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.	:	

ORDER VACATING THE DEPARTMENT'S JUNE 29, 2012 ORDER AND DECISION UPON RECONSIDERATION

I. PROCEDURAL HISTORY

On August 1, 2011, the City of Providence Board of Licenses ("Board") denied the application of JARR Realty, LLC d/b/a Davinci's Restaurant & Lounge ("Appellant") for a Class BV license based on its calculation of legal remonstrance. On appeal to the Department of Business Regulation ("Department"), the Department issued an Order of Remand on February 22, 2012, directing the Board to reconsider whether letters purporting to withdraw objections had removed the legal remonstrance, *i.e.* whether the application should be granted in light of the rescission letters.[1] 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.

[1] 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 pursuant to R.I. Gen. Laws § 3-7-21 (authorizing the Department "to make *any* decision or order he or she considers proper")(*emphasis supplied*)

On subsequent appeal to the Department, the Department issued an order requiring the Board to grant the Appellant an unconditional BV liquor license on March 29, 2012. In light of the Department's grant of the Board's Motion for Reconsideration,[2] the parties mutually agreed to stay the Department's March 29, 2012 decision pending reconsideration.[3] In light of the letters of the local remonstrant conditionally withdrawing their objections, the Department issued a Modified Decision and Order on June 29, 2012 granting the Appellant's license subject to the said 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"
4. "no outdoor speakers"[4]

Subsequently, the Board appealed the Department's June 29, 2012 Decision to the Rhode Island Superior Court pursuant to the relative provisions of the Rhode Island Administrative Procedures Act, Chapter 42-35 (C.A. NO.: PC-12-3913). The parties stipulated to the dismissal of the Superior Court appeal upon agreement of the parties to jointly request that the Department reconsider the Department's June 29, 2012 Decision following the provision of notice of the

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See, e.g., La Base Sports Bar v. City of Providence, DBR No. 10-L-0037 (Order of Remand following withdrawal of abutter's remonstrance).

[2] Section 19 of the Rules of Procedure for Administrative Hearings.

[3] The Board's Motion for Reconsideration was based on its complaint that, though findings of fact and conclusions of law were incorporated within the March 29, 2012 order's "Facts and Travel" and "Law and Analysis," they were not separately set forth therein under the technical headings "Findings of Fact" and "Conclusions of Law". While the Department recognized in the Modified Decision that the formatting preference gives clarity to decisions, it clarified that these stylist technicalities did not invalidate the prior decision as a matter of law. Acting in an abundance of caution and further citing the additional testimony of Appellant's owner Youssef Rouhana as grounds for reconsideration, the Department nevertheless granted the Motion for Reconsideration.

[4] When the Department received Appellant's Notice of Appeal on March 8, 2012, 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 the matter finality, the Department instead exercised its discretion to decide the case on the merits on March 29, 2012.

Department hearing to all 200 foot abutters.[5] The Board provided the Department with a certified copy of Board's Record, which included a list of the names and addresses of the property owners within the 200-foot radius of the Appellant's premises. The Department mailed notice to all of the listed property owners, advising them of their right "to be heard (or send a letter of objection or approval)." In response to its notice, the Department received four letters from local remonstrants, two of which renewed the objection at the Department level, the other two of which withdrew the objection on the condition that there would be "no DJ." No remonstrants appeared in person before the Department.

II. GROUNDS FOR RECONSIDERATION

Under Central Management Regulation 2, Rules of Procedure for Administrative Hearings, Section 19, "[a]t any time after the issuance of a final order of the Director, any Party may, for good cause shown, by motion petition the Director to reconsider the final order," "set[ting] forth the grounds upon which he/she relies." *See also* 2 Am. Jur. 2d Administrative Law § 379 ("A motion for reconsideration or rehearing must be sufficiently definite to notify the agency of the error claimed in order to allow the agency the opportunity to correct it or prepare to defend it.") If the motion is "filed more than twenty (20) days after entry of the final decision," the Hearing Officer must find "good cause to entertain said motion." Upon finding "good cause," "the Director may grant the motion for reconsideration within his/her discretion and shall order such relief as he/she deems appropriate under the circumstances." Id. *See also* 2 Am. Jur. 2d Administrative Law § 378 ("A final decision may be modified if...a great public interest is served by the modification.").

[5] It should be noted that neither the Board nor any remonstrant raised the notice issue in the prior Department proceedings. Absent the consent of the Appellant, the Department could have deemed the notice issue waived. *See Neuschatz v. Reitsma*, 2004 WL 1351325 (R.I. Super., 2004).

