

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 2407

July 17, 1981

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1. APPELLATE DECISIONS - GEMINI RISING, INC. v. AVALON.

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1. APPELLATE DECISIONS - GEMINI RISING, INC. v. AVALON.

#4352
GEMINI RISING, INC.,
A N.J. CORP.,
T/A JACK'S PLACE,

APPELLANT,

VS.

BOARD OF COMMISSIONERS OF THE
BOROUGH OF AVALON,

RESPONDENT.

CONCLUSIONS

AND

ORDER

Piltzer & Piltzer, Esqs., by David S. Piltzer, Esq., Attorney
for Appellant.
Gaver & Mead, Esqs., by Eric D. Gaver, Esq., Attorney for
Respondent.

INITIAL DECISION BELOW

Hon. J. Roger Persichilli, Administrative Law Judge

Dated: April 25, 1980

Received: April 28, 1980

BY THE DIRECTOR:

Written Exceptions to the Initial Decision were filed by the appellant and a written Answer was submitted on behalf of the respondent, pursuant to N.J.A.C. 13:2-17.14.

In its first Exception, the appellant argues that the action of the Board of Commissioners should be voided because of the use of an alleged "pre-prepared" resolution, and the alleged political pressures and influence attendant to the consideration by the Board of appellant's renewal application.

As properly noted by the Administrative Law Judge, the draft of a proposed resolution post dated the municipal hearing, and the holding in Feldman v. Municipal Council of the Township of Irvington, (App. Div. Docket No. A-1814-73) not officially reported but noted in Bulletin 2168, Item 1 is inapposite. Nor do I find any competent proofs of unreasonable action herein predicated solely upon political consid-

erations or to any sufficient extent to invoke the doctrine of Paitakis v. City Council of the City of New Brunswick, 126 N.J. Super. 233 (App. Div. 1974).

A large ground-swell of public opposition to appellant's operation and proposed plan of expansion clearly appears from the evidence adduced, not a political pre-determined action against appellant as vengeance or punishment. I reject this Exception as without basis.

Appellant further argues that special conditions may not be imposed which limit the statutory privileges of a retail license, citing Common Council of the City of Englewood v. Lacqua, 92 N.J. Super. 493 (App. Div. 1966).

In Lacqua, there was no competent support for the imposition of special conditions which limited the patronage to whom a retail consumption licensee could sell alcoholic beverages; in effect, the conditions imposed transformed the plenary retail consumption license into a club license. In the matter sub judice, the Board was confronted with existant nuisance complaints referable to the operations of appellant's licensed business, and a strong fear that an expansion of outside sales would exacerbate such problems.

Special conditions, such as prohibiting outside sales and consumption, in toto, are proper when warranted by the factually-demonstrated problems confronting the issuing authority. Chateau Company, Inc. v. Belleville, Bulletin 280, Item 5.

The normal privileges attendant to a license can be restricted by special condition imposed pursuant to N.J.S.A. 33:1-32, provided they are necessary and proper to accomplish the objects of the Alcoholic Beverage Law. Thus, I reject the general proposition set forth in this Exception as inapplicable to the matter sub judice.

Remaining for consideration are the specific special conditions imposed by the Board and, in particular, whether they are supported by the record as necessary; proper as to their ability to achieve the objective sought; and/or proper within the scope of the Alcoholic Beverage Law and its regulations.

My review of the record indicates two dominant factors:

The first is the community fears associated with the proposed expansion of alcoholic beverage sales and consumption at other outside areas by the appellant. The second is the demonstrated nuisance activities attributable to appellant's patrons, occurring, continually at late night hours. See, for example, the police reports submitted as R-6 in evidence.

I find no direct support to warrant a discontinuance of the limited outside sale and consumption of alcoholic beverages conducted by the appellant for the past three years prior to this appeal. There is no testimony referable to nuisance type activity generated by the ability of patrons to sit on the patio and consume alcoholic beverages. I am particularly mindful that such activity ceases around 7:00 p.m. and I shall embody same as a special condition. I shall, however, reverse the total ban against same as set forth in the first and second special conditions.

