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

BULLETIN 2134 February 27, 1974

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ITEM

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25 Commerce Drive Cranford, N.J. 07016

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1. APPELLATE DECISIONS - FOSTER v. PASSAIC.

George Forster and Evelyn Forster,

Appellants,

v.

Board of Alcoholic Beverage Control of the City of Passaic,

Respondent.

On Appeal

CONCLUSIONS and ORDER

Harry Kampelman, Esq., Attorney for Appellants
Michael A. Konopka, Esq., Attorney for Respondent

BY THE DIRECTOR:

This is an appeal from action of the Municipal Board of Alcoholic Beverage Control of the City of Passaic (hereinafter Board) which on September 25, 1973 denied appellants' application for a person-to-person transfer of a plenary retail consumption license by way of transfer of the capital stock of Hacli Corporation, t/a Page Four, for premises 265 Passaic Street, Passaic.

The petition of appeal contended that the Board rejected appellants' application on the solitary ground that appellants, once holders of another plenary retail license, had had that license suspended on a gambling violation. The Board denied that this was the sole ground for its action, averring that it had considered appellants' application in its entirety and determined from its own investigation that such grant would not be in the best interest of the municipality.

A de novo hearing was held at this Division pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded the parties to introduce evidence and to cross-examine witnesses. Additionally a report by the Passaic Police Department was accepted into evidence of the investigation made on behalf of the Board and upon which it relied. The Board further relied upon the records contained in this Division respecting appellants' prior license suspensions in the City of Hackensack.

The entire hearing encompassed the testimony of three witnesses. The Board Chairman Lois Allen testified on its behalf that the Board considered the police report above referred to and reviewed the record of the prior ownership by appellant

George Forster of licensed premises described as George's Club located at 20 Bridge Street, Hackensack. She admitted that the Board did not consider Evelyn Forster, appellant and wife of George Forster, to be any way disqualified from owning any licensed premises. Another member of the Board, Ramon Marrero, present at the hearing in this Division, was offered as a witness for the Board but his testimony was stipulated by counsel as corroborative of that of Chairman Allen.

Appellant George Forster testified that from 1957 to 1968 he owned a tavern at 20 Bridge Street, Hackensack. During that period his licensed premises were closed due to suspensions for twelve days in 1953 arising from a sale to minors, for seven days in 1957 due to a brawl, for fifteen days in 1959 for another cause, and for one hundred twenty days in 1966 on a gambling complaint. There were two other charges, one in 1964 and one in 1968, which had been withdrawn. He is presently employed in a tavern in Passaic and his conduct in that establishment is proper.

Appellant George Forster's wife Evelyn, a co-appellant, testified generally in corroboration of that of her husband. She is presently employed in the Post Office in Jersey City but intends to assist her husband in the management of the premises.

The crucial issue in this matter is whether the action of the Board in rejecting appellants' person-to-person application for transfer was a proper exercise of its discretionary power. In that connection the Board relied heavily upon an investigation made pursuant to its request by the Passaic Police Department. That investigation resulted in a report, part of which is here set forth:

> "According to Hackensack Police Department records, please be advised that George Forster, also known as George Foster, was arrested on a Disorderly Person charge on November 4, 1958 and the case was dismissed on November 13, 1958. He was also arrested on June 11, 1964 for maintaining a gambling resort and that charge was dismissed in Bergen County Court on March 16, 1965. He was again arrested on November 10, 1966 for Bookmaking. He was found not guilty on this charge on January 24, 1968. On March 11, 1968, he was arrested on 2 counts of issuing false checks and both of these charges were withdrawn on March 27, 1968 with a $10.00 cost of court.
>
> "A check of the New Jersey State Alcoholic Beverage Control office in Cranford, New Jersey revealed that while Mr. Forster was the owner of George's Club 20 in 20 Bridge Street, Hackensack, New Jersey, his license was suspended twice for gambling violations. In September, 1965, he was given a 15 days suspension for running a numbers lottery.

In September, 1966, he was given a 120 day suspension for numbers lottery.

"Other charges on file at A.B.C. Board Office are:

9-1952	A warning for excessive noise.
6-1953	Suspended 12 days for serving liquor to a minor.
4-1954	Sale to minor - found not guilty.
3-1957	Suspended for 7 days - fight in tavern, and unqualified employee.
10-1957	Warning - failing to provide a clear view of premises while closed.
2-1959	Suspended 15 days - sale of package goods after hours.
8-1961	Warning - fight in premises."

