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

BULLETIN 2326 August 22, 1979

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ITEM

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BULLETIN 2326 August 22, 1979

1. APPELLATE DECISIONS - PAUL'S SHORE LIQUORS, INC. v. ASBURY PARK.

Paul's Shore Liquors, Inc., t/a Odyssey Lounge,

Appellants,

vs.

City Council of the City of Asbury Park,

Respondent.

ON APPEAL

CONCLUSIONS

AND

ORDER

Charles Frankel, Esq., Attorney for Appellant.
Norman Mesnikoff, Esq., Attorney for Respondent, City of Asbury Park.
Laird, Wilson & MacDonald, Esqs., by James B. MacDonald, Esq., Attorneys for Salvation Army, Objector.
Klein & Klein, Esqs., by Carl Klein, Esq., Attorneys for Paul Wisniewski, Jr., and M & K Tavern, Objectors.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

This is an appeal from the action of the City Council of the City of Asbury Park, (Council) which, on May 31, 1978, denied appellant's application to enlarge its existing licensed premises (a place-to-place transfer) located at 427 Cookman Avenue to include the street level floor of the adjoining building designated as 421-425 Cookman Avenue, Asbury Park.

Appellant contends in its Petition of Appeal, that the action of the Council was arbitrary, capricious and without foundation; based upon legally insufficient evidence; and is discriminatory.

The Council, in its Answer, denies the substantive allegations of the appellant's Petition and reiterates the basis for denial as contained in its Resolution, which is as follows:

1. Proximity to the Salvation Army Church;

2. Increase in severe parking problem in the area;

3. Absence of need for additional licensed premises in the area.

These grounds devolve from the following "findings of fact" contained within the cited Resolution:

1. That the Salvation Army maintains a church on the southeast corner of Sewall and Grand Avenue, Asbury Park, which is around the corner from the premises in question;

2. While the front entrance of the premises in question is more than 200 feet from the front entrance of the Salvation Army church, if one walk on the sidewalk, the said entrances are close to each other and the rear entrance of the licensed premises is within 65 feet of the rear exist of said church;

3. At least two licensed premises are within a short distance of the premises in question, namely M & K Tavern and Archie's;

4. The extension of the licensed premises would lead to a substantial increase in patrons;

5. The applicant has made no provision for off-street parking;

6. The operation of the present premises has created severe parking problems and an extension of said premises would further accentuate said parking problem.

A de novo hearing was held in this Division pursuant to N.J.A.C. 13:2-17.6, with full opportunity afforded the parties to introduce evidence and cross-examine witnesses.

From the pleadings and testimony, it appears that this license was recently acquired by corporate appellant, who caters to a "gay" clientele.

Within a few blocks radius there are the following "gay" bars clustered near the lake separating Asbury Park and Ocean Grove: M and K's Disco, 313 Cookman Avenue, capacity 700; Archie's, 326 Cookman Avenue, capacity 75; The Blue Note, 707 Bangs Avenue, capacity unknown; The Bond Street Bar, 208 Bond Street, capacity unknown; The Sand and Sea, 1605 Ocean Avenue, capacity unknown; Odyssey Lounge, 421 Cookman Avenue, capacity 175.

The City of Asbury Park is one mile square, with a resident population of 16,730. The population is substantially increased by tourists throughout the year, especially during the months of June through September.

Major Karl Monroe of the Salvation Army, in charge of its station (church) located at 510 Grand Avenue, Asbury Park, testified in support of the respondent.

The station consists of a church, administrative building containing offices and a Youth Center Building containing a gym, showers and game room. The Youth Center Building's entrance is off the parking lot which is approximately 65 feet from the rear doorway of subject licensee. He complained that beer bottles and broken glass, as well as other bar related debris, have littered the parking lot in the past. He complained too about the use of the rear doorway as a means of egress and ingress, although admitting that the property upon which the license is sited has a perpetual right-of-way across the church's parking lot.

Reverend Monroe voiced annoyance concerning the use of the church's parking lot by appellant's employees and patrons, conceding however, that since he spoke to the appellant's manager, that practice has ceased. He described too, the breaking of the chain used to block off the parking lot by an unknown person, some time ago. The church has not repaired the chain, and, as a consequence, the lot is easily accessable to anyone.

