STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
P.O. BOX 2039
U.S. ROUTE 1-9 (SOUTHBOUND), NEWARK, N. J. 07114

BULLETIN 2289 July 27, 1978

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1. NOTICE TO MUNICIPAL ISSUING AUTHORITIES - RENEWAL OF INACTIVE LICENSES.

TO ALL MUNICIPAL ISSUING AUTHORITIES:

RE: RENEWAL OF INACTIVE LICENSES

The Division has received numerous inquiries regarding Chapter 246 of the Laws of 1977, which became effective on October 3, 1977, and which places certain restrictions on the renewal of inactive Class "C" licenses.

The Act, which supplements Title 33 of the Revised Statutes, provides as follows:

> "No Class C license, as the same is defined in R.S. 33:1-12, shall be renewed if the same has not been actively used in connection with the operation of a licensed premises within a period of 2 years prior to the commencement date of the license period for which the renewal application is filed unless the director, for good cause and after a hearing, authorizes a further application for renewal; provided, however, that if the licensee has been deprived of the use of the licensed premises as a result of eminent domain fire or other casualty, and establishes by affidavit filed with the director that he is making a good faith effort to resume active use of the license in connection with the operation of a licensed premise then the period of 2 years provided for in this section shall be automatically extended for an additional period of 2 years."

This Act applies to all Class "C" licenses as defined by N.J.S.A. 33:1-12, and not only, as has been mistakenly suggested, to plenary retail consumption licenses. Specifically, this means that the Act is applicable to plenary retail consumption, seasonal retail consumption, plenary retail distribution, limited retail distribution, plenary retail transit and club licenses.

Prompt filing of papers with the Division will expedite the scheduling of hearings, and will assure that a prompt decision will be rendered on each application.

Any Class "C" license which has not been used in connection with the operation of a licensed premises since July 1, 1976 becomes subject to the Act this year. As the Act indicates, such licenses may not be renewed unless the Director finds good cause after a hearing, to authorize a further application for renewal.

An extension of the two year period is provided when the premises are taken by eminent domain or lost as a result of casualty.

Issuing authorities should advise licensees who are subject to this Act to file a timely request to the Director for a hearing prior to filing their renewal application for the coming license year. Requests for a hearing should be made by Verified Petition, setting forth all relevant facts and the circumstances which give rise to good cause for renewal. Upon receipt of the Petition the Division will advise parties of the scheduled hearing date.

The determination by the Director of whether good cause has been established will be made on a case-by-case basis, applying recognized judicial concepts associated with that term, and, to the extent applicable, of prior decisions of the Division concerning renewal of inactive licenses.

Licensees who fall within the casualty or eminent domain exceptions must file affidavits with the Director, establishing that they have met the statutory requirements set forth in the Act. A hearing is not required in such cases.

Joseph H. Lerner
Director

Dated: April 14, 1978

2. DISCIPLINARY PROCEEDINGS - GAMBLING (BETTING AT POOL TABLE) - PRIOR SIMILAR OFFENSE - LICENSE SUSPENDED 20 DAYS.

In the Matter of Disciplinary Proceedings against	:	
Eisenhower's Musical Bar, Inc. t/a Circle Inn Route 70, Eisenhower Traffic Circle Lakehurst, N.J. 08733	:	S-11,216 X-19,373-AE CONCLUSIONS and ORDER
Holder of Plenary Retail Consumption License C-4, issued by the Borough Council of the Borough of Lakehurst.	:	

Rothstein, Mandell and Strohm, Esqs., by Edward M. Rothstein, Esq., Attorneys for Licensee.
Leonard A. Peduto, Deputy Attorney General, Appearing for Division.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleads "not guilty" to the following charge:

> On April 22, 1977, you, through William Walker, a person employed on your licensed premises, allowed, permitted and suffered gambling in and upon your licensed premises, viz., participant betting for stakes of money and for drinks on games of table pool; in violation of Rule 7 of State Regulation No. 20.

In behalf of the Division, ABC Agent C testified that he entered the licensed premises on April 22, 1977, at approximately 8:56 p.m., in the company of ABC Agents B and L. The premises consist of a one story building with tables and chairs to the left, a pool table in the left corner, and to the right, a shuffleboard machine, phone booth and ladies room. In the middle is a large rectangular shaped bar with a go-go type raised platform behind it.

Upon entry Agent C observed that, one William Wayne Walker was tending bar, a go-go dancer was performing, and several men were in the area of the pool table where a game was in progress. He watched the go-go dancer perform, for approximately ten minutes, and he then drifted to the pool table where he was joined shortly thereafter by the other agents. The agents positioned themselves on either side of the table. Two men, Stanley O'Donnell and David Wigley, were playing "Eight Ball."

At 9:20, O'Donnell placed five twenty-dollar bills on the pool table and stated to Wigley, "You want to shoot me for this?" Wigley declined, and a twenty-dollar wager was ultimately agreed upon. Agent C was then two feet from the pool table. Wigley won and O'Donnell handed him $20.00. Wigley then played between six and eight games with various other challengers, the stake being a drink. The pool table was five or six feet from the bar.

The bartender was seen on several occasions, when not serving patrons, to be watching the game. On at least one occasion he (Agent C) observed Wigley say to the bartender "Wayne I'm thirsty. I won again. Give me another drink." Agent C asked the bartender Wayne, in the presence of Agents B and L, "Do you think I could beat Dave in a game?" Wayne replied, "This is his second home and he's good." Agent C retorted, "Right now he's playing Stan for twenty dollars. I think I'll play him for twenty." Wayne then replied, "If you do, I don't want to see the money."

The above referenced game was also between O'Donnell and Wigley. They wagered $20.00 each and placed the bills beneath an ashtray on a cocktail table nearby where it was visible, throughout. A side wager for $10.00 was made by William Gauweiler. O'Donnell won the game and removed the two twenty-dollar notes which were until then visible from the cocktail table. Gauweiler withdrew ten dollars from his pocket and gave it to O'Donnell.

Thereafter, the agents identified themselves, advised Walker of the alleged violation which had taken place and after obtaining names and addresses of participants, departed.

The testimony of Agents B and L was largely corroborative of Agent C.

William Wayne Walker, the bartender on duty, testified in behalf of the licensee that he saw no evidence of gambling activity that evening. He stated that there was a large sign on the wall in the area of the pool table advising patrons that gambling was prohibited. A similar, though smaller sign is located near the shuffleboard machine. After the incident of April 22, 1977, the words "for money or drinks" were added. He admitted having a conversation with Agent C, but asserts he told the agent no gambling was allowed when a bet for money was discussed.

Eleanor Kempienski, the majority stockholder of corporate licensee, also gave testimony as to the physical layout of the tavern and the strict policy maintained regarding gambling, which came about as a result of an incident that occurred at the shuffleboard machine several years ago. She explained that the signs were recently changed to add the words "for money

or drinks", when she realized what patrons meant by statements such as "Give him a drink on a game" and other expressions of similar import.

Ernest Bernich, another bartender on duty that evening, gave testimony in support of the licensee which in no wise contradicted that of the agents. In essence he stated that he saw nothing amiss that evening and related Mrs. Kempienski's strict orders to employees regarding gambling in the barroom.

Stanley O'Donnell, a patron involved in the gambling that evening, testified that, while there was a $20.00 bet made on the game, there was no such incident as $100.00 being placed upon the table as described by Agent C. He could not recollect if the $20.00 bet which he admits was made, was visible on a cocktail table under an ashtray, throughout that game. He admitted that it was bar knowledge that the management prohibits gambling in the tavern and there are two signs posted to that effect. He opined that the gambling that did take place was done in a manner that would not alert the employees, for fear of being "flagged." He admitted that when the agent stated he was busting the place for gambling at the pool table he responded, "We're not gambling on this game. The most we are playing here was (for) the courtesy of a drink."

William Gauweiler, another patron identified by Agent C as participating in the gambling at the pool table that evening testified that he made a ten dollar side bet on one of the games. He, too, was of the opinion that the bartenders were not aware of the gambling.

David Wigley also admitted wagering twenty dollars on one game of pool. When questioned as to whether or not one hundred dollars was initially proposed as the stake, he responded, "That could have been mentioned..." He further admitted wagering drinks upon the outcome of several games that evening.

Inasmuch as the licensee's witnesses corroborated the agents' testimony of wagering in the barroom as noted hereinabove, the sole dispositive issue is: whether there is sufficient evidence to warrant a finding that the licensee "allowed, permitted and suffered" the violation charged.

Preliminarily, I observe that we are dealing with a purely disciplinary action; such action is civil in nature and not criminal. In re Schneider, 12 N.J. Super. 449 (App. Div. 1951). Thus, the proof must be supported by a fair preponderance of the credible evidence only. Bulter Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956).

Since the matter sub judice presents a factual situation, the credibility of witnesses must be weighed. Evidence, to be believed, must not only proceed from the mouths of credible

witnesses, but must be credible in itself, and must be such as common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961).

I have had the opportunity to observe the demeanor of the witnesses as they testified and have made a careful analysis and evaluation of their testimony.

I have set forth much of the testimony in the record in order to objectively arrive at a determination herein.

I am imperatively persuaded that the testimony of Agent C relative to the gambling activity engaged in by patrons upon the licensed premises on the date mentioned in the charge, is factual, clear and credible.

I am wholly unimpressed with the testimony of licensee's witnesses to the effect that the employees were unaware of the gambling activity.

While there is no requirement that the proscribed activities be "open and notorious", I find substantial credible evidence which unmistakably demonstrates that the licensee's agents knew or should have known of the existence of such proscribed activities. It is apparent that the licensee failed, even avoided, by its "see no evil" attitude, in its obligation to supervise the premises adequately. Mazza v. Cavicchia, 15 N.J. 498, 507 (1954); Davis v. New Town Tavern, 37 N.J. Super. 376-379 (App. Div. 1955), Benedetti v. Board of Commissioners of Trenton, 35 N.J. Super. 30, 34 (App. Div. 1955).

In Mazza the court held that the knowledge of the licensee is not necessary to sustain a finding of "guilt" on disciplinary charges.

Said the court (15 N.J. at 509):

> The rule in question comes clearly within the delegated authority of the Director as a reasonable regulation in the field of alcoholic beverage control The Director has the power to make the licensee responsible for the activities upon the licensed premises. In fact, it is difficult to see how the Division could properly maintain discipline in this field if in each case it had to show knowledge by the licensee of all the activities upon the premises. This would leave the door open to evasion of the Alcoholic Beverage Law and the many rules of the Director promulgated there-

under and would make the enforcement of the law an impossibility.

It is well-established that a licensee cannot escape the consequences of the occurrence of incidents, such as hereinabove related, on the licensed premises. A licensee may not avoid his responsibility for conduct occurring on his premises by merely closing his eyes and ears. On the contrary, licensees or their agents or employees must use their eyes and ears, and use them effectively to prevent the improper use of or conduct upon their premises. Bilowith v. City of Passaic, Bulletin 527, Item 3; Re Ehrlich, Bulletin 1441, Item 5; Re Club Tequila, Inc., Bulletin 1557, Item 1. Clearly, the licensee "suffered" the aforesaid gambling activities to take place on the licensed premises. See Essex Holding Corp. v. Hock, 136 N.J.L. 28 (Sup. Ct. 1947).

Additionally, it is basic that, in disciplinary proceedings, a licensee is fully accountable for all violations committed or permitted by his agents, servants or employees. Rule 33 of State Regulation No. 20; In re Schneider, supra.

Accordingly, after a careful evaluation and consideration of the testimony adduced herein, and the legal principles applicable thereto, I conclude and find that the Division has established the truth of the charge, and recommend that it be adjudged guilty thereof.

I recommend that appellant's license be suspended for ten (10) days, to which should be added an additional ten (10) days suspension for a prior, similar occurrence which happened within the past two years, for a total suspension of twenty (20) days.

Conclusions and Order

Written Exceptions to the Hearer's Report were filed by the licensee, and written Answers thereto were filed on behalf of the Division, pursuant to Rule 6 of State Regulation No. 16.

In its first Exception, the licensee argues that there was insufficient proofs to support a finding that the licensee could have been aware of the proscribed activity. ABC Agent C testified, contra to the licensee's exception, that he stated to the bartender "Right now he is playing Stan for twenty dollars. I think I'll play him for twenty."

This statement by an agent is entirely consistent with proper and recognized investigative procedures, when considered with the overt nature of certain aspects of the gambling which took place at the pool table, i.e., exchange of monies and buying of drinks by the loser of the game. The record as a whole, amply supports the findings of the Hearer. Thus, I find this Exception, as well as the general statement that guilt was not proven by a

preponderance of testimony, to be lacking in merit.

The licensee next asserts that the penalty imposed is excessive. It argues that the licensee's policy against gambling was "clearly established", through instructions to employees and signs on the licensed premises. In further mitigation it seeks to reopen a consideration of its prior violation on the same charge, and advances the argument of a "modern trend" towards gambling in New Jersey.

The testimony discloses an effort by the licensee to do nothing more than what every licensee is enjoined to do, that is, prohibit gambling on its licensed premises. I find that the effort to prevent the activity was insufficient, both with respect to its prevention, and the observations by employees; thus, it is not a mitigating factor.

The licensee's efforts to reopen the prior disciplinary proceeding is without basis, and rejected. It is firmly established that the Director may consider prior violations in determining the penalty to be imposed, Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956), and the penalty imposed therein is consistent with Division policy and practice.

I find no merit to the attempt to draw a mitigating inference from those examples of legalized gaming permitted in New Jersey. The regulated and controlled nature of the permitted gaming activities is Legislatively approved, whereas the gambling sub judice is proscribed and illegal.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's Report, the written Exceptions to said Report, and the written Answers thereto, I concur in the findings and the recommendations of the Hearer, and adopt them as my conclusions herein. I find the licensee guilty as charged, and shall suspend its license for twenty days.

Accordingly, it is, on this 9th day of February, 1978,

ORDERED that Plenary Retail Consumption License C-4 issued by the Borough Council of the Borough of Lakehurst to Eisenhower's Musical Bar, Inc., t/a Circle Inn, for premises Route 70, Eisenhower Traffic Circle, Lakehurst, be and the same is hereby suspended for twenty (20) days commencing at 2:00 a.m. Tuesday, February 21, 1978 and terminating at 2:00 a.m. Monday, March 13, 1978.

Joseph H. Lerner
Director

3. APPELLATE DECISIONS - SURF VILLA, INC. v. SURF CITY.

#4124 Surf Villa, Inc. t/a The Villa, Appellant, v. Mayor and Borough Council of the Borough of Surf City, Respondent.	ON APPEAL CONCLUSIONS and ORDER

Dimon, Eleuteri and Paarz, Esqs., by Robert E. Paarz, Esq., Attorneys for Appellant.
Berry, Summerill, Piscal, Kagan and Privetera, Esqs., by Seymour J. Kagan, 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 Mayor and Borough Council of the Borough of Surf City (Council) which, by Resolution dated June 9, 1977, renewed appellant's Plenary Retail Consumption License, C-2, for premises located between 15th and 16th Streets Long Beach Boulevard, Surf City, for the 1977-78 licensing year, subject to the imposition of a special condition that, "no electronic amplification equipment be used in their entertainment."

Upon the filing of this appeal, the Director of this Division, by Order dated June 24, 1977, stayed the imposition of the said special condition pending the determination of this appeal.

Appellant, in its Petition of Appeal, contends that the imposition of the special condition is: (a) Arbitrary and capricious; (b) Overbroad to meet any evil envisioned; (c) Imposed out of political motivation and without foundation in the law; (d) Contrary to the weight of the credible evidence; (e) An unconstitutional denial of substantive and procedural due process; and (f) Exacts higher standards of appellant then that required of other licensees in the jurisdication.

In its Answer, the Council denies the substantive allegations of the Petition of Appeal, and asserts that the need for the condition is supported by the record to resolve neighbor's complaints of undue noise.

A de novo hearing was held in this Division pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded the parties to introduce evidence and cross-examine witnesses.

J. Charles McKirachan, a retired minister, who has for the past five years continuously resided on "The Island" (Long Beach Island, the situs of Surf City) was the respondent's principal witness.

He testified that he acquired his property in 1945; it is 150 feet from the subject licensed premises, which was in existence at the time of purchase.

Until two years ago he had no cause to object to the tavern's existence. However, at that time, the tavern began to employ live bands and problems arose. The problems reached a critical stage recently, causing him to file several complaints with the local Municipal Court. From midnight until about three a.m., the sound of highly amplified music keeps him and his wife awake. He describes it as, "...the sound is compressed and the walls vibrate, our walls vibrate, even the dishes on the shelves vibrate. We have a brass bed and the decorative things on the brass bed tinkle and you can feel it, not only hear it, particularly because of the bass, boom boom boom."

McKirachan described his wife's recent nervous condition, which he attributes to the current situation, and her use of medicine with increasing frequency, though stating, "she is a very healthy woman." He felt that the subject of the Surf Villa preoccupies a host of people in the community, and is the topic of discussion of everyone he encounters on the street.

It is McKirachan's opinion that the real estate values have been adversly affected by the conduct of appellant, although he could cite no competent evidential basis to support his statement.

While the sole issue on appeal is the imposition of a special condition prohibiting electronic amplification of music, the minister spent much time describing, in detail, other problems in the area which he finds offensive, and which he links to the recent change of direction in the operation and management by the appellant of the subject premises.

Additionally, he related the tenor of personal contact he and others had with the Comegys, corporate owners of the appellant. Although the incidents related were not relevant, or at best, tangential to the issue sub judice, the testimony developed an image of the manner and nature of Mr. Comegys, as well as the mental attitude of this witness and others towards appellant.

At the conclusions of his testimony, he responded, on

cross-examination, that, other than the noise problem which he views as acute, all of the myriad of other complaints are, today, "trivial."

Mary Ann Jobson, a neighbor residing approximately 400 feet distant from the premises similarly testified on behalf of respondent to the noise conditions and the impossibility to sleep while the band plays. She and her husband Damon preferred six complaints against the licensee for noise in a relatively short span of time. She stated that, since the installation of steel doors, coupled with the ban against amplification of sound, it has become peaceful again.

Damon Jobson testified in corroboration of his wife's testimony.

Thomas Pippett, who resides nearby, next testified for respondent and stated that he primarily visits his home on weekends during the summer. He also complained of the noise emanating from appellant's premises, as well as other non-relevant matters. The bulk of his testimony dealt with those complaints which are not the subject of this hearing, but which appear to be the most vexious to him. He indicated that if they don't change he may sell the home. He, too, stated that, since the installation of the steel doors, the noise condition is much improved. He expressed fear, however, that the doors may be kept open, causing the sound level to become intolerable once again.

Mildred Barr, who resides less then 50 feet from subject premises, testified for respondent that no steel door was installed at the door in the rear of the licensed premises closest to her home. She stated that sound continues to emanate at a high enough volume to disturb the members of her family. The balance of her testimony concerned matters not in issue.

Joseph Gardner who resides approximately 200 feet from the premises testified on behalf of respondent that conditions for the past two years are such that he cannot sleep some nights due to the noise. He too, admits that since amplification was prohibited and the steel doors installed there has been a noticeable improvement in the noise problem.

Wayne Watson, who resides within 150 feet of the premises, gave testimony in a similar vein to that given by Mr. Gardner.

The appellant then produced several witnesses in support of its Petition of Appeal. Emily Ada Robinson, the proprietor of a tennis shop fifty feet distant, and a summer resident of the Borough, testified on behalf of the appellant that she has never heard music emanating from the Surf Villa at a loud volume at any time during the past two years. She lives in proximity to the licensed premises and states that her sleep or tranquility has not been disturbed.

Ellen Gertrude Scull who resides 270 feet away testified on behalf of appellant that, although she could hear music at times, its volume was sufficiently low so that it never disturbed her nor anyone who visited her home. She was never awakened at night, or prevented from sleeping due to the music. Furthermore, she stated that "[You] don't hear it at all now, its dead around there", referring to the past five months preceeding September 1, 1977.

William Scull, Ellen Scull's husband, testified in corroboration of his wife's testimony.

Joan A. Campbell, who summers at Surf City and visits, weekends, throughout the balance of the year next testified for appellant. She owns a house approximately 200 feet from the Surf Villa, and is an ardent, nocturnal walker. Her habitual route brings her past the Surf Villa, on the 16th Street side. Unless the door is opened momentarily as she passes, she hears no loud sound emanating from the building. When she is in close proximity to appellant's premises, the sound level she hears was likened to that of a home radio.

Shirley A. Comegys, who with her husband, owns all of the stock of corporate appellant, described the licensed premises. The building is one city block long with a parking lot on each side, and is separated from the adjoining properties in the rear by an alley. The interior of the premises consist of a package store with a bar room to the rear. The bar has 65 stools and there is table seating for upwards of 175 persons.

Prior to the renewal of appellant's license with the special condition attached thereto, the appellant had installed double (steel) doors on every doorway, except one, to prevent the escaping of sound into the street. Appellant carpeted the entire wall fronting 16th Street to deaden sound and will complete the balance in stages. The appellant planned to install material on the ceilings for the same purpose. Some of the work had been completed before the de novo hearing, and the balance should have been by this time, except for the ceiling which, it later developed, violated local building and fire codes. All of this was done at the advice of a sound proofing expert consulted for this purpose.

Mrs. Comegys went to Filmore, Pennsylvania, where she was instructed in the use and calibration of a decibel meter purchased to take readings of the sound level in the area of the licensed premises. She has taken readings in the area of the Jobson and McKirachan homes on a nightly basis.

Lastly, Mrs. Comegys testified that, without amplified music, their business would be adversly affected, and they probably could not meet their mortgage and other commitments.

I have set forth, in considerable detail, the testimony herein in order to obtain an objective perspective of the underlying circumstances connected with the imposition of the special condition herein.

It is a basic principle that no testimony need be believed, but, rather, the Hearer must credit as much or as little as he finds reliable. 7 Wigmore Evidence, Sec. 2100 (1940); Greenleaf Evidence, Sec. 201 (16th Ed. 1899).

Evidence, to be believed, must not only proceed from the mouths of credible witnesses, but must be credible in itself, and must be such as common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954); Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). The accepted standard of persuasion relating to testimony governing the trier of the facts is that the determination must be founded in truth. Riker v. John Hancock Mutual Life Ins. Co., 129 N.J.L. 508, 511 (Sup. Ct. 1943).

All of the witnesses who gave testimony (excluding Mrs. Comegys, whose financial interest in the outcome is critical) were, in my opinion, of the highest caliber. None had a financial interest in the outcome. All lived within a radius of four hundred feet of the licensed premises and had reasonably normal hearing, yet there exists an obvious dichotomy in their testimony.

It is resolved, however, when the attitude towards Mr. Comegys, who never testified, is considered. It was evident throughout, from testimony relative to complaints which were not at issue, that Mr. Comegys failed in public relations. Apparently, those neighbors who came to him to duscuss their complaints in a reasonable way were so antagonized by his behavior that he "could do no right" in their estimation, thereafter.

Therefore, I am persuaded for the reasons stated, that the testimony of Reverend and Mrs. McKirachan, Mr. & Mrs. Jobson, Thomas Pippitt, Joseph Fardner, Mr. Watson and Mildred Barr, though honestly and sincerely advanced, lacked objectivity and tended to be exaggerated.

On the other hand, I accord greater weight to the testimony of Emily Robinson, Mr. and Mrs. Scull, Joan Campbell and Mary Russoniello, who were not subjected to Mr. Comegys' abusive matter and, therefore, perhaps more objective in their appraisal.

I find aspects of Shirley Comegys' testimony most convincing despite her obvious financial involvement in the outcome of this matter. I am impressed that the appellant realized, albeit belatedly, the seriousness of the problem and that at times it was responsible for disturbing its neighbors, and the

steps it took to correct it.

Appellant has, by now, erected double steel doors on all entrances to prevent sound emissions from the building. Appellant has carpeted the walls and, were it not for the fact that the material recommended for sound proofing the ceiling violated various codes, would have treated that also. Appellant plans to install new (or additional) air conditioning equipment to obviate the need to keep doors open when they are crowded on hot summer evenings. Most impressive of all, Mrs. Comegys went to Pennsylvania for instruction in the calibration and use of a special decibel meter purchased to scientifically monitor the level of sound in and about the immediate area of the Surf Villa. Lastly, she is using this training and equipment nightly, in an endeavor to prevent the sound level from reaching that point where it becomes disturbing to neighbors.