I shall affirm the third, fourth, and fifth special conditions which prohibit construction of an outside bar, and any further expansion of the area for outside sale or consumption by appellant's patrons. Such contemplated expansion has apparently been rendered moot, but, a prohibition against any further outside alcoholic beverage activity, no matter what other area may be contemplated, is reasonable, and should be imposed to avoid future difficulties. The traffic and parking problems demonstrated in the record support the fifth special condition and its requirement that the existing off-street parking be retained.

The sixth special condition is supported by competent testimony. I shall affirm same with one modification, to wit, the clean-up shall be done no later than 9:00 a.m. of the following day. Daylight debris clean-ups are more meaningful and eliminate late night activities by appellant's employees which, in itself, could disturb the neighborhood residents.

The seventh special condition is proper and necessary. The time frame and number of attendants is reasonable. I shall amend the objects and scope of such attendants' activities to provide a more general obligation to eliminate various other nuisance type activities.

The eighth special condition represents a bona fide concern of the Board of Commissioners concerning health and safety, but is not cognizable under the alcoholic beverage law under the facts herein. Any violations or required activity must be

pursued through the building or health ordinances of the municipality or state. Therefore, I shall reverse this condition.

In the respondent's Answer to the Exceptions, it seeks to clarify the physical layout of the outside area of appellant's premises potentially capable for expansion as an additional patio to facilitate alcoholic beverage sale or service.

As indicated heretofore, the only permissible area shall be that patio area of six (6) tables previously used by appellant, and only for the limited time period therein. Should problems be generated therefrom, the Board can institute appropriate disciplinary actions against appellant or reconsider such activity at it's next renewal.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the written summations of the parties, the Initial Decision, the written Exceptions filed by the appellant and the written Answer submitted by the respondent, I concur in the findings and recommendations of the Administrative Law Judge and adopt same, except as modified herein, as my conclusions herein.

Accordingly, it is, on this 6th day of June, 1980,

ORDERED that the action of the Board of Commissioners of the Borough of Avalon be and the same is hereby affirmed in part, reversed in part, and modified in part as heretofore noted; and it is further

ORDERED that the renewal of appellant's license for the 1979-80 license term be and the same is hereby approved subject to the following special conditions annexed thereto:

- (1) Outside sale and consumption of alcoholic beverages shall be permitted at the existing front (west) side of licensee's premises only, and no later than 7:00 p.m. daily;
- (2) No outside bar or expansion of the outside areas of the licensee's premises to enable or facilitate outside sale or consumption shall be permitted;
- (3) The area presently used for parking

shall remain available for same unless otherwise waived by the issuing authority, or unless otherwise ordered by a court of plenary jurisdiction;

(4) The licensee shall, no later than 9:00 a.m. of the following morning, clean up all bar related debris and litter within a minimum of one block of the licensed premises; and

(5) The licensee shall, from 8:00 p.m. until one-half ($\frac{1}{2}$) hour after closing, station two (2) attendants or security personnel to the exterior of the licensed premises to properly police same, and the parking area, to facilitate patron ingress and egress, control disturbances and noise; monitor parking, prevent removal of open containers from the licensed premises by patrons; deter loitering; and maintain peace and control thereabout; and it is further

ORDERED that my Order of June 27, 1979, staying a portion of the special conditions, be and the same is hereby vacated.

JOSEPH H. LERNER
DIRECTOR

IN RE:	:	<u>INITIAL DECISION</u>
	:	
GEMINI RISING, INC., A NEW	:	
JERSEY CORPORATION, t/a JACK'S	:	DKT. NO. ABC 2849-79
PLACE,	:	AGENCY DKT. NO. 4352
APPELLANT,	:	
V.	:	
	:	
BOARD OF COMMISSIONERS OF THE	:	
BOROUGH OF AVALON,	:	
RESPONDENT.	:	

APPEARANCES:

Piltzer & Piltzer, Esqs., by David S. Piltzer, Esq.,
Attorney for Appellant

Gaver & Mead, Esqs., by Eric D. Gaver, Esq.,
Attorney for Respondent

WITNESSES:

For the Respondent:

Steven Shuttleworth, Detective, Avalon Police
Department

Robert J. Weed, Captain, Avalon Police Department

Paul J. Gossin, Jr., Resident of Avalon Borough

William P. Dodd, Jr., Resident of Avalon Borough

Phyllis Dodd, Resident of Avalon Borough

Sharon T. Zachary, Property Owner, Avalon Borough

Harry L. Baxter, Resident of Avalon Borough

DKT. NO. ABC 2849-79

For the Appellant:

John Erkert, President and General Manager of
 Gemini Rising, Inc., t/a Jack's Place

Owen Quinn, Councilman of the Borough of Avalon,
 September 1978 to June 1979

EXHIBITS:

- R-1 Tax Map, Borough of Avalon (one page)
- R-2 Petition in Opposition to Building Permit #6658,
 issued to Jack's Place (twenty-eight pages)
- R-3A Affidavit of Lena Russo (two pages)
- R-3B Affidavit of Warren Price (two pages)
- R-4 Letters in Opposition, dated in the months of
 April, May and June 1979, Previously Marked for
 Identification O-1 to O-12, and O-14
- R-5 Form Letters in Opposition, Previously Identified
 as O-15 (forty-one pages)
- R-6 Packet of Police Incident Reports, re Jack's
 Place, Police Department, Borough of Avalon
 (forty-one pages)
- R-7 Letter of Reverend Boyd T. Sylvester to Joseph H.
 Lerner, dated July 5, 1979 (three pages)
- R-8 Six Letters of Objection Addressed to Mr. Gaber,
 counsel for Respondent
- R-9 Transcript of the Minutes of the Special Meeting
 of the Board of Commissioners, Borough of
 Avalon, June 13, 1979
- R-10 Transcript of the Minutes of the Special Meeting
 of the Board of Commissioners, Borough of
 Avalon, June 19, 1979
- R-11 Resolution No. 79-192, Captioned "Renewal of
 Plenary Retail Consumption License-Gemini
 Rising t/a Jack's Place-State Assigned License
 No. 0501-33-004-001, With Conditions"

- A-1 Schematic Drawing of Avalon Between 36th and
 40th Streets, Bounded by Dune Drive on the East
 and Ocean Drive on the West
- A-2 Continuation of Exhibit A-1, North from 36th to
 32nd Streets
- A-3 Continuation of Exhibit A-1, South, Bounded by
 Ocean Drive on the East and Fourth Avenue on the
 West, including Canal Street, 39th, 40th, 41st
 and 42nd Streets
- A-4 Color Photograph of Jack's Place, Inside Bar Area
- A-5 Two Color Photographs of Jack's Place from the
 Corner of 36th Street
- A-6 Two Color Photographs Depicting Entrance and Patio
 Area

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- A-7 Two Color Photographs Depicting Close-Up Views Contained on Exhibit A-5
- A-8 Two Color Photographs Depicting the Parking Lot of Jack's Place
- A-9 Two Color Photographs Depicting Outside Bar and Patio Area, Taken in Approximately May 1979
- A-10 Color Photograph of Deck Under Construction, January 19, 1979
- A-11 Color Photograph of Newly-Constructed Bar and Deck at Jack's Place
- A-12 Color Photograph Looking South on Ocean Drive, Depicting Jack's Place on Left

BEFORE THE HONORABLE J. ROGER PERSICILLI, A.L.J.

The matter sub judice is an appeal from the action of the Board of Commissioners of the Borough of Avalon which, by Resolution No. 79-192 adopted on June 19, 1979, denied appellant's application for a Plenary Retail Consumption License without conditions. Appellant sought to renew its Plenary Retail Consumption License No. 0501-33-004-001 for premises 3601 Ocean Drive, Avalon, New Jersey. Said license was renewed with conditions. Notice of Appeal and a Petition of Appeal and a Request to Stay the Conditions were served on June 27, 1979 upon Joseph H. Lerner, Director, Division of Alcoholic Beverage Control, Department of Law and Public Safety. An Answer was filed on behalf of the respondent, Board of Commissioners of the Borough of Avalon, on July 2, 1979. By Order dated June 27, 1979, Director Lerner stayed certain portions of the Special Conditions imposed upon the appellant's license. Thereafter, he transmitted this matter to the Office of Administrative Law for determination, as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

A hearing was conducted on November 1, 1979 and continued on January 21, 1980 at the Cape May County Library Meeting Room, Cape May Court House, New Jersey. The parties were given full opportunity to be heard and to cross-examine witnesses. Written summations and replies were permitted and the hearing record was closed on March 26, 1980.

