

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
U.S. Routes 1-9 (Southbound) Newark, N. J. 07114

BULLETIN 2330

October 26, 1979

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1. COURT DECISIONS - RUBIN'S TAVERN, INC. v. PATERSON - DIRECTOR AFFIRMED.

Superior Court of New Jersey
Appellate Division
A-3300-77

RUBIN'S TAVERN, INC.,)
New Jersey Corporation,)
)
Appellant,)
)
v.)
)
DIVISION OF ALCOHOLIC BEVERAGE)
CONTROL OF THE CITY OF PATERSON,)
)
Respondent.)

Argued: June 12, 1979 - Decided June 21, 1979.

Before Judges Lynch and Crane.

On appeal from the Order of the Director of the
Division of Alcoholic Beverage Control.

Mr. Frank T. Simeone argued the cause for appellant
(Messrs. Goodman, Rothenberg & Galluccio, attorneys).

Mr. Ralph L. DeLuccia, Jr. argued the cause for respondent
Division of Alcoholic Beverage Control of Paterson (Mr.
Henry Ramer, Corporation Counsel, attorney).

Mr. John J. Degnan, Attorney General, submitted a Statement
in Lieu of Brief on behalf of the Division of Alcoholic Beverage
Control (Ms. Erminie L. Conley, Assistant Attorney General, of
counsel; Mr. Mart Vaarsi, Deputy Attorney General, on the
Statement).

PER CURIAM

(Appeal from the Director's decision in Re Rubin's Tavern, Inc.
a New Jersey Corporation v. Paterson, Bulletin 2294, Item 2.
Director affirmed. Opinion not approved for publication by the
Court Committee on Opinions).

2. APPELLATE DECISIONS - FANG'S CORPORATION v. PHILLIPSBURG.

Fang's Corporation,	}	
		ON APPEAL
Appellant,	}	
		CONCLUSIONS
vs.		
Town Council of the	}	AND
Town of Phillipsburg,	}	
		ORDER
Respondent.	}	

 Stover, Stover & Broscius, Esqs., by Scott D. Thatcher, Esq.,
 Attorneys for Appellant.
 Robert E. Frederick, Esq., Attorney for the Township of
 Lopatcong.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

This is an appeal from the action of the Town Council of the Town of Phillipsburg (Council) which, by Resolution of April 11, 1978, denied appellant's application for a person-to-person and place-to-place transfer of Plenary Retail Consumption License No. 2119-33-014-002, by a vote of three affirmative, two negative, one abstention. One Councilman was absent and it appears that a majority of the total membership was necessary to affect valid municipal action.

Appellant contends, in its Petition of Appeal, that the action of the Council was erroneous and improper.

The Council, upon receipt of notice of the appeal, held a special meeting and by unanimous vote determined that the Town would not be represented at the hearing, "inasmuch as the Council, on April 11, 1978, voted 3-2 to approve the place-to-place transfer of the license in question."

Attached to the letter was a certified copy of the referenced Resolution which states as follows:

R:78-56

A RESOLUTION APPROVING THE PERSON TO PERSON
TRANSFER OF PLENARY RETAIL CONSUMPTION
LICENSE NO. C-5 -- NORTH END CAFE

BE IT RESOLVED by the Council of the Town of Phillipsburg
that:

WHEREAS, Notice of Intention of Transfer of License having
been properly advertised in accordance with provisions of the
law and proof thereof submitted to the Council of the Town of
Phillipsburg, and no remonstrances, protests or complaints having
been filed by any person, or persons, with the Council and said
Council having investigated the applicant and premises,

NOW, THEREFORE, BE IT RESOLVED that the following license
be transferred: --

PLENARY RETAIL CONSUMPTION LICENSE: -- C-5

FROM: Alexander Nyiri, Executor of the
Estate of Ida Nyiri Faulkner
T/A North End Cafe
22-24 North Main Street
Phillipsburg, New Jersey

TO: Fang's Corp. Ha Chow Chow Restaurant
T/A Chow Chow
Memorial Parkway
Phillipsburg, New Jersey

EFFECTIVE DATE: April 12, 1978

ADOPTED by Council:
ADOPTED by Council: April 11, 1978

ATTEST:

/s/ John H. Pursel
Mayor

/s/ James A. Miceli
Town Clerk

Resolution - Cont'd

Reviewed for Administration:

Reviewed as to Form Legality

/s/ James A. Miceli
Town Manager

Town Attorney

VOTE: YEAS: Bianchi, Shappell, Pursel
 NAYS: Rufe, Swick
 ABSTAIN: Norton
 ABSENT: Blackton

RESOLUTION FAILED.

