

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

IN THE MATTER OF	:	
LIQUOR LICENSE APPLICATION OF	:	
RMP INVESTMENT GROUP, LLC	:	DBR No. 13LQ063
	:	

DECISION AND ORDER

I. INTRODUCTION

This Decision and Order resolves an appeal of the liquor licensing decision of the City of Providence Board of Licenses (“Board”) rendered on May 31, 2013 (“Decision”). The Decision a) granted a Class BV Full Liquor License to RMP Investment Group, LLC (“Applicant”) and b) reserved decision on the application for permission to remain open until 2:00 a.m. on Fridays and Saturdays and the night before legal state holidays (BX designation) with a review to occur ninety days after the issuance of the license. The Decision was appealed to the Department of Business Regulation (“Department”) by four “abutters”, Omni Combined WE LLC, Omni IC LLC, Richard Nemrow, and Stephen Goulding (collectively “Appellants”).

As the Hearing Officer appointed by the Director of the Department, the undersigned conducted an administrative hearing in accordance with the provisions of the Administrative Procedures Act, R.I. Gen. Laws § 42-35-1 *et seq.* The parties, Appellants and the Applicant, were given “the right to present evidence, cross-examine witnesses, object, make motions and present arguments” pursuant to Central Management Regulation 2 *Rules for Procedure for Administrative Hearings* (CLR 2), Section 15(D). The Hearing Officer also received written and

oral comment of interested persons falling outside the statutory meaning of “abutter” in accordance with CMR 2, Section 15(F) which provides that “any Person who is not a Party to a proceeding may, in the discretion of the Hearing Officer, be permitted to make oral or submit written statements on any issues relevant to the proceeding.”¹ Because the concerns raised by these public members were substantially the same as those raised by the Appellants, they are addressed collectively throughout this Decision by reference to the Appellants’ arguments. The Board’s participation in the hearings was limited to providing the Certified Record of the Board’s proceedings in accordance with R.I. Gen. Laws § 3-7-21(c).

II. JURISDICTION

The Department has jurisdiction over appeals from decisions of local liquor licensing authorities under R.I. Gen. Laws § 3-7-21.

III. ISSUE

Should the Department affirm or overturn the Board’s liquor licensing decision?

IV. STANDARD OF REVIEW

The Department has the broad authority to “confirm or reverse the decision of the local board in whole or in part” under R.I. Gen. Laws § 3-7-21(a). Judicial interpretation of § 3-7-21 in light of the legislative intent to vest the Department with broad discretion as a “superlicensing authority,” gives the Department the power of “de novo” review. *Hallene v. Smith*, 98 R.I. 360, 363 (R.I., 1964). *See also Jake & Ella's, Inc. v. Dep't of Bus. Regulation*, 2002 WL 977812 (R.I. Super., 2002)(“the discretion given to the DBR goes as far as to vest the hearing officer with the authority to review the local board partially de novo and partially appellate if he/she sees fit.”) In other words, the Department “independently exercises the licensing function” in reviewing the

¹ These public members are not witnesses produced by parties to a contested case, and, as such, are not required to be subjected to full cross-examination. However, where the public member agreed to answer a few questions, the Hearing Officer permitted limited questioning.

record of the municipal hearing and any additional evidence presented at the Department hearing. *Cesaroni v. Smith*, 98 R.I. 377, 379 (R.I., 1964).²

V. DISCUSSION

R.I. Gen. Laws § 3-7-19(a) provides that “[r]etailers’ Class B...licenses under this chapter 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.” This provision, commonly referred to as the “legal remonstrance” rule, restricts the Board’s authority by prohibiting it from granting a Class B license application if persons who file their objections with the Board own more than 50% of the land within a 200 foot radius of the proposed establishment. In the instant case, the Board found that 100% or virtually 100% of the persons within 200 foot (“abutters”) objected.³ The Board’s record includes a list of eleven properties owned by five owners. Four of these five owners are Appellants in the Department appeal who mounted their objections before the undersigned Hearing Officer. The fifth is company that owns the real property that is leased by the Applicant. Collectively, the four abutting Appellants clearly significantly more than 50% of the neighboring land.^{4, 5}

² The Department’s *de novo* decision is considered “unaffected by any error inhering in the exercise of the licensing function by a local board acting within its territorial jurisdiction.” *Cesaroni v. Smith*, *id.* at 379-380. Therefore, questioning of the Applicant with respect to the relationship between the owner of the premises real estate and one of the Board members and that member’s participation and recusal from the Board proceedings are irrelevant to the Department’s exercise of its independent licensing decision.

