

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

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NAJ Properties, LLC d/b/a The Pier Restaurant :  
Appellant :  
v. :  
Board of License Commissioners of :  
the City of Newport :  
and :  
Pier of Newport, LLC :  
Appellee :

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DBR No. 12-LQ-0032

**DECISION AND ORDER**

**I. INTRODUCTION**

On or about March 28, 2012, the Newport Board of License Commissioners (“Board”) granted a request by The Pier of Newport, LLC (“Pier”) to withdraw an application to transfer a Class B liquor license (“License”) to N.A.J. Properties, LLC (“Appellant”). Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed the Board’s decision to the Director of the Department of Business Regulation (“Department”). A de novo hearing was held on May 2, 2012 before the undersigned sitting as a designee of the Director with the parties timely filing post hearing briefs.

**II. JURISDICTION**

The Department has jurisdiction to hear appeals from decisions of local liquor licensing authorities under R.I. Gen. Laws § 3-7-21, subject to relevant provisions of the Rhode Island Administrative Procedures Act, § 42-35-1 *et seq.*

### **III. ISSUES**

1. Whether the Department has jurisdiction to review a local board's decision to grant a request for withdrawal of a transfer application.
2. Whether to uphold or overturn the Board's decision to grant the request for withdrawal of the transfer application under the facts before the undersigned.

### **IV. MATERIAL FACTS**

The Pier entered into a Lease Agreement (Appellee's Exhibit 3) with the Appellant for property located at Howard Wharf, Newport, Rhode Island and designated as Plat 32, Lots 48-7 and 252. At the time of the execution of the lease, an application to transfer the liquor license back to the Appellant was prepared by the Pier as transferor and Appellant as transferee, with intent that the application be filed upon the termination of the lease term, provided the Pier did not exercise its option to purchase the subject property. Though the lease expired on October 31, 2011, the parties dispute whether the Pier has a right to exercise the option to purchase. The contractual disputes between the parties are the subject of civil proceedings brought by Pier in the Newport County Superior Court (See NC 2011-0502).

Despite the pending proceedings, the Appellant submitted the transfer application to the Board in December 2011. In response to the Appellant's submission prior to disposition in the pending civil matter, the Pier filed a letter objecting to the application on January 11, 2011 (Appellee's Exhibit 1; hereinafter "January 11<sup>th</sup> letter"). The Pier continued to voice its concerns by submitting a written request to the Board on March 28, 2012, seeking leave to withdraw the application to transfer the license to the Appellant (Appellee's Exhibit #2; hereinafter "March 28<sup>th</sup> letter"). At a scheduled hearing on the same date, the Appellant voiced its objection to the withdrawal. After receiving testimony from Appellant's counsel, the Board unanimously voted

to grant the Pier's request to withdraw the transfer application. It is from this decision that the Appellant appeals the Board's decision to the Department. The Department held a de novo hearing on May 2, 2012, where the majority of the hearing was a presentation by counsel for each party based on the documents submitted into evidence as noted above. Testimony was also received by Mr. Vincent Sandonato, owner of NAJ Properties, LLC, relating to his character and fitness in connection with the transfer of the liquor license in question.

## V. DISCUSSION

### A. Jurisdiction

The Department has jurisdiction to "review the decision of any local board" pursuant to R.I. Gen. Laws § 3-7-21. In *Beacon Restaurant, Inc. v. Adamo*, the Rhode Island Supreme Court considered whether a local board's decision to deny a request for withdrawal was appealable to the Department, *i.e.* whether the Department had jurisdiction. 241 A.2d 291 (R.I. 1968). The court stated "[a] decision, as that term is used in the statute, contemplates action taken by the council after it has conducted a hearing referred to in § 3-5-17." *Id.* at 294. Under the particular facts of *Beacon*, the Court found nothing "which could be reviewed by the liquor control administrator" when the local board had "heard no testimony, listened to no arguments, or *done anything.*" *Id.* (*emphasis supplied*). The decision of the Board in the instant case is distinguishable because testimony and arguments were received prior to the decision. Specifically, the Minutes of the Council Meeting dated March 28, 2012, as submitted into evidence with the undersigned, document the following:

