

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

BULLETIN 2349

May 5, 1980

TABLE OF CONTENTS

ITEM

1. SPECIAL RULING PURSUANT TO N.J.S.A. 33:1-12.39 - IN THE MATTER OF THE PETITION OF THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC. (Asbury Park).
2. SPECIAL RULING PURSUANT TO N.J.S.A. 33:1-12.39 - IN THE MATTER OF THE PETITION OF THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC. (Tenafly).
3. SPECIAL FULING PURSUANT TO N.J.S.A. 33:1-12.39 - IN THE MATTER OF THE PETITION OF THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC. (Dover - Morris County).
4. SPECIAL RULING PURSUANT TO N.J.S.A. 33:1-12.39 - IN THE MATTER OF THE PETITION OF THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC. (Red Bank).

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

BULLETIN 2349

May 5, 1980

1. SPECIAL RULING PURSUANT TO N.J.S.A. 33:1-12.39 - IN THE MATTER OF THE  
PETITION OF THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.

In the Matter of the Petition of	:	
	:	
The Great Atlantic & Pacific	:	CONCLUSIONS
Tea Company, Inc.	:	
	:	AND
Holder of Plenary Retail Distribution	:	
License No. 1303-44-023-001 issued	:	ORDER
by the City of Asbury Park.	:	
-----	:	
Skoloff & Wolfe, Esqs., by Saul A. Wolfe, Esq.,	:	
Attorney for Petitioner	:	
David Griffiths, Esq., Deputy Attorney General,	:	
Appearing for Division	:	

Initial Decision Below

Hon. Gerald T. Foley, Jr., Administrative Law Judge

Dated: November 9, 1979 - Received: November 15, 1979

BY THE DIRECTOR:

No Exceptions were filed to the Initial Decision herein pursuant to N.J.S.A. 33:1-12.39.

Having carefully considered the entire record herein, including the transcript of the testimony and the Initial Decision of the Administrative Law Judge, I conclude that the petitioner has failed to establish good cause for my authorization to petitioner to apply for renewal of the license. Therefore, I reject the conclusions and recommendations of the Administrative Law Judge.

This license has been inactive since 1975. My Special Ruling August 23, 1978, part of the record herein, provided relief to the licensee pursuant to N.J.S.A. 33:1-12.39 based on representations incorporated therein; i.e., that a potential site and two prospective buyers had been found. To date, over a year later, the record reveals that no contract has even been executed, nor is one about to be executed.

My Special Ruling of 1978 further provided "However, the license is subject to the special condition that if it does not become operational during the 1978-79 license period, no further renewals will be authorized". The Administrative Law Judge acknowledges that special condition (at Page 3), upon which there was no timely appeal filed by the licensee from the final determination of an administrative agency, but ignores its significance.

Therefore, I reject the proposition that the licensee has established good cause pursuant to N.J.S.A. 33:1-12.39 on the record herein.

Accordingly, it is, on this 20th day of December, 1979

ORDERED that the Petition of the Great Atlantic & Pacific Tea Company, Inc. for authorization by the Director to apply to the City of Asbury Park for renewal of its plenary retail distribution license for the 1979-80 license term be and the same is hereby denied.

JOSEPH H. LERNER  
DIRECTOR

Appendix - Initial Decision Below

IN RE:	}	<u>INITIAL DECISION</u>
PETITION OF THE GREAT ATLANTIC	}	
AND PACIFIC TEA COMPANY, INC.,	}	OAL DKT. NO. ABC 2445-79
PURSUANT TO N.J.S.A. 33:1-12.39	}	
(ASBURY PARK, NEW JERSEY)	}	AGENCY DKT. NO. -

APPEARANCES:

Saul A. Wolfe, Esq., Skoloff and Wolfe, Esqs.,  
for Petitioner

David S. Griffiths, Esq., Deputy Attorney General,  
for the Division of Alcoholic Beverage Control

BEFORE THE HONORABLE GERALD T. FOLEY, JR., A.L.J.:

On September 14, 1979 a hearing was held on a petition of the Great Atlantic and Pacific Tea Company, Inc. (A&P) seeking authorization from the Director of the Division of Alcoholic Beverage Control to apply to the Board of Commissioners of the City of Asbury Park for renewal of its plenary retail distribution license number D-4 for the 1979-80 license term.

It is suggested that this decision be read in conjunction with that written in the "lead" case (A&P, Linden, New Jersey) which has been filed.

The record in this matter was closed on October 25, 1979.

At the hearing the following exhibits were admitted into evidence:

1. P-1, Affidavit of Service of a copy of verified petition for renewal authorization on the Municipal Clerk of Asbury Park.

2. P-2, Letter of Mr. Wolfe dated September 8, 1979 to the Clerk of Asbury Park advising that the hearing in this matter had been rescheduled from September 12, 1979 to September 14, 1979.
3. R-1, Special Ruling of Director Joseph H. Lerner, dated August 23, 1978, finding that A&P established good cause to warrant a further application for renewal of its license for the 1978-79 license term. A special condition was added to the effect that if the license did not become operational during the 1978-79 license period, no further renewal would be authorized.

Thomas P. Quinn testified that subsequent to last year's renewal that A&P considered using its license in conjunction with the Plus Store concept. To that end a study was made as to the cost of renovating the former A&P store. Mr. Quinn stated the store was in horrendous condition and it was estimated that \$250,000 would be needed to refurbish it.

Plus ruled the store out. A&P had no interest in it and that was basically the end of the former A&P location.

In 1978, prior to the Plus concept becoming a reality, the witness communicated with one Abraham Eisenberg, Esq., concerning the possibility of a client of Mr. Eisenberg, a Mr. Goldman, acquiring A&P's license. The witness said he thought he told Mr. Eisenberg that A&P was not certain that it was going to sell.

Negotiations were resumed with Mr. Eisenberg after the decision was reached not to renovate the former A&P store. These negotiations are continuing even though A&P has found Mr. Eisenberg to be a difficult negotiator.

A&P is also negotiating with one Lucas Carrubia, Jr. A contract for the sale of the license is being considered.

Negotiations with both parties were continuing right up to the week of the instant hearing. A&P is ready to sell its license to the first ready purchaser. It is A&P's intention to sell to someone who will activate and use the license in Asbury Park. The contemplated sale price is \$6,000.

On cross-examination Mr. Quinn said that there is a 95% chance that the license will be sold in the near future. He stated that negotiations were not going that well with Mr. Eisenberg because he wanted A&P to finance the \$6,000. He said the sale to Mr. Goldman would probably not materialize but that Mr. Carrubia was very interested. The witness said he felt Mr. Carrubia thought he could find a suitable location although he did not know what locations Mr. Carrubia was considering.

The hearing was closed.

A&P's burden under N.J.S.A.33:1-12.39 is to establish good cause for the Director to authorize it to apply for renewal of its license for the 1979-80 license term. In this case the special condition set forth in the special ruling of August 23, 1978 was not fulfilled. The license did not become operational during the 1978-79 license period.

Good cause means a substantial reason, one that affords a legal excuse. Whether substantial reasons exist is for the court to determine under the facts and circumstances, Pines v. District Court in and for Woodbury County, 10 N.W. 2d 574, 583, 233 Iowa 1284 (Sup.Ct. 1943).

The Director has indicated that he will determine whether good cause has been established on a case by case basis. He will apply recognized judicial concepts associated with the term. He will also apply, in so far as they are applicable, prior decisions of the Division on the subject. Bulletin 2289, July 27, 1978, dated April 14, 1978.

I have considered the testimony of Mr. Quinn and have detailed the facts herein. In my judgment, A&P has established good cause under N.J.S.A. 33:1-12.39. As of the week of the hearing, it had continuing negotiations with two prospective purchasers of its license, one of whom was very interested. Its intention is to sell the license for \$6,000 to someone who will activate and use it in Asbury Park.

I therefore recommend to the Director of the Division of Alcoholic Beverage Control that he authorize A&P to apply to the Board of Commissioners of the City of Asbury Park for renewal of its plenary retail distribution license for the 1979-80 license term.

This action cannot be effected prior to the effective date of this order, which is forty-five (45) days from the date of agency receipt of this order, unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period, N.J.S.A. 52:14B-10(c).

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.

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DATE

\_\_\_\_\_  
GERALD T. FOLEY, JR., A.L.J.

\_\_\_\_\_  
Receipt Acknowledged:

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DATE

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AGENCY HEAD

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Mailed to Parties:

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FOR OFFICE OF ADMINISTRATIVE LAW

2. SPECIAL RULING PURSUANT TO N.J.S.A. 33:1-12.39 - IN THE MATTER OF THE PETITION OF THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.

In the Matter of the Petition of

The Great Atlantic & Pacific  
Tea Company, Inc.

Holder of Limited Retail Distribution  
License No. 0261-43-007-001 issued by  
the Mayor and Council of the Borough  
of Tenafly.-----

Skoloff & Wolfe, Esqs., by Saul A. Wolfe, Esq., Appearing  
for Petitioner.  
David Griffiths, Esq., Deputy Attorney General, Appearing  
for Division.

CONCLUSIONS

AND

ORDER

#### Initial Decision Below

Hon. Gerald T. Foley, Jr., Administrative Law Judge

Dated: November 14, 1979 - Received: November 20, 1979

BY THE DIRECTOR:

No Exceptions were filed to the Initial Decision  
of the Administrative Law Judge herein pursuant to N.J.S.A.  
33:1-12.39.

Having carefully considered the entire record herein,  
including the transcript of the testimony and the Initial  
Decision, I concur in the findings and recommendations of  
the Administrative Law Judge and adopt them as my conclusions  
herein.

Accordingly, it is, on this 19th day of December, 1979,

ORDERED that the Petition of the Great Atlantic and  
Pacific Tea Company, Inc. for the Director's authorization  
to apply to the Mayor and Council of the Borough of Teanfly  
for renewal of its Limited Retail Distributuion License for  
the 1979-80 license term be and the same is hereby denied.

JOSEPH H. LERNER  
DIRECTOR

#### Appendix

#### Initial Decision Below

In Re: Petition of The )  
Great Atlantic and Pacific )  
Tea Company, Inc. pursuant )  
to N.J.S.A. 33:1-12.39 )  
(Tenafly, New Jersey) )

INITIAL DECISION

OAL DKT. NO. ABC 2442-79  
AGENCY DKT. NO.

APPEARANCES:

Saul A. Wolfe, Esq.,  
Skoloff and Wolfe, Esqs.  
for Petitioner, The Great Atlantic  
and Pacific Tea Company, Inc.

David S. Griffiths, Esq.  
Deputy Attorney General  
for the Director of the Division of  
Alcoholic Beverage Control

Donald W. de Cordova, Esq.  
Morrison and Griggs, Esqs.  
for the Borough of Tenafly

BEFORE THE HONORABLE GERALD T. FOLEY, JR., A.L.J.:

On September 14, 1979 a hearing was held on the verified petition of The Great Atlantic and Pacific Tea Company, Inc. (A&P), seeking authorization from the Director of the Division of Alcoholic Beverage Control pursuant to N.J.S.A. 33:1-12.39 for it to apply to the Borough of Tenafly for renewal of its limited retail distribution license for the 1979-80 license term.

On September 14, 1979, six individual petitions of the A&P were heard and, inadvertently, the one pertaining to Tenafly was heard prior to its scheduled starting time of 1:30. The result of this was that Donald W. de Cordova, Esq., representing the Borough of Tenafly, who appeared at the proper time for the hearing, did not participate. I offered to conduct the hearing anew in its entirety at a later date.

Mr. de Cordova who, during a recess, was provided with a summary of the testimony by Mr. Wolfe, chose to set forth the Borough's position by letter. This was done by letter dated September 26, 1979, received September 28, 1979, in which Mr. de Cordova urged that A&P had not shown good cause for it to be granted an extension of time to try to "peddle" its license. Tenaflly maintained that A&P had not been diligent in that it claimed A&P had had two years in which to find a purchaser or make a determination to surrender its license.

It is suggested that this decision be read in conjunction with that in the "lead" case, A&P, Linden, New Jersey, ABC 2445-79, previously filed.

The record in this matter closed on October 25, 1979.

At the hearing a copy of an affidavit of service of a copy of the verified petition for renewal authorization on the Municipal Clerk of Tenaflly was admitted into evidence as P-1.

Thomas P. Quinn stated that A&P had decided to sell its warm beer license in December, 1978. A newspaper ad was run and A&P had one response. The individual was not interested when Mr. Quinn explained to him what type of license it was.

The witness said that Tenaflly was listed as a possible plus store because of the former A&P store in February, 1979. However, at the end of March or early April, 1979, Tenaflly was ruled out. Mr. Quinn said he turned the license over to Edward Kerbeykian for a possible sale. He stated that Mr. Tedesco of A&P made two trips to Tenaflly to see if he could find a buyer for the license but that he had no luck.

Mr. Quinn stated that at the time the instant petition was filed with the Division of Alcoholic Beverage Control in June, 1979, A&P was negotiating with Gristedes Supermarket for the latter to acquire its license. However, as of the date of the hearing, September 14, 1979, the witness said that basically the negotiation was coming to an end with the result that there was no agreement between Gristedes and the A&P for the sale of the license. He said dealings with Gristedes ended about August 1, 1979.

Mr. Quinn stated that if A&P's application is granted, A&P would like to sell the license to a party in Tenaflly that would activate and use it in Tenaflly. He said A&P would have sold the license to Gristedes for \$5,000.



On cross-examination, Mr. Quinn was asked his opinion as to the likelihood that the license would be sold in the near future. He stated that the likelihood was 90% and, that given a favorable amount of time, he firmly believed that A&P would be able to dispose of the license to somebody that will activate and use it. He indicated that it was a warm beer license and that this type of license does not change hands that often in New Jersey.

Edward Kerbeykian stated that he was contacted by Mr. Quinn in April or May, 1979 to discuss the disposition of the warm beer license in Tenaflly. One of his employees contacted Gristedes whose manager seemed to show interest. However, neither the manager nor anyone else in New Jersey had the authority to enter into an agreement. There were communications with Gristedes' management at their headquarters that extended for two to three months. They were unsuccessful and negotiations ended about late July, 1979. The witness said that in his opinion there was a reasonable possibility that a suitable user of the license could be found in Tenaflly within a year.

On cross-examination the witness said he had a canvas of potential users of the license made. He estimated that eight or ten potential users, one being Gristedes, were found. None, other than Gristedes, were interested in purchasing the license. He said it was possible some potential users were missed in the canvas of the business areas, in the main drag. In answer to my questions, he said he has an active file and a followup in the future to contact the other original possible buyers. He stated he would say that no followups have been made since the collapse of the Gristedes negotiations.

The witness stated to Mr. Griffiths that it was his opinion that the license should be sold within the next year, more likely than not, a better than 50% chance.

Under N.J.S.A. 33:1-12.39, the statute applicable here, the A&P has the burden of establishing to the satisfaction of the Director, good cause for him to authorize it to apply to the Borough of Tenaflly for renewal of its warm beer license for the 1979-80 license term. From my review of the record, I have concluded that the A&P has not established good cause in this matter.

Good cause means a substantial reason, one that affords a legal excuse. Whether substantial reasons exist is for the court to determine under the facts and circumstances, Pines v. District Court in and for Woodbury County, 10 NW2d 574, 583, 233 Iowa 1284 (Sup. Ct. 1943).

Additionally, the Director has indicated that he will determine whether good cause has been established on a case by case basis. He will apply recognized judicial concepts associated with the term. He will also apply, insofar as they are applicable, prior decisions of the Division on the subject, Bulletin 2289, July 27, 1978, dated April 14, 1978.

In the instant matter, the negotiations for a sale of the license to Gristedes collapsed on or about August 1, 1979. Mr. Quinn could only offer that A&P would like to sell the license. The record is silent as to the identity of a prospective purchaser.

Additionally, from the testimony of Mr. Kerbeykian, it appears that all the prospective purchasers were canvassed at the time Gristedes was found and only Gristedes expressed an interest. Mr. Kerbeykian, at the time of the hearing, more than six weeks after the Gristedes negotiations ended, had not followed-up with any of the original prospective buyers.

I therefore recommend to the Director of the Division of Alcoholic Beverage Control that he deny the petition of the A&P for authorization to apply to the Borough of Tenafly for renewal of its limited retail distribution license for the 1979-80 license term.

This action cannot be effected prior to the effective date of this order, which is forty-five (45) days from the date of agency receipt of this order, unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period, N.J.S.A. 52:14B-10(c).

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.

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DATE

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GERALD T. FOLEY, JR., A.L.J.

Receipt Acknowledged:

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DATE

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AGENCY HEAD

Mailed to Parties:

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DATE

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FOR OFFICE OF ADMINISTRATIVE LAW

3. SPECIAL RULING PURSUANT TO N.J.S.A. 33:1-12.39 - IN THE MATTER OF THE  
PETITION OF THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.

In the Matter of: )

The Great Atlantic & Pacific )  
Tea Company, Inc. )

CONCLUSIONS AND ORDER

Holder of Plenary Retail Distribution )  
License No. 1409-44-013-001 issued by the )  
Town of Dover (Morris County). )

-----  
Skoloff & Wolfe, Esqs., by Saul A. Wolfe, Esq., Attorneys for Licensee  
David Griffiths, Esq., Deputy Attorney General for the Division

INITIAL DECISION BELOW

Gerald T. Foley, Jr., Administrative Law Judge

Dated: October 16, 1979 - Received October 22, 1979

BY THE DIRECTOR:

No Exceptions to the Initial Decision was filed on behalf of the parties hereto. The attorney for the applicant advises by letter dated October 26, 1979 that the applicant, The Great Atlantic & Pacific Tea Company, Inc. waives the right to file Exceptions.

Having carefully considered the record herein including the Initial Decision, I concur with the findings of the Administrative Law Judge and adopt them as my findings herein.

Accordingly, it is, on this 3rd day of December, 1979,

ORDERED that the Mayor and Board of Aldermen of the Town of Dover is hereby authorized to consider the application for renewal of the subject license for the 1979-80 license term, and to thereupon grant or deny said application, in the reasonable exercise of its discretion, expressly subject to the Special Condition that license must become operational during the 1979-80 term; no further extensions will be authorized.

JOSEPH H. LERNER  
DIRECTOR

IN RE:	)	<u>INITIAL DECISION</u>
PETITION OF THE GREAT	)	
ATLANTIC AND PACIFIC TEA COMPANY, INC.	)	OAL DKT. NO. ABC 2445-79
PLENARY RETAIL DISTRIBUTION LICENSE	)	
NO. 1409-44-013-001	)	
DOVER, NEW JERSEY	)	

## APPEARANCES:

Saul A. Wolfe, Esq., Skoloff and Wolfe, Esqs.,  
for Petitioner

David S. Griffiths, Esq., Deputy Attorney General,  
for the Division of Alcoholic Beverage Control

BEFORE THE HONORABLE GERALD T. FOLEY, JR., A.L.J.:

On September 14, 1979 a hearing was held on a verified petition dated June 25, 1979 and filed on behalf of the Great Atlantic and Pacific Tea Company, Inc. seeking authorization, pursuant to N.J.S.A. 33:1-12.39, from the Director of the Division of Alcoholic Beverage Control to apply to the Mayor and Board of Aldermen, Dover, New Jersey for renewal of its plenary retail distribution license. The matter was filed as a contested case on July 24, 1979.

N.J.S.A. 33:1-12.39, in pertinent part, states that "No Class C license, as the same is defined in R.S. 33:1-12, shall be renewed if the same has not been actively used in connection with the operation of a licensed premises within a period of two years prior to the commencement date of the license period for which the renewal application is filed unless the director, for good cause and after a hearing, authorizes a further application for renewal."

At the hearing, Saul A. Wolfe, Esq., attorney for petitioner, represented that, subsequent to the closing of the A&P store in Dover, A&P found a location at 77 Bassett Highway in Dover where it could place its liquor license back into operation. A&P entered into a two year lease for those premises from June 1, 1979 through May 31, 1981. A copy of the lease was marked P-2 in evidence. It is an agreement between Food Service International, Inc., and the Great Atlantic and Pacific Tea Company, Inc. for a term of two years, commencing on June 1, 1979 and ending on May 31, 1981. The subject matter of the lease is a store at 77 Bassett Highway, Dover, New Jersey for the sale of liquor, wine, beer, other alcoholic beverages, delicatessen and gourmet products and accessories, party favors and any other items incidental thereto. The rent is \$26,000 and the A&P has an option to renew the lease for three years commencing on June 1, 1981 and ending May 31, 1984.

Mr. Wolfe indicated that A&P caused a complete application for a place to place transfer to be filed with the requisite fees with the municipal clerk prior to the expiration of the license period, that the transfer application was scheduled to be heard by the governing body on June 26, 1979 but that it was removed from the calendar and not acted upon because of some advice received by the municipal clerk from some representative of the Division of Alcoholic Beverage Control.

At the hearing, Mr. Michael A. DeLorenzo, Town Clerk of Dover, brought with him a resolution adopted on September 11, 1979 by the Mayor and Board of Aldermen. This resolution, which was marked P-1 in evidence, indicated that the Mayor and Board of Aldermen found the lease to be acceptable and they requested the Director of the Division of Alcoholic Beverage Control to renew the A&P's inactive license.

Mr. Thomas Quinn, the national liquor director of the A&P, indicated that the A&P could be in full time operation within four to five weeks after A&P received the approval. He said the store is in gorgeous shape and that A&P has only a couple of minor adjustments to make.

Subsequent to the hearing, I received on October 11, 1979, a letter from Deputy Attorney General Griffiths under date of October 10, 1979. Mr. Griffiths indicated that the Director of the Division of Alcoholic Beverage Control had reviewed certain documents that were admitted into evidence at the hearing. He advised that the Director consented to the entry of an order in favor of the A&P and that the latter's application had been approved upon the Director's finding of the existence of good cause under N.J.S.A. 33:1-12.39.

In addition to the resolution and lease, P-1 and P-2 in evidence, respectively, Mr. Griffiths forwarded me a certification of Thomas Quinn, captioned in the Division.

Initially, I point out that jurisdiction of this matter is in the Office of Administrative Law. No order remanding the case to the Division has been entered. However, I have presided at the hearing and have reviewed the record before me. I find as a fact that the Great Atlantic and Pacific Tea Company, Inc. has shown, under the circumstances of this case, good cause for the Director of the Division of Alcoholic Beverage Control to authorize a further application for renewal of its license for the 1979-80 license term.

I therefore recommend that the Director authorize a further application for renewal for the 1979-80 license term.

This action cannot be effected prior to the effective date of this order, which is forty-five (45) days from the date of agency receipt of this order, unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period, N.J.S.A. 52:14B-10 (c).

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.

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DATE

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GERALD T. FOLEY, JR. A.L.J.

Receipt Acknowledged:

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DATE

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AGENCY HEAD

Mailed to Parties:

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DATE

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FOR OFFICE OF ADMINISTRATIVE LAW

4. SPECIAL RULING PURSUANT TO N.J.S.A. 33:1-12.39 - IN THE MATTER OF THE PETITION OF THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.

In the Matter of:

The Great Atlantic & Pacific  
Tea Company, Inc.

Holder of Plenary Retail Distribution  
License No. 1340-44-013-001 issued by  
the Borough Council of the Borough of  
Red Bank

-----  
Skoloff & Wolfe, Esqs., by Saul A. Wolfe, Esq., Attorneys  
for Licensee.  
David Griffiths, Esq., Deputy Attorney General for the  
Division.

CONCLUSIONS

AND

ORDER

# INITIAL DECISION BELOW

Gerald T. Foley, Jr., Administrative Law Judge

Dated: November 2, 1979 - Received: November 7, 1979

BY THE DIRECTOR:

No Exceptions to the Initial Decision were filed on behalf of the parties hereto.

Having carefully considered the record herein including the Initial Decision, I concur with the findings of the Administrative Law Judge and adopt them as my findings herein.

Accordingly, it is, on this 6th day of December, 1979,

ORDERED that the Borough Council of the Borough of Red Bank is hereby authorized to consider the application for renewal of the subject license for the 1979-80 license term, and to thereupon grant or deny said application, in the reasonable exercise of its discretion, expressly subject to the Special Condition that license must become operational during the 1979-80 term; no further extensions will be authorized.

JOSEPH H. LERNER  
DIRECTOR

## APPENDIX

## INITIAL DECISION BELOW

N RE:	)	<u>INITIAL DECISION</u>
THE PETITION OF THE GREAT	)	
ATLANTIC AND PACIFIC TEA COMPANY, INC.,	)	QAL DKT. NO. ABC 2445-79
Pursuant to N.J.S.A. 33:1-12.39	)	
(RED BANK, NEW JERSEY)	)	

## APPEARANCES:

Saul A. Wolfe, Esq., Skoloff and Wolfe, Esqs. for Petitioner

David S. Griffiths, Esq., Deputy Attorney General, for the  
Division of Alcoholic Beverage Control

BEFORE THE HONORABLE GERALD T. FOLEY, JR., A.L.J.:

On September 13, 1979 a hearing was held on the petition of the Great Atlantic and Pacific Tea Company Inc., (A&P), pursuant to N.J.S.A. 33:1-12.39, seeking authorization from the Director of the Division of Alcoholic Beverage Control to apply for renewal of its plenary retail distribution license in Red Bank, New Jersey for the 1979-80 license term.

It is suggested that this decision be read in conjunction with that in the Linden, New Jersey matter, the "lead" case.

The record in these cases was closed on October 25, 1979.

At the hearing the following exhibits were admitted into evidence:

1. R-1, Special Ruling of the Director dated August 23, 1978 in which he found that the A&P had established good cause to warrant a further application for renewal of its plenary retail distribution license for the 1978-79 license term. The Director further ruled that the license was subject to a special condition that if it did not become operational during the 1978-79 license period, no further renewals would be authorized.
2. P-1, Affidavit of service of copy of verified petition for renewal on the Municipal Clerk of Red Bank.
3. P-1, Executed contract dated June 18, 1979 between A&P and Norman's Red Bank Corp. for sale of A&P's plenary retail distribution license for \$30,000. This exhibit was marked into evidence on September 14, 1979, the following day, and was also marked P-1.

At the outset of the hearing on September 13, 1979, I read into the record a letter from William F. Dowd, Esq., dated August 17, 1979. Mr. Dowd indicated his office represented the Borough of Red Bank and that it would not participate in the hearing but would abide by the decision of the judge in the matter.

Thomas P. Quinn testified that A&P retained one Gene Blackman, a real estate broker, to locate a facility for an A&P operation in Red Bank. The efforts were unsuccessful. A&P then decided to sell the license and on June 18, 1979, a written contract was entered into between A&P and Norman's Red Bank Corporation for the sale of the license to Norman's for \$30,000.

A&P filed a consent to the transfer of the license to Norman's and cooperated with Norman's so that the latter could use the license as soon as possible.

On cross-examination the witness stated that Norman's application for person to person and place to place transfers was being held up, awaiting the outcome of the instant hearing.

Mr. Wolfe represented that he was holding \$5,000 in escrow pursuant to the contract.

Norman Seigel testified that he is a 55% stockholder in and is president and director of Norman's Red Bank Corporation. He has been in business in Red Bank for 17 years. He considered Norman's to be a high quality food business dealing in gourmet food, catering and take out lunch trays.

Mr. Seigel confirmed that Norman's had a contract to purchase the A&P's license for \$30,000 and that \$5,000 has been deposited in escrow with Mr. Wolfe.

The witness said that on June 21, 1979, pursuant to the contract, he applied to the Municipal Clerk for place to place and person to person transfers of the license. He said, however, that the clerk did not accept the application for filing. The next scheduled meeting of the governing body was the week of June 27, 1979. The clerk indicated she would not accept the application because of the time problem involved in the publications between the date of filing and June 27, 1979.

The witness said he indicated to the clerk that he had arranged for publication and the notice of the application was published in the Daily Register on June 22 and June 29, 1979.

Mr. Seigel stated he informed the clerk of the ABC rules that permitted the hearing prior to the five days after the second publication but she refused to accept the application.

The witness drew checks to the State ABC and to Red Bank to cover the respective filing fees but that, as a result of the action of the municipal clerk, the application was not considered by the governing body at its meeting on June 27, 1979.

Mr. Seigel said he intended to remodel his present business and incorporate the license into the present operation. He would like to be able to use the license immediately.

On cross-examination the witness said if he had the license today, it would be activated within six weeks. He has made plans and the equipment he needs is on standby waiting the okay.

On September 14, 1979, the contract was marked into evidence as P-1.

Under N.J.S.A. 33:1-12.39 the burden is that of the A&P to establish good cause for the Director to authorize a further application for renewal of its license.



The Director has indicated that he will determine whether good cause has been established on a case by case basis. He will apply recognized judicial concepts associated with the term. He will also apply, in so far as they are applicable, prior decisions of the Division on the subject. Bulletin 2289, July 27, 1978, dated April 14, 1978.

In Pines v. District Court in and for Woodbury County, 10 N.W. 2d 574, 583, 233 Iowa 1284 (Sup. Ct. 1943), the court stated that good cause means a substantial reason, one that affords a legal excuse. It said whether substantial reasons exist is for the court to determine under the facts and circumstances.

The court, in Wilson v. Morris, 369 S.W. 2d 402, 407 (Mo. 1963), stated that good cause depends upon the circumstances of the individual case, and a finding of its existence lies largely in the discretion of the officer or court to which the decision is committed.

Finally, in Wray v. Folsom, 166 F. Supp. 390, 394 (U.S. D.C., W. D. Arkansas, 1958), good cause was conceived to be a relative and highly abstract term. Its meaning must be determined not only by the verbal context of the statute in which the term is employed, but also by the context of the action and procedures involved and the type of case presented.

A review of the facts which have been detailed leads me to the conclusion that the A&P has established good cause for the Director to authorize it to apply for renewal of its license. The contract to sell its license to Norman's Red Bank Corp. has been executed by both parties and Norman's application for person to person and place to place transfers is being held in abeyance, pending the outcome of the instant matter. Mr. Seigel is very anxious to activate the license. I therefore recommend to the Director of the Division of Alcoholic Beverage Control that he authorize the A&P to apply to the Borough Council of the Borough of Red Bank for renewal of its plenary retail distribution license for the 1979-80 license term.

This action cannot be effected prior to the effective date of this order, which is forty-five (45) days from the date of agency receipt of this order, unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period, N.J.S.A. 52:14B-10(c).

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.

\_\_\_\_\_  
DATE

\_\_\_\_\_  
GERALD T. FOLEY, JR., A.L.J.

Receipt Acknowledged:

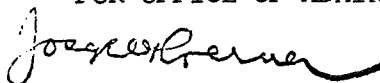
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AGENCY HEAD

Mailed to Parties:

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DATE

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FOR OFFICE OF ADMINISTRATIVE LAW

  
Joseph H. Lerner  
Director