

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
U.S. Routes 1-9 (Southbound) Newark, N.J. 07114

BULLETIN 2415

October 9, 1981

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1. APPELLATE DECISIONS - PASSAIC COUNTY PROSECUTOR BURRELL IVES HUMPHREYS
v. WEST PATERSON et al.

#4387

PASSAIC COUNTY PROSECUTOR
BURRELL IVES HUMPHREYS,

Appellant,

vs.

MUNICIPAL COUNCIL OF THE
BOROUGH OF WEST PATERSON
and BROWERTOWN LIQUORS, INC.,
t/a THE TOWPATH,

Respondents.

CONCLUSIONS AND ORDER

APPEAL

Giles W. Casaleggio, Esq., Attorney appearing for Appellant
Jack L. Cohen, Esq., Attorney appearing for Browertown Liquors, Inc.
Philip H. Mizzone, Jr., Esq., Attorney appearing for West Paterson.

Initial Decision Below

Hon. Joseph Rosa, Administrative Law Judge

Dated: June 9, 1980

Received: June 10, 1980

BY THE DIRECTOR:

Appellant appeals from the action of the Municipal Council of the Borough of West Paterson, hereinafter "Council", which, by resolution dated June 28, 1979 renewed the Plenary Retail Consumption License of respondent, Browertown Liquors, Inc., t/a The Towpath, for the 1979-80 license period.

Upon Answers filed, the matter was referred for hearing and Initial Decision to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1, et seq. After four days of hearings before an Administrative Law Judge, an agreement was reached between the parties hereto, which was reduced to a "Consent Order" dated June 3, 1980, a copy of which is annexed and part of the Initial Decision. The "Consent Order" provided for the renewal of the said license, subject to certain Special Conditions, pursuant to N.J.S.A. 33:1-32. Paragraph 5 of the "Consent Order" states in part as follows: " 'Consent Order' shall be incorporated in an Initial Decision by the Hon. Joseph Rosa; and that the said Initial Decision is expressly subject to review by the Director of the Division of Alcoholic Beverage Control who may either affirm, modify or reject the proposed Consent Order, or any of its terms."

I have carefully considered the entire record, including the transcripts of testimony, the exhibits, and the Initial Decision, and I concur in the conclusions of the Initial Decision which embodies the Special Conditions, except as hereinafter modified.

Before making such modifications, I called for Oral Argument before me at which the appellant was represented by Frank Santora, Esq., Assistant Prosecutor and the Council was represented by Philip Mizzone, Esq., Township Attorney. Jack L. Cohen, Esq., representing respondent, Browertown Liquors, Inc., advised me by telephone that he had no objection to any modification which would be made to the said Special Conditions in the Conclusions and Order.

At the Oral Argument, it was expressly agreed that the Special Conditions, as modified, which would be attached to the license shall apply to the renewed license for the 1980-81 license term.

The authority to approve same conditions and to modify them derives from N.J.S.A. 33:1-32, which states as follows:

"Subject to rules and regulations, each issuing authority by resolution, first approved by the Director, may impose any condition or conditions to the issuance of any license deemed necessary and proper to accomplish the objects of this chapter and secure compliance with the provisions thereof.....(Emphasis supplied)

I shall now consider, seriatim, the Special Conditions set forth in the Initial Decision.

1. This paragraph is a disclaimer of any violations by the respondent, Browertown Liquors, Inc., and is not objectionable.

2a. Provides that respondent, Browertown Liquors, Inc., in the future operation of the licensed premises, will "enforce a dress code whereby no person will be permitted entry into the licensed premises or served therein if he or she is wearing frayed or cut-down jeans, sandals, sneakers or a tank top". This Special Condition is disapproved because a dress code is not cognizable under the Alcoholic Beverage Law. I find that this condition is a subjective categorization in the nature of and legislating of morality, and it may possibly be a violation of constitutional provisions.

