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 2305

December 14, 1978

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1. COURT DECISIONS - FREEHOLD P.B.A. LOCAL 159 and KENNETH MOUNT v. DEPARTMENT OF LAW AND PUBLIC SAFETY ET AL. - DIRECTOR AFFIRMED WITH MODIFICATION.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4316-76

FREEHOLD P.B.A. LOCAL 159 and KENNETH MOUNT,)

Appellants,)

v.)

DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF ALCOHOLIC BEVERAGE CONTROL and JOSEPH H. LERNER, DIRECTOR, DIVISION OF ALCOHOLIC BEVERAGE CONTROL,)

Respondents.)

Argued September 19, 1978 - Decided September 28, 1978

Before Judges Matthews, Kole and Milmed

On appeal from the Director of Division of Alcoholic Beverage Control

Mr. David Solomon argued the cause for appellants (Messrs. Schneider, Cohen and Solomon, attorneys; Mr. Bruce Brafman on the brief).

Mr. Leonard A. Peduto, Jr., Deputy Attorney General, argued the cause for respondents (Mr. John J. Degnan, Attorney General of New Jersey, attorney; Mr. William F. Hyland, former Attorney General, Ms. Erminie L. Conley, Deputy Attorney General of counsel).

PER CURIAM

(Appeal from Director's advisory opinion concerning employment of regular police officers while off duty at Freehold Raceway. As modified, Director affirmed. Opinion not approved for publication by Court Committee on Opinions).

2. OPINION OF ATTORNEY GENERAL - OPINION FORMALLY ADOPTED BY DIRECTOR - SBD LICENSEES PERMITTED TO SELL BEER ON SUNDAYS PURSUANT TO N.J.S.A. 33:1-40.3.

In the Matter of the Petition of	
Garden State Beer & Soda Company, Inc.	CONCLUSIONS AND ORDER
for Declaratory Ruling pursuant to N.J.S.A. 52:14B-8.	

Garden State Beer and Soda Co-op Inc., Pro se.

Petition has been received in this Division requesting a Declaratory Ruling on the following question:

> Can a holder of a State Beverage Distributor's license sell malt alcoholic beverages in original containers for consumption off the licensed premises on Sundays and weekdays during the same hours as the sale of alcoholic beverages for on-premises consumption is permitted in the respective municipalities in which such licensees are located.

A hearing was held in this Division with testimony being adduced on behalf of the Petitioner. Prior to the publication of a Hearer's Report, I requested and received a formal opinion from the Attorney General of New Jersey on the specific subject issue, who responded to the query in the affirmative.

In accordance therewith, I formally adopt said opinion, which is set forth in full, as an appendix hereto, as my conclusion herein.

Accordingly, it is, on this 29th day of September, 1978,

DETERMINED and ORDERED that under the provisions of N.J.S.A. 33:1-40.3, State Beverage Distributor licensees may sell malt alcoholic beverages in original containers for off-premises consumption on Sundays and week days during the same hours as sale of alcoholic beverages for on-premises consumption is permitted in the respective municipalities in which such licensees are located.

Joseph H. Lerner
Director

APPENDIX

OPINION OF ATTORNEY GENERAL - S.B.D. LICENSEES MAY SELL MALT ALCOHOLIC BEVERAGES ON SUNDAY AND WEEKDAYS FOR OFF-PREMISES CONSUMPTION IN ORIGINAL CONTAINERS DURING SAME HOURS ON-PREMISES CONSUMPTION IS PERMITTED IN MUNICIPALITY UNDER N.J.S.A. 33:1-40.3

July 19, 1978

Joseph H. Lerner, Director
Division of Alcoholic Beverage Control

FORMAL OPINION NO. 10 - 1978

Dear Director Lerner:

You have requested an opinion as to whether holders of State Beverage Distributor's licenses (hereafter S.B.D.'s) may sell malt alcoholic beverages in original containers for off-premises consumption on Sundays and weekdays during the same hours as the sale of alcoholic beverages for on-premises consumption is permissible. It is our opinion that S.B.D. licensees may sell malt alcoholic beverages under these circumstances.

