

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE COMPLEX, BLDG 68-69
1511 PONTIAC AVENUE
CRANSTON, RI 02920**

**Megan Kenney,
Appellant,**

v.

**Providence Board of Licenses,
Appellee.**

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DBR No.: 14LQ044

DECISION

I. INTRODUCTION

On or about July 25, 2014, the Providence Board of Licenses (“Board”) denied Megan Kenney’s (“Appellant”) application for a Class C liquor license (“License”). Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed the Board’s decision to the Director of the Department of Business Regulation (“Department”). Pursuant to R.I. Gen. Laws § 3-7-21(c), the parties agreed to base most of the appeal on the record before the Board. Further testimony and oral closings were held on October 24, 2014 before the undersigned sitting as a designee of the Director. The parties rested on the record.¹

II. JURISDICTION

The Department has jurisdiction over this matter pursuant R.I. Gen. Laws § 3-7-21, 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 application for the License.

¹ The undersigned received the transcript of hearing on October 28, 2014.

IV. MATERIAL FACTS AND TESTIMONY

At the July 23, 2014 Board hearing, the Board members did not find any problems with the Appellant's experience or business plan. However, the Board discussed that it felt that the business plan would not work in that location as it felt there were no young professionals to which the bar could cater. The Board discussed that the previous licensee (Louie's) at that location had its license revoked for several underage drinking incidents and it felt that the only way for the Appellant to prosper in that area would be to attract underage drinkers despite her intentions. Some Board members indicated on the record and two (2) city councilors by letter indicated that there is a proposed development project for this area and this venue would not fit with the proposed development plan. There was also a concern expressed about parking.

At the Board hearing, Virginia and Teofila Carmond both spoke against the application. They are neighbors and stated that the bar would be noisy and there already is noise seven (7) days a week. Mr. Carmond stated that the existing bars make noise from 11:00 p.m. to 2:00 a.m. and there is already a club next door, Club Escape. Sergeant David Tejada from the License Enforcement Unit stated his opposition to the application because of the underage drinking in the area at the now closed Louie's and Ava's Wrath. He stated that there is a college in walking distance from the proposed location and the only type of bar that can survive in that area is an underage bar as there are no other type of patrons. Lieutenant Patrick Reading, district commander, objected to the application and stated that if he could get rid of Ava's Wrath that would be very good. Lieutenant Alyssa DeAndrade, prior district commander, objected to the application. She stated that there will be problems with underage drinking since the neighborhood does not have the young professionals. There were also three (3) letters of objection received at the Board hearing. Two (2) letters indicated a blanket objection with no

reasons given and the third letter indicates its opposition because of late night noise from 11 p.m. to 2:00 a.m. at Club Escape. See City's Exhibit One (1) (record and transcript of hearing).

At the Department hearing, Major David Lapatin, commanding officer of investigative division, testified on behalf of the City. He testified that he is familiar with the proposed location and objected to the granting of the License because Louie's had a history of underage drinking going back to the 1990's from Providence College and now Johnson & Wales is in the area as well. He testified that the bars in the area cannot survive without underage drinking and in his opinion, the Appellant could not survive without underage drinking. He also testified that he is concerned for the neighborhood and the parking situation. On cross-examination, he testified that Louie's license was revoked for underage drinking.

At the Board hearing, the Appellant stated that she lives six (6) minutes away and has friends in the neighborhood and thinks there is a neighborhood and while it is a college area, it is also a neighborhood that young professionals can afford these days. Her experience includes graduating from Johnson & Wales and recently opening a restaurant in Cranston.

V. DISCUSSION

A. **Standard of Review**

R.I. Gen. Laws § 3-7-8² provides for the granting of a Class C liquor license. 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

² R.I. Gen. Laws § 3-7-8 states in part as follows:

Class C license. – (a) A retailer's Class C license authorizes the holder of the license to keep for sale and to sell beverages at retail at the place described in the license and to deliver those beverages for consumption on the premises where sold. No beverages shall be sold or served after twelve o'clock (12:00) midnight nor before six o'clock (6:00) a.m. Local license boards in the several cities and towns may fix an earlier closing time within their discretion. The license authorizes the holder to keep for sale and sell beverages, including beer in cans, at retail at the place described in the license and to deliver those beverages for consumption on the premises.

function the board act (sic) 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 (1975). The Department has the same broad discretion in the granting or denying of liquor licenses. *Id.* at 177. See also *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 Commissioners*, LCA–CU-98-02 (8/26/98).

