

E. Front Street, CN 087, Trenton, New Jersey 08625-0087

BULLETIN 2463

May 23, 1994

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Division of
**ALCOHOLIC
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Division of
**ALCOHOLIC
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E. Front Street, CN 087, Trenton, New Jersey 08625-0087

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May 23, 1994

1. NOTICE REGARDING SUBMISSION OF PRODUCT BRAND REGISTRATION NUMBERS WITH EACH PROMOTION REQUEST.

Notice that unless the brand registration number for each product included in a promotion is provided, the Division is unable to process promotion requests promptly; sets out the five (5) pieces of information which must be included to expedite all future requests. No promotion will be approved for a product that is not brand registered.

The Division is unable to process promotion requests in a prompt manner unless applicants provide us with the brand registration number for each product included in any promotion.

For your future reference, in order to expedite the promotion approval process for all products included in any promotions, holiday/combo packages, point-of-sale materials or advertisements, please include with your requests:

- (1) the New Jersey brand registration number,
- (2) the full name of the product as it appears on the approved BATF label,
- (3) the brand trade name,
- (4) the nature and type of product, and
- (5) the specific vintage or age of the product.

If your company is only a distributor of the product, please contact the appropriate person (brand owner or owner's authorized agent) who registered this product with this Division in order to supply the required information. If the product is not registered, please contact Ms. Brenda Rush-Grafenstine at (609) 984-2371 of the Licensing Bureau to receive the required forms and instructions for filing.

According to N.J.A.C. 13:2-33.1, brand registration is required of any alcoholic beverage offered for sale, delivery, receipt or purchase in New Jersey. Thus, no promotion will be approved for a product that is not brand registered.

Thank you for your assistance with this matter.

Very truly yours,

JOHN G. HOLL
Acting Director

2. NOTICE TO ALL RETAILERS OF ALCOHOLIC BEVERAGES REGARDING COMPLIANCE WITH TAX LAWS OF THE STATE OF NEW JERSEY.

Notice that the Division is cooperating with the New Jersey Division of Taxation in identifying retail distribution and consumption licensees not complying with this State's tax laws. The focus will be on those retailers who have failed to remit or have underpaid sales taxes (both of which violate ABC Statutes and regulations). Be aware that Taxation may seize a license for failure to remit taxes and sell it to satisfy the tax debt. Retailers in violation are encouraged to contact Taxation in order to mitigate disciplinary action, penalties and interest charge.

March 25, 1994

NOTICE TO: ALL RETAILERS OF ALCOHOLIC BEVERAGES
FROM: JOHN G. HOLL, ACTING DIRECTOR

The New Jersey Division of Taxation, Department of the Treasury has sought the assistance of the Division of Alcoholic

Beverage Control in identifying retail distribution and consumption licensees who are not complying with the tax laws of the State of New Jersey. ABC supports this initiative and is cooperating with Taxation.

The Division of Taxation intends to undertake extensive audits of alcoholic beverage retailers. It will particularly direct inquiries to those retailers who have failed to remit or have underpaid sales taxes. Both instances constitute violations of ABC statutes and regulations and may warrant disciplinary action against the licensee.

The authority of Division of Taxation to enforce tax compliance by holders of licenses issued by the ABC was recently significantly enhanced. The new law provides that Taxation may seize a license for failure to remit taxes. The license may thereafter be sold to a third party to satisfy the tax debt.

If, as a retail distributor of alcoholic beverages, you are not in compliance with the tax laws of the State of New Jersey and, in particular, if you have not paid sales tax, you are encouraged by the Division of Alcoholic Beverage Control to contact the Division of Taxation. The Division of Taxation and the Division of Alcoholic Beverage Control have engaged in a program to accomplish tax compliance. Your voluntary effort may mitigate any disciplinary action the ABC is entitled to take. The Division of Taxation has authorized ABC to represent that voluntary compliance will also mitigate penalties and interest charges.

If you want to contact the Division of Taxation, call Mr. James A. Eckstein, 1-609-633-6793.

John G. Holl, Acting Director
Division of Alcoholic Beverage Control

3. OPINION LETTER: PERMISSIBLE ACTIVITIES BY AN UNLICENSED GIFT BASKET MAKER RECEIVING AND HANDLING ALCOHOLIC BEVERAGES FOR INCLUSION IN CONSUMER GIFT BASKETS.

An opinion letter advising a gourmet food store and gift basket maker on whether or not the company may be involved in certain alcoholic beverage related activities; advertising by gift basket maker at package good store does not appear to be a violation of Title 33 or Division regulations as long as the licensee permits the advertising at no charge or for a fee; a licensee may deliver alcoholic beverages to the gift basket business, provided he/she has a valid transit insignia or special transit insignia, and is so directed by consumer purchasing the alcoholic beverage; package goods store licensee, under N.J.A.C. 13:2-20.9(a) is prohibited from returning to pick up the gift baskets and deliver them since he/she would then be involving themselves in the gift basket maker's business; any carrier of the completed gift baskets, containing alcoholic beverages, must possess a transportation license.

April 8, 1994

Victor Klymenko, Secretary
Sweet Dreams Gifts
101 John Street
Maplewood, NJ 07040

Dear Mr. Klymenko:

I am in receipt of your letter dated December 8, 1993, and the supporting documentation accompanying the letter. You have requested an opinion on whether or not your company, Sweet Dreams, a gourmet food store and gift basket maker, may be involved in certain activities relating to alcoholic beverages. Your inquiry can be divided into three basic questions:

1. May an unlicensed gift basket company enter into an advertising relationship with a package goods store licensee to advertise products and services offered by the gift basket maker on the licensed premises of the package goods store?

2. Recognizing that only the licensee may sell alcoholic beverages, and that profits from the sale of alcoholic beverages must go to the licensee, and that the sale of the alcoholic beverages must take place on the licensed premises, may the package goods store licensee deliver the purchased wine or other alcoholic beverages to the gift basket store at the direction of the consumer after the sale has been consummated on the package goods store premises?
3. May the gift basket store have the package goods licensee deliver the completed baskets for further distribution to consumers once they are completed or can the gift basket store send out the gift basket containing alcohol via UPS or other carrier?

With respect to the first question you present, it does not appear that advertising by the gift basket maker on the licensed premises of a package goods store would violate State Alcoholic Beverage Control Statutes or Division regulations provided that the package goods store licensee permits the advertising on his premises at no charge or for a fee. It is specifically noted that no advertising fee may be charged based on sales of alcoholic beverages and there can be no involvement, direct or indirect, by the basket maker in sales of alcoholic beverages.

With respect to your second question, the package goods store licensee may deliver alcoholic beverages to the gift basket business if so directed by the consumer having purchased the alcoholic beverages. Any licensee making such a delivery is required to possess a valid transit insignia or special transit insignia permitting transportation of the alcoholic beverages by the licensee in the course of his business.

With respect to your third question, I note that pursuant to N.J.A.C. 13:2-20.9(a), a licensee holding a transit insignia may transport alcoholic beverages solely for the licensee's own business. Accordingly, the package goods store licensee may not return to pick up the gift baskets and deliver them since he would then be involved in the business of the gift basket maker. I further note that such activity has the potential for the unlicensed gift basket maker to become involved in the business of the alcoholic beverage retail licensee.

While it would be possible for the gift basket maker to utilize a carrier holding a transportation license to deliver the

gift baskets to the ultimate consumers, I note that the carrier named in your letter, UPS, does not currently hold such a license. As you know, subject to the limitations of N.J.S.A. 33:1-2, the purchaser of the gift baskets could pickup the baskets containing alcoholic beverages at the premises of the gift basket maker.

I note that the opinion rendered herein is specifically based upon the operative facts described in your letter dated December 8, 1993, and should the actual operation of your business result in activity inconsistent with your submission, the Division reserves the right to withdrawal this approval and initiate appropriate proceedings, if required. It is further noted that this opinion is issued on a trial basis and may be withdrawn or amended upon further consideration.

Very truly yours,

David N. Bregenzer, Esq.
Executive Assistant
Regulatory Bureau

DNB/tld

cc: John Holl, Acting Director
cc: Gerald A. Griffin

4. NOTICE TO NEW JERSEY BRAND REGISTRANTS - CLARIFICATION OF
DIVISION'S POLICY CONCERNING BRAND REGISTRATION APPLICATIONS
FILED BY AUTHORIZED AGENTS ON BEHALF OF BRAND OWNERS.

Notice advising New Jersey brand registrants and wholesalers or persons other than the brand owner who have tried to file brand registrations with this Division that the mere authorization to sell, import or distribute the products in New Jersey is not legally sufficient for purposes of registering the products in this State; N.J.S.A. 33:1-2b and c and N.J.A.C. 13:2-33:1(b) deal specifically with such situations; letters merely designating an applicant as a brand importer or distributor but not authorizing the applicant to file for brand registration in New Jersey will not be accepted as sufficient.

