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

Village Liquors, LLC,	:	
Appellant,	:	
	:	
v.	:	**DBR No. 11-L-124**
	:	
South Kingstown Board of Licensing	:	
Commissioners,	:	
Appellee.	:	

DECISION AND ORDER

I. Introduction

On or about November 28, 2011, the South Kingstown Board of Licensing Commissioners ("Liquor Board"), the local liquor licensing authority under R.I. Gen. Laws § 3-5-15, denied the application of Village Liquors, LLC ("Appellant") for a new Class A liquor license on the grounds that there were no licenses available to be granted. Appellant appealed the Liquor Board's decision to the Director of the Department of Business Regulation ("Department").

II. Jurisdiction

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-1-1 *et seq.*, R.I. Gen Laws § 3-7-21 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen Laws §42-35-1 *et seq.*

III. Issues

Whether to grant a Class A license to the Appellant.

IV. Material Facts and Travel of Case

On or about March 23, 2011, a change in population count in the Town of South Kingstown, Rhode Island was documented at 30,639 pursuant to the United States Census Bureau. At that time, the South Kingstown Liquor Rules and Regulations as adopted December 14, 1998 and amended through August 16, 2010 ("liquor rules" or "liquor rule") read as follows: "[t]he number of licenses for each class shall be authorized as indicated below: Class A – 4 (not to exceed 1 per 6,000 inhabitants)".

On April, 11, 2011, after becoming aware of the change in population, the Appellant filed applications required by the liquor rules as a condition precedent to applying for a Class A Retail liquor license: 1) application to amend South County Commons "Master Plan", and 2) application for Development Plan Review of Appellant's proposed retail liquor site. On April 25, 2011, during the pendency of these pre-requisite applications, the South Kingstown Town Council voted to amend the rules to read as follows: "[t]he number of licenses for each class shall be authorized as indicated below: Class A – 4 (maximum)".

On July 14, 2011, the South Kingstown Planning Board ("Planning Board") granted Appellant approval of the amendment to the Master Plan and Development Plan Review. On July 15, 2011, Appellant filed an application with the South Kingstown Zoning Board of Review, as required by the Rules, for a "Special Use Permit" for a retail liquor store; and on August 17, 2011, received unanimous approval for such "Special Use Permit."

On August 23, 2011, in compliance with the liquor rules, Appellant filed an application for a Class A Retail Liquor License with the Liquor Board. A quorum of the South Kingstown Economic Development Committee ("South Kingstown EDC") unanimously voted to support Appellant's liquor license application on October 13, 2011.

On November 28, 2011, after a public hearing, the Liquor Board denied Appellant's request for a license on the grounds that there was no fifth license available to be granted. Appellant thereafter appealed the Liquor Board's decision to the Department, which was received on December 6, 2011.

On December 23, 2011, a pre-hearing conference was held before the undersigned sitting as designee of the Director of the Department of Business Regulation. After discussion amongst the parties present, and with no objections, the following parties were allowed to intervene: Wakefield Liquors, Inc., Patsy's Package Store and Sweeny's Package Store, Inc. The interveners' participation in the matter was for the limited purpose of submitting legal briefs to the undersigned.[1] The Liquor Board, Appellant, and interveners discussed and agreed to submit legal briefs with the expectation that the matter would be decided without oral argument. After consideration of the briefs, the undersigned e-mailed the Liquor Board, Appellant and intervenors to advise that more factual information was needed to make a decision and requested that the Board and Appellant present evidence and testimony at a full hearing. In response to this e-mail, the Town and Appellant requested a conference call with the undersigned to discuss the matter. In lieu of a hearing, the undersigned approved the request of the Town and Appellant that the matter be decided after submission of a joint stipulation of facts

[1] "The hearing officer may grant a petition for intervention at any time and may set conditions upon the intervener's participation in the proceeding." 2 Am. Jur. 2d Administrative Law § 309.

