

**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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<b>Wise Guys Deli, Inc.,</b>	:	
<b>Appellant,</b>	:	
	:	
v.	:	<b>DBR No. 12-L-0075</b>
	:	
<b>Providence Board of Licensing</b>	:	
<b>Commissioners,</b>	:	
<b>Appellee.</b>	:	

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**DECISION AND ORDER**

**I. Material Facts and Travel**

The Appellant, Wise Guys Deli, Inc., applied for Class BV Limited Liquor License with a BX License (“License”) with the City of Providence Board of Licenses (“Board”). On June 21, 2012, the Appellant removed the BX delineation from the application, leaving the BV Limited License for the Board’s consideration. At the Board Hearings, one objector owning property in the 200-foot radius of Appellant’s premises testified on the record, Roberta Falocco. The following documentation was also presented in objection to the License:

- a. A petition reading “We the property owners within the 200 foot radius object to the granting of a BV Limited and a BX for the Wise Guys Deli, Inc. of 129 Atwells Ave,” bearing 14 name and address entries;
- b. One document presented as an e-mail communication between Ms. Falocco and a neighboring property owner whose name also appeared on the petition;

- c. Four documents presented as e-mail communications between Ms. Falocco and neighboring property owners not listed on the petition, purporting to object to the grant of the license; and
- d. Two documents presented as unaddressed letters from two adjacent property owners not listed on the petition purporting to object to the grant of the license.

On or about June 26, 2012, the Board rendered a decision denying the Appellant's application ("Decision") on the grounds that a) "49 percent of the owners of property within 200 feet of Applicant's premises objected to this license," and b) "concerns by members of the Board that the granting of this license to this type of business would set a precedent for similarly situated businesses in the future."

The Appellant appealed the Liquor Board's decision to the Director of the Department of Business Regulation ("Department"). The Board provided the Department with a certified copy of Board's Record, which included a list of the names and addresses of 36 property owners within the 200-foot radius of the Appellant's premises. The Department mailed notice to all of the listed property owners, advising them of their right "to be heard (or send a letter of objection or approval)." At the Department hearing, the Board elected to rest on the Board's Record; Appellant exercised his right to present his entire case to the hearing officer. The following was presented to the undersigned:

- a. Testimony from two abutting objectors, Verna Gauthier and Ms. Falocco;
- b. Four statements of objections submitted by Ms. Falocco to the Governor's Office, including one statement attributed to Ms. Gauthier, one unsigned statement, and two signed statements;

- c. A fax from Ms. Falocco to the Department “asking that the license be denied and honor the residences and the businesses who signed the petition” and referencing an attached article regarding a disturbance on Federal Hill;<sup>1</sup>
- d. A signed letter of support to the Department from Anthony T. Allegretti, owner of the property on which the Appellant operates, dated Aug 7 2012;
- e. Testimony from Providence Councilman Bryan Principe limited to comment on whether the hearing officer should consider the concerns of the Board-level objectors who did not appear at the Department-level hearing;
- f. Testimony from Lieutenant Luis San Lucas regarding public disturbance calls for Atwells Ave and Spruce Street between the hours of 1:00 a.m. and 3:00 a.m.; and
- g. Testimony from the Gianfranco Morrocco, owner and operator of Wise Guys Deli Inc. (Appellant), Mediterraneo Café (34 Atwells Avenue, across the street from Wise Guys Deli), Caffè Dolce Vita (59 DePasquale Square), and Amici Bar & Grill (242 Atwells Avenue), all located in the Federal Hill neighborhood.

## **II. Issue**

The issue on appeal is whether the Department should grant the license application, and if so, whether the license should be conditioned on a serving time restriction.

