



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

Lawrence W. Lewis (DE I.D. #2359)
Laura L. Gerard (DE I.D. #3202)
Deputy Attorneys General
820 N. French St., 6th Floor
Carvel State Office Building
Wilmington, DE 19801
Phone: (302) 577-8400
Counsel for Appellant Below,
Appellant, Office of the
Commissioner, Delaware Alcoholic
Beverage Control

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Sup. Ct. R. 817

UNREPORTED CASES

NATURE OF PROCEEDINGS

Appellant Office of the Delaware Alcoholic Beverage Control Commissioner (“Commissioner”) 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 that 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 to appeal the AC’s 2011 Order 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 Superior Court in accordance with the former provisions of 4 *Del.C.* § 541. (A-12). The assigned Superior Court

¹ Appellant’s Appendix to his Opening Brief is referred to as “A-“ followed by the page number. Reference to the Answering Briefs of Appellees is “Ans.Br.” followed by the page number.

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.

Judge 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 and filed an Opening Brief. Hak's and the AC have filed Answering Briefs. This is the Commissioner's Reply Brief.³

³ The Commissioner relies on the Statement of Facts in the Opening Brief.

ARGUMENT

I. THE OFFICE OF THE DELAWARE ALCOHOLIC BEVERAGE CONTROL COMMISSIONER HAS STANDING TO REPRESENT THE PUBLIC INTEREST IN THE APPELLATE REVIEW OF A LICENSING DECISION.

The Commissioner has standing to appeal a liquor licensing decision because: (1) the General Assembly delegated police and regulatory powers to that office to protect the public interest and ensure liquor applicants and licensees satisfy the requirements of the Delaware Liquor Control Act (“Act”); and (2) *Ropp v. King, et al.*, 2007 WL 2198771 (Del.Ch. July 25, 2007) and *Wilmington Trust v. Barron*, 470 A.2d 257 (Del. 1983) are inapplicable to the present regulatory matter and reliance on these cases is misplaced.

A. THE COMMISSIONER HAS POLICE AND REGULATORY POWERS TO REPRESENT THE PUBLIC INTEREST IN LIQUOR LICENSING MATTERS.

Article II, § 1 of the Delaware Constitution of 1897, the Act,⁴ and this Court’s decisions in *Broadmeadow Investment, LLC v. Delaware Health Resources Bd., et al.*, 56 A.3d 1057 (Del. 2012) and *Cebrick v. Peake*, 426 A.2d 319 (Del. 1981) are controlling. The office of the Commissioner must perform its regulatory duties as authorized and delegated by the General Assembly and the Governor. 4

⁴ See 4 Del.C. §§ 301, 304, 541. 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 statutory duties to control the purchase, possession, and sale of alcoholic liquors by those licensed. 4 Del.C. §§ 304(a)(3), (a)(4). The AC has no authority to do so. 4 Del.C. §§ 301, 304(b).

Del.C. § 304; Cebrick v. Peake, 426 A.2d 319, 320 (Del. 1981). The Commissioner must perform his statutory duties whether or not persons appear in opposition to an application. *Cebrick, supra*. It is the Commissioner who represents the State and public interests for ensuring compliance with the Act. *Id.* An applicant for a liquor license has the burden of proof and persuasion to the Commissioner for satisfying the requirements of the Act. Only the Commissioner has authority to issue and actually issues liquor licenses.⁵ Indeed, the General Assembly delegated the Commissioner's authority only to an Acting Commissioner. 4 *Del.C. § 301*.

Cebrick v. Peake expressly held that an agency has standing to file an appeal in its own name from a Superior Court decision overturning its underlying decision. In *Cebrick*, the Peakes filed an application with the former-Delaware Alcoholic Beverage Control Commission (“DABCC”) for a package store license. *Cebrick*, 426 A.2d at 319. The DABCC denied the application. *Id.* The applicant appealed to the Superior Court under the Administrative Procedures Act on the grounds that the DABCC's decision was not supported by substantial evidence. *Id.* The Superior Court agreed and reversed the decision of the DABCC. *Id.* at 320.

⁵ “ ‘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).

The DABCC appealed that reversal to the Delaware Supreme Court. *Id.* As a threshold issue, the Delaware Supreme Court determined that the DABCC had standing to appeal the Superior Court’s reversal of its decision based upon the statutory responsibility of the DABCC to act as a public advocate in regulating the liquor industry. *Id.* at 320. The Supreme Court reasoned that 1) the Act did not specifically bar the DABCC from docketing an appeal, although the initial proceeding was before the DABCC; 2) the Act required an appellant to serve the DABCC with a copy of the “petition, appeal or other application for relief, thus implying an adversarial relationship between a petitioner whose application has been refused and the” DABCC;⁶ and, 3) an applicant who has been denied a liquor license and who appeals to the Superior Court would be without party opposition if there had not been objectors or protestants before the DABCC, or if objectors or protestants who had appeared elect not to participate in an appeal to the Superior Court. *Cebrick*, 426 A.2d at 320-321.