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 *International Yacht Restoration School Inc. and Jose F. Batista v. Newport City Council and Dockside North, LLC et al.*, DBR No. 02-L-0037 (6/30/03) at 9-10, the Department held as follows:

The undersigned recognizes that the Department has the same broad discretion to grant or deny licenses on original applications or transfer requests in a hearing de novo as that of a local board. See Reynolds at 86 R.I. at 177 (citing Kaskela v. Daneker, 76 R.I. 405, 407 (1950)). However, as stated in Kinniburgh, the Department, generally less familiar than the local board with individuals and/or neighborhoods associated with the application, will not simply substitute its opinion for that of the local board. [the decision then cites to Kinniburgh at 17 *infra*).

Furthermore, the Department has 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.

The Department has the same discretion as the local licensing authority to grant or deny a liquor license application. However, as discussed above, the Department relies on the local licensing authority's familiarity with the area. The Board has consistently reviewed the record at a *de novo* hearing to see if there is evidence supporting a local authority's decision. There are no reasons to vary from this long-standing review which is well within the Department's discretionary authority as a "super-licensing authority." See R.I. Gen. Laws § 3-7-21. See also *Tedford v. Reynolds*, 141 A.2d 264 (R.I. 1958). See also *Sugar, Inc. and Sharlene Alon v. City of Providence, Board of Licenses*, DBR No.: 09-L-0119 (3/9/10); *Crazy 8's Bar/Billiards v. Providence Board of Licenses*, DBR No.: 09-L-0042 (8/24/09); and *Krikor S. Dulgarian Trust v. Providence Board of Licenses*, DBR No.: 08-L-0175 (6/18/09).³

B. Arguments

The City argued that despite the fitness of the applicant, there are overriding issues such as public safety concerns regarding underage drinking and the parking and the history of that location. It argued that that it will be impossible to sustain a bar in that area without underage drinking and the neighborhood does not have the type of residents to which the Appellant plans to cater.

³ While *Wise Guys Deli, Inc. v. Providence Board of Licenses*, DBR No. 12-L-0075 (9/27/12) does not contain the language regarding the deference given by the Department to a local licensing authority in regards to decisions on a grant or denial of a new or transfer of a liquor license instead of exercising the Department's full discretionary authority, that decision found that the evidence did not support the Board's denial of license once conditions were imposed. Thus, it reviewed the matter for whether the evidence supported the local authority's decision.

The Appellant argued that the location is zoned for a bar so there is no issue regarding parking as it already zoned for a bar. The Appellant argued there was no evidence introduced to show that there are no young professionals living in the area. The Appellant argued that based on prior Department cases, generalized objections are not relevant and the discussion at the Board hearing about noise in the area really concerned the club in the area. The Appellant argued that while the police offered their opinions that the bar will not work without underage drinking, they have no experience running a bar and offered no specific reasons why the Appellant's business plan would not work. The Appellant argued that if indeed she resorts to underage drinking, the solution is simple, she will end up having her license revoked by the Board. The Appellant argued that she will follow her business plan.

C. Whether the Denial of the License Should be Upheld

The Board's reasons for denying the License can be summed up as follows: 1) the subject location had previously been licensed by the Board and was revoked for underage drinking; 2) there were objections from the city councilor, the police, and neighbors; 3) parking concerns; 4) proposed development; and 5) the only way the Appellant can make money is to have underage drinking. At the Department hearing, the Board relied on those same reasons.

i. Location and Underage Drinking

The Board and the police expressed concern that the prior licensee at said location had its license revoked after a series of underage drinking problems. The Board and the police both believe that the Appellant cannot succeed monetarily without resorting to catering to underage college students.

In *DeCredico v. City of Providence, Board of License Commissioners*, DBR No. LCA-PR94-27 (1/20/95) ("*DeCredico I*"), the applicant's liquor license application was rejected because

neighbors were concerned about the growing number of liquor-serving facilities in the vicinity and that the establishment would be “almost identical” to a past problematic bar at the proposed location. The Department⁴ found that at night the proposed establishment would attract a crowd similar to the previously problematic bar. The Department found that the applicant was a proven restaurant operator but did not have the requisite experience of managing a late-night, full-bar drinking establishment to be able handle the potential problems that had plagued the area in the past.

Similarly in *Crazy 8's Bar/Billiards v. Providence Board of Licenses*, DBR No.: 09-L-0042 (8/24/09), the applicant proposed to establish a bar in a location that previously was a troubled social club masquerading as a bar. The Department upheld the denial of the application as the applicant did not present sufficient evidence to show that conditions surrounding the proposed establishment would be any different than what had been experienced in the past and the applicant did not have the requisite experience to run a bar. Like *DeCredico I*, the applicant had not put enough separation between its proposed business and the past problem-causing establishment.

