

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

Krikor S. Dulgarian Trust,	:	
Appellant,	:	
	:	
v.	:	
	:	
Providence Board of Licenses,	:	
Appellee,	:	DBR No.: 08-L-0175
	:	
and	:	
	:	
Shark Sushi Bar & Grill, Inc.	:	
Intervenor.	:	

DECISION

Hearing Officer: Catherine R. Warren, Esquire

Hearing Held: February 4, and 27, March 5, 10, 27, and 31, and April 9, 2009

Appearances:

On behalf of Krikor S. Dulgarian Trust: Keven McKenna, Esquire

On behalf of Providence Board of Licenses: Maxford O. Foster, Esquire

On behalf of Shark Sushi Bar & Grill, Inc.: Stephen M. Litwin, Esquire

I. INTRODUCTION

On or about August 29, 2008, the Providence Board of Licenses (“Board”), granted a Class B liquor license with late closing time of 2:00 a.m. (a Class BX license) (“License”) to Shark Sushi Bar & Grill, Inc. (“Shark” or “Intervenor”). Pursuant to R.I. Gen. Laws § 3-7-21, Grant Dulgarian, Trustee of the Krikor S. Dulgarian Trust (“Appellant”), appealed the Board’s decision to the Director of the Department of Business Regulation (“Department”).

A *de novo* hearing was held on February 4 and 27, March 5, 10, 27, and 31, and April 9, 2009 before the undersigned sitting as a designee of the Director. On February 4, 2009, the undersigned granted Shark's motion to intervene. Oral closings were made on April 9, 2009 and a schedule set for the filing of supplemental briefs but none were filed.

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.*

III. ISSUES

Whether to uphold or overturn the City's grant of Shark's application for said License.

IV. MATERIAL FACTS AND TESTIMONY

Patricia Zompa ("Zompa"), Chief Clerk to the Board, testified on behalf of the Board. She testified that her duties include accepting applications from applicants who want to start businesses, preparing for Board hearings, and attending Board hearings. She testified that the Board will not issue a license before contacting and obtaining approvals from the fire department, fire alarm unit, the health department, the City of Providence ("City) building department, and the City and tax departments. She testified that in this matter, the License has been granted pending all of those approvals. Tr2 67-75.¹

On cross-examination by the Appellant, Zompa testified that there is a transcript for each Board hearing. See Board Exhibits Two (2) (August 13, 2008 Board hearing transcript) and Exhibit Three (3) (August 29, 2008 Board hearing transcript). She

¹ Tr2 is used to refer to the transcript of the second day of hearing held on February 27, 2009 with each prior and subsequent volume referred to by the number of that hearing. The numbers after Tr1 etc. refer to the page numbers of the pertinent transcript.

testified that referral letters to the City departments were sent on July 21, 2008 by interoffice mail but she does not have proof that they were received. See Board Exhibit 1A (copy of letter). She testified that in August, 2008, the City's Department of Inspections and Standards did not approve the location. She testified that she relies on the check list on the back of the application that must be completed before an application can be issued and all paperwork is kept inside the file with all approvals which are required to be in writing. Tr2 75-110.

On redirect examination by the Board, Zompa testified about the checklist on the application. See Board's Exhibit 1D. She testified that the checklist indicates the date the application was advertised and the date is given for when the agencies were notified of application (July 21, 2008). She testified that the checklist indicates that "Building" objected on August 25, 2008. See Board's Exhibit 1D. She testified that Shark provided a radius map, a list of property owners, and a form stating that Shark will not be a nightclub but will be a restaurant. Tr3 122-123.

Upon questioning from the undersigned to clarify the Board's Exhibit 1D, Zompa testified that after the list for fire, building, etc., there are two (2) columns with the first column indicating when fire, building, alarm etc. were notified of an application and the second column is to mark when that date when fire, building, etc. sign-off (or not). She testified that paper copies of approvals are put in the licensing file and the clerk's office must receive paper copies of all approvals before any license is issued. Tr3 171-173.

On further cross-examination by the Intervenor, Zompa testified that according to the Board's Exhibit 1D, a notice of the application was sent on July 21, 2008 to the fire alarm unit and at the date of this hearing, nothing had been returned from fire alarm. She

testified that the fire alarm unit will eventually inspect the premises and if it is in compliance would send a confirming facsimile to the clerk's office and at that point, the clerk's office would "say okay to fire alarm, put a date in and put a copy of the letter inside that file." She testified that the same process would be followed for the other requirements. Tr3 174-176.