In the instant case, the Hearing Officer found that the Board's request that the Department notify all 200-foot abutters constituted "good cause," justifying reconsideration following provision of such notice. Because reconsideration is not limited to situations in which the original decision was invalid as a matter of law, the grant of the motions in this case does not carry any implication that the original decision was invalid.[6]

III. 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." In *Hallene v. Smith*, 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." 98 R.I. 360, 365 (R.I. 1964)(*emphasis supplied*). 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.

IV. STANDARD OF REVIEW

Under R.I. Gen. Laws § 3-5-17, "[a] local liquor licensing body has wide discretion in determining whether or not to issue a liquor license." *Boulevard Billiard Club v. Board of Licenses Com'n of City of Pawtucket*, 1975 WL 170016 at 1 (citing *Board of Police Comm'rs. v. Reynolds,* 86 R.I. 172 (1957)). R.I. Gen. Laws § 3-5-17 does not "specif[y] the criteri[a] to be

[6] Under Central Management Regulation 2, Rules of Procedure for Administrative Hearings, Section 5, the "Department shall give notice ("Notice") to all Parties of the initiation of a Contested Case." The rule further defines a "Party" as a "Person named or admitted as a Party, or properly seeking and entitled as of right to be admitted as Party in a Contested Case." However, neither the Rules nor case law provide further direction as to how to construe the term "entitled as of right to be admitted as a party."

used by the licensing authority in making its decision." *Ribiero v. Pastore*, 1983 WL 481440 at 2 (R.I. Super., 1983). Instead, the local licensing authority is vested with "considerable discretion" to consider or decline to consider various factors in rendering its decision. Id. Upon appeal of the local licensing authority's decision to the Department under § 3-7-21(a), the Department "has the same broad discretion to grant or refuse such applications as have the local boards." *Hobday v. O'Dowd*, 94 R.I. 172, 174 (1962).

V. DISCUSSION

Under § 3-7-19(a), a "[r]etailers' Class B...license[]...shall not be issued to authorize the sale of beverages in any building where the owner of the greater part of the land within two hundred feet (200') of any point of the building files with the body or official having jurisdiction to grant licenses his or her objection to the granting of the license." 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. All references in § 3-7-19 are to the local licensing authorities, "the bod[ies] or official[s] having jurisdiction to grant licenses" in the first instance, with subsection (a) carving out an exception for the local licensing authority of the City of East Providence and subsection (d) referring to specific local boards (the "board of license the cit[ies] of" Providence, Newport, Warren, Bristol, Cranston, Pawtucket, Little Compton, Bristol, Smithfield, and Tiverton). Thus, careful contextual analysis supports the conclusion that § 3-7-19(a) applies as a jurisdictional bar on local boards in the case of legal remonstrance, but not on the Department.

Moreover, when an Appellant appeals to the Department, it gains an opportunity to have its case heard *de novo*. *See Hallene*, *supra*. Accordingly, "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." *Krikor S. Dulgarian Trust v. Providence Board of Licenses*, DBR No. 10-L-0143 at 8 (June 15, 2011). In absence of objecting interveners at the Department level, the local remonstrance does not necessarily control the Department's decision.

It is within the sole discretion of the hearing officer whether or not to consider, and what weight to assign, lower level letters of objection that were not renewed on appeal. The General Assembly's intent to vest the Department with such discretion is implied from the fact that the Department is permitted, but not required to, admit the local hearing transcripts into the administrative record. § 3-7-21 (c) ("[t]he director may accept...")(*emphasis supplied*). The weight that the hearing officer assigns to arguments and evidence presented at both the Board and the Department level is solely within his or her discretion. *Vel-Vil, Inc. v. Pastore*, 1986 WL 732870 at 3 (R.I.Super., 1986)("The weight to be given to the evidence is for the Administrator"). When the Department receives no communication directly from the local level objectors, despite the fact that notice was provided informing abutters as to the name and address of the Hearing Officer to whom letters of objection must be directed to in order to properly invoke one's right to object, the weight of the locally-submitted letters is minimal.

In the instant case, despite the fact that notice was provided to all 34 abutting property owners, written communication to the Department was only submitted on behalf four parties; none of whom actually appeared before the undersigned to voice their objections at the Department level. The property interest of the two owners who renewed their complete objection to granting the license at the Department-level totals 2,490 ft^2.[7] Out of the total 72,996 ft^2 figure calculated by the Board to cover the area of privately owned land in the 200 foot radius

[7] Within the condominium building located at 333 Atwells Avenue (lot 1065), Juliet Nassar owns 1,245 ft^2 (unit 307) and Luis and David DiCola own 1,245 ft^2 (unit 207).

of the proposed establishment, the Department-level objections only amount to a 3.4 % remonstrance.