Conversely, in *DeCredico v. City of Providence, Board of License Commissioners*, DBR No. LCA-PR94-26 (1/23/95) (“*DeCredico II*”) upheld by *DeCredico v. City of Providence Board of Licenses*, 1996 WL 936872 (R.I. Super.), the applicants presented a well-financed project to open an upscale jazz club. Many neighbors objected to the application because of past problems with liquor licensees in the neighborhood. The decision found that the proposed club was likely to attract a different clientele from the patrons of the establishments that created problems for the neighborhood in the past. Thus, the liquor license application was approved despite objections from the neighbors. The decision found that a licensing authority can move a neighborhood

⁴ At the time of *DeCredico I*, the Liquor Control Administrator adjudicated said appeal. The position of Liquor Control Administrator was abolished by P.L. 1996, ch. 100 art. 36 § 4 with the Department assuming those functions. For ease of reference, any discussions of decisions issued by the Liquor Control Administrator will refer to the Department.

forward without duplicating past errors by denying application requests to those that are poorly planned or whose plan and locus are similar or identical to past problem spots.

It was undisputed before the Board that the Appellant has the experience to run the bar. The Board did not think the Appellant had a poor business plan but rather its concern was that despite her business plan, the bar would not succeed because of the neighborhood. In *Crazy 8's* and *DeCredico I*, neither applicant had the requisite experience to run their proposed new establishments differently than the prior licensees. In *DeCredico II*, the applicants had the experience and a plan. The Department has previously upheld the rejection of a liquor license based on location and an unacceptable business plan. In this matter, the Board's only objection is location.

ii. Local Objections

There were three (3) letters of objection received at the Board hearing. Two (2) of the letters indicated a blanket objection with no reason given and the third letter indicates its opposition because of late night noise from 11 p.m. to 2:00 a.m. at Club Escape. Two (2) neighbors appeared at the Board hearing and objected on the basis of late night noise from 11:00 p.m. to 2:00 a.m. that exists at Club Escape.

The neighbors' objections did not link the Appellant to any specific incidents. See *International Yacht Restoration School Inc.* (while there were 42 objectors to the granting of the license, the applicants had relevant experience, the town followed a policy of business development, and the objectors did not focus on specific incidents related to the applicants).⁵ See also *Krikor S. Dulgarian Trust v. Providence Board of Licenses*, DBR No.: 08-L-0175

⁵ *International Yacht* found that the neighbors did not "focus on specific incidents attributable to [the applicant] or its management, but rather on unruly behavior emanating" from the area. *Id.* at 10.

(6/18/09). However, neighborhood objections can demonstrate the negative impact a proposed licensee may have. See *Crazy 8's*; See *Domenic J. Galluci d/b/a Dominic's Log*.

In this matter, a few neighbors presented general concerns regarding noise rather than objections specifically related to the application. This is an application for a Class C license which by law closes at midnight. See R.I. Gen. Laws § 3-7-8. A Class C licenseholder may apply for a 1:00 a.m. closing time for Fridays and Saturdays; however, the Appellant did not apply for a late night weekend license. It will be closed by midnight. It will not be open on Sunday night. Unlike Club Escape, it will not be a late night establishment. There are conditions that can be attached to the license to meet such generalized non-specific concerns such as those raised at the Board hearing.

The police objected because the prior licensee in that location had on-going problems with underage drinking and the police believe the Appellant would have the same problems because of the neighborhood. Those concerns were addressed above and are addressed below.

iii. Parking

The Board expressed concern about parking. However, the Appellant has a parking lot. There was no evidence introduced that the Appellant did not have the required available parking spaces. Instead, it was represented that the area was zoned for a bar so presumably that would have taken parking into consideration. No evidence was introduced to support a finding that there was not enough parking for the Appellant's location.

iv. Development

The Board received a letter from two (2) city councilors indicating that there is a proposed development plan for this area which includes the proposed location and a nearby area. No evidence was introduced regarding the actual name of the developer, an actual plan, and/or any time

line for such plans. The Board indicated the developer wanted to develop residences and stores in the area (though there was no actual evidence introduced regarding potential plans). However, the fact that development is being proposed – no matter how speculative – belies the stated opinion at hearing that the area is just a college area with no potential patrons except for underage drinkers. In other words, what the Appellant sees in this neighborhood for her proposed young professional bar might be the same vision that the unnamed developer has. Right now the only inference that can be drawn from the unnamed potential developer is that there is more to the area than college students which undercuts the Board’s grounds for denial.

v. Underage Drinking

All liquor licensees run the risk of being patronized by underage drinkers. All liquor licensees are expected and required to ensure that such patronage does not occur. It may be that some areas have more underage drinkers than other areas and because of past history of a location *vis a vis* noise, disturbances, and underage drinking, new applications have been denied. However, such denials have been in concert with applicants who did not possess the requisite experience to run a liquor serving establishment or have an appropriate plan. The Appellant has the appropriate experience. Her plan is a young professional bar. She indicated at hearing that she would not rely on college identifications for entering the bar. In this matter, because of the history of Louie’s, the Board has a heightened concern for underage drinking. The Appellant is well aware of this concern and addressed it at the Board hearing via her business plan.

D. Conclusion

As articulated through liquor licensing decisions at the State court level and the Departmental level, the standard of review for a new license is subject to the discretion of the issuing authority. Such discretion must be based on reasonable inferences drawn from the

evidence. Arbitrary and capricious determinations not supported by the evidence are considered suspect. *Infra*. 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.

A licensee is not obligated to stay with the business plan presented to the board but if a licensee changes its business plan and that causes problems, the local licensing authorities take dim views. However, 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. See *Sugar, Inc., and Sharlene Alon v. City of Providence, Board of Licenses*, DBR No.: 09-L-0119 (3/8/10); *Newport Checkers Pizza, Inc. d/b/a Scooby's Neighborhood Grille v. Town of Middletown*, LCA-MI-00-10 (12/7/00).

The Board found that the Appellant was fit to hold a liquor license. The Board found that the Appellant had an acceptable business plan but found that it was unsuitable for this location because of the area. This decision has reviewed the various reasons for the denial of the application of the License and has found that some of the reasons (parking, developer) are not rationally supported by the evidence. In addition, the totality of these reasons does not support a denial of the License once certain conditions are imposed pursuant to *Thompson*. The imposition of conditions on the granting of the License ensures that this situation remains as presented by the Appellant and her interests and the Board's concerns about underage drinking and noise are met. See *Sugar*.

Therefore, this License shall be granted upon the following conditions:

1. The Appellant shall use an ID scanning machine and UV light for patrons' identification presented upon entrance.

2. The Appellant will not accept college identifications (as set forth in business plan).

3. The Appellant will only have ambient music (as represented at the Department hearing).

4. The Appellant shall be closed on Sundays and shall open at 4:00 p.m. (as represented at the Department hearing).

5. These conditions may be augmented by the Board, if necessary, because of new facts or circumstances.

6. These conditions shall be reviewed by the Board upon any renewal application filed for 2015 to 2016 and the Board may decide to vacate all, some, or none on the granting (if granted) of the renewal.⁶

7. The Appellant may request the Board to review these conditions at any time if she so desires.

Failure by the Appellant to comply with a condition(s) may result in sanctions by the Board for non-compliance with a licensing condition(s).

VI. FINDINGS OF FACT

1. On or about July 25, 2014, the Board denied the Appellant's 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. A *de novo* hearing was held on October 24, 2014 before the undersigned sitting as a designee of the Director. The parties rested on the record.

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

⁶ It should be noted that if the Appellant does request the lifting of conditions and the Board denies the same that may be appealed under the relevant statutes to the Department as a (partial) denial of a renewal of license.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:


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

2. Based on the forgoing, the imposition of conditions on the granting of the License ensures that this situation remains as presented by Appellant and her interests and the Board's concerns about underage drinking and noise are met.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of the Board denying the granting of the License be overturned and the License be granted with the conditions set forth above in Section V.

Dated: November 19, 2014



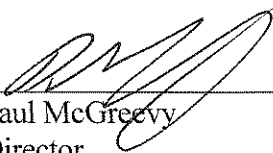
Catherine R. Warren
Hearing Officer

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: 20 Nov 2014



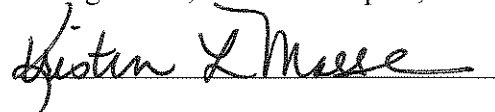
Paul McGreevy
Director

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 21st day of November, 2014 that a copy of the within Decision was sent by first class mail, postage prepaid to Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, RI 02904 and Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903 and by hand delivery to Maria D'Allesandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Bldg. 68-69, Cranston, RI 02920.


Justin L. Mee