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

D. Liakos d/b/a Van Gogh, **Appellant,** **v.** **City of Providence, Board of Licenses,** **Appellee.**	**DBR No.: 16LQ011**

ORDER ON MOTION FOR STAY

I. INTRODUCTION

This matter arose from a motion for stay filed by D. Liakos d/b/a Van Gogh ("Appellant") with the Department of Business Regulation ("Department") pursuant to R.I. Gen. Laws § 3-7-21 regarding its closure pending a decision taken by the City of Providence, Board of Licenses ("Board"). A hearing on the motion to re-open the Appellant pending the Board's decision was held on September 2, 2016 before the undersigned pursuant to a delegation of authority by the Director of the Department.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to 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.*

A liquor appeal to the Department pursuant to R.I. Gen. Laws § 3-7-21 is considered a *de novo* hearing. The Department's jurisdiction is *de novo* and the Department independently exercises the licensing function. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984); *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964); and *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964).

Because the Department's has such broad and comprehensive control over traffic in intoxicating liquor, its power has been referred to as a "super-licensing board." *Baginski v. Alcoholic Beverage Comm.*, 4 A.2d 265, 267 (R.I. 1939). See also *Board of Police Com'rs v. Reynolds*, 133 A.2d 737 (R.I. 1957). The purpose of this authority is to ensure the uniform and consistent regulation of liquor statewide. *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964).

III. MOTION TO STAY

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." *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (1976). Despite the ruling in *Harsch*, the Supreme Court in *Department of Corrections v. Rhode Island State Labor Relations Board*, 658 A.2d 509 (R.I. 1995) found that *Harsch* was not necessarily applicable in all agency actions and the Court could maintain the *status quo* in its discretion when reviewing an administrative decision pursuant to R.I. Gen. Laws § 42-35-15(c). While appeals before the Department do not fall under R.I. Gen. Laws § 42-35-15(c), it is instructive to note that the *Department of Corrections* found it a matter of discretion to hold matters in *status quo* pending review of an agency decision on its merits.

IV. DISCUSSION

Based on representations by the parties, the Board issued an emergency closure of the Appellant on August 20, 2016 with a hearing held on August 22, 2016. On August 22, 201~~8~~6 the Appellant was closed until August 25, 2016 at which time the Appellant agreed to remain closed until August 29, 2016 when a decision would be issued by the Board. On August 29, 2016, the Board heard testimony from the police regarding the safety issues at the Appellant and ordered it

to continue to be closed until September 1, 2016 when a decision would be made. On August 29, 2016, the Appellant filed its motion for stay with the Department. On September 1, 2016, the Board met with three (3) members and instead of issuing a decision despite having a quorum decided to wait until a fourth member who had heard testimony was available for decision on September 7, 2016. No testimony or evidence was taken on September 1, 2016, but the Appellant was ordered to remain closed.

The Board has the authority to close licensees by emergency closing pursuant to Providence Charter section 1102(3) which provides as follows:

> Unless otherwise provided by state law, suspend, annul, rescind, cancel or revoke any license issued by the board of licenses for any reason which the board may deem to be in the public interest; provided, however, that no license shall be suspended for more than seventy-two (72) hours or annulled, rescinded, cancelled or revoked unless the licensee shall have been given at least three (3) days' written notice of the action proposed to be taken and of the grounds therefor and the time and place of the hearing. The said licensee shall also be notified of the right to be represented at said hearing by legal counsel.

The Appellant argued that the Board needs to make a final decision and not keep closing the Appellant pending a decision. The Appellant argued that there was no reason not to have a decision issued on September 1, 2016 when the Board had a quorum.

Hearings were held before the Board on August 22 and 25, 2016. The Appellant agreed on August 25, 2016 to close until August 29, 2016 pending a decision on re-opening that day. On August 29, 2016, the Board heard testimony and closed the Appellant until September 1, 2016. On September 1, 2016 no testimony was taken and the Board delayed its decision until September 7, 2016.

