

Gen. Laws § 3-7-21, Provident Properties (“Appellant”)² appealed the Board’s decision to the Director of the Department of Business Regulation (“Department”). A *de novo* hearing was held on September 2 and 7, 2010 before the undersigned sitting as a designee of the Director. By order dated July 8, 2010, Karma, Inc. (“Intervenor” or “Karma”) was allowed to intervene. Oral closings were made on September 7, 2010 and the Appellant timely filed a brief on September 22, 2010. Karma and the Board did not file briefs.

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 Board’s grant of Karma’s application for said licenses (“License”).

IV. MATERIAL FACTS AND TESTIMONY

Joseph DiBattista (“DiBattista”) testified on behalf of the Appellant. He testified that he manages 101 Friendship Street which is across the street from Karma and is currently occupied by the Department of Children, Youth and Families (“DCYF”) which is a 24/7 operation. He testified there are about nine (9) night clubs in that area with a

licenses as new applications. Karma’s application for the BX and N licenses are on forms indicating that they are new applications for BX and N licenses and the newspaper advertisement for the local hearing indicates the application for the BX and N licenses are new applications. The Board’s letter scheduling its hearing indicates that it is a transfer of the BV license with the BX and N being new applications. This affected the type of statutory notice that should have been given by the Board. As noted in the Order Vacating the July 8, 2010 Order (7/15/10), if the Board in future is going to treat this type of application as a combined transfer and new application, the Board will need to ensure compliance with the 200 foot notice by mail rule in R.I. Gen. Laws § 3-5-17. However, this appeal ends up “curing” such violations. *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984). However, such future violations could run the risk of be remanded for compliance by the local authority with the statutory notice for new applications, etc.

² This case caption was amended to substitute Provident Property, LLC for JD/Hallmark Properties by order dated September 1, 2010.

total capacity of over 3,700. He testified that the 24/7 employees complain about the noise and chaos, the tenants have complained about violence, and he has had problems with broken windows and trash on the sidewalk. He testified that he is a member of the Jewelry District Association (“JDA”) and at its meetings, Lieutenant Figueirdeo (part of the downtown force), gives a monthly report on incidents in the area and there are many. He testified that the Appellant objects to the License because when the clubs close in the area there is fighting and chaotic traffic at 2:00 a.m. Tr1 24-30³

On cross-examination, DiBattista testified that he has heard of Gianfranco Marrocco (“Marrocco”)⁴ and knows he owns restaurants and he knows Peter Petrarca (“Petrarca”) is a State representative. He testified that he knows the Intervenor had a problem with an open bar on its opening night [July 22, 2010] and went before the Board but other than that he hasn’t heard of any other problems. Tr1 30-32.

Arthur Salisbury (“Salisbury”), Vice-President of JDA, testified on behalf of the Appellant. He testified he has lived in the Jewelry District since 1978 and lives about 300 feet from Karma. He testified there are 23 liquor licensees within a 900 feet radius of 15 Elbow Street with nine (9) of them within 150 feet of 101 Friendship Street. He testified that this concentration of liquor licensees has been trouble for years. He testified that the clubs near Karma have capacities of 400 (Level II), 750 (Metropolitan/Ultra), 180 (Jerky’s), 215 (Hell), 1350 (Coliseum), and 415 (Mirabar) and all have 2:00 a.m. closing times. See Appellant’s Exhibit 15. He testified that the 23 licensees in the area

³ Tr1 is used to refer to the transcript of the first day of hearing with the numbers referring to the page numbers of the transcript. Tr2 is the transcript for the second day of hearing.

⁴ Marrocco along with Peter Petrarca, counsel for the Intervenor, are the co-owners of the Intervenor. See Board’s Exhibit One (1) and testimony.

have a total capacity of 5,956⁵ but near Karma, the clubs' capacity is 3,735 which is 63% of the area's total capacity. He testified that all of the cars have been vandalized in his building's parking lot in the last couple of months. He testified that his building and other buildings have had their windows broken and there is violence every weekend. He testified that problems start about 10:30 p.m. and last until 2:30 to 3:00 a.m. He testified that at 2:00 a.m. the police shut-off streets in the areas to create one-way streets to force the traffic to exit and not return. Tr1 31-51.

