

Division of  
**ALCOHOLIC  
BEVERAGE  
CONTROL**

# Bulletin

140 E. Front Street, CN 087, Trenton, New Jersey 08625-0087

BULLETIN 2469

JUNE 28, 1996

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ALCOHOLIC  
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140 E. Front Street, CN 087, Trenton, New Jersey 08625-0087  
BULLETIN 2469

JUNE 28, 1996

1. NOTICE AND ORDER TO 1995-1996 SOLICITOR PERMITTEES.

DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF ALCOHOLIC BEVERAGE CONTROL  
CN087 TRENTON, NJ 08625

NOTICE AND ORDER TO 1995-1996 SOLICITOR PERMITTEES

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The following Notice and Order extending 1995-1996 Solicitor Permits was issued by Director John G. Holl on May 23, 1996. Based upon the authority granted by this Notice and Order, Solicitors may continue to solicit sales of alcoholic beverages on behalf of their Class A or B licensed employers, provided that they have in their possession a valid Solicitor Permit issued for the 1995-1996 term, until midnight July 30, 1996. The Division anticipates that 1996-1997 Solicitor Permits will be issued and mailed to permittees on or about July 15, 1996.

BY THE DIRECTOR

Pursuant to N.J.S.A. 33:1-67, no individual may offer for sale or solicit any order in the State on behalf of a Class A or B licensee, for the purchase or sale of any alcoholic beverage unless that individual has been issued a Solicitor Permit by the Division of Alcoholic Beverage Control. Solicitor Permits are issued for a one-year term which commences June 1 and expires the following May 31.

The Division, as the result of technical difficulties is unable to generate 1996-1997 Solicitor Permits prior to expiration of the current permit term. In order to facilitate the orderly continuation of business, I shall, therefore, order the 1995-1996 permit term extended.

Accordingly, on this 24th day of May, 1996, it is

ORDERED that the expiration date of Solicitor Permits issued for the 1995-1996 term is hereby amended and extended to July 30, 1996, and it is further



ORDERED that this Notice and Order shall serve as authorization for this extension. Any valid 1995-1996 Solicitor Permit containing an expiration date of May 31, 1996 shall continue in force and effect until July 30, 1996.

/s/ John G. Holl  
JOHN G. HOLL  
DIRECTOR

2. FRANCISCO RIVERA T/A EL PORTO ALEGRE V. BOARD OF COMMISSIONERS OF THE CITY OF UNION CITY.

STATE OF NEW JERSEY  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

APPEAL # 6093

|   |   |                            |
|---|---|----------------------------|
| -----                                   | : | FINAL CONCLUSION AND ORDER |
| FRANCISCO RIVERA t/a                    | : | REVERSING ACTION BELOW AND |
| EL PORTO ALEGRE,                        | : | ORDERING PLACE-TO-PLACE    |
|   | : | TRANSFER OF LICENSE        |
| Appellant                               | : |                            |
|   | : | OAL DKT. NO. ABC 397-94    |
| v.                                      | : |                            |
|   | : |                            |
| BOARD OF COMMISSIONERS OF               | : |                            |
| THE CITY OF UNION CITY,                 | : |                            |
|   | : |                            |
| Respondent                              | : |                            |
| -----                                   | : |                            |
| GEORGE T. TAITE, ESQ., for Appellant    | : |                            |
| (De Luca & Taite, attorneys)            | : |                            |
|   | : |                            |
| JOSEPH S. SHERMAN, ESQ., for Respondent | : |                            |
| (Scarinci & Hollenbeck, attorneys)      | : |                            |

## INITIAL DECISION BELOW

HONORABLE RICHARD MCGILL, ADMINISTRATIVE LAW JUDGE

DECIDED: AUGUST 24, 1995

RECEIVED: AUGUST 28, 1995

BY THE DIRECTOR:

No written exceptions to the Initial Decision were filed by either party as is permitted under N.J.A.C. 1:1-18.4(d). The time for the Division to file its Final Conclusions and Order was extended until December 1, 1995 by properly executed Orders of Extension, as provided by N.J.A.C. 1:1-18.8.

