vision of
ALCOHOLIC
BEVERAGE
CONTROL

Bulletin

Front Street, CN 087, Trenton, New Jersey 08625-0087

BULLETIN 2464

August 22, 1994

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Bulletin

Front Street, CN 087, Trenton, New Jersey 08625-0087

August 22, 1994

BULLETIN 2464

1. **NOTICE TO ALL ANNUAL STATE CONCESSIONAIRE PERMITTEES - SPECIAL EVENTS PERMIT REQUIRED FOR THE SALE AND SERVICE OF ALCOHOLIC BEVERAGES IN SITUATIONS WHICH DIFFER FROM THE ROUTINE CIRCUMSTANCES ARTICULATED IN CONCESSION AGREEMENTS BETWEEN PERMITTEES AND THEIR RESPECTIVE LANDLORDS.**

Notice, which was distributed to all Annual State Concessionaire permittees in July, 1994, sets forth need to obtain permit for special events which differ from routine business conducted by permittee; restates that the primary goals of the Division when issuing a Special Event Permit are to restrict access to alcoholic beverages by persons under the legal age to consume and by individuals who are actually or apparently intoxicated. In addition, the Division seeks to ensure the safety and well-being of event participants by providing notice of the event to the appropriate local, county and/or state public safety authorities; issuance of such permits is discretionary, and based upon good cause; applications for those permits must be received by the Division at least two weeks prior to a scheduled event.

July 1, 1994

Dear Annual State Concessionaire Permittee:

During the 1993-94 license term, the Division has reviewed the conduct of various Annual State Concessionaire permittees, particularly with respect to the sale and service of alcoholic beverages in situations which differ from the routine circumstances articulated in concession agreements between permittees and their respective landlords.

As a result, I have determined that the sale of alcoholic beverages at golf tournaments, concerts or other unique events with anticipated large attendance, which may occur on or adjacent to your annual state permitted premises should be accomplished under the authority of a Special Events Permit. In this regard, ABC's primary goals are to ensure that permittees demonstrate the ability to:

(1.) restrict access to alcoholic beverages by persons under the legal age to consume;

(2.) restrict access to alcoholic beverages by individuals who are actually or apparently intoxicated;

(3.) ensure the safety and well-being of event participants, by providing advance notice of the event to appropriate local, county and/or state public safety authorities.

Annual permittess should note that ABC's issuance of Special Events Permits is discretionary, and based upon good cause. N.J.S.A. 33:1-74a. Permittees must demonstrate that proposed events conducted under such authority are both unique in nature and directly associated with the fulfillment of the applicant's contractual obligations to its landlord unit of government. Additionally, ABC reserves the right to require additional security or law enforcement presence during events at which significant under-age attendance is anticipated or where there is a likelihood of potential disorderly conduct.

Attached to this Notice if an application for a Special Events Permit which should be completed and submitted to this Division at least two weeks prior to a scheduled event. The application must be filed by an official of the company which holds the Annual State Permit, who has full authority to act on behalf of the company, (i.e. general partner, managing partner, vice president or president of a corporation, individual proprietor). The permit application must be accompanied by a fee of $50.00 per day in the form of a check or money order payable to the Division of Alcoholic Beverage Control.

The responses to questions appearing on the first page of the application will provide ABC with a detailed profile of the proposed event, including a physical description of the premises as well as the manner in which alcoholic beverages will be dispensed. Applicants should note the statutory limit of 25 permits which may be sited at any premises during a calendar year. N.J.S.A. 33:1-74b. Please note that every application must be accompanied by a detailed sketch of the premises, which identifies exits and entrances, sale/consumption areas, placement of beer trucks, fences or other access control barriers and location of security personnel. The reverse side of the application contain areas in which the written consent to alcoholic beverage activity by the owner of the premises (the unit of government or public authority which owns the facility) must appear.

Additionally, please note that a copy of the complete application must be forwarded to the municipality within which the public building or land is located, to ensure that local authorities responsible for public safety services and enforcement of the Alcoholic Beverage Control Act and Regulations, receive adequate advance notice of the event. Permittees are encouraged to solicit recommendations from local officials regarding traffic and crowd control, as well as control of access to alcoholic beverages at the event, and make such recommendations part of their permit application.

Finally, applicants are advised that all proceed derived from the sale of alcoholic beverages during special permitted events may only accrue to the annual state permittee, and not to organizations, promoters, production companies or other entities involved in the conduct of the event. All advertising or media promotion of events which refer to the availability of alcoholic beverages must be responsibility of the permittee.

Should you have any questions concerning the application process, please conduct Licensing Bureau Assistant Director Lisa DiLascio (609) 984-2736) or Executive Assistant Susan Fiore (609) 984-1980.

Very truly yours,

JOHN G. HOLL
ASSISTANT ATTORNEY GENERAL
ACTING DIRECTOR

JGH:LJD/bp
Attachment: As indicated

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
140 East Front Street
CN 087
Trenton, New Jersey 08625

APPLICATION FOR SPECIAL EVENT PERMIT
(PERMIT MAY BE ISSUED ONLY TO ANNUAL STATE CONCESSIONAIRE PERMITTEES)

Applications must be accompanied by a fee of $50.00 PER DAY payable with a MONEY ORDER or CHECK drawn to the order the DIVISION OF ALCOHOLIC BEVERAGE CONTROL.

APPLICATION MUST BE SUBMITTED AT LEAST TWO WEEKS PRIOR TO THE DATE OF THE AFFAIR

1. Name of Permittee_____

   Address_____

2. Annual State Permit No. 34____-14-_____-_____
3. For what type of Special Event is this permit requested?_____

   _____

4. Location of premises where affair will be held: (describe in relation to the permanently licensed premises.)

   _____

   _____

SUBMIT A DETAILED SKETCH OF THE PREMISES, IDENTIFY ALL ENTRANCES/EXITS, AREAS WHERE ALCOHOLIC BEVERAGES ARE TO BE DISPENSED AND LOCATION OF ALL SECURITY OR LAW ENFORCEMENT OFFICERS WHO WILL BE PRESENT.

5. Indicate the date(s) and hours during which the event will be held:

   _____,19_____from_____to_____
   (date) (time) (time)

   _____,19_____from_____to_____

6. Indicate the anticipated number of attendees at this event _____
   Indicate the anticipated age-group of attendees _____
7. Check kinds of alcoholic beverages to be dispensed if permit is granted:
   Wine ( ) Distilled Spirits ( ) Malt Alcoholic Beverages ( )
8. Indicate size, type of container and price for each size container in which alcohol will be dispensed

   _____

9. How will payment for alcoholic beverages be assessed: Pre-paid Ticket( ) Cash ( ) Other ( )

10. How many containers will be sold to each patron in a single transaction? _____
11. Describe below the security provisions which will be in place during event. In particular identify how you will identify underage patrons and how you will prevent their access to sale/service areas. Additionally indicate what security resources are available and how you propose to handle intoxicated patrons or other emergencies. (add additional pages as necessary)

12. Identify any promoters, production companies or other entities involved in the conduct of this event:

_____

_____

13. To whom and for what will the the proceeds of the event accrue?

_____

(OVER)

SPECIAL EVENTS PERMITS APPLICATION (cont.)

AUTHORIZED SIGNATURE OF APPLICANT: This application must be filed by an official of the company which holds the plenary retail State Permit, who has full authority to act on behalf of the company and who is disclosed in the applicant's most recent full license application filed with the Division of Alcoholic Beverage Control (i.e. corporate president or vice president, general or managing partner, individual proprietor).

The applicant represents that if a Special Permit is issued, the permittee will abide by all provisions of the NJ Alcoholic Beverage Control Law, State Rules and Regulations, and applicable Municipal Ordinances and Regulations, the same as if the sale and service of alcoholic beverages were occurring on the applicant's permanently permitted premises.

The applicant certifies that not more that twenty-five (25) Special Permits of any type have been authorized for these premises during this calendar year.

The applicant further represents that a copy of this application and all attachments have been delivered to the Municipal Clerk of the municipality in which the above-described special event will occur and that all recommendations of the municipality, with regard to security controls, have been incorporated into the description entered herein.

_____ _____

Printed Name and Title of Signator Signature

Date: _____/_____/19_____

WRITTEN APPROVAL OF OWNER OF PREMISES: The following consent is to be signed by the person authorized by the landlord unit of government where the affair is to be held.

I certify that I am the person designated to authorize the sale and service of alcoholic beverages at the premises described in this application, and that I am aware of no reason why such sale or service should not occur, and that there is no objection to such sale and service as herein specified.

I certify that the special event described herein is unique in nature and that the applicant's services are required to fulfill its contractual obligation to this governmental unit or public authority.

I further certify that not more that twenty-five (25) Special Permits of any type have been authorized for these premises during this calendar year.