(exhibit Joint Admission #1). The decision herein was developed after the undersigned considered of all the briefs filed, joint stipulations of the parties, and the evidence submitted at the pre-hearing conference.[2]

IV. Discussion

A. Standard of Review

As a matter of law, local licensing boards have broad discretion in deciding whether or not to grant a liquor license application. *Bd. of Police Comm'rs v. Reynolds*, 86 R.I. 172, 176 (1975)("it is a matter of discretion whether or not they shall grant the license"). 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 Bd. of License Commiss'rs*, LCA-CU-98-02 (8/26/98).

Further, under Rhode Island law, "the right of review given to the division of alcoholic beverages was a broad and comprehensive one and in effect established the division as a state super-licensing board which as such had the right in its sound discretion to hear cases *de novo*, either in whole or in part." *Kaskela v. Daneker* 76 R.I. 405 (R.I. 1950). "The power of review is not limited to mere errors of law and as such, the Department has broad powers 'to make such decision or order *as to it shall seem proper*.'" *Hallene v. Smith*, 98 R.I. 360, 365 (R.I. 1964).

[2] This includes documentation specifically cited to herein as well as the following items: (1) Transcript of the hearing of the South County Zoning Board of Review dated August 17, 2011; (2) Transcript of the hearing of the South Kingstown Town Council dated November 28, 2011; and (3) Appellant's Retail Class A license application.

B. Application of the pre-amendment liquor rules

In reviewing the denial of the license *de novo*, the Department must first decide which liquor license rules apply to the Appellant's application, *i.e.* the pre-amendment or post-amendment liquor rules. The standards guiding judicial decision-making, analogous principles in the zoning context, and the suspect timing of the amendment support the undersigned's decision that the pre-amendment rule applies to the Appellant's application now before it on *de novo* review. This decision does not, however, make any holdings with regards to the applicability of the April 25th amendment to applicants other than the Appellant in the instant case.

1. Judicial treatment of post-filing statutory amendments

Because the Department acts in a quasi-judicial capacity in reviewing local board decisions,[3] the analysis used by courts in determining whether a post-amendment law should apply retroactively to a pending matter aides the undersigned's analysis. "Proceedings instituted...before the passage of the amendment will...not be affected by it but will continue to be governed by the original statute." 82 C.J.S. Statutes § 579. Specifically, courts "look to the stage of the proceedings affected by the change." Id. Given the Appellant's progress through the stages of the application process, the undersigned finds that the application will continue to be governed by the original pre-amendment liquor rules.

In the instant case, the Appellant began performing the pre-requisite conditions to obtain the license *before* the amendment of the liquor rule that set the maximum number of liquor license at four (4). As stated by the Court in *Town of Johnston v. Pezza*, pre-

[3] *See, e.g., Lyons v. Liquor Control Administrator*, 218 A.2d 1, 3 (R.I. 1966)(referring to the "decision of an administrative officer rendered in a judicial or quasi-judicial hearing").

requisite conditions are laden with substantive requirements set by an administration, to allow an applicant to file an application. 723 A.2d 278, 283 (R.I. 1999). The pre-conditions are essential components of the application itself; performing the required conditions initiates the application process. On April 11, 2011, Appellant submitted the first required condition of the liquor rules to the South Kingstown Planning Department amending the Commons' "Master Plan". This submission set the application process in motion. Complying and executing application pre-requisite conditions commences the application process, even if an application was not formally filed with the Liquor Board.

After Appellant initiated its application process, the Liquor Board amended its rule to cap the liquor licenses to four (4). The April 25th amended liquor rule capping the maximum number of licenses at 4 does not apply to Appellant's application because evidence shows that Appellant began and furthered its application before the rule was amended. Therefore, the pre-amendment rule applies to Appellant's application.

