

STATE OF NEW JERSEY  
Department of Law and Public Safety  
DIVISION OF ALCOHOLIC BEVERAGE CONTROL  
NEWARK INTERNATIONAL PLAZA  
U.S. Routes 1-9 (Southbound) Newark, N. J. 07114

BULLETIN 2340

February 27, 1980

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February 27, 1980

1. COURT DECISIONS - NARDUCCI AND TESTA v. ATLANTIC CITY.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
A 706-78

FRANK J. NARDUCCI, JR., and )  
SALVATORE A. TESTA, )  
Appellants, )  
v. )  
BOARD OF COMMISSIONERS OF THE CITY )  
OF ATLANTIC CITY, )  
Respondents. )  
-----

Argued October 30, 1979 - Decided January 18, 1980.

Before Judges Crane and King.

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

Edwin J. Jacobs, Jr. argued the cause for appellants (Tort, Jacobs & Rosenberger, attorneys).

Mart Vaarsi, Deputy Attorney General, argued the cause for respondent (John J. Degnan, Attorney General, attorney; Stephen Skillman, Assistant Attorney General, of counsel).

PER CURIAM

(Appeal from the Director's decision in Re Narducci and Testa v. Atlantic City, Bulletin 2305, Item 3. Director affirmed. Opinion not approved for publication by Court Committee on Opinions.

## 2. COURT DECISIONS - WEBCO PRODUCTS, INC. v. EVESHAM TOWNSHIP.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
A-2333-78

WEBCO PRODUCTS, INC., )  
Appellant, )  
v. )  
TOWNSHIP COUNCIL OF THE TOWNSHIP )  
OF EVESHAM, )  
Respondent. )

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Argued January 8, 1980 - Decided January 25, 1980.

Before Judges Matthews and Ard.

On appeal from final decision of the Division of .  
Beverage Control.

Herhsh Kozlov argued the cause for the appellant. (Robert E.  
Zwengler, on the supplemental brief).

Thomas Norman argued the cause for the respondent.

A statement in lieu of brief was filed on behalf of the  
Alcoholic Beverage Control by John J. Degnan, Attorney General,  
attorney (Mart Vaarsi, Deputy Attorney General, of counsel and on  
the statement).

PER CURIAM

(Appeal from the Director's decision in re Webco Products, Inc.  
v. Evesham Township, Bulletin 2315, Item 2. Director affirmed.  
Opinion not approved for publication by Court Committee on  
Opinions.

3. APPELLATE DECISIONS - SOUTH BERGEN COUNTY LICENSED BEVERAGE ASSOCIATION v. EAST RUTHERFORD et al.

#4262	:	
South Bergen County	:	
Licensed Beverage Association,	:	
	:	ON APPEAL
Appellant,	:	
v.	:	CONCLUSIONS
	:	
Borough Council of the	:	AND
Borough of East Rutherford &	:	
Erie Clam Bar, Inc.,	:	ORDER
	:	
Respondents.	:	
.....	:	
Skoloff & Wolfe, Esqs., by Saul A. Wolfe, Esq., Attorneys for Appellant.		
Smith, Ely, Bruinooge, Smorodsky, Sheridan & Sullivan, Esqs., by Thomas H. Bruinooge, Esq., Attorneys for Respondent, Erie Clam Bar, Inc.		
Alfred Porro, Jr., Esq., by Richard Macaluso, Esq., Attorney for Respondent, Borough of East Rutherford.		

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

Appellant challenges the action of the respondent, Borough Council of the Borough of East Rutherford (Council) which, by Resolution dated June 19, 1978, granted an application for place-to-place and person-to-person transfer of Plenary Retail Consumption License No. 0212-33-007-002 from Frank Arl, Inc., 966 Paterson Avenue, East Rutherford, to Erie Clam Bar, Inc., 264 Park Avenue, East Rutherford.

Appellant in its Petition of Appeal contends that such action was erroneous in that:

- a. It violates a local distance-between-premises ordinance;
- b. No notice of hearing was given to appellant, though timely objection was personally served upon the local issuing authority;
- c. The Council failed to provide a copy of the minutes of the meeting and/or copy of Resolution approving said transfer; and

- d. All of the above renders the entire procedure void ab initio.

The Council admits receiving a letter from appellant registering its objection, but states that no special hearing was ever held. The transfer was approved at a regular meeting. It further admits its failure to supply a copy of the minutes of the June 19, 1978 meeting, as the same have not yet been completed. It is silent as to the unfulfilled request for a copy of the Resolution.

By way of an affirmative defense, the Council states that the second part of the distance ordinance provides for its granting if "extraordinary and exceptional circumstances necessitate an exception to the minimum distance limitation and, then, only upon the approval of four members of the governing body." The Council did make such a determination by a required vote of four members present.

A de novo hearing was held in this Division pursuant to N.J.A.C. 13:2-17.6, with full opportunity afforded the parties to introduce evidence and cross-examine witnesses.

This appeal is predicated upon two separate issues: the first, being that the Council's action was deficient procedurally; the second, that it was improper substantively because it violated the minimum distance ordinance.

- I -

N.J.A.C. 13:2-2.7 provides as follows:

13:2-2.7 Hearing granted upon receipt of written objection

Each municipal clerk shall immediately upon receipt of a written objection, duly signed by an objector, transmit forthwith to the issuing authority of the particular municipality said objection and everything pertaining thereto, whereupon it shall become the duty of each issuing authority to afford a hearing to all parties and immediately notify the applicant and the objector of the date, hour and place thereof. Said hearing shall be stenographically or electronically recorded.

#### Historical Note

Formerly Alcoholic Beverage Control regulation 2, rule 7.

From the record, it appears that, after receiving written hand-delivered notice of objection, no written notice of hearing date was given to appellant. The Council argues that there was a waiver because one of the members of Appellant Association appeared at the meeting where this application was



moved and passed. Said meeting was the regular scheduled meeting at which all liquor license applications were to be considered and appropriate action taken. Council also takes the position that since this was a regular meeting as opposed to a special meeting of the Borough Council, no notice was necessary.

Although clearly directed to record the meeting verbatim, by the use of a stenographer or electronic recorder, neither procedure was employed. A proffer of the Clerk's minutes, in lieu, was made.

N.J.A.C. 13:2-2.9(b) provides:

- (b) However, the issuing authority shall not disapprove the application without first affording the applicant an opportunity to be heard, and providing the applicant with at least five days notice thereof. The hearing need not be of the evidentiary or trial type; and the burden of establishing that the application should be approved shall rest with the applicant. In every action adverse to any applicant or objector, the issuing authority shall state the reasons therefor.

#### Historical Note

Formerly Alcoholic Beverage Control regulation 2, rule 9.

There were no findings of fact made upon which the action is predicated, nor is there even the simple statement that the application is granted pursuant to the second part of the ordinance pertaining to a finding of "extraordinary and exceptional circumstances". Such finding is mandated in order to avoid a violation of the minimum distance as set forth in the first part of the Ordinance.

I find, as a fact, that the Council's failure to advise appellant in writing of the time and date set for the hearing was not cured by certain association members, in their individual capacities, being present that evening. Their attorney was absent, and it is their attorney who was selected by the Association to represent them, not a particular member or group of them who attended this meeting, to ascertain that their respective licenses were renewed.

Similarly, I find that there was no attempt made to record the meeting verbatim. I further find this defect cannot be cured by an offer of clerk's minutes of the meeting. Had the framers of the most recent Rules and Regulation, (revised

and effective March 1, 1978), so intended, they would have clearly stated it in the Rule. Minutes are no more accurate than the person taking them and, in this instance, there is a question of certain objections being raised at the meeting, which are not even mentioned in the proffered minutes.

I find, as a fact, that the Council erred in not sending written notification of the hearing to the Appellant. There is no distinction made in the rule between special and regular meetings.

I find, too, that the Resolution was deficient in that it contained no findings of fact or conclusions, as required by the Regulation.

- II -

Substantively, the sole question posed - the outcome of which shall be dispositive of the issue is: Are there extraordinary and exceptional circumstances present which necessitate an exception to the minimum distance ordinance herein (500 foot radius)?

