

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

Applegate Realty, Co.	:	
National Development Group, Inc.	:	
Appellant,	:	
	:	
v.	:	DBR No.: 22LQ010
	:	
Town of Johnston, Board of Liquor	:	
Licensors,	:	
Appellee,	:	
	:	
and	:	
	:	
101 Bar and Grill d/b/a Bar 101,	:	
Intervenor.	:	

DIRECTOR'S ORDER RE: MOTION FOR STAY

The Director modifies the Hearing Officer's recommendation and issues this order with respect to the motion for stay filed by National Development Group, Inc. and Applegate Realty, Co. ("Appellants").

Sections I – VI and paragraphs 1-5 of Section VII of the Hearing Officer's recommended order attached hereto are hereby incorporated herein by reference. The remaining paragraphs of Section VII and Section VIII are deleted and replaced with the following:

"VIII. ORDER

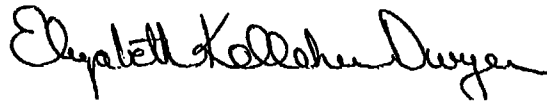
The Board determined to grant Intervenor's application for an expansion of the liquor license into unit 105 after a hearing held on June 13, 2022. Although in considering a request for stay, the Department may determine to maintain the *status*

quo in its discretion, the Department declines to do so here. The Appellant has not made the required strong showing that it will prevail on the merits of its appeal, and that it will suffer irreparable harm if the stay is not granted.

Based upon the foregoing, the Appellant's request to stay the Board's decision of June 13, 2022, is denied.

Nothing herein precludes, and the Department certainly encourages, the parties continuing their efforts to consensually resolve the parking and trespass issues central to this matter."

Dated: July 29, 2022



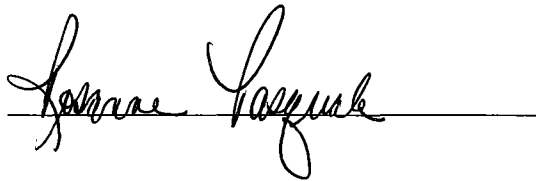
Elizabeth K. Dwyer, Esq.
Interim Director

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES AN INTERLOCUTORY ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-15. 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 APPROPRIATE TERMS.

CERTIFICATION

I hereby certify on this 1st day of August, 2022, that a copy of the within Order was sent by first class mail, postage prepaid, and by electronic delivery to the following: Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, RI 02904 peter@petrarcalaw.com; James P. Marusak, Esquire, Gidley, Sarli & Marusak, LLP, One Turks Head Place, Suite 900, Providence, RI 02903 jpm@gsm-law.com; Dylan Conley, Esquire, Law Office of William J. Conley, Jr., 123 Dyer Street, 2nd Floor, Providence, RI 02903 dconley@wjclaw.com, and by electronic-delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, RI 02920 pamela.toro@dbr.ri.gov.

A handwritten signature in cursive script, reading "Lorraine Pasquale", is written over a horizontal line.

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Appellant,	:	
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v.	:	
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Town of Johnston, Board of Liquor Licensors	:	DBR No. 22LQ010
Appellee.	:	
	:	
and	:	
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101 Bar and Grill d/b/a Bar 101,	:	
Intervenor.	:	

ORDER RE: MOTION FOR STAY

I. INTRODUCTION

This matter arose from an appeal and stay request filed on June 16, 2022 by the National Development Group, Inc. and Applegate Realty, Co. (“Appellants”) with the Department of Business Regulation (“Department”) pursuant to R.I. Gen. Laws § 3-7-21 regarding the decision taken on June 13, 2022 by Town of Johnston, Board of Liquor Licensors (“Board” or “Town”) to grant an application by 101 Bar and Grill d/b/a Bar 101 (“Intervenor”) for an expansion of the liquor license.¹ A remote hearing on the motion to stay was heard on July 19, 2022 before the undersigned who was delegated to hear this matter by the Director of the Department. All parties were represented by counsel.

¹ Prior to hearing, the Intervenor moved to intervene which was granted.