Recently we have noticed some confusion on the part of certain wholesalers and importers as to what document must be filed with this Division in order to brand register alcoholic beverages which are to be sold in New Jersey. Some wholesalers or persons other than the brand owner have attempted to file brand registrations with this Division, and have offered as supporting documentation, an authorization letter from the brand owners which permits such wholesaler to sell (or import or distribute) the products in question. The mere authorization to sell, import or distribute the products in New Jersey is not, however, legally sufficient for purposes of registering the products in this State.

Pursuant to N.J.S.A. 33:1-2b and c, New Jersey wholesale licensees are prohibited from selling a product unless the product has been acquired from a brand owner, the brand owner's Authorized Agent, or a wholesale licensee in this State who has been designated as a registered distributor by a brand owner. Prior to such sale, an application to register each separate alcoholic beverage product must be filed with the Division, by either the manufacturer, importer or wholesaler who owns the brand or trade name and label, or an importer or wholesaler selling the brand who is appointed as "Authorized Agent" by the brand owner for the purpose of filing the Brand Registration schedule (N.J.A.C. 13:2-33.1b.). Brand registrants filing as an Authorized Agent on behalf of a brand owner are advised that their applications must be accompanied by a "Letter of Appointment" from the brand owner which explicitly awards the applicant authority to register brands for distribution in the State of New Jersey and to designate New Jersey Wholesalers as distributors on behalf of same.

In conclusion, Brand Registrants should take note that letters which merely designate the applicant as a brand importer or distributor, and do not authorize the applicant to file for Brand Registration in New Jersey, will not be accepted as sufficient basis to register products as an Authorized Agent.

5. NOTICE TO LICENSEES WITH RETAIL SALES PRIVILEGES - REQUIREMENT TO FILE LONG APPLICATION FOR RENEWAL AND LIST NEW JERSEY SALES TAX CERTIFICATE OF AUTHORITY NUMBER ON LONG FORM LICENSE APPLICATION - PENALTY FOR NON-COMPLIANCE.

A recent survey by this Division of filed applications indicated that roughly 30% did not include their New Jersey Sales Tax Certificate of Authority Number (CSTA); in light of this lack

of compliance, all renewal filings for the 1994-95 term will be on a full license application to include their CSTA; Division of Taxation currently requires all wholesale licensees to provide information on sales to retailers for purposes of assessing compliance with the Sales Tax Remittance Laws (failure to ensure all required sales taxes are collected and remitted is both an A.B.C. and Tax Law violation as well as possibly a criminal violation).

Applicants for retail alcoholic beverage licenses are required to provide their New Jersey Sales Tax Certificate of Authority Number (CSTA) on any application filed for issuance, transfer or renewal of their license. In Bulletin 2457, Item 4 (February 1991), licensees were advised of this requirement, which resulted from a change in the Retail Sales and Use Tax Act. That change extended this Act to include all alcoholic beverage licensees which exercised retail sales privileges (including State-issued licenses such as State Beverage Distributor, Farm and Plenary Wineries, Plenary Retail Transit Licenses and all Annual State Permittees). A recent review of filed applications indicates that approximately 30% do not contain CSTA's.

As a result of the noted lack of compliance with this requirement, licensees are advised that renewal filings for the 1994-95 term will be on a full license application which must contain disclosure of an CSTA. A licensee's failure to comply with this requirement will result in imposition of a penalty assessment of \$1,000.00 by the Division as well as a new deadline by which the number must be disclosed. Continued non-compliance with this requirement will result in an indefinite suspension of license, until the the licensee has complied.

Licensees should note that the Division of Taxation currently requires New Jersey wholesale licensees to provide information on all sales made to retail licensees, for purposes of assessing compliance with the Sales Tax Remittance Laws. Licensees are cautioned to ensure all required sales taxes are collected and remitted as required. Your failure to do so is not only both an A.B.C. and Tax Law violation, but may also be a violation of criminal law.

If your business has not yet been assigned a New Jersey Sales Tax Certificate of Authority Number, contact the Division of

Taxation directly at CN 269, Trenton, New Jersey 08646-0269 and request the application form to obtain such a number. Please note that this authority is different from the New Jersey Taxpayer Identification Number issued to your business.

6. THE GRAND VICTORIAN HOTEL V. BOROUGH COUNCIL OF THE BOROUGH OF SPRING LAKE - FINAL CONCLUSION AND ORDER ACCEPTING INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE REVERSING ACTION OF THE BOROUGH COUNCIL OF THE BOROUGH OF SPRING LAKE. THIS DECISION ORDERS THE PLACE-TO-PLACE AND PERSON-TO-PERSON TRANSFER OF A PLENARY RETAIL CONSUMPTION LICENSE TO THE GRAND VICTORIAN HOTEL, SUBJECT TO CERTAIN SPECIAL CONDITIONS.

Owners of hotel sought to purchase a Seasonal Retail Consumption License which had been located at another hotel; the Borough Council, after conducting hearings, denied the transfer based on anticipated public health and safety issues. On appeal, the Administrative Law Judge reversed the Borough Council for failure to make relevant factual findings. The Director affirmed the reversal by the Administrative Law Judge and ordered the license transfer with special conditions imposed to address the initial concerns of the Borough Council.

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

APPEAL NO. 5870)	FINAL CONCLUSIONS AND ORDER
)	ACCEPTING THE INITIAL DECISION
THE GRAND VICTORIAN HOTEL,)	OF THE ADMINISTRATIVE LAW JUDGE,
)	REVERSING THE ACTION OF THE
APPELLANT,)	BOROUGH COUNCIL OF THE BOROUGH OF
)	SPRING LAKE AND ORDERING THE
V.)	TRANSFER OF THIS LICENSE WITH
)	CONDITIONS
BOROUGH COUNCIL OF THE)	
BOROUGH OF SPRING LAKE,)	
)	OAL DKT. NO. ABC 1879-92
RESPONDENT.)	
)	
SRCL # 1348-34-007-003)	

James S. Rothschild, Jr., Esq., with Beatrix W. Shear, Esq.,
on the brief, Representing the Appellant (Riker, Danzig,
Scherer, Hyland, and Perretti, Attorneys)

James A. Carey, Esq., on behalf of the Respondent (Carey and
Graham, Attorneys)

INITIAL DECISION BELOW

HONORABLE ROBERT W. SCOTT, ADMINISTRATIVE LAW JUDGE

DECIDED: JUNE 28, 1993

RECEIVED: JUNE 29, 1993

BY THE ACTING DIRECTOR:

Written Exceptions to the Initial Decision were filed on behalf of the Respondent issuing authority, and written Replies thereto were filed on behalf of the Appellant, in accordance with the provisions of N.J.A.C. 1:1-18.4(d). The time to render a Final Decision was extended by properly executed Orders and therefore the Decision must be made on or before October 15, 1993. For the following stated reasons I shall reject the filed Exceptions and accept the substance of the Initial Decision, but I shall modify same. Accordingly, I shall reverse the action of the Respondent local issuing authority and Order the transfer of this license to the Appellant, but the transferred license shall be subject to the conditions noted below.

I.

The Appellant, the Grand Victorian Hotel, is a small, 25 room bed and breakfast/hotel located in Spring Lake, New Jersey. It is situated contiguous to the Breakers, an old Victorian style hotel, which holds a plenary retail consumption license. In the summer of 1991, the owners of the Grand Victorian sought to purchase a seasonal retail consumption license from its current holders. Prior to 1988, the license was situated at the Allaire Hotel although, since September of 1987, it has been in an inactive status.

The Respondent, the Borough Council of the Borough of Spring Lake, conducted hearings on the Grand Victorian's application for a person-to-person and place-to-place transfer of the license. Thereafter it, by Resolution #128, dated December 2, 1991, denied

the Appellant's transfer. The Resolution stated the denial was based upon public health and safety issues, largely because Respondent anticipated an increase in traffic, parking, and noise on residential streets adjacent to the Grand Victorian's property, if this license were transferred as requested.

The Appellant filed a proper appeal with the Division of Alcoholic Beverage Control and the matter was transmitted to the Office of Administrative Law for a hearing as a contested case. At the conclusion of the hearing, the Administrative Law Judge found that the Respondent had failed to make relevant factual findings and that its conclusions were not supported by the credible evidence. He ruled that the asserted potential "dangers" to the public health and safety (parking, traffic and noise) - which were cited by the Respondent in denying this transfer - in fact are problems which currently exist, and that no evidence had been offered to reflect that the problems would increase as a result of the proposed transfer. Accordingly, he recommended that the denial be reversed and that the license transfer be ordered approved.

II.

