STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 Commerce Dr. Cranford, N.J. 07016

BULLETIN 2055 August 3, 1972

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ITEM

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1. APPELLATE DECISIONS - SITHENS v. GLEN ROCK.

S. Douglas Sithens, t/a Hong Wong House, Appellant, v. Mayor and Council of the Borough of Glen Rock, Respondent.	)	On Appeal CONCLUSIONS and ORDER

Ferro, Lamb and Kern, Esqs., by Albert E. Ferro, Esq., Attorneys for Appellant
James J. Dooley, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This appeal challenges the action of respondent Mayor and Council of the Borough of Glen Rock (hereafter Council) which, on October 11, 1971, unanimously adopted the following resolution denying appellant's application for a plenary retail consumption license:

> "WHEREAS, S. Douglas Sithens has applied to the Borough Council for issuance of a Plenary Retail Consumption License for premises situated at 928 Prospect Street, Borough of Glen Rock, also known as Lot 41, Block 162-V, and
>
> WHEREAS, the Borough Council has conducted the requisite statutory investigation and has further considered the application with due regard to the public interest involved including such factors as the proximity of the premises to an existing bar and restaurant, the adequacy of such existing facilities to serve the neighborhood and the effect on the immediate adjacent residential area.
>
> NOW, THEREFORE, BE IT RESOLVED by the Governing Body, having considered the evidence submitted and the factors heretofore set forth, makes the following findings:

1. The Plenary Retail Consumption License is sought for the operation of a restaurant where alcoholic beverages will be served and would additionally permit the sale of package goods and beer for off-premises consumption.

2. The proposed facility is immediately adjacent to an existing bar and restaurant located in the same premises and an additional Plenary Retail Distribution facility at 924 Prospect Street.

3. The additional facility if granted, would result in an over-concentration of such facilities in an area which is adequately served by existing facilities."

Appellant alleges that the action of the Council was erroneous and should be reversed because the granting of the instant application would not result in an over-concentration of such facilities in the area; would not have an adverse effect on the adjacent residential district; would not be against the public interest; and would logically conform with zoning requirements in the municipality. Lastly, the applicant asserts that he has proven a need for the facility.

The answer of the Council denies appellant's allegation and avers that its action in denying appellant's application was a valid and reasonable exercise of its discretionary power.

The matter was heard de novo pursuant to Rule 6 of State Regulation No. 15, with leave to counsel to present further evidence and cross-examine witnesses. Additionally the transcript of the hearing below was admitted into evidence pursuant to Rule 8 of State Regulation No. 15, together with the minutes transcribed at said hearing, several drawings and diagrams, depicting the various licensed premises and business sections of the Borough, and a copy of Local Ordinance No. 644, effective on November 13, 1961, which amended an earlier ordinance "LIMITING THE NUMBER AND TYPE OF LICENSES TO SELL ALCOHOLIC BEVERAGES IN THE BOROUGH OF GLEN ROCK." Sub-paragraph (b) of Section 1 of said ordinance limits the number of plenary retail consumption licenses to two (2).

It was established that on the date that the instant application was submitted to respondent by appellant, two plenary retail consumption licenses had been issued by respondent. Since the application of the above ordinance will be dispositive of the matter a brief review of the evidence with respect thereto and the controlling law is appropriate.

The Council may, according to its population and pursuant to provisions of N.J.S.A. 33:1-12.14 (as amended June 7, 1971 C-196) issue four plenary retail consumption licenses. Further. a municipality may limit the number of licenses to sell alcoholic beverages at retail. N.J.S.A. 33:1-40. It is well established that a local issuing authority has the right to limit the issuance of licenses or even to refuse to issue any licenses, and may do so by ordinance further limiting the State statute. R.S. 33:1-40. Bumball v. Burnett, 115 N.J.L. 254 (Sup. Ct. 1935); Fanwood v. Rocco, 59 N.J. Super. 306, 319. This was done by the Council. Cf. Colonial Hotel Inc. v. Cape May, Bulletin 1479, Item 1; Hosts, Inc. v. Point Pleasant Beach, Bulletin 732, Item 2; Ostrowsky v. Newark, 102 N.J. Eq. 169; Sayreville Italian-American Club v. Sayreville, Bulletin 1411, Item 1.

