

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
RICHARD J. HUGHES JUSTICE COMPLEX, CN-087
TRENTON, NJ 08625

BULLETIN 2446

JUNE 13, 1986

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JUNE 13, 1986

1. AMENDMENT TO REGULATIONS - SPECIAL CONCESSIONAIRE PERMIT
(N.J.A.C. 13:2-5.2) - TEXT OF REGULATION AS AMENDED

The provisions of N.J.A.C. 13:2-5.2 set forth the requirements, procedure, terms and conditions for the issuance of a Special Concessionaire Permit to authorize the sale of alcoholic beverages in public buildings owned by or under the control of the State or any of its political subdivisions. The amendments will now permit the Director to authorize the sale of alcoholic beverages not only for on-premises consumption, but also in limited situations for sale in original containers for off-premises consumption. Additionally, the holder of a Special Concessionaire Permit must comply with the hours of sale in the municipality in which the public building is located.

The amendments' proposal appeared in the March 17, 1986 New Jersey Register (18 N.J.R. 545). Following the requisite comment period, the amendments were adopted without change and became effective May 19, 1986, upon publication in the New Jersey Register [18 N.J.R. 1104 (a)].

The full text of N.J.A.C. 13:2-5.2, as amended, is as follows:

13:2-5.2 Special Concessionaire Permit

(a) Application for a special concessionaire permit may be made to the director by any individual, partnership, or corporation who has entered into a contract with the State of New Jersey, or any political subdivision thereof, whereby said person or organization is authorized to sell alcoholic beverages for immediate consumption in any public building owned by or under the control of the State of New Jersey or any political subdivision thereof. Such permit may also authorize the sale of alcoholic beverages in original containers for off-premises consumption, provided the applicant, with the consent of the governmental agency, establishes to the satisfaction of the director that there is good cause for such sales.

(b) The term of a special concessionaire permit shall be from July 1 through June 30 unless otherwise specified. The fee for said permit shall be fixed by the director, and must accompany application with either cash, certified check or money order payable to the Division of Alcoholic Beverage Control.

(c) Application must be supported by the following documents before permit will be issued by the director:

1. Letter of authorization from, and copy of agreement with State, county, or municipal official or body charged with responsibility over public lands for which sale of alcoholic beverages is sought;
2. Letter of applicant detailing manner and method of proposed operation under permit;
3. Plan or sketch of premises to be used in accordance with permit;

(i) The holder of a special concessionaire permit must abide by all provisions of the New Jersey Alcoholic Beverage Control law, division rules and regulations and municipal ordinances as they pertain to retail licensees. Failure to do so may result in disciplinary proceedings against the permittee. Hours of sale shall not exceed those permitted in the municipality in which the public building is located.

(j) The rules herein contained shall be considered as general rules governing the issuance of a special concessionaire permit and may be relaxed or dispensed with by the director in any case where a strict adherence to them will result in hardship.

2. WARNING TO WHOLESALE LICENSEES: SALES MAY ONLY BE MADE TO PROPERLY AND ACTIVELY LICENSED RETAILERS - USE OF LICENSE NUMBERS.

A recent incident that was uncovered by the Division showed a situation wherein several wholesalers have regularly been making sales to an unlicensed entity for a number of years. There was some question as to whether or not the wholesalers believed that the area was covered under a license, but careful attention to the facts as were reflected in the wholesaler's records would have shown that the establishment was not licensed nor permitted in any way to sell alcoholic beverages. The wholesaler was, therefore, in violation of the law by selling to this entity.

Wholesalers are reminded that regulations require the conspicuous posting of a license certificate. Therefore, if any account does not have its license conspicuously posted, or if it is not seen by the wholesaler's personnel, the entity should be questioned for proof of proper licensing. Reliance should not be placed entirely upon lists which might be obtained from the Division of Alcoholic Beverage Control, since such lists quickly go out of date due to transfers, revocations, etc.

Secondly, every permanently licensed entity which is authorized to sell alcoholic beverages, including the holders of state issued Special Concessionaire Permits, are assigned the 12-digit license number. This number is fully explained under the heading "License Number" on page 35 of the Alcoholic Beverage Control Handbook for Retail Licensees. There is no exception to this assignment of the 12-digit license number and regulations further require that such license number be shown on every invoice. If your records do not reflect a 12-digit invoice number, inquiry should be made as to the status of that customer. If that customer proves not to be properly licensed, the Division should be notified that sales have been made and all future sales should cease immediately.

The attention of wholesalers is also called to ABC Bulletin 2441, Item 8, (April 26, 1985), wherein a notice and warning was given to wholesale licensees that it is prohibited for the wholesaler to receive payment for alcoholic beverages from other than the invoiced retail licensee. Wholesalers were further advised in that notice that if such payment should be received from a non-licensed party,

or from someone who does not hold a permit, the wholesaler is to promptly notify the Division of the details, to the attention of the Trade Practices Bureau.

The only time that a sale may be made to an entity without having a 12-digit license number is in the case of a special permit, such as a Social Affair Permit, which is only for a one time sale or for a very short period of time.

3. CORRECTION--TEXT OF N.J.S.A. 33:1-81, AS AMENDED, P.L. 1985, C. 113, EFFECTIVE JULY 1, 1985.

In Bulletin 2441, Item 3 (April 26, 1985) the full text of N.J.S.A. 33:1-81, as amended, effective July 1, 1985, was erroneously set forth by omitting the text of subsection (c) and mislabeling subsection (d) as (c). The correct, full text of N.J.S.A. 33:1-81, as most recently amended, and as was effective July 1, 1985, is as follows:

33:1-81. Unlawful acts by persons under legal age for purchase of alcoholic beverages; disorderly persons

It shall be unlawful for (a) a person under the legal age for purchasing alcoholic beverages to enter any premises licensed for the retail sale of alcoholic beverages for the purpose of purchasing, or having served or delivered to him or her, any alcoholic beverage; or

(b) A person under the legal age for purchasing alcoholic beverages to consume any alcoholic beverage on premises licensed for the retail sale of alcoholic beverages, or to purchase, attempt to purchase or have another purchase for him any alcoholic beverage; or

(c) Any person to misrepresent or misstate his age, or the age of any other person for the purpose of inducing any licensee or any employee of any licensee, to sell, serve or deliver any alcoholic beverage to a person under the legal age for purchasing alcoholic beverages; or

(d) Any person to enter any premises licensed for the retail sale of alcoholic beverages for the purpose of purchasing, or to purchase alcoholic beverages, for another person who does not because of his age have the right to purchase and consume alcoholic beverages.

Any person who shall violate any of the provisions of this section shall be deemed and adjudged to be a disorderly person, and upon conviction thereof, shall be punished by a fine of not less than \$100.00. In addition, the court shall suspend the person's license to operate a motor vehicle for six months or prohibit the person from obtaining a license to operate a motor vehicle in this State for six months beginning on the date he becomes eligible to obtain a license or on the date of conviction, whichever is later. In addition to the general penalty prescribed for an offense, the court may require any person under the legal age to purchase alcoholic beverages who violates this act to participate in an alcohol education or treatment program authorized by the Department of Health for a period not to exceed the maximum period of confinement prescribed by law for the offense for which the individual has been convicted. (As amended, P.L. 1985, c. 113, effective July 1, 1985.)

4. NOTICE TO RETAIL LICENSEES: WARNING CONCERNING COUNTERFEIT PENNSYLVANIA DRIVER'S LICENSES - UNLAWFUL TRANSPORTATION OF ALCOHOLIC BEVERAGES IN EXCESS OF STATUTORY LIMITS - RECORDS REQUIRED FOR SALES IN EXCESS OF 20 GALLONS OF ANY TYPE ALCOHOLIC BEVERAGES AT ANY ONE TIME.

Retail licensees are well aware of the risks that exist in the sale of alcoholic beverages to youthful appearing patrons and the quasi-criminal and administrative penalties that can result from a sale to persons under the legal age. The Division has noted in prior Bulletins the most recent changes in the law and has provided advice for licensees in this sensitive area of high responsibility. See, Bulletin 2437, Item 7 (explanation of defenses to sale to underage); Bulletin 2441, Item 3 (penalties against underage purchasers); Bulletin 2442, Item 5 (warning notice concerning counterfeit driver's licenses); Bulletin 2443, Item 6 (administrative penalties for sale to underage); and Bulletin 2445, Items 2, 3 and 5 (law change including written age representation statement as defense to sale to underage). Additionally, the Alcoholic Beverage Control Handbook For Retail Licensees, distributed to all retailers by the Division in early 1986 contains a detailed discussion on sale to underaged persons and the available legal defenses under the topic "Age to Purchase".