## **III. Jurisdiction**

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-1-1 *et seq.*, R.I. Gen Laws § 3-7-21 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen Laws §42-35-1 *et seq.*

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<sup>1</sup> The Providence Journal article is irrelevant. Titled “2 hurt in 50-person brawl in Providencce: no serious injuries after fight on Atwellls Ave,” the article states that “[a]ccording to Police, the fight appears to have started nearby at Sequel Lounge.” The article does not indicate any connection whatsoever to the Appellant nor to any of the other establishments operated by the Appellant’s owner and operator, Mr. Marrocco. (Mediterraneo Café, Caffè Dolce Vita, or Amici Bar & Grill).

#### **IV. Standard of Review**

Under R.I. Gen. Laws § 3-5-17, “[a] local liquor licensing body has wide discretion in determining whether or not to issue a liquor license.” *Boulevard Billiard Club v. Board of Licenses Com'n of City of Pawtucket*, 1975 WL 170016 at 1 (citing *Board of Police Comm'rs. v. Reynolds*, 86 R.I. 172 (1957)). R.I. Gen. Laws § 3-5-17 does not “specif[y] the criteri[a] to be used by the licensing authority in making its decision.” *Ribiero v. Pastore*, 1983 WL 481440 at 2 (R.I.Super.,1983). Instead, the local licensing authority is vested with “considerable discretion” to consider or decline to consider various factors in rendering its decision. *Id.* Upon appeal of the local licensing authority’s decision to the Department under § 3-7-21(a), the Department “has the same broad discretion to grant or refuse such applications as have the local boards.” *Hobday v. O’Dowd*, 94 R.I. 172, 174 (1962). The hearing officer has a “broad and comprehensive” right “to hear cases *de novo*, either in whole or in part.” *Kaskela v. Daneker* 76 R.I. 405 (R.I. 1950).

#### **V. Discussion**

At the hearing before the undersigned, the Board and objectors argued that the Department *must* consider the local level objections; the Appellant argued that consideration is limited to Department-level objections. At the outset of this discussion, it is important to note that neither party is correct in their aversions. It is within the sole discretion of the hearing officer whether or not to consider, and what weight to assign, lower level objections that were not renewed on appeal. The General Assembly’s intent to vest the Department with such discretion is implied from the fact that the Department is permitted, but not required to, admit the local hearing transcripts into the administrative record. § 3-7-21 (c) (“[t]he director may accept...”)(*emphasis supplied*). The weight that the hearing officer assigns to arguments and

evidence presented at both the Board and the Department level is solely within his or her discretion. *Vel-Vil, Inc. v. Pastore*, 1986 WL 732870 at 3 (R.I.Super., 1986) (“The weight to be given to the evidence is for the Administrator”).

As grounds for its decision, the Board stated that “49 percent of the owners of property within 200 feet of Applicant’s premises objected to this license.” When objections do not rise to the level of a legal remonstrance,<sup>2</sup> the Board and the Department may still consider the concerns voiced by objectors, depending on their helpfulness to the hearing officer’s analysis. Given the limited weight assigned to the evidence of objection presented by the Board and objectors,<sup>3</sup> the undersigned finds that the 49% figure cited by the Board does not warrant denial of the license. From the Board Record, it appears that the figure was calculated based on the lot sizes associated with names of 200-foot abutters listed in (a) the submitted petition, and (b) a series of documents that purported to be emails between Ms. Falocco and (c) objecting property owners and unaddressed letters. The latter two sources bore neither signatures nor any other indicia of reliability.

Though Ms. Falocco testified that she collected the signatures, the weight assigned to this evidence is limited because no reasons for objection are supplied to aid the undersigned’s analysis. Of particular concern to the undersigned is whether any of the property owners would have continued to object had they known that the BX rider was removed from the application at the second Board Hearing. Without an explanation, the hearing officer is unable to determine whether or not the reasons for objection are valid. For example, signatures could represent

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<sup>2</sup> In a letter to the Board dated May 24, 2012, counsel for the Appellant “state[d] for the record that the petition does not reach the 51% needed to have a legal remonstran[ce].” This was not contested by the Board at the Department hearing.

