



("Department"). A *de novo* hearing was held on March 9, 2010 before the undersigned sitting as a designee of the Director. All briefs were filed by May 14, 2010.

A decision ("Decision") was issued on July 16, 2010 which remanded this matter to the Board for further decision in light of the delivery issue as discussed in the Decision. On or about December 10, 2010, the Appellant notified the undersigned that the Board had again considered this matter on December 8, 2010 and had voted again to deny the application.<sup>1</sup> A further hearing in this matter was held of January 11, 2011 with the parties resting on the record.

## **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. ISSUE**

Whether to uphold or overturn the Board's decision to deny the Appellant's application to transfer its License.

## **IV. MATERIAL FACTS AND TESTIMONY**

At the first hearing, the parties stipulated that the Appellant is currently located at 1179 Central Avenue, Pawtucket, Rhode Island ("Current Location") and seeks to transfer its License to 273 Newport Avenue, Pawtucket, Rhode Island ("Proposed Location"). See Decision. Said Decision is incorporated by reference herein.

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<sup>1</sup> The Board filed a motion to dismiss the Appellant's appeal of the December denial as untimely since the Appellant filed a hard copy notice of appeal dated December 22, 2010. At hearing, the undersigned denied said motion as the Department maintained jurisdiction over the appeal subject to the remand as well as the fact that the Appellant had notified the Department within two (2) days of the December denial; thus, invoking the Department's continuing jurisdiction.

Craig Power (“Power”), the Appellant’s owner, testified on the Appellant’s behalf. He testified that he and his counsel met with the Board on October 6, 2010 at which time he advised the Board that he would make certain stipulations: 1) no deliveries off of Courtney Avenue; 2) all deliveries would come on and off Newport Avenue; 3) smallest delivery truck as in a 24 foot or box truck shall be used; 4) about 6-7 deliveries a week; 5) no deliveries between 11:00 a.m. to 2:00 p.m.; 6) place signs in parking lot about deliveries and stripe the lot so no parking on delivery route in parking lot; and 7) keep customer traffic out of delivery area. He testified that at the Board’s suggestion, he met with the neighbors in November, 2010 and the neighbors still objected to a liquor store but only the manager of Walt’s Roast Beef mentioned deliveries and he believed he was able to assuage any concerns by explaining the plans for deliveries. He testified that he and his counsel met with the Board again on December 8, 2011 and the License was denied again. Power testified that he still is willing to make the above stipulations to keep the trucks off of the residential part of Courtney Avenue. Tr 11-17.<sup>2</sup>

On cross-examination, Power testified he would verbally and in writing instruct vendors not to use Courtney Avenue, to use box trucks, and to limit the time of deliveries to before 11:00 a.m. and after 2:00 p.m. He testified that he is at the store between 16 to 20 hours a week; otherwise, his manager is there and she has worked for him for five (5) years and can monitor the trucks. He testified that he has 15 to 18 vendors and has good relationships with them. Tr 18-23.

Upon questioning from the undersigned, Power testified that of his vendors, about ten (10) of them, use the same delivery company which comes out of East Greenwich,

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<sup>2</sup> Tr refers to the transcript of the hearing held on January 11, 2011 with the numbers referring to the pages of the testimony.

Rhode Island so that for at least ten (10) of the vendors, their deliveries come on the same truck. He testified he also deals with McLaughlin & Moran. He testified that he has been located at his Current Location for five (5) years and he would still use the same people and have the same deliveries at the Proposed Location. Tr 23-24.

Steven B. Garofalo, an engineer, testified on behalf of the Appellant. See Appellant's Exhibit A (Garofalo's resume). He testified that he performed a study of the Proposed Location and there is 32 feet between Walt's Roast Beef and the Proposed Location so there is adequate space for a single unit (box) truck to be able to back up and deliver. He testified that the truck could safely ingress and egress from Newport Avenue and back up and maneuver to park there and so they would not have to use the residential area of Courtney Avenue.<sup>3</sup> See Appellant's Exhibits B and C (aerial photographs with the truck delivery route marked). Tr 24- 32.