On cross-examination, Salisbury testified that he would like see the concentration of liquor licenses in the area reduced. He testified he doesn't know anything about Marrocco or Petrarca that would make them unfit to own a club. Tr1 51-55.

Albert Dahlberg ("Dahlberg") testified on behalf of the Appellant. He testified that he is the Director of State and Community Relations for Brown University ("Brown"). He testified that Brown owns eleven (11) buildings and five (5) parking lots and leases several buildings and three (3) parking lots in the Jewelry District. He testified that Brown has just under 600 employees in the Jewelry District. He testified that all of Brown's buildings have 24 hour access including the Molecular Medicine building at 70 Ship Street. He testified that the parking lot across from 70 Ship Street often contains hypodermic needles, used condoms, bottles, and drug paraphernalia. He testified that late at night particularly at weekends, clubgoers will bang on the windows for 70 Ship Street, urinate in public, and vomit. He testified that Brown locked that parking lot and increased their safety patrols because of these problems. He testified that there have been complaints for years from faculty, students, and staff about the problems in that area

⁵ The Appellant's exhibit included Federal Wrap; however, it is not a liquor licensee (but rather BYOB) so its capacity of 35 should be deducted from the 5,956 total.

associated with the clubs. He testified that Brown does not object to all liquor licenses in that area but is very concerned with the concentration of clubs in the area that rely on alcohol for most of their revenue and the associated violence. Tr1 55-61. On cross-examination, Dahlberg testified that he does not have specific information on bad behavior against Brown employees related to Elements or Karma. Tr1 61.

Edward F. Pelletier III (“Pelletier”) testified on behalf of the Appellant. He testified he is a retired police sergeant from Warwick Police Department and has been working as a private investigator for over two (2) years. He testified he was hired to monitor Karma’s commercial building the previous Saturday night (August 28, 2010) and set-up surveillance in the parking lot behind Family Court. He testified he was on location from about 11:30 p.m. to 2:45 a.m. and took four (4) video clips that total approximately ten (10) minutes and began filming about 2:00 a.m. and ended about 2:40 a.m. See Appellant’s Exhibit 16(A)-(D). The parties and the undersigned viewed the videos. A review of the videos show some people running up the street, the police running, traffic, and someone spinning his or her car tires. The video didn’t show a fight but Pelletier testified that he felt that the people running were running in response to a fight off-screen. He testified that he could not tell which patrons were exiting Karma or Level II since they are both in the same building. He testified that he observed about seven (7) altercations outside. Tr1 64-79. On cross-examination, Pelletier testified that he didn’t know whether if he videotaped the area on another Saturday night and Karma was closed, the same activities would occur. Tr1 79-80.

Peter McClure (“McClure”) testified on behalf of the Appellant. He testified that he has lived on Chestnut Street near the Intervenor’s location since 2002. He testified he

is a member of the JDA and the Hospitality Resource Partnership (“HRP”). He testified that the area changes on weekend nights with illegal parkers, fights, and broken windows. He testified that the concentration of clubs attracts drunks and violence and while the clubs might have their own police details, the police have to put on extra patrols for the clubs. He testified that the old club area is an anachronism because of the development in the area. He testified that some of the clubs are well run and don’t have problems. Tr2 6-19. On cross-examination, McClure testified that he did not know Marrocco. Tr2 24.

Frank LaTorre (“LaTorre”) testified on behalf of the Appellant. He testified he appeared at the hearing in his capacity as co-facilitator of the HRP, a downtown civic organization and collaboration with all the stakeholders in the neighborhood: property owners, residents, security, colleges, and club owners. He testified that they meet and discuss issues of concern and long range planning. He testified that there is police participation in HRP and he has gone out late at night prior to and after January, 2010 with Lieutenant Figueiredo and finds the area to be very tense with young intoxicated people in a concentrated area. He testified that he doesn’t think the situation has changed even with Elements closing. Tr2 24-39.

On cross-examination, LaTorre testified that he felt there was no difference in the area when Elements was closed. He testified that he is in favor of staggered closing times. He testified he is aware that Marrocco owns two (2) restaurants and has club experience but he doesn’t know about Petrarca’s experience. He testified that he thinks 21 years plus is beneficial because under 21 cannot be controlled except in a concert venue. Tr2 39-43.

