STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
621 EVENTS LLC,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

STATE LIQUOR AUTHORITY,

Respondent.

DECISION and ORDER
RJI NO.: 01-08-ST9086
INDEX NO.: 5702-08

Supreme Court Albany County All Purpose Term, October 17, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Petitioner commenced this Article 78 proceeding challenging respondent's denial of its application for a special on premise liquor license, pursuant to Alcohol Beverage Control Law §64-a (hereinafter "ABCL §64-a"). Respondent, State Liquor Authority (hereinafter "SLA"), answered the petition and raised a single affirmative defense. Because respondent's

interpretation of ABCL §64-a was arbitrary, capricious and an error of law, the petition is granted in part and the matter is remanded to the respondent for further proceedings in accord with this Decision and Order.

This proceeding, challenging the SLA's interpretation of ABCL §64-a is in the nature of a mandamus to review. (See 125 Bar Corp. V. State Liquor Authority, 24 NY2d 174 [1969]). "The standard of review in such a proceeding is whether the agency determination was arbitrary and capricious or affected by an error of law." (Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753, 758 [1991]). This Court's review is limited to the grounds "invoked by the agency" in its determination. (Matter of Scherbyn, supra at 758).

Here, in a Notice of Disapproval of Application, dated June 4, 2008, the SLA denied petitioner's application for a special on premise liquor license. Procedurally, the SLA's decision constituted one commissioner's vote to approve the application and one commissioner's vote to deny it. At the time of their decision, there were no other SLA commissioners. As a liquor license application is not approved without a majority of the commissioner's voting for approval, and the petitioner has not challenged this portion of the SLA decision, this tie vote constituted a denial. (ABCL §14).

The commissioner voting to deny petitioner's application, did not reach its merits. Rather her denial was based upon her interpretation of ABCL §64-a. The SLA's decision, in accord with the commissioner voting for denial and her interpretation of ABCL §64-a, denied petitioner's application without prejudice and required the petitioner undergo a "500 foot hearing" pursuant to ABCL §64-a(7)(d) . Petitioner, disagreeing with such interpretation and because a third commissioner had been appointed, sought a rehearing. At the rehearing, the

above two commissioners votes were unchanged and the third commissioner recused herself. The resulting tie vote continued the denial of petitioner's application.

The SLA's decision, in accord with the interpretation of the commissioner who voted to deny, interpreted ABCL §64-a(7)(a)(ii) and (7)(d), which states:

> (7) No special on-premises license shall be granted for any premises which shall be
> (a)(ii) in a city, town or village having a population of twenty thousand or more within five hundred feet of three or more existing premises licensed and operating pursuant to the provisions of this section;
> (d)Notwithstanding the provisions of subparagraph (ii) of paragraph (a) of this subdivision, the authority may issue a retail license for on-premises consumption for a premises which shall be within five hundred feet of three or more existing premises licensed and operating pursuant to the provisions of this section if, after consultation with the municipality or community board, it determines that granting such license would be in the public interest. Before it may issue any such license, the authority shall conduct a hearing, upon notice to the applicant and the municipality or community board, and shall state and file in its office its reasons therefor... (emphasis added)

As set forth in the petition, and as admitted by the respondent, there is one existing premise licensed and operating pursuant to ABCL §64-a within five hundred feet of petitioner's proposed facility. There are, however, at least three other "existing premises licensed and operating" with liquor licenses within five hundred feet of petitioner's proposed location. Other than the one premise mentioned above, all additional licensed establishments, existing within 500 feet of petitioner's proposed establishment, are not licensed under ABCL §64-a but rather are licensed under different sections of the ABCL.

The SLA decision interpreted ABCL §64-a(7)(a)(ii) as prohibiting the licensure of an new premise, unless the ABCL §64-a(7)(d) exception was demonstrated, where three or more premises located within five hundred feet of the proposed facility were licensed under any section of the ABCL by the SLA. The SLA decision did not limit the application of ABCL §64-

a(7)(a)(ii) to only those "existing premises licensed and operating" pursuant to ABCL §64-a, which interpretation is urged by petitioner.

As such, the issue presented on this petition is whether ABCL §64-a(7)(a)(ii)'s "this section" language means "section 64-a" or means "any section of the ABCL".

While it is "petitioner's burden to demonstrate respondent's abuse of its discretion" (Matter of Pizzaguy Holdings, LLC v New York State Liq. Auth., 39 A.D.3d 1072 [3d Dept. 2007]), and "when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference". (Raritan Development Corp. v. Silva, 91 NY2d 98, 102 [1997]). "Where, as here, the issue presented is one of pure statutory interpretation, little deference is accorded to the interpretation of the administrative agency, as no special competence or expertise is implicated." (Sweeney v. Dennison, 52 AD3d 882, 883 [3d Dept. 2008]). Moreover, deference to the agency's interpretation is not warranted here because the words "licensed and operating pursuant to this section" of ABCL §64-a(7)(a)(ii) are not used in "any technical sense and the interpretation of this statute does not involve the knowledge and understanding of underlying operational practices." (Price Chopper Operating Co., Inc. v. New York State Liq. Auth., 52 AD3d 924, 925 [3d Dept. 2008][quoting Sbriglio v. Novello, 44 AD3d 1212 [3d Dept. 2007][internal quotations omitted]).

In interpreting a statute this Court's primary function is to determine the intent of the legislature. "To that end, the statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning." (County of Broome v. Badger, __ N.Y.S.2d__ [3d Dept.2008][quoting Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653 [2006][internal quotations omitted]).

The statutory text at issue is unambiguous. It plainly states that ABCL §64-a(7)'s ban on the grant of a license pursuant to ABCL §64-a applies only when there are three or more facilities operating within five hundred feet of the proposed facility which are licensed pursuant to "this section". "This section" means just what it says, "this" being section 64-a of the ABCL. To construe it otherwise would disregard the plain language employed by the legislature. It would require this Court to read "this" as meaning "any", a tenuous reading. Such construction specifically contradicts the plain language of the statute and is not adopted by this Court. Accordingly, the petitioner has demonstrated that the respondent's interpretation of ABCL §64-a(7)(a)(ii) was arbitrary, capricious and affected by an error of law.

The Petition is granted to the extent that this Court finds that ABCL §64-a(7)(a)(ii) does not apply to petitioner's SLA application, as only one other ABCL §64-a licensed premise is located within 500 feet of petitioner's proposed facility. Otherwise, as the respondent has not issued a decision on the merits of petitioner's application, this matter is remitted to respondent for further review of petitioner's application in accord with this Decision and Order.

Additionally, this Court has considered petitioner's request for a hearing, which is denied as unnecessary because the issue presented by this petition is narrowly confined.

All papers, including this Decision and Order, are being returned to the attorney for the Petitioner. The signing of this Decision and Order shall not constitute entry or filing under

CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: November 4 2008
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated September 15, 2008, Verified Petition of Frank Penski, dated September 16, 2008, with attached Exhibits 1 - 6, and unsworn "declaration" of Michael Sinensky, dated September 12, 2008, with attached Exhibits 1(1-13).
2. Answer of Adrienne Kerwin, dated October 8, 2008, with attached Exhibits "A" - "E", and Affirmation of Thomas Donohue, dated October 8, 2008.
3. Reply of Frank Penski, dated October 17, 2008.