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

BULLETIN 2300 October 18, 1978

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1. APPELLATE DECISIONS - MR. CHRISTIAN'S PUB, INC. v. PALISADES PARK.

Mr. Christian's Pub, Inc., t/a The Giraffe, Appellant,	ON APPEAL
v.	CONCLUSIONS and ORDER
Mayor and Council of the Borough of Palisades Park, Respondent.	

Rusch & Litt, Esqs., by Arnold D. Litt, Esq., Attorneys for Appellant.
Stephen P. Sinisi, Esq., Attorney for Respondent.
Planer & Kantor, Esqs., by Frank J. Planer, Esq., Attorneys for Objectors.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the Mayor and Council of the Borough of Palisades Park (Council) which, on June 28, 1977, denied appellant's application for renewal of its Plenary Retail Consumption License, C-16, for premises 344 Bergen Boulevard, Palisades Park, and commonly identified as "The Giraffe".

Upon the filing of the within appeal, the Director of this Division, by Order to Show Cause dated June 30, 1977, extended the license of the appellant pending the determination of this appeal.

In its Petition of Appeal the appellant advances several contentions challenging the action of the Council, two of which were patently frivilous. These two questioned the power and authority of the Council to hear and determine the renewal application of the appellant. The statutory mandate given to issuing authorities, N.J.S.A. 33:1-24, 25, together with the substantial body of decisional law, is in complete refutation of appellant's contentions.

The remaining contentions appellant advances may be distilled to two general arguments. The first alleges that one of the members of the Council failed to disqualify himself from the proceedings on the basis of bias and prejudice. The second

and principal contention, is that the action of the Council was contrary to the weight of the evidence, and its conclusion was unfair and inequitable.

The Council in its Answer, denies each of appellant's contentions and relies upon its extensive and detailed resolution denying appellant's application for renewal.

A de novo appeal was heard in this Division with full opportunity afforded the parties to introduce evidence and to cross-examine witnesses, pursuant to Rule 6 of State Regulation No. 15. Further, a transcript of the proceedings before the Council was submitted, pursuant to Rule 8 of State Regulation No. 15.

The resolution adopted by the Council denying appellant's application for renewal consisted of six typewritten pages and ennumerated a dozen findings of fact in support of its action. That resolution described appellant's business premises as being located on a State highway, with parking for about twenty-two cars on site and an additional one hundred cars in premises nearby. There were numerous complaints by residents who testified before the Council, relating to disturbances in early morning hours on the principal business evenings of appellant.

At the hearing before the Council, testimony was received from six neighbors of appellant's premises, and the Chief of Police. At the hearing in this Division, three of the six testified again. The appellant produced the testimony of the owner of its corporate stock, its manager, a bartender, a security guard, a parking attendant and two patrons.

From the sum of the testimony, it clearly appeared that the appellant's premises is used as a discotheque singles' bar on Wednesday and Friday evenings. The maximum number of allowable patrons is one hundred and eighty-six and, on some occasions, the premises are fully occupied. The closing hours in the Borough for taverns is three a.m., morning, and the neighbors complain that, after that hour and for the next, there is a continual racket of car doors being slammed, loud talking and calling among patrons, racing motors and the usual noises attendant upon a very large number of young people being discharged from the premises.

The principal objection of the neighbors relate to the noise of the Wednesday evening crowds, which prevent sleep during the week night. There is less objection to the noise created on Fridays and into Saturday mornings.

There was no evidence presented respecting the appellant's allegation that one of the Council members was prejudiced and, in consequence, the Council should have not made its determination. Hence the sole issue in controversy is that of nuisance.

The burden of establishing that the issuing authority's action was erroneous and should be reversed, rests entirely with the appellant. Rule 6 of State Regulation No. 15.

In support of that burden, the appellant has shown that no disciplinary porceedings have ever been initiated by the Borough against the appellant during its tenure, despite complaints to the Police and others during the licensing year. These complaints which charged the existence of a nuisance, culminated, not with any disciplinary proceedings, but with the subject denial of renewal of the license.