Broadmeadow and *Cebrick* provide well-settled guidance for this Court. As this Court recognized in *Broadmeadow*, it is contrary to administrative law principles to limit the right of an appeal so as not to include an aggrieved party who participates in a public hearing below. *Id.*, 56 A.3d at 1061-1062. In

⁶ 4 *Del.C.* § 304(b) requires that “a party to such hearing” must file an appeal in the office of the Commissioner. Like the process in *Cebrick*, this requirement places the Commissioner on notice of an appeal and implies an adversarial relationship between the Commissioner and an applicant whose unprotested application has been denied.

Broadmeadow, the appellant participated in and presented testimony at public hearings held before the State Health Resources Board, in opposition to an application by a competing nursing home operator. This Court reasoned that it would be “internally inconsistent to allow ‘any person’ the opportunity to participate before the Board in the administrative hearing process and then subsequently foreclose that person’s right to judicial review of the Board’s decision.” *Id.* at 1062. The Court further reasoned that “any person” under the provisions of 16 *Del.C.* § 9305 had standing to appeal if that person was an “aggrieved” party. *Id.*

Like the facts in *Broadmeadow*, the Commissioner presented oral argument at the AC’s March 2010 hearing and also appeared at the AC’s August 2011 hearing. (A-6, 66). It defies common sense to grant the Commissioner, who has authority to regulate the alcohol industry and represents the public interest, a right to be heard before the AC, but subsequently deny the Commissioner an opportunity for judicial review. *Broadmeadow*, 56 A.3d at 1061-1062; *see also Trone, et al. v. Delaware Alcoholic Beverage Control Comm.*, 2000 WL 33113799, at *3 (Del.Super. Dec. 28, 2000)(standing argument waived when objector allowed to participate in administrative hearing). This Court in *Broadmeadow* rejected the Superior Court’s decision that allowed the “general public’s” right to be heard at

the administrative level but denied the opportunity for judicial review. *Broadmeadow*, 56 A.3d at 1061-1062. The Court should also do so here.

It is unquestionable that the Commissioner is an aggrieved party. *Broadmeadow*, 56 A.3d at 1062. The 2011 Order placed the Commissioner in an untenable position. The Commissioner determined Hak's application was deficient, failing to meet the statutory requirements of a restaurant. (A-89, 94). Yet, the AC reversed the Commissioner's decision and ordered a "conditional" restaurant license, which is non-existent under the Act. (A-59, 63). Thus, the Commissioner had to issue a liquor license on an application that he himself found noncompliant with the Act. This problem was further compounded by the Superior Court's decisions that deny the Commissioner's right of appeal and any means of judicial review of the flawed 2011 Order.

The public interest should be considered in the judicial review of administrative practice. Indeed, this Court granted the former DABCC standing to appeal as a party in a licensing case, from a reversal of its regulatory decision. *Cebreck v. Peake*, 426 A.2d 319, 320 (Del. 1981); *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). And *this Court found standing to appeal*, even in the

absence of an express statutory right of appeal for the DABCC. *Cebreck*, at 320-321; Hak's Ans.Br. p.23.⁷

This Court has recognized the right of an administrative board to appeal in other cases, often citing the board's responsibility to protect the public interest. *Zoning Bd. of Adjust. v. Dragon Run Terrace, Inc.*, 216 A.2d 146, 179 (Del. 1965) ("We think that while the Board is only an agency of the county, has no corporate existence and has no direct interest in the outcome of the litigation, it nevertheless represents the public interest in the protection and enforcement of the zoning regulations. As the guardian of the public interest, it therefore has standing to defend its decision on appeal, particularly in view of the fact that it is the only indispensable party before the Superior Court."); *Simpson v. Kennedy*, 327 A.2d 763, 765 (Del. Super. 1974) ("The legislative purpose cannot be served unless the Commission is in Superior Court on appeals. Complainants oftentimes lack funds to retain a lawyer to represent them. If the Commission is not a party in this Court, a Commission order in favor of a complainant who is financially unable to respond to the appeal would be meaningless. The purpose of the Act would fail."); *Nepi v. Lammot*, 156 A.2d 413, 416 (Del. Super. 1959) ("It was likewise proper for

⁷ Hak's argues the holding in *Ropp* was based upon the absence of a statutory basis for the Securities Commissioner to appeal the decision of "his own agency." Ans.Br. p.23. This argument must fail. First, this Court's reasoning in *Cebreck* controls. Second, as discussed *infra* at pp. 11-16, the Commissioner and the AC are separate and distinct. Unlike the facts of *Ropp*, there has been no delegation of the Commissioner's statutory and regulatory duties to the AC.

petitioner to name the Board as defendant. The nature of the action is an appeal from that Board which acts in a quasi-judicial capacity.”).