The transfer of a liquor license is not an inherent or automatic right. If denied on reasonable grounds, such action will be affirmed. Richmon, Inc. v. Trenton, Bulletin 1560, Item 4. No one has a right to demand a license. A license is a special privilege granted to the few, denied to the many. Paul v. Gloucester County, 50 N.J.L. 585 (1888). In considering the subject of licenses, the Supreme Court, in Blanck v. Magnolia, 38 N.J. 484 (1962), held the grant to a license for the sale of alcoholic beverages to be an exceptional one coming within the police power of the State, adding (at p. 491):

> "The test in the establishment and issuance of liquor licenses is whether the public good requires it.... 'The common interest of the general public should be the guide post in the issuing and renewing of licenses.'"

It is entirely competent for a municipal issuing authority to confine its selection of licensees to those who have clearly demonstrated that they are worthy to receive the privilege of a license and its determination should be given considerable weight on appeal. Eana, Inc. v. Pleasantville, Bulletin 1024, Item 2; Clark v. West Orange, Bulletin 631, Item 7.

It is relevant to this matter to observe that appellants failed to satisfy respondent that the public interest would be best served by granting this transfer. There is nothing in the record indicating or even suggesting that the refusal by respondent to grant the license was based upon any improper motives. Bumball v. Burnett, 115 N.J.L. 254 (1935).

Certainly the Board would have been remiss had it not explored the prior record of appellants. One of the purposes of the maintenance of records of the experience of the many thousands of licensees in this State is to provide a basis for determination of conduct of the respective performances of licensees. The Board properly availed itself of that information.

At the close of the hearing in this Division both counsel

requested the matter be referred to the Director for immediate conclusions and order.

Accordingly, it is, on this 20th day of December 1973,

ORDERED that the action of respondent in denying transfer of appellants' license be and the same is hereby affirmed, and that the appeal herein be and the same is hereby dismissed.

ROBERT E. BOWER
DIRECTOR

2. APPELLATE DECISIONS - PAIVA v. HARRISON.

Fernando Paiva, t/a Pop's Place, Appellant, v. Town Council of the Town of Harrison, Respondent.	On Appeal CONCLUSIONS and ORDER

Norman A. Doyle, Jr., Esq., Attorney for Appellant
Walter Michaelson, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of respondent Town Council of the Town of Harrison (Council) which on August 22, 1973, revoked appellant's plenary retail consumption license, in consequence of a finding of guilt that:

> "On or about February 18, 1973, you allowed, permitted and suffered in and upon your licensed premises a brawl, acts of violence, disturbances and unnecessary noise and you allowed, permitted and suffered the licensed place of business to be conducted in such manner as to become a nuisance in violation of Rule 5, State Regulation No. 20."

In his petition of appeal appellant alleged that the Council's action was erroneous in that it was arbitrary, against the weight of evidence, was mistakenly influenced by anonymous complaints and, under the circumstances, the penalty was too severe.

In its answer the Council denied these contentions and asserted that its action was proper and fair.

Upon filing of the appeal the Director, by order dated September 5, 1973, stayed the order of revocation imposed by the Council pending determination of the appeal and further order.

This matter was heard de novo pursuant to Rule 6 of State Regulation No. 15.

In behalf of respondent, Sergeant Donald Woods, of the local Police Department, testified that, while on duty on February 18, 1973, at 1:23 a.m., he received a call from the emergency room of the West Hudson Hospital reporting that one Andrew Lipesky was being treated for stab wounds. No report of the incident had been made by appellant-licensee.

Andrew Lipesky testified that, after drinking for twelve hours prior thereto, he entered appellant's tavern (known as Pop's Place) accompanied by Michael Wieczenski on February 18, 1973, at approximately 1:10 a.m. He characterized himself as being drunk upon entry into the tavern. Approximately ten minutes after his entry therein, he was attacked by three males, and the next thing he recalled was that he was in a hospital. He was told that a female (later identified as Maria Paiva) took him to the hospital.

Upon being questioned as to whether there was an argument, Lipesky replied that he didn't recall having one. Upon being asked whether the event "happened rather sudden", he replied in the affirmative. He had never been in a fight with his assailants and denied knowing their identities.

