Division of
ALCOHOLIC
BEVERAGE
CONTROL

Bulletin

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

BULLETIN 2462 February 28, 1994

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NOTICE REGARDING SALE OF SACRAMENTAL WINES BY NEW JERSEY WHOLESALE LICENSES

Notice reminding wholesalers that they must obtain a sacramental Wine Permit in order to make sales to churches, synagogues and other bona-fide religious institutions; A religiously affiliated long-term care facility is not a bona-fide religious institution; Such permit does not authorize the sale of malt alcoholic beverages or distilled spirits for any purpose, nor does it authorize the sale of wine intended for table use by the clergy or any lay ministry; Prohibition against religious entities selling or distribution such wines to their congregations; Filing of reports with Director.

NOTICE REGARDING SALE OF SACRAMENTAL WINES BY NEW JERSEY WHOLESALE LICENSEES

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The Director recently accepted a $2,500.00 monetary penalty from a wholesale licensee who engaged in the improper sale of alcoholic beverages to a religiously affiliated long-term care facility under the perceived authority of a sacramental wine permit. Wholesalers are reminded that they are permitted to make such sales to churches, synagogues and other bona-fide religious institutions only if they have been issued a Special Permit by this Division. The permit, which is in effect with the license term (from July 1 to the following June 30) is issued for a fee of $25.00. The permit fee is not prorated.

Wholesalers should note that this permit authorizes only the sale and distribution of brand registered wines labeled "Approved for Sacramental Use," and are intended for use within the liturgical ceremonies of religious denominations. This permit does not authorize the sale of malt alcoholic beverages or distilled

spirits for any purpose, nor does it authorize the sale of wine intended for table use by the clergy or any lay ministry. Sale and delivery of sacramental wines may be made to any location that regularly conducts religious services or to such other place that a house of worship designates for storage.

Wholesalers are advised that religious entities which purchase sacramental wines are prohibited from selling or distributing such wines to their congregations. Wholesalers who engage in such sales, particularly where large quantities are involved and the facts reasonably indicate that such wines will be unlawfully re-sold or distributed, are subject to disciplinary proceedings.

Permittees are required to file quarterly reports with the Director, which include the names, address and quantities of product sold to each religious purchaser. Additionally, permittees must provide the Division with copies of all price lists or printed solicitations offered to religious purchasers. Permittees are reminded that prices and terms of sale for sacramental wines must be included in their monthly Current Price List (CPL) and may not be amended without prior approval from the Division, pursuant to N.J.A.C. 13:2-24.6.

2. SPALCI V. UNION - AMENDED ORDER VACATING PRIOR STAY ORDER (OF SPECIAL CONDITIONS PROHIBITING GO-GO DANCING).

Director issued Amended Order which vacated prior Stay Order and imposed special conditions which prohibited go-go girls from performing on licensed premises and prohibiting the sale of the license to any person who plans to utilize "go-go" girls on said premises.

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

APPEAL NO. 6051 SPALCI, INC. T/A VALENTINO'S RESTAURANT LICENSE NO. 2019-33-044-004 APPELLANT, vs. TOWNSHIP COMMITTEE OF THE TOWNSHIP OF UNION, RESPONDENT.	AMENDED ORDER VACATING PRIOR STAY ORDER MUN. REV. NO. 9316

A. Kenneth Weiner, Esq., Representing the Appellant

Stuart R. Koenig, Esq., Special Counsel, Representing the Respondent Township

BY THE DIRECTOR:

On June 30, 1993, Appellant, Spalci, Inc., filed an appeal with the Division of Alcoholic Beverage Control (hereinafter the "Division") from the imposition of certain special conditions on its license by respondent Township of Union. The Township had renewed Spalci's plenary retail consumption license no. 2019-33-044-004 for the 1993-1994 license term but made the renewal subject to the following special conditions:

a. prohibiting "go-go" girls from performing on Appellant's premises; and

b. prohibiting sale of the license to any person planning to use "go-go" girls on the premises.

At the same time Appellant filed its appeal, it also sought and obtained from the Division a stay of the special conditions pending the determination of the appeal. On July 20, 1993, nearly three weeks after the entry of the Stay Order, counsel for the

Township sought a hearing to vacate the Stay. Formal application for this relief was made on July 26 and the hearing was held on July 27 at the Division's offices in Trenton. The hearing was limited to the issue of whether the June 30 order should be canceled, modified or continued.

Both parties, ably represented by counsel, declined to offer live testimony, relying instead on various documents and arguments of counsel. After the hearing, both parties submitted supplemental briefs which have been received and considered.

The Township argues that the Division erred in granting the Stay because the Order, rather than preserving the status quo, had the effect of immediately allowing appellant to change its business to a "go-go" bar, something it had been prohibited from doing ever since it acquired the license in 1989. The Township argues that Spalci, Inc. voluntarily agreed to these special conditions in 1989 and has abided by them until the Division's Stay Order of June 30, 1993. According to one Jerome Petti, the township's self-styled "police commissioner," the conditions were originally sought in writing after the operators of another "go-go" establishment in the Township allegedly reneged on oral promises not to operate a "go-go" bar.

Appellant contends that the Stay Order "corrected a situation that should never have occurred and in fact has rectified an injustice that was perpetuated on Appellant in 1989" (original emphasis). Appellant argues that Mr. Spalliero, principal shareholder of Spalci, Inc., was improperly advised by counsel in 1989 that he had no choice but to agree to forego "go-go" operations. Appellant argues that it was only very recently that Mr. Spalliero learned at a seminar that he had a legal right to challenge the special conditions.

Counsel on both sides have raised a variety of other factual and legal issues, all of which can be fully aired at a plenary hearing.

Pursuant to N.J.S.A. 33:1-32, a municipality may impose special conditions on a liquor license if first approved by the Director. Respondent apparently sought and received ex parte approval from the Division of the special conditions in the 1991-92 license term but has not sought approval in any other license year.

It is apparent that until the entry of the Stay Order, Appellant had operated its business without "go-go" girls for nearly four years.

Counsel for the Township correctly argues that the Division's reliance on N.J.S.A. 33:1-31 as a basis for the Stay Order was misplaced. That section deals with appeals from license suspensions and revocations, not with special conditions imposed by municipalities.

The test for granting injunctive relief, such as a stay of an administrative action, is well-established. In order to justify the exercise of the Court's discretion to grant an interim restraint, the party seeking such relief must demonstrate the existence of the following four separate conditions:

1. The movant must demonstrate that there is a clear probability that it will prevail on the merits of the underlying controversy;

2. The movant must demonstrate that, in the absence of such a stay, the appellant will suffer irreparable injury;

3. The movant must demonstrate that the probability of harm to other persons will not be greater than the harm the appellant will suffer in the absence of such a stay; and

4. The movant must show that the public interest will not be adversely affected by such a stay.

Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Zoning Board of Adjustment of Sparta v. Services Electric Cable Television of N.J., Inc., 198 N.J. Super. 370, 379 (App. Div. 1985). Moreover, a stay is not a matter of right, even though irreparable harm may otherwise result. Yakus v. United States, 321 U.S. 441, 64 S. Ct. 660, 88 L.Ed. 834 (1944). Because a stay is the exception rather than the rule, GTE Corp. v. Williams, 731 F.2nd 676, 678 (10th Cir. 1984), the party seeking such relief must clearly carry the burden of persuasions to all of the prerequisites. United States v. Lambert, 695 F.2nd 536, 539 (11th Cir. 1983).

Monetary loss alone does not constitute irreparable harm. Morton v. Beyers, 822 F.2nd 634, 372 (3rd Cir. 1987), Citizen's Coach Co. v. Camden Horse RR Co., 29 N.J. Eq. 299, 303 (E & A 1878). Additionally, a stay is not a matter of right even if irreparable injury might result. It is an exercise of judicial discretion and the propriety of its issue is dependent upon the entire circumstances of the particular case. Virginian Railway Company v. United States, 272 U.S. 658, 672-3, 47 S.Ct. 222, 228, 71 L.Ed. 463, 471 (1926).

As is the case whether the action of an administrative agency or official is subject to judicial review, a presumption exists that the decision under challenge is reasonable and correct and that discretion legislatively delegated to such an agency or official has been properly exercised. Boyle v. Rite, 175 N.J. super. 158, 166 (App. Div. 1980); Commuter Operating Agency's Determination, 1676 N.J. Super. 430, 435 (App. Div. 1979), certif. den. 81 N.J. 261 (1979). One challenging such a determination accordingly has the burden of demonstrating that the determination was arbitrary, unreasonable or capricious. Morris Cty. v. Skokowski, 86 N.J 419, 414 (1981); N.J. Guild of Hearing Aid Dispensers v. Lone, 75 N.J. 544, 561 (1978).

It is clear that a preliminary restraint, such as the one entered in this case, should be designed to maintain the status quo. See U.S. v. Pavenick, 197 F.Supp. 257, 260 (D.N.J. 1961). In this case, the stay order had precisely the opposite effect. The stay order was improvidently granted.

Accordingly, it is on this 29th day of July, 1993,

ORDERED that the prior Stay Order staying the above-referenced conditions be and the same is hereby VACATED, as further provided below; and it is further

ORDERED that License No. 2019-33-044-004 for premises at 1181 Morris Avenue, Union, issued and renewed by the Township Committee of the Township of Union (Union County) for the 1993-94 license period, be and the same is hereby SUBJECT TO the hereinafter referenced Special Conditions (pending determination of this appeal or until sooner ordered by the Director):

a. prohibiting go-go girls from performing on Appellant's premises;

b. prohibiting the sale of said Plenary Retail Consumption License to any person who plans to utilize "go-go" girls on said premises; and it is further

ORDERED that these Special Conditions shall go into force and effect five calendar days after the execution of this Order.

JOHN G. HOLL
ACTING DIRECTOR

3. JMJ, JR. V. PALISADES PARK - SUPPLEMENTAL ORDER STAYING SUSPENSION AND ORDER TO SHOW CAUSE WITH SPECIAL CONDITION (PROHIBITING GO-GO DANCING) CONTINUED.

Supplemental Order issued staying suspension and Order to Show Cause extending license with special condition imposed that no go-go dancing or similar entertainment whatsoever may take place on the licensed premises, was continued. Appellant/Licensee failed to sustain its burden of showing that the action of the Respondent/Issuing Authority was prima facie erroneous, and that irreparable injury would result to the Appellant if the term of the license was not extended without being subject to the referenced special condition.

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

APPEAL NOs. 6089 & 6090

JMJ JR., INC. T/A DANCIN, SPORTS BAR & CAFE APPELLANT, vs. MAYOR AND COUNCIL OF THE BOROUGH OF PALISADES PARK, RESPONDENT.	SUPPLEMENTAL ORDER STAYING SUSPENSION AND ORDER TO SHOW CAUSE WITH SPECIAL CONDITION CONTINUED MUN. REV. NO. 9355

David M. Watkins, Esq., Representing the Appellant

Stephen A. Cochrane, Esq., Representing the Respondent
(Joseph A. Pojanowski, III, Esq., Special Counsel)

BY THE ACTING DIRECTOR:

I. PROCEDURAL FACTS:

The within appeal stems from a hearing held on September 14, 1993 by the Respondent Issuing Authority on the licensee's application to renew its license for the 1993-1994 license term as well as with respect to certain disciplinary matters. As a result of that hearing, the Respondent apparently did not renew the license and it also imposed a two year suspension of the Appellant's license.

Thereafter, Appellant filed a Notice and Petition of Appeal of the two year suspension and a Petition for extension of its prior license into the new term. The Acting Director of this Division, John Holl, in reaching his initial determination in this matter, reviewed both the Notice and Petition of Appeal as well as the Resolution denying renewal of this license, dated September 14, 1993 (effective September 16, 1993) and various documents submitted by the issuing authority. Those documents represented that this premises, on 40 separate occasions during the period from March until May 1993, allowed, permitted or suffered lewd or immoral conduct by go go girls. As a result, on September 16, 1993, he issued both a Stay Order as well as an Order to Show Cause which extended the prior license into the new term. Nevertheless, based upon the allegations of numerous acts of misconduct occurring on the premises, both such Orders were issued subject to the following special condition:

> No go go dancing or similar entertainment whatsoever may take place on the licensed premises.

The Appellant thereafter requested a hearing for purposes of having the Order modified to remove the imposed Special Condition. The hearing was held as noted below, after being set in coordination of the attorneys' schedules in conjunction with the undersigned's schedule.

II. EVIDENCE PRESENTED AT THE HEARING:

On November 3, 1993 a hearing was held before the undersigned who functions as Acting Director, pursuant to the provisions N.J.S.A. 33:1-35, in the absence or unavailability of John Holl, who is otherwise the duly appointed Acting Director of this Division.

During the hearing before me, no evidence was presented by either side. Rather, Respondent's counsel proffered arguments as to why the Respondent's action should be affirmed and, at the least, why the special condition should remain on the Stay and Extension Orders. In rebuttal, the Appellant, through its counsel, advised that Appellant was not provided with an opportunity to present a defense at the hearing held before the municipal court

judge. Thereafter, Appellant determined not to present any defense when the within matter was heard before the local issuing authority. Appellant, its counsel advises, would have vigorously asserted defenses to such charges, if it had had such an opportunity to do so before the municipal court judge. When Appellant was advised that the issuing authority would determine whether or not the charges were sustained, based upon its consideration of municipal court convictions (as well as the transcript of the proceedings before the judge), Appellant determined not to present a defense. Appellant's counsel also advised that as a result of the special condition placed upon the Stay Orders, Appellant has closed down approximately one-third of its premises on which such go-go entertainment had previously been operated.

At the conclusion of the hearing before me, both parties were provided the opportunity to submit post-hearing information and evidence. Both attorneys have done so and their submissions have been reviewed and considered in reaching my decision herein. Additionally, by letter dated November 17, 1993, Appellant has submitted a response to Respondent's letter memorandum.

III. APPLICABLE LEGAL STANDARDS:

N.J.S.A. 33:1-31 provides that the filing of an appeal shall act as a stay of the disciplinary action appealed from, unless the Director shall otherwise order. On the other hand, N.J.S.A. 33:1-22 provides that

> [w]here an appeal is taken from the denial of an application for a renewal of a license, the director may, in his discretion, issue an order upon the respondent issuing authority to show cause why the term of the license should not be extended pending the determination of the appeal, together with ad interim relief extending the term of the license pending the return of the order to show cause. If it shall appear upon the return of the order to show cause that the action of the respondent issuing authority is prima facie erroneous and that irreparable injury to the appellant would otherwise result, the director may, subject to conditions as he may

impose, order that the term of the license be extended pending a final determination of the appeal.

In making my decision on the matter herein under consideration, I shall utilize the standards referenced in N.J.S.A. 33:1-22; specifically, my determination herein shall be based upon my assessment of whether or not: (1) the action of the respondent issuing authority was prima facie erroneous, and (2) irreparable injury will result to the Appellant if the term of the license is not extended without being subject to the referenced special condition.

IV. EVALUATION OF EVIDENCE, TESTIMONY AND ARGUMENT:

Appellant's position appears to basically be based on three arguments: (1) With the dismissal of the municipal court complaints against the Appellant Licensee, there no longer is a foundation for the action taken against the license by the Respondent; (2) the inability to present a defense before the municipal court judge prejudiced the Appellant-Licensee and prevented it from rebutting the charges; and (3) the evidence submitted at the hearing before the local issuing authority was insufficient to support the charges. The Respondent argues to the contrary.

In evaluating this matter, I find that the Respondent has, through the joint submission of summarized testimony, indicated that some evidence was submitted concerning the alleged underlying offenses. In making this determination, I have reviewed the portions of the transcripts of the testimony taken before the municipal court judge which the parties have supplied me.

While the convictions, as found by the municipal court judge, were overturned on appeal, the Superior Court judge, who was acting in an appellate capacity, did so on the basis that the implicated portions of the municipal ordinance (No. 895) were unconstitutional. Notwithstanding the determination that the Ordinance applied to Appellant was found unconstitutional, however, the testimony of the actions which were observed by Borough Construction Code Official John Candelmo and Borough Police Lieutenant Service was competent evidence. Both sides agreed before me that same was available for consideration by the members of the the municipal issuing authority for their consideration.

While it is unfortunate that the Appellant was not, for whatever reason, afforded an ability to present a defense before the municipal court judge, I note that Appellant's counsel apparently was provided the opportunity to object and cross examine the Respondent's witnesses, both of which he did with vigor. Of more import, Appellant could have presented its defense before the local issuing authority when the gravamen of the current matter was under consideration, but it chose not to. As a result, I find that the first two bases of Appellant's argument are without merit in determining whether or not the Special Condition should be lifted at this time.

With respect to Appellant's remaining argument, a fundamental determination is whether or not there was sufficient evidence in order to prima facie sustain the charges which, in turn, would obviate a finding that its actions were prima facie erroneous.

A. EVIDENCE AS TO CLOTHING WORN BY THE DANCERS:

Initially, I note that in the present instance, both sides agree that the dancers were not totally nude, nor were they topless or bottomless. Appellant asserts that the girls were wearing bathing suits. I shall hereafter quote from the testimony provided to me whose pages, unfortunately, are not numbered. In such testimony, I find the witnesses indicated the following:

From John Candelmo:

A "Well I guess they appear to be bathing suits. I don't think they'd go swimming in them."

* * * *

And, from Lt. Servis:

A "They were all wearing clothing which barely covered their breast, only the nipple area of the breast. Above the waist."

Q "Okay. And below the waist?"

A "Below the waist I think they were wearing what best could be described as G-strings which would be a triangular shape of cloth that would cover their genital areas and then just a string that attached up to their waist and around their waist."

* * * *

Q ". . . . What about on the reverse side? Was there any clothing on the reverse side covering he buttocks?"

A "No, none at all; just a string that ran from what would be the point of the triangle in front up to a string that went around the waist."

* * * *

A "The costuming has been the same throughout these summons. Occasionally there would be a woman dressed more in what you might consider lingerie than bikini clad or scantily clad, but it was basically all very -- clothing that just barely covered their breasts and their genital area."

* * * *

A "There were many times, every time, where the breasts were not covered. There were (sic) never a time when the nipple was uncovered."

* * * *

A "Yes. Under the negligee was her skin. Over her skin was her negligee."

Q "And you couldn't see her nipple. You could see an outline but you couldn't see the nipple?"

A "That's correct."

B. EVIDENCE AS TO DANCERS AND PATRONS ACTIVITIES:

Both sides recognize that N.J.A.C. 13:2-23.6(a)1 does more than merely prohibit totally nude dancing. IMO Playpen, Inc., Bulletin

1778, Item 5 (1967). The argument between the parties is whether or not the activities of the go go girls at this premises would be deemed "lewd and immoral conduct" as would be determined under ABC laws and regulations. Appellant argues its girls were always ". . . properly clothed and that they were [not] wearing anything other than bathing suits which one might wear at a local swimming pool." The respondent argues to the contrary.

From my review of the adduced testimony, I find that it is clear that if Appellant's dancers were "properly clothed," they were but within a string's width of violating the clothing standard. I have no doubt that some of the testimony referenced above could be construed to place Appellant's dancers' costumes within the penumbra of violative conduct as referenced in Playpen, supra. See, too, IMO Fizer Corp., Bulletin 2334, Item #2 (1979).

In evaluating cases such as these, where neither total nudity nor topless nor bottomless dancing is involved, often the action of the dancers and patrons is quite instructive. In the current case, Respondent's witnesses testified as follows:

Q "Did they use a pole in their performance?"

A "Yeah. There are poles and pillars there and they dance around the poles. They wrap their legs around the poles and they sort of sit down and up while they're holding the poles."

* * * *

A "At that time on that same platform behind the bar there were two women dressed in a similar manner as just described, also dancing or making exaggerated movements to the music and clinging to these poles."

Q "At any time did you see any patrons place dollars bills in the G-string at all?"

A "Yes. The girls will come up to the bar and lean over or stand on their toes and gentlemen patrons would put folding money either into the --- what would be the bra area of their clothing or into the G-string of their bottom clothing."

* * * *

A : "This time there were three women, also similarly clad, also dancing behind that -- platform behind the bar, also using the poles and the pillars in an exaggerated movement of their bodies."

There were several instances of additional, similar testimony offered, but I find it would be surplusage to list same.

V. DISCUSSION AND ANALYSIS:

A. ACTIONS OF THE RESPONDENT NOT PRIMA FACIE ERRONEOUS:

From the above, I find that the evidence could support a finding that "lewd and immoral activity" may have taken place upon the licensed premises, even if the dancers were fully clothed. Cf., IMO Howell's Sportsman's Inn, Inc., Bulletin 2169, Item #3 (1974). Whether or not such conduct actually transpired is better left to the de novo appeal plenary hearing, at which time further specification of the dancing can occur. From the vast number of various types of go-go dancing cases which come before this Division, we have found some go-go girls gyrate around poles in such a manner which leaves little doubt of the sexual content and implication of their "dances." Moreover, the placing of tips in the dancers bra and g-strings would appear to violate the Division's regulations. Ibid. As a result of the above, I cannot find, based upon the record before me, that the action of the respondent issuing authority was prima facie erroneous.

B. APPELLANT WILL NOT SUFFER IRREPARABLE INJURY:

The information presented to me indicated that the Licensee continues to operate two thirds of its premises, with only one-third shut down as a result of the special condition which prevents go-go dancing. Clearly, Appellant could also open up such portion of its premises to non go-go entertainment and activities if it so wished. The determination to close that portion of the premises is voluntary on the Appellant's part.

Based upon the above, it appears that Appellant is fully exercising its license privilege on two thirds of its premises.

Appellant has voluntarily suspended its activities on the other portion of the premises. It can resume exercising such privilege at any time, albeit without go-go dancing entertainment. It therefore appears that whatever suspension of the Appellant's license privilege is occurring, same results from the Appellant's voluntary decision. In any case, whatever harm Appellant is suffering, same would appear to be pecuniary in nature. It is well settled that "[h]arm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe v. De Gioia, 90 N.J. 126, 132-133 (1982). Stated in the converse, monetary loss alone generally does not constitute irreparable harm. Morton v. Beyers, 822 F.2nd 364, 372 (3rd Cir. 1987). Appellant therefore has not demonstrated it is or will suffer irreparable harm as a result of the special condition placed upon its license privilege.

VI. PRELIMINARY FINDINGS AND CONCLUSIONS:

As a result, I do not find that Appellant has met its burden in order to support the modification or cancellation of the special condition placed upon its license. Based upon the above, I shall continue the Stay Orders, and I shall continue the Special Condition placed upon them.

It is, on this th day of November, 1993,

ORDERED that the prior Orders which extended the term of License No. 0245-33-013-003 for premises located at 15 Grand Avenue, Palisades Park issued by the Mayor and Council of the Borough of Palisades Park for the 1993-94 license period pending return of this Order to Show Cause or until sooner order of the Director; be and the same is hereby continued, such Orders continuing to be subject to the following special condition:

No go go dancing or similar entertainment whatsoever may take place on the licensed premises.*

*This Order is also subject to any Special Conditions that may have been imposed upon this license for the 1992-93 license term.

JOHN G. HOLL
ACTING DIRECTOR

by: GERALD A. GRIFFIN
ACTING DIRECTOR

GG:bhs

4. SALVATORE AVENA V. ATLANTIC CITY ABC BOARD - ORDER CONTINUING STAY OF SUSPENSION PENDING DETERMINATION OF APPEAL.

Order issued continuing stay of suspension pending determination of appeal of license suspension for 75 day period; Respondent/Issuing Authority failed to produce a residuum of competent or credible evidence to support its position that the public interest required that this suspension be ordered into effect without the licensee having first had the opportunity to argue its appeal before appropriate administrative authorities.

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

APPEAL NO. 6082 SALVATORE AVENA T/A PLAYGROUND LOUNGE LICENSE NO. 0102-33-239-004 APPELLANT, vs. MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF ATLANTIC CITY, RESPONDENT.	ORDER CONTINUING STAY OF SUSPENSION PENDING DETERMINATION OF APPEAL

PETER L. BRUSO, ESQ. (JACOBS, BRUSO AND BARBONE, P.A.)
ATTORNEYS FOR APPELLANT

BEVERLY GRAHAM-FOY, ESQ. (PAUL J. GALLAGHER, ESQ., CITY SOLICITOR),
ATTORNEYS REPRESENTING RESPONDING ISSUING AUTHORITY

BY THE ACTING DIRECTOR:

I. PROCEDURAL FACTS:

The Respondent Issuing Authority, by Resolution dated 8/10/93, found the above referenced Licensee guilty of:

1) on January 20, 1993, allowing, permitting or suffering, upon the license premises, the employment of a person under 18 years of age, in violation of N.J.A.C. 13:2-14.1(b) and

2) on January 20, 1993, failing to maintain an accurate employee list, in violation of N.J.A.C. 13:2-23.13(a)3.

As a result, the respondent imposed a suspension of license for 75 days, which suspension was to commence on September 1, 1993.

Upon the Appellant's filing of an appeal, an Order was issued, under the provisions of N.J.S.A. 33:1-31, which stayed the suspension pending the determination of the appeal. Thereafter, by letter dated August 31, 1993, the attorney for the Respondent Issuing Authority requested that the Stay Order be vacated. As a result of that request, the Division scheduled a hearing before the Director in order to consider the Respondent's objection to the continuation of the stay of suspension.

II. EVIDENCE PRESENTED AT THE HEARING:

At the hearing held at this Division on September 23, 1993, the Respondent presented no evidence concerning the alleged violations for which this suspension was imposed. Rather, the Respondent advised that this licensed premises was:

1. on 10/23/92, the subject of an alleged pickpocket incident reported to the police by a complainant who stated same occurred while he was a patron at this premises and was sitting with six women. (Apparently, no charges against the license were issued nor were any arrests made);

2. on 6/24/93, the site of a brawl allegedly involving employees and patrons of the premises (for which no charges against the license were indicated as having been issued); and

3. adjacent to a parking lot at which a homicide apparently occurred some four to five months ago.

During the hearing, the only evidence presented by the Respondent concerning the first two above noted incidents were copies of two police reports. The detective presented by the Respondent as its only witness stated he had no personal direct knowledge concerning the contents of such police reports. With respect to the third and most serious violation, the homicide, the witness advised that the matter was still under investigation. He indicated that the only connection with the licensed premises at present appeared to be a relationship between the victim and a dancer-employee at this premises. However, upon direct questioning, the witness stated that he did not mean to imply that there was any connection between this licensed premises and the homicide.

In rebuttal, the attorney representing the Licensee argued that the licensed premises is within a one to two minute walk from Trump Plaza Casino and he suggested that it is common for people to report that their money has been stolen rather than admit to the embarrassment of having lost it at the casinos. With respect to the second suggested incident, the Licensee's attorney presented a witness who advised that he was the custodian on duty on the night in question. He stated that none of the bar's employees were involved in any altercation with the patrons; rather it was the patrons who were escorted out of the premises at closing time, who were arguing among themselves and same apparently caused a disturbance outside of the premises.

At the conclusion of the hearing, both parties were provided the opportunity to submit post-hearing briefs. Both attorneys have done so and their submissions have been reviewed and considered in reaching my decision herein.

III. DISCUSSION AND ANALYSIS:

N.J.S.A. 33:1-31 provides that the filing of an appeal shall act as a stay of the suspension action appealed from, unless the Director shall otherwise order. Upon judicial review, it has been held that the Director has the authority to deny a stay, that but such denial "must be based on the determination of an overriding public interest to such a degree that immediate cessation of the activities is required." Parrillo's vs. Bellville Excise Board et al., A-1893-78 (unreported)(App. Div. 1979) Page 3 of slip opinion. In this instance, the Respondent has presented no evidence or information surrounding the underlying offenses for which this 75 day suspension was imposed. While the quantum of penalty to be imposed upon a determined violation is in the reasonable discretion of the issuing authority, I note that for similar violations, the State precedent penalty bulletin (Bulletin 2453, Item #2 dated October 31, 1993) suggests a warning for a first offense. As a result, absent extremely serious aggravating circumstances, the offenses sited by Respondent do not appear to be serious violations of the ABC law and regulations.

With respect to the evidence produced regarding the other alleged incidents, only mere hearsay in the form of police reports was produced with respect to the first two matters. While, in administrative proceedings, hearsay is admissible, generally there must be a residuum of competent evidence to support the proffered proposition. Weston v. State, 60 N.J. 36, 51 (1972). None was produced and therefore I shall not consider these two alleged incidents.

With respect to the most serious allegation, even the City's own witness admitted that he was not implying that there was any connection between the licensed premise and the homicide. As a result, based upon the record before me, there is a failure of credible evidence which supports the Respondent's assertions. Consequently, I am unable to find that the Respondent has met its burden by demonstrating that the public interest requires that this suspension be ordered into effect without the Licensee having first had the opportunity to argue its appeal before appropriate administrative authorities.

Based upon this hearing and adduced evidence, as referenced above, I shall hereafter continue the Stay.

Accordingly, it is on this day of October, 1993,

ORDERED that the Stay Order dated September 2, 1993, be and the same is hereby continued and the Respondent's Order of Suspension be and the same is hereby continued to be STAYED pending the determination of this appeal.

JOHN G. HOLL
Acting Director

By: GERALD A. GRIFFIN
Acting Director

5. INNKEEPER, INC., T/A MASON JAR V. TOWNSHIP COUNCIL OF THE TOWNSHIP OF MAHWAY AND REMINGTON, INC. - FINAL CONCLUSION AND ORDER REVERSING DECISION BELOW AND REMANDING TO TOWNSHIP COUNCIL OF MAHWAH TO PROVIDE AN OPPORTUNITY FOR REMINGTON, INC., TO REQUEST A PLACE-TO-PLACE TRANSFER.

The licensee was evicted from its licensed premises by a foreclosure action. The licensee later reoccupied the premises and sought the approval of the municipality for a person to person transfer of the license. The municipality approved the transfer finding that no place to place transfer application was necessary which was affirmed on appeal by the Administrative judge. The Director reversed the action of the municipality and held that a place to place transfer of a license must be applied for when a licensee involuntarily loses possession of its premises by operation of law for any period of time.

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

APPEAL NO. 5965 INNKEEPER, INC. T/A MASON JAR, APPELLANT, V. TOWNSHIP COUNCIL OF THE TOWNSHIP OF MAHWAH AND REMINGTON, INC., PRCL NO. 0233-33-002-009 RESPONDENTS.	FINAL CONCLUSION AND ORDER REVERSING THE DECISION BELOW AND REMANDING TO TOWNSHIP COUNCIL OF THE TOWNSHIP OF MAHWAH TO PROVIDE AN OPPORTUNITY FOR RESPONDENT REMINGTON, INC., TO REQUEST A PLACE-TO-PLACE TRANSFER OAL DKT. NO. 8101-92

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INITIAL DECISION BELOW

HONORABLE JEFFREY GERSON, ADMINISTRATIVE LAW JUDGE

Decided: July 23, 1993 Received: July 28, 1993

BY THE DIRECTOR:

I. PROCEDURAL HISTORY

The Appellant, Innkeeper, Inc. (Innkeeper) appealed the decision of the Township Council of the Township of Mahwah (Township) which, by resolution dated September 9, 1992, granted a person-to-person transfer of Plenary Retail Consumption License No. 0233-33-002-009 from Crossroad Caterers, Inc. (Crossroad), to Remington, Inc. (Remington).[1] The Appellant appealed both the granting of the person-to-person transfer request as well as the finding by the Township Council of Mahwah that no place-to-place transfer was required. Upon the filing of an answer to the appeal with this Division, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case. On December 22, 1992, the Appellant, through its attorneys, filed a motion with

1. Prior to this appeal, Crossroad declared bankruptcy. The pending transfer of the liquor license and objections by Innkeeper then were litigated before Judge Tuohey of the United States Bankruptcy Court, District of New Jersey, as a core proceeding in an action to lift the automatic stay. Judge Tuohey denied the application, enjoined Innkeeper from appearing before the Township Council or any regulatory agency to object to the transfer of the liquor license, and found, inter alia, that a place-to-place transfer of the liquor license was not required. Judge Tuohey specifically ordered that the transfer of the liquor license to Remington be authorized, "subject to all relevant and appropriate statutory/ legal requirements." On appeal to the United States District Court, Judge Rodriguez vacated the injunction and permitted Innkeeper to attend the Township hearing and raise its objections.

At the hearing before the Township, the Appellant raised various objections, including the asserted requirement that a place-to-place transfer application was required. The Township dismissed Appellant's objections and passed Resolution No. 101-92A, which granted the person-to-person transfer and found, in part, that the Bankruptcy Court, despite making findings and legal conclusions, had no jurisdiction and they were not bound by the Court's opinion. The parties to this appeal conceded before the Administrative Law Judge that the Bankruptcy Court's decision was not binding. I find that Judge Rodriguez's vacation of the permanent injunction set aside all proceedings under Judge Tuohey's order to deny lifting the automatic stay. McKay v. Estate of McKay, 205 N.J. Super. 609, 614-15 (Law Div. 1984) (quoting 49 C.J.S., Judgments S306, at 557-58). Thus, Judge Tuohey's findings are not binding on this Division. DeNato vs. Finch, 436 F.2d 737 (3d Cir. 1971).

the Director of the Division of Alcoholic Beverage Control to recall this matter from the Office of Administrative Law for a summary disposition of the appeal. On April 8, 1993, the Appellant's request to recall the matter from the Office of Administrative law was denied. Thereafter, cross-motions for summary judgment were filed with the Office of Administrative Law and it was agreed by all parties that the salient facts of the appeal were not in dispute. The Administrative Law Judge therefore rendered his Summary Decision wherein he recommended that the appeal be dismissed and the action of the issuing authority be affirmed.

Written Exceptions to the Initial Decision were filed on behalf of the Appellant/Innkeeper, and Replies thereto were received on behalf of Remington in accordance with the provisions of N.J.A.C. 1:1-18.4(d). Relevant Exceptions and Replies shall be discussed hereinafter.

The time to render a final decision was extended by properly executed orders and a decision must be rendered by the Director on this matter on or before January 13, 1993.

II. FACTUAL SUMMARY

The facts essential to a determination in this matter are not in dispute. Thomas Lynch was the principal owner of Crossroad and M & L Equities, Inc. (M & L). M & L owned the building and land located at 209 Ramapo Valley Road, Mahwah, New Jersey, a hotel facility known as "The Mark". Crossroad was the holder of a plenary retail consumption license at that location. Citizens First National Bank of New Jersey, which held a first mortgage on the building, later foreclosed on the obligation. On September 16, 1991, a court appointed rent receiver lawfully evicted Crossroad as a tenant for non payment of rent, depriving Crossroad of all possessory interest in the premises. On or about April 30, 1992, notice of a corporate structure change was filed on behalf of Crossroad which indicated that 97.5% of the shares of Crossroad had been transferred from Thomas Lynch to Citizens First National Bank of New Jersey. The remaining 2.5% continued to be held by Mr. Robert Timmes. The new shareholders of Crossroad allegedly activated the license at 209 Ramapo Valley Road and later, in July of 1992, a person-to-person transfer application was filed to transfer the license to Remington. After a hearing, and over the continuing objections of the Appellant, the Township granted the person-to-person transfer application. The Township specifically determined in its Resolution that a place-to-place transfer was not required in this matter and noted that, if such a transfer would be required, a waiver of the municipal "distance between the premises"

ordinance would be required since the licensed premises of the Appellant at 221 Ramapo Valley Road is within one thousand (1,000) feet of the subject premises.

III. ISSUE

In his Initial Decision, the Administrative Law Judge determined that the issue to be decided was whether or not the Township Council, in refusing to require a place-to-place transfer of the license in this matter, acted unreasonably or arbitrarily in clear abuse of its discretion. Citing Lyons Farms Tavern, v. Municipal Board of Alcoholic Beverage Control, 55 N.J. 292, 303 (1970), the Judge noted that the local issuing authority's decision is to be entitled to great deference:

The conclusion is inescapable that if the legislative purpose [behind the New Jersey Alcoholic Beverage Control Act, N.J.S.A. 33:1-1 through 4.1] is to be effectuated, the Director and the Court must place much reliance upon local action. Once the municipal board has decided to grant or withhold approval of [an] . . . application of the type involved here, its exercise of discretion ought to be accepted on review in the absence of clear abuse or unreasonable or arbitrary exercise of its discretion. Initial Decision at page 3.

In its Replies to the Exceptions, the Respondent also emphasized that the above cited statement is the proper standard for review in this appeal. The Respondent noted in its reply:

On appeal from the initial determination of the municipality, the standard for review is clear: appellant has the burden of demonstrating that the Mahwah Council, as issuing authority, abused its discretion by committing "a manifest mistake, clearly unreasonable action, or some more untoward impropriety." Rajah Liquors v. Division of Alcoholic Beverage Control, 33 N.J. Super. 598, 600 (App. Div. 1955).

While the Administrative Law Judge and Respondent have correctly set forth the standard of review of factual determinations of local issuing authorities, the issue whether a place-to-place transfer was required, in the circumstances of this case, is a legal decision, subject to a far less rigorous standard of review. In the instant case, no facts pertinent to the place-to-place transfer issue were in dispute. The significant

issue - whether the period of inactivity caused by the eviction triggers the requirements of N.J.S.A. 33:1-26 - is legal in nature and is not entitled to a presumption of correctness on review. See Mayflower Securities Co. V. Bureau of Securities, 64 N.J. 85, 93 (1973). The issue thus is not whether the municipal issuing authority abused its discretion, but whether it correctly applied the pertinent legal principles.

For the reasons set forth below, I find that the action of the Township was in error and I reject the Initial Decision of the Administrative Law Judge.

IV. ANALYSIS

Appellant argues that when the licensee was lawfully evicted from the licensed premises, the license acquired the status of a "pocket license," since it no longer had a premises. Appellant argues that such a "pocket license" may not be re-sited, even at its original location, without applying to the local issuing authority for a place-to-place transfer. In essence, Appellant maintains that the license needs to be transferred from the licensee's "pocket" to the original location.

In his Initial Decision Below, the Administrative Law Judge noted that the majority of the numerous cases cited by the Appellant do not resolve the issue presented in this matter.[2] The cases and letter opinions cited by the Appellant support the well established rule that a liquor license, in order to be used, renewed, issued or transferred, must be used or renewed by, or else issued or transferred to someone with a present possessory interest in the premises to be licensed at the time the license is being so used, renewed, issued or transferred. Initial Decision at page 4. The Administrative Law Judge properly distinguished most of the exhaustive list of cases cited by the Appellant from the instant case on the basis that those cases dealt with situations in which the applicant had no right to possession of the premises sought to be licensed at the time licensure was sought. In its Exceptions, the Appellant agrees that the cited cases deal with the lack of a possessory interest of an applicant or a licensee in the premises at the time of issuance or renewal of a license. In the instant case, it is undisputed that Crossroads was lawfully evicted and lost possession of the premises sought to be licensed for approximately seven (7) months, but then regained it prior to applying for license renewal or transfer.

2. The case and Bulletin Items in question are aptly cited and summarized in the Judge's Initial Decision at pages 4-5 and are therefore not reproduced herein.

In applying In re Clayton, ABC Bulletin 250, Item #11 (1938), the Administrative Law Judge surmised that the only critical times of possession by a licensee were at the periods of issuance, renewal or transfer. I disagree that a licensee must have a possessory interest in the premises to be licensed only at the so-called "critical times" of issuance, renewal or transfer. Rather, both the statutory mandates of the Alcoholic Beverage Control Law and the regulations promulgated thereunder provide clear justification for requiring that licensees maintain a continuing possessory interest in the licensed premises. This requirement furthers continued compliance with the Alcoholic Beverage Control Act, the regulations promulgated thereunder and the requirements of issuing authorities.

A review of the statutory scheme reveals a number of provisions which make it clear that a licensee must maintain a continuing possessory interest in the licensed premises if it is to meet the obligations imposed under our Statutes. For example:

N.J.S.A. 33:1-12 establishes certain classes of licenses and limits the activities which can be conducted by different classes of licensees on the licensed premises. A licensee cannot control the activities on a licensed premises if it has no possession or control over the premises. Accordingly, the licensee would be unable to ensure that statutory provisions are complied with.

N.J.S.A. 33:1-26 provides, in part, that "[a]ny person who shall exercise or attempt to exercise, or hold himself out as authorized to exercise, the rights and privileges of a license except the licensee and then only with respect to the licensed premises, shall be guilty of a misdemeanor." Again, it is apparent that without a continuing possessory interest and the control of the licensed premises, the licensee is without means to prevent others, such as sham enterprises and unauthorized third parties, who hold themselves out as qualified to use the licensed premises.

N.J.S.A. 33:1-35 provides for a warrantless search and inspection of the licensed premises and licensed building by the Director, Division of Alcoholic Beverage Control, and authorized officials of the local issuing authority. Implicitly, such searches of licensed premises can occur at anytime and evidence of violations can be used to take disciplinary actions against licensees.

N.J.A.C. 13:2-23.29 further provides that "[b]y the acceptance of the license, the licensee consents to the detention, as and for

evidence, of any physical matter, including alcoholic beverages, found on the licensed premises . . . ." It is apparent that for such a consent to remain effective and for the statute to carry out its intended purpose, the licensee must maintain continuing possession of the licensed premises. It would be difficult for the Division to utilize this statutory grant of power if there were no assurance that the licensee retains possession and control of the premises.

N.J.A.C. 13:2-23.1 et seq. mandates that a licensee is charged with the responsibility of preventing various kinds of conduct or activity on the licensed premises ranging from narcotics activity, underage sales or consumption to brawls, nuisances, gambling, or in general, any type of illegal activity. Once again, unless the licensee maintains a continuing possessory interest in the licensed premises, it is without means to prevent the occurrence of these prohibited activities.

Moreover, should a licensee lose possession of its licensed premises or should there be other changes in the facts set forth in the license application, N.J.S.A. 33:1-34 and N.J.A.C. 13:2-2.14 require that the licensee give notice of such change in facts by filing same, in writing, with the local issuing authority and this Division within ten (10) days of the occurrence. This notice requirement not only protects the licensee from being held responsible for activities at a location over which it no longer has any control, but also provides the State Division of Alcoholic Beverage Control and the local issuing authority a means by which they can properly regulate the retailing of alcoholic beverages. Upon notification of a change in fact, both agencies can determine whether action may be necessary to prevent third parties from exercising control over the license or the licensee. The only way to effectuate these statutory safeguards is to require that a premises be under the continuing possession and control of the licensee. When the licensee loses possessory interest, the premises are de-licensed by application of law and subject to review by the issuing authority upon re-application.

N.J.S.A. 33:1-31(i) specifically provides that "[a]ny license, whether issued by the director or any other issuing authority, may be suspended or revoked by the director, or the other issuing authority may suspend or revoke any license issued by it, for any of the following causes . . . [a]ny other act or happening, occurring after the time of making of an application for a license which if it had occurred before said time would have prevented the issuance of the license." Clearly, then, the times of renewal,

issuance or transfer of a license are not the only "critical times" when the facts represented on a licensee's application are subject to scrutiny and review. I am convinced that not only the statute and regulations, but also the orderly administration of the Alcoholic Beverage Control Act require that the licensee maintain a continuing possessory interest and control over the licensed premises during the time for which it is licensed.

In reaching his conclusion to the contrary, the Administrative Law Judge has relied heavily on an opinion letter written by former Commissioner D. Frederick Burnett, In re Clayton, supra, ABC Bulletin 250, Item #11 (1938). In that matter, the licensee apparently lost its right to possession of the property and his license was suspended. Commissioner Burnett, replying to a letter that was not produced, responded that:

If, however, the license is subsequently reinstated, as it may be if he pays up his back taxes, he may apply to the Township Committee for a transfer to a different premises if he wished. I say "different" premises. What I mean by that is that if your local issuing authority issues a license to some other person in respect to the premises previously occupied by Bensel, he will have to make application for a different place if he wants to exercise his license. Of course, if no new license has been issued in the mean time for the premises so previously occupied and he pays his back taxes so that his license is restored, he can resume business at the original place, provided, necessarily, the landlord who dispossessed him relent and restores possession to him.

The Administrative Law Judge relied on Clayton to distinguish between the other cases cited by the Appellant which he said required a possessory interest only at certain "critical times" such as issuance, renewal or transfer, and the factual situation presented by Crossroad in this case. The Administrative Law Judge stated that "[i]n fact, Clayton stands for the proposition that a license, after dispossession, is still valid for those original premises if the licensee can regain possession and no other license has been issued for those premises in the meantime." Initial Decision at page 7.

The Clayton precedent cited by the Administrative Law Judge is Commissioner Burnett's letter reply to an inquiry from a municipal clerk. Unlike a contested case where the parties have the opportunity to develop a detailed factual context, the Clayton letter sets forth only a skeletal factual framework. Indeed, the inquiry itself is not reproduced and it is not entirely clear what

question Commissioner Burnett is answering. From an analysis of the decision, it may well be that he was addressing the issue of whether a new license could be issued to a new applicant. If so, the discussion concerning Bensel's right to resume business would be dicta.

Moreover, the Clayton letter is subject to a different interpretation than the one urged by Respondent, and set forth by the Administrative Law Judge. The letter notes that Bensel's license "may" be "reinstated" if back taxes are paid. Later, it talks about Bensel getting his license "restored." Implicit in this language is the recognition that additional action would be required by the issuing authority to "reinstate" or "restore" the license. Presumably, the issuing authority would not act to reinstate without requiring that all other appropriate approvals be obtained (such as a place-to-place transfer). The Administrative Law Judge's statement that "[t]he only qualification placed upon Bensel's resumption of operations at the premises was that the landlord let him back in" is incorrect. Before that could occur, the municipality must have acted to "reinstate" the license.

Moreover, the proposition that Clayton is dispositive on the issue of whether or not a transfer is required must be rejected. Clayton did not discuss the precise issue of a transfer in any respect. In any event, without a full factual background, Clayton is ambiguous. I see no reason to interpret it such as to make it inconsistent with the statutory scheme. Cf. N.J. Builders, Owners and Managers Ass'n. v. Blair, 60 N.J. 330, 338-40 (1972); In re Scioscia, 216 N.J. Super. 644, 652 (App. Div.), cert. den. 107 N.J. 652 (1987) (similar to fundamental statutory construction, if language "is susceptible to different interpretations, it should be interpreted in accordance with its underlying objectives.").

I conclude that a licensee must maintain a present possessory interest in a licensed premises at all times, and not just at the time of issuance, transfer or renewal. Furthermore, upon loss of a possessory interest, the licensee is required to report this change within ten (10) days pursuant to N.J.S.A. 33:1-34 and N.J.A.C. 13:2-2.14. Should the licensee regain a possessory interest in the licensed premises, the licensee may then apply to the local issuing authority for a place-to-place transfer to transfer the license from "pocket status" to the former licensed premises. In this manner, the local issuing authority has the opportunity to make a full evaluation of whether or not the premises have remained suitable for licensure or whether the gap in possessory interest or other factors may have rendered the premises unfit. Any other

conclusion would circumvent the intent and spirit of the Alcoholic Beverage Control Act and deprive the local issuing authority of its discretionary ability to grant or deny a place-to-place transfer.

Additional Exceptions submitted by the Appellant relate to the Administrative Law Judge's dismissal of a challenge to an earlier 1988 transfer of the subject license to the location at 209 Ramapo Valley Road. I accept the Administrative Law Judge's determination that such Appellant's challenge is time-barred. I note that this Division can at any time institute disciplinary action to cancel a transfer which was improvidently granted in contravention of a local ordinance. In re City Hall Sandwich, Inc., ABC Bulletin 2334, Item #1 (Dec. 4, 1979).

Respondent, Remington, Inc., argues in its replies to Exceptions that the subject person-to-person transfer must be upheld "even when reduced to a matter of mere equity" since Remington has been operating at the purported licensed premises since the fall of 1992. I note, however, that Appellant gave ample notice of its challenge to all parties involved in this matter and Remington went forward with its activity well aware of the risks and possible consequences involved. Respondent also argues that:

[e]mployees have altered their lives in reliance on a job. The Township of Mahwah has accepted Remington into its community as a tax paying business citizen. Too much water has gone under the bridge to turn a vibrant and successful business back into the near dormant property which existed prior to the transfer.

I agree that requiring immediate cessation of business on the purported licensed premises would place an undue hardship on innocent third parties.

Accordingly, my within Order shall provide for a ninety (90) day period in which the license may continue operation on the premises and give leave to the licensee to apply to the Township for a place-to-place transfer locating the license on the premises.

I note that the Resolution issued by the Township stated that in the event a place-to-place transfer were required, "the applicant would have to seek a waiver from the provisions of the ordinance." Resolution No. 101-92A, Pr6, at pp. 4-6. Absent the express grant of waiver authority or standards provided in the ordinance, "a local governing body has no jurisdiction to grant or transfer a license in violation of the terms of a local ordinance." Petrangeli v. Barrett, 33 N.J. Super. 378, 384 (App. Div. 1954)

(municipality cannot disregard distance ordinance limiting issuance of liquor licenses); Yowell v. Township Committee of the Township of Galloway, OAL Dkts. ABC 5234-87, ABC 4048-88, Appeal No. 5439 (Dec. 2, 1988) (where distance ordinance prevented issuance of license, township could not implicitly grant application through inaction); 1855 South Fourth Street, Inc. v. Municipal Board of ABC, OAL Dkt. ABC 8067-90, Appeal No. 5734 (Oct. 3, 1991) (waiver of distance between licenses ordinance should be stated by ordinance and conditions of waiver must be met); Gene's Liquors v. Municipal Board of ABC, 92 N.J.A.R. 2d (ABC) 39; OAL Dkt. ABC 2849-91, Appeal No. 9038 (March 9, 1992) (where ambiguous, township should clarify distance between licenses ordinance to prevent misapplication). Moreover, it is a "well-settled rule that an ordinance may not be amended or modified by resolution." Inganamort v. Borough of Fort Lee, 72 N.J. 412, 421 (1977). Notwithstanding, the language of Mahwah's Alcoholic Beverage Ordinances leaves room for interpretation that the applicant may fall within the ordinances' exceptions of a license that is either a "transfer[] from person to person for the same premises covered by the previous license," Mahwah Code S6-6.1(b), or is a transfer to a licensed premises existing as such when the ordinance was adopted. Mahwah Code S6-6.2. These considerations are not befor me but the parties to this matter should be guided accordingly.

V. CONCLUSION AND ORDER

For the reasons noted above, I reject the decision of the Administrative Law Judge and reverse the action of the Township. I shall further delay the effective date of my decision for a period of ninety (90) days to provide the Township with the opportunity to consider an application for a place-to-place transfer, if it is submitted by the licensee.

Accordingly, it is on this 13th day of January, 1994,

ORDERED that the action of the Township Council of the Township of Mahwah below which determined that a place-to-place transfer for Plenary Retail Consumption License No. 0233-33-002-009 from pocket status to a proposed location at 209 Ramapo Road, Mahwah, New Jersey, was unnecessary, is hereby reversed; and it is further

ORDERED that the effect of my within decision shall be deferred for a period of ninety (90) days to provide the opportunity for the Township Council of the Township of Mahwah to consider an application for a place-to-place transfer if submitted by Respondent, Remington, Inc., for the premises located at 209 Ramapo Road, Mahwah, New Jersey; and, in its discretion, to determine whether or not such transfer should be granted, if an exception to the distance between premises ordinance is applicable in this instance; and it is further

ORDERED that any party may apply to me for an extension of the ninety (90) day period provided herein upon a showing of good cause for such extension.

JOHN G. HOLL
ACTING DIRECTOR

APPENDIX: INITIAL DECISION BELOW

JGH/DNB/AFS/tld

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Publication of Bulletin 2462 Is Hereby Directed This
2nd Day of March, 1994

John G. Holl, Acting Director
Division of Alcoholic Beverage Control