2011 IL App (1st) 093293-U

SIXTH DIVISION
November 18, 2011

No. 1-09-3293

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

CITY OF CHICAGO, Plaintiff-Appellee, v. POOH BAH ENTERPRISES, INC., an Illinois Corporation and PERRY MANDERA, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. Nos. 99 CH 9682 93 CH 4559
POOH BAH ENTERPRISES, INC. *et al.*, Plaintiffs-Appellants, v. CITY OF CHICAGO, *et al.*, Defendants-Appellees.	)	The Honorable James A. Epstein, Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Justice Cahill concurred in the judgment.
Presiding Justice R. E. Gordon concurred in part and dissented in part.

O R D E R

¶ 1 *Held:* Revocation of Pooh Bah's licenses for repeated violations of a Chicago ordinance held not to be arbitrary, unreasonable, or unrelated to the legitimate purposes of government regulation behind the ordinance. Pooh Bah's claim that the City violated the constitution provision barring licensing for revenue was properly dismissed. The supreme court's review in 2006 of Pooh Bah's constitutional challenges foreclosed Pooh Bah's as-applied constitutional claim that it sought to pursue before the circuit court on remand from the supreme court.

¶ 2 Pooh Bah Enterprises, Inc., owned by Perry Mandera, appeals the 1993 administrative decision revoking its licenses, including its liquor license, because dancers at its strip club, "Thee Dollhouse,"[1] located at 1531 North Kingsbury Street, exposed their buttocks and breasts in violation of Chicago Municipal Code §4-60-140(d) (Coverage Ordinance).

¶ 3 On appeal, Pooh Bah claims the administrative decision revoking all of its business licenses was arbitrary, unreasonable, and unrelated to the purpose of government regulation underlying the Coverage Ordinance, making the revocations excessive and arbitrary. Pooh Bah further contends its complaint stated a cause of action for licensing for revenue without legislative authorization under certain provisions of the Chicago Municipal Code and it should have been permitted to litigate its "as-applied" first amendment challenge to the City's ordinance. We affirm.

¶ 4 BACKGROUND

¶ 5 In February 1993, Pooh Bah became the only commercial establishment in Chicago where the sale of liquor and dancing by seminude women were combined. Immediately, municipal authorities opposed the club's operation. In March 1993, the Liquor Control Commission of the City of Chicago (LCC) initiated administrative proceedings charging 24 violations, most under the Coverage Ordinance, and seeking to revoke various municipal licenses, including Pooh Bah's municipal retail liquor license.[2] The LCC alleged Pooh Bah

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[1] Mandera later contracted with a Las Vegas strip club owner, Frederick Rizzolo, and renamed the club "Crazy Horse Too." Since 2003, the club has been called "VIP's, A Gentleman's Club."

[2] Pooh Bah held several licenses for the premises, including retail liquor, late-hour liquor,

allowed dancers to expose their buttocks and portions of their breasts at or below the areola for public view at its club. On October 15, 1993, the LCC issued its order sustaining 22 of the charges. The LCC revoked Pooh Bah's business licenses effective October 29, 1993. Pooh Bah appealed to the Liquor Appeal Commission of the City of Chicago (LAC), which, on January 24, 1995, affirmed the revocation of Pooh Bah's liquor license. The LAC did not address the revocation of Pooh Bah's other business licenses because its review authority is limited to liquor licenses.

¶ 6 In May 1993, while the administrative proceedings were under way, Pooh Bah filed suit in the circuit court claiming the dancers' attire complied with the Coverage Ordinance. Alternatively, Pooh Bah challenged the constitutionality of the Coverage Ordinance. The City responded with a counterclaim seeking equitable and other relief. In May 1999, the City filed a five-count public nuisance suit against Pooh Bah based on violations of the Coverage Ordinance that were observed by undercover police officers shortly before suit was filed. The 1999 suit sought injunctive relief to shut down the club. The two cases were consolidated. In 2001, the circuit court held the Coverage Ordinance unconstitutional, reversed the revocations of Pooh Bah's licenses, and dismissed the City's nuisance suit.

