

24, 2022. A full hearing was held on May 24, 2022. The parties were represented by attorneys who rested on the record.²

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.*

III. ISSUES

Whether to uphold or overturn the Board's decision to deny the Appellant's renewal application for the License.

IV. MATERIAL FACTS

The Appellant initially came before the Board on January 20, 2022 at which time the Board reviewed several complaints about the Appellant that it had received from neighbors about noise and of the Appellant's advertising for various D.J. entertainments at its establishment.³ The Board questioned the Appellant's owner, Yorjan Tavarez, regarding the advertisements posted on social media advertising D.J.'s. Mr. Tavarez indicated that he had cancelled the advertised event listing. However, the Board pointed it that it had copies of many advertisements for D.J.'s at the Appellant. Mr. Tavarez indicated that it had music playing but no entertainment. The Board decided to set the matter down for hearing on January 26, 2022 in relation to the renewal application. On that

² The transcript of the Department's hearing was received on June 1, 2022.

³ The undersigned listened to audio for the Board's three (3) different days of hearing online. Those recordings can be found as follows:

<https://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=13377&Format=Minutes> (January 20, 2022).

<https://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=13373&Format=Minutes> (January 26, 2022).

<https://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=13390&Format=Minutes> (March 16, 2022).

date, the Appellant did not appear. The Board denied the application renewal which the Appellant appealed to the Department which remanded it back to the Board.

The Board heard the renewal application again on March 16, 2022 at which time the Appellant appeared with counsel. The Appellant represented that it did not have any D.J.'s playing inside and did not have any D.J. apparatus. The Board had copies of 17 different advertisements posted by the Appellant for D.J.'s. The Appellant represented that it had no live entertainment by D.J.'s. It was represented that during the January 20, 2022 Board hearing, the Appellant deleted its Instagram advertisements but did not delete its Facebook advertisements in relation to its D.J. advertisements. This was not disputed by the Appellant at the March 16, 2022 Board hearing.

The advertisements for D.J.s are from the Fall of 2021 and January of 2022. The Appellant also admitted it advertised on the radio. The certified record makes mention of a December 25, 2021 radio advertisement in relation to a D.J. being at the Appellant. The certified record also included several emails from the neighbors recounting loud music as well as the various D.J. advertisements. See certified record.

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 Supreme 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, 1134 (R.I. 1998).

B. The Appeal before the Department

The hearing before the undersigned is a *de novo* hearing so that the parties start afresh during the appeal. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984); and *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964) (Department's jurisdiction is *de novo* and the Department independently exercises the licensing function). 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 denial of renewal but whether the Board presented its case before the undersigned. The undersigned will make her findings on the basis of the evidence before her and determine whether that evidence justifies said denial.

C. Standard of Review

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 § 3-5-21⁴ or R.I. Gen. Laws § 3-5-23⁵ 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 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 supported 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.

C. Prior Discipline

The Appellant had administrative penalties imposed for having entertainment without a license and having 12 instances of public smoking on December 14, 2013. More recently, there was an incident of shots fired in 2021 for which the Appellant was penalized.

⁴ R.I. Gen. Laws § 3-5-21 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.

⁵ 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.

D. Arguments

The City and Board argued that there were some instances where D.J.'s were playing/performing at the Appellant. However, they agreed that for most of the advertisements, the City did not have corroborating evidence that a D.J. performed on the day advertised. They also argued that having a D.J. make an appearance and mingle with patrons falls under entertainment provisions. They argued that the Appellant's owner deleted its D.J. advertisements during the January 20, 2022 Board meeting from one of its social media account which goes to the fitness of the licenseholder. They argued that the renewal was not filed by October 1, 2021 but was filed on November 18, 2021 so statutorily does not fall under the provision that allows a *prima facia* renewal because it was filed late. They argued because the renewal was late, the standard would be the same as for a new license application. The Board acknowledged that it believed that if the Appellant had filed a timely renewal application, there would not be enough to support a non-renewal as case law speaks of a grouping of events in a 12 month period that negatively impacts the neighborhood's quality of life. The Board argued that the Appellant could not be trusted due to the owner's misrepresentations to the Board so was unfit to be a licenseholder.