Additionally, it was uncontroverted that there were no problems that related to the management of the premises in its interior. Hence, the sole nuisance which the Council wished to abate was the noise and parking situation on the exterior of the premises. The method used by the Council to abate that nuisance was to deny renewal of license.

It is noted that, during the period between initial hearing on the appeal in this Division and the final hearing, the appellant and the objectors met together in an attempt to alleviate the problems. As a result of that meeting, as described by counsel, the appellant altered the manner by which patrons' cars were handled, and devised means to reduce headlight glare directed into neighbors' windows.

The crucial issue in this appeal is: does appellant's record in the management of its licensed premises justify the Council's action in denying renewal of license? In short, did the Council act reasonably, in the proper exercise of its discretion, and in a manner consonant with its quasi-judicial function?

Appellant alleges that it violated no State regulation governing the conduct and use of its licensed premises, and that no disciplinary proceedings were instituted by the Council against it. It would have been a more satisfactory procedure for the Council to initiate such proceedings upon specific charges and to base its refusal to renew on an adjudicated record.

It is firmly established that the grant or denial of an alcoholic beverage license rests in the sound discretion of the Council in the first instance. In order to prevail on this appeal, the appellant must show unreasonable action on the part of the Council constituting a clear abuse of such discretion. Rajah Liquors v. Div. of Alcoholic Bev. Control, 33 N.J. Super. 598 (App. Div. 1955); Blanck v. Mayor and Borough Council of Magnolia, 38 N.J. 484 (1962).

Although renewal of license may be denied, even absent prior record of violations, R.B. & W. Corp. v. Caldwell, Bulletin 1921, Item 1; Ocean Club Corp. v. Jersey City, Bulletin 2122,

Item 2, aff'd in an unreported opinion of the Appellate Division, Docket No. A-293-73, cited in Bulletin 2148, Item 2, such situations are usually the result of a long record of adjudicated violations emanating from the licensed premises. A litany of unacceptable conditions attributable to a licensee's business is usually testified to by numerous adjacent residents. Police reports of myriad calls to the premises, or to incidents caused by its misbehaving patrons, are offered into evidence. Such background situation may often result in denial of renewal. Cf. Nordco, Inc. v. State, 43 N.J. Super. 277 (App. Div. 1957).

In the matter sub judice, the resolution adopted by the Council supported the conclusion that appellant's premises is undoubtedly a trouble spot on Wednesday and Friday evenings insofar as the behavior of its patrons in entering and leaving the premises creates noises of an unacceptable level. In reply to that obvious conclusion, the response of appellant is that it cannot control the noise of its patrons and such uncontrolled noise should not affect its right to renewal of its license privileges. This response is specious, and without merit.

It is a well established principle that a licensee is responsible for conditions both inside and outside the licensed premises. Tyrone's Haven, Inc. v. South River, Bulletin 2214, Item 1, aff'd in unreported opinion of Appellate Division, Docket No. A-881-75, cited in Bulletin 2242, Item 2; Galasso v. Bloomfield, Bulletin 1387, Item 1.

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. Blanck v. Mayor and Borough Council of Magnolia, supra. This responsibility is "wide" and its guide is "the public interest". Lubliner v. Paterson, 33 N.J. 428, 446 (1960). Thus, entirely apart from the consideration as to the appellant's culpability for the described conditions existing at this establishment, the broad question posed before the Council on appellant's application for renewal was whether, in the light of the surrounding circumstances and conditions, it was in the public interest for these licensed premises to continue to operate. The objective judgment of the Council was that its continuance would be inimical to the public interest. R.O.P.E. Inc. v. Fort Lee, Bulletin 1966, Item 1.

The appellant is under an obligation to keep the outside of its premises free from the conditions which have given rise to the nuisance complaints. There was uncontroverted testimony elicited that on Wednesday and Friday evenings, going into the early morning hours of the following day, the noisy patrons of appellant's establishment caused constant annoyance to the surrounding neighbors.

The efforts which have been made by the appellant to

reduce the difficulties caused by its patrons is impressive, and demonstrative of its cooperation with the neighbors and the police authorities. Furthermore, the appellant has taken steps since the denial of the renewal of its license, and following the commencement of the hearings on its appeal in this Division, to remedy the situation to a greater degree.

