

III. ISSUE

Whether to uphold or overturn the Board's grant of the Class BV liquor license with a 12 midnight closing.

IV. MATERIAL FACTS AND TESTIMONY

On July 8, 2019, MNS, LLC ("MNS") which was owned by Marvin Harris ("Harris") and run by Isaura Pimental ("Pimental") appeared before the Board and its attorney indicated that Harris had planned to transfer MNS's liquor license to Pimental, but instead decided to surrender its liquor license. On August 19, 2019, the Appellant appeared before the Board for its application for a new Class BV liquor license to be located where MNS had been.

On August 19, 2019, Pimental testified before the Board regarding the Appellant's application for a Class BV license. She testified she did not plan to have entertainment and has been a bartender for over ten (10) years. She testified that she has learned from her mistakes and she will make her place be more of a restaurant. She testified that her planned hours of operation are to be 5:00 p.m. to 1:00 a.m. and to finish food service about 12 midnight. Armando Bisceglia testified on Pimental's behalf before the Board. He testified he is consulting with her on how to start and operate the business. Pimental's attorney represented that the Appellant had its own parking lot and had leased a nearby parking lot and any parking issues are with the neighboring restaurant. Sergeant Tejada of the Providence Police Department objected to the grant of the license because Pimental managed the MNS at the same location when it had entertainment without a license violations and noise complaints from the neighbors.

On August 19, 2019, the Board approved a license for the Appellant with closing at 12 midnight and as the license would expire on December 1, 2019, the matter was set for review on November 13, 2019 before the Board before its expiration. On November 13, 2019, the Board

continued the matter so that the issued license and the renewal application could be heard on the same day of November 21, 2019.

On November 21, 2019, the local City councilor, Carmine Castillo testified before the Board that the Appellant has loud music and garbage and she gets telephone calls at 12:30 a.m. and 1:00 a.m. from neighbors saying they cannot sleep because of loud music from Appellant. The local State Senator Queszada also testified to receiving complaints from neighbors about noise from the Appellant. She testified that there were two (2) community meetings in September, 2019 to discuss issues in the area and Pimental did not attend. Ilana Crespo testified that she lives across from the Appellant's parking lot and hears noise at the weekend late at night.

The license was issued in August, 2019 with the midnight closing and MNS surrendered its license on July 8, 2019. The Appellant's attorney raised the issue that it was unclear what time period the neighbors were complaining about noise and pointed out that there is a restaurant next door. Pimentel testified that she has two (2) small speakers mounted on the wall.

On November 21, 2019, the Board decided to continue the 12 midnight closing condition on the license and renewed the license with that condition with a six (6) month review.

MNS had two (2) entertainment without a license violations in 2017 for which administrative penalties were imposed. In 2018, an entertainment without a license violation resulted in a two (2) day suspension of its liquor license. In 2019, there were three (3) allegations of entertainment without a license violations and one (1) bottle service violation, and an emergency hearing was scheduled for July 8, 2019 at which time MNS surrendered its liquor license so no findings were made on the 2019 allegations. See City's Exhibit One (1) (MNS licensing history).

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).

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.”³ 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*,

³ 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.

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 its decision 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 decision.

C. Arguments

The Appellant argued that while Pimental was the MSN's manager at that location, she started a new corporation with a new license that the Board granted with a 12 midnight closing. The Appellant argued that the testimony at the November 21, 2019 Board hearing related to the time prior to when the Appellant began operating and no one testified to about noise occurring after the Appellant opened. The Appellant argued that Pimental admitted there were past problems and explained her plans and there are no grounds to continue the conditional license.

The Board argued that Pimental managed the prior establishment and her business is the same type of operation even if it is a new liquor license. The Board argued that it granted the conditional license because of past issues with that location for which Pimental was the manager. The Board argued that while the hearing testimony may not have been clear as to time, the conditional license is within the Board's discretion especially for a license in a residential area. The Board argued that the November 21, 2019 date was only a two (2) month review and the probationary period should be extended beyond that time to ensure compliance. The Board argued it found that there had been related problems at night so linked the closing condition to those issues.

D. Discussion

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). However, 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.

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. Arbitrary and capricious determinations not supported by the evidence are considered suspect. *Infra*. See *W&D Parkview Enterprise, Inc. d/b/a Parkview v. City of Providence, Board of Licenses*, DBR No.: 19LQ021 (12/12/19).