2b. Provides for the employment of four uniformed guards, two of whom shall be armed, and two of whom shall be unarmed, who shall be the outside environs and shall police "the outside environs of the licensed premises on Friday and Saturday nights when the licensed premises are open for business. On any other nights when the licensed premises may be open for business, respondent, Browertown Liquors, Inc. shall employ two unarmed guards. The armed guards shall be engaged through established and reputable security agencies accountable to the Chief of the West Paterson Police Department, or his designee designated for such purpose. The unarmed guards need not be engaged through such security agencies but they should be persons accountable to the Chief of the West Paterson Police Department or his designee,

designated for such purpose". I approve this Special Condition except that I disapprove that part of 2b. which refers to "armed" guards. I can conceive of serious consequences with weapons in the hands of civilians, who do not have special police training and skills.

2c. Requires that any individual engaged by the Browertown Liquors, Inc. as a member of its inside security staff be first approved by the West Paterson Police Chief or his designee and shall be identified by such garb. This condition is approved.

2d. Sets forth that "beginning July 1, 1980 live music shall be limited to four nights a week; however at least one of the said live music nights shall be restricted to a "nostalgic night". The restriction on "hard rock" musical organizations shall persist after July 1, 1980". That part of the Special Condition is approved. The balance of that Special Condition which proposes to authorize the Prosecutor of Passaic County to file objections to the addition of a "fourth night" of live music in the event of a "serious disciplinary infraction" before July 1, 1980 is disapproved, as being moot.

2e. Which limits the occupancy of the licensed premises to 790 persons at any one time is approved.

2f. Requires Browertown Liquors, Inc. to perform certain repairs and alterations in order to correct violations of the Uniform Construction Code noted on the November, 1979 report prepared by Stanley J. Sickles of Shephard Security Service, Inc. Enforcement thereof is not properly cognizable within the Alcoholic Beverage Control jurisdiction of the "Council" and should be enforced through building code proceedings. They are therefore, disapproved. This is similarly true with the recommendations contained in the report of Sickles dated December 3, 1979, except that those recommendations which relate to the lighting in the interior areas of the licensed premises and exit signs are proper subjects for Special Conditions, and are approved.

The recommendations of Elmer McDonald of the Department of Community Affairs set forth in the report dated September 18, 1979 requiring correction of certain building code deviations are not proper subjects for Special Conditions under the Alcoholic Beverage law and are, therefore, disapproved.

3. Sets forth generally that the respondent Council may neither modify nor relax any of the Special Conditions herein agreed to or "to be imposed upon the license and the licensed premises" except, after reasonable notice and opportunity to be heard have been given to the appellant.

This provision is disapproved because it seeks to shift the regulatory burden from the objector to the local issuing authority. Special Conditions may only be relaxed or modified at subsequent renewal periods, or at time of application for transfer of the license. The right of the appellant to present its views would not be hampered by the deletion of this provision.

Paragraphs 4, 5 and 6 of the "Consent Order" deal with the inherent powers of the Council as a local issuing authority; the Director's powers to review this agreement and reject same; and the objector's rights as they relate to the 1980-81 renewal period. These are approved.

7. Provides that "notwithstanding any of the provisions of this "(Consent) Order", the official record of the aforementioned administrative hearing shall take precedence over any interpretation of this agreement".

The said provision is disapproved because it can only create construction and interpretation problems in the future. The terms of Special Conditions are or should be clear. If terms are not included, they should not be inferred because of what may have been testified to by some witness during the four days of hearings. Obviously the "Consent Order" serves no purpose if it can be negated by some unspecified provision. It is clear that the parties must establish the terms unequivocally and clearly and express them in understandable, unambiguous terms.

Accordingly, it is on this 15th day of July, 1980,

ORDERED that the action of the respondent, Municipal Council of the Borough of West Paterson, in renewing the Plenary Retail Consumption license of respondent, Browertown Liquors, Inc., trading as The Towpath, be and the same is hereby affirmed, expressly subject to the Special Conditions as approved, modified or disapproved hereinabove and are incorporated herein as though the said Special Conditions as so approved or modified are set forth at length; and it is further

ORDERED that the said Special Conditions as hereinabove approved shall be applicable to and annexed to the renewed license herein for the 1980-81 license term; and it is further

ORDERED that the appeal herein be and the same is hereby dismissed.