Michael J. Rollo, Sr. ("Rollo") testified on the Appellant's behalf. He testified that he owns the property in which the Proposed Location is located and has owned it for 50 years. He testified that when he bought the property, there was a pharmacy in the Proposed Location until 1998 and then it became a Wonder Food store and then a dollar store and now is vacant. He testified that there had never been any problems with deliveries in the past to the stores with trailer trucks and the dollar shop had a box truck. On questioning from the undersigned, Rollo testified that he believes that most deliveries to the property have been made off of Courtney Avenue. Tr 41- 43.

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<sup>3</sup> Courtney Avenue was described in the Decision as parallel to Newport Avenue but in reviewing Appellant's Exhibits B and C, it curves behind part of the shopping plaza and contains one (1) house and commercial property. Thus, the trucks would actually exit from the commercial portion of Courtney Avenue. All discussion and agreements at the hearing agreed that the trucks would not go on the residential portion of Courtney Avenue.

Albert J. Vitali, Jr. (“Vitali”) testified on behalf of the Board. He testified that he is the city councilor for the Third District in which the Proposed Location is located. He testified that the Board is concerned about the traffic on Courtney Avenue but that Power’s offer for conditions would be helpful in mitigating issues for the neighborhood. He testified that as long as the trucks remain in front of the Sherwin Williams Paint Store (non-residential area of Courtney Avenue) as Garofalo testified, that would be the safest way to accommodate the vehicles. He testified that he would not object to a 24 foot delivery truck with no deliveries off the residential portion of Courtney Avenue and with the time restrictions offered by Power (also assuming no deliveries before 7:00 a.m. or after 5:00 p.m. as required by the Noise Ordinance) and that it is made clear to the vendors about the conditions of deliveries. He testified that it’s common to put conditions on liquor licenses and if those type of conditions were imposed if the License is granted then the impact on the neighborhood would be minimal. Tr 44-52.

## V. DISCUSSION

### A. **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 (sic) act as agents of the legislature in the exercise of the police power. . . . [I]t is a matter of discretion whether or not they shall grant the license and this court has no control over their decision.” *Bd. of Police Comm’rs v. Reynolds*, 86 R.I. 172, 176 (1957). The Department has the same broad discretion in the granting or denying of liquor licenses. *Id.*, at 177. See also *Domenic J.*

*Galluci, d/b/a Dominic's Log Cabin v. Westerly Town Council*, LCA-WE-00-04 (10/25/00). 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 *BDR v. City of Providence, Board of Licenses*, LCA-PR-00-07 (9/18/00).

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.

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.

## B. Whether the License Can be Granted

As decided in the Decision, the only issue before the undersigned related to the Board's concerns regarding deliveries made off of Courtney Avenue. The Appellant offered to make accommodations on deliveries as to time and place as conditions on the License. Vitale testified that if such conditions were made part of the License then the impact on the neighborhood would be minimal and not be objectionable.

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.<sup>4</sup> See *Sugar, Inc. and Sharlene Alon v. City of Providence, Board of Licenses*, DBR No.: 09-L-0119 (3/9/10) and *Newport Checkers Pizza, Inc. d/b/a Scooby's Neighborhood Grille v. Town of Middletown*, LCA-MI-00-10 (12/7/00).<sup>5</sup>

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<sup>4</sup> *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).

<sup>5</sup> Indeed, the Board has previously conditioned a liquor license curtailing how deliveries are made to a liquor store. Brava Liquor & Wines, a Pawtucket Class A liquor licensees on Prospect Street, is to have no deliveries on Prospect Street. See Board Exhibit's Two (2).