2. Analogous principles in zoning law

Further guiding the undersigned's analysis is application, by way of analogy, of a legal principal recognized in the process of obtaining government permission for building (zoning law) to the process of obtaining government permission for liquor store operations. According to Corpus Juris Secundum, "[a] zoning change or amendment may be ineffective or unenforceable as against a property owner who has legally engaged in, or obtained a permit for, a use authorized under the regulations and has substantially altered his or her position in reliance thereon." 101A C.J.S. Zoning & Land Planning § 72. The Rhode Island Supreme Court has recognized that "[c]urrent trends in the decisions indicate that rights existing under an ordinance may not be swept aside by a

subsequently enacted zoning ordinance, where, in reliance on the existing ordinance, expenses are incurred in preparing for the issuance of a permit." *Tantimonaco v. Town of Johnston*, 232 A.2d 385, 389 (RI 1967).

The rationale behind this rule is applicable to the instant case. Where an applicant for a liquor license has initiated the application process and, at its own expense, fulfilled pre-requisite conditions in reliance upon the liquor license rules in effect at the time of application, it would be inequitable to deny the applicant the effect of the existing rule and subject it to a new standard. Additionally, other parties have demonstrated reliance on the pending license application. The landlord of the unit for the proposed liquor store held the unit open for over 8 months without rent in expectation of occupation by Village Liquors. Liquor Board Hearing Transcript at 17 (hereinafter "Liquor Transcript"). Where, as in this case, the evidence supports a finding of requisite reliance, the pre-amendment rule should apply.

Legal scholars have stated, and the Department duly recognizes, that reliance is not always sine qua non for the application of a pre-amendment rule. Instead, "the test should involve a weighing of such factors as the nature, extent, and degree of the public interest to be served by the ordinance amendment against the nature, extent, and degree of the [applicant's] reliance on the state of the ordinance under which he or she has proceeded." 101A C.J.S. Zoning & Land Planning § 72. In the instant case, the record demonstrates that applying the pre-amendment rule to allow an additional license is actually in furtherance of the public interest, including, for example, the support of the

South Kingstown EDC. Therefore, there are no public concerns outweighing the Appellant's reliance on application of the pre-amendment liquor rules.[4]

3. Timing of the amendment after receipt of Appellant's application

Appellant alleges that the April 25th amendment was a "flagrant attempt[] to 'cure'" because "[i]t was not until [Appellant's] April 11th submission that the [Liquor] Board realized that their regulations allowed a fifth Class A license." Appellant's Memorandum at 4. The record supports the notion that the Liquor Board made the change with knowledge of the Appellant's initiation of the liquor license application process and the amendment's effect of terminating this process.[5] Thus, Appellant argues that the Liquor Board's "subsequent efforts had the singular purpose of thwarting Petitioner's application." Id.

The Appellant's argument as to the Liquor Board's motives echoes the concern expressed by the Rhode Island Supreme Court in a similar situation where the maximum number of liquor licenses was changed "immediately prior to the action taken on the pending applications," concluding that "such a practice is highly questionable." *Board of License Com'rs of the Town of Narragansett v. O'Dowd*, 179 A.2d 579, 582 (R.I. 1962). *O'Dowd* shapes the Department's attitude towards changing the limiting number right before making a decision on a pending application.

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[4] The lack of public interest in applying the post-amendment rule to Appellant's application further brings into question the Liquor Board's motives. *See* 101A C.J.S. Zoning & Land Planning § 262 (Where a licensing authority "arbitrarily and unreasonably adopts a new regulation in order to frustrate an applicant's plan...rather than to promote general welfare, the new regulation may not be applied retroactively" against the frustrated applicant).

[5] *See* a) April 1, 2011 letter to South Kingstown Building Offical/Zoning Officer requesting zoning certificate for a liquor store, b) April 5, 2011 letter from the Kingstown Building Offcial noting that a Class A license is required to operate a liquor store (cc: Town Manager, Town Clerk, Building Official, and Special Legal Counsel, and c) "Application Notification List" for "Village Liquors, LLC" (dated April 11, 2011).

