STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE COMPLEX, BLDG 68-69
1511 PONTIAC AVENUE
CRANSTON, RI 02920

James and Laureen D'Ambra, **Appellants,**	:	
v.	:	**DBR No.: 14LQ058**
Narragansett Town Council, **Appellee,**	:	
and The Break, LLC **Intervenor,**	:	

DECISION

I. INTRODUCTION

This matter arose pursuant to an appeal filed by James and Laureen D'Ambra ("Appellants") pursuant to R.I. Gen. Laws § 3-7-21 with the Department of Business Regulation ("Department") regarding a decision ("Decision") by the Narragansett Town Council ("Town") to renew the Class BV liquor license ("License") held by The Break, LLC ("Break" or "Intervenor"). The Appellants moved to stay the renewal and a hearing on the stay request was held on December 4, 2014 before the undersigned pursuant to a delegation of authority by the Director of the Department. The Break moved to intervene which was granted. By order dated December 12, 2014, the Department found that the Appellants did not have standing to appeal the renewal of the License but the Department invoked its authority pursuant to R.I. Gen. Laws § 3-2-2 to allow the appeal to go forward on the issue of compliance with Rule 14 of *Commercial*

Licensing Regulation 8 – Liquor Control Administration ("CLR8").[1] [2] Oral argument was heard on the issue of CLR8 on January 26, 2015 with briefs timely filed by February 25, 2015.[3]

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 in light of Rule 14 of CLR8 License, the License still exists.

IV. MATERIAL FACTS AND TESTIMONY

Based on the evidence, the chronology of events regarding the issuance of this License is as follows:

1. A predecessor in the Appellant's location received a special use permit from the Town to build a hotel in 2007.

2. On April 15, 2013, Rebecca Durkin d/b/a The Break, received a class BV-Tavern liquor license from the Town. The Town imposed four (4) requirements/conditions:

    a. Alcohol service inside and outside ends by 10:00 p.m.

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[1] Rule 14 of *Commercial Licensing Regulation 8 – Liquor Control Administration* ("CLR8") which provides as follows:

> GRANTED LICENSE (NOT ISSUED)-RETAIL
>
> 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.

[2] Apparently Rule 14 was not considered by the Town. At the stay hearing, the undersigned indicated that matter could be remanded to the Town for consideration of Rule 14 but the Intervenor and Appellants requested the Department address the matter. The Town expressed no opinion. In the December 12, 2014 order issued by the Department, the Department indicated it would hear the issue and not remand the matter unless an objection was filed. No objection was filed.

[3] The transcript was received on March 5, 2015.

b. Parking plan to be submitted for review and approval within 60 days from April 15, 2013.

c. The Town's council will review the business operations three (3) after the Licensee opens (the License is issued).

d. Entertainment limited to one to two piece combination, low acoustic, not amplified music

In addition, a copy of the Break's menu, TIPS certification for alcohol servers, a certificate of good standing for the Break from the Division of Taxation ("Taxation"), and approvals from the Department of Health ("DOH"), Fire Marshal, Building Official, and Tax collector were all required to be submitted to the Town before the License would issue. See Intervenor's Exhibits Four (4) (Town May 14, 2013 letter to Rebecca Durkin d/b/a The Break); Seven (7) (transcript of the April 15, 2013 Town Council meeting); and Eight (8) (minutes of the April 15, 2013 Town Council meeting).

3. On June 14, 2013, a supplemental parking plan was filed with the Board by Rebecca Durkin d/b/a The Break. See Intervenor's Exhibit Five (5).

4. The License was renewed on November 18, 2013. Tr. 13.[4]

5. On April 21, 2014, the License was transferred from Rebecca Durkin d/b/a The Break to the Break LLC. See Intervenor's Exhibit 16 (minutes of the April 21, 2014 Town Council meeting).

6. On November 3, 2014, the License was renewed by the Town.[5]

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[4] Tr. Refers to the transcript of the hearing before the Department of Business Regulation on January 26, 2015 with the page number following Tr.

[5] It is from that renewal that this appeal originated.