Joseph H. Lerner
Director

IN RE:)	<u>INITIAL DECISION</u>
PASSAIC COUNTY PROSECUTOR)	OAL DKT. NO. ABC 4261-79
BURRELL IVES HUMPHREYS)	AGENCY DKT. NO. 4387

APPEARANCES:

Joseph A. Falcone, Acting Passaic County Prosecutor, Special Deputy Attorney General in Charge, By: **Giles W. Casaleggio**, Senior Assistant Prosecutor for the Appellant, Passaic County Prosecutor

Jack L. Cohen, Esq., Attorney for Respondent, Browertown Liquors, Inc., t/a Towpath

Phillip Mizzone, Jr., Esq., Attorney for Respondent, The Municipal Council of the Borough of West Paterson

BEFORE THE HONORABLE JOSEPH ROSA, A.L.J.:

This is an appeal from an action of the Municipal Council of the Borough of West Paterson, (hereinafter Respondent), who by Resolution dated June 28, 1979, renewed the plenary retail consumption license of Browertown Liquors, Inc., t/a The Towpath, (hereinafter Licensee - License No. 1616-33-002-001), for the year 1979-80.

A meeting was held before the Respondent on June 27, 1979 at which time the aforesaid Resolution was adopted granting the renewal application of the licensee. At said meeting, a representative of the Passaic County Prosecutor's Office (Hereinafter Appellant) appeared to contest the renewal application of the licensee. The Respondent, at this time, did not afford the Passaic County Prosecutor's office a full objector's hearing.

On July 25, 1979, the Appellant filed a Notice and Petition of Appeal with the Director of the Division of Alcoholic Beverage Control, State of New Jersey. In its

appeal, the Appellant contended that the action of the Respondent was arbitrary, capricious, and unreasonable and contrary to the applicable law and regulations. It further contended that the license renewal was contrary to the duty and obligation of the licensing authority to determine applications for license renewal based upon the good and welfare of the community, and that the continued grant of the license in question did not serve the public benefit. Answers were filed by the Respondent and the Licensee and the matter was then transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1, et seq. Respondent municipality and the Licensee contended that there was more than sufficient and competent evidence to support the Resolution of renewal and ask that it be affirmed.

On December 17, 1979, various motions were heard in reference to the standing of the parties and as to the procedure which took place on June 27, 1979. By Letter Decision dated January 22, 1980, these motions were disposed of, and an Order embodying the terms of the Letter Decision was executed on February 11, 1980. (Copies of both the January 22, 1980 Letter Decision and the Order with reference thereto are attached hereto.)

A hearing de novo pursuant to N.J.A.C. 13:2-17.6 was begun on April 21, 1980 before the Honorable Joseph Rosa, Jr., Administrative Law Judge. Pursuant to N.J.A.C. 13:2-17.14, all parties were given an opportunity to be heard and to crossexamine witnesses. No transcript of the proceeding below was submitted inasmuch as no stenographic record was taken at the renewal hearing.

After four days of hearing, Giles W. Casaleggio, Attorney for the Appellant stated that an agreement had been reached between the Appellant, the Respondent, and the Licensee. The agreement entered into would allow the renewal of the Licensee's plenary retail consumption license subject to certain special conditions, pursuant to N.J.S.A. 33:1-32. The special conditions were to be set forth in a Consent Order to be executed by all parties.

Also present at the hearing was Albert Weite, President of Browertown Liquors, Inc., who in answer to questioning by the Court stated that he was aware of the consequences of the agreement, and further stated that he would comply with the terms thereof. The Consent Order, which embodied the terms of the agreement was executed

by all parties, and forwarded to the Office of Administrative Law, and executed by the Honorable Joseph Rosa, Jr. on June 3, 1980. Said Order is attached hereto and made a part hereof, as if set forth fully herein.

After careful review of the testimony and the record in this matter, I FIND:

1. The Licensee is the holder of plenary retail consumption license No. 1616-33-002-001, heretofore issued by the Municipal Council for the Borough of West Paterson, New Jersey.
2. Said plenary retail consumption license was renewed by the Municipal Council of the Borough of West Paterson at a regular meeting held June 27, 1979, and was codified by Resolution dated June 28, 1979.
3. Appellant filed an appeal from this action of the Municipal Council of the Borough of West Paterson.
4. Appellant now wishes to withdraw his appeal against the action of the Municipal Council of the Borough of West Paterson.
5. All parties have executed a copy of a proposed Consent Order, a copy of which is attached hereto and made a part hereof, which provides for the renewal of the plenary retail consumption license No. 1616-33-002-001.
6. That all parties are aware that this Order and agreement may be modified, affirmed, or disapproved by the Director of the Division of Alcoholic Beverage Control, and if such Order is modified or disapproved by the Director, the Appellant would be allowed to reinstate his appeal.
7. That the aforesaid Licensee has entered into the Consent Order freely, knowingly and without coercion.

I therefore CONCLUDE that the withdrawal of the appeal has been entered into by the Appellant knowingly and voluntarily. I further CONCLUDE that the Consent Order attached hereto and made a part hereof, represents the agreement entered into by the parties hereto, and same is hereby APPROVED as if set forth fully herein.

This recommended decision may be affirmed, modified or rejected by the **DIRECTOR OF THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL, JOSEPH H. LERNER**, who by law is empowered to make a final decision in this matter. However, if the head of the agency does not so act in forty-five (45) days and unless the period is extended as provided by statute, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE with the **DIRECTOR OF THE DIVISION OF ALCOHOLIC BEVERAGE, JOSEPH H. LERNER**, my Initial Decision in this matter and the record of these proceedings.

ACTING PASSAIC COUNTY PROSECUTOR	:	STATE OF NEW JERSEY
JOSEPH A. FALCONE	:	DEPARTMENT OF LAW AND
	:	PUBLIC SAFETY
Appellant	:	DIVISION OF ALCOHOLIC
	:	BEVERAGE CONTROL
vs	:	No. 4387
	:	OALDocket No. ABC 4261-79
	:	
BROWERTOWN LIQUORS, INC.	:	<u>CONSENT ORDER</u>
t/a THE TOWPATH, and the	:	
MUNICIPAL COUNCIL OF THE	:	
BOROUGH OF WEST PATERSON	:	
Respondents	:	

This matter being opened to the Division of Alcoholic Beverage Control upon hearing before the Office of Administrative Law on April 21, April 22, April 23 and April 24, 1980, and in the presence of JOSEPH A. FALCONE, Acting Prosecutor, of Passaic County, for Appellant (Giles W. Casaleggio, Acting Assistant Prosecutor appearing), Jack L. Cohen, attorney for Licensee, Philip H. Mizzone, Jr., attorney for Respondent Municipal Council of the Borough of West Paterson, and the parties having conferred and reached an agreement as to the issues and controversies,

It is on this 3rd day of June, 1980

ORDERED that the plenary retail consumption license No. 1616-33-002-001 issued to Respondent, Browertown Liquors, Inc. t/a The Towpath for the year commencing July 1, 1979 and terminating June 30, 1980 be and the same is hereby renewed for the balance of said term only and expressly subject to the special conditions contained in the following agreement reached by the parties.

1. It is understood and agreed that by entering into this agreement the Respondent Browertown Liquors, Inc. does not admit or concede that it has at any time violated any of the statutes of the State of New Jersey, or any of the ordinances of the Borough of West Paterson, or any regulations of the Division of Alcoholic Beverage Control, or any other board or agency having jurisdiction over said Respondent; that this agreement is being entered into by said Respondent simply to avoid unnecessary expensive and protracted litigation.

2. In the future operation of the licensed premises, the Respondent Browertown Liquors, Inc. will

a. enforce a dress code whereby no person will be permitted entry into the licensed premises, or served thereon, if he or she is wearing frayed or cut-off jeans, sandals, sneakers, or a tank top;

b. employ four (4) uniformed security guards, two (2) of whom shall be armed and two (2) of whom shall be unarmed and

who shall police the outside environs of the licensed premises on Friday and Saturday nights when the licensed premises are open for business. On any other nights when the licensed premises may be open for business, Respondent Browertown Liquors, Inc. shall employ two (2) unarmed guards. The armed guards shall be engaged through established and reputable security agencies acceptable to the Chief of the West Paterson Police Department, or his designee designated for such purpose. The unarmed guards need not be engaged through such security agencies but they shall be persons acceptable to the Chief of the West Paterson Police Department, or to his designee designated for such purpose;

c. before engaging any individual as a member of its inside security staff, Respondent Browertown Liquors, Inc. shall have said individual approved by the Chief of the West Paterson Police Department, or his designee designated for such purpose. Members of the inside security staff shall be identified by special garb;

d. Respondent Browertown Liquors, Inc. shall limit its entertainment policy as follows: through June 30, 1980 live music shall be limited to three (3) nights per week. Through June 30, 1980, respondent shall be permitted to open no more than five nights per week. All other nights only pre-recorded or "canned" music shall be permitted. In no event shall the music offered on any night be by a musical organization whose

predominant appeal is through "hard rock" programming, dress and manner.

Beginning July 1, 1980, live music shall be limited to four (4) nights per week; however, at least one of said live music nights shall be restricted to a "nostalgic night". The restriction on "hard rock" musical organizations shall persist after July 1, 1980. In the event Respondent is guilty of a serious disciplinary infraction in the period before July 1, 1980 the office of the Prosecutor of Passaic County has the right to file objection to the addition of a fourth (4th) night of live music;

e. occupancy of the licensed premises is limited to not more than 790 persons at any one time;

f. Respondent Browertown Liquors, Inc. acknowledges receipt of a copy of report dated November 13, 1979 and a copy of letter report dated December 3, 1979 prepared by Stanley J. Sickles of Shephard Security Service, Inc./ To the extent that a copy of which is attached hereto. it has not already done so, Respondent Browertown Liquors, Inc. will perform the repairs or alterations required to cure the alleged violations of the uniform construction code noted on pages 3 and 4 of the report of November 19, 1979, with the exception of those alleged violations of nos. 1, 4 and 5 and said Respondent will also, to the extent that it has not already done so, comply with the recommendations contained in the letter report of December 3, 1979. Respondent will also maintain compliance

with the recommendations of Elmer McDonald of Department of Community Affairs contained in his report dated September 18, 1978.

3. No modification or relaxation of the conditions herein agreed to, to be imposed upon the license and the licensed premises, shall be granted by the issuing authority except after reasonable notice and an opportunity to be heard has been given to the Prosecutor of Passaic County.

4. Neither its participation in this settlement nor anything herein contained shall operate in the future to limit the jurisdiction or authority of the Borough of West Paterson in reference to the licensed premises or the plenary retail consumption license by virtue by which the premises are operated; more specifically, the Borough of West Paterson as the issuing authority may hereafter impose such other conditions or restrictions upon the said license or the licensed premises as it might in the absence of this settlement agreement.

5. The parties acknowledge their understanding that this agreement will be embodied in a Consent Order; that said Consent Order shall be incorporated in an Initial Decision by the Honorable Joseph Rosa, Jr., Administrative Law Judge and that the said Initial Decision is expressly subject to review by the Director of the Division of Alcoholic Beverage Control who may either affirm, modify or reverse the proposed Consent Order, or any of its terms.

6. In the event the respondent should violate any of the conditions of this Order prior to June 30, 1980, the Prosecutor's Office reserves the right to object to renewal of respondent's license at the 1980 renewal hearing.

7. Notwithstanding any of the provisions of this Order, the official record of the aforementioned administrative hearing shall take precedence over any other interpretation of this agreement.

2. APPELLATE DECISIONS - HOME AND LAND INVESTMENT CORP. v. CAMDEN.

#4290

Home and Land Investment Corp.,
t/a Rainbow Lounge, }

Appellant,

ON APPEAL

vs. }

CONCLUSIONS

Municipal Board of Alcoholic Beverage
Control of the City of Camden,

AND

ORDER

Respondent. }

Thomas F. Grace, Jr., Esq., Attorney for Appellant.
Martin F. McKernan, Jr., Esq., City Attorney, by
Matthew E. Segal, Esq., Appearing for the Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

This is an appeal from the action of the Municipal Board of Alcoholic Beverage Control of the City of Camden which, by Resolution dated October 10, 1978, suspended appellant's license for one hundred and ninety (190) days upon a finding of guilty to a charge alleging that the appellant allowed the subject premises to be conducted in such a manner as to become a nuisance, in violation of N.J.-A.C. 13:2-23.6(a).

