

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE LIQUOR CONTROL ACT

- and -

IN THE MATTER OF AN APPLICATION by **Freeman's Little New York Downtown Limited**, holder of Eating Establishment Liquor License No. 001866 and Lounge License No. 001867, to amend licensing conditions for premises known as Little New Yorker, located at 3671 Dutch Village Road, Halifax, Nova Scotia

BEFORE: Roland A. Deveau, Q.C., Acting Vice-Chair

LICENSEE: **Freeman's Little New York Downtown Limited**
Christopher I. Robinson, LL.B.

INTERVENOR: **Alcohol and Gaming Division**
Jennifer Price-Hudson, Manager of Licensing
Jp. Landry, Regional Manager, Investigation and Enforcement
Jeremy White, Director, Investigation and Enforcement

HEARING DATE: June 7, 2011

SITE VISIT: September 15, 2011

DECISION DATE: **October 19, 2011**

DECISION: Application granted on a probationary basis.

I INTRODUCTION

[1] This Decision is further to a hearing by the Nova Scotia Utility and Review Board (the "Board") respecting an application by Freeman's Little New York Downtown Limited (the "Licensee"), holder of Eating Establishment Liquor License No. 001866 and Lounge License No. 001867, to amend the licensing conditions for premises known as Little New Yorker, located at 3671 Dutch Village Road, Halifax, Nova Scotia (the "licensed premises").

[2] The Licensee seeks to remove the following licensing conditions contained in the Nova Scotia Alcohol and Gaming Authority ("AGA") Order dated November 22, 1999:

2. Service of liquor in the licensed premises will cease at 12:00 o'clock midnight with one half hour to vacate the premises.
3. There will be no live bands performing in the premises.
4. The doors to the outside will remain closed during the hours of operation so that the noise normally associated with licensed premises will not emanate from the building.

[3] The Board held a public hearing to consider the application on June 7, 2011, at the Board's offices in Halifax, Nova Scotia. The Licensee was represented by its solicitor, Christopher I. Robinson, LL.B.

[4] As the Board heard during the hearing, this licensed location has previously caused quiet enjoyment concerns for local residents. Prior establishments called "Dutchie's" and "Giuliano's", which operated under different ownership, were the subject of various proceedings involving area residents. The present restaurant has operated under the current ownership, apparently with no incident, since January 2011.

II EVIDENCE

(i) Evidence of the Licensee

[5] Laurel Kathleen Harrington is the owner of Freeman's Little New York Downtown Limited. She testified about her background as a licensed owner. She described starting as a university student when she was hired as a waitress by Mr. and Mrs. Freeman Joseph, the former owners, at the Quinpool Road location. After working her way up to shift manager, she was offered a share of the business in 2002. She bought out the restaurant in 2006.

[6] She soon expanded the business to a Grafton Street location (in the Prince George Hotel in downtown Halifax) and to the subject Dutch Village Road location.

[7] Ms. Harrington stated that her business is primarily targeted at food service. She describes her business philosophy to new staff as being a business that is mainly a restaurant that operates a lounge, not the reverse.

[8] Noting the example set by the Freemans, she said that she has "great" relationships with her staff members. She added that her management decisions are based on the long term benefits for her licensed establishments, including for both her staff and her clientele. She is very dedicated to her staff, intending to keep them as long term employees. Many employees have been with the business for many years.

[9] In terms of keeping control of her licensed business, Ms. Harrington employs managers she describes as "people managers". She stated that all staff receives proper training and that her paramount concern is the safety of her staff and

customers, as well as the quiet enjoyment of her neighbors. She testified that, under her ownership, there are no issues with disturbances. Ms. Harrington's goal is to operate a place where a person can enjoy a quiet night out with family and friends. Her policy at the restaurants is to be proactive as customers enter the door. Staff exhibit a "heightened sense of awareness" if a problem maker comes in the door. She and her staff do not hesitate to contact police if necessary, but usually communicating proactively with the customer will address any potential problem. She stated that she has placed patrons in a taxi to make sure they get home safe.