Lipesky asserted that the assault took place in the back room which contained no bar. It contained a pool table and a booth for patrons to sit. The bar was located in the front room. He described the assault as taking place over a period of a "couple of minutes." He knew of no reason why he was attacked; he had never seen his attackers before.

Michael Wieczenski, who accompanied Lipesky into the appellant's premises, testified that they first stopped at the bar, which was crowded, and from there proceeded into the back room in order to "shoot pool." He saw seven males with whom he was not acquainted in the back room "shooting pool." He observed "a little rumpus going on, an argument or something." He and Lipesky sat on a stool. Lipesky went into the bathroom and, upon coming out, walked around the pool table. The witness then went into the bathroom for a moment and, upon coming out, he saw three males attacking Lipesky.

Upon being questioned concerning appellant Paiva's whereabouts, the witness responded, "I didn't see him this time. This happened real quick. Really happened quick, I tell you. When I walked out of the back room three guys were on my friend. I don't know how quick somebody can stab somebody, but I know it was real quick. I know it all happened in nine or ten seconds, and when I fell back I didn't see Andrew [Lipesky] any more. When I turned around, I was going to try to catch one of the kids, and Freddie [Paiva] was standing there ------ He had a fire extinguisher in his hand and was yelling. I seen one of the last kids running out, and I took off after him. I don't know what Freddie did with the fire extinguisher, but he grabbed me and pushed me against the wall, and I was really screaming. That was an argument there. I was mad and stuff. I couldn't understand why he grabbed me. I don't know -- it seemed like he was trying to hold me there, but

according to what I heard, he thought I was one of the kids who stabbed Andrew."

Paiva had his hand against Wieczenski's throat, holding him back and telling him to "Shut up, shut up." In the meantime, Lipesky's assailants and their companions ran out of the tavern.

The fight had not been brewing before it commenced; he was minding his own business; neither he nor Lipesky had any warning that a fight was going to ensue.

The licensee Fernando Paiva testified that he was called into the men's room because someone in there was bleeding. Upon entering therein he saw Lipesky and asked him what had happened. Lipesky replied that he didn't know, he was too drunk. Upon walking out, he saw Wieczensky running. Thinking that Wieczenski had assaulted Lipesky, he grabbed Lipesky and held him up against the wall until someone told him that Lipesky was Wieczenski's friend. He advised Lipesky to go to the hospital, he did not take him there. He had grabbed the fire extinguisher in order to disperse the combatants.

He didn't call the Police Department because his telephone had been out of order for four days. He was not aware that a fight had been in progress because there was no noise resulting from it. None of the participants in the fracas had ever patronized the tavern prior to this incident.

Stephen Ksyniak testified that he was seated at the front end of the bar when he heard an argument erupt in the back room or pool room. Paiva settled the argument by ordering the participants out. Thereafter "the guys started arguing again and it ended up being a fight." Paiva tried to break it up. He found that Lipesky had been stabbed.

Prior thereto, an individual, whom he later saw in the rear room, tried to sell him a large pocket knife. Paiva witnessed this and confiscated the knife.

Maria Paiva, appellant's wife, testified that, as she was about to drive away from the tavern, a male asked her to drive a friend, who had been hurt, to the hospital. She drove four males to the hospital and then proceeded home. At home she tried to contact her husband at the tavern by telephone and couldn't get through. When appellant finally arrived home, he called Chief Saporito in order to inform him that she took the males to the hospital. She had no knowledge concerning what had happened inside the tavern. In describing Lipesky's conduct in the car, the witness asserted that "He was incoherent. He was using foul language."

Deputy Chief Saporito, of the local Police Department, testified that on February 18, 1973, at approximately 1:30 a.m., he was called to headquarters to investigate the subject stabbing. As a result of his investigation he proceeded to the tavern

accompanied by appellant. Appellant gave him a knife which he had seized from a patron when he tried to sell it. This was not the knife that was involved in the stabbing.

In behalf of appellant, Anthony Catena testified thusly relative to the subject incident: "I was sitting about three stools from the back of the pool table. When they shoot pool and holler, and -- that's all I heard. I was drinking beer, and all of a sudden the kid come out and said, 'Some kid in there wants a towel for his face.' I didn't see no fight, no argument, no brawl whatsoever, and I was sitting right there at the second stool from the archway that was in there."