³ See May 30 Board Transcript.

⁴ The list used to reach this conclusion and the square footage of owned property appearing thereon were not challenged by any competent evidence presented by the Applicant. *Elmwood Tap, Inc. v. Daneker*, 78 R.I. 408, 411, 82 A.2d 860, 862 (1951)(In upholding the liquor control administrator’s acceptance of evidence of 200 foot land ownership, stating “[i]f petitioner deemed the evidence with reference to the areas owned by objectors insufficient as a matter of fact, it was free to produce evidence to the contrary, which it did not do.”)

⁵ It appears from the May 30 Board Transcript that one of the square foot figures may have been an error. Calculating the percentage of land owned by the abutting Appellants with the corrected figure yields a result of 96.6%.

The greater than 50% finding does not end the inquiry in this particular case, however. As an exception to the legal remonstrance rule, R.I. Gen. Laws § 3-7-19(d) provides that “[n]otwithstanding the provisions of this section, the board of licenses of the city of Providence shall, after application, have the authority to exempt from the provisions of this section any proposed retailer Class B, C or I license intended to be located within the following described area(s) in the city of Providence.” The Board found that the Applicant’s premises are within the geographic area described under § 3-7-19(d)(1)(A),⁶ a determination that was not contested by any competent evidence before the Board or the Department. See Department Hearing Transcript at 34-39. Accordingly, the Board correctly concluded that it had the authority to exempt the Applicant from the legal remonstrance rule. The Department clearly shares this authority.

The Appellants argue that § 3-7-19(d) authorizes the Board to grant an application in the geographic exemption area despite legal remonstrance, but does not authorize the Department to do so on appeal. This argument fundamentally misconstrues the nature of the Department’s “superlicensing” authority. Pursuant to R.I. Gen. Laws § 3-7-21, the Department assumes “original jurisdiction” over the application because the appeal “transfer[s] or remove[s] a cause from the jurisdiction of a local board to that of the state tribunal.” *Hallene v. Smith*, 98 R.I. 360, 365 (R.I. 1964). As such, 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). Any discretion that the Board possesses to approve an application in a geographic exemption area is necessarily possessed by the Department upon appeal.

Though the objections of the Appellants do not amount to an absolute bar on granting the application in this case, the substance of their comments may still be considered by both the

⁶ See May 30 Board Transcript.

Board and the Department in rendering a decision on whether or not the application for a new license should be granted. The objections in this case are primarily rooted in problems in the history of past operations on the premises as presented by letters of objection and the oral testimony of several witnesses, *e.g.* noise, rowdiness, litter, breaking glass, vandalism, graffiti, fighting, underage drinking, etc.⁷ While there may be some connection between owner of the premises real estate leased to the Applicant and the prior operations, neither the Applicant limited liability company entity nor its three real person members were involved in the management of these prior operations on the premises. Department Hearing Transcript at 19-25. Accordingly, it was not established that any relevant prior history on this premises would justify the conclusion that this particular Applicant is not suitable to hold a liquor license.