The Board granted the license with a midnight closing on August 19, 2019 and maintained that condition of licensing on November 21, 2019. While the Board may have referred to the license as “probationary,” the Department considers the Board’s decision to be that the Class BV license was granted on August 19, 2019 with a 12 midnight closing. The 12 midnight closing is part of the license. The Board decided to review the 12 midnight closing on November 21, 2019 and decided to maintain that condition and at the same time it renewed the license with the 12 midnight closing. Thus, the issue is whether the grant of the liquor license with the 12 midnight closing is supported by evidence.

As cited above in *Chapman*, there must be evidence supporting community concerns. In *International Yacht Restoration School Inc.*, the Department found that the Newport licensing authority had not abused its discretion in granting that license despite 42 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 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 the various concerns. See also *Liquor Depot v. City of East Providence, et al.*, DBR No. 08-L-0250 (6/2/09) (Class A license denial overturned since objections were 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*, 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.

The Appellant plans to serve food and to open late. Pimental was not familiar with the regulatory requirement that food service in a Class BV license is always to be available at the same time alcohol is served.⁴ Pimental was the manager of the prior establishment at the same location

⁴ Section 1.4.5 of 230-RICR-30-10-1 *Liquor Control Administration* regulation provides in part as follows:

(B) Victualer - An applicant for a Class B alcoholic beverage license (also referred to as a Class B-V) may be granted a license subject to, but not limited to, the following terms and conditions:

(1) Demonstration to the satisfaction of the licensing board that a kitchen is established on the proposed premises as evidenced by a certificate of occupancy from the local building official and inspection and approval by the Department of Health.

(2) Furnishing to the licensing authority a copy of the proposed menu and food services to be provided.

(C) Pursuant to R.I.G.L. § 3-1-1, a Class B Licensee is defined as "Any shop or place where a substantial part of the business is the furnishing of food for consumption at the place where it is furnished." In order to comply with the foregoing provision, the licensee must offer to the public, in conjunction with the sale of alcoholic beverages, the opportunity to purchase and consume food to be served on the premises in the same area designated for the sale and consumption of alcoholic beverages.

(in a residential neighborhood) that had a series of violations and surrendered its liquor license prior to an emergency hearing. Sergeant Tejada testified to said violations and noise complaints about MSN. When granting the License, the Board imposed the condition that the Appellant close at 12 midnight (time that Pimental said it would stop serving food).

As referenced above, in *Domenic J. Galluci*, 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. *Domenic J. Galluci* denied a new application for a liquor license. Here, the Board found that the Appellant was associated with past issues in the same location since the owner, Pimental, was the MSN manager that had entertainment without a license violations. Moreover, like in *Domenic J. Galluci*, the new location is the same as the old location.

While Pimental testified there will be no entertainment without a license, there are music speakers in the building so music will be played. Because of the past issues with MSN and Pimental's relation to MSN as manager, the Board can infer that there could be potential entertainment without a license issues and other compliance issues (e.g. noise) with the Appellant. In addition, Pimental's testimony demonstrated a lack of familiarity with the requirements of liquor licensing.

These foods must be offered for sale during all times that alcoholic beverages are sold and consumed on the licensed premises.

(D) All Class B licensees shall:

(1) Publish and conspicuously post a menu from which all patrons of the licensed establishment can see and order food.

(2) Ensure that food offered on the menu is prepared and stored on the licensed premises.

(E) Licensees shall be presumed to meet the requirements of this provision by offering food at a sandwich level, as opposed to offering solely snack foods including but not limited to potato chips, pretzels, pickled eggs, pizza strips, stuffies and crackers and cheese.

Thompson v. East Greenwich, 512 A.2d 837 (R.I. 1986) found that a town may grant a liquor license upon conditions that promote the reasonable control of alcoholic beverages. Thus, it is within the Board's discretion to grant the liquor license application with conditions. See *Megan Kenney v. Providence Board of Licenses*, DBR No.: 14LQ044 (11/20/14); *Sugar, Inc., and Sharlene Alon v. City of Providence, Board of Licenses*, DBR No.: 09-L-0119 (3/8/10); and *Newport Checkers Pizza, Inc. d/b/a Scooby's Neighborhood Grille v. Town of Middletown*, LCA-MI-00-10 (12/7/00). The conditions become part of the liquor license. E.g. *Krikor S. Dulgarian Trust v. Providence Board of Licenses*, DBR No.: 10-L-143 (5/20/11).