On redirect examination, LaTorre testified that he is aware of that Karma is 21 plus but it still could ask the Board to waive that requirement. He testified that he objects to the transfer because of the location and its history. Tr2 43-44.

Stephen Beranbaum (“Beranbaum”) testified on behalf of the Intervenor. He testified that he is the manager of the LLC that owns the building where Level II and Karma are located and he owns the parking lot next to the building and is at the parking lot most Friday and Saturday nights. He testified there is a difference between Elements’ and Karma’s patrons in that the latter has attracted an older and better dressed crowd. He testified that he leaves the lights on overnight in his parking lot and Karma pays for that electricity. Tr2 48-53. On cross-examination Beranbaum testified that the Intervenor has on-site management unlike Elements and more age appropriate staff. Tr 53-57.

Marrocco testified on the Intervenor’s behalf. He testified that his occupation is restaurateur/nightclub owner/real estate. He testified he owns Mediterraneo Restaurant, Caffè Dolce Vita, and Geppetto’s Pizzeria and a hotel, Dolce Villa. He testified that he has owned the Smoke Lounge, a nightclub, for almost two (2) years with Petrarca and another owner and they chose to have the Smoke Lounge be over 21 years and it serves food. He testified he had a night club at Mediterraneo for 12 years and owned the nightclub, Mambo, for about two (2) years. Tr2 58-61

Marrocco testified that Karma could have only seven (7) people for security but instead have ten (10) to twelve (12) with a security manager who is on-site all the time and a general manager as well. He testified that Karma is 21 years plus and the dress code is no head gear, hats, baggy sweaters, baggy pants, boots, sports jerseys of any type, etc. He testified that security checks patrons with wands and has all patrons empty their

pockets into a big plastic bowl. He testified that Karma advertises on the radio and advertises on television on MTV and VH1 which has a different demographic that Karma is looking for. He testified that not having eighteen (18) plus is a financial detriment. He testified they were aware they would not have eighteen (18) plus during the negotiations to buy the club and he believes that most of the problems would be solved by making the clubs be 21 years plus since the underage drinkers are the problem. He testified that the purchase price was about \$475,000. He testified on opening night Karma had a two (2) hour open bar which he thought was legal because other establishments were doing it but it isn't.⁶ He testified that there are security cameras, two (2) outside and eight (8) inside, and the club is well lit. He testified that Karma enhanced the lighting outside and pays for the parking lot lights to be on all night. Tr2 61-68.

On cross-examination by the Appellant, Marrocco testified that Karma's head of security is in his 50s and has an extensive security background. He testified that at least one of the owners or manager is on-site at all times. He testified that Karma bought everything in Elements for \$475,000 with the assets being worth about \$150,000 and there also was a lease assignment. He testified that some of the cameras used are the same as Elements and some aren't. He testified that Karma is not yet using an ID scanner. He testified that he and Petrarca changed the interior layout, changed the colors, put in a computer system, but the floor plan is essentially the same as Elements. He testified that Karma plays top 40, mashups, a little hip hop, and techno. He testified that the big difference from Elements is that Karma has its owners on-site since what happens

⁶ Karma stipulated that it received a warning from the Board for this infraction. Tr2 73. The Board questioned Marrocco on which other establishments have open bars but the undersigned overruled that as irrelevant to the issue of this hearing: whether to uphold the License transfer.

at the door dictates what happens throughout the night so there is a severe dress code and 21 plus. He testified that they spent about \$40,000 improving the club. Tr2 68-83.

On questioning from the undersigned, Marrocco testified he had no problems with the Mediterraneo nightclub when he owned it. He testified that he has had a couple of sound violations at the Smoke Lounge and right now is holding off on entertainment because that license lapsed and he needs to go to zoning for it. He testified that there was a shooting about 500 feet from Mambo when he owned it and he then transferred that license. He testified that he hasn't had any problems with his restaurants. Tr2 83-85.

Detective John St. Lawrence ("St. Lawrence") testified on behalf of the Board. He testified that he is the license enforcement officer for the Providence Police. On cross-examination by Appellant, St. Lawrence testified that he would characterize that area (Friendship Street and Richmond Street) as dangerous. On cross-examination by Karma, St Lawrence testified that when he went to Karma two (2) weeks prior to the hearing, he saw someone with a wand and was cleared through to enter. Tr2 86-93.