The Appellant represented that D.J. advertisements were for appearances by D.J.'s who mingled with patrons but did not perform as there is no D.J. booth because the venue is too small. The Appellant agreed that D.J. appearances constitute entertainment but argued it a new issue and would not rise to the level of denial of renewal. The Appellant represented that it would no longer have D.J.'s make promotional appearances. The Appellant agreed that at some point a licensee could fall out of the *prima facie* provision but would not be sure what date that would be.

E. Whether the Appellant's Application to Renew License should be Granted

In *AJC Enterprises*, the Court found that the neighbors who all lived in the area “testified at length concerning the increase in noise, parking congestion, litter, public urination, patrons either screaming, intoxicated, or pugnacious, as well as an increase in various other activities, all of which disrupted the neighborhood's established way of life.” *Id.* at 274.⁶ This matter revolves around some neighborhood disturbances in terms of loud music. However, the City is more concerned that the Appellant misled the Board and then deleted evidence.

Currently, the Appellant's license has a closing time of 11:00 p.m. but the Board had since imposed at 10:00 p.m. closing time. See March 24, 2022 stay order. Even if the D.J.'s are not performing and are just appearing there, the Appellant's advertisements for D.J.'s seem at odds with a closing time of 10:00 p.m. or 11:00 p.m. The neighbors' complaints indicate that the Appellant plays loud music that can be heard outside its building. The Appellant does not have an entertainment license.

Mr. Tavarez told the Board that he did not have D.J.'s and had canceled the one appearance despite the fact that the Appellant had posted numerous advertisements for D.J.'s on different nights. The Appellant then deleted its advertisements from one of its social media accounts but not all of its social media accounts.

It is troubling that the Appellant was even advertising on social media since its renewal application that it filed on November 18, 2021, it answered, “no,” to the question, “[w]ill you use

⁶ 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 causal 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).

social media to promote business?” Clearly, that answer was a misrepresentation as it had Facebook advertisements in December, 2021 and January, 2022.

The Board acknowledged that under the *prima facie* standard, it did not think there would be enough to deny the renewal of license. The *prima facie* standard applies to those licensees that file for renewal prior to October 1 of the year. Pursuant to R.I. Gen. Laws § 3-5-8,⁷ the Appellant’s License expired on December 1, 2021. The Appellant filed its renewal prior to the expiration of its License. Certainly, once a license expired, there would be no entitlement to a *prima facie* renewal.

Not only was the Appellant posting advertisements for D.J.’s which it now says it will not do (despite saying it would not be using social media back on November 18, 2021), some of the advertisements advertised that hookah was available at the Appellant. While this was not touched upon at hearing, it merits a discussion in terms of whether the Appellant complies with all statutory and regulatory mandates. R.I. Gen. Laws § 23-20.10-6 excludes from the prohibition on public smoking, any “smoking bar” as defined by R.I. Gen. Laws § 23-20.10-2(20). Smoking is defined in R.I. Gen. Laws § 23-20.10-2(19).⁸

⁷ R.I. Gen. Laws § 3-5-8 provides as follows:

Expiration date of licenses. Every license except retailer's Class F licenses and retailer's Class G licenses shall expire on December 1 after its issuance.

⁸ R.I. Gen. Laws § 23-20.10-6 provides in part as follows:

Where smoking not regulated. – (a) Notwithstanding any other provision of this chapter to the contrary, the following areas shall be exempt from the provisions of this chapter:

(6) Any smoking bar as defined in § 23-20.10-2(20).

R.I. Gen. Laws § 23-20.10-2(20) defines a smoking bar as follows:

(20) (i) "Smoking bar" means an establishment whose business is primarily devoted to the serving of tobacco products for consumption on the premises, in which the annual revenues generated by tobacco sales are greater than fifty percent (50%) of the total revenue for the establishment and the serving of food or alcohol is only incidental to the consumption of the tobacco products. Effective July 1, 2015, all existing establishments and establishments that open thereafter must demonstrate quarterly, for a period of one year and annually thereafter, that the annual revenue generated from the serving of

If the Appellant is allowing public smoking – which includes smoking hookah – it would have to qualify as a smoking bar so that its annual revenue generated by tobacco sales would be greater than 50% and the serving of food, alcohol, or beverages would only be incidental to the consumption of the tobacco products. The statute provides that smoking bars file annual affidavits regarding their revenue with the Division of Taxation.

