Division of
Alcoholic Beverage Control

Bulletin

140 East Front Street, P.O. Box 087, Trenton, New Jersey 08625-0087

BULLETIN 2479 JUNE 3, 1998

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Division of
Alcoholic Beverage Control

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140 East Front Street, P.O. Box 087, Trenton, New Jersey 08625-0087

BULLETIN 2479 **JUNE 3, 1998**

1. PRESS RELEASE - OFFICE OF THE ATTORNEY GENERAL - WHOLESALE LIQUOR OFFICIALS PLEAD GUILTY.

NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY

PRESS RELEASE - OFFICE OF THE ATTORNEY GENERAL

FOR IMMEDIATE RELEASE
May 20, 1998

Wholesale Liquor Officials Plead Guilty

TRENTON--Attorney General Peter Verniero today announced that two senior managers and a salesman of one of the state's largest liquor wholesale corporations, pleaded guilty to conspiring to falsify records and furnishing illegal rebates. The corporation will enter pleas to administrative charges in connection with the scheme and has agreed to pay $1.1 million in fines and restitution. the pleas are part of a global settlement which resolves the company and individuals' of criminal and administrative liability for their role in the scheme.

The Attorney General said the pleadings of the employees from Reitman Industries of West Caldwell, Essex County, stem from a long-term investigation by the divisions of Criminal Justice, State Police and Alcoholic Beverage Control into illegal rebates and illegal activity throughout the liquor industry in New Jersey.

"We will vigilantly pursue the ongoing criminal and administrative investigation called Operation Dolus," said Attorney General Verniero. "Falsifying records and illegal rebates in the liquor industry will not be tolerated."

The long-term investigation revealed that the corporate officers of various state licensed liquor holders ignored the laws governing pricing, discounts and documentation of liquor sales by offering retailers illegal cash rebates and un-invoiced liquor.

Paul Zoubek, director of the Division of Criminal Justice, said the personnel who pleaded guilty in Superior Court in Passaic County were identified as:

David Lowenstein, 53 Short Hills, Essex County, a vice president and Gary Dato, 65, Rocky Mountain, Virginia, a retired solicitor, both entered guilty pleas to an Accusation charging fourth degree conspiracy. Dennis Resnick, 47, Livingston, Essex County, a sales manager, entered a guilty plea to a charge of participating in unlawful acts prohibited by Title 22, a disorderly persons offense.

Appearing before Superior Court Judge Joseph Falcone, Lowenstein, Dato, and Resnick admitted participation in the conspiracy.

The corporation has agreed to pay $1.1 million in fines and restitution as part of the global settlement agreement. In addition, its alcoholic beverage licenses will be suspended for five days an additional 50 days will be stayed for two years conditional on no additional administrative violations.

As part of the settlement, Lowenstein agreed to a suspension of his employment activities at Reitman Industries for a period of 55 days. Dato agreed never to apply to the New Jersey Division of Alcoholic Beverage Control for any type of alcoholic beverage license or permit and never to apply for employment or work in any capacity in a New Jersey State licensed alcoholic beverage entity. Alcoholic Beverage Control imposed a six-month suspension to Dennis Resnick's solicitor's permit and a $7,500 fine, which will be stayed for up to five years if there are no further violations. In addition, the Court sentenced Resnick to a one-year probation and a $500 fine.

According to Zoubek, the multi-phase investigation known as "Operation Dolus" is an examination into allegations of widespread corruption in the alcoholic beverage industry in New Jersey. Initiated six years ago, it included intelligence gathering, an undercover operation at a night club in Long Branch, prosecution and corrective action.

Colonel Carl Williams, superintendent of the State Police, said in January, 1993, the State Police posed as officials of a large beverage retailer, Club Paradise in Long Branch and conducted a 13 month-long undercover investigation.

Williams said that two State Police inspectors took on the identity of the purchasing manger and fiscal operations manager of the night club.

During the undercover operation, the State Police inspectors conducted meetings with representatives of liquor wholesalers who sought to sell large volumes of liquor to the club. Williams said that during those meetings undercover inspectors were offered illegal rebates and alcoholic beverages by the various representatives in order to induce them to make the purchases.

John G. Holl, director of the Division of Alcoholic Beverage Control, said the amount of cash offered in the illegal rebates varied, adding that they were based on a percentage of the gross monthly sales of the retailer, which ranged from between two percent to four percent.

"When a wholesaler provides illegal rebates to 'favored' retailers, it skews the State's regulatory framework," said Holl. "We're trying to create a level playing field so that the 'unfavored' retailers aren't forced into price wars and other aggressive marketing practices that eventually lead to abusive consumption."

In order to better monitor business practices, the State will also appoint a "compliance officer" at Reitman, Holl said.

Deputy Attorney General Julie A. Sealander and Lawrence Monaco of the Division of Criminal Justice Antitrust Bureau represented the State at the court proceeding. Former Deputy Attorney General Joseph Brederholf of the Division of Criminal Justice supervised the investigation. Deputy Attorney's General Wesley Geiselman, Louis Rogacki and Susan Dolan of the Division of Alcoholic Beverage Control are coordinating the administrative investigation.

2. REQUEST FOR OPINION - B.Y.O.B. GUIDELINES.

January 15, 1998

John O'Brien, Executive Director
New Jersey Press Association
840 Bear Tavern Road
Suite 305
West Trenton, New Jersey 08628-1019

Dear Mr. O'Brien:

Pursuant to our telephone conversation of January 14, 1998, this will confirm that it is unlawful for an owner of a restaurant which does not have a liquor license to permit the consumption of alcoholic beverages other than wine or malt beverages in a public portion of the restaurant. It is also unlawful for the restaurant to advertise that wine or malt alcoholic beverages may be brought into the premises and consumed by the patrons.

