

Protection. Complaint at ¶¶ 1-7. This matter arises from the passage of Senate Bill 936, which amended Virginia Code §§ 18.2-334.2, 18.2-340.16, 18.2-340.19, 18.2-340.22, and 18.2-340.31, to permit qualified organizations to conduct Texas Hold'em poker tournaments ("Texas Hold'em"). *Id.* ¶ 12.

Plaintiff alleges that it, as a qualified organization, has a legal right to conduct Texas Hold'em and that the Defendants unlawfully denied Plaintiff a permit to do so. *Id.* ¶¶ 48-54. Specifically, Virginia Code § 18.2-340.22 now "permits qualified organizations to conduct ... Texas Hold'em poker tournaments." Va. Code § 18.2-340.22(A). The Code also directs that the Department's Board of Charitable Gaming (the "Board") "shall promulgate regulations establishing circumstances under which [qualified] organizations ... may conduct Texas Hold'em...." Cmpl. ¶ 17. *See* Va. Code § 18.2-340.28:2(A). Another Code section reiterates that the Board "shall adopt regulations that ... [p]rescribe the conditions under which a qualified organization may manage, operate, or contract with operators of, or conduct Texas Hold'em...." Cmpl. ¶ 19. *See* Va. Code § 18.2-340.19(A)(12).

Plaintiff alleges that, in line with this statutory directive, the Board formally approved regulations for conducting, managing, and operating Texas Hold'em (the "Regulations") on December 31, 2020. Cmpl. ¶ 33. "On January 4, 2021, after approving the Regulations unanimously, the Board emailed the Department the approved Regulations in final format so that they could be formally listed on the Virginia Register of Regulations." *Id.* ¶ 36. Plaintiff alleges that, pursuant to the adopted Regulations, Plaintiff filed a completed application for an amended Charitable Gaming Permit on February 2, 2021, so that it could add Texas Hold'em to its existing permit. *Id.* ¶ 43.

Then, during the 2021 General Assembly Special Session, Budget Amendment Item 105, #1c was approved on February 28, 2021 (the “2021 Budget Amendment”). *Id.* ¶ 38. The 2021 Budget Amendment states that “[a]ll regulations promulgated by the Charitable Gaming Board and in effect on March 1, 2021 shall remain in force and no additional regulations shall be promulgated ... prior to June 31, 2022.” *Id.*¹ However, the 2021 Budget Amendment was not signed into law until April 7, 2021. On April 12, 2021, the Department published the Regulations on the Virginia Register of Regulations. *Id.* ¶ 39. According to the Department, the Regulations, although Board-approved in January, were not declared “effective” or “in effect” until March 23, 2021. *Id.* ¶ 40. Therefore, given the 2021 Budget Amendment and the “effective” date of the Regulations, the Regulations were voided. *Id.* ¶ 42.

Against this backdrop, the Department failed to act on Plaintiff’s February 2, 2021 amended permit filing within forty-five (45) days as required by Virginia Code § 18.2-304.25. *Id.* ¶ 45. Given the lack of response, on April 27, 2021, Plaintiff’s counsel sent Menefee a letter requesting the Department’s compliance with the 45-day deadline. *Id.* ¶ 46. On May 10, 2021, Menefee, on behalf of the Department, denied Plaintiffs’ amended permit filing citing the 2021 Budget Amendment and stating that the Department “will not issue any permits or registrations pursuant to the Texas Hold’em ... Regulations prior to the effective date of the regulation ... your application will be returned to you via mail and any fees paid will be refunded.” *Id.* ¶ 47, Ex. E.

¹ Although not cited to in Plaintiff’s Complaint, the 2021 Budget Amendment also provided, immediately preceding the above-quoted section, as follows: “The Office of the State Inspector General shall ... review the regulatory structure of charitable gaming in Virginia, to include, at a minimum: (i) current permitting requirements and exemptions; ... (v) the structure of the Charitable Gaming Board including any changes needed to prevent conflicts of interest; ... (vii) whether regulation of charitable gaming would be more appropriately vested with the Virginia Lottery. The Office of the State Inspector General shall report on their findings to the General Assembly no later than October 1, 2021.” The Court can take judicial notice of this and other law pursuant to Virginia Supreme Court Rule 2:202.

