

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

_____ :
Square Peg Round Hole, LLC d/b/a Wreck: :
Appellant, :

v. :

DBR No.: 10-L-0057

Town of Westerly Licensing Board :
Appellee. :
_____ :

DECISION

Hearing Officer: Catherine R. Warren, Esquire

Hearings Held: July 15, 2010

Appearances:

For: Square Peg Round Hole, LLC d/b/a Wreck: Louis Cappuccio, Esquire

For: Town of Westerly Licensing Board: John Turano, Esquire

I. INTRODUCTION

On or about May 13, 2010, the Westerly Licensing Board (“Board”) denied an application by Square Peg Round Hole, LLC d/b/a Wreck (“Appellant”) for a full Class B liquor license (“Full License”) but granted the Appellant a limited Class B liquor license (“Limited License”). Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed the Board’s decision to deny its application for a Full License to the Director of the Department of Business Regulation (“Department”). A *de novo* hearing was held on July 15, 2010

before the undersigned sitting as a designee of the Director. The parties rested on the record.¹

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 § 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 Appellant's application for a Full License.

IV. MATERIAL FACTS AND TESTIMONY

Dennis Berkholder ("Berkholder") testified on behalf of the Appellant. He testified that he is the applicant and has spent approximately \$100,000 refurbishing the building which is on the beach and also has obtained a license to sell food, etc. He testified that the restaurant is currently open and he plans to open year-round and would like a Full License. He testified he has owned number of different businesses in the past fifteen (15) years including a printing press and general contractor. Tr 12-16.

On cross-examination, Berkholder testified he does not have any experience running a restaurant except for his current experience with the Appellant and he does not have any experience running a bar or tavern and this is his first venture with respect to a restaurant or bar. He testified that beer and wine are served on the front deck and there is a grill outside from which food is served. Tr 16-18.

¹ The undersigned received a copy of the transcript of hearing on August 3, 2010. Any references to the transcript shall be to Tr with the page numbers following.

On redirect examination, Berkholder testified that the food is served where alcohol would be served. He testified that since the restaurant opened, there haven't been any issues with unruly people, crowd control, or parking. On recross-examination, Berkholder testified there have not been any issues with the police. Tr 18-19.

James Angelo ("Angelo") testified on behalf of the Appellant. He testified that he is a resident of Westerly and has been on the Board for five (5) years. He testified he is familiar with the application and he voted in favor of the Full License. He testified that all the referrals for the application were approved and in respect to the issue of outside entertainment, the Appellant agreed to mount the speakers so they face the sea. Tr 19-22

On cross-examination, Angelo testified that favored the application since recently the Westerly Town Council rescinded all restrictions on the number of liquor licenses except Class A licenses so he felt that without any such restrictions anyone qualified to obtain a liquor license should be able to obtain a license. He testified that if someone has met the town, zoning, planning, and police requirements, the person is qualified and the Board does not usually review the qualifications of a person running a business. He testified he believed that Berkholder was qualified to run a restaurant. Tr 22-25.

On redirect examination, Angelo testified that while the law distinguishes between a full and a limited license, he agrees that both are for alcohol with the limited license usually being for clubs or organizations other than a restaurant. Tr 26.

Leo Trambukis ("Trambukis") testified on the Appellant's behalf. He testified that he resides in Westerly and has been on the Board for five (5) years. He testified he voted in favor of the Full License since he was satisfied that all the referrals were in place

and there was no evidence that the Appellant was not qualified. He testified he does not see a distinction between a full or limited license since both are for alcohol. Tr 27-29.

On cross-examination, Trambukis testified that the vote was tied two (2) to two (2) on the application for a Full License. He testified that he believed that Berkholder was qualified for a Full License based on the referrals from the police chief, the zoning official, the town manager, the fire chief, and the Department of Health though they do not relate to serving alcohol but rather to the zoning, health, and the fire code. He testified that while Berkholder had no restaurant experience, he (Trambukis) saw no reason why someone of reasonable intelligence could not do it. Tr 29-33.

