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

Perez Smith, LLC d/b/a Paris Bistro, Appellant,	:	
	:	**DBR No. 24LQ005**
v.	:	
City of Providence, Board of Licenses, Appellee.	:	

ORDER RE: MOTION FOR STAY

I. INTRODUCTION

This matter arose from an appeal and motion for a stay filed on May 31, 2024 by Perez Smith, LLC d/b/a Paris Bistro ("Appellant") with the Department of Business Regulation ("Department") pursuant to R.I. Gen. Laws § 3-7-21 regarding the decision taken on May 30, 2024 by the City of Providence, Board of Licenses ("Board") to revoke the Appellant's extended liquor license (Class BVX) and reduce its hours of operation to midnight for 30 days. A hearing on the motion to stay was heard on June 3, 2024 before the undersigned who was delegated to hear this matter by the director of the Department.

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. 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 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). 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 BASIS FOR DISCIPLINE

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.
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> 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).

The Department reviews sanctions to ensure statewide consistency and appropriateness in the situation. It also supports progressive discipline barring the rare and extreme event where revocation may be warranted without prior discipline. It also accepts the principles of comity and deference to the local authorities and their desire to have control over their own town or city. At the same time, pursuant to R.I. Gen. Laws § 3-2-2 and R.I. Gen. Laws § 3-7-21, the Department ensures that tensions between local boards and licensees are settled in a consistent manner. Nonetheless, there is not a mechanical application of sanctions as each matter has its own sets of circumstances. See *C&L Lounge, Inc. d/b/a Gabby's Bar and Grille; Gabriel L. Lopes v. Town of North Providence*, LCA – NP-98-17 (4/30/99). At the same time, a sanction cannot be arbitrary and capricious. The unevenness of the application of a sanction does not render its application

unwarranted in law but excessive variance would be evidence that an action was arbitrary and capricious. *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (upholding revocation for a series on infractions). See *Jake and Ella's v. Department of Business Regulation*, 2002 WL 977812 (R.I. Super.) (R.I. Super.) (overturning a revocation of a liquor license as arbitrary and capricious).

IV. 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.

V. DISCUSSION

The information received by the undersigned is based on representations of the parties. The undersigned did not have a transcript of the Board hearing; however, an audio of the Board's hearing for May 23, 2024 was available online, and the undersigned listened to that recording[1] as

[1] See https://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=14764&Format=Minutes (audio of Board's May 23, 2024 meeting).

well as the recording of the decision made on May 30, 2024.[2] During the May 23, 2024 hearing, videos of the incidences at issue were played for the Board. The undersigned did not review the videos. However, the following was agreed to by the parties.

At the Board hearing it was agreed that on Sunday (May 5, 2024) into Monday (May 6, 2024), the Appellant closed at 1:00 a.m. on May 6, 2024. When the Appellant had been opened that evening, a patron had behaved inappropriately (physically grabbed waitstaff) and was ejected.

At the stay hearing, it was agreed that at approximately, 1:17 a.m., this former patron/suspect returned to the Appellant and tried to kick the door in. He did not get inside. When he was trying to kick the door in, he appeared to have a gun (the way he held his hand). The Appellant's owner, Perez Smith, and a staff member went out the back entrance to the front where the suspect was outside. The staff member apparently had a knife. The owner had a gun which based on the Board hearing, he pointed at the suspect. The parties represented that this confrontation lasted over five (5) minutes but less than ten (10) minutes. At the Board hearing, it was represented that it was seen on video that Mr. Smith and the suspect shook hands. At this time, no one called the police. At the Board hearing, Mr. Smith testified that he told the waitstaff to call the police before he went outside but no one did. He testified that he did not confirm with his staff when he came back inside that they had called the police. He testified that he believed the incident was over at that time. The suspect then returned about 45 minutes later (about 2:15 a.m.) and fired 19 shots outside the Appellant. No one was hurt.

The Appellant argued that the Appellant cannot be held responsible for the 2:15 a.m. shooting as the suspect was not a patron so that there was no nexus between the Appellant and suspect, and there was a 45 minute delay during which the suspect lay in wait. The Appellant

[2] See https://providenceri.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=14765&Format=Minutes (audio of Board's May 30, 2024 meeting).

argued that it knows better and would never do what it did again. The City argued that the Appellant escalated the issue when the owner went outside with his gun and did not call the police.

This issue here is not about a patron but about an owner who chose to chase after the suspect who was outside by going into the street brandishing a gun. Not only did the owner bring a gun with him but a waitstaff brought a knife. Instead of calling the professionals, the owner sought a confrontation outside as if he was at the O.K. Corral. While the owner testified he told the staff to call the police, no one from the Appellant did, and the owner did not confirm if the police were called. It is true that it was 45 minutes later that the suspect returned again and fired shots outside the premises. However, the Board's concern was that the owner chose to escalate the situation.

At the same time, the Appellant has changed its format without notifying the Board. It went from fine dining to a lounge. The owner testified at the Board hearing that it could not make it as a restaurant. The Board required the Appellant to provide a new business plan which would include a security plan as it is now a lounge. This was not conditioned on re-opening.[3]

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[3] In terms of change of business plans, *Ice Lounge, Inc. d/b/a Ice Lounge v. The City of Providence Board of Licenses*, DBR No.: 14LQ064 (2/27/15) cited to *C&L Lounge, Inc. d/b/a Gabby's Bar and Grille; Gabriel L. Lopes v. Town of North Providence*, LCA – NP-98-17 (4/30/99) (upheld by *Gravino v. City of Warwick and Department of Business Regulation*, 1999 WL 485869 (R.I. Super.)) in discussing the consequences of such a change. On page four (4) of the *Ice* decision, footnote five (5) noted as follows.