Initially, I note that the issuance, renewal or transfer of a retail liquor license rests within the sound discretion of the local issuing authority. A local issuing authority is vested with a high degree of responsibility and wide discretion, but it must use the public interest as its principal guide in licensure (renewal, issuance, or transfer) matters. The Respondent's decision will only be set aside when there has been an abuse of discretion, a manifest mistake, or its action was clearly unreasonable. Hudson-Bergen Package Stores Association v. Municipal Board of Alcoholic Beverage Control of North Bergen, A.B.C. Bulletin No. 1981, Item No. 1 (April 28, 1971); Paul v. Brass Rail Liquors, Inc., 31 N.J. Super. 598 (App. Div. 1955); Rajah Liquors v. Division of Alcoholic Beverage Control of Newark, 33 N.J. Super 598 (App. Div. 1955) and Blank v. Mayor and Borough Council of Magnolia, 38 N.J. 484 (1962).

Both the Appellant and the Respondent agree that the fundamental issue in this case is whether or not the Respondent acted in an arbitrary, unreasonable, or capricious manner in denying the Appellant's application. The burden of establishing that the action of the local issuing authority was in bad faith,

erroneous and should be reversed, rests with the Appellant. Lyons Farms Tavern, Inc. v. Municipal Board of Alcoholic Beverage Control of the City of Newark, 55 N.J. 292 (1970) ("Lyons Farms I"); Pilon v. Board of Alcoholic Beverage Control of Paterson, 112 N.J. Super. 436 (App. Div. 1970).

The Respondent set forth its reasons for denial of the transfer in its Resolution. Upon review of the adduced record, however, the Administrative Law Judge found that the Respondent had not made relevant findings which were supported by the credible evidence and that, instead, other findings, somewhat contrary to the Respondent's, should have been made from the evidence presented. Specifically, the Administrative Law Judge found, and I accept, that:

- 1) The proposed transfer of the license in question to The Grand Victorian Hotel will not increase the need for parking in the area around the hotel, nor will it increase the traffic around the hotel. Additionally, the transfer will not increase the number of people patronizing the hotel and restaurant. Finally, the transfer will not increase the number of weddings and receptions held, nor will it increase the number of people attending these wedding receptions.
- 2) The proposed transfer would not increase the amount of alcohol presently consumed by patrons of the hotel in its restaurant and party rooms. The proposed transfer would give the hotel more control over the consumption of alcoholic beverages and would discourage patrons and reduce the number of people who bring their own alcoholic beverages into the hotel's restaurant or its weddings and receptions.
- 3) The Appellant's willingness not to have a permanent bar would discourage people from coming off the street and the beach to have a drink at The Grand Victorian Hotel.
- 4) There is insufficient evidence that the proposed transfer would create dangers to the public health, safety, morals, and general welfare commonly recognized as incidents of the sale and consumption of alcohol. There is no evidence that the proposed transfer by itself would have a negative impact in the area that is not already present with the operation of the hotel and the Breakers.

5) There is insufficient evidence that an overwhelming majority of persons in the area are vehemently opposed to the proposed transfer. Eighteen (18) or nineteen (19) people testified and described traffic, parking, and noise that one would normally find near a hotel located on the beach in the summertime.

6) The Borough of Spring Lake may put reasonable conditions on the use of the license and describe the area of the hotel that can be used for the sale of alcoholic beverages. The Grand Victorian's offer not to have a permanent bar is a reasonable condition.

III.

The Respondent, in its Exceptions, argues, first, that the Administrative Law Judge failed to properly apply the doctrine of "Lyons Farms I." Secondly, Respondent submits that the Judge failed to correctly assess the ramifications of activating the license next door to an existing licensed premises. Thirdly, Respondent alleges that the Administrative Law Judge failed to make a correct determination that the Appellant had no option to activate the license anywhere else in the municipality; and, finally, Respondent submits that the Judge substituted his judgment for that of the municipality. My review of the Respondent's Exceptions, in light of the record developed in this case, leads me to conclude that they are without merit.

The threshold issue in Lyons Farms I, supra, dealt with an application filed by a licensee to enlarge the licensed premises from a delicatessen-restaurant to a primary bar operation. The issue of more patrons at the expanded location, with the resultant adverse impact on public health and safety, is not present in the findings in this matter. In fact, the Grand Victorian seeks to gain more control and stabilize the amount of alcohol currently consumed on its premises. The evidence demonstrates that the Grand Victorian currently has a full schedule of events and functions at which guests may bring their own alcoholic beverages. The acquisition of a license would grant the hotel greater control over consumption of alcohol by its hotel guests, patrons, and party goers. Although the testimony of Respondent's witnesses appears to be credible regarding traffic, parking and noise, I adopt the findings of the Administrative Law Judge that such testimony described a "normal" indicia of traffic and noise "near a hotel located on the beach in the summertime." Initial Decision, Page 11. Therefore, the facts reveal that the placing of an active

seasonal license at this location will not have any additional adverse impact from a public health and safety perspective. The Appellant's proposed operation of the Grand Victorian in conjunction with operation of the Breakers (located on the immediate adjacent lot), will also not pose an incremental threat to the public health. Cf., Dennis Romano et al. v. Cliffside Park, Bulletin 2318, Item #1 (January 12, 1979).

Concerning the second Exception, in assessing the ramifications of activating a license next to The Breakers (which operates with a plenary retail consumption license), the Administrative Law Judge found that there was no evidence that the transfer would have a negative impact. Currently, the Grand Victorian operates without a license. Any parties or hotel patrons who desire to drink must supply their own alcoholic beverages. Consequently, I find Appellant's argument persuasive that if the Grand Victorian had the capability to legally serve (or not serve) its patrons alcoholic beverages, it could result in better control. Furthermore, my review of the record provides support to the Administrative Law Judge's implicit finding that the transfer will not have a cumulative negative effect on the community, in consideration of the number of patrons who currently frequent the adjacent Breakers Hotel. Moreover, it is noted that the Borough of Spring Lake admits that it has no municipal ordinance which restricts the transfer of a plenary retail consumption license within a certain distance of another licensed premises. (See Page 47 of Respondent's Brief)

The Respondent's third Exception claims that the present licensees have the ability to either: 1) locate an interested party and obtain a variance from the 18 room restriction imposed by the municipality on the activation of a license, or 2) sell the license back to the municipality pursuant to N.J.S.A. 40:48-2.41. The speculative nature of this suggestion, as well as the probable financial hardship which the current licensee would face, results in this Exception as being largely immaterial and not viable in the context of these proceedings. Moreover, whether or not there may be other options or locations at which this license may be transferred, has little impact on the present issue. Were this a case dealing with the application of a distance-between-premises ordinance which would otherwise prohibit a transfer, that factor would be critical. Shenise v. Twp. Comm. of Jefferson, Bulletin 1155, Item #2 (January 17, 1957). In the current instance, however, we are not dealing with such an ordinance; as a result, whether or not there are other options or locations to which the

license could be transferred is irrelevant. The critical issue is whether the Respondent's denial of this transfer, on the findings made in this particular instance, was arbitrary and unreasonable. The prevailing law is clear that a liquor license is an asset of value subject to protection against unreasonable and illegally grounded discriminatory conduct by the issuing authority. Township Committee of Lakewood Township v. Brandt, 38 N.J. Super. 462, 466 (App. Div. 1955); Common Council of Hightstown v. Hedy's Bar, 86 N.J. Super. 561, 564 (App. Div. 1965). Accordingly, this Exception is without merit.

The Respondent's final Exception asserts that the Administrative Law Judge substituted his judgment for that of the issuing authority. I find, instead, that in making his decision, the Administrative Law Judge considered live testimony of eleven Spring Lake residents. Also, the transcripts of the municipal hearing were reviewed, and the testimony of other residents in opposition of the transfer was evaluated. Additionally, the Borough Clerk and the Acting Police Chief testified before the Administrative Law Judge. After reviewing all of the testimony and evidence, the Administrative Law Judge concluded that the Borough of Spring Lake had made factual findings which were not supported by the evidence; as a result, it acted unreasonably, arbitrarily, capriciously, and abused its discretion in denying The Grand Victorian's application. I agree.

Public sentiment, to be a basis on which to support a denial of a license transfer, must bear a relationship ". . . with dangers to the public health, safety, morals and general welfare commonly recognized as incidents of the sale and consumption of alcohol." Great Atlantic and Pacific Tea Co., Inc. v. Mayor and Council of the Borough of Point Pleasant Beach, 220 N.J. Super. 119, 128 (App. Div. 1987). There was no such relationship indicated in the facts adduced herein.

IV.

Based on the foregoing, I am in agreement with the basic findings of fact and conclusions of law as made by the Administrative Law Judge. I shall accept the substance of the recommended Decision and I shall reverse the action of the Respondent in denying the person-to-person and place-to-place transfer. However, I shall modify the Judge's recommendation by specifically imposing two Special Conditions for the reasons noted below.

