STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
PASTORE COMPLEX
CRANSTON, RHODE ISLAND 02920

The 305 Cigar Bar & Lounge, Inc., Appellant,	:	
v.	:	**DBR No.: 14LQ058**
Providence Board of Licenses, Appellee.	:	

DECISION

I. INTRODUCTION

On or about November 10, 2014, the Providence Board of Licenses ("Providence" or "Board") denied the 305 Cigar Bar & Lounge, Inc.'s ("Appellant") application for a class C liquor license ("License"). Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed the Board's denial to the Director of the Department of Business Regulation ("Department"). A hearing was held on January 16, 2014 before the undersigned sitting as a designee of the Director. The parties were represented by counsel and rested on the record.

II. JURISDICTION

The Department has jurisdiction over this matter 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.*

III. ISSUES

Whether the Board appropriately denied the Appellant's application for License on the basis of a legal remonstrance pursuant to R.I. Gen. Laws § 3-7-19(a).

IV. MATERIAL FACTS AND TESTIMONY

The Board held four (4) days of hearing. The Board discussed whether the map calculations for the 200 feet radius of the Appellant's proposed location were correct. At the October 20, 2014 hearing, the Board discussed that the radius square footage total was incorrect and the Board decided to ask City departments to review the map. At the Board's November 10, 2014 meeting, it was represented that neither the Zoning department nor the Building department for the City could determine whether the map was correct. At the November 10, 2014 hearing, the Board decided that a legal remonstrance existed.

At the October 1, 2014 Board hearing, it was represented that 333 Atwells Avenue is a condominium. During the various Board hearing it was represented and the exhibits show that some of the objectors objected to a late night 2:00 a.m. establishment. At the October 20, 2014 Board hearing, it was represented that for at least one lot, lot 980, that about 85% of it is not in the 200 foot radius but that its whole square footage was included in the total radius square footage. It is unclear if the square footage was re-calculated to exclude the part of lot 980 that is not in the radius. It was also unclear from the Board hearing how the Walgreen's lot which is within the 200 feet radius was calculated. At oral argument before the Department, it was represented that square footage for each condominium for 333 Atwells Avenue was included in the square footage for the radius.

V. DISCUSSION

A. De Novo Hearing

The Rhode Island Supreme Court held *Hallene v. Smith*, 201 A.2d 921, 925 (R.I. 1964) as follows:

> We conclude then that § 3-7-21 contemplates not an appeal, but a proceeding to transfer or remove a cause from the jurisdiction of a local board to that of the state tribunal that may be invoked whenever a local board acts adversely to the license under consideration. When this provision is properly invoked, it transfers the 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. Error of law or fact inhering in the latter proceeding is without legal consequence on the jurisdiction of the administrator. When it is pending before the administrator on a hearing de novo, the cause is precisely the same as when it stood before the local board prior to its removal. The issue therein is the same, and the posture of the parties remains the same as that in which they stood before the local board. In short, the cause, when removed to the jurisdiction of the administrator, stands as if no action thereon had been taken by the local board.

While a liquor appeal to the Department is a *de novo*, the Department has broad authority and is considered a "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, 407 (R.I. 1950). Thus, because of the Department's broad authority over an appeal the parties may rest on the record below or choose to re-try the complete case or choose to supplement the record below. Therefore, a local authority could find a legal remonstrance and if that finding is appealed, the local authority could rest on the record below that such a legal remonstrance exists and if a legal remonstrance exists then no appeal can be heard. *Elmwood Tap v. Daneker*, 82 A.2d 860 (R.I. 1951) (Department without jurisdiction to hear appeal since legal remonstrance established). Nonetheless, since an appeal is *de novo*, the issue of a legal remonstrance can be heard for the first

time on appeal. See *Meeting Street and MSC Realty v. Providence Board of Licenses*, DBR No. 06-L-0167 (8/8/07).[1] In this instance, the Board found a legal remonstrance and on appeal the Board argues that the record below supports such a finding.

