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

Willy & Sylvia, LLC d/b/a Club Bebeto	:	
Appellant	:	
v.	:	**DBR No. 12-LQ-0042**
	:	
Johnston Town Council	:	
Appellee	:	

RECOMMENDATION AND INTERIM ORDER GRANTING MOTION FOR STAY

I. INTRODUCTION

Club Bebeto ("Appellant") seeks a stay of the Town of Johnston ("Town") Board of Licensees ("Board") decision of April 9, 2012 revoking Appellant's liquor license ("License") following a for-cause hearing. The Town objected to the Appellant's motion. This matter came before the undersigned on May 24, 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 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 as well as the transcript of the April 9 hearing before the Board as submitted into evidence with the undersigned ("Transcript"). Further facts may be established by either party at the hearing on the merits of this case.

V. DISCUSSION

A. The Department's authority to issue a stay order

The authority of the liquor control administrator under R.I. Gen. Laws § 3-7-21 is broad. Not only does the administrator have the power to "confirm or reverse the decision of the local board in whole or in part", but is further empowered "to make *any* decision or order he or she considers proper." Id. (*emphasis supplied*). It can be inferred from the General Assembly's use of the dual terms "decision *or* order" that it intended to vest the administrator with the power to grant forms of relief other than final decisions on the merits. Id. (*emphasis supplied*). "An order is the mandate or determination of the court...not disposing of the merits, but...directing some step in the proceedings." Black's Law Dictionary (9th ed. 2009), *quoting* 1 Henry Campbell Black, *A Treatise on the Law of Judgments* § 1, at 5 (2d ed. 1902). The type of order at issue here is a stay order, which the Department has authority to issue.

There are several types of stay orders that the administrator might issue under R.I. Gen. Laws § 3-7-21. First, the administrator could grant a stay of its own administrative proceedings during pendency of judicial review under the Rhode Island Administrative Procedures Act, R.I. Gen. Laws § 42-35-15(c). Secondly, under DBR regulations, the administrator can suspend its

own proceedings based on a joint request of the parties to stay proceedings in lieu of consent decree negotiations.1 Central Management Regulation 2: Rules of Procedure for Administrative Hearings, § 15 (I).

Thirdly, the type of stay order contemplated here is a suspension on a local board's license revocation pending resolution of the appeal to the liquor control administrator. In *Burton v. Lefebre*, the Rhode Island Supreme Court stated that an appeal to the administrator "does not suspend the local board's order of revocation pending the appeal, unless the administrator shall so order." 53 A.2d 456, 460 (R.I. 1947) (citing predecessor legislation G.L.1938, chap. 164, § 9, as amended by P.L.1939, chap. 660, sec. 128). This case supports the notion that, though never automatic, one type of "order" that the administrator has discretion to issue is an order staying a local liquor license revocation.

B. The Department's reasoning for issuing a stay order

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.

1. Hardship to the Appellant absent issuance of the stay

Since the issuance of the local board's revocation decision, the Appellant has been closed down. The Appellant subsequently exercised its right to appeal the revocation decision to the Department, arguing that the punishment of revocation was too harsh under the circumstances. Though a favorable appeal decision would allow the business to re-open in the near future, requiring the Appellant to remain closed pending such decision poses a grave hardship to the

[1] "A joint request for a stay of the hearing for the purpose of preparing documents relevant to [a stipulation, consent agreement, consent settlement, consent order, default or dismissal by the Hearing Officer] shall be forwarded to the Hearing Officer and may be granted within the sound discretion of the Hearing Officer."

owners. Revocation "functions as the death penalty in the context of license violations." *Jake and Ella's, Inc. v. Department of Business Regulation*, 2002 WL 977812, *6, (R.I. Super. 2002). Unless the revocation decision is stayed, the Appellant will continue to suffer measurable financial losses each day that passes between now and the issuance of the appeal decision.

2. Hardship to the Town of Johnston and its residents absent issuance of the stay.

The hardship to the Town of Johnston and its residents is measured by the impact of continued operations during the period between the issuance of the stay order and the issuance of the Department's appeal decision. At the hearing before the undersigned, two principle arguments were advanced in favor of immediate revocation of the license: "gang activity" and noise concerns, each of which is addressed in turn.

a. "Gang activity"

The Department recognizes that local government and citizens have a strong interest in avoiding continued or exacerbated gang activities in its community. Only two instances of the 20 police incident reports were classified as constituting "gang activity" in the testimony of the police at the local hearing. After discussing these two isolated instances, the discussion turned to noise issues and no other concrete arguments for concern with gang activities were advanced thereafter.