> "When a commission, board, body or person is authorized by ordinance, passed under a delegation of legislative authority, to grant or deny a license or permit, the grant or denial thereof must be in conformity with the terms of the ordinance authorizing such grant or denial... Nor can such commission, board, body or person set aside, disregard or suspend the terms of the ordinance, except in some manner prescribed by law." Dal Roth v. Div. of Alcoholic Beverage Control, 28 N.J. Super. 246 (App. Div. 1953) at p.254.

A liquor license may not be issued in violation of a local ordinance. Bachman v. Phillipsburg, 68 N.J.L. 552.

The testimony educed at the de novo hearing disclosed that in a conversation, the Mayor of Glen Rock advised Sithens (appellant herein) that "...We had two licenses available." Additionally, co-counsel for appellant herein testified that upon requesting information regarding alcoholic beverage ordinances from the Borough Clerk, he was advised that "...there were no ordinances restricting the number of licenses."

The Borough Administrator testified that he had a general awareness of the existence of certain local ordinances relative to retail consumption licenses at the time of Sithens' application but he did not inform Sithens at the time.

Since the application of local Ordinance No. 644 is dispositive of the matter it is unnecessary to deal with the additional question raised on this appeal. It should be noted, however, that in a situation such as was developed here, Sithens was entitled to be advised at the outset that while N.J.S.A. 33:1-12.14 prohibits the issuance of more plenary retail consumption licenses than the number set forth therein, it does not make it mandatory that each municipality issue the maximum number of permissible licenses. It may, by ordinance, limit the number of licenses to an amount less than authorized by statute. Bumball v. Burnett, supra. To advise Sithens that four licenses were available was, at least, inaccurate.

The appellant argues that the Council is estopped from denying the issuance of the license herein and cites Johnson v. Hospital Service Plan of N.J., 25 N.J. 134 (1957); and Koppel v. Olaf Realty Corp., 56 N.J. Super. 109, aff'd 62 N.J. Super. 103 (Ch. 1959) in support of his position. These cases are clearly distinguishable and inapplicable. The Johnson case deals with the ratification of a binding contract by the subsequent acts of an agent of the City of Newark, notwithstanding the fact that the agent authorizing the contract exceeded his authority to do so. In Koppel, a suit for specific performance of a contract for sale of realty and completion of a house thereon, a defendant-purchaser of the premises on a mortgage foreclosure sale was estopped to question that its rights had been adversely affected when the plaintiff had relied on the defendant's acts. It can readily be seen that in either case the conduct controlled by the principle of estoppel were acts which were not violative of the law. As hereinabove noted, the Council was unalterably bound by the provisions of the subject ordinance, and had no authority to act in disregard thereof. Dal Roth v. Div. of Alcoholic Beverage Control, supra. Thus, the doctrine of estoppel is inapplicable.

I, therefore, find that the action of the Council herein was not erroneous and was within its lawful authoity, was consistent and in conformity with the provisions of the applicable ordinance. It is, therefore, recommended that said action be affirmed and the appeal herein be dismissed.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including transcript of the testimony, the exhibits and the Hearer's report, I accept the recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 25th day of May, 1972,

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

ROBERT E. BOWER
DIRECTOR

2. APPELLATE DECISIONS - BROGAN v. RIDGEWOOD.

J. Peter Brogan and Thomas F. Ruane, t/a Bro-Rue,

Appellants,

v.

Mayor and Council of the Village of Ridgewood,

Respondent.

On Appeal
CONCLUSIONS and ORDER

Jeffer, Walter, Tierney, DeKorte, Hopkinson & Vogel, Esqs., by Jerome A. Vogel, Esq., Attorneys for Appellant
Charles C. Collins, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Appellants appeal from the action of the Mayor and Council of the Village of Ridgewood (hereinafter respondent) which denied the application of appellants for the renewal of their plenary retail consumption license for premises 330 Franklin Turnpike, Ridgewood, for the 1971-1972 licensing period.

Appellants allege that the acts of respondent were arbitrary, capricious, unreasonable and violative of applicable law in that said action was based on facts which do not exist and on conclusions of law which are improper and irrelevant.

The reasons set forth in the resolution of respondent are as follows:

"1. No substantial use of the existing license at the said premises has been made since prior to March 25, 1970.

2. Over the period of time since the license was last previously renewed the premises have been allowed to deteriorate into a state of disrepair.

3. The applicant has vigorously pursued and obtained a variance to use the premises for a nursing home and preliminary site plan approved of said project.

