

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION**

Club Elements, Appellant,	:	
	:	
v.	:	DBR No.: 10-L-003
	:	
Board of Licenses, City of Providence, Appellee.	:	
	:	

RECOMMENDATION AND ORDER DENYING MOTION FOR STAY

I. INTRODUCTION

Club Elements (“Appellant”) seeks a stay of the Board of Licenses, City of Providence’s (“Board”) decision (“Decision”) of January 1, 2010 in which the Board pursuant to Section 1102 of Providence’s Home Rule Charter suspended Appellant’s liquor license (“License”)¹ pending a full hearing scheduled for January 4, 2010 which was continued to January 6 and will continue on Friday, January 8, 2010 before the Board.² The Board objected to Appellant’s motion. By order dated October 31, 2006, the Director of the Department of Business Regulation (“Department”) has delegated his authority to hear appeals filed pursuant to R.I. Gen. Laws § 3-7-21 to the undersigned. A hearing on the motion for stay was held on January 7, 2010.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-2-1 *et seq.*, R.I. Gen. Laws § 3-5-1 *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.*

¹ It should be noted that the Board’s Decision also includes the suspension of other licenses held by the Appellant such as its Food Dispenser license, etc. The hearing before the undersigned is solely related to the Appellant’s liquor license held pursuant to R.I. Gen. Laws § 3-2-1 *et seq.* and appealed pursuant to R.I. Gen. Laws § 3-7-21.

² Said section 1102 limits such emergency suspensions to no more than 72 hours unless the licensee has been given three (3) days written notice of a hearing.

III. MATERIAL FACTS

The facts stated herein are based on the representations made by counsel for Appellant and Board. The undersigned has not received any record and/or documents confirming these facts.

The parties agreed that on the night of December 31, 2009 between 1 a.m. and 2 a.m., there was fighting in the club and someone pulled the fire alarm which caused the patrons to exit the building and an individual was arrested outside the club by the police and that individual had been ejected from the club. There is a dispute over the basis of this arrest.

IV. DISCUSSION

Rhode Island law allows for the emergency suspension of various licenses when there is a danger to public health or safety or welfare. See R.I. Gen. Laws § 42-35-14.

It should also be noted that a liquor license is not considered a property right. "Although a lawfully issued liquor license may not be property in the strict legal sense, it has some of the aspects of a property right, and it is reasonable to suppose that the legislature intended that a holder of such a license should have protection from arbitrary interference therewith by the local licensing board." *Burton v. Lefebvre*, 53 A.2d 456, 460 (R.I. 1947). However, the Rhode Island Supreme Court has also found as follows:

[I]t is well settled in this state and elsewhere that the business of the sale of intoxicating liquor is so clearly and completely subject to exercise of the police power of the state that it may even be entirely prohibited by the state . . . (citations omitted) . . . or it may be permitted subject to such restrictions and burdens, however great, as the state legislature may deem it advisable to impose, so long as they are not discriminatory in such a way as to be in violation of the equal protection clause of the fourteenth amendment and the procedure is not such as to violate its due process clause. *Tisdall v. Board of Alderman*, 188 A. 648, 651 (1936).

Under various circumstances, a post-deprivation hearing satisfies due process requirements regarding an emergency suspension. See *Matthews v. Eldridge*, 424 U.S. 319 (1976).³ In this matter, the Providence Home Charter grants the Board limited power to suspend a license up to 72 hours unless a licensee received three (3) days written notice of the action proposed to be taken and date and time of a full hearing. Such a suspension must be in the public interest. In this matter, the Appellant's License has been suspended by emergency action by the Board. The nights that the License was suspended are in dispute. The parties agree that January 1 and 2 were the first two (2) days of the emergency suspension. The Appellant argued that January 3 was the third day of the shutdown so that it could open tonight, January 7, 2010. The Board's position is that since the club does not open on Sundays, Mondays, Tuesdays, or Wednesdays, that the third day of the shutdown is today, Thursday, January 7, 2010 which is the third day the club would be open since the Board's emergency order. The Board's letter ordered the Appellant to cease and desist but did not clarify the shutdown days.

Assuming, that today, January 7, 2010, is the third day of the emergency shutdown, the Appellant would be able to open tomorrow, January 8, 2010. There is no dispute by the parties that would be the case. The Appellant is concerned over what action the Board may take tomorrow at the scheduled hearing. The undersigned cannot prejudge what the Board may or may not do tomorrow and cannot say what evidence may be presented at tomorrow's hearing and cannot craft a remedy to address what hasn't yet been done. Tomorrow, the Board is holding a full hearing on the issue of whether the Appellant violated its statutory and regulatory obligations

³ The Court held as follows:

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Matthews*, at 334-335.

on December 31, 2009 and if so, what is the appropriate sanction. The Appellant represented that it always has a police detail when it is open.

Under *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195 (R.I. 1976), a stay will not be issued unless the party seeking the stay makes a “strong showing” that “(1) it will prevail on the merits of its appeal; (2) it will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to other interested parties; and (4) a stay will not harm the public interest.”