Of a more serious nature, the Reverend described finding couples "actively engaged" in autos parked inthe church parking lot. He did not make inquiry as to whether or not they were patrons of the Odyssey, or merely availing themselves of a convenient, semi-private trysting place.

The Reverend could not recollect the date of the church's construction, but knows of his own knowledge, that it was there at least twenty-five years. He could not state when a licensed

premises first occupied the site upon which appellant is presently located, but assumes it is at least as long as the church occupied its site. He is, apparently, not objecting to the existance of the tavern per se, but rather the various objectionable sights and occurrances in the proximate area, where young people might possibly view them as they enter or exit the Youth House.

Viola J. Cassidy, a local resident, testified in behalf of respondent that the parking condition in the area is horrendous on weekend evenings, especially during the summer. Unruly young persons illegally park on a nearby empty lot, the surface of which is sandy. They "rev" their motors and spin their wheels in the sand as they depart when the tavern closes. She maintains that they are all patrons of the Odyssey. Complaints were lodged with City Officials and a sign posted in this lot which has aided in the correction of the problem.

In addition, she testified that automobiles are double parked on certain streets and that the owners of these vehicles too are patronizing the Odyssey Lounge. Lastly, she testified to a disturbance created by one hundred-fifty patrons of the appellant, congregating in a vacant lot, screaming and cursing. Although their sleep was interrupted, neither she nor her hushusband telephoned the police to complain.

Although admitting that many Ocean Grove residents park their autos on nearby public streets in Asbury Park in order to use them Saturday evenings and Sundays (Ocean Grove prohibits vehicular traffic on Sunday), she steadfastly denied that any of the offending vehicles she referred to in her testimony could possibly belong to an Ocean Grove resident, insisting instead, that they all belonged to Odyssey Lounge patrons.

Paul Wisniewski, owner of M and K's Disco, located less than one block away from the Odyssey on Cookman Avenue, testified as an expert witness on behalf of the Council. After several expansions in the recent past, his tavern has, by his own admission, a capacity of at least 700 and is used to its capacity most weekends.

It is Wisniewski's opinion, as a "gay bar" operator for twelve or more years, that there is no more room for "gay bars" in the City. This is predicated, in part, upon the fact that on certain weekend evenings some of them are quite empty.

He stated that he cannot rent the apartments above the stores in the many buildings he owns on Cookman Avenue to anyone other than bartenders, due to the noise from the Odyssey

Lounge. In addition, he has sustained at least $1,500.00 damage to show windows of stores in the various properties he owns on Cookman Avenue near appellant's premises. He blames this upon patrons of appellant walking on the streets with bottles or sticks and tossing them through windows.

Subsequent to this testimony before the Council in May, relative to his opposition to the appellant's application, and his testimony before this Division in July as a witness in support of Council's action, Wisniewski filed for a place-to-place transfer. On September 22, 1978, he applied to relocate to Heck Street on the site of the former Elks Club, a four story building. His application was approved on October 4, 1978, subject to obtaining a certificate of occupancy, after alteration of the building.

Wisniewski emphasized the parking problem in the area, adding that in contrast, he provides off-street parking for his patrons in three lots he owns, and is about to acquire a fourth for the same purpose. He admits that this is not a special condition imposed upon his license by the City, but rather a voluntary act because, "my parking would interfere with other business."

Raymond Palazzo, manager and son of Anna Palazzo, sole stockholder of corporate appellant, testified in its behalf. His mother acquired the license in November, 1976. The current capacity is approximately one hundred seventy-five and it would increase to between two hundred twenty-five and two hundred fifty if the expansion is permitted. Currently, they must restrict the patronage on weekend evenings in the summer due to overcrowding of the bar area and dance floor. In addition, if he did not restrict the numbers of patrons he could be in violation of local occupancy limitations. He opined that the need is there, that patronage is being turned away, and as a consequence, they are gravitating to the M and K's due to its ability to accomodate several hundred patrons in relative comfort.

He has an understanding with the City Parking Authority that he can rent up to one hundred parking spaces in the evening, in blocks of twenty-five spaces. He has also negotiated, on his mother's behalf, for the purchase of a property suitable for parking sixty-three vehicles, should permission to expand the premises be granted.

Since his conversation with Major Monroe, he has removed the outside hardware from the parking lot door, in effect restricting its use to that of an emergency exit. He has instructed his staff that the doors are not to be used other than in an

emergency. The staff has been instructed not to park in the church's parking lot and he too, has made other arrangments for parking his car. He voluntarily details a man to clean this lot of all litter three or four times a week and has been, by arrangement, leaving his garbage in the front for pick-up. There exists a perpetual right of access across the parking lot, but nonetheless, corporate licensee is willing to restrict its use to all but essential purposes.

The expansion, were it approved, would allow the appellant to expand its dance floor, erect a D.J. booth and have a seating lounge area in the rear with a small service bar to serve this section. It is Palazzo's opinion, based on almost two years active management of this license, that expanded facilities are required as the operation has proved so popular that large numbers are turned away on certain nights.

Joan Stark next testified in behalf of appellant that she uses dancing as an exercise program and lost in excess of thirty-five pounds last summer dancing seven nights a week at the various "gay bars" in the area, including the Odyssey Lounge.

It is her testimony that the appellant gets so crowded on certain evenings that it is impossible to move on the dance floor and the heat is oppressive. This condition exists at the other bars too, at times. She opined that there is a great need for additional space at the "gay bars" in the area, including the Odyssey Lounge.

Archie Davies, manager of Archies, one of the other "gay bars" in Asbury Park, testified that he has been in the appellant's premises on numerous occasions and from his observation it suffers from a lack of space.

Thomas Harrell and Paul J. Trelease, patrons of appellant, testified in corroboration of appellant's witnesses, whose testimony is quoted above.

- I -

Prior to arriving at a determination herein, I shall review pertinent precedential decisions governing this Division's role and function in deciding appelas from the action of a local issuing authority.

The well-settled principle governing the subject controversy is expressed in Paul v. Brass Rail Liquors, 31 N.J. Super. 211,

214 (App. Div. 1954), wherein it was held:

> The issuance, renewal and transfer of liquor licenses rest in the sound discretion of the issuing authority and its action will not be judicially disturbed in the absence of a clear abuse of discretion. Zicherman v. Driscoll, 133 N.J.L. 586 (Sup. Ct. 1946); Biscamp v. Twp. Council of the Twp. of Teaneck, 5 N.J. Super. 172 (App. Div. 1949).

In Lyons Farms Tavern v. Mun. Bd. of Alcoholic Beverage Control, Newark, 55 N.J. 292, 303 (1970), the court stated:

> The conclusion is inescapable that if the legislative purpose is to be effectuated the Director and the courts must place much reliance upon local action. Once the municipal board has decided to grant or withhold approval of a premises enlargement application of the type involved here, its exercise of discretion ought to be accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of its discretion. Although the Director conducts a de novo hearing in the event of an appeal, the rule has long been established that he will not and should not substitute his judgement for that of the local board or reverse the ruling if reasonable support for it can be found in the record.

The following expressions from the recent case of Margate Civic Assoc. v. Board of Commissioners, Margate, 132 N.J. Super. 58, 63 (App. Div. 1975) are pertinent:

> The responsibility for the administration and enforcement of the alcoholic beverage laws relating to the transfer of a liquor license from place-to-place or to cover enlarged premises is primarily committee to municipal authorities. N.J.S.A. 33:1-19, 24; Lyons Farms Tavern v. Mun. Bd.

Alc. Bev. Con., Newark, supra. Local boards considering applications for such transfers are invested by our Legislature with wide discretion, and their principal guide in making a determination is the public interest. Id., 303; Lubliner v. Bd. of Alcoholic Bev. Con., Paterson, 33 N.J. 428, 446 (1960); See Tp. Committee of Lakewood Tp. v. Brandt, 38 N.J. Super. 462, 466 (App. Div. 1955).

Once the local board has made its determination, the municipality's action is broadly subject to appeal to the Director of the Division of Alcoholic Beverage Control who conducts a de novo hearing of the appeal, making the necessary factual and legal determinations on the record before him. Fanwood v. Rocoo, 33 N.J. 404, 414 (1960).

However, the rule is well established that the Director will not substitute his judgement for that of the local board, or reverse the ruling if reasonable support for it can be found in the record. On judicial reveiw the court will generally accept the Director's factual findings as well as his ultimate determination unless unreasonable or illegally grounded. Lyons Farms Tavern v. Mun. Bd. Alc. Bev. Con., Newark, supra at 303; Fanwood v. Rocco, supra at 414-415.

Since the Council's action in matters of this kind is discretionary, appellant, to prevail on appeal, must show manifest error or clear abuse of discretion. Rajah Liquors v. Div. of Alcoholic Bev. Control, 33 N.J. Super, 598 (App. Div. 1955).

The issue thus presented is: Did the Council act reasonably in the exercise of its discretion in denying approval of appellant's transfer application? Were the findings made by Council, which form the basis of the denial, proper under the circumstances?

- II -

I shall first consider the argument that the Salvation Army's Youth House is a church within the intentment of N.J. S.A. 33:1-76, and thus, the entrance is within 200 feet and proscribed by statute.

In Manning v. Trenton, Bulletin 247, Iten 1, the late Commissioner Burnett stated:

> The word "church" may designate either a religious congregation or an edifice of worship, according to the context. See Trustees, etc. vs. Fisher, 18 N.J.L. 254, 257 (Sup. Ct. 1841); Nwk. Athletic Club vs. Board of Adjustment, 7 N.J. Misc. 55, 59 (Sup. Ct. 1929). As used in the Alcoholic Beverage Control Act, it means a "recognized edifice devoted permanently to the worship of God." Bulletin 5, Item 3. That an edifice is what is meant appears from the fact that the yardstick in the statute is a distance of 200 feet, to be measured between "the nearest entrance of said church" and "the nearest entrance of the premises sought to be license." Hence, being a religious body is not of itself sufficient to invoke the benefit of the statute. Cf. George vs. Board of Excise, 73 N.J.L. 366 (Sup. Ct. 1906) aff'd, 74 N.J.L. 816 (E. & A. 1907), where the Court said" "The Legislature clearly did not intend that wherever religiously inclined persons meet together for Bible study and the like, a church existed within the meaning of this excise regulation." The mere fact, therefore, that a religious organization calls itself a "church" does not make it a church within the meaning of Section 76 of the Control Act, R.S. 33:1-76

In Manning, the church was a duly constituted body belonging to the Methodist Episcopal Church. The building in which it was located was formerly a two story dwelling house. On the first floor partitions were removed to form an auditorium where

religious services were held. The second floor contained an apartment undergoing repairs. Formerly, it was used as a residence by the pastor, but later it was rented to a tenant. Upon completion of the repairs, it was the intention of the religious organization to either continue to rent out the apartment or to allow their pastor to reside there.

Commissioner Burnett held in Manning:

> (No) one would recognize this ordinary dwelling house as being a church. The most anyone could say is that it is used to some extent like a church. It is not used exclusively for the worship of God. It was not built with that in mind. The second floor of this dwelling house is nothing but a flat to be rented out to tenants. The Church Trustee (who testified on behalf of all the Trustees) himself talks of the "church downstairs." A house divided against itself into a place of worship and an ordinary flat is not, within the contemplation of the statute, a church edifice.

In Quality House Wine & Liquor, Inc. v. New Brunswick, Bulletin 249, Item 4, a brick building in which church services were conducted on the ground floor, with six tenants occupying the upper two stories, was held not to be a "church" within the meaning of the statute. See also Parisi v. Jersey City, Bulletin 1201, Item 1.

Thus, I find tha the Youth Building is not a "church" within the intentment of the Alcoholic Beverage Law.

Since respondents concede that the distance is in excess of 200 feet to the chapel's entrance, there is no violation of N.J. S.A. 33:1-76, even if it is assumed, arguendo, that the Salvation Army maintains a church around the corner from appellant's premises.