7. A DOH May 7, 2014 letter indicates that the Break had been approved conditioned on further improvements but indicates that this does not constitute final approval which cannot take place until construction has been completed in accordance with the approved plan and a final inspection can be conducted. See Intervenor's Exhibit 11 (DOH letter).

8. A Letter of good standing from Division of Taxation ("Taxation") for the Break dated July 14, 2014 indicates that all taxes have been paid. A litter permit was issued to the Break by Taxation. See Intervenor's Exhibits 14 (litter permits) and 15 (letter of good standing).

9. A lawsuit was filed by one of the Appellants (and others) in Superior Court on December 11, 2013 in regard to the Town's Zoning and Platting Board of Review ("Board") decision made on October 21, 2013 and recorded on November 22, 2013 that granted the Break's zoning application. See Intervenor's Exhibit One (1) (Superior Court lawsuit with attached Board decision dated October 21, 2013).

10. On or about October 17, 2014, a petition was filed by the abutters of the Intervenor with the Board requesting that the Board vacate its decision dated October 21, 2013 relating to the Break. See Intervenor's Exhibits Two (2) (petition) and Three (3) (the November 26, 2013 amended decision is included as an attachment).

11. A Superior Court lawsuit was filed by the Appellants (and others) on December 9, 2014 requesting as follows: 1) that the Court declare the Board's October 21, 2013 decision to be null and void; 2) restrain the Break from being issued any more permits and from further building; and 3) deny the Break's July 14, 2014 application for special use permit. See Intervenor's Exhibit Three (3). The parties agreed that the request for a temporary restraining order ("TRO") was denied by the Court. Tr. 44. The Appellants' attorney represented that the lawsuit was still in Court. Tr. 45.

James D'Ambra testified on behalf of the Appellants. He testified he has a summer house across from the Intervenor and it has not opened and has not served alcohol. See Appellants' Exhibits One (1) and Two (2) (photographs of the Break).

William O'Donnell testified on behalf of the Appellants. He testified that he was the attorney for the plaintiffs who filed the 2013 Superior Court lawsuit. He testified the lawsuit was not related to the License but rather was appealing dimensional variances granted to the Break. He testified that the suit argued that the Board could not take action in 2013 on the 2007 permit because of a tolling statute. On cross-examination, he testified that if the 2013 Board decision modifying the 2007 special use grant was improperly granted (as alleged) the Break would not be able to build the hotel without getting a new special use permit.

James Durkin ("Durkin") testified on behalf of the Intervenor. He testified that he is a member of The Break, LLC which operates the hotel. He testified that construction on the hotel started in June, 2013. He testified that prior to creating The Break, LLC, the hotel was being constructed by he and his wife in their individual capacities and the property was owned by the Rebecca Durkin Trust. He testified that the plan for the hotel includes a restaurant and bar facilities. He testified that construction has been ongoing since June, 2013. He testified that the December, 2013 Superior Court lawsuit has not been dismissed. He testified that he cannot open a restaurant and serve liquor without a hotel. He testified that he feels that the licensing conditions have been met.

On cross-examination, Durkin testified that in May, 2013, the Break voluntarily applied to modify the 2007 special use permit and received permission and started building and has never been ordered to stop work. He testified that in May, 2014, he spoke to the Building Inspector and based on that conversation, in June, 2014, the Intervenor filed another request for

modifications. He testified that no Court ordered him to submit the second application to the Board but the Building Inspector told him to. He testified that there were things that had to be changed such as the hot tub per DOH's concerns and the local ordinance would not allow the dumpster to be attached to the building as initially approved. He testified that he could have built the hotel based on the special use permit granted in 2007.

On cross-examination, Durkin testified that he requested permission to bump out the stairwells by six (6) inches to comply with the Fire Code and DOH required the hot tub have a separate filter and chlorination system so that was requested as well as to include balconies and to extend the porch so that one could have a chair on the porch and wheelchair go down at the same time. He testified that the application was submitted to comply with health and fire codes and to make the facility a better and safer place.