An adjudicating agency is permitted to be a party to an appeal under federal law. *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Comp. Programs Dept. of Labor*, 519 U.S. 248, 263 (1997) (an agency that is a necessary party on appeal under the Federal Administrative Procedures Act has an absolute right to appear as a respondent before the courts.); *see also Pittston Stevedoring Corp. v. Dellaventura et al.*, 544 F.2d 35, 43, n.5 (2d.Cir. 1976) (“The existence of sufficient adversity between private parties has not been thought to preclude the Government’s right to be a party in many other sorts of review of federal administrative action”), *aff’d on other grounds sub nom., Northeast Marine Terminal Co. v. Caputo et al.*, 432 U.S. 249 (1977).

Appellees’ attempt to distinguish *Broadmeadow* misses the mark. Both Broadmeadow Investment and the Commissioner participated in hearings before administrative boards. (A-6, 66).⁸ Moreover, both are aggrieved parties. *Broadmeadow, supra*, at 1062.

⁸ While the Commissioner acknowledges that issues of standing can be raised at any time, under the reasoning of *Trone*, 2000 WL 33113799, at *3, neither Appellee should be allowed to raise the issue of the Commissioner’s standing when neither objected or attempted to prohibit the Commissioner from participating or appearing at the hearings before the AC in 2010 and 2011. (A-66-87). Also, regardless of whether the Commissioner was “allowed” to participate in hearings before the AC, the Commissioner submits that the Constitution, the Act, and the APA provide the legal authority to file an appeal in the courts.

Cebrick remains good law and is applicable after the legislative changes to the Act. Those changes did not modify any of the police powers or statutory duties of the previous DABCC, which rest with the Commissioner. 4 *Del.C.* §§ 301, 304, 543. “[L]egislative language is interpreted on the assumption that the legislature was aware of existing judicial decisions.” *One-Pie Investments, LLC v. Jackson*, 43 A.3d 911, 915, n.12 (Del. 2012).

The General Assembly is presumed to have been aware of *Cebrick* and the Delaware Administrative Procedures Act (“APA”) when it amended the Act. Thus, there was no need for the General Assembly to add an express, statutory right of appeal for the Commissioner, as Appellees argue. Hak’s Ans.Br.p.23. If the General Assembly intended to bar or remove any appellate rights of the Commissioner as this Court correctly found in *Cebrick*, it could and should have expressly done so through amendments to the Act and the APA. It did not.

There is no entity other than the Commissioner to represent the public interest to ensure compliance with the Act, before the AC and the courts. *Cebrick, supra*. Without the Commissioner, any unprotested applicant denied licensure by the Commissioner could appeal to the AC, unopposed and *ex parte*. And, any license decision by the AC would not be subject to judicial review.

B. APPELLEES' RELIANCE ON CASES THAT CONCERN AN ADMINISTRATIVE BODY'S QUASI-JUDICIAL FUNCTIONS IS MISPLACED.

The General Assembly has not delegated the Commissioner's regulatory authority to the AC. Further, the Commissioner's function here was regulatory. The Commissioner determined that one applicant's unprotested application did not satisfy the statutory licensure requirements.⁹ Thus, the cases mistakenly relied upon by the Appellees and the court below are inapplicable.

The General Assembly delegated the Commissioner's authority only to an Acting Commissioner. 4 *Del.C.* § 301(c). Nowhere else in the Act is there any other such delegation. Despite this clear statutory language, Appellees' standing argument hinges completely on the mistaken assumption that the Commissioner and the AC are parts of the same agency. They are not.

The Commissioner is appointed by the Governor and serves at the Governor's pleasure. 4 *Del.C.* § 301(b). The members of the AC are also appointed by the Governor and serve at his pleasure. *Id.* This is the mere extent of any similarity between the two.

