STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION

JD/Hallmark Properties, Appellant,	:	
v.	:	**DBR No.: 10-L-0063**
City of Providence, Board of Licenses , Appellee,	:	
and	:	
Karma, Inc.	:	
Intervenor.	:	

ORDER VACATING JULY 8, 2010 ORDER

On or about May 26, 2010, JD/Hallmark ("Appellant") filed an appeal pursuant to R.I. Gen. Laws § 3-7-21 with the Department of Business Regulation ("Department") regarding the transfer/grant of liquor licenses from Club Elements to Karma, Inc. ("Karma"). This matter came before the undersigned on July 7, 2010 in her capacity as Hearing Officer as the designee of the Director of the Department of Business Regulation ("Department").[1] The Appellant filed a Motion to Vacate the transfer of License or in Alternative Remand the Matter to the Board and stay the opening of Karma. The Appellant argued that the Board had failed to provide notice of Karma's application to be given to all owners within 200 feet of the property pursuant to R.I. Gen. Laws § 3-5-17. At hearing, the Board agreed that notice was failed to be given. After hearing, an order was entered remanding this decision to the Board for a further hearing after proper notice was given and staying the grant of the License. See Order dated July 8, 2010. On July 9, 2010, Karma filed a Motion for Reconsideration on the basis of R.I. Gen. Laws § 3-5-19

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

which must be read in conjunction of R.I. Gen. Laws § 3-5-17.[2] The Appellant filed an opposition to said motion. A hearing was held on July 13, 2010. The Board took no position on said motion.

A review of the two (2) statutes indicates that in 1977 by P.L. 1977, ch. 216 § 1, R.I. Gen. Laws § 3-5-17 was amended to add that notice must be given by mail to abutters in the 200 feet radius and R.I. Gen. Laws § 3-5-19 was amended to add that notice need not be made in case of a transfer of a license without relocation. In other words, a local licensing authority could

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[2] Said statutes provide as follows:

> § 3-5-17 Notice and hearing on licenses. – Before granting a license to any person under the provisions of this chapter and title, the board, body or official to whom application for the license is made, shall give notice by advertisement published once a week for at least two (2) weeks in some newspaper published in the city or town where the applicant proposes to carry on business, or, if there is no newspaper published in a city or town, then in some newspaper having a general circulation in the city or town. Applications for retailer's Class F, P and Class G licenses need not be advertised. The advertisement shall contain the name of the applicant and a description by street and number or other plain designation of the particular location for which the license is requested. Notice of the application shall also be given, by mail, to all owners of property within two hundred feet (200') of the place of business seeking the application. The notice shall be given by the board, body or official to whom the application is made, and the cost of the application shall be borne by the applicant. The notices shall state that remonstrants are entitled to be heard before the granting of the license, and shall name the time and place of the hearing. At the time and place a fair opportunity shall be granted the remonstrants to make their objections before acting upon the application; provided that no advertisement or notice need be given pursuant to this section when a license holder applies for a temporary seasonal expansion of an existing liquor license.
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> § 3-5-19 Transfer or relocation of license. – The board, body or official which has issued any license under this title may permit the license to be used at any other place within the limits of the town or city where the license was granted, or, in their discretion, permit the license to be transferred to another person, but in all cases of change of licensed place or of transfer of license, the issuing body shall, before permitting the change or transfer, give notice of the application for the change or transfer in the same manner as is provided in this chapter in the case of original application for the license, and a new bond shall be given upon the issuance of the license provided, that notice by mail need not be made in the case of a transfer of a license without relocation. In all cases of transfer of license, indebtedness of the licensee incurred in the operation of the licensed premises shall be paid to or released by an objecting creditor before the issuing body permits the transfer. In cases of dispute as to the amount of indebtedness, the issuing body, may, in its discretion, permit the transfer upon statement of the licensee, under oath, that the claim of indebtedness is disputed and that the statement of dispute is not interposed for the purpose of inducing transfer of the license. No creditor is allowed to object to the transfer of a license by a receiver, trustee in bankruptcy, assignee for the benefit of creditors, executor, administrator, guardian or by any public officer under judicial process. In case of the death of any licensee, the license becomes part of the personal estate of the deceased. The holders of any retail Class A license within the city or town issuing or transferring a Class A license have standing to be heard before the board, body, or official granting or transferring the license.

choose to require notice be given by mail to abutters within 200 feet for a transfer of license without change of relocation but need not. This matter concerns a transfer without relocation.