The genesis for the requirement for some type of hearing on an action being taken by the government arises from due process requirements. The leading U.S. Supreme Court case for

determining what type of property interest should be protected and what due process is necessary is *Matthews v. Eldridge*, 424 US 319 (1976).[1] *Matthews* allows flexibility regarding due process requirements. Thus, the required procedures vary according to the interests at stake in a particular context but the fundamental requirement is the opportunity to be heard at a meaningful time and in a meaningful manner. See *Brock v. Roadway Express*, Inc., 481 US 252 (1987). See also *Kaveny v. Town of Cumberland Zoning Board of Review*, 875 A.2d 1 (R.I. 2005). In certain situations, a post-deprivation hearing satisfies due process requirements. *L.A. Ray Realty v. Town Council of Town of Cumberland*, 698 A.2d 202 (R.I. 1997).

The Board's emergency closings were issued pursuant to Providence Charter § 1102 which provides that no license may be suspended for more than 72 hours unless the licensee has been given at least three (3) days written notice of action proposed to be taken. In this matter, the Board has ordered the Appellant to close on August 20 and 22, 2016 and then by agreement on August 25, 2016 to August 29, 2016. On August 29, 2016, after hearing testimony, the Appellant was ordered closed until September 1, 2016. On September 1, 2016 rather than make a final decision (as the hearing on the allegations have closed), the Board continued this matter until September 7, 2016 for a decision, but heard no new testimony regarding the safety issues.

Up until September 1, 2016, the Board was issuing three (3) day closures after hearing testimony. A licensing authority cannot indefinitely keep closing a licensee in increments[2] even with a finding of a public interest because that would never give the licensee a final appealable

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[1] *Matthews* sets forth three (3) factors to consider whether an individual has received due process:

> 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. *Id.* at 335.

[2] Obviously if the parties agree to a licensee remaining closed that would be a different analysis.

decision (under R.I. Gen. Laws § 3-7-21). While the Board has not indefinitely closed the Appellant, its continuing extension of the emergency runs the risk of becoming indefinite suspension or in other words a *de facto* suspension or revocation.

In order to comply with the three (3) day notice requirement, the Board's hearing should have been held on September 5, 2016 but that is Labor Day. The Board meets on Wednesdays so presumably scheduled it for September 7 rather than September 6. The hearing should be held on September 6, 2016.

At its hearing, the Board must make a decision.[3] The Board shall issue its final decision on the allegations at its next hearing; unless the parties agree to a continuance or settlement.

VI. RECOMMENDATION

Based on the forgoing, the undersigned recommends the following:

1. The closure is not stayed.
2. A hearing/decision must be made on September 6 (unless parties agree to the September 7, 2016).[4]

Depending on the decision by the Board on September 6, 2016 (or September 7, 2016), a hearing shall be held on **September 9, 2016** at the DEPARTMENT OF ADMINISTRATION, One Capitol Hill, Providence, R.I. at **9:30 a.m.** in the fourth floor legal hearing room.

Dated: 9/2/16

Catherine R. Warren
Hearing Officer

[3] Apparently on September 1, 2016, the Board took note that the Department was scheduled to hear this matter on September 2, 2016. While such a hearing was scheduled that does not obviate the need for the Board to address the issue as the licensing authority.

[4] There may also be an Open Meetings Act reason to meet on September 7, 2016 rather than September 6, 2016 but that is dependent on when this order is signed and the City's scheduling.

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: 9/2/16

Macky McCleary
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 2nd day of September, 2016 that a copy of the within Order was sent by email and first class mail, postage prepaid, to the following: Mario Martone, Esquire, and Stephen Ryan, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903, Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, RI 02904, and Louis A. DeSimone, Jr., Esquire, 703 West Shore Road, Warwick, RI 02889 and by hand-delivery to Maria D'Alessandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Building 69-1, Cranston, RI 02920

Kristen L. Masse