Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-048

DECEMBER TERM, 2001

In re Club Metronome, Inc.	}	APPEALED FROM:
	}	Liquor Control Board
	}	DOCKET NO. None

In the above-entitled cause, the Clerk will enter:

Appellant Metronome, Inc. appeals from a decision of the Liquor Control Board suspending its liquor license for thirty days. Metronome contends: (1) the Boards' findings were unsupported by the evidence; and (2) certain Board regulations exceeded the scope of its authority. We affirm.

Following an evidentiary hearing on September 20, 2000, the Board issued a written decision containing extensive factual findings and legal conclusions concerning allegations that appellant, which operates Club Metronome in the City of Burlington, had violated numerous Board regulations. The allegations stemmed from on-site visits to Club Metronome by Board investigators during the late evening and early morning hours of March 17 and 18, 2000, and June 10, 2000. The Board concluded that appellant had violated several regulations, and suspended appellant's liquor license for thirty days. This appeal followed.

A summary of the facts pertinent to each of the separate claims on appeal is set forth below. In reviewing appellant's claims, we presume the reasonableness and validity of determinations within the Board's expertise, and require a clear and convincing showing to overcome that presumption. See In re Capital Inv. , Inc., 150 Vt. 478, 480 (1988). The Board's findings are binding on this Court unless clearly erroneous, and its decision to suspend appellant's license will not be disturbed if there exists any reasonable basis to support it. Id. at 480-81.

Appellant first contends the Board erred in finding a violation of Regulation 24, which requires prior Board approval of "any change of directors, officers, managers, or affiliates, or any change in shares which causes the holdings of any new or existing shareholder . . . to equal ten percent or more of the corporation's . . . voting shares." Appellant claims that Howie Otten - the subject of the Board's finding - was not a part owner, but merely a lien holder based on various unspecified loans to the business. The Board's finding was based on ample evidence to the contrary, including an investigator's testimony that when she asked a server if anyone was attending to an intoxicated customer, the server referred her to Otten, whom she described as a part owner of the business; that when the investigator questioned Otten, the latter confirmed that he owned part of the business (later identified as a twenty percent share); and that Otten agreed to look into the problem and eventually took the drink away from the individual in question and requested that he leave. The investigator also testified that Mark Gauthier, one of appellant's part owners, had described Otten as a partner or investor in the business, notwithstanding the fact that he is not listed as an owner in appellant's shareholder agreement.

Appellant argues that the Board's finding was based on inadmissible hearsay. As appellant raised no objection on this ground at the hearing, the claim is waived on appeal. See In re Johnston, 145 Vt. 318, 321 (1985) (licensee's challenge to admission of alleged hearsay evidence was waived absent timely objection). Appellant contests application of the waiver doctrine because it was not represented by counsel at the hearing. The fact that appellant, a licensed corporation, chose to appear without counsel at the hearing does not exempt it from the rule requiring preservation of claims on appeal. As for the sufficiency of the evidence, we believe that the record evidence summarized above provided a reasonable basis for the Board to conclude that Otten functioned as either a manager or an owner without prior Board approval, in violation of Regulation 24.

Appellant next contends the Board erred in finding that it had violated Regulation 37, which requires compliance with the Fire Marshall's rules as to fire hazards. The finding was based on a Board investigator's testimony that on the evening of June 10, 2000, she had observed the premises to be extremely crowded, and had spoken with appellant's manager who reported that there were about 265 persons in the establishment. The investigator also testified that she had contacted the Fire Marshall, who advised her that the maximum occupancy for the business was 175. Mark Gauthier, appellant's part owner, acknowledged that he had never informed himself of the actual limit, indicating that he had relied on two private contracts for musical performances under prior ownership stating that the limit was 300.

Appellant claims that it lacked notice of the occupancy limit, and therefore could not be held in violation of the regulation. Appellant's claimed ignorance of the actual occupancy limit does not excuse the violation. See State v. Dann, 167 Vt. 119, 133 (1997). Appellant also asserts that there was insufficient evidence that the occupancy exceeded the Fire Marshall's limit. As noted, however, the manager acknowledged to the investigator that there were about 265 persons on the premises. Although appellant argues that this evidence was inadmissible hearsay, the objection was not raised below, and therefore was waived on appeal. Johnston, 145 Vt. at 321.

Lastly, appellant argues that the regulation requiring compliance with the Fire Marshall's regulations exceeded the Board's authority. Although the argument was not raised below, and therefore is normally not cognizable on appeal, it goes to the Board's jurisdiction, and therefore may be considered for the first time on appeal. See SBC Enters., Inc. v. City of South Burlington, 166 Vt. 79, 83 (1996). Appellant correctly notes that we have invalidated Board regulations unrelated to the purposes of Title 7, such as the general regulation of "public morals." See id at 83-85 (Board lacked authority to suspend license for violation of city's public-indecency ordinance); In re Club 107, 152 Vt. 320, 324 (1989) (insufficient nexus between liquor regulation and prohibition of obscene or indecent entertainment). We believe, however, that there is a sufficiently close connection between regulating the sale of intoxicants and maintaining a safe premises to ensure that patrons consuming alcohol may escape the building in the event or a fire or other emergency, particularly in light of the effect that intoxicants may have on both the judgment and the physical coordination of persons consuming alcoholic beverages. See In re DLC Corp., 167 Vt. 544, 549-50 (1998) (upholding Board condition relating to drug use on business premises as reasonably related to public's health and safety). Therefore, we conclude that the regulation requiring compliance with the Fire Marshall's regulations was within the jurisdiction of the Board.

