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

BULLETIN 2247 March 7, 1977

TABLE OF CONTENTS

ITEM

STATE OF NEW JERSEY
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1. APPELLATE DECISIONS - BANNER LIQUOR CO. et al. v. GUILD WINERIES AND DISTILLERIES, INC.

Banner Liquor Co., Dealers Liquor Company, F. & A. Distributing Co., Flagstaff Liquor Co. Garden State Wine and Spirits, Gilhaus Beverage Co., Inc. and Merchants Wine and Liquor Company, all being corporations of the State of New Jersey, Petitioners, v. Guild Wineries and Distilleries, Inc. Respondents.	On Appeal CONCLUSIONS and ORDER

Sidney Berg, Esq., Attorney for Petitioners
Friedman & D'Alessandro, Esqs., by Edward G. D'Alessandro, Esq., Attorneys for Respondents
Alan Strauss, Esq., of the California Bar, Appearing with Attorney for Respondents.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

The Petitioners are holders of Plenary Wholesale Licenses in the State of New Jersey and have, for several years, until May 15, 1975, been Respondent's distributors of their products identified by the label 'Roma'. On that date, the respondent notified the petitioners that their agency relationship was terminated, and that they no longer would be supplied with 'Roma' products for distribution in New Jersey.

The Petitioners filed this petition contending that the applicable statute, N.J.S.A. 33:1-93.6, forbids the disenfranchisement of Petitioners by respondent in that 'Roma' wines are a "nationally advertised brand" and that distributors of "nationally advertised brands" once selected, may not be thereafter terminated unless they are guilty of disparagement.

The respondent denies that its product is a "nationally advertised brand", hence the aforementioned statute does not apply; and, arguendo, even if the statute did apply, the petitioners "disparaged the respondent's product line and showed unfair preferment to other brands".

The statute upon which the petition is based is as follows:

"N.J.S.A. 33:1-93.6 Discrimination in sales to wholesalers

> There shall be no discrimination in the sale of any nationally advertised brand of alcoholic beverage other than malt alcoholic beverage, by importers, blenders, distillers, rectifiers and wineries, to duly licensed wholesalers of alcoholic beverages who are authorized by such importers, blenders, distillers, rectifiers and wineries to sell such nationally advertised brand in New Jersey."
>
> (underscore added)

The primary issue may be put simply as "Is Roma Wine a nationally advertised brand"? The Petitioners say that it is; the respondent says that it is not.

A hearing was held in this Division pursuant to N.J.S.A. 33:1-93.7 and State Regulation No. 15A, prior to which the Director had, on January 16, 1976, issued an Order granting interim relief to the Petitioners pending the determination of the merits of this petition.

At the outset of the hearing, counsel stipulated the factual background respecting the extent of the advertising program of Roma Wines, as stated in interrogatories served upon the respondent, the answers to which were not controverted.

Responding to an inquiry posed in the interrogatories, a list was furnished indicating the advertisements placed for Roma Wines during the past three years. From such list it appeared that advertisements appeared in newspapers distributed in the states of Arizona, Connecticut, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, North Carolina, Ohio, Rhode Island, Texas and Wisconsin. The annual advertising expenditures for 1973 were $191,775, for 1974 - $1,642 and for 1975 $56,355.

Having determined the extent of the Roma advertising, the Petitioner introduced testimony of Martin Greenspan, Myron Feldman Jerome Blumberg and Milton Cooper, all of whom have been engaged in the alcoholic beverage industry in New Jersey for many years. Each of the witnesses, in defining "nationally advertised brands" as such term is used in that industry, declared that any brand that was not a distillers or "house" brand, would be a "nationally advertised brand". The petitioners also introduced testimony of Albert S. Davis and Howard Schwartz, who have been associated with the retail

aspect of the alcoholic beverage industry. Each defined "nationally advertised brands" as any brand which a purchaser could purchase in any other store, in direct competition with them.

The Petitioners called, as their expert on advertising, retired professor, Dr. Daryl B. Lucas, who has taught advertising for many years at New York University. Professor Lucas opined that "national advertising" is all advertising other than local advertising. He was unequivocal in his judgment that any product which is sold in forty markets of the U.S. and is advertised in ten states as well as the regional editions of six national magazines is certainly a "nationally advertised" product.

The respondent called as its expert, Peter H. Dailey, the president of a Los Angeles advertising company and, formerly, a vice president of the national advertising firm of Foote, Cone & Belding. In his opinion, a "nationally advertised brand" is a brand which is advertised in sufficient of the major markets to touch the majority of the whole population. Certainly, the Roma advertising program is not nearly such a program. Additionally,in his professional opinion, no national advertising program could be launched at a cost of less than a million dollars, hence the budget of Roma, less than one hundred thousand dollars, is not nearly enough to represent expenditures necessary to make its advertising national in scope.

I

The phrase "nationally advertised brands" as used in the statute N.J.S.A. 33:1-93.6 has caused discomfort in the alcoholic beverage industry since its adoption in 1942. For an interpretive history of this legislation see All State Wine and Spirits, Inc., et al v. Laird's Inc., Bulletin 2181, Item 1. In Hoffman Import and Distributing Co. v. Frederick Wildman & Sons, Bulletin 1682, Item 1, aff'd in an unreported opinion by the Appellate Division (recorded in Bulletin 1881, Item 1) the Director determined that national advertising may be effected in several ways: (1) by the use of nationally circulated newspapers, magazines, television and radio; (2)by advertising in leading newspapers circulating in the major geographical areas; or (3) a combination of both. If local newspapers are used, a plan geared toward nation-wide coverage must be developed.

The alcoholic beverage industry is subjected to many rigid controls respecting its advertising. For example, no television advertising of whiskey is permitted, and all advertising of any kind to promote the sale of alcoholic beverages is prohibited in some states, and curtailed in others. Cf. Premier-Pabst Sales Co. v. State Bd. of Equilization (California), 13 Fed. Supp. 90.; State v. J.P. Bass Pub. Co., 104 Me 288 (1908); State v. State Capital Co. 24 Okla. 252 (1909). Contraints upon the alcoholic beverage industry require advertising campaigns to be carefully conceived; hence, the methods employed vary from the purveyance of other commoditites.

In All State... v. Laird's supra, the Director determined that Laird's advertising campaign, directed to some eastern states and limited to about $35,000.00, was not wide enough to be described as "national advertising"; hence Laird's was not a nationally advertised brand.

In the subject matter, the advertising for Roma embraced thirteen states and in one of three years, carried expenditures of $191,775. So many variables underlie advertising campaigns that it is extremely difficult to determine the desired result of a campaign merely by the amount of the funds expended, or the specific media used, or the areas in which the empasis of the advertisements are placed. As an example, Roma expended $24,662.00 for advertising in the State of Ohio in 1973, and nothing thereafter. Nonetheless, its sales of Roma wines for 1973 were 30,142 cases; almost the same amount in 1974; and in 1975 the number of cases sold diminished to 24,646. In contrast however, Roma spent $2,774 in 1973 in Arizona, nothing in 1974 and $2,184 in 1975. Its sales declined from 43,922 cases in 1973 to 7,542 in 1975.

Thus, in Hoffman Import... v. Wildman, supra, and All State v. Laird's, supra the Director found (1) that there was no advertising on a nation-wide basis, national in scope; (2) sustained and recent exposure; and (3) geared and oriented to the consumer and general public. Wildman's wines were "last advertised in national media during the 1950's; they have not been advertised in such media or in local newspapers or other acceptable medial covering the broad geographical areas of the country since 1959. Thus, these products have fallen short of meeting even the marginal requirements of national advertising as contemplated in the applicable section." Hoffman, supra.

The respondent declares that Roma Wines advertisements were, in 1972 and 1973, placed in the regional issues of nation magazines such as Women's Day, Family Circle, Ladies Home Journal, Redbook, Better Homes and Gardens, Playboy and Newsweek. The following year, advertisements were limited to the magazine Parade which is circulated within local sunday newspapers. For Roma Wines, Parade carried advertising to cover areas of Arizona and New Mexico in the southwest, Conncticut and Massachusetts in the northeast, New Jersey and Maryland in the middle atlantic states and in North Carolina for the eastern south.

In short, during 1973, 1974 and 1975, the advertising program for Roma Wines embraced a large part of the country. Although the manifest intent of such program was to capture certain "regional" areas, a composite of such regions constitute a large segment of the country. Apparently, the respondent relies upon the belief that Roma Wines, not having been advertised in all of the major markets of the United States, cannot be said to have been "nationally advertised". Such belief confuses "nation-wide" advertising with "national" advertising. The distinction between them, as explained by Professor Lucas, relates to the intent with which such terms are used. "Nation-wide" has a geographical connotation; "national" has an identity meaning. This is the basic difference, although sometimes the terms are used interchangeably.

As the Director said in Hoffman Import & Distribution v. Frederick Wildman & Sons, supra, "It is not unreasonable for the Legislature to conclude that consumer demand is generated by national advertising which makes a brand well known to consumers." In this case, the product was distributed and advertised principally in New England states; the Director concluded that there was no "national" advertising.

In the present matter, I conclude that Roma Wines are a "nationally advertised brand". The respondent's argument that they are advertised only in particular regions, and hence, are a regional product is not substantiated by the proofs. The table of distribution shows substantial distribution in the majority of our states and although the momentary advertising policy is apparently undergoing a change so that radio and newspaper advertising is being directed to particular areas, the brand of Roma Wines has had such coverage as to be classed as having been "nationally advertised".

II

N.J.S.A. 33:1-93.7 permits a wholesaler to petition the Director for a hearing whenever a distiller....refuses to sell his product to a wholesaler. The Petitioners herein contend that the respondent has refused to sell to them and that such action is discriminatory and in violation of that statute.

The respondent contends that the Petiomers have "disparaged" its product, caused business losses which resulted in the right of respondents to change wholesalers. The respondent contends that the Petitioners disparaged the product, i.e. showed unfair preferment in sales effort for those of a competitor or engaged in improper or proscribed trade practices, being standards of discrimination of a product as set forth in American B.D. Co. v. Seagrams, 107 N.J. Super. 264, (App. Div. 1969).

The respondent introduced the testimony of Walter Reil, its District Manager for New Jersey. He related a series of visits both to liquor distribution outlets, where he observed the failure of sellers to have favorable shelf space for Roma products, disregarding sales campaigns involving discount promotions. He visited the offices of the petitioners, where he complained about the unfavorable treatment the Petitioner's salesmen were giving to the Roma line.

The Regional Manager of respondent, Thomas Kelley testified that he had visited New Jersey repeatedly and was disappointed by the unfavorable treatment which Roma Wines received from many managers of distribution outlets. Roma's sales have been steadily declining, a situation which he attributes to the lack of interest in the product exhibited by the Petitioners and their salesmen.

Kelley recited figures which indicated that gross sales were reduced in New Jersey from 124,000 cases in 1972-73 to 92,000 in 1974-1975. He believed that a shift in public tastes from hard liquor to wines should have resulted in a sales growth during that

period, not a decline. Thus, he concluded that the Petitioners were not using effort in generating sales.

The testimony of both Reil and Kelly was at variance with one another, and the figures offered by Kelly further differed from those supplied in responses to interrogatories which showed the decline in sales in this State to be about parallel with the total decline of sales in the entire country.

In short, the testimony was far from conclusive in proving that petitioners had"disparaged" Roma Wines or had taken any affirmative action to hurt the sales of Roma products. At best, the respondent has proven only that Roma sales have declined in New Jersey, as well as in many other states.

I find that the respondents have not established that the Petitioners have conducted their business in such a way as to negate the interest of Roma Wines and,conversely, the Petitioners have established that the respondent has discriminated against them, as prohibited by the Statute and Regulations of this Division.

