STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 Commerce Drive Cranford, N.J. 07016

BULLETIN 2139 March 25, 1974

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BULLETIN 2139 March 25, 1974

1. COURT DECISIONS - BALZER'S DELICATESSEN, INC. v. TEANECK - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2972-72

BALZER'S DELICATESSEN, INC.,
t/a HERITAGE LIQUORS,

Appellant,

v.

TOWNSHIP COUNCIL OF THE TOWNSHIP OF TEANECK, and DIVISION OF ALCOHOLIC BEVERAGE CONTROL, DEPARTMENT OF LAW AND PUBLIC SAFETY OF THE STATE OF NEW JERSEY,

Respondent.

Argued February 4, 1974 - Decided February 19, 1974.

Before Judges Leonard, Allcorn and Crahay.

On appeal from Conclusions and Order of the Division of Alcoholic Bverage Control, Department of Law and Public Safety, State of New Jersey.

Mr. Samuel J. Davidson argued the cause for appellant, Balzer's Delicatessen.

Mr. Michael I. Lubin argued the cause for respondent, Township Council of the Township of Teaneck (Messrs. Schneider, Schneider & Behr, attorneys; Mr. Stephen J. Draisin, on the brief).

Mr. William F. Hyland, Attorney General of New Jersey, submitted a statement in lieu of brief for respondent, Division of Alcoholic Beverage Control, (Mr. George F. Kugler, Jr., former Attorney General of New Jersey, and Mr. David S. Piltzer, Deputy Attorney General, of counsel).

PER CURIAM

(Appeal from the Director's decision in Re Balzer's Delicatessen, Inc., Bulletin 2110, Item 1. Director affirmed. Opinion not approved for publication by the Court Committee on Opinions).

2. DISCIPLINARY PROCEEDINGS - SALE AT LESS THAN FILED PRICE - PRIOR SIMILAR AND DISSIMILAR OFFENSES - APPLICATION TO PAY FINE REJECTED - LICENSE SUSPENDED FOR 32 DAYS.

In the Matter of Disciplinary Proceedings against Terracina Inc. t/a Tube Bar 12 Tube Concourse Jersey City, N.J. Holder of Plenary Retail Consumption License C-184, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City.	CONCLUSIONS and ORDER

Michael Halpern, Esq., Attorney for Licensee

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on June 13, 1973, it sold an alcoholic beverage at less than the filed price thereof, in violation of Rule 5 of State Regulation No. 30.

Licensee has a prior record of suspensions of license; (1) ten days effective January 6, 1970 on a similar charge; (2) for sixty days effective March 13, 1969 for permitting gambling on the licensed premises;and (3) for fifteen days effective May 27, 1969 on an "hours" violation. Re Tube Bar, Inc., Bulletin 1896, Item 13.

The license will be suspended for twenty days on the charge herein to which will be added ten days by reason of the similar offense occurring within the past five years, plus ten days in consequence of the two dissimilar offenses occurring within the past five years, making a total suspension of forty days, with remission of eight days for the plea entered, leaving a net suspension of thirty-two days.

The licensee has made application to the Director for the imposition of a fine in lieu of suspension pursuant to the provisions of Chapter 9 of the Laws of 1971. In view of the licensee's prior record, I have determined to deny licensee's said application.

Accordingly, it is, on this 1st day of November, 1973

ORDERED that Plenary Retail Consumption License C-185, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City to Terracina Inc., t/a Tube Bar, for premises 12 Tube Concourse, Jersey City, be and tha same is hereby suspended for thirty-two (32) days, commencing 2:00 a.m. on Tuesday, November 13, 1973 and terminating 2:00 a.m on Saturday, December 15, 1973.

JOSEPH H. LERNER
ACTING DIRECTOR

3. APPELLATE DECISIONS - A's INN, INC. v. DEAL.

A's Inn, Inc., t/a A's Inn, Inc.,

Appellant,

v.

Board of Commissioners of the Borough of Deal,

Respondent.

On Appeal

CONCLUSIONS and ORDER

Christiansen, Jube & Keegan, Esqs., by John P. Keegan, Esq.,
Attorneys for Appellant
Lautman, Rapson & Henderson, Esqs., by C. Keith Henderson, Esq.,
Attorneys for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from action of the Board of Commissioners of the Borough of Deal (hereinafter Board) which on June 26, 1973, renewed appellant's plenary retail consumption license with certain special conditions attached thereto. Appellant contends that its license should not be so conditioned and that such conditions, as imposed, are the result of the Board's arbitrary and capricious action. The Board denied such contention by an affirmative allegation that the attachment of conditions to the issuance of the license was in lieu of a denial of renewal of appellant's license.

The conditions imposed upon appellant's license, complained of herein, were specified as follows: (a) that no more than seventy-nine patrons be permitted in the premises at any one time; (b) that no live music or entertainment be permitted in the premises, and (c) that the entire interior portion of the premises be so lighted that the degree of illumination therein is always equal to the illumination that would be cast over an area with a diameter of ten feet by a 60-watt (120 volt) clear electric light bulb located ten feet above the center of such area.

A de novo hearing was held in this Division, with full opportunity afforded the parties to introduce evidence and cross-examine witnesses. In addition, pursuant to Rule 8 of State Regulation No. 15, a transcript of the hearing held by the Board was admitted into evidence. Following the hearing in this Division, the Director by order dated October 2, 1973, rescinded the conditions restricting the presence of live music or entertainment,

which order was based upon the absence of any proof by the Board that such live music disturbed the peace and quiet of residents in the area.

At the outset of the hearing in this Division, appellant agreed to abide by the lighting conditions imposed, indicating that lighting within the establishment conforms to the requirement but is controlled by a dimmer switch which henceforth would not be used to reduce the overall amount of illumination.

The remaining and sole issue in controversy is that condition which restricts the number of patrons within the premises at one time to seventy-nine. Appellant's contention that such limitation was totally unreasonable, without basis or foundation, was denied by the Board which, in converse, alluded to a host of evils such as traffic congestion, parking and litter violations, as well as the anti-social behavior of the crowds of young people making up the patronage of appellant's premises, which thus justified the imposition of the said special condition.

Appellant offered the testimony of a licensed engineer (William Poznak) who in his opinion asserted that the premises had a maximum occupancy load, from a construction standpoint, of five hundred thirty persons. From a utility standpoint, however, a maximum load of one hundred twenty-seven persons would be acceptable. The limitation of patrons to the number seventy-nine bore no relevancy to any practical acceptable standard, and was apparently determined upon the number of seats in the establishment, without consideration of the usuable floor space for standing purposes.

An entertainer employed by appellant (Joseph Petillo) testified that on some evenings there would be between 160 and 180 patrons present, without the appearance of crowding. Another employee (Bredan W. Kelly) testified that, after the restriction of seventy-nine patrons was imposed, the premises appeared virtually empty although each seat was occupied. Bredan Kelly's brother Christopher, also employed by appellant, testified that the number 160 represented a fair crowd and the building did not appear jammed with people until more than two hundred entered.

Dominic J. Torchia, Chief of Police of the Borough, testified that the building could not hold 135 patrons, and the problems to the neighborhood occurred when the number of patrons exceeded one hundred. Sergeant George C. Worth, of the Deal Police Department, testified that the establishment was crowded when occupied by one hundred twenty patrons.

James Carasia, the bartender for appellant, testified that the premises are not crowded until more than two hundred patrons are present and is comfortable for any number less than one hundred eighty. It was stipulated that the testimony of Sandra Carasia would be corroborative of that of her husband James.

A principal of the corporate appellant, Armen C. Grez, Jr., described the number of one hundred eighty patrons present at one time as a "nice crowd." He has seventy-nine seats in the premises and any number above that would be standing. He described a number of two hundred twenty-five as being "crowded."

Sarah Mazza (wife of a local police officer) testified on behalf of respondent concerning a visit she and her husband had made in January to appellant's premises. She estimated the number of patrons then present in the premises at about one hundred twenty, which she described as "crowded." Her husband, Raymond Mazza, testified that he had also visited the premises in conjunction with his duties when there were one hundred seventy patrons within the premises, and this number was described as uncomfortably crowded. He estimated that one hundred patrons would be a comfortable number. Chief of Police Dominic J. Torchia was recalled to testify on behalf of the Board and, when asked for an opinion concerning his estimate of what the Police Department would consider to be a safe number of patrons in appellant's establishment, responded thusly: "If 71 people are sitting, it is obvious that there is standing room, and I feel that somewhere in the area of 100 would create no problems, regardless they congregate in this area or that area, and it would be comfortable."