_____ _____

Printed Name and Title of Signator Signature

Date:_____/_____/19_____

On behalf of :

_____

Unit of Government or Public Authority

ABC06/1994

2. IN THE MATTER OF OBJECTIONS TO STATE BEVERAGE DISTRIBUTION APPLICATION OF ROADSIDE BEVERAGE, INC. - FINAL CONCLUSION AND ORDER DISMISSING OBJECTIONS AND GRANTING STATE BEVERAGE DISTRIBUTION LICENSE SUBJECT TO SPECIAL CONDITIONS.

Objections to the issuance of a State Beverage Distribution (hereinafter "SBD") license were filed by two local license holders approximately four months after the initial filing of the SBD application. Since no action had been taken on the application when the objections were received, the Director held a hearing. After hearing the evidence and arguments of the parties, the Director held that since the SBD license filed was not "true and complete" until a few days before the objections were filed, the objections would be accepted as timely filed with the Division. The Director further ruled that there was nothing in the record before him to support a finding that the proposed location of the SBD license would be contrary to the public interest. On the contrary, the Director determined that the license would meet a public need and would be in the public interest. The Director noted that most of the objections appeared to stem from purely

competitive concerns and that such concerns are generally of little value in assessing "public need" and "public interest." The SBD license was then granted subject to several special conditions.

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

IN THE MATTER OF OBJECTIONS TO THE APPLICATION FOR A STATE BEVERAGE DISTRIBUTORS LICENSE #3402-19-150-001 BY:	ORDER DISMISSING OBJECTIONS AND GRANTING LICENSE SUBJECT TO SPECIAL CONDITIONS.
ROADSIDE BEVERAGE INC.	
FOR PREMISES AT:	
1260 Ocean Avenue Lakewood, NJ 08701	

Charles J. Kaess, Esq., Attorney for License Applicant

R. Douglas Shearer, Esq., Attorney for Objectors

BY THE DIRECTOR:

This hearing resulted from a signed written objection filed on behalf of a competitor distribution licensee (Kev-J-Mar, Inc.) to the application for a state beverage distributors (SBD) license. Although the applicant had published notice on February 17 and 24, 1994, of its intent to site the license at the noted location, the written objection (which was dated June 24, 1994) was not received at the Division until June 27, 1994. It came to my attention just prior to my action on the applicant's request for an SBD license. (Thereafter, on June 30, 1994, via facsimile, another written objection was received from Michael Danski, L&M Dan Corp. t/a Barry's Discount Liquors.) Because the applicant represented that it was suffering irreparable harm from the failure to have this license issued to it, I scheduled a hearing before me regarding the objections, rather than forwarding same to the Office of

Administrative Law, which is the normal procedure to address such objections.

A hearing was held before me on Tuesday, July 5, 1994, at this Division's offices. Essentially the hearing involved three issues: (1) Were the objections timely filed; (2) Was there a public need for this new SBD and would it be in the public interest; and (3) Were the objections a sufficient basis on which to deny the issuance of this license. Sworn testimony was received from the president of the applicant corporation, Louis Albruzzese, and the one objector, Michael Danski (of L&M Dan Corp.), as well as argument made by counsel for both sides. The substance of that hearing hereafter follows.

(1) TIMELINESS OF THE OBJECTIONS:

Petitioner filed its original application with this Division on February 14, 1994. Thereafter, on February 17, and 24, 1994, it published notice of its intent to purchase and site this license at that noted premises. Nevertheless, the objections to the application were not received at this Division until June 27 and 30, 1994. Since I had not yet acted on the application, I scheduled the hearing but directed that the parties provide argument and evidence on the issue of timeliness of the filing of the objections.

A. Testimony and Evidence:

Mr. Kaess, the attorney for the licensee, noted the February publication dates. He thereafter suggested that while there was no indication of a timeliness standard for State license applications, either of two standards applicable to municipal licenses should be deemed to apply. Mr. Kaess argued that the public notice states that objections should be made immediately in writing to the Director." Thereafter proper procedure requires that upon receipt of a timely written objection, the matter shall be set down for a hearing. Additionally, he noted that the provisions of N.J.A.C. 13:2-8 provide that a hearing should be held not sooner that five days (excluding Saturdays, Sundays and legal holidays) after the second publication and should not be later than 14 days thereafter. As a result, he argued that objections, to be timely, should be received within 14 days of the second publication, which was prior to the date the objections were filed in the instant case. Secondly, he argued that another municipal standard which could be applied is the one which addresses the inaction of a governing body regarding transfer applications. Pursuant to N.J.A.C. 13:2-7.7 it

is provided that "[i]n the event no action is taken on an application for transfer of a municipally issued license within 60 days of the date of filing of the application, the applicant may file an appeal with the Director from such failure to act on the transfer application." As a result, he suggested that an outside time period of 60 days from the date of filing the application, could be utilized as the outer limit in which to consider objections as being timely filed. He asserted that since the current objections had been filed far beyond such time, they were untimely.

The attorney for the objector, Mr. Shearer, initially asserted that no one reads the legal notices in the paper consistently, and that since the applicant had made no exterior alterations on this premises (until recently), his clients had no notice that a new licensee, who was potential competition, was going to be located near their stores. As soon as they realized this, they immediately objected. He suggested that under the provisions of N.J.A.C. 13:2-1.9, the Director can relax procedural rules and he suggested that same would be appropriate in this case.

The attorney for the objector further contended that since the petitioner, for whatever reason, was asked to re-file his application, which occurred on June 24, 1994, the petitioner should then have been required to re-advertise his intent to locate this license, and that in any case June 24, 1994 should be the date from which to judge the timeliness of objections. He submitted therefore that the objections should be considered timely. Mr. Shearer further suggested that since the objectors' facilities were in such close proximity to this SBD, that each license holder in the area should individually receive written notice of a pending application. He admitted, however, that same was not required under current law.

In response to my question as to how the objectors learned of this SBD license, Mr. Danski indicated he was told by one of his beverage suppliers who stated he would be making a new stop in the area. While the other objector was not available, counsel indicated that his clients had a good relationship with township officials and they were often advised of matters which might affect their businesses.

In conclusion, Mr. Shearer submitted that since the application had not been acted upon, the objections were timely.

B. Chronology of Licensing Process:

Prior to rendering my decision on this issue, I believe it is instructive to set forth a short chronology of the processing of this license application as disclosed by our license file.

DATE:	EVENT:
February 9, 1994	"Renewal" Application Fee filed - license had lapsed for failure to timely renew
February 14, 1994	Original New License application filed
February 16, 1994	Fingerprint cards sent for criminal history processing.
March 8, 1994	File forwarded to NJ S/P ABCEU for qualification inspection of premises
March 11, 1994	Telephone call to Mr. Albruzzese advising that his application was missing: 1. Affidavit of publications 2. bond 3. Report of ABCEU completed site visit.
March 15, 1994	Memo from Licensing Bureau to Enforcement Bureau on Louis Albruzzese's 1974 conviction disclosed on fingerprint check.
April 15, 1994	Standard Letter of Information from Division to Lakewood issuing authority advising of application to site the license in that Township.
May 4, 1994	ABCEU conducts license inspection of SBD site.

June 1, 1994 — Telephone call to Mr. Albruzzese re-advising that we still did not have:
1. Affidavit of publication
or
2. bond.
Mr. Albruzzese advised that he thought he had lost his building, but he will know for sure on 6/3 and will advise us.

June 7, 1994 — Division received copy of Bond filed with Div. of Taxation on June 2, 1994.

June 15, 1994 — Report of Site Inspection received from ABCEU.

June 21, 1994 — Division received proof of publication.

June 24, 1994 — Mr. Albruzzese filed a new application which was required because prior application had too many corrections in various persons handwriting and Division was unable to ensure the truth of what specific facts Mr. Albruzzese was attesting to.

June 27, 1994 — Recommendation of Enforcement Bureau that license be issued. Notation that criminal disqualification was removed in 1988 and thus he was qualified to hold an interest in a license.

June 27, 1994 — First letter of objection date stamped in as received at the Division.

June 29, 1994 — File and Letter of Objection presented for Director's review. Determination made to hold hearing. Applicant and Objectors advised.

July 5, 1994 Hearing held.

July 5, 1994 Applicant amended its application to indicate it filed with BATF for Basic Federal Permit on June 23, 1994.

C. Discussion and Analysis:

Pursuant to N.J.A.C. 13:2-1.1(a), in order to obtain a license it is necessary that an "[a]pplication for license must be filed on forms promulgated by the Director, Division of Alcoholic Beverage Control, in duplicate with the Division at or before the first insertion of advertisement and accompanied by the full annual license fee." It is further provided in N.J.S.A. 33:1-25 that

> [a]pplicants for licenses shall answer questions as may be asked and make declarations as shall be required by the form of application for license as may be promulgated by the director from time to time. All applications shall be duly sworn to by each of the applicants. . . . All statements in the 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 the application shall be guilty of a misdemeanor. Fraud, misrepresentation, false statements, misleading statements, evasions or suppression of material facts in the securing of a license are grounds for suspension or revocation of the license.

The Division has previously determined that failure to file a complete application is fatally defective to an otherwise approved license application. Two Nicks Corp. v. Mun. Bd. of ABC of Jersey City, Bulletin 2099, Item #1 (April 5, 1973). Therefore, I find that it is clear that in considering the issue of what is a timely filed objection to an application, such application must be full and complete in all relevant aspects. In the present case, our file indicates that Mr. Albruzzese's application did not file his bond with this Division until June 7, 1994 nor his proof of publication until June 21, 1994. A review of his originally filed application (on February 17, 1994) did not, when filed, contain the proper license name, its New Jersey Sales Tax Certificate of

Authority Number, the correct name and number of the Lessor of the property nor his Disqualification of Removal Order Date and Number, his wife's social security number (which is still missing from the newly filed application) nor did it contain the date when his corporation was chartered or incorporated. It was thus proper that he be required to re-file a true and correct application with the Division, which he did on June 24, 1994.

Given the above referenced facts, I find that until June 24, 1994, this application was not true and complete; thus the letter of objections, dated June 24, 1994, and received at this Division on June 27, 1994, were under any reasonable standard, timely filed with this Division. The objections were received before action was taken on this license application and therefore, on these particular facts, they were timely filed and a hearing was required before action could be taken on the application. Compare with Miles v. Paterson ABC Bd., Bulletin 1306, Item #2 (September 24, 1949). (In view of the fact that objectors were given the opportunity to object, a hearing was held, and the newly refiled application is in substantial compliance with our regulations, I shall, under the provisions of N.J.A.C. 13:2-1.9 waive any new publication notices, to the extent that same may be otherwise required.)

Additionally, it is noted that prior to activating a Class A (Manufacturer's) or Class B (Wholesaler/Distributor's) license, we require that the applicant obtain a Federal Basic Permit. The applicant has previously been advised telephonically to submit a copy of its application to this Division, but it has not done so to date. It is not eligible for licensure until such application is submitted to the Division.

(2) DOES LICENSE MEET A PUBLIC NEED AND IS IT IN THE PUBLIC INTEREST?

A. Applicable Law and Standards:

It has long been Division policy that applicants for a State Beverage Distributors License, besides having to meet the general fitness and qualifications criteria applicable to all applicants for licensure, also must meet two further standards, i.e., that ". . . there is public need (for the grant or transfer of a SBD license) and whether such license will be in the public interest."

Mauriello v. Driscoll, 135 N.J.L. 220, 221 (Sup. Ct. 1947), as cited in IMO Lincolt Distributors, Inc. to D and D Beverages, Inc., Bulletin 2275, Item 4 (September 15, 1977). Once having established that it prima facie meets both the general criteria for license issuance as well as the two additional referenced SBD standards, the burden of persuasion shifts to the Objectors. It then becomes necessary for the Objectors to establish not only the validity of their objections, but also that same vitiates one (if not more) of the appellant's standards of licensure which it had previously established by its provided proofs. The applicant thus was provided an opportunity to produce its proofs to establish that its license would meet a public need and would be in the public interest.

B. Testimony and Evidence:

Prior to producing its proofs, the attorney for the applicant submitted an amendment to the license application in which the licensee avered that besides selling at retail, the applicant would pursue distribution rights to smaller exotic and/or ethnic beers for sale to retailers. Thereafter, the attorney representing the applicant claimed that this license will meet a public need because it will be focusing its efforts on reaching clientele via specialty beers, such as foreign and ethic flavors, in addition to distributing non-alcoholic beverages. Moreover, the applicant testified that this license was issued to replace one he had purchased in 1988, but he which had inadvertently allowed to lapse by failing to pay the renewal fee on time. The applicant's attorney suggested that since it was in essence the same license, the purchase of an existing license satisfied the public need test.

With respect to the public interest, the attorney for the licensee noted that this license has no on-premises consumption privilege. Additionally, Mr. Kaess argued that since this licensee can only sell warm beer (or chilled beer in relatively large containers) there is little risk that such beverages will be consumed shortly after purchasers leave the premises. He therefore suggested there is no realistic harm to the public interest by the issuance of this license. The public will benefit from being able to purchase warm beer in large quantities along with quantities of non-alcoholic beverages, such as Snapple and various soda and iced tea beverages.

The objector testified that there currently are six licensed stores which sell beer within a few miles of the prospective site of this SBD and there is another SBD in Bricktown. These stores provide enough variety and choice to the public. Therefore, there is no public need for it. Moreover, he testified that he paid $330,000 for his license and goodwill. This amount does not include the building, which he rents but does not own. This large cost compared to the minimal $825. annual license fee for an SBD, gives the SBD an unfair advantage. The objector is concerned that any diversion of revenue will cause him financial harm and will require that he lay off at least one person. The other stores face the same problems and some could go under. The failure of existing businesses and the consequent termination of their workers' employment would not be in the public interest.

C. Discussion and Analysis:

The standard particular to SBD licensure cases - that same must meet a public need and be in the public interest - is a long established policy, as previously referenced above. Much of the Division's prior discussions on the issue of "public need" dealt with direct and indirect matters concerning competition with existing licenses (albeit with respect to SBDs who intended to wholesale, focus was given to what new products they would be distributing which were not currently available from existing distributors [i.e., exotic and/or ethnic beers]).

Canvassing our bulletins reveals that no decisions regarding SBDs have been published since the time that this industry was deregulated in New Jersey (i.e., mid-1980). Cf., IMO Bensel to Erickson, Bulletin 2391, Item #2 (March 27, 1980) As a result, I am not certain that the "public need" standard as it was once utilized, retains the same cachet and credentials in this current deregulated industry. Nevertheless, I have recognized that in areas which are highly over licensed (in comparison to the number of licenses authorized under the population limitation provision [N.J.S.A. 33:1-12.14]), the siting of an additional SBD license may be unsuitable. As a result, I recently denied the transfer of an existing SBD license, which was to be utilized in a retail capacity only, into Jersey City, which our records indicate has 255 retail consumption licenses (but would otherwise be authorized only 76 such licenses) and it also has 115 retail distribution licenses, albeit would only be authorized 30 under the population limitation statute. In Re FTD Soda and Beer Outlet, OAL DKT. #s ABC 7419-93 and 1938-93 (On Remand), (Lic. # 3402-19-005-001 (April 22, 1994).

While there is testimony in the present case that there are six licenses in existence in a two to three mile area of this SBD location; no evidence was offered as to what the authorized number of licenses would be under the statute in consideration of the area's population. In any case, this area does not seem to be so severely over licensed as, for example, Jersey City's is, and thus, I believe that the competitive market should be given the opportunity to determine whether or not a need exists for this license.

In like respect, I find nothing in the record which would support a finding that the location of this license would be contrary to the public interest. As a result, I find that the applicant has met its burden of persuasion regarding these two standards.

(3) SUBSTANCE OF OBJECTIONS TO THE ISSUANCE OF THIS LICENSE:

A. Testimony and Evidence:

The objector testified that since the applicant will be selling warm domestic beers (i.e., Budweiser, Miller, Coors, etc.) at retail, he will be in direct competition with already existing license holders including the objectors. Mr. Danski stated that half of his sales are of beer (both warm and cold) and that he often advertises warm beer specials. He felt that even a small decrease in his sales of warm beer would hurt his business and require him to lay off one person.

The objector was also concerned of the applicant's ability to sell non-alcoholic beverages at retail prices which were cheaper than what the objector would pay at wholesale. For example, the objector stated that the applicant was advertising Snapple, at retail, at $12.69 a case, while he had to spend over $13. a case at wholesale. The objector's attorney argued that the applicant's ability to sell non-alcoholic beverages at "loss leader" prices put his clients at a competitive disadvantage, and that persons who visited the applicant's store to purchase such non-alcoholic beverages would naturally then purchase their warm beer from him also.

A third objection raised was to the applicant's use of drive in carports, which would enable the applicant to conceal his sales activities and thereby create the potential to sell chilled beer

beyond the scope of its SBD license. The objector indicated that he was concerned that such unlawful activity was taking place at the other SBD in the area.

The attorney for the objector also raised the issue of what products besides warm malt alcoholic beverages [and chilled in containers of at least 7.75 fluid gallons] and non-alcoholic beverages could be sold by an SBD license. Specifically, he argued that since that privilege states that this license shall not be issued for a premises on which any retail business other than the sales of malt alcoholic beverages and non alcoholic beverages is carried on, the SBD could not sell ice, ice containers, beer taps nor potato chips and snacks.

The objector concluded by stating his opinion that it was not realistic to believe that the applicant would be able to sell exotic and/or ethnic beers as a significant portion of its business. Rather, the applicant would sell domestic beers and that such sales would detract from the objector's business. He stated that because Lakewood was trying to upgrade its downtown area, retail licensees were forced to the outskirts of town. That was why there were so many in the fringe area, and the addition of this SBD would just increase the concentration of retail licensees.

In response, the applicant testified that while he would sell domestic warm beer products, he did not think his warm beer sales would be a significant part of his business. Rather, he believed his non beer beverages, especially Snapple, for which he said he was a sub-distributor, would be the major portion of his business. He said his advertised price of $12.69 a case was only a grand opening special, and that he would raise or lower his prices in the future dependent upon his costs of the products. In fact, he hoped to sell his non alcoholic beverages to the existing retail licensees and would attempt to give them a very good deal on the prices. Additionally, he testified that he had been unable to negotiate with suppliers of exotic and/or ethnic beers because he did not have a distributors license. Once he possessed this license he intended to obtain the distribution rights to such currently non-available beers and he would also wholesale them to other retailers in the area.

The applicant acknowledged that his premises contained six drive in bays in which purchasers could pull their cars in and have product loaded into their vehicles. He specifically avered that he would not sell chilled beer in small quantities in violation of his license. He stated he would not risk his business by such

violations and he welcomed any competitor licensees to stop in and check for themselves. He felt that his impact on the warm beer sales of his competitors would be minimal. His attorney further responded that the selling of cold kegs of beer, as well as the use of a car port, was permitted with an SBD license.

B. Discussion and Analysis:

This Division has consistently held that objections of retail licensees to SBD licenses are of limited weight since, obviously, they are registered for the sole purpose of preserving their own economic status. Re Jiannantino, Bulletin 1246, Item 9 (September 9, 1958). In the present case, most of the objections appeared to stem from purely competitive concerns. As noted, those self interest type of concerns have historically been discounted by this Division and same have even less credence now that this industry has been deregulated. Further, these objections are generally of little value in assessing "public need" and "public interest."

With respect to the concerns of this SBD being able to sell ice, ice coolers, beer taps, and potato chips, it is clear that such matters are beyond the purview of this type of license's privilege. Opinion Letter, Bulletin 2421, Item #10 (September 16, 1981). If the applicant wishes to sell such products it must do so from an area completely distinct and apart from its licensed premises, which can be reached from an entranceway apart from the licensed premises, so that purchasers can enter and exit same without transversing any portion of the licensed premises. Additionally, there can be no entranceways available to its customers which connect the licensed premises with the unlicensed premises. Since this was an articulated concern of the objectors and because the applicant's position on this issue was unclear, I shall herewith impose a special condition which shall require the applicant, should it wish to engage in non-beverage sales, to first submit a representative sketch of its premises which clearly evidences that the sales area of any non beverage materials meets the concerns articulated above. It shall not sell any such non beverage products until such sketch has been submitted, reviewed and approved by appropriate Division staff.

With respect to the drive-in aspects of this premises, we have previously prohibited "drive-up windows" or "curb service" by retail licensees. ABC Retailers Handbook, "Drive In Window Sales," p.32. (1994). I have recently expressed my concern with

such types of operations for reasons of public policy. IMO FTD Soda and Beer, Inc., supra. The sensitivity of the relationship between alcoholic beverages and motor vehicle operations is such that this may not be a prudent practice, and, left unconstrained, could lead to sales without the licensee having the opportunity to visually observe patrons to ascertain whether the patrons are of legal age to purchase alcoholic beverages or are actually or apparently intoxicated. Opinion Letter: Retail Licensees - "Drive-In' Liquor Store Disapproved, Bulletin 1031, Item #3 (September 1, 1954).

While I am cognizant that the Division has, under prior Directors, issued SBD licenses to premises which have drive-in facilities, I am concerned with the continuation of this practice. In order to address my concerns I shall impose a special condition upon this license which will require that any purchasers of alcoholic beverages must, prior to making such purchases, completely exit their vehicle in order for the licensee and its employees to visually observe their appearance for purposes of ensuring they are of age and are not apparently intoxicated. I shall also require that each drive-bay must contain a conspicuously posted large sign advising that purchasers of alcoholic beverages must completely exit their vehicles prior to engaging in such sales.

In concluding my discussion of this issue, I also note that I am concerned that this configuration reduces the ability of interested persons to monitor the sales activities of the license to ensure only permitted beverages in required sizes are being sold. I therefore will hold the applicant to his word that he shall make the operation of his premises reasonably available to inspection by his competitors to address this concern. Any problems in this regard should immediately be brought to the attention of this Division's Enforcement Bureau staff.

(4) CONCLUSIONS AND ORDERS:

It is well settled that the Director of this Division has the discretionary authority to grant or deny the issuance, renewal or transfer of SBD licenses, based upon public need and necessity, and the good faith of the applicant. Re: Mystic, Bulletin 1833, Item #3 (November 20, 1968). The applicant herein has met its burden of proof, while the objectors have not. The within Order shall grant this application subject to the hereafter enumerated special conditions.

Accordingly, it is on this day of July, 1994,

ORDERED that the objections to the said application for a State Beverage Distributors License be and are hereby dismissed; and it is further

ORDERED that the said application be and is hereby granted in accordance with the application filed and fees paid, such license be and is hereby subject to the following special conditions:

1. The licensee must submit a copy of the application it filed with the BATF for a Federal Basic Permit.

2. If the applicant wishes to sell non beverage products it must do so from an area completely distinct and apart from its licensed premises, which can be reached from an entranceway apart from the licensed premises, so that purchasers can enter and exit same without transversing any portion of the licensed premises. Additionally, there can be no entrance ways available to its customers which connect the licensed premises with the unlicensed premises. The applicant therefore is required, if it wishes to engage in non-beverage sales, to first submit a representative sketch of its premises which clearly evidences that the sales area of any non beverage materials meets the concerns articulated above. It shall not sell any such non beverage products until such sketch has been submitted, reviewed and approved by appropriate Division staff.

3. The applicant must require any purchasers of alcoholic beverages, prior to making such purchases, completely exit their vehicle in order for the licensee and its employees to visually observe their appearance for purposes of ensuring they are of age and are not actually or apparently intoxicated. It must also conspicuously post in each drive-bay a large sign advising purchasers of alcoholic beverages that they must completely exit their vehicles prior to engaging in such sales.

JOHN G. HOLL
ACTING DIRECTOR

JGH:GG:bhs

3. EXPLANATION OF THE REQUIREMENTS FOR FILING AN APPEAL WITH THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL.

The Division encourages all licensees to seek advice from competent private legal counsel when filing an appeal to protect their legal rights, but also recognizes that there are situations when this is not feasible and the licensee will have to file an appeal pro-se.; sets out the procedural guidelines which must be followed in filing the appeal, which include: 1.) a "Notice and Petition of Appeal" which must be signed by the licensee; 2.) an affidavit of service that a copy of the Notice and Petition of Appeal has been served upon the local issuing authority; 3.) a $100.00 filing fee; and 4.) a copy of the resolution of the issuing authority which sets forth the action being appealed.

PROCEDURE: FILING AN APPEAL WITH THE ABC

Please be advised that in order to file and perfect an appeal, you should refer to N.J.A.C. 13:2-17.1, et seq. Where valuable legal rights are involved, we suggest you seek advice from competent private legal counsel.

Procedurally, in order to file an appeal, you must file three items:

1. A "NOTICE AND PETITION OF APPEAL" which:

   a. Fully identifies the parties to appeal, for example, to include:

   For the Licensee:
   (1) License's Proper Name & Trade Name
   (2) Complete Address (& Phone Number where you can be reached)
   (3) Complete License Number

   For the Issuing Authority:
   Full Name and Address and Telephone Number

   For Objector/Appellants (if any)
   Full Name, Address and Telephone Number of Principal Objectors.

b. Describes the proceedings below (the subject matter of the appeal);

c. Indicates the date of and action being appealed.

d. Advises of the grounds of the appeal; for example, action was arbitrary and capricious, etc.

f. States the relief (both interim and final) requested.

For example, interim relief might be a Stay of Suspension (for disciplinary actions) or an Order extending the prior license into the new term (for denial of renewals)

Similarly, final relief might request reversal of findings of guilt and penalty imposed by local issuing authority.

NOTE: that this document must be signed by either the licensee (sole proprietor, general partner, president or vice-president) or an attorney who represents the licensee in the appeal. We cannot accept an appeal which is not filed by one of the above parties, unless so directed by a court of competent jurisdiction.

2. We require an **AFFIDAVIT OF SERVICE** that a copy of the notice petition of appeal has been served upon the local issuing authority (either personally or by way of mail); and

3. We require a **$100.00 FILING FEE.**

In addition to the above, we request a copy of the **RESOLUTION** of the issuing authority which sets forth the action of which the licensee is appealing.

GERALD A. GRIFFIN
Deputy Attorney General
In Charge
Regulatory Bureau

4. OPINION LETTER - "FREE GOODS" OR "PRODUCT DISCOUNT" INDUCEMENTS CONTINUE TO BE PROHIBITED. INDUSTRY IMPLEMENTATION OF UNIFORM CURRENT PRICE LIST REQUESTED.

