

STATE OF NEW JERSEY  
Department of Law and Public Safety  
DIVISION OF ALCOHOLIC BEVERAGE CONTROL  
1100 Raymond Blvd. Newark, N.J. 07102

August 30, 1967

BULLETIN 1748

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omitted from Bulletin. The item in question appeared in  
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1. APPELLATE DECISIONS - TRU-DEL CORP. v. JEFFERSON.

TRU-DEL CORP., t/a THE LODGE, )  
Appellant, )  
v. ) ON APPEAL  
TOWNSHIP COMMITTEE OF THE ) CONCLUSIONS  
TOWNSHIP OF JEFFERSON, ) AND ORDER  
Respondent. )

-----  
Andora & Baron, Esqs., by Anthony D. Andora, Esq., Attorneys  
for Appellant.  
Schenck, Price, Smith & King, Esqs., by Garret A. Hobard, IV,  
Esq., Attorneys for Respondent.  
Skoloff & Wolfe, Esqs., by Saul A. Wolfe, Esq., Attorneys for  
Objector.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal by appellant from the denial by respondent on April 11, 1966 of a place-to-place transfer of appellant's plenary retail consumption license from Route 15 to Building #9 of the Lakeside Shopping Center, Township of Jefferson.

The grounds of appeal in the instant matter can be summarized as follows: that respondent's action was arbitrary, unreasonable and capricious and constituted an abuse of discretion; the respondent ignored the testimony submitted by appellant whereby the State Highway Department, by reason of condemnation proceedings, acquired eighty per cent of appellant's land used for parking purposes in connection with the operation of its restaurant and bar; that appellant has been deprived of its sewerage disposal system and that water used for drinking has been contaminated; and that the proposed site sought for the license is one-half mile distant from its existing premises and thus would not increase the concentration of liquor licenses in the area.

Respondent's answer denied the allegations in the petition of appeal and contends that the action of respondent "was in accordance with law and the applicable decisions of the Division of Alcoholic Beverage Control."

Resolution #52, passed by respondent at a meeting held April 11, 1966, reads as follows:

"WHEREAS, Tru-Del Corp. has applied for a transfer of Plenary Retail Consumption License from premises located on Route 15, known as The Lodge, in the Township of Jefferson, to premises located on property of The Arthur D. Crane Company known as Building No. 9 of the Lakeside Shopping Center; and

"WHEREAS, the Township Committee has heard the testimony of the applicant's witness, Anthony Scaramellino and considered the exhibits presented in connection therewith; and

"WHEREAS, the Township Committee of the Township of Jefferson makes the following findings of fact:

"1) The premises known as The Lodge have been depleted in area as the result of the taking by the State Highway Department, but the principal building remains in tact and the applicant has approximately thirty eight parking spaces available to service its customers;

"2) The applicant testified that the New Jersey State Highway Department taking deprived him of his existing sewerage disposal facilities, but also testified that he has a system capable of adequately servicing twenty to thirty customers;

"3) The applicant testified without contradiction that there exists five licensed premises within one mile of the proposed transfer site;

"4) The applicant's present premises has a useable area of approximately 7,000 square feet and the proposed premises a useable area of approximately 1440 square feet;

"5) The applicant's present premises can service forty people at the bar and the proposed premises would service nine people at the bar;

"6) While the applicant testified that his existing source of water supply, a well, was at one point contaminated as a result of blasting by the New Jersey State Highway Department and condemned by the Jefferson Township Board of Health, there was no testimony to show that the well is presently unusable and the applicant admittedly did not know whether or not the well currently delivers potable water;

"7) The applicant used the present location for banquet facilities, but plans to neither serve nor sell food at the new location;

"8) The only opinions purporting to be expert produced to substantiate applicant's case were by various letters which the Committee finds of questionable value, and the applicant produced no live expert testimony on the issue of hardship; and

"WHEREAS, the Township Committee makes the following ultimate findings of fact by way of conclusion from the above findings:

"1) The application for transfer is in violation of Jefferson Township Ordinance No. 79 which prohibits the transfer of any license to a point within one mile of any other licensed premises;

"2) The applicant has not demonstrated any hardship which will be imposed upon him by the denial of this application, since the existing premises could adequately service customers equal to or greater in number than the proposed location;

"NOW, THEREFORE, BE IT RESOLVED by the Township Committee of the Township of Jefferson, Morris County, New Jersey as follows:

"1) That the application of Tru-Del Corp. for the transfer of Plenary Retail Consumption License be and the same is hereby denied for the reasons hereinabove stated without prejudice to re-apply for said transfer in the event that ordinance No. 79 is amended...."