Accordingly, it is recommended that the petition filed herein be granted, and that an Order be entered by the Director giving to the Petitioners relief appropriate in the circumstances.

It may be noted here that the Petitioners have expressed an opinion in their memorandum that "....there are many other suppliers "waiting in the wings" for a decision to be rendered in this case which will permit them to disenfranchise many more distributors from their respective lines". While this may or may not have any validity, it is patently true that a continual requirement that the Director make determinations as to what is or is not "national advertising" in future cases, suggests a needed modification of the statute so that the legislature may redefine its intent by such proscription.

It appears from the attitudes and proofs established in this matter that there is sufficient concern within the industry for legislative action based upon the Director's recommendation. In short, the confusion to the industry by the use of the term "national advertised brands" should be put to rest.

Conclusions and Order

Exceptions to the Hearer's Report and accompanying argument have been filed by the respondent. Answering argument has been filed by the petitioners. Additionally, oral argument was held before me on the exceptions. The respondent takes exception to the interpretation given by the Hearer to the pertinent statutory phrase "nationally advertised brand" and the Hearer's application of such interpretation to the facts of this case. The petitioners contend that the Hearer correctly construed and applied the statute.

I find from the record herein that respondent sold its Roma brand wines during its fiscal years (July 1, 1972 to June 30, 1975) of 1973, 1974 and 1975 in, respectively, 36, 38 and 35 states in this country, but that sales in 20% or more of the retail outlets of the major markets in these states during such three years occurred in only 12 of such states, namely, Connecticut, Delaware, Maryland, Massachusetts, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Tennessee, Virginia and West Virginia.

I further find that respondent advertised these wines as follows: in fiscal year 1973, an expenditure of $191,775 covering 14 states; in fiscal year 1974, an expenditure of $89,632 covering 5 states; and in fiscal year 1975, an expenditure of $75,163 covering 8 states.

None of the states in which advertising appeared during the last two years is different from the ones in which advertising appeared during the first such year.

In 1973, such advertising appeared in three New England states, three Middle Atlantic states, two Southern states, three Midwestern states, and three Southwestern states. In 1974, advertising appeared in one New England state, two Middle Atlantic states and two Southwestern states, in one of which only $150 was expended. In 1975, advertising appeared in two New England states, three Middle Atlantic states, one Southern state and two Southwestern states. All of this advertising was in local newspapers (some of which included the Sunday supplement "Parade") and local radio stations, except that during "1972-1973" Roma advertising appeared in regional editions of seven nationally distributed periodicals covering 10 states. However, it is uncontroverted that, since 1973, only local newspapers and local radio stations were used to advertise these products.

The Hearer held that this amount of advertising, when combined with the distribution of Roma wines in a majority of the states of the country (at least 35 of 50 in each of the three years in question), is sufficient to constitute this a "nationally advertised brand" within the meaning of N.J.S.A. 33:1-93.6, et seq. In doing so, the Hearer implicitly accepted the petitioners' contention that such quoted term does not require nationwide advertising, but rather, only requires non-local advertising, i.e. advertising outside the immediate area in which the product is manufactured for the purpose of fostering sales of the product in general, as contrasted with advertising of the product by a retailer to foster sales at the retailer's premises. With this I do not agree.

The Hearer's interpretation of the phrase in question adopts the advertising trade's terminology of what constitutes "national advertising" as opposed to "local advertising." Its purpose is to differentiate between the two types of advertising in order to determine which of the two rates of advertising customarily charged shall be applied to a particular item. It is usual to charge a higher rate for national advertising. This definition does not require "national advertising" to be nationwide.

However, the statutory term is not concerned with advertising trade terminology. By enacting this statute, the legislature sought to restrict the distribution to wholesalers of only those products which are well known to consumers, and for which there is a consumer demand. The Legislature concluded that such demand is generated primarily by nationwide advertising of sufficient degree and recency to make a brand well-known to consumers throughout the country. It is this type of advertising, and not the rate-determining type in the advertising trade, that the Legislature had in mind.