A letter from the president of the area Tavern Owners Association attesting to appellant's interest in the ethics of the industry was received in evidence.

Preliminarily, I observe that the Director's function is not to reverse the determination of the municipal 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.

In matters of this kind we are dealing with a purely disciplinary action; such action is civil in nature and not criminal. In re Schneider, 12 N.J. Super. 449 (App.Div. 1951). Thus the proof must be supported only by a preponderance of the credible evidence. Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 20 N.J. 373 (1956).

The burden of establishing that the Council acted erroneously and in an abuse of its discretion rests with appellant. Rule 6 of State Regulation No. 15. 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 men, 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 Council. Cf. 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. Bd. of Alc. Bev. Newark, 55 N.J. 292, 303 (1970).

The evidence clearly establishes that a brawl, a disturbance and an act of violence occurred on appellant's licensed premises on the night of February 18, 1973. The issue to be decided is whether appellant, through his agents or employees (Rule 33 of State Regulation No. 20) "allowed, permitted or suffered" such occurrence.

In Essex Holding Corp. v. Hock, 136 N.J.L. 28 (Sup.Ct. 1947), the court said that, within the meaning of the Alcoholic Beverage Regulations, the word "suffer" imposes disciplinary responsibility on a licensee, regardless of knowledge, where there is a "failure to prevent prohibited conduct by those occupying the premises with his authority." The question involved here is whether the licensee could reasonably have taken steps to prevent the act of violence and disturbance that took place on his licensed premises, but failed to do so.

This Division has consistently held that:

> "Licensees may not avoid their responsibility for the conduct of their premises by merely closing their eyes and ears. On the contrary, licensees must use their eyes and ears, and use them effectively, to prevent the improper use of their premises." Bilowith v. Passaic, Bulletin 527, Item 3.

While it is true that a licensee has been held not to be responsible for a "sudden flare-up" on his premises, where he could not have reasonably been aware of its imminence, such is not the case here.

Additionally, I deem it would have been more reasonable for the appellant to have produced the bartender as a witness if he could have exculpated the appellant. There was no satisfactory reason for his failure to appear.

The principle of law applicable hereto is that, where a party has a witness or witnesses available and where they possess peculiar knowledge concerning the facts essential to a party's case, the failure to call said witness or witnesses gives rise to an inference that, if called, the testimony elicited therefrom would be unfavorable to said party, i.e., he could not truthfully contradict the testimony of the Council's witnesses. Re Lesniewski, Bulletin 1581, Item 5; Hickman v. Pace, 82 N.J. Super. 483 (1964); Re Soto Pruna, Bulletin 1713, Item 1.

Lipesky, who admitted being intoxicated, testified that the altercation was of a "couple of minutes" duration. In view of his condition, his estimate of the duration of the altercation is open to serious doubt. Lipesky's companion Wieczenski testified that he had observed "a little rumpus going on, an argument or something" in the back room.

I am satisfied that respondent has proved its case by a fair preponderance of the believable evidence. Thus appellant has failed to meet the burden of establishing that the action of respondent herein was erroneous. Rule 6 of State Regulation No. 15.

In passing, it may be well to note that former Director Lordi in Jackson v. Newark, Bulletin 1600, Item 2, made the following observation:

"... As stated by the Hearer, where, as here, a dangerous weapon such as a knife has been wielded by a participant in a fight on licensed premises, a licensee or his employee, upon becoming aware of same, should exercise proper judgment by notifying the police of such fact. Indeed, where a licensee or his employee become aware of the apparent commission of any crime in connection with the licensed business, they should notify the police. I am taking this opportunity to impress this point upon licensees in order that they, as citizens with a strong stake in proper law enforcement, may assume a leading position in cooperating with law enforcement agencies."

However, upon full consideration of all factors herein, I am persuaded that the penalty imposed (that is, revocation of license) was excessive under all of the circumstances in this matter.

It has generally been held by this Division that a suspension or revocation imposed in a local disciplinary proceeding rest in the first instance within the sound discretion of the municipal issuing authority, and the power of the Director to reduce or modify it will be sparingly exercised and only with the greatest caution. Harrison Wine & Liquor Co. v. Harrison, Bulletin 1296, Item 2. The Director has, however, modified such penalty where it was manifestly unreasonable or unduly excessive. Rigoletti v. Wayne, Bulletin 1430, Item 2, and cases cited therein. Cf. Mitchell v. Cavicchia, 29 Super. 11; In re Larsen, 17 N.J. Super. 564.