As previously indicated, it is significant that no disciplinary proceedings were instituted against appellant by the Council. If the operation of the licensed premises were of the degree of nuisance that the Council's action in denying renewal of the license would seem to imply, reason would dictate that the Council should have instituted disciplinary proceedings before the time for renewal.

It is understandable that local issuing authorities do, at times, withhold the institution of disciplinary proceedings with the expectation that licensees will make efforts to improve the conditions in the operation of the business. This is not to say that a prior warning is necessary in each case. There may be conduct so indisputably bad that a single instance would warrant revocation or the refusal to renew, but this is not such a case. See Monesson v. Lakewood, Bulletin 657, Item 1; Salmanowitz v. Hightstown, Bulletin 807, Item 2; Bd. of Com'rs. of Bayonne v. B & L Tavern, Inc., 42 N.J. 131 (1964). This latter concept is tempered by the doctrine of fairness set forth in Stratford Inn, Inc. v. Avon-by-the-Sea, Bulletin 1775, Item 2.

> It has been the long established policy of this Division to equate a refusal to renew an annual license with revocation proceedings and to necessitate timely action by the local issuing authority. Common fairness to the licensee has been the basis for this policy. If undesirable conditions develop in the future, the local authorities always have the power to institute disciplinary proceedings even before the renewed license period has expired.

By substantial evidence it has been clearly established that the conditions which brought about the rage of the residents were attributable to the conduct of the appellant. Appellant has thus created and encouraged a local nuisance, in consequence of which an appropriate remedy must be sought. Hence, the remaining and sole issue presented is whether the denial of renewal of license is the appropriate remedy.

It is appropriate to apply the test set forth in Lyons Farms Tavern, Inc. v. Newark, 55 N.J. 292, 307 (1970), did the decision of the Council represent a reasonable exercise of discretion on the basis of the evidence presented? I find that the

action of the Council was unreasonable.

The Council made no effort to condition the license so that the annoyances to the residents would be removed. From the testimony, one of the residents candidly admitted that if the annoyances had been limited to Fridays and sleep had not been prevented on Wednesdays, the likelihood is that most of the critics to renewal of license could be stilled. This conclusion is most logical and is supported by the testimony.

I conclude that the appellant has sustained its burden, required by Rule 6 of State Regulation No. 15, of establishing that the action of the Council was erroneous and should be reversed, subject to the special condition recommended hereinafter.

It is, accordingly, recommended that an order be entered reversing the action of the Council and directing that the Council renew the said license for the current licensing period, expressly subject to a special condition that there be no live or amplified musical entertainment with the appellant's licensed premises, except on Friday and Saturday evenings.

Conclusions and Order

Written Exceptions to the Hearer's Report were filed by appellant, and written Answers thereto were filed by the respondent and the objectors, pursuant to Rule 14 of State Regulation No. 15. Additionally, I held oral argument with respect to the issued raised herein.

In its Excpetions and at oral argument, the appellant objects to that portion of the Hearer's Report which recommends the imposition of a special condition prohibiting live or amplified musical entertainment upon appellant's premises, except on Friday and Saturday evenings.

Appellant argues that the nature of the operation at the licensed premises is a discotheque, which requires musical entertainment. Absent the ability to provide such entertainment it will be forced out of business. It further argues that the special condition is not reasonable, is against the weight of the evidence adduced at the hearing, and has the effect of "spot zoning" a proscription against discotheques in the Borough.

In their Answers to the Exceptions and at oral argument, the respondent and objectors support the recommended special condition. They maintain that it is a reasonable response to the nuisance situation complained of with respect to the operation of appellant's premises. They further request that an additional special condition be imposed requiring outside security, and additional parking personnel to be provided by the appellant.

The nuisance conditions, amply demonstrated by the record herein, are the direct result of the nature and type of operation conducted at the licensed premises, and the appellant's inability to cope with same. It is the congregation of a certain type of patronage, attracted by the discotheque entertainment, that provides the source for difficulties. This is the crux of the problem.

