

**JOSEPH A. COLALILLO
AND DONALD MALLOY,**

Petitioners,

v.

**DIVISION OF ALCOHOLIC
BEVERAGE CONTROL,**

Respondent.

Decided March 24, 1980

Initial Decision on Motion

SYNOPSIS

Petitioners, Colalillo and Malloy, were the holders of a Class C plenary retail consumption liquor license issued by the Borough of Bound Brook. Applications for the renewal of this license were made to the Borough and granted for the years 1976-77, 1977-78, 1978-79 and 1979-80; nevertheless, the license went unused from June 1976 through September 13, 1979 when the Borough granted a place-to-place transfer of the license to new premises. On September 12, 1979, the petitioners filed a request with the Division of Alcoholic Beverage Control for good cause authorization *nunc pro tunc* of the applications for license renewals for the licensing years 1978-79 and 1979-80 since *N.J.S.A.* 33:1-12.39 (enacted on October 3, 1977) requires the Division's approval for the renewal of a Class C license if that license has not been actively used for the two years preceding the renewal date.

Prior to the hearing, petitioners filed a motion with the administrative law judge for a ruling holding that *N.J.S.A.* 33:1-12.39 should be given prospective application only and thus would not apply to the petitioners' applications for renewal for the years 1978-79 and 1979-80 and, in the alternative, that authorization for such a renewal might be granted *nunc pro tunc*.

In ruling upon the motions, the administrative law judge observed that the law was well settled that statutes will generally be held to operate prospectively unless it was the clear purpose and intent of the Legislature to give them a retrospective effect. On examining the legislative intent, the judge found that it was the Legislature's purpose to retire and restrict the number of Class C licenses in existence at the time of the bill's passage and thus the statute was to apply to licenses up for renewal in the first license year following the statute's adoption, *i.e.*, the 1978-79 renewal year.

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Accordingly, *N.J.S.A.* 33:1-12.39 was found to apply to petitioners' application for renewal for the years 1978-79 and 1979-80.

On the motion to authorize renewal *nunc pro tunc*, the administrative law judge noted that the Director of the Division of Alcoholic Beverage Control had broad powers to comprehensively administer the Alcoholic Beverage Act and there was no doubt that this included the ability to issue an order *nunc pro tunc* authorizing the renewal of a license. In determining if such an order should be entered, the judge noted that the failure to do so would result in the forfeiture of the petitioners' license and that forfeitures were to be avoided unless absolutely compelled. The judge also found that to penalize the petitioners because of the failure of the Borough to advise the petitioners that it could not properly renew the license would be inequitable. Accordingly, the judge concluded that an order setting down a good cause hearing as required by *N.J.S.A.* 33:1-12.39 for the renewal of the petitioners' licenses for the license years 1978-79 and 1979-80 should be entered *nunc pro tunc*.

Francis X. Journick, Esq., for Petitioners (Wilentz, Goldman & Spitzer, attorneys)

Marvin Olick, Esq., for the Objectors, Somerset County Tavern Owners' Association (Skoloff & Wolfe, attorneys)

ROSA, JR., ALJ:

This is an initial decision on motion concerning the applicability and construction of *N.J.S.A.* 33:1-12.36 and the powers of the Director of the Alcoholic Beverage Commission to grant *nunc pro tunc* relief with reference to *N.J.S.A.* 33:1-12.39. The petitioners, Joseph A. Colalillo and Donald J. Malloy, were the holders of plenary retail consumption license No. 1804-44-006-001, issued by the Borough of Bound Brook. The license was for premises located at 313 Talmadge Avenue, Bound Brook and was last operated on or about June 12, 1976. Applications for renewal of the license were made to the Borough of Bound Brook for the license years 1976-1977, 1977-1978, 1978-1979 and 1979-1980. All the renewals were granted, although the license was not utilized at any time after June 12, 1976, until after September 13, 1979, when the Borough of Bound Brook granted a place-to-place transfer of said license, permitting it to be utilized at 260 West Union Avenue, Bound Brook.

On or about September 12, 1979, the petitioners filed a petition with the Director of the Division of Alcoholