

IN THE SUPREME COURT OF THE STATE OF DELAWARE

OFFICE OF THE COMMISSIONER, :
DELAWARE ALCOHOLIC BEVERAGE :
CONTROL, :
: :
Appellant Below, : No. 101, 2014
Appellant, :
: On Appeal from Decision
v. : of the Superior Court of the
: State of Delaware, in and for
APPEALS COMMISSION, : New Castle County
DELAWARE ALCOHOLIC BEVERAGE : C.A. No. N11A-09-008 JRJ
CONTROL, and LEX-PAC, INC. :
d/b/a HAK'S SPORTS BAR & : Trial Court: Appeals
RESTAURANT, : Commission, Docket
: No. 13111
Appellees Below, :
Appellees. :

**CORRECTED OPENING BRIEF OF APPELLANT OFFICE OF THE
COMMISSIONER,
DELAWARE ALCOHOLIC BEVERAGE CONTROL**

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CITATIONS.....	ii
NATURE OF PROCEEDINGS.....	1
SUMMARY OF ARGUMENT.....	3
STATEMENT OF FACTS.....	4
ARGUMENT.....	13
I. THE OFFICE OF THE DELAWARE ALCOHOLIC BEVERAGE CONTROL COMMISSIONER CHARGED BY THE GENERAL ASSEMBLY TO EXERCISE DELAWARE’S POLICE POWERS TO REGULATE THE BUSINESS OF ALCOHOLIC LIQUORS WITHIN THE STATE POSSESSES STANDING TO REPRESENT THE PUBLIC INTEREST IN THE APPELLATE REVIEW OF A LICENSING DECISION.....	13
(a) Questions Presented.....	13
(b) Standard and Scope of Review.....	13
(c) Merits of Argument.....	13
(i) The Superior Court erred in not correctly distinguishing the Commissioner’s distinctive regulatory and quasi-judicial roles.....	14
(ii) The public interest should be considered in the judicial review of administrative practice.....	19
(iii) The Superior Court’s reliance on cases concerning an administrative body’s quasi-judicial role is misplaced.....	22
II. THE APPEALS COMMISSION’S 2011 ORDER IS CONTRARY TO THE LAW.....	27
(a) Questions Presented.....	27
(b) Standard and Scope of Review.....	27

(c) Merits of Argument	28
CONCLUSION	35

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<i>Alfieri v. Martelli</i> , 647 A.2d 52 (Del. 1994)	23, 24
<i>Broadmeadow Investment, LLC v. Delaware Health Resource Bd., et al.</i> , 56 A.3d 1057 (Del. 2012)	13, 18, 20, 21, 22, 26
<i>Caras v. Delaware Liquor Comm.</i> , 90 A.2d 492 (Del. Super. 1952).....	28
<i>Cebrick v. Peake</i> , 426 A.2d 319 (Del. 1981).....	16, 19, 20, 21, 22, 26
<i>Darling Apartment Co. v. Springer</i> , 22 A.2d 397 (Del. 1941).....	15
<i>Delaware Alcoholic Beverage Control Comm. v. Alfred I. duPont School Dist.</i> , 385 A.2d 1123 (Del. 1978).....	20, 32, 33
<i>Delaware Alcoholic Beverage Control Comm. v. Mitchell</i> , 196 A.2d 410 (Del. 1963)	20
<i>Fantasia Restaurant & Lounge, Inc. v. New Castle County Bd. of Adjust.</i> , 735 A.2d 424 (Del.Super. 1998).....	24, 29
<i>Fiduciary Trust Co. v. Fiduciary Trust Co.</i> , 445 A.2d 927 (Del. 1982)	13
<i>Ins. Comm’r. of the State of Delaware v. Sun Life Assurance Co. of Canada</i> , 21 A.3d 15 (Del. 2011)	17
<i>Kiloski v. Pennsylvania R.Co.</i> , 96 F.Supp. 321 (D.Del. 1951)	30
<i>Kirpat, Inc. v. Delaware Alcoholic Beverage Control Comm.</i> , 1998 WL 731577 (Del.Super. Mar. 31, 1998).....	30
<i>Kopicko v. Dept. of Servs. for Children, Youth and their Families</i> , 846 A.2d 238, 2004 WL 691901 (Del. 2004).....	27
<i>Kowalski v. Unemployment Ins. Appeal Bd.</i> , 1990 WL 28597 (Del.Super. Jan. 22, 1990)	32

<i>Liborio II, L.P. v. Artesian Water Company, Inc.</i> , 621 A.2d 800 (Del.Super. 1992).....	21
<i>Nischay, Inc. v. Alcoholic Beverage Control Appeals Comm., et al.</i> , 2011 WL 1743976 (Del.Super. Mar. 16, 2011).....	22, 23
<i>Office of the Commissioner, Delaware Alc. Bev. Control v. Appeals Comm., et al.</i> , 2014 WL 601384 (Del.Super. Jan. 31, 2014)(Order).....	2
<i>Office of the Commissioner, Delaware Alc. Bev. Control v. Appeals Comm., et al.</i> , 2013 WL 3816682 (Del.Super. July 18, 2013)	2
<i>Office of the Commissioner v. Appeals Comm., et al.</i> , 2011 WL 285597 (Del.Super. Jan. 19, 2011).....	2, 20
<i>One-Pie Investments, LLC v. Jackson</i> , 43 A.3d 911 (Del. 2012).....	21
<i>Pusey v. Delaware Alcoholic Beverage Control Comm.</i> , 1990 WL 128175 (Del.Super.Aug.30, 1990), <i>rev'd on other grounds</i> , 596 A.2d 1367 (Del. 1991)	31, 32
<i>Robbins v. Glenn Deaton, Inc.</i> , 1995 WL 108888 (Del.Super. Feb. 6, 1995)..	15, 16
<i>Ropp v. King</i> , 2007 WL 2198771 (Del. Ch. July 25, 2007)	24, 25
<i>Rommell v. Walsh</i> , 15 A.2d 6 (Conn. Supr. 1940).....	15, 16
<i>Sandt v. Delaware Solid Waste Auth.</i> , 640 A.2d 1030 (Del. 1994).....	27
<i>Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund</i> , 68 A.3d 665 (Del. 2013)	27
<i>Snyder v. Quicksilver Trucking</i> , 2007 WL 315337 (Del. Super. Jan. 31, 2007).	31
<i>Standard Distributing, Inc. v. Hall</i> , 897 A.2d 155 (Del. 2006)	28
<i>Trone, et al. v. Delaware Alcoholic Beverage Control Comm.</i> , 2000 WL 33113799 (Del.Super. Dec. 28, 2000).....	19

Wilmington Trust v. Barron, 470 A.2d 257 (Del. 1983).....22

Constitutions, Statutes, Laws, and Rules

Article II, § 1, Del.Const. of 1897 3, 4, 13, 14, 15

4 *Del.C.* § 101 7, 8, 9, 11, 18

4 *Del.C.* § 301 3, 4, 5, 6, 14, 21, 25

4 *Del.C.* § 3035

4 *Del.C.* § 304 3, 4, 5, 6, 14, 15, 16, 19, 21, 23, 25, 28

4 *Del.C.* § 40116

4 *Del.C.* § 5246

4 *Del.C.* § 541 1, 2, 3, 5, 6, 14, 16, 17, 18, 19, 20, 22, 23, 25, 26, 28

4 *Del.C.* § 543 7, 8, 11, 21

4 *Del.C.* § 544 17, 18, 22, 25, 28

4 *Del.C.* § 5547, 29

4 *Del.C.* § 5612, 30

4 *Del.C.* § 9042, 8

29 *Del.C.* § 82045

29 *Del.C.* § 10102(6).....19

29 *Del.C.* § 101286

38 Del. Laws 1933, ch. 18.....6

59 Del. Laws 1973, ch. 1076

72 Del. Laws 2000, ch. 486	5, 6
78 Del. Laws 2012, ch. 384	1
Commissioner Rule No. 19(F).....	7
Commissioner Rule No. 42.....	9

UNREPORTED CASES

NATURE OF PROCEEDINGS

Appellant Office of the Delaware Alcoholic Beverage Control Commissioner (“Commissioner”), authorized to exercise the State of Delaware’s police powers to regulate the sale, manufacture, distribution, and importation of alcoholic liquors within the State as delegated by the General Assembly, appeals the Superior Court’s Opinion and Order dated July 18, 2013 and Order dated January 31, 2014. These Orders dismissed the Commissioner’s appeal of the Amended Decision and Order (“2011 Order”) of Appellee Appeals Commission (“AC”), on the basis the Commissioner lacks standing to appeal the 2011 Order to the Superior Court. (A-15, 32, 53).¹

Before dismissal, the Commissioner’s appeal was submitted for arbitration before a Superior Court Commissioner², where the merits of the appeal were fully briefed, an arbitration hearing was scheduled, and, at Appellees’ request, discovery was initiated. After the Commissioner responded to discovery requests, Appellee Lex-Pac, Inc. (“Hak’s”) raised the issue of whether the Commissioner had standing

¹ Appellant’s Appendix to his Opening Brief is referred to as “A-“ followed by the page number. Supr.Ct.R. 14.

² See former 4 *Del.C.* § 541(c). Section 541(c) was amended by eliminating the arbitration process before a Superior Court Commissioner and providing for an appeal to Superior Court briefed on the record before a Superior Court Judge. 78 Laws 2012, ch. 384, § 1, eff. Aug. 1, 2012.

to appeal the AC's 2011 Order³ and filed a Motion to Dismiss. (A-9). Following briefing and oral argument, the Superior Court Commissioner dismissed the appeal on July 18, 2013. (A-32, 42).

The Commissioner appealed the dismissal to the assigned Superior Court Judge, in accordance with the former provisions of 4 *Del.C.* § 541, who declined to consider further briefing and issued an Order on January 31, 2014, upholding the Superior Court Commissioner's Opinion. (A-15).

The Commissioner timely appealed to this Court. This is the Commissioner's Opening Brief.

³ The 2011 Order concerns Hak's application to the Commissioner in 2008 and supplemented application through mid-April 2009 to change its liquor license type from a taproom to a restaurant. (A-98). The application was submitted one month after Hak's pled guilty to allowing female, employee dancers under the age of 21 years on its taproom premises, in violation of 4 *Del.C.* §§ 561(b)(1), 904(d), and conceding that it wanted to "employ people under the age of 21 and could not do so with its current [taproom] license." (A-100, 102). The Commissioner proposed to deny Hak's application in November 2009, and afforded Hak's an opportunity for a hearing and to submit additional evidence in support of its application, which Hak's refused. (A-93, 94). The Commissioner denied the application in 2010 ("Decision"). (A-89).

Hak's appealed the Commissioner's Decision to the AC. At the AC's 2010 hearing, the Commissioner and Hak's presented oral argument. (A-66). The AC, in its 2010 Decision and Order ("2010 Order"), completely adopted the Commissioner's findings of fact yet granted a conditional restaurant license, which does not exist under the Delaware Liquor Control Act ("Act"), on condition that Hak's provide a six month audit of its revenues; if Hak's did not have at least 60% of its sales derived from the sale of food, the conditional restaurant license would automatically revert to a taproom license. (A-61).

The Commissioner appealed the 2010 Order to the Superior Court. Following briefing by the Commissioner and Hak's, the Superior Court remanded the case to the AC because the Court was unable to determine whether the 2010 Order "proceeded upon a correct theory of law, or whether its findings are based upon competent evidence." *Office of the Commissioner v. Appeals Commission and Lex-Pac, Inc.*, 2011 WL 285597, at *3 (Del.Super. Jan. 19, 2011). On remand and the same record, the AC issued its 2011 Order, which revised its findings of fact and granted a conditional restaurant license. (A-53).

SUMMARY OF ARGUMENT

1. The Commissioner has police and regulatory powers under Article II, § 1 of the Delaware Constitution of 1897 and the Delaware Liquor Control Act (“Act”) and represents the public interest over the highly-regulated alcoholic liquor industry when determining licensing issues, for the effective control of alcoholic liquors within the State and thus, has standing to appeal an order of the Appeals Commission. The Superior Court legally erred when it dismissed the Commissioner’s appeal for lack of standing. Contrary to normal standards of administrative law, the Superior Court’s decisions effectively eliminate judicial review of the administrative decisions of the Appeals Commission.

2. The Appeals Commission’s 2011 Order is contrary to law, in that it (i) granted a conditional restaurant license which does not exist under the Act, (ii) created a reversionary-interest in a taproom license at the end of a six-month conditional period, (iii) improperly focused on income stream, weighed the evidence, substituted its own judgment for the Commissioner’s, and shifted the burden of proof to the Commissioner, when it had no authority to do so under 4 *Del.C.* §§ 301, 304, or 541, and (iv) adopted an unsubstantiated legal argument outside of the record as a factual finding.

STATEMENT OF FACTS

The State of Delaware delegated its police and regulatory powers to the Commissioner for controlling the manufacture, sale, distribution, and importation of alcoholic liquors within the State. Article II, §1, Delaware Constitution of 1897; Delaware Liquor Control Act, 4 *Del.C.* Ch. 101 *et seq.* (“Act”). Under the Act, and in accordance with the Delaware Administrative Procedures Act (“APA”), the Commissioner has regulatory authority, in relevant part, to: (a) promulgate rules with the force and effect of law that focus primarily on public safety and the consumer’s best interests; (b) control the manufacture, purchase, possession, sale and delivery of alcoholic liquors by those licensed; and (c) determine and publish standards for the manner in which a hotel’s, restaurant’s or club’s dining room must be equipped to exercise the privilege of the sale of alcoholic liquors therein, and examine proposed plans or premises for a dining room and authorize their use in connection with a license to sell alcoholic liquors. 4 *Del.C.* §§ 304(a)(1), (a)(3), (a)(6). In addition to this regulatory role, the Commissioner also has a distinct, quasi-judicial role, in resolving disputes between an applicant or a licensee and another party, determining violations by licensees and deciding whether to grant, deny, cancel or transfer a liquor license.

The Commissioner must be sufficiently educated and experienced to carry out the duties of the Act, is appointed by the Governor and serves at his pleasure,

and has discretion to name a Deputy Commissioner. 4 *Del.C.* § 301. Unlike the Commissioner, the AC is not required to be appropriately educated or experienced, and has no express authority under the Act to adopt rules; control the purchase, possession and sale of alcoholic liquors; grant, refuse or cancel liquor licenses; or determine standards for the manner in which alcoholic liquors are sold. 4 *Del.C.* §§ 301, 304(b). The AC's authority is very limited to reviewing an appeal on the record created before the Commissioner and, in accordance with the APA, affirming, reversing, or modifying the Commissioner's decision. 4 *Del.C.* § 304(b).⁴ The three members of the AC are appointed by the Governor and serve at his pleasure. 4 *Del.C.* § 301(b).⁵

The powers and duties set forth in § 304 have not materially changed over the years, though the players have. Effective 2000, the Delaware General Assembly created the position of the Commissioner, in place of the former, five-member Delaware Alcoholic Beverage Control Commission ("DABCC"). 72 Laws 2000, ch. 486. A comparison of the powers and duties of § 304 under the positions of the Commissioner and DABCC shows no significant changes to the

⁴ Former § 541(c) provides the Superior Court may remand an appeal to the AC for taking additional evidence.

⁵ The Delaware Department of Safety and Homeland Security ("DSHS") oversees the Division of Alcohol and Tobacco Enforcement. 29 *Del.C.* § 8204. The Commissioner is not listed under DSHS. 29 *Del.C.* Ch. 82. Only the Personnel Section of DSHS provides personnel services and other necessary support services for the Commissioner's office and the AC. 4 *Del.C.* § 303.

authority and role of these positions in regulating the liquor industry in Delaware. 72 Laws 2000, ch. 486, § 7; 59 Laws 1973, ch. 107, §§ 4-7; 38 Laws 1933, ch. 18, §§ 5, 27, 35. The General Assembly also added a limited review process before the AC, but did not change the regulatory authority and powers under § 304 that rest with the former DABCC, the Commissioner or Acting Commissioner. 72 Laws 2000, ch. 486, *supra*; 4 *Del.C.* §§ 301, 304(b).⁶ The Commissioner retains police and regulatory power over the sale and distribution of alcohol in Delaware. 4 *Del.C.* § 304(a).

Where an application for a change in the type of liquor license is not protested, as in the present case, the Commissioner may, in his discretion, decide the application on the record submitted by the applicant or hold a hearing. 4 *Del.C.* § 541(a).⁷ If an unprotested application fails to satisfy the requirements of the Act, the Commissioner can propose to deny the application and afford the applicant an opportunity for a hearing, before issuing a case decision. 29 *Del.C.* Ch. 101, subch. III. Following any additional evidence from an applicant, the

⁶ Based upon the statutory language and as argued *infra*, the Commissioner believes the right of appeal before the AC under § 304(b) is limited to a protested application where the Commissioner functions in a quasi-judicial role.

⁷ An applicant for a liquor license or change in the type of liquor license must advertise its application to afford the public with notice of the proposed liquor business and an opportunity for the intended public to protest the application. 4 *Del.C.* §§ 524, 541. Where an application is timely protested, the Commissioner must hold a hearing where the applicant and protestors present evidence, and based upon the evidence in the record, the Commissioner issues a case decision. 4 *Del.C.* § 541; 29 *Del.C.* § 10128.

Commissioner then issues his case decision. (A-89, 94). This process was followed in the present case. (*Id.*).

The Act sets forth the types of liquor licenses available in Delaware and their fees. 4 *Del.C.* §§ 554(a), 554(g).⁸ An applicant seeking a liquor license has the burden of persuading the Commissioner that it satisfies the requirements of the Act and the Commissioner's regulations.

The necessary attribute of a restaurant is that it operates principally for the purpose of serving complete meals to persons for consideration. 4 *Del.C.* § 101(34). To accomplish this, an applicant must have, among other items, seating at dining tables for 35 or more persons and suitable kitchen facilities for cooking an assortment of foods under the charge of a chef or cook. *Id.*⁹ An applicant must also show specific floor space, complete meal service, and income-distribution requirements. 4 *Del.C.* §§ 543(b)(8), (b)(9). Moreover, §§ 543(b)(8)-(b)(10) vest the Commissioner with authority to determine the "primary purpose" of a proposed licensee, to issue the appropriate license under the statute, and provides a non-exclusive list of factors the Commissioner must consider in making that determination including, but not limited to, the establishment's floor plan, the

⁸ There is no designation for a "conditional restaurant license."

⁹ A "meal" for a restaurant and hotel means "the normal meals provided at breakfast, lunch and dinner, offered from menus consisting of, but not limited to, breakfast foods, soups, appetizers, entrees, salads, vegetables, desserts and beverages other than alcoholic." Commissioner Rule No. 19(F).

number and sizes of bars on a proposed premises, and the number of employees and their function. Persons under the age of 21 years can enter a restaurant.

A taproom has a wholly different principal purpose: it is “operated primarily for the sale by the glass and for consumption on the premises of alcoholic liquors with the sale of food as a secondary object as distinguished from a restaurant where the sale of food is the primary object.” 4 *Del.C.* § 101(40). Persons under the age of 21 years, including patrons and employees, are prohibited from entering and being in a taproom. 4 *Del.C.* § 904(d). In addition, a taproom as an existing license of the same type, is prohibited from being located within nine-tenths of a mile of another taproom. 4 *Del.C.* § 543(d).

Hak’s filed an application with the Commissioner in June 2008, which it supplemented with additional and updated information through mid-April 2009, for another change of the type of its liquor license, from a taproom to a restaurant (“application”). (A-94, 98).¹⁰ Hak’s candidly admitted its motive for applying for the change was to have the ability to employ minors as dancers as it could not “do so with its current [taproom] license.” (A-100). The Commissioner concluded the application showed that Hak’s would likely be *less* characteristic of a restaurant, when compared to its 2000 application to become licensed as a restaurant, as the

¹⁰ In 2000, Hak’s applied for and was granted a restaurant license by the former DABCC. In 2001, Hak’s applied for and was granted a change of liquor license type, from a restaurant to a taproom. Hak’s was charged with and later pled guilty in May 2008 to allowing persons under the age of 21 years –female employee dancers – in the licensed taproom. (A-89).

application showed: (a) a 16% increase in bar seats (from 30 to 35) with an 11% decrease in dining seats (from 132 to 118); (b) the proposed floor plan added a second large stage surrounded by a bar and a booth for a disc jockey; (c) the proposed floor plan also featured couches not conducive to dining and clearly intended to accommodate “personal couch dances;”¹¹ (d) the proposed menu had reduced offerings compared with the proposed restaurant menu in 2000, with a 20% decrease in entrees, 25% decrease in sandwiches, 67% decrease in salads, and a 25% decrease in desserts. (A-94). The Commissioner concluded these items demonstrated the primary purpose of the business was entertainment, not providing complete meals. (A-96-97); 4 *Del.C.* §§ 101(7), 101(35).

The Commissioner proposed to deny the application and afforded Hak’s an opportunity for a hearing, to present additional evidence in further support of its application, and to refute the Commissioner’s intent to deny. (A-97). Like any unprotested applicant, Hak’s had the burden of persuasion and production. Despite the opportunities and its burdens of proof, Hak’s neither submitted additional evidence nor requested a hearing. (A-93).

The Commissioner issued his case decision in January 2010 (“Decision”), denying the application to change license type from a taproom to a restaurant,

¹¹ Hak’s submitted floor plan failed to provide any dimensions, as required by Commissioner Rule 42. Presuming it had been drawn to scale, the Commissioner estimated that it appeared 45% of the floor space was utilized for alcohol and/or entertainment, with only 55% utilized for food preparation, service and consumption. (A-99).

concluding the evidence showed the primary purpose of the premises was entertainment and not providing complete meals: (a) there was no evidence by Hak's of a new business plan to increase food sales; (b) the licensee's floor plan when previously licensed as a restaurant was questionable, but the proposed floor plan was an even greater departure from a restaurant floor plan; (c) the evidence lessened the probability of an increase of projected gross sales to more than 60%, given that its menu decreased, the number of dining seats decreased, the number of bar seats increased, and a second bar and stage were added; and (d) Hak's anticipated sale of food would "likely make up more than 60% of its gross sales" but the Commissioner expressly found Hak's "projection not believable, especially when the motive for the assertion is to allow the applicant to hire persons under the age of 21, which could not occur absent such a projection." (A-89-92).

Hak's appealed the Decision to the AC, which held a hearing in March 2010, at which the Commissioner and Hak's presented argument. (A-66). Despite there being absolutely no factual evidence in the record about this, Hak's argued -- which the AC adopted as a factual finding -- that the Commissioner conditions the award of restaurant licenses upon the requirement that eight months after the license has been awarded, the applicant verify that the projections made before the license issued were in fact accurate. (A-62, 76). The AC's 2010 Order also adopted the Commissioner's factual findings in total, yet granted Hak's a

“conditional restaurant license.” (A-62, 63). The Commissioner appealed the 2010 Order to Superior Court which, after briefing by Hak’s and the Commissioner, remanded the matter to the AC because the Court was unable to determine whether the 2010 Order “proceeded upon a correct theory of law, or whether its findings are based upon competent evidence.”¹²

The AC issued an Amended Decision and Order (“2011 Order”), granting a conditional restaurant license and on the same record, adopted its own factual findings, stating in relevant part: (1) neither § 101(34) nor Rule 19 impose any requirements for floor plans; (2) the AC determined, under § 543(b)(8), that the Commissioner’s Decision concluded that 45% of the floor space was used for alcohol and entertainment and 55% was used for food prep, which the AC opined was a substantial amount, and the record did not include any substantial evidence to the contrary; (3) under § 543(b)(9), the Commissioner’s reliance on the reduced number of menu items -- which the AC weighed as minor -- did not support the Commissioner’s conclusion that the sales of complete meals would not represent a substantial portion of Hak’s total gross receipts and believed it was contradicted by

¹² During the 2010 appeal, Hak’s requested a restaurant license be issued. Because an individual premises cannot be licensed under two types of liquor license, the Commissioner informed Hak’s that he could not issue a restaurant license until Hak’s surrendered the existing taproom license (A-6). Hak’s claimed it surrendered the taproom license under a “reservation of rights,” however, the Commissioner informed there was no authority to recognize a surrendered license under a “reservation of rights” and based upon this, a restaurant license was issued to Hak’s. (A-6).

a single letter dated April 17, 2009 that offered Haks would expand its menu sometime in the future and increase its hours of operation; and (4) despite there being no factual evidence in the record, the AC adopted an argument as a finding of fact that the Commissioner conditions a restaurant license award subject to an applicant verifying that projections made before the license issued were in fact accurate. (A-53).

On the Commissioner's appeal of the AC's 2011 Order, the Opinion and Order, dated July 18, 2013, of the Superior Court Commissioner ruled that the Commissioner lacked standing to bring the appeal. (A-32). Similarly, the Superior Court Order, dated January 31, 2014, upheld the dismissal. (A-15). The Commissioner appeals the Superior Court decisions.

ARGUMENT

I. THE OFFICE OF THE DELAWARE ALCOHOLIC BEVERAGE CONTROL COMMISSIONER CHARGED BY THE GENERAL ASSEMBLY TO EXERCISE DELAWARE'S POLICE POWERS TO REGULATE THE BUSINESS OF ALCOHOLIC LIQUORS WITHIN THE STATE POSSESSES STANDING TO REPRESENT THE PUBLIC INTEREST IN THE APPELLATE REVIEW OF A LICENSING DECISION.

I.(a) Questions Presented

Whether the Superior Court's Opinion and Orders dismissing the Commissioner's appeal on the basis that his position lacks standing to appeal an order of the Appeals Commission is free of legal error? This question was preserved below. (A-12, 13).

I.(b) Standard and Scope of Review

"Whether the Superior Court correctly interpreted the applicable standing provisions at issue is a question of law, which this Court reviews *de novo*." *Broadmeadow Investment, LLC v. Delaware Health Resources Bd., et al.*, 56 A.3d 1057, 1059 (Del. 2012)(citing *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927 (Del. 1982)).

I.(c) Merits of Argument

The Commissioner has standing to appeal the AC's 2011 Order under the State's police and regulatory powers afforded by Article II, § 1 of the Delaware Constitution of 1897, the Act, the APA, and Delaware case law. The Superior

Court erroneously construed the law by not correctly distinguishing the Commissioner's separate regulative and quasi-judicial roles. In so ruling the Court below prevented the Commissioner from representing the public interest in the licensing process. A construction of the Act that limits the right of appeal to only an applicant, licensee or protestor, and not the position of the Commissioner, is contrary to the Commissioner's regulatory role delegated by the State, and to customary administrative law principles. "Serious concerns would be raised by a statutory scheme that created an adversarial administrative proceeding but only permitted an appeal by one category of adversary, e.g., the losing applicant." *Broadmeadow*, 56 A.3d at 1062. The Superior Court's reliance on cases involving an administrative body's quasi-judicial role is misplaced because the procedural posture is not analogous.

- (i) The Superior Court erred in not correctly distinguishing the Commissioner's distinctive regulatory and quasi-judicial roles.

The General Assembly saw fit to delegate the Commissioner's regulatory authority only to an Acting Commissioner. 4 *Del.C.* § 301. The AC has not been delegated this regulatory authority, and the Act shows *no* delegation of any authority from the Commissioner to the AC, contrary to the Superior Court's orders. 4 *Del.C.* §§ 301, 304, 541.

The State delegated its police powers for regulating the alcoholic liquor industry in Delaware to the position of the Commissioner. Art. II, § 1, Delaware

Const. of 1897; 4 *Del.C.* Ch. 101 *et seq.* “A license to sell alcoholic liquor is ... a mere temporary permit issued under the authority of the State in the exercise of its police power to do that which otherwise would be unlawful.” *Darling Apartment Co. v. Springer*, 22 A.2d 397, 401 (Del. 1941). The Commissioner’s regulatory authority includes the power to promulgate rules with the force and effect of law, that must focus primarily on public safety and the consumer’s best interests. 4 *Del.C.* § 304(a)(1). Further, the Commissioner has authority to control the purchase, possession, and sale of alcoholic liquors by those licensed. 4 *Del.C.* §§ 304(a)(3), (a)(4). An applicant for a liquor license has the burden of proof and persuasion to the Commissioner for satisfying the requirements of the Act.

Administrative agencies, such as the Commissioner, serve two distinct roles, regulatory and quasi-judicial. *Robbins v. Glenn Deaton, Inc.*, 1995 WL 108888, at *2 (Del.Super. Feb. 6, 1996):

[A]dministrative boards sometimes stand in a different category *because while they perform quasi-judicial functions they often represent the public’s interest in the matter in controversy and therefore are properly a party to the dispute on appeal. This principal was recognized even in the absence of specific statutory authority in Rommell v. Walsh*, 15 A.2d 6, 9 (Conn. Supr. 1940), where Chief Justice Maltbie said:

In some appeals from administrative boards the question at issue is of consequence only to certain parties who will be directly affected, ... In other cases, however, there is a definite public interest to be protected. This is true, for instance, of many orders of the public utilities commission, and is

particularly true with respect to zoning regulations. In appeals of this type, the public interest should be represented.

(emphasis added). In *Robbins*, Judge Terry concluded the Unemployment Insurance Appeals Board, as trustee of unemployment compensation monies, had a duty to see the monies were spent for the public purposes authorized by the State's laws. *Id.* at *3. Similarly, the Commissioner fulfills a regulatory capacity under the State's police powers, in which this position represents the public interest over the highly-regulated alcoholic liquor industry and has a duty to ensure applicants and licensees satisfy the requirements of the Act. The position of the Commissioner must perform its regulatory duties as authorized and delegated by the General Assembly and the Governor. 4 *Del.C.* § 304; *Cebrick v. Peake*, 426 A.2d 319, 320 (Del. 1981).

The Commissioner also has a distinctive, quasi-judicial role, where he resolves disputes between liquor applicants, licensees and other parties, such as the Division of Alcohol and Tobacco Enforcement or neighboring residents, 4 *Del.C.* §§ 304(a)(5), 401, 541(a), or grants, refuses, cancels or transfers liquor licenses. 4 *Del.C.* § 304(a)(4). In doing so, the Commissioner decides upon applications for new licenses or change of license type under 4 *Del.C.* Ch. 5 which, to be granted, must still satisfy the requirements of the Act in the Commissioner's discretion.

The present case involves the Commissioner's regulatory role of denying an unprotested application that did not satisfy the Act; thus, the right of appeal set forth in §§ 544 and 541 applies:

If an application is not timely protested, but the Commissioner determines that the application should nevertheless be denied, the Commissioner shall render the decision promptly in writing. The Commissioner's decision shall be final and conclusive unless, within 30 days after notice thereof has been mailed by the Commissioner's office, the *applicant* files an appeal in the office of the Commissioner. The appeal shall follow the procedure outlined in § 541 of this title.

(emphasis added). Section 544 affords an applicant the ability to file, in the Commissioner's office, an appeal of the Commissioner's denial of its application to the AC. Section 541 states that a "party to such hearing" before the AC can then file an appeal of the AC's decision to the Superior Court where an unprotested application is denied by the Commissioner:

The decision of the Appeals Commission *shall be final and conclusive unless*, within 30 days after notice thereof has been mailed by the Appeals Commission, *a party to such hearing files an appeal* in the Superior Court of the county within which the *applicant* sought a license. . . .

4 *Del.C.* § 541(c) (emphasis added). Section 541 does not state "an *applicant* files an appeal in the Superior Court . . ." Under principles of statutory construction, "[t]he use of different terms within similar statutes generally implies that different meanings were intended." *Ins. Comm'r. of the State of Delaware v. Sun Life Assurance Co. of Canada*, 21 A.3d 15, 22 n. 37 (Del. 2011) (citation omitted).

“When construing the provisions in a legislative enactment, this Court will attempt to harmonize them to the extent possible. This is accomplished by reading the statutory provisions *in pari materia*.” *Broadmeadow*, 56 A.3d at 1061.

The use of different terms, “a party to such hearing” and “applicant” in §§ 541 and 544, suggests that a party other than an applicant is intended and could file an appeal of a denied, unprotested application. Aside from the applicant, there is no other party in an unprotested application except the Commissioner. The General Assembly intended that, in the scenario of an unprotested application denied by the Commissioner, as in the present case, someone other than an applicant can appeal to the Superior Court. Given the regulatory responsibility of the Commissioner’s position, including his role as public advocate, and the statutory language of §§ 544 and 541, the Commissioner is a necessary party to a hearing before the AC and has standing under these sections to docket an appeal and contest the AC’s 2011 Order in Superior Court. Indeed, the language as to the AC’s decision being “final and conclusive ... unless” an appeal is filed suggests the General Assembly considered the AC’s decisions to be subject to further review, especially given the fact that it is the Commissioner’s position, not the AC, that has authority to issue and actually issues liquor licenses.¹³

¹³ “ ‘License’ means any license or permit to manufacture, to sell, to purchase, to transport, to import or to possess alcoholic liquor *authorized or issued by the Commissioner* under the provisions of Chapter 5 of this title.” 4 *Del.C.* § 101(23)(emphasis added). There is nothing in

This statutory interpretation is also consistent with the APA, which does not prohibit the Commissioner from filing an appeal and where a “party” includes each agency named or admitted in an agency proceeding as a party, or properly seeking and entitled as of right to be admitted as a party to a proceeding. 29 *Del.C.* § 10102(6). Contrary to the Superior Court’s reasoning that the APA did not expressly provide the Commissioner with a right of appeal (A-15, 32), this Court previously reasoned otherwise, concluding the APA did not bar the former DABCC, as the public advocate, in appealing from Superior Court to this Court. *Cebrick*, 426 A.2d 319 (Del. 1981). While the APA is silent on the right of the former DABCC and the Commissioner to appeal, *this* Court has granted DABCC standing to appeal as a party in a licensing case. *Cebrick*, 426 A.2d at 320. Notably, the Commissioner was admitted before the AC in March 2010 and presented oral argument against Hak’s, and also appeared before the AC in August 2011. (A-6, 66). *Trone, et al. v. Delaware Alcoholic Beverage Control Comm.*, 2000 WL 33113799, at *3 (Del.Super. Dec. 28, 2000).

- (ii) The public interest should be considered in the judicial review of administrative practice.

It defies logic and reason to grant the position of the Commissioner, with authority to regulate the alcohol industry, a right to be heard before the AC, but

the Act that gives the AC authority to order the Commissioner to do anything. 4 *Del.C.* §§ 304, 541.

subsequently deny the Commissioner an opportunity for judicial review. *Broadmeadow*, 56 A.3d at 1061-1062. In that case, this Court rejected the Superior Court's decision that allowed the "general public's" right to be heard at the administrative level but denying the opportunity for judicial review. *Id.* The Superior Court's Orders in the present case preclude judicial review of the AC's orders involving the Commissioner's denial of unprotested applications, contrary to the statutory language of 4 *Del.C.* § 541 and this Court's reasoning in *Broadmeadow*.

The former DABCC has been recognized historically as having standing to appeal from a Superior Court ruling adverse to the DABCC's ruling. *Cebrick v. Peake*, 426 A.2d 319 (Del. 1981). This Court reached this conclusion based upon its consideration of historical precedent of appeals by the DABCC; the APA did not bar the DABCC from appealing; an implied adversarial relationship between the DABCC and an applicant who's application had been denied; and, the practical reality that an applicant denied a liquor license would be without party opposition on appeal if there were no protestors before the DABCC.¹⁴ *Id.* at 320. The

¹⁴ In addition to *Cebrick*, the DABCC filed other appeals. *See, e.g., Delaware Alcoholic Beverage Control Comm. v. Mitchell*, 196 A.2d 410 (Del. 1963) (DABCC appealed Superior Court's reversal of DABCC Order); *Delaware Alcoholic Beverage Control Comm. v. Alfred I. duPont Sch. Dist.*, 385 A.2d 1123 (1978) (DABCC appealed Superior Court reversal of DABCC's decision, post-enactment of APA). There is no similar historical precedence for the Commissioner, as this case is the Commissioner's first appeal of an order of the AC. *Office of the Commissioner v. Appeals Comm., et al.*, 2011 WL 285597 (Del.Super. Jan. 19, 2011).

DABCC had standing to appeal from a reversal of its regulatory decision, in representing the public interest. *Id.*; see also *Liborio II, L.P. v. Artesian Water Company, Inc.*, 621 A.2d 800, 803-804 (Del.Super. 1992)(holding that Public Service Commission was necessary party to appeal given its significant regulatory authority).

Broadmeadow and *Cebrick* provide settled law to guide this Court. This Court's reasoning in *Cebrick* is good law and still applies after the 2000 legislative changes, as those changes did not modify any of the police powers or regulatory authority of the former DABCC, which rest with the position of the Commissioner. 4 *Del.C.* §§ 301, 304, 543. Neither the Act nor the APA prohibits the Commissioner from taking an appeal. *Cebrick, supra*, at 320. When amending the Act and the APA in 2000, had the General Assembly intended for the Commissioner to be barred from participating in an appeal to the AC or taking an appeal to the Superior Court, it could have included such language in the Act or the APA. It chose not to. See, e.g., *One-Pie Investments, LLC v. Jackson*, 43 A.3d 911, 915, n.12 (Del. 2012)("legislative language is interpreted on the assumption that the legislature was aware of existing judicial decisions."). Further, there is no entity in the present case other than the Commissioner to represent the public interest for ensuring compliance with the Act before the AC and the Courts. *Cebrick, supra*. The AC has no authority to do so. 4 *Del.C.* §§ 301, 304(b). Unless

the Commissioner has standing, Hak's appeal to the AC would be unopposed, thereby rendering the appeal process and the differing language at §§ 544 and 541 meaningless and allow the AC's decisions to not be subject to review by the courts. *Broadmeadow, supra; Cebrick, supra.* (A-42-51).

- (iii) The Superior Court's reliance on cases concerning an administrative body's quasi-judicial role is misplaced.

The Superior Court erred in dismissing the Commissioner's appeal, confusing the Commissioner's dual roles. The Superior Court incorrectly relied on cases that concern an administrative agency's quasi-judicial role, which have no relevance in the present case. (A-32). The Commissioner's regulatory role is distinctive from his quasi-judicial role.¹⁵ The Commissioner in the present case rendered a legal decision on the legal sufficiency of Hak's license application, deciding it did not meet the requirements of the Act. This is primarily a regulatory role, representing the public interest.¹⁶

¹⁵ When sitting as a quasi-judicial tribunal, the Commissioner's interest in an appeal of his decision is governed by *Wilmington Trust v. Barron*, 470 A.2d 258, 261-62 (Del. 1983). With this said, however, the Commissioner does not concede that his position does not have authority or an interest to participate in a case where there are two private, adverse parties, such as with a protested application. In *Nischay, Inc. v. Alcoholic Beverage Control Appeals Commission, John H. Cordrey and Limestone Liquors, Inc.*, 2011 WL 1743976 (Del.Super. March 16, 2011), the appeal concerned the Commissioner's decision, in his quasi-judicial role, of the protested applications of two package store applicants vying essentially for the same geographic area to open their respective stores. Had the AC ordered in *Nischay* for the Commissioner to issue a "conditional package store license," the Commissioner in his regulatory role, would have standing to appeal the AC's decision because it is contrary to the Act.

¹⁶ The position of the Commissioner possibly exercises a quasi-judicial role derivative solely in his authority to grant or deny a liquor license.

The appeal procedure for a quasi-judicial decision by the Commissioner, as in *Nischay*, is outlined scantily in § 304(b):

(b) The Commissioner's decision shall be final and conclusive unless, within 30 days after notice thereof has been mailed by the Commissioner's office, *a party to such hearing files an appeal* in the office of the Commissioner. Upon receipt of the appeal, the Commissioner shall cause the Chairperson of the Appeals Commission to be advised of the pending appeal and the Chairperson shall cause the Commission to be convened with at least 20 days notice *to all parties*. . . .

4 *Del.C.* § 304(b) (emphasis added). Unlike the language of § 544, there is no language in § 304(b) that restricts or limits this provision to a particular type of application (e.g., unprotested application) or decision of the Commissioner (e.g., denial). Also, given the phrase "to all parties," § 304 speaks, at least by inference, to a party's appeal from a decision in the Commissioner's quasi-judicial role and arguably, limits the jurisdiction of the AC to appeals from quasi-judicial decisions of the Commissioner.

The Superior Court erroneously relied upon *Nischay*, which fleetingly described the appeals procedure to the AC as "internal." (A-39). The word "internal" is not in the statutory provisions of § 304(b) or former § 541, and is merely a minor characterization in that case and should not have been afforded any weight by the Superior Court. (A-32). "The courts may not engraft upon a statute ... language which has been clearly excluded there-from by the Legislature."

Alfieri v. Martelli, 647 A.2d 52, 54 (Del. 1994). Where a “law expressly describes [a] particular situation to which it [applies], an irrefutable inference must be drawn that what is omitted or excluded was intended to be omitted or excluded.” *Fantasia Restaurant & Lounge, Inc. v. New Castle County Bd. of Adjust.*, 735 A.2d 424, 430 (Del.Super. 1998).

Similarly, the Superior Court erroneously relied upon *Ropp v. King*, 2007 WL 2198771 (Del. Ch. July 25, 2007), which concerned a completely different statutory scheme and authority. (A-39). In *Ropp*, the Securities Commissioner, pursuant to Section 103 of the Rules and Regulations of the Delaware Securities Act, specifically designated a Deputy Attorney General as an administrative Hearing Officer to hear and decide an administrative complaint brought by the Division of Securities for the State’s Department of Justice. The order of the Securities Commissioner that delegated his authority expressly provided that the Hearing Officer would have all powers and duties as possessed by the Securities Commissioner and, further, any order issued by the Hearing Officer would serve as an order of the Securities Commissioner for purposes of judicial review. *Ropp*, 2007 WL 2198771, at *1. After an evidentiary hearing, the Hearing Officer issued an opinion and order dismissing the Securities Division’s charges as without merit. The Securities Commissioner filed an appeal of the Hearing Officer’s decision to the Court of Chancery. Applying principles of statutory construction, the Court of

Chancery determined the statutory language of “person aggrieved by an order of the Commissioner” did not support the Securities Commissioner’s right to appeal.

Reliance on *Ropp* was erroneous as that case is factually and legally distinguishable from the present case. Unlike *Ropp*, the Commissioner did not delegate any authority or power to the AC and indeed, the statutory language of the Act supports this. The General Assembly, when amending the Act, expressly determined that an Acting Commissioner, either through a Governor’s appointment or the Commissioner’s incapacity, removal, resignation or death -- not the AC -- would have all of the Commissioner’s powers and perform all the duties and functions of the Commissioner during the Commissioner’s absence or incapacity or until a successor commissioner was appointed. 4 *Del.C.* § 301(c). There is no provision under the Act that shows the General Assembly delegated the Commissioner’s powers, duties and functions to the AC. Rather, the General Assembly decided the AC’s authority is very limited. 4 *Del.C.* § 304(b). Had the General Assembly intended for the AC to possess the Commissioner’s powers and functions, it could have expressly made this delegation in the Act. It did not.

The members of the AC, which are appointed by and serve the Governor, hear appeals of the Commissioner’s decisions on the record. 4 *Del.C.* §§ 304(b), 541, 544. Section 544 expressly provides that an applicant whose unprotested application has been denied by the Commissioner can file an appeal in the

Commissioner's office. The appeal procedures of § 541 then apply, which provide that "a party to such hearing" – not simply the "applicant" -- can take an appeal of the AC's decision to the Superior Court. The Superior Court's Orders overlook this statutory language and principles of statutory construction and allow for an appeal that is one-sided – by only the applicant – which is inconsistent with this Court's decisions in *Broadmeadow, supra*, and *Cebrick, supra*.

To conclude, the State's police powers, the Act, the APA, case law, and principles of statutory interpretation demonstrate that the Delaware General Assembly fully intended that the Commissioner, in his regulatory, public advocate role to ensure compliance with the Act, possesses authority to prosecute appeals.

