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 2346

April 22, 1980

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ITEM

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BULLETIN 2346

April 22, 1980

1. COURT DECISIONS - HI-GRADE, INC. and MRD CORPORATION, NEW JERSEY CORPORATIONS-DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A 129-79

HI-GRADE, INC. and MRD CORPORATION, New Jersey corporations,

Appellants,

v.

JOSEPH H. LERNER, DIRECTOR, Division of Alcoholic Beverage Control,

Respondent.

Submitted December 11, 1979; Decided January 11, 1980.

Before Judges Crane, Milmed and King.

On appeal from Order of the Division of Alcoholic Beverage Control.

Weintraub & Gelade, attorneys for appellants (Richard B. Gelade, on the brief).

John J. Degnan, Attorney General, attorney for respondent (Bertram P. Goltz, Jr., Deputy Attorney General, of counsel; David S. Griffith, Deputy Attorney General, on the brief).

PER CURIAM

(Appeal from the Director's decision in Re Hi-Grade, Inc. and MRD Corporation, New Jersey corporations, Bulletin 2345, Items 4 and 5. Director affirmed. Opinion not approved for publication by Court Committee on Opinions.

2. APPELLATE DECISIONS - MING'S RESTAURANT, et als. v. WOODBRIDGE.

#4316 Ming's Restaurant, Barry Rubin, t/a Down Under, Hank Pogyena, t/a Hank's Tavern, Tom Quigley, t/a The Forte Inn, Emelie Scarano, t/a Gallery Restaurant and The Barbary Coast, Appellants, vs. Mayor and Council of the Township of Woodbridge, Respondent.	ON APPEAL CONCLUSIONS AND ORDER

Palmisano & Goodman, Esqs., by Robert G. Goodman, Esq., Attorneys for Appellant.
Arthur W. Burgess, Esq., Attorney for Respondent.

Initial Decision Below:

Hon. Edward D. Beslow, A.L.J., c/b
Dated July 19, 1979 - Received July 31, 1979

BY THE DIRECTOR:

No written Exceptions to the Initial Decision below were filed by the parties pursuant to N.J.A.C. 13:2-17.14.

Having carefully considered the entire record herein, including the transcripts of testimony, the exhibits and the Initial Decision, I concur in the findings and recommendation of the Administrative Law Judge and adopt them as my conclusions herein.

Accordingly, it is, on this 7th day of September, 1979,

ORDERED that the action of the Mayor and Council of the Township of Woodbridge be and the same is hereby affirmed, and the appeal be and is hereby dismissed.

Joseph H. Lerner
Director

Exhibit "A"

Initial Decision Below

MING'S RESTAURANT, BARRY RUBIN T/A DOWN UNDER, HANK POGYENA T/A HANK'S TAVERN, TOM QUIGLEY T/A THE FORGE INN, EMELIE SCARANO T/A GALLERY RESTAURANT, AND THE BARBARY COAST - APPELLANTS	:	INITIAL DECISION
	:	O.A.L. DKT. NO. A.B.C. 99-79
V.	:	
MAYOR AND COUNCIL OF THE TOWNSHIP OF WOODBRIDGE - RESPONDENTS	:	

APPEARANCES:

Palmisano & Goodman, by Robert G. Goodman, Esq., Woodbridge, New Jersey, for appellants

Arthur W. Burgess, Esq., Woodbridge, New Jersey, for the Township of Woodbridge

Venezia & Nolan, by James P. Nolan, Esq., Woodbridge, New Jersey, for Stan's Bar & Grill

BEFORE THE HONORABLE EDWARD D. BESLOW, A.L.J., c/b:

On December 19, 1978, the Municipal Council of the Township of Woodbridge (Township) adopted a resolution granting an application by Stan's Bar & Grill (Stan's) for a place to place transfer of Plenary Retail Consumption License No. 1225-33-069-001 from premises located at 213 New Brunswick Avenue, Hopelawn, to premises known as the Greenwood Diner located at 801 U.S. Highway #1 (Route #1) and Green Street, Iselin, New Jersey. Prior to the adoption of the resolution, a public hearing with regard to this application was held on December 12, 1978.