There was no evidence one way or another in terms of the whether the Appellant was a smoking bar. Its advertisements call it a restaurant and lounge. However, if it was offering hookah and was not a smoking bar, it was noncompliant with the statute on public smoking.⁹

The Board argued that the totality of circumstances regarding the fitness of the licensee justified the denial of the renewal. Certainly, Mr. Tavaréz has not acquitted himself well before the Board or with his business' neighbors. He seems to be trying to run a nightclub when the Appellant is supposed to be a restaurant. In trying to do that, he misled the Board and lied on his

tobacco products is greater than fifty percent (50%) of the total revenue for the establishment, and the serving of food, alcohol, or beverages is only incidental to the consumption of the tobacco products. Every owner of a smoking bar shall register no later than January 1 of each year with the division of taxation and shall provide, at a minimum, the owner's name and address and the name and address of the smoking bar. The division of taxation in the department of administration shall be responsible for the determination under this section and shall promulgate any rules or forms necessary for the implementation of this section.

(ii) Smoking bars shall only allow consumption of food and beverages sold by the establishment on the premises and the establishment shall have public access only from the street.

(iii) Any smoking bar, as defined herein, is required to provide a proper ventilation system that will prevent the migration of smoke into the street.

R.I. Gen. Laws § 23-20.10-2(19) defines a smoking as follows:

(19) "Smoking" or "smoke" means inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, pipe, weed, plant, other tobacco product or plant product, or other combustible substance in any manner or in any form intended for inhalation in any manner or form. "Smoking" or "smoke" also includes the use of electronic cigarettes, electronic cigars, electronic pipes, electronic nicotine delivery system products, or other similar products that rely on vaporization or aerosolization; provided, however, that smoking shall not include burning during a religious ceremony.

⁹ Another issue that was raised at hearing was whether the Appellant had provided a Division of Taxation letter of good standing in its renewal. The Appellant represented after hearing that it had provided such a letter, but the City was unsure.

renewal application. He tried to hide evidence of advertising for entertainment by deleting social media posts.

R.I. Gen. Laws § 5-22-1.1 provides as follows:

Live entertainment — City of Providence. The board of licenses for the city of Providence is authorized to license, regulate, or prohibit "live entertainment" in the city of Providence, including, but not limited to, live performances of music or sound by individuals, bands, musicians, disc jockeys, dancing, or karaoke, with or without charge, provided that "incidental entertainment" be permitted as of right, and no license shall be required. "Incidental entertainment" means background music provided at a restaurant, bar, nightclub, supper club, or similar establishment, limited to the following format:

(1) Live music performance limited to no more than a maximum of three (3) acoustic instruments that shall not be amplified by any means, electronic or otherwise; or

(2) Prerecorded music or streamed music played over a permanently installed sound system. If a bar or restaurant includes incidental entertainment, it cannot charge a cover charge; shall not allow dancing by patrons of the establishment; cannot employ flashing, laser, or strobe lights; and the maximum volume, irrespective of the format, is limited solely to the boundaries of the premises at all times, and shall permit audible conversation among patrons of the establishment.

The Appellant does not have an entertainment license. It can provide incidental music, but the music cannot be heard outside its building. The music cannot be amplified.

In order to ensure that the Appellant is not being run as a night club with entertainment without a license, loud music, advertising D.J.'s on social media as well as taking into consideration the licensee's propensity to obfuscate and lie about its business, the undersigned will recommend renewal but with certain conditions.

