STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
PASTORE COMPLEX
1511 PONTIAC AVENUE
CRANSTON, RHODE ISLAND

In Re: Jarr Realty, LLC	:	**DBR No.: 14LQ062**

ORDER DISMISSING AND DENYING EMERGENCY MOTION

I. Introduction

On December 4, 2014, Jarr Realty, LLC ("Appellant") filed with the Department of Business Regulation ("Department") an Emergency Motion to Re-Issue Appellant's License in Accordance with DBR's Orders of June 28, 2012 and January 8, 2013 ("Emergency Motion"). On December 5, 2014, the City of Providence ("City") filed an objection thereto. Oral argument on the Appellant's Emergency Motion came before the undersigned sitting as a designee of the Director of the Department on December 5, 2014.

In 2011, the Appellant initially applied for and was denied a Class BV liquor license ("License") by the Providence Board of Licenses ("Board") on August 1, 2011. The Appellant appealed the denial to the Department and the matter was remanded to the Board for further consideration and the Board again denied the Appellant's application for the License on March 2, 2012. On March 29, 2012, the Department remanded the matter to the Board with instructions to issue the License without conditions. A Motion for Reconsideration of the March 29, 2012 decision was filed and that decision was vacated by the Department on June 29, 2012 which ordered the Board to issue the License with conditions. The Board appealed the June 29, 2012 decision to Superior Court but that

appeal was dismissed upon agreement by the Board and the Appellant to jointly file with the Department a Motion to Reconsider its June 29, 2012 decision. On January 8, 2013, the Department issued a decision vacating the June 29, 2012 decision and finding that no legal remonstrance existed and ordering the Board to issue the License without conditions.

The Appellant's Emergency Motion requests the Department re-issue the January 8, 2013 decision with "today's date" so that the Appellant is not in violation of Rule 14 of *Commercial Licensing Regulation 8 – Liquor Control Administration* ("CLR8"). Said rule provides as follows:

> **GRANTED LICENSE (NOT ISSUED)-RETAIL**
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> A retail alcoholic beverage license may be granted but not issued pending full compliance with conditions and criteria necessary for the issuance of said license. All such "grants" of alcoholic beverage licenses shall be in writing. The license shall particularly describe the place or premises where the rights under the license are to be exercised. The applicant shall have no more than one (1) year after the original granting of the license to meet all conditions and criteria set forth in the granting order. If the applicant does not meet all the conditions and criteria within one (1) year, the license shall become null and void without further hearing by the local licensing authority; provided, however, said time period shall not be calculated when the license at issue is involved in litigation, from the date of commencement of the action to final disposition.

II. Arguments

The Appellant argued that Rule 14 has no statutory or legal basis. The Appellant argued that the General Assembly has capped the number of licenses but has not addressed the Rule 14 issue. The Appellant argued that Rule 14 cites to R.I. Gen. Laws § 3-5-9 but that is for premises. The Appellant argued that it has taken it longer than expected to rehabilitate the building in which it will be located and has spent $1.2 million on rehabilitating the building so that to deny the license would be blatantly unfair. The Appellant argued that the Department in its discretion can re-issue the License.

The City argued that Rule 14 controls and that the Department never issued the License and is without authority to issue a license to the Appellant. The City argued that the Appellant's License is null and void by operation of Rule 14 and the Appellant's recourse is to apply for a new Class B license. The City argued that the Department has wide rule-making discretion and it is good public policy to limit the granting and issuing of licenses; otherwise, there could be a situation where the City has no idea who is using the License or will it be used.

III. Discussion

a. Rule 14 of CLR8

Rule 14 exists clearly for the reason of establishing the "reasonable control of the traffic in alcoholic beverages." R.I. Gen. Laws § 3-1-5. R.I. Gen. Laws § 3-5-9 applies to all retail licenses. It states as follows:

> Premises covered. - Not more than one retail license, except in the case of a retailer's Class E license, shall be issued for the same premises. Every license shall particularly describe the place where the rights under the license are to be exercised and beverages shall not be manufactured or kept for sale or sold by any licensee except at the place described in his or her license.

