

February 11, 2009, as the parties had not provided a requested status report by December 8, 2008, the undersigned indicated that a hearing would be scheduled. The parties agreed to a hearing on July 22, 2009 at which time, the Appellant indicated that she would file a Motion to Remand (“Motion”) to which the Board would not object. By email dated June 22, 2010, the undersigned indicated that she had never received said Motion. Unfortunately, the Motion had been initially filed on March 9, 2010 but was not received by the undersigned. Nor was it received after the undersigned’s email of June 22, 2010. The undersigned received the Motion on November 8, 2010.² The Motion requests that this matter be remanded to the Board so that the Appellant can be heard by the Board regarding her interest in the License. The Appellant did not request oral argument.

II. Jurisdiction

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-2-1 *et seq.*, R. I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

III. Issue

Whether this matter should be remanded to the Board for the Board to receive evidence from the Appellant regarding the renewal of the License.

IV. 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

Please be advised that any settlement will need to comply with of *Vitterito et al. v. The Sportsman's Lodge & Restaurant*, 228 A.2nd 119 (R.I. 1967) (even if a liquor license is in a receiver's estate that does not change the status of the liquor license and the license is still subject to renewal by a local licensing authority) and *Vars v. Citrin*, 470 F.3d 413 (1st Cir. (R.I.) 2006) (secured creditor no longer had interest in liquor license once license expired).

² The undersigned has apologized to the attorneys as the Motion was forwarded by email on June 22, 2010 but was not received by her.

ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. Dept. of Environmental Management*, 553 A.2d 541 (R.I. 1989). In cases where a statute may contain ambiguous language, the Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (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.*

The Rhode Island Supreme Court has stated that the legislature expressly provided for state control and has adopted a system for administering such control in a manner which it deems the “most likely to productive of the public good.” *Bd. of License Comm’rs v. Daneker*, 78 R.I. 101, 107 (R.I. 1951). The Courts have consistently recognized that the Department has broad and comprehensive state control over the traffic in intoxicating liquors. *Baginski v. Alcoholic Beverage Comm’n.*, 4 A.2d 265 (1939). Furthermore, *Baginski* found that consistent with the Department’s wide powers of regulation and supervision, it is, in effect, a “state superlicensing board.” *Id.*, at 268. The Department’s oversight ensures that the state liquor licensing statute is consistently and uniformly enforced throughout the State of Rhode Island.

B. Arguments

The Appellant argues that since the 1990’s, the License has been transferred from tenant to tenant at the Appellant’s property (“Property”). The Appellant argued that the License has always been an asset in which she has a secured interest and the License has run with the Property. The Appellant represented that in 2004, her tenant at the Property

decided not to renew his lease agreement so the Appellant made a new lease agreement with Pacheco and the License was transferred to him. The Appellant argues that Pacheco failed to pay rent on the Property and she evicted him and the District Court ordered him on February 22, 2007 to “return” the License to Appellant.

The Appellant represents that on October 16, 2007, she was advised by the Board that Pacheco had filed the renewal application. The Appellant argued that the Board had found the License to be abandoned because Pacheco failed to pay the renewal application fee and she had no notice of said hearing. She argued that due process required that she be given notice of hearing because of her interest in the License. The Motion argued, “Simmons, as the true party in interest and individual in whom an equitable and legal right and/or interest in the License was vested *vis a vis* the lease agreement . . . was not previously aware, that . . . [Pacheco] failed . . . to complete the license renewal process insofar as it was represented to her . . . that the same would be done.” The Motion argues that the Appellant had a good faith belief that the License would be renewed. She argues that because of her security interest and the Court order, Pacheco had no right to abandon the License.

The Appellant also argues that subsequent to filing this appeal, she learned that Pacheco filed for bankruptcy so she is unable to “chase” him with regards to his alleged violation of the Court order and lease agreements so her only recourse is to pursue a reconsideration of the Board’s February 26, 2008 decision and a retroactive renewal of the License. According to the Appellant, Pacheco was not the equitable owner of the License and did not hold legal title to the same because of her lease agreement.

The Appellant’s arguments can be summarized as follows: 1) fairness and/or equity; and 2) using the Board to enforce possible other legal action against Pacheco.

