

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

BULLETIN 2417

October 27, 1981

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ITEM

1. APPELLATE DECISIONS - WHITEBRIER HOTEL, INC. v. AVALON.

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1. APPELLATE DECISIONS - WHITEBRIER HOTEL, INC. v. AVALON.

#4351

WHITEBRIER HOTEL, INC.,)	
Appellant,)	
vs.)	CONCLUSIONS
BOARD OF COMMISSIONERS OF THE)	AND
BOROUGH OF AVALON,)	ORDER
Respondent.)	On Appeal

Gorelick, Groon, Dare & Hornstein, Esqs., by Henry Gorelick, Esq.,
Appearing for Appellant.
LaManna & Quinn, Esqs., by Vincent L. LaManna, Jr., Esq.,
Appearing for Respondent.
McGahn & Friss, Esqs., by Joseph G. Gindhart, Esq.,
Appearing for Objectors.

Initial Decision Below

Hon. J. Roger Persichilli, Administrative Law Judge

Dated: June 5, 1980

Received: June 10, 1980

Written Exceptions to the Initial Decision were filed by the appellant pursuant to N.J.A.C. 13:2-17.14.

In its Exceptions, the appellant argues that the Administrative Law Judge attached undue weight and credibility to the testimony of the objector's witnesses, which testimony generally lacked specificity. Moreover, it contends, various findings as to traffic problems, the categorization of appellant's clientele, the representations of use at the time appellant obtained municipal approval to reconstruct the licensed premises, community sentiment, and alleged bottle debris and litter caused by its patrons, were erroneous, and not supported by the record as a whole.

The dominant problems elicited from the testimony of the objectors included traffic and parking problems, public drinking, anti-social acts, litter and noise, all in or about appellant's premises. The location of the appellant's parking-lot entrance is at the point where a beach or boardwalk patron would cross to reach those locations. This concerns objectors as to safety of children and residents.

In addition, there is a common thread, in a perception of the character of the community as family orientated, prevalent in the testimony of objectors who are opposed to a "honky-tonk" atmosphere created by the large number of "singles" and younger people attracted to appellant's premises.

The appellant's witnesses provide a picture of the patronage as a "low-key, convivial group" with occasional noisy periods for short durations only. The outside bar opens around noon, and closes around 8:00 P.M. daily. It is used on weekends from May to mid-June and all days from June 21 until one week after Labor Day. The outside sales account for more than one-half of the appellant's gross receipts for liquor sales.

The Administrative Law Judge concluded that the Board of Commissioners' action was reasonably supported by the record with respect to the nuisance-type complaints, and he found, in essence, a noise nuisance resulting from patron conduct, vehicular operations and music.

Both the Board of Commissioners and the Administrative Law Judge were able to observe the character and demeanor of the witnesses and ascribe the weight and credibility to be affixed to their testimony. It is reasonable to conclude, based upon the common experience, observations and understanding of mankind, as well as the specific testimony, that 300 to 400 patrons consuming alcoholic beverages and socializing at an outside bar and patio have to generate more than the normal level of noise to surrounding neighbors. The regular gathering of the large numbers of patrons during the summer season outside the confinement of walls, doors and windows, corroborated by the financial figures submitted by the appellant, indicates that the preponderant liquor vending operation of the appellant is at the outside area. Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Freud v. Davis, 64 N.J. Super. 242 (App.Div. 1960).

Thus, I concur in the findings that a nuisance situation exists attributable to the nature of appellant's operations.

Having established a factual predicate supporting the imposition of special conditions upon the renewal of appellant's license, the next issue is whether same are reasonable and proper to accomplish the objectives of this chapter and secure compliance with the provisions thereof. N.J.S.A. 33:1-32.

This Division has held that the issuing authority has the inherent power to establish a policy to limit sale and consumption to the main structure of the licensed premises and to prohibit same at outside areas. Dorf v. Metuchen, Bulletin 1004, Item 7; Kotzas v. Dover, Bulletin 854, Item 8. See also Re Regan, Bulletin 335, Item 8 questioning the propriety of an outside bar.

The Board of Commissioners has determined, in a reasonable exercise of its discretion, that a total ban against outside sale and service of alcoholic beverages is an appropriate response to the nuisance problems herein. As held in Lyons Farm Tavern, Inc. v. Municipal Board of Alcoholic Beverage Control, Newark, 55 N.J. 292, 303 (1970), the Director's function is to affirm a reasonable exercise of discretion by the local issuing authority. The Board is primarily entrusted with the responsibility and administration of appellant's license and the Director must place great reliance on its action. Lyons Farm Tavern, supra.

While the Board may have considered and imposed special conditions limiting outside sales and consumption via numerical quotas, time restrictions, service only in conjunction with meals or service only at a specified number of tables, it is not the Director's function to substitute his opinion for that of the Board, where the Board's conclusion is reasonably supported by the record. Margate Civic Assoc. v. Board of Commissioners, Margate, 132, N.J. Super. 58 (1975). See George's Bar & Grill v. Lakewood, Bulletin 2296, Item 1; A.H.S., Inc. v. Wall Township, Bulletin —, Item —, (decided January 11, 1980). I shall affirm the action of the Board.

I note that my affirmance of the Board's action herein is not inconsistent with my partial reversal of said Board in the matter of Gemini Rising, Inc. vs. Avalon, Bulletin —, Item — (decided June 6, 1980). In Gemini, there was no testimony referable to nuisance-type activity generated by the limited number of patrons able to sit at the six (6) tables on the patio area and consume alcoholic beverages, generally with meals. The factual predicate for the special condition was not established. Thus, I reversed. In Gemini, however, I did affirm the prohibition against expansion of outside sales and service. In the matter sub judice there is a proven basis for the special conditions, due, in large part, to the extensive, dominant nature of the appellant's outside operations and the difficulties directly resultant therefrom.

Thus, I reject the Exceptions of the appellant as without merit for the reasons stated herein, as well as for the reasons set forth in the Initial Decision. I specifically add that the economic hardship appellant alleges will result from a prohibition against outside sale and consumption of alcoholic beverages must prevail where greater social interests justify such restrictive conditions. Nordco, Inc. v. State, 43 N.J. Super. 277 (App. Div. 1957); Dal Roth v. Division of Alcoholic Beverage Control, 28 N.J. Super. 246 (App. Div. 1953).

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the legal memoranda of the parties, the Initial Decision, and the written Exceptions filed thereto by the appellant, I concur in the findings and recommendations of the Administrative Law Judge and adopt them as my conclusions herein.

Accordingly, it is on this 21st day of July, 1980,

ORDERED that the action of the Board of Commissioners of the Borough of Avalon in affixing the subject Special Conditions heretofore set forth at length and incorporated herein by reference, and which are herein first approved by the Director, nunc pro tunc to the renewal of appellant's license for the 1979-80 license term be and the same is hereby affirmed; and it is further

ORDERED that my Order of June 27, 1979 staying in part the Special Conditions pending determination of this appeal be and is hereby vacated; and it is further

ORDERED that, in the event the appellant's license is renewed for the 1980-81 license term, said license shall be subject to the aforementioned Special Conditions to reflect a meaningful determination herein; and it is further

ORDERED that the appeal be and is hereby dismissed.

JOSEPH H. LERNER
DIRECTOR

WHITEBRIER HOTEL, INC.,	:	<u>INITIAL DECISION</u>
	:	
PETITIONER,	:	DKT. NO. ABC 2848-79
	:	AGENCY DKT. NO. 4351
V.	:	
	:	
BOARD OF COMMISSIONERS OF	:	
THE BOROUGH OF AVALON,	:	
	:	
RESPONDENT.	:	

APPEARANCES:

Gorelick, Groon, Dare & Hornstein, Esqs., by
Henry Gorelick, Esq., on behalf of the Appellant

LaManna & Quinn, Esqs., by Vincent L. LaManna, Jr., Esq.,
on behalf of the Respondent

McGahn & Friss, Esqs., by Joseph G. Gindhart, Esq.,
on behalf of the Objectors

WITNESSES:

For the Objectors:

Eleanor Rinaldi, a resident of the Borough of Avalon

Richard F. Robinson, M.D., property owner in the
Borough of Avalon

Emer Flounders, property owner in the Borough of
Avalon

Ida Albertson, resident of the Borough of Avalon

Robert Armstrong, property owner in the Borough of
Avalon

For the Appellant:

Ellsworth Armacost, Mayor of the Borough of Avalon

Joseph E. Foley, Chief of Police of the Borough of Avalon

Christopher Ryan, property owner in the Borough of Avalon

Edward H. Margolis, property owner in the Borough of Avalon

Samuel Downes, summer resident of the Borough of Avalon and a member of the Beach Patrol

William J. Browning, Jr., an employee of the Whitebrier Hotel, Inc.

Joseph A. Brophy, Jr., General Manager of the Whitebrier Hotel, Inc.

Anthony J. Zurawski, sole owner of the Whitebrier Hotel, Inc.

EXHIBITS:

For the Appellant:

- A-2 Transcript of public hearing for renewal of Plenary Retail Consumption License of Whitebrier Hotel, Inc., dated June 18, 1979
- A-3 Minutes of the special meeting of the Board of Commissioners, Borough of Avalon, June 19, 1979
- A-4 Petition in favor of the approval of the Whitebrier license without restrictions (forty-six pages)
- A-5 Police records of the Borough of Avalon from August 29, 1978 through August 5, 1979 (thirteen pages)
- A-6A through 6-Z Colored photographs of the Whitebrier Hotel and contiguous areas
- A-7 Thirty individual letters in support of the renewal without restrictions
- A-8 Zoning map of the Borough of Avalon

For the Respondent:

- R-1 Resolution No. 79-193, adopted by the Borough of Avalon on June 19, 1979

For the Objectors:

- O-1 A handdrawn schematic depicting the Whitebrier Hotel and various objector residences
- O-2 A four page Petition in opposition to the appellant
- O-3 A plot plan, dated July 26, 1971, depicting the Whitebrier property prior to construction
- O-4 A survey, dated July 11, 1973, representing the Whitebrier improvements submitted to the Borough of Avalon
- O-5 A letter from Emer C. Flounders to the Zoning Board of Adjustment, Borough of Avalon, dated July 1, 1973, with attached return receipt

BEFORE THE HONORABLE J. ROGER PERSICHILLI, A.L.J.

The matter sub judice is an appeal from the action of the Board of Commissioners of the Borough of Avalon which, by Resolution No. 79-193 adopted on June 19, 1979, denied appellant's application for a Plenary Retail Consumption License without conditions. Appellant sought to renew its Plenary Retail Consumption License No. 0501-33-009-001 for premises located at 21st Street and Beach Avenue, Avalon, New Jersey. Said license was renewed with conditions. Notice of Appeal and a Petition of Appeal and a Request to Stay the Conditions were served on June 26, 1979 upon Joseph H. Lerner, Director, Division of Alcoholic Beverage Control, Department of Law and Public Safety. An Answer was filed on behalf of the respondent, Board of Commissioners, Borough of Avalon. By Order, dated June 27, 1979, Director Lerner stayed portions A and B of Section 2 of the conditions and transmitted this matter to the Office of Administrative Law for determination, as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

A hearing was conducted on October 3, 1979, and continued on November 15, 1979 and April 11, 1980. The hearings were conducted, at various locations, in Cape May Court House, Cape May County, New Jersey. The parties were given full opportunity to be heard and to cross-examine witnesses. Written summations and replies were permitted and the hearing record was closed on May 9, 1980.

By Resolution No. 79-193, adopted on June 19, 1979, the Commissioners of the Borough of Avalon granted a Plenary Retail Consumption License for the 1979-80 period to Whitebrier Hotel, Inc., subject to the following conditions:

"a. No alcoholic beverages shall be permitted to be sold from the outdoor bar facility or outside of the existing exterior walls of the existing structure on the licensed premises.

b. No alcoholic beverages shall be permitted to be consumed at the outdoor bar facility or beyond the existing exterior walls of the existing structure on the licensed premises.

c. Licensee shall immediately following closing, clean up bar related litter within a minimum of one block of the licensed premises.

d. Within 90 days from the date hereof, licensee shall arrange for a study by the Cape May County Health Department or some other recognized agency or consultant for determination as to the adequacy of the toilet and bathroom facilities on the premises during peak hours and within 180 days from the date hereof, the written results of said study shall be filed with the Borough Clerk. Prior to the next application for renewal of this license, any additional facilities indicated in such study shall be constructed and approved."

Appellant's Petition contends that the restraints "deprive appellant of its right under the license, constitute a deprivation of property without just and adequate compensation therefor, and are otherwise illegal." It further contends that the action of the respondent was erroneous for the following reasons:

- "A. The action of was unsupported by the evidence.
- B. The action was against the weight of the evidence.
- C. The action disregarded and is in violation of the law in such case made and provided.
- D. The action was taken without due deliberation and factual support.
- E. The action constitutes a gross infringement on appellant's property rights.
- F. The action is discriminatory in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

- G. The action causes a manifest injustice under the law.
- H. The limitations, restrictions and conditions are illegal, arbitrary, capricious, unconstitutional and otherwise unlawful and constitute an abuse of discretion."

The respondent's Answer admits that the restrictions and conditions were placed upon the license, denies the allegations of the Petition and relies upon the conditions as fully set forth in the Resolution No. 79-193.

The pleadings in this matter also contain a Petition of the citizens group of Avalon to intervene. At the initial day of hearing, the citizens group of Avalon was defined as a group of area residents with properties that are directly affected by the operation by the Whitebrier Hotel, Inc. They comprise individual objectors to the application.

Eleanor Rinaldi, a resident of 21st Street in Avalon, identified her place of residence on O-1 in evidence. Her property is located diagonally across the street from the Whitebrier Hotel. Mrs. Rinaldi's testimony was substantially in accord with her testimony given before the Board of Commissioners on June 18, 1979. Her objections addressed the traffic and parking problems attributable to the Whitebrier's operations. She had witnessed patrons of the Whitebrier drinking on the public streets, making love in public areas, urinating in public and causing litter to be strewn in the surrounding neighborhood. Mr. Rinaldi also complained of the outdoor noise and the patrons' frequent use of profanity. She has observed staggering patrons enter their automobiles and drive away. Although such behavior and observations have occurred at various times during the week, Mrs. Rinaldi testified that the weekends, particularly in the evening, are the times of most activity. She also testified that "this year he (Mr. Zurawski) has a boy picking up bottles in the street in the morning." (Tr. I, p. 16)

Richard F. Robinson, M.D., owns a property located at 2145 Avalon Avenue (depicted on O-1 in evidence). The doctor usually visits his property with his spouse and two younger children. He testified that since 1974, traffic has increased considerably during the hours the outdoor bar is operating. While he has not personally seen patrons dropping litter, he characterized walking to the beach along the empty lot next to his house as an "obstacle course" of bottles and cans. Dr. Robinson has witnessed Whitebrier patrons urinating in public, and carrying plastic glasses with beverage in them to the beach. He also noted one incident where a patron appeared very drunk, but nonetheless was able to operate his vehicle. His testimony focused upon his concerns for the safety of small children and the family atmosphere which is, supposedly, characteristic of Avalon. He testified:

"There's an entrance and the parking lot at the end of 21st Street, just about the point where a child would have to cross the street to get to the ramp to the boardwalk, and that street being filled as it is, and the parking lot filled, cars are constantly going down there and finding no place to park, backing in, turning around, and leaving, and our concern is that the children are going to get hit or that someone leaving is not going to have good control and there's going to be a serious accident or an injury or a death to some child, or an older person who can't get out of the way." (Tr. I, p. 42)

"Well, as I expressed at the hearing in June, I'm concerned about not just our neighborhood, but the entire town. I think that we heard the testimony that indicates that this is a meeting place and watering hole for a young crowd of single people which is all right, except that Avalon, by tradition, has been a family town, and our renters are families, and our concern is that in addition to the noise condition and the congestion is that may drive renters away." (Tr. I, p. 43)

The Robinson family spent two weeks of the summer in Avalon during 1979.

Emer Flounders is the owner of a property at 2163 Avalon Avenue, next door to the Robinson property. He spent two weeks in June in Avalon and was present during the summer on Saturdays when he inspected his house between rentals. Mr. Flounders was concerned about the noise from the outdoor bar, the obscene language, rowdy behavior of the patrons, and litter, which, he felt, was affecting the entire neighborhood. He characterized the weekend atmosphere as "honky-tonk."

Mr. Flounders stated that he supported Mr. Zurawski's request for a variance to reconstruct the Whitebrier because Mr. Zurawski led him to believe that the new hotel would not have an outside bar. (Tr. I, p. 49) Mr. Zurawski showed him a model of the proposed structure and it did not contain an outdoor bar facility. In his discussion, Mr. Zurawski represented that no outdoor bar would be constructed (Tr. III, p. 41). Furthermore, the survey, dated July 11, 1973 (O-4 in evidence), which depicts the Whitebrier improvements, submitted to the Borough of Avalon, does not depict an outside bar facility.

Mrs. Ida Albertson, a resident of First Avenue, Avalon, testified that she observed persons drinking by the Whitebrier on Avalon Street. The persons were holding glasses and beer bottles. Her observations were made during the summer of 1978. During 1979 she was in poor health and therefore remained within the vicinity of her home on First Street.

The last witness for the objectors, Mr. Robert Armstrong, testified that Mr. Zurawski erected a high fence to shield the outdoor bar from the public and that he also attempted to police some of the litter in the area. However, other than these two items, Mr. Armstrong did not feel there had been an improvement in the attendant problems attributable to the outdoor bar operations.

The parties stipulated that further objector testimony would be cumulative and repetitive of the testimony placed on record and, therefore, no further witnesses were presented. Counsel for the Borough of Avalon adopted the objectors' testimony and exhibits and rested upon the Resolution, R-1 in evidence.

Counsel for the objectors referred to the testimony of Mrs. Dorothy Wilson, given before the Board of Commissioners, as illustrative of the objections and the problems attendant to the operation of the Whitebrier's outdoor bar facility. She testified, inter alia, that:

"For 16 years I have owned the property at 21st Street and the Beach, and the last ten years I have spent four or more months there each year. This is a residential neighborhood where there has been a hotel which for many years was run as a first-class establishment which did not cause any problems.

Anthony and Betty Zurawski bought it some years ago and began having loud rock groups on Sundays. This attracted enormous crowds and the noise and the traffic conditions were terrible and the neighbors objected to the nuisance in this residential neighborhood.

Mr. and Mrs. Zurawski tore down the old hotel and requested a variance from the residential zoning so they could rebuild.

They met with opposition and were unable to build, and so they turned to their neighbors for help promising that if these neighbors would help them get the variance to build they would never have any outside bar or activity again but would run the new hotel as a first-class family hotel suitable to the residential area where they wanted a variance to build.

Well, we helped them. They did receive permission to build but they did not keep their promise to us and we found we have all been misled. They opened an outside bar and now instead of one day a week there are seven days a week when the Whitebrier makes it miserable to live in the area.

I have a home with a top deck with a wonderful view of the dunes and the bay area and the ocean, but the noise for hours a day and the gross language sometimes heard from across the street renders this part of my home too unpleasant to use. Even inside my house and my guests and I cannot escape the problem of the loud noise and the conduct from the patrons of the outside bar. Young children who are put to bed hours before the noise and turmoil of the outside bar is over, and the noise is sometimes later than nine o'clock at night, are unable to sleep because of this condition.

The pleasures that I should be able to have in using my property are decreased by the proximity of the Whitebrier.

I want to say that I have been a friend of Anthony and Betty Zurawski over these many years and as a friend I have spoken to them about the damage their bar does to me and the neighborhood. I have also spoken to their employees asking that the noise and the nuisance be stopped. Whoever I talked to the answer was always about the same, that the noise and nuisance, however regrettable, could not be stopped because it is impossible to control a large drinking crowd outdoors.

Anthony told me that the adverse affect on the neighborhood would not make them give up the outside bar voluntarily because it provided so much money...(Tr., pp. 5-8)

When June of 1978 came the liquor licenses were not restricted against outside bars. So in spite of the neighbors the previous Avalon Commissioners have allowed this outside bar to flourish and the crowds have become larger, louder, more unrestrained in their language, their actions, and so forth. Quarrels sometimes occur on the street as patrons leave the bar. The traffic congestion has become even more aggravated and dangerous. People coming from the beach into 21st Street face a traffic tangle of cars backing and jockeying for positions to get into the outside bar.

It is especially frightening for children. Liquor bottles and glasses are discarded throughout the area...(Tr. p. 9)

Last year I looked out my window and I saw a naked man on the sidewalk in front of my house. He was talking to someone in a parked car. There had been a similar situation when four naked men ran from the Whitebrier outside bar to the boardwalk. I have attempted to find out what police action resulted from that occurrence and I have spoken with Chief Foley and also the dispatcher he referred me to. The record could not be located but the dispatcher offered to continue searching and to telephone me. I have not heard from him.

I have picked up bottles and glasses that were dropped on my property and even see evidence that under my tall bayberry bushes it has been used for various purposes. I have spoken to the Board of Health at Crest Haven and they tell me they regulate the number of toilets only by the employees and that the two for the women and the two for the men in the Hall Recreation Room is adequate for the employees of the Whitebrier. They have no jurisdiction over the number of toilets needed for patrons of restaurants and bars. There appears to be no authority over facilities for these patrons. There is obviously a lack of facilities for the crowd that gathers there. I have been told by the Whitebrier Hotel guests that as they sit on their balcony trying to enjoy the ocean view they are disgusted to see patrons walk over and urinate on the grass.

It is difficult to convey how thoroughly altered my neighborhood has become because of the outside bar at the Whitebrier. To live with this public nuisance day by day for months each year is a thoroughly disgusting experience...(Tr. pp. 10-11)

This year he has put wood across the upper part of the 21st Street side where the outside bar is located. He told me it was to control the noise. It has not been successful in doing this.

I was in my home on Sunday, June 10th, on Saturday, June 16th, until 4:45 p.m. and yesterday, Sunday, June 17th. The noise in my house was very loud on each of these days.

I feel it was worse than the other years in the month of June. Each year as the season moves ahead the size of the crowd increases as does the volume of the noise. This is now early in the season, yet the noise is already excessive in my house.

The wood does not control the noise and, of course would not be able to control other aspects of the nuisance as far as the bar patrons are concerned.

On 6-13-79 Anthony told me that I would come off as being unreasonable at the hearing if I did not say he had decreased the noise by the wood he has put up. I do not think it is unreasonable to state how my property is affected by this outside bar. The crowd extends far beyond the area where the wood is and spreads over a large concrete area all the way to the hotel building and farther at the west end of the bar, and is obviously something that can be observed from my home along with the noise nuisance which has been created.

After spending years saying it is impossible to control the outside drinking crowd I do not really know why Anthony now says a strip of wood could or would do it." (Tr. pp. 12-13) (A-2 in evidence)

Ellsworth Armacost, Mayor of Avalon, was called to testify as the appellant's witness. The Mayor was questioned on the Resolution and the factors which were considered in adopting the Resolution. His testimony did not add materially to the considerations set forth at the June 18, 1979 public hearing or in the June 19, 1979 special meeting of the Board of Commissioners.

Joseph E. Foley, Chief of Police of the Borough of Avalon testified that, during his twelve years as Chief, he did not recall any liquor violations at the Whitebrier nor did he recall any criminal charges filed against its principals. The complaints relating to the Whitebrier generally involved noise, parking violations, and littering. None of the incident reports filed with the Avalon police (A-5 in evidence) resulted in an arrest. The chief nevertheless concluded that parking is a problem.

Christopher Ryan, a school teacher, and Edward H. Margolis, an insurance broker, are regular patrons of the Whitebrier during the summer. They testified that the Whitebrier patrons are basically a twenty-five to thirty-forty age group of persons comprised of many individuals with professional backgrounds. They also testified that the outside bar enjoys heavy patronage on weekends between the hours of 5:00 and 7:00 p.m. The estimated number of patrons ranged between 300 and 400 persons. (The testimony of Chief Foley reflects inadequate on-site and off-street parking facilities to accomodate these large numbers.) Neither witness had observed rowdy or drunken behavior, nor did either witness have occasion to hear loud noises, shouting or profanity. The Whitebrier maintains security personnel and the patrons were generally described as a "low-key, convivial group." Both gentlemen own property in the Borough of Avalon.

Samuel Downes, a school teacher, is a lieutenant on the Beach Patrol in Avalon and a doorman/security person at the Whitebrier during the summer. He described the 21st Street beach as one of the most crowded beach areas in Avalon. He is employed by Mr. Zurawski between the hours of 6:00 p.m. to 2:00 a.m. on Saturday and Sunday and, during his tenure, never had cause to call the local police or remove a patron from the premises.

William J. Browning, Jr. is employed as a doorman by the Whitebrier. His testimony was similar to the testimony of Mr. Downes concerning the Whitebrier's patrons. He noted that noisy periods do occasionally occur, but for only "short periods of time." Mr. Browning estimated that the Whitebrier has approximately sixty guest rooms and "a little over 100" parking spots; which leaves approximately forty parking spots for other Whitebrier guests and employees.

Joseph A. Brophy, Jr., the Whitebrier's general manager, described the appellant's physical plant as a fifty-nine unit motel with 113 parking spots, a tennis court and an outside patio. The inside dining facility seats eighty-five to ninety persons; the bar seats approximately forty-five persons and the cocktail lounge seats another thirty or forty persons. Mr. Brophy identified the twenty-six photographs received as A-6 in evidence. He also testified that the new Whitebrier commenced business in August 1973 and the outdoor bar was established in May 1975. Prior to May 1975, liquor was served on the outside of the Whitebrier premises. In June 1979 a louvered wooden fence was constructed which blocked the view from 21st Street. A fence was also constructed on the Avalon side of the bar. Alcoholic drinks are served at the outside bar and pool area. The outdoor bar opens between 12:00 and 12:30 p.m. and closes between the hours of 7:00 and 8:00 p.m., daily. Heavy patronage occurs after 5:00 p.m., particularly on weekends. The witness stated that the dining room, between the hours of 5:00 and 7:00 p.m., serves a clientele comprised mainly of senior citizens.

The outdoor bar is open for weekends in May and is opened full-time from June 21 until Labor Day and it is closed one weekend after Labor Day.

During 1978 the outdoor bar grossed approximately \$120,000; \$96,000 comprising estimated liquor sales and the balance comprising food sales.

Mr. Brophy also testified that eighty-five to ninety persons were employed during the 1979 summer season. The witness also addressed the question of adequacy of existing bathroom facilities. He stated that the men's room provides facilities for three patrons and the women's room provides two facilities.

Anthony J. Zurawski, the owner of the Whitebrier, concurred with the testimony of Mr. Brophy. He testified that during May through September 1979, the outdoor bar accounted for

\$124,000 of his total liquor sales of \$222,600. Outdoor food sales during this period approximated \$35,000. For the 1978 season, he testified that the outdoor bar grossed \$105,600 in liquor sales. In view of his present financial structure, Mr. Zurawski asserts that the curtailment of outdoor liquor sales would render it impossible for him to meet his financial obligations. He estimated the expenses attributable to outdoor liquor sales approximates fifty to fifty-five percent of gross liquor sales. (Tr. II, p. 254) Mr. Zurawski also testified that wine in half gallons is not sold at the Whitebrier and only beer in cans, not bottles, is sold at the outdoor bar.

There was no further relevant testimony in this matter.

The appellant's summation suggests that the objectors appeared less concerned with the residential character of the neighborhood than with their ability to rent their properties. Indeed, the candid testimony of the objectors' witnesses addressed motives of personal economic profit as well as the peaceful and quiet possession of their property. Nevertheless, these motives constitute legitimate concerns which do not taint the "quality" of their objection.

Appellant also argues that the limiting Resolution is "replete with factual inaccuracies which are without support from the record." The Resolution factually finds the adjacent area is occupied predominantly by single family homes. The Resolution also factually finds the "conduct of music" creates a "noise" situation but the Whitebrier conducts no organized outdoor entertainment. Concerning litter, the Resolution refers to bottles, but no wine or beer bottles are used in connection with the outdoor bar facility. Similarly, the finding that "severe traffic congestion and parking problems exist" is refuted by the official police records which reveals less than ten incidents during the 1978 and 1979 summer months.