These and other witnesses testified for the Board by describing onerous conditions of noise, litter, parking difficulties and traffic which related to the crowds attending appellant's establishment and which is not herein specifically set forth in that those conditions were exacerbated by the great numbers of patrons visiting the premises. It may be concluded that the reduction of the permitted number of patrons to seventy-nine substantially reduced or even eliminated the problems.

The Alcoholic Beverage Law (N.J.S.A. 33:1-22) permits a local issuing authority to impose any special condition to any license deemed necessary and proper to accomplish the objects of the law. Where such conditions are imposed, the Director determines, on appeal, whether these special conditions imposed were arbitrary, unreasonable or mistaken. Belmar v. Div. of Alcoholic Beverage Control, 50 N.J. Super. 423, 426 (App.Div. 1958).

As long as conditions imposed relate to the subject license (Balaniz v. East Newark, Bulletin 156, Item 1) and are made concurrent with the issuance of the license (Alanwood Holding Company v. Atlantic City et als., Bulletin 1963, Item 1) and are reasonably required to serve the best interests of the community (Borko v. Mansfield Twp., Bulletin 1894, Item 3), the impositions of such conditions will be affirmed by the Director.

It is thus evident that the Board's powers include the right to condition the license limiting the extent of the patronage within appellant's establishment at any one time. The

issue is refined to the single question, i.e., is the limit to the number seventy-nine imposed by the Board a reasonable exercise of its discretionary power. Cf. Coventry v. Eatontown et al., Bulletin 413, Item 13.

During the lengthy four-day hearing of the matter, numerous photographs, diagrams and documents were admitted into evidence from which it appears that the premises consist of a one-story square building containing about 1930 square feet. Some portion of the interior is taken up by a small area once used as a kitchen and now apparently used for storage purposes. The photographs and sketches of the interior reveal that there is a large bar which permits thirty-six seated guests and a service bar against which three or four people could stand. An additional forty persons could be seated at tables and individual chairs. Hence any larger number of patrons than seventy-nine would represent a standing-room-only situation.

The vigorous and lengthy attack upon the imposition of the limitation of patrons was instituted by appellant solely as a result of apparent financial consequences. The proofs amply substantiate that the large numbers of patrons, particularly of young people, entering and leaving a popular establishment in a shore community caused numerous problems to the police and to the surrounding neighbors. Appellant has no legal right to be secured in his income from his business; to the contrary, as the court has held in Dal Roth v. Div. of Alcoholic Beverage Control, 28 N.J. Super. 246, 255: "Restrictive liquor regulations may, and ofttimes do, result in individual hardships. However, where larger social interests justify a restrictive policy, private individual interests must give way."

From an examination of the testimony taken at the hearing before the Board and a review of the testimony of the Mayor, Daniel Kruman, offered by appellant in this Division, it is obvious that the number seventy-nine, fixed as a patronage limitation by the Board, was a result of an a priori determination. The figure "... probably stuck in my head asking how many stools are there," responded the Mayor to the question relating to the basis for the Board's determination. It is clear that the number seventy-nine did not result from any calculation or measurement relating to the practical occupancy load considered to be in the best public interest.

It is thus concluded that, although the imposition of the special condition relating to a patronage limitation upon appellant's license was a reasonable exercise of the Board's power, it abused its discretion when it determined that the number seventy-nine should be the limitation without selecting such number on the basis of evidence, empirical or otherwise.

Of the total testimony offered in opinion of the number of patrons that the licensed premises could house at one time, with regard to safety, public welfare, convenience and logic, the testimony of Chief of Police Torchia gave the clearest and most objective basis for determination. As hereinabove mentioned, Chief Torchia was called by appellant and respondent, both depending upon his opinion as well as factual data produced. In his considered judgment, the practical number of one hundred shines clearest and its ring sounds as a crystal through the varied numbers suggested in the record. By such limitation, appellant's tavern would enjoy a full occupancy of all seats as well as a group of standees equal to about twenty percent. of its seating capacity. Public safety would thus be assured, as well as patronage convenience. The record reveals that young people have no compunction with regard to standing and, as revealed in testimony, may actually enjoy it. The limitation to one hundred patrons would permit the premises to be comfortably filled and, as the testimony indicated, the exterior noise, parking, litter and traffic problems would be reduced to a minimum.

