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 2320 May 16, 1979

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1. COURT DECISIONS - P.A. LACE, INC. - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1587-78

P.A. LACE, INC.
t/a THE PALACE SALOON,

Appellant,

v.

DIVISION OF ALCOHOLIC BEVERAGE
CONTROL, DEPARTMENT OF LAW & PUBLIC
SAFETY, STATE OF NEW JERSEY,

Respondent.

Submitted February 27, 1979 - Decided March 16, 1979.

Before Judges Lynch, Crane and Horn.

On appeal from Division of Alcoholic Beverage Control.

Mr. Robert M. Zweiman, attorney for appellant (Mr. Edward J. Nesselquist, on the brief).

Mr. John J. Degnan, Attorney General, attorney for respondent (Mr. Mart Vaarsi, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

(Appeal from the Director's decision in Re P.A. Lace, Inc., Bulletin 2319, Item 5. Director affirmed. Opinion not approved for publication by Court Committee on Opinions).

2. COURT DECISIONS - CHIAFULLO v. LONG BRANCH - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2345-77

ANTHONY CHIAFULLO,
t/a TONY'S TOMATO PIES,

Plaintiff-Appellant,

v.

CITY COUNCIL OF THE CITY OF
LONG BRANCH,

Defendant-Respondent.

Argued March 27, 1979 - Decided April 10, 1979.

Before Judges Ard and Antell.

On appeal from the Order of the Division of Alcoholic Beverage Control.

John A. Golden argued the cause for the appellant (Golden and Golden, attorneys).

David S. Piltzer argued the cause for the respondent (Piltzer & Piltzer, attorneys).

A statement in lieu of brief was filed by John J. Degnan, Attorney General, attorney for the Division of Alcoholic Beverage Control (Mart Vaarsi, Deputy Attorney General, of counsel and on the statement).

PER CURIAM

(Appeal from the Director's decision in Re Chiafullo v. Long Branch, Bulletin 2286, Item 1. Director affirmed. Opinion not approved for publication by Court Committee on Opinions).

3. APPELLATE DECISIONS - PAL'S PANCAKE HOUSE, INC. v. EAST HANOVER.

Pal's Pancake House, Inc., t/a Horn of Plenty Pub, Appellant,	:	ON APPEAL
vs.	:	CONCLUSIONS AND ORDER
Township Committee of the Township of East Hanover, Respondent.	:	

Charles E. Villanueva, Esq., Attorney for Appellant.
Edwards & Gallo, Esqs., by Douglas Willer, Esq., Attorneys for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

This appeal is from the reimposition of special conditions upon Plenary Retail Consumption License C-1, issued to Pal's Pancake House, Inc., t/a Horn of Plenty Pub (Horn) for the 1977-78 licensing year, by the Township Committee of the Township of East Hanover (Committee).

The complained of conditions are as follows:

1. License shall not be utilized as package store

2. Any entertainment utilized shall not be in the nature of those types of entertainment associated with a discotheque

The appellant contends in its Petition of Appeal that the action of the Committee in imposing the special conditions was erroneous for the following reasons:

A. They are outside the scope of relevant licensing standards;

B. They are unreasonable and arbitrary in imposition and enforcement;

C. These conditions are not uniformly imposed and, therefore, are violative of appellants' "due process" and "equal protection" rights; and

D. They are phrased in vague, ambiguous and legally unenforceable language

The Committee, in its Answer, denies the substantive allegations, and invokes the doctrine of laches, in as much as the appellant did not challenge these identical conditions when first imposed as a condition to transfer approval.

Upon filing of the appeal, the Director, by Order dated July 27, 1977, stayed the special conditions pending the determination of this appeal.

The minutes of the proceedings before the Committee held June 18, 1976 and June 16, 1977 were admitted into evidence, supplemented by testimony of witnesses, oral argument and the receipt of additional exhibits at this de novo hearing; in accordance with Rules 6 and 8 of State Regulation No. 15.

From the record, the following factual matrix emerges.