For the reasons stated below, I accept, as modified, the recommended decision of the Administrative Law Judge ("ALJ"). As a result, I reverse Respondent's decision denying Appellant's transfer and order it to approve Appellant's application for the place-to-place transfer.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellant, Francisco Rivera, t/a El Porto Alegre, appealed the decision of Respondent, Board of Commissioners of the City of Union City, which denied the Appellant's request for a place-to-place transfer of its license. Mr. Rivera operated a go-go bar known as "Porto Alegre Bar" located at 900 New York Avenue in Union City. Mr. Rivera could no longer operate his business at his prior location because of a fire. On June 28, 1993, Mr. Rivera filed an application for a place-to-place transfer of his plenary retail consumption license No. 0910-33-096-005 from the former location to 4816 Palisade Avenue. On August 17, 1993, the Board of Commissioners held a hearing and by resolution denied Mr. Rivera's request for a place-to-place transfer.

By an unanimous resolution, the Board of Commissioners voted to deny the transfer "due to past history of violations: Union City charges on January 11, 1991; September 13, 1991; May 25, 1992; and July 11, 1992; New Jersey charges on August 3, 1988." These violations included: operating without books of account, operating without an employee list, operating without a current copy of the license application, sale to a minor, operating with an intoxicated employee, a go-go dancer, and permitting an assault to take place on the premises. As a result of these violations, the license was suspended for a total of twenty (20) days.

On or about September 13, 1993, Appellant filed a Notice of Appeal with this Division. The Appellant never filed a formal Petition of Appeal. No Answer was filed by the Respondent. On January 19, 1994, the matter was transferred to the Office of Administrative Law (OAL) for a hearing as a contested case.

At OAL, the parties submitted pre- and post- hearing memoranda. The Respondent argued that the Appellant is prohibited from transferring his licensed go-go bar by municipal ordinance. The asserted controlling Ordinance was adopted in May of 1988, and states, in part, that the privilege to conduct go-go is "non-transferable and terminates upon any transfer of the plenary retail consumption license." Union City Ordinance, 8-8.11 (May 19, 1988). Ordinance 8-8.11 was later amended by an Ordinance introduced on July 27, 1993 and adopted on August 25, 1993 which declared "that the prohibition on transferability of go-go bars applied to both place-to-place transfers as well as person-to-person transfers." Respondent asserted that this was a clarifying amendment that applied to the license at issue.

Respondent also contended that the Alcoholic Beverage Control Act and other Union City ordinances support its denial of the transfer application. It submitted that Union City is over-licensed with 155 plenary retail consumption licenses in existence as opposed to the present statutory population limit of 20 to 25 licenses. Respondent claimed that N.J.S.A. 33:1-12.14 required that it reduce the number of licenses in existence beyond its population cap. It also argued that its ordinances reflect a municipal desire to curtail the number of outstanding licenses. Additionally, a Union City Ordinance provided Respondent with a first option to purchase any plenary retail consumption license which would be transferred person-to-person, in order to retire the number of outstanding licenses. Union City Ordinance, 8-3.45 (June 14, 1988). Another Ordinance offered plenary retail consumption licensees the opportunity to voluntarily retire their licenses. Union City Ordinance, 8-3.46 (June 14, 1988).

In addition, Respondent maintained that a "high incidence of criminal activity in the area surrounding the proposed location for the transfer" supported its denial of Appellant's transfer application.

The Appellant argued that the Board of Commissioners only relied upon the Appellant's history of violations to deny the transfer application. Appellant contended that these violations

cannot be a basis to revoke a license. He added that Ordinance 8-8.11 cannot be considered by the Administrative Law Judge because it was not included in the resolution denying the transfer and its amendment was passed after Appellant's application was denied. He also submitted that the alleged criminal activity in the proposed location of the license also does not support a denial of the transfer application because it was not the basis of the denial. Further, Appellant complained that the denial of the place-to-place transfer application effectively revoked his license and deprived him of his property right. In addition, Appellant asserted that it was improper to deny the transfer application based on Respondent's desire to reduce the number of consumption licenses.