4. The premises had been operated as a non-conforming use in an R-2 single family residence zone. Recent suspension of operation as an inn together with the active prosecution of alternate plans for use of the property constitute an abandonment of the non-conforming use under the provisions of N.J.S.A. 40:55-48 and Village of Ridgewood Ordinance #1316, Section 602(d) thereby prohibiting renewal of such use."

Appellants argue that there has been substantial use of the premises; the premises had not been allowed to deteriorate; the act of appellants in obtaining a variance for an alternate use of the property has no bearing on the present application; and there is no legal or factual basis for the conclusion that the conduct of appellants constitute an abandonment of non-conforming use.

The appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded the parties to present evidence pursuant thereto and cross-examine witnesses.

Thomas F. Ruane, co-licensee and one of the appellants, testified as follows:

The premises in question consist of a fifteen-room dwelling existing as a non-conforming use in a residential zone, has been licensed to dispense alcoholic beverages for approximately twenty-five years and the present owners acquired both license and premises approximately August 24, 1969. This license was in operation from October 1969 through March 1970, and from August 18, 1970 through August 29, 1970, when it became necessary to suspend the operation because the manager who was engaged to actually operate the premises defaulted and appellants were unable to find an adequate replacement. It was reopened on a limited basis in June 1971, during which time no food was served and only the basement and first floor were being utilized. The premises were operated continuously from June 17, 1971 until the date of the hearing herein on a limited basis, as a bar only, although the entire first floor, including three dining rooms was described as licensed premises.

Prior to reopening the premises in June 1971, the licensees were required to make some minor plumbing and electrical repairs caused by deterioration in the extended period (August 1970-June 1971) during which time the premises was not operated.

On June 17, 1971, the witness contacted the local director of health and welfare for an inspection of the licensed premises. Such inspection was duly made on June 22, 1971, coincidentally, the same date that the respondent voted to deny the renewal of the license. The licensees were not provided with a copy of the health director's report.

Ruane asserted that the initial purpose for the purchase of the license hereinwas to build a nursing home on the property and seek a place-to-place transfer of the license. An application to the local authority for a zoning variance to permit the construction of a nursing home had been successful but financial difficulties had made construction impossible. Appellants are prominent businessmen with little or no experience in the operation of a restaurant or bar.

The extensive period of non-activity was caused by the inability of appellants to find satisfactory management personnel. Ultimately and reluctantly they were required to open and operate the business themselves and it is intended that appellants will

continue to operate on the limited basis described until such time as either a qualified manager can be found or until such time as the construction of a nursing home becomes feasible. The latter of the two alternatives being relatively remote, appellants presently intend to pursue the restaurant business.

The only additional testimony presented was that of Edward J. Gage, Jr., Director of Health and Welfare of the Village of Ridgewood, for the past nineteen years.

During the period from June 30, 1970 to June 22, 1971, he made several informal visits to the premises and made inspections of the exterior only. The condition of the building satisfied him that it was not in use. He noted one broken window on the second floor of the building and some broken boards on the rear of the building.

On June 22, 1971, at the request of appellants he made a formal inspection of the interior of the premises confined only to these areas intended by the appellants to be used for dispensing alcoholic beverages.

In his opinion the premises were adequate and would not prevent the issuance of a license to dispense alcoholic beverages. He thereafter advised Ruane that the premises were satisfactory. "...From a sanitary point of view." It should be noted that the inspection was made and the report presented on the same day that respondent denied the renewal of the license herein.

He emphasized that he felt the area described in the license application was adequate for serving alcoholic beverages but that the kitchen area was in need of repair. He concluded that he would have approved the operation of the premises as a bar only, but would be reluctant to approve its use as a restaurant.

Initially it should be noted that the decision whether or not a license should be issued rests within the sound discretion of the local issuing authority in the first instance. Blanck v. Magnolia, 38 N.J. 484; Fiory v. Ridgewood, Bulletin 1932, Item 1 (and cases cited therein).

On the other hand an owner of a license or privilege acquires by reason of its investment therein an interest which is entitled to some measure of protection. Twp. Committee of Lakewood Twp. v. Brandt, 38 N.J. Super. 462 (App. Div. 1955); Re To-Jon, Inc., v. Watchung, Bulletin 1946, Item 1.

With respect to the reasons for denial of renewal it is clear that the evidence presented raises two justiciable issues:

(1) Non-user/abandonment.