V. DISCUSSION

A. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. DEM,* 553 A.2d 541 (R.I. 1989) (citation omitted). In cases where a statute may contain ambiguous language, the Rhode Island Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131, 1134

(R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. The Department's *Sue Sponte* Authority

The Department has broad and comprehensive control over the traffic in alcohol. Indeed, the Department's power of review is so broad that it has been referred to as a "state superlicensing board." *Baginski v. Alcoholic Beverage Comm'n.*, 4 A.2d 265, 267 (R.I. 1939). Because of this broad authority to enforce Title 3, the Department may review matters on appeal pursuant to its authority under R.I. Gen. Laws § 3-2-2[6] rather than R.I. Gen. Laws § 3-7-21.

The Department exercises its authority under R.I. Gen. Laws § 3-2-2 when the matter rises to a level that impacts its broad authority over statewide licensing. For example, the Superior Court in *City of Providence Bd. of Licenses v. State Department of Business Regulation,* 2006 WL 1073419 (R.I. Super.), upheld the Department's authority to hear a matter on appeal pursuant to the Department's *sua sponte* authority under R.I. Gen. Laws § 3-2-2. In that matter, the *Providence Journal* appealed to the Department and argued that the Providence Board of Licenses ("Providence Board") had not followed Rule 27 of CLR8 when it had granted an expansion of a liquor license to a licensee without a public hearing as required by Rule 27.[7] The Superior Court in the *City of Providence* found as follows:

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[6] R.I. Gen. Laws § 3-2-2 provides as follows:

> Supervision. – (a) The department has general supervision of the conduct of the business of manufacturing, importing, exporting, storing, transporting, keeping for sale, and selling beverages.
>
> (b) The department may lease a warehouse for the purpose of efficiently exercising its powers and duties of inspection and may upon reasonable charges store beverages for license holders in the warehouse. No lease shall be for a longer period than five (5) years and every lease shall contain the provision that if it becomes unlawful to manufacture, keep for sale, and to sell beverages in this state it shall become void.
>
> (c) The department has the power at any time to issue, renew, revoke and cancel all manufacturers', wholesalers' and retailers' Class G licenses and permits as are provided for by this title.
>
> (d) The department shall supervise and inspect all licensed places to enforce the provisions of this title and the conditions, rules and regulations which the department establishes and authorizes.

[7] Subsequent to this case, the statute was amended to eliminate the seasonal expansion hearing requirement.

> Rule 27 is promulgated through the above statutory provisions and enforceable statewide. Rule 27 would be revoked by implication if the Department cannot enforce it against a local board that does not appropriately apply it. *See El Marocco Club, Inc. v. Richardson,* 746 A.2d 1228, 1231 (R.I.2000) (concluding that where the implication of a municipality's authorization to attach conditions to the issuance of a liquor license was not read into § 3-5-21, "the power to revoke or suspend licenses becomes a nullity since there is no basis upon which [said power] can be exercised [ ]") (quoting *Thompson v. East Greenwich,* 512 A.2d 837, 841 (R.I.1986) (citing *Gott v. Norberg,* 417 A.2d 1352, 1356-57 (R.I.1980))). Therefore, by precluding the application of the rule, the Journal and others similarly situated are stripped of their right to a meaningful opportunity to challenge any license expansion when the Board, on its own, deems the rule inapplicable. This was clearly not the intent of the General Assembly when it created the Department.
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> The Court has long recognized the Department's statewide authority in the regulation of alcoholic beverages, deeming it a "state superlicensing board." *Baginski,* 62 R.I. at 182, 4 A.2d at 265.Vested with such authority, the Department, on its own motion, has the power and jurisdiction to revoke such licenses that have been acquired in disregard of its rules and regulations. *See Belconis v. Brewster,* 65 R.I. 279, 284, 14 A.2d 701, 703 (1940) (the liquor control administration may, of its own motion, revoke or suspend any license dealing with the distribution of alcoholic beverages).

In *City of Providence*, there was an issue of whether the *Providence Journal* had standing to bring the appeal to the Department. The Department found that whether or not the *Providence Journal's* appeal was timely, the Department as a "superlicensing" body had the general supervisory authority to take cases *sua sponte* to ensure compliance with Title 3. The Superior Court upheld this finding. Thus in that matter, the Department exercised its authority pursuant to R.I. Gen. Laws § 3-2-2 to hear the *Providence Journal*'s appeal as the issue before the Department hinged on whether the Providence Board had complied with a specific statewide rule. See also *Volare, Inc. d/b/a Barry's v. City of Warwick Board of Public Safety*, LCA-WA-95-01 (7/17/95) (finding that the Department also had jurisdiction under R.I. Gen. Laws § 3-2-2 as the Department has jurisdiction to ensure compliance with Title 3).

