

**TOWN OF OLD ORCHARD BEACH, MAINE
ADMINISTRATIVE REVIEW BOARD HEARING
Tuesday, March 10, 2020**

The Administrative Review Board met at 3:12 p.m. on March 10, 2020 in the Town Council Chamber. The following Board members were in attendance:

Attending: Town Manager Larry Mead
Assistant Town Manager, Louise Reid
Code Enforcement – Ricky Haskell
Police Chief Dana Kelley
Fire Chief Fred Lamontagne
Marc Bourassa – Town Business Community Member
Michael Shannon – Alternate Citizen Member of the Board
Dan Blaney – former Administrative Review Member
Keith D. O’Leary – Owner of pun Saloon, LLC

Absent: Jeffrey Hinderliter – Planner
Tina Kelley – Citizen Member of the Board

The Town Manager, Larry Mead, opened the Administrative Review Board at 3:12 p.m.

The Town Manager at the beginning of the meeting read the following:

Authority of the A.R.B.

Authorized by Code of Ordinances: Businesses Section 18-38 and Section 18-39

Purpose of the A.R.B.

- 1. FACT FINDING**
- 2. PRIME GOAL = RESOLVE ISSUES**

Process

- **A.R.B. meeting is triggered by either:**
 - 1. one written complaint to License Administrator**
 - **pertaining to Business License / Code / Ordinance violation**
 - 2. three or more disturbances verified by Police Chief**
- **This does not imply that businesses appearing before A.R.B. are less than stellar**
- **Complaint goes to License Administrator, to Town Manager, to A.R.B. (to discuss complaint/disturbance with business)**
- **If unresolved: to Town Council**

Tools

- A. Resolve Complaint or Issue through Common Sense and Mutual Cooperation**
- B. Propose Consent Agreement with Applicant**

C. (if not resolved) Recommendation to Town Council of License Revocation/Denial

Keith O'Leary dba/Pun Saloon, LLC (206-31-9-A)

The Town Manager in his capacity as Chair of the Administrative Board asked each of the Board members to introduce themselves to those in attendance during this day's review.

The meeting of the Administrative Review Board was convened pursuant to Article 2, Section 18-39 (sub section b, c, and d) of the Town's Code of Ordinances to review the business license issued to Keith O'Leary dba/Pun Saloon, LLC as a review and discussion of the previous meeting with Mr. O'Leary held on October 17, 2019 at which time the Council conducted a hearing to consider whether to suspend or revoke the license. As a reminder, the establishment, Uptown O'Leary's Tap, is designated as a Restaurant because the Zoning Ordinance does not permit new drinking establishments within 400 feet of another building or property that is used by an establishment that serves alcohol in the downtown district. O'Leary's is located within 400 feet of such other establishments. During several visits by law enforcement it was noted that the owner was not conducting the business primarily as a Restaurant but rather as a drinking establishment or a bar.

Notes from Meeting on October 17, 2019

The cause prompting this administrative process stems from an investigation, as reported by the Police Department, that provides evidence that O'Leary's is not meeting the conditions of its business license that regularly serve full course meals to patrons, but rather is functioning as a drinking establishment. Under the Town of Old Orchard Beach's Code of Ordinances, Section 78-720, a drinking establishment may not be located in a building that is closer than 400 feet to any other establishment which serves alcoholic beverages for consumption on the premises. The building occupied by O'Leary's, 41 Old Orchard Street, is located less than 300 feet from GFB Scottish Pub, located at the corner of Seavey and Imperial Street.

The Town Manager explained that the Board's task is to conduct the fact finding concerning violations with the goal of resolving the matter through a Consent Agreement with the Licensee. If the Licensee does not accept a Consent Agreement proposed by the Board the License Administrator shall recommend to the Town Council that the license be either suspended or revoked.

The Town Manager presented the applicable ordinance provisions: Section 78-720 – Spacing of Drinking Establishments and also Section 18-39 – Suspension or Revocation.

Section 18-39:

Sec. 18-39. - Suspension or revocation.