In response, the Board of Commissioners maintained that the denial of the place-to-place transfer application, based on the Appellant's history of violations, was properly within its discretion. Moreover, Respondent asserted that despite the adoption of the amendment to Ordinance 8-8.11 after the transfer denial, the City's ordinances indicate its desire to reduce the number of licenses. Further, Respondent argued that the amendment to 8-8.11 was a clarification of legislative intent applicable to the denial of transfer.

As a result of the memoranda submitted and the evidence presented at the hearing, Administrative Law Judge McGill found that the Appellant had operated a go-go bar at 900 New York Avenue. He also found that Appellant had received a total of 20 days license suspension for the following violations:

|                    |         |   |
|--------------------|---------|---|
| January 11, 1991   | 3 days  | failure to have books of account on the premises                  |
|                    | 2 days  | failure to have employee list on the premises                     |
| September 13, 1991 | 1 day   | failure to have a copy of the license application on the premises |
|                    | 10 days | sale to a minor   |
| May 25, 1992       | 2 days  | permitting an intoxicated employee on the premises                |
| July 11, 1992      | 2 days  | permitting an act of violence (an assault) on the premises        |

The Judge found that in May of 1988, the Respondent passed an ordinance which, except for existing go-go bars, prohibited nude or nearly nude activity on a retail licensed premises, but that the exception for existing go-go bars terminated upon "any transfer" of the license. He also found that the subsequent amendment to the 8-8.11 ordinance, was introduced on July 27, 1993, while the Appellant's transfer application was pending. The Judge found that the Appellant's transfer application was denied before the adoption of the amendment to Ordinance 8-8.11. He observed that this amending ordinance "clarified" that the exception granted to existing go-go bars was non-transferable upon either a person-to-person or place-to-place transfer of a license.

Judge McGill found that the Board of Commissioners' reasons did not support the denial of Appellant's place-to-place transfer application. The ALJ held that the Board of Commissioner's desire to reduce the number of liquor licenses in its community or the statute limiting the issuance of licenses according to population, are not valid reasons to support the denial of the transfer application. Relying on Great Atlantic & Pacific Tea Co. v. Mayor of Point Pleasant Beach, 220 N.J. Super. 119 (App. Div. 1987), Common Council of Hightstown v. Hedy's Bar, 86 N.J. Super. 561 (App. Div. 1965) and Township Committee of Lakewood v. Brandt, 38 N.J. Super. 462 (App. Div. 1955), Judge McGill held that issuing authorities cannot disregard the interest of a licensee by denying a place-to-place transfer simply to reduce the number of outstanding liquor licenses. Furthermore, the ALJ observed that N.J.S.A. 33:1-12.14 "simply prohibits issuance of new retail licenses" where the existing number of licenses exceed those authorized by the population cap. Thus, Judge McGill held that this statute does not require a reduction in the number of existing licenses.

Judge McGill further distinguished Union City's ordinance 8-8.11 and found that it does not prohibit the actual transfer of the license. Rather, the Judge surmised that this ordinance only prohibits go-go entertainment upon the occurrence of a license transfer, but it does not bar the actual transfer itself. The ALJ added that the amendment to the ordinance does not support the denial of the transfer because it was adopted after the transfer denial and because it too does not prohibit a license transfer.

The ALJ also rejected the Respondent's reliance upon Union City's first option ordinance because the ordinance by its terms only applies to person-to-person transfers and not Appellant's

place-to-place transfer. Finally, Judge McGill found that the Appellant's previous violations did not rise to the level of warranting a denial of the place-to-place transfer application. While the ALJ acknowledged Respondent's claim that the denial was also warranted because the proposed site for the transfer was in an area of reputed criminal activity, he found that Respondent failed to produce any competent evidence to support this allegation.

Thus, the Judge found that the Board of Commissioners had abused its discretion. Based on his factual findings, the Judge concluded that the application for the place-to-place transfer should be approved. Accordingly, the ALJ recommended that the action of the Board of Commissioner's denying the Appellant's application for a place-to-place transfer, should be reversed and the transfer be granted.