It is under this authority that the Department is hearing this matter as set forth in the December 12, 2014 order.

C. Arguments

The Intervenor agreed there is a policy against the speculation of liquor licenses and against the holding onto licenses and not using them but argued that neither of those concerns is an issue in this matter. The Intervenor argued that there has been ongoing litigation since December, 2013 which extends the time under Rule 14. The Break further argued that it had met the Town's conditions of licensing and is in good standing with Taxation and DOH.

The Appellants argued that the License was not the subject of litigation so that by operation of Rule 14, the License expired in April, 2014 and could not be renewed by the Town. The Appellants requested that the Department declare the License null and void pursuant to Rule 14. The Appellants argued that the Intervenor's zoning relief requests to modify special use permits and variances that were previously granted did not tie up the License.

The Town argued that its requirement to limit the time for the Break to serve alcohol and the type of entertainment allowed are restrictions on the License and not conditions that have to be met to be licensed. The Town argued that the only condition on the License was the submission of the parking plan which was met so that the License was properly renewed.

D. Rule 14 of CLR8

Rule 14 balances the need for a liquor licensee to be able to plan and construct an establishment knowing that it will be able to sell alcohol when it opens and the need for the local authority to be able to control liquor trafficking by ensuring that liquor licenses are used within a reasonable time and are not held for speculation.[8] Rule 14 references R.I. Gen. Laws § 3-5-9

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[8] R.I. Gen. Laws § 3-1-5 provides as follows:

> Liberal construction of title. – This title shall be construed liberally in aid of its declared purpose which declared purpose is the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages; provided, however, that the promotion of incentive programs or discounts for any person sixty-five (65) years of age or older, active duty members of the armed forces of the United States, and members of the National Guard or Reserves shall be allowed.

which provides that a license must be issued to a specific premise. In other words, once a license is granted, it must be used for specific premises. Rule 14 takes into consideration that the premises might not be ready for occupation right away but ensures that the license will not be granted and/or held in perpetuity if the premises are not ready.[9]

a. Conditions of Licensing

The first sentence of Rule 14 provides that 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." The Rule then states that a licensee shall have a full year to "meet all conditions and criteria set forth in the granting order." When the Intervenor was granted its License the City imposed conditions or restrictions on licensing. The parties have debated whether these conditions of been met. The Intervenor argued that the only condition that needed to be met and had been met was that of submitting the parking plan. However, the Rule is concerned with "full" compliance for "all conditions and criteria" necessary for the issuance of said license and not just additional conditions imposed by a local licensing authority.

There are certain requirements – state and local - that a licensee must meet before a license is issued.[10] For example, there are statutory requirements regarding compliance with the Fire Safety Code and Fire Alarm Systems. See R.I. Gen. Laws § 23-28.1-1 *et seq.*; and R.I. Gen. Laws § 23-28.25-1 *et seq*. As the Town indicated in its grant of the License, the Intervenor also would need a certificate of good standing from Taxation, and approvals from DOH, the Fire Marshal, the Building Official, and the Tax Collector in order for the License to issue. A

[9] See *Baker v. Department of Business Regulation*, 2007 WL 1156116 (R.I.Super.) (finding that a Class B liquor license can be revoked for failing to comply with conditions of licensing when license not being used and finding that license is tied to premises).

[10] For a general discussion of Rule 14 and the State and local (Providence) requirements that must be met prior to a license being issued, see *Krikor S. Dulgarian Trust v. Providence Board of Licenses*, DBR No.: 08-L-0175 (6/19/09).

licensee does not only need to meet specific conditions placed by a granting authority (e.g. the parking plan) but all ("full") conditions necessary in order to be able to open and those conditions were also included in the Town's grant of the License (and would be included in any grant of a liquor as they are the un-changing "criteria" necessary for issuance).

