

STATE OF NEW JERSEY  
Department of Law and Public Safety  
DIVISION OF ALCOHOLIC BEVERAGE CONTROL  
25 Commerce Drive Cranford, N.J. 07016

BULLETIN 2270

November 16, 1977

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ITEM

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FOR 20 DAYS.



A further exhibit, accepted into evidence under stipulation of counsel, consisted of a survey of Van Cleef Engineering Associates made on February 7, 1977 which reflected the distance along the sidewalk from the point opposite the front door of appellant's proposed premises to the front door of nearest licensed premises was 604 feet. Appellant challenged the use of the term "front door" as applied to the measurement of their premises, hence, the survey was accepted with reference to appellant's doorway being the one nearest to the sidewalk.

A large scaled drawing of the area on West Union Avenue encompassing the premises of proposed use by appellant together with the site of two nearby licensed premises and the local high school was accepted into evidence during the testimony of Robert Rosa, a Municipal Planner who indicated that, according to his measurements, the front doorways identified on the foregoing survey were 611 feet apart.

However, Rosa continued his measurements perpendicular to the sidewalk and along and parallel with the side of the building on the proposed situs to reach the rear thereof and continue along such rear to a doorway which appellants propose to use as a main and single entrance. By such extension, the total distance is increased by 144 feet, thus making the distance between appellant's rear door and the front door of the nearest licensed premises a total of 755 feet.

One of the appellants, Joseph Colalillo, testified that he and his wife own the premises subject to this appeal, to the rear of which is a large parking area. The driveway adjoining the proposed building is a common driveway for other stores in the same complex in which his store is located. He insisted that the primary entrance to his and all stores is by way of the rear entrances as most of the patrons arrive by car and cannot park comfortably in front of the establishments.

Colalillo further described the store building by reference to photographs entered into evidence indicating that he would modify the front doorway into a "fire door" through which no one could gain admittance to the interior. He admitted on cross-examination that other stores in the same complex had patrons enter from both front and back entrance-ways and did not block driveways that lead to the sidewalk. He denied that the blockage he planned was an attempt to come within the footage permitted distance.

The applicable Ordinance (5-7.1) provides:

"No plenary...distribution license shall be issued, nor shall any place-to-place transfer of an existing license be granted, for the sale or service of alcoholic beverages upon premises which are within 700 feet of any existing premises licensed to sell or serve alcoholic beverages.... The distance shall be measured from the nearest entrance of the nearest premises to the nearest entrance of the premises sought to be licensed along the normal way that a pedestrian would properly walk, as provided by N.J.R.S.33:1-76."

Although the above Ordinance contains exceptions, such exceptions do not apply to the immediate situation.

A photograph of the proposed premises shows the sidewalk and a concrete apron eight or ten feet wide leading to an attractive front doorway partially glassed, flanked by glass panels, and above with two coach lamps attached to the building. Alongside of this entranceway are two vertical glass panels from the ground to the roof overhang. The doorway is constructed at an angle where the glass front and the solid side join at a corner. The store has a frontage of thirty feet and a depth exceeding one hundred feet. It is presently vacant but was last used as a men's clothing store and at one time one of the appellants conducted a butcher store there.

The issue herein is narrowed to a single question: may distance between existing licensed premises and a proposed site be measured to and past an existing doorway intended to be closed for ingress and used for fire purposes only?

This issue has been long since solved by the court in Presbyterian Church, etc., v. Div. of Alcoholic Beverage Control, 53 N.J. Super. 271 (App. Div. 1958) cited by both counsel in support of their respective positions. The court established that the proper measure between subject premises is along the sidewalk as a person would normally walk. A diagram of the respective locations of the nearby Church and Temple to the proposed location (p.277 of that opinion) reveals that no distances into the premises were calculated in the measure of distance.

Appellant uses the reference in that matter to the "fire door" of the nearby Temple. The proofs therein were clear that such doorway was indeed a "fire exit", had no outside handle and was not the regular entrance to the Temple. Measurements are made to regular doorways and not to doors present solely for auxiliary purposes. Sovat, Inc. v. Board of Commissioners of the City of Atlantic City, et al., Bulletin 2189, Item 1 where a private-general public prohibited door of a hospital-school could not be used for measurement calculation.

Most nearly analagous to the instant situation is Karam, et al. v. Alcoholic Beverage Control, et al., 102 N.J. Super. 291 (App. Div. 1968) wherein the court stated at 298:

In our view, it is an impermissible evasion of the ordinance to build a physical obstruction on licensed premises for no other purpose than to make it impossible for a pedestrian-patron to affect normal entrance to the building via the nearest sidewalk--and this solely in order to inflate the walking distance to the nearest licensed premises above the ordinance minimum. (Emphasis included)

It is apparent and obvious that the blatant attempt by the appellants to alter the distance minimums by the intent to characterize the front door as a "fire door" and debar entrance to the proposed establishment from the street would be just as impermissible here as in the Karam Case, supra.

I find that the Council very properly rejected appellant's application for place-to-place transfer. The transparent subterfuge of appellant to relocate the primary entrance to the rear of the building in order to gain additional footage in the distance calculations was not lost upon the Council, who, seeing through it, established its determination upon the accepted standard of measurements following the guidance of the Presbyterian Church Case, supra.

At the hearing of the basic issue in the matter, in this Division, appellant advanced the contention that the Ordinance adopted by the Council, upon which the footage determination was made, was constitutionally defective. A motion to set aside the Council's action based upon such defect was rejected with a colloquy developing from which it was learned that appellant had sought judicial review of the alleged constitutional issue which was forestalled until full administrative remedy was exhausted.

Augmenting their motion, appellants submitted extensive memoranda including and revolving about an oral opinion of the Superior Court, wherein the Court concluded that the Director was clothed with the power to declare the subject ordinance violative of the applicable constitutional mandates.

The thrust of appellant's contention respecting the 700 foot limitation is that this distance has no rational basis for existing or is justified, is a variable in the event of certain hardships and was set as a measurement in 1949 when, some assert, that specific measurement would provide a benefit to a then-existing licensee.

Had the subject ordinance been adopted for an alleged purpose to prevent appellants from being able to successfully obtain their place-to-place transfer, the Director, finding such purpose to the ordinance, could have found against the Council under the doctrine of Blanck v. Mayor and Borough Council of Magnolia, 38 N.J. 484 (1962). However, the passage of twenty-eight years and the marked similarity of the present Ordinance to like ordinances in other communities throughout New Jersey, makes it apparent that the Ordinance manifests some overall public purpose coaxial with the general goals of the Council. Whenever the judgment of an issuing authority has been reasonably made, with proper motivation, the Director abides by such determination. Fanwood v. Rocco, 33 N.J. 404 (1960); Lyons Farms Tavern v. Municipal Board of Alcoholic Beverages, Newark, 55 N.J. 292 (1970). Even where there is an honest difference of opinion in the exercise of discretion for or against the transfer, the action in approving or denying the transfer should not be disturbed. Paul v. Brass Rail Liquor, 31 N.J. Super 211 (App. Div. 1954).

It is apparent that the appellants, unsuccessful in their attempt to obtain Council's consent to the subject transfer based upon the camouflage of the front doorway, now try to create a diversionary tactic by the attack upon the aged ordinance. Aged and infirm it may be, but it is still valid in its applicability until or unless it is repealed.

It is, therefore, concluded that the appellants have failed to sustain their burden of establishing that the action of the Council was erroneous and should be reversed, as required by Rule 6 of State Regulation No. 15.

It is, accordingly, recommended that the action of the Council be affirmed, and the appeal herein be dismissed.

### CONCLUSIONS AND ORDER

Written exceptions to the Hearer's Report with supportive argument were filed by appellants and written answer with supportive argument thereto was filed by respondent, pursuant to Rule 14 of State Regulation No. 15.

In their exceptions appellants now contend, for the first time in these proceedings, that the Hearer incorrectly interpreted the pertinent Municipal Ordinance 5-7.1 respecting place-to-place transfers of existing licenses. The construction of the aforesaid ordinance advanced by appellants would make its distance limitations applicable only to an identical type of license. Consequently, in its application sub judice, it would not prohibit the requested transfer.

The entire section of Municipal Ordinance 5-7.1 proves as follows:

5-7.1 Restrictions. No plenary retail consumption license or plenary retail distribution license shall be issued, nor shall any place to place transfer of an existing license be granted, for the sale or service of alcoholic beverages upon premises which are within 700 feet of any existing premises licensed to sell or serve alcoholic beverages under another plenary retail consumption or plenary retail distribution license. The distance shall be measured from the nearest entrance of the nearest licensed premises to the nearest entrance of the premises sought to be licensed along the normal way that a pedestrian would properly walk, as provided by N.J.R.S. 33:1-76.

Appellants advocate that the phrase "another plenary retail consumption or plenary retail distribution license" in the ordinance should be interpreted to afford a limiting meaning to the term "another". Thus the distance proscription is applicable to only "another" identical license.

The respondent, in its answer to the Exceptions, challenges this reasoning. It points out that Section 5-7.1 is couched in the disjunctive that is, the word "or" is used.

As the Court stated, in State v. Kress, 105 N.J. Super 514, 520 (Law Div. 1969), "[Ordinarily] the word 'or' in a statute is to be considered a disjunctive particle indicating an alternative.... Nearly all cases emphasize the controlling factors of legislative intent, not only as to the meaning of particular words and phrases but also the general spirit of the act in question".

The respondent argues that legislative history of Section 5-7.1 points to the use of the word "or" in the alternative; that it deals with both plenary retail consumption and plenary retail distribution licenses; and that they are not differentiated in separate sections.

Interpretation of statutes and ordinances, when justifiable, must always seek to further the legislative intent and objectives as are fairly expressed in its language. Watson v. United States Rubber Co., 24 N.J. 598, 603 (1957).

The words and terminology of an ordinance or statute, in the absence of an explicit indication of a special meaning, are to be given their ordinary and well understood meaning. Service Armament Co. v. Hyland,

70 N.J. 550, 556 (1976); Fahey v. City of Jersey City, 52 N.J. 103, 107 (1968). And, most importantly, where the wording of a statute is clear, definitive and unambiguous, no construction or interpretation is permitted. Duke Power Co. v. Patten, 20 N.J. 42, 49 (1955); Bass v. Allen Home Improvement Co., 8 N.J. 219, 226 (1951).

I have analyzed the provisions of the subject ordinance, and find that it clearly prohibits a transfer of a plenary retail distribution license within 700 feet of an existing plenary retail distribution license or plenary retail consumption license.

Words alone do not control in construction of a statute. It is the internal sense of the law which must be gathered and recognized. Loboda v. Clark Tp., 40 N.J. 424, 435 (1963); San-Lan Builders, Inc. v. Baxendale, 28 N.J. 148, 155 (1958). And in furtherance thereof, specific statutory language may be avoided to thwart a result not intended. State v. Madewell, 117 N.J. Super 392, 394-395 (App. Div. 1971), aff'd, 63 N.J. 506 (1973).

It is not necessary to attribute no meaning to the term "another". I find that its use is not one of limitation in the entire context of the ordinance, but is a descriptive adjective used solely to distinguish the previous recitation of types of licenses. Its purpose is not one of qualification or limitation. This interpretation provides a sensible evaluation, consistent with reason and good discretion. State v. Spindel, 24 N.J. 395, 402-403 (1957); Keenan v. Bd of Chosen Freeholders, Cty of Essex, 105 N.J. Super. 271, 279 (Law Div. 1969). Additionally, it does not frustrate the substantial objectives of the ordinance. New Jersey Highway Authority v. Drenth, 44 N.J. Super. 327, 331 (Law Div. 1957).

In view of the unambiguous language of the municipal ordinance, the strained interpretation sought by appellants is completely unwarranted. State v. Fearick, 69 N.J. 32, 37 (1976). It is impermissible to resort to a forced construction for the purposes of limiting the plain meaning of the statutory language. Markey v. City of Bayonne, 24 N.J. Super. 105, 114 (App. Div. 1952).

Additionally, I must accord appropriate reliance upon the implicit interpretation of the municipal issuing authority which is thoroughly familiar with its community's characteristics and nature of particular areas, and of the applicability of the subject ordinance thereto. Lyons Farm Tavern v. Mun. Bd. Alc. Bev., Newark, 55 N.J. 292, 302-303 (1970).

While cognizant of the different legislative treatment in population requirements for issuance, between consumption and distribution licenses, and the existence of other ordinances which often distinguish distance-between-premises limitations to identical licenses; I find that, in the instant matter, the respondent made a fair and valid application of the ordinance, based upon its fair reading of the reasonably ascertainable language used. Accordingly, this exception is without merit.