A. Substantial Likelihood of Success on the Merits

There have been prior incidences at Appellant’s of which the undersigned takes administrative notice. The parties dispute that Appellant is responsible for incidences alleged on December 31, 2009.

While the full facts regarding these incidents have not been litigated, the fact remains that there are serious allegations regarding fighting and crowding and public safety issues. There is no dispute that there have been prior incidents at Appellant’s and that the Appellant has had its License suspended once before (though on appeal). The current basis for the suspension is for disorderly conditions inside the Appellant’s. The Department has a long line of Department cases regarding progressive discipline and upholding the same. E.g. *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.). In addition, liquor licensees are responsible for conduct that arises within their premises and for conduct that occurs off premises but can be reasonably inferred from the evidence had their origins inside. *The Edge-January, Inc. v. Pastore*, 430 A.2d 1063 (1981); *Manuel J. Furtado, Inc. v. Sarkas*, 373 A.2d 169 (R.I. 1977).

Public fighting, pulling of fire alarms, and arrests represent a serious public safety issue. And public fighting represents a public safety issue in that fighting can lead to personal injury

and destruction of property. There is no dispute that the police did make certain arrests in the area and were called to the area on December 31, 2009.

Obviously, the outcome of whether the Appellant is responsible will be fully determined at the hearing before this Board. But this information before the undersigned is why the Board issued an emergency suspension because it was concerned for the public safety arising out of fights, fire alarms, and arrests. It is to be expected that at the Board hearing the evidence and facts of this matter will be fully aired.

B. Irreparable Harm to the Appellant; Substantial Harm to Other Interested Parties; Public Interest

The Board (an interested party) has an interest in ensuring that liquor licensees – where the public gather - are compliant with their statutory obligations. In addition, there is a strong public protection interest. Not only does the public have an interest in ensuring that public spaces are safe, granting a stay raises issues of public safety and public protection in that there are allegations of disorderly conduct and fights. While Appellant disputes that it is responsible for the incidences alleged, there is no dispute that the police did respond to incidences in the area and made an arrest.

It is on the basis of such information, that the Board made its decision to issue the emergency suspension. Section 1102 of the Providence Home Charter tries to balance the concerns in such situations: a licensee's interest in its license and the protection of the public. The Charter allows for a short term suspension to address emergency safety situations but also ensures that such matters are then quickly and fully litigated.

In light of the information received at hearing, it is not for the undersigned to second guess the local licensing authority's decision to impose a temporary suspension on Appellant's

License in order to protect the public pending a full hearing. Indeed, such a hearing often serves as a vehicle for addressing and resolving any issues at hand.

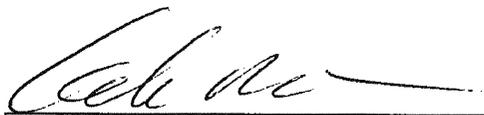
Therefore, pursuant to *Harsch*, the Appellant has not made the strong showing necessary for the issuance of a stay.

V. **RECOMMENDATION**

Based of the forgoing, the undersigned recommends that Appellant's motion for a stay of the Board's order to close on January 7, 2010 be denied.

This order only relates to the Board's Decision as it relates to January 7, 2010 as the parties agree that pending any possible action taken at tomorrow's hearing the Appellant may open on January 8, 2010.

Dated: 1/7/10



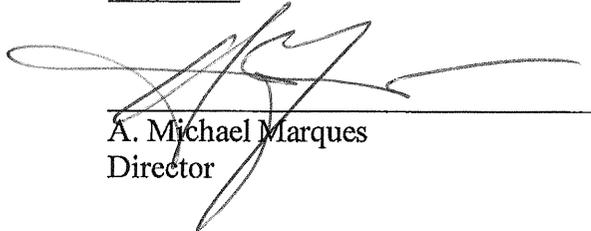
Catherine R. Warren
Hearing Officer

INTERIM ORDER

I have read the Hearing Officer's Recommendation in this matter, and I hereby take the following action with regard to the Recommendation:

ADOPT
 REJECT
 MODIFY

Dated: 01-07-2010



A. Michael Marques
Director

NOTICE OF APPELLATE RIGHTS

THIS ORDER IS REVIEWABLE BY THE SUPERIOR COURT PURSUANT TO R.I. GEN. LAWS § 42-35-15(a) WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF A PETITION DOES NOT STAY ENFORCEMENT OF THIS ORDER.

CERTIFICATION

I hereby certify on this 7th day of January, 2010 that a copy of the within Order was sent by first class mail, postage prepaid and by facsimile to -

Steve Ryan, Esquire
Assistant City Solicitor
275 Westminster Street
Providence, RI 02904
FAX 351-7596

John J. DeSimone, Esquire
DeSimone & DeSimone
735 Smith Street
Providence, RI 02908
FAX. 454-1402

and by hand-delivery to Maria D'Alessandro, Associate Director, Department of Business Regulation, 233 Richmond Street, Providence, RI 02903.