Anthony Scaramellino (president of appellant) testified that appellant's license was acquired in 1957 and that the said licensed premises consist of a "restaurant, banquet hall and cocktail lounge and a seven-room apartment above;" that, prior to a portion of the land being acquired by the State for highway purposes, there were parking facilities for "approximately one hundred to one hundred twenty-five" cars; that there are now only parking facilities for "I'd say approximately between forty and fifty automobiles;" that in "'64, I believe" condemnation proceedings were instituted, as a result of which appellant agreed to convey and, according to the deed dated February 23, 1966, did convey 0.695 acres of land to the State of New Jersey; that the licensed premises have not been in operation since February 28, 1965, "due to the taking of the property and due to the destroying of the septic system and the pollution of the well;" that the licensed premises then continued in operation by use of a temporary method of disposing of sewerage devised by pumping the fluids from the ground into "a six thousand-gallon oil tanker" and then having it "hauled away" but the said temporary system was discontinued because of "the actual cost of the overhead;" that the well from which the water was obtained became contaminated because of blasting of rock by a construction company while in the process of constructing the highway.

Scaramellino also testified that the southbound traffic is in front of the property and that the northbound traffic is in the rear of the building; that ingress and egress to the licensed premises is only afforded to southbound traffic, and at the present time there is no ingress or egress from the northbound lane. Cars using the northbound lane, whose occupants desire to patronize appellant's present premises, must proceed a half-mile from the premises and use a "jughandle turnabout."

Cross examination by the attorneys for the respondent and objector, respectively, disclose that appellant was paid a substantial amount of money by the State for the land acquired by the Highway Department, and that appellant also lodged a claim against the contractor allegedly responsible for the damage done to the premises, which at the present time has not been resolved.

Scaramellino testified that the assessment for appellant's present premises since the acquisition of a portion of the land by the State has been reduced.

Joseph Tritch (a public accountant retained by appellant) testified regarding the total sales and net profit made or loss sustained by appellant in the operation of the restaurant and bar during the years 1962 to and including 1965. The testimony of Tritch discloses that, since the portion of the parking area was conveyed to the State, the net profit during the years 1963

and 1964 diminished, and during 1965 there was a loss in the operation of the licensed premises.

Wendell R. Inhoffer (a civil engineer and consultant) testified that in June 1962 his firm was retained by appellant in connection with its sanitation problem at the present licensed premises. He stated that the problem of removing grease was solved by the addition of a secondary sand filter which filtered the sewerage of grease and removed bacteria so that the water which entered the subsurface filter then filtered through the ground so that there was no clogging effect on the soil. However, after the highway was reconstructed, "the right of way line passed through the middle of the newly constructed sand filter and the slope lines", completely demolishing the filter. Inhoffer further testified that "we could construct a package sewerage treatment plan, which is a relatively small but complete sewerage treatment plan." However, he stated "to adequately handle this building and assuming a design factor of perhaps three thousand gallons per day, I would assume it could cost, including not only the package treatment plan but a third and tertiary sand filter and permanent pipe and electrical work, the cost could approach \$23,000." Moreover, "a plan of this type requires a licensed sewerage treatment plant operation which could approach \$1,800 per year. There would be a cost of perhaps four to \$500 per year, perhaps twenty-five hundred might be a good figure."

Inhoffer also estimated that the construction of a new well for use at the premises would cost \$1,500.

Inhoffer further testified that in his opinion the sewerage system presently used at appellant's licensed premises with minor changes in plumbing, a bar with a capacity of forty patrons and the sale of package goods might be operated. However, he noted that the existing system is not sufficient for restaurant operation. When asked concerning the parking facilities, Inhoffer testified that the land still owned by appellant is sufficient to accommodate the parking of fifty cars.

Harold J. Christy (township engineer) testified that he measured the distance of the liquor licensed premises located less than a mile from the proposed site in the shopping center and found "going from the north on Route 15 there is the Vunderbar and the Pallis Three; and, going to the south and west, Chabon's Tavern is within one mile and going to the south on Route 15 you have Tierney's Corner, Cals and The Lodge [appellant's premises] itself right now where the license is within the one-mile limit."

Robert Entwistle (a member of respondent Committee) testified he voted to deny the transfer of appellant's license because it would violate the ordinance prohibiting transfer of a liquor license to premises located less than one mile from another licensed premises. He further stated "that our ordinance was good and Mr. Scaramellino's approach to us was not actually on the basis of an out and out hardship. He wanted to relocate in violation of the ordinance and I felt this was wrong."

Committeeman Entwistle also testified that a factor considered is the number of licensed premises in the area, and thus he was of the opinion that there is no need or necessity for a license at the proposed location.

Ordinance No. 79, adopted by respondent on April 5, 1954 (a supplement to an ordinance relating to sale of alcoholic beverages and the regulation thereof) provides as follows:

"BE IT ORDAINED by the Township Committee of the Township of Jefferson, in the County of Morris:

"1. In addition to the limitations as to the number of licenses and transfers to be permitted, no transfer of a presently existing license shall be granted from its present location to a newly constructed or heretofore unlicensed premises, unless the premises to which the transferee desires to transfer shall be at least one mile from any other presently established licensed premises.

"2. This ordinance shall take effect immediately."

In the instant case the respondent found, after the hearing before it, that "the applicant has not demonstrated any hardship which will be imposed upon him by the denial of this application, since the existing premises could adequately service customers equal to or greater in number than the proposed location."

The testimony of appellant's witnesses to a large extent dwelled on the impossibility of appellant's profitable continuance of its former type of operation at its present premises and they also considered the curtailment or limitation of said operation in connection with the liquor license. The witnesses agreed that, because of the necessary expenditures to be incurred for new equipment resulting from the damage done to the sanitary sewerage system and water supply, plus the upkeep thereof, together with the cost of the continuous overhead expenses, the expense would be prohibitive.

In some municipalities there exist ordinances which provide that the local issuing authority may use its discretion to transfer a liquor license closer to another licensed premises if it finds that the licensee is forced to vacate its present premises for reason not caused by the licensee. However, there is no such clause in the ordinance in question.

In Smith v. Bosco et als., 66 N.J. Super. 165 (App. Div. 1961), Judge Freund, speaking for the court, stated:

"It is elementary that concern for the licensee's own financial misfortunes will not be elevated above the public interest. Cf. Hudson Bergen County Retail Liquor Stores Ass'n. v. Board of Com'rs. of City of Hoboken, 135 N.J.L. 502, 510 (E. & A. 1947). Administrative efforts to accommodate individual licensees must be accomplished within the framework of the existing legislation, construed in terms of the overriding public policy ...."

I shall now consider the contention of the appellant that the distance-between-premises ordinance (Ordinance #79) is unreasonable as applied to the facts in the case herein.

There is no dispute that there are five liquor outlets within one mile of appellant's proposed site for the transfer of the license in question. I might add that the proposed premises are in the shopping center, in the same building sought previously by Henry K. Churm, a licensee whose premises had theretofore been destroyed by fire. Churm appealed from the denial of his application for a place-to-place transfer, and the then Director held that, since there were liquor premises within a mile of the proposed premises, there was a definite violation of the distance-between-premises ordinance known as No. 79, and thus the ordinance

did not appear unreasonable as it applied to the facts of that case. Churm v. Jefferson, Bulletin 1459, Item 2. Some time thereafter, Churm again applied for a transfer to the same premises in the shopping center, and on appeal from denial of the application by the issuing authority the Director did not make a finding with respect to the reasonableness or unreasonableness of Ordinance No. 79 as "a separate and independent ground for respondent's denial of the place-to-place transfer was that in consideration of the number of licenses near the new location sought, there is no need or necessity for any additional license there." Churm v. Jefferson, Bulletin 1611, Item 3.

I am fully aware that on appeal each case stands or falls on its own merits. I have considered the fact that there is less parking space at appellant's present premises than formerly existed before the acquisition of a portion thereof by the State to be used for highway purposes. Although appellant's business has been curtailed to some extent, the testimony of appellant's witnesses disclosed that appellant is not precluded from operating at the present premises. It may have to change the type or method of operation. Although appellant contends that, although it received a substantial amount of money from the State for the value of the land conveyed, nothing was paid to it for loss or curtailment of its business which might occur in the future operation.

Committeeman Entwistle testified that in his opinion the transfer of the license would be a violation of Ordinance No. 79, and that it did not constitute a hardship upon the licensee and, furthermore, because of the number of licenses in the are, there was no need or necessity for a license at the proposed site.

The number of licenses which may be permitted in any particular area and the determination as to whether or not a license shall be transferred to a particular location come within the sound discretion of the issuing authority, and the Director's function on appeal is not to substitute his opinion for that of the issuing authority but, rather, to determine whether proper cause exists for its opinion and, if so, to affirm irrespective of his personal views. Rothman v. Hamilton, Bulletin 1091, Item 1; Food Fair Stores of New Jersey, Inc. v. Union, Bulletin 1129, Item 1; The Grand Union Company v. West Orange, Bulletin 1155, Item 3.

In Fanwood v. Rocco and Div. of Alcoholic Beverage Control, 59 N.J. Super. 306, 321 (App.Div. 1960), Judge Gaulkin stated:

"The Legislature has entrusted to the municipal issuing authority the right and charged it with the duty to issue licenses (R.S. 33:1-24) and place-to-place transfers thereof '[O]n application made therefor setting forth the same matters and things with reference to the premises to which a transfer of license is sought as are required to be set forth in connection with an original application for license, as to said premises.' N.J.S.A. 33:1-26."

As was stated in Ward v. Scott, 16 N.J. 16, 23 (1954):

"Local officials who are thoroughly familiar with their community's characteristics and interests and are the proper representatives of its people, are undoubtedly the best equipped to pass initially on such applications .... And their determinations should not be approached with a general feeling of suspicion, for as Justice Holmes has properly admonished: 'Universal distrust

creates universal incompetence.' *Graham v. United States*, 231 U.S. 474, 480, 34 Ct. 148, 151, 58 L. Ed. 319, 324 (1913)."

The court stated in Fanwood, supra, at p. 320:

"No person is entitled to either [transfer of a license or issuance of an original license] as a matter of law.... If the motive of the governing body is pure, its reasons, whether based on morals, economics, or aesthetics, are immaterial."

In the matter sub judice, the municipality did not grant, but denied, the application. The action of the respondent may not be reversed by the Director unless he finds "the act of the board was clearly against the logic and effect of the presented facts." Hudson Bergen County Retail Liquor Stores Association et al v. Hoboken et al, 135 N.J.L. 502, at p. 511.