(2) Deterioration of the premises.

Generally, mere non-use will not of itself void a license. However, a municipal issuing authority should not be required to renew a license under which no business has been conducted for a protracted period unless convincing evidence in explanation and justification of non-user is adduced. Re Hudson-Bergen Package Stores Assoc. v. Garfield et al., Bulletin 1976, Item 3.

> "To accomplish abandonment, the facts or circumstances must clearly indicate such an intention. Abandonment is a question of intention. Non-user is a fact in determining it, but is not, even for twenty years, conclusive evidence in itself of an abandonment. Raritan Water Power Co. v. Veghte, et al., 21 N.J. Eq. 463 (1869) at p.480.

Further:

> "Since abandonment bespeaks a voluntary relinquishment and involves the element of intention, mere non-user, though a fact to be considered, is not of itself adequate to sustain such a finding." River Development Corp. v. Liberty Corp., 29 N.J. 239 (1959) at p.241.

It is clear that the facts elicited in the instant matter indicate an intention on the part of appellants to continue the existence of the license in question.

With respect to the question of deterioration and disrepair it is sufficient to say that the local health officer testified that, in his opinion, the premises were adequate from a health and sanitation standpoint for use as a bar or tavern.

The burden of establishing that the action of a municipal issuing authority is erroneous and should be reversed rests with the appellant. Rule 6 of State Regulation No. 15.

I find, based on the credible evidence presented, that the appellants have sustained that burden and accordingly recommend that the action of the respondent herein be reversed that that it be directed to renew the license in accordance with the application heretofore filed, with the express condition that within the current licensing period the appellants herein resume operation of the licensed premises on a substantial full-time basis, and that the failure of appellants to do so shall be a negative factor to be considered by respondent upon application for renewal of this license for the 1972-1973 licensing period.

Conclusions and Order

Exceptions to the Hearer's report, with supporting argument, were filed by respondent pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including the transcript of testimony, exhibit, Hearer's report and the exceptions filed with reference thereto, which exceptions I find to have been satisfactorily considered by the Hearer or to be lacking in merit, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 26th day of May 1972,

ORDERED that the action of respondent Mayor and Council of the Village of Ridgewood in denying appellants' application for renewal of their plenary retail consumption license is hereby reversed, and respondent Mayor and Council is hereby directed to grant renewal of appellants' license for the 1971-72 license period.

ROBERT E. BOWER
DIRECTOR

3. APPELLATE DECISIONS - CEDENO v. UNION CITY.

Antonio Cedeno,

Appellant,

v.

Board of Commissioners of the City of Union City,

Respondent.

On Appeal

CONCLUSIONS and ORDER

Greenberg and Feiner, Esqs., by Robert Greenberg, Esq., Attorneys for Appellant
Edward J. Lynch, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Appellant appeals from the action of the respondent Board of Commissioners of the City of Union City (Board) which by resolution dated November 23, 1971 revoked the plenary retail consumption license issued to appellant for premises 2510 Central Avenue, Union City, "effective immediately" after finding appellant guilty of the following charges, as amended as to Charge 1, as follows:

> "1. Allowing, permitting and suffering the licensed premises to be used for the sale of Narcotics more particularly Heroin on the following dates and by the following persons: On March 17, 1971, Hector Gaston sold a pack of heroin for five dollars. On April 20th, 1971, Manny Sanchez sold two tinfoil packs of heroin for ten dollars. On April 22, 1971, Miguel 'Tito' Rentas sold two tinfoil packs of heroin for ten dollars. On May 3rd, 1971, Hector 'Hoboken' Robles sold two small packages of heroin for ten dollars. On May 4th, 1971, Juan Rubio sold two tinfoil packs of Heroin for ten dollars. Said sales originated and or took place in and about the licensed premises by the aforesaid persons of ill-repute all in violation of Rule 4, State Regulation No. 20.
>
> 2. On all of the aforesaid dates you did permit the licensed premises to be used in furtherance or aid of the aforesaid illegal activity all in violation of Rule 4, State Regulation No. 20."

Upon the filing of the appeal and after a hearing on an order to show cause, an order was entered by the Director on December 3, 1971 staying the Board's order of revocation pending the determination of this appeal.