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 exercises the licensing function. *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. THE TRAVEL OF THIS MATTER

This appeal arises out of Department decision issued on May 18, 2022 entitled *Applegate Realty Co. et al. v. Town of Johnston, Board of Liquor Licensors*, DBR Nos. 21LQ008;-010,-013. In that decision, the Department exercised its *sua sponte* authority to hear an appeal regarding the Intervenor's liquor license. When the Intervenor was initially granted a liquor license, the license covered units 103 and 104 of its premise. In 2020, the Intervenor expanded its liquor service into unit 105 without following the statutory and regulatory requirements of applying to the Board for permission to expand its liquor license. The Department remanded the matter to the Board so that the Board could hold the appropriate hearing on such an application. The Intervenor then applied to the Board to expand its premises into unit 105, and the Board heard the application on June 13, 2022 at which time it granted the expansion into unit 105. The Appellants then appealed the grant

of the license expansion. Prior to a hearing on the stay, the parties tried to resolve this issue but were unsuccessful. The May 18, 2022 decision is incorporated by reference into this order.

IV. RELEVANT STATUTE

R.I. Gen. Laws § 3-5-23 governs disorderly conduct. It 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 imposing a sanction on a liquor license, 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, 295-6 (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.

It is to be conceded that this imposes upon a licensee an onerous burden in the management of the licensed premises. It is, however, within the authority of the legislature, the liquor traffic being peculiarly within the police power of the state.

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.

Thus, 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, 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 (R.I. 1966). See also *Scialo v. Smith*, 99 R.I. 738 (R.I. 1965). See also *A.J.C. Enterprises; Schillers*; and *Furtado v. Sarkas*, 118 R.I. 218 (1977).

V. STANDARD FOR ISSUANCE OF A STAY

Under *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (R.I. 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 Appellants abut the Intervenor on either side. They argued that the Intervenor's expansion of the premises has caused illegal parking, trespass, and property damage to their property. The Appellants relied on their exhibits submitted to the Board including reports by security and a private investigator regarding those who park in their parking lots and various reports showing property damage, public urination, illegal parking, and towing. The Appellants argued that the property damage, trespass, illegal parking are caused by the Intervenor's patrons parking on their property. The Appellants argued that the Intervenor knowingly expanded into unit 105 in contravention of the liquor licensing regulation. They argued that the Intervenor is causing a nuisance as described in *Schillers* and *Cesaroni* and found in the Department case of *The Vault Lounge, LLC v. City of Providence, Board of Licenses*, DBR No. 17LQ018 (7/12/18).

The Intervenor argued that the incidences detailed by the Appellant are not related to it and that this matter is not like a Providence nightclub so is not like *The Vault*. It argued that the parking issue is from 4:00 p.m. to 9:00 p.m., and the unit 105 expansion has not increased business over 10% and is mostly food. It argued that there is a lot of evidence that it will introduce at hearing that will show there is no link between unit 105 and the Appellants' allegations.

The Board argued that it has a strong likelihood of success on the merits. It argued that it is a local licensing authority and has knowledge of the area and the various businesses. It argued that it represents the public interest, and there will be harm to the public interest if neighbors try to impose their will on a licensed business.

VII. DISCUSSION

The liquor licensing statute balances many interests. It allows for local control of certain liquor licenses, but those local decisions may be appealed to the Department as the super licensing

authority. It allows abutters to appeal so that there is the ability by applicants and licensees and abutters to check or oversee local decisions. It does not provide that all local decisions are final.

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 *El Patio Bar and Grill v. City of Providence, Board of Licenses*, DBR No.: 19LQ033 (1/23/20); *Domenic J. Galluci, d/b/a Dominic's Log Cabin v. Westerly Town Council*, LCA-WE-00-04 (10/25/00); and *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. See *W&D Parkview Enterprise, Inc. d/b/a Parkview v. City of Providence, Board of Licenses*, DBR No.: 19LQ021 (12/12/19).

In this matter, the Intervenor expanded its licensed premises without going through the requisite local licensing process. When it was pointed out to the Intervenor that it had not followed the regulatory process, instead of filing an application, it moved to clarify its licensed premises with the Board. See May 18, 2022 decision. As noted in that decision, it is troubling that the Intervenor moved into unit 105 without filing with the Board for the approval of such an expansion. Such behavior either indicated a lack of knowledge regarding liquor licensing requirements or an intentional violation of the licensing regulation.

While the Department usually defers to local licensing authorities in terms of their granting or denying liquor license applications, this matter is different in that the Intervenor expanded and served liquor in an unlicensed premise for over a year. Thus, it was in contravention of licensing requirements for over a year. Therefore, there are two (2) issues in terms of this expansion application: first, the Intervenor's flagrant violation of liquor licensing requirements and whether that impacts its fitness for licensing; and second, the Appellants' arguments that this illegal expansion caused and is causing a nuisance *vis a vis* illegal parking, property damage, trespass, etc. While the Appellant is not a Providence nightclub, *The Vault* demonstrates what can happen – denial of renewal application

- when there is an ongoing nuisance caused by a liquor licensee and that licensee fails to take action to mitigate or remedy such nuisances.

