STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
PASTORE COMPLEX
1511 PONTIAC AVENUE
CRANSTON, RHODE ISLAND

D&J Food Service, LLC d/b/a Bob & Timmy's Grilled Pizza of Smithfield, **Appellant,**	:	
v.	:	**DBR No.: 11-L-0014**
Smithfield Town Council, **Appellee.**	:	

DECISION AFTER REMAND

I. INTRODUCTION

On or about March 1, 2011, the Smithfield Town Council ("Board" or "Council") denied an application by D&J Food Service, LLC d/b/a Bob & Timmy's Grilled Pizza of Smithfield ("Appellant") to obtain a Class B liquor license ("License"). Pursuant to R.I. Gen. Laws § 3-7-21, the Appellant appealed the Council's decision to the Director of the Department of Business Regulation ("Department"). A *de novo* hearing was held on April 5 and 29, 2011 before the undersigned sitting as a designee of the Director with the parties timely filing briefs by June 30, 2011. A decision ("Decision") was issued on September 7, 2011 remanding this matter to the Council for further proceedings.[1] On remand, the Council again denied the Appellant's application for License pursuant to Town Ordinance 118-13 ("Ordinance") that had been adopted unanimously by the Council on November 1, 2011. The Council issued the denial on remand decision ("Remand Decision") on December 20,

[1] The Decision is hereby incorporated by reference.

2011. The Appellant asserted its right for further appeal to the Department and a briefing schedule was set with all briefs being timely filed by January 27, 2012.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 3-5-1 *et seq.*, R.I. Gen. Laws § 3-7-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

III. ISSUES

Whether to uphold or overturn the Board's Remand Decision to again deny the Appellant's application for a License.

IV. MATERIAL FACTS

The Appellant is located at 1201 Douglas Pike, Smithfield, RI. The Appellant is in the same building as a Dr. Day Care pre-school facility. The Council initially found there were safety issues related to having a day care next door to a liquor licensee. In the Decision, the undersigned remanded this matter as follows:

> In light of the forgoing, this matter is remanded for the following clarification by the Board:
>
> 1. Does the Board seek to establish an absolute 200 feet barrier between Class B licensees and day care/pre-schools; or
> 2. Has the Board made an independent finding that there is a specific safety issue for *this* Day Care and restaurant being in the same building; or
> 3. Is the Board seeking to adopt a public policy that a day care/pre-school and a (full and/or limited [in the sense of beer and wine]) licensed restaurant can not share a building and/or parking lot [e.g. could a day care and licensed restaurant be in the same shopping plaza in separate buildings]; and
> 4. If the Board's findings are solely related to paragraph Two (2), what evidence does the Board rely on to support such specific safety findings: e.g. 1) same building; 2) common parking lot; and 3) shared entrance to parking lot, etc.; and
> 5. If the Board's findings are solely related to paragraph Three (3), what evidence does the Board rely on to support such a public

policy (e.g. like in *A Rock*):[2] e.g. 1) same building; 2) common parking lot; and 3) shared entrance to parking lot, etc., and

6. If the Board's findings are solely based on safety concerns in this instance (e.g. paragraphs Two (2) and Four (4)), does the Board believe the Appellant could satisfactorily mitigate its safety concerns. E.g. 1) separate entrances to the parking lot; 2) differing traffic flow; and 3) restrictions on license or probationary period, etc. [footnote omitted].

If the Board seeks to adopt a policy that day cares/pre-schools and licensed restaurants cannot share a building, it must provide evidence as in *A Rock*. If a specific public policy is adopted, it would follow that an applicant could not mitigate safety concerns (assuming there was evidence for the adoption of such a broad-based policy). [footnote omitted]. If the Board's concerns are limited to safety issues regarding a shared building and parking lot and only finds support for its concerns in R.I. Gen. Laws § 3-7-19, then presumably the Appellant may be able to overcome such concerns if mitigation is possible. See Decision, at 14-15.

