

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

BULLETIN 1466

August 16, 1962

TABLE OF CONTENTS

ITEM

1. DISCIPLINARY PROCEEDINGS (Dunellen) - NUISANCE (APPARENT HOMOSEXUALS) - SALE AND FAILURE TO CLOSE LICENSED PREMISES DURING PROHIBITED HOURS - LICENSE SUSPENDED FOR SEVENTY-FIVE DAYS.
2. APPELLATE DECISIONS - FOOD CITY BAR & LIQUORS, INC. v. WANTAGE.
3. DISCIPLINARY PROCEEDINGS (Jersey City) - GAMBLING (HORSE RACE BETS) - LOTTERY (NUMBERS AND HORSE RACE POOL) - SALE IN VIOLATION OF STATE REGULATION NO. 38 - SALE OF DRINKS FOR OFF-PREMISES CONSUMPTION - LICENSE SUSPENDED FOR 45 DAYS, LESS 5 FOR PLEA.
4. STATE LICENSES - NEW APPLICATION FILED.

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

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August 16, 1962

1. DISCIPLINARY PROCEEDINGS - NUISANCE (APPARENT HOMOSEXUALS) -
SALE AND FAILURE TO CLOSE LICENSED PREMISES DURING PROHIBITED
HOURS - LICENSE SUSPENDED FOR SEVENTY-FIVE DAYS.

In the Matter of Disciplinary)
Proceedings against)

James J. Tumulty and Anne Tumulty)
316 North Avenue)
Dunellen, New Jersey)

CONCLUSIONS

AND

Holder of Plenary Retail Consumption)
License C-4, issued by the Mayor and)
Council of the Borough of Dunellen.)

ORDER

John A. Lynch, Esq., by Edward R. Gavarny, Esq., Attorney for
Licensees.

Edward F. Ambrose, Esq., Appearing for the Division of Alcoholic
Beverage Control.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"Licensees pleaded not guilty to the following charges:

- '1. On July 8, 9, 16, 21, 22, August 12, 25 and 26, 1961, you allowed, permitted and suffered your licensed place of business to be conducted in such manner as to become a nuisance in that you allowed, permitted and suffered persons who appeared to be homosexuals, e.g., males impersonating females, in and upon your licensed premises; allowed, permitted and suffered such persons to frequent and congregate in and upon your licensed premises; and otherwise conducted your licensed place of business in a manner offensive to common decency and public morals; in violation of Rule 5 of State Regulation No. 20.
- '2. On July 16, 1961 between 1:00 A.M. and 1:15 A.M. and again on July 22, 1961 between 1:00 A.M. and 1:20 A.M., you failed to have your licensed premises closed; in violation of Section XVI of an Ordinance adopted by the Council of the Borough of Dunellen on July 2, 1934 as amended April 7, 1941.
- '3. On July 16, 1961 between 1:00 A.M. and 1:05 A.M., you sold, served, delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages on your licensed premises and on said date of July 16, 1961 between 1:00 A.M. and 1:15 A.M. and again on July 22, 1961 between 1:00 A.M. and 1:20 A.M., you allowed the consumption of alcoholic beverages on your licensed premises, in violation of Section XVI of an Ordinance adopted by the Council of the Borough of Dunellen on July 2, 1934 as amended April 7, 1941.'

"At the hearing held herein, six ABC agents testified with reference to the first charge. The primary testimony was given by Agent De, and his testimony was corroborated by the other five agents. The substance of their testimony is as follows:

"On July 8, 1961, at about 9:30 p.m., Agents M and R entered the licensees' premises and found a bartender, called Fran, serving eleven male and three female patrons. During the course of the evening, additional patrons entered until there were sixty male and four female customers present. At that time, another bartender named Jimmy (later identified as James J. Tumulty, the co-licensee), assisted Fran behind the bar. Six of the men appeared to be homosexuals, described as such by these agents because of their actions and characteristics. They talked in high-pitched voices and acted characteristically like women. Agent R testified that, on this occasion, while he was in the men's room, one of the apparent homosexuals made an indecent proposal and grabbed his private parts.

"On July 16, 1961, at about 12:15 a.m., Agents D and M entered the licensed premises and observed Jimmy, the co-licensee, and an unnamed bartender serving sixty male and two female patrons. They testified that both women appeared to be normal, but fifteen of the men gave every evidence of being apparent homosexuals. In addition, thirty other patrons were suspected of being apparent homosexuals, by their actions and speech.

"On July 21, 1961, Agents M and R entered the said premises, followed shortly thereafter by Agents S and De. On this occasion, Jimmy, the co-licensee, and a bartender called Ted were serving thirty-six male and three female patrons, and many of the male patrons appeared to be very effeminate in their talk and action. According to the testimony of Agent De, many of these men were attired in tight-fitting chino pants, trousers or dungarees. They had on polo shirts, bright and solid colored. Some had dress shirts with ties, other had shirts open to the chest, exposing a naked chest; some wore their hair long and combed back, and others were observed wearing loafers, white bucks and sneakers. These apparent homosexuals continually used limp-wrist action when they lifted their drinks; they extended their 'pinkies', held their cigarettes as a female would, and smoked their cigarettes very effeminately. They used many expressions, such as 'dear', 'sweetie', 'honey'. As they walked around the premises, they swished their hips from side to side in a female manner.

