

R.I. Gen. Laws § 3-7-21, the Appellant appealed this decision by the Board to the Director of the Department of Business Regulation (“Department”). This *de novo* hearing was held on June 8, 2010 before the undersigned sitting as a designee of the Director. Prior to the hearing, Benefit Street Pub and Duquenois Realty, LLC filed a motion to intervene. At hearing, neither party objected to said motion and the motion was granted. All briefs were timely filed by August 13, 2010.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-1-1 *et seq.*, 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. ISSUE

Whether to uphold or overturn the Board’s decision to deny the Appellant’s application for a Class B liquor license.

IV. MATERIAL FACTS AND TESTIMONY

Mohd Eid (“Eid”) testified on behalf of the Appellant. He testified that he is the Appellant’s principal and filed the application for the License. He testified that he has a written lease agreement for the Appellant’s location.² He testified that the Appellant has been open for approximately nine (9) months and currently operates as a cigar retail place that does not sell food or alcohol. He testified that he was a manager at a cigar bar with a full bar, kitchen, and lounge in Tarpon Springs, Florida in 2002 and 2003. He testified that currently the Appellant has two (2) humidors to keep the cigars fresh, a main seating area, showcases, a custom-made humidor locker for customers to rent, and eleven (11) properly sized parking spaces as required by the zoning ordinance. See Appellant’s

² The location has two (2) addresses: 424 Benefit Street or 1438 Newport Avenue in Pawtucket, RI.

Exhibits 1A-E and Two (2). He testified that an extension is under construction and will include a kitchen, a bar with six (6) stools, bathroom, walk-in humidor, and the building will have approximately 38 seats. He testified that the hours will be 12:00 p.m. to 12:00 a.m. Monday through Thursday and 12:00 p.m. to 1:00 a.m. on Friday and Saturday. He also testified that the building has an existing ventilation system and a new-smoke eater for 1200 square feet. Tr 16-31.³

Eid testified that the cigars are imported, handmade, and range in price from \$5-\$30 a cigar. He testified that the bar may include imported beer, but will be mostly hard liquor and wine but that the alcohol service will be secondary to the cigar portion. He testified that customers have requested alcohol and the lounge is often empty because most customers drive to Providence to consume alcohol. He testified that the customers are mostly professionals with 90% coming from Massachusetts. He testified that the Intervenor's are not competitors because his customers are not attracted to those types of establishments. He testified that his customers prefer to smoke a cigar with a drink without getting drunk. He testified that Cigar Masters, a national company and the operators of the cigar bar in Westin Hotel in Providence and Bam, a wholesale business in Pawtucket, are helping him open his lounge. Tr 31-38

On cross-examination, Eid testified that he had testified before the Board that if he was unable to obtain a liquor license he would have to close because there isn't enough business with only cigar sales. He testified that he feels a liquor license will help him stay in business because people will buy more cigars when they can sit down and smoke them. He testified his main drinks will be cognac, scotch, wine and he may sell beer though at the Board hearing he testified that he would not sell beer. He testified that

³ Tr is hereinafter used to refer to the transcript of the Departmental hearing.

the bar choices will be limited with a preference for hard liquor. He believes his patrons mostly come from out-of-state as it is a high end establishment and that area of Pawtucket can't afford such cigars. He testified he has changed his plan a bit since appearing before the Board in that the seating would no longer be 44 but be no more than 40. He testified that he had a company review the kitchen space which had to be enlarged but the building's other side is being opened up. See Appellant's Exhibit Three (3) (current plan) and Exhibit Four (4) (plan to expand into convenience store next door). He testified the kitchen and the bar won't open until after 4:00 p.m. He testified he doesn't know whether his seating capacity plan complies with the Fire Code. Tr 38-60.

David Moran ("Moran") testified on behalf of the Board. He testified that he is a casualty and claims adjuster and handles motor vehicle accidents for an insurance company. He testified he is a City Councilor representing District One (1) where the Appellant is located and has spoken to some of his constituents who aren't interested in having a liquor licensee in the area and were concerned with safety and traffic and no constituent told him it would be a great idea. He testified that there are 8-10 liquor establishments in close proximity to the Appellant's location. See Board's Exhibit Two (2) (list of establishments and distance from Appellant's location). Tr 60-84.