The applicable statutes covering this situation are contained in N.J.S.A. 2A:170-25.21 through 25.23. Violations of these statutes are disorderly persons offenses.

In summary, a restaurant not having a liquor license may permit patrons to bring wine or malt beverages (beer) but may not advertise that such beverages may be brought into the premises. It is also not required that a restaurant permit wine or beer to be brought in and it can prohibit such practices on its own. Similarly, a municipality may prohibit B.Y.O.B. by enactment of a municipal ordinance.

I would be very appreciative if you would disseminate this information concerning the B.Y.O.B. laws to your members.

Should you have any additional questions, please feel free to contact me. Thank you for your attention.

Very truly yours,

/S/ JOHN G. HOLL
John G. Holl
Director

3. REQUEST FOR OPINION - EMPLOYMENT OF CORRECTIONS OFFICERS AT LIQUOR LICENSED PREMISES.

January 20, 1998

Detective Jim A. Dellaira
Trenton Police Department
Chief's Office
225 North Clinton Avenue
Trenton, New Jersey 08609

RE: RESPONSE TO INQUIRY REGARDING EMPLOYMENT OF CORRECTIONS OFFICERS AT LIQUOR LICENSED PREMISES

Dear Detective Dellaira:

We are in receipt of your letter dated September 22, 1997, which asks whether county or State Corrections officers may be employed by a business licensed to sell alcoholic beverages in the State of New Jersey. The applicable regulation is N.J.A.C. 13:2-23.31. This regulation concerns employment restrictions on law enforcement officers. The regulation states in pertinent part:

> "(a) No license shall be held by any regular police officer, any peace officer or any other person whose powers or duties include the enforcement of the alcoholic beverage law or regulations, or by any profit corporation, or association in which any such officer or person is interested, directly or indirectly.
>
> (b) No licensee shall employ or have connected with him in any business capacity whatsoever any such officer or person ..."

As a general rule, the regulation prohibits the employment of law enforcement officers or peace officers within the jurisdictional boundaries of the territory (municipality, county or State) in which they are empowered to exercise their peace keeping authority. For example, a Trenton police officer may not be employed by a licensee within the jurisdictional boundaries of the City of Trenton. At the same time, a Mercer County Sheriff's officer may not be employed by a licensee within the jurisdictional boundaries of Mercer County. By the same token, a New Jersey State Police officer may not be employed within the jurisdictional boundaries of the State of New Jersey.

You have correctly pointed out that N.J.S.A. 2A:154-3 and 2A:154-4 are applicable to your question. This statute essentially defines "peace officers."

N.J.S.A. 2A:154-3, states that:

> "All court attendants, sheriff's officers and county corrections officers in the competitive class of civil service who have been or who may hereafter be appointed by the sheriff or board of chosen freeholders of any county in this State shall, by virtue of such appointment and in addition to any other power or authority, be empowered to act as officers for the detection, apprehension, arrest and conviction of offenders against the law."

N.J.S.A. 2A:154-4, states that:

> "All corrections officers of the State of New Jersey, parole officers employed by the Bureau of Parole in the Department of Corrections and investigators in the Department of Corrections, who have been or who may hereafter be appointed or employed, shall, by virtue of such appointment or employment and in addition to any other power or authority, be empowered to act as officers for the detection, apprehension, arrest and conviction of offenders against the law."

You will note that Chapter 154 of Title 2A concerns "peace officers". You will also note that sections 3 and 4 of Chapter 154 specifically refer to county Corrections officers and State corrections officers as "peace officers". Consequently, it would appear from my reading of N.J.A.C. 13:2-23.31(b) that both, county corrections officers and State Corrections officers are prohibited from working in a liquor licensed premises within the jurisdictional boundaries of the county or State in which they are so employed. This conclusion is reached taking into account that Chapter 154 defines corrections officers as "peace officers."

The prohibition in the regulation applies to liquor license holders, in that, they are prohibited from employing a regular police officer or any peace officer. As a result, the license may be charged for violating this regulation.

Your last inquiry is whether the offending police officer or peace officer should be charged? A violation of N.J.A.C. 13:2-23.31 is not a criminal offense. Consequently, you may not charge or arrest the offending officer for violation of this regulation.

Very truly yours,

/S/ JOSE' RODRIGUEZ
Jose' Rodriguez
Deputy Attorney General
Enforcement Bureau

4. REQUEST FOR OPINION - PLENARY RETAIL CONSUMPTION LICENSE PROVISION OF STORAGE LOCKERS TO CUSTOMERS FOR STORAGE OF WINES.

June 2, 1998

Mr. John V. Lombardo
Le Johns Liquors
Corner of Main, Northfield, and Valley - Town Square
West Orange, New Jersey 07052

Dear Mr. Lombardo:

You have asked for our advice concerning a proposal to provide private storage lockers to your customers who may not have sufficient space at home to store their wines. Your letter states that you have more than adequate space in your store (on the second floor) to provide this type of service. You expect to offer at least two sizes of lockers. The smallest would hold up to ten cases while larger units would hold up to twenty cases. These units would be available for a monthly fee with a minimum rental period of six months. You indicate that the storage area would be accessible to your customers only during regular business hours.

To my knowledge, this is the first request of this type that the Division of ABC has received. The statute governing Plenary Retail Distribution Licenses neither permits or prohibits the type of service that you would like to provide. However, N.J.S.A. 33:1-14 describes a Public Warehouse License as one which permits storing and warehousing of alcoholic beverages.

I have carefully considered whether your storage proposal might contribute to excessive consumption of alcoholic beverages or make them accessible to persons under the legal drinking age. In my opinion, you may safely provide this storage service to your customers provided you comply with certain minimum conditions.

First, you must obtain a Public Warehouse License pursuant to N.J.S.A. 33:1-14. The annual fee for that license is $400. I enclose a copy of an application form which you may use to apply.

Second, the Public Warehouse licensed premises must be distinct from your retail licensed premises. Thus, if your second floor is currently licensed as part of your Plenary Retail Distribution License, you must act appropriately "de-license" that floor before we will issue any State license on the same premises.

Third, this storage service must be accessible to your customers only during your regular business hours. No one should be permitted access to the storage areas when your license premises is otherwise closed for business. Further, it is your responsibility to insure that no one under the legal drinking age may have access to the storage area other than your own employees.

Very truly yours,

/S/ JOHN G. HOLL
JOHN G. HOLL
DIRECTOR

5. RANI PRASAD, T/A PLAINFIELD LIQUOR, INC. V. GOVERNING BODY OF THE CITY OF PLAINFIELD - FINAL CONCLUSION AND ORDER ACCEPTING THE INITIAL DECISION AND GRANTING APPLICATION FOR PERSON-TO-PERSON AND PLACE-TO-PLACE TRANSFER OF THE LICENSE.

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

RANI PRASAD T/A PLAINFIELD LIQUOR, INC. APPELLANT, V. GOVERNING BODY OF THE CITY OF PLAINFIELD, RESPONDENT.	FINAL CONCLUSION AND ORDER ACCEPTING THE INITIAL DECISION AND GRANTING APPLICATION FOR PERSON-TO-PERSON AND PLACE-TO-PLACE TRANSFER OF THE LICENSE OAL DKT. NO. ABC 09775-97N AGENCY DKT. NO. 6521

Patrick C. O'Hara, Esq., Attorney for Appellant
(Wronko, O'Hara and Miller, attorneys)

Kirk D. Rhodes, Esq., Attorney for Respondent

Initial Decision Below by the Honorable Barbara A. Harned, Administrative Law Judge

Decided: April 17, 1998 Received: April 21, 1998

BY THE DIRECTOR:

No written Exceptions to the the Initial Decision were filed by the Respondent pursuant to N.J.A.C. 1:1-9.4. The time to render a Final Conclusion and Order expires on May 6, 1998.

For the following reasons, I accept the basic findings of fact and conclusions of law of the Administrative Law Judge ("ALJ"). I reverse the decision of the Respondent in denying the place-to-place and person-to-person transfer of plenary retail distribution license no. 2012-44-009-001 from Louis Kadubic to the Appellant, to be activated at 108 Watchung Avenue, Plainfield.

I. PROCEDURAL HISTORY

This matter arose from Respondent's Resolution of September 29, 1997, by which Respondent denied the above-noted application for transfer of the subject license. The Appellant filed an appeal with this Division and the matter was transmitted to the Office of Administrative Law ("OAL") for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Appellant and Respondent agreed to have the matter heard as an accelerated proceeding which the Division of Alcoholic Beverage Control ("ABC") concurred with and the motion for acceleration was granted by the ALJ on January 12, 1998. The matter was heard before the ALJ on March 9 and 10, 1998.

II. FINDINGS OF FACT

The ALJ discusses the facts upon which the initial denial is based and notes that such facts are essentially undisputed. The rationale for the denial of the transfer is set forth in Respondent's Resolution and provides as follows:

> the licensee's proposed place-to-place transfer was opposed by a majority of the residents of the area in which the licensee intended to run its establishment, and that based on the overwhelming community sentiment opposing the opening of any new retail liquor establishments in the area of 108 Watchung Avenue, Plainfield, New Jersey and the negative impact upon health, safety and welfare of the community if the within liquor license application were granted . . . .(R-2).

The ALJ provides a reasoned analysis in conjunction with relevant law. In sum, the ALJ finds that the concerns noted in Respondent's Resolution are not supported by the record and that the transfer of the license to the Appellant and to the proposed licensed premises should be granted.

The record reveals that the current licensee operated the license, across the street from the proposed licensed premises, for a period of approximately 14 years without any disciplinary action taken against the license or any complaints regarding traffic or loiterers around the establishment. The license has been held in a "pocket" status since 1990. The Appellant, as noted by the Resolution of Respondent, has completed the transfer application in all respects and is qualified to be the holder of the subject license. It is necessary to review the ALJ's findings to determine whether the community sentiment

opposing the license transfer was substantially widespread in the community and reasonably associated with the public health, safety and welfare of the community.

In support of its denial of the transfer, the Respondent sets forth the following: 1.) activation of the license across the street from where the prior licensee operated the business would cause traffic problems as well as loitering and littering issues in the neighborhood; 2.) the testimony of nine citizens and seven letters of objection from citizens opposing the transfer, without offering any specific reasons or merely asserting general opposition to another liquor store in Plainfield, which could cause "more trouble for our youths;" 3.) a petition presented to the Respondent signed by approximately 437 residents led Respondent to conclude that the transfer of the license would have a negative impact upon the health, safety and welfare of the community. The ALJ sets forth a detailed analysis of the evidence relating to each of the reasons upon which the Respondent based its denial.

With respect to the traffic and loitering issue, there is no evidence offered to support a position that traffic will be increased in the neighborhood or that loitering will become a problem detrimental to the area as a result of the transfer and activation of this license. The ALJ examines this issue fully and finds that there is sufficient customer parking in the area of the proposed licensed premises and that the operation of a night club next door should not present any undue traffic or loitering problems. The record reflects that deliveries to the night club are made between noon and 2:00 p.m. and that delivery trucks are able to park in front of the night club or in the alleyway or municipal parking lot in the rear of the premises. The ALJ concludes that the traffic in the area will not be adversely affected by the transfer. There was no testimony to support the claim that traffic problems would increase.