The Liquor Board's citation to a later Superior Court case for the proposition that change in limit can be done "at the same time" as the application decision does not change the Department's analysis. Liquor Board's Memorandum at 3. That case, *Town of Lincoln v. Racine*, addressed the Town of Lincoln's "cap and no cap approach" of holding hearings on license applications that would be in excess of the maximum codified in the ordinance, and thereupon, simultaneously re-evaluating whether or not it would be desirable to increase the limit through proper rule-making authority to enable it to grant the pending permit. 1993 WL 853869, *2 (R.I. Super. 1993). The Superior Court did not in any way condone the practice of using an amendment to deny an application that would not exceed the pre-amendment limit on the number of licenses issued within the municipality.

C. Interpretation of the pre-amendment liquor rules

When Appellant began its application process, the rule stated "The number of licenses for each class shall be authorized as indicated below: Class A – 4 (not to exceed 1 per 6,000 inhabitants)". While the Liquor Board argues that the pre-amended rule's language caps the number of licenses to four (4), the Appellant argues, and the undersigned agrees, that the pre-amendment rule sets a per-capita limit, rather than a maximum cap.

1. R.I. Gen. Laws § 3-5-16 requires specific language of limitation

R.I. Gen. Laws § 3-5-16 gives the Liquor Board the authority to establish a maximum cap by an explicit rule or regulation. *Tedford v. Reynolds*, 141 A.2d 264, 269 (R.I. 1958), citing *Board of Police Com'rs of City Warwick v. Reynolds*, 133 A.2d at 741. ("It is now well settled that if a local board desires to avail itself of the authority granted

to it under § 3-5-16 it should do so by adopting a rule or regulation"). In other words, the Liquor Board has a broad discretion to set a maximum limit, but it is required to establish such a limit by creating a rule to clearly reflect its intention.

The case law is clear that, in order act as an absolute cap on the number of licenses that may be issued in a municipality, the language of a limiting ordinance must explicitly codify that maximum, "fixing *specifically* the maximum number of licenses of each particular class which it contemplates limiting." *Tedford*, Id. (*emphasis supplied*). While the post-amendment rule satisfies this requirement, we are only concerned with the pre-amendment rule that applies to the Appellant's pending application. Where, as here, the pre-amendment ordinance does not use the terms "maximum," "limit", "capped," "no more than" or other similar language, the Department will not give it the effect that the Liquor Board desires. Absent express limiting language, the pre-amendment ordinance only limits the number of licenses in accordance with the town's inhabitants (1 per 6,000 inhabitants).

2. Application of the *Hometown Properties* case

Despite the lack of the requisite express language necessary to interpret the pre-amendment rule as setting an absolute maximum to 4 licenses, the Liquor Board continues to argue that *Hometown Properties, Inc. v. Fleming* should control the Department's interpretation. 680 A.2d 56 (R.I. 1996). While the Department agrees that the *Hometown* decision includes some applicable analysis, nothing it the decision overcomes the fact that the pre-amendment rule cannot be construed as a maximum limitation without the explicit use of the term "maximum" or its equivalent.

Hometown is relevant to this discussion to the extent that rules applicable to the construction of statutes may apply to the Department's interpretation of local liquor license rules.[6] In *Hometown*, the Rhode Island Supreme Court recognized that a statutory amendment may have one of two purposes, to change the law or to clarify the law. Id., 680 A.2d at 62. Absent specific language in the statute that declares a purpose to clarify, the court held that "when a statutory provision is amended, the General Assembly is assumed to have intended to accomplish some purpose." Id. The phrase "accomplish some purpose" comes from the Connecticut Supreme Court case to which *Hometown* cites for this proposition: *Gonsalves v. City of West Haven*, 680 A.2d 156, 159-160 (Conn. 1995). In *Gonsalves*, the Connecticut court articulated a presumption that the legislature "intended to *change* the meaning of the statute and to accomplish some purpose." Id. (*emphasis supplied*). In fact, this presumption is the majority view: "[c]ourts have declared that the mere fact that a legislature enacts an amendment indicates that it intended to change the original act by creating a new right or withdrawing an existing one." 1A Sutherland Statutory Construction § 22:30 (7th ed). The rationale for this presumption is that "an amendment is more frequently used to add or take a provision from a law than to interpret it." Id.