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 the first hearing, there was evidence regarding the impact of deliveries on residential streets behind the Proposed Location. However, in light of the Appellant's agreement to impose certain conditions on the License to eliminate those concerns, there is no longer any basis for the denial. The conditions provide for the reasonable control of alcohol by ensuring that the Appellant is held to its representations to the Board and the Department so that the findings that the denial was not warranted remain based in fact.

Therefore, this License shall be granted upon the following conditions:

1. There shall be no deliveries off or on the residential part of Courtney Avenue;
2. All deliveries will come on and off Newport Avenue;
3. Deliveries shall be made in a 24 foot or box truck or smaller truck;
4. Deliveries shall be approximately six (6) or seven (7) a week;
5. No deliveries between 11:00 a.m. to 2:00 p.m. and compliance with the local Noise Ordinance;
6. Signs shall be placed in parking lot about the delivery area and the lot shall be striped on its delivery route to prevent customer parking in the delivery route;
7. Customer traffic shall be kept out of delivery area;
8. Vendors shall be notified orally and in writing upon the Appellant relocating pursuant to this Decision of the delivery conditions on the License. e.g. box truck, use of Newport Avenue, etc.; and



9. Vendors shall be notified orally and in writing annually of said delivery conditions upon renewal of the License assuming such conditions are made part of the renewal.

## **VI. FINDINGS OF FACT**

1. On January 20, 2010, the Board denied the Appellant's application to transfer its License from its Current Location to the Proposed Location.

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

3. A *de novo* hearing was held on March 9, 2010, before the undersigned sitting as a designee of the Director.

4. A decision was issued on July 16, 2010 remanding this matter to the Board to further consider the issue of deliveries off of Courtney Avenue.

5. The Board again denied the application on December 8, 2010.

6. A hearing was held on January 11, 2011 on the Board's December denial.

7. The facts contained in Sections IV and V are re-incorporated by reference herein.

## **VII. CONCLUSIONS OF LAW**

Based on the testimony and facts presented:

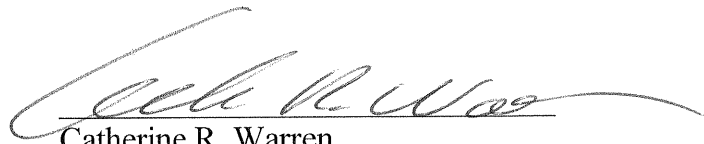
1. The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-5-1 *et seq.*, R.I. Gen. Laws § 3-7-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

2. Based on the forgoing, the imposition of conditions on the granting of the License ensures that this situation remains as testified to and addresses the delivery issues.

**VIII. RECOMMENDATION**

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

Dated: 1/31/11

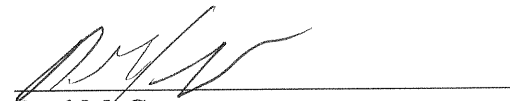
  
Catherine R. Warren  
Hearing Officer

**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: 2 Feb 2011

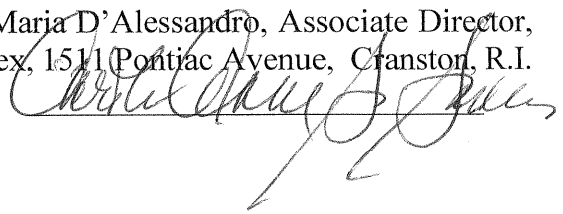
  
Paul McGreevy  
Director

**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 3<sup>rd</sup> day of February, 2011, that a copy of the within Order was sent by first class mail, postage prepaid to Michael E. Sendley, Esquire, McKinnon & Harwood, LLC, 1168 Newport Avenue, Pawtucket, Rhode Island 02861 and Frank J. Milos, Jr., Esquire, Assistant City Solicitor, City of Pawtucket 121 Roosevelt Avenue, Pawtucket, Rhode Island 02861 and by electronic delivery to Maria D'Alessandro, Associate Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I.

A handwritten signature in black ink, appearing to read "Maria D'Alessandro", is written over the end of the text block.