¶ 7 In September 2004, we upheld the constitutionality of the Coverage Ordinance and rejected Pooh Bah's claim that the ordinance violated the free speech clauses of the Illinois and United States constitutions. *City of Chicago v. Pooh Bah Enterprises, Inc.*, Nos. 1-01-0592, 1-01-1932 (Cons.) (1st Dist. Sept. 28, 2004) (unpublished order under Supreme Court Rule 23). Based on our finding that the ordinance was constitutional, we held that a violation of the

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public place of amusement, music-and-dance, and limited business.

ordinance could serve as the basis to revoke Pooh Bah's municipal licenses and as a basis for a public nuisance finding, as alleged by the City. We reversed the circuit court's judgment and remanded for further proceedings. The supreme court granted Pooh Bah's petition for leave to appeal. The court unanimously rejected the first-amendment challenges to the ordinance. *City of Chicago v. Pooh Bah Enterprises, Inc*., 224 Ill. 2d 390 (2006). The supreme court presented a detailed history of the litigation, which makes repetition here unnecessary.

¶ 8 In its petition for rehearing before the supreme court, Pooh Bah argued, *inter alia*, that the court did not address its as-applied challenge under the free speech clauses of the Illinois and United States Constitutions. Justice Freeman issued a dissent to the petition's denial, which triggered no response from the majority. *Pooh Bah*, 224 Ill. 2d at 450-69 (Freeman, J., dissenting.). Pooh Bah's petition to the United States Supreme Court for a *writ of certiorari* was denied.

¶ 9 On remand, the circuit court affirmed the administrative decisions revoking Pooh Bah's licenses based on its 1993 violations of the Coverage Ordinance. The circuit court declined to review Pooh Bah's as-applied constitutional challenge, finding review of the claim precluded by the mandate of the supreme court. Regarding Pooh Bah's claim that the City unlawfully licensed for revenue under certain licensing provisions, the City filed a combined motion to dismiss, pursuant to section 2-619.1 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2008)). The court dismissed the license for revenue claims, but granted leave to amend. Ultimately, the court dismissed with prejudice Pooh Bah's amended claims under the liquor licensing and amusements provisions. The court concluded that, as an affirmative matter, the City had legislative authority to tax, which negated these amended claims completely. The court

held the allegations under the tobacco and limited business provisions remained insufficient. An agreed order was entered disposing of all remaining claims after Pooh Bah's motion for reconsideration was denied.

¶ 10 Pooh Bah timely appeals.

¶ 11 ANALYSIS

¶ 12 Pooh Bah raises three issues. First, it contends the revocation of all of its City licenses is a "business death penalty" and, as such, must be reversed. Pooh Bah argues the blanket revocation that would result in the termination of Pooh Bah's business, was unwarranted, excessive, and arbitrary under the facts of the case. Second, Pooh Bah contends that its license for revenue claims were improperly dismissed, both as a matter of fact and law. Finally, Pooh Bah argues that it is entitled to complete its trial evidence on its as-applied first amendment challenge to the City's Coverage Ordinance. Pooh Bah alleges that prior proceedings have not addressed its as-applied constitutional claims.

¶ 13 Revocation of All Licenses

¶ 14 We review an agency's imposition of penalties under an abuse of discretion standard. *Scott v. Illinois State Police Merit Board*, 222 Ill. App. 3d 496, 502-03 (1991). The abuse of discretion standard is "the most deferential standard of review available with the exception of no review at all." *People v. Coleman*, 183 Ill. 2d 366, 387 (1998). "An abuse of discretion occurs where no reasonable person would agree with the position adopted [below]." *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176 (1997). Thus, it cannot be said that an abuse of discretion occurred "if reasonable persons could differ as to its decision." *In re Adoption of D.*, 317 Ill. App. 3d 155, 160 (2000).

¶ 15 The LCC imposed the most severe penalty permitted under the Coverage Ordinance - the equivalent of a "death penalty" for the licensee.[3] Pooh Bah does not dispute that the dancers at its club exposed their buttocks and parts of their breasts in violation of the Coverage Ordinance. Rather, Pooh Bah argues that the revocation of all of its licenses was not proportionate to the violations.

¶ 16 It is the agency's decision, not that of the circuit court, that we review. *Daley v. El Flanboyan Corp.*, 321 Ill. App. 3d 68, 71 (2001). We review the agency's findings of fact against the manifest weight of the evidence standard to determine whether the findings justify the agency's decision. It falls to the party challenging an agency's findings of fact to demonstrate that they are against the manifest weight of the evidence. We will not overturn an agency's findings of fact unless it is shown that "the opposite conclusion is clearly evident." *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204 (1998). Record evidence consistent with the agency's decision renders the decision not against the manifest weight of evidence. *Leong v. Village of Schaumburg*, 194 Ill. App. 3d 60, 65 (1990). Under such circumstances, we are bound to uphold an agency's decision. *Id*.

