

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 2397

April 27, 1981

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April 27, 1981

1. APPELLATE DECISIONS - 301 OAK STREET CORPORATION v. PASSAIC.

#4364

301 Oak Street Corporation,

Appellant,

vs.

Municipal Board of Alcoholic
Beverage Control of the City
of Passaic,

Respondent.

ON APPEAL

CONCLUSIONS

AND

ORDER

OAL DKT. NO. ABC 2868-79

Dominick Girodano, Esq., Attorney for Appellant.
Randolph Newman, Esq., Attorney for Respondent.

Initial Decision Below

Hon. Joseph Rosa, Jr., Administrative Law Judge

DATED: March 5, 1980

RECEIVED: March 7, 1980

BY THE DIRECTOR:

Written Exceptions to the Initial Decision with supportive argument were filed by the appellant, and Written Answer was submitted thereto by the respondent, pursuant to N.J.A.C. 13:2-17.14.

In its Exceptions, the appellant argues that the imposition of a sixty (60) day license suspension is inappropriate and/or excessive and inconsistent with the general finding that non-renewal of license was not warranted. The respondent replies that the modification proposed by the Administrative Law Judge was inadequate and should be six (6) months.

For basic statutory reasons, I shall reject the proposed sixty (60) days license suspension. A license can only be suspended in consequence of a finding of guilt to specified charges resulting from a duly instituted and conducted disciplinary proceeding in accordance with N.J.S.A. 33:1-31. The Administrative Law Judge's attempt to convert a renewal proceeding and appeal therefrom, pursuant to N.J.A.C. 13:2-2.1 et seq., and N.J.S.A. 33:1-22 into a disciplinary proceeding encompassed within N.J.S.A. 33:1-31 and N.J.A.C. 13:2-19.1 et seq. is clearly without basis in law, and is erroneous. Tomark, Inc. v. Passaic, Bulletin _____, Item _____.

I do not accept, however, the appellant's argument that the Initial Decision held that it was not responsible for conditions outside the premises. The Administrative Law Judge correctly held that the nuisance and brawl incidents did occur at or about appellant's licensed premises for which culpability could attach to the appellant. The Judge concluded, however, that non-renewal was not appropriate giving due consideration to the extent of the incidents, the absence of arrests or disciplinary charges, and the improved situation when the corporate stockholder returned to active management after his illness. I concur in these findings and conclusions on the facts, sub judice.

To provide proper recognition to the difficulties affecting the public interest that do exist in connection with the operation of appellant's licensed business, special conditions, imposed pursuant to N.J.S.A. 33:1-32 sometimes constitute an appropriate remedy. In lieu of denial of renewal, a licensee is given a final opportunity to prove its fitness for licensure, subject to restrictions.

The testimony herein discloses problems concerning noise, debris and litter, loitering, parking and other type disturbance situations. The Division has imposed various, almost standard-type conditions, in similar circumstances. Thus, I shall direct the following special conditions be affixed to appellant's license for the 1979-80 license term:

1. The only permissible amplified music or entertainment allowed shall be from one jukebox which shall have a volume regulator pre-set to reduce noise emission. In addition, all doors and windows, except for entry and egress, must remain closed; and

2. The appellant shall station a security guard or specially designated employee at the exterior of the licensed premises daily from 10:00 p.m. to one-half hour after closing to prevent loitering at or about the licensed premises, prohibit removal of open bottles and containers from the interior of the premises; limit noise and debris caused by patrons, and control, where possible, proper patron-parking.

Lastly, I reject that portion of the Initial Decision on pages 14 and 15, which purports to apply forfeiture principles to the subject administrative case. The cited cases are inapplicable to this agency and not analogous. The courts have consistently held that a liquor license is not a right or property, but a privilege. Zicherman v. Driscoll, 133 N.J.L. 586, 587 (Sup. Ct. 1946). See also The Boss Company, Inc. v. Atlantic City, supra.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the Initial Decision below, the written Exceptions filed by appellant and the written Answer submitted thereto by the respondent, I concur in the factual findings and conclusions of the Administrative Law Judge insofar as the reversal of the denial of appellant's application for renewal is concerned. I reject the proposed imposition of a sixty (60) days license suspension. I shall impose the special

conditions set forth hereinabove.

Accordingly, it is, on this 18th day of April, 1980,

ORDERED that the action of the Municipal Board of Alcoholic Beverage Control of the City of Passaic be and the same is hereby reversed; and it is further

ORDERD that said Board be and the same is hereby directed to renew appellant's license, in accordance with the application filed therefor, for the 1979-80 license term, expressly subject to the two (2) special conditions hereinabove set forth and incorporated herein by the reference as set forth at length.