An opinion letter advising that wholesalers and manufacturers are prohibited from offering sales inducements involving "free goods" or "product discounts" in sales of alcoholic beverages to retailers; absent adoption of the current price list by the industry which contains a "per unit cost" and a "per bottle cost" for each level and type of discount such promotions are misleading to retailers; the alcoholic beverage industry is requested to provide recommendations to the Division regarding implementation of a uniform current price list.

June 29, 1994

William J. Mac Knight, Esq.
Schreiber, Simmons, Mac Knight & Tweedy
9 West 57th Street
New York, New York 10019

RE: FEDWAY ASSOCIATES, INC., REQUEST FOR OPINION - OFFERING QUANTITY DISCOUNTS IN KIND TO RETAIL LICENSEES BY NEW JERSEY WHOLESALERS

Dear Mr. Mac Knight:

Thank you for your letter dated March 25, 1993, concerning the above-referenced matter. As you know, this matter has been the subject of continuing consideration by this Division since that time.

You have requested permission on behalf of Fedway Associates, Inc., a business licensed to sell alcoholic beverages at wholesale in the State of New Jersey, to conduct promotions wherein quantity discounts in kind are offered to retail licensees. These types of discounts are also commonly known as "free goods" and "product discounts". The example noted in your letter, "buy ten cases of brand x and receive one case of brand x without additional charge" or "buy ten cases of brand x and get one case of brand x free", describe the basic promotion in question.

You argue that State statute, specifically, N.J.S.A. 33:1-90, contemplates the use of such "free goods and discounts" in the industry and that while N.J.S.A. 33:1-93(a) gives the Director the authority to promulgate regulations concerning various matters, including "maximum discounts, rebates, free goods, allowances and other inducements to retailers", the New Jersey Legislature did not intend for the Director to prohibit any such promotions. Furthermore, you advance the proposition that the Legislature specifically permits "free goods" type promotions in N.J.S.A. 33:1-90.

Initially, I must express my disagreement with the proposition that N.J.S.A. 33:1-90 specifically permits "free goods" type promotions. It is apparent from the wording of that statute that the legislative intent was to require that any type of promotion or inducement offered by manufacturers, wholesalers or other persons privileged to sell to retailers must be offered on a non-discriminatory basis to all retailers. Simply because "free goods" are mentioned as a possible inducement does not lead to the conclusion that "free goods" are specifically permitted or that the Division is not permitted to promulgate rules or regulations that would prohibit (or restrict) the use of "free goods" promotions. In fact, N.J.S.A. 33:1-93 gives the Director broad authority to regulate any inducements given to retailers by manufacturers and wholesalers to the extent necessary to fulfill the restrictions embodied in the Alcoholic Beverage Control Act.

From a historical perspective, I note that the Division's concern with "free goods" promotions coincided with de-regulation of minimum price control in New Jersey. De-regulation became effective in New Jersey on March 11, 1980 when the United States Supreme Court declined to order, in the matter of Heir, et al. v. Degnan, et al., 82 N.J. 109 (1980), a further stay of the effect of de-regulation. Former Director Joseph H. Lerner published ABC Bulletin 2342 on March 11, 1980 which provided guidance to alcoholic beverage licensees in significant areas impacted by de-regulation in order to assist them in complying with the new regulations. Item #3 of ABC Bulletin 2342 provides, in part, that:

> "The use of the term "free goods" or "free merchandise" is disapproved. A wholesaler may not sell below "cost" nor provide free merchandise, except for authorized samples. N.J.S.A. 13:2-24.8. Thus, the suggestion that one case is "free" upon the purchase of products upon specific terms is a misleading reference to a quantity discount contrary to N.J.A.C. 13:2-24.11(a)(1)."

N.J.A.C. 13:2-24.10(a)(1), formerly N.J.A.C. 13:2-24.11(a)(1) provides as follows:

> "No manufacturer, importer, registrant, wholesaler, distributor or retailer shall included in any advertising material or in any advertisement, directly or indirectly, any statement, illustration, design, device, name, symbol, sign or representation that: . . . is false or misleading. . ."

It is apparent that former Director Lerner's concerns were that the information provided on the new Current Price List provided by wholesalers would otherwise be misleading to retailers without such restrictions. Under former Director Lerner's reasoning, to suggest that a product is being received "free" results in a misleading statement that was contrary to the prohibition on licensees selling below "cost".

Former Director Catherine Costa, in a Notice to all wholesalers dated November 1, 1991, noted that many current price list filings by wholesalers were at that time reflecting a quantity discount in terms or language which were effectively synonyms of "free goods" such as, "one case no charge on five cases" or "buy ten cases, receive eleven cases". Other New Jersey licensed wholesalers were alleged to be submitting current price list filings which were directly offering "free goods" on quantity purchases in contravention of ABC Bulletin 2342, Item #3. Former Director Costa wrote that filings that are synonymous with a "free goods" promotion, or are the functional equivalent of a "free goods" promotion, are equally similar in their ability to mislead a retailer into assuming that additional cases were being provided without charge. As a result there would be no "cost" base for such "free goods" as mandated by N.J.A.C. 13:2-24.8. Accordingly, former Director Costa prohibited the use of any such type of product discounts and she placed the industry on notice that quantity discounts must be reflected on the current price list by the use of either a numerical percentage reduction off the single case price for each case at each stated quantity level, or by specifically identifying the dollar case cost for each case at each stated quantity level. A final alternative was to specifically identify the dollar or cents reduction allowed off the single case price for each case at the stated quantity level.

The concerns expressed by former Directors Lerner and Costa were that utilization of promotions involving "product discounts" or "free goods" by wholesalers can easily be misleading to retailers who may review current price list filings submitted by

wholesalers. Nevertheless, these concerns would be vitiated upon adoption by the industry of a uniform Current Price List which contains a "per unit cost" and "per bottle cost", for each level and type of discount as well as the brand registration number for each product. A uniform Current Price List would alleviate much of our concerns.

I welcome recommendations from the alcoholic beverage industry regarding implementation of a uniform Current Price List that would satisfy the Division's concerns, as noted above. However, until such a uniform Current Price List can be proposed and fully adopted throughout the industry, the restrictions noted in former Director Costa's Notice and ABC Bulletin 2342, Item #3 will remain in effect.

Accordingly, I cannot, at this time, relax the Division's policy with respect to promotions involving "free goods." However, I understand that the alcoholic beverage wholesale industry is developing a proposed uniform Current Price List to be utilized by all wholesalers. While I recognize that there may be some need for differences between Current Prices Lists filed by beer wholesalers from those filed by wine and spirits wholesalers, these differences are minimal and can be accommodated. The need for uniform Current Price List filing has long been apparent to this Division. I note that in the absence of industry action in developing a uniform Current Price List, the Division may be required to promulgate regulations providing for uniform Current Price List filings.

I look forward to hearing from you as well as other members of the industry concerning this matter.

Very truly yours,

John G. Holl
Acting Director

JGH/DNB/tld
cc: Robert J. Pinard, Executive Director
Beer Wholesalers Association of New Jersey
cc: Charles Sapienza, Executive Director
NJ Wine & Spirits Wholesalers Association

5. NOTICE TO ALL HOLDERS OF NEW JERSEY CLUB LICENSES REGARDING "CASINO NIGHT", "MONTE CARLO NIGHT" AND "LAS VEGAS NIGHT" PROHIBITED FUND RAISING ACTIVITIES.

Notice advising licensees that activities such as "Monte Carlo Night", "Las Vegas Night", "Night at the Races" and "Casino Night" contain elements of gambling and therefore are not permitted at any event at a premises holding an Alcoholic Beverage Control permit or license. In addition, the devices required to conduct such games are themselves prohibited from being present upon a licensed premises; violations can result in the suspension of a liquor license.

May 3, 1994

NOTICE TO ALL HOLDERS OF NEW JERSEY CLUB LIQUOR LICENSES RELATIVE TO "CASINO NIGHT", "MONTE CARLO NIGHT" AND "LAS VEGAS NIGHT" FUND RAISING ACTIVITY

The New Jersey Division of Alcoholic Beverage Control has advised that more and more holders of New Jersey club liquor licenses are engaging in "Casino Night", "Monte Carlo Night" or "Las Vegas Night" types of fund raising events for charitable purposes.

Initially, you should be advised that except for a few restricted situations, gambling and gambling type activities of any kind are not permitted at any event at a premises holding an ABC permit or license. The few restricted situations allowed by the ABC are those games of chance such as bingo, raffles and lotteries that have been approved by the New Jersey Legalized Games of Chance Commission (N.J.A.C. 13:22-23.7(b). That agency's headquarters are in Newark, New Jersey and may be contacted by telephone at (201)648-2710. However, notwithstanding any approval a licensee may receive from the Legalized Games of Chance Commission, alcoholic beverage activity may not occur while such licensed bingo games, etc., are in progress.(N.J.A.C. 13:2-23.7).

