

In response to said letter, the undersigned notified the parties that the letter would also be addressed at hearing. At hearing, the attorneys for the Department and Appellant appeared but Rite Aid's and the Board's attorneys did not appear.

II. Jurisdiction

The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-5-1 *et seq.*, R.I. Gen. Laws § 3-7-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

III. Issues

Whether the License could be transferred in light of R.I. Gen. Laws § 3-7-4, R.I. Gen. Laws § 3-7-5, R.I. Gen. Laws § 3-5-11.1, R.I. Gen. Laws § 3-5-11, and R.I. Gen. Laws § 3-5-17 and whether the License still exists.

IV. Material Facts and Testimony

No testimony was taken. However, pursuant to the May Order, the Appellant's request for admissions were deemed admitted. Those admissions will be discussed in the context of the discussion below.

V. Discussion

A. Arguments

The Appellant argued that the Appellant's admissions demonstrate that the transfer of license to Rite Aid was in violation of R.I. Gen. Laws § 3-7-4 (200 feet radius) and R.I. Gen. Laws § 3-5-11 (licensing of chain stores). The Department argued that the License should not have been transferred because of violations of R.I. Gen. Laws § 3-5-11 and R.I. Gen. Laws § 3-7-5 (must be self contained and independent drugstore).³ The

³ See Department's Exhibit One (1) (September 3, 2010 Department email to Board setting forth its position against the transfer of the License).

Department also relied on its prior decision in *R.J. Hill Liquors, Inc. v. Woonsocket City Council*, LCA-WO-96-15 (2/10/97) in relation to R.I. Gen. Laws § 3-5-11.

B. The License

It is a matter of law that local licensing boards have broad discretion in deciding whether or not to grant a liquor license application. “The granting or denying of such licenses is in no sense an exercise of the judicial process. On the contrary it is purely administrative. In performing that function the board act (sic) as agents of the legislature in the exercise of the police power. . . . [I]t is a matter of discretion whether or not they shall grant the license and this court has no control over their decision.” *Bd. of Police Comm'rs v. Reynolds*, 86 R.I. 172, 176 (1975). The Department has the same broad discretion in the granting or denying of liquor licenses. *Id.*, at 177. While the Department has the same broad discretion in granting or denying a liquor license application, as articulated through liquor licensing decisions at the State court level and the Departmental level, the standard of review for a new license or a transfer of license is subject to the discretion of the issuing authority. Such discretion must be based on reasonable inferences drawn from the evidence. Arbitrary and capricious determinations not supported by the evidence are considered suspect. If the local licensing authority can demonstrate evidence in support of its decision, the Department will uphold the grant or denial of a license.

However, the Department cannot uphold the granting or transfer of a liquor license that is statutorily invalid. The Courts have consistently recognized that the Department has broad and comprehensive state control over the traffic in intoxicating liquors. *Baginski v. Alcoholic Beverage Comm'n.*, 4 A.2d 265 (1939). Furthermore, *Baginski* found that consistent with the Department’s wide powers of regulation and supervision, it

is, in effect, a “state superlicensing board.” *Id.* at 268. See R.I. Gen. Laws § 3-7-21. See also *Tedford v. Reynolds*, 141 A.2d 264 (R.I. 1958).

For the reasons set forth below, this License should not have been transferred pursuant to various statutes and is revoked and furthermore is now null and void as it no longer exists.

i. R.I. Gen. Laws § 3-7-4⁴ - 200 Feet

Rite Aid admitted that it is less than 200 feet from Appellant pursuant to R.I. Gen. Laws § 3-7-4. As the Appellant is located less than 200 feet from the Rite Aide, under said statute the License could not be issued to Rite Aid.⁵

ii. R.I. Gen. Laws § 3-5-11⁶ - Licensing of Chain Stores

⁴ R.I. Gen. Laws § 3-7-4 states in part as follows:

Proximity of Class A licenses. – (a) Retailer's Class A licenses under this chapter shall not be issued to authorize the sale of beverages in any store or place within two hundred feet (200') measured by any public way of another premises holding a Class A license. Licenses presently issued to premises within two hundred feet (200') of the premises where another Class A license is presently issued, may continue to be issued to those premises so long as those premises are in continuous operation under the license. Any transfer or removal from those premises of the license is subject to the provisions of this section. Where a proposed licensed place is upon the opposite side of the street from an existing license, the width of the street is to be disregarded in measuring the distance so as to ascertain if it is two hundred feet (200') away from the premises.

⁵ For a full discussion on this statute, see *PLW-MA Inc. v Pawtucket Board of License Commissioners*, DBR No. 08-L-0148 (2/19/09) at <http://www.dbr.ri.gov/documents/decisions/CL-Decision-PLW-MA.pdf>.

⁶ R.I. Gen. Laws § 3-5-11 states as follows:

Licensing of chain stores. – (a) Licenses, except retailer's Class E, Class B, Class B-H, Class B-L, Class B-M, and Class B-V licenses, authorized by this title shall not be granted, issued, or transferred to or for the use of any "chain store organization," which term shall consist of any chain of retail or wholesale business or business organizations, and more specifically defined herein, including, without limitation, grocery stores, markets, department stores, and convenience stores, as well as retailers of alcoholic beverages, and which include chains in which one or more stores are located outside of the state.

(b) The term "chain store organization" is defined to include, but not limited to:

(1) Any group of one or more holders of Class A liquor licenses who engage in one or more of the following practices with respect to the business conducted under such licenses, either directly or indirectly, or have any direct or indirect beneficial interest in the following practices:

(i) Common, group, centralized or coordinated purchases of wholesale merchandise.

(ii) Common billing or utilization of the services of the same person or the same entity in the management or operation of more than one liquor licensed business.

Maxi Drug South LP d/b/a Rite Aide Pharmacies advertise by circulating flyers in the *Providence Journal* newspaper. There are 44 Maxi Drug South LP d/b/a Rite Aide Pharmacies in the State of Rhode Island. All Rhode Island Rite Aid stores are owned by Maxi Drug South, LP, a limited partnership whose general partner is The Jean Coutu Group (PGC), USA, Inc. While R.I. Gen. Laws § 3-5-11 exempts some liquor licenses from its provisions, it does not exempt the combination of AE licenses. See *R.J. Hill Liquors, Inc.* R.I. Gen. Laws § 3-5-11 prohibits the licensing of any chain of retail businesses including but not limited to grocery stores, markets, department stores, and convenience stores. The Rite Aid in this matter is clearly part of a chain of retail pharmacies in Rhode Island and as such cannot hold a Class AE liquor license.

iii. R.I. Gen. Laws § 3-7-5⁷ - Class A and Class E licenses

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- (iii) Participation in a coordinated or common advertisement with one or more liquor licensed business in any advertising media.
 - (iv) Coordinated or common planning or implementation of marketing strategies.
 - (v) Participation in agreed upon or common pricing of products.
 - (vi) Any term or name identified as a chain or common entity.
 - (2) Any group of one or more liquor license holders who share any of the following common features, either directly or indirectly or acquire any direct or indirect beneficial interest in the following practices:
 - (i) The same director of a corporation, member of a LLC, LLP, partner in a general or limited partnership, trustee or beneficiary of a trust.
 - (ii) The same individual or corporate owners.
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- (4) Upon a finding of violation of this section, the department shall be empowered to set a fine up to the amount of ten thousand dollars (\$10,000) per violating licensee, revoke the license of the violator, or suspend the license of the violator for a period of time to be determined by the department. Additionally, the department shall issue a cease and desist order against the violating chain store entity(s) and may further order the dissolution of the violating chain store entity(s).

⁷ R.I. 3-7-5 states as follows:

Class A license issued to Class E licensee. – It is permissible for the holder of a retailer's Class E license to hold a retailer's Class A license. No Class A license shall be granted to a holder of a Class E license unless the holder of a Class E license maintains, operates, manages or conducts a drugstore. The drugstore shall be operated as a self-contained and independent establishment and shall not be located in or be operated as a part of any market, department store or hardware store. For a Class A license as described, the holder of a Class E license shall pay the regular annual license fee and have the full privilege of a Class A license.