[10] Ms. Harrington noted that she has a good relationship with the Alcohol and Gaming Division, Service Nova Scotia and Municipal Relations (the "AGD"). She has received no warnings or infractions from the AGD or from police.

[11] She is also proud of her work in the communities where her restaurants are located. She typically sponsors sports teams and holds fundraisers for local causes. Perhaps more importantly, Ms. Harrington also strives to improve the neighbourhoods where she operates by promoting local business development (e.g., street fairs) and encouraging liveable neighbourhood streets (e.g., family day).

[12] With respect to the Dutch Village Road location, Ms. Harrington is aware that there were quiet enjoyment problems under prior ownership, when the establishment was named "Dutchie's and Giuliano's". These problems included both alcohol and drug abuse, as well as noise. She also noted the building had fallen into a state of disrepair.

[13] She testified that she is sensitive to the community's concerns about noise and maintains that any establishment she operates, including the Little New Yorker on

Dutch Village Road, will not cause any quiet enjoyment problems for neighbourhood residents.

[14] She noted that her Dutch Village Road establishment operates differently than under prior ownership. When she purchased it, the building had fallen into a serious state of disrepair. She has taken down unsightly billboards from the property and installed lighting. She has also planted trees, installed flower boxes, and replaced the awning in front of the building. She has also donated 1,200 square feet of office space in her building to the East Coast Blues Society.

[15] Adopting a successful experience from her Quinpool Road restaurant, she organized a "family day" in the Dutch Village Road neighbourhood. Her employees spearheaded the "family day" along Dutch Village Road on the Saturday prior to the hearing. In addition to food and children's face painting, the fire department, community police and sea cadets also participated. She also held two "open houses" at her restaurant, inviting residents from the large apartment building across the street and from nearby dwellings. About 65-70 people attended the "open houses". She also met privately with Robert MacDonald, who owns the apartment building across the street, to show him that the Little New Yorker operates differently than the prior lounges at that location.

[16] She asserted that her goal is not to run a "party lounge". She noted that the booths in the restaurant help create a relaxed atmosphere. She emphasized that her business is focussed on food service. While she seeks to extend the hours of operation from midnight to 2:00 a.m., she said that this part of the operation will benefit

shift workers (like nurses or paramedics), workers at Bayers Lake and recreational hockey players from Centennial Arena.

[17] Ms. Harrington proposes to offer matinee or evening shows featuring local musicians. In her view, this will benefit the neighbourhood by providing a local source of entertainment for residents.

[18] Counsel for the Licensee also called Marie Louise Robinson to testify in support of the application. Ms. Robinson manages the Freeman's Grafton Street restaurant owned by Ms. Harrington. It is licensed as an eating establishment and lounge, with no conditions on entertainment.

[19] Ms. Robinson confirmed the management style conducted by her owner. She stated that hiring and training is important at Freemans' establishments, including First Aid. She noted the maturity level of employees, in large part due to work hours and employment benefits offered by Ms. Harrington aimed at keeping employees (including employees with young families). She said that Freeman's staff are generally more responsible and mature than staff at other establishments.

[20] With respect to quiet enjoyment, Ms. Robinson testified that she manages a similar restaurant at the Grafton Street location, located on the ground floor of the Prince George Hotel. It offers live music. She stated that she has a good working relationship with hotel management and there have been no complaints from hotel guests since the restaurant opened three years ago.

(ii) Evidence of the Alcohol and Gaming Division

[21] While present at the hearing, the representatives of the AGD did not offer any testimony respecting this application.

(iii) Evidence from members of the public

a) Persons supporting the application

[22] Numerous persons appeared at the hearing to speak in support of the application. The speakers included local residents and employees of Ms. Harrington's restaurants.

[23] Many residents spoke about the former operation of "Dutchie's" and "Giuliano's" under previous management, stating that the new ownership under Ms. Harrington represents a very positive change in the neighbourhood. They noted both her attempts at improving the atmosphere on the street and her exemplary operation of the restaurant since she purchased it.

[24] A few speakers also appeared at the hearing to confirm that Ms. Harrington operates successful and respectful operations on Quinpool Road and Grafton Street. Some also testified about her efforts to improve the neighbourhoods where she operates.

[25] In response to the Notice of Hearing published in the Chronicle Herald, the Board also received 39 letters of comment in support of Ms. Harrington's application. Moreover, the Licensee filed a petition in support of its application, containing about one thousand signatures from residents near both the Quinpool Road and Dutch Village Road restaurants.

b) Persons objecting to the application

[26] Four persons spoke against the application, Robert MacDonald, Edward Gannon, Roger Roode and Sidney Handley. The Board also received three letters of comment opposing the application (including a letter from Mr. MacDonald).

[27] Robert MacDonald's company owns the 70 unit apartment building located opposite the street from the Little New Yorker. He personally manages the apartment building.

[28] While he acknowledged that Ms. Harrington's restaurant is a positive change for the neighbourhood, he was disappointed in learning of the present application because he believes this type of business is disruptive, by its very nature, and is not compatible with residential properties in the neighbourhood.

[29] He questions why the proposed 2:00 a.m. closing time is necessary if Ms. Harrington is community minded, as she contends.

[30] In reference to quiet enjoyment concerns with the prior establishments known as "Dutchie's" and "Giuliano's", Mr. MacDonald submitted that an acceptable solution had only been found with prior ownership after the licensing authorities intervened. He explained that the prior owner made no serious attempt to curtail the noise until the matter went to the Alcohol and Gaming Authority, when a formal objection to the licenses' renewal was considered by the Board's predecessor. The Board observes that the present conditions were placed on the licenses at that time, in the AGA's decision dated November 22, 1999. Mr. MacDonald stated that these licensing conditions had worked and that they should be maintained.

[31] Mr. MacDonald stated that he and his apartment residents had various problems with the prior establishments, including extremely disorderly and uncontrolled behaviour. In his view, the residents of this neighbourhood should not be placed at risk that noise levels will increase again if the licensing conditions are relaxed.

[32] Roger Roode owns a small multi-unit apartment building on Deal Street, adjacent to the side of the Little New Yorker. Citing the experience with the prior ownership of the premises, he is concerned with loud music and intoxicated individuals leaving the premises. Mr. Roode stated that the tenancy in his building had become longer term after the licensing conditions were changed by the AGA in 1999. Prior to that, he stated that he had difficulty keeping tenants because of the noise and disturbances.

[33] Sidney Handley resides in Mr. MacDonald's apartment building and works as security for the building. He testified about the disturbances at the licensed premises under prior ownership.

[34] Mr. Handley also testified about an incident at the premises in late May 2011, when police and an ambulance were called to the Little New Yorker after midnight. The Board notes that this incident was later explained by the Licensee in rebuttal evidence. The incident involved an elderly person who fell and injured her leg while exiting the restaurant after playing the VLTs. The person did not drink alcohol. Consequently, the Board places little weight on this incident in the context of quiet enjoyment.

[35] Edward Gannon lives in a dwelling on Deal Street, where he and his family have lived for 57 years.

[36] Mr. Gannon described Deal Street as being an R-1 residential street with single family dwellings. He recalled the disturbances at the premises under prior ownership, including indecent acts on the streets and on the side of the building, such as patrons urinating or having sex outside and shouting or fights.

[37] He said that the quiet enjoyment had been reasonable since 1999, when the licensing conditions were imposed. He also commended Ms. Harrington for her management of the premises, but he felt that his quiet enjoyment is paramount.

(iv) Site Visit

[38] On September 15, 2011, the Board conducted a site visit of the Dutch Village Road area which contains the Little New Yorker, as well as the apartment building and the residential dwellings discussed during the hearing.

[39] The Board drove along Dutch Village Road, Deal Street and Alma Crescent in both directions. It was noted that the neighbourhood contains a wide mix of uses, including Mr. MacDonald's large multi-level apartment building located on Dutch Village Road directly across from the Little New Yorker, as well as smaller apartment buildings and single family dwellings. However, Dutch Village Road, itself, contains a number of commercial uses, including two licensed restaurants and other businesses. The Board notes that most of the other businesses are not of the type that would likely operate in the evening hours.

[40] The neighbourhood is also near Titus Street, which contains commercial uses such as small businesses, a convenience store, a service station and fast food establishments.