In furtherance of the Division's continuing efforts to apprise licensees of the law and risks involved in the ever present attempts by underage persons to purchase alcoholic beverages, a detailed notice dated June 9, 1986 was provided retail licensees in the Wildwood area of South Jersey. The concerns and advice of the Division is equally applicable and appropriate for all retail licensees in this State. Accordingly, the content of that Notice is herewith repeated in this Bulletin:

"The Division has become aware of a repeat of last year's extensive use of false Pennsylvania Photo Driver's Licenses by persons under 21 years of age trying to purchase alcoholic beverages. The risks of accepting false ID is particularly high during Senior Week, when large numbers of high school graduates visit the Wildwood area. Licensees are warned that they must be extremely vigilant in protecting against underage sales. In that regard licensees and all employees must be instructed and made aware of the following:

- (1) Do not accept Pennsylvania Photo Driver's Licenses as proof of age unless other forms of identification are produced. Carefully review the forms of identification for alterations, erasures, inconsistencies and obvious forgery.
- (2) Even if what appears to be valid proof is presented, a licensee will still violate the law if the person does not appear to be of legal age.

(3) The police should be called when a licensee believes counterfeit I.D. is presented. Keep the proof for police review. If the person flees the premises, forward the I.D. to the Director, Division of Alcoholic Beverage Control, Division of ABC, CN 087, Trenton, N.J. 08625.

(4) New Jersey law limits the amount of alcoholic beverages that can be transported by one person in a vehicle solely for personal consumption within any consecutive period of 24 hours without a Special Permit obtained from the ABC. The limits are as follows:

- (a) 1/2 barrel of beer or no more than 64 12 oz. cans or bottles of beer (2 2/3 cases) or 24 quarts of beer; and
- (b) no more than 5 gallons of wine; and
- (c) no more than 12 quarts of other alcoholic beverages.

Any sale to a person exceeding these amounts which the licensee knows, or should have known, will be transported in a vehicle will not only be a violation on the part of the transporter, but the licensee can be charged with aiding or abetting in the violation. Since underage persons may ask someone of legal age to purchase large quantities for them, this law must be strictly observed.

If a licensee uses its licensed vehicle to deliver a large purchase, the Division will consider it an indirect sale to a person under the legal age if the delivery site has underage residents present or registered as guests at that hotel, motel or rooming house address.

(5) Federal law considers licensees who sell more than 20 gallons of any type of alcoholic beverages in one sale to be wholesalers subject to Federal license requirements. To negate this requirement, retailers must keep a record of the sale, including the date of sale, kind and quantity of product sold, serial number on all full cases, and name and address of the purchaser. Failure to have the proper Federal license or keep records is also a violation of State law. These provisions will be strictly enforced.

"The Director anticipates the full cooperation and assistance of all licensees in this enforcement effort. The information provided should help you in fulfilling your obligations. The Division, in cooperation with State and local enforcement agencies, pledge their backup when you are confronted with fraudulent attempts to abuse your license privilege and livelihood by underage persons. Working together, we can succeed to insure a safe, responsible and enjoyable climate for all visitors to our New Jersey Southern Shore Resort area."

5. STATE LICENSE TRANSACTIONS - FEBRUARY 11, 1986 TO DATE.

The following transactions have taken place with reference to State-issued licenses since February 11, 1986.

Type of License:	License#:	Status:
New Wine Wholesale DAK Foods, Inc. Lexington Avenue East Brunswick, N.J.	3401-26-375-001	New license iss. eff: 2/11/86
Plenary Retail Transit Capt. Applegate Inc. Boat Capt. Applegate #555759 600 Huron Avenue Atlantic City, N.J. 08401	3401-13-376-001	New license iss. eff: 2/18/86
Plenary Retail Transit Capt. Applegate Inc. Boat Applejack #563059 600 Huron Ave Atlantic City, N.J. 08401	3401-13-378-001	New license iss. eff: 2/18/86
Transportation Donald H. Wright Davis Village Rd New Ipswich, N.H. 03071	3401-20-377-001	New license iss. eff: 2/18/86
State Beverage Distributor Joseph F. Belasco 57-63 Mallory Avenue Jersey City, N.J. 07304	3400-19-207-004	Person-Person & Place-Place iss. eff: 2/25/86
From: Kilmer Beverages, Inc. Cor Rts 528 & 539 New Egypt, N.J. 08533		
Public Warehouse license J.S.L Warehousing Corp. 100 Federal Blvd Carteret, N.J. 07008	3401-28-372-002	Place to Place transfer iss. eff: 2/24/86
From: 9 Peekay Drive Clifton, N.J. 07014		
New Transportation license Falcon Express, Inc. 5200 Comly Street Philadelphia, PA 19124	3401-20-379-001	New license iss. eff: 2/26/86
Transportation License Marine Transportation Intermodal Inc. 4800 Tremley Point Rd Linden, NJ 07036	3400-20-782-002	Place-Place Transfer iss. eff: 2/28/86
From: 300 Milik Street Carteret, NJ 07008		
New Limited Wholesale Adamba Imports International Inc. Distribution Street Bldg 263 D Newark, N.J. 07114	3401-25-381-001	New license iss. Eff: 3/18/86

Type of License:	License#:	Status:
New Transportation license Trump's Castle Associates 750 West Delilah Road Pleasantville, N.J. 08232	3401-20-387-001	New license iss. eff: 3/27/86
New Mine Wholesale license Buena Vista Minery Inc 27000 Ramal Rd P.O. Box 182 Sonoma CA. 95476	3401-26-388-001	New license iss. eff: 3/27/86
New Transportation License S & B Mazza Trucking Inc. 13 Midsummer Drive Old Bridge, N.J. 08857	3401-20-383-001	New license iss. eff: 3/24/86
New Plenary Retail Transit License Robert D. Schumann III #276491 "Miss Cape May" 912 Shunpike Road Cape May, N.J. 08204	3401-13-384-001	New license iss. eff: 3/27/86
New Plenary Retail Transit License Robert D. Schumann III #274396 "Sea Star II" 912 Shunpike Road Cape May, N.J. 08204	3401-13-385-001	New license iss. eff: 3/27/86
Additional Warehouse Trump's Castle Associates 750 West Delilah Road Pleasantville, N.J. 08232	3401-28-386-001	New license iss. eff: 3/27/86
New Transportation license M C E Inc. Eugene Drive, Plains Twp Milkes Barre, PA 18705	3401-20-389-001	New license iss. eff: 4/3/86
Annual State Permit Marlyn, Inc. S. Elmwood Road Marlton, N.J. 08053	3401-14-390-001	New license iss. eff: 4/15/86
Plenary Retail Transit license Dutchess, Inc. "Dutchess II" Channel Drive and Broadway Point Pleasant, N.J. 08742	3401-13-391-001	New license iss. eff: 4/15/86
Annual State Permit Perreault Corporation 92 Mercer Road Colts Neck, N.J. 07722	3401-14-392-001	New license iss. eff: 4/15/86
Limited Wholesale license Vinimport, Inc. 411-415 John Street Elizabeth, N.J. 07202	3401-25-334-002	Place to Place transfer eff: 5/1/86
From: 9 St Francis Street Newark, N.J. 07105		

Type of license:	License #:	Status:
State Beverage Distributor Tastee Beverage Inc 1112 7th Avenue Neptune, N.J. 07753	3400-19-269-002	Renewed eff: 4/14/86
Annual State Permit John Sullivan 209 Totowa Road Wayne, N.J. 07470	3401-14-394-001	New license iss. eff: 5/2/86
Limited Wholesale license Regal Wine Imports, Inc. 321 N. Delsea Drive Suite 6 & 9 Deptford, N.J. 08096	3401-25-393-001	New license iss. eff: 5/6/86
Public Warehouse license Trump Plaza Associates West Parkway Drive Egg Harbor, N.J. 08215	3401-28-396-001	New license iss. eff: 5/12/86
Transportation license Trump Plaza Associates Indiana at the Boardwalk Atlantic City, N.J. 08401	3401-20-395-001	New license iss. eff: 5/12/86
Plenary Wholesale James B. Beam Distilling Co. 619 Amboy Avenue Edison, NJ 08837 From: 500 North Michigan Avenue Chicago, IL 60611	3401-23-198-002	Place to Place transfer iss. eff: 5/28/86
Limited Wholesale Robert Chadderdon Selections Inc. 30 Rockefeller Plaza Suite 1900 New York, NY 10012	3401-25-401-001	New license iss. eff: 5/30/86
Public Warehouse Hanover Warehouse Inc. Bldg 10-17 Central Ave Kearny, NJ 07032	3401-28-398-001	New license iss. eff: 5/20/86
Rectifier & Blender Regnier Division of Sonoma Vineyards 6 Princess Road Lawrenceville, NJ 08648 From: Regnier Inc.	3400-15-385-002	Person-Person Transfer iss. eff: 5/19/86
Transportation License Campbell's Auto Express Inc Lamb's Rd & Laurel Drive Pitman, N.J. 08071	3401-20-397-001	New license iss. eff: 5/19/86
Annual State Permit The Frenchman's Kitchen Inc. Stable Cafe, NJ Sports Complex Rt 20 P.O. Box C200 East Rutherford, NJ 07073	3401-14-399-001	New license iss eff: 5/29/86

