

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

BULLETIN 2416

October 15, 1981

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ITEM

1. APPELLATE DECISIONS - ZENGEL v. POINT PLEASANT.

STATE OF NEW JERSEY
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1. APPELLATE DECISIONS - ZENGEL v. POINT PLEASANT.
#4446

Francis Zengel, John Zengel, :
and Mark Connito, t/a :
The Silver Dollar, :

Appellants, :

vs : :

Mayor and Borough Council of :
The Borough of Point Pleasant :

Respondent. :

CONCLUSIONS AND ORDER

On Appeal

Stanzione & Stanzione, Esqs., by Joseph Scalia, Esq., Attorney for Appellants
Popovitch & Popovitch, Esqs., by Daniel S. Popovitch, Esq., Attorney for Respondent
Sim, Sinn, Gunning, Serpentelli and Fitzsimmons, Esqs., by Dennis J. Cantoli, Esq.,
of Counsel, Attorney for Objectors.

Initial Decision Below

Hon. Lillard E. Law, Administrative Law Judge

Dated: June 12, 1980

Received: June 16, 1980

Written Exceptions to the Initial Decision were filed on behalf of the
Respondent Council pursuant to N.J.A.C. 13:2-17.6.

In his Initial Decision, the Administrative Law Judge recommends that
"Special Conditions (a) through (e) (which are set forth in the Initial Decision),
imposed upon the renewal of the subject Plenary Retail Consumption license.....be
affirmed." He also recommends that Special Condition (g) be modified to provide
as follows: ".....live entertainment beyond 12:00 midnight shall be permitted on
Friday, Saturday, and holidays only." (The emphasis represents the recommended
modification.)

Respondent takes exception to any modification of Special Condition (g)
which permits live entertainment after 12:00 midnight on Friday and Saturday
nights only. It contends that such modification would only tend to exacerbate
the problems which the restriction was intended to solve. It urges that "the
residents of the area are entitled to enjoy a quiet holiday night, especially
if such holiday night does not fall before a weekend. In those instances it
is really no different than any other week night."

Respondent further advocates that, in the event there is such modification
of this Special Condition, that live entertainment be permitted on the holiday
eve rather than the holiday night itself.

I find that this Exception has merit. I shall therefore modify Special Condition (g) to read as follows: "All live entertainment on the premises shall cease at 12:00 midnight each day of operation, Sunday through Thursday, inclusive. Live entertainment beyond 12:00 midnight shall be permitted on Fridays, Saturdays and holiday eves only."

I also shall modify Special Condition (c) which requires that the licensee shall remove litter within three blocks of the licensed premises before 8:00 A.M. of each morning following an evening of operation. I consider that the requirement to remove litter within three blocks to be unreasonable.

I shall therefore modify the said Special Condition (c) to read as follows: "(c) Litter is to be removed within one block of the licensed premises before 8:00 A.M. of each morning following an evening of operation."

Having considered the entire record herein, including the transcript of testimony, the exhibits, the Initial Decision below and the written Exceptions to the said Initial Decision, I concur in the findings and conclusions set forth therein, except as hereinabove modified, and adopt its recommendations.

Accordingly, it is on this 18th day of July, 1980,

ORDERED that the action of the Respondent, Mayor and Borough Council of the Borough of Point Pleasant, in imposing Special Conditions upon the renewal of Appellant's Plenary Retail Consumption license for the 1979-80 license period as hereinabove modified with respect to Special Conditions (c) and (g), which said Special Conditions, as modified hereinabove, are incorporated in the Order as though set forth in length, be and the same is hereby affirmed; and it is further

ORDERED that the said Special Conditions, as hereinabove modified with respect to Special Conditions (c) and (g), shall be and the same are hereby made applicable to the renewal of subject license for the 1980-81 license term; and it is further

ORDERED that the appeal herein be and the same is hereby dismissed.

