Ambrose

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark, N.J. 07102

BULLETIN 1649 December 14, 1965

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ITEM

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1. APPELLATE DECISIONS - SPRINGDALE PARK, INC. v. ANDOVER and VIEBROCK

SPRINGDALE PARK, INC., Appellant, v. TOWNSHIP COMMITTEE OF THE TOWNSHIP OF ANDOVER, and CORD VIEBROCK, t/a VIEBROCK'S MOTEL, Respondents.	)	ON APPEAL CONCLUSIONS AND ORDER

Kapelsohn, Lerner, Leuchter & Reitman, Esqs., by Sol D. Kapelsohn, Esq., Attorneys for Appellant.
Van Blarcom, Silverman & Weber, Esqs., by Albert G. Silverman, Esq., Attorneys for Respondent Licensee, and Frank G. Scholosser, Esq., Associate Counsel.
No appearance for respondent Township Committee.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

Respondent Cord Viebrock, the owner and operator of Viebrock's Motel on State Highway 206, Andover Township obtained a plenary retail consumption license on December 15, 1964 for the said premises, based upon plans and specifications submitted to respondent Township Committee of the Township of Andover (hereinafter Committee). Such issuance was authorized under an ordinance adopted pursuant to R.S. 33:1-12.20 which states that nothing in the license limitation act "shall prevent the issuance, in a municipality, of a new license to a person who operates a hotel containing fifty sleeping rooms or who may hereafter construct and establish a new hotel containing at least fifty sleeping rooms."

Appellant, the holder of a plenary retail consumption license and the operator of a restaurant, tavern and package goods store on State Highway 206, Andover Township, asserts in its petition of appeal that the issuance of the license to respondent Viebrock was erroneous for reasons which may be summarized as follows:

(a) Viebrock's Motel contains less than the minimum number of rooms required by R.S. 33:1-12.20;

(b) The motel premises do not come within the definition of a hotel, as statutorily defined;

(c) There is no public need or necessity for the issuance of the said license;

(d) Viebrock did not truthfully state in his application the name of the owner of the business;

(e) Material changes were made in the application for license, after the hearing on the same, without readvertising or "other required further procedures";

(f) The members of the Committee constitute the governing body of Andover Township as well as its zoning board; they approved a 1963 application for a zoning variance; the conditions under which the variance was granted were such as to preclude Viebrock from operating under the said license;

(g) Some members of the Committee were improperly motivated because of prior business dealings and were improperly influenced by "advice or information outside of the record of these proceedings";

(h) Appellant was denied a fair and proper hearing before the Committee on its objections; the Committee made a pre-judgment therein; the action of the Committee was contrary to "the weight of the credible testimony."

Respondent Viebrock filed an answer generally denying the substantive allegations of the petition and states, in summary, the following:

1. A need exists for restaurant facilities with liquor privileges at his motel, in view of the fact that the Cochran House, a landmark restaurant in nearby Newton, was razed;

2. His motel meets the prerequisites of the subject statute and contains at least fifty sleeping rooms;

3. Respondent Committee, by amended ordinance authorizing issuance of this type of license, and acting upon such authority, properly and lawfully issued the same;

4. A "motel" comes within the scope of said statute relating to hotels; and

5. Respondent Committee found there was a public need and necessity for the issuance of the said license and acted properly within its discretion.

No answer was filed on behalf of respondent Committee, nor was it represented at the hearing herein.

The appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15, with full opportunity for all parties to present their testimony under oath and cross-examine witnesses. Reed v. South Toms River et al., Bulletin 1628, Item 2.

The genesis of this action is as follows: Viebrock operates a modern motel, constructed in 1959 and first opened in 1960. From time to time thereafter, additions and improvements were made so that, according to the testimony of respondent's witnesses, the premises now contain at least fifty sleeping rooms. On June 16, 1964, Viebrock filed an application for a plenary retail consumption license, having theretofore been granted a zoning variance for the operation of a restaurant at those premises. The application was denied because the quota of ten "C" licenses authorized under the provisions of a 1953 ordinance had been exhausted.

On August 10, 1964, the Committee passed an ordinance by a three-to-two vote amending its 1953 ordinance and permitting it to act without the limitation imposed upon its issuance of plenary retail consumption licenses with respect to hotels meeting the statutory requirements. Following the passage of this ordinance, Viebrock filed an application for license under the exception authorized by the limitation law set forth hereinabove. Public hearings were held thereon, objectors were heard, and on December 15, 1964 such plenary retail consumption license was thereupon issued.

I shall examine the objections in the petition of appeal which I consider meritorious in the light of the proofs presented herein.

I

Appellant argues that a motel does not come within the hotel exception delineated in the applicable statute and ordinance.

This Division has consistently held in pertinent decisions that it equates a motel with a hotel. The Division has taken this practical and realistic view in the light of the phenomenal development of the motel industry in the past twenty years. Thus, in Rynax v. Neptune, Bulletin 1462, Item 1, when considering the issuance of a liquor license to a motel pursuant to R.S. 33:1-12.20, it was stated:

> "The word 'hotel' has been interpreted by the Director of this Division as contemplating and including an exception in favor of 'motels' as well as 'hotels'. Bayshore Tavern Owners Association et al. v. Sea Bright, Bulletin 1378, Item 2; cf. Schermer v. Fremar Corporation, 36 N.J.Super. 46 (1955)."

In Schermer, the court noted that "In modern usage, it may be generally regarded that establishments which furnish lodgings to transients, although designated motels, may be deemed hotels" (36 N.J. Super. at p. 51). See also Longview Corp. v. South Hackensack, Bulletin 1494, Item 2; Ocean County Licensed Beverage Association and Liptak v. Point Pleasant, Bulletin 1522, Item 3; 43 C.J.S. Innkeepers, Sec. 1, p. 1128 et seq.

II

Appellant maintains that the premises operated by Viebrock as a motel contains less than fifty sleeping rooms and the number is therefore below the minimum required for the issuance of the said license. In support of its contention, it has produced advertisements placed by Viebrock in various newspapers and periodicals, on advertising cards and in the classified section of the 1964 United Telephone Company directory. Several of these advertisements, including the telephone directory, represent this motel as containing forty rooms and other advertising displays set forth "40 rooms".

Committeemen Longcore and Sabourin testified that they made a personal count and found only forty-seven rooms excluding Viebrock's room. On cross examination, Sabourin admitted that he had excluded one of the sleeping rooms in an efficiency unit since both rooms contained only one entrance, and that he excluded another sleeping room for the same reason. In addition, the apartment occupied by Viebrock has two separate bedrooms.

Longcore also admitted that there were fifty-one rooms with beds but stated that he would not want to rent beyond forty-seven "with somebody else in the other part." On cross examination, he admitted that there were a total of fifty-one sleeping rooms.

The other three committeemen, including the mayor, made an inspection of these premises and also a physical count of the rooms. They counted fifty-one bona fide sleeping rooms. Their testimony was corroborated by Viebrock, who stated that he was "positive" that the motel had fifty-one sleeping rooms.

Counsel for appellant asserted that he had requested opportunity to have an expert make a count and that the request was denied by the Committee. At this hearing he requested that either the Hearer or some other designated person make such count. An agent of this Division was assigned and has reported that he visited the motel and made a room-by-room count; that there are actually fifty-one sleeping rooms, which include the rooms in Viebrock's apartment.

There is, of course, no exclusionary provision in the applicable statute as to rooms occupied by the owner or members of his staff. Accordingly, I am persuaded and find that this motel contains the minimum number of sleeping rooms required for the issuance of a liquor license under the statute.

Viebrock insists that his advertisements do not accurately reflect the true number of rooms at this time for reasons which I find unnecessary to consider. I conclude that he has established valid credentials in his application for the said license.

III

Appellant contends that there is no public need and necessity for this license and that, therefore, the grant was an unreasonable exercise of the Committee's discretion. It advanced statistics to show that more licenses were issued in this municipality than should have been issued based on the census; that in any event issuance of another license is not justified.

Counsel argued, further, that even if Viebrock were to operate a restaurant, a liquor license is not absolutely necessary for the success of such operation. Continuing that argument, he stated that while R.S. 33:1-12.20 permits issuance of a license, it is not a mandatory requirement and must be based upon the needs and welfare of the community. He further maintained that the three committeemen who voted for the grant of said application were not motivated by public need and necessity, nor was their vote based on a reason "which accords with public policy or which justifies the issuance of a liquor license."

Committeeman Longcore was opposed to licensing any motel and thought that no additional licenses should be issued along Route 206. Committeeman Sabourin opposed the issuance of any additional licenses in Andover Township because the need of this municipality had already been met.

Respondent Viebrock produced evidence to show that his motel is a first class, high type motel on a busy highway located in an area which is experiencing a large industrial and commercial growth; that a number of new industries have recently located

therein and that there is a need for a facility of this type which will include restaurant and alcoholic beverage services.

Mayor Leonard testified that he voted to grant the hotel license because he felt it was in the best interest of the Township. He expressed his reasons at length, both on the hearing before the Committee and at this plenary de novo hearing. He stated:

> "Inasmuch as by law, in the State of New Jersey, a hotel-motel license can be had because of the room count being more than the required minimum of 50; and too, because of the potential that Mr. Viebrock has, and of course would have in the future; and, too, when I myself go on a trip by car, I appreciate the additional benefit that a motel might have where a restaurant and cocktail lounge are available."

He further stated that there was no other motel containing dining facilities in this municipality and none in the immediate vicinity. He analyzed the operations of the other liquor licensed premises in the community and felt they did not compare in the type of service that would be given by Viebrock's Motel. He explained that Andover Township is a growing township and would profit economically from this action.

Committeeman Jump testified that he voted for issuance of the license because the premises had met the statutory requisites; that it would attract transient trade to the community; and "It would benefit our township, also, by creating more attraction for outsiders to come in, as they would for a restaurant or for a meal, or for a conference...it would encourage that type of business, which ordinarily we wouldn't have come into the township."

Committeeman Davis stated that he voted in favor of the license application for essentially the same reasons set forth by Jump and added that the issuance would ultimately serve the general good of the community and the travelling public.

At the hearing before the Committee, a full opportunity was granted to the objectors to set forth their objections and, as Mayor Leonard noted, the Committee had spent 89 1/2 hours of its time in consideration of this matter prior to the December 15, 1964 meeting. Counsel for Viebrock pointed out that the only objectors were local liquor licensees, including appellant; that on the other hand, numerous local residents petitioned the Committee to act favorably upon his application. He also pointed out that the Andover Township Industrial Board recommended the grant of the said license as serving the best interests of the community.

Finally, it should be observed that while it is true that a majority of three to two carried the day, it also may be of significance (as reflecting the sentiment of the residents of the municipality) to note that the majority who voted for issuance were re-elected for new terms on the Committee whereas the two minority members who opposed this license were serving the last days of their tenure as elected officials of the Township.

The action of respondent Committee is consistent with a view articulately stated in Ward v. Scott, 16 N.J. 16 (1954), where the Supreme Court, dealing with an appeal from a zoning

ordinance, set forth the following general principle:

> "Local officials who are thoroughly familiar with their community's characteristics and interests and are the proper representatives of its people, are undoubtedly the best equipped to pass initially on such applications for variance. And their determination should not be approached with a general feeling of suspicion, for as Justice Holmes has properly admonished: 'Universal distrust creates universal incompetence.' Graham v. United States, 231 U.S. 474, 480, 34 S.Ct. 148, 151 58 L.Ed. 319, 324 (1913)."

It is well settled that the issuing authority's discretionary powers in matters of this kind are broad and it has the power to determine in the first instance whether or not a license should be granted. The burden of proving that respondent Committee abused its discretion falls upon appellant; it must make out its case by a preponderance of the proofs. Family Finance Corp. v. Gaffney, 11 N.J. 565; O'Hara and Yuttal v. West Orange, Bulletin 1483, Item 2.

The grant or denial of a retail liquor license lies within the discretion of the Township Committee and the Director may not reverse the Committee's decision in the absence of a manifest mistake or other abuse of discretion. Florence Methodist Church v. Florence, 38 N.J.Super. 85; Blanck v. Magnolia, 38 N.J. 484.

The Director's function on appeals of this kind is not to substitute his personal opinion for that of the issuing authority but merely to determine whether reasonable cause exists for its opinion and, if so, to affirm irrespective of his personal views. Bertrip Liquors, Inc. v. Bloomfield, Bulletin 1334, Item 1. Definitively expressed in another way: where reasonable men, acting reasonably, have arrived at a determination with respect to the issuance of a license, such determination should be sustained by the Director unless he finds that it was clearly against the logic and effect of the presented facts. Hudson Bergen County Retail Liquor Stores Association v. Hoboken, 135 N.J.L. 502. Cf. Fanwood v. Rocco, 59 N.J.Super. 306.

It should be additionally pointed out in connection with issuance of the liquor license to this motel that the Legislature, in enacting the exception to the limitation imposed upon local communities, intended that notwithstanding that communities have issued their maximum allowable quota of liquor licenses, they may, by ordinance, implement this legislation by granting additional hotel licenses. It is clear that the Legislature did not intend such licenses to be subject to populational limitations and thus this license is placed in a special category as an exception to the license limitation act. While, of course, the Committee's discretion must be circumspectly exercised and based upon the best interests of the community, the arguments advanced by appellant with respect to the number of licenses already issued in Andover Township lose considerable force and vitality. I am persuaded that the Committee, upon full consideration of all the facts and after a fair and full hearing, acted in the valid and proper exercise of its discretion in the issuance of this license.

IV

My canvass of the entire record, which includes 437 pages of transcript in the plenary de novo hearing, thirty-five exhibits

for appellant and four for respondent licensee (inclusive of certain portions of the transcript of the proceedings before the Committee), satisfies me that there was no credible and convincing evidence of "such business dealings and relationship with (Viebrock) as to make participation in the proceedings and vote thereon, improper." I similarly find impersuasive the allegation of improper motivation on the part of the Committee members, as charged by appellant. On the contrary, I find, as indicated hereinabove, that they acted in the reasonable exercise of discretion, based upon all the facts and circumstances. I have carefully examined the entire record with respect to the other allegations set forth in the petition of appeal and find them lacking in substantial merit.

In view of the aforesaid, I conclude that appellant has failed to sustain the burden of establishing that respondent Committee's action was unreasonable and improper and constituted an abuse of its discretionary authority. Rule 6 of State Regulation No. 15. I therefore recommend that an order be entered affirming said action and dismissing the appeal.

Conclusions and Order

Written exceptions to the Hearer's Report and written argument in substantiation of the exceptions were filed by appellant's attorneys pursuant to Rule 14 of State Regulation No. 15.

Appellant contends that the Hearer erred in finding that the subject motel "contains 50 or more sleeping rooms within the meaning of the applicable statute (R.S. 33:1-12.20);" that the "statutory requirement may [not] be met by counting sleeping rooms utilized solely by the motel owner and his administrative staff and his employees;" and that the Hearer further erred in sending an investigator to count the rooms and accepting his report (which corroborated the count of fifty-one sleeping rooms) without furnishing a copy thereof to appellant and without permitting opportunity to appellant for examination.

I find nothing in the plain reading of the statute to provide, or even suggest, that the count of sleeping rooms is exclusive of those set aside for or actually occupied by the motel owner or his employees. The language of the statute is unequivocal. It refers to "a hotel containing fifty sleeping rooms." A sleeping room is synonymous with a bedroom or living-bedroom. A bedroom has been defined as "A room furnished with a bed and maintained primarily to be slept in." Webster's New International Dictionary. A sleeper has been defined as something that provides accommodation for sleeping. See Schermer v. Fremar Corporation (Ch. Div. 1955), 36 N.J. Super. 46, 50.

It would seem from these definitions that a "sleeping room" may contain the barest of sleeping accommodations in order to satisfy the statutory requirements. In Von Der Heide v. Zoning Board of Appeals, 204 Misc. 746, 123 N.Y.S. 2nd, 726 (Sup. Ct. 1953), aff'd 282 App.Div. 1076, 126 N.Y.S. 2nd 852 (1953), the court defined a motel "as one generally defines the term .... furnishes the transient guest with sleeping quarters and bath and toilet facilities with linen service and a place to park his car." 123 N.Y.S. 2nd 726, 729. It is generally accepted that a motel is a transient facility accommodating in large part overnight guests.

The policy of this Division is to avoid seeking any hidden or abstruse meanings in statutory construction. Such is the statutory imperative in the administration of the alcoholic beverage law.

Appellant is in error in its computation of the total of the sleeping rooms because it conceives of a unit which may contain several sleeping rooms as one in its count of "sleeping rooms", without counting each room as a separate sleeping accommodation, as is clearly the legislative design. For example, by appellant's method of counting, a unit which contained one entrance and had multiple sleeping rooms would be considered one sleeping room. My examination of the record satisfies me that there was substantial proof offered to support the count of fifty-one sleeping rooms, as hereinabove defined.

Under the facts in this case, the Hearer acted with propriety to verify the count by inspection, either personally or through an agent designated by him, to satisfy himself further as to the actual count. It should be pointed out that at the hearing appellant's attorney requested the Division to make "its own count of the rooms." In its brief appellant repeated the invitation that "there should be an inspection by the Hearing Officer or the Director." Appellant cannot now complain that such count made in its absence is improper, particularly where no request to be present was ever made. Furthermore, at the hearing the Hearer stated that such count would be made if "there is a serious doubt in my mind as to the accuracy of the count." Appellant's attorney approved such procedure in these words, "All right. Fair enough." The Hearer added, "it may very well be that I may decide that on the basis of the testimony already in, that I'm reasonably satisfied that there is an accurate count; if on the other hand, I am not reasonably satisfied, then I will do what any judge would do where he is not satisfied." Appellant's attorney replied, "I can't, and I don't complain of that position."

Notwithstanding the fact that the Hearer properly supported his finding by a further investigation, as hereinabove set forth, I conclude on the basis of my analysis of the testimony adduced at the de novo hearing that there were in fact fifty-one sleeping rooms. In reaching this conclusion I have not taken into consideration the report of the agent assigned by the Hearer to such investigation.

Finally, with respect to this particular exception, I am mindful of the advertising on the part of Viebrock's Motel concerning the number of rooms available to the public. Whatever the reasons may be for such advertising, it is entirely irrelevant to this finding on the basis of the established record and the applicable statute referred to above.

Appellant further takes exception to the Hearer's finding that there was no convincing evidence to sustain the charge of "favoritism, predetermination and prearrangement" on the part of respondent issuing authority. My examination of the record satisfies me that this is a routine exception without substantial merit; that indeed respondent issuing authority acted circumspectly, without improper motivation, and in the public interest. This exception is rejected.

I have examined the other exceptions raised by appellant and find them to be without merit.

Having carefully considered the record herein, including the transcript of the testimony, the exhibits, the memoranda submitted in summation by counsel for appellant and counsel for respondent Viebrock, the written exceptions and argument in support thereof, the answer to the said exceptions, and the Hearer's report, I concur in the findings and recommended conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 20th day of October 1965,

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

JOSEPH P. LORDI
DIRECTOR

2. APPELLATE DECISIONS - KOST v. ORANGE.

GEORGE KOST & FRANK T. KOST, t/a PARK DELICATESSEN & LIQUOR,	)	
Appellants	)	ON APPEAL
v.	)	CONCLUSIONS
	)	AND ORDER
MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF ORANGE,	)	
Respondent.	)	

James A. Palmieri, Esq., Attorney for Appellants.
Felix J. Verlangieri, Esq., by John F. Monica, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

George Kost and Frank T. Kost, t/a Park Delicatessen & Liquor, the holders of Plenary Retail Distribution License D-8 for premises 135-137 Park Street, Orange, were found guilty by respondent of two charges of selling, serving and delivering alcoholic beverages to a minor on April 3, 1965 and April 23, 1965, in violation of Rule 1 of State Regulation No. 20. Their license was suspended on the first charge for fifteen days and on the second charge for twenty days, or a total of thirty-five days, effective July 6, 1965. Appellants filed this appeal challenging such conviction; and an order was entered on July 2, 1965, staying respondent's order of suspension until further order of the Director. R.S. 33:1-31.

In their petition of appeal, appellants allege that respondent's action was erroneous and should be reversed because no sale was made on the first charge, and the sale embodied in the second charge was a "legal one in conformity with the law."

In its answer, respondent admits the jurisdictional allegations, asserts that a sale was in fact made by appellants as charged in the first count, and that the sale alleged in the

second count was in fact an illegal sale.

This matter was heard de novo, pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded counsel to present testimony under oath and cross-examine witnesses.

The testimony adduced at this plenary hearing with respect to the first count reflects the following: Paul ---, a seventeen-year-old minor (date of birth September 3, 1947) entered appellants' premises on April 3, 1965 at about 8:45 p.m. He ordered two six-packs of Schaefer beer and a half pint of Wilson's whiskey. Frank Kost, one of the appellants, took a bottle of the said whiskey from the shelf behind him and placed the same and the beer in a paper bag. Kost did not ask him for any proof of age or identification. While he was adding the amount of the purchase on an adding machine, a police officer walked in, grabbed the bag and placed Kost under arrest. The minor further asserted that he was the only customer at the counter and the action of Kost in adding the amount of purchase was for his particular order. He stated further that while no mention of money was made at that moment, he fully intended to pay for the purchase as soon as he was advised of the exact amount.

Frank M. Possert, a local police officer, testified that on the evening of April 3, he noticed a motor vehicle parked about fifty feet south of these premises and spoke to three occupants therein. As a result of the conversation, he went to the premises, observed the above transaction, entered the store and grabbed the bag containing the alcoholic beverages. Frank Kost said to him, "What are you doing? There was no sale made. You have no right to touch that bag. Leave the bag alone." The police officer informed him that he was seizing the bag and its contents, and placed Kost under arrest.

On cross examination, he insisted that he had an unobstructed view of the transaction from the outside of the premises. He admitted that Frank Kost said to him, "There was no money exchanged."

Francis J. Powers, a local police officer, testified that he received a call for assistance and, when he arrived at the scene, Officer Possert was standing outside with Paul and had the bag of alcoholic beverages in his hand. He examined the bag and ascertained that it contained alcoholic beverages.

George Kost testified that he went to the back room to fill another order and, while there, his brother Frank placed two six-packs of Schaefer beer and a half pint of whiskey in a paper bag. Within a few seconds thereafter, the police officer came in and grabbed the bag. He claimed that it was impossible for the police officer to observe the transaction from the outside of the premises because displays in the window obstructed vision. On cross examination, he admitted that Paul placed an order for these alcoholic beverages at the time and place charged, and that his brother Frank prepared the order.

Frank Kost, testifying in defense of this charge, also admitted that Paul entered the premises at about 8:45 p.m. on the date alleged and ordered two six-packs of beer and a half pint of whiskey. He insisted, however, that after he put the liquor into the bag, he intended to ask the minor for his age and "get

the card to sign his name on it." At that moment the officer came in and grabbed the bag. Thus, he asserted, he did not have time to ask the minor for his age and identification before the police officer arrived and acted as hereinabove described. He denied that he used the adding machine for this transaction. He was then asked the following:

> "Q You said you filled the order of Mr. --- and then you were going to ask him for his age and to sign a card later. Why didn't you ask him to do it first when he walked in?
>
> A Sometimes you can't do that, and then you sign a guy up and make him sign it."

Appellants' principal contention is that there was no completed sale, and therefore no sale to the said minor. This contention appears to be without merit. The Alcoholic Beverage Law, within its broad definition of sale, encompasses and is applicable to the very transaction alleged in this charge. R.S. 33:1-1(w) defines "sale"(so far as applicable to this case) as "Every delivery of an alcoholic beverage otherwise than by purely gratuitous title, including...the solicitation or acceptance of an order for an alcoholic beverage."

It is clear, beyond peradventure of doubt, from the testimony of all the witnesses, that an order was accepted and, pursuant thereto, the beer and whiskey were placed in the bag and turned over to the minor. All that remained to be done was the determination of the exact amount owed and the receipt thereof by appellants for the sale. There was no question in anyone's mind that the minor was required to pay for the same and indeed the licensee said, "Certainly I intended to get paid for it."

Thus, the acceptance of the order in itself constitutes a sale under the above cited definition. It has been held that even an acceptance of an order by telephone similarly constitutes a sale of alcoholic beverages. Re Gold's Drug Stores Corporation, Bulletin 231, Item 8. Cf. Fran-Bo-Car, Inc. v. Englewood, Bulletin 1186, Item 3.

In Fran-Bo-Car, the Director held that under the broad sweep of the Alcoholic Beverage Law and the principle of rigid control underlying its administration, service, even indirectly, to a minor by such service to the minor's companion is a violation of the statute, citing Grippo v. Hoboken, Bulletin 999, Item 2. Cf. Re Morganstern & Oliner, Bulletin 292, Item 9, cited in Re Gahr, Bulletin 377, Item 7.

In appeals to the Director from the local issuing authority, the burden of establishing that the action of such issuing authority was erroneous and should be reversed rests with appellant. Rule 6 of State Regulation No. 15. I am satisfied, from my evaluation of the testimony, that there was, in fact, a sale made to the minor on April 3, 1965, and that appellants have, therefore, failed to sustain their burden as defined in said regulation.

With respect to the second count, the testimony reflects the following: Frank ---, a twenty-year-old minor, entered the licensed premises at approximately 10:00 p.m. on April 23, 1965. He ordered two pints of Miller High Life beer and a pint of Swiss Colony Bali Hai wine from George Kost, who delivered the same to him and accepted payment therefor. At no time was this minor asked

for identification or proof of his age, nor was he asked to make any written representation with respect thereto.

Upon leaving the premises, Frank joined his companions in a motor vehicle, which was shortly thereafter stopped by Officers Possert and Powers. They interrogated him and ascertained that he had made the said purchase. On cross examination, the minor insisted that at no time did he show any driver's license to Kost at the time of the purchase.

Officer Possert testified that, on this occasion, he observed a motor vehicle with three occupants parked near the premises and upon driving past appellants' premises saw Frank, the minor, making a purchase. After Frank left the store, entered the vehicle and started to leave, the said motor vehicle was intercepted by this officer. The package containing the said alcoholic beverages was inspected by the police officer, and he was informed that the alcoholic beverages were purchased by this minor from the appellants.

The police officer returned to the premises and informed Kost that he was under arrest on a charge of sale of alcoholic beverages to a minor. Kost exclaimed, "'Oh, my God, again?' He said, 'I, we didn't even straighten out the first one yet. I wouldn't do anything like that again, a second time.'" It was stipulated that Officer Francis Powers' testimony would be substantially the same as that testified to by Possert, and would be fully corroborative thereof.

George Kost admitted the sale but insisted that he asked this minor for identification and proof of age. The minor thereupon produced a driver's license that had "144" on it. This indicated to Kost that this minor was twenty-one years of age. Upon cross examination, this witness admitted that he did not ask the minor to execute a written representation of his age, although he appeared to be in doubt as to his statutory maturity. He was then asked by me:

> "THE HEARER: But you know that the regulations require that where you are in doubt, you have to get a written representation or a writing made in your presence?
>
> "THE WITNESS: Yes.
>
> "THE HEARER: Don't you know that?
>
> "THE WITNESS: Yes."

It is abundantly clear from the testimony that appellants did not request or obtain a written representation of the minor's age even though Kost admits that there was doubt in his mind. This Division is, as was indeed the respondent, bound by the imperative legislative directive, and I must conclude that there was an unmistakable violation.

Appellants could have protected themselves if they had complied strictly with the provision of the statute, especially since Kost admits that he was suspicious of the minor's age. R.S. 33:1-77 contains the following proviso: "that the establishment of all of the following facts by a person making any such sale shall constitute a defense to any prosecution therefor: (a) that the minor falsely represented in writing that he or she was

twenty-one (21) years of age or over, and (b) that the appearance of the minor was such that an ordinary prudent person would believe him or her to be twenty-one (21) years of age or over, and (c) that the sale was made in good faith relying upon such written representation and appearance and in the reasonable belief that the minor was actually twenty-one (21) years of age or over" (underscoring ours). In a Special Note in explanation of Rule 1 of State Regulation No. 20 (on page 77 of the Rules and Regulations), it is set forth that a mere verbal inquiry as to age, or the display of a document representing said age, is no defense. The representation in writing required by the Alcoholic Beverage Law is a "writing made by the minor at or prior to the time of sale or service. Such a writing must be signed by the minor in the presence of the licensee or his employee and one in which the minor gives his name, address, age, date of birth and, by signing the writing, makes a statement that he is making the representation as to his age to induce the licensee to make the sale."

The prevention of sales of intoxicating liquor to minors not only justifies, but necessitates the most rigid control. Hudson Bergen County Retail Liquor Stores Association v. Hoboken, 135 N.J.L. 502 (E. & A. 1947); In re Schneider, 12 N.J. Super. 449 (App.Div. 1951). Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956). Under all of these circumstances, I believe there is the necessary quantum of proof, namely, by a preponderance of the believable evidence, of appellants' guilt. I also conclude that the Board, acting reasonably, reached a reasonable conclusion in its determination.

I, therefore, find that appellants have failed to carry the burden of establishing that respondent's action on both counts was erroneous and against the weight of the evidence, as required by Rule 6 of State Regulation No. 15. It is, accordingly, recommended that an order be entered affirming respondent's action, dismissing the appeal, and fixing the effective dates for the suspension imposed by respondent.

Conclusions and Order

Written exceptions to the Hearer's Report and written answers to the said exceptions were filed within the time limited by Rule 14 of State Regulation No. 15. The exceptions were limited to the first charge.

I have examined the exceptions and conclude that they are without merit.

After carefully considering the record herein, including the transcript, the exceptions and the answers to the said exceptions, and the Hearer's Report, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 21st day of October, 1965,

ORDERED that the action of respondent in finding appellants guilty be affirmed and that the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that Plenary Retail Distribution License D-8, issued by the Municipal Board of Alcoholic Beverage Control of the City of Orange to George Kost and Frank T. Kost, t/a Park Delicatessen & Liquor, for premises 135-137 Park Street, Orange, be and the same is hereby suspended for thirty-five (35) days, commencing at 2:00 a.m. Thursday, October 28, 1965, and terminating at 2:00 a.m. Thursday, December 2, 1965.

JOSEPH P. LORDI
DIRECTOR

FOR IMMEDIATE RELEASE

3. NUMBER OF MUNICIPAL LICENSES ISSUED AND AMOUNT OF FEES PAID FOR THE PERIOD JULY 1, 1965 to SEPTEMBER 30, 1965 AS REPORTED TO THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL BY THE LOCAL ISSUING AUTHORITIES PURSUANT TO R.S. 33:1-19 (INCLUDING 57 ISSUED BY THE DIRECTOR PURSUANT TO R.S.33:

CLASSIFICATION OF LICENSES

County	Plenary Retail Consumption No. Issued	Plenary Retail Consumption Fees Paid	Plenary Retail Distribution No. Issued	Plenary Retail Distribution Fees Paid	Club No. Issued	Club Fees Paid	Limited Retail Distribution No. Issued	Limited Retail Distribution Fees Paid	Seasonal Retail Consumption No. Issued	Seasonal Retail Consumption Fees Paid	Licenses Expired	Licenses Surrendered Revoked	Number Licenses in Effect	To Fe Pa
Atlantic	485	$ 200,310.00	75	$ 28,225.00	29	$ 2,470.00							589	$ 231,005.
Bergen	813	326,838.00	301	91,322.00	147	13,580.00	50	$ 2,419.50	5	$ 1,398.75			1316	435,558.
Burlington	199	92,169.00	43	14,410.00	51	7,025.00	1	50.00					294	113,654.
Camden	457	225,569.19	85	35,335.00	80	7,930.00			1	450.00			623	269,284.
Cape May	138	77,000.00	13	4,700.00	17	2,200.00							168	83,900.
Cumberland	80	41,100.00	15	4,200.00	32	4,250.00							127	49,550.
Essex	1289	736,380.00	347	209,600.00	91	12,575.00	26	1,300.00	1	750.00			1754	960,605.
Gloucester	108	39,110.00	15	3,845.00	22	2,020.00							145	44,975.
Hudson	1464	663,781.24	298	122,400.00	78	9,350.00	60	2,550.00					1900	798,081.
Hunterdon	78	28,880.00	14	8,168.00	14	1,500.00							106	38,548.
Mercer	421	262,500.00	51	22,510.00	58	8,550.00			1	111.78			531	293,671.
Middlesex	631	319,430.00	88	30,155.00	121	10,360.00	4	200.00					844	360,145.
Monmouth	546	265,025.00	125	44,400.00	63	6,741.03	10	492.00	25	12,390.53			769	329,048.
Morris	358	149,607.00	105	43,359.00	71	6,582.50	12	600.00	4	1,290.00			550	201,438.
Ocean	190	104,893.60	50	22,147.00	38	4,400.00							278	131,440.
Passaic	849	352,412.98	170	52,685.00	50	5,775.00	7	350.00					1076	411,222.
Salem	50	22,430.00	8	1,640.00	19	1,625.00							77	25,695.
Somerset	190	89,433.75	41	12,975.00	36	4,200.00							267	106,608.
Sussex	161	45,490.00	19	3,895.00	14	815.00	1	50.00	1	225.00			196	50,475.
Union	550	318,246.00	144	74,176.00	87	9,360.00	26	1,280.00					807	403,062.
Warren	146	42,860.00	20	4,435.00	29	2,950.00			2	375.00			197	50,620.
Total	9203	$4,403,465.76	2027	$ 834,582.00	1147	$ 124,258.53	197	$ 9,291.50	40	$ 16,991.06			12614	$5,388,588.

Joseph P. Lordi
Director

November 22, 1965

4. DISCIPLINARY PROCEEDINGS - SALE TO MINORS - LICENSE SUSPENDED FOR 15 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)
CARL'S ORCHID LOUNGE, INC. 1007-1009 Broad Street Newark, N. J.	) CONCLUSIONS AND ORDER
Holder of Plenary Retail Consumption License C-922, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.	)

Licensee, by Carl H. Scillia, President, Pro se.
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on September 28, 1965, it sold two 6-packs of beer to two minors, ages 19 and 20, in violation of Rule 1 of State Regulation No. 20.

Absent prior record, the license will be suspended for fifteen days, with remission of five days for the plea entered, leaving a net suspension of ten days. Re Fairview Cafe, Bulletin 1638, Item 12.

Accordingly, it is, on this 18th day of October, 1965,

ORDERED that Plenary Retail Consumption License C-922, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Carl's Orchid Lounge, Inc. for premises 1007-1009 Broad Street, Newark, be and the same is hereby suspended for ten (10) days, commencing at 2:00 a.m. Monday, October 25, 1965, and terminating at 2:00 a.m. Thursday, November 4, 1965.

JOSEPH P. LORDI
DIRECTOR

5. DISCIPLINARY PROCEEDINGS - POSSESSION OF ALCOHOLIC BEVERAGE NOT TRULY LABELED - LICENSE SUSPENDED FOR 10 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)
CHARLES R. and MARGARET KUGLER t/a CHARLIE'S TAVERN 26 Thompson St. Raritan, N. J.	) CONCLUSIONS AND ORDER
Holders of Plenary Retail Consumption License C-14, issued by the Borough Council of the Borough of Raritan.	)

Robert W. Wolfe, Esq., Attorney for Licensees.
Morton B. Zemel, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensees plead non vult to a charge alleging that on September 13, 1965, they possessed an alcoholic beverage in one bottle bearing a label which did not truly describe its contents, in violation of Rule 27 of State Regulation No. 20.

Absent prior record, the license will be suspended for ten days, with remission of five days for the plea entered, leaving a net suspension of five days. Re Levine, Bulletin 1638, Item 9.

Accordingly, it is, on this 20th day of October, 1965,

ORDERED that Plenary Retail Consumption License C-14, issued by the Borough Council of the Borough of Raritan to Charles R. and Margaret Kugler, t/a Charlie's Tavern, for premises 26 Thompson Street, Raritan, be and the same is hereby suspended for five (5) days, commencing at 1:00 a.m. Monday, October 25, 1965, and terminating at 1:00 a.m. Saturday, October 30, 1965.

Joseph P. Lordi,
Director