Our review of the record, particularly the testimony of the residents of Spring Lake and the Acting Police Chief, reveals that these witnesses exhibited concerns which were primarily based on their negative assumptions regarding the impact that a permanent standing bar would have on the surrounding neighborhood. As I have already noted, the record is clear that the Appellant, sua sponte, has expressed a willingness to not have a permanent bar. The Respondent rejected this solution, indicating its belief that same was unenforceable.

The lack of a standing bar would discourage people from visiting the neighborhood (where the hotel is located) whether they were from other towns or the beach area, for the mere purpose of purchasing alcoholic beverages at the hotel. Since Appellant is willing to only provide alcoholic beverages to its bona fide patrons via a service bar, this proposal appropriately addresses the Respondent's perceived public health and safety concerns. I shall so impose the necessary conditions in order to effectuate such limitation of alcoholic beverage activity at this location.

Accordingly, it is on this day of October, 1993,

ORDERED that the appeal of The Grand Victorian Hotel from the action of the Borough Council of the Borough of Spring Lake be and is hereby SUSTAINED; and it is further

ORDERED that the action of the Borough Council of the Borough of Spring Lake which, by Resolution Number 128, dated December 2, 1991, denied Appellant's application for a person-to-person and place-to-place transfer of Seasonal Retail Consumption License No. 1348-34-007-003, be and is hereby REVERSED; and it is further

ORDERED that the person-to-person and place-to-place transfer application of SRCL #1348-34-007-003, from: Elmer J. Herrmann, Jr., Robert R. Blasi, Pauline H. Wright, and George Mueller, from an inactive status to: George A. Sarkar and Angela A. Sarkar, t/a the Grand Victorian Hotel, at premises 1505 Ocean Avenue, be and the same is hereby APPROVED, in accordance with the application filed and fees paid, subject to the following Special Conditions:

(1) a permanent standing bar is hereby prohibited; and

- (2) the Grand Victorian Hotel is restricted to having only a service bar in order to provide alcoholic beverages to guests that are dining in its restaurant, utilizing its party rooms, or receiving room service while staying in the hotel. All other sales, service, delivery or consumption of alcoholic beverages, is prohibited.

JOHN G. HOLL
Acting Director

by: GERALD A. GRIFFIN
Acting Director

GG:LRE:cps

7. BELLEAIRE RESORT CORP., T/A WARREN HOTEL V. BOROUGH COUNCIL OF THE BOROUGH OF SPRING LAKE - FINAL CONCLUSION AND ORDER ACCEPTING INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE REVERSING ACTION OF THE BOROUGH COUNCIL OF THE BOROUGH OF SPRING LAKE. THIS DECISION ORDERS THE ISSUANCE OF A PLENARY RETAIL CONSUMPTION LICENSE UNDER THE HOTEL/MOTEL EXCEPTION, N.J.S.A. 33:1-12.20. PURSUANT TO MUNICIPAL ORDINANCE, TO BELLEAIRE RESORT CORP., SUBJECT TO CERTAIN SPECIAL CONDITIONS.

The hotel which had transformed its operations from that of a seasonal hotel to that of a year-round hotel sought a Plenary Retail Consumption License under the "Hotel Exception" contained in N.J.S.A. 33:1-12.20. The Borough Council denied the application based on public sentiment against the application and the resulting increased dangers to the public health, safety, morals and general welfare of the community. The Administrative Law Judge reversed the action of the Borough Council on the grounds that the Borough's stated reasons for the denial were unsupported by the evidence and exhibited "some bad faith." The Director affirmed the reversal by the Administrative Law Judge and ordered the license transfer with special conditions imposed to address the initial concerns of the Borough Council.

APPEAL NO. 5874

APPELLANT,

v.

RESPONDENT.

ON APPEAL
FINAL CONCLUSIONS AND ORDER
ACCEPTING INITIAL DECISION OF
THE ADMINISTRATIVE LAW JUDGE,
REVERSING ACTION OF THE
BOROUGH COUNCIL OF THE BOROUGH
OF SPRING LAKE AND ORDERING
THE ISSUANCE OF A PLENARY
RETAIL CONSUMPTION LICENSE
SUBJECT TO CERTAIN SPECIAL
CONDITIONS

OAL DKT. NO. ABC 2438-92

James A. Carey, Esq., Representing the Respondent (Carey and Graham, Attorneys)

BY THE DIRECTOR:

Written Exceptions to the Initial Decision were filed on behalf of the Respondent issuing authority, and written Replies thereto were filed on behalf of the Appellant, in accordance with the provisions of N.J.A.C. 1:1-18.4(d). The time to render a Final Decision was extended by properly executed Orders to February 28, 1994. For the following stated reasons, I reject the filed Exceptions, accept the Initial Decision, reverse the action of the Respondent local issuing authority, and Order the issuance of a new

Plenary Retail Consumption License to the Appellant subject to certain conditions which are enumerated hereinafter.

I. BACKGROUND

The Appellant, which trades as the Warren Hotel, is a hotel complex located on Ocean Avenue in Spring Lake. The complex consists of three buildings -- the main building, the pool bar, and the Beach House -- and covers an entire block. The main building, a five story structure, has 165 guest rooms. It also contains a lobby, a main dining room, a cocktail lounge, a restaurant, and two other rooms on the first floor. The pool bar is located next to the swimming pool and tennis courts. The Beach House is a three story structure with a cocktail lounge on the first floor and living quarters on the second and third floors.

While this Hotel has been in existence for over 90 years, it has only operated with a seasonal (i.e., limited) retail liquor license since approximately 1970. This license has allowed the Warren Hotel to sell and serve alcoholic beverages from May 1 to November 14 of each year. N.J.S.A. 33:1-12.2 Until 1989, the Warren Hotel was purely a seasonal hotel, open for business only from May to September. In 1989, the Appellant applied, under N.J.S.A. 40:55D-68.1 (the "Breakers Bill"), for approval to remain open during the entire year. Its application was granted allowing the Hotel year-round operation. Since obtaining approval in 1989 to remain open twelve months a year, the Hotel has been open for conventions, weddings, parties, and seminars from November 15 until January 1 and from February 1 until April 30. During the period from November 16 until May 1, the Appellant is not licensed to serve alcoholic beverages. Nevertheless, persons holding events at the hotel have provided their own alcoholic beverages during that time period. The Warren Hotel is closed in January so that the employees can take a vacation.

Since 1977, the Borough Council of Spring Lake has had an ordinance describing the conditions under which an additional plenary retail liquor license could be issued to a qualified hotel or motel with at least 100 guest sleeping rooms, in accordance with the provisions of N.J.S.A. 33:1-12.20. The Respondent, since at least 1947, has had a total of 9 licenses: 2 plenary retail consumption licenses; 3 seasonal retail licenses; three plenary retail distribution licenses and one club license. [See, e.g., the New Jersey Supreme Court case (unreported) entitled: Spring Lake Chateau, Inc. v. Bor. of Spring Lake, and the statements contained therein, as reprinted in Bulletin 783, Item #7 (November 7, 1947)].

It currently retains the same number and classification of licenses, except the two plenary retail consumption licenses are held by hotels. [Initial Decision at 3.] As a result, it has issued more than the maximum number of plenary and seasonal retail consumption licenses it would otherwise be permitted under the provisions of N.J.S.A. 33:1-12.14, in consideration of its population. Nevertheless, under N.J.S.A. 33:1-12.20, municipalities are granted authorization to issue additional plenary retail consumption licenses above their "caps" to hotels or motels which have at least 100 guest sleeping rooms.

The Appellant submitted its application for such a plenary retail consumption license in July of 1991. Thereafter, the Respondent conducted hearings on the application on December 2, 16, and 30, 1991. On December 30, 1991, the Respondent adopted Resolution No. 142, which, by a 4 to 2 vote, denied the application. The Resolution stated that the denial was based upon public sentiment against the application, arising from increased noise, activity, parking, bar use and other problems associated with the operation of a restaurant-banquet facility. The resolution also concluded that granting the application would result in "[i]ncreased dangers to the public health, safety, morals and general welfare of the community recognized as incidents of the sale and consumption of alcoholic beverages." (Paragraph #20.)

The Appellant properly filed an appeal with the Division of Alcoholic Beverage Control and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. The parties stipulated that the matter would be decided by the Administrative Law Judge (ALJ) based upon the transcripts of the municipal hearings. The record was closed after the ALJ had an opportunity to hear oral arguments and consider briefs submitted by counsel.

