

STATE OF NEW JERSEY  
Department of Law and Public Safety  
DIVISION OF ALCOHOLIC BEVERAGE CONTROL  
1100 Raymond Blvd. Newark, N.J. 07102

BULLETIN 1980

June 15, 1971

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1. APPELLATE DECISIONS - FELDMAN v. BAYONNE.

#3460

Bernie Feldman's Liquor Store, Inc., )  
Appellant, )  
v. )  
Municipal Council of the City )  
of Bayonne, )  
Respondent. )

On Appeal

#3495

Bernie Feldman's Liquor Store, Inc. )  
Appellant, )  
v. )  
Municipal Council of the City )  
of Bayonne, )  
Respondent. )

CONCLUSIONS  
AND ORDER

Feinberg, Dee & Feinberg, Esqs., by William M. Feinberg, Esq.,  
Attorneys for Appellant.

Nathan Zinader, Esq., Attorney for Respondent.

Samuel J. Davidson, Esq., Attorney for Hudson-Bergen Package  
Stores Association, Objector..

Hellring, Lindeman & Landau, Esqs., by David Landau, Esq., Attorneys  
for various Licensees trading under the name Shop-Rite, Amici Curiae.

Skoloff & Wolfe, Esqs., by Saul A. Wolfe, Esq., Attorneys  
for Bayonne Licensed Beverage Association, et al.,  
Objectors.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

The subject cases are inter-related, involve common ques-  
tions of law and fact, and thus will be embodied in a single  
Hearer's report.

In case #3460, appellant filed a petition of appeal on  
November 26, 1969, alleging that respondent (hereinafter Council),  
in effect, had denied appellant's application for renewal of its  
plenary retail distribution license for the license year 1969-70  
for premises 454 Broadway, Bayonne, by failing to rule thereon.

Appellant alleges, in its petition of appeal, that the  
action of the Council was erroneous in that (a) petitioner possesses  
all necessary qualifications for such renewal; (b) Council improperly  
consolidated the hearing on petitioner's renewal application with  
a hearing to revoke its prior license; (c) Council's non-action is

motivated solely by the pressure brought upon it by local liquor dealers' associations to prevent the utilization of the name Shop-Rite in conjunction with the sale of alcoholic beverages in the City of Bayonne, thereby preserving an illegal monopoly in the field which they have enjoyed during a period of many years; (d) the objections filed by the Hudson-Bergen Package Stores Association, the Bayonne Package Stores Association, the Bayonne Tavern Owners Association and by the individual objectors are unsupported by the evidence.

No answer was filed in this case.

In case #3495, appellant challenges the Council's action revoking its license embodied in a resolution, adopted on May 21, 1970, as follows:

"WHEREAS, a notice dated June 20, 1969, copy of which is annexed hereto, containing charges preferred against Bernie Feldman's Liquor Store, Inc., a licensee and applicant for renewal of Plenary Retail Distribution License No. D-2, was properly served upon the corporation and Alfred Tarasiewicz, its President; and

"WHEREAS, hearings were held by the Municipal Council of the City of Bayonne in connection with the charges mentioned in the said notice; and

"WHEREAS, the hearings in the said matter commenced June 26, 1969, and were held intermittently until January 16, 1970; and

"WHEREAS, the Bayonne Tavern Owners Association, the objectors, were represented by Frank J. Ziobro, Esq.; and the Hudson-Bergen Package Stores Association, an objector, was represented by Samuel J. Davidson, Esq.; and the applicant was represented by Feinberg, Dee & Feinberg, Esqs., by William M. Feinberg, a member of the firm; and members of the City Law Department were in attendance at all hearings; and

"WHEREAS, due consideration having been given to the voluminous testimony and evidence adduced at the said hearings; and

"WHEREAS, the following determinations are hereby made by the Municipal Council of the City of Bayonne:

"1. An application filed with the City Clerk of Bayonne on October 7, 1968, for transfer of Plenary Retail Distribution License No. D-2 from Bernie Feldman's Liquor Store, Inc., to Shop-Rite Liquors of Bayonne, Inc., filed by Alfred Tarasiewicz, President, contained false or misleading statements in violation

of N.J.S.A. 33:1-25.

"2. Application filed with the City Clerk of the City of Bayonne October 31, 1968, for transfer of Plenary Retail Distribution License No. D-2 for Bernie Feldman's Liquor Store, Inc., to 454 Broadway, Inc., filed by Alfred Tarasiewicz, President, contained false or misleading statements in violation of N.J.S.A. 33:1-25.

"3. Application for renewal of the same Plenary Retail Distribution License No. D-2, filed May 27, 1969, by Bernie Feldman's Liquor Store, Inc., filed by Alfred Tarasiewicz, President, contains false and misleading statements in answers to questions 34 and 35 on said application, in violation of N.J.S.A. 33:1-25.

"4. Applicant corporation advertised and offered for sale 'Shop Rite' brand liquors, constituting a chain liquor store operation, contrary to N.J.S.A. 33:1-12.31.