B. Relevant Statutes

R.I. Gen. Laws § 3-7-6 states in part as follows:

Renewal of Class A, Class B, Class C, Class D, Class E, and Class J licenses. – The holder of a Class A, Class B, Class C, Class D, Class E, or Class J license who applies before October 1 in any licensing period for a license of the same class for the next succeeding licensing period is prima facie entitled to renewal to the extent that the license is issuable under § 3-5-16. This application may be rejected for cause, subject to appeal as provided in § 3-7-21. A person whose application has been rejected by the local licensing authorities shall, for the purpose of license quotas under § 3-5-16, be deemed to have been granted a license until the period for an appeal has expired or until his or her appeal has been dismissed.

R.I. Gen. Laws § 3-5-8 states as follows:

Expiration date of licenses. – Every license except retailer's Class F licenses and retailer's Class G licenses shall expire on December 1 after its issuance.

R.I. Gen. Laws § 3-5-29 states as follows:

Prohibition against assignment or leasing of license. – The holder of a license issued pursuant to this title shall not assign, rent, lease or let the license but may transfer his or her interest only as provided in § 3-5-19.

R.I. Gen. Laws § 3-5-19 states in part as follows:

Transfer or relocation of license. – The board, body or official which has issued any license under this title may permit the license to be used at any other place within the limits of the town or city where the license was granted, or, in their discretion, permit the license to be transferred to another person, but in all cases of change of licensed place or of transfer of license, the issuing body shall, before permitting the change or transfer, give notice of the application for the change or transfer in the same manner as is provided in this chapter in the case of original application for the license, and a new bond shall be given upon the issuance of the license provided, that notice by mail need not be made in the case of a transfer of a license without relocation.

C. Facts

Based on the pleadings and pertinent statutes, these are the undisputed facts:

1. Pacheco held the License. The License was issued to him (or his company) for the Property's address. See Appellant's Motion.

2. The Appellant was Pacheco's landlord and owned the Property. See Appellant's Motion.

3. The Appellant did not hold the License. See Appellant's Motion.

4. Under the Appellant's and Pacheco's lease, the Appellant had a security interest in the License. See Appellant's Motion.

5. R.I. Gen. Laws § 3-5-29 bars Pacheco from assigning, renting, leasing, or letting the License to Appellant. Pursuant to said statute, the only way the Appellant could obtain the License was by a transfer pursuant to R.I. Gen. Laws § 3-5-19.

6. No transfer application was filed by Appellant and/or Pacheco to transfer the License from Pacheco to Appellant. (No party ever represented that one was filed).

7. The Appellant moved to evict Pacheco for non-payment of rent. See Appellant's Motion.

8. On February 22, 2007, the District Court in its order regarding Appellant's eviction action against Pacheco stated that, "[t]he Defendant is ordered to return the liquor license to Plaintiff." (See order attached to March 6, 2008 notice of appeal).

9. Under the law, the Appellant needed to file a transfer application to transfer the License from Pacheco to her. Only the Board can grant a transfer. See R.I. Gen. Laws § 3-5-29 and R.I. Gen. Laws § 3-5-19.³

10. The License expired on December 1, 2007. See R.I. Gen. Laws § 3-5-8.

11. Pacheco did not complete the renewal application by October 1, 2007. See Appellant's Motion and Board's decision.

B. Whether There is a License to Remand

The Appellant does not dispute that Pacheco failed to file a complete and timely renewal application. Instead, she argues she should have had notice of the hearing. Therefore, there is no dispute that Pacheco's License expired December 1, 2007 and a renewal application was not filed either before the expiration or after the expiration of the

³ While the District Court's order spoke of returning the License, *Vitterito et al. v. The Sportsman's Lodge & Restaurant*, 228 A.2nd119 (R.I. 1967) clearly found that a liquor license that is part of a receiver's estate is still subject to the local licensing authority and all relevant statutory requirements. In other words, the District Court's order did not transfer the License from Pacheco to Appellant because transferring a license is subject to the authority of the Board. The Court's order must refer to contractual remedies (e.g. perhaps that Pacheco should cooperate with a transfer application if filed) regarding the License based on said lease. The Court's order did not divest the Board of its authority to transfer the License.

License. As the License expired and there was no complete renewal filed, the License ceased to exist on December 1, 2007.

