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

Magaly Morel d/b/a El Caribeno Restaurant Sport,	:	
Appellant,	:	
v.	:	**DBR No 12LQ030**
Providence Board of Licenses	:	
Appellee.	:	

DECISION AND ORDER

I. Introduction

Magaly Morel d/b/a El Caribeno Restaurant Sport ("Appellant" or "Applicant") applied to the City of Providence Board of Licenses ("Board") for a Class BV-Limited Liquor License with New BX (2 am Closing)(the "License"). The Board denied said application on March 15, 2012, and the Appellant timely filed an appeal with the Department of Business Regulation (the "Department"). This decision was rendered following a de novo hearing before the undersigned, sitting as the designee of the Director of the Department.

II. Issue

The issue on appeal is whether the Department should grant the license application, and if so, with what, if any, conditions it should be issued with.

III. Jurisdiction

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-1-1 *et seq.*, R.I. Gen Laws § 3-7-21 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen Laws §42-35-1 *et seq.*

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 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). The hearing officer has a "broad and comprehensive" right "to hear cases *de novo*, either in whole or in part." *Kaskela v. Daneker* 76 R.I. 405 (R.I. 1950).

V. Discussion

The Board based its Decision to deny the license on two grounds: a) "strong neighborhood opposition" and b) "less than forthright answers and actions of this applicant to this Board,"[1] neither of which supports denying the License in this case. At the de novo hearing, in addition to addressing the two aforementioned issues, the Board raised community

[1] At the Board hearing, concerns were also voiced as to the placement of a liquor establishment in a residential neighborhood; however, it was clarified at the Department hearing that the area features a liquor store, car dealership, bank, salon, butcher shop, hardware store, and other businesses.

concerns with parking and the Applicant presented testimony as to her fitness as a liquor license holder.

A. <u>"Strong Neighborhood Opposition"</u>

The "strong neighborhood opposition" presented to the Board consisted of the oral testimony of Larry Olivieri at the January 26 Board Hearing,[2] a petition signed by persons in the neighborhood within and without the 200-foot radius, and objection letters addressed to the Board. In addition, the undersigned received into the record three letters of objection addressed to the Department. Given the multiple defects in the evidence of "strong neighborhood opposition" discussed herein, the license cannot be denied on that basis.

The property ownership of the signatories did not rise to the level of "legal remonstrance" under R.I. Gen. Laws § 3-7-19(a). When objections do not rise to the level of a legal remonstrance, the Board and the Department may still consider the concerns voiced by objectors. The weight to be assigned to the submitted evidence of objection is solely within the hearing officer's discretion. *Vel-Vil, Inc. v. Pastore*, 1986 WL 732870 at 3 (R.I.Super., 1986).

Signatures on a petition that do not include the reasons for objection are of limited value to the hearing officer's decision-making. Without an explanation, the hearing officer is unable to determine whether or not the reasons for objection are valid. For example, signatures could represent objection based on 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 the reasons for one's objections also denies the liquor license applicant the opportunity to work cooperatively with the community to resolve any competing concerns. The weight assigned to the petition is further limited by the fact that the Board did not

[2] Olivieri raised two issues at the Board Hearing: parking and closing time, discussed under subsections C and E, respectively.

address the origin of the signatures or confirm their validity in its presentation of evidence to the hearing officer.[3] Finally, the Appellant presented a petition in favor of granting the license that raises doubt that the petition accurately represents "strong community opposition."

The Department directly received three letters of objection, to which the undersigned also assigned limited weight. 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 that would justify denial of the license. DBR No. 10-L-0143 (June 15, 2011). As in *Krikor*, the letters submitted in opposition to the Appellant's License only present global concerns with the collateral effects of additional liquor licenses being issued in the neighborhood. The following language is illustrative: "we strongly oppose the granting of any liquor license to any establishment so close to our house;" "we have seen this happen times before with other business;" "serving alcohol would drastically change the quality of life for the neighborhood;" "granting this request would negatively affect the quality of life for these residents;" "it will change the neighborhood in a negative way."

