

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

Philip Johnston, JFC Auto Sales,	:	
JFC Propane, Johnston’s Enterprises Inc.,	:	
Appellants,	:	
	:	
v.	:	
	:	
Providence Board of Licenses	:	DBR No.: 23LQ004
Appellee	:	
	:	
and	:	
	:	
Shivkrupa Corp. 309 Manton Avenue and	:	
Shivkrupa Corp. 896 Manton Avenue,	:	
Intervenors.	:	

DECISION

I. INTRODUCTION

This matter arose pursuant to an appeal and motion for stay filed on May 19, 2023 by Philip Johnston, JFC Auto Sales, JFC Propane, and Johnston’s Enterprises Inc. (“Appellants”) with the Department of Business Regulation (“Department”) pursuant to R.I. Gen. Laws § 3-7-21 regarding the decision taken on May 11, 2023 by the Providence Board of Licenses (“Board”) granting Shivkrupa Corp. 309 Manton Avenue’s application to transfer its Class A liquor license (“License”) from Shivkrupa Corp. 309 Manton Avenue to Shivkrupa Corp. 896 Manton Avenue (“Intervenors”).¹ The Appellants requested a stay to which the Board and Intervenors objected. The Department denied the stay request by an order dated June 2, 2023. A full hearing was held

¹ The Intervenors were granted permission to intervene on May 31, 2023.

on June 26, 2023 before the undersigned² with the parties resting on the record.³ The parties were represented by counsel.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-2-1 *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. ISSUE

Whether to uphold or overturn the Board’s grant of the transfer of Intervenor’s Class A liquor license.

IV. MATERIAL FACTS AND TESTIMONY

Philip Johnston (“Johnston”) testified on behalf of the Appellants. He testified that he owns the Appellants, and his property abuts the proposed location [896 Manton Avenue] for the Intervenor’s Class A liquor license. He testified that he runs a propane company and has a propane tank on his property which is located about six (6) feet from the Intervenor’s property line. He testified that he uses the propane tank daily to fill anything that runs on propane with grills being the most popular. He testified his tank is only one (1) year old, but he has been pumping propane probably for 35 to 40 years. He testified that he uses the tank about 100 or more times a day. He testified that he is in compliance with all safety regulations. He testified that he is concerned with the Intervenor’s proposed location because he believes there will be an increase in traffic with a liquor store at that location. He testified there is not much traffic at the auto sales business which is currently at the proposed location. He testified that he is concerned that people who drink also smoke. He testified that he is concerned about any ignition source even starting a car next to his property (transcript at 21-22). Joint Exhibit One (1) (photographs of the properties).

² Pursuant to a delegation of authority by the Director of the Department.

³ The Department hearing transcript was received on July 24, 2023.

On cross-examination by the Intervenor, Johnston testified that he wants to make sure whoever is next door is in compliance with all licensing requirements. He testified that he did not know if Providence was enough to sign off on the fire safety compliance by the Intervenor, and he thinks the State should sign off as well. He testified that he sells cars and makes repairs, but that is 25 feet from the propane tank. On re-cross by the Intervenor, he testified that he has never had an explosion or fire because of the propane. He testified he is concerned about the traffic that the liquor store will draw and smoking at that location.

On cross-examination by the Board, Johnston testified there is no leakage when one is filling a tank from the propane tank. He testified that when the propane is shut off, a miniscule amount of gas comes out. He testified that the propane tank is in a locked cage. He testified that the propane tank does not emit gas. He testified that there is an eight (8) to ten (10) foot wooden fence between his property and the Intervenor's property.

On cross-examination by the City, Johnston testified that he is worried about the amount of people going to the liquor store, and the type of people going to the store there. He testified that if the State Fire Marshal signed off, that would be fine.