I am persuaded that the ends of justice will best be served by the reduction of the penalty of revocation to a suspension of thirty days. It is accordingly recommended that an order be entered affirming the Council's action and modifying the penalty from a revocation of the license to a suspension of thirty days.

Conclusions and Order

Written exceptions to the Hearer's report, with supportive argument, were filed by appellant and respondent, pursuant to Rule 14 of State Regulation No. 15.

I have carefully analyzed the arguments set forth in each of the exceptions and find that they have either been satisfactorily considered by the Hearer in his report or are without merit.

However, I wish to emphasize that, as noted in Jackson v. Newark, supra, cited by the Hearer herein, licensees have a strong stake in proper law enforcement and must assume a leading position in cooperating with law enforcement agencies. While I am satisfied as was the Hearer that revocation was an excessive penalty in view

all the facts and circumstances in this case, licensees may not expect consideration in similar circumstances unless they assume their full responsibilities in conducting their premises in a law-abiding manner.

Consequently, having considered the entire record, including transcript of the testimony, the exhibits, the Hearer's report, and the exceptions and argument with respect thereto, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 21st day of December 1973,

ORDERED that the action of the respondent in finding appellant guilty of the charge herein is hereby affirmed; that the penalty of revocation of license be modified to a suspension of thirty days; and that expressly subject to the said modification, the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that my order dated September 5, 1973, staying respondent's action pending the termination of this appeal, be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-1, issued by the Town Council of the Town of Harrison to Fernando Paiva, t/a Pop's Place, for premises 902 John Street, Harrison, be and the same is hereby suspended for thirty (30) days, commencing 2:00 a.m. on Thursday, January 3, 1974 and terminating 2:00 a.m. on Saturday, February 2, 1974.

Robert E. Bower
Director

3. APPELLATE DECISIONS - JENKINS ET AL v. JERSEY CITY.

Dale Jenkins and Joseph Passaro, t/a Dale & Joe's Tavern,	)	
Appellants,	)	On Appeal
v.	)	
Municipal Board of Alcoholic Beverage Control of the City of Jersey City,	)	CONCLUSIONS and ORDER
Respondent.	)	

Michael Halpern, Esq., Attorney for Appellants
Raymond Chasan, Esq., by Bernard Abrams, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the Municipal Board of Alcoholic Beverage Control of the City of Jersey City (hereinafter Board) which on June 12, 1973 denied appellants' application for a place-to-place transfer of their plenary retail consumption license from premises 137 Fremont Street to 426-430 Summit Avenue, Jersey City.

The petition of appeal challenges the said action as capricious, arbitrary and contrary to the evidence presented. The Board denied this contention asserting that its action was within its discretionary authority and, further, that appellants' application was not founded on good faith.

A de novo hearing was held in this Division pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded the parties to introduce evidence and to cross-examine witnesses. Additionally, the transcript of testimony taken before the Board was admitted into evidence pursuant to Rule 8 of State Regulation No. 15.

Appellants offered the following exhibits which were accepted into evidence:

(1) Application of appellants
(2) Report of Board Secretary of his investigation of application
(3) Letters in objection to the grant of application filed with the Board
(4) Application, Investigation, Board minutes, and resolution of approval of a prior application made

by one Sullivan for the same premises
(5) Lease in favor of appellants' lessor
(6) Assignment of above lease
(7) Letter from premises owner to appellants' lessor
(8) Lease from lessor to appellants
(9) Photographs of land and building to which transfer was sought
(10) Copy of appraisal of realty value of subject premises.

The following factual background to the filing of this appeal is uncontroverted. Appellants operated a licensed premises in another part of the City in premises which were taken by governmental appropriation for urban redevelopment. Hence appellants, being forced to move, could under the existing ordinance apply for transfer to any approved location within 4,000 feet of the prior location. The subject premises are within such distance limitation.