The letters that were sent to the Board, but not to the Department, are afforded limited weight due to the failure of the objectors to renew their objections on appeal. Without their appearance before the undersigned to renew their objections, the undersigned is unable to assess the credibility of these authors through either cross-examination by the Applicant or questioning by the undersigned.

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[3] In contrast, the Board in *Elmwood Tap, Inc. v. Daneker* supported the introduction of a signed petition of objection with "the testimony of certain police officers of the city of Providence who, at the request of the bureau, interviewed all objectors whose names appeared on a remonstrance in writing filed with the bureau." 82 A.2d 860 (R.I. 1951). The limited weight assigned by the undersigned does not amount to a determination that the petition was inadmissible, however. Id. (objections as to the validity of objections "went to [the] weight and not to [the] admissibility in evidence.") *C.f. Di Ruzzo v. Corner Pizza, Inc.*, 1991 WL 789827 (R.I. Super., 1991).

Even to the extent that Board-level objections are considered, no compelling arguments are raised therein. First, general statements such as "my community is facing numerous crime and public safety challenges" and "alcohol is the cause of many problems" lack the requisite specificity to the Applicant. *Krikor*, id. Second, generalized concern that the area "is saturated with establishments" is not adequate grounds for denying a license. *Krikor*, id. at 8 (over-abundance is "a policy argument and is not grounds to overturn the grant of this License.")[4]

Finally, some of the letters of objection submitted to the Board allege littering, loitering, public urination, fights, sexual solicitation, drug sales, and associated noise disturbances. Without referencing any police records, citations, or any other supporting documentation, there is absolutely no indication that these complaints are attributable to the Applicant. Testimony before the undersigned indicated that these problems may have existed in the neighborhood when a *prior and distinct* establishment operated on the premises. These concerns are not to be imputed on the new Applicant. The Applicant testified that the prior owner operated as a "mini-night club," an atmosphere she strives to disassociate her operation from. Since opening as a restaurant, the Applicant has promoted a family-friendly atmosphere that discourages and prohibits patrons from disorderly conduct on and around the premises. Unsupported fear that the establishment will revert back to a problematic atmosphere does not justify denying the license.[5]

B. "Less than forthright answers and actions of this applicant to this Board"

[4] 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.

[5] If the same problems do begin to arise at the premises under new ownership, the community is protected by the Board's authority to suspend or revoke the license under R.I. Gen. Laws § 3-5-23, "Revocation of license for criminal offenses or disorderly conditions."

The second reason supplied in support of the Board's Decision is its concern that the Appellant allegedly mislead the Board.[6] First, the Board was concerned by the Applicant's failure to disclose a desire to apply for a liquor license during the earlier hearing for the food license. The Rhode Island Supreme Court has recognized that local licensing authorities "confer...distinct privileges on a single licensee." *El Nido, Inc. v. Goldstein*, 262 A.2d 239, 242 (R.I. 1993).[7] The Licensee is not required to apply for distinct licenses at the same time. Neither is the Licensee required to decide at the time of an initial food application whether or not the business plan will include application for liquor or entertainment at some time in the future. Moreover, the Licensee may, as a matter of business strategy, operate initially with a food license alone, assessing the clientele and needs of the business, before deciding whether or not to apply for a liquor license.[8]

While the Department recognizes that intentionally misleading a local licensing board as to material aspects of the application could be grounds for denial of the application under much different circumstances,[9] the facts in this case do not come close to establishing any bad faith on the part of the Applicant. At the food license hearing, the applicant was asked: "And today you're not applying for a liquor license?" The Applicant responded "No." Food License

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[6] The Board's concerns were the product of a series of misunderstandings that were carefully addressed at the de novo hearing. When appearing on her own behalf at the first Board hearing (food license), difficulty with the English language contributed to the misunderstandings. When appearing with an interpreter at the second Board hearing (liquor license), the record reflects that the interpreter was answering the questions for the Applicant without first directing the question to the Applicant. Recognizing this issue, one Board member expressly stated: "I'm concerned when the interpreter does all the talking. Usually you have to get the information from the parties that are applying, and the interpreter interprets the information from the parties, and I'm just hearing from the interpreter and it concerns me. Ms. Maynard, Liquor License Transcript at 11 (January 26, 2012).