III ANALYSIS AND FINDINGS

[41] The *Liquor Licensing Regulations* (the "*Regulations*") contain various provisions that aim to protect the quiet enjoyment of surrounding properties:

Eligibility criteria for permanent license

8 In addition to the criteria in subsection 48(3) and (5) to (9) of the Act and the requirements for specific classes of permanent licenses set out in Sections 9 to 14, a permanent license may be granted, renewed or transferred by the Review Board only if all of the following eligibility criteria are met:

- ...
- (b) the Review Board is satisfied that operating the licensed premises will not interfere in any way with the quiet enjoyment of neighbouring properties;
 - (c) the Review Board is satisfied that operating the licensed premises will not interfere in any way with or cause inconvenience to schools, churches, hospitals, nursing homes or similar institutions.

Conditions on permanent license to ensure quiet enjoyment of properties

28 The Review Board may impose conditions on a permanent licensee to ensure that operating the licensed premises will not interfere with the quiet enjoyment of neighbouring properties, including conditions on the entertainment to be presented in the licensed premises.

64(2) A licensee must not permit any activity in or about their licensed premises that may interfere with the quiet enjoyment of neighbouring properties.

[42] The Board has considered the issue of quiet enjoyment in a number of its previous decisions. In the Liquor License Board's *Ellingbo* Decision dated March 21, 1995 concerning an application for a lounge license in Port Hawkesbury, Nova Scotia, the Board made the following comments:

In the Board's opinion, even the most exemplary management cannot wholly insulate a neighbour from the inevitable consequences of living close to a licensed lounge. There will be late night traffic, there will be consumption of alcohol, there will be noise as patrons leave the establishment. Management practices may mitigate the degree of annoyance this activity results in, but no lounge operator can eliminate it. It is a fact of life in the liquor business... The residents who are now objecting have raised the issue of quiet enjoyment, and the Board's responsibility to protect the public interest in this regard.

[*Ellingbo* Decision, p. 7]

[43] Further, in a Decision of the Liquor License Board dated November 29, 1993 involving the renewal of entertainment privileges for the *Sternwheeler and Portland Landing Lounges* in Dartmouth, Nova Scotia, the Liquor License Board elaborated on the issue of quiet enjoyment:

The concept of "quiet enjoyment" as it relates to licensing criteria, has been part of Liquor License Board regulations for ten years. It served to replace the previous requirement of an applicant to satisfy the Board that there was a "need" for a liquor license. Over the years, "quiet enjoyment" has been the basis of many denials of applications for license. While difficult to define in tangible terms, it has not been restricted to a narrow interpretation. *The right of a person to quiet enjoyment of property, reasonably free from the disturbances and noise emanating from drinking establishments, is considered by the Board to be a paramount consideration. These disturbances are not limited to actual assaults on residents, or break-ins of homes or businesses. Interference with property, in terms of licensing criteria, is considered to be offensive or disturbing activity connected with a bar that significantly limits the use and enjoyment of a person's property.* [Emphasis added]

[Sternwheeler Decision, p. 37]

[44] The Board has also taken into account how the nature of activities to be carried out in a proposed licensed premises may affect nearby properties. In *Maxx Entertainment*, the Board considered an application for the relocation of a Dooly's franchise to an area along the fringe of the commercial downtown district in Bridgewater, Nova Scotia, near residential properties. At paragraphs 19 to 24, the Board concluded:

[19] While some of the concerns of neighbouring properties were addressed in the development agreement (i.e., the placing of a fence along the Ley property and restricting live entertainment to four times per year), the task before the Board in the present appeal is restricted to its jurisdiction under the *Liquor Control Act* and the *Regulations* thereunder. Thus, *despite Board approval of Town Council's decision to approve the development agreement in a prior planning appeal, the Board must now consider the present application in light of liquor licensing legislation and regulations, which relate primarily, in this application, to the issue of quiet enjoyment.*

[20] The Board has experience dealing with applications where licensed premises are proposed to be located in commercial areas which border on residential properties. Conditions can be placed on licenses which attempt to mitigate potential problems, such as restricting the hours of operation, sound-proofing requirements, prohibition on conversion privileges, limitations on entertainment, etc. The Board observes that the development agreement in the present matter already limits live entertainment to four times per year. The Board has the discretion to determine whether a further public hearing is necessary to amend or delete any conditions.