Hometown recognized that the presumption of intent to materially change the meaning of a pre-amendment statute is rebuttable under certain circumstances, citing 1A Sutherland Statutory Construction § 22.30 at 266-68 (5th ed. 1992) for that proposition. id., 680 A.2d at 62. The current edition of Sutherland Statutory Construction states that "[t]he presumption of change is not conclusive and may be overcome by *more persuasive*

[6] *Warren v. Frost*, 301 A.2d 572, 575 (R.I. 1973)("it is settled in this state that the rules of statutory construction apply with equal force when called upon to construe an ordinance").

considerations" Id. at § 22:30 (7th ed.)(*emphasis supplied*). "Courts look to the circumstances surrounding enactment to determine this issue." Id.

In the instant case, the Liquor Board argues that the pre-amendment rule intended a maximum of four (4) liquor licenses; therefore, the Liquor Board states that their amendment is clarifying the pre-amendment rule and establishing its meaning. However, Appellant is arguing that the pre-amendment rule intended to only limit the number of licenses based upon the population; therefore, Appellant states that the Liquor Board had not clarified the pre-amendment rule but rather changed it. Faced with this dispute as to how to interpret the statute, the undersigned found no "persuasive considerations" in support of the Liquor Board's conclusory argument on this point. Therefore, the Department does not view the new rule as a means to clarify the pre-amendment rule's intent, but rather reads as a change to limit the Liquor Board's power to issue a fifth Class A liquor license to the Appellant.

Viewing the amendment as a change of the existing law, rather than a clarification, directs the Department's *de novo* interpretation its pre-amendment meaning. The *Hometown* court explained that "[w]hen a subsequent amendment serves to clarify, rather than to change, the amended statute, the amendment is entitled to great weight in construing the preamendment version of the law." Id., 680 A.2d at 62. It follows that when a subsequent amendment serves to change, rather than to clarify, the amended rule, the amendment does *not* control the meaning of the pre-amendment rule. To the contrary, where an amendment is viewed as a change of law, the pre-amended rule should be construed as have a meaning opposite to the meaning of the amended rule. Here, the

fact that the amendment codifies a maximum is evidence that the pre-amendment rule established a per capita limit rather than a maximum limit.

D. Decision on the merits of the application

As documented in the transcript from the hearing, the Liquor Board's decision was based on post-amendment rule establishing the maximum number of liquor licenses at 4. *Board of Licenses transcript* pp. 90-92. As set forth above, the Liquor Board erred in applying the post-amendment rule. In the Department's *de novo* examination of whether to grant the Class A license, the undersigned applied its construction of the pre-amendment rule.

Under the pre-amendment version of the liquor rules, the 5th license became available when the 2010 census showed that South Kingstown's population increased beyond 30,000 inhabitants.[7] Therefore, the Liquor Board could not deny the application on the basis that the ordinance prohibited its issuance. Instead, the Liquor Board was required to decide the application on its merits. Exercising its discretion to reach the merits *de novo*,[8] the undersigned found sufficient evidence in the Department's record to support the decision to grant the Appellant a Class A liquor license.

1. Satisfied pre-conditions

The parties jointly admitted "[t]hat all condition precedents, as required by the South Kingstown Liquor License Rules and Regulations, were properly and fully submitted, by Petitioner, to Respondent prior to the setting of the November 28, 2011

[7] The parties did not challenge the suitability of the census data to this determination before the undersigned.