"5. The stockholders of the applicant corporation; to wit: Alfred Tarasiewicz, Robert Salkowski and Richard Salkowski, do not qualify as stockholders of Bernie Feldman's Liquor Store, Inc., the holder of Plenary Retail Distribution License No. D-2, by reason of the statute provided for in such cases and by reason of the Rules and Regulations of the Alcoholic Beverage Commission of the State of New Jersey.

"NOW, THEREFORE, BE IT RESOLVED, That the Plenary Retail Distribution License of Bernie Feldman's Liquor Store, Inc., No. D-2, is hereby cancelled, revoked and declared null and void; and be it

"FURTHER RESOLVED, That this revocation shall be effective May 28, 1970."

In its petition of appeal (filed May 25, 1970, Case #3495) appellant alleged that the Council's action was erroneous in that (a) Council lacked authority to revoke appellant's license for the reasons upon which its action was grounded; (b) the revocation is based upon findings unsupported by the facts and contrary to the law; (c) Council's action is motivated solely by the pressure brought upon it by local liquor dealers' associations to prevent the utilization of the name Shop-Rite in conjunction with the sale of alcoholic beverages in the City of Bayonne, thereby preserving an illegal monopoly in the field which they have enjoyed during a period of many years; (d) Council failed to make any findings of fact upon which its conclusions were predicated; (e) the decision of the Council was arbitrary and capricious and was based upon considerations which do not constitute legally admissible evidence;

(f) appellant was not given the requisite notice of the so-called "charges" made against it, as required by R.S. 33:1-31.

The Council, in its answer, denied that its action was erroneous as alleged by appellant and affirmatively asserted that its resolution adopted on May 21, 1970 "was a reasonable exercise of discretion and a proper exercise of statutory jurisdiction in this matter."

Bayonne Package Stores Association, which had filed objections below and participated in the hearings below on both the objections to renewal and on the alleged charges against appellant, filed a separate answer denying that the Council's action was erroneous.

The matter was heard de novo, pursuant to Rule 6 of State Regulation No. 15, with full opportunity for counsel to present testimony under oath and cross-examine witnesses. All parties herein relied upon the stenographic transcripts of the proceedings held before the Council (consisting of 18 transcripts of hearings held on 18 days between June 19, 1969 and January 16, 1970, totalling in excess of 1200 pages of testimony). These were admitted in evidence pursuant to Rule 8 of State Regulation No. 15. Additional testimony was presented at this hearing on appellant's behalf. All of the exhibits received in evidence below were received herein, subject to the objections noted by appellant's attorney at the proceedings below as to the admissibility of some of the exhibits.

The record below reflects the following: Appellant, on May 27, 1969, applied to the Council for renewal of its plenary retail distribution license for the licensing year 1969-70 for premises 454 Broadway, Bayonne.

The notice published in the local newspaper on December 10, 1968, listed as sole officers and directors and their shareholdings the following: President, Alfred Tarasiewicz, 50 per cent; Treasurer-Secretary, Robert Salkowski, 25 per cent; Vice-President,

Richard Salkowski, 25 per cent. Parenthetically, it should be noted that Bernard Feldman and his wife and daughters, who were the sole stockholders of the corporate licensee-appellant, transferred all of their shareholdings to the aforementioned stockholders on December 9, 1968.

At the initial hearing held by the Council on June 19, 1969 to consider the application for renewal, the City Clerk noted that objections thereto had been filed by three individual licensees and by the Hudson-Bergen Package Stores Association. The objecting licensees based their objections upon the allegation that Questions 34 and 35 in appellant's application were falsely answered.

At this point, the Council's attorney called its attention to the Director's opinion in Bernie Feldman's Liquor Store, Inc. v. Bayonne, Bulletin 1870, Item 1 (received by him immediately prior to the hearing before the Council on June 19, 1969), wherein the Director reversed the Council's action in ordering the conditional suspension of appellant's license in a hearing called by the Council to determine the qualifications of the new stockholders of the corporate appellant pursuant to objections filed by local liquor dealers' associations. In that case the Director ruled that the Council's action was erroneous due to the fact that the Council failed to notice the licensee in accordance with the procedural requirements set forth in R.S. 33:1-31 relating to disciplinary proceedings initiated by the municipal issuing authority.

The Council re-scheduled the hearing to June 26, 1969 and resolved that appellant "be served with a five-day notice of the charges preferred against the licensee and the objections to the renewal of said license."

At the Council hearing of June 26, 1969, it appeared that appellant had received proper notice of charges preferred against it by the City of Bayonne, as follows:

"1. Fifty per cent of the stock of the above corporation is owned by Alfred Tarasiewicz, twenty-five per cent by Robert Salkowski, and twenty-five per cent by Richard Salkowski.

"2. An application filed with the City Clerk of Bayonne on October 7, 1968, for transfer of Plenary Retail Distribution License Number D-2 from Bernie Feldman's Liquor Store, Inc. to Shop-Rite Liquors of Bayonne, Inc., filed by Alfred Tarasiewicz, President, contained false or misleading statements in violation of N.J.S.A. 33:1-25.