By Resolution No. 79-192, adopted June 19, 1979, the Commissioners of the Borough of Avalon granted a Plenary Retail Consumption License for the period commencing July 1, 1979 to Gemini Rising, t/a Jack's Place, subject to the following conditions:

- "a. No alcoholic beverages shall be permitted to be sold from the outdoor bar facility or outside of the existing exterior walls of the existing structure on the licensed premises.

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b. No alcoholic beverages shall be permitted to be consumed at the outdoor bar facility or beyond the existing exterior walls of the structure on the licensed premises.

c. No alcoholic beverages shall be permitted to be sold in any contemplated pool area or beyond the existing exterior walls of the existing structure on the licensed premises.

d. No alcoholic beverages shall be consumed in the contemplated pool area or beyond the existing exterior walls of the existing building on the licensed premises.

e. All of the premises now used for or provided for parking shall be retained and used for parking except so much of that area as may be permitted to be used for a pool area by virtue of a determination in the case now pending in the New Jersey Superior Court, Docket No. C-3445-78.

f. Licensee shall immediately following closing, clean up bar related litter within a minimum of one block of the licensed premises.

g. Licensee shall, from 8:00 P.M. until $\frac{1}{2}$ hour after closing, provide for two (2) attendants or security personnel to prevent noise and disorder in the parking area and to notify Borough Police Officers as to other disorderly conduct, including intrusion on private property of adjacent residents for any purpose, including urination.

h. Within 90 days from the date hereof, licensee shall arrange for a study by the Cape May County Health Department or some other recognized agency or consultant for determination as to the adequacy of the toilet and bathroom facilities on the premises during peak hours and within 180 days from the date hereof, the written results of said study shall be filed with the Borough Clerk. Prior to the next application for renewal of this license, any additional facilities indicated in such study shall be constructed."

Director Lerner's Order of June 27, 1979 stayed "that portion of a, b, c and d, which prohibits the sale and consumption on the exterior of the licensed building, limited however to permit sale and consumption at that limited area on the exterior traditionally used by appellant. Sale and consumption at or from the outdoor bar, facility or contemplated pool area is not stayed

and that aspect of Special Conditions a, b, c and d shall remain in full force and effect; and it is further ordered that all of the remaining Special Conditions shall remain in full force and effect, insofar as they should prevent no unreasonable hardship on appellant."

Appellant's Petition contends that the action of the respondent was erroneous and "constituted an arbitrary and capricious decision and amounted to an abuse of the discretion of the Borough Commissioners in that a Plenary Retail Consumption License without conditions should have been issued..." Furthermore, it alleges that the "conditions are unduly burdensome, restrictive, arbitrary and capricious and...would constitute an undue hardship on the appellant in his attempts to conduct business..." Respondent's Answer denies said allegations and asserts the following grounds support the Board's actions:

1. Those grounds detailed and set forth in Resolution 79-192;
2. Jack's Place constitutes a nuisance;
3. Jack's Place sought an illegal expansion of a non-conforming use; and
4. The premises for which the license was sought are in violation of the zoning ordinance of the Borough of Avalon.

Counsel for the appellant initially argued that the procedure by which the Resolution was adopted is defective. He argued that the record disclosed that, at the June 19, 1979 meeting of the Avalon Board of Commissioners, a pre-prepared typed Resolution had been drawn prior to the hearing conducted on that date. Counsel states that such a procedure was "strongly disapproved" in the unreported case of Feldman v. Municipal Council of the Township of Irvington, decided October 16, 1974 by the Appellate Division of the New Jersey Superior Court, Docket No. A-1814-73. Although the Appellate Division did not reverse in the Feldman case, it gave clear notice to all municipal issuing authorities that the use of a pre-prepared resolution creates the impression of a pre-determined conclusion and an inference of partiality on the part of the local governing body. Counsel argued that the impression of partiality is present because the imposition of Special Conditions on appellant's license had become a political issue in a campaign for the mayoralty of the Borough of Avalon in which Mayor Armacost was pitted for re-election against a candidate, Commissioner Quinn, who was supported by Jack Erkert, the principal owner of Gemini Rising. I find these issues to be without merit. The record reveals that a public hearing was conducted for the renewal of the Plenary Retail Consumption License for Gemini Rising t/a Jack's Place on June 13, 1979 (R-9 in evidence). The pre-prepared