[8] The General Assembly vested the administrator with broad power to issue "any decision or order he or she considers proper". R.I. Gen. Laws § 3-7-21. An appeal to administrator "transfers jurisdiction of the cause from the local board to the administrator by operation of law" and "the cause then pending before the administrator is entirely independent of and unrelated to the cause upon which the local board acted." *Hallene v. Smith*, 98 R.I. 360, 365 (1964). Therefore, unlike an appellate body, the Department can step into the shoes of the local board and make a decision on whether or not to grant the Appellant's license.

Public Hearing." Joint Admission #1. The record does not indicate any defects or issues with the application. *See* Liquor Board Hearing Transcript. The only contingent items related to the issuance of the license were administrative matters such as fees, fire code compliance, and certificate of good standing from taxation. Id. at 5-7.

2. Planning issues

As concerns the parking and traffic issues raised before the Liquor Board, the "late-breaking commentary [was] misplaced." Liquor Transcript at 51. These are issues tangential to the propriety of issuing a liquor license that should have been raised before the *Planning* Board rather than the Liquor Board. At the public hearings before the Planning Board, "not one person stood up against [the pre-requisite] application." Id. at 7. In fact, there "were residents who stood in favor of this application at those hearings."

3. Economic hardship to the four existing liquor license holders

The transcript of the liquor license hearing is dominated by testimony from the existing liquor license holders' regarding increased competition to their individual businesses. The Department does not afford this argument extensive treatment, however, because the economic interests of the entire community outweigh the particular store owners' concerns. *See, e.g. Fouch v. State, Alcoholic Beverage Control Div.*, 10 Ark. App. 139, 662 S.W.2d 181, 185 (Ark.App.,1983)(rejecting the argument that "retail liquor outlets in the ... area [were] having problems producing enough income to remain open and that another liquor outlet in the area would have an adverse economic impact on the marginal outlets that are presently operating" on the basis that the local liquor board's decision must be guided by the public interest rather than protection of economic interests of current liquor license holders.)

In assessing broader community interests over the economic concerns of the four existing businesses, neither does the Department gives much weight to the petition of 358 signatures solicited by the existing liquor stores. Liquor Board Hearing Transcript at 31. The apparent willingness of customers representing 1% of the South Kingstown population to sign to a petition to "protect the economic interest of the four current holders of Class A Liquor Licenses"[9] does not overcome the strong public support for Village Liquors.[10] Indeed, the record indicates that a larger segment of the population would be in favor of the license application. Far outweighing the signatures of 358 residents allegedly opposed to issuance are (a) the favorable testimony of the property managers for South County Commons, representing the interests of 1500 people living or working there[11], and (b) the favorable testimony of the South Kingstown EDC, representing the interests of the entire population of South County.[12]

4. The "necessity and convenience" for Village Liquors.

The Liquor Board cites *Hobday v. O'Dowd* in its argument in against granting the license to the Appellant. Liquor Board's Memorandum at 8. In that case, the Rhode Island Supreme Court upheld the Department's denial of a liquor license on the grounds that "petitioner had not shown that the necessity and convenience of the residents of the town warranted the establishment of another retail liquor outlet under a class A license." 179 A.2d 319, 322 (R.I. 1962). The instant matter is distinguishable in that the Appellant did in fact demonstrate the "necessity and convenience" of opening Village Liquors in

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[9] Transcript at 31.
[10] At the hearing, appellant raised the concern that the signatures were not certified and that signatories may not have been aware of what they were assigning. Transcript at 65. Because the undersigned has afforded little weight to the petition, it is not necessary to address these contentions.
[11] Hearing Transcript at 42.
[12] The South Kingstown EDC was established to further the "need to expand the community's tax base and to encourage the development and retention of skilled employment opportunities for local residents." http://www.southkingstownri.com/town-government/boards-commissions/101

South County Commons. Specifically, in testimony before the Planning Board, the representative for the Appellant testified to the "convenience" of licensing Village Liquors in the Commons as follows:

> "The Commons, while many people from South Kingstown shop there, it's a regional plaza, it's a destination. Folks come down from all surrounding communities, and we feel that the liquor store's going to add to that, and there is a restaurant in these that is desirous of getting – of Bring Your Own Beer License, and this would be a natural fit with that"

Planning Transcript at 16. *See also* Liquor Transcript at 12.

