SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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In the Matter of the Application of,
BOXERS ENTERPRISES LLC

Index No. 103364/12

DECISION and ORDER

Petitioner,

Mot. Seq. 01

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

- against-

THE NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

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HON. EILEEN A. RAKOWER:

Petitioner Boxers Enterprise, LLC ("Boxers" or "Petitioner") submits an Article 78 Petition by way of Order to Show Cause seeking an order to annul the April 23, 2012 determination of the New York State Liquor Authority ("SLA") denying Petitioner's application for an on-premises liquor license and requiring the SLA to issue an on-premises license at 766 Tenth Avenue, New York, NY ("the Premises"). The SLA cross moves for an Order (1) pursuant to CPLR 3211(2) and 7801, et seq., dismissing this proceeding on the grounds that this Court lacks subject matter jurisdiction as the Petitioner failed to exhaust its administrative remedies; or (2) alternatively, in the event that SLA's motion is denied, for an order pursuant to CPLR 7804(f) granting SLA 30 days from service of the notice of entry denying its cross motion within which to answer the verified petition. Oral argument was held on September 11, 2011.

On or about November 1, 2011, Boxers filed an application with the SLA for a new on-premises liquor license for the Premises located within 200 feet of the Adolph S. Ochs School and Academy, also known as P.S. 111 ("P.S. 111" or "the School"). The SLA opposed the application based on Alcoholic Beverage Control

Law 64(7)(a), commonly known as the "200 Foot Rule," which bars an applicant from obtaining an on-premises liquor license if its premises are within 200 feet of a building occupied exclusively as a school. The SLA contended that a wire gate on 52nd Street leading into the schoolyard of P.S. 111 was within 200 feet of Petitioner's Premises ("the Gate"). Boxers contended that the Gate was not used by students for ingress to the school for the past six years and that the controlling statute requires that a door to the school be "regularly used" for ingress by students in order for it to constitute as an "entrance" and disqualify the Premises sought to be licensed that is within 200 feet of the entrance.

On February 15, 2012 and February 29, 2012, the Full Board of the SLA held a public meeting at which it considered Petitioner's Application. At the meeting held on February 15, 2012, Irma Medina, the Principal of P.S. 111, discussed the School's use of the Gate. Ms. Medina represented that the Gate is used seasonally in the spring and fall but that it had not been used in the past year (i.e. Fall 2011 or Spring 2011) due to construction which caused trailers or other equipment to block the Gate's use. Ms. Medina also stated that the School intended to re-open the Gate in the springtime. Alexander Victor, Esq. submits an affidavit in support of Boxers' Petition and contends that he has personally viewed evidence contrary to the claimed construction and claimed future use of the Gate.

As set forth in Respondent Mark Frering's attorney affirmation, "The Full Meeting was non-adversarial in nature, and consisted primarily of argument and unsworn statements made before the Board by interested parties and various members of the community." At the end of the February 29, 2012 Full Board Meeting, after considering Petitioner's arguments, the members of the Board verbally disapproved Petitioner's application for a license. No evidentiary hearing under oath took place at these meetings.

On April 23, 2012, the Full Board issued a written notice of its disapproval of Petitioner's application. The notice included a statement of the grounds for denial of the application. The notice informed Petitioner that "if you believe you have good cause to controvert the facts and determination of this disapproval, you may request to have this decision reviewed by the Members of the Authority." The notice provided two options to Petitioner- a request for a "Disapproval Hearing" or a request for "Reconsideration." Petitioner did not thereafter request either a Disapproval Hearing or Reconsideration of the SLA's initial Application Disapproval.

Respondent contends that Petitioner's instant proceeding is barred by Petitioner's failure to exhaust its administrative remedies. Petitioner contends that Respondent's April 23, 2012 denial was a final decision, administrative review would have been futile, and, alternatively, that since an interpretation of a statute is at issue and a question of law is raised, there is no obligation to exhaust administrative remedies.

