

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

Secreto, LLC ,
Appellant,

v.

City of Providence, Board of Licenses,
Appellee.

DBR No.: 15LQ010

**RECOMMENDATION AND INTERIM ORDER GRANTING MOTION
FOR STAY WITH CONDITIONS AND NOTICE FOR *DE NOVO* HEARING**

I. INTRODUCTION

Secreto, LLC (“Appellant”) seeks a stay of the City of Providence, Board of Licenses’ (“Board”) decision taken on July 6, 2015 to revoke its Class B liquor license (“License”). The Appellant has appealed this decision to the Department of Business Regulation (“Department”) pursuant to R.I. Gen. Laws § 3-7-21. The Board objected to the Appellant’s request for a stay. This matter came before the undersigned on July 9, 2015 in her capacity as Hearing Officer as the designee of the Director of the Department.

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. STATUTORY BASIS FOR REVOCATION OR SUSPENSION

R.I. Gen. Laws § 3-5-21 states 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 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.

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 *Schillers* and *Scialo v. Smith*, 99 R.I. 738 (R.I. 1965).

Nonetheless, the revocation of a liquor license is a relatively rare event and is reserved for a severe infraction or a series of smaller infractions that rise to a level of jeopardizing public safety. See *Stagebands, Inc. d/b/a Club Giza v. Department of Business Regulation*, 2009 WL 3328598 (R.I. Super.) (disturbances and a shooting on one night justified revocation) and *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (upholding revocation when had

four (4) incidents of underage sales within three (3) years). See also *Cardio Enterprises, d/b/a Comfort Zone Sports Bar v. Providence Board of Licenses*, DBR No.: 06-L-0207 (3/29/07) (killing of patron with incident starting inside and escalating outside justified revocation); *PAP Restaurant, Inc. v. d/b/a Tailgate's Grill and Bar v. Town of Smithfield, Board of License Commissioners*, DBR No.: 03-L-0019 (5/8/03) (series of infractions justified revocation).

Thus, the Department will uphold a revocation where an incident is so egregious as to justify revocation without progressive discipline. However, the Department will decline to uphold a revocation where the violation is not so egregious or extreme and the local authority has not engaged in progressive discipline. *Infra*.

IV. STANDARD FOR ISSUANCE OF A STAY

Under *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (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 undersigned did not have a transcript of the Board hearing. Instead, the arguments are based on representations made by the parties. Based on the representations at hearing, on June 29, 2015, after holding an emergency meeting, the Board chose to suspend the Appellant's License for ten (10) days and impose an administrative penalty of \$1,500 for a shooting. As the Appellant had already been closed for seven (7) days, the Appellant was to serve the remainder of the ten (10) days suspension over the July 4th weekend.¹ The Board allowed the Appellant to reopen after the suspension without a police detail. After the suspension of License, the Board brought a 13 count² Order to Show Cause against the Appellant for alleged incidents that occurred in March and May, 2015. The allegations include entertainment without a license, violating the hours of operation, overcapacity, and public sale of tobacco without a City license.

The Appellant argued that under *Harsch*, it would prevail in the matter on merits since the Board has not followed progressive discipline since it jumped from a ten (10) day suspension to a revocation based on these allegations. The Appellant represented that it believed it will be able to prove at least six (6) of the allegations did not occur. The Appellant argued that there is no public harm as the Appellant had been allowed to reopen without a police detail and these allegations are not related to violence. The Appellant argued that there is irreparable harm because this is a revocation of License rather than a suspension. Further, the Appellant argued

¹ The Appellant appealed the administrative penalty but not the suspension. See *Secreto, LLC v. City of Providence, Board of Licenses*, DBR No. 15LQ009.

² The Board represented at hearing before the Department that a count was dismissed so there are 12 counts (allegations) against the Appellant.

that under the *Department of Corrections* which it believes controls the stay request, the *status quo* should be maintained by allowing it to open pending the appeal.³

The City argued that the hearing on the shooting occurred before the hearing on the March and May allegations because of the emergency nature of the shooting. The City argued that there is ample evidence to support the finding of the violations. The City argued that while the allegations do not concern violence, the Appellant has purposely violated its statutory obligations. The City argued there is a public interest issue in that it is the interest of the public and other licensees that the Appellant follows the law and stops acting like a nightclub (entertainment, DJ, hookah smoking) when it does not hold a Class N license. The City argued that the Appellant has also been advertising drinks specials and leasing its license.