JOSEPH E. LERNER
DIRECTOR

301 OAK STREET CORPORATION, t/a)
OAK INN

INITIAL DECISION

OAL DKT. No. ABC 2868-79

v.)

MUNICIPAL BOARD OF ALCOHOLIC)
BEVERAGE CONTROL OF PASSAIC

APPEARANCES:

Dominick Giordano, Esq., for the Appellant, 301
Oak Street Corporation

Randolph Newman, Esq., City Prosecutor for the
Respondent, Board of Alcoholic Beverage Control,
City of Passaic

BEFORE THE HONORABLE JOSEPH ROSA, JR., A.L.J.:

This is an appeal from an action of the Municipal Board of Alcoholic Beverage Control of the City of Passaic, (hereinafter Respondent), who by Resolution and Order dated June 28, 1979, refused to renew the plenary retail consumption license of 301 Oak Street Corporation, (hereinafter Appellant), license No. 1607-33-122-002, for the year 1979-80. The reasons for said denial as set forth in a resolution of the Respondent were as follows:

A record of lack of ability of licensee to carry on operation within the Community as regards to good and welfare of the Community specifically referring to (1) inability of licensee to manage premises; (2) evidence of criminal activity; (3) continued nuisance of surrounding area.

A hearing was held before the Respondent Board on June 28, 1978 at which time the aforesaid Resolution was adopted denying the renewal application of the Appellant.

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On June 29, 1979, the Appellant filed a Notice and Petition of Appeal with the Director of the Division of Alcoholic Beverage Control, State of New Jersey. On June 29, 1979, the Director of the Division of Alcoholic Beverage Control issued an Order to Show Cause extending the term of Appellant's plenary retail consumption license pending the determination of the Appeal. The matter was then transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1, et seq.

In its Appeal, the Appellant contends that the action of the Respondent was erroneous, was arbitrary, capricious, illegal, not based upon the evidence, contrary to the law, unreasonable, without proper notice, and that at the aforementioned hearing the Appellant was denied substantive and procedural due process.

A hearing de novo, pursuant to N.J.A.C. 2-17.6, was held on January 31, 1980 and February 4, 1980 before the Honorable Joseph Rosa, Jr., Administrative Law Judge. Pursuant to N.J.A.C. 13:2-17.14 all parties were given the opportunity to be heard and to cross-examine witnesses. No transcript of the proceeding below was submitted inasmuch as no stenographic record was taken at the renewal hearing. Respondent contends that there is more than sufficient and competent evidence in the record to support its Resolution, and asks that the denial of renewal be affirmed.

Relevant testimony was as follows:

Testifying initially on behalf of the Respondent was Clifford D. Falk, the operations manager of Jarmin, Inc., a trucking operation which is located at 312 Oak Street, Passaic, diagonally across the street from the Respondent's place of business, which is known as the Oak Inn and which is located at 301 Oak Street. He testified that:

He has been the operations manager of Jarmin, Inc., for the last two years. In this period of time there has been a serious parking problem on Oak Street, particularly with the parking of motor vehicles in the entrance driveway to the Jarmin Trucking yard. A number of the motor vehicles which have been parked in the entrance driveway have had to be towed from the area. Additionally, there was recently a burglary of one of the tractor trailer trucks of Jarmin. During the course of the burglary the night guard of Jarmin came on the scene but could not apprehend the perpetrator due to the fact that a number of patrons of the Oak Inn had come out of the front of the tavern and yelled a warning to the perpetrator allowing him to escape over a fence. On a number of occasions he has gone into the Oak Inn and asked the bartender to have the patrons move motor vehicles which were parked

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near, or in, the entrance driveway to Jarmin. On some of these occasions, he felt there was a possibility of violence due to the fact that the patrons did not wish to move the cars. He claims he never saw the actual owner of The Oak Inn prior to the renewal hearing.