Joseph H. Lerner
Director

Appendix - Initial Decision Below

FRANCIS ZENGEL, JOHN ZENGEL, : INITIAL DECISION
 AND MARK CONNITO, T/A THE :
 SILVER DOLLAR, : OAL DKT. NO. ABC 0164-80
 :
 APPELLANTS, : AGENCY DKT. NO. 4446
 :
 V. :
 :
 MAYOR AND COUNCIL OF THE :
 BOROUGH OF POINT PLEASANT, :
 OCEAN COUNTY, :
 :
 RESPONDENTS. :

APPEARANCES:

For the Appellants, Stanzione & Stanzione
 (Joseph Scalia, Esq., appearing)

For the Respondent, Popovitch & Popovitch
 (Daniel S. Popovitch, Esq., appearing)

For the Objectors, Sim, Sinn, Gunning, Serpentelli
 and Fitzsimmons (Dennis J. Cantoli, Esq., of Counsel)

BEFORE THE HONORABLE LILLARD E. LAW, ALJ

- A-1 Tax Map, Borough of Point Pleasant (8½ x 11)
 (photocopy)
- A-2 Letter dated March 30, 1978, addressed to Silver
 Dollar, Inc. from John DePolo, Construction Official,
 Borough of Point Pleasant. Re: Block 140 Lot 1
- A-3 Report of Thomas G. Dorrance, Engineering Acoustics,
 Dames & Moore, dated October 8, 1979 (13 page document)
- A-4 Transcript of Proceedings In the Matter of: LIQUOR
LICENSE RENEWAL OF THE SILVER DOLLAR TAVERN, October 9,
 1979. Testimony of Thomas Grosvenor Dorrance

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- A-5 Series of twelve (12) photographs of Silver Dollar and surrounding area. A-5(a) through A-5 (1).
- A-6 Letter dated August 9, 1979, addressed to Stanzione & Stanzione from Roden S. Lightbody, Traffic Engineer, County of Ocean, New Jersey
- R-1 Point Pleasant Police Department Incident Reports issued from Setpember 2, 1978 through September 3, 1979.
Re: The Silver Dollar (65 Incident Reports)
- R-2 Point Pleasant Police Department Memorandum.
To: Capt. Robert A. Cooper, Acting Chief of Police
From: Sgt. Raymond A. Kelly
Subject: MV Summons - 9/1/78 through 7/23/79 inclusive
- R-3 Point Pleasant Police Department Memorandum.
To: Robert A. Cooper, Chief of Police
From: Sgt. Raymond A. Kelly
Subject: MV Summonses - 7/23/79 through 9/6/79 inclusive
- R-4 Borough of Point Pleasant, New Jersey Tax Map, Sheet #10
- R-5 Site Plan of Property and Existing Building of The Silver Dollar, Revised February 1, 1979
- R-6 ORDINANCE #587 "NOISE CONTROL" and AMENDED ORDINANCE "NOISE CONTROL," Borough of Point Pleasant Beach.
Final reading and passage August 7, 1979.

STIPULATIONS:

1. Special condition (f), subsequent to Appellants' 1978-79 license renewal, is now pending before the Appellate Division of Superior Court for final determination and is presently stayed.
2. The parties agree that in the event the Appellate Division of Superior Court finds in favor of Appellants, Council will remove its condition (f) from its special conditions for Appellants' 1979-80 license renewal. (See Item 5, Prehearing Order, March 20, 1980)

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Appellants appeal from an action of respondent Mayor and Council of the Borough of Point Pleasant, hereinafter "Council," which on or about December 18, 1979, approved and imposed certain conditions upon Appellants' application for renewal of their Plenary Retail Consumption License for 1979-80. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A hearing de novo was conducted on March 31 and April 1, 1980 at the Brick Township Municipal Court, Brick Town, New Jersey. The parties were given full opportunity to be heard and to cross-examine witnesses. Written summations and replies were ordered and the hearing record was closed on May 2, 1980.

The procedural history of the matter sub judice is as follows:

In a timely manner and within the time specified by law, Appellants filed with Council an application for renewal of their Plenary Retail Consumption License No. 1524-33-001-003 for premises located at 632-643 Ocean Road, Point Pleasant Borough, Ocean County, New Jersey at which Appellants conduct their business under the trade name of The Silver Dollar. Council conducted hearings on the application for the license renewal on July 24, 1979; August 14, 1979; September 11, 1979; October 9, 1979; and November 12, 1979.