After the remand, the Council adopted the Ordinance[3] which prohibits Class A, Class B, Class B-Limited, Class C, Class D, Class E, or Class J liquor licenses being issued to a location within the same building and within 200 feet of a daycare. Thus, a daycare can be within 200 feet of a liquor licensee if the daycare and licensee are in separate buildings. This ordinance is similar but not identical to the State statute[4] prohibiting Class B, Class C, and Class I liquor licensees from being within 200 feet of

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[2] This cite is to *A Rock and a Hard Place v. City of Woonsocket*, DBR No.: 06-L-016 (5/10/07).

[3] Ordinance 118-13 provides as follows:

ARTICLE IX Location of Licensed Premises §118-13 Prohibited Location

No Class A, Class B, Class B-Limited, Class C, Class D, Class E, or Class J license issued pursuant to the provisions of R.I.G.L. chapter 3-7 ("Retail Licenses") shall be granted to any applicant who proposes to use and/or operate under said license at a location which is within the same building and is within two hundred (200) feet of any portion of the premises of a childcare provider and/or child-placing agency licensed pursuant to the provisions of R.I.G.L. chapter 42-72.1.

[4] R.I. Gen. Laws § 3-7-19 provides in part 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 . . . 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. . . .

private or public schools (kindergarten through 12th grade) whether in the same building or in separate buildings.

V. DISCUSSION

A. The Standard of Review

R.I. Gen. Laws § 3-7-7[5] provides that a town or city may grant a Class B license. It is a matter of law that local licensing boards have broad discretion in deciding whether or not to grant a liquor license application. "The granting or denying of such licenses is in no sense an exercise of the judicial process. On the contrary it is purely administrative. In performing that function the board act (sic) as agents of the legislature in the exercise of the police power. . . . [I]t is a matter of discretion whether or not they shall grant the license and this court has no control over their decision." *Bd. of Police Comm'rs v. Reynolds*, 86 R.I. 172, 176 (1975). The Department has the same broad discretion in the granting or denying of liquor licenses. *Id.* at 177. See *Donald Kinniburgh d/b/a Skip's Place v. Cumberland Board of License Commissioners*, LCA–CU-98-02 (8/26/98).

While the Department has the same broad discretion in granting or denying a liquor license application, as articulated through liquor licensing decisions at the State

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[5] R.I. Gen. Laws § 3-7-7 states in part as follows:

> Class B license. – (a)(1) A retailer's Class B license is issued only to a licensed bona fide tavern keeper or victualer whose tavern or victualing house may be open for business and regularly patronized at least from nine o'clock (9:00) a.m. to seven o'clock (7:00) p.m. provided no beverage is sold or served after one o'clock (1:00) a.m., nor before six o'clock (6:00) a.m. Local licensing boards may fix an earlier closing time within their jurisdiction, at their discretion. The East Greenwich town council may, in its discretion, issue full and limited Class B licenses which may not be transferred, but which shall revert to the town of East Greenwich if not renewed by the holder.
> ********
> (4) Any holder of a Class B license may, upon the approval of the local licensing board and for the additional payment of two hundred dollars ($200) to five hundred dollars ($500), open for business at twelve o'clock (12:00) p.m. and on Fridays and Saturdays and the night before legal state holidays may close at two o'clock (2:00) a.m. All requests for a two o'clock (2:00) a.m. license shall be advertised by the local licensing board in a newspaper having a circulation in the county where the establishment applying for the license is located.

court level and the Departmental level, the standard of review for a new license or a transfer of license is subject to the discretion of the issuing authority. Such discretion must be based on reasonable inferences drawn from the evidence. Arbitrary and capricious determinations not supported by the evidence are considered suspect. *Infra.*

B. Liquor Licensing in State of Rhode Island

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.[6] The intent of the new system was to eliminate the old unsupervised system of local regulation that resulted in a lack of uniformity and instead vest broad powers of control and supervision in a state system. The purpose of this system is to safeguard the public. As held in *Baginski v. Alcoholic Beverage Commission*, 4 A.2d 265, 266-67 (R.I. 1939):