On cross-examination, Mr. Falk admitted that a parking problem still exists at the location. He has asked the Italian-American Club, and a local church, which are also located on Oak Street, if the motor vehicles which were parked in the driveway belonged to their patrons, or parishioners. At all times, however, the motor vehicles appeared to have been owned by patrons of The Oak Inn. He stated that the parking problem was at its worst during the four month period of time that The Oak Inn reopened for business. During this interlude either he, his night guard, or a member of the Passaic Police Department had to go into The Oak Inn at least sixteen to eighteen times a week to ask the bartender to implore the patrons not to park in the driveway. Over the last two years, he has had at least twenty motor vehicles towed away from the entrance driveway, and at least eighteen of these belonged to patrons of The Oak Inn. He stated that he has never spoken to the local Alcoholic Beverage Control Board or to the Passaic Chief of Police about The Oak Inn prior to the renewal hearing. He further testified that the burglary of the Jarmin yard occurred in February of the year 1979, and that were it not for the patrons of The Oak Inn he feels that the burglar would have been apprehended. He also testified under cross-examination that he felt that the patrons of The Oak Inn were responsible for a number of cans and bottles which have been thrown into the trucking yard, but admits that he has never actually seen patrons of The Oak Inn throwing bottles or cans. He stated that the parking problem seems to have improved in the recent months, particularly since June when the renewal hearing occurred.

Testifying next on behalf of the Respondent was Ptl. John V. Palko, Jr., Badge No. 88, a member of the Passaic Police Department for the last three and one-half years. He testified that:

On May 28, 1979, at approximately 11:13 P.M. he, along with an Officer Taborn, also of the Passaic Police Department, was dispatched to investigate a disturbance at The Oak Inn. When he arrived and entered the premises the bartender told him that a patron had "torn up the joint." No arrest was made however because no one wanted to sign a complaint. He has been in The Oak Inn on at least fifteen to twenty occasions and has never seen the owner present there. It is a constant source of loud noise, and there is debris constantly on the street and sidewalk in the area in front of the tavern. In his opinion, The Oak Inn is a detriment to the City of Passaic. He "hated to go" into The Oak Inn, and was in "constant fear whenever he went there." He feels the tavern is located

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in a "rough area" and is frequented by "rough people."

Under cross-examination, he admitted that he is in fear not only of the Oak Inn, but a number of other taverns in the City of Passaic. He has never made an arrest at the Oak Inn, but has made reports of incidents that have occurred there. He recalled that the manager of the Oak Inn at the time of the incident of May 28th, was a Clarence Dominick and Mr. Dominick was helpful when the Officer entered the premises. The Officer recalled another incident which occurred in the bar in August or September of the year 1979. On that occasion, he was called to the tavern to investigate an altercation. As he approached the front door of the tavern, a man, who it was subsequently learned had been hit in the head with a pool cue stick, came running out the front door, with his head covered with blood. After the Officer entered the tavern, the patrons denied that there had been a fight in the tavern, despite the fact that the Officer could readily see some blood on the pool table, and also saw someone mopping blood off the floor. There were no arrests made as a result of this incident.

The Officer also admitted that for as long as he could remember there had been a parking problem on Oak Street, and he considered it a "double parker's paradise." He also stated that in the summer months a number of people always congregate in the area in front of the Oak Inn between the front door and the curb.

He does not socialize or frequent taverns in the City of Passaic. He admitted testifying previously against the Oak Inn in the renewal hearing in June of 1979. He felt that the most frequent complaint at the Oak Inn was that of loud music emanating from the tavern.

The next witness on behalf of the Petitioner was an Officer Philip Taborn, Badge No. 94, who has been a member of the Passaic Police Department for the past four years. Officer Taborn testified that:

Prior to becoming a police officer in the City of Passaic, he had been a corrections officer in Rahway State Prison for four years. On July 13, 1979, at approximately 12:23 A.M., he was on routine patrol when he was dispatched to the Oak Inn in response to a complaint about loud music. The bartender at that time was Clarence Dominick who the Officer approached and asked to lower the jukebox.

He was also present at the Oak Inn on May 28th with Officer Palko when they had cause to investigate the complaint of the patron who allegedly had torn up the premises.

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On May 2, 1979, he was dispatched to the Oak Inn approximately four times, each time for a complaint of loud music. The last time was at approximately 2:29 A.M. At that time he told the bartender that if the music wasn't lowered the tavern would have to be closed. The patrons at this turn of events became quite unruly and as Officer Taborn was leaving the tavern in the police vehicle a beer bottle came flying out of the front door and landed on the roof of the police vehicle. He was ordered by the Sergeant in charge of the investigation to leave the area for fear of provoking a riot.

He has been in the Oak Inn at least sixty-five or seventy times, and would categorize the basic complaints emanating from the operation of the tavern as loud music and personal disputes. He recalls the owner being there on only one occasion and this was when there was an attempted break and entry into the premises after the hours of business operation. The person normally in charge at the tavern is Clarence Dominick. He believes that the bar is a detriment to the City of Passaic.