On December 18, 1979, Council approved Appellants' application for renewal of their Plenary Retail Consumption License subject to seven conditions set forth herein as follows:

"*** (a) No less than two uniformed security guards are to be posted on the premises and patrolling both the exterior and interior from at least one half hour prior to the beginning of any live entertainment, and continuing until at least one hour after the end of all live entertainment for that particular day. In addition, at least one uniformed security guard shall be posted on the premises at the time of closing, if the time of closing shall differ from the end of live entertainment. This shall apply to all live entertainment beginning after 6:00 p.m.

(b) Security guards shall be posted at all entrances to check the identification of all customers to determine if all customers are of legal age to consume alcoholic beverages.

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(c) Litter is to be removed within three blocks of the licensed premises before 8:00 a.m. of each morning following an evening of operation.

(d) Windows are to be closed at all times during the hours of operation. All doors shall remain closed, except for providing ingress and egress to customers and employees. At no time shall doors be left continuously open to provide ingress and egress.

(e) The sale of alcoholic beverages for off premises consumption is prohibited after 10:00 p.m.

(f) Capacity of the establishment is limited to 400 persons.

(g) All live entertainment on the premises shall cease at 12:00 midnight, each day of operation, Sunday through Thursday, inclusive. Live entertainment beyond 12:00 midnight, shall be permitted on Fridays and Saturdays only.

4. All of the aforesaid conditions shall be effective immediately.***"

On December 20, 1979, Appellants filed with the Director, Division of Alcoholic Beverage Control, a Notice of Appeal and an Application for Stay and in support thereof, the Verified Petitioner of Appeal with Application for ad interim Relief Staying the Enforcement of License Restrictions. On or about December 26, 1979 an Answer was filed with the Division of Alcoholic Beverage Control by Council.

In the Appeal filed with the Division of Alcoholic Beverage Control, Appellants requested that three of the conditions of approval, to wit, Conditions (a), (f) and (g), be voided and that ad interim relief be granted staying the enforcement of these three conditions pending the outcome of the Appeal to the Division of Alcoholic Beverage Control, whereby special conditions (a) and (f), only were stayed pending the determination of the Appeal. The Director did not act to stay special condition (g) as requested by Appellants. A written copy of the aforementioned Order entered by the Director was received in the office of Appellants' attorneys on January 4, 1980, which provided, in pertinent part, as follows:

****It is, on this 27th day of December 1979, ORDERED that respondents' imposition of the said special conditions a and f only, be and the same

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are hereby stayed pending the determination of the appeal, or until further Order of the Director, and it is further Ordered that special conditions b, c, d, e and g be and the same shall continue to remain in full force and effect."
(Emphasis in text)

Subsequent to Appellants' receipt of notice of the decision by the Director of the Division of Alcoholic Beverage Control they communicated with the Office of Administrative Law to determine if Appellants' Appeal had been classified as a "contested case" and referred to the Office of Administrative Law and that, therefore, that office did not have jurisdiction to entertain any proceedings with respect to Appellants' request for a Stay, Appellants commenced an application in the Superior Court of New Jersey, Appellate Division.

On January 10, 1980, Appellants filed with the Superior Court of New Jersey Appellate Division, a Notice of Motion for Leave to Appeal and for Stay Pending Appeal and in support thereof, a Certification of Francis Zengel. At the aforesaid time, Appellants also filed a Notice of Motion for Temporary Stay by a single judge of the Appellate Division. On January 10, 1980, the Honorable Robert A. Matthews, P.J.A.D., sitting as a single judge of the Appellate Division, ordered that special condition (g) be stayed pending appeal. On or about January 17, 1980 and January 21, 1980, the full part of the Appellate Division denied Appellants' application for a stay. Pursuant to R. 2:9-8 Appellants filed its application before the Supreme Court of New Jersey which was subsequently denied.

On or about February 8, 1980, Appellants filed before the Office of Administrative Law a Notice of Motion for ad interim relief to Stay special condition (g). Oral argument on the Motion was heard on March 12, 1980, at the Office of Administrative Law, Trenton, New Jersey. Subsequently, on March 27, 1980, the Court by way of Decision on Motion denied Appellants' prayer for relief and the matter moved forward to a de novo hearing.

