

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

BULLETIN 2412

September 23, 1981

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

BULLETIN 2412

September 23, 1981

1. APPELLATE DECISIONS - A & C PROPERTY, INC. v. CLIFTON.

#4453	:	OAL DKT. NO. ABC 0749-80
A & C PROPERTY, INC.	:	
T/A BRUNO'S RESTAURANT,	:	
Appellant,	:	ON APPEAL
v.	:	CONCLUSIONS and ORDER
MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE	:	
CONTROL OF THE CITY OF CLIFTON,	:	
Respondent.	:	

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Allen C. Mara, Esq., Attorney for Appellant.  
Francis J. Calise, Esq., Attorney for Respondent.

Initial Decision Below

Hon. Joseph Rosa, Jr., Administrative Law Judge

Dated: June 4, 1980      -      Received: June 5, 1980

BY THE DIRECTOR:

No exceptions to the Initial Decision were filed by the parties herein pursuant to N.J.A.C. 13:2-17.14.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, and the Initial Decision, I am unable to associate myself with the findings and conclusions of the Initial Decision and, therefore, reject the recommendations contained in the Initial Decision.

Before commenting upon the facts and the applicable law, I note that no stenographic or electric recording was employed by the respondent at the hearing below although, as mandated by N.J.A.C. 13:2-7.8, whereupon objections are filed to the proposed action. The minutes are only as accurate as the person keeping them, and, as was stated in the Initial Decision, they were not verbatim minutes but were merely the recollection of what transpired, by the Secretary of the respondent Board.

At the hearing before the Board, there were two objectors present: (a) Mrs. Geene, President of the Parents Teachers Association of Woodrow Wilson Junior High School who objected because of the proximity of the proposed transfer site to a local junior high school; and (b) Mr. Andrew Ericson, President of the Richfield Civic Association who pointed out that the proposed location was objectionable because of the accumulation of others who "hang out" there. He also felt that availability of alcoholic beverages would encourage younger persons to induce older persons to purchase alcoholic beverages for them, and would generate more difficulties in the area.

As set forth in the Initial Decision, and reflected in the minutes of the meeting before the respondent and confirmed by the testimony of Police Chief Edward Kredatus, who testified at the de novo hearing, there were 142 police incident reports between January 1, 1978 to December 7, 1979 in the immediate area of the proposed site. Forty (40) of these incident reports directly related to the proposed transfer site, and involved loitering by large groups of youths, malicious mischief and similar offenses. The Police Chief added that, in his opinion, the proposed site would not be a suitable location for a liquor license. He pointed out that there was a liquor store in the shopping center wherein the proposed transfer site is located, which was within 150 feet of the proposed site.

As the Court emphasized in Fanwood v. Rocco, 59 N.J. Super. at page 320 "The primary purpose of the act is to promote temperance (N.J.S.A. 33:1-3) and to be remedial of abuses inherent in liquor traffic and shall be liberally construed' to effect those purposes. N.J.S.A. 33:1-73. Hudson Bergen County Retail Liquor Stores Ass'n., Inc. v. Board of Com'rs. of City of Hoboken, supra. 135 N.J.L. 502 (1942). Because these are the purposes, there is a sharp and fundamental distinction between the power of the Director when a license is denied by the municipality and when one is granted, because refusing a license cannot lead to intemperance or to any of the other evils the act is intended to prevent".

The Court added: "The Legislature has entrusted to the municipal issuing authority the right and charged it with the duty to approve of place-to-place applications for such transfer and 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 Ass'n, Inc. v. Hoboken, supra. 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 for... 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 S. Ct. 148, 151, 58 L. Ed. 319, 324 (1913)."

It is clear that the Director should abide by the decision of the local issuing authority even if he may disagree with that decision unless he finds that the action of the Board was clearly arbitrary and capricious. The facts in the matter sub judice do not indicate that the Board acted unreasonably, arbitrarily or capriciously. Thus, the Director should accept its determination.