For many years the permissible hours for retail sale of alcoholic beverages for off-premises consumption were governed by a rule of the Division of Alcoholic Beverage Control. N.J.A.C. 13:2-36.1 prohibited sales on Sunday and limited sales on other days to the hours of 9:00 a.m. to 10:00 p.m. In 1971 the Legislature enacted N.J.S.A. 33:1-40.3 which provides as follows:

> Whenever the sale of alcoholic beverages for consumption on the premises and off the premises or either thereof is authorized in any municipality by ordinance or rule or regulation of the Division of Alcoholic Beverage Control, by the holder of a retail consumption or retail distribution license, such ordinance or rule shall authorize the sale of malt alcoholic beverage (s) in original bottle or can containers for consumption off the premises on the same days and during the same hours as the sale of alcoholic beverages for consumption on the premises is permitted and authorized in said municipality.

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"All parts of ordinances and regulations of the Director of the Division of Alcoholic Beverage Control inconsistent with the provisions of this act are superseded to the extent of such inconsistency."

Therefore, the sale of malt alcoholic beverages for off-premises consumption is permitted during the same days and hours during which municipalities permit the sale of alcoholic beverages for on-premises consumption.

In the resolution of the question of whether the statute includes an S.B.D. licensee,* it is significant to note that its literal terms do not restrict its application to any particular class of licensee. The operative language states, without qualification, that under the circumstances described in the statute, a municipal ordinance or Division rule "shall authorize the sale of malt alcoholic beverages in original ... containers for consumption off the premises on the same days and during the same hours as the sale of alcoholic beverages for consumption on the premises ..." While the prefatory language refers to "retail consumption or retail distribution license," it merely describes the contingency which must exist before a right to make such sales arises. It does not place a limitation on the particular class of licensee permitted to make the sale. In the event the Legislature intended such a limitation, it could have stated a qualification in express terms. An additional qualification which the Legislature has failed to include in its own enactment should not be inferred by indirection. Crastel v. Board of Commissioners, Newark, 9 N.J. 225, 230 (1952). See also State v. Congden, 76 N.J. Super. 493, 501-502 (App. Div. 1962). It is therefore clear that whenever a rule or ordinance permits the sale of alcoholic beverages for on or off-premises consumption by a retail consumption or distribution licensee, then any duly licensed person may sell malt alcoholic beverages for off-premises consumption.

This construction of the plain terms of the statute is reinforced by the underlying legislative purpose. The statement accompanying the bill (S2108) and the Governor's statement indicate it was designed to provide additional convenience to the general public in the purchase of malt beverages. Significantly, both statements make reference to "package stores,"

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* S.B.D. licensees are entitled to sell "unchilled, brewed, malt alcoholic beverages in original containers only, in quantities of not less than 144 fluid ounces," both to retail licensees, at wholesale, and to the general public at retail, for off-premises consumption. See N.J.S.A. 33:1-11(2c).

a term as readily applicable to S.B.D. licensees as to other distribution licensees. It is therefore apparent that the principal legislative purpose was simply to increase public convenience in the purchase of malt alcoholic beverages. A construction of the statute which would exclude S.B.D. licensees from its terms would be inconsistent with this expressed legislative history.

Furthermore, it would be anomalous to interpret the statute to limit S.B.D. licensees in the sale of malt alcoholic beverages to different hours than any other retailer who is privileged to make package sales. S.B.D.'s historically have been subject to the same hour restrictions as other licensees engaged in comparable sales. A.B.C. Bulletin 380 Item 10. It cannot be assumed that the Legislature intended to substantially depart from this administrative practice and place more onerous hourly restrictions on this small class of licensee. A statute should be interpreted to avoid unreasonable or absurd consequences. Davis v. Heil, 132 N.J. Super. 283, 293 (App. Div. 1975); In re The Summit and Elizabeth Trust Co., 111 N.J. Super. 154, 168 (App. Div. 1970). Therefore, we conclude that it was the legislative intent that malt alcoholic beverages in original containers be more readily available to the general public by extending the hours and days of sale for all licensees, including S.B.D. licensees.

