BULLETIN 2465 March 13, 1995

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BULLETIN 2465 March 13, 1995

1. NOTICE OF RELAXATION OF APPLICATION OF N.J.A.C. 13:2-24.6(a)5 (AMENDMENTS TO CURRENT PRICE LISTINGS FOR NEW PRODUCTS).

Notice to New Jersey licensees and registrants of relaxation of application of N.J.A.C. 13:2-24.6(a)5 for petitioners who wish to introduce new alcoholic beverage products into New Jersey after the Current Price Listing (CPL) filing deadline date. Licensees and registrants who wish to seek approval will need to petition the Division, in affidavit form, and address: 1. that the amendment is being submitted in good faith and not for an improper competitive advantage; and 2. the reasons why the amendment is being filed out of time. Upon review of the submission, where cause is not shown to the contrary and all other regulatory requirements (i.e. brand registration of such new products) are satisfied, the Director will grant approval and permit the filing of an amendment to a CPL beyond the deadline date.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

Over the past several months the Division has received requests from suppliers and wholesalers seeking to introduce new products for sale in New Jersey after the deadline for filing current price lists. N.J.A.C. 13:2-24.6(a)5 prohibits licensees and registrants from filing amendments to their current price lists (CPLs) except upon approval of the Director of the Division of Alcoholic Beverage Control upon a determination that same is necessary to correct bona fide errors. By Notices contained in Bulletin 2421, Item 2 (dated July 22, 1981) and Item 3 (dated October 30, 1981) the industry was advised of the standards the Division would apply in assessing requests to amend CPLs for asserted bona fide errors, including the requirement that no request would be considered if received after 48 hours past the CPL filing date. Thereafter, by Bulletin 2460, Item 8B (dated June 2,

1993) further information was provided to members of the industry on the Division's standards. In that Notice we advised that while amendments received after the 48 hours would be presumptively denied, the Division would consider evidence that the delay in filing the amendment was caused by circumstances beyond the licensee's/registrant's control. Additionally, the Division stated consideration would be given to requests to amend CPLs for other than bona fide errors, where evidence was submitted and established that the failure to meet the CPL filing date was caused by circumstances beyond the licensee's/registrant's control.

I am herewith giving Notice to the industry that I have further relaxed the prohibition of filing CPL amendments after the deadline date, to permit such filings for purposes of introducing new alcoholic beverage products into the New Jersey marketplace. Licensees and registrants who wish to seek approval for a late filing are required to petition the Division, by affidavit, and address the following matters:

1. That the amendment is being submitted in good faith and not for an improper competitive advantage. (Besides making this representation, petitioners must also provide information as to the pricing strategy they are following in introducing the product(s) into the marketplace, including the suggested prices for the various sizes and case discounts, and the names of the anticipated major competitive product(s) they expect to compete against, their manufacturers and their filed prices for comparable sizes and case discounts.) AND

2. The reasons why the amendment is being filed out-of-time. (Petitioners must provide dates and details of their activities in attempting to meet the CPL filing deadline and specify what events occurred which prevented it from meeting the CPL filing deadline. Where delays are attributed to suppliers, corroborating letters from the suppliers should be submitted with the petition.)

Thereafter, upon a review of the submission and any other relevant proofs deemed appropriate, where no cause is shown to the contrary, I will grant approval and thereby provide relief from the restriction of N.J.A.C. 13:2-24.6(a)5 and permit the filing of an amendment to a CPL beyond the deadline date.

It must be stressed that licensees/registrants are required to meet all other regulatory requirements, including brand registration of such new products with this Division before solicitation or sales activities can commence in this State. N.J.S.A. 33:1-2(c) and 2(d); N.J.A.C. 13:2-33.1 through 33.2. Licensees and registrants are reminded that, depending upon the Division's workload demands, delays in brand registration may occur, especially during pre-holiday periods.

This policy will also be considered by the Division during its current review of all its regulations for purposes of amendment, repeal and re-adoption under the Sunset Act.

JOHN G. HOLL
ACTING DIRECTOR

Dated: September 30, 1994

2. APPELLATE DECISION AFFIRMING DIRECTOR'S FINAL DECISION IN THE MATTER OF THE GRAND VICTORIAN HOTEL V. BOROUGH COUNCIL OF SPRING LAKE.

Bulletin 2463, Item #6 contains the determination of the Alcoholic Beverage Control to reverse the local issuing authority and to order the transfer of a seasonal consumption license to the appellant in the matter of The Grand Victorian Hotel v. Borough Council of Spring Lake. The Superior Court of New Jersey, Appellate Division, in an unreported, per curiam decision filed on July 1, 1994, affirmed the Division's Final Decision ordering the transfer of the seasonal consumption license to the Grand Victorian Hotel.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-0924-93T3

THE GRAND VICTORIAN HOTEL,

Petitioner-Respondent,

v.

BOROUGH COUNCIL OF THE
BOROUGH OF SPRING LAKE,

Respondent-Appellant.

Argued June 14, 1994 - Decided July 1, 1994

Before Judges Dreier and Kleiner.

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

James A. Carey argued the cause for appellant, Borough Council of the Borough of Spring Lake (Carey and Graham, attorneys; Mr. Carey, on the brief).

Beatrix W. Shear argued the cause for respondent, The Grand Victorian Hotel (Riker, Danzig, Scherer, Hyland & Peretti, attorneys; Ms. Shear, on the brief).

Allan J. Nodes, Deputy Attorney General, argued the cause for respondent, Division of Alcoholic Beverage Control (Deborah T. Poritz, Attorney General, attorney; Mr. Nodes, on the statement in lieu of brief).

PER CURIAM

The Borough Council of the Borough of Spring Lake appeals a decision of the Director of the Division of Alcoholic Beverage Control transferring a seasonal retail consumption license to The Grand Victorian Hotel. We affirm.

In 1991, the owners of the Grand Victorian Hotel, a twenty-five room bed and breakfast facility, applied to the Borough Council for the transfer to it of an inactive seasonal retail

consumption license which was offered for sale by its registered owner. After a public hearing, the Borough Council adopted Resolution #128 denying the requested license transfer. The council concluded that the proposed licensure would increase traffic and parking problems and would increase noise in a residential R-1 zone due to the close proximity of the Grand Victorian to an existing large hotel, the Breakers, which is a licensed liquor facility. The owners of the Grand Victorian filed an appeal from the Borough's decision with the Division of Alcoholic Beverage Control and the appeal was referred to the Office of Administrative Law as a contested case. A de novo proceeding, N.J.A.C. 13:2-17.6, was scheduled before an administrative law judge who concluded:

> 1. The proposed transfer of the license in question to The Grand Victorian Hotel will not increase the need for parking in the area around The Grand Victorian. It will not increase the traffic around The Grand Victorian Hotel during the months when the license would permit the sale of alcoholic beverages at the hotel. The transfer will not increase the number of people patronizing the petitioner's hotel and restaurant. The proposed transfer will not increase the number of weddings and receptions the petitioner now holds, nor will it increase the number of people attending these wedding and receptions.
>
> 2. The proposed transfer of the license to the petitioner would not increase the amount of alcohol presently consumed by patrons of the petitioner in its restaurant and party rooms. The proposed transfer would give the petitioner more control over the consumption of alcoholic beverages in these facilities. The proposed transfer would reduce the number of people who bring their own alcoholic beverages into the petitioner's restaurant and would discourage patrons from providing their own alcoholic beverages at weddings and receptions.
>
> 3. The petitioner's willingness not to have a permanent bar would discourage people coming off the street and the beach just to have a drink at The Grand Victorian Hotel.
>
> 4. There is insufficient evidence that the proposed transfer would create dangers to the public health, safety, morals and general welfare commonly

recognized as incidents of the sale and consumption of alcohol....[T]here is no evidence that the proposed transfer by itself would have a negative impact in the area that is not already present with the operation of the petitioner and the Breakers.

5. There is insufficient evidence that an overwhelming majority of persons in the area are vehemently opposed to the proposed transfer. Eighteen (18) or Nineteen (19) people testified before the respondent and the undersigned. They described traffic, parking and noise that one would normally find near a hotel located on the beach in the summer time.

