STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: November 18, 2013)

THE CITY OF PROVIDENCE BOARD OF LICENSES	:	
v.	:	**C.A. No. PC-2013-2429**
THE DEPARTMENT OF BUSINESS REGULATION OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATION and PAUL MCGREEVY in his capacity as Director of the Department of Business Regulation	:	

DECISION

PROCACCINI, J. The City of Providence Board of Licenses (Board) appeals a Declaratory Ruling Order (Ruling) issued by the Rhode Island Department of Business Regulation (DBR). The DBR issued the Ruling in response to Karma Club, Inc.'s (Karma) written request for an advisory opinion regarding the sale of distilled liquor by the bottle. Jurisdiction is pursuant to G.L. 1956 § 42-35-15. After wading through the numerous and lengthy arguments of the parties, the issue can be "distilled" into a single and straightforward question: Does the DBR possess the authority to expand the sale of bottles of distilled liquor in Rhode Island bars and nightclubs through the issuance of a declaratory ruling?

I

Facts and Travel

On June 2, 2008, DBR issued a Notice entitled "Prohibitions Relating to Drink Specials and Bottle Sales," addressed to all holders of liquor licenses within the state of Rhode Island. (Notice at 1.) The Notice stated, inter alia, that "[a] licensee may not sell or deliver any

alcoholic beverages by the bottle, excluding aquardiente or wine, to any patron, but must serve and dispense the alcoholic beverage by an employee or the owner."[1] Id. at 2. Under the direction of this Notice, the Board has consistently maintained that establishments holding a Class B liquor license may not sell distilled liquor by the bottle, and that it is punishable by a fine of $1000 per violation. See id. ("REMINDER: A licensee found by the Department to be in violation of the above restrictions could be subject to a fine of one thousand dollars ($1,000) per violation.").

On March 11, 2013, the Board fined Karma a total of $2500 for various violations of the conditions of its liquor license, including one count of selling alcoholic beverages by the bottle; two counts of selling alcohol to underage persons; and two counts of allowing patrons to self-serve alcoholic beverages. (Board's Decision at 1.) The Board did not suspend or revoke Karma's licenses. On March 15, 2013, Karma appealed the Board's Decision to DBR. On March 22, 2013, DBR held a prehearing conference call with counsel for Karma and the Board, at which time counsel for Karma requested an advisory opinion to clarify the 2008 Notice. The parties agreed to stay the appeal until DBR issued said advisory opinion.

On March 27, 2013, counsel for Karma submitted a "Request for Advisory Opinion" to DBR via email. (Pl.'s Ex. A at 1.) In the request, Karma requested "an advisory opinion on its notice dated June 2, 2008 and the Department's interpretation of RIGL 3-7-26 and RIGL 3-8-14 as well as Regulation 8 Rule 11." Id. Specifically, Karma asked for "clarification" as to the following:

> "1. Does RIGL 3-8-14 make the sale of alcohol by the bottle illegal? And where does it give an exception for the sale of wine by the bottle?

[1] Aquardiente is a generic term for distilled alcoholic beverages made in South America containing between 29% and 60% alcohol by volume.

> "2. What is the general law, rule or regulation that permits the DBR in Regulation 8 Rule 11 the ability to make the determination that wine may be sold by [the] bottle.
> "3. Does RIGL 3-7-26 specifically prohibit the sale of alcohol by the bottle? And if the answer is yes, specifically what section does so?
> "4. If the above statute does not prohibit the sale of alcohol by the bottle, Licensee request [sic] the Department as the super licensing authority to identify the general law that prohibits the sale of alcohol by the bottle."

In response to Karma's request for an advisory opinion, DBR issued a Ruling on May 6, 2013, stating, inter alia, that "[t]he sale of a multiple serving bottle of distilled liquor to a VIP patron table ("VIP bottle service") is permitted." (Pl.'s Ex. B at 7.) The Board filed a timely appeal of DBR's Ruling on May 22, 2013.

II

Standard of Review

This Court's appellate review of the decisions of administrative agencies such as the DBR is governed by the Rhode Island Administrative Procedures Act, as set forth in § 42-35-1 et seq. See Rossi v. Employees' Ret. Sys. of R.I., 895 A.2d 106, 109 (R.I. 2006). Pursuant to § 42-35-8, "declaratory rulings . . . have the same status as agency orders in contested cases," and are therefore subject to the same standard of review as other agency decisions. Greenwich Bay Yacht Basin Assocs. v. Brown, 537 A.2d 988, 993 (R.I. 1988). The relevant standard of review as set forth in § 42-35-15(g), provides as follows:

> "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, inferences, 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;
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> "(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."

This Court looks to the record to determine whether the administrative decision on appeal was based on "legally competent evidence." Envt'l Sci. Corp v. Durfee, 621 A.2d 200, 208 (R.I. 1993). Competent evidence is defined as that which a reasonable mind might accept to support a conclusion. See Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981).

Despite the high level of deference afforded to agency findings of fact, this Court will review all determinations of law de novo. See Iselin v. Ret. Bd. of Emp.'s Ret. Sys. of R.I., 943 A.2d 1045, 1049 (R.I. 2008); Narragansett Wire Co. v. Norberg, 118 R.I. 596, 376 A.2d 1, 16 (1977). "When construing a statute our ultimate goal is to give effect to the purpose of the act as intended by the Legislature." Arnold v. R.I. Dep't of Labor & Training Bd. of Review, 822 A.2d 164, 168 (R.I. 2003) (quotations omitted). If "'the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.'" Solas v. Emergency Hiring Council of State, 774 A.2d 820, 824 (R.I. 2001) (quoting Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996)).

When a statute is ambiguous, "we employ our well-established maxims of statutory construction in an effort to glean the intent of the Legislature." Unistrut Corp. v. State Dept. of Labor & Training, 922 A.2d 93, 98-99 (R.I. 2007). In such a situation, this Court will accord

deference to an administrative agency's interpretation "unless such interpretation is clearly erroneous or unauthorized." Labor Ready Ne., Inc. v. McConaghy, 849 A.2d 340, 344-45 (R.I. 2004). "[W]hile not controlling, the interpretation given a statute by the administering agency is entitled to great weight." State v. Cluley, 808 A.2d 1098, 1103 (R.I. 2002) (citing Berkshire Cablevision of R.I., Inc. v. Burke, 488 A.2d 676, 679 (R.I. 1985)). Nevertheless, the "ultimate interpretation of an ambiguous statute . . . is grounded in policy considerations" and this Court will not construe a statute in such a way as to "defeat its underlying purpose." Arnold, 822 A.2d at 168.

III

Analysis

A

Justiciability

A threshold issue before this Court is whether DBR's publication of the Ruling was proper. In its March 27, 2013 communication with DBR, Karma specifically requested an "advisory opinion" from DBR on the issue of VIP bottle service. While acknowledging the specific format of Karma's request, DBR sua sponte converted the request into one for a "declaratory ruling" under § 42-35-8. (Ruling at 1.) This decision was based, allegedly, upon "the content of the request and the discussions with counsel." Id.

The Rhode Island Administrative Procedures Act allows administrative agencies to publish declaratory rulings "as to the applicability of any statutory provision or of any rule or order of the agency." Sec. 42-35-8. That section also calls on agencies in the state to "provide by rule for the filing and prompt disposition of petitions for [such] declaratory rulings." Id. Pursuant to this statutory directive, DBR lays out its procedure for filing petitions for declaratory

rulings in Title 11 of the Rhode Island Administrative Code. See Declaratory Rulings, R.I. Admin. Code 11-3-3:3. Rule 3, entitled "Declaratory Rulings," permits "any interested person [to] petition the Department for a declaratory ruling." Id. The DBR then must either issue a declaratory ruling; solicit written arguments from interested persons; or provide for oral arguments on the issue. Id. Rule 3 also provides guidance to interested persons as to the required form of petition:

> "(1) Petitions may be submitted electronically or in hard copy.
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> "(2) At the top of the page shall appear the wording "Before the Department of Business Regulation." On the left side of the page below the foregoing, the following caption shall be set out: "In the Matter of the Petition of (name of the petitioning party) for a Declaratory Ruling." Opposite the foregoing caption shall appear the word "Petition."
>
> "(3) The body of the petition shall be set out in numbered paragraphs. The first paragraph shall state the name and the address of the petitioning party. The second paragraph shall state all rules or statutes that may be brought into issue by the petition. Succeeding paragraphs shall set out the state of facts relied upon in form similar to complaints in civil actions before the superior courts of this state. The concluding paragraphs shall contain the prayer of the petitioner. The petition shall be subscribed and verified in the manner prescribed for verification of complaints in the superior courts of this state.
>
> "(4) Petitions shall clearly identify the filer and/or his or her authorized representative and the date of submission of the petition."

The Rhode Island Supreme Court has stated that § 42-35-8 is "an administrative counterpart of the Declaratory Judgments Act." Liguori v. Aetna Cas. & Sur. Co., 119 R.I. 875, 882-83, 384 A.2d 308, 312 (1978). Therefore, the well-settled rule that "the Superior Court is without jurisdiction under the Uniform Declaratory Judgments Act unless it is confronted with an actual justiciable controversy" applies equally to declaratory rulings under § 42-35-8. See

McKenna v. Williams, 874 A.2d 217, 226 (R.I. 2005). A justiciable claim must involve "'a plaintiff who has standing to pursue the action' and 'some legal hypothesis which will entitle the plaintiff to real and articulable relief.'" Id. (quoting Meyer v. City of Newport, 844 A.2d 148, 151 (R.I. 2004). Declaratory rulings are "not intended to serve as a forum for the determination of abstract questions or the rendering of advisory opinions." Lamb v. Perry, 101 R.I. 538, 542, 225 A.2d 521, 523 (1967). A review of the facts in this case compels the conclusion that DBR's ruling was improperly rendered given Karma's failure to articulate a justiciable basis for a declaratory judgment.

As an initial note, it is clear that Karma's request for an advisory opinion does not "generally adhere" to the form requirements for a declaratory ruling. Karma's request is entitled "Request for Advisory Opinion." (Pl.'s Ex. A at 1.) Nowhere in the one-page document does the term "Declaratory Ruling" or "Petition" appear. See Declaratory Rulings, R.I. Admin. Code 11-3-3:3(B)(2) (calling for particular wording in a petition for a declaratory ruling, specifically "In the Matter of the Petition of (name of the petitioning party) for a Declaratory Ruling" and the word "Petition" opposite said caption). Moreover, the request was not "set out in numbered paragraphs," including "the name and address of the petitioning party." Id. at 11-3-3:3(B)(3).

More significant than defects in form, however, is Karma's failure to include any "facts relied upon in form similar to complaints in civil actions before the superior courts of this state," or a "prayer of the petitioner." Id. Such contested facts are necessary to establish the required "legal hypothesis" entitling Karma to "real and articulable relief" under a declaratory ruling. See McKenna, 874 A.2d at 217; accord Republican Party of Conn. v. Merrill, 55 A.3d 251, 258 (Conn. 2012) (holding that a request to an administrative agency "by a person seeking a determination regarding the applicability of a statute to specific facts may be treated as a petition

for a declaratory ruling") (emphasis added); accord Cannata v. Dep't of Envtl. Prot., 680 A.2d 1329, 1335 (Conn. 1996) (holding that a petition to an administrative agency constituted a petition for a declaratory ruling because the party expressly requested a determination as to whether their particular use of land met statutory requirements for an exemption). Specifically, Karma's request "ask[ed] for clarification" regarding DBR's 2008 Notice as to which, if any, statute prohibited the sale of alcohol by the bottle. (Pl.'s Ex. A at 1.) The request did not reference the facts underlying Karma's March 2013 fines regarding its alleged violation of such rules or present an argument in support of any particular analysis. See id. The request did not include any "prayer of the petitioner" in that it did not include any persuasive language indicating that Karma had a vested stake in the resolution of the issue, nor did it advocate a particular interpretation. See id.

In sum, there are no facts upon which DBR could have relied upon to convert Karma's request for an advisory opinion into a declaratory ruling. McKenna, 874 A.2d at 227 (rejecting a prayer for declaratory judgment when the court found that "[t]here is nothing in this complaint that clothes these plaintiffs with any rights, status, or other legal relations to further the act's purpose to settle and to afford relief from uncertainty and insecurity") (quotations omitted). Essentially, DBR accepted a vague, poorly-framed request from a nightclub liquor license holder and sized upon that opportunity to fashion a substantial expansion of liquor sales without the approval of the legislature as required by § 3-5-13. Therefore, DBR's conversion of Karma's request for an advisory opinion into a Ruling was in error and an invalid exercise of its authority. Sec. 42-35-15(g).

B

DBR's Declaratory Ruling Order

Assuming Karma had properly petitioned the DBR for a declaratory ruling, setting forth facts establishing a justiciable controversy in the correct format, this Court retains jurisdiction to review the Ruling pursuant to § 42-35-15. The Board argues that DBR's statutory interpretation of Title III of the General Laws of the State of Rhode Island was clearly erroneous given the title's overriding mission of temperance and the guidelines set forth within the title. The Board also argues that DBR exceeded its authority in issuing the Ruling, which constitutes an unconstitutional usurpation of legislative power. In response, DBR contends that its interpretation of the relevant statutory provisions is not "clearly erroneous or unauthorized"; therefore, this Court may not disturb its findings.

Administrative agencies are "legislative creatures without inherent or common-law powers" and thus "possess no ability to promulgate regulations absent a specific or implied grant of statutory authority." F. Ronci Co., Inc. v. Narragansett Bay Water Quality Mgmt. Dist. Comm'n, 561 A.2d 874, 881 (R.I. 1989) (citing Berkshire Cablevision of R.I., Inc. v. Burke, 488 A.2d 676, 679 (R.I. 1985)). "[W]hen a right to exercise a portion of the state's sovereignty is delegated by the general assembly to a municipal officer or body, such delegated authority may be exercised only to the extent of the power conferred." Andruzewski v. Smith, 105 R.I. 463, 467, 252 A.2d 914, 916 (1969). Thus, when called upon to clarify the "general law that prohibits the sale of alcohol by the bottle" in the Rhode Island General Laws, DBR may not act outside of the parameters of Title III. See Iselin, 943 A.2d at 1050.

Title III of the Rhode Island General Laws governs the distribution of alcoholic beverages. Sec. 3-1-1 et seq. The mandate of the Legislature is that the title receives a liberal

construction in pursuit of "the promotion of temperance" and the "reasonable control of the traffic in alcoholic beverages." Sec. 3-1-5. The subject of Karma's request for advisory opinion—VIP bottle service—is not expressly defined in Title III. While § 3-5-13 expressly forbids the sale of distilled liquor in establishments with liquor licenses unless expressly authorized by the title, no other section expressly permits the sale of distilled liquor in bottles, rendering the title ambiguous on the matter. Therefore, in its Ruling, DBR should have examined the title in its entirety to "'glean the intent and purpose of the Legislature from a consideration of the entire statute, keeping in mind [the] nature, object, language, and arrangement of the provisions to be construed.'" Tanner v. Town Council of E. Greenwich, 880 A.2d 784, 796 (R.I. 2005) (quoting Mottola v. Cirello, 789 A.2d 421, 423 (R.I. 2002)).

Fundamental to DBR's Ruling is the assertion that "[t]here is no Rhode Island statute that directly permits or prohibits 'VIP bottle service.'" (Ruling at 4.) DBR argues that, because the General Assembly has not expressly prohibited the practice, DBR has the authority to promulgate regulations that police the sale of distilled liquor in bottles pursuant to § 3-5-20.[2] Moreover, DBR argues that its conclusion that VIP bottle service is permitted simply because it is not expressly prohibited in any state statute is reasonable, and this Court must defer to that reasoning. However, both of these arguments fail.

When a right to exercise a portion of the state's sovereignty is delegated by the General Assembly to an administrative agency, such delegated authority may be exercised only to the extent of the power conferred. See Andruzewski, 105 R.I. at 467, 252 A.2d at 916. Although the General Assembly delegated to DBR a portion of its sovereignty with respect to the control

[2] "[T]he 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."

of alcohol, DBR is limited in its ability to exercise that delegated authority. See id. Section 3-5-13 clearly requires that sales of distilled liquors for consumption on a licensee's premises be authorized by Title III. Beyond this, the General Assembly has not conferred to DBR the power to permit the sale of distilled liquor, much less by the bottle to VIP patron tables. Conversely, the Legislature has expressly conferred the right to regulate the sale of aquardiente—a distilled liquor—and wine by the bottle. Sec. 3-7-26 (expressly noting that "[n]othing in this section shall be construed to prohibit . . . the sale or delivery of wine by the bottle"); Sec. 3-8-14 (permitting license holders to sell aquardiente by the bottle "because this beverage is generally purchased by the bottle by ethnic tradition"). DBR cannot regulate the sale of any other type of distilled liquor by the bottle without similar enabling authority. See Ramsden v. Ford, 88 R.I. 144, 148, 143 A.2d 697, 699 (1958) (holding that delegations of power to municipal authorities "should be strictly construed").

