

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark 2, N. J.

August 10, 1961.

BULLETIN 1398

TABLE OF CONTENTS

ITEM

1. APPELLATE DECISIONS - TOMPKINS v. SEASIDE HEIGHTS.
2. APPELLATE DECISIONS - EPSTEIN v. PATERSON (CASE #2).
3. APPELLATE DECISIONS - HELMS v. NEWARK AND CARDINAL WINES AND LIQUORS, INC.
4. APPELLATE DECISIONS - JACOBS v. NEWARK AND MELODY BAR AND LIQUOR, INC.
5. CANCELLATION PROCEEDINGS - HOLDER OF CLUB LICENSE CEASED TO BE A BONA FIDE CLUB - LICENSE CANCELLED.

DISCIPLINARY PROCEEDINGS (Lower Penns Neck) - FALSE ANSWER IN APPLICATION - NO PENALTY FIXED BECAUSE OF CANCELLATION OF LICENSE.
6. DISCIPLINARY PROCEEDINGS (Hoboken) - SALE AT LESS THAN PRICE LISTED IN MINIMUM CONSUMER RESALE PRICE LIST - TWO SEPARATE VIOLATIONS - LICENSE SUSPENDED FOR 15 DAYS, LESS 5 FOR PLEA.

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark 2, N. J.

August 10, 1961.

BULLETIN 1398

1. APPELLATE DECISIONS - TOMPKINS v. SEASIDE HEIGHTS.

Ralph E. Tompkins and George)
E. Tompkins,)

Appellants,)

On Appeal

v.)

CONCLUSIONS AND ORDER

Mayor and Council of the)
Borough of Seaside Heights,)

Respondent.)

Pincus, Shamy & Sheehan, Esqs., by Daniel M. Sheehan, Esq.,
Attorneys for Appellants.
William E. O'Connor, Jr., Esq., Special Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of respondent on February 1, 1961, whereby it denied appellants' application for the transfer of a plenary retail consumption license from Jennie Poane to appellants and from 122-124-126 Sumner Avenue to 1320 Boulevard, Seaside Heights. Five members of the local issuing authority voted to deny and one member voted to grant said application.

"The petition of appeal alleges in effect that the action of respondent was against the weight of the evidence and constituted an abuse of discretion.

"The answer denies the aforesaid allegations in the petition of appeal and states the following as the reasons, inter alia, for its denial:

- (a) the proposed location is in the immediate vicinity of a church rectory;
- (b) the building to which the transfer is sought contains a soda fountain, news stand and luncheonette to which children have a tendency to be attracted;
- (c) the general neighborhood of the area of the proposed transfer constitutes a residential section with limited neighborhood activity, the proposed transfer being inimical thereto.

"At the hearing held herein the transcript of the evidence taken at the hearing held by respondent was introduced into evidence upon consent, and additional evidence was taken in accordance with Rule 8 of State Regulation No. 15.

"For the purposes of this appeal, the Borough is considered as being divided generally into two tracts (apparently because title to all property in each of the tracts was derived from two different persons). Tract 1 includes all property in the southerly half of the

Borough, between the Atlantic Ocean and Barnegat Bay, and Tract 2 includes all property (except a small portion known as the Larkin Tract) in the northerly part of the Borough, between the ocean and the bay. Tract 1 and Tract 2 are approximately the same size.

"The Borough has issued sixteen plenary retail consumption licenses (including the Poane license) and three plenary retail distribution licenses for premises in Tract 1. Six of these consumption licenses and three of these distribution licenses have been issued for premises on the Boulevard. The Borough has, for many years, issued one plenary retail consumption license and one plenary retail distribution license for premises in Tract 2. This consumption license has been issued for premises on the Boulevard, about four blocks from appellants' premises. The Boulevard runs through both Tract 1 and Tract 2, from the northerly line of the Borough to the southerly line thereof. Photographs introduced into evidence disclosed that on both the easterly and westerly side of the Boulevard, and for almost its entire length in the Borough, there are rooming-houses, small hotels, motels and many small business places in addition to residences. There appears to be no substantial difference in the character of the Boulevard in Tract 1 and Tract 2. The side streets, running easterly from the Boulevard one block to the ocean and westerly from the Boulevard three blocks to the bay, are almost entirely residential in both tracts.

"The premises for which the Poane license was granted were completely destroyed by fire. Appellants thereafter applied for the transfer of her license to them and to their premises on the Boulevard about eight blocks from the Poane premises. Five letters objecting to the transfer were received and on January 25, 1961, respondent held a public hearing thereon. At said hearing Paul C. Gorneman, who with his wife owns property facing Barnegat Bay, testified that they are opposed to the transfer because the transfer to premises in Tract 2 would detract from the desirability of the neighborhood. He admitted, however, that 'by the greatest stretch of imagination they couldn't disturb me.' The four other persons who reside on side streets and who had written letters of objection did not testify at said hearing. However, two other persons who own property on side streets stated that they objected because the north end is residential. The Mayor and Council also considered letters received from thirteen persons who own property on side streets who stated that they did not object to the transfer, and a petition requesting the granting of the transfer, which petition contained the signatures of one hundred persons who own property in the Borough. The matter was then adjourned to the regular meeting on February 1, at which the resolution to deny the application was adopted, as aforesaid.

"At the hearing herein Mayor McDevitt testified as to the location of the rectory and the various licenses in the Borough. He also testified that some voters expressed interest and that he told them to appear at the public hearing. Councilman Ambrunn was called as a witness by appellants and testified that he was not present on January 25 but that he had read the transcript of the testimony given at the public hearing before voting to deny the application at the meeting held on February 1.

"I find the following to be the facts in this case:

- (1) the entrance to the rectory, located on the Boulevard, is about 260 feet from the entrance to appellants' premises, but the church is located on a side street about six blocks from the rectory;
- (2) appellants now conduct in the building at 1320 Boulevard a variety store and restaurant with a counter at which carbonated drinks are served. However, the licensed premises will have a separate

- (3) entrance on the Boulevard and will be completely separated by a solid wall from the portion of the building in which the other business is conducted; although the side streets are almost completely residential in character, the entire length of the Boulevard is of a mixed business and residential character.

"The transfer of a liquor license is not an inherent or automatic right. If denied on reasonable grounds, such action will be affirmed. VanSchoick v. Howell, Bulletin 120, Item 6. On the other hand, where it appears that the denial was arbitrary or unreasonable, the action will be reversed. The Aloha, Inc. v. Belmar, Bulletin 1100, Item 9.

"After reviewing the evidence, exhibits and briefs filed by both attorneys, I find no merit as to allegation (a) in the answer, particularly in view of the fact that no objection was received from the clergymen residing in the rectory. Since the soda fountain and luncheonette will be completely separated from the licensed premises, I find no merit as to allegation (b) in the answer. General objections to the transfer of a license to a business street filed by residents of side streets which are residential are not in themselves sufficient reason for denying a transfer. Pistilli v. Bernardsville, Bulletin 1030, Item 2. Moreover, in this case the evidence indicates that the large majority of the owners of property on nearby side streets favored the granting of the transfer. Hence there appears to be no merit to allegation (c) in the answer.

"Respondent's attorney refers to the decisions of the Courts in Fanwood v. Rocco et al., 59 N.J. Super. 306 (App. Div. 1960); affirmed in 33 N. J. 404 (Sup. Ct. 1960). However, that case concerned the transfer of a license to a section of a municipality in which licenses had never been previously permitted. As Justice Jacobs said in his opinion:

*** it appears clear to us that, consistent with and in furtherance of the foregoing, the municipal governing body may reasonably honor local sentiments by declining to license taverns and package stores in designated areas within the municipality."

"In this case licenses already existed in Tract 2, and the evidence indicates that local sentiment favored the granting of the transfer. Cf. Toth v. Fieldsboro, Bulletin 1381, Item 4.

"There is absolutely no evidence that any member of the issuing authority was improperly motivated, but the evidence herein leads to the conclusion that the members of the issuing authority abused their discretion in denying appellants' application for transfer.

"For the reasons aforesaid, it is recommended that an order be entered herein reversing respondent's action and directing respondent to grant a transfer of the license in accordance with the application filed by appellants."

Pursuant to the provisions of Rule 14 of State Regulation No. 15, the special attorney for respondent filed with me written exceptions to the Hearer's Report together with written argument thereto, and the attorneys for appellants advised me in writing that they did not intend to file written answering argument.

Having carefully considered the evidence, exhibits, briefs,

written exceptions to the Hearer's Report and written argument thereto, I concur in the findings of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 22nd day of May 1961,

ORDERED that the action of respondent be and the same is hereby reversed, and respondent is directed to grant the transfer of the license in accordance with appellants' application.

WILLIAM HOWE DAVIS
DIRECTOR

2. APPELLATE DECISIONS - EPSTEIN v. PATERSON (CASE #2).

Case No. 2)	
Nathan Epstein, trading as)	
Onyx Club,)	
Appellant,	)	On Appeal
v.	)	CONCLUSIONS AND ORDER
Board of Alcoholic Beverage)	
Control for the City of)	
Paterson,)	
Respondent.)	

Riskin & Joseph, Esqs., by Philip W. Riskin, Esq., Attorneys
for Appellant
William Rosenberg, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from respondent's action on August 23, 1960, whereby it revoked appellant's license C-130, issued for premises 534 Madison Avenue, Paterson.

"Upon the filing of this appeal the Director entered an order staying respondent's order of revocation until the entry of a further order herein. R.S. 33:1-31.

"There is no dispute about the facts of this case. After appellant, who has held the license for many years, applied to respondent for a renewal of his license for the licensing year beginning July 1, 1960, respondent, on June 29, 1960, adopted the following resolution:

'WHEREAS, application has been made to this Board for the renewal of Plenary Retail Consumption license C-130, heretofore issued to Nathan Epstein, t/a Onyx Club, for premises situated at 534 Madison Avenue, Paterson, New Jersey; and,

'WHEREAS, this Board, on June 22, 1960, suspended said license for a period of twenty (20) days, effective 3 A.M., July 5, 1960; and,

'WHEREAS, the Director of the Division of Alcoholic Beverage Control of the State of New Jersey, on May 17, 1960, instituted disciplinary proceedings against said license, which are now pending; and,

'WHEREAS, reports received from the Paterson Police Department and complaints filed by residents in the immediate area of the licensed premises indicate that the licensee does not exercise proper control of his patrons; NOW, THEREFORE,

'BE IT RESOLVED, that the renewal of Plenary Retail Consumption license C-130 is hereby granted, subject to the aforementioned suspension and to any penalty imposed by the Director of the Division of Alcoholic Beverage Control in the matter of the now pending disciplinary action; and,

'BE IT FURTHER RESOLVED, that the granting of such renewed license is further subject to the special condition that the licensee employ the services of a constable on Friday, Saturday and Sunday nights of each week from the hour of 10:00 P.M. to the hour of closing. The duties of such constable shall be to maintain law and order in and adjacent to the premises situated at 534 Madison Avenue, Paterson, New Jersey.'

"Appellant accepted renewal of his license. On August 15, 1960, respondent served upon appellant a notice that it would hold a hearing on August 22, 1960, upon the following charge (as amended at said hearing):

'1. That you did fail to provide a constable to maintain law and order in and adjacent to your licensed premises during open hours, in violation of the condition imposed by the issuing authority by resolution adopted June 29, 1960, on the following dates:

July 30, 1960, 10:30 P.M.

August 1, 1960, 1:52 A.M.

August 7, 1960, 12:23 A.M. - 1:30 A.M. & 11:00 P.M.

August 8, 1960, 1:58 A.M.'

"At the scheduled hearing an attorney (not the present attorney for appellant) entered a plea of non vult to said charge as amended. After hearing evidence presented in alleged mitigation, the three members of respondent Board unanimously voted in favor of the resolution revoking the license.

"The petition of appeal herein alleges that the action of respondent was erroneous for reasons which may be summarized as follows:

1. The condition that appellant provide a constable for the alleged purpose of maintaining law and order was an improper and unlawful exercise of the licensing authority.

2. Said condition was unreasonable, discriminatory and arbitrary.

3. Said condition is illegal in that it constituted a deprivation and unlawful taking of property without due process of law.

R.S. 33:1-32 provides:

'Subject to rules and regulations, each issuing authority by resolution, first approved by the commissioner, may impose any condition or conditions to the issuance of any license deemed necessary and proper to accomplish the objects of this chapter and secure compliance with the provisions hereof, and all such licenses shall become effective only upon compliance with the conditions so stated and shall be revocable for subsequent violation thereof.'

"At the hearing herein it was stipulated that the Director approved the special conditions set forth in the resolution in question by letter dated August 17, 1960. Appellant's attorney then moved to dismiss 'the entire proceedings and the order of revocation' because the resolution imposing the condition was a nullity since it was not 'first approved' by the Director and because the alleged violations occurred before the date upon which the Director approved said resolution. Decision was reserved on said motion.

"It has been uniformly held that the failure to submit special conditions for approval by the Director prior to the issuance of a license is a mere technicality and, when raised, will be considered on the merits nunc pro tunc. DeLuccia v. Paterson, Bulletin 1240, Item 1 (affirmed by App.Div. March 17, 1959, and unreported). Clearly, the resolution imposing the condition in question was not a nullity. It is true that the alleged violations were committed prior to the date of approval by the Director. Appellant herein could have promptly filed an appeal to the Director from the imposition of the conditions, as in Belmar v. Division of Alcoholic Beverage Control, 50 N.J. Super. 423 (App.Div. 1958). However, one may not accept a license with conditions, ignore them and then collaterally attack them in a proceeding taken to enforce the conditions. Iannella v. Johnson, 136 N.J.L. 514 (Sup. Ct. 1948), affirmed 137 N.J.L. 659 (E. & A. 1948), app.dism. 336 U.S. 932 (1949). I find that the motion to dismiss is without merit and, hence, recommend that said motion be denied.