¶ 17 As we noted, Pooh Bah does not challenge the LCC's findings of fact that violations of the Coverage Ordinance occurred. Instead, Pooh Bah contends the LCC abused its discretion in not applying progressive punishment, particularly where neither the LCC order revoking the liquor license, nor the City's defense of the revocations in the circuit court, offered any

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[3] The penalty, however, was never imposed. The licensee continues in business pending the exhaustion of its appeals, nearing its second decade after the initial administrative ruling in 1993.

justification for imposing any punishment on Pooh Bah's non-liquor licenses, the terms of which were not alleged to have been violated.

¶ 18 Pooh Bah further contends the City failed to present any evidence of actual harm to the public arising from Pooh Bah's coverage violations. Pooh Bah argues that because its violation involved no criminal conduct or any dangerous activities, the sanction imposed was too severe. Pooh Bah points to its change of the dancers' attire in line with the supreme court's decision in 2006 to urge that the City's suggestion of continuing violations of the Coverage Ordinance lacks merit. Pooh Bah asserts the City's efforts to completely shut-down its business is unreasonable.

¶ 19 In its reply brief, Pooh Bah argues, "[N]o precedent [in Illinois exists] for such a drastic and maximum sanction for a first-time violation of a disputed and litigated regulatory law." Pooh Bah asserts the Coverage Ordinance was the subject of a good faith challenge to its validity and enforceability, which should not serve as a basis for the closure of its business. Pooh Bah broadly contends no justification exists for the revocation of all of its city licenses for its failure to comply with one license ordinance, namely, the Coverage Ordinance. According to Pooh Bah, the City is unable to offer any rationale for its revocation of all of Pooh Bah's licenses, which renders its decision "arbitrary and capricious." As such, the City's action merits no judicial deference.

¶ 20 Finally, Pooh Bah notes the City's characterization of Pooh Bah's "disdainful" attitude toward the Coverage Ordinance. This it finds significant because the LCC relied on Pooh Bah's "disdain" as an aggravating factor in determining the sanction for Pooh Bah's violation of the Coverage Ordinance.

¶ 21 The City responds that many of the factors that Pooh Bah contends mitigate its violations

and the revocations of its licenses were never raised before the administrative agency and are therefore waived. See *Provena Covenant Medical Center v. Department of Revenue*, 236 Ill. 2d 368, 386 (2010) (issues not placed before the agency are waived and cannot be considered on review). To warrant the harsh penalty, the City points to Pooh Bah's "multiple and knowing violations," which occurred before and after the LCC rulings. The City dismisses Pooh Bah's contention that it believed in good faith that the Coverage Ordinance was unconstitutional, arguing that "self-imposed confusion does not mitigate in its favor." The City argues, "Pooh Bah flouted section 4-60-140(d) for more than a decade and reaped great financial benefits."

¶ 22 Pooh Bah replies, "The City's suggestion that Pooh Bah thumbed its nose at the courts by continuing its dancers' use of the triangular latex and t-bar costumes is false." Pooh Bah asserts it merely adhered to its good faith position that the Coverage Ordinance was unconstitutional until its position was determined to be conclusively wrong with the issuance of the Illinois high court's decision. Pooh Bah argues, "There was nothing frivolous or in bad faith in [its] position."

¶ 23 Upon administrative review of the LCC's decision, it is not our role to determine whether we would have imposed the sanction entered by the administrative agency. *Abrahamson v. Ilinois Department of Professional Regulation*, 153 Ill. 2d 76, 99 (1992) (reviewing courts defer "to the administrative agency's expertise and experience in determining what sanction is appropriate to protect the public interest"). Where the agency's factual findings are not challenged, our review is limited to "whether the LCC 'acted arbitrarily and without cause or in clear abuse of [its] discretion.' " *Roach Enterprises, Inc. v. License Appeal Comm'n*, 277 Ill. App. 3d 523, 528 (1996) (quoting *Leong*, 194 Ill. App. 3d at 64). Under the controlling standard of review, when evidence exists in the record that supports the agency's decision, we must

affirm. *Leong*, 194 Ill. App. 3d at 65.

¶ 24 While Pooh Bah claims it violated only a single ordinance, it was found to have violated that ordinance in 22 counts, along with a prior violation of a different ordinance. Pooh Bah provides us with no authority for its claim that multiple ordinance violations are subject to mitigation on the basis that it had good faith defenses to the violations. Nor do we find authority for Pooh Bah's contention that "progressive penalties" were required to be imposed before revocation of all licenses could be ordered. Nor is Pooh Bah's claim that no harm to the public occurred arising from its violations of the Coverage Ordinance well taken. Public harm arises whenever an ordinance is not followed, though not always in an observable way. We agree with the City's assertion: the very regulation of a liquor license is meant "to protect public health, safety and welfare."

¶ 25 In sum, we agree with the City that Pooh Bah elected to risk continuing violations of the Coverage Ordinance to reap the financial benefits flowing from its violations. We reject Pooh Bah's complaint that the LCC abused its discretion in imposing the revocation sanction when it was found to have blatantly disregarded the Coverage Ordinance.

¶ 26 Licensing for Revenue Claim

¶ 27 Pooh Bah next contends the circuit court erred by granting the City's motion to dismiss amended count X in which Pooh Bah alleged the City licensed for revenue from 1993 to 1997 in violation of Article VII, section 6(e) of the Illinois Constitution. Ill. Const. 1970, art. VII, sec. 6(e). The City filed a combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2008)). The circuit court granted the City's motion with prejudice pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2008)) regarding

Pooh Bah's challenges to the liquor and amusement licenses to generate revenue as expressly allowed under Illinois law. The allegations against the tobacco and limited business licensing provisions were dismissed as insufficient under section 2-615 (735 ILCS 5/2-615 (West 2008)). We address the dismissal of the licensing for revenue claims jointly.

¶ 28 A motion to dismiss under section 2-619 admits the legal sufficiency of a complaint, but raises defects or defenses that defeat the claim. *Chubb Group Ins. Companies v. Carrizalez*, 375 Ill. App. 3d 537, 538 (2007). A motion to dismiss under section 2-615 challenges the legal sufficiency of a claim. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429, 305 (2006). To state a cause of action, a claim must plead a set of facts entitling the party to relief. When no relief is available, the claim is subject to dismissal. *Canel v. Topinka*, 212 Ill. 2d 311, 318 (2004). "The critical inquiry is whether the allegations of the complaint, when construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003). Dismissal under either section is subject to *de novo* a grant of a section. *Id.*; *Carrizalez*, 375 Ill. App. 3d at 538.

¶ 29 Article VII, section 6(a) of the Illinois Constitution grants home rule units "any power *** pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." Ill. Const. 1970, art. VII, sec. 6(a). However, the grant is not unlimited; Article VII, section 6(e) prohibits using police power to produce revenue. *Rozner v. Korshak*, 55 Ill. 2d 430, 432-33 (1973); see also *City of Chicago Heights v. Western Union Telegraph Co.*, 406 Ill. 428, 433-434 (1950); *Lamere v. City of Chicago*, 391 Ill. 552, 558-559 (1945).

¶ 30 "Licensing for revenue" describes a situation in which a governmental unit, without the

power to tax, attempts to raise revenue by exercising its police power. *Rozner*, 55 Ill. 2d at 432-33. Section 6(e) provides, "A home rule unit shall have only the power that the General Assembly may provide by law *** to license for revenue." Ill. Const. 1970, art. VII, sec. 6(e). See *Commercial National Bank of Chicago v. City of Chicago*, 89 Ill. 2d 45, 50-51 (1982) ("home rule units have only the power in these methods of raising revenue conferred by the General Assembly"). Absent "specific legislative authority" (*Rozner*, 55 Ill. 2d at 432), a home-rule municipality may not engage in licensing for revenue.

¶ 31 Pooh Bah argues the City lacks the power to license for revenue because no specific legislative authority exists and absent such authority, the "excessive 'license' fees to raise revenue for general City purposes[,] violated Article VII, Section 6(a) of the Illinois Constitution." Pooh Bah claims the annual license fees the City imposed from 1993 to 1997 for liquor, amusement, tobacco, and limited business licenses were arbitrary and greatly exceeded the City's administrative costs of regulating the licensed businesses. Pooh Bah contends the costs associated with renewing a license are far lower than those associated with the first time issuance of a license, yet the fees are greater for renewal than at first issuance. The City's "illicit license scheme" renders the Coverage Ordinance void as of 1993 and therefore unenforceable. Given its unenforeability, Pooh Bah asserts the City cannot rely upon the Coverage Ordinance to penalize Pooh Bah for its admitted violations in 1993.