Even assuming that all of the local level objectors did properly renew their objections before the Department, two of the local level objectors expressly rescinded their objections at the Department level. The property interests of these two owners totals 13,598 ft^2.[8] Removing this square footage from the total objecting area calculated by the Board results in a new calculation of remonstrance of 48.9%,[9] a figure still below the 50% required to establish a legal remonstrance.

Beyond these numbers, the Department may, in its discretion, consider the substance of the objections in formulating its decisions. The over-generalized concerns cited in some of the original objection letters and the two objection letters submitted to the Department do not constitute grounds for denial. Objection letters that lack specific and compelling reasons for denying an application may represent mere dislike of the applicant or desire of neighboring establishments to limit competition, neither of which would be grounds for denying the application. Failure to include specific reasons for one's objections further denies the liquor license applicant the opportunity to cooperatively address the community's concerns.

Accordingly, in *Krikor S. Dulgarian Trust v. Providence Board of Licenses*, the Department dismissed "broad concerns regarding health and safety" because they lacked of any specificity to the Appellant." DBR No. 10-L-0143 (June 15, 2011). Like the situation in *Krikor*, the objections in this case are too generalized to reasonably support denial of the license. The general concerns with over-crowding, "less desirable late night crowd", "safety, parking, and

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[8] Within the condominium building located at 333 Atwells Avenue (lot 1065), Olga Hawwa owns 1,245 ft^2 (Unit 308). Per representations of counsel for the Appellant, without objection by counsel for the Board, Mr. Gaudreau is the owner of 333 Retail A Holdings, representing a total of 12,353 ft^2.

[9] 59,354 - 13,598 = 35, 747. 35747 / 72996= 48.9%

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 proposed establishment. Nothing in the record pinpoints the cited problems to the Appellant to the exclusion of the many other liquor establishments on Federal Hill. Neither it is apparent why the Appellant should be denied a license because of the objector's concerns with a murder on Federal Hill totally unrelated to the Appellant's establishment or the City of Providence's alleged "failure to enforce the zoning laws and limitation on variances."[10]

Neither is generalized concern with over-abundance of liquor licenses in the area adequate grounds for denying a license application. *See Ribiero v. Pastore*, 1983 WL 481440 at 3 (R.I.Super.,1983)(concern with the overabundance of licenses *alone* "might not be a sufficient basis for denying transfer"). The two objection letters addressed to the Department oppose the License because Federal Hill is "saturated by establishments serving liquor."[11] In *Krikor, supra,* the Department held that over-abundance is "a policy argument and is not grounds to overturn the grant of this License." Id. at 8. Municipalities are legislatively empowered to codify a policy addressing over-abundance of license under R.I. Gen. Laws § 3-5-16, but are required to do use using rule-making formalities. *Tedford v. Reynolds*, 141 A.2d 264, 269 (R.I., 1958). Where the issuance of the Appellant's license will not violate any limit set by the city, the Department will not deny a license based solely on the argument that there are "too many" in the area. While it is true that the Department may, in its sole discretion, consider specific evidence showing the lack of "necessity and convenience" of an additional license, no such evidence was presented here. *Hobday v. O'Dowd*, 179 A.2d 319, 322 (R.I., 1962); *Smith v. Board of License Com'rs*, 1979 WL

[10] Letter from Louis and David DiCola.
[11] Id.

196091 at 1 (R.I.Super., 1979)(rejecting the "proposition that necessity and convenience are *always* essential criteria to be considered.")(*emphasis supplied*).

Finally, one of the Department level objection letters stated that "[f]inding a parking spot become a problem on side streets like Acorn Street."[12] The Department may, in its discretion, consider parking issues in deciding whether or not to issue a liquor license. In *Ribiero v. Pastore*, the Superior Court upheld the Department's decision based on concerns with liquor license overabundance "coupled with the Administrator's findings with respect to parking and traffic congestion." 1983 WL 481440 at 3 (R.I. Super., 1983).[13] The record in this case does not justify denial on the grounds of parking, however. Neither the Board nor any objectors presented specific or compelling evidence that granting this specific license would cause a nuisance on community parking. In contrast, the hearing officer in *Ribiero* was presented with testimony from both the City Planner and the applicant's traffic expert before denying the license. Id.[14]

Further in support of the application, the Appellant's operator testified before the Department at the first reconsideration hearing 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 Board did not rebut this testimony nor present any violation history for this establishment that would raise doubt as to the operator's

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[12] Letter from Juliet Nasser.