Plaintiff alleges that the Department's denial of its amended permit application violated its rights under four separate counts: (1) Count I - Declaratory Judgment; (2) Count II – Violation of Procedural Due Process; (3) Count III – Violation of Substantive Due Process; and (4) Count IV – Judicial Review of Unlawful De Facto Regulation and Unlawful Case Decision (a Virginia Administrative Process Act (“VAPA”) claim).²

II. Analysis

A. Standard of Review

Although Defendants' pleading is styled as a Motion to Dismiss and a Demurrer, the Court treats the pleading as a Demurrer in its entirety. “A demurrer admits the truth of the facts contained in the pleading to which it is addressed, as well as any facts that may be reasonably and fairly implied and inferred from those allegations.” *Yuzefovsky v. St. John's Wood Apts.*, 261 Va. 97, 102 (2001). However, “[a] demurrer does not admit the correctness of the pleader's conclusions of law.” *Fox v. Custis*, 236 Va. 69, 71 (1988). A demurrer “can be sustained if the pleading, considered in the light most favorable to the [Petitioners], fails to state a valid cause of action.” *Hooked Group, LLC v. City of Chesapeake*, 298 Va. 663, 667 (2020) (quoting *Welding, Inc. v. Bland County Serv. Auth.*, 261 Va. 218, 226 (2001)).

B. Defendants' Demurrer

a. Count I: Declaratory Judgment

² As raised by the parties, the Court notes the ongoing work of the General Assembly surrounding S.B. 1127. However, in this Order and Opinion, the Court is responding only to the facts before it on the Demurrer, and not to the ongoing legislative process as it surrounds S.B. 1127.

In Count I of the Complaint, Plaintiff seeks a declaratory judgment by the Court, pursuant to Virginia Code § 8.01-184, as follows:

1. Qualified organizations, like Cheers, may manage, operate, or conduct Texas Hold'em poker tournaments pursuant to state law, without the need for a further license from the Department, within the limitations imposed by that law;
2. Qualified organizations may contract with Texas Hold'em poker tournaments operators for the conduct of such poker tournaments pursuant to S.B. 936; and
3. Qualified organizations may contract with other third-parties including, but not limited to, vendors selling relevant items to fully effectuate the qualified organizations' ability to manage, operate, or conduct Texas Hold'em poker tournaments.

Defendants argue that Count I fails to state a justiciable controversy and is barred by sovereign immunity. A "circuit court cannot acquire jurisdiction over a declaratory judgment action unless the proceeding involves an actual adjudication of rights." *Daniels v. Mobley*, 737 S.E.2d 895, 898 (2013). "A justiciable controversy, for purposes of declaratory judgment, must involve 'specific adverse claims, based upon present rather than future or speculative facts.'" *Id.* (quoting *City of Fairfax v. Shanklin*, 205 Va. 227, 229 (1964)). The "declaratory judgment statute was not intended to vest the courts with the authority to render advisory opinions." *Id.* at 899.

The Court finds that the requested relief does not present a justiciable controversy as it would require an adjudication of specific facts that are not before the Court and an adjudication of the rights of all "qualified organizations" who are similarly not before the Court. To obtain a declaratory judgment, Plaintiff would have to show that its application, and all other qualified organizations' applications, for a permit complied with the applicable statute and regulations as contemplated by Virginia law, which it cannot do in this proceeding. Additionally, although S.B. 936 provides for an exception to the Commonwealth's criminal prohibition against illegal gambling, "[t]he traditional perspective is that declaratory relief is inappropriate to restrain the

sovereign in criminal matters.” *Id.* Therefore, the Court cannot exercise jurisdiction over Count I for declaratory judgment.³