¶ 32 The circuit court rejected Pooh Bah's characterization of the fees collected pursuant to the 1993 License Recodification Amendment Ordinance as an exercise of police power. "[The license fee increases] were not adopted under the guise of the City's police power. [The Ordinance] was 'frankly a taxing measure,' and as such was within the City's home rule powers."

The court granted the City's motion to dismiss the claims regarding the fees for amusement and liquor licenses as expressly authorized by Illinois law. See 65 ILCS 5/11-42-5 and 235 ILCS 5/4-1. The court ruled the allegations regarding the limited business and tobacco licenses to be insufficient to state a cause of action.

¶ 33 Pooh Bah asserts the court erred in it's ruling. "[T]he Court's legal characterization of these license fees as 'taxes' is flatly at odds with the preamble and the text of the ordinance *** and is not even supported by the enactments's title on which the court based its erroneous characterization." Pooh Bah cites no direct authority to support its position; rather, it seeks to distinguish *Rozner*, and this court's decision in *A & H Vending Service, Inc. v. Village of Schaumburg*, 168 Ill. App. 3d 61, 63 (1988), which, if persuasive, would leave the City without authority for its position.

¶ 34 In *Rozner*, the supreme court rejected a challenge similar to the one made by Pooh Bah in this case. The plaintiff contended the Chicago ordinance at issue "must be regarded as a 'license for revenue,' which, under the 1970 constitution, cannot be imposed." *Rozner*, 55 Ill. 2d at 432. The court rejected the plaintiff's characterization of the aim behind the ordinance. "In the present case the City of Chicago has not attempted to tax under the guise of its power to regulate. Its 'Wheel Tax License' ordinance is frankly a taxing measure [citations], and is within the power of the City under section 6(a) of article VII." *Id*. at 433.

¶ 35 The circuit court in the instant case made remarks similar to those in *Rozner* about the amusement and liquor licenses fees at issue before us. We agree with the circuit court. Pooh Bah's bald claim that the liquor and amusement licensing fees are not proper taxing measures is insufficient to distinguish the "city Wheel Tax in *Rozner*." We conclude *Rozner* provides direct

authority for the City's position in this case. Pooh Bah's assertion to the contrary is simply unpersuasive.

¶ 36 Nor do we agree with Pooh Bah's offered distinction of this court's holding in *A & H Vending.* Pooh Bah contends that because "*A & H Vending* did not itself construe that constitutional provision [section 6(a) of article VII], *** there is no precedent to follow." While a direct precedent fitting the facts of this case may not exist, the controlling rule of law is clear:

> "When a governmental entity has been granted the power to license and regulate but not the power to tax, the Illinois courts have held that the license fee must be reasonably related to the cost of regulation. However, when the power to license and regulate is combined with the power to tax, the courts have upheld license fees geared to producing revenue. When the power to license is combined with the power to tax, the license fees do not have to be reasonably related to the cost of regulation." *A & H Vending, 168 Ill. App. 3d* at 63.

¶ 37 The City undoubtedly has the power to tax and to regulate. Ill. Const. 1970, art. VII, sec. 6(a). The General Assembly likewise authorized the City to tax and license to regulate amusements and liquor. See 5 ILCS 5/11-42-5 (West 2008) ("corporate authorities of each municipality may license, tax, regulate, or prohibit amusements and may license, tax, and regulate all places for *** amusement"); 235 ILCS 5/4-1 (West 2008) (granting corporate authorities of municipalities the authority to "determine the number, kind, and classification of

licenses, for sale at retail of alcoholic liquor *** and the amount of the local license fees to be paid *** and the manner of distribution of such fees after their collection"); *Sager v. City of Silvis*, 402 Ill. 262, 268 (1949) ("Under legislative power to license, regulate and prohibit sales of intoxicating liquor a city has been permitted to impose license fees for substantial municipal revenue"). Although the two powers are distinct, "each may be exercised by the imposition of a license fee." *Rozner*, 55 Ill. 2d at 432-33 (finding the City could impose a wheel tax through license fees).