Type of license:	License #:	Status:
Plenary Wholesale Federal Distillers, Inc. 15 Monsignor D Brien Highway Cambridge MA 02141	3400-23-024-002	Corp. Structure Change iss. 6/9/86
Limited Wholesale Los Andes Import, Inc. 543 59 Street West New York NJ	3400-25-741-002	Corp. Structure change iss. 6/9/86

6. ADMINISTRATIVE RULING (TOWNSHIP OF HAMPTON) - CONCLUSIONS AND ORDER DENYING AUTHORIZATION TO RENEW AN INACTIVE LICENSE FOR THE 1985-86 LICENSE TERM - EFFECT OF LENGTHY PERIOD OF INACTIVITY (20 YEARS), PRIOR LIMITING SPECIAL CONDITION, AND INDEFINITE PROGNOSIS OF ACTIVATION CONSIDERED IN APPLICATION UNDER N.J.S.A. 33:1-12.39.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

IN THE MATTER OF THE APPLICATION
FOR EXTENSION OF RENEWAL OF THE
LICENSE OF

THE ESTATE OF THOMAS ROSELLI,

HOLDER OF PLENARY RETAIL CONSUMPTION
LICENSE NUMBER 1910-33-007-001
ISSUED BY THE MAYOR AND TOWNSHIP
COMMITTEE OF THE TOWNSHIP OF
HAMPTON

FINAL CONCLUSION AND FINAL
ORDER DENYING AUTHORIZATION
TO FILE A RENEWAL APPLICATION
AND TO RENEW THE LICENSE FOR
1985-86 LICENSE TERM PURSUANT
THE PROVISIONS OF N.J.S.A.
33:1-12.39

OAL DKT. NO. ABC 5395-85
AGENCY DKT. NO. 06-86-165

Michael C. Gaus, Esq. Attorney for Petitioner
(Concilio & Gaus, Attorneys)

Nancy Mahony, Law Assistant, Representing the Division
(W. Cary Edwards, Attorney General of New Jersey)

INITIAL DECISION

HONORABLE LEON S. WILSON, ADMINISTRATIVE LAW JUDGE

Decided: March 12, 1986

Received: March 18, 1986

BY THE DIRECTOR:

Written Exceptions were filed by Nancy Mahony, Law Assistant, representing the Division and reply to those exceptions were filed by Michael C. Gaus, attorney for the Petitioner with regards to the above captioned Initial Decision as provided by N.J.A.C. 13:2-19.6. The Division sets out four exceptions to the decision of the Administrative Law Judge: (1) that the Administrative Law Judge misconstrues the Director's 1984 Special Ruling and the conditions imposed upon it; (2) that the Administrative Law Judge chose to rely on older case law which gave a limited definition of good cause instead of relying upon the more recent case law; (3) that the Administrative Law Judge, while conceding that the license had been inactive and possibly never used in its 22-year existence, failed to factor this particular component into his analysis of good cause; and (4) the Administrative Law Judge failed to distinguish petitioner's efforts between good faith and those that would constitute good cause. In reply the Attorney for the petitioner stated that the basis of the Administrative Law Judge's decision correctly applied the current law with regards to the case, that

Petitioner demonstrated its willingness and efforts to activate the license and that the statutory burden placed upon the licensee had been met. In reviewing the exceptions and the Initial Decision of the Administrative Law Judge together with the evidence and the annexed exhibits submitted, there is an initial recommendation to authorize renewal for the 1985-86 under certain conditions and the 1986-87 license terms since the licensee has demonstrated good cause pursuant to N.J.S.A. 33:1-12.39. In reaching this decision the Administrative Law Judge advances a standard of comparing the efforts of the licensee to activate the license to what the hypothetical reasonable licensee would have done under the circumstance of this case. It is to this basic point that the exceptions are addressed. In order to form a more cohesive basis to address the issues in this proceeding, I will review the entire matter and address the exceptions as part of the final conclusion and discussion.

The licensee petitioned the Director of the Division of Alcoholic Beverage Control for authorization to renew the license for the 1985-86 license term by Verified Petition dated June 12, 1985 pursuant to N.J.S.A. 33:1-12.39. This was the second such application applied for on behalf of the petitioner. The first application was granted on July 25, 1984 wherein the Director authorized renewal by Special Ruling for the 1984-85 license term, as well as for the five previous terms nunc pro tunc. That Special Ruling specifically imposed a Special Condition stating that no further renewals would be granted unless the license was being actively used at an approved location on or prior to June 30, 1985. This second petition request was forwarded to the Office of Administrative Law for a hearing pursuant to the above captioned statute and pursuant to the provisions of N.J.S.A. 52:14F-1 et seq. on August 27, 1985. The matter was heard on February 5, 1986 and decided by the Administrative Law Judge on March 12, 1986.

The evidence and facts demonstrated that the license was acquired by the late Thomas Roselli in or about January, 1964. The testimony notes that the circumstances of the original acquisition and whether the license was ever active is somewhat "uncertain"; however, since January of 1964 the license was inactive. From that date to the 1984-85 license renewal period, the licensee submitted the necessary applications and fees for the annual renewal of the license, and the license was renewed by the Township of Hampton. There was testimony that on several occasions Mr. Roselli attempted to sell the license, and in 1982 and 1983 a local bank held an option to buy the license in connection with a restaurant premises it had acquired in foreclosure. The bank ultimately did not need the license in question and released this option. On December 16, 1983, Mr. Roselli died and the following spring the executrix of the estate was notified by the Division that the license could not be renewed unless the requirements of N.J.S.A. 33:1-12.39 were satisfied. The renewal of this license from July 1, 1978 through June 30, 1984 was in direct violation of N.J.S.A. 33:1-12.39. The Petitioner submitted an affidavit and supplemental information requested by the Division. On July 25, 1984 the Director issued a Special Ruling authorizing the municipality to renew the license in its inactive state for the five previous terms nunc pro tunc and also for the 1984-85 license term.

In that Special Ruling the Division reiterated, based on the affidavit and information submitted, that Mr. Roselli had been sick and eventually died before he was able to consummate any potential existing transaction concerning the license. The executrix maintained that she and the law firm that was handling the estate of Mr. Roselli were presently negotiating with several individuals and local brokerage firms in order to sell the license. In addition, petitioner stated that Mr. Roselli had no idea or knowledge he was required to submit petitions to the Division and receive authorization to renew the license in its inactive state. He filed the necessary applications and fees, the municipality renewed the license, and he was not notified that any additional requirements were necessary. In granting the authorization to renew the license for the 1984-85 term, the Special Ruling specifically placed a Special Condition upon the license stating that no further renewals of the license would be granted unless the license #85 actively being used at an approved location on or prior to June 30, 1985. The petitioner testified that after the ruling was issued they attempted privately to locate a facility at which to operate the license in Hampton Township and/or sell it to someone who would activate it. Unable to sell the license privately, in February 1985 the executrix placed advertisements in both the popular and trade magazines and in mid-March of 1985 retained the services of a business broker, B.B. Dickman Business Brokers, in order to sell the license. Although there were some eight individual inquiries about the license, none of these inquiries resulted in a contract to either lease or purchase a suitable premises for the Roselli estate to operate the license or to sell the license to a third party who would activate it.

Petitioner testified that the two primary reasons for the inability to locate either a suitable site or a purchaser was that Hampton Township is a rural community which has increased in population from 3,000 in 1980 to approximately 10,000. Due to the increase in population, the property values, particularly along the highway, have increased dramatically in value and there is a notable lack of existing space suitable for purchase or rental to place the license. In addition, due to the fact that the license is specifically conditioned on activation by June 30, 1985, there was a fear that time and money would be forfeited if the license was not renewed. Sometime in the summer of 1985, Mrs. Miriam Rosenkranz made inquiries regarding the license and testified at the hearing that she was seeking to build a bowling alley with an associated liquor-bar in Hampton Township. She testified that she had purchased property that apparently was zoned correctly and that, at the time of the hearing, the percolation and other tests relating to the feasibility of construction had been completed satisfactorily. She testified at the hearing that the project's cost was approximately \$1.9 million dollars and she was seeking the appropriate financing. She also testified that the project could not be successful without a liquor license. Mrs. Rosenkranz did not enter into a contract with the petitioner, even with the contingency that the license must be renewed. She stated that the special design and equipment standards of the project, the considerable financial exposure, and the dependency upon successful cooperation and contribution by others over whom she had no control, did not allow her to reach any definitive prognosis as to when the premises would be built and with all these contingencies she was fearful of entering into a contract for a license that might not be renewed. She did state, however, that the parties had reached satisfactory terms and conditions regarding the sale of the license and if she was afforded a year's time in which to complete her project, she would really commit herself to the purchase. Thus, not only does the licensee seek authorization for the 1985-86 license term, but also for the 1986-87 license term.