In Lyons Farms Tavern v. Mun. Bd. Alc. Bev., v. Newark, 55 N. J. 292, 303 (1970) the Court gave clear expression to this principle: "The conclusion is inescapable that if the legislative purpose is to be effectuated, the Director and the courts must place much reliance upon local action. Once the municipal board has decided to grant or withhold approval of a premises-enlargement application of the type involved here, its exercise of discretion ought to be accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of its discretion. Although the Director conducts a de novo hearing in the event of an appeal, the rule has long been established that he will not and should not substitute his judgement for that of the local board or reverse the ruling if reasonable support for it can be found in the record." See also Schaffener-Hamilton Corporation v. Hamilton, Bulletin 2081, Item 1; Odom v. Paterson, Bulletin 2353, Item 2.

I believe that the respondent was apprehensive that the transfer of this liquor license to a site in an area which has required so much police action, and which is located in a shopping center which attracts large congregations of youths, would be inimical to the public welfare. Clifton is an urban community and has many of the police problems which are encountered by large populated urban communities.

Said the Court, in Lyons Farms (at page 304): "we are living in a parlous period and applications such as this must be reviewed in the ambience of the times. It would not do to apply the same test in populous Newark as would be utilized in a rural or suburban community. Time, place and circumstances make such an approach unrealistic".

Although Clifton is not as large as Newark, its problems, as manifested by the record, are similar, and the rationale is equally applicable. It is no answer to suggest that more police and greater security would eliminate the problems. Nor is it a sufficient answer that the Administrative Law Judge finds that "(10) the proposed licensee has not had any serious police problems at his present location". Of course, neither has he had a liquor license, which the respondent felt would generate additional problems at this site. It is important to see that the problem is not aggravated.

The Administrative Law Judge refers to The Boss Co., Inc. v. Bd. of Com'rs. of Atlantic City, supra as authority for the principle that "the license has value of a monetary nature and that the local issuing authority should "concern itself with the equities"; citing Common Council of Hightstown v. Hedy's Bar, supra. However, the public interest predominates and is superior to the financial concerns of the appellant. See Nordco, Inc. v. State, 43 N. J. Super. 277 (App. Div. 1950).

I find, therefore, that the respondent acted reasonably and circum-spectly and in the public interest, in denying the subject application of the appellant.

Accordingly, it is, on this 10th day of July, 1980,

ORDERED that the action of the respondent Board of Alcoholic Beverage Control of the City of Clifton be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

Joseph H. Lerner  
Director

IN RE:	)	INITIAL DECISION
A & C PROPERTY, INC. t/a	)	OAL DKT. NO. ABC 0749-80
BRUNO'S RESTAURANT,	)	AGENCY DKT. NO. 4453
Appellant,	)	
	)	
V.	)	
BOARD OF ALCOHOLIC BEVERAGE	)	
CONTROL OF CLIFTON,	)	
Respondent.	)	

APPEARANCES:

Allen C. Marra, Esq., for Appellant, A & C Property, Inc. t/a Bruno's Restaurant

Francis J. Calise, Esq., for Respondent, Municipal Alcoholic Control Board of the City of Clifton

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

This is an appeal from an action of the Municipal Board of Alcoholic Beverage Control of the City of Clifton, (hereinafter Respondent), which by Resolution dated December 12, 1979 denied the application of A & C Property, Inc., t/a Bruno's Restaurant, (hereinafter Appellant), for a person-to-person, and place-to-place transfer of plenary retail consumption license number 1602-33-063-003, from J & L Friendly Tavern, t/a

Danny's Lounge, with premises located at 82 Hyland Avenue, Clifton to Appellant, for premises located at 1006 Route 46 in the City of Clifton.

In its Petition of Appeal, the Appellant contends that the action of the Board was erroneous in that: (a) Appellant did comply with all of the local rules and regulations; (b) the action was arbitrary, capricious and contrary to the facts that were presented and heard at the December 12, 1979 meeting of the Board.

The Respondent in its answer to the Appeal denies each of the contentions and sets forth various affirmative defenses in rebuttal. After receipt of the Petition of Appeal, on January 3, 1980, by the Division of Alcoholic Beverage Control, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1, et seq.

A hearing de novo, pursuant to N.J.A.C. 2-17.6, was held on May 14, 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 cross-examine witnesses. No transcript of proceeding below was submitted inasmuch as no stenographic record was taken at the transfer hearing. Respondent contends that there was more than sufficient and competent evidence to support its Resolution and asks that the denial of the place-to-place and person-to-person transfer be affirmed. The relevant facts are as follows:

Appellant applied for the aforesaid transfer on November 1, 1979 before the Board of Alcoholic Beverage Control in the City of Clifton. A hearing was held on said application on December 12, 1979 before the Board of Alcoholic Beverage Control of the City of Clifton. Respondent issued a Resolution on December 12, 1979, denying the application for transfer. (R-1 - Evidence)

It was stipulated to by the parties that at the time of the application the revised interior site plan was approved by the Board. It was also stipulated that the proposed situs complied with all the applicable City ordinances and State statutes. The only question to be decided at the hearing was that of suitability of the proposed situs for the plenary retail consumption license.