Charles R. Miller, Jr., sole stockholder and sole officer of licensee, Erie Clam Bar, Inc., testified that he has had ten years experience in the restaurant licensed premises business without citation for violation.

Miller acquired a long-term lease on subject building when it was in a generally run-down and vandalized state. It had been closed for a year or more prior to his acquiring it, its license having been transferred to another establishment in a distant area of the Borough.

Prior to its closing, it had a bad reputation. A murder in the barroom was responsible for its ultimate demise.

The building is located adjacent to the railroad tracks at or near the border of Rutherford which is "dry". In consequence, it is alleged that it "serves that public need" of many Rutherford residents.

A pair of photos (before and after renovation) depict a severely plain, brick, box-like building devoid of architectural embellishments. On the exterior it appears that the current licensees have: painted the brick and trim; cut in and installed a bay-like window on the second floor; installed small window panes instead of the massive show-window glass in the front; added shutters to the four windows on the visible side

of the building facing the railroad tracks; and installed a new sign and exterior lights.

A third photo is of the ceiling was offered in evidence containing a plaster relief of two winged cherubs in a coy pose under which is the inscription: "This is it!". Miller describes the relief as unique.

He stated that extensive repairs, restoration and alterations were done on the interior, including new plumbing, heating, lighting and air-conditioning. He claims that the building is the oldest in the area and "historical". Where possible, the antique flavor was preserved.

It was his intention from the beginning to acquire a license eventually.

When the restaurant opened, it was self-service, with dining on the street and upper floors, similar to a fast-food operation. The results were not encouraging, and so, it was converted to a fish-market type of operation. The fresh fish and sea-food were visible and available for purchase; it may be cooked and eaten there or taken home for preparation and/or consumption.

This second operation didn't provide satisfactory results, and so, a third (and current) approach was taken, described as a "sit-down family restaurant . . . with a low price profile."

Miller knew that his premises was less than 500 feet from several licensed establishments when he negotiated to acquire the license, but, "anticipated no trouble" getting it transferred.

He was a member of Appellant-Association when it proposed and assisted in the passage of the minimum distance ordinance in 1975 by the Borough Council. He owned the present establishment at that time, but took no action opposing its passage.

Edward Hill, A Borough Councilman, offered nothing of relevance to the issue of extraordinary and exceptional circumstances in his testimony. He was familiar with the minimum distance ordinance at the time the application was before the Council. Nonetheless, he stated that he had no objections to the proposed transfer, for, in his mind, the 500 feet minimum was intended for the residential area, not the so-called business section. This view was supported by his faith in Miller, borne of his record in operating his previous establishment.



John J. Roberts, a Borough Councilman, stated that he had no objection to the transfer of the license because of Miller's fine record in the first establishment, coupled with his investment in the current premises, and the improvements he made to the building.

When asked:

Q. Are there any reasons in your mind why the transfer should be granted?

Roberts answered:

A. Well, I think on a hardship on Mr. Connors part from which understanding awhile back, talking to him, that he had two years . . . to do whatever with the license otherwise it would be taken away from him, and from what I understand eighteen months had expired on it and Mr. Connors is not a rich man by any means and that was also in my thoughts when I would have approved the license.

Additionally, he felt that it's a "historical" building, though admitting on cross-examination that no governmental body, which passes upon sites and has the power to make such a designation has considered, affirmatively acted with regard to this building. He was then asked:

Q. When you say this is a "historical building" what you mean then is that this is a very old building?

A. Yes, sir.

Roberts acknowledged that, to the best of his knowledge, Connors had never applied for a transfer of this license to another location, nor had there been a prior person-to-person application filed with the Council.

Gerald K. Hubsmith, owner of Hub's Bar and a member of the Appellant-Association, testified that his bar has been in the family since repeal of prohibition. He stated the building in which his license is sited is approximately one hundred years old, as is the building housing the Park Tavern. They are not unusual, as most of the neighborhood buildings are of that vintage.

Hubsmith sent a letter to the Borough Clerk objecting to the transfer, but he too was given no formal notification

of the hearing. He was present that evening because his license renewal application (and all others in the Borough) was to be acted upon by the Borough Council.