Parenthetically, assuming the prefatory language of the Act, which refers to the "holder of a retail consumption or retail distribution license," is deemed to be a condition of the authority to make the sale under the statute, an S.B.D. licensee would in any event be encompassed by its terms. The Division of Alcoholic Beverage Control has concluded that an S.B.D. is "in part, a retail licensee." Re Berkeley Beverage Co., A.B.C. Bulletin 331, Item 4. That it is a distribution license is manifested by its name and the nature of the privileges granted by it. N.J.S.A. 33:1-11(2) (c). Also, the Division of Alcoholic Beverage Control has consistently held that retail sales by such licensees are subject to the same regulations which govern retail sales of package goods by other retail distribution licensees. See Re Riverside Distributors, A.B.C. Bulletin 611, Item 11; A.B.C. Bulletin 580, Item 10; Re K & O Liquor Store, A.B.C. Bulletin 201, Item 7. If the

* For example, it could have limited the privilege to "Class C" licenses or to "plenary retail consumption," "seasonal retail consumption," "plenary retail distribution" or "limited retail distribution" licensees. See N.J.S.A. It is evident from other portions of the Alcoholic Beverage

(fn. con'd.)

Legislature intended to depart from this administrative practice of maintaining comparability between these classes of licensees, it could have used the specific statutory designation of the kind of license for which it intended the privilege of selling during extended hours to be applicable.* The use of the more general terms "retail consumption" and "retail distribution licensee" is a compelling indication that the presumed legislative intent was to encompass all licensees privileged to make retail sales. Therefore, an S.B.D. licensee should be considered a retail distribution licensee as that term is employed in the statute.

In conclusion, you are advised that under the provisions of N.J.S.A. 33:1-40.3 State Beverage Distributor's licensees may sell malt alcoholic beverages in original containers for off-premises consumption on Sundays and weekdays during the same hours as the sale of alcoholic beverages for on-premises consumption is permitted.

Very truly yours,

JOHN J. DEGNAN
Attorney General of New Jersey

By: ______________________
Mart Vaarsi
Deputy Attorney General

fn. cont'd.
law that whenever the Legislature intends for a provision to apply only to a specific type or class of license, it invariably specifies the type or class by its exact statutory designation. See, e.g., N.J.S.A. 33:1-12.14, 15, 17, 23, 25, 26, 27, 28, 29 and 39; N.J.S.A. 33:1-17; N.J.S.A. 33:1-19.1; N.J.S.A. 33:1-23 (c. 246, L. 1977).

3. APPELLATE DECISIONS - NARDUCCI ET AL. v. ATLANTIC CITY.

Frank J. Narducci, Jr., and Salvatore A. Testa, Appellants,	ON APPEAL
vs.	CONCLUSIONS AND ORDER
Board of Commissioners of the City of Atlantic City, Respondent.	

Tort, Daniels and Jacobs, Esqs., by Edwin J. Jacobs, Jr., Esq., Attorneys for Appellants.
Carl A. Wyhopen, Esq., Appearing for the Division.
John C. Matthews, Esq., Attorney for Respondent, Board of Commissioners of the City of Atlantic City.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

This is an appeal from the action of the Board of Commissioners of the City of Atlantic City (Board) which, on January 5, 1978, denied appellants' application for a person-to-person transfer of Plenary Retail Consumption License C-191, from Jeanne's Enterprises, Inc., to themselves, for premises 2201 Pacific Avenue, Atlantic City.

The appeal differs from the usual one heard in this Division in that, the Director, pursuant to 9 N.J.R. 487 (c), certified to the local issuing authority in Atlantic City that he made preliminary finding that the granting of the subject application would not be in the public interest, based upon an extensive investigation conducted by the Special Atlantic City Task Force, at the instance of the Director.

The Board did not conduct its own investigation, or refer to any local considerations; but rather denied the application solely upon the Director's Special Ruling of November 3, 1977.

Appellants in their Petition of Appeal contend that the action taken was erroneous in that: (a) the Director is without power to issue an order denying a plenary retail consumption license transfer application; (b) the findings of the

Director are not supported by the record; (c) the action taken by the Director is not consonant with N.J.S.A. 33:1-1- et. seq. and, lastly, (d) the proceedings deprived appellants of equal protection and due process of law.

In its Answer, the Board denies any procedural defect or substantive error. It avers that it properly followed the Special Ruling of the Director.

