STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE COMPLEX, BLDG 68-69
1511 PONTIAC AVENUE
CRANSTON, RI 02920

Black Emerald, LLC,	:	
Appellant	:	
	:	
v.	:	**DBR No.: 15LQ013**
	:	
The City of Providence Board of Licenses,	:	
Appellee	:	
	:	
and	:	
	:	
Al's Liquor Store and Sin Jiang,	:	
Intervenors.	:	

DECISION

I. INTRODUCTION

On or about August 13, 2015, the Providence Board of Licenses ("Board" or "City") failed to approve or deny Black Emerald, LLC's ("Appellant") application ("Application") for a Class A liquor license ("License") to be located on Atwells Avenue, Providence, R.I.[1] Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed this decision to the Director of the Department of Business Regulation ("Department"). Al's Liquor Store and Sin Jiang ("Intervenor") moved to intervene which was granted. The undersigned[2] set this matter down for hearing in order to address the issue of the applicability of R.I. Gen. Laws § 3-7-4 to the Appellant's Application. A hearing was held on September 15 and 21, 2015 with the parties resting on the record.

[1] The Board moved to approve the application and the vote was tied 2-2 and the Board moved to deny the application and the vote was tied 2-2. As a result, the application was in essence denied. See Board's record.

[2] The undersigned was appointed hearing officer by the director of the Department.

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 Appellant's application for a Class A liquor license should be granted.

IV. MATERIAL FACTS AND TESTIMONY

The main issue in this matter is the applicability of R.I. Gen. Laws § 3-7-4 which provides in part as follows:

> Proximity of Class A licenses. – (a) Retailer's Class A licenses under this chapter shall not be issued to authorize the sale of beverages in any store or place within two hundred feet (200') measured by any public way of another premises holding a Class A license. Licenses presently issued to premises within two hundred feet (200') of the premises where another Class A license is presently issued, may continue to be issued to those premises so long as those premises are in continuous operation under the license. Any transfer or removal from those premises of the license is subject to the provisions of this section. Where a proposed licensed place is upon the opposite side of the street from an existing license, the width of the street is to be disregarded in measuring the distance so as to ascertain if it is two hundred feet (200') away from the premises.

The testimony at the Board hearing indicated that the parking lot at the Appellant's proposed location is private property. See testimony of Mark Shair, real estate broker and leasing agent for the Eagle Square project,[3] and of Matt Caron, director of operations of Felco Dvelopment which manages the Eagle Square project in the July 27, 2015 Board transcript, pp. 15, 40. On appeal, the parties did not dispute that the parking lot of the Appellant's proposed location is private property.

The Appellant's proposed location and the Intervenor's location are both on the same side of Atwells Avenue near an intersection with Valley Street. Valley Street intersects Atwells Avenue

[3] The Eagle Square project is the shopping plaza in which the Appellant proposes to be located.

between the two (2) locations. The Appellant's proposed location is on the corner of Atwells Avenue and Valley Street and is in a parking lot which is private property.

The Appellant and Intervenor agreed that the measurement from the Appellant to the Intervenor measuring from the corner of Atwells Avenue and Valley Street - the corner of the parking lot - to the Intervenor is 175 feet by public way including Valley Street. The Appellant and Intervenor agreed that Valley Street was 50 feet. The parking lot has an entrance and exit (for cars) that exits onto Valley Street. The Intervenor and Appellant agreed that measuring from the driveway entrance/exit to the Intervenor is 238 feet including Valley Street; however, that measurement was not along the sidewalk so the parties agreed that the measurement from the driveway entrance to the Intervenor by public way would be greater than 238 feet. See Joint Exhibit One (1) and Intervenor's Exhibit Seven (7).

At the Department hearing, Miriam Alvarez testified on behalf of the Intervenor. She testified she owns the Mexican restaurant opposite the proposed site. She testified that another liquor license will add to the drunkenness of the area. She testified she has to call the police a lot regarding drunk people and they come into her restaurant and do not want to pay. On cross-examination, she testified she has problems with the drunks at night time. She testified that she cannot say where the drunks come from, but more drunks are not needed in the area.

Sin Jian, co-owner of the Intervenor, testified on behalf of the Intervenor. He testified that he has owned Al's Liquor Store since January, 2015. He testified that he has about 50 to 100 customers a day; sometimes more than 100. He testified that there are five (5) Class A liquor licenses within a half a mile of the Appellant and ten (10) within one (1) mile of the Appellant. He testified that he also gathered signatures from his customers who were against granting the License to the Appellant. See Intervenor's Exhibits Four (4) and Six (6).

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 ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). 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. DEM,* 553 A.2d 541 (R.I. 1989) (citation omitted). 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.*

In regard to the liquor statutory scheme, the Rhode Island Supreme Court has stated that the legislature expressly provided the state control and has adopted a System for administering such control in a manner which it deems the "mostly likely to be productive of the public good." *Bd. Of License Comm'rs v Daneker,* 78 R.I. 101, 107 (R.I. 1951).