> Chapter 2013 is a familiar and well-recognized example of the legitimate exercise of the police power. *Tisdall v. Board of Aldermen*, 57 R.I. 96, 188 A. 648. The act is entitled an act to promote temperance and to control the manufacture, transportation, possession and sale of alcoholic beverages. Its chief purpose may, without question, be said to be the safeguarding of the public health, safety and morals. *Clark v. Alcoholic Beverage Commission*, 54 R.I. 126, 170 A. 79.
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> The traffic in intoxicating liquors has ever been a prolific source of evils, gravely injurious to the public welfare. The need of its regulation and control is undisputed. In a search for a system of effective, impartial and uniform regulation and control of this traffic our legislature enacted the above chapter [P.L. 1933 ch. 2013] which was later amended by P.L.1934, chap. 2088. This system is a departure from that which had long existed here prior to the advent of national prohibition. Then the regulation and control of substantially every phase of the liquor traffic was vested exclusively in the local governing bodies. The state exercised over this local administration no administrative supervision or control, except occasionally in some cities and towns the legislature intervened to set up state-appointed license commissions or police commissions with licensing powers; but such commissions were vested with purely local administrative powers only. They were not commissions with state-wide jurisdiction.

[6] Liquor licensing statute, R.I. Gen. Laws § 3-1-1 *et seq.*

> Chapter 2013 changed all this. Where, before, the emphasis was exclusively on control locally, now it is predominantly on state control. This is evident in many sections of the act. Running through the entire act is the central idea that the traffic in intoxicating liquors is a problem that is state-wide; and correspondingly, that state supervision and control, either originally in some phases or ultimately in others, alone can adequately cope with it. However, along with the incorporation into the law of this new idea, there has been retained a remnant of local administration. An example of this is the right of local boards to grant and to revoke, at least in the first instance, class C licenses. Such licenses correspond to the retail licenses, popularly known as saloon licenses under the old law

Di Traglia v. Daneker, 115 A.2d 345 (1955) reiterated the findings in *Baginski*.[7] The liquor licensing statute sets forth a dual licensing system of local and state control. There is no right to a liquor license but rather businesses that handle or use liquor are subject to an extensive regulated licensing system. In this instance, the Appellant had its application denied by the Council. Pursuant to the statute, the Appellant appealed to the Department. The hearing before the Department is a *de novo* hearing. The Rhode Island Supreme Court held in *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

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[7] *Di Traglia*, at 347 found as follows:

> The public has a vital and continuing interest in the control and supervision of the liquor traffic. Therefore the business of selling beverages, if permitted at all, is clearly and completely subject to the police power of the state in order that the health, morals and safety of the people generally may be protected against the evils of intemperance. In the exercise of that power the state may impose restrictions and burdens, however great, which the legislature may deem advisable to prescribe, so long as such provisions are not discriminatory or inconsistent with federal or state constitutional requirements. *Tisdall Co. v. Board of Aldermen*, 57 R.I. 96, 103, 188 A. 648.
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> In this state the liquor traffic is regulated by a license system under ultimate state control and supervision. See *Baginski v. Alcoholic Beverage Comm'n*, 62 R.I. 176, 4 A.2d 265. As hereinbefore stated, petitioner was granted a class B victualer's liquor license by the licensing board of the city of Cranston. . . . [the statute] provides, among other things, that if any licensed person shall permit any of the laws of this state to be violated in the place where he is licensed to sell intoxicating liquor, 'in *addition* to any punishment, penalty or penalties which may be prescribed by statute for such offense, he may be summoned before the board, body or official which issued his license or before the liquor control administrator when he and the witnesses for and against him may be heard * *

> 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.[8]

See also *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) and *Cesaroni v. Smith*, 202 A.2d 292 (R.I. 1964) (*de novo* hearing is unaffected by any error by local board). Thus, the hearing before the undersigned is a *de novo* hearing on the Council's decision to deny the Appellant's application for License.