The resolution of the Board recites a detailed factual accounting of the circumstances giving rise to the application and the distances applicable, the objectors and their reasons for objection (it may be here parenthetically noted that each of the objectors was a competitor licensee). It concluded with the following:

> "The Board further determines that the place-to-place transfer of the Plenary Retail Consumption License C-26 is hereby denied as the application for the transfer was not presented in good faith. Good common business sense would require an explanation from the licensees as to their reasons for entering into such a short term lease of only one (1) year rental of $1,800.00 a month with parking rental charges for only eight (8) cars, surely, such a higher rental, even in a better area, would require their telling the Board of the plans they had to renovate, alter, etc., to attract customers to have sufficient business to meet their rent and other expenses. The licensees did not negotiate with Paul Grieco, the owner, and further raises doubts as to whether the licensees are the true parties in interest."

Testifying on behalf of appellants, Saul W. Farber (appellants' lessor) described himself as a businessman who rented the extensive plot on which he operates a car-wash, service station, luncheonette and package liquor (plenary retail distribution license) store and a building in which is presently housed a State Motor Vehicle Agency operated by him and into which appellants would transfer their present license, if approved. He stated that the owner of the land (Philip Grieco) leased it to him or to his predecessor-in-interest for a five-year term with a five-year option expiring in 1981. He has operated the motor vehicle agency for about six months and has found it to be an unprofitable venture; hence he approved the proposed lease with appellants.

In response to inquiry concerning the term of the

proposed lease with appellants, he said that he was willing to grant the lease for a much longer term but appellants desired a minimal term lease to be sure the project was economically feasible before negotiating for a longer term. The lease further guaranteed appellants with eight parking spaces at an additional rental of $300 monthly, but appellants' patrons would have access to other spaces in the large plot that can accommodate several hundred cars. Hence the basic rental of $1,800 for the building would have added to it the additional cost for parking.

Appellants called Donald A. Gordon (a local realtor and appraiser) who testified that the subject building has an annual rental value of $24,500. He described the building as being of cinder-block construction approximately 35x50 feet in size. It is one-story and has no basement. He characterized the area in which the building and contiguous land is located as a prime commercial area in the City.

Leonare Greiner (Secretary of the Board) testified that within a three-block area are eight plenary retail licensees and, in addition, there are three "inactive" licenses awaiting approved sites, presumably in the area.

Appellants' counsel urged the Director to reverse the Board's determination, contending that within the past year the Board had found the same site favorable in connection with its approval of an application of another licensee (Two Nicks Corp. v. Jersey City, Bulletin 2099, Item 1), although the action of the Board was reversed by the Director on other grounds. Counsel cited the Board's phraseology in that resolution, which is repeated here at length:

> "After hearing arguments, by both subject licensee and objectors, the Board, after taking into consideration that the distance of place to place is in order, hardship shown by applicant, that the area is not overcrowded and there is a need and necessary for another license in the area, with all other rules and regulations in order, the Board reserved decision, and thereafter, upon discussion of note data, approved transfer of same." (Underscore added.)

That resolution, adopted less than one year before the instant resolution, is in the absence of evidence indicating changed conditions in the intervening period, or a change in the composition of the Board, dispositive of any question of public need for the transfer.

However, the subject resolution was not bottomed upon the question of need or necessity. Rather, the determination of the Board, as disclosed by its resolution, was the apparent

economic problem the appellants would obviously encounter should the transfer be approved.

Thus the issue is distilled into the simple inquiry whether the Board's action was erroneous if based upon the speculative economic result if the transfer were approved. Or, conversely, is the economic risk attendant upon a transfer solely the private matter of appellants beyond the scrutiny or consideration of the Board?

It appeared during argument of counsel that the appellants had been paying $90 a month rent at their present location and would be paying, as hereinabove indicated, a total rental of $2,100 monthly, including parking, at the proposed location. Additionally there would be some construction requirements in order to create a tavern business in the new building. Also apparent to the Board is the proximity of the plenary retail distribution license which, of necessity, would somewhat reduce the off-premises packaged goods sales. Furthermore, there exists the glaring gamble that the proposed lease of one year contains a mere one-year option, clearly indicating appellants are taking a speculative gamble, which presumably would be sanctioned by the Board.

The decision as to whether or not a license should be transferred to a particular locality rests within the sound discretion of the municipal issuing authority. Hudson-Bergen County Retail Liquor Stores Assn. v. North Bergen et al., Bulletin 997, Item 2; Paul v. Brass Rail Liquors, 31 N.J. Super. 211 (1954); Biscamp v. Teaneck, 5 N.J. Super. 172 (1949). Each municipal issuing authority has wide discretion in the transfer of a license, subject to review by the Director who may, in the event of any abuse thereof, reverse its action. However, action based upon such discretion will not be disturbed in the absence of clear abuse. Blanck v. Magnolia, 38 N.J. 484 (1962).