Whether or not the expansion is granted, these two entities will co-exist at this location in the future, as they have for many years in the past. It should be borne in mind that the church never opposed the annual renewal of the tavern's license, including the most recent license term. The genuine complaints that the Salvation Army does experience, as related by Major Morris, could have been remedied by the framing of special conditions

imposed upon the grant of the application.

With regard to parking, it should be noted that there is no requirement that appellant provide off-street parking. Parking is not a new problem in Asbury Park, and it cannot be remedied so easily. That the owner of M and K's Disco has the funds to and does provide off-street parking for its patrons is most commendable; but it is not to be, under these ciruumstances, used as a criteria to selectively measure any other licensees, unless it be done uniformly throughout the City.

Appellant has stated that, if the expansion is approved, it would then (a) acquire a parking lot and (b) formalize the tentative arrangements made with the City Parking Authority. It has thus faced the problem and proposes reasonable solutions.

I note too, that there was no competent testimony tying this problem with patrons of appellant's establishment. Indeed, the testimony that the Ocean Grove residents saturate the area on Saturday nights points to another cause.

Similarly, no competent evidence was presented that the owners of vehicles illegally parked in the church's lot, nor the participants engaging in semi-public acts of sex, are patrons of the appellant. This is especially true when it is noted that a scant 250 feet away is the M and K Disco, having a capacity of at least 700 patrons, as well as the other licensees clustered in the immediate vicinity.

Asbury Park is basically a one-industry town; tourism. It has fared poorly when compared to some of the neighboring sea-shore communities to its south. A large portion of its downtown heart was damaged during the civil disturbances that followed the tragic assination of Rev. Martin Luther King, Jr. Its Urban Renewal Authority cleared a large area which still remains vacant due to the unavailibility of a sponsor capable of securing adequate financing.

By comparision, the area in which this license is situated has fared rather well. It is due in no small measure to the concern of local residents, business leaders, civic leaders and the city police department. The bars and clubs have not degenerated to the "shot and beer" type of establishments that are found all too often in run-down city areas elsewhere. They are, by and large, well run and present no insoluable problems to the residents, police or municipal officials.

To find that no need for additional licensed premises exists in the area flies in the face of the realities of the

situation. Granted, the need exists primarily on the weekends, but that is the nature of this industry.

It was poor judgement, at the very least, to have accepted Wisniewski as a reliable, expert witness. His personal financial interests are so obviously in opposition to this application that objectivity is not possible. Thus, I dismiss his testimony as lacking probative value, without impugning the man's reputation in any manner. His subsequent application, and its approval by the local issuing authority, contradicts his earlier testimony and the Town's conclusions relative to the area's need. This is not lightly dismissed by the Hearing Officer.

I, therefore, find that the Council erred in determining that no need exists for additional licensed premises in the area.

Some of the complaints testified to by Major Monroe are genuine and require remedy. The obvious first step is that of self-help. The church is urged to:

1. Repair and use the existing chain to restrict the area, otherwise the facilities will continue to be used by trespassers;

2. Post large signs, conspicuously, informing the public that they are prohibited from parking in its lot; and

3. Request that the police ticket all illegally parked vehicles in its lot and tow them away.

The second step is appellant's cooperation. It is urged to cooperate with the Salvation Army officials in order to minimize annoyance and inconvenience caused by its patrons.

Lastly, local police cooperation should be sought so that the lot can be survailed by their cruisers as they patrol the area, and take immediate remedial action when infractions are found.

I conclude that appellant has sustained the burden of establishing that the action of the Council in denying the application herein was arbitrary, unreasonable and an abuse of its discretion, as required by N.J.A.C. 13:2-17.6. Therefore, I recommend that an order be entered reversing the determination of the Council and directing that the transfer be approved in accordance with the application filed therefor. However, I further find and recommend that, for the reasons hereinabove

expressed, the license should be transferred expressly subject to the following special conditions:

1. The rear doorway or doorways shall be restricted in use to that of emergency or fire exit and shall not be employed as a usual patrons' entrance and/or exit. Exterior hardware shall be removed and other hardware installed on the inside consistant with this restriction and local fire and building codes.

