STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
RICHARD J. HUGHES JUSTICE COMPLEX, CN-087
TRENTON, NJ 08625

BULLETIN 2430 March 31, 1983

TABLE OF CONTENTS

Item

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
RICHARD J. HUGHES JUSTICE COMPLEX, CN-087
TRENTON, NJ 08625

BULLETIN 2430 March 31, 1983

1. DIVISION OFFICES HAVE RELOCATED

The Division Offices have relocated to the Richard J. Hughes Justice Complex, 25 Market Street, CN 087, Trenton, New Jersey 08625. New Division telephone number is (609) 984-2830.

2. RECENT LEGISLATION

Recent Legislation - Increase of legal age to purchase and consume alcoholic beverages to twenty-one (21) years of age; Inclusion of operation of bowling establishment having more than 20 lanes as an exception to the two license limitation law (N.J.S.A. 33:1-12.32).

(a) Increase of Legal Age to 21

Chapter 215 of the Laws of 1982 (adopted December 28, 1982) amends N.J.S.A. 9:17B-1 and raises the legal age to purchase and consume alcoholic beverages in New Jersey to twenty-one (21) years of age. The law permits those persons who had attained the age of nineteen (19) prior to January 1, 1983 to continue to be able to lawfully purchase and consume alcoholic beverages.

In application, the law now permits anyone born on or before December 31, 1963 to lawfully purchase and consume alcoholic beverages until January 1, 1985 at which time all persons must have attained the age of twenty-one (21) years.

It should also be restated that the legal age to have an interest in a liquor licensed premises (and purchase in the regular course of business) or to be employed at liquor licensed premises to sell, serve or deliver is still eighteen (18) years of age.

(b) Bowling lane exception to two license limitation law

The provisions of N.J.S.A. 33:1-12.31 limit a person from having a beneficial interest in more than a total of two alcoholic beverage retail licenses. Interests in more than two retail licenses acquired before August 3, 1962 aew not affected.

Chapter 91 of the Laws of 1983 (adopted March 11, 1983) supplements the provisions of N.J.S.A. 33:1-12.32 and adds as an exception to the two license limitation provisions of N.J.S.A. 33:1-12.31, the acquisition of an additional license or licenses when the retail license is used in connection with the operation of a bowling establishment consisting of more than 20 lanes. The amendment further requires that the exception is available "only so long as the person uses the license in connection with the operation of that bowling establishment'" and when applicable, the additional license or licenses shall be limited to the sale of alcoholic beverages for consumption on the licensed premises only.

3. NOTICE TO LICENSEES - PROHIBITION OF VIDEO POKER AND OTHER SIMILAR MACHINES ON LIQUOR LICENSES PREMISES

Numerous requests have been received from law enforcement officials, municipal clerks, retail licensees and manufacturers of video machines seeking Division policy on the placement of Video Poker, Black Jack, Dice, Hi-Low and similar gaming type video machiens on liquor licensed premises. While the proliferation of numerous variations of machines that involve traditional utilization of card and dice games is recent, the subject matter has been part of Division regulation since October 11, 1934 (then Rules 7 and 8 of State Regulation No. 20).

Current Division Regulation, N.J.A.C. 13:2-23.7 prohibits gambling of any kind on liquor licensed premises. The possession on licensed premises of "(any) slot machine or device in the nature of a slot machine which may be used for the purpose of playing for money or other valuable thing" is also prohibited. N.J.A.C. 13:2-23.7(a)(4). By operation of this Regulation, these machines are prohibited.

In addition, while a draw poker or similar type machine may be programmed so that it does not itself pay off anything

of value based upon a participant's success or failure in connection with the operation of the machine, the Division has taken the policy position that such machines offer marginal amusement value in that there is a basic lack of need for any type of coordinative skill by the player. Such a machine is so susceptible to gambling between a participant and an observer that the Division has rejected their suitability in a liquor licensed premise. So too, the machine may be reprogrammed upon placement to award prizes itself, or the scores or points attained by a player may become a basis to award money or "other valuable things" by the licensee.

Thus, the video machines which resemble games of cards, dice, roulette, etc. are not permitted in liquor licensed premises in New Jersey.

4. NOTICE REGARDING ADVERTISING - DIRECT MAIL ADVERTISEMENT OR INCLUSION OF DISCOUNT COUPONS BY RETAIL LICENSEES

Since the articulation of Division policy prohibiting the use of mails in the advertisement and solicitation of alcoholic beverages (Bulletin 2381, Item 2), numerous inquiries have been received seeking a reevaluation of the opinion as it relates to two specific practices.

The dissemination of product advertisements and coupons for numerous products or services in one mailing is now common. These "Value Pacs" or like mailings to "resident or occupant" represent a currently acceptable method of introducing a potential consumer to a product, service or business establishment. Such mailings do not involve the personal element of solicitation prohibited under N.J.A.C. 13:2-23.4. A recipient of these mailings may disregard same, or direct the postal authorities to decline to deliver them. No potential confrontative situation can occur as might in a personal or telephone solicitation.

The second practice involves direct mailing by a licensee to a previous customer or patron who agreed to be placed on a mailing list. The voluntary agreement to be on a mailing is indicative of an absence of objection to such direct mailings and does not offend the intent or purpose of N.J.A.C. 13:2-23.4.

The conduct of these two specific types of advertising practices is now permitted. These practices are permitted for otherwise lawful advertising, coupon or discount practices. Actual solicitation of orders by mail is and continues to be prohibited.

5. NOTICE REGARDING RETAIL COOPERATIVE PURCHASES - APPLICATION OF PROVISIONS OF N.J.A.C. 13:2-26.1 AS THEY RELATE TO UTILIZATION OF BONDS AS ADEQUATE ASSURANCE OF PAYMENT ON CREDIT PURCHASES IN LIEU OF JOINT AND SEVERAL LIABILITY.

Several inquiries have addressed the permissibility and manner of application of acceptance by wholesalers of "cash" bonds from retailers who participate in credit cooperative purchases as an alternative to a provision that all members shall be jointly and severally liable for payment of purchases made through the Cooperative.

The applicable regulatory provision is set forth in full (N.J.A.C. 13:2-26.1(a)(6)):

> (6) all purchases on credit through or by cooperative agreement shall be reduced to writing, signed by the wholesaler and each individual participating member of the cooperative, and be consistent with the credit provisions of Subchapters 24 and 39 of this Chapter. Such credit terms shall include adequate assurances of payment by either the posting of a bond by the cooperative member or a provision that each member of the cooperative shall be jointly and severally liable for payment for the purchases made through the cooperative. A copy of such written agreements shall be maintained by the wholesaler in its marketing manual and by the registered buying cooperative;

The initial question posed is whether a wholesaler may accept a "cash" bond from the retail membership of the cooperative rather than a "surety" bond from a non-related third person or entity. The objective of the bond is to secure payment of credit purchases by multiple retailers in the event one or more retail purchasers should default. There appears to be no reasonable basis to distinguish between a "cash" bond; that is, a separately designated liquid account

under control of a fiduciary and singularly dedicated as a source of payment for delinquencies, and a "surety" bond, which interjects another business entity with attendant bonding expenses and collection procedures. The Division has, since 1934, accepted "cash" bonds in conjunction with seizures unlawful property under N.J.S.A. 33:1-66 and that practice has been efficient and secure. Thus, a "cash" bond is a permissible mode of satisfying the "bond" requirement in N.J.A.C. 13:2-26.1(a)(6).

The next area of inquiry requires an elaboration of the phrase used in the regulation mandating that there be "adequate assurances of payment." The initial determination of amount of the cash or surety bond is a policy determination of a particular wholesaler who utilizes this device. Any such determination could, upon complaint by another or demand by the Division, be subject to review by the Director. It is appropriate, however, to indicate certain basic guidelines or presumptions applicable to a determination of "adequate assurances."

The bond must be a continuing guarantee encompassing the duration of credit transactions and must be a singular dedication to guarantee payment on default of purchases of alcoholic beverages only. If draws are made against the fund, it must be replenished.

Since the bond in lieu of joint and several liability is a term of sale, the wholesaler must include the availability of this option in its Current Price List under N.J.A.C. 13:2-24.6(a)(3). Because the non-discriminatory provisions of N.J.A.C. 13:2-24.1 are also applicable, specific criteria and standards governing the determination for acceptance and implementation of a bond alternative to joint and several liability contained in its Marketing Manual are required by N.J.A.C. 13:2-24.6(a)(2).

In evaluating the amount of the bond, a presumption of adequacy will attach if the amount is at least equal to the sum of the largest monthly purchase orders attributable to the two biggest purchaser retailers participating in any cooperative purchase for the past four months. February through May, June through September and October through January will be the standard four month periods. As an example, if the purchase history for Cooperative Purchase Group A from February 1982 to

May 1982 reflects the largest purchases during any one month period to have been $10,000 to Retailer No. 5 ($5,000 on February 5, 1982 and $5,000 on February 19, 1982) and $15,000 to Retailer No. 11 ($15,000 on May 20, 1982), the amount of a bond would have to be no less than $25,000 to be presumptively adequate for all credit sales to that cooperative during February through May, 1983. Utilization of the same process would provide the adequate amounts for the other four-month periods.

If a wholesaler has no comparable four-month period of transactions in 1982 to apply the standard to a cooperative purchase group, the following would be presumptively adequate. The wholesaler would use the most recent full four-month period to establish the amount. For example, if the wholesaler commenced sales to Cooperative Purchase Group A in August 1982, a credit sale in April 1983 would be governed by the history of transactions in the October 1982 through January 1983 period. If there is no four-month history of transactions, the wholesaler should utilize the two largest retailer purchase orders within the last three or less months as the amount of the bond until a four-month history is developed.

If this is a first-time transaction, the amount of the bond would be the sum of the two largest retailer purchase orders.

To generalize the above, the basic objection in determining "adequate assurances" requires a fluctuating, not static, amount of the bond which correlates to the recognizable and identifiable increases and decreases of purchase activities during certain times of the year. The potential default of the two largest retailer purchases should be a satisfactory norm. If the cooperative purchase group contains five or less members, the bond amount may be predicated upon the one largest retailer purchaser only. All of the other provisions of N.J.A.C. 13:2-24.1, et seq., are applicable, including N.J.A.C. 13:2-24.4 governing extension of credit by wholesalers and the delinquency

consequences where a default occurs. The Division intends to actively monitor any utilization of the bond alternative to joint and several liability.

6. NOTICE TO WHOLESALERS - SUBMISSION OF ANNUAL CREDIT REPORTS

Under N.J.A.C. 13:2-24.4(e)(iii), wholesalers are required to submit to the Division, annually, a report outlining its activities relating to credit transactions and compliance with credit regulations. The Division shall be mailing to all licensed wholesalers an instruction sheet outlining the report requirements for the 1982 calendar year. The report requirements for 1982 will be modified and reflect some of the comments received in the 1981 reports.

7. HAROLD F. DAMON, JR. DEPUTY DIRECTOR

As of March 21, 1983 Harold F. Damon, Jr. was sworn in as a Deputy Director of the Division of Alcoholic Beverage Control. His telephone number is (609) 984-2736. Deputy Director John J. Sinsimer was assigned to the newly created trade Practices Bureau. Deputy Director Damon was assigned to the Licensing Bureau.

8. APPELLATE DECISION - Greenspan, et al v. Jersey City (Application and interpretation of distance between premises ordinance of the City of Jersey City).

8. APPELLATE DECISIONS - GREENSPAN, ET AL V. JERSEY CITY (APPLICATION AND INTERPRETATION OF DISTANCE BETWEEN PREMISES ORDINANCE OF THE CITY OF JERSEY CITY.)

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

#4674
AARON GREENSPAN, IRVING GREENSPAN AND 171-177 SIP AVENUE CORPORATION)

vs.)