The Division of Alcoholic Beverage Control, which is a Division within the New Jersey Attorney General's Office, advises

and reiterates that fund raising activity such as "Monte Carlo Night", "Las Vegas Night", "Night at the Races", and "Casino Night", contain elements of gambling. These include the fact that chance is a determining factor in a player's success at such games, and that a player is required to pay an admission fee or other valuable consideration in the hope of winning money, prizes or other valuable things. Additionally, the devices required to conduct such games are themselves prohibited from being present upon a licensed premises, (N.J.A.C. 13:22-23.7(a)).

In light of the above mentioned information, the Division of Alcoholic Beverage Control advises not to engage in any "Casino Night", "Monte Carlo Night", "Night at the Races" or "Las Vegas Night" types of activities for fund raising or charitable purposes.

This warning is provided as a courtesy in hopes that club licensees in the State of New Jersey will discontinue these types of fund raising activities. Violations can result in the suspension of a liquor license.

Very truly yours,

RICHARD T. CARLEY
ASSISTANT ATTORNEY GENERAL
ENFORCEMENT BUREAU

By:
Jose' Rodriguez
Deputy Attorney General

RTC:JR:sb

6. APPELLATE DECISION - UNO CONCEPTS OF SOUTH PLAINFIELD, INC., V. MAYOR AND COUNCIL OF THE BOROUGH OF SOUTH PLAINFIELD - ORDER AFFIRMING ACTION OF RESPONDENT BUT MODIFYING PENALTY, ACCEPTANCE OF A MONETARY OFFER OF $1,200. IN LIEU OF SUSPENSION OF LICENSE FOR THREE DAYS.

The license was suspended for three (3) days by the local issuing authority for selling an delivering an alcoholic beverage to a person under the age of twenty-one (21). The licensee appealed to the Director and requested the opportunity to pay a

monetary fine in lieu of suspension. The Director, in applying the Division's previous policy with regard to such matters, found insufficient grounds on which to deny the application and allowed the payment of $1,200.00 in lieu of the three (3) day suspension. The Director also put all licensees on notice of the new Division policy for such cases in which some portion of the municipally imposed suspension will be required to be served in situations where it is determined that the licensee, or its employees, knew or should have known it was serving alcoholic beverages to an underage person.

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

APPEAL NO. 6118

UNO CONCEPTS OF SOUTH PLAINFIELD, INC., LICENSE NO. 1222-33-003-004 APPELLANT, VS. MAYOR AND COUNCIL OF THE BOROUGH OF SOUTH PLAINFIELD, RESPONDENTS.	ORDER AFFIRMING ACTION OF RESPONDENT BUT MODIFYING PENALTY, ACCEPTANCE OF A MONETARY OFFER OF $1200 IN LIEU OF SUSPENSION OF LICENSE FOR THREE DAYS MUN. REV. NO. 9382

Lawrence J. Freundlich, Esq., Attorney for Appellant
(Freundlich & Reisen, Attorneys at Law)

Patrick J. Diegnan, Esq., Attorney for Respondent

BY THE DIRECTOR:

Appellant, Uno Concepts of South Plainfield, appeals from the action of the Mayor and Council of the Borough of South Plainfield which, by Resolution dated December 16, 1993, suspended Appellant's license for 3 days. It should be noted that it was originally a

five (5) day suspension, but two (2) days of the suspension were remitted in exchange for Appellant's guilty plea and other mitigating circumstances. The Appellant had been charged with the selling and delivering of an alcoholic beverage to a person under the age of 21 years in violation of N.J.S.A. 33:1-77.

Upon the filing of the Appeal, an Order was entered, dated January 11, 1994, staying the suspension pending determination of the Appeal.

The file reveals that the essential facts appear to be that on July 2, 1993 a South Plainfield Police Officer observed two (2) females entering Appellants restaurant. It was his opinion that the two (2) females looked young so he "ran" a check on the license plate of the car they drove up in. The check revealed that the owner of the car was two (2) months under the age of twenty-one (21). The officer then proceeded into the restaurant.

Meanwhile, inside Appellant's restaurant the under-age female went to the back to make a phone call while her friend sat at a table near the bar with a male friend who was already there and had a partially consumed drink in front of him. The female friend ordered two (2) beers and the bartender, Mr. Valenzano, delivered the beers to the female and male sitting at the table. (He did not card the female at the table because he had carded her previously and knew her to be over the the age of twenty-one (21)). After returning to the bar, Mr. Valenzano noticed that there was another female, the under-age female, sitting at the table and that she had a beer in front of her and a policeman beside her who was apparently checking her identification.

Mr. Valenzano was charged and found guilty in Municipal Court of serving a person under the legal age and fined accordingly. The Mayor and Council of the Borough of South Plainfield then suspended Appellant's license for selling and delivering an alcoholic beverage to a person under the age of twenty-one (21).

Appellant filed its appeal and made an application requesting the opportunity to pay a monetary penalty, in compromise, in lieu of license suspension pursuant to N.J.S.A. 33:1-31. The Respondents, Mayor and Council of the Borough of South Plainfield, through their attorney, have opposed this application.

The Division's previous policy concerning such requests was that for first offenses, with certain exceptions for certain very

serious offenses, a request by a licensee to pay a monetary penalty in lieu of all or part of the suspension would be considered. See ABC Bulletin 2443, Item #6; ABC Bulletin 2453, Item #2. While this Division seriously considers the issuing authority's position in such matters, the final determination is in the sole discretion of the Director of the Division. N.J.S.A. 33:1-31. Where the only issue was whether or not the Director should accept the monetary penalty in lieu of a suspension, same was not considered a "contested case", and the Director would generally make his determination based upon the documents in the file, rather than forwarding same for a hearing.

I indicate that the above was the previous policy of this Division because I am in the process of articulating a revision to this policy and thus the Division will be handling future cases in a different manner. This change is being made to further underscore the problem of underage drinking and that the sale of alcoholic beverages by licensees to minors is a serious problem and that violators will be dealt with accordingly. Therefore, in the future, when a licensee applies for permission to pay a monetary fine in lieu of a municipally imposed suspension, some portion of the municipally imposed suspension will be required to be served in situations where it is determined that the licensee, or its employees, knew or should have known it was serving alcoholic beverages to an underage person. The burden will be on the licensee to show that the service was not the result of this intentional or reckless type of misconduct so that no suspension time should be served and that the entire suspension should be converted to a monetary penalty by this Division. A more detailed explanation of the new policy of this Division with respect to this issue will be the subject of an upcoming ABC Bulletin item.

With this in mind, I note that Respondents, Mayor and Council of the Borough of South Plainfield were advised of the previous policy in a letter from this Division and were given an opportunity to provide this Division with their factual reasons for opposing Appellant's application. The Town's response, while stating that it feels strongly that a suspension is justified in this matter, fails to set forth a factual basis on which to deviate from the presumption of allowing a "first offender" to pay a monetary penalty in lieu of suspension. The basis for the Town's opposition to Appellant's application is that the bartender pled guilty to the offense; that Appellant did not have an adequate training program in place; and that a monetary penalty in lieu of suspension is not a proper penalty in this situation. Notwithstanding this response, I find nothing in the facts before me which would indicate that

this licensee, or its employee, knowingly served a person under the legal age nor that it should have known that the alcohol served would be consumed by a person under the legal age. Moreover, without additional facts concerning either the offense or the licensee (i.e., proof of prior offenses, and/or provision of aggravating facts not apparent in the record) there are insufficient grounds on which to disregard the Division's previous policy and thus deny the application, by Appellant, to pay a monetary fine in lieu of the suspension of license for three (3) days.

Having favorably considered the request, I shall accept a monetary penalty of $1,200.00 in compromise, in lieu of the three (3) days license suspension. The monetary penalty must be paid by the Appellant within fifteen (15) days from the date of this Order. The within Order shall reflect the disposition of the matter as indicated above.

Accordingly, it is on this day of July, 1994,

ORDERED that the action of the Mayor and Council of the Borough of South Plainfield be and the same is hereby affirmed subject to the modification of penalty from a three (3) day license suspension to the acceptance of a monetary penalty of $1,200.00; and, as modified, the Appeal be and is hereby dismissed.

ORDERED that the Appellant has fifteen (15) days from the date of this Order in which to tender the partial offer (by Bank or Certified Check, lawyers check or Money Order made out to: "NJ Div. of ABC"). If such payment is not received within 15 days of this Order, the entire suspension shall be ordered into effect without further notice.

JOHN G. HOLL
ACTING DIRECTOR

JGH:LSR:bhs

7. ORDER DENYING APPELLANT'S REQUEST FOR AD INTERIM RELIEF PENDING FINAL DETERMINATION OF APPEAL OF DENIAL FOR RENEWAL OF LICENSE FOR 1994-1995 TERM. (RISKY BUSINESS, INC. V. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF GARFIELD).