The Horn family has operated restaurants in suburban Essex County, the Jersey shore and Florida for many years; among them are Mayfair Farms, Pal's Cabin and the Pancake House chain.

They have operated a Pancake House at the subject location for approximately eighteen years, without a liquor license. A few years ago it was decided to upgrade the subject facility to a restaurant with liquor available. A contract to purchase a Broad "C" license was entered into, subject to person-to-person and place-to-place transfer approval by the township.

A petition was circulated and complaints were voiced at the (1976) transfer hearing by residents of Mt. Pleasant Avenue (zoned residential) in opposition to the transfer of this license to Route 10 (zoned business) where the facility is located. The rear of the building on Route 10 abuts the rear of residences on Mt. Pleasant Avenue.

Edith Jacquin, the Township Clerk, testified (at the de novo hearing) on behalf of the respondent as to the nature of the objections to the transfer application.

> This has been a transfer of a liquor license from a (Broad) C type package goods store

> under the Grandfather Clause to a restaurant, and since it was going into a restaurant, the local residents felt that the package goods store part of it should be eliminated. And also they were afraid that it -- if it were a restaurant that there would be loud or a lot of unruly music, you know with the vibrations of the music, they asked that that part be eliminated from the restaurant plus some other little things that had been problem areas and they asked that these little things be corrected before the transfer be completed.

Because of the proximity of the high school, a five minute walk, the objectors also submitted that a package store operation would be unappropriate.

The objectors also wanted restrictions to prevent the Panckae House from operating as a "discotheque".

She was then asked:

> Q. Was there any discussion as to the meaning of that word discotheque?
>
> A. Discoteque in that there would be loud music eminating from the building. They did say like a soft piano music that would be nice for family type restaurant. They would not restrict that type of entertainment. But the loud rock groups where it goes out and beyond the confines of the restaurant, that is what they objected to.

An additional factor expressed by the objectors was the fear that crowds would be generated by a youth orientated entertainment policy. The parking lot may be used for drinking and would be a potential source for consumption by minors, to whom alcoholic beverages would be provided.

Mrs. Jacquin stated that in June 1977 the neighbors expressed a desire to have the subject conditions continued, although there were no incidents or occurrences of an objectionable nature during appellant's first year of operation with a liquor license.

Leonard McCracken who resides on Mt. Pleasant Avenue, directly behind the Pancake House, testified on behalf of the respondent that he was one of the objectors present at the 1976 meeting. He made his feelings known in a telephone call stating:

> I made a phone call to Committeeman Tomko, and asked him to put some restrictions on this license if it was approved, and not to go by Mr. Horn's letter that we had received that it wouldn't be a discotheque, and it wouldn't have a package store there.

He was then asked the type of restrictions he envisioned and he responded no discotheque and no liquor store. When asked the reason for objecting he stated:

> Well, mainly, it's the outside element that it would bring into our neighborhood. We live in a residential zone and have a pretty nice neighborhood and we would like to keep it that way. We are afraid of outside elements coming into it, and disturbing the peace and tranquility of the area.

The basis of his fear regarding a discotheque was generated by stories he had heard about problems relating to two other taverns in the Township. He heard that "...fights break out there, with people coming in from other towns, and trouble with the cops getting beat up, things of that nature. I didn't want anything like that in my back yard."

He objected to package liquor sales stating that:

> We have a neighbor there that had some problems with his daughters walking into a department store in our town and there was a liquor store adjacent to it, and men hanging around the outside making remarks to his daughters as they go in, and I don't think they should be allowed in this area because they have a Dairy Queen right next to them, and they have a roast beef house next to that and that's primarily a young peoples area.

Lastly, he expressed concern relative to the restaurant's nearness to the high school, which he estimated to be one half mile (or less) distant. He has seen the students patronize the nearby franchised custard and fast food establishments at lunch hour.

