STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
PASTORE COMPLEX
1511 PONTIAC AVENUE
CRANSTON, RHODE ISLAND

W&D Parkview Enterprise, Inc. **d/b/a Parkview,** **Appellant,**	:	
v.	:	**DBR No.: 19LQ021**
City of Providence, Board of Licenses, **Appellee.**	:	

DECISION

I. INTRODUCTION

This matter arose from an appeal filed by W&D Parkview Enterprise, Inc. d/b/a Parkview ("Appellant") with the Department of Business Regulation ("Department") pursuant to R.I. Gen. Laws § 3-7-21 regarding a decision taken by the City of Providence, Board of Licenses ("Board") on July 22, 2019 to deny the Appellant's application for a Class BVX (2:00 a.m. closing) liquor license ("License"). The Appellant currently holds a Class BV license. A hearing was held on October 23, 2019 before the undersigned[1] with the parties resting on the record.[2] The parties were represented by counsel.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. § 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.*

[1] Pursuant to a delegation of authority by the Director of the Department.

[2] The Department hearing transcript was received on November 6, 2019.

III. ISSUE

Whether to uphold or overturn the Board's denial of the Appellant's application for a Class BVX license.

IV. MATERIAL FACTS AND TESTIMONY

At the Board hearing, there were supporters and objectors for the grant of the License. The Appellant represented at hearing that while its original business plan was as a bakery that was not financially viable so it was changing its business plan and opening from noon to 1:00 a.m. and would open to 2:00 a.m., if granted the License.

Various neighbors testified in opposition. There were various complaints brought up by the neighbors: 1) hear noise at night (specifically July 7, 2019 at 1:10 a.m.);[3] 2) nightclubs in area already; 3) safety concerns; 4) Appellant has been cited for violations already; 5) the Appellant is in a residential area; 6) area is gateway to Roger Williams Park; 7) would prefer Appellant stay a bakery; 8) limited parking in area (Appellant only has nine (9) parking spaces); 9) there have been clubs in that location before that had problems and were shut down; 10) currently hear noise from patrons exiting; 11) the Appellant will act as a nightclub which is not allowed in that area; 12) while capacity is 73 that is still a lot of people in a residential area at closing time; and 13) Appellant has not fixed its current issues. The neighbor who lives right behind the Appellant – eight (8) feet from the deck – testified she can hear the music and sing along to it. The Providence Police also represented that the police objected for the many reasons given by the neighbors. The owner of three (3) properties behind the Appellant also objected as his tenants complain about the

[3] The exhibits included in the Board's certified record indicated that there was video taken of the Appellant showing it operating at 1:10 a.m. on that night and that music could be heard outside at that time. The video was referenced in an email included in written objections submitted to the Board, but apparently was not submitted to the Board as it was not submitted to the Department. However, there was testimony at the Board about that night and the loud music and flashing lights. A police report indicating that a call was made at 1:31 a.m. on July 7, 2019 about loud music coming from the Appellant was included in the certified record.

noise. The certified record included a list of approximately 56 signatures of neighbors with addresses of those in opposition as well as various letters and emails (some from those who appeared) opposing the granting of the License.

At the Board hearing, there was testimony in support of granting the License. One neighbor (brother-in-law of owner) testified that the Appellant opened at a location that had been closed and should be given a chance. The Appellant's owner testified that she thought the opposition was personal. She testified that she received signatures from neighbors in support. An employee of two (2) years testified that the objectors never have never been in the restaurant and now just seem angry that alcohol will be sold. The certified record included a list of approximately 28 signatures of neighbors with addresses in support of the License. The Appellant also represented the local city councilor was in support of the License.[4]

At the Department hearing, an employee appeared and testified that she thinks the Appellant should be given a chance to open late for 30 days. Eleven (11) supporters of the granting of the License appeared and while they did not testify, they signed in support of the License.

The Appellant opened approximately two (2) years ago as a bakery and café. At the Department hearing, the Appellant represented that it started about a year ago operating into the evening as a lounge with the full use of its BV license staying open until 1:00 a.m. and serving breakfast, lunch, and dinner. It now plans to cease offering breakfast and to open at lunchtime as a lounge. See Appellant's business plan submitted to the Board contained in the certified record.