On cross-examination, the Officer admitted that on the incident of May 2nd, the patrons became unruly after another Passaic Police Officer pulled the plug out of the jukebox. In the summer months a number of the patrons congregate outside the tavern and many of them have portable radios with loud volume. He admitted that he has never made any arrests inside the tavern. He feels that there has been a slight trend to "betterment" in the last few months, and recalls that on almost all occasions that he entered the Oak Tavern the bartender was usually cooperative. He knows that some of the patrons are known drug dealers and has arrested some of the patrons for other violations of the City of Passaic. He believes that the majority of the patrons are Passaic residents. The Officer also stated he is in fear on many of the occasions when he enters The Oak Inn due to the hostile attitude of the patrons.

The next witness on behalf of the Petitioner was a Ptl. Richard Sagala, Badge No. 82, Passaic Police Department. He testified that:

He has been a member of the Passaic Police Department for approximately four and one-half years and currently lives in the City of Paterson. He was on duty in August of 1979 with Officer Palko when they saw a man running on Oak Street with a severe gash in his head. They stopped the man, and they were told, by him, that he was hit in the head with a pool stick while he was playing pool in the Oak Inn.

He has been to the Oak Inn approximately ten to fifteen

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times, mostly on complaints for loud music. He feels the bar is a detriment to the City of Passaic and has always been verbally abused by the patrons whenever he has occasion to enter the tavern in uniform.

Under cross-examination, the Officer admitted that the August 1979 incident involving the man who had been hit with a pool stick was the worst incident that he can remember at the Oak Inn. When investigating that incident, he spoke to the bartender and recalled that none of the patrons wanted to help the investigation or offer any information regarding the incident. He based his opinion that the tavern was a detriment to the City of Passaic on the clientele who he felt were hostile to the police officers and "surround you" when you enter. The tavern has a reputation in the Passaic Police Department as a "bad bar", and he is always in fear when he is called to enter it. He has been verbally abused a number of times upon his entry, but has never been assaulted. He admitted however that he is also fearful in a number of other taverns in the City of Passaic. He does not socialize in the City of Passaic or frequent any of its taverns.

Testifying next on behalf of the Respondent was George Ratajczak, Badge No. 51. He testified that:

He has been a member of the Passaic Police Department for approximately eight years. On May 2, 1979, at approximately 2:20 A.M., he was one of the officers involved in the investigation of the Oak Inn, due to a loud music complaint, and he was the officer who pulled the plug of the jukebox out of the wall. He recalled that as he and the other officers left the premises a beer bottle came flying from the premises at the police vehicle when it was leaving the scene.

He has been dispatched to the Oak Inn on a large number of occasions mostly for loud music complaints, civil disturbances and fights. He feels that the tavern is a detriment to the City of Passaic.

Under cross-examination, the Officer stated that he felt that the bartender was uncooperative on the loud music incident of May 2nd, and that he pulled the plug out of the wall after he had heard a number of "racial remarks." He feels there has been some improvement in the operation of the Oak Inn in recent months. He admitted that he has never made any arrests inside of the Oak Inn, and that he has never been assaulted inside. He also admitted that he has never broken up an actual fight inside of the tavern.

The next witness on behalf of the Respondent was Detective Emmet Garner, Badge No. 52. He testified that:

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He has been a member of the Passaic Police Department for the last eight years and is a resident of the City of Orange. During his eight year period of employment by the City of Passaic, the last three of which he has been a Detective, he has entered the Oak Inn approximately one to two hundred times. He has entered the tavern both in his capacity as a uniform and an undercover officer. Most of the entrances were for disturbances, nuisances, narcotics and possible vice complaints. In his opinion, he felt that the Oak Inn has been a "den of iniquity", and a source of violence and a "real sore" to the City of Passaic.

Under cross-examination, the Detective admitted that a number of the entries that he made into the Oak Inn were as a result of routine tavern checks. He stated this would be so also for the other officers. He is aware of this fact inasmuch as he has personally compiled R-1 and R-2 in Evidence which are a record of all the responses to calls from 301 Oak Street. He also noted there are, within 200 feet of the Oak Inn, at least four other liquor licenses, one of which is the 12 Aces Social Club, which Detective Garner, and all the other officers who testified, noted was also a "trouble spot" in the City of Passaic.