6. The respondent may put reasonable conditions on the use of the license and may describe the area of the petitioner's facility which can be used for the sale of alcoholic beverages. The petitioner's offer not to have a permanent bar is a reasonable condition.

Accordingly, the administrative law judge recommended that the decision of the Borough Council be reversed. The Director of the Division of Alcoholic Beverages substantially accepted the recommendation but imposed two special conditions:

(1) a permanent standing bar is hereby prohibited; and

(2) the Grand Victorian Hotel is restricted to having only a service bar in order to provide Alcoholic Beverages to guests that are dining in its restaurant, utilizing its party rooms, or receiving room service while staying in the hotel. All other sales, service, delivery or consumption of alcoholic beverages, is prohibited.

In an appeal from a denial of a liquor license transfer by a municipality, the applicant has the burden to establish that the municipal governing body, as the license issuing authority, acted arbitrarily, unreasonably, or capriciously in its decision. Lyons Farms Taverns, Inc. v. Mun. Bd. of Alcoholic Beverage Control, 55 N.J. 292, 303 (1970). Although the municipal issuing authority is vested with a high degree of discretion, its decisions are subject to review by the Director of the Division of Alcoholic Beverage Control where the decision is a result of an abuse of discretion, a

manifest mistake, or is found to be clearly unreasonable. Lubliner v. Bd. of Alcoholic Beverage Control, 33 N.J. 428, 446 (1960); Paul v. Brass Rail Liquors, Inc., 31 N.J. Super. 211, 214 (App. Div. 1954); Rajah Liquors v. Div. of Alcoholic Beverage Control, 33 N.J. Super. 598, 600 (App. Div.), certif. denied, 18 N.J. 204 (1955); Blanck v. Mayor and Borough Council of Magnolia, 38 N.J. 484, 492 (1962).

The judicial standard of a review of an administrative agency such as the Division of Alcoholic Beverage Control is:

> "`[W]hether the findings made could reasonably have been reached on sufficient credible evidence present in the record,'considering `the proofs as a whole,' with due regard to the opportunity of the one who heard the witnesses to judge of their credibility ... and ... with due regard also to the agency's expertise where such expertise is a pertinent factor."
>
> [Matter of Fiorillo Bros. of N.J. Inc., 242 N.J. Super. 667, 675 (App. Div.), certif. denied, 122 N.J. 363 (1990) (quoting Mayflower Sec. v. Bureau of Sec., 64 N.J. 85, 92-93 (1973) (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965))).]

In this appeal, the Borough has merely reiterated the conclusions originally articulated in its Resolution #128. It has failed to articulate any evidential basis for those general conclusions other than to review the personal opinions of approximately eighteen area residents who appeared at the license transfer hearing. The administrative law judge did not render his decision upon the speculative conclusions of area residents. His conclusions were grounded on an analysis of the actual usage of The Grand Victorian without a liquor license operating adjacent to another facility with a liquor license. The conclusion that adding a liquor license would not increase patronage or increase parking problems in the area was well founded in the record. That evidence was sufficient to justify the conclusion that the municipal council acted solely in response to public sentiment.

The Director's decision adopting with modification the recommendation reversing the Borough Council is clearly based upon credible evidence in the record. Additionally, the Director's expertise must be accorded great weight in our review. The specific prohibitions imposed as special conditions were designed

to further guarantee that some fears expressed by local residents would not materialize. The Borough has failed to demonstrate that the aim of those special conditions is speculative or unreasonable. In this regard, we note specifically the pertinent section of the Director's findings:

> Our review of the record, particularly the testimony of the residents of Spring Lake and the Acting Police Chief, reveals that these witnesses exhibited concerns which were primarily based on their negative assumptions regarding the impact that a permanent standing bar would have on the surrounding neighborhood.... [T]he record is clear that the [Hotel], sua sponte, has expressed a willingness to not have a permanent bar. The [Borough of Spring Lake] rejected this solution, indicating its belief that same was unenforceable.
>
> The lack of a standing bar would discourage people from visiting the neighborhood (where the hotel is located) whether they were from other towns or the beach area, for the mere purpose of purchasing alcoholic beverages at the hotel. Since [The Grand Victorian] is willing to only provide alcoholic beverages to its bona fide patrons via a service bar, this proposal appropriately addresses [the Borough's] perceived public health and safety concerns. I shall so impose the necessary conditions in order to effectuate such limitation of alcoholic beverage activity at this location.

Although a municipal governing board may and should render its decision with consideration to the views of the public who oppose transfer, Lyons Farms, supra, 55 N.J. at 305, it must accede to the demands of citizen witnesses only when those demands are founded upon provable facts. In this case, the citizenry both before the municipality and at the de novo proceeding offered repetitive conclusions without any credible evidence or expert opinion to substantiate their common allegations. The Director was correct in disregarding those allegations. The Great Atlantic & Pacific Tea Co., Inc. v. Mayor and Council of the Borough of Point Pleasant Beach, 220 N.J. Super. 119, 128 (App. Div. 1987).

The decision of the Director of the Division of Alcoholic Beverage Control is affirmed.

3. EXPLANATION OF PENALTIES FOR VIOLATION OF STATE LAW PROHIBITING THE SALE OF CIGARETTES TO A MINOR.

A recent survey conducted by the N.J. Department of Health in conjunction with local public health officers sought to determine the availability for sale of cigarettes to persons under 18 years of age. Included in the survey were fifty-nine (59) retail alcohol establishments. The general result of the survey determined that in 84% of the cases, involving all types of retail establishments, minors were able to purchase cigarettes.

N.J.S.A. 2A:170-51 prohibits the sale of cigarettes to persons under the age of 18. The statute provides that:

> "Any person who directly or indirectly, acting as agent or otherwise, sells, gives or furnishes to a minor under the age of 18 years, any cigarettes made of tobacco or any other matter of substance which can be smoked, or any cigarette paper or tobacco in any form, including smokeless tobacco, shall be punished by a fine of $250.00."

The offense can be charged in municipal court. The ABC interprets the statute to apply to both the licensee and any person who sells the cigarettes. Liability would be incurred for allowing a minor to purchase from a cigarette vending machine on a licensed premises, as well as for other means of providing cigarettes (e.g., an over the counter sale).

The ABC imposes a penalty of up to $150.00 for a first offense. A second offense may result in a penalty of up to $300.00 and a third offense may result in elimination of the conduct of other businesses on the licensed premises in addition to a monetary penalty. The application of a graduated penalty is not dependent upon a judicial or administrative disposition of a prior offense. In addition to ABC penalties and a fine in municipal court, a multiple offender faces action by the NJ Division of Taxation against the license to sell cigarettes.

RTC

4. OPINION LETTER - PROVIDES FOR ABBREVIATED QUALIFICATION OF A LARGE SECURED CREDITOR IN VERY LIMITED CIRCUMSTANCES.

An opinion letter advising that when dealing with the multiple transfer of a license which was purchased by a large secured creditor corporation from a trustee in bankruptcy, the Division authorizes local issuing authorities to designate a specific officer who shall apply for the transfer of the license on behalf of the corporation. This opinion is applicable only to the very limited circumstances presented. This letter is the opinion of the Director of the New Jersey Division of Alcoholic Beverage Control which the municipal issuing authorities may choose, in their discretion, to accept.

August 26, 1994

J. Kenneth Harris, Esq.
White & Williams
Suite 300
222 Haddon Ave.
Westmont, New Jersey 08108-2828

RE: TRANSFER OF PLENARY RETAIL CONSUMPTION LICENSE NO. 0409-33-039-007 ISSUED BY THE TOWNSHIP OF CHERRY HILL TO SOA REALTY CORPORATION/TRANSFER BY AGENT

Dear Mr. Harris:

Receipt is acknowledged of your correspondence requesting an opinion on the transfer of an alcoholic beverage license. The issue as you summarize involves the problem of the multiple transfer of a license which was purchased by a large secured creditor corporation from a Trustee in Bankruptcy. The creditor wishes to transfer the license to itself and then immediately to a third party. The problem involves the extent of background checks and investigation through the extended chain of corporate entities, officers and shareholders of the creditor.