It is this type of advertising to which our Supreme Court referred in construing this language in Canada Dry Ginger Ale, Inc. v. F. & A. Distrib.Co., 28 N.J. 444, 455 (1968) when it said that the legislation was intended to protect wholesalers who were "dependent upon a distiller for a supply of sought-after merchandise." The sought-after merchandise is not wine which is pro-

duced in one state and advertised merely in another state. It is wine which has been advertised substantially throughout most of the country. The advertising need not embrace every nook and cranny of each state, nor need it even encompass every state. But mere sales, without concomitant advertising, are not determinative.

These principles are embodied in prior Division precedents. See Hoffman Import & Distributing Co. v. Frederick Wildman & Sons, Bulletin 1682, Item 1; Hoffman Import & Distributing Co. v. S.S. Pierce Co., Bulletin 1826, Item 2, aff'd sub.nom. by the Appellate Division of Superior Court in an unreported opinion dated September 30, 1969 (Docket No. A-364-68): All State Wine and Spirits, Inc. v. Lairds, Inc., Bulletin 2181, Item 1.

In the said S.S. Pierce case, the Appellate Division agreed with this Division's interpretation of what is a "nationally advertised brand," citing as examples "Johnnie Walker," White Label, "Four Roses," Gordon's Gin," " or the like." Referring to the S.S. Pierce brand, the court said:

> "Its advertising of its 'alcoholic beverages' is 'regional' only and so very limited in financial outley as to negate 'national advertising' within the fair meaning of the statute. While nationwide magazines were mentioned, Hoffman offered no proof that Pierce's advertising therein was 'national' in scope."

Under the circumstances, it is not within my province to overrule this judicially approved long-standing interpretation of the statutory language in question. If the statute does not provide sufficient protection to New Jersey wholesalers threatened with the loss of lines of so-called "multiple" brands sold by two or more New Jersey wholesalers or of brands also sold in other states, the remedy lies in statutory amendment by the Legislature, not in a re-interpretation by this Division of the language at this late date.

My careful review of the entire record herein leads me to conclude that petitioners have not sustained their burden of establishing, by a preponderance of the evidence adduced, that Roma wines brand is a "nationally advertised brand" within the intendment of the statute. The limited geographical advertising, at most, amounts to regional, not national advertising. And the limited, decreasing financial outlay further negates advertising substantial enough to constitute advertising national in scope, as required by the statute.

In view of such finding, the jurisdictional facts necessary to support the application of N.J.S.A. 33:1-93.6, et seq., to respondent are lacking. It is, thus, unnecessary to deal with the secondary issue herein, namely, whether petitioners engaged in untoward conduct which would justify respondent's refusal to continue to sell them the Roma brand of wine.

I will, therefore, not accept the Hearer's recommendations, but will, instead, dismiss the petition.

Accordingly, it is, on this 24th day of November, 1976,

ORDERED that the petition filed herein be and the same is hereby dismissed.

JOSEPH H. LERNER
DIRECTOR

2. APPELLATE DECISIONS - JOSEPH KRANTZ CO., INC. v. ATLANTIC CITY ET AL.

Joseph Krantz Co., Inc., Appellant,	:	
v.	:	On Appeal
Board of Commissioners of the City of Atlantic City and 156 S. Tenth Ave., Inc., t/a Mary's Restaurant, Respondents.	:	CONCLUSIONS and ORDER

Samuel Krantz, Esq., by Stephen Nehmad, Esq., Attorneys for Appellant
Murray Fredericks, Esq., by William G. Lashman, Esq., Attorneys for Respondent-Atlantic City
Thomas W. Rauffenbart, Esq., Attorney for Respondent - 156 S. Tenth Avenue, Inc.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the Board of Commissioners of the City of Atlantic City (hereinafter Board) which, on June 24, 1976, adopted a resolution approving a person-to-person and place-to-place transfer of Plenary Retail Consumption License, C-96, from Haroula Poulathas t/a Palace Restaurant and Lounge to 156 S. Tennessee Ave. Corp., t/a Mary's Restaurant and from premises 1216-18 Atlantic Avenue to 156 South Tennessee Avenue, Atlantic City.

Appellant contends, in its petition of appeal, that the action of the Board was erroneous in that the proposed site of the license is in an area already adequately serviced by several other licensed premises; and that the proposed site is within two hundred feet of an existing licensed premises, hence such transfer is violative of the local ordinance.

The Board denied that its action was prohibited by its own ordinance, averring that the ordinance excepts such proximate transfers when the situs is to a restaurant in business for a minimum of fifteen years with a seating capacity of at least one hundred persons (Ordinance #18-1970).

A de novo hearing was held in this Division with full opportunity afforded the parties to introduce evidence and to cross-examine witnesses pursuant to Rule 6 of State Regulation No. 15. Additionally numerous exhibits, initially presented

to the Board at its hearing, were accepted into evidence and referred to during the examination of the witnesses presented.

It was determined at the outset of the hearing that there was no challenge to the grant of the person-to-person transfer; the appeal was solely directed to the place-to-place grant.

Appellant introduced Joseph Krantz as its sole witness. He testified that he owns the Fredonia Hotel and Bar which is located at 158-160 South Tennessee Avenue and abuts the building to which the transfer was approved. He described respondent's restaurant, Mary's as having had a maximum capacity of 90 persons for many years; however, in 1976, the premises were remodeled, and the capacity increased to some number over one hundred.

He described the street, South Tennessee Avenue, which runs from Pacific Avenue to the Boardwalk as a "dead-end", and parking is a gigantic problem. There are other licensed premises both on that street and in the area. Krantz admitted, in cross-examination, that his major objection to the transfer would be the prospective dilution of his profits. The hotel guests of respondent's hotel and restaurant have used his bar for liquid refreshment over many years, and this transfer may result in a loss of patronage to appellant.

Paul Tjoumakaris testified that he, his mother and brother are the owners of Mary's Restaurant. He admitted that, although the restaurant was in existence since 1930 it had contained a maximum of 72 seats. Thereafter, in 1975 the interior was entirely rebuilt and now contains 160 seats. Thus it now attracts a larger number of patrons, and an alcoholic beverage license is mandatory for it as a first class restaurant, to survive. He had no objections to the limitation of the license prohibiting any bar other than a service bar, and requiring that such service bar not be visible from the street. He declared that he and his family had spent $50,000. to $60,000. for the remodeling.

I

Of appellant's two principal grounds of appeal, one concerns Ordinance 18-1970, of which an extract of the pertinent section is as follows:

> ".....bona fide restaurants having a seating capacity of at least one hundred persons at tables, which restaurants have been in business at the same premises for at least fifteen years, shall be permitted to have a license transferred to said premises, even though said premises are within two hundred feet of the premises for which a license of either type is outstanding....." (Adopted: July 2, 1970).

Admittedly the above section is not as clear as it might be, but the Board avers, in its answer, that "This Ordinance has been interpreted that the minimum of one hundred (100) seats requirement must be made at the time of the application for transfer. It does not require that the seating capacity be in existence for 15 years prior to this application. The City of Atlantic City has so interpreted the Ordinance many times prior to the Respondent's application for transfer."

The Board maintains that since the respondent's restaurant has been in existence for fifteen years and has a present seating capacity of at least one hundred persons, the mandate of the ordinance has been fulfilled.

The number of patrons able to be seated at tables in any restaurant is, by its very nature, a variable. It is inconceivable that the City of Atlantic City would cause a requirement that each applicant wishing to come under the provisions of the ordinace be in an unenviable position of proving a total seating capacity in an establishment fifteen years earlier. It is more logical that the Board would restrict applicability of the ordinance to restaurants which were in existence for at least fifteen years, a fact which is easily provable, and to further require that such establishment be of sufficient size to presently accommodate at least one hundred patrons at tables. I find that the appellant's restaurant is entitled to the benefit of the ordinance.

II

Appellant's further contention that there is already an overabundance and saturation of licensed premises in the area is established by the testimony and exhibits showing the number of bars in the area. Were the respondent granted transfer with approval to operate another bar in the area, the challenge to the Board's action would have considerable merit.