II. THE APPEALS COMMISSION'S 2011 ORDER IS CONTRARY TO THE LAW.

II. (a) Questions Presented

Whether the 2011 Order of the Appeals Commission is legally erroneous in that it ordered a type of liquor license not found in the Act, created an automatic reversionary interest in another type of liquor license, weighed the evidence, and adopted, as a finding of fact, an argument made and unsupported by any evidence in the record before the Commissioner? This question was preserved below but not decided. (A-6).

II.(b). Standard and Scope of Review

In the interests of justice, the merits of the appeal of the 2011 Order should be addressed by this Court, as the merits were fully briefed below in 2012, before the issue of standing was first raised. Supr.Ct.R. 8. The merits of the appeal are outcome determinative, would have significant implications for future cases, and this Court's consideration of the merits will promote judicial economy. *Sandt v. Delaware Solid Waste Auth.*, 640 A.2d 1030, 1034 (Del. 1994); *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.13d 665, 679 n.40 (Del. 2013)(citing *Sandt*).

"This Court's review of an administrative agency's decision is the same as the court below." *Kopicko v. Dept. of Servs. For Children, Youth and their Families*, 846 A.2d 238, 2004 WL 691901, at *2 (Del. 2004). To survive appeal,

the 2011 Order must be supported by substantial evidence and must not be the product of an error of law. 4 *Del.C.* § 541(c). “Substantial evidence” has been defined as “more than a scintilla but less than a preponderance” to support the factual findings and as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Standard Distributing, Inc. v. Hall*, 897 A.2d 155, 158 (Del. 2006). The reviewing court must find that the discretionary act “was unreasonable and the ground upon which it was based or reason shown therefore was clearly untenable.” *Caras v. Delaware Liquor Comm.*, 90 A.2d 492, 494 (Del.1952).

II.(c) Merits of Argument

The Appeals Commission (“AC”) may only hear appeals on the record from the Commissioner’s decisions, and may “affirm, reverse or modify the decision of the Commissioner.” 4 *Del.C.* §§ 304(b), 544, 541. The AC has no authority to fashion equitable remedies, including prospective remedies. *Id.* The AC’s 2011 Order is legally erroneous in that it: (i) granted a conditional restaurant license, when no such license exists under the Act; (ii) granted a reversionary interest in a taproom license if the conditional restaurant license was not satisfied; (iii) weighed the evidence and substituted its decision for the Commissioner’s with respect to its opinions that the floor plan devoted a substantial amount of floor space to the preparation of food and the significant decrease in various menu items was minor,

and rejected the Commissioner's credibility determination as to Hak's projected sales of food to alcohol sales being not believable; and (iv) accepted legal argument by Hak's, that was not part of the evidentiary record before the Commissioner, as a finding of fact that the Commissioner conditions a restaurant license award subject to an applicant verifying that projections made before the license issued were in fact accurate. (A-59, 76).

Nowhere in the Act is a conditional restaurant license found. The Delaware General Assembly created 34 types of licenses and related fees under the Act. 4 *Del.C.* §§554, 512(i) and 554(jj). Section 554 makes no mention of a "conditional license" or any equivalent to a "conditional" as to the type of license. *Fantasia Restaurant & Lounge, Inc. v. New Castle County Bd. of Adjust.*, 735 A.2d 424, 430 (Del.Super. 1998)

Despite lacking authority, the AC authorized a new license not recognized under the Act, when it granted a "conditional restaurant license" for six months. (A-59, 63). It also granted prospective relief to Hak's, based on a future contingency, and created a reversionary interest in a liquor license by determining that if the condition of the temporary conditional restaurant license were met, the license would subsequently change into a regular biennial restaurant license, without any further action by the Commissioner and regardless of whether the applicant met other statutory or regulatory requirements for a restaurant. (A-59).

The 2011 Order points to no provision in the Act that authorizes a temporary license to change into a regular biennial license by operation of law based on a future, contingent event, which arguably is not competent evidence. (A-59); *see, e.g., Kiloski v. Pennsylvania R.Co.*, 96 F.Supp. 321 (D.Del. 1951)(future happenings are not facts and not capable of exact knowledge).

Moreover, the AC ordered an automatic revocation of the “conditional restaurant license” if Hak’s failed to meet the AC’s imposed condition, yet the Commissioner has no statutory authority to carry out this ordered action. (A-59). Only the Commissioner can, in response to a charge and not acting *sua sponte*, cancel a license if a licensee violates the terms of its license, such as failing to attain the appropriate ratio of gross income from applicable sources. 4 *Del.C.* § 561(b). The AC has no authority to confer this power upon the Commissioner.

The AC is limited to determining if the Commissioner’s decision was supported by substantial evidence in the existing factual record and reflects a correct interpretation of the law. In reviewing the Commissioner’s discretionary licensing decisions, the tribunal before which an appeal is heard must determine if the Commissioner’s judgment was arbitrary and capricious. *Kirpat, Inc. v. Delaware Alcoholic Beverage Control Comm.*, 1998 WL 731577, at *3 (Del.Super. Mar. 31, 1998). The 2011 Order fails to meet these requirements as the AC itself

weighed the evidence, substituted its own judgment for the Commissioner's, and reversed the Commissioner's Decision.

A trier of fact weighs the evidence, draws proper inferences from the evidence presented to him, and determines witness credibility. *Snyder v. Quicksilver Trucking*, 2007 WL 315337 (Del. Super. Jan. 31, 2007). The Commissioner concluded Hak's request to be licensed as a restaurant more likely than not failed to meet the Act's requirements for a restaurant and did not exhibit characteristics typical of a restaurant. (A-89). Yet, the AC independently weighed the same evidence, drew a completely different set of inferences from the facts -- without such authority -- and reached a different conclusion. (A-53). The AC substituted its determination of the weight and competence of the evidence for that of the Commissioner.

Further, the AC ignored the primary purpose of Hak's business, which is entertainment, and focused on income stream. (A-58). A restaurant license can be denied where a large portion of the clientele would be patronizing the entertainment portions of a proposed licensed premises rather than patronizing the premises for complete meals. *Pusey v. Delaware Alcoholic Beverage Control Comm.*, 1990 WL 128175 *1 (Del. Super. Aug. 30, 1990), *rev'd on other grounds*, 596 A.2d 1367 (Del. 1991). In the present case, the Commissioner also considered Hak's licensing history where it applied for a restaurant license in 2000, requested

a change of license to a taproom in 2001, and in 2008 – within a month after pleading guilty to having underage female dancers on the licensed taproom -- requested a change back to a restaurant license. (A-89). The constant factor throughout is the provision of live entertainment, which allows the inference that Hak's principal purpose is entertainment, even if its income stream is derived from the service of food and drink. *Pusey, supra*. From these facts, including Hak's history, the Commissioner's Decision and inferences were properly supported by the record. (A-89).

Despite the competent evidence found in Hak's applications and supporting documents, the AC focused on Hak's *anticipated* sales figures, thus failing to make "a logical and reasoned analysis of the evidence presented at the hearing," in its entirety, resulting in the absence of a rational basis for its decision. This rose to the level of an arbitrary and capricious decision. *Kowalski v. Unemployment Ins. Appeal Bd.*, 1990 WL 28597, at *10 (Del.Super. Jan. 22, 1990).

A reviewing tribunal "does not weigh the evidence, determine questions of credibility, or make its own factual findings." *Delaware Alcoholic Beverage Control Comm. v. Alfred I. duPont School Dist.*, 385 A.2d 1123, 1125 (Del. 1978). Yet, the AC inappropriately weighed the evidence and substituted its own judgment for the Commissioner's. In noting the Commissioner's reliance on Hak's reduced menu items, the AC instead viewed the reductions as minor. (A-58-

59). This is not the AC's purview. The Commissioner rightfully placed generous weight in the significant reductions of 67%, 25% , and 20%. *Alfred I. duPont School Dist., supra*. Further, by weighing this evidence and disagreeing with the Commissioner's afforded weight, the AC substituted its own judgment, which is not within its purview. Similarly, the AC relied heavily on Hak's April 17, 2009 letter that mentioned it would increase menu items and hours of operation, which also was not within the AC's purview. This letter and the decreased menu items are inconsistent evidence, which was for the Commissioner to resolve. *Id.*

The 2011 Order also incorrectly shifts the burden of proof to the Commissioner, by stating there was no substantial evidence in the record to contradict Hak's estimated 55% of the floor plan for food service or to determine said percentage is "substantial." (A-57-58). An applicant always has the burden of proving that it meets the statutory and regulatory requirements for a liquor license. Hak's submitted floor plan failed to provide any dimensions. Despite ample opportunity to present dimensions to the Commissioner, Hak's failed to do so.

Last, the AC adopted, as a factual finding, an argument by Hak's that was not in the record. Hak's argued the Commissioner allegedly conditions a restaurant license award subject to an applicant verifying that projections made before the license issued were in fact accurate. (A-59, 72). Even though this

argument was not supported by anything in the record, the AC nonetheless accepted this argument as an express factual finding. (A-59).

Based upon the above reasons, the 2011 Order is contrary to the law.

CONCLUSION

For the foregoing reasons, the Delaware Alcoholic Beverage Control Commissioner respectfully requests this Court reverse the judgment of the Superior Court that the Commissioner lacks standing to prosecute an appeal and either reverse the Appeals Commission's 2011 Order granting a conditional restaurant license or, alternatively, remand this matter to the Superior Court for the Commissioner's appeal to proceed on the merits.

Respectfully submitted,

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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Below, Office of the

Commissioner, Delaware Alcoholic

Beverage Control

Date: June 10, 2014

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Office of the Commissioner,)
Delaware Alcoholic Beverage Control,)
)
Appellant,)
)
v.)
)
Appeals Commission, Delaware Alcoholic)
Beverage Control, and Lex-Pac, Inc., d/b/a)
Hak's Sports Bar & Restaurant,)
)
Appellees.)

C.A. No.: 11A-09-008 JRJ

ORDER

Upon Appellant's Appeal from Superior Court Commissioner's
Opinion and Order: **AFFIRMED**

AND NOW TO WIT, this 31ST day of January, 2014, the Court having duly considered Appellant's timely appeal of the Superior Court Commissioner's Opinion and Order, the opposition and supplements thereto, and the record below, **IT IS HEREBY DETERMINED THAT:**

1. The procedural history for this case is disconcertingly long. Appellee, Hak's Sports Bar & Restaurant ("Hak's"), attempted to convert its liquor license

classification from a taproom to a restaurant in June 2008.¹ On January 15, 2010, the Delaware Alcoholic Beverage Control Commissioner (“ABC Commissioner”), denied Hak’s application.²

2. Hak’s appealed to the Delaware Alcoholic Beverage Control Appeals Commission (“the Commission”), which reversed the ABC Commissioner on May 3, 2010. The Commission issued an amended decision on August 24, 2011.³ The ABC Commissioner timely appealed the amended decision to the Superior Court.⁴

3. On March 2, 2012, this Court suspended its briefing schedule and ordered the parties to complete arbitration before a Superior Court Commissioner pursuant to the then-applicable 4 *Del. C.* § 541(c).⁵ Ultimately, on July 8, 2013, the Superior Court Commissioner heard oral argument on Hak’s Motion to Dismiss,⁶ thereby canceling the scheduled July 2013 arbitration hearing.⁷

4. The Superior Court Commissioner issued an Opinion and Order on July 17, 2013, dismissing the appeal based on lack of standing.⁸ The Commissioner

¹ Commissioner’s Opinion and Order (“Order”), July 17, 2013, 11A-09-008, Trans. ID 53275679, at 2.