"Despite the plea entered at the hearing below, evidence was permitted to be presented herein upon the issue as to whether the condition in question was unreasonable, discriminatory or arbitrary. Morris N. Kaminetsky (a member of respondent Board) testified that the Board had received numerous complaints from the Paterson Police Department between August 1959 and May 1960 as to the manner in which appellant's premises were conducted; that numerous complaints had been received from neighbors and that he, himself, passed the premises three or four times a day and had observed unsatisfactory conditions on the outside of the premises. Appellant, on cross examination, admitted that members of the Police Department had been called to his premises, either by him or others, on four occasions in April and May 1960. Despite the testimony of appellant, his wife and four other witnesses that the premises were always properly conducted, I find that appellant has failed to establish that the condition imposed on his license was unreasonable, discriminatory or arbitrary.

"After considering the evidence, oral arguments and the brief submitted by appellant's attorneys, I find no basis for reversal or modification of the penalty imposed by respondent. The plea for modification should be made, if at all, to respondent, which may grant relief in the event that the members of the Board determine that such action is advisable. Harrison Wine and Liquor Company, Inc. v. Harrison, Bulletin 1296, Item 2.

"For the reasons aforesaid, it is recommended that an order be entered herein denying the motion to dismiss, affirming the action of respondent Board and fixing a date when the revocation imposed by respondent shall become effective."

While I agree with the Hearer on the general proposition that a special condition imposed on a license is valid nunc pro tunc when subsequently approved by me, I nevertheless disagree with him that guilt may be found and a license "suspended or revoked for an alleged violation occurring prior to my approval. The statute in question (R.S. 33:1-32, quoted in the Hearer's Report) is quite specific that the condition must be "first approved" by

the Commissioner (now Director). In Peck v. West Orange, Bulletin 147, Item 1, the late Commissioner Burnett, giving nunc pro tunc approval to an ordinance which (under Section 37 of the Alcoholic Beverage Control Act, now R.S. 33:1-40) required his "first" approval, expressed the view that "such ordinances do not become legally effective until the Commissioner's approval is obtained." This view has been uniformly followed by each succeeding commissioner or director. In fact, Rule 10 of State Regulation No. 3, Rule 10 of State Regulation No. 5 and Rule 24 of State Regulation No. 6 expressly provide that, "to be legally effective", a condition imposed upon a license, or upon its extension or transfer, must (among other things) be approved by the Director. In DeLuccia v. Paterson (cited in the Hearer's Report), wherein question was raised with respect to a special condition similar to the one here involved, it was stated "that the special condition imposed by respondent was made effective when the Director approved it and that appellant's non-compliance with the approved condition warranted the institution of disciplinary proceedings" (emphasis added).

Common fairness dictates that a licensee should not be punished for violations of a condition or regulation which is not legally in effect when the alleged violations are committed. Since in this case the alleged violations occurred prior to the approval of the condition, there was no basis for the charges preferred by respondent and, hence, its action must be reversed.

There is another matter which, for the future guidance of the parties, deserves comment. It would appear from the testimony in this case that employment by appellant of a person who is technically a constable is extremely difficult, if not impossible, because of the usual lack of constables available for this type of work or, if and when available, because of the prohibitively high prices charged for such work. However, I do not believe that respondent used the word "constable" in its technical sense. Special police officers appointed pursuant to R.S. 40:47-19 could maintain law and order on the premises to the same extent as constables; and I believe that respondent had in mind any proper officer with lawful authority to maintain law and order. Accordingly, the term "constable", as used in the condition, is hereby interpreted to mean a person who is either a constable or a special police officer. In the future, therefore, appellant will be deemed to be in compliance with the condition if he engages either a constable or a special police officer on the days and during the times specified in the condition.

Accordingly, it is, on this 23rd day of May 1961,

ORDERED that the action of respondent be and the same is hereby reversed.

WILLIAM HOWE DAVIS
DIRECTOR

3. APPELLATE DECISIONS - HELMS v. NEWARK AND CARDINAL WINES AND LIQUORS, INC.

Mildred Helms,)	
Appellant,)	
v.	)	ON APPEAL
	)	CONCLUSIONS
Municipal Board of Alcoholic)	
Beverage Control of the City	)	AND
of Newark, and Cardinal Wines)	
and Liquors, Inc.,	)	ORDER
Respondents.)	

Vincent Belfatto, Esq., Attorney for Appellant
 Vincent P. Torppey, Esq., by Jacob M. Goldberg, Esq., Attorney
 for Respondent Board
 Robert W. Wolfe, Esq., Attorney for Respondent-licensee

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of respondent Board whereby on February 8, 1961, by a vote of two-to-one, it granted the application of Cardinal Wines & Liquors, Inc. (hereafter Cardinal) to transfer its plenary retail distribution license from 41 Montgomery Street to 618-620 Bergen Street. The effective date of the transfer was made subject to the completion of the premises at 618-620 Bergen Street according to the plans and specifications on file and, further, subject to a subsequent inspection by the respondent Board.