Under *Thompson v. East Greenwich*, 512 A.2d 837 (R.I. 1986), a town may grant a liquor license upon conditions that promote the reasonable control of alcoholic beverages. *Thompson* found that R.I. Gen. Laws § 3-5-21[9] allows municipalities to

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[8] At the time of *Hallene*, appeals were directed to the Liquor Control Administrator. The position of Liquor Control Administrator was abolished in 1996. P.L. 1996, ch.. 100, art. 36, § 4. The Department assumed its functions, jurisdiction, and authority. See R.I. Gen. Laws § 3-7-21. For convenience, this decision will refer to the Department when discussing municipal liquor appeals.

[9] R.I. Gen. Laws § 3-5-21 states in part as follows:

> Revocation or suspension of licenses – Fines for violating conditions of license. – (a) Every license is subject to revocation or suspension and a licensee is subject to fine by the board, body or official issuing the license, or by the department or by the division of taxation, on its own motion, for breach by the holder of the license of the conditions on which it was issued or for violation by the holder of the license of any rule or regulation applicable, or for breach of any provisions of this section.

impose conditions on liquor licensees in accordance with R.I. Gen. Laws § 3-5-1[10] which restricts such conditions to be in the reasonable control of alcoholic beverages. Such a condition may be an individual condition[11] on the grant of a license or may be conditions (e.g. an ordinance) applicable to all liquor licensees. *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228 (R.I. 2000) upheld a locality's anti-nude dancing ordinance when it found that a 1997 statutory amendment, R.I. Gen. Laws § 3-7-7.3, specifically endowing localities with the power to restrict or prohibit entertainment in Class B licensees only clarified what was already authorized in R.I. Gen. Laws § 3-5-15 and R.I. Gen. Laws § 3-5-21. See also *Casa DiMario, Inc. v. Richardson*, 763 A.2d 607 (R.I. 2000). Thus, localities may impose conditions on liquor licensees other than provided for in the State statute as long as such conditions promote the control of alcoholic beverages. See *Amico's Inc. v. Mattos*, 789 A.2d 899 (R.I. 2002).

C. Ordinance

The Appellant argues that the Council overstepped its authority by enacting the Ordinance and since the legislature has not amended R.I. Gen. Laws § 3-7-19 to include

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[10] R.I. Gen. Laws § 3-1-5 states as follows:

> Liberal construction of title. – This title shall be construed liberally in aid of its declared purpose which declared purpose is the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages.

R.I. Gen. Laws § 3-5-21 states in part as follows:

> Revocation or suspension of licenses – Fines for violating conditions of license. – (a) Every license is subject to revocation or suspension and a licensee is subject to fine by the board, body or official issuing the license, or by the department or by the division of taxation, on its own motion, for breach by the holder of the license of the conditions on which it was issued or for violation by the holder of the license of any rule or regulation applicable, or for breach of any provisions of this section.

[11] E.g. *Newport Checkers Pizza, Inc. d/b/a Scooby's Neighborhood Grille v. Town of Middletown*, LCA-MI-00-10 (12/7/00) (Department upheld Town's condition of an early closing of 11:00 p.m. as reasonable under *Thompson* to balance interests of neighbors and licensee).

pre-schools, the Town cannot.[12] The Courts review ordinances to determine whether the regulated area is one reserved for the State since municipalities may not legislate on matters of statewide concern[13] and whether the locality has been delegated authority by the legislature in the challenged area. *Amico's Inc.* found that that a town could regulate smoking in certain liquor licensees by ordinance and such regulation had not been pre-empted by State statute. The Court found that the town could regulate smoking in restaurants and bars based on its authority over liquor licensing (*Thompson* and R.I. Gen. Laws § 3-1-5) (as well as the town's authority to regulate victualing houses).