Appellant alleges that the action of the Board was erroneous because (a) the alleged illegal activities occurred outside the premises and without the knowledge or participation of appellant; (b) that the testimony was not based upon competent proof; (c) that there were improperly admitted into evidence, Laboratory and Police reports; and (d) the respondent failed to establish a prima facie case.

The answer of respondent denies the substantive allegations of the appellant and sets forth in separate defenses that (a) the appellant maintained his premises as a nuisance, and (b) that narcotic traffic existed at the premises for "a long period of time" and the purchase of narcotics by police officers "emanated from the licensed premises".

The matter was presented for determination upon the transcripts of the proceedings held before the Board together with supportive testimony produced on behalf of the parties herein, pursuant to Rules 6 and 8 of State Regulation No. 15.

The transcripts reflect the following: Carl Sicola, an undercover agent connected with the Hudson County Prosecutor's office was assigned to conduct an investigation with respect to narcotics activity in and outside the appellant's licensed premises and made a surveillance of the premises between March and June 1971. He acted under the supervision of Detective Sergeant Mona and Detective Corcorin of the local police department. This investigation was part of an area-wide investigation of narcotics activity which apparently prevailed on a large scale in that general vicinity.

On March 17, 1971, he met two men who asked him whether he wanted to buy heroin. He indicated that he did. They drove him to the corner of Central Avenue and 25th Street which is near the licensed premises and he waited in the car. The two men entered the licensed premises and shortly thereafter one Hector Gaston emerged from the tavern and entered his car. They then proceeded from the premises and the transaction was consummated. A preliminary field test by the officers indicated that the tinfoil pack purchased contained a white substance which was positive for opiate (heroin).

The next transaction occurred on April 22, 1971. The officer went to the tavern, looked into the premises and saw one Miguel (Tito) Rentas. Rentas saw him, left the tavern, and outside the premises asked him whether he wanted to make a buy. He told him he wanted two bags for $10, whereupon Rentas went back into the bar area, came out within a few minutes and handed him the two tinfoil packs. A preliminary field test again was made which showed that the packs contained a white substance which was positive for opiate (heroin).

The next transaction took place on May 3, 1971. On this occasion one Hector "Hoboken" Robles sold him two small packets of heroin for $10. The same procedure took place. Negotiations were made outside the tavern; Robles went into the tavern, emerged within a minute, handed him the two packs for which he was paid $10.

On May 4, 1971 a similar transaction was made with Juan Rubio who met him in front of the tavern and negotiated the transaction; Rubio went into the tavern, emerged within a minute and sold him two packets of alleged heroin for $10.

On none of these occasions were the transactions conducted inside the licensed premises.

After the field tests were made, the packets of alleged heroin were sent to the State Police Laboratory; the State police laboratory reports introduced into evidence established that they did, in fact contain heroin. However, it should be noted at this point that the chemist's reports were admitted into evidence over the timely objection of counsel that the reports could not be cross-examined and the contents thereof were not established through the testimony of the chemist who prepared the reports. Counsel's objection was overruled; nor was the chemist produced at the de novo hearing in this Division.

Testimony with respect to the surveillance and the transactions were corroborated by Sergeant Mona who was at all times stationed at a point of observation.

Antonio Cedeno, the appellant herein, gave the following account: He has been the licensee of these premises for the past three years and actually tends bar there every day. He tries to run a "clean" place and most of his patronage are regular customers, although he does have some transient business. Approximately all of his patronage are of Spanish or Puerto Rican descent.

He does not remember ever seeing Officer Sicola in his premises except on one occasion when the officer entered the premises and spoke to a couple of his patrons. He insisted that he told him to leave because he didn't want "a group in my tavern." The individuals mentioned herein by the officer were occasional patrons whom he recognized but did not know by name. However, he insisted that at no time did he ever see or observe any transactions in the premises relating to narcotics nor was he aware that such activity took place. He admitted, however, that his license was suspended for sixty days in 1970, upon a plea of guilty to a charge allowing and permitting gambling in the licensed premises.

He also acknowledged that he saw Officer Sicola on the outside of the premises, but never saw or was aware of any transactions which the officer made with any of the patrons in the premises.

It was conceded by the Board's witnesses that none of the alleged transactions took place inside the premises at any time nor that Cedeno participated therein.

