**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**
**DEPARTMENT OF BUSINESS REGULATION**
**233 RICHMOND STREET**
**PROVIDENCE, RHODE ISLAND 02903**

| | | |
|---|---|---|
| **Jake's Bar & Grille, Inc.**<br>**Appellant,** | : | |
| **v.** | : | **DBR No.: 07-L-0309** |
| **Providence Board of Licenses,**<br>**Appellee.** | : | |

# FINAL ORDER

## I. INTRODUCTION

On or about November 19, 2007, the Providence Board of Licenses ("Board") issued a memorandum ("Memorandum") regarding the procedures associated with seasonal expansion of licenses. On or about December 5, 2007, Jakes's Bar & Grille, Inc. ("Appellant") filed an appeal with the Department of Business Regulation ("Department") on the basis of Memorandum. By letter dated December 12, 2007, the undersigned forwarded a letter to the parties requesting the parties' position on whether the Department had jurisdiction pursuant to R.I. Gen. Laws § 3-7-21 to hear this appeal.[1] A hearing was held on January 17, 2008 solely on the jurisdictional issue.

## II. JURISDICTION

The Department has jurisdiction to consider the issue of jurisdiction of an appeal pursuant to R.I. Gen. § 3-5-1 *et seq.*, R.I. Gen. Laws § 3-7-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

[1] This letter also inquired whether the appeal had been filed within the statutorily required ten (10) days of a decision being issued by the local licensing authority. The Memorandum was dated November 19, 2007 but the Appellant indicated it did not receive the Memorandum until November 30, 2007. The Board agreed that the appeal was filed in a timely manner.

## III. ISSUE

Whether the Department has jurisdiction pursuant to R.I. Gen. Laws § 3-7-21 to hear Appellant's appeal.

## IV. MATERIAL FACTS AND TESTIMONY

Richard H. Aitchison ("Aitchison"), Licensing Administrator, testified on behalf of the Board. He testified that the Board did not fix a closing date for 2007 seasonal expansion license. He testified that if a liquor licensee wants to expand service onto a sidewalk that licensee would need a sidewalk permit and permission from the Board but if an applicant just wanted to expand on to its own patio in only need approval from the Board.[2] Aitchison testified that in 2007, an applicant for a seasonal expansion license had to provide notice of application and an advertisement of the application had to be run in the newspaper and the Board held a hearing on the application. He testified that prior to 2007 an applicant would apply for a seasonal license and provide the Board with an outside floor plan. However, he testified that in 2007 pursuant to the Department's decision in 2005 ("2005 Department Decision")[3] that an applicant needed to provide a radius map and provide notice to abutters. He testified that the Memorandum was the Board's way of explaining to licensees the Board's policy in light of the new 2007 statute.[4]

---

[2] It is understood that the Appellant has its own patio and it is not a sidewalk.

[3] See *City of Providence Bd. of Licenses v. State of Rhode Island*, 2006 WL 1073419 (Superior Court 2006) (Superior Court decision upholding the 2005 Department Decision that required local licensing authorities to provide notice to abutters, advertisement of, and hearing on applications for a seasonal expansion of license pursuant to R.I. Gen. Laws § 3-5-17).

[4] R.I. Gen. Laws § 3-5-17 was amended in 2007. See P.L. 2007, ch. 501, § 1, eff. Oct. 30, 2007; P.L. 2007, ch. 511, § 1, eff. Oct. 30, 2007.

The undersigned asked Aitchison the following:

Hearing Officer: Did Jake's get a seasonal expansion in 2007?

Aitchison: Yes, they had the full blown hearing with notice, advertisement and one of the issues we've dealt with licensees throughout the year was the expense part. Previously before the total expense was $135. . . . We always held a hearing but we just didn't notice anybody or advertise it but we had the hearing. The Board either granted or did not and if they granted it for that seasonal period time it was a $135 fee. This past year in 2007 the average fee and cost to the licensee was an average of about $1,000 so they were concerned about it throughout the year. Other licensees were concerned about whether or not it was going to be permanent or not so we really kept that thing open because we didn't know where the legislation was going to go and we didn't know where the court action [2005 Department Decision on appeal] was going to go.

