

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

ABK, LLC d/b/a Boneyard BBQ and Saloon Appellant,	:	
	:	
	:	DBR No. 19LQ031
	:	
v.	:	
	:	
Town of Hopkinton Town Council sitting as the Board of Licenses, Appellee.	:	
	:	
	:	

ORDER RE: SECOND MOTION FOR STAY

I. INTRODUCTION

This matter arose from a motion for stay filed on October 1, 2019 by ABK, LLC d/b/a Boneyard BBQ and Saloon (“Appellant”) with the Department of Business Regulation (“Department”) pursuant to R.I. Gen. Laws § 3-7-21 regarding the decision taken on September 30, 2019 by the Town of Hopkinton Town Council sitting as the Board of Licenses (“Board”) to revoke the Appellant’s Class BV liquor license (“License”). After a hearing on said motion, a conditional stay was granted by the Department of October 9, 2019. A full hearing on this appeal was heard on November 7, 2019 at which time the Appellant requested that the conditional stay be modified to allow it to open to midnight rather than 11:00 p.m. and to allow Patrick Kane to operate the licensee. The October 9, 2019 order is incorporated into this order by reference.

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. THE BASIS FOR SUSPENSION AND REVOCATION

R.I. Gen. Laws § 3-5-23 states in part as follows:

(b) If any licensed person permits the house or place where he or she is licensed to sell beverages under the provisions of this title to become disorderly as to annoy and disturb the persons inhabiting or residing in the neighborhood, or permits any gambling or unlawful gaming to be carried on in the neighborhood, or permits any of the laws of this state to be violated in the neighborhood, in addition to any punishment or penalties that may be prescribed by statute for that offense, he or she may be summoned before the board, body, or official which issued his or her license and before the department, when he or she and the witnesses for and against him or her may be heard. If it appears to the satisfaction of the board, body, or official hearing the charges that the licensee has violated any of the provisions of this title or has permitted any of the things listed in this section, then the board, body, or official may suspend or revoke the license or enter another order.

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.

For further discussion, see the October 9, 2019 order.

IV. STANDARD FOR ISSUANCE OF A STAY

Under *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (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.” 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). The issue before the undersigned is a motion to stay a Decision which is subject to a *de novo* appeal and does not fall under R.I. Gen. Laws § 42-35-15(c). Nonetheless, 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.

V. THE BOARD HEARING

The October 9, 2019 order summarized the testimony heard by the Board.

VI. ARGUMENTS

The Appellant requested that the conditional stay be modified to allow it to open until midnight rather than to 11:00 p.m. The Appellant represented that it was not financially viable to only open to 11:00 p.m. The Appellant requested that Mr. Kane be allowed to operate the licensee. The Appellant represented that it has not been open since the conditional stay was granted.

The Board objected arguing that it is clear that Mr. Kane is a clear danger as a manager. The Board argued that while it did not agree with the conditional stay, the stay included conditions that the Appellant meet with the Board and the Appellant has not met with the Board in the past

month since the stay was granted and now has requested that the stay be modified without any discussion with the Board regarding compliance with the stay conditions.

VII. DISCUSSION

The conditional stay has seven (7) conditions. The sixth condition was that the Appellant must provide proof to the Board that as represented at the stay hearing it is working on or has removed Mr. Kane from the LLC prior to re-opening. At the hearing, the Appellant represented that it made a mistake in making that representation at the stay hearing and it does not intend to remove Mr. Kane from the LLC.

Conditions three (3), four (4), five (5), and seven (7) all require that the Appellant meet or provide information to the Board. The Appellant cannot re-open without providing proof to the Board of a working surveillance system. The Appellant must provide the Board with its security plan and alcohol service compliance plan. In relation to the security plan, the Board may decide if the weekends should include security or a police detail. The Appellant is to meet with the Board with its new proposed manager regarding that manager's experience.

The Appellant has not provided any of that information to the Board. While the Appellant has changed its mind regarding keeping Mr. Kane on the LLC, there is no evidence that the Appellant has taken steps to address any of the issues stemming from the August, 2019 incidence and other incidences. It could be in meeting with the Board and explaining its security plan, alcohol service plan, and its new manager that the Board could agree to modify the stay (request modification of the stay) to allow the Appellant be open to midnight.

The conditional stay was granted pursuant to case law so that the *status quo* could be maintained – in that the Appellant was allowed to stay open - but in order to stay open, certain conditions were imposed in order to address public safety issues. In addition, allowing the Appellant to stay open, allowed for a meaningful hearing for the Appellant on appeal. However,

the Department will decline to modify the stay to allow the Appellant to stay open to midnight rather than 11:00 p.m. on the basis of financial concerns. The Appellant has not even spoken to the Board and has not demonstrated any attempt to comply with the stay conditions. Financial concerns are not irreparable harm and do not outweigh the other factors that contributed to the decision to allow the conditional stay.

While the Appellant has argued that in considering violations, the incidences in 2018 cannot be considered and there is no proof linking the DWI's to the Appellant, the initial stay order indicated there really are two (2) issues in this matter regarding the final determination of violations. One is whether the prior incidences from 2018 and some from 2019 are relevant and/or provable. The second issue is the August, 2019 accident and its relation to the Appellant and could it by itself justify revocation or could it in conjunction with some incidences - depending on what is proved - be enough to justify revocation. Certainly, the issue of Mr. Kane passing out in May, 2019 with apparently no improvement in management after is also a factor in any decision.


It was uncontradicted at the Board hearing that there were violations of Section 1.4.18 of 230-RICR-30-10-1 *Liquor Control Administration* Regulation on August 15-16, 2019. There was evidence of issues of management in terms of the May, 2019 incident and some testimony regarding Mr. Kane allowing a friend to serve alcohol. As noted in the first stay order, the Board is rightfully concerned with the Appellant's management and Mr. Kane did not appear qualified to manage an establishment based on the testimony before the Board. While the Appellant argued at hearing that the evidence regarding Mr. Kane did not show the violations alleged by the Board, the issues right now relate to the stay conditions. Based on the arguments made at hearing, there are no reasons to modify the initial stay order to allow Mr. Kane to work or manage the Appellant.

However, since the Appellant represented that it no longer plans to take Mr. Kane off the LCC, the sixth condition based on that representation at the stay order can be deleted.

VIII. RECOMMENDATION

Based on the foregoing, the undersigned recommends that the October 9, 2019 conditional stay of the revocation of the Class BV license stay in place except that the sixth condition be deleted.

Dated: 11/13/19

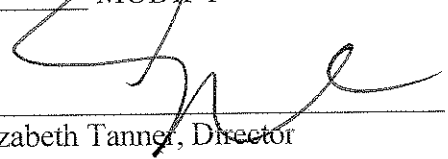

Catherine R. Warren
Hearing Officer

INTERIM ORDER

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

ADOPT
 REJECT
 MODIFY

Dated: 11/19/2019

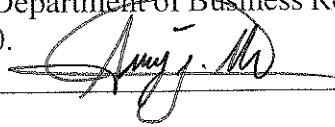

Elizabeth Tanner, Director
Director

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES AN ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify on this 19th day of November, 2019 that a copy of the within Order was sent by first class mail, postage prepaid and by electronic delivery to the following: Kevin J. McAllister, Esquire, Hopkinton Town Solicitor, 362 Broadway, Providence, R.I. 02909, Michael P. Lynch, Esquire, 117 High Street, P.O. Box 761, Westerly, R.I. 02891, Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, R.I. 02904, and Christopher Masselli, Esquire, Law Office of Thomas E. Badway & Associates, 1052 North Main Street, North Providence, R.I. 02904 and by hand-delivery to Pamela Toro, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.


Kevin J. McAllister