I accept the written objections of seven citizens, and the testimony of nine others, and do not doubt their good faith and intent. However, their objections must be evaluated in light of the public policy of this State. This policy, as set forth in the Alcoholic Beverage Control Act, does not prohibit the sale and consumption of alcohol, but provides a statutory and regulatory scheme to strictly control the alcoholic beverage industry in order to protect the health, safety and welfare of the people. See N.J.S.A. 33:1-3.1. The ALJ notes the lack of specific facts which support the objectors' position. As a result, I am unable to find a reasonable association between their concerns and the public health, safety and welfare.

The petition submitted in opposition to the transfer of the subject license was signed by approximately 437 residents of Plainfield. The petition does not reveal whether the signers reside in the neighborhood of the proposed transfer, and it is important to note that the petition was initiated by a licensee who will be a competitor of the Appellant. The ALJ finds that the petition originated on the licensed premises of the objecting licensee and was disseminated by his customers.

At the hearing before Respondent, the Council reviewed the objectors' testimony and written submissions, including the petition noted above, and thereafter noted individual concerns regarding the application before them. It is clear that a basis for Respondent's action was a concern about the number of licenses in Plainfield. They believed that this matter would provide an opportunity for Plainfield to retire a liquor license since it has licenses in excess of the population cap. The transcript also reflects the concerns of Respondent with respect to the operation of any liquor license. However, I am constrained by relevant law to review these concerns to determine if they are conjectural in nature. These deliberations are clearly conclusive in nature and the record does not reveal any supporting facts relevant to the transfer before me.

III. LAW AND ANALYSIS

While a local issuing authority has broad discretion over transfer matters, see Lubliner v. Bd. of Alc. Bev. Control, 33 N.J. 428, 446 (1960), the denial of a transfer may be reversed if Appellant shows that the denial constituted an abuse of discretion or a manifest mistake, or was clearly unreasonable. N.J.A.C. 13:2-17.6. The local authority may reasonably consider community sentiment when deciding whether or not to grant a place-to-place transfer request. Borough of Fanwood v. Rocco, 33 N.J. 404, 412 (1960). The sentiments relied upon must be substantially widespread in the community, and reasonably associated with public health, safety, morals and general welfare concerns commonly recognized as incidental to the sale and consumption of alcoholic beverages. Lyons Farms Tavern, v. Mun. Bd. of Alc. Bev. Control of Newark, 55 N.J. 292, 306-307 (1970); A&P Co. v. Mayor of Pt. Pleasant Bch., 220 N.J. Super. 119, 128 (App. Div. 1987). Moreover, general objections or expressions of concern, conjectural in nature, are insufficient grounds for denying a transfer request. Van's Restaurant, Inc., v. Mun. Bd. of Alc. Bev. Control of Clifton, ABC Bulletin No 2242, Item No. 4 (January 19, 1977).

With respect to consideration of community sentiment, the Lyons Farms Court notes that:

> . . . controlling this exceptional business requires an attentive and sympathetic attitude towards the sentiments of substantial numbers of persons in the locality, whether they be residents, commercial operators, or representative of a nearby church, school or hospital. When their views are hostile to a licensee's request for enlargement of his existing business, and the views are reasonably associated with the dangers to the public health, safety, morals and general welfare commonly recognized as incidents to the sale and consumption of alcohol, the local regulatory body does not act arbitrarily in honoring them.
>
> Lyons Farms, at 306-307. (emphasis supplied)

My review of the record reveals that the Appellant is qualified to hold the subject license; the activation of said license will not increase any traffic problems or quality of life issues in the neighborhood; the objections and petitions considered are either conjectural in nature or do not offer any specific reasons to support the opposition to the transfer of the license; and the intent of Respondent to reduce the number of licenses in Plainfield by the denial of the transfer application does not meet the criteria as set forth in Lyons Farms, supra.

As noted by the ALJ, a denial of this type cannot be based on an intention to provide other licensees with protection against economic competition. Although I do not find direct evidence compelling this conclusion, the testimony of a competing licensee and his involvement in originating the petition noted above leads me to afford limited weight to the petition in determining whether it expresses community sentiment as defined by case law. See A&P Co., v. Mayor, Pt. Pleasant Bch., 220 N.J. Super. at 128. I also take note that certain of the concerns raised are more attendant to the operation of a plenary retail consumption license and not a distribution license.

Based on the foregoing, I find that the objections of the residents, by way of their testimony, letters, and petition, are conjectural in nature and lack any factual basis to support the action of Respondent. The concerns noted by the Governing Body of Respondent regarding over-licensure in Plainfield are always a legitimate concern of the local issuing authority. However, the remedy for over-licensure is not properly achieved by the denial of

person-to-person and place-to-place applications for the transfer of liquor licenses. In any event, the ALJ notes that there have been four retail liquor licenses in the area of the proposed transfer for many years and if the Appellant is successful, it would not add another active license to the neighborhood. If a circumstance arises which adversely affects the welfare of the neighborhood when the subject license is activated, the Respondent can review it and determine whether the imposition of special conditions is necessary to alleviate the problem. The record before me does not support the objectors' claims that a potential problem will occur and, therefore, the action of Respondent must be reversed.

Accordingly, it is on this 6th day of May, 1998,

ORDERED that the action of the Governing Body of the City of Plainfield which, by Resolution dated September 29, 1997, denied Appellant's application for a person-to-person and place-to-place transfer of Plenary Retail Distribution License No. 2012-44-009-001 is hereby REVERSED; and it is further

ORDERED that the application of Appellant for the above cited transfer of Plenary Retail Distribution License No. 2012-44-009-001 to Rani Prasad t/a Plainfield Liquor, Inc., for premises located at 108 Watchung Avenue, Plainfield, is hereby GRANTED; and it is further

ORDERED that the appeal is hereby DISMISSED.

/S/ JOHN G. HOLL
JOHN G. HOLL
DIRECTOR

6. M.G.A. RESTAURANT CORPORATION, T/A COLONETTE DINER & RESTAURANT V. THE MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL FOR THE CITY OF JERSEY CITY, AND A.P.G. CORPORATION, T/A KELLOGG CAFE - ORDER REJECTING SUMMARY INITIAL DECISION.