[21] Obviously, the objections of neighbouring residents are of great concern to the Board. In many cases, when quiet enjoyment arguments are raised by neighbours, applications are denied. *If this application was for a large late night drinking and entertainment lounge, the objections filed by the objectors would very likely have caused the Board to deny this application.*

[22] However, with the greatest respect to the views of Mr. Ley, and others who filed objections, the Board does not find that the application, as presented, has the potential to interfere with the quiet enjoyment of their neighbouring properties. In the Board's view, the proposed relocation will not add to the existing noise or activity. In fact, the Board considers that the relocation may in fact help reduce some of the current problems around the proposed location, which is now vacant after normal working hours.

[23] The Board is comforted in this finding by the nature of the business conducted by Dooly's, as described in the testimony of Mr. Benjamin, Mr. MacPherson, and the three patrons who spoke in support of the application. The Board accepts their evidence respecting the quiet environment promoted within the premises during business hours. Clearly, this is an environment which is intended to attract a more mature clientele seeking a quiet and relaxed atmosphere in which to socialize. The Board infers that the current loitering and noise problems faced by the neighbourhood are not compatible with the nature of the Licensee's business, as their impact would likely cause some mature patrons to avoid the premises. Thus, in the Board's view, it is likely the Licensee will take steps to reduce or eliminate such problems.

[24] The Board is also satisfied that the relocation of the licensed premises to the new location will not add significantly to the late evening or early morning traffic in the neighbourhood. The Board accepts the evidence of Mr. MacPherson, and others, who testified that patrons typically trickle out of the premises throughout the evening, leaving only a few patrons at closing time. Thus, the relocation of the premises should have little effect on the noise problems currently experienced by neighbouring residential properties in the late evening and early morning hours. [Emphasis added]

[2002 NSUARB 57]

[45] The Board has carefully reviewed the evidence and submissions of the Licensee presented at the hearing, along with the evidence tendered by numerous members of the public who appeared to speak for and against the application, as well as the letters of comment filed with the Board. As noted earlier, the test to be met by an applicant in such proceedings relates to the quiet enjoyment of neighbouring properties. While counsel for the Licensee suggested to the contrary, the Board considers that it is the Licensee who must show, on the balance of probabilities, that the removal of the conditions will not interfere with the quiet enjoyment of neighbouring properties or interfere with, or cause inconvenience to, churches and similar institutions.

[46] In *Re Roberts (Sensations)*, 2006 NSUARB 46, the Board noted that:

[174] The words of Regulations 6(c)(vi) and (vii) above [essentially identical to the current s.8 (b) and (c)], or of other provisions in the *Liquor Licensing Regulations*, do not state that the Board is to balance the interests of potential or existing licensees with the interests of neighbouring uses such as residential dwellings, churches, schools or similar institutions. The above provisions simply and expressly provide that the Board must be satisfied the operation of the licensed premises "will not interfere in any way with the quiet enjoyment of neighbouring properties" or "will not interfere with, or cause inconvenience to schools, churches, hospitals, nursing homes or similar institutions." These requirements are not tempered or qualified in any way in the Regulations. [Emphasis added]

[47] That is not to say, however, that a property's quiet enjoyment may not already be otherwise impacted by the existing noise level in its surrounding environment. As the Board stated in its recent Decision respecting *The Bitter End* and *Mosaic*, 2011 NSUARB 86:

[54] ...In assessing the impact a licensed premises may have upon its neighbouring properties, the Board should take into account the background noise which normally exists in that neighbourhood, including pedestrian activity, traffic and noise from unlicensed establishments such as late night food outlets or other sources.

[55] Further, the Board considers that quiet enjoyment can be a concept which is measured in degrees. The level of quiet enjoyment that can be expected in a rural setting, or on the outskirts of a small town, may be quite different than that which can be reasonably expected in a vibrant urban environment such as downtown Halifax.

