

III. ISSUES

Whether to uphold or overturn the Board's denial of the Appellant's application for a Class BVX license and whether the Department has jurisdiction over the appeal of said denial.

IV. MATERIAL FACTS AND TESTIMONY

The Appellant applied for food dispenser, holiday sales, tobacco, and Class BV licenses which were granted by the Board. This appeal relates to the Board's denial of the Appellant's late night liquor license application. A review of the transcript of the Board's hearing on the Appellant's applications shows that the Appellant's business experience, business plan, and location were discussed. There was no dispute that the Appellant's owners (husband and wife) were qualified to operate a liquor licensed establishment. The Board did not give any reasons for its denial of the Class BVX application.

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 (R.I. 1998).

B. The Appeal before the Department

The hearing before the undersigned is a *de novo* hearing so that the parties start afresh during the appeal. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984). Thus, while there was not a totally new hearing before the Department, the proceeding before the Department is considered a *de novo* hearing. The outcome of an appeal is a decision whether to uphold, overturn, or modify a licensing board's decision. Therefore, this appeal is not bound by the Board's reasons for its decision but whether the Board presented its case in support of the decision before the undersigned.

C. Arguments

The Appellant argued that Board apparently objected to said application because it did not like the Appellant's business model (a "lounge") which it argued is a common model within the City. The Appellant argued that there is nothing on the record to show that the Appellant could not run this establishment and the Board gave no reasons for denying the Class BVX license application. The Appellant argued that the Department has found that due process rights attach to a 2:00 a.m. license when there is no blanket prohibition on such a license within the town or city.

The Board argued that under R.I. Gen. Laws § 3-7-7, there are two (2) conditions needed to obtain a Class BVX license: first, to be a Class B license holder and second, approval from the local licensing board. The Board argued that due process rights only attach after the grant of a license as due process cannot attach to something ones does not have. The Board argued that it has total discretion over late night licenses and while the

Department has jurisdiction over appeals of sanctions imposed on an already granted late night licenses, such appeals are different from a license that has not been granted.

The City argued that the Department cannot supercede the City's authority to establish hours of operation for a restaurant. The City argued that there is no automatic right to a late license as it is just an extension of hours. The City argued that the Board is familiar with this Appellant's location and there is nothing stopping the Appellant from re-applying for said license. The Board argued that it is being careful in issuing Class BVX licenses since once the late license is granted, the licensee can appeal any sanctions. The City argued that the Board has the right to condition hours of operation in order to ensure the public health and safety. The City agreed there was a right of appeal for the denial of a BV license application, but not for a denial of a BVX license application.

In response, the Appellant argued that due process does not mean that an applicant is entitled to a Class BVX, but rather means one is entitled to a level playing field so that there are reasons for such a denial. In response, the Board argued that if the Appellant's argument is accepted then there is almost no situation, absent a finding of unfitness, to deny a Class BVX license application.

D. Discussion

R.I. Gen. Laws § 3-7-21(a) provides for appeals to the Department of certain actions taken by local licensing authorities on liquor licenses and applications. It provides as follows:

(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.

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 (sic) act 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 (1957). The Department has the same broad discretion in the granting or denying of liquor licenses. *Id.*, at 177. See also *Domenic J. Galluci, d/b/a Dominic's Log Cabin v. Westerly Town Council*, LCA-WE-00-04 (10/25/00); *Donald Kinniburgh d/b/a Skip's Place v. Cumberland Board of License Commissioners*, LCA-CU-98-02 (8/26/98).

R.I. Gen. Laws § 3-7-7³ provides that a town or city may grant a Class B licensee a 2:00 a.m. closing time on Friday and Saturday nights.

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

(a)(1) A retailer's Class B license is issued only to a licensed bona fide tavern keeper or victualer whose tavern or victualing house may be open for business and regularly patronized at least from nine o'clock (9:00) a.m. to seven o'clock (7:00) p.m. provided no beverage is sold or served after one o'clock (1:00) a.m., nor before six o'clock (6:00) a.m. Local licensing boards may fix an earlier closing time within their jurisdiction, at their discretion. The East Greenwich town council may, in its discretion, issue full and limited Class B licenses which may not be transferred, but which shall revert to the town of East Greenwich if not renewed by the holder. The Cumberland town council may, in its discretion, issue full and limited Class B licenses which may not be transferred to another person or entity, or to another location, but which shall revert to the town of Cumberland if not renewed by the holder.

