Gossweiler

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark 2, N. J.

February 3, 1964

BULLETIN 1548

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ITEM

STATE OF NEW JERSEY
Department of Law and Public Safety
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1100 Raymond Blvd. Newark 2, N. J.

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BULLETIN 1548

1. COURT DECISIONS - RIDGEMONT LIQUORS INC. v. PARK RIDGE - BULLETIN 1546, Item 1, CORRECTED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-952-62

RIDGEMONT LIQUORS, INC., a New Jersey Corporation
Plaintiff-Appellant,
vs.
BOROUGH OF PARK RIDGE,
Defendant-Respondent.

Argued December 16, 1963 -- Decided December 26, 1963.

Before Judges Gaulkin, Foley and Lewis.

Mr. James A. Major II argued the cause for the plaintiff (Messrs. Major & Major, attorneys).

Mr. Aaron W. Nussman argued the cause for the defendant.

PER CURIAM.

Plaintiff is a holder of a Plenary Retail Distribution License (commonly known as a package store license) issued by the Borough of Park Ridge.

A Park Ridge ordinance provides that:

"No person holding a plenary retail distribution license shall permit the sale of alcoholic beverages in or upon any premises in which any other merchandise business is carried on ***."

Plaintiff admits that N.J.S.A. 33:1-12, subsection 3a, authorizes municipalities to enact ordinances to forbid the sale of alcoholic beverages by the holder of such a license "in or upon any premises in which any other mercantile business is carried on, except that any such ordinance *** shall not prohibit the retail sale of nonalcoholic beverages as accessory beverages to alcoholic beverages." Plaintiff says, in its brief, "We concede the ordinance is valid, but we would know its meaning."

To determine that meaning, plaintiff instituted this action, demanding a judgment declaring that it may "sell, as ancillary products, such items as cigars, cigarettes, cocktail canapes, tidbits, and like products." The Law Division granted summary judgment in favor of Park Ridge that the ordinance forbids such sales, and plaintiff appeals. We affirm.

Plaintiff contends, in effect, that the ordinance means that no liquor may be sold in premises in which an independent merchandise business is carried on, but that it does not mean to forbid sales of merchandise by the licensee which are merely incidental to the sale of packaged liquor. It argues: "Is it not obvious that the legislative policy considerations do not apply when we *** sell people who are purchasing our product such ancillary products as are customarily used? For instance, a patron desires to purchase a case of beer for a picnic or party. He enters our store. He also wants a supply of potato chip or salted nuts, or pretzels. Is there any reason in the world why his wants should not be supplied?"

It is not disputed that the Legislature may control the liquor industry rigorously. It may forbid altogether the sale of nonalcoholic merchandise by licensees. As we have said, N.J.S.A. 33:1-12, subsection 3a, gives municipalities the right to do just that, except as to "the retail sale of nonalcoholic beverages as accessory beverages to alcoholic beverages." Even that exception did not appear in the statute until 1951. See L. 1951, c. 163. The ordinance does not expressly provide for any other exception, and we find no justification for reading into it the construction advanced by plaintiff.

The judgment is affirmed.

2. APPELLATE DECISIONS - CLUB 309 v. NEWARK.

Club 309 (a corp.), Appellant,	)	On Appeal
v.	)	CONCLUSIONS AND ORDER
Municipal Board of Alcoholic Beverage Control of the City of Newark, Respondent.	)	

William Osterweil, Esq., Attorney for Appellant.
Norman N. Schiff, Esq., by Paul E. Parker, Esq., Attorney for Respondent.

BY THE ACTING DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

This is an appeal from the action of the respondent whereby it revoked appellant's plenary retail consumption license for premises 309 Lafayette Street, Newark, on August 14, 1963, effective forthwith, after the appellant was adjudged guilty of charges dated June 25, 1963, as follows:

"1. On Wednesday, January 23, 1963 at approximately 2:15 A.M., they failed to have the entire licensed premises closed between the hours of 2:00 and 7:00 A.M.; in violation of Section 3.1(b) of the Revised Ordinances of the City of Newark, adopted October 15, 1952 as amended December 5, 1956.

"2. On Wednesday, January 23, 1963 at approximately 2:15 A.M., they sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of an alcoholic beverage, and allowed, permitted and suffered the consumption of such an alcoholic beverage on the licensed premises between the hours of 2:00 and 7:00 A.M.; in violation of Section 3.1(a) of the Revised Ordinances of the City of Newark, adopted October 15, 1952 as amended December 5, 1956.

"3. On Wednesday, January 23, 1963 at approximately 2:15 A.M., they allowed, permitted and suffered their licensed place of business to be conducted in such manner as to become a nuisance, in that they allowed, permitted and suffered on their licensed premises, lewdness and immoral activities and they otherwise conducted their licensed place of business in a manner offensive to common decency and public morals; in violation of Rule 5 of State Regulation No. 20."

Upon the filing of the appeal, an order was entered on August 20, 1963, staying the aforesaid order of revocation pending the further order of the Director, pursuant to R.S. 33:1-31.

Appellant, in its petition of appeal, charges substantially that the respondent's action was erroneous for the following reasons:

(a) it was contrary to the weight of the evidence.
(b) The findings were based on matters "extraneous to the evidence."
(c) Respondent permitted cross examination of its own witnesses by members of the Board and thereby impeached said witnesses.
(d) The action of the respondent was arbitrary and contrary to the evidence.
(e) One of the members of the Board acted as "Prosecutor, Judge and Jury" and disregarded the testimony of respondent's witnesses.

Appellant, therefore, requests that the action of the respondent Board be set aside and reversed.

Respondent, in its answer, denies the essential allegations in the said petition and asserts that its decision was based upon the factual testimony before it.

Attorneys for both parties agreed to submit this appeal upon the transcript taken in proceedings before respondent. This procedure is authorized by Rule 8 of State Regulation No. 15. The transcript of the proceedings reflects the following testimony of the witnesses for both sides, which I shall summarize in the order presented therein.

Mrs. Rose Nitkowicz testified that on the night of January 22 and in the early morning of January 23, 1963, she, in the company of her husband and several friends, had been drinking at the Peppermint Twist and, between the hours of 11:15 p.m. and 2:15 a.m., she consumed about five drinks of alcoholic beverages. At 2:15 a.m., in the company of her husband and James Fucci, Alphonse Naparano and Mr. Sages (a bartender at the Peppermint Twist), she drove to the licensed premises, which is about a block from the Peppermint Twist. Although it was after the closing hour, the licensee's bartender, Frank Calleo, admitted them to the premises; she seated herself at the bar and had a couple of more drinks.

She testified further that she proceeded to the ladies' room and as she opened the door thereto, Sages followed closely behind her, turned off the lights in the ladies' room, entered the room and forced her to have intercourse with him in a "backwards" position. She did not recall whether they had any conversation because she was too nervous, nor did she make any outcry. Sages left the room and was immediately succeeded by Naparano, who came into the ladies' room and committed the same act of intercourse in the same manner. Naparano was, in turn, succeded by Fucci, who committed the same act of intercourse in the same manner.

She then followed Fucci out of the ladies' room and returned to her seat at the bar. Her husband was seated next to her but she said nothing to him nor did she complain to the bartender or anyone else. Asked why she did not tell her husband about these incidents, she said she was afraid some harm would befall him if he protested. He was then called by his companions to continue a game at the "pinball machine". Shortly thereafter, she returned to the

ladies' room to pick up her coat and then went to the cigarette machine upon the pretense of purchasing cigarettes.

Mrs. Nitkowicz thereupon left the tavern, walked about a block where she hailed a police car containing two police officers and complained to them of what had occurred. As she was speaking to them, her husband, with her coat on his arm, approached the car, with Fucci a short distance behind him. She told the policemen that her pocketbook had been knocked from her hand in the ladies' room and was in the tavern. She went with the police officers directly to the Third Precinct police station, where she was questioned and signed a statement.

On the following day, the licensee's bartender, Frank Calleo, was placed in a police line-up, but neither Mrs. Nitkowicz nor her husband could identify him as the bartender who served the drinks at the time in question. In fact, her description of the one who served her was that he was about six feet tall and dark complexioned.

On cross examination, Mrs. Nitkowicz stated that she determined the time by a newly purchased wrist watch. This watch was not worn by her while testifying, nor was it produced at the hearing. She admitted further that there was no clock either at the Peppermint Twist or at the licensed premises. She explained that the reason she did not identify the bartender in the line-up at police headquarters the following day was that "I guess I was afraid and mixed up and confused and shocked and what-not." She was closely examined with respect to the alleged attacks in the ladies' room and she revealed additional items, (1) that she now recalled that she stated to them "If my husband finds out, my husband will kill you", (2) that in the darkness of the ladies' room, she could recognize only the voices of the men who allegedly attacked her, and (3) that the ladies' room apparently consisted of only one room without any partition.

Theodus Nitkowicz, husband of the preceding witness, gives the following version: He was with his wife at the Peppermint Twist, left that tavern and arrived at appellant's premises "after closing hours". Since he did not have a watch, he was not sure of the exact time but did know that it was after the usual closing hour. At the licensed premises herein, he had several drinks and played pinball at the pinball machine, located about fifteen or twenty feet from the ladies' room. He did not know at that time what transpired in the premises, nor did his wife cry out, scream or make any complaint to him. When his wife said something like "Let's get out of here" and ran out the door, he asked her what was wrong but she did not tell him. He grabbed her coat and ran after her, followed by Fucci. However, when he reached his wife and the police officers, Fucci had apparently disappeared.

On cross examination, Nitkowicz stated that he did not know exactly how many drinks he had had that night, that he was not drunk but was "feeling good". He did not go with his wife directly to the Third Precinct but went there about twenty minutes later, and was arrested for creating a disturbance.

With respect to the time that he left the Peppermint Twist, he was asked the following questions by the chairman:

"Q Mr. Nitkowicz, you say that somebody said that it was closing time at the Peppermint Twist?
A That is how I determined the time.
Q Had you been in the Peppermint Twist before that night?
A Yes.

Q What is the closing time there?
A I never stayed there that late before.
Q Were you ever there when it was closing time?
A No.
Q But you are sure this was around two o'clock?
A I am positive of that.
Q But you don't know whether the Peppermint Twist closes at twelve o'clock or one o'clock?
A No, I don't know."

Nicholas Nardone, a Newark police officer, testifying on behalf of respondent, stated that Mrs. Nitkowicz approached him at about 3:20 a.m. on January 23, accompanied by her husband. No one else (other than his fellow officer) was present at that time. As a result of her complaint to him, she entered the police car but her husband refused to do so. They drove to the licensed premises and found that all the doors were locked and the lights out. They then drove to the Peppermint Twist and found it also closed. They proceeded to the Third Precinct, where Mr. Nitkowicz appeared about twenty minutes thereafter, became belligerent and was arrested.

On cross examination, the officer stated that within three minutes after he first spoke to Mrs. Nitkowicz, he drove past the licensed premises and found the place closed and the lights off. The officer further stated that in his regular tours of duty in that area over a period of time, he has never seen the licensed premises open after the statutory closing hour. He also insisted that when Mr. and Mrs. Nitkowicz first approached him, she had the coat over her arm and that her husband did not return to the tavern to pick up the coat, as she testified earlier. He was then asked the following questions:

"Q Officer Nardone, you said that the 309 Club is in your area and that you cruise around there?
A Yes.
Q Have you ever been in there?
A Yes.
Q Did you ever see a pinball machine in that place?
A Not that I remember.
Q Are you positive there was no pinball machine in that place?
A Yes."

Detective Charles Lorenzo of the Newark Police Department testified that he obtained a statement from Mrs. Nitkowicz at 9:00 a.m. on January 23, 1963, and that he made an investigation of the premises on the afternoon of January 24. He asserted that he made a careful search of the entire premises and did not find any pinball machine therein or any evidence of the removal of a pinball machine. He also stated that at about 3:40 p.m. on January 23, Nitkowicz and his wife viewed a line-up in which Calleo was present and failed to identify him as the bartender who served them at the time in question.

Vincent Sainz, testifying on behalf of respondent, stated that he found Mrs. Nitkowicz' purse on the following day in the Peppermint Twist and returned it to her at her house. On cross examination, it was developed that the bartender at the Peppermint Twist told him that the purse belonged to Mrs. Nitkowicz and requested that he return it to her.

A motion was thereupon made by appellant's attorney to dismiss the charges on the ground that there was insufficient evidence to sustain them. This motion was denied by respondent.

Appellant produced as its first witness Frank Calleo, president of the licensee corporation, who testified that he was employed as a bartender at the licensed premises from 7:00 p.m. to 2:00 a.m. However, he recalled that on the date alleged in the charges, he closed the premises at 1:15 a.m. At that time, a friend of his nicknamed "Babe" was there, and there were no other patrons. He insisted that the reason he closed at 1:15 a.m. was that he was employed on a construction job and had to get up at 6:00 a.m. that morning; also that there were no customers in the place at that time.

Calleo denied that Nitkowicz or Mrs. Nitkowicz, or Naparano, Fucci or Sages came into his premises at that time, or that he had seen them on the night or early morning in question. He denied that these five individuals had ever come into appellant's premises during the time that he was on duty. He asserted that the first time he saw these people was at police headquarters.

He described the ladies' room as having a table and two chairs "directly in front of you, as you walk in...there is a sink, a wash basin, and a little further in there is a step." He further stated that another door leads into the room containing the commode. He categorically denied that there was ever a pinball machine, shuffleboard table or any other amusement game in his premises. He also denied that he kept his premises open after 2:00 a.m. on January 23 or that he sold or permitted the consumption of alcoholic beverages at the time and place alleged. He was then questioned with respect to the ladies' room and fortified his description as given heretofore. In answer to the chairman's question, he stated that he was five feet five inches tall.

Louis Iachio, known by his nickname "Babe", substantially corroborated the testimony of the prior witness. He stated that he was a frequent patron at appellant's licensed premises and was at said premises on the night of January 22-23, 1963. He denied that Nitkowicz or Nitkowicz' wife were present in the tavern on that night. He stated that there was no pinball machine on the premises on that night or any other night.

He was closely examined by members of respondent Board with reference to his activity on the night in question and informed them that he arrived at the tavern at approximately ten o'clock and remained there until Calleo closed the premises. He gave a complete description of the interior with which he was quite familiar, having assisted in the decoration and repair of the premises. After the tavern was closed at approximately one o'clock, he and Calleo walked to his car and he drove home.

The general rule in these cases is that findings must be based on competent, legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32 C.J.S. Evidence, sec. 1042, p. 1116. By a preponderance of the evidence is meant evidence which is of greater weight, or more convincing, than that which is offered in opposition. 32 C.J.S. Evidence, sec. 1021, p. 1051, and cases therein cited. Respondent was required to establish its case by a fair preponderance of the credible evidence. Freud and Pittala v. Davis, 64 N.J. Super. 242; Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373; 42 Am. Jur. Public Administrative Law, sec. 132, p. 467. While there is no set formula for determining the quantum of evidence required, each case being governed by its own circumstances, the verdict must be supported by substantial evidence. Cf. Walter v. Alt, 152 S.W.2d 135, 141.

The inquiry is whether there is such evidence which, if

accepted and given its fullest probative force, reasonably tends to sustain the judgment of the respondent herein. The accepted standard of persuasion governing the trier of facts is that the determination is probably founded in truth. Riker v. John Hancock Mutual Life Insurance Co., 129 N.J.L. 508

Also, the testimony, to be believed, must not only proceed from the mouth of credible witnesses but must be credible in itself and must be such as common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546; Gallo v. Gallo, 66 N.J.Super. 1.

Bearing these principles in mind, I am of the conviction that, considering the full impact of all of the evidence, it is insufficient to support a finding of appellant's guilt. The respondent relies primarily upon the testimony of Mrs. Nitkowicz, which is substantially uncorroborated. While I have not had the opportunity to observe her demeanor on the stand, my evaluation of her testimony, as reflected in the transcript, persuades me that it is contradictory, unbelievable and unreliable. Her testimony with respect to the incidents that are alleged to have occurred in the ladies' room on appellant's premises does violence to common experience and is contradicted by both verbal and physical evidence.

It is uncontradicted that the ladies' room consists of two rooms, the first of which contains a table and two chairs and serves as a powder room; yet her description of what transpired suggests that the alleged rape took place immediately upon her entering the room in a position where part of her body rested upon the commode. It is also contrary to human behavior that during these alleged rapes, she made no outcry or protest, nor did she in any way at that time or thereafter in the premises manifest that she had been the victim of the described savagery. It is significant that when she returned to the bar, her husband was seated next to her; yet she did not tell him of these attacks nor did she communicate that fact to the bartender. Her explanation for this was that she feared some fancied harm to herself or to her husband. It, of course, became her duty and would have been the natural act of a person so violated to speak out at that time.

The credibility of a witness may be attacked by showing that she failed to speak or act when it would have been natural to do so if the facts were in accordance with her testimony. Thus, her silence at a time when good faith required disclosure of those facts affects her credibility. 98 C.J.S. Witnesses, sec. 464, p. 344. Thus, arguendo, if the occurrences took place in the ladies' room, as testified by this witness, without the sight and hearing of the licensee's employee, and she admittedly never communicated that fact to him at or after its occurrence, how can the licensee be charged with allowing, permitting and suffering its licensed premises to be conducted in such manner as to become a nuisance, "in that they (sic) allowed, permitted and suffered on their licensed premises lewdness and immoral activities"? Of course, appellant denies that any such occurrence took place because she was not on its premises at the date and time alleged herein.

Mrs. Nitkowicz also testified that after she complained to the police officers, she proceeded with them directly to the police station. This was also contradicted by both her husband and police officer Nardone. Nardone states that within three minutes after she approached him, they drove to the licensed premises and found the place locked and dark.

There are several other contradictions which should be pointed out. This witness testified that her husband was playing at a pinball machine on the premises; yet, in addition to the wit-

nesses for appellant, Detective Lorenzo testified on behalf of the respondent that he made an investigation of these premises on the day following these alleged incidents and was satisfied that there was no such pinball machine on the premises nor was there any evidence that such a machine had been removed therefrom. This is fortified by appellant's witnesses, who state with certainty that such machine was never on these premises.

Mrs. Nitkowicz signed a statement at police headquarters on the following day, in which she described the bartender as being a man approximately six feet tall. Calleo, who was the bartender on that night and early morning, was placed in a line-up on the afternoon of January 23; yet both Mr. and Mrs. Nitkowicz were unable to identify him as the person who served them on the dates in question. It should also be mentioned that Calleo was, in fact, five feet five inches tall.

Mrs. Nitkowicz admits that she had at least five drinks of whiskey at the Peppermint Twist and had two more such drinks at Club 309. The logical inference is that, if she was not drunk, she was certainly considerably under the influence of liquor. The rule is well established that evidence of drinking immediately prior or concurrent with the alleged facts may be shown as affecting the witness's ability to remember the facts distinctly. Cf. 98 C.J.S. Witnesses, sec. 461, p. 329.

Testimony of Nitkowicz, while slightly corroborative of his wife's presence at the licensed premises, is not very convincing. While he denies that he was actually drunk on the morning of January 23, there is a clear inference from his conduct and his inability to recall the number of drinks that he had that he was certainly under the influence of liquor. It might even be charitable to conclude that he was drunk because it would seem that no man in his right mind would have tolerated the bestial acts committed upon his wife with such apparent indifference, if he were not in fact drunk. His condition is further emphasized by the fact that the police arrested him because of his belligerence and disorderly conduct.

There are several other inconsistencies which lend an air of unreality and incredibility to these charges. Mrs. Nitkowicz stated that she left her purse in the ladies room at appellant's premises; yet appellant produced uncontradicted testimony that her purse was found the following day at the Peppermint Twist. I am also persuaded that Calleo's story appears to be more credible and is fully corroborated in every particular by Iachio. Nothing in the evidence suggests that they have been untruthful with respect to the facts set forth hereinabove.

These are serious charges and a finding of guilt must be based on reliable testimony. No testimony need be believed but, rather, so much or so little may be believed as the trier finds reliable. 7 Wigmore Evidence, sec. 2100; Greenleaf Evidence, sec. 201 (16th Ed. 1899).

I cannot say that the testimony produced by respondent, particularly in view of the fact that much of the evidence adduced from the primary witnesses was contradicted by the police officers, is of such probative force that it has engendered that feeling of reasonable probability in these circumstances. As Judge Jayne stated in Davidson v. Fornicola, 38 N.J.Super. 365, 371:

> "In exacting proof by the preponderance or greater weight of the evidence, the law does not prescribe the necessary

quantum of the overweight or the degree of excess of its superiority in credibility. A preponderance is attained where the evidence in its quality or credibility destroys and overbalances the equilibrium."

My consideration of all of the testimony in this case convinces me that the testimony of appellant's witnesses stands in a much more convincing posture. Re Chizun, Bulletin 1274, Item 7.

I make no finding with respect to the alleged incidents involving Mrs. Nitkowicz on that date at any other place. I do find that the proofs are insufficient to satisfy me that any such alleged attacks took place at the licensed premises.

I further find that there is no proof that the appellant permitted its place of business to be conducted as a nuisance, as set forth in the third charge. I am also satisfied that the proofs are insufficient to show that appellant sold any alcoholic beverages or permitted the consumption thereof or failed to close its licensed premises after 2:00 a.m. on January 23, as set forth in the first and second charges.

I therefore recommend that the action of respondent be reversed and that the charges preferred against appellant be dismissed. Cf. Re Dew Drop Inn, Inc. v. Paterson, Bulletin 1332, Item 2; Farrell v. Englewood, Bulletin 1489, Item 1; Chase v. Washington, Bulletin 1272, Item 4.

Conclusions and Order

No exceptions were taken to the Hearer's Report within the time limited by Rule 14 of State Regulation No. 15.

Having carefully considered the facts and circumstances herein, I concur in the findings and conclusions of the Hearer and adopt his recommendation.

Accordingly, it is, on this 8th day of January 1964,

ORDERED that the action of respondent, in finding the appellant guilty of charges as set forth therein and revoking said license, be and the same is hereby reversed.

EMERSON A. TSCHUPP
ACTING DIRECTOR

3. APPELLATE DECISIONS - SUN MOTEL, INC. v. NEPTUNE.

Sun Motel, Inc.)
Appellant,)
v.) On Appeal
Township Committee of the Township of Neptune,) CONCLUSIONS and ORDER
Respondent.)

Benjamin J. Lipetz, Esq., Attorney for Appellant
Messrs. Stout & O'Hagan, by William J. O'Hagan, Esq., Attorneys for Respondent
Robert W. Wolfe, Esq., Attorney for Objector, Manasquan-Shark River Association
John A. Traynor, Esq., pro se.

BY THE ACTING DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

This is an appeal from the action of respondent which, by resolution dated August 20, 1963, unanimously denied appellant's application for a plenary retail consumption license for premises located at the southwest corner of State Highway 33 at the intersection of West Bangs Avenue in Neptune Township.

Appellant, in its petition of appeal, alleges that there is a need for the license without which appellant finds it impossible to operate its 90 unit motel with banquet facilities for 500 to 600 people.

Respondent, in its answer, denied appellant's allegation contending that there exists within the vicinity of appellant's premises ample liquor outlets to supply the public needs.

When the matter came on for hearing, respondent's resolution was marked Exhibit A-2 in evidence and sets forth a further reason why appellant's application was denied, viz., the proximity of three churches to appellant's motel. A map of the Township of Neptune was marked Exhibit A-1 in evidence and shows the locations of the three churches and four licensed premises, all in the area of appellant's motel.

The distances indicated on the map are "as the crow flies" and taking appellant's motel as the focal point, the Hamilton Methodist Church is 375 feet to the southeast therefrom, the Holy Innocents Church, 400 feet to the northeast and the Redeemer Lutheran Church 1500 feet to the northwest. The licensed premises are the Brookside Motel, containing 50 or more sleeping units, which is located on the highway 2,750 feet east of the proposed premises; Blarney Castle, 3,400 feet west therefrom; Ilvento's, 3,000 feet northeast therefrom and Sy and Art's, 3,500 feet northwest therefrom.

Ordwin Zagury, president of appellant corporation, testified in substance that he has resided in Neptune Township for twenty-five or thirty years and that in addition to the rooming facilities in the Sun Motel, "we have a large banquet and dining rooms, public rooms that are capable of handling a group of five to 600 people,

feed them, seat them. They can be in the form of a convention, of a banquet or any similar group gathering, whether it is a political gathering or a fraternal organization***". And that to his knowledge there is no facilities in Neptune Township which can accommodate so many people, "with one possible exception***And that is Jumping Brook Country Club, which operates seasonally." He further testified that he has had numerous requests from fraternal, civic and service organizations for the use of the premises and that when they found they could not be served alcoholic beverages they took their business elsewhere.

Joseph Wardell, mayor of the township, testified that he participated in the hearing on appellant's application and, "After hearing the evidence that was presented indicating that there were four licensed establishments within a mile radius of the applicant's establishment, which indicated that the neighborhood was well served with licenses, plus many objectors from churches in the immediate neighborhood, the committee unanimously decided that the issuance of the license would not serve public necessity and there were other detrimental effects due to the location of the churches, and the application was denied."

Joseph E. Bennett, township clerk, testified that the Jumping Brook Country Club holds a plenary retail consumption license; that to the best of his knowledge the place is open all year round; that while the golf facilities are for members of the club, the other facilities are open to the general public and that there are presently twenty consumption licenses, five distribution licenses and five club licenses in the township which has a population between 21 and 22 thousand.

Reverend Robert Sherman, Minister of the Hamilton Methodist Church, testified that his primary objection to the issuance of the license is because it conflicts with his basic religious concepts and that of many of the people in the surrounding area of appellant's motel.

John A. Traynor, an Attorney at Law, resident of the township and a parishioner of Holy Innocents Church, testified that he objects to the issuance of the license because appellant's motel "is smack in the middle of the three churches"; that there are sufficient licensed premises in the neighborhood and that the issuance of the license to appellant will not be in the public interest.

Considering appellant's allegation and the testimony of its officer in support thereof, it is apparent that the only question to be determined herein is whether or not the economic interest of appellant is a factor warranting reversal of respondent's action.

The general rule respecting need and necessity for a liquor outlet at a particular locality is that its determination rests within the sound discretion of the issuing authority (Lykosh v. Perth Amboy and Krecz, Bulletin 1295, Item 1; Zicherman v. Driscoll, 133 N.J.L. 586) and where, as in the instant case, there is a conflict between private interests and the interest of the community at large the latter must prevail. Moraitis v. Lower Penns Neck, Bulletin 839, Item 11; cf. Zicaro v. Newark and Home Liquors, Bulletin 1444, Item 2.

In view of the aforesaid, I conclude that appellant has failed to establish that the action of respondent was erroneous and I recommend that an order be entered affirming said action and dismissing the appeal.

Conclusions and Order

No written exceptions to the Hearer's Report were filed with me within the time limited by Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits and the Hearer's Report, I concur in the findings and conclusions of the Hearer and adopt his recommendation.

Accordingly, it is, on this 7th day of January 1964,

ORDERED that the action of respondent Township Committee be and the same is hereby affirmed, and that the appeal herein be and the same is hereby dismissed.

EMERSON A. TSCHUPP
ACTING DIRECTOR

4. DISCIPLINARY PROCEEDINGS - SALE IN VIOLATION OF STATE REGULATION NO. 38 - PRIOR SIMILAR RECORD OF LICENSEE AND PRINCIPAL STOCKHOLDER - LICENSE SUSPENDED FOR 35 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against Doc's Spa, Inc. 91 E. Main Street Paterson 2, N. J. Holder of Plenary Retail Consumption License C-43, issued by the Board of Alcoholic Beverage Control for the City of Paterson	CONCLUSIONS AND ORDER

Robert W. Wolfe, Esq., Attorney for Licensee.
Edward F. Ambrose, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE ACTING DIRECTOR:

Licensee pleads non vult to a charge alleging that on Sunday, November 24, 1963, it sold a half pint of liqueur for off-premises consumption, in violation of Rule 1 of State Regulation No. 38.

Licensee has a previous record of suspension of license by the Director for thirty-five days, effective January 22, 1962, for similar violation and false statement in the license application. Re Doc's Spa, Inc., Bulletin 1436, Item 5. In addition, the license then held by Bernard Doornbos (president and 98% stockholder of the licensee corporation) for premises 219 Water Street, Paterson, was suspended by the Director for ten days, effective May 15, 1956, for sale in violation of State Regulation No. 38 (Re Doornbos, Bulletin 1118, Item 8); again for sixty-five days, effective April 16, 1957, for nuisance (apparent homosexuals, foul and indecent language and conduct, and females soliciting purchase of drinks) (Re Doornbos, Bulletin 1168, Item 3); and by the municipal issuing authority for thirty days, effective October 1, 1957, for excessive noise and licensee working while intoxicated.

The prior record of suspension of license of the licensee's principal stockholder for dissimilar violation occurring more than five years ago disregarded but the prior record of suspension of license for similar violation within the past five years and the

suspension of license of its principal stockholder for similar violation more than five but less than ten years ago considered, the license will be suspended for thirty-five days, with remission of five days for the plea entered, leaving a net suspension of thirty days. Re Oliveri, Bulletin 1532, Item 3; Re Doc's Spa, Inc., supra.

Accordingly, it is, on this 6th day of January, 1964,

ORDERED that Plenary Retail Consumption License C-43, issued by the Board of Alcoholic Beverage Control for the City of Paterson to Doc's Spa, Inc. for premises 91 E. Main Street, Paterson, be and the same is hereby suspended for thirty (30) days, commencing at 3:00 a.m. Monday, January 13, 1964, and terminating at 3:00 a.m. Wednesday, February 12, 1964.

EMERSON A. TSCHUPP
ACTING DIRECTOR

5. STATE LICENSES - OBJECTIONS TO TRANSFER OF STATE BEVERAGE DISTRIBUTOR'S LICENSE - TRANSFER APPROVED.

In the Matter of Objections to the Transfer of State Beverage Distributor's License SBD-34 from)

Anders Beverage Co., Inc.)
14-16-18 Grove Terrace,) CONCLUSIONS
Irvington,)

to)

Edward Buchanan and Elizabeth Buchanan)
t/a Buchanan's Beer Distributor,)
Herbertsville Road and 17th Avenue,)
Brick Township, Ocean County.

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Clohosey & Ford, Esqs., by Thomas P. Ford, Jr., Esq., Attorneys cant

Harry G. Hyra, Esq., Attorne istributors, an

BY THE ACTING DIRECTOR:

On October 14, 196 nd Elizabeth Buchanan, t/a Buchanan's Beer Distribu ation for a transfer of State Beverage Distributo Anders Beverage Co., Inc. to themselves and from premises 14-16-18 Grove Terrace, Irvington, to Herbertsville Road and 17th Avenue, Brick Township, Ocean County.

Written objections to said transfer were filed, and a hearing was duly set thereon. The objectors set forth reasons for their objections which may be summarized as follows:

(a) That there is no need or necessity for such establishment at the contemplated location, and
(b) That it would compete for the customers presently served by the objector.

At the hearing herein the applicant Edward Buchanan testified that he sought transfer of the license with the express purpose of operating in and servicing the entire shore area. He has found

this area to be one of the largest growing areas in the State, and it is his opinion that the needs of that area would be served by such transfer. The applicant testified additionally that he has been engaged in the alcoholic beverage industry for the past twenty-three years, and has sufficient capital at hand at the present time to permit him to start operations and construct the proposed building.

Upon approval of the said license transfer he intends to construct a one-story concrete block building having a square footage of 2,500 square feet, and the building will be about 150 feet from his permanent residence in that township. Buchanan also stated that the new location is not near any existing schools or churches; that it is at least three miles from the only other SBD licensee in Brick Township and about five or six miles from the nearest SBD distributor in Toms River. The applicant Edward Buchanan also further testified that the plans and specifications on file and the map introduced into evidence reflect the exact plans which he intends to follow in the construction of his building.

Aaron Wiss, executive director of the State Beverage Distributors Association, testified that his organization unanimously voted to recommend such transfer and, in the opinion of his organization, this operation, being statewide in nature, would not interfere with the operation of the other two such distributors operating in Ocean County.

Richard L. Hickey, president of Breton Woods Distributors, the holder of a State Beverage Distributor's license, appeared on its behalf to object to said transfer because, in his opinion, there is "ample coverage there right now."

It was developed on cross examination that his company had been in business for one year; that he has one truck and services a twenty-five mile square area. He also admitted that this type of operation is not limited in area, and further admitted that he is worried that some of his own business in Brick Township itself might be affected by the said transfer.

A letter was received by this Division from a clergyman objecting to the said transfer, but he did not appear at this hearing.

After considering all the testimony, I am persuaded that the objections to the approval of this application for transfer of this license have not been adequately proved; that they are of insufficient weight to warrant denial of the application, and that a sufficient need exists for the granting of said application.

The objector's main objection to said transfer is that he might lose some business if the applicant is permitted to operate. This does not provide valid ground for unfavorable action. In any event, I believe his fear is more fanciful than real!

The applicant is permitted to sell only warm beer in quantities of not less than 144 fluid ounces. There is no convincing evidence to the effect that the proposed new premises will materially increase competition by reason of said transfer. State Beverage Distributor licensees may deliver throughout the State and, as a rule, do not conduct any on-premises retail business of any substance. Re Kalb, Bulletin 1457, Item 5; Re Lutz, Bulletin 1312, Item 6.

After considering all the evidence, it is my considered judgment that the objections are without merit.

Accordingly, the pending application is approved and the appropriate endorsement on the license certificate may be made upon completion of the new premises in accordance with the plans and specifications herein filed. Re Walkiewicz, Bulletin 1172, Item 5.

EMERSON A. TSCHUPP
ACTING DIRECTOR

Dated: January 2, 1964

6. DISCIPLINARY PROCEEDINGS - SALE IN VIOLATION OF STATE REGULATION NO. 38 - PRIOR SIMILAR RECORD - LICENSE SUSPENDED FOR 30 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)	
Buschbaum Enterprises, Inc. t/a The Old Mill Inn 373 Straight Street Paterson 3, N. J.	)	CONCLUSIONS AND ORDER
Holder of Plenary Retail Consumption License C-20, issued by the Board of Alcoholic Beverage Control for the City of Paterson	)	

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Licensee, by Peter C. Buschbaum, President, Pro se.
Edward F. Ambrose, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE ACTING DIRECTOR:

Licensee pleads guilty to a charge alleging that on Sunday, November 24, 1963, it sold twelve cans of beer for off-premises consumption, in violation of Rule 1 of State Regulation No. 38.

Licensee has a previous record of suspension of license by the Director for ten days, effective June 19, 1961, for similar violation. Re Buschbaum Enterprises, Inc., Bulletin 1400, Item 10.

The prior record considered, the license will be suspended for thirty days, with remission of five days for the plea entered, leaving a net suspension of twenty-five days. Re Mandel & Lichenstein, Bulletin 1536, Item 5.

Accordingly, it is, on this 6th day of January, 1964,

ORDERED that Plenary Retail Consumption License C-20, issued by the Board of Alcoholic Beverage Control for the City of Paterson to Buschbaum Enterprises, Inc., t/a The Old Mill Inn, for premises 373 Straight Street, Paterson, be and the same is hereby suspended for twenty-five (25) days, commencing at 3:00 a.m. Monday, January 13, 1964, and terminating at 3:00 a.m. Friday, February 7, 1964.

Emerson A. Tschupp,
Acting Director.