A de novo hearing was held in this Division pursuant to N.J.A.C. 13:2-17.6 (formerly Rule 6 of State Regulation No. 15), with full opportunity afforded the parties to introduce evidence and cross-examine witnesses.

The Deputy Attorney General representing the Division offered no witnesses, but submitted the transcripts of various depositions, reports and other documentary evidence into evidence as part of the record herein, pursuant to N.J.A.C. 13:2-17.8 (formerly Rule 8 of State Regulation No. 15).

The basis of Director's preliminary finding, i.e., that the granting of the application herein would not be in the best interests of the public, consisted of a conclusion arrived at after consideration of a series of related facts, which are hereinafter set forth.

From the deposition of Frank Narducci, Jr., it appears that at the time of the investigation, he was twenty-four years of age and a high school graduate, having also attended a community college for a very brief period. He thereafter became a member of the Operating Engineers Union and operated heavy construction equipment when he could find employment. In 1975, he earned $18,000.00 to $19,000.00. He did not work during 1976. He resides in his parent's home.

Narducci has no checking account, credit or department store accounts. His savings bank accounts balance approximately $26,000.00. He also holds, jointly with his mother, $30,000.00 in certificates of deposit. He owns a 1976 Lincoln Continental Mark IV, which he purchased for $7,500.00 plus trade in of an earlier model Pontiac Grand Prix.

Although he "owns" two or perhaps three pieces of real estate in Philadelphia, he lacked specific knowledge of their addresses, when purchased, the cost, or the names of the sellers.

Salvatore Testa in his deposition indicated that he attended courses given at a local university to qualify for a Pennsylvania real estate license and is, (at the time of the investigation) employed as a real estate salesman. His recent earnings record is as follows: None in 1977, between four

and five thousand dollars in 1976, and less than four thousand dollars in 1975. He has no department store, credit or bank checking accounts. His savings bank account balance is approximately $1,800.00 and the 1975 Lincoln Continental he uses is owned by his father. He resides with his parents.

Testa possesses a joint interest with his parents in two parcels of Philadelphia real estate, although he contributed nothing towards their purchase. He is establishing a kitchen cabinet business at one of the two aforementioned properties. The start-up costs of between eight and nine thousand dollars was borne by his father.

Narducci and Testa entered into an agreement on April 18, 1978 with Grace Kolker, sole stockholder of the corporate owner of the licensed premise known as Le Bistro, located at 2201 Pacific Avenue, Atlantic City, for its purchase. The agreed price of $250,000.00 required a down payment of $72,500.00, and the balance was to be paid pursuant to a nine percent, five year purchase money mortgage. Subsequently, the agreement was modified and the liquor license was treated as a separate item of sale for $50,000.00 and the purchase price and mortgage were reduced accordingly as to the realty. The $72,500.00 down payment was delivered to the seller at contract signing.

The deposition of Grace Kolker indicated that this agreement was entered into without any investigation or evaluation of the purchasers' ability to successfully finance, manage and operate the establishment, to insure that the proposed terms of the mortgage would be met.

The $72,500.00 down payment was provided by Narducci, who stated that he, in turn, obtained it from Martin Taylor, a wholesale jeweler and family acquaintance. Narducci subsequently obtained more money from Taylor in order to make mortgage payments. The sum owed Taylor at the time of deposition was $100,000.00, which is unsecured. No note was executed, nor is there any agreement or unerstanding between Taylor and Narducci as to the mode or method of repayment.

The Deputy Attorney General, in conjunction with the offering of documents into evidence, produced the testimony of Ronald Chance. He is employed by the New Jersey State Police, assigned to the Task Force, and interviewed Martin Taylor. Taylor stated that he had to obtain a personal loan from a commercial bank, pledging securities as collateral, in order to obtain the cash to loan to Narducci. He refused, however, to authorize inspection of the records regarding this transaction at said bank.

The appellants have not yet formulated definite plans for the business, nor determined whether they would personally supervise its day-to-day operation. No contingency plan was developed in the event the business does not generate sufficient revenues to cover the mortgage, payroll, supply bills, etc., other than to seek another loan.

Lastly, although the appellants are not criminally disqualified, the fathers of both appellants have criminal records as do other family members and associates, which prevent them from having any interest in a liquor license in New Jersey.