(4) Any holder of a Class B license may, upon the approval of the local licensing board and for the additional payment of two hundred dollars (\$200) to five hundred dollars (\$500), open for business at twelve o'clock (12:00) p.m. and on Fridays and Saturdays and the night before legal state holidays may close at two o'clock (2:00) a.m. All requests for a two o'clock (2:00) a.m. license shall be advertised by the local licensing board in a newspaper having a circulation in the county where the establishment applying for the license is located.

There is no doubt that the Department has jurisdiction over the appeal of a sanction imposed upon a late night license.⁴ There is no doubt that the Department has jurisdiction over the denial of a Class BV application,⁵ but now the City and the Board are arguing that an applicant for a Class BVX license whose application has been denied has no right of appeal to the Department. However, the Department has previously found that such appeals fall within its jurisdiction.

In *28 Prospect Hill Street, Inc. v. Gaines*, 461A.2d 923 (R.I. 1983), the Court found that a city or town may enact a blanket prohibition of a 2:00 a.m. closing time applicable to all Class B licensees and such a blanket prohibition would not trigger any due process concerns. However, there is a distinction between allowing a blanket prohibition of 2:00 a.m. closing times for all Class B licenses *and* a city or town decision/sanction concerning an individual license holder based on reasons or allegations raised by local officials. “Due process protections are to be extended to these later (sic) types of cases.” See *Joseph’s Pub v. Smithfield Appeal Board of License Commissioners*, LCA-SM-97-06 (8/21/97), p. 10. However, *Joseph’s Pub* related to the revocation of a 2:00 a.m. license closing hour and the standard of review for a revocation or suspension of license necessitates a different standard of review relating to “for cause.” Nonetheless, the Department has found that an application for a 2:00 a.m. closing time represents an application which needs to be noticed and heard by a city or town absent a blanket prohibition of a 2:00 a.m. closing time for Class B licenses. See *Volare, Inc. d/b/a Barry’s v. City of Warwick Board of Public Safety*, LCA-WA-95-01 (7/17/95).

⁴ *Ice Lounge, Inc. d/b/a Ice Lounge v. The City of Providence Board of Licenses*, DBR No.: 15LQ00 (7/22/2015) summarized the Department’s jurisdiction over sanctions on late night licenses.

⁵ E.g. *Crazy 8’s Bar/Billiards v. Providence Board of Licenses*, DBR No.: 09-L-0042 (8/24/09); and *Krikor S. Dulgarian Trust v. Providence Board of Licenses*, DBR No.: 08-L-0175 (6/18/09).

Subsequent to *Volare* which found that an application for a 2:00 a.m. license must be noticed and heard by a town or city, the Department in *Alexander Angelo, Inc. d/b/a Toast v Town of North Providence*, DBR-03-L-0168 (11/3/03) (p. 7) found as follows:

The Rhode Island Supreme Court discussed issues surrounding 2:00 am. closing authorizations for Class B licenses in 28 Prospect Hill St., Inc. v. Gaines, 461 A.2d 923 (R.I. 1983). Pertinent to the issue presented in the instant case, the court in Gaines specifically stated that “the Legislature intended that the question of extending the closing hours of Class B licensees should be left to the discretion of local municipalities.” Id. at 927 (see also Volare, Inc. d/b/a Barry’s v. City of Warwick, Board of Public Safety, LCA-WA-9501 (October 3, 1996)). When reviewing discretionary decisions by a local authority, the Department has stated in the past that it:

looks for relevant material evidence rationally related to the decision at the local level. Arbitrary and capricious determinations, unsupported by record evidence, will be considered suspect. Since the consideration of the granting of a license application concerns the wisdom of creating a situation still non-existent, reasonable inferences as to the effect a license will have on a neighborhood must be logically and rationally drawn and related to the evidence presented. A decision by a local board or this Office need not be unassailable, in light of the broad discretion given to make the decision. Kinniburgh v. Cumberland Board of License Commissioners, LCA-CU-98-02 (August 26, 2998) at 17 (see also BDR, Inc. v. City of Providence, Board of Licenses, LCA-PR-00-07 (September 18, 2000); Cadillac Lounge, LLC v. City of Providence, LCA-PR-99-15 (April 14, 2000).