At the November 21, 2019 hearing, the Board revisited the grant of the license which had been three (3) months earlier and extended the grant of the license with a 12 midnight closing with a six (6) month review and renewed the license with the same 12 midnight closing. There were objections from the neighbors to the license due to late night noise. It was unclear what time period the noise complaints referred to; though, two (2) community meetings were held in September, 2019 - after the Appellant received its midnight closing license - to discuss local issues.

To the extent that there is confusion in how the Board termed the grant of the license and how long it was valid, the Department finds that the evidence supports the grant of the Class BV liquor license on August 19, 2019 with the condition that it close at midnight. The Board did not grant a 90 day Class BV license, but rather granted a Class BV license with a 12 midnight closing that the Board chose to review prior to its expiration.

In light of the broad discretion given to the Board, the undersigned only reviews the Board's decision for evidence to support it. The Board's decision need not be unassailable but rather there must be evidence to support the Board's decision. Therefore, the issue is whether there was competent evidence to support the Board's discretionary decision to grant the license on

August 19, 2019 with the 12 midnight closing. The Board based its decision on Pimental's testimony, her experience as manager at MSN, MSN's licensing history, MSN's history, and the location. In addition, Pimental's testimony showed a lack of familiarity with liquor licensing regulations and the 12 midnight closing reflected Pimental's plans to stop serving food at midnight. The Board's decision on August 19, 2019 to impose the 12 midnight closing is supported by competent evidence. On November 21, 2019, the Board chose not to change its initial decision and renewed the license with the 12 midnight closing. There are no grounds to change the November 21, 2019 decision because it is a continuation of a decision made on August 19, 2019 for which there was competent evidence to support it.⁵

VI. FINDINGS OF FACT

1. On August 19, 2019, the Board approved a license for the Appellant with closing at 12 midnight and as the license would expire on December 1, 2019, the Board chose to review the closing time prior to renewal.

2. The matter was set for review on November 13, 2019 before the Board. On November 13, 2019, the Board continued the matter so that the license review and the renewal application could be heard on the same day of November 21, 2019.

3. On November 21, 2019, the Board reviewed the grant of license with a 12 midnight and continued the grant of the license with said condition and Board approved the renewal of the license with the condition of closure at 12 midnight with a six (6) month review.

⁵ The Board's decision to revisit the grant of the conditions of licensing is discretionary. The Appellant merely objected to the November 21, 2019 testimony at the Board hearing and did not present any testimony why and how the Board's reasons for granting the license with conditions had been mitigated. On November 21, 2019, the Board again chose to review the 12 midnight closing within six (6) months so it will need to schedule a hearing prior to May 21, 2020 for the review. The Board is choosing to allow the Appellant to demonstrate to the Board in advance of renewal that the condition should no longer be imposed.

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

5. A *de novo* hearing with oral closings was held December 12, 2019.

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

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

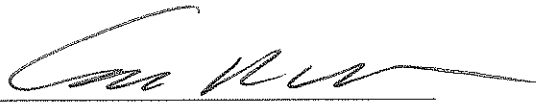
1. The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-2-1 *et seq.*, R.I. Gen. Laws § 3-7-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

2. In this *de novo* hearing, no showing was made by the Appellant that would warrant overturning the Board’s decision to grant the license with a 12 midnight closing.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of the Board to grant the license with a midnight closing be upheld.

Dated: January 17, 2020

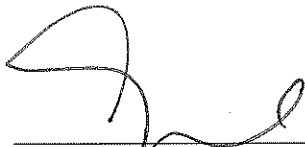

Catherine R. Warren
Hearing Officer

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: 1/23/20


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 23rd day of January, 2020 that a copy of the within Decision was sent by first class mail, postage prepaid and by electronic mail to Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, R.I. 02904; Louis A. DeSimone, Jr., Esquire 1554 Cranston Street, Cranston, RI; and Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903, and by electronic delivery to Pamela Toro, Associate Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Bldg. 68-69, Cranston, RI 02920.