¶ 38 The trial court properly dismissed Pooh Bah's amended count X regarding the fees for amusement and liquor licenses as foreclosed by Illinois law. The claims are affirmatively defeated by express authorization of Illinois law. See 65 ILCS 5/11-42-5 and 235 ILCS 5/4-1. The remaining claims of count X failed to state a cause of action when Pooh Bah pleaded nothing more than the City engaged in an "illicit license scheme."

¶ 39 Pooh Bah's overall claim that the ordinance is an unconstitutional exercise of municipal authority is equally unpersuasive. Pooh Bah bears the burden of demonstrating that the ordinance is unconstitutional. *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 854 (2007) ("Municipal ordinances are presumed to be constitutional, and the party challenging the validity of an ordinance has the burden of showing that it violates the constitution."). The record is barren of any evidence to support Pooh Bah's blanket contention that the license renewal process costs the City much less than the initial license registration process.

¶ 40 Even if such evidence were available to Pooh Bah, the City is authorized to use license fees as a source of revenue. See *Sager*, 402 Ill. at 268; *Rozner*, 55 Ill. 2d 432-33. The situation

presented by this case is far from the "situations in which a governmental unit that did not have the power to tax attempted to raise revenue by the existence of its police power." *Rozner*, 55 Ill. 2d at 433. Because the City had the power to tax and regulate amusements and liquor, it could use its taxing power to charge license fees in excess of the costs of regulation, which is precisely what Pooh Bah contends the City did.

¶ 41 We agree with the circuit court's implicit assessment of the claims regarding the tobacco and limited business fees of amended count X that Pooh Bah failed to heed the circuit court's earlier warning.

> "If Pooh Bah decides to replead this claim, it must either state facts alleging the true cost of administering these licenses, or it must state why it is unable to do so and explain the basis for its belief that the City is licensing for revenue."

¶ 42 Rather than meet its burden in repleading the amended count, Pooh Bah contends that without discovery it would be unable to make a more specific claim. We accept that as a concession that tobacco and limited business claims fail to state a cause of action. Yet, facts from other sources, such as the City's budget or public records, were available *if* there was a legally sufficient basis for such claims.

¶ 43 To be successful in its claim against the City, Pooh Bah was required to allege facts supporting its belief that the City licensed for revenue. Count X failed to state a claim for licensing for revenue. The circuit court properly granted the City's combined motion to dismiss.

¶ 44 As-Applied Challenge

¶ 45 Finally, Pooh Bah argues the prior proceedings did not reach, much less adjudicate, its as-applied constitutional challenges to the Coverage Ordinance. On remand, the circuit court did not allow Pooh Bah to put forth an evidentiary case on its as-applied first amendment challenge. The circuit court based its decision against allowing Pooh Bah to challenge the constitutionality of the ordinance on "as-applied" grounds on the express language in the supreme court's opinion.

¶ 46 Prior to remanding this case, the Illinois Supreme Court explicitly rejected Pooh Bah's argument that it should be allowed to dispute the City's claim of secondary effects of mixing liquor and nudity, which undergirded the Coverage Ordinance.

> "Pooh Bah argues that on remand it should be permitted to present additional evidence on the question of whether the ordinance actually creates the secondary effects claimed by the City. This argument is untenable. The sole reason Pooh Bah seeks to present such evidence is to renew and bolster its contention that the ordinance violates constitutional standards. For purposes of this appeal, however, the constitutionality of the ordinance is no longer subject to dispute. Our holding that the ordinance does not violate the United States or Illinois constitutions is conclusive of the issue and shall be binding on the parties and on the circuit court on remand." *Pooh Bah*, 224 Ill. 2d at 448.

¶ 47 Pooh Bah argues, "[T]he only reasonable interpretation of the Supreme Court's determination regarding the 'constitutionality' of the coverage ordinance is that it applied solely

to the facial challenge." Pooh Bah argues that to read the supreme court's opinion as foreclosing proceedings on the as-applied challenge, which Pooh Bah contends was undecided, would deny Pooh Bah the right to a ruling on this issue and, therefore, deny it due process. Pooh Bah argues that given the "unrestricted remand language in the appellate court order and the Supreme Court's affirming order," the circuit court erred in prohibiting litigation of Pooh Bah's "undecided" as-applied challenge to the City's ordinance.