A municipal ordinance may be pre-empted if it conflicts with a State statute on the same subject or if the Legislature intended the statutory scheme to completely occupy the field of regulation. *Amico's.* However, based on the long line of cases cited, it is clear that a local authority is able to able to impose limits on liquor licensing other than those provided by the State as long as the conditions are for the promotion of the control of alcohol.[14]

All administrative agencies powers are derived from statute and an agency cannot do what is not provided for in law. "An administrative agency is a product of the legislation that creates it, and it follows that '[a]gency action is only valid, therefore,

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[12] In *Pizza Hut of America v. Pastore*, 519 A.2d 592 (R.I. 1987), the Supreme Court found that R.I. Gen. Laws § 3-7-19 did not include a private pre-school within 200 feet prohibition as private schools were not included in said prohibition. Subsequent to that decision, the statute was amended to include private schools as well as public and parochial schools though pre-schools were not included in the amendment. P.L 1988 ch. 156 § 1. However, there is no dispute that the statute does not apply to pre-schools. Thus, the Town's Ordinance has extended the State's 200 feet prohibition to more licensees and pre-schools within the same building within 200 feet.

[13] "Ordinances, however, will be found unenforceable and invalid when they are in contravention of the city charter or the general laws of the state." *Providence City Council v. Cianci*, 650 A.2d 499, 501 (R.I. 1994).

[14] Of course, the Department role as a "super-licensing" agency oversees local actions in terms of appeals, enforcement, etc. *Tedford v. Reynolds*, 141 A.2d 264 (R.I. 1958); *Baginski v. Alcoholic Beverage Comm'n*, 4 A.2d 265 (R.I. 1939); *Town of Lincoln v. Racine*, 1993 WL 853869 (R.I. Super. 1993).

when the agency acts within the parameters of the statutes that define [its] powers.'" *In re Advisory Opinion to the Governor,* 627 A.2d 1246, 1248 (R.I. 1993) (citation omitted). See also *Iselin v. Ret. Bd. of Employees' Ret. Sys. of Rhode Island*, 943 A.2d 1045 (R.I. 2008). Thus, it is not within the Department's authority to strike down a municipal ordinance. Nonetheless, the Ordinance appears to fall under permitted liquor regulation by a local authority. State cases have long found that liquor is to be regulated by the State and localities because of public health, welfare, and safety concerns. Here, the Town has imposed conditions on liquor licensees by an ordinance that affects the entire locality in terms of permissible locations of liquor licensees. Thus, for the purposes of this decision, the undersigned will treat the Ordinance as valid. [15] [16] [17]

D. Retroactive Application

Assuming the Ordinance is valid, the Appellant argues that applying the Ordinance to its application for License would be an impermissible retroactive application. The Council cites to *Lawrence v. Anheuser-Busch, Inc.*, 523 A.2d 864 (R.I. 1987) for the proposition that retroactive application of an ordinance or statute is prohibited when it would affect vested legal rights. The Council argues that the

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[15] In ruling on the validity of ordinances, "a court must, if possible, interpret the ordinance as valid." *Greenwich Bay Yacht Basin Associates v. Washburn*, 560 A.2d 945, 948 (R.I. 1989). See also *Fritz v. Presbrey*, 116 A.2d 419 (R.I. 1922).

[16] Any constitutional challenge to the Ordinance would not properly be before an administrative agency but rather is for the courts. See *Easton's Point Association et al v. Coastal Resources Management Council et al.*, 522 A.2d 199 (R.I. 1987).

[17] The Appellant also argues that the Town made no specific findings in support of the Ordinance. The Board argues that it presented testimony regarding safety issues at the Department hearing but does not need to provide legislative findings for what is common knowledge. Indeed, the State already prohibits certain liquor licensees from being located within 200 feet from private, public, or parochial schools. And the Courts have consistently upheld conditions related to the reasonable control of alcoholic beverages. Unlike *A Rock and Hard Place*, the Board did not adopt a public policy with findings but rather adopted a blanket prohibition in the form of the Ordinance.