Upon questioning from the undersigned, Karma represented that it did not have the ID scanner that is part of the conditions of licensing but one is on order. Tr2 94.

V. DISCUSSION

A. **The Arguments**

The Appellant argued that the License could not be transferred as it had been revoked and the Elements cannot benefit and receive monetary gain for its bad actions by selling the License. In addition, the Appellant argued that Karma has not differentiated itself from Elements and the area is overcrowded with liquor licensees and the testimony before the Board and Department show that this is a problem location.

In closing, the Intervenor argued that the Board's stay of the revocation was similar to what judges do all the time and the Board has the power to make such orders. The Intervenor argued that Elements has been closed since January and there was no difference after it closed in the area but now Karma has opened under new management with 21 years plus, strict dress code, more security, management on-site so Karma has differentiated itself from Elements which was demonstrated by Beranbaum's testimony. Karma admitted that it believed the Elements' owners were "bums." Karma argued that there has been no evidence that either Petrarca or Marrocco are unfit owners.

B. The Standard of Review

R.I. Gen. Laws § 3-7-7 provides that a town or city may grant a Class B licensee a 2:00 a.m. closing time on Friday and Saturday nights.⁷ 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 (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

⁷ 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.

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.

R.I. Gen. Laws § 3-5-19 governs the transfer or relocation of a liquor license. The transfer of a liquor license pursuant to R.I. Gen. Laws § 5-3-19 is treated the same as a new application. *Ramsay v. Sarkas*, 110 R.I. 590 (1972). See also *Island Beverages v. Town of Jamestown*, DBR No. 03-L-0007 (3/13/03). Thus, the same standard applies to a new application and a transfer application and a 2:00 a.m. closing time application. Therefore, this decision will review the various licenses at issue with the same standard.

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*. As the Appellant noted in its brief, the Department applies a partial *de novo* and partial appellate standard to evaluating said appeal. The Appellant also argued that because there is new testimony at the Departmental appeal hearing, the Department should not limit itself to mere appellate review. However, the Department does not perform an appellate review solely on the record. Rather, the Department hears, evaluates, and reviews new testimony at the Departmental hearing in relation to the local licensing authority's decision. As recently reiterated in *Krikor S. Dulgarian Trust v. Providence Board of Licenses*, DBR No.: 08-L-0175 (6/18/09), there is no reason to change this approach to reviewing liquor appeals.

C. Whether the Granting of the License Should be Upheld

I shall address the neighbors' testimony and reasons for their objections as well as the various objections contained in the Appellant's brief.

i. Whether Elements Benefited from its Violations

The Appellant argues that granting the transfer of the License rewarded Elements' bad behavior and deprived the abutters of their statutory notice and ability to block the License by a legal remonstrance pursuant to R.I. Gen. Laws § 3-7-19.⁸ The Appellant also argued that a licenseholder's financial interests should not be put ahead of the public's interest in the safe distribution and consumption of alcohol. Certainly Elements benefited financially from being able to sell the club and transfer the License but it does not follow that those financial interests have been put ahead of the public's interest in the safe distribution and consumption of alcohol. The decision to transfer the License to Karma is discussed below. But any decision to grant a transfer of a license – even from a problematic licenseholder – takes into consideration the applicant's ability to safely serve alcohol. If it does not, that would be grounds for a finding to overturn the decision.

The Appellant relies on two (2) cases relating to the impermissible transfers of liquor licenses. The Appellant cites *Green Point Liquors, Inc. v. McConaghy*, 2004 WL 2075572 (R.I.Super. 2004) for its holding, “[i]t is not the purpose of the liquor licensing statutes to create or allow to exist a private market for the transfer of liquor licenses,

⁸ R.I. Gen. Laws § 3-7-19 states in part as follows:

Objection by adjoining property owners – Proximity to schools and churches. – (a) Retailers' Class B, C and I licenses under this chapter shall not be issued to authorize the sale of beverages in any building where the owner of the greater part of the land within two hundred feet (200') of any point of the building files with the body or official having jurisdiction to grant licenses his or her objection to the granting of the license, nor in any building within two hundred feet (200') of the premises of any public, private, or parochial school or a place of public worship. In the city of East Providence, retailer's Class A licenses shall not be issued to authorize the sale of beverages in any building within five hundred feet (500') of the premises of any public, private, or parochial school or a place of public worship.