Testifying on his own behalf was the principal shareholder of 301 Oak Street Corporation, Warren Ximinies. He testified that:

He has held the liquor license of the Oak Inn since December 15, 1978. On December 27, 1978 he was involved in an auto accident which resulted in his confinement until March 3, 1979. There are no other shareholders of the corporation and he was not in the tavern during the entire period of his recuperation from the auto accident. On March 20, 1979, he had to have an operation performed as a result of the accident and was seldom in the tavern until approximately June 1, 1979. During his period of recuperation from the accident, he was assisted in the operation of the tavern by a Robert Powell, his wife, his son, and Clarence Dominick. His wife has owned other taverns prior to this and owns and operates another tavern in the City of Passaic.

He claims he instructs his help that he wants to run a "clean place", doesn't allow gambling, narcotics, or "improper performance", and stated that his bar has never been closed for any disciplinary violations aside from an after hours sale infraction. He does acknowledge that there has been, what he termed as a "minor problem", at the tavern due to loud music. He considers his establishment a neighborhood tavern, and as such is not any worse than any of the other taverns in the City of Passaic which are in low-income neighborhoods. If he is not at the tavern, he telephones periodically to check on the operation of the tavern.

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He feels the tavern is a benefit to the local Community inasmuch as it offers the local residents a place to congregate and socialize. He was never advised by the Board of Alcoholic Beverage Control of the City of Passaic prior to the renewal hearing that his establishment was being considered a nuisance, and stated that the only notice he had was a letter from the Passaic County Prosecutor, a copy of which was simultaneously sent to the Municipal Board of Alcoholic Beverage Control of the City of Passaic, in which the County Prosecutor indicated that he was opposed to the renewal of the liquor license of The Oak Inn.

Under cross-examination, Mr. Ximinies admitted that he has been associated in various business capacities with the Virgo Lounge and the Interlude Tavern, both in the City of Passaic. He knew about the cue stick incident, but accepted his manager's version of the incident.

Under questioning by the Court, Mr. Ximinies admitted that the only musical entertainment in the Tavern comes from the jukebox and not from live entertainment. He stated that he can continue to do business without the jukebox.

The next witness on behalf of the Petitioner was Mabel Ximinies. She testified that:

She is the wife of Warren Ximinies and presently is the owner and operator of the Virgo Lounge in the City of Passaic, where she has lived for the last fifteen years. She knew that the Oak Inn was not an active operation when her husband bought it. She has worked at the Oak Inn as a barmaid and has never heard complaints about loud music emanating from the jukebox or a parking problem. The neighborhood where the Oak Inn is located is a densely populated area and she admitted that people tend to congregate on the street in this neighborhood. She feels the operation and the nature of the Oak Inn are the same as any of the taverns "downtown" in the City of Passaic.

Under cross-examination, Mrs. Ximinies admitted she still owns and operates the Virgo Lounge, and further admitted that she has heard that the Passaic Police Department has been in the Oak Inn on a number of occasions regarding the jukebox being too loud. She also stated that she was never a barmaid at night when most of, if not all, the complaints were made about loud music. She feels that the Oak Inn is a benefit to the neighborhood and the City of Passaic, inasmuch as it keeps the people "off the street."

The next witness on behalf of the Petitioner was a Robert Powell. Mr. Powell testified that:

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He is an accountant and currently does the "books" for the Oak Inn. He has also, on occasion, assisted Mr. Ximinies as a part-time bartender, particularly during the period of time when Mr. Ximinies was recuperating from the auto accident. He was present in the Oak Inn on a number of occasions when members of the Passaic Police Department were also there but at these times the police were involved only in routine tavern checks. He is not aware of any complaints about the operation of the Oak Inn nor has he ever been present in the Oak Inn when an arrest was made. He stated that he has never had anyone approach him regarding the parking problem at the Oak Inn.

He admitted that many people "hang outside" on the street in front of the tavern, but feels that this type of conduct is common to the entire neighborhood. He also feels that the majority of the patrons of the Oak Inn are middle and working class people and the Inn provides a place for them to congregate after work.

Under cross-examination, Mr. Powell admitted that he only worked at the Oak Inn part-time and has not been compensated financially for his bartending services.

The final witness for the Petitioner was a Clarence Dominick. He testified that:

He has been employed for the last year as an evening bartender at the Oak Inn. Prior to this, he worked as a bartender in the 12 Aces Social Club, which he felt was a "far worse bar than the Oak Inn." He has been present in The Oak Inn on a number of occasions when the Passaic Police have entered but stated that most of the visits by the police were for loud noise complaints.

He has never been present in the Oak Inn when there were any arrests inside of the tavern. He claimed to know nothing about the alleged parking problem, aside from one or two visits that he had from representatives of Jarmin Trucking. He felt that he was cooperative with the representative from Jarmin Trucking when he came in and asked him to find out which of the patrons were blocking the trucking company's access.