Testifying initially on behalf of the Respondent was Irene Olivio, the Secretary of the Board of Alcoholic Beverage Control of the City of Clifton.

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She testified that:

She was the person who took the minutes of the meeting which took place on December 12, 1979. They were not verbatim minutes but were her recollection and interpretation of what happened at the meeting. A copy of the minutes were introduced as R-1 in evidence. The minutes reflected that there were two objectors present, a Mrs. Geene, President of the Parents Teachers Association of Woodrow Wilson Junior High School, and a Mr. Andrew Ericson, President of the Richfield Civic Association.

Mrs. Geene objected to the issuance of the license because of the proximity of the shopping center wherein the proposed situs was located to a local junior high school, and the number of students who congregate in the area.

Mr. Ericson objected to the transfer because he felt that the shopping center was not the proper location for a liquor license because of the accumulation of youths who "hang out" there. He also felt that the availability of liquor would promote younger persons to induce older youths to acquire the liquor for them and promote more difficulties in the area.

Testifying next on behalf of the Respondent was Edward Kredatus, Chief of the Clifton Police Department. He testified that:

He had recommended to the Respondent Board that the transfer not be granted because of 142 police reports received over a period of two years all of which emanated from the Clifton Plaza area where the license was to be located. No "serious" crimes were listed to his knowledge, but most of the complaints were for loitering, malicious mischief and other like offenses. To his knowledge there had been no complaints regarding the Appellant himself. He could not ascribe any specific reports to Bruno's Pizza, but all of the police reports were in the vicinity of the Appellant. When he gave his opinion to the Respondent Board he felt that because of the large number of complaints and incidents, he didn't believe that the transfer should be approved. His recommendations were contained in a letter dated December 7, 1979 which was admitted into evidence as R-10. He also described the physical location of the proposed license by the series of photographs, which also depicted various graffiti and vandalism problems in the shopping plaza (R2-9 in Evidence).

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Under cross-examination, Chief Kredatus stated that the problems had been basically the same at the shopping plaza over a number of years. He admitted that there were no specific problems with Bruno's Pizza but a general police problem with youths in the area. He further stated that based on his review of the various police reports he felt that the proposed situs would not be a suitable location for the license. He did acknowledge however that there was already a liquor store in the shopping center within 150 feet of the proposed location. This liquor store does sell package goods to take out.

Testifying on his own behalf was the Appellant, Anthony D'Angelo. He testified that:

He is the President and a shareholder of A & C Property, Inc. He has been at the present location in the pizza-restaurant business for the past two years during which he has had no problem with the police. He has made certain changes and expended certain monies to change the interior of his premises prior to the application for transfer: These changes were made under the direction of the City of Clifton, Board of Health Inspector. The changes basically provided for the construction of a dining room in the rear of his premises, which he stated would be the area where liquor would be served. There would be no beer served over the counter in the take-out area of the premises. After he had made these physical changes, he applied for the liquor license transfer. The purpose of obtaining the liquor license is so that he may serve alcoholic beverages, generally beer and wine, with his dinners. There will be no alcoholic beverages to "take out" from his premises.

The only problems he has personally had with youths, and/or vandalism in the area have been a broken window in the year 1978 and various loitering problems in front of his establishment which he characterized as no worse than any other store in the shopping plaza.

Under cross-examination, Mr. D'Angelo claims he does not have a "heavy juvenile" trade, nor has he had any serious problem with juveniles. He did admit that he gets a few students each day after school who come into his establishment, have something to eat, and leave. His present trade is mostly a "take-out" business but wishes to expand it to an "eat-in" restaurant. He again stated that he would not have any take-out liquor orders and not have any bottles "to go." He admitted that he had called the police on one or two occasions regarding youths in the shopping plaza generally for dispersal of the youths but nothing of a serious nature.

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After a careful review of the documents and evidence in this matter, I FIND:

1. Appellant is the owner of Bruno's Pizza and Restaurant which is located in a shopping plaza in the City of Clifton.
2. Appellant has applied for a transfer of plenary retail consumption license No. 1602-33-063-003, heretofore issued by the City of Clifton, for a person-to-person and place-to-place transfer from J & L Friendly Tavern Inc., t/a Danny's Lounge, currently located at 80 Hyland Avenue C, to A & C Property, Inc., t/a Bruno's Restaurant, 1006 Route 46, Clifton.
3. His application for a place-to-place and person-to-person transfer was denied by the Board of Alcoholic Beverage Control, City of Clifton on December 12, 1979.
4. At the meeting at which the application was denied, objectors appeared to object to the transfer of the license.
5. Although they received proper notice of the appeal and hearing in the Office of Administrative Law, the objectors did not appear at the hearing in the Office of Administrative Law..
6. Bruno's pizza is located in the Clifton Shopping Plaza in the City of Clifton, New Jersey.
7. Over the past two years, there have been a number of police incidents at the Clifton Shopping Plaza.
8. Many of the police incidents are the result of vandalism and youth loitering.
9. There is a liquor store located in the shopping plaza within 150 feet of the proposed situs.

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10. The proposed licensee has not had any serious police problems at his present location.

In view of the foregoing, I CONCLUDE that Appellant has shown that the actions of the Respondent were without basis in law, were arbitrary, and capricious and should be overturned.

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); and Biscamp v. Teaneck, 5 N.J. super. 172 (App. Div. 1949). The issuance or transference of a retail liquor license, in the first instance rests within the sound discretion of the local issuing authority. Hudson-Bergen County Retail Liquor Association v. North Bergen, Bulletin 1981, Item 1; Paul v. Brass Rail Liquors, 31 N.J. Super. 211 (App. Div. 1954). The local issuing authority is vested with a high responsibility and wide discretion, and is to have as its principal guide in licensure matters the public interest. N.J.S.A. 33:1-19, 24. See also Rajah Liquors v. Division of Alcoholic Beverage Control 33 N.J. Super. 598 (App. Div. 1955) and Blanck v. Mayor and Council of Magnolia, 38 N.J. 484, (1962). 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 their action in the absence such of manifest mistake or abuse of discretion. C.f. Florence Methodist Church v. Twp. Committee, Florence Twp., 38 N.J. Super. 85 (App. Div. 1955).

However, when the municipal action is unreasonable or improperly grounded, the Director may grant such relief or take such action as is appropriate. Common Council of Hightstown v. Hedy's Bar, 86 N.J. Super. 561 (App. Div. 1965). N.J.S.A. 33:1-26, N.J.S.A. 33:1-22; N.J.S.A. 33:1-38; Mayor and Council of Borough of Totowa v. Chicken Barn, Inc. 41 N.J. Super 459 (App. Div. 1956) and South Jersey Retail Liquor Dealers Association v. Burrett 125 N.J.L. 105 (Sup Ct. 1940).

The legislature has recognized that ordinarily local officials are thoroughly familiar with their Community's characteristics and the nature of a particular area within which a proposed license shall be located "The conclusion is inescapable that if the legislative purpose is to be effectuated, the Director and the Courts must place much reliance upon local action." Once a municipal board has decided to grant or withhold approval of an application,

"its exercise of discretion ought to be accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of its discretion. Although the Director conducts a de novo hearing, in the event of an appeal, the rule has long been established that he will not and should not substitute his judgment for that of the local board or reverse the ruling if reasonable support for it can be found on the record. C.f. Fanwood v. Rocco, 33 N.J. 404, 414 (1960).

It has long been the standard that the sentiments of substantial numbers of persons in the localities give great weight to the decision of local issuing authority. The test in deciding whether or not these sentiments and a decision based thereon should be upheld on review was set forth in Lyons Farm Tavern v. Municipal Board of Alcoholic Beverage Control of the City of Newark, 55 N.J. 292, 307 (1970) where the New Jersey Supreme Court stated that in reviewing licensure matters, the test would be,

"Did the decision of the local board represent a reasonable exercise of discretion on the basis of evidence presented. If it did that ends the matter of review by both the Director and the courts."