There was no evidence submitted on the part of the appellant which in any way indicated that there was a need or necessity for its license at the proposed premises. Although a convenience in a proper case may be considered a reason for the granting of a liquor license, that in itself is rarely, if ever, a valid basis upon which the Director may compel the municipality to do so. Fanwood v. Rocco and Div. of Alcoholic Beverage Control, supra.

I am satisfied from the testimony herein that, although appellant may to some extent suffer economic loss in the operation of the premises where the license now exists, it has received compensation in a substantial amount from the State to somewhat compensate for such contingencies.

I have considered all of the various grounds of appeal relied on by the appellant herein. After careful examination and consideration of the testimony, the exhibits and the memoranda filed herein by the attorneys for the interested parties, I find sufficient evidence to support respondent's findings in this matter.

In the absence of improper motivation by respondent (and I might add that none has been alleged), I find the action of respondent neither arbitrary, capricious, unreasonable, nor did it constitute an abuse of discretion.

It is my conclusion that appellant has failed to sustain the necessary proof to establish that respondent's action was erroneous so as to warrant reversal thereof. Rule 6 of State Regulation No. 15. Hence it is recommended that an order be entered affirming respondent's action and dismissing the appeal herein.

#### Conclusions and Order

Pursuant to Rule 14, State Regulation No. 15, exceptions to the Hearer's Report, with argument in support thereof, were filed by the attorneys for the appellant and answer to the exceptions, with argument in support thereof, was filed by the attorney for the respondent. Thereafter, rebuttal to the answer and response thereto were filed.

At my request the attorneys for the respective parties presented oral argument before me. A primary reason for my requesting oral argument was a thought to the possibility of a remand limited solely to a determination by the respondent with respect to the question of public need for an additional license at the location sought, for, as pointed out by the Hearer, the resolution of denial in Churn v. Jefferson, Bulletin 1611, Item 3,

set forth as a ground therefor, the absence of need for an additional license at the same shopping center location to which the appellant seeks transfer while in the instant appeal the resolution of denial made no mention of such a ground. It would appear, however, that such a remand would be bootless with but two of respondent's members who voted for denial being eligible to vote on the matter. In any event, the burden of showing public need was upon the appellant and, as pointed out by the Hearer, no evidence indicating in any way that such a need exists was presented. Presumably, there has been no change in this respect since Churm v. Jefferson, supra (March of 1965) in which appeal the evidence was that the nearest existing licensed premises was 246 feet from the shopping center location; that four other licensed premises were located from 1,320 to 1,396 feet therefrom; and that one other such premises was 4,224 feet therefrom.

Having carefully considered the entire record herein, including the testimony taken, the exhibits introduced in evidence, the briefs filed, the exceptions to the Hearer's report and answer thereto, the oral argument of the attorneys and the Hearer's report, I concur in the Hearer's findings and conclusions and shall follow his recommendation.

I find that the appellant has failed to sustain the burden (Rule 6, State Regulation No. 15) of establishing that the action of the respondent was erroneous and should be reversed.

Accordingly, it is, on this 15th day of June, 1967,

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

JOSEPH P. LORDI  
DIRECTOR

2. DISCIPLINARY PROCEEDINGS - NUMBERS BETS (HORSE RACES) - LOTTERY (NUMBERS GAME) - LICENSE SUSPENDED FOR 60 DAYS.

In the Matter of Disciplinary Proceedings against )

Robbins-Nicholson, Inc. )  
t/a Cedar Bar )  
14 Ridge Road )  
North Arlington, N. J. )

CONCLUSIONS  
AND ORDER

Holder of Plenary Retail Consumption License C-3 issued by the Mayor and Council of the Borough of North Arlington )

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Carmine F. Savino, Jr., Esq., Attorney for Licensee.  
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charges:

1. On October 8, 18, 20, 21, 31, November 1 and 2, 1966, you allowed, permitted and suffered gambling in an upon your licensed premises, viz., the making and accepting of bets on horse races on all of said dates, and the making and accepting of bets in a

lottery commonly known as the 'numbers game' on said dates of October 31, November 1 and 2, 1966; in violation of Rule 7 of State Regulation No. 20.

"2. On October 31, November 1 and 2, 1966, you allowed, permitted and suffered tickets and participation rights in a lottery, commonly known as the 'numbers game', to be sold and offered for sale in and upon your licensed premises and allowed, permitted and suffered such tickets and participation rights in and upon your licensed premises; in violation of Rule 6 of State Regulation No. 20."

ABC Agent S testified that pursuant to specific assignment to investigate an allegation of gambling, he visited the licensed premises on October 8, 1966, accompanied by Agent P. Both agents entered the licensed premises (described as a neighborhood tavern) at 11:45 a.m. Albert Robbins (president of the corporate licensee) was tending bar.