"Appellant's petition of appeal sets forth the following grounds for reversal of the action of respondent Board:

- (a) The granting of the transfer of said license would greatly increase the traffic hazard now existing in the area;
- (b) There is no public need or necessity for the transfer of said license to the proposed site;
- (c) The area is amply served by the present existing outlets;
- (d) The action of the respondent Board was arbitrary, erroneous, in abuse of its discretion and contrary to the intent and purport of Section 3.29 of the Revised Ordinances of the City of Newark.

"The answers filed on behalf of both respondents denied these allegations and contend that the grounds upon which the issuing authority made its decision were based upon factual testimony before the Board from which, in its sound discretion, it concluded that the transfer should be granted.

"The appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15. The transcript of the proceedings before the respondent Board was received in evidence and additional testimony was presented by appellant in accordance with Rule 8 of said Regulation.

"The evidence shows that for the past twenty years Cardinal has conducted its licensed business with an unblemished record; that its present site is in the process of being acquired by purchase or condemnation by the Newark Housing Authority for urban redevelopment; that for the past eight to nine months it has made a survey of other business areas in the City to find a suitable place to relocate its business; that its proposed site is one of a few sections where it could re-establish itself without violating any of the City's ordinances; that it intends to erect a building at the proposed site in the rear of which it will provide 2,500 square feet for off-street parking; that the proposed site is in a commercial and business district; that there are a number of stores in the area; that a gasoline service station adjoins the proposed site and that the proposed site is presently being used as a 'graveyard' for motor vehicles reduced to junk.

"It further appears that within a radius of two blocks of the proposed site there are five D licensees and eleven C licensees, three of which have the broad package privileges; that the nearest plenary retail distribution license is 700 feet from the proposed site of respondent-licensee; that the nearest plenary retail consumption license (with broad package privileges) is 170 feet from the proposed site and that the latter (the Melody Bar and Liquor, Inc.) in a recent (1/18/61) application to the local Board to transfer its license to its present site represented that it would confine its business to selling alcoholic beverages in original containers for off-premises consumption and, accordingly, has presently abandoned the sale of alcoholic beverages by glass or other open receptacle for on-premises consumption.

"At the hearing before the local Board eighteen persons (including the appellant) appeared in person to oppose Cardinal's application. Nine of these objectors were property owners, five were licensees, three were residents in the area, and one represented a civic group. In addition, a petition containing about one hundred names objecting to Cardinal's application was filed with the respondent Board. Five witnesses testifying on behalf of all the objectors stated that the area would be adversely affected by the transfer; that it would impair the morals of the children in the neighborhood; that it would increase the now existing traffic hazard in the area; that there is no need for another licensee in the area, and that the area is adequately supplied with the existing liquor outlets.

"At the hearing held herein seven additional objectors were produced by the appellant and testified to the same effect as those who appeared before the local Board.

"In addition, there was testimony that the proposed site is across the street from a fourteen-block area designated for urban renewal and rehabilitation; that a liquor store at the proposed site would have an adverse effect on this area, and that it would not be in harmony with the proposed rehabilitation plans.

"Appellant's contention that Cardinal's business will impair the morals of the children in the neighborhood is without merit. There is no evidence to this effect and no evidence that Cardinal will conduct its business improperly.

"Appellant's contention that the approval of Cardinal's transfer to the proposed site will not be in harmony with the contemplated rehabilitation of the adjacent area is likewise without merit. There is no evidence that Bergen Street will not remain

zoned for business as heretofore. Likewise, the weight to be accorded petitions for or against the granting of a retail license, or the transfer thereof, is a matter properly within the discretion of the municipal issuing authority. Bilancio v. Trenton, Bulletin 1221, Item 5; Palmer Food & Liquors, Inc. v. Bogota, Bulletin 1298, Item 1.

"Counsel for the appellant argues that the action taken by the local Board on January 18, 1961, on the application of the Melody Bar and Liquor, Inc. is tantamount to the creation of a new plenary retail distribution license and, hence, its subsequent approval of Cardinal's transfer to the proposed site was in violation of Section 3.29 of the City ordinance which prohibits the local Board in hardship cases (as proven herein) from transferring a license within six hundred feet of a like license. There is no merit to this contention. Cf. The Original Tavern Owners Association of Newark v. Newark et al., Bulletin 1360, Item 1. With reference to appellant's remaining grounds for reversal (a, b and c), it has been established that considerations of undue concentration of licensed liquor premises, possible traffic hazard and proximity to churches and schools are matters entrusted to the sound discretion of the issuing authority. Miles et als. v. Paterson et al., Bulletin 1306, Item 2; Shiloh Baptist Church of Atlantic City v. Atlantic City et al., Bulletin 1387, Item 2.