1. The Board heard testimony regarding the Bill of Indebtedness, RI Distributing Company.

2. The Board heard testimony from Michael D. O'Hare objecting to the transfer on behalf of the Aquidneck Hospitality Group.
3. The Board listened to arguments from Joseph Palumbo, Esq., representing the Appellant, regarding why the request to withdraw the transfer application should be denied. As the Appellant's post-hearing brief characterizes this testimony, he was given the opportunity to explain to the board that "this was just what the parties sought to avoid by signing the transfer application back when the lease was executed." (Appellant's Post Hearing Memorandum, at 3.)
4. *After* hearing this testimony and arguments, the Board unanimously granted the request to withdraw the application.

Considering the activity before the Board prior to its decision to grant the withdrawal, the determination satisfies the meaning of a "decision" that is appealable to the Department. Accordingly, the Department assumed jurisdiction, reaching the merits of the case.

#### **B. Standard of Review**

The Department has jurisdiction to hold a de novo hearing to review the decision of a local licensing board. *Hallene v. Smith*, 201 A.2d 921, 925 (R.I. 1964). After such a hearing, the Department, in its own discretion, may "confirm or reverse the decision of the local board in whole or in part, and to make any decision or order he or she considers proper." R.I. Gen. Laws § 3-7-21.

#### **C. Qualified Right to Withdraw Transfer Application**

The Appellant cites two Rhode Island Supreme Court cases for the proposition that the Pier had no right to withdraw the transfer application. A more careful reading of these cases does not necessarily lead to this conclusion, however. In *Manoogian v. Williamson*, the Rhode

Island Supreme Court considered whether a local license board had the discretion to refuse to reopen a case based on an oral request to withdraw an application without providing grounds for the withdrawal. 153 A.2d. 165, 168 (R.I. 1959). The court quoted and cited Corpus Juris Secundum as follows: “an application for a license cannot be withdrawn without leave and such leave ‘will not be granted where the effect would be to block the application of a fit and suitable person.’ 48 C.J.S. Intoxicating Liquors § 144, p. 248.” *Id.* (C.J.S. citation as in original). There is danger in reading this statement out of context, however. The C.J.S. quotation was not located in the cited provision, but it does appear in C.J.S. Intoxicating Liquors § 151 (Westlaw 2012). The single case cited for the proposition is *Manoogian* itself. *Id.*

Legal scholars have re-focused on the *Manoogian* court’s language that the transferor “had no *absolute* right to withdraw its transfer application.” C.J.S. Intox. Liq. § 213, quoting *Manoogian*, *id.* at 430 (*emphasis supplied*). Instead, withdrawal is a *qualified* right: the *Manoogian* court explained that the local board was authorized to condition the grant of leave to withdraw on the transferor’s explanation of grounds for withdrawal. *Manoogian*, 153 A.2d. at 429 (“it was within the board’s jurisdiction to require petitioner to give his reasons for withdrawal”). The court further stated that it the local board was authorized “to hear the [transferees’] objections thereto before granting or denying the application”. *Id.* Relying on *Manoogian*, the R.I. Supreme Court in *Beacon Restaurant, Inc. v. Adamo* upheld the local board’s decision “to require [the transferor] to give its reasons for the withdrawal and to hear [the transferee’s] objections” before granting the request to withdraw. *Id.*, 241 A.2d at 295.

These decisions support finding a qualified right to withdraw a transfer application. The local board has discretion to deny a request to withdraw on the conditions that (1) the transferor justify the request and (2) the transferee be given a right to object. It follows that the local board

has discretion to grant a request to withdraw if the transferor presents adequate grounds for withdrawal and the transferee is afforded a right to be heard regarding the withdrawal. Both conditions are met in this case.