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF JERSEY CITY)

CONCLUSIONS AND ORDER
OAL DOCKET NO. ABC1319-82

LEWIS M. HOLLAND, Esq., attorney for appellants
(Chasan, Leyner, Holland & Tarrant, attorneys)

BERNARD ABRAMS, Esq., Assistant Corporation Counsel
Attorney for respondent
(Matthew Burns, Corporation Counsel, attorney)

ACTION BELOW:

INITIAL DECISION

George Perselay, Administrative Law Judge

Date Decided: January 31, 1983 Date Received: January 31, 1983

Written Exceptions to the Initial Decision were filed on behalf of the issuing authority and an Answer thereto with additional exceptions were filed on behalf of the appellant, pursuant to N.J.A.C. 13:2-17.14.

In their application, the appellants sought approval of a person-to-person and place-to-place transfer, which is governed in part by the terms of Chapter 4, Article 1, Section 4-4(A) of the city ordinance. The relevant portion is as follows:

> No Plenary Retail Consumption License shall be granted for or transferred to any premises the entrance of which is within the area of a circle having a radius of seven hundred fifty feet (750') and having as its central point the entrance of an existing licensed premises covered by a Plenary Retail Consumption License. However, if any licensee holding a Plenary Retail Consumption License shall be compelled to vacate the licensed premises for any reason that in the opinion of the Board of Alcoholic Beverage Control was not caused by any action on the part of the licensee, or if the landlord of the licensed premises shall consent to a vacation thereof, the licensee may, in the discretion of the Board of Alcoholic Beverage Control be permitted to have such license transferred to another premises within a radius of five hundred feet (500') of the licensed premises so vacated.

At the hearing the Board denied the transfers in that it was not within 500 feet of the premises vacated and that the hardship provision did not permit it to consider any transfer beyond 500 feet. The Board did not rule on the provision of a transfer to another location beyond the 750 feet radius although there was evidence submitted and marked as Exhibit 2A, a map drawn by a surveyor showing the distance to be more than 750 feet.

At the hearing evidence was presented that for many years the Board had considered and determined that the 750 feet radius was a measurement from entrace to entrance. N.J.S.A. 33:1-76 provides that the measurement shall be in a normal way that a pedestrian would properly walk from the nearest entrance of the premises to be licensed. While the statute was primarily directed to distances from established churches, nevertheless, the Appellate Division in Karam, et al v. Alcoholic Beverage Control, et al, 102 N.J. 291 (293) (App. Div. 1968) stated, "of the various ways, if more than one, by which

a pedestrian can properly go from one to another, the shortest is to govern" I concur in the findings of the Administrative Law Judge that the said measurements should be determined, as the Board itself has done, as a person would walk, properly and lawfully, especially where, as here, sidewalks are provided.

In its exceptions, the issuing authority relies on the decision stated in Lyons Farms Tavern vs. Municipal Board of Alcoholic Beverage Control, Newark, 55 N.J. 292 (1970) wherein the court held that the municipal board's exercise of discretion ought to be accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of its discretion.

A municipality's grant or denial of a license will not be set aside as long as the municipality's exercise of judgment and discretion is reasonable. However, where the municipal action was unreasonable or improperly grounded, its denial should be set aside. Hudson Bergen County Retail Liquor Stores Association vs. Board of Commissioners of the City of Hoboken, 135 N.J.L. 502 (E. & A. 1947).

In the Answer to the Exceptions to the Initial Decision, counsel for appellants states that the Administrative Law Judge erred in his conclusions that the appellants failed to meet the conditions under the city ordinance. Chapter 4, Article 4, Section 4-4(A) regarding the consent of landlord which in this case for the most part, are one and the same individuals. There is no question that the appellants were forced to close their business due to economic necessity resulting from urban changes.

It is only coincidental that the premises were leased to a governmental agency. It was not in a true sense a "forced taking." The appellants, as a landlord considering the declining area, gained from the leasing arrangement to a desirable tenant.

Having carefully considered the entire record herein, including the Exceptions and Answer thereto, I concur in the findings and conclusions of the Administrative Law Judge and adopt same as my conclusions herein.

Accordingly, it is on this 15th day of March, 1983,

ORDERED that the action of the Municipal Board of Alcoholic Beverage Control of the City of Jersy City, in denying appellants' application for a person-to-person and place-to-place transfer be and the same is hereby reversed, and it is further

ORDERED that the Municipal Board of Alcoholic Beverage Control of the City of Jersey City be and is hereby directed to grant appellants' application for a person-to-person and place-to-place transfer of the Plenary Retail Consumption License 0906-33-173-001 for premises 159-163 Newkirk Street, Jersey City, New Jersey, in accordance with the application filed therefore.

JOHN F. VASSALLO, JR.
DIRECTOR

APPENDIX: Initial Decision Below

JFV:lg

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. ABC 1319-82

AGENCY DKT. NO. 4675

AARON GREENSPAN, IRVING GREENSPAN
AND 171-177 SIP AVENUE CORPORATION,
Appellant,
v.
BOARD OF ALCOHOLIC BEVERAGE CONTROL
OF THE CITY OF JERSEY CITY,
Respondent.

APPEARANCES:

Lewis M. Holland, Esq., for appellant
(Chasan, Leyner, Holland & Tarrant, attorneys)
Bernard Abrams, Assistant Corporation Counsel, for respondent
(Matthew Burns, Corporation Counsel, attorney)

Record Closed: December 15, 1982 Decided: January 31, 1983

BEFORE GEORGE PERSELAY, ALJ:

This is an appeal from a denial by the respondent of an application for a person to person, place to place transfer of a plenary retail consumption license. Application to transfer the license was originally filed with respondent on September 9, 1980 in the proposed name of 171-177 Sip Avenue Corporation, Inc. and was amended on or about September 17, 1980 to read in the name of Irving Greenspan, Aaron Greenspan and 171-177 Sip Avenue Corporation (R-1). A hearing was held September 23, 1980 and was

adjourned to allow a determination of a difference in measurements, as will be more fully discussed. A meeting scheduled for January 20, 1981 was postponed at the request of appellant's attorney, and there were no further proceedings on that application. The municipal fee of $120 and state fee of $50 were paid.