He was on duty when the patron, a woman, "tore the place apart", and in response thereto he had called the police to remove her. He was also present when the incident involving the pool stick occurred and stated that this was the result of a boxer who was playing pool and "egging on" the other patron he was playing with until the other patron hit him over the head with a pool stick. He did not feel that the incident when Officer Ratajczak pulled the plug out of the jukebox could have led to a riot, and doesn't feel that there are any particular "rough char-

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acters" that frequent the bar.

He also stated that he had been there at least ten or twelve times when the police had entered the premises, and has not heard any particularly loud abuse of the police officers on those occasions. He felt there has been cooperation with the police in regard to the complaints of loud music.

Under cross-examination, Mr. Dominick stated that he felt that there was not a serious parking problem caused by The Oak Inn, and that the other problems were not of a serious nature.

After having observed the demeanor of all the witnesses, having considered the entire record, including the testimony and exhibits submitted into evidence, together with the arguments of Counsel, I FIND:

1. Appellant is the holder of Plenary Retail Consumption License No. 1607-33-122-002, for premises known as The Oak Inn, which is located at 301 Oak Street, in the City of Passaic, Passaic County, New Jersey.
2. The principal shareholder and President of 301 Oak Street Corporation, t/a Oak Inn is Warren Ximinies.
3. The Oak Inn is located in a densely populated area of Passaic.
4. Oak Street in Passaic has serious parking problems due to the population density and the number of liquor licenses located on Oak Street.
5. There are a number of other liquor licenses within 200 feet of the Oak Inn.
6. On or about May 28, 1979, the Passaic Police Department were called to the Oak Inn as a result of an unruly patron who had done damage to the interior of the premises.
7. On or about May 2, 1979, the Passaic Police were dispatched to the Oak Inn as a result of a complaint regarding loud music. Upon their arrival the patrons became unruly and antagonistic to the police.
8. On or about May 2, 1979, a beer bottle was thrown

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by a patron of the Oak Inn at a City of Passaic Police car.

9. The Passaic Police have been called to the Oak Inn on a number of occasions due to complaints of loud music.
10. In August, 1979, an altercation occurred inside the Oak Inn in which one patron was struck on the head with a pool stick and received a severe laceration.
11. No arrests or complaints were made or filed as a result of this incident.
12. Many of the members of the Passaic Police Department feel that the Oak Inn is a detriment to the City of Passaic.
13. After his purchasing the Oak Inn in December of 1978, the owner Warren Ximinies was rarely, if ever, on the premises until June 1, 1979, due to an injury which he received in an automobile accident on or about December 27, 1978.
14. Few, if any, arrests have been made inside the Oak Inn.
15. During the summer months, patrons congregate on the sidewalk in front of the Oak Inn.
16. The Oak Inn received no notice of any pending non-renewal action by the Alcoholic Beverage Control Board of the City of Passaic.
17. The conduct at The Oak Inn has improved since June of 1979.

Based on the foregoing, I CONCLUDE that the Respondent has not sustained its action by a preponderance of the believable and credible evidence.

In the present matter, there was no stenographic record of the hearing below and therefore the issue in this Appeal is whether the evidence herein justifies the action of the Board in refusing to renew the Appellant's license. Cf. Nordco, Inc. v. Newark, Bulletin 1148, Item 2. In analyzing testimony, it would be helpful to state the applicable legal

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principles pertinent to a determination hereof. A liquor license in New Jersey vests a personal right in the licensee to conduct the business otherwise illegal. As such, it is merely a temporary permit or privilege. Mazza v. Cavicchia, 15 N.J. 498, 505 (1954). However, it has been held that once granted a license is protected against arbitrary revocation, suspension or refusal to renew. The Boss Company, Inc. v. Board of Commissioners of Atlantic City, 40 N.J. 379 (1963).

The granting or denial of an alcoholic beverage license rests within the sound discretion of the issuing authority. The Appellant must show an unreasonable action on the part of the issuing authority which constitutes a clear abuse of its discretion. The local issuing authorities are vested with a high responsibility and wide discretion and are to have as their principal guide the public interest. N.J.S.A. 33:1-19, 24. See also Rajah Liquors v. Division of Alcoholic Beverage Control, 33 N.J. Super. 598 (App. Div. 1955) and Blanck v. Mayor and Council of Magnolia, 38 N.J. 484 (1962).