Furthermore, to the extent that Plaintiff had requested a declaration of its rights, such declaration would be barred by sovereign immunity. “As a general rule, the Commonwealth is immune both from actions at law for damages and from suits in equity to restrain governmental action or to compel such action.” *Afzall v. Commonwealth*, 273 Va. 226, 231 (2007). A resolution of the declaratory judgment action in the manner requested by Plaintiff “would enjoin the Commonwealth from acting, in violation of this prohibition” articulated in *Afzall*. *See Mobley*, 737 S.E.2d at 900-01. Therefore, the Court hereby **SUSTAINS** the Demurrer to Count I of the Complaint.

b. Counts II & III: Violations of Procedural and Substantive Due Process

In Count II of the Complaint, Plaintiff alleges that the Defendants’ denial of its amended permit, without notice, a hearing, or a decision by a neutral decisionmaker, amounted to a deprivation of Plaintiff’s procedural due process rights. In Count III, Plaintiff alleges that it has a vested right or claim of entitlement to manage, operate, or conduct Texas Hold’em given existing state law and to do so without any further license or amended charitable gaming license in light of the 2021 Budget Amendment nullifying the Regulations. Plaintiff alleges that the Defendants’ denial of the permit application has deprived Plaintiff of its property interest in its current charitable gaming license. Plaintiff alleges it has been damaged in an amount to be determined at

³ In any event, Plaintiff concedes that “[t]he issuing of permits to play charitable games is anticipated by statute.” Cmpl. ¶ 15. *See* Va. Code § 18.2-340.25(A) (“Except as provided for in § 18.2-340.23, prior to the commencement of any charitable game, an organization shall obtain a permit from the Department.”). This contradicts Plaintiff’s request for a declaration that qualified organizations may conduct Texas Hold’em without further license from the Department.

trial and seeks an Order that the denial amounted to a deprivation of Plaintiff's procedural and substantive due process rights. Defendants argue that Plaintiff fails to allege a substantive property right in being able to conduct charitable Texas Hold'em.

"Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding [decision] can be made affecting the person's rights to liberty or property." *McManama v. Plunk*, 250 Va. 27, 34 (1995). "The due process clause of the fourteenth amendment requires procedural safeguards only where a state deprives a person of a property or liberty interest." *Last v. Va. State Bd. of Med.*, 14 Va. App. 906, 914 (1992). The right to procedural due process "does not create constitutionally protected interests; rather, it provides a procedural safeguard against government's arbitrary deprivation of certain interests." *McManama*, 250 Va. at 34. In analyzing a procedural due process claim, Virginia courts employ a two-step process: (1) first, determine whether a litigant has asserted a valid property interest that triggers procedural due process guarantees; and (2) second, if a valid property interest is asserted, determine if the procedures applied satisfy the due process "fairness" standard. *Id.*

"Once licenses are issued ... their continued possession may become essential in the pursuit of livelihood." *Bell v. Burson*, 402 U.S. 535, 539 (1971). "Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Mall Amusements, LLC v. Va. Dep't of Alcoholic Beverage Control*, 66 Va. App. 605, 613 (2016) (quoting *Bell*, 402 U.S. at 539). However, a "property interest requires more than a 'unilateral expectation' that a permit or license will be issued; instead, there must be a legitimate claim of entitlement." *Biser v. Town of Bel Air*, 991 F.2d 100, 104 (4th Cir. 1993). *See also Dick's Inn LLC v. Va. Alcoholic Beverage Control Bd.*, 60 Va. Cir. 407, at *4 (Richmond Cir. Ct. 2002)

(“A license is a qualified property right given to an individual by the legislature, and that the legislature can revoke.”).