Appellant next asserts that the evidence was insufficient to support the Board's finding of a violation of Regulation 38, which provides that the doors of establishments where alcoholic liquor is sold or consumed "shall not be locked if any persons other than the Licensee and his employees are on the licensed premises." The Board's finding was based on the uncontroverted evidence that an investigator who temporarily left the premises was unable to reenter because the outside street-level door was locked, and that patrons remained inside the club. Appellant contends there was no violation because the outside door, which also leads into a separate establishment called Nectars, was actually controlled by Nectars. The claim is refuted by the evidence that appellant's employee promptly corrected the problem when it was brought their attention. Appellant also contends there was no violation because the door was only locked from the outside, but could be opened by patrons from the inside. We are not persuaded that the sole purpose of the regulation is to ensure that patrons may exit promptly and safely. The rule also serves to ensure that the premises are open to inspection by the State, and to entry by the police or fire fighters in the event of an emergency. Accordingly, we conclude that the evidence was sufficient to establish the violation.

Appellant next contends the Board erred in finding a violation of Regulation 41, which provides, in pertinent part, that "[n]o person shall carry or consume alcoholic beverages while dancing." Appellant asserts five separate claims in this regard. First, appellant contends the Board erred in taking judicial notice of the dictionary definition of the term. The Board noted that the definition of "dancing" in the American Heritage Dictionary - "to move rhythmically usually to music" - was consistent with the Board investigator's stated understanding of the term as "moving to the rhythm of music." Use of the dictionary is a common and accepted means of deriving the meaning of statutory language. See In re Vt. Nat'l Bank, 157 Vt. 306, 312-13 (1991). Although appellant argues to the contrary, we discern no basis to conclude that appellant was in any way prejudiced by the Board's failure to provide notice of an intent to take judicial notice of the dictionary definition, which was consistent with the testimony of the Board's investigators.

Appellant also contends that the term "dancing" is unduly vague and therefore failed to provide constitutionally adequate notice. On the contrary, we believe the construction adopted and applied by the Board is perfectly consistent

with the understanding of a "person of ordinary intelligence." Dann, 167 Vt. at 130. Appellant argues that the definition is overbroad and might be applied to a single person standing in front of a stage "moving his head in rhythm to the music." There was amply testimony in this case, however, that numerous couples were dancing together in an area used for dancing, while consuming alcoholic beverages. See id. (rejecting risk of arbitrary or standardless enforcement where facts belied the claim). Appellant also asserts a free speech claim, noting that dancing constitutes a protected form of expression, and arguing that the State has failed to advance a substantial interest to justify the regulation. The argument is unavailing for two reasons. First, the claim was not raised below, and therefore is not preserved for review on appeal. See Johnston, 145 Vt. at 318. Second, , the regulation in question plainly imposes no restrictions on patrons' freedom to express themselves through dancing. Cf. Flanigan's Enters. v. Fulton County, 242 F.3d 976, 982-87 (11th Cir. 2001) (invalidating total prohibition on nude dancing in establishments that sell liquor).

Appellant further asserts that the evidence was insufficient to support the finding of a violation of Regulation 41. As noted, two investigators testified that they observed numerous couples dancing, as that term is commonly understand, while consuming alcoholic beverages. This was plainly sufficient to support the finding. Lastly, appellant asserts that the regulation prohibiting dancing while consuming alcoholic beverages exceeds the scope of the Board's authority. We believe, to the contrary, that the regulation is reasonably related to the regulation of intoxicants, first by making it easier to monitor the consumption by patrons of alcoholic beverages, and second by promoting the safety of persons consuming alcoholic beverages. See DLC Corp., 167 Vt. at 549-50.

Finally, appellant contends the evidence was insufficient to support the Board's findings that appellant violated Regulation 42, by serving multiple drinks to a single customer, Regulation 19, by allowing an apparently intoxicated person to consume alcohol and to loiter on the premises, and Regulation 50, by failing to pay an employee a fixed salary. The Board's investigator testified that she observed a server serve three glasses of wine to a patron at one time. Appellant acknowledged at the hearing that the glasses contained wine. Although appellant claims that there was no evidence the customer intended to consume all three glasses, there was no evidence to the contrary, and the evidence standing alone was sufficient to support the finding. The investigator also testified that she observed an obviously intoxicated man in appellant's establishment, informed Otten about it, and later saw the same patron with a new beer that had been furnished to him at the bar. This evidence was more than sufficient to support the Board's finding of a violation of Regulation 19. Finally, it was undisputed that a person who checked coats at appellant's business was paid only in tips rather than by a fixed salary, as required by Regulation 50. Appellant claims that the coat checker was an independent contractor, and not subject to the requirement. Appellant provided no documentation to establish the coat checker's employment status, however. Furthermore, the Board reasonably concluded that, regardless of the coat checker's status, the purpose of the regulation was to ensure that no person worked solely for tips, thereby engendering loyalty to the customers rather than the licensee. The Board's reasoning was sound and well within its area of expertise, and therefore will not be disturbed on appeal. See Capital Inv., 150 Vt. at 480.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice