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

J. Acqua, Inc. d/b/a Acqua Lounge, Appellant,	:	
v.	:	**DBR No.: 16LQ014**
City of Providence, Board of Licenses, Appellee.	:	

ORDER REMANDING MATTER TO PROVIDENCE BOARD OF LICENSES

I. INTRODUCTION

Pursuant to R.I. Gen. Laws § 3-7-21, J. Acqua, Inc. d/b/a Acqua Lounge ("Appellant") filed an appeal with the Director of the Department of Business Regulation ("Department") of the Providence Board of Licenses' ("Board") decision to revoke its Class BVX liquor license ("License"). The Appellant requested a stay of the revocation and a stay hearing was held on September 15, 2016 before the undersigned.[1] The Board and City objected to a stay issuing.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-5-1 *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.*

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 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

[1] Pursuant to a delegation of authority by the Director of the Department.

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. STANDARDS FOR DISORDERLY CONDUCT

R.I. Gen. Laws § 3-5-23 states in part as follows:

> (b) If any licensed person permits the house or place where he or she is licensed to sell beverages under the provisions of this title to become disorderly as to annoy and disturb the persons inhabiting or residing in the neighborhood . . . he or she may be summoned before the board, body, or official which issued his or her license and before the department, when he or she and the witnesses for and against him or her may be heard. If it appears to the satisfaction of the board, body, or official hearing the charges that the licensee has violated any of the provisions of this title or has permitted any of the things listed in this section, then the board, body, or official may suspend or revoke the license or enter another order.

In revoking or suspending a liquor license, it is not necessary to find that a liquor licensee affirmatively permitted patrons to engage in disorderly conduct. See *Cesaroni v. Smith*, 202 A.2d 292, 295-296 (R.I. 1964). Furthermore, the Court found that "disorderly" as contemplated in the statute meant as follows:

> The word "disorderly" as used here contemplates conduct within premises where liquor is dispensed under a license that causes either directly or indirectly conditions in the neighborhood in annoyance of or disturbing to the residents thereof. *Id.* at 296.

A liquor licensee has the "responsibility to control the conduct of its patrons both within and without the premises in a manner so that the laws and regulations to which the license is subject will not be violated." *Schillers, Inc. v. Pastore*, 419 A. 2d 859 (R.I. 1980).

A liquor licensee is accountable for violations of law that occur on its premises and outside. *Vitali v. Smith*, 254 A.2d 766 (R.I. 1969). It is not a defense that a licensee is not aware of the violations or provided supervision to try to prevent violation. While such a responsibility may be onerous, a licensee is subject to such a burden by the legislature and accepted such conditions by becoming licensed. *Therault v. O'Dowd*, 223 A.2d 841, 842-3 (R.I. 1966). See also *Scialo v. Smith*, 99 R.I. 738 (R.I. 1965). As the Supreme Court has found, "the responsibility of a licensee for the conduct of his patrons within the licensed premises that makes it disorderly within the meaning of the statute is established by evidence showing a toleration or acquiescence in such conduct by the licensee." *Cesaroni*, at 296. See also *AJC Enterprises*; *Schillers;* and *Furtado v. Sarkas*, 373 A.2d 169 (R.I. 1977).

V. PRIOR HISTORY OF THE LICENSEE

In October, 2015, the Appellant had its License suspended for four (4) days for disorderly conduct and in April, 2016, it had a three (3) day suspension for disorderly conduct.

VI. DISCUSSION

The facts were mostly undisputed. Four (4) patrons came to the Appellant. They were not patted down upon entry because the security member knew one (1) of them. The security member has since been fired by the Appellant. The four (4) patrons argued inside. The Board did not dispute the owner's testimony before the Board that he intervened to stop the fight. However, a gun was fired into the ceiling. The shooter fled. The owner cooperated with the police in identifying three (3) of the four (4) patrons. It was not disputed that a shot was fired inside the Appellant.

In its decision, the Board found as mitigating factors that the Appellant assisted the police in their investigation, the Appellant terminated the party responsible for permitting entry of the shooter, and the Appellant is not required to maintain security personnel at the establishment. At the Board hearing, there may have been some testimony that the owner was not initially fully forthcoming with the police. However, the Board made no findings regarding any non-cooperation by the owner.

The Appellant argued that it had a substantial likelihood of success on the merits. The Appellant argued that the revocation was excessive and inconsistent with prior discipline. The Appellant argued that denying the stay would cause irreparable harm and it has been closed since August 15, 2016. The Appellant argued that the new security plan and police detail would address any public safety issues.

The Appellant argued that it was not minimizing the seriousness of the incident and had felt a 30 day suspension would be appropriate. It represented that it fired two (2) employees. It has hired new security with a security plan that will include staff at all entrances/exits with two (2) security at the front door, one to check identification and one to wand the patrons. The Appellant represented that if it was allowed to re-open, it would implement this security plan. The Appellant offered to have a two (2) officer police detail and use of the security plan as conditions of a stay.

The City argued that the patrons that were let in had caused problems before so that the Appellant should have been aware of possible problems. The City argued that the issue is that a patron took a gun into the licensee. The City argued that the licensee has cooperated previously, but the fact that a gun was in the premises cannot be minimized and cannot be resolved by a suspension. The City argued that the security plan is after the fact. The City argued that that the Appellant has a history of disorderly conduct so that there is a public safety issue.

As the Appellant had raised an issue regarding politics affecting the revocation vote, the Board pointed out that the vote was three (3) to one (1) for revocation. The Board argued that the sole factor for the Board in its decision was that there was a gun inside a licensee and it went off.

Further, the Appellant argued that this is not a situation where a licensee wantonly disregarded its statutory and regulatory obligations. The Appellant argued that it had no obligation to pat-down patrons. The Appellant argued that a decision to revoke should be predicated on there being a finding that there are no other means to stop certain practices or incidents from occurring and re-occurring. In response, the City argued that the Appellant is responsible for the actions inside including of its employees despite the employee being fired. The City argued that licensees have the responsibility to put security in place that is needed in order to prevent disorderly conduct.

The Department has consistently followed progressive discipline barring an egregious act. There is no dispute in this matter that a gun was fired inside. The Board and City feels that merits revocation. The Appellant feels that a suspension and a new security plan is appropriate. The Board has not had the benefit of being able to review the plan.[2]

[2] The plan was submitted at the stay hearing. At the stay hearing, the Appellant represented that all patrons would be wanded. In the security plan, the plan to wand is listed only after when there is entertainment and mandatory pat downs for entertainment.

VII. RECOMMENDATION

In its decision, the Board found some mitigating factors for this incidence. It also has not had a chance to review the security plan (which might need to be clarified). Before the Department rules on the stay request for the revocation, this matter is remanded back to the Board for it to discuss the Appellant's security plan (and any other conditions) and whether that would either merit a stay of a revocation by the Board **or** a reconsideration of the initial penalty.[3]

Dated: 9/16/16

Catherine R. Warren
Hearing Officer

[3] Therefore, the Appellant shall remained closed pending the Board's further and prompt review of this matter. Depending on the Board's decision, the Department continues to have jurisdiction of any appeal or renewed request for a stay, if necessary.

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: 9/16/16

Macky McCleary
Director

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 16th day of September, 2016 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, RI 02903 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.