

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DEPARTMENT OF BUSINESS REGULATION**

---

<b>Club Elements, Appellant,</b>	:	
	:	
	:	
v.	:	<b>DBR No.: 10-L-003</b>
	:	
<b>Board of Licenses, City of Providence, Appellee.</b>	:	
	:	

---

**RECOMMENDATION AND ORDER DENYING MOTION FOR STAY**

**I. INTRODUCTION**

Club Elements (“Appellant”) seeks a stay of the Board of Licenses, City of Providence’s (“Board”) decision (“Decision”) of January 1, 2010 in which the Board pursuant to Section 1102 of Providence’s Home Rule Charter suspended Appellant’s liquor license (“License”)<sup>1</sup> pending a full hearing scheduled for January 4, 2010 which was continued to and heard on January 6, 8, 11, and 12 and will be heard tomorrow, January 15.<sup>2</sup> Previously, the Appellant requested a stay for the shut down for January 7, 2010 which was denied. At the January 8, 2010 Board hearing, the Appellant was closed by the Board for that Friday and Saturday. At the January 13, 2010 Board hearing, the Appellant was closed at least for January 14, 2010.

The parties dispute whether Appellant will be closed on January 15 and 16, 2010. The Appellant argues that the Board has in effect suspended it indefinitely by emergency action. The Board argued that it will decide tomorrow whether to further suspend this license.

---

<sup>1</sup> It should be noted that the Board’s Decision also includes the suspension of other licenses held by the Appellant such as its Food Dispenser license, etc. The hearing before the undersigned is solely related to the Appellant’s liquor license held pursuant to R.I. Gen. Laws § 3-2-1 *et seq.* and appealed pursuant to R.I. Gen. Laws § 3-7-21.

<sup>2</sup> Said section 1102 limits such emergency suspensions to no more than 72 hours unless the licensee has been given three (3) days written notice of a hearing.

The Board objected to Appellant's motion. By order dated October 31, 2006, the Director of the Department of Business Regulation ("Department") has delegated his authority to hear appeals filed pursuant to R.I. Gen. Laws § 3-7-21 to the undersigned. A hearing on the motion for stay was held on January 14, 2010.

## II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-2-1 *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.*

## III. MATERIAL FACTS

At today's hearing, the Board raised the issue that the Appellant holds a victualing license which also has been suspended by the Board. See Footnote One (1). A Class B liquor licensee must comply with the requirements of R.I. Gen. Laws § 3-7-7.<sup>3</sup> See *Baker v. Rhode Island Department of Business Regulation*, 2007 R.I. Super. Lexis 55. Rule 5 of *Commercial Licensing*

---

<sup>3</sup> R.I. Gen. Laws § 3-7-7 states in part as follows:

Class B license. – (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. The East Greenwich town council may, in its discretion, issue full and limited Class B licenses which may not be transferred, but which shall revert to the town of East Greenwich if not renewed by the holder. The Cumberland town council may, in its discretion, issue full and limited Class B licenses which may not be transferred to another person or entity, or to another location, but which shall revert to the town of Cumberland if not renewed by the holder.

\*\*\*

(2) The license authorizes the holder to keep for sale and sell beverages including beer in cans, at retail at the place described and to deliver them for consumption on the premises or place where sold, but only at tables or a lunch bar where food is served. It also authorizes the charging of a cover, minimum, or door charge. The amount of the cover, or minimum, or door charge is posted at the entrance of the establishments in a prominent place.

(3) Holders of licenses are not permitted to hold dances within the licensed premises, unless proper permits have been properly obtained from the local licensing authorities.

(4) Any holder of a Class B license may, upon the approval of the local licensing board and for the additional payment of two hundred dollars (\$200) to five hundred dollars (\$500), open for business at twelve o'clock (12:00) p.m. and on Fridays and Saturdays and the night before legal state holidays may close at two o'clock (2:00) a.m. All requests for a two o'clock (2:00) a.m. license shall be advertised by the local licensing board in a newspaper having a circulation in the county where the establishment applying for the license is located.

*Regulation 8 Liquor Control Administration* (“CLR8”) governs what type of food must be served for a Class BV (beverage victuals) license. Pursuant to statute, a class B license is only issued to a bona fide tavern keeper. See footnote three (3). The Appellant argues that it holds a Class N license so that the victualing requirement is not relevant.<sup>4</sup> The Board argues that the Appellant holds both licenses.

According to the Board’s letter of January 1, 2010 (see footnote one (1)), the Appellant’s food license has been suspended. If its food license is suspended, the Appellant would not be able to use its Class B license since food must be offered and served during the time alcohol is served. See Rule 5 of CLR8.