However, when the municipal action based on the local sentiment is unreasonable or improperly grounded, the Director may grant such relief or take such action as is appropriate. Common and Council of Hightstown v. Hedy's Bar, 86 N.J. Super. 561 (App. Div. 1965). The determination of the local board will not be altered on appeal by the Director, and the Director may not merely substitute his opinion for that of the local municipal board. See Rajah Liquors v. Division of Alcoholic Beverage Control, 33 N.J. Super. 598, 600 (App. Div. 1955); cert. den. 18 N.J. 204 (1955), and Bivona v. Hock, 5 N.J. Super. 118, 120 (App. Div. 1949).

Where there is an honest difference of opinion in the exercise of discretion for or against the transfer of a liquor license, the action of the local issuing authority and approval of the transfer should not be disturbed. C.f. Paul v. Brass Rail Liquors, 31 N.J. Super. 211 (App. Div. 1954).

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 connection with a transfer." Township Committee of Lakewood v Brandt 38 N.J. Super 462,466 (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. Supra at 384.

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 and the local issuing authority should "concern itself with the equities" in the case. C.F. Common Council of Highstown v. Hedy's Bar 86 N.J. Super 561, 565 (App. Div. 1965).

I FIND and CONCLUDE that the local issuing authority did not consider any of the equities of the matter, particularly the fact that an agent of the City, the Health Inspector had been involved in approving plans and renovations, after the expenditure of considerable monies by the applicant.

I, therefore in the present matter, FIND and CONCLUDE that the actions of the of the local issuing authority were unreasonable. The number of police reports, (142) were for a two-year period of time. This averages to one complaint every five days. Included are all sorts of complaints including vandalism, loitering, and loud noise. This amount of complaints is not unreasonably large for a modern day urban shopping center. Also, very few of the complaints, if any, were specifically attributed to the proposed license location. They were for the entire shopping plaza. For the local issuing authority to deny the transfer based on this amount of police complaints was unreasonable.

It should also be noted that there is a liquor store presently located within the shopping plaza. For the local issuing authority to base its decision on availability of liquor from the proposed license location to alleged groups of youths congregating in the shopping plaza is also unreasonable, because if the youths wished to obtain liquor they

may readily do so at the establishment already there. Further, the proposed license is a plenary retail consumption license and not a distribution license. There was testimony by the proposed licensee that there will be no "take-out" of beer, which is readily available at the present time on a "take-out" basis from the liquor store. The purpose of this license will be to add to the restaurant atmosphere of the present pizza parlor. To say that this licensee will radically increase the availability of alcoholic beverages to the youth in the area is unreasonable.

In the denial Resolution, the local board found that the disturbances in the shopping plaza would be "intensified by the placement of this license as proposed by the applicant." I FIND and CONCLUDE this to be palpably unreasonable particularly in light of the fact that the Board itself stated in its Resolution that the incidents "do not reflect directly on the proposed licensee" but stated that they reflect upon the "specific area in which the proposed license is to be located."

It is therefore ORDERED that the action of the Board of Alcoholic Beverage Control of the City of Clifton be REVERSED and Respondent is HEREBY ORDERED to grant the Appellant's application for a person-to-person place-to-place and transfer of the subject alcoholic beverage license in accordance with the application filed heretofore.

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 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 with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.

2. COURT DECISIONS - A & C PROPERTY, INC. v. CLIFTON ET AL.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
A-4802-79

A & C PROPERTY, INC.,  
t/a BRUNO'S RESTAURANT,

Appellant,

v.

BOARD OF ALCOHOLIC BEVERAGE  
CONTROL OF CLIFTON and  
DIRECTOR OF ABC, DEPARTMENT  
OF LAW AND PUBLIC SAFETY,

Respondents.

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Submitted March 9, 1981 - Decided March 26, 1981

Before Judges Allcorn, Pressler and Furman

On appeal from the Director of Alcoholic Beverage  
Control

Allen C. Marra, attorney for the appellant

Francis J. Calise, attorney for the respondent  
Alcoholic Beverage Control of Clifton

John J. Degnan, Attorney General of New Jersey,  
attorney for respondent, Division of Alcoholic  
Beverage Control (Erminie L. Conley, Assistant  
Attorney General, of counsel; Kenneth I. Nowak,  
Deputy Attorney General, on the statement in lieu  
of brief).

PER CURIAM

(Appeal from the Director's decision in Re A & C  
Property, Inc. v. Clifton, Bulletin 2412, Item 1.  
Director reversed. Opinion not approved for  
publication by the Court Committee on Opinions).

3. SPECIAL RULING PURSUANT TO N.J.S.A. 33:1-12.39 - IN THE MATTER OF THE PETITION OF GIACOMO MENEI.

IN THE MATTER OF THE PETITION OF  
Giacomo Menei  
HOLDER OF PLENARY RETAIL CONSUMPTION  
LICENSE NO. 0102-33-035-002 ISSUED  
BY THE BOARD OF COMMISSIONERS OF  
THE CITY OF ATLANTIC CITY.

CONCLUSIONS

AND

ORDER

-----  
David E. Ferguson, Esq., Attorney for Petitioner.  
Charles J. Mysak, Esq., Deputy Attorney General Appearing for Division.

Initial Decision Below

Hon. Thomas E. Clancy, Administrative Law Judge

Dated: May 28, 1980

Received: May 28, 1980

BY THE DIRECTOR:

No written Exceptions to the Initial Decision were filed in this petition proceeding for relief, pursuant to N.J.S.A. 33:1-12.39.

The petitioner had received a prior extension, under the "pocket license" law to authorize the consideration by the local issuing authority of his application for renewal of his license for the 1978-79 license term. See, Special Ruling, dated June 22, 1978. That Ruling was predicated, in large part, upon the existance of an executed agreement to purchase a situs for the license. That agreement was not consummated.

The proofs submitted for the requested further authorization pursuant to N.J.S.A. 33:1-12.39 for the 1979-80 license term set forth continued efforts to locate a licensed premises through the efforts of petitioner and real estate brokers he has retained. Additional consideration and discussions included the possible sale of this license to third parties. It has been established that the petitioner has again contracted to purchase a premises to site the license for \$220,000.00.

The subject petition, while only covering the renewal period of 1979-80, will be amended to include the 1980-81 license term, because of the within petition proceedings which effectively spanned the 1979-80 license term. The proofs adduced to include bona fide efforts to activate this license through the latter part of May 1980, immediately preceding the Initial Decision herein.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits and the Initial Decision, I concur in the substantive findings and recommendations of the Administrative Law Judge except as hereinbelow modified, and adopt same as my conclusions herein.

I make the following comments and modifications. The relief granted in this proceeding is not my Order to renew the subject license. It is the authorization given to the local issuing authority to consider petitioner's application for renewal, and to, thereupon, either grant or deny same in the reasonable exercise of its discretion. In effect, a waiver from the prohibition against renewal set forth in N.J.S.A. 33:1-12.39. All other qualifications for licensure established by law must be met and considered and resolved by the issuing authority.

Secondly, I do not adopt that testimony of petitioner which purports to establish some hardship equity because he acquired the inactive license prior to the adoption of the "pocket license" law on October 3, 1977. A license does not embody any property right, but is merely a temporary privilege to conduct a regulated business. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 NJ 373, 381 (1956). Prior to N.J.S.A. 33:1-12.39, the local issuing authority always had the authority to deny, in the exercise of its discretion, renewal for a license that had not been actively used. Kalman and Prickett v. Division of Alcoholic Beverage Control et al (App. Div. 1963) not officially reported, noted in Bulletin 1527, Item 1; Churm v. Jefferson Township, Bulletin 1611, Item 3. The petitioner cannot attain a better posture by the enactment of the "pocket license" law.

Finally, in granting relief herein, the net effect will be the third authorization issued under N.J.S.A. 33:1-12.39. A special condition must be annexed to the renewal, if granted, that the license must become operational within the 1980-81 license term.

Accordingly, it is, on this 3rd day of July, 1980,

ORDERED that the Board of Commissioners of the City of Atlantic City be and the same are hereby authorized to consider the application for renewal of petitioner's license for the 1979-80 and 1980-81 license term, and, to thereupon, grant or deny said application in the reasonable exercise of its discretion. In the event the license is renewed for the 1980-81 license term, said renewal shall be subject to a special condition that the license must become operational within said 1980-81 license term.