As stated above, there are 44 Maxi Drug South LP d/b/a Rite Aide Pharmacies in the State of Rhode Island. All Rhode Island Rite Aid stores are owned by Maxi Drug South, LP, a limited partnership whose general partner is The Jean Coutu Group (PGC), USA, Inc. The same entity that owns this Rite Aid at issue also owns 43 other Rite Aid drugstores in Rhode Island. The statute requires that a drugstore that holds a Class E license⁸ be a “self-contained and independent establishment” (as well as not be located or operated as part of any market, department store, or hardware store). Clearly this Rite Aid is not a self contained and independent establishment but rather a drugstore franchise or chain store so pursuant the statute, the License should not have been transferred.⁹

iv. R.I. Gen. Laws § 3-7-6¹⁰ – Renewal of License

The failure to file a renewal application for a liquor license by October 1 of the expiration year results in the license expiring without the preservation of any renewal rights pursuant to R.I. Gen. Laws § 3-7-6. Thus, without a timely renewal application

⁸ The Class E liquor license transferred to Rite Aid is a separate license from the Class A liquor license transferred to Rite Aid. *El Nido, Inc. v. Goldstein*, 626 A.2d 239 (R.I. 1993). See also *R.J. Hill Liquors, Inc.*

⁹ The Appellant raised the issue of notice pursuant to R.I. Gen. Laws § 3-5-17. However, as the hearing before the Department is a *de novo* hearing rather than an appellate review of what occurred at the municipal level, any alleged error of law or fact committed by the municipal agency is of no consequence. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984). See also *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964) (*de novo* hearing is unaffected by any error by local board).

¹⁰ R.I. Gen. Laws § 3-7-6 provides as follows:

Renewal of Class A, Class B, Class C, Class D, Class E, and Class J licenses. – The holder of a Class A, Class B, Class C, Class D, Class E, or Class J license who applies before October 1 in any licensing period for a license of the same class for the next succeeding licensing period is prima facie entitled to renewal to the extent that the license is issuable under § 3-5-16. This application may be rejected for cause, subject to appeal as provided in § 3-7-21. A person whose application has been rejected by the local licensing authorities shall, for the purpose of license quotas under § 3-5-16, be deemed to have been granted a license until the period for an appeal has expired or until his or her appeal has been dismissed. The license holder may be required to pay a twenty-five dollar (\$25.00) fee upon application of renewal, at the option of local licensing authorities. This fee shall be used by the local licensing authority for advertising and administrative costs related to processing the renewal application.

being filed, a liquor license expires on its own terms. See R.I. Gen. Laws 3-7-6 and *Vitterito et al. v. The Sportsman's Lodge & Restaurant*, 228 A.2nd119 (R.I. 1967) and *Vars v. Citrin*, 470 F.3d 413 (1st Cir. (R.I.) 2006).¹¹ See also *Cynthia Simmons v. Providence Board of Licenses*, DBR No.: 08-L-0065 (11/19/10); *Liquor 99, Inc. v. City of Providence, Board of Licenses*, DBR No.: 06-L-0036 (8/22/07); and *Oasis Liquors v. Bureau of Licenses, City of Providence*, DBR-04-L-0066 (12/30/04).

Administrative notice is taken of a transcript of the Board's hearing on August 18, 2010 at which time the transfer of the License from Genter's Pharmacy to Rite Aid was approved by the Board. Pursuant to R.I. Gen. Laws § 3-5-8,¹² liquor licenses expire on December 1, 2010. Since a renewal was not filed prior to October 1, 2010, the License expired on December 1, 2010. The Letter states that Rite Aid did not apply for renewal in 2010 (for the year 2011) or in 2011 (for the year 2012). Of course without a renewal of License in 2010, the License expired and could not be renewed in 2011. However, even if it was found that the License had somehow renewed in 2011, no timely renewal was filed in 2011 for the year 2012. There was no dispute at hearing regarding the facts set forth in the Letter.¹³ Thus, even if the License was appropriately transferred (and it was not), the License expired and no longer exists.

¹¹ As *Vars* warned, a liquor license is only for a one (1) year term. The compliance by a liquor licensee with conditions of licensing is an ongoing obligation. To find otherwise would not comport with the statutory goals of reasonably controlling the traffic in alcoholic beverages.

¹² R.I. Gen. Laws § 3-5-8 states as follows:

Expiration date of licenses. – Every license except retailer's Class F licenses and retailer's Class G licenses shall expire on December 1 after its issuance.

¹³ The parties were specifically notified that the Letter would be addressed at hearing as the Letter came to the parties attention after the May Order issued.

C. Conclusion

Based on the forgoing, the License should never have been transferred by the Board in violation of said statutes. When a local authority grants a license without jurisdiction, the Department shall revoke the license. See *Baginski*. In this matter, the Board was without jurisdiction to transfer the License so the License is revoked; however, the License also expired without renewal and thus, is also null and void.

VI. Finding of Facts

1. The Board granted Rite Aid's application for the transfer of a Class AE license from Genter's Pharmacy to Rite Aide.
2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed said decision by the Board to the Director of the Department.
3. Rite Aide and the Department intervened in said appeal.
4. A *de novo* hearing was held on June 26, 2012 before the undersigned sitting as a designee of the Director. The parties chose not file briefs and rested on the record.
5. The facts contained in Section IV and V are reincorporated by reference herein.

VII. Conclusions of Law

Based on the testimony and facts presented:

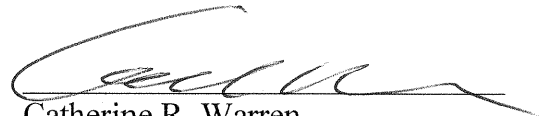
1. The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-5-1 *et seq.*, R.I. Gen. Laws § 3-7-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*
2. The Board's transfer of License violated R.I. Gen. Laws § 3-7-5, R.I. Gen. Laws § 3-5-11, and R.I. Gen. Laws § 3-7-4. Thus, the License is revoked.

3. No timely renewal of License was filed in 2010 or 2011 so that the License expired and is null and void as it no longer exists.

VIII. Recommendation

Based on the above analysis, the Hearing Officer recommends that it be found the License is revoked for violations of R.I. Gen. Laws § 3-7-5, R.I. Gen. Laws § 3-5-11, and R.I. Gen. Laws § 3-7-4 but furthermore, the License expired and is null and void as it no longer exists.

Dated: 8/14/12



Catherine R. Warren
Hearing Officer

ORDER

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

_____ ADOPT
_____ REJECT
X _____ MODIFY *See Attachment A, Page 9A*

Dated: 8/17/2012


Paul McGreevy
Director

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.

Attachment A

The modification below replaces in its entirety page 3 of the Decision for City Liquors, Appellant v. City of Providence, Board of Licenses, Appellee and Department of Business Regulation and Maxi Drug South, L.P. d/b/ Rite Aid Pharmacy, Intervenors—DBR No.: 11-L-0009. No other modifications are made to the Decision.

Modification

Department also relied on its prior decision in *R.J. Hill Liquors, Inc. v. Woonsocket City Council*, LCA-WO-96-15 (2/10/97) in relation to R.I. Gen. Laws § 3-5-11.

B. The License

It is a matter of law that local licensing boards have broad discretion in deciding whether or not to grant a liquor license application. “The granting or denying of such licenses is in no sense an exercise of judicial process. On the contrary it is purely administrative. In performing that function the board act (sic) as agents of legislature in the exercise of the police power.... [It] is a matter of discretion whether or not they shall grant the license and this court has no control over their decision.” *Bd. of Police Comm’rs v. Reynolds*, 86 R.I. 172, 176 (1957). The Department has the same broad discretion in the granting or denying of liquor licenses. Therefore, the Department may or may not uphold or reverse a municipality’s decision based on the evidence presented at a *de novo* hearing.

However, the Department cannot uphold the granting or transfer of a liquor license that is statutorily invalid. The Courts have consistently recognized that the Department has broad and comprehensive state control over the traffic in intoxicating liquors. *Baginski v. Alcoholic Beverage Comm’n*, 4 A.2d 265 (1939). Furthermore, *Baginski* found that consistent with the Department’s wide powers of regulation and supervision, it