The burden of proof in establishing that the action of the issuing authority was erroneous rests with the Appellant, N.J.A.C. 13:2-17.6, and the decision of the local issuing authority will stand so long as its exercise of judgment and discretion was reasonable. Fanwood v. Rocco, 33 N.J. 404 (1960), and Lyons Farms Tavern, Inc., v. Newark, 55 N.J. 292 (1970). The appeal to the Division is not de novo entirely. The Appellant has a heavy burden since he must show an abuse of discretion, or a decision which is unreasonable or illegally grounded. Fanwood v. Rocco at 414, 415.

The local authority's exercise of discretion ought to be accepted absent a clear abuse for unreasonable or arbitrary exercise of discretion. Lyons Farms, Supra. and Nordco, Inc. v. State, 43 N.J. Super. 277 (App. Div. 1957).

In the present matter, the local authority decided not to renew the Appellant's liquor license on the ground that the tavern had become a "trouble spot." Confirmation of this was found by the local Board in the testimony of the officers before it and a letter which it had received from the Passaic County Prosecutor's Office, both of which indicated that the Oak Inn had more trouble than any other tavern located in a difficult area. The Board felt that these two factors taken together were significant matters. It is entirely proper,

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"for both the local and State agencies, when passing on such applications, to take into account not only the conduct of the licensee, but also conditions, not attributable to its conduct, which render a continuance of a tavern in a particular location against the public interest." Nordco, Inc., Supra at 282.

In this hearing the local authority relied particularly on the testimony of the police officers of the City of Passaic, who testified specifically to three incidents which had occurred at the Oak Inn, two of which occurred in May of 1979 and one of which occurred in August of 1979. All other testimony of the officers was in a generalized nature, i.e., that the Oak Inn constantly had loud noise emanating from it and was deemed by members of the police department to be a "trouble spot." There was also testimony of a parking problem by a local businessman.

As correctly pointed out by the Appellant, if the tavern was as bad a trouble spot as depicted by the City it would seem reasonable that there would be testimony to more than three specific instances. Yet in this case, only three instances could be recalled by the police officers. As to the parking situation, there was not definitive testimony that could implicate the Oak Inn as the only source of parking trouble in the neighborhood. On the contrary, the neighborhood seems to be densely populated with a number of businesses and operations that would attract motor vehicles and to attribute the parking problem solely to the Oak Inn would appear to be clearly unreasonable.

It is clear that a licensing authority has the right to exercise the discretion to determine what, in light of all the surrounding circumstances and conditions, is in the public interest of the local municipality. In the present matter, the Alcoholic Beverage Control Board has had the opportunity to observe the demeanor of the witnesses produced before it and was persuaded by their testimony that certain acts did occur within and in the immediate vicinity of the Appellant's establishment.

I CONCLUDE, also, after observing the demeanor of the witnesses and the evidence, that the principal licensee, Warren Ximinies, had apparently during the specific period of time abdicated his responsibility as a licensee in favor of a bartender-manager, Clarence Dominick, who apparently was totally unable to control the type of patronage and their conduct in the licensed premises. It appears clear that the manager was unable to control the patronage to the detriment of the public on at least three occasions. It is also apparent that the repeated gatherings by patrons in front of the licensed premises constituted the "nuisance" condition which served as the basis for the denial of the renewal herein. However, the presence of the jukebox and

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its loud playing, more than anything else, contributed to the atmosphere within the Oak Inn.

The licensee must keep his establishment and his patronage under control and is responsible for the conditions both outside and inside of the premises. Glasso v. Bloomfield, Bulletin 1387, Item 1. In the area of licensing, the determinative consideration is the public interest, and is it served by the continuance of a licensed operation, not the fault or merit of the licensee. See: Paul v. Gloucester County, 50 N.J.L. 585 (E & A 1888) and Zicherman v. Driscoll, 133 N.J.L. 586, 588 (Sup. Ct. 1946). In Driscoll, it was held

"the common interest of the general public should be the guidepost in the issuing and renewing of licenses." Driscoll, Supra at 588.

I am not unmindful of the testimony of the Appellant's witnesses that the Oak Inn serves a reasonable public purpose allowing and providing a place to gather and socialize for the lower- and middle-income people who populate the neighborhood. The inquiry thus becomes whether in light of the totality of the circumstances, and conditions, was it in the public interest to allow this tavern to continue to operate. The objective judgment of the Board was that its continuance would be inimical to the public interest. C.f. R.O.P.E., Inc. v. Fort Lee, Bulletin 1966, Item 1. I CONCLUDE that this determination based on three incidents was unreasonable.