JOSEPH H. LERNER  
DIRECTOR

Appendix - Initial Decision Below

IN THE MATTER OF:	)	<u>INITIAL DECISION</u>
GIACOMO MENEI'S	)	OAL DOCKET # ABC 5717-79
PETITION	)	

## APPEARANCES:

David E. Ferguson, Esq., on behalf of the Licensee, Giacomo Menei

Charles J. Mysak, Esq., Deputy Attorney General, on behalf of  
the New Jersey Division of Alcoholic Beverage Control

BEFORE THE HONORABLE THOMAS E. CLANCY, A.L.J.:

The Licensee, Giacomo Menei, petitioned the Director of the Division of Alcoholic Beverage Control to renew his license for the 1979-1980 licensing period, pursuant to N.J.S.A.33:1-12.39. After his request was denied, he took an appeal and the matter was referred to the Office of Administrative Law as a "contested case".

An administrative judicial proceeding was held on February 19, 1980 and the record was finalized upon receipt of supplemental materials from the Licensee on May 5, 1980.

The Licensee testified that in the last year or so he has maintained monthly contact with his Atlantic City realtors, Tannenbaum and Milask, in an attempt to find a location for his license, that several possibilities didn't pan out because of prohibitive purchase prices and zoning restrictions, that he has personally contacted several owners who had property for sale but met with negative results, that in one instance he had offered to buy a particular piece of property but was unable to work out the details of the proposed purchase, that he purchased the license in question in June of 1977 without knowing that it had to be "located" within a two year period of time, that he had received an "extension" for the license upon a prior occasion because he had entered into a proposal to purchase a particular piece of property -- but this "purchase" was never consummated because the owner kept raising the price, that he hopes to be able to open an Italian restaurant-bar with the license, and would himself be a worker on its premises, and that recent remodeling work he was required to do (and personally performed) on Giacomo's Vineyard in Egg Harbor City (for which he holds another liquor license) had interfered with his ability to pursue more fully the situation involving the Atlantic City license.

In addition, the Licensee's attorney, David E. Ferguson, advised, among other things, that at present three (3) national food chains have expressed interest in purchasing Mr. Menei's license, which means he might ultimately receive a lot less money for its purchase than if he was allowed to "locate" same and thereafter earn money on its use, and that the legislation requiring the active use of the license within a two year period of time or a demonstration of good cause to the Director in order for a renewal - was enacted after Mr. Menei had purchased the license; accordingly it worked a hardship upon him because it imposed an obligation which was not present in the law at the time of the original purchase.

The remainder of the presentation on behalf of the Licensee was documentary in nature. An affidavit of Licensee (exhibit P-1) generally corroborates his testimony and reflects additional efforts he made to "locate" the license. Finally, a real estate contract (Exhibit P-2) reflects that the Licensee is obligated to purchase property commonly known as 121-125 South Tennessee Avenue, Atlantic City, N.J. by June 1, 1980 upon the fulfillment of certain conditions.

Based on the foregoing, I FIND that good cause exists for the renewal of the Licensee's license pursuant to N.J.S.A. 33:1-12:39 for the licensing period requested. The continued efforts of the Licensee should now be allowed to bear fruition. Accordingly, I CONCLUDE that the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, should, in the conscientious exercise of his absolute discretion, renew said license for the period of time requested.

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 Director of the Division of Alcoholic Beverage Control 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-1, et seq.

I, HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record of these proceedings.

4. STATE LICENSES - NEW APPLICATIONS FILED.

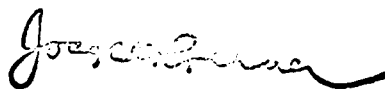
New World Wine Co. Ltd., A New Jersey Corporation  
18 Heller Pl. Bellmawr, N. J.

Application filed 8/24/81 for person-to-person and place-to-place transfer of a limited wholesale license from Phillip Silverstone, 4445 Baker Ave., Pennsauken, N. J.

B & B Beverage Co., 241-243 Chelsea Ave., Long Branch, N. J.  
Application filed 9/9/81 for limited wholesale license.

Winebow, Inc., 721 Carroll Pl., Teaneck, N. J.  
Application filed 9/17/81 for place-to-place transfer of a limited wholesale license to include warehouse premises at 1 Hollywood Ave., Bldg. 20B, HoHoKus, N. J.

Shore Beverage Co., Inc., 1001 Hopewell Ave., Ocean, N. J.  
Application filed 9/18/81 for place-to-place transfer of a limited wholesale license from 502 Atkins Ave., Neptune, N. J.



Joseph H. Lerner  
Director