BULLETIN 2481 November 20, 1999

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ITEM

**1. LATEEF, INC., D/B/A TALK OF THE TOWN, V. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF CAMDEN - FINAL CONCLUSION AND ORDER - DENIAL OF APPLICATION FOR RENEWAL.**

**STATE OF NEW JERSEY**
**DEPARTMENT OF LAW AND PUBLIC SAFETY**
**Division of Alcoholic Beverage Control**

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| **LATEEF, INC., d/b/a** | |
| **TALK OF THE TOWN** | |
| **LIC NO. 0408-33-091-004** | **FINAL CONCLUSION AND ORDER** |
| **APPELLANT,** | |
| **V.** | **OAL DKT NO. ABC 6170-98S** |
| | **AGENCY DKT. NO. 6572** |
| **MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF CAMDEN** | |
| **RESPONDENT.** | |

John F. Vassallo, Jr., Esq., Attorney for Appellant.

Dennis G. Kille, Esq., Attorney for Respondent.

Initial Decision Below by the Honorable Robert W. Scott, Administrative Law Judge.

Decided: June 15, 1999 Received: June 16, 1999

**BY THE DIRECTOR:**

The issue before me is whether I should adopt the initial decision of the Administrative Law Judge ("ALJ"), and affirm the action of the Municipal Board of Alcoholic Beverage Control of the City of Camden ("Respondent") in denying Lateef, Inc.'s ("Appellant") application for renewal of its Plenary Retail Consumption License.

## PROCEDURAL HISTORY

This matter arose when Respondent adopted resolution A.B.C. 98/99-26 on June 8, 1998, denying Appellant's application for renewal of its Plenary Retail Consumption License for the 1998-99 license term. The Respondent based its denial on several findings, including Appellant's three prior suspensions for maintaining a nuisance and lewd conduct on the licensed premises.

On June 25, 1998, the Appellant filed an appeal with the Division of Alcoholic Beverage Control. On July 8, 1998, Director Holl entered an order permitting Appellant to remain open, pending the outcome of this appeal, with certain operating conditions. On July 13, 1998, the matter was sent to the Office of Administrative Law for a determination as a contested case.

After a hearing, the record closed on May 11, 1999. The ALJ concluded that the Respondent did not act unreasonably in denying Appellant's application for renewal, and that its decision was not an abuse of its discretion.

The Initial Decision was received by the Division on June 16, 1999. The time to render a Final Conclusion and Order was extended by a properly executed Order until October 28, 1999. I hereby adopt the Initial Decision of the ALJ as set forth below.

## FACTUAL DISCUSSION

The Appellant, Lateef, Inc., is holder of Plenary Retail Consumption License No. 0408-33-091-004. The licensee owns and operates a bar called Talk of the Town, which is maintained on a day-to-day basis by an on-site manager, Larry Cunningham. Appellant's license has a significant history of disciplinary actions. Specifically, Lateef, Inc., has been suspended three times for charges of maintaining a nuisance and lewdness. In addition, Mr. Cunningham may have acted as manager even though ineligible to be so employed due to prior criminal ineligibility.

The Appellant's first suspension occurred in 1995. The Respondent imposed a suspension of 45 days, after finding Appellant guilty of maintaining a nuisance. The licensee's appeal was denied.

In 1997, the Appellant received two 30-day suspensions for lewd and immoral activity, as a result of successive violations relating to nude "go-go" dancing on the premises. The first of these thirty-day suspensions was imposed on April 7, 1997, when Appellant was found guilty of engaging in, suffering, or allowing lewd conduct in violation of N.J.A.C. 13:2-23.6(a)1, after an investigator witnessed a female dancer performing entirely in the nude. The investigator also witnessed a male patron "using a plastic bottle to penetrate the vaginal area of this female performer." Camden A.B.C. Resoultion 97-1. Lateef, Inc. appealed this suspension and a hearing was scheduled for February 6, 1998. The appeal was dismissed when Larry Cunningham improperly attempted to represent the Appellant at the hearing. The matter was remanded back to the Office of Administrative Law on March 31, 1998, by the Director , to give the appellant another opportunity to present the merits of his case.

Prior to the date of that hearing, however, Appellant was suspended again for a period of thirty days. This suspension was based on charges of lewd and immoral activity after an investigator again witnessed a dancer engaging in prohibited conduct. This included allowing male patrons to engage in inappropriate touching as well as acts of simulated sexual activity with the dancer. Lateef Inc. appealed this suspension, which was subsequently consolidated with the earlier remanded appeal. Both appeals were denied by the ALJ . Director Holl affirmed those initial decisions and the imposed suspensions were served.

In addition to the activities engaged in by the Appellant which have resulted in disciplinary action by the Respondent ABC Board, the Appellant has had numerous other incidents requiring the attention of the Camden City Police Department. The ALJ found that the police were required to respond to numerous incidents in and around Appellant's establishment during the time period of March, 1996, through June, 1998. During this time period, police responded to complaints of such a substantial nature that up to fifteen additional police officers were often needed to gain control of the situation. Sgt. Hall testified that the complaints concerned activities such as fighting, large crowds, drinking outside the establishment, and underage drinking. Lt. Phillips also testified that he observed large crowds outside Appellant's establishment and that he witnessed patrons throwing bottles and glasses at cars parked on the streets. In support of these findings, a video tape was entered into evidence that contained footage of Appellant's establishment on five random evenings. On three of those evenings the

tape shows large, noisy crowds leaving Appellant's establishment and creating a disturbance which would last anywhere from ten to fifty minutes. Lt. Phillips further testified that the crowds at closing time also created traffic problems around Appellant's premises.

One of the special conditions imposed by Director Holl in his order of July 8, 1998, was that the Appellant shall close no later than midnight on Thursdays, Fridays, Saturdays, and Sundays. While this appeal was pending, the Respondent brought disciplinary charges against the appellant for violation of that order. Appellant appealed and requested the Director to stay the suspension. A hearing was held and on May 5, 1999, Director Holl entered an order denying a stay, after being satisfied that there was ample evidence that the offense took place and little likelihood that appellant would be successful on appeal. Director Holl found that there was a significant history of violations by the Appellant where stays had been granted only to be followed by subsequent disciplinary problems. In all of these instances, the disciplinary action was sustained on appeal. Director Holl found that this pattern of behavior by Appellant was contrary not only to the spirit of the laws and regulations, but undermined the ability of the local issuing authority to effectively control the actions of licensees within its jurisdiction. In his decision, Director Holl emphasized, "[w]here, as here, the evidence of the violation is clearly established, granting yet another stay would allow a license to enter a pattern of violation/appeal/stay, depriving the Camden ABC Board of the ability to effectively enforce ABC laws." Appellant served that 30-day suspension and reopened for business on or about June 3, 1999.

## EXCEPTIONS AND REPLIES

At the request of Appellant, the time for filing Exceptions was extended and written Exceptions to the ALJ's Initial Decision were filed by Appellant on July 13, 1999. The Appellant maintains that the ALJ erred in concluding that the municipality did not act unreasonably and that its decision was not an abuse of discretion. Appellant argues that non-renewal is essentially a revocation, and that the penalty of revocation is too severe for the problems alleged.

The Appellant argues that the ALJ incorrectly found that Lateef, Inc., was suspended three times in 1997. Appellant pointed out at the hearing that one of those suspensions occurred in 1995. The Appellant argues that since the license was not suspended three times in 1997, its establishment did not constitute a nuisance. Appellant also maintains that subsequent to its 1997 violations for lewdness, it discontinued "go-go" dancing, thereby eliminating the chance of any

future problems of this nature. With respect to these past disciplinary actions, Appellant argues that appropriate penalties were imposed and served. Appellant insists that if those violations warranted revocation, it should have been imposed at that time.

The Appellant complains that Respondent found that its establishment was run by an on-site manager, Larry Cunningham, and that he was employed there prior to the removal of criminal ineligibility. Appellant argues that there was no evidence that Mr. Cunningham's role in the operation of the bar was a problem, and even if it was, non-renewal was not the proper remedial action. Appellant also insists that there is no evidence to support the fact that Mr. Cunningham may have ever been ineligible to work on the licensed premises by reason of a prior criminal conviction.

The Appellant points out that the Respondent relied on testimony and videotape footage that described illegal activity in and around the licensed premises. Appellant argues that the videotape and the testimony of Lieutenant Phillips demonstrate that the entire area surrounding Appellant's bar is a problem area for drugs and illegal activity, but that none of this was directly related to Appellant's bar.

Appellant argues that Respondent erroneously concluded that the Appellant's establishment created traffic problems which prevented the passage of emergency vehicles. Appellant insists that this claim is unsupported, and that if a problem does exist, Appellant's occupancy limit precludes it from being the cause.

Appellant insists that the assignment of several police units to the area where Appellant's bar is located is unrelated to Appellant's business, and is instead the result of the heavy criminal activity in the area itself. Appellant further maintains that the crowd problems in the area are unrelated to its business, as evidenced by the fact that the problems continued to exist after the restricted hours were imposed on the Appellant's bar.

Appellant takes issue with the exhibits admitted into evidence before the ALJ. Appellant asserts that the first fifteen exhibits, consisting of various incident reports filed by the Camden City Police Department, were from a prior year and are irrelevant to the appeal of the denial of the 1998-99 renewal application.

Appellant also contends that exhibits R-18 through R-37, consisting of police reports filed within the 1997-1998 year, are hearsay, and although admittable, do not provide the

opportunity for cross-examination or explanation. Appellant argues that these exhibits either do not support denial of renewal or have been dealt with in previous disciplinary proceedings. Appellant also argues that the ALJ made a finding that Appellant's business was a trouble spot based on the quantity of these exhibits, and not the quality.

The Respondent submitted Replies to the Exceptions on July 21, 1999. The Respondent argues that part of Appellant's Exceptions focus on the evidence considered by the Respondent on June 8, 1998, when it voted to deny renewal. The Respondent argues that appeals are decided de novo and that the evidence submitted to the ALJ is more than adequate to support its decision.

The Respondent avers that the rest of Appellant's Exceptions are an attempt to minimize the impact of the police reports admitted into evidence by making each individual incident seem insignificant. Respondent insists that it never claimed that the reports themselves justified non-renewal, but instead, taken together, served to corroborate the unrebutted police testimony at the hearing.

The Respondent claims that the Appellant has not met its burden of proof and notes that the Appellant has not provided a copy of the transcript from the hearing before the ALJ. Exceptions must specify the Findings of Fact or Law to which exception is taken, pursuant to 1:1-18(b)(1) of the Uniform Rules of Administrative Procedure. Moreover, the Excepting party has the burden of providing the necessary transcripts for review. *See* In Re Morrison, 216 N.J. Super 143 (App. Div. 1987).

## LEGAL DISCUSSION

The de novo hearing before the ALJ establishes that Respondent's decision to deny renewal of the license and the ALJ's affirmation thereof was based on the following findings:

1) The licensee's prior disciplinary history. This history includes a 45-day suspension in 1995 for maintaining a nuisance, and two 30-day suspensions in 1997 for lewd and immoral conduct violations. Both of the 1997 suspensions pertained to similar charges resulting from nude "go-go" dancing on Appellant's premises.

2) The draining effect of Appellant's establishment on the city's police force and the negative consequences of this "troublespot" on the community. The ALJ found that the licensed establishment was a "continuing source of disturbance." Initial Decision, p. 6. The ALJ also found that a significant percentage of the police force was usually required to gain control of the disturbances occurring at or about Appellant's establishment at a time when police resources

were already in high demand within the City of Camden. The disturbances requiring police assistance included fights and uncontrollable crowds who, while leaving Appellant's establishment, were seen drinking and destroying property.

The ALJ correctly states that the decision to either grant or deny a renewal application rests with the sound discretion of the municipality, and that its decision should not be reversed absent a showing that the action was unreasonable and a clear abuse of discretion.

> "[T]he Director and the courts must place much reliance upon local action . . .[The local issuing authority's] exercise of discretion ought to be accepted on review in the absence of clear abuse or unreasonable or arbitrary exercise of discretion. Although the Director conducts a de novo hearing in the event of an appeal, the rule has long been established that he will not and should not substitute his judgment for that of the local board or reverse the ruling if reasonable support for it can be found in the record."

Lyons Farms Tavern, Inc. v. Municipal Board of Alcoholic Beverage Control, 55 N.J. 292, 303 (1970).

Upon appeal of the issuing authority's action, the burden of proof is on the Appellant to show, by a preponderance of the evidence, that the issuing authority abused its discretion and acted unreasonably in denying renewal of the Appellant's license. "In adjudicating matters of this kind, we are guided by the firmly established principle that disciplinary proceedings against liquor licensees are civil in nature and require proof by a preponderance of the believable evidence only." In the Matter of Casino Royal, A.B.C. Bulletin 2269, Item 3 (1977). In this case, I find that Appellant has not met this burden.

I find that although the Respondent relied on the above factors in the aggregate, the licensee's prior disciplinary history alone, would have served as a sufficient basis to deny renewal. *See* The Midnight Sun v. Mayor and Council of the City of Garfield, A.B.C. Bulletin 2188, Item 2 (May, 1975)(holding that prior disciplinary determinations may, by themselves, be sufficient to sustain a denial of renewal).

While Appellant is correct in stating that one of the three prior suspensions occurred in 1995, this fact is immaterial to the conclusion that Appellant's establishment has a significant disciplinary history. The fact that Appellant had three prior suspensions within a period of three years is sufficient evidence to support this conclusion. This history is an important factor on

which the City of Camden may ultimately base its decision to deny renewal. In deciding whether or not to grant a renewal application, the municipal authority may take into account the licensee's entire history, not just events taking place in the preceding license term. "In matters relating to the denial of licenses, the Director has unhesitatingly affirmed the denial of renewal by the local issuing authority particularly in situations where the licensees have an extensive record of suspensions of license." The Midnight Sun, A.B.C. Bulletin 2188, Item 2 (May, 1975).

Likewise, the deleterious effect of problems associated with the continued operation of the license on the community could also be a sufficient basis, by itself, to support the Respondent's action. *See* Nordco, Inc. v. N.J. Division of Alcoholic Beverage Control, 43 N.J. Super. 277 (App. Div. 1957)(holding that excessive incidents requiring police response may constitute a "trouble spot" and may serve as a sufficient basis for denial of renewal).

Further, I am not persuaded by the argument that Appellant has taken steps to ensure discontinuance of *certain* disciplinary problems (the "go-go" dancing), is adequate assurance that no future problems will occur. This is supported by the fact that, while this appeal was pending, the Appellant was suspended a fourth time for violating a Special Condition imposed by the Stay Order issued on July 8, 1998. The violation of that order demonstrates either a flagrant disregard for the high degree of responsibility required of an alcoholic beverage licensee or an inability to exercise control over the licensed premises. Failure to adhere to the laws and regulations of such a highly regulated industry, when already on notice that your privilege to do business is at stake, is a clear manifestation of Appellant's inability or unwillingness to do so. Whether Appellant is unable or unwilling to comply with these laws is irrelevant; to hold an alcoholic beverage license is a privilege. *"A licensee must keep his place and his patronage under control.* When the exercise of his personal right becomes a nuisance to the community, public interest requires that the privilege terminate." Conte v. Princeton, A.B.C. Bulletin 139, Item 8 (1936).

Appellant argues that by considering its negative disciplinary history, it is, in effect, twice being penalized for the same offenses. I do not agree. The issuing authority has a duty to ascertain all the facts and arrive at a decision which will serve the best interest of the community. If a licensed establishment is or becomes a "trouble spot" and, consequently, contrary to the best interests of the community, the issuing authority may take this into account. *See* Nordco, Inc. v. N.J. Division of Alcoholic Beverage Control, 43 N.J. Super 277, 281 (1957).

With respect to determining what is in the best interests of its community, the municipality is best suited to make these determinations. In so doing, the municipality may take into account factors such as the disciplinary history of the license as well as the community sentiment. "The liquor business is one that must be carefully supervised and it should be conducted . . . in a reputable manner. The common interest of the general public should be the guidepost in the issuing and renewing of licenses." Zicherman v. Discoll, 133 N.J.L. 586, 587 (1946). Therefore, it is not unreasonable, nor is it a penalty for past disciplinary violations, for the municipality to deny renewal based on this sort of negative history when it is in the best interest of the community.

The Appellant's Exceptions focus on the alleged insufficiency of the evidence on which the Respondent based its denial. As discussed herein, so long as there are reasonable grounds on which the municipality has based its decision, the action will be affirmed on review by the Division. In addition to the disciplinary problems of Appellant, the Respondent has presented sufficient evidence, through police testimony supported by written reports, to show that Appellant's establishment places a dangerously high demand on the City's police force, thereby posing a significant risk to the community. These factors are adequate and reasonable grounds to support the Respondent's decision to deny renewal.

Accordingly, the issue of the Appellant's on-site manager, Larry Cunningham, need not be discussed, since sufficient, independent grounds exist to affirm the decision of the Municipal Board of Alcoholic Beverage Control of the City of Camden.

## CONCLUSION

Upon consideration of the facts herein, I accept the basic findings of fact and conclusions of law of the ALJ. I find that Appellant's establishment has a significant disciplinary history and that it places a dangerous and unreasonably high demand on the City of Camden's police force. I find that Appellant has not met its burden and that these factors constitute reasonable grounds on which the Respondent may deny Appellant's renewal application.

Accordingly, it is on this day of , 1999,

**ORDERED** that the action of the Respondent in denying the Appellant's application for renewal of Plenary Retail Consumption License No. 0408-33-091-004 is hereby **AFFIRMED**.

/s/ ALFRED E. RAMEY, JR.
ALFRED E. RAMEY, JR.
ASSISTANT ATTORNEY
GENERAL-IN-CHARGE

AER/CDS/DRA
Attachment: Initial Decision Below

2. NAICKEN, INC., V. MAYOR AND COUNCIL OF THE CITY OF PLAINFIELD - FINAL CONCLUSION AND ORDER - REVERSING ACTION OF ISSUING AUTHORITY WHICH DENIED THE TRANSFER APPLICATION FOR A PLACE-TO-PLACE TRANSFER

**STATE OF NEW JERSEY**
**DEPARTMENT OF LAW AND PUBLIC SAFETY**
**Division of Alcoholic Beverage Control**

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|---|---|---|
| **NAICKEN, INC.** | ) | **FINAL CONCLUSION AND ORDER** |
| | ) | |
| | ) | |
| **APPELLANT,** | ) | |
| | ) | |
| **V.** | ) | **OAL DKT NO. ABC 1274-98** |
| | ) | **AGENCY DKT. NO. 6345** |
| | ) | |
| | ) | |
| **MAYOR AND COUNCIL OF THE CITY OF PLAINFIELD,** | ) | |
| | ) | |
| **RESPONDENT.** | ) | |
| ---------- | ) | |

John F. Vassallo, Jr., Esq., for appellant
(Kearns, Vassallo, Guest & Kearns, attorneys)

Kirk D. Rhodes, Esq., for respondent

Initial Decision Below by the Honorable Diana C. Sukovich, Administrative Law Judge

Decided: June 16, 1999 Received: June 23, 1999

**BY THE DIRECTOR:**

Appellant contests action by the Local Issuing Authority denying an application for a place-to-place transfer of its Plenary Retail Distribution License. The issue is whether there is reasonable support in the record for the respondent`s decision to deny the transfer. Written Exceptions to the Initial Decision were filed on behalf of the Respondent and written replies thereto were filed on behalf of the Appellant, in accordance with the provisions of N.J.A.C. 1:1-18.4(d). The time to render a final Decision was extended by properly executed Orders and, therefore, the Decision must be made on or before November 19, 1999. For the reasons stated herein, I reject the initial decision of the ALJ ; reverse the action of the Respondent and Order the place-to-place transfer of this license.

## I. PROCEDURAL HISTORY

This matter arose from the Decision of the Mayor and Council of the Municipality of Plainfield (Plainfield) which, by Resolution dated June 26, 1995 denied the Appellant's (Naicken, Inc.) application for a place-to-place transfer of its inactive Plenary Retail Distribution License No. 2012-44-036-004. The Appellant filed a timely Notice and Petition of Appeal which was then transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 14F-1 et seq. Hearings were conducted on May 5 and May 6, 1997. A Initial Decision in favor of the respondent was rendered by the Honorable Diana C. Sukovich on August 11, 1997. Exceptions were filed on September 5, 1997 and Replies thereto on October 10, 1997.

The Director remanded the case to OAL on December 29, 1997 to determine whether the respondent`s denial was based upon widespread sentiments in the entire community; whether there was a reasonable association between the concerns expressed by respondent at the hearing and the public interest, and whether the 504 signature petition introduced by the appellant correctly demonstrated widespread community sentiment in favor of the transfer. On July 16,1999 Judge Sukovich rendered her Initial Decision on the remand. The judge concluded that it could not be determined that respondent`s denial was based upon widespread sentiments in the community, nor that any such sentiments were reasonably associated with health, morals, safety, or general welfare of the community. She did not change her initial decision.

## II INITIAL DECISION

The ALJ found that on June 1,1995, appellant filed an application for a place to place transfer of his plenary retail distribution license from its former location to a building he

had purchased on West Front Street in Plainfield, N.J. The council held hearings on November 20 and December 4, 1995 and denied the application.

The license in question was actively used in a building owned by Naicken at 105-107 Randolph Road in Plainfield until on or about August 31, 1993. In 1990, Appellant learned Respondent was interested in purchasing his property and negotiated with Plainfield for the next two years concerning their acquisition of it. During that time, Plainfield's representatives told Naicken they would help him to relocate the license, but Naicken understood Plainfield would have to approve the transfer. After selling his building to the municipality, Naicken purchased the building in question at the West Front Street site. He expended $150,000 in renovations, which were completed sometime in 1995. The Director of Plainfield's Department of Economic Development (Marcus Dasher) told him that it was advisable to not apply for a transfer of the liquor license until renovations were completed. The proposed licensed premises at the West Front street site will be operated as a combination delicatessen/convenience store and liquor store. This is similar to how Naicken operated the Randolph Road location. Naicken also plans to operate a take-out chicken restaurant from this site.

In July of 1995, Naicken together with several family members canvassed an area in the proximity of the West Front Street site, requesting that individuals sign a Petition in support of Naicken's proposed business. A review of the Petition indicates that 504 people signed it in mid-July of 1995. The sheets which they signed stated " I hereby express my support of Mr. Naicken and his proposed new business at 1314-1320, West Front street, consistent with the paragraph above entitled " statement of support from the community at large" that supporting statement was on a separate sheet which referenced specific information including Naicken`s intention to sell alcoholic beverage package goods. Several individuals who signed the Petition spoke in favor of Naicken's application during pertinent Council meetings.

Naicken has been open for business (but not for the sale of alcohol) at the West Front Street site since January 1997. He operates a delicatessen and convenience store. There are two new grocery stores located approximately 300 feet from Naicken's business. The area across the street is generally of a "light industrial" nature which includes a PSE&G truck yard, a lumber processing entity, a parking lot for telephone company trucks and several factories. There is also a church approximately 500 feet from Naicken's business and an empty building (sometimes utilized as a church) across the street and approximately 400 feet away. The lots adjacent to the West Front Street site are undeveloped and individuals do not "hang out in front of Naicken's business". As part of the renovations, Naicken arranged for PSE&G to survey the site, pertinent to lighting needs and to install additional light facilities. There is a

house approximately 200 to 250 feet away directly to the rear of Naicken's building. The area north of the site is largely residential with small businesses.

Approximately 350 feet across the street from the site is the Anchor Bar which sells alcoholic beverages for on-premises consumption only. The area in the proximity of the Anchor Bar is a place of "drug-related" activities. Naicken acknowledges that there are "problems" in the vicinity of the Anchor Bar. There are no other liquor-related businesses in proximity to Naicken's business. The closest residential dwelling is located approximately 200 feet from Naicken's business. One witness, Nancy Piwowar (Piwowar) resides approximately 3 ½ blocks from Naicken's business. She testified that there were "major problems" associated with the Anchor Bar. She also testified that the situation has generally improved since 1995. She has lived in her home for 43 years and opposes Naicken's license transfer request. She testified that she knew of at least 14 other people in her neighborhood who oppose the license transfer application.

David Graves (Graves) resides "within eye shot" of the rear yard of Naicken's business. Graves is aware of problems associated with the Anchor Bar, including loitering, trash, noise and prostitution. Graves testified that he was asked to sign Naicken's petition but refused to do so. He also did not see a Statement of Support attached to the petition. He testified at pertinent Council meetings against granting Naicken the place-to-place transfer of the liquor license.

The resolution adopted by the council on June 26,1996 stated that their decision to deny the transfer was because it "was opposed by a majority of the residents of the area in which the licensee intended to run its establishment, and that the overwhelming community sentiment opposing the opening of any new retail liquor establishments in the area of 1314-1320 West Front street, Plainfield, New Jersey..."

The ALJ found that "although the record in the current matter is scant regarding the specific factors relevant to the council`s decision to deny Naicken`s application, I am persuaded that appellant has not proven that the council`s action was arbitrary nor unreasonable." The judge noted that the site was proximate to a school and a church although not so close as to violate the distance prohibited by statute. The proximity of the Anchor Bar, with it`s problems was another factor. Finally, the judge concluded that the pertinent area was, generally, a "trouble-spot".

The ALJ gave little weight to the 504 signature petition submitted by Naicken because it could not be determined that those who signed it had access to the referenced

statement of purpose. The judge concluded that the appellant had not demonstrated , by a preponderance of the evidence, that the denial was arbitrary

## III-REMAND

No further witnesses were called on remand. After reviewing the transcript, the Judge made the following findings. Piwowar testified on her own behalf and not as a representative of the West Heights Area Association which is an informal local improvement association. She knew at least fourteen (14) people in her neighborhood who had expressed opposition to the license transfer application. However, she was not specific regarding the identities of those individuals and did not address whether they testified in opposition to the application during pertinent Council meetings. She testified regarding loitering and illegal drug transactions in the area near Appellant's prior business as well as the condition of vacant lots across the street from it. However, she did not reference any such conditions directly caused by the operation of Naicken's business, nor within its control. She filed a Letter in Opposition to Petitioner's transfer application with the City Clerk in November of 1995.

Graves testified concerning observations of trash in the lot to the rear of Naicken's current business and of children in Naicken's store, as well as problems regarding the Anchor Bar. He testified in opposition to the transfer before Council but did not reference any specific reasons why he was opposed to the transfer. He also is a member of the West Heights Area Association, but did not testify as a representative of the Association.

The Judge found that no other objectors could be identified from the record presented to her. She also found that the concerns of these two objectors were related to the general condition of the area in proximity to Naicken's current business site and not to concerns specific to Naicken, nor the operation of Naicken's prior business in Plainfield. She concluded that "the record does not demonstrate that Respondent's denial of Appellant's transfer application was based upon wide-spread sentiments of the community, nor that any such sentiments were reasonably associated with the health, morals, safety, or general welfare of the community". However, the Judge did not address the ultimate issue of whether the application should be granted.

## V. EXCEPTIONS

The appellant submitted Exceptions and the Respondent filed Replies, which are summarized below together with my assessment of their merit.

The basic thrust of the Appellant's Exceptions is that there were no specific findings or reasons given by Respondent to support its conclusion that there was overwhelming community sentiment opposing the place-to-place transfer of this liquor license. Additionally, only two witnesses were called in the de novo hearing and their testimony was insufficient to form a conclusion about community sentiment.

Respondent's reply is that the Judge's Decision is well-reasoned and the Director should not substitute his judgement for that of the local Board. Further, Respondent submits that based upon the overwhelming support found in the record, the Director should not reverse or amend the decision of the trial Court denying Appellant's application based upon overwhelming public sentiment. Additionally, Respondent states that the Judge's decision clearly shows the complete failure of Appellant to demonstrate by a preponderance of the evidence, that the issuing authority's decision was erroneous, unreasonable or an abuse of discretion.

Exceptions must specify the Findings of Fact or Conclusions of Law to which exception is being taken. N.J.A.C. 1:1-18(b)(1). The Exceptions must set forth supporting reasons. N.J.A.C. 1:1-18.4(d)(3). Exceptions to factual findings must describe the witnesses testimony relied upon, and Exceptions to Conclusions of Law must set forth the authorities relied upon. Id. Moreover, the party asserting the Exceptions has the burden of providing the necessary transcripts for review. In re: Morrison, 216 N.J. Super. 143, 157-158 (App. Div. 1987); See also Rowley v. Bd. of Education of Manalapan - Englishtown, 205 N.J. Super. 65 (App. Div. 1985). For reasons stated below, I agree in part with Appellant's Exceptions and reject Respondent's Replies.

## VI. LEGAL DISCUSSION

While a local issuing authority has broad discretion over transfer matters, see Lubliner v. Bd. of Alc. Bev. Control, 33 N.J. 428, 446 (1960), the denial of a transfer may be reversed if Appellant shows that the action of Respondent issuing authority was erroneous. N.J.A.C. 13:2-17.6. The local authority may reasonably consider community sentiment when deciding whether or not to grant a place-to-place transfer request. Borough of Fanwood v. Rocco, 33 N.J. 404, 412 (1960). The sentiments relied upon must be substantially widespread in the community, and reasonably associated with public health, safety, morals and general welfare concerns commonly recognized as incidental to the sale and consumption of alcoholic beverages. Lyons Farms Tavern, v. Mun. Bd. of Alc. Bev. Control of Newark, 55 N.J. 292, 306-307 (1970); A & P Co. v. Mayor of Pt. Pleasant Bch., 220 N.J. Super. 119, 128 (App. Div. 1987). Moreover, general objections or expressions of concern, conjectural in nature, are

insufficient grounds for denying a transfer request. Van's Restaurant, Inc. v. Mun. Bd. of Alc. Bev. Control of Clifton, ABC Bulletin No. 2242, Item No. 4 (January 19, 1977).

In an appeal from a denial of a liquor license transfer by a municipality, the applicant has the burden to establish that the municipal governing body, as the license issuing authority, acted arbitrarily, unreasonably, or capriciously in its decision. Lyons Farms Taverns, Inc. v. Mun. Bd. of Alcoholic Beverage Control, 55 N.J. 292, 303 (1970). Although the municipal issuing authority is vested with a high degree of discretion, its decisions are subject to review by the Director of the Division of Alcoholic Beverage Control where the decision is a result of an abuse of discretion, a manifest mistake, or is found to be clearly unreasonable. Lubliner v. Bd. of Alcoholic Beverage Control, 33 N.J. 428, 446 (1960); Paul v. Brass Rail Liquors, Inc., 31 N.J. Super. 211, 214 (App. Div. 1954); Rajah Liquors v. Div. of Alcoholic Beverage Control, 33 N.J. Super. 598, 600 (App. div.), certif. denied, 18 N.J. 204 (1955); Blanck v. Mayor and Borough Council of Magnolia, 38 N.J. 484, 492 (1962).

The judicial standard of review of an administrative agency such as the Division of Alcoholic Beverage Control is:

> [W]hether the findings made could unreasonably have been reached on sufficient credible evidence present in the record, considering 'the proofs as a whole,' with due regard to the opportunity of the one who heard the witnesses to judge of their credibility ... and ... with due regard also to the agency's expertise where such expertise is a pertinent factor.
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> [Matter of Fiorillo Bros. of N.J. Inc., 242 N.J. Super. 667, 675 (App. div.), certif. denied, 122 N.J. 363 (1990) (quoting Mayflower Sec. v. Bureau of Sec., 64 N.J. 85, 92-93 (1973) (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965))).] See also Grand Victorian Hotel v. Borough Council of the Borough of Spring Lake, (App. Div. Dkt. No. A-0924-93T3 decided July 1, 1994).

Moreover, the Rule is well settled that the Director will not substitute his judgement for that of the local Board or reverse the Ruling if reasonable support for it can be found in the record. Margate Civic Ass'n. v. Bd. of Comm'rs., Margate, 132 N.J. Super. 58, 63 (App. Div. 1975). If the municipal action is unreasonable or improperly grounded, the Director may grant such relief or take such action as is appropriate. Lyons Farms, supra. 55 N.J. at 303.

I have carefully reviewed the facts and circumstances of this particular case. The parties agree that there are no issues regarding zoning matters that are applicable to this case. By the same token, the parties agree that Appellant is qualified to hold a liquor license. Equitable estoppel is not applicable in this case for reasons stated in my Remand Order dated December 29, 1997. That Order is attached hereto and incorporated herein by reference as if fully set forth at length.

