STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE COMPLEX
1511 PONTIAC AVENUE, BLDG. 68-69
CRANSTON, RI 02920

Club Heat d/b/a Level II Appellant,	:	
v.	:	DBR No. 12LQ064
City of Providence Board of Licenses, Appellee.	:	

RECOMMENDATION AND INTERIM ORDER DENYING MOTION FOR A STAY

I. INTRODUCTION

Club Heat d/b/a Level II ("Appellant") seeks a stay of the Providence Board of Licensees ("Board") decision of June 4, 2012 revoking Appellant's liquor license ("License") following a Show Cause Hearing. The Board objected to the Appellant's motion. This matter came before the undersigned on June 25, 2012 in his capacity as Hearing Officer as the designee of the Director of the Department of Business Regulation ("Department").

II. JURISDICTION

The Department has jurisdiction to hear appeals from decisions of local liquor licensing authorities under R.I. Gen. Laws § 3-7-21, subject to relevant provisions of the Rhode Island Administrative Procedures Act, § 42-35-1 *et seq.*

III. ISSUE

Should the Department issue a stay order pending the appeal hearing on the Board's liquor license revocation decision?

IV. MATERIAL FACTS

The facts cited in the below Discussion are based on the representations by counsel for the Appellant and the Board at the stay hearing, the Board's April 4 Decision ("Decision"), the Board's Memorandum of Law in Support of its Objection to Appellant's Motion for a Stay,[1] and the Board's Certified Record of the proceedings before it in this matter,[2] all of which were submitted into evidence with the undersigned. Further facts may be established by either party at the hearing on the merits of this case.

V. DISCUSSION

Under R.I. Gen. Laws § 3-7-21, the administrator has the power "to make *any* decision *or* order he or she considers proper." Id. (*emphasis supplied*). In so enacting, the General Assembly vested the administrator with the power to grant forms of relief other than final decisions on the merits. The order requested here is a suspension of the Board's license revocation pending resolution of the appeal to the liquor control administrator. "The legal effect of a stay order is that the liquor license is returned to the licensee pending the outcome of the appeal." *Willy & Sylvia, LLC d/b/a Club Bebeto v. Johnston Town Council*, DBR No. 12-LQ-0042 at 10.

Though the administrator has discretion to issue an order to effect a stay, stay is not automatic. *Burton v. Lefebre*, 53 A.2d 456, 460 (R.I. 1947) (an appeal to the administrator "does not suspend the local board's order of revocation pending the appeal, unless the administrator shall so order"). *See also Willy & Sylvia,* Id. at 2-3. The Appellant's arguments at the hearing as to policy objections to non-automatic stay rule do not overcome this judicial precedent.

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[1] At the stay hearing, the undersigned gave counsel for the Appellant the opportunity to submit written legal arguments prior to the Department's decision on the stay, but counsel elected to rest on its oral arguments made at the hearing. This does not affect Appellant's right to submit written memoranda in support of its position once the undersigned reaches the final merits of the case.

[2] The certified record included certified transcripts of all the Board proceedings and exhibits thereto, including police incident reports, violation history, and photographs taken by law enforcement personnel.

Parties should be well aware that all Department decisions expressly include language explaining the non-automatic stay, stating "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."[3]

In deciding whether to issue a stay order, the Department has broad discretion to consider the movant's likelihood of success on the merits and to balance the interests of the local authority and the general public in immediately effectuating the revocation against the interests of the former license holder in postponing the revocation until the appeal decision is rendered. *Willy & Sylvia,* id. at 3.

A. The Appellant's likelihood of success on the merits

The Appellant has the burden to demonstrate its likelihood of success on the merits in order to procure a stay order from the Department. The Appellant failed to show that the November 27 and April 8 incidents of over-crowding and violence, taken in context of its prior violation history, do not warrant revocation of its license.