It is not disputed that Club Elements had a Class BV liquor license as well as a Class BX license (2 a.m. closing) and a Class N license (nightclub). Apparently, the Board considered the BV license was being transferred from Club Elements to Karma but treated the application by Karma for the BX and N licenses as new applications. Karma's application for the BX and N licenses are on forms indicating that they are new applications for BX and N licenses and the newspaper advertisement for the local hearing indicates the application for the BX and N licenses are new applications. The Board's letter scheduling its hearing indicates that it is a transfer of the BV license with the BX and N being new applications. See Appellant's Objection to Motion for Reconsideration and the Appellant's Motion to Vacate. Apparently it is the policy of the Board not to transfer BX or N licenses.[3]

The BV and BX and N licenses are all separate. A class N license cannot issue without a Class B (See R.I. Gen. Laws § 3-7-16.6) but it is possible for a licensing authority to grant a transfer a Class BV but deny an application for a transfer of the BX license associated with the granted BV license. See *Baird Beverages, LLC v. Exeter Town Council*, DBR No. 07-L-0004 and 06-L-0208 (4/ 12/07). In that matter, an applicant sought the transfer of a Class BVX but the Town only granted the transfer of the BV license and denied the transfer of the BX license. On appeal, an application for a BX license is considered the same as a new application.[4]

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[3] It is interesting to note that the Board in its May 26, 2010 letter summarizing the action it took on May 24, 2010 regarding the application only speaks of license transfer from Club Elements. In the letter, the Board never differentiates between a transfer and new applications. See Appellant's Motion to Vacate. Indeed, the Board had decided to suspend/revoke all of Club Elements' licenses pending a transfer application being filed. See Order in *Club Elements, Inc. v. Board of Licenses, City of Providence*, DBR No. 10-L-003 (6/17/10).

The undersigned also notes that the April 7, 2010 *Providence Journal's* classifieds attached to the Appellant's Motion to Vacate advertises a hearing on a transfer of a BVX license.

[4] In *Alexander Angelo, Inc. d/b/a Toast v. Town of North Providence*, DBR-03-L-0168 (11/3/03), the Department discussed the discretionary standard as applied to a request for a 2:00 a.m. closing time. *Alexander Angelo* cited to

It is unclear why the Board chose to treat the applications for the Class BX and N licenses as new applications but treat the BV application as a transfer.

On the basis of R.I. Gen. Laws § 3-5-17, any application for a new license must include notice by mail to the 200 feet abutters. Certainly, if there is a BV business without a BX license and the business decided to file an application for a BV license that would be a new application and require notice to the 200 foot abutters. The Appellant agrees that for the class BV license no notice by mail is required but argues that notice to the abutters is required for the new BX and N licenses and the newspaper advertisement lacked the individual names of stockholders.

The issues before the undersigned are as follows:

1. Should the Board have given notice by mail to the 200 feet abutters for the applications for the BX and N licenses? If the Board should have given such notice, should this matter be remanded and/or stayed for said notice to be given?

2. Does the Board's advertisement violate Rule 3 of *Commercial Licensing Regulation 8 Liquor Control Administration* ("CLR8")? If so, should this matter be remanded and/or stayed for the appropriate advertisement to be made?

As the Class N and Class BX were considered new applications, notice by mail to the 200 feet abutters needed to have been given. Rule 3 of CLR8 requires that the name of applicant including the name of stockholders of a corporation who own over 10% of stock, the d/b/a, the address of proposed location, and date, time, and place of hearing be advertised twice once a week fourteen (14) days in advance. See R.I. Gen. Laws § 3-5-17. In this matter, the two (2) newspaper advertisements were timely made and included all required information except the name of Karma's two (2) stockholders.

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the finding in *28 Prospect Hill Street, Inc. v. Gaines*, 461A.2d 923 (R.I. 1983), that the issue of whether to extend a licensee's closing time is left to the local licensing authority's discretion. In discussing what constitutes discretion, *Alexander Angelo* relied on previous Department cases related to the granting of a new license.

In the Department's July 8, 2010 Order, this matter was remanded back to the Board on the assumption that notice needed to be given by mail to the 200 feet abutters and thus the Board's decision was premature and without benefit of hearing all affected individuals. That order was consistent with *Providence Journal Company v. Providence Board of Licenses et al.*, DBR No. 04-L-0096 (1/18/05) upheld by *City of Providence Board of Licenses v. Department of Business Regulation* 2006 WL 1073419 (R.I. Super.). However, in light of R.I. Gen. Laws § 3-5-19, such notice by mail need not been given because it was a transfer without relocation.

The question now becomes whether a remand and/or stay is warranted in light of the failure to provide notice by mail for the applications for BX and N licenses.[5] A stay and remand would be warranted if this was an existing business seeking to add a new license. However, in this matter, Club Elements already had a BX and N license. If Club Elements did not, then a stay and remand would be warranted in light of the Board's failure to provide notice by mail for the new applications. While the Board treated Karma's BX and N applications as new applications,[6] those licenses already existed at an ongoing entity that was seeking to transfer its BV license to Karma. The intent of the statute is to provide notice to abutters for new licenses at a location – either by a transfer or new application.