It was undisputed at hearing that the Appellant obtained its License in February, 2012. The only blemishes on its record prior to the shooting was that on May 10, 2013, it was warned about entertainment without license and on November 6, 2013, it was fined for violating its hours of operation and public smoking. In January, 2014, allegations of entertainment without a license and public smoking were dismissed.

The Department has consistently followed progressive discipline barring an egregious act. Applying the stay criteria, 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. In this matter, the Appellant had its License previously suspended for ten (10) days. Based on its licensing history, even if the Board is able to prove all 12 counts – and that is disputed by the Appellant – it is

³ The Appellant raised the issue of the city solicitor bringing prosecutions on behalf of the police before the Board and then representing the Board on appeal rather than the Board's actual attorney. The Board disagreed this is an issue. This is not an issue for the stay.

unlikely that the sanction would rise to a revocation.⁴ Thus, the Appellant is likely to prevail at least on reducing the sanction (depending on what allegations, if any, are proved). It is also within the Department's discretion to maintain the *status quo* pending an appeal. A full hearing is needed to ascertain whether there were any violations and if so, what is the appropriate sanction. Indeed, in this matter, the Appellant did not even have a full hearing before the Board as it was a default judgment but since the Department hearing is *de novo*, the parties will start afresh during the appeal.⁵

There are no allegations of physical threats to public safety. There is a concern that the Appellant is not operating pursuant to statute which can rise to a safety issue. It is in the public interest and in the interest of other licensees that licensees abide by the law which can be addressed by imposing conditions on a stay. Granting a conditional stay maintains the *status quo* pending the full hearing.

VI. RECOMMENDATION

Based on the forgoing, the undersigned recommends that a stay of the revocation of License be granted conditioned on the following:

1. No entertainment without a license;
2. No disc jockeys;
3. No acting as a nightclub;

⁴ It should be noted that the Board hearing was a default hearing so that the evidence was not contested by the Appellant. Apparently, the Board refused a short continuance for the licensee despite the fact that the Appellant's now-counsel represented to the Board that he believed he would be retained by the Appellant but had not been yet at the time of the Board hearing.

⁵ 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) (as the hearing is a *de novo* hearing rather than an appellate review of what occurred at the municipal level, any alleged error of law or fact committed by the municipal agency is of no consequence); *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964); 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).


4. The Appellant's music does not go over 50 dB;⁶
5. No public smoking (including no hookah) and no sales of tobacco; and
6. A staff member must be designated by management to be responsible for staying within capacity. This staff member must be designated for all times the Appellant is open and said staff member must be known to all staff.

The Board and Appellant may agree to modify the conditions of the stay if they choose.

Nothing in this order precludes the undersigned to revisit this order because of a change in circumstances. E.g. the violation of any of the conditions could warrant a review of the stay order.

A DE NOVO HEARING WILL BE HELD ON THIS APPEAL AS WELL AS THE APPELLANT'S OTHER APPEAL (DBR No.: 15LQ009) ON AUGUST 4, 2015 at 9:30 a.m. AT THE DEPARTMENT OF BUSINESS REGULATION, PASTORE COMPLEX, 1511 PONTIAC AVENUE, CRANSTON, RI.⁷

Dated: 7/10/15


Catherine R. Warren
Hearing Officer

⁶ The undersigned based this condition on Article III of Providence Ordinance Code Section 16-93 which states as follows:

Radios, television sets, and similar devices.
It shall be unlawful for any person within any residential zone of the city to use or operate any radio receiving set, musical instrument, phonograph, television set, or other machine or device for the producing or reproducing of sound in such a manner as to disturb the peace, quiet and comfort of neighborhood residents or of any reasonable person of normal sensitivity residing in the area. The operation of any such set, instrument, phonograph, machine or device so as to exceed fifty (50) dBA between the hours of 8:00 p.m. and 7:00 a.m. or so as to exceed fifty-five (55) dBA between the hours of 7:00 a.m. and 8:00 p.m. measured at the property line of the building, structure or vehicle in which it is located, or at any hour when the same is audible to a person of reasonably sensitive hearing at a distance of two hundred (200) feet from its source, shall be prima facie evidence of a violation of this section.

