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

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| **Tropicana Restaurant and Bar, Inc.**<br>**d/b/a Tropicana,**<br>**Appellant,** | : | |
| **v.** | : | **DBR No.: 15LQ023** |
| **City of Providence, Board of Licenses,**<br>**Appellee.** | : | |

## RECOMMENDATION AND INTERIM ORDER CONDITIONALLY GRANTING MOTION FOR STAY

## I. INTRODUCTION

Tropicana Restaurant and Bar Inc. d/b/a Tropicana ("Appellant") seeks a stay of the City of Providence, Board of Licenses' ("Board") decision taken on November 18, 2015 to deny renewal of its Class B liquor license ("License").[1] The Board objected to the Appellant's motion. This matter came before the undersigned on November 30, 2015 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 § 3-2-1 *et seq.*, R.I. Gen. Laws § 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.*

[1] The License expires on December 1, 2015.

## III. DENIAL OF APPLICATION FOR RENEWAL OF LICENSE

Pursuant to R.I. Gen. Laws § 3-7-6, the Appellant's Class B application for renewal of license may be denied "for cause." Said statute provides as follows:

> Renewal of Class A, Class B, Class C, Class D, Class E, and Class J licenses. The holder of a Class A, Class B, Class C, Class D, Class E, or Class J license who applies before October 1 in any licensing period for a license of the same class for the next succeeding licensing period is prima facie entitled to renewal to the extent that the license is issuable under § 3-5-16. This application may be rejected for cause, subject to appeal as provided in § 3-7-21.

In *Chernov Enterprises, Inc. v. Sarkas*, 284 A.2d 61, 63 (R.I. 1971), the Rhode Island Supreme Court rejected the argument that a license renewal may only be based on breaches of R.I. Gen. Laws § 3-5-21[2] or R.I. Gen. Laws § 3-5-23[3] but instead found "that a cause, to justify action, must be legally sufficient, that is to say, it must be bottomed upon substantial grounds and be established by legally competent evidence." See also *A.J.C. Enterprises, Inc. v. Pastore*, 473 A.2d

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[2] R.I. Gen. Laws § 3-5-23 states 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.
>
> (c) In the event that a licensee is required to hire a police detail and the police refuse to place a detail at the location because a licensee has failed to pay outstanding police detail bills or to reach a payment plan agreement with the police department, the license board may prohibit the licensee from opening its place of business until such time as the police detail bills are paid or a payment plan agreement is reached.

[3] 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.

269 (R.I. 1984); *Edge-January, Inc. v. Pastore*, 430 A.2d 1063 (R.I. 1981). In *Chernov*, renewal was denied because the licensee's president had supporned perjury of two (2) minors that had been served by the licensee. In *Edge-January*, the renewal was denied as it was found that the neighbors' testimony had shown a series of disorderly disturbances happening in front of the licensee's premises that had their origins inside.

In discussing the type of evidence required to be proved for a denial, the Rhode Island Supreme Court found in *A.J.C. Enterprises, Inc. v. Pastore*, 473 A.2d 269, 275 (R.I. 1984) as follows:

> We have said at least twice recently that there need not be a direct causational link between incidents occurring outside or nearby a drinking establishment and its patrons. Such a link is established when it can be reasonably inferred from the evidence that the incidents occurred outside a particular establishment and had their origins within. *The Edge-January . . . Manuel J. Furtado, Inc. v. Sarkas*, 373 A.2d 169, 172 (R.I. 1977).

While this is a denial of renewal matter, it is similar to a revocation case in that there needs to be finding of cause. In revoking a liquor license based on disorderly conduct, it is not necessary to find that a liquor licensee affirmatively permitted patrons to engage in disorderly conduct. Rather, the Rhode Island Supreme Court held in *Cesaroni v. Smith*, 202 A.2d 292, 295-296 (R.I. 1964) as follows:

> [T]he legislature, in enacting the pertinent provision of the statute, intended to impose upon such licensee the obligation to maintain an efficient and affirmative supervision over the conduct of his patrons in his place to such an extent as is necessary to maintain order therein. It is our opinion that as a practical matter a licensee assumes an obligation to affirmatively supervise the conduct of his patrons so as to preclude the generation therefrom of conditions in the neighborhood of like character to conditions that would result from maintenance of a nuisance therein.

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.