<sup>3</sup> The limited weight assigned by the undersigned does not amount to a determination that the petition was inadmissible, however. *Elmwood Tap, Inc. v. Daneker*, 82 A.2d 860 (R.I. 1951) (objections as to the validity of objections “went to [the] weight and not to [the] admissibility in evidence.”)

objection based on mere dislike of the applicant or desire of neighboring establishments to limit competition, neither of which would be grounds for denying the application. Failure to include the reasons for one's objections further denies the liquor license applicant the opportunity to cooperatively address the community's concerns.<sup>4</sup>

Given the limited weight to be afforded the Board's 49% calculation, the undersigned relies instead on the number of objections raised at the Department level. Despite the fact that notice was provided to all 36 abutting property owners, only two, Ms. Gauthier and Ms. Falocco appeared before the undersigned to voice their objections at the Department level. Though Ms. Falocco submitted documentation to Governor's Office appearing to represent the objection of three additional 200-foot abutters, the submission does not constitute reliable evidence of objection to take into account. The Department received no communication directly from the listed authors of the objection statements despite the fact that notice was provided informing abutters as to the name and address of the Hearing Officer to whom letters of objection must be directed to in order to properly invoke one's right to object. The property ownership of the only two abutters that properly exercised their right to object at the Department level amounts to a mere 4.4%.<sup>5</sup>

Turning to the substance of the objections and testimony presented at the Department level, the generalized concerns raised do not warrant denial. In *Krikor S. Dulgarian Trust v. Providence Board of Licenses*, the Department dismissed "broad concerns regarding health and safety" because they lacked of any specificity to the Appellant. DBR No. 10-L-0143 (June 15,

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<sup>4</sup> The weight assigned to the petition is further limited by the Board's failure to confirm the validity of the signatures. For example, the Board in *Elmwood Tap, Inc. v. Daneker* supported the introduction of a signed petition of objection with "the testimony of certain police officers of the city of Providence who, at the request of the bureau, interviewed all objectors whose names appeared on a remonstrance in writing filed with the bureau." 82 A.2d 860 (R.I. 1951).

<sup>5</sup> The certified Board record indicates that a) Ms. Falocco owns 2695 square feet within the 200-foot radius of the premises; b) Ms. Gauthier owns 1865 square feet therein; and c) the total square footage used in the Board's calculation is 104445.

2011). Like the situation in *Krikor*, the objections in this case are too generalized to reasonably support denial of the license. Ms. Falocco’s testimony complains of “loud music,” “property damage,” and “late night disturbances,” that she characterizes as “due to patrons leaving these establishments,” referring generally to “the restaurants in the neighborhood.” Similarly, the testimony of Ms. Gauthier was concerned globally with noise and liquor consumption that have increased over the years in Federal Hill. Nothing in the record pinpoints the cited problems to the Appellant nor any other establishment operated by Appellant’s owner as distinguished from over forty other liquor establishments on Federal Hill.<sup>6</sup>

In addition to their generalized complaints about increasing noise and disturbance in the Federal Hill neighborhood, Ms. Falocco and Ms. Gauthier opposed the License because of the “saturation of liquor licenses” in the area. *General* concern with over-abundance of liquor licenses in the area alone is not adequate grounds for denying a license. See *Ribiero v. Pastore*, 1983 WL 481440 at 3 (R.I.Super.,1983)(concern with the overabundance of licenses *alone* “might not be a sufficient basis for denying transfer”). In *Krikor, supra*, the Department held that over-abundance is “a policy argument and is not grounds to overturn the grant of this License.” *Id.* at 8 (June 15, 2011). Municipalities are legislatively empowered to codify a policy addressing over-abundance of license under R.I. Gen. Laws § 3-5-16, but are required to do so using rule-making formalities. *Tedford v. Reynolds*, 141 A.2d 264, 269 (R.I., 1958). Where the issuance of the Appellant’s license will not violate any limit set by the city, the Department will not deny a license based solely on the argument that there are “too many” in the area. While it is

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<sup>6</sup> Without objection from either party, the undersigned took administrative notice of the Providence Board of Licenses records of active class B licensed establishments in the Federal Hill neighborhood pursuant to Central Management Regulation 2 (Rules of Procedure for Administrative Hearings), 14C.  
Atwells Avenue: 33 BV; 2 BL  
Spruce St.: 2 BV; 1 BL  
Dean St.: 1 BV  
Broadway: 4 BV; 1 BL  
Bradford St: 1 BV

true that the Department may, in its sole discretion, consider specific evidence showing the lack of “necessity and convenience” of an additional license, no such evidence was presented here.