The first instance occurred on March 18, 2012, when a Sur-13 member made verbal threats and reached into his waist band in Appellant's parking lot. Transcript at 5-6. The record does not disclose whether this individual entered the Appellant's club or caused any disturbance within. Absent a showing in the appeal hearing that the incidence was related to Appellant's violation of its liquor license conditions, this single incidence does not justify the immediate revocation of the liquor license. The decision before the Department now is not whether the

owner's failed to exercise their duty of supervision over the premises when this instance occurred—that determination is preserved for the appeal hearing on the merits of the case. Until that hearing occurs, however, the Department has no reason to conclude immediately revoking the liquor license is a necessary measure to prevent such isolated instances from occurring during the interim period. Therefore, denying the revocation's immediate effect does not pose an undue hardship on the Town or its citizens.

The second incidence occurred on March 25, 2012, when one of Appellant's bar tenders was arrested for serving alcohol to minors and two individuals were arrested for underage drinking. After the incident, the Appellant responsibly responded to the potential safety concern arising from this instance by promptly firing the responsible employee. Transcript at 15-16.

In addition to firing the employee in response to the second incident, Appellant voluntarily sought police detail during the revocation hearing. Transcript at 12, 20. The request was effectively denied by statements of police testimony. Transcript at 20 (providing a police detail would "tak[e] away from [officers'] other duties, just to monitor what's going on there"; Id. at 21 ("I don't think we need a business in the town where we need to supply a police officer"). The safety concerns at issue here could very well be eliminated by the Town providing a police detail. Because the owners bear the cost of the detail, it is unclear to the undersigned why the Town has denied the request. See Transcript at 21 (Mrs. Vargus: "I gonna pay" for the police detail). Immediate revocation is not the appropriate remedy where the Town's own inaction contributes to the safety concerns that it in turn cites as grounds for revocation. Under R.I. Gen. Laws § 3-5-21(c), nonpayment of police detail bills is grounds for suspension until such bills are paid, there is no statutory provision that authorizes the Town to revoke a license based on its own decision to refuse to provide the police detail in the first instance.

Absent evidence of additional instances on the premises that may be presented at the scheduled appeal hearing on the merits, the Department does not have reason to find immediate revocation necessary where the owner has voluntarily taken appropriate measures to eliminate the future risk of such instances and the Town has refused to cooperate in addressing the owner's safety concerns. Therefore, denying the revocation's immediate effect does not pose an undue hardship on the Town or its citizens.

b. Noise

The Department recognizes the concerns of the Town and its citizens as to the noise levels alleged to be generated at the Appellant's premises. The Department does not find that the community will suffer an undue hardship with regard to this concern if the stay order is issued, however. Immediate revocation of the liquor license is not the only remedy to address the noise concerns. If Appellant is allowed to retain its liquor license and continue its operations during the pendency of the appeal and the noise problems continued, other remedies are available. For example, the Town could impose penalties such as a fine or suspension on the entertainment license or the complaining citizens could allege violation of the Town's sound ordinance. Those would be more appropriate remedies under the circumstances because they specifically address the noise concerns without unnecessarily subjecting Appellant from interim financial losses associated with immediate revocation.

3. Appellant's likelihood of success on the merits

In addition to the finding that the hardship to the Appellant in denying the stay would outweigh the alleged hardship to the Town and its citizens in the event of issuing the stay, the undersigned finds that Appellant is likely to succeed on the merits after the scheduled appeal hearing. The appeal challenges the severity of imposing immediate revocation under the

circumstances. In *Jake and Ella's, Inc. v. Department of Business Regulation*, the Superior Court stated that "sanctions levied for liquor license violations should be reasonably related to the severity of the conduct constituting the violation." The court listed several "factors to be considered in weighing the severity of the violation," including:

a. the number and frequency of the violations,
b. the real and/or potential danger to the public posed by the violation,
c. the nature of any violations and sanctions previously imposed, and
d. any other facts deemed relevant in fashioning an effective and appropriate sanction.

2002 WL 977812, *6 (R.I.Super., 2002).

a. Number and frequency of violations

Though the number of police response incidents during Appellant's operation was around 20, only two instances were highlighted by the police testimony at the April 9 for-cause hearing as posing public safety concerns warranting revocation. The remaining instances were not specifically addressed and the remaining testimony was limited to anecdotal evidence of noise complaints.

b. Danger to the public posed by the violation

The actual danger to the public is limited as discussed in section 2(a) above, especially when considered against the severity of the punishment as concerns the livlihoods of the Bebeto owners.

c. The nature of any violations and sanctions previously imposed (progressive discipline policy)

In *El Chapin Restaurant v. City of Central Falls Liquor Board*, the Department denied the request for a stay on a license revocation based on a "long line of Department cases regarding progressive discipline and upholding the same". DBR No. 08-L-0274 at 3. The Department cited a Superior Court case as an example of its "progressive discipline" policy: *Pakse Market*

Corp. v. McConaghy, 2003 WL 1880122 (R.I. Super. 2003). In Pakse, the DBR upheld a revocation following "progressive discipline" where the local licensing authority's "imposition of a two-day suspension for appellant's first offense, followed by progressively harsher penalties for the second and third offense and a revocation of appellant's license for a fourth offense, was not arbitrary and capricious because it was based on the premise that appellant's continued violations posed a danger to the community." Id. at 5.

