

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FORE NEW CASTLE COUNTY**

OFFICE OF THE COMMISSIONER,	)	
DELAWARE ALCOHOLIC BEVERAGE	)	
CONTROL,	)	
	)	
Appellant,	)	
	)	C.A. No. 10A-05-005-JRJ
	)	
v.	)	
	)	
APPEALS COMMISSION,	)	
DELAWARE ALCOHOLIC BEVERAGE	)	
CONTROL and LEX-PAC, INC.	)	
d/b/a HAK'S SPORTS BAR &	)	On Appeal from Decision of the
RESTAURANT,	)	Appeals Commission Delaware
	)	Alcoholic Beverage Control
Appellees.	)	Docket No. 13111

Date Submitted: November 15, 2010  
Date Decided: January 19, 2011

Upon Appeal of the Decision of the Delaware Alcoholic Beverage  
Control Appeals Commission: **REMANDED**

Philip G. Johnson, Esq., Deputy Attorney General, Laura L. Gerard, Esq., Deputy Attorney General, Department of Justice, 820 N. French Street, Wilmington, DE 19801, Attorneys for Appellant.

Adam Balick, Esq., Joanne Ceballos, Esq., Melony Anderson, Esq., Balick & Balick, LLC, 711 King Street, Wilmington, DE 19801, Attorneys for Appellee.

**Jurden, J.**

## I. INTRODUCTION

The Office of the Delaware Alcoholic Beverage Control Commissioner (“Commissioner”) appeals the decision of the Delaware Alcoholic Beverage Control Appeals Commission (“Appeals Commission”), which reversed the Commissioner and granted Lex-Pac, Inc. d/b/a Hak’s Sports Bar & Restaurant (“Hak’s”) a restaurant license. For the reasons set forth below, the Court finds the Appeals Commission failed to set forth a sufficient legal or factual basis to reverse the Commissioner. Accordingly, the Appeals Commission’s decision is **REMANDED** for further findings consistent with this opinion.

## II. BACKGROUND

On July 3, 2008, Hak’s submitted an application to the Commissioner seeking reclassification from a taproom to a restaurant.<sup>1</sup> According to a floor plan submitted in Hak’s application, the establishment would have 138 dining seats and 35 bar seats.<sup>2</sup> Hak’s acknowledged in its application that, *inter alia*, it sought reclassification for the purpose of employing people under the age of 21,<sup>3</sup> a practice unlawful under its current taproom license.<sup>4</sup>

### *The Commissioner’s Factual Findings*

The Commissioner sent notice of intent to deny the application on November 16, 2009, and filed a formal denial on January 15, 2010. The Commissioner concluded that if the proposed

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<sup>1</sup> In 2000, Hak’s was licensed as a restaurant. In 2001, Hak’s applied for and was granted reclassification as a taproom.

<sup>2</sup> See Appellee’s Answering Brief (“Ans. Br.”), Ex. A.

<sup>3</sup> *Id.*

<sup>4</sup> 4 *Del. C.* § 101. Definitions.

As used in this title, in addition to their usual meaning:

(34) "Restaurant" means any establishment which is regularly used and kept open principally for the purpose of serving complete meals[sic] 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.

(40) "Taproom" means an establishment provided with special space and accommodations and 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.

application was granted, Hak's would not operate as a restaurant. In the "FACTS" section of the Commissioner's Order, he found the following:

In 2007, Hak's pled guilty to allowing underage persons into a taproom. Hak's wanted a restaurant license so it could employ individuals under the age of 21.

"When Hak's was originally licensed as a restaurant it had 132 dining seats and 30 bar stools located around one bar."<sup>5</sup> The current application's floor plan has 118 seats for "dining," 35 bar seats around 2 bars, 10 "couches", 2 stages, and a "DJ booth".<sup>6</sup> The Commissioner stated that the "minimum ratio that has previously been approved is four dining seats for each bar seat. That ratio would require a minimum of 140 dining seats without accounting for the additional dining seats required by the couches which line the dining rooms."<sup>7</sup> "While there are no dimensions of the various rooms depicted on the floor plan, it is hardly the floor plan of a restaurant . . . approximately 45% of the floor space is utilized for alcohol and/or entertainment, 55% is used for food preparation, service and consumption."<sup>8</sup>

The Commissioner also found that Hak's current menu was considerably smaller than the menu Hak's had when it was previously licensed as a restaurant. Under its current application, the

menu will consist of 8 entrees (down from 10 when it was previously approved), five appetizers (down from eight previously), six sandwiches (less than the total of 8 burgers and wraps previously offered), one soup (instead of three), three salads (less than five previously offered), and three desserts (not four as previously offered).<sup>9</sup>

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<sup>5</sup> See Appendix to Appellant's Opening Brief ("App. Op. Br.") at A-67.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

In Hak's current restaurant application, it claims that anticipated food sales will comprise 60% of its total revenue.<sup>10</sup> The Commissioner found this claim unavailing, stating, "it is hard to imagine that if Hak's was licensed as a restaurant it would derive a 'substantial portion' of its revenue from the sale of complete meals."<sup>11</sup>

### ***The Commissioner's Legal Conclusions***

The Commissioner denied Hak's application pursuant to 4 *Del. C.* § 543 (b) (8) and (9).<sup>12</sup>

The Commissioner gave the following rationale for denying the license pursuant to § 543 (b)(8):

The floor plan is more typical of either a taproom or a gentlemen's club rather than a restaurant. The substantial number of bar seats and the two large bars surrounding two stages are not the floor plan of a restaurant. The "Champagne Room" is a substantial room, which was full of dining seats when the premises was licensed as a restaurant, but now contains six two-tops and eight couches. Couches are not conducive to dining and are clearly intended to accommodate "the personal couch dances" touted on Hak's web page, not dining patrons.<sup>13</sup>

The Commissioner found that the ratio of floor space dedicated to providing complete meals compared to the floor space dedicated to "entertainment" and alcoholic beverage service did not satisfy § 543 (b)(8).