"Agent De stated further that he saw them sitting in couples and groups, fluttering their eyes at each other, openly touching parts of each others' bodies, buttocks, thighs and faces; and they would whisper into each others' ears. Shortly after he arrived, two of these apparent homosexuals came in and joined him and engaged him in a conversation, during which time the one continually 'grasped my arm, side and other parts of my body, and squeezed gently, and during the conversation asked if I wouldn't go along with them to their apartment'. During their conversation, one of these patrons said, 'Hey, look over there! Look at those two making love right in the open', pointing to the apparent homosexuals seated at the bar, hugging each other, one kissing the other on the ear. This was done while the co-licensee and the bartender, known as Ted, were in the immediate vicinity serving drinks to patrons. This agent then engaged the licensee in conversation, in which he asked him the following:

'Q. Where do the kids go from here?

A. To ---.

Q. Where was that?

A. Up the road...

- Q. Have the kids been coming here long because I just recently learned about it.
 A. I don't know what you are talking about.'

It was further testified that while Agent S was in the premises on this date, an apparent homosexual asked him what he was doing when another patron said, 'I'm cruising him', (meaning Agent S). Another patron fondled this agent on his buttocks in open view of the patrons. One of the patrons was heard to say, 'What a man, isn't he a big one, sexy, etc.'.

"On August 12, 1961, at about 9:25 p.m., Agent De entered the above described premises, being followed shortly thereafter by Agent S. At this time, the agents observed that the bartender, Ted, was serving customers, who, at the height of its activity, included thirty-one males and four females. At least sixteen of the men appeared to be definitely homosexuals, both by speech and actions as described hereinabove. On this occasion, too, Agent De was approached and accosted carnally by one of these homosexuals in the men's room, and an improper solicitation was made at the time.

"On August 25, 1961, at about 10:40 p.m., Agent De entered these premises, followed therein shortly by Agents S, G and R. On this occasion, the co-licensee, James Tumulty, and Ted were tending bar. Ted was later identified as Joseph Uskay, a full-time bartender. On this evening, the patronage consisted of one couple, fifty males and two unescorted females. Of the males, at least thirty-five appeared to be homosexuals. According to Agent De's further testimony, one of the apparent homosexuals named Harry invited him to sit at the bar with him. The agent was accompanied by Agent R. An indecent proposal was made to him at that time. Another apparent homosexual, called Clair, also known on these premises as Clara, introduced himself to these agents and left shortly thereafter to join another group. In the meantime, Agent G was approached by another apparent homosexual named Paul, who invited him to come to his apartment for 'a little pleasure'. Agent G told him that he was busy that evening, and so Paul gave him his telephone number and requested that he call him at a later time.

"A female entertainer, named Marge, had indicated her displeasure to Agent De at the fact that this was a 'gay bar' and that she was afraid that it might hurt her reputation. Agent De then spoke to Jimmy, the co-licensee, and asked:

- 'Q. Jim, didn't you tell her this was a gay bar when you hired her?

The co-licensee answered:

Why don't you shut up. Suppose there is an ABC man in here.

- Q. So what difference does it make?

- A. I don't care about personalities, just so long as they behave themselves.'

"At 12:05 a.m. on August 26, 1961, while Agent De was still on these premises, Harry, the apparent homosexual hereinabove referred to, made another indecent proposal to this agent. On this occasion, Agents De and R identified themselves to James Tumulty,

the co-licensee, and had a discussion with him in a rear room of the premises. They asked him how long had this 'gay' crowd been coming in here and the co-licensee stated, 'I don't know who is gay in here'. He then further stated, 'I don't care what their personality is as long as they behave themselves when they come in here'. He denied to these agents that he knew who was a homosexual and refused the invitation of Agent R to walk around the bar and listen to the conversation of these patrons. Tumulty stated, 'I'm not looking for that. All I'm looking for is business'; whereupon he left and returned to the bar. During the course of this conversation, it was noted that about thirty to thirty-five patrons, most of whom were apparent homosexuals, referred to in the above conversation, had left these premises. The bartender was asked why these patrons suddenly left the premises, and he stated, 'I don't know, maybe they don't like the entertainment, or maybe its too hot in here'. The bartender further noted that he had received no instructions to serve homosexuals or not to serve them, and it was his understanding that as long as they behave themselves they could stay. On cross-examination, Agent De was asked:

'Q. Did you see any act of homosexuality done on the premises in Jimmy's during any of the periods you testified to?

A. If you would term two males hugging and kissing at the bar an act of homosexual activity, I would say I did see some perversion. And the fact that I was grabbed (carnally) in the men's room, I would say that was.

Q. We have two now, right?

A. And the fact that they were fondling each other at the bar and talking in high, lispy tone of voices, touching and grabbing each other at the bar, using effeminate mannerisms, I would say that depicted some perversion or apparent homosexuals.

Q. Was either the licensee or any of his agents present when the act of kissing took place?

A. They were in the barroom at this time.

Q. Were they at or near where the act was performed that you saw?

A. I believe within a distance to see it. The bar isn't that large they couldn't see.

Q. To your knowledge did they see it?

A. I can't testify whether they saw it or not; they were able to see it.'

"This was the testimony which was substantially corroborated by the other agents, each agent testifying in corroboration of his observations during this particular visits on some or all of the dates hereinabove set forth.

"With respect to the second and third charges, the substance of the evidence discloses that Agents D and M entered the said premises on July 16, 1961 at 12:15 a.m. At 1:00 a.m. the co-licensee announced that he was closing but the patrons who had been served theretofore continued to consume their drinks. The agents finished

their drinks at 1:15 a.m. and left. Although several of the patrons still remained inside, the last patrons left these premises on this morning at 1:20 a.m.

"On July 21, 1961, at 11:20 p.m., Agents M and R entered these premises, followed shortly thereafter by Agents S and De. Shortly before 1:00 a.m. on July 22, 1961, the co-licensee announced a last call for drinks. Agent De was served his last drink at 1:05 a.m., which was five minutes after the legal closing hour. The other patrons, including Agent S, continued to drink and Agent S finally consumed his drink at 1:20 a.m. and left the premises, whereupon he was met on the outside by Agents M and R.

"James Tumulty, co-licensee, was the only witness for the defense, and he made a blanket denial of the charges. The substance of his testimony was that he did not know that any of his patrons were homosexuals; that he saw no overt acts as described by the ABC agents committed on his premises; that he could not, in fact, determine who was a homosexual. He further stated that when one of the agents made the following inquiry, 'Don't you like us queens?', and 'What is the matter, don't you want us in here, Jim?', he replied, 'Not if you can't behave yourself'.

"This witness further testified that when he was accused by the agents of catering to homosexuals, he told them that if they would point out any particular homosexuals, he would put him out.

"With respect to the second and third charges, this witness denied that he served any alcoholic beverages after 1:00 a.m. on July 16, 1961, and he was asked whether any alcoholic beverage was consumed after that time, to which he replied that if drinks were ordered before 1:00 o'clock, he permitted them to consume them after that time. He further insisted that his premises were closed at 1:00 o'clock on that day.

"On cross-examination, he energetically denied that he could recognize any homosexuals, nor did he know that they were there, if they were, in fact, present. He specifically denied that he saw any of the acts or actions as testified by the agents. He did admit that when the agents questioned him about Harry, he stated to them that if he would point to Harry and state that he was definitely a homosexual, that he would put him out. He stated, 'If he says Harry is a homosexual, I will put him out, but if he asks me why, I will say you said it'.

"The hearing was adjourned at the request of counsel for the licensee to permit him to produce the bartender. However, at the adjourned hearing, this witness was not produced.

"In rebuttal, Agent De denied asking the licensee, 'Don't you like us queens?'. He further specifically denied that he was part of the group which he described in his direct examination, or that he acted in any manner which would indicate to the licensee or anyone else that he was an apparent homosexual. Agent R corroborated this testimony. He reiterated, upon cross-examination, that when the licensee was questioned about hiring Marge without informing her that this was a 'gay place', the licensee angrily censured him and said, 'Why don't you shut up. Suppose there is an ABC man in here'.

"This case presents the sharp and definite conflict of six ABC agents as opposed to the testimony of the licensee. The licensee has taken the position that he saw nothing unusual either in the dress, characteristics, mannerisms, actions or behavior of any of the patrons, and appeared rather surprised that such persons could be so readily identified by the Division's witnesses.

"If, indeed, the testimony of the ABC agents is to be believed, to the effect that these patrons dressed and acted as described by them, then it would be highly ingenuous to accept as credible the licensee's testimony that he noticed none of these things on any of the occasions testified to.

"I have purposely gone into much detail to set forth the gravamen of these charges. I have tried not to repeat corroborative testimony, because I have felt that it is not necessary to go into every nook and cranny in order to delineate the substance of these charges. Within the four corners of Agent De's testimony are contained sufficient testimony as to what transpired on these days, if it is to be believed, to alert the licensee that his was an operation proscribed by the statute, and pertinent rules and regulations of this Division.

"For example, the presence of fifty males and two females on August 25th, in the circumstances described, should have made it crystal clear to the licensee that, standing alone, this was a suspicious circumstance. If, in addition to that, there was the characteristic dress as hereinabove detailed, the hugging and kissing and unsavory actions which apparently took place at the bar in the open view of the bartenders and the licensee, such conduct must have been observed by the licensee.

"It is no answer for the licensee to state that he did not see what was going on. Licensees may not avoid the responsibility for the conduct of the licensed premises merely by closing their eyes and ears. On the contrary, licensees must use their eyes and ears and use them effectively to prevent improper use of the premises. Re Ehrlich, Bulletin 1441, Item 5; Bilowith v. Passaic, Bulletin 527, Item 3. Moreover, a licensee is under a duty to exercise close supervision of his licensed premises, and violations occurring therein cannot be excused because he had no personal knowledge of them. Rule 33 of State Regulation No. 20; Stein v. Passaic, Bulletin 451, Item 5. After considering all of the testimony herein as to Charge 1, I am satisfied that the Division has proved the violations therein by a fair preponderance of the credible evidence. Re Carelis, Bulletin 1393, Item 2; Benedetti v. Board of Commissioners of Trenton, 35 N.J.S. 30, 113 Atl. 2nd 44.

"It is no defense to this charge that the licensee is not interested in the personalities of patrons so long as 'they behave themselves'. It has been well-established that the congregations of large numbers of homosexuals is inimical to the orderly conduct of licensed premises. It was not merely that these apparent homosexuals congregated; but I am satisfied that they conducted themselves in a manner which was offensive to public decency and morals. The open hugging and kissing at the bar, the numerous immoral proposals made to the agents, the indecent touching of parts of the agents' bodies by several of these patrons, and the general deviative and offensive actions and remarks made by them would indicate to me that there was such overt conduct which should have been observed and apprehended by the licensee.

"This was apparently more than mere innocuous male chit-chat, but constituted a constant form of activity in violation of the rules and regulations of this Division, and particularly Rule 5 of State Regulation No. 20.

"The liquor business must be carefully supervised and tightly restrained in the public interest, in accordance with the manifest design of the Alcoholic Beverage Control Act. Re Olympic, 49 N.J.S. 299, 307.

"The court observed In Re Schneider, 12 N.J.S. 449, at page 458:

'The object manifestly inherent in the rule with which we are here concerned is primarily to discourage and prevent not only lewdness, fornication, prostitution, but all forms of licentious practices and immoral indecency on the licensed premises.'

"The court further went on to state:

"Immorality" is not necessarily confined to matters sexual in their nature. In a given context the word may be construed to encircle acts which are contra bonos mores, inconsistent with rectitude and the standards of conscience and good morals. Its synonyms are: corrupt, indecent, depraved, dissolute; and its antonyms are: decent, upright, good, right. Webster's International Dict. (2d ed.).'

"The primary intent of the regulation is to suppress the inception of any immoral activity. This language was approved in Paddock Bar, Inc. v. Division of Alcoholic Beverage Control, 46 N.J.S. 405 (App. Div. 1957), where the court stated, at page 408:

'Assuredly, it is inimical to the preservation of our social and moral welfare to permit public taverns to be converted into recreational fraternity houses for homosexuals or prostitutes. It is the policy and practice of the Division of Alcoholic Beverage Control to nip reasonably apprehended evils while they are in the bud.'

"The counsel for the licensees energetically advocates that the absence of female garb on these apparent homosexuals would tend to exonerate these licensees from any liability on the first charge. I do not agree. This question was disposed of in a number of cases before this Division, and particularly in Re Kaczka and Trobiano, Bulletin 1063, Item 1, in which the following language appears:

'...counsel for defendants...contended that, because none of the male patrons was dressed in female attire or imitated the opposite sex, guilt on Charge 1 had not been established. There is ample proof that these patrons conducted themselves and acted like females, despite the lack of conventional female garb. Such apparel is not essential to a finding of guilt on Charge 1. Re One Thirty-five Mulberry St. Corp., Bulletin 892, Item 2.'

"Another contention of counsel was to the effect that these agents had investigated many cases of apparent homosexuality and were, therefore, experts and able to readily identify them; this licensee was not so equipped. However, I cannot believe that this licensee, having been in this business for many years, could have failed to recognize these apparent homosexuals in view of their manifest actions and behavior.

"It is, of course, not necessary to prove that these persons were in fact homosexuals. It is sufficient to show that they were apparent homosexuals. Herein lies the distinction between this case and the case decided in Re Murphy's Tavern, Inc., Bulletin 1374, Item 2, where the Director had this to say:

'In his briefs defendant's attorney calls attention to the admitted fact that all male patrons wore male attire. He argues that the evidence does not establish that any patron was in fact a homosexual and that the evidence is not sufficient to establish the nuisance charges. These arguments are fully answered in the decision of Judge Jayne in Paddock Bar, Inc. vs. Division of Alcoholic Beverage Control, 46 N.J. Super. 405 (App. Div. 1957), wherein it is said:

"If the evidence here failed adequately to prove that the described patrons were in fact homosexuals, it certainly proved that they had the conspicuous guise, demeanor, carriage, and appearance of such personalities. It is often in the plumage that we identify the bird. The psychiatrist constructs his deductive conclusions largely upon the ostensible personality behavior and unnatural mannerisms of the patient."