Moran testified that the first reason for the denial was public safety and traffic since the Appellant is located at the corner of Benefit Street and Newport Avenue which is a busy intersection. He testified that Newport Avenue consists of four (4) lanes with two (2) each running North and South and it gets very busy and vehicles would back-up into Newport Avenue from the Appellant's parking lot. He testified that the location is a commercial intersection with businesses located on all corners. He testified that there

could be an accident at that intersection without a Class B liquor licensee but there is a greater risk because of the alcohol factor. He also testified that the other reason for the denial was there is no community need since there are enough establishments in the area selling liquor. He testified that while there are no other cigar bars in Pawtucket, the Appellant still would be a class B liquor licensee. He testified the denial was not based on concerns about competition. See Board's Exhibit 3-1 to 3-10 (photographs of Appellant's location and parking lot). Tr 70-84.

On cross-examination, Moran testified that he did not remember using the word competition at the Board hearing. He testified that his list of liquor licensees includes those up to two (2) miles away. He testified that the Benefit Street Pub has a parking lot across the street. He testified that the Appellant will be a different use from the other Class B licensees because it is a combination of alcohol and cigars. He testified that the Appellant's location is commercially zoned and he is not against a commercial use for this location but is against a liquor license because of oversaturation and public safety because of the concern over vehicles backing up onto Newport Avenue. Tr 84-101.

On redirect examination, Moran testified that the concern is not that the Appellant would increase the traffic flow on Newport Avenue. Tr 102-104.

Raymond Moreau ("Moreau") testified on behalf of the Intervenors. He testified that he is retired from the Pawtucket Police Department where he was a motor cycle traffic officer for 22 years. He testified that he takes care of the bar at the Benefit Street Pub by cleaning and setting it up and most of its patrons are from Pawtucket. He testified that he is familiar with the Appellant's location and there are other nearby Class B Liquor

licensees. He testified that he is familiar with Newport Avenue and it is very busy and has accidents. He testified that he sees no need for another liquor license. Tr 105- 113.

On cross-examination by the Appellant, Moreau testified that the capacity of the Benefit Street Pub is 47 and up until eight (8) months ago, there was only on-street parking available for its patrons. He testified that the pub now uses a parking lot across the street for its patrons. Tr 114-118. On cross-examination by the Board, Moreau testified that the pub has been open for 50-60 years so is grandfathered from current parking requirements. Tr 118-120.

Gordon Duquenois ("Duquenois") testified on behalf of the Intervenor. He testified that he previously was Fire Marshal for Pawtucket and now works for Travelers Insurance and is one (1) of the two (2) members of Duquenois Realty LLC which since 1998 has owned the real estate where the Benefit Street Pub is located. He testified that he purchased property across the street and took down a residential house to make a parking lot for the businesses where the pub is located. Tr 121-124

A view was held of the Appellant's location on July 7, 2010 which was attended by the undersigned and all attorneys.

V. DISCUSSION

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 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 *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 Bd. of License Commiss'rs*, 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.

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.

A. Relevant Statutes

R.I. Gen. Laws § 23-20.10-2(15) defines a smoking bar as follows.

(15)(a) "Smoking bar" means an establishment whose business is primarily devoted to the serving of tobacco products for consumption on the premises, in which the annual revenues generated by tobacco sales are greater than fifty percent (50%) of the total revenue for the establishment and the serving of food or alcohol is only incidental to the consumption of such tobacco products. The establishment must annually demonstrate that revenue generated from the serving of tobacco products is greater than the total combined revenue generated by the serving of beverages and food. The division of taxation in the department of administration shall be responsible

for the determination under this section and shall promulgate any rules or forms necessary for the implementation of this section.

(b) Smoking bars shall only allow consumption of food and beverages sold by the establishment on the premises and the establishment shall have public access only from the street.

(c) Any smoking bar as defined herein, is required to provide a proper ventilation system which will prevent the migration of smoke into the street.

R.I. Gen. Laws § 23-20.10-6(6) exempts from the regulation of smoking any smoking bar as defined in R.I. Gen. Laws § 23-20.10-2(15).