A second application (R-2) was filed October 16, 1981 with both fees being paid anew in the total amount of $170. A hearing was held December 2, 1981 and by resolution (R-3) passed December 16, 1981 and dated December 30, 1981 the respondent denied the person to person and place to place tranfers.

Appellants made timely appeal to the New Jersey Division of Alcoholic Beverage Control and the matter was forwarded to the Office Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. and docketed February 18, 1982. A hearing scheduled for July 22, 1982 was adjourned and a hearing was held September 1, 1982. The record was extended to October 18, 1982 for submission of memorandum. By inadvertence, counsel for respondent failed to serve a copy of its memorandum upon counsel for appellant. A copy was served November 30, 1982 and the record was extended to December 15, 1982 for reply.

Issues

The issues to be determined are:

1. Is the proposed location of the place to place transfer (entrance to entrance) within 750 feet of an existing licensed premises?

2. Were the Greenspans forced to vacate their premises at 159-163 Newkirk Street for a reason that, in the opinion of the Board of Alcoholic Beverage Control, was not caused by any action on their part?

3. Did the landlord consent to vacation of the premises by the Greenspans thereby allowing, in the discretion of the Board of Alcoholic Beverage Control, the licensee to transfer the license to premises within 500 feet of the premises vacated?

4. Were the premises at 159-163 Newkirk Street acquired by any municipal, county, state or federal government or agency in accordance with law, which in the discretion of the Board of Alcoholic Beverage Control would allow the licensee to apply for transfer within a radius of 4000 feet of the premises so vacated.

As to the issues set forth as number two, three, and four, each determination is dependent upon the opinion or discretion of the Board of Alcoholic Beverage Control. See copy of section 4-4 of the Jersey City ordinance attached to this opinion as Appendix I. There has been no evidence produced to show the opinion or discretion of the Board was exercised in an unreasonable, arbitrary or capricious manner. This court will comment later in its analysis on these issues, but has no basis on which to reach a different conclusion nor to substitute its judgment for that of the local board.

As to issue No. one, this court is of the opinion that the respondent Board has acted in error, and that the proposed location of the place to place transfer is beyond 750 feet, as has been historically measured by the respondent Board, from the entrance of appellant's premises to another licensed premises.

Another issue, employment of a person who is disqualified by a criminal record, was removed from the case by a court ruling based upon appellant's representation that the individual would not be employed until the disqualification was properly removed.

Statement of Facts

The essential facts in this case are not in dispute. I hereby make the folowing findings of fact:

1. Plenary retail consumption license No. 0906-33-173-002 (referred to in the Board's resolution (R-3) as 0906-33-173-001) is held by Irving and Aaron Greenspan, partners t/a Greenspan's Kosher Delicatessen and Restaurant and is situated at 159-163 Newkirk Street (R-1 and R-2).

2. The proposed location of the place to place transfer is the "V.I.P." restaurant located at 171-177 Sip Avenue. (R-1 & R-2).

3. The historic manner of measurement of distance between licensed premises, or other measurement required by the ordinance, has been "as a reasonably prudent man would walk from one place to another." (See Transcript of Michael Halpern, Esq., and testimony of the secretary of the Board at 37).

4. The measurement of the distance between the entrance of the V.I.P. and Jack Muller's Bar, made by the appellant's surveyor, Mr. Lange, pursuant to instruction from the Board's secretary as a prudent man might walk, set the distance at 802 feet. (A-1). Attached as Appendix II.

5. The same measurement made by the members of the enforcement unit, set the distance at 724 feet (A-2 —), 716 feet by testimony, at 37. Attached as Appendix III.

6. The secretary of the Board stated the enforcement unit usually measured "as a prudent man would walk" and that standard was in effect for approximately 12 years. (testimony at 51).

7. The secretary of the Board does not recall directions or discussion of measurement "as the crow flies," (testimony, at 50).

8. The Greenpan's entered into an agreement with 171-177 Sip Avenue Corporation regarding the sale of alcoholic beverages at the new location. (A-3)

9. The Greenspan's Kosher Deli and Restaurant was economically affected because of population change, and eventually closed its business.

10. The landlord-owner of the premises at 159-163 Newkirk Street are the two Greenspan's and their mother.

11. The Greenspan's, as partners in the delicatesssen business, were in substantial arrears to the Greenspans and their mother, as landlord, in rental and tax payments.

12. The Greenspans and their mother, as owner-landlord, leased the premises to Hudson County Community College, a governmental agency.

13. The parties have agreed that if section 4-4(b) is applicable, the proposed premises are within 4000 feet of 159-163 Newkirk Street.

14. The parties have agreed that the premises are within 500 feet of each other, but the entrances, as presently situated, are more than 500 feet of each other.

Statement of Law

Appeals to the Director of the Division of Alcoholic Beverage Control shall be heard de novo and the parties may introduce oral testimony and documentary evidence.

N.J.A.C. 13:2-17.6. The burden of establishing that the action of the respondent issuing authority was erroneous rests with the appellant. Ibid. The conduct of the de novo hearing of the appeal is to make necessary factual and legal determinations on the record before this court. Under the settled practice, the Director of Alcoholic Beverage Control abides by the municipality grant or denial of the application so long as its exercise of judgment and discretion was reasonable. See Fanwood v. Rocco, 33 N.J. 404 (1960) aff'd. 59, N.J. Super. 306 (App. Div. 1960).

The scope of review of the State division on an appeal from the determination of a local board on the transfer of a liquor license will be limited to a determination whether or not the local board has abused its discretion, notwithstanding the testimony taken, de novo, on review, Rajah Liquors v. Division of Alcoholic Beverage Control, 33 N.J. Super. 598 (App. Div. 1955).

Responsibility for the administration and enforcement of the alcoholic beverage laws relating to the transfer of a liquor license from place-to-place is primarily committed to municipal authorities. Lyons Farms Tavern, v. Mun. Bd. of Alc. Bev. Newark, 55 N.J. 292 (1970). Municipal authorities are vested with a high responsibility and wide discretion and are intended to have as their principal guide the public interest. In order to effectuate the legislative purpose in the alcoholic beverage laws relating to the transfer of a liquor license from place-to-place, the Director of the Division of Alcoholic Beverage Control and the courts must place much reliance on the local action. Lyons Farms. In the absence of an abuse of such discretion, the action of this local authority should not be disturbed by the Director of the Division, and the Director may not reverse its action in the absence of such manifest mistake or abuse of discretion. Cf. Florence Methodist Church v. Twp. Committee, Florence Twp., 38 N.J. Super. 85 (App Div. 1955).

Initially, it should be observed that there is no inherent or automatic right to the transfer of alcoholic beverage license. Zicherman v. Driscoll, 133 N.J.L. 586 (Sup. Ct. 1946); Biscamp v. Twp. Council of the Twp. of Teaneck, 5 N.J. Super. 172 (App. Div. 1949).

Although a liquor license is a privilege, the owner "acquires through his investment therein, an interest which is entitled to some measure of protection in connnection with a transfer." Twp. Committee of Lakewood Twp. v. Brandt, 38 N.J. Super. 462 (App. Div. 1955).

Once granted, a license is protected against arbitrary revocation, suspension or refusal to renew. The Boss Co., Inc., v. Bd. of Com'rs. of Atlantic City, 40 N.J. 379, 384 (1963). The license has value of a monetary nature that arises "from the power possessed by the licensee to substitute, with the municipal consent, some other person in his place as licensee." The Boss Co., at 384. See also, Bd. of Com'rs. of Bayonne v. B & L Tavern, Inc., 42 N.J. 131 (1964).

It is clear that the holder of a license can claim certain "equities" which an applicant for a new license cannot, Fanwood v. Rocco, 59 N.J. Super. 306, 322 (App. Div. 1960), aff'd. 33 N.J. 404 (1960) and the local issuing authority should "concern itself with the equities" in the case. Cf. Common Council of Hightstown v. Hedy's Bar, 86 N.J. Super. 561, 565 (App. Div. 1965).

However, when the municipal action is unreasonable or improperly grounded, the Director may grant such relief or take such action as is appropriate. Hedy's Bar, and South Jersey Retail Liquor Dealers Ass'n. v. Burnett, 125 N.J.L. 105 (Sup. Ct. 1940).

The decision of a local Board of Alcoholic Beverage Control is subject to reversal when the Director determines that its discretion has been exercised improperly, mistakenly, or unfairly. Belmar v. Div. of Alcoholic Beverage Control, 50 N.J. Super. 423, 426 (App. Div. 1958). The contemporaneous and practical construction placed on an ordinance over a period of years by the agency charged with its enforcement without interference by the municipal council is evidence of its conformity with the council's intent and may be accorded great weight by the courts. Margate Civic Association v. Bd. of Comm'rs., Margate, 132 N.J. Super. 58, 64-65 (App. Div. 1975), certif. den. 68 N.J. 139 (1975); Essex Co., etc., Stores Ass'n. v. Newark etc., Alc. Bev. Cont., 64 N.J. Super. 314, 322 (App. Div. 1960).

When such construction has been followed for a number of years, and the municipal council has reenacted the ordinance without changing the relevant language, the practical construction is entitled to even greater weight and is regarded as presumptively the correct interpretation. Ford Motor Co. v. N.J. Dept. of Labor & Industry, 7 N.J. Super. 30, 38 (App. Div. 1950), aff'd., 5 N.J. 494 (1950).

In regard to measuring as a prudent man would walk, the law is clear that such a measurement must be made by means of the nearest crosswalk, whether marked or unmarked. Hopkins v. Municipal Bd. of Alcoholic, etc., Newark, 4 N.J. Super. 484, 487 (App. Div. 1949).

The measurement provided in N.J.S.A. 33:1-76 is defined: "in the normal way that a pedestrian would properly walk from the nearest entrance of the premises to be licensed." If there are several ways by which a pedestrian can properly go from another, the shortest is to govern. Karam, et al. v. Alcholic Beverage Control, et al., 102 N.J. Super. 291 (App. Div. 1968); certif. den. 53 N.J. 63 (1968).

Analysis and Findings

It is readily apparent that the language of the ordinance reading "within an area having a radius of 750 feet" has been interpreted as an entrance to entrance measurement and not a geometric circle having a radius of 750 feet. The latter concept would be most restrictive. The secretary of the Board stated the prudent person standard had been in effect for twelve (12) years. He instructed the appellant' surveyor to use the prudent man's standard. There has been interjected into the hearing the term "as the crow flies," which is generally considered to be a straight line between two points. "As the crow flies" does not take into consideration crosswalks, sidewalks and such other considerations which a pedestrian would utilize to properly walk from place to place. Pedestrians are persons afoot. N.J.S.A. 39:1-1. They must cross the roadway within a crosswalk, or where there is no crosswalk, at right angles to the highway. Where sidewalks are provided, it is unlawful for a pedestrian to walk along or upon an adjacent roadway. N.J.S.A. 39:4-34. The crow is an inaccurate instrument of measure when one considers the allurement of a

cornfield or other area, however small, which may provide a source of sustenance to our feathered friend. The testimony of a more trained person, a surveyor in this instance, reposes greater confidence in the trier of fact. See Kovacs v. Kaczorowski, 3 N.J. Super. 469, 473 (Ch. Div. 1949).

The drawing which reflects the measurement by the enforcement unit may well portray, indeed, the manner in which a person who imbibes in one licensed premises may walk to the next licensed premise. To so walk would be to violate the statutes pertaining to pedestrians. It reflects a disdain, voluntary or involuntary, for the necessary caution which must be exercised by the pedestrian when considering motor vehicle traffic.

A prudent person would be judicious and cautious, and would be mindful of walking on the sidewalk as opposed to the roadway, and concerned about the moving traffic. The prudent person would walk in accordance with accepted standards and rules such as the statute pertaining to crosswalks and sidewalks.

Considering the foregoing and the evidence in this case, I FIND that the survey and manner of measurment (A-1) made by the appellant's surveyors is the more accurate and reflects the path a reasonably prudent person would follow in properly going from one licensed premises to the other. I further FIND that the measurement between Jack Miller's Bar and the V.I.P. is 802 feet.

I further FIND that the ordinance has been interpreted historically, and at least for the last twelve years, as reading the language "within an area having a radius of 750 feet" to mean 750 feet as a prudent person would normally and properly walk between entrances.

Accordingly, I CONCLUDE that the distance between an existing license and the proposed location of the place to place transfer are not within 750 feet of each other. As to issues two, three, and four, I FIND that the kosher delicatessen business was adversely affected by socio-economic urban changes. The adverse effect was sufficient to cause the brothers Greenspan to go out of business. I FIND that such economic impact is not a

reason which compels vacating the property as intended by the ordinance. I further FIND that the consent of the landlord to the vacating of the premises is self-serving and not within the intendment of the ordinance. The tenants, the brothers Greenspan, were in arrears to themselves and their mother, the landlord. The landlord did not seek to evict the tenant for failure to pay rent. The proposal is a sham. Nevertheless, as previously stated, the determination is within the discretion or opinion of the Board, and there is nothing before this court to suggest any reason why their judgment was erroneous.

So, too, for the "taking" by a governmental agency. It was a voluntary lease entered into by the landlord. No doubt they are thankful for its existance, and the income created from it. To suggest it was a "taking" to bring the matter within the terms of the ordinance was creative and noteworthy, but of little vitality in the opinion of this court. Again, this court cannot say the local Board's discretion was improperly exercised.

Conclusion

I FIND and CONCLUDE that on issues two, three, and four the appellant has failed to prove by a preponderance of the evidence that the action of the municipal issuing authority was erroneous. I FIND and CONCLUDE, as to issue one, that the appellant has proved by a preponderance of the credible evidence that the municipal issuing authority was erroneous in its findings that the entrance between Jack Miller's Pub and the "V.I.P.," the proposed site of the place to place transfer, was within the 750 foot proscription in the ordinance.

Accordingly, the action of the municipal issuing authority in denying the person to person and place to place transfer is hereby REVERSED.

It is hereby ORDERED that the Board of Alcoholic Beverage Control of the City of Jersey City immediately approve the person to person and place to place transfer of Plenary Retail Consumption License 0906-33-173-002 as contained in application filed October 16, 1981.

reason which compels vacating the property as intended by the ordinance. I further FIND that the consent of the landlord to the vacating of the premises is self-serving and not within the intendment of the ordinance. The tenants, the brothers Greenspan, were in arrears to themselves and their mother, the landlord. The landlord did not seek to evict the tenant for failure to pay rent. The proposal is a sham. Nevertheless, as previously stated, the determination is within the discretion or opinion of the Board, and there is nothing before this court to suggest any reason why their judgment was erroneous.

So, too, for the "taking" by a governmental agency. It was a voluntary lease entered into by the landlord. No doubt they are thankful for its existance, and the income created from it. To suggest it was a "taking" to bring the matter within the terms of the ordinance was creative and noteworthy, but of little vitality in the opinion of this court. Again, this court cannot say the local Board's discretion was improperly exercised.

Conclusion

I FIND and CONCLUDE that on issues two, three, and four the appellant has failed to prove by a preponderance of the evidence that the action of the municipal issuing authority was erroneous. I FIND and CONCLUDE, as to issue one, that the appellant has proved by a preponderance of the credible evidence that the municipal issuing authority was erroneous in its findings that the entrance between Jack Miller's Pub and the "V.I.P.," the proposed site of the place to place transfer, was within the 750 foot proscription in the ordinance.

Accordingly, the action of the municipal issuing authority in denying the person to person and place to place transfer is hereby REVERSED.

It is hereby ORDERED that the Board of Alcoholic Beverage Control of the City of Jersey City immediately approve the person to person and place to place transfer of Plenary Retail Consumption License 0906-33-173-002 as contained in application filed October 16, 1981.

This recommended decision may be affirmed, modified or rejected by the DIRECTOR OF THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL, JOHN F. VASSALLO, JR., who by law is empowered to make a final decision in this matter. However, if JOHN F. VASSALLO, JR. does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby FILE my Initial Decision with the Division of Alcoholic Beverage Control for consideration.

January 31, 1983
DATE

GEORGE PERSELAY, ALJ

Receipt Acknowledged:

DATE

DIVISION OF ALCOHOLIC BEVERAGE CONTROL

Mailed To Parties:

DATE

FOR OFFICE OF ADMINISTRATIVE LAW

vt

Witnesses

For Respondent

Leonard E. Greiner, Sr.
John Cipriano
Lt. John McAuley

For Appellant

Herman Lange
Irving Greenspan

Evidence

R-1	Application for transfer, dated September 9, 1980
R-2	Application for transfer, dated October 16, 1981
R-3	Resolution and Order of denial, dated December 30, 1981
R-4	Maps showing radius of 750 feet
R-5	Map — scale 1" equals 100'
A-1	Survey drawing - Lange, dated September 1980
A-2	Survey drawing - Lange, dated September 1980—October 1980
A-3	Letter of agreement, dated October 22, 1981, Greenspan and 171-177 Sip Avenue Corp.

Witnesses

For Respondent

Leonard E. Greiner, Sr.
John Cipriano
Lt. John McAuley

For Appellant

Herman Lange
Irving Greenspan

Evidence

R-1	Application for transfer, dated September 9, 1980
R-2	Application for transfer, dated October 16, 1981
R-3	Resolution and Order of denial, dated December 30, 1981
R-4	Maps showing radius of 750 feet
R-5	Map — scale 1" equals 100'
A-1	Survey drawing - Lange, dated September 1980
A-2	Survey drawing - Lange, dated September 1980—October 1980
A-3	Letter of agreement, dated October 22, 1981, Greenspan and 171-177 Sip Avenue Corp.

APPENDIX I

CHAPTER 4.
Alcoholic Beverages
(N.J.S. 33-1.1 et seq.)

ARTICLE 1. PLENARY RETAIL CONSUMPTION LICENSES AND PLENARY RETAIL DISTRIBUTION LICENSES.
(N.J.S. 33:1-19)

Sec. 4-1. Number of licenses limited; types limited.

(a) No Plenary Retail Consumption License to sell alcoholic beverages at retail shall be granted hereafter, unless the number of such licenses issued and outstanding is less than five hundred (500), except as hereinafter set forth.
(b) No Plenary Retail Distribution License to sell alcoholic beverages at retail shall be granted hereafter, unless the number of such licenses issued and outstanding is less than seventy (70), except as hereinafter set forth.
(c) No seasonal Retail Consumption Licenses, no Limited Retail Distribution Licenses and no Club Licenses to sell alcoholic beverages at retail shall be granted.
(Ord. No. 1112, Sec. 1)

Sec. 4-2. New licenses granted may not exceed limit.

When the number of Plenary Retail Consumption Licenses or Plenary Retail Distribution Licenses issued and outstanding is less than the number specified above, additional licenses may be granted, but only in sufficient numbers so that the number of licenses outstanding will equal, but not exceed, the number specified in this Article.
(Ord. No. 1112, Sec. 2)

Sec. 4-3. Exceptions to license limitations.

Section 4-1 shall not apply to the renewal of licenses which are issued and outstanding, nor shall it apply to the transfer of such licenses from person to person, nor to the renewal of licenses so transferred; provided, however, the Municipal Council reserves the right of issuing Plenary Retail Consumption Licenses to any banquet hall with adequate kitchen facilities or new and bona fide restaurants or hotel premises, as defined by the laws of the State of New Jersey governing alcoholic beverages, notwithstanding any limitation in this Article.
(Ord. No. 1112, Sec. 3)

Sec. 4-4. Plenary Retail Consumption License; proximity of licensed premises; exception for bowling academy, effect of property acquisition by government.

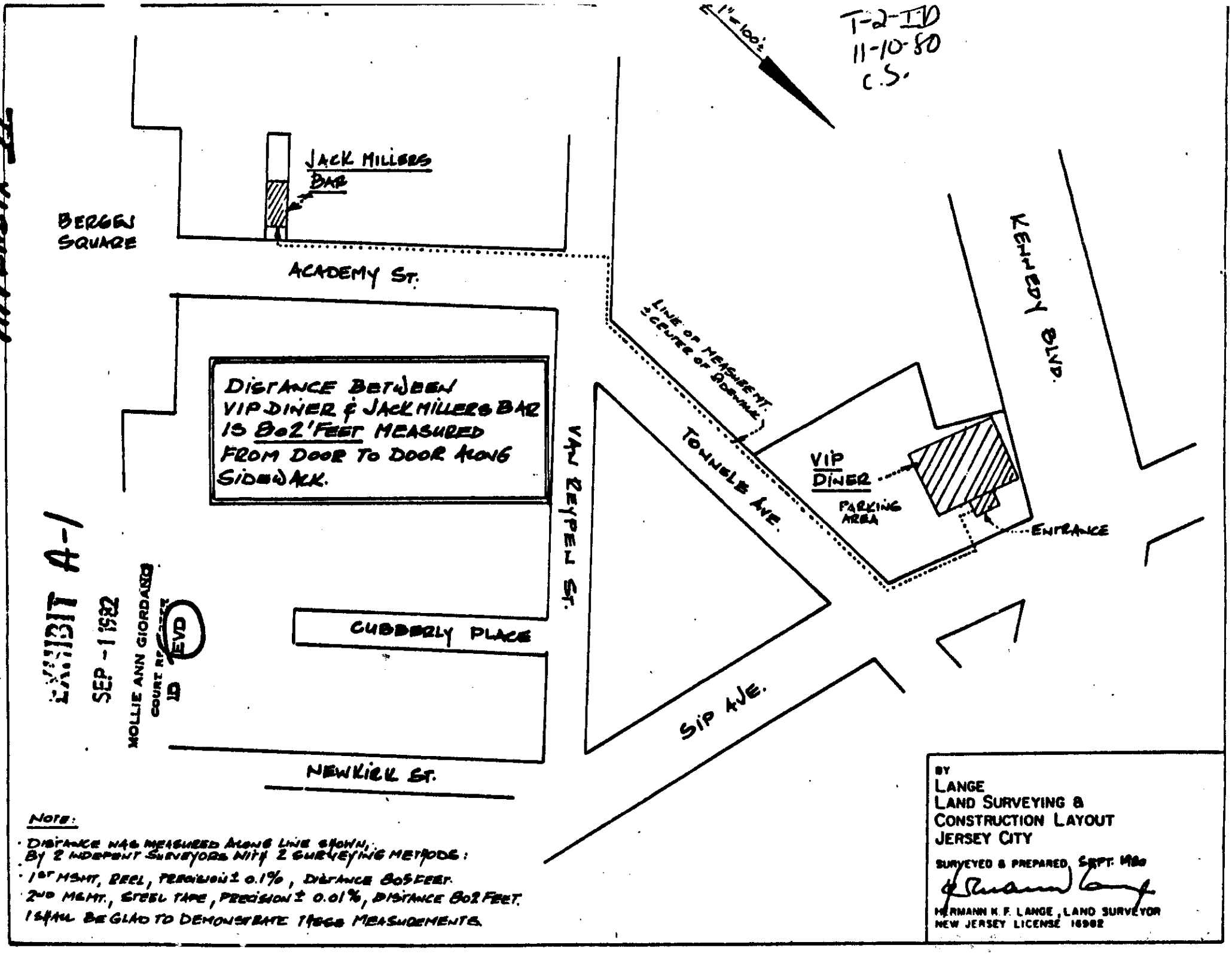
(a) No Plenary Retail Consumption License shall be granted for or transferred to any premises the entrance of which is within the area of a circle having a radius of seven hundred fifty feet (750') and having as its central point the entrance of an existing licensed premises covered by a Plenary Retail Consumption License. However, if any licensee holding a Plenary Retail Consumption License shall be compelled to vacate the licensed premises for any reason that in the opinion of the Board of Alcoholic Beverage Control was not caused by any action on the part of the licensee, or if the landlord of the licensed premises shall consent to a vacation thereof, the licensee may, in the discretion of the Board of Alcoholic Beverage Control be permitted to have such license transferred to another premises within a radius of five hundred feet (500') of the licensed premises so vacated. The provisions of this Section relating to distances between licensed premises shall not apply to the issuance or transfer of any license to premises which will be operated by the licensee as a bowling academy. The premises shall be deemed to be operated as a bowling academy if it contains four (4) or more pairs of bowling alleys.
(b) Whenever any municipal, County, State or federal government or agency acquires any property in accordance with law, which results in or causes holders of Plenary Retail Consumption or Distribution Licenses to vacate their premises thereby, the licensees may make application to the Board of Alcoholic Beverage Control for a transfer of their respective licenses, and the Board shall, in its discretion, grant the transfer of such license hereunder; provided that, the licensee shall locate elsewhere and within a radius of four thousand feet (4000') from the premises which the licensee has been or may be compelled to vacate.
(Ord. No. 1112, Sec. 4; Ord. No. W-132, Sec. 1)

