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

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| **101 North Main Street Condominium Association, Pamelee and Raymond F. Murphy, Jr., Appellants,** | : | |
| **v.** | : | **DBR No.: 16LQ003** |
| **City of Providence, Board of Licenses, Appellee.** | : | |
| **and** | : | |
| **Oh Night Lounge, LLC d/b/a Olive's Hookah Lounge and Bar, Intervenor.** | : | |

## RECOMMENDATION AND INTERIM ORDER DENYING MOTION FOR STAY AND NOTICE FOR *DE NOVO* HEARING

## I. INTRODUCTION

101 North Main Street Condominium Association, Pamelee and Raymond F. Murphy, Jr., ("Appellants") seek a stay of the City Providence, Board of Licenses' ("Board") decision taken on February 11, 2016[1] to grant a Class BVX liquor license ("License") to Oh Night Lounge, LLC d/b/a Olive's Hookah Lounge and Bar ("Intervenor"). Pursuant to R.I. Gen. Laws § 3-7-21, the Appellants appealed this decision to the Department of Business Regulation ("Department"). The Board and Intervenor objected to the Appellants' request for a stay. This matter came before the

[1] The decision was made orally with a written decision being issued on February 22, 2016.

undersigned on February 26, 2016 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 § 3-7-1 *et seq.*, R. I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

## III. 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.

## IV. DISCUSSION

The undersigned did not have a transcript of the Board hearing. Instead, the arguments are based on representations made by the parties.

a. **Arguments**

The Appellants argued that they had a substantial likelihood of success on the merits. They argued that the Board had improperly noticed this matter as a transfer of the BX license when the BX license would be a new license and the BV was the transfer. The Appellants argued that the LLC owner has no experience in the restaurant or liquor industry and while the owner's wife has managed a hookah facility, said facility is much smaller than the proposed licensee and she will not be an owner. The Appellants further argued that it would better for the Board to have granted a limited license in order to give time to the inexperienced applicant to gain experience. The Appellants argued that pursuant to R.I. Gen. Laws § 3-7-7, a BV license must be granted to a *bona fide* restaurant. The Appellants argued that the Intervenor plans on being a smoking bar which is incompatible with being a *bona fide* restaurant as a smoking bar is required to have tobacco receipts in the amount greater than combined food and beverage receipts. As a result, the Appellants argued that a smoking bar should be a Class C license. The Appellants argued that pursuant to R.I. Gen. Laws § 5-24-1, only the city council can issue a victualling license (the "V" license) and that State law trumps any local ordinance. See *El Nido v. Goldstein*, 626 A.2d 239 (R.I. 1993).

The Intervenor argued that it plans an upscale entity inspired by Lebanese culture and that the owner of the LLC has business experience and his wife will be the general manager and will testify at hearing to her eight (8) years of experience running another hookah bar including supervising staff. The Intervenor argued that the wife will be the general manager of the Intervenor and that the hookah bar, Byblos, for which the wife currently is the general manager has never had any licensing violations in Providence. The Intervenor also represented that the licenses being transferred were a BV/BX/BN and were renewed on December 1, 2015 so there is no "new" BX license and the Appellants did not ask for the night club ("N") license. The Intervener argued that

under R.I. Gen. Laws § 3-5-15, the Board is allowed to issue licenses. The Intervenor argued that pursuant to R.I. Gen. Laws § 3-7-7, victualling licenses must serve food but there is no statutory requirement that food receipts be over 50%; instead, under the Department's *Commercial Licensing Regulation 8 Liquor Control Administration*, the Department defined the serving of food to be at a sandwich level during all times alcohol is offered for sale. The Appellant also argued that the capacity will be less than the current capacity as the stage and dance floor are being removed and being replaced by permanent seating. The Intervenor argued that granting a stay would harm it.

The Board appeared and represented that this was a transfer of BV, BX, BN, food, and holiday sales' licenses but that the N license would be abandoned. The Board represented that a N license had been at this location for many years, and the Board liked the idea of being able to eliminate it at that location. The Board argued that the Intervenor has experience to run this type of establishment. The Board also argued that it liked the idea of reducing capacity and that it took into consideration that both Mills Tavern and the OX Café and Harry's Burgers all of which are across the street have 2 a.m. licenses.

The City argued that the statute allows a victualing house to also be a smoking bar as the Department regulation allows both to co-exist as long as the B licensee serves food to the public and for the smoking bar, tobacco receipts are greater than the food and beverage receipts. The City argued that an N license cannot also be a smoking bar so that an N license can no longer be at this location. The City argued that it the city's interest to eliminate the N license and the Intervenor's business plan is very clear.

The Appellants further argued that the security plan, experience, and business plan are not a condition of the License. The Appellants argued that Byblos is much smaller than the proposed

License and that Mills Tavern and XO Café have the requisite experience and are fine dining. The Appellants also argued that the Intervenor is not voluntarily giving up the N license, but only is because a smoking bar cannot have an N licensee. The Appellants also raised issues regarding the entertainment license and noise.

The Intervenor represented that the hours of operation will be from 4:00 p.m. to 2 a.m. and also indicated that it would be amenable to a condition of licensing be only over 21 years.

**b. Whether a Stay Should be Issued**

Based on the representations from the City, there is no issue regarding the notice given for the transfer of the licenses as all licenses were being transferred. The Appellants argued that the Board could not grant a victualing license; however, the issues before the Department only relate to liquor licenses and not the grant of any other license. See *El Nido*. The proposed general manager is prepared to testify as to her experience running a hookah bar. See Intervenor's Exhibit One (1). Finally, there is apparently no statutory bar to having a Class B license and smoking bar in the same premises nor is there a statutory limit on percentage of food sold by a Class B license as compared to a smoking bar. Thus, there was not a showing by the Appellants that they had substantial likelihood of prevailing on the merits.

The Intervenor is not yet opened. The Intervenor is well aware that if it opens prior to a final decision by the Department, it could run the risk of losing its liquor license. Based on the forgoing, there is no reason to grant a stay of the grant of the License.

## V. RECOMMENDATION

Based on the forgoing, the undersigned recommends that a stay of the grant of License be denied.

**The parties will be notified of the date of the appeal hearing.**

Dated: 3/1/16

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: 3/1/16

Macky McCleary
Director

## 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 1st day of March, 2016, that a copy of the within Order was sent by first class mail, postage prepaid to Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, R.I. 02903, Nicholas Hemond, Esquire, DarrowEverett, LLP, 1 Turks Head Place, Suite 1200, Providence, R.I., and John J. Garrahy, Esquire, 2088 Broad Street, Cranston, R.I. 02905 and by hand-delivery to Maria D'Alessandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Building 68, Cranston, Rhode Island.