The factual findings of the Board are supported by the record. The finding relating to "noise" was based upon (1) the conduct of patrons, (2) the conduct of music from the premises and (3) the operation of motor vehicles by patrons. It was founded upon all three conditions, not just music. There is testimony relating to bothersome music, but it appears less offensive in the comprehensive objections voiced by the objectors. There is presently no organized outdoor entertainment at the Whitebrier. The Board finding concerning litter in the form of bottles also finds support in the record. In fact, a candid photograph (A6-h in evidence) offered by the appellant depicts a young man leaning on the back of his automobile, by the Whitebrier's tennis courts, drinking from a bottle. While the Whitebrier may not serve bottled beer or wine, the testimony establishes that Whitebrier's patrons cause this form of litter along with beer cans and other containers. I find the record to be replete

with testimony concerning traffic congestion and parking problems experienced by area residents. The police records only partially evidence these problems which were adequately brought out in testimony. Lastly, the appellant's exception relating to single family homes is frivolous. The "closest geographical structure" is a four unit apartment. Technically, the Board should have referred to the surrounding area or the immediate area, but the fact remains that the area is occupied predominantly by single family homes. The Whitebrier is located "in an area zoned residential since 1959 and is therefore non-conforming." (R-1 in evidence)

Appellant's counsel relies on the cases of Belmar v. Alcoholic Beverage Control, 50 N.J. Super. 423 (App. Div. 1958) and the case of Englewood v. Lacqua, 92 N.J. Super. 493 (App. Div. 1966), "wherein drastic limitations which curtailed the use and enjoyment of a hotel liquor license were stricken as being unreasonable, arbitrary and capricious." In these instances, counsel argued, the Court recognized that there was a failure to establish any factual support for the restrictions imposed by the issuing authority. However, I find that such is not the case herein. The testimony before the undersigned and that offered before the Board on June 18, 1979 (A-2 in evidence) provides ample factual support for the Board's findings and restrictive actions.

The responsibility for the administration and enforcement of the Alcoholic Beverage Laws relating to the renewal for transfer of a liquor license is primarily committed to the local issuing municipal authorities. N.J.S.A. 33:1-19, 24, 32; Laurino v. State of New Jersey, Division of Alcoholic Beverage Control, 81 N.J. Super. 220, 227 (App. Div. 1963); Lyons Farms Tavern v. Municipal Board of Alcoholic Beverage Control, Newark, 68 N.J. 44, 52 (1975). Furthermore, the Legislature recognized that the local governing body is familiar with the community's characteristics, the nature of a particular area and of the dangers associated with the sale and consumption of alcoholic beverages. Consideration of local sentiment in the field of liquor control was recognized in Borough of Fanwood v. Rocco, 33 N.J. 404, 412 (1960). The local boards have been delegated the duty and the responsibility to enforce the provisions of the act and it invested them with a high responsibility, a wide discretion, and intended their principal guide to be the interest of the public. Lubliner v. Board of Alcoholic Beverage Control, City of Paterson, 33 N.J. 428, 446 (1960). Once the local municipality has exercised its discretionary authority, the Director should accept its action on review in the absence of clear abuse, or unreasonable or arbitrary exercise of its discretion. Lyons Farms Tavern v. Municipal Board of Alcoholic Beverage Control, Newark, 55 N.J. 293, 303 (1970); Fanwood v. Rocco, supra. It is well settled that the Director may not substitute his judgment with that of the local

board if reasonable support for the board's actions can be found on the record. Margate Civic Association v. Board of Commissioners, Margate, 132 N.J. Super. 58, 63 (1975).

Based upon the record sub judice, I FIND:

1. The appellant, Whitebrier Hotel, Inc., a corporation of the State of New Jersey, sought to renew a Plenary Retail License, No. 0501-33-009-001, for premises located at 21st Street and Beach Avenue, Avalon, New Jersey.

2. A public hearing concerning the renewal of the Plenary Retail Consumption License of Whitebrier Hotel, Inc. was conducted on June 18, 1979, at which time the appellant and the objectors were given full and ample opportunity to present their respective positions to the local issuing authority.

3. On June 19, 1979, the respondent, Board of Commissioners of the Borough of Avalon, renewed the license of Whitebrier Hotel, Inc. with four (4) conditions, recited supra.

4. Whitebrier Hotel, Inc. is a commercial establishment located in a residential zone.

5. Whitebrier Hotel, Inc. operates an outdoor bar which generates a substantial portion of gross liquor sales during its summer operational season. The testimony of Joseph A. Brophy, Jr. concerning the Whitebrier physical plant, operational dates and hours is accepted as factual and incorporated herein. The testimony of Anthony J. Zurawski concerning gross liquor sales and total liquor sales generated by the outdoor bar is accepted as factual and incorporated herein.