On January 8, 1979, the above listed appellants filed a notice and petition of appeal with the Division of Alcoholic Beverage Control (Division), pursuant to N.J.A.C. 13:2-17.1, seeking to have the resolution of the Township overruled. The petition of appeal listed the following reasons as support for the appellant's position:

1. an oversaturation of liquor licenses within the immediate geographic area;

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2. the proposed premises borders on a heavy residential area, and there is strong public sentiment against the transfer;

3. the proposed location is within a short distance of John F. Kennedy High School and Iselin Junior High School;

4. the location of the proposed premises is situated on a busy section of Route #1 at the Iselin Circle which is a very dangerous roadway;

5. the publication of the notice of the transfer application was defective.

In accordance with N.J.A.C. 13:2-17.2, Stan's was joined as a respondent. After proper notice, a public hearing on this appeal was held on May 23, 1979. Appearances are noted above.

In support of its action, the Township, as provided for in N.J.A.C. 13:2-17.8, offered the transcribed record of the December 12, 1978 hearing (Exhibit R-1). At that hearing, several objectors to the transfer, including four of the appellants in the pending matter, through Mr. Goodman, their attorney, objected on the following grounds: the proposed location is in close proximity to the Iselin traffic circle and the Woodbridge Shopping Center and will increase traffic congestion and safety hazards; the proposed location is near to John F. Kennedy High School and Iselin Junior High School; there are other liquor licensees in the general area of the proposed location who will be adversely affected; and, local sentiment is against the granting of the transfer. In support of the last objection, Mr. Goodman submitted a petition bearing the signatures of some forty people who opposed the transfer application.

Paul Hatzinikitas, the operator of the Greenwood Diner, testified that he is hoping to increase his business by being able to offer his customers alcoholic beverages with their dinner. He further stated that there was no intent to start a liquor store or operate any banquet halls on the proposed premises.

Hank Pogyena, owner of Hank's Tavern, stated that the Greenwood Diner is one half mile and 7/10 from the Worth Street entrances of Iselin Junior High School and John F. Kennedy High School respectively, and that it was his opinion that the students would be attracted to the proposed premises in order to obtain alcoholic beverages.

At the May 23, 1979 hearing in the pending matter, Mr. Pogyena was the only witness called to speak against the transfer. In addition to restating his prior testimony, the witness further testified that the Iselin traffic circle is a very dangerous area and that the traffic becomes congested as a result of the Woodbridge Shopping Center which is on Route #9 approximately one half mile from the proposed premises. Mr. Pogyena also submitted a petition with the

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signatures of approximately two hundred and thirty (230) individuals who objected to the transfer (Exhibit P-1).

Henry J. Ney, a professional engineer and licensed planner, testified on behalf of Stan's as an expert on traffic engineering. Although Mr. Ney did not appear at the Township hearing, he was allowed to testify in this proceeding as all appeals are heard de novo. N.J.A.C. 13:2-17.6.

Mr. Ney testified that he conducted a study of the proposed location which consisted of a review of the site and the current means of ingress and egress to it; a review of the existing traffic volumes on Route #1 and Green Street which are the abutting roadways to the proposed premises; a determination of the number of seats available at the current facility; a review of the interior parking capabilities; and an analysis of the amount of traffic would be generated by the facility and whether or not that traffic would have an adverse impace on Route #1, Green Street or any of the surrounding roadways.

As a result of his study, Mr. Ney was of the opinion that the granting of the transfer applications would have no material effect on the traffic that currently emanates from the Greenwood Diner's present use. He also testified that virtually all traffic going into the Woodbridge Shopping Center from the north proceeds along Route #9 rather than Route #1. He was of the opinion, therefore, that the shopping center has no impact on the proposed location. Mr. Ney concluded his testimony by stating that the granting of the transfer application would in no way contribute to or create a hazard to vehicular or pedestrian traffic around the proposed location.