The ALJ, after conducting a thorough review of the submitted record, found that the Respondent's findings concerning the public sentiment against the license and its conclusion that the transfer would jeopardize the health, safety, and welfare of the citizens of Spring Lake, were unsupported by the evidence and exhibited "some bad faith." (Initial Decision at 13.) In reaching his determination, Judge Scott reviewed each of the proffered reasons asserted by the Respondent in support of its denial of the issuance, assessed each reason against the adduced evidence, and found those reasons to be unsupported by the record. He, therefore, ordered that the denial of the issuance of a new plenary

retail consumption license be reversed, and ordered that the Respondent approve the application consistent with the terms of its ordinance, which also required the Appellant to turn in its seasonal retail consumption license.

It is well settled that the issuance, renewal or transfer of a retail liquor license rests within the sound discretion of the local issuing authority. A local issuing authority is vested with a high degree of responsibility and wide discretion, but it must use the public interest as its principal guide in licensure matters (renewal, issuance, or transfer). The respondent's resolution will only be set aside when there has been an abuse of discretion, a manifest mistake, or its action was clearly unreasonable. Blank v. Mayor and Borough Council of Magnolia, 38 N.J. 484 (1962); Rajah Liquors v. Division of Alcoholic Beverage Control of Newark, 33 N.J. Super 598 (App. Div. 1955); Paul v. Brass Rail Liquors, Inc., 31 N.J. Super. 598 (App. Div. 1955); Hudson-Bergen Package Stores Association v. Municipal Board of Alcoholic Beverage Control of North Bergen, Bulletin 1981, Item No. 1 (April 28, 1971).

N.J.S.A. 33:1-12.20 allows a municipality to issue "a new license to a person who operates a hotel or motel containing 100 guest sleeping rooms or who may hereafter construct and establish a new hotel or motel containing at least 100 guest sleeping rooms." In 1977, the Respondent adopted an ordinance (16-1977) which set forth the criteria potential hotel/motel applicants would have to meet in order to be accorded consideration for issuance of an additional (i.e., third) plenary retail consumption license in the community, under the permissive provisions of N.J.S.A. 33:1-12.20. That Ordinance requires that at least 100 of the guest rooms be heated, and if the rooms are not heated, the applicant has twelve months to comply with this requirement after the license is issued. The ordinance also provides that any seasonal license must be surrendered when the new license is issued.

II. FACTUAL FINDINGS

The Respondent set forth its reasons for denial of the issuance of the new license in its Resolution. Upon review of same, however, the ALJ found that other relevant findings should have been made and he held that "the evidence and the concern raised in this case does not reach the magnitude or level where it can be found or concluded that the Appellant's year round operation with the sale of alcoholic beverages will result in increased

crime, drunkenness, litter, fighting, etc. Further, Respondent has its police power to control these areas along with traffic, parking and excessive noise." (Initial Decision at 16.) Specifically, the ALJ found, and I accept, that:

- 1) The Appellant trading as the Warren Hotel is a valid non-conforming use in what became a residential zone in 1957. Prior to that the area was zoned for hotels. The Warren Hotel borders on the Atlantic Ocean and its facilities take up an entire borough block. It is now surrounded by single family residences.
- 2) The Appellant presently holds a seasonal liquor license and can sell alcoholic beverages from May 1 through November 15 of each year.
- 3) The Appellant has some off-street parking, but there are not sufficient parking spaces to provide parking for all of the Appellant's patrons.
- 4) Prior to 1970, the Appellant's licensed premises consisted of the main hotel building. In 1974, the licensed premises was extended to what is known as the Beach House. The Beach House is separate and apart from the main hotel building and is the only free standing restaurant and bar in the Borough of Spring Lake.
- 5) In 1985, the licensed premises was extended to a building known as the pool bar. This building is in the center of the Appellant's complex and is next to the pool and tennis courts.
- 6) In 1990, there was an addition to the rear of the main building of the Warren Hotel and this addition also became part of the licensed premises.
- 7) Twenty percent of the Appellant's revenue comes from the Beach House, forty percent of the revenue comes from hotel operations and forty percent comes from banquet and similar operations. The granting or denying of the Appellant's application will not have any significant economic impact on the Appellant's ability to run a successful operation.

- 8) The lounge area in the main building of the Warren Hotel has a capacity of 200 standing people. Alcoholic beverages are also served in five other dining rooms in the main building. The Appellant has a seating capacity of 800 people for banquets and a standing capacity for 2000 people.
- 9) The Beach House is a separate building and is apart from the main building and has a capacity of 120 people. The Appellant employs eighteen people per shift to operate the Beach House.
- 10) The pool bar building has the capacity for 600 people and requires five employees for operation. Entertainment is now being provided in the pool bar when it is in operation.
- 11) There are residents of Spring Lake who support and oppose the Appellant's application. The Appellant, however, has been "a good neighbor" and has run a respectable establishment.
- 12) Granting the Appellant's application will, from November 15 of each year until April 30 of the next year, increase noise around the hotel, increase bar use, increase people activity in general, will increase traffic late at night and will increase the number of drivers and automobiles seeking parking spaces around the hotel.
- 13) The Appellant meets or is willing to meet all of the requirements of the Respondent's ordinance number 16-1977.
- 14) Expansion of the Appellant's facilities since 1974 have increased public access to the beach. The granting of the Appellant's application would not increase access to the beach. The granting of the Appellant's application may diminish the use of the Appellant's hotel operations.

Based upon an independent review of the record, I make the following additional factual findings to supplement those made by the ALJ.

...

- 15) Though the appellant can not serve alcoholic beverages from November 15 through April 30 because of its limited seasonal license, persons holding events, e.g., conventions, weddings, parties, seminars, etc., supply their own alcoholic beverages during that time period. It therefore is not disputed that on most weekends from November 15 through April 30 (excluding January), events are going on in the hotel where alcoholic beverages are being served. Initial Decision at 2.
- 16) The awarding of this license will allow Appellant to supply and control the sale and consumption of alcoholic beverages during the winter months and would discourage and reduce the number of people who currently bring in alcoholic beverages into the hotel's restaurant or for weddings and receptions. Initial Decision at 6. T. 12/2/91 at 27-28. See, also, Final Order, The Grand Victorian Hotel v. Spring Lake, Appeal No. 5870, OAL Dkt. No. ABC 1879-92 (Decided October 5, 1993); 94 N.J.A.R.2d (ABC) ____.
- 17) The Appellant met the criteria of the "Breakers Bill" (N.J.S.A. 40:55D-68.1 et seq.) and it has been open year round (except for January) since 1989, albeit during the winter only for "events" such as weddings, etc. and not for room rentals, since its rooms currently are not heated. Initial Decision at 2, 4, 11.
- 18) The Appellant Hotel currently has 165 rooms and if granted this license, it intends to heat 100 of them, within one year of receipt of the license, as required by Ordinance No. 16-1977. Initial Decision at 6.
- 19) The Appellant can voluntarily heat all 165 rooms now if it wishes. If it heats 100 rooms, that will add a maximum of 200 people per day to its premises (two per room), while currently 1,000 to 2,000 at a time utilize the hotel for the various events held there. T. 12/2/91 at 79-89.

III. EXCEPTIONS AND ANALYSIS

Respondent filed six Exceptions to the Initial Decision. It argues first that the ALJ erred in deeming that the denial of the issuance of the license was not a valid exercise of the Council's discretion and instead was unreasonable, arbitrary, and capricious. Second, Respondent alleges that the ALJ erred in deeming that a hotel/motel population exception license should be issued under the

provisions of N.J.S.A. 33:1-12.20. Third, Respondent alleges that the ALJ failed to make a correct determination because there is no requirement that a municipal body issue any or all licenses authorized by ordinance. Fourth, the Respondent alleges that the ALJ erred in failing to understand the relevance of the Beach House and fifth, Respondent asserts that the ALJ did not give proper weight to the doctrine espoused in Lyons Farms I. Finally, the Respondent contends that the factual findings by the Judge do not support the conclusions he reached.

I am satisfied that the issues covered in the Respondent's Exceptions were adequately addressed by Judge Scott in his Initial Decision. With respect to Respondent's initial exception, the Judge found that Respondent had enacted an ordinance which appears to have signaled its willingness to issue a third plenary retail consumption license to a hotel or motel which met the criteria contained therein. All agreed that the Appellant has been a "good neighbor" for the Borough of Spring Lake and that it meets or is willing to meet the criteria set forth in the ordinance concerning the issuance of a third plenary retail consumption license in Spring Lake.

While actions taken on liquor license applications are matters generally left up to the discretion of the local issuing authority, it is well recognized that when that issuing authority acts in an unreasonable fashion or its actions are improperly grounded, it is subject to being reversed upon appeal to the Director. Common Council of Hightstown v. Hedy's Bar, 86 N.J. Super. 561 (App. Div. 1965). In the instant case, the Judge reviewed the testimony of the objectors as well as the supporters. Of the 13 citizens who testified at the municipal hearing, four favored the application and nine were opposed. Of those nine, two complained about the operation of the Beach House (which concerns can be addressed by imposition of Special Conditions as further discussed below), and four complained about general matters regarding the Borough of Spring Lake but their concerns did not have anything to do directly with the Warren Hotel. Of the remaining three objectors, one was concerned with the grounds of the Warren Hotel. The other two were concerned about potential future owners, a matter of speculation and not properly considered here since the issuing authority has substantial powers to discipline or otherwise remedy, at time of renewal, should any problems occur with future owners. Beach Building Corp. v. Bd. of Com'rs. of Atlantic City, Bulletin 2302, Item 4 (August 18, 1978).

The ALJ also reviewed three letters and a petition which was represented as being signed by 26 residents of Spring Lake, three of whom also testified. Of the eight objections listed on the petition, only two referred to traffic, noise littering and activities associated with the serving of alcoholic beverages. (These objections are further discussed infra.) The Judge found that the other six reasons were speculative and contained no facts which would tie them to the Appellant. I further note that several of the "reasons" given are plainly wrong, e.g., the owner testified that the hotel is not nor has it been for sale (Reason #5) and there currently are only two year round plenary retail consumption licenses (along with three seasonal, three distribution and one club license), rather than 9 plenary retail consumption licenses (Reason #8).

It is also important to bear in mind while petitions serve as convenient medium for conveying views to the governing body, they are not controlling and may not substitute for the independent investigation and fact finding required of the issuing authority. See, Dunster v. Bernards, Bulletin 99, Item 1 (December 11, 1935).

Despite a thorough review of the entire record presented to him, the ALJ was unable to find support for the assertion that the community sentiment of Spring Lake was against this transfer. I agree with Judge Scott in this assessment. Our Supreme Court has stated public sentiment must reflect "widespread local sentiment" [Fanwood v. Rocco, 33 N.J. 404, 415 (1960)] or be in accord with "[a]n attentive and sympathetic attitude toward the sentiments of substantial numbers of persons in the locality" [Lyons Farms Tavern v. Mun. Bd. Alc. Bev., Newark, 55 N.J. 292, 306-307 (1970)] in order to form the basis of a proper denial. The record does not support such a finding here.

The other reason given to deny the issuance -- that granting the Appellant's application would result in "[i]ncreased dangers to the public health, safety, morals and general welfare of the community recognized as incidents of the sale and consumption of alcoholic beverages" -- is a mere conclusory statement having no basis in the facts adduced herein. The Hotel can at any time heat 100 or all 165 of its rooms without restriction. People could thereafter rent those rooms and bring their own alcoholic beverages. Moreover, the record indicates that the granting of this license will increase Appellant's ability to monitor and control the sale and consumption of alcohol on its premises, a task which everyone agrees it has accomplished, to date, without a problem.

Since the reasons given by Respondent for denying the issuance of the license are unsupported by the record, I must agree with the ALJ that its action was arbitrary and unreasonable and must be reversed.

Respondent's second Exception states that "[t]he Administrative Law Judge erred in deeming that a Hotel License should be Issued under N.J.S.A. 33:1-12.20." To a great extent, the rationale utilized in responding to Respondent's first Exception is applicable to the bare assertions contained in this one. However, Respondent also asserts that since the Appellant already has a seasonal license, the justification for awarding a hotel/motel population cap exception license under N.J.S.A. 33:1-12.20 is lacking. It further claims that the record reflects that the Appellant is engaged more in catering than in the hotel business and therefore a plenary license should not be issued to what it characterizes is a "banquet facility."

With respect to the first portion of this Exception, I note that the statute does not restrict such issuance to a plenary retail license, but permits the issuance of a "new license" to a qualified hotel. N.J.S.A. 33:1-12.20. While recent experience of the Division is that hotels generally apply for plenary retail consumption licenses under this exception, in the past some applicants applied for seasonal licenses. See, IMO Atlantic Bar, Inc., Bulletin 824, Item #7 (November 23, 1948). The law itself is silent as to the reason for granting this exception to the license limit law, and a canvassing of our Bulletins sheds little light on the subject, albeit "hotels" have historically been accorded favorable consideration in the awarding of alcoholic beverage licenses "because of their unique public service, [they] are essentially different from ordinary drinking places." Mainiero v. Roxbury Twp., Bulletin 246, Item #2 (May 17, 1938). It has been speculated, however, that the reason for this exception is that "[t]he hotel and motel industry caters to transients, as well as to people in the community; and it appeared to be the feeling of the Legislature that the accommodation of such transients would generally serve the best interests of the community." Hackensack Motel Corp. v. Little Ferry, Bulletin 1648, Item #1 (October 11, 1965).

What is clear, however, is that the issuance (or not) of a license under this statutory provision is generally left to the sound discretion of the issuing authority. Moreover, the Borough Council clearly did not intend to exclude hotels having seasonal

retail licenses from applying for a plenary retail license under this section, since its own ordinance expressly contains a provision requiring a seasonal license holder to surrender it upon being awarded a plenary license. Ordinance No. 16-1977, Section 3(b).

As to the second part of this Exception -- that Appellant is a "banquet facility" rather than a hotel meeting the criteria of N.J.S.A. 33:1-12.20 -- the opinion of the ALJ found that the Appellant complies with both the requirements of the statute as well as the ordinance. (Initial Decision at 6.) It is well settled that a license issued under this statutory exception need not be utilized solely for the hotel and its patrons, but that it need only be utilized "'in connection with' the operation of a hotel containing at least [the required number of] . . . sleeping rooms." (emphasis supplied). Springdale Park, Inc. v. Tp. Comm. of Andover, 97 N.J.Super. 270, 273 (App.Div. 1967). Indeed in the Springdale case, the appellant-objector therein argued, unsuccessfully, that it involved a transfer of a hotel/motel exception license ". . . to a non-motel premises for a non-motel use." Id. at 272. See, also, Ocean County Licensed Beverage Ass'n v. Point Pleasant, Bulletin 1522, Item #3 (June 19, 1963).

The Warren Hotel has been in operation all year round (except in January) since 1989. The awarding of this license will merely allow it to sell alcoholic beverages during the November 16 to May 1 period. The hotel will have twelve months in which to heat a minimum of 100 of its guest sleeping rooms. Once those rooms are heated, this license will be utilized by patrons during the "off season" and same will lead to an increase in the "hotel" portion of the business. However, regardless of whether such increased "hotel" business occurs, neither the statute nor the ordinance requires (albeit they appear to assume) that the rooms be actually utilized, but rather that they merely be in existence. If the Appellant does not have the required number of rooms heated within the 12 month period, Respondent can then institute proceedings to either cancel or revoke the license.

With respect to Respondent's third exception -- that there is no requirement that a municipality issue the total number of licenses allowable by law in that municipality -- that principle, as a general proposition, is well settled. Nevertheless, the reasons for the denial (or issuance) are scrutinized by the Director on appeal, albeit he usually affirms the action of the municipal issuing authority. See, e.g., Emston Corp. v. Brigantine, Bulletin 2091, Item #4 (February 1, 1973); Somerset County Tavern Owners

Ass'n v. Bridgewater and Lawrenceville Corp., Bulletin 1653, Item #1 (December 1, 1965); Rauly, Inc. v. Lakewood, Bulletin 1653, Item #2 (November 24, 1965); Tara Bay Club v. Upper Twp., Bulletin 1627, Item 1 (June 2, 1965); Ocean County Licensed Beverage Ass'n v. Point Pleasant, Bulletin 1522, Item #3 (June 19, 1963). When it has been determined that the municipality arbitrarily or unreasonably exercised its discretion, the Director has reversed the issuing authority and ordered the issuance (or transfer) of a license. Inn of Woodbridge Inc. v. Woodbridge, Bulletin 2439, Item #1 (December 24, 1984), 9 N.J.A.R. 286, aff'd per curiam (App.Div. May 8, 1986, A-2429-84) (unreported), certif. den. 105 N.J. 510 (1986); Hackensack Motel Corp. v. Little Ferry, Bulletin 1648, Item #1 (October 11, 1965); Silver Sands Motel v. Point Pleasant Beach, Bulletin 1624, Item #1 (May 20, 1965).

Judge Scott concluded that the record presented to him cast considerable doubt upon the reasonableness of the municipality's exercise of its discretion when it determined to deny Appellant's application. He found that there was a paucity of support for the municipality's action beyond the purported public sentiment against the transfer. Additionally, although the denial was allegedly based upon public sentiment against the application, supposedly related to increased noise, activity, parking, bar use and other problems associated with the operation of a restaurant-banquet facility, the ALJ found no credible evidence to support a finding that same rose to a level sufficient to deny the license, as previously indicated, supra.