Moreover, the "well-established maxims of statutory construction" lend themselves to the same conclusion that DBR's interpretation of Title III is clearly erroneous. See Unistrut Corp., 922 A.2d at 98-99. The express grant of the ability to sell both wine and aquardiente by the bottle evidences an intent to exclude the sale of other types of alcohol by the bottle. See §§ 3-7-26, 3-8-14; Volpe v. Stillman White Co., 415 A.2d 1034, 1036 (R.I. 1980) (applying "the principle that express enumeration of items in a statute impliedly excludes all others" to further legislative intent). Although "the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping," it has force "when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (quoting United States v. Vonn, 535 U.S, 55, 65 (2002)).

Here, the Legislature specifically carved out an exception in § 3-7-26 regarding the sale of wine by the bottle and in § 3-8-14 regarding the sale of aquardiente by the bottle, and yet declined to do so for distilled liquors in general. The Legislature clearly recognized the need to grant the power to not only regulate the sale of alcohol in general by the bottle, but to regulate a particular type of distilled liquor by the bottle. An interpretation of the Legislature's decision as an intentional omission, thereby limiting the distribution of alcohol, clearly furthers the legislative intent of promoting temperance, defined as "restrained or moderate indulgence (esp. of alcoholic beverages)" and "abstinence." Black's Law Dictionary (9th ed. 2009). An interpretation to the contrary, permitting establishments to sell distilled liquor in multiple-serving bottles, is clearly erroneous in that it does not, under any construction of the term, promote temperance; in fact, it does the opposite. See McConaghy, 849 A.2d at 344-45; Arnold, 822 A.2d at 168 (this Court will not construe a statute in such a way as to "defeat its underlying purpose").[3] This conclusion is further supported by § 3-7-26, which prohibits "happy hours" and other sales practices designed to encourage patrons to drink multiple alcoholic beverages in a short period of time.

Without an express grant of power, DBR's Ruling permitting the sale of distilled liquor in bottles exceeds the scope of the authority endowed upon it by Title III. Agency actions are only valid "when the agency acts within the parameters of the statutes that define [its] powers." Iselin, 943 A.2d at 1050 (citation omitted); F. Ronci Co., Inc., 561 A.2d at 881 (noting that administrative agencies are "legislative creatures without inherent or common-law powers" and

[3] Moreover, it is well established that "a State has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries." N.Y. State Liquor Auth. v. Bellanca, 452 U.S. 714, 715 (1981). Title III, which grants licensees the ability to sell liquor within the state, thus consists of a positive grant of power beyond which no permissions may be inferred.

thus "possess no ability to promulgate regulations."). DBR, like all other administrative agencies, "may not enforce regulations that are in direct contradiction to the specific powers enumerated in their enabling legislation." F. Ronci Co., Inc., 561 A.2d at 881. An erroneous interpretation of an authorizing statute which expands its powers beyond the scope of the statute is unenforceable. See id. DBR's status as a de facto "state superlicensing board," vested with broad regulatory and supervisory powers, simply cannot expand so far as to create what this Court would describe as a "state superlegislating board." See Baginski v. Alcoholic Beverage Comm'n, 62 R.I. 176, 4 A.2d 265, 268 (1939). Accordingly, DBR's Ruling is clearly erroneous in view of the substantial evidence on the whole record and in excess of its statutory authority. Sec. 42-35-15.

IV

Conclusion

After review of the entire record, this Court concludes that DBR's Ruling was an unlawful usurpation of legislative authority issued in excess of the agency's statutory authority, and that the conclusions contained within the Ruling were clearly erroneous. Accordingly, the Ruling issued by DBR is vacated. This matter is remanded to DBR for proceedings consistent with this opinion. Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

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COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**November 18, 2013**
JUSTICE/MAGISTRATE:	**Procaccini, J.**
ATTORNEYS:	
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For Defendant:	**Jenna R. Algee, Esq.** **Ellen R. Balasco, Esq.**