First, the Pier communicated the reasons supporting its request to withdraw to the Board, though its letters to the Mayor and Council Members. The March 28<sup>th</sup> letter requesting the withdrawal from the transferor, while not explicitly listing reasons for withdrawal therein, should be read in context of the other communications the Pier's counsel made to the Board. In the January 11<sup>th</sup> letter, counsel specifically notified the Board of pending litigation in the Superior Court regarding the transferor's right to purchase the property. It was because of this pending litigation that the Board rescheduled the hearing for March. The Board was well-aware of the still-pending litigation when it considered whether or not to grant the request to withdraw on March 28<sup>th</sup>.

Second, the Appellant was given the opportunity to be heard on the request to withdraw at the March 28<sup>th</sup> hearing before the Board. The minutes from the aforementioned hearing documents that counsel for the Appellant objected to the request on the basis that the parties had contracted "to avoid this type of situation." The references to the contractual provisions put the Board on further notice of the pending contractual disputes between the parties that prompted the request to withdraw.

**D. Review of the Board's decision to grant the request to withdraw the transfer application.**

Local boards have broad discretion in their review of liquor license applications, suspensions, and transfers. *Hobday v. O'Dowd*, 179 A.2d 319, 321 (R.I. 1962) ("A board vested by the legislature with authority to issue liquor licenses, when it is acting within the jurisdiction

conferred, has a broad discretion to determine whether applications for licenses will be granted or denied”). This broad discretion extends to decisions on whether or not to grant a request to withdraw a transfer application. *Manoogian*, 153 A.2d at 168 ( “whether leave should be granted rested in the discretion of the board”) *See also Beacon*, 241 A.2d at 295 (the decision “lies in the sound discretion of the board”).

1. Form and Timeliness of the Request.

The local board’s decision to deny the request for withdrawal in *Manoogian* was based, at least in part, on the facts that the transferor’s request was improper in form and in time. *Id.*, 153 A.2d 165. In that case, the local board had approved the transfer on January 21, 1959; and, the transferor made an oral request to withdraw its application at that same date. *Id.* at 167-168. The request to withdraw is distinguishable in this case because a) it was written, and b) the request was made before the Board heard the matter, as opposed to after the Board had closed the case and rendered the decision.

2. Pending Civil Litigation.

During the *de novo* hearing before the undersigned and the local proceedings before the Board, the principle argument advanced by the Appellant in favor of denying the request to withdraw is that the Pier is contractually prohibited from withdrawing the transfer. The Appellant cited the contractual provision in the Lease Agreement that requires the Pier to “peaceably yield up the liquor license” back to it at the end of the lease term. The provision continues that said transfer is not required if the Pier “exercises its right...to purchase the Lease Premises”. Therefore, whether the Pier is contractually prohibited from withdrawing the transfer application depends on whether the Pier can and will exercise the option. This, in turn, is

dependent on the outcome of the civil litigation of the parties, the content of which is far beyond the jurisdiction of the Board or the Department.

In light of this important relationship between the Appellant's principle objection to withdrawal and the outcome of the civil litigation, the Appellant errs in stating the proceedings are "not probative on the issue of whether the license should be transferred back to the Appellant" (Appellant's Post Hearing Brief, at 7). The pending civil litigation between the parties includes a claim for specific performance to allow the Pier to exercise its option to purchase the premises to which the liquor license applies to. The decision of the Newport Superior Court will determine whether the Pier is entitled to exercise the option to purchase. If the Court rules in favor of the Pier, and the Pier elects to purchase the premises, the Pier is not contractually prohibited from withdrawing the application.