The resolution also concluded that granting the application would result in "[i]ncreased dangers to the public health, safety, morals and general welfare of the community recognized as incidents of the sale and consumption of alcoholic beverages." Respondent, however, presented no evidence in support thereof other than the testimony of the objectors who testified below. As a result, the record contained only the testimony of one expert witness (Appellant's) regarding the issues of noise, activity, bar use, traffic or the lack of parking. Appellant's expert asserted that there would be no increases in any of those categories (Initial Decision at 12), albeit the Judge found there would be some increases. The Judge determined however that Respondent had sufficient remedies available to it to address such matters, should they become issues of substantial concern. Cf., Noumair v. Asbury Park et al., Bulletin 2327, Item #2 (March 5, 1979); Romano v. Cliffside Park, Bulletin 2318, Item 1 (January 12, 1979); Van's Restaurant Inc. v. Clifton, Bulletin 2242, Item #4 (October 21, 1975).

Additionally, an independent review of the record indicates that the Appellant's expert witness specifically testified that "[t]here's far less effect by granting a liquor license in the winter than there would be in the summer because it's an off peak time." (T. 12/2/91 at 2.5) The record does not reflect that the present full schedule of weekend events has resulted in any additional law enforcement problems at the Appellant's premises. Of particular note is the fact that the hotel is currently open eleven months a year with no adverse impact on public health and safety in the municipality (and during six of those months it has sold and served alcoholic beverages under its seasonal retail license). Where a hotel "[a]lready exists; and many of the objections with respect to parking, noise and possible property depreciation are objections raised to the operation of the motel and restaurant . . . [w]hether or not the license is ultimately granted will have no effect upon the continued operation of the present premises. I conceive, therefore, that those objections are insubstantial where they related merely to the introduction of a liquor license to the present operation." Silver Sands Motel, supra.

In its fourth Exception, Respondent argues that the ALJ failed to understand the relevance of the Beach House, since it is the only free standing restaurant bar and restaurant and bar in Spring Lake which gives it a "tremendous advantage to the applicant when considering the other licenses in town." Thereafter, the thrust of this Exception becomes vague, but it appears that the Respondent is arguing that if its intent had been to act in bad faith against the Appellant, then it would have never granted the Appellant this quasi monopolistic position of having the only free standing bar and restaurant in the Borough. To the extent that the Respondent has any fears of the bar in the Beach House leading to uncontrolled use in the off season, I shall address same by imposing special condition restricting its use, as further discussed below.

Respondent's fifth Exception alleges that the ALJ failed to properly apply Lyons Farms I, and its last Exception is that the ALJ's conclusions were not supported by the factual findings. Initially I note that the facts in Lyons are distinguishable from the case at bar. Moreover, in the present case there was a total lack of credible evidence to support a public sentiment argument (as opposed to the legitimate concerns expressed in Lyons Farms I) and this necessarily leads to the conclusion that Respondent's action was arbitrary and capricious. The record offers far more to support Appellant's application than Respondent's denial.

This decision, it should be stressed, does not impose or substitute either my own or the judge's policies or judgment upon the municipality; rather, this decision merely carries out the municipality's previously articulated policy, as set forth in Ordinance No. 16-1977. There is no question but that the Appellant is fully qualified and currently meets all of the criteria provided in the Ordinance. Cf. Silver Sands Motel, supra.

The awarding of this license will not lead to any further such licenses (contrary to the belief of counsel [T. 12/2/91 at 32, 42, 46]), since, with its Ordinance, the municipality has voluntarily capped the maximum issuance of plenary retail consumption licenses at three, and this is the third (and last) such license which can be issued under that local ordinance (unless it is later amended). Where a municipality has set forth a limit on the number of licenses it will issue, that limit prevails over the permissive provisions of N.J.S.A. 33:1-12.20. Szczesna v. Wildwood, Bulletin 852, Item #1 (August 16, 1949); See, also, Notice: New Legislation - State Wide Limitation of the Number of Plenary and Seasons Retail Licenses Bulletin 762, Item 1 (May 16, 1947); Notice - [I]nterpretation and Explanation of the New Law; Bulletin 762, Item #2 (May 14, 1947).

Some persons have expressed concerns of the impact of a permanent free standing bar, operating for the entire year, upon a community such as Spring Lake. Although not supported by the record as a reason to deny the issuance of the license, we nevertheless understand that these concerns are genuine and should be accommodated where, as here, the licensee also agrees. On this issue, Appellant has gone on record indicating that it would accept a condition which, if imposed, would limit the use of the Beach House and Pool Bar to the period from May 1 to November 14. (T. 12/16/91 at 7.) This offer acknowledges an awareness of the municipality's concerns, effectively prevents the operation of a "free standing" public bar in Spring Lake outside of the summer months, and shall hereafter be incorporated in my Final Decision. Of course, by doing so, I am granting express approval of both special conditions, as provided by N.J.S.A. 33:1-32.

IV. CONCLUSIONS

Before concluding my opinion, I feel it necessary to comment on two matters which are reflected in this case. My thoughts hereafter are expressed in light of the substantial amount of time and research which this Division has expended in this appeal.

In the first instance, I am troubled by the record presented to me and the apparent failure of the Borough of Spring Lake to attempt to produce any competent, expert evidence to support its position. Additionally, I am troubled since this is the second instance in a relatively short period of time where this Division (and Judge Scott) have found it necessary to reverse the action of the Borough Council of Spring Lake in its determinations concerning the issuance (or transfer) of licenses to hotels in that community. In both instances, the Borough has failed to produce competent, credible evidence to support its position. One would think that if the municipality is validly concerned about increases in noise, traffic, activity, bar use, etc., it would have presented expert testimony to attempt to substantiate those concerns. At a minimum, it should have been able to produce experienced police officers who, based upon their training and/or experience, could lend some support to Respondent's position. In fact, the Chief of Police was at one of the meetings held on this matter, but his comments positively supported the current licensee and the use of its seasonal license, with respect to the firm controls it maintains on its patrons. (T. 12/30/91 at 37.)

In the present case, the only expert witness who testified was Appellant's. This failure of proof occurred even though the Respondent had the ability at the appeal de novo before this Division to introduce new testimony or reasons to support its position. Rather than availing itself of this opportunity, however, Respondent chose to rest upon the record at the municipal level; it introduced no other testimony at the hearing held before the ALJ. While I have concerns about the seemingly counter-intuitive testimony concerning the lack of increased usage based upon the issuance of this license, neither the ALJ nor I have any option but to rule upon the record presented to us. The Respondent has had two opportunities to present sufficient proof to support its case. It, having failed to do so, I cannot now at this late date remand the matter and give it a third opportunity.

In the second place, I am concerned with how the position of the Respondent appears to be at odds with its ordinances or the lack thereof. In the prior case which was recently before me (Grand Victorian Hotel v. Spring Lake, Appeal # 5870, OAL Dkt. No. ABC 1879-92), the Respondent asserted its concern with activating a license next to an existing license. Rather than legislate such concern by adopting a distance-between-premises ordinance, Respondent merely raised assertions of its significance, but failed to produce proof at the hearing to support same. The current case

causes even more consternation since in this instance, all the Borough had to do was amend its ordinance to limit the number of plenary retail consumption licenses to the two then in existence. However, by articulating a policy which signaled its intent to consider awarding a third such license, setting forth criteria for an applicant to meet, and then without a credible basis determining not to award the third license to this applicant who met all the relevant criteria, raised the specter of unreasonableness, arbitrariness and bad faith upon the actions and motivations of the Council.

The Borough of Spring Lake may well have legitimate concerns about maintaining its quiet character during the winter months in the area where the Appellant's Hotel and the Grand Victorian Hotel are located. The record presented to me, however, is devoid of sufficient proof to support that notion.

Based on the foregoing, I am in agreement with the basic findings of fact and conclusions of law of the Administrative Law Judge. I accept the recommended Decision and reverse the action of the Respondent in denying the issuance of a new Plenary Retail Consumption License pursuant to N.J.S.A. 33:1-12.20. As noted herein, I hereafter impose a special condition which restricts the usage of the license at the Beach House and Pool Bar during the off season.

