Division of
Alcoholic Beverage Control

Bulletin

140 East Front Street, P.O. Box 087, Trenton, New Jersey 08625-0087

BULLETIN 2482 **December 26, 2000**

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

IN RE APPLICATION OF PATERSON CONFECTIONARY MARKET	)	FINAL CONCLUSION AND FINAL ORDER
	)	CONSOLIDATED
IN RE APPLICATION OF ACUDE CORPORATION	)	OAL DKT. NO. ABC 3348-99 AGENCY DKT. NO. 6632
	)	OAL DKT. NO. ABC 3349-99 AGENCY DKT. NO. 6633

Dayman Yafar (appearing on behalf of Paterson Confectionary Market)
John F. Fox, Esq. (appearing on behalf of Acude Corporation)
Fox & Fox, Attorneys
David F. Piltzer, Esq., (appearing on behalf of Objector Budget Soda)

Decided: May 30, 2000 Received: June 2, 2000

Director's Decision Due By: August 31, 2000

BY THE DIRECTOR:

This matter involves Objections received by the Division of Alcoholic Beverage Control to applications for State Beverage Distributor's Licenses to the above-captioned parties. The issue is whether there is a reasonable basis in the record to support issuance of the licenses, over the objections. The Administrative Law Judge (ALJ) found that there was. For the reasons stated herein, I accept the Initial Decision of the ALJ and approve both applications for State Beverage Distributor's Licenses, with Conditions as noted herein.

I. PROCEDURAL HISTORY

This matter arose when these applicants for two separate State Beverage Distributor's Licenses in the City of Paterson published Notice of their application pursuant to Regulation. Shortly thereafter, the Division of Alcoholic Beverage Control received objections. The cases were transmitted to the Office of Administrative Law (OAL) on March 25, 1999, as contested cases pursuant to N.J.S.A. 52:14F-1 et. seq. The cases were consolidated by the Court without objection. A hearing was held on March 24, 2000, where testimony and documentary evidence was submitted to the ALJ. An Initial Decision in favor of the applicants was rendered by the Honorable Maria Mancini LaFiandra on May 30, 2000. Exceptions were filed on June 8, 2000 and replies thereto on June 15, 2000. Although only the objector, Budget Soda, was represented by counsel at the OAL hearing, other objectors were called as witnesses by that party.

II. FACTS OF THE CASE

A. Paterson Confectionary Market

The ALJ found that on July 1, 1998 Paterson Confectionary Market (Paterson Market) submitted an application to the State ABC for a State Beverage Distributor's License. The appropriate fees were paid and the required notices were published on June 23, 1998 and July 5, 1998. The application was amended on March 3, 1999. Testimony at the hearing established that Paterson Market intended to engage in the business of wholesaling warm beer, soda, juices and water. Paterson Market's proposed premises has a Certificate of Occupancy, issued by the municipality, which limits sales to wholesalers only. The sole owner of the corporation, Dayman Yafar, testified that his intent is to sell only at wholesale, and not to consumers.

The objector alleged that the proposed site of the State Beverage Distributor's License was within the distance prohibited by city ordinance for plenary retail licensees. The ALJ found the Ordinance did not apply to State Beverage Distributors. The Objector alleged that issuance of the licenses would saturate the City with entities who dispense alcoholic beverages. The ALJ found that the number of State Beverage Distributor Licenses that may be issued, is governed by Statute and issuance of these two licenses would not be in violation of the statutory limitation. The Objector also asserted that the proposed licensed site is within close proximity to a church but admitted that it was not within the Distance Prohibited By Statute. No objection was received from the church and the ALJ concluded that this fact was not an impediment to issuance of the license.

The objectors also raised questions concerning the timeliness of the Notice of publication and other technical defects therein. The Judge found that these objections were not

part of the original or amended objections to the application, and should not be considered on this appeal. I note that the Objector's Exceptions to the Initial Decision focused in part on this conclusion by the ALJ. I have considered those Exceptions and determined that the published Notice was adequate. All parties to this proceeding have had an opportunity to make their positions known to the ALJ and the merits of those positions have been fully explored. I also note that the party asserting the Exceptions has the burden of providing necessary transcripts for review. See In Re: Morrison, 216 N.J. Super. 143, 157-158 (App. Div. 1987). No transcripts have been provided to me in this case.

I find that a fair and open hearing was provided to all parties in this case by the ALJ and I concur with the Findings of Fact she has made concerning the Paterson Market application and adopt them as my own.

2. Acude Corporation

The ALJ found that in June 1998 Acude Corporation (Acude) submitted an application to the Division of Alcoholic Beverage Control for a State Beverage Distributor's License. She also found that the corporation is a membership club in which retailers pay a fee. Consequently, they obtain an advantage over nonmembers in the form of discounted prices. It isn't clear from the Opinion below whether membership is restricted to retailers or could include consumers. However, in light of the conditions I will impose upon the license, that fact is not significant.

Objections were received from William Klein, Councilman of the City of Paterson, who objected because the City is "saturated with liquor stores and bars". In addition, various retail licensees who are concerned that additional licenses might diminish their retail business, also lodged objections and testified before the ALJ.

In addition to their concerns about "saturation" and personal business impact, the Objectors complained that Acude's location in the vicinity of an alternative high school that is part of a housing project was inappropriate and that a Municipal Ordinance regulating distance between retail establishments would be violated.

The ALJ determined that with respect to the proximity of the proposed licensed site to the school, Acude had presented a certified copy of an "action form" adopted by the Paterson Public School District, which contains a waiver that permits Acude to sell alcoholic beverages at wholesale, not at retail. The ALJ found that the proximity of this license to the alternative high school was not an impediment in light of the specific waiver given to Acude. She also found that the Ordinance restricting distance between retail liquor establishments did not apply to State Beverage Distributors, especially those who will only engage in wholesaling of beer.

I concur with the Findings of Fact made by the ALJ concerning the Acude application and adopt them as my own. I specifically note that N.J.S.A. 33:1-76, which prohibits sales of alcoholic beverages within 200 feet of a church or school, may be waived at the issuance of the license and at each renewal thereafter, by the duly authorized governing body on authority of such church or school. In light of the restrictions that I have placed upon the license, I agree that proximity to the alternative high school located in the housing project is not an impediment.

III. LEGAL DISCUSSION

The privileges conferred by a State Beverage Distributor's License are contained in N.J.S.A. 33:1-11. Essentially, this license allows the holder to sell and deliver unchilled beer and ale in original containers in a quantity of not less than 144 ounces to consumers and retailers. This license may not be issued for premises where any other retail business, except the sale of nonalcoholic beverages, is carried on. Likewise, the sale or delivery of any alcoholic beverage for consumption on the licensed premises is not permitted.

Both applicants have voluntarily agreed that they will limit the exercise of their license privilege to the sale of alcoholic beverages at wholesale and not sell to consumers. Additionally, there is no substantive evidence that issuance of these licenses will adversely and improperly affect competition in the City of Paterson.

Because the privileges of a State Beverage Distributor's license are state-wide, the question of public necessity and convenience cannot be determined on the narrow basis of a single municipality in which the prospective licensee would have its principle office or warehouse. See Re: Beer Depot, Bulletin 1312, Item and Re: Variety Beers and Soda Distributors, Inc., Bulletin 1000, Item 6.

It is well settled that the decision as to whether or not an application for a transfer of a State Beverage Distributor's license should be granted rests solely within the discretion of the Director of the Division of Alcoholic Beverage Control. While the sentiments of the local community and its municipal governing body are given serious consideration, the objections must be reasonable and based upon valid grounds. See Breton Woods Beverage Distributors, Inc., Bulletin 1490, Item 4 (Nov. 26, 1962). And Re: Watchung Spring Water Co., Inc. t/a Soda Town, Bulletin 1581, Item 6 (Aug. 10, 1964).

After giving due consideration to all of the evidence presented in this matter, I have determined that the objections are not sufficiently meritorious to warrant a denial of the application.

Accordingly, the pending application is approved with an appropriate endorsement on the licensed certificate that the sale of malt alcoholic beverages are limited to licensed New Jersey retailers or wholesalers.

/S/ JERRY FISCHER
JERRY FISCHER
DIRECTOR

2. LANDING REALTY, INC., T/A NARDINE'S RESTAURANT, V. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF HOBOKEN - FINAL CONCLUSION AND ORDER AFFIRMING ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION IN PART AND REMANDING THE CASE TO THE OFFICE OF ADMINISTRATIVE LAW FOR FURTHER PROCEEDINGS

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
Division of Alcoholic Beverage Control

LANDING REALTY, INC., T/A NARDINE'S RESTAURANT,	)	FINAL CONCLUSION AND ORDER
PETITIONER,	)	
v.	)	OAL DKT NO. ABC 1154-95
	)	AGENCY DKT. NO. 6238
MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF HOBOKEN	)	
RESPONDENT.	)	

Roberta L. Tarkan, Esq., Attorney for Petitioner

Lawrence M. Fox, Esq., Attorney for Respondent (Murray, Murray & Corrigan, Attorneys)

Initial Decision Below by the Honorable Thomas R. Vena, Administrative Law Judge

Decided: January 20, 2000 Received: January 24, 2000

BY THE DIRECTOR:

The issue before me is whether to adopt, modify, or reject the Initial Decision of the Administrative Law Judge (ALJ). The ALJ concluded, on cross motions for summary judgement, that the Respondent's failure to take action on Appellant's renewal application for the 1994-1995 license year constituted a denial and was erroneous and an abuse of discretion. The ALJ further concluded that the appeal was not time-barred and evidence the respondent sought to introduce at the OAL, to justify its failure to take action, was inadmissible.

PROCEDURAL HISTORY

This matter began when Landing Realty, Inc., (Appellant) appealed the De Facto denial of its renewal application by the Hoboken ABC, (Respondent) for the 1994-1995 license term. George B. Campen, Esquire, filed the appeal on behalf of the Appellant on December 27, 1994. The matter was transmitted to the Office of Administrative Law (OAL) on January 31, 1995 for determination as a contested case.

The case was initially assigned to Administrative Law Judge (ALJ) Sebastian Gaeta, Jr., and a hearing was scheduled for September 26, 1995. At the request of the Respondent, the hearing was adjourned due the apparent difficulty in securing a response from the Appellant to discovery requests. During this time, ALJ Gaeta was appointed to the Superior Court bench and the matter was reassigned to ALJ Thomas R. Vena, who scheduled a hearing to take place on August 2, 1999. The August 2, 1999 hearing was converted to a pre-hearing conference that resulted in an order scheduling a hearing date of December 8, 1999, directing discovery completion and providing for pre-hearing memoranda.

The Respondent subsequently filed two motions with the ALJ. The first sought sanctions for the Appellant's failure to comply with its discovery obligations and the second sought leave for the Respondent to include in its OAL presentation, evidence about the Appellant that was not before the Respondent (after-acquired) when it made its decision to table the application and take no further action upon the same. The parties pre-hearing memoranda were submitted to the ALJ on November 8, 1999 and November 23, 1999, respectively. By order dated November 24, 1999 and letter opinion dated November 29, 1999, the ALJ denied Respondent's motion for sanctions, reserved on its motion for leave to introduce after-acquired evidence and converted the parties' pre-hearing memoranda to cross-motions for summary disposition.

The December 8, 1999 hearing was reserved for oral argument on the cross-motions. The ALJ found that there was no genuine issue of material fact in dispute, that would preclude summary judgement. The ALJ determined that: 1) The Respondent failed to conform to the formal notice requirements of N.J.A.C. 13:2-17.3 in the manner in which it notified the appellant of its decision to take no action on the renewal application, 2) Respondent's De Facto denial of the application for renewal was erroneous as a matter of law, 3) Appellant's appeal was not time-barred, and 4) the after-acquired evidence was inadmissible.

The Initial Decision was received by the Division on January 24, 2000. The time to render a Final Conclusion and Order was extended by properly executed Orders until July 10, 2000.

FACTUAL DISCUSSION

The Appellant, Landing Realty, Inc., t/a Nardine's Restaurant, is the holder of Plenary Retail Consumption License Number 0905-33-081-002, in Hoboken, New Jersey. Appellant

made a timely application to renew its license for the 1994-95 license term. On July 27, 1994, the Secretary of the Hoboken ABC, Leonard Serrano, sent a letter to the president of Landing Realty, Inc., Esmat Zaclama, informing him that they had not received the Appellant's sales tax certificate of authority number and therefore, was unable to consider the application for renewal at that time.

On August 23,1994, Respondent adopted a resolution stating that it had "tabled" the renewal application because of Appellant's failure to pay local property taxes. On September 19, 1994, Mr. Serrano sent a letter to Mr. Zaclama stating that the application had been tabled for that reason and, if the city failed to act by September 28, it could be "deemed a denial"which the licensee could appeal to the state ABC. Mr. Serrano sent an additional letter to Mr. Zaclama, dated November 1, 1994, in which he stated that the city's failure to act constituted a denial of the application and that the Appellant should file an appeal with the Division of Alcoholic Beverage Control, pursuant to N.J.A.C. 13:2-17.1.

The appeal was filed on or about December 27, 1994, by George B. Campen, Esquire, former counsel to the Appellant. He referred to the letter of November 1,1994 as an arbitrary and capricious denial of renewal. The answer denied the allegations and raised the issue of it being time-barred.

At the OAL hearing, Respondent offered to provide evidence that sometime in 1995 it discovered that the Appellant failed to comply with a 1992 directive from the Hoboken Board of Health. It was supposed to submit remodeling plans of the restaurant which it failed to do. In addition, the Respondent sought to demonstrate that it was precluded from renewing Appellant's license for the 1994-95 license term because the license was inactive for more than two years, in violation of N.J.S.A. 33:1-12.39.

The ALJ suggested that the parties seek clarification from the attorney who filed the appeal to determine whether the Petition of Appeal constituted an acknowledgment of service by the Appellant for the November 1,1994 letter from the city clerk. On December 22, 1999, the ALJ received a certification from Mr Campen which stated that he contacted the City's ABC Board in December of 1994 and obtained a copy of the letter from the Board. He was unaware of when or whether the letter was actually received by the appellant and the appeal he filed was not an acknowledgment of service.

LEGAL DISCUSSION

The renewal of a retail alcoholic beverage license rests within the discretion of the local issuing authority and the Division of Alcoholic Beverage Control if on appeal. Zicherman v. Driscoll, 133 N.J.L. 586, 588 (Sup. Ct. 1946); Nordco, Inc. v. State, 43 N.J. Super. 277, 282 (App. Div. 1957). A decision by the local issuing authority should be overturned only when there is clear abuse of discretion or an arbitrary exercise of its powers. Lyons Farms Tavern v. Municipal Bd. Alc. Bev., Newark, 55 N.J. 292, 351 (1970).

N.J.A.C.13:2-17.3 states in part that an appeal must be taken "within 30 days after the personal service or mailing by registered mail of a written notice by the municipal issuing authority of the action taken against the license or the applicant." Here, the respondent argues that tabling its consideration of the application constitutes "action taken against the ...applicant" and the letter of November 1,1994 sent via ordinary mail, constitutes " personal service." There is another section of the regulations which is specifically applicable to circumstances where the local issuing authority fails to take action on a renewal application within 90 days after the license term expires.

N.J.A.C. 13:2-2.10 states in part that "if no action is taken on an application for renewal of license within 90 days after the expiration of its term, the applicant may file an appeal with the Director from such failure to act on the renewal application." No time limitation is imposed on an applicant in this situation and he is free to wait at least a reasonable time while the city makes up its mind. Thereafter, the applicant may treat the situation as though an adverse determination had been made and file an appeal with the Director.

The ALJ determined that this matter was ripe for Summary Decision, with the sole issues being whether the reason given by the City in its resolution, for its refusal to take action (non-payment of property tax) was legally insufficient and whether the appeal was filed within the time allowed by law.

Summary Decision is appropriate when "the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and the moving party is entitled to judgement as a matter of law." N.J.A.C. 1:12-12.5(b). The burden is on the moving party to show there is no issue of material fact. Inferences and doubts are drawn in favor of the non-movant and against the movant.

I agree with the ALJ's conclusion that the Petition of Appeal is not time-barred. Pursuant to N.J.S.A. 33:1-22, when the local issuing authority "shall refuse" to issue a license, an appeal by the licensee must be taken within thirty (30) days after he is personally served with notice of the action taken against him or service is effected by registered mail. A municipality may only act by way of a properly adopted resolution or ordinance. See Town of Irvington v. Ollemar, 128 N.J.. 402 (CHC. 1940) and Inganamort v. Borough of Fort Lee, 72 N.J. 412 (1977). I find that the resolution adopted by the city on August 23, 1994, tabling the application, is not a clear refusal and the subsequent letters by the city clerk, do not change that. The licensee was free to wait a reasonable time to see if the city would take his application off the table. His appeal on December 27, 1994 was entirely consistent with the Statue and N.J.A.C. 13:2-2.10.

I would reach the same conclusion if the city's action was a clear denial. Pursuant to N.J.S.A. 33:1-22, the time to appeal does not begin to run until one of the above-listed forms of notice is given. Respondent conceded to the ALJ that it failed to comply with these notice requirements. Instead, he argues that the licensee received actual notice by ordinary mail and that is sufficient as "personal service" when a statute does not direct service to be made by any

particular official. Respondent relies on Wilson v. Trenton, 53 N.J.L. 645 (E. & A. 1891), Alexander v. Rekoon, 104 N.J.L. 1 (S.Ct. 1927) and Smick Lumber v. Hubschmidt, 177 N.J. Super. 131 (Law Div. 1980), aff'd, 182 N.J. Super. 306 (App. Div. 1982).

The Respondent cites Wilson to establish that notice by regular mail is sufficient when a statute does not direct that personal service be made by any particular official in any particular matter, as long as the notice was sufficient and there was evidence of actual delivery to the party. Here, there is no proof of when the Appellant actually received notice of the municipal action taken against it. Appellant's former attorney does not acknowledge his receipt of the November 1,1994 letter until sometime in December 1994 when he contacted the city clerk and there is nothing in the record before the AJJ or me to indicate whether the licensee received it at all.

Finally, the respondent relies on Smick Lumber, where the court concluded that service was sufficient since the defendant admitted receiving notice within the time frame set forth under the Mechanics' Lien Act, even though service was by ordinary mail rather than certified or registered mail. This is not the case in the present matter because the Appellant does not acknowledge receiving the notice until sometime in December of 1994, thereby making the appeal timely filed.

I agree with the ALJ that the reason given by the town for tabling consideration of the application, failure to pay property taxes, is not sufficient, as a matter of law, to deny renewal of the license. See N.J.S.A. 40:52-1.2. I also agree that the Respondent's attempt to introduce justification for tabling the license application that was unknown at the time it passed its resolution should not be considered. Furthermore, even if the applicant had failed to comply with a Directive from the Hoboken Board of Health and evidence thereof was before the Respondent when it issued its resolution, that by itself would not be enough to deny renewal of the license.

The licensee's inactivity for two or more license years could have been a legally sufficient basis to deny renewal. Under those circumstances, the licensee should have been directed to petition the Director for a Special Ruling that would allow the municipality to act upon the renewal application. See John A. Casarow, Jr., Trustee in Bankruptcy for Grey Fox, Inc. v. Borough of Paulsboro, Director's decision of May 3, 1999. However, the Respondent had nothing before it to indicate inactivity by the Licensee when it passed its resolution in August of 1994.

Almost five years have elapsed between the filing of the Licensee's Appeal (December 27, 1994) and the Summary Judgement Hearing at OAL on December 9, 1999. I am permitted to take notice of records maintained by the Division of ABC concerning this license. Those records reflect that the last renewal application filed by the Appellant was for the 1995-96 license term. The fact that the licensee is presently appealing denial of a prior renewal has no effect on his obligation to make timely filing for renewal in subsequent years. N.J.S.A. 33:1-

12.13 requires a licensee to file a renewal application along with payment of appropriate fees, on an annual basis. If no applications for renewal have been filed, any decision I render in this case may be moot.