DATED: April 11, 1978

The proposed licensed premises is to be sited within a Chinese restaurant located in a small shopping mall on Route 22, straddling the Lopatcong-Phillipsburg border; the rear 20 percent within Phillipsburg and the balance, Lopatcong. The entrances and exits to the mall, as well as to the restaurant, are within Lopatcong which provides the necessary municipal services. The rear delivery entrance is within Phillipsburg, as is a portion (or all) of the kitchen and the rest rooms.

Lopatcong, upon learning of the appeal, filed an application to be joined as a party-respondent which was opposed by the appellant. The alleged basis for the intervention is the claim that: (a) Lopatcong Township has an interest in and is a necessary party for the disposition of this action; (b) that N.J.S.A. 33:1-16 provides that, in instances where municipalities cannot agree upon a satisfactory division of a fee (as here), the Director of this Division shall apportion it; and (c) the closing hours of Phillipsburg and Lopatcong differ, and "any violations of state laws or regulations and Lopatcong Township Ordinances which would take place in Lopatcong would have to be prosecuted in Phillipsburg."

The Council (of Phillipsburg) relies upon its Resolution

of April 11, 1978. It offers no other information, nor was it present at the de novo hearing, either as a party or observer.

This information was supplied by appellant's attorney, who represented to the hearing officer that, after passage of the Resolution, a town official realized that, under local ordinance a majority of the Council, not merely of those present and voting, was required to validly pass a resolution; hence the refusal to implement it or defend this action.

- I -

The Division of Alcoholic Beverage Control, being a creature of the Legislature, is limited by the controlling Statutes (N.J. - S.A. Title 33) and its Rules and Regulations, Title 13 (Sub. B) of the New Jersey Administrative code. Neither provides for anything akin to impleading or joinder.

I find, as a fact, that Lopatcong is neither a necessary nor proper party to this appeal. I, therefore, recommend denial of its application. For completeness of record and to the extent Lopatcong may be considered an objector, I shall, however, make the following findings in relationship to the various points it raises.

(1) The only interested parties to this appeal are appellant and respondent. Full and complete relief can be accorded these parties without Lopatcong being joined as a party;

(2) Appellant is not a proper or necessary party to any action envisioned under N.J.S.A. 33:1-16 between the municipalities and it should be the subject of a separate action;

(3) The Director of this Division, by letter dated June 9, 1978, has determined and advised the parties that:

The issuing authority, the Town of Phillipsburg will have licensing and disciplinary jurisdiction over this license. Additionally, that Township's Municipal Alcoholic Beverage Ordinances, including hours of sale, shall prevail.

The Township of Lopatcong's Ordinances referable to health, zoning, safety and building requirements will, of course,

control those portions of the licensed premises in its municipality.

Having disposed of the various allegations contained within the Township of Lopatcong's application, no judiciable issue would exist for determination if Lopatcong were a proper party to this appeal.

- II -

Hoi Chow Chan, the Manager and Corporate Officer of the restaurant and premises sought to be licensed, testified in support of the appellant that, up to the present time, the restaurant has permitted "brown-bagging" of wine and beer by its patrons, and has experienced no problems. The appellant has, in the past, operated liquor-licensed restaurants in Pennsylvania, and is experienced in the problems attendant to this type of an operation.

Apparently, from the Resolution of April 11, 1978 and the minutes of the May 16, 1978 meeting, forwarded to this Division under cover of its May 17, 1978 letter, there exists no disagreements between appellant and Council, save whether or not the Resolution was properly passed in accordance with local ordinance.

The language of the Resolution indicates that the Council has no reservations regarding appellant, which is further evidenced by the affirmative vote of the majority of those present and participating that evening.

It would be an exercise in futility to recommend remand in this instance, as the Council had an opportunity to address itself to the application once again, on May 16, 1978, at a special meeting called solely for that purpose. Instead of clarifying or altering its position, it took the action hereinbefore described.

I, therefore, recommend that the action of the Town Council of the Town of Phillipsburg denying appellant's application for person-to-person and place-to-place transfer of subject Plenary Retail Consumption License be reversed, and that an order be issued directing the Town to grant said transfers in accordance with the applications filed therefor.

Conclusions and Order

Written Exceptions to the Hearer's Report were filed on behalf of Lopatcong Township and written Answers were submitted thereto by appellant, pursuant to N.J.A.C. 13:2-17.14.

In its first Exception, Lopatcong Township submits that it has standing to oppose the application of appellant and be joined as a party respondent. I am persuaded and determined that it is entitled to raise objections to the application, and, under the specific facts herein, function as a party-respondent.

Where a license transfer, if approved, would result in a municipality having a portion of the licensed premises within its jurisdiction, it would be anomolous not to permit such municipality to voice its comments thereon. Thus, I recind any prior opinion I have rendered herein on this subject and reject that portion of the Hearer's Report which differs from the above. However, since Lopatcong Township did participate in the de novo appeal, both parties have briefed the issues in full, and the ultimate outcome is not affected by this procedural issue, I find that this does not represent such "material change" as to warrant oral argument. N.J.A.C. 13:2-17.14 (f).

Lopatcong Township further argues that the record as a whole does not support the appellant's application, and the Hearer failed to adequately treat the testimony of objectors.

I have reviewed and analyzed the testimony of objectors at the hearing below and in this Division. In addition to oral arguments from several counsel, Neil Corley, a police officer of Lopatcong Township; Mrs. Gill, a Lopatcong Township resident and Mayor Fulerm of Lopatcong Township testified. In substance, they raised traffic, policing and adequate public outlet issued which, to a large extent, are speculative.

I find that the current parking spaces in the mini-mall (94) appear to be adequate for the five businesses therein, particularly since the other businesses generally close around 6:00 p.m. Whatever ingress and egress problems exist to Route 22 will continue and will not likely be exacerbated by the business expansion of the proposed licensee. Thus, I reject this Exception as without merit.

The contention of Lopatcong Township that it will be stripped of its policing powers, hours regulations and general self-rule powers under various Alcoholic Beverage Laws, Municipal Law and Constitutional provisions is rejected.

While I am mindful of the concern of the Statutory obligation of the Township of Lopatcong to police a licensed premises which it does not license, it is assumed that it does, in fact, tax the 80% of the facility in its municipality. It permitted or suffered said structure to be built on municipal borders. It issued, at some point in time, a building permit

to appellant when it took over the adjacent mini-mall store. Infractions of the Alcoholic Beverage Law can and should be referred to the Town of Phillipsburg's issuing authority. In the event that dissatisfaction results from the actions or inactions of the said body, recourse will exist in this Division.

Similarly, within the Alcoholic Beverage Law, I find no provisions which requires that the non-licensing issuing authority consent to such licensure under N.J.S.A. 33:1-16; and I do not find N.J.S.A. 40:43-72 and 43-73 to be dispositive. Thus, I dismiss these Exceptions to be without merit.

The proofs as to other available sources of alcoholic beverages constituted a mere recitation of other licensees and their proximity to the proposed licensed premises. Such evidence does not support a preponderant finding of adequate service of the public's need, sub judice. Conversely, the applicant described the existing restaurant business, its expansion, and intent to serve alcoholic beverages, if permitted. There was a majority of support of voting members for the transfer by the Council, although such majority was insufficient to pass the application. The respondent produced no evidence in support of its denial at the de novo hearing. I find that the applicant appears qualified, and has established that the action of respondent was erroneous and should be reversed.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the written summations and briefs of appellant and Lopatcong Township, the Hearer's Report, the written Exceptions filed by Lopatcong Township and the written Answers submitted thereto by appellant, I concur in the findings and recommendations of the Hearer, except as heretofore noted, and adopt them as my conclusions herein.

Accordingly, it is, on this 22nd day of March, 1979,

ORDERED that the action of the Town Council of the Town of Phillipsburg be and the same is hereby reversed, and said Council be and the same is hereby directed to grant said transfers in accordance with the applications filed therefor.

JOSEPH H. LERNER
DIRECTOR

3. APPELLATE DECISIONS - FACES, INCORPORATED v. WEST ORANGE.

Faces, Incorporated	:	
t/a Creation,	:	
	:	
Appellant,	:	ON APPEAL
vs.	:	CONCLUSIONS
	:	
Municipal Board of Alcoholic	:	AND
Beverage Control of the Town	:	ORDER
of West Orange,	:	
	:	
Respondent.	:	
	:	
.....	:	

Maurer & Maurer, Esqs., by Barry D. Maurer, Esq., Attorneys for Appellant.
 Joseph C. Dooley, Jr., Esq., by Matthew J. Scola, Esq., Attorneys for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

This is an appeal from the action of the Municipal Board of Alcoholic Beverage Control of the Town of West Orange (Board), which, on June 20, 1978, denied appellant's application for renewal of its Plenary Retail Consumption License # 0722-33-017-001, for premises 410 Eagle Rock Avenue, West Orange.

In its Resolution of Denial, the Board stated that it preceives no reason to modify or reverse its earlier Resolution of Non-Renewal for the year 1977-78 and, therefore, it once again refused to grant appellant's application for renewal for the forthcoming license period, 1978-79.

Appellant contends, in its Petition of Appeal, that such finding is erroneous, based solely upon the Board's prior year's denial of license renewal, which action was appealed to and was then still pending final Resolution by the Division of Alcoholic Beverage Control. It further alleges that final disposition of appellant's appeal from denial of renewal for the 1977-78 licensing period must apply with equal force to the present appeal from the denial of renewal for the 1978-79 licensing period.

The Board's Answer was in the form of a brief letter wherein it repeats and incorporates, by reference, its Answer to the earlier (1977-78) Petition of Appeal filed by the appellant.

On filing of the Petition of Appeal, the Director of this Division, by Order dated June 28, 1978, extended the subject license pending the determination of this appeal.

A de novo hearing was held in this Division, with full opportunity afforded the parties to introduce evidence and to cross-examine witnesses, pursuant to N.J.A.C. 13:2-17.6. No one was produced; the hearing being limited solely to presentation of legal argument.

On November 2, 1978, the Director issued his Conclusions and Order in the earlier appeal, granting renewal of appellant's license for the 1977-78 licensing period nunc protunc subject to certain special conditions.

Inasmuch as the Board presented no reason for its action, save its position taken earlier, there is now no justiciable issue before this Division for resolution.

I, therefore, recommend that an order be entered reversing the action of the Board and directing that the license be issued, subject however, to the same special conditions ordered affixed to appellant's license by the Director's Conclusions and Order dated November 2, 1978, as though set forth herein at length.

Conclusions and Order

Written Exceptions to the Hearer's Report were filed by the parties by way of incorporation of previous letters, memoranda, motions and argument in the predecessor appeal No. 4126, pursuant to N.J.A.C. 13:2-17.14.

These Exceptions have been resolved in my determination in the prior appeal concerning the same subject license for the 1977-78 license term. I incorporate same as if set forth herein at length. See Conclusions and Order of November 2, 1978 in Faces, Inc. v. West Orange, Bulletin 2310, Item 2.