It is undisputed that The Silver Dollar is located on the south side of New Jersey Highway Route 88 in the Borough of Point Pleasant. It is uncontroverted that, by Borough ordinance, no vehicular parking is permitted on either side of Route 88 other than approved on-premises parking. Further, that public streets adjacent to The Silver Dollar are limited to parking on one side of the street or that on street parking is entirely banned.

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At the hearing respondent Council presented three members of its Police Department who testified to the problems that they encountered at or around the premises of The Silver Dollar between September 1978 and September 1979. Chief of Police Robert A. Cooper admitted that he had not directly observed the business operation of Appellants, his testimony, over the objection of Appellants' counsel, relied upon Police Department Incident Reports filed by various members of the police department. (R-1) A review of the filed Incident Reports (R-1) provided the basis for Chief Cooper's testimony, wherein he indicated that the activities at The Silver Dollar created such problems as; excessive noise, fights among patrons, parking and traffic problems. He testified that during the periods that live entertainment was provided at The Silver Dollar, upwards to two hundred (200) automobiles were in evidence on and around the premises. He stated that, on occasion, the police department received requests to remove and tow away automobiles that were parked in areas adjacent to Appellants' establishment. He testified that the police department was in receipt of complaints of excessive noise from citizens who reside in the immediate neighborhood of The Silver Dollar, particularly prior to, during, and subsequent to performances of live rock and roll bands at the establishment. He stated that the complaints indicated that there was much shouting and yelling by the patrons, automobile tires squealing as the patrons drove away from the area and patrons urinating on the streets and lawns. On cross-examination, Chief Cooper testified that the problems generated by The Silver Dollar were unique to the community and that no other business in the Borough created such problems. It was revealed at the hearing that Chief Cooper recommended that Appellants' license be renewed, however, he further recommended that live music be banned from The Silver Dollar.

The testimony of Detective Robert M. Carlton, a patrolman prior to November, 1979, indicated that he had observed the activities of The Silver Dollar at closing time on twelve (12) to fifteen (15) different occasions. He stated that, subsequent to its closing, he had observed Silver Dollar patrons yelling and screaming, noise emanating from automobile engines and tires squealing as the patrons left the area for a period of fifteen (15) to twenty (20) minutes on each occasion. He testified with regard to a series of Police Incident Reports he had filed between the period of September 2, 1978 and July 29, 1979 and which included, inter alia, incidents of; yelling and cursing, bottles broken, assault and battery, a patron "ruffed up" by a Silver Dollar staff member, disorderly persons report, noise complaint and an intoxicated man lying across the hood of an automobile. (R-1) He testified further that the police were called

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approximately twelve (12) times by one neighbor with regard to noise complaints, however, he had no direct knowledge of a finding that the alleged noise was disruptive.

Police Officer Douglas Jones testified with regard to his use of a noise measuring device, which he learned to operate by attending a two (2) day workshop in 1978. He testified that he used the noise measuring device on three (3) occasions, all of which were at or adjacent to The Silver Dollar. He testified that he was familiar with the Borough's Noise Control Ordinance which provided noise level standards for its residential and commercial areas as follows: Residential zones between 8 a.m. and 10 p.m. a maximum of 65 decibels; Residential zones between 10 p.m. and 8 a.m. a maximum of 50 decibels. Commercial zones at all times 65 decibels. (R-6) Officer Jones testified that on August 10, 1979, between 10:25 p.m. and 11 p.m., he set up and used the noise measuring device on Brown Street, a residential zone at the rear of The Silver Dollar. He testified that a band was playing at The Silver Dollar at the time and that the noise measuring device indicated a reading of fifty-four (54) decibels, for which a summons was issued, however, it had not been heard as of the time of the herein hearing. He testified that on September 2, 1979, between 11:30 p.m. and 12:30 a.m., he again used the noise measuring device in the vicinity of The Silver Dollar. He testified that the first reading occurred at the corner of Brown Street and Delaware Avenue with a reading of fifty-three (53) decibels. The second reading taken on Brown Street indicated a reading of between fifty-four (54) to sixty (60) decibels while the third reading taken on Brown Street indicated a reading of sixty (60) to sixty-three (63) decibels. He testified that the fourth reading, which was taken at the west door of The Silver Dollar, indicated a reading of ninety (90) decibels. He stated that a summons had been issued to The Silver Dollar for an alleged violation of the Noise Ordinance, however, the matter had not been disposed of as of the date of the hearing. Officer Jones testified that the noise measuring device that he used did not have the capacity to filter out other noises such as automobile traffic, etc.