## IV. THE REASONS GIVEN FOR DENIAL OF RENEWAL

The undersigned did not have a transcript of the Board hearing. Instead, the arguments are based on representations made by the parties. The Board's letter denying renewal found that the Appellant did not have a kitchen and since a condition of a Class B license is the service of food, the License renewal was denied. It gave no other reasons for the denial of the License. The Appellant represented that there had been a misunderstanding at the Board hearing and that the hood of the Appellant's fryolator was broken and would be fixed tomorrow (December 1, 2015). The Board did not dispute that the Appellant had a kitchen (See Appellant's Exhibit One (1) (photographs)) but disputed whether the Appellant was serving food.

Rule 5 of *Commercial Licensing Regulation 8 Liquor Control Administration* ("CLR8") requires as follows:

> **RULE 5 CLASS B (VICTUALER, TAVERN) LICENSE – RETAIL**
> ***
> (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. Gen. Laws § 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. 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.

At the stay hearing, the Board argued that the denial was also based on the Appellant causing a nuisance to its neighbors. The Board represented that the city councilor in whose district the Appellant is located appeared at the Board hearing and indicated that he had received numerous complaints from constituents regarding the Appellant having loud music, public smoking, drinking outside, loitering outside, and public urination. The Board also represented that another city councilor whose district is very near Appellant and who lives nearby as well testified as a councilor and resident as to the same issue. The Board indicated that the Appellant had its hours reduced to midnight in the summer to address some issues and that the Appellant was cited this year for entertainment without a license and public smoking. No other residents testified.

The parties agreed that there were many other late night establishments including liquor licensees nearby the Appellant and that Chalkstone Avenue is a commercial district. The Board represented that the information from the city councilors were of complaints about Appellant. The Appellant represented that there is a bus stop outside of Appellant.

## V. STANDARD FOR ISSUANCE OF A STAY

Under *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (1976), 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." 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). The issue before the undersigned is a motion to stay a Decision which is subject to a *de novo* appeal and does not fall under R.I. Gen. Laws § 42-35-15(c). Nonetheless, 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.

## VI. ARGUMENTS

The Appellant argued that the basis for the denial is the denial letter regarding the kitchen so that the Board should have just issued a conditional renewal subject to compliance with the food service requirements. The Appellant argued that denying a renewal application is an end-run around the show cause process and there has only been one show cause brought prior to this denial.

The Board argued that the Appellant was causing an on-going nuisance so that there was legally competent evidence to deny the renewal. The Board argued that while Chalkstone Avenue was a commercial district, the Appellant is not abiding by the laws.

## VII. DISCUSSION

The Board's denial letter is limited to the issue of the kitchen. The Board argued that there were other reasons for the denial; however, there is no such finding in the denial letter. It may be that the Board heard evidence of complaints but did not think that they supported a denial. Granting a stay with conditions maintains the *status quo* pending the appeal.

## VIII. RECOMMENDATION

Based on the forgoing, the undersigned recommends that the Appellant's motion for a stay of the denial of License renewal be granted on the following condition:

1. The Appellant complies with the service of food requirements contained in Rule 5 of CLR8.[4]

Pursuant to R.I. Gen. Laws § 3-2-2 and R.I. Gen. Laws § 3-7-21, this matter is remanded to Board for it to clarify if there were any other reasons for the denial of the License.

Nothing in this order precludes the undersigned from revisiting this order because of a change in circumstances. E.g. the violation of the conditions could warrant a review of the stay order.

If after the remand, a hearing on the appeal is necessary, the parties and the undersigned will choose a mutually agreeable date for a hearing.

Dated: 11/30/15

Catherine R. Warren
Hearing Officer

**INTERIM 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: 12/1/15

Macky McCleary
Director

Entered this day as Administrative Order Number 15-59 on 1st December of ~~November~~, 2015.

[4] In other words, the Appellant cannot open if it cannot serve food pursuant to the regulatory requirements such as posting a menu and having at least sandwich level service.

## 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 1st day of December, 2015 that a copy of the within Order was sent by email and first class mail, postage prepaid, to the following: Mario Martone, Esquire, City of Providence Law Department. 444 Westminster Street, Suite 220, Providence, RI 02903 Mmartone@providenceri.com and Nicholas Hemond, Esquire, DarrowEverett, LLP, 1 Turks Head Place, Suite 1200, Providence, RI NHemond@darroweverett.com and by hand-delivery to Maria D'Alessandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Building 69-1, Cranston, RI 02920