B. 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 ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047, 1049 (R.I. 1994). 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). 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.*

[1] There was an issue raised by the parties prior to hearing on January 16, 2015 and that was whether the Department needed to notify the abutters of the appeal hearing. There is no statutory requirement for the Department to notify the abutters regarding a municipal liquor appeal hearing including a legal remonstrance appeal. The statutory requirement is that notice must be given to abutters of the local hearing. R.I. Gen. Laws § 3-5-17. While the Department has very infrequently chosen to notify the abutters, there is no statutory requirement that it do so. The Department is an appellate authority and has no advertising requirements or notice requirements. See *Harris v. Sarkas*, 1976 WL 177186 (R.I. Super.). If a local authority has found a legal remonstrance, it can rely on the record below or if it needs to bring in abutters to the appeal hearing then the local authority would bring in the abutters. If abutters appeal a grant of a license and seek to prove a legal remonstrance at the Department hearing, it is their responsibility to bring in the relevant abutters, etc. See *Meeting Street* (abutters moved to find a legal remonstrance and a hearing was held thereon). See also *North Main d/b/a Pirates Den v. Providence Board of Licenses, et al.*, DBR No. 09-L-0130 (4/2/10) (abutters intervened for purpose of demonstrating a legal remonstrance).

C. Legal Remonstrance

R.I. Gen. Laws § 3-7-19[2] provides that if the owners of the greater part of the land within 200 feet of the building object to the issuance of Class C liquor license, said license cannot issue. A legal remonstrance is established if the owners of more than half of the square footage of the 200 feet radius object to the granting of certain liquor licenses.

In *Elmwood Tap v. Daneker*, 82 A.2d 860 (R.I. 1951), the Rhode Island Supreme Court upheld the Department's[3] finding that it was without jurisdiction to hear an appeal of liquor license denial because a legal remonstrance had been established. In that matter, the Department received in evidence 1) written evidence of the plat showing the streets and boundaries of the lots of land within the 200 feet radius as well as a list of addresses and a written remonstrance of the signatures and addresses of those claiming to be owners of the property objecting to the license; 2) testimony of police officers who interviewed neighbors to confirm ownership and objections; and 3) testimony of a number of people who objected in person to the granting of the application. A tabulation of the square feet demonstrated that the owners of a majority of the land objected to the granting of the license. The appellant in that matter argued that the objectors who

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[2] R.I. Gen. Laws § 3-7-19(a) states as follows:

> Objection by adjoining property owners – Proximity to schools and churches. – (a) Retailers' Class B, C and I licenses under this chapter shall not be issued to authorize the sale of beverages in any building where the owner of the greater part of the land within two hundred feet (200') of any point of the building files with the body or official having jurisdiction to grant licenses his or her objection to the granting of the license, nor in any building within two hundred feet (200') of the premises of any public, private, or parochial school or a place of public worship. In the city of East Providence, retailer's Class A licenses shall not be issued to authorize the sale of beverages in any building within five hundred feet (500') of the premises of any public, private, or parochial school or a place of public worship.

[3] This decision (and others) refers to the Liquor Control Administrator rather than Department. However, that position is now handled by the Department rather than being a specific title within the Department so the undersigned will for clarity refer to the Department in discussing this decision (and others).

appeared in person did not own sufficient land to establish a legal remonstrance. However, the Court found as follows:

> In the circumstances herein outlined there was uncontradicted evidence, either direct or by reasonable inference, to warrant the administrator in holding that the objectors had established a legal remonstrance and that therefore he was without jurisdiction by force of the statute. If petitioner deemed the evidence with reference to the areas owned by objectors insufficient as a matter of fact, it was free to produce evidence to the contrary, which it did not do. On the record before us we find no error in the action taken by the administrator. *Id.*, at 862.

In *The Castle, 19 Greenough Place, Inc. v. Mayor of Newport*, 9 A.2d 710 (R.I. 1939), a legal remonstrance was not established because there was no proof that the objectors owned the greater part of the land within a 200 feet radius because there was no evidence of the addresses or any other designation of the property owned or where it was located so that it could not be determined if the owners of a greater part of the land within 200 feet objected to the granting of the land. In that case, the local licensing authority had erroneously found that a majority of the owners objected to the license rather than determining whether the objectors owned the greater part of the land within the 200 feet radius.

In *Edward W. Smith Estates, Inc. v. O'Dowd*, 174 A.2d 676, 678 (R.I. 1961), the Rhode Island Supreme Court addressed the issue of corporations objecting pursuant to R.I. Gen. Laws § 3-7-19. The Court found as follows:

> The petitioners' second contention [legal remonstrance argument] is likewise without merit. They concede that if Edward W. Smith Estates, Inc. and Westerly Shopping Center, Inc. are not proper remonstrants, then the remaining remonstrants represented in the hearing are not the owners of more than one half of the property within 200 feet of the licensed premises. It is elementary that no stockholder, even if he possesses all of the stock, can speak for the corporation as such. Nor is it material that such a stockholder is an officer. In the absence of official action by its board of directors or such other

> authority as the charter or by-laws may provide, it cannot be said that a corporation has taken a position such as that claimed by petitioners. Although Edward W. Smith testified that he owned the corporation and was its president and treasurer, he offered no testimony that the corporation had voted to oppose the granting of the license in issue. There was no testimony whatsoever in the matter of Westerly Shopping Center, Inc. other than that given by Smith in support of the written remonstrance signed 'Westerly Shopping Center, Inc. By Madelyn E. Gould President.' However, he admitted having no knowledge as to any action taken by the corporation authorizing its president to record its objection.