Raymond Hugh ("Hugh") testified on behalf of the Intervenor. He testified that the Shark will be a high-end restaurant; not a drinking establishment.² He testified that the seats will be in fixed positions. He testified that part of the dining area will be open kitchen where the cooking will be done in front of the patrons and the other area will be regular tables. He testified that he owns two (2) other restaurants including Shanghai Restaurant ("Shanghai") on Thayer Street which holds a 1:00 a.m. closing full liquor license and he has owned Shanghai for four (4) years without any incidents. Tr1 22-26.

On cross-examination by the Appellant, Hugh testified that he does not intend to obtain an entertainment license. He testified that he is renting Shark's location (275 Thayer Street, Providence, RI) and hopes to make a profit. He testified that he has about 85 seats at Shanghai. He testified he would like two (2) turnovers at Shark for dining. He testified that he plans to open at 11:30 a.m. for lunch and be open until 1:00 a.m. all days but Fridays and Saturday when he will be open until 2:00 a.m. He testified there isn't room for dancing in Shark. He testified a Dunkin' Donuts and a clothing store were previously in Shark's intended location. He testified that the cooking facilities will be a gas hibachi and sushi. He testified that if he did not receive a liquor license, he would not open because while one doesn't need a liquor license to sell food, liquor accompanies food so not having a liquor license would affect his ability to run the restaurant. He

² The parties agreed that Shark will have seating for 131. Tr4 367.

testified that he has a twenty (20) year lease to rent the proposed location. Tr1 26-51. See Board's Exhibit 1A (copy of lease).

Hugh testified that both Appellant's Exhibits One (1) and Two (2) represent the restaurant area for Shark. He testified that he specializes in the food for Shark. He testified that he owns 100 shares in Shark and he signed the License application. Hugh testified that the "fax Joe plan" was the better plan of the two (2) floor plans contained in Board Exhibit 1B. He testified that the building has two (2) levels and he will be cooking downstairs in the basement. He testified that he has a contract with Joseph DaLomba, his partner in Shark, for the construction of the restaurant. He testified he doesn't know if Shark leases the egress from the building. Tr3 176-234.

Joseph DaLomba ("DaLomba") testified on behalf of Shark. He testified that his real estate company, High Tech Construction, does management and construction and is the contractor for Shark. He testified his company has built low income housing, industrial projects, expensive houses, and commercial restaurants. He testified that he is aware of the type of approvals one needs from a local authority such as building, mechanical, plumbing, and fire which is why Peter Casale was hired. Tr5 500.

On cross-examination, DaLomba testified that he did not sign the application for the liquor license and that the other 50% owner for Shark is Hugh. He testified that his company obtained a demolition permit and demolition has taken place as well as sheet rock, framing, and finish work. He testified he has been on-site. He testified the Fire Marshal has so far inspected the location three (3) times. He testified that the back alley is shared by two (2) landlords, Shark's landlord and the Army Navy store, but he doesn't know if Shark has an easement to use the alley as a fire exit. Tr5 500-521.

Peter Casale ("Casale") testified on behalf of Shark. He testified that he has been retained by Shark as a consultant for construction and has thirty (30) years experience in the construction field. He testified he originally trained as a carpenter and was a builder for seven (7) years prior to taking a position with the City in 1989 as a Building Inspector. He testified he left the City in 2000 and went to a property management company as Director of Maintenance for four (4) years before returning to the City as Chief of Structures in the Zoning Division of the Department of Inspections and Standards but left three (3) years ago and is now a private consultant. Tr5 522-3.

Casale testified that Shark has asked him to take the lead in all permitting issues before the State of Rhode Island Rehabilitation Board and the City Zoning Board. He testified he is familiar with a Certificate of Occupancy which is issued at the end of a substantial construction project and must be issued prior to any occupancy of any space. He testified that this building needs plumbing, electrical, mechanical, and structural approvals from the Department of Inspections and Standards. He testified that he submitted an application to the Fire Prevention Bureau and had several plan review meetings with local fire officials and successfully obtained written approval and parts of that system has been installed. He testified that there had been three (3) fire prevention inspections at the proposed location which he attended and any deficiencies were corrected. He testified he coordinated the fire prevention, fire alarm, Department of Health, Zoning Board, and verbal approval from the Rehabilitation Board in order to obtain the building permits. He testified that he has been present for inspections by the building inspector and that fire electrical, plumbing, building compliance are all required

for a Certificate of Occupancy. He testified that only when one receives approval from the appropriate departments would a Certificate of Occupancy be granted. Tr5 523-529.

