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

Woodland Meeting House, LLC **Appellant,** **v.** **The Town of Foster, Town Council,** **Appellee.**	**DBR No. 12LQ100**

DECISION AND ORDER

I. INTRODUCTION

Woodland Meeting House, LLC ("Appellant"), Class BV liquor licensee, appeals the liquor licensing decisions made by the Town of Foster ("Town") imposing insurance and indemnification requirements as conditions on its license to serve liquor in the outdoor area surrounding the premises. The undersigned was appointed by the Director of the Department of Business Regulation ("Department") to act as the Hearing Officer in this matter.

II. FACTS AND TRAVEL

The history of this case begins when the Appellant filed a complaint for declaratory relief in Superior Court of Providence County against the Town "asking the Court for a declaration that the Town is without authority to limit or interfere with Woodland's sale of alcohol, whether inside or outside the restaurant, because Woodland's current licenses already permit it to do so." C.A. PC-2010-5797 (J. Sarah Taft-Carter), Transcript at p. 1. On March 16th, 2012, the Appellant "filed a motion to stay and an emergency restraining order…seeking to prevent the

Town from requiring Woodland to obtain an additional liquor license before Woodland may hold an outdoor festival over the Memorial Day weekend, during which Woodland plans to serve patrons alcohol outdoors." Id. at 1-2. "The maters were consolidated, and the case was heard on the merits on April 5th and on subsequent dates." Id. at 2.

On May 1, 2012, the Superior Court issued a bench decision concluding that "because Woodland did not specify in its application for a Class B license that it sought to serve alcohol outside of its restaurant, the license pertains solely to the inside of Woodland's restaurant." Court Transcript at p. 17. The decision further provides that "the Town does have the authority to regulate Woodland's service of alcohol outside its restaurant and to require Woodland to obtain a Temporary Seasonal Expansion of the license or a Permanent Expansion of the license." Id. at 16.[1]

On May 22, 2012, the Town sent a letter to the Appellant, explaining that the Superior Court decision limited the Appellant's license to the "perimeter of the restaurant building." That correspondence refers to an attached license application "that would need to be completed and filed with the Town Clerk for consideration of expansion (temporary or permanent)." The record includes a document titled "Application for License" dated May 29, 2012 with an attached map titled "Amended Area Specification" showing a 400 x 400 foot area.[2] The parties stipulate that all subsequent acts of the Town relevant to this proceeding pertain to a license permitting service of alcohol in that 400' x 400' outdoor area.

[1] The undersigned Hearing Officer was not made aware of this case by either party until the Town brought it to the undersigned's attention on December 2, 2013.

[2] The hand-written designation "Amended" appears on this document. An initial application was apparently submitted and placed on the agenda for May 24, 2012. The audio recording of that meeting indicates that, based on concerns with the completeness of the application, the matter was continued with the request that an amended application be submitted.

On June 1, 2012, a meeting of the Town Council was held, with the following agenda item: "Woodland Meeting House Seasonal Temporary Expansion of BV Liquor License." The Town Council voted to grant the seasonal temporary expansion of the BV license with 14 conditions, the last of which provides that "[t]he expansion of the BV liquor license applies from May 30th through September 15th.".[3, 4] No conditions regarding insurance or indemnification were imposed at that time.

On October 11, 2012, the Appellant appeared before the Council on an application for a "Permanent Outdoor Liquor License." The Council voted to approve the Application with 10 conditions, the last two of which provide:

- "The applicant shall execute an Indemnification Agreement indemnifying the Town of Foster from any and all liability in a form approved by the Town Solicitor."
- "The applicant shall purchase and maintain insurance with coverage terms and in sufficient amounts as recommended by the Town Treasurer."

The audio recording and minutes of the October 11 meeting reflect that an abutter (former Town Solicitor) sent the Council a letter suggesting the insurance and indemnification requirements and that the President of the Council referred the matter to the acting Town Solicitor. The Town Solicitor reported to the Council that the Rhode Island Interlocal Trust ("Trust") recommended a three million dollar insurance policy and indemnification agreement. No witnesses were presented in support of the recommendation as applied to this specific licensee. Nor does it appear that there was any documentary evidence introduced on the official record to support this recommendation at the time of the October 11 decision. Nor did the

[3] The record does not include an audio recording of this meeting; however, the meeting minutes portray that counsel for the Appellant, the Appellant, the Police Chief, and the Building Official "had met to discuss restrictions for the expansion area and the public safety issues." The content of those discussions is not documented in the minutes nor was any document of consensual agreement presented. As such, the conditions placed on the approval of the temporary license appear to be result of a unilateral decision of the Council, not by agreement of the Appellant.
[4] At that same meeting, the Council also voted on an agenda item titled "Woodland Meeting House Outdoor Entertainment License" with ten separate conditions. As described under section II herein, the Department does not have jurisdiction over the entertainment license.

Council engage in meaningful on the record discussion as to whether or not the insurance and indemnification conditions should be imposed on the Appellant. The record does not include any evidence that the insurance and indemnification conditions were voluntarily agreed to by the Appellant.[5] A question from the public was received regarding how these insurance and indemnification requirements would affect other liquor establishments. The acting Town Solicitor indicated that going forward, these conditions should be imposed on all licensees as a renewal requirement. However, there is no indication in the record that the Town Solicitor's recommendation for the renewal requirement had been adopted by the Council.

On October 25, 2012, the Appellant appealed the October 11, 2012 decision of the Council to the Department. On appeal, the Appellant raises three issues:

1. "The Foster Town Council now requires a three million dollar insurance policy for service of liquor in the adjoining outside private park of Woodland Meeting House, LLC."
2. "For the privilege of service of alcohol in it's [sic] outside private park area the town of Foster requires Woodland Meeting House, LLC to indemnify the town for any costs it might incur due to law suits in the park."
3. "The Town of Foster is treating the outside liquor license as a second license as opposed to part of the existing license of Woodland Meeting House, LLC."

On November 20, 2012, the Town Clerk sent a letter to the Appellant stating: "We are pleased to tell you that your insurance policy for Woodland Meeting House has been approved. Enclosed is the necessary Indemnification Agreement to sign and return so that we may issue your license." The record is not clear as to whether the Appellant's current insurance policy is acceptable to the Town. The record is devoid of any executed copy of the Indemnification Agreement requested by the Town.

[5] The record indicates that the Town Solicitor and the Appellant agreed to certain conditions on the entertainment license on July 12, 2012, excluding indemnification and insurance. However, no evidence was presented that the Appellant voluntarily consented to indemnification and insurance conditions on the BV liquor license at any point in time.

Meanwhile, the undersigned was attempting to schedule a pre-hearing conference date, a process which was delayed by the schedules of the acting Town Solicitors. On January 6, 2013, the Department was informed that a new Town Solicitor was selected. In late November, the acting Town Solicitor informed the undersigned that a new Town Solicitor was to be appointed by the Council on December 6, 2012 and suggested that the hearing should not be scheduled until after that time. On January 22, 2013, a pre-hearing conference was finally held. At the conclusion of the pre-hearing conference, it was the undersigned's understanding that the parties would attempt to reach an amicable resolution of the matter. As such, a full hearing date was not immediately scheduled and the undersigned awaited communication from the parties as to whether or not they were able to resolve the matter without the necessitating a hearing.

The undersigned did not hear from either party until the Appellant's owner contacted the Department on August 20, 2013. The Department advised the Appellant's owner to contact her legal counsel regarding the matter. On November 6, 2013, the undersigned was notified that new counsel had been retained by the Appellant.

On November 12, 2013, all liquor licenses in the Town, including Woodland Meeting House's original (indoor) liquor license and outdoor liquor license, were up for renewal. They were all extended until the next meeting scheduled on December 12, 2013.

On November 25, 2013, the undersigned sent an electronic message to the parties clarifying the issues on appeal with a list of questions that the undersigned would address. On December 10, 2013, a second pre-hearing conference was held with the new Town Solicitor and Appellant's new counsel. The undersigned was advised of the Council meeting to be held on December 12, 2013. The parties and the undersigned awaited the result of the Council's decision on that date. Based on the conversation at the pre-hearing conference, the undersigned's

expectation was that the parties would either resolve the matter amicably, or, if an agreement could not be reached, the Council would proceed to hold the scheduled hearing on the renewal application and make a decision thereon.

At the December 12, 2013 meeting, the Council voted to renew the Appellant's original (indoor) liquor license, but to postpone any decision on renewal of the Appellant's outdoor liquor license. The reason articulated for postponing the vote, as summarized in the minutes, was "that the DBR advised that Ms. Mills and her representatives sit with representatives of the Town to determine what outdoor area would be permitted for serving alcohol." On December 18, 2013, the Town Clerk sent the Appellant a letter stating: "The Foster Town Council is pleased to give you your renewal licenses for the period of December 1, 2013 – December 1, 2014. For the present time, however, please be aware that the BVL, Victualing and Entertainment licenses will be defined by the Town as for your indoor premises only, until you are able to meet with representatives from the Council to work out the details of the outdoor area you wish to utilize, as suggested by the Department of Business Regulations." Clearly there was a misunderstanding because the undersigned never advised that the matter not be decided as scheduled or that the outdoor privileges that previously existed should not have been renewed if an amicable resolution was not reached.

On December 17, 2013, a conference call was held with the Town Solicitor and the Appellant's owner for the purpose of scheduling a full hearing on the merits. The Appellant was not represented by counsel at that time nor at any time thereafter and proceeded *pro se*.

The full hearing on the validity of the conditions imposed on the permanent outdoor license and the decision not to renew the same was held before the undersigned on January 14, 2014. The undersigned considered the minutes and, where available, audio recordings of the

relevant Council meetings. On behalf of the Town, testimony was received from Colleen M. Bodziony, Director of Member Services for the Trust, Ian Ridlon, General Counsel for the Trust, and Councilman Neil Whitelaw. In favor of the Appellant, testimony was received from an owner of abutting property, Kevin Ryan, Representative Michael Chippendale, and the Appellant's owner, Lisa Mills.

The testimony of Ms. Bodziony and Mr. Ridlon was that the Trust recommended to the Town employees (not directly to the Town Council) that all licensees be required to carry comprehensive general liability insurance with limits equal to that of the Town. As evidenced by the Insurance Certificate, that limit is $ 3,000,000. Town Exhibit 2. The testimony explained that the Trust does not advise municipalities about specific insurance requirements for particular establishments, only generally recommending the precautions of matching comprehensive general liability insurance limits and indemnification. It is the role of the municipality to evaluate how to apply the general recommendations to particular applicants. The Town also introduced a document prepared by the Trust entitled "The Risk Advisor." Town Exhibit 2. No Town employees testified before the undersigned to explain any discussions with the Trust.

III. JURISDICTION

The Department has jurisdiction to review local liquor licensing decisions under R.I. Gen. Laws § 3-7-21, subject to relevant provisions of the Rhode Island Administrative Procedures Act, § 42-35-1 *et seq*. In this particular case, the Department does not have jurisdiction over the Appellant's separate entertainment license issued pursuant to the Town's authority under R.I. General Laws § 5-22-1, which provides "city councils may license, regulate, and in those cases specifically set forth in 5-22-5, may prohibit and suppress ... shows and performances in their respective towns, conforming to law." However, it should be noted that

the Department has jurisdiction over entertainment-related conditions imposed on a liquor license under R.I. Gen. Laws § 3-7-7.3. Accordingly, the Department has the power review violations of entertainment ordinance provisions when the penalty is specifically imposed on the liquor license. And, as the superlicensing authority over all liquor control matters, the Department also has the power to make final determinations as to whether provisions of Title III are violated if a municipality uses Title III provisions to penalize another license held by an appellant.

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 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).

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Town did not err in treating the request for the temporary and permanent expansion through a separate license application process. The Superior Court decision clearly provided that the then-existing liquor license was limited to the building. Thus, requiring separate approval to

sell liquor outside, with the designation "Outdoor Liquor License" was not erroneous.[6] The Council's method of first approving a temporary outdoor liquor license, before approving a permanent outdoor liquor license, was also reasonable because there is statutory distinction between the two. Written approval of an expansion to an outdoor area does not require § 3-5-17 "advertisement or notice" "when a license holder applies for a *temporary seasonal expansion* of an existing liquor license," however, permanent expansion would.[7, 8, 9]

The Town Solicitor argues that the insurance and indemnification requirements were conditions precedent of receiving the permanent outdoor liquor license, and therefore, the Appellant never held the permanent outdoor liquor license she applied for.[10] The record clearly indicates to the contrary, however, because the Council voted on the motion of the Council President to approve the outdoor liquor license with "stipulations" not "conditions precedent."[11] As such, the Appellant obtained the outdoor liquor license on the date of the Council's vote, October 11, 2012. It is clear from the testimony that the Appellant understood the application to be granted and that no action was taken by the Town Council to indicate to her otherwise, such as an action for unlicensed activity, for example. It is true that the Clerk's letter of November 20, 2012 tends to indicate that the license would not be "issued" until the executed

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[6] *See also* Department's Commercial Licensing Regulation 8 (CLR 8), Rule 41 ("a licensed premise shall not be altered or expanded except with the written approval of the licensing authority issuing the license"; CLR 8, Rule 27 (the liquor licensee is strictly limited to service of alcohol in the area delineated in words and by drawing in the original liquor license application, or as expanded by subsequent written approval).