Appellant's attempted distinction between interior operational control and outside patron disruptiveness is neither critical nor dispositive. The patrons who commit the abuses on the exterior, do so because of the negative effects of consumption of alcoholic beverages within the licensed premises. The appellant is obligated to refuse service of alcoholic beverages to a patron who is, or appears to be, intoxicated. The failure to fulfill this duty evidences a lack of concern for the patron and the residents of the area who thus suffer the complained of abuses and indignities caused by such patrons.

It is a well-established principle that the Director should not substitute his judgment for that of the local issuing authority, if reasonable support can be found in the record. Margate Civic Assoc. v. Bd. of Comm'rs., Margate, 132 N.J. Super. 58 (App. Div. 1975).

However, the record also demonstrates that the appellant has made a concerted effort to improve patronage control and alleviate the nuisance conditions; and I concur with Hearer's recommendation that the denial of renewal was not a reasonable action under the facts sub judice.

In fact, in oral argument, the attorney for the Council represented that the Council does not object to the recommended reversal of denial of renewal, subject, of course, to the imposition of appropriate special conditions.

I shall, therfore, reverse the action of the Council, but only expressly subject to more relevant special conditions to be affixed to the appellant's license. N.J.S.A. 33:1-22, Lubliner v. Bd. of Alcoholic Bev. Control, Paterson, 33 N.J. 428 (1960).

The imposition of the hereinafter designated special conditions is a final endeavor to ameliorate the complained of situation. Wenzler v. Hillside, Bulletin 2182, Item 3. The failure of the appellant to seize this final opportunity and insure that the licensed premises will be conducted in a lawabiding manner, may result in disciplinary proceedings, and even denial of renewal of its license. Kaplan v. Englewood, Bulletin 1745, Item 1 (Director's decision affirmed by the Appellate Division, Docket No. A-1310-66, unpublished decision, reported in Bulletin 1790, Item 1; cert. denied 51 N.J. 464 (1968).

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the Hearer's Report, the Exceptions filed thereto, the Answers to said Exceptions and oral argument, I concur in the findings and recommendations of the Hearer, except as to the special condition, recommended by the Hearer, and adopt them as my conclusions herein, subject to the special conditions set forth hereinbelow.

Accordingly, it is, on this 15th day of June, 1978,

ORDERED that the action of the Mayor and Council of the Borough of Palisades Park be and the same is hereby reversed; and it is further

ORDERED that the Mayor and Council of the Borough of Palisades Park be and the same is hereby directed to renew appellant's Plenary Retail Consumption License C-16, for the 1977-78 license term, in accordance with the application filed therefore, expressly subject to the imposition of the following special conditions annexed thereto:

(1) Package liquor of any kind shall not be sold for off-premises consumption after 10:00 P.M.

(2) No live music or entertainment shall be permitted in the licensed premises at any time. Amplification of a disc jockey's voice or of recorded music shall be permitted, provided same does not constitute a "noise" nuisance.

(3) Occupancy regulations, as limited by applicable municipal ordinances, shall be conspicuously posted, in the said premises and strictly adhered to at all times.

(4) Uniformed professional security guards or special police officers shall be employed by the appellant from the hours of 9:00 P.M. until a reasonable time after the closing hour, to control parking, and to curtail breaches of the peace, the use of abusive language, littering, loitering and similar acts which are detrimental to the public welfare. The number and location of the aforesaid are as follows:

(a) on any day the appellant is opened, a minimum of two special police officers or professional security guards shall be employed as set forth hereinabove. One shall be

directed to the parking areas utilized by the appellant for its patrons.

(b) an additional special police officer or professional security guard shall be employed on the exterior of the licensed premises on Wednesdays, Fridays and Saturdays, during the hours and for the purposes as hereinabove stated.

