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

BULLETIN 2251 April 13, 1977

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BULLETIN 2251 April 13, 1977

1. COURT DECISIONS - SHOP-RITE OF HUNTERDON COUNTY, INC. v. RARITAN.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-537-75

SHOP-RITE OF HUNTERDON COUNTY, INC.,

Respondent and
Cross-Appellant,

v.

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF
RARITAN, COUNTY OF HUNTERDON, NEW JERSEY,

Respondent,

and

ROBERT A. YARD,

Appellant.

Argued January 10, 1977 - Decided January 31, 1977.

Before Judges Bischoff, Morgan and Rizzi.

On appeal from Division of Alcoholic Beverage Control.

Mr. Edmund R. Bernhard argued the cause for appellant (Messrs. Bernhard, Durst & Dilts, attorneys).

Mr. Roger A. Beeman argued the cause for respondent Shop-Rite of Hunterdon County, Inc. (Mr. Lee B. Roth, attorney).

No brief filed on behalf of respondent Township Committee of the Township of Raritan.

PER CURIAM

(Appeal from the Director's decision in Re Shop-Rite of Hunterdon County, Inc. v. Raritan, et al, Bulletin 2206, Item 3. Director affirmed. Opinion not approved for publication by the Court Committee on Opinions).

2. APPELLATE DECISIONS - MOONCAT CORP. v. WALLINGTON.

Mooncat Corp., Appellant, v. Mayor and Council of the Borough of Wallington Respondent.	On Appeal CONCLUSIONS and ORDER

Anthony A. Kress, Esq., Attorney for Appellant
Gruen, Olick and Ritvo, Esqs., by Harold Ritvo, 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 respondent Borough Council of the Borough of Wallington, (Council), which, on July 28, 1976, suspended appellant's plenary retail consumption license for a period of one hundred and twenty days, based upon a finding of guilt of four charges as set forth in its subject resolution which, in part, reads as follows:

> "NOW, THEREFORE BE IT RESOLVED, the Governing Body of the Borough of Wallington, County of Bergen, State of New Jersey makes the following findings of fact to wit:
>
> 1. Notice was served upon the Mooncat Corp., of charges considered this evening, pursuant to law.
>
> 2. The Mooncat Corp., failed to file and publish a notice of change of corporate structure, and failed to file proof of such filing and publication, required pursuant to the provisions of Rules 11, 12, and 13 of State Regulation No. 2, of the Rules and Regulations of the Division of Alcoholic Beverage Control in the Department of Law and Public Safety, State of New Jersey such as to violate N.J.S.A. 33:1-34.
>
> 3. In payment of the fee required pursuant to Chapter VIII a check was issued and delivered to wit; No. 668, in the amount of $300.00 drawn on the National Community Bank, Mt. Pleasant Wallington Branch, Joseph Van Wetting as signator

and made payable to the Borough of Wallington and the Mooncat Corp. knowing at the time that the aforementioned bank had no such funds, or should have known pursuant to the presumptions of statute, and therefore the Mooncat Corp. violated Borough Ordinance and State statutes.

4. The licensed premises are not so arranged and lighted that a full view of the interior may be had at all hours from the public thoroughfare or from adjacent rooms to which the public is freely admitted, contrary to the provisions of section 8-4.4 of the Revised General Ordinances of the Borough of Wallington, 1970 as amended and supplemented.

5. On numerous occasions in and before January 1976, the Mooncat Corp., in and of itself or by way of its agents, failed to facilitate and did hinder, or cause the hinderance or delay of an investigation and inspection of the licensed business and premises and search thereof by Police Officers of the Police Dept. of the Borough of Wallington, contrary to the provisions of Rule 35 of State Regulation No.20 of the aforesaid Rules and Regulations of the Division of Alcoholic Beverage Control.

BE IT FURTHER RESOLVED THAT, as a result of the aforesaid mentioned findings and inaction of the holders of License C-8 of the Borough of Wallington, that the aforementioned license be revoked immediately, and that, in the event that payment of the license fee is duly made subsequent to the payment of said fee, there shall be a suspension of 30 days for each of the violations set forth in the aforementioned charges."

In its petition of appeal, licensee contends:

1. That the Corporation, did in fact file the required notice of Change of Corporate Structure form, and ordered that the newspaper suggested by the Borough Clerk as appropriate for publishing, to publish the notice. The Corporation was assured that the aforesaid notice would be published and that the Borough would be supplied with the necessary affidavit.

2. The corporate officers have no recollection of any refusal to completely cooperate with any municipal officials and at no time was any such official ever denied entry.

3. The allegation that the licensed premises are not properly arranged and lighted is "improper".

4. As a result of a bookkeeping error the appellant's account was short $6.00 and the bank refused to honor the check. It was never the intent of the appellant to defraud or otherwise deprive the municipality of its rightful license fee.

The Council, in its answer, denies these contentions.

Upon the filing of this appeal, the Council's order of suspension was stayed, by order of the Director on July 29th 1976 pending the determination of this appeal.

A de novo hearing was held in this Division pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded the parties to introduce evidence and cross examine witnesses. This afforded licensee Corporation the opportunity to participate and submit testimony and proofs on its own behalf for the first time in view of its failure to attend the July 28th 1976 meeting through its own inadvertance and no fault of the Council.

Testifying as a witness for the Council, Lorraine Klamerus, the Borough Clerk, stated that she was responsible for all matters concerning Borough Alcoholic Beverage Licenses and fees. Her two assistants may not accept monies or transact any business relative to liquor licenses, in her absence. In her absence, her assistants are instructed to direct persons to call again when she is available, and, they advise her of any calls or visits of this nature upon her return.

She testified that in ".....early February 1976 an application (Notice of Change of Corporate Structure) was filed by Dennis Tucci and James Crocco, fifty percent shares each....." She stated she never saw an affidavit of Proof of Publication, and since none was in the file, it was not received.

On June 4, 1976, Dennis Tucci and a Joseph Van Wettering visited her office to facilitate the renewal of the license, and tendered the required $300.00 filing fee. The check was deposited on June 25th and returned by the bank on June 28th, because of insufficient funds. On July 29th 1976 Joseph Van Wettering visited her office and paid the $300.00, in cash, for which she issued an official receipt.

On cross examination the appellant's attorney requested and was given the Clerk's file relating to subject licensee. He discovered two newspapers therein. The first one was the March 25, 1976 copy of "The Messenger" which contained appellant's Notice of Change of Corporate Structure on Page 5, indicating that Joseph Crocco was President and Dennis Tucci was Secretary-Treasurer. The second newspaper was the July 29th issue of "The Messenger" which contained appellant's Notice of Change of Corporate Structure, on Page 5, indicating that Joseph Van Wettering was the President and Dennis Tucci was the Secretary-Treasurer. No affidavits of Proof of Publication were found in the file. Klamerus admitted that the notices were printed but asserted that she was not aware of it when the charges were brought. She does not place the newspapers in the individual files; they

are filed centrally because an individual issue may carry several legal notices. When questioned why she had not placed a copy or notation of it in appellant's file she explained: "It's not my responsibility. It's the principal's responsibility to send me proof or the affidavit of proof." Counsel then asked:

> "Q: Therefore, is it fair to say that the reason this particular charge was brought against my client was because you didn't have the Affidavit of proof?
>
> A: Exactly"

When questioned whether she notified anyone of the return of the check due to insufficient funds she stated "Yes, one of my office staff had called Mr. Van Wettering, Mr. Tucci and Mr. Crocco at their homes....the same day....there was no answer at any of their homes". The calls were made between 11:00 A.M. and 4:00 P.M. No attempt was made to contact anyone at the tavern because she "knew that the bar doesn't open until nine, nine-thirty, somewhere around there."

Patrolman Charles Neilley of the Wallington Police Department testified that he has visited the tavern on police business quite a few times, and on several occasions found the door to be locked. Sometimes he was admitted when he knocked; other times he was not. These visits were made in the early hours of the morning between 2:00 and 4:00 A.M. He could not ascertain whether or not anyone was in the tavern when his knocks went unanswered because the only window through which he could look into the premises was a small diamond shaped insert in the front door which was smoked or hazy.

Dennis Tucci, the secretary-treasurer of the corporate licensee testified on behalf of the appellant. He is twenty years old and worked as a bartender at the tavern before becoming a fifty percent stockholder. He did not employ the services of an attorney to file and publish the necessary Notice of Change of Corporate Structure. He was guided by the advice of the Council Clerk who informed him of the steps to be taken. He produced a bill from the newspaper which stated that it published a legal notice on July 29th and August 5th 1976 at the cost of $13.68, and there was still due and owing $13.32 for the earlier publication. It notes in capital letters,"LEGAL AFFIDAVIT SENT TO BOROUGH CLERK". Tucci stated he relied upon its telephone assurance that proof of Publication would be sent to the Borough Clerk and further, the billing states that it was, indeed, done.

The first notice that any corporate officer or employee had that the $300.00 check was returned by the bank was when a complaint was served upon Joseph Van Wettering. He accompanied Van Wettering to the Police Station where Van Wettering offered to pay the $300.00. The payment was refused and he was told that he must tender it at the court hearing. Tucci admitted that the door had a small diamond shaped window and was of smoke or dark glass but that it was transparent. The structure has remained unchanged for at least two years. He acknowledged that the police chief informed him verbally that this constituted a violation of the Borough ordinance. He claims he was also informed that he would receive an official notice, and would then have ninety days to correct it. Tucci noted that he works every night and locks the door at closing time while cleaning up prior to departure. If someone knocks after he locks the door he peers through the window and if it is a police officer he admits him. If however, as is usually the case, he sees a civilian he does not open the door.

Preliminarily, I observe that we are dealing with a purely disciplinary action; such action is civil in nature and not criminal. In re Schneider, 12 N.J. Super. 449 (App.Div.1951). Thus the proof must be supported by a preponderance of the credible evidence only. Butler Oak Tavern v. Alcoholic Beverage Control, 20 N.J. 373 (1956).

It is a firmly settled principle that the Director's function on appeal is not to reverse the determination of the municipal issuing authority unless he finds, as a fact, that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by respondent. Schulman v. Newark, Bulletin 1620, Item 1; Montiero v. Newark, Bulletin 2073, Item 2, and cases cited therein.

The burden of establishing that the Council acted erroneously and in an abuse of its discretion rests with appellant. Rule 6 of State Regulation No. 15. The ultimate test in these matters is one of reasonableness on the part of the Council. Or, to put it another way: Could the members of the Council, as reasonable men, acting reasonably, have come to their determination based upon the evidence presented? Cf. Hudson Bergen County Retail Liquor Stores Ass'n v. Hoboken, 135 N.J.L.502 (E & A 1947); Nordco, Inc. v. State 43 N.J. Super. 277, 282 (App. Div.1957); Lyons Farms Tavern v. Mun Bd of Alc. Bev. Newark, 55 N.J. 292,303 (1970).

I

With respect to the first charge, it is alleged that the licensee failed to file and publish a Notice of Change of Corporate Structure, as required by Rule 13 of State Regulation No. 2, which reads as follows:

> "RULE 13. The Notice of Change in Corporate Structure shall be once in a newspaper printed in the English language, published and circulated in the municipality in which the licensed premises is located. If, however, there shall be no such newspaper, then such Notice shall be published in a newspaper printed in the English language, published and circulated in the county in which the licensed premises is located. Proof of publication of such Notice shall be furnished by the licensee to the municipal issuing authority in affidavit form within ten days after the date of publication."

The last sentence is pertinent to the disposition of this charge. That the notices were in fact, published cannot be disputed. However, this was not brought to the attention of the Borough Council when it met to deliberate the charges against the appellant on July 28th because, due to a misunderstanding, no one appeared on appellant's behalf in defense of the charges. Apparently, Tucci, depended upon the newspaper's representation that it would supply the required affidavits directly to the Borough Clerk. Mindfull of Tucci's youth, lack of experience the fact that the notices were actually published and the newspaper's representation relative thereto, I find that there has been substantial compliance with the regulation. Therefore, I find that this charge has not been established and appellant has suceeded in sustaining the burden with respect to this charge of establishing that the action of the Council was erroneous and should be reversed as required by Rule 6 of State Regulation 15; and, I so recommend.