Appellant has no vested legal right since it does not have a License so that applying the Ordinance would not be a retroactive application.

The Department has previously faced a similar situation. In December, 1994, a Class B liquor licensee named Barry's located in Warwick applied to the local board to remain open to 2:00 a.m. but the board refused to accept the application. Barry's appealed to the Department. See *Volare, Inc. v. City of Warwick, Board of Public Safety*, LCA-WA95-01 (7/17/95) ("Barry's I"). Barry's I found that the Board had relied on unpublished findings to deny the 2:00 a.m. closing since there were no written ordinances or regulations promulgated on 2:00 a.m. closings. The Department ordered Warwick to publish or promulgate regulations regarding criteria for a 2:00 a.m. closing and to consider Barry's application since there was no blanket prohibition on 2:00 a.m. closings.

After the remand, a public hearing was held in Warwick and at that point the board amended its regulations to contain a blanket prohibition on 2:00 a.m. closings for Class B licensees. Barry's again appealed to the Department. In *Volare, Inc. d/b/a Barry's v. City of Warwick*, LCA-WA95-01 (10/3/96) ("Barry's II"), the Department found that the board had approved a blanket prohibition on 2:00 a.m. closings which was within its power and discretion under R.I. Gen. Laws § 3-7-7. Thus, the Department found it would not interfere with the local board's action.

Similarly in this situation, the Appellant has never been issued a license but instead its application was initially denied by the Council. As a result of the Appellant's appeal of the denial, the Department remanded the denial back to the Council for further consideration. In response (as in Barry's II), the Council passed an ordinance with a blanket prohibition on all Class B licensees and other liquor licensees being located

within 200 feet and within the same building as a pre-school. The Appellant argues that applying the Ordinance is a retroactive denial of its application but it never obtained a License from the Council but rather was denied, remanded, and denied again. Like in Barry's II, the appeal is *de novo* and the Department has the same authority as the Board. The License cannot be granted because of the Ordinance.

Barry's II found that for the Department to order the local board to consider Barry's application despite Warwick's new ordinance would eviscerate the Board's discretionary authority under R.I. Gen. Laws § 3-7-7. Similarly, to order the License be granted despite the new Ordinance would contravene the Council's authority in this matter. Additionally, the Ordinance does not contain "grandfather" rights so that even if the License was granted on appeal, the Council could properly deny it on renewal as being in violation of the Ordinance. See Barry's II (any local Class B licensee already allowed to open to 2:00 a.m. will lose that right on renewal).[18]

E. Equity and Equitable Estoppel

The Appellant argues that the Ordinance is inherently unfair since it only applies to the Appellant and no other facility by limiting the prohibition to being within 200 feet **and** in the same building. However, equitable principles are not applicable to an administrative procedure. See *Nickerson v. Reitsma*, 853 A.2d 1202 (RI 2004) (Supreme Court vacated a Superior Court order that had vacated an agency sanction on equitable

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[18] In terms of local ordinances being applicable to on-going entities (as opposed to this situation where the Appellant never received a License), the Supreme Court found as follows.

> Furthermore, plaintiff's liquor and entertainment licenses have always been subject to annual renewals from the town. As a liquor-serving licensee operating in this heavily regulated commercial arena, plaintiff was not entitled to presume that by obtaining an original liquor license from the town without the anti-nudity conditions, it would thereafter be able to estop the town from ever imposing such conditions in the future via the enactment of ordinances like No. 965 and No. 1057. Thus, we conclude, plaintiff has failed to satisfy the prerequisites for obtaining the benefits of the equitable estoppel doctrine. *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228, 1234 (R.I. 2000).

grounds). Thus, it is not within an agency's power to strike down an Ordinance on the equitable concept of fairness.

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 (RI 2001) (citation omitted) (italics in original).