Further, the Commissioner denied Hak's application pursuant to § 543 (b)(9). The Commissioner found that "receipts from the sale of complete meals will not constitute a substantial portion of the gross revenue of the business."<sup>14</sup> The Commissioner reasoned that when licensed as a taproom, Hak's receipts from service of complete meals constituted 40% of

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<sup>10</sup> See Ans. Br., Ex A.

<sup>11</sup> See App. Op. Br. at A-67.

<sup>12</sup> 4 *Del. C.* § 543 (b) The Commissioner may refuse to license an applicant if the Commissioner has substantial evidence that would reasonably support a belief that:

(8) As to a restaurant applicant, 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;

(9) As to a restaurant applicant, 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.

<sup>13</sup> See App. Op. Br. at A-68.

<sup>14</sup> *Id.*

gross revenues, but Hak’s failed to explain how the projected receipts from food sales would comprise a substantial portion of its gross revenue. “[Hak’s] anticipates that the sale of food will increase and ‘likely make up more than 60% of its gross sales.’ There is nothing to validate this anticipated increase in food sales.”<sup>15</sup> Hak’s did not change its floor plan or business plan, and the menu contains less food than it did when Hak’s was originally licensed as a restaurant.<sup>16</sup>

### ***The Appeals Commission’s Reversal***

The Appeals Commission overruled the Commissioner and granted Hak’s a “conditional” restaurant license.<sup>17</sup> The Appeals Commission “determined that the findings of fact under the heading (“FACTS”) made by the Commissioner in the Commissioner’s Order are supported by substantial evidence . . . and adopt[ed] the findings in whole.”<sup>18</sup> Under “Conclusions of Law,” the Appeals Commission outlined its statutory role, the standard of review on appeal, and the Commissioner’s statutory authority to deny a restaurant license. The Appeals Commission “modified” the Commissioner’s Order by granting Hak’s a “conditional” restaurant license. The conditional restaurant license requires Hak’s to provide a certified independent audit of its revenues for six months and establish that at least 60% of Hak’s gross revenues are derived from the sale of complete meals. According to the Appeals Commission’s ruling, Hak’s license status will revert to a taproom if it does not comply with this condition.<sup>19</sup>

### **III. DISCUSSION**

“Reversal is not always required because the Board fails to make its findings in expansive terms. If appropriate, reviewing courts can look at subordinate facts underlying the Board’s conclusions when those facts can be determined, by implication, from the ultimate

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at A-71.

<sup>18</sup> *Id.* at A-72.

<sup>19</sup> *Id.* at A-73-4.

conclusion.”<sup>20</sup> However, “when the Court cannot determine, from the ultimate findings and the record, whether the [Appeals Commission] proceeded upon a correct theory of law, or whether its findings are based upon competent evidence,” further findings are needed and remand is required.<sup>21</sup>

Paragraph 5 of the Appeals Commission’s Order suggests that the Appeals Commission found Hak’s projected or actual receipts from the sale of complete meals would represent a substantial portion of Hak’s gross receipts. But, the Appeals Commission does not provide its rationale and record support as to how it reached this conclusion.

In addition, the Appeals Commission fails to address the Commissioner’s alternative finding, specifically, that pursuant to § 543 (b)(8), Hak’s has “failed to designate a substantial portion of the premises’ floor space . . . to be used for the storage, preparation, service and consumption of complete meals.” The implication is the Appeals Commission concluded that Hak’s had designated a substantial portion of floor space for storage, preparation, service and consumption of complete meals, but the Court is unable to determine the Appeals Commission’s basis for this conclusion. The Court is unable to determine from the Appeals Commission’s decision whether the Appeals Commission “proceeded upon a correct theory of law, or whether its findings are based upon competent evidence.”<sup>22</sup>

#### IV. CONCLUSION

For the forgoing reasons, the Court **REMANDS** this matter to the Appeals Commission and requests further explanation as to why the Appeals Commission concluded that the Commissioner erred in denying Hak’s a restaurant license pursuant to 4 *Del. C.* (b) (8) and (9).

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<sup>20</sup> *Haveg Industries, Inc. v. Humphrey*, 456 A.2d 1220, 1222 (Del. 1983).

<sup>21</sup> *Board of Public Ed. in Wilmington v. Rimlinger*, 232 A.2d 98, 101 (Del. 1967); *See Lindsay v. Chrysler Corp.*, 1994 WL 750345, at \*4 (Del. Super. Dec. 7, 1994).

<sup>22</sup> *Rimlinger*, 232 A.2d at 101.

**IT IS SO ORDERED.**

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Jan R. Jurden, Judge