1. Progressive Discipline

Appellant failed to demonstrate that revocation was unreasonably related to the severity of the Appellant's conduct in the operation of its liquor business. *See Jake and Ella's, Inc. v. Department of Business Regulation*, 2002 WL 977812, *6 (R.I.Super., 2002); *Paske Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super. 203). Throughout its operational history, the Board has treated the Appellant consistent with the Department's progressive discipline policy: "[t]his case presents the final straw in a long line of progressive discipline by the Board." Board's Memorandum at 8. "In fact, the Licensee has the longest violation history of any

[3] DBR decisions including this standard language can be viewed at http://www.dbr.state.ri.us/decisions/decisions_commlicensing.php

licensee in the city." Id.[4] With regard to the over-crowding violation, the Appellant had already been charged with two counts in 2008, fined $500 and closed for one day. City of Providence Board of License Violation History (dated January 18, 2012). Another example of the Board's progressive treatment is its progression from a warning on an underage drinking account to a first fine of $250 and a $350 fine on third and fourth occasions. Id.[5]

2. Grounds for Immediate Revocation

a. The November 27, 2011 Incident

Even if the Board did not adhere to a progressive discipline policy, some conduct warrants the *immediate* imposition of the severe consequence of revocation. Under R.I. Gen. Laws § 3-5-21(a), a "license is subject to revocation...for violation by the holder of the license of any rule or regulation applicable." Thus, the stay must be denied unless the Appellant meets its burden of proof to show it did not violate any provision of law or condition of its license. Appellant's conduct need not be proven beyond a reasonable doubt; rather, the Department can base its ultimate conclusion on a reasonable inference from the evidence. *J&A Commercial Center, Inc. v. Pastore*, 1990 WL 124376, *3 (R.I. Super. 1990).

The Appellant failed to overcome the evidence in the record supporting the Board's allegation that the Appellant violated the law setting the maximum occupancy at 400 by allowing its premises to be occupied by 848 people on November 27, 2011. Three public safety officials were involved in the occupancy count on November 27, 2011, each stationed at the three

[4] The Department itself has had the previous opportunity to review the violation history of the Appellant. See *Club Heat v. Providence Board of Licenses*, DBR No.: 08-L-0291 (December 19, 2008) (denying Club Heat's Motion for a Stay).

[5] Where the Board demonstrates adherence to a progressive discipline policy, the anecdotal evidence regarding incidences at surrounding clubs presented by counsel for the Appellant at the stay hearing is not compelling. The undersigned agrees with counsel for the Board that doing so is akin to comparing "apples to oranges." *See, e.g.*, Cross-Examination of Greg Daniels, April 11 Show Cause Hearing at 38-71.

different exits of the premises. The three sub-total counts were reported to Patrolman Desmarias, who totaled the final count.

The largest occupancy was measured by Robert Riley, who was positioned at the main entrance. Riley's count of 565 patrons alone demonstrates an overcapacity of 141%, which is in clear violation of the ordinance setting maximum occupancy at 400. Riley's testimony was supported by the authenticated photograph of the "clicker" devise employed by Riley, exhibiting a figure of 565. Riley testified that patrons were counted as they exited in a nearly single-file line and that "no one on the sidewalk" was counted. First Show Cause Hearing at 28, 71. Riley further demonstrated that patrons included in the count were from Level II as opposed to patrons of neighboring clubs. Specifically, in response to the question "do other establishments in the area exit near the vicinity of this door to which you were posted", Riley answered in the affirmative, but immediately indicated that such establishments are set apart by a "good distance, probably 60-70 feet away". Id. at 28. Riley further testified that he was not distracted while he was counting. Id. at 28.

The second official, Kenneth DeMarco, testified that he recorded a total count of 191 patrons exiting the side door. May 30 Show Cause Hearing at 6. Though he did not use a clicker, DeMarco testified that he counted patrons immediately as they exited one at a time from the narrow doorway and that he did not include in the count any persons already present on the sidewalk. Id. at 9. He further testified that he did not receive any walkie-talkie calls nor encounter any other distractions during his count. Id. at 11, 19. Finally, Ivan Tavarez provided an occupancy head count of 92 for the third door, the back metal staircase. Id. at 22-23. Tavarez testified that he was focused on the task of counting only those individuals who exited the

premises and that the lattice at the back landing controls the crowd in a manner that facilitated accurate head counting. Id. at 23-24, 28.