"After reviewing all the evidence, the exhibits and oral argument of counsel, I conclude that appellant has failed to sustain the burden of proof in showing that the action of respondent Board was erroneous. Rule 6 of State Regulation No. 15; Triangle Corp. et al. v. Camden et al., Bulletin 1276, Item 1; Peska et al. v. Trenton et al., Bulletin 1333, Item 5; Tozzi's Tavern, Inc. et al. v. Plainfield et al., Bulletin 1349, Item 1 (aff'd. 65 N.J. Super. 268 (App.Div. 1961)).

"For the reasons aforesaid, it is recommended that an order be entered affirming the action of the respondent Board, and dismissing the appeal."

No exceptions to the Hearer's Report were filed with me within the time limited by Rule 14 of State Regulation No. 15.

After carefully considering the evidence and exhibits herein and the oral arguments of counsel before the Hearer, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 23rd day of May, 1961,

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

WILLIAM HOWE DAVIS
DIRECTOR

4. APPELLATE DECISIONS - JACOBS v. NEWARK AND MELODY BAR AND LIQUOR, INC.

Sidney Jacobs, t/a Sid's Tavern,)	
)	
Appellant,	)	ON APPEAL
)	
v.	)	CONCLUSIONS
)	
Municipal Board of Alcoholic Beverage Control of the City of Newark, and	)	AND
Melody Bar and Liquor, Inc.	)	ORDER
)	
Respondents.)	
)	

Goldberger & Ostrow, Esq., by Howard A. Goldberger, Esq.,
Attorneys for Appellant.
Vincent P. Torppey, Esq., by Jacob M. Goldberg, Esq.,
Attorney for Respondent Municipal Board.
Joseph A. D'Alessio, Esq., Attorney for Respondent Melody Bar and
Liquor, Inc.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of the respondent Board whereby by a 2 to 0 vote of its members (1 being absent) it approved an application to transfer the plenary retail consumption license (C-165, with broad package privilege) of Melody Bar and Liquor, Inc. from 171 Howard Street to 610 Bergen Street, Newark.

"The petition of appeal alleges that the action of the members of the respondent Board constituted an abuse of discretion because there are a large number of liquor outlets in the area and the transfer of the license in question was not conducive to the best interests of the community. Furthermore, it alleged that the numerous objections made at the hearing as well as the recommendations made by the police department that the transfer be denied were ignored by the respondent Board.

"Respondent Board's answer filed herein denies the allegations set forth in the petition of appeal and contends that its decision was based upon the factual testimony and that within its sound discretion it concluded that the transfer be granted.

"The stenographic transcript of the proceedings held on January 11, 1961 before the respondent Board was submitted as part of the record of the instant appeal (Rule 8 of State Regulation No. 15). Additional testimony and exhibits were introduced at the hearing held herein.

"Appellant testified that he holds a plenary retail consumption license on Bergen Street and objected to the transfer because it would affect his business.

"It appears that respondent Melody Bar and Liquor, Inc. operated a liquor establishment for approximately fourteen years at 171 Howard Street but was forced to vacate the premises when the building was acquired by the Housing Authority of the City of Newark.

"There is no contention that the transfer of the license (which has been classified as a hardship case) has violated any provision of the ordinance applicable to such cases. The location of

the proposed premises is zoned for business.

"The pertinent objections advanced by the various objecting witnesses were to the effect that there are presently sufficient liquor outlets in the vicinity; that the transfer of the license to the premises in question will constitute a detriment to the neighborhood; and that it will adversely affect the proposed rehabilitation development program contemplated in the area.

"Joseph Lemberg, an officer of the respondent licensee, testified that the liquor establishment will not be operated as a tavern but will sell alcoholic beverages in original containers for off-premises consumption.

"The number of licensed premises to be permitted in any particular area has been held to be a matter confided to the sound discretion of the local issuing authority. Di Gioacchino v. Atlantic City, Bulletin 1030, Item 3. In cases of the kind now under consideration, the Director's function is to determine whether reasonable cause exists for the issuing authority's opinion and, if so, to affirm its action. Curry v. Margate City, Bulletin 460, Item 9; Mulcahy et al. v. Maplewood et al., Bulletin 658, Item 4; Krogh's Restaurant, Inc. et al v. Sparta et al., Bulletin 1258, Item 1.

"There was some apprehension expressed by various witnesses that the proposed licensed premises will create a moral hazard for the young folks. It is readily understandable that such concern may exist. However, if the premises are conducted in a law-abiding manner (and it must be assumed that such will be the case), the appellant or other objectors have nothing to fear. If, perchance, the licensed premises are permitted to be operated in violation of the Alcoholic Beverage Law, the respondent-licensee will subject its license to either suspension or revocation.