S asked Robbins for a newspaper to "look up some horses." After receiving the newspaper from Robbins, S asked "if I could get a bet in that day." Robbins responded, "Well, they come in every day." When asked if he could get a bet in on the trotters, Robbins replied that he did not believe so. Later, Robbins informed the agent that Jimmy (later identified as James Tramutoli) who was seated across the bar would take the bet. Thereupon, the agent asked Jimmy for a slip of paper. Jimmy reached over the bar for a pad and handed the pad to the agent. The agent wrote on a slip of paper his selection of a horse running that day at Aqueduct track. Approximately five minutes thereafter, Jimmy came to the agent for the slip of paper and \$6 in currency which represented the bet on the horse. The agent asked Robbins, "Is Jimmy okay?" Robbins responded, "Oh, yeah, Jimmy's okay."

Agents S and P next visited the tavern on October 18, 1966 at 11:30 a.m. Robbins was tending bar. Jimmy entered and sat at the bar across from the agents. Agent S informed Robbins that the horse he had previously bet on came in third but he failed to collect on it. Robbins shrugged his shoulders and said nothing. The agent then informed Robbins that he had a "couple of horses" to bet on that day. Robbins replied, "Give them to me." Upon request, Robbins supplied a piece of paper to the agent. S and P each wrote on the paper the name of a horse on which they wished to place a bet that day. Robbins took the slip of paper and the money representing the wager and put them in his trousers pocket.

Later, a male identified as Ralph Strain entered the tavern. Jimmy signaled the agents that Strain was the book-maker. Strain was described as "an older man, short, stocky, red-face, about five-seven, medium; you know, a little stocky; he was heavy."

Jimmy Tramutoli was described as "short, older man, sometimes wears glasses when he's reading, a little boisterous, loud", "five-five" in height and "medium build."

When Strain first entered the tavern, he went to the telephone booth. Robbins went to the telephone booth and handed something to Strain. Upon Robbins' return to the bar, he informed the agents that "he had got the bet in." Robbins then added, "If you win, I'll have the money for you tomorrow."

Agent S entered the licensed premises on October 20, 1966 at approximately 12:30 p.m. and positioned himself at the bar.

Robbins was tending bar. S asked Robbins for a newspaper in order "to check the paper for horses" and for a slip of paper which Robbins produced. S asked Robbins "if Ralph would be in today." Robbins responded, "He comes in every day." He informed the agent that he had advised Strain to take the agent's bets any time he (Robbins) was not in the tavern. The agent wrote the names of two horses running that day on the slip and the notation that he was betting the sum of \$2 on each. Strain entered the tavern at 1:20 p.m. While Strain was in the telephone booth, the agent asked Robbins whether Strain was calling in the bets. Robbins responded, "Don't worry, you've plenty of time." The agent handed Robbins the slip containing his selections. Robbins proceeded to the telephone booth and handed the slip to Strain. He then returned to the bar where the agent was seated, took \$4 of the agent's money and placed it on the bar in front of the position where Strain was seated prior to going to the telephone booth.

On October 21, 1966, Agent S entered the tavern at 12:45 p.m. accompanied by ABC Agent P. Again Robbins was tending bar. Robbins informed the agent that on the prior night old-time trolley cars had been discussed and on the current day a horse named Trolley Car was running. Strain entered the premises at approximately 1:10 p.m. and assumed his usual position at the far end of the bar. At this time the testimony revealed the following:

Q And after Mr. Strain came in did P--- or you have any conversation with Mr. Robbins?

A Yes. Agent P asked Al for a slip of paper to write down the horse he wanted to play.

Q What did Mr. Robbins do?

A Mr. Robbins stated to him, 'Just tell Ralph. He'll remember the bet.'

Q Then what occurred?

A Then I approached Ralph and I told him 'Trolley Car in the first race at Garden State and Gracious in the second race at Aqueduct, \$2 to win on each horse.' I handed Mr. Strain \$4 and returned to my position at the bar.

Q Did you then see what Mr. Strain did?

A He proceeded to the phone booth."

On the occasion of October 31, 1966, Agents S, P and D arrived in the vicinity of the tavern at approximately 1:10 p.m. D entered alone shortly after arrival, followed by S and P thereafter. S and P sat alongside each other, about two stools removed from D. A male identified as Thomas Hart was tending bar. Robbins was seated next to Ralph Strain on the patrons' side of the bar, at the far end. James Tramutoli was seated across the bar from the agents. The agent called to Tramutoli (who was seen jotting in a pad), "I have something for you." Jimmy approached the agent. The agent informed Jimmy that he would like to play a combination numbers bet on 2 4 6 for \$1.50. Jimmy advised the agent to "write it down" and handed him a pad. The agent wrote the numbers bet on the pad "right at the bar" and handed Jimmy \$1.50 and the slip.

Thereafter, upon request, Hart furnished the agents with a newspaper and a slip of paper. Agent S wrote on the paper the names of two horses upon which he wished to place a bet. Agent P also wrote a horse bet on the same slip of paper. The writing was done on the bar by both agents. S took the slip to Strain who was seated next to Robbins. Strain said, "Just give me the money. No slips." Eventually Strain proceeded to the telephone booth.

As to the visit of November 1, 1966, Agents S and P entered the tavern at approximately twelve noon and positioned themselves at the bar. Robbins, who was tending bar, informed the agents that "he picked a small winner yesterday and he had a couple of good ones for today." At S's request to give him a

winner, Robbins gave him the names of two horses racing that day. Upon further request, Robbins gave the agent a slip of paper and the agents wrote their choices on the paper and left it on the bar. At Robbins' request, the agent informed him as to their horses. Strain entered the licensed premises on this day at approximately 1:20 p.m. and again sat at the far end of the bar. The agent approached Strain, advised him of his selections, handed him \$8, after which Strain went to the telephone booth.

On the same date, Tramutoli entered the licensed premises at approximately 1:00 p.m. The testimony revealed the following:

"Q Was there any occurrence between you and him [Tramutoli]?"

A Yes. I called him over and handed him twenty-five cents, stating 'I want 552 today.' Jimmy handed me the pad. He said, 'Write it on the pad.' I wrote '552-25¢.'

Q Where did you do this writing?

A Right on the bar in front of me.

Q Where was Mr. Robbins?

A I do not know.

Q Well, I mean--

A He was in the area. In other words, exactly--I can't say he was exactly standing in front of me or in front of--he was in the immediate--serving the patrons."

Agent P also wrote a numbers bet on the same slip.

On November 2, 1966, several law enforcement officers connected with the Bergen County Police Department, the Bergen County Prosecutor's Office and the North Arlington Police Department collaborated with ABC Agents S, D and P in conducting the investigation. Agent S had in his possession a "marked" five-dollar bill and three "marked" one-dollar bills. Agent P had two "marked" one-dollar bills in his possession. Agent S also had in his possession a slip on which he had prerecorded several horse race bets. Agents S and P entered the licensed premises at 12:45 p.m. and positioned themselves at the bar. Agent D followed shortly thereafter and sat one stool away from S. Thomas Hart was tending bar. Robbins was sitting on the patrons' side. Tramutoli was seated in his usual position across the bar from the agents. At approximately 1:00 p.m. S called across the bar to Tramutoli, "I want to see you. I want to play a couple of numbers today." Tramutoli came over to the agents' position, handed P a pad and P wrote two numbers bets on the pad on the bar. Agent P then handed the slip and two marked one-dollar bills to Tramutoli.

Strain entered the barroom at approximately 1:20 p.m. and sat at "a table located to the rear." S went to the table and handed Strain the slip on which he had prerecorded the horse race bets and \$8 in marked money. Strain checked the selections with a scratch sheet he had in his possession. Agent D was signalled to contact the law enforcement officers. After D exited from the premises and returned with the law enforcement officers, S and P were requested to leave the premises with the patrons. They did not reveal their identities.

On cross examination, the agent testified that when he was conversing with Strain on November 2, 1966 (the day of the raid), Robbins was behind him playing shuffleboard and he made no observation as to whether or not Robbins observed his transaction with Strain. He did not know what the telephone call referred to. The testimony then revealed the following:

"Q When you sat down and carried on conversation with Mr. Strain, or anyone else in the tavern, are

you prepared to testify that Mr. Robbins observed you and kept you in observation all the time that you were doing these things?

A No, sir.

Q He was busy bartending, is that so?

A Yes, sir; yes, sir.

Q It's quite possible, Mr. S---, that you could have taken out a slip of paper at the bar and written on it without Mr. Robbins knowing anything about it, isn't that so?

A Sure, definitely, it's possible."

Earlier the witness reiterated that he had placed a bet on October 8, 1966 with Tramutoli.

On redirect examination, the agent testified as to the gambling activities thusly:

"At one time Al Robbins [stated] to me the first time, 'If there's any strangers in the premises, don't come by me.' But everything else there was nothing secret. I didn't whisper. The day we bet Trolley Car a lady hollered right out 'Here, Ralph. \$2 on Trolley Car.'

\* \* \*

Q And how was your activity carried on with the numbers betting with Mr. Tramutoli?

A Well, after the first day that he took the horse race bet, then we just called to him 'Jimmy, we have something for you,' and he would come over.

Q And you said this in what tone of voice?

A Well, just like I'm speaking here.

Q Where did you do the writing?

A Right on the bar."

It was stipulated between counsel that the testimony of Agent P, who was in the licensed premises with Agent S on all occasions except October 20, 1966, would be the same as the testimony of Agent S.

ABC Agent D testified that he visited the licensed premises twice. On the occasion of October 31, 1966, he entered the tavern alone at approximately 1:10 p.m. followed shortly thereafter by Agents P and S who sat about three stools away. Thomas Hart was tending bar. D observed Agents P and S perusing a newspaper which they obtained from the bartender. After a while he saw both agents write on a piece of paper and S took the piece of paper and some paper currency and proceeded to a point between Strain and Robbins seated at the bar conversing. S handed Strain the piece of paper and the money. He did not hear any conversation concerning that transaction. After looking at the paper, Strain returned it to S. He kept the money.

On the occasion of November 2, 1966, D entered the tavern at approximately 1:00 p.m. S and P had entered the tavern shortly prior thereto. Hart was tending bar. Tramutoli was seated across the bar. Robbins was playing shuffleboard. He observed Agent P writing on a piece of paper and S calling Tramutoli over to their position. He then observed P handing the slip and money to Tramutoli after which Tramutoli returned to his position at the bar. At the time of this occurrence, Robbins was playing shuffleboard "no more than three and a half to four feet to the side of them [the agents]."

Strain entered the barroom at approximately 1:20 p.m. and sat at a table "across from the telephone booth." He read a

scratch sheet. Agent S went to Strain and handed him the prepared bet slip and money. Strain examined the slip. D departed from the tavern and summoned the local law enforcement officers. On Tramutoli, the officers found the \$2 marked money and some numbers bet slips. In Strain's possession, they found \$8 in marked money and the bet slip that S had prepared.

On cross examination, Agent D admitted that no bet slip was found on Strain other than the one passed to him by S.

In behalf of the licensee corporation, Albert Robbins testified that he was a part owner thereof. He was in the licensed premises the afternoon of November 2, 1966 up to 1:30 p.m. at the time the raid was conducted by the law enforcement officers. There were approximately twenty to twenty-five patrons in the tavern at the time, including Ralph Strain and James Tramutoli. Strain and Tramutoli had been patronizing the tavern for "twenty years or more," both of them were retired and talked about horses and going to the track. Neither of them is a bookie or takes bets. He denied that on October 18, 1966 an ABC agent questioned him as to Strain's reliability as a bookmaker or that the agent asked him (Robbins) to place a bet for him. If he gave anyone a slip of paper, he would not observe what the paper was used for. He never placed a bet with Strain. He had no knowledge as to what Strain would be doing at the telephone. On the day of the raid, i.e., November 2, 1966, no evidence of gambling was found in his possession in the tavern. Finally, he testified as follows:

"Q And you deny every allegation made here today that there was gambling going on in your premises?

A Right.

Q To your knowledge?

A Correct."

On cross examination he admitted seeing Agent S and Strain conversing with each other on a number of occasions. However, he did not definitely recall an incident wherein Agent S communicated with Strain while Strain was seated next to him (Robbins). He did not know how Strain and S became acquainted with each other. He denied saying to S, "If I'm not here to take your bet, you can give it to Ralph" and added that he would not accept a bet. He admitted seeing Agents S and P conversing with Tramutoli; however, he "didn't see anything occur between them." He saw no writing. He made no effort to take any steps to see what was occurring. Tramutoli is a retired tailor doing part time work. He would write sleeve length measurements on the bar. He had no recollection of telling the agents "Well, the bookie comes in every day," or anything similar to that. He admitted talking generally to the agents concerning horse racing and that seven or eight patrons who are retired generally discuss horse racing. However, he did not notice them trying to place a bet in the licensed premises nor did they ever mention placing a bet. The agents may have said to him, "We have a couple of good ones we would like to play today" and they may have followed that up by asking for a piece of paper. However, he would not know what they did with the paper. He did not recall any incident of picking up money from the agents' position at the bar and giving it to Strain. He recalled a general conversation about a horse named "Trolley Car" and denied having knowledge of any betting on it.

In evaluating the testimony and its legal impact, we are guided by the basic and firmly established principle that disciplinary proceedings against liquor licensees are civil in nature and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Hornauer v. Division of Alcoholic Beverage Control, 40 N.J. Super. 501 (1956). This principle was restated in the case of Howard Tavern, Inc. v. Division of Alcoholic Beverage Control (App. Div. 1962), not officially

reported, reprinted in Bulletin 1491, Item 1, where the court said:

"The truth of charges in a proceeding before an administrative agency need be established only by a preponderance of the believable evidence, not beyond a reasonable doubt. *Atkinson v. Parsekian*, 37 N.J. 143, 149 (1962)."

The general rule in these cases is that the finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

I am persuaded that the testimony offered by Agent S in a direct and positive manner was credible and truly portrayed the acts of gambling that took place upon the licensed premises. For example, S's testimony clearly indicates that he engaged in the horse race betting with Albert Robbins who was a major stockholder, an officer and a bartender for the licensee corporation on the dates of October 8 and October 18, 1966. Furthermore, the evidence clearly establishes that Robbins was well aware of the gambling activities engaged in by both Strain and Tramutoli in the licensed premises. Robbins introduced Tramutoli to Division Agent S on the occasion of his first visit on October 8, 1966.

A licensee cannot escape the consequences of the occurrence of incidents, such as hereinabove related, on the licensed premises. A licensee may not escape or avoid his responsibility for conduct occurring on his premises by merely closing his eyes and ears. On the contrary, licensees or their agents or employees must use their eyes and ears, and use them effectively, to prevent the improper use of their premises. Bilowith v. Passaic, Bulletin 527, Item 3; Re Ehrlich, Bulletin 1441, Item 5; Re Club Tequila, Inc., Bulletin 1557, Item 1. Most certainly, the licensee "suffered" the aforesaid gambling activities to take place on the licensed premises. See Essex Holding Corp. v. Hock, 136 N.J.L. 28.

However, I have some feeling of doubt as to the adequacy of the proof as to that part of the charges relating to the date of November 2, 1966.

After carefully considering and evaluating all of the evidence adduced herein, and the legal principles applicable thereto, I conclude that the Division has proved its case by clear and convincing testimony and by a fair preponderance of the credible evidence. I therefore recommend that the licensee be found guilty of said charges one and two, which particularly refer to the dates of October 8, 18, 20, 21, 31 and November 1, 1966, and I further recommend that there be a finding of not guilty as to that part of the charges which refers to November 2, 1966.

The licensee has no prior adjudicated record of suspension of license. I further recommend that the license be suspended for sixty days. Re Englund, Bulletin 1717, Item 4.

#### Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 6 of State Regulation No. 16.

Having carefully considered the entire record herein, including the transcript of the testimony and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 19th day of June, 1967,

ORDERED that Plenary Retail Consumption License C-3, issued by the Mayor and Council of the Borough of North Arlington to Robbins-Nicholson, Inc., t/a Cedar Bar, for premises 14 Ridge Road, North Arlington, be and the same is hereby suspended for the balance of its term, viz., until midnight, June 30, 1967, commencing at 2:00 a.m. Monday, June 26, 1967; and it is further

ORDERED that any renewal license that may be granted shall be and the same is hereby suspended until 2:00 a.m. Friday, August 25, 1967.

JOSEPH P. LORDI  
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - ALCOHOLIC BEVERAGES NOT TRULY LABELED - LICENSE SUSPENDED FOR 10 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against CHARLES BOTTO and ELIZABETH BOTTO t/a PARK REST BAR & GRILL 201 Park Avenue Lyndhurst, N. J.

CONCLUSIONS AND ORDER

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Holders of Plenary Retail Consumption License C-21 issued by the Board of Commissioners of the Township of Lyndhurst

Licensees, Pro se.  
Leon Chorkavy, Jr., Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensees plead non vult to a charge alleging that on April 3, 1967, they possessed an alcoholic beverage in a bottle bearing a label which did not truly describe its contents, in violation of Rule 27 of State Regulation No. 20.

Absent prior record, the license will be suspended for ten days, with remission of five days for the plea entered, leaving a net suspension of five days. Re Jewell Realty Corporation, Bulletin 1733, Item 8.

Accordingly, it is, on this 19th day of June, 1967,

ORDERED that Plenary Retail Consumption License C-21, issued by the Board of Commissioners of the Township of Lyndhurst to Charles Botto and Elizabeth Botto, t/a Park Rest Bar & Grill, for premises 201 Park Avenue, Lyndhurst, be and the same is hereby suspended for the balance of its term, viz., until midnight, June 30, 1967, commencing at 2:00 a.m. Monday, June 26, 1967; and it is further

ORDERED that any renewal license that may be granted shall be and the same is hereby suspended until 3:00 a.m. Saturday, July 1, 1967.

JOSEPH P. LORDI  
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - ALCOHOLIC BEVERAGES NOT TRULY LABELED - AGGRAVATING CIRCUMSTANCE - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

FRED SERRA, INC.  
16 E. Columbia Avenue  
Palisades Park, N. J.

)  
)  
) CONCLUSIONS  
) AND ORDER  
)  
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Holder of Plenary Retail Consumption License C-12, issued by the Mayor and Council of the Borough of Palisades Park.

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Harvey Smith, Esq., Attorney for Licensee.  
Leon Chorkavy, Jr., Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

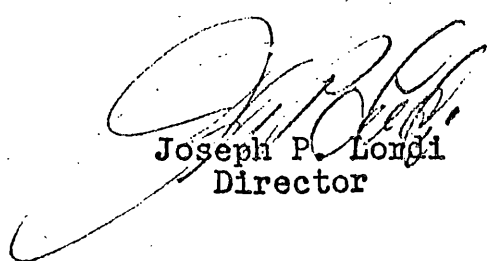
Licensee pleads non vult to a charge alleging that on April 5, 1967 it possessed alcoholic beverages in two bottles bearing labels which did not truly describe their contents, in violation of Rule 27 of State Regulation No. 20.

Although the licensee has a previous record of suspension of license by the municipal issuing authority for five days effective December 23, 1962 for sale in violation of State Regulation No. 38, the said prior record will be disregarded for penalty purposes by reason of intervening change of stockholders. Re Collbern, Inc., Bulletin 1735, Item 4. However, a suspension imposed simultaneously herewith on the license issued to State Restaurant, Inc., for premises 37 Main Street, Haceknsack, upon the licensee's confessional plea to a similar violation occurring on February 8, 1967, will be considered an aggravating circumstance by reason of the controlling stock interests in both corporations presently held by Louis Louizides and John Louizides. Cf. Re Sovat Corporation, Bulletin 1697, Item 7.

Considering the above facts and circumstances, the license will be suspended for twenty-five days, with remission of five days for the plea entered, leaving a net suspension of twenty day.

Accordingly, it is, on this 25th day of July 1967,

ORDERED that Plenary Retail Consumption License C-12, issued by the Mayor and Council of the Borough of Palisades Park to Fred Serra, Inc., for premises 6 E. Columbia Avenue, Palisades Park, be and the same is hereby suspended for twenty (20) days, commencing at 3 a.m. Tuesday, August 1, 1967, and terminating at 3 a.m. Monday, August 21, 1967.

  
Joseph P. Londi  
Director