Under *Thompson v. East Greenwich*, 512 A.2d 837 (R.I. 1986), a town may grant a liquor license upon conditions that promote the reasonable control of alcoholic beverages. The Appellant's behavior has raised pertinent questions about its fitness to be a licenseholder. As a result, there is cause to support that its renewal be conditioned as the Appellant has shown that it is not capable of running its business in a trustworthy fashion. In a sense, this is a chance for the

Appellant to show that it can be well run and not mislead the Board. In order to allow the Appellant's License to be renewed, it must be monitored by the Board¹⁰ and provide the Board with certain information as a result of its untrustworthy behavior. The Appellant is a Class BV licensee currently closing at 10:00 p.m. It should not be run as a nightclub.

The conditions are as follows:

1. Only incidental music be played so that the Appellant complies with R.I. Gen. Laws § 5-22-1.1 (e.g. cannot hear music outside, must be able to hear conversation inside, no strobe lights, etc.). Thus, only ambient music can be played so that the Appellant's music does not go over 50 dB.

2. The Appellant shall appear at the Board as soon as possible after the issuance of this decision and then every 30 days to provide an update on how it is operating and to review if any further complaints have been received by the Board in relation to the Appellant.

3. When the Appellant appears before the Board for the first time after the issuance of the decision, it shall provide an updated business plan to the Board. If the Appellant decides to vary from this business plan, it shall so inform the Board prior to any change in its business plan.

4. When the Appellant appears before the Board for the first time, it shall inform the Board whether it is a smoking bar. If it indicates that it is a smoking bar, it shall provide the Board with copies of any tax affidavits filed in 2021 or previously. It shall provide proof of a ventilation system as required by law. If it cannot provide that information, it cannot be considered a smoking bar.¹¹

¹⁰ For example, see *WGIC d/b/a Beve v. City of Providence, Board of Licenses*, DBR No. 19LQ008 (5/28/19).

¹¹ If it tells the Board that it plans to be a smoking bar, it obviously must inform the Board and provide proof of the ventilation system and proof of its receipts for tobacco, alcohol, and food as delineated by statute.

5. When the Appellant appears before the Board for the first time, it shall provide its copy of its letter of good standing from the Division of Taxation as required for a renewal application.

6. No advertisements about music allowed in any venue or forum.

7. The Appellant shall continue to close at 10:00 p.m.

8. After one (1) year from this decision, the Board shall decide whether the Appellant shall continue to appear monthly or whether the Appellant should appear quarterly, everyone other month, or not at all, etc.

9. The Appellant shall not open until it appears before the Board with the information required by this Decision.¹² It is noted that failure to provide such information could lead to the revocation of license. E.g. letter of good standing.

VI. FINDINGS OF FACT

1. On or about March 16, 2022, the Board denied the Appellant's renewal application for License.

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

3. By order dated March 24, 2022, the Department conditionally stayed the Board's denial of renewal of License.

4. A *de novo* hearing was held on May 24, 2022 before the undersigned sitting as a designee of the Director. The parties rested on the record.

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

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

¹² Obviously, the Board hearing shall be scheduled as soon as possible after the Appellant indicates it is ready to appear on the agenda.

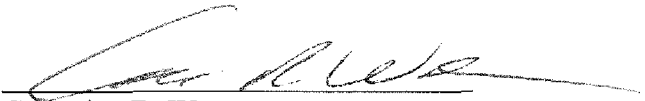
1. The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-7-21 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

2. In this *de novo* hearing, a showing was made by the Appellant to overturn the denial of the renewal application but with the above delineated conditions imposed on the License.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of the Board denying the Appellant’s License renewal be overturned, but with the conditions imposed as outlined above.¹³

Dated: June 14, 2022



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:

 X ADOPT
 REJECT
 MODIFY

Dated: 06/14/2022


Elizabeth M. Tanner, Esquire
Director

¹³ It should be noted that if the Appellant fails to comply with these conditions of its License, such a failure could be considered a statutory breach of maintaining conditions of licensing pursuant to R.I. Gen. Laws § 3-5-21.

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 15th day of June, 2022 that a copy of the within Decision and Notice of Appellate Rights were 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, R.I. 02903, Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, R.I. 02904, and Louis A. DeSimone, Jr., Esquire, 1554 Cranston Street, Cranston, R.I. 02920 and by electronic delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.

Diane L. Paravisini