An agency action must be final and binding before an aggrieved party may seek judicial review under Article 78 (*see* CPLR §7801[1]):

> Administrative actions as a rule are not final "unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process" (*Chicago & S. Air Lines v Waterman Corp., 333 US 103, 113).* To determine if agency action is final, therefore, consideration must be given to "the completeness of the administrative action" and "a pragmatic evaluation [must be made] of whether the 'decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury'" (*Church of St. Paul & St. Andrew v Barwick, 67 NY2d 510, 519, cert denied 479 US 985*, quoting *Williamson County Regional Planning Commn. v Hamilton Bank, 473 US 172, 192-193*; *Matter of Edmead v McGuire, 67 NY2d 714, 716*) [a "challenged determination is final and binding when it 'has its impact' upon the petitioner who is thereby aggrieved"]; *see also, Abbott Labs. v Gardner, 387 US 136, 148-149*; *Federal Trade Commn. v Standard Oil Co. of Cal., 449 US 232, 239*; *National Treasury Empls. Union v Federal Labor Relations Auth., 712 F2d 669, 671* [DC Cir] [an agency's position will not be considered final if it is "tentative, provisional, or contingent, subject to recall, revision, or reconsideration"]).
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> Thus, a determination will not be deemed final because it stands as the agency's last word on a discrete legal issue that arises during an administrative proceeding. There must additionally be a finding that the injury purportedly inflicted

> by the agency may not be "prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (*Church of St. Paul & St. Andrew v Barwick, supra, 67 NY2d at 520*; *Matter of Ward v Bennett, 79 NY2d 394, 400*; *de St. Aubin v Flacke, 68 NY2d 66, 75*; *Matter of New York State Inspection, Sec. & Law Enforcement Empls. v Cuomo, 64 NY2d 233, 240*; *Matter of Putnam v City of Watertown, 213 AD2d 974, 974-975)*. If further agency proceedings might render the disputed issue moot or academic, then the agency position cannot be considered "definitive" or the injury "actual" or "concrete."

(*Essex County v. Zagata*, 91 N.Y.2d 447, 453-54 [1998]).

It is generally held that "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." (*Lehigh Portland Cement Company v. New York State Department of Environmental Conservation,* 87 N.Y.2d 136, 140 [1995], *citing Watergate II Apartments v. Buffalo Sewer Authority,* 46 N.Y.2d 52 [1978]). The purpose of this rule is to relieve the courts of the burdens associated with deciding issues that have been entrusted to an agency and to permit agencies to establish a consistent scheme of regulation regarding its area of expertise. (See, *Watergate II Apartments, supra* at 57). The exhaustion of remedies requirement is, however, flexible and is not required where "an agency's action is challenged as beyond its grant of power or when resort to an administrative remedy would be futile." (*Lehigh Portland Cement Company, supra* at 140). Such an appeal is considered futile when the reviewing agency has "predetermined" the relevant issue or has construed "the relevant regulation in a manner which would require an adverse result against [petitioner.]" However, where a reviewing agency "did not issue any sort of determination or statement of policy on the issue in dispute," administrative review is not futile. (*Lehigh Portland Cement Company, supra* at 141- 42).

In the instant matter, Petitioner failed to exhaust the administrative remedies that were expressly enumerated in Respondent's April 23, 2012 notice of disapproval. By failing to exhaust these remedies, the Petitioner failed to develop an evidentiary record that a reviewing court could consider upon a proper application. Public policy

precludes courts from usurping a reviewing agency's function in favor of giving it the opportunity to fully consider a matter within its purview and make a reasoned determination regarding issues within its area of expertise. (See, *Young Men's Christian Association v. Rochester Pure Water District,* 37 N.Y.2d 371 [1975]). Accordingly, in a case such as this, "[t]he failure to exhaust administrative remedies is dispositive."(*Matter of Weissman v. City of New York, et al.,* 96 A.D. 2d, 454, 456 (1st Dept 1983) and the Petition must be dismissed for lack of subject matter jurisdiction.

Wherefore, it is hereby,

ORDERED and ADJUDGED that Petitioner Boxers Enterprises LLC's Article 78 Petition is denied; and it is further

ORDERED and ADJUDGED that Respondent New York State Liquor Authority's cross motion to dismiss Petitioner Boxer Enterprises LLC's Article 78 proceeding is granted and the proceeding is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 9/24/12

EILEEN A. RAKOWER, J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

☒ FINAL DISPOSITION