II

With respect to the second charge, the testimony of the Borough Clerk clearly shows a lack of an earnest effort to communicate with the corporate principals, past and present, or employees of appellant corporation in order to inform them of the dishonored check. The calls made to the various homes were made in the afternoon when the corporate officers would be at work, under normal circumstances. Had an effort been made to contact the tavern someone might have been reached. Tucci testified that appellant had adopted a 3:00 P.M. opening time effective November 1975. A letter to one (or all) of the individuals informing them of the occurrence would have been reasonable after telephone contact was unsuccessful. I cannot therefore concur with the finding of the Council that the check was issued with guilty knowlege or intent to defraud; nor do I concur with the opinion of Council's attorney that the return of this check gives rise to the right to revoke the license immediately. I find that this charge has not been established, and that appellant has sustained its burden of establishing that the action of the Council was erroneous and should be reversed as required by aforecited Rule; and I so recommend.

III

Concerning the third charge, we have the admission of Dennis Tucci, coupled with the testimony of Patrolman Neilley which leads to the inescapable conclusion that the appellant was guilty of the charge of violating Borough ordinance 8-4.4 relating to arranging and lighting the interior so that a full view of the interior may be had at all hours from the exterior.

Appellant's attorney argues that, since this condition existed for at least the past five years, it must first be given notice and a reasonable time to correct it before being charged. I find this argument to be frivolous and without merit. The Council's apparent laxity in the enforcement of Alcoholic Beverage regulations constitutes no defense to the charge. The testimony indicates, and I find, that the regulation was enacted in 1934. All licensees are charged with knowledge of the Borough ordinances. I view the argument that appellant's five year's (minimum) of open violation of the ordinances gives rise to a non-conforming use, to be specious. Additionally, finding of guilt on this count, is a finding of a violation of the Borough's Alcoholic Beverage regulations, not a zoning or building code violation, as appellant's attorney proposes in his opening statement.

My examination of the facts and the applicable regulation generates no doubt that this charge was established by a preponderence of the believable evidence. I conclude therefore, that appellant has failed to sustain the burden of establishing that the Council's action, relative to this charge, was erroneous and against the weight of evidence, as required by Rule 6 of State Regulation 15.

IV

The fourth charge concerns itself with the accusation that the licensee corporation, by its principals or agents, hindered or delayed the investigation and inspection of the licensed premises.

Patrolman Neilly's testimony indicates that those few occasions occurred in the early hours of the morning. Although he had no daily report records with him

from which he could refresh his recollection, he nonetheless placed them as occurring between 2:00 and 4:00 A.M. On cross examination, he readily admitted that they all could have occurred after 3:00 A.M. which was closing time. As related previously, Dennis Tucci stated he locked the door at closing time before tidying up, and if anyone knocked he looked through the window to see who it was. Whenever he saw a policeman he admitted the officer.

After carefully considering the testimony adduced, I find an absence of substantial credible evidence to support a finding of guilt. Thus, I conclude that appellant corporation has sustained its burden of establishing that the action of respondent relative to this charge, was erroneous and should be reversed.

Accordingly, I recommend that the action of the respondent be reversed and this charge be dismissed.

V

In sum, it is recommended that the Council's finding of guilt on the first, second, and fourth charges be reversed and that its finding of guilt on the third charge be affirmed. It is further recommended that the suspension imposed by the Council be modified to a suspension of thirty days on the third charge solely and that an order be extended fixing the effective dates of the suspension which was stayed pending further order herein.

Conclusions and Order

Written exceptions to the Hearer's report with supportive argument were filed by the parties hereto, pursuant to Rule 14 of State Regulation No. 15.

The Council takes exception only to a recommendation of "not guilty" on charge No. 3 relating to the dishonored check, and allege that the licensee failed for twenty-nine days to pay the license renewal fee, during which time it enjoyed the use of license privileges. It maintains that the bank statement submitted shows that the check was returned for insufficient funds on June 28th; that the statement was rendered as of June 30th 1976, but that the fee was not paid until July 29th, 1976.

The transcript reflects that appellant's employee made several attempts to pay the fee, the first time being at police headquarters on the evening Van Wettering was served with the complaint. However, each time the offer of tender was made, prior to the hearing, it was not accepted. I find, therefor, said exception to be without merit.