Sec. 4-5. Plenary Retail Distribution License; proximity of licensed premises.

No Plenary Retail Distribution License excepting renewals or transfers from person to person shall be granted for or transferred to the premises the entrance of which is within the area of a circle having a radius of seven hundred and fifty feet (750') and having as its central point the entrance of an existing licensed premises covered by a Plenary Retail Distribution License. In the event a licensee desires to transfer to the other premises, he shall be permitted to do so within seven hundred and fifty feet (750') of the premises wherein he is located at the time of transfer, but shall comply with the provision aforementioned when transferring to premises in excess of seven hundred and fifty feet (750') from the premises from which a transfer is sought.
(Ord. No. 1112, Sec. 5)

Sec. 4-6. Surrender, transfer, or lapse of license; conditions for grant of new license.

(a) If any license is surrendered, transferred to other premises, or is permitted to lapse, the Board of Alcoholic Beverage Control may grant a license for said premises, notwithstanding any limitation in this Article provided:
(1) The owner of the premises filed a petition with


1" = 100'
T-2-ID
11-10-80
C.S.
JACK MILLERS BAR
BERGEN SQUARE
ACADEMY ST.
LINE OF MEASUREMENT & CENTER OF SIDEWALK
KENNEDY BLVD.
DISTANCE BETWEEN VIP DINER & JACK MILLERS BAR IS 802' FEET MEASURED FROM DOOR TO DOOR ALONG SIDEWALK.
VAN REYPEN ST.
TONNELE AVE.
VIP DINER
PARKING AREA
ENTRANCE
EXHIBIT A-1
SEP - 1982
MOLLIE ANN GIORDANO COURT REPORTER
ID
CUDDERLY PLACE
SIP AVE.
NEWKIRK ST.
Note:
· DISTANCE WAS MEASURED ALONG LINE SHOWN, BY 2 INDEPENT SURVEYORS WITH 2 SURVEYING METHODS:
· 1ST MSMT, REEL, PRECISION ± 0.1%, DISTANCE 802 FEET.
2ND MSMT., STEEL TAPE, PRECISION ± 0.01%, DISTANCE 802 FEET.
I SHALL BE GLAD TO DEMONSTRATE THESE MEASUREMENTS.
BY
LANGE
LAND SURVEYING & CONSTRUCTION LAYOUT
JERSEY CITY
SURVEYED & PREPARED, SEPT. 1980
HERMANN K. F. LANGE, LAND SURVEYOR
NEW JERSEY LICENSE 16982

APPENDIX III

EXHIBIT A-2

SEP - 1 1982

T-6-10
11-10-80
C-5.

MOLLIE ANN GIORDANO
COURT RE...

JACK MILLERS EVD
BAR

BERGEN SQUARE

ACADEMY ST.

KENNEDY BLVD.

LINE OF MEASUREMENT CENTRE OF SIDEWALK

DISTANCE BETWEEN VIP DINER & JACK MILLERS BAR IS 802 FEET MEASURED FROM DOOR TO DOOR ALONG SIDEWALK.

VAN REYPEN ST.

TONNELE AVE.

VIP DINER

PARKING AREA

ENTRANCE

CUBBERLY PLACE

SIP AVE.

NEWKIRK ST.

NOTE

DISTANCE WAS MEASURED ALONG LINE SHOWN, BY 2 INDEPENT SURVEYORS WITH 2 SURVEYING METHODS

1ST MSMT, REEL, PRECISION ± 0.1%, DISTANCE 805 FEET

2ND MSMT, STEEL TAPE, PRECISION ± 0.01%, DISTANCE 802 FEET.

I SHALL BE GLAD TO DEMONSTRATE THESE MEASUREMENTS.

RESURVEYED. 9 OCT 80 WITH DEFENDANTS JAMES SMITH & CLARA SIRIANE. FOUND DIST TO BE THE SAME.

HOWEVER, IF MEASURED ALONG STRAIGHT LINE, DISTANCE WILL BE ± 724 FEET.

SEE FENCES

BY
LANGE
LAND SURVEYING & CONSTRUCTION LAYOUT
JERSEY CITY

SURVEYED & PREPARED SEPT 1980 & OCT 80

HERMANN F. LANGE, LAND SURVEYOR
N.J. JERSEY LICENSE 16982

PUBLICATION OF BULLETIN 2430 IS HEREBY DIRECTED THIS

31st DAY OF MARCH, 1983.

JOHN F. VASSALLO, JR.
DIRECTOR