I have carefully evaluated the testimony of the witnesses and observed their demeanor on the witness stand. We are dealing here with a disciplinary proceeding which is civil in nature and requires proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Div. of Alcoholic Bev. Control, 20 N.J. 373 (1956); Hornauer v. Div. of Alcoholic Beverage Control, 40 N.J. Super. 501, 503 (1956). The general rule in these cases is that the finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042. Although the preponderance of evidence rule is applicable it has been generally held that the verdict must be supported by substantial evidence. Ondina Corp., Bulletin 1826, Item 1; Cf. Walter v. Alt, 152 S.W. 2d 135, 141.

Thus the central and dispositive issue in this matter is whether the appellant "allowed, permitted and suffered" the activity to take place within or immediately outside the licensed premises.And the licensee is responsible regardless of his knowledge where there is a failure to prevent the prohibited conduct in his premises. Essex Holding Corp. v. Hock, 14 N.J. Super. 39 (App. Div. 1951). From the totality of the evidence herein presented there is no convincing evidence to establish that the appellant knew or might have known of the proscribed activity. The Board's witnesses frankly admitted that all of the transactions except for the initial contact took place outside the licensed premises. Nowhere has there been presented any evidence to indicate that the licensee was aware of such activity or that he could have been aware by any action, act or conduct. The police officers never brought these to his attention nor is there any evidence that any of the contacts were made in such manner as to make the licensee aware of such contact. As the then-Director Burnett reasoned in Re Foster and Clauss, Bulletin 239, Item 1:

> "There is, however, nothing whatsoever in the statements or in the police files submitted which shows knowledge or awareness by the licensees, or which might tend to impute such knowledge.
>
> "Unless the offense can be tied in and brought home to the licensees by their knowledge, or by acquiescence, which implies knowledge, I cannot, in fairness, hold them responsible."

Accepting the testimony of the officers herein it is nevertheless extremely difficult to find any evidence establishing knowledge or participation whether direct or indirect on the part of the licensee.

I am persuaded after observing the demeanor of the licensee that he did not know nor was there such conduct as would have brought to his attention the fact that these transactions actually occurred nor that there was any conscious participation or acquiescence on his part with respect thereto. Cf. In re Schneider, 12 N.J. Super. 449 (App. Div.1951). Nor is there evidence to support a finding of open and notorious conduct in the said premises relating to narcotics activity. Therefore, I do not believe that there was a failure on his part to prevent the prohibited conduct. I therefore conclude that the Board has failed to establish the truth of the said charges.

Furthermore, as hereinabove noted, there was no competent evidence presented to establish that the packets contained heroin. The chemist's reports were admitted into evidence over the objection of appellant's attorney. The chemist should have been produced and should have testified with respect to the contents and be subject to cross-examination. The bare reports were at best hearsay and not competent to establish the truth of their contents. They should not have been admitted into evidence over the timely objection of appellant's attorney.

Finally it should be stated that while we recognize the seriousness of these charges involving as they do alleged traffic in narcotic activity, these charges must be proved and supported by competent credible evidence. Crespo v. Hoboken, Bulletin 1915, Item 2; Cf. Re Columbia Tavern, Inc., Bulletin 1750, Item 8; Re Royal Club of Beverly, Bulletin 1973, Item 8.

Under the totality of the evidence presented I cannot say that I am persuaded with reasonable certainty that these charges have been proved. In disciplinary proceedings, a preponderance of the evidence is necessary to support and justify a finding of guilt and doubtful questions of fact must be resolved in appellant's favor. Ondina Corp., supra.

It is, accordingly, recommended that an order be entered reversing the action of the Board and dismissing the charges.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 14 of State Regulation No. 15.

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

Accordingly, it is, on this 26th day of May 1972,

ORDERED that the action of respondent Board of Commissioners of the City of Union City be and the same is hereby reversed, and the charges herein be and the same are hereby dismissed.

ROBERT E. BOWER
DIRECTOR

4. APPELLATE DECISIONS - DARNELL'S v. NEWARK.

Darnell's, Inc., t/a Carl's, Appellant, v. Municipal Board of Alcoholic Beverage Control of the City of Newark, Respondent.	)	On Appeal CONCLUSIONS and ORDER

Norman Fischbein, Esq., Attorney for Appellant
William H. Walls, Esq., by Beth Jaffe, Esq., Attorney for 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 Newark (hereinafter Board) which denied appellant's application for a place-to-place transfer of its plenary retail consumption license C-457, from 361 Springfield Avenue to 359 Springfield Avenue, Newark.