'Moreover the nuisance charges are established by the evidence which shows that these persons were permitted to congregate on the premises habitually and in inordinate numbers.'

"It is significant to quote the language of the court as bearing further on this contention in Murphy's Inc. v. Davis, 70 N. J. Super. 87, to the following effect:

'In the first place, the testimony outlined above undeniably demonstrates that an inordinate number of the patrons habitually congregating at the tavern displayed the dress, mannerisms, speech and gestures commonly associated with homosexuals. We have previously held that such concentrated mingling of persons manifesting these characteristics is sufficient foundation for an inference as to their actual condition and tendencies, and warrants punishment of any licensee who acquiesces in their assemblage upon his premises, Paddock Bar, Inc. v. Alcoholic Beverage Control Division, 46 N.J. Super. 405 (App. Div. 1957). Such a result is justified by the Division's policy, supported in law and in its own long-term practice, of thwarting reasonably apprehended sexual misconduct upon licensed premises in its embryonic stages. Cf. In re Schneider, 12 N.J. Super. 449 (App. Div. 1951).

'Secondly, aside from the question of actual homosexuality, the proofs herein are, considering our reviewing function, highly persuasive as to the overt acts of lewdness practiced upon the premises. The testimony of the agents with respect to the physical touching of private parts, the simulated kissing, and the suggestiveness of many of the conversations cannot be overlooked in this regard. And the recital of agent D. with respect to his encounter with Geddings, though denied by the latter, could reasonably be believed

by the hearing officer and the Director. Agent D's direct testimony that he was "propositioned", along with the reports of other conversations overheard by the investigators, provides ample support for the finding of guilt on the charge of soliciting.

'It should not be thought that the court is callous to the problem of the homosexual, medically or socially. The public interest in tight control over the liquor business, In re Olympic, Inc., 49 N.J. Super. 299, 306 (App. Div. 1958), certification denied 27 N.J. 279 (1958), involves, however, neither the curative approach of the physician nor the analytical view of the sociologist. The primary concern in this regard is maintenance of accepted standards of public decency and morality, and when these standards are, as here, impinged upon, proper sanctions are not only justified but are demanded.'

"The facts in the present case should have clearly indicated to the licensee that the inordinate numbers on many occasions of male patrons in this tavern who had the appearance and guise of being homosexuals, together with the actions and activities as hereinabove described, pointed to a clear violation of the rules and regulations of this Division. The admonition by the licensee to the ABC agent when he mentioned the word 'queens' to 'shut up...suppose there are ABC agents in here', satisfies me that he had a consciousness of the activities complained of.

"I am persuaded by the overwhelming testimony and the clear and convincing proof in this case that these licensed premises on the dates in question were the scene of large assemblages of apparent homosexuals; that the licensee knew or should have known of their presence and activities; and that he did, in fact, acquiesce in such assemblage, in violation of the intent and purpose of Rule 5 of State Regulation No. 20. Re Roselle, Bulletin 279, Item 8.

"With respect to the second and third charges, I think it is also abundantly clear that on the date set forth in the charges, the licensee permitted the sale, service, delivery and consumption of alcoholic beverages, in violation of the local ordinance. The licensee testified that he permitted the consumption of alcoholic beverages after the closing hour if they were in fact purchased before the 1:00 a.m. closing hour. This is in clear violation of the ordinance which proscribes and prohibits the consumption of alcoholic beverages after 1:00 a.m.

"Licensee is apparently under a misapprehension that if beverages were purchased before the closing hour, that patrons may be permitted to consume their drinks thereafter. When the ordinance set the time of closing at 1:00 a.m., it meant exactly what it said.

"Licensees are required to adhere strictly to the provisions of the local ordinance and to clear out the patrons and close the place on time. Patronage that is worthwhile will understand and will hold no grudge if told to leave at the closing hour. As the then Commissioner Burnett suggested in Re Four Hundred Social Club, Inc., Bulletin 242, Item 8: 'The rest of the customers will have to be herded out willy nilly'. The licensee should teach his customers the first lesson in parliamentary law, that a motion to adjourn is not debatable.

"The clear and convincing proof in this case substantiates the charges set forth hereinabove, and I recommend that the licensees be found guilty of all charges.

"Licensees have a prior adjudicated record. Effective February 24, 1947 the license of James J. Tumulty was suspended for sixty days by the Director (then Deputy Commissioner) for possession of illicit alcoholic beverages (Bulletin 742, Item 8; Bulletin 749, Item 2); effective July 7, 1954 his license, previously suspended for twelve days by the Mayor and Council of Dunellen for sale of alcoholic beverages to a minor, was affirmed on appeal and reimposed by the Director (Bulletin 1024, Item 3); effective July 19, 1954 his license was suspended by this Division for twenty-five days for indecent entertainment and hostess activity (Bulletin 1024, Item 5). In view of the fact that these dissimilar violations occurred more than five years prior to the date hereof, they will not be considered by me in recommending the imposition of penalty.