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

M.G.A. RESTAURANT CORPORATION, T/A COLONETTE DINER/ RESTAURANT, APPELLANT/OBJECTOR v. THE MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL FOR THE CITY OF JERSEY CITY, and A.P.G. CORPORATION, T/A KELLOGG CAFE, RESPONDENTS.	ORDER REJECTING SUMMARY INITIAL DECISION OAL DKT. NO. ABC 3624-96 AGENCY APPEAL NO. 6359

John F. Vassallo, Jr., Esq. (Kearns, Vassallo and Kearns, attorneys) and Leonidas P. Doumas, Esq. for Appellant/Objector

David S. Piltzer, Esq.
(Piltzer and Piltzer, attorneys) for Respondent A.P.G. Corporation

No appearance by Respondent Municipal Alcoholic Beverage Control for the City of Jersey City

Initial decision below by the Honorable Jeffrey A. Gerson, ALJ decided: November 19, 1997 and received: November 24, 1997

BY THE DIRECTOR:

Written exceptions to the Administrative Law Judge's (ALJ) initial decision were filed by the Appellant on December 8, 1997, pursuant to

N.J.A.C. 1:1-18.4(d). Respondent filed his reply on December 12, 1997. The time to render a Final Conclusion and Order was extended as provided by N.J.A.C. 1:1-18.8. According to N.J.A.C. 1:1-18.7, I reject the ALJ's Summary Initial Decision and remand this matter to the Office of Administrative Law (OAL) to consider additional evidence and findings on the issue of publication consistent with this Final Conclusion and Order.

I. CONCISE PROCEDURAL HISTORY AND FACTUAL STATEMENT

On June 28, 1995, the Municipal Alcoholic Beverage Control Board for the City of Jersey City (Jersey City) granted A.P.G. Corporation's (APG) application for a place-to-place-transfer from 1033 Communipaw Avenue to 38 Kellogg Street. The ALJ found that on October 2 and 9, 1995, APG published a notice of the granting of the transfer. On February 22, 1996, Jersey City approved the renewal of APG's license over the objection of MGA. On or about March 18, 1996, MGA filed a Notice of Petition and Appeal objecting to Jersey City's granting of the place-to-place transfer and subsequent license renewal. On March 28, 1996, Respondent APG filed an Answer. The matter was referred to OAL as a contested case on April 2, 1996.

APG filed a Motion for Summary Initial Decision. APG argued that the New Jersey Division of Alcoholic Beverage Control (ABC) had no jurisdiction to hear the objector's appeal because it was filed more than 30 days after the grant of the place-to-place license transfer and an objector to renewal should not be allowed to base his challenge on alleged defects in a prior transfer of the license. MGA responded that APG's place-to-place transfer application in June of 1995 was defective because there was no publication of notice of the application before Jersey City considered it. MGA argues that this defect in the transfer may be raised at the time of renewal.

On November 19, 1997, the ALJ granted the respondent's motion. Judge Gerson found the objector's appeal of the transfer was not filed within the 30 day period after the license transfer as required by N.J.S.A. 33:1-26. The ALJ noted that the MGA appeal was filed more than 30 days after the October 9, 1995 notice of transfer was published. Further, the ALJ found that the objector had no reasonable basis to object to the renewal of the license. Rather, all of the objector's concerns were directed at the allegedly improper transfer on June 28, 1995. The ALJ relied on Hess Oil and Chem. Corp. v. Doremus Sports Club, 80 N.J. Super. 393 (App. Div. 1963) cert. den. 41 N.J. 308 (1964), for the proposition that the Division of ABC had no jurisdiction to entertain the appeal that is not timely filed.

In its Exceptions, appellant argues that the ALJ decided the case before discovery was completed concerning APG's publication of notice prior to the place-to-place transfer. Publication is required by N.J.S.A. 33:1-26 and N.J.A.C. 13:2-7.4(c)(d). The Appellant also argues that if the licensee failed to publish notice of its pending transfer application then, as a matter of law, Jersey City had no jurisdiction to grant the original transfer application or the subsequent renewal of the license at that location.

II. ISSUE

The issue presented to me is whether the ALJ properly granted Summary Initial Decision as a matter of law. The principal issue before the ALJ was whether the appellant established that Jersey City's approval of the liquor license renewal application was erroneous and a clear abuse of discretion.

Upon consideration of the record presented to me, I find that the Objector was not given a fair opportunity to present its case. MGA is entitled to discovery on the issue of the licensee's publication of Notice of the original license transfer application. If the objector's allegation is proven true, Jersey City may have abused its discretion in granting renewal of this license at this location. For the reasons set forth below, I reverse the ALJ's grant of Summary Initial Decision in favor of APG.

III. LEGAL ANALYSIS

The Alcoholic Beverage Control Act requires a person applying for a transfer of a liquor license to publish a notice of intention to do so. N.J.S.A. 33:1-26. A local issuing authority may consider a license application only after publication of notice. The statute reads:

On application made therefore setting forth the same matters and things with reference to the premises to which a transfer of license is sought as are required to be set forth in connection with an original application for license, as to the premises, and after publication of notice of intention to apply for transfer, in the same manner as is required in case of an application for license as to the premises, the director or other issuing authority may transfer . . . any license issued by him or it respectively to a different place of business than that specified therein, by endorsing permission upon the license.

N.J.S.A. 33:1-26(emphasis added). Thus, failure to publish notice of the license application renders the application fatally defective.