Hak's appears to analogize the Commissioner and the AC to that of the Unemployment Insurance Appeals Board ("UIAB"), Claims Deputies, and Appeal

⁹ The Commissioner did not resolve a dispute between two or more parties in the present case. Such a function would have been an exercise of a quasi-judicial role. *Cebreck*, 426 A.2d at 320; *Robbins v. Glenn Deaton, Inc.*, 1995 WL 108888, at *2 (Del.Super. Feb. 6, 1999)

Referees, and cites to 19 *Del.C.* § 3320. Hak's Ans.Br. p. 14.¹⁰ This, too, misses the mark.

Section 3320 is not the basis of appeals against decisions by the Unemployment Insurance Board ("UIAB"), as this Court has found. This Court has held that the UIAB is an agency separate from the Delaware Department of Labor ("DOL") and the DOL was entitled as of right to appeal decisions of the UIAB where DOL had to follow and enforce its statutory duties regarding its administration of the Unemployment Compensation Fund. *Delaware Dept. of Labor v. Minner, et al.*, 448 A.2d 227, 230-231 (Del. 1982). In *Minner*, this Court stated that the DOL had the statutory duty to advocate policy consistent with "the public good and the general welfare of the citizens of this State." *Id.* at 230 (*citing* 19 *Del.C.* § 3301). This Court determined that the DOL could not "be expected to fulfill this duty completely without access to the appellate process. Any such denial would violate sound public policy." *Id.*¹¹

¹⁰ The statutory right of the Claims Deputy is more appropriate to an appeal against the decision of an Appeals Referee, who, like the Claims Deputy, is also a Department of Labor employee. Therefore, that appeal requires specific statutory authorization. Hak's Ans.Br. p.14. There is no such similar statutory language in the Act regarding the Commissioner and the AC.

¹¹ After *Minner*, the DOL filed or participated in appeals against the UIAB and its decisions. *Delaware Dept. of Labor v. Cavan, et al.*, 1997 WL 716904 (Del.Super. Aug. 25, 1997); *Thornton v. Caldwell Flexible, et al.*, 1996 WL 280760 (Del.Super. Apr. 19, 1996). "It is not unusual for an administrative agency to act as litigant, lawyer and judge in the initial determination of the matter before it [**and to appear**] **before the reviewing court ...in support of its own decision....**" *Blinder, Robinson & Co., Inc., v. Bruton*, 552 A.2d 466, 472 (Del. 1989) (*citing Application of Wilmington Suburban Water Corp.*, 211 A.2d 602, 605 (Del. 1965)(internal quotations omitted) (emphasis added).

The same is true here. No delegation and no reporting relationship exists between the Commissioner and the AC. 4 *Del.C.* §§ 301, 304. At most, the Commissioner's office stands in relation to the AC as the DOL stands to the UIAB--by merely providing administrative, logistical support. This is not enough. What has been delegated is this: the legislative delegation of review to an outside, distinctive agency, the AC. This removes the final order issue and permits the Commissioner to be a party to an appeal. This is consistent with the statutory language of former § 541, § 544, and the Act.

The Act provides a completely different statutory scheme and authority and the facts of the present case differ than those in *Ropp v. King*, 2007 WL 2198771 (Del. Ch. July 25, 2007), upon which the Superior Court mistakenly relied. (A-39). In *Ropp*, the Securities Commissioner expressly designated, pursuant to rules and regulations of the Delaware Securities Act, a Deputy Attorney General as an administrative Hearing Officer to 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 a hearing, the Hearing Officer issued an opinion

and order dismissing the Securities Division's charges as without merit. The Securities Commissioner appealed the Hearing Officer's decision to the Court of Chancery. 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.

Appellees' reliance on *Ropp* is erroneous. The Commissioner himself did not delegate *any* authority or power to the AC. Appellees point to no rule, regulation, order, or letter of the Commissioner as evidence of a purported delegation. 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 the Commissioner's powers and perform his duties during the Commissioner's absence or incapacity or until a successor commissioner was appointed. 4 *Del.C.* § 301(c). Had the Commissioner delegated his regulatory authority to an Acting Commissioner, the Commissioner, under *Ropp*, would be barred from appealing the Acting Commissioner's decision. As the Commissioner did not delegate his regulatory authority to the AC (and, indeed, cannot delegate his authority to the AC), he may appeal the erroneous 2011 Order of the AC.

Despite this, Hak's argues that the source of the supposed delegation "is a distinction without a difference." Hak's Ans.Br. p. 23. To the contrary, the

distinction on delegation makes *all* the difference. Only the General Assembly can delegate the State's police powers and regulatory duties regarding alcohol in Delaware through legislative enactment. This legislative body chose to delegate those powers to the Commissioner and, in limited instances, to an Acting Commissioner. Had the General Assembly intended for the AC to be delegated the Commissioner's powers and functions so as for the AC to be the "one and final voice of alcohol," it could and should have expressly made this delegation in the Act. Again, it did not.