In the time that the Appellant has made full use of its BV license, it has the following violations and sanctions: 1) September 22, 2018 entertainment without a license with a warning

[4] Subsequent to the Board hearing, the local councilor resigned his seat and as noted at the Department hearing, he had not been replaced at the time of the Department hearing. The local state senator wrote in in opposition. See certified record.

issued on October 18, 2018; 2) February 9, 2019 entertainment without a license with a $250 administrative penalty imposed on April 1, 2019; 3) March 28, 2019, entertainment without a license, smoking in public, bottle service with a $550 administrative penalty, warning, and $1,000 administrative penalty imposed respectively on April 1, 2019; and 4) May 19, 2019 entertainment without a license for which an administrative penalty of $500 was imposed on June 26, 2019.

The Appellant's business plan submitted to the Board did not mention offering hookah and being a smoking bar, but at the Department hearing, the Appellant represented it was operating as a "smoking bar." R.I. Gen. Laws § 23-20.10-6 excludes from the prohibition on public smoking, any "smoking bar" as defined by R.I. Gen. Law § 23-20.10-2(20).[5] The Appellant represented that it has filed the appropriate affidavits[6] and has "smoke eaters" (ventilation system) as required for a smoking bar. No copies of the affidavits were submitted to the Board or Department.

It was undisputed that currently the Appellant cannot obtain an entertainment license at that location. See Board's certified record and Board hearing transcript. R.I. Gen. Laws § 5-22-

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[5] R.I. Gen. Laws § 23-20.10-2(20) provides as follows:

> (i) "Smoking bar" means an establishment whose business is primarily devoted to the serving of tobacco products for consumption on the premises, in which the annual revenues generated by tobacco sales are greater than fifty percent (50%) of the total revenue for the establishment and the serving of food or alcohol is only incidental to the consumption of the tobacco products. Effective July 1, 2015, all existing establishments and establishments that open thereafter must demonstrate quarterly, for a period of one year and annually thereafter, that the annual revenue generated from the serving of tobacco products is greater than fifty percent (50%) of the total revenue for the establishment, and the serving of food, alcohol, or beverages is only incidental to the consumption of the tobacco products. Every owner of a smoking bar shall register no later than January 1 of each year with the division of taxation and shall provide, at a minimum, the owner's name and address and the name and address of the smoking bar. The division of taxation in the department of administration shall be responsible for the determination under this section and shall promulgate any rules or forms necessary for the implementation of this section.
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> (ii) Smoking bars shall only allow consumption of food and beverages sold by the establishment on the premises and the establishment shall have public access only from the street.
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> (iii) Any smoking bar, as defined herein, is required to provide a proper ventilation system that will prevent the migration of smoke into the street.

[6] http://www.tax.ri.gov/forms/2016/SIU/RI-7665_m.pdf (link for said affidavit).

1.1[7] governs live entertainment in the City and pursuant to that statute, the Appellant can only play ambient music that allows for audible conversation inside and cannot be heard outside.

V. DISCUSSION

A. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. DEM,* 553 A.2d 541 (R.I. 1989) (citation omitted). In cases where a statute may contain ambiguous language, the Rhode Island Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (R.I. 1998).

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[7] R.I. Gen. Laws § 5-22-1.1 provides in part as follows:

> Live entertainment – City of Providence. The board of licenses for the city of Providence is authorized to license, regulate, or prohibit "live entertainment" in the city of Providence, including, but not limited to, live performances of music or sound by individuals, bands, musicians, disc jockeys, dancing, or karaoke, with or without charge, provided that "incidental entertainment" be permitted as of right, and no license shall be required. "Incidental entertainment" means background music provided at a restaurant, bar, nightclub, supper club, or similar establishment, limited to the following format:
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> (1) Live music performance limited to no more than a maximum of three (3) acoustic instruments that shall not be amplified by any means, electronic or otherwise.
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> (2) Prerecorded music or streamed music played over a permanently installed sound system. If a bar or restaurant includes incidental entertainment, it cannot charge a cover charge; shall not allow dancing by patrons of the establishment; cannot employ flashing, laser, or strobe lights; and the maximum volume, irrespective of the format, is limited solely to the boundaries of the premises at all times, and shall permit audible conversation among patrons of the establishment.