However, the Board, in this instant matter, did not approve another bar; rather it permitted respondent restaurant to serve alcoholic beverages with meals as an adjunct to the restaurant business. Photographs of the interior of the restaurant introduced into evidence display an establishment that is an attractive eatery, typical of the many fine restaurants in Atlantic City, most all of which presently serve alcoholic beverages with meals. The Board, mindful of public needs, approved the transfer with the aforementioned condition.

The burden of establishing that the action of the Board in granting the transfer was erroneous and should be reversed rests with appellant. Rule 6 of State Regulation No. 15. The decision as to whether or not a license will be transferred to a particular locality rests in the first instance within the sound discretion of the local issuing authority. Hudson-Bergen County Retail Liquor Stores Association v. North Bergen, Bulletin 997, Item 2.

Where there is an honest difference of opinion in the exercise of discretion for or against the transfer of a liquor license, the action of the issuing authority in approving the transfer should not be disturbed. Paul v. Brass Rail Liquors, 31 N.J. Super. 211 (App.Div. 1954)

> In such appeals: " the Director conducts a de novo hearing ....and makes the necessary factual and legal determination on the record before him...under his settled practice, the Director abides by the municipality's grant or denial of the application so long as its exercise of judgement and discretion was reasonable..." Fanwood v. Rocco. 33 N.J. 404, 414 (1960)
>
> Further, "once the municipal Board has decided to grant or withhold approval of a premises-enlargement application...its exercise of discretion ought to be

accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of its discretion..." Lyons Farms Tavern V. Newark, 55 N.J. 292,303 (1970)'

I find no abuse or unreasonable action by the Board in approving the transfer, conditioned as it was to the prohibition of a regular bar and for its particular use in the intended restaurant.

Thus, I find that the appellant has not met its burden of establishing that the action of the Board is erroneous and should be reversed, as required under Rule 6 of State Regulation No. 15.

Accordingly, it is recommended that the action of the Board in approving the transfer to respondent be affirmed, and the appeal be dismissed.

Conclusions and Order

No exceptions to the Hearer's Report were filed pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire matter herein, including the transcript of the testimony, 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 1st day of December 1976

ORDERED that the action of the Board of Commissioners of the City of Atlantic City approving a person-to-person and place-to-place transfer of Plenary Retail Consumption License, C-96, from Haroula Poulathas t/a Palace Restaurant and Lounge to 156 S. Tennessee Ave. Corp. t/a Mary's Restaurant, and from premises 1216-18 Atlantic Avenue to 156 South Tennessee Avenue, Atlantic City, be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

JOSEPH H. LERNER
DIRECTOR

3. APPELLATE DECISIONS - DI ADAMO v. EVESHAM ET AL.

Joseph Di Adamo,	:	
Appellant,	:	On Appeal
v.	:	CONCLUSIONS AND ORDER
Township Committee of the Township of Evesham and Webco Products, Inc., a New Jersey Corporation,	:	
Respondents.	:	

Joseph Di Adamo, Appellant, Pro se
Hartman, Schlesinger, Schlosser & Faxon, Esqs., by Jan M. Schlesinger, Esq., Attorneys for Respondent, Township
Hersh Kozlov, Esq., Attorney for Respondent, Webco Products, Inc.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Appellant was one of several unsuccessful applicants for a new plenary retail consumption license, ultimately granted and issued by the respondent Township to the successful applicant.

He contends, in his petition of appeal, that the Township Committee of the Township of Evesham (hereinafter Committee) was deluded by the successful applicant (hereinafter, Webco) who furnished inaccurate information in its application respecting the scope and size of the proposed building it intended to erect. Respondent, in answers filed, denied this contention.

A de novo appeal was held in this Division pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded the parties to introduce evidence and cross-examine witnesses. Additionally, there was accepted into evidence copies of certain Committee records pertinent to the resolution of the Committee to open the rolls for an additional plenary retail consumption license, and its eventual grant to Webco as successful applicant.