6. The outdoor bar facility serves primarily a younger clientele, between the ages of twenty-five to forty years of age.

7. Whitebrier Hotel, Inc. was rebuilt under the ownership of Anthony J. Zurawski and commenced business, as such, in August 1973. The outdoor bar facility was established in May 1975.

8. Alcoholic beverages have been served on the exterior of the licensed premises during the entire tenure of Mr. Zurawski's ownership.

9. The survey of Mr. Zurawski's property, dated July 11, 1973, (O-4 in evidence) does not depict an outdoor bar facility. Mr. Zurawski sought local support by representing that no such facility would be constructed.

10. The outdoor bar facility serves from 300 to 400 patrons during peak hours. The construction of this facility has expanded the Whitebrier's bar business and its bar related problems.

11. Said heavy patronage is the primary cause of parking problems in the immediate area and adds measurably to traffic congestion in the vicinity of 21st Street and Beach Avenue.

12. Whitebrier Hotel, Inc. is the origin of bar related litter found in this immediate area.

13. Patrons from the Whitebrier Hotel, Inc. cause excessive noise, profanity and objectionable behavior to occur when leaving said establishment, which behavior interferes with the peaceful occupancy of tenants and residents of the immediate area.

14. Mr. Zurawski has constructed a wooden fence, employs security personnel and attempts to police the bar related litter, which steps have not effectively controlled the objectional conditions and behavior.

15. The Special Conditions will control rather than expand the problems associated with this establishment.

16. Community sentiment is opposed to the operation of an outdoor bar facility and the sale and consumption of alcoholic beverages on the exterior of the Whitebrier Hotel.

The appellant maintains that its Petition of 477 favorable signatures representing over 150 property owners (A-4 in evidence) compared to the seventy-three objectors, representing fifteen property owners (O-2 in evidence), evidences favorable community sentiment by sheer numbers. However, the objectors' Petition represents members of the community most affected by the Whitebrier's operations. The public members who favor the continuation, without restriction, are Whitebrier patrons. In this instance, the quality of the objections must outweigh the quantity support. It will be recalled that a liquor license is nothing more than a temporary permit or privilege to pursue an activity that is otherwise illegal. It is a business which may be entirely prohibited or permitted under such circumstances as will limit, to the upmost, its evils. Mazza v. Caucicchia, 15 N.J. 498, 505 (1954).

Appellant also maintains that a loss of \$100,000 in gross sales would result in an economic catastrophe to the hotel. This potential loss assumes that no outdoor patrons will continue drinking activities inside the Whitebrier Hotel. It assumes the loss of all outdoor patrons. This assumption is unwarranted, much in the manner that the undersigned cannot presume that 300 or 400 patrons drive to the Whitebrier (its clearly apparent that many walk) or that each driver is the sole occupant of the vehicle which ultimately finds its way to the Whitebrier. Unquestionably, a restriction on outdoor sales will have a negative impact, but not catastrophic. Mr. Zurawski

testified that costs on outdoor liquor sales approximated fifty to fifty-five percent of gross liquor sales. Therefore, potential profits will be diminished by forty-five to fifty percent, assuming the entire amount is lost.

Though the Board has acted upon the evidence before it, it could have prohibited the outdoor bar and continued the sale and consumption of alcoholic beverages to hotel guests at pool-side or during lunch or supper at outdoor patio tables. It elected to entirely restrict sales and consumption "outside of the exterior walls of the existing structure." As such, all outdoor liquor sales and consumption is prohibited.

The restrictions are stern but it is clear, based upon the record before me, that the local board acted lawfully, and not arbitrarily or capriciously in the exercise of their discretionary authority. Based upon objectionable conditions and behavior, they imposed stringent limitations within their proper authority. It is within their discretion to modify, delete or continue those conditions for the new term commencing July 1, 1980.


Thus, I CONCLUDE that the decision of the issuing authority to impose four (4) conditions on the license of Whitebrier Hotel, Inc. was a proper reflection of community sentiment and a reasonable exercise of its discretionary authority. The record is devoid of evidence of impropriety or arbitrary or capricious Board action.

Accordingly, it is ORDERED that the four (4) conditions imposed upon the Plenary Retail Consumption License of Whitebrier Hotel, Inc., License No. 0501-33-009-001, for the 1979-80 term, for premises located at 21st Street and Beach Avenue, Avalon, Cape May County, New Jersey, be AFFIRMED.

This recommended decision may be affirmed, modified or rejected by the head of agency, Joseph H. Lerner, Director of the Division of Alcoholic Beverage Control, who by law is empowered to make a final decision in this matter. However, if the head of the agency does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

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Joseph H. Lerner
Director