In addition, there was testimony by Mr. Henry M. Fulkrod who is a 30 year resident of the county and currently a member of the Zoning Board of Adjustment in Hampton Township. Mr. Fulkrod testified to the rapid increase in population in the township, a lack of available local recreation facilities, and his opinion that the proposed project of Mrs. Rosenkranz would be a benefit to the community. It is also noted that, by letter of the borough attorney, Mr. S. Rosenman, dated October 4, 1985, the Township of Hampton acknowledged service of the applicant's petition but advised: "...it was there (sic) (officials of Hampton Township) decision that the Township take no position in this matter."

CONCLUSIONS AND DISCUSSIONS

A license is not an asset or property right but rather "... (a) license is a temporary privilege to conduct business in a

sensitive and strictly regulated industry." Butler Oak Tavern v. The Director of the Division of Alcoholic Beverage Control, 20 N.J. 373, 381 (1956); In the Matter of the Great Atlantic and Pacific Tea Company, ABC Bulletin No. 2351, Item 2. This privilege pursuant to N.J.S.A. 33:1-12.13 must be renewed annually. In October, 1977, the State placed a condition upon renewal of any inactive Class C license by the enactment of N.J.S.A. 33:1-12.39. The essence of this statute, as set out in the comments of both the Assembly Committee on Commerce, Banking and Insurance and the Senate Committee on Law and Public Safety, was to halt the renewal and require retirement of inactive licenses.

The purpose and effect of the statute was to insure that licenses which are inactive resume active status within a two year period or be retired, unless the licensee demonstrated to the Director that good cause existed to allow the license to continue in its inactive state. In The Matter of The Application for Extension of Renewal for Silwad, ABC Bulletin No. 2442, Item 8. The term "good cause" was not specifically defined by the statute, indicating a legislative determination to initially delegate to the Director of the Division of Alcoholic Beverage Control the responsibility for establishing standards and methods to evaluate each individual case to determine whether the Petitioner met the statutory requirement. Experience has demonstrated that good cause is not capable of an arithmetic or boiler plate test, and the Director has been required to review each application on a case-by-case basis in order to determine whether the statutory requirement of good cause has been met. Notwithstanding this case-by-case review, articulated standards have been developed.

In the latest case in this area, Silwad, supra, the Director set forth six variables or factors which are used as a basis to determine whether good cause has been established. In addition, the Director distinguished, in Silwad, the difference between the statutory terms "good faith," and "good cause". Specifically "... to establish good cause to the satisfaction of the Director, a petitioner must not only demonstrate its (good faith) efforts to activate the license, but emphasis must be directed to proof of a realistic prognosis as to when it expects the license to be actively used based upon the facts and circumstances of each individual case." Therefore, in determining whether good cause has been established, the Director will place an emphasis, especially regarding petitions involving inactive licenses for multiple license terms, on the facts relating to the activation or prognosis for activation of the license. Similarly, the Division will review all prior petitions and special rulings involving the inactive license, in order to determine whether the present request for relief should be granted and whether the prognosis is realistic.

In reviewing the Initial Decision, the Administrative Law Judge made a determination that the controlling facts and circumstances to be used in determining whether good cause exists are those that have occurred since the Director's Special Ruling of July 25, 1984. The Administrative Law Judge stated "...he (the Director) has, in effect, found that the 20-year period before that

time was adequately explained in the petition submitted 21 months ago. His explicit time limitation (the special condition requiring activation of this license before June 30, 1985) is tantamount to a presumption on his part that a reasonable licensee could have done that which was necessary to activate this license in that time." Therefore the analysis applied by the Administrative Law Judge was whether a reasonable licensee under the facts and circumstances of this case would have been more successful in meeting its obligations, namely activation of the license. Thus if the hypothetical reasonable licensee could have done no more than the Petitioner did, good cause would have been established.

Contrary to the standard articulated by the Administrative Law Judge, the controlling issue in this case was whether the Director's special condition established in the July 25, 1984 special ruling is a mere presumption that the license could be activated or a directive which, if not met, would necessitate the denial of relief. Reviewing the facts and circumstances of the entire case it is obvious that the special condition placed upon the license was not merely a presumption but a notice to all parties that the license would not be renewed unless activated. When dealing with a multi-term inactive license there is a direct relationship between the length of inactivity and the prognosis for activating the license, as it relates to the necessary quantum of proof to establish good cause. This is not only logical but conforms to the legislative purpose of the act. In these situations each license term or special ruling is connected or related to the previous license term and accumulative evidence or testimony presented in all petitions and rulings are used to determine whether good cause has been established. To review each petition in a vacuum unrelated to the previous license term and ruling would in essence defeat the intent and purpose of the statute which is to retire inactive licenses. Therefore, by placing the special condition upon the license, all parties were specifically given notice that if the license was not activated by June 30, 1985, any further requests would be denied, absent extreme justification. This justification might involve the fact that the license transfer to a premise for immediate activation is pending or building construction is a few months from completion. Clearly, this exception is not established if the prognosis is speculative and not definitive, such as in this case.

In reviewing the facts and testimony of the case in this light I note that the special ruling for the 1984-85 renewal was granted because the licensee, either due to negligence or due to confusion on the part of the issuing authority, was unaware of the necessity to petition and receive authorization from the Director prior to renewing the license in its inactive state for the previous five license terms. These factors, plus the long illness and subsequent death of Mr. Roselli and the holding of this license by his widow, generated empathy for the request and deemphasized the evaluation of prognosis for that petition in finding good cause. The Division was informed that the petitioner was negotiating with several individuals and brokers in an effort to sell the license. Yet, for approximately seven months after the special ruling was issued, the petitioner purportedly attempted to sell the license "privately"

and inquiries did not result in any buyers. In February, 1985, the petitioner placed an advertisement for the sale of the license in both popular and trade magazines but there is no testimony as to the number of magazines or the number of advertisements. In mid-March the petitioner retained the services of a business broker to sell the license. The petitioner took these additional steps a mere three months prior to the expiration of the license term and the date set forth on the special condition.

At the time the condition expired there was no firm commitments or contracts by any party to purchase the license, nor did the licensee locate or have available a premises in which to place the license. It was not until sometime in the Summer of 1985 that the licensee received an "apparent offer" to buy the license. However, at the present time the prospective purchaser has not entered into a contract with the licensee even with a contingency that the sale would be null and void if authorization to renew the license was denied. This "purchaser" seeks to place the license in a yet to be built bowling alley with an associated bar. While the prospective purchaser owns the land upon which the building and licensed premises would be constructed and apparently has done the necessary preliminary tests which demonstrate that construction can be satisfactory completed, she does not have the projected \$1.9 million dollars to finance the project nor is there testimony that the necessary plans are drawn or that site plan approval is either in the process of being applied for or has been received. Finally, there is no realistic time schedule as to when the premises will be completed. Although the purchaser apparently testified that the project could not be successful without a liquor license, the purchaser failed to enter into a contract to secure what may possibly be the only available license within the municipality. In addition there was testimony that due to the special design and the equipment requirements of her project and its dependency upon successful cooperation and contribution by others, such as AMF bowling supplies, over whom she has no control, she is reluctant to enter into a contract to purchase the license since it may not be renewed.

Thus, not only was the license not activated on June 30, 1985, but the testimony reveals it most definitely will not be activated by June 30, 1986, and there is no reasonable prognosis based upon the testimony and evidence before me that the license would even be activated by June 30, 1987. Therefore, the Director would be required to extend a 20-year old inactive license for a minimum of three additional license terms with no reasonable prospect at this time that the license would ever be activated. To do so would be to render the legislative provisions futile.

While it may be argued that a reasonable licensee would have exercised greater diligence by immediately placing the license in trade magazines and placing it with a business broker in order to give it the widest exposure for sale, the depositive test in this matter is not the actions of a reasonable licensee, but rather, the prognosis as to when the license will reasonably be reactivated in light of the fact that it has been inactive for 20 years. It is patently obvious from the facts and circumstances that the petitioner has failed to demonstrate any reasonable prognosis that the

license will be activated and, thus, has not established good cause, nor grounds upon which the Director should vacate the special condition imposed by the July 25, 1985, ruling.

The testimony and the Initial Decision attempted to identify two factors in particular which prevented the licensee, i.e. any reasonable licensee, from activating the license on or before June 30, 1985. The first factor was that the Township of Hampton is a rural community which has increased in population from 3,000 persons in 1980 to in excess of 10,000 persons in 1985. There are no existing buildings within the municipality and the price of property on the highway has increased dramatically in value. It is then postured that the only method to activate the license is to build a premise in those appropriately zoned areas, something which could not be completed within the time prescriptions of the special condition. It is also advanced that prospective purchasers were extremely tentative in entering into contracts for the sale of the license due to the fact that there was a possibility that the license would not be renewed if the license was not activated. Assuming arguendo that this is so, I am now confronted with a situation, where after a year of advertising the availability of what may be the only available license in a community which has tripled its population, that this license cannot be sold or activated. This leads to an extremely strong presumption that there is no need or necessity for the license and it should be retired consistent with the purpose and reasons for the enactment of the statute.