For the reasons aforesaid, it is recommended that the action of respondent Board be affirmed, subject to the condition as herein modified, i.e., limiting patronage at any one time to one hundred in place of seventy-nine, and first approved by the Director.

Conclusions and Order

Pursuant to Rule 14 of State Regulation No. 15, written exceptions to the Hearer's report were filed by both the attorney for appellant and the attorney for respondent.

Appellant, in its exceptions, argues that there is no factual or evidentiary basis for the Hearer's recommended modification of the Board's special condition to the effect that the number of persons permitted in appellant's premises be limited to one hundred. Respondent argues, conversely, that such recommendation by the Hearer results not in affirmance of the Board's determination but was, in effect, a new conclusion.

I have carefully considered the several transcripts of the testimony, the exhibits, the Hearer's report and the aforementioned written exceptions filed and the argument of counsel with respect thereto. It is apparent that the Hearer based his recommendation of the special condition relating to patronage limitations upon the expert testimony of the local Chief of Police, and others. Such recommendations were consonant with that degree of utility most convenient to the patrons and safest with regard to the problem of overcrowding. Additionally, I find that the public interest which the Board endeavored to safeguard is best met by the Hearer's recommended limitation. I, therefore, concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 14th day of January 1974,

ORDERED that the action of respondent with respect to the special condition relating to lighting of the licensed premises be and is hereby affirmed; and its action with respect to the special condition relating to limitation of patrons within the establishment at one time to seventy-nine be and the same is hereby modified to permit one hundred patrons to be present in the said premises at one time; and it is further

ORDERED that, expressly subject to the said special conditions set forth hereinabove, the action of the respondent Board of Commissioners of the Borough of Deal be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

ROBERT E. BOWER
DIRECTOR

4. SEIZURE - FORFEITURE PROCEEDINGS - SEIZURE OF ALCOHOLIC BEVERAGES IN LICENSED PREMISES AS EVIDENCE IN SUPPORT OF COMPANION CHARGE OF SALE AT LESS THAN FILED PRICE - ALCOHOLIC BEVERAGES FORFEITED.

In the Matter of the Seizure on December 12, 1972 of a quantity of alcoholic beverages at licensed premises of S & L Wallace Inc., located at 116 Clifton Avenue, in the Township of Lakewood, County of Ocean and State of New Jersey.	X-34,283-G On Hearing CONCLUSIONS and ORDER

Leonard Wallace, appearing for claimant, S & L Wallace's Inc.
Harry D. Gross, Esq., Appearing for Division.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

This matter came on for hearing pursuant to N.J.S.A. 33:1-66 and State Regulation No. 28, to determine whether one case (12 containers) of alcoholic beverages, as set forth in Schedule "A" attached hereto and made part hereof, seized on December 12, 1972 at licensed premises of claimant, S & L Wallace's Inc., holder of a plenary retail distribution license, and located at 116 Clifton Avenue, Lakewood, New Jersey, constitute unlawful property and should be forfeited.

The seizure was made by ABC agents in conjunction with a companion charge that the licensee sold and offered for sale at retail the aforesaid alcoholic beverages, in violation of Rule 5 of State Regulation No. 30. To the said charge, the claimant entered a plea of guilty, in consequence of which the licensee, S & L Wallace's Inc., applied for and paid a fine in lieu of suspension of its license. Re S & L Wallace's Inc., Bulletin 2097, Item 1A.

The seized beverages were seized as evidence in support of the above charge. Upon the guilty plea entered by claimant, the seized alcoholic beverages were thereupon determined to have been sold and offered for sale in violation of the Rules and Regulations of this Division. Rule 5 of State Regulation No. 30.

The applicable statute, N.J.S.A. 33:1-66(c) contains the following mandate:

> "All alcoholic beverages...sold...in violation of rules and regulations...are hereby declared unlawful property and shall be seized, forfeited and dispose of in the same manner as other unlawful property seized under this section."