Based on this "progressive discipline" policy, the Department refused to issue a stay because Chapin Restaurant had been subject to progressive discipline, the last step of which was the revocation. In that case, Chapin's license was suspended for one week in Spring 2008, with imposition of a $500 administrative penalty. Chapin failed to timely pay the fine, even after several letters demanding it do so. After finally paying the fine months later in September 2008, Chapin continued to demonstrate its failure to maintain its premises. Two stabbing occurred immediately outside the premise in October, which triggered the severe penalty of license revocation. Even after this serious occurrence, Chapin failed to cooperate with the authorities. For these reasons, the Department denied the request for the stay order.

The facts before the undersigned in the instant case are completely distinguishable. Unlike the parties in *Chapin*, there is no history of progressive discipline that supports the "death penalty," as the court in *Jake & Ellas*, *supra*, characterized license revocation. The Appellant was not progressively disciplined with suspensions or administrative penalties prior to the drastic result of revocation. Neither did the Appellant receive any formal communication from Johnston liquor license authority regarding potential revocation until receiving the notice of show-cause hearing scheduled for April 9, 2012. Though the Town asserts informal warnings by police

officers, this does not amount to a pattern of "progressive discipline" such as the increasingly severe measures taken in *Chapin* and in *Paske* that justifies immediate revocation.

Furthermore, the initial recommendation of the police that discipline be limited to a 60-day suspension indicates the availability and appropriateness of using progressive discipline in this case (It should be noted that as of this writing, the Appellant has been closed for almost 60 days, which is tantamount to a suspension. Any benefit or detriment received by the Town and Appellant respectively has been achieved by this shut down). Transcript at 19. While the police later withdrew this recommendation in favor of total revocation, doing so was apparently based solely on the testimony of Mr. Beaumier, a neighbor presenting incidents of noise concerns. Transcript at 26 ("[A]fter hearing this testimony, I respectfully request to withdraw my recommendation for a two-month suspension and ask for complete revocation of their operating license, liquor license, food license and entertainment license."). This change from a progressive measure to the most severe penalty available was not justified absent additional testimony as to safety concerns, such as the stabbings occurring in *Chapin*.

d. Consideration of "other facts deemed relevant in fashioning an effective and appropriate sanction"

Revocation also seems excessive due to the owner's lack of knowledge of the gang affiliation of some of its patrons. While it is true that the owners are responsible regardless of proof of actual knowledge, their state of mind is relevant in assessing the severity of the appropriate penalty. In *Musone v. Pawtucket Bd. of License Com'rs*, the Superior Court expressed "great reservations about the Liquor Control Administrator's imposition of the most severe penalty allowed by law" (revocation), where there was "reason to believe the violation was more the result of negligence rather than malicious intent." 1984 WL 560365, *2

(R.I.Super., 1984). In the instant case, the testimony of Mrs. Vargas gives the undersigned reason to find that the Appellant lacked any malicious state of mind with regard to potential dangers on its premises. In fact, the testimony demonstrated the owners' dedication to addressing the problem, with the requests for a police detail. Transcript at 12. Therefore, yet another fact that should be considered in assessing the severity of the penalty is the Town's own contribution to the safety concerns by refusing to provide a police detail upon Appellant's request.

4. The legal effect of an order staying the revocation decision

The legal effect of a stay order is that the liquor license is returned to the licensee pending the outcome of the appeal (see Case Di Mario, Inc. v. Department of Business Regulation, 2002 WL 33984623 (R.I. Super. 2002) where the Town of Johnston returned the Class BV liquor license to the plaintiffs on the same day that the administrator granted a stay of the revocation of the liquor license).

VI. RECOMMENDATION

Based on the forgoing, the undersigned recommends that Appellant's motion for a stay be granted. Nothing in this order precludes the Appellant from petitioning the undersigned to revisit this order because of change in circumstances. Should the parties come to a pre-hearing agreement as to the management of potential issues at Appellant's premises, such as provision of a police detail, the undersigned could appropriately be petitioned to modify the order to condition the stay on payment for police details or other necessary measures.

As agreed to by the parties at the stay hearing and pre-hearing conference, a de novo hearing is scheduled for June 27, 2012, at 9:00AM at The Department's address noted above. This date may be rescheduled at the request of the parties.

Date: 6/6/2012

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

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

✓ ADOPT

___ REJECT

___ MODIFY

the recommendation of the Hearing Officer in the above-entitled Interim Order.

Date: 6/6/2012

Paul McGreevy
Director

Entered as an Administrative Order No.: - 12-036 this 6th day of June, 2012.

NOTICE OF APPELLATE RIGHTS

THIS ORDER IS REVIEWABLE BY THE SUPERIOR COURT PURSUANT TO R.I. GEN. LAWS § 42-35-15(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 OF A PETITION DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER.

CERTIFICATION

I hereby certify on this 6th day of June, 2012 that a copy of the within Order and Notice of Appellate Rights was sent by email and first class mail, postage prepaid to -

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