The essence of the entire statutory philosophy of the alcoholic beverage statute, N.J.S.A. 33:1-1 etc., is one of control. The word "control" permeates the entire Act from its initial enactment in 1933. The sale of intoxicating liquors, theretofore illicit, is thus permitted under a system of licensure and rigid control. Such regulatory rigidity was developed for the protection of the public. Sales of intoxicants can be made only under special conditions and at such minimum fixed prices as are fixed by regulation. Licensees may not run up bills for liquor stock and, should such bills be unpaid, cash payments only are required. Cf. State Regulations Nos. 30 and 20. These are but a sampling of the myriad regulatory limitations imposed upon licensees. The ostensible purpose of the applicable statute and the companion regulations is primarily to promote temperance and to restrict the easy sale of liquor. Hence licensees are indirectly required to operate soundly and operate such ventures in such manner that they will not become subject to the trade evils. The sale of alcoholic beverage is in a class by itself. Paul v. Gloucester County, 50 N.J.L. 585 (1888).

The most cogent and long-established principle in support of the Board is, "... If the motive of the governing body is pure, its reasons, whether based on morals, economics, or aesthetics, are immaterial." (Underscore added) Fanwood v. Rocco, 59 N.J. Super. 306, 320 (1960).

It has been axiomatically noted in this Division that disciplinary actions most often result from the actions of licensees under economic pressures. It is quite apparent that, in order to avoid such risk, the Board, acting in the public interest, rejected appellants' application.

Appellants cite Wrege v. Elizabeth, Bulletin 1930, Item 3, and Lyons Farms Tavern, Inc. v. Newark, Bulletin 1777, Item 2, in support of their argument. Neither is dispositive of the issue herein. The Wrege case involved a transfer to premises around the corner from the prior location and the Director, in reversing the Council, noted that no new licenses would be added to the area. In the instant matter the transfer embraces a considerable distance in another neighborhood, and a new license would be active in the subject area. The Lyons Farms Tavern matter is not applicable in that that determination by the Director was subsequently reversed. See 55 N.J. 292(1970).

Finally, it is the total action of the Board that is in review, not the pro forma steps employed toward that action. There is no allegation or evidence to indicate that the Board was improperly motivated in arriving at its determination. So long as its motives are pure, the responsibility of the municipal issuing authority is "high", its discretion is "wide" and its guide "the public interest." Lubliner v. Paterson, 33 N.J. 428 (1960). The long-established principle that the number of licensed premises to be permitted in a particular area has been held to be a matter residing in the sound discretion of the local issuing authority. Lakewood v. Brandt, 38 N.J. Super. 462 (App. Div. 1955); Zicherman v. Driscoll, 133 N.J.L. 586 (1946). Since the Board's action is discretionary, appellants must show manifest error or clear abuse of discretion. Rajah Liquors v. Div. of Alcoholic Beverage Control, 33 N.J. Super. 598 (App.Div. 1955). Finding neither manifest error nor clear abuse of discretion that appellants have failed to meet their burden of establishing that the action of the Board was erroneous and should be reversed, as required by Rule 6 of State Regulation No. 15, it is recommended that the action of the Board be affirmed and the appeal be dismissed.

Conclusions and Order

Written exceptions to the Hearer's report were filed by appellants within the time pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including transcript of testimony, exhibits, the Hearer's report,

and the exceptions filed thereto which I find have either been fully considered and resolved by the Hearer or to be without merit, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 21st day of December 1973,

ORDERED that the action of respondent Municipal Board of Alcoholic Beverage Control of the City of Jersey City be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

Robert E. Bower,
Director.

4. STATE LICENSES - NEW APPLICATIONS FILED.

V. & P. Import, Inc.
t/a Vicente Puig Import Company
41 Marietta Parkway
East Rutherford, New Jersey
Application filed February 25, 1974
for plenary wholesale license.

Dante Wines, Inc.
Old Georges Road off Route 130
Deans Section
South Brunswick, New Jersey
Application filed February 26, 1974
for wine wholesale license.

Robert E. Bower
Director