Currently in New Jersey there are 525 municipalities out of 567 that do in fact issue plenary licenses. Division records show that 467 of those communities either exceed or are at the maximum limit of licenses which can be issued based upon the population limitation as set out in N.J.S.A. 33:1-12.14. Additionally, of the 9,846 plenary retail consumption and distribution licenses issued in the State of New Jersey, 793 or approximately 8.05% are inactive. Therefore, as stated in Silwad, supra, it is readily apparent that, due to the excess number of existing licenses that are currently inactive, there will be many instances where the petitioners cannot meet the statutory requirements of N.J.S.A. 33:1-12.39 since there will be no ready market for licenses in communities that far exceed the population quota limits. More specifically, I note that in the Township of Hampton there are currently nine plenary retail consumption licenses. Even assuming that the population has in effect tripled, the number of existing licenses in the municipality is still equivalent to three times the number permitted pursuant to the above cited statute. While I note that there is testimony by Mr. Henry Fulkrod that there is a need for and notable lack of recreation facilities, the Issuing Authority, which would be directly affected by this decision, chose to take no position with regards to the outcome of this matter, realizing that, if relief were not granted, the license would be retired and the number of licenses in the municipality would be reduced. These factors not only demonstrate or question whether there is a need or necessity within the municipality for this particular license, but more specifically demonstrate that due to the lack of a definitive prognosis for activation of a license

which has been inactive for 20 years, the requirements of N.J.S.A. 33:1-12.39 have not been met and that the legislative purpose to retire inactive licenses is clearly compelling herein.

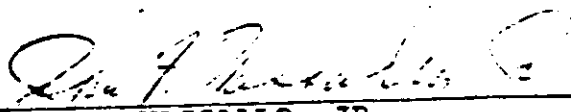
In reviewing the Initial Decision, I note that the Administrative Law Judge relied upon the language and decision reached in the Chateau Corporation, cited in the Initial Decision. In that case the Petitioner, who held a license which had been inactive for approximately 11 years, demonstrated that he had attempted through a multitude of avenues to activate the license but was unsuccessful allegedly because of the size of the town and available locations suitable for placing of a license. The Administrative Law Judge in finding good cause stated: "...it (petitioner) has established a substantial reason justifying renewal (good cause) by proving its good faith efforts to renew and by establishing a record that permits a conclusion that activation by someone else would be just as difficult as activation by petitioner. In short, based on the record, the malady (inactivity of a potentially active license) addressed in N.J.S.A. 33:1-12.39 could not be cured by terminating this license." While that determination may have been justified under the facts and circumstances of Chateau Corporation for that particular license term, as applied to this particular case and to the express legislative policy of N.J.S.A. 33:1-12.39, that holding is in conflict and to the extent it is inconsistent with this opinion in the establishment and evaluation of variables to ascertain good cause, it is hereby overruled.

Based upon the review of the testimony and the Initial Decision as set forth above I do hereby reject the findings of fact, conclusions of law and recommendations of the Administrative Law Judge for reasons stated above. The relief requested by the petitioner is denied.

Accordingly it is on the 30th day of April, 1986,

ORDERED that the petition of the Estate of Thomas Roselli, former holder of Plenary Retail Consumption License No. 1910-33-007-001 issued by the Mayor and Township Committee of the Township of Hampton for relief pursuant to N.J.S.A. 33:1-12.39 is hereby denied for failure of the petitioner to establish good cause; and it is further

ORDERED that with denial of this ruling, the application to renew this license for the 1985-86 license term must be denied and the Mayor and Township Committee of the Township of Hampton shall return to the petitioner 90% of the municipal license fees filed in connection with that renewal application in accordance with N.J.S.A. 33:1-25.


 JOHN F. VASSALLO, JR.
 DIRECTOR

DATED: APRIL 30, 1986
 ATTACHMENTS



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. ABC 5395-85

AGENCY DKT. NO. 06-86-165

ESTATE OF THOMAS ROSELLI,

Petitioner,

v.

**DIRECTOR, DIVISION OF
ALCOHOLIC BEVERAGE CONTROL,**

Respondent.

**Michael C. Gaus, Esq., for petitioner
(Kelly, Gaus, Holub, Reed and Morro, attorneys)**

**Nancy Mahony, Law Assistant, for respondent
(W. Cary Edwards, Attorney General of New Jersey, attorney)**

Record Closed: February 24, 1986

Decided: March 12, 1986

BEFORE LEON S. WILSON, ALJ:

The estate of Thomas Roselli (petitioner) applies to the Director of the Division of Alcoholic Beverage Control, for special authorization pursuant to N.J.S.A. 33:1-12.39, to renew its Class C Plenary Retail Consumption Liquor License, No. 1910-33-007-001, despite the fact that the license has been inactive for approximately 22 years.

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This is the second such application on behalf of petitioner. The first, filed in connection with a 1984-85 license year renewal application, was granted on July 25, 1984. The Director authorized renewal for that license term, as well as for the previous five license years (from 1978 through 1984), nunc pro tunc. His ruling, however, imposed as a special condition, the following: "No further renewals will be granted unless the license is actively being used at an approved site on or prior to June 30, 1985." Special Ruling of the Director, July 25, 1984; J-1. In due course, the local alcoholic beverage control agency, the Township Committee of the Township of Hampton, Sussex County, acting upon that special authority, granted the renewals then in issue.

In anticipation of the termination of its license on June 30, 1985 and of its forthcoming application for further renewal, petitioner again seeks special authorization for renewal of its still inactive license. Verified petition was filed with the Director on or about June 12, 1985; the matter was transmitted to the Office of Administrative Law for disposition as a contested case pursuant to the provisions of N.J.S.A. 52:14F-1 et seq., on August 27, 1985. It was preheard before me on October 25, 1985. Pursuant to prehearing order, issued on October 31, 1985, the matter was set down for trial, first in early January 1986, and later, at the end of that month. These trial dates were postponed, however, at the joint request of the parties to accommodate calendar conflicts. Plenary hearing in the matter was conducted before me at Newark on February 5, 1986. Pursuant to leave granted, memoranda to the issues were simultaneously filed by counsel on February 19, 1986 and the record deemed closed February 24, 1986.

FACTS

The facts of the matter were established through the testimony of four witnesses, presented by petitioner, and numerous documentary exhibits. These are listed in the annexed appendix. The Township of Hampton acknowledged service of the applicant's petition upon it but advised that: "It was their (officials of Hampton Township) decision that the Township take no Position in this matter." See, letter from S. Roseman, Esq., to the undersigned, October 4, 1985. Although the Division of Alcoholic

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Beverage Control participated through counsel, the Division too takes no position regarding the merits of petitioner's application; rather, it appeared principally to present its view regarding the proper interpretation of the statutory provision at issue. From this record I make the following **FINDINGS OF FACT:**

The late Thomas Roselli acquired the subject license by purchase in January 1964. He was at that time a resident of Sussex County, and holder of an alcoholic beverage control license sited in Frankfurt Township, which borders on Hampton Township. The circumstance of that original acquisition, and the history of this license from that time to the present, is somewhat uncertain. Mr. Roselli, after a disabling illness of several years, died on December 16, 1983. At the time of his death he was apparently living alone. He had retired both from the Frankfurt Tavern business, which he sold in 1971, and a construction business in which he was engaged thereafter. His sister, Angelina Gargiulo, is the executrix of his estate and its principal beneficiary.

Mrs. Gargiulo testified that she had known of the Hampton Township license for many years. It was established only, however, that her brother had made due application for renewal of that license continuously until the license year beginning July 1977; that his applications had designated as trade name for the license "Tommy's Place," the trade name under which he operated the Frankfurt Township tavern; and that thereafter he had sought on several occasions to sell the license in question. During 1982 and 1983 a local bank held an option to buy Mr. Roselli's license to use in connection with a restaurant it had seized, should an existing license be unavailable. P-12. It appears, however, the bank ultimately had no need of Mr. Roselli's license and released its option; the net effect of the transaction was to deny the licensee an opportunity to sell his license elsewhere during that critical period of time. In fact, a potential buyer of the license had been referred to Mr. Roselli's sister. He purchased her license in lieu of this one.

In the spring following Mr. Roselli's death, Mrs. Gargiulo applied for renewal of the dormant license. As indicated, the Director specially authorized the Hampton Township Committee to consider her application, and that Committee approved it both for the then current license year (1984-85) and for the five years intervening since the last renewal.