"3. Application filed with the City Clerk of the City of Bayonne October 31, 1968, for transfer of Plenary Retail Distribution License Number D-2 for Bernie Feldman's Liquor Store, Inc. to 454 Broadway, Inc., filed by Alfred Tarasiewicz, President, contained false or misleading statements in violation of N.J.S.A. 33:1-25.

"4. Application for renewal of the same Plenary Retail Distribution License Number D-2, filed May 27, 1969, by Bernie Feldman's Liquor Store, Inc., filed by Alfred Tarasiewicz, President, contains false and misleading statements in answers to Questions 34 and 35 on said application, in violation of N.J.S.A. 33:1-25.

"5. You are advertising and offering for sale 'Shop-Rite' brand liquors, constituting a chain liquor store operation contrary to N.J.S.A. 33:1-12.31.

"6. Such practices are creating traffic and parking problems in the area of the licensed premises and promoting intemperance in the City of Bayonne.

"7. The individual stockholders above mentioned do not qualify as stockholders of Bernie Feldman's Liquor Store, Inc., under the law of the State."

Prior to the day of the hearing (June 26, 1969), the City Clerk was in receipt of objections to the renewal of the license filed by Bayonne Package Stores Association, the Bayonne Tavern Owners Association and several licensees alleging:

"1. That the legal notice published in the Bayonne Times on May 29, 1969 and June 5, 1969 by Bernie Feldman's Liquor Store, Inc. for a Plenary Retail Distribution License for premises at 454 Broadway, Bayonne, New Jersey, is invalid on the grounds that it does not disclose that said corporate applicant has applied for a license to trade as 'Shop-Rite Liquors of Bayonne' in violation of R.S. 33:1-12.31.

"2. That on and after December 9, 1968, operated the business of said corporate licensee as a part of the 'Shop-Rite' chain of retail liquor stores, in violation of R.S. 33:1-12.31.

"3. (a) That Alfred Tarasiewicz, 46 Avenue B, Bayonne, New Jersey, is president, director and stockholder of this corporate applicant; he is also a

stockholder and director of Consolidated Supermarkets, Inc.; and he is also a stockholder in Wakefern Food Corporation which is the owner of 'Shop-Rite' name, label and insignia.

"(b) That Richard Salkowski of 111 West 5th Street, Bayonne, New Jersey, is vice-president and stockholder of this corporate applicant; he is also stockholder, director and secretary of Consolidated Supermarkets, Inc.; and he is also a stockholder in Wakefern Food Corporation which is the owner of the 'Shop-Rite' name, label and insignia.

"(c) That Robert Salkowski, 7 East Court, Bayonne, New Jersey, is treasurer-secretary and stockholder of this corporate applicant; he is also a stockholder of Consolidated Supermarkets, Inc.; and he is also a stockholder in Wakefern Food Corporation which is the owner of the 'Shop-Rite' name, label and insignia.

"(d) That said Alfred Tarasiewicz applied for and was denied a liquor license by the Borough of Franklin, New Jersey, on May 29, 1967.

"(e) That Consolidated Supermarkets, Inc. acquired an interest in the liquor license of Clare's Food Market, Inc. for premises on Munsonhurst Road in the Borough of Franklin, New Jersey, which license was revoked by the Division of Alcoholic Beverage Control on June 17, 1968.

"4. That in the renewal application of Bernie Feldman's Liquor Store, Inc., Question 34 is answered contra to actual fact as set forth in Paragraph 3(d) above.

"5. That in the renewal application of Bernie Feldman's Liquor Store, Inc., Question 35 is answered contra to actual fact, (a) as set forth in Paragraph 3(c); (b) in material aspects pertaining to the beneficial interests of persons mentioned therein in other liquor licenses.

"6. The undersigned say that the above mentioned persons are all connected, directly or indirectly, with the operation of the Shop-Rite Supermarkets in the City of Bayonne and throughout the State of New Jersey, and that these persons will have available to themselves the Shop-Rite alcoholic beverages. These Shop-Rite brands are now on sale in other Shop-Rite connected liquor stores in other communities, and such Shop-Rite brands are advertised in a newspaper with State-wide circulation in the same way that standard brand liquors are advertised and no individual retailer can afford such advertising. Such Shop-Rite brands of liquors undersell the standard brand of liquors. Standard brands of liquor are available to all licensees and must be sold at the same price but Shop-Rite liquors are not available to all licensees. This type of operation involving as it does large sales of alcoholic beverages, including malt liquors, is not in the interest of enforcement of laws relating to alcoholic beverages; and in the attempt to meet such competition other local licensees may be inclined to violate the rules and regulations of the Division of Alcoholic Beverage Control and other laws relating to alcoholic beverages.