The failure to file a renewal of a liquor license results in the license expiring without the preservation any renewal rights pursuant to R.I. Gen. Laws § 3-7-6. Thus, without a timely renewal application being filed, a liquor license expires on its own terms. See R.I. Gen. Laws 3-7-6 and *Vitterito et al. v. The Sportsman's Lodge & Restaurant*, 228 A.2nd 119 (R.I. 1967) and *Vars v. Citrin*, 470 F.3d 413 (1st Cir. (R.I.) 2006). See also *Liquor 99, Inc. v. City of Providence, Board of Licenses*, DBR No.: 06-L-0036 (8/22/07) and *Oasis Liquors v. Bureau of Licenses, City of Providence*, DBR-04-L-0066 (12/30/04). In addition, a liquor license will not be kept alive just to satisfy creditors. See *Marty's Liquors, Inc. the Warwick Board of License Commissioners*, 1985 WL 663587 (R.I. Super). Or in this case, a license will not be kept alive to satisfy a secured party. See *Shobar, LLC v. Providence Board of Licenses*, DBR No. 07-L-0013 (8/22/08).

In *Vars v. Citrin*, 470 F.3d 413 (1st Cir. (R.I.) 2006), the Vars, the plaintiffs, held a security interest in a liquor license. The Court found as follows:

Rhode Island courts have recognized that a liquor license, though not property in the traditional sense, is valuable and the holder of such a license enjoys some protection. *Beacon Rest., Inc. v. Adamo*, 103 R.I. 698, 241 A.2d 291, 294 (1968); *Vitterito v. Sportsman's Lodge & Rest.*, 102 R.I. 72, 228 A.2d 119, 122-23 (1967). The liquor business, however, is subject to the police power which permits the government to restrict sale or prohibit it entirely. *Vitterito*, 228 A.2d at 122. Rhode Island law limits the term of the liquor license to one year. The Varses' interest, moreover, was derivative of that of Jake & Ella's who held the license.

While the Varses had a protectable interest during the pendency of the 2001 revocation process, they had none when the City Council reduced the number of liquor licenses. At the time of the Council meeting, almost two months after the license had expired and with no application for renewal

having been filed, the Varses were without a right or interest on which to base a due process claim. *Id.*, at 414 -415.

In other words, once the license expired, the Vars - whose rights were derivative of the liquor licenseholder - had no more rights in the liquor license because the license ceased to exist. Similarly, no renewal application was completed by Pacheco. The Appellant does not dispute that Pacheco's renewal application was incomplete. Since Pacheco's application was incomplete under R.I. Gen. Laws § 3-5-8, the License expired on December 1, 2007. If Pacheco had timely filed his renewal application and the Board sought to deny said application, then the License would automatically renew pending a final decision by the Board whether to deny the license. However, the License expired and once a liquor license expires, it no longer exists.

As *Vars* warned, a liquor license is for a one (1) year term. The compliance by a liquor licensee with conditions of licensing is an ongoing obligation. To find otherwise would not comport with the statutory goals of reasonably controlling the traffic in alcoholic beverages. Thus, a Class B liquor license that does not comport with the requirements of conditions of licensing (e.g. location is not used as restaurant, etc.) cannot be kept alive. See *Baker v. Rhode Island Department of Business Regulation*, 2007 R.I. Super. Lexis 55. Similarly, this License cannot be kept alive to protect the Appellant's secured interest when the License has expired and no renewal was effectuated and no transfer application filed. To do so would be contrary with the intent and purpose of the liquor licensing statutory scheme. Furthermore, it is in the public interest that the liquor licensing statute is uniformly and consistently applied.

Like in *Vars*, the Appellant had an interest in the License as a secured creditor and like in *Vars* that right is derivative of the Appellant's rights in the License. She does not

obtain any greater rights because of her secured interest or lease and she does not become some kind of holder of the License. She only can become a licenseholder by transfer and that was never even sought in this matter.

The Appellant argues she should have been given notice by the Board of the February, 2008 hearing because of her interest in the License and she has an equitable interest in the License. The Appellant's only interest in the License was a security interest. Her security interest ended when the License expired. The Board is under no obligation to give notice to those with security interests in liquor licenses. The Board provides notice to liquor license holders as required by statute. The Appellant's request has no basis in law.

Furthermore, the Board had no reason to hold the hearing since the License had expired. In fact, *Oasis Liquors v. Bureau of Licenses, City of Providence*, DBR-04-L-0066 (12/30/04) found that Providence cannot use abandonment proceedings for liquor licenses that no longer exist (e.g. license expired) and that such proceedings cannot be used to potentially breathe life into licenses that have expired. The Appellant is seeking a hearing so she can appear before the Board and argue that a liquor license that expired should be renewed retroactively because she hadn't known the renewal had not been effectuated and she held security interest in said license. The Appellant is trying to breathe life back into an expired License that was not even her license (she only had a security interest). See also Order dated 8/22/08 in *Shobar, LLC v. Providence Board of Licenses*, DBR No. 07-L-0013 (Order Denying Motion for Reconsideration) (discusses various cases related to expired licenses and the consequences thereon).