[7] The record indicates that the acting Town Solicitor advised the Council of this distinction on May 24, 2012.

[8] Neither party raised notice as an issue, so it is presumed that said requirements were satisfied.

[9] Counsel for the Council urges that there is no such thing as a "permanent" outdoor liquor license. Of course, the undersigned recognizes that all licenses are subject to annual renewal. R.I. Gen. Laws § 3-7-6. In this case, "permanent" refers to a 12 month vs. seasonal license and the continuing nature of such a license absent non-renewal "for cause."

[10] Counsel for the Town also indicated that the condition relating to fencing may not have been satisfied. However, the audio recording of the July 12, 2012 meeting on the Appellant's liquor license indicates that the stipulation on the outdoor liquor license that the perimeter be delineated was considered satisfied by inspection of the police chief and building inspector.

[11] The record indicates that the acting Town Solicitor recommended that indemnification and insurance be "conditions precedent;" however, such terminology was not included in the President's motion.

indemnification agreement was returned. However, the Clerk's statement cannot be interpreted as substantively affecting the license rights of the Appellant absent action of the Council.[12]

Accordingly, the undersigned finds that the insurance and indemnification "stipulations" were in the nature of conditions subsequent, not conditions precedent.[13] In other words, the act of the Council on October 11, 2012 was to grant the license with the requirement that the licensee achieve compliance with the stipulations thereafter. Failure to do so may have been grounds for disciplinary action on the license, but could not have the effect of invalidating the license that was granted.

Having determined that the Council granted the permanent outdoor liquor license on October 11, 2012, without conditions precedent, the next question is whether imposition of the insurance and indemnification conditions was a proper exercise of the Council's authority. The Town failed to establish that it was.[14]

First, the conditions, as written, are in contravention of the specific statutory delegation of authority to the Council because they leave unfettered discretion in the hands of the Town Treasurer and Town Solicitor to set the amount and type of insurance and scope of the indemnification, respectively. Pursuant to § 3-5-15, the General Assembly has provided that

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[12] *See Casa DiMario, Inc. v. Richardson*, 763 A.2d 607, 612 (R.I. 2000)(holding that liquor licensee could not reasonably rely on statement of the clerk or other town official that the licensee would be exempt from anti-nudity ordinance where such an exemption could only be made by "a city or town council act[ing] through a majority vote of those members who are present at a duly convened meeting of the council.").

[13] In contrast, if a statute or ordinance had provided for the insurance and indemnification requirements, satisfaction thereof would be a condition precedent to issuance of the license. *See, e.g., Santulli v. Sarkas*, 76-3779, 1978 WL 196154 (R.I. Super. Feb. 28, 1978)("the provisions of *§ 3-7-20*...requires, as a condition precedent to the issuance of a Class B Victualer license that the licensee give bond to the Town Treasurer to guarantee payment of various terms *including* the *official license fee*.")(emphasis in original). For example, in the Town of Burrillville, R.I. Gen. Laws § 3-7-27 makes insurance naming the Town as an additional insured a condition precedent of granting a license.

[14] On November 25, 2013, the undersigned provided both parties with a list of seven items on which evidence would be heard. Items 2 - 4 on that list provide as follows:

2. "What law/ordinance and facts support imposing the proposed insurance requirements on Woodland?"
3. "What law/ordinance and facts support imposing the proposed 'indemnity/hold harmless' provisions on Woodland?
4. "What other Town licensees have requirements imposed similar to 2 and 3 above?"