Some of the facts are critical for arrival at a fair and impartial decision in this case. Naicken, Inc. operated a liquor licensed business in Plainfield up until approximately August 31, 1993. They operated that business for approximately 13 years. The record below does not reflect that in the thirteen years of operation the City of Plainfield encountered any difficulty with Naicken's business. In 1993, Plainfield purchased the building from Naicken and represented that they would work with him to find a new location for usage of the liquor license. Naicken purchased another building at the presently proposed site. At that time, he was told not to submit his place-to-place transfer application until he completed renovations. He then invested $150,000 into renovating the building. The area in which the building is located is of a light industrial nature. The parties agree that there are no town ordinances that would prohibit Naicken from situating the business at the proposed site.

The proposed site is not in a residential area and only two nearby residents objected to transferring the liquor license to that location. Both objectors testified as individuals and not as members of any special interest group, club or community organization. One such objector, Ms. Piwowar, objects to the transfer because of problems which exist at the Anchor Bar. Evidently, the Anchor Bar is closer to Ms. Piwowar then the proposed site of the Naicken license. We note for the record that the Naicken license is a plenary retail distribution license which does not provide for on-premises consumption of alcohol like the Anchor Bar. Ms. Piwowar is a long-time resident of Plainfield and while she has knowledge of many problems associated with the Anchor Bar, she did not pinpoint any problems with Naicken's prior ownership of the liquor license, future operation of the license, nor major problems at the proposed site. Mr. Graves also testified in opposition to the transfer of the license. He can see the backyard of Naicken's business from his home. He did not testify on behalf of any organization, club or community interest group. His testimony is not substantive and of little value in making a determination of community sentiment. It does not contain any viable reasons in opposition to the liquor license transfer. He states that he has observed children standing in front of Naicken's business. However, there is nothing unnatural or incongruent with this observation, in that Naicken presently operates the site as a delicatessen and convenience store.

In the Initial Decision, the Judge found that the record reflected Naicken's proposed site for the liquor license was a "trouble spot". In Nordco, Inc. v. State, 43 N.J. Super. 277, 282 (App. Div. 1957), the Court was asked to make a determination as to whether or not a bar located in Newark was a "trouble spot". In that case, the police had been summoned 59 times during a one year period for disturbances. The license had also been previously suspended for sale of liquor on Sunday. Additionally, aside from the calls, there had been four assaults or disturbances as well 16 other incidences at the bar in the six or seven preceding years. When considering all of these facts, the Court concluded that the Nordco license was indeed a "trouble spot".

The Judge cites as authority El Porto Alegre v. Union City Bd. of Commr's., 96 N.J.A.R. 2d (ABC) 8. In that case, Porto Alegre applied for a place-to-place transfer of its liquor license. The business had been a go-go bar at its prior location. The transfer was necessitated because a fire had destroyed Porto Alegre's original license site. The issuing authority voted to deny transfer based upon Porto Alegre's past violation history (a twenty day suspension had previously been imposed on the license). Additionally, the Town sought to reduce the number of liquor licenses within its jurisdictional boundaries and determined to deny transfer of the license because the proposed location of the license was the site of criminal activity. The Administrative Law Judge determined that the Board's reason did not support denial of Porto Alegre's place-to-place transfer application and the Director of the Division of Alcoholic Beverage Control found that the Board's denial of the place-to-place transfer application was in error. The Director stated; "[B]eyond mere allegation of criminal activity, the Respondent offered no evidence or testimony before the ALJ that the proposed location was indeed a "trouble spot"." A close look at El Porto Alegre leads to the conclusion that the Town in denying a place-to-place transfer of the license on the basis of it being a "trouble spot" must buttress that decision with concrete evidence of criminal activity and not just mere allegation. Nordco, Inc. suggests that there must be evidence or testimony from the Town of a history of police responses to the location in question or a need for police patrols at the proposed site. There is nothing to suggest that this is the case with respect to Naicken's application.

In each one of these cases, (Nordo and Porto Alegre), we find very similar essential circumstances. First, there was criminal activity at the location in question. Second, testimony of criminal activity was established by more than mere allegation. Third, evidence was presented that established numerous police responses to the location and or recurring incidents to which police respond that go to the business being allowed to be run as a nuisance within the community. There is no such evidence in the record before us. As a matter of fact, there is no indication in the record that Naicken had any problems with the liquor license at

the Randolph Street site. Nor does the record indicate that Naicken failed to control his license and the activity at the Randolph Street site.

Likewise, there is absolutely nothing to suggest that the transfer of the license to the proposed site at West Front Street would exacerbate the problems at the Anchor Bar. As a matter of fact, there is precious little in the record to indicate that Naicken's proposed site is indeed a "trouble spot". The Town presented little testimony in this regard except that of witnesses Piwowar and Graves. There was no testimony of any public officials. Nor does the record reflect any general outcry in opposition to the license transfer from the masses. Indeed, it is difficult to deduce how the Judge could find overwhelming community sentiment against the license transfer, based on the opinion of two people. In fact, my review of the record shows no evidence, nor reasonable association, that a liquor license at the proposed site would be dangerous to the public health, safety, morals or general welfare of the public. Lyons Farms Tavern v. Mun. Bd. of Alc. Bev. Cont. Newark, 55 N.J. 292, 304 (1970); Martell's SeaBreeze, Inc. v. Mayor and Council of the Borough of Pt. Pleasant Beach, 97 N.J.A.R. 2d (ABC) 39, 55.