"7. This City has an excessive number of licenses, as shown by the Daily Certification Reports of Permanent Retail Licenses filed by the City Clerk with the Division of Alcoholic Beverage Control. Therefore no new license can be issued in this City. This Council has passed a resolution at the request of the liquor associations, increasing the liquor license fees for taverns and package stores, so that the number of outstanding liquor licenses could be reduced by selling them back to the City. The City, because of the excessive number of licenses, has never permitted a chain store or super-market operation of a liquor store in this City.

"8. The undersigned further say that the location of this corporate retail distribution licensee is in the main, and most congested business area of the City of Bayonne, and it is not satisfactory from a traffic standpoint for a chain store operation.

"9. That the aforesaid three new stockholders, directors and officers of this corporate licensee, since they acquired among themselves all the stock of said Bernie Feldman's Liquor Store, Inc., have conducted a chain retail package liquor store at the licensed premises and have promoted the 'Shop-Rite' private label brand of alcoholic liquors. They have conducted and participated in an advertising campaign advertising 'Shop-Rite' private label brand of alcoholic liquors that is contra to the legislative intent as expressed by our courts, and in the Alcoholic Beverage Control Law as set forth in R.S. 33:1-1 et seq. and contra to State Regulation 30, Rule 1 and Rule 6.

"10. That the operation of this 'Shop-Rite' chain retail liquor store is contra to R.S. 33:1-12.31 which states that:

"'No person, as the same is defined in Section 33:1-1 of the Revised Statutes, shall, except as hereinafter provided, acquire a beneficial interest in more than a total of two alcoholic beverage retail licenses, but nothing herein shall require any such person who has, on the effective date of this act, such interest in more than two such licenses to surrender, dispose of, or release his interest in any such license or licenses.' Act effective August 3, 1962. In R.S. 33:1-1 a 'person' is defined as follows:

"'r. 'Person.' Any natural person or association of natural persons, association, trust company, partnership, corporation, organization, or the manager, agent, servant, officer, or employee of any of them.' See Grand Union Co. v. Sills, 43 N.J. 390 cited under R.S. 33:1-12.31."

Additionally, the aforementioned liquor associations and several individuals filed objections with the City Clerk alleging:

"1. On December 9, 1968, a change occurred in the stockholdings of Bernie Feldman's Liquor Store, Inc., holder of Plenary Retail Distribution License Number D-2 for premises located at 454 Broadway, Bayonne, New Jersey, resulting in the following persons, residing at their following respective addresses, each acquiring in the

aggregate more than ten per cent of said corporate licensee's stock, more particularly each acquiring in the aggregate the percentage set forth after their names:

"Alfred Tarasiewicz, 30 LaTourette Place, Bayonne, New Jersey (50%)

"Robert Salkowski, 7 East Court, Bayonne, New Jersey (25%)

"Richard Salkowski, 111 West 5th Street, Bayonne, New Jersey (25%)

"2. On December 13, 1968, a Trade Name Certificate Number 53976 was filed in the Hudson County Clerk's Office setting forth that Bernie Feldman's Liquor Store, Inc. is trading as Shop-Rite Liquors of Bayonne, at 454 Broadway, Bayonne, New Jersey.

"3. On December 27, 1968 and thereafter, the said stockholders, as the sole directors and officers, operated the business of said corporate licensee as a Shop-Rite chain retail liquor store in violation of R.S. 33:1-31 which became effective on August 3, 1962.

"4. On December 27, 1968 and thereafter, the said stockholders, as the sole directors and officers of said corporate licensee, began a local advertising campaign of low-priced liquors bearing the 'Shop-Rite' private label and which is in violation of State Regulation 30, Rule 1 and Rule 6.

"5. Such marketing practices will result in a substantial increase in the sales volume of low-priced 'Shop-Rite' private label liquors and will compound the already existent traffic and parking problem in the area of the operation of said corporate licensee.

"6. Such marketing practices will stimulate sales and impair the State's policy favoring trade stability and the promotion of temperance in the liquor field in the City of Bayonne.

"7. On or about October 7, 1968, the Shop-Rite Liquors of Bayonne, Inc. filed an application listing the aforementioned three individuals as its sole stockholders, directors and officers for a transfer to it of the aforesaid Plenary Retail Distribution License Number D-2 issued to the aforementioned Bernie Feldman's Liquor Store, Inc. Said application did contain false statements in material respects pertaining to the beneficial interests of persons mentioned therein in other liquor licenses and in respect to a prior denial of an application by the aforementioned Alfred Tarasiewicz for a transfer of a liquor license to himself in the Borough of Franklin, New Jersey.

"8. On or about October 31, 1968, the 454 Broadway, Inc. filed an application listing the aforementioned three individuals as its sole stockholders, directors and officers for a transfer to it of the aforesaid Plenary Retail Distribution License Number D-2 issued to the aforementioned Bernie Feldman's Liquor Store, Inc.

Said application did contain false statements in material respects pertaining to the beneficial interests of persons mentioned therein in other liquor licenses and in respect to a prior denial of an application by the aforementioned Alfred Tarasiewicz for a transfer of a liquor license to himself in the Borough of Franklin, New Jersey.