I further supplement same by incorporation of my reply dated January 19, 1979 denying appellant's request to reopen the subject appeal hearing. See Exhibit A annexed hereto.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the

Hearer's Report and the Exceptions filed thereto, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 10th day of April, 1979,

ORDERED that the action of the Municipal Board of Alcoholic Beverage Control of the Town of West Orange be and the same is hereby reversed; and it is further

ORDERED that the Municipal Board of Alcoholic Beverage Control of the Town of West Orange be and the same is hereby directed to renew appellant's Plenary Retail Consumption License 0722-33-017-001 for the 1978-79 license term, in accordance with the application filed therefore, expressly subject to the imposition of the following special conditions annexed thereto:

(1) There shall be no "discotheque" type operations permitted on any floor of the licensed premises, and

(2) The permissible uses for the second floor of the licensed premises shall only include:

(a) Use for group social activities, such as weddings, banquets and the like, and/or

(b) Use as a restaurant with a cocktail lounge, limited dancing and "nightclub" type entertainment, as hereinbefore defined, which additional terms are incorporated herein by reference, as if set forth at length.

JOSEPH H. LERNER
DIRECTOR

4. APPELLATE DECISIONS - BAR HAR, INC. v. PERTH AMBOY ET AL.

Bar Har, Inc.,	:	
Appellant,	:	
v.	:	ON APPEAL
Municipal Council of the	:	CONCLUSIONS
City of Perth Amboy and Harbor	:	AND
Light Tavern & Liquor Store,	:	ORDER
Inc.,	:	
Respondents.	:	
.....	:	

Wilentz, Goldman & Spitzer, Esqs., by Stephen E. Barcan, Esq., Attorneys for Appellant.
 Eugene L. Goceljack, Esq., Attorney for Respondent-City of Perth Amboy.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

This is an appeal from action of the City Council of the City of Perth Amboy (hereafter Council) which, by Resolution dated September 5, 1978, denied appellant's application for a person-to-person and place-to-place transfer of Plenary Retail Consumption License No. 1216-32-037-002, from Harbor Light Tavern and Liquor Store to appellant and from and to the same licensed premises at 274 Front Street, Perth Amboy with the only difference being a premises enlargement to include a rear patio not included in the immediate prior license renewal.

The factual background giving rise to the subject denial is not disputed. The appellant is purchasing a tavern business that once had included as part of the licensed premises a patio in the rear. This patio was heretofore damaged by storms and was not included within the description of the licensed premises at renewals thereafter. The purchaser of the license now wishes to include that now-repaired patio. Hence a premises-enlargement required the subject place-to-place application. In consequence of appellant's desire to enlarge the licensed premises, the application for both person-to-person and place-to-place was filed as a joint application pursuant to N.J.A.C. 13:2-7.14. That regulation provides as follows:

Transfers of license both as to person and place may be applied for simultaneously and in a single application; but if there is such combined application for person-to-person and place-to-place transfer, the license shall not be transferred to the applicant unless the place-to-place transfer is also affected. (underscore added)

A de novo hearing was held in this Division pursuant to N.J.A.C. 13:2-17.6, at which the parties were permitted to introduce evidence and cross-examine witnesses. However, since the issue was reduced to the interpretation of the aforesaid regulation, witnesses were produced for the sole purpose of relating that issue.

The appellant's president and sole stockholder, Barry Rosengarten, testified that, prior to the hearing before the Council, he vigorously endeavored to withdraw the place-to-place portion of the application. The attempt to withdraw was repeated before the Council and was denied on the belief of the Council that it had no power to hear the partial application.

The council elicited testimony of its Clerk, Harold E. Augustine, who indicated that he had communicated with this Division prior to advising the appellant that the application would have to be denied. He had based that advise upon information he had received.

The issue herein is further distilled to the sole question whether the applicant may withdraw a part of its joint application before hearing or, conversly, is the Council required to determine the entire application as filed, or none at all.

The pertinent regulations, N.J.A.C. 13:2-7.4 and N.J.A.C. 13:2-4.6 are explicit in precluding the issuing authority or the Director from making a split determination on a combined application. However, these regulations are silent respecting the right of the parties to withdraw part of their applications. Certainly, it cannot be logically argued that an applicant may not, before action is taken, withdraw his application in toto. In so doing, the applicant would lose a portion of his application fee, but would otherwise remain in the same posture as before the application was published and filed.