"I, therefore, recommend that an order be entered herein suspending the license for sixty days because of the finding of guilt involving the numerous violations contained in Charge 1 (Re Rutgers Cocktail Bar, A Corp., Bulletin 1133, Item 2) and for a period of fifteen days on Charges 2 and 3 (Re Johnnie's, Inc., Bulletin 1291, Item 1; Re The Barracuda, Bulletin 1255, Item 6), making a total suspension period of seventy-five days."

Written exceptions to the Hearer's Report and written argument thereto were filed with me by the attorney for the licensees pursuant to the provisions of Rule 6 of State Regulation No. 16.

I have given careful consideration to the evidence and exhibits herein, the arguments of counsel at the conclusion of the hearing, the Hearer's Report, the exceptions and written argument of counsel for the licensees in support thereof. I concur in the conclusions of the Hearer and adopt his recommendations. Hence, I find the licensees guilty as charged.

Accordingly, it is, on this 13th day of June, 1962,

ORDERED that Plenary Retail Consumption License C-4, issued by the Mayor and Council of the Borough of Dunellen to James J. Tumulty and Anne Tumulty for premises 316 North Avenue, Dunellen, be and the same is hereby suspended for the balance of its term, effective 1:00 A.M. Thursday, June 21, 1962; and it is further

ORDERED that any renewal license that may be granted shall be and the same is hereby suspended until 1:00 A.M. Tuesday, September 4, 1962.

WILLIAM HOWE DAVIS
DIRECTOR

2. APPELLATE DECISIONS - FOOD CITY BAR & LIQUORS, INC. v. WANTAGE.

Food City Bar & Liquors, Inc.,)
 Appellant,)
 v.)
 Township Committee of the)
 Township of Wantage,)
 Respondent.)

On Appeal

CONCLUSIONS AND ORDER

 Emanuel A. Honig, Esq., Attorney for Appellant
 Dolan and Dolan, Esqs., by Robert H. Lee, Esq., Attorneys for Respondent
 McGovern and Roseman, Esqs., by William J. McGovern, Esq.,
 Attorneys for Objectors John Westhoff and Mary Westhoff, and
 Sussex County Tavern Owners Association.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of respondent which, by resolution dated January 9, 1962, unanimously denied appellant's application for a person-to-person and place-to-place transfer of plenary retail consumption license No. C-1 specifically from Robert M. Bihn and Harriet Elizabeth Bihn, t/a The Log Cabin Inn, to appellant and from premises located on Route 94 to premises to be constructed on the easterly side of Route 23 southerly of and adjoining M and M Food City in the Township of Wantage. The distance between the two premises is approximately eight miles.

"Appellant in its petition of appeal alleges in substance that the action of respondent was erroneous in that it was arbitrary, unreasonable and capricious; that it was contrary to the laws and regulations of the State of New Jersey and of the Division of Alcoholic Beverage Control; that it was not reasonably supported by the evidence, and that it constitutes an abuse of respondent's discretionary powers.

"When the matter came on for hearing the transcript of the proceedings before respondent, including eleven exhibits and a true copy of respondent's resolution, were offered by appellant and received in evidence without objection.

"Since the resolution succinctly refers to the evidence adduced before respondent and states the grounds upon which that authority predicated its action, it is, excepting the first paragraph, set forth below:

'WHEREAS objections in writing to the transfer of said license were filed with the Township Clerk by twenty-one individual objectors and by petitions objecting to such transfer signed by approximately four hundred persons, and

'WHEREAS a public hearing was conducted by the Township Committee of the Township of Wantage on November 27, 1961, pursuant to notice given to all objectors, at which time all objectors were given the right to testify in respect to their objection and the right of cross examination was accorded to both the applicant and the objectors, and

'WHEREAS the Township Committee has examined the plans and specifications for the building proposed to be constructed by the applicant in connection with said application and has inspected the site to which said license is proposed to be transferred, and

'WHEREAS said Township Committee has duly considered the contents of the application, the plans and specifications, the proposed site and has considered and evaluated the testimony given and reported stenographically at the hearing of the objections;

'NOW, THEREFORE, the Township Committee of the Township of Wantage does hereby make the following determination with respect to said application and the objections made thereto:

1. The site to which the transfer is proposed to be made should not present any threat to or impairment of the morals of minors if the proposed business is properly conducted.

2. The traffic hazard which would normally result from the operation of the proposed business at said site would not be increased beyond the level of increase which would result from any other business being conducted at the same site.

3. The proposal by the applicant to utilize the license for the sale of package goods is not contrary to law.

4. There is no evidence before the Township Committee in respect to the objection that the stockholders of the applicant corporation are not bona fide holders of said stock.

5. The objections that approval of said transfer would result in harmful competition and would hurt the business of certain objectors engaged in similar businesses have no merit.