"Wherefore, the above mentioned persons, Alfred Tarasiewicz, Robert Salkowski and Richard Salkowski do not qualify in all respects as individual applicants for a liquor license under R.S. 33:1-24, R.S. 33:1-34, R.S. 33:1-25, R.S. 33:1-12.31, State Regulation 30, Rule 1 and 6, and are disqualified to be stockholders of Bernie Feldman's Liquor Store, Inc., holder of Plenary Retail Distribution License Number D-2 issued for premises at 454 Broadway, Bayonne, New Jersey."

Prior to continuing with the hearing below, appellant protested the Council's action in considering the disciplinary charges and its application for renewal of license in a consolidated hearing, alleging that it would be prejudiced thereby. It is my view that the Council's action was procedurally unobjectionable.

The Council received in evidence (OB-1) an application filed with the Franklin Borough Clerk on May 4, 1967, for person-to-person and place-to-place transfer of a plenary retail consumption license from Clare's Food Market for premises on Munsonhurst Road to Alfred Tarasiewicz, t/a Shop-Rite Liquors, for premises 384 Rutherford Avenue, Franklin. The Borough, by resolution adopted May 29, 1967, denied the transfer until evidence was shown that the construction of the shopping center is assured.

The Council next received in evidence an application filed October 7, 1968 for person-to-person transfer of the subject license from appellant to Shop-Rite Liquors of Bayonne, Inc. and an application filed October 31, 1968 for person-to-person transfer of the subject license from appellant to 454 Broadway, Inc. Both applications list the same officers and stockholders as set forth in said notice that appeared in the local newspaper on December 10, 1968.

It was stipulated that a business name certificate indicating that Bernie Feldman's Liquor Store, Inc. was conducting its retail package liquor business at 454 Broadway, Bayonne, was filed

on December 13, 1968 (OB-7 in evidence). Additionally, it was stipulated that Shop-Rite Liquors of Bayonne, Inc. changed its corporate name to 454 Broadway, Inc. in October 1968. 454 Broadway, Inc. was dissolved in February 1969.

I shall examine individually, where possible, and collectively, where indicated, the five determinations or grounds upon which the Council based its decision to revoke the license.

In substantiation of the charges that the applications filed with the Bayonne Municipal Council on October 7, 1968, October 31, 1968 and May 27, 1969 by Alfred Tarasiewicz, president of the corporate applicants, contained false or misleading statements, the Council put in evidence an application (OB-1) filed with the Franklin Borough Council on May 4, 1967, signed by Alfred Tarasiewicz, for a person-to-person and place-to-place transfer of a consumption license containing broad package privilege from Clare's Food Market to Shop Rite Liquors and from premises on Munsonhurst Road to premises at 384 Rutherford Avenue, Franklin.

At the hearing held by the Borough Council on May 29, 1967 to consider this application, it was developed that the license was not in use; that it was not feasible to erect a building on Munsonhurst Road; that the move to Rutherford Avenue would be a temporary move until such time as a supermarket building could be erected on Route 23 and, upon the completion of such structure, a transfer to the new location would be sought.

At the conclusion of the hearing, the Franklin Borough Council adopted the following resolution:

"Be It Resolved that the Mayor and Council of the Borough of Franklin deny the transfer of the Retail Consumption Liquor License with Broad Package Privileges to Alfred Tarasiewicz trading as 'Shop-Rite Liquors' for premises located at 384 Rutherford Avenue; said license heretofore being issued to Clare's Food Market, until such time as tangible evidence is shown of their good faith in proceeding with the construction of the shopping center; until they produce either a signed contract or the erection of or the establishment of a supermarket is seen."

Additionally, it was established at the hearing before the

Franklin Borough Council that Consolidated Super Markets (of which Tarasiewicz is a stockholder and a director) had on June 7, 1966 acquired the interest of Clare's Food Market, Inc. in land on Munsonhurst Road for the purpose of constructing a building housing a supermarket to be operated as a Shop-Rite market by Consolidated and quarters for a liquor business to be operated by Tarasiewicz as Shop-Rite Liquors. However, subsequent to May 29, 1967, Tarasiewicz had no further dealings with Clare's Food Market and he has not participated in Clare's subsequent attempts to transfer its license. See Czubak v. Franklin and Clare's Food Market, Bulletin 1808, Item 3; for Supplemental Conclusions and Order, see Bulletin 1889, Item 2.

It is noted that respondent Council, in the First, Second and Third enumerated Determinations contained in its resolution adopted May 21, 1970, concluded that the three applications filed with it by Alfred Tarasiewicz, as president of the corporate applicants involved, contained false and misleading statements in violation of R.S. 33:1-25. The resolution is completely devoid of any finding of fact relating to alleged falsity or misleading nature of the statements, nor do these determinations specify what those statements were.