"[t]he right, power, and jurisdiction to issue all other licenses authorized by this title [including Class BV licenses] within the maximum number to be fixed as provided in § 3-5-16 are in the town councils or license boards of the several towns." In *Seveney v. Town of Bristol Town Council*, the Superior Court reviewed the argument of a liquor licensee that the Town Council's delegation to the Chief of Police of "the power to determine the conditions-the number of police stationed at a particular establishment-surrounding the maintenance of a liquor license" was an unlawful "delegation of a legislative function to an executive branch officer." C.A. PC/04-0911, 2006 WL 1892863 (R.I. Super. June 21, 2006). In evaluating such a delegation, the court "examine[d] the specificity of the functions delegated, the standards accompanying the delegation, and the safeguards against administrative abuse." Id. In *Seveney*, the delegation was upheld based on the following rationale:

> "the Resolution provides adequate guidelines for the Chief of Police to effectuate the purpose of the Ordinance while protecting against potential administrative abuse...the Resolution describes, in detail, a primary standard for carrying out its purpose of ensuring safety. The Resolution sets forth that the Police Chief should assign one officer for every 30 patrons pursuant to capacity, at least one officer to each door used as a means of ingress/egress, and a minimum of two officers at any establishment. Additionally, the Resolution guards against abuse of the system by affording bar owners the opportunity to appeal to the Town Council when they disagree with the Chief of Police's recommendation and, also, by providing that the Town Council must approve the contracted rate for the officers each year. The Ordinance and corresponding Resolution clearly do not give the Chief of Police 'unbridled' discretion."

In contrast, the conditions at issue here do not set any guidelines on the amount of insurance, how the amount of insurance should be calculated, the type of insurance (general liability, liquor liability, etc.), nor do they limit the types of eventualities that licensee must agree to indemnify the Town for (liquor-related or not, etc.). As such, the conditions violate § 3-5-15 as an invalid delegation to the Treasurer and Town Solicitor.

Even reaching the substance of the conditions as they were enforced by the Town, through the $ 3,000,000 policy required by the Treasurer and the Indemnification Agreement drafted by the Town Solicitor, the restrictions should be stricken. The Rhode Island Supreme Court set forth the authority of municipalities to impose conditions on liquor licenses in the case of *Thompson v. Town of E. Greenwich*, 512 A.2d 837, 841 (R.I. 1986). Though there is no statute that expressly delegates the power to impose conditions on licenses, the "authority to issue [retail liquor] licenses is logically and appropriately complemented by § 3-5-21, which legislatively empowers these same governing bodies to revoke or suspend a liquor license for breach of any conditions upon which it was issued." Id. The Rhode Island Supreme Court expressed its "considered judgment that the Legislature intended in conferring the power to revoke or suspend to implicitly authorize municipalities to attach conditions to the issuance of liquor licenses." Id.

Under *Thompson*, the conditions must be "*both* reasonable *and* in accordance with the declared purpose of title 3." Id. at 843 (emphasis supplied). Title 3's "declared purpose is the "promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." R.I. Gen. Laws § 3-1-5. Courts have found the "sufficient nexus to the purposes of title 3"[15] for a variety of conditions and interpreted the nexus requirement broadly. For example, conditions relating to closing times,[16] smoking,[17] adult entertainment,[18] and police details[19] have been upheld. Conditions relating to methods to ensure the ability of a liquor licensee to satisfy financial obligations are reasonably related to the purposes of Title 3. Such financial obligations could conceivably include liquor-related liabilities such as a judgment relating to serving

[15] *Amico's Inc. v. Mattos*, 789 A.2d 899, 906 (R.I., 2002).
[16] *Thompson*, id.
[17] *Amico's*, id.
[18] *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228, 1231 (R.I., 2000).
[19] *Musone v. Pawtucket Bd. Of License Com'rs*, 1984 WL 560365 (R.I. Super., 1984)

excessive amounts of liquor or serving to a minor. Requiring some type of financial protection for the Town would also satisfy the nexus requirement because the Town could be found liable as the issuer of the license in cases involving liquor-related liabilities. *See, e.g., Martinelli v. Hopkins*, 787 A.2d 1158 (R.I. 2001).

However, the particular insurance and indemnification requirements imposed on this Appellant are not "reasonable" under the circumstances of this case. In considering whether conditions imposed by a local licensing authority are "reasonable," the Department has the power of "de novo" review, and is not limited to the appellate standard of determining whether the imposition was "arbitrary and capricious." *Hallene, supra.* Thus, the Department may make a separate determination to impose conditions based on an independent and non-deferential analysis that the conditions were unreasonably imposed.