outside the purview of DBR's regulatory watch.” *Id.*, at 10. Having been the *Green Point* Departmental hearing officer whose decision was upheld by Superior Court, the undersigned is well aware of the issue of impermissible transfers of liquor licenses. In *Green Point*, the Board⁹ tried to transfer a Class A liquor license that had not been used for at least seven (7) years but which the Board had allowed to be renewed despite its non-use. The Board’s action was in direct contradiction of R.I. Gen. Laws § 3-5-16.1 which provides that a Class A liquor license that is abandoned for 90 days shall be cancelled by the local licensing authority. In that matter, the Board transferred said license and on appeal, the Department found that the license was null and void and didn’t exist to be transferred because it should have cancelled when it had been abandoned. The Superior Court upheld that finding.

Indeed, *Green Point* found that the Board had ignored the clear directive of the other case that the Appellant relies on, *Marty's Liquors, Inc. v. Warwick Bd. of License Com'rs*, 1985 WL 663587 (R.I.Super. 1985), which the Appellant cites for its finding, “[t]he general assembly clearly did not want Class A licenses to be held in limbo in over-licensed cities and towns.” *Id.*, at 7. In *Marty's*, the local authority was asked to keep a liquor license alive for an improper purpose: the creditors. In that matter, the local authority revoked a license that had clearly been abandoned but on appeal, the plaintiffs argued that the Class A license should be kept alive so that it could be sold out of receivership and its creditors satisfied. *Marty's* found that it would be an impermissible purpose to keep the license alive for the purpose of satisfying creditors.

Green Point and *Marty's* both relate to Class A liquor licenses which are subject to a statutory cap based on the population of a city or town. If a city or town is over said

⁹ *Green Point* involved the Providence Board of Licenses.

statutory cap and a license is abandoned, the license cannot be reissued as the city or town is to achieve its statutory cap by attrition. Hence *Marty's* finding that the legislative purpose is not to keep Class A licenses in limbo – e.g. alive for creditors – for over-licensed towns and cities – e.g. those over the statutory cap.

Green Point's full quote regarding keeping a license alive for sale is as follows:

Additionally, allowing the transfer and prolonged non-use of liquor licenses contravenes public policy. Allowing an individual to purchase a liquor license, allow that license to lie dormant, and subsequently transfer that license to a future user promotes private market speculation of licenses that are otherwise difficult to obtain through proper application to the Board of Licenses. It is not the purpose of the liquor licensing statutes to create or allow to exist a private market for the transfer of liquor licenses, outside the purview of DBR's regulatory watch. *Green Point*, at 10.

Thus, the Court discussed how the Board's policy of allowing individuals to purchase liquor licenses, never use them, but renew them annually contravenes the liquor statutes and DBR's regulatory watch. The license in *Green Point* had been abandoned for several years but the Board kept it alive and allowed it to be transferred in violation of the abandonment statute.¹⁰

Similarly to *Green Point*, *Baker v. Department of Business Regulation*, 2007 R.I. Super. Lexis 55 involves a Class B liquor license that was not being used but that the Board¹¹ allowed to be annually renewed. While Class B liquor licenses do not have an abandonment statute like Class A licenses, a Class B liquor license must be used at a *bona fide* tavern in a specified location, etc. and failure to comply with those conditions

¹⁰ See also *Oasis Liquors v. Bureau of Licenses, City of Providence*, DBR 04-L-0066 (12/30/04) which found the failure to file a renewal of a liquor license resulted in the license expiring without the preservation of any renewal rights under R.I. Gen. Laws § 3-7-6. Said decision found that Providence could not initiate abandonment proceedings for a license that no longer existed in order to potentially breathe life back into the license. See also Order dated 8/22/08 in *Shobar, LLC v. Providence Board of Licenses*, DBR No. 07-L-0013 (Order Denying Motion for Reconsideration) which discusses various cases related to expired licenses and the consequences thereon.

¹¹ *Baker* involved the Providence Board of Licenses.

justify revocation. See R.I. Gen. Laws § 3-7-7 and R.I. Gen. Laws § 3-5-9. Thus, *Baker* upheld the Department's decision revoking the Class B license as it no longer existed as it should not have been renewed since it did not fulfill the conditions of licensing.