#### ISSUE

The central issue presented is whether the Board of Commissioner's denial of the Appellant's application for a place-to-place transfer of its liquor license was a reasonable exercise of its discretion based on the record. Upon appellate review, the Director is required to determine whether or not the Appellant has established that the Board of Commissioners' denial of the liquor license transfer application was erroneous and a clear abuse of discretion.

Upon consideration of the record presented to me, I find that the Appellant has shown a clear abuse of discretion on the part of the Board of Commissioners. For the reasons set forth below, I find that the action of the Board of Commissioners in denying the application for a place-to-place transfer, was in error, and I therefore accept, as modified, the Initial Decision.

#### ANALYSIS

The appellant has the burden of persuasion to show that the issuing authority's denial was unreasonable. N.J.A.C. 13:2-17.6; Lyons Farms Tavern, Inc. v. Municipal Board of Alcoholic Bev. Control, 55 N.J. 292, 303 (1970); Inn at Woodbridge, Inc. v. Municipal Council of Woodbridge, 9 N.J.A.R. 286, 294 (ABC) (1984), cert. den. 105 N.J. 510 (1986). On appeal to the Director, the



hearing is not entirely de novo, as the appellant's burden of proof by a preponderance of the evidence "... becomes heavier on his appeal to the Division, since in a discretionary matter such as this he must show manifest error or some abuse of discretion below." Nordco, Inc. v. State, 43 N.J. Super. 277, 287 (App. Div. 1957). When reviewing the actions of issuing authorities,

[t]he Director and the courts must place much reliance upon local action. . . . its exercise of discretion ought to be accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of its 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, supra, 55 N.J. at 303; Fanwood v. Rocco, 33 N.J. 404, 414 (1960).

Upon my review of the record herein, I am in basic agreement with the Administrative Law Judge's findings of fact and conclusions of law, except as noted below. Although, the Board of Commissioners' Resolution denying Appellant's application was based upon the licensee's prior violations, the Board later asserted that the transfer should be denied because the proposed location of the license was the site of criminal activity.

Issuing authorities may consider a particular location is a "trouble spot" and if continuance of a consumption license in a particular location would be against the public interest. See Nordco, supra, 43 N.J. Super. at 282. Case law also recognizes a municipality's discretion to prevent the further decay of its neighborhoods. See Lyons Farms Tavern, supra, 55 N.J. at 304; Fanwood, supra, 33 N.J. at 414, 415; Boricua Social Club, Inc. v. City Council, 94 N.J.A.R.2d(ABC) 36 (1994). However, beyond mere allegation of criminal activity, the Respondent offered no evidence or testimony before the ALJ that the proposed location was indeed a "trouble spot." Moreover, neither party made any effort to submit Exceptions to the Initial Decision concerning this or any other allegation.

The Board of Commissioners' argument that their ordinances and

State statute support a denial of a place-to-place transfer -- because of their need to curtail the number of outstanding licenses -- is misplaced. Instead, the ALJ is correct in holding that the Alcoholic Beverage Control statute N.J.S.A. 33:1-12.14 was designed only to limit new issuances of liquor licenses according to municipal population. Nothing in this statute, however, provides for the retiring of existing licenses when a municipality is licensed over the population cap.

Moreover, some of the ordinances that the Board of Commissioners relied upon were never approved by the Director of the Division of Alcoholic Beverage Control as required by N.J.S.A. 33:1-40. Under N.J.S.A. 33:1-40, the Director must make a determination whether the provisions of the ordinances are cognizable and derivable from the concepts articulated under the Alcoholic Beverage Control Act. N.J.S.A. 33:1-1 et. seq. If an ordinance is not considered by the Director to be cognizable or derivable under Title 33 and thus not approved, the ordinance may be considered valid as an exercise of some other municipal power related to the health, safety and welfare of the municipality. However, a licensee's violation of an ordinance that is not cognizable or derivable under Title 33 and not approved by the Director, may not be the sole cause of the suspension, revocation or non-renewal of that license.