*Hobday v. O’Dowd*, 179 A.2d 319, 322 (R.I., 1962); *Smith v. Board of License Com’rs*, 1979 WL 196091 at 1 (R.I.Super., 1979)(rejecting the “proposition that necessity and convenience are *always* essential criteria to be considered.”)(*emphasis supplied*).

The second reason for denial set forth by the Board is “concerns by members of the Board that the granting [a liquor] license to this type of business would set a precedent for similarly situated businesses in the future.” It is clear from the transcripts that the Board’s reference to “this type of business” reflects its concern with issuing liquor licenses to “delis.” The Appellant represented that his operation is “more than a deli” and “more like a restaurant.” The Appellant’s features dine-in tables and serves “prepared food, lasagnas, pastas, pasta salads, tuna salad” Board’s June 25 Transcript at 3, 6. Moreover, the type of food to be sold at the establishment should not control the outcome liquor licensing decision. An application to serve a beer with an Italian grinder should be treated no differently than an application to serve a glass of wine with Pasta Primavera.

Addressing the Board’s concern with the potential precedential effect of its decision, the Appellant has demonstrated that there is a standard to differentiate his Application from future applicants. The Appellant represented to the Board and the undersigned that there had been a BV Limited License on the premises under prior operation of a deli known as “Ragotti’s.” Board’s June 25 Transcript at 4 (original spelling). The Board did not contest this aversion at either the Board or Department hearing. This history of the premises as a location for a deli serving beer and wine support the grant of Appellant’s license.



Moreover, the Appellant presented specific testimony of its owner's operation of other successful establishments in the Federal Hill neighborhood. Mr. Marrocco operates three establishments with full liquor licenses: Mediterraneo Café (across the street from Wise Guys Deli), Caffè Dolce Vita, and Amici Bar & Grill. The Board did not present any violation history for these establishments that would raise doubt as to Mr. Marrocco's fitness as a operator of an establishment serving beer and wine.

The Department is authorized to grant Appellant's License, subject to the conditions it deems fit. In *Thompson v. East Greenwich*, the Rhode Island Supreme Court held that local liquor licensing boards may grant a liquor license upon conditions that promote the "reasonable control of alcoholic beverages". 512 A.2d 837, 841 (R.I. 1986).<sup>7</sup> Because appeal to the Department "transfers jurisdiction of the cause from the local board to the administrator by operation of law," the Department assumes the same power to issue conditional grants of liquor licenses on appeal.

The Rhode Island Supreme Court has specifically upheld validity "conditions regulating the closing time of a liquor licensee's establishment." *Thompson, id.* Distinct from closing hour restrictions are conditions prescribing the hour until which liquor may be served. "Restrictions relating to the hours during which sales of liquor may be made are for the purpose of strict surveillance and control of the liquor industry." *28 Prospect Hill Street, Inc. v. Gaines*, 1982 WL 609133 at 4 (R.I. Super., 1982). Such conditions do not prevent the licensee from operating without sale of liquor until the closing time designated by the municipality.

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<sup>7</sup> R.I. Gen. Laws § 3-5-21 allows imposition of penalties upon "breach by the holder of the license of the conditions on which it was issued". "If [the implication that conditions may be imposed] is not read into the statute, the power to revoke or suspend becomes a nullity since there is no basis upon which it can be exercised" *Thompson, Id.*, citing *Gott v. Norberg*, 417 A.2d 1352 (R.I. 1985). The Rhode Island Supreme Court derived the limitation on the power to impose conditions from R.I. Gen. Laws 3-1-58, which sets forth the purpose of the of Title III. *Id.* at 842.

In response to the abutters' complaints about late-night noise, it is a reasonable accommodation for the neighborhood to limit the hour until which beer and wine may be served at the Appellant's establishment. In setting the serving hour condition, the undersigned turned to the testimony of Lieutenant Luis San Lucas. The records for public disturbance police calls from 8/29/11 through 8/29/12 on Atwells Ave and Spruce St. demonstrate that 81% of complaints occurred between the hours of 1:00 and 3:00 AM. To address the City's concern with increased alcohol-related disturbances in the area at the cited times, it is reasonable to require the Appellant to cease serving beer and wine at 11 AM weekdays and 12 PM on weekends and holidays.

#### **VI. Findings of Fact**

1. Sections I-V of this decision and order are incorporated herein as findings of fact.

#### **VII. Conclusions of Law**

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-1-1 *et seq.*, R.I. Gen. Laws § 3-7-21 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws §42-35-1 *et seq.*
2. R.I. Gen. Laws § 3-7-21 vests the Department with broad discretion to decide whether or not to grant a liquor license application.
3. Given concerns with authenticity and lack of specificity, the objections in the record do not justify the denial of the liquor license application.
4. A license condition limiting the sale of beer and wine until 11 AM on weekdays and 12 PM on weekends and holidays reasonably responds to community's concerns about late-night business at the Appellant's establishment.

#### **VIII. Recommendation**

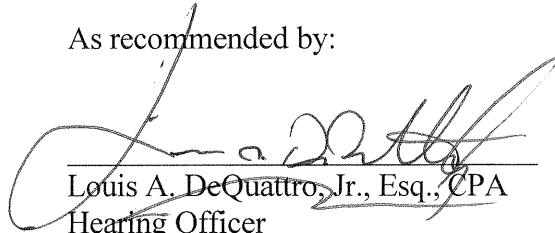
It is recommended that the Board be ordered to grant Appellant's BV Limited liquor license, subject to any and all customary approvals such as fire, health and the like, with the following conditions:

1. Sale of beer and wine shall cease at 11 PM Monday through Thursday.
2. Sale of beer and wine shall cease at 12 AM Friday, Saturday, Sunday and holidays.

The Appellant shall have the right to request the Board lift the time conditions above no earlier than eight (8) months after the grant of the license.


As recommended by:

Date: 9/27/12

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

I have read the Hearing Officer's recommendation and I hereby (circle one) adopt reject or modify the recommendation of the Hearing Officer in the above-entitled Decision and Order of Remand.

Date: 9/27/12

  
Paul McGreevy  
Director

Entered as an Administrative Order No.: 12-054 this 27<sup>th</sup> day of September, 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.**

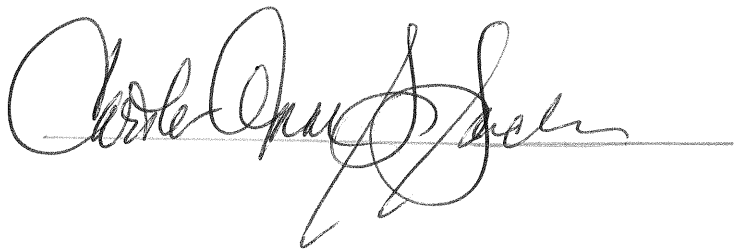
CERTIFICATION

I hereby certify on this 27<sup>th</sup> day of September, 2012 that a copy of the within Order and Notice of Appellate Rights was sent by e-mail and first class mail, postage prepaid to -

Peter Petrarca, Esq.  
Petrarca & Petrarca  
330 Silver Spring Street  
Providence, RI 02904  
Peter330350@gmail.com

Sergio Spaziano  
City of Providence, Law Department  
275 Westmister Street  
Providence, RI 02903  
sspaziano@providenceri.com

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

A handwritten signature in black ink, appearing to read "Charles Andrew Spaziano", is written over a horizontal line. The signature is cursive and somewhat stylized.