The Intervenor has not met all conditions of licensing. E.g. there is no final DOH approval or a certificate of occupancy. Tr. 27 (stipulate as to no certificate of occupancy).

b. The Extension of Time

The Rule provides that the one (1) year period shall not include the "time period" for "when the license at issue is involved in litigation." The Appellants argued that only refers to the license itself being in litigation such as if an abutter appealed the grant of a liquor license to the Department. The Intervenor argued that the litigation referred to is broader than just an appeal of the grant of a liquor license.

Rule 14 speaks of a license being "involved" in litigation rather than the "subject" of litigation. If the Rule wanted to limit the type of litigation to the liquor license being the subject of litigation, it could have stated that the license was to be the subject of litigation or it could have specifically provided that the liquor license appeals extend the one (1) year period. Instead, the Rule refers to a license being involved in litigation and speaks of the date of commencement of the action (rather than a liquor license appeal) to the final disposition. By using the world "involved" rather than the "subject," the Rule expects that not all litigation that could impact a liquor licensee's ability to meet the one (1) year deadline would be litigation that a license is a subject of but rather the Rule expects that litigation could somehow involve a license and impact the one (1) year deadline.

Black's Law Dictionary (10th ed. 2014) defines litigation as the "process of carrying on a lawsuit" and a "lawsuit itself."[11] It would not be disputed that civil lawsuits in the Rhode Island Superior Court would be litigation. However, the Intervenor also filed applications with the Board for zoning permission. The Intervenor put into evidence a letter from the Department's legal counsel regarding Rule 14 relating to another matter. See Intervenor's Exhibit Nine (9). The complete facts regarding that other matter before the Department that caused that letter to be written are not available. The Department's opinion apparently found a zoning application to be part of litigation since it related to a condition of licensing with reference being made that the condition was "proper zoning." It is not on the record why those applicants in that matter had to file two (2) zoning applications and how they rose to litigation.

However, zoning applications are not necessarily litigation. If the filing of any zoning application could be considered litigation, a licenseholder could continually file zoning applications to extend the time of Rule 14. That is not the intent of the Rule; rather, the Rule is to provide an extension for unforeseen events which is defined as a certain type of litigation. Zoning permission and renovating a building for the license and obtaining Fire and Tax clearances are some of the known criteria that are expected to be completed in one (1) year. However, litigation could arise from a zoning application such as an appeal of a zoning denial to Superior Court. Furthermore, zoning applications could turn into contested cases at the zoning board level and could be then considered litigation.

The one (1) year period is extended by the period from the "date of the commencement of the action to final disposition." Rule 14. In other words, the time period is extended by the time

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[11] In *Roadway Express, Inc. v. Rhode Island Commission for Human Rights*, 416 A.2d 673 (R.I. 1980), the Court relied on a dictionary definition in applying the "ordinary meaning" of "must." *Id.*, at 674. As the Court has found, "[i]n a situation in which a statute does not define a word, courts often apply the common meaning given, as given by a recognized dictionary." *Defenders of Animals, Inc.*, at 543. Similarly, common meanings shall be given to words within regulations.

the litigation takes to be completed. *Black's Law Dictionary* defines disposition to include a "final settlement or determination" e.g. the court's disposition of the case.

c. <u>The Litigation as Issue</u>

The December, 2013 Superior Court lawsuit docket shows that a complaint was filed with the filing fee. However, it does not show that the complaint was served or an answer filed.[12] See also Intervenor's Exhibit One (1) (docket sheet). The December, 2014 Superior Court lawsuit docket shows that a complaint was filed and summons were issued. Memorandum in support of the request for the TRO and opposition to the TRO were both filed and a decision rendered on December 17, 2014 with an order to enter. An order has not been entered. Thus, both of these lawsuits have commenced but neither has a disposition as envisioned by Rule 14 in that neither has been dismissed or withdrawn, etc.