The court below failed to correctly distinguish the Commissioner's distinctive regulatory and quasi-judicial roles. The court, instead, erroneously relied upon cases that involve an administrative body's quasi-judicial role, specifically *Wilmington Trust v. Barron*, 470 A.2d 257 (Del. 1983). Unlike *Barron*, the Commissioner was not acting in a quasi-judicial role as he was not deciding a dispute between two parties. *Wilmington Trust v. Barron* holds that an individual judicial officer is not a proper defendant in a declaratory judgment action. Nothing more, nothing less. By mistakenly relying upon *Barron*, the court below prevented the Commissioner from representing the public interest in the licensing process, contrary to *Cebrick, supra*.

The present case involves the Commissioner's *regulatory* role of denying an unprotested application that failed to satisfy the statutory requirements for a

restaurant liquor license. *See Robbins v. Glenn Deaton, Inc.*, 1995 WL 108888 (Del.Super. Feb. 6, 1995). Thus, *Barron* is inapplicable.

Aside from the applicant, there is no other person 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. 4 *Del.C.* §544, former § 541. Given the regulatory duties of the Commissioner, including his role as public advocate, and the language of § 544 and former § 541, the Commissioner has standing 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. *See* former 4 *Del.C.* § 541(c).

II. THE INCORRECT RULING BY SUPERIOR COURT ON STANDING PREVENTS REVIEW OF THE 2011 APPEALS COMMISSION'S ORDER FOR LEGAL ERROR.

No court has addressed the merits of this appeal and the legal errors in the Appeals Commission's ("AC") 2011 Order. Because the court below misapplied the law and based its decisions upon erroneous assumptions regarding the Commissioner's standing, the interests of justice support the need for the merits of the appeal to be reviewed and decided. Sup. Ct. R. 8.

The merits of this appeal are outcome determinative, possess significant implications for future cases, especially those involving nonprotested applications, and Court consideration of the issues on the merits will promote judicial economy as they have not been addressed. *Sandt v. Delaware Solid Waste Auth.*, 640 A.2d 1030, 1034 (Del. 1994). The Court has interpreted Rule 8 several times to permit arguments on appeal where error about which an appellant complains is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Russell v. State*, 5 A.3d 622, 627 (Del. 2010); *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

The Commissioner asserted below several arguments on the merits. (A-6-7). The parties briefed these arguments before Hak's sought dismissal on the issue of the Commissioner's standing. (A-9). If the merits are not finally addressed, the potential exists for an applicant of a liquor license to request a conditional liquor

license (which is nonexistent under the Act), in reliance upon the erroneous 2011 Order. It would also allow the AC, *inter alia*, to make factual findings based on mere legal argument before it, without any support in the record, contrary to the AC's review authority. 4 *Del.C.* § 304(b); (A-59, 75-76). Moreover, it would permit the AC to weigh evidence – a matter that rests within the Commissioner's authority and purview – and substitute its own judgment for the Commissioner's. Again, this would be contrary to the AC's review authority. *Id.* All of these issues are prejudicial to the Commissioner's statutory rights and duties and has jeopardized the fairness and integrity of his obligations in determining liquor licensing matters.

The AC has no authority to fashion equitable remedies, including prospective remedies, or make a factual determination based upon a mere argument. 4 *Del.C.* §§ 304(b), 544, 541. Yet, it did so here.

Decisions of administrative boards can be reversed for legal error. “Reversal is warranted if the administrative agency exercised its power arbitrarily or committed an error of law, or made findings of fact unsupportable by substantial evidence.” *Olney v. Cooch*, 425 A.2d 610, 613 (Del.1981) (*citing Kreshtool v. Delmarva Power and Light Co.*, 310 A.2d 649, 652 (Del.Super. 1973)). The 2011 Order is legally erroneous because the AC: (i) granted a conditional restaurant license, when no such license exists under the Act (A-59), 4 *Del.C.* § 554; (ii)

granted a reversionary interest in a taproom license if the conditional restaurant license was not satisfied (A-59); (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 (A-57, 58, 90, 91, 96); 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, 75-76). Each of these reasons is reversible legal error.

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

/s/ Laura L. Gerard

Lawrence W. Lewis (DE I.D. #2359)
Laura L. Gerard (DE I.D. #3202)
Deputy Attorneys General
820 N. French Street, 6th Floor
Carvel State Office Building
Wilmington, DE 19801
Phone: (302) 577-8400
Counsel for Appellant, Appellant
Below, Office of the
Commissioner, Delaware Alcoholic
Beverage Control

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