Resolution was adopted thereafter on June 19, 1979 (R-10 in evidence) at a special meeting of the Board of Commissioners. It is clear that the Resolution was adopted subsequent to the June 13, 1979 public hearing and not prepared in advance of the hearing. At the June 19, 1979 meeting, counsel for the Board stated that he "drafted a form of resolution so that the Commissioners could have something to consider and discuss at this meeting." He further advised them that they have the discretion "to either approve the application of those conditions, turn the application down, or insert conditions." Counsel's argument that the Resolution was the result of political partiality is not supported by the record. On the contrary, Mr. Quinn testified that similar conditions were imposed on the Whitebriar's Renewal Application. Furthermore, the cross-examination of Mr. Quinn clearly establishes that he had ample opportunity, as one of the Commissioners, to analyze what was presented before him at the hearing of June 13, 1979, and that the Resolution which was subsequently adopted reflected the public sentiment.

The undisputed facts sub judice reveal that the Borough of Avalon is a small shore resort community located in Cape May County. It has been characterized as a family resort area. Throughout the years, it has experienced primarily residential growth and non-conforming uses were created upon the enactment of zoning ordinances. Jack's Place is one example. It is located in a residential zone, in a neighborhood composed primarily of single family dwellings, with a mix of duplex and multi-family dwellings. The record discloses that there are only two other commercial locations within two blocks of Jack's Place, one sandwich shop and one delicatessen. Throughout the years, Jack's Place experienced a transition from a local pub servicing an older clientele to a seasonal business which enjoys the patronage of a younger clientele. In an effort to improve his business and better serve his patrons, the proprietor proposed the construction of an outdoor pool, an outdoor bar and an outdoor deck in the area presently used for patron parking. The present operation of Jack's Place provides a capacity for 650 patrons, with an outdoor area containing six tables. The appellant concedes that the outdoor eating area does not comprise a major portion of food or liquor sales. Counsel for the appellant has represented, in his summation, that his client has removed both the swimming pool and the outside bar. Therefore, the issues of the swimming pool and the outside bar, as they relate to the Special Conditions, are moot.

The hearing conducted by the Board of Commissioners on June 13, 1979 afforded the public the opportunity to voice their objections to the renewal of the Plenary Retail Consumption License. The public spoke of continuing problems of noise, litter, vandalism, public urination, traffic congestion, the lack of parking and of the construction of an outdoor bar and swimming pool. It was generally regarded that the expansion of the bar would expand the existing problems.

The nature of the scope of review in the de novo hearing sub judice was questioned by the respective counsel in their summations and replies. I find that the instant appeal provides the mechanical means by which the licensee is afforded the opportunity to be heard on the issue of whether the Director will approve the conditions imposed by the local governing body. The statute, N.J.S.A. 33:1-32, empowers the issuing authority, subject to rules and regulations, to impose any condition or conditions to the issuance of any license deemed necessary and proper, subject to being "first approved by the Commissioner." As long as the conditions imposed relate to the license in question (Balaniz v. Newark, Bulletin 156, Item 1), are made concurrent with the issuance or renewal of the license (Alanwood Holding Co. v. Atlantic City, et als., Bulletin 1963, Item 1) and are reasonably required to serve the best interest of the community (Borko v. Mansfield Township, Bulletin 1894, Item 3), the imposition of such conditions will be affirmed by the Director (A's Inn, Inc. v. Deal, Bulletin 2139, Item 3). A renewal license is in the same category as an original license (Zicherman v. Driscoll, 133 N.J.L. 586, Sup. Ct. 1946). Where an appeal is the vehicle employed to test the imposition of conditions, the Director must determine whether or not the municipality's discretion in imposing such conditions has been properly exercised. By virtue of law, there can be no question that the Director has the authority to modify conditions imposed by a local issuing authority, though the Director will not substitute his judgment for that of the local issuing authority or reverse its determination if reasonable support for its actions can be found on the record. (MJS, Inc. v. Borough Council of the Borough of Edgewater, Bulletin 2287, Item 2); Essnjay, Inc. v. Perth Amboy (Bulletin 2222, Item 1).

At the hearing, the respondent presented five members of the community for testimony. Although the reasons for objection varied with each individual, the common thread inherent to the objections was the preservation of the neighborhood. The community concerns and sentiments addressed the problems of traffic congestion and parking, attributable, in major part, to the patrons of Jack's Place. Litter in the form of bottles, napkins and plastic glasses imprinted with Jack's logo was said to be frequently found in the surrounding neighborhood. Several witnesses testified that saw patrons urinating in public areas. The concensus of opinion was that the bar created more problems in the evening hours than in the daytime hours of operation. The testimony focused upon the disturbances created by the noise, profanity and "rowdyism" which occurs in the evening and at times immediately after the bar closes for the evening. The witnesses also testified that, over the year, the clientele which patronized this establishment, changed from a family or older clientele to a younger element who are more vociferous than an older or family clientele. The fact that Jack brought in rock bands was supportive of these observations. None of the witnesses offered by respondent were against the renewal of the license but they were in favor of the special conditions imposed upon the license. Furthermore,

they were concerned that permission to expand the use would expand the problems. Their composite testimony was reflective of the testimony given before the Board of Commissioners on June 13, 1979. The Exhibits previously submitted to the Board were also admitted in evidence in the de novo hearing.

The respondent also produced members of the local police department who testified to the problems that they have faced at Jack's Place during the summer season. Although the problems were not unlike those normally experienced at other bars, Captain Weed testified that there has been an increase in police activity along with the increase in business that Mr. Erkert, the proprietor, has generated. The testimony of the officers reflected a general agreement that the conditions imposed by the Board would control rather than expand the problems associated with this establishment. The officer's testimony also reflects that the appellant fully cooperates with the local police department and that the licensed premises is as well conducted as other licenses in the municipality.

The appellant, Jack Erkert, testified to the manner in which he maintains and polices his property. Under his ownership, the appellant improved the physical appearance of the property and has made efforts to control the noise emanating from his establishment. Specifically, he closed off the windows and had installed carpeting on the interior walls. He has also improved the restroom facilities. Mr. Erkert described the interior of his premises as a bar room, small dining room and a package store area. Lunch and cocktails are also served outdoors on the tables in the patio area of the licensed premises until 7:00 p.m. Jack's Place has been utilizing the outside patio area for the past three years. He testified that he "probably" could get another ten tables in the subject outdoor area. Presently, the focus of Mr. Erkert's business is during the evening hours. He has entertainment during the evening. It was his expectation that the daytime business would increase in the outdoor bar-eating area. Mr. Erkert agreed that Avalon is regarded as a family resort area and that he services primarily a younger clientele. The licensee has not been subject to any disciplinary proceedings with respect to his license.

Mr. Quinn testified that, as a Borough Commissioner, he seconded and voted for the Resolution imposing the Special Conditions. He felt that there was adequate opportunity for all parties to be heard at the hearing, that the Board's actions reflected and were in accord with community sentiment and that there was a reasonable opportunity to reflect upon the testimony presented. There was testimony to the effect of how he would have voted given certain conditions not in existence at the time of his actual vote, but I find such testimony to be equivocal and not relevant to the issues before me.

Based upon the testimony adduced at the hearing, the documents received in evidence, together with the post-hearing submissions received from counsel, I FIND:

DKT. NO. ABC 2849-79

1. The appellant, Gemini Rising, t/a/ Jack's Place, a corporation of the State of New Jersey, sought to renew a Plenary Retail Consumption License, No. 0501-33-004-001 for premises known as 3601 Ocean Drive, Avalon, New Jersey.

2. A public hearing concerning the renewal of the Plenary Retail Consumption License for Gemini Rising was conducted on June 13, 1979, at which time the applicant and the objectors were given full and ample opportunity to present their respective positions to the local issuing authority.