On cross-examination, Casale testified he measured the width of Shark's back alley and it complied with the Fire Code. He testified that alleyway is not entirely owned by Shark and he does not know if the other owner has given an easement but the Deputy Fire Marshal approved the fire exit. He testified that the fire suppression system for the hibachi is an Ansul system which is directly attached and inset into the hood system above the cooking surface and was approved by the Deputy Fire Marshal. He testified he used the SRC1 State Code for commercial buildings. He testified that the process is to do a plan review with the building and fire officials, identify deficiencies based on the SRC1, and work for an agreeable proposal because it is fruitless to petition the pertinent boards without the support of the building and fire officials. Tr5 530-536.

Casale testified there is not going to be a second exit from the basement. He testified that it is his understanding that an easement is forth coming to allow trespass over the neighbor's property to access to the public right of way. He testified that Shark will not be able to get a liquor license until it produces a Certificate of Occupancy and it can not get one until it passes all of its final inspections. He testified that it can't get sign off from the individual divisions, such as fire and building, unless it is in compliance and that would include free access from the rear exit to the public right of way. He testified that there is a requirement that below the level of an exit, one must have two (2) means of egress. He testified that since there is a full kitchen in the basement and a structural hardship on the property, Shark worked diligently with the Fire Department to package a variance. He testified that the Rehabilitation Board allowed the variance for the single

exit for the basement. He testified that the building is not required to be sprinkled but Shark sprinkled the lower level kitchen area in addition to having the Ansul system and sealing off access to the main floor from the basement (food will be on a dumb waiter) in order to have the one (1) basement exit directly to the exterior. Tr5 536-575.

Grant Dulgarian (“Dulgarian”) testified on behalf of the Appellant. He testified that he is the trustee for the family trust that owns property on Thayer Street. He testified that there is a shortage of parking in that area and “any action that exacerbates that shortage parking should not be allowed.” Tr4 391. He testified that he is familiar with the proposed location. He testified that it is not that easy to exit from the rear since the back exit exits into a very narrow alley surrounded by tall walls and it requires the taking of several perpendicular turns to access the Thayer Street sidewalk. He testified that according to the plans submitted by Shark, the property line is in the middle of the alley. He testified that he objects to the License because it adds a greater demand on parking and because of the safety issues. Tr4 388-410.

On cross-examination, Dulgarian testified that any action that exacerbates parking in a measurable way is objectionable so he would not object if someone is one (1) or two (2) parking spaces short but Shark will add an enormous demand for parking. He testified that he didn’t object a few years ago when Andrea’s restaurant added seats. Tr4 410-416. On redirect examination, Dulgarian testified that Andrea’s expanded in order to meet the legal requirements of the American with Disabilities Act. Tr4 431-2.

Robert Moitozo (“Moitozo”) testified on behalf of the Appellant. He testified he has a Civil Engineering college degree and has been licensed in Rhode Island since 1996. He testified his practice relates primarily to primary traffic and transportation. See

Appellant's Exhibit Six (6) (resume). He testified that he examined the Intervenor's records, walked the site, and reviewed the City's Code of Ordinances and they require Shark to have 33 off-street spaces.³ He testified that there are national and city standards for traffic control for safety and convenience. Tr4 361-385.

Andrew Mitrelis ("Mitrelis") testified on behalf of the Appellant. He testified that he owns Andrea's restaurant located on the corner of Meeting and Thayer Streets near Shark's proposed location. He testified that opposes the License because Chipolte Restaurant was denied a liquor license and now Shark obtained a parking variance. He testified that the area will be devastated by the extra demand for parking. Tr3 235-252.

On cross-examination by the Intervenor, Mitrelis testified that he did not object to the License at the Board hearing but he's changed his mind. He testified he has owned Andrea's for 43 years and when it first opened there were only three (3) restaurants on Thayer Street so parking was not an issue like now. He testified that the Appellant is his landlord and in 1981, the Appellant obtained a parking variance for Andrea's location on Thayer Street. He testified in the past years, Andrea's expanded next door into what had been a clothing store and obtained an additional 24 seats. Tr3 235-261. On cross-examination by the Board, he testified that he or a family trust own Andrea's, Café Paragon, and Spats on Thayer Street area and none of them have parking. Tr3 264-266.