The responsibility for the administration and enforcement of the alcoholic beverage laws relating to the place to place transfer of a liquor license is primarily committed to municipal authorities. N.J.S.A. 33:1-19,24. The purpose for this is that local officials are more familiar with the characteristics of their community and the nature of a particular area.

In Lyons Farms Tavern v. Municipal Board of Alcoholic Beverage Control of the City of Newark, 55 N.J. 292 (1970), the court expounded the view set out in Borough of Fanwood v. Rocco, 33 N.J. 404 (1960) that public sentiment may be taken into account in the review of a transfer application. In fact, the court went on to state that the local authorities would be remiss in their duty if they failed to give serious consideration to such sentiment.

Unlike the Lyons Farms case where detailed and specific testimony as to the public sentiment was introduced, the record below in the now pending matter contains only general unsupported statements made by the attorney for several objecting alocoholic beverage licensees and a petition whose owner was unsupported and whose probative value is highly questionable. Absolutely no substantial evidence was introduced by appellants.

In concluding that much reliance must be placed upon local action if the legislative purpose behind the alcoholic beverage law is to be effectuated, the court in Lyons Farms held that once the municipality has decided to grant or deny an application:

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> Its exercise of discretion ought to be accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of its discretion. Although the Director conducts a de novo hearing in the event of an appeal, the rule has long been established that he will not and should not substitute his judgment for that of the local board or reverse the ruling if reasonable support for it can be found in the record.

There was nothing introduced on appeal to indicate that the granting of the transfer application by the Township was an arbitrary, unreasonable or abusive exercise of its discretion. Indeed, the testimony of Mr. Ney supported that decision.

The final argument of appellants is that the publication of the notice of the transfer application was defective. N.J.A.C. 13:2-7.7 provides that the notice of publication shall be published once a week for two (2) weeks successively at least seven (7) days apart, and the form of said notice is set out in N.J.A.C. 13:2-7.4(a)

The record indicates that notice of the transfer application was published by Stan's on October 25, 1978 (Exhibit R-3), and on November 24, 1978 (Exhibit R-2). Appellants contend that this notice was defective in at least two respects: firstly, the notice of October 25, 1978 failed to set out where objections to the transfer application could be forwarded; and secondly, the subsequent notice published on November 24, 1978, in relation to the initial notice, did not constitute publication once a week for two (2) consecutive weeks.

The purpose of any notice requirement is to apprise a person of some proceeding in which his interests are involved or to inform one of some fact which it is his right to know. Burns v. WestAmerica Corp., 137 N.J. Super. 442 (Atlantic County District Court 1975). After a review of the record, it is apparent that, despite the technical deviation from the publication of notice requirements, ample notice was made to the public. Any inadequacies caused by the omission in the October 25, 1978 notice as to where to forward objections and the lapse of time between that date and the publication of notice on November 24, 1978, were offset by the publication of a notice (Exhibit R-4) by the Township on December 8, 1978, advising the public of the scheduled time and date of the hearing to hear objections to the transfer application. This notice, in fact, can be considered to technically fulfill the requirements of the notice regulations as it was published two (2) weeks after the November 24, 1978 notice. Since the determining factor should be notice to the public, which party caused the notice to be published should be of no concern.

As there was no indication that adequate notice was not, in fact, provided, or that any member of the public was deprived of the right to appear at the local hearing,it would be unfair and unnecessary to remand this matter back to the Township for further hearings. To hold here that regulatory compliance has been met furthers the interest of justness and does not contradict administrative practices in this State. See, N.J.A.C. 14:1-1.2(b); N.J.A.C.14:17-1.2(b).