Moreover, testimony as to the uniqueness of the proposed operation in comparison to consumer's alternative liquor purchasing options goes to the "necessity and convenience" of such a shop in the Commons. Appellant's proposed operation is distinguishable from other retail outlets in that it will be a "very well-designed store, bright, user-friendly, [with] computers to help you chose the wine based on the food that you are serving that you want to match it with. Planning Transcript at 11-12.

"Necessity and convenience" for Village Liquors is further demonstrated by South Kingstown EDC unanimously voting to endorse the issuance of a fifth Class A liquor license to Appellant. Before the Licensing Board, the Town Clerk cited an October 21 letter from Larry Fish, the Chair for South Kingstown EDC "endorsing and supporting this license". Liquor Transcript at 5 and 58. Supplementing this letter is a statement by one of the members as to the reasoning behind the unanimous support of the application. Before the Planning Board, Ms. Deedra Durocher, identifying herself as a member of the South Kingstown EDC, stated that the proposed operation of Village Liquors would "foster growth in the non-residential tax bases" and "noted that competition is good for existing businesses because it makes them work harder to compete for business." Planning Transcript at 9.

5. Applicant's fitness as a liquor license holder

The applicant has further demonstrated its particular fitness to operate a liquor store. The owner went above and beyond the minimum requirements for the license. Specifically, the owner plans on protecting her business and the public with an advanced security system. Liquor Transcript at 8. The owner further demonstrated that she is planning on obtaining liquor liability insurance, a measure further protecting the public. Id. at 11.

In its review, the Department will not consider the fitness of future hypothetical applicants. Though the Board expressed concerns about fairness to other potential applicants,[13] procedural issues at the Board level do not control the Department's decision. In *Hallene v. Smith*, the Rhode Island Supreme Court explained that, due to the independence of the administrator's decision from the local board's decision, the procedural issue of proper notice was "without materiality as to the propriety of an exercise by the administrator of the jurisdiction conferred upon him by 3-7-21." 98 R.I. 360, 368 (R.I. 1964). Applying the rationale to the instant case, the procedural concerns at the local level are "without materiality" to the undersigned's *de novo* determination of whether the application before it should be granted.

Even to the extent that the procedural concerns bear on the propriety of issuing the license upon *de novo* review, fairness to the Appellant would also need to be considered.[14] Counsel for the Appellant expressed the situation as follows: "[t]here is a license available, right now, and as of this morning, Village Liquors LLC is the sole

[13] *E.g.* commentary by Councilwoman McEntee that she " would like to open up to see who else is out there that may be interested in applying for this license." Hearing Transcript at 76.
[14] Board members expressed partial recognition of the issue of fairness to the Appellant, e.g. commentary that "[i]n fairness to the Pagliarinis, I think we need some kind of deadline" Hearing Transcript at 78.

applicant, thus far, before any Board or Commission in the Town." Planning Transcript at 4. Giving the applicant who is first in time primary consideration for the fifth license is a sound procedure. *See, e.g. Hornsby v. Allen*, 330 F.2d 55, 56 (5th Circ. 1964)("If there are more applicants than licenses and all applicants are equally qualified to serve the general welfare...then selection among them by lot or on the basis of the chronological order of application would meet constitutional requirements")[15]

In light of the evidence reviewed, the Appellant should be granted a Class A liquor license.