In your specific situation, your client, SOA Realty Corporation, through its predecessor in interest, GVS Investments, Inc., was the owner of the above-referenced license. In 1989, SOA Realty sold the license to Seafood Shanty and took back several promissory notes. Subsequently, Seafood Shanty defaulted on the loan and filed for bankruptcy. Pursuant to the U.S. Bankruptcy Court Order dated June 9, 1994, the license was sold to SOA Realty

in exchange for the payment of $75,000.00 and the release of an administrative claims for unpaid rent and the release and discharge of its security claim for a total amount in excess of half a million dollars.

SOA Realty currently has and is negotiating with a potential buyer for the real-estate and license. It is the intent of the creditor to hold the license for an extremely short period of time and it would remain inactive. In essence, SOA Realty, at this juncture, is merely an investor or lender of money and seek to recoup its loss by selling the license. SOA Realty will not use or activate the license but merely sell it to the third party user.

The major problem posed in this transfer is that SOA Realty Corporation is a wholly owned subsidiary and of Subaru of America, Inc. Subaru of America, Inc., in turn is owned by Fuji, Heavy Industries, Ltd., and Fuji Heavy Industries, U.S.A., which are ultimately controlled by the Japanese Parent Corporation. Therefore, it would appear that the investigation, fingerprinting and background checks through the entire corporate chain of officers, directors and shareholders would be quite time consuming and lengthy. This is critical in light of the fact that the buyer might be available for immediate transfer which would be delayed many months while the entire investigation through the corporate chains proceeds.

The problem posed requires review not only of the facts and circumstances of this case, but also the competing requirements and intent of the Alcoholic Beverage Control Act. N.J.S.A. 33:1-25 and 33:1-26 set forth the requirements and qualifications for entities that wish to hold or have transferred to them Alcoholic Beverage Licenses. Specifically, no license may be issued to any person under the age of 18 or one who has been convicted of a crime of moral turpitude. In cases of corporation, all shareholders holding 1% or more of the stock and all officers and members of the board of directors must be listed and qualified in order for the license to be transferred. The necessity for these requirements are obvious since one of the primary purposes of the Alcoholic Beverage Control Act is to avoid the infiltration by persons with known criminal background, habits or associations, and also to insure and maintain a three tier system for the sale and distribution of alcoholic beverages. Therefore, it is necessary to ensure that all persons who have or could control the sale of alcoholic beverages through a particular license must meet these qualifications and do not use a subsidiary or holding company as a means to bypass, circumvent or violate these laws.

On the other hand, as can be seen as a result of the large number of loan failures that occurred during the 1980's, many investors especially large banking institutions and other secured creditors have been forced through foreclosure or bankruptcy to take ownership of the licensed entity and license. These companies are normally not in the business of selling alcoholic beverages but are now confronted with the situation of qualifying as licensees in order to sell the license to recoup there losses. If a license cannot be sold without a long time consuming investigation, a potential sale could be lost and any additional financing by the secured creditor would be extremely doubtful. Therefore, a dichotomy of purposes has developed in the Alcoholic Beverage Control Act. On one hand it is required by statute that all persons involved with the sale of alcoholic beverages must qualify; on the other, the Division is required to maintain trade stability and create a marketplace that fosters competition. Thus, a balance must be struck to ensure both purposes are satisfied and do not frustrate each other.

Upon review, I am satisfied that the intent and purpose of the Alcoholic Beverage Control Act permits in these very limited circumstances an abbreviated qualification of the entity or individual that will hold the license in its inactive state for a very short period of time before transfer. The parent organizations as posed in this case are publicly traded, nationally known and are not in the business of selling either at retail or wholesale, alcoholic beverages. These corporations merely seek to recoup their loss as can be seen in this case where the proposed license will be sold for $133,000.00 which is the approximate amount of forgiveness of debt that the proposed licensee paid in bankruptcy. Moreover, in these situations, it is necessary to maintain some type of market stability where licensees may seek loans and investments for their business and investors are comfortable that security is available, especially in light of todays market. If this procedure is not allowed, it would appear that the number of investments and loan institutions that would offer funds to alcoholic beverage licensees would be very limited and very expensive. Moreover, I am satisfied that sufficient safeguards can be put into effect to insure in these limited circumstances that the statute and regulations regarding qualifications are not bypassed.

Therefore, as suggested in your correspondence, SOA Realty may be allowed to designate a specific officer who shall apply for the transfer of the license on behalf of the corporation. This person must be fully investigated and qualified. In addition, SOA Realty must submit an affidavit indicating to the best of its knowledge

the officers, directors and shareholders of its parent corporations would, if any investigation were required, qualify to hold a license under the Alcoholic Beverage Control Act of New Jersey. The issuing authority, at this point in time, may, if it is satisfied that all other requirements have been met, transfer the license to the individual on behalf of SOA Realty, then immediately transfer the license to the entity that will ultimately be operating the license.

I finally note that this is merely the opinion of the Director of the Division of Alcoholic Beverage Control which the municipal issuing authority may choose to, in its own discretion, accept. Obviously, this license will be transferred by the Township Committee of the Township of Cherry Hill and if, in its own discretion, it feels that a full and extensive investigation is necessary, then it is within its rights and duties to require that type of investigation. By no means is this opinion issued as a directive to the local issuing authorities prohibiting them from conducting a further or more extensive investigation if they so choose based upon whatever variables they feel are necessary.

This license may be transferred within the discretion of the local issuing authority to an individual officer of SOA Realty who must be fully qualified pursuant to the Alcoholic Beverage Control Act. In addition, there must be submitted by SOA Realty a full and complete affidavit indicating that to the best of its knowledge, that all officers, directors and shareholders within the corporate chain do qualify pursuant to the provisions the Alcoholic Beverage Control Act. Moreover, the affidavit should state that there are no other reasons why SOA Realty Corporation or any of the corporations within the corporation chain would be disqualified from holding a license.

This opinion is based upon the facts and circumstances as presented in your correspondence. The Director reserves the right to review, modify and change this opinion if other facts or circumstances come to light and are brought to the attention of the Division.

If you have any further questions, please do not hesitate to call.

Very truly yours,

J. Wesley Geiselman
Deputy Attorney General
Enforcement Bureau

JWG/tld
cc: Cherry Hill Municipal Clerk

5. FINAL CONCLUSION AND ORDER DENYING APPLICATION FOR DISQUALIFICATION REMOVAL.

Petitioner, Gus C. Santorella, was disqualified from employment in the alcoholic beverage industry pursuant to N.J.S.A. 33:1-25 and N.J.S.A. 33:1-26. Pursuant to N.J.A.C. 13:2-15.1 et seq., he applied for removal of the disqualification. The Administrative Law Judge determined that the petitioner failed to carry his burden to prove by a preponderance of the credible evidence that his statutory disqualification should be removed. The Director, in his Final Conclusion and Order, held that the decision of the Administrative Law Judge should be affirmed and he denied the petition for removal of the disqualification and for a temporary work letter. In addition, the Director concluded that since the petitioner apparently was recently involved in the operation of a licensed premises and therefore could not show a continuous period of good behavior for at least five (5) years, N.J.A.C. 13:2-15.4(a), no new petition for disqualification removal would be accepted by the Division until March 15, 1998.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
Division of Alcoholic Beverage Control

IN THE MATTER OF THE APPLICATION FOR DISQUALIFICATION REMOVAL BY:	FINAL CONCLUSION AND ORDER DENYING APPLICATION
GUS C. SANTORELLA, PETITIONER.	OAL DKT. NO. ABC 10829-93 AGENCY DKT. NO. NN-1595

Gus C. Santorella, Petitioner, Pro se.

Jennifer Pirrung, Deputy Attorney General, for the Division (Deborah T. Poritz, Attorney General of New Jersey, attorney)

INITIAL DECISION BELOW

HONORABLE STEPHEN G. WEISS, ADMINISTRATIVE LAW JUDGE

Decided: March 17, 1994 Received: March 21, 1994

BY THE DIRECTOR:

No written Exceptions to the Initial Decision were filed by or on behalf of either of the parties within the time provided. The time for rendering a Final Decision was extended by properly executed Orders of Extension until July 8, 1994.