Joseph Iacoi (“Iacoi”) testified on behalf of the Board. He testified that he resides in Westerly and has been Chairman of the Board for 5½ years. He testified that he reviewed the application and prior to the meeting visited the site and the building was being completely renovated. He testified that the vote on the Full License application was tied. He testified that Berkholder was coming from the home service industry into a restaurant/liquor atmosphere and the changes being made to the location were huge including changing the structure itself to the type of entertainment. He testified that previously there was a Limited License in that location. He testified that he felt the Appellant’s business plan was not yet in place (e.g. changes to the seating that didn’t match the testimony at the Board hearing) and he felt that it would be better to maintain the *status quo* until the November Board renewal meeting to give Berkholder a chance to develop his plan and make it better. He testified that he was uncomfortable with the presentation of the menu, the change in atmosphere, and the layout of the building. He testified that Mr. Tuscano, the Fire District Representative, objected to the application

and while he is his uncle, that didn't affect his (Iaco) consideration of the application and in fact, he voted against Tuscano as a Municipal Court Judge when he (Iaco) was Town Council President in 1990. Tr 33-41.

On cross-examination, Iacoi testified the Board likes to hear about an applicant's business plan such as the number of employees, the restroom operations, and entertainment, etc. He testified that the Board granted the Appellant a victualing license. He testified that he felt a Full License would go beyond what had been the previous establishment and the Appellant was without experience in the restaurant/liquor industry but if an applicant was someone who had experience with restaurants and certified bartenders, he would have looked differently at the application. Tr 46-51.

V. DISCUSSION

A. **The Arguments**

In closing, the Appellant argued that it received all prior approvals required for a Full License and received a victualing license. The Appellant argued there was no reason to grant it a Limited License and not a Full License as demonstrated by the two (2) councilors' testimony who voted in favor of the Full License. It further argued that both licenses are for alcohol so there is no reason to make a distinction between the types of licenses. The Appellant argued that the only difference in the two (2) licenses would be the aggravation of operating with a Full License in that there could be extra insurance and security requirements. Finally, the Appellant argued that a Limited License can only be granted on request by an applicant under R.I. Gen. Laws § 3-7-7 and since the Appellant did not request the Limited License, the Board's grant of the Limited License was tantamount to approving a Full License. Tr 53-61; 63-68.

In closing, the Board argued that the statute makes a distinction between the Full License and a Limited License and the Board is authorized to determine what licenses will be granted and is not there to rubber stamp applications even if all approvals have been met but rather to decide if a person is qualified to operate a liquor establishment. The Board argued that none of the required approvals relate to the serving of alcohol and after the review of the application, the Board found that the Appellant did not have the qualifications to run an establishment with a Full License but ended up granting a Limited License to see how the Appellant's plans worked out before considering the Full License again. Tr 61-63.

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 (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); *Donald Kinniburgh d/b/a Skip's Place v. Cumberland Board of License Commissioners*, LCA-CU-98-02 (8/26/98).

The Department will not substitute its opinion for that of the local town but rather will look,

for relevant material evidence rationally related to the decision at the local level. Arbitrary and capricious determinations, unsupported by record evidence, will be considered suspect. Since the consideration of the granting of a license application concerns the wisdom of creating a situation still non-existent, reasonable inferences as to the effect a license will have on a neighborhood must be logically and rationally drawn and related to the evidence presented. A decision by a local board or this Office need not be unassailable, in light of the broad discretion given to make the decision. *Kinniburgh*, at 17.

Furthermore, the Department has found as follows:

[T]he Department, often less familiar than the local board with the individuals and/or neighborhoods associated with the application, will generally hesitate to substitute its opinion on neighborhood and security concerns if there is evidence in the record justifying these concerns. To this end, the Department looks for relevant material evidence supporting the position of the local authority. (citation omitted). *Chapman Street Realty, Inc. v. Providence Board of License Commissioners*, LCA-PR-99-26 (4/5/01), at 10.

As articulated through liquor licensing decisions at the State court level and the Departmental level, the standard of review for a new license is subject to the discretion of the issuing authority. Such discretion must be based on reasonable inferences drawn from the evidence. Arbitrary and capricious determinations not supported by the evidence are considered suspect. *Infra*.