Andres Elsesses, who resides next door to McCracken on Mt. Pleasant Avenue, testified in the same nature as Mr. McCracken. He summerized his objections to the license transfer as follows:

> The objection is I did not want any discotheques, neither did I want a place where they sell liquor. Neither did I want a place where grownups could go in and give liquor to the children like they do in certain areas, and I didn't want rowdyism, and furthermore, due to the fact that it was within several hundred feet of the Presbyterian Church, and also, I take note a difference, I know the area perfectly, it's a little over a thousand feet from the high school. It's erroneous because even children would walk through my grass and I don't mind them going to the restaurant there. They have adjoining -- that ice cream place, and I have no objection on that. I certainly would object to a liquor place to distribute liquor under any condition because I didn't buy the place -- it's in a residential area, and afterall, I've been living in the town fifty years, by God I don't want no place where they sell liquor where it's available to the kids. And it will be, let's face it, and I don't want any honky tonk place either. I live in East Hanover. I am a substantial resident of the town. I want it kept that way and of course, due to the fact that the town, we were going to Court, I mean we were determined to go to Court if they did have a sale of liquor, but due to the fact that I understood then, it was agreed that we hire a lawyer and I was instrumental in that and I was also instrumental in getting the people to sign there along the Avenue which is about fifty people or so signed petitions.

Frederick W. Liebhauser who sat as a Committeeman when the matter was first before them (in 1976) testified as to what he and his fellow Committeemen were concerned with, and which resulted in the special conditions being attached.

He stated that they (and the objectors) were worried that an operation

> ...like a cabaret type of operation where someone is playing jukebox music and it's eminating out of the buidling and people were wearing mod clothes and maybe long hair.

> I don't know. I know that this is what the objectors were against was a person from Essex County. We had been inundated with operations like this, and they were afraid this would come to Morris County and East Hanover.
> ...Mainly the thing about the discotheque was to be very honest, we had some problems from East Hanover Township with (name deleted) which has a C license too. One of the patrolman has a gun taken away from him. People coming from Newark and Irvington, they just didn't want this operation because this was a transfer, a transferral. That was the prime thing. I'm referring to what happened in March of 1976.

Mr. Liebhauser did state on cross-examination the following:

> I understood that after the first year they (special conditions) would be waived, just like it was for the (name deleted). That this was a condition because of objection of the residents in the immediate area and to satisfy the fact that we were having a new neighbor who had alcohol, an old neighbor that was coming with an alcoholic establishment in the area, and that he would bear these conditions for the first year. I think every member of the Council thought that Pal's Cabin would bear it for the first year ... That was my impression. That was a general impression of the other four. I'm sorry they're not here today, but I don't know where they are.

Walter Fenner, Jr. of 181 Mt. Pleasant Avenue testified for the respondent that he is a real estate broker. He has had only one experience selling a residence abutting a "C" licensee, which occurred fifteen years ago. He felt that it would drastically decrease the value of the home, and more importantly felt that it would be extremely difficult to get anyone to buy the house at all.

W. Donald Horn, an officer and stockholder of the corporate licensee testified on its behalf. From his description, it is apparent that this restaurant was to be operated in a similar fashion as the other Horn family ventures. Primarily it is to be a restaurant, not a tavern or discotheque. Liquor would be served, but other then late comers on weekend evenings, their experience has been that liquor sales were in

conjunction with food, although they do have some (limited) bar-only trade. Entertainment is restricted to the (so called) "popular" or jazz music played by two or three piece groups at a level of amplification that does not interfere with normal dinner conversation. No psychadelic light shows or acid-rock music, which is so highly amplified that conversation is impossible, would be used. Horn stated that this type of operation is the antithesis of the image created over the years by their various restaurant operations, and would be as detrimental to their business and reputation as the neighbors fear it would be for the surrounding area.

The Horn's were aware in 1976 of the neighbors' fears, and that a petition was being circulated. They wrote each person whose name and address appeared on the petition, outlining their proposed operation to allay fears and distorted mental images, which they felt, were groundless.