Appellant takes exception to the Hearer's sole recommendation of guilty (Charge No. 4) violation of Borough Ordinance 8:4-4 relating to full view of the interior from the street, contending that the clear violation of this Ordinance for the past five years constitutes a valid non-conforming use. It further contends that such Ordinance regulating the physical aspects of the premises is a building and zoning matter, and not a matter for the Division of Alcoholic Beverage Control. Lastly, he maintains that a thirty-day suspension is excessive.

I find that the said exceptions have either been fully considered and properly answered in the Hearer's report or are lacking in merit.

Thus, having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's report and the exceptions filed thereto, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 15th day of December 1976

ORDERED that the action of the Council in finding the appellant guilty of charges one, two and four be, and the same are herein reversed and the said charges be and are hereby dismissed; and it is further

ORDERED that the action of the Council in finding appellant guilty of the third charge be and the same is hereby affirmed; and it is further

ORDERED the action of the Council in suspending appellant's plenary retail consumption license for one hundred twenty days be and the same is hereby modified to a suspension for thirty days, and the appeal herein be and the same is hereby dismissed; and it is further

ORDERED, that the previous Order of July 29, 1976 staying the effective date of the suspension imposed by the Council be and the same is hereby vacated; and it is further

ORDERED that the Plenary Retail Consumption License C-8, issued by the Borough Council of the Borough of Wallington to Mooncat Corp. for premises 209 Paterson Ave, Wallington, be and the same is hereby suspended for thirty (30) days commencing at 2:00 A.M. on Tuesday, January 4, 1977 and terminating at 2:00 A.M. on Thursday, February 3, 1977.

JOSEPH H. LERNER
DIRECTOR

3. APPELLATE DECISIONS - GANMORE ENTERPRISES, INC. v. PALISADES PARK.

Ganmore Enterprises, Inc., A New Jersey Corporation,	:	
Appellant	:	On Appeal
v.	:	CONCLUSIONS and ORDER
Mayor and Council of the Borough of Palisades Park.	:	
Respondent	:	

Rotolo and Rotolo, Esqs., by Peter S. Rotolo, Esq. Attorney for Appellant
Gross, Demetrakis and Sinisi, Esqs., by Stephen P. Sinisi, Esq. Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the imposition of a certain special condition attached to the renewal of appellant's Plenary Retail Consumption License C-5, for premises, 230 East Brinkerhoff Avenue, Palisades Park, by respondent Mayor and Council of the Borough of Palisades Park (hereinafter Council).

The complained of special condition attached to the appellant's license is as follows:

> "License C-5 is hereby renewed but shall be inoperative on or after January 31, 1977, if, by the aforesaid period of time licensee shall have failed to relocate in other than a residential zone permitting the operation, conduct and sale of alcoholic beverages, the aforesaid period of time having been determined by the Mayor and Council of Palisades Park as sufficient in affording licensee reasonable opportunity to relocate in accordance with this condition."

In its petition of appeal, appellant contends that the special condition is unreasonable, arbitrary and capricious, and an abuse of its discretion, as said condition is unlikely, if not impossible, to fulfull; that a plenary retail consumption license has been issued for these premises annually since February 27, 1934 without objection; and that the real purpose is an attempt by respondent to eliminate a non-conforming zoning use, which is protected by N.J.S.A. 40:55-48.

In its Answer, the Council denies the allegations and reiterates the findings it had set forth in its subject resolution dated June 28, 1976.

A de novo hearing on appeal was held in this Division, with full opportunity afforded the parties to introduce evidence and cross examine witnesses, pursuant to Rule 6 of State Regulation No. 15.

Mayor Robert Pallotta testified on behalf of the Council. He stated in part, ".....Testimony was given at the hearing and Council deliberated and heard both sides, and they did come up with the decision that it had been a non-conforming use for many years. It is in a residential zone and the Council felt at that time that we had to start somewhere to begin to make the necessary corrections where this inequity existed in the Borough. So, they did give the licensee a stipulated 7 months to relocate into a non-residential zone....."