Hence the aforesaid sale of the subject alcoholic beverages, upon the said proofs, required both seizure and forfeiture.

The claimant appeared and contended that as it had entered a plea of guilty and in consequence thereof, had paid a fine of $350.00 in lieu of a five-day suspension of license, it should have had returned to it the alcoholic beverages seized as evidence. This contention is without substance in light of the aforesaid statute, and is, therefore, rejected.

It is, accordingly, recommended that the claim of S & L Wallace's Inc. be denied and an Order be entered forfeiting the said alcoholic beverages.

Conclusions and Order

No exceptions to the Hearer's Report were filed within the time permitted by Rule 4 of State Regulation No. 28.

After carefully considering the entire matter herein, including the abstract of the testimony, the exhibits and the Hearer's Report, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is on this 17th day of January, 1974

DETERMINED and ORDERED that the seized property consisting of cash and the alcoholic beverages, as more fully set forth in Schedule "A" attached hereto and made part hereof, constitutes unlawful property and the same be and is hereby forfeited in accordance with the provisions of N.J.S.A. 33:1-66; to be accounted for in accordance with law, and the said alcoholic beverages be and the same shall be retained for the use of hospitals and State, county or municipal institutions, or destroyed, in whole or in part, at the direction of the Director of the Division of Alcoholic Beverage Control.

Robert E. Bower,
Director

SCHEDULE "A"

12 - containers of alcoholic beverages
$95.00 - cash

5. DISCIPLINARY PROCEEDINGS (South Amboy) - LOCAL HOURS VIOLATION - NOT GUILTY FINDING - CHARGES DISMISSED.

In the Matter of Disciplinary Proceedings against Club 500, Inc. t/a Angie's 500 Washington Avenue South Amboy, N.J., Holder of Plenary Retail Consumption License C-34, issued by the Common Council of the City of South Amboy.	CONCLUSIONS and ORDER

Wilentz, Goldman & Spitzer, Esqs., by Douglas T. Hague, Esq., Attorneys for Licensee
David S. Piltzer, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charge:

> "On Saturday, May 5, 1973, at about 2:25 A.M., you permitted the consumption of an alcoholic beverage upon your licensed premises; in violation of Chapter VI Section 6-4 of the Revised Ordinances of 1969 adopted by the Mayor and Council of the City of South Amboy, July 1, 1969."

The ordinance alleged to have been violated, in its pertinent part, reads as follows:

> "6-4 Excluded Hours of Sale.
>
> No alcoholic beverages shall be sold, served or consumed, nor shall any licensee permit the sale, service, delivery or consumption of any alcoholic beverage, directly or indirectly, upon the licensed premises between the following hours:
>
> Weekdays, except January 1st, 2:00 A.M. and 7:00 A.M.
>
> Sunday, except January 1st, 2:00 A.M. and 1:-00 A.M."

In behalf of the Division, ABC agent D testified that, accompanied by agents M and P, he arrived at the vicinity of the

licensed premises on May 5, 1973 at 1:20 a.m. They took a post of observation across the street from the licensed premises in order to observe whether anyone was entering or exiting from the premises.

The agent observed individuals exiting from the premises in groups of two or three. At approximately 2:10 a.m. he saw four males, carrying instruments, leave the premises. Leaving agent P at the post of observation, agents D and M entered the premises (which agent D described as containing a long oval bar) at approximately 2:25 a.m. He saw a female, identified as Arlene Piazzolla behind the bar, and four other females and four males at the far end of the bar. He identified one of the females as Angelina Rizzo, a fifty percent stockholder of the corporate licensee.

Agent D "observed a female on the opposite side of the bar with an alleged mixed drink to her mouth and had just put it down on the bar." He approached the female and asked her whether the drink on the bar was hers. She responded in the affirmative and said that it was scotch and water. Later, it was ascertained that the glass contained an alcoholic beverage.

After identifying himself to Rizzo and Piazzolla he departed from the premises.

On cross examination, the agent testified that from his position at the bar he could see that the four-ounce highball glass which the female put to her lips was a quarter full. He did not obtain her name.