The Board contends, and the Department agrees, that this capacity violation, even "when taken alone, already rises to the level warranting revocation of all licenses" because it represents an "egregious public safety violation, literally placing hundreds of patrons lives in jeopardy." Board's Memorandum at 3. Numeric occupancy limits are official proxies for the ascertainment of the amount of persons that a building can accommodate without posing structural or evacuation dangers. Difficulties in evacuation pose elevated concerns for second floor establishments such as that of Appellant. The satisfaction of these critical safety standards are 100% in control of the licensee who has the sole responsibility of granting or denying entrance to patrons.[6]

b. April 8, 2012 Incident

Neither is the Appellant likely to succeed on the merits with regard to the April 8 incident. R.I. Gen. Laws 3-5-23(b) provides that the Board "may suspend or revoke the license" after a hearing "[i]f any licensed person... *permits* any of the laws of this state to be violated *in the neighborhood.*" (*emphasis supplied*). The Rhode Island Supreme Court has consistently interpreted the statute as follows: "it is the responsibility of an alcohol beverage licensee so to supervise the operation of a business carried on pursuant to his license as to make certain that the laws to which his license is subject are not violated." *Scialo v. Smith*, R.I., 210 A.2d 595, 598. The licensee is responsible for permitting its patrons to commit illegal acts regardless of any

[6] At the stay hearing, counsel for the Appellant countered that the over-crowding issue does not justify revocation and that the Board did not treat it seriously prior to the second (April 8) incident. The Department disagrees with the Appellant's minimization of the overcrowding event and takes notice that counsel for Appellant previously stated that he had no objection to the motion to formally consolidate the two counts as joint grounds for revocation. April 11 Show Cause Hearing at 71.

evidence of "consent either expressed or implied." *Therault v. O'Dowd*, 223 A.2d 841, 842 (R.I. 1966). "To argue that the burden thus imposed by the statute is onerous or even harsh is unavailing because a license such as that held by petitioner is granted and accepted subject to such conditions as the legislature deems advisable, however burdensome those conditions may be." Id. at 842-843 (R.I. 1966)(citing *C. Tisdall Co. v. Board of Aldermen*, 57 R.I. 96, 188 A. 648).

It is undisputed that a fight broke out inside of the premises on April 8. Witnesses described the developing scene as an "ocean of people fighting". Testimony of Matthew Banno, April 12 Show Cause Hearing at 19. An estimated 50-150 people were involved in the violent brawl. *See* Testimony of Eguene Chin, April 11 Show Cause Hearing at 23; Michael Figueiredo, id. at 102; Gregory Daniels, id. at 44; Edward Leste, id. at 10. Officer Gregory Daniels further testified that "the initial disturbances were all from Level II," Appellant's establishment. Id. In addition to the magnitude of this fight, it was further characterized by erratic behaviors such as jumping off a balcony and flying through the air over the crowd. *See* Testimony of Daniels and Leste, id.

It is also uncontroverted that six victims were transported to RI Hospital following the fighting incident inside the premises. All six victims told police and/or detectives that the injuries they sustained occurred *inside* the premises. *See* Providence Incident Report, id. at 3. *See also* Testimony of Gregory Daniels, April 11 Show Cause Hearing at 40-41 (subject bleeding profusely from the head told Daniels that he was stabbed at Appellant's premises); Kenneth DeMarco, id. at 73 (DeMarco witnessed a patron exiting the premises who appeared to have been stabbed several times); Testimony of Theodore Michael, April 23 Show Cause Hearing at 20 (victim with large cut over his eye told Michael that the was a large fight upstairs

and he got hit with a bottle during its pendency); Testimony of Chris Banno, May 7 Show Cause Hearing at 9-10 (Banno was inside the premises when he was punched twice and pinned against a wall and suffered a punctured lung).

The testimony from the police and the circumstantial evidence reflected in the transcript from the Board support the undersigned's finding that there was blood-generating violence occurring within the premises. In arguing against the causation inference, Appellant heavily stresses that "no weapons" were located on the premises. Though no guns or knives were recovered, such weapons are easily removable from the scene. Furthermore, criminal battery and assault are not limited by the choice of weapon. The use of glass or fists to cause an injury is sufficiently dangerous to warrant public safety scrutiny. Bouncers even testified to tables, metal stands, and ropes being used as weapons. Testimony of Matthew Banno, April 12 Show Cause Hearing at 29.

Perhaps more important than the mode of force is the degree of force evident in this case – it was enough to generate pools of blood on the floor of the premises. Testimony of Edward Leste, April 11 Show Cause Hearing at 10. *See also* Officer Allin's Police Incident Report 2012-00030470 "blood-stained clothing items were seized from the interior of the club". Though the amount of blood was not numerically quantified, the fighting generated enough blood that responder Kenneth DeMarco testified that he slipped "in a large amount of blood." Id. at 82. Another valuable qualitative description of the amount of blood is the testimony of veteran Michael Banno that he "hadn't seen [that] much blood since Iraq in one room." April 12 Show Cause Hearing at 82.

Despite the compelling testimony of statements to the police specifically naming the Appellant's premises and the circumstantial evidence of blood inside the premises, the Appellant

argues that the injuries could have occurred *outside* of the premises. Without any supporting evidence, citation to hypothetical alternative causes of the injuries does not meet the Appellant's burden of proof. Even assuming, *arguendo*, that the injuries occurred outside, the Rhode Island Supreme Court has consistently held that "there need not be a direct causational link between incidents occurring outside or nearby a drinking establishment and its patrons;" instead, the connection can be reasonably inferred from the evidence that the incidents occurred outside a particular establishment and had their origins within." *A.J.C. Enterprises, Inc. v. Pastore,* 473 A.2d 269, 275 (R.I.,1984). Though it may be true that the presence of other establishments' patrons outside the premises exacerbated the fighting, numerous witnesses specifically testified to the movement of large crowds of fighting patrons from inside Appellant's premises to the outside areas to which additional police officers responded. *See, e.g.,* Officers DeMarco and Taveras Providence Incident Report No. 2012-00030479. Therefore, the Appellant has not met its burden of proof to demonstrate that the injuries did not either occur or originate within the Appellant's premises.

The Appellant further argues that it took all precautionary measures to prevent the incident from occurring and to control it once it commenced. Careful reading of the transcripts of Board hearings largely disposes of this argument. Former employee for the Appellant, Matthew Banno testified that the Appellant did not alert him to or train him regarding an emergency evacuation plan. April 12 Show Cause Hearing at 44. Though the safety manual that the Appellant claims to abide by requires fire and evacuation drills, there was testimony that none were performed. He also testified to a lax pat-down procedure, a "rushed process" due to management's concern with getting customers in quickly. Id. at 27-28. Banno indicated that weapons have been later found on the premises that were not detected during the quick pat-

down. Id. at 27. Management consistently undervalued safety, even overruling Banno's prior decisions to refuse entry to known instigators. Id. at 89.

Even assumed to be true, however, the precautionary measures taken by the licensee are not necessarily dispositive. In determining grounds for revocation, "what is all important and decisive is whether there has been a violation of the law-not whether supervision was provided." The Rhode Island Supreme Court explained that the liquor laws "make a licensee absolutely accountable for what happens on his premises; and that he is not aware of what is going on is not available as an excuse or a defense." Neither does the claim that adequate supervision was provided save the Appellant from being "absolutely accountable."

3. Balance of the hardships

The Department has broad discretion to balance the considerations appropriate to issuing a stay. The measure of the Appellant's interest in procuring a stay is lost profits during the pendency of the hearing. The Department also has discretion to consider whether there is an alternative "remedy at law" available to the Appellant in absence of granting the stay. The fact that the "licensee is free to pursue an action against the City for lost profits" weighs in favor of finding that hardship to the Appellant is minimized by the opportunity for post-decision remedies. Board's Memorandum at 8.