The appellant contends the action of the Board was erroneous and capricious. The Board denied these contentions and asserted its action was within its sound discretion based upon testimony presented before it.

The appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15; on its behalf, counsel for the Board introduced into evidence the transcript of the proceedings before the Board, pursuant to Rule 8 of State Regulation No. 15.

At the hearing before this Division, testimony of Carl Kaplan, principal officer and stockholder of appellant corporation, revealed that appellant owns and operates a tavern located on the southwest corner of Springfield Avenue and Bergen Street. A ten-year lease for the premises was nearing expiration and negotiations for renewal appearing futile, appellant purchased the property on the southeast corner of Bergen Street and Springfield Avenue (directly across the street). Application was made for a place-to-place transfer to the store in the building on the adjacent corner and that application was rejected by the Board.

The appellant is presently a month-to-month tenant in its present location and, unless there is an approval of the application to transfer, the present landlord has indicated that appellant's tenancy will be terminated.

The transcript of testimony taken before the Board reveals that a hearing on the application was first listed for November 29, 1971. On that date Kaplan testified that his landlord would not make improvements and he purchased the other premises. At that time two objectors did not appear to move their objections, so the matter was carried until December 13, at which time the chairman indicated to appellant's counsel that the Board had not yet made up its mind and the matter would be continued until January 10, 1972. On that date, counsel for appellant was notified that there was a request for an adjournment initiated by one of Newark's councilmen. The Board was advised that the delays meant hardship to the appellant as maintenance costs for the new unused building were running. The matter was again adjourned until January 24, 1972.

On that date, Councilman Westbrooks testified that he had no objection to the transfer other than to "...indicate for the record my total support on their behalf at this time", indicating support for objectors present.

Miss Susan Wanderman, a teacher at the Cleveland School, raised an objection in that "...more bars are not really needed at this time since there are some in the area. We feel that should be adequate. Also it is very bad for the children passing all those bars. That is why most of the teachers object to the transfer into an area where there is a bar already down the street on the same block."

Miss Gerladine Sheppard objected saying "I see no need for an additional bar to be established in that area."

Another teacher at Cleveland School, Miss Rosa Parker, characterized her objections to the transfer as an objection to all taverns, saying "...you will find Rosa Parker has been raising hell about these people opening up taverns...."

At the conclusion of the hearing, the Board rejected the application without ascribing reasons therefor. The vote was unanimous.

From the testimony of the objectors, it is apparent that the objections posed were directed to taverns generally and not to the issue before the Board. Cf. Palmer v. Atlantic City, Bulletin 1017, Item 1. While the comments of the schoolteachers were laudable and their protectory attitude towards the children praiseworthy, there was an absence of any logical critique to the transfer itself. The number of licensed premises in the immediate vicinity of the intersection would be unchanged as would the relative distances between both the new and old locations and other licensed premises in the area. Tagliaferro v. Newark et al., Bulletin 1710, Item 1; Cf. L. Kubisky, Inc., v. Paterson, Bulletin 1662, Item 2; Costa v. Verona, Bulletin 501, Item 2.

Despite the lamentations concerning the use of the premises, the movement itself would presumably neither increase nor decrease the inherent problems connected with taverns as were so vividly described by the witnesses.

The appellant conjectured that an unstated reason for rejection of the application might have stemmed from an allusion to a children's social center once in occupancy of the proposed location. As objector Parker noted:

> "Last year they had a social center where the children went to make things. You would pass there and see the beautiful things that the children made. There was an enjoyment to pass that corner which was next to the laundromat. Now the children will have to pass that tavern...."

At the hearing before this Division, proof was advanced that the occupant maintaining the children's social center voluntarily removed to another building. The Board apparently did not know this at the time of its decision, although there is no reference whatever to that aspect of the question. As no reasons were ascribed to the Board's action, a review of its logic becomes mere speculation.

The transfer of a liquor license is not an inherent or automatic right. If denied on reasonable grounds, such action will be affirmed. Richmon, Inc. v. Trenton, Bulletin 1560, Item 4. On the other hand, where it appears that the denial was unreasonable, arbitrary or capricious, the action will be reversed. Tompkins v. Seaside Heights, Bulletin 1398, Item 1.