N.J.S.A. 33:1-25 precludes issuance of a license to any person who has been convicted of a crime involving moral turpitude. N.J.S.A. 33:1-26 prohibits knowing employment or connection in any business capacity whatsoever with a licensee of a person who would fail to qualify as a licensee. The petitioner, Mr. Santorella, was disqualified from employment in the industry due to a conviction of a federal crime in 1976. In early 1992, he applied for removal of the disqualification as provided for under N.J.A.C. 13:2-15.1 et seq.

After initial review of the petition, the matter was referred to the Office of Administrative Law for a hearing as a contested case pursuant to N.J.A.C. 13:2-15.3. After review of the Initial Decision by the Administrative Law Judge and the record below, I shall accept the recommendation of the Administrative Law Judge in this matter and adopt it as my own.

Based on testimony and documentary evidence presented, the Administrative Law Judge determined that the petitioner failed to carry his burden to prove by a preponderance of the credible evidence that his statutory disqualification should be removed. The Judge based his determination on three reasons, noting that the presence of any one of them would provide an adequate basis to deny the petitioner's application as contrary to the public interest.

The first basis for denial noted by the Judge was that the petitioner pled guilty in 1989 to a violation of N.J.S.A. 2C:36-2, a disorderly persons offense involving drugs. While that conviction by itself does not necessarily constitute a crime involving moral turpitude under the statute, it demonstrates, pursuant to N.J.A.C. 13:2-15.4(a)2, that the petitioner has not "conducted himself . . . in a law abiding manner", since his conviction involving a crime of moral turpitude in 1976.

The second and third reasons for denial of the application for removal of statutory disqualification arise from the activities of the petitioner described in the case of State of New Jersey, Division of Alcoholic Beverage Control, v. 99 Washington Street, Inc., t/a Good and Plenti, OAL Docket No. ABC 2959-90, 92 N.J.A.R. 2nd (Vol. 1) 76 (Div. of ABC). On March 25, 1993, the New Jersey

Superior Court, Appellate Division, in a per curiam decision, affirmed the findings, conclusion and penalty ordered by then Director Costa. State of New Jersey v. 99 Washington Street, Inc., t/a Good and Plenti, A-208-92T-1 (App. Div. March 25, 1993) (unreported). As noted by the Administrative Law Judge, the Director's final decision determined that the petitioner was involved in the operation of the licensed premises at a time when he was statutorily disqualified from involvement in any such activity and that he was "knowingly employed" by the licensee in violation of N.J.S.A. 33:1-26.

While I shall accept the initial determination of the Administrative Law Judge, an issue remains as to when the petitioner would be eligible to submit an application for disqualification removal for consideration by the Division in the future. N.J.A.C. 13:2-15.4 provides as follows:

> (a) The Director may, in the exercise of his or her discretion, enter an order removing the disqualification, if he or she is satisfied from the petitioner's testimony, the witnesses produced or the investigative record, that:
>
> 1. At least five years have elapsed from the later of the date of conviction or release from incarceration;
>
> 2. The petitioner has conducted himself or herself in a law-abiding manner during such period; and
>
> 3. His or her association with the alcoholic beverage industry will not be contrary to the public interest.

A threshold requirement of the above regulation is that at least five years have elapsed from the latter of the date of conviction or release from incarceration. The petitioner then must establish that he has conducted himself in a law-abiding manner during such period. From the facts adduced in the hearing below, it is apparent that the petitioner was recently involved in the operation of a licensed premises contrary to N.J.S.A. 33:1-25 and N.J.S.A. 33:1-26. It is consonant with the intent of the statute and the above regulation to require the petitioner to wait at least five consecutive years from the time of engaging in prohibited activities on the licensed premises before submitting an additional petition for removal of statutory disqualification. The final adjudication of State of New Jersey v. 99 Washington Street, Inc., t/a Good and Plenti, was pursuant to the per curiam decision of the

Appellate Division on March 25, 1993. Absent a continuous period of good behavior for at least five years, the Director lacks a record on which to evaluate the character and conduct of the applicant for a disqualification removal. I shall, therefore, accept a new petition for removal of statutory disqualification from the petitioner no earlier than five years (March 25, 1998) from the date of the final adjudication.

Accordingly, it is on this 7th day of July, 1994,

ORDERED that the petition of Gus C. Santorella for removal of statutory disqualification pursuant to N.J.A.C. 13:2-15.1 et seq. and for a temporary work letter pursuant to N.J.A.C. 13:2-14.6 be and is hereby denied; and it is further

ORDERED that leave is granted to the petitioner, Gus C. Santorella, to submit a further petition for removal of statutory disqualification pursuant to N.J.A.C. 13:2-15.1 et seq. no earlier than March 25, 1998.

/s/ John G. Holl
JOHN G. HOLL
ACTING DIRECTOR

JGH/DNB/tld

6. IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST: J & M RESTAURANT, T/A FLASHDANCERS/SNAPPERS - FINAL CONCLUSION AND ORDER ACCEPTING AND MODIFYING INITIAL DECISION AND IMPOSING 128 DAYS OF SUSPENSION.

The licensee operated a go-go bar and wanted to permit nude dancing which is prohibited on a licensed premises. In order to permit nude dancing on a portion of its premises, the licensee attempted to de-license a room by merely submitting a revised drawing of its premises to the town clerk. The licensee gave no notice to the municipality that it intended to conduct nude dancing on that portion of the "de-licensed" premises. The licensee was subsequently charged with violations for allowing, inter alia, nude dancing on its premises. The Director concluded that a licensee may not de-license a portion of its premises to operate a nude dancing club without applying before the municipal issuing authority for a place-to-place transfer to de-license a portion of its premises to allow a different business activity to be conducted

adjacent to or within its premises. The Division requires that all licenses apply to the issuing authority for a place-to-place transfer for any voluntary expansion or de-licensing of a licensed premises.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST:	FINAL CONCLUSIONS AND ORDER ACCEPTING AND MODIFYING INITIAL DECISION AND IMPOSING 128 DAYS OF SUSPENSION
J & M RESTAURANT, T/A FLASHDANCERS/SNAPPERS, 250 PASSAIC AVE, EAST NEWARK, N.J.	OAL DKT. NOS. ABC 4876-92 & 535-93
HOLDER OF PLENARY RETAIL CONSUMPTION LICENSE NO. 0902-33-003-005, ISSUED BY THE MAYOR AND BOROUGH COUNCIL OF EAST NEWARK	AGENCY DKT. NOS. S-91-18447, H-07192-002, S-92-18853, H-07191-063 (CONSOLIDATED)

KEITH A. COSTILL, DEPUTY ATTORNEY GENERAL, for Division of Alcoholic Beverage Control (Deborah T. Poritz, Attorney General of New Jersey, attorney)

JEFFERY W. HERMANN, Esq., for Licensee (Cohn, Lifland, Pearlman, Herrman and Knoff, attorneys)

INITIAL DECISION BELOW

HONORABLE LINDA BAER, ADMINISTRATIVE LAW JUDGE

Decided: March 31, 1994 Received: April 6, 1994

BY THE DIRECTOR:

Written Exceptions to the Initial Decision were filed on behalf of the Licensee, J & M Restaurant, t/a Snappers, t/a Flashdancers on May 10, 1994 in accordance with the provisions of N.J.A.C. 1:1-18.4(d). The Division of Alcoholic Beverage Control ("Division"), filed a response to Exceptions on June 1, 1994. Relevant Exceptions and Replies shall be discussed hereinafter.

The time to render a Final Decision was extended by properly executed Orders, and a Final Conclusion and Order must be rendered by the Director on or before October 13, 1994. Upon consideration of all the factors herein and for the following reasons I shall modify the legal conclusions of the Administrative Law Judge, and modify the amount of suspension as noted.

I. CHARGES

OAL Dkt. ABC 4876-92 contains charges which relate to the activities occurring at 250 Passaic Avenue, East Newark, on January 3, 1991 at J & M Restaurant, Inc., t/a Snappers. The five count Notice of Charges was dated April 25, 1991. The charges contained in ABC 4876-92 are as follows:

1. On January 3, 1991, you conducted your licensed business without keeping and having on your licensed premises available for inspection by authorized persons and officers a photostatic or other true copy of the application for your current license; and/or copy of the last filed long form application for your then current license; in violation of N.J.A.C. 13:2-23.13(a)2.