However, even if it was found that the abandonment hearing was appropriate/necessary, the hearing was for Pacheco, the licenseholder. The Appellant has

no right to a hearing on a license in which she had a secured interest. This raises the issue of Appellant's standing. The Appellant filed an appeal of the abandonment hearing when that hearing was unnecessary and should not have been held since the License expired by statute. However, assuming the Board's hearing was appropriate, it is unclear what right of appeal the Appellant has from the Board's decision. She owns the Property so is an abutter within 200 feet of the License location. However, R.I. Gen. Laws § 3-7-21 gives appeal rights to those authorized to protest against the granting of a license (e.g. within 200 foot radius) in R.I. Gen. Laws § 3-5-17. The Appellant is not protesting a grant of a license but rather the expiration of a license. The Board's February 22, 2008 decision did inform Pacheco that he had a right to appeal the Board's finding to the Department but he was the licenseholder.

The Appellant argued she had a good faith belief the License would be renewed. She argued that Pacheco had no right to abandon the License.⁴ It may be that the Appellant has an action against Pacheco for breach of contract/lease but she cannot enforce such rights against him pursuant to the Board's authority. The Appellant admits that she is seeking recourse against Pacheco via the Board since she can't "chase" him because of his bankruptcy filing.

An underlying theme of the Appellant's arguments (as recited above) is that she had certain rights (via her lease agreement and Court order) that need to be protected and in fairness and equity, this matter should be remanded. However, an administrative proceeding is not an equitable proceeding and there is no equitable jurisdiction. To find that this matter should be remanded upon a finding of equitable interest or on

⁴ While the Board may have deemed the License abandoned because of the failure to renew, the fact is the License expired. *Infra*.

unarticulated equitable grounds would be reversible error. *Nickerson v. Reitsma*, 853 A.2d 1202, 1206 (R.I. 2004). It also would be contrary to *Vars* and the other above-cited cases and statute.

This proceeding cannot keep this License alive for the purposes of allowing the Board to discuss whether the License has been abandoned when 1) there is no such issue since the License expired; and 2) even if there was such an issue of abandonment, there is no dispute that the License expired. Presumably, the Appellant seeks to have the License renewed and then transferred to her but the Department cannot keep someone else's License alive for that purpose. Nothing precludes the Appellant from applying for a new liquor license.⁵

Based on forgoing, the Motion to Remand this matter is denied and the appeal is dismissed.

V. Finding of Facts

The facts contained in Section IV and V are reincorporated by reference herein.

VI. Conclusions of Law

Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. § 3-2-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*
2. Pursuant to R.I. Gen. Laws § 3-5-1 *et seq.*, *Vars*, *Vitterito*, and the other cases discussed above, the License expired and does not exist.
3. There were no grounds to hold an abandonment hearing.

⁵ A renewal of a Class B liquor license would, of course, have to comply with all conditions of licensing for a Class B license. For a new application, compliance must be within one (1) year of the granting of the license. In other words, the Class B license must be for a *bona fide* tavern, have a food license, be at an identifiable location, and be open certain hours. See *Baker*.

4. Even if there were grounds for an abandonment hearing, the Appellant does not have standing to file an appeal.

5. There are no proceedings to remand to the Board.

VII. Recommendation

Based on the above analysis, the Hearing Officer recommends that it be found that pursuant to R.I. Gen. Laws § 3-2-1 *et seq.* and the cases discussed, the License expired and does not exist so that the Motion to Remand is denied and the appeal is dismissed.

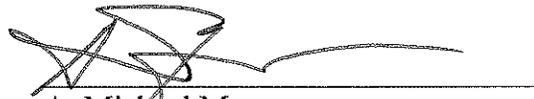
As recommended by:

Date: 11/18/10


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: 11-19-2010


A. Michael Marques
Director

Entered as an Administrative Order No.: 10-140 this 19th day of November, 2010.

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 19th day of November, 2010 that a copy of the within Order Denying Motion for Remand and Order of Dismissal was sent by first class mail, postage prepaid to:

Max Foster, Esq.
Assistant City Solicitor
275 Westminster Street
Providence, RI 02904

Christopher M. Mulhern, Esq.
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121 South Main Street
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and by electronic mail to Maria D'Alessandro, Deputy Director, Department of Business Regulation.

A Brooke Ellison