Meanwhile, the parties agreed there are ongoing zoning hearings. Tr. 90. Durkin testified that the reason he is still having a zoning hearing is because "you" have delayed the zoning hearing by eight (8) months. By you, Durkin either meant the Appellants or their counsel. Tr. 104. The Appellants' attorney responded by saying he has not delayed it and has not started his (Appellants) case. Durkin testified that the zoning hearing was because of the second application. The undersigned inquired if the hearing has been ongoing for eight (8) months. The Intervenor's attorney indicated that he believed the hearing started in August, 2014. The undersigned inquired if the October, 2014 petition to the Board was part of the hearing. The Appellants' attorney replied, "yes" and indicated that the petition "was the first day of hearing of the second zoning application." Tr. 106. The Appellants' attorney argued that the Intervenor voluntarily submitted its second application to the Board. However, the evidence showed the

[12] The Appellants' attorney indicated that the lawsuit is dormant. Tr. 85. The undersigned indicated to the parties that she could confirm the status of the lawsuits on the Court's new e-filing system. The information regarding the Court's docket is from the Court's e-filing system. Tr. 114-115. See *Arnold v. Lebel*, 941 A.2d 813 (R.I. 2007).

second application included requests needed to comply with the DOH requirements and local ordinances so the request was not only for "voluntary" additions to the hotel but also included requests for approvals that were necessary in order to open.

d. Applicability of Rule 14

In this matter, the License cannot be used if the hotel cannot open as there would be no bar at which to serve alcohol. The Appellants argued that the Intervenor has continually been building and never has been ordered to stop work so that any litigation did not impair its ability to build the hotel. However, the License is involved in the litigation related to the hotel as that litigation revolves around whether it can or will open.[13]

Rule 14 extends the one (1) year period for relevant litigation from the "date of the commencement of the action to final disposition." While the Appellants' attorney indicated that the December, 2013 lawsuit is "dormant," there has been no final disposition of that case. On the other hand, the mere filing of a case with no further action cannot delay the issuance of a license in perpetuity. For the purposes of Rule 14, the Department will consider a lawsuit that has been filed but never served to be disposed of after 120 days as provided for by Super. R. Civ. P. 4(l).[14]

If the one (1) year period from April 15, 2014 is extended by 120 days the end date is extended to August 13, 2014.

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[13] The Break LLC was sued in Federal District Court by The Breakers Palm Beach for copyright infringement over the Intervenor's name. The lawsuit was served on the Appellant on June 6, 2014 and dismissed in November, 2014. Tr. 65. See Intervenor's Exhibit Six (6). This lawsuit involved the name of the hotel and would not have operated to prevent the hotel from opening at all (just from using the name The Break) so did not involve the License.

[14] Super. R. Civ. P 4(l) provides as follows:

> (l) Summons: Time Limit for Service. If service of the summons, complaint, Language Assistance Notice, and all other required documents is not made upon a defendant within one hundred and twenty (120) days after the commencement of the action the court upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (g).

The second zoning application was filed in June, 2014.[15] However, the filing of an application is not the commencement of litigation (unlike the filing of a Superior Court lawsuit). *Infra*. Until there is zoning hearing, there is no indication that the matter will be ongoing and contested and could be considered to be litigation involving a license. In this matter, it is more likely that the filing with the Board of the petition to vacate in October, 2014 was the commencement of the "litigation" at the zoning board. However, according to the Secretary of State's website, the second zoning application hearing started on August 21, 2014.[16] There is no other evidence that it started earlier (at hearing, the representation was that the zoning hearing started in August, 2014).

Rule 14 discusses the difference between the grant and issuance of a liquor license. It distinguishes between the grant of the license which refers to when the license is approved and the issuance of the license which is when the license can be used. By its own terms, Rule 14 does not allow a license to be renewed past the one (1) year period after the grant since the

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[15] At hearing, the June, 2014 was given as the second application date; however, the 2014 Superior Court lawsuit indicates the filing was July, 2014.

[16] No minutes for the Board's meetings were posted on the Secretary of State's website. However, the Board's agendas prior to the Department hearing and from August 21, 2014 onwards include several dates of hearing for the Break.