This section requires that the license must describe the location where the license is to be used and only that location can be used. R.I. Gen. Laws § 3-5-9 clearly envisions that all retail licenses must be used at a specific location. While R.I. Gen. Laws § 3-5-9 applies to all retail licenses, in terms of revoking a Class B license for non-use,[1] the Superior Court *Baker v. Department of Business Regulation*, 2007 WL 1156116 (R.I.Super.) found as follows:

[1] R.I. Gen. Laws § 3-7-7 requires that a Class B liquor license is only to be granted to a *bona fide* restaurant.

Additionally, the DBR found that the License violates Section 3-5-9, which requires that "[e]very license shall particularly describe the place where the rights under the license are to be exercised." Because the License was not being used at the address to which it was issued, the DBR held that Section 3-5-9 had been violated as well. In the Decision, the DBR stated that finding "the License [to be] valid where it was unused for over eleven (11) years [] would make a mockery of the statutory requirements set forth by the Legislature to obtain and maintain a Class B liquor license." *See* Decision at 10.

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In Section 3-1-5, the Legislature expressly states that the declared purpose of title 3 is "the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." *See also Thompson v. East Greenwich,* 512 A.2d 837, 842 (R.I. 1986); *Independent Beer Distribs. Ass'n v. Liquor Control Hearing Bd.,* 94 R.I. 354, 361 180 A.2d 805, 808-09 (1962).

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The Court will not construe a statute to reach an absurd result. *State v. Menard,* 888 A.2d 57, 60 (R.I. 2005) (citations omitted). The requirement that a Class B liquor license be issued only to a "licensed bona fide tavern keeper or victiculer" is clearly delineated in Section 3-7-7, and requiring a license-holder to meet this requirement only at the exact moment of licensure would render it meaningless. Baker's interpretation of the statute would preclude a licensing authority from revoking the license of a license-holder who no longer met the requirements for licensure mere days after issuance. Constraining the licensing authorities in this way does not comport with the goal of reasonably controlling the traffic in alcoholic beverages.

Similarly, applying the provisions of Section 3-5-9 only at the moment of licensure would undercut the purpose of Title 3. The language of Section 3-5-9 indicates a legislative intent to ensure that Class B licenses are valid only when issued to a bona fide retailer. This Section requires that all retail liquor licenses be used at a specific location, and that the "place where the rights under the license are to be exercised" be particularly described in the license itself. The inclusion of such a provision further indicates the Legislature's intent to ensure more regulatory control over liquor licenses by correlating each license with a specific property. If this requirement is to be met only at the moment of issuance, then, again, the requirement itself becomes meaningless. Therefore, the Court finds that the DBR's determination that the requirements in Sections 3-7-7 and 3-5-9 apply to Class B licenses even after issuance comports with the legislative intent of Title 3, and is not an abuse of discretion or an error of law.

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Similarly, there are abandonment statutory provisions for Class A liquor license contained in R.I. Gen. Laws § 3-5-16.1. R.I. Gen. Laws § 3-5-16.1 states as follows:

> Revocation of abandoned Class A licenses. – Whenever it comes to the attention of any local licensing authority as defined in § 3-5-15 that the holder of a Class A license has abandoned the premises from which the licensee has been conducting his or her business or has ceased to operate under the license for a period of ninety (90) days or more then after hearing with due notice to the licensee the local licensing authority shall cancel the license; provided, that the authority may grant a reasonable period of time, not to exceed one year, to the licensee within which to reestablish the business where the abandonment or cessation of operating was due to illness, death, condemnation of business premises, fire or other casualty.

The General Assembly did not want Class A licenses continuing to exist when not being used. The same policy is supported when a Class B license is revoked for non-use. The requirement to specifically identify a premise of a retail license supports the public policy of reasonably controlling the traffic in alcoholic beverages by ensuring that a town or city knows where each liquor license is located. Furthermore, the requirement also provides a basis that licenses that are not being used and/or are failing to comply with the conditions of licensing cannot continue to exist.