Mr. John DePolo, Construction Official and Building Inspector for the Borough, testified that The Silver Dollar was located on property classified commercial and that the properties immediately adjacent to and behind The Silver Dollar were classified R-1 and R-2 residential. With regard to the occupancy load limit for The Silver Dollar, Mr. DePolo testified that he characterized the establishment as a "night club" and that he first determined the occupancy

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to be 750 persons. He stated that he relied upon the Building Officials and Code Administrators, Inc., hereinafter "BOCA" code, to determine the occupancy for The Silver Dollar. Subsequent to the installation of a fire sprinkler system and additional egress to the building, Mr. DePolo increased the occupancy load limit to 1,350 occupants. (A-2) He testified that he believed that the original determination of 750 was what the occupancy load limit should be for the establishment.

Council presented four citizens who live in the immediate vicinity of The Silver Dollar for testimony. Although the testimony of each individual varied with regard to the issues sub judice, a summary of the testimony indicated the objection to the use of live entertainment by Appellants and its concomitant problems. The testimony indicated that no major problems existed between the neighbors prior to July, 1977, at which time the nature of the operation changed from a bar and package goods to a Nite Club with bands and live entertainment. Thereafter, the citizens testified, they experienced problems with noise from The Silver Dollar and its patrons prior to opening, during the period that the bands played and subsequent to closing. They complained of noise created by automobiles which occurred before 10 p.m. and subsequent to 2:30 a.m. and asserted that the automobiles would cruise around the neighborhood seeking available parking spaces. They complained of litter strewn about and some patrons urinating on the lawns.

Respondent Council argues that the action of a municipality is armored with a presumption of validity and that the statutes and case law have afforded broad powers to a municipality to impose restrictions upon a licensee to prevent the continuance of a nuisance and to preserve an area from the adverse impact that a licensed premises may create. N.J.S.A. 33:1-32; Borough of Fanwood v. Rocco, 33 N.J. 404, (1960); Nordco Inc v. State of New Jersey, et al, 43 N.J. Super 277 (App. Div. 1957); Lyons Farms Tavern v. Municipal Board of Alcoholic Beverages, Newark 55 N.J. 292 (1970). With regard to the testimony of its witnesses and the filed complaints against The Silver Dollar (R-1), Council further argues that the Director of Alcoholic Beverage Control has upheld municipalities to impose sufficient reasonable restraints upon the operation of a licensee to insure that the municipal desires are not frustrated and that the peace and quiet of the neighborhood is insured. Surf Villa v. Surf City, Bulletin 2289, Item 2; 111 Club, Inc v. Boonton, Bulletin 228, Item 2; Emerson, Limited v. Cinnaminson, Bulletin 2250, Item 3; Stampac, Inc. v. Point Pleasant, Bulletin 2252, Item 3. It continues to aver that the Director has held, as a matter of law, that a licensee is responsible for conditions both inside and outside the licensed premises. Cobosko Enterprises, Inc. v. Paulsboro, Bulletin 2256, Item 5.

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Appellant, Francis Zengel, testified to the manner in which the owners of The Silver Dollar had made alterations and/or improvements to the physical facilities of The Silver Dollar for the purposes of safety and to reduce the level of noise which might escape the premises. He stated that during its reconstruction in June and July, 1977, the building was insulated on its interior with a fireproof acoustical ceiling, acoustical siding, and a heavy curtain installed at the south side of the building's interior. He stated that the owners installed a sprinkler system and various fire doors upon the recommendation of the Borough's Building Inspector. He testified that the owners had also installed an exterior vestibule at the building's main entrance to reduce the noise escaping from the premises, however, it was subsequently ordered removed by agents of the Borough as a non-compliance structure.

Appellant Zengel testified that the owners of The Silver Dollar had contracted to have sound pressure levels (noise) measured by an independent consulting firm. Mr. Zengel stated that he was not advised when the measurements were to be conducted, however, that such tests were conducted on the night of October 4, 1979 at four (4) locations in the vicinity of The Silver Dollar between the hours of 9:45 p.m. until 12:10 a.m. He asserted that a musical group which was representative of the type of bands employed at The Silver Dollar was performing on the night of October 4, 1979. Appellants offered into evidence the report of the noise level measurement, hereinafter "Dorrance Report," (A-3). He also stated that the former manager of The Silver Dollar had attempted to monitor sound escaping from the premises and that on one occasion had required a performing band to reduce the volume of its amplifying system.