Section 14-193 of the City's Code provides that "[n]o person, corporation or entity shall publicly or for pay, or for any profit or advantage, exhibit, promote, take part in, conduct, engage in or give any 'entertainment event' without an entertainment license from the board of licenses."

B. The Appeal before the Department

The Department has broad and comprehensive control over the traffic in alcohol. Indeed, the Department's power of review is so broad that it has been referred to as a "state superlicensing board." *Baginski v. Alcoholic Beverage Comm'n.*, 4 A.2d 265, 267 (R.I. 1939). Thus, the Director has the authority under R.I. Gen. Laws 3-7-21, "to make any decision or order he or she considers proper."[8] The hearing before the undersigned is a *de novo* hearing so that the parties start afresh during the appeal. *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984); and *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964) (Department's jurisdiction is *de novo* and the Department independently exercises the licensing function). A new hearing was held for this appeal. The outcome of an appeal is a decision whether to uphold, overturn, or modify a licensing board's decision. Thus, this appeal is not bound by the Board's reasons for denial of the License application but whether the Board presented its case before the undersigned. The undersigned will make her findings on the basis of the evidence and will determine whether that evidence justifies said denial.

C. Arguments

The Appellant requested to the Board and Department that a Class BVX license be issued conditionally for 30 days so that it could demonstrate its ability to the Board to operate with a late night license. The Appellant argued it understands it cannot have a DJ. The Appellant offered to have a weekend police detail and to implement recommendations from a sound engineer to limit sound and to make it no entry allowed after 1:00 a.m. The Appellant argued it just wants a chance

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[8] R.I. Gen. Laws § 3-7-21 provides in part as follows:

> Appeals from the local boards to director. (a) Upon the application of any petitioner for a license, or of any person authorized to protest against the granting of a license, including those persons granted standing pursuant to § 3-5-19, or upon the application of any licensee whose license has been revoked or suspended by any local board or authority, the director 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, but the application shall be made within ten (10) days after the making of the decision or order sought to be reviewed. ***

but there are neighbors who object to everything and preferring a bakery is not grounds to object. Rather, the Appellant argued that it has provided a security plan and business plan to the Board and there have been no issues since the application has been pending. The Appellant argued that the four (4) instances of entertainment without a license do not render the Appellant unfit and there has been no violence. The Appellant argued that it plays ambient music and neighbors then just call the police. The Appellant argued that the area has many 2:00 a.m. licenses and it just wants an opportunity to show it can run the business with a 2:00 a.m. license.

The Board argued that the denial is within its discretion and was based on the evidence on the record. The Board argued that it is not denying the Appellant the ability to operate but rather is protecting the neighborhood from the noise and parking problems. The Board argued that the Appellant had four (4) instances of entertainment without a license and those are violations that are completely within the Appellant's control. The Board argued that the Board based its decision on the negative impact to the neighborhood and all the Appellant needed to have done is turn the music down which it did not do.

D. Discussion

R.I. Gen. Laws § 3-7-7[9] provides that a town or city may grant a Class B licensee a 2:00 a.m. closing time on Friday and Saturday nights.

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[9] R.I. Gen. Laws § 3-7-7 states in part as follows:

> Class B license. – (a)(1) 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. ***
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> (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.

It is a matter of law that local licensing boards have broad discretion in deciding whether or not to grant a liquor license application. "The granting or denying of such licenses is in no sense an exercise of the judicial process. On the contrary it is purely administrative. In performing that function the board (sic) act as agents of the legislature in the exercise of the police power. . . . [I]t is a matter of discretion whether or not they shall grant the license and this court has no control over their decision." *Bd. of Police Comm'rs v. Reynolds*, 86 R.I. 172, 176 (1957). The Department has the same broad discretion in the granting or denying of liquor licenses. *Id.*, at 177. See *Domenic J. Galluci, d/b/a Dominic's Log Cabin v. Westerly Town Council*, LCA–WE-00-04 (10/25/00); *Donald Kinniburgh d/b/a Skip's Place v. Cumberland Board of License Comm'rs*, LCA–CU-98-02 (8/26/98).

