STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. Filed April 13, 2006 **SUPERIOR COURT**

CITY OF PROVIDENCE BOARD OF LICENSES	:	
V.	:	**C.A. No.: PC 05-0794**
STATE OF RHODE ISLAND DEPARTMENT OF BUSINESS REGULATION, and THE PROVIDENCE JOURNAL COMPANY, Intervenor	:	

DECISION

DIMITRI, J. Before this Court is an appeal brought by the Providence Board of Licenses (the "Board") from a January 18, 2005 decision by the Rhode Island Department of Business Regulation (the "Department"). The Board contends that the Department erred by vacating a decision from the Board granting a "seasonal license" to D. Liakos, Inc., d/b/a Monet ("Club Monet"). The Department maintains that the "seasonal license" was improperly issued because The Providence Journal Company (the "Journal") was not given proper notice of an opportunity to object. Jurisdiction to this Court is pursuant to G.L. 1956 § 42-35-15.

Facts and Travel

On April 2, 2004, Club Monet[1] applied to the Board for an Expansion of Premises License in order to serve alcohol outside during the "summer" season.[2] See Application for Expansion of Premises. Without notice or a hearing on the application, the Board granted Monet's application for expansion on April 7, 2004. Id. In order to facilitate its newly acquired

[1] Monet is located at 115 Harris Avenue, Providence, Rhode Island and holds a license to serve alcohol to its patrons inside its building.

[2] The "summer" season is extended for purposes of this license. The "seasonal license" covered the period of April 1, 2004 through October 31, 2004.

ability to serve alcohol outside, Club Monet fenced in its property which adjoins the Journal's property and began serving its guests therein throughout Club Monet's hours of operation. Given the nature of Club Monet's business, it operates well into the night during which Monet keeps the area lit by torches atop the fence posts.

Upon realizing that Club Monet expanded its services outside, the Journal, citing Liquor Control Regulation 27 ("Rule 27") and G.L. 1956 § 3-5-17, requested the Board to rescind Club Monet's Expansion of Premises License until a public hearing could be held on the issue. See June 23, 2004 Letter. Rule 27, entitled *Premises – Retail*, states:

> "[a]ll licenses granted or issued must identify a premise for operation under the license. The licensed premises is that portion of the licensee's property owned, leased or controlled by the licensee, on which or from which alcoholic beverage may be sold, served or stored. It shall be defined by the licensee at the time the application (new or renewal) is filed and finally determined by the approval of the local licensing board.
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> In addition every applicant is required to submit to the local licensing board and keep current an accurate drawing of the licensed premises outlining and giving dimensions of the area which is actually the subject of he license. Any sale, service or storage of alcoholic beverages outside the licensed premises is a violation.
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> Once the licensed premise is established, any expansion thereafter shall require a hearing as prescribed in § 3-5-17 and the approval of the local licensing board. A decrease in the area of the licensed premises requires notification to the local licensing board and filing of a revised drawing. Any notice of a decrease in the area shall not require a public hearing."

Furthermore, the notice requirement of § 3-5-17, in pertinent part, states:

> "[b]efore granting a license to any person under the provision of this chapter and title, the board, body or official to whom application for the license is made, shall give notice by advertisement published once a week for at least two (2) weeks in some newspaper published in the city or town where the applicant

> proposes to carry on business…. Notice of the application shall also be given, by mail, to all owners of property within two hundred feet (200') of the place seeking the application. The notice shall be given by the board, body or official to whom the application is made, and the cost of the application shall be borne by the applicant. The notices shall state that remonstrants are entitled to be heard before the granting of the license, and shall name the time and place of the hearing. At the time and place a fair opportunity shall be granted the remonstrants to make their objections before acting upon the application."

Aware of the above stated law, the Board replied two days later in a letter denying the Journal its request. See June 25, 2004 Letter. The Board stated therein that "notice is not given to abutters because this expansion is a seasonal one…not a permanent expansion of premises. Zoning in the City of Providence allows all businesses to expand outside as long as they ascertain all the necessary permits." Id.

Having been denied its request for a hearing from the Board, the Journal filed an appeal with the Department on July 8, 2004 pursuant to G.L. 1956 § 3-7-21.[3] The Journal's appeal challenged the Board's approval of Monet's expansion of premises license without advertising, giving notice, or conducting a public hearing. The Board countered with essentially two arguments: 1) the Journal did not have standing to appeal the Board's decision because its decision did not "concern the grant or denial of a license….[Rather,] its internal procedure used for seasonal expansions of licensed premises" is at issue and "has nothing to do with alcoholic beverage regulation or Rule 27[;]" and 2) the Board's "system of granting outside expansions without [a] public hearing is a valid exercise of its police power." See Department's Decision at 2. Club Monet also asserted its position to the Department as well. Among its several

[3] In accordance with § 3-7-21(a):

> "[u]pon the application of any petitioner for a license, or of any person authorized to protest against the granting of a license,…the director has the right to review the decision of any local board, and after hearing, 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…."

arguments,[4] Club Monet principally argued that the Department could not hear the appeal because, as per § 3-7-21, the Journal did not file its appeal within the ten day statutory period from the rendering of the Board's decision on April 7, 2004.

The Department held a hearing on August 25, 2004. After reviewing the evidence before it, including the testimony of Club Monet's owner, Mr. John Chaves, Jr., the Department issued a written decision on January 18, 2005. The Department found that whether or not the Journal's appeal was timely based on the ten day period set forth in § 3-7-21, the Department as a "superlicensing" body has the general supervisory jurisdiction to take cases sua sponte to insure compliance with Title 3 of the Rhode Island General Laws. See Decision at 7-8. Finding itself vested with the proper jurisdiction to hear the Journal's appeal, the Department went on to hold that Rule 27 and § 3-5-17 do apply to the "seasonal" expansions granted by the Board. See Decision at 8. Furthermore, the Department found the Board's sole reliance on a Zoning Ordinance to allow Club Monet's license expansion without notice or a hearing to be in contradiction of "statewide alcoholic beverage laws." Id. Therefore, in light of the uncontradicted lack of notice provided to the Journal regarding Club Monet's expanded liquor license, the Department vacated Club Monet's "seasonal expansion" license and remanded the case to the Board for a hearing in compliance with Rule 27. Id. at 10.

It is from this Decision that the Board filed its timely appeal. Pursuant to Rule 24 of the Rhode Island Rules of Civil Procedure, on April 11, 2005, the Journal intervened by stipulation.

[4] Club Monet made three other arguments not pertinent to this appeal. First, Club Monet averred that the proper jurisdiction for the Journal's appeal lay with the Superior Court pursuant to a writ of mandamus because the Department's "general supervisory" authority did not give the Department jurisdiction to supervise licensing functions by local boards. Secondly, it contended that Rule 27 pertains to the "sales, service or storage" of alcoholic beverages; thus, it does not require a hearing on expansion. Finally, it requested that if the Department did reverse the Board's decision, that it not rescind the license pending a public hearing.

Standard of Review

The Superior Court's review of an administrative agency is governed by G.L. 1956 § 42-35-15(g). Section 42-35-15(g) provides:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, interferences, conclusions, or decisions are:
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> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Id. When reviewing a decision under said statute, the court may not substitute its judgment for that of the agency on questions of fact. Johnston Ambulatory Surgical Ass'n, Inc. v. Nolan, 755 A.2d 799, 805 (R.I. 2000). "The court is limited to an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision." Barrington Sch. Comm. v. Rhode Island State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992). "Legally competent evidence is indicated by the presence of 'some' or 'any' evidence supporting the agency's findings." Rhode Island Pub. Telecommunications Auth. v. Rhode Island State Labor Relations Bd., 650 A.2d 479, 485 (R.I. 1994). "If competent evidence exists in the record considered as a whole, the court is required to uphold the agency's conclusions." Barrington Sch. Comm., 608 A.2d at 1138.

The Application for a Seasonal Expansion

The Board essentially argues that an approval of an application for a temporary seasonal expansion is not a granting of a license that invokes Rule 27, § 3-5-17, or any notice provisions therein. Therefore, the Board contends that since neither Rule 27 nor § 3-5-17 was applicable, the Department did not have the authority to hear the Journal's petition sua sponte. The Department and/or the Journal maintain that the Department's promulgated rules, including Rule 27, do pertain to a temporary seasonal expansion. Thus, the Department may hear a petition implicating a violation of its regulations on its own motion.

Arguing that Club Monet undisputedly possesses a valid, permanent license to serve alcoholic beverages to its patrons, the Board posits that the "expansion" of the license to Club Monet's outside seating area is not an expansion of the licensed premises that requires the type of notice required by Rule 27 and § 3-5-17 because a Providence Zoning Ordinance allows such an outdoor expansion. The Board further maintains that such a temporary permit is a routine exercise of the Board's police powers.

Rule 27, in pertinent part, states that

> "[a]ll licenses granted or issued must identify a premise for operation under the license. The licensed premises is that portion of the licensee's property owned, leased or controlled by the licensee, on which or from which alcoholic beverage may be sold, served or stored. It shall be defined by the licensee at the time the application (new or renewal) is filed and finally determined by the approval of the local licensing board….
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> Once the licensed premise is established, any expansion thereafter shall require a hearing as prescribed in § 3-5-17 and the approval of the local licensing board…."

The regulations of the Department's Liquor Control Administration, including Rule 27, are promulgated pursuant to G.L. 1956 §§ 3-5-20, 3-2-2, 42-35-1, et seq. Accordingly, "the regulations are legislative rules that carry the force and effect of law and enjoy a presumption of validity." Parkway Towers Assocs. v. Godfrey, 688 A.2d 1289, 1293 (R.I. 1997) (citing Lerner v. Gill, 463 A.2d 1352, 1358 (R.I. 1983)).

This Court has consistently stated that "when a statute expresses a clear and unambiguous meaning, the task of interpretation is at an end and this Court will apply the plain and ordinary meaning of the words set forth in the statute." Ret. Bd. of the Emples. Ret. Sys. of R.I. v. DiPrete, 845 A.2d 270, 297 (R.I. 2004) (citing State v. Bryant, 670 A.2d 776, 779 (R.I. 1996)). Furthermore, "'[i]f the language is clear on its face, then the plain meaning of the statute must be given effect' and this Court should not look elsewhere to discern the legislative intent." Id. (quoting Henderson v. Henderson, 818 A.2d 669, 673 (R.I. 2003) (quoting Fleet National Bank v. Clark, 714 A.2d 1172, 1177 (R.I. 1998))).

Club Monet has a valid license to serve alcoholic beverages on its premises. This license strictly defines where Club Monet may serve alcoholic beverages. Therefore, its licensed premise has been established and "any expansion thereafter shall require a hearing as prescribed in § 3-5-17 and the approval of the local licensing board." See Rule 27. Rule 27 is clear and unambiguous. Applying the plain and ordinary meanings of the words of Rule 27, this Court finds it clear that any expansion of the licensed premises requires a hearing as set forth in § 3-5-17. Club Monet applied for a "seasonal expansion" to serve alcoholic beverages in an outside seating area that was not in existence when the original liquor license was obtained; thus, this temporary expansion necessitated the application for a seasonal expansion license. Rule 27 is not ambiguous in not allowing exemptions for "seasonal" licenses: any expansion of the licensed

premise must be noticed and a hearing must be held to give abutters a meaningful opportunity to be heard. As the Department stated,

> "an expansion of a premise, . . . , can change or transform the nature or character of a retail alcoholic beverage business. Owners of land within two hundred (200) feet have been granted the right to comment or object to the original plans for a proposed alcoholic beverage premise at a public hearing. They may not have objected at the original hearing according to the plans originally represented to the local authority at that point in time. It would be unfair to these individuals to have one business plan proposed at the original grant of the application for licensure just to have those plans changed, perhaps significantly and soon thereafter, and to preclude these individuals a similar chance to review, comment or object to the new plans. Such a scenario would render the original right to object meaningless."

See Decision at 5 (citations omitted).

The Applicability of the Zoning Ordinance

Despite the above language, the Board maintains that pursuant to a City of Providence Ordinance, Club Monet's licensed premises have not been "expanded" due to the awarding of the Application for Expansion of Premises. Said ordinance states:

> "[e]xcept in an R Zone, up to an additional twenty five (25) percent of the existing inside seating of an eating and/or drinking establishment may be provided outside of the establishment. Such seating shall be located on the same lot as the main use or may be located on the adjoining city sidewalk only with the appropriate city permits and/or licenses. No additional parking shall be required for such additional seating, provided existing parking is not reduced. Any outdoor seating located within two hundred (200) feet of an R Zone shall cease operation by 11 p.m."

See The Land Use Ordinance of the City of Providence Art. IV, § 401.1. Pursuant to this language, the Board concludes that because Club Monet's application for a "seasonal license" is within the twenty five percent zoning margin, this "expansion" is, in effect, covered by the original license. In its written decision, the Department refuted the Board's presumption stating

that "local zoning ordinances that affect alcoholic beverage regulation cannot contradict statewide alcoholic beverage laws." See Decision at 8.

"It is declared to be a fundamental principle that municipal ordinances are inferior in status and subordinate to the laws of the state." East Greenwich v. O'Neil, 617 A.2d 104, 109 (R.I. 1992) (quoting Wood v. Peckham, 80 R.I. 479, 98 A.2d 669, 670 (1953)). "Generally, state laws of statewide application preempt municipal ordinances on the same subject if the Legislature intended that they thoroughly occupy the field." Id. (citing Easton's Point Associates, Inc. v. Coastal Resources Management Council, 559 A.2d 633, 636 (R.I. 1989)). Furthermore, the Rhode Island Zoning Enabling Act states that "[n]othing in [the Zoning Enabling Act] shall be construed to limit the authority of agencies of state government to perform any regulatory responsibilities." G.L. 1956 § 45-24-28(e).

The Department's Liquor Control Administration was created to establish a broad and comprehensive state control over the traffic in intoxicating liquors and to vest that control in an administrative body where, before, control was exclusively at the local level. Baginski v. Alcoholic Beverage Comm'n., 62 R.I. 176, 180-81, 4 A.2d 265, 267 (1939). Consistent with its wide powers of regulation and supervision, the Department is, in effect, a "state superlicensing board." Id. at 182, 4 A.2d 268. Therefore, any local zoning ordinance that would seemingly conflict with the authority of a regulation of the Department is deemed preempted. See East Greenwich v. O'Neil, 617 A.2d at 109.

Here, the Providence Zoning Ordinance §401.1, as the Board states, allows a business a twenty five percent expansion of its inside seating establishment for outside eating and drinking. However, this ordinance does not supercede or preempt any Department rule designed to regulate the serving of alcoholic beverages. In fact, any attempt by the zoning ordinance to do so

would be ultra vires. Furthermore, § 401.1 states "[s]uch seating shall be located on the same lot as the main use or may be located on the adjoining city sidewalk only with the appropriate city permits and/or licenses." (Emphasis added.) Section 401.1, itself, does not remove the need for the proper permits and licenses to be obtained. One license evidently required—given the fact that Club Monet found it necessary to apply for one—is a license to expand the licensed premises to serve alcoholic beverages outside. Therefore, despite § 401.1, Rule 27 and the notice requirements of § 3-5-17 referenced therein are applicable to any expansion of the licensed premises—even one deemed a temporary seasonal license.

The Department's Authority To Hear a Case Sua Sponte

The Board further argues that the Department lacked the jurisdiction to hear the Journal's case sua sponte. The Board posits that the Department exceeded its authority when it erroneously relied on G.L. 1956 § 3-5-21(a) sua sponte to vacate Club Monet's "seasonal license." The Board asserts that the Department's reliance on § 3-5-21(a) is misplaced because there was no "breach" by Club Monet of the conditions on which it was issued. See id. The Department avows that its powers to take independent action are not solely vested in § 3-5-21(a), but its authority to do so is also found in G.L. 1956 §§ 3-2-2 and 3-5-20, which grant the Board general jurisdiction to supervise and enact rules for local boards. Furthermore, the Department avers that the Board's interpretation of § 3-5-21(a) would render the plain meaning of the statute meaningless if the Department could not take independent action once it became aware of a violation of one of its rules.

Pursuant to § 3-2-2(a), "the [D]epartment has general supervision of the conduct of the business of manufacturing, importing, exporting, storing, transporting, keeping for sale, and selling beverages." Furthermore, the Deparment "shall supervise and inspect all licensed places

to enforce the provisions of [Title 3 of the General Laws of Rhode Island] and the conditions, rules and regulations which the [D]epartment establishes and authorizes." § 3-2-2(d). With respect to the Department's rulemaking ability, "the department is authorized to establish rules and regulations and to authorize the making of any rules and regulations by the licensing authority of the several towns and cities as in their discretions in the public interest seem proper to be made[.]" § 3-5-20. In addition, "[e]very license is subject to revocation or suspension . . . by the [D]epartment on its own motion for breach by the holder of the license of the conditions on which it was issued or for violation by the holder of the license of any rule or regulation applicable, or for breach of any provisions of this section." § 3-5-21(a) (emphasis added).

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.

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).

Conclusion

After a review of the entire record, this Court finds that the Department's decision to vacate and remand the case to the Board for a hearing on the application was not in excess of the Department's authority. The Department's decision was not made upon unlawful procedure, affected by error of law, and was not an unwarranted abuse of discretion. Substantial rights of the Board have not been prejudiced. Accordingly, the decision of the Department is affirmed.

Counsel shall prepare an Order for entry consistent with this Decision.