[7] The court made this distinction between a class-B retailer's license and a victualing-house license while recognizing "the fact that it is common practice for a business person to apply for each license simultaneously when he or she seeks to operate a restaurant and/or a lounge." Id.

[8] The Applicant testified before the undersigned that while operating as a food-only establishment, customers had requested orders of beer and wine, demonstrating the clientele's demand for alcoholic beverage service.

[9] In *Tavone v. Town of West Warwick Bd. of License Com'rs*, the court upheld the Department's revocation decision when the record established "material misrepresentation". In that case, the licensee represented that entertainment would be limited to "oldies but goodies" and "country and western" and then proceeded to open with "live striptease acts." 1990 WL 10000210 at 1 (R.I.Super.,1990

Transcript at 3 (December 7, 2011). As phrased, the question inquired into whether a liquor license was being sought on that particular day, not whether there was any intent to apply for a liquor license on some future date.

At the de novo hearing, the Board also raised concern that the Applicant was "misleading" the Board by advertising the restaurant as a "Sports Bar" in a banner/sign on the restaurant prior to application for or receipt of a liquor license. At the hearing before the undersigned, the miscommunication was resolved by testimony that the "Sports Bar" banner belonged to the prior licensee and was promptly removed by the Applicant. The Applicant further clarified that she had no intention of operating a sports bar. In fact, she affirmatively offered to remove a pool table on the premises to avoid any public perception of a sports bar. She testified that removal of the pool table would be consistent with her goal to create a family-friendly dining area.

Yet another issue of misunderstanding between the Board and the Applicant regarding whether there was a "bar" on the premises was also resolved at the Department hearing. At the Board hearing, the Applicant was asked: "In the old restaurant was there a bar?" The Applicant answered: "There used to be one. Now we have table and chairs. At the de novo hearing, counsel for the Board questioned the Applicant about what appeared to be a "bar" in the photographs of her establishment. She explained that the countertop that was previously utilized as a bar is still on site; however, the counter is no longer utilized as a "bar." The counter is used to place and pick-up orders for take-out food. It is not used as an area at which patrons are directed to order and/or consume alcoholic beverages.

C. Parking

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).[10] The record in this case does not justify denial on the grounds of parking, however. Neither the Board nor any objectors presented compelling evidence that granting the license would nuisance community parking, only generally referencing "[p]arking and things like that"[11] and that "parking is limited around the proposed restaurant."[12] 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.[13] The record in this case is simply devoid of such evidence. Moreover, the Applicant testified before the undersigned that the establishment has a low occupancy limit and that a portion of its business is limited to take-out customers who do not occupy parking spaces for a long period of time.

D. Appellant's Fitness to Operate a Liquor Establishment

The testimony before the undersigned established that the Applicant had eight years of experience in serving, ordering, and stocking liquor at another restaurant. She testified that she could ascertain when a customer was in a state of intoxication and that she was familiar with the

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[10] "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.")

[11] Larry Olivieri , January 26, 2012 Transcript at 7.

[12] Letter to Board of Licenses from Tiffany and Angel Medrano.

[13] 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.

laws prohibiting service to minors. The Appellant demonstrated that she would avoid the problems that were associated with the prior operation on the premises as a "mini-nightclub". The Applicant clearly distinguished her operation as a family-friendly atmosphere focusing on ethnic cuisine. She presented pictures of the changes she has made to the interior to produce a clean feel and safe environment to enjoy a family dining experience. The record does not reflect any food license violations under Appellant's current operation. The record is devoid of evidence of police calls to the new establishment.