With regard to parking for automobiles, Appellant Zengel testified that there were fifty-five (55) to sixty (60) on site parking spaces at The Silver Dollar and that the owners had attempted to make arrangements for off-site parking for its patrons, however, there existed a Borough zoning ordinance which precluded them from doing so. In any event, he testified that the Borough's Building Inspector had set the occupancy limit of 1,350 people. He stated that the establishment has had as many as 1,200 in attendance with a popular band performing. He testified that the owners could live with an occupancy rate of eight hundred (800) patrons in attendance at any given time for four (4) nights per week.

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Mr. Zengel compared The Silver Dollar gross receipts for the limited periods prior to and subsequent to Council's imposition of its special conditions in December, 1979. He testified that the owners deposited \$46,000 for the month of February 1979 as compared with \$21,000 for the same month in 1980. He stated that in March, 1979 deposits of \$45,000 were made, while in March, 1980, \$33,000 was deposited. He testified that the expenses for the establishment were less in 1980 because The Silver Dollar was open only two (2) nights per week as compared with four (4) nights per week in the same months in 1979. He testified that the owners had incorporated other forms of entertainment since September 1978, including go-go dancers during the week and live rock bands for Sunday matinees. He stated that the go-go dancers were not successful during the evening and night time hours and that the owners terminated the Sunday rock band matinees because it was not profitable. He testified that he and the other owners each worked at The Silver Dollar between twenty (20) and twenty-five (25) hours per week, however, they did not draw a salary for their work. He testified further, that he had not received a return on his investment of approximately \$100,000 since he became a partner in the enterprise.

Mr. Zengel testified that The Silver Dollar employs three (3) security guards to aid with the disbursement of its patrons and that it also employs an individual to police the litter in the vicinity of The Silver Dollar.

Appellants aver that the New Jersey Courts have found that reports and records kept in connection with law enforcement are business records within the meaning of the business record statute. State v. Hudes, 128 N.J. Super 589 (Bergen County Ct. 1974). N.J.S.A. 2A:84A-16, Rule 63 (13), however does not admit business records as an exception to the hearsay rule unless there is some residuum of trustworthiness contained in the police reports. They cite Schneiderman v. Strelecki, 107 N.J. Super. 113 (App. Div. 1969), wherein the court held that a routine report of a motor vehicle accident in which a pedestrian was struck by a truck, in which the report was prepared by an investigating police officer in pursuance of his duty and in which said report was filed in the regular course of business, could be received in evidence as a business record. They argue that Schneiderman, supra, however, was not intended to be an open floodgate for the admission of all business records. They contend that our courts have long held that for a business record to be admissible evidence it must satisfy the following criteria: (1) it must be made in the regular course of

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business; (2) it must be prepared within a short time of the act, condition, or event described, and (3) it must contain a source of information and method of preparation that justifies allowing it into evidence. State v. Materolli, 136 N.J. Super. 449, 453 (App. Div. 1975), certif. denied, State v. Materolli, 68 N.J. 445 (1976). In addition to the three elements set forth in Materolli, supra, they are that our courts have mandated that the informant be "under a 'business duty' to supply honest information to the entrant." Sas v. Strelecki, 110 N.J. Super 14, 20, 22 (App. Div. 1970). See also State v. Taylor, 46 N.J. 316, 330-331 (1966), certif denied sub nom. Taylor v. New Jersey, 385 U.S. 885 (1966); and State v Gardner, 51 N.J. 444 (1968). Accord, Monarch Fed. Savings & Loan v. Gesner, 156 N.J. Super 107 (Ch. Div. 1977)