In terms of the issue for whether a stay should be granted, the facts stated herein are based on the representations made by counsel for Appellant and Board. The parties agreed that on the night of December 31, 2009 between 1 a.m. and 2 a.m., there was fighting in the club and someone pulled the fire alarm which caused the patrons to exit the building and an individual was arrested outside the club by the police and that individual had been ejected from the club. There is a dispute over the basis of this arrest. The police also called in all police cars from the city which left the rest of the city under protected for approximately thirty (30) minutes. At this hearing, the undersigned reviewed videotape of one (1) of the four (4) exits from the Appellant’s premises which showed the arrest and some patrons exiting. The undersigned also heard the

---

<sup>4</sup> R.I. Gen. Laws § 3-7-16.6 states in part as follows:

Class N nightclub license. – (a) Notwithstanding any provision of this title to the contrary, any town or city council, by ordinance, may authorize the licensing authorities designated as having the right, power, and jurisdiction to issue licenses under this title pursuant to § 3-5-15 to designate and issue a special class of Class N nightclub licenses within its jurisdiction.

(b) A Class N license, when so authorized, shall be required by each establishment within the jurisdiction which:

- (1) Has as its primary source of revenue the sale of alcoholic beverages and/or cover charges;
- (2) Holds a Class B or Class ED license;
- (3) Has a fire department occupancy permit of no less than two hundred (200) persons and no greater than ten thousand (10,000) persons; or any establishment with a fire department occupancy permit of less than two hundred (200) persons that holds an entertainment license.

police dispatch tape indicating that a call had been made saying that shots has been fired inside the Appellant's. Whether shots were actually fired that night is disputed by the parties.

The Appellant argued that a fire alarm was pulled inside and the police overreacted to the crowd exiting so that there was no public safety issue. The Appellant represented that it had moved the fire alarms pursuant to the fire marshall's order to behind the bar so that patrons could not pull the fire alarms.

The Board argued that there were two (2) public safety issues. First, the Board argued that fighting inside and outside of the club that night and what was described at the time by the shift commander as a "riot" raised public safety issues. Second, the Board argued about the security cameras videotapes. The Board represented that the Appellant's computer technician testified in front of the Board that he spoke to a shareholder from the Appellant on the morning of New Year's Day and that shareholder requested that he (the technician) download the third video from the security cameras for Level II (a club upstairs from the Appellant's) but not the first two videos on the computer. The Board represented that the shareholder rejected the technician's offer to download the video from the first two cameras. The Board represented that at tomorrow's hearing there will be testimony that shortly after the shareholder requested the technician download that video, someone with the access code of the first name of the shareholder logged onto the Level II computer and the videos were deleted.

The Appellant disputes that anyone deleted the videos off the computer. The Appellant represents that when the shareholder spoke to the technician, he was only looking for the third video he knew that was the video of the exit where the arrest was made that night and he wanted to review that video and that the Appellant gave that video to the police department. The Appellant represented that it did not know what happened to the Level II videos.

The Board represented that it also has the Appellant's computer (as opposed to Level II's computer) and there are no security videos from the Appellant's security cameras on that computer. The Board represented it had to get search warrants for these computers since the Appellant would not cooperate with the police.

#### IV. DISCUSSION

Rhode Island law allows for the emergency suspension of various licenses when there is a danger to public health or safety or welfare. See R.I. Gen. Laws § 42-35-14.

It should also be noted that a liquor license is not considered a property right. "Although a lawfully issued liquor license may not be property in the strict legal sense, it has some of the aspects of a property right, and it is reasonable to suppose that the legislature intended that a holder of such a license should have protection from arbitrary interference therewith by the local licensing board." *Burton v. Lefebvre*, 53 A.2d 456, 460 (R.I. 1947). However, the Rhode Island Supreme Court has also found as follows:

[I]t is well settled in this state and elsewhere that the business of the sale of intoxicating liquor is so clearly and completely subject to exercise of the police power of the state that it may even be entirely prohibited by the state . . . (citations omitted) . . . or it may be permitted subject to such restrictions and burdens, however great, as the state legislature may deem it advisable to impose, so long as they are not discriminatory in such a way as to be in violation of the equal protection clause of the fourteenth amendment and the procedure is not such as to violate its due process clause. *Tisdall v. Board of Alderman*, 188 A. 648, 651 (1936).

Under various circumstances, a post-deprivation hearing satisfies due process requirements regarding an emergency suspension. See *Matthews v. Eldridge*, 424 U.S. 319 (1976).<sup>5</sup> In this matter, the Providence Home Charter grants the Board limited power to suspend

---

<sup>5</sup> The Court held as follows:

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

a license up to 72 hours unless a licensee received three (3) days written notice of the action proposed to be taken and date and time of a full hearing. The Board has given three (3) days notice to the Appellant of its intent to revoke the license and for a hearing thereon and argued that since that hearing notice was given it can suspend the License for longer than three (3) days. Such a suspension must be in the public interest. In this matter, the Appellant's License has been suspended by emergency action by the Board but the length of suspension is unclear.

As the Board is hearing this matter again tomorrow, the Board shall determine whether the Appellant holds a Class B license and if the Appellant's virtual's license is suspended, the issue of a stay for this license becomes moot since a Class B license is dependent on the licensee being a bona fide tavern within the meaning of Rule 5 of CLR8 and R.I. Gen. Laws § 3-7-7. The Board shall also address whether a Class N license has any effect on this finding.