Hearing Officer: Mr. Aitchison, Mr. DeTorre is saying that the Board was considering that the 2007 grant is a permanent part of the license . . . would the Board agree with that?... My understanding was that these were always seasonal. ... Would the parties agree that people had been applying for the seasonal licenses? . . .

Aitchison: We were asked throughout the process if this was going to be permanent or not. We took the position and obviously the Board in the end took the position that they weren't permanent but we took the position throughout the application process and hearing process that we didn't know if they were going to be permanent or not. We did not tell people or the applicants that this was definitely permanent but because we didn't know where this was going with the legislation and we didn't know where the decision was going to go in the courts. One way or the other. So we proceeded forth [pursuant to 2005 Department decision].

On cross-examination by Appellant, Aitchison was asked as follows:

Appellant's Counsel: Didn't the Board tell people they could go beyond those dates once they got that license with the advertising and notice.

Aitchison: We didn't fix a closing date to the application because we didn't know.

Appellant's counsel: If they wanted to stay open in November of '07 they could have?

Aitchison: That's correct

Upon further questioning from the undersigned, Aitchison testified that the Board did not fix an "end date" in 2007 because of the proposed of legislation[5] and what the court's interpretation[6] would be. He testified that the Board was not in position to say if the seasonal license was "permanent" in response to applicants' questions but the Board didn't fix a closing date like it usually did.

The Appellant's expansion of premises license application was heard by the Board on June 6, 2007. This application was not introduced into evidence. See Appellant's Exhibit Two (2) (May 10, 2007 notice to Appellant's owner indicating the date of hearing and minutes from said hearing). The Expansion of Premises license issued to Appellant on June 12, 2007 does not list an end date. See Appellant's Exhibit One (1) (copy of 2007 expansion license). The parties also submitted the minutes of the June 6, 2007 meeting at which the expansion application was approved by the Board. Those minutes do not indicate the beginning or end of the seasonal expansion license. The parties also submitted an expansion of license approval inspection form stating that an outside license has been approved but not listing a beginning or ending date for the license. See Appellant's Exhibit Two (2).

No one testified for Appellant.

## 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

[5] This refers to the amendment to R.I. Gen. Laws § 3-5-17. See footnote four (4).
[6] This refers to the appeal of the 2005 Department Decision which was upheld by the Superior Court. The Board filed *Petition of Certiorari* with the Rhode Island Supreme Court. The undersigned and the parties agreed at hearing to their understanding that in light of the amendment to R.I. Gen. Laws § 3-5-17, the appeal was not pursued. See footnote three (3).

ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047, 1049 (R.I. 1994). See *Parkway Towers Associates v. Godfrey*, 688 A.2d 1289 (R.I. 1997). The Rhode Island 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. Dept. of Environmental Management,* 553 A.2d 541 (R.I. 1989) (citing *Cocchini v. City of Providence*, 479 A.2d 108, 111 (R.I. 1984). In cases where a statute may contain ambiguous language, the Rhode Island Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131, 1134 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

**B. Statutory Construction**

The Rhode Island Supreme Court has stated that it will not read a statute literally if to do so will attribute to the legislature a meaning or result which is contrary or inconsistent with the evident purposes of the act. *See Rhode Island Consumers' Council v. Public Utilities Commission*, 267 A.2d 404 (R.I. 1970). Thus, for example one cannot interpret a statutory section based on its title alone. *See Orthopedic Specialists, Inc. v. Great Atlantic & Pacific Tea Co., Inc.*, 388 A.2d 352 (R.I. 1978) (declaring that "as a general proposition of statutory construction, titles do not control meaning of statutes").

**C. Jurisdiction**

The Appellant argued that until 2005 it received a seasonal expansion of license each year for the period of April 15th through October 31st of that year. The Appellant argued that in 2005, the Department issued a decision which was subsequently upheld by Superior Court regarding the need for notice to abutters and hearings on seasonal

expansion of license application. The parties agreed that prior to 2005, a liquor licensee would apply for a seasonal expansion of license without notice being given.