Appellants cite State v. McGee, 131 N.J. Super 292 (1974), wherein the court reaffirmed the business duty concept. In McGee, supra the court found that since an owner of a gun who originally reported it stolen to his local police department was under no duty to make a truthful account of the facts, testimony from a firearms expert that he found the serial number of the gun listed with the national computer was inadmissible under the business records act. Appellants contend that as in the report in McGee, supra, the majority of the police reports in the case sub judice were based on statements of third-parties made to a police officer. They argue that the third parties who related complaints and other incidents to the police officers were not under a duty to make a truthful account of the facts and that an absence of trustworthiness and veracity is established by some of the incident reports themselves. (R-1) They assert that almost one-half of the police incident reports admitted into evidence involved noise complaints, with over 85% of the complaints (26 of 30) from the same four residences; ** the Conger residence, the McCarthy residence, the Jaworovitch residence, and the Castaldo residence. From these four residences, they observe, only one resident (Mr. Alfred Conger) thought the "problem" was so serious that it warranted coming to the hearing to testify. The others, Appellants contend, freely, and often, telephoned the police, however, were not so willing to repeat their allegations under oath. They argue that two facts may be inferred from this. First, that the whole neighborhood (which consists of over 30 residences in the immediate one block area) does not consistently find The Silver Dollar to be a disturbance, as four resident neighbors and the Respondent would have one believe. Second, the inverse of the first, that most of The Silver Dollar's neighbors do not find that its business is at all disturbing.

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Appellants argue that while it is a common practice of hearing officers to admit and consider hearsay evidence in an administrative proceeding, City of Newark v. Essex Co. Bd. of Taxation, 138 N.J. Super, 217 (App. Div. 1975), our courts have long held that an administrative decision must be based on a residuum of legal and competent evidence and not on hearsay alone.

Appellants recognize that the imposition of conditions on renewal of a license is an appropriate method of insuring compliance with the alcoholic beverage laws. Belmar v. Div of A.B.C., 50 N.J. Super 433 (App. Div. 1958). They assert that such action of the municipality must be reasonable and that its action is unreasonable if the goal is not legitimate or if the means chosen to effect it are not reasonable. Respondent's alleged goal is elimination of various problems alleged to exist because of Appellant's business. These alleged problems include loud noise and music, heavy traffic and parking violations. They contend that the goal of eliminating such problems is legitimate only if such problems actually exist. Appellants assert that the evidence presented by Respondent does not establish that the problems exist and that the testimony presented by Respondent, for the most part, was either exaggerated, unreliable or untrue. See Surf Villa, Inc., T/A The Villa v. Mayor and Borough Council of Surf City, Bulletin 2289, Item 3.

Appellants are also aware that the power to regulate the field of intoxicating liquors is within the police power of the State. Blanck v. Mayor and Borough Council of Magnolia, 38 N.J. 484 (1962). They aver, however, this power must be considered in conjunction with the pronouncement that although "no person has right to a liquor license, he acquires through his investment an interest that is entitled to some measure of protection." Twp. Committee of Lakewood Twp. v. Brandt, 38 N.J. Super 462 (App. Div. 1955). The holder of a license must be treated with essential fairness and with recognition that justice is the polestar. Samuel Berelman, Inc. v. Camden, Bulletin 1940, Item 1 (cf. Barbire v. Wry, 75 N.J. Super 327 (App. Div.))

In conclusion, Appellants ask only for fair treatment. They contend that fair treatment would be given if the objectionable conditions were either set aside or modified, with a modification allowing live music on Holiday eves and on four nights per week, including Friday and Saturday, until 2 a.m. with an occupancy limit of not less than 800 persons on such nights to allow Appellants' business to survive. They assert that this court can so modify the

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restrictions as there is ample authority for the proposition that the Director can modify conditions imposed by a local authority where there has been abuse of discretion on the municipal level. Lyons Farms Tavern v. Municipal Court of Alcoholic Beverage Control, 68 N.J. 44 (1975); Fanwood v. Rocco, 33 N.J. 404 (1960). Additionally, Appellants argue that where such an abuse of discretion exists, the Director may grant such relief to take whatever action is required to correct the mistake or the propriety of the municipal issuing authority Peter, Saul and Mary, Inc. t/a The New Rip Tide v. Mayor and Council of the Borough of Point Pleasant, Bulletin 2266, Item 2.