Therefore, for a party to obtain *equitable estoppel* against an agency, it must show that a "duly authorized" representative of the agency 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.*, at 612. See also *El Marocco Club, Inc.*, at 1234 ("key element of an estoppel is intentionally induced prejudicial reliance.") (internal citation omitted). However, a government entity and its representatives do not have "any implied or actual authority to modify, waive, or ignore applicable state law that conflicts with its actions or representations." See *Romano*, at 40. Furthermore, "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). Additionally, "'[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). In addition, the party must make a requisite showing that *equitable estoppel* should be applied to prevent fraud and injustice. *Guilbeault v. R.J. Reynolds Tobacco Company*, 84

F.Supp.2d 263 (D.R.I. 2000) (to prove fraud plaintiff needs to show that defendant made a false or misleading statement of material fact that defendant knew to be false and it was made in order to deceive and that plaintiff detrimentally relied on statement).

The issue of *equitable estoppel* was raised in Barry's II and rejected by the Department since Barry's had never been given any indication that it would receive approval for a 2:00 a.m. closing and any detrimental reliance based on presumptions by Barry's was unjustified. The Appellant argued that it had a reasonable expectation of the law (that a Class B license could be allowed in that location) when it applied for the License. However, unfortunately for the Appellant, the issue for *equitable estoppel* is not the expectation of the law but whether the Appellant detrimentally relied on affirmative representatives by the Board regarding whether it would receive a License. There was no showing by the Appellant that it had detrimentally relied on affirmative representatives of the Board that it would receive a License.[19]

F. Conclusion

As discussed above, the Department does not have the authority to strike the Ordinance on Constitutional or equitable grounds but rather any such decision falls under the authority of the courts. For the purpose of this decision, the Ordinance is presumed valid. Based on the forgoing, there are no grounds to grant the License.

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[19] For example in discussing *equitable estoppel* in the context of a municipal ordinance, the Court has found as follows:

> The plaintiff also alleged that the doctrine of equitable estoppel should have barred the application of Ordinance No. 965 to its nightclub. The plaintiff essentially contended that because the no-public-display-of-nudity conditions mandated by Ordinance No. 965 had not been imposed upon plaintiff before the enactment of that ordinance, and because the plaintiff had expended considerable funds in preparing its nightclub for nude dancing, the town should be estopped from enforcing the ordinance with respect to this aspect of its business. However, even assuming without deciding that the doctrine of equitable estoppel could be applied against a municipality in this context, plaintiff failed to establish the requisite conditions precedent for applying this doctrine. *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228, 1233 (R.I. 2000).

VI. FINDINGS OF FACT

1. On or about March 1, 2011, the Council denied a request by the Appellant to grant it a Class BV liquor license.

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

3. A *de novo* hearing was held on April 5 and 29, 2011 before the undersigned sitting as a designee of the Director.

4. A Decision was issued on September 7, 2011 remanding this matter to the Council.

5. On November 1, 2011, the Council adopted Ordinance 118-13 which forbids a Class B liquor license being issued to a location within 200 feet and in the same building of any child care provider licensed pursuant to R.I. Gen. Laws § 42-72.1.

6. On the basis of the Ordinance, the Council issued a decision on remand on December 20, 2011 finding again that the application by Appellant for License be denied.

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

8. The Department does not have the authority to strike down an Ordinance on Constitutional or equitable grounds. For the purposes of this decision, the Ordinance is presumed valid.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 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, no grounds were asserted for the Department to grant the License assuming the validity of the Ordinance.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the decision of the Council denying the Appellant's application for a Class BV liquor license on the basis of Ordinance 118-13 be upheld.

Dated: 2/24/12

Catherine R. Warren, Esquire
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: 1 March 2012

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 7th day of March, 2012 that a copy of the within Decision and the Notice of Appellate Rights was sent by first class mail, postage prepaid, to

Edmund L. Alves, Jr., Esquire
Smithfield Town Solicitor
30 Exchange Terrance
Providence, RI 02903

David A. Ursillo, Esquire
7 Waterman Avenue
North Providence, RI 02911

and by electronic-delivery delivery to Maria D'Alessandra, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, RI.