August 21, 2014 agenda:
http://www.sos.ri.gov/documents/publicinfo/omdocs/notices/4251/2014/165073.pdf
September 18, 2014 agenda:
http://www.sos.ri.gov/documents/publicinfo/omdocs/notices/4251/2014/166358.pdf
October 23, 2014 agenda:
http://www.sos.ri.gov/documents/publicinfo/omdocs/notices/4251/2014/168031.pdf
November 20, 2014 (only item on agenda):
http://www.sos.ri.gov/documents/publicinfo/omdocs/notices/4251/2014/168931.pdf
November 24, 2014:
http://www.sos.ri.gov/documents/publicinfo/omdocs/notices/4251/2014/169838.pdf
December 18, 2014 agenda:
http://www.sos.ri.gov/documents/publicinfo/omdocs/notices/4251/2014/171031.pdf
January 8, 2015 agenda:
http://www.sos.ri.gov/documents/publicinfo/omdocs/notices/4251/2015/171910.pdf
January 15, 2015 agenda:
http://www.sos.ri.gov/documents/publicinfo/omdocs/notices/4251/2015/172217.pdf
January 22, 2015 agenda:
http://www.sos.ri.gov/documents/publicinfo/omdocs/notices/4251/2015/172594.pdf

license becomes null and void without hearing by operation of the regulation (unless the time is extended by litigation). During the one (1) year period, a license maybe renewed as required pursuant to R.I. Gen. Laws § 3-5-8 as most liquor licenses (including a class B license) expire on December 1 of each year. Thus, even if a license has been renewed during that one (1) year period, it still would be null and void after one (1) year of the grant of the license if the license did not issue. In this matter, the License was renewed on November 18, 2013 but such a renewal has no effect on the one (1) year period in Rule 14.

Subsequent to the renewal, the License was transferred on April 21, 2014 during the time that the License existed (due to the 120 day extension). A transfer of a license is treated the same as a new application in that a transfer has the same notice and appeal rights as an application for a new license. See R.I. Gen. Laws § 3-7-19 and R.I. Gen. Laws § 3-7-21. A renewal application does not have the same notice or appeal rights as a new application or transfer application. However, the transfer of the License cannot be considered a grant of the License under Rule 14 as the Rule provides that 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." In other words, the one (1) year period runs from the original grant which is the initial grant of a new license. A transfer of license cannot be an original grant of a license because the license has already been granted in response to the initial application. And again, the Rule 14 policy would militate against allowing a licenseholder to continually file transfer applications as a way to circumvent the one (1) year period of Rule 14.

The transfer of the License is not the original grant of the License. Therefore, the second zoning hearing (which is considered litigation based on the evidence as to its contested nature) started after the License became null and void on August 13, 2014 by operation of Rule 14.[17]

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. *Romano v. Retirement Board of the Employees' Retirement System of the State of Rhode Island*, 767 A.2d 35 (R.I. 2001). Rule 14 controls in this situation. See *In Re: Jarr Realty, LLC*, DBR No. 14LQ062 (12/9/14).

There is no dispute that the Appellant has been working on the premises and intends to open a hotel with a restaurant and bar. However, the only exemption that Rule 14 contains to the one (1) year period is the litigation exemption. It does not contain an exemption for the proof of diligence on the part of the applicant-licensee in trying to complete its premises within one (1) year.[18] The result of Rule 14 is if a license becomes null and void that license-applicant would have to apply again for a license. Such an application would necessitate following the statutory requirements for an application for a new license (notice and appeal rights).

Based on the forgoing, the one (1) year period under Rule 14 was extended by 120 days because of litigation that involved the License. The 120 day extension brought the period to August 13, 2014. The License became null and void pursuant to Rule 14 on August 13, 2014.

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[17] As noted above, the second zoning hearing started on August 21, 2014 but it may not have become "litigation" until the filing of the petition to vacate. Since the License became null and void prior to the Board hearing, it is not necessary to determine the commencement date of the "litigation" except to reiterate that the mere filing of a zoning application does not constitute litigation as envisioned in Rule 14 since it is assumed such applications will be filed in order to comply with all necessary criteria for the issuance of a license.

[18] It should be noted that 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).

VI. FINDINGS OF FACT

1. On or about November 3, 2014, the Intervenor's License was renewed by the Town.

2. The Appellants appealed said renewal to the Department.

3. By order dated December 12, 2014, the Department found that the Appellants did not have standing to appeal the renewal but the Department had jurisdiction to hear the issue of whether there had been compliance with Rule 14 of CLR8.