The Appellants suggest that the location has become “recognized” as an “after hours” location because of the alleged practice of past operators at that location to remain open after legal closing time. However, nothing in the record establishes that the Applicant intends to operate the proposed establishment in violation of legal closing time nor any other Title III provision. It is notable that one member of the Applicant is the owner of Geppetto’s Restaurant, a liquor licensee that has been in operation for approximately nine or ten years; another member has served as the head bartender thereof for approximately five years. Department Hearing Transcript at 16-17. No violation history for this facility was presented by the Appellants, documented in the Board’s Certified Record, nor recalled by the sworn testimony of the member having experience as a bartender at that facility, which weighs in favor of finding the Applicant

⁷ In support of its arguments pertaining to past operations on the premises, one Appellant also introduced a civil complaint alleging wrongful death of a patron of one of these prior establishments. However, the Applicant was not a named party to the complaint and no evidence of fact-finding of a judge or jury in that case was produced. The Appellants also sought to introduce documents purporting to be police reports pertaining to alleged incidents at the premises during operation by the prior licensees. However, these documents were never authenticated or introduced with proper foundation. Therefore, the undersigned did not rely on either source in rendering his recommendation, relying instead on the oral testimony of the witnesses for the proposition that there was some history of problems on the premises.

suitable to hold a liquor license and abide by all the legal conditions thereto. Department Hearing Transcript at 46-47.

The Appellants also sought to establish through cross-examination that the Applicant does not have a sufficient business plan.⁸ In some cases, it may be shown that a business plan is so completely inadequate and subject to failure that the owners are at risk of succumbing to the temptation of violating the liquor laws. However, any infirmities that may have been revealed by the Appellants' questioning on these issues did not rise to a level that would justify denying the application in this particular case, especially in light of the prior experience of two members with the business operations of a liquor establishment that has continued to remain in business for nine to ten years.

The Appellants further submitted that the premises and surrounding area is not conducive to a liquor establishment. For example, the Appellants argue the establishment will be difficult to police because it is "set back" from the main road and the establishment has few windows. The number of windows and other physical characteristics of the building and lot are issues under state and local laws outside of the Department's liquor licensing jurisdiction. Having been presented with no evidence of violations of any such laws, the Department will not exercise any zoning-type function by evaluating whether the location is appropriate. Neither do complaints that granting the license will reduce area property values or hinder future development efforts justify denial of the Application; these economic interests are irrelevant to the declared purpose of Title III which is "promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." R.I. Gen. Laws § 3-1-5.

⁸ The topics of the questioning and testimony considered by the undersigned included preliminary research on customer traffic and parking in the area, calculation of operating costs, percent of sales of alcohol vs. food, percent of full capacity needed to make profit, knowledge of the boundaries of the premises being leased, content of the proposed menu, and knowledge of the legal requirements, costs, and occupancy consequences if a full kitchen were to be installed.

In sum, none of the above considered arguments or speculative concerns support denying the Applicant the opportunity to demonstrate that it can distinguish itself from its predecessors and successfully operate within the confines of the law without creating any unlawful disturbance in the neighborhood. Rather than pre-emptively deny the application, the potential remedy lies in R.I. Gen. Laws § 3-5-23 and § 3-5-21 which authorize the Board and the Department to discipline the Applicant if it does in fact fail abide by the provisions of Title III or to permits its establishment to “become disorderly as to annoy and disturb the persons inhabiting or residing in the neighborhood.”⁹ The record reflects that the Applicant’s business plan includes having one of the three members supervising on the premises at all times. Department Hearing Transcript at 25-26. In order to avoid discipline, these members are advised that the “licensee assumes an obligation to affirmatively supervise the conduct of his patrons,” the breach of which makes the licensee “absolutely accountable.” *Cesaroni v. Smith*, 202 A.2d 292, 295-96 (1964).¹⁰ As such, the members should take all reasonably necessary action to assure that their patrons are not engaged in “disorderly” behavior that “annoys” and “disturbs” the neighborhood, including, for example, steps to prevent patrons from illegally parking in the immediate vicinity of the premises.

Based on the foregoing, it is clear that the Board did not err in granting the Class BV license to the Applicant. The Board’s decision to defer decision on the BX designation was also reasonable under the circumstances, giving the Applicant ninety days to demonstrate whether the establishment is operated in a manner that supports granting 2:00 a.m. closing permission under § 3-7-7(a)(4). The time that an establishment holding a Class BV license without a BX

⁹ With respect to the complaints about potential noise that the Applicants would create, the undersigned also notes that Providence Code of Ordinances, Chapter 16 may provide available remedies to the Appellants. *See, e.g., Town of New Shoreham v. Racine*, 1992 WL 813547 (R.I. Super. 1992) (referencing “other avenues, via (zoning) ordinances, to control the level of noise emanating from establishments” outside of Title III licensing action).

