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

BULLETIN 2246

February 24, 1977

TABLE OF CONTENTS

ITEM

STATE OF NEW JERSEY
Department of Law and Public Safety,
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1. APPELLATE DECISIONS - REESE v. OLD BRIDGE.

Joseph and Margaret Reese, Inc. t/a Sunset Tavern Appellant, v. Township Council of the Township of Old Bridge, Respondent.	:	On Appeal CONCLUSIONS and ORDER

Peter J. Schwartz, Esq. Attorney for Appellant
Louis J. Alfonso, Esq. Attorney for Respondent
Frank Cofone, Jr., Esq. Attorney for Objector

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the Township Council of the Township of Old Bridge (hereinafter Council) which, on May 17th 1976 denied appellant's application for a place-to-place transfer of its plenary retail consumption license C-2, from premises 50 Sunset Avenue to State Highway 9 North, Fairway Plaza Shopping Center, Old Bridge.

The petition of appeal alleges that the action of the council was improper in finding that transfer was in violation of local ordinance prohibiting licenses within 2,000 feet from one another, as a person would normally and properly walk door-to-door.

The council, in its answer, alleges that it concluded that the location was not well-suited for another license; that there was a school and church nearby; and, hence, it would not be in the public interest to permit the transfer.

A hearing de novo was conducted in this division, with full opportunity afforded the parties to introduce evidence and to cross examine witnesses. Rule 6 of State Regulation 15. In addition, pursuant to Rule 8 of State Regulation 15, a transcript of the proceedings before the Council was introduced into evidence. At the hearing in this Division, it appeared, at the outset that the basic issue to be determined was contained within the transcript of the testimony and argument before the Council. Supplementary testimony was introduced by the appellant, Council and an objector.

The major issue in contention is the applicability of the local ordinance to the facts herein presented. The pertinent section of the ordinance reads as follows:

> "6-3.5 Limitations on Transfers and Issuance of New Licenses. No new licenses or transfers of existing plenary retail distribution licenses, plenary retail consumption licenses,

seasonal consumption licenses or limited distribution licenses for the sale of alcoholic beverages shall hereafter be issued for or transferred to premises within 2,000 feet of premises for which a plenary retail distribution license, plenary retail consumption license, seasonal consumption license or limited distribution license for the sale of alcoholic beverages is outstanding, provided that this limitation shall not prevent the renewal or person-to person transfer of a license for premises licensed prior to July 11,1960. Nothing herein shall be deemed to prevent transfer of a license to within 750 feet of the premises licensed prior to July 11, 1960.

The first distance hereinabove set forth shall be measured in the normal way that a pedestrian would properly walk from the nearest entrance of licensed premises to the nearest entrance of the premises sought to be licensed.

The second distance hereinabove set forth shall be measured in the normal way that a pedestrian would properly walk from the nearest entrance of the premises from which transfer is sought to the nearest entrance of the premises to which transfer is sought."

From an examination of the transcript of the testimony taken before the Council, the maps and photographs and the testimony of the engineer, surveyor, and traffic expert whose testimony was elicited on behalf of the appellant and the Council at the hearing herein, it appears that the crucial issue involved the measurement of the 2,000 feet referred to in the ordinance.

The Council had before it the application of the appellant, which proposed to move its plenary retail consumption license from Sunset Ave. where it had existed for years prior to its destruction by fire, to a vacant store in the Fairway Shopping Center located on State Highway 9(North) immediately north of the Fairway Lane jughandle. State Highway 9 is a multi-laned high-speed State highway running in a generally North-South direction. It accomodates heavy traffic of passenger cars, as well as all the truck traffic in this corridor which are barred from using the Garden State Parkway.

There presently exists a liquor store (Madison Liquors - the Objector herein) across Highway 9 (125 feet from shoulder to shoulder), and approximately 587 feet south of the door of the proposed transfer location.

The objector maintains that the distance is to be measured as follows: Along State Highway 9, 220 feet north from the doorway of Madison Liquors located on the south bound side, to the traffic light pole with a button to activate pedestrian crossing signal; then, east 165 feet across State highway 9 to the north bound side; then 367 feet north along the northbound edge of the highway; thence 108 feet east from the edge of the highway to the doorway of the proposed location. The distance from door to door using this method is 860 feet.

The appellant maintains that this is an extremely dangerous route; that the proper route, under the circumstances, should be from the doorway of Madison Liquors approximately 1500 feet south along the southbound side of State Highway 9 to the Route 516 overpass; thence an unstated distance across the route 516 overpass to the northbound side of State Highway 9; thence along the northbound side of State Highway 9 an unstated distance, but in excess of 1500 feet, to a point in the roadway which is due west of the doorway of the proposed location; thence east 108 feet to said doorway. The distance from door to door using this method is unknown, but exceeds the 2000 feet, as required by the aforecited Township Ordinance.

After a full hearing, which included testimony from appellant's traffic consultant, the Council denied the application for a place-to-place transfer. In its resolution, the Council determined that the distance between the existing location (Madison Liquors) and the proposed location is less than the required 2,000 feet. In effect, they determined that the route to be used, for measurement purposes, was the most direct one as urged by the objector, crossing State Highway 9 at the Fairway Lane jug handle at the point where the traffic signal poles bearing the pedestrian signal activation buttons are located.

Testimony was received at the hearing before the Council, and enlarged upon at the Division hearing, from Abrahm Simmoff, a traffic consultant. At the hearing before the Council, Simmoff testified, as follows:

"Q Now, is your testimony that you feel that a person could not safely cross at that spot?

A In my opinion, it's physically impossible.

Q The traffic or the buttons on these traffic control devices, how long do they change the light for?

A Ten seconds.

Q Could a person properly cross the intersection there?

A Not within the time it's allowed. In my opinion for this type of an intersection with the heavy traffic on Route 9, there should be an all red. And there should be a pedestrian walk period of a minimum of twenty-three seconds.

Q Now, I'm not saying safely, I'm saying properly crosses.

A Well, I consider properly to be safe. Those two words go together.

Q Your opinion then is a pedestrian should go south on Highway 9 to 516, 1,500 feet then cross over 516 and then come back north on the east side of Highway 9, is that correct?

A If he had to cross the highway at that particular portion of the highway, it's my opinion that that is the only safe crossing.

At the de novo hearing herein, Simmoff enlarged on this aspect of his testimony. In essence he repeated the testimony he offered at the hearing held by the Council and added "the only semblance that there is to any pedestrian crossing is the fact that we have two push buttons on the north side of the intersection, one on the east side of

Route 9, the other on the west side..".." there's absolutely no other protection provided for the pedestrians such as a walkway, cross walks or side walks or a satisfactory sequence for the light as far as timing and All Red goes. It does not exist..."

He added..."They (pedestrians) would have to proceed along the highway in a southerly direction to route 516, cross over and then come back in a northbound direction. However, I can't even classify that as being safe because there are no sidewalks provided and the examination of 516 doesn't really have all those provisions either within them..."

I find, as a fact, that the Fairway Lane jughandle is so dangerous that it cannot be considered a pedestrian crossing. Why then did the New Jersey Department of Transportation design the jughandle as it did and install the presently existing equipment? No testimony was submitted by either side to explain its rationale. I have, therefore made independent inquiry; the response is quoted in its entirety.

> "Based on your telephone request of September 9, 1976, I have reviewed our file for the signalized intersection of Route U.S. 9 and Fairway Lane in Old Bridge Township, Middlesex County.
>
> At the time the traffic signal and jughandle were designed, our traffic projections indicated a negligible amount of pedestrian traffic would be using the intersection. Therefore, economic considerations precluded the installation of extensive pedestrian controls. As a result, no specific provisions were made for pedestrians except for the installtion of pedestrian push-buttons on the signal poles located on the northeast and northwest corners of the intersection. An actuation of any of these pushbuttons provide a 12 second green interval followed by a 3 second yellow and 2 second all red interval. This push-button operation is only intended to give the occasional pedestrian, in the absence of a vehicular actuation on Fairway Lane, the ability to stop highway traffic in order to proceed across the intersection.
>
> In regard to your other question, the average walking speed of pedestrians has been determined to be four feet per second. The time required to cross a roadway is calculated from when the pedestrian leaves the curbline until he reaches the middle of the farthest travelled lane.
>
> As I also indicated to you on the telephone, should pedestrian traffic at this location substantially change, the existing signal equipment is capable of being modified to provide for additional pedestrian control if and when it is needed."

It is quite apparent that the State never intended to encourage pedestrians to cross highway 9 at Fairway Lane.

The calculating of distance limitations has presented a thorny problem to the Director of this Division from the earliest years following the passage of the Alcoholic Beverage Law. As stated in Petrangeli v. Barrett, 33 N.J. Super. 378,384

(App.Div.1954):

> " It has long been established that a local governing body has no jurisdiction to grant or transfer a license in violation of the terms of a local ordinance. Bachman v. Phillipsburg, 68 N.J.L. 552 (Sup.Ct.1902). The rule is aptly stated in Tube Bar, Inc. v. Commuters Bar, Inc., 18 N.J. Super. at p.354."

Hence, the present ordinance must be strictly construed in terms of judicially approved precedent.

It is a well established principle that the accepted and proper method of measurement in a matter of this kind is not between building entrances but between points on the public way intersecting any walk which a person would use in entering the properties in question. Presbyterian Church of Livingston v. Division of Alcoholic Beverage Control et al., 53 N.J. Super. 271 (App.Div.1954).

We must look to N.J.S.A. 33:1-76 as the standard for measurement. This statute provides that "the two hundred feet shall be measured in the normal way that a pedestrian would properly walk from the nearest entrance of said church or school to the nearest entrance of the premises sought to be licensed." (underscore added)

In an interpretation of this statute, the court

> "The determination by the Municipal Board, in applying the aforesaid method of measurement, that the measurement should be made only to an intersection where marked cross-walks or traffic signals exist has no support in law. The type of crosswalk...has been declared by our courts to be lawful for pedestrian traffic."

Hopkins v. Municipal Board of Alcoholic, etc., Newark, 4 N.J. Super. 484, 487 (App. Div. 1949).

The court later held however that:

> "The respondent's argument that under N.J.S.A. 33:1-76 the 'lawful' way is the only 'proper' way for pedestrians to walk evidently rests upon certain language in the Hopkins case, supra. But Hopkins addressed itself to the question whether a crosswalk was 'proper' although not at a through intersection; it did not hold that the legality of a crosswalk for vehicular observance purposes necessarily governed in measuring the proximity of a church or school to a liquor license applicant's site."

Presbyterian Church of Livingston v. Division of Alcoholic Beverage Control, supra at p.279.

In Karam et al v. West Orange, et al. 102 N.J. Super. 291, 297 (App. Div.1968) the court, in considering the various methods by which a pedestrian might walk as envisioned by the statute stated:

> "Others (other pedestrian routes) involved walking along

> the building line of the sidewalk on Pleasant Valley Way and Eagle Rock Avenue, and traversing the intersection of those streets within their crosswalks but not stepping up on the curb corners. We incline to view that the latter method was impermissible in terms of pedestrian safety." (underscore added)

The foregoing principles are readily applicable to situations where the distances may be measured along a public street having a usual sidewalk. Highway 9 on which the proposed transfer site is located and along which measurement would normally be taken to the nearest licensed premises of Madison Liquors, has existed as a public highway for many years. From testimony supported by a series of photographs placed into evidence, it would appear that no provision has been made for any sidewalk in the area in expectation of any pedestrian traffic.

It is urged that Highway 9, which contains a grassy median barrier, is not that type of highway to which the present statute applying to pedestrian traffic would apply.

N.J.S.A. provides:

> "...On all highways where there are no sidewalks or paths provided for pedestrian use, pedestrians shall, when practicable, walk only on the extreme left side of the roadway or its shoulder facing approaching traffic."

The applicability of the above statute is not "practicable" in this case. In Szarko's v. Hillside, Bulletin 2160, Item 1, the director concluded under very similar circumstances....."that any pedestrian who walks on Route 22 courts suicide...." Highway 9 is no less dangerous.

Although present law requires the inclusion of lands for sidewalk upon the acquisition of lands for highway purposes (N.J.S.A. 20:3-46) no like requirements existed when Highway 9 was created. Thus, there is no present provision for pedestrian use of this road.

There is, in short, no route concerning which we have had testimony either before the Council or at the hearing herein, which could be used for the purposes of measurement.

I find that Section 6-3.5 of the ordinances of the Township of Old Bridge as applied here was improper.

There is no ordinance in the Township relating to minimum distances from schools and houses of worship; therefore the criteria of 200 feet as set forth in N.J.S.A. 33:1-76 governs. The record discloses that it is (approximately) 1,400 feet from the McDivitt School to the proposed location; and this measurement is through a wooded area across a barrier wall and trespassing upon private property, to wit: the off-street parking area of an apartment complex that lies between them. If measured along Phillips Lane, a public street, and Highway 9, the distance is approximately 3,300 feet.

The Baptist Church which is across Highway 9 from the proposed location is at least 1,400 feet distant, and this measurement was made using the Fairway Lane crossing, the correctness of which has already been discussed above.

There was no recorded testimony, at either hearing, from anyone representing the Board of Education or the Baptist Church objecting to this proposed place-to-place transfer. I find no violation of minimum distance requirements from either the Church or School; nor was it a genuine concern of anyone who gave testimony at either hearing.

Dom Renzie, a Council member, explained why he voted against the place-to-place transfer. There has been no evidence brought forth to substantiate those fears he expressed. At best, the fears expressed concerned the effect that the transfer would have, if granted, are conjectural. In any event, it must be assumed that appellant is well aware of the fact that an application for the renewal of the license must be made annually. If the premises are conducted in a law abiding manner (and it must be assumed that such will be the case) residents of the Township have nothing to fear. If, however, the licensed premises will be operated in violation of the ABC Law, the licensee will subject its license to suspension or revocation. Tagliaferro v. Newark, Bulletin 1710, Item 1; Jesswell v. Newark, Bulletin 1847, Item 5; Monmouth County Retail Liquor Stores v. Middletown et al, Bulletin 1572, Item 1.

In reviewing the record herein, including the exhibits and testimony presented, I find no factual or legal basis to support the Council's action, and find that the action of the Council was unreasonable and arbitrary.

For the reasons stated, I conclude that the appellant has sustained the burden imposed upon it under Rule 6 of State Regulation No. 15. It is, therefore, recommended that the Council's action be reversed, and that an order be entered directing the Council to grant the application for transfer in accordance with the application filed therefor.

Conclusions and Order

Written exceptions to the Hearer's report were filed by the Council and the objector, Madison Liquors, pursuant to Rule 14 of State Regulation No. 15.

The Council's exceptions were contained in a letter dated October 19th and postmarked October 21st, 1976, with no indication of proof of service of a copy thereof upon the other parties or their attorneys as required by Rule 14 of State Regulation No. 15. The filing is, therefore, out of time (10 days) and not in the manner proscribed by the rule.

This impediment aside, the attorney contends that appellant has no authority by way of lease, option or right of possession to have their license located at that location. The direct testimony of Mr. Sitar, on behalf of appellant, indicates that there is an option to lease, and that rent has been paid monthly for the location, which remains vacant.

The only testimony brought forth at the Division Hearing which questioned that right to possession was that of the objector's (Madison Liquors) manager, who stated

that he was told by the major stockholder of the corporate objector that a lease had been entered into between the landlord and Madison Liquors on August 27th, 1976, a scant week before the hearing. He was not present during the lease negotiations or signing, had neither seen a copy of the purported lease nor could he discuss its terms.

It is significant that the principal stockholder of the objector corporation was not present personally to testify to this allegation, nor was any reason given for his absence. Assuming he was engaged elsewhere, why was no copy of the lease given to the manager so that it could be seen by the Hearer and opposing counsel and made part of the proof herein?

It would be impermissible to find that the appellant had no right of occupancy, based solely upon this hearsay statement. Weston v. State 60 N.J. 36; (Sup.Ct.1972) holds that hearsay may be employed to corroborate competant proof, or competent proof may be supported or given added probative force by hearsay testimony; but administrative decision(s) must be based on (a) residuum of legal and competent evidence and cannot be based upon hearsay alone.

Additionally, the Council refers to a purported lease but fail to include a copy for perusal although there is a copy of a letter from the landlord's attorney to the Council dated September 21, 1976 to the effect that there is a lease in existence which is subject to the condition that the tenant (Madison Liquors) first secure a transfer of an existing liquor license.

I have examined the other exceptions advanced by the Council's attorney and find that they have either been considered and correctly resolved in the Hearer's report, or are without merit.

The newly-engaged attorney for the objector also filed exceptions to the Hearer's report. He also raises the claim that the appellant had no right to possession of the premises, which has already been dealt with above. Similarly, he failed to submit to me a copy of this lease, instead he supplies a copy of the same letter from the landlord's attorneys to the Council, dated September 21, 1976. I find no merit in these exceptions.

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

Accordingly, it is on this 23rd day of November 1976

ORDERED that the respondent Council's action be and the same is hereby reversed; and it is further

ORDERED that the Council is hereby directed to grant appellant's application for a place-to-place transfer of its plenary retail consumption license in accordance with the application filed therefor.

Joseph H. Lerner
Director

2. APPELLATE DECISIONS - GENITO v. TEWKSBURY.

Pasquale Genito t/a Weathercock Farm, Appellant, v. Township Committee of the Township of Tewksbury, Respondent.	On Appeal CONCLUSIONS and ORDER

Weiner & Sussan, Esq., by Theodore A. Sussan, Esq., Attorneys for Appellant
Large, Scammell & Danziger, Esq., by Scott Scammell II, Esq., Attorneys for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the Township Committee of the Township of Tewksbury, (Committee), which rejected acceptance of appellant's application for a new plenary retail consumption license.

Appellant contends that the Committee had a statutory duty to entertain his application in that he had published notice thereof in accordnance with the statute; and its failure to accept the said application and hearing was error.

The Committee denied such duty of conducting a hearing was imposed on it by statute, and added that such hearing, if held, would represent a nullity because the population of the Township was insufficient to permit another plenary retail consumption license, as limited by N.J.S.A. 33:1-12.14.

At the outset of the de novo appeal held in this Division pursuant to Rule 6 of State Regulation No. 15, a colloquy ensued between counsel for the parties and the hearing officer by which the basic facts were stipulated as having been outlined in the petition of appeal and the answer filed. To such factual outline counsel added oral argument in support of their respective positions.

It was admitted that the population of the Township based upon last official 1970 U.S. Census was 2,959. It was further admitted that the present population is well above that number. It was further acknowledged that appellant is qualified to apply for a license, and that he has published the required notice of application, as set forth in Rule 2 of State Regulation No. 2. It is also uncontroverted that the Committee has adopted no resolution or ordinance by which an additional plenary retail license could be issued. Lastly, there exists one plenary retail consumption license in the municipality.

Appellant's entire appeal must of necessity fall of its own weight. N.J.S.A. 33:1-12.14 provides that ".....no new plenary retail consumption license shall be issued in a municipality unless and until the combined number of such licenses existing in the municipality is fewer than one for each 3,000 of its population as shown by the last then preceding Federal census....." (underscore added).

Obviously, the Committee could NOT have validly issued a license to appellant; the mandate of that statute is controlling.

Appellant advances a further argument that the Committee should have accorded him an opportunity to be heard on the application; hence it should have accepted the application for that purpose and then opened the door for him to present reasons why the application should be considered. Such contention is without basis in fact or logic.

Factually, the record reveals that counsel for appellant did present to the Committee an explanation of appellant's purposes in obtaining a license. There was no requirement that appellant's application for a new license should be moved simply for the purpose of permitting appellant to be heard.

Appellant has failed further to consider N.J.S.A. 33:1-19.1 which outlines the steps relating to new licenses whenever the municipality determines to permit the issuance thereof. (underscore added). If the Committee had been lawfully entitled to issue an additional license, it need not have done so unless it determined that an additional license was needed. Joa v. Pine Beach, Bulletin 1592, Item 3. Cf. Bumball v. Burnett, 115 N.J.L. 254 (1935); Marko v. Piscataway, Bulletin 2156, Item 1.

Appellant advances one peripheral argument to his main contentions, which has some merit. After the Committee declined to act on his application, it returned to him his license fee less ten (10%) per cent thereof which it retained pursuant to N.J.S.A. 33:1-25. He now seeks its return.

The retention of the ten percentum permitted under the statute aforesaid relates to the general function of the issuing authority which is required to conduct investigation of the license applicants and by its members and staff do expend time and energy in determining the accuracy of the applications which it entertains. Hence the ten per cent (10%) so retained was permitted to defray all or part of such costs.

In this matter however, the application was not entertained; the Committee neither accepted it nor acted upon it. Hence, no retainage would be needed to defray any costs as there were none. It is, therefore recommended that the Committee be directed to return such retainage to appellant.

In all other respects however, it is recommended that in view of the appellant's failure to meet the burden imposed upon him, pursuant to Rule 6 of State Regulation No. 15, to establish that the action of the Committee was erroneous and should be reversed, the action of the Committee in not entertaining appellant's application be affirmed and the appeal filed herein be dismissed.

Conclusions and Order

No exceptions to the Hearer's Report were filed pursuant to Rule 4 of State Regulation No. 15.

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

Accordingly, it is, on this 1st day of December, 1976

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

JOSEPH H. LERNER
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - LEWDNESS BY FEMALE PERFORMER - LICENSE SUSPENDED FOR 30 DAYS.

In the Matter of Disciplinary Proceedings against Hondo, Inc. 347 South Salem Street Victory Gardens, N.J. Holder of Plenary Retail Consumption License C-1, issued by the Mayor and Council of the Borough of Victory Gardens.	:	CONCLUSIONS and ORDER

Sobel & Lyon, Esq., by Allan M. Goldstein, Esq., Attorneys for Licensee
Carl J. Wyhopen, Esq., Attorney for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded "not guilty" to the following charge:

"On May 28, 1976, you allowed, permitted and suffered lewdness and immoral activity in and upon your licensed premises, viz., in that you allowed, permitted and suffered a female person, while performing on your premises for entertainment of your customers and patrons, to engage in conduct of a lewd, indecent and immoral manner and to commit and engage in acts, gestures and movements of and with her hands, legs and other parts of her body, in a manner and form having lewd, indecent and immorally suggestive import and meaning; in violation of Rule 5 of State Regulation No. 20."

In support of the charge, the Division offered the testimony of two ABC Agents.

ABC Agent B testified that, accompanied by Agent C, he entered the licensed premises on May 28, 1976 at approximately 11:45 A.M. They positioned themselves at the bar, which was oval in shape, and to the left side of a large open area having a stage on the opposite (right) side and a food counter on the far side. The patronage of approximately ten persons, upon entry, increased to approximately thirty-five. A male, identified as Gordon Graham, was tending bar. A male, identified as Stephen Schiff, was acting in a managerial capacity. Also, he was one of three principals of the licensee corporation. A waitress, identified as Lenore A. Disco, was on duty in addition to the two males.

Each Agent ordered a drink and a sandwich. At noon, a female go-go dancer identified as Joyce appeared on the raised stage in front of the agents. She was attired in a two-piece, sequined costume, the top being of the brief "Bikini" variety and the bottom a simple "G" string. Observing Agent B eating his sandwich she said to him "you're hungry, huh?" and pulled down the front of her "G" string to expose her entire pubic area. She leaned forward, and stated that the owners told her not to "Flash" (expose her pubic area).

During this first set she "flashed" three times. She "flashed" twice upon accepting dollar tips. She performed for approximately one half hour.

A go-go dancer, identified as Bernadette, followed her almost at once and danced for one half hour in the normal manner, doing nothing unusual. Thereafter Joyce danced her second half hour set, flashing four times upon acceptance of dollar tips from patrons, including one from the ABC agents. She would not "flash" when Schiff was watching her, but did so when his gaze was elsewhere. The bartender was observed to have seen her "flash" at least twice during the second set.

Bernadette danced her second set in normal manner as heretofore.

Joyce danced her third half hour set, flashing eight times after accepting eight one dollar tips. The agent observed that the waitress, Disco, was serving food to a patron who tipped Joyce. Again, Joyce flashed, putting one foot on the bar and the other on the stage. She fully exposed her pubic area to the patron, the waitress and any others in the surrounding area.

After three sets were danced by each female, the agents identified themselves and requested Joyce's "G" string as evidence. She went to the ladies room, changed, and returned handing them the requested item for which a receipt was issued.

Agent C's testimony was corroborative of Agent B's, with certain significant additions. During the first set, Joyce flashed three times and he observed the bartender to be looking at her twice. During the second set, Joyce flashed four times and the bartender was observed to have observed her twice. During the third set, the bartender was observed to have seen Joyce flash four of the eight times that she flashed.

On cross examination, Agent C testified, as follows:

"Q: How do you know...what did you base your presumption that he was actually watching her?

A: It is not a presumption, sir. I was directly in front of him while he was looking at her. His facial expressions when she did it, he wasn't standing there numb, he knew what she was doing like any other male with a female in front of him when she pulls the lower portion of her costume down. He looked."

In behalf of the licensee corporation, Stephen Schiff gave testimony as to the instructions every go-go dancer receives when she is hired. They are: (1) No drinking while working; (2) No sitting with customers - they must sit behind bar if not dancing; (3) No flashing and (4) Not allowed to accept rides from customers. The management will pick them up and later return them to the bustop.

Schiff also testified that he hires his dancers through agencies and that they don't dance in his premises more than two days in any month. He characterized the business as "running in the red"; also that it owes $8,000.00 to the liquor supplier. He also stated (and department records verify) that the licensee is on the default or non-delivery list.

Gordon Graham, the bartender on duty that day, testified that he did not notice anything unusual in the manner in which Joyce performed. He denied observing her flash that day.

It is apparent that a purely factual question has been presented for determination.

Preliminarily, I observe that, in evaluating the testimony and its legal impact, we are guided by the firmly established principle that disciplinary proceedings against liquor licensees are civil in nature and, thus, require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956).

Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as common experience and observations of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954). The finding 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. 32A C.J.S. Evidence, sec. 1042. ".....Every fact or circumstances tending to show the jury the witness' relation to the case or the parties is admissible to the end of determining the weight to be given to his evidence." State v. Spruill, 16 N.J. 73,78 (1954). It is fundamental that the interest or bias of a witness is relevant in evaluating his testimony. In re Hamilton State Bank, 106 N.J. Super. 285 (App.Div.1969).

I have carefully evaluated the testimony herein, and have had the opportunity to observe the demeanor of the witnesses as they testified. My evaluation of the entire record gives rise to the inescapable conclusion, and I find, that the charge has been amply supported by the credible and forthright testimony of the agents.

The agents' version of what occurred on the date in question is a factual and believable account. On the contrary, I was unimpressed with the credibility of the licensee's bartender and its manager. It should be borne in mind that the agents investigated activities on these premises pursuant to a specific assignment, and there has been no showing, nor was it even alleged, that they were improperly motivated.

The blanket denial of the incidents relating to the charge is entirely unconvincing in view of the minutely detailed account of the performances presented by the agents.

It is basic that in disciplinary proceedings, a licensee is fully accountable for any violation committed or permitted by its agents, servants or employees, Rule 33 of State Regulation No. 20. In re Schneider, 15 N.J. Super 449 (App.Div.1951). See also In re Olympic, Inc. 49 N.J. Super. 299. Clearly the instructions of the owners of taverns to their employees, or their absence from the premises or their non-involvement in the incident does not absolve the licensee when a violation does occur as happened in the subject case.

In adjudicating this matter I note the logic used by Judge Jayne speaking for the court in McFadden's Lounge v. Div. of Alcoholic Beverage Control, 33 N.J. Super 61 (App.Div.1954), wherein he stated at p.62:

> " Experience has firmly established that taverns where wine, men, women, and song centralize should be conducted with circumspect respectability. Such is a reasonable and justifiable demand of our social and moral welfare intelligently to be recognized by our licensed tavern proprietors in the maintenance and continuation of their individualized privilege and concession."

The Division's unrelenting policy of prohibiting "topless" female employees whether entertainers or otherwise has been affirmed by the courts. See In re Club "D" Lane, Inc., 112 N.J. Super 577 (App.Div.1971).

Accordingly, after examining the various precedents cited, I am persuaded by the clear and convincing proof in this case, that the charge has been sustained by a fair proponderance of the credible evidence.

I, therefore, recommend that the license be suspended for thirty days, Re Club "D" Lane Inc., Supra.

Conclusions and Order

Written exceptions to the Hearer's report were filed by the attorney for the licensee pursuant to Rule 6 of State Regulation No. 16.

It maintains, in its exceptions that the agents were both "under the influence" (of alcohol) because he has concluded that their blood contained between .05 and .10% alcohol, and their ability to perceive was, thus substantially diminished.

Assuming that a proper foundation were laid, (it was not), for the introduction and consideration of testimony regarding the so-called "Alco-Calculator" published by Rutgers University Center of Alcoholic studies, I find the evidence in this case insufficient to reach a finding that said agents were "under the influence".

The transcript clearly contradicts perception of the testimony by the attorney for the licensee regarding amounts of alcoholic beverages consumed that evening. There was no testimony as to the individual agent's height, weight, rate of consumption, tolerance for alcohol, etc., all of

which factors are essential in order to reasonably estimate the alcoholic content of a subject's blood, and its affect on the subject. Presumably, if the agents were "under the influence" as alleged, the licensee's bartender, observing this, would have refused to serve them, in compliance with Division Rules and Regulations.

Licensee is also factually incorrect when it states that the Hearer omitted, from his report, testimony of the agents that they heard the dancer state that she was not allowed to "flash". The Hearer set forth the following:

> "Observing Agent B eating his sandwich she said to him 'you're hungry, huh?' and pulled down the front of her 'G' string to expose her entire pubic area. She leaned forward, and stated that the owner told her not to 'flash' (expose her pubic area)."

In fact, the report also refers to the licensee's agents' specific instructions to the dancers that they may not "flash".

Licensee further alleges that there were strobe lights on the stage, constantly blinking on and off. The transcript disclosed that the principal corporate officer stated that there were spotlights in the ceiling containing 75 watt bulbs illuminating the stage. In addition, there were blinking lights placed under the plastic stage. I therefore, find the exceptions to be devoid of merit.

I have also examined the other exceptions advanced by the licensee's attorney and find that they have either been considered and correctly resolved in the Hearer's report, or are without merit. The request by the attorney for the licensee for oral argument is unwarranted, and is, therefore, denied.

Having carefully considered the entire record herein, including the transcript of the testimony, the Hearer's report and the exceptions filed thereto, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 23rd day of November 1976

ORDERED that the Plenary Retail Consumption License C-1, issued by the Borough Committee of the Borough of Victory Gardens to Hondo Inc., for premises 341 South Salem Street, Victory Gardens, be and the same is hereby suspended for thirty (30) days commencing 2:00 A.M. on Tuesday November 30, 1976 and terminating 2:00 A.M. on Thursday, December 30,1976.

JOSEPH H. LERNER
DIRECTOR

4. STATE LICENSES - NEW APPLICATION FILED.

South Jersey Distributors, Inc.
430 Pennsylvania Avenue
Atlantic City, New Jersey
Application filed February 15, 1977
for place-to-place transfer of
Limited Wholesale License WL-1
from 300-318 N. Tennessee Avenue,
Atlantic City, New Jersey.

Joseph H. Lerner
Director