The Department acts as a "state superlicensing board" (*Baginski v. Alcoholic Beverage Commission*, 4 A.2d 265. 268 (R.I. 1939)) and is authorized by statute to promulgate regulations related to the liquor licensing statutes. E.g. R.I. Gen. Laws § 3-2-2; R.I. Gen. Laws § 3-5-20. Rule 14 strikes a balance between ensuring that an applicant has time to come into compliance with building, fire, and zoning (etc.) requirements after the granting of a liquor license but that the grant of the license is not open ended so that the license continues to "exist" without being used. In other words, the licensing scheme ensures that liquor licenses are being used and that the local licensing authority knows

who holds the license and where the license is located. Rule 14 contains an exemption to the one (1) year rule for litigation. This matter had ongoing litigation on appeal to the Department and to Superior Court, but there was no evidence that once the Department issued its January 8, 2013 decision that the Appellant was engaged in further litigation.

b. Jurisdiction

The granting of a Class B license is governed by R.I. Gen. Laws § 3-7-1 *et seq.* which provides that local licensing authorities issue Class B licenses. The Department does not have the authority to issue Class B licenses. The Department's authority over the issuance of Class B licenses is limited to its appellate authority pursuant to R.I. Gen. Laws § 3-7-21.[2] The parties agreed that there had been no decision by the Board from which the Appellant was appealing to the Department.

The Appellant is essentially requesting that the Department re-issue a final decision but changing the date so that the License may issue. The Department does not have the authority to issue a License.

While the Department has been called a "super licensing" authority and the Director has the authority under R.I. Gen. Laws 3-7-21, "to make any decision or order he or she considers proper," the Department does not have the discretion to ignore or waive statutory or regulatory requirements. Rule 14 controls in this situation. At the

[2] R.I. Gen. Laws § 3-7-21 states in part as follows:

> Appeals from the local boards to director. – (a) Upon the application of any petitioner for a license, or of any person authorized to protest against the granting of a license, including those persons granted standing pursuant to § 3-5-19, or upon the application of any licensee whose license has been revoked or suspended by any local board or authority, the director has the right to review the decision of any local board, and after hearing, to confirm or reverse the decision of the local board in whole or in part, and to make any decision or order he or she considers proper, but the application shall be made within ten (10) days after the making of the decision or order sought to be reviewed. Notice of the decision or order shall be given by the local or licensing board to the applicant within twenty-four (24) hours after the making of its decision or order and the decision or order shall not be suspended except by the order of the director.

very latest the License was granted January 8, 2013 and became null and void on January 8, 2014. Rule 14 comports with statutory requirements by ensuring that licenses are not kept in existence even when not being used. Rule 14 provides that after one (1) year the License is null and void without a hearing.

c. **Equity**

The Appellant argued that it would be blatantly unfair not to allow it to open after it was granted a license and expended money in rehabilitating the building. However, equitable principles are not applicable to an administrative procedure. See *Nickerson v. Reitsma*, 853 A.2d 1202 (RI 2004) (Supreme Court vacated a Superior Court order that had vacated an agency sanction on so-called inherent equitable powers).

Nonetheless, on rare occasions, the Rhode Island Supreme Court has found that the doctrine of *equitable estoppel* may apply against public agencies. The Supreme Court has held as follows:

> in an appropriate factual context the doctrine of estoppel should be applied against public agencies to prevent injustice and fraud where the agency or officers thereof, *acting within their authority*, made representations to cause the party seeking to invoke the doctrine either to act or refrain from acting in a particular manner to his [, her, or its] detriment. *Romano v. Retirement Board of the Employees' Retirement System of the State of Rhode Island*, 767 A.2d 35, 39 (RI 2001) (citation omitted) (italics in original).