- (a) The town council, upon notice and after hearing, for cause, may suspend or revoke any license issued pursuant to this article. The term "cause" shall mean the violation of any license condition, any section of this article, any condition constituting a threat to the public health or safety, or the revocation or suspension of any state or local license that is a condition precedent to the issuance of a license pursuant to this article. The

term "cause" shall also include any of the grounds for denying a license application under section 18-35.* Licenses may be temporarily suspended without prior notice and hearing if, in the judgment of the building inspector, the town manager or the town council, the continued operation of the licensed business or activity constitutes an immediate and substantial threat to the public health and safety, provided the licensee receives written notification of the suspension and the reasons therefor, prior to its taking effect, and a hearing is scheduled as soon as possible thereafter.

*Notwithstanding anything to the contrary in 1 M.R.S.A. § 302, this amendment shall apply to any actions or proceedings pending on the date of its enactment.

- (b) Before the town council conducts a hearing on a suspension or revocation, the town manager will convene an administrative board consisting of the town manager; the police chief; the fire chief; the license administrator; the planning director; a member of the town business community appointed by the town council; and a citizen of the town, not an employee of the town, appointed by the town council, an alternate member of the town business community appointed by the town council; and an alternate citizen of the town, not an employee of the town, appointed by the town council, to discuss with the licensee the situation giving rise to the possible suspension or revocation.
- (c) The purpose of the administrative board will be fact finding with the goal of resolving the situation by proposing a consent agreement with the licensee. If the licensee fails to appear before the administrative board or fails to accept a consent agreement proposed by the administrative board, the license administrator shall recommend to the town council that the license be suspended or revoked, as appropriate.
- (d) Action undertaken by the administrative board will be viewed as advisory to the town council. The town manager will place recommendations on the agenda for the next regular meeting of the town council. The town council will act upon such recommendations in the same manner as used for license hearings.

(Ord. of 6-13-1961, § 5(C); Ord. of 2-16-1988; Ord. of 8-7-2001; Ord. of 9-18-2001; Ord. of 4-15-2008; [Ord. of 3-1-2016](#))

Section 78-720:

Sec. 78-720. - Spacing of drinking establishments.

- (a) After November 5, 2003, no new drinking establishment shall be located in a building, structure, or area of land which is closer than 400 feet, measured in a straight line without regard to intervening structures or objects, to any other building, structure, or land which is:
 - (1) Occupied by a drinking establishment; or
 - (2) Occupied by any establishment which serves alcoholic beverages for consumption on the premises.
- (b) No drinking establishment shall be located in a building, structure, or area of land which is closer than 100 feet from the boundary of a residential zoning district.
- (c) Any drinking establishment existing on November 5, 2003 may continue to operate in its existing location provided the owner of the establishment registers with the code

enforcement officer on a form specified by the code enforcement officer and establishes to the satisfaction of the code enforcement officer that the establishment was lawfully located or has been deemed legally nonconforming as a drinking establishment as of November 5, 2003. Any establishment which does not so register with the code enforcement officer by May 5, 2004 or which the code enforcement officer determines was not lawfully located as of November 5, 2003 shall not qualify as a lawful nonconforming use under section 78-176, and continued operation shall constitute a violation. A drinking establishment which is allowed to operate pursuant to this section is not eligible for an appeal from restrictions on nonconforming uses under section 78-180.

- (d) Any establishment which serves alcoholic beverages for consumption on the premises must, annually at the time of renewal of its license under chapter 18, article II of this Code, provide information to the code enforcement officer on a form specified by the code enforcement officer demonstrating that the establishment continues to operate in a manner which complies with the spacing requirements of subsection (a) of this section or is allowed to continue in a nonconforming location pursuant to subsection (c) of this section. Any establishment which does not provide such information or which has changed its operation so that it no longer complies with such spacing requirements will be in violation.