Our regulations further illustrate how and when to publish a notice. The regulations state that an application for a place-to-place transfer application only should be filed "at or before the first insertion of the advertisement of the notice of application." N.J.A.C. 13:2-7.2(a).[1] The regulations provide the exact form that the notice of transfer application should be in, N.J.A.C. 13:2-7.4, what newspaper the Notice should be printed in, N.J.A.C. 13:2-7.4(c), and requires that proof of publication be submitted to the issuing authority as a part of the application, N.J.A.C. 13:2-7.4(d). Indeed, the regulations tell local issuing authorities that they cannot consider a transfer application until at least five business days after the second notice of publication was published. N.J.A.C. 13:2-7.6. (In fact, the local issuing authority must have the hearing within 14 days after the second publication, unless adjourned with notice given to all the parties. Id.)

The purpose of the statutory notice provisions is to enable would be objectors to determine whether or not to contest a license transfer. Thus, actual publication with substantially accurate information concerning the hearing, ownership, location and type of license is required. See N.J.A.C. 13:2-7.5 ("Each issuing authority, immediately upon receipt of a written objection duly signed by an objector, shall set the matter down for an hearing and notify all the parties of the date, hour and place thereof."). Commissioner Burnett explained:

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1. Page 8 of the Application for a retail liquor license requires applicants for a new license or license transfer to insert the dates when public notice of the application will be published. Q.8.7.

The purpose of requiring the advertisement of notice of intention is to make the advertisement a medium through which all bona fide objectors might be accorded a fair hearing. The disclosure of the location of the premises sought to be licensed is of the utmost importance in enabling persons residing in the vicinity to make known their objections to the issuance of a license for such premises. Failure to make such disclosure renders the advertisement fatally defective even though there was no intention to deceive on the part of appellant.

Trotto v. Trenton, ABC Bulletin 46, Item 11 (Sept. 29. 1934).

Publication of notice of intent to apply for a license is a statutory prerequisite for the local issuing authority to consider a license application. The Director has long held that a fatal defect in notice deprives the issuing authority of jurisdiction to act on the application. See e.g., Trotto v. Trenton, ABC Bulletin 46, Item 11 (Sept. 29. 1934); Methodist Episcopal Church v. Verona, ABC Bulletin 101 Item No. 5 (Dec. 23, 1935); Emmons v. Eatontown, ABC Bulletin 362, Item 7 (Nov. 16, 1939); ABC Bulletin 230, Item 11 (Feb. 15, 1938); Ninety-one Jefferson St. v. Passaic, ABC Bulletin 255, Item 9 (June 24, 1938); Kline v. Fairlawn, ABC Bulletin 1175, Item No. 3 (May 15, 1957); Morris Lending v. Palisades Park, ABC Bulletin 1329, Item No. 5 (Jan. 23, 1960).

A publication of notice is defective and the issuing authority has no jurisdiction to act upon an application if the notice is published: (a) in the wrong newspaper, Morris Lending v. Palisades Park, ABC Bulletin 1329, Item No. 5 (Jan. 23, 1960) (the action of the issuing authority "in granting renewal was a nullity and must be reversed"); Kline v. Fairlawn, ABC Bulletin 1175, Item No. 3 (May 15, 1957)(reversing the grant of license); (b) if the wrong address is published, Trotto v. Trenton, ABC Bulletin 46, Item 11 (Sept. 29. 1934); Methodist Episcopal Church v. Verona, ABC Bulletin 101 Item No. 5 (Dec. 23, 1935)(license improperly issued and canceled); (c) if incomplete address, Emmons v. Eatontown, et. al., ABC Bulletin 362, Item 7 (Nov. 16, 1939); (d) if the wrong license type is advertised, ABC Bulletin, Item 11 (Feb. 15, 1938); and (e) if notice is published less than one week apart, Ninety-one Jefferson St. v. Passaic, ABC Bulletin 255, Item 9 (June 24, 1938).

Since publication of notice is a jurisdictional prerequisite, deficiencies cannot be waived, consented to or cured by the local issuing authority. Trotto v. Trenton, ABC Bulletin 46, Item 11 (Sept. 29. 1934). The act of an issuing authority approving of a license transfer or renewal does not cure deficiencies in publication. See

Methodist Episcopal Church v. Verona, ABC Bulletin 101, Item No. 5 (Dec. 23, 1935); Emmons v. Eatontown, ABC Bulletin 362, Item 7 (Nov. 16, 1939). In Emmons v. Eatontown, ABC Bulletin 362, Item 7 (Nov. 16, 1939), the local issuing authority approved an issuance of a license where the notice of publication listed an inaccurate address. After the transfer, objectors appealed the transfer and at renewal, the local issuing authority denied the renewal because of objections. Id. The Commissioner found that local issuing authority had no jurisdiction to granted the original issuance of the license because of the defective notice.

Unlike South Jersey Package Store Ass'n. v. Wal-Mart Stores, Inc., ABC Bulletin ____, OAL Dkt. no. ABC 10869-96 (April 30, 1998), where the applicant did not include in the notice shareholders, officers or directors who each held 1% or more of stock, objectors here were given no notice nor had their day in court. In Wal-Mart, minor deficiencies in notice did not remove the issuing authority's jurisdiction to consider an application especially where the objectors had notice of the application of a publicly traded corporation, had their day in court, and did not deprive the objectors or issuing authority of meaningful evaluation of the application. The missing names were relatively minor and a result of mistake, not deceit. Further, the missing names were a matter of public information readily available from other sources. Jurisdiction would be deprived if the missing name undermined review of the applicant or would be the basis for an objection for that person.

In this case, the objector's argument that proper notice was not made according to ABC laws and regulations raises an important factual issue that goes to the heart of whether Jersey City had jurisdiction to consider the transfer application. Respondent's arguments are of no moment if the threshold issue of jurisdiction is not resolved. MGA can raise at renewal that the issuing authority had no jurisdiction to hear the original transfer. See e.g. Peper v. Princeton University Bd. of Trustees, 77 N.J. 55, 65-66 (1978) (The lack of subject matter jurisdiction can be raised at anytime.). The purpose behind the statutory notice requirement was not served in this case. There was no notice of the pending application to the community so that any objections could have been heard. Thus, I reject Respondent's argument that the issue of publication of notice should not be reached because of the possible lateness of the appeal.