Ellen Fallon, who operates a licensed premises in the Borough with her husband gave testimony in her (former) capacity as secretary to the South Bergen Licensed Beverage Association. She stated that she personally delivered the Association's written objection to the Borough Clerk rather than forwarding it by mail "because objections that had been sent through the mails the month before were denied as ever having been received."

Mrs. Fallon approached Miller when they (Association) were attempting to get the subject ordinance enacted in 1975. He was then part-owner of the Townhouse, a licensed premises, and owner of the Erie Clam Bar, an unlicensed premises.

She pointed out to him that, if the ordinance went through it would preclude licensing the Erie Clam Bar.

Miller responded that he had no desire to license the Erie; that he hoped to get out of the bar business, and never again wanted a liquor license.

From the testimony and photographs admitted into evidence, I cannot find any grounds upon which this transfer application can be deemed as presenting extraordinary and exceptional circumstances which necessitate an exception to the distance ordinance.

I do not find that the building is "historic" or unique in anyway. It is merely an old building in an older section of the Borough, possessing a curious ceiling which was rehabilitated and given new life. Expenditure of monies necessary to render the building fit for use is not "unique" or "extraordinary".

There has been no showing that Mr. Connor's claimed hardship, which he identifies as his inactive license, is either accurate factually, or not the result of his own inaction, much less a subject for serious consideration in the prospective purchasers application for transfer to the current location, when all concerned knew it violated the minimum distance ordinance.

When a commission, board, body or person is authorized by ordinance, passed under a delegation of legislative authority, to grant or deny a license or permit, the grant or denial thereof must be in conformity with the terms of the ordinance

authorizing such grant or denial. 9 McQuillin, Municipal Corporations (3d ed. 1950), § 26. 73; Bohan v. Weehawken, 65 N.J.L. 490, 493 (Sup. Ct. 1900). Nor can such commission, board, body or person set aside, disregard or suspend the terms of the ordinance, except in some manner prescribed by law. Public Service Ry. Co. v. Hackensack Imp. Com., 6 N.J. Misc. 15 (Sup. Ct. 1927); 62 C.J.S., Mun. Corp., § 439.

The local Council, therefore, lacked power to grant the transfer for two reasons; first, because the applicant did not meet the first subsection of the ordinance; and, second, because the Council did not make a finding sufficient to justify the issuance under the second subsection of the ordinance. See Tube Bar, Inc., v. Commuters Bar, Inc., 18 N.J. Super. 352.

I conclude that appellant has sustained the burden pursuant to N.J.A.C. 13:2-17.6. of establishing that the action of the Council in granting the application herein was arbitrary, unreasonable and an abuse of its discretion.

Therefore, I recommend that an order be entered reversing the action of the Council.

#### CONCLUSIONS AND ORDER

No written Exceptions to the Hearer's Report were filed by the parties pursuant to N.J.A.C. 13:2-17.14.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits and the Hearer's Report, I concur in the findings and recommendations of the Hearer, and adopt them as my conclusions herein.

Accordingly, it is, on this 19th day of July, 1979,

ORDERED that the action of the Borough Council of the Borough of East Rutherford be and the same is hereby reversed.

JOSEPH H. LERNER  
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - SERVICE TO A MINOR - NO PROOF OF SERVICE -  
GLASS VIRTUALLY EMPTY - MINOR POSSESSED FALSE IDENTIFICATION - CHARGE DISMISSED.

In the Matter of Disciplinary  
Proceedings against }

S-11,701

X-51,252-G

The 223 Corporation  
t/a The Colonial Room  
Beef & Beer  
Rts. 130 & 73  
Pennsauken Mart  
Pennsauken Township, N.J. }

CONCLUSIONS

AND

ORDER

Holder of Plenary Retail Con-  
sumption License No. 0427-33-  
039-001 issued by the Township  
Committee of the Township of  
Pennsauken. }

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Michael S. Greenblatt, Esq., Attorney for the Licensee.  
Mart Vaarsi, Esq., Deputy-Attorney General, Appearing for  
Division.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

Licensee pleaded "not guilty" to a charge alleging that, on April 8, 1978, it sold, served and delivered an alcoholic beverage to a minor, under the age of eighteen years, in violation of Rule 1 of State Regulation No. 20 (now N.J.A.C. 13:2-23.1).