V. Findings of Fact

1. On or about March 23, 2011, United States Census Bureau reported the Town of South Kingstown population, 30,639 pursuant to the.
2. On or about March 23, 2011, the South Kingstown Liquor Rules and Regulations as adopted December 14, 1998 amended through August 16, 2010 stated: "[t]he number of licenses for each class shall be authorized as indicated below: Class A – 4 (not to exceed 1 per 6,000 inhabitants)".
3. On April, 11, 2011, the Appellant filed an application to amend South County Commons "Master Plan" and for Development Plan Review of Appellant's proposed retail liquor site.
4. On April 25, 2011, the South Kingstown Town Council voted to amend the rules to read as follows: "[t]he number of licenses for each class shall be authorized as indicated below: Class A – 4 (maximum)".

[15] See also Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2nd Circ. 1968) ("in cases where many candidates are equally qualified under these standards, that further selections be made in some reasonable manner such as 'by lot or on the basis of the chronological order of application'") (citing and quoting Horsnby, id.)

5. On July 14, 2011, the South Kingstown Planning Board granted Appellant approval of the amendment to the Master Plan and Development Plan Review.
6. On July 15, 2011, Appellant filed an application with the South Kingstown Zoning Board of Review for a "Special Use Permit" for a retail liquor store.
7. On August 17, 2011, the Appellant received unanimous approval for the "Special Use Permit."
8. On August 23, 2011, Appellant filed an application for a Class A Retail Liquor License with the Board of Licensing.
9. On October 13, 2011, the South Kingstown Economic Development Committee voted in favor of supporting Appellant's liquor license application.
10. On November 28, 2011, after a public hearing, the Board of Licensing denied Appellant's request for a license on the grounds that there was no fifth licenses available to be granted.
11. On December 6, 2011, the Department received the Appellant's appeal of the Liquor Board's decision on this matter.
12. On December 23, 2011, a pre-hearing conference was held before the undersigned sitting as designee of the Director of the Department of Business Regulation.
13. The parties waived their rights to a full de novo hearing.
14. Sections I-IV of this decision and order are incorporated herein as further findings of fact.

VI. Conclusions of Law

Based on the above:

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-1-1 *et seq.*, R.I. Gen Laws § 3-7-21 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen Laws §42-35-1 *et seq.*
2. The South Kingstown Liquor Rules and Regulations adopted December 14, 1998 amended through August 16, 2010 that states "The number of licenses for each class shall be authorized as indicated below: Class A – 4 (not to exceed 1 per 6,000 inhabitants)" applies to the Appellant's liquor application.
3. The rule in 2 above does not set the maximum number of Class A licenses to four (4) but actually requires the Board to make a decision on the merits of Appellant's application for a fifth license when the inhabitants of South Kingstown rose above 30,000, on a per capita basis.
4. As the inhabitants of the Town of South Kingstown rose above 30,000 according to the United Sates Census Bureau on or about March 23, 2011, a fifth (5^{th}) Class A liquor license was available to be granted to Appellant at the time when the Board denied Appellant's application on November 28, 2011.
5. The Appellant met all the necessary pre-condition requirements to be granted a Class A liquor license.
6. The Department has the sound discretion to review this case *de novo* and determine whether a license should be issued to the Appellant.

VII. Recommendation

Based on the above, the Hearing Officer recommends that the: (1) decision of the Board denying the License application be overturned; (2) Appellant be granted a Class A liquor license; and (3) Board be ordered to issue Appellant a Class A liquor license in the Town of South Kingstown as requested in the application subject to any and all customary approvals such as fire, health and the like.

Respectfully submitted,

6/15/2012

Louis A. DeQuattro, Jr., Esq., CPA
Hearing Officer
Deputy Director & Executive Counsel
Department of Business Regulation

I have read the Hearing Officer's Decision and Recommended Order in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

___✓___ ADOPT

_____ REJECT

_____ MODIFY

Dated: 6/18/12

Maria D'Alessandro (for)
Paul McGreevy, Director

Notice of Appellate Rights

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.

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Certification

I hereby certify that on this 18th day of June, 2012, a copy of this document was sent by electronic mail and by regular mail, postage prepaid a

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By electronic mail only to the following personnel of the Department of Business Regulation: Maria D'Alessandro, Esq., Deputy Director