In addition, the Board argued that there were two (2) reasons there was a public safety issue: first, the fighting that night and those related activities; and second, the issue of the security cameras.

The undersigned is treating this motion as a stay for tonight, January 14, 2010, as a hearing is scheduled for tomorrow at which time the Board can address the Class B issue. However, if the Board continues its emergency suspension of the Class B license, there needs to be a finding regarding how long the suspension is for. E.g is the suspension hearing-to-hearing or thirty (30) days or what time frame. In addition, the Board now has had evidence before it from the police though not from the Appellant. Has the Board made a finding that the fighting that night could cause an ongoing possible threat to the patrons and/or city residents. Has the Board made a finding that imposing further conditions on this license would not provide

---

finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Matthews*, at 334-335.

adequate safety measures. If the Board believes (after hearing evidence) there has been an intentional despoliation of evidence by the Appellant does the Board believe this rises to a public safety issue in regards to actual physical safety for patrons and/or residents or would the Board believe that it relates more to the licenseholder's qualifications to hold a liquor license.

Under *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195 (R.I. 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."

**A. Substantial Likelihood of Success on the Merits**

There have been prior incidences at Appellant's of which the undersigned takes administrative notice. The parties dispute that Appellant is responsible for incidences alleged on December 31, 2009 and the Appellant disputes the Board's characterization of the security camera videos.

While the full facts regarding these incidents have not been litigated, the fact remains that there are serious allegations regarding fighting and crowding and public safety issues as well as evidence issues. There is no dispute that there have been prior incidents at Appellant's and that the Appellant has had its License suspended once before (though on appeal). The Department has a long line of Department cases regarding progressive discipline and upholding the same. E.g. *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.). In addition, liquor licensees are responsible for conduct that arises within their premises and for conduct that occurs off premises but can be reasonably inferred from the evidence had their origins inside. *The Edge-Jamuary, Inc. v. Pastore*, 430 A.2d 1063 (1981); *Manuel J. Furtado, Inc. v. Sarkas*, 373 A.2d

169 (R.I. 1977). Currently, the Appellant has been closed for five (5) days (that represents the days it would have actually opened).

Public fighting, pulling of fire alarms, and arrests represent a serious public safety issue. And public fighting represents a public safety issue in that fighting can lead to personal injury and destruction of property. There is no dispute that the police did make certain arrests in the area and were called to the area on December 31, 2009.

Obviously, the outcome of whether the Appellant is responsible will be fully determined at the hearing before this Board. But the information before the undersigned is that the Board issued an emergency suspension because it was concerned for the public safety arising out of fights, fire alarms, arrests, and evidence issues.

**B. Irreparable Harm to the Appellant; Substantial Harm to Other Interested Parties; Public Interest**

The Board (an interested party) has an interest in ensuring that liquor licensees – where the public gather - are compliant with their statutory obligations. In addition, there is a strong public protection interest. Not only does the public have an interest in ensuring that public spaces are safe, granting a stay raises issues of public safety and public protection in that there are allegations of disorderly conduct and fights. While Appellant disputes that it is responsible for the incidences alleged, there is no dispute that the police did respond to incidences in the area and made an arrest.

It is on the basis of such information, that the Board made its decision to issue the emergency suspension.

In light of the information received at hearing regarding the Class BV issue (which had not come up before) as well as the public safety issue, it is not for the undersigned to second



guess the local licensing authority's decision to impose a temporary suspension on Appellant's License in order to protect the public pending a full hearing. Indeed, such a hearing often serves as a vehicle for addressing and resolving any issues at hand. However, as detailed above, the Board must address the length of the suspension if it continues the suspension and the basis for continuing such a suspension as well as the Class BV issue.

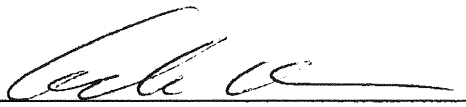
Therefore, pursuant to *Harsch*, the Appellant has not made the strong showing necessary for the issuance of a stay for January 14, 2010

V. **RECOMMENDATION**

Based of the forgoing, the undersigned recommends that Appellant's motion for a stay of the Board's order to close on January 14, 2010 be denied.

This order only relates to the Board's Decision as it relates to January 14, 2010 as the Board will further address this suspension and other matters as detailed in this order at tomorrow's hearing.

Dated: Jan 14, 2010

  
Catherine R. Warren  
Hearing Officer

**INTERIM ORDER**

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

ADOPT  
 REJECT  
 MODIFY

Dated: 01-14-2010

  
A. Michael Marques  
Director

**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 14<sup>th</sup> day of January, 2010 that a copy of the within Order was sent by ~~first class mail, postage prepaid~~ and by facsimile to -  
*email*

Kevin McHugh, Esquire  
Assistant City Solicitor  
275 Westminster Street  
Providence, RI 02904  
FAX 351-7596

John J. DeSimone, Esquire  
DeSimone & DeSimone  
735 Smith Street  
Providence, RI 02908  
FAX. 454-1402

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

  
\_\_\_\_\_