"I am satisfied that in all respects proper consideration was given by the respondent Board before action was taken on the application for transfer. Furthermore, there has been no evidence presented therein to indicate that the two members present who voted to approve the place-to-place transfer were improperly motivated or that there was an abuse of discretion on their part.

"After careful examination of the record herein, I recommend that the action of the respondent Board in approving the application for transfer of the license in question to the proposed site be affirmed and that the appeal herein be dismissed."

No exceptions to the Hearer's Report were filed with me within the time limited by Rule 14 of State Regulation No. 15.

Having carefully considered the entire record, including the evidence, exhibits and argument of the attorneys in behalf of the respective parties in this matter, I concur in the conclusions of the Hearer and adopt them as my conclusions herein. I shall enter an order in accordance with the recommendation.

Accordingly, it is, on this 23rd day of May, 1961,

ORDERED that the action of respondent Board be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

WILLIAM HOWE DAVIS
DIRECTOR

5. CANCELLATION PROCEEDINGS - HOLDER OF CLUB LICENSE CEASED TO BE A BONA FIDE CLUB - LICENSE CANCELLED.

DISCIPLINARY PROCEEDINGS - FALSE ANSWER IN APPLICATION - NO PENALTY FIXED BECAUSE OF CANCELLATION OF LICENSE.

In the Matter of Disciplinary
Proceedings against

Lower Penns Neck Township
Republican Club
North-West corner of Riviera Drive
& Cornell Road
Lower Penns Neck
P.O. Pennsville, New Jersey

CONCLUSIONS

AND

ORDER

Holder of Club License CB-3, issued
by the Township Committee of the
Township of Lower Penns Neck.

Gerard J. DiNicola, Esq., Attorney for Defendant-licensee.
William F. Wood, Esq., Appearing for the Division of Alcoholic
Beverage Control.

BY THE DIRECTOR:

Defendant has pleaded non vult to the following charges:

- "1. On September 19, 1960 and prior thereto, you, a club licensee, failed to have and keep a true book or books of account wherein were entered all monies received and the source of such receipts and wherein were entered all monies expended from such receipts and the names of the persons receiving such expenditures and the purpose for which such expenditures were made; in violation of Rule 12 of State Regulation No. 7.
- "2. In your application dated May 31, 1960, filed with the Lower Penns Neck Township Committee, upon which you obtained your current club license, you falsely stated, in answer to Question 15, the address of William Benson (correct first name, Woodland), one of your so-called directors, as Spruce Street, Pennsville, New Jersey, whereas, in truth and fact he resided at 99 Broadway, Pennsville, New Jersey; said false statement being in violation of R.S. 33:1-25."

At the same time as the above charges were served, defendant was also ordered to show cause why its current license should not be cancelled and declared null and void for the following stated reason:

"Said license was improvidently issued in violation of R. S. 33:1-12(5) and Rule 2 of State Regulation No. 7 in that, at the time of issuance of said license and prior thereto, you were not a bona fide club."

By letter dated April 18, 1961, the attorney for defendant advised that said defendant had informed him that it did not intend to contest the order to show cause and that it desired "to enter the same plea to that charge as they had previously done in the other two charges."

It appears from the investigation made herein that defendant was incorporated on January 10, 1947, and set forth its purposes to operate as a social and fraternal organization; that it had previously held a club liquor license which had been revoked by the then Director of the Division of Alcoholic Beverage Control effective February 15, 1954, for "farming out" the license to one Arthur Del Duca who was found to be the real and beneficial owner thereof (Bulletin 1004, Item 1); that on August 5, 1958, defendant acquired its present license by action of the local issuing authority which renewed said license each term, including the current licensing period.

On August 16, 1960, an ABC agent visited defendant's premises and Arthur Del Duca was tending bar. The agent saw Del Duca serve a bottle of beer to a man who, after interrogation, was ascertained by the agent to be a member of the club. The agent's inspection of the licensed premises resulted in the finding of no records other than bills for alcoholic beverages. When questioned about the club and its officers, Del Duca stated that he knew nothing and referred the agent to Eugene Pyle (the president). The latter was contacted regarding the essential records of the club, such as the by-laws, constitution, income and expenses of the liquor business, but Pyle claimed that five or six weeks prior thereto the records, as well as other personal items, had been stolen but that the police had not been notified. Pyle was asked about records made since the robbery with especial reference to the income and expenses, but he stated he could not furnish any information with reference thereto. Pyle further stated that Del Duca owns the building wherein the club is located, also tends bar and maintains the premises and that no rent is paid to Del Duca for their use. As a result of Pyle's statement that the club meets regularly on the last Thursday of each month, the agent went to the premises on Thursday, August 25, 1960 and waited there until 8:30 p.m., but the only persons in the premises were Pyle, Del Duca and another member who said he knew nothing of the meeting but had stopped in the place for a drink. Pyle said the officers and directors had been elected at a meeting in June 1960, but he had neither records to show that such a meeting was held nor did he remember having attended said meeting.