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Therefore, based on a review of the entire record in this matter, I FIND:

1. On December 19, 1978, the Township adopted a resolution granting an application by Stan's for a place to place transfer of Plenary Retail Consumption License No. 1225-33-069-001 from premises located at 213 New Brunswick Avenue, Hopelawn, to premises known as the Greenwood Diner located at 801 Route #1 and Green Street, Iselin, New Jersey. Public hearing in this matter had been held on December 12, 1978.

2. The determination of the Township was reasonably supported by the record and there is no evidence of any abuse or unreasonable or arbitrary exercise of its discretion. The appellants have not met the burden of establishing that the decision of the Township should be reversed. N.J.S.A. 13:2-17.6

3. Adequate notice of the transfer application was afforded to the public.

In view of the foregoing, I CONCLUDE that the decision of the Township granting the transfer application of Stan's Bar & Grill was a reasonable exercise of its discretion and should not be altered. Therefore, the appeal as presented by the appellants is HEREBY DISMISSED. This action cannot be effected prior to the effective date of this order, which is forty-five (45) days from the date agency receipt of this order, unless the agency head acts to affirm, modify or reverse during the forty-five (45) day period. N.J.S.A. 52:14B-10.

I HEREBY FILE with the Director of the Division of Alcohol Beverage Control my Initial Decision in this matter and the record in these proceedings.

DATE July 19, 1979

Edward D. Beslow
EDWARD D. BESLOW, A.L.J. c/b

Receipt Acknowledged:

DATE July 31, 1979

FOR AGENCY HEAD

Mailed to Parties:

DATE

OFFICE OF ADMINSTRATIVE LAW

MDR

3. APPELLATE DECISIONS - ROGER OSTER v. NEW BRUNSWICK.

#4239
Roger Oster,
t/a Roger's Roost Bar & Grill,

Appellant,

vs.

City Council of the City of New Brunswick,

Respondent.

ON APPEAL

CONCLUSIONS

AND

ORDER

Edward J. Barone, Esq., Attorney for Appellant.
Gilbert L. Nelson, Esq., Attorney for Respondent.
Suong Mai Thich, Esq., Attorney for Objectors.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

This is an appeal from the action of the City Council of the City of New Brunswick (Council) which, on June 30, 1978, denied appellant's application for renewal of its Plenary Retail Consumption License No. 1214-33-061-001, issued to it by the Council for premises 82 Lee Avenue, New Brunswick.

Appellant, in its Petition of Appeal, contends that the action taken was erroneous, in that the various findings of fact upon which the denial is grounded did not involve violations which occurred upon the licensed premises, and is, therefore, arbitrary and has no basis in law or fact.

The Council's findings, made after a hearing afforded licensee on June 12, 1978 and contained within a resolution of even date, attribute the following conditions to appellant's operation:

> Excessive noise; debris strewn about adjacent premises; boisterous and obscene language by patrons loitering about and leaving the premises late

at night; harassment of pedestrians by loitering patrons in front of the premises; irregular parking; physical damage to adjacent property; a loss of property values to neighborhood homes caused by the aforesaid conditions.

It should be noted that there were several allegations contained in the original Notice of Charges, of which the licensee was adjudged innocent.

Upon filing of the appeal, an Order, dated June 27, 1978, was entered by the Director staying the Council's action of June 12, 1978, and granting an ad interim extension of the license pending the determination of this appeal.

A de novo hearing, normally afforded the parties pursuant to N.J.A.C. 13:2-17.6, was waived. They stipulated instead to submit the matter for resolution upon the transcript of the hearing held before the local issuing authority, the pleadings and summations of the respective parties.

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A reading of the transcript amply establishes and supports the Council's findings of guilty of:

A) Excessive noise;

B) Boisterous and obscene language by patrons loitering about and leaving the premises late at night, and;

C) Debris strewn about adjacent area.

