demonstrates the generalized nature of the concerns: "I would hope that similar types of applications are denied in the future". July 20 Letters from Scott Gaudreau and Adrienne DiCicco. In *Krikor S. Dulgarian Trust v. Providence Board of Licenses*, the Department dismissed "broad concerns regarding health and safety" such as those asserted by the original remonstrants. Id. at 8. The lack of any specificity to the Appellant makes these letters largely irrelevant to the undersigned's decision.

Neither is the concern with over-abundance of area liquor licenses compelling. One letter states "My community is already amply served by outlets selling beer, wine, and liquor. In fact, it is saturated with establishments." In *Krikor*, the Department dismissed the analogous argument there are too many liquor establishments on Thayer Street." Id. at 8. The Department explained that general concern with over-abundance of liquor licenses in the area is "a policy argument and is not grounds to overturn the grant of this License."

B. The conditions reasonably respond to the concerns of the Federal Hill neighborhood to promote the "reasonable control of alcoholic beverages".

The Department has held that conditions targeting noise do promote "reasonable control of alcoholic beverages" and, as such, are within its control to impose. In *La Base Sports Bar & Grill v. City of Providence, Board of Licenses*, the Department granted a license with the condition that the music does not go over 50 dB, DBR No. 10-L-0037 at 13 (April 4, 2011). The Department explained that "the conditions provide for the reasonable control of alcohol by ensuring that the Appellant's noise does not become a detriment to the community." Id. at 13.

Judicial review of the Department's decision confirms the position that noise conditions satisfy the "reasonable control of alcohol" standard derived from R.I. Gen. Laws § 3-1-5. *Thompson*, id. at 842. All Department decisions are controlled by this limitation. Therefore,

cases upholding Department revocation or non-renewal decisions based on noise complaints demonstrate the required connection between liquor control and noise concerns. *See, e.g. The Minden Corporation v. Sarkas*, 1976 WL 177015 (R.I. Super. 1976); *Der Hagopian v. Pastore*, 1981 WL 386452 (R.I. Super 1981); *Balch v. Pastore*, 1986 WL 716011 (R.I. Super. 1986). Noise conditions reasonably relate to liquor control because of noise control protects the community from the effects of loud sounds from neighboring liquor establishments. The same rationale would apply to conditions regarding safety – they control violence and danger that arise within a liquor establishment.

A single case appears to depart from the pattern of finding the required connection between liquor control and noise concerns. Closer examination demonstrates the distinguishability of the case, however. In *Town of New Shoreham v. Racine*, the Rhode Island Superior Court reviewed the decision of the Department on a license granted on the condition that there be "no entertainment outside the footprint of the main building and there be no entertainment amplified outside the confines of the building with the exception of events such as weddings." 1992 WL 813547 (R.I. Super. 1992). Though the court stated its support for the Hearing Officer's finding that the condition "bore no reasonable relation to the promotion of temperance or the reasonable control of traffic in alcoholic beverages," the court did not explain its previous holdings that confirm that noise is grounds for discipline and thus also an appropriate subject of a condition, the violation of which is subject to discipline. Id. Nor has this case been cited in any subsequent case law or legal literature.

Perhaps indicative of the weakness of this argument, it is preceded by two different legal conclusions that each independently support the same decision upholding the Department's decision reversing the penalty. First, the Hearing Officer "found as fact that no violation of the

license condition occurred" upon discussing how an exception within the condition applied, an argument that does not control the Department's ability to impose noise conditions. Id.

More importantly, the Hearing Officer "found as fact that the license condition was 'unfair'" because the Board did not impose similar conditions on other licensees. Id. Fairness is a key consideration in determining whether a local Board or the Department has exceeded their authority under R.I. Gen. Laws § 3-1-5. Citing the *Thompson* requirement that conditions promote the control of liquor, the Racine Court ruled that "towns are not to impose unfair and absurd conditions on license holders." Id. The instant matter is clearly distinguishable from *Racine*. Here, the Department is acting fairly in imposing the noise condition. The Licensee specifically agreed to the conditions at the reconsideration hearing, thus manifesting his assent to their reasonableness. Furthermore, unlike *Racine*, the Department has imposed similar noise conditions on other Providence licensees. *La Base Sports Bar & Grill v. City of Providence, Board of Licenses,* Id.

V. Findings of Fact

1. Sections I-IV of this decision and order are incorporated herein as findings of fact.

VI. Conclusions of Law

1. The Department has discretion to grant the Motion for Reconsideration.
2. The Department has jurisdiction to decide this matter on the merits.
3. The conditions contained in the Rescission Letters are reasonably related to the promotion of liquor control.
4. The Department has authority to order issuance of Appellant's license with conditions.

VII. Recommendation

It is recommended that Administrative Order No. 12-016 be vacated and the Board be ordered to grant Appellant a full liquor license, subject to any and all customary approvals such as fire, health and the like, with the following conditions:

1. there will be no second floor balcony or patio;
2. the music will be limited to a single instrument/singer;
3. the windows will be closed during the times when music is playing; and
4. no outdoor speakers.

As recommended by:

Date: 6/28/2012

Louis A. DeQuattro, Jr., Esq., CPA
~~Hearing~~ Officer
Deputy Director & Executive Counsel

I have read the Hearing Officer's recommendation and I hereby (circle one) adopt, reject or modify the recommendation of the Hearing Officer in the above-entitled Decision and Order of Remand.

Date: 6/29/12

Maria D'Alessandro (for)
Paul McGreevy
Director

Entered as an Administrative Order No.: -12-041 this 29th day of June, 2012.

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.

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CERTIFICATION

I hereby certify on this 29th day of June, 2012 that a copy of the within Order and Notice of Appellate Rights was sent by e-mail and first class mail, postage prepaid to -

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