I am aware that the action of the local issuing authority may not be reversed in the absence of manifest mistake or abuse of discretion. Florence Methodist Church v. Twp. Comm., Florence Twp., 38 N.J. Super. 85 (App. Div. 1955). Nevertheless, if the municipal action is improperly grounded or unreasonable, I may grant such relief or take such action as is appropriate. Common Council of Highstown v. Hedy's Bar, 86 N.J. Super. 561 (App. Div. 1965).

I have seriously considered and given due deference to the concerns regarding the Anchor Bar. The Anchor Bar is approximately 350 feet from the proposed site. The record indicates that there are problems in the vicinity of the Anchor Bar relative to drug-related activities, loitering and littering. The complained of activity has taken place at a location that is over one football field away from Naicken's proposed site. There is no indication of trouble at the proposed site nor has there been any evidence of trouble at the prior site of his business on Randolph Street. Additionally, there will be no consumption of alcohol at the proposed site. There is nothing in the record that indicates that there was criminal activity taking place at Naicken's proposed site. Nor is there anything in the record that would elevate the activity at Naicken's proposed site to that of a "trouble spot". In El Porto Alegre v. Union City Bd. of Commr's., 96 N.J.A.R. 2d (ABC) 8, 13. The Court held that the local issuing authority may not deny a place-to-place liquor license transfer on unsupported claims that the new location is a "trouble spot". It is also well-established that an owner of a license or privilege acquires through his investment therein, an interest which is entitled to some measure of protection in connection with a transfer. Twp. Comm. of the Twp. of Lakewood v. Brandt, 38 N.J. Super. 462, 466 (App. Div. 1955).

In The Grand Victorian Case, supra., the Court stated; "Although a municipal governing board may and should render its decision with consideration to the views of the public who oppose transfer, Lyons Farms, supra. 55 N.J. at 305, it must accede to the demands of citizen witnesses only when those demands are founded upon provable facts. In this case, the citizenry both before the municipality and at the de novo proceeding offered repetitive conclusions without any credible evidence or expert opinion to substantiate their common allegations. The Director was correct in disregarding those allegations. The Great Atlantic & Pacific Tea Co., Inc. v. Mayor and Council of the Borough of Pt. Pleasant, 220 N.J. Super. 119, 128 (App. Div. 1987)."

My Decision is informed by the Court's guidance in Grand Victorian Hotel. On this record I cannot reasonably arrive at the conclusion that the objection and testimony of two individuals rises to the level of overwhelming community sentiment. By the same token, I cannot overlook the fact that Naicken obtained the signature of 504 community residents on a petition in support of his proposed business. I cannot gloss over the fact that Naicken together with several family members canvassed the area in the proximity of the proposed West Front Street site and requested individuals to sign his petition. Nor can I disregard the fact that the petition contained a statement in support of Naicken's business at the new location. Indeed, both objectors (Piwowar and Graves) testified that they too were asked to sign the petition. I also note that some individuals who signed the petition spoke in favor of Naicken's application at "pertinent council meetings."

I do not agree with the Administrative Law Judge that little weight should be given to the petition. While the petition itself is not dispositive of this issue, each signature in the petition represents a person who has lent their name to Naicken's cause. Those people have in effect said "yes" to Naicken's proposed relocation of the liquor license. On the other hand, Plainfield has little or nothing to buttress or substantiate its decision to deny the place-to-place transfer of this liquor license. In fact, when asked to reexamine this issue on remand, the Judge found there was no evidence of wide-spread sentiment against the transfer of this liquor license.

On Appeal, a de novo hearing was conducted on Plainfield's denial of the Appellant's application for a place-to-place transfer. Plainfield's Resolution reflected that the place-to-place transfer was opposed by a majority of the residents in the area in which the licensee intended to run its establishment, and that the overwhelming community sentiment opposed the opening of any new retail establishment in the area. However, no such evidence or testimony was presented before the OAL Judge. The Judge found there was no evidence of widespread sentiment against the transfer. The two witnesses, Piwowar and Graves, testified

on their own behalf and not on behalf of anyone else. They did not specifically identify any other individuals who were opposed to the transfer. Nor did they testify on behalf of the West Heights Area Association. In contrast, Appellant obtained 504 signatures on his petition in support of the business. While the petition in and of itself is not dispositive of the issue of widespread community sentiment, it is entitled to some weight which I conclude on this record is sufficient to add further support to the finding that there was no evidence of widespread sentiment against the transfer of this liquor license.

In closing, I agree with Judge Sukovich to the extent that she finds that "the record in this matter does not demonstrate that Respondent's denial of Appellant's transfer application was based upon widespread sentiments of the community, nor that any such sentiments were reasonably associated with the health, morals, safety or general welfare of the community." Consequently, I am compelled to reverse the action of the City in this instance.

Plainfield has failed to show any reasonable support of its denial of Appellant's application for a place-to-place transfer. Accordingly, Plainfield's denial of this person-to-person transfer was erroneous, N.J.A.C. 13:2-17.6.

Accordingly, it is on this day of , 1999,

ORDERED, that the action of the Mayor and Council of the City of Plainfield, which denied the transfer application for a place-to-place transfer of Naicken, Inc., License No. 2012-44-036-004 be and is hereby reversed; and it is further

ORDERED, that the transfer application for a place-to-place transfer of Naicken, Inc., License No. 2012-44-036-004 for the premises located at 105-107 Randolph Road, Plainfield to the location of the premises known as 1314-1320 West Front Street, Plainfield be granted.

/s/ ALFRED E. RAMEY, JR.
ALFRED E. RAMEY, JR.
ASSISTANT ATTORNEY
GENERAL-IN-CHARGE

Appendix: Initial Decision Below
AER:JR:mer