On cross examination, Pallotta admitted that residences were permitted in business zones. Stores with apartments above were common on Broad Avenue, the Borough's principal business thoroughfare.

Vito J. Pirrera, who resides around the corner from the licensed premises and who appeared as an objector at the Council hearing, testified at the Division hearing that, in the immediate area there are many children who walk to and from the school and playground who are subjected ".....to conditions that exist in the environment that surrounds having a tavern in a residential area...." When queried as to what conditions he was referring to he stated "well, particularly the fact that there is abusive language by people in the tavern. They are subjected to conditions which would be very offensive to the eyes of a child and even the eyes of an adult." And, further, "In terms of my own observations, the only conditions that I can elaborate on would be the fact that the children do pass through the neighborhood and are passing in front of the tavern to and from school."

Mr. Pirrera added that a parking problem exists in the neighborhood which he attributed to the existence of this tavern.

Joseph T. Constantino, another objector, and a nearby resident, testified relative to illegal parking by patrons of the tavern. He stated that there were no problems while the former owner, Mr. Gannon, was alive. The trouble commenced soon after Gannon's death in 1973. In addition, he related an unpleasant incident that he experienced in a discussion with the current licensee's son. On another occasion an alleged patron exposed himself in the presence of his young granddaughters.

Five other objectors were present, but it was stipulated that their testimony would be cumulative in support of the testimony of the prior witnesses.

Testimony was elicited from Walter Hutchinson, the sole stockholder of appellant corporation. From testimony, photographs, maps, and pleadings, the following history of the licensed premises is obtained:

The subject premises have been licensed continuously since February 27, 1934. In this period, the Borough of Palisades Park grew, so that now it has reached a point where available building lots are few and scattered. The principal business thoroughfares were developed at a time when parking was not a problem, and no off-street facilities were planned or provided.

In 1939 the Borough adopted a zoning ordinance which is presently in force. Under the zoning ordinance, the subject license (and one other) are located in residential zones. The continued utilization of the subject premises for the sale

of alcoholic beverages constituted a non-conforming use for the 37 of the 43 years it has existed at this location. The other licensees (17) have their various premises in the non-residential zones.

In 1973 the then licensee died and his widow and daughters assumed its day-to-day management. On May 26, 1976 the application of Standardbred Transportation Co. Inc., for a place-to-place and person-to-person transfer of subject license was denied by the Council. Thereafter Hutchinson, the sole stockholder of Standardbred Transportation Co., Inc., acquired all of the outstanding stock of the licensee, Ganmore Enterprises Inc.

Hutchinson then signed a conditional lease for a location in a non-residential zone, occupancy of which was denied by the building inspector because no off-street parking was provided. He next located a vacant store, three doors south of Borough Hall. It had no gas lines, no off-street parking and was too close to an existing licensee. Occupancy of this situs was also denied by the building inspector. The third site he located was destroyed by fire while he was negotiating with the owner. It is being rebuilt as a factory and therefore no longer available to him.

Hutchinson asserted that no other locations were available to him, to his knowledge, and, because he has resided in the Borough for forty years, is currently a member of the Board of Adjustment and had been engaged in the real estate business in the area for many years, his knowledge of the area is extensive.

His attempts to relocate having been stymied each time, he had no alternative but to remain at the existing location. He invested a minimum of ten thousand dollars to alter and rehabilitate the premises after signing a five year lease with the landlord. Knowing of the complaints of several of his neighbors, he excluded the rear patio area from the proposed licensed premises when applying for renewal of the license for the year 1976-77. This area had been part of the licensed premises for at least the recent past, if not since the granting of the original license in 1934.

It is firmly settled that the Director abide by the action of the municipal issuing authority unless he finds as a fact that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by respondent. Schulman v. Newark, Bulletin 1620, Item 1; Monteiro v. Newark, Bulletin 2073, Item 2, and cases cited therein; Blanck v. Magnolia, 38 N.J. 484 (1962).