² *Id.* The Order does not discuss the reasons for the delay between Hak’s June 2008 application and the ABC Commissioner’s January 2010 ruling.

³ *Id.* at 3; *see also*, Notice of Appeal, Sep. 12, 2011, Trans. ID 39756592, at 2.

⁴ Order at 3;

⁵ Trans. ID 49181884.

⁶ Hak’s Ltr Br. in Support of Mtn. to Dism., May 21, 2013, Trans. ID 52401724.

⁷ Trans. ID 53153247.

⁸ Order at 1.

determined that the ABC Commissioner lacked statutory authority to appeal his own agency's ruling.⁹ The ABC Commissioner timely filed an appeal.¹⁰

5. The Court reviews a motion to dismiss ruling *de novo*.¹¹ Statutory construction rulings are also reviewed *de novo* to determine whether the Commissioner erred as a matter of law in formulating or applying legal concepts.¹²

6. The Delaware Alcoholic Beverage Control Commission is an administrative body ("ABC agency") created by statute.¹³ As such, the Commission is limited to the powers expressly authorized.¹⁴ In 2000, the State Legislature restructured the ABC agency, creating two tiers of review: the ABC Commissioner and the Commission.¹⁵ While this case has slowly progressed, the State Legislature has continued to fine-tune the new ABC agency structure.¹⁶

7. During this time, the Legislature amended the Delaware Administrative Procedures Act ("APA") to clarify, among other things, that the ABC Commission

⁹ *Id.* at 6-8 ("Absent express statutory authority, the court cannot sanction the practice of an agency seeking judicial review from its own decision.") (finding the ABC Commissioner's reliance on *Cebreck v. Peake*, 426 A.2d 319 (Del. 1981), misplaced because it involved the agency's prior structure).

¹⁰ Trans. ID 53356023. The Court informed the parties that, absent good cause, it was willing to conduct *de novo* review based upon the record. *See* Trans. ID 54407234. The ABC Commissioner requested full briefing and a hearing in order to present several additional arguments. *See* Trans. ID 54481543. Because the Court can only determine issues within its jurisdiction, for efficiency, the Court will review the sole issue of jurisdiction. *See Dover Historical Soc. v. Dover Plan. Comm'n*, 838 A.2d 1103, 1110 (Del. 2003); *O'Neill v. Town of Middletown*, 2006 WL 205071, at *7 (Del. Ch. Jan. 19, 2006) ("Before turning to the merits of the Plaintiffs' claims, the Court must first answer the threshold question of whether the Plaintiffs have the right to maintain this litigation.").

¹¹ *Leatherbury v. Greenspun*, 939 A.2d 1284, 1288 (Del. 2007).

¹² *Id.*

¹³ Order 6 (citing *Diamond State Liquors, Inc. v. Delaware Liquor Comm'n*, 75 A.2d 248, 253 (Del. Gen. Sess. 1950)).

¹⁴ Order 6 (citing *Retail Liquor Dealers Ass'n v. Delaware Alcoholic Bev. Control Comm'n*, 1980 WL 273545, at *3 (Del. Ch. Apr. 23, 1980)).

¹⁵ 4 Del. C. § 301 (2013).

¹⁶ *See* 2012 Delaware Laws Ch. 384 (S.B. 277).

is subject to the provisions set forth in the APA.¹⁷ The ABC Commissioner, not subject to the APA's restrictions, has broader power in order to fulfill his duties to the ABC agency.¹⁸ Yet, neither the APA nor the ABC statutes grant the ABC Commissioner the right to appeal a final decision of his own agency. The fact that the Legislature did not provide the ABC Commissioner that right is "indicative of legislative intent – especially because it is clear that the legislature knows how to provide for such [right of appeal] when it so desires."¹⁹

8. While constitutional due process protections authorize the Court to permit review of an agency's decision where the rights of a private party are affected,²⁰ the Court agrees with the Commissioner and will not extend a right to appeal in an agency with a two-tier review in place and the Legislature has not otherwise acted. The Court's unwillingness to extend the ABC Commissioner a right to appeal is reinforced by the Legislature's recent amendments to the ABC statutes clarifying the agency's processes, but not including a carve-out for appeals instituted by the ABC Commissioner.

¹⁷ See 29 Del. C. § 10161(a) (2012); See *Nischay v. Alcoholic Bev. Control Appeals Comm'n*, 2011 WL 1743976 (Del. Super. Mar. 16, 2011) (Herlihy, J.); *O'Neill*, 2006 WL 205071, at *11.

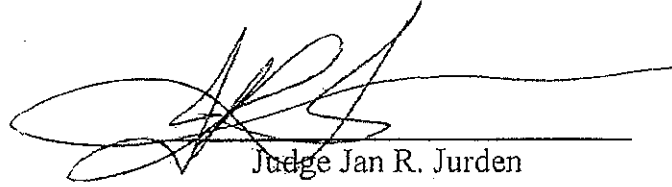
¹⁸ See 4 Del. C. § 304(a).

¹⁹ *O'Neill*, 2006 WL 205071, at *10. See also 19 Del. C. § 3320 ("Appeals to the [Unemployment Insurance Appeal Board] may be made by the parties ... as well as by the claims deputy whose decision is modified or reversed by an appeals tribunal.").

²⁰ See *O'Neill*, 2006 WL 205071, at *12; See also, *In re Halifax Paper Co.*, 131 S.E.2d 441 (N.C. 1963) ("Cases from other jurisdictions respecting the rights of public officials and administrative bodies to appeal from decisions of administrative agencies are in irreconcilable conflict. This is due to the great variety of statutory and constitutional provisions or lack of statutory authority. Usually no appeal is permitted in the absence of some statutory authority therefor. But where statutes exist permitting appeals by persons aggrieved, appeals by public officials and governmental units are usually allowed in cases involving questions of law[....]").

WHEREFORE, the Court finds that the Commissioner's well-reasoned Opinion and Order granting Appellees' Motion to Dismiss is free from legal error and is, therefore, **AFFIRMED**.

IT IS SO ORDERED.



Judge Jan R. Jurden



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

OFFICE OF THE COMMISSIONER,
DELAWARE ALCOHOLIC BEVERAGE
CONTROL,)

Appellant,)

v.)

APPEALS COMMISSION,
DELAWARE ALCOHOLIC BEVERAGE
CONTROL, and LEX-PAC, INC.)
d/b/a HAK'S SPORTS BAR &)
RESTAURANT,)

Appellees.)

C.A. No. 11A-09-008 JRJ

2013 JUL 17 PM 4:52
CLERK OF COURT

OPINION AND ORDER

In June 2008, Lex-Pac, Inc. d/b/a Hak's Sports Bar & Restaurant ("Hak's") applied for a change of its liquor license classification from a taproom to a restaurant. The application for the change of liquor license classification was made to Delaware Alcoholic Beverage Control Commissioner ("DABCC").

The DABCC is an administrative agency which has a two tier administrative process in place. The application for the change of liquor license classification first goes to the Commissioner of the DABCC who makes the decision whether to grant or deny the application. The Commissioner's decision is final unless the Commissioner's decision is appealed to the Appeals Commission of the DABCC.

In this case, the Commissioner of the DABCC denied Hak's application for the change of liquor license classification. Hak's appealed the Commissioner's decision to the Appeals Commission. The Appeals Commission reversed the Commissioner and granted Hak's a restaurant license.

The Commissioner of the DABCC has appealed the decision of the Appeals Commission of the DABCC to the Superior Court. Hak's filed a motion to dismiss, which the Appeals Commission joined, on the grounds that the Commissioner of the DABCC does not have standing to appeal the decision of the Appeals Commission of the DABCC.

For the reasons addressed herein, the court concludes that the Commissioner of the DABCC does not have standing to appeal its own agency's final decision, the decision of the Appeals Commission of the DABCC, to the Superior Court. Since the Commissioner does not have standing to appeal the Appeals Commission's decision to the Superior Court, Hak's motion to dismiss the Commissioner's appeal is granted.

PROCEDURAL HISTORY

In June 2008, Hak's submitted an application with the Commissioner of the DABCC seeking a change of its liquor license classification from a taproom to a restaurant. The Commissioner denied Hak's application for a change of license classification from taproom to a restaurant and issued his case decision on January 15, 2010.

Hak's appealed the Commissioner's decision to the Appeals Commission. By Order dated May 3, 2010, the Appeals Commission reversed the Commissioner's decision denying the restaurant license and granted Hak's a conditional restaurant license.

The Commissioner appealed the Appeals Commission's 2010 Order to the Superior Court. The Superior Court remanded the matter to the Appeals Commission to provide "further explanation" for the Appeals Commission's decision.¹ On August 8, 2011, the Appeals Commission issued an Amended Decision and Order providing "further explanation" as requested by the Superior Court. The Appeals Commission by its August 2011 Order again reversed the Commissioner's decision denying the restaurant license and again granted Hak's a conditional restaurant license.

The Commissioner appealed the Appeals Commission's August 2011 Order to the Superior Court. The appeal was taken on February 10, 2012.

At the time the appeal was taken, the governing statute required that the appeal be first decided by an arbitration conducted by a Superior Court Commissioner unless all the parties to the appeal agreed to bypass the arbitration.² The statute was amended, effective August 2012, eliminating the arbitration procedure.³ Arbitration was requested on the present appeal on March 2, 2012, prior to the legislative changes having taken effect. Since the legislative changes had not yet taken effect at the time arbitration was requested in the present appeal, it was decided that this appeal would proceed through arbitration.

During the course of the arbitration proceeding, Hak's filed the subject motion to dismiss seeking the dismissal of the Commissioner's appeal on the grounds that the Commissioner lacked standing to appeal its own agency's final decision.

¹ See, *Office of the Commissioner, Delaware Alcoholic Beverage Control v. Appeals Commission et al.*, 2011 WL 285597 (Del. Super. 2011).

² 4 Del. C. § 541(c) (prior to amendment of August 2012 as per 2012 Delaware Laws Ch. 384 (S.B. 277)).

³ See, 2012 Delaware Laws Ch. 384 (S.B. 277).

COMMISSIONER LACKS STANDING TO APPEAL

The issue presented herein is whether the Commissioner has standing to appeal the Appeals Commission's decision to the Superior Court. Without standing, the appeal is improper and the appeal should be dismissed.⁴ The Superior Court must have express statutory authority to assume jurisdiction over an appeal from an administrative agency.⁵

Understanding the structure of the DABCC is essential to the determination of this issue. The DABCC is the agency tasked by the General Assembly with ensuring the health, safety and welfare of the public by regulating the activities of the alcoholic beverage industry, pursuant to Title 4 of the Delaware Code.⁶

Prior to 2001, the DABCC was comprised of five commissioners.⁷ The Commission (comprised of the five commissioners) considered all applications for liquor licenses.⁸ The Commission's decision was final and conclusive unless a party to the hearing filed an appeal in the Superior Court.⁹

Beginning in July 2001, the General Assembly changed the structure of the DABCC. The DABCC is now comprised of one Commissioner and three members of the Appeals Commission.¹⁰ After July 2001, the Commissioner, together with the Appeals Commission, form the entirety of the DABCC. By creating an Appeals Commission, the General Assembly created oversight within the agency on the authority of a single individual, the Commissioner, to issue or deny alcoholic licenses.