JOSEPH H. LERNER
DIRECTOR

2. OBJECTIONS TO TRANSFER OF STATE BEVERAGE DISTRIBUTION LICENSE - APPLICATION DENIED.

In the Matter of Objections to the issuance of a State Beverage Distribution License to: M & T Beer Distributors, Inc. 272 Route 9 Howell, N.J.	ON APPEAL CONCLUSIONS AND ORDER

Applicant Corporation, by: Michael Booras, sole stockholder, Pro se.
Piltzer and Piltzer, Esqs., by David S. Piltzer, Esq., Attorneys for Monmouth-Ocean County Beer Distributors Association, Objectors.
Kein and Pollatschek, Esqs., by Julius R. Pollatschek Esq., Attorneys for N.J. Package Stores Association, Objectors.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

M. & T. Beer Distributors, Inc. filed an application on November 10, 1977 for the issuance of a State Beverage Distribution License to be located at premises 272 Route 9, Howell Township, New Jersey.

Written objections to the granting of the application for said license were filed by objectors, including the Township of Howell. The objections may be summarized as follows:

1. There are five State beer distributors, at present, active in the area in which the applicant seeks to operate, as well as several current, but inactive, licenses.

2. The present S.B.D. licensees in this area have maintained an orderly market in the face of adverse conditions because they are well-experienced, of substantial continuous duration, have adequate

warehouse facilities, and possess exclusive franchises to distribute various popular brands of beer.

3. The Applicant's total leased space is insufficient to store sufficient stock to maintain a viable operation.

4. There are sufficient plenary retail consumption and distribution licensees in the area to service the public's need for beer in containers.

5. The grant of the application would be contrary to the public interest.

At the hearing held in this Division, Michael Booras, the sole corporate stockholder, insisted upon representing the corporate applicant. This request was granted, over objection, after it was made clear that an adjournment would be granted if the application was made to retain counsel. He testified that he has had no experience in the alcohol beverage industry in New Jersey. He had held similar licenses in New York for approximately nine years, and, prior to that, was employed by a New York brewery as a salesman.

The applicant did not have any franchises at the time of hearing. He stated that he would get his supplies from "....whoever will sell it to me." To date, no firm arrangements have been made.

His responses indicate a lack of knowledge of New Jersey laws and rules governing the various aspects of the alcoholic beverage industry. Booras could not answer, with specificity, as to where he intends to sell beer, beyond a general statement that he would sell anywhere its legal for him. He admitted he has not, as yet, canvassed potential customers for orders. He did however,in a general way, speak to retailers along U.S. Route 9, in various Ocean and Monmouth County communities, in order to get a feeling as to potential business.

These merchants expressed the opinion that they were paying too much for their beer supplies. Without knowing wholesale costs, minimum retail consumer prices, or the actual price the merchants were being chrged, he felt that he could sell the product to them more reasonably. Lastly, he stated that there are no existing home delivery routes which will be taken over, if a license were granted.

Counsel for the objectors subpoened John Dillon, an A.B.C. employee, who produced and testified from Division records. He stated that, in 1967, there were 129 S.B.D. licenses issued in N.J. The number has steadily declined and currently there are 88 licenses. There are eight in Monmouth County and four

in Ocean County. There currently are sixteen plenary retail consumption licenses and three plenary retail distribution licenses in Howell Township.

John J. Garrity, Executive Director of the Beer Wholesalers Association of New Jersey testified on behalf of its objection. He described the changes that have occured in the beer industry in New Jersey and the resultant decrease in the number of viable S.B.D. licensees. In his opinion, there was no need for an additional license in the Monmouth-Ocean Counties area.

He doubted that any new license issued could obtain franchises. It was his judgement that the only way a new licensee could exist in the area was to cut prices, and thereby create a disorderly market. Having no franchises, he would not be responsible to any brewer for rotating the customers stock and removing, at his expense, out of date products. This task would fall to the franchised distributor in the area, although it may not in fact have sold the particular cases of beer to the customer originally, thereby adding further confusion to the situation.

Robert Bainton, an S.B.D. licensee serving the Monmouth-Ocean area, testified in support of his objection and expressed the opinion that 2500 square feet was insufficient to conduct a traditional S.B.D. operation. He feared that this small size suggested that applicant intended to engage in "trans-shipping", an undesirable practice from the Association's viewpoint, and one which could create chaotic conditions, if introduced to New Jersey.

Joseph De Marco, a New Jersey S.B.D. licensee, who also has similar interests in New York, gave a more detailed description of the negative effects of the practice of "trans-shipping". He shared Bainton and Garrity's fears and suspicions of applicant's intent to operate in this manner.