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Sensitive to the Director's special condition imposed, Mrs. Gargiulo and others of her relatives, attempted first privately, and gradually more formally to locate a facility at which to operate the license in Hampton Township, or to sell it to another for that purpose. Until February 1985, however, her efforts were limited to personal inquiries of those known to them who might be interested. It appears that the other members of the Roselli family have held liquor licenses in Sussex County for many years;¹ they knew many people who would likely be interested in the Hampton license. Her efforts were, however, unsuccessful. In February 1985, though continuing their own personal activities, Mrs. Gargiulo placed advertisements in both the popular and trade presses and, in mid-March 1985, escalated her efforts by retaining the services of a business broker. B.B. Dickman Business Brokers acknowledged by rider to its contract of March 15, 1985, that it had been advised "that if the license is not in active operation at an approved location by that time (June 30, 1985), the right to renew or transfer the license will, in all likelihood be lost." Rider to Dickman contract, March 15, 1985; P-7. Although some eight individuals had expressed interest in the license as a result of these efforts, the estate continued to be unable to lease or purchase a suitable facility at which to operate the license, or to secure a formal commitment for its purchase.

The reasons for this lack of success were mixed. Hampton Township itself is a rural community located north of the county seat on a major county highway. Its population, according to its 1980 census, was approximately 3,000 persons. Nevertheless, it had over the years, issued ten Class C liquor licenses, of which seven were, at the time, in active use. Of these one was used in connection with a tavern; the other six with restaurants. Since 1980, however, the region of which Hampton Township is a part has experienced substantial growth; its population is now estimated to exceed 10,000. Property values, particularly along the highway, have increased dramatically and more than a dozen substantial building projects, both commercial and residential, have been undertaken or completed since that time. Thus, lack of existing space, suitable for purchase or rental, was an inhibiting factor.

¹ "My family - brother and three sisters - have been in the business for years and years." Testimony of Mrs. Gargiulo.

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It appears that another was the very existence of the special condition imposed by the Director in July 1984. In order to activate this license, a building must be specially erected for the purpose. Given the considerable risk that completion might be delayed and the special condition enforced in accordance with its terms, the possibility that considerable time and funds would be forfeited was quite real. Nevertheless, it was clearly established that the reactivation of this license would be consistent with the present needs of the community and would not be contrary to the fundamental restrictive purposes of the Alcoholic Beverage Control law.

Mr. Henry M. Fulkrod has been active in the Sussex County Tavern Owners Association for more than 18 years and served as its president for 15. A long-term (30 years) resident of the county, he is currently a member of the Zoning Board of Adjustment in Hampton Township, the Township Constable and is chairman of its Welfare Board. In addition to his testimony regarding the increasingly rapid development in the area and details regarding the seven or eight active and two inactive licenses in the Township, Mr. Fulkrod testified that there was a notable lack of local recreational facilities available in the Township or reasonably convenient to it. Thus, the likelihood that this license will be in active use in the foreseeable future, to the substantial benefit of the community, is high.

Although petitioners had no success within the time allowed by the Director, they have not, since that date, lessened their activities. It now appears these have borne fruit.

During the summer of 1985, as a result of their own efforts (the exclusive listing agreement with B.B. Dickman Brokers having expired) the estate entered into negotiation for the sale of this license to Mrs. Miriam Rosenkranz. Mrs. Rosenkranz testified that she is seeking to build a recreational bowling alley, with an associated liquor bar, in Hampton Township. She further testified that she has already purchased and is now the owner of land suitably located and zoned, that percolation and other tests related to the advisability of construction have been completed satisfactorily, that the estimated cost of the project is \$1.9 million, that she is currently (February 1986) seeking appropriate

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financing and that her project could not be successful without a liquor license. Nevertheless, since she had been advised by petitioner in September 1985, in the strongest terms, of the Director's special condition (P-3), but apparently only by reason of that fact, she has refrained from formalizing a contract for the transfer of the subject license proffered to her in December 1985. P-1.

Despite the lack of this commitment regarding a liquor license, Mrs. Rosenkranz is proceeding with the project in all other respects. It was established before me that there was no recreational bowling alley in the area between Newton and Port Jervis. Mrs. Rosenkranz testified that, given the special design and equipment requirements of her project, the considerable financial exposure it requires, and its dependency upon the successful cooperation and contributions of others over whom she has no control (particularly, the AMC Corporation, suppliers of bowling alley equipment), it was plainly imprudent to commit himself to purchase the Roselli license subject to the Director's time limitation. Nevertheless, she testified that all of the other terms and conditions relative to the sale of the license were mutually satisfactory to the parties and that, were she afforded a year's time in which to complete her project, she would willingly commit herself to purchase the license.

At issue here is the status of this liquor license for the license year 1985-86, of which there is but four months remaining.

DISCUSSION

The subject matter presented by the present application is commonly referred to as a "pocket license." Left unregulated by the Legislature for approximately 45 years, the circumstances under which inactive - or "pocket" licenses- are to be renewed, is now governed expressly by the provisions of N.J.S.A. 33:1-12.39, first enacted in 1977 and effective October 3rd of that year. By that legislation, it was for the first time required that local licensing agencies notify the Director regarding applications for renewal of inactive licenses, defined by the Act as those not in active use during the two years

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preceding the renewal term at issue. It further provides that such an application shall be denied "unless the Director, for good cause and after a hearing, authorizes a further application for renewal. . . ." Ibid. The term "good cause" is not further defined or even alluded to in that or any related provision of the law. Its meaning has, perforce, been left to development by the Director on a case by case basis.

Since 1977, the Director has taken the occasion to write at length of this issue in connection with more than a dozen contested cases. Most of these decisions attempt, more or less, to rationalize the application of the law to specific circumstances; it cannot be said that there has been developed a readily applicable standard by which to measure good cause. Indeed, more cannot be said than that the Director has the most broad discretion with regard to renewals of such licenses, that in exercising this discretion he will consider all of the facts and circumstances affecting both the past history of the license and the likelihood of its future activation, and that "good cause" is largely independent of the motivation, intention or attitude of the applicant (i.e., the applicant's "good faith"), but rather is dependent upon historical fact and reasonable (logical) inferences to be drawn from proven behavior. Clearly, no particular factor has been selected as governing.

To vest an administrator, such as the Director, with the authority to lend meaning to an ill-defined phrase such as "good cause," is a generally effective means whereby society, through its Legislature, expresses a public concern and yet seeks to remain sensitive to harsh realities in resolving it. Where, as here, no prescriptive legislative pronouncement could comprehend those realities in all their detail, it is not inappropriate that common sense and good judgment, leavened with specialized experience and expertise, be brought to bear upon each instance presented for resolution. In effect, the Director is called upon to perform not so much a judicial as a quasi-legislative act in passing upon applications for special authority under this provision. It is to his unique resources that such matters are to be submitted after a reasonably definitive finding of the particular facts and circumstances presented, and their analysis in accordance with such of those as have been found more or less significant by the Director in the past.

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Review of the Director's decisions in prior cases of the type, suggest many such significant factors. Several were summarized in one of the most recent of these decisions. In In the Matter of Silwad Corporation, Bulletin No. 2442, Item No. 8 (1985), six categories of circumstances were selected for special mention: (1) the willingness of the applicant to attempt to activate its license in the past; (2) the nature and quality of the applicant's specific efforts to that end; (3) the extent to which frustration or failure was due to causes beyond the applicant control; (4) the extent to which the applicant had committed itself financially to reactivation; (5) the "need" for further license activity in the community; (6) the prognosis for early reactivation.

Among these, the last, that is, a reasonable prospect of early utilization, was accorded the greatest emphasis in that decision.

Decisions before the time of Silwad are not inconsistent with its teaching. For example, in In Re Linden Motor Inn, Bulletin No. 2376, Item No. 2 (1980), the Director granted renewal where previous inactivity was in part due to unusual financing requirements and redesign of a major hotel project (matters more or less beyond the control of the applicant).

In In Re Francesconi, Bulletin No. 2410, Item No. 1 (1980), the renewal application was authorized. Mentioned prominently were the financial impact of non-renewal, intervening financial reversals including bankruptcy, the effects of a condemnation of property and a likelihood the license would be operational during the current license term.

In In Re Normick Inc., Bulletin No. 2368, Item No. 2 (1980), renewal was allowed after four years' inactivity. The Director found there had been a substantial effort to renew a substantial financial investment, however, a restrictive (zoning) code delayed reactivation.

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An application was granted despite the entire absence of an imminent possibility of reactivity in Chateau Corporation v. Division of A.B.C., 6 N.J.A.R. 278 (1982). The Director adopted the decision of the administrative law judge without explanatory comment. The administrative law judge, however, stressed that "there has been no showing that anyone else could use this license (in consideration of extremely scarce land and facilities suitably zoned)" [6 N.J.A.R. at 282], and that "the malady (inactivity of a potentially active license) addressed in N.J.S.A. 33:1-12.39 could not be cured by terminating this license." Id., page 283; original parenthesis.