Manual Lam ("Lam") testified on behalf of the Appellant. He testified he is a Brown Medical School student and has been employed by his parents who own the Sushi Express located at 281-283 Thayer Street. He testified he had lived on the East Side of Providence but now lives in Johnston, RI. He testified he opposes this License for

³ The parties agreed that under the City's Ordinance, the Intervenor does not have the required off-street parking. Tr4 375. The parties agreed that Shark received a variance from the Providence Zoning Board for the required parking and that variance is on appeal to Superior Court. Tr4 371.

several reasons including parking because congestion has gotten worst in terms of safety and the effect it will have on businesses in the area. On cross-examination by the Board, Lam testified that his parents' restaurant serves sushi so Shark will be a direct competitor which he believes will affect his parents' business. Tr3 288-299.

Jagdish Sachdev ("Sachdev") testified on behalf of the Appellant. He testified that he has a store at 252 Thayer Street selling clothing, books, and gifts. He testified he lives on the East Side and he's been in business on Thayer Street for 42 years and the traffic problems have gotten worse and parking has become very bad. He testified that parking has impacted his business and his customers tell him that they stop coming to Thayer Street because of parking problems. He testified that he parks at Moses Brown School so that there will be more parking available nearer his store. Tr3 299-301.

On cross-examination by the Intervenor, Sachdev testified that he was previously located in the space that Andrea's took over and the Appellant is his landlord. On redirect examination, he testified that there is a Brown Thayer Street parking lot where Brown allows public parking in the evening (to which the parties agreed). Tr4 322-340.

David Nishimura ("Nishimura") testified on the Appellant's behalf. He testified he lives about three (3) blocks from the proposed location. He testified that he is a Board Member of the College Hill Neighborhood Association ("CHNA") and was its representative to the College Hill Parking Task Force convened under Brown's aegis for nearly two (2) years issuing a report last Spring. See Appellant's Exhibit Seven (7) ("Parking Report"). He testified that the task force met monthly and included local institutions, commercial, residential, police, and City planning. He testified that its basic finding was that there is not a simple solution to the East Side parking situation and the

goal is incremental improvement. He testified that the committee found that parking was tight but manageable based on industry wide standards for how far retail customers will park and walk. He testified that he is familiar with 275 Thayer Street and because parking is marginal, it can't be given away. He testified that he objects to the issuance of License because of the proliferation of liquor licenses in the area so that the area has been transformed and is now less family and resident friendly. Tr5 456-465.

Ronald Dwight ("Dwight") testified on behalf of the Appellant. He testified that he lives on Benefit Street and is a Board Member of the CHNA and was testifying on its behalf and his own behalf. He testified that he objects to the License because it will exacerbates the traffic and parking problems in the area and CHNA is concerned with the quality of life on the East Side. He testified the CHNA is opposed to late closing time because people end up driving around the neighborhood late at night. Tr5 475-480.

On cross-examination by Intervenor, Dwight testified he would like the establishments to close at a reasonable hour like midnight. He testified that his concerns are parking, congestion, and late night noise. Tr5 480-485.

Antoinette Breed ("Breed") testified on behalf of the Appellant. She testified that she has resided on College Hill for thirty (30) years and is opposed to another liquor license and a 2:00 a.m. closing. She testified that Americans do not traditionally eat dinner at 10:00 p.m. or 11:00 p.m. so that any establishment with a 2:00 a.m. closing is in practice a nightclub. She testified that the Thayer Street business area is in the heart of the residential East Side and it is not possible for patrons and delivery trucks to access Shark without going through residential neighborhoods. She testified that all businesses

on Thayer Street should have a 12:00 a.m. closing and late night drinking and eating should be in the arts and entertainment. Tr6 587-590.

Lieutenant John K. Ryan (“Ryan”) testified on behalf of the Appellant. He testified he is the Commander of District Nine (9) which covers the East Side of the City. He testified that he is familiar with Thayer Street and because of the parking issues, he objected to this application when it was before the Board because it is going to bring more people into an already crowded area. On cross examination by the Board, Ryan testified that he has spoken before the Board on numerous liquor license applications and in some cases the Board will agree with him and sometimes they won’t. Tr6 595-599.⁴

V. DISCUSSION

A. The Arguments

In closing, the Appellant argued that the Board and the Intervenor had not reached the standard contained in R.I. Gen. Laws § 3-1-5⁵ because they have not demonstrated the promotion of temperance and the reasonable control of traffic of alcoholic beverages. The Appellant argued that the Department has the *de novo* power to review decisions and is not limited to mere appellant review but rather the Legislature delegated its police power authority to the local boards so the Department needs to find that the granting of

⁴ The Appellant subpoenaed Bernard Leby (“Leby”) of the City’s traffic division. The Board moved to quash the subpoena. The Appellant argued that Leby did not need to be paid because he works for the city so Super. Civ. Pro. R. 45 does not apply. The Appellant also offered that it would demonstrate that the traffic division was not apprised of the Board hearing/application. However, there is no requirement that the traffic division sign off on a liquor license. The Appellant had a traffic expert testify and the report from the parking task force of which Leby was a member is an exhibit. The undersigned quashed the subpoena pursuant to Super R. Civ. P. 45 (as allowed by Section 13 of the Department’s *Central Management Regulation 2 –Rules of Procedures for Administrative Hearings*).