⁴ *Christian v. Delaware Alcoholic Beverage Control Appeals Commission*, 2003 WL 21733139, at *2 (Del.Super. 2003), *aff'd*, 2003 WL 22697649 (Del. 2003).

⁵ *IFIDA v. Division of Social Services*, 1994 WL 45346, at *1 (Del.Super. 1994).

⁶ See, 4 *Del.C.* § 301 *et seq.*

⁷ See, 4 *Del. C.* § 301 (prior to 2001).

⁸ See, 4 *Del. C.* § 301(i); 4 *Del.C.* § 541 (prior to 2001)

⁹ 4 *Del. C.* § 541(c); 4 *Del. C.* § 544 (prior to 2001).

¹⁰ 4 *Del. C.* § 301 (73 Del. Laws, c. 135, effective July 9, 2001).

Now the licensure process begins with the submission of an application to the Commissioner.¹¹ The application may proceed either protested or unprotested. Whether or not the application is protested, the Commissioner can still approve or deny the application.¹²

The Commissioner's decision is final and conclusive unless a party files a written appeal.¹³ In the event of an appeal, the Appeals Commission is convened to hear the appeal.¹⁴ The Appeals Commission performs the limited duty of reviewing the Commissioner's licensure decisions upon appeal by an aggrieved party.¹⁵

The Appeals Commission has no staff. Accordingly, the Commissioner's office has issued notices of hearings, arranged for court reporters and performed other administrative functions necessary to facilitate the process of the appeal being heard before the Appeals Commission.

The decision of the Appeals Commission becomes final and conclusive unless a party to a hearing before the Appeals Commission files an appeal to the Superior Court.¹⁶ The appeal to the Superior Court is from the Appeals Commission's decision, the final agency decision of the DABCC.

¹¹ 4 Del. C. § 541(a).

¹² 4 Del. C. § 544.

¹³ 4 Del. C. § 304(b); 541(b)(c); 544.

¹⁴ 4 Del. C. § 304(b).

¹⁵ 4 Del. C. § 301, 541.

¹⁶ 4 Del. C. § 541.

The DABCC is an administrative body and has no powers other than those conferred upon it by statute by which it was created.¹⁷ Administrative agencies derive their powers and authority solely from the statute creating them and defining their powers.¹⁸

The General Assembly did not confer any right (or power) upon the Commissioner of the DABCC to appeal a decision from the Appeals Commission of the DABCC to the Superior Court.¹⁹

The Commissioner, in support of his position that he has standing to appeal the Appeals Commission's decision to the Superior Court, relies on *Cebreck v. Peake*, 426 A.2d 319 (Del. 1981). In *Cebreck*, the Delaware Supreme Court held that the Delaware Alcoholic Beverage Control Commission had standing to appeal the Superior Court's reversal of its agency's order.²⁰

The *Cebreck* case was decided in 1981, before the statutory structure of the Delaware Alcoholic Beverage Control Commission changed. At the time the *Cebreck* case was decided, the Commission made the final agency decision and any appeal from the final agency decision went to the Superior Court. At the time *Cebreck* was decided there was no two-tier internal agency system in place. The present system is a post-*Cebreck* legislative creation.

¹⁷ See, *Diamond State Liquors, Inc. v. Delaware Liquor Commission*, 75 A.2d 248, 253 (Del. Gen. Sess., 1950); *Retail Liquor Dealers Ass' Delaware v. Delaware Alcoholic Beverage Control Commission*, 1980 WL 273545, at *3 (Del.Super. 1980).

¹⁸ *Retail Liquor Dealers Ass' Delaware v. Delaware Alcoholic Beverage Control Commission*, 1980 WL 273545, at *3 (Del.Super. 1980).

¹⁹ See, for example, 19 *Del. C. § 3320* (Appeals to the UIAB [Unemployment Insurance Appeal Board] may be made by the parties to a disputed unemployment insurance claim, as well as by the claims deputy whose decision is modified or reversed by an appeals tribunal.)

²⁰ *Cebreck v. Peake*, 426 A.2d 319, 320 (Del. 1981)

At the time *Cebreck* was decided, the decision by the Commission was the final agency decision. Therefore, when the Superior Court reversed the final agency decision of the DABCC, which was the decision of the Commission, the Commission was determined to have standing to appeal the Superior Court's adverse ruling.

This case presents a different scenario. Unlike the one tier internal agency structure that was in place at the time *Cebreck* was decided, there is now a two-tier internal agency system in place. The first tier, the Commissioner, denied the license application. The second tier, the Appeals Commission, reversed that decision and granted the license application. The final agency decision from the DABCC is now, under the present two tier agency structure, the Appeals Commission's decision.

The *Cebreck* case holds that the DABCC has standing to appeal an adverse decision by the Superior Court from its agency's final decision. Thus, if the Superior Court were to reverse the DABCC's final decision, that of the Appeals Commission, under the holding of *Cebreck*, the Appeals Commission (as the final agency decision) would have standing to appeal the Superior Court's adverse ruling.

The *Cebreck* case did not address, and did not hold, that the Commissioner of the DABCC has standing to appeal its own agency's final decision *to the Superior Court*.

The Commissioner contends that he and the Appeals Commission are not part of the same agency. The court does not agree. The fact that the Commissioner and the Appeals Commission are part of the same agency appears to be self-evident. The DABCC, as set forth at 4 *Del. C.* § 301 *et seq.*, is expressly comprised of a two tier agency structure. The statutory scheme clearly indicates that the General Assembly intended to create a two tier agency structure: a Commissioner and a three member

Appeals Commission. The Commissioner and the Appeals Commission together comprise one agency.

The Delaware Superior Court has already recognized that the Commissioner and the Appeals Commission are part of the same agency, not separate agencies. The Superior Court in *Nischay, Inc. v. Alcoholic Beverage Control Appeals Commission*, 2011 WL 1743976, at *4 (Del.Super. 2011) characterized an appeal of the Commissioner's Order to the Appeals Commission as an "internal appeal".²¹ The *Nischay* court recognized that the DABCC's final decision was the decision issued by the Appeals Commission.²²

Because the Commissioner and the Appeals Commission are both part of the same agency, the Commissioner cannot be aggrieved, and cannot seek redress, from his own agency's final order. Absent express statutory authority, the court cannot sanction the practice of an agency seeking judicial review from its own decision.²³ The General Assembly has, in fact, conferred the right of a lower tier in an agency to seek redress from a reversal of its order by a higher level agency decision.²⁴ Yet the General Assembly did not see fit to do so here.

The General Assembly did not confer in the Commissioner the right to file an appeal or to engage counsel to pursue an appeal from the Appeals Commission's decision. In this case, the Department of Justice has two deputy attorneys general representing the DABCC on opposite sides of this appeal. One attorney is representing

²¹ See, *Nischay, Inc. v. Alcoholic Beverage Control Appeals Commission*, 2011 WL 1743976, at *4 (Del.Super. 2011).

²² *Nischay, Inc. v. Alcoholic Beverage Control Appeals Commission*, 2011 WL 1743976, at *4 (Del.Super. 2011).

²³ See, *Ropp v. King*, 2007 WL 33113799, at *5 (Del.Ch. 2007).

²⁴ See, for example, 19 *Del. C.* § 3320 (Appeals to the UIAB [Unemployment Insurance Appeal Board] may be made by the parties to a disputed unemployment insurance claim, as well as by the claims deputy whose decision is modified or reversed by an appeals tribunal.)

the Commissioner of the DABCC and is advocating for the reversal of the agency's final decision. The other attorney is representing the Appeals Commission of the DABCC and is advocating for an affirmance of the agency's final decision. Their legal stances are in direct opposition to one another. They are, however, both representing the same agency.

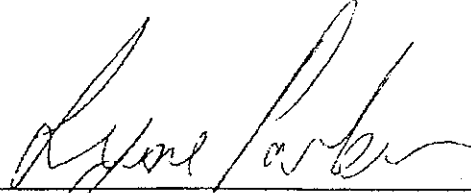
The Commissioner justifies his right to appeal by contending that as Commissioner he is cloaked with various powers, including regulatory powers. The Commissioner contends that his right to appeal the Appeals Commission's decision is derived from his regulatory role to represent the public interest.

The General Assembly cloaked the Commissioner with various powers and, at the same time, created a two tier internal agency process for the consideration of liquor licenses. The Commissioner acts as investigator, prosecutor and judge in rendering its decision on a license application. The General Assembly placed an internal check on the Commissioner's powers by allowing the Appeals Commission to issue the final agency decision. If the General Assembly wanted to give the Commissioner the right to appeal the Appeals Commission's decision, it could have done so. It did not. Noticeably absent from the Commissioner's enumerated powers is the power to appeal the Appeal Commission's decision to the Superior Court.

There is no statutory authority to support an argument that the Commissioner may appeal a final decision issued by his own agency acting in any capacity. The General Assembly has not given the Commissioner of the DABCC the right to appeal the final order of the DABCC to the Superior Court. Lacking a statutory right to appeal, the Commissioner does not have standing to appeal its own agency's final decision, that of the Appeals Commission, to the Superior Court.

For the foregoing reasons, Hak's motion to dismiss the Commissioner's appeal to the Superior Court is granted. The Commissioner's appeal is hereby dismissed.

IT IS SO ORDERED this 17th day of July, 2013.



Lynne M. Parker
Commissioner of the Superior Court

oc: Prothonotary (civil)
cc: Andrew G. Kerber, Deputy Attorney General
Laura L. Gerard, Deputy Attorney General
Adam Balick, Esquire

2013 JUL 17 PM 4:32
CLERK OF SUPERIOR COURT

**BEFORE THE APPEALS COMMISSION
ALCOHOLIC BEVERAGE CONTROL COMMISSION
OF THE STATE OF DELAWARE**

IN RE:)
Application of LEX-PAC, INC.) No. 13111
)
Applicant: LEX-PAC, INC.)
d/b/a Hak's Sports Bar & Restaurant)
1050 S. Market St.)
Wilmington, DE 19801)

AMENDED DECISION AND ORDER

BACKGROUND:

LEX-PAC, INC., d/b/a Hak's Sports Bar & Restaurant ("Haks") was licensed by the Delaware Alcoholic Beverage Control Commission ("DABCC") as a restaurant in May 2001 and changed its license classification from restaurant to taproom in September 2001. On July 3, 2008, Haks filed an application (the "Restaurant Application") pursuant to 4 *Del.C.* §516 with the Delaware Alcoholic Beverage Control Commissioner ("Commissioner") to change its license back to a restaurant license. The Commissioner denied the Restaurant Application in a written decision dated January 15, 2010 (the "Commissioner's Order"). Haks filed a timely appeal to the Commissioner's Order with the Alcoholic Beverage Control Appeals Commission ("Appeals Commission") pursuant to 4 *Del.C.* § 304(b). An appeals hearing was held before the Appeals Commission beginning on March 18, 2010 in the State Office Building in Wilmington and continued to March 26, 2010 in the State Office Building in Wilmington (the "Appeals Hearing"). The Appeals Commission issued a decision modifying the Commissioner's Order and the Commissioner appealed to the Superior Court. The Superior Court remanded the matter to the Appeals Commission for further explanation as to why the Appeals Commission

concluded that the Commissioner erred in denying Haks a restaurant license pursuant to 4 Del.C. § 543(b)(8) and (9). This Amended Decision and Order provides the further explanation sought by the Superior Court.