The carbon copy of the agent's report of activity, which was prepared by him from field notes which he had prepared, did not reflect that the female was drinking. The report recites that the female had a drink in her hand. The report was received in evidence. The original of the report (which was also received in evidence) contained a statement across the top of the reverse side of the page which reads as follows:

> "Agents proceeded to walk along the right side of the bar and at this time observed a female patron seated at the bar to be consuming what appeared to be an alleged mixed drink in a four ounce glass."

The agent asserted that when he changed the ribbon in his typewriter the copy may have slipped.

The copy of the report was retained by the agent in order to refresh his memory at the hearing and the original was submitted to the Division.

Agent M testified that prior to entering the licensed premises with agent D at 2:25 a.m. alone, he had entered the licensed

premises at 1:35 a.m.; saw approximately thirteen patrons in the tavern; saw Arlene Piazzolla behind the bar apparently waiting on the patrons and then exited to rejoin agent D at the post of observation.

Upon reentering the tavern at 2:25 a.m. he walked over toward the right rear and observed a female at the left side of the bar taking a "glass from her mouth" and place it on the bar. Agent D picked up the glass which contained a liquid and handed it to agent M who poured it into the evidence bottle. It was later established that the liquid was an alcoholic beverage.

In defense of the charge, Angelina Rizzo testified that she was in the tavern at all times herein mentioned. She recalled the two agents entering the premises after 2:00 a.m. and she informed them that the premises were closed. Two males identified as Russell Gehrun and John Wilczynski and a female, identified as Arlene Piazzolla, were on the premises. There were three individuals, one of whom was a female, at the opposite side of the bar. There were two glasses in front of them, on the ledge at the bartender's side of the bar. Agent D engaged in a discussion with Wilczynski concerning the fact that individuals were still in the premises.

The last call for drinks was at approximately 1:45 a.m. The unidentified female whose drink was confiscated was not observed drinking after 2:00 a.m.

At the time the agents entered the premises there were eight persons in the tavern including herself. There was no one behind the bar. The barmaid was on the patron's side of the bar. No one requested a drink when the last call was announced.

Russell C. Gehrun, a police officer of a not too distant community, testified that he was a patron at the time of the alleged violation and was positioned diagonally across the oval bar from where two females (one of whom was alleged to have consumed an alcoholic beverage in violation of the quoted ordinance) and one male were positioned.

He observed two glasses in front of them on the lower ledge on the bartender's side of the bar. He observed the agents enter and walk around the bar, although they were informed that the place was closed. He heard agent D identify himself and assert that "everybody was supposed to have been off the premises".

Agent D then proceeded around the bar and held one of the glasses on the lower ledge up to the light to examine it and he, thereafter, poured the contents into a vial. He did not see the female take a drink from that glass at any time after the agents entered the premises. She did not order a drink at last call and her drink had been lying on the ledge for at least a half-hour prior to the time that the agents entered the premises. He had the trio

(the two females and the male) under observation for quite some time due to their antics and because he was waiting for them to leave so that the others could leave.

John Wilczynski Williams testified that he had been in the tavern since 10:30 p.m. The agents entered and walked around the bar where he, Rizzo and Gehrun were positioned. Williams then testified that, after identifying themselves, the following colloquy occurred between he and agent D:

> "He said, 'You're not supposed to consume any alcohol.
>
> "I said, 'Who's consuming any?'"

None of them had any drinks before them at that time.

Agent D then walked around the bar, picked up a glass that was in front of a female identified as Ruth Cwitkowski, held it up to a light and poured the contents into a vial. The trio (of which Cwitkowski was a part) refused a drink at 1:45 a.m. Their glasses were on the ledge or well at the edge of the bar. He did not see Cwitkowski drink from the glass at any time after 2:00 a.m.

Ruth Cwitkowski testified that she patronized the licensed premises on the subject date in order to listen to her son who was playing with the band. She was seated with a female acquaintance whose son was also playing with the band.

At approximately 1:40 or 1:45 a.m. Williams offered to purchase her a drink. She refused and informed him that she couldn't finish the drink she had. That was the drink that was ultimately seized by the agents. The drink was a scotch and soda. It had been lying in front of her for so long that the melted ice made the drink so watery that she put the drink on the ledge.

The witness denied having anything to drink after 2:00 a.m. The glass seized by the agent was the glass that she had placed on the ledge.