When the transfers were approved, the license was issued containing the aforementioned restrictions. Horn called Town Hall to discuss the matter. Committeeman Liebhauser advised him that it was to be imposed for the first year only. Based upon this discussion, Horn decided not to appeal.

I have set forth, in lengthy detail, the testimony herein in order to obtain an objective perspective of the underlying circumstances connected with the imposition of the special conditions herein.

I

Special conditions attached to a license need only be reasonable to obtain approval by the Director of this Division. Belmar v. Division of Alcoholic Beverage Control, 50 N.J. Super. 423 (App. Div. 1958); Marinaccio v. Asbury Park, Bulletin 2009, Item 2; Alanwood Holding Co. v. Atlantic City, Bulletin 1963, Item 1. Conversely, if no special conditions need be attached in the judgment of the local issuing authority but, in the alternative, revocation or non-renewal is warranted, and such judgment appears reasonable, the action will be affirmed. Gauntt v. Paulsboro, Bulletin 2187, Item 2; Alice G. Townsend, Inc. v. Orange, Bulletin 2186, Item 3.

The dispositive issue herein may be identified as follows: Did the Council act arbitrarily or unreasonably in imposing conditions, under the circumstances and in light of the testimony it heard from the objectors?

It is basic that the action of the municipality must be reasonable in equating the public's interests, which are

paramount, with the interests of the licensee. Rajah Liquors v. Division of Alcoholic Beverage Control, 33 N.J. Super. 598 (App. Div. 1955). A liquor license is a privilege and there is no inherent right in a citizen to sell intoxicating beverages at retail. No licensee has a vested right to the renewal of its license. Zicherman v. Driscoll, 133 N.J.L. 586 (Sup. Ct. 1946).

In A's Inn, Inc. v. Deal, Bulletin 2139, Item 3, the Director cautioned however, that such special conditions, as are imposed, must be reasonable.

However, in order to determine whether there has been a fair and reasonable exercise of its authority, objective criteria must exist upon which the imposed special conditions can be weighed. In the instant matter, I find a lack of such criteria.

The record leads me, inescapably, to conclude that the opposition of the neighbors residing on Mount Pleasant Avenue is largely based upon fears and supposition of anticipated future offenses which may or may not be committed by licensee.

There is a common thread linking the testimony of the objectors and that is their assumption that the subject license is being or will be, (if permitted), operated as a discotheque or tavern featuring acid-rock music blasting forth at ear-shattering volume from the building throughout the late hours; and that it will be frequented by young, unruly patrons who will, under the influence of alcohol, commit various unpleasant offenses.

This fear is apparently generated by problems experienced by the Township with regard to another licensee, which received publicity in the local newspapers.

It must be borne in mind that the corporate licensee has already operated for upwards of one year without any incidents of the type feared by the witnesses. Additionally, they have indicated by letter to the signers of the petition, orally at the 1976 hearing and at the de novo hearing in this Division, that they too, view "that kind" of operation with distain.

Absent a showing of nuisance created by the subject licensee resulting from the sale of alcohol in original container, and/or the operation of subject premises as a discotheque, I find the imposition of the special conditions to be an arbitrary and unreasonable, there is no concrete basis for these conditions as it applies to the appellant, other than mere speculation.

It is noted that the local issuing authority possesses ample power and authority to discipline any licensee for infractions of local and state A.B.C. Regulations. Should this (or any other) licensee disregard them, the license may be suspended or revoked, or have special conditions imposed during the following renewal period.

I, therefore, recommend that an order be entered reversing the action of the Township Committee which imposes the special conditions to the appellant's license for the 1977-78 license term.

Conclusions and Order

Written Exceptions to the Hearer's Report were filed by the respondent, and written Answers thereto were submitted by the appellant, pursuant to N.J.A.C. 13:2-17.14.

In its Exceptions, the respondent argues that the Township Committee properly recognized "community sentiment", which is an approved licensing factor, in accordance with Lyons Farms Tavern v. Newark, 68 N.J. 44 (1975) and Fanwood v. Rocco, 33 N.J. 404 (1960).