C. Whether the Denial of the Full License Should be Upheld

1. The Applicability of R.I. Gen. Laws § 3-7-7

R.I. Gen. Laws § 3-7-7 provides in part as follows:

(a) A retailer's Class B license is issued only to a licensed bona fide tavern keeper or victualer whose tavern or victualing house may be open for business and regularly patronized at least from nine o'clock (9:00) a.m. to seven o'clock (7:00) p.m. provided no beverage is sold or served after one o'clock (1:00) a.m., nor before six o'clock (6:00) a.m. Local licensing boards may fix an earlier closing time within their jurisdiction, at their discretion.

(b) . . . If the applicant requests it in his or her application, any retailer's Class B license may be issued limiting the sale of beverages on the licensed premises to malt and vinous beverages containing not more than twenty percent (20%) alcohol by volume.

The Appellant argued that it applied for a Full License and not a Limited License and R.I. Gen. Laws § 3-7-7 requires that an applicant request a Limited License and since it did not request one, the Board's granting of a Limited License was a grant of a Full License. The Board denied the Appellant's application for a Full License. See Joint Exhibit One (1) (Board minutes) and testimony. There is no dispute that the Board denied that application. The fact that the Board then moved to grant a Limited License rather than a Full License does not make the Limited License void. Once the motion was made to grant the Appellant a Limited License, Berkholder could have stated that he did not request such a license, did not want one, and would decline to accept it. The Appellant did not object to the granting of the Limited License and the Board granted a Limited License. The fact that the Appellant had not initially requested a Limited License does not turn the Board's vote on the Limited License into a Full License. In fact, if anything, such a reading of the statute would make the grant of a Limited License void rather than converting it to a Full License that had already been denied. The Appellant's argument concerning R.I. Gen. Laws § 3-7-7 is without merit.

ii. The Board's Evidence

As explained at hearing, the issue is whether the Board has evidence to support its denial of the application for a Full License. The Appellant argued that liquor is liquor so the distinction between the two (2) types of license is irrelevant. However, in closing, the Appellant acknowledged that a Full License often includes more requirements such as

insurance and security so that while both licenses are for the serving of alcohol, they are treated differently and are different as set forth in R.I. Gen. Laws § 3-7-7.

The Appellant argued that there had been no discussion before the Board regarding a Limited License. Tr 55. While this is a *de novo* appeal, it should be noted that the Board's minutes indicate that Iacoi stated at the Board hearing, he was concerned with the expansion of the decks on both sides, the increase in activity with outside entertainment, and with the application for a Full License and that he preferred a Limited License at the location with a review of said license at the end of season. See Joint Exhibit One (1) (Board minutes).² This is consistent with the Iacoi's testimony at the Department's hearing and with his further testimony that the Appellant did not have experience running a bar restaurant. The Board based its decision on the fact that there was concern over Berkholder's plan³ and a lack of experience in running a bar restaurant. The Board then decided that as the prior establishment had a Limited License and since Berkholder had no experience with a bar restaurant, it should give him a chance to develop experience in running such a business before granting a Full License and decided to grant a Limited License. See Joint Exhibit One (1).

The Department has reviewed several decisions by licensing boards to deny an application for a liquor license on the basis an applicant does not have the requisite experience. In this situation, the Board has allowed the applicant to gain experience and thus overcome his lack of experience.

² At the end of the hearing, it was agreed that the record would be left open for the transmittal of a video of the Board hearing and it would be Joint Exhibit Seven (7). Said video was never forwarded to the undersigned. However, the hearing before the undersigned is a *de novo* hearing so the lack of the video is irrelevant. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984) and *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964). The parties did submit the minutes of the Board meeting.

³ Such concern can be seen in Berkholder's testimony at the Board hearing that he would primarily serve Chinese food (see Joint Exhibit One (1)) but at the Department hearing the menu submitted included hot dogs, hamburgers, wings, chicken, and barbeque. See Joint Exhibit Six (6).

In *DeCredico v. City of Providence, Board of License Commissioners*, DBR No. LCA-PR94-27 (1/20/95), the applicant's liquor license application was rejected because neighbors were concerned about the growing number of liquor-serving facilities in the vicinity and that the establishment would be "almost identical" to a past problematic tavern at the proposed location. The Department⁴ found that at night the proposed establishment would attract a crowd similar to the previously problematic tavern. The Department found that the applicant was a proven restaurant operator but did not have the requisite experience of managing a late-night, full-bar drinking establishment to be able handle the potential problems that had plagued the area in the past. *Id.*, at 3-7.