Preliminarily, I observe that in order to sustain the charge referred to hereinabove, it is essential that the proofs show that the licensee permitted the consumption of an alcoholic beverage upon its licensed premises. We are guided herein by the firmly established principle that disciplinary proceedings against liquor licensees are civil in nature and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960).

I find, as a fact, that there was no consumption of alcoholic beverages, as alleged, and that, therefore, there was no

violation of the subject ordinance.

Thus, I conclude that the charge herein has not been established by a preponderance of the credible evidence. Accordingly, I recommend that the licensee be found not guilty, and that the charge herein be dismissed.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 6 of State Regulation No. 16.

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

Accordingly, it is, on this 31st day of January 1974,

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

Robert E. Bower,
Director.

6. DIRECTOR'S OPINION - EX PARTE - RE REGIONAL ADVERTISING BY WHOLESALERS.

Laird & Company

Scobeyville (Monmouth County) N.J. 07724

Attention: G. H. Wedell, President

Gentlemen:

Receipt is acknowledged of your letter dated March 15, 1974, together with a verified petition with exhibits annexed thereto, wherein you request an ex parte advisory opinion based upon the allegations contained therein, as follows:

The petitioner is the holder of Limited Distillery License SL-2, Rectifier and Blender License R-1, Public Warehouse License X-21 and Transportation License T-46.

For the past ten years, it has been selling Laird's Apple Jack (Apple Brandy) a distilled alcoholic beverage, in various locations reflected in exhibits attached to the petition. The petitioner alleges that it has only advertised its products in regional media (as detailed in Exhibit 2) for the past ten years, and that it has never nationally advertised its products.

It, therefore, seeks a determination by way of an advisory opinion, as to whether the above stated alcoholic beverage is a nationally advertised brand within the meaning of N.J.S.A 33:1-93.6-11.

I have carefully examined the exhibits attached to the petition and find that ninety percent of the sales of Laird's Apple Jack were sold in seventeen states, and the District of Columbia, along the eastern seaboard, and that ten percent of the total sales were made in the other states.

I, further, note from my examination of Exhibit 2, annexed to the said petition, that this product was advertised between the years 1970 and 1973, in newspapers circulated in New Jersey, North Carolina and Pennsylvania. The New York Times carried the advertisement of this product on a regional basis between the years 1970 and 1973. There was no magazine advertisements between 1968 and through 1973. In 1967, there was one advertisement in the eastern regional division of Look Magazine. The eastern regional edition of Life Magazine carried several advertisements during 1964 through 1966.

In order for this licensee to become subject to the provisions of the aforementioned statute, it must affirmatively appear that its product or products are nationally advertised. N.J.S.A. 33:1-93.6; Rule 1 of State Regulation No. 15 A.

The criteria for establishing that the products are nationally advertised are: (1) the brand must be widely advertised in the major areas of distribution; (2) the brand must be advertised in national (not local or regional) issues of magazines; and (3) the brand must be consistently advertised in newspapers of national scope as opposed to local or regional newspapers.

It is apparent from the proofs submitted, that this product is sold, distributed and advertised on a purely regional basis, i.e., along the eastern seaboard. A similar situation prevailed in Hoffman Import & Distributing Company, a corporation v. S. S. Pierce Co., a corporation, Bulletin 1826, Item 2, affirmed Superior Court Appellate Division, September 30, 1969, Docket A-364-68 not officially reported, recorded in Bulletin 1881, Item 1.

In Hoffman, the Director cited with approval the testimony of an expert witness who, in asserting that S.S. Pierce engaged in regional advertising in national media stated, "You must have distribution in at least seventy-five percent of the major markets of the United States with your distribution."

Since S. S. Pierce alcoholic beverage products were merely regional advertised the Director determined that they were not nationally advertised brands. The court, on appeal, agreed with that interpretation as being clearly within the fair meaning of the statute.

Similarly, I find from the proofs submitted, that there was only regional advertising, and the subject product was not nationally advertised. I, therefore, conclude that, in my opinion, Laird's products are not nationally advertised and, thus, are not embraced within or subject to the provisions of N.J.S.A.33:1-93.6-11, and State Regulation No. 15A.

JOSEPH H. LERNER
ACTING DIRECTOR