In its Answers thereto, the appellant acknowledges the "community sentiment" concept as an appropriate factor to be considered by a local issuing authority. However, it denies any validity where there is no objective independent support for such sentiment, and it is purely anticipatory.

Sub judice, the proposed special conditions limit the general statutory privilege of a plenary retail consumption license, i.e., the right to make sales for off-premises consumption in original containers, N.J.S.A. 33:1-12 and N.J.S.A. 33:1-12.23, and the ability to conduct an otherwise lawful type of business activity, i.e., a discotheque. Such special conditions cannot be predicated solely on speculation of a segment of the Township residents just because it is categorized as "community sentiment".

There is nothing in the record to attribute to the appellant, at this posture, any abuse of license privileges. The Township, through its disciplinary powers and at subsequent renewal periods can adequately and efficiently deal with any actual offenses by the appellant. Thus, I find the Exceptions of the Township Committee to be without merit.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the

Hearer's Report, the Exceptions filed by the respondent and the Answers submitted thereto by the appellant, I concur in the findings and recommendations of the Hearer, and adopt them as my conclusions herein.

Accordingly, it is, on this 24th day of January, 1979,

ORDERED that the action of the Township Committee of the Township of East Hanover, as it relates to and with respect to the special conditions herein imposed upon the renewal of appellant's license for the 1978-79 license term, be and the same is hereby reversed, and the said special conditions be and are hereby vacated.

JOSEPH H. LERNER
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - LEWDNESS - IMMORAL ACTIVITY - LICENSE SUSPENDED FOR 30 DAYS.

In the Matter of Disciplinary Proceedings against

Will May Estates Ltd.,
t/a Barclay Lounge
9-13 So. Pennsylvania Ave.
Atlantic City, New Jersey

Holder of Plenary Retail Consumption License 0102-33-245-001 issued by the Board of Commissioners of the City of Atlantic City.

CONCLUSIONS

AND

ORDER

Goldenberg, Mackler & Feinberg by Harry A. Goldenberg, Esq., Attorneys for Licensee.
Mart Vaarsi, Esq., Deputy-Attorney General, Appearing for Division.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

HEARER'S REPORT

Licensee pleaded "not guilty" to a charge alleging that, on June 25, 1977, it permitted lewdness and immoral activity upon the licensed premises by allowing female patrons to solicit for prostitution, and through its employee procured females for prostitution purposes, in violation of Rule 5 of State Regulation No. 20 (now N.J.A.C. 13:2-23.6).

Two ABC Agents participated in the investigation of alleged solicitation for prostitution at the licensed premises, pursuant to a specific assignment. Agent P gave the following account: On June 18, 1978, a week earlier than the date charged, in the early morning hours, he visited the subject premises with Agent B, which contained a bar and a few tables. He had made a prior visit to the premises and had previously been engaged in conversation with the bartender.

Upon seating themselves at the bar, Agent P engaged the bartender, whom he called Jay-Jay, later identified as John Murray Jr, in conversation. He clearly indicated that he wished to engage in immoral activity with one of the girls and asked

Jay-Jay where the girls were. The bartender replied that the girls were then tied up, but when they came in he could make arrangements. When asked what the costs for such activity with the girls would be, he was told, "usually around twenty-five or thirty dollars."

On that date, no girls appeared and the agents departed after a short waiting period. They returned on the date charged, accompanied by ABC Agent G. Again the bartender, Jay-Jay, was engaged in conversation relating to the desire of the agents to secure the services of a prostitute, to which Jay-Jay replied, "when they come in, I'll send them over." The agent recounted in detail his conversation with the bartender as follows:

> So at this time I called Jay-Jay over and I said, "do you mean the one in the green sweater? And Jay-Jay said, "Yes." So I said, "what about the price?" He said, "like I told you, you'll have to get that squared away with them, about twenty or thirty dollars. You'll have to, you know, come to an agreement with the girl on that." And he says, "you'll have to pay for the room." So I says, "all right, send her a drink."