This condition provides a baseline for ensuring the music stays ambient. See *La Base Sports Bar & Grill LLC v. City of Providence, Board of Licenses*, DBR No.: 10-L-0037 (4/5/11).

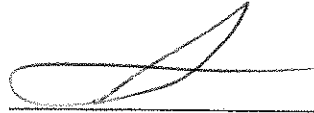
⁷ If this date is inconvenient to a party(s), the party should contact the other party and the undersigned to schedule a mutually convenient date. The Appellant is advised that pursuant to R.I. Gen. Laws § 3-7-21, it is the Appellant's responsibility to provide a stenographer at hearing.

INTERIM ORDER

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

____ ADOPT
____ REJECT
____ MODIFY

Dated: 7/15/15



Macky McCleary
Director

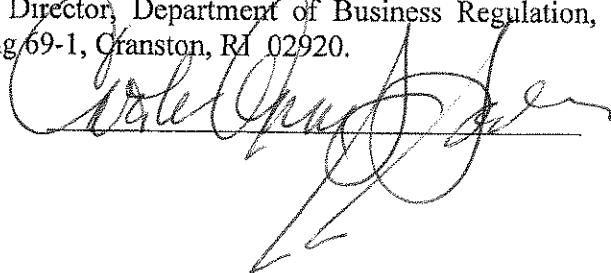
Entered this day as Administrative Order Number 15- 30 on 15th of July, 2015.

NOTICE OF APPELLATE RIGHTS

THIS ORDER IS REVIEWABLE BY THE SUPERIOR COURT PURSUANT TO R.I. GEN. LAWS § 42-35-15(a) 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 A PETITION DOES NOT STAY ENFORCEMENT OF THIS ORDER.

CERTIFICATION

I hereby certify on this 15th day of July, 2015 that a copy of the within Order was 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, RI 02903 and Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, RI 02904 and by hand-delivery to Maria D'Alessandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Building 69-1, Cranston, RI 02920.



[Signature]

DIRECTOR'S MODIFICATION OF RECOMMENDED DECISION

The Director hereby modifies the recommended Decision by deleting Section VI and replacing it with the following:

Applying the stay criteria, 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. Notwithstanding the hearing officer's statement in the recommended decision that the Appellant is likely to prevail on the merits of its appeal at least in part, I do not believe the Appellant has made a strong showing that it will prevail. It cannot be ascertained which party will prevail without a full hearing. Granting a conditional stay maintains the *status quo* pending the full hearing.

VI. Based upon the foregoing, A stay of the revocation of the License is granted, conditioned on the following:

1. No entertainment without a license;
2. No disc jockeys;
3. No acting as a nightclub and no service of alcoholic beverages after 7:00 p.m.;
4. The Appellant's music does not go over 50dB;⁶
5. No public smoking (including no hookah) and no sales of tobacco; and
6. A staff member must be designated by management to be responsible for staying within capacity. This staff member must be designated for all times the Appellant is open and said staff member must be known to all staff.
7. .

⁶ The undersigned based this condition on Article III of Providence Ordinance Code Section 16-93 as cited in the recommended decision.

The Board and Appellant may agree to modify the conditions of the stay if they choose.

Nothing in this order precludes the undersigned to revisit this order because of a change in circumstances. e.g. the violation of any of the conditions could warrant a review of the stay order.

A *DE NOVO* HEARING WILL BE HELD ON THIS APPEAL AS WELL AS THE APPELLANT'S OTHER APPEAL (DBR No.: 15LQ009) ON AUGUST 4, 2015, AT 9:30 A.M. AT THE DEPARTMENT OF BUSINESS REGULATION, PASTORE COMPLEX, 1511 PONTIAC AVENUE, CRANSTON, RI.⁷

⁷ If this date is inconvenient to a party(s), the party should contact the other party and the undersigned to schedule a mutually convenient date. The Appellant is advised that pursuant to R.I. Gen. Laws § 3-7-21, it is the Appellant's responsibility to provide a stenographer at hearing.