In discussing the discretionary standard enunciated in *Kinniburgh* (cited to in *Angelo Alexander*), the Department has also found as follows:

[T]he Department, often less familiar than the local board with the individuals and/or neighborhoods associated with the application, will generally hesitate to substitute its opinion on neighborhood and security concerns if there is evidence in the record justifying these concerns. To this end, the Department looks for relevant material evidence supporting the position of the local authority. (citation omitted). *Chapman Street Realty, Inc. v. Providence Board of License Commissioners*, LCA-PR-99-26 (4/5/01), at 10.

Along with *Alexander Angelo*, the Department has applied the same discretionary standard used for Class BV application denials to Class BVX application denials in *A Rock and a Hard Place*, DBR No.: 06-L-0167 (5/10/07);⁶ and *Baird Beverages, LLC v. Exeter Town Council*, DBR Nos.: 07-L-004, DBR No. 06-L-0208 (4/16/07).

The City argued that allowing appeals of BVX denials would result in all late night license applications having to be granted. Interestingly, *Alexander Angelo*, *Baird Beverages*, and *A Rock* all upheld a local authority's decision to deny a Class BVX application. The late license application in *Alexander Angelo* was denied because the applicant had failed to comply with conditions imposed on its Class BV license. In *A Rock*, Woonsocket denied the late night license application because the town had decided to abolish 2:00 a.m. licenses by attrition for safety reasons and no communities around Woonsocket had 2:00 a.m. closings. In *Baird Beverages*, the 2:00 a.m. license application was denied as none of the surrounding towns had 2:00 a.m. closings and for the public safety concern that the town did not have its own police force but relied on the State police and volunteer rescue and according to the Department of Transportation, the licensee was located near a dangerous intersection.

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. As discussed above, the same is true for an application for a 2:00 a.m. closing time. Such discretion must be based on reasonable inferences drawn from the evidence. Arbitrary and capricious determinations not supported by the evidence are considered suspect. *Infra*. The issue is whether the denial of the application for the late liquor license is reasonable in this situation.

⁶ There was testimony in *A Rock* that the 2:00 a.m. license is just an extension of time and an "add-on" to the BV liquor license. Clearly, that position was rejected in the *A Rock* decision.

As the Board did not articulate its reasons for the denial, this matter is remanded to the Board for a decision on the Appellant's application for a Class BVX license consistent with this decision.

VI. FINDINGS OF FACT

1. On or about March 13, 2017, the Board denied the Appellant's application for a Class BVX (2:00 a.m.) license.
2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed the decision by the Board to the Director of the Department.
3. Oral arguments were made on March 31, 2017.
4. Appeals of Class BVX license applications have previously been found to fall under the Department's jurisdiction.

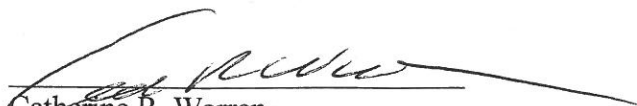
VII. CONCLUSIONS OF LAW

The Department has jurisdiction over appeals of denials of Class BVX license applications pursuant to R.I. Gen. Laws § 3-2-2 *et seq.*, R.I. Gen. Laws § 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.*

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that this matter be remanded to the Board for a further decision on the Appellant's application for a Class BVX license consistent with this decision.

Dated: MAY 10, 2017


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:

X ADOPT
 REJECT
 MODIFY

Dated: 5/12/17

Scotty Lindsey
Scotty Lindsey
Director

THIS DECISION CONSTITUTES A FINAL DECISION OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO RHODE ISLAND GENERAL LAWS TITLE 42, CHAPTER 35. AS SUCH, THIS DECISION MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MAY BE COMPLETED BY FILING A PETITION FOR REVIEW IN SAID COURT.

CERTIFICATION

I hereby certify on this 12 day of May, 2017 that a copy of the within order was sent by first class mail, postage prepaid and by electronic mail to Nicholas Hemond, Esquire, DarrowEverett, LLP, One Turks Head Place, Providence, RI 02903 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.

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