The Borough Council adopted a noise ordinance (No. 68-15) on December 13, 1968 which was vague and contained no definitive standards by which to objectively measure and determine whether or not the level violated the ordinance. However, on August 11, 1977, it amended it in part by Ordinance (No. 77-5), which supplied those missing definitive standards so that a trained person with a decibel meter can objectively measure and make such a determination.

Special conditions attached to a license need only be reasonable to obtain approval by the Director of this Division. Belmar v. Div. of Alcoholic Beverage Control, 50 N.J. Super. 423 (App. Div. 1958); Marinaccio v. Asbury Park, Bulletin 2009, Item 2; Alanwood Holding Co. v. Atlantic City, Bulletin 1963, Item 1. Conversely, if no special conditions need be attached in the judgment of the local issuing authority but, in the alternative, revocation or non-renewal is warranted, and such judgment appears reasonable, the action will be affirmed. Gauntt v. Paulsboro, Bulletin 2187, Item 2; Alice G. Townsend, Inc. v. Orange, Bulletin 2186, Item 3;

The dispositive issue herein may be identified as follows: Did the Council act arbitrarily or unreasonably in imposing a condition per se, or in the alternative could the desired effect be obtained by other means at it's disposal?

I have serious reservations that there was sufficient basis or residuum of testimony to support the Council's imposition of this special condition. I shall now consider the alternative issue whether the desired effect could be obtained by other means.

It is basic that the action of the municipality must be reasonable in equating the public's interests, which are paramount, with the interests of the licensee. Rajah Liquors v. Div. of Alcoholic Bev. Control, 33 N.J. Super. 598 (App. Div. 1955).

A liquor license is a privilege and there is no inherent right in a citizen to sell intoxicating beverages at retail. No licensee has a vested right to the license of its renewal. Zicherman v. Driscoll, 133 N.J.L. 586 (Sup. Ct. 1946).

In A's Inn, Inc. v. Deal, Bulletin 2139, Item 3, the Director cautioned however, that such special conditions, as are imposed, must be reasonable.

However, in order to determine whether there has been a fair and reasonable exercise of its authority, objective criteria must exist upon which the imposed special conditions can be weighed. In the instant matter, I find a lack of such criteria.

Thus, I find that, although the imposition of a special condition relating to sound amplification can be a reasonable exercise of the Council's power, it abused its discretion and acted arbitrarily when it determined that an absolute prohibition was necessary to obtain the desired effect.

I feel that, under the Amended Noise Ordinance, with its definitive standards, proper compliance could be obtained without the imposition of such an oppressive special condition.

Having enacted such an ordinance, it is assumed that the Borough purchased the necessary decibel meter and trained some of its police personnel in its use. The town can now employ this equipment, and upon a finding that this (or any other) licensee has exceeded the allowable levels, issue the appropriate summons. Furthermore, should violations occur with any degree of regularity, the respondent may institute disciplinary proceedings against the offending licensee.

The licensee is admonished to consult with its sound expert and determine how to sound proof the ceiling (or floor) with a material or device which does not violate any of the various codes applicable to this building, and have the modification performed expeditiously.

I find, however, that on those occasions the doors were kept open, the level of sound escaping the building was sufficient to create a nuisance and disturb the neighboring residents. I therefore recommend that the special condition be modified to read as follows:

> "No electronic amplification equipment shall be used in appellant's premises during those times that any door or window remains open for any reason whatsoever, other than for normal ingress and egress of patrons."

As modified, I recommend that the action of the

respondent Council be affirmed, and the appeal be dismissed.

Conclusions and Order

No written Exceptions to the Hearer's Report were filed pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits 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 10th day of February, 1978,

ORDERED that, subject to the modification of the special condition as hereinafter set forth, the action of the Mayor and Borough Council of the Borough of Surf City be and the same is hereby affirmed, and the appeal be and is hereby dismissed; and it is further

ORDERED that the following modified special condition be and the same is hereby attached to the renewal of appellant's plenary retail consumption license for the 1977-78 license term:

> No electronic amplification equipment shall be used in the licensed premises during those times that any door or window remains open for any reason whatsoever, other than for the normal ingress and egress of patrons.

Joseph H. Lerner
Director