I note that Union City Ordinance 8-3.45 and 8-3.46 was submitted for Division approval. By letter dated July 11, 1988, the Division approved of Ordinance 8-3.46, which provided for voluntary retirement of Union City licensees, as being in conformity with N.J.S.A. 40:48-2.40 et. seq. However, the Division expressly disapproved of Union City Ordinance 8-3.45 (which gave the Board of Commissioners a mandatory first option to purchase a license whenever the licensee attempted to sell its license in a person-to-person transfer). The Division found this ordinance was in clear contravention of N.J.S.A. 33:1-26 by interfering with a licensee's ability to transfer a license and by giving the Board of Commissioners an interest in all licenses. The Division added that such an interest has an improper destabilizing impact on the local Alcoholic Beverage Control industry in violation of N.J.S.A. 33:1-3.1. Thus, Ordinance 8-3.45 could not be considered as supporting Respondent's denial of the Appellant's transfer application. In any event, the ALJ was correct in finding that Ordinance 8-3.45 or 8-3.46 did not support Appellant's desire to reduce the number of licenses because the ordinances were inapplicable to place-to-place transfers.

Moreover, I also note that Union City Ordinance 8-8, which prohibits nude or nearly nude activities with exceptions, was not submitted to the Division for review. Ordinance 8-8.11 was submitted to the Division in its amended form. Ordinance 8-8.11 and its subsequent amendment permit the continuation of go-go entertainment in go-go establishments in existence prior to May 19, 1988, but prevent such go-go licensees from transferring this exemption to other locations or persons. I find that Ordinance 8-8.11 does appear to be cognizable and derivable under the Alcoholic Beverage Control Act, N.J.S.A. 33:1-1 et. seq. and thus I approve it nunc pro tunc.

Nothing in Title 33 gives a licensee the right to have "go-go" activity on a licensed premises. In fact, this Division is very much aware of the inherent problems associated with licensed establishments which have incorporated "go-go" activity on their licensed premises. See, A & J Entertainment v. Municipal Board of Alcoholic Bev. Control of North Bergen, N.J.A.R.2d (ABC) (1995), Agency Dkt. Nos. S93-19182, H-07193-015, S92-18047, H-07192-019 (July 24, 1995)(liquor license revoked due to lewdness and prostitution charges); Division of Alcoholic Bev. Control v. Quesada, 95 N.J.A.R.2d (ABC) 88 (1994)(liquor license revoked due to lewdness charges); Division of Alcoholic Bev. Control v. J & M Restaurant, t/a Flashdancers/Snappers, 95 N.J.A.R.2d (ABC) 11 (1994)(liquor license suspended 90 days due to lewdness charges; In re Nessie's Inc., t/a Country Inn, 93 N.J.A.R.2d (ABC) 21 (1993)(liquor license revoked because of lewdness charges); In re Fizer Corp., 9 N.J.A.R. 349 (1984) (license revoked due to lewdness charges).

Judge McGill is correct, however, in concluding that this ordinance does not prevent the place-to-place transfer of a liquor license. The ordinance and its amendment clearly prevent go-go entertainment from continuing after a transfer of a license. I find that the ordinance in its original form prevented the continuation of go-go entertainment with "any transfer" of a license. Licenses may be "transferred," either person-to-person, place-to-place or both. N.J.S.A. 33:1-26 and N.J.A.C. 13:2-7.1. Thus, the May 1988 Union City Ordinance 8-8.11 prevented the continuation of go-go in a place-to-place transfer.

Accordingly, I find that the Appellant is precluded from having go-go entertainment at any future location where the license will be transferred. In fact, this prohibition includes the siting of the license at its former location. Innkeeper, Inc. v. Township

Council, et. al., 94 N.J.A.R.2d (ABC) 13 (loss of continuous possessory interest and control over licensed premises requires place-to-place transfer to locate license at former location), aff'd, No. A-3241-93T3 (App. Div. June 6, 1995) (per curiam), 95 N.J.A.R.2d (ABC) 113 (1995).