Licensee filed license renewal application for the 1994-1995 license term with the City of Garfield; the Municipal Board of Alcoholic Beverage Control for the City of Garfield adopted resolution denying renewal of license. The basis for denial was the pending Division initiated administrative and criminal charges pertaining to Controlled Dangerous Substances violations on the licensed premises, and also on an increase in the amount of citizen opposition to the renewal. The licensee appealed and the Director issued an Order to Show Cause to the municipality as to why the licensee should not be granted ad interim relief, allowing the licensed premises to remain open pending final appeal of the municipal resolution denying renewal. A hearing was held, following which the Director ordered that the licensee's request for ad interim relief be denied.

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

APPEAL NO. 6719

RISKY BUSINESS, INC. LICENSE NO. 0221-33-022-005 APPELLANT, VS. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF GARFIELD RESPONDENT.	ORDER DENYING APPELLANT'S REQUEST FOR AD INTERIM RELIEF PENDING FINAL DETERMINATION OF APPEAL OF DENIAL FOR RENEWAL OF LICENSE FOR 1994-95 TERM

VINCENT J. D'ELIA, Esq., Attorney for Appellant

FRANK PUZIO, Esq., Attorney for Respondent

ANTHONY J. GOLOWSKI, Deputy Attorney General, appearing on behalf of the Division of Alcoholic Beverage Control, Enforcement Bureau

BY THE DIRECTOR:

This matter commenced before the Division of Alcoholic Beverage Control (hereinafter Division) when the Appellant, Risky Business, Inc., t/a Risky Business Cafe by its attorney, Vincent J. D'Elia, filed a Notice of Appeal and Application for Emergent Relief, dated July 5, 1994. The Appellant is seeking Ad Interim Relief from the action of the Municipal Board of Alcoholic Beverage Control of the City of Garfield which, by Resolution dated June 28, 1994, denied Appellants application for renewal of their Plenary Retail Consumption License for the 1994-95 license term.

A hearing was held on July 18, 1994 before Acting Director John G. Holl, at which the Respondent and Enforcement Bureau of this Division were directed to Show Cause why the license should not be extended pending final determination of the appeal of the denial of the renewal of Appellant's license for the 1994-95 term. Final arguments were presented to the Acting Director by all parties on July 21, 1994.

The statute which sets forth the standard in matters of this type is N.J.S.A. 33:1-22. The pertinent provision of this statute provides:

> Where an appeal is taken from the denial of an application for a renewal of a license, the director may, in his discretion, issue an order upon the respondent issuing authority to show cause why the term of the license should not be extended pending the determination of the appeal, together with ad interim relief extending the term of the license pending the return of the order to show cause. If it shall appear upon the return of the order to show cause that the action of the respondent issuing authority is prima facie erroneous and that irreparable injury to the appellant would otherwise result, the director may, subject to conditions as he may impose, order that the term of the license be extended pending a final determination of the appeal.

The applicable regulation (N.J.A.C. 13:2-17.9) regarding the extension of license terms, provides in its entirety:

> Upon the filing of an appeal from the denial of an application for renewal of a license, or the failure to act upon such renewal application within the time set forth in N.J.A.C. 13:2-2.10(b), the Director may, at the time of the filing of the appeal, in his or her discretion, issue an order upon respondent issuing authority to show cause why the term of the license should not be extended pending the determination of the appeal, together with ad interim relief extending the license pending the return of the order to show cause. If it shall appear that a substantial question of fact or law has been raised, and that irreparable injury to the appellant would otherwise result, the extension of license, subject to such conditions as may be imposed, shall be continued pending a final determination of the appeal, or the expiration of the license term, whichever comes sooner.

A reading of the above provides ample direction in conducting a review of the evidence deduced at the hearing. It is clear, for ad interim relief to be granted, the Appellant must exhibit that the action of the Respondent was prima facie erroneous and that irreparable injury would otherwise result. That is, Appellant must raise a substantial question of law or fact in order to meet its burden to justify the relief sought from this Division.

Upon careful consideration of the entire record, and for the reasons noted below, I am convinced that the Appellant has failed to meet its burden of establishing that a substantial question of law or fact exists. Similarly, the Appellant has failed to show the required irreparable harm. As such, cause does not exist to stay the decision of the City of Garfield. Therefore, request for ad interim relief will not be granted.

At the hearing, the Appellant offered the testimony of the two licensees, Daniel Manoogian and Richard Krupinski (hereinafter Appellants). Respondent offered the testimony of Investigator Peter DeLisa of the Bergen County Narcotics Task Force and Frank Puzio, Esq., counsel for the City of Garfield.

Testimony of the licensees confirmed that the renewal of the Plenary Retail Consumption License of Risky Business, Inc. was denied by Respondent for the 1994-95 term. The denial was based upon Resolution No. ABC 94-11, dated June 28, 1994. The Resolution resulted from a hearing conducted by Respondent on June 20, 1994, and set forth the following reasons for denial:

1. Pending disciplinary charges brought against the licensee by the State ABC Board.

2. Strong likelihood of revocation of this license by the State ABC Board.

3. Objection of neighbors heard by the local ABC Board on June 20, 1994.

4. Pending criminal charges against the individual licensee brought by the State of New Jersey.

The Resolution and moving papers indicate that the subject license was charged with two (2) specific violations of the pertinent administrative regulations. The charges allege that on April 12, 1993 and May 19, 1993 the Appellant did allow, permit, or suffer in or upon the licensed premises, unlawful possession or unlawful activity pertaining to narcotics or other drugs or other controlled dangerous substances, (CDS) in violation of N.J.A.C. 13:2-23.5(b).

Testimony elicited from Mr. Manoogian and Mr. Krupinski confirmed that both were the subject of pending criminal charges alleging violation of criminal statutes governing the use, possession and sale of CDS. The foundation for these charges are the same underlying facts which constitute the basis for the administrative charges noted above.

Although both licensees testified that they had no knowledge of, or involvement with, any incidents on the licensed premises dealing with CDS, their admissions regarding knowledge of persons involved with such activity is relevant to this inquiry. Of particular significance is Mr. Manoogian's direct testimony, wherein he confirms a professional and personal relationship with a Michael Albert, subject of criminal charges arising out of the factual circumstances which form, in part, the basis for denial of the renewal of the Appellant's license. Testimony from Mr. Manoogian and Mr. Krupinski confirmed that Mr. Albert was, at one time, an employee of Risky Business, Inc., as well as a regular patron. Mr. Manoogian also testified that Mr. Albert was permitted access to areas of the licensed premises normally restricted to the licensees and their employees.

Direct testimony of the Mr. Manoogian and Mr. Krupinski also confirmed that a listed employee of Risky Business, Inc., Lawrence Mason, was well known to the license holders and was a regular

patron of the bar, as well as an employee at various times. This is significant, as subsequent testimony of Investigator DeLisa confirms the arrest of Mr. Mason for charges arising out of the incidents involving CDS at Risky Business, Inc.

As to the issue of whether irreparable harm would result if ad interim relief is not granted, the testimony before me is limited and does not permit a finding that both licensees will suffer to the extent required by pertinent law. Mr. Manoogian testified that he is not working at the present time, but offers no specific proofs as to the "injuries" he will suffer if relief is not granted. Mr. Krupinski testified that he is working part-time, and he joins with his partner in offering no proofs as to irreparable harm. No evidence was submitted as to the harm suffered by other employees of Risky Business, Inc.

Investigator DeLisa testified in support of the Respondent and confirmed three incidents at the Risky Business Cafe, where he was involved, in an undercover capacity, as a buyer of CDS from Michael Albert on the licensed premises. Investigator DeLisa testified that he met with Mr. Albert at the Risky Business Cafe on three separate dates to purchase various amounts of cocaine. While testifying about matters concerning the three dates, DeLisa established that Mr. Albert was well known by both the Appellants and the patrons of the Risky Business Cafe. In addition, DeLisa also stated that Mr. Albert appeared to have free access to areas of the licensed premises which were normally restricted to the licensees and their employees.

Of particular significance is the incident which occurred on April 12, 1993. Investigator DeLisa testified that on such date he visited the Risky Business Cafe for the purpose of purchasing cocaine from Mr. Albert. DeLisa established, through his testimony, that the Appellants were in the presence of Mr. Albert while he was preparing cocaine for sale in the rear office of the Risky Business Cafe. In particular, DeLisa noted that he viewed Mr. Albert in the office of the licensed premises, in the presence of Mr. Manoogian and Mr. Krupinski, holding a scale which is commonly used to weigh cocaine. Investigator DeLisa further testified that when Mr. Manoogian exited the office where the cocaine allegedly was being weighed and packaged for sale, Mr. Manoogian was seen carrying a small cut straw similar to the type of paraphernalia commonly used to ingest cocaine. DeLisa also testified that through his training, education and experience as a police officer, Mr. Manoogian's appearance and mannerisms indicated that he had ingested cocaine while he was in the rear office with Mr. Albert.