Parking is a perennial problem in older urban areas throughout the State and New Brunswick has not escaped it. Though convinced that the patronage of this tavern has

added to the City's problem, the responsiblity for alleviating it should not be borne by this licensee. I know of no doctrine which favors a resident and/or landowner over another, insofar as parking an automobile on any public street in New Brunswick. With regard to those vehicles illegally or improperly parked, whether or not the property of tavern patrons, the local police have sole jurisdiction and authority to ticket or tow away to an impound facility. I do not, therefore, concur in the propriety of this charge and finding of guilty as it relates to the facts herein presented.

Similarly, I cannot concur in the propriety of the charge relating to a diminution of land values in the area, assuming it were proven by expert testimony. This Division has long resisted the use or denial of a plenary retail license to enforce non-liquor related objectives, irrespective of their worthiness. See M.L.H. Operating Co., t/a Mt. Laurel Hilton Inn v. Township of Mt. Laurel, Bulletin 2241, Item 2, and the cases cited therein.

There is insufficient evidence in the transcript to support a finding of "guilty" relative to physical damage to adjacent properties. It must be established by a preponderance of believable evidence that this damage was caused by bar patrons; not merely that property was damaged and, since noisy, boisterous patrons leave the tavern, it follows they must have caused it.

Several neighborhood residents testified that they were fearful of the patrons, and others testified to foul and abusive language addressed to them by these individuals. But there was insufficient testimony to establish, by the preponderance of believable evidence, that the patronage was harassing residents of the neighborhood.

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From the entire record herein, it has been clearly shown that appellant's premises has become a source of trouble and annoyance to the neighbors and to the police. The number of repeated calls to the police requiring response, as well as continued noise until early morning hours caused by patrons, clearly characterizes the premises

as a nuisance.

As early as 1936, the then Director of this Division stated in the landmark case of Conte v. Princeton, Bulletin 139, Item 8, "A license is a privilege. A licensee must keep his place and his patronage under control. When the exercise of his personal right becomes a nuisance to the community, public interest requires that the privilege terminate." This doctrine has been cited repeatedly through the years. The Midnight Sun v. Garfield, Bulletin 2188, Item 2; A's Inn v. South Belmar, Bulletin 2220, Item 1 are two of the more recent examples.

"(It) is well-settled that a licensee must keep his place and his patronage under his control and is responsible for conditions inside and outside his premises." Capri v. East Newark, Bulletin 1853, Item 3. The reason for the imposition of such a strict rule is that the liquor business is an exceptional one, and courts have alwasy delt with it exceptionally. See X-L Liquors v. Taylor, 17 N.J. 444 (1955); Mazza v. Cavicchia, 15 N.J. 498(1954).

It is firmly settled that the Director's function on appeal is not to reverse the determination of the local issuing authority unless he finds as a fact, that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by respondent. Schulman v. Newark, Bulletin 1620, Item 1; Monteiro v. Newark, Bulletin 2073, Item 2 and cases cited therein.

The burden of establishing that the Council acted erroneously and in an abuse of its discretion rests with appellant. The ultimate test in these matters is one of reasonableness on the part of the Council. Or, to put it another way, could the members of the Council, as reasonable persons, acting reasonably, have come to their determination based upon the evidence presented? The Director should not reverse unless he finds as a fact that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by the Board. Hudson-Bergen County Retail Liquor Stores Ass'n. v. Hoboken, 135 N.J.L. 502 (E. & A. 1947); Nordco, Inc. v. State, 43 N.J. Super 277, 282. (App. Div. 1957); Lyons Farms Tavern v. Mun. Board of Alcoholic Beverage Control, 55 N.J. 292 (1970).

I find, as a fact, that the nuisance created by licensee could have been dealt with by employing less harsh means. Revocation or non-renewal of license should not be

considered unless all else has failed, or the licensee has clearly shown by his behavior that anything else would be futile.

From the testimony of neighbors, the trouble began with the introduction of disco nights and go-go girls. There seems to be agreement that the tavern was not objectionable when operated as a so-called "neighborhood bar."