The Division called the minor, Maria S-- to testify in support of the charge. She testified that she is fifteen years of age, and, when she entered the subject premises on April 8, 1978, she carried with her a license of someone else whose age was twenty-three years. However, she was not asked her age by the management as she neither ordered nor received any alcoholic beverage whatsoever.

Her companions at the table at which she was seated were drinking and, during the few moments she was in the establishment, she admittedly took a cube of ice from one of the glasses at the table. At that moment, a local police officer then in the premises, approached her and asked her for her identification.



On cross-examination, Maria admitted that she and her boy friends had entered the premises solely to see if other friends of theirs were present. They did not enter with any purpose to have any drinks, nor did they order or receive any drinks of any kind.

Police Officer Charles E. Ghee of the Pennsauken Police Department testified in support of the charge that, on April 8, 1978, he was in the licensed premises with a Police Captain for the purpose of observing possible sales of alcoholic beverages to minors. He observed Maria and noted a glass on the table in front of her. He obtained identification from her, and immediately recognized that the identification was not hers, whereupon Maria admitted to her proper identification.

The glass on the table nearest to Maria had about a half inch of liquid in it. The contents of the glass were seized. The officer admitted not having seen Maria consume any liquid or actually take any drink whatever. He had sniffed the contents of the glass and determined that it had an odor of an alcoholic beverage.

Police Captain Harry Smalfus testified that he accompanied Officer Ghee to the licensed premises, and later was summoned to a table where the officer was receiving identification from Maria. He took the seized glass and poured it into an evidence bottle which was ultimately turned over to an ABC Agent. He, too, determined that the glass smelled of an alcoholic beverage.

ABC Inspector DL testified that the bottle containing the subject liquid was turned over to and examined by the Division Chemist, whose report was accepted into evidence. That report indicated the alcoholic content to have contained 1.3% alcohol.

In a similar matter, the Director of this Division has affirmed that the statements of a minor made as part of the res gestae have a greater weight of credibility than subsequent statements. Re: James V. Sylvester, Inc., Bulletin 2269, Item 1. At no point has Maria admitted consuming alcoholic beverage, even the residue of an alcoholic beverage in a glass at the table which she visited. Her only admission was that she took ice from one of the glasses at the table.

Disciplinary proceedings of this nature require proof by a preponderance of the believable evidence only, as these

actions are civil in nature. Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960).

In the subject matter there was insufficient proof upon which a determination that a sale or delivery to a minor could be based. There was no violation here that comes within the purview of the regulation. The minor upon whose testimony the Division's case rested, categorically denied any consumption of alcoholic beverage. The remaining witnesses testified solely as to the glass which contained an alcoholic beverage; neither could confirm that the girl actually drank from it.

Accordingly, it is recommended that the licensee be found not guilty herein and the charge be dismissed.

#### CONCLUSIONS AND ORDER

No written Exceptions to the Hearer's Report were filed by the parties pursuant to N.J.A.C. 13:2-19.6.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, and the Hearer's Report, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

I shall dismiss the charges herein with reluctance. I am satisfied that the proofs adduced failed to establish the charge by a preponderance of the evidence; however, the presence of false identification by the fifteen year old minor raises grave doubts that alcoholic beverage consumption may have occurred or had been intended by the minor. I am further concerned with a licensee permitting minors on licensed premises to sit at tables where alcoholic beverages are present.

Accordingly, it is, on this 19th day of July, 1979,

ORDERED that the license be and the same is found "not guilty" of the charge preferred, and said charge be and the same is hereby dismissed.