Based upon the testimony adduced at the hearing, the documents received in evidence, together with the post-hearing submissions received from counsel, I FIND:

1. The Appellants, Francis Zengel, Frank Zengel and Mark Connito, t/a The Silver Dollar, sought to renew a Plenary Retail Consumption License No. 1524-33-001-003 for premises known as 632-634 Ocean Road, Point Pleasant, New Jersey.

2. Public hearings concerning the renewal of the Plenary Retail Consumption License for Appellants were conducted on July 24, August 4, September 11, October 9, November 12 and December 18, 1979, at which the applicant and the objectors were given full and ample opportunity to present their respective positions to the local issuing authority.

3. On December 18, 1979, the respondent Mayor and Council of the Borough of Point Pleasant, renewed the license with seven (7) conditions, recited ante.

4. The Silver Dollar is a commercial establishment located in a commercial zone which is adjacent to and borders a residential zone.

5. The Silver Dollar is open all year and services a young clientele during the evening and night time hours.

6. Under the ownership of Appellants, The Silver Dollar has undergone exterior and interior physical improvements.

7. Appellants have made efforts to control the sounds which emanate from the establishment.

8. The Silver Dollar is located on New Jersey Highway 88, a busy thorofare which does not offer public transportation to those individuals who patronize Appellants' establishment.

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9. The Silver Dollar provides on-site parking spaces for fifty-five (55) to sixty (60) automobiles and there is no approved off-site parking for the establishment.

10. The Silver Dollar has had as many as 1,200 patrons in attendance during the course of a single nights entertainment.

11. The Silver Dollar is a cause of parking problems by the nature of its business, and adds to traffic congestion in the neighborhood.

12. Patrons from The Silver Dollar cause late hour noise and objectionable behavior to occur when leaving said establishment, which behavior interferes with the peaceful occupancy of the residents in the immediate area.

13. There have been no prior disciplinary proceedings against The Silver Dollar.

14. Community sentiment favors the Special Conditions imposed by Council.

15. Special Condition (f) "Capacity of the establishment is limited to 400 persons," is now before the Appellate Division of Superior Court for final determination.

16. The Special Conditions, as set forth by Council, will control the associated problems of traffic, noise and litter.

The crucial issue in this appeal is whether the action of Council in imposing the special conditions for the renewal of Appellants' plenary retail consumption license was reasonable under the circumstances presented. It is clearly established that the grant or denial of an alcoholic beverage license rests in the sound discretion of Council in the first instance and, in order to prevail on this appeal, Appellants must show that the action of Council was unreasonable and a clear abuse of such discretion. Rajah Liquors v. Division of Alcoholic Beverage Control, 33 N.J. Super. 598 (App. Div. 1965); Blanck v. Magnolia, 38 N.J. 484 (1962). Though there have been no prior disciplinary proceedings against Appellants, it is clear that such proceedings are not a prerequisite to the imposition of conditions. Old Mill Stream Inn, Inc., v. Paramus (Bulletin 2215, Item 1.)

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It is further observed that although the financial interest of the licensee is of secondary importance to the public welfare, Nordo, Inc. v. State, 43 N.J.S. 277 (App. Div. 1957), the Court in the matter of Lakewood v. Brandt, 30 N.J. Super. 462 (App. Div. 1955) established that:

"An owner of a license or privilege acquire through his investment therein, an interest which is entitled to some measure of protection***."

Having carefully reviewed the entire record, I CONCLUDE that the decision of the issuing authority to impose special conditions (a) through (e) was proper and a reasonable exercise of its authority.

I CONCLUDE that Council's special condition (g) shall be modified to provide as follows:

***Live entertainment beyond 12 midnight, shall be permitted on Fridays, Saturdays, and Holidays only." (Emphasis represents the Courts' modification)

Accordingly, it is ORDERED that special conditions (a) through (e) imposed upon the renewal of the Plenary Retail Consumption License of The Silver Dollar, License No. 1524-33-001-003, at premises 623-643 Ocean Road, Point Pleasant Borough, New Jersey be AFFIRMED and that special condition (g) be Modified as set forth herein, ante.

This recommended decision may be affirmed, modified or rejected by the head of agency, Director of the Division of Alcoholic Beverage Control, who by law is empowered to make a final decision in this matter. However, if the head of the agency does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph W. Lerner, my Initial Decision in this matter and the record in these proceedings.

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Joseph H. Lerner
Director