The Appellate Division's decision in Hess Oil and Chem. Corp. v. Doremus Sport Club, 80 N.J. Super. 393 (App. Div. 1963) cert. denied, 41 N.J. 308 (1964), albeit discussing jurisdiction, does not apply here. In Hess, the court found that the Director had no jurisdiction

to hear a late appeal filed by objectors to a transfer because it was filed beyond the statutory period allowed. (citing N.J.S.A. 33:1-26). The objectors had filed written objections and appeared at the issuing authority's hearing. The objectors, however, received no notice from the issuing authority that the transfer was granted and their Appeal was filed 39 days after the effective date of the transfer. In Hess, the objectors had notice of the application for transfer and had an opportunity to be heard. It was their responsibility to keep themselves informed as to what action was taken and when. The underlying statutory purpose of giving objectors an opportunity to be heard was satisfied.

Hess has been followed in subsequent cases dealing with other agencies. In Midland Glass Co. v. Department of Environ. Protection, 136 N.J. Super 194 (App. Div. 1975), certif. dismissed, 70 N.J. 152 (1976) and Schaible Oil Co. v. New Jersey Dept. of Environ. Protection, 246 N.J. Super. 29 (App. Div. 1991), cert. den. 126 N.J. 387 (1991) New Jersey courts denied late filed appeals from agency orders. But, in White v. Violent Crimes Compensation Bd., 76 N.J. 368, 379 (1978), the New Jersey Supreme Court held that for "a statutorily created right, a 'substantive' limitation period may be appropriately tolled in a particular set of circumstances if the legislative purpose underlying the statutory scheme will thereby be effectuated." In the White decision, the statutory time limitation was tolled for the period of the victim's crime induced incapacity. Thus, Hess should not be interpreted to undermine the statutory purpose behind N.J.S.A. 33:1-26 to notify the community, by publishing in the newspaper on two successive weeks, in advance of an issuing authority hearing a license transfer application. Our law envisions retailer accountability to his or her local community. If the community is denied an effective way to object, that purpose of the law is undermined.

Thus, I find that the ALJ erred in deciding that the Respondent was entitled to summary judgment without permitting the Appellant to seek discovery on the issue of proper publication of the original transfer application. Accordingly, the fact issue of whether APG complied with regulations requiring publication of its transfer application is material to MGA's timely appeal of APG's license renewal.

I also find that the ALJ erred by finding proper publication was made based on the illegible submission of a post transfer notice. The ALJ stated in his initial decision that "notice of the place-to-place transfer was placed in the Jersey Journal on October 2 and October 9,

1995 (though a clear copy of the advertisement could not be reproduced, I accept the fact that it was published)." That publication, if it occurred, was approximately three and one half months after Jersey City granted the place-to-place transfer. Although neither Jersey City nor the Respondent had an obligation to personally notify the objector of the resolution approving the place-to-place transfer, there was a clear obligation on the part of the Respondent APG to publish its intention to seek that transfer in a local newspaper. N.J.S.A. 33:1-26; N.J.A.C. 13:2-7. A subsequent publication of the granting of the application does not fulfill this statutory and regulatory requirement.

I am unable to discern from the record before me whether APG properly published notice of its intent to seek a transfer of this license. N.J.A.C. 1:1-18.7(a) permits me to remand a contested action to OAL for further action on issues or arguments incompletely considered. I therefore remand this matter for further specific factual findings on the issue of whether APG complied with the statute and regulations which require publication of an application for a place-to-place transfer of a license. I direct that the Appellant shall have the opportunity, including discovery, to demonstrate that publication was not made. I further direct that it shall be the licensee's burden to prove that publication was made according to N.J.S.A. 33:1-26. The ALJ may properly restrict discovery, testimony and evidence to this issue alone.

The public interest and policy of this Division is better served by insuring that the notice requirements of statutes and regulations are complied with and actions taken by the issuing authority are proper in all respects.

IV. CONCLUSION AND ORDER

I remand this matter to OAL to consider any additional evidence and findings on the issue of publication consistent with this Final Conclusion and Order.

Accordingly, it is on this 21st day of MAY, 1998,

ORDERED that the within matter be and is hereby REMANDED to the Office of Administrative Law for clarification as to whether Respondent A.P.G. Corporation complied with the statutory and regulatory responsibility to publish its application for a place-to-place transfer as required by N.J.S.A. 33:1-26 and N.J.A.C. 13:2-7.4; and it is further

ORDERED that it shall be Respondent A.P.G. Corporation's burden to demonstrate that publication was properly made; and it is further

ORDERED that in the event that no proof is shown, the action of the Respondent Municipal Alcoholic Beverage Control for the City of Jersey City to approve the place-to-place transfer application of A.P.G. Corporation shall be null and void; and
be it further

ORDERED that if the issuing authority's action is null and void, then be it further ordered that:

a. Respondent A.P.G. Corporation must publish according to N.J.S.A. 33:1-26 and N.J.A.C. 13:2-7.4 and comply with all other Division laws and regulations;

b. Respondent A.P.G. Corporation must expeditiously re-file its place-to-place transfer application with Respondent Municipal Alcoholic Beverage Control for the City of Jersey City;

d. Respondent Municipal Alcoholic Beverage Control for the City of Jersey City must have a completed license application including proof of publication before it shall consider any transfer application and pass an appropriate resolution in its discretion, and

d. A.P.G. Corporation can operate its business pending consideration and determination by the issuing authority of a new application for transfer.