Plaintiff alleges that it has a property interest pursuant to its current charitable gaming license. The Court notes that Plaintiff *could* successfully allege a property interest in its *current* charitable gaming license. However, this license does not include the permission or the ability to conduct Texas Hold'em. The Supreme Court of Virginia in *Kizee v. Conway* stated that “[t]here is an obvious distinction between revoking a permit which has been granted and not giving a permit which can be rightly withheld.” 184 Va. 300, 307 (1945). The *Kizee* Court held that taxicab drivers “had no inherent or vested right to a renewal of their permits” to operate for-hire vehicles on city streets, reasoning that the drivers “have been deprived of nothing to which they are legally entitled ... they have no more right to operate taxicabs ... than the present licensees.” *Id. See also Taylor v. Smith*, 140 Va. 217, 232 (1924) (“But, where the power exists to prohibit the doing of an act altogether, there necessarily follows the power to permit the doing of the act upon any condition, or subject to any regulation, however arbitrary or capricious it may be, as the greater power includes the less.”). Therefore, the Court finds that Plaintiff has not alleged a legitimate claim of entitlement to, and therefore no property interest in, a license to conduct Texas Hold'em which has not yet been issued to Plaintiff.

Further, Plaintiff alleges that it has a vested right or claim of entitlement to manage, operate, or conduct Texas Hold'em given existing state law and to do so without any further license or amended charitable gaming license in light of the 2021 Budget Amendment nullifying the Regulations. This argument is contradicted by the plain language of the statutes cited in Plaintiff's Complaint. Virginia Code § 18.2-340.22(A) now “permits qualified organizations to conduct ... Texas Hold'em poker tournaments.” Va. Code § 18.2-340.22(A). However, before the

“commencement of *any charitable game*, an organization *shall* obtain a permit from the Department.” *Id.* § 18.2-340.25(A) (emphasis added). *See id.* § 18.2-340.25(F) (“[N]o organization shall conduct any charitable gaming until the requirements are met and a permit is obtained.”). Permits are only valid for up to two years at a time. *Id.* § 18.2-340.25(B). Further, “[a]pplications for renewal of permits shall be made in accordance with Board Regulations.” *Id.* § 18.2-340.25(E). Finally, the Virginia Code provides that “[t]he conduct of any charitable gaming is a privilege that may be granted or denied by the Department of Agriculture and Consumer Services or its duly authorized representatives in its discretion in order to effectuate the purposes set forth in this article.” *Id.* § 18.2-340.15(B). Qualified organizations may only conduct Texas Hold’em after obtaining a permit and applications for permits *shall* be made in accordance with Board Regulations. Under the above-cited statutes, Plaintiff does not have any vested right or claim of entitlement to conduct Texas Hold’em without any further license or amended license. Therefore, the Court finds that Defendants’ denial of the permit did not deprive Plaintiff of any cognizable property rights.

Further, the first question in the Court’s substantive due process analysis is whether the Plaintiff has alleged a constitutionally protected property interest. *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 68 (4th Cir. 1992). As noted above, because Plaintiff has failed to allege such a property interest, the Court finds that Plaintiff similarly fails to state a claim for violation of its substantive due process rights. Therefore, the Court hereby **SUSTAINS** Defendants’ Demurrer to Counts II and III of Plaintiff’s Complaint.

c. Count IV: VAPA Claim

In Count IV of the Complaint, Plaintiff seeks a Court Order that the Department applied an unlawful *de facto* regulation, that the Department’s denial of Plaintiff’s permit application was

an unlawful case decision under the VAPA because the Department never conducted a hearing and never provided reasonable notice of a hearing or of the Department's basic laws, matters of fact and law asserted or questioned by the Department. Defendants argue that Plaintiff's application did not involve any disputed fact issues and that the decision to return the permit application and to refund the fees was based on the lack of enabling regulations that would allow Plaintiff to apply in the first instance for such a permit.