Therefore, for a party to obtain *equitable estoppel* against an agency, it must show that a "duly authorized" representative of the agency made affirmative representations within the scope of his/her authority, that such representations were made to induce the plaintiff's reliance thereon, and that the plaintiff actually and justifiably relied thereon to its detriment. *Casa DiMario, Inc. v. Richardson*, 763 A.2d 607, 612 (R.I. 2000). See also *El*

Marocco Club, Inc. v. Richardson, 746 A.2d 1228, 1234 (R.I. 2000) ("key element of an estoppel is intentionally induced prejudicial reliance.") (internal citation omitted).[3]

However, a government entity and its representatives do not have "any implied or actual authority to modify, waive, or ignore applicable state law that conflicts with its actions or representations." See *Romano*, at 40. *Romano* found that the "doctrine of *equitable estoppel* should not be applied against a governmental entity like the board when, as here, the alleged representations or conduct relied upon were *ultra vires* or in conflict with applicable law." *Id.* at 38. See also *Technology Investors v. Town of Westerly*, 689 A.2d 1060 (R.I. 1997). Moreover, "any party dealing with a municipality 'is bound at his own peril to know the extent of its capacity.'" *Casa DiMario*, at 612 (internal citation omitted). See also *Tidewater Realty, LLC v. State, Providence Plantations*, 942 A.2d 986, 995 (R.I. 2008) (well-settled principle that a municipal employee cannot bind the city without possessing the actual authority to do so and apparent authority and reliance on the part of the plaintiff are not adequate). Furthermore, "'[a]s a general rule, courts are reluctant to invoke estoppel against the government on the basis of an action of one of its officers.'" *Casa DiMario,* at 612. (internal citation omitted).

In addition, the party must make a requisite showing that *equitable estoppel* should be applied to prevent fraud and injustice. See *Guilbeault v. R.J. Reynolds Tobacco Company*, 84 F.Supp.2d 263 (D.R.I. 2000) (to prove fraud, plaintiff needs to show that defendant made a false or misleading statement of material fact that defendant knew to be false and it was made in order to deceive and that plaintiff detrimentally relied on statement).

[3] Thus, for example, the Appellant could not claim that it was induced to rely on the grant of the License in order to rehabilitate the building for more than one (1) year as Rule 14 clearly states the grant of a license lasts for one (1) year except for litigation.

In fact, the Superior Court in *Baker* rejected an *equitable estoppel* argument from Baker who argued that the City was estopped from revoking her license for non-use as the City had kept renewing the license. The Court found that the Board could not waive the licensing requirements of Title 3. Similarly, the Department cannot waive its statutory jurisdictional authority, the statutory authority for the granting of a license, or the regulatory requirements for the granting and issuance of a license.

IV. Conclusion

Based on the forgoing, there are no grounds to grant this Emergency Motion since there is no appeal before the Department pursuant to R.I. Gen. Laws § 3-7-21, the Department cannot issue a Class B License, and Rule 14 applies to this Appellant in that it has been over one (1) year since the grant of the License (January 8, 2013) so that the License by operation of Rule 14 is null and void.

Therefore, the undersigned recommends that this Motion be dismissed and denied.

As recommended by:

Date: 12/9/14

Catherine R. Warren
Hearing Officer

I have read the Hearing Officer's recommendation and I hereby ADOPT/~~REJECT~~ the recommendation of the Hearing Officer in the above-entitled Order of ~~Dismissal~~.

Date: 9 Dec 2014

Paul McGreevy
Director

Entered as an Administrative Order No.: 14-68 this 9th day of December, 2014.

NOTICE OF APPELLATE RIGHTS

THIS ORDER 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.

CERTIFICATION

I hereby certify on this 9th day of December, 2014 that a copy of the within Order and Notice of Appellate Rights was sent by first class mail, postage prepaid to Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, RI 02904 and Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903 and by hand-delivery to Maria D'Allesandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Bldg. 68-69, Cranston, RI 02920.