[56] While the Board expects that no licensed premises in downtown Halifax should interfere with the quiet enjoyment of neighbouring properties, pedestrian activity or traffic which is indirectly related to the collection of restaurants, lounges or other unlicensed venues in downtown Halifax results in the normal backdrop of noise which already exists in this particular urban environment. As noted above in the **Ellingbo** decision:

In the Board's opinion, even the most exemplary management cannot wholly insulate a neighbour from the inevitable consequences of living close to a licensed lounge. There will be late night traffic, there will be consumption of alcohol, there will be noise as patrons leave the establishment. Management practices may mitigate the degree of annoyance this activity results in, but no lounge operator can eliminate it...

[57] Provided patrons are not unruly or rowdy inside a licensed premises, or immediately upon exiting, any subsequent behavior is difficult to attribute to any particular establishment.

[58] Moreover, any noise which emanates from unlicensed businesses, such as late night food establishments like the Pita Pit (which is directly next to the Residence Inn) and those establishments at Pizza Corner (which is in the vicinity of the hotel) can be taken into account by the Board in determining the level of noise and activity normally existing in the vicinity of a licensed premises.

[2011 NSUARB 86]

[48] The objections of those in neighbouring properties are of great concern to the Board. Depending on the circumstances, some applications are denied when the Board finds that the licensed activity will interfere with the quiet enjoyment of neighbouring properties.

[49] As noted in *The Bitter End/Mosaic* and *Maxx Entertainment* decisions above, the Board has experience in dealing with applications where the licensed premises are located in commercial areas which border on, or are adjacent to, residential properties such as the apartment buildings and dwellings in this instance. Conditions can be placed on liquor licenses which attempt to prevent potential problems, such as restricting the hours of operation, sound-proofing requirements, prohibition on conversion privileges, limitations on entertainment, etc. Conditions placed on the licenses require Board approval to be amended or deleted, and the Board has the discretion to determine whether a further public hearing is necessary to amend any conditions.

[50] The Board is satisfied that the current activities of the Little New Yorker are not the source of the complaints which the Board heard about in this hearing. The Board also finds that the present Licensee operates an establishment that is much more respectful of neighbouring properties than under prior ownership.

[51] Taking into account the totality of the evidence in this matter, the Board concludes that the Licensee has shown, on the balance of probabilities, that no noise complaints have arisen as a result of the operation of the Little New Yorker. Moreover, the Board is satisfied that removing the three licensing conditions, as requested by the

Licensee, will not materially interfere with the quiet enjoyment of neighbouring properties.

[52] The Board is also satisfied that approving the application, with conditions, will not add appreciably to existing noise or activity originating from inside the licensed premises.

[53] Accordingly, the Board approves the application. However, given the proximity of the Little New Yorker to the neighbouring residential properties, the Board will approve this request on a probationary basis.

[54] The Board approves the application to remove licensing conditions # 2, 3 and 4 on the existing licenses, on a probationary basis. As provided in the *Regulations*, the Licensee will be permitted to operate until 2:00 a.m. daily. However, any live entertainment will be required to conclude by midnight. No entertainment shall be permitted on the outdoor patio.

[55] This approval shall be reviewed by the Board after one year to determine whether the application should be approved on a permanent basis. In the interim, if the Investigation and Enforcement, Alcohol and Gaming Division receives any complaints pursuant to the *Regulations*, such complaints must be forwarded to the Board.

[56] The Board notes s. 81 of the *Regulations*, which confers a specific power on AGD compliance officers (i.e., inspectors) to deal in an immediate manner with quiet enjoyment concerns:

Inspector may direct licensee to lower volume

81 (1) An inspector may direct a licensee presenting entertainment in a licensed premises, including a patio or other outdoor licensed area, to lower the volume of the entertainment or turn off the amplification of the entertainment.

(2) A licensee must comply with a direction under subsection (1).

[57] In the event local residents encounter any difficulties with noise levels from the licensed premises, the incidents should be reported to the AGD as soon as possible.

[58] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 19th day of October, 2011.

A handwritten signature in black ink, appearing to read "Roland A. Deveau". The signature is written in a cursive style with a large initial "R".

Roland A. Deveau