However, after reading the testimony and arguments of counsel, I can assume that the allegation that the application for transfer of the distribution license from Bernie Feldman's Liquor Store, Inc. to Shop-Rite Liquors of Bayonne, Inc., filed by Alfred Tarasiewicz, President, on October 7, 1968, contained false and misleading statements in violation of R.S. 33:1-25, referred to the answer to Question 34, as follows:

"34. Has the applicant or has any person mentioned in this application ever had any interest, directly or indirectly, in any application for an alcoholic beverage license in New Jersey which was denied? No If so, give name of applicant and state to whom application was made and when and state reasons (if any) given by the issuing authority for the denial."

In this connection, it is noted that the objectors con-

tended that the resolution adopted by the Franklin Borough Council was tantamount to a denial of an application for liquor license and therefore Question 34 in appellant's renewal application is false. Tarasiewicz asserted that the resolution was not, in effect, an outright and unconditional denial of the application but, on the other hand, he construed the effect of the Borough Council's action as holding the application in abeyance until such time as the building was erected.

It is interesting to note that the section of R.S. 33:1-25 pertaining to false or misleading statements, cited by respondent Council in its First, Second and Third Determinations contained in its resolution which is the subject matter of this appeal, reads as follows:

"...All statements in said applications required to be made by law or by rules and regulations shall be deemed material, and any person who shall knowingly misstate any material fact, under oath, in said application shall be guilty of a misdemeanor. Fraud, misrepresentation, false statements, misleading statements, evasions or suppression of material fact in the securing of a license are grounds for suspension or revocation of the license." (Underscoring added)

It is my view that the statute contemplates an intentional, knowing or willful perversion of the truth. In order to establish guilt under this section, a person must have a guilty animus or an animus fraudare, an intent to cheat, deceive or impose upon.

The language employed by the Franklin Borough Council in its resolution adopted May 29, 1967, at best, is ambiguous and can be subject to more than one interpretation, particularly by a layman. It is not inconsistent with his belief that the application was being held in abeyance pending construction of a building. In any event, under the circumstances I do not feel that the making of a false or misleading statement can be imputed to Tarasiewicz in this connection.

Additionally, I observe that, inasmuch as the application filed October 7, 1968 was withdrawn, no license was ever granted.

The statute clearly contemplates that the penalty of suspension or revocation is to be assessed against a license secured by fraud. Inasmuch as the application was withdrawn and no license secured, it follows that such penalty cannot be assessed.

Turning to the alleged false statement in the application filed on October 31, 1968 with the Council by Tarasiewicz for a person-to-person transfer from Bernie Feldman's Liquor Store, Inc. to 454 Broadway, Inc. (the subject of the Second Determination made by the Council herein), I find that at a caucus meeting of the Council subsequent to the filing of the application of October 7, 1968 by Shop-Rite Liquors of Bayonne, Inc., it was suggested to the stockholders thereof that the Shop-Rite Liquors corporate name be changed. The name was changed to 454 Broadway, Inc. As in the case of the application of October 7, 1968, the application of October 31, 1968 was withdrawn prior to any action thereon by respondent Council.

Therefore, it is my view and I find that the Council was in error in its first two determinations in its resolution of May 21, 1970.

In order to maintain chronological clarity, I repeat at this point that the Feldman family transferred its stockholdings in Bernie Feldman's Liquor Store, Inc. to Tarasiewicz and to the two Salkowskis on December 9, 1968. This transfer was not assailed as being procedurally defective and is not the subject of inquiry herein.

On May 27, 1969, the corporate appellant filed an application with the Council for renewal of its license for the ensuing license year. The Council, in its Third Determination, held that the renewal application "filed by Alfred Tarasiewicz, President, contains false and misleading statements in answers to Questions 34 and 35 on said application, in violation of N.J.S.A. 33:1-25."

Questions 34 and 35 of the aforesaid application and the answers thereto read as follows:

"34. Has the applicant or has any person mentioned in this application ever had any interest, directly or indirectly, in any application for an alcoholic beverage license in New Jersey which was denied? See below If so, give name of applicant and state to whom application was made and when and state reasons (if any) given by the issuing authority for the denial. Alfred Tarasiewicz applied for a transfer of retail consumption license with Broad package privileges to Mayor and Council of Borough of Franklin, N. J. The granting of this application was withheld until Mr. Tarasiewicz constructed or proceeded with construction of a shopping center. This occurred in May 1967.

"35. Has the applicant or has any person mentioned in this application having a beneficial interest in the license applied for or in the business to be conducted under said license ever had any interest, directly or indirectly, in any alcoholic beverage license or permit in New Jersey or any other state which was surrendered, suspended, revoked or cancelled? No. If so, state details with respect to each surrender, suspension, revocation or cancellation. See answer to #34. On information applicant believes that there have been further proceedings re license referred to in #34, but has no personal knowledge as to outcome."

In adjudicating the Council's action on Question 34, I am of the opinion that my discussion of the propriety of the action it took in the first two determinations, contained in its resolution adopted May 21, 1970, requires no enlargement and, for the reasons heretofore expressed, I hold that Tarasiewicz' answer to Question 34 (contrary to the Council's finding) did not contain false and misleading statements.