Appellants' second exception maintains that assuming, arguendo, the said ordinance is applicable, it is, nevertheless, unreasonable as applied to the appellants' transfer application, considering the current geographic location of licenses existent in the Borough of Bound Brook.

The proceedings before this Division were conducted within a specific and agreed framework of the Petition of Appeal. The narrow controversy raised therein concerned a distance measurement interpretation in relationship to the existing ordinance of the Borough of Bound Brook.

It is relevant to note that appellants, contemporaneous with the administrative hearing, instituted a plenary action in the Superior Court of New Jersey seeking to set aside the subject ordinance on grounds of unconstitutionality. A motion to amend the Notice of Appeal in this Division after hearing was denied.

As presented, the nature of the proposed amendment sought an adjudication that the distance ordinance was constitutionally defective in that it exceeded the scope of delegated statutory powers and purposes. As this is clearly an issue of constitutional dimension per se, rather than unconstitutional application, the appropriate forum is a court of plenary jurisdiction. Seip v. Mayor, etc. of Frenchtown, 79 N.J. Super. 521 (App. Div. 1963).

However, since this issue was raised in the Exceptions, I shall consider the legal issues involved therein. Appellants argue that, in the alternative, the Director should exercise his powers under N.J.S.A. 33:1-41 to grant this transfer notwithstanding the provisions of the ordinance in question. Such statute provides:

If any person affected or who might be affected by any limitation of the number of licenses or of the hours between which sales of alcoholic beverages at retail may be made shall consider himself aggrieved thereby, he may appeal to the commissioner (now Director) in respect thereto, and thereupon the commissioner, after public hearing, may set aside, vacate and repeal the limitation complained of or change, alter, amend or otherwise modify the same.

He notes that, although the Director is not authorized to void an ordinance, he may, in an appeal proceeding, invalidate the limitation on the number of licenses set by the municipality and contained in the ordinance; citing Blanck v. Mayor and Borough Council of Magnolia, 73 N.J. Super. 306 (App. Div. 1962), rev'd on other grounds, 38 N.J. 484 (1962); Phillipsburg v. Burnett, 125 N.J.L. 157 (Sup. Ct. 1940).

I find this contention to be insubstantial. In Dal Roth v. Div. of Alcoholic Beverage Control, 28 N.J. Super. 246, 252 (App. Div. 1953) the Court held that, in effect, a distance requirement contained in a municipal ordinance regulating place-to-place transfers was a necessary adjunct to a municipal authority's power to limit the number of licenses, and that "... [such] a regulation must result in a limitation in the number of licenses, for the greater the intervening distance that must separate licensed premises, the fewer the number that may exist within the municipality". A distance-between-premises ordinance is one means of effectuating this objective. Margate Civic Assoc. Bd. of Comm'rs, Margate, 132 N.J. Super. 58, 66 (App. Div. 1975).

Appellants contend that there are no sites presently available in the Borough if this 700 foot limitation remains in effect, and therefore, the distance limitation contained in the ordinance is unreasonable, and should be set aside.

The fact remains however, that other similar distance limitations in ordinances of cities, such as Newark and Jersey City, have been uniformly upheld, although similar arguments were raised against those limitations. See Hopkins v. Municipal Bd. of Alcoholic, etc., Newark, 4 N.J. Super. 484 (App. Div. 1949), Tube Bar, Inc. v. Commuters Bar, Inc., 18 N.J. Super. 351 (App. Div. 1952); Dal Roth v. Div. of Alcoholic Beverage Control, supra.

Appellants cite Shenise v. Jefferson Township, Bulletin 1155, Item 2 where the then Director reversed a municipality's denial of an application for a place-to-place transfer, which denial was predicated upon the prohibition of a distance-between-premises ordinance.

However, the ordinance in the matter sub judice clearly does not approach the severely limiting requirement of one mile distance contained in the ordinance in Shenise.

The record does not establish that appellants have exhausted all opportunities to obtain a site for their license, nor have they considered the probability of additional sites becoming available in the foreseeable future.