ARGUMENTS OF APPELLANTS:

Haks argued at the Appeals Hearing that the Commissioner erred in finding that Haks would not meet the requirements under 4 Del.C. § 543(b)(8) that the applicant “designate a substantial portion of the premises' floor space, as determined by the Commissioner, to be used for the storage, preparation, service and consumption of complete meals” and under 4 Del.C. § 543(b)(9) that the applicant’s “projected or actual receipts from the sale of complete meals fails to represent a substantial portion of the establishment's total gross receipts as determined by the Commissioner.” Haks argued that it showed 77% of its seating to be seating for dining and that its financial projections showed 60% of gross receipts to be derived from sales of meals. Haks argued that the Commissioner should have followed past practice of allowing an applicant a period of months to operate to demonstrate compliance with the financial projections.

The Commissioner argued that reasonable inference to be drawn from the Haks application is that Haks is an entertainment establishment with the provision of food an ancillary service. The Commissioner indicated that the floor plan for Haks shows that seating is focused on the two large stages and that it is unrealistic to provide for seating for diners on couches as Haks has done.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1) The statutory role of the Appeals Commission is to “review the matter on the record and affirm, reverse or modify the decision of the Commissioner.” 4 Del.C. §304(b).

2) The Appeals Commission must “examine the record to determine whether or not the Commission[er]’s findings are based on substantial evidence.” *DABCC v. A.I. DuPont*, 385 A.2d 1123, 1125 (Del. 1978); *DABCC v. Allen*, 227 A.2d 484, 485 (Del. 1967). “Substantial evidence is evidence which affords a substantial basis of fact from which the fact in issue can be reasonably inferred ...” *A.I. DuPont*, 385 A.2d at 1125. The Commissioner’s findings should not be set aside unless there is no substantial evidence to support them. *Allen*, 227 A.2d at 485.

3) The Commissioner is vested with discretion to grant or refuse licenses, but that discretion is a sound judicial discretion, to be exercised on solid legal reasons, and not arbitrarily or capriciously. *Lord v. Delaware Liquor Commission*, 13 A.2d 438 (Del. GS 1940). “The record must clearly show the basis on which the administrative agency [acted] in order that its exercise of discretion may be properly reviewed.” *Applications of X-Chequer Inn, Inc.*, 229 A.2d 22, 26 (Del. Super. 1967), *overruled in part on other grounds, Ahner v. DABCC*, 237 A.2d 706 (Del. 1967).

4) The statutory grounds for refusal of a license by the Commissioner are set forth in 4 Del.C. §543.

5) The Appeals Commission finds that the Commissioner’s finding that Haks would not operate as a restaurant is not supported by substantial evidence. Under 4 Del. C. §101 (34), a “Restaurant” is defined to mean “any establishment which is regularly used and kept open principally for the purpose of serving complete [meals] to persons for consideration and which has seating at tables for 35 or more persons and suitable kitchen facilities connected therewith for cooking an assortment of foods under the charge of a chef or cook.” The record includes nothing that would dispute that Haks has seating at tables for 35 or more persons and suitable kitchen

facilities connected therewith for cooking an assortment of foods under the charge of a chef or cook. The Commissioner's decision is based upon the Commissioner's determination that the floor plan for Haks is "more typical of either a taproom or a gentlemen's club rather than a restaurant." However, neither 4 Del. C. §101 (34) nor the Commissioner's Rule 19 impose any requirements for restaurant floor plans. The record includes a letter dated April 17, 2009 from Haks counsel advising that Haks would expand its menu and increase the hours of operation of the restaurant which would result in an increase in the percentage of food sales in Haks revenue. The Commissioner's decision states that Haks attorney cover letter represents that Haks expects food sales to make up more than 60% of gross sales, but the Commissioner then opines that "it is hard to imagine that if Haks was licensed as a restaurant it would derive a "substantial portion" of its revenue from the sale of complete meals." However, the record includes no factual evidence that supports the Commissioner's opinion. Consistent with the Superior Court's ruling in Christian v. Delaware Alcoholic Beverage Control Appeals Commission, 2003 Del. Super. LEXIS 258; Affd. Christian v. Delaware Alcoholic Beverage Control Appeals Commission, 2003 Del. LEXIS 561 (Del., Nov. 12, 2003), that witness opinions must be supported by facts, the Commissioner's opinions must likewise be supported by facts. "[T]he opinions of witnesses that a license will result in adverse consequences must be supported by facts." Christian v. DABCC. As there are no facts in the record that contradict the applicant's projection of food sales at more than 60% of gross sales, the record does not include substantial evidence that supports the Commissioner's opinion. There is substantial evidence in the record that indicates that Haks will be regularly used and kept open principally¹ for the purpose of serving complete

¹ The Appeal Commission interprets the word "principally" consistent with its common usage as meaning: First, highest, or foremost in importance, rank, worth, or degree; chief.

meals to persons for consideration and, therefore, satisfies the statutory definition of "restaurant" established in 4 Del. C. §101 (34). The fact that Haks also provides entertainment does not preclude Haks from meeting the statutory definition of "restaurant" established in 4 Del. C. §101 (34).

6) Under 4 Del. C. §543(b)(8), the Commissioner may refuse to license a restaurant applicant if the Commissioner has substantial evidence that would reasonably support a belief that the applicant has failed to designate a substantial portion of the premises' floor space, as determined by the Commissioner, to be used for the storage, preparation, service and consumption of complete meals. At the Appeals Hearing, Haks provided a definition for "substantial" as meaning "ample or a considerable amount." (Appeals Hearing Transcript, Page 7, Lines 2-3). This definition was not contested by the Commissioner. The Commissioner's Order concludes that 45% of the floor space at Haks is utilized for alcohol and entertainment and 55% is used for food preparation, service and consumption. The Appeals Commission finds that the record does not include substantial evidence that would reasonably support the conclusion that the applicant has failed to designate a substantial portion of the premises' floor space, as determined by the Commissioner, to be used for the storage, preparation, service and consumption of complete meals. The Commissioner determined that 55% of the floor space is used for food preparation, service and consumption. The Appeals Commission holds with respect to Haks that 55% is an ample or considerable amount² (and, therefore, substantial) and the record does not include substantial evidence to the contrary. To the extent that the Commissioner's Order might be based on the Commissioner's discretion in determining the

² The Appeals Commission does not establish 55% as the minimum percentage required to be substantial in all cases, only that 55% is certainly substantial in the case of Haks.

adequacy of the floor space designated to food preparation, service and consumption, the Appeals Commission finds that, as there are no facts in the record that would indicate that 55% of the premises floor space is not a substantial portion of the total floor space, the Commissioner's exercise of discretion would be arbitrary and capricious and not reflecting sound judicial discretion exercised on solid legal reasons as required by Lord v. Delaware Liquor Commission.

7) Under 4 Del. C. §543(b)(9), the Commissioner may refuse to license a restaurant applicant if the Commissioner has substantial evidence that would reasonably support a belief that the applicant's projected or actual receipts from the sale of complete meals fails to represent a substantial portion of the establishment's total gross receipts as determined by the Commissioner. The Commissioner's decision states that Haks has represented that it expects food sales to make up more than 60% of gross sales and that when operating as a tap room its current food revenue is 40% of total revenue. Further, the record includes a letter dated April 17, 2009 from Haks counsel advising that Haks would expand its menu and increase the hours of operation of the restaurant which would result in an increase in the percentage of food sales in Haks revenue. At the Appeals Hearing, Haks provided a definition for "substantial" as meaning "ample or a considerable amount." (Appeals Hearing Transcript, Page 7, Lines 2-3). This definition was not contested by the Commissioner. The Appeals Commission finds that the record does not include substantial evidence that would reasonably support the conclusion that Haks projected receipts from the sale of complete meals fails to represent a substantial portion of Haks total gross receipts. The Commissioner's reliance upon the reduction in the number of menu items, which the Appeals Commission views as a minor reduction, does not support the

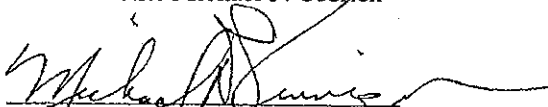
Commissioner's conclusion that sales of complete meals will not represent a substantial portion of Haks total gross receipts, and is contradicted by the April 17, 2009 letter from Haks counsel advising that Haks would expand its menu and increase the hours of operation of the restaurant. Further, the Commissioner did not dispute the representation by Haks that the Commissioner has previously allowed all applicants to have an eight month period to demonstrate that the sale of complete meals will represent a substantial portion of total gross receipts. (Appeals Hearing Transcript, Page 9, Lines 17-24). The Commissioner offered no explanation as to why Haks could not be afforded a similar eight month period to demonstrate the validity of its projections. The Appeals Commission finds the Commissioner's refusal to consider a similar eight month period for Haks to be arbitrary and capricious and not reflecting sound judicial discretion exercised on solid legal reasons as required by Lord v. Delaware Liquor Commission.


8) Accordingly, the Appeals Commission modifies the Commissioner's Order to grant Haks a conditional restaurant license on the condition that, no later than November 30, 2010, Haks provide to the Commissioner a certified independent audit of its revenues for a period of six months beginning on May 1, 2010 and ending on October 31, 2010 (the "Six-Month Audit"). If the Six-Month Audit indicates that at least 60% of Haks gross revenues are derived from the sale of complete meals in accordance with DABCC Rule 19 then the condition shall be satisfied and Haks shall be licensed as a restaurant. If the Six-Month Audit indicates that less than 60% of Haks gross revenues are derived from the sale of complete meals in accordance with DABCC Rule 19 then the condition shall be not have been satisfied and Haks shall be licensed as a taproom.

CONCLUSION

For the foregoing reasons, the Commissioner's Order is modified as provided in paragraph 8 of the Findings of Fact and Conclusions of Law.


Commissioner Michael P. Cebrick


Commissioner Michael Finnigan

 AUGUST 8,
Dated: July __, 2011

CERTIFICATE OF MAILING AND/OR DELIVERY

The undersigned certifies that on June 10, 2014, she caused the Appellant's Corrected Opening Brief and Attachment to be filed and served by Lexis/Nexis and delivered to the following persons in the form and manner indicated:

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One true copy by email and first class, postage prepaid to:

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Attorney for Lex-Pac, Inc.

One true copy by email and hand delivery to:

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/s/ Laura L. Gerard
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