Joseph Markovich, a plenary retail distribution licensee from Howell Township, testified in opposition to the application, upon the ground that the consumption and distribution licensees in and adjacent to Howell Township adequately supply and service the needs of the public.

The issuance or transfer of a liquor license, whether state or municipal, from person-to-person or place-to-place, is not a privilege inherent in the license. Re Maccia, Bulletin 1401, Item 5. The test in the isssuance or transfer of licenses is whether there is a need and necessity for such issuance or transfer and whether same would serve the public interest. Lyons Farms Tavern V. Mun. Board Alcoholic Beverage., Newark, 55 N.J. 292 (1970); Lubliner V. Board of Alcoholic Beverage Control., Paterson, 33 N.J.

428 (1960); Tp. Committee of Lakewood v. Brandt, 38 N.J. Super. 462 (App. Div. 1955).

The present case is analagous in certain aspects to the circumstances presented in Re:Saxon, Bulletin 1237, Item 7, where the Director held:

> However, in the present case Saxon Distributing Co. has not operated under its license since March 1, 1958, and it has not transferred its customers to the applicants. Thus, in effect, the applicants are seeking to establish a new business for the sale of unchilled beer in Bergen County, which now has nineteen State Beverage Distributor licensees. Under these circumstances, it does not appear that there is need or necessity for an additional SBD license in the area where the applicants intend to operate.

In applying the appropriate standards to such applications, the Director recently noted in Re: Calabrese, Bulletin 2196, Item 5:

> The transfer sought herein would be of no demonstrable value to the applicant, nor would it serve the public interest, because the applicant admittedly has not obtained any distribution franchises with which to engage in operations.

The present applicant presented no evidence of any franchise or distribution arrangements with any malt beverage brewing companies.

It is well settled that the Director has the discretionary authority to grant or deny the issuance, renewal or transfer of SBD licenses based upon the public need and necessity, and the good faith of the applicant. Re: Mystic, Bulletin 1833, Item 3.

In sum, it is apparent that:

1. The appellant has no firm prospects at the wholesale level, or for home delivery routes to consumers;

2. the appellant has no viable source of product available for distribution;

3. the area is adequately served by existing licensees; and

4. the public need or necessity does not warrant an outlet at the proposed location.

Accordingly, I recommend that the application be denied.

CONCLUSIONS AND ORDER

No Written Exceptions to the Hearer's Report were filed by the applicant or the objectors.

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

Accordingly, it is, on this 23rd day of June, 1978,

ORDERED that the application of M & T Beer Distributors, Inc., for the issuance by the Director of a State Beverage Distribution License for premises 272 Route 9, Howell Township, New Jersey, be and the same is hereby denied.

JOSEPH H. LERNER
DIRECTOR

3. APPELLATE DECISIONS - S. LUIGI'S RESTAURANT OF WILDWOOD, A N. J. CORP. v. WILDWOOD ET AL - ON REMAND FOLLOWING ORDER IN BULLETIN 2275, ITEM 2.

S. Luigi's Restaurant of Wildwood, a N.J. Corp. Appellant, v. Board of Commissioners of the City of Wildwood and The First United Methodist Church, Respondents.	ON APPEAL ORDER FOR REMAND

Piltzer & Piltzer, Esqs., by David S. Piltzer, Esq., Attorney for Appellant. Bruce M. Gorman, Esq., Attorney for Respondent, Board of Commissioners. Way, Way & Goodkin, Esqs., by Richard T. Goodkin, Esq., Attorney for Respondent, Church.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

The within appeal relates to an appeal previously heard in this Division. (S. Luigi's Restaurant of Wildwood v. Wildwood, et al, Bulletin 2275, Item 2), which resulted in an affirmance by the Director of a denial by the Board of Commissioners of the City of Wildwood (hereafter Board) of appellant's application for a place-to-place transfer of appellant's Plenary Retail Consumption License, C-51, from premises 528 West Montgomery Street to 4119 Pacific Avenue, Wildwood.

