Division of
ALCOHOLIC BEVERAGE CONTROL

Bulletin

140 E. Front Street, CN 087, Trenton, New Jersey 08625-0087

BULLETIN 2467 April 23, 1996

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BULLETIN 2467 April 23, 1996

1. NOTICE TO THE INDUSTRY - COPS-IN-SHOPS

The Division, in cooperation with the Division of Highway Traffic Safety, is participating in a state-wide program to help curtail underage drinking. This program, known as Cops-In-Shops, allows undercover law enforcement officers to join forces with local retail establishments to deter the sale of alcohol to underage individuals and to stop adults from attempting to purchase alcohol for people under the legal age.

Generally, the program functions as follows: In selected towns, at cooperating liquor establishments, a team of two undercover officers will be assigned to work two evenings a week (usually, but not necessarily Fridays and Saturdays) in four hour shifts each evening. One officer will work undercover as an employee or patron in each establishment and stop anyone under the age of 21 who attempts to buy alcohol or uses false identification. The second officer will serve as a "backup" outside the establishment to determine if alcoholic beverages have been purchased by an adult and passed of to an underage drinker. State Police ABC Inspectors will also participate at selected locations. The cooperating liquor establishments will allow police officers to be present on their premises and will post signs about the program.

The first phase of the program was officially commenced on February 7, 1996 and targets municipalities with significant numbers of college student residents. The second phase will be launched in May, and its focus will be on resort area municipalities, including those along the Jersey shore. The program will continue indefinitely.

"Cops-In-Shops," which is being funded through a $67,000 federal grant secured by the Division of Highway Traffic Safety, is a unique program founded three years ago by the Los Angeles based Century Council, a non-profit organization. The program, which is supported nationally by more than 800 brewers, vintners,

distillers, and wholesalers, brings together liquor retailers and law enforcement in a cooperative effort to curb and prevent the illegal purchase of alcohol by minors. Thirty-two states including Texas, Ohio, Nebraska, Oregon, Maine, Kentucky and Virginia have participated in--or are currently operating--Cops-In-Shops programs.

2. REQUEST FOR ADVISORY OPINION - MAY INDIVIDUAL HOLDING AN INTEREST IN A RETAIL CONSUMPTION LICENSE BE THE LANDLORD OF A LEASED PREMISES TO A NEW JERSEY BREWERY.

February 27, 1996

Joel C. Napolitan, Manager
New Jersey Brewery, L.L.C.
28 Hollow Brook Road
Califon, New Jersey 07830

Re: Request for Advisory Opinion pursuant to N.J.A.C. 13:2-36.1: May individual holding an interest in a retail consumption license be the landlord of a Leased Premises to a New Jersey Brewery?

Dear Napolitan:

I have received your letter dated December 1, 1995, requesting an advisory opinion, as well as your follow-up letter dated February 10, 1996, with documentation. You advise that New Jersey Brewery, L.L.C. is in the process of establishing a brewery at 201 Broad Street, Phillipsburg, New Jersey. The intended lessor of the premises to be licensed is Norman Falk and Falk & Falk. You further advise that Norman Falk is the officer of a company, Falk's Bar-Liqour, Inc. which holds plenary retail consumption license #2120-33-002-001. Review of the Division's licensing records shows that Mr. Falk is listed as President and Treasurer of the corporate retail licensee which is located on Route 22 at Still Valley Circle in Pohatcong Township.

You state that the relationship between New Jersey Brewery, L.L.C. and Norman Falk is strictly that of lessee and lessor and that the lessor will not benefit from the brewery operation in any way through the lease payments anymore than he would from any other lessee paying a fixed monthly lease. You affirm that Norman Falk and Falk & Falk are not to be paid any fraction of profit from the brewery's sale of beer nor do they in any way whatsoever possess any ownership, directorship, or any other voting powers in the intended brewery. You affirm that the amount of sales by New Jersey Brewery has no effect on the amount due under the lease.

You have provided a copy of the lease agreement and addendum dated February 6, 1996, between the parties. The addendum contains a specific provision, paragraph 33.1 providing that "it is hereby expressly understood and agreed by lessor and lessee that the lessor has no interest in or right to any alcoholic license, permit or approval heretofore or hereafter issued to the licensee by any government authority, and lessor has no right to obtain any such right or interest upon default of the lessee hereunder or for any other reason." Review of your a lease and addendum confirms that lease payments are not tied in any way on a percentage basis or otherwise to income generated by the proposed brewery licensee.

Based on the facts and representations set forth in your letters of December 1, 1995 and February 10, 1996, as well as review of the lease dated February 6, 1996, and an addendum dated February 6, 1996, it appears that subject to the limitation noted below, State statutes and Division regulations do not prohibit the officer/employee of a retail consumption licensee from becoming the landlord of the brewery licensee under the circumstances described. Generally, N.J.S.A. 33:1-43(b), the tied house statute, prohibits any owner, stockholder or officer or Director of any corporation, or any person whatsoever interested in any way whatsoever in the retailing of alcoholic beverages to conduct, own either in whole or part, or to be a shareholder, officer or director of a corporation or association directly or indirectly, interested in any brewery. By Formal Opinion 1964 - No. 3 (May 6, 1964) reproduced in ABC Bulletin 1564, Item 2, the Attorney General issued an opinion discussing whether or not certain types of leases could result in a prohibited acquisition of beneficial interest in a license by the landlord. With respect to a prohibited interest under the two license limitation law, the Attorney General stated:

> [i]f the rental agreement considered as a whole represents an acceptable landlord-tenant agreement not entered into for the purpose of circumventing the provisions of Chapter 152, such an agreement would not constitute a "beneficial interest" within the meaning of the statute. The test should be whether the agreement represents solely a reasonable method of compensating the landlord for the use of the premises or whether it is a device whereby the landlord can derive benefits equivalent to participation in the business conducted therein.

Review of the facts you have disclosed does not reveal any direct or indirect interest or beneficial interest by the landlord individually or as an officer of a retail consumption licensee in the proposed brewery licensee. However, N.J.A.C. 13:2-23.25 further provides in part that no retail licensee shall ". . . be employed by or connected in any business capacity whatsoever with any person interested directly or indirectly in the manufacturing or wholesaling of any alcoholic beverages within or without this State." Emphasis supplied. Thus sales from the proposed brewery to the retail consumption license in which the landlord holds an interest may be prohibited pursuant to N.J.A.C. 13:2-23.25. Accordingly, the opinion herein is subject to the or indirect requirement that the proposed brewery licensee may not make any direct sales of its product to Falk's Bar-Liquor, Inc., Plenary Retail Consumption License No. 2120-33-002-001 or any other retail alcoholic beverage license in which Norman Falk or Falk and Falk have an interest. Furthermore, it is specifically noted that this opinion is based solely on the information provided in the ex parte representations of New Jersey Brewery, L.L.C. by its manager, Joel C. Napolitan and is limited only to these representations. Should the actual facts be inconsistent with the submissions, the Division reserves the right to vacate this opinion and initiate appropriate administrative proceedings, if required.

Finally, please be advised that pursuant to a recent regulatory change, all requests for advisory opinions must

> Contain a certification that the requesting party is not aware that the subject matter of the inquiry is presently an issue pending in any federal or state court or any administrative or adjudicatory forum. If the requesting party is aware that the subject matter of the inquiry

is an issue pending in any court or forum, the nature of the proceeding and the identification of the court or forum shall be fully described in the request for the advisory opinion. N.J.A.C. 13:2-36.1(b).

Accordingly, the opinion contained herein is subject to receipt of your certification in conformance with the noted regulation. Please forward the certification to the undersigned at your earliest possible convenience.

Very truly yours,

David Bregenzer
Deputy Attorney General
Regulatory Bureau

GG/eam

3. OPINION LETTER - DISTRIBUTION OF WINE PRESERVATION SYSTEM TO RETAIL LICENSEES.

February 27, 1996

Mark Lauber, President
Lauber Imports
Conlawine Building
24 Columbia Road
Somerville, NJ 08876-3519

RE: Distribution of wine preservation system to retail licensees

Dear Mr. Lauber:

Your letter dated November 15, 1995 concerning the above-referenced matter has been referred to me for consideration and reply. In your letter you describe a wine preservation system utilized to vacuum seal still wines and pressurize sparkling wines

that would give restaurants the opportunity to pour an unlimited number of wines by the glass with no loss from spoilage. You state that you would lease or buy the system from the manufacturer and then lease or sell the system to retail consumption licensees. You advise that the sale of this system to retailers would not be connected in any way with the purchase of any wine product from you. You affirm that the restaurant can use the system for whatever wines they wish to preserve. You inquire whether or not sales of this system by you (in your capacity as an alcoholic beverage wholesaler) would violate any State alcoholic beverage statutes or Division regulations.

Please be advised that the lease or sale of the wine preservation system, as described, does not appear to be inconsistent with existing State alcoholic beverage control statutes or Division regulations. However, your proposed sale or lease of this equipment is subject to the Division's promotional requirements:

1. It must be offered nondiscriminatorily to all similarly situated licensees, N.J.A.C. 13:2-24.1;

2. Sales of this system are not conditioned upon the purchase or future purchase of alcoholic beverage products, N.J.A.C. 13:2-24.2;

3. You must maintain appropriate records of the sales promotion in your Marketing Manual as required under N.J.A.C. 13:2-24.5.

Additionally, you are cautioned that N.J.A.C. 13:2-24.2(a)(2) prohibits wholesalers from "loaning" facilities or equipment to licensees. The Tied House Statute, N.J.S.A. 33:1-43, prohibits wholesalers from "loaning" any property to retailers that is accompanied by an agreement to sell a product.

Please note that this approval is a result of conceptual review of your proposed sale or lease of the "wine preservation system" to retailers as described in your letter. Should the actual operation of your sales activity be inconsistent with State statute or Division regulations, the Division reserves the right to take appropriate action, if required.

Should you have any additional questions, please do not hesitate to contact me.

Very truly yours,

DAVID N. BREGENZER
DEPUTY ATTORNEY GENERAL

DNB:mer

4. OPINION LETTER - PURCHASE OF WINES IN A PRIVATE SALE FOR LATER AUCTION.

March 4, 1996

Liam Benson
O'Donoghues
205 1st Street
Hoboken, New Jersey 07030

Re: Purchase of Wines in a Private Sale for Later Auction

Dear Mr. Benson:

Thank you for your letter of February 1, 1996, concerning your request to purchase wine in a private sale that will be later sold by auction. You have advised that you are a holder of a Plenary Retail Consumption License. You have indicated that you and a partner, not a licensee, wish to purchase wine in a private sale from an estate. You and your partner then wish to resell these wines by auction. You have asked whether that activity would be permissible.

Please be advised that the Division law and regulations prohibit licensees from purchasing wines from unauthorized sources. N.J.S.A. 33:1-11; N.J.A.C. 13:2-23.12. In addition, it is illegal for the holder of a Plenary Retail Consumption Licensee to act as a "wholesaler" in selling alcoholic beverages to other retailers. N.J.S.A. 33:1-11. Likewise, your partner could not purchase alcohol beverages with the intent to re-sell these alcoholic beverages without holding the appropriate licenses. See N.J.S.A. 33:1-2.

You may wish to advise the estate that the Division does issue permits to executors to sell an estate's privately held wines by auction. The terms of that permit would also authorize a retailer to then purchase such wines for either personal consumption or to sell same on its licensed premises. If the wine is being held by an individual owner, the Director has, in the past, issued a permit to such person to sell the wine upon a showing of exceptional circumstances. If this may be the case, you may wish to encourage the owner of those wines to petition the Director directly for relief.

Please feel free to contact me should you have any questions or comments with regard to the above.

Very truly yours,

Analisa Sama Holmes
Deputy Attorney General
Regulatory Bureau

ASH/em/vkc

5. OPINION LETTER - EFFECT OF MUNICIPAL CONSOLIDATION ON PRE-EXISTING ALCOHOLIC BEVERAGE LICENSES.

March 4, 1996

Angelo J. Bolcato
Laddey, Clark, Coffin & Ryan
Attorneys at Law
350 Sparta Avenue
Sparta, New Jersey

Re: Effect of Municipal Consolidation on
Pre-existing Alcoholic Beverage Licenses

Dear Mr. Bolcato:

Your letter to Director Holl dated December 18, 1995, on the above referenced matter has been referred to me for consideration and response. You state in your letter that you represent the

Borough of Franklin which, together with the Township of Hardyston and the Borough of Hamburg is in the process of investigating municipal consolidation. You question what effect consolidation may have on existing liquor licenses within the three municipalities. You note that the licenses predate current statutes (in particular N.J.S.A. 33:1-12.14, which determines the number of retail licenses which can be issued based upon population). You argue that it appears reasonable that licenses already in existence will continue in existence after consolidation. You note some support of this proposition in N.J.S.A. 33:1-12.35, which allows for existing licenses to continue to be held and N.J.S.A. 33:1-12.16, which allows the continued existence, renewal, and transfer of licenses that could not otherwise be issued after enactment of the population cap law.

Since this is a matter that may appear before the Division in its adjudicatory capacity, no definitive opinion can be expressed concerning the merits of your position. However, at least one ABC Bulletin Item appears to give some support to your position. By letter dated January 25, 1935, former Commissioner Burnett responded to the inquiry of the solicitor of the Township of Haddon. As reported in ABC Bulletin No. 61, Item 8, (copy enclosed) a Bill had been introduced in the legislature which provided for the annexation of three sections of Haddon Township to the Borough of Collingswood. At that time the Borough of Collingswood did not permit the sale of alcoholic beverages within its boundary lines. The issues involved were whether or not licensees in their locations could continue to operate during the remaining term of the license period and would they be entitled to renewal of their license at the expiration of the term. Commissioner Burnett noted that "where a license has been granted and acted upon and the licensee has changed his position on the faith thereof, it constitutes a vested right during the term of the license subject to be divested only in the manner expressly set forth by the statute." However, the Commissioner also noted that a licensee is not "entitled" to a renewal and that no one has a vested right to renewal. He notes that "whether a renewal should be granted or not is, like the original issuance of the license, a matter to be decided in light of what then is determined to be the best common interest of the public at large."

I further note that generally, the grant or denial of a liquor license rests in the sound discretion of the municipality in the first instance. In order for an appellant to prevail in reversing the action of a municipality authority it must be shown that the action was unreasonable, constituting a clear abuse of discretion.

Fanwood v. Rocco, 33 N.J. 292 (1970); Nordco Inc. v. State, 33 N.J. Super. 277 (App. Div. 1957). However, with respect to renewal it has also been held that "an owner of a license or privilege acquires through his investment therein an interest which is entitled to some measure of protection." Township Committee of the Township of Lakewood vs. Brandt, 38 N.J. Super. 462 (App. Div. 1955).

Moreover, as then Commissioner Driscoll stated and as quoted by the Appellate Division in an unpublished decision reprinted in ABC Bulletin in 1509, Item 1:

> Where a license has been renewed from year to year, and where no disciplinary proceedings have been instituted for alleged misconduct during the current licensing year, and the licensee has thereby been encouraged to make a substantial investment in the business, common fairness requires that the refusal to renew be supported by valid reasons. Vasto v. Atlantic Highlands, ABC Bulletin 622, Item No. 4 (1944) . . . .
>
> As I have heretofore pointed out on many occasions, the grant of a renewal license, like that of an original license, is subject to the exercise of reasonable discretion by the local issuing authority. Where, however, as in this case, a license has been renewed year after year, a refusal to renew thereafter must be founded upon valid and substantial grounds supported by the weight of the evidence. Monesson v. Lakewood, ABC Bulletin 657, Item 1.
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> Bayonne v. B & L Tavern, A-894-61 (App. Div. April 15, 1963).

It has long been held that "[w]here a license has been renewed on an annual basis without placement of Special Conditions and there is no prior record of offenses during the year in question, common fairness dictates that the basis for non-renewal requires specific, definitive and documented acts of malfeasance or misconduct by the licensee, its employees or patrons." Salmanowitz vs. Hightstown, ABC Bulletin, 807, Item 2 (1948), Nordco, ABC Bulletin 1114, B & L Tavern, ABC Bulletin 1509, Item 1, page 8, (1963).

I hope that the above is some assistance to you in the planning for your municipal consolidations. As always, should you have any questions, please do not hesitate to contact me.

Very truly yours,

David Bregenzer
Deputy Attorney General
Regulatory Bureau

DNB/em

6. OPINION LETTER - RESTRICTED BREWERY LICENSE APPLICATION - INTERPRETATION OF RESTAURANT EXCEPTION.

March 13, 1996

William T. Cahill, Jr., Esq.
Cahill, Wilinski & Cahill
89 Haddon Avenue, Suite A, P.O. Box 80
Haddonfield, New Jersey 08033

Re: Restricted Brewery License Application - Interpretation of Restaurant Exception

Dear Mr. Cahill:

Receipt is acknowledged of your letter dated March 13, 1996, concerning the above captioned matter. In your letter you ask whether or not the "restaurant exception" in Title 33 (pertaining to Plenary Retail Consumption Licenses) applies to the two license limitation provision in the Restricted Brewery License portion of the statute. In other words, you ask if a person qualifies for more than two Plenary Retail Consumption Licenses, can they also qualify (assuming they are qualified in all other respects) for more than two Restricted Brewery Licenses?

Initially, we presume that the restaurant exception of which you are speaking, is that provision found at N.J.S.A. 33:1-12.31, et seq. which is commonly known as "the two license limitation

law." That enactment provides that after the effective date of that act (August 3, 1962, as amended on June 17, 1971) "[n]o person . . . shall, except as hereinafter provided, acquire a beneficial interest in more than two alcoholic beverage retail licenses . . . ." The exceptions to such provision include retail licenses issued to restaurants.

In contrast, the provision establishing the Restricted Brewery License is found at N.J.S.A. 33:1-10.1c. That provision states, in part, that "[n]otwithstanding the provisions of R.S. 33:1-26, the Director shall issue a restrictive brewery license only to a person or entity which has identical ownership to an entity which holds a plenary retail consumption license issued pursuant to R.S. 33:1-12, provided that such plenary retail consumption licenses is operated in conjunction with a restaurant regularly and principally used for the purpose of providing meals to its customers and having adequate kitchen and dining room facilities, and that the licensed restaurant premises is immediately adjoining the premises licensed as a restricted brewery . . . . No more than two restricted brewery licenses shall be issued to a person or entity which holds an interest in a plenary retail consumption license . . . ."

It is our interpretation that the provisions of the two license limitation law (N.J.S.A. 33:1-12.31) apply only to retail licenses whereas the two license limitation provision contained in N.J.S.A. 33:1-10.1c applies to restricted breweries licenses. As a result, it is our opinion that the two license limitation law (and the exceptions provided thereto) as contained in N.J.S.A. 33:1-12.31 et seq. do not apply to restrictive breweries. Accordingly, a person cannot have an interest in more than two restrictive brewery licenses even if such person held interests in more than two restaurants which were issued retail licenses under the noted exception provisions.

Please advise if you require further information.

Very truly yours,

GERALD A. GRIFFIN
Deputy Attorney General In-Charge
Regulatory Bureau

GG/eam

7. MR. G.'S INC. T/A PM WINE & SPIRITS V. BOROUGH COUNCIL OF THE BOROUGH OF FAIR LAWN - FINAL CONCLUSION DENYING APPLICATION TO PAY A MONETARY PENALTY AND FINAL ORDER RE-IMPOSING SUSPENSION OF LICENSE FOR 10 DAYS. MR. G.'S INC. T/A PM WINE & SPIRITS V. BOROUGH COUNCIL OF THE BOROUGH OF FAIR LAWN - ORDER DENYING MOTION REQUESTING RECONSIDERATION OF DENIAL OF ACCEPTANCE OF A MONETARY PENALTY.

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

APPEAL NO. 6262

MR. G.'S INC., T/A PM WINE & SPIRITS, LICENSE NO. 0217-33-011-003, APPELLANT, vs. BOROUGH COUNCIL OF THE BOROUGH OF FAIR LAWN, RESPONDENT.	ON APPEAL FINAL CONCLUSION DENYING APPLICATION TO PAY A MONETARY PENALTY AND FINAL ORDER RE-IMPOSING SUSPENSION OF LICENSE FOR 10 DAYS MUN. DIS. NO. 9513

Dennis Cummins, Jr., Esq., Representing the Appellant

BY THE DIRECTOR:

The Respondent issuing authority, by resolution dated April 25, 1995, imposed a ten day suspension against Appellant's license. That suspension was the consequence of the licensee's entry of a plea of non vult to a charge of selling, on August 5, 1994, alcoholic beverages to an 18 year old person who was under legal age to purchase or consume same, in violation of N.J.A.C. 13:2-23.1(a). Thereafter, Appellant filed an appeal with the Division and an Order was issued which stayed the suspension pending the determination of this appeal. Appellant appealed solely in order to petition that the suspension be compromised to a monetary penalty in lieu thereof.

Under the provisions of N.J.S.A. 33:1-31, only the Director of the Division of Alcoholic Beverage Control can convert a suspension to a monetary penalty. All other issuing authorities in penalizing a license must either suspend or revoke it. While the determination of whether or not to convert a suspension is in the sole discretion of the Director, in matters concerning municipal suspensions, the Division requests and seriously considers the position of local issuing authority. In the present case, the local issuing authority, by letters dated October 6 and November 1, 1995, has vigorously objected to the conversion to a monetary penalty stating that it had considered aggravating facts in determining to suspend Appellant's license for ten days.

Generally, the quantum of penalty to be imposed in a locally initiated disciplinary proceeding is left to the exercise of sound discretion of the issuing authority. Appeals to the Director, for purposes of compromising municipally imposed suspensions to monetary penalties, are thereafter considered on a case-by-case basis. While the Division has no specific regulations regarding conversion of municipal suspensions to monetary penalties, the Division has identified in various Bulletins, what matters we consider relevant in converting State imposed suspensions.

In Bulletin 2443, Item 6 (September 13, 1985) the Division advised that, generally, in State initiated disciplinary proceedings, for a first offense for violating the regulation which prohibits sales to an underage person the Division will consider accepting a monetary penalty. Thus, if this were a State initiated proceeding, and the Appellant were a "first offender," it presumably would fall within the penumbra of this policy and be accorded the presumption of having a monetary penalty accepted, all other things being equal. It must be stressed, however, that even for State initiated disciplinary proceedings, those articulated policies are merely general guidelines and each case must be assessed in consideration of all relevant aggravating or mitigating circumstances.[1] Furthermore, in every instance this Division assesses the circumstances of the offense as well as the history of the licensee before determining whether or not to accept a monetary penalty. As noted, however, the presumption accorded to licensees facing State penalties, does not necessarily apply to licensees appealing municipal suspensions. Nevertheless, the discussion contained in the noted bulletin is an appropriate starting point for evaluation of Appellant's request.

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[1]When a 100% change in shareholders of the licensed corporation, occurs, the license is generally considered to be free of prior

Besides the violation history of the licensee, the Division also carefully considers all relevant facts and circumstances regarding the charged violation. In the present instance, although the suspension was imposed for a single sale to an underage person, the police report (and attachment) submitted by the issuing authority indicates that the purchaser admitted to frequenting the licensed premises three times in the past with his friends and that each time he and his friends purchased alcoholic beverages from the same employee (Kyo Ho Yang). Moreover, the purchaser represented that neither at the current time nor in previous times had there been any attempt made by the licensee's employee to identify the purchaser and ensure that the purchaser was of legal age. In fact, he stated that at one time, when another clerk was in the store, Kyo Ho Yang did not sell beverages to a friend of his at that time, since the other clerk knew that his friend was underage. He stated that previous thereto, however, as well as subsequently, Kyo Ho Yang had unlawfully sold his friend alcoholic beverages.

Bulletin 2443 declared that attempts to make proper identification of underage persons (i.e., "carding"), even where same did not rise to an absolute defense, was still considered the primary mitigating circumstance in such matters. There is no evidence of that occurring in this case. Additionally, the representations of the underage purchaser, that he (and his friends) had purchased alcoholic beverages several other times in the past without being "carded," raises a reasonable inference that

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violations for penalty enhancement purposes. In the present instance, the new sole shareholder purchased same in March of 1995. Under the tenure of the prior shareholder, however, Division records reveal that the license accumulated a history of five State adjudicated proceedings during the period from 1986 through 1990, with the latest violation only being concluded in 1993. Three of those five adjudications involved charges of sales to underaged persons. Thus, the licensed corporation would not be considered a "first offender." Indeed, the violation being appealed is at least that license's sixth violation. Although a new purchaser unconnected with the prior licensed business, receives a "clean license" for penalty enhancement purpose, this violation occurred while the license was held by the predecessor licensee and thus this request must be evaluated in light of those facts.

same had occurred and such misconduct would be considered an aggravating factor. The adverse information contained in the police report and attachment are unrebutted although same were furnished to the Appellant herein.

The purchaser of the corporate stock of the licensee has submitted an affidavit which advises that he is the new purchaser of this license. He avers that he obtained same through institution of a law suit against the prior stockholder of the license, which was his mother-in-law. He also indicates, in response to the Division's specific inquiry, that at the time of the offense, he was the "acting temporary manager" of this store prior to his obtaining ownership of the license. While it appears that the Appellant herein was not directly connected to the offense in question, nevertheless it is clear that, as the manager of the licensed business when the offense occurred, he bears some responsibility since the employee was clearly not properly trained or supervised in order to identify and prevent sales to underage.

As a result of the above discussion, I find that, based upon the facts and circumstances of this case, a monetary penalty should not be accepted. Consequently, I shall order the stayed suspension to be reimposed.

Accordingly, it is this 6th day of December, 1995.

ORDERED that the appeal herein be and is hereby dismissed; and it is further

ORDERED that plenary retail consumption license #0217-33-011-003, issued by the Borough Council of the Borough of Fair Lawn to Mr. G's Inc., t/a PM Wines & Spirits for premises at 22-02 Maple Avenue, Fair Lawn, and the same is hereby suspended for a period of ten days, such suspension to commence at 3:00 a.m., Tuesday, January 2, 1996, and continuing until, 3:00 a.m., Friday, January 12, 1996.

JOHN G. HOLL
DIRECTOR

JGH/GG/bhs

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

APPEAL NO. 6262

MR. G.'S INC., T/A PM WINE & SPIRITS,	
LICENSE NO. 0217-33-011-003,	ORDER DENYING MOTION REQUESTING RECONSIDERATION OF DENIAL OF ACCEPTANCE OF A MONETARY PENALTY
APPELLANT,	
vs.	
BOROUGH COUNCIL OF THE BOROUGH OF FAIR LAWN,	MUN. DIS. NO. 9513
RESPONDENT.	

Dennis Cummins, Jr., Esq., Representing the Appellant

BY THE DIRECTOR:

By Order dated December 6, 1995, I rejected the Appellant's application to pay a monetary penalty in compromise in lieu of the municipally imposed suspension of this license. I therefore dismissed the appeal and ordered the previously stayed suspension to be imposed commencing at 3:00 a.m., Tuesday, January 2, 1996, and continuing for ten days. By letter dated December 14, 1995, the attorney representing the Appellant requested that the stay of suspension be continued and that the matter be forwarded to the Office of Administrative Law (OAL) for a hearing. By letter dated December 21, 1995, that request was denied, but the Appellant was provided with the opportunity to file a Motion requesting reconsideration. That letter contained the wrong telephone fax number for Appellant's attorney and he apparently did not receive same until December 29, 1995. As a result, by letter dated December 29, 1995, the commencement of the suspension was postponed

until January 9, 1996 in order to provide Appellant with the opportunity to submit a motion for reconsideration. Appellant's attorney did so by Notice of Motion dated January 2, 1996, which was supplemented by further affidavits and information received at the Division on January 10, 1996. Because the supplemental information was received after the new commencement date of the suspension, the suspension was effectuated. For the following reasons I have declined to exercise my discretion to accept a monetary penalty and therefore the entire ten day suspension shall be served as previously ordered.

In my original Order denying Appellant's application to pay a monetary penalty, I indicated that my decision rested basically on two grounds: (1) that the licensee was not eligible because it was not a "first offender," and (2) that the circumstances surrounding of the offense reflected aggravating factors. Either ground was a basis to deny acceptance of a monetary penalty. I found both existed and consequently the suspension was ordered into effect.

Appellant's Notice of Motion asked for a plenary hearing to determine whether or not the within violation was the first violation for the new owner of the license or was it a violation for the old owner. Appellant also asked for a hearing to determine whether "unsubstantiated allegations" contained in the Fair Lawn Police Reports -- indicating that there had been prior unlawful sales occurring between the underage person and the clerk who served him -- were in fact true. The general rule regarding motions is that no oral argument is granted and that motions are determined based upon the papers filed. N.J.A.C. 1:1-12.2. See, also, R. 1:7-4. As a result, Appellant's request for a plenary hearing is DENIED.

Appellant also submitted certifications and information in taking issue with my determination that this violation was not a "first offense" for the licensee as well as with my consideration of referenced statements contained in the police report. With respect to the facet of Appellant's Motion which deals which the misconduct asserted in the police report, the current sole-shareholder submitted an affidavit which stated that the "clerk" who sold the alcoholic beverages to the underage purchaser was merely a visitor who was there only one or two days and who spoke very little English. Appellant further stated that such person is now in Korea and thus is not available to provide testimony or an affidavit. As a result of my determination regarding the other aspect of this matter, I find it is unnecessary to determine this issue and therefore I have disregarded any alleged aggravating facts concerning the commission of the offense.

With respect to the "first offender" issue, initially I note that were this a State initiated disciplinary proceeding, there is a presumption that, for a licensee being charged with a first offense of one sale to one underage purchaser, it is eligible to tender payment to be accepted, in compromise, in lieu of the imposition of a suspension. While this is a municipal appeal, nevertheless our records indicate that the license (then designated PRCL # 0217-33-011-003) issued to Mr. G's, Inc., had been the subject of five[1] disciplinary proceedings for violations dating from June 1986 through March 1990, with the latest violation having been finally disposed on July 22, 1993. Four of these five State prosecuted violations involved sales to underage persons. Appellant has not taken issue with those prior violations, but rather argues that the licensed corporation is now owned by a new sole shareholder and therefore the new licensee (designated PRCL # 0217-33-011-004) should be considered as a new license for purposes of accepting a monetary penalty.

In the footnote contained in my prior Order which rejected the Appellant's petition, I noted the general standards under which this Division assesses whether or not a licensee is considered a new licensee or not and thus can be considered a "first offender" or not. Those standards are incorporated by reference herein and shall not be repeated.

It is uncontroverted that the current violation occurred on August 5, 1994. At that time, according to Division License Bureau records, this license was held by the prior sole shareholder, Choon Ja Pak, who is represented to be the current sole-shareholder's mother-in-law. Division records also contain an application for a change of corporate structure which was filed on June 1995, and such application was accompanied by a corporate resolution dated March 23, 1995, which noted that as of March 23, 1995, Jou Hak Maing became the sole shareholder of Mr. G's, Inc. Thus, from this Division's licensing records, and in accordance with the Appellant's own application, the current offense occurred when the licensed corporation was held by the prior sole shareholder as the owner of record and thus the offender licensee was not a first offender.

The Appellant has now submitted a certification of Jou Hak Maing and his wife Kristine Maing which, along with an unsigned

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[1] The docket numbers of such violations are: S88-15920; S88-15970; S88-16098; S88-16586; and 90-17728

contract, reflects that on January 21, 1994, Jou Hak Maing entered into a sales agreement with the prior owner, Choon Ja Pak, to purchase the stock of the licensed corporation. By the terms of this sales agreement, the stock was to be transferred to Jou Hak Maing on February 21, 1994. Appellant has also submitted a copy of a Court Order dated March 23, 1995, which granted a constructive trust against the stock of Mr. G's for plaintiff (Jou Hak Maing) and provided authority to have such stock transferred to plaintiff. Apparently, as a result of such judicial Order, the March 1995 change of corporate structure application was filed. The new owner has also asserted that he is unable to forward appropriate income tax forms to us, from which the Division would determine the proper monetary penalty which should be tendered (if a penalty were to be accepted), because the prior owner apparently kept the profits of the business and filed and paid the income taxes during the period in question. Appellant, in a prior affidavit, advised that he was acting as the temporary manager prior to March 1995, and that while he helped out in the store, he did not receive any income and "had no knowledge of the finances in the operation of the store."

It is settled that under principles of alcoholic beverage control law, a person is generally considered to have an ownership interest in a license if (1) he can without constraint sell the license or otherwise dispose of it (subject to the action of the issuing authority); or (2) he has ultimate control over all of the operations of the license including sole control over the financial books and records and can directly receive the profits of the license. IMO M S & W Distributors, Inc., Bulletin 2404, Item #1. Based upon the Appellant's assertions as contained in his submitted affidavits and certifications, while the court may have found that he had a beneficial interest sufficient to have the stock transferred to him, nevertheless, he was not considered an owner of an interest in this license for alcoholic beverage control purposes. As a result, this offense occurred both actually and technically while the license was held by the previous owner and it is uncontroverted that the previous owner was not a "first offender" in terms of its prior disciplinary record. On this basis alone, I find no reason to exercise my discretion to accept a monetary penalty.

While the issue is not before me, I will indicate that, given the current sole-shareholder's involvement with this license when the offense was committed (family relationship, temporary manager, beneficial interest of stock ownership, and manager on the premises [albeit apparently absent from the immediate vicinity] when the

violation occurred), there appears to be more than sufficient connection to the prior licensee to conclude the new sole-shareholder would not necessarily be eligible to pay a monetary penalty in lieu of the imposition of a suspension.

Accordingly, it is on this 11 th day of January, 1996,

ORDERED that my prior order which effectuated the suspension commencing on January 9, 1996, be and the same shall remain undisturbed and the suspension be and the same shall continue in effect as referenced therein.

JOHN G. HOLL
Director

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Publication of Bulletin 2467 is hereby directed this
23rd Day of April, 1996

JOHN G. HOLL, DIRECTOR
DIVISION OF ALCOHOLIC BEVERAGE CONTROL