Where financing problems intervened to delay activation for three years, special authority was granted in consideration of the reasonable expectation that the license would be in use within six months of the Director's action (i.e., before the end of the current license year). In the Matter of T.J.'s Liquor and Lounge, Bulletin No. 2359, Item No. 3 (1979).

Financing difficulties were cited as well in In the Matter of 4200 Corporation. Bulletin No. 2363, Item No. 3 (1979). Special authority was granted after five years' inactivity during which time the licensee had been developing an 18-story motel project.

Even where the "prognosis (for early activation) is still speculative as to the actual ability to resume active use of this license within the [current] 1979-80 license term," the Director found that "good faith efforts have been shown herein" and granted special authority. In the Matter of Yorkview Corporation, Bulletin No. 2365, Item No. 1 (1979). The administrative law judge's decision, however, notes that no site had yet been selected, although the applicant was negotiating for the purchase of vacant land and that an appropriate building to house the liquor business "could be up and operational in 4-5 months." Renewal was permitted in that case after a 17-year period of inactivity.

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In In the Matter of Magfra, Bulletin No. 2413, Item No. 2 (1980), the Director allowed renewal after having previously done so on special condition. No factor was singled out for special reliance either by the administrative law judge or the Director; however, it was noted that a prospective buyer of the license had testified regarding an intention to activate the license, though no binding contract had been signed.

License renewals have been denied by the Director in the past as well. In In Re West End Racquet Club, Bulletin No. 2367, Item No. 1 (1980), the administrative law judge recommended granting special authority but the Director refused. He noted specially that a sales agreement entered into after a special authorization given the previous year, had fixed "little value to the liquor license" and that the proposed project to house the license would take years to complete. An excess of active licenses in the community was noted as well. Rejecting an undue reliance on the good faith of the licensee, the Director retired the license primarily because "I see nothing in the record to indicate any realistic prognosis that this license will be activated in the existing license term." The Director wrote in January of the license year of which he spoke.

The same reason was cited for retiring a license inactive for two years in In Re Great A & P (Ridgewood), Bulletin No. 2351, Item No. 1 (1979). Here too, the Director emphasized the likelihood the license would not be active by the end of the current license year.

That factor was suggested as determinative on a third occasion in In Re Great A & P (Englewood), Bulletin No. 2351, Item No. 2 (1979). Writing in December 1979, six months into the license year in question, the Director denied special authority, noting "even if a location is found it is not realistic to expect the facility to be fully operational during the current license year."

Though difficult to identify specifically, there emerges from these precedents two categories of factors contributing to the Director's discretion; most generally, these are related to "past history" and "future prospects." Only where the former may be seen to support a conclusion that the licensee was fully capable of operating its license, and

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only where the latter could be seen to justify an inference that it was fully willing to do so, was the special authority granted. In addition to the precedents supporting this two-fold analysis, it appears consistent with, if not dictated by, the underlying purpose of the Act.

It has been frequently noted in the past that the Legislature failed to designate the purpose for its enactment of Section 12.39 (N.J.S.A. 33:1-12.39). Beyond its repeated observation that the measure was needed to retire inactive and unused licenses and to maintain all licenses in an active state, the relationship between that precise and limited objective and the overall purpose of alcohol beverage regulation was not made explicit. That connection is nevertheless perceivable.

It is the agency's charge to oversee and regulate this highly sensitive industry to protect the public from the unscrupulous and the inept. Many substantial economic and health considerations, highly responsive to adverse effect in this particular industry, warrant the closest supervision to assure diligent compliance with uniform protective regulations. In effect, the special privileges granted by the State to its alcoholic beverage licensees are accompanied by an equally profound public responsibility: To demonstrate continuously, sound judgment, compliant and cooperative concern for government techniques and methods of regulation, and sensitivity to the inherent dangers of laxity and abuse. It is the Director's task to determine, both initially and in connection with every license renewal, whether an applicant is worthy, by these standards, to justify the confidence reposed in him by the Director's license. By this view, licensees are no mere free agents subject to special regulation; they are, in common parlance, agents of the Director in fulfilling the legislative purpose.

The pocket license may thus be seen as suggestive of the possibility that a licensee is either incapable of or unwilling to fulfill his responsibilities. At minimum, the holder of a license inactive for several years has done nothing to advance that public policy. Where circumstances allow, the public interest requires that another be substituted in his stead who will. Thus it is that the "good cause" standard of the statute may be seen to acquire useful definition.

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The test cannot turn upon the individual predilections and special personalities of a particular applicant. Rather the test must turn upon whether, under the facts and circumstances presented, the reasonable licensee would likely have been more successful in meeting his obligations. If those particular circumstances would have frustrated that hypothetical reasonable licensee in the same manner as they did the applicant, then good cause has been established and the Director's special authorization should be forthcoming.

In the matter before me, the controlling facts and circumstances are primarily those that have occurred since the Director's approval on July 25, 1984. He has, in effect, found the 20-year period before that time adequately explained in the petition submitted 21 months ago. His explicit time limitation, requiring activation of this license before June 30, 1985, is tantamount to a presumption on his part that a reasonable licensee could have done that which was necessary to activate this license in that time. In prospect, that presumption was undoubtedly warranted. We are called upon here, however, to evaluate that presumption with the benefit of hindsight, applying in detail that which is now known of the facts and circumstances, which were not known in the summer of 1984.

The first of these circumstances is clearly the particular location and recent history of Hampton Township. Whether anticipated by the estate of Thomas Roselli or not, that community has changed since his disabling illness in the early 1980's and even in the two years since his death. The population has grown considerably, possibly even trebling since 1980. Yet commercial building construction has remained special purpose, intended not to create rental space for new opportunity or even facilities built upon speculation that enterprise will need it. Generalized investment in the region has certainly not anticipated its population growth, nor has it effectively paced it.

The efforts of the Gargiulo family verify this conclusion. These were not either strangers to north Sussex County nor unsophisticates in the alcoholic beverage industry. They knew personally many of the responsible licensees and were intimately familiar with

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the commercial resources of the community. Their efforts to locate a facility or a buyer, though properly to be described as "private" and "personal," were clearly appropriate to the circumstances. Not until February 1985 did they abandon efforts based upon their personal contacts in favor of the more businesslike approach of offering the license to potential purchasers out of the area. By that time, the deadline was but five months away. Given the practical necessity to build, and its attendant time-consuming, interim steps, it is not surprising that none would accept the grave risk imposed by the deadline. Although little of record appears with regard to the negotiations with the six or eight individuals previously expressing interest in the license, the attitude of Mrs. Rosenkranz is clear and may be taken as representative. Moreover, she particularly has expressed a present willingness to undertake a major investment involving activation of this license as quickly as the realities of building financing, licensing approvals, construction and the multitude of other details that commercial reality permits. At its shortest, this period of time is estimated by her to be not less than one year.

Although the Director has repeatedly specified, on those occasions when he has renewed long inactive licenses, that his special authority is limited to the single license year for which he has acted, and that any future request for special authority to renew the inactive license will be rejected, it is the teaching of several of his decisions that this is not an inflexible objective response. It is neither accurate to say that he has always granted a first application for that special authority and never extended the time beyond the license year in issue, nor is it conceivable that such an inflexible response could have been intended by the Legislature. For it always remains that the Director must, under the law, exercise his reasonable discretion at the time of an application, not in anticipation of an application to be filed in future years. Thus, his express directive here that "no further renewals will be granted unless the license is actively being used . . . on or prior to June 30, 1985" (Petition, Exhibit C), cannot be evaluated only in light of the circumstances known to him at the time of his decision, that is, in July 1984. Given what is now known of the circumstances since that time, activation of the license within that time limit was at best unlikely, if not impossible.

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Despite this, it is clear the Director has no express authority beyond the current license year to countenance continuation of an inactive license. By the law, this Class C license expired on June 30, 1985, subject only to the Director's unique power to renew it nunc pro tunc upon hearing. Moreover, even if he were to exercise that authority, this same license would again expire on June 30 of this year (1986). Since there is no possibility whatever that it can be in active use by that time, the status of this license beyond that date must inevitably remain uncertain. Since, as noted before, it is the presence of the Director's limitation that has to some extent inhibited activation of this license, or at least substantial progress to that goal, it cannot be said that enforcement of a fixed time limit, restricted to the current license year, could serve the public interest.

Thus, despite my finding that these applicants have demonstrated both a capacity to activate (sell) this license in the past, and that their lack of success was due to circumstances sufficient to have frustrated any reasonable licensee, and despite my finding that this license will be active within a reasonable time in the future, the effect of explicitly confining the Director's authorization to the present license year, of which only a few months remain, renders empty any relief which might be granted these licensees.