The Appellant's counsel indicated that it was the Appellant's understanding that in applying for the seasonal expansion license for 2007 the outside service portion was not limited to a season but rather was attached to the Appellant's liquor license so that the expansion became part of the license and would be renewable with the license in November of each year. (Appellant's owner did not testify to this understanding).

The Memorandum indicated that a seasonal expansion of license would need to be applied for in the Spring of each year for the period of April 15th through the October 31st. There was no dispute that this was the time period for seasonal expansion of licenses prior to the 2005 Departmental decision. While the Appellant in her letter of appeal to the Department indicated that the seasonal expansion was a permanent expansion, the Appellant's counsel indicated that the Appellant understood that expansion was part of its license and was subject to an annual renewal but that the renewal would be for a license that allowed service of alcohol outside all year if desired.

The Board's attorney indicated that the Board does not believe the Department has jurisdiction under R.I. Gen. Laws § 3-7-21 to hear this appeal.

R.I. Gen. Laws § 3-7-21 states in part as follows:

> Appeals from the local boards to director. – (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.

The issue is whether the Memorandum served to revoke Appellant's liquor license and thus whether the appeal falls under R.I. Gen. Laws § 3-7-21. Certainly, the Memorandum is not acting as suspension of liquor license. Thus, the issue is whether the Memorandum served to revoke Appellant's liquor license.

Appellant argued that previously it had always received a seasonal expansion of license but in 2007, it received an expansion of license that lasted all year for its entire premises. It based this argument on the Board not setting an end date for the seasonal license and that there was no expiration date for the 2007 seasonal expansion on the printed expansion license.

The undersigned indicated to the parties that she has heard other matters regarding the 2007 seasonal expansion applications in Providence and in those matters it was agreed that the period for seasonal expansion was from April 15 through October 31.[7]

However, accepting Aitchison's testimony that the Board did not place an end date on the 2007 seasonal expansion license does not convert an application for a seasonal expansion of license into permanently becoming part of a liquor license. The application of the seasonal expansion was not submitted by the parties. However, there was no dispute that Appellant applied for a seasonal expansion of license in 2007 and because of the 2005 Department Decision, the Appellant follow a different procedure

[7] *Two Forty-Four Wickenden, Inc., d/b/a Zbar & Grille, v. Board of Licenses, City of Providence*, DBR No.: 07-L-0252 and *D. Liakos, Inc., d/b/a Monet Lounge v. Providence Board of Licenses, and Providence Journal, Intervenor*, DBR No.: 07-L-0209. The parties indicated that either the undersigned was misinformed or the premises may be different with different rules.

than previously in order to obtain a seasonal expansion of license. Nonetheless, despite the different procedures, Appellant applied for a seasonal expansion of license.

The Board's May 10, 2007 letter indicates that two (2) advertisements were run in the *Providence Journal* regarding Appellant's expansion of license application. See Appellant's Exhibit Two (2). While neither advertisement was introduced into evidence, again the advertisements were what the parties agreed were part of the new procedures for applying for a seasonal expansion of license.

There was not any argument that the seasonal expansion of license would have begun before April 15. Instead, Appellant's argument was that it ran to the end of the year because no end date had been set by the Board.

If a licensee applies for a seasonal expansion of license and goes through the procedure for a seasonal expansion of license application, such an application cannot be converted into an appellant's year-round license because the Board failed to set an end date. To allow such a result would render moot the statutory and regulatory authorization for any type of license and the process required to obtain the license whether it be a seasonal expansion of license or another type of license (or even another type of expansion of premises license). If for example, an applicant applies for a certain type of license and the regulatory agency fails to note the expiration date on the license that would not make the license permanent if such a license should expire after one (1) or two (2) years. While the Appellant's license does not have a termination date noted on it, it does not follow that such a license does not end.

Aitchison's testimony is that the Board never set an "end date." That may be. He also testified that the Board never said that the seasonal expansion would be permanent. Nonetheless, the Board's "failure" to set an "end date" for a seasonal expansion does not

convert such a license into part of the Appellant's liquor license forever. Appellant applied for a seasonal expansion of license. Appellant was granted one. The seasonal expansion of license expired sometime in 2007 regardless of whether the Board set an "end date."