The Committee further offered the testimony of the Township Mayor Sandra Shenfeld who gave a graphic explanation of the many activities the Committee engaged in during its process of determining who, among the applicants, should be granted the new license. She described her community (popularly known as Mariton) as

a rural municipality covering about thirty square miles, and containing 13,500 persons in 1970 which has expanded to a present estimate of twenty thousand.

She acknowledged that the vote for the successful applicant was narrow, but the majority of the Committee considered that Webco, by offering a new ratable of considerable amount, and locating its prospective place in an area of the Township not presently served, with ample parking, afforded the residents of her community a greater benefit than that of any other applicants, including the appellant.

Joseph Di Adamo, the appellant, testified that he is a thirty-year resident of the Township, and has been engaged in a catering business there for more than twenty years. He has been one of the motivators of the Committee's action to increase the number of plenary retail consumption licenses, principally so that he could have such a license to use with his catering business and in the house which he owns nearby to his home. Although he was an unsuccessful applicant, the vote of the Committee was divided, with two members favoring his application and the remaining three voting for the successful respondent. He expressed bitterness in that, notwithstanding his long business tenure in the Township and his several unsuccessful attempts to secure a license, he was not the successful applicant.

The burden of establishing that the action of the Committee was erroneous and should be reversed rests with appellant. Rule 6 of State Regulation No. 15 It is well established that the determination of what licensed premises are to be permitted to exist as well as what licenses are to be granted and to what locations, falls within the purview of the governing body of that municipality. Fanwood v. Rocco, 33 N.J. 404 (1960). The local issuing authority is vested with the discretionary authority to determine the number of licenses, if any, to exist in that municipality. Bumball v. Burnett, 115 N.J.L. 254 (1935).

N.J.S.A. 33:1-12 vests in the local issuing authority the right to determine what licenses, if any, that authority wishes to issue within existing population limits. The grant of a liquor license has been held to involve action judicial in nature. Dufford v. Nolan, 46 N.J.L. 87 (1884).

It is, of course, difficult for a municipal issuing authority to make a selection from among many qualified applicants, one of whom would best serve the needs of the community. Shop-Rite of Hunterdon County, Inc. v. Raritan, et al, Bulletin 2206, Item 3.

The plight of appellant, Di Adamo, in thrice being denied in his attempt to secure a liquor license for his catering business does, of course, evoke sympathy. However the Committee properly

concluded that the interests of the municipality, as a whole, takes precedence over the private interest of any particular citizen. BJB Corporation v. Lakewood, et al, Bulletin 2142, Item 2; Kelly v. Manalapan, Bulletin 531, Item 3; Cf. Forbes Liquors, Inc. v. Brick, et al, Bulletin 1641, Item 1.

From Mayor Shenfeld's graphic description of the difficulties the Committee encounters as a result of the population increase and the problems arising from Route 70, it is understandable that there would be approval of a large new restaurant facility to be opened on a fifty acre tract some miles from the hub of that growing community. Certainly the vote of the Mayor and her colleagues contrary to popular opinion and for the larger pubic good cannot be considered improvident or erroneous.

The appellant has thus failed to meet his burden imposed upon him by Rule 6 of State Regulation No. 15, as aforesaid.

Accordingly, it is, recommended that the action of the Committee be affirmed, and the appeal herein be dismissed.

Conclusions and Order

No Exceptions to the Hearer's report were filed pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire matter herein, including the transcript of the testimony, 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 2nd day of December 1976,

ORDERED that the action of the Township Committee of the Township of Evesham be and the same is hereby affirmed, and the appeal filed herein be and the same is hereby dismissed.

Joseph H. Lerner
Director

4. STATE LICENSES - NEW APPLICATION FILED.

Austin, Nichols & Co., Incorporated
733 Third Avenue
New York, New York
Application filed March 2, 1977
for place-to-place transfer of
Plenary Wholesale License W-17
to include premises in New Jersey
at 100 Galway Place, Teaneck,
New Jersey.

Joseph H. Lerner
Director