6. The objections of members of the clergy, although entitled to great respect, cannot be given legal effect.

7. The general area to which the proposed transfer is to be made already contains a sufficient number of plenary retail consumption licenses and there is no evidence before this committee of the need or necessity for another such license in the general area wherein said proposed site is located and such transfer would, in the opinion of this committee, result in an undue concentration of consumption licenses in said area and would not tend to fill a public need or necessity.

8. This committee finds that immediately adjacent to the site of the proposed transfer there is conducted a supermarket dealing in food and household supplies, known as "Food City" and that immediately adjacent to said Food City there is a general merchandise business conducted under the name of "Discount City", and that the personnel concerned with the operation of Food City and Discount City, either as owners, stockholders or employees, are to a considerable extent stockholders in the corporation known as Food City Bar and Liquors Inc. This committee recognizes that the sale of alco-

holic beverages in packages for off-the-premises consumption is not incompatible with the operation of a food store or supermarket. It also recognizes that a tavern is a legitimate business. However, in the opinion of this committee the presence of a bar for the dispensing of alcoholic beverages by the glass constitutes an invitation to a segment of the public whose interests may not be the purchase of food, household supplies, or alcoholic beverages in packages for off-the-premises consumption and that the operation of a tavern for the sale of alcoholic beverages by the glass, as virtually a part of, or in close proximity with a business dealing chiefly in the sale of food and household supplies, is not in the best interests of the community.

'NOW, THEREFORE, BE IT RESOLVED by the Township Committee of the Township of Wantage that for the reasons set forth in paragraphs 7 and 8 hereinabove stated the application of Food City Bar and Liquors Inc., a New Jersey corporation, for the transfer of Plenary Retail Consumption License No. C-1, heretofore issued to Robert M. Bihn and Harriet Elizabeth Bihn, trading as The Log Cabin Inn to said applicant and for transfer from premises located on the north-westerly side of Route 84, approximately two miles from the New York State line, Wantage Township, Sussex County, New Jersey, to premises located on the easterly side of Route 23, adjoining and south-erly to Food City Supermarket in Wantage Township aforesaid, be and the same is hereby denied.'

"Pursuant to Rule 8 of State Regulation No. 15, additional evidence was produced by the parties hereto.

"The additional evidence produced by appellant is an aerial photograph of the area of Route 23 between the Boroughs of Hamburg and Sussex in Sussex County (Exhibit A-11) which affords a bird's-eye view of the terrain and buildings thereon. Waldo H. Clarke, a land surveyor who prepared the photograph, testified in substance that the exhibit includes the area of the proposed site of transfer; that he personally inspected the area and made the measurements indicated on the exhibit; that the property along Route 23 from the Hardyston Township line to the Borough of Sussex is predominantly agricultural and commercial; that residential property is approximately one and one-quarter miles from the proposed site; that the nearest licensed premises are three-quarters of a mile south of the proposed site; that the next nearest premises are 85/100ths of a mile therefrom; that the next nearest premises are approximately 1.45 miles therefrom, and the next nearest premises (a package store) are 1.6 miles from the proposed site. Mr. Clarke further testified that Route 23 is a main thoroughfare in a north-south direction, and that Route 84 is a State Highway going 'generally east and west.'

"Robert M. Bihn (the holder of the license in question) was called as a witness for appellant and testified that, prior to the hearing on appellant's application, he had twice conversed with Committeeman Rome who, on the first occasion, said he saw no objection to transferring the license and, on the second occasion, after the Committee had attended a meeting of the tavern owners, said 'they couldn't -- the Township Committee couldn't go along with the transfer of the license.'

"On cross-examination Mr. Bihn admitted that the meeting of the tavern owners and the conversations he had with Mr. Rome took

place after a prior application for transfer of his license to the proposed site had been filed by an applicant other than appellant. It appears that the prior application was later withdrawn without prejudice.

"Committeemen George Clark and Harold Rome testified that they attended the aforesaid meeting of the tavern owners, and William Hough (who was elected a committeeman after appellant's application had been filed and who participated at the hearing on said application) testified that 'in general conversation with the public, we talked to them' respecting the transfer. However, each of the committeemen testified that he personally inspected the proposed site of transfer, measured the distances and inspected appellant's plans and specifications; that none of the discussions he had prior to the hearing on appellant's application influenced his judgment; that his decision was based upon a full consideration of all the facts and made in the best interests of the Township.

"The burden of proving that respondent abused its discretion rests upon appellant and it must sustain that burden by a preponderance of the proofs. Family Finance Corp. v. Gaffney, 11 N.J. 565, 575 (1953); Buyer v. West Orange, Bulletin 1205, Item 2. The burden imposed becomes heavy on appeal to the Division since, in a discretionary matter such as this, appellant must show either manifest error committed by respondent or an unreasonable abuse of its discretionary powers. Nordco, Inc. v. State, 43 N.J. Super. 277, 287; Rajah Liquors v. Div. of Alcoholic Beverage Control, 33 N.J. Super. 598, 600 (App. Div. 1955).