2. On January 3, 1991, you conducted your licensed premises without having your current license certificate conspicuously displayed at all times; in violation of N.J.A.C. 13:2-23.13(a)(1).

3. On January 3, 1991, you conducted your licensed business without keeping on your licensed premises or having available for inspection upon demand a list complete in all respects containing the names and addresses and other required information with respect to all persons then currently employed on your licensed premises; in violation of N.J.A.C. 13:2-23.13(a)(3).

4. On January 3, 1991, you conducted your licensed premises without having at all times on said premises the special federal tax stamp or indicia of payment thereof; in violation of N.J.S.A. 33:1-31(e).

5. On January 3, 1991, you allowed, permitted or suffered lewdness or immoral activity in and upon your licensed premises, viz, you allowed, permitted or suffered entertainers, while performing on your premises for the entertainment of your customers and patrons, to engage in conduct, by themselves and in association with patrons and customers of your licensed premises, of a lewd, indecent or immoral character and to commit and engage in acts, gestures or movements of and with their hands, legs and other parts of their bodies, by themselves and in association with your patrons and customers, in a manner and form having a lewd, indecent or immorally suggestive import and meaning; in violation of N.J.A.C. 13:2-23.6.

Prior to the hearing date on those charges, companion case ABC 535-93 was transmitted to the Office of Administrative Law. OAL Dkt. ABC 535-93 contains charges which relate to activities occurring at the same premises, in Flashdancers, on November 9, 1991. The five count Notice of Charges was dated August 26, 1992. The charges contained in ABC 535-93 are as follows:

1. On November 9, 1991, you allowed, permitted or suffered lewdness or immoral activity in and upon your licensed premises, viz, you allowed, permitted or suffered entertainers while performing on your premises for the entertainment of your customers and patrons, to engage in conduct, by themselves and in association with patrons and customers of your licensed premises, of a lewd, indecent or immoral character and to commit and engage in acts, gestures or movements of and with their hands, legs and other parts of their bodies, by themselves and in association with your patrons and customers, in a manner and form having a lewd, indecent or immorally suggestive import and meaning, in violation of N.J.A.C. 13:2-23.6.

2. On November 9, 1991, you sold, served or delivered or or suffered the sale, service or delivery of alcoholic beverages beyond the scope of your license, viz, in an

area which was not designated or described by you in your license application as a place to be licensed for the said sale, service or delivery or consumption of alcoholic beverages, in violation of N.J.S.A. 33:1-12.

3. On November 9, 1991, you conducted your licensed business without keeping on your licensed premises or having available for inspection upon demand a list complete in all respects containing the names and addresses and other required information with respect to all persons then currently employed on your licensed premises, in violation of N.J.A.C. 13:2-23.13(a)(3).

4. On November 9, 1991, you conducted your licensed premises without having at all times on said premises the special federal tax stamp or indicia of payment thereof, in violation of N.J.S.A. 33:1-31(e).

5. From November 9, 1991 to present, you employed or had connected with you in a business capacity, Jerry Ventura, a police officer whose employment was not approved by the Director, in violation of N.J.A.C. 13:2-23.31.

6. On or about November 9, 1991, you allowed, permitted or suffered your licensed premises to be used in furtherance or aid of or accessible to an illegal activity and enterprise, viz, lewd & immoral activity as well as "BYOB" laws, in violation of N.J.A.C. 13:2-23.5(c).

*7. On November 9, 1991, you engaged in a promotional scheme or practice at your licensed premises whereby you offered to a patron a free drink conditioned upon the purchase of an alcoholic beverage, viz, requiring purchase of alcoholic beverages at Snappers as a condition to Membership at Flashdancers, in violation of N.J.A.C. 13:2-23.16:(a)2.

*8. On November 9, 1991, and prior to date, you conducted other mercantile business in and upon your licensed premises, in violation of N.J.S.A. 33:1-12(a). (Selling membership to Flashdancers).

* The Division dropped Charges 7 and 8 (ABC 535-93) prior to the hearing.

9. On or about November 9, 1991, and prior thereto, you the holder of a plenary retail consumption license, employed a bartender, to wit, Eric Ventura, without said employee having obtained a city bartender's permit, in violation of Municipal Ordinance 6-7-3.

These two cases were consolidated pursuant to N.J.S.A. 52:14(b)-1 to -15 and N.J.S.A. 52:14(f)-1 to -13 for the purposes of hearing.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On September 22, 1993, an in-person pre-hearing conference was held. As a result of this conference, the parties agreed that charges seven and eight of ABC 535-93 were to be dropped by the Division. The case was heard on December 20, 1993 by Administrative Law Judge (ALJ) Linda Baer. The record was closed on February 10, 1994 after receipt of post-hearing briefs and a certified copy of the Division's license application file. The following is a review of the facts presented at the hearing:

The Licensee is the holder of Plenary Retail Consumption License No. 0902-33-003-005. The licensed premises are located at 250 Passaic Avenue, East Newark. Division files indicate that the license was transferred from Thumpers, Inc. to J & M Restaurant, t/a Parkside Cafe. The transfer application lists Mr. Joao Campos and Mrs. Maria Campos (his wife) as the sole stockholders. Mr. Campos is named as the President of the corporation, while Mrs. Campos is named as Secretary and Treasurer. The licensed premises operated as the Parkside Cafe until the premises were divided in 1991. The licensed premises was then renamed as Snappers.

Snappers, a tavern, has a rectangular stage in the center of the bar where go-go dancers perform. On September 11, 1991, Henry Campos, son of Joao Campos, submitted four pages of amendments to the license application of Snappers. These amendments indicated that a portion of the first floor of the licensed premises were to be de-licensed. Attached to these amendments was a drawing of the proposed unlicensed portion of the premises. Nothing on this submission reflects how the de-licensed area was to be used. The amendments were signed by Mr. Henry Campos, Vice President of J & M Restaurant, t/a Snappers. East Newark's municipal clerk signed and dated the amendments September 11, 1991. In the area of the premises which were allegedly de-licensed, a private club was created, housing a topless juice bar called Flashdancers.

A description of the physical premises where Snappers and Flashdancers are located is necessary to understand the charges lodged by the Division in this case. The building located at 250 Passaic Avenue is a single story building. After walking through two double doors to enter the building, a patron enters the foyer. A doorway to the left of the foyer leads to a dressing room used by go-go dancers. To the right of the foyer is a doorway that leads to Flashdancers, the topless bar. This entrance is the only means of entry into Flashdancers. In the entry door to Flashdancers, a bouncer is posted to supervise those entering and exiting. This topless area of the premises is approximately 20 feet by 37 feet and contains an oval shaped bar with approximately 25 stools.

After entering the front door, a patron may enter the go-go bar--Snappers--by walking straight through the foyer. A rectangular stage is located in the center of the bar. Along the back of the room, a pool table, disc jockey booth, and restrooms are located. These are the only public restrooms in the building. On the right side of the bar area, an enclosed kitchen and an office are situated. Two exit doors are located in Snappers, these exits can only be accessed by walking through the kitchen.

Flashdancers, the topless bar, is a members-only club which requires a $25.00 yearly membership. No alcohol may be purchased at Flashdancers, and all packaged goods brought in must be purchased in Snappers. Therefore, the only alcoholic beverages (bottle or container) permitted in Flashdancers must be purchased in Snappers. The application for membership states that the members must be 18 years or older. Those who become members of Flashdancers are cautioned that they must be 21 years of age in order to consume alcohol. In addition, members are told they are not allowed to touch the dancers. Membership advertisements state that: sex solicitation is forbidden; memberships are non-transferable, and can be revoked at management's discretion. Flashdancers, t/a Topless, Inc., is owned entirely by Mr. Carlos Campos, son of Joao and Maria Campos. Carlos Campos serves as the manager of both Snappers and Flashdancers.

A. Review of Facts and Testimony Relating to Charges Resulting from January 3, 1991 Inspection

E.C., Senior Undercover Inspector employed by the New Jersey Division of Alcoholic Beverage Control, testified at the OAL hearing that as a result of receiving complaints of alleged lewd behavior, he conducted an investigation of the premises located at 250 Passaic Avenue, East Newark. E.C. was accompanied by Inspectors P.D. and D.S. E.C. testified that the three investigators took seats at the rectangular bar inside of Snappers,

where four go-go dancers were performing that evening. E.C. testified that the dancers were Debra Fratto, Carmen Luisa Reyes, Antonia Dejesus, and Patricia Murphy. E.C. testified that Ms. Murphy accepted tips in her hand and was not performing contrary to regulations.