In any event, a municipality has wide discretion in the issuance or transfer of liquor licenses, in order to preserve the public good, and this municipal interest should not be subservient to the individual interest. See Blank v. Mayor and Borough Council of Magnolia, supra; Dal Roth v. Div. of Alcoholic Beverage Control, supra. And "... its action will not be judicially disturbed in the absence of a clear abuse of discretion". Paul v. Brass Rail Liquors, 31 N.J. Super. 211, 214, (App. Div. 1954).

The subject ordinance is presumptively reasonable, and the burden of establishing its invalidity falls upon the appellants. State v. Mundet Cork Corp., 8 N.J. 359, 370 (1952).

I have canvassed and analyzed the entire record herein, and find no basis to conclude that the ordinance is invalid as applied to appellants' application for transfer of their license, or that the respondent acted unreasonably in enforcing the subject ordinance.

I, thus, find the exceptions filed by the appellant to be without merit.

Having carefully considered the entire record herein, including the transcript of testimony, the exhibits, the Hearer's Report, the Exceptions filed thereto, and the Answer to the said Exceptions, I concur in the recommended findings of the Hearer, as supplemented herein, and adopt them as my conclusions.

Therefore, it is, on this 30th day of June 1977,

ORDERED that the action of the respondent, Mayor and Council of the Borough of Bound Brook be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

JOSEPH H. LERNER  
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - SUPPLEMENTAL ORDER.

In the Matter of Disciplinary Proceedings against

A.R.A., Inc.  
t/a The Pub  
160 Highway 35  
Middletown Township  
P.O. Red Bank, N.J.

SUPPLEMENTAL ORDER

Holder of Plenary Retail Consumption License C-19, issued by the Township Committee of the Township of Middletown.

.....  
Drazin & Warshaw, Esqs., by Thomas T. Warshaw, Esq.,  
Attorneys for Licensee.

Mart Vaarsi, Esq., Attorney for Division

BY THE ACTING DIRECTOR:

On November 10, 1976, Conclusions and Order were entered herein suspending the subject license for the balance of its term, viz., 12:00 p.m. midnight, June 30, 1977, effective November 23, 1976, upon finding licensee guilty of charges alleging the falsification of information on the license application and knowingly aiding and abetting undisclosed persons, John and Nina Armellino, to exercise the rights and privileges of its license; in violation of N.J.S.A. 33:1-25 and 1-52. Re A.R.A., Inc., t/a The Pub, Bulletin 2244, Item 1.

Upon entry of the said Order, licensee appealed therefrom to the Appellate Division of the Superior Court, which, on February 8, 1977, affirmed my action. Re A.R.A., Inc., t/a The Pub and John Armellino v. Director, Division of Alcoholic Beverage Control, (App. Div. Docket No. A-891-76), not officially reported, recorded in Bulletin 2253, Item 1.

Thereafter, on March 7, 1977, a Supplemental Order was entered incorporating the decision of the Appellate Division of the Superior Court; reimposing the suspension, which was stayed during the appeal proceedings, to be effective on Thursday, March 17, 1977, and granting leave to the licensee, or any bona fide transferee, to apply to the Director by verified petition for lifting of the suspension whenever the unlawful situation has been corrected, but such lifting shall not take place, in any event, sooner than ninety (90) days from the commencement date of the suspension herein.

It now appears, from the verified petition submitted by the sole stockholders of the licensee, Thomas and Lucille Raimondo, that John and Nina Armellino are no longer associated with the licensee either as a stockholder, employee, creditor, manager or have any rights or interest whatsoever in the license herein. Therefore, the unlawful situation has apparently been corrected.

More than ninety (90) days have elapsed since the commencement of said suspension. Good cause shown, I shall grant the petition requesting termination of the suspension.

Accordingly, it is, on this 8th day of July 1977,

ORDERED that the said suspension imposed herein, be and the same is hereby terminated, effective immediately.

GEORGE E. LUND  
ACTING DIRECTOR

3. DISCIPLINARY PROCEEDINGS - SUPPLEMENTAL ORDER.

In the Matter of Disciplinary :  
Proceedings against :  
 :  
Lawrence M. Black :  
t/a Black's :  
1554 Maple Avenue :  
Hillside, N.J. :  
 :  
Holder of Plenary Retail :  
Distribution License D-2, :  
issued by the Municipal Board :  
of Alcoholic Beverage Control :  
of the Township of Hillside. :

SUPPLEMENTAL  
ORDER

.....  
Samuel Raffaeolo, Esq., and Robert W. Schwankert, Esq.,  
Attorneys for Licensee.  
Carl A. Wyhopen, Esq., Appearing for Division.