The statutes at issue are clear that any "action of the Department in denying, suspending or revoking any permit shall be subject to the Administrative Process Act (§ 2.2-4000 *et seq.*)." Va. Code § 18.2-340.20(A). The Code requires that "no permit to conduct charitable gaming shall be denied, suspended or revoked except upon notice stating the proposed basis for such action and the time and place for the hearing." *Id.* § 18.2-340.20(B). "After a hearing on the issues, the Department may refuse to issue or may suspend or revoke any such permit if it determines that the organization has not complied with the provisions of this article or the regulations of the Board." *Id.* Further, "[a]ny person aggrieved by a refusal of the Department to issue any permit, the suspension or revocation of a permit, or any other action of the Department may seek review of such action in accordance with" the VAPA. *Id.* § 18.2-340.20(C). On appeal of agency action under the VAPA, the party complaining bears the "burden of demonstrate[ing] an error ... subject to review." *Id.* § 2.2-4027. Issues of law subject to review include: (1) an agency's accordance with constitutional law; (2) an agency's accordance with statutory law; (3) an agency's procedural error that is not harmless; and (4) the substantiality of evidentiary support for findings of fact. *Id.* The Court reviews issues of law with respect to agency decisions *de novo*. *Id.*

Based on the filings and the oral argument of the parties, the Court finds that Defendants committed violations of the VAPA and other statutory law. First, Plaintiff alleges that Defendants

failed to comply with the informal fact finding proceeding or formal hearing process, as required by the VAPA and by the basic laws under Title 18.2. Cmpl. ¶¶ 99-100. This allegation alone states a claim under the VAPA because the Department's denial of a permit is subject to the VAPA, Title 18.2 requires notice and a hearing prior to such a denial, and only after a hearing may the Department refuse to issue a permit if it determines that an organization has not complied with the applicable law or Regulations.

Further, Plaintiff alleges that Defendants failed to respond to the permit application within forty-five (45) days as required by the Code. Plaintiff alleges that the Regulations were in effect on January 4, 2021. Therefore, Plaintiff argues that Defendants were required to respond to its February 2, 2021 permit application within forty-five (45) days of the application. However, Defendants argue that they were not required to consider the application as of February 2, 2021, because the Regulations did not actually go into effect until March 23, 2021, when they were filed with the Registrar. *See* Va. Code § 2.2-4103 (“No regulation or amendment or repeal thereof shall be effective until filed with the Registrar.”). Regardless, under either argument, the Court finds that Defendants did not act on or respond to the permit application within the statutorily-mandated time frame of forty-five (45) days. It is clear to the Court that Defendants failed to meet this deadline whether it started from the date of Plaintiff's application, or from the date the Regulations went into effect.⁴ Therefore, the Court, pursuant to Virginia Code § 2.2-4029, hereby **SUSPENDS** the Department's denial of Plaintiff's permit and **REMANDS** the matter in Count IV to the Department for further proceedings in accordance with the law as stated herein.

⁴ Further, the General Assembly's consideration and approval of the 2021 Budget Amendment did not have an effect on Defendants' statutory requirement to respond to an application for a permit within forty-five (45) days. And, the 2021 Budget Amendment was not formally signed into law until April 7, 2021.

III. Conclusion

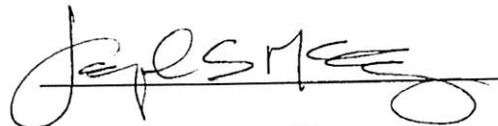
Based on the foregoing, the Court hereby **SUSTAINS** the Demurrer to Counts I, II, and III of the Complaint. Therefore, Counts I, II, and III of the Complaint are hereby **DISMISSED**. As to Count IV, the Court hereby **SUSPENDS** the Department's denial of Plaintiff's permit and **REMANDS** the matter in Count IV to the Department for further proceedings in accordance with the law as stated herein.

Pursuant to Rule 1:13 of the Supreme Court of Virginia, the Court dispenses with the parties' endorsement of this Order.

The Clerk is directed to forward a copy of this Order to the parties.

It is so **ORDERED**.

ENTER: 8/1/2021


Jacqueline S. McClenney, Judge

A Copy

Teste: EDWARD F. JEWETT, CLERK

BY: Donna Clythae D.C.