In addition to Pyle, the agent interviewed the other officers, the trustees and a former president of the club and all refused to sign statements containing information given by them using, in substance, the same language, "I know I don't have to sign that and I won't do it." The officers and directors (with the exception of the president) were in agreement that they never performed any duties in connection with their respective offices, they never attended meetings, knew nothing of the defendant-club's financial condition or its method of disbursement of its funds. Furthermore, none had ever seen the club's records but all appeared to know about the so-called theft.

It can be readily seen that the club, allegedly consisting of seventy members, is a personal operation of Arthur Del Duca, which for all practical purposes has been admitted by the "non vult plea" of defendant. There is no doubt that the club is now merely a "front" for Del Duca and has ceased to be a bona fide club entitling it to hold a liquor license. Therefore, I shall cancel the license now held by defendant. Cf. Re Eight Aces, Bulletin 1072, Item 5.

In view of the result reached herein, it is unnecessary to fix a penalty for the violations set forth in the charges to which the defendant has pleaded non vult.

Accordingly, it is, on this 22nd day of May 1961,

ORDERED that Club License CB-3, issued by the Township Committee of the Township of Lower Penns Neck to Lower Penns Neck Township Republican Club, for premises at North-West corner of Riviera Drive & Cornell Road, Lower Penns Neck, be and the same is hereby cancelled and declared null and void, effective immediately.

WILLIAM HOWE DAVIS
DIRECTOR.

6. DISCIPLINARY PROCEEDINGS - SALE AT LESS THAN PRICE LISTED IN MINIMUM CONSUMER RESALE PRICE LIST - TWO SEPARATE VIOLATIONS - LICENSE SUSPENDED FOR 15 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary
Proceedings against

Litwin's Fair Liquor Stores, Inc.
606 Washington Street
Hoboken, New Jersey

CONCLUSIONS

AND

Holder of Plenary Retail Distribution
License D-23, issued by the Municipal
Board of Alcoholic Beverage Control
of the City of Hoboken.

ORDER

Samuel Moskowitz, Esq., Attorney for Defendant-licensee.
Edward F. Ambrose, Esq., Appearing for the Division of Alcoholic
Beverage Control.

BY THE DIRECTOR:

Defendant pleaded non vult to the following charges:

- "1. On or about March 27, 1961, you sold and offered for sale, at retail, a quart bottle of Seagram's V.O. Canadian Whisky and one case (twenty-four 12-ounce cans) of Rheingold Extra Dry Lager Beer, alcoholic beverages, at less than the prices thereof filed with the Director of the Division of Alcoholic Beverage Control; in violation of Rule 5 of State Regulation No. 30.
- "2. On April 4, 1961, you sold and offered for sale, at retail, directly or indirectly, a 4/5 quart (fifth) bottle of Cutty Sark Blended Scots Whisky, an alcoholic beverage, at less than the price thereof filed with the Director of the Division of Alcoholic Beverage Control; in violation of Rule 5 of State Regulation No. 30."

During the course of an investigation of defendant's licensed premises, ABC agents found an undated sales slip disclosing sale of a quart bottle of Seagram's V.O. Canadian Whisky for \$7.00 and a case (24 - 12-ounce cans) of Rheingold Extra Dry Lager Beer for \$4.00, whereas the minimum resale prices then in effect for said items were \$7.95 and \$4.40, respectively. Irving Litwin, president of defendant corporate-licensee, admitted making the sale of such alcoholic beverages on or about the time alleged in Charge 1.

On April 4, 1961, at about 12:55 p.m., two agents entered defendant's premises and one of the agents purchased a

4/5 quart bottle of Cutty Sark Blended Scots Whisky from said Irving Litwin for \$6.10 whereas the minimum resale price then in effect for such item was \$6.78.

Defendant has no prior adjudicated record. Under all the circumstances and including the fact the case includes two separate sales, I shall suspend defendant's license for fifteen days. Five days will be remitted for the plea entered herein, leaving a net suspension of ten days.

Accordingly, it is, on this 23rd day of May 1961,

ORDERED that Plenary Retail Distribution License D-23, issued by the Municipal Board of Alcoholic Beverage Control of the City of Hoboken to Litwin's Fair Liquor Stores, Inc., for premises 606 Washington Street, Hoboken, be and the same is hereby suspended for ten (10) days, commencing at 9:00 a.m., Monday, June 5, 1961 and terminating at 9:00 a.m., Thursday, June 15, 1961.


William Howe Davis
Director