¶ 48 A lower court must adhere to the higher court's mandate. *Clemons v. Mechanical. Devices Co.*, 202 Ill. 2d 344, 351 (2002). Whether the lower court honored the mandate is an issue we review *de novo*. *Id.* at 351-52. When the mandate is general, meaning it lacks specific instructions on how to proceed, the lower court looks to the higher court's opinion to determine the bounds of the lower court's discretion. *See Clemons*, 202 Ill. 2d at 353; *Harris Trust & Savings Bank v. Otis Elevator Co.*, 297 Ill. App. 3d 383, 387 (1998).

¶ 49 An ordinance may be challenged on first amendment grounds in two ways: facially and as-applied. A facial challenge allows "persons to whom a statute may constitutionally be applied to challenge the statute on the ground that it may conceivably be unconstitutionally applied to others in situations not before the court." *Vuagniaux v. Department of Professional Regulation*, 208 Ill. 2d 173, 191 (2003). An as-applied challenge attacks the statute as constitutionally inapplicable to specific conduct and "asserts that the particular acts which gave rise to the litigation fall outside what a properly drawn regulation could cover." *Id.*

¶ *50* Our supreme court considered in its 2006 decision both first amendment challenges. Pooh Bah insists, however, that the court failed to consider its as-applied claim. As support for

this reading of the opinion, Pooh Bah points to Justice Freeman's dissent, which adopted Pooh Bah's view that it should be permitted to further litigate its as-applied claim. *Pooh Bah*, 224 Ill. 2d at 450-69 (Freeman, J., dissenting.). Pooh Bah's assertion proves the opposite.

¶ 51 Justice Freeman's dissenting view supports the City's claim that the mandate, based on the majority opinion, foreclosed further litigation on first amendment grounds. In the face of Justice Freeman's dissent, the majority did not modify its rejection of Pooh Bah's request to offer evidence on the secondary effects of the Coverage Ordinance, its as-applied claim. The clear mandate of the court precludes the avenue Pooh Bah now seeks to take.

¶ 52 The ruling of our supreme court is clear: the City's Coverage Ordinance "does not violate the United States or Illinois constitutions." The supreme court's holding is binding on the circuit court, this court, and the parties. *Pooh Bah*, 224 Ill. 2d at 448. There is no room in the mandate for Pooh Bah's contention to the contrary.

¶ 53 CONCLUSION

¶ 54 The administrative decisions revoking Pooh Bah's city licenses for violations of the Coverage Ordinance is not arbitrary, unreasonable, or unrelated to the legitimate purposes of the government regulation. The circuit court properly upheld the revocations. Pooh Bah's claims that the City violated Article VII, section 6(e) of the Illinois Constitution by licensing for revenue do not warrant further consideration. The circuit court properly dismissed the claims as insufficient as a matter of law. Lastly, our supreme court expressly foreclosed Pooh Bah's as-applied first amendment claim that it seeks to pursue to continue with this litigation and continue to reap great financial benefits.

¶ 55 Affirmed.

¶ 56 PRESIDING JUSTICE ROBERT E. GORDON, concurring in part and dissenting in part:

¶ 57 I concur with the majority's conclusion that our supreme court already decided Pooh

Bah's as-applied challenge. Order at ¶49. I also concur with the majority that we must affirm the trial court's dismissal of Pooh Bah's amended count X. Order at ¶33.

¶ 58 However, for the reasons explained below, I must respectfully dissent from the part of the majority's order which affirmed the total revocation of all of Pooh Bah's licenses.

¶ 59 The majority states that it does not "find authority for Pooh Bah's contention that "progressive penalties were required to be imposed before revocation of all licenses could be ordered." Order at ¶23. That is not what Pooh Bah contended.

¶ 60 Pooh Bah did not contend that progressive penalties were required; rather it argued that the lack of progressive penalties was one factor to be considered.

¶ 61 Specifically, Pooh Bah argued that the LLC abused its discretion when it "leapt from a 5-day voluntary closure in 1991 *** to a universal revocation that will terminate Pooh Bah's business," where the 22-violations at issue all occurred under a prior owner. *Jacquelyn's Lounge, Inc. v. License Appeal Commission*, 277 Ill. App. 3d 959 (1996) ("we find that the plaintiffs' imposition of revocation [of all licenses] as a penalty was an abuse of discretion").

