

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

BULLETIN 2480

OCTOBER 23, 1998

TABLE OF CONTENTS

ITEM

1. PRESS RELEASE-OFFICE OF THE ATTORNEY GENERAL-- COPS IN SHOPS PROGRAM EXPANDED TO TARGET COLLEGE COMMUNITIES.
2. NOTICE TO INDUSTRY--WHOLESALEERS CAN ACCEPT RETAILERS' CREDIT CARDS AS PAYMENT FOR ALCOHOLIC BEVERAGES SALES.
3. REQUEST FOR OPINION--ISSUANCE OF A NEW LICENSE.
4. REQUEST FOR DIVISION ADVICE--TRANSFER APPLICATION FOR DISTRIBUTION LICENSE TO PREMISES WITHIN THE BLUE SKY CAFE.
5. REQUEST FOR DIVISION ADVICE--CATERER DISPENSING ALCOHOLIC BEVERAGE.
6. REQUEST FOR DIVISION REVIEW--WHOLESALEER'S DISCOUNT OFFER.
7. REQUEST FOR LEGAL ADVICE--TAX CLEARANCE CERTIFICATE.
8. BROWNSTONE INN, INC. V. TOWNSHIP OF WYCKOFF - FINAL CONCLUSION AND ORDER.
9. 12 SOUTH, INC. T/A 12 SOUTH V. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF ATLANTIC CITY - FINAL CONCLUSION AND ORDER IMPOSING SUSPENSION WITH SPECIAL CONDITION.

BULLETIN 2480

OCTOBER 23, 1998

1. PRESS RELEASE - OFFICE OF THE ATTORNEY GENERAL--COPS IN SHOPS
PROGRAM EXPANDED TO TARGET COLLEGE COMMUNITIES

NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY

PRESS RELEASE - OFFICE OF THE ATTORNEY GENERAL

FOR IMMEDIATE RELEASE

October 2, 1998

Cops in Shops Program Expanded to Target College Communities

LINCROFT--Governor Christie Whitman and Attorney General Peter Verniero today announced the expansion of a program designed to curtail illegal drinking in municipalities with large populations of college students under the age of 21.

Verniero made the announcement at the state summit on "Responsible Drinking in the College Environment" held at Brookdale Community College in Monmouth County. The summit brought together substance abuse experts, college officials, students, and law enforcement officials to highlight successful initiatives in reducing campus-related drinking.

"Tough law enforcement against underage drinking like the Cops in Shops program is one part of the solution." Verniero said. "But today's Summit underscores that we have to take a multi-prong approach to dealing with campus alcohol abuse."

Through the Cops in Shops Program, under cover law enforcement officers will join forces with retail establishments to deter the sale of alcohol to underage individuals, and to stop adults from attempting to purchase alcohol for people under the legal age, Verniero explained.

PAGE 2

"Underage drinking continues to be a problem among young people," Attorney General Verniero said. "Through this public/private partnership, New Jersey alcoholic beverage retailers and the law enforcement community have another effective way to work together to combat illegal drinking."

According to Verniero, 17 college municipalities have received a total of \$51,000 in federal money to work undercover in participating retail locations for a minimum of two nights each week during a three-month interval. Local law enforcement officers will pose either as store employees or will be positioned outside the establishment to apprehend adults who attempt to procure alcohol for underage drinkers.

In addition, the Division of State Police has received approximately \$25,000 from the Division of Alcoholic Beverage Control to target underage drinking at bars in college communities. Troopers will work undercover over the course of a two-month sting to identify and apprehend illegal drinkers.

Cops in shops, which has been implemented throughout the state at various times since 1996, creates a strong deterrent, Verniero noted, since undercover enforcement officers can be in any store or bar, at any time.

"The true benefit of Cops in Shops goes beyond the number of arrests a police officer makes," Verniero added. "It deters young people from attempting to purchase alcohol and help cut down on illegal underage consumption in New Jersey."

According to Verniero, the program's expansion stems from the summer of '98 Cops in Shops program, where 189 underage drinking arrests were made in 15 participating seashore municipalities during the period between Memorial Day and Labor Day.

Underage drinkers face a minimum fine of \$500 and mandatory loss of their drivers licenses for six months. Adults who purchase alcohol for underage drinkers can go to jail for six months and face a \$1,000 fine.

As part of the program, retail outlets display posters and decals on doors, windows, counter tops, and cold cases warning underage drinkers that a police officer may be working undercover in the establishment,

"This program has a double benefit," said Division of Alcoholic Beverage Control Director John Holl. "Retailers who might otherwise be exposed to liability for underage sales are assisting enforcement and, law enforcement is better prepared to apprehend underage purchasers and send its message of deterrence."

Holl added that this initiative focuses on the individual who knows he or she is breaking the law, rather than on the licensee who may, in good faith, believe the person is of legal age.

According to Colonel Peter O'Hagan, Director of the Division of Highway Traffic Safety, Cops in Shops is yet another effective way to rid our roads of potential drunk drivers.

"By making young people stop and think twice about illegally purchasing alcohol, we are also working to prevent a potential drunk driver from getting behind the wheel and becoming involved in a senseless tragedy," O'Hagen said.

Cops in Shops is a program of The Century Council, a national not-for-profit organization dedicated to combating alcohol abuse. The Century Council is providing materials for the Cops in Shops program.

2. NOTICE TO INDUSTRY--WHOLESALEERS CAN ACCEPT RETAILERS' CREDIT CARDS AS PAYMENT FOR ALCOHOLIC BEVERAGES SALES.

JULY 15, 1998

Recently, a wholesaler inquired whether it could accept bank credit cards (visa, master card or american express) from all retailers and wholesalers for payment of alcoholic beverages.

ABC laws and regulations permit wholesalers to accept payment for sales of alcoholic beverages by bank credit cards. Wholesalers who offer this service must state it in their current price list and on their invoices.

Wholesalers offering to accept retailers' payment by bank credit card must comply with the discrimination regulation, N.J.A.C. 13:2-24.1 and the credit regulation. N.J.A.C. 13:2-24.4.

Thank you for your cooperation.

/S/JOHN G. HOLL
JOHN G. HOLL
DIRECTOR

PAGE 4

3. REQUEST FOR OPINION--ISSUANCE OF A NEW LICENSE.

July 30, 1998

Mr. Elnardo J. Webster, II
Sills, Cummis, Zuckerman, Radin,
Tischman, Epstein & Gross
One Riverfront Plaza
Newark, NJ 07102-5400

RE: REQUEST FOR OPINION: ISSUANCE OF A NEW LICENSE

Dear Mr. Webster:

Receipt is acknowledged of your correspondence regarding the above captioned matter. Your letter inquires about the possibility of issuing a new Plenary Retail Distribution license in New Milford Borough. You are correct in noting that the issuance of new licenses is controlled by the population requirements of N.J.S.A. 33:1-12.14.

Division records indicate that New Milford Borough has a population of 15,990 persons as shown by the most recent Federal Census. In accordance with the statute, the borough has issued two Plenary Retail Distribution licenses. Your letter states that the Mayor and Council believe that the Borough would benefit from a third such license.

A municipality derives its authority to issue new liquor licenses from N.J.S.A. 33:1-12.14, which provides in pertinent part, that "no new plenary retail distribution license shall be issued in a municipality unless and until the number of such licenses existing in the municipality is fewer than one for each 7,500 of its population as shown by the last then preceding Federal census." New Milford Borough has already issued one retail distribution license for each 7,500 of its population, inasmuch as there are two licenses for the first 15,000 persons. In other words, the overage of 990 persons does not comprise another 7,500 persons which would bring the Borough below the statutory ratio and empower them to issue another license. See A.B.C. Bulletin No. 2478, Item 1 (copy enclosed).

Moreover, once the Borough's population exceeds 22,500 persons as shown by a current Federal Census, it may issue a new Plenary Retail Distribution License. Therefore, the statute prohibits the issuance

of a new license "unless and until" such issuance would not contravene the limitations of N.J.S.A. 33:1-12.14.

I hope that the above is responsive to your inquiry. Should you have any additional questions please do not hesitate to contact me.

Very truly yours,

/s/LISA R. EILLISON
Lisa R. Ellison
Deputy Attorney General

4. REQUEST FOR DIVISION ADVICE--TRANSFER APPLICATION FOR DISTRIBUTION LICENSE TO PREMISES WITHIN THE BLUE SKY CAFE.

July 8, 1998

Ms. Linda S. Wanat, Clerk
Township of Montclair
205 Claremont Avenue
Montclair, NJ 07042-3469

Mr. David Joseph
c/o Blue Sky Cafe
400 Bloomfield Avenue
Montclair, New Jersey 07042

Re: TRANSFER APPLICATION FOR DISTRIBUTION LICENSE
TO PREMISES WITHIN THE BLUE SKY CAFE

Dear Ms. Wanat and Mr. Joseph:

Both parties have requested advice from the ABC concerning the proposed transfer of a Plenary Retail Distribution License into premises which now operate as an unlicensed restaurant known as the Blue Sky Cafe. The physical plan is outlined in the Montclair clerk's letter of April 8, 1998 addressed to Diane Weiss and attachments thereto. The attachments consist of a sketch of a floor plan and a letter from the architect. It is clear that these are not final plans; you evidently anticipate some guidance from us before going forward.

Alcoholic beverage law and policy require that each license premises be separate and distinct. N.J.S.A. 33:1-26 states in part:

A separate license is required for each specific place of business and the operation and effect of every license is confined to the licensed premises.

The floor plan and architect's description, augmented by telephone conversation with Mr. David Joseph, describe the restaurant as occupying three floors in a building. The first and second floors have separate street entrances. The remainder of the cafe is on the third floor. The proposed liquor store premises would occupy approximately 100 square feet on the first floor. As the sketch of the floor plan shows, the liquor store would have one of these street entrances as a separate entrance directly into the store. There would also be a separate exit door at the rear of the liquor store premises which would open into the cafe itself. The purpose of this exit would be to allow liquor store patrons to have access to bathrooms located within the restaurant area. This exit door would also function as a barrier free access for handicapped persons, but would not be available for use by general patrons of the cafe who wish to enter the liquor store premises. The architect states that the walls of the liquor store would consist of perforated metal panels or other similar material that would allow the passage and free flow of ventilation, sound and sight between the inside of the liquor store and the outside cafe seating area.

The concept of placing a liquor store within the premises which operate as a separate business is not by itself forbidden by the Alcoholic Beverage Control Act. In Essex County Retail Liquor Stores Association v. Newark, 64 N.J. Super. 314 (App. Div. 1960) the Court determined that the legislative purpose underlying the specific place of business requirement was to prevent the splitting of licenses or the indirect avoidance of the maximum license limitation statute. That is not the stated or apparent intention of the parties to this application. However, the proposal presents some difficulties. The statute also requires that "the operation and effect of every license is confined to the licensed premises." In this situation, it is reasonable to anticipate that patrons of the liquor store may leave through either the Front Street entrance or the rear exit and consume their purchase while dining in the Blue Sky Cafe. Under this situation, the issuing authority might question whether the "operation

and effect" of the package store license is truly confined to the licensed premises or will inevitably spill over to the surrounding restaurant whose premises are not licensed. In the final analysis, this type of question is a fact sensitive one which is well suited for determination by the local issuing authority. As our Supreme Court stated in Lyons Farms Tavern v. Municipal Board of Alcoholic Beverage Control 55 N.J. 303 (1970):

Responsibility for the administration and enforcement of the alcoholic beverage laws relating to the transfer of a liquor license from Place-to-Place . . . is primarily committed to municipal authorities . . . ordinarily local officials are thoroughly familiar with their community's characteristics, the nature of a particular area and the dangers associated with the sale of alcoholic beverages.

In view of the above, we can advise that while the applicant's proposal is not prohibited by alcoholic beverage law, it nevertheless must be carefully scrutinized because the physical layout of the proposed operation may result in violations of N.J.S.A. 33:1-26. The township should consider whether the final plans and specifications are adequate to insure that the operation and effect of the license is confined to the license premises. In this regard, we offer to consult with the Township as it reviews the final plans submitted by the applicant. We will be happy to give our opinion to the town as input into its decision concerning the Place-to-Place and Person-to-Person Transfers.

Very truly yours,

/s/ JOHN G. HOLL
JOHN G. HOLL,
DIRECTOR

5. REQUEST FOR DIVISION ADVICE--CATERER DISPENSING ALCOHOLIC BEVERAGE.

June 24, 1998

Robert J. Buckalew, Esq.
Buckalew, Frizzell & Crevina
Heritage Plaza 1
55 Harristown Road
Glen Rock, NJ 07452

RE: REQUEST TO RECEIVE DIVISION ADVICE

Dear Mr. Buckalew:

Thank you for your letter of June 11, 1998 to DAG Charles Sapienza. He has asked that I provide you with a reply. You have asked if you could receive a copy of any regulations or advisory opinions concerning the role of a caterer in dispensing alcoholic beverages, collecting payments for alcoholic beverages and receiving profits from the sale of alcoholic beverages. You explain that you represent a club licensee who wishes to retain a contract caterer to operate the club's dining facility.

Please be advised that Division policy and case law state that only a licensee can dispense alcoholic beverages, collect payment for the sale of alcoholic beverages and thus profit from the sale of alcoholic beverages. N.J.S.A. 23:1-2, 33:1-25, 33:1-26. This concept is a basic tenant of alcohol control law. A licensee cannot contract, lease or "farm out" its license to another party to sell or profit from the sale of alcoholic beverages in any manner. Moreover, by any such action, the licensee may have committed an administrative violation by allowing another to operate the license. This is a serious violation that could result in a substantial suspension.

I strongly suggest that you review Alcoholic Beverage Law, N.J.S.A. 33:1-1 et seq. and Division Regulations at N.J.A.C. 13:2-1 e seq. Furthermore, policy decisions of the Director of the Division of Alcoholic Beverage Control have been published in ABC Bulletins since 1934. These Bulletins may be found at the Seton Hall Law Library in Newark, New Jersey.

For your information, the Division's Handbook for Retail Licensees, while not a substitute for the Statutes or Regulations, provides a guide to all retail licensees, including club licensees. I have enclosed ABC Bulletin 2431, Item 7 which discusses some of the limitations specifically imposed on club licensees.

Thank you for contacting the Division.

Very truly yours,

/s/ ANALISA SAMA HOLMES
Analisa Sama Holmes
Deputy Attorney General
Regulatory Bureau

6. REQUEST FOR DIVISION REVIEW--WHOLESALER'S DISCOUNT OFFER.

June 30, 1998

Frank Helmka
980 Shrewsbury Avenue
Tinton Falls, NJ 07724

RE: REQUEST FOR DIVISION REVIEW

Dear Mr. Helmka:

You have asked if a distribution licensee can pass on a wholesaler's cumulative discount offer to consumers by a reduction in price without violating the ABC Regulation that prohibits a sale below cost.

Specifically, a beer wholesaler is offering a \$16.80 discount if a cumulative of 85 half barrels of a select variety of beers is purchased by a single retailer in one month. If a retailer purchases 85 or more half barrels at the end of the month, the retailer would receive a credit. You ask if a retailer who hopes to sell 85 half barrels, can advertise a reduced price in anticipation of receiving the credit.

The simple answer is "no". Unless the retailer purchases all 85 kegs, there is no guarantee that the retailer will receive the discount. Furthermore, the discount is not realized until the following month.

Division Regulation, N.J.A.C. 13:2-24.8, prohibits retailers from offering or selling alcohol at a price below cost. "Cost" is defined as "the actual proportionate invoice price to a retailer" plus taxes. N.J.A.C. 13:2-24.8(b). Unless the invoice includes the discount, the retailer cannot offer the product to consumers at a below invoice price. Of course, the retailer can still participate in the cumulative discount program and qualify for credit.

Thank you so much for your thoughtful question to the Division.

Very truly yours,

/s/ANALISA SAMA HOLMES
Analisa Sama Holmes
Deputy Attorney General
Regulatory Bureau

7. REQUEST FOR LEGAL ADVICE--TAX CLEARANCE CERTIFICATE.

June 24, 1998

Alan Wolff
Markman, Wolff & Company

RE: REQUEST FOR LEGAL ADVICE - TAX CLEARANCE CERTIFICATE

Dear Mr. Wolff:

Thank you for your letter of May 22, 1998 to DAG Charles Sapienza. He has asked me to provide you with a reply.

You are an accountant on behalf of Frank and Ann M. Romano and ORPH, Inc. You explain that "the licensee is a 100% stockholder in the corporation which operates the business." You add that the liquor license is held by individuals but the sales tax is collected and paid under another corporate name. You have asked for advice because the State of New Jersey, Division of Taxation, has not issued a tax clearance certificate for the licensee, Frank and Ann Romano, because it is contrary to ABC law for a licensee to allow another to use its license..

The Division of Taxation is correct that it is unlawful for a licensee to allow another to use its license for business. See N.J.S.A. 33:1-26. Only the licensee can hold and collect sales taxes for the sale of alcoholic beverages.

The legislative policy behind the ABC Laws is to require the licensee to be accountable to the local issuing authority and the general public. Attempts to insulate the license from such accountability are clearly contrary to such policy.

The licensee should take immediate corrective measures to amend its license application. A person-to-person transfer application may be necessary.

Moreover, by such action, the licensee may have committed an administrative violation by allowing another entity to operate the license. This is a serious violation that could result in a substantial suspension. I strongly suggest that your clients seek the assistance of competent counsel.

Please be guided accordingly.

Very truly yours,

/s/ ANALISA SAMA HOLMES
Analisa Sama Holmes
Deputy Attorney General
Regulatory Bureau

8. BROWNSTONE INN, INC. V. TOWNSHIP OF WYCKOFF - FINAL CONCLUSION AND ORDER.

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

BROWNSTONE INN, INC.)	FINAL CONCLUSION AND
)	ORDER
APPELLANT,)	
)	
V.)	
)	
TOWNSHIP OF WYCKOFF)	OAL DKT. NO. ABC 7314-97
)	AGENCY DKT. NO. 6486
RESPONDENT.)	
)	
)	

Jeffrey B. Steinfeld, Esq., Attorney for Appellant, Brownstone Inn, Inc.
Philip A. Tornetta, Esq., Attorney for Respondent, Township of Wyckoff

Initial Decision Below by the Honorable Richard McGill,
Administrative Law Judge

Decided: June 12, 1998

Received: June 17, 1998

BY THE DIRECTOR:

This case raises the issue of whether Special Conditions placed on a License are necessary and proper within the meaning of N.J.S.A. 33:1-32.

PROCEDURAL HISTORY

This matter is an appeal in which Brownstone Inn, Inc. (Appellant) seeks relief from two (2) Special Conditions imposed upon its license renewal by the Township of Wyckoff (Respondent), for the 1997-1998 license term.

This case materialized when Respondent renewed Appellant's Plenary Retail Consumption License No. 0270-33-001-004 with two special conditions for the 1997-1998 license term. The first special condition requires a parking lot attendant on Thursday, Friday, and Saturday evenings from 5:30 to midnight. This was put in place to prevent parking on private property owned by others in the neighborhood. The second special condition requires Appellant to place an individual at the door at closing time to advise patrons to adhere to proper conduct in exiting.

Respondent approved the renewal of Appellant's license with the special conditions on June 17, 1997. Appellant filed a Notice of Appeal on June 25, 1997 and the matter was transmitted to the Office of Administrative Law on July 23, 1997, for determination as a contested case. A hearing was conducted on May 1, 1998.

FACTUAL DISCUSSION

At the hearing before the ALJ, the parties submitted a stipulation of facts and Appellant relied on the testimony of a single witness, Mr. Aziz Kastrati, the licensee. Appellant is the holder of Plenary Retail Consumption License No. 0270-33-001-004, situated at 625 Wyckoff Avenue, Wyckoff, New Jersey, where the same operates a

restaurant and bar. Prior to Appellant being transferred the license, a resolution was passed by Respondent approving the license renewal for the 1991-1992 license term with the imposition of the two special conditions at issue. Each subsequent resolution approving renewal contained substantially the same two special conditions.

The record reflects that by letter dated May 29, 1996, Henry P. McNamara, owner of adjacent property located at 630 Wyckoff Avenue, objected to the renewal of Appellant's license due to parking problems it caused. The letter stated that Appellant's customers were parking on McNamara's property when the lot was full. On September 14, 1996, the Wyckoff Police Department received a complaint concerning three vehicles parked in the nearby lot of Coldwell Bank at 11:18 p.m. It was discovered that the vehicles belonged to a patron and two employees of Appellant.

Appellant objects to the special conditions on the grounds that circumstances which may have supported them no longer exist. Mr. Kastrati testified that after purchasing the Brownstone Inn, he added four additional parking spots and eliminated various promotions resulting in a substantial decrease in business. The number of vehicles in the parking lot has decreased substantially since implementation of these changes.

EXCEPTIONS AND REPLIES

The Respondent asserts that the Exceptions were not filed in a timely manner. Specifically that they were not received until July 10, 1998, ten days after the thirteen day period from the date the initial decision was mailed to the parties, as provided by N.J.A.C. 1:1-18.4. It is the policy of this Division, and in the interest of justice to review all Exceptions and Replies filed in a matter. Exceptions are considered, even if not in strict compliance with applicable time frames for filing, absent a showing of some severe prejudice to the other party.

The Exceptions can be summarized as follows: Appellant argues that there are several pre-existing, non-conforming parking facilities surrounding the Brownstone Inn, and that none of these properties have attached to their licenses any similar special conditions. Specifically, there is a property directly across the street from the Brownstone Inn, located at 397 Franklin Avenue, with a Plenary Retail Consumption License, to which no conditions are attached.

Appellant further argues that it has received disparate, unequal treatment because the owner of 397 Franklin Avenue is Henry P. McNamara, a State Senator and a powerful political force in Wyckoff. The licensee at that address intends to operate a bread and wine store. Appellant argues that Judge McGill chose to ignore clear evidence of the disparate, unequal treatment, when rendering his decision.

Appellant argues that the conclusions made in the letter of Henry P. McNamara, in opposition to the renewal of appellant's license, were never verified or confirmed. Also, complaints made to the police department are irrelevant since they pre-date Appellant's ownership of the Brownstone Inn, and are not relevant to the issue of whether the conditions are currently necessary.

Appellant concedes that Judge McGill cited the correct standard in reviewing the appeal at issue. "The Director of the Division of Alcoholic Beverage Control should not substitute his judgment for that of the local authority or reverse its ruling if reasonable support for it can be found in the record." Lyons Farms Tavern v. Mun. Bd. Alc. Bev., Newark, 55 N.J. 292, 303 (1970). However, Appellant objects to the special conditions because there is no reasonable support for the conditions, and no basis has been set forth by Respondent citing present reasons why the conditions should be continued.

Respondent argues that the Township's experience with the Brownstone Inn dictates that the conditions imposed upon its license are reasonable and necessary to protect the public interest and the health, safety, and welfare of its residents.

With respect to Appellants claim that no other licensed premises in the vicinity are the subject of Special Conditions, Respondent asserts that this is because there is only one other property in the vicinity of the Brownstone Inn at which there is located a liquor license. However, since this license was inactive when transferred to its present location at 397 Franklin Avenue and currently remains inactive, Respondent has never received any complaints regarding this license. Therefore, there were no reasons to impose any special conditions upon this license. The license is planned to be activated in conjunction with a bread and wine store. Respondent argues that this use is decidedly different than and in overwhelming contrast to the Appellant's use of its property as a bar and restaurant. Respondent contends that if the planned bread and wine store was to exhibit the type and magnitude of problems that the Brownstone Inn has historically demonstrated, the issuing authority would be duty bound to respond accordingly.

Respondent asserts that Judge McGill correctly concluded that the current lack of complaints regarding parking problems at the Brownstone Inn were attributed to the effectiveness of the condition which requires a parking lot attendant. In addition, Judge McGill correctly concluded that the condition requiring a door-man at closing time effectively reduced the amount of incidents requiring police responses.

LEGAL DISCUSSION

The renewal of a retail alcoholic beverage license rests within the sound discretion of the local issuing authority. 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). Similarly, the imposition of special conditions at the time of renewal is a matter over which the local issuing authority has principal jurisdiction and primary authority.

Special conditions attached to a license need only be reasonable to obtain approval by the Director of this Division. Belmar v. Division of Alcoholic Beverage Control, 50 N.J. Super. 423 (App. Div. 1958); Marinaccio v. Asbury Park, Bulletin 2009, Item 2; Alanwood Holding Co. v. Atlantic City, Bulletin 1963, Item 1. However, imposition of conditions must be based on something more than mere speculation. Pals Pancake House v. Twp. Comm. of the Twp. of East Hanover, ABC Bulletin 2320, Item 3 (1979).

The local issuing authority may impose conditions on the issuance of a license deemed necessary and proper to accomplish the purpose of the alcoholic beverage control laws and to achieve compliance therewith. N.J.S.A. 33:1-32. Municipal authorities have wide discretion in exercising their authority under the alcoholic beverage control laws in recognition that "ordinarily local officials are thoroughly familiar with their community's characteristics, the nature of the particular area and the dangers associated with the sale of alcoholic beverages." Lyons Farms Tavern v. Mun. Bd. Alc. Bev., Newark, 55 N.J. 292, 302-303 (1970). The exercise of discretion by the municipal authorities should be accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of discretion. Id. at 303; Belmar v. Div. of Alcoholic Beverage Control, 50 N.J. Super. 423, 426 (App. Div. 1958).

The stipulated record before me reflects that the Respondent's actions are reasonable to address a long standing problem with respect to parking and incidents involving patrons leaving the premises. I take note that the licensee has made efforts to comply with the conditions and that the Respondent appears to have agreed to modify the special conditions by decreasing the number of days they are applicable. Upon consideration of all the factors herein, I accept the basic finding of fact and conclusions of law of the ALJ. I find that Respondent acted reasonably in the exercise of its discretion and that the current lack of complaints can be attributed in part to the success of the special conditions.

Accordingly, it is on this 1st day of September, 1998,

ORDERED that the action taken by the Township Committee of the Township of Wyckoff be and the same is hereby Affirmed, and the appeal be and the same is hereby Dismissed; and it is further

ORDERED that the Plenary Retail Consumption License No. 0270-33-001-004, issued by the Township Committee of the Township of Wyckoff, for the 1997-98 license term, to Brownstone Inn, Inc., for premises located at 625 Wyckoff Avenue, Wyckoff, New Jersey, be and the same is hereby renewed subject to the following conditions:

1. On Thursday, Friday, and Saturday from 5:30 p.m. to midnight an attendant or agent of the Brownstone Inn shall be in the parking lot to enforce parking restrictions contained herein. The attendant shall prevent parking in the adjacent lots (Wyckoff Ford, Coldwell Banker, and McNamara lots).

2. An individual shall be placed at the door at closing advising patrons to adhere to proper conduct in exiting.

/s/ JOHN G. HOLL
JOHN G. HOLL
Director

this action on a finding that the Appellant did allow, permit or suffer in or upon the licensed premises narcotic or other unlawful drugs, 15 counts, in violation of N.J.A.C. 13:2-23.5(b)2; a finding the Appellant also did allow, permit or suffer in or upon the licensed premises illegal activity or enterprise, 15 counts, in violation of N.J.A.C. 13:2-23.5(c); and that the Appellant did allow, permit or suffer in or upon the licensed premises prohibited patrons, 15 counts in violation of N.J.A.C. 13:2-23.5(a). The parties agreed to an ad interim Stay of Respondent's action. I held an emergent hearing to consider the granting of a Stay or other Order. After reviewing the record presented by the parties, I entered an Order on February 4, 1997 denying Respondent's request that the Stay not be granted. I placed Special Conditions requiring a uniformed security guard to be present on the licensed premises during business hours and also directed that the second floor of the licensed premises be closed to the public. This Order is in effect pending the determination of this Appeal.

The matter was transmitted to the Office of Administrative Law to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The ALJ held a de novo hearing on six days between July 16, 1997 and ending on September 25, 1997. An Initial Decision was issued on February 19, 1998 wherein the ALJ recommended that the revocation of the license was not supported by the record and that the Appellant should be permitted to apply for renewal of the license for the 1997-98 license term. Exceptions were filed by Respondent on April 24, 1998 and Appellant replied on April 28, 1998 by incorporating arguments set forth in the written summation already provided to the ALJ. The time within which to render a Final Conclusion and Order has been extended to October 5, 1998 by a properly executed Order.

FACTUAL DISCUSSION

At the hearing before the ALJ, testimony was offered by Respondent which reflected that 12 transactions for the purchase of a controlled dangerous substance (CDS), cocaine, were carried out at the second floor of the licensed premises between July 14, 1994 and August 11, 1995. The record reflects that there was an ongoing undercover investigation of the licensed premises prior to July 14, 1994. Testimony from Atlantic City Police Detectives confirmed that all of the transactions occurred with either the knowledge or the participation of an employee of the Appellant. The ALJ found that "extensive illegal drug activity" occurred on the second floor of the licensed premises from June 1994 until August 1995. The evidence offered by Appellant does not raise any significant issues regarding this finding. I accept the findings of fact by the ALJ regarding the underlying facts which support the violations.

Having found that the drug activity did occur, the ALJ recommended, based upon the actions of the Appellant, that the charges should be dismissed and that the revocation of the subject license should be reversed and the Appellant be allowed to apply for renewal of the license for the 1997-98 license term. It is incumbent upon me to review the remainder of the record, in conjunction with pertinent law, to determine whether I should accept, reject or modify this recommendation.

After the first confirmed CDS activity (in July of 1994), the Appellant was contacted by his attorney, who advised him of rumors that drugs were being sold on the licensed premises. Appellant later met with a Detective Abrams of the Atlantic City Police Department sometime early in 1995. The testimony of both Detective Abrams and Dennis Raftis (Appellant), reveals that Mr. Raftis advised that he was having trouble with certain patrons coming to his establishment on "Wing Night". Appellant testified he initiated this promotion which offered chicken wings sold at reduced prices on Monday and Tuesday evenings. He furthered advised the Detective that young people from a low income housing project located nearby were patronizing his establishment and that he believed them to be selling drugs on the licensed premises. He inquired if Detective Abrams could help and offered to cooperate with law enforcement authorities. The Detective responded that he would look into the matter and take appropriate action. Appellant had no further formal direct contact with this Detective or other police personnel.

The licensed premises were frequented by off duty Atlantic City Police Department personnel as well as casino employees. Certain police officers testified that Appellant, prior to the time period in question, raised concerns about "Wing Night" and the problems arising therefrom. Police officers who were patrons did not observe any drug activity when they were on the licensed premises. Those who engaged in the CDS activity testified that they carried out their illegal activity outside the presence of the Appellant and with the help of a lookout to insure Appellant would not be aware of their actions. As noted, all of the drug transactions were carried out on the second floor of the licensed premises. On certain days, there were at least four or five drug transactions completed. The record confirms the involvement of an employee, Nester Mercado, a bartender on the second floor.

The Appellant testified that he was unaware of any CDS activity on the second floor. He asserts he made efforts to stop any such activity by contacting Detective Abrams early in 1995. He confirms

that he focused his request on problems on the first floor of the premises and he assumed that help would be on the way with respect to stopping illegal narcotics activity. The Appellant has been in the liquor business for approximately 35 years and had a regular presence on the licensed premises for five or six days a week and claims he had no reason to suspect any employees or patrons regarding the criminal activity.

The ALJ found the testimony of Appellant to be credible and recommended that the revocation sought in this matter should be reversed. Appellant, he reasoned, had made a request for police assistance even though he was unaware that the police were already investigating an employee and a patron for the type of activity he complained of on the first floor. He found that Appellant attempted to eliminate the problem as soon as he became aware of it (after being contacted by his attorney) and that his request for assistance was of such a nature that it should result in total mitigation of the charges. While I adopt the ALJ's factual finding, I disagree with his legal analysis that total mitigation is warranted.

EXCEPTIONS AND REPLIES

Respondent asserts that the conduct of Appellant does not constitute a total and complete mitigation of the charges and in fact that revocation in this matter is required. Respondent argues that there is no question that extensive drug activity occurred on the licensed premises during the time period in question and notes that the only notification the Appellant gave to police was about the problems on the first floor of the establishment. Counsel argues that the record reveals a total lack of effort to rid the premises of the illegal activity but for the sole notification. The record is clear that the licensed premises were replete with drug activity and that it is not credible, according to Respondent, that the Appellant was unaware of the unlawful activity on his licensed premises. Counsel argues that the ALJ's reliance on *Ishmal vs. Division of Alcoholic Beverage Control*, 58 NJ 347(1971) is misplaced.

Respondent distinguishes *Ishmal* by noting that in that case the police testified that the licensee made at least 50 phone calls seeking assistance to rid the licensed premises of illegal activity. The Supreme Court found that the licensed premises were a trouble spot primarily because of its physical location, and that the regular, ongoing efforts of the licensee compelled the conclusion that the licensee did not allow, permit or suffer the drug problem at the tavern. As a result, the Court remanded the matter to reconsider the

ability of the licensee to apply for a place to place transfer. Respondent argues that a single meeting with a police detective and informal off duty conversations with police patrons do not rise to the level of the Ishmal defense and therefore the violations cannot go without punishment. I find this argument persuasive.

Appellant relies on his written summation filed with the ALJ. Counsel does not dispute the underlying facts supporting the charges but argues that the transactions were carried out in such a manner that did not allow Appellant to become aware of the unlawful activity. Counsel asserts that the notification to the police about the first floor problems shows that while Appellant acted when he was aware of a drug problem, his lack of action concerning second floor activities reveals he was unaware of same. He claims that the conduct of the police was improper because they began an undercover investigation after being notified by Appellant. He contends that the undercover investigation "created" the distribution network on the second floor of the licensed premises without Appellant's knowledge. Counsel notes that off duty police frequented 12 South as patrons and that they were also unaware of the drug activity in question.

Ishmal is not dispositive in this case. In Ishmal, the licensee was aware of the activities and made regular ongoing efforts to seek police assistance. Here, the Appellant claims a total lack of awareness of the activities. He made only one notification to law enforcement requesting help. Even allowing some mitigation for that notification, the record compels me to reject the ALJ's recommendation that the charges against Appellant be dismissed.