Based upon the foregoing information and the negative recommendation of the Task Force, the Director preliminarily determined that approval of the application for transfer would be contrary to the public interest.

The Appellants did not testify or present any witnesses or documents in support of their appeal. Instead, the limited their appearance to argument of Counsel attacking the validity of 9 N.J.R. 487 (C), wherein they allege that the Director usurped the power of the local issuing authority, commenting on the evidence submitted by the Special Task Force, and lastly, characterizing the decision as "visiting the sins of the fathers upon the sons."

Subsequent to the hearing, appellants' attorney advised the Division that the recent decision (April 18, 1978) of _In re Schmidt & Sons_, 158 N.J. Super. 595 (App. Div. 1978) is pertinent and applicable to the issue _sub judice_.

- I -

The Atlantic City Special Task Force was created as a liquor license investigative body as a needed response to circumstances apparent after the recent referendum establishing casino gambling in Atlantic City.

One of the most often proffered arguments against the establishment of legalized casino gaming was that organized crime groups, with their vast treasuries, would soon move in and seek to control, either by direct or indirect means, the casinos, hotels in which they are located, personnel employed therein, taverns, restaurants, food, liquor and supply companies, trade unions, and almost every other imaginable aspect of the activities of a vacation city geared to entertainment and legalized, controlled gambling. In short, an extraordinary situation was created, necessitating extraordinary efforts to prevent its usurpation for crime by persons and organizations.

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To insure that casino gaming will bring to Atlantic City, and the State of New Jersey, those advantages perceived by the electorate in approving the referendum, continued scrutiny into all phases of licensing is required. The Atlantic City Special Task Force was created to meet that need. It is composed of representatives of law enforcement agencies (including inspectors assigned to it from this Division), attorneys, accountants, and others who have expertise in the various areas where it is anticipated that criminal elements and unsavory persons may attempt to penetrate.

Over forty years experience has taught that the liquor and liquor related industry is fraught with unusual enforcement problems and myriad opportunities for abuse for illegal gain by those so inclined. Cf. Passaic County Retail Liquor Dealers Assn. v. Paterson, 37 N.J. Super 187 (App. Div. 1955)

The Director of this Division determined that the City of Atlantic City does not possess the financial resources or expertise in sufficient depth to maintain the intensive investigative level necessary to accomplish proper licensing review, with due regard to the unique circumstances created by the inception of legalized casino gaming. This was exacerbated by public sentiment expressed towards the rapid licensing and commencement of operations of casinos and supportive industries necessary for the comfort and pleasure of an anticipated large patronage.

In creating the Division, the Legislature charged the Director with the duty "to do, perform, take and adopt all other acts, procedures and methods designed to insure the fair, impartial, stringent and comprehensive administration" of the Alcoholic Beverage Law. N.J.S.A. 33:1-23. Courts have held that this duty confers on the Director not only the perogative, but an obligation, to adopt administrative measures to competently deal with unique situations which may arise.

The situation, sub judice, is one in which the municipality, under the extraordinary circumstances created by casino gambling, is unable to take municipal action comparable to the extent and in the manner envisioned by Title 33. The Director was obligated to exercise his broad supervisory power to insure proper licensing in this unique situation.

I find that, the steps he has taken (9 N.J.R. 487 (c)) fall within the general and specific authority he possesses as set forth in N.J.S.A. 33:1-23 and N.J.S.A. 33:1-39, respectively, and in no way usurps the power of the local issuing authority as alleged by the appellants.

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- II -

The appellants allege that the arrest record of Phillip Testa was inaccurate, in that it contained certain entries pertaining to another individual known by the same name. Investigation by the Attorney General's office determined that the allegation was correct and submitted a corrected arrest record of Phillip Testa, father of Salvatore A. Testa, one of the appellants herein.

In all other respects the documents and records submitted were not challenged as to truthfulness or accuracy. Appellants argue that the information contained within certain of the documents was irrelevant and not competent factors to be considered.

While not denying that Phillip Testa had a criminal record, counsel attempted to minimize same since the sole conviction occurred twenty-five years ago.

The rather unusual circumstances surrounding the loan of $100,000.00, unsecured, without repayment schedule and not evidenced in writing, from Taylor to Narducci, is treated very casually by appellants as if it were an ordinary, everyday occurrence. They attempt to dismiss any adverse inferences therefrom by saying that Taylor viewed Narducci as "the son he never had."