(Ord. of 11-5-2003(1), § 7.1.3.3)

Continuation of Today's Meeting

On February 24, 2020 the Code Enforcement Office conducted an inspection of O'Leary's Pub at the request of the Town Planner. Upon the inspection the following was found:

**Menus are posted and visible from the sidewalk at the time of the inspection.
There appears to be sufficient menus with at least one on every table.
There was no staff available at the time of our inspection.
When asked the Owner stated these menus are current and being served.
There appeared to be four dinner items on the menu.
No Chalk Board seen offering specials.
Tables had salt and pepper shaker on each table.
There appears to be adequate stock to serve dinner.
The owner stated he serves until closing.**

Discussion continued on the Consent Agreement of November 14, 2019. The Consent Agreement Terms include requirements the Licensee must meet in order to demonstrate the business is "primarily and regularly used for the purpose of providing full course meals" and otherwise does not meet the definition of a Drinking Establishment.

The Consent Agreement terms include two sections. A-1 (Required Licensee Actions) and A-D (Documentation) which identify the requirements the Licensee must meet. Regarding compliance with A-I, the Code Officer Tim Nelson inspected the property on February 24, 2020. Regarding compliance with A-D, specifically A and B, the business owner provided food and liquor receipts for three consecutive months and hours worked for one month.

Overall, it is the staff's opinion the business owner is complying with the Consent Agreement. They noted the lack of staff and hours worked for only one month (out of three since the Consent Agreement was signed) but this was understandable due to the slow winter months.

There was the suggestion that the Consent Agreement stay in place till possibly September 15, 2020 and the following Motion was made by Michael Shannon and seconded by Ricky Haskell:

MOTION: Michael Shannon motioned and Ricky Haskell seconded to address the requirements of the Consent Agreement around September 15, 2020 with the continuation of rectifying the Code Violations by that time.

VOTE: Unanimous: Town Manager Larry Mead, Code Enforcement Officer Ricky Haskell, Fire Chief Fred Lamontagne, Marc Barassa, Michael Shannon, Dan Blaney.

Nay: Chief Dana Kelley

Jonathan Tibbett dba/Tebbs2
(206-26-4-D), 34D Saco Avenue, year-round retail Smoke Shop with Hemp Products

It should be noted that Jonathan Tibbett, owner of Tebbs2 closed his business making the Administrative Review appearance and consideration not necessary.

To provide background for future discussions, the requested appearance of Jonathan Tibbett dba/Tebbs2, pursuant to Section 18-39 of the Old Orchard Beach Code of Ordinances, to consider whether to recommend to the Town Council that the business license for the operation of Tebbs 2 Smoke Shop be suspended or revoked. The cause prompting this administrative hearing stems from inspection of the property that shows the business owner was at the time operating a Headshop which is a use that is not allowed. Headshops are not identified as a permitted or conditional use in the zoning district (DD-2) where the above property is located; therefore are considered an Omitted Use. Chapter 78, Section 78-148, Omitted uses, states: Any

Use not specifically allowed as either a permitted use or a conditional use is specifically prohibited.” Because the Headshop use is omitted from Chapter 78, Section 78-747, Permitted Uses, it is prohibited from operation at 34 D Saco Avenue.

Under the Town's Ordinance the Administrative Review Board shall conduct fact finding. If the Board determines that there is a violation of the Ordinance the Board shall propose a Consent Agreement with the Licensee. If the Licensee does not accept the Consent Agreement the License Administrator shall recommend to the Council that the license be revoked or suspended.

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“Headshop means a building or place where drug paraphernalia is sold or offered for sale or where merchandise is displayed for the purpose of sale and/or for the purchase of promoting sales and where either the nature of the merchandise or the nature of some of the merchandise is equipment, products or material designed or marketed for use as drug Paraphernalia. An establishment which meets this definition is considered a head shop, notwithstanding that it may also sell or display other types of merchandise.”

