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

Ocean State Hospitality, Inc. d/b/a Fatt Squirrel, Appellant,	:	
v.	:	**DBR No.: 16LQ002**
City of Providence, Board of Licenses, Appellee.	:	

ORDER

I. INTRODUCTION

This matter arose from a motion for stay filed by Ocean State Hospitality, Inc. d/b/a Fatt Squirrel ("Appellant") with the Department of Business Regulation ("Department") pursuant to R.I. Gen. Laws § 3-7-21 regarding an action taken by the City of Providence, Board of Licenses ("Board") on continuing the closure of the Appellant's Class BVX liquor license ("License") until a hearing on February 10, 2016.[1] The Appellant also is requesting that the matter brought against it by Providence be heard by the Department due to certain information that the Board received off-the-record. The parties agreed the Board, pursuant to Providence Charter section 1102,[2] properly closed the Appellant after an incident on January 29-30, 2016 with a hearing scheduled for

[1] The undersigned heard this matter pursuant to a delegation of authority from the Director of the Department.

[2] Providence Charter section 1102(3) provides as follows:

> Unless otherwise provided by state law, suspend, annul, rescind, cancel or revoke any license issued by the board of licenses for any reason which the board may deem to be in the public interest; provided, however, that no license shall be suspended for more than seventy-two (72) hours or annulled, rescinded, cancelled or revoked unless the licensee shall have been given at least three (3) days' written notice of the action proposed to be taken and of the grounds therefor and the time and place of the hearing. The said licensee shall also be notified of the right to be represented at said hearing by legal counsel.

February 1, 2016. On February 1, 2016, the parties agreed that the Appellant would remain closed and continued the hearing until February 4, 2016.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. § 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.*

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). 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. MOTION TO STAY

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." *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (1976). 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).

While appeals before the Department do not fall under R.I. Gen. Laws § 42-35-15(c), 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.

IV. STANDARDS FOR DISORDERLY CONDUCT

R.I. Gen. Laws § 3-5-23 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 revoking or suspending 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, 295-296 (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 (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, 842-3 (R.I. 1966). See also *Scialo v. Smith*, 99 R.I. 738 (R.I. 1965). As the Supreme Court has found, "the responsibility of a licensee for the conduct of his patrons within the licensed premises that makes it disorderly within the meaning of the statute is established by evidence showing a toleration or acquiescence in such conduct by the licensee." *Cesaroni*, at 296. See also *AJC Enterprises*; *Schillers;* and *Furtado v. Sarkas*, 373 A.2d 169 (R.I. 1977).

A final decision has not been made by the Board. 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). 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.*

A licensee is responsible for disorderly conduct inside its premises and disorderly conduct outside its premises that can be directly or indirectly linked to activities inside the premises.

IV. DISCUSSION

A hearing began before the Board on February 4, 2016 regarding an incidence on January 29-30, 2016. The information received by the undersigned is based on representations of the parties. A transcript was not available. It was agreed that there had been a disturbance inside the Appellant on January 29-30, 2016. The extent of the disorderly conduct is in dispute. There was then disorderly conduct outside the bar, but the extent of the nature of that conduct is in dispute. The number of people outside the club is in dispute. It is not in dispute that someone outside the club fired shots from a gun. There was testimony before the Board that the shots were fired in the air and then at the building. It is undisputed that shots hit the building where the Appellant is located. It is not known whether the person who fired the shots was a patron of the Appellant.

During the February 4, 2016 hearing, it was agreed that local residents somehow gave a packet of letters to each Board member regarding their (unfavorable) opinion of the Appellant. It was agreed that the Board attorneys and the Board administrator were not made aware of these letters prior to the receipt of the letters by the Board members.[3] A review of the letters indicate that most of their content is not about the actual incidents being heard by the Board, but rather

[3] As this was an Order to Show Cause against the Board regarding January 29-30, 2016 incident and the January 10, 2016 allegation (that was also being heard), there was no reason for any member of the public to be heard unless a member of the public was testifying regarding those two (2) specific events. Unlike a hearing on a transfer application or an application for a new license, an order to show cause relates to certain allegations that must be proved by testimony on those allegations.

addressed the residents' overall displeasure with the Appellant. Most of the Board members indicated that they read the letters. One member indicated that he would not be prejudiced by the letters' contents. The other Board members were not asked about any potential prejudice. The Appellant's attorney also represented that after the hearing had been suspended some members of the Board still continued to speak to residents regarding the Appellant. As a result of the letters, the Appellant's attorney requested that the Department take the hearing from the Board and hear the rest of this matter.

In terms of the request for the Department to hear this matter, the Board's own attorney indicated that he did not think the Board would be biased by the letters. The Board's attorney for hearing indicated that the Board was already aware of the residents' opinions of the Appellant and that the letters were not as inflammatory or prejudicial as the Appellant asserted. However, the Board's attorney indicated that the Board would not object to the Department taking the hearing in the interest of judicial economy and efficiency and to avoid any lingering issue over the letters.