First, the Council did not provide a sufficient rationale for imposition of the insurance and indemnification conditions on the Appellant on its October 11, 2012 hearing and decision date. The Rhode Island Supreme Court has provided that when a licensing authority makes a decision, it "must, at a minimum, indicate the evidence upon which it relies." *Mosby v. Devine*, 851 A.2d 1031, 1051 (R.I. 2004)(quoting *Dionne v. Jalette,* 641 A.2d 744, 745 (R.I.1994) and applying it to the gun licensing context). An applicant for a license is "entitled to know the reasons upon which [the licensing] decision is based." Id. (quoting *DeCiantis v. Rhode Island Department of Corrections,* 840 A.2d 1090, 1092-93 (R.I.2003))(this is true even where there are no constitutional right to a full hearing and the decision-maker has "unfettered discretion"). The reasons for this requirement cited in *Dionne v. Jalette* apply to judicial review of administrative agency decisions, but some of the articulated reasons have the same practical import on the Department's review of municipal liquor licensing decisions. "The reasons have to do with

facilitating...review,...assuring more careful administrative consideration, helping parties plan their cases for rehearings and...review, and keeping [decision-making bodies] within their jurisdiction." Id. at 745 (quoting 2 Davis, *Administrative Law Treatise,* § 16.05 at 444).

In this case, while the Town Solicitor, appearing before the Department, attempted to rationalize the Council's decision to impose the conditions, after the fact, the record indicates that detailed reasons were not articulated on the October 11 decision record. The Council did not engage in a meaningful on-the-record discussion of the particular risk posed by the Appellant's establishment at the October 11 Council meeting. The record is devoid of any considerable deliberation of the details of the Town employees' discussions with the Trust, i.e. the risk to the Town of not having the indemnification and insurance requirements, the benefit of having those conditions, etc. Had the Council had such thorough dialogue at the hearing on the application, the Appellant may have been able to respond to the Council in a meaningful manner to advocate her position. As such, the October 11, 2012 vote to impose the conditions was not supported by an adequate rationale for the Department to review on appeal.

Second, in order to be "reasonable," the conditions must be uniformly applied to similarly situated licensees. In *Town of New Shoreham v. Racine*, the Superior Court upheld the Department's decision to reverse a local board's disciplinary action for alleged violation of a condition that was deemed "unfair" because it was not equally imposed on other licensees:

> "The record also provides ample evidence to support the Administrator's finding that the license condition was unfair. Island Entertainment, Inc.'s license was the only license that had such a condition imposed upon it. This fact was disclosed in the record and supports the Administrator's conclusion."
> 1992 WL 813547, * 5.

In the instant case, the Town did not to establish that it is uniformly applying insurance and indemnification requirements. It does not appear from the record that an ordinance or

written policy imposing the insurance requirement on all licensees has been adopted. Here, the record reflects that the Appellant is the only licensee in the municipality with the three million dollar insurance and indemnification requirement. If a municipality chooses to single out a licensee for a condition not imposed on other licensees, it must do so based on duly enacted standards and/or based on evidence that the licensee has engaged in such conduct as to require a unique condition not imposed on similarly situated licensees. The Town has not adopted uniform standards, the application of which would support its decision to impose these conditions on the Appellant but not on other licensees. For example, in *Racine*, the court, in upholding the Department's finding that the condition was not "reasonable" pointed out that "[t]he Town has other avenues, via (zoning) ordinances, to control the level of noise eminating from establishments such as Island entertainment, Inc." The "avenue" of an "ordinance" assures that liquor licensees are being treated fairly.

It should also be noted that failure to adopt such uniform standards for imposing insurance and indemnification requirements is contrary to the advice of the Trust in the Risk Adviser, which the Town has otherwise relied upon on as an after-the-fact justification for its decision. The Risk Advisor specifically advises municipalities to adopt such standards. "The municipality is advised to adopt a schedule of insurance levels so it does not find itself making decisions on a case-by-case basis, which in turn could give rise to charges of discriminatory treatment by applicants." Town Exhibit # 2. "An ordinance or regulation should specify exactly what is required of licensees. This will help avoid individual claims of wrongful denials or discrimination while simultaneously giving municipal officials guidelines to follow." Id.

Third, the October 11, 2012 imposition of conditions was not "reasonable" because the Council's evidentiary record, or lack thereof, does not support its conclusion that the insurance

and indemnification conditions should be imposed on the Appellant. The record is devoid of any supporting testimony, documentary evidence, data, or information. Significantly, no witnesses from the Trust were presented for consideration at the time of the October 11 decision nor does it appear that the Risk Advisor was introduced into the official record or considered through on-the-record discussions.