Furthermore, the hearing before the undersigned is a *de novo* hearing. The Rhode Island Supreme Court held *Hallene v. Smith*, 201 A.2d 921, 925 (R.I. 1964) as follows:

> We conclude then that § 3-7-21 contemplates not an appeal, but a proceeding to transfer or remove a cause from the jurisdiction of a local board to that of the state tribunal that may be invoked whenever a local board acts adversely to the license under consideration. When this provision is properly invoked, it transfers the jurisdiction of the cause from the local board to the administrator by operation of law, and the cause then pending before the administrator is entirely independent of and unrelated to the cause upon which the local board acted. Error of law or fact inhering in the latter proceeding is without

[5] As an aside, the Appellant was on notice regarding the applications by Karma as it appeared at the Board hearing.
[6] If the Board is going to treat this type of application in the future as a combined transfer and new application, the Board will need to ensure compliance with the 200 foot notice rule.

> legal consequence on the jurisdiction of the administrator. When it is pending before the administrator on a hearing de novo, the cause is precisely the same as when it stood before the local board prior to its removal. The issue therein is the same, and the posture of the parties remains the same as that in which they stood before the local board. In short, the cause, when removed to the jurisdiction of the administrator, stands as if no action thereon had been taken by the local board.

See also *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984) (as the hearing is a *de novo* hearing rather than an appellate review of what occurred at the municipal level, any alleged error of law or fact committed by the municipal agency is of no consequence) and *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964) (*de novo* hearing is unaffected by any error by local board).

In light of the circumstances of the Board's failure to require statutory notice for the applications for the BX and N licenses and the incomplete advertisement coupled with the *de novo* hearing, there is no purpose served by remanding and staying the granting of the license. Notice need not be given to the 200 feet abutters for the BV transfer. The BX and N already existed at that location but were being treated as new applications. The hearing was timely advertised though it omitted the individual stockholders.[7] A *de novo* hearing is unaffected by any error by the local board and the errors by the Board in this matter in these limited circumstances do not warrant a stay and remand.[8]

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[7] Failure to advertise would result in a stay and a remand. In addition, an advertisement that omits some information could result in a remand and stay depending on the circumstances.

[8] To issue a remand and stay would only prolong any hearing on this matter by requiring the Board to hold further hearings which would result in an appeal by either party depending on its decision. Obviously, in some situations, that is a necessary result. But in light of the discussion above, it is not in this situation.

Under *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (1976), a stay will not be issued unless the party seeking the stay makes a "'strong showing'" that "(1) it will prevail on the merits of its appeal; (2) it will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to other interested parties; and (4) a stay will not harm the public interest." Nonetheless, the Supreme Court in *Department of Corrections v. Rhode Island State Labor Relations Board*, 658 A.2d 509 (R.I. 1995) found that *Harsch* was not necessarily applicable in all agency actions and the Court could maintain the *status quo* in its discretion when reviewing an administrative decision pursuant to R.I. Gen. Laws § 42-35-15(c). The issue before the undersigned is a motion to stay the Decision to transfer the License which is subject to a *de novo* appeal and does not fall under R.I. Gen. Laws § 42-35-15(c).

The Appellant argued that it had a substantially likelihood of success on the merits to succeed before the Board once notice is given by mail and the hearing re-advertised. However, in light of the broad discretion given the local licensing authorities, the undersigned does not make such a finding. In light of the above, proceeding promptly with the *de novo* hearing will allow a complete and full hearing.

However, if Karma prevails on its motion to dismiss so that no *de novo* hearing is held, the Department under its *sua sponte* authority will revisit the Board's error of law and the appropriate response.

On the basis of the forgoing, this Hearing Officer recommends the following:

1. The Order of July 8, 2010 is vacated so that this matter is not remanded and the granting of the License is not stayed.

2. A tentative hearing date (subject to a ruling on the motion to dismiss) is scheduled for **August 6, 2010 at the Department of Administration, One Capitol Hill, Providence, RI at 9:30 a.m.** (The parties will be notified of the conference room).

Dated: 7/15/10

Catherine R. Warren
Hearing Officer

INTERIM ORDER

I have read the Hearing Officer's Order and Recommendation in this matter, and I hereby take the following action with regard to the Order and Recommendation:

___✓___ ADOPT
_____ REJECT
_____ MODIFY

Dated: 07-15-2010

A. Michael Marques
Director

Entered as Administrative Order No. 10-104 on this 15th day of July, 2010.

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 STAY ENFORCEMENT OF THIS ORDER.

CERTIFICATION

I hereby certify on this 15th day of July, 2010 that a copy of the within Order was delivered by facsimile and by first class mail, postage prepaid to -

Kevin McHugh, Esquire
City of Providence Law Department
275 Westminster Street
Providence, RI 02903
Fax. 401-351-7596

Peter Petrarca, Esquire
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Duffy & Sweeny
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Providence, RI 02903
Fax. 401-455-0701

and by hand-delivery to Maria D'Alessandro, Associate Director, Department of Business Regulation, 233 Richmond Street, Providence, RI 02903.

A B Ellison