The prior adjudication resulted in a finding by the Director that the appellant had relocated its principal doorway at its proposed establishment to a rear doorway. The distance from the rear doorway to the principal door of respondent Church would be in excess of the statutory minimum of two hundred feet. It was held that such relocation of the doorway was merely a means to circumvent the statutory prohibition set forth in N.J.S.A. 33:1-76. The Director relied upon the doctrine expressed in Karam, et al. v. Div. of Alcoholic Beverage Control, et al, 102 N.J. Super. 291 (App. Div. 1968), that entranceways to licensed premises may not be moved solely for the purpose of subverting the effect of N.J.S.A. 33:1-76.

After the prior determination, the appellant permanently closed the front entranceway. Appellant contends that a flooding condition required such closure, and because of that situation, appellant again applied for the same place-to-place transfer.

The Board refused to permit the appellant to introduce any testimony in support of its application, or basis for relocation of the door. It ruled that the application had been previously denied, and affirmed an appeal by the Director. The doctrines of res judicata and collateral estoppel were cited in support of said determination.

An appeal from that action was taken to this Division where, upon counsel's oral argument, it appeared that the single issue presented was: did a flooding condition arise or exist which would require and justify a permanent closing of the former front entrance, leaving the only customer access through the rear entrance?

Evidence relating to the existence, or non-existence of such flooding condition, and its relationship, if any, to the permanent blockage of the doorway, would be more properly presented to the Board. That Board, as with all issuing authorities, has primary responsibility to determine issues of transfers within their municipality. The Director of this Division has appellate jurisdiction in such matters. N.J.S.A. 33:1-26. Until the additional facts alleged by appellant are part of the record herein, it cannot be determined whether res judicata or collateral estoppel is applicable.

Accordingly, it is recommended that the matter be remanded to the Board with instructions to the respondent to afford a hearing on appellant's application, particularly, to determine - (a). if the blockage of the prior front doorway was the result of some flooding condition, and, (b). if so, is such transfer in the best interest of the municipality.

It is further recommended that the respondent Church and other objectors, if any, be permitted to be heard in the matter.

Lastly, it is recommended that the Director retain jurisdiction for the purposes of any subsequent appeal from the aforesaid determinations by the Council.

ORDER FOR REMAND

Written Exceptions to the Hearer's Report were filed by the respondent, Board of Commissioners, and written Answers thereto were submitted by the appellant, pursuant to Rule 14 of State Regulation No. 15.

In its exceptions, Board argues that the prior determination in this Division, i.e., the erection of a new door at the premises to be licensed did not serve a functionally legitimate purpose, is dispositive of the issue raised in the within appeal. It asserts that the record below establishes that the entranceways were changed prior to the alleged flooding problem. Therefore, the subsequent factual changes should not validate previous impermissible conduct.

In its reply, the appellant maintains that the creation of another entranceway, more than 200 feet from a church is not per se illegal. It is the closing of an entranceway, within 200 feet of a church, not for a legitimate functional purpose, that is prohibited.

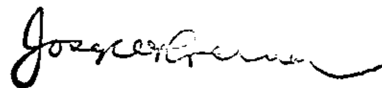
I am satisfied that the intent of the holding in Karam, et al. v. Div. of Alcoholic Beverage Control, et al, supra is to determine the issue as delineated in the appellant's reply, and as clearly set forth by the Hearer.

The determination, sub judice, whether a flooding condition existed to justify the closing of an entranceway, has not been previously adjudicated, and, therefore, the concepts and legal principles of res judicata and collateral estoppel are not applicable.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's Report, the written Exceptions filed by the respondent, Board of Commissioners and the written Answers submitted thereto by the appellant, I concur in the findings and recommendations of the Hearer, and adopt them as my conclusions herein.

Accordingly, it is, on this 29th day of June, 1978,

ORDERED that the within matter be and the same is hereby remanded for a plenary rehearing before the respondent, Board of Commissioners of the City of Wildwood, on all relevant issues, and particularly with the issues to be adjudicated and the procedures to be followed, as set forth in the Hearer's Report and incorporated herein. Jurisdiction will not be retained.



Joseph H. Lerner
Director