The Risk Advisor specifically advises that "[i]n reaching a decision regarding whether to grant an applicant a license and what conditions or restrictions should be placed on the license, the municipality should also take into consideration the history of the event or the municipalities experiences with similar events." Town Exhibit # 2. However, no evidence of the Appellant's history or similar events in the Town was presented at the October 11 hearing or the Department hearing to support the unique conditions on this licensee. It is significant in this case that the Appellant had first operated under a temporary outdoor license before being granted a permanent outdoor license, giving the Town a record that it should have specifically reviewed in making its decision in this case.

The Risk Advisor also advises that "municipalities should require certain high risk classes of licensees to agree to indemnify the municipalities." Town Exhibit # 2. The Risk Advisor recognizes that certain licensees may not be "high risk," stating that "[f]or other events posing lesser danger of injury, the insurance requirement can be scaled back accordingly;" "[f]or some events, minimal levels (e.g. $100,000 per occurrence) may be acceptable." Id. There was no testimony, documentary evidence, data, or information as to whether Appellant's operation fell within the "high risk" class of licenses requiring an indemnification agreement or whether lesser insurance requirements may be appropriate.

Finally, the Town erred in failing to renew the permanent outdoor liquor license on December 12, 2013. R.I. Gen. Laws § 3-7-6 "provides that an application for renewal of a liquor license may be rejected for 'cause.'" *A.J.C. Enterprises, Inc. v. Pastore*, 473 A.2d 269, 274 (R.I. 1984). "[I]n authorizing revocation for cause, the Legislature never intended either to confer upon a licensing authority a limitless control or to countenance the use of an unbridled discretion." Id. (citing *Chernov Enterprises, Inc. v. Sarkas*, 109 R.I. 283, 287 (1971)). The "cause" must be "'legally sufficient'; that is, it must be bottomed upon substantial grounds and established by legally competent evidence." The court has found sufficient "cause" where the licensing authority proved that the licensee engaged in significant violations of law; for example, violating Sunday entertainment laws, serving minors, and suborning perjury;[20] public urination and excessive noise of patrons;[21] injuries-causing fistfights, bottle-throwing in parking lot;[22] public urination and sexual activities, vandalism by patrons of neighboring property, excessive noise, and disturbances requiring police attention.[23] No "legally competent evidence," no evidence for that matter, was presented at the December 12, 2013 hearing that would support denying the renewal application for the permanent outdoor license. Unlike the cited "for cause" cases, not a single violation of Title III was established by the Town.

For the foregoing reasons, it is recommended that the Director order that the Town renew the permanent outdoor liquor license, subject to any and all customary approvals such as fire, health and the like.[24] The insurance and indemnification conditions should be stricken from the license, with all the other conditions imposed on it at the October 11, 2012 meeting remaining in

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[20] *Chernov, supra.*
[21] *A.J.C., supra.*
[22] *Mathieu v. Board of License Com'rs, Town of Jamestown*, 115 R.I. 303 (1975).
[23] *Edge-January, Inc. v. Pastore*, 430 A.2d 1063 (1981).
[24] There was some dispute at the hearing as to whether or not the fire inspection had been successfully completed as of the date of the Department's hearing. It is for the Town to determine whether such local inspection requirement have been satisfied before granting the renewal.

place. This Decision does not in any way preclude the Town from imposing further conditions on the license; provided that such conditions are consistent with the guidance provided in this Decision.

RECOMMENDATION

It is recommended that the Director order as follows:

1. The Town is ordered to renew the permanent outdoor liquor license, subject to any and all customary approvals such as fire, health and the like.
2. The following conditions shall be stricken from the permanent outdoor liquor license:
   - "The applicant shall execute an Indemnification Agreement indemnifying the Town of Foster from any and all liability in a form approved by the Town Solicitor."
   - "The applicant shall purchase and maintain insurance with coverage terms and in sufficient amounts as recommended by the Town Treasurer."
3. The permanent outdoor liquor license shall be subject to all other conditions imposed on the Appellant at the October 11, 2012 meeting.

Date: 3/20/2014

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

ORDER

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: 24 March 2014

Paul McGreevy
Director

Entered as an Administrative Order No.: -14-15 this 24th day of March, 2014.

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 24th day of March, 2014 that a copy of the within Decision and 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