4. A hearing was held on January 26, 2015 with briefs timely filed February 25, 2015.

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:

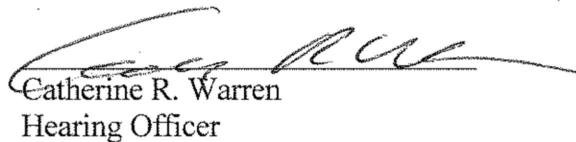
1. The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-2-2, R.I. Gen. Laws § 3-7-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

2. Pursuant to Rule 14, the License became null and void on August 13, 2014.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that it is found that pursuant to Rule 14, the License became null and void on August 13, 2014.

Dated: 3/19/15



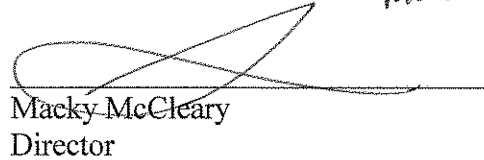
Catherine R. Warren
Hearing Officer

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 Attached modification

Dated: 4/21/15



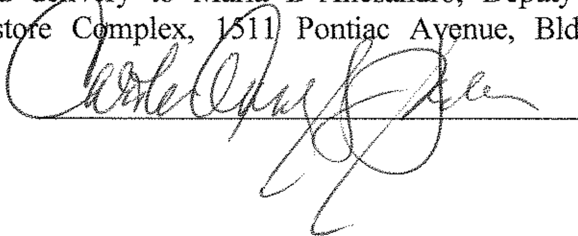
Macky McCleary
Director

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.

CERTIFICATION

I hereby certify on this 21st day of ~~March,~~ April 2015 that a copy of the within Order and Notice of Appellate Rights was sent by first class mail, postage prepaid to John J. DeSimone, Esquire, DeSimone Law Offices, 735 Smith Street, Providence, RI 02908, Donald J. Maroney, Esquire, Kelly, Kelleher, Reilly & Simpson, Pier Professional Towers, 28 Caswell Street, Narragansett, RI 02882, Dawson T. Hodgson, Esquire, Martineau Davis Associates, PC, 2639 South County Trail, East Greenwich, RI 02818, and Patrick J. Dougherty, Esquire, 887 Boston Neck Road, Suite #1, Narragansett, RI 02882 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.



DIRECTOR'S MODIFICATION OF RECOMMENDED DECISION

The Director hereby modifies the recommended Decision by rejecting Sections V(D), VI, and VII and replacing with the following:

The renewal of a liquor license by a municipality is presumed valid and it is the Appellant's burden of proof to establish invalidity. The Appellants have failed to meet their burden of proof to show that the renewal was invalid.

At issue is CLR 8, Rule 14, which reads:

> "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...If the applicant does not meet all 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 the commencement of the action to final disposition."

In other words, Rule 14 gives a grantee one year to fulfill conditions precedent to the issuance of a liquor license, with extension granted for time during which the license is involved in litigation. In the instant case, four "stipulations" were placed on the license. As explained by counsel for the Town in his closing brief, only one of these "stipulations" was a condition precedent, namely that the parking plan be submitted within 60 days from April 15, 2013. The remaining three "stipulations" were conditions running with the license, not conditions precedent to issuance. The parking plan was submitted June 14, 2013. Thus, the Department considers the liquor license to have been "issued" as of June 14, 2013, within the one year period provided by Rule 14. The evidence establishes that the Town treated the license as being "issued" when it renewed the license on November 18, 2013, transferred the license to the Intervenor on April 21, 2014, and renewed the license on November 3, 2014. Neither Rule 14 nor the Town's granting order make the opening of the establishment or a Certificate of Occupancy a condition precedent to issuance of the liquor license.

The policy behind Rule 14 is to prevent grantees from sitting on liquor licenses without using them for an unreasonable period of time. In the instant case, the Intervenor was actively engaged in construction in order to prepare its facility to open as a boutique hotel and restaurant/bar. The Intervenor's efforts cannot be characterized as siting on a license for an unreasonable period of time. Therefore, the Town's renewal of the license does not violate the letter or the spirit of Rule 14.