The Superior Court in applying *Edward W. Smith* to a legal remonstrance argument pursuant to R.I. Gen. Laws § 3-7-19 found that written objections from the Newport Art Museum and Newport Housing Authority based on a legal remonstrance "lack[ed] the requisite form to make them legally binding because there was no evidence of any corporate action authorizing the executive directors to remonstrate against the granting of a liquor license." *City of Newport v. Department of Business Regulation*, 1988 WL 1017311 at 2. The Superior Court found that the Department was correct in finding that both those objections were "defective in that there was no evidence that the writers of the objections had the requisite corporate authority." *Id.*, at 3.

In *Edward W. Smith*, no one testified on behalf of Westerly Shopping Center, Inc. and instead only a written remonstrance from Westerly Shopping Center, Inc. was filed and signed by "Madelyn E. Gould, President." There was testimony from Edward W. Smith Estates, Inc. in that Edward W. Smith testified against the license but there was no testimony that said corporation had voted to oppose the license. Therefore *Edward W. Smith* found that it could not be found that the corporations had taken the position as argued by the petitioners. In the Superior Court case of *City of Newport*, the Court found that there was no evidence (written or oral) supporting the written objections.

Therefore, in this matter, it is necessary to find that the objectors own land within the 200 feet radius of the Appellant's location and if necessary, that such owners and/or witnesses were authorized to speak on behalf of the ownership entity. Such evidence could include testimony and/or affidavits that a member of a LLC is authorized to speak on behalf of the LLC or that an officer of a corporation is authorized to speak on behalf of the corporation. In terms of an apartment building, the owner of the building who owns the land upon which the building sits would be the one objecting in order to establish a legal remonstrance. In terms of a condominium building, the question is who owns the land upon which the building sits. If the condominium association owns the land, then the association would speak for the land. In *Elmwood Tap, Inc. v. Daneker*, 78 R.I. 408 (1951), there was direct oral testimony from witnesses that either owned the land or were authorized to speak for the owners. It is not expected that police officers will verify ownership of the various lots within the 200 foot radius like in *Elmwood Tap*, but in order to establish a legal remonstrance there needs to be a finding that those objecting are owners or authorized to speak on behalf of the owners.

It should be noted that in determining whether a legal remonstrance exists, the reasons for an objection to the granting of a liquor license do not matter. All that is required under the statute is an objection. In determining an objection, the local authority just needs to calculate the square footage and whether the owners of more than half of the square footage of the land within the radius object to the granting of the license.

The reasons for objections matter when the local authority is deciding whether to grant a liquor license separate and apart from whether there is a legal remonstrance. In other words, when the local authority is deciding on the merits whether to grant a license

or not the reasons for objections are relevant. If the objector bases his or her objection on the fact that there is no parking but it is shown that the applicant has a brand new parking lot then the objection would not have as much weight as an objection based on the fact that the appellant is choosing to open a bar and has never run a bar before and has no business plan. In this matter, the Appellant is seeking an extended Class C license that would close at 1:00 a.m. at weekends. See Board's certified record. See R.I. Gen. Laws § 3-7-8 (requirements for Class C license). For Department decisions discussing objections to the granting of liquor licenses, see *Megan Kenney v. Providence Board of Licenses*, DBR No.: 14LQ044 (11/20/14); *Sugar, Inc. and Sharlene Alon v. City of Providence, Board of Licenses*, DBR No.: 09-L-0119 (3/9/10); *Crazy 8's Bar/Billiards v. Providence Board of Licenses*, DBR No.: 09-L-0042 (8/24/09); and *Krikor S. Dulgarian Trust v. Providence Board of Licenses*, DBR No.: 08-L-0175 (6/18/09).[4]