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. In this situation, the *status quo* would be that there is no liquor license for unit 105. The expansion was not countenanced by the local authority until it was ordered by the Department to hold a hearing. In that decision, the Intervenor was ordered to cease and desist from using unit 105 for the sale, service, or storage of alcoholic beverages.

The Intervenor argued that at a full hearing, it will show that there is no connection between its liquor service in unit 105 and any of the Appellants' allegations regarding a nuisance. Indeed, a full hearing will allow the parties to expand on the issue of fitness of the licensee as well as the issue of whether the Intervenor is causing a nuisance. However, pending the full hearing, the *status quo* shall be maintained of no liquor sale, service, or storage in unit 105.

The May 18, 2022 decision noted that a liquor licensee certainly can be sanctioned for violating statutory and regulatory requirements.² In this matter, the Intervenor had been serving

² R.I. Gen. Laws § 3-5-21 provides 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:

- (1) Breach by the holder of the license of the conditions on which it was issued; or
- (2) Violation by the holder of the license of any rule or regulation applicable; or

(5) Operating in any manner inconsistent with the license, or in any manner consistent with another class license, without first coming before the board for a new license application.

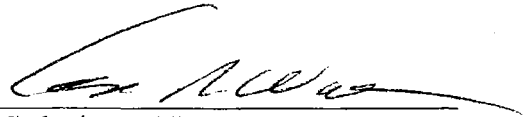
(b) Any fine imposed pursuant to this section shall not exceed five hundred dollars (\$500) for the first offense and shall not exceed one thousand dollars (\$1,000) for each subsequent offense. For the

alcohol in unit 105 since 2020 in contravention of the Regulation. The May 18, 2022 decision noted that at that time, the Department would not consider the imposition of either a monetary penalty or suspension or revocation of the Intervenor's liquor license (which covers units 103 and 104) for this continuous and overt violation. However, such penalties are certainly within the Department's authority to impose in its oversight of liquor.³ The Department will consider as part of the full hearing whether any sanctions should be imposed on the Intervenor's liquor license for such violations.

VIII. RECOMMENDATION

Based on the foregoing, the Appellants' motion to stay the grant of the expansion is granted so that the Intervenor shall immediately cease and desist from using unit 105 for the sale, service, or storage of alcoholic beverages pending the outcome of this hearing.

Dated: July 20, 2022


Catherine R. Warren
Hearing Officer

purposes of this section, any offense committed by a licensee three (3) years after a previous offense shall be considered a first offense.

³ R.I. Gen. Laws § 3-7-21 provides in part as follows:

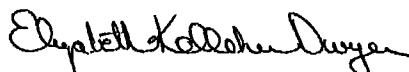
Appeals from the local boards to director. (a) Upon the application of any petitioner for a license, or of any person authorized to protest against the granting of a license, including those persons granted standing pursuant to § 3-5-19, or upon the application of any licensee whose license has been 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. Notice of the decision or order shall be given by the local or licensing board to the applicant within twenty-four (24) hours after the making of its decision or order and the decision or order shall not be suspended except by the order of the director.

INTERIM ORDER

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

_____ ADOPT
_____ REJECT
 X MODIFY (see attached)

Dated: 7/29/2022



Elizabeth Kelleher Dwyer, Esquire
Acting Director

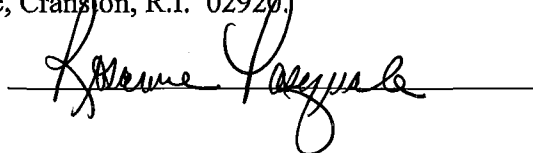
A hearing will be scheduled on a mutually convenient date to be determined by the parties.⁴

NOTICE OF APPELLATE RIGHTS

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CERTIFICATION

I hereby certify on this 1st day of ^{August} ~~July~~, 2022 that a copy of the within Order was sent by first class mail, postage prepaid and by electronic delivery to the following: Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, R.I. 02904 Peter@petrarcalaw.com; James P. Marusak, Esquire, Gidley, Sarli & Marusak, LLP, One Turks Head Place, Suite 900, Providence, R.I. 02903 jpm@gsm-law.com; Dylan Conley, Esquire, Law Office of William J. Conley, Jr., 123 Dyer Street, Second Floor, Providence, R.I. 02903 dconley@wjclaw.com and by electronic delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.



⁴ Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant is responsible for the stenographer. They parties may also still try to settle this matter prior to hearing.