2. A sign be conspicuously posted upon the inside of said door or doors advising the patronage that the door is for emergency use only;

3. An employee be assigned to remove all bar-related litter from the church parking lot at closing time each night, or earlier if necessary or requested by church officials; and

4. No refuse or debris be stored outside the rear of the premises in that area proximate to the church parking lot, unless ordered by Municipal officials. In that case, the licensee shall provide an adequate, tamper-proof fenced off area for the refuse to be stored while awaiting collection by the Sanitation Department.

CONCLUSIONS AND ORDER

Written Exceptions to the Hearer's Report were filed by the respondent, City Council of the City of Asbury Park, pursuant to N.J.A.C. 13:2-17.14.

In its Exceptions, the respondent objects to the following factual findings of the Hearer as not supported by the record sub judice:

(a) that the Salvation Army's objection was not to the licensee-appellant per se, but various objectionable occurences in the proximate area;

(b) that there is a need for additional licensed premises in the area, which finding fails to note the 57 existing licensed premises;

(c) the Hearer's apparent distinction between

"gay" and "straight" bars;

(d) that Asbury Park is basically a one-industry town, to wit, tourism;

(e) that the civil disturbances following the assassination of Rev. Martin Luther King, Jr. resulted in damages to a portion of the downtown area of the City; and

(f) that by and large the area's licensed premises are well run and present no insoluable problems to the community.

As to Items (d), (e) and (f), such findings provide background comments, which, even if not completely accurate, would not dilute or vitiate the recommended findings of the Hearer. Thus, I find these Exceptions to be without merit, particularly because they are irrelevant to the critical issue for my determination.

Items (a), (b) and (c) are related to the second general aspect of respondent's Exception, which alleges that the Hearer incorrectly applied the doctrines set forth in Lyons Farms Tavern v. Mun. Bd. of Alcoholic Beverage Control, Newark, supra and Fanwood v. Rocco, supra. In the final analysis, the determination by the local issuing authority of transfer issues must be based on some objective facts and criteria. If a determination based upon recourse to "community sentiment" were not subject to re-evaluation by the Director, on appeal, then the statutory right of appeal set forth in N.J.S.A. 33:1-26 would be nugatory.

Thus, my review of the record fails to establish that the proximity of the licensed premises to the Salvation Army or the nuisance-type complaints of one individual constitute, in and of itself, "community sentiment."

The Hearer's distinction of the type of clientele at appellant's premises has some validity in my determination of whether the finding of additional need for such type establishments is supported by the competent evidence. Regardless, however, I cannot reconcile the Council's position of lack of need and reluctance to increase licensure in the City with its subsequent approval of a licensed premises expansion to one of appellant's competitors who operates a nearby facility.

If, in fact, the Council was expressing valid "community sentiment", I question the justification for its apparent selective applicability. Clearly, the grant of

premises enlargement to M and K's Disco, only one block away, bespeaks an effort or intent to reduce licenses in the City. Therefore, I dismiss these Exceptions as without merit.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the memoranda of the parties and objectors, the Hearer's Report and the written Exceptions filed thereto, I concur in the findings and recommendations of the Hearer, including the special conditions set forth therein, and adopt them as my conclusions herein.

Accordingly, it is, on this 9th day of March, 1979,

ORDERED that the action of the City Council of the City of Asbury Park be and the same is hereby reversed, and said City Council be and the same is hereby directed to grant the appellant's application for transfer in accordance with the application filed therefor, expressly subject to the four (4) special conditions set forth in the Hearer's Report and incorporated herein as if set forth at length.

JOSEPH H. LERNER
DIRECTOR

2. STATE LICENSES - NEW APPLICATIONS FILED.

Continental Import & Export, Inc.
55 Morris Avenue
Springfield, New Jersey
Application filed August 8, 1979
for limited wholesale license.

Illva Saronno Inc.
200 Clearview Ave., Raritan Center
Edison, New Jersey
Application filed August 6, 1979
for rectifier and blender license.

Joseph H. Lerner
Director