Appellants attack the Special Task Force's inquiry into and reliance upon the youthful partners' business experience, lack of expertise in the liquor industry, almost total dependence upon their parents for support, shelter and cars, the source of financing, and close criminal associations of appellants, as beyond the scope of proper inquiry into an applicant's qualifications to hold an alcoholic beverage license. It is their position that the inquiry is limited to the statutory requirements of (a) attaining the age of eighteen years, and (b) not having been found guilty of a crime involving moral turpitude. The cases are legion holding that inquiry into other aspects of an applicant's background and character is proper and, in fact, mandated, in order to properly evaluate his/their qualifications. See Butler Oak Tavern v. Divison of Alcoholic Beverage Control, (Law Div. 1959), 20 N.J. 373 (1956); Two Guys from Harrison, Inc. v. Furman, 58 N.J. Super. 313 rev'd. 32 N.J. 199 (1960); Boller Beverages, Inc. v. Davis 38 N.J. 138 (1962). I therefore, reject this argument as meritless.

- III -

The appellants allege in their petition of appeal that the findings are not supported by the record. Since the

factual findings are not disputed, it is in essence, the conclusions drawn from these facts that is disputed. The basis for the preliminary finding by the Director include the following factors: (a) applicants lack of independent resources, (b) applicants lack of current income, (c) applicants dependency on their parents for shelter, support and other necessaries, both of whom fathers are criminally disqualified, (d) the age of the applicants in relationship to a substantial investment, and the absence of experience, preplanning or intent to operate, (e) the unusual manner of obtaining financing for this venture, (f) the casual and non-business manner in which the applicants operated in entering this venture, and (g) the association of other persons, who would be criminally disqualified to have an interest in this license, with the appellants.

I am satisfied that any reasonable person could draw the adverse inferences from the record, and therefore, dismiss this contention as without merit.

- IV -

The appellants have alleged that the recent Appellate Division decision of In re Schmidt and Sons, supra, is pertinent and applicable to the issue, sub judice.

In the Schmidt case, the corporate principal, William Pflaumer, plead guilty to Federal charges in 1972 that he had mislabeled beer barrels; and in 1974 maintained false records of beer purchases and obstructed justice by attempting to influence a jury witness. The Division of Alcoholic Beverage Control held that the crimes set forth above involved moral turpitude, and that therefore, pursuant to N.J.S.A. 33:1-25, Mr. Pflaumer was inelligible to hold a license. The Director then suspended the existing wholesale and transportation licenses in which Pflaumer had a beneficial interest. While the Appellate Division agreed that the crimes did involve moral turpitude, the Court went on to hold that Pflaumer was entitled to the full protection of the Rehabilitated Convicted Offenders Act, N.J.S.A. 2A:168A-1 et seq., and that N.J.S.A. 33:1-25, was subject to that statute.

The appellants assert that the following language in the Schmidt case, supra at 600-601 is appropriate.

> Every regulated business and profession has its own unique public impact which warrants its regulation in the first instance, many are of no less substantial and general public concern than the distribution of alcohol, and the use of the moral turpitude standard of disqualification in pre-1974 regulatory legislation was typical, customary

> and characteristic. We see no reason to assume, therefore, that of all the licensing authorities operating in this State, the Legislature, without so stating, actually intended that the moral turpitude standard of only this one licensing authority would be unaffected by the act.

The applicability of the Schmidt decision was advanced by appellants in April 26, 1978, which technically was beyond the time afforded the parties to submit summations or Memoranda of Law. However, because of the nature of the allegation, and the response by the Attorney General's Office, dated May 5, 1978, I deem it an application to reopen the matter in order to include this further legal argument and grant it, nunc pro tunc.