The Department will not substitute its opinion for that of the local town but rather will look,

> for relevant material evidence rationally related to the decision at the local level. Arbitrary and capricious determinations, unsupported by record evidence, will be considered suspect. Since the consideration of the granting of a license application concerns the wisdom of creating a situation still non-existent, reasonable inferences as to the effect a license will have on a neighborhood must be logically and rationally drawn and related to the evidence presented. A decision by a local board or this Office need not be unassailable, in light of the broad discretion given to make the decision. *Kinniburgh*, at 17.

In discussing the discretionary standard enunciated in *Kinniburgh,* the Department has also found as follows:

> [T]he Department, often less familiar than the local board with the individuals and/or neighborhoods associated with the application, will generally hesitate to substitute its opinion on neighborhood and security concerns if there is evidence in the record justifying these concerns. To this end, the Department looks for relevant material evidence supporting the position of the local authority. (citation omitted). *Chapman Street Realty, Inc. v. Providence Board of License Commissioners*, LCA-PR-99-26 (4/5/01), at 10.

The Department applies the same discretionary standard used for Class BV application denials to Class BVX application denials. See *Zayas Solutions, LLC d/b/a Tafino Restaurant and Lounge v.*

City of Providence, Board of Licenses, DBR No.: 17LQ004 (5/12/17); *A Rock and a Hard Place*, DBR No.: 06-L-0167 (5/10/07); and *Baird Beverages, LLC v. Exeter Town Council*, DBR Nos.: 07-L-004, DBR No. 06-L-0208 (4/16/07).

As articulated through liquor licensing decisions at the State court level and the Departmental level, the standard of review for a new license or a transfer of license is subject to the discretion of the issuing authority. As discussed above, the same is true for an application for a 2:00 a.m. closing time. Such discretion must be based on reasonable inferences drawn from the evidence. Arbitrary and capricious determinations not supported by the evidence are considered suspect. *Infra.* The issue is whether the denial of the application for the late liquor license is reasonable in this situation.

As cited above in *Chapman*, there must be evidence supporting community concerns. In *International Yacht Restoration School Inc.*, there were approximately 42 objectors to the transfer of a liquor license in Newport and the license was granted. The Department found that the Newport licensing authority had not abused its discretion in granting that license despite the neighbors' objections because the local authority found the application represented a desirable business proposal for an additional business establishment in the wharf area in Newport. The Department decision found said decision was not an aberration but followed a pattern to allow that area to become high-density commercial. The decision further found that the Newport applicant had operated liquor establishments for six (6) years without any significant violations of local or State law. The Decision found that the neighbors did not "focus on specific incidents attributable to [the applicant] or its management, but rather on unruly behavior emanating" from the area. *Id.*, at 10.

In *Krikor S. Dulgarian Trust v. Providence Board of Licenses*, DBR No.: 08-L-0175 (6/18/09), the abutter appellant had broad concerns regarding traffic, parking, safety, noise, and

late night liquor closings in the area. However, the decision upheld the local authority's grant of a license because it found that there was no evidence from the objecting neighbors that linked the applicant to noise or underage drinking. See also *Liquor Depot v. City of East Providence, et al.*, DBR No. 08-L-0250 (6/2/09) (local authority's denial of a Class A license was overturned since the concern over a nearby school was speculative).

However, neighborhood objections can demonstrate the negative impact a proposed licensee may have. In *Crazy 8's Bar/Billiards v. Providence Board of Licenses*, DBR No.: 09-L-0042 (8/24/09), the Department upheld the local authority's denial of application because the location had a history of problems and the applicant had no relevant business experience. In *Domenic J. Galluci d/b/a Dominic's Log*, the local authority found that 1) the prior liquor license located at the proposed location was linked to disorderly conduct, assaults, and traffic issues; 2) the applicant was associated with past licensee; and 3) local licensing authority could reasonably infer from the evidence that reopening the establishment could have a similar negative effect on the neighborhood.

In some situations, objections regarding the granting of a liquor license from the neighbors are not linked to any specific incident and are too generic. *International Yacht Restoration School Inc.* In this matter, there was testimony in favor and against the application. Arguably some of the testimony against the application could be considered irrelevant. e.g. would prefer a bakery. However, there was specific testimony regarding loud music after hours emanating from the Appellant and noise from the Appellant late at night.