CONCLUSIONS OF LAW

The Appellant has the burden to show that the action of Respondent is erroneous. N.J.A.C. 13:2-17.6. In conjunction with this burden of proof the actions of the licensee must be considered in the context of its obligation to maintain control of its premises, patrons and employees. In Re: Nathans Realty, Inc., 96 NJAR 2nd (ABC) 25 (Jan. 1996). A licensee is obliged to keep its business and its patronage under control, and is responsible for conditions on the premises. Capri v. East Newark, ABC Bulletin No. 1853, Item No. 3 (1964). Even a licensee's lack of personal knowledge or intent does not alleviate the licensee from responsibility for its employees or patrons from illegal acts. Olympia, Inc. v. Division of Alcoholic Beverage Control, 49 N.J. Super. 299, 305 (App. Div. 1958). Indeed, the licensee is responsible for such conduct even if it occurs contrary to its express instructions. Id. The licensee may not escape liability by asserting that it was unaware of the specific acts charged.

Narcotics activity on licensed premises has long been held to be extremely vile and dangerous conduct which requires the most direct and immediate action. *Raydean, Inc. v. Morristown*, Appeal 5940 (Div. Of ABC, 1992). There is no question that 12 CDS transactions occurred on various dates from July of 1994 to August of 1995. This activity was not isolated and that there was a regular pattern of illegal conduct on the licensed premises for the time period in question. Purchase and sale of cocaine were conducted upon the licensed premises under circumstances where the Appellant should have been aware of them. Although there is no evidence that reflects the licensee encouraged or took part in the illegal activity, a single notification to police does not absolve Appellant of its legal obligations.

However, the Appellant did, after being contacted by his attorney, notify the appropriate law enforcement authorities regarding a drug problem on the first floor of his licensed premises. There is also testimony that the licensee did have informal conversations with off duty police officers regarding this problem, although the conversations were never directed toward the second floor illegal activity. Thus, even though Ishmal does not control, the notification by the Appellant may still be considered as a mitigating factor in determining the penalty to be imposed in this case.

Pursuant to ABC Bulletin No. 2453, Item No. 2, there is a presumption that a third CDS related violation occurring within a two year period results in revocation of the license. I find that the action of the Respondent has not been shown to be erroneous but the particular facts of this case require a modified penalty with a condition to insure that continued illegal activity will not recur on the licensed premises.

I conclude that the Appellant is guilty of allowing, permitting or suffering in or upon the licensed premises illegal activity involving unlawful drugs on the 12 dates in question cited by the AJO in violation of N.J.A.C. 13:2-23.5 (b) 2 and N.J.A.C. 13:2-23.5 (c). I find that the Appellant is not guilty of allowing, permitting or suffering on the licensed premises prohibited patrons in violation N.J.A.C. 13:2-23.5. The finding that unlawful drugs were on the licensed premises has minimum penalty of 90 days per count. The illegal activity on the licensed premises has a minimum penalty of 25 days per count.

The notification to police by Appellant took place after the first CDS transaction which occurred on July 14, 1994. My review of

the record, the pertinent law and the policy of this Division compel that fairness dictates an appropriate penalty which will include a special condition, particularly in view of Appellant's position that he was unaware of the extensive drug activity which occurred on his licensed premises over an extended period of time.

Accordingly, it is on this _____ day of October, 1998,

ORDERED that the Appeal herein be and is hereby DISMISSED and the action of the Respondent issuing authority, as modified, be and is hereby AFFIRMED; and it is further

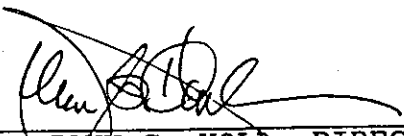
ORDERED that the Municipal Board of Alcoholic Beverage Control of the City of Atlantic City is directed to RENEW Plenary Retail Consumption License No. 0102-33-252-008, issued to 12 South, Inc., t/a 12 South, located at 12 South Indiana Avenue, Atlantic City, for the 1997-98 license term with the following special condition:

- 1. A uniformed security guard must be on the licensed premises during business hours to ensure that customers on the licensed premises are in compliance with ABC regulations and law; and it is further

ORDERED that Plenary Retail Consumption License No. 0102-33-252-008, issued by the Municipal Board of Alcoholic Beverage Control of the City of Atlantic City, to 12 South, Inc., t/a 12 South, located at 12 South Indiana Avenue, Atlantic City, be and the same is hereby SUSPENDED for a period of 115 days. Thirty days shall be immediately served by the licensee beginning on November 1, 1998, at 12:01 a.m. and ending on December 1, 1998 at 12 midnight. The additional 85 days suspension will be held in abeyance to be imposed if a similar offense occurs within two years from the date of this Order. I may impose this suspension by ex parte order without further notice.

/s/ JOHN G. HOLL
JOHN G. HOLL
DIRECTOR

Publication of Bulletin 2480 is hereby directed this
23rd Day of October, 1998



JOHN G. HOLL, DIRECTOR
DIVISION OF ALCOHOLIC BEVERAGE CONTROL