A licensee's financial benefit (e.g. for creditors) cannot trump statutory mandates (abandonment, conditions of licensing). However, while some may find the policy of staying a revocation of an existing license to allow for the transfer of that license to be disagreeable there is no legal bar to such a decision. Obviously, a transfer must comply with all statutory and regulatory requirements and cannot go on indefinitely (e.g. past the time for a Class A license abandonment or expiration.) so that a statute is circumvented and/or violated (as the *Marty's* plaintiffs asked the Court to do). But in this matter, Karma's financial benefit¹² is not grounds to overturn the Board's decision.

The Appellant also argued that since the Board chose to transfer the License rather than having Karma apply for a new license, the neighbors were deprived of their right to establish the statutory legal remonstrance. That consequence is a result of a legislative policy decision as effectuated by said statute and the Board's decision to transfer an existing license. That statutory result does not make the transfer improper.

ii. Did the Board Transfer what had been Revoked

The Appellant argued that the Board revoked the License and thus cannot transfer what has been revoked. It is certainly true that the Board cannot transfer a license that has expired (see above) or was revoked. The undersigned addressed the Board's choice of language in the Department's Order of Dismissal of Elements' appeal of its emergency

¹² The Elements' owners received \$475,000 for the club but there was no evidence of the actual financial gain since for example, all the proceeds could have gone to creditors. However, obviously, it is financially better to sell a club with a liquor license than without.

suspension. See *Club Elements v. Board of Licenses, City of Providence*, DBR No.: 10-L-003 (6/17/10) (Dismissal Order). In a footnote, the Department noted as follows:

During the course of these proceedings, the undersigned indicated to counsel that while the Board may have termed its action regarding the Appellant's License as a "revocation" and "final revocation," the actual substance of its actions in the February 22, 2010 letter was to suspend the License until March 12, 2010 pending the filing of a transfer application and if a transfer application was not filed by that date, the "revocation would be final." (See February 22, 2010 Board letter).

Indeed, the Board stated that the revocation would be stayed pending a transfer application being filed by March 12, 2010 which arguably would mean that on February 22, 2010 the revocation was stayed and was not in effect until March 12, 2010 when it would have become effective if no transfer application has been filed. That would have meant that the liquor license could have been used between February 22, 2010 and March 12, 2010 (the revocation being stayed so not in effect). However, the Board actually was suspending the License between February 22, 2010 and March 12, 2010 so that it could not be used and then the Board planned to make that suspension permanent by revoking the license if the application was not filed. A revocation by its own definition is permanent.

As under the tenets of statutory construction, the Board's terminology of revocation and final revocation is not controlling. The substance of the action rather than the form is controlling on the action taken by the Board. See *Orthopedic Specialists, Inc. v. Great Atlantic & Pacific Tea Co., Inc.*, 388 A.2d 352 (R.I. 1978). The License was suspended pending the filing of a transfer application. Arguably, once the application was filed, the suspension was lifted but apparently the Appellant never sought to re-open once the transfer application was filed. However, the filing of the transfer application avoided the revocation of the License. Thus, the License still existed at the time of the transfer application being filed.

Karma argued that the Board stayed the revocation which didn't become permanent when the application was filed. The Board's action can be read that way though as stated in the Order of Dismissal that would have resulted in the club being able to open and it is doubtful the Board would have intended that result. Nonetheless, whether the Board's action on February 22, 2010 is termed a "revocation" or

“suspension,” the final result of revocation only occurs without the filing of the transfer application by a date certain.

On March 12, 2010, Elements’ attorney asked that the Board continue the stay. See Board’s Exhibit 14. The Board continued that motion from Friday, March 12 to Monday, March 15. At that hearing, the Board discussed how it had thought the idea of a potential transfer to a 21 years plus club would be worth exploring. Therefore, the Board voted to amend its order of February 22, 2010 to extend the date to file the transfer application until March 29, 2010. See Board’s Exhibit One (1). There has been no evidence that Karma’s application was not filed by March 29, 2010. The application for the transfer of license is dated March 24, 2010. See Board’s Exhibit One (1).