The burden of establishing that the Board acted erroneously and in an abuse of its discretion rests with appellant. Rule 6 of State Regulation No. 15. The ultimate test in these matters is one of reasonableness on the part of the Board. Or, to put it another way; could the members of the Board, as reasonable men, acting reasonably have come to their determination based upon the evidence presented? The Director should not reverse unless he finds as a fact that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by the Board. Cf. Hudson-Bergen County Retail Liquor Stores Ass'n v. Hoboken, 135 N.J.L. 502 (E.&A. 1947); Nordco, Inc. v. State, 43 N.J. Super.277, 282 (App.Div.1957); Lyons Farms Tavern v. Mun. Bd. of Alc. 55 N.J. 292 1970.

It its seven page resolution the Council states ".....that sufficient credible evidence outlining the traffic pattern of school children in close proximity to the licensed premises and their utilization of the Seventh Street artery as a

main artery to and from school events were uncontroverted.....as a consequence thereof, and on the basis of the foregoing reasons and findings of fact that continuation of the licensed premises as a non-conforming use in this residential zone with inadequate parking and in close proximity to the high school and recreational fields in Palisades Park make it necessary and proper to impose this condition that the licensee take all necessary and proper steps to vacate its licensed premises and locate in other than a residential area in the Borough of Palisades Park by no later than January 31, 1977....."

Absent any local ordinance extending it, N.J.S.A. 33:1-76 provides that the minimum distance of licensed premises from a school or house of worship shall be two hundred feet. The testimony herein indicates that the high school in question is a quarter mile (more or less) distant from appellant's premises. The likelihood is that most of the students will pass this or some other tavern as they walk to and from school, considering the small size (one mile square) of the Borough in conjunction with the number of licenses (nineteen) and their dispersal pattern throughout the area. Surely it was never the legislature's intent to hold that the mere passing of a tavern by children on their way to and from school, playgrounds and moving picture theatres was cause to deny or revoke a license or force a licensee to move to another location. Were this so, liquor would only be available in remote sections of our towns and in rural areas.

The testimony of vulgar and obscene language used by patrons is so vague and sparse as to be impersuasive.

The allegation of inadequate parking is unquestioned. Because of the early development of the area, the Borough suffers from this general condition through its environs. All nineteen licensees have that problem. Eight have provided for off street spaces; some as few as six spaces and only four can be characterized as being adequate for their patronage. Appellant is not one of the eight who provided off street facilities. Indeed, in the past forty-three years that the license existed at this location, none has been provided. During his short tenure, the Council and surrounding neighbors have been unjustly ascribing neighborhood parking problems to the management and existance of appellant's tavern.

From the testimony of Mayor Pallotta, the sole corporate stockholder, Hutchinson, and the photographs and maps in support thereto, it is clear that there is nothing to distinguish subject premises from the others in the Borough of Palisades Park except for the fact that it is in a residential zone. Most (but not all) licenses in the Borough are under, next to, across the street or around the corner from residences. Some are closer to the playground and theatre than is appellant. All suffer from the parking problem that afflicts the Borough, to a lesser or greater degree. Less than half have taken steps to provide off-street parking as discussed hereinbefore.

I am impressed with the fact that during the years that this tavern has been in existence there has been only one reported infraction, relating to a Sunday sale in 1971. I recognize too, the weakness in the proof to connect the tavern with most of the complained of conditions existing outside the premises on the public street. Finally the new owner's endeavors to cause a change for the better as evidenced by its exclusion of the rear patio from the license,

eliminating the pool table, renovating and refurbishing the interior is demonstrative of appellant's positive attitude to upgrade it's patronage and live at peace with its neighbors.

Thus, I conclude that the only reason for the action taken here was to eliminate a non-conforming use which existed for six years prior to the adoption of zoning ordinances in 1939, and continues to this date. The Director will not lend his support to a municipality's attempt to do by indirection that which it may not do by direction.

An owner of a license or privilege acquires by reason of its investment therein an interest which is entitled to some measure of protection. Tp. Committee of Lakewood v. Brandt, 38 N.J. Super 462 (App.Div. 1955). This also applies to a licensee seeking renewal of the license, To-Jon, Inc. v.Watchung, Bulletin 1946, Item 1.

I find, as a fact, that the appellant has sustained the burden of establishing that respondent's action was erroneous and should be reversed.

It is, therefore, recommended that an order be entered reversing the action of the Committee and directing it to grant the application of the appellant for renewal of the said license, free of the complained condition.