The cumulative hardship to the public safety of the entire population of Providence is far greater. In response to a question by Providence Councilman Batista, Michael Figueredo testified that it was "one of the worst [in his experience] because of the injuries," commenting that "[u]sually you don't see that many injuries in one disturbance. April 12 Show Cause Hearing at 10. The Board has charged the Appellant with "total disregard for the safety of its patrons and

the public at large" (Decision at 4). Allowing an operation with such disregard to resume during the pendency of the hearing on the merits would fail to address a considerable risk to the public.

Those citizens most directly at risk from continued operations are the patrons. On November 27, Appellant allowed patrons to incur all the risks inherent in exceeding maximum occupancy standards. The standards are calculated to approximate the number of people that could successfully evacuate a building during an emergency, the weight that the structure can accommodate without structural damages, and other safety parameters. The risk that these parameters will continue to be ignored during the pendency of the hearing on the merits places up to 800 patrons at risk per night.

The violent conditions to occur on April 8, 2012 further alerts the undersigned to the types of dangers that, if over-crowding is not addressed, faces up to 800 patrons per night. Even those not directly involved in the fighting are also placed at risk when violence breaks out within the licensee's premises. The volume of blood spilled on the premises placed each and every patron and emergency respondent at the risk of slip-and-fall injuries as well as exposure to blood-borne pathogens.

Above and beyond the risk to up to 800 patrons per night, the community at large also has an interest supporting denial of the stay motion. Allowing continued operations could cause another massive commitment of emergency responders. On April 8, "[a] call for every available car in the City was broadcast to respond to the scene of the disturbance" (Decision at 2) and six rescue vehicles and three fire engine were also summoned (Decision at 3). See also Testimony of Eugene Chin, April 11 Show Cause Hearing at 27-28; Greg Daniels at 59 (in 23 years of

service, Daniels had only heard four calls for every car in the city).[7] Response to such incidents removes a significant portion of the city's emergency response team from immediate availability for concurrent incidents. The Department previously addressed this concern when an incident at Club Heat necessitated the response of ten officers, refusing to grant a stay where the conduct on the Appellant's premises "raises issues of public safety and public protection." Club Heat, id., DBR No.: 08-L-0291 at 5. Even beyond Providence city lines, State police and Cranston city police officers were delegated the responsibility to respond to Providence emergencies during the incident pursuant to a mutual aid plan, further burdening the safety response teams of neighboring cities and towns. Testimony of Greg Daniels, April 11 Show Cause Hearing at 60; Steven Laroche, May 2 Show Cause Hearing at 15.

Based on the above, the Appellant has not made the showing necessary for the issuance of a stay.

VI. RECOMMENDATION

Based on the forgoing, the undersigned recommends that Appellant's Motion for Stay be denied. As agreed to at the pre-hearing conference, a *de novo* hearing has been scheduled for the following dates beginning at 9:30AM at the offices of the Department: July 17, 18, and 19, 2012.

Date: 7/3/12

Allan Baras co, for
Louis DeQuattro

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

[7] The Department will not entertain the Appellant's argument that the rescue efforts were an "overreaction" – it is not a body of police policy oversight. Neither will it address Appellant's complaints as the manner in which the police and the fire department responded to either incident.

INTERIM ORDER

I have read and considered the Hearing Officer's recommendations in this matter, and I hereby take the following action:

☑ ADOPT

☐ REJECT

☐ MODIFY

Dated: 7/3/12

Maria D'Alessandro (for)
Paul McGreevy
Director

Entered as Administrative Order No. 12-042, this 3rd day of July, 2012.

NOTICE OF APPELLATE RIGHTS

THIS ORDER IS REVIEWABLE BY THE SUPERIOR COURT PURSUANT TO R.I. GEN. LAWS § 42-35(a) 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 OFA PETITION DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER.

CERTIFICATION

I hereby certify on this 3rd day of July, 2012 that a copy of the within Interim Order and Notice of Appellate Rights was sent first class mail, postage prepaid, and by email to:

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and by electronic mail to Maria D'Alessandro, Deputy Director, Securities, Commercial Licensing and Racing & Athletics at the Department of Business Regulation.

Bridgette