Accordingly, it is on this 28th day of February, 1994,

ORDERED that the appeal of The Belleaire Resort Corporation from the action of the Borough Council of the Borough of Spring Lake be and is hereby SUSTAINED; and it is further

ORDERED that the action of the Borough Council of the Borough of Spring Lake, which, by Resolution Number 142, dated December 30, 1991, denied Appellant's application for a new Plenary Retail Consumption License, be and is hereby REVERSED; and it is further

ORDERED that the Respondent Borough Council of the Borough of Spring Lake, ISSUE Appellant Belleaire Resort Corporation, trading as Warren Hotel, a plenary retail consumption license under the provisions of N.J.S.A. 33:1-12.20, but that such license shall be issued subject to the following Special Conditions:

- (1) the Pool Bar may sell and serve alcoholic beverages only during the time period from May 1 to November 14 of each year; and

- (2) the Beach House may sell and serve alcoholic beverages only during the time period from May 1 to November 14 of each year; and it is further

ORDERED that upon issuance of such plenary retail consumption license to it, Appellant shall surrender its seasonal retail consumption license (SRCL #1348-34-001-001) to the Borough of Spring Lake, which shall retire same and not thereafter re-issue it, and the Appellant shall further comply with all other applicable provisions of Ordinance No. 16-1977.

JOHN G. HOLL
Acting Director

JGH:GG:GCS:LRE

8. NOTICE AND ORDER TO CLASS A AND B LICENSEES EMPLOYING SOLICITORS: EXTENSION OF 1993-94 SOLICITOR PERMIT AUTHORITY TO JUNE 30, 1994.

The following Notice and Order, extending 1993-94 Solicitor Permits, was issued by Acting Director John G. Holl on May 4, 1994. Based upon the authority granted by this Notice and Order, the expiration date of 1993-94 Solicitor Permits issued to sales employees of New Jersey Class A and B licensees, has been extended to June 30, 1994. The reason for this extension is to provide adequate time for the Division to complete testing of its production system for newly formatted 1994-1995 Solicitor Permits. It is anticipated that the new permits will be issued and mailed to wholesale employers no later than June 15, 1994.

BY THE DIRECTOR:

The Division of Alcoholic Beverage Control recently modified the format of the Solicitor Permit certificate issued to sales

employees of Class A and B licensees pursuant to N.J.S.A. 33:1-67, N.J.A.C. 13:2-16.1. It is anticipated that completion of testing of the new Solicitor Permit computer system may cause an unavoidable delay in the printing and mailing of Solicitor Permits for the 1994-1995 term, which commences June 1, 1994.

To address this contingency on this 4th day of May, 1994, I do hereby ORDER the following:

1. The expiration date on Solicitor Permits issued by the Division of Alcoholic Beverage Control pursuant to N.J.S.A. 33:1-67 and N.J.A.C. 13:2-16.1 for the 1993-1994 term is hereby amended and extended to June 30, 1994.
2. This Notice and Order shall serve as authorization for this extension. Any valid Solicitor Permit, carried upon the person of a bona-fide sales employee of a NJ Class A or B licensee, and containing an expiration date of May 30, 1994, shall continue in force and effect until June 30, 1994.

JOHN G. HOLL
ASSISTANT ATTORNEY GENERAL
ACTING DIRECTOR

9. NOTICE TO CLASS A AND B LICENSEES - PROMULGATION OF NEW APPLICATION FORM - APPLICANTS FOR NEW SOLICITOR PERMITS MUST SUBMIT SBI AND FBI FINGERPRINT CARDS AND PROCESSING FEES WITH INITIAL PERMIT APPLICATIONS.

Pursuant to N.J.A.C. 13:2-16.6, applicants for new Solicitor Permits are required to submit: (1) a completed, notarized permit application; (2) a passport sized color photograph of the applicant taken within 30 days prior to the application filing date and (3) completed fingerprint cards and necessary fees required for fingerprint processing.

Beginning on June 1, 1994, applicants for new Solicitor Permits will be required to complete a new 3-paged application form, copies of which were distributed to all licensed employers with the 1994-1995 permit renewal mailing. The application for has been shortened to simplify the application process.

Additionally, beginning June 1, 1994, applicants for new Solicitor Permits will be required to submit two completed fingerprint cards with their permit applications, one for the State Bureau of Identification (SBI) and another for the Federal Bureau of Investigation (FBI). The total processing fee for fulfillment of the SBI and FBI criminal record reviews is \$36.00, which must be paid in the form of a certified check or money order, payable to "Division of State Police-SBI". As in the past, the Division's Licensing Bureau will provide blank cards, however, permit applicants must make arrangements to have their fingerprints taken by their local police departments.

There will be no change in the Division's present procedure to issue the applicant a valid Solicitor Permit while criminal history checks are pending. If however, upon receipt of the results, a solicitor is determined to be disqualified from employment in the alcoholic beverage industry, the matter will be immediately referred to the Division's Enforcement Bureau for institution of revocation proceedings.

10. RECENT LEGISLATION - AMENDMENTS TO PLENARY AND FARM WINERY LICENSE (N.J.S.A. 33:1-10) - DISCUSSION AND TEXT OF AMENDED STATUTE.

On January 10, 1994, former Governor Florio signed into law Assembly Bill 102 which is now codified as Chapter 372 of the laws of New Jersey 1993.

This legislation amends the plenary and farm winery licenses portion of N.J.S.A. 33:1-10 which regulates Class A alcoholic beverage licenses. The amendments provide the following:

1. Increases, from two to five, the number of additional retail salesrooms permitted to be maintained and operated off their licensed premises, by each such licensee. The fee remains at \$200 for each salesroom.

2. Decreases, from five to two, the required minimum number of such licenses needed to establish jointly controlled and operated county salesrooms (with a limit of one per county). The fee remains at \$500 for each county salesroom. (These salesrooms are in addition to the maximum of five otherwise available to each New Jersey winery.)
3. Expands the sales privilege at both single licensee as well as at jointly owned county salesrooms to now permit on premises consumption as well as off premises package good sales of the products referred to in Section 4, below.
4. Restricts sales by plenary and farm licensees to only their own alcoholic beverage products which are defined as wines that are produced, blended, fortified or treated on the licensed premises in New Jersey (except for a limited grandfather exception). As a result, wineries cannot merely bottle wine bought in bulk and then sell same as their products.

The ability of New Jersey's wineries to offer their wine for sale by the glass for consumption at the salesrooms will clearly enhance these wineries efforts to make themselves more effective travel and tourism destinations. The addition of three more sales outlets for each licensee, along with the eased ability by which only two licensees can joint and operate additional county salesrooms, will provide these wineries with further cost effective ways of distributing New Jersey wines.

Hereafter, follows the text of the amended portions only of this statute:

N.J.S.A. 33:1-10. Class A licenses shall be subdivided and classified as follows:

* * *

Plenary Winery License. 2a.

* * *

[T]he holder of the license shall also have the right to sell such wine at retail in original packages in [two] five salesrooms apart from the winery premises for consumption on the premises, for consumption on or off the premises and for sampling purposes for

consumption on the premises, at a fee of \$200.00 for each salesroom. Additionally, subject to rules and regulations, one salesroom per county may be jointly controlled and operated by at least [five] two plenary or farm winery licensees for the sale of the products [produced under the licenses of such licensees] of any plenary or farm winery licensee for consumption on or off the premises and for consumption on the licensed premises for sampling purposes [only], at an additional fee of \$500.00 per county salesroom.

For the purpose of this subsection "product" means any wine that is produced, blended, fortified, or treated by the licensee on its licensed premises situated in the State of New Jersey.

Any holder of a plenary winery license who sold wine which was produced, bottled, and labeled by that holder in a place other than its licensed New Jersey premises between July 1, 1992 and June 30, 1993, may continue to sell that wine provided no more than 25,000 cases, each case consisting of 12 750 milliliter bottles or the equivalent, are sold in any single license year. This privilege shall terminate upon, and not survive, any transfer of the license to another person or entity subsequent to the effective date of this 1993 amendatory act or any transfer of stock of the licensed corporation other than to children, grandchildren, parents, spouses or siblings of the existing stockholders.

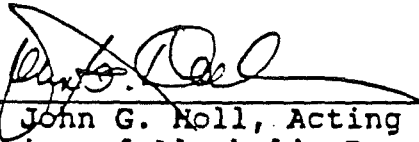
Farm Winery License. 2b.

* * *

[T]he holder of this license shall also have the right to sell his products in original packages at retail to consumers in [two] five salesrooms apart from the winery premises for consumption on or off the premises, at a fee of \$200 for each salesroom. Additionally, subject to rules and regulations, one salesroom per county may be jointly controlled and operated by at least [five] two plenary or farm winery licensees for the sale of the products [produced under the licenses of such licensee] of any plenary or farm winery licensee for consumption on or off the premises and for consumption on the licensed premises for sampling purposes [only], at an additional fee of \$500 per county salesroom. For the purposes of this subsection, "sampling" means the selling at a nominal charge or the gratuitous offering of an open container not exceeding one and one-half ounces of any wine.

EXPLANATION - Matter enclosed in brackets [thus] is omitted in the law. Matter underlined thus is new matter.

Publication of Bulletin 2463 Is Hereby Directed This
23rd Day of May, 1994



John G. Noll, Acting Director
Division of Alcoholic Beverage Control