Likewise, Tarasiewicz' answer to Question 35 was not false or misleading. He had entered into a contract to acquire Clare's Food Market, Inc.'s alcoholic beverage license. He was not successful in his negotiations. I find that Tarasiewicz at no time acquired "any interest" in an alcoholic beverage license which was "surrendered, suspended, revoked or cancelled." It was so held in Packard-Bamberger & Co., Inc. v. Oakland, 87 N.J. Super. 92 (App. Div. 1965) wherein the court stated at p. 97:

"For purposes of this case we need not delineate the whole range of 'beneficial interests' in a license within the contemplation of the Legislature in the enactment of the 1962 statute. For the reasons stated, we are satisfied that a contract vendee does not have such an interest and gains none until there is an actual transfer of the license to him by the action of the vendor and the due approval thereof by the specified statutory authority."

It appears that the major point of inquiry in this proceeding is embodied in the Council's Fourth Determination which charges that the advertising and offering for sale of "Shop-Rite" brand liquors constituted a "chain liquor store operation;" contrary to R.S. 33:1-12.31. The objectors were greatly concerned with this particular phase of the inquiry and argued that the three new stockholders, since acquiring all of the stock of the corporate appellant, have unlawfully conducted a "chain" retail package liquor store at the licensed premises and have promoted the "Shop-Rite" private label brand of alcoholic beverages. Additionally, they contend that they have unlawfully conducted and participated in an advertising campaign advertising the "Shop-Rite" private label brand, thus creating a "chain operation"; that the same was violative of the above quoted statute, resulting in the various stores having a "beneficial interest" in each other.

It is inarguable that the words "chain store" do not appear in R.S. 33:1-12.31, which reads as follows:

"On and after the effective date of this act no person, as the same is defined in section 33:1-1 of the Revised Statutes, shall, except as hereinafter provided, acquire a beneficial interest in more than a total of 2 alcoholic beverage retail licenses, but nothing herein shall require any such person who has, on the effective date of this act, such interest in more than 2 such licenses to surrender, dispose of, or release his interest in any such license or licenses."

Therefore, it is apparent that this section solely proscribes the acquisition of a beneficial interest in more than two alcoholic beverage retail licenses.

Upon examining the almost awesome voluminous testimony of numerous witnesses, various stipulations and exhibits, I make the following findings of fact:

Wakefern Food Corp. (hereinafter Wakefern), of which Alfred Tarasiewicz is a stockholder, owns no liquor stores nor shares directly or otherwise in the profits of any liquor store. The owners of the various Shop-Rite stores are shareholders of

Wakefern. Wakefern authorizes the use of the Shop-Rite name and its distinctive emblem or logo to those who qualify. No consideration or compensation is paid to Wakefern by those who qualify, either on the sale of the liquor or for the use of the trade mark. This is done as an accommodation for the stockholders of Wakefern who hold liquor licenses.

Wakefern tests the liquor sold under the Shop-Rite name for the purpose of maintaining a qualitative standard for these products.

Wakefern exercises no control in the operation of appellant's business. It did not participate in the acquisition of the license by appellant.

In the distribution of the food products, Wakefern may dictate to a food manufacturer or distributor that it can sell those products solely to Shop-Rite franchisees. However, Wakefern cannot dictate to liquor distributors that they may sell the Shop-Rite brand of alcoholic beverages solely to retailers trading as Shop-Rite stores. Wakefern delivers food products. It does not deliver alcoholic beverages to anyone, nor does it dictate policy relating to the sale of alcoholic beverages by any Shop-Rite liquor store. Wakefern collates figures relating to the sale of food items. It does not provide the same service concerning sales of alcoholic beverages.

Tarasiewicz has an interest in two Shop-Rite food stores in Bayonne, one in Franklin, one in Pennsylvania and one in Pearl River, New York. Robert and Richard Salkowski also have an interest in the Pearl River market. None of these stores have liquor licenses except the Pearl River market. They have no interest, directly or indirectly, in any liquor license except the license of the corporate appellant and the license in Pearl River, New York.

Appellant made no agreement relating to cooperative advertising for the sale of liquor with Wakefern. Payment for advertising is made by each individual store. Each store is free to

conduct an individual advertising program.

Appellant arranged for individual advertisements in the local newspaper. Appellant has also, on occasion, joined with other Shop-Rite retail liquor outlets in jointly advertising bottled goods through an advertising agency. However, each outlet paid separately or individually for its share of the cost of the advertisement.

No one other than Tarasiewicz and the two Salkowski brothers have any voice in the management of appellant's liquor store.

It was not shown that any distributor or Wakefern has a voice in the policy, management, advertising or profits of any Shop-Rite liquor store. It was not proved that any distributor sold liquor to Shop-Rite as a unit instead of to each individual store, or that unit payment was made therefor rather than payment being made by the individual stores ordering the liquor.

Shop-Rite liquors were never considered as a private brand and, in so far as Wakefern or appellant are concerned, they are available to all retailers who wish to purchase them. The price of the various Shop-Rite liquors are filed with the Division of Alcoholic Beverage Control in accordance with the regulations pertaining thereto.

The profits of the individual stores authorized to use the Shop-Rite name are retained by each individual store and are not shared or pooled with other retail outlets or with Wakefern. Wakefern does not purchase, supply, sell or distribute liquor. Liquor is purchased from wholesalers or distributors.

Upon considering all of the foregoing, I hold that appellant has acquired no interest in any other alcoholic beverage retail license or licenses violative of the interdict contained in the cited statute. Those stockholders of Wakefern who own and operate liquor stores trading as "Shop-Rite" formed a committee which acts as a clearing house for information pertaining to

the liquor business. The only service provided by Wakefern, in addition to any other heretofore mentioned, is to notify retailers of price changes established by a wholesaler in cases where the wholesaler is unable to communicate with individual retailers. Wakefern is not compensated for this voluntarily extended service.

I therefore conclude that neither Wakefern nor the various stores have a beneficial interest in each other and that their modus operandi is not repugnant to R.S. 33:1-12.31. See Hudson-Bergen Package Stores Association v. Lyndhurst, Bulletin 1914, Item 2; and see also Grand Union Co. v. Sills, 43 N.J. 390 (1964); Packard-Bamberger & Co., Inc. v. Oakland, *supra*; Hudson-Bergen Package Stores Association v. Paramus, Bulletin 1913, Item 1, for a discussion of beneficial or ownership interests in liquor licenses.

Nor do I find a scintilla of evidence to sustain the charge that appellant conducts business as part of a chain liquor store operation. A chain store has been defined as a store in a group of stores, one or more of which is located within the state, under the same management, supervision or ownership. Lee v. Herndon, 10 So. 2d 305, 306. I find none of these indicia present in the case sub judice which would warrant a finding that appellant was operating as part of a chain store operation.

Although I have not found a precedent, I further find that R.S. 33:1-12.31 does not preclude appellant from acquiring an interest in a New Jersey liquor license irrespective of the fact that it may have multiple liquor license holdings or interests in another state or states.

The final ground set forth in the Council's resolution of May 21, 1970, revoking appellant's license, is without merit. There was no proof adduced that the stockholders of the corporate appellant failed to meet the requirements of R.S. 33:1-25 relative to age, citizenship, residence and free of conviction of crime involving moral turpitude. As a matter of fact, this issue was abandoned on this appeal.

The action of the Council will not be reversed by the Director unless he finds that it was clearly against the logic and effect of the presented facts. Cf. Hudson Bergen County Retail Liquor Stores Assn. v. Hoboken, 135 N.J.L. 502, 511 (E. & A. 1947).

In the case sub judice, the appeal to the Division constitutes a de novo hearing. Cino v. Driscoll, 130 N.J.L. 535 (Sup. Ct. 1943); Fanwood v. Rocco, 33 N.J. 404 (1960).

The Director's review in a matter of this kind is plenary and may result in independent findings which supersede the action taken at the original hearing. Neiden Bar and Grill v. Newark, 40 N.J. Super. 24 (App. Div. 1956). See also Oak Inn, Incorporated v. Division of Alcoholic Beverage Control, et al. (App. Div. 1963), not officially reported, reprinted in Bulletin 1523, Item 2.

I find that the Council did not act in accordance with the logic and effect of the presented facts and further that its action was not a reasonable exercise of its discretion and that appellant has met the burden established by Rule 6 of State Regulation No. 15.

I therefore recommend that in Case #3495 the Council's action in revoking appellant's license for 1969-70 be reversed and the charges be dismissed. I further recommend that in case #3460 the Council's action in denying renewal of appellant's license for 1969-70 be reversed and that the Council be directed to grant renewal of the license in accordance with application filed therefor.

#### Conclusions and Order

Exceptions to the Hearer's report and written supportive argument have been filed by the objector, Hudson-Bergen Package Stores Association and the Council pursuant to Rule 14 of State Regulation No. 15.

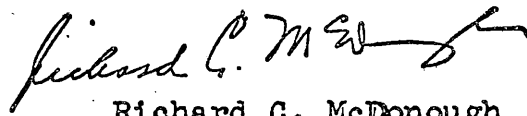
Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's report and the exceptions thereto, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 26th day of April 1971,

ORDERED that, in Case #3495, the action of the Council be and the same is hereby reversed, and that the charges herein be and the same are hereby dismissed; and it is further

ORDERED that, in Case #3460, the action of the Council be and the same is hereby reversed, and that Council is hereby directed to renew appellant's plenary retail distribution license for the 1969-70 licensing period nunc pro tunc in accordance with the application filed therefor; and it is further

ORDERED that, absent any new or additional issues before the Council with respect to appellant's pending application for renewal of license for the 1970-71 licensing period, that these Conclusions and Order shall be determinative of the said application for renewal thereof.



Richard C. McDonough  
Director