Given the pending lawsuit and the Board's notice of it, it was reasonable to grant the request to withdraw. The rights of the parties before it were, and still are, dependent on the outcome of the civil case. If the court rules in favor of the Pier, the liquor license would remain in the Pier's name, obviating the need for transfer proceedings. Therefore, by granting the request to withdraw, the Board eliminated the possibility of unnecessary transfer proceedings. If, on the other hand, the court finds in favor of the Appellant, both parties would be able to comply with the judgment by re-filing the transfer application at that time. The Board was not required to accept the Appellant's suggestion that the transfer be granted with a condition for re-transfer if the Superior Court finds in favor of the Pier. It exercised its discretion in a manner that avoided potentially wasteful proceedings for both parties and the local liquor licensing administration.

#### **E. Conclusion**



The evidence and arguments presented to the undersigned at the *de novo* hearing fully support the Board's decision to grant the Pier's timely written request to withdraw the transfer application in lieu of the pending civil proceedings, after providing the Appellant with an opportunity to be heard. Based on this conclusion, it was moot as to whether the undersigned should grant or deny the application to transfer the liquor license in question. Therefore, the undersigned did not herein include any facts, discussion or analysis presented regarding the suitability of approving a transfer of the Class B license from the Pier to NAJ.

#### **VI. FINDINGS OF FACT**

1. On or about March 28, 2012, the Board unanimously voted to grant the Pier's request to withdraw the transfer application.
2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed that decision by the Board to the Director of the Department.
3. A *de novo* hearing was held on May 2, 2012, before the undersigned sitting as designee of the Director.
4. The facts contained in Section IV and V are reincorporated by reference herein.

#### **VII. CONCLUSIONS OF LAW**

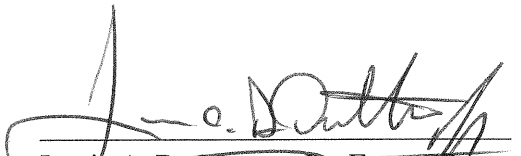
Based on the testimony and facts presented to the undersigned:

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-7-21.
2. The Pier had a qualified right to withdraw the transfer application.
3. The Board's decision to allow the Pier to exercise the qualified right to withdraw was reasonable under the circumstances.

#### **VIII. RECOMMENDATION**

Based on the above analysis, the Hearing Officer recommends upholding the decision of the Board granting the request to withdraw the transfer application for a Class B liquor license executed by the Pier as transferor and by the Appellant as transferee. As recommended by:

Date: 5/25/2012

  
Louis A. DeQuattro, Jr., Esq., CPA  
Hearing Officer  
Deputy Director & Executive Counsel

I have read the Hearing Officer's recommendation and I hereby (check one)

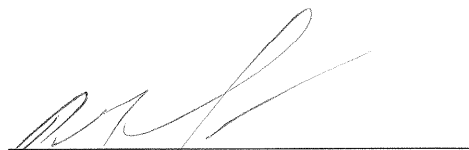
ADOPT

REJECT

MODIFY

the recommendation of the Hearing Officer in the above-entitled Decision and Order.

Date: 25 May 2012

  
Paul McGreevy  
Director

Entered as an Administrative Order No.: -12-034 this 25<sup>th</sup> day of May, 2012.

### 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**

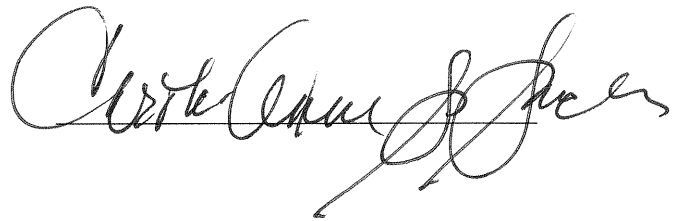
I hereby certify on this 25<sup>th</sup> day of May, 2012 that a copy of the within Order and Notice of Appellate Rights was sent by email and first class mail, postage prepaid to -

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and by email to Maria D'Alessandro, Deputy Director, Securities, Commercial Licensing and Racing & Athletics

A handwritten signature in black ink, appearing to read "Christopher J. Jones", written over a horizontal line.