E.C. stated that he and the other investigators observed that three dancers were performing in a lewd manner and allowing patrons to put dollar bills under their bras and G-strings. At the OAL hearing, E.C. described the behavior of the three women performing contrary to regulations. First, Ms. Fratto was performing in a white G-string and a stretched, white, wet, transparent T-shirt, which caused her breasts to be visible. E.C. testified that Ms. Fratto accepted tips between her breasts and G-string, and allowed the patrons to linger as they placed the bills. Second, E.C. stated that Ms. Reyes was wearing a G-string, with her breasts covered only with her hands. E.C. observed Ms. Reyes allowing patrons to fondle her bare breasts. Third, E.C. testified that Dejesus was wearing a white G-string and white pasties while performing.

The Investigator testified that this was sufficient action to warrant further investigation. The three agents then spoke to Mr. Carlos Campos, son of the owner and manager of Snappers. E.C. testified that P.D. requested the documents required by law of all licensees. E.C. stated that the license certificate and the E-141A form were in a drawer and not displayed as required; that a federal tax stamp and license application was not produced and that the employee list was incomplete (none of the go-go dancers or barmaids were listed).

One of the go-go dancers, Carmen Reyes, testified before Judge Baer. She testified that she was employed by Snappers on the date the investigation noted above occurred. Ms. Reyes described Snappers as a go-go bar where alcoholic drinks are served. In recalling January 3, 1991, Ms. Reyes stated that at that time, she had been working as a dancer for approximately five months. Ms. Reyes stated that the Inspectors sat in a corner, and that one was talkative. Ms. Reyes testified that one Investigator asked her to join them for drinks after her shift, asked her for her phone number, and asked her out to dinner. Ms. Reyes stated that she told them that she did not date customers. Ms. Reyes testified that at approximately 12:30 a.m., Inspectors E.C. and P.D. identified themselves as inspectors for the ABC.

Ms. Reyes stated that while working at Snappers, go-go dancers perform for one half hour and have one half hour break. In addition, Ms. Reyes testified that the Manager, Carlos Campos, has imposed rules for the dancers. These rules include: dancers are to stay on stage for 20 minutes, then they can dance around the bar area and look for tips. Also, there is to be no flashing, pulling down or opening of clothing, no leaning or tipping the G-string and no sheers. Ms. Reyes indicated that if a dancer violated these rules, she would be warned that if she continued, she would be fired. Finally, Ms. Reyes denied that anyone would see or fondle her breasts because, on January 3, 1991, prior to her breast implant surgery, she was only a size 34A.

At the hearing, Judge Baer found that the Division had sustained the above referenced charges, and found the Licensee guilty of such charges upon clear and convincing evidence.

B. Review of Facts and Testimony Relating to Charges Resulting from November 9, 1991 Inspection

At the OAL hearing, Senior Inspector B.B., a State Police Officer assigned to the ABC Enforcement Bureau, testified as to the investigation that occurred on November 9, 1991. B.B. stated that he had spent 13 years as an investigator, and wrote the investigation report in this matter. B.B. testified that he investigated 250 Passaic Avenue with Principal Inspector L.C., and that upon entry into the foyer of the licensed premises, they were stopped by two doormen. B.B. stated that a doorman asked which bar they were planning on entering, the topless or the go-go. The Investigators replied that they might go into both, and then entered the regular bar. B.B. testified that he and L.C. purchased two beers, and asked the barmaid if they could take the bottles of beer over to the bar. B.B. stated that the barmaid gave her approval, and they then watched two go-go dancers (E.M. and A.H.) perform. B.B. testified that during a brief conversation with the dancers, they were told that the dancers in the topless bar danced nude.

B.B. stated that at this time, they went to the entry area for the topless bar. The doorman (Mr. Sproviero) told the Inspectors that in order to enter the topless bar, they had to become members. B.B. testified that they were told that the membership fee was $25.00 yearly. The Inspectors were then given a membership application. Inspector B.B. testified that when asked about alcoholic beverages, Mr. Sproviero told them they had to purchase

alcohol in the main bar (Snappers) and bring it into the topless bar (Flashdancers). B.B. stated that he and L.C. then marked currency in order to apply for membership. However, Mr. Sproviero was not in the foyer, so B.B. and L.C. entered Flashdancers. After entering Flashdancers, B.B. stated that he observed a female who was standing on the bar exposing her bare breast and pubic area to a male patron sitting at the bar. B.B. observed the patron touching and fondling her pubic area.

B.B. described this female, P.O., as wearing a light green transparent bikini-type swim suit. B.B. stated that the swim suit bra had been pulled beneath her breast and her panties were around her knees. B.B. testified that he and L.C. sat at the bar, and that P.O. walked up to them and began performing for them. B.B. stated that P.O. was "[a]sing her own fingers to caress herself,...touching her breasts, squeezing them, trying to entice the patron to give her a tip." T at 42.[1] B.B. also observed P.O. take her fingers and spread the labia majora and labia minora. B.B. stated that while P.O. performed in front of them, a second go-go dancer, who was nude, began dancing on the raised stage in the middle of the oval bar. This dancer was observed using her fingers to massage her bare breasts and vaginal area. B.B. testified that patrons also made bodily contact with this second dancer, "They were in there, touching her, squeezing her. She was accepting tips and throwing them on the stage, the currency." T at 43.

B.B. testified that at this time, Mr. Sproviero entered the room and told the Inspectors that they had to leave, and escorted them to the foyer. B.B. testified that he attempted to explain to Mr. Sproviero that they had intended to join as members, but no one was at the door to accept money when they entered. Mr. Sproviero told B.B. to fill out an application. The Inspectors then identified themselves. B.B. testified that Mr. Sproviero stated that he only worked part time and Carlos Campos was the manager. B.B. and L.C. were then escorted into the kitchen to meet Carlos Campos. B.B. stated that he identified himself and requested that Mr. Campos produce the license certificate, license application, long and short forms, the E-141A form and the federal tax stamp.

B.B. related that Mr. Campos stated that Flashdancers is an unlicensed area and considered a separate corporation. Mr. Campos told B.B. that he had de-licensed Flashdancers by submitting new license application pages 1, 3, and 12, and a new floor plan layout. B.B. then questioned Mr. Campos about the purchase and consumption of alcohol at Flashdancers. Mr. Campos told B.B. that

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1. Transcript of Office of Administrative Law Hearing before Judge Linda Baer, held on December 20, 1993.

all drinks are purchased in the licensed area, and that the patron takes the unopened bottle into Flashdancers, where the barmaid will remove the cap. Mr. Campos testified that a mixed drink is mixed on the licensed premises and placed in a cup with a top, and the patron is permitted to carry it to Flashdancers.

B.B. testified that Mr. Campos presented an incomplete E-141A form, since the go-go dancers performing and one bar employee were not listed. Mr. Campos failed to produce a federal tax stamp. The Licensee did not dispute either of these charges at the OAL hearing. B.B. stated that they observed a patron entering Flashdancers drinking a 12 ounce bottle of Miller, and that he and L.C. entered Flashdancers with open bottles of Miller Lite.

Officer Gerald Ventura, a Wallington Patrolman, testified that he had been employed at Snappers. The Division alleged that Officer Ventura was employed by Snappers without local agency approval. Officer Ventura stated that his responsibilities were to check the identification of all members entering Flashdancers to make sure that they had a paid membership card. Officer Ventura testified that he was told that he was not permitted to be employed by Snappers, a licensed premises, so he remained in the foyer area and checked identification to determine that the patrons were 21. Officer Ventura stated that he only allowed alcohol purchased from Snappers to be brought into Flashdancers, and that he did not allow open containers. Officer Ventura stated that his name appears on the ABC list of employees for Snappers because he cleans up Snappers and uses the rest room when it closes at 2 a.m.