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 the 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. Arguments

The Appellant argued that R.I. Gen. Laws § 3-7-4 clearly prohibits Class A licensees within 200 feet but only excludes measuring the width of the street when the two (2) licensees are across from each other on the same street. The Appellant argued that the "the" in "the street" in the statute refers the street of the existing licensee. The Appellant argued that the Intervenor is on the same side of Atwells Avenue as the Appellant so it is not on the opposite side of the street so that street width is to be included in the measurement. The Appellant also argued that public way includes being able to get to the liquor store building so that one has to measure from the parking lot driveway entrance to the Intervenor and that measurement is over 200 feet.

The Intervenor argued that based on the stipulated facts the Appellant is within 200 feet of the Intervenor even including the street measuring from the corner of the parking lot. The Intervenor argued that the Appellant's argument is illogical because the end result of that interpretation could be to allow two (2) stores to be next to each other at an intersection if their parking lot entrances were far away. The Intervenor argued that the purpose of the statute is to prevent the congregation of Class A licensees so that the street is to be excluded.

The Board took no position.

D. The Appeal before the Department

The hearing before the undersigned is a *de novo* hearing so that the parties start afresh during the appeal. See *A.J.C. Enterprises v. Pastore*, 473 A.2d 269 (R.I. 1984) (as the hearing is

a *de novo* hearing rather than an appellate review of what occurred at the municipal level, any alleged error of law or fact committed by the municipal agency is of no consequence); *Hallene v. Smith*, 201 A.2d 921 (R.I. 1964); and *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964) (Department's jurisdiction is *de novo* and the Department independently exercises the licensing function). Thus, the proceeding before the Department is considered a *de novo* hearing. The outcome of an appeal is a decision whether to uphold, overturn, or modify a licensing board's decision.

E. R.I. Gen. Laws § 3-7-4

Prior to the hearing, the undersigned provided the parties with a copy of the Department's decision in *PLW-MA, Inc. d/b/a Blackstone Wine and Spirits v. City of Pawtucket Board of License Commissioners, et al.*, DBR No.: 08-L-0148 (2/19/09) ("PLW Decision"). The PLW Decision found there were no prior Department or Court cases regarding R.I. Gen. Laws § 3-7-4. In interpreting R.I. Gen. Laws § 3-7-4, the Decision found as follows:

> After the end of prohibition of liquor within the United States, Rhode Island implemented a new system of statewide control of liquor coupled with local authority to grant certain licenses. See P.L. 1933 ch. 2013. The intent of the new system was to system the old unsupervised system of local regulation that resulted in a lack of uniformity and instead vested broad powers of control and supervision in a state system. *Baginski v. Alcoholic Beverage Commission,* 4 A.2d 265 (R.I. 1939). [footnote omitted].
>
> It is instructive to review the pertinent legislative history of R.I. Gen. Laws § 3-7-4 as there has not been any Department, Superior Court or Supreme Court case that addresses the issue of the method of measurement under said statute. The first mention of any type of 200 feet measurement is in the initial liquor law of 1933 which contains the prohibition against issuing a class C license (a "saloon" license) to any building or place where the owners of the greater part of land within 200 feet of such building object. It also prohibited issuing a Class C license to any building or place within 200 feet measured by "any public way" of the premises of a public or parochial school or a place of worship. See P.L. 1933 ch. 2013 § 21. In 1936, Class B licenses were included in the same prohibitions applicable to Class C licenses. In addition, the law was amended to provide, "[c]lass A licenses under this act shall not be issued to authorize the sale of beverages in any building or place within two hundred feet measured by any public way of another premises holding a class A license." See P.L. 1936 ch. 2338 § 4. In 1941, the statute was amended so that the 200 feet measurement for the Class A

licensee's proximity to another Class A licensee that is to be made by any public way shall exclude the width of the street. See P.L. 1941 ch. 1038 § 1. In 1956, R.I. Gen. Laws § 3-7-4 and R.I. Gen. Laws §3-7-19 were codified into those sections.

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In 1962, after the *Newport* [*Motor Inn, Inc. v. McManus,* 171 A.2d 440 (R.I. 1961)] case, R.I. Gen. Laws § 3-7-19 was amended and the 200 feet measurement between a Class B, C, or I license and a public or parochial school or a place of worship was no longer to be measure by any public way. See P.L. 1962 ch. 238. However, R.I. Gen. Laws § 3-7-4 was not amended and the 200 feet measurement by any public way stayed the same.

Clearly the legislature chose different methods of measuring in R.I. Gen. Laws § 3-7-4 and R.I. Gen. Laws § 3-7-19. Prior to the 1962 amendment, Class B and C licenses' proximity to schools and places of worship was to be measured by "any public way." The 1962 amendment changed the measurement to the 200 feet radius used to measure the owners of the land within 200 feet of the licensee. The legislature chose not to amend the method of measuring the proximity of two (2) Class A licensees.

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The term "any" has a broad meaning that on its face does not limit or specify the number of things to which it refers. Thus, it does not limit the measurement between two (2) Class A licensees to only one (1) measurement if there can be more than one (1) measurement under the statute by a public way. [footnote omitted]. It is conceivable that depending on the location of a licensee, its building, its premises, a proposed licensee, and the public ways, that there could be more than one way to measure by a public way between a Class A licensee and a proposed Class A licensee.