Appellant's owner did not testify as to what she was told or not told by the Board. However, Appellant's argument sounds like an argument in equity because the argument is that somehow the Appellant's owner because of Board's actions believes the Appellant's seasonal expansion license stopped being seasonal and became part of the established liquor license. However, equitable principles are not applicable to an administrative procedure. See *Nickerson v. Reitsma*, 853 A.2d 1202 (R.I. 2004) (Supreme Court vacated a Superior Court order that had vacated an agency sanction on equitable grounds).

Nonetheless, on rare occasions, the Rhode Island Supreme Court has found that the doctrine of *equitable estoppel* may apply against public agencies. The Supreme Court has held as follows:

> in an appropriate factual context the doctrine of estoppel should be applied against public agencies to prevent injustice and fraud where the agency or officers thereof, *acting within their authority*, made representations to cause the party seeking to invoke the doctrine either to act or refrain from acting in a particular manner to his [, her, or its] detriment. *Romano v. Retirement Board of the Employees' Retirement System of the State of Rhode Island*, 767 A.2d 35, 39 (R.I. 2001) (citation omitted) (italics in original).

Therefore, for a party to obtain *equitable estoppel* against the Board, it must show that a "duly authorized" representative of the Board made affirmative representations, that such representations were made to induce the plaintiff's reliance thereon, and that the plaintiff actually and justifiably relied thereon to its detriment. *Casa DiMario, Inc. v.*

*Richardson*, 763 A.2d 607, 612 (R.I. 2000). See also *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228, 1234 (R.I. 2000) ("key element of an estoppel is intentionally induced prejudicial reliance.") (internal citation omitted).

However, "neither a government entity nor any of its representatives has any implied or actual authority to modify, waive, or ignore applicable state law that conflicts with its actions or representations." See *Romano*, at 39-40. See also *Technology Investors v. Town of Westerly*, 689 A.2d 1060 (R.I. 1997). Moreover, "any party dealing with a municipality 'is bound at his own peril to know the extent of its capacity.'" *Casa DiMario*, at 612 (internal citation omitted). Furthermore, "'[a]s a general rule, courts are reluctant to invoke estoppel against the government on the basis of an action of one of its officers.'" *Id.* (internal citation omitted).

Appellant has not provided any evidence that the Board or any Board member made affirmative representations to Appellant's owner regarding the seasonal license becoming part of the Appellant's established license. Appellant has not provided any evidence that Appellant relied to its detriment on any affirmative representations by the Board. Instead, Aitchison testified that the Board did not set an "end date" for the seasonal license because of the concern over litigation and the proposed statutory amendments to R.I. Gen. Laws § 3-5-17. He testified that the Board never told any applicant that the license would become part of an established license. On the basis of the facts before the undersigned, the doctrine of *equitable estoppel* does not apply.

Based on the forgoing, the Memorandum did not serve to deny or revoke Appellant's liquor license because it was a seasonal license and expired sometime in 2007.

## V. CONCLUSION

This matter is dismissed as the Department does not have jurisdiction to hear the appeal by Appellant as the Board has not revoked or denied the renewal of Appellant's liquor license.

As recommended by:

Date: February 14 2008

Catherine R. Warren
Hearing Officer

I have read the Hearing Officer's recommendation and I hereby ADOPT/REJECT the recommendation of the Hearing Officer in the above-entitled Order of Dismissal.

Date: 2-15-2008

A. Michael Marques
Director

Entered as an Administrative Order No.: 08-038 this 15th day of February, 2008.

## NOTICE OF APPELLATE RIGHTS

**THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.**

## CERTIFICATION

I hereby certify on this 18 day of February, 2008 that a copy of the within Final Order and Notice of Appellant Rights was delivered by first class mail, postage prepaid to -

Raymond DeTorre, Esquire
1177 Smith Street
Providence, RI 02908

Steven Catalano, Esquire
City of Providence Law Department
275 Westminster Street
Providence, RI 02903

and by hand-delivery to Maria D'Alessandro, Associate Director, Department of Business Regulation, 233 Richmond Street, Providence, RI 02903.

A B Ellison