> In *Gabby's*, the licensee's owner represented at its licensing hearing that it would create a family dining atmosphere but at the revocation hearing, he testified that he had to diversify its format. *Gabby's* found that the licensee had adopted a new business format that caused regular disorderly incidents and that it had been warned by the town but had continued to operate with that type of business. The decision found that when a licensee changes its business format, it does so at its own peril and must face the consequences:
>
> > There is nothing per se illegal about a licensee changing his business format without Town approval to maximize profits. However, a Town need not tolerate a business format yielding negative neighborhood conditions it never bargained for, and specifically warned against, at the time of licensure.[footnote omitted] A liquor licensee has the responsibility to follow through on his representations of how he will conduct his business, made at the time of licensure. When a liquor licensee shifts his business format from his representations, he does so at his own peril. In the instant case the result of the shift was volatile disorderly conditions warned against as a condition of licensure. *Gabby's*, at 15.

The Appellant has been closed for 25 days, and the Board gave the Appellant credit for those days served. The issue is whether those 25 days – a suspension – is an appropriate penalty or should additional penalties be imposed, and if so what should they be. The Board revoked the extended license and reduced hours of operation to midnight for 30 days.

Applying the criteria from *Harsch*, a stay will not be issued if the party seeking the stay cannot make a strong showing that it will prevail on the merits of its appeal. The Board (an interested party) has an interest in ensuring that liquor licensees – where the public gather - are compliant with their statutory obligations, and that the public is safe. And there is a public interest in maintaining public safety.

There is no doubt that there was a violation by the Appellant in escalating the situation. The Appellant argued that the suspect's return 45 minutes later cannot be blamed on the Appellant.

In 2022, the Board adopted rules and regulations in relation to operations and procedures for licensing. Licensing authorities rely on representations on applications in granting liquor licenses when they may not have granted the license or granted a conditional license with a different business plan. In the 2022 rules, § 25 provides as follows:

> Material Misrepresentation and Change of Business Model.
> a. Material ·Misrepresentation. When the Board of Licenses grants a license, it does so based on a specific presentation regarding business model, management, marketing, security, and nuisance mitigation. If a licensee departs from the business model presented to the Board of Licenses, it may be subject to appropriate sanctions.
> b. Change of Business Model. A licensee may change its business model without applying for a new license, however, it must present the Board of Licenses with a presentation regarding the new business model prior to enactment. Failure to present the Board of Licenses with the new business model may result' in a finding of material misrepresentation and corresponding sanctions.
> 1. Material Change in Externalities. If the Board of Licenses finds that the proposed change in business model will cause a material change in externalities imposed on immediate abutters, then the Board of Licenses shall require the applicant to provide written notice by certified and standard mail to all abutters within 200' of the four walls of the premises. The applicant may rely on the City's GIS generated abutter's list to identify all parties requiring such notice.

The Board's 2022 rules are not a statute or an ordinance but can be considered for liquor licensing to be a condition of licensing. The Appellant was licensed prior to 2022. Nonetheless, it failed to present its new plan to the Board. And as previously noted by the Department, a licensee changes its format at its own peril and faces the consequences.

That may be but there is still the issue of the appropriate penalty for the owner's actions. These issues will be fleshed out at hearing.

It is discretionary to issue a stay in order to maintain the *status quo* pending an appeal. In this matter, it cannot be ascertained what would be an appropriate sanction for the recent violations, if proved, without a full hearing. If a stay is not granted for the extended license revocation, the Appellant will not have a meaningful appeal. The granting of a partial stay maintains the *status quo* and ensures public safety pending the full hearing. Thus, the following conditions shall be imposed on the granting of the stay.

1. Before being able to use the extended liquor license, the Appellant must submit its new business and security plan to the Board.

However, a stay will not be recommended for the midnight closure for 30 days. This allows the Appellant to safely open while it is gaining approval for resumption of usage of the extended liquor license from the Board. It will not be able to use its extended license until the Board accepts its business plan and security plan. Nothing precludes the Board and City from reaching a settlement in this matter prior to a full hearing.

VI. RECOMMENDATION

Based on the foregoing, the undersigned recommends that a stay be granted of the revocation of the extended liquor license subject to the condition delineated above pending a full hearing before the Department.

Dated: June 4, 2024

Catherine R. Warren
Hearing Officer

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
_____ MODIFY

Dated: June 5, 2024

Elizabeth Kelleher Dwyer, Esquire
Director

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

NOTICE OF APPELLATE RIGHTS

THIS ORDER 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 THE APPROPRIATE TERMS

CERTIFICATION

I hereby certify on this 5th day of June, 2024 that a copy of the within Decision and Notice of Appellate Rights was sent by 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; Louis A. DeSimone, Jr., Esquire, 1554 Cranston Street, Cranston, R.I. 02920; and Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, R.I. 02904, and by electronic delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.

Megan Mihara

[4] Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant is responsible for the stenographer.