The denial of the right to continue the operation of a licensed premises, that is, the revocation or non-renewal of the license presents the most severe penalty that may be imposed upon the licensee. The local Board chose non-renewal based on three specific instances and an unspecified number of loud music complaints. The Board chose rather than to remedy the loud music situation, to invoke the penalty of non-renewal. I FIND this to be manifestly unreasonable.

It should also be noted that throughout all of the instances complained of by the members of the local police who testified, there was not one arrest made within or in the area directly around the Oak Inn. The majority of the complaints emanating from the Oak Inn were based on the loud playing of the licensee's jukebox. As a result of this testimony, the local Board unreasonably denied renewal of the license. Forfeitures are not favored by the law, c.f. DeFeo v. Smith, 17 N.J. 183 (1955), and are to be avoided unless absolutely compelled, Ali v. Towe, 30 N.J. Super. 19 (App. Div. 1954).

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Contrary to the position taken by the local Board, which has resulted in a forfeiture of the Appellant's license, nothing in the testimony compels a forfeiture in the present case.

I FIND and CONCLUDE that in the present matter a more satisfactory procedure for the Board would have been to initiate a disciplinary proceeding on a specific charge and to suspend for a period of time on an adjudicated record, rather than to base refusal to renew on a non-notice basis.

In the present matter, the local Board chose not to give any notice to the Appellant but chose the remedy of non-renewal as a matter of first instance. I CONCLUDE that this was unreasonable in light of the incidents which were testified to by the members of the Passaic Police Department.

It should be noted that the entire actions of the local Board in this matter are based on three incidents and a continual problem of loud noise emanating from the Oak Inn. The opinions of the police officers that the license should not be renewed and that the establishment is a detriment to the City of Passaic were based entirely on their police reports and police conduct and were not general neighborhood feeling. In fact, no one from the neighborhood appeared to object to the renewal. It should be remembered that one of the key factors to be considered in licensing situations is local sentiment. C.f. Lyons Farm, Supra and Fanwood v. Rocco, Supra.

I therefore FIND and CONCLUDE that the local Board abused its discretion in not renewing the plenary retail consumption license of 301 Oak Street Corporation and the punishment of non-renewal was unreasonable. However, it appears that the licensee needs more than this appeal proceeding to impress upon him the necessity of keeping his patronage under his control and to impress upon him his responsibility for the conditions both inside and outside his premises. C.f. McFadden's Lounge v. Division of Alcoholic Beverage Control, 33 N.J. Super. 61, 62 (App. Div. 1954). The primary purpose of a suspension being imposed against a licensee is to serve as a warning that if the conditions are repeated, the license will be permanently in jeopardy. Bayonne v. Bayonne B & L Tavern, 42 N.J. 131 (1964). Because of this, I CONCLUDE that the Appellant should be given an opportunity to prove his worthiness to remain in the Alcoholic Beverage industry. The Appellant has shown that the penalty imposed by the issuing authority was excessive and unreasonable but he has not shown that he should not be reprimanded in some way. Accordingly, I CONCLUDE that the plenary retail consumption license for the Oak Inn should be renewed for the year 1979-80 subject to the following conditions:

1. That a penalty of sixty (60) days' suspension be imposed beginning from the date of final decision by the Director

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of the Division of Alcoholic Beverage Control.

2. That the licensee remove from his premises all forms of musical entertainment including but not limited to jukebox, record players, tape players, radios, and live entertainment.

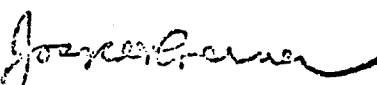
However, Appellant should be pointedly warned that although the charges directed to Appellant were not sufficiently documented on this occasion, the Municipal Board of Alcoholic Beverage Control may consider the results of this action and the evidence of activity surrounding Appellant's premises for the balance of the 1979-80 license year as reason for renewal for the 1980-81 license year. The Appellant thus should use far greater diligence in ridding himself and the area of undesirable elements that may or may not at the present time be frequenting his tavern. He should also be given further instructions to those he chooses to employ as to their responsibilities in the operation of his tavern.

This recommended decision may be affirmed, modified or rejected by the head of agency, the Director of the Division of Alcoholic Beverage Control, who by law is empowered to make a final decision in this matter. However, if the head of the agency does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph W. Lerner, my Initial Decision in this matter and the record in these proceedings.

2. STATE LICENSES - NEW APPLICATION FILED.

George T. Shalhaub
346 Larch Avenue
Bogota, New Jersey
Application filed April 23, 1981
for limited wholesale license.


Joseph H. Lerner
Director