The appellant, in its Petition of Appeal, alleges that the action of the respondent Board was improper in that:

(a) The hearing was conducted in such fashion as to prevent a fair hearing;

(b) The charges were vague and not supported by the evidence;

(c) The findings of fact were not within the framework of the charges; do not constitute grounds for suspension; were irrelevant to the charges;

(d) The conduct complained of is outside the control of the appellant; and

(e) The penalty imposed is unduly harsh.

The respondent, in its Answer, denies the substantive allegations of the Petition of Appeal.

Upon filing of the appeal, the Director, by Order dated November 1, 1978, stayed the suspension pending the determination of the appeal.

Prior to the scheduled de novo hearing in this Division, the parties conferred in an endeavor to resolve the matter. It was agreed, informally, that the hearing would be adjourned in order for the local issuing authority to reconsider its one hundred and ninety (190) days suspension. If it imposed a more modest suspension, the appellant would then withdraw its appeal and serve the reduced term of suspension.

The Board did, on February 15, 1979, by Supplemental Order, rescind its previously imposed penalty and imposed thirty (30) days closing. This action was taken concurrently with its grant of a person-to-person transfer of the subject license to another. The Board further provided, in its Resolution, that it would not object to a monetary fine in lieu of the thirty (30) days suspension.

However, the corporate licensee was closed from December 1978 through the date of the new Resolution, February 15, 1979. It maintains that since it was closed for a period in excess of the thirty (30) days suspension, it should be given credit for this period and, in effect, not have to be closed at a future date.

The Board rejected this contention, maintaining that N.J.A.C. 13:2-19.5 provides that when any license has been suspended such suspension shall continue in full force notwithstanding any transfer of license; and further, the suspension cannot begin until the licensee is in operable condition. In this instance, the establishment was closed for reasons independent of this proceeding.

I have reviewed the transcript of the local hearing and find that it contains ample substantiation of the Board's findings which gave rise to the amended penalty of license

suspension for thirty (30) days. Further, a thirty (30) days suspension, based upon a finding that the licensee was guilty for the second time of maintaining a nuisance, is reasonable under Division precedent.

The licensee's contention that it has already been closed for a period in excess of the penalty imposed and should be credited for this towards its penalty is without merit. The relevant regulation quoted by the Board is clear and unequivocal upon its face and cannot be subject to another interpretation. Furthermore, the dates of suspension can only be set by the Director of the Division of Alcoholic Beverage Control in those matters that are before him on appeal.

I, therefore, recommend that the action of the Board be affirmed, the appeal be dismissed, the Director's Order staying the suspension issued November 1, 1979 be vacated and that the thirty (30) days suspension be reimposed.

If the appellant is desirous of requesting a fine, in lieu of suspension, it should affirmatively request same of the Director. Whether such would be granted is in the sole discretion of the Director and I make no recommendations with respect thereto.

CONCLUSIONS AND ORDER

No Written Exceptions to the Hearer's Report were filed by the parties pursuant to N.J.A.C. 13:2-17.14.


Having carefully considered the entire record herein, including the transcript of the testimony before the Board, the exhibits and the Hearer's Report, I concur in the findings and recommendations of the Hearer and adopt them as my Conclusion herein.

Accordingly, it is on this 31st day of July, 1980

ORDERED that the action of the Municipal Board of Alcoholic Beverage Control of the City of Camden be and the same is hereby affirmed, and the appeal herein be and is hereby dismissed; and it is further

ORDERED that my Order of November 1, 1978, staying the suspension, pending determination of the appeal, be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License No. 0408-33-070-003 issued by the Municipal Board of Alcoholic Beverage Control of the City of Camden to Home and Land Investment Corporation, t/a The Rainbow Lounge, subsequently transferred to Bacchanal, Inc. for premises 1598 Mount Ephraim Avenue, Camden, New Jersey, be and the same is hereby suspended for thirty (30) days commencing 3:00 A.M. Tuesday, August 12, 1980 and terminating 3:00 A.M. Thursday, September 11, 1980.


JOSEPH H. LERNER
DIRECTOR