3. On June 19, 1979, the respondent, Board of Commissioners of the Borough of Avalon, renewed the license as Gemini Rising with eight (8) conditions, recited supra.

4. Jack's Place is a commercial establishment located in a residential zone.

5. Jack's Place is a seasonal business which services primarily a young clientele.

6. Under the ownership of Jack Erkert, Jack's Place has undergone exterior and interior physical improvements.

7. Mr. Erkert has made efforts to control the sounds which emanate from his establishment by sealing the window areas and carpeting the interior walls.

8. Jack's Place seeks to continue to serve patrons on the exterior patio area of his licensed premises.

9. Jack's Place presently intends to put additional tables on the exterior patio area if the Director so permits.

10. Jack's Place is a primary cause of parking problems in this immediate area and by virtue of its business adds, measurably, to traffic congestion in this area.

11. Jack's Place is the origin of bar-related litter found in this immediate area.

12. Patrons from Jack's Place cause late hour noise, profanity and objectionable behavior to occur when leaving said establishment, which behavior interferes with the peaceful occupancy of tenants and residents of the immediate area.

13. The Special Conditions will control rather than expand the problems associated with this establishment.

14. Community sentiment is opposed to the construction of an outdoor pool, outdoor bar or the expansion of the outdoor usage of Jack's Place.

15. Community sentiment is opposed to the present usage of the outdoor patio area of Jack's Place.

The case of Lyons Farms Tavern v. Municipal Board of Alcoholic Beverage Control of Newark, 68 N.J. 44 (1975) is not dissimilar to the issues presented herein. Although the Court was considering a person-to-person transfer in the Lyons case, the conditions imposed upon the renewal of Gemini Rising's license were directly comparable to those imposed by the Director in Lyons and were similarly based upon community sentiment. The Special Conditions were upheld in Lyons and the Court observed that the Director, in imposing conditions (on the license transfer) must act "in a reasonable manner in honoring the local sentiment expressed both at the Board meeting and at the de novo hearing." (Lyons, supra, p. 52) The record sub judice contains substantial, competent and credible testimony which is supportive of the actions of the local issuing authority. Furthermore, the written Petition and letters of objections also evidenced the negative community sentiment. While there is little doubt that the proposal to construct an outdoor pool and bar area precipitated or initiated the actions which gave rise to this appeal, I do not find that the negative community sentiment was limited to these singular considerations. I have considered the appellant's written Petition in support of its position, the testimony of its witnesses and the arguments advanced by counsel and find that same does not outweigh the record in support of the local board's actions.

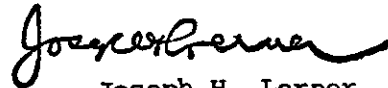
The conditions imposed directly address the problems voiced before the Board. Denial of the license was not considered, and the imposition of conditions was viewed as the proper method of control. Though there had been no prior disciplinary proceedings, it is clear that such proceedings are not a prerequisite to the imposition of conditions. Old Mill Stream Inn, Inc. v. Paramus (Bulletin 2215, Item 1). In the case at hand, the conditions imposed were not arbitrary or overly burdensome. Though the financial interest of the licensee is of secondary importance to the public welfare, Nordo, Inc. v. State, 43 N.J.S. 277 (App. Div. 1957), there is no indication that the specific conditions imposed would create an undue hardship upon the license or upon the licensee's current business.

Thus, I CONCLUDE that the decision of the issuing authority to impose eight (8) conditions on the license of Gemini Rising, t/a Jack's Place, was properly a reflection of community sentiment and a reasonable exercise of its discretionary authority. I find no credible evidence to support a contrary conclusion nor does the record evidence improprieties, or arbitrary or capricious Board action.

Accordingly, it is ORDERED that the eight (8) conditions imposed upon the renewal of the Plenary Retail Consumption License of Gemini Rising, t/a Jack's Place, License No. 0501-33-004-001, at premises 3601 Third Avenue, Avalon, Cape May County, New Jersey, be AFFIRMED.

This recommended decision may be affirmed, modified or rejected by the head of agency, Joseph H. Lerner, 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 Joseph H. Lerner, Director of the Division of Alcoholic Beverage Control, my Initial Decision in this matter and the record in these proceedings.



Joseph H. Lerner
Director