The Appellant already has a Class BV liquor license and was operating a bakery. It chose to change its business format to operate as a lounge. Under the law, it is unable to obtain an entertainment license. In the space of eight (8) months after its change in format, it had four (4)

entertainment without a license violations and a bottle service violation.[10] The Appellant offered to make changes inside based on a sound engineer. The Board argued that entertainment is within the Appellant's control and the Appellant did not just turn the music down.

The Board found that the Appellant was not operating its business within statutory and regulatory requirements. The Appellant argued that it be given a conditional license with various conditions. A conditional license is within the Board's discretion. However, the issue is whether there was competent evidence to support the Board's decision. Here, there was specific testimony about problems at the Appellant and the Appellant had a number of violations relating to its new format within eight (8) months. The Board based its decision not only on local specific objections but also on the Appellant's failure to show an ability to comply with licensing requirements prior to its application rather than seeking proof of compliance after licensing.

In some cases where the local authority has denied an application for a liquor license, the Department has found that various reasons for denial were not rationally supported by the evidence and that some other reasons for denial could be addressed by establishing conditions on the granting of the license.[11] In *Sugar, Inc., and Sharlene Alon v. City of Providence, Board of Licenses*, DBR No.: 09-L-0119 (3/8/10), the Department found that most of the local authority's reasons for denial were not supported by the evidence and other concerns could be addressed by conditioning the granting of the license on the basis of the business plan presented by the applicant. See also *Kenney v. Providence Board of Licenses*, DBR No. 14LO044 (11/20/14) (reasons for denial not supported by evidence but can impose conditions to stay within applicant's business plan).

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[10] It also had a public smoking violation, but the Appellant represented that it is now a smoking bar.

[11] See *Thompson v. East Greenwich*, 512 A.2d 837 (R.I. 1986) (a town may grant a liquor license upon conditions that promote the reasonable control of alcoholic beverages).

Thus, sometimes when there is no evidence to support the denial but there are concerns over the license application then it is reasonable to condition the grant of a license on the basis of an applicant's representation of its business to the Board. But unlike *Sugar* and *Kenney*, the Appellant's current operation of its proposed business plan already was not in compliance with a liquor licensee's statutory and regulatory requirements. The Appellant is willing to have a conditional license on a go forward basis, but the Board chose to deny the License application because the Appellant already had shown itself not to be compliant.

The issue before the Department is whether there is competent evidence to support the Board's discretionary finding of denial. Based on the foregoing, there was specific testimony regarding noise and music from the Appellant as well as the Appellant's licensing history to support the Board's denial.

VI. FINDINGS OF FACT

1. On or about July 22, 2019, the Board denied the Appellant's application for a Class BVX (2:00 a.m.) license.

2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed the decision by the Board to the Director of the Department.

3. A *de novo* hearing with oral closings was held October 23, 2019.

4. The facts contained in Section IV and V are reincorporated by reference herein.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

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

2. In this *de novo* hearing, no showing was made by the Appellant that would warrant overturning the Board's decision not to grant the Appellant an after-hours license.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of the Board denying the Appellant's application for an after-hours license be upheld.

Dated: December 9, 2019

Catherine R. Warren
Hearing Officer

ORDER

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

_____ ADOPT
_____ REJECT
_____ MODIFY

Dated: 12/12/19

Elizabeth M. Tanner, Esquire
Director

THIS DECISION CONSTITUTES A FINAL DECISION OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO RHODE ISLAND GENERAL LAWS TITLE 42, CHAPTER 35. AS SUCH, THIS DECISION MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MAY BE COMPLETED BY FILING A PETITION FOR REVIEW IN SAID COURT.

CERTIFICATION

I hereby certify on this 12th day of December, 2019 that a copy of the within order was sent by first class mail, postage prepaid and by electronic mail to Nicholas Hemond, Esquire, DarrowEverett, LLP, One Turks Head Place, Providence, RI 02903 and Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903, and by elecronic delivery to Pamela Toro, Associate Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Bldg. 68-69, Cranston, RI 02920.