E. Conditions

The Department is authorized to grant Appellant's License, subject to the conditions it deems proper. Local liquor licensing boards may originally grant a liquor license upon conditions that promote the "reasonable control of alcoholic beverages". *Thompson v. East Greenwich*, 512 A.2d 837, 841 (R.I. 1986). Because appeal to the Department "transfers jurisdiction of the cause from the local board to the administrator by operation of law,"[14] the Department assumes the same power to issue conditional grants of liquor licenses on appeal.

In response to the concerns raised about a 2 A.M. closing time,[15] is a reasonable accommodation for the neighborhood to limit the hour until which beer and wine may be served at the Appellant's establishment. The Rhode Island Supreme Court has specifically upheld validity "conditions regulating the closing time of a liquor licensee's establishment." *Thompson*, id. Distinct from closing hour restrictions are conditions prescribing the hour until which liquor may be served. "Restrictions relating to the hours during which sales of liquor may be made are for the purpose of strict surveillance and control of the liquor industry." *28 Prospect Hill Street, Inc. v. Gaines*, 1982 WL 609133 at 4 (R.I. Super., 1982). Such conditions do not prevent the

[14] *Hallene v. Smith*, 98 R.I. 360 (R.I. 1964).
[15] Concerns with closing time were raised by Larry Olivieri and Detective Creamer at the January 26 Board Hearing.

licensee from operating without sale of liquor until the closing time designated by the municipality. In this case, it is reasonable to limit the service of beer and wine until 12 A.M. on weekends and holidays and until 11 A.M. on weekdays.[16]

The Appellant also agreed to condition the license on the removal of a pool table inside the establishment. The only person who appeared in person to object to the license, Mr. Olivieri, provided the Department with written indication that community concerns might be resolved through imposition of this condition. (Letter received August 29, 2012). In the letter, Mr. Olivieri stated that if the pool table was removed, the "restaurant would no longer be considered a sports bar," which could "diminish the fears of [the] neighbors and allow her to proceed with her business venture."

VI. Findings of Fact

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

VII. Conclusions of Law

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-1-1 *et seq.*, R.I. Gen Laws § 3-7-21 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen Laws §42-35-1 *et seq*.
2. R.I. Gen. Laws § 3-7-21 vests the Department with broad discretion to decide whether or not to grant a liquor license application.
3. A license condition limiting the sale of beer and wine until 11 AM on weekdays and 12 PM on weekends and holidays reasonably responds to community's concerns.

VIII. Recommendation

[16] "Restrictions on the "sale of liqour for several hours following *midnight* of each day is intended to promote the peace and quiet of the neighborhood in which the licensee is situated, and to promote the health and welfare of the public." *28 Prospect Hill Street*, id. (emphasis supplied). *See also* testimony of Larry Olivieri citing "the old saying that nothing good happens between midnight and 4:00 a.m." January 26, 2012 Transcript at 7.

It is recommended that the Board be ordered to grant and issue the License to the Appellant, subject to any and all customary approvals such as fire, health and the like, with the following conditions:

1. Sale of beer and wine shall cease at 11 PM Monday through Thursday.
2. Sale of beer and wine shall cease at 12 AM Friday, Saturday, Sunday and holidays.
3. Pool tables shall be removed from the premises.

As recommended by:

Date: 9/27/12

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

I have read the Hearing Officer's recommendation and I hereby (circle one) adopt, reject or modify the recommendation of the Hearing Officer in the above-entitled Decision and Order.

Date: 9/27/12

Maria D'Alessandro (for)
Paul McGreevy
Director

Entered as an Administrative Order No.: 12-053 this 27th day of September, 2012.

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 27th day of September, 2012 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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and by email to Maria D'Alessandro, Deputy Director, Securities, Commercial Licensing and Racing & Athletics