Henry Campos testified at the OAL hearing that J & M Restaurant is owned by his parents. Henry Campos stated that initially, the license located at 250 Passaic Avenue licensed the entire premises. However, Henry Campos stated that he assisted his parents in 1991 in de-licensing a portion of the premises. In de-licensing a portion of the building, Henry Campos stated that he read the ABC Handbook, spoke to employees of the ABC (although he received no responses in writing) and submitted an application with a sketch of the "new" licensed premises.

Carlos Campos, manager of Snappers and owner/manager of Flashdancers testified that he is the sole shareholder in Topless Corporation, t/a Flashdancers. Also, Carlos Campos stated that Officer Ventura is an employee of Topless, but is on the employee list solely because he is on the premises of 250 Passaic Avenue at closing time.

At the hearing, the Licensee moved to suppress all the evidence gathered as a result of the November 9, 1991 inspection of Flashdancers on the basis that it was gathered in the absence of a warrant. This motion was denied by Judge Baer because licensees waive their rights to warrantless searches at the time of license application. Moreover, the Judge found that the testimony and evidence at the hearing revealed that as there was no bouncer or attendant at the entry for Flashdancers, the inspectors entered Flashdancers freely, and the evidence collected was in plain view.

Judge Baer found that the licensed premises at 250 Passaic included the entire building, including Flashdancers. The Judge reasoned that case law and statutes require the Licensee to obtain local issuing authority approval to de-license its premises to allow nude dancing to exist on the premises. The Judge rejected the Licensee's claim of proper de-licensing by submission of an amended sketch as incredulous and not in good faith. Moreover, as the licensee - - Snappers and Flashdancers - - shared a manager, parking area, common entrance, dressing rooms, bathrooms and kitchen, the Judge surmised that "there is no legitimate separate and distinct business being conducted" in the "de-licensed" room. Accordingly, Judge Baer sustained all the Division's charges for the January inspection, except for the charge of violation of "BYOB" laws under N.J.A.C. 13:2-23.5(c), because her decision mooted the charge.

III. ISSUE

This appeal raises a seemingly basic question of how a licensee properly de-licenses a portion of its licensed premises. In actuality, the licensee operates a go-go bar and wants to permit nude dancing on its premises. As nude dancing is prohibited on a licensed premises according to the New Jersey Alcoholic Beverage Control regulations, the licensee essentially de-licensed a room on its licensed premises to permit an otherwise illegal activity. Thus, the defined issue is whether a licensee may de-license a portion of its premises to operate a nude dancing club without a formal hearing before the municipal issuing authority. I conclude that the licensee may not.

IV. ANALYSIS

The expansion or de-licensing of any licensed premises can only be accomplished through an application for a place to place transfer of liquor license. Our statute, N.J.S.A. 33:1-26, outlines the procedures for transfer of a license which is codified

at N.J.A.C. 13:3-3.1 to 3.10. The statute sets forth that a licensee must submit an application and obtain a grant of approval from either the Director or the issuing authority for the transfer of "any license issued by him or it respectively to a different place of business than that specified therein, by endorsing permission upon the license." N.J.S.A. 33:1-26. This statute highlights the dominant aspect of the administration of liquor licenses as the receipt of municipal approval for a change in place of business. See, e.g., N.J.S.A. 33:1-3.1(b)(9)(public policy of maintaining "primary municipal control over the retailing of alcoholic beverages"); N.J.S.A. 33:1-24 (the duties of municipal issuing authorities). A reduction in the size of a licensed premises and the leasing of that space to a different business entity to permit a questionable activity within or adjacent to a licensed premises signifies a "different place of business" other than what was reflected on the original place-to-place transfer or what was considered at the transfer hearing by the municipal issuing authority. Thus, any licensee who seeks to change the character of its business by reducing the size of its licensed premises must file a formal transfer application for a place to place transfer.

In addition to the statutory language that requires licensees to obtain a place to place transfer for a change of premises to a different place of business, New Jersey courts also recognize that licensees should seek local issuing authority's approval to change the character or size of a licensed premises. Licensees must take heed that the opportunity to sell alcoholic beverages is a privilege to do what otherwise would be illegal. Mazza v.Cavicchia, 15 N.J. 498, 505, (1954). The receipt of a liquor license is not an unrestricted grant to sell alcoholic beverages, but it is a revocable privilege, strictly regulated according to the terms and conditions imposed by the State and local municipality. Lubliner v. Board of Alcoholic Beverage Control, 33 N.J. 428, 446 (1960); Margate Civic Ass'n v. Board of Commissioners, 132 N.J. Super. 58, 63 (App. Div. 1975), cert. den. 68 N.J. 139 (1975). Courts have long held that municipalities are vested with primary authority to consider place-to-place transfer or enlargement of premises applications. Lyons Farms Tavern, Inc. v. Municipal Board of Alcoholic Beverage Control, 55 N.J. 292, 302 (1970). ("In allocating spheres of operation between the State Division and municipal authorities the Legislature widely recognized that ordinary local officials are thoroughly familiar with their community's characteristics, the nature of a particular area and the dangers associated with the sale of alcoholic beverages.")

Case law observes that the Legislature has vested municipalities, which are guided by the local public interest, "with a high responsibility, a wide discretion" in the enforcement of the alcoholic beverage laws. Id. at 303. The courts add that this privilege goes hand in hand with a licensee seeking municipal approval to change its licensed premises. See, e.g., Lyons Farms Tavern, Inc. v. Municipal Board of Alcoholic Beverage Control, supra, 55 N.J. 292, 302 (1970)(place to place or enlargement of premises transfer); B & G Corp. v. Municipal Council, 12 N.J.A.R. (A.B.C.) 458, 470 (1988)(person to person transfer), aff'd, 235 N.J. Super. 90 (App. Div. 1989). Moreover, charged with honoring public sentiment, a municipality must be informed of the change in character of a licensee's business before it occurs. See id. In this way a full municipal determination can be made to either approve or disapprove the change of premises.

The receipt of municipal approval requires more than a clerk's signature on a filing of a license renewal application or amendment to an application which provides no explanation for the change in business. The licensee must obtain approval through a municipal resolution in which a municipal board has had a full opportunity to give notice of the application, hear the application, examine witnesses and make an informed decision on the proposed change in business or premises. See, e.g., N.J.S.A. 13:2-2.5 to 2.16 (new applications); N.J.A.C. 13:2-4.3 to 4.10 (renewal applications); N.J.A.C. 13:2-7.1 to 7.15 (transfer applications). See Innkeeper Inc., v. Township Council of Mahwah, 94 N.J.A.R. 2d (ABC) 13 (1984) (when licensee was de-licensed by operation of law, licensee obligated to apply for a place-to-place transfer to activate license at former premises.) "In this manner, the local issuing authority has the opportunity to make a full evaluation of whether or not the premises have remained suitable for licensure or whether the gap in possessory interest or other factors may have rendered the premises unfit. Any other conclusion would circumvent the intent and spirit of the Alcoholic Beverage Control Act and deprive the local issuing authority of its discretionary ability to grant or deny a place-to-place transfer." Innkeeper, Inc. v. Township Council of Mahwah, 94 N.J.A.R. 2d (ABC) 18 (1994).

In this instance, the licensee was attempting to introduce a highly questionable activity adjacent to or within its licensed premises. If the Board of East Newark was properly notified of the licensee's de-licensing of a room of its premises to allow nude dancing, this protracted enforcement action could have been avoided.

I concur with Administrative Law Judge Baer who observed that a mere submission to the issuing authority or this Division of a revised sketch of a premises without any indication how the "de-licensed" premises was to be used is not only insufficient to de-license the premises, but in bad faith:

> The law governing liquor licenses is given liberal judicial interpretation. The legislative intent and spirit of Title 33 is to protect against what Respondent has done, which is to circumvent local authorities by misleading them or by omitting the real reason why he wanted to de-license a portion of the establishment known as "Snappers." Respondent created a new area where he put up a few walls and brought in nude dancers. His attempt to create the so-called "unlicensed premises" by circumventing local issuing approval and evading what Title 33 seeks to regulate, is an outrage to this tribunal.

In order to address this latest concern, and being empowered to uphold the public policy and legislative purpose of Title 33 of strictly regulating alcohol "to protect the health, safety and welfare" of our citizens, to "foster moderation and responsibility in the use and consumption" of alcohol and to maintain "primary municipal control over the retailing of alcoholic beverages," I require all licensees to apply to the issuing authority for a place-to-place transfer for any voluntary expansion or de-licensing of licensed premises.

In its exceptions, the licensee claims that it was allowed to have nude dancing within a separate room adjacent to or within its licensed premises because this room was properly de-licensed. The Licensee contends that this room was de-licensed properly because it followed the instructions of the "controlling authority", the Alcoholic Beverage Control Handbook for Retail Licensees. (1985) (hereinafter "Handbook"). The Licensee submits that any ABC investigators' search that took place in the de-licensed area was warrantless and the suspension imposed should be reversed. Moreover, the Licensee argues that fundamental fairness requires that the ABC should be estopped from asserting that the procedure of de-licensing of a licensed premises, other than the Handbook, cannot be required.

I reject the Licensee's arguments. The 1985 Handbook does refer to a decrease in the area of a licensed premises as "merely requir[ing] notice to be given to the issuing authority by filing a new page 3 and a revised sketch." Handbook (10/85 Ed.) at p. 54.

As correctly pointed out by the ABC in its Reply to the Exceptions, the Handbook, clearly states in its Forward:

> One word of caution, however, since we have tried to present the material in easily understandable terms, it is possible that we may have over-simplified some complex subjects. Thus, the Handbook should only be looked to as a guide and not necessarily as a complete authority. It is not intended to be used as the basis for support of legal positions.

Id. at ii.

Therefore, licensees are put on notice not to use or to rely on this Handbook to the exclusion of the ABC Statutes, regulations, case law or Bulletin items. N.J.S.A. 33:1-26 requires licensees to apply for transfer applications whenever there is a change in premises to "a different place of business." In addition, ABC Bulletins[2] reflect the correct procedure for de-licensing a portion of the premises in In re Daly, ABC Bulletin 171, Item 3 (April 15, 1937); In re Stansy, ABC Bulletin 586, Item 6 (May 4, 1943); Ocean County Licensed Beverage Ass'n. v. Mayor & Council of Borough of Point Pleasant, ABC Bulletin 1522, Item 3 (June 9, 1963).

Accordingly, Appellant's estoppel argument is not persuasive. "[E]quitable estoppel is rarely invoked against a governmental entity." Citizens for Equity v. New Jersey Department of Environmental Protection, 126 N.J. 391 (1991). It may be invoked against governmental entities to prevent manifest injustice. W.V. Pangborne & Co. v. New Jersey Department of Transportation, 116 N.J. 543, 554 (1989). Licensee will suffer no manifest injustice because there was no misrepresentation by the Division nor there was no reasonable reliance. Citizens for Equity v. New Jersey Department of Environmental Protection, 252 N.J. Super. 62, 79-80 (App. Div. 1990), aff'd., 126 N.J. 391 (1991).

I agree with the findings of the Administrative Law Judge that the Licensee's estoppel argument is incredulous:

> Alternatively, even if one were to assume that respondent attempted to appropriately de-license a portion of the premises and it were possible to legally do so by applying a sketch of the premises, respondent would also be required to have submitted the sketch in good faith. Designated in respondent's sketch of the unlicensed portion of

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2. The licensee's comment that the ABC Bulletin is "obscure" is unsubstantiated. ABC Bulletins have been published since the creation of our Division in 1933 and number in excess of 2,400.

> the building is a small room in the same building, same floor as Snappers. There is no description of the "unlicensed portion," and no information on what it is to be used for.

Slip. op. at 19-20.

I note that it is incumbent upon me to consider all evidence presented and give appropriate weight to the credible evidence, considering the proofs as a whole. The record is convincing as to the violative conduct of the licensee. However, the licensee's assertion that they complied with Division policy with respect to de-licensing, (although suspect based upon their blatant disregard of the responsibilities of a licensee) has a modicum of legitimacy in light of the potential for alternative interpretations presented by the Forward and the contents of the Handbook.

Therefore, that portion of licensee's suspension relating to the lewd activities on a licensed premises, in violation of N.J.A.C. 13:2-23.6, is reversed. Furthermore, logic compels a reversal of Judge Baer's finding that the licensee allowed, permitted, or suffered licensed premises to be used in furtherance of an illegal activity or enterprise, in violation of N.J.A.C. 13:2-23.5(c).

I accept Judge Baer's holding that the licensee did not violate N.J.S.A. 33:1-12, with respect to the sale, service or delivery of alcoholic beverages beyond the scope of a license. I also accept Judge Baer's determination that the Inspectors did not conduct a warrantless search of the alleged "de-licensed" room. As I am reversing the charges pertaining to the activities occurring in the "de-licensed" room, I need not reach the conclusion as to whether or not a warrantless search was conducted.

The licensee, in order to de-license that portion of its premises to allow nude dancing, must file a formal place-to-place transfer application with the City of East Newark, and a formal hearing shall be held, whereupon the Town Council of East Newark shall issue a final determination on the application by Resolution. Under the charges as thus modified, the license is suspended for 128 days.

V. CONCLUSION AND ORDER

For the reasons noted above, I modify the Initial Decision of the Administrative Law Judge with respect to the November 9, 1991

violations. As discussed herein, the licensee's reliance on the Handbook and its susceptibility to alternative interpretations, leads me to reject the conclusions of Judge Baer that the licensee violated N.J.A.C. 13:2-23.6 (allowing, permitting or suffering conduct of a lewd, indecent, or immoral character on the licensed premises) and the conclusion that the licensee violated N.J.A.C. 13:2-23.5(c) (allowing, permitting, or suffering licensed premises to be used in furtherance of an illegal activity).

Accordingly, it is on this 13th day of October, 1994

ORDERED, that the 338 day suspension imposed upon Plenary Retail Consumption Licensee 0902-33-003-005 by the Division of Alcoholic Beverage Control be and is hereby MODIFIED as follows:

Based upon the record below, and pursuant to State statute and regulations, I FIND that J & M Restaurant, t/a Flashdancers/Snappers violated the following on January 3, 1991:

1) N.J.A.C. 13:2-23.13(a)(2)- Application for license on premises, (1 Day);

2) N.J.A.C. 13:2-23.13(a)(1)- Current license certificate conspicuously displayed, (1 Day);

3) N.J.A.C. 13:2-23.13(a)(3)- Complete employee list on premises, (1 Day);

4) N.J.S.A. 33:1-31(e)- Federal Tax Stamp on premises, (2 Days) and

5) N.J.A.C. 13:2-23.6- Allowed, permitted, or suffered lewd or immoral activity in or upon licensed premises, (90 Days)

Based upon the record below, and pursuant to State statute and regulations, I FIND that J & M Restaurant, t/a Flashdancers/Snappers violated the following on November 9, 1991:

1) N.J.A.C. 13:2-23.31- Police Officer employment not approved by the Director, (30 Days);

2) N.J.S.A. 33:1-31(e)- Federal Tax Stamp on premises, (2 Days)

3) N.J.A.C. 13:2-23.13(a)(3)- Complete employee list on premises, (1 Day);

and it is further

ORDERED that the Licensee shall apply to the Mayor and Borough Council of East Newark to consider an application for a place-to-place transfer, if submitted by Licensee for the premises located at 250 Passaic Avenue, t/a Flashdancers/Snappers, and for the Mayor and Borough Council of East Newark to determine, in its discretion, whether or not such a transfer should be granted; and it is further

ORDERED that the Plenary Retail Consumption License No. 0902-33-003-005 issued by the Mayor and Borough Council of East Newark, to J & M Restaurant, t/a Flashdancers/Snappers for premises located at 250 Passaic Avenue, East Newark, New Jersey, be and is hereby SUSPENDED for a period of 128 days, such suspension to commence on Sunday, at 2:00 a.m., on November 27, 1994, and to commence until Tuesday, at 2:00 a.m., on April 4, 1995.

/s/ John G. Holl
JOHN G. HOLL
ACTING DIRECTOR

APPENDIX: INITIAL DECISION BELOW

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Publication of Bulletin 2465 Is Hereby Directed This 13th Day of March, 1995

John G. Holl, Acting Director
Division of Alcoholic Beverage Control