Old Orchard Beach does not allow retail marijuana establishments and registered medical marijuana caregiver retail stores. Some medical marijuana uses are allowed but the type of use and location is limited. Adult use marijuana related stores, retail marijuana establishments, including retail marijuana stores, retail marijuana cultivation facilities, retail marijuana products manufacturing facilities, retail marijuana testing facilities, and retail marijuana social clubs, are prohibited in Old Orchard Beach.

If the CBD is derived from hemp and does not exceed the THC levels, it is acceptable as a retail produce in Old Orchard Beach because the ordinances regulate marijuana, not hemp. If the CBD is derived from marijuana it is only acceptable to sell where medical marijuana can be sold in Old Orchard Beach.

According to the business owner at the time of the need for the Administrative Hearing he was only to be selling vapes, water pipes, pipes, ashtrays, scales, etc. As for CBD he will sell hemp with the legal amount of THC or less (-0.3% THC). Currently the business owner sells CBD Tinctures, Gummies, Hemp, Flavored Honey Sticks, balms, body butters, cartridges, etc. He has assured that he will get rid of any products that may not be allowed.

Based on the Old Orchard Beach Police Department findings and observations from Saco Avenue, the Town has found that the business owner is illegally operating a prohibited use, a Headshop, as defined in the Old Orchard Beach Code of Ordinance Chapter 78, Article I, Section 78-1, and has installed exterior signage without Design Review and Building Permit Approval.

The Business Owner was notified of the violations.

1. Illegal Operation of a Headshop:

The above mentioned property is illegally operating as a Headshop. Headshops re not identified as a permitted or conditional use in the Zoning District (DD-2) where the above property is located; therefore are considered an Omitted Use. Chapter 78, Section 78-148, Omitted uses, states: “Any use not specifically allowed as either a permitted use or a conditional use is specifically prohibited.” Because the Headshop use is omitted from Chapter 78, Section 78-747, Permitted Uses, it is prohibited from operating at 34 D Saco Avenue. It should also be noted that on December 19, 2019, you were notified by Planner Jeffrey Hinderliter as well as by e-mail that Headshops are a use that is no longer allowed by the Town. The Business Owner acknowledged receipt.

2. Installation of Signage with Sign Permit Approval

Signs have been installed on the above-mentioned property without Design Review and Building Permit approval. Chapter 78-426 states: “Prior to the issuance of a building permit or prior to the issuance of a site plan review or conditional use permit in the DD-1 and DD-2 Districts, Design Review is required for the following activities: (4) Installation, addition, or modification of signage.” This has not been one by the Business Owner, thus they are in violation of the Signage requirement.

The Business Owner was ordered to take the following actions to correct the violations within seven days of the letter.

- 1. Cease all Headshop Operations. This shall include, but is not limited to ceasing all sales and removal of all items defined as Drug Paraphernalia, as defined in Chapter 78-1, from the property located at 34D Saco Avenue, Old Orchard Beach, Maine. This includes, but is not limited to anything posted, applied or attached.**

Unless these violations were corrected the Town may commence legal action in the Maine District Court or the Maine Superior Court. If the Town is the prevailing party in enforcement litigation, the owner may be liable for the Town’s attorney’s fees and costs plus civil penalties. Fines of up to \$2,500 per violation per day may be imposed.

The Business Owner was also instructed that should he or she wish to dispute the Notice and Order, it may be appealed to the Old Orchard Beach Board of Appeals. Such appeal would be filed with the Code Enforcement Officer. It should also be noted that filing the appeal to the Board of appeals does not relieve the Business Owner of the responsibility to correct the violations or of the liability for civil penalties.

Again, since the Owner has closed his establishment the Administrative Review Board Hearing was not necessary.

MOTION: Ricky Haskell motioned and Mark Bourassa seconded to Adjourn the Administrative Board Meeting at 3:45 p.m.

VOTE: Unanimous.

Respectfully Submitted,

**V. Louise Reid
Secretary to the Administrative Board**

I, V. Louise Reid, Secretary to the Administrative Review Board of Old Orchard Beach, Maine, do hereby certify that the foregoing document consisting of six (6) pages is a true copy of the original Minutes of the

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