⁵ 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.

the License is in the public interest. The Appellant argued that the License is not in the public interest because the proposed location has no parking and is within walking distance of an elementary and secondary school and a college so promotes underage drinking and will increase the demand for parking. The Appellant argued that the neighbors are opposed to the granting of the License for many reasons such as not wanting drunks in their neighborhood, more demand on parking will harm the area, and the negative impact on the other businesses because of the demand for additional parking. The Appellant argued that there are no adequate fire safety exits so that the back alley way would be too crowded to exit and there is no evidence that the Intervenor controls that back alley exit. The Appellant argued that the police opposed the granting of the License. Finally, the Appellant argued that the Department is required to protect the public interest and has complete discretion so should deny the License application.

In closing, the Board argued that the prevailing review standards are set forth in *Chaika v. Providence Board of Licenses*, DBR 06-L-0072 (7/31/07) and local licensing boards have broad discretion whether to grant liquor licenses. The Board argued that it already considered all of the Appellant's arguments at the Board hearing such as parking and the police objection. Indeed, the Board argued that the Zoning Board granted the parking variance and the Board granted the liquor license since none of the businesses in the area have parking. The Board argued that in sometimes the police object to a liquor license and sometimes they don't.

The Board argued that the Intervenor is a restaurant and not a nightclub and the service of alcohol will be an ancillary to the food. In addition, the Board argued that the Intervenor has made a huge investment and Hugh already has another liquor

establishment and demonstrated compliance with the liquor rules and regulations. In terms of parking, the Board argued that the Parking Report indicates in its key finding that there is adequate on street and off street parking for the current demands but that a more effective management program is required. The Board argued that a condition of the License is for the Intervenor to comply with the Fire Code and if it can't comply with the requirements for access to a public way, the License will not be issued.

The Intervenor argued that the Intervenor's arguments presuppose that the Intervenor would not want to abide by the laws and there has been no testimony to suggest that would take place. The Intervenor argued that it demonstrated it knows it has to meet certain requirements such as fire suppression systems and cannot open for business until it receives those approvals. In addition, the Intervenor argued that Hugh has had full liquor license for four (4) years for Shanghai without incident which is what the Board found when granting Mitrelis a late night liquor license in *Chaika*.

B. The Standard of Review

R.I. Gen. Laws § 3-7-7⁶ provides that a town or city may grant a Class B licensee a 2:00 a.m. closing time on Friday and Saturday nights. It is a matter of law that local

⁶ R.I. Gen. Laws § 3-7-7 states in part as follows:

Class B license. – (a)(1) A retailer's Class B license is issued only to a licensed bona fide tavern keeper or victualer whose tavern or victualing house may be open for business and regularly patronized at least from nine o'clock (9:00) a.m. to seven o'clock (7:00) p.m. provided no beverage is sold or served after one o'clock (1:00) a.m., nor before six o'clock (6:00) a.m. Local licensing boards may fix an earlier closing time within their jurisdiction, at their discretion. The East Greenwich town council may, in its discretion, issue full and limited Class B licenses which may not be transferred, but which shall revert to the town of East Greenwich if not renewed by the holder.

(4) Any holder of a Class B license may, upon the approval of the local licensing board and for the additional payment of two hundred dollars (\$200) to five hundred dollars (\$500), open for business at twelve o'clock (12:00) p.m. and on Fridays and Saturdays and the night before legal state holidays may close at two o'clock (2:00) a.m. All requests for a two o'clock (2:00) a.m. license shall be advertised by the local licensing board in a newspaper having a circulation in the county where the establishment applying for the license is located.

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 (sic) act 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 (1957). The Department has the same broad discretion in the granting or denying of liquor licenses. *Id.*, at 177. See also *Domenic J. Galluci, d/b/a Dominic’s Log Cabin v. Westerly Town Council*, LCA–WE-00-04 (10/25/00); *Donald Kinniburgh d/b/a Skip’s Place v. Cumberland Board of License Commissioners*, LCA–CU-98-02 (8/26/98).

In *Alexander Angelo, Inc. d/b/a Toast v. Town of North Providence*, DBR-03-L-0168 (11/3/03), the Department discussed the discretionary standard as applied to a request for a 2:00 a.m. closing time. *Alexander Angelo* cited to the finding in *28 Prospect Hill Street, Inc. v. Gaines*, 461A.2d 923 (R.I. 1983), that the issue of whether to extend a licensee’s closing time is left to the local licensing authority’s discretion. In discussing what constitutes discretion, *Alexander Angelo* relied on previous Department cases related to the granting of a new license.

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.

As articulated through liquor licensing decisions at the State court level and the Departmental level, the standard of review for a new license or a transfer of license is subject to the discretion of the issuing authority. As discussed above, the same is true for an application for a 2:00 a.m. closing time. 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*.

C. Whether the Granting of the License Should be Upheld

i. R.I. Gen. Laws § 3-1-5 and the Standard of Review

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. *Baginski v. Alcoholic Beverage Commission*, 4 A.2d 265 (R.I. 1939).⁷ As the Appellant

⁷ *Baginski*, at 266-267, found as follows:

Chapter 2013 is a familiar and well-recognized example of the legitimate exercise of the police power. *Tisdall v. Board of Aldermen*, 57 R.I. 96, 188 A. 648. The act is entitled an act to promote temperance and to control the manufacture, transportation, possession and sale

argued, the purpose of this system is to safeguard the public. However, while R.I. Gen. Laws § 3-1-5 provides the purpose of the statute, it does not provide the standard of review for the Department when reviewing these appeals *de novo*.

Like the Appellant argued, the Department has the same broad discretion in granting or denying a liquor license application. See *Hobday v. O'Dowd*, 179 A.2d 319 (R.I. 1962); *Baginski*. The standard of review in these *de novo* appeals was an ongoing theme at hearing and the undersigned provided the parties with relevant case law and Department decisions to explicate the Department's authority. As explained at hearing and in previous decisions, the Department in exercising its discretion looks for evidence to support the local authority's decision. Tr3 at 119-120.

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

of alcoholic beverages. Its chief purpose may, without question, be said to be the safeguarding of the public health, safety and morals. *Clark v. Alcoholic Beverage Commission*, 54 R.I. 126, 170 A. 79.

The traffic in intoxicating liquors has ever been a prolific source of evils, gravely injurious to the public welfare. The need of its regulation and control is undisputed. In a search for a system of effective, impartial and uniform regulation and control of this traffic our legislature enacted the above chapter [P.L. 1933 ch. 2013] which was later amended by P.L.1934, chap. 2088. This system is a departure from that which had long existed here prior to the advent of national prohibition. Then the regulation and control of substantially every phase of the liquor traffic was vested exclusively in the local governing bodies. The state exercised over this local administration no administrative supervision or control, except occasionally in some cities and towns the legislature intervened to set up state-appointed license commissions or police commissions with licensing powers; but such commissions were vested with purely local administrative powers only. They were not commissions with state-wide jurisdiction.

Chapter 2013 changed all this. Where, before, the emphasis was exclusively on control locally, now it is predominantly on state control. This is evident in many sections of the act. Running through the entire act is the central idea that the traffic in intoxicating liquors is a problem that is state-wide; and correspondingly, that state supervision and control, either originally in some phases or ultimately in others, alone can adequately cope with it. However, along with the incorporation into the law of this new idea, there has been retained a remnant of local administration. An example of this is the right of local boards to grant and to revoke, at least in the first instance, class C licenses. Such licenses correspond to the retail licenses, popularly known as saloon licenses under the old law.

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

The Department has the same discretion as the local licensing authority to grant or deny a liquor license application. However, as discussed above, the Department relies on the local licensing authority's familiarity with the area. The Board has consistently reviewed the record at a *de novo* hearing to see if there is evidence supporting a local authority's decision. There are no reasons to vary from this long-standing review which is well within the Department's discretionary authority as a "super-licensing authority." See R.I. Gen. Laws § 3-7-21. See also *Tedford v. Reynolds*, 141 A.2d 264 (R.I. 1958). The Appellant's argument regarding the standard of review is misplaced.

ii. The Granting and Issuing of a License

During the hearing, the Appellant argued that a liquor license comes last; not first so that the Intervenor should complete its building and meet the building, fire codes, etc. and then obtain a liquor license. E.g. Tr5 517. However, Rule Fourteen (14) of *Commercial Licensing Regulation 8 - Liquor Control Administration* ("CLR8") allows a retail liquor license to be granted subject to approval of all conditions and criteria necessary for issuance of said License.⁸ The Board was well within its authority to approve the License subject to meeting statutory and regulatory conditions of licensing.

⁸ Rule 14 of CLR8 states as follows:

GRANTED LICENSE (NOT ISSUED) – RETAIL A retail alcoholic beverage license may be granted but not issued pending full compliance with conditions and criteria necessary for the issuance of said license. All such "grants" of alcoholic beverage licenses shall be in writing. The license shall particularly describe the place or premises where the

There are certain requirements – state and local - that a licensee must meet before a license is issued. For example, there are statutory requirements regarding compliance with the Fire Safety Code and Fire Alarm Systems. See R.I. Gen. Laws § 23-28.1-1 *et seq.*; R.I. Gen. Laws § 23-28.25-1 *et seq.* The City prohibits the Board from issuing any license until an applicant provides written statements from the Department of Inspection and Standards and the City Fire Department stating that the premises are in compliance with municipal building and fire codes. See City Ordinance Art. I Sec.14-1.

Zompa testified that the conditions of licensing must be met by the Intervenor in order for the License to be issued. Proof of such compliance must be in writing and received by the clerk's office before the License will be issued.

The Appellant argued that there was no proof that the proposed location would not be a fire hazard. The Appellant raised the issue of the back alley being shared with a neighbor and thus whether the Intervenor controlled the emergency egress to a public way. The Appellant was also concerned with there being only one (1) basement exit and the use of hibachi stoves.

The Appellant apparently assumed that the city officials charged with ensuring compliance with the Fire Code prior to the issuance of any License would not perform their duties properly. However, the undersigned cannot make such an assumption because to do so would result in town and city licensing grinding to a halt as local licensing authorities could no longer rely on the expertise of various officials charged

rights under the license are to be exercised. The applicant shall have no more than one (1) year after the original granting of the license to meet all conditions and criteria set forth in the granting order. If the applicant does not meet all conditions and criteria within one (1) year, the license shall become null and void without further hearing by the local licensing authority; provided, however, said time period shall not be calculated when the license at issue is involved in litigation, from the date of the commencement of the action of to final disposition.

with fire, building, etc. enforcement. In addition, there was no evidence that the City would fail to properly inspect the proposed location for compliance with the Fire Code and Alarm systems as well as other requirements prior to the License being issued.

Instead, the evidence was that the Intervenor's consultant has been working closely with various Fire officials and the appropriate Board in order to receive a variance for the one (1) exit in the basement and to meet all Fire Code conditions and prior to the Department hearing, there already had been three (3) fire inspections. The Appellant raised the issue regarding the exit and egress to a public way and which entity actually has control of that egress. There was testimony that the Intervenor's neighbor and landlord each owned part of the egress. It is not for the undersigned to second guess the local and State experts regarding whether the Appellant will have met the requirements of the Fire Safety Code regarding the egress. However, under Rule 14 of CLR8, the Intervenor has one (1) year from the granting of the License to comply with all the necessary conditions such as building, fire, health, or tax. No Certificate of Occupancy will issue without the required building and fire code compliance. See R.I. Gen. Laws § 23-27.3-120 *et seq.* This License will not be issued if the Appellant does not comply with the pertinent Fire Code regarding any requirements for the control of access to said egress to the public way.

iii. Parking

The Appellant also objected to the granting of the License because of lack of parking in the area. The Board and Intervenor admitted that the Intervenor does not have the required available parking spaces. The Intervenor has received a variance from the Zoning Board for the 33 parking spaces it would need under the City's ordinances. The

variance is being appealed. Lieutenant Ryan and the neighbors all testified that they were concerned with increased parking congestion. *Infra*.

The Parking Report concluded that parking was adequate in the area but needed to be better managed. The Appellant's witness who was a member of the parking task force testified that the parking was tight but manageable. The Parking Report concluded that there were more spaces available during the day than the demand. The Intervenor's restaurant will increase demand on parking but there was no evidence that that it would increase the demand for parking so much that there would be no available parking in the general vicinity of Thayer Street. The Zoning Board granted the variance. The Board decided that since Thayer Street businesses do not have parking, the fact that the Intervenor has no parking would not be an impediment to the granting of this License.

iv. Neighbors' Objections

Various neighbors objected to the granting of the License. The neighbors objected on different grounds: parking, safety, and late night liquor license. For example, both Breed and Dwight felt the License should have a midnight closing. Parking and safety have already been addressed above.

In *International Yacht*, there were approximately forty two (42) objectors to the transfer of a liquor license in Newport. 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 not “focus on specific incidents attributable to [the applicant] or its management, but rather on unruly behavior emanating” from the area. *Id.* at 10.