[13] "It seems clear that the adequacy of parking, traffic congestion and the effects upon the public health and welfare are all appropriate factors to be considered in exercising that discretion." *See also Boulevard Billiard Club v. Board of Licenses Com'n of City of Pawtucket,* 1975 WL 170016 at 2 (R.I.Super., 1975)(upholding the Department's denial of the license based on "objections of the proprietors of nearby businesses" that the granting the license would result in a "concomitant diminuation of spaces available to the patrons of the many other businesses located in the area.")

[14] Similarly, in *Boulevard Billiard Club* the record established in detail that the applicant had "no off-street parking facilities available to it"; that the establishment was "located a half block away from [a] busy intersection"; "that many businesses [were] located within a few hundred feet of the plaintiff's premises"; "that limited on-street parking [was] available in the area"; and that the applicant "would attract a substantial number of vehicles to the area during its business hours. Id. at 2.

fitness to run a liquor establishment. Moreover, the operator testified as to the community benefit of his plans to convert a building in dire need of restoration into a "fine dining" establishment by investing substantial funds to renovate this "eye sore."

Having decided that there are no grounds for denying the application, the next question is whether it is appropriate to attach any special conditions on the license attendant to its issuance to address community concerns. On appeal, the Department assumes the same authority as the Board to impose license conditions in accordance with the reasonableness requirements set forth in *Thompson v. East Greenwich*, 512 A.2d 837 (R.I., 1986). *Hallene*, *supra.* ("an appeal to the Department "transfer[s] or remove[s] a cause from the jurisdiction of a local board to that of the state tribunal.") The letters rescinding objections submitted at the local level requested that the license be conditioned on the prohibition against a second floor balcony or patio, music produced by more than single instrument/singer, outdoor speakers, and opening windows while music is playing. The letters rescinding objections submitted at the Department level suggested issuing the license on the condition that the Appellant "will not be allowed to have a DJ."

All of these proposed conditions relate to entertainment, however, not the service of liquor. The City of Providence has "other avenues, via (zoning) ordinances, to control the level of noise eminating from [liquor] establishments" and other community concerns regarding entertainment. *Town of New Shoreham v. Racine*, 1992 WL 813547 at 5 (R.I. Super. 1992); R.I. General Laws § 5-22-1 *et seq.* The community concerns relating to entertainment in the instant case are beyond the scope of the Department's jurisdiction, which pertains to liquor licenses, but not to entertainment licenses.[15] *See* R.I. Gen. Laws § 42-14-1 (listing the chapters with which

[15] In contrast to the instant case, the Department may have occasion to address entertainment concerns in cases in which R.I. Gen. Laws § 3-7-7.3 applies or where a violation of an entertainment ordinance is cause for discipline under R.I. Gen. Laws § 3-5-21.

the Department is charged with enforcing to the exclusion of chapter 5-22 regarding entertainment licenses).[16]

II. Findings of Fact

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

III. Conclusions of Law

1. The Department has discretion to vacate its prior order and reconsider the matter.
2. The Department has jurisdiction to decide this matter on the merits.
3. Despite adequate notice to all abutters, no legal remonstrance existed at the Department level.
4. Community concerns regarding entertainment do not give rise to the necessity for conditions on the liquor license as those concerns are appropriately addressed outside the Department's jurisdiction.

IV. Recommendation

It is recommended that the Department's June 29, 2012 Order be vacated. It is further recommended that the Board be ordered to grant Appellant's license, subject to all necessary approvals, *i.e.* zoning, fire, etc.

As recommended by:

[16] For an analogous discussion of the distinction between liquor and food license, see *El Nido, Inc. v. Goldstein* 626 A.2d 239, 242 (R.I., 1993)("Although ...it is common practice for a businessperson to apply for each license simultaneously... a [liquor] license and a [food] license confer two distinct privileges on a single licensee...Because these two licenses are distinct, the city council may grant a [food] license...while the same city council members, sitting as the board of license commissioners, may simultaneously deny the transfer or issuance of a [liquor] license."

Date: 1-8-2013

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 Decision and Order of Remand.

Date: 9 Jan 2013

Paul McGreevy
Director

Entered as an Administrative Order No.: 13100 this 7th day of January, 2013.

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 9th day of January, 2013 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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