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"Public way" is not defined in the statute. . . . But a public way is understood to be a street or highway; something that the public travels on. The Motor and Other Vehicles statute defines "private road or driveway" as "every way or place in private ownership that is used for vehicular travel only by the owner and by those others having express or implied permission from the owner." See R.I. Gen. Laws § 31-1-23(g). . . . [footnote omitted].

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Clearly the intent of R.I. Gen. Laws § 3-7-4 is to maintain a certain distance between Class A liquor stores. Thus, the statute prohibits the granting of a license if a proposed licensee's location would be within 200 feet by *any* public way to a current licensee because of the closeness of the two (2) locations. Therefore, if there is any measurement by any public way between a current Class A licensee and a proposed Class A licensee location that is less than 200 feet, the license "shall not" be granted. PLW Decision at 13-20.

F. Whether the License can be granted pursuant to R.I. Gen. Laws § 3-7-4

The measurement between the Appellant and Intervenor from the corner is 175 feet even including the street. The Appellant argued that the street width only is to be excluded if the existing

licensee is on the same street as the proposed location but on the other side of the street. However, the ban on the 200 feet is not modified by the opposite street provision. Rather the opposite street provision is included in a separate sentence that explains how the measurement should be taken "where" the licensees are on opposite sides of the street. When the licensees are on the same side of the street and there are no intervening streets, the provision does not apply. But where crossing a street is part of the going by public way between the existing licensee and proposed license, the street width is to be excluded. The statutory purpose to prevent congestion of Class A licensees would not be implemented if the statute is read the way the Appellant urges. Rather the statutory provision regarding excluding street width is a stand-alone sentence that does not modify or limit the prohibition on Class A licensees that are within 200 feet but rather explains how such measurement is to be taken. The statute is targeting all Class A licensing congestion and not just congestion on opposite sides of the same street.

However, in this matter, the street width is irrelevant as the measurement between the two (2) locations is less than 200 feet even including the street. The Appellant argued that the measurement must be from the driveway as there must be a way to get to the store. However, the statute speaks of measurement by any public way. See PLW Decision. It does not limit measurements to only be by driving on any public way.[4] The statute did not limit the measurements to be from a specified entrance but rather can be from the edge of the parking lot as the measurement is to be by any public way from the proposed location to the current licensee.

[4] While the Appellant's argument that the measurement must take into account getting to the store was not supported by statute, the exhibits actually did show that a person may walk from the Atwells Avenue and Valley Street corner through the parking lot to the proposed liquor store location. There is a fence along the Valley Street side of the parking lot near that intersection. There is no fence at the actual corner or on the Atwells Avenue side. See Intervenor's Exhibit Five (5) (photographs).

In this matter, the public way excludes the parking lot so the measurement from the parking lot can be from anywhere. The measurement from the driveway by any public way is over 200 feet. However, the measurement from the corner of the parking lot to the Intervenor's location is less than 200 feet.

VI. FINDINGS OF FACT

1. On or about August 13, 2015, the Board failed to approve or deny the Appellant's Application for a License.

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

3. A hearing was held on September 15 and 21, 2015 with the parties resting on the record. At hearing, the Intervenor was allowed to intervene.

4. The parking lot of the shopping plaza within which the Appellant proposes to be located is not considered a public way within R.I. Gen. Laws § 3-7-4.

5. The measurement from the corner of the parking lot (Atwells Avenue and Valley Street intersection) to the Intervenor is 175 feet including the street and 125 feet excluding the street.

6. 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.*

2. In this *de novo* hearing, the evidence showed that there is a measurement by any public way between the Appellant's proposed location and the Intervenor that is 175 feet including Valley Street (125 feet without Valley Street).

3. Since there is a measurement by any public way between the Appellant's proposed location and the Intervenor that is within 200 feet, R.I. Gen. Laws § 3-7-4 prohibits the granting of the License.[5]

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the Appellant's Application for the License be denied as the granting of the License is prohibited by R.I. Gen. Laws § 3-7-4.

Dated: 10/1/15

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: 10/5/15

Macky McCleary
Director

[5] Since R.I. Gen. Laws § 3-7-4 prohibits the granting of the License, there is no reason to discuss the fitness of the Appellant in this decision.

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 October, 2015 that a copy of the within Decision was sent by first class mail, postage prepaid to Peter Petrarca, Esquire, Petrarca & Petrarca, 330 Silver Spring Street, Providence, RI 02904, John J. DeSimone, Esquire, DeSimone & DeSimone, 735 Smith Street Providence, RI 02908, Louis A. DeSimone, Jr., Esquire, 703 West Shore Road, Warwick, RI 02889, and Mario Martone, Esquire, City of Providence Law Department, 444 Westminster Street, Suite 220, Providence, RI 02903 and by hand delivery to Maria D'Allesandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Bldg. 68-69, Cranston, RI 02920.