Counsel for appellant cites Dilkes v. Panacoast, 53 N.J.L. 553 (Sup. Ct. 1891) and Ferguson v. Atlantic City 63 N.J.L. 95 (Sup. Ct. 1899), both of which support the thesis that an application may be withdrawn any time before action is taken thereon.

The Council cannot seriously contend that it, or the public, would suffer in any way by the appellant's withdrawal of part of the application. The appellant could readily have made two simultaneous applications. Essex County Retail Liquor Stores Ass'n. v. Newark, 77 N.J. Super. 70 (App. Div. 1962). The total fees to be posted by applicant would be the same whether there were two individual applications or one combined application. Hence, by the withdrawal of portion of an application, the Council would retain the fees paid thereon, and thus lose nothing, in respect to its fiscal posture.

Nor would the public be affected negatively by a withdrawal of part of a combined application. If the withdrawal was prior to the municipal action, the applicant would be left as before, as would the public. Adequate notice had been provided for receipt of written objections as to the remaining person-to-person application. The Regulations, N.J.A.C. 13:2-7.14 and N.J.A.C. 13:2-4.6 are not so inflexible that a portion of an application cannot be stricken before hearing.

With respect to the person-to-person application, testimony was received in this Division that all investigations and police review with respect to appellant had been completed. Counsel for both parties conceded that there was no question of appellant's qualifications to hold a license; the rejection had been based, as previously indicated, on the place-to-place portion of the application only.

In its defense to the appeal, the respondent Council urged consideration of the unusual circumstances in the matter. The City is the owner of the land upon which the licensed premises are located. That land had been acquired under a Green Acres Program dedicated to the beautification of the waterfront. The removal of appellant's premises is a long term goal of the Council.

Testimony with respect to the tenancy arrangements between the City and appellant was not received as it was not relevant to the basic issue. So long as the license is legally located where it is, the City, as landlord, cannot use its denial of appellant's application as a means or a forum in which to explore license reductions or forcing tenant eviction.

Thus, I find that the appellant has successfully met its obligation of establishing that the action of the Council was erroneous and should be reversed, pursuant to N.J.C.A. 13:2-17.6. I recommend that the Director reverse the action of the Council and direct the Council to approve the person-to-person transfer of the subject license in accordance with the application filed therefor.

Conclusions and Order

No written Exceptions to the Hearer's Report were filed pursuant to N.J.A.C. 13:2-17.14.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the legal memoranda of the parties, and the Hearer's Report, I concur in the findings and recommendations of the Hearer, and adopt them as my conclusions herein.

Accordingly, it is, on this 2nd day of April, 1979,

ORDERED that the action of the Municipal Council of the City of Perth Amboy in refusing to permit the appellant to withdraw its place-to-place transfer application and denying appellant's application for person-to-person transfer be and the same is hereby reversed; and it is further

ORDERED that the said Council be and the same is hereby directed to approve the person-to-person transfer to appellant in accordance with the application filed therefor.

JOSEPH H. LERNER
DIRECTOR

5. STATE LICENSES - NEW APPLICATIONS FILED.

Illva Saronno Inc.
200 Clearview Avenue
Raritan Center
Edison, New Jersey

Application filed October 4, 1979
for plenary wholesale license.

Dalt International Inc.
360 Sylvan Avenue
Englewood Cliffs, New Jersey

Application filed October 4, 1979
for place-to-place transfer of
Wine Wholesale License 3400-26-675-001
to include a warehouse at 12 Mileed Way,
Avenel, New Jersey.

Ennio Beatrice
1083 E. 22nd Street
Paterson, New Jersey

Application filed October 9, 1979
for limited wholesale license.

Click Corporation of America
t/a Unwineder
549-55 South Broadway
Gloucester, New Jersey

Application filed October 24, 1979
for person-to-person transfer of
Plenary Winery License 3400-21-710-001
from 7-Up Bottling Company of Camden.



Joseph H. Lerner
Director