On cross-examination by Mr. D'Elia, Esq., counsel for Appellant, Investigator DeLisa revealed that Mr. Manoogian is the subject of an on-going criminal investigation involving the the distribution of cocaine. Investigator DeLisa testified that numerous tips have been received from reliable informants, indicating that Mr. Manoogian is currently involved in the distribution of cocaine.

Investigator DeLisa's testimony corroborates Mr. Albert's "status" in the Risky Business Cafe as an employee/patron. Furthermore, the experience, education and professional training of Investigator DeLisa lend much support to his conclusion regarding the scale he observed being used by Mr. Albert in the presence of the Appellants.

Testimony was also offered by Investigator DeLisa indicating that Mr. Manoogian was on the licensed premises when a sale of cocaine was to occur on May 19, 1993. On this date, Investigator DeLisa again took part in an undercover narcotics sale at Risky Business, Inc. DeLisa testified that, while he was on the licensed premises on May 19, 1993, he heard Mr. Manoogian inform the bartender who was working at the time that Mr. Albert was going to bring some cocaine to the bar later that evening. Later that evening, DeLisa testified, in excess of 6 ounces of cocaine were purchased from Mr. Albert in an alley attached to the licensed premises. Immediately following the purchase on May 19, 1993, members of the Bergen County Narcotics Task Force and the Garfield City Police executed a search warrant on the Risky Business Cafe. DeLisa further testified that Mr. Manoogian and Mr. Krupinski were arrested along with Mr. Albert. Of particular importance is the testimony of Investigator DeLisa which revealed that one folded index card containing 0.20 grams of cocaine was found in the office of the Risky Business Cafe.

Based upon the evidence in this matter, it is clear that the City of Garfield has a legitimate concern regarding the unlawful activities that allegedly took place at the Risky Business Cafe. The concerns of the City of Garfield were, in part, established by Mr. Frank Puzio, Esq., counsel for the City of Garfield. Mr. Puzio introduced evidence purporting to be records of complaints against Risky Business, Inc. Without citing each specific record submitted, I admitted and have reviewed the evidence for the limited purpose of confirming that police reports were filed with respect to the Risky Business Cafe. Accordingly, I have given appropriate weight to the records in my role as trier-of-fact.

It is necessary to note the obligation of the City of Garfield in licensing matters. The primary responsibility of enforcement of laws pertaining to retail liquor licenses rests upon the municipality. Benedetti v. Trenton, 35 N.J. Super. 30 (App. Div. 1995); Rajah Liquors v. Div. of Alcoholic Bev. Control, 33 N.J. Super. 598 (App. Div. 1955).

In the area of licensing, as distinguished from disciplinary proceedings, the determinative consideration is the public interest in the creation or continuance of the licensed operation, not the fault or merit of the licensee. Blank v. Magnolia, 38, N.J. 384 (1962). In matters pertaining to licensing, the responsibility of a local issuing authority is "high", its discretion "wide" and its guide is "the public interest." Lubliner v. Paterson, 33 N.J. 428, 446 (1960). Thus, entirely apart from the Appellant's culpability for the above described drug involvement and transactions allegedly occurring at the Risky Business Cafe, the broad question posed before the City of Garfield on appellant's application for renewal was whether, in light of the surrounding circumstances and conditions, was it in the public interest for this bar to continue to operate.

The City of Garfield must act reasonably, in the best interests of the municipality and with due regard to fundamental fairness. It is basic that the action of the municipality must be reasonable in equating the rights of the licensee with the paramount rights of the public. Simonsen Inc. v. Asbury Park, Bulletin 2217, Item 1; Rajah Liquors v. Div. of Alcoholic Bev. Control, 33 N.J. Super. 598 (App. Div. 1955). The applicable legal principle pertinent to a determination of whether the municipality acted properly requires the burden of proof in all cases which involve discretionary matters where an applicant seeks a renewal of a license to fall upon the licensee to show manifest error or abuse of discretion. Downie v. Somerdale, 44 N.J. Super 84 (App. Div. 1957); Lyons Farms Tavern, Inc., 55 N.J. 292 (1970). To meet this burden, the licensee must establish that a substantial question of law or fact exists that shows the municipality's decision to be clearly erroneous.

Generally speaking, a "substantial question of law or fact" can be defined as "a 'close' question or one that very well could be decided the other way." United States v. Molt, 758 F.2d 1198, 1200 (7th Cir.1985); See also United States v. Giancola, 754 F.2d 898, 901 (11th Cir.1985); United States v. Randell, 761 F.2d 122, 125 (2d Cir.1985). Furthermore, a question may be deemed

substantial when the appellant's contention discloses a contested matter of right, involving some fair doubt and reasonable room for controversy, in matters of either fact or law. See Harrison v. Chamberlin, 271 U.S. 191, 194 (1925).

Based upon the documentary evidence and the testimony of the witnesses, it is clear that Appellant has failed to meet the required burden of showing a substantial question of law or fact to exist. The resolution of the issues presented in this case rests upon the evidence presented and the credibility of the witnesses. The choice of accepting or rejecting the testimony of witnesses rests with the trier of the facts, and a reasonable choice must be made. Freud v. Davis, 64 N.J. Super 242, 246 (App. Div. 1960).

As outlined earlier, Investigator DeLisa testified extensively as to the illegal narcotics activity involving the licensees and the licensed premises. His testimony confirmed that he visited the licensed premises for the purposes of purchasing cocaine, that he made three (3) such purchases, that the Appellants were present during the weighing and packaging of cocaine for sale, and that one of the Appellants used cocaine on the licensed premises.

Appellant did not refute the above testimony. Instead, counsel for Appellant attempted to discredit DeLisa's testimony by suggesting that from his position in the licensed premises it would have been difficult to observe the actions taking place in the back office of the licensed premises on April 12, 1994. DeLisa's testimony is consistent and is forthright in his description of the licensed premises and his operations. Investigator DeLisa is a professional law enforcement officer whose experience as an undercover narcotics agent lends credence to his ability to make reliable observations such as the one which occurred on the licensed premises on April 12, 1994.

As to the issue of credibility, the Appellant offered testimony that is telling on this issue. Mr. Manoogian, in response to direct examination by his counsel, testified he had never been arrested on any other criminal charges other than those pending against him arising out of this matter. Subsequent evidence (P-6) presented reveals that Mr. Manoogian was charged with criminal trespassing in the Borough of Hillsdale on November 18, 1992. Although the disposition of the arrest resulted in what appears to be a guilty finding for a violation of an ordinance, the lack of candor to the initial inquiry of his own counsel and subsequent cross-examination of Mr. Golowski on the issue detracts from his credibility.

While the City of Garfield is required to act reasonably in licensing matters, it is also necessary to note the obligations of the licensee. It is a well settled principle that a licensee must keep his place and his patronage under control and is responsible for conditions both outside and inside the premises. Galasso v. Bloomfield, Bulletin 1387, Item 1. It has long been held that narcotics activity on the licensed premises is an extremely vile and dangerous conduct which requires the most direct and immediate action to correct. Raydean, Inc. v. Morristown, Appeal No. 5940 (Div. of Alcoholic Bev. Control Aug. 12, 1992) (order imposing stay).

There are allegations of continuing narcotics activity on the licensed premises in conjunction with the arrests for narcotics possession and sale noted in the case at bar. At a minimum, it would appear that the Appellant was unresponsive and disregarded its duty to insure that the licensed premises remain drug free. The Appellant has ignored its duty and responsibility as a holder of an alcoholic beverage license. The evidence has revealed that there was no effort by the Appellant to keep the subject premises free of drug traffic.

I find that the conduct of Appellant has been clearly contrary to the public interest, creating an atmosphere of non-compliance with the laws and regulations regarding the sale of alcoholic beverages in this state. Therefore, I am satisfied that it would not be in the best interest of the public to allow the licensed premises to remain open pending disposition of the administrative charges which have been brought against Appellant.

In addition to the consideration regarding the public interest, (which is not dispositive of the issues before me) the Appellant has failed to establish a substantial question of law or fact which would support the issuance of a stay. Furthermore, the limited proofs offered as to irreparable harm do not provide a basis upon which I can conclude that relief should properly be granted. Therefore, it is incumbent upon me to deny the ad interim relief sought.

Accordingly it is on this day of July, 1994

ORDERED, that the Appellant's request for Ad Interim Relief from the action of the Municipal Board of Alcoholic Beverage Control of the City of Garfield, which denied Appellant's application for renewal of their Plenary Retail Consumption License No. 0221-33-022-005 for the 1994-95 license term, is hereby denied.

JOHN G. HOLL
ACTING DIRECTOR

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Publication of Bulletin 2464 Is Hereby Directed This
22nd Day of August, 1994

John G. Holl, Acting Director
Division of Alcoholic Beverage Control