/S/ JOHN G. HOLL
JOHN G. HOLL
DIRECTOR

7. MS. ELLIE'S INC., T/A RICCI'S IN THE VALLEY AND PICCOLO ITALIA RESTORANTE,' INC. V. CITY COUNCIL OF ORANGE TOWNSHIP.

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

MS. ELLIE'S, INC., T/A RICCI'S-IN-THE VALLEY and PICCOLO ITALIA RISTORANTE, INC.,	ORDER ADOPTING INITIAL DECISION
APPELLANTS,	
v.	OAL DKT. NO. ABCAM-01261-96N AGENCY APPEAL NO. 6335
CITY COUNCIL OF ORANGE TOWNSHIP,	
RESPONDENT.	

Robert C. Williams, Esq. for Appellants

Ronald C. Hunt, Esq.
(Hunt, Hamlin & Ridley, attorneys) for Respondent

Initial decision below by the Honorable Marylouise Lucchi-McCloud, ALJ decided: March 9, 1998 and received: March 13, 1998

BY THE DIRECTOR:

This matter involves the appeal by two licensees' of an Ordinance adopted by the City Council of Orange which changed closing hours from 3:00 a.m. to 2:00 a.m. for the reasons set forth herein. I adopt the Administrative Law Judge's (ALJ's) Findings of Fact and Conclusions of Law. Accordingly, the Appeal is dismissed.

Written Exceptions to the ALJ's Initial Decision were filed by the Appellants on March 31, 1998 pursuant to N.J.A.C. 1:1-18.4(d). Respondent's reply was filed on April 2, 1998. The time to render this Final Conclusion and Order was duly extended to June 11, 1998, as provided by N.J.A.C. 1:1-18.8.

The facts in this case are relatively simple and not in dispute. In October, 1992, Orange adopted an Ordinance which expanded closing

hours from 2:00 a.m. to 3:00 a.m. on Saturdays and Sundays. Three years later, in October, 1995, Orange rolled back the hours to 2:00 a.m. through passage of Ordinance 22-96.

The ALJ found that Orange had rolled back the hours of sale in response to problems relating to increased traffic, police man-power and drunk driving and citizen testimony complaining of noise, parking, litter and vandalism. The ALJ found no evidence that appellants detrimentally relied on the former ordinance or that Orange's action was unfair.

Appellants have presented an exhaustive analysis of the facts addressed at the OAL hearing. Appellants further argue that the "rollback" was not a reasonable exercise of Respondent's discretion since Orange never held a hearing nor imposed any special conditions on problem licensees from October 1992 through October 1995. While this may well be true, it is also true that Respondent was under no obligation to hold disciplinary hearings or impose special conditions prior to amending its closing hours.

Appellants also take issue with the ALJ's findings of facts and asserts that the matter should be remanded for further factual findings bearing on the need to change closing hours.

While Appellants have made policy arguments against the "rollback", these arguments should be made to the City Council. I agree with the ALJ that appellants have failed to establish that the issuing authority's ordinance limiting the hours of sale before 2:00 a.m. was erroneous and a clear abuse of discretion. Lyons Farms Tavern, Inc. v. Municipal Board of Alcoholic Beverage Control, 55 N.J. 292, 303 (1970); N.J.A.C. 13:-17.6.

Local municipalities have the right to determine the hours of sale of alcoholic beverages. N.J.S.A. 33:1-40; Walinski v. Gloucester, 25 N.J. Super. 122, 131 (Ch. Div. 1953). The Director has upheld a town's amendment to an ordinance to reduce the hours of sale over the objection of a retailer claiming discrimination. Avon-Wall, Inc. v. Wall, ABC Bulletin 2420, Item 4 (Aug. 14, 1980)(where licensee bought license because of expanded hours of sale and was not the primary subject of complaints). The sale of alcoholic beverages, as an inherently dangerous product, is subject to strict regulation and always contingent upon the public's will. Mazza v. Cavicchia, 15 N.J. 498, 505 (1954) (" it must be remembered that a license to sell intoxicating liquor is not a contract nor is it a property right. Rather it is a temporary permit or privilege to pursue an occupation which otherwise is illegal.").

The Orange ordinance was shown to be amended in the public interest with no showing that it was founded on impermissible grounds. Although there were no formal complaints against the licensees, the ALJ heard testimony from an Orange police officer, councilmen, a former councilwoman and residents concerning problems of automobile accidents, drunken driving, traffic, parking, public urination, trash, and noise that support Orange's action to limit the hours of sale. I sympathize that appellants may not have caused all the problems complained of, but they must nonetheless suffer the financial loss of one hour's sales for the greater good of the whole community. Avon-Wall, Inc. v. Wall, ABC Bulletin 2420, Item 4 (Aug.14, 1980)(quoting Dal Roth, Inc. v. Division of Alcoholic Beverage Control, 28 N.J. Super. 246 (App. Div. 1953)).

A duly adopted, legally authorized ordinance is part of the democratic process. The representatives of the City of Orange, responding to what they perceived as the legitimate concerns of their constituents, debated and passed the rollback. This response was neither arbitrary nor a clear abuse of discretion. It was, rather, democracy at work.

Accordingly, it is on this 28th day of May 1998,

ORDERED that the Appeal of Appellants is hereby **DISMISSED**; and it is further,

ORDERED that the action of the City Council of the City of Orange passing Ordinance No. 22-95, amending the Orange Code for hours of sale in which alcoholic beverages can be sold on Saturdays and Sundays from 3 A.M. to 2 A.M., be and is **AFFIRMED.**

/S/ JOHN G. HOLL
JOHN G. HOLL
DIRECTOR

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Publication of Bulletin 2479 is hereby directed this
3rd Day of June, 1998

JOHN G. HOLL, DIRECTOR
DIVISION OF ALCOHOLIC BEVERAGE CONTROL