As was stated in Common Council of Hightstown v. Hedy's Bar, 86 N.J. Super. 561,562,563 (App. Div. 1965):

> "The standards of review controlling the Director and the court on appeal are set out in Borough of Fanwood v. Rocco, 33 N.J. 404 (1960), affirming 59 N.J. Super. 306 (App. Div. 1960). The court there pointed out that under New Jersey's system of liquor control the municipality has the original power to pass on an application for an alcoholic beverage license or the transfer thereof. However, its action is subject to appeal to the Director of the Alcoholic Beverage Control Division. On such appeal the Director conducts a de novo hearing and makes the necessary factual and legal determinations on the record before him.

> ...Under his settled practice, the Director abides by the municipality's grant or denial of the application so long as its exercise of judgment and discretion was reasonable...However, where the municipal action was unreasonable...or improperly grounded...the Director will grant such relief or take such action as is appropriate. ...On judicial review, the court will generally accept the Director's factual findings ... and not interfere with his action so long as it was not unreasonable or illegally grounded...."

From the testimony on behalf of the appellant, it appears uncontroverted that the appellant could not reasonably remain in the old location, and to protect the licensee, secured the new location. It has been held that:

> "An owner of a license or privilege acquires through his investment therein, an interest which is entitled to some measure of protection in connection with a transfer." Lakewood v. Brandt, 38 N.J. Super. 462 (App. Div. 1955).

In considering appellant's contentions, I find that inasmuch as the liquor licensed premises (present and proposed) are fairly adjacent, it is apparent that the transfer of the license could not result in the creation of an additional license or increase the number of present licenses in the area. Hudson-Bergen Package Stores Ass'n et al v. Bayonne, Bulletin 2012, Item 1.

I find the action of the respondent Board was arbitrary, unreasonable and an abuse of discretion in denying the transfer in question. Under the circumstances I recommend that the action of respondent Board be reversed and that it be ordered to grant the said transfer in accordance with the application filed therefor.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 14 of State Regulation No. 15.

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

Accordingly, it is, on this 31st day of May 1972,

ORDERED that the action of respondent Municipal Board of Alcoholic Beverage Control of the City of Newark be and the same is hereby reversed, and respondent is directed to grant the said transfer in accordance with the application filed therefor.

Robert E. Bower,
Director.

5. DISCIPLINARY PROCEEDINGS - GAMBLING (LIAR'S POKER) - LICENSE SUSPENDED FOR 15 DAYS, LESS 5 FOR PLEA - APPLICATION FOR IMPOSITION OF FINE IN LIEU OF SUSPENSION GRANTED.

In the Matter of Disciplinary Proceedings against	)	
Paris Lanes, Inc. t/a Rainbow Lounge 199 Paris Avenue Northvale, N. J.,	)	CONCLUSIONS and ORDER
Holder of Plenary Retail Consumption License C-2, issued by the Mayor and Council of the Borough of Northvale.	)	

Licensee, Pro se
Walter H. Cleaver, Esq., Appearing for Division

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on February 10, 1972 it permitted gambling on the licensed premises, viz., playing a game called "Liar's Poker," in violation of Rule 7 of State Regulation No. 20.

Absent prior record, occurring within the past ten years, the license would normally be suspended for fifteen days with remission of five days for the plea entered, leaving a net suspension of ten days. Re Vitkauskis, Bulletin 2027, Item 4.

However, the licensee has made application for the imposition of a fine in lieu of suspension in accordance with the provisions of Chapter 9 of the Laws of 1971.

Having favorably considered the application in question, I have determined to accept an offer in compromise by the licensee to pay a fine of $500 in lieu of suspension.

Accordingly, it is, on this 31st day of May 1972,

ORDERED that the payment of a $500 fine by the licensee is hereby accepted in lieu of the suspension of license for ten (10) days.

ROBERT E. BOWER
DIRECTOR

6. STATE LICENSES - NEW APPLICATIONS FILED.

Monsieur Henri Wines Ltd., 131 Morgan Ave., Brooklyn, New York
Application filed August 2, 1972 for place-to-place transfer of licensed warehouse, operated under Wine Wholesale License WW-2, from 63-14 Dewey Ave., West New York, N. J. to 38 List Road, Kearny, N. J.

One Stop Beverages, Inc., 657-669 South Park St., Elizabeth, N. J.
Application filed August 2, 1972 for person-to-person and place-to-place transfer of State Beverage Distributor's License SBD-68 from Deer Park Beverage Co., Inc., 68-76 Cherry St., Elizabeth, N. J.

Robert E. Bower
Robert E. Bower
Director