BY THE ACTING DIRECTOR:

On November 26, 1975, Conclusions and Order were entered herein suspending the subject license for fifteen (15) days, commencing January 5, 1976 and terminating January 20, 1976, upon finding licensee guilty of violation of Rule 1 of State Regulation No. 38.

Suspension was stayed pending appeal to the Superior Court, Appellate Division, which on April 11, 1977, affirmed the Director's determination. Re Lawrence M. Black, t/a Black's v. Division of Alcoholic Beverage Control (App. Div. 1977), Docket A-4649-75, not officially reported, recorded in Bulletin Item . While the appeal was pending, Conclusions and Order were entered on December 2, 1976, in another Division proceeding, cancelling the license issued to Lawrence M. Black, t/a Black's effective immediately, upon finding licensee ineligible to hold an alcoholic beverage license due to his conviction of a crime involving moral turpitude.

Accordingly, it is, on this 15th day of July 1977,

ORDERED that for record purposes, the license herein is suspended for fifteen (15) days, the effective dates of which cannot be set at this time due to the cancellation of said license by Order dated December 2, 1976.

GEORGE E. LUND  
ACTING DIRECTOR

4. DISCIPLINARY PROCEEDINGS - POSSESSION OF IMPROPERLY LABELED ALCOHOLIC BEVERAGES - FINE PERMITTED IN LIEU OF SUSPENSION FOR 20 DAYS.

In the Matter of Disciplinary )  
Proceedings against )

The Brass Penny, Incorporated )  
t/a The Brass Penny )  
273 Main Street )  
Peapack-Gladstone, N.J. )

CONCLUSIONS  
and  
ORDER

Holder of Plenary Retail Consump- )  
tion License C-1, issued by the )  
Mayor and Council of the Borough )  
of Peapack-Gladstone. )

Jerome Kasper, Esq., by Peter E. Rhatican, Esq., Attorneys for  
Licensee  
Carl A. Wyhopen, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleads "not guilty" to a charge alleging that, on February 10, 1976, it possessed, in and upon its licensed premises, alcoholic beverages in bottles which bore labels which did not truly describe their contents, viz., an enumerated list of twenty bottles of various alcoholic beverages; in violation of Rule 27 of State Regulation No. 20.

Prior to the taking of testimony, the licensee's attorney moved to delete items 14 and 15 from Schedule "A" of subject charge "in the interest of fair play and justice". He contends that the bottles listed as items 14 and 15 were supplied voluntarily by the licensee to the Division, as is discussed more fully hereinafter. Judgment on the motion was reserved.

ABC Agent G testified that, on February 10, 1976, he proceeded to the licensed premises upon assignment to investigate a complaint alleging the presence of watered-down bottles of alcoholic beverages on the premises.

He tested the open stock, and found eighteen bottles whose contents did not genuinely reflect that described on the label, in that they were low in proof. These were seized, tagged and brought to the Division for analysis. The manager expressed shock at this revelation, as did his father, who with his wife own the outstanding stock of the corporation.

The following day he returned, at the licensee's request, to pick up four additional bottles that had been found in a cabinet, whose appearance gave him cause to suspect that

they had been tampered with in similar fashion as those seized the previous day. He stated that, had the licensee not voluntarily informed the Division and cooperated in this investigation, these additional bottles would have gone undetected. Furthermore, he had gauged the licensee's open stock on a routine inspection on November 20, 1975, seven weeks prior to the occurrence, and found no violation with respect to the open stock.

On cross examination, he admitted advising licensee's manager of the following:

1. If he was ever suspicious about a bottle or bottles, he could submit them for Division analysis and if they proved to be not as labeled, no charge would be brought against the licensee for this voluntary submission; and
2. For a fee, the Division, upon request, will test by gauging a licensee's open stock and similarly no charge would be brought against licensee should a bottle bear a label which did not truly describe its contents.