Michael Dimeo ("Dimeo") testified on behalf of the Appellants. He testified to his experience in fire protection and suppression working for insurance companies, a nuclear power plant, and currently as a consultant. Appellants' Exhibit One (1) (Dimeo's resume). He testified that he is familiar with the various fire codes. Appellants' Exhibit Two (2) (list of fire codes). He testified that when fire codes are amended, a business does not have to retrofit for the updated code, but a new or renovated business would have to comply. He testified that he knew the Board was able to transfer a liquor license, but he did not realize until his testimony that day at hearing that the Providence building department and fire marshal also would review the building before

the issuance of the liquor license. (transcript at 67). He testified that he believes a fire protection engineer needs to review the liquor store to ensure it meets the code and is in compliance before the License is transferred. He testified that he only saw the outside of the proposed liquor store, but he has concerns about the building. He testified that he is concerned about compliance with the building code in terms of whether there is a fire sprinkler system and about OSHA compliance with whether there will be controls on smoking inside the building. (transcript at 72-74).

Dimeo testified that the Appellants put in a new propane tank last year so had to meet the amended fire code. He testified that he was able to obtain a variance for the propane tank for the Appellants because he put in a galvanized steel barrier next to the tank (parallel) that is 50 feet long and six (6) feet six (6) inches high. (transcript at 93-94).⁴ He testified that the Appellants' safety is top of the line. He testified that there are four (4) controls to stop propane from being spilled. He testified that if someone flicked a cigarette, it would never cause a fire on the Appellants' property. He testified that a cigarette could cause a fire on the Intervenors' side of the property. (transcript at 104-105).

On cross-examination by the Intervenors, Dimeo testified that the maximum amount of propane that could escape is six (6) pounds, and it would begin to dissipate because it is heavier than air. He testified that there is no way that would make the tank explode. He testified that there are no potential catastrophes there. (transcript at 111).

On cross-examination by the Board, Dimeo testified that when filling a tank, there would not even be a pound of propane in the nozzle. He testified the tank is safe.

Brijesh Patel testified on behalf of the Appellants. He testified that he is the father of the applicant for the transfer of the liquor license, but he agreed to buy the proposed location. He

⁴ The variance request dated August 1, 2017 and the decision granting the variance dated December 21, 2017 were submitted after hearing and admitted as exhibits by email dated July 5, 2023.

testified that he measured the proposed location's parking lot and fence, and the proposed location has a fence about eight (8) feet three (3) inches. He testified that the building is about 26 feet from the fence between the two (2) properties. On cross-examination, he testified that there will be no parking next to the fence between the two (2) properties, and there will be no smoking in the parking lot. On redirect, he testified that if the purchase and sale agreement goes through, his intention would be to comply with all State and local codes in the construction of the building.

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 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 (R.I. 1998).

B. **The Appeal before the Department**

The Department has broad and comprehensive control over the traffic in alcohol. Indeed, the Department's power of review is so broad that it has been referred to as a "state superlicensing board." *Baginski v. Alcoholic Beverage Comm'n.*, 4 A.2d 265, 267 (R.I. 1939). Thus, the Director has the authority under R.I. Gen. Laws 3-7-21, "to make any decision or order he or she considers

proper.”⁵ The hearing before the undersigned is a *de novo* hearing so that the parties start afresh during the appeal. *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). A new hearing was held for this appeal. 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 its decision but whether the Board presented its case before the undersigned. The undersigned will make her findings on the basis of the evidence and will determine whether that evidence justifies said decision.

C. Arguments

The Appellants argued that the propane tank is six (6) feet from the property line, but one cannot account for a cigarette being flicked which is a safety concern. They argued that any transfer should be conditioned on the State Fire Marshal inspecting the proposed location.

The Intervenors argued that the Appellants’ expert testified that the tank is safe even if all the systems failed so the public safety concern is misguided.

Both the City and Board argued that fire reviews are conducted by the City, and there is no need for the State Fire Marshal to be involved. They argued that there are no safety concerns based on the Appellants’ expert’s testimony that the propane tank is safe.

⁵ 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.

D. Discussion

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 *Domenic J. Galluci, d/b/a Dominic’s Log Cabin v. Westerly Town Council*, LCA–WE-00-04 (10/25/00); *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. *Infra*. See *W&D Parkview Enterprise, Inc. d/b/a Parkview v. City of Providence, Board of Licenses*, DBR No.: 19LQ021 (12/12/19). In light of the broad discretion given to the Board, the undersigned only reviews the Board's decision for evidence to support it. The Board's decision need not be unassailable but rather there must be evidence to support the Board's decision. Therefore, the issue is whether there was competent evidence to support the Board's discretionary decision to grant the transfer of License.