¶ 62 In support, Pooh Bah cites *Jacquelyn's Lounge, Inc. v. License Appeal Commission*, 277 Ill. App. 3d 959 (1996), where this court held that a reviewing court may overturn sanctions imposed by a licensing agency that are overly harsh in light of mitigating circumstances. *Jacquelyn's Lounge*, 277 Ill. App. 3d at 966. Even where an agency's findings are not against the manifest weight of the evidence, a reviewing court may still find that, under the particular circumstances of the case, the penalty of license revocation was unduly harsh. *Jacquelyn's Lounge*, 277 Ill. App. 3d at 966. In *Jacquelyn's Lounge*, we held that, although the agency's

findings were not against the manifest weight of the evidence, its revocation of all of an establishment's licenses was an unduly harsh penalty, where the owner had not been charged with any violations prior to the violation at issue, and where the owner had "no personal knowledge or involvement" with the violation that led to the revocation. *Jacquelyn's Lounge*, 277 Ill. App. 3d at 967. We found the revocation to be an abuse of discretion and reversed. *Jacquelyn's Lounge*, 277 Ill. App. 3d at 967.

¶ 63 Pooh Bah also cites *Hanson v. The Illinois Liquor Control Commission*, 201 Ill. App. 3d 974 (1999), in which the appellate court held that the revocation of a liquor license was an abuse of discretion, where the owner did not have a prior violation and was not personally "aware" of the violation that led to the revocation. *Hanson*, 201 Ill. App. 3d at 984.

¶ 64 Similarly, in the case at bar, defendant Perry Mandera, the sole owner of Pooh-Bah, had no prior violations and claims no involvement with or prior personal knowledge of the violations that led to the revocation. As the City of Chicago stated in its brief to this court, the "LLC sustained 22 charges against Pooh Bah for conduct that undisputably took place at its club on February 22-24, 1993." Since the violations undisputably occurred before Mandera became Pooh Bah's owner, the City does not argue that these 22 violations, which are the only violations at issue, were subject to his knowledge or involvement.

¶ 65 The issue then is, was it an abuse of discretion for the LLCC on October 15, 1993, without any resort to progressive penalties, to revoke all the licenses of a sole owner, based solely on the violations of a prior owner. The question for a reviewing court is not whether we "would decide upon a more lenient penalty were it initially to determine the appropriate penalty"

but rather whether the commission "selected a type of discipline unrelated to the needs of the commission or statute." *Jacquelyn's Lounge*, 277 Ill. App. 3d at 966. In the case at bar, the wholesale revocation left the new owner with no hope but a constitutional challenge which would knock out the whole statute and gave him no reason or incentive to change the targeted policies during the litigation process.

¶ 66 In response to Pooh Bah's argument about the change of ownership and the lack of progressive penalties, City of Chicago cites *Addison Group, Inc. v. Daley*, 382 Ill. App. 3d 1036 (2008). Unlike the case at bar, *Addison* involved both a violation that occurred during the term of the current owner and a history of progressive discipline. *Addision*, 382 Ill. App. 3d at 1037, 1042. However, in fashioning an appropriate remedy, the hearing commissioner did consider evidence of prior fines, including one fine that had been paid by a prior owner. *Addision*, 382 Ill. App. 3d at 1041. It is this evidentiary ruling that the City of Chicago cites as a reason for affirming.

¶ 67 However, in *Addison*, we acknowledged that both *Hanson* and *Jacquelyn's Lounge* found revocation to be too harsh a penalty and we stated that "we might find revocation too harsh a penalty here, too." *Addision*, 382 Ill. App. 3d at 1042. However, "the Commission here did not impose that penalty. It imposed only a 30-day suspension." *Addision*, 382 Ill. App. 3d at 1042. We found this 30-day suspension "justified by the history of progressive discipline for a series of violations." *Addision*, 382 Ill. App. 3d at 1042.

¶ 68 *Addison* aids Pooh Bah more than the City, with the court's reliance on a "history of progressive discipline" to justify a much less harsh 30-day suspension and the court's

acknowledgment that revocation might be too harsh a penalty for even a series of violations that had already been the subject of more and more fines.

¶ 69 For all these reasons, I would find that the LLCC's revocation of all licenses on October 15, 1993, was an abuse of discretion.