Thus, since Karma filed the application by March 29, 2010, the Board’s revocation did not go into effect. Therefore, the License still existed to be transferred. Again, the Appellant might have preferred that the Board revoked the License and allowed the appeal process to play out but instead the Board chose to transfer an existing license that had not expired and had not been revoked. It would behoove the Board in future to be more meticulous with its phrasing but the Board clearly chose to stay its revocation of the License and lift the revocation if a transfer application was filed by March 29, 2010. It was and the revocation was lifted.

Since the revocation was not effective because the transfer application was filed on time, *Vitali v. Smith*, 254 A.2d 766 (R.I. 1969) and *Casia DiMario, Inc. v. R.I. Dep’t of Bus. Reg.*, 2004 WL 1542069 (R.I. Super. Ct.) (cannot transfer a revoked license) are not applicable. Certainly, when a license has been revoked (or abandoned), there is no license to transfer and to try to do so would be impermissible. See above.

iii. Whether Karma has Differentiated Itself from Elements

In *DeCredico v. City of Providence, Board of License Commissioners*, DBR No. LCA-PR94-27 (1/20/95) (“*DeCredico I*”), 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 Department¹³ 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-bar drinking establishment to be able handle the potential problems that had plagued the area in the past. *Id.*, at 3-7. See also *Crazy 8’s Bar/Billiards v. Providence Board of Licenses*, DBR No.: 09-L-0042 (8/24/09).

Conversely, in *DeCredico v. City of Providence, Board of License Commissioners*, DBR No. LCA-PR94-26 (1/23/95) (“*DeCredico II*”) 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

¹³ At the time of *DeCredico I*, the Liquor Control Administrator adjudicated said appeal. The position of Liquor Control Administrator was abolished by P.L. 1996, ch. 100 art. 36 § 4 with the Department assuming those functions. For ease of reference, any discussions of decisions issued by the Liquor Control Administrator will refer to the Department.

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. *Id.*, at 4-7.

The Appellant argues that Karma will be identical to Elements. Karma, itself, represents that it does not believe Elements was well-run and argued that it has differentiated itself. The Board granted the License to Karma subject to certain conditions as outlined in Karma's business plan and as agreed to by Karma. In particular, the Board imposed a 21 plus condition.¹⁴ See Board's Exhibit One (1) (May 24, 2010 Board hearing transcript and business outline).

¹⁴ Karma agreed to this condition. R.I. Gen. Laws § 3-7-16.6 which authorizes the issuance of Class N licenses does not require that nightclubs allow those under 21 to enter. Rather R.I. Gen. Laws § 3-7-16.6(c) lists requirements for "[a]ny establishment with a Class N license which admits patrons under twenty-one (21) years of age on the premises of the establishment when alcoholic beverages are being sold . . . shall." In other words, if a nightclub allows under 21 years entrance, the nightclub must follow certain laws but there is nothing in the statute that requires nightclubs to allow entrance to patrons under 21.

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 reasonable control of alcoholic beverages. *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).

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

The business plan includes as follows: 1) the interior will be remain mostly the same with some aesthetic changes; 2) strict dress code (see above) to attract upscale crowd; 3) ID scanner; 4) 10-15 trained bouncers in club and VIP sections; 5) wireless communications,¹⁵ 6) house lights; 7) upgrade of security cameras; 8) music to be top 40, dance, techno, alternative; 9) entrance restricted to over 21 years. See Joint Exhibit One (1).

There were no conditions placed on Elements' license. By requiring Karma to comply with the business plan it presented to the Board, the Board is providing heightened oversight over the License. The testimony was that the lighting has been upgraded as has the security cameras. The testimony was that Karma has 10-12 security staff and a head of security (as required under the business plan) which is more than Elements. There was no evidence regarding whether Karma's musical format would be different than Elements but there was testimony that Karma will have a stricter dress code and there was testimony that the advertising was aimed at a different demographic.¹⁶ Beranbaum testified that he believed that Karma's patrons were older and better dressed than previously.

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. Part of that power is vested in the Department as a "super-licensing" agency (see *Baginski*) in order to promote uniformity and reasonable control of the traffic of alcoholic beverages. It is for those reasons and consistent with *Thompson* that the Department made 21 plus a condition of licensing in *Sugar, Inc., and Sharlene Alon v. City of Providence, Board of Licenses*, DBR No.: 09-L-0119 (8/24/09). The Board has chosen to do the same pursuant to *Thompson* and *Amico's*.