The Appellants' safety concern articulated at the Board hearing⁶ and the stay hearing before the Department was that cigarettes from the Intervenors' customers could ignite the propane tank's fumes. At hearing, Johnston testified that he was concerned that customers of a liquor store were more likely to smoke than customers of an auto sales' company.

The evidence was that there is an eight (8) foot fence between the two (2) properties, and there is a 50 foot long and six (6) foot high metal barrier next to the propane tank. Dimeo's testimony did not support the expressed concern about smoking or any other source of ignition causing a fire in the propane tank. Indeed, he testified how safe the tank was and how he was able to get a variance because of various extra safety measures that he proposed for the tank. He testified no fire could be ignited at the propane tank. Instead, Dimeo's concern was about the proposed location's building itself. Indeed, he was unaware that a condition of the transfer (or grant) of a liquor license is that compliance with building and fire safety codes (etc.) must be shown by an applicant.

⁶ See <https://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=14091&Format=Minutes> (audio of Board's May 11, 2023 meeting).

There was no evidence at hearing that supported the concern over a possible stray cigarette causing a fire at the propane tank. Dimeo's testimony was that he was concerned about the safety of the proposed location based on his viewing from the street. Like all transfers or grants of liquor licenses, this transfer is subject to compliance with building and fire code (and all applicable statutes and regulations).⁷ The parties did not dispute that the transfer would be conditioned on the City inspecting the building at the proposed location for fire code compliance. Instead, the Appellants requested that in addition to the City fire inspection, the State Fire Marshal also be required to inspect the Intervenors' premises.

However, there was no showing that the State Fire Marshal need be involved. The transfer of the License is conditioned on compliance with all applicable codes. The City is responsible for those types of inspections. In addition, there was no evidence that the Intervenors' proximity to the propane tank was a safety risk.

Based on the foregoing, there are no grounds to overturn the Board's May 11, 2023 decision to grant the transfer of License as there was competent evidence to support said decision.

VI. FINDINGS OF FACT

1. On May 11, 2023, the Board approved the transfer of License from its location at 309 Manton Avenue to 896 Manton Avenue.
2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellants appealed the decision by the Board to the Director of the Department.
3. The Appellants requested a stay of the Board's decision which was denied by order of the Department dated June 2, 2023.
4. A *de novo* hearing with oral closings was held June 26, 2023.

⁷ Indeed, at the Board hearing specific mention was made of certain fire code requirements for the Intervenors.

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:

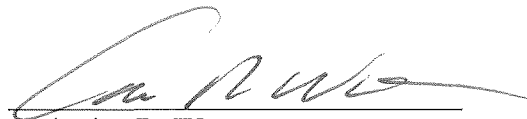
1. The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-2-1 *et seq.*, R.I. Gen. Laws § 3-7-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

2. In this *de novo* hearing, no showing was made by the Appellants that would warrant overturning the Board's decision to grant the transfer of the License.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of the Board to grant the transfer of the License be upheld.

Dated: August 10, 2023



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:

ADOPT
 REJECT
 MODIFY

Dated: August 11, 2023


Elizabeth Kelleher Dwyer, Esquire
Director

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TOR.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 APPROPRIATE TERMS.

CERTIFICATION

I hereby certify on this 11th day of August, 2023 that a copy of the within Order and Notice of Appellate Rights were sent by electronic delivery and first class mail, postage prepaid, and by electronic delivery to the following: Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, R.I. 02903 and mariomartonelaw@gmail.com, Louis A. DeSimone, Jr., Esquire, 1554 Cranston Street, Cranston, R.I. 02920 and ldatty@gmail.com, John J. DeSimone, Esquire, 735 Smith Street, Providence, R.I. 02908 and jjd@desimonelaw.net, and Robert A. Peretti, Esquire, 1140 Reservoir Avenue, Suite 201, Cranston, R.I. 02920 and bob@peretti.legal, and by electronic delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.

Megan Mihara