D. Radius Map

The statute clearly requires the majority of the owners of the land within a 200 feet radius of an applicant object to the granting of a license in order to establish a legal remonstrance. The evidence at hearing was that the radius map included the square footage of condominiums with a building. Thus, if the lot was 10,000 square feet but had a building with six (6) apartments of 1,000 square feet each, 6,000 feet was added to the square footage. This was apparently the case with the 333 Atwells condominiums. It was also unclear from the transcripts below how the square footage for Walgreen's was

[4] In reviewing the transcripts, there seemed to be some confusion over when reasons for objections given are relevant. The attorneys cited to *Wise Guys Deli Inc. v. Providence Board of Licenses Commissioners*, DBR No. 12-L-0075 (9/27/12). However, in that case, the City had not found a legal remonstrance but instead found that owners representing 49% of the land had objected and denied the application. Thus, the posture of the case was not a legal remonstrance case (despite *dicta* regarding a legal remonstrance) but rather should be considered a substantive discussion on the merits of whether the license should be granted. Thus, the case discussed the reasons for the objections and evaluated the merits of an application as opposed to whether a legal remonstrance exists.

calculated. It could have been based on the square footage of the store rather than the lot upon which the store sits. The statute clearly and unambiguously speaks of land and not of buildings. It is the "greater part of the land" that establishes a legal remonstrance.

The square footage of a circle is determined by multiplying the radius by pi. Thus, the square footage of a 200 foot radius is 200 multiplied by 3.14 which equals 125,600. The statute provides that the radius is from the building so that for each application the square footage will vary based on the radius from the building's footprint. However, in this matter, the square footage was apparently 156,702 as apartment square footage was included in the radius square footage. It should be noted that only the land that falls inside the radius is included so that if one-half a lot is inside the radius only half of that lot's square footage is included.

In order to establish a legal remonstrance, the Board needed to find that owners representing over half the 200 foot radius square footage of the land objected to the Appellant's application. However, no legal remonstrance could be found on the basis of the record below as the square footage was incorrectly calculated.

E. Remand

At the Board hearings, the Board discussed how if there is a legal remonstrance then no license could be granted as no license could exist. For that reason, once the Board determined there was a legal remonstrance, it did not consider the merits of the application because no license could exist.

At the Department hearing, the Appellant requested that the Department find that no legal remonstrance exists and remand the matter back for a consideration of the application on the License. The Board requested some kind of declaratory ruling on a

legal remonstrance. An appeal is not a venue for a declaratory ruling. This decision sets forth the reasons that in this matter no determination could be made of whether a legal remonstrance exists and why. The "why" is because the square footage was incorrectly calculated. This decision also reviewed the pertinent Rhode Island Supreme Court cases on a legal remonstrance and the type of evidence on which a finding of a legal remonstrance can be made. For example, there needs to be a finding that the owners of the land object. Since the radius map was incorrectly calculated, there is not enough evidence on whether a legal remonstrance exists. The map needs to be correctly calculated, the abutters noticed,[5] and a new hearing held at which the Board needs to weigh the evidence before it on whether the owners representing the majority of land object to the grant of the License.

In order not to unnecessarily prolong this matter any further, this matter will be remanded to the Board to consider two (2) issues in the following order:

First, should this License be granted.

Second, regardless of what the first answer is, does a legal remonstrance exist.

It could be both answers are no and then the License is denied on the merits. It could be both answers are yes and then the License is denied on the basis that a License cannot exist because of a legal remonstrance.

VI. FINDINGS OF FACT

1. On or about November 10, 2014, Providence denied the Appellant's application for a License.

[5] It should be noted that abutters within 200 feet are all noticed even if the property (e.g. a condominium) is not included in the square footage.

2. Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed that decision by Providence to the Director of the Department.

3. A hearing was held before the Department of January 16, 2015 with the parties resting on the record.

4. The radius map used by the City to find a legal remonstrance included the square footage of apartment/condominiums within buildings. It was also unclear if the map included entire lots when only part of the lot was in the radius and how the Walgreen's lot was calculated. The radius map only should include the land – not the square footage of buildings or apartments - inside the 200 feet radius.

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

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter 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.*

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that this matter be remanded to the Board for further hearing consistent with the decision.

Dated: 2/3/15

Catherine R. Warren
Hearing Officer

ORDER

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

✓ ADOPT
_____ REJECT
_____ MODIFY

Dated: 5 February 2015

Paul McGreevy
Director

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 5th day of February, 2015 that a copy of the within Order was sent by email and first class mail, postage prepaid, to the following: Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903 and Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, RI 02904 and by hand-delivery to Maria D'Alessandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Building 69-1, Cranston, RI 02920

Kristen L Masse