I do agree, however, with the ALJ's conclusion that an issuing authority cannot deny a license's place-to-place transfer solely because of a desire to curtail the number of existing licenses within the municipality or city. Great Atlantic & Pacific Tea Co., supra, 220 N.J. Super. at 128-29. Such activity can be deemed an arbitrary and capricious action against a person's interest in a liquor license. Id. Nevertheless, I have recognized a municipality's efforts to legitimately reduce the number of outstanding licenses as a part of plan to rehabilitate a deteriorated business area, especially when supported by widespread public sentiment related to public health, safety, morals and general welfare concerns. Boricua Social Club, supra, 94 N.J.A.R.2d(ABC) at 40.

The remaining issue is whether the Board of Commissioners' denial of Appellant's place-to-place transfer application, based on the Appellant's previous violations, was reasonable. Initially, I reject the ALJ's holding that a denial of the Appellant's place-to-place transfer based on its past violations was in effect a revocation of the license. Since the license would remain in existence, the mere denial of a place-to-place transfer would not extinguish the license. Clearly, however, if further place-to-place transfer applications were consistently denied, an argument could be made that the denials resulted in an attempt to extinguish the license.

Generally, a place-to-place transfer may be granted to a licensee, despite previous violations, when the licensee is able to show either that such past violations are minor infractions, or are unrelated to the new business or location, or that it will operate its license in the new location or in a new manner of operation to the satisfaction of the issuing authority. However, in the current case the licensee's past violations include one instance of a sale of alcohol to an underaged person, allowing an intoxicated employee to work and allowing an assault to occur on the licensed premises. Given the generally minimal penalties imposed for these violations indicate that the issuing authority did not consider them to be very serious matters. As a result, this licensee's violation history does not, prima facie, appear to rise to a level sufficient

to deny a place-to-place transfer application in the absence of proof that the siting of the license at the new location would have detrimental consequences to the public's safety, health and welfare. I caution the licensee, however, that any continuation of such behavior should not be tolerated and could impact on the licensee's next renewal application.

Thus, I find that the Board has failed to show any reasonable support of its denial of Appellant's application for a place-to-place transfer. The Board's denial of this transfer was thus an abuse of discretion.

In conclusion, I wish to express my concern that the Appellant's filed place-to-place transfer application incorrectly indicates that the license or applicant was not suspended or had a penalty imposed upon it within the past ten years. Accordingly, I am directing that the Division's Enforcement Bureau conduct an investigation into this application to determine if false swearing or any other violations occurred and to pursue appropriate administrative proceedings, if warranted.

Accordingly, it is on this 1st day of December 1995,

ORDERED that the Appeal be and is hereby sustained and it is further

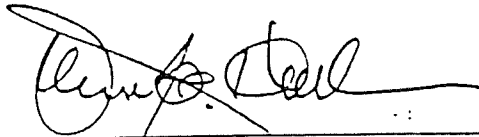
ORDERED that the action of the Board of Commissioners of the City of Union City, which denied the transfer application for a place-to-place transfer of FRANCISCO RIVERA T/A EL PORTO ALEGRE PLENARY RETAIL CONSUMPTION LICENSE NO. 0910-33-096-005 from 900 New York Avenue, Union City to 4816 Palisade Avenue in Union City, be and is hereby REVERSED; and it is further

ORDERED that the Board of Commissioners for the City of Union City GRANT the transfer application for a place-to-place transfer of FRANCISCO RIVERA T/A EL PORTO ALEGRE PLENARY RETAIL CONSUMPTION LICENSE NO. 0910-33-096-005 from 900 New York Avenue, Union City to 4816 Palisade Avenue in Union City, but that such license shall be issued subject to Union City Ordinance 8-8.11 which prohibits that no go-go entertainment shall occur on the licensed premises.

/s/ John G. Holl  
JOHN G. HOLL  
DIRECTOR

JGH/ASH

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Publication of Bulletin 2469 is hereby directed this  
28th Day of June, 1996

A handwritten signature in dark ink, appearing to read "John G. Holl", is written over a horizontal line.

JOHN G. HOLL, DIRECTOR  
DIVISION OF ALCOHOLIC BEVERAGE CONTROL