As stated above, the local licensing authority’s decision need not be unassailable in light of the broad discretion given the local licensing authority. Rather there just needs to be evidence on the record that supports the local authority’s decision.

At hearing, the neighbors objected to the 2:00 a.m. closing time. Testimony at hearing indicated that some neighbors felt that Shark would be more of a nightclub rather than a restaurant because of its late closing. It should be noted that under Rule 5 of CLR8, a class BV licensee must offer food for sale at all times that alcohol is sold. The neighbors had general concerns regarding late night drunkenness, driving, and noise. However, these were general concerns rather than those specifically related to Shark or Hugh’s current liquor license. See *Chaika*.

v. The Board’s Reasons for Approving the License

At the August 29, 2008 Board hearing, the Board granted the License based on the facts that 1) Hugh has operated Shanghai for four (4) years without incident; 2) that the service of alcohol will be ancillary to the service of food; 3) Shark’s investment; and 4) the goodwill of this licenseholder. See Board’s Exhibit Three (3). There were the same reasons given by the Board at the Department’s hearing. Tr7 662-666.

There is no dispute that Hugh has held a liquor license at Shanghai for four (4) years without any discipline. Hugh testified that Shark would be fine dining and that alcohol would enhance the service of food. Hugh and DaLomba testified as to the

construction ongoing to the premises to install the 131 seat restaurant complete with two (2) types of cooking: in the kitchen and in front of patrons. The Intervenor has a twenty (20) year lease for the restaurant. Hugh and DaLomba have hired a consultant to ensure compliance with all pertinent statutory and regulatory conditions.⁹ Hugh has experience in running restaurants. DaLomba has experience in the construction industry.

The Appellant has broad concerns regarding traffic, parking, safety, noise, and late night liquor closings on Thayer Street. However, as discussed above, there was no evidence linking Hugh or DaLomba to noise or underage drinking. The License has been granted conditioned on compliance with all fire, health, building, etc. as allowed by Rule 14 of CLR8. The Intervenor has received a parking variance. The evidence was that parking in the area is tight but manageable.

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. The Appellant has not presented evidence that would warrant the overturning of this decision. Obviously, once a liquor license is issued, all licensees must abide by the local and State statutory and regulatory obligations or face sanctions if found to have violated such. The record in this *de novo* hearing supports the Board's conclusion to grant the License.

Based on the forgoing, the undersigned will not substitute her judgment for that of a local licensing authority regarding its grant of the License.

⁹ At one point in the hearing, the Appellant brought up the issue of the corporation that owns Shark and implied there may be a violation of R.I. Gen. Laws § 3-5-10 but never presented any argument or evidence on this. Nonetheless, it can be noted that *Decredico v. City of Providence* 1996 WL 936872 (R.I. Super. 1996) would render at least part of the Appellant's aborted argument misplaced.

VI. FINDINGS OF FACT

1. On or about August 29, 2008, the Board granted Shark's application for a Class BX liquor license with a 2:00 a.m. closing time.
2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed said decision by the City to the Director of the Department.
3. A *de novo* hearing was held on February 4, and 27, and March 5, 10, 27, and 31, and April 9 before the undersigned sitting as a designee of the Director.
4. The facts contained in Section IV and V are reincorporated by reference herein.

VII. CONCLUSIONS OF LAW

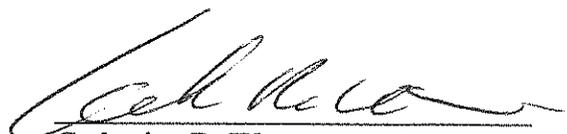
Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-5-1 *et seq.*, R.I. Gen. Laws § 3-7-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*
2. In this *de novo* hearing, no showing was made by Appellant that would warrant overturning the Board's decision to grant Shark's the License with a 2:00 a.m. closing time.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of the City to grant Shark's application for Class BX License with a late closing time be upheld.

Dated: June 17, 2009


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: 06/18/2009


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 ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify on this 19th day of June, 2009 that a copy of the within Order was sent by first class mail, postage prepaid to -

Maxford O. Foster, Esquire
City of Providence Law Department
275 Westminster Street
Providence, RI 02903

Keven McKenna, Esquire
23 Acorn Street
Providence, RI 02903

Stephen M. Litwin, Esquire
One Ship Street
Providence, RI 02903

and by hand-delivery to Maria D'Alessandro, Associate Director, Department of Business Regulation, John Pastore Complex, 1511 Pontiac Avenue, Cranston, RI.