On only one prior occasion that has come to my attention has the Director consciously noted that the time remaining of the license year before him was realistically insufficient to satisfy the special condition. In Yorkview, supra, the petitioner was the executrix of the estate of a decedent owner of a license which had been inactive for 17 years. Having failed to activate the license within the year allowed by the Director's first special authorization, she sought what was tantamount to an extension for the following year. Though the Director granted her request, it was noted that no matter how great the licensee's expertise or diligence, the Director's condition imposed in his first ruling could not have been satisfied.

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A contrary result (i.e., denial) was reached where the first special authorization had finally been issued only 11 days before the expiration of the license year in issue. Nevertheless, the Director fairly appraised the "supplemental activity [which] occurred since then" when he took up the matter a year later. Though it was withheld in this case, clearly implied was his authority to extend the one-year limit into a future license year.

It must be CONCLUDED from the foregoing, that the special condition imposed in July 1984, is presently to be appraised in light of circumstances developing since that time, and that the Director is free to extend that time even to the point of expressing his willingness to consider favorably an application in the future where circumstances reasonably warrant such special consideration.

In consideration of the foregoing discussion, I RECOMMEND that the Director of the Division of Alcoholic Beverage Control grant his special authority to the Township Council of Hampton Township, Sussex County, to renew, upon due consideration, the alcoholic beverage license now held by the estate of Thomas Roselli for the license year 1985-86, despite the fact that the licensee failed to comply with the special condition attached to a similar approval granted for the previous license year. Moreover, I RECOMMEND that the Director express in terms as certain as possible, the circumstances under which he will favorably receive an application to renew this license in the event it is not activated prior to June 30, 1986. To that end, I make the following Findings of Facts and Conclusions of Law:

I FIND that the estate of Thomas Roselli has demonstrated in the period July 25, 1984 (viz.: the date of the Director's special authorization to renew for the license year 1984-85) until June 12, 1985 (viz.: the date of filing of the present petition for renewal for the license year 1985-86), a diligent and persistent effort to satisfy its obligations as an alcoholic beverage licensee, and particularly, to see to the earliest activation of the subject liquor license in a responsible and reasonably prudent manner; I FURTHER FIND that the applicants have, during the period from July 12, 1985 to the present (viz.: during the pendency of this litigation), persisted in their pursuit of this goal despite the

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uncertainty arising from the Director's special ruling and that they expended funds and time and attention commensurate with that which would have been expended by a reasonable licensee during these periods; **I FURTHER FIND** that activation of this license in Hampton Township is warranted and justified under the rubric of "need or necessity," given the substantial population growth in the community experienced during the past five years and the acknowledged need for local recreational facilities not presently available; **I FURTHER FIND** that efforts of the applicant to activate this license since July 1984 have been singularly frustrated by circumstances effectively beyond its control, to wit: the lack of existing rental or purchase space appropriate to the present population and needs of the community, suitable for operation of a licensed premises and thus, the need to construct such a facility anew, and the risk imposed upon any user of this license by the prospect of its non-renewal on a date well prior to that time within which such a facility might be constructed; **I FURTHER FIND** the applicant has demonstrated by its conduct a sincere willingness and desire to see to the early activation of this license; and **I FINALLY FIND** that it is highly unlikely that this license will be activated within one year from the time of its renewal and the effective resolution of the uncertainty attended upon it, but that it is highly likely, if not certain, that it will be so activated within the license year 1986-87, if renewed now and upon next application.

For the foregoing reasons, **I CONCLUDE** that the petitioners have established good cause for the inactivity of the subject license for the period July 1984 to the present time; **I FURTHER CONCLUDE** that special authority is properly to be granted in accordance with law to the Township Committee of the Township of Hampton to consider renewal of this license for the license year 1985-86, subject to the special condition that this license be activated within one year of the date of Final Decision in this matter; and **I FINALLY CONCLUDE** that in the likely event this license shall fail to have been activated prior to June 30, 1986, then in that event no further special authorization to renew shall be issued by the Director except upon proof of reasonable and due progress towards activation of this license within the terms of this special condition, including but not limited to proof of a signed contract to purchase, proof of the continued availability and suitability of a site for the erection of appropriate facilities, proof of negotiations tending to a contract to build, proof of negotiations tending to reasonably necessary

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financing for construction and proof of the reasonable likelihood of appropriate license and certificate approvals, all as consistent with the proposed project as spread upon the record through the testimony of the proposed purchaser of the subject license, and that in the event an effective commitment to activate this license without delay shall not be proved in such manner, then it should be anticipated that any future application for special authorization will be denied.

In consideration of the foregoing, I DIRECT that the Township Council of the Township of Hampton be specially authorized to consider renewal of the applicants' alcoholic beverage license for the renewal year 1985-86 subject to the conditions expressed.

This recommended decision may be affirmed, modified or rejected by the DIRECTOR OF THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL, JOHN F. VASSALLO, JR., who by law is empowered to make a final decision in this matter. However, if John F. Vassallo, Jr., 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 my Initial Decision with JOHN F. VASSALLO, JR. for consideration.

MAR 12 1986

DATE

3/17/86

DATE

MAR 17 1986

DATE

js/e

Leon S. Wilson

LEON S. WILSON, ALJ

Receipt Acknowledged:

[Signature]
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

Mailed To Parties:

[Signature]
FOR OFFICE OF ADMINISTRATIVE LAW

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APPENDIX
LIST OF WITNESSES

Mrs. Miriam Rosenkranz, proposed purchaser

Mr. Henry M. Fulkord, former president, Sussex County Tavern Owner's Association; member, Hampton Township Zoning Board of Adjustment; Constable, Hampton Township

Mrs. Angelina Rosselli Gargiulo, executrix of the estate of the late Thomas Roselli

Mr. Thomas Gargiulo

LIST OF EXHIBITS

- J-1 Special Ruling of the Director of the Division of Alcoholic Beverage Control, dated July 25, 1984
- P-1 Contract for transfer of liquor license from petitioner to Mrs. M. Rosenkranz (unsigned)
- P-2 Letter from P.J. Laemars, Esq. (attorney for M. Rosenkranz) to M. Gaus, Esq. attorney for petitioner, September 11, 1985
- P-3 Letter from M. Gaus, Esq., to P.J. Laemars, Esq., dated September 20, 1985
- P-4 Application for license renewal for the period July 11, 1984 through June 30, 1985, signed "Angeline Gargiulo," dated June 18, 1984
- P-5 Proof of payment of application fee, dated June 18, 1984
- P-6 Cancelled check, proof of payment of license fees, dated June 18, 1984

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- P-7 Correspondence and contract between applicant and Dickman Business Brokers, dated variously from February 26, 1985 through July 1, 1985
- P-8 Application for Alcoholic Beverage License Renewal for the period from July 1, 1985 to July 30, 1986, signed "Angelina Gargiulo," dated June 12, 1985
- P-9 Proof of payment, application fees, dated June 12, 1985
- P-10 Cancelled check, proof of payment, alcoholic beverage license fees, dated June 12, 1985
- P-11 Application for renewal of alcoholic beverage license for the period from July 1, 1985 to June 30, 1986 with resolution and certification attached, dated June 25, 1985
- P-12* Letter from William A. Dolan, II, Esq., to Director, Division of Alcoholic Beverage Control, dated May 17, 1983

* Admitted February 18, 1986 upon special application by petitioner.

Newton; overcrowded, Rosenkranz owns land

Rosenkranz is negotiating with builder and surveyor - zoning ok - PERC test completed

AMC not Brunswick

Fillcron 30 year licensee in Branchville

1 Hampton C equals tavern; others equal restaurant

Full crime zoning board - five years

Proposed site equals permitted under zoning law

No bowling alley from Port Jarvis to Sparta

Eight major projects in one year

Condominium project

Financial effect

Sister's license

Code: I feel the license should be renewed one more time - we worked very hard to get the license sold. One year was not long enough.

My family - brother and three sisters have been in the business for years and years

P.G.'s accident, May 1985 - seven months

7. CORRECTION OF STATUTORY CITATION IN BULLETIN 2443, ITEM 1, REGARDING SECTION 4 OF P.L. 1985, c. 258 - CORRECT CITATION IS N.J.S.A. 33:1-3.1.


In Bulletin 2443, Item 1 (September 13, 1985), the Division set forth the text of section 4 of P.L. 1985, c. 258, which contains the public policy and legislative purpose of the Alcoholic Beverage Control Law. That Bulletin item, due to preliminary informal indication from the Office of Legislative Services, indicated that the codified citation for that section would be "N.J.S.A. 33:1-1.1." That is incorrect. The correct citation is N.J.S.A. 33:1-3.1.

The reference to section 4 in the text of N.J.S.A. 33:1-3, as set forth in that same Bulletin item, should also be accordingly corrected to "N.J.S.A. 33:1-3.1."

* * * * *

PUBLICATION OF BULLETIN 2446 IS HEREBY DIRECTED THIS

13TH DAY OF JUNE, 1986.


JOHN F. VASSALLO, JR.
DIRECTOR