

**STATE OF VERMONT  
LIQUOR CONTROL BOARD**

**In Re: JOHN RAPUANO**

**D/B/A STRATTON CHANDLERY, LLC  
531 WEST JAMAICA ROAD  
JAMAICA, VERMONT**

**DOCKET NO. 2017-003**

**ORDER DENYING APPLICATION FOR SECOND CLASS LIQUOR LICENSE**

Applicant, John Rapuano d/b/a Stratton Chandlery, LLC, appeared before the Liquor Control Board (“Board”) on March 8, 2017 to support his application for a Second Class Liquor License.<sup>1</sup> Jacob A. Humbert, Esq, Assistant Attorney General Appeared on behalf of the Vermont Department of Liquor Control (“DLC”). The Board considered testimony from Mr. Rapuano, DLC Investigator Jason Elmer and the evidence admitted.<sup>2</sup>

The Board is established as the paramount authority in the administration of Vermont’s liquor statutes. *See In Re: Wakefield*, 107 Vt. 180, 190 (1935); *Verrill, Jr. v. Daley, Jr.*, 126 Vt. 444, 446 (1967). The Board’s authority to grant Second-Class Liquor Licenses is codified at 7 V.S.A. §222. Granting or denying a liquor license application is a discretionary function entrusted to the Board. *In re DLC Corp.*, 167 Vt. 544, 548 (1998). A liquor license is a privilege and not a right. *In re Judy Ann’s Inc.*, 143 Vt. 228 (1983). Such privilege is subordinate to the public interest and the police power of the state. *Carousel Grill v. Liquor Control Board*, 123 Vt. 93, 94 (1962). At the forefront of our duties as a Board, we are charged with ensuring public safety. Licensee seeks a Second-Class Liquor License as defined by 7 V.S.A. §2(19) and is, therefore, subject to the Board’s jurisdiction. Determining whether a license can be issued; to whom a license may be granted; and where licensed activities may occur are matters entrusted to us and is not to be taken lightly.

We begin with a review of the statutes relevant to the Application. The first is 7 V.S.A. §2(19), which defines a “Second-Class License” as:

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<sup>1</sup> License application proceedings are deemed “Informal” pursuant to the Board’s properly adopted Administrative Organization and Procedures, and Agency Rules of Practice, Rule 4.

<sup>2</sup> The Board admitted the following evidence:

1. State’s Exhibit 1: December 8, 2016 Second Class and Retail Delivery Application
2. State’s Exhibit 2: Statute pertaining to Second Class licensees
3. Applicant’s Exhibit 1: Description of Business Plan

a license granted by the control commissioners permitting the licensee to export malt or vinous beverages and to sell malt beverages or vinous beverages to the public for consumption off the premises for which the license is granted. The Liquor Control Board may grant a second-class licensee a fortified wine permit that permits the licensee to export and to sell fortified wines to the public for consumption off the licensed premises.

7 V.S.A. §222(2) governs the Board's authority and discretion to grant a Second-Class Liquor License as:

Upon making application, paying the license fee provided in section 231 of this title, and upon satisfying the Board that such premises are leased, rented, or owned<sup>3</sup> by the retail dealer and are a safe, sanitary, and proper place from which to sell malt and vinous beverages, a second-class license, which shall authorize such dealer to export malt and vinous beverages, and to sell malt and vinous beverages to the public from such premises for consumption off the premises. A retail dealer carrying on business in more than one place shall be required to acquire a second-class license for each place where the retail dealer sells malt and vinous beverages. No malt or vinous beverages shall be sold by a second-class licensee to a minor.

Effective January 1, 2017, via Act 144 (May 25, 2016), Second-Class Liquor License holders may apply for a retail delivery permit as a benefit that flows from such licensure. 7 V.S.A. §2(40) defines "Retail delivery permit" as a

permit granted by the Liquor Control Board that permits a second-class licensee to deliver malt beverages or vinous beverages sold from the licensed premises for consumption off the premises to an individual who is at least 21 years of age at a physical address in Vermont.

7 V.S.A. §222(7) (A) governs the Board's authority to grant a Retail Delivery Permit:

The Liquor Control Board may grant a retail delivery permit to a second-class licensee if the licensee files an application accompanied by the fee provided in section 231 of this title

(ii) Notwithstanding subdivision (i) of this subdivision (7)(A), the Liquor Control Board shall not grant a retail delivery permit in relation to a second-class license issued to a licensed manufacturer or rectifier for the manufacturer's or rectifier's premises.

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<sup>3</sup> The Board is satisfied that Mr. Rapuano is the owner of the premises that which he seeks to be licensed.

(B) A retail delivery permit holder may deliver malt beverages or vinous beverages sold from the licensed premises for consumption off the premises to an individual who is at least 21 years of age subject to the following requirements:

- (i) Deliveries shall only be made by the permit holder or an employee of the permit holder.
- (ii) Deliveries shall only occur between the hours of 9:00 a.m. and 5:00 p.m.
- (iii) Deliveries shall only be made to a physical address located in Vermont.
- (iv) An employee of a retail delivery permit holder shall not be permitted to make deliveries of malt beverages or vinous beverages pursuant to the permit unless he or she has completed a training program approved by the Department as required pursuant to section 239 of this chapter.
- (v) Malt beverages and vinous beverages delivered pursuant to a retail delivery permit shall be for personal use and not for resale.

DLC, through rulemaking, promulgated General Regulation No. 56, applicable to retail delivery states as follows:

Retail Delivery - Second Class Licensees also holding a Retail Delivery Permit shall have and maintain all insurance coverages as required by Vermont law. Permit holders shall not deliver, to any one physical address in any twenty-four (24) hour period, malt beverages in quantities equal to or more than an aggregate amount of 288 ounces and/or vinous beverages in quantities equal to or more than an aggregate amount of 3,000 milliliters. Deliveries shall only be made between the hours of 9:00am and 5:00pm by an employee of the permit holder who is at least eighteen (18) years of age and who has successfully completed the required Second Class training. Permit holders shall comply with all applicable requirements of Title 7.

Permit holders shall maintain a log of all deliveries made, which shall be subject to inspection upon request pursuant to General Regulation No. 7. Such log shall at a minimum include:

1. Name of recipient and physical address in Vermont to where the product was delivered;
2. How ID was verified in compliance with General Regulation No. 13;
3. A signature of recipient at least twenty-one (21) years of age;

4. Complete description of the product and quantity delivered;
5. The price;
6. Time of delivery (delivery shall be permitted only between the hours of 9:00 am – 5:00 pm);
7. The name of the employee making the delivery.

Applicant, with significant experience in the fine wine business, submitted his Second-Class Liquor License Application on December 8, 2016. This occurred after the Local Control Commissioners in Jamaica approved the Application on December 5, 2016. The proposed licensed premises are not subject to zoning regulations. In his Application, he describes the proposed licensed premises as “rustic, minimalist.” The premises are, in fact, a garage attached to Applicant’s personal, private residence. According to Inv. Elmer, the proposed licensed premises have no store front, no public parking, no posted list of hours that the store is open and no inventory.<sup>4</sup> Applicant seeks this license to deliver alcoholic beverages, specifically wine, from his personal residence to purchasers at their address, without carrying on the activities traditionally associated with Second-Class licensed premises. Applicant would only open his location to the public for retail purposes on a “by appointment only basis.” Applicant seeks the Second-Class Liquor License because it is a condition precedent to a Retail Delivery Permit. There is no mechanism by which a Retail Delivery Permit could be granted in the absence of a valid Second-Class Liquor License as detailed above.

Second-Class Liquor Licenses are, traditionally, granted to retail locations, such as convenience stores and grocery stores, which are predictably open to the public and which contain displays of alcoholic beverage on sale to the public for off-premises consumption. This Application presents the Board with an issue of first impression: could or should Applicant’s personal, private, residential, attached garage be licensed for Second-Class purposes? The crux of this matter is whether the Board can expand the traditional scope of the Second-Class Liquor License into, essentially, a “residential” Second-Class Liquor License. Our narrow focus becomes whether Applicant’s garage is a “proper place from which to sell malt and vinous beverages.” We are not aware of any similar application or a Second-Class Liquor License covering a private residence. Neither Applicant nor DLC presented any evidence on this point at the March 8, 2017 hearing.

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<sup>4</sup> Applicant testified that his garage is now stocked with food inventory, which he delivers.

In an exercise of our discretion to determine what “proper” premises are under 7 V.S.A. §222(2), we deny the Application. A “residential” expansion of the Second-Class licensing scheme to a private garage would expand the enforcement radius of DLC’s investigators from downtowns and commercial areas into residential neighborhoods and, potentially, Vermont’s “back roads,” likely at significant State expense.<sup>5</sup> Even if DLC had the resources to properly enforce our liquor laws and regulations in such non-traditional settings, General Regulation No. 7 cannot be enforced in any reasonable or conceivable sense on a “by appointment only” basis when our Regulation allows for inspection “at any time.”<sup>6</sup> Indeed, General Regulation No. 34 (if the Application was granted), would allow the doors to the proposed licensed premises remain locked at all times as long as only the licensee was on the premises. A DLC Investigator could never walk in unannounced. A “residential” Second-Class Liquor License would hinder DLC’s ability to adequately enforce Vermont’s liquor laws; to engage in compliance checks, to verify the licensee’s records, including enhanced record keeping for retail delivery required in General Regulation No. 56, discussed *supra*.