JOSEPH H. LERNER  
DIRECTOR

## 5. SEIZURES - ENUMERATED MISCELLANEOUS SEIZURE CASES

- SEIZURE CASE NO. 13,667 - On June 6, 1978 at a parking lot of the Bechtel Construction Company, Lower Alloways Creek Township, alcoholic beverages, miscellaneous personalty and \$425.85 in cash forfeited; 1977 Chevrolet Pick-Up Truck to be returned to Wilmington 451 Federal Credit Union which holds a \$4,272.24 lien on truck. Payment of requisite seizure and storage fees are to be made.
- SEIZURE CASE NO. 13,670 - On June 16, 1978 at or near 112 No. 16th St., East Orange, alcoholic beverages ordered forfeited. \$1,600.00 posted by claimant - \$400.00 returned to claimant, Estelle Green, for damages to vehicle. Balance of \$1,200.00 forfeited.
- SEIZURE CASE NO. 13,728 - On November 18, 1978 at Small Businessmen Ass'n., Paterson, alcoholic beverages, miscellaneous personalty and \$404.90 in cash forfeited.
- \$700.00 and \$100.00, posted by claimants, forfeited.
- SEIZURE CASE NO. 13,738 - On December 21, 1978 at 25 Fairhaven, alcoholic beverages, miscellaneous personal property and \$65.60 in cash, forfeited.
- SEIZURE CASE NO. 13,739 - On January 7, 1979 at premises of La Florida La Canella, Paterson, alcoholic beverages, miscellaneous personalty and \$23.45 in cash forfeited; \$350.00, posted by claimant, returned; \$200.00, posted by claimant, forfeited.
- SEIZURE CASE NO. 13,643 - On April 2, 1978 at or near Bergen and Willow Streets, Red Bank, Buick Riviera automobile and \$708.26 in cash. \$100.00 deposited by claimant, forfeited; \$600.00 deposited by claimant, returned; \$108.25 in cash and alcoholic beverages forfeited.
- SEIZURE CASE NO. 13,717 - On October 15, 1978 at unlicensed premises of Cafe Roma, 170 Lincoln Ave., Orange, alcoholic beverages, miscellaneous personalty and \$42.45 in cash. \$250.00, deposited by claimant, returned; \$750.00, deposited by claimant, \$42.45 in cash and alcoholic beverages forfeited.



SEIZURE CASE NO. 13,791 - On June 9, 1979 at unlicensed premises at a club on 71 North Main Street, Paterson, alcoholic beverages, miscellaneous personal property and \$98.67 in cash, forfeited; \$600.00, deposited by claimant, forfeited.

SEIZURE CASE NO. 13,754 - On February 24, 1979 at unlicensed premises on the second floor of a two-story building on 9 Lackawanna Avenue, Newark, alcoholic beverages, miscellaneous musical instruments, miscellaneous personal property and \$177.25 in cash forfeited; \$75.00, \$75.00 and \$75.00, deposited, forfeited;

SEIZURE CASE NO. 13,786 - On May 11, 1979 at unlicensed premises at S/E Corner of 4th and Royden Streets, Camden, alcoholic beverages, miscellaneous personalty, \$55.00 in cash, \$1,000.00, deposited by claimant, forfeited.

SEIZURE CASE NO. 13,779 - On May 6, 1979 at unlicensed premises in a restaurant at 30 Chestnut Street, Newark, alcoholic beverages, miscellaneous personalty and \$482.50 in cash forfeited.

\$350.00, deposited by claimant, returned;  
\$650.00, deposited by claimant, forfeited.

SEIZURE CASE NO. 13,753 - On February 25, 1979 at 133 Church Street, Swedesboro, alcoholic beverages, miscellaneous personal property and \$13.31 in cash forfeited.

\$600.00, deposited by claimant, forfeited.



## 6. STATE LICENSES - NEW APPLICATIONS FILED.

Louis and Concetta Graniero  
t/a Home Beverage Service  
125 North Dean Street  
Englewood, New Jersey

Application filed February 6, 1980  
for place-to-place transfer of state  
beverage distributor's license from  
17 E. Linden Avenue, Englewood, New Jersey.

The F. & M. Schaefer Brewing Co.  
Newark International Plaza  
U.S. Rt. 1 & International Way  
Newark, New Jersey

Application filed February 8, 1980  
for place-to-place transfer of  
limited wholesale license from  
22 Daniel Road, Fairfield, New Jersey.

K & M Imports Inc.  
One Executive Drive  
Fort Lee, New Jersey

Application filed February 13, 1980  
for plenary wholesale license.



Joseph H. Lerner  
Director