This tavern pre-dates the adoption of zoning regulations in the area, and thus, is a non-conforming use. Its right to exist, as it did for many years, is not here questioned. However, when its use results in an unreasonable discomfort of its neighbors, indeed, to the point where it is characterized as a nuisance, remedial action is appropriate.

The distance between the buildings (less than two (2) feet between the tavern and the home next door) is too little. The character of the neighborhood is residential and the businesses conducted within it had been in harmony with it in the past.

I recommend that the action of the City Council of the City of New Brunswick, refusing renewal of appellant's Plenary Retail Consumption License be reversed, and an order be entered directing its issuance, subject to the following special condtions:

1) Disco or other music employing amplified instruments is prohibited;

2) Live entertainment shall be limited to individuals or groups who shall be restricted to accompaniment upon non-amplified instruments or the juke box;

3) The juke box employed shall be of the type that has its volume pre-set and cannot be increased by anyone in the licensed premises. It shall be pre-set at a sound level which shall not escape the premises at such a volume that the health and sleep of neighboring residents is effected;

4) At all times live entertainment is employed, appellant shall provide a

uniformed, professional security guard outside its premises in an endeavor to prevent loiterers from gathering, alcoholic beverage consumption upon the sidewalks, the smashing of empty beer bottles and glasses and patrons conducting themselves in a loud or boisterous manner;

5) Except for ingress and egress, the doors shall be closed at all times, irrespective of weather or season;

6) The licensee shall have its employees patrol an area within one hundred fifty (150) feet of its building to retrieve all glasses, bottles or other bar-related litter, at least once a day, at closing, or oftener, if necessary.

CONCLUSIONS AND ORDER

Written Exceptions to the Hearer's Report were filed by the respondent City Council of the City of New Brunswick, pursuant to N.J.A.C. 13:2-17.14. In consequence of the issues raised, I scheduled Oral Argument in accordance with the aforesaid Regulation.

In essence, argument advanced in the Exceptions of the respondent is that the record below adequately supports the penalty imposed; and appellant has failed to show manifest error or abuse of discretion. I concur with said statement and conclude that the Hearer in the instant matter substituted his judgment as to penalty and failed to apply the standard of review applicable to this Division as espoused in the Lyons Farm Tavern case, supra.

While making a factual finding that various nuisance situations existed in consequence of appellant's manner of operation of the licensed premises, the Hearer gave little weight to the extent and gravity of same, particularly since the latter is important in review of the reasonableness of the action of the City Council of the City of New Brunswick.

The nuisance situation, sub judice has been in existence

for about four years. In 1978, approximately 103 police calls were generated at or about the appellant's premises. During the 1977-78 and 1978-79 license terms, appellant's license was suspended on four separate occasions for various regulatory infractions by this Division and the local issuing authority.

Finally, while petitions of residents must be carefully viewed and circumspectly considered, the Hearer failed to provide proper evidential value to same herein. In toto, the evidence clearly supports a characterization of the operation of appellant's premises as a "trouble spot", Nordco, Inc. v. State, 43 N.J. Super 277 (App. Div. 1957). Denial of appellant's application to renew his license for the 1978-79 license term is amply warranted.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the written summations of the parties, the Hearer's Report and the written Exceptions filed thereto, I adopt the findings of the Hearer as to the establishment of nuisance violations by the appellant, but reject his recommendation to substitute special conditions in place of denial of renewal.

Accordingly, it is, on this 14th day of September, 1979,

ORDERED that the action of the City Council of the City of New Brunswick, in denying appellant's application for renewal for the 1978-79 license term, be and the same is hereby affirmed, and the appeal be and is hereby dismissed; and it is further

ORDERED that my Order to Show Cause dated July 5, 1979 in Appeal No. 4374, extending appellant's license for the 1979-80 license term pending determination of that appeal, be and the same is hereby vacated, effective immediately, and said appeal be and is hereby dismissed as moot.

JOSEPH H. LERNER
DIRECTOR