Penelope Moore, the Division Chemist, testified on behalf of the Division. Her expertise, as well as the accuracy of her Report of Chemical Analysis, was stipulated to by the licensee's attorney. She stated that "the bottles were all filled to the top and in some cases overflowing, which would indicate that there had obviously been something done to the bottles. They did not come from the factory overfilled...." On cross examination, in answer to various questions, she stated that she could not recall a similar case of such obvious low proof and light color involving so many bottles. She stated in her recommendations that there was a "definite indication of tampering" from her observations and tests. The loss of proof was characterized as tremendous in the majority of bottles, obviating the possibility of it being a natural phenomenon. She characterized the violation as unsophisticated.

Prior to putting any witnesses on the stand to testify, the corporate licensee introduced into evidence eighteen letters which had been sent to the Division on behalf of the corporate licensee's president, David A. Karner. They come from persons who could be characterized as community leaders such as professional persons, corporate officers and executives, the local Chief of Police, etc., attesting to the excellent character and position of Karner in his community and in his own professional field (advertising).

David A. Karner, the president and owner of fifty percent of the outstanding stock of corporate licensee testified as follows: He is a successful designer in the advertising and packaging field. Although he has had no prior restaurant or tavern experience, he purchased this license located in an old (1840) building a few years ago. His purpose was two-fold:

1. He was highly successful in his profession and a tax loss was not unwelcome while the business was being upgraded to what his image of it should be.

2. His daughter's husband had liquor establishment experience previously and he could be the manager. His son was about to graduate from college and he, too, could enter the business as the assistant manager. In due course, the two young men could buy the business from him, and the monies he received would be placed again into his retirement fund.

Karner paid his son-in-law a salary of \$18,000 for awhile but the business could not afford it and he had to cut the salary to \$14,000 until some improvement would be noted in the restaurant's receipts.

Soon, thereafter, his son-in-law informed him that he was quitting. Upon leaving, he said to Karner "Dave, I'm tired of the restaurant business and I think it's best; you and I are not getting along so hot. I think we better call it quits because I'm told I can make \$25,000 a year". Karner told him he agreed that it's better if he could make his \$25,000. In reality, he made \$7,500 the first year. His son-in-law continued to reside across the street from the licensed premises.

In February 1976, Karner's son-in-law advised him that he had a potential buyer for the premises. Many calls were made, rumors spread throughout the area that the Brass Penny was for sale; and several brokers called Karner.

It was disclosed that if the sale was effected, his son-in-law would be made manager and share in the profits without having to invest any money of his own into the venture.

It was during this period of time that an anonymous call to the Division and the subsequent seizure were made. Moreover, in addition, there was a visit made by the New Jersey Department of Health, investigating a similar type of complaint lodged with it that the kitchen area was filthy and a health hazard. The premises passes the inspection. The United States Department of Labor was next on the scene to investigate a complaint it had received relative to the premises. Its investigation disclosed nothing amiss.

Stories began to spread throughout the area about the restaurant's problems. Karner voluntarily appeared before the Town Council to explain what was transpiring. He sought help from the police, who among other things, suggested securing all liquor and hiring private security; suggestions which were followed by the licensee.

The various occurrences convinced the Karners that this was not coincidental. The senior Karner concluded it was his daughter's husband who was the person behind these occurrences.

He waited until the day the telephone bills were delivered before disclosing his opinion to his daughter, and requested that she show him their phone bill. The "toll call" listing indicates a phone call was placed to the ABC Division Office on February 9, 1976, at 10:16 a.m.

That evening, Karner and his son confronted the son-in-law who admitted making the various calls but later recanted and engaged an attorney to represent him.

Karner did not ask for, nor voluntarily receive, the set of keys to the premises that were in his son-in-law's possession. He explained that it did not occur to him to attempt to recover possession of the keys because the young man was his daughter's husband, not a stranger.

David P. Karner (son of David A.) corroborated his father's testimony. He verified the confrontation with his brother-in-law and the confession made to both of them, as related by his father in his testimony above.

Charles Bocchino, the local Chief of Police, stated that he had never conducted a formal investigation as this was an ABC matter. He examined the various doors and windows, however, and found no obvious signs of a breaking and entry.

He added that an attorney representing Karner's son-in-law advised him that he refused to allow his client to be questioned by the police, or appear before the Division to answer any questions.