It is further recommended that future renewals exclude the rear patio area; and further, that as special conditions, the appellant be directed to remove exterior hardware from the patio door and on the interior install hardware consistent with that approved by the Borough for emergency exits, and that a sign be posted on the interior side of the door that it is to be used only in an emergency.

Conclusions and Order

Written exceptions to the Hearer's report with supportive argument were filed by respondent pursuant to Rule 14 of State Regulation No. 15. No answering argument was filed by appellant.

In its exceptions, the respondent argues that the Hearer ignored the doctrine set forth in the precedent case of Nordco Inc. v. State, 43 N.J. Super 277 (App.Div. 1957), to the effect that:

> "the Director, in his appellate capacity should not reverse unless he finds as a fact that there was a clear abuse of discretion or unwarranted findings of fact or mistake of law by the Board or Municipal issuing authority. Lyons Farms Tavern v. Municipal Board of Alc. 55 N.J. 292 (1970)."

The Hearer's Report clearly infers that he has found a clear abuse of discretion and unwarranted findings of fact.

Nor can I agree with respondent's contention that "only a cursory glance at the resolution of July 28, 1976.....will reveal that said condition was based on substantial credible and in some cases uncontroverted evidence sufficient to sustain the imposition of the within condition". My finding, upon examination of the transcript is to the contrary.

Respondent cites the seven months grace period afforded Ganmore to relocate, as an example of its reasonableness, noting that "this period would allow it to reap whatever rewards would be generated through the holiday season of 1976." The manifest fallacy to this contention is that the special condition imposed by the Council was a clear abuse of discretion which cannot be remedied in any way other than reversal.

Respondent alleges that "it is fallacious for the Hearer to support his conclusion to rescind the within condition by finding that the sole stockholder of appellant had invested several thousand dollars to alter and rehabilitate the premises after signing a lease with the landlord. The issuance, transfer and renewal of a liquor license has been and continues to be a privilege and not a property right, and a licensee has no vested right to subsequent terms 279 Club, Inc. v. Municipal Board of Alcoholic Beverage Control of Newark, 73 N.J. Super 15 (1962)".

It has long been held that a liquor license is merely a privilege; no one is entitled to such license as a matter of right Paul v. Gloucester County, 50 N.J.L. 585 (1888). However, an owner of a license or a privilege acquires through his investment an interest which is entitled to some measure of protection. Lakewood Twp. v. Brandt, 38 N.J. Super 462 (App. Div. 1955).

The application of fairness has long been a hallmark in the administration of this Division.

> "As with all administrative tribunals the spirit of the Alcoholic Beverage Law and its administration must be read into the regulation. The law must be applied rationally and with fair recognition of the fact that justice to the litigant is always the polestar'". Berelman v. Camden, Bulletin 1940, Item 1. Barbire v. Wry 75 N.J. Super 327 (App.Div. 1962). Martindell v. Martindell 21 N J. 341 at 349 (1956).

I have examined these and the other exceptions advanced by the respondent and find that they have either been considered and correctly resolved in the Hearer's report, or are without merit.

Having carefully considered the entire record herein, including the transcript of the testimony, the Hearer's report, and the exceptions filed thereto, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 14th day of December, 1976

ORDERED that the action of the respondent Borough Council of the Borough of Palisades Park in attaching a special condition to the renewal of appellants' license be, and the same is hereby reversed; and it is further

ORDERED that any renewals of subject license shall exclude the rear patio area, as part of the licensed premises; and it is further

ORDERED, the appellant shall remove the exterior hardware from the patio door and shall install hardware on the interior which shall meet the requirements set by the Borough for emergency exits; and it is further

ORDERED that a sign shall be posted on the interior side of the patio door that the said door shall be used for emergency purposes only.

JOSEPH H. LERNER
DIRECTOR

4. STATE LICENSES - NEW APPLICATION FILED.

Milza Acquisition Corp.
t/a Renault Winery &
L. N. Renault & Sons, Inc.
Bremen Avenue and Liebig Street
Galloway Township, New Jersey
Application filed April 12, 1977
for person-to-person transfer of
Plenary Winery License V-13 from
Renault Winery, Inc.

Joseph H. Lerner
Director