Thereafter, the agents were joined by the female with whom the arrangements for illicit intercourse were later made and the agents and the girl, later identified as EM, left the bar. Agent P and the girl registered at a motel and proceeded to a room. The girl was paid with "marked" money. Shortly thereafter, Agents G and B entered with members of the Atlantic City Police Department. The money, which had been paid to the girl, was retrieved and the girl was placed under arrest.

ABC Agent B testified in corroboration of the testimony of Agent P. He asserted that after Jay-Jay brought a drink to the female EM at Agent P's request, she joined Agents P and B at the bar.

Louis Chait, the Secretary of the licensee corporation, testified that there had been a transfer of the license about five months after the date charged, but that he was aware that charge had been made against the licensee. The bartender Jay-Jay was no longer employed by the present licensee, Chait had discharged him. He did not know the whereabouts of Jay-Jay nor

did he get any detailed information concerning the charge.

We are dealing with a purely disciplinary measure and its alleged infraction, which is civil in nature and not criminal. Kravis v. Hock, 137 N.J.L. 252 (Sup. Ct. 1948); Panda v. Driscoll, 135 N.J.L. 164 (E. & A. 1946). Thus, the Division is required to establish the truth of this charge by a fair preponderance of the credible evidence only. Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 20 N.J. 373 (1956). In other words, the finding must be based upon a reasonable certainty as to the probabilities arising from a fair consideration of all of the evidence. 32C.J.S. Evidence, sec. 1042,

Our courts have consistently maintained that:

> "the commission of an overt act on the licensed premises in furtherance or promotion or encouragement of an illicit purpose is, in itself, an immoral activity comprehended by the scope of the regulatory rule."

In re Schneider, 12 N.J. Super. 449 (App. Div. 1951). See In re Olympic Inc. 49 N.J. Super. 299 (App. Div. 1958); Essex Holding Corp. v. Hock, 136 N.J.L. 28 (Sup. Ct. 1947).

The Division amply proved that a prostitute was not only permitted to ply her trade within the licensed premises, but encouraged to do so by a cooperative and willing bartender. His activity fell short of actually arranging for the illicit act to take place, placing on the agents the duty of negotiating with the prostitute themselves. However, such shortcoming cannot mitigate in favor of the licensee, whose agent, the bartender, by encouraging this illicit trade undoubtedly sought to increase the patron activity.

From my evaluation of the totality of the evidence, I reach the firm conclusion that the said licensee, through its employee, allowed, permitted and suffered the immoral activity, as set forth in the charge herein, and that the Division has established the truth of that part of the charge which so alleges by a fair preponderance of the credible evidence. I recommend that the licensee be found not guilty to that part of the charge which alleges that the licensee engaged in procurement.

Absent prior violation, and mindful that the present licensee

was not in ownership when the immoral activity occurred, it is recommended that the license be suspended for thirty (30) days.

Conclusions and Order

No written Exceptions to the Hearer's Report were filed pursuant to N.J.A.C. 13:2-19.6.

Having carefully considered the entire record herein, including the transcript 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.

By letter received in this Division on January 12, 1979, the licensee's attorney advises that the licensee closed the premises January 8, 1979 and requests consideration to commence the suspension as of that date.

It is long-established Division policy that the effective dates of a suspension are fixed by the Director, and, therefore, the request is denied. I shall, however, waive the usual ten day period and shall set an early commencement of the suspension date.

Accordingly, it is, on this 24th day of January, 1979,

ORDERED that Plenary Retail Consumption Lic. 0102-33-245-001, issued by the Board of Commissioners of the City of Atlantic City to Will-May Estates Ltd., t/a Barclay Lounge, for premises 9-13 So. Pennsylvania Avenue, Atlantic City, be and the same is hereby suspended for thirty (30) days commencing 2:00 A.M. Thursday, January 25, 1979 and terminating 2:00 A.M. Saturday, February 24, 1979.

JOSEPH H. LERNER
DIRECTOR