Submitted as part of the evidence was a decision by the State's Commission of Human Rights (*Alber v. POP, LLC*, RICHR No. 06-PAG 158, 06-PRT 159 (10/1/08)) finding that a liquor licensee's own personal decision to bar those under 21 years old from its restaurant violated the age discrimination statute *vis a vis* public places, R.I. Gen. Laws § 11-24-1 *et seq.* However said decision relates to a personal decision as opposed to a decision by a licensing authority implementing R.I. Gen. Laws § 3-1-1 *et seq.* for the control of traffic in alcoholic beverages in which there is great public interest. See also Providence City Solicitor opinion therein in Joint Exhibit One (1).

¹⁵ Karma's attorney represented that both the ID scanner and ear pieces for wireless communication were on order. Tr2 94.

¹⁶ Tr2 63. While the testimony was not explicit regarding Karma's advertising as compared to Elements' advertising, Karma is 21 plus and the testimony was that Karma would be using television advertising for a different demographic which presumably would be different than Elements' 18 plus demographic.

There is no dispute that both Marrocco and Petrarca have experience with the former having extensive experience in operating restaurant and clubs. While there was no direct testimony regarding the type of experience that the owners and/or managers of Elements had, Karma represented that its owners or general manager would be on-site every night.

The main difference between Elements and Karma is that Karma will be 21 years plus rather than 18 years plus. Since Karma won't be catering to underaged patrons, one would expect that its clientele would be different from Elements and older.

There was also evidence supporting a finding that Karma had differentiated itself from Elements by the imposition of licensing conditions. However, Karma admitted that it was not in compliance with two (2) of its conditions: ID scanners and wireless communication. Karma shall comply with said conditions within thirty (30) days of this decision (which is more than four (4) months since Karma opened).

iv. Neighbors' Objections

Various neighbors or those representing neighborhood groups and owners objected to the transfer of the License. The neighbors objected that another late night liquor licensee would contribute to an already crowded and sometimes volatile situation.

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. 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.

Indeed, the testimony at this hearing was that the area was just as chaotic without Karma or Elements after Elements shut down and before Karma opened.

Based on the neighbors’ concerns, the Appellant also argued that because of the high concentration of liquor licenses in that area and the problems associated thereto, the transfer should be denied. Such reasons have been used to uphold a denial of license. See *Corina Street Café v. City of Providence, Board of Licenses*, LCA-PR-96-20 (11/25/96).

However, 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. The neighbors had general concerns regarding late night drunkenness, noise, and violence. However, these were general concerns rather than those specifically related to Karma, Marrocco, or Petrarca. See *Krikor S. Dulgarian Trust v. Providence Board of Licenses*, DBR No.: 08-L-0175 (6/18/09). There was no evidence from the objecting neighbors that linked Karma to noise, underage drinking, or violence.

v. Conclusion

At the May 26, 2010 Board hearing, the Board granted the transfer/new License based on certain conditions as discussed above. 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 and for this licensee, it must also comply with its licensing conditions 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.

VI. FINDINGS OF FACT

1. On or about May 26, 2010 the Board granted the Intervenor's application for the License.
2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed said decision by the Board to the Director of the Department.
3. A *de novo* hearing was held on September 2 and 7, 2010 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 the Intervenor the License.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of the Board to grant Karma's application for the License with the Board's attached conditions as discussed above be upheld but also be conditioned on the implementation of the ID scanner and wireless communication within thirty (30) days of this decision.

Dated: 11/5/10

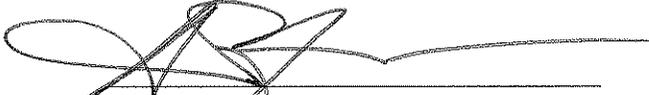

Catherine R. Warren
Hearing Officer

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: 11-08-2010


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 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 9th day of November, 2010 that a copy of the within Order was sent by first class mail, postage prepaid to -

Kevin McHugh, Esquire
City of Providence Law Department
275 Westminster Street
Providence, RI 02903

Rachelle Green, Esquire
Duffy & Sweeny
One Financial Plaza, Suite 1800
Providence, RI 02903

Peter Petrarca, Esquire
330 Silver Spring Street
Providence, RI 02904

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

A B Ellison