Therefore, the undersigned has two (2) issues to address. The issue of a stay for the closure until February 10, 2016 and whether the Department should hear the rest of this matter pursuant to its "super-licensing" authority.

The Board must be mindful of not engaging in any *ex parte* consultations as that serves to ensure that a hearing officer or a board maintains his or her or its neutrality on a matter he or she or they are hearing. The Board is to be the neutral impartial fact-finder. Otherwise, the Board runs the risk of engaging in prohibited conversations or at the very least being perceived as being impartial. In *Fernandes v. Bruce et al.*, 2014 WL 2558354 (R.I. Super.), a member of a decision-making board (a zoning board) indicated prior to hearing how he would vote on the application to be heard but did not recuse himself at hearing. The Superior Court relied on *Barbara Realty*

Company v. Zoning Board of Review, 128 A.2d 342 (R.I. 1957) and *Champlin's Realty Associates v. Tikoian*, 989 A.2d 427 (R.I. 2010) to find that the member had already precluded consideration of further evidence on this matter and that undermined the appearance of impartiality and was offensive to the due process clause' guarantee of an impartial and disinterested tribunal. That case is a reminder that a board must be very careful to evaluate any potential appearance of impartiality as well as not to decide a case before hearing. See *Champlin's Realty Associates v. Tikoian*, 989 A.2d 427 (R.I. 2010).

While the Board members were not all asked whether they could consider the matter before them – the January 10, 2016 and January 29-30, 2016 allegations – without being influenced by the letters, the Board has agreed with the Appellant that in the interest of judicial economy and fairness, that this matter can be heard by the Department. Therefore, the Department pursuant to R.I. Gen. Laws § 3-2-1 *et seq.* will exercise its authority to hear the action being brought by Providence against the Appellant (unless the parties reach a settlement).

The Appellant has been closed for six (6) days and argued that the emergency situation that warranted closing after the shooting has been addressed. The Appellant has been licensed for three (3) years and in those years has only had a violation for allowing a patron entrance at 1:00 a.m. and has no prior disorderly issues. The Police Department indicated that it will seek revocation of the License so it will need to demonstrate that this incident was so egregious that it would warrant revocation without any prior suspensions. The Board argued that the public safety issues are still in play and that the Appellant should continue to be closed until February 10, 2016 when the Board can make a further determination in terms of whether the Appellant should be opened.

The Appellant represented that it is amenable to a conditional stay pending hearing on the merits. It is willing to have a two (2) officer police detail at the weekend. It is also willing to limit the type of entertainment and music/concerts it offers.

The undersigned is mindful that there are serious allegations against the Appellant that could impact public safety. However, there has not been a full hearing regarding both incidents. There is no dispute that there was disorderly conduct on both nights, but the extent of that conduct is in dispute. Additionally, it has not been established yet that the shooter was related to either the internal or external disturbance, but the Board offered that there was testimony that the other nearby licensed entity was closed so that it may be after all the evidence is heard that an inference will be the shooter was related to the disorderly conduct at the Appellant for which the Appellant would be responsible. However, a full hearing is needed to determine the full extent of the disorderly conduct on both nights.

February 10, 2016 would represent the 11th day of closure. The Board is scheduled to meet that day on this matter.

Based on the forgoing, the Board is directed to determine whether this matter could be resolved and if not, to address the issue of issuing a conditional stay pending a hearing before the Department.

V. RECOMMENDATION

Based on the forgoing, the undersigned recommends the following:

1. When the Board hears this matter on February 10, 2016, it will determine whether it can enter into a settlement agreement with the Appellant and if not, the Board will consider the issue of it issuing a conditional stay pending the hearing before the Department.

2. If no settlement is reached and no stay is agreed to, a stay hearing will be held on **February 11, 2016 at 11:00 a.m.** and full hearing on this matter will be held on **February 16, 2016 and 9:30 a.m. to 12:30 p.m.** and if need be on **February 17, 2016 at 9:30 a.m. to 12:00 p.m.**[4] The hearings will be held at the Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, RI.

Dated: 2/5/16

Catherine R. Warren
Hearing Officer

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: 2/5/16

Macky McCleary
Director

Entered this day as Administrative Order Number 16-7 on 9th of February, 2016.

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.

[4] These dates may be changed subject to the availability of counsel.

CERTIFICATION

I hereby certify on this 9th day of February, 2016 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
Mmartone@providenceri.com

Stephen M. Litwin, Esquire
One Ship Street
Providence, RI 02903
attysml@aol.com

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 as well as by electronic mail to Louis DeSimone, Esquire, attorney for the Board, and Stephen Ryan, Esquire, attorney for the Providence Police Department.