“Residential” Second-Class licensed premises, not generally open to the public, raise issues with the nexus of an individual citizen’s rights (under the Fourth Amendment of the U.S. Constitution or Chapter I, Article 11 of the Vermont Constitution) to be free from unlawful searches and seizures with a licensee’s obligation to allow inspection of its licensed premises and records “at any time.” As the United States District Court for the District of Vermont recently noted in *Routhier v. Goggins, et al.*, Case No. 5:16-cv-102 (D.Vt., January 18, 2017), “warrantless inspections also may be ‘necessary to further the regulatory scheme.’ Unannounced inspections are essential to ensuring that regulations [...] are strictly enforced.” See *Crosby v. Paulk*, 187 F.3d 1339, 1346-47 (11th Cir. 1999). “[Our] regulatory scheme also places licensees on notice that they are subject to warrantless administrative search and limits who may conduct

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<sup>5</sup> These enforcement concerns do not exist in the closest analogs to the instant Application, general stores or bed and breakfasts. Such licensed premises may be adjacent to, connected or actual private residences, however these involve First and Third-Class Liquor Licenses, which are open to the public and DLC enforcement scrutiny.

<sup>6</sup> General Regulation No. 7 reads, in relevant part:

Licensees and licensee employees shall allow at any time, a member of the Liquor Control Board, the Commissioner, and/or any of their assistants or Investigators to examine the licensed premises as well as all records, papers, stock, merchandise or equipment in reference to the operation of the license, and shall retain such items for inspection.

the search and what locations and items are subject to search.” *Id.*; *see also, e.g.*, General Regulation No. 7. Unannounced, warrantless searches so essential to enforcing our liquor laws and regulations would become subject to limitation and scrutiny in a residential setting, effacing DLC and the Board’s enforcement powers. The Vermont Supreme Court has “consistently agreed [] that the home represents a unique historical category with ‘special expectations of privacy’ warranting the strongest constitutional protection from warrantless searches and seizures.” *State v. Geraw*, 173 Vt. 350 (2000) *citing State v. Morris*, 165 Vt. 111, 133 (1996) (Dooley, J., dissenting). Constitutional protections that would not apply in a commercial retail store setting would likely apply to the proposed licensed premises, a private residence, potentially shielding the Applicant and other similar applicants from enforcement endeavors.

From a legal standpoint, it does not appear the Board has authority to grant the Application insofar as delivery as a Retail Delivery Permit would be sought. A review of the Legislative intent behind retail delivery as enacted, provides:

Retail delivery permit: a permit granted by the Liquor Control Board that permits a second-class licensee to deliver malt beverages or vinous beverages **sold from the licensed premises** for consumption off the premises to an individual who is at least 21 years of age at a physical address in Vermont.

(Emphasis added). The original version of this statute, passed by the Senate on March 22, 2016, reads as follows:

Retail delivery permit: a permit granted by the Liquor Control Board that permits a second-class licensee to deliver malt beverages or vinous beverages **sold by the licensee to the purchaser** at a location in Vermont. (Emphasis added).

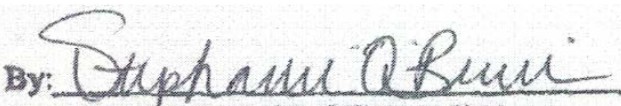
(Emphasis added). This change, in the Board’s assessment, demonstrates legislative intent that only those products actually offered for sale to in-person patrons of Second-Class licensee can be delivered. In other words, their intent is to *complement* a Second-Class Liquor License with retail delivery, not to allow retail delivery *instead of* traditional Second-Class activities. If the wine/beer to be delivered needed only to be “sold by” the licensee, then it could come from anywhere and from any location. Instead, the law as enacted would require that the products delivered be the same that a customer could walk in and purchase themselves. Applicant, however, seeks to be a Second-Class license in name only, which is contrary to this new law.

### **CONCLUSION**

For the foregoing reasons, in our discretion and as a matter of law, this Board concludes that the proposed licensed premises are not “proper” under 7 V.S.A. §222(2). We will not create a “residential” Second-Class Liquor License. The Application for a Second-Class Liquor License is hereby **DENIED**.

DATED at Montpelier, Vermont this 16<sup>th</sup> day of May 2017.

### **VERMONT LIQUOR CONTROL BOARD**

By:   
Stephanie M. O'Brien, Chair