Division records also show that on March 11, 1996, the city of Hoboken passed a resolution revoking Appellant's license. Our records do not reflect that an appeal was taken from this action. If this is the case, I would be without authority to render a decision on the merits since the non-existence of the license renders the issue moot. See Hess Oil & Chemical Corp. v. Doremus Sport Club, 80 N.J. Super. 393 (App. Div. 1963) cert. denied 41 N.J. 308 (1964).

In light of the foregoing circumstances, the Appellant should be afforded the opportunity to submit proof on these issues. In such situations, the New Jersey Administrative Code provides, "[a]n agency head may enter an order remanding a contested case . . . for further action on issues or arguments not previously raised or incompletely considered." N.J.A.C. 1:1-18.7. It is, therefore, appropriate in this case to remand the matter back to the Office of Administrative Law.

On remand, the ALJ should afford the parties the opportunity to give testimony and offer evidence pertaining to the following:

1) Whether the Appellant has appealed a resolution, passed on March 11, 1996, by the Respondent, revoking Appellant's license.

2) Whether the Appellant has filed for renewal of the license for the 1996-97, 1997-98, 1998-99, and 1999-2000 license terms.

CONCLUSION

Upon consideration of the facts herein, I find that good cause exists to remand this matter to the Office of Administrative Law for further analysis consistent with this opinion.

Accordingly, it is on this **10th** day of **July 2000**,

ORDERED that the decision of the ALJ with respect to whether or not the appeal was timely filed is hereby **AFFIRMED**; and it is further

ORDERED that the case is hereby **REMANDED** to the Office of Administrative Law for further proceedings consistent with this opinion.

/S/ JERRY FISCHER
JERRY FISCHER
ASSISTANT ATTORNEY GENERAL-IN-CHARGE

3. ECONOMY LIQUORS, INC., V. GOVERNING BODY OF THE CITY OF TRENTON - FINAL CONCLUSION AND ORDER AFFIRMING ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION DENYING APPELLANT'S APPLICATION FOR PLACE-TO-PLACE TRANSFER

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

APPEAL NO. 6643

ECONOMY LIQUORS, INC. LICENSE NO. 1111-44-088-003 APPELLANT, v. GOVERNING BODY OF THE CITY OF TRENTON, RESPONDENT.	)	CONCLUSION AND ORDER

BY THE DIRECTOR:

Appellant contests action by the local issuing authority denying an application for a place-to-place transfer of its plenary retail distribution license. The issue is whether there is reasonable support in the record for Respondent's decision to deny the transfer. Written Exceptions to the Initial Decision were not filed on behalf of either party. The time to render a Final Decision was extended by properly executed Orders; therefore, my Final Conclusion and Order must be issued on or before August 31, 2000. For reasons stated herein, I accept the Initial Decision, affirm the action of the Respondent and deny the place-to-place transfer of the above noted license.

PROCEDURAL HISTORY

This matter arose from the decision of the Alcoholic Beverage Control Board of the City of Trenton (Trenton) which, by resolution dated March 30, 1999 denied the Appellant's

(Economy Liquors Inc.) application for a place-to-place transfer of its inactive plenary retail distribution license number 1111-44-088-003. The Appellant filed a timely Notice and Petition of Appeal which was then transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 14F-1 et seq. A hearing was conducted on March 20, 2000. An Initial Decision in favor of the Respondent was rendered by the Honorable Anthony T. Bruno in May 26, 2000.

INITIAL DECISION

At the hearing before the ALJ, numerous witnesses testified in opposition to the place-to-place transfer. They included Christopher DeJesus, Vice-Principal of Martin Luther King Middle School; Tyrone Gaskin, Social Worker; Reverend James Justice, Pastor of Mount Zion A.M.E. Church; Algernon S. Ward, Jr., First Vice-President of the Trenton Council of Civic Association's representing Districts 9 - 11 Crime Watch and Civic Association; Margaret Syphax, local resident; Cordelia Staton, Assistant to the Director of the Weed and Seed Program; Paul Perry, local resident; Angel Lewis, local resident; Ralphiel Mack, Social Worker at Jefferson Elementary School and Reverend Roger Jones, Pastor of the New Holy Cross Church on behalf of the Concerned Ministers of Trenton. I hereby incorporate by reference the testimony of these individuals as set forth in the Initial Decision. Additionally, Respondent has submitted its Resolution dated March 30, 1999 which sets forth the general reasons for denial of the place-to-place transfer.

The ALJ found as a fact that the site which is the subject of the place-to-place transfer of this license is zoned RB-Residence within the B District of Trenton. The Judge states in his Initial Decision:

> "The permitted uses of premises within the resident's B District does not include use as a liquor store. (City of Trenton revised General Ordinances 19-18.1-Exhibit C-1.) The Zoning Ordinance further states, "No building shall hereafter be used, erected, altered, converted...nor shall any land be designed, used or physically altered for any purpose in any manner except in conformity with this chapter." (SCC19-15.1). "All uses not expressly permitted in this Chapter are prohibited. (SCC 19-1.5)"

The ALJ also stated "One may only ask rhetorically why Economy completed the purchase of the site without obtaining a Use Variance to permit the non-conforming use of the property as a liquor store. However, I conclude that Economy's purchase of the site

without obtaining a Use Variance cannot be considered as "hardship" or "special reason".[1]

LEGAL DISCUSSION

I find that the public interest must guide a municipality in its determination. The testimony by Respondent's witnesses reflects the issuing authority's concern for the welfare of its citizens. The issuing authority's actions cannot be categorized as arbitrary, capricious, or unreasonable. In arriving at this determination, I gave due consideration to all of the facts and circumstances presented to the ALJ in this case. One of those facts was the distance of the proposed site to churches and schools in the area. It is well-established that close proximity to a school or church may be a factor in determining the propriety of a license transfer, even if outside the distance barred by the statutory distance limitation in N.J.S.A. 33:1-76. Fanwood v. Rocco, 33 N.J. 404 (1960).

The responsibility for the administration and enforcement of Alcoholic Beverage Laws pertaining to the transfer of a license primarily rests with the local issuing authority. N.J.S.A. 33:1-19 and -24, Lyons Farms Tavern v. Mun. Bd. of ABC, 55 N.J. 292, 302 (1970). Municipal authorities have wide discretion in making this determination, and are guided by considerations of the public interest. Lyons Farms, supra. 55 N.J. at 303; Lubliner v. Bd. of ABC, 33 N.J. 428, 446 (1960).

Appellant asserts that there have been other transfers approved in this municipality in the recent past. This argument is not persuasive, since the history of the proposed licensed premises as a trouble spot is unique. Respondent, guided by the public interest, has determined that a licensed premises at this location and in this neighborhood would cause problems in the community. Respondent properly considered conditions not attributable to the conduct of this licensee, and determined that conducting a liquor licensed business at this particular location would be contrary to the public interest. Nordco, Inc. v. State, 43 N.J. Super. 277, 282 (App. Div. 1957). Case Law supports a municipality's discretion to prevent decay of its neighborhood and community. Lyons Farms Tavern, 55 N.J. at 304; Boricua Social Club, Inc. v. City Council, 94 N.J.A.R. 2nd (ABC) 36 (1994).

Appellant bears the burden of proving that the issuing authority's denial was unreasonable. N.J.A.C. 13:2-17.6; Lyons Farms Tavern, Inc. v. Mun. Bd. of ABC, 55 N.J. 292, 303 (1970); Inn at Woodbridge, Inc. v. Mun. Council of Woodbridge, 9 N.J.A.R. 286, 294 (ABC 1984) cert. denied 105 N.J. 510 (1986).

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[1] Not mentioned in the Administrative Law Judge's Decision is the fact that the transfer issue may well be rendered moot in that movement of the license would be in violation of Trenton's Local Zoning Ordinance 19-18.1.

I find that the Appellant has failed to prove by a preponderance of the evidence that the local issuing authority of the City of Trenton abused its discretion in denying the place-to-place transfer of Plenary Retail Distribution License No. 1111-44-088-003. Therefore, I concur with the decisions of the City of Trenton and Administrative Law Judge Bruno.

Accordingly, it is on this 29th day of August, 2000,

ORDERED, that the action of the Governing Body of the City of Trenton, in denying Appellant's application for the place-to-place transfer of Plenary Retail Distribution License No. 1111-44-088-003, to 813 Southard Street, is hereby affirmed, and the Appeal is hereby dismissed.

/S/ JERRY FISCHER
JERRY FISCHER
DIRECTOR

4. BUSINESS FOR ALL, INC., V. DIVISION OF ALCOHOLIC BEVERAGE CONTROL - FINAL CONCLUSION AND ORDER DENYING PETITION FOR ISSUANCE OF A NEW LICENSE PURSUANT TO THE PROVISIONS OF N.J.S.A. 33:1-12.18 FOR THE 1996-97 & 1997-98 LICENSE TERMS

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
Division of Alcoholic Beverage Control

BUSINESS FOR ALL, INC., APPELLANT, V. DIVISION OF ALCOHOLIC BEVERAGE CONTROL, RESPONDENT.	FINAL CONCLUSION AND ORDER DENYING PETITION FOR ISSUANCE OF A NEW LICENSE PURSUANT TO THE PROVISIONS OF N.J.S.A. 33:1-12.18 FOR THE 1996-97 AND 1997-98 LICENSE TERMS AGENCY DKT. NOS. 12-96-418 AND 07-98-965

Scott J. Bennion, Esq., Attorney for Appellant

Richard Nasca, Deputy Attorney General, for Division of Alcoholic Beverage Control (John J. Farmer, Jr., Attorney General of New Jersey, Esq.)

Jonathan H. Rose, Esq., for Respondent, City of Passaic
(Scarinci & Hollenbeck, Attorneys)

Initial Decision Below by the Honorable Ken R. Springer, Administrative Law Judge

Decided: June 15, 2000 Received: June 21, 2000

BY THE DIRECTOR:

This appeal involves two petitions by Business For All, Inc., (hereinafter "petitioner") requesting authorizations for the issuance of a new license due to its failure to timely renew for the 1996-97 and 1997-98 license terms pursuant to the provisions of N.J.S.A. 33:1-12.18. For two years in succession, petitioner failed to file an application for renewal of its annual license by the statutory deadline and now seeks that a new license should be issued due to circumstances beyond its control.

The petitioner on April 7, 1997, filed an application with the Director for a Special Ruling pursuant to N.J.S.A. 33:1-12.18 for the 1996-97 license term and the matter was subsequently transmitted to the Office of Administrative Law on December 24, 1997. The Passaic ABC Board objected and was noticed of the OAL referral.

The next year on June 30, 1998, the petitioner filed a second application with the Director requesting similar relief for the 1997-98 license term. This application was forwarded to the Office of Administrative Law on July 29, 1998 and consolidated. The Office of Administrative Law held a hearing on these cases on April 28, 1999 and closed the record on August 3, 1999. The Initial Decision was issued on June 15, 2000. The applicant's attorney has filed a series of Exceptions to the Initial Decision dated July 5, 2000 and Replies to those Exceptions were filed by the State dated July 18, 2000. The Division requested and received an extension for the Director's review and final determination until September 21, 2000.

The facts in this matter are completely set forth by the Administrative Law Judge and need not be repeated herein at length. The key issue in this case is whether pursuant to the petitioner's testimony he or his father attempted to file the renewal application with the Secretary of the Passaic ABC Board in June of 1996 and attempted to file a subsequent renewal application on or about June of 1997. The Administrative Law Judge after hearing all the testimony and reviewing all the facts found that as to the 1996-97 license term, the petitioner did not attempt to file the renewal application with the City until October 2, 1997. In addition, the Administrative Law Judge found that with regards to the 1997-98 license term, the petitioner did not file the application with the City until October 2, 1997. The attorney for the petitioner in his Exceptions attempts to dispute these findings by drawing different conclusions from the testimony. For example, the Administrative Law Judge notes the licensee had been in business since 1988 and it was aware of the necessity to renew the license on an annual basis. Therefore he could not claim that he had no knowledge the license had to be renewed. The petitioner attempts to "turn this around" and state it is highly unlikely that the petitioner would not attempt to renew the license knowing that it had to be renewed on an annual basis. Similarly the petitioner states that the notes of the deceased ABC Board Secretary does not deny she refused to accept the renewal application but only denies she did not refuse any application because of tax purposes. Finally, the petitioner notes that there were problems in 1998 and 2000 that the City would not accept the applications of the petitioner, therefore, similar problems occurred in 1996 and 1997.

The Deputy Attorney General in response to these written Exceptions states that the Administrative Law Judge makes determinations of credibility based upon reviewing the demeanor of the witnesses and all the facts before him. These findings should not be disturbed, unless there is a showing that the findings are so contrary to the evidence as presented that a reasonable man would not have drawn those conclusions.

The choice of accepting or rejecting the testimony of witnesses rests with the Judge, the trier of fact. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). It is obvious that the Administrative Law believed the testimony of the State which he found to be credible and his determination was based upon a reasonable certainty as to the probabilities arising from fair consideration of the evidence. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954). Specifically, the Administrative Law Judge was able to observe the demeanor of the witnesses as they testified and made a determination as to where the truth lies. Gallo vs. Gallo, 66 N.J. Super. 1,5 (App. Div. 1961). Thus he was able to determine the credibility of each witness in reaching his conclusion.

The petitioner while presenting alternative interpretations of the evidence, has failed to present any evidence that the Administrative Law Judge did not consider nor did he demonstrate through transcripts or other evidence that the conclusion and determinations drawn by the Administrative Law Judge were clearly against the weight of the testimony. The Courts have found that while an agency head is not bound by the Administrative Law Judge's conclusions, if it chooses to disregard or ignore them, it must set forth a reasonable basis for such denial or alternative findings especially with the issue credibility of witnesses. To do otherwise is to risk reversal by the Appellate Courts. (See for instance State of New Jersey, Department of Health v. Tegnazin, 194 N.J. Super. 435, 449 (App. Div. 1984); Clowes v. Terminix Intern, Inc., 109 N.J. Super. 574, 587 through 588 (App. Div. 1988); Renan Realty Corp. v. Community Affairs Department, 182 N.J. Super 415, 419 (App. Div. 1981); P.F. v. New Jersey Division of Disability, 139 N.J. Super. 522, 530 (App. Div. 1995).

Therefore, in reviewing the Exceptions presented by the petitioner, I am satisfied that the Administrative Law Judge weighing all the testimony and evidence considered the arguments raised by the petitioner, and chose to make a different finding of fact and determination based upon the overall factual situation. Therefore, the Exceptions presented by the petitioner I believe have been previously considered and addressed by the Administrative Law Judge.

CONCLUSIONS OF LAW

In making applications for relief pursuant to N.J.S.A. 33:-1-12.18, the application must be filed no later than September 28th of the year in which it is to be renewed. In this case, the Administrative Law Judge found that the applications had not been filed by September 28, 1996 and September 28, 1997 but instead both had been filed on October 2, 1997. This was beyond the statutory deadline for both the 1996-97 and 1997-98 renewals. The

failure to meet the statutory deadline of September 28th deprives the Director of jurisdiction to consider the petition, and the petition must be dismissed. Red Lark Lounge Inc. v. ABC, A1139-721 (App. Div. 1927, 1973, unreported), In Re Driftwood Inc., A810-87T7 (app. div. July 12, 1988 unreported), Neltex Inc., v. ABC, A1481-87T7 (App. Div. February 1989 unreported), In Re Granada Restaurant, 97 NJAR 2nd (ABC) 13 (December 3, 1996).

In the alternative, the petition attempts to argue that the facts clearly demonstrate constructive or substantial compliance with the statutory deadline. In order to establish substantial compliance, the key element is to demonstrate that the petitioner or applicant relied upon to his detriment representations made by State or municipal officials or that he attempted to file in timely manner and was prevented from doing so by the action of the State or municipal officials. In Re Ronnie Trent Enterprises, ABC Bulletin No. 2296, Item 7 (April 2, 1978). In the case before us, the Administrative Judge made no findings nor is there any other information that the applicant has submitted which would demonstrate this detrimental reliance. If anything, the applicant had substantial time to file these applications but chose not to.

The burden is upon the petitioner to demonstrate that the failure to timely renew is due to circumstances beyond its control. Normally such circumstances are events and experiences that are outside the ordinary course of daily events. On this issue, the petitioner presented no testimony to demonstrate anything substantial occurring that was different than any other renewal term. The applicant knew since 1988 that the license had to be renewed on an annual basis and chose not to do so at this particular time. While he might have moved, he knew that the license was renewed in June.

Accordingly, it is on this 13th day of September, 2000,

ORDERED that the petition of Business For All, Inc., holder of plenary retail consumption license 1607-33-112-004 requesting authorization for the issuance of a new license for failure to timely renew for the 1996-97 and 1997-98 license terms is hereby dismissed; and it is further

ORDERED that the petition of the applicant, Business For All, Inc., holder of plenary retail consumption license 1607-33-112-004 requesting authorization to renew its license for the 1996-97 and 1997-98 license terms is hereby dismissed as moot; and it is further

ORDERED that the Municipal Board of Alcoholic Beverage Control of the City of Passaic shall note on its record that plenary retail consumption license number 1607-33-112-004 held by Business For All, Inc., lapsed in the 1996-97 license term for failure to timely renew.

/S/ JERRY FISCHER
JERRY FISCHER
DIRECTOR

5. **RUSSIAN WHITE HOUSE RESTAURANT, INC., V. VILLAGE OF RIDGEWOOD - FINAL CONCLUSION AND ORDER AFFIRMING THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AFFIRMING RESPONDENT'S DENIAL OF RENEWAL FOR THE 1997-98 & 1998-99 LICENSE TERMS**

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
Division of Alcoholic Beverage Control

RUSSIAN WHITE HOUSE RESTAURANT, INC.,	FINAL CONCLUSION AND ORDER ACCEPTING THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AFFIRMING RESPONDENT'S DENIAL OF RENEWAL FOR APPELLANT'S LICENSE FOR THE 1997-1998 AND 1998-1999 LICENSE TERMS.
PLENARY RETAIL CONSUMPTION LICENSE NO. 0251-33-010-006	
APPELLANT,	
V.	OAL DKT NO. ABC 7585-97 & ABC 7036-98 CONSOLIDATED
VILLAGE OF RIDGEWOOD	
RESPONDENT.	AGENCY DKT. NO. 6491 & 6575

Alan S. Pralgever, Esq., Attorney for Appellant.
(Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, attorneys)

Sydney V. Stoldt, Esq., Attorney for Respondent.
(Stoldt, Horan & Kowal, attorneys)

Initial Decision Below by the Honorable Arnold Samuels, Administrative Law Judge.

Decided: March 23, 2000 Received: April 3, 2000

BY THE DIRECTOR:

The issue before me is whether the Village of Ridgewood ("Respondent") acted in an arbitrary and capricious manner in denying Russian White House Restaurant, Inc., t/a All American Sports Bar's ("Appellant") renewal of its Plenary Retail Consumption License, after finding that the establishment is a trouble spot and a nuisance, and that the continued operation of the license would be against the public interest. I adopt the decision of the Administrative Law Judge and affirm the Respondent's actions for the reasons stated below.

PROCEDURAL HISTORY

The Village Council of the Village of Ridgewood, by resolutions dated June 30, 1997 and June 22, 1998, denied the Russian White House Restaurant's applications for renewal of its Plenary Retail Consumption License for the 1997-1998 and 1998-1999 license terms. The Respondent's actions stem from a series of violations related to the license, including the service of alcohol to minors, patrons leaving the licensed premises and driving while under the influence of alcohol, the service of alcohol to intoxicated persons, and incidents of assault and battery of patrons, innocent bystanders and police officers.

After receiving the Appellant's appeals, the Division of Alcoholic Beverage Control ("Division") extended each license year pending determination of the appeals in Orders dated July 1, 1997 and June 7, 1998. The Division transmitted the two appeals to the Office of Administrative Law ("OAL") on August 7, 1997 and on July 22, 1998, respectively, for hearing and determination as a consolidated case, pursuant to N.J.S.A.52:14F-1 to 13.

Following the July, 1997 extension, the Respondent motioned for an order to dissolve the extension of the license. On September 8, 1997, the Director issued an Order denying the motion. The Order, however, included Special Conditions stipulating that (1) All individuals serving alcohol within the licensed premises will complete a training course, (2) The All American Sports Bar ("Sports Bar") will no longer permit boxing matches, (3) The Sports Bar will report all alcohol promotions to the police department, and (4) The Sports Bar must report all incidents of violence to the police.

Subsequently, a plenary hearing was held over a total of fifteen days between June 18, 1998 and June 2, 1999. During this period, the Appellant's license had again come due for renewal for the 1999-2000 license term. The Respondent denied renewal based on the same incidents and circumstances identified during the hearings for the previous two renewal terms.

The Appellant moved to consolidate the appeal of a third denial of renewal for the 1999-2000 license term. The OAL denied this request because of the substantial delay that would occur should the hearing be reopened. Appellant applied for interlocutory review of the Order Denying Consolidation. The request was denied.

Also, the Respondent denied renewal of Appellant's license for the 2000-2001 license term. In my July 28, 2000 Order, I imposed special conditions on the operation of the license

pursuant to a request for interim relief that would extend the license pending outcome of the appeal. One special condition stated that "[t]he Appellant shall have one police officer on the licensed premises between the hours of 9 p.m. and 2 a.m. (closing time) on each and every day that the licensee is open for business during those hours. This condition is to ensure that the activities that take place thereon are in compliance with ABC regulations and law. The police officer shall be employed by the Village of Ridgewood and the Village shall be reimbursed by the Appellant at the rates set by the Ordinance providing for reimbursement in such matters. The officer shall, at all times, be under the direction and control of the Police Chief."

The Initial Decision in the instant matter was rendered on March 23, 2000 and received by the Division on March 31, 2000. In his decision, Judge Samuels concluded that Respondent proved, by a clear preponderance of the credible evidence, that the All American Sports Bar was a trouble spot and a nuisance. Further, he concluded that the denials of renewal were not disproportionate penalty and that no mitigating factors existed. Based upon these conclusions, an Order was entered affirming the action of the Respondent denying license renewals for the years 1997-1998 and 1998-1999. Appellant now appeals the recommendation and Order of the Administrative Law Judge.

On May 15, 2000, at the Director's request, the Office of Administrative Law extended the statutory period for review and rendering of a Final Decision to June 29, 2000 in order to provide Appellant with additional time to file Exceptions. Appellant filed Exceptions to the Initial Decision on May 17, 2000. Respondent subsequently filed its undated Reply to the Exceptions, which was received by the Division on May 25, 2000. On June 19, 2000, the Director requested a second 45 day extension of the statutory period for review and rendering of a Final Decision, which would extend the period to August 14, 2000. Prior to the expiration of time to render a Final Decision, a third order of extension was requested and received by the Director, and the period for review and rendering of a Final Decision was extended to September 28, 2000.

FACTUAL DISCUSSION

In the fall of 1993, the Russian White House, Inc., opened a restaurant in the Village of Ridgewood. Svetlana Chusid was listed as the sole owner of the stock of Russian White House, Inc. The Village of Ridgewood approved the transfer of Plenary Retail Consumption License No. 0251-33-010-005 to the Russian White House, Inc., in September 1993. Respondent renewed the license for the 1994-1995 and 1995-1996 license terms.

In April, 1996, the Respondent approved an expansion of the existing premises, which licensed the first floor. Soon after, Chusid changed the format of the Russian White House, and re-opened it as the All American Sports Bar. On the 1999-2000 renewal application, Svetlana Chusid acknowledged a transfer of the stock the Russian White House, Inc., to an entity controlled by her son Boris Chusid, who was named President. Boris Chusid also owns the

building in which the Sports Bar is located. Eugene Chusid, also Svetlana Chusid's son, is the active head manager of the Sports Bar.

The Respondent denied renewal of the Appellant's license for the 1997-1998 and 1998-1999 license terms, finding that the Sports Bar was a trouble spot. The denials were based on approximately 40 incidents that took place between November, 1994 and June, 1998, and were documented in police reports. The incidents relied on by the Respondent included instances of members of the Chusid family being arrested for charges unrelated to the operation of the Sports Bar; members of the Chusid family resisting arrest and obstructing the police; patrons urinating outside the Sports Bar facility; several altercations, fights, and assaults inside and outside of the Sports Bar that included patrons, employees, and innocent bystanders; individuals charged with DUI immediately after leaving the licensed premises; patrons using and possessing controlled dangerous substances ("CDS") and CDS related paraphernalia; several instances of individuals under the legal drinking age purchasing alcoholic beverages and consuming them at the Sports Bar; and finally, incidents involving patrons exiting the Sports Bar with open containers containing alcoholic beverages.

At the hearing, the Administrative Law Judge considered testimony from the police officers who had authored the police reports entered into evidence, as well as a neighbor of the Sports Bar. He also heard testimony from a member of the Chusid family, as well as Sports Bar employees. In a well reasoned 72 page Initial Decision, the Administrative Law Judge found that the Respondent had proven by a clear preponderance of the believable evidence that its actions were not arbitrary, capricious or unreasonable.

The Administrative Law Judge found that the Police Department frequently responded to calls at the Sports Bar involving fights resulting in injuries, public urination, disturbances, disorderly conduct, and patrons exiting the bar with open containers of alcohol.

More specifically, police officers testified that they spent 60 percent to 70 percent of the time while on patrol near the Sports Bar. Another officer testified that he responded more to calls from the Sports Bar than from any other licensed premises in the Village of Ridgewood, and that patrons at the Sports Bar are younger and more rowdy than the patrons of other licensed establishments. In addition, police officers testified that there were frequent fights in and around the Sports Bar, and that bouncers and other employees of the Sports Bar often participated in these incidents. Additionally, underage patrons were often admitted into the Sports Bar without showing any identification once they had presented false identification and were known to the bar employees. There often was no one at the entrance to verify the age of patrons.

Without repeating all of the factual evidence considered by Judge Samuels, it is important to note some of the principal evidence as well as specific findings on the subject. This is necessary in order to make clear that the record below establishes quite easily that the Respondent was faced with a problem that exceeded what might be typical for any licensed

premises. Contrary to Appellant's assertion that the incidents at its premises were not distinguishable from others, the record and Judge Samuels 43 findings comprising 10 pages make clear that the premises were a long standing trouble spot.

During the 1994-1995 license term, there was one incident involving the operation of the Sports Bar. This incident involved the arrest of a patron who the police witnessed urinating in public and who was found to be in possession of CDS.

The requirement for a police presence increased during the following license term, 1995-1996. In the course of this period, there were three incidents involving underage drinking, two incidents of fights and/or assaults at the Sports Bar, two incidents of intoxicated patrons leaving the bar, and an incident involving a patron leaving the bar with an open container of alcohol. A bouncer allegedly blocked police entry to the bar during this last incident.

The number of incidents requiring police intervention increased again during the 1996-1997 license term. During this period, there were five assaults/fights associated with the Sports Bar, including one that resulted in the filing of three separate police reports. In addition, four patrons of the Sports Bar were charged with DUI, a patron was arrested for possession of CDS, two incidents of patrons exiting the Sports Bar with open containers of alcohol, and an incident of malicious mischief occurred in the Sports Bar parking lot.

In the 1997-1998 license term, the number of incidents requiring police intervention continued at approximately the same level as in the previous year. Respondent highlighted the fact that the need for police presence continued even after the Respondent had denied Appellant's renewal application. The incidents for this license term included seven fights/assaults associated with the Sports Bar. One of the altercations resulted in four police reports, including an allegation that Sports Bar employees would not permit the police entry into the licensed premises. Furthermore, some of the altercations involved Sports Bar employees. In addition, three people were charged with DUI after drinking at the Sports Bar.

The Administrative Law Judge also considered incidents that occurred during the 1998-1999 license term. These involved two charges of underage drinking at the Sports Bar. One of the individuals charged with underage drinking was also charged with DUI. In addition, a Sports Bar bartender was charged with serving alcohol to an underage individual. Based upon the long history of police presence at the licensed premises, the Respondent denied the Appellant's applications for renewal for the 1997-1998 and 1998-1999 license terms.

The Appellant filed written Exceptions which challenged the Administrative Law Judge's Findings of Fact as well as alleging credibility and evidential errors on the part of the Administrative Law Judge.

Appellant argued that the Administrative Law Judge erred in relying on the testimony and exhibits presented by the Respondent because this evidence was largely inadmissible hearsay. The Appellant contends that the Administrative Law Judge should have determined that the majority of evidence, consisting primarily of statements on the scene to police, was inadmissible hearsay. Appellant claims that hearsay may only be employed to corroborate competent proof. N.J.A.C. 1:1-15.5(b). I note that hearsay is admissible in administrative hearings, and is "[a]ccorded whatever weight the judge deems appropriate." N.J.A.C. 1:1-15.5.

Appellant also takes exception to the Administrative Law Judge's Findings, and argues that the Sports Bar has cooperated, and continues to cooperate, with the Village of Ridgewood, and that community sentiment is in favor of keeping the Sports Bar open. Finally, Appellant contends that the Administrative Law Judge erroneously concluded that Respondent's witnesses were more credible than Appellant's. In addition, Appellant argues that it did not have timely notice that Respondent was planning to initiate negative actions against it. Essentially, these arguments go to the Appellant's view that the Administrative Law Judge's findings were against the weight of the evidence.

Because Respondent renewed Appellant's license in prior years, the Appellant averred that the burden of proof shifted to Respondent to prove a rationale for non-renewal through specific, definitive, and documented acts of malfeasance or misconduct by the licensee, its employees or patrons. Furthermore, the Appellant asserted that theAdministrative Law Judge was incorrect in his assertion that the burden of proof does not shift.

Additionally, Appellant argues that the incidents that took place prior to June 30, 1996, the date Respondent last renewed the Sports Bar's license, were improperly considered for the 1997-1998 license renewal. The Appellant maintains it was improper to consider incidents involving Eugene Chusid's alleged municipal violations, as well as the actions taken against Svetlana Chusid and Larisa Chusid because the parties are not stockholders of the licensee. N.J.S.A. 33:1-25.

Although disciplinary charges were not brought against the Sports Bar regarding each and every violation, the cumulative evidence indicates that the Sports Bar has required a police presence that has increased from year to year, and the bar is a trouble spot and a nuisance.

LEGAL DISCUSSION

"A liquor license is a privilege; property rights are not involved, and no licensee has a vested right to subsequent terms." *279 Club, Inc. v. Municipal Bd. of Alcoholic Beverage Control of Newark*, 73 N.J. Super. 15, 20, (App. Div. 1962); *Zicherman v. Driscoll*, 133 N.J.L. 586, (Sup.Ct.1946), 45 A.2d 620. A license to sell intoxicating beverages is neither a contract nor a property right. It is, instead, a temporary permit or privilege to pursue an otherwise illegal occupation. *See Mazza v. Cavicchia,* 15 N.J. 498, 505 (1954). N.J.S.A. 33:1–26 provides "that under no circumstances shall a license or rights thereunder be deemed property." *The Boss Co. v. Bd. of Commissioners of City of Atlantic City,* 40 N.J. 379, 382 (1963). However, once a license

is granted, it is protected against arbitrary or unreasonable suspension, revocation, or refusal to renew and the licensee is entitled to claim certain equities. When making a determination on a license, the local issuing authority must concern itself with those equities. *See, e.g., The Boss Co.* at 384; *Common Council of Hightstown v. Hedy's Bar,* 86 N.J. Super. 562, 565 (App. Div. 1965).

The primary responsibility for enforcing Alcoholic Beverage Control laws falls on the local issuing authority. *See Lyons Farm Tavern v. Municipal Bd. of Alcoholic Beverage Control of City of Newark,* 55 N.J. 292, 302 (1970). When an action of the local issuing authority is appealed to the Office of Administrative Law and the Administrative Law Judge issues an Initial Decision, the Director has the authority to adopt, reject, or modify that decision. *See In the Matter of Kallen,* 92 N.J. 14, 20 (1983). However, the actions of the local issuing authority are only reversible when those actions constitute abuses of discretion, manifest mistakes, are clearly unreasonable, or they are improperly grounded in the facts. *See Blanck v. Magnolia,* 38 N.J. 484, 492 (1962); *Common Council of Hightstown* at 563; *Grand Victorian Hotel v. Borough Council of the Borough of Spring Lake,* 94 N.J.A.R.2nd (ABC) 43, 47, *aff'd.*, No. A-0924-93 (App. Div. July 1, 1994). Reviewing courts should not interfere unless the evidence clearly indicates an abuse of discretion. *See 279 Club v. Municipal Bd. of Alcoholic Beverage Control of Newark,* 73 N.J. Super. 15, 21 (App. Div. 1962), citing *Nordco, Inc. v. State,* 43 N.J. Super. 277 (App. Div. 1957). Furthermore, the Administrative Law Judge and the Director may not substitute their judgment for that of the local issuing authority without a proper showing. *See Paul v. Brass Rail Liquors,* 31 N.J. Super. 211, 214-215 (App. Div. 1954); *Jaya v. City of Union City,* 96 N.J.A.R. 2nd (ABC) 53, 55 (March 4, 1996).

All incidents were generated at or were a result of the actions or omissions of the licensee. This caused a disproportionate requirement of police presence. The situation was further aggravated by the negative reactions, denials, evasions and hostile attitude by the licensee, its employees and agents.

The Appellant suggested that because the Respondent had renewed its license in prior years, it did not have notice that its actions or lack of action would be a basis for the future denial of its license. Considering Respondent's exhibits, which cover five years, there were a number of violations, including seven individuals arrested for DUI (who had allegedly been drinking at the Sports Bar); five people arrested for underage drinking; and three incidents of individuals being arrested for possession of CDSs and related paraphernalia. Appellant is incorrect in contending that the prior incidents must be segregated between renewals. The Administrative Law Judge found, and I concur, that there was a long-standing, unbroken pattern of problems. It is that continuous pattern that mandates the affirmance of the municipality's decision not renew the license. The Respondent, when considering Appellant's renewal application, had before it a record of problems, which, when considered in light of past experience, allowed the municipality to reasonably conclude that non-renewal was warranted. It is unreasonable to expect the municipality to put its head in the sand each year and divorce itself from knowledge of prior year's activities. The full impact of each year's charges could be best understood in the context of the entire record before the municipality. *See, e.g. Biscamp v. Twp. Council of the-Twp. of Teaneck,* 5 N.J. Super. 172, 175 (App. Div. 1949).

Appellant misuses the concept of notice to make an unreasonable claim for denial of fundamental fairness. The notice that Appellant is entitled to is simply notice that certain conduct would be unacceptable management of a license. The breadth of conduct alleged by Respondent and found by the Administrative Law Judge has in both case law and regulatory practice been proscribed, and thus is a valid basis for denial of renewal. It is well settled that such conduct is sufficient to deny the renewal of the license. Moreover, many of the incidents charged are direct violations of both regulatory and criminal statutes.

While in certain circumstances, the lack of prior charges may serve as mitigating circumstances because the conduct was either less egregious or less quantitative, that is not the case here.[1] *Cf.* N.J.A.C. 13:2-19.

Included in the Administrative Law Judge's analysis are five incidents of underage drinking attributed to the Sports Bar from the period of November, 1994 through January, 1999. N.J.S.A. 33:1-77 provides a statutory defense to charges of serving alcoholic beverages to an underage person. However, N.J.S.A. 33:1-77 does not provide a statutory defense unless a three prong test is met.[2] The Administrative Law Judge found that Appellant did not meet its burden.

I have considered the detailed findings of fact and determinations as to credibility of witnesses made by the Administrative Law Judge. I find that the Administrative Law Judge has

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[1] *See Allan Corp. v. Township of Garfield,* 92 N.J.A.R. 2nd (ABC) 26, 36 (February 25, 1962) (quoting *B & L Tavern v. City of Bayonne,* ABC Bulletin 1509, Item 1 (1963)) (non-renewal not warranted because the activities at the bar were not different from those at other taverns and the owner unaware of the municipality's concerns).

Unlike the owners of the tavern in *B&L Tavern,* the owners of the Sports Bar were put on notice, and therefore warned, that their license was in peril, as evidenced by the denials of renewal for the 1997-1998 and 1998-1999 license terms. The Sports Bar required more police presence than other licensed premises in the municipality. The incidents were repeated year after year, with no improvement in the licensee's conduct. Although the licensee changed the name and format of the premises associated with the license from a restaurant, where the license had been renewed, to the Sports Bar, and there were changes in the licensee's corporate structure, the premises have been operated continuously by the Chusid family since the original license transfer in 1993. Assessing the credibility of the witnesses, the Administrative Law Judge accepted the testimony of the police officers who testified that they spent a considerable amount of time and resources responding to incidents at the Sports Bar. I concur with the Administrative Law Judge's determination.

[2] Case law supports the Administrative Law Judge's conclusion that the statutory defense is only available when the licensee can pass a three-prong test. The three prong test requires: (1) the purchaser falsely represented his or her age by producing, among other examples, a photographic ID indicating that the purchaser is of the legal age; and (2) An ordinarily prudent person would believe the person to be of the legal age; and (3) The sale was made in good faith relying on the false identification and the purchaser's appearance; thereby believing the purchaser was 21 years of age or older. *See* N.J.S.A. 33:1-77. Therefore, if the licensee does not meet the all of the requirements of this test, it may not assert that it reasonably relied on an underage patron's misrepresentation of age. *See Faces, Inc. v. Kennedy* 185 N.J. Super. 113, 122 (App. Div. 1981).

Furthermore, prong three requires that the licensee must carefully examine the photographic ID in order to ascertain its authenticity. *See Div. of Alcoholic Beverage Control v. Mrs. G's, Inc.*, 92 N.J.A.R. 2nd (ABC) 52; *Avena v. Atlantic City Municipal Board of ABC,* 96 N.J.A.R. 2nd (ABC) 1, *aff'd.*, 96 N.J.A.R. 2nd (ABC) 175 (App. Div. August 26, 1996).

reviewed the voluminous evidence presented and made well-stated findings of fact which are supported in the record and based upon his assessment of the credibility of witnesses. *See, P.F. v. New Jersey Division of Developmental Disabilities*, 139 N.J. 522, 530 (1995); *Dennery v. Board of Educ.*, 131 N.J. 626, 641 (1993); *Clowes v. Terminix Int'l, Inc.*, 109 N.J. 575, 587 (1988); *Rowatti v. Gonchar*, 101 N.J. 46, 51-52 (1985); *Henry v. Rahway State Prison*, 81 N.J. 571, 579-80 (1980); *Mayflower Sec. Co. v. Bureau of Sec.*, 64 N.J. 85, 92-93 (1973). I adopt the factual findings and conclusions of the Administrative Law Judge as my own, as they are supported by the record below.

I have considered Appellant's arguments, and it is clear that the frequency of police presence at the licensed premises demonstrates that the tavern has become a "trouble-spot," and that the denial of renewal is appropriate. *See Nordco, Inc. v. State*, 43 N.J. Super. 277, 281 (App. Div. 1957); *see also Antoine Services, Inc. v. City of Linden*, 97 N.J.A.R. 2d (ABC) 9 (1996) (Revocation of license after repeated violations and mounting municipal charges. These incidents also provided support for conclusion that bar was a trouble spot.); *Downie v. Borough of Somerdale*, 44 N.J. Super. 84 (App. Div. 1957) (In order to allow licensee to continue association in another establishment, license revocation converted into 34 day suspension through end of license term, and license denied renewal after two sales after hours and two sales to minors); *279 Club, Inc. v. Municipal Bd. of Alcoholic Beverage Control of Newark*, 73 N.J. Super. 15, (App. Div. 1962) (License denied renewal after three violations, including sales of marijuana by licensee); *Benedetti v. Board of Com'rs of the City of Trenton*, 35 N.J. Super. 30 (App. Div. 1955) (Licensee allowed, permitted and suffered upon licensed premises, over a long period of time, conditions which comprised a flagrant offense to fundamental decency and morality, justifying revocation.); *Butler Oak Tavern v. Division of Alcoholic Beverage Control*, 20 N.J. 373, (App. Div.1956) (Licensee's continuing illegal actions and instant violation amount to flagrant disregard, and, in view of prior record of violations, lead to revocation of liquor license.); *Zicherman v. Driscoll*, 133 N.J.L. 586 (1946) (No abuse of discretion in refusing to renew license suspended for violations, in view of evidence of violations of law by licensee, character of persons frequenting licensed premises and disturbances on the premises.); *In Re Nessie's, Inc., t/a Country Inn*, 93 N.J.A.R. 2d (ABC) 21 (1993) (License revoked based upon licensee's total disregard as to what was occurring on licensed premises, no corrective by the licensee, license operated as a nuisance.) Support for this action is found in the voluminous record of incidents before the Administrative Law Judge. I agree with the Administrative Law Judge that the conduct of the Appellant renders the continuance of the licensed premises against the public interest.

CONCLUSION

I find Appellant's Exceptions to be without merit and the findings of the Administrative Law Judge to be supported by the record. Having considered the record, the Administrative Law Judge's Initial Decision, Appellant's Exceptions, and Respondent's Replies, I concur in the findings and conclusions of the Administrative Law Judge and hereby adopt them as my own. I am troubled by the fact that incidents continued to occur at the Sports Bar that required police intervention year after year. I find that the Appellant's establishment has a history of problems that compel me to conclude its operations rise to the level of a trouble spot. Accordingly, I find the actions of the

Respondent issuing authority to be reasonable and appropriate, within its discretion, and well grounded in fact.

Accordingly, it is on this 28th day of September, 2000,

ORDERED that the Appeal be and is hereby **DENIED,** and it is further

ORDERED that the action of the Mayor and Council of the Village of Ridgewood, in denying Appellant's application for renewal for the 1997-1998 and 1998-1999 license terms, for Plenary Retail Consumption License No. 0251-33-010-006, issued to Russian White House, Inc., t/a All American Sports Bar, 17 Chestnut Street, Ridgewood, New Jersey be and the same is hereby **AFFIRMED.**

/S/ JERRY FISCHER
JERRY FISCHER
DIRECTOR

6. RUSSIAN WHITE HOUSE RESTAURANT, INC., V. VILLAGE OF RIDGEWOOD - ORDER GRANTING PARTIAL RECONSIDERATION OF THE FINAL CONCLUSION AND ORDER OF SEPTEMBER 28, 2000

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
Division of Alcoholic Beverage Control

RUSSIAN WHITE HOUSE RESTAURANT, INC.,	ORDER GRANTING PARTIAL RECONSIDERATION OF THE FINAL CONCLUSION AND ORDER OF SEPTEMBER 28, 2000
PLENARY RETAIL CONSUMPTION LICENSE NO. 0251-33-010-006	
APPELLANT,	
V.	OAL DKT NO. ABC 7585-97 & ABC 7036-98
VILLAGE OF RIDGEWOOD	CONSOLIDATED
RESPONDENT.	

Alan S. Pralgever, Esq., Attorney for Appellant.
(Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, Attorneys)

Sydney V. Stoldt, Esq., Attorney for Respondent.
(Stoldt, Horan & Kowal, Attorneys)

BY THE DIRECTOR:

This matter comes before me on motion by the Appellant asking for a stay of my Final Conclusion and Order pending his Appeal to the Superior Court, Appellate Division. The Motion also requests that I reconsider my Final Conclusion and Order so as to permit the

Appellant to sell his license within a reasonable amount of time, and that he be permitted to reopen and operate his license while his Appeal is pending.

The Appellant has submitted a Brief and Certification of Boris Chusid in support of his Motion. The Certification states that he is the President of the corporation which is the sole owner of the licensed entity, Russian White House Restaurant, Inc. Allowing a sale of the liquor license would significantly limit the financial impact of the Final Conclusion and Order. There is a prospective buyer who is interested in purchasing the license and moving it to a nearby restaurant. This sale would be an arm's length transaction and I interpret that to mean that neither the seller nor its principals will have any direct or indirect interest in the purchaser. He states that he has been closed since the date of my Final Conclusion and Order (September 28, 2000) and this has adversely impacted the business.

Among other things, the Brief cites Ishmal v. Division of Alcoholic Beverage Control, 58 N.J. 347 (1971) and Greenstein v. Division of Alcoholic Beverage Control, an unreported opinion dated November 11, 1974 for the proposition that where the interests of justice require, the Director may ameliorate the impact of a denial of renewal by affording the licensee an opportunity to secure another location or sell to a buyer who will operate it in a different manner and at a different location. Concerning the request for a stay, he argues that he will suffer irreparable harm if he is not allowed to operate his business and has demonstrated a probability of success on the merits.

The Respondent filed a Brief and Certification of Larry D. Worth, the Village Manager. Among other things, the Certification advises that ABC violations at these premises have continued through September 21, 2000 and the Appellant owes $25,000 to the Village for police officers who were required to be there by my Interim Order of July 2, 2000. The Brief argues that Ishmal and Greenstein are factually distinguishable. In those cases, renewal was denied because of changes in the area around the licensed premises and not the activity of the licensee.

On October 6, 2000, I held a telephone conference with counsel. The Respondent stated that it would not object to giving the Appellant a reasonable opportunity to sell the license in an arm's length transaction, so long as the existing business remained closed while such a sale was being arranged, and the following conditions were required:

1. No member of the Chusid Family shall have any direct or indirect interest in the purchaser and any financial arrangement incidental to the sale would not provide that any member of the family could reacquire the license upon a default;
2. The Appellant will dismiss his Appeal with prejudice;
3. The Appellant will pay the police costs of $25,000 immediately;
4. The Appellant will reimburse the Village for its legal fees in connection with this matter.

Further, the Respondent made clear that it reserved its right to review any application for a transfer of the license and grant or deny it based upon its own good judgement. Appellant replied that he opposed a dismissal of the Appeal before a sale is approved but, would request the Appellate Division to take no action pending the results of the Director's Order. Appellant contests the amount due to the Village for police reimbursement and opposes the request for legal fees.

An application for stay of my Final Conclusion and Order pending an Appeal to the Superior Court, Appellate Division requires the Applicant demonstrate four elements:

1. The probability of eventual success on the merits;
2. Irreparable injury if the stay is not granted;
3. The probability of harm to other persons will not be greater than the harm the stay seeks to prevent;
4. The public interest will not be adversely affected by a stay.

See Crowe v. DeGoia, 90 N.J. 126, 132-134 (1982).

I am not convinced that the Appellant has demonstrated reasonable probability of eventual success on the merits. The Initial Decision rendered by the ALJ was soundly based upon his review of the evidence and his judgement as to the credibility of the witnesses who appeared. My review coincides with that of the ALJ. Although the Director conducts a de novo hearing in the event of an Appeal, the rule has long been established that he will not and should not substitute his judgement for that of the local board or reverse the ruling if reasonable support for it can be found in the record. On judicial review, the Director's factual findings as well as his ultimate determination ordinarily are accepted unless unreasonably or illegally grounded. See Lyons Farms Tavern v. Municipal Board of Alcoholic Beverage Control, Newark, 55 N.J. 292, 303 (1970). Further, I am not convinced that the financial harm which the Appellant anticipates, outweighs the danger to the community from the continued operation of a license that has been a constant source of complaints that involve ABC violations.

However, subject to certain conditions, I am willing to reconsider my Final Conclusion and Order and give the Appellant a reasonable opportunity to sell this license, in an arm's length transaction, to a party that is qualified under the statute and acceptable to the Village of Ridgewood.

Therefore, it is on this 6th day of October 2000,

ORDERED that the Final Conclusion and Order of September 28, 2000 be and is hereby modified to hold that its effectiveness shall be Stayed for a period of 90 days to give the Appellant an opportunity to present the Village with an application for transfer of the license; and it is further

ORDERED that the Appellant is hereby prohibited from selling or serving alcoholic beverages; and it is further

ORDERED that the Appellant shall, within 14 days of this Order, pay $12,500 to the Respondent on account of monies due for police services and shall consult with the Respondent concerning the remainder of this claim; and it is further

ORDERED the payment provided herein shall be without prejudice to either party to assert claims or defenses to any or all of the amounts alleged by Respondent to be owed to it; and it is further

ORDERED that the Appellant shall request the Superior Court, Appellate Division to take no further action on its Appeal while this Order remains in effect; and it is further

ORDERED that any sale of the license shall be to an independent person and no member to the Chusid Family shall have any direct or indirect interest in the buyer nor shall any financial arrangements incidental to the sale include a provision that would permit the seller or any member of the Chusid Family to acquire any right to the license upon default; and it is further

ORDERED that the terms and conditions of this Order shall expire on December 28, 2000 unless extended or modified by me, upon application of either party.

/S/ JERRY FISCHER
JERRY FISCHER
DIRECTOR

7. STEVEN VOTER, V. NEW JERSEY DIVISION OF ALCOHOLIC BEVERAGE CONTROL - FINAL CONCLUSION AND ORDER AFFIRMING THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION, UPHOLDING THE ISSUANCE OF A SOLICITOR'S PERMIT, SUBJECT TO CONDITIONS

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
Division of Alcoholic Beverage Control

STEVEN VOTER PETITIONER, NEW JERSEY DIVISION OF ALCOHOLIC BEVERAGE CONTROL, RESPONDENT.	)	FINAL CONCLUSION AND ORDER OAL DKT NO. ABCOT 6726-99S AGENCY DKT. NO. 6694

George W.C. McCarter, Esq., for Petitioner (McCarter and Higgins, attorneys)

Kevin Marc Schatz, Deputy Attorney General, for Division of Alcoholic Beverage Control (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Initial Decision Below by the Honorable Joseph F. Fidler, Administrative Law Judge

Decided: March 21, 2000 Received: March 23, 2000

BY THE DIRECTOR:

The issue before me is whether the Respondent ("Division"), may impose a condition upon the issuance of a solicitor's permit which would prevent Petitioner from servicing his wife's sister's husband's account. The issue is presented in the context of the relevant regulation being published prior to the Petitioner's application, but made effective afterwards. Respondent moved for Summary Decision, and Petitioner opposed. The Administrative Law Judge granted the Division's motion, and I accept his decision.

PROCEDURAL HISTORY

On August 17, 1999 the Division of Alcoholic Beverage Control ("Division") issued Solicitor Permit No. 11516 to petitioner Steven Voter with a condition that prohibited him from servicing his wife's sister's husband's account. Petitioner objected to the condition imposed on the issuance of the permit and requested a hearing by a letter dated August 3, 1999. On August 24, 1999 the Division transferred the matter to the Office of Administrative Law ("OAL") for determination as a contested case. The Division filed a motion for summary decision.

A telephone status conference was held on February 18, 2000 during which counsel advised they had completed their submissions. The record closed on that date.

On March 21, 2000, the Honorable Joseph F. Fidler concluded the Division was entitled to summary decision and Petitioner's petition seeking relief was dismissed. Petitioner now takes exception to the Initial Decision and further challenges the manner of the Division's issuance of the solicitor's permit and the legality of the condition imposed.

At the request of both parties, the time for filing Exceptions and Replies was extended. Written Exceptions to the Initial Decision were filed by Petitioner on April 19, 2000; written Replies were filed by the Division on May 2, 2000.

FACTUAL DISCUSSION

In 1993, the Divisions of Criminal Justice, State Police, and Alcoholic Beverage Control commenced an investigation regarding illegal rebates to retailers by wholesalers. The investigation showed that some solicitors illegally rebate or kickback a percentage of the sale price to certain retailers who regularly purchase from them. The investigation mentioned above culminated in the filing of a number of enforcement actions and the payment of substantial fines by several major wholesalers. Part of the activities uncovered by the investigation included attempts by retailers to pressure wholesalers into hiring members of the retailer's immediate family to act as solicitors to their specific accounts. Such relationships foster alliances between wholesalers and specific retailers that lead to a loss of independence and a breakdown in the strong policy against marketplace discrimination. It is the Division's well-grounded belief that a wholesaler who hires a retailer's immediate family member secures a competitive advantage over other wholesalers and

undermines many of the public policies that have been declared for the New Jersey Alcoholic Beverage Control Act. See *N.J.S.A.* 33:1-31.

Such conduct is prohibited by ABC statutes and regulations which seek to maintain a high degree of independence between wholesalers and retailers and a level playing field whereby wholesalers offer all retailers the same inducements to purchase their goods. Independence is extremely important for a regulatory scheme that is intended to prevent suppliers from controlling retailers where such control could lead to improper stimulation of consumption and other evils that were associated with the distribution of alcohol before prohibition. New Jersey statutes against discrimination (from wholesaler to retailer) are also intended to maintain independence of the distribution tiers, ensure a level playing field between all retailers and foster competition among wholesalers and retailers that will benefit consumers while not undermining the stability of the industry.

In response to the discovery of these unfair practices, the Division promulgated a regulation to bar certain practices that tainted the relationship between major retailers and wholesalers. The proposed amendments comprised of three new subsections, modified as *N.J.A.C.* 13:2-16.11(c) to 16.11(e) providing:

> (c) As of February 16, 1999, no holder of a solicitor's permit shall offer for sale or solicit any order for the purchase or sale of any alcoholic beverage to any retail licensee in which an immediate family member of the solicitor has any direct or indirect financial interest or participates in the operation of the retail license.
>
> (d) The term "immediate family member" as used in this chapter . . . includes brother-in-law.
>
> (e) The provisions of (c) and (d) above do not apply to any solicitor who has been issued a solicitor's permit on or before February 16, 1999.

On November 19, 1998, the proposed amendments were delivered to the New Jersey Legislature, Office of Legislative Services. On December 21, 1998, the proposed amendments were published in the New Jersey Register, and, at the same time, a summary was published in the New Jersey Journal. Simultaneously, summaries were provided to wholesalers who employed affected solicitors. The rule proposal notified the public that amendments would apply to all solicitor's permits granted after the effective date of the regulation and also advised the public that it could submit comments in response to the proposed amended regulation. Five comments were received, but none from the Petitioner. Following the notice and comment period, the amended regulation was adopted on January 21, 1999 in accordance with the requirements of *N.J.S.A.*

52:14B-1 *et seq.*, and became effective on February 16, 1999. The Regulation was published in the New Jersey Register at *31 N.J.R. 545.*

On January 7, 1999, the Division received Petitioner's application for a solicitor's permit (dated December 29, 1998), almost three weeks after the proposed amendments to *N.J.A.C.* 13:2-16.11 were initially published. The Division decided to hold all applications for solicitor's permits filed after December 21, 1998, until the final version of the proposed regulation became effective. By letter dated March 3, 1999, all applicants for solicitor's permits were notified as to their need to submit a supplemental affidavit declaring "no immediate family member" of the applicant, including "brothers-in-law," has any direct or indirect interest in or participates in the operation of a retail alcoholic beverage license. However, Petitioner and four other applicants did not complete the supplemental affidavit.

Petitioner advised the Division by letter dated March 19, 1999 that his wife's sister's husband participates in the operation of a retail license. In response, the Deputy Attorney General-In-Charge of Licensing notified Petitioner that the Division would process his Solicitor's Permit application upon receipt of his supplemental affidavit stating he would not service the account of his wife's sister's husband. Confirmation of the conversation was sent in a letter dated April 14, 1999.

Petitioner responded in a letter dated June 9, 1999, taking exception to the Division's requirement of the supplemental affidavit. Petitioner contended that:

1. The Division's delay constituted an improper attempt to extend backwards the effective date of the rule amendment;
2. The Division incorrectly interpreted the term brother-in-law; and
3. The amendments were *ultra vires.*

In response, the Division stated that unless Petitioner submitted the supplemental affidavit, the Division would not be in a position to offer him a solicitor's permit. However, Petitioner was advised that if he submitted the affidavit, he did so without prejudice to his rights in the event a court determined the Division's actions improper. On or about August 17, 1999, Petitioner submitted the affidavit, and the Division issued the Solicitor's Permit. The Solicitor's Permit allows Petitioner to service the account of any licensed retailer, except the licensee with which his wife's sister's husband is affiliated, subject to the outcome of this appeal.

LEGAL DISCUSSION

Petitioner takes exception to the entire "Findings of Fact" section of the Initial Decision, contending that the section merely recites what was "certified" in submissions by the Division but doesn't state whether the court actually accepted those as factual findings of the court. However, I note that the section to which Petitioner excepts is entitled "Findings of Fact" and clearly includes all pertinent facts and issues the Administrative Law Judge found to comprise the factual record of

this case. Nor does the Petitioner identify any specific facts that he believes constitute a basis for denying summary disposition. As articulated in the motion pleadings and below, this matter presents "questions of law" for which no evidentiary hearing is required once the trial court has determined that a rational basis exists for the promulgation of the rules.

Petitioner challenges the Administrative Law Judge's finding that "this matter is ripe for summary decision because Petitioner has not provided the required affidavit and because there are no material facts in dispute." The premise of his argument is that the Division had no evidence that any improper conduct ever occurred and the regulation is premised on mere speculation. Furthermore, he dismisses the rationale for this regulation by asserting that nepotism exists in every industry. Ignoring for the moment the unsupported character of this assertion, Petitioner fails to articulate any factual challenge to the Division's conclusion that the payment of salaries by wholesalers to the relatives of retailers as a condition of their purchasing products constitutes a disincentive to competition in the industry and amounts to little more than a commercial form of bribery.

Moreover, Petitioner takes exception to the court's failure to refute Petitioner's arguments summarized on pages 10 and 11 of the decision[1]:

1. The regulation is arbitrary and capricious, discriminates against him and is not rationally related to any legitimate State interest;
2. The grandfather clause violates due process;
3. The Division's definition of brother-in-law is irrational;
4. The Division illegally applied this regulation to him and had the Division promptly processed his application he would have been grandfathered under the new regulation; and
5. The Division is not authorized to extract promises about future conduct as a condition for issuing his permit.

The Legislature gave the Director the authority to promulgate regulations and amendments for the proper regulation and control of the manufacture, sale and distribution of alcoholic beverages. *N.J.S.A.* 33:1-39 provides the Director with the authority to promulgate new rules and amendments "as may be necessary for the proper regulation and control of the manufacture, sale and

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[1]Petitioner also takes exception to the Administrative Law Judge's statement that Petitioner's application was "further delayed by his refusal to complete the affidavit needed to implement the regulations..." Petitioner claims that this improperly implies Petitioner's own act caused his application to be processed after the effective date of the Regulation when Petitioner's subsequent delay is unrelated to the Division's initial delay in processing his application. The Division concedes that Petitioner's delay in submitting the supplemental affidavit had no impact on whether his permit would be subject to the new regulation.

distribution of alcoholic beverages and the enforcement of...[the ABC Act]." The Director has been granted broad authority by the Legislature to regulate the alcoholic beverage industry and enforce compliance with alcoholic beverage control laws. *Butler Oak Tavern v. Division of ABC*, 20 N.J. 373, 381 (1956). Court decisions have made clear that the Director may impose any condition or conditions upon a licensee to ensure compliance with the alcoholic beverage control laws. *N.J.S.A.* 33:1-32; *Lyons Farms Tavern, Inc. v. Municipal Bd.*, 68 N.J. 44 (1975); *See also, Fanwood v. Rocco,* 33 N.J. 404, 411 (1960) (holding that the Director has very broad discretion, and that "the liquor business is an exceptional one and courts have always dealt with it exceptionally"); *Boller Bev. Inc., v. Davis*, 38 N.J. 138 (1962); *Gilhaus Bev. Co., Inc. v. Lerner*, 78 N.J. 499 (1979).

It is the Petitioner's burden to establish the absence of a rational relationship between the amended regulation and a legitimate governmental interest, because unless the Division's regulation is arbitrary or unreasonable, the Division's actions "should be accorded a presumption of validity." *N.J. State League of Munic. v. DCA,* 158 N.J. 211, 222 (1999). The Division acted to minimize the influence that major liquor retailers held over the business operations and marketing decisions of alcoholic beverage wholesalers by promulgating amendments. Our Legislature has charged me with regulating the operation of the alcoholic beverage industry. Specifically, I am charged with encouraging competition, promoting trade stability, and prohibiting discrimination on the sale of alcoholic beverages to retail licensees. *N.J.S.A.* 33:1-3.1(b)(6),(7), and (10); *N.J.S.A.* 33:1-23. *N.J.S.A.* 33:1-39 allows the Director to "make such general rules and regulations and such special rulings and findings as may be necessary for the proper regulation and control of the manufacture, sale and distribution of alcoholic beverages and the enforcement of this chapter . . . and may alter, amend, repeal and publish the same from time to time." Title 33 delegates to me the authority to make such rules and regulations as may be necessary for the proper regulation and control of the manufacture, sale and distribution of alcoholic beverages. *Heir v. Degnan*, 82 N.J. 109 (1980).

All of my decisions must be governed by the mandate "to provide a framework for the alcoholic beverage industry that recognizes and encourages the beneficial aspects of competition." *N.J.S.A.* 33:1-3.1(b)(6). It is the governing principle of this Division to promote moderation and highly regulate the sale of alcoholic beverages. *State v. Conner,* 373 A.2d 729 (N.J.Mun.Ct. 1977); See, *Affiliated Distillers Brands Corp. v. Sills*, 56 N.J. 251 (1970); *Canada Dry Ginger Ale Inc. v. F. & A. Distributing Co.*, 28 N.J. 444, (1958). *See also, Fanwood v. Rocco,* 59 N.J.Super. 306, 157 A.2d 712 (App.Div.1960), aff'd 33 N.J. 404, 165 A.2d 183 (1960). Therefore, the amendments to *N.J.A.C. 13:12-16.11* are not *ultra vires.*

Petitioner takes exception to the new regulation as written, and argues that it will not bar "grandfathered solicitors" from establishing new business relationships with "immediate family members" where such relationship did not exist prior to the effective date of the new amendment. Grandfather clauses have routinely been upheld. *Affiliated Distillers Brands Corp. v. Sills*, 56 N.J. 251, 263 (1970), *opinion modified on other grounds* 60 N.J. 342 (1972). Grandfather clauses reflect

a recognition that a staged implementation of a regulatory change may be warranted in particular cases. Implicit in the power to enact a regulatory scheme is the power to determine the staging of the implementation of that scheme. As such, grandfather exclusions are not invidious per se and violative of equal protection. *Paul Kimball Hosp. v. Brick Twp. Hosp.*, 86 N.J. 429, 441 (1989) *citing, Affiliated* at 265; see, *City of Jersey City v. Farmer*, 329 N.J.Super. 27, 32 (App. Div. 2000), cert. denied, 165 N.J. 135, (2000). When an initial regulatory scheme is adopted, existing business must sometimes be preserved in order to satisfy the dictates of fairness and avoid hardships. *Id. citing, United States v. Maher*, 307 U.S. 148, 153 (1939). The question from an equal protection viewpoint is whether there is a justifiable basis for the discrimination. A classification will not be set aside if any state of facts reasonably may be conceived to justify it. *Paul Kimball Hosp.* at 441, citing, *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). With a determination that there is conceivable legitimate purpose for the grandfather clause, the legislative action will be upheld. In *Affiliated*, the Court struck down a legislative scheme because it did not adequately protect the rights of existing licensees who had made the necessary investments to commence business. In the instant matter, the grandfather clause protects those existing solicitors who have ongoing business with immediate family members, while preventing this practice from spreading.

The grandfather clause included in the amended regulation acts to avoid the economic dislocation resulting from disrupting current business relationships. However, the grandfather clause will not permit existing solicitors to establish new business relationships with "immediate family members." 31 *N.J.R.* 546. It is anticipated that the passage of this regulation will make clear to the industry the strong view of this agency that anti-competitive practices will not be tolerated. At the same time, it anticipates that grandfathered relationships will dissolve naturally in a reasonable time. The grandfather clause in the amended regulation has a conceivable rational basis and does not violate equal protection. In fact, the absence of a grandfather clause could have invited costly and lengthy litigation.

Petitioner takes exception to the finding that the affidavit the Division asked him to sign was "authorized by *N.J.S.A.* 33:1-25." Petitioner contends the statute cited by the court permits the Division to ask questions and require declarations for applicants and imposes penalties for false statements. He argues that the statute does not authorize a promise of future conduct as a condition for issuing a permit. The Division asserts that if Petitioner's argument was accepted, new regulations could never be enforced because acts committed in contravention thereof would be permissible. The Division maintains Petitioner's contention is contrary to law. In addition, *N.J.S.A.* 33:1-25 provides that "applicants for licenses shall answer questions as may be asked and make declarations as shall be required by the form of application as may be promulgated by the Director from time to time . . ." In other words, applicants are required to make declarations under oath as determined by the Director. Therefore, *N.J.S.A.* 33:1-25 authorizes the supplemental affidavits which the Division required Petitioner to complete.

Moreover, there is no statutory requirement regarding the processing time for an application for a solicitor's permit. The Division did not act unreasonably when it processed Petitioner's application in five weeks. Since the amended regulation in question is remedial, there was no impropriety in the Division's decision to defer review of Petitioner's application, as well as others, until the effective date of the amendments.

This becomes obvious when examining the context in which this action took place. Importantly, Petitioner's application was not filed until after publication of the then proposed regulations. Thus, he was on specific notice that his conduct was deemed inappropriate. In fact, it was also clear that under the statutory direction of the Legislature, all anti-competitive behavior was suspect.[2] *N.J.S.A.* 33:1-3.1(b)(10) directly addresses the behavior here by prohibiting discrimination in the sale of alcoholic beverages to retail licensees. It is behavior Petitioner asks me to condone. Given this context, it was reasonable and appropriate to delay further processing of solicitor's permits pending the final action on the proposed regulation. *Cf. Gruppo v. Schrenell and Co.*, 223 N.J.Super. 154 (App. Div. 1988). Clearly, there is no manifest injustice in the procedure utilized by the Division in this matter. *Cf. Richardson v. Director, Division of Taxation*, 14 N.J. Tax 356 (Tax Court, 1994).

Lastly, the Division has interpreted the term "brother-in-law" to include the husband of one's spouse's sister in accordance with a commonly understood definition found in both Black's Law Dictionary and other English language dictionaries. Since the Division's interpretation of "brother-in-law" is reasonable, the Division may properly interpret the regulatory term to include the husband of a spouse's sister. Petitioner also contends that the term "brother-in-law" is irrational because it is incapable of being understood. The words of a statute or regulation will be given their ordinary and common meaning in order to give effect to the legislative intent. *See, e.g., Grubb v. Borough of Hightstown*, 333 N.J.Super. 592 (2000); *Royal Food Distributors, Inc. v. Director, Div. of Taxation*, 15 N.J.Tax 60 (1995); *County of Camden v. South Jersey Port Corp.*, 312 N.J.Super. 387, (App.Div. 1998), *certif. denied*, 157 N.J. 542 (1998). The term "brother-in-law" is one used commonly and with little doubt as to its meaning by ordinary citizens. Moreover, the agency's interpretation of the term is consistent with the common understanding. Given the clear relationship of the regulation to the legislative mandate to encourage competition, promote trade stability and prohibit discrimination in the sale of alcoholic beverages, the agency's determination of discriminatory practices and its integration of the scope of these choices should be given great weight.

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[2]Importantly, the decision to promulgate regulations addressed to particular relationships did not imply that the Division was incapable of acting against statutory violative behavior not specifically enumerated in regulations. *See, e.g., Sheeran v. Progressive Life Ins. Co.182 N.J.Super.* 237 (App.Div. 1981); *Chemical Realty Corp. v. Taxation Div. Director*, 5 N.J. Tax 581 (1983).

In order for regulations to be valid, they must be "within the ambit of delegated authority." *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 N.J. 544, 561-562 (1978). The seminal case pertaining to the standards applicable to judicial review of the validity of regulations promulgated by an administrative agency is *Consolidation Coal Co. v. Kandle*, 105 N.J.Super. 104 (App.Div.1969), aff'd o.b. 54 N.J. 11 (1969). Administrative regulations "must be accorded a presumption of reasonableness" and the burden is on the attacking party to demonstrate that they are arbitrary, capricious, unduly onerous or otherwise unreasonable. 105 N.J.Super. at 118; *see also Cole Nat. Corp. v. State Bd. of Examiners*, 57 N.J. 227, 231, 271 A.2d 421 (1970); *Motyka v. McCorkle*, 58 N.J. 165, 181 (1971) (holding that a "customary rebuttable presumption of validity and regularity [is] afforded to administrative regulations, and an ultra vires finding is disfavored").

Upon consideration of all the facts herein, I accept the basic findings of fact and conclusions of law of the Administrative Law Judge. I find that the Division is authorized under *N.J.S.A.* 33:1-39 to promulgate new rules and amendments "as may be necessary for the proper regulation and control of the manufacture, sale and distribution of alcoholic beverages and the enforcement of...[the ABC Act]." The regulation in this case functions to assist the Division in regulating the sale of alcoholic beverages to retailers under the legislative declaration of *N.J.S.A.* 33:1-3.1(b) to maintain a fair and competitive system in the sale of alcoholic beverages. Furthermore, I find that the Petitioner has not met its burden of proving the Division's regulation is arbitrary or unreasonable. Accordingly, I find that the promulgation of this regulation, "Solicitor's Permit, Restrictions on permittee" and the decision of the Administrative Law Judge is affirmed and adopted.

CONCLUSION

I find that Petitioner failed to prove that the regulation is not rationally related to a legitimate governmental interest. It is reasonable for the Division to believe that an employing wholesaler of a family member would be anti-competitive and contrary to the purposes of the Alcohol Beverage Control Act, *N.J.S.A.* 33:1-1 *et seq.* Furthermore, the Petitioner failed to defeat the summary motion by not presenting the required affirmative evidence. The Administrative Law Judge properly concluded there were no material facts in issue.

Since the Petitioner failed to prove the amendments to *N.J.A.C.* 13:2-16.11 are arbitrary, capricious, or otherwise unreasonable, I shall uphold the amendments. Having considered the record, the Administrative Law Judge's Initial Decision, Petitioner's Exceptions and Division's Replies, I adopt the findings and conclusions of the Administrative Law Judge.

Accordingly, it is on this 5th day of October, 2000

ORDERED that the Initial Decision upholding the Division's condition upon issuance of a solicitor's permit, be and the same is hereby **ACCEPTED**, and it is further,

ORDERED that the Appeal be and the same is hereby **DISMISSED.**

/S/ JERRY FISCHER
JERRY FISCHER
DIRECTOR

8. 281 SIMON SEZ, INC., V. COMMON COUNCIL OF HACKENSACK CITY - FINAL CONCLUSION AND ORDER AFFIRMING THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND SUSPENDING LICENSE FOR A PERIOD OF NINETY DAYS BUT REVERSING THE MUNICIPALITY'S DETERMINATION TO REVOKE

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

APPEAL NO. 6528

281 SIMON SEZ, INC., LICENSE NO. 0223-44-019-005 APPELLANT, 5. THE COMMON COUNCIL OF HACKENSACK CITY, RESPONDENT.	)	FINAL CONCLUSION AND ORDER OAL DKT. NO. ABC 07556-99

Arthur Del Colliano, Esq., Attorney for Appellant
David F. Piltzer, Esq., (Piltzer & Piltzer), Co-Counsel for Appellant
Richard E. Salkin, Esq., Attorney for Respondent

Decided: March 1, 2000 Received: March 3, 2000

INITIAL DECISION BELOW

HONORABLE MICHAEL L. RAVIN, ADMINISTRATIVE LAW JUDGE

BY THE DIRECTOR:

Appellant appeals the action of the local issuing authority, which revoked its Plenary Retail Distribution License. The issue is whether there is reasonable support in the record for Respondent's Decision to revoke the license. Written exceptions to the Initial Decision were filed on behalf of the Respondent and written replies thereto were filed on behalf of the Appellant, in accordance with the provisions of N.J.A.C. 1:1-18.4(d). The time to render a Final Decision was extended by properly executed Order and, therefore, the decision must be made on or before October 16, 2000. For the reasons stated herein, the Initial Decision of the Administrative Law Judge is accepted, but the penalty imposed is modified.

PROCEDURAL HISTORY

This matter arose from the decision of the Common Council of Hackensack City (hereinafter City) which, by Resolution dated November 17, 1997, revoked Plenary Retail Distribution License No. 0223-44-019-005. The Appellant filed a timely Notice and Petition of Appeal which was then transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 14F-1 et seq.

Hearings were conducted on November 17, 1997 before the City Council. The parties jointly offered a transcript of that hearing to the Administrative Law Judge in lieu of presenting testimony. An Initial Decision in favor of Respondent was rendered by the Honorable Michael L. Ravin, Administrative Law Judge on March 1, 2000.

INITIAL DECISION

The Administrative Law Judge found that on May 2, 1997, June 21, 1997 and July 25, 1997 the Appellant sold alcohol to minors. The Administrative Law Judge reversed the City's decision which found that Appellant sold alcohol to minors on May 16, 1997. The Administrative Law Judge ordered that Appellant's license be suspended for twenty-five (25) days and that in lieu of said suspension, the Appellant may apply to the Director and request that I accept a monetary offer in compromise in lieu of the suspension.

FACTUAL DISCUSSION

There are four underage sale incidents which were considered in the Administrative Law Judge's Initial Decision. The first occurred on May 2, 1997. Detective Jennifer Finley, a Hackensack police officer, went to Appellant's licensed premises at 281 State Street. Detective Finley was accompanied by Detective Roman. The Officers had received information that alcohol was being sold to underage persons at Simon Sez. While in the parking lot, the detectives observed two known juveniles approach a Dodge Van occupied by two males. One of the juveniles subsequently identified as J.A., made an exchange with the driver of the van subsequently identified as D.D.A. D.D.A. then got out of the van and entered Simon Sez. He came out of the

store holding a brown bag which he handed to J.A. D.D.A. got back into the van and pulled away. J.A. and the other juvenile walked away.

Approximately two blocks from the store, detectives Finlay and Roman stopped J.A. and the second juvenile, who they witnessed drinking from the brown bag. Inside the bag, the detectives found a bottle of an alcoholic beverage. According to Detective Finlay, J.A. and the other juvenile were taken to headquarters. J.A. told the detectives he was sixteen (16) years old, that he knew D.D.A. from high school and that D.D.A. was seventeen (17) years of age. He stated that he gave D.D.A. the money to purchase the alcohol.

Later, Detective Finlay summoned D.D.A. to police headquarters wherein D.D.A. produced his driver's license which showed that he was seventeen (17) years of age. D.D.A. told the detectives that he was not asked to show identification when he purchased the alcohol at Simon Sez. D.D.A. was not able to identify the particular employee of Simon Sez who sold him the alcohol. D.D.A. was charged with possession of alcohol by a minor.

The only witness called by the Respondent to support this charge was Detective Finley. Based on her testimony, the Administrative Law Judge found sufficient reliable evidence to support the first charge. Judge Ravin found that the statements made by D.D.A. to the detectives were admissible hearsay under N.J.R.E. 803(c)(25), as statements against interest. The production of the driver's license by D.D.A. that established his underage status was a nonverbal "statement" within the parameters of N.J.R.E. 801(a). D.D.A.'s "statement" was corroborated by statements given to Detective Finley by J.A. as to his personal knowledge of D.D.A.'s age.

Appellant alleges that it was fundamentally unfair for Respondent not to produce J.A. or D.D.A. at the hearing. However, the Administrative Law Judge correctly states that the proceedings at the OAL are de novo and Appellant had every right to subpoena the minors to testify at that hearing. The Administrative Law Judge noted that Appellant, not Respondent, has the burden to prove that the action of the local issuing authority was erroneous. N.J.A.C. 13:2-17.6. He found that the Appellant failed to carry this burden and that a sale to a minor on May 2, 1997 had occurred.

The second incident occurred on May 16, 1997. Detective Finley testified that she was summoned by Officer Sartori to the scene of a motor vehicle stop he had made outside Simon Sez. Sartori told Finley he had seen the occupants of the car enter Simon Sez and exit with alcohol. Detective Finley observed three occupants and two brown paper bags, each containing a forty ounce bottle of Old English Malt Liquor.

Detective Finley testified that the driver of the car was M.M. who produced a New Jersey driver's license showing his date of birth as May 1, 1980. The first passenger was identified as B.C., who produced a driver's license showing his date of birth as August 6, 1979. The second

passenger was not identified nor was a date of birth determined. M.M. told Detective Finley that he purchased the alcohol from Appellant and that no identification was presented at the time of purchase. B.C. and M.M. entered Simon Sez with Detective Finley and positively identified Gulabbhi Patel as the person who sold them the alcohol. Detective Finley testified that she asked Mr. Patel if the underage purchaser had provided any identification and he said "no." Detective Finley did not write a report concerning this incident but referred to the report prepared by Officer Sartori to refresh her recollection. That report did not contain a reference to Mr. Patel's alleged admission that he did not request identification. The report did not contain a reference to Finley's conversation with Gulabbhi Patel. However, Mr. Gulabbhi Patel testified that Detective Finley came into the store on May 16, 1997, said "you sold this beer" and he replied that he did not.

The Respondent also called Ishwarlal Patel, an employee of the store. Ishwarlal stated he was present at Simon Sez on May 16, 1997. He stated Detective Finley came into the store and asked Gulabbhi Patel to come outside. The two talked outside for several minutes and Gulabbhi Patel then came back into the store and told Ishwarlal Patel that Detective Finley told him he sold liquor to a minor. Ishwarlal Patel testified that he saw no "kids" with Detective Finley and that he told Detective Finley that Gulabbhi Patel did not sell the liquor to the minors.

The Administrative Law Judge chose to give greater weight to the sworn testimony of Gulabbhi and Ishwarlal Patel, in his consideration of this incident than the testimony of Detective Finley. The Administrative Law Judge found that Detective Finley had no knowledge of the actual sale inside Simon Sez except that which she heard from others. He also found that both Ishwarlal and Gulabbhi Patel had direct knowledge of the incident and denied the sale. Respondent argued that the identifications by M.M. and B.C. of Gulabbhi Patel as the person who sold them the alcohol is admissible hearsay under N.J.R.E. 803(a)(3). The Administrative Law Judge disagreed and held that the out-of-court identification is admissible only if the declarant is a witness at trial or hearing. Neither M.M. or B.C. were witnesses at the hearing and the Judge found an absence of sufficient reliable evidence to conclude that the violation occurred.

The third incident occurred on June 21, 1997. Detective Thomas Staron testified that he was parked across the street from Simon Sez after receiving reports that sales of alcohol were being made to minors and out-of-town juveniles. When he started his surveillance, there were no cars in the Simon Sez parking lot. Thereafter, a Jeep occupied by five youthful individuals entered the parking lot. The Detective testified that the occupants looked 16 to 18 years of age. J.N., the Jeep's driver, exited the car and entered Simon Sez. A couple of minutes later, J.N. came out of the store carrying a plastic bag. He handed it to the front seat passenger and drove away. Detective Staron followed the Jeep and stopped it shortly thereafter. All of the individuals in the car told the Detective they were 16 or 17 years old and came from Paramus. J.N. presented a valid New Jersey photo driver's license bearing a January 12, 1980 date of birth. Staron asked J.N. if he purchased anything at Simon Sez and J.M. said that he had not. Detective Staron found the same bag he had seen J.N. hand to the front seat passenger partially covered by a jacket on the front passenger floor.

The bag contained a forty ounce bottle of Old English Malt Liquor, a twenty ounce bottle of St. Ives special brew, and a pack of cigarettes. J.N. then admitted to purchasing the alcohol and stated that no one requested his identification. Detective Staron also asked the occupants of the car why they came to Hackensack to buy liquor and they replied that "the word is out, that's the place to go."

Detective Staron then took J.N. back to Simon Sez. Ishwarlal Patel and two other employees were behind the counter. J.N. was asked to identify the employee who sold him the alcohol but was unable to do so. However, Ishwarlal Patel admitted selling him the alcohol and stated that "I sold it to him, he showed me a California driver's license." Ishwarlal Patel was taken to police headquarters and charged with selling alcohol to a minor. Detective Staron then asked Detective Foschini to search J.N. for a California driver's license. Foschini told Staron that no California license was found.

Ishwarlal Patel testified that he is the manager of Simon Sez and has worked there for five years. He works there full time and was working on June 21, 1997 when the third incident occurred. His subordinate, Jakir Shaikh was also working on that day. Shaikh has worked there for 1 ½ years and is also a full-time employee. Mr. Patel testified that on that day he was standing at the counter and a man with grayish eyes and blackish hair came into the store. Mr. Patel did not see this individual get out of the car. He did not remember what he was wearing but describes him as tall, light and maybe wearing a t-shirt. There were no other customers in the store at the time.

The individual ordered alcohol from Mr. Patel. According to Mr. Patel, J.N. presented a California photo driver's license. The photograph on the license matched the face of the individual. Mr. Patel checked the date of birth on the driver's license and determined that the individual was "old enough, 21." He did not ask for any other form of identification. Mr. Patel then showed the California license to Mr. Shaikh who said "it looked good" to him. Mr. Patel then returned the driver's license to J.N. and sold him the beer. Although they had a book from the ABC containing sample licenses from all states, including California, they did not check the validity of the license given to them by J.N. because they claimed to be familiar with California licenses. Mr. Patel testified that he had seen three of them in the book a week before and J.N. appeared old enough.

Jakir Shaikh testified that he was working the counter when J.N. came into the store. There were two surveillance cameras in the store at the time, but neither of them were operational. J.N. told Ishwarlal Patel that he wanted to purchase beer. J.N. presented a California driver's license which had J.N.'s face on it. At Mr. Patel's direction, Mr. Shaikh checked the driver's license. After Mr. Shaikh checked the California driver's license, he went into the back and got the beer. Ishwarlal Patel rang up the sale and J.N. left the store.

Detective Staron testified that he came back to the store but Mr. Shaikh was not present when Ishwarlal Patel told him that he was the employee that sold J.N. the beer. The Administrative

Law Judge found sufficient reliable evidence to support the charge that Appellant made an underage sale to J.M. on June 21, 1997.

The fourth incident occurred on July 25, 1997. On that date Detective Walter Krakowski was at a point of observation outside of Simon Sez. Detective Krakowski has been a member of the Hackensack Police Department for 24 years. He was positioned about 25 to 50 feet from Simon Sez and had a clear view of the inside of the store. He observed the person whom he later identified as H.S. go into the store. He subsequently observed H.S. being served four (4) forty ounce bottles of beer by a person with a brown shirt, whom he later identified as Mr. Shaikh. H.S. came out of the store with a bag, placed it in a car, went back into the store and brought two additional bottles of beer. Thereafter, another individual got out of the same car, went into Simon Sez and bought a pack of cigarettes from a person with a blue shirt. H.S. then drove the car away.

Detective Krakowski followed the car and shortly thereafter pulled it over. The occupants were asked to step out of the car and informed that it appeared that they had purchased alcohol. H.S. admitted to the purchase and the alcohol was identified as Country Club Malt Liquor.

Detective Krakowski asked H.S. for identification and he produced a Bergen County Identification Card and New Jersey photo driver's license. Both showed that he was 18 years of age. The detective asked H.S. if he showed identification when he made the purchase and H.S. stated that he showed the Bergen County identification card.

Detective Krakowski then took H.S. back to Simon Sez. H.S. identified Mr. Shaikh as the employee who sold him the beer. Mr. Shaikh was wearing a brown shirt. Detective Krakowski then asked Mr. Shaikh and Mr. Patel to see their ABC card. (An identification card issued by the municipality.) He recorded the number of the ABC card and informed Mr. Shaikh that he was going to be charged with selling alcohol to minors and would receive his summons in the mail. Detective Krakowski testified that Mr. Shaikh was charged with two counts of selling alcohol to minors under the New Jersey Penal Code.

Ishwarlal Patel testified that he was working in Simon Sez on July 25, 1997 together with Mr. Shaikh and Yogesh Patel. Ishwarlal Patel stated that Detective Krakowski came into the store alone. He spoke to Mr. Patel and asked for the ABC card. The detective wanted to know which employee managed the store and Mr. Patel said that he was the manager. According to Mr. Patel, Detective Krakowski then said to him that the other two employees sold cigarettes to a minor. The detective said nothing about alcohol and after Detective Krakowski left, the employees wondered what had happened. Ishwarlal Patel testified that he saw no one with a brown shirt sell alcohol to H.S. but said it was possible that Mr. Shaikh or Gulabbhi Patel served H.S.

Yogesh Patel testified that he worked on July 25, 1997 at Simon Sez. He testified that Detective Krakowski came into the store and asked him and Mr. Shaikh for their ABC cards.

He testified that Detective Krakowski spoke to the manager of the store and told the manager cigarettes were sold to minors and summonses would be sent to them later. The Administrative Law Judge found sufficient reliable evidence to sustain the charge of an underage sale to H.S. on July 25, 1997.

EXCEPTIONS

The Respondent submitted exceptions and the Appellant filed replies which are summarized as follows:

The basic thrust of the Respondent's Exceptions is that the Administrative Law Judge erred in reversing the Municipal Council's decision concerning the May 16, 1997 violation. Respondent argues that the Administrative Law Judge not only misapplied legal principles concerning the "residuum rule" by failing to consider statements made to Detective Finley by B.C. and M.M. on May 16, 1997 but also erred when he examined the transcript of the proceedings and "assessed the credibility of the witnesses based on the inherent reasonableness of their testimony..." Respondent argues that the Administrative Law Judge mistakenly concluded that Detective Finley's testimony was not reliable as to what Gulabbhi Patel actually told her since that statement was not written down in Detective Sartori's police report and she did not write a report of her own. Respondent argues that Ishwarlal Patel's credibility had been destroyed and any corroborating testimony offered by him should not be considered.

Respondent also argues that the penalty imposed by the Administrative Law Judge is inappropriate and does not conform with the provisions of ABC Bulletin 2443, (September 1985). Respondent suggests that even if the Director agrees with the initial findings of the Administrative Law Judge, a twenty-five (25) day suspension can not be justified for three similar violations within a seventy-four (74) day period. Finally, the Respondent argues that the licensee had an opportunity to present mitigating factors at the initial hearing and did not do so.

Appellant replies that the Administrative Law Judge committed error by finding that Appellant must show prejudice to it resulting from the absence of written charges, as mentioned in N.J.S.A. 33:1-31. Appellant also replies that the Judge correctly arrived at his findings concerning the May 16, 1997 incident and that his determination should not be disturbed. Appellant argues that the Administrative Law Judge rested his decision on his finding that the sworn testimony of Appellant's two witnesses was more reliable than the unsworn out-of-court statements of the two underage individuals, not whether Detective Finley's testimony was credible.

With respect to penalty, Appellant replies that the Administrative Law Judge's determination should not be reversed. Scherer & Co. v. Twp. of Mahwah, 97 N.J.A.R. 2nd 3. In the Scherer case there were four alleged sales to minors, but those offenses were considered as a "collective first offense." That determination by the municipality protected the licensee from a more serious sanction. Additionally, the licensee in the Scherer case entered a non vult plea to the

charges and sought remission of penalty as well as conversion of suspension into a monetary fine. The facts of this case differ considerably from the Scherer case. These offenses are not considered "collective first offenses" nor has this licensee entered a non vult plea to the charges.

Appellant lists various mitigating factors that occurred after the last incident and asks that they be considered with respect to penalty. Appellant argues that Division policy embodied in ABC Bulletin 2453, Item 1, fully justifies taking these mitigating factors into consideration, even though they were not presented at the initial hearing before the Municipal Council.

Exceptions must specify the findings of fact or conclusions of law to which exception is being taken. N.J.A.C. 1:1-18(b)(1). The Exceptions must set forth supporting reasons. N.J.A.C. 1:1-18.4(d)(3). Exceptions to factual findings must describe the witness's testimony relied upon. Exceptions to conclusions of law must set forth the authorities relied upon. Moreover, the party asserting the Exceptions has the burden of providing the necessary transcripts for review. In re Morrison, 216 N.J. Super. 143, 157-158 (App. Div. 1987); see also Rowley v. Bd. of Ed. of Manalapan - Englishtown, 205 N.J. Super. 65 (App. Div. 1985). For reasons stated below, I agree in part with Respondent's Exceptions and reject Appellant's replies.

LEGAL DISCUSSION

I find no merit in Appellant's contention that this entire matter be reversed on the basis that Respondent failed to comply with the procedural requirements of N.J.S.A.33:1-31 by not serving him with written charges prior to the municipal hearing. That statute states in part:

> "No suspension or revocation of any license shall be made until a 5-day notice of the charges preferred against the licensee shall have been given to him personally or by mailing the same by registered mail addressed to him at the licensed premises and a reasonable opportunity to be heard thereon afforded to him."

The Appellant raised this argument in a Motion for Summary Decision which was denied by the Administrative Law Judge on August 6, 1998. The Appellant also raised it again when he applied for interlocutory relief, which was denied by the Director on August 19, 1998. It is well settled that: "The very nature of a de novo appeal is to eliminate, where possible, procedural defects below and afford a reconsideration..." Cino v. Driscoll 130 N.J.L. 535 (E & A 1943); Nordco, Inc. v. Div. of ABC, 43 N.J. Super. 277 (App. Div. 1957); Twin Manor, Inc. v. Asbury Park, ABC Bulletin 2087, Item 2. I find that the Appellant was fully conversant with the charges and given every opportunity to submit any and all facts and legal argument to the Administrative Law Judge at that hearing.

The licensee was found to have violated N.J.A.C. 13:2-23.1(a), which provides as follows:

> "No licensee shall sell, serve or deliver or allow, permit or suffer the sale, service or delivery of any alcoholic beverage, directly or indirectly, to any person under the legal age to purchase or consume alcoholic beverages, or allow, permit or suffer the consumption of any alcoholic beverage by any such person in or upon the licensed premises."

After a full hearing before the City, Respondent was found guilty on all (four) counts. The Administrative Law Judge reviewed the transcript. He found three counts supported by the evidence and one count unsupported. I am in complete agreement with the findings of fact and law related to the three counts in which the Administrative Law Judge affirmed the actions of the municipality. However, I believe that the Administrative Law Judge incorrectly determined that there was no competent evidence to support the allegations related to the May 16, 1997 incident. While I am bound to accept the factual findings of the Administrative Law Judge when supported in the record, his evidential error has tainted that finding. In the Matter of Taylor, 158 N.J. 644 (1999).

In his decision, the Administrative Law Judge tells us:

> "Because the parties have offered a transcript to this tribunal as opposed to live testimony which they offered to the Mayor and Council, unlike that body, I am without ability to assess credibility based upon demeanor. I am relegated to determining the credibility of the witness based on the inherent reasonableness of the testimony and the extent to which the testimony of any given witness was supported or contradicted by the testimony of other witnesses."

I do not disagree with this general statement, but I believe it obscures the proper allocation of burden of going forward and the burden of proof.

The incident in question occurred on May 16, 1997. On that day, Detective Finley was advised by Officer Sartori that he had seen youthful-looking individuals enter Simon Sez and exit the store with alcohol. Sartori told Finley that he subsequently stopped the motor vehicle that they had been traveling in. After receiving the call, Detective Finley arrived at the scene, observed the occupants and two brown paper bags inside the vehicle which contained forty-ounce bottles of Old English Malt Liquor. Detective Finley determined the age and identity of two of the individuals in the car but was unable to do so with the third. The driver, identified as M.M. told Detective Finley that he purchased the alcohol beverages from Appellant and no identification had been requested or presented. Further, the two underage persons entered

Simon Sez with Detective Finley and positively identified Gulabbhi Patel as the person who sold them the alcohol. Both Gulabbhi Patel and his assistant Ishwarlal Patel denied the sale took place.

The Administrative Law Judge chose not to give any weight to the statements made by the underage to Detective Finley nor to her testimony. Rather, he assigned great weight to the testimony offered by Gulabbhi and Ishwarlal Patel in that it was under oath and offered at the hearing before the municipality. He found that the statements made by the underage persons were out-of-court identifications which are only permissible as exceptions to the hearsay rule if the declarant is a witness at the trial or hearing. Neither of the underage purchasers testified at the hearing. The Administrative Law Judge failed to address their admissibility as hearsay exceptions to the alleged statement by Mr. Patel that the underage purchasers failed to provide identification.

It is a well settled principle in administrative hearings that hearsay is admissible. N.J.A.C. 1:1-15.5(a). Parties in contested cases are not bound by statutory or common law rules of evidence or formally adopted rules of evidence all relevant evidence is admissible. N.J.A.C. 1:1-15.1(c). Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b).

There was evidence offered by Detective Finley relative to her personal observations at the scene that is not hearsay. She described the identity of the driver and the passenger, their age, her observations while in the liquor store and her observations concerning the contents of the brown paper bag in the vehicle. These observations are legally competent evidence. There was also Mr. Patel's denial of the presentation of identification by the underage purchasers that could reasonably be inferred as an admission that a sale took place.

Finley's recitation of the events at the scene consisted primarily of her own observations and, as such, are admissible non-hearsay testimony. Her recitation of events described immediately by fellow officers at the scene and given contemporaneously with their observations can be deemed credible. N.J.R.E. 803 (c)(1).[1] Likewise, Finley's observations at the scene provide reasonable assurance that Sartori's statements are reliable. The identification of Gulabbhi Patel by B.C. and M.M. at the scene, as the seller, was corroborated by Finley's personal observations and by information received from Officer Sartori. Moreover, her testimony that Mr. Patel admitted not seeing identification from the underage purchasers, rather than denying their purchase, could be

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[1] I find that the statements made between officers at the scene of a crime are made in a context where they are not likely to be made with the opportunity to "deliberate or fabricate." They have an inherent reliability as the ability for the officers to properly perform their jobs depends on honest communication between themselves.

deemed an admission that a sale was made to the individuals accompanying Detective Finley and be admissible under several rules of evidence. N.J.R.E. 803(b); 803 (c)(1); 803(c)(2)

In this case, Detective Finley testified as to her personal observations at the scene as well as what other persons said to her. She examined the driver's licenses produced by the underage driver and one of his passengers. This information corroborated the fact that these individuals were underage. She saw two brown paper bags each containing a forty ounce bottle of Old English Malt Liquor and obtained an admission relative to the underage purchase. This information corroborated the statements made to her by Detective Santori. She testified to a statement made that could constitute an admission against interest. Unless there is some other issue with respect to Detective Finley's competency to testify or credibility, her testimony clearly goes to the ultimate finding of fact made by the municipality. It should not be barred by the residuum rule and should have been given due weight and consideration by the Administrative Law Judge. Coupled with the testimony of the underage purchasers, there was substantial credible evidence in the record from which the Administrative Law Judge could have determined that a violation occurred on May 16, 1997.

I understand that the Administrative Law Judge arrived at this conclusion based upon his review of the testimony in the transcript and made his own assessment of credibility based upon the inherent reasonableness of the testimony of the witnesses and whether that testimony was contradicted. However, Detective Finley was involved in more than one of these incidents of violation and to deem her testimony credible and trustworthy with respect to one incident and not the other is a credibility determination that causes me to pause and reflect on this matter with great concern. As to the weight accorded Mr. Patel's denial, the Administrative Law Judge failed to take into account his interest in the outcome and his credibility about testimony offered concerning other incidents where a violation was clearly demonstrated. Since it was made in the context of an erroneous analysis of the applicable law and predicated on the same transcript before me, I have determined that I am not bound to accept the determination of the Administrative Law Judge on the May 16, 1997 charge. I therefore find that there was a sale of alcohol to an underage person on May 16, 1997.

I now address the Administrative Law Judge's recommendation regarding the penalty to be imposed. It is well settled that the primary responsibility to enforce the law pertaining to retail licenses rests upon the municipality. N.J.S.A. 33:1-24. The municipality also has the power to conduct disciplinary proceedings to suspend or revoke retail licenses. N.J.S.A. 33:1-31. Also see Benedetti v. Bd. of Commr's. of the City of Trenton, 35 N.J. Super. 30, 113 a.2nd 44 (App. Div. 1955). It has long been held in this State that the sales of intoxicating liquor to minors not only justifies but necessitates the most rigid control. Hudson Bergen County Retail Liquors Stores Assoc. v. Bd. of Commr's. of City of Hoboken, 135 N.J.L. 502 (52 A 2nd 668) (E. & A. 1947); In Re Schneider, N.J. Super 449, 456, 79 A 2nd 865 (App. Div. 1951); Mazzav Cavicchia, 15 N.J. 498, 505, 105 A 2nd 545 (1954); Butler Oak Tavern v. Division of ABC, 20 N.J. 373, 384 (1956). (In

determining that the Director of the Division of Alcoholic Beverage Control "has the statutory authority to suspend or revoke liquor licenses for a first offense." 20 N.J. 373 at 379.)

In F & A Distributing Co. v. Division of ABC, 36 N.J. 34, 174 A 2nd 738 (1961), a wholesaler who was suspended on a first offense for a credit violation argued that they had been singled out for a penalty that was not imposed on others. The Court held that the Director has the authority to determine whether an offending licensee may pay a fine in lieu of serving a suspension. Simply because the penalty meted out seems to the offended to be more severe than that imposed in some other cases, is not a case for reversal. See F & A Distributing Co. at 36 N.J. 38.

ABC Bulletin 2453, Item 2 (October 31, 1988), sets forth guidelines for the imposition of penalties in cases where there is a sale to a person under the legal age. It is currently the Division's policy to impose a fifteen (15) day suspension for the first such violation, thirty (30) days for a second violation, forty-five (45) days for a third violation, and revocation of liquor license for four similar violations within a two-year period.

Under the Division's present policy, the penalty for the three violations that the Administrative Law Judge found were substantiated by the facts, would be ninety (90) days suspension of license. Under my finding of a fourth violation, revocation would be an appropriate penalty. There seems to be no dispute that at the time the initial hearing was conducted on November 17, 1997, Appellant was given an opportunity to present mitigating factors. It did not do so. More than two years have elapsed since the hearing before the municipality. At one time, this matter was dismissed for Appellant's failure to appear at a proceeding before the Office of Administrative Law. The case was subsequently retransmitted to the Office of Administrative Law in July, 1999. I cannot overlook the fact that Appellant has taken advantage of the protracted nature of this appeal to take measures to prevent similar violations from occurring. Likewise, I cannot overlook that a reasonably prudent licensee should have taken those measures after the first, second or even third violation incident. For me to give credit to the Appellant some two years after the fact for taking measures that were evidently needed will in essence be a total disregard of the enforcement efforts of the local issuing authority. The facts do not warrant such consideration in this case.

At this late date, I will accept the mitigating factors offered by the Appellant in a Certification dated December 10, 1999 and submitted to the Administrative Law Judge over two years after the Notice of Appeal was filed only in mitigation of the penalty of revocation. I note that this Certification inaccurately states as a mitigating circumstance that since May 2, 1997 no charges have been brought against Simon Sez. Appellant overlooks the fact that three of the charges he was called upon to answer occurred after that date. This is not a case where the licensee candidly came forward and took responsibility for these serious violations. Moreover, the record leads me to the inescapable conclusion that the Appellant recklessly disregarded his obligation not sell alcoholic beverages to minors to the point of his establishment acquiring a reputation as the place for minors

to go to purchase alcohol.[2] His testimony before the City denying any violations occurred, is a position that remained unchanged throughout the terribly long time that this matter took to reach a final conclusion, warrants the penalty imposed today, a penalty more severe than recommended by the Administrative Law Judge.

Therefore, although I reverse the Administrative Law Judge's determination of the charge concerning the May 16, 1997 incident and find that there is ample evidence to conclude that four separate sales to underage persons took place, I impose no additional penalty for the May 16, 1997 incident because of the steps taken by the licensee to comply with his responsibilities. I will not affirm the Respondent's revocation of the Appellant's license. Instead, I will modify the penalty as follows: the license will be suspended for fifteen (15) days for the May 2, 1997 violation, thirty (30) days for the June 21, 1997 violation, and forty-five (45) days for the July 25, 1997 violation, for a total of ninety (90) days suspension of license.

Accordingly, it is on this 16th day of October, 2000,

ORDERED that Plenary Retail Distribution License No. 0223-44-019-005, issued by the City to 281 Simon Sez, Inc. located at 281-282 State Street, Hackensack, be and the same is hereby SUSPENDED for a period of ninety (90) days commencing at 2:00 a.m. on Monday, January 1, 2001 and terminating at 2:00 a.m. on Sunday, April 1, 2001; and it is

FURTHER ORDERED that the determination to revoke the appellant's license is reversed and that in all other respects the action of the respondent is affirmed.

/S/ JERRY FISCHER
JERRY FISCHER
DIRECTOR

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[2]If Appellant's testimony is to be believed, he was expert in the form of a California license because he had seen so many of them come through his store. I suspect this influx from California was more attributable to the store's reputation as place for minors to purchase alcohol than for the residential history of its customers.

9. JOSE N. DURAN V. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF NEWARK - FINAL CONCLUSION AND ORDER AFFIRMING THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION REVERSING THE MUNICIPALITY'S DECISION TO DENY A TRANSFER

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

APPEAL NO. 6710

JOSE N. DURAN,	)	
LICENSE NO. 0714-44-041-005,	)	FINAL CONCLUSION AND ORDER
	)	OAL DKT. NO. ABC 11460-99
APPELLANT,	)	
	)	
V.	)	
MUNICIPAL BOARD OF	)	
ALCOHOLIC BEVERAGE CONTROL	)	
OF THE	)	
CITY OF NEWARK,	)	
	)	
RESPONDENT.	)	

Saul A. Wolfe, Esq., (Skoloff & Wolfe) Attorney for Appellant
Albert J. Mrozik, Esq., (Michelle Holler-Gregory, Corporation Counsel) Attorney for Respondent

Decided: May 3, 2000 Received: May 5, 2000

INITIAL DECISION BELOW

HONORABLE THOMAS R. VENA, ADMINISTRATIVE LAW JUDGE

BY THE DIRECTOR:

Appellant appeals the action of the local issuing authority, which denied a place-to-place transfer of its Plenary Retail Distribution License. On appeal, the Administrative Law Judge

reversed the decision of the local issuing authority and recommended that the place-to- place transfer be approved. The issue is whether the Administrative Law Judge correctly concluded that Respondent's decision was unreasonable or improperly grounded and without support in the record. Neither of the parties filed Exceptions to the Administrative Law Judge's Initial Decision in accordance with the provisions of N.J.A.C. 1:1-18.4(d). The time to render a Final Decision was extended by properly executed Order and, therefore, the Decision must be made on or before December 18, 2000. For reasons stated herein, the Initial Decision of the Administrative Law Judge is accepted.

PROCEDURAL HISTORY

This matter arose from the Decision of the Municipal Board of Alcoholic Beverage Control of the City of Newark (hereinafter Newark) which, by Resolution dated September 13, 1999, denied the place-to-place transfer of Appellant's (Jose N. Duran) application for a place-to-place transfer of his inactive Plenary Retail Distribution License.

The Appellant filed a timely Notice and Petition of Appeal which was then transmitted to the Office of Administrative Law (OAL) as a contested case. A hearing was conducted on April 27, 2000. An Initial Decision in favor of the Appellant was rendered by the Honorable Thomas R. Vena on May 3, 2000. No Exceptions to that decision have been filed.

FACTUAL DECISION

The Administrative Law Judge found that on April 22, 1999, Appellant filed an application for a place-to-place transfer of his inactive Plenary Retail Distribution License from 209-211 Irvine Turner Boulevard to 302-308 Osborne Terrace in the City of Newark. Newark held hearings on September 13, 1999 and denied the application.

The Administrative Law Judge also found that Senior Newark ABC Inspector Phillip Walker and the City of Newark Police Department conducted investigations relative to the place-to-place transfer and both recommended approval of the application. Their recommendation was based upon their finding that the new location was in compliance with all ordinances and all fees had been paid. The Administrative Law Judge found that the transfer would result in substantial renovation of the store-front premises at 302-308 Osborne Terrace which is currently vacant and would also allow the Appellant to achieve a lifelong goal of entrepreneurship in the liquor industry, in which he has substantial experience.

The Administrative Law Judge also concluded that 20 objectors appeared before the City of Newark at the hearing held on September 13, 1999 but, none of the objectors stated any specific grounds on which denial of the license transfer could be based. There was also a petition containing 162 names submitted to Newark but never accepted by Newark. That petition was offered into evidence at the Office of Administrative Law, but the Administrative Law Judge

9. JOSE N. DURAN V. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF NEWARK - FINAL CONCLUSION AND ORDER AFFIRMING THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION REVERSING THE MUNICIPALITY'S DECISION TO DENY A TRANSFER

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

APPEAL NO. 6710

JOSE N. DURAN,	)	
LICENSE NO. 0714-44-041-005,	)	FINAL CONCLUSION AND ORDER
	)	OAL DKT. NO. ABC 11460-99
APPELLANT,	)	
	)	
V.	)	
MUNICIPAL BOARD OF	)	
ALCOHOLIC BEVERAGE CONTROL	)	
OF THE	)	
CITY OF NEWARK,	)	
	)	
RESPONDENT.	)	

Saul A. Wolfe, Esq., (Skoloff & Wolfe) Attorney for Appellant
Albert J. Mrozik, Esq., (Michelle Holler-Gregory, Corporation Counsel) Attorney for Respondent

Decided: May 3, 2000 Received: May 5, 2000

INITIAL DECISION BELOW

HONORABLE THOMAS R. VENA, ADMINISTRATIVE LAW JUDGE

BY THE DIRECTOR:

Appellant appeals the action of the local issuing authority, which denied a place-to-place transfer of its Plenary Retail Distribution License. On appeal, the Administrative Law Judge

reversed the decision of the local issuing authority and recommended that the place-to- place transfer be approved. The issue is whether the Administrative Law Judge correctly concluded that Respondent's decision was unreasonable or improperly grounded and without support in the record. Neither of the parties filed Exceptions to the Administrative Law Judge's Initial Decision in accordance with the provisions of N.J.A.C. 1:1-18.4(d). The time to render a Final Decision was extended by properly executed Order and, therefore, the Decision must be made on or before December 18, 2000. For reasons stated herein, the Initial Decision of the Administrative Law Judge is accepted.

PROCEDURAL HISTORY

This matter arose from the Decision of the Municipal Board of Alcoholic Beverage Control of the City of Newark (hereinafter Newark) which, by Resolution dated September 13, 1999, denied the place-to-place transfer of Appellant's (Jose N. Duran) application for a place-to-place transfer of his inactive Plenary Retail Distribution License.

The Appellant filed a timely Notice and Petition of Appeal which was then transmitted to the Office of Administrative Law (OAL) as a contested case. A hearing was conducted on April 27, 2000. An Initial Decision in favor of the Appellant was rendered by the Honorable Thomas R. Vena on May 3, 2000. No Exceptions to that decision have been filed.

FACTUAL DECISION

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The Administrative Law Judge also found that Senior Newark ABC Inspector Phillip Walker and the City of Newark Police Department conducted investigations relative to the place-to-place transfer and both recommended approval of the application. Their recommendation was based upon their finding that the new location was in compliance with all ordinances and all fees had been paid. The Administrative Law Judge found that the transfer would result in substantial renovation of the store-front premises at 302-308 Osborne Terrace which is currently vacant and would also allow the Appellant to achieve a lifelong goal of entrepreneurship in the liquor industry, in which he has substantial experience.

The Administrative Law Judge also concluded that 20 objectors appeared before the City of Newark at the hearing held on September 13, 1999 but, none of the objectors stated any specific grounds on which denial of the license transfer could be based. There was also a petition containing 162 names submitted to Newark but never accepted by Newark. That petition was offered into evidence at the Office of Administrative Law, but the Administrative Law Judge

9. JOSE N. DURAN V. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF NEWARK - FINAL CONCLUSION AND ORDER AFFIRMING THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION REVERSING THE MUNICIPALITY'S DECISION TO DENY A TRANSFER

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

APPEAL NO. 6710

JOSE N. DURAN,	)	
LICENSE NO. 0714-44-041-005,	)	FINAL CONCLUSION AND ORDER
	)	OAL DKT. NO. ABC 11460-99
APPELLANT,	)	
	)	
V.	)	
MUNICIPAL BOARD OF	)	
ALCOHOLIC BEVERAGE CONTROL	)	
OF THE	)	
CITY OF NEWARK,	)	
	)	
RESPONDENT.	)	

Saul A. Wolfe, Esq., (Skoloff & Wolfe) Attorney for Appellant
Albert J. Mrozik, Esq., (Michelle Holler-Gregory, Corporation Counsel) Attorney for Respondent

Decided: May 3, 2000 Received: May 5, 2000

INITIAL DECISION BELOW

HONORABLE THOMAS R. VENA, ADMINISTRATIVE LAW JUDGE

BY THE DIRECTOR:

Appellant appeals the action of the local issuing authority, which denied a place-to-place transfer of its Plenary Retail Distribution License. On appeal, the Administrative Law Judge

reversed the decision of the local issuing authority and recommended that the place-to- place transfer be approved. The issue is whether the Administrative Law Judge correctly concluded that Respondent's decision was unreasonable or improperly grounded and without support in the record. Neither of the parties filed Exceptions to the Administrative Law Judge's Initial Decision in accordance with the provisions of N.J.A.C. 1:1-18.4(d). The time to render a Final Decision was extended by properly executed Order and, therefore, the Decision must be made on or before December 18, 2000. For reasons stated herein, the Initial Decision of the Administrative Law Judge is accepted.

PROCEDURAL HISTORY

This matter arose from the Decision of the Municipal Board of Alcoholic Beverage Control of the City of Newark (hereinafter Newark) which, by Resolution dated September 13, 1999, denied the place-to-place transfer of Appellant's (Jose N. Duran) application for a place-to-place transfer of his inactive Plenary Retail Distribution License.

The Appellant filed a timely Notice and Petition of Appeal which was then transmitted to the Office of Administrative Law (OAL) as a contested case. A hearing was conducted on April 27, 2000. An Initial Decision in favor of the Appellant was rendered by the Honorable Thomas R. Vena on May 3, 2000. No Exceptions to that decision have been filed.

FACTUAL DECISION

The Administrative Law Judge found that on April 22, 1999, Appellant filed an application for a place-to-place transfer of his inactive Plenary Retail Distribution License from 209-211 Irvine Turner Boulevard to 302-308 Osborne Terrace in the City of Newark. Newark held hearings on September 13, 1999 and denied the application.

The Administrative Law Judge also found that Senior Newark ABC Inspector Phillip Walker and the City of Newark Police Department conducted investigations relative to the place-to-place transfer and both recommended approval of the application. Their recommendation was based upon their finding that the new location was in compliance with all ordinances and all fees had been paid. The Administrative Law Judge found that the transfer would result in substantial renovation of the store-front premises at 302-308 Osborne Terrace which is currently vacant and would also allow the Appellant to achieve a lifelong goal of entrepreneurship in the liquor industry, in which he has substantial experience.

The Administrative Law Judge also concluded that 20 objectors appeared before the City of Newark at the hearing held on September 13, 1999 but, none of the objectors stated any specific grounds on which denial of the license transfer could be based. There was also a petition containing 162 names submitted to Newark but never accepted by Newark. That petition was offered into evidence at the Office of Administrative Law, but the Administrative Law Judge

rejected it because of its hearsay character. Unfortunately, the Administrative Law Judge did not make clear in the record the basis of his conclusions concerning the petition and the evaluation of these particular objections by the local citizens. However, the Respondent did not file exceptions to the Administrative Law Judge's findings and declined to do so. Therefore, I accept them as uncontested in the record. The Administrative Law Judge did note that the basis of the objections evidenced by that petition was "unspecified."

The Administrative Law Judge found that Newark denied the place-to-place transfer for two reasons. The first, strong opposition from the community. The second, the transfer was not in the best interest of the community. However, the ALJ concluded that the record contained no evidence either supporting the conclusion by the Respondent of the existence of any factors indicative of an adverse effect on the safety and/or welfare of the neighborhood in question nor a basis for him to reach such a conclusion. Again, the record available to me consists of the Initial Decision and Exhibits which are noted in the appendix of the Decision. Since the factual conclusions of the Administrative Law Judge are unchallenged, I must conclude that the facts determined by him are deemed accurate by both parties. Since the facts existing in the record, are sufficient to support the conclusion that Appellant was otherwise qualified to operate a licensed premise, I conclude that the findings of the Administrative Law Judge that are unchallenged by the respondent do not merit a remand for further findings of fact.

LEGAL DISCUSSION

A local issuing authority has broad discretion over transfer matters. Lubliner v. Bd. Of Alcoholic Beverage Control, 33 N.J. 428, 446 (1960). However, the denial of a transfer may be reversed where the applicant shows that the municipal issuing authority acted arbitrarily, unreasonably, or capriciously in its decision. See Lyons Farms Tavern v. Municipal Bd. Of Alcoholic Beverage Control of Newark, 55 N.J. 292, 303 (1970). Even though the municipal authority is vested with a high degree of discretion, its decisions are subject to review by the Director of the Division of Alcoholic Beverage Control where the decision is a result of an abuse of discretion, manifest mistake, or is clearly unreasonable. Lubliner v. Bd. Of Alcoholic Beverage Control, 33 N.J. 428, 446 (1960); Blanck v. Mayor and Borough Council of Magnolia, 38 N.J. 484, 492 (1962). On a de novo trial, the burden of establishing that the municipal decision was erroneous rests on the Appellant. N.J.A.C. 13:2-17.6. The local authority may reasonably consider community sentiment when deciding whether or not to grant a place-to-place transfer request. Borough of Fanwood v. Rocco, 33 N.J. 404, 412 (1960). The sentiment relied upon must be substantially widespread in the community, and reasonably associated with public health, safety, morals and general welfare concerns commonly recognized as incidental to the sale and consumption of alcoholic beverages. Lyons Farms Tavern v. Municipal Bd. Of Alcoholic Beverage Control of Newark, 55 N.J. 292, 306-307 (1970). General objections or expressions of concern, conjectural in nature are not sufficient grounds to conclude that there is widespread community sentiment that is a probable basis to denying a transfer request. The Great Atlantic & Pacific Tea

Co., Inc. v. Mayor and Council of the Borough of Pt. Pleasant, 220 N.J. Super. 199, 128 (App. Div. 1987).

The Administrative Law Judge concluded, from the testimony and other evidence before him, there was no support in the record for Newark to deny the place-to-place transfer license application. Newark has failed to submit exceptions to this conclusion or present an alternative interpretation of this evidence. Respondent has not asked that we consider testimony, review transcripts or otherwise give any weight to any other proposed evidentiary submission. We also note the record reflects Respondent had opportunity to submit post-hearing memorandum to the Administrative Law Judge but chose not to do so. Therefore, I am satisfied that the Administrative Law Judge properly weighed all the testimony and evidence presented by the parties and gave due consideration to arguments presented by both Appellant and Respondent. It is well settled that the Director will not substitute his judgment for that of the local Board or reverse the ruling if reasonable support for it can be found in the record. Margate Civic Assoc. v. Bd. Of Commr's., Margate, 132 N.J. Super. 58, 63 (App. Div. 1975). However, if the municipal action is unreasonable or improperly grounded, the Director may grant such relief or take such action as is appropriate. Lyons Farms, supra. 55 N.J. at 303.

Existing precedent is not without good reason in directing that I pay special attention to the concerns and of the local community and the local government for issues related not only to the public health, safety and welfare, but also to the general quality of life in the community. However, it is equally well settled that under the Federal and State Constitutions, a licensee is entitled to procedural due process before his important, personal economic interests might be taken away. He is entitled to protection from arbitrary and capricious action, including the opportunity to address the evidence against him. Where the issue confronting a licensee is predicated on community sentiment that the proposed action will unreasonably disturb the quality of life in the community, it is important to consider both the direct evidence presented below as well as be cognitive of the general circumstances under which a community typically evaluates the quality of life of its citizens. I would necessarily consider the testimony of each and every objector as well as assess the content and evidentiary value of each and every document admitted into evidence. Unfortunately, neither of the parties have asked me to engage in this analysis with respect to this case nor does the record allow me to engage in an independent evaluation of these considerations. The Initial Decision does not detail the nature of the objector's testimony, nor does it specify the language in the 10 page petition which contained 162 signatures. That document was not admitted into evidence and as a result is not before me for review.

Contrary to the position taken by the respondent in its final action, the only evidence in the record that reflects community sentiment supports the application of the Appellant. What I have before me in terms of evidentiary documents are the license transfer application dated April 22, 1999, a memorandum from Senior Inspector Walker to ABC Secretary Holland McCluney recommending that the license transfer be granted, and a 25 page Investigation Report prepared by

the Newark Police Department which also recommends approval of the license transfer. I, therefore, am restricted by the record in my evaluation and analysis of this matter.

I find that the Respondent was fully conversant with the issues and given every opportunity to submit any and all facts and legal argument to the Administrative Law Judge at the hearing. I am limited to the record before me and am bound to accept the factual findings of the Administrative Law Judge when those findings are supported in the record. In the matter of Taylor, 158 N.J. 644 (1999). The record in this matter does not demonstrate that Respondent's denial of Appellant's transfer application was supported by the evidence. There is nothing in the record that would allow me to determine community sentiment in general, nor the views of the individuals alleged to oppose this place-to-place transfer. Whether their individual views were meritorious or were reasonably associated with the health, safety or general welfare of the community cannot be divined from the record. I, therefore, am compelled to reverse the action of the City in this instance.

Newark has failed to show any reasonable support of its denial of Appellant's application for a place-to-place transfer. Accordingly, Newark's denial of this place-to-place transfer was erroneous. N.J.A.C. 13:2-17.6.

Accordingly, it is on this 14th day of December, 2000,

ORDERED, that the action of the Municipal Board of Alcoholic Beverage Control of the City of Newark which denied the transfer application for a place-to-place transfer of Jose N. Duran, License Number 0714-44-041-005 be, and the same is hereby reversed; and it is further

ORDERED, that the transfer application for a place-to-place transfer of Jose N. Duran, License Number 0714-44-041-005 for the premises located at 209-211 Irvine Turner Boulevard to the location of the premises known as 302-308 Osborne Terrace in the City of Newark be, and the same hereby is, granted.

/S/ JERRY FISCHER
JERRY FISCHER
DIRECTOR

APPENDIX: INITIAL DECISION BELOW

10. IN THE MATTER OF THE APPLICATION OF D. LOBI ENTERPRISES, INC., T/A THE SURFRIDER BEACH CLUB, V. BOROUGH OF SEA BRIGHT - FINAL CONCLUSION AND ORDER AFFIRMING THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND THE BOROUGH'S DECISION TO DENY A TRANSFER [PRESENTLY ON APPEAL IN SUPERIOR COURT, APPELLATE DIVISION]

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
Division of Alcoholic Beverage Control

IN THE MATTER OF THE APPLICATION OF D. LOBI ENTERPRISES INC. T/A SURFRIDER BEACH CLUB, APPELLANT, V. MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF SEA BRIGHT, RESPONDENT.	FINAL CONCLUSION AND ORDER ACCEPTING INITIAL DECISION OAL DKT. NO. ABC 4601-96S AGENCY DKT. NO. 6370 MUN. REV. NO. 9613

Charles J. Uliano, Esq., Attorney for Appellant
(Chamlin, Rosen, Cavanagh & Uliano, Esqs.)

Scott C. Arnette, Esq., Attorney for Respondent
(Miller and Gaudio, Esqs.)

Initial Decision Below by the Honorable Barbara A. Harned, Chief Administrative Law Judge

Decided: June 21, 1999 Received: June 22, 1999

BY THE DIRECTOR:

Appellant contests action by the local issuing authority denying its application for a person-to-person and place-to-place transfer of Plenary Retail Consumption License Number 1343-33-014-006. The issue is whether there is reasonable support in the record for the Respondent's decision to deny the transfer. Written exceptions to the Initial Decision were filed on behalf of the Appellant and written replies thereto were filed on behalf of the Respondent, in accordance with the provisions of N.J.A.C. 1:1-18.4(d). The time to render a Final Decision was extended by properly executed Orders and, therefore, the decision must be made on or before February 3, 2000. For the reasons stated herein, the Initial Decision of the Administrative Law Judge is accepted. Respondent's denial of the transfer application is affirmed.

PROCEDURAL HISTORY

On April 20, 1996 the Mayor and Council of the Borough of Sea Bright (Sea Bright) denied the Appellant's application for a person-to-person and place-to-place transfer of license number 1343-33-014-006 (the license). Appellant filed a timely Notice and Petition of Appeal which was then transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 14F-1 et seq. Hearings were conducted on October 29, 30, 31, November 1, 1996 and January 6 and 16, 1997. An Initial Decision in favor of Respondent was rendered by the Honorable Barbara A. Harned, (Chief ALJ) Chief ALJ on June 21, 1999. Exceptions were filed on July 14, 1999 and Replies thereto on July 22, 1999.

INITIAL DECISION

At the de novo hearing, the Chief ALJ received testimony from 21 witnesses, reviewed 248 evidentiary submissions, considered five transcripts of testimony taken at the municipal hearing and personally visited the site where the appellant would like to transfer this license. Her factual findings are carefully drawn and fully expressed in pages 3 through 54 of her opinion. The Chief ALJ found that on May 15, 1995, Appellant filed an application to transfer an inactive license it had contracted to purchase, to a beach club and banquet facility (the Surfrider) it operated at 531 ocean avenue in Sea Bright, New Jersey. The license had been actively used at another beach club facility known as the Peninsula House until a fire destroyed those premises in 1986. The Peninsula property is now a borough-owned parking lot on Ocean avenue and stands about one half mile south of the applicant's facility. The license itself is owned by the Natwest bank. The contract between Natwest and Appellant provides that it is voidable if the transfer application is denied.

The Chief ALJ found that Sea Bright is a beach front community in the shape of a peninsula, approximately three and one half miles long and six tenths of a mile square. It is a narrow strip of land, bordered by the Shrewsbury River on the west and the Atlantic Ocean on the east. Ocean Avenue is the main thoroughfare to get into and out of town. Traffic in Sea Bright is much heavier during the summer season when there is constant traffic during the daylight hours to get to the

beaches. Mr. Lobiondo, the applicant's principal, testified that in the summer, there is an "invasion" of people which is "almost overwhelming."(see opinion at page13).

The Surfrider Beach Club is located on the northern portion of the peninsula. It's primary use is as a beach club catering to families but also operates a banquet facility and has obtained a use variance to operate a restaurant. It has two parking lots which can accommodate a total of 280 vehicles. The North Beach area where the Surfrider is located, is primarily a residential neighborhood with the exception of McLoone's Rum Runner dining facility at 810 Ocean avenue. McLoone's is a licensed establishment. The land mass and Ocean avenue are very narrow in this area. There are no shoulders or sidewalks to buffer the houses across the street from activity at the surfrider. In contrast, the portion of Ocean avenue where the Peninsula club was located is six lanes wide. That facility was set back from the roadway and enjoyed at least some separation from it's residential neighbors .

In May of 1995, the applicant published a notice of its application to seek the transfer of the license. As a result, the Borough received approximately 200 letters as well as phone calls to council members and comments from borough residents to public officials in opposition. The majority of the letters were a typewritten form letter which required the objector to fill in their name and address and then sign the bottom of the document and mail or deliver it to the borough hall. With a few exceptions, these letters state only that the signatory objects to the renewal or transfer of the license but, contain no specific reasons for their position. Other letters of objection were received at Borough Hall on personal stationery or as handwritten notes.

There were approximately 11 objectors who spoke at the municipal hearing. The majority of these persons live in close proximity to the proposed site. They raised a number of concerns during the hearing before the Borough Council. One of their primary concerns was that the Surfrider's parking lot had been utilized by McLoone's facility to allow the parking of cars for patrons of that business. When this occurred, the residents who lived across the street had experienced noise, car doors slamming, talking and shouting, fast acceleration and skidding noises from cars pulling out as well as other nuisances such as public urination and boisterous activity normally associated with the service of intoxicants. The objectors argued that introducing another plenary retail consumption license to this area would add greater problems of a similar nature. Several of these objectors also testified at the de novo hearing before the Chief ALJ. She found their testimony to be credible.

The Chief ALJ found that when the Surfrider's lower parking lot was used at night, neighbors were disturbed by noise and other incidents. The Chief ALJ also considered Appellant's contention that because McLoone's Rumrunner, a licensed establishment located in the neighborhood, did not generate complaints, it could not be said that a license located at the Surfrider facility would negatively impact the neighbor's peace and quiet or generate complaints. The Chief ALJ distinguished McLoone's noting that it had a buffer from its nearest neighbor while the Surfrider did not. Moreover, she concluded that the Borough Council might have been unwise in licensing McLoone's in this primarily residential neighborhood but, did not require that they "further perpetuate earlier unwise action." (See Opinion at Page 60.)

The Chief ALJ found that many of the other licensed retail establishments in the Borough were set further back from Ocean Avenue than the Surfrider and were located in areas where Ocean Avenue was much wider and contained buffers in the form of shrubs and trees which protected residents from noise and other nuisances generated by the licensed premises. She considered and rejected the applicant's argument that its intention was to use the license for banquets that would end no later than 11:00 p.m. and not be the subject of complaints by neighbors. She pointed out that Mr. Lobiando had stated that he was not willing to accept any restrictions on the use of his license and as such, his ability to serve alcoholic beverages would be at his disposal seven days a week until 2:00 a.m. Finally, she rejected the applicant's argument that objectors who appeared at the Borough's hearing were not sworn and Appellant's counsel was not permitted to cross-examine them at that time. (See Opinion at Page 60-62.)

I am satisfied that Appellant has been given every opportunity to submit any and all facts, circumstances and legal argument to advance its position. Further, the Chief ALJ has given careful consideration to all of the evidence submitted to her and has made her factual findings based upon the credibility of the witnesses and the weight of all of the evidence that both parties produced. With the exception of my conclusion that the letters and testimony expressed widespread community sentiment reasonably associated with public health safety and morals, I hereby adopt the Chief ALJ's findings of fact, as my own, as if they were fully set forth at length in the Final Conclusion and Order.

EXCEPTIONS

The Appellant submitted Exceptions and the Respondent filed Replies which are summarized as follows:

The basic thrust of the Appellant's Exceptions is that there is insufficient proof to support a conclusion that Sea Bright was reasonable in finding that the transfer of this consumption license would so impact local residents in close proximity that the health, safety and welfare of the community would be adversely affected. Appellant argues that the Chief ALJ erred in disregarding the intended use for the liquor license and its assessment that if the license transfer occurred, traffic would increase. Appellant states that the Chief ALJ disregarded the fact that the Chief of Police did not oppose the license transfer and that the police had no records of complaints emanating from this location. Appellant alleges that the Court made erroneous findings with respect to local citizen complaints about Mc Loone's patrons who used the Surfrider parking lot on occasion. Appellant alleges that the Chief ALJ improperly made an issue of D. Lobi not accepting restrictions on the license.

Respondent replies that Appellant, in taking exception and challenging several of the Chief ALJ's findings of material fact, is required to provide the transcript of those proceedings to the Director in a timely fashion. Respondent argues that Appellant's failure to provide the transcripts of the hearing should effectively preclude any review by me of such exceptions. Respondent cites

Matter of Morrison, 216 N.J. Super 143, (App. Div. 1987) in support of his assertion. I concur with Respondent.

Additionally, Respondent contends that there were sufficient proofs to support the Chief ALJ's finding that the license transfer would adversely impact local residents in close proximity to the proposed site. Respondent asserts that the Chief ALJ properly applied standards annunciated in Lyons Farm Tavern v Municipal Board of ABC, Newark, 55 N.J. 292, (1970). Respondent contends that the proofs submitted by the Borough of Sea Bright, Appellant's testimony on cross-examination and observations made by the Chief ALJ during her site visit, clearly support the Findings of Fact. Respondent contends that the Chief ALJ correctly found that the applicant refused to accept any restrictions on the liquor license and that the license transfer would cause an increase in traffic in the area affected by the license. Respondent contends that the Chief ALJ properly concluded that patrons from Mc Loone's used D. Lobi's parking lot and made noise and created other disturbances negatively impacting the residents across the street. Finally, Respondent contends that Sea Bright's denial of the person-to-person and place-to-place transfer was a reasonable exercise of its police power and was not arbitrary or capricious.

Exceptions must specify the Findings of Fact or Conclusions of Law to which exception is being taken. N.J.A.C. 1:1-18(b)(1). The Exceptions must set forth supporting reasons. N.J.A.C. 1:1-18.4(d)(3). Exceptions to factual findings must describe the witnesses testimony relied upon and Exceptions to Conclusions of Law must set forth the authorities relied upon. Moreover, the party asserting the Exceptions has the burden of providing the necessary transcripts for review. This has not been done in this case. Consequently, there is no duty to review them before deciding on a course of action regarding findings and recommendations of the Chief ALJ. In Re Morrison, 216 N.J. Super. 143, 157-158 (App. Div. 1987); see also Rowley v. Board of Education of Manalapan-Englishtown, 205 N.J. Super. 65 (App. Div. 1985). For the above reasons as well as those stated below, Appellant's Exceptions are rejected.

LEGAL DISCUSSION

A local issuing authority has broad discretion over transfer matters. See Lubliner v. Board of Alcoholic Beverage Control, 33 N.J. 428, 446 (1960). The burden of establishing that the action of Respondent issuing authority was erroneous, rests with Appellant N.J.A.C. 13:2-17.6. The local authority may reasonably consider community sentiment when determining whether or not to grant a place-to-place transfer request. Borough of Fanwood v. Rocco, 33 N.J. 404, 412 (1960). The sentiments relied upon must be substantially widespread in the community, and reasonably associated with public health, safety, morals and general welfare concerns commonly recognized as incidental to the sale and consumption of alcoholic beverages. Lyons Farm Tavern v. Municipal Board of Alcoholic Beverage Control of Newark 55, N.J. 292, 306-307 (1970); A & P Company v. Mayor of Point Pleasant Beach, 220 N.J. Super. 119
(App. Div. 1987).

The Chief ALJ relied on A&P Co. v. Mayor of Pt. Pleasant Beach, supra, in reaching a conclusion that the Sea Bright's denial of the transfer was not reasonably supported by a record of wide-spread public sentiment that had a specific relationship to public health, safety and welfare. In that case, A & P had failed to renew its lease at its old premises. As a result, its liquor store license became inactive. Subsequently, A & P sought to move its operation and reactivate its license in a shopping center, in close proximity to other liquor stores.

Approximately ten persons objected before the Point Pleasant Beach Borough Council. All of them were either friends or associates of existing liquor stores or persons who felt there was no need for another store in the Borough. In addition, four letters of objection were introduced. Two came from other liquor store owners who objected to the potential competition that an A & P store posed, and two came from persons associated with those distressed competitors. The Borough denied the application for transfer and A & P appealed.

At the de novo hearing before the ALJ, the objectors submitted two petitions against the transfer. One was placed in one of the competitor's store, while the other was offered by a friend of a competitor. Neither petition contained reasons why those who signed objected to the transfer. The Director concluded that the Borough denied the application to either negate the applicant's efforts to reactivate its license or, to protect other local liquor store operators from competition. The Director adopted the ALJ's findings that there was insufficient evidence to support the Borough's action and overturned their decision. The Borough appealed and argued that the Director improperly substituted his judgement for that of the counsel. On appeal, the Court found the Director's determinations to be reasonable and legally grounded. See A&P Co. 220 N.J. Super. at 131. It held that when a municipality's action is in response to public sentiment, such sentiment must have a reasonable association with dangers to the public health, safety, morals and general welfare commonly recognized as incidence of the sale and consumption of alcohol. It agreed with the Director's conclusion that if the Borough's action was based upon their desire to protect existing competitors or remove this license altogether, it must be reversed.

In the case at hand, Sea Bright's motivation in denying the person-to-person and place-to-place transfer of this liquor license is not intended to protect an established, commercial enterprise from competition. Additionally, there is nothing in the record that would lead to the conclusion that Sea Bright has resolved to eliminate this license, which had been inactive for almost nine years before the transfer application was made. Any analogy between the petition prepared by A & P's competitor and the 200 letters of objection submitted in this case is misplaced. It is reasonable to infer that the letters may have been prepared by some of the more vigilant members of the community that opposed the liquor license transfer and handed out to other residents for signature and mailing. There is nothing in the record to indicate that the letters were not signed and posted by the individual whose name appears at the bottom of the letter and that they do not reflect widespread public sentiment against placing this consumption license in an area where public health, safety and welfare might be jeopardized. These letters must be considered as part of the witness testimony and other evidence that was before the Sea Bright council.

The testimony of witnesses indicates that a variety of cognizable reasons were given in opposition to the transfer. Mr. Mulligan lives in close proximity to the Surfrider. He testified that he was concerned about noise, drunks and increased traffic. He experienced car doors slamming, loud conversations, acceleration of cars out of the lot and loud radios when the parking lot was actively used. Paul Rubino, another nearby resident, testified that he opposed the transfer because he did not want noise and crowds. Michael O'Shea objected to the transfer because he had seen many alcohol-related deaths and fights caused by drinking throughout Sea Bright. He also objected because of D. Lobi's close proximity to his house and the increased traffic which he believes would result. William Keeler, a borough Councilman, testified that he voted no on the license transfer issue because of safety concerns as well as noise and increased traffic. Elizabeth Smith voted no on the transfer issue because of neighborhood concerns about property value, the effect of the residential quality of life in a neighborhood, and she felt public sentiment was very much against a transfer to D. Lobi. Janice Demarco testified in opposition to the transfer, citing noise and increased traffic as a basis for her objection. Marilyn DeMarco objected to the transfer based upon noise and loud music. Michael Chrysanthopoulos objected to the transfer based upon noise, car doors slamming and cars accelerating from D. Lobi's parking lot. Liam O'Callaghan objected based upon noise and increased traffic as well as concern about behavior of intoxicated patrons.

The testimony of these individuals articulate concerns reasonably associated with public health, safety, morals and general welfare commonly recognized as incidental to the sale and consumption of alcoholic beverages. This seems to be representative of the over-all sentiments in the community. The form letters and other written submissions by concerned citizens could reasonably be accepted as a further expression of that widespread public sentiment.

The judicial standard of review of an administrative agency is:

> "[W]hether the findings made could reasonably have been reached on sufficient credible evidence present in the record, considering "the proofs as a whole," with due regard to the opportunity of the one who heard the witnesses to judge their credibility ... and ... with due regard also to the agency's expertise where such expertise is a pertinent factor. Matter of Fiorillo Brothers of New Jersey Inc., 242 N.J. Super. 667, 675 (App. Div.), certif denied, 122 N.J. 363 (1990) quoting Mayflower Sec. v. Bureau of SEC., 64 N.J. 85, 92-93 (1973), quoting Close v. Kordulak Brothers, 44 N.J. 589, 599 (1965)]. See also Grand Victorian Hotel v. Borough Council of the Borough of Spring Lake, (App. Div. Docket No. A-0924-93T3 decided July 1, 1994."

Additionally, it is well settled that the Director should not substitute his judgment for that of the local board or reverse the Ruling if reasonable support for it can be found in the record. Lawrence Methodist Church v. Township Committee of Lawrence Township, 38 N.J. Super. 85 (App. Div. 1955).

It is appropriate for the local issuing authority to cite prior problems normally associated with the service of intoxicating beverages such as noise and boisterous behavior as a reason for denying a transfer request, See Jaya v. City of Union City, 96 N.J.A.R. 2nd (ABC) 53. Likewise, a local issuing authority may rely on unique local geography and conditions in denying a transfer application. See Biscamp v. Township Council of Teaneck, 5 N.J.Super. 172 (App. Div.1949). In that case, denial was affirmed by the Court on grounds that the proposed location was too near a public park, on a narrow road, too near an intersection of heavily traveled roadway and that granting the application would increase traffic hazards.

I agree with the Chief ALJ's Conclusion of Law that the borough's denial of the license transfer application was not arbitrary, capricious, or an abuse of its discretion. Rather, it appears to have been a decision properly grounded in widespread community sentiment, reasonably associated with public health, morals and general welfare concerns, incidental to the sale and consumption of alcoholic beverages as well as the likely impact of this consumption license upon the residents living in close proximity to it.

Accordingly, it is on this 3rd day of February, 2000,

ORDERED, that the application for a person-to-person and place-to-place transfer of Plenary Retail Consumption License No. 1343-33-014-006 be and the same is hereby DENIED.

/S/ ALFRED E. RAMEY
ALFRED E. RAMEY
ASSISTANT ATTORNEY GENERAL IN CHARGE

ATTACHMENT - INITIAL DECISION

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Publication of Bulletin 2482 is hereby directed this
26th Day of December, 2000

JERRY FISCHER, DIRECTOR
DIVISION OF ALCOHOLIC BEVERAGE CONTROL