"The transfer of a liquor license to other premises is not an inherent or automatic right. The issuing authority may grant or deny the transfer in the exercise of reasonable discretion. If denied on reasonable grounds, such action will be affirmed. Gentes v. Middletown, Bulletin 1327, Item 1; Biscamp and Hess v. Teaneck, Bulletin 821, Item 8. See also Biscamp v. Teaneck, 5 N.J. Super. 172 (App. Div. 1949) where, as in the instant case, the issuing authority denied a transfer of a liquor license because it was of the opinion that there was no need or necessity for a liquor outlet in a particular section of the municipality.

"It has long been established that the number of liquor licenses which should be permitted in any area and the determination as to whether or not a license will be transferred to a particular location are matters within the sound discretion of the issuing authority (see Fanwood v. Rocco, 59 N.J. Super. 306) and that the Director's function on appeal is not to substitute his opinion for that of the issuing authority but, rather, to determine if proper cause exists for its opinion and, if so, to affirm irrespective of his personal views. Rothman v. Hamilton Township, Bulletin 1091, Item 1; Food Fair Stores of New Jersey, Inc. v. Union, Bulletin 1129, Item 1; The Grand Union Company v. West Orange, Bulletin 1155, Item 3.

"Having considered the testimony, the exhibits, the arguments advanced in briefs submitted by the attorneys for the parties hereto and by the attorneys for the objectors, I find that the evidence supports respondent's findings that the area to which appellant seeks to have the license transferred has sufficient liquor establishments to meet its needs. I further find that the unanimous action of respondent was neither arbitrary, capricious, unreasonable nor an abuse of respondent's discretion, and that the evidence is insufficient to show that the members of respondent committee were improperly motivated.

"I conclude, therefore, that appellant has failed to establish that respondent's action was erroneous, and I recommend that an order be entered affirming said action and dismissing the appeal."

Written exceptions to the Hearer's Report and written argument in substantiation of the exceptions were filed with me by appellant's attorney within the time limited by Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including the testimony, the exhibits, the briefs submitted at the conclusion of the hearing by the respective attorneys, the Hearer's Report and the exceptions and argument with respect thereto, I concur in the findings and conclusion of the Hearer and adopt his recommendation.

Accordingly, it is, on this 13th day of June 1962,

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

WILLIAM HOWE DAVIS
DIRECTOR

- 3. DISCIPLINARY PROCEEDINGS - GAMBLING (HORSE RACE BETS) - LOTTERY (NUMBERS AND HORSE RACE POOL) - SALE IN VIOLATION OF STATE REGULATION NO. 38 - SALE OF DRINKS FOR OFF-PREMISES CONSUMPTION - LICENSE SUSPENDED FOR 45 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against)

Villa Rosa, A Corporation)
t/a Villa Rosa)
364-366 Palisade Avenue)
Jersey City 7, New Jersey)

CONCLUSIONS

AND

Holder of Plenary Retail Consumption License C-526, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City.)

ORDER

Quirinus A. Ricciardelli, Esq., Attorney for licensee.
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to charges alleging that (1 and 2) on March 31, April 4 and 18, 1962, it permitted the acceptance of horse race and numbers bets and conducted a horse race pool, in violation of Rules 6 and 7 of State Regulation No. 20; (3) on April 4, 11 and 18, 1962, it sold various quantities of cans of beer for off-premises consumption, in violation of Rule 1 of State Regulation No. 38; and (4) on April 11, 1962, it sold two whiskey drinks in other than original containers for consumption off the licensed premises, in violation of R.S. 33:1-2.

Absent prior record, the license will be suspended on charges 1 and 2 for twenty-five days (Re Hillside Bowling, Inc., Bulletin 1448, Item 2), on charge 3 for fifteen days (Re Sabo, Bulletin 1449, Item 3), and on charge 4 for five days (cf. Re Lopiano, Bulletin

1146, Item 5), or a total of forty-five days, with remission of five days for the plea entered, leaving a net suspension of forty days.

Accordingly, it is, on this 13th day of June, 1962,

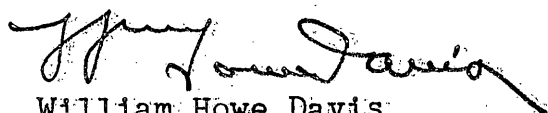
ORDERED that Plenary Retail Consumption License C-526, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City to Villa Rosa, A Corporation, t/a Villa Rosa, for premises 364-366 Palisade Avenue, Jersey City, be and the same is hereby suspended for the balance of its term, effective 2:00 A.M. Wednesday, June 20, 1962; and it is further

ORDERED that any renewal license that may be granted shall be and the same is hereby suspended until 2:00 A.M. Monday, July 30, 1962.

WILLIAM HOWE DAVIS
DIRECTOR

4. STATE LICENSES - NEW APPLICATION FILED.

Barnegat Beverage Distributors, Inc.
539 Mantoloking Road
Osbornville, Brick Twp., New Jersey
Application filed August 14, 1962 for Limited Wholesale License.


William Howe Davis
Director