¹⁰ *See also Shillers Inc. v. Pastore*, 419 A.2d 859 (R.I. 1980). *Vitali v. Smith*, 105 R.I. 760, 254 A.2d 766 (R.I. 1969)

designation must close and sales of alcoholic beverages must cease, 1:00 a.m., is applicable to the Applicant during the ninety day period. R.I. Gen. Laws § 3-7-7(a)(1). R.I. Gen. Laws § 3-7-7(a)(4) “require[s] any application by a holder of a Class B license to remain open until 2 a.m. on the days specified in the...statute to be advertised by the local board in a newspaper having circulation in the county in which the tavern or restaurant is located...to alert the residents living near an applicant to give them the opportunity to appear at the hearing on the licensee's application, if they so desired, and express their approval or disapproval of the proposed extra-hours operation.” *28 Prospect Hill St., Inc. v. Gaines*, 461 A.2d 923, 926 (R.I. 1983).

During the ninety day review hearing, the Board may also consider whether additional conditions should be imposed on the Applicant's license based on this Applicant's performance and compliance, as distinguished from that of its predecessors. For example, the Appellants' concerns about difficulty policing the premises, while not supported by any evidence presented to the Department that would justify denial of the license, may be addressed during the ninety day review via license conditions if supported by sufficient evidence at that time. Once the license has been granted and the performance and compliance of the Applicant is available for review, the Board may determine that a police detail or other conditions pertaining to the security of the premises and/or effects on the neighborhood may be appropriate. *See, e.g., Musone v. Pawtucket Bd. of License Comm'rs*, 1984 WL 560365 (R.I. Super., 1984)(citing *Joseph Roderick, d/b/a JJ'S Pub v. Board of License Commissioners, Town of Bristol, and Louis H. Pastore, Jr., Liquor Control Administrator*, C.A. No. 79-4132.) (“both the Local Board and the Liquor Control Administrator” have “an implied power to impose conditions on a liquor license where appropriate,” including the condition that the licensee “hire and pay for a policeman at the establishment,” *i.e.* police detail). The decision of the Board whether to grant the BX

designation and/or whether to impose additional conditions on the license after having reviewed the Applicant's performance and compliance record is appealable to the Department pursuant to R.I. Gen. Laws § 3-7-21.

VI. FINDINGS OF FACT

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

VII. CONCLUSIONS OF LAW

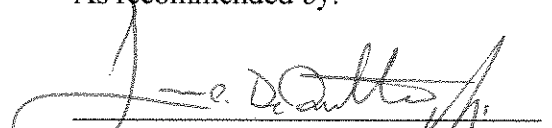
1. The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-7-21.
2. R.I. Gen. Laws § 3-7-21 vests the Department with broad discretion to decide whether or not to grant a liquor license application.
3. The Department has the authority to grant this application despite legal remonstrance because it falls within an area described by R.I. Gen. Laws § 3-7-19(d).
4. The Appellants arguments pertaining to the history of the premises, the Applicant's business plan, and the conduciveness of premises and/or area for a liquor establishment do not justify denial of the license.

VIII. RECOMMENDATION

It is recommended that the Decision of the Board be upheld in full and it be ordered that the Board issue the applicant a Class B liquor license in accordance with this Decision.

As recommended by:

Date: 10/4/2013

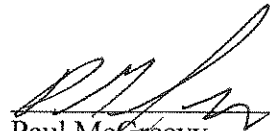

Louis A. DeQuattro, Jr., Esq., CPA
Hearing Officer
Deputy Director & Executive Counsel

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.

Date: 7 Oct 2013



Paul McGreevy
Director

Entered as an Administrative Order No.: 13-046 this 7th day of October, 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 ^{7th} day of October, 2013 that a copy of the within Order and Notice of Appellate Rights was sent by e-mail and by first class mail, postage prepaid to -

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