

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

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334 South Water LLC d/b/a Penthouse,  
Appellant,

v.

City of Providence, Board of Licenses,  
Appellee.

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DBR No.: 17LQ013

**RECOMMENDATION AND ORDER GRANTING  
MOTION FOR STAY ON LIQUOR LICENSE**

**I. INTRODUCTION**

334 South Water Street, LLC d/b/a Penthouse (“Appellant”) seeks a stay of the City of Providence, Board of Licenses’ (“Board”) decision taken on November 2, 2017 to revoke its Class BV and Class BVX liquor 2:00 a.m. (extended hours) License.<sup>1</sup> The Board objected to the Appellant’s motion. This matter came before the undersigned on November 3, 2017 in her capacity as Hearing Officer as the designee of the Director of the Department of Business Regulation (“Department”).

**II. JURISDICTION**

The Department has jurisdiction over this matter pursuant to 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.*

A liquor appeal to the Department pursuant to R.I. Gen. Laws § 3-7-21 is considered a *de novo* hearing. The Department’s jurisdiction is *de novo* and the Department independently

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<sup>1</sup> At the Board hearing, the Board also revoked the Appellant’s other City licenses, but the Department does not have jurisdiction over those licenses. Appeals to the Department can only relate to the liquor license held by the Appellant. See *El Nido v. Goldstein*, 626 A.2d 239 (R.I. 1993) (victualing license is a separate and distinct license from a liquor license).

exercises the licensing function. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984); *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964); and *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964). Because the Department's has such broad and comprehensive control over traffic in intoxicating liquor, its power has been referred to as a "super-licensing board." *Baginski v. Alcoholic Beverage Comm.*, 4 A.2d 265, 267 (R.I. 1939). See also *Board of Police Com'rs v. Reynolds*, 133 A.2d 737 (R.I. 1957). The purpose of this authority is to ensure the uniform and consistent regulation of liquor statewide. *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964).

### III. MOTION TO STAY

A stay will not be issued unless the party seeking the stay makes a "strong showing" that "(1) it will prevail on the merits of its appeal; (2) it will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to other interested parties; and (4) a stay will not harm the public interest." *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (1976). Despite the ruling in *Harsch*, the Supreme Court in *Department of Corrections v. Rhode Island State Labor Relations Board*, 658 A.2d 509 (R.I. 1995) found that *Harsch* was not necessarily applicable in all agency actions and the Court could maintain the *status quo* in its discretion when reviewing an administrative decision pursuant to R.I. Gen. Laws § 42-35-15(c). While appeals before the Department do not fall under R.I. Gen. Laws § 42-35-15(c), it is instructive to note that the *Department of Corrections* found it a matter of discretion to hold matters in *status quo* pending review of an agency decision on its merits.

### IV. STATUTORY BASIS FOR REVOCATION OR SUSPENSION

R.I. Gen. Laws § 3-5-21 states in part as follows:

Revocation or suspension of licenses – Fines for violating conditions of license.  
– (a) Every license is subject to revocation or suspension and a licensee is subject to fine by the board, body or official issuing the license, or by the department or by the division of taxation, on its own motion, for breach by the holder of the license of the

conditions on which it was issued or for violation by the holder of the license of any rule or regulation applicable, or for breach of any provisions of this section.

(b) Any fine imposed pursuant to this section shall not exceed five hundred dollars (\$500) for the first offense and shall not exceed one thousand dollars (\$1,000) for each subsequent offense. For the purposes of this section, any offense committed by a licensee three (3) years after a previous offense shall be considered a first offense.

The revocation of a liquor license is a relatively rare event and is reserved for a severe infraction or a series of smaller infractions that rise to a level of jeopardizing public safety. See *Stagebands, Inc. d/b/a Club Giza v. Department of Business Regulation*, 2009 WL 3328598 (R.I. Super.) (disturbances and a shooting on one night justified revocation) and *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (upholding revocation when had four (4) incidents of underage sales within three (3) years). See also *Cardio Enterprises, d/b/a Comfort Zone Sports Bar v. Providence Board of Licenses*, DBR No.: 06-L-0207 (3/29/07) (killing of patron with incident starting inside and escalating outside justified revocation); *PAP Restaurant, Inc. v. d/b/a Tailgate's Grill and Bar v. Town of Smithfield, Board of License Commissioners*, DBR No.: 03-L-0019 (5/8/03) (series of infractions justified revocation).

Thus, the Department will uphold a revocation where an incident is so egregious as to justify revocation without progressive discipline. However, the Department will decline to uphold a revocation where the violation is not so egregious or extreme and the local authority has not engaged in progressive discipline. *Infra*.

## V. DISCUSSION

The information received by the undersigned is based on representations of the parties. A transcript was not available. It was agreed by the parties that there were (4) different nights from which the allegations arose and on which the revocations of all the Appellant's licenses were based.

The Appellant has held a liquor license for many years. Apparently, the establishment was closed over this past summer and reopened in September, 2017. See *334 South Water Street LLC*

*d/b/a Matter of Mile & a Quarter, 17LQ006 (8/2/17); and 334 South Water Street LLC d/b/a Matter of Mile & a Quarter, 17LQ006 (5/22/17).* The Appellant “re-opened” on September 30, 2017. It received an entertainment license from the Board for October, 2017 as entertainment licenses are often given on a monthly basis by the Board. The parties agreed at the Department hearing that the Appellant does not currently have an entertainment license. The Appellant represented that it does not wish to apply for one if allowed to re-open. However, as noted above, entertainment licenses do not fall under the Department’s jurisdiction.

**A. Board’s Reasons for Revocation**

**1. September 30, 2017: People on the premises after 2:30 a.m.**

Pursuant to Rule 18 of *Commercial Licensing Regulation 8 – Liquor Control Administration*, no one is permitted on the premises of an establishment with a 2:00 a.m. closing after 2:30 a.m. The parties disputed whether approximately 24 people were on the premises after 2:30 a.m. and whether they were Appellant’s employees. The Board and City argued that the testimony from the detail police officer at the Board hearing was that at approximately 2:30 a.m. he observed the people so that they had not left at 2:30 a.m. The Appellant argued that it would present evidence at a full hearing that they were employees. The City argued that this violation occurred the first night of the re-opening.

**2. Anti-Nudity Ordinance: October 8 and 22, 2017**

The City and Board argued that on those two (2) nights the Appellant violated the City of Providence’s Anti-Nudity ordinance. The Appellant argued that it did not violate the ordinance and said ordinance is vague. The City and Board argued that the violations of a City ordinance are violations of R.I. Gen. Laws § 3-5-21 since it would be a violation of a condition of licensing not to comply with State and City laws.

**3. October 21 and 22, 2017; entry after 1:00 p.m.**

Apparently when the entertainment licenses were granted by the Board for October, a condition was put on the entertainment license that no one could be admitted after 1:00 a.m. On October 21, 2017, approximately three (3) people entered at 1:10 a.m. The Appellant argued that they were employees which would be shown at the full hearing. The City argued that the owner told the police that they were employees, but did not testify at the Board hearing. On October 22, 2017, a performer who was to appear that night entered after 1:00 a.m. with an entourage of about 13 people. The City and Board argued that the entourage could not all be performers as well.

The City and Board represented that the no entry after 1:00 a.m. condition was put on the Appellant during the application for the entertainment license. The Appellant argued that as such it was irrelevant to the liquor license. The City and Board argued that it was relevant because it showed the Appellant was unable to follow the rules of operation.

**B. Arguments**

In addition to those arguments detailed above, the Appellant argued that it has a substantial likelihood of success on the merits and there would be irreparable harm if it closed and there is no danger to the public if a stay is granted. The Appellant represented that it would not object to a mandatory police detail.

The City and Board argued that the Appellant has had four (4) violations within one (1) month of re-opening and cannot follow the rules. They argued that the Appellant is not operating a restaurant as it had before since the restaurant is only opened for the nightlife in the upstairs portion. They argued that the Appellant had no licensing problems when just a restaurant, but now it is only interested in operating as a club and has had continuous problems. They argued that on three (3) of the four (4) nights that violations occurred, the Appellant had a voluntary police detail.

**C. Discipline Prior to September/October 2017**

In 2016, the Appellant had two (2) different incidents of disorderly conduct which resulted in a \$4,000 administrative penalty, a five (5) day suspension of its Class BVX license, and 30 day closing at midnight.


**D. Liquor License**

The Department has consistently followed progressive discipline barring an egregious act. Applying the stay criteria, a stay will not be issued if the party seeking the stay cannot make a strong showing that it will prevail on the merits of its appeal. In this matter, it cannot be ascertained which party will prevail without a full hearing. There is also a question of what impact any potential violation of an entertainment license condition (as opposed to statutory or regulatory violations) has on the liquor license. If a stay is not granted for the revocation, the Appellant will not have a meaningful appeal. Thus, in its discretion the Department will maintain the *status quo* prior to the events of September/October, 2017 except that the stay will be conditioned on a police detail after 10:00 p.m. on Friday and Saturdays.

**VI. RECOMMENDATION**

Based on the forgoing, the undersigned recommends that the Appellant's motion for a stay of the revocation of its liquor license be granted with the condition of the police detail as set forth above.

Dated: 11/7/17

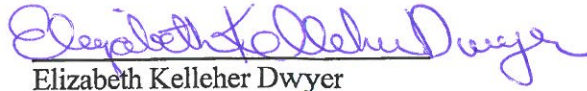
  
Catherine R. Warren  
Hearing Officer

**ORDER**

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

ADOPT  
 REJECT  
 MODIFY

Dated: 11-7-17

  
Elizabeth Kelleher Dwyer  
Interim Director


**A hearing on the merits will be held on November 27, 2017 at 1:30 p.m. at the Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, RI.<sup>2</sup>**

**NOTICE OF APPELLATE RIGHTS**

**THIS ORDER IS REVIEWABLE BY THE SUPERIOR COURT PURSUANT TO R.I. GEN. LAWS § 42-35-15(a) 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 A PETITION DOES NOT STAY ENFORCEMENT OF THIS ORDER.**

**CERTIFICATION**

I hereby certify on this 7 day of November, 2017 that a copy of the within Order was sent by first class mail, postage prepaid and by electronic mail to Nicholas Hemond, Esquire, DarrowEverett, LLP, One Turks Head Place, Providence, R.I. 02903, Louis A. DeSimone, Jr., Esquire, 703 West Shore Road, Warwick, RI 02889, and Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903 and by hand delivery to Maria D'Allesandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Bldg. 68-69, Cranston, RI 02920.

  
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<sup>2</sup> The Appellant is advised that it is responsible for a stenographer for the hearing pursuant to R.I. Gen. Laws § 3-7-21. If this date is inconvenient, the parties shall notify the undersigned and a new mutually convenient date will be schedule.