The interpretation of Rule 27 of State Regulation No. 20 is well settled. Re Freddy's Bar & Grill, Inc. Bulletin 2222, Item 4 is illustrative wherein the Director enunciated the following:

"In its pertinent part, Rule 27 of State Regulation No. 20 (which is alleged to have been violated) reads as follows:

'No retail licensee shall possess, have custody of, or allow, permit or suffer in or upon the licensed premises any alcoholic beverage...in violation of the Alcoholic Beverage Law, or any alcoholic beverage in any keg, barrel, can, bottle, flask or similar container which...bears a label which does not truly describe its contents....'  
(emphasis added)

The underlined portion of the subject rule is clear and unambiguous. It renders the mere possession of a container bearing a label which does not truly describe its contents a violation. Mere possession is malum prohibitum.

An offense which is malum prohibitum does not require proof of guilty knowledge or intent unless the statute or regulation clearly so provides. There is no inference that may be reasonably drawn from the quoted regulation which would give rise to the principle that guilty knowledge or mens rea or criminal intent is a prerequisite to a finding of guilt. Thus, the defenses raised by the licensee are effectively negated, without considering the bona fides thereof.

A licensee is responsible for any alcoholic beverages not truly labeled found upon his licensed premises. Cedar Restaurant & Cafe Co. v. Hock, 135 N.J.L. 156 (Sup. Ct. 1947). Said the court in that case at p. 159:

'...We find nothing within the Alcoholic Beverage Control Act, R.S. 33:1-1, et seq., to indicate an intent that the holder of a retail consumption license must have knowledge that he possesses illicit beverages in order to make him amenable to disciplinary action. Our courts have consistently held that such knowledge is not an essential ingredient to conviction for possession under statutes similar to the one under consideration.' See also The Panda v. Driscoll, 135 N.J.L. 164 (E. & A. 1946)."

The licensee's motion to delete Items 14 and 15 from Schedule "A" of subject charge is supported by the testimony, and in the interest of fair play and justice should be granted, and I so recommend. I further recommend that the charge against the licensee be reduced to suffering the possession of eighteen bottles of alcoholic beverages which bore labels which did not truly describe their contents.

I am favorably impressed by Karner and his son who appear to be men of good reputation, character and honesty. This opinion is shared by the leading citizens of the area, as evidenced by their many letters in support of the elder Karner as an individual and as a businessman operating these licensed premises.

The testimony would seem to support Karners theory that these occurrences were the result of an intentional and malicious plot against him. However, the Rule is so unequivocal and the cases pertaining to it so uniform in application that a finding of guilty is inescapable. I, therefore, recommend that the licensee be found guilty of the said charge, as hereinabove modified.

From the totality of the evidence, and the mitigating circumstances contained therein, I recommend that the licensee's license be suspended for thirty-five days. I further recommend that, in the event this report is adopted, the licensee may

be permitted to apply for the payment of a fine, in compromise, in lieu of suspension of license.

CONCLUSIONS AND ORDER

Written Exceptions to the Hearer's Report were filed by the licensee, and written Answers thereto were filed on behalf of the Division, pursuant to Rule 6 of State Regulation No. 16.

The arguments set forth in the licensee's Exceptions were advanced at the hearing and correctly resolved in the Hearer's Report. I find them to be lacking in merit.

Having carefully considered the transcript of testimony, the exhibits, the Hearer's Report, the Exceptions to the said Report and Answer to the said Exceptions, thereto, I concur in the findings and recommendations of the Hearer, and adopt them, with a single modification, as my conclusions herein. I shall reduce the recommended suspension from thirty-five (35) days to twenty (20) days.

Upon receipt and consideration of the Hearer's Report, the licensee, after filing written Exceptions, notified the Division that, if the recommendations of the Hearer are adopted by the Director, the licensee desired to make application for the imposition of a fine, in lieu of suspension, in accordance with the provisions of N.J.S.A. 33:1-31.

I have favorably considered the said application, and shall accept an offer in compromise by the licensee to pay a fine of \$1,500.00 in lieu of suspension of license for twenty (20) days.

Accordingly, it is, on this 20th day of July 1977,

ORDERED that the payment of a \$1,500.00 fine by the licensee be and the same is hereby accepted in lieu of suspension of license for twenty (20) days.



Joseph H. Lerner  
Director