The Division's response, in pertinent part, is as follows:

> Mr. Jacobs states that:
>
> "The Court also held that Pflaumer's convictions did not relate "adversely to the occupation . . . for which the license or certificate is sought".
>
> This simply is not so. What the Appellate Division held in C. Schmidt and Sons is that Pflaumer's convictions could not automatically bar Pflaumer from licensure. The Court expressly remanded the matter to the Division of Alcoholic Beverage Control for a determination, pursuant to the Rehabilitated Convicted Offender's Act, as to whether the conviction adversely affected Pflaumer's ability to be licensed as well as for the other findings required to be made by that Statute if a person is to be denied a license because of a criminal conviction.
>
> Mr. Jacobs contends that the Schmidt case invalidates the proposition that the applicants "relation to and association with persons possessing criminal records" is a relevant factor to be considered. The holding in Schmidt hardly has any such effect.
>
> The records of the parents of the applicants were introduced for the purpose of establishing a possible motive for a "front". In view of the fact that at the time the application was filed the Division's practice was that those convicted

> of a crime were automatically disqualified from holding a license, the decision in Schmidt has no effect on the evidentiary impact of the parents' criminal record for such motivation. At any time prior to the decision in Schmidt, a person with a criminal conviction would have believed that he personally could not be involved in a licensed business. The after the fact determination of the Appellate Division in Schmidt can have no relevance to what the parties observed as the state of the law at the time the application was filed.
>
> Criminal records of associates of the applicants were also introduced into evidence for the purpose stated in the report to the Director and at the hearing in this matter. An applicant's associations has traditionally always been an appropriate avenue of inquiry in a licensing proceeding under the Alcoholic Beverage Law. Association with criminal elements has never been an automatic bar to licensure but a discretionary factor to weigh in the context of each unique set of circumstances in relation to a particular applicant. Such inquiry, by its very nature, has always arisen in a situation where the applicant for a license was not personally automatically disqualified from holding a license as is the case here.... Therefore, the Schmidt case has absolutely no effect on this historic criterion of alcoholic beverage licensing.

The Division also cited a recent Appellate Division opinion, Niglio v. New Jersey Racing Commission, 158 N.J. Super. 182 (App. Div. 1978) which appears at variance with the holding in Schmidt. It submits that the discussion in the Niglio case regarding Mrs. Niglio's lack of independence is also relevant to the appellants' lack of independence in this matter.

In the Niglio case the Commission suspended Mrs. Niglio's license pursuant to N.J. Racing Commission Harness Rule Chapter 4 Section 9 (1), which states that the spouse of a disqualified person is likewise barred from participating in racing.

The Appellate Division did not rule on the constitutionality of this rule which is predicated solely on a marital relationship, but affirmed the commission by noting that it is clear that the license would be denied to a single person whose affinity with a convicted criminal approached the dependency here found between Mrs. Niglio and her busband. The Court stated at 186 that "...it is clear to us that the suspension here was produced not by the marital relationship but

by the inescapable dependency of Mrs. Niglio upon her husband, a disqualified person." It was the dependent affinity with a convicted criminal which resulted in the suspension.

The undesirability of an association between those previously convicted of a crime, or those in affinity with such a person and the sensitive liquor industry is too apparent to require extended discussion. Certainly, an appropriately strong State interest is involved and there is a rational basis for the action taken here. Boller Beverages, Inc. v. Davis, Supra; Butler Oak Tavern v. Division of Alcoholic Beverage Control, Supra; Cf. Blanck v. Magnolia, 38 N.J. 484 (1962).

I, therefore, find that the holding in Schmidt is neither applicable to or binding on this determination.

- V -

I conclude that the appellants have failed to sustain their burden of establishing that the action of the Board of Commissioners of the City of Atlantic City, which was soley predicated upon the preliminary finding of the Director as contained in his Special Ruling of November 3, 1977, was erroneous and should be reversed, as required by N.J.A.C. 13:2-17.6.

It is, therefore, recommended that the action of the Board of Commissioners of the City of Atlantic City be affirmed, and the appeal herein be dismissed.

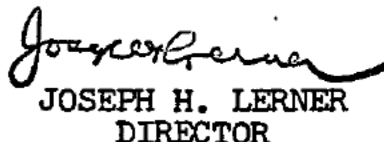
CONCLUSIONS AND ORDER

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 transcripts of the testimony, the exhibits and the Hearer's Report, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 4th day of October, 1978,

ORDERED that the action of the Board of Commissioners of the City of Atlantic City be and the same is hereby affirmed, and the appeal be and is hereby dismissed.



JOSEPH H. LERNER
DIRECTOR