In *Sugar, Inc., and Sharlene Alon v. City of Providence, Board of Licenses*, DBR No.: 09-L-0119 (8/24/09), one of the reasons that the applicant was denied a transfer of Class BV liquor license was that the local authority found that applicant did not have any experience managing a liquor establishment. Between the time of the local denial and the full hearing on the appeal and said decision, the applicant gained direct experience of almost ten (10) months by managing the bar that she wished to buy (and thus transfer said license). Thus, the Department found that there was no longer a basis for the local authority to find that the applicant did not have relevant experience.

In *Crazy 8's Bar/Billiards v. Providence Board of Licenses*, DBR No. 09-L-0042 (8/24/09), the Department upheld the local authority's denial of Class C liquor license application. Similar to the applicant in *Decredico*, the applicant in *Crazy 8's* was a proven business operator but did not have experience in managing the unique requirements of a

⁴ At the time of *DeCredico*, the Liquor Control Administrator adjudicated said appeal. The position of Liquor Control Administrator was abolished by P.L. 1996, ch. 100 art. 36 § 4 with the Department assuming those functions. For ease of reference, any discussions of decisions issued by the Liquor Control Administrator will refer to the Department.

liquor establishment and the issues such an operation presents. Moreover, the proposed general manager of the bar never testified regarding her experience as a bar manager and bartender. Thus, the proposed manager's relevant experience (if any) of managing such an establishment was never demonstrated. The Appellant's evidence (testimony, business plan) was not specific enough to demonstrate knowledge of the likely clientele, staffing structure, or opening times, etc. In that matter, the parties agreed that the proposed location was known trouble spot and the local authority found that the applicant was unable to demonstrate through its plan that it would be any different from the previous troubled licensee. See also *Corina Street Café v. City of Providence, Board of Licenses*, LCA-PR-96-20 (11/25/96) (liquor license application was rejected because of the proposed plan to change the character of its business (from a deli to a bar/restaurant)).

As stated above, the local licensing authority's decision need not be unassailable in light of the broad discretion given the local licensing authority. Rather there just needs to be evidence on the record that supports the local authority's decision. In this matter, there was evidence supporting the decision by the Board not to grant a Full License because Berkholder had no experience running such a food and liquor establishment (and presented no one with such experience that would assist him).

VI. FINDINGS OF FACT

1. On or about May 13, 2010, the Board denied the Appellant's application for a Full License but granted the Appellant a Limited 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

3. A *de novo* hearing was held on July 15, 2010 before the undersigned sitting as a designee of the Director. The parties rested on the record and oral argument.

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:

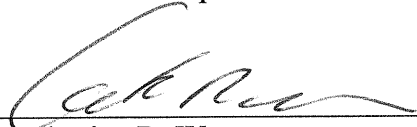
1. The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-5-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

2. In the *de novo* hearing, no showing was made by the Appellant that would warrant overturning the Board's decision to deny the Appellant's application for the Full License. The Board's decision was supported by evidence on the record.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of the Board denying the Appellant's application for a Full License be upheld.

Dated: 9/9/10

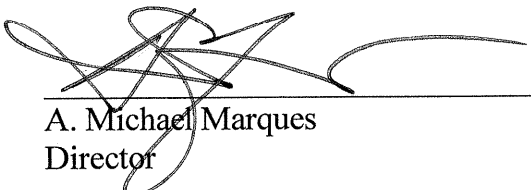

Catherine R. Warren
Hearing Officer

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: 09-10-10


A. Michael Marques
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 10th day of September, 2010 that a copy of the within Decision was sent by first class mail, postage prepaid, to

Louis B. Cappuccio, Esquire
PO Box 763
Westerly, RI 02891

John J. Turano, Esquire
Westerly Town Hall
45 Broad Street
Westerly, RI 02891

and by electronic-delivery to Maria D'Alessandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, RI 02920

R B Ellison