B. The Arguments

The Board's reasons for its denial were 1) the saturation of Class B licensees in the area and absence of community need; and 2) traffic and health, safety, and welfare considerations. The Board argued that the Appellant is seeking the License for economic benefit and there is no community need since the Appellant's business does not serve Pawtucket and there are fourteen (14) Class B licensees in a two (2) mile vicinity that provide alcohol. The Board also argued it is within its discretion to deny the application as the Appellant changed its seating plans but the plan is not based on a finding by the Fire Marshal and there are traffic concerns since the location is on a very busy intersection which is not be appropriate for a liquor establishment.

The Appellant argued that while it is seeking a Class BV License, its proposed use for business is not similar to the other existing Class B licensees and indeed, there are very few cigar bars in the State. The Appellant argued that the legal distinction for smoking bars is that the serving of food and alcohol is only incidental to the consumption of tobacco products. The Appellant argued that the testimony at hearing does not support the Board's reason for its denial in that Moran conceded that 1) the Appellant's proposal is different from the other neighboring establishments; 2) there are no other cigar bars in

Pawtucket; and 3) the licensed establishments listed in Board's Exhibit's Two (2) are up to twenty (20) blocks away from the proposed location. The Appellant also argued that the Board did not present any expert testimony or traffic or accident records to support its witnesses' personal opinions regarding traffic and that "oversaturation" is a pretext to prevent competition which isn't a basis for denial.

C. Whether the Denial of the License Transfer Application Should be Upheld

I will discuss the two (2) reasons for the Board's denial below.

1. Oversaturation

The Board's argument that the area was oversaturated with liquor licensees and its reliance on *Douglas, Inc. and Derby Liquors, Inc. v. Pawtucket Board of License Commissioners* (3/14/83)⁴ was recently addressed in *PLW-MA, Inc., d/b/a Blackstone Wine and Spirits v. City of Pawtucket, Board of License Commissioners*, DBR No.: 10-L-0017 (7/16/10) from which the following discussion is drawn. *Douglas* found as follows:

It would appear from the evidence in this case that the primary reason for the Appellant seeking the license in question was for economic benefit. There was no evidence presented of community need of additional Class A alcoholic beverage license in the neighborhood in question. In fact, the question of public need and necessity was either overlooked or ignored by the Appellant making its application and presenting its case to this Administrator.

On the other hand there is evidence that within the area several other Class package stores exist to provide the community with the opportunity to purchase alcoholic beverages. Also there was also a strong community sentiment expressed against this transfer both in the unanimous vote of the local Board (footnote omitted) and in the testimony of community sentiment presented at the hearing de novo before this Administrator

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

We are of the opinion that in the proper circumstances, community sentiment, not just the fitness of the applicant, may properly be heard and should be given thoughtful consideration with regard to a transfer of an alcoholic beverage license. *Id.*, at 4-5.

Similarly in *Vel-Vil, Inc. v. Pastore*, WL 732870 (R.I.Super.1986), the Department⁵ overturned the local granting of a license finding that the applicant had not sustained its burden that there was an additional need to serve alcohol in the proposed location's neighborhood and that another liquor license might threaten the areas's ongoing revitalization and there were three (3) liquor establishments in the immediate vicinity and twenty (20) within fifteen (15) blocks. The Superior Court upheld this decision finding that the Department had *de novo* authority in hearing appeals.⁶

The Board argued that the lack of community need for a liquor license can be the basis for the denial of a liquor license application. The Department reviews whether a local licensing authority has abused its discretion by failing to have relevant material evidence in support of its decision. As discussed below, if a local licensing authority finds there is no community need, it must articulate what is meant by community need; otherwise, the term is too vague. *Douglas* also spoke of the need to carefully consider

⁵ The undersigned relies on the Superior Court case to summarize the Department's findings.

⁶ Since *Vel-Vil*, the Department has declined to exercise its full *de novo* authority. *Kinniburgh* (discussed above) sets forth the Department's approach to defer to the local authority's knowledge but requiring evidence to support the local authority's articulated reason for the denial or grant of the license. The Department has consistently reiterated its limited approach on such reviews. See *Club Social Las Americas v. Providence Board of License Commissioners*, LCA-PR-97-21 (2/23/99). As recently as last year, the Department found as follows:

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 . . . (Department) 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). *Krikor S. Dulgarian Trust v. Providence Board of Licenses*, DBR No.: 08-L-0175 (6/18/09), at 18.

community sentiment. The Department has continuously considered community sentiment but ensures that such sentiment is based on evidence and not just speculation.

In reviewing the many cases that have come before the Department over the years since *Douglas* and *Vel-Vil* that address “community sentiment,” the Department has not sought proof by a local licensing authority when it grants a license that the applicant is providing a needed service of selling liquor. Nor has the Department in the past twenty (20) years reviewed a denial of a license and upheld the denial if there is no proof that the applicant is needed to provide liquor sales. Instead, the Department will uphold denials when a local authority has found based on the evidence that a community does not need another license because of past problems, traffic, etc. The concept of community need must be based on a specified reason (see below) why the license would not benefit the area.⁷ As discussed, the local authorities have broad discretion in making such determinations.

In *Corina Street Café v. City of Providence, Board of Licenses*, LCA-PR-96-20 (11/25/96), the Department upheld the denial of the application for a liquor license. Said decision found that the applicant wanted to change the character of its business (from a deli to a bar/restaurant) and the majority of neighbors opposed the application regardless of the applicant’s responsibility and good faith intentions. The decision found that the City had a specific policy to eliminate liquor licenses in the area by not issuing new licenses and not replacing those licenses that had been eliminated because of the area’s history of

⁷ After the end of prohibition of liquor within the United States, Rhode Island implemented a new system of statewide control of liquor coupled with local authority to grant certain licenses. See P.L. 1933 ch. 2013. The intent of the new system was to eliminate the old unsupervised system of local regulation that resulted in a lack of uniformity and instead vested broad powers of control and supervision in a state system. See *Baginski v. Alcoholic Beverage Commission*, 4 A.2d 265 (R.I. 1939). The purpose of this system is to safeguard the public.

problems with liquor licensees and alcohol consumption. That decision pointed out that community opinion is not sacrosanct but in that matter community opposition, previous issues associated with liquor licensing in that area and the city's resulting licensing policy as well as the applicant's inexperience supported the denial of the application because the license would not be in the best interests of the neighborhood.

In *Cadillac Lounge, LLC v. City of Providence*, LCA-PR-99-15 (10/18/02), the Department found that, “[w]hile the substantial neighborhood opposition would in and of itself be sufficient for the Board and this Department to deny the license in this case, an additional aggravating factor revealed in testimony . . . is her (the applicant's) sketchy business plan.” *Id.*, at 10. However, the Department also found that the substantial neighborhood opposition was based on the detailed problems of an existing licensee and its relation to the transfer application at issue. The Department concluded that a liquor licensee takes a neighborhood as it finds it and the local authority has the right to review how an application may alter local conditions which in this matter consisted of troubled conditions.

In *Gallucci*, there was testimony from residents and the police regarding the problems associated with the applicant's proposed location in that its prior liquor licensee was linked to disorderly conduct, assaults, and traffic issues. In that matter, the applicant argued that there had been a license at the location for decades but the Department found that a local licensing authority can take a fresh look and determine if a continuous license in a location is in the best interests of the community. In that matter, the Department found that the local licensing authority could reasonably infer from the evidence that reopening the

establishment could have a similar negative effect on the neighborhood and further noted that the applicant was even associated with the past licensee.⁸

In *Kinniburgh*, a local diner sought a liquor license that was denied which was upheld by the Department. At the Department hearing, there was testimony from neighbors very near the diner who were against granting the license because of the noise, litter, and other problems already associated with the diner. The local council members also testified to these issues. The Department found that the opposition was not speculative but was from witnesses with personal knowledge from which reasonable inferences could be drawn regarding their current issues with the applicant.

Thus, as cited above in *Chapman*, there must be evidence supporting community concerns. In contrast, 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), there were approximately forty two (42) objectors to the transfer of a liquor license in Newport and the license was granted. The Department found that the Newport licensing authority had not abused its discretion in granting that license despite the neighbors' objections because the local authority found the application represented a desirable business proposal for an additional business establishment in the wharf area in Newport. The Department decision found said decision was not an aberration but followed a pattern to allow that area to become high-density commercial. The decision further found that the Newport applicant had operated liquor establishments for six (6) years without any significant violations of local or State law. The Decision found that the neighbors did

⁸ In this decision the Department also stated that a local licensing authority could reasonably conclude that although there are other licenses in the same neighborhood, it is time to draw the line with the latest application. *Id.*, at 11. However, such a conclusion is based on the context that the area is full of liquor trouble spots.

not “focus on specific incidents attributable to [the applicant] or its management, but rather on unruly behavior emanating” from the area. *Id.*, at 10.

In *Krikor S. Dulgarian Trust v. Providence Board of Licenses*, DBR No.: 08-L-0175 (6/18/09), the abutter appellant had broad concerns regarding traffic, parking, safety, noise, and late night liquor closings in the area. However, the decision upheld the local authority’s grant of a license because it found that there was no evidence from the objecting neighbors that linked the applicant to noise or underage drinking. See also *Liquor Depot v. City of East Providence, et al.*, DBR No. 08-L-0250 (6/2/09) (local authority’s denial of a Class A license was overturned since the concern over a nearby school was speculative).

In *Target Two, Inc. d/b/a Cliffside Inn v. Newport Board of Commissioners*, DBR 02-L-0037 (7/19/02), the local licensing authority denied an application by an inn for an in-house liquor license in order to maintain the residential nature of the area and avoid commercial creep. While the Department found that such a policy was not objectionable, it found the evidence did not support the articulation of such a policy as the city already had several liquor licensees in residential areas. The Department rejected the city’s argument that the granting of a license would increase liquor licenses in a residential area because absent a blanket prohibition of liquor licenses in residential neighborhoods, the analysis should not be whether a new license would increase an arbitrarily set number but whether the granting of the license would benefit or hinder the residential character of the neighborhood. In that matter, the Department found that the granting of a liquor license would actually reduce the number of deliveries in the area and benefit the area.

Douglas mentions that a primary reason for that appellant in seeking a liquor license was for economic benefit. However, economic benefit is likely to be anyone's reason for seeking a professional or trade license. The decision also spoke of whether there was public need or necessity for the liquor store as there were other liquor stores in the area in which to purchase liquor.⁹ The term "community need" in *Douglas* is not to be associated with whether an applicant can prove that the neighborhood needs an establishment at which to purchase liquor. Rather that term is part of the Department's continuous review and consideration of community sentiment and evidence in its review of liquor licensing decisions. As further clarified and discussed after *Douglas* by numerous Department decisions, the term "need" must be based on specific articulated reason(s). Such reasons could be that the neighbors object because the previous license holder made the area miserable and the new applicant will be the same as it lacks experience (so there is no need for the applicant). See above as well as *Crazy 8's Bar/Billiards v. Providence Board of Licenses*, DBR No.: 09-L-0042 (8/24/09).

A further example is *DeCredico v. City of Providence, Board of License Commissioners*, DBR No. LCA-PR94-27 (1/20/95). In that decision, 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 tavern at the proposed location. The Department found that at night the proposed establishment would attract a crowd similar to the previously problematic tavern. The Department found that the applicant was a proven restaurant operator but did not have the requisite experience of managing a late-night, full-

⁹ That is not to say that a local authority might not be faced with a *Vil-Vel* situation of twenty (20) liquor establishments in fifteen (15) blocks and for various reasons as in *Corina* choose to reduce the number in that area.

bar drinking establishment to be able handle the potential problems that had plagued the area in the past. Thus, there was no need for the application since it would repeat past problems.

However, in *DeCredico v. City of Providence, Board of License Commissioners*, DBR No. LCA-PR94-26 (1/23/95) 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 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. In that matter, the Department didn't find there was a "need" for the license but rather found that the neighbors' objections weren't warranted. See *Gregory Theisler d/b/a Kangaroo Sports Bar and Deli v. Warwick Board of Public Safety*, LCA – WAS 96-08 (5/31/96) (overturning a decision to deny a license since the grounds relied on were unsubstantiated or were rebutted including testimony at the local hearing of parking issues and claims that the applicant would attract "gangs").

In this matter, there was no evidence that the Appellant's location was in an area that had a history of problems associated with liquor licensing. There was no evidence that the Appellant could or would replicate past problems associated with a liquor license holder at said location or in the area. There was no evidence that the Appellant's business plan was ill-conceived. There was no evidence as in *Corina* that the Board was

specifically seeking to reduce liquor licenses in that area because of past problems. Thus, there is no evidence to support the Board's finding of oversaturation of liquor licenses in the area to support its denial of this application.

The Board argued that there was no need for another liquor licensee since there were already enough in the area and that it did not base its decision on concern for competition but the Board did not present evidence that the area was overcrowded with licensees (e.g. crowd issues, increased disturbances, police concerns, etc.). As set forth above, the Board's reasons and evidence do not reach the requisite level for denial pursuant to the Department's constant review of a proposed licensee's place in its community and a local licensing authority's decision in regard to that community.

2. Traffic, Health, Safety, and Welfare Considerations

The Board was concerned that there could be an increase in traffic and accidents if the Appellant receives a liquor license. The evidence is that the Appellant's location is in a commercial zone so regardless of what business is located there, the area receives car traffic. As Moran testified, there was not a concern about the increase in traffic flow on Newport Avenue but rather with the backing out of cars from the parking lot and a concern with drinking, driving, and traffic.

As seen in the site view and the exhibits (Board Exhibits 3(1) to 3(10) (photographs of the outside of location), the Appellant's parking lot would be considered "tight." Depending on the size of one's vehicle and the other cars parked there, it may require some drivers to back out on Newport Avenue if they could not back out to the side and swing around face-front. However, there are some spaces on the side of the building where the exit is onto Benefit Street rather than Newport Avenue. A review of

the photographs indicates that there is no curb cut for the parking lot the entire length of Newport Avenue so that presumably the cars parked in the spots without a curb cut are considered to have enough room to back out and swing around to exit face front.

Eid testified that his clients would like to have a drink and smoke a cigar but do not drink to get drunk. More definitively, however, is the law which requires that in order for this type of establishment to exist its annual revenues “generated by tobacco sales are greater than fifty percent (50%) of the total revenue for the establishment and the serving of food or alcohol is only incidental to the consumption of such tobacco products” and “must annually demonstrate that revenue generated from the serving of tobacco products is greater than the total combined revenue generated by the serving of beverages and food.” In other words, the Appellant must rely on food and alcohol sales for the majority of its revenue or else it can not be a smoking bar so that the consumption of liquor would be at most 49.9% of its revenue.

3. 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.

In this matter, there was no evidence supporting the oversaturation or location basis advanced by the Board. There was no evidence regarding the concern over liquor and cars backing up into Newport Avenue as not all parking spots exit backwards onto Newport Avenue and the business plan presented is based on the license being for a smoking bar with limited drinking.

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 often take a dim view.¹⁰ 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

¹⁰ As discussed in *Vosler Inc. d/b/a Café Four 12 v. Providence Board of Licenses*, DBR No. 07-L-0001 (3/29/07):

The Department has previously ruled on the issue of a change in business format and disorderly conduct that may arise from such a change and such decisions inform the review of this matter. In *C & L Lounge, Inc. d/b/a Gabby's Bar and Grill; Gabriel Lopes v. Town of North Providence and the North Providence Town Council*, LCA-NP-98-17 (4/30/99), the Department modified the town's revocation of the license to a thirty (30) day suspension.

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.
Vosler, at 15-16.

See also *Tropics, Inc. d/b/a Club Tropics v. City of Warwick, Board of Public Safety*, LCA-WA-97-05 (2/28/97) (revocation justified when *Tropics*' initially opened, it had an age 21 and over policy on Friday and Saturday nights and one (1) year later started to allow all ages fourteen (14) and over as a way to compete with Providence clubs) and *Picasso's Pizza and Pub, Inc. d/b/a Score's RI Ultimate Sports Pub v. North Providence Board of License Commissioners*, DBR No. 03-L-0250 (6/3/04) (town found the licensee was operating its business contrary to the representations on which the license was granted which eventually resulted in a suspension).

reasonable control of alcoholic beverages.¹¹ See *Newport Checkers Pizza, Inc. d/b/a Scooby's Neighborhood Grille v. Town of Middletown*, LCA-MI-00-10 (12/7/00) (Department upheld Town's condition of an early closing of 11:00 p.m. as reasonable under *Thompson* to balance interests of neighbors and licensee). See also *Sugar, Inc. and Sharlene Alon v. City of Providence, Board of Licenses*, DBR No.: 09-L-0119 (3/9/10).

This decision has reviewed the various reasons for the application denial and has found that the various reasons are not rationally supported by the evidence. The totality of these reasons do 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 and testified to by Eid. See *Scooby's*. The conditions provide for the reasonable control of alcohol by ensuring that the Appellant is held to its representation to the Board and the Department so that the findings that the denial was not warranted remain based in fact.

¹¹ *Thompson* relied on R.I. Gen. Laws § 3-1-5 and R.I. Gen. Laws § 3-5-21.

R.I. Gen. Laws § 3-1-5 states as follows:

Liberal construction of title. – This title shall be construed liberally in aid of its declared purpose which declared purpose is the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages.

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.

Thompson found R.I. Gen. Laws § 3-5-21 allows municipalities to impose conditions on liquor licensees in accordance with R.I. Gen. Laws § 3-5-1 which restricts such conditions to be in the promotion of the control of alcoholic beverages. Subsequent to *Thompson*, the Supreme Court has addressed the issue of whether a town may pass an ordinance that affects liquor licensees as a group. *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228 (R.I. 2000) found that 1997 amendment to R.I. Gen. Laws § 3-7-7.3 specifically endowed all cities and towns with the power to restrict or prohibit entertainment in Class B liquor licensees but that only clarified what had been already authorized in R.I. Gen. Laws § 3-1-5 and R.I. Gen. Laws § 3-5-2. See also *Amico's Inc. v. Mattos*, 789 A.2d 899 (R.I. 2002). *Thompson* related to an individual licensee who agreed as a condition of licensing to abide by certain conditions (which the town was requesting all licensees agree to but had not made part of a liquor ordinance).

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

1. The Appellant remains a cigar bar or smoking bar pursuant to R.I. Gen. Laws § 23-20.10-2(15).¹²

2. There was a disparity between the Board hearing and the Department hearing over whether the Appellant plans to serve beer (imported) or not. The Appellant shall file with the Board within 30 days of this decision a written submission stating its plan regarding beer.

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

4. The discovery by the Board that any of the testimony given at hearing was erroneous or constituted a misrepresentation of the facts presented would be grounds to revisit the granting of this License.

5. These conditions shall be reviewed by the Board upon any renewal application filed for the licensing period of 2011 to 2012 and the Board may decide to vacate all, some, or none on them upon granting (if granted) the renewal.¹³

6. The Appellant may file a request with the Board to lift the condition that it remains a smoking bar/cigar bar.¹⁴

7. The Appellant shall comply with statutory requirements and all applicable parking, zoning, fire, building code, etc. before the issuance of said license. (See Rule 14

¹² Said statute states that the Division of Taxation shall be responsible for the cigar bar determination under said section. Obviously, the Appellant may rely on a decision that it is a cigar bar from the Division of Taxation. However, if such a certification is not available in a timely fashion for any renewal application, the Board may ask for other type of proof by the Appellant to demonstrate that its revenues are consistent with the statutory mandates.

¹³ It should be noted that if the Appellant does request the conditions be lifted 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.

¹⁴ The issue of whether a different use of a Class B license may cause traffic issues was not reached in this decision.

of the Department's *Commercial Licensing Regulation 8 – Liquor Control Administration*).

VI. FINDINGS OF FACT

1. On or about April 21, 2010, the Board denied the Appellant's application for a Class B liquor license.

2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed this decision by the Board to the Department.

3. A *de novo* hearing was held on June 8, 2010 before the undersigned sitting as a designee of the Director with a site view taken on July 7, 2010. All briefs were timely filed by August 13, 2010.

4. At the hearing, Benefit Street Pub and Duquenois Realty, LLC's motion to intervene was granted.

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

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-5-1 *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 testified to and presented by Eid. See *Scooby's*.

VIII. RECOMMENDATION

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

Dated: 9/22/10


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: 9-23-2010


A. Michael Marques
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 DECISION 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 23rd day of September, 2010 that a copy of the within Decision was sent by first class mail, postage prepaid to -

Frank Milos, Jr., Esquire
Assistant City Solicitor
City of Pawtucket
137 Roosevelt Avenue
Pawtucket, RI 02860

Michael F. Horan, Esquire
393 Armistice Boulevard
Pawtucket, RI 02861

Mark P. Welch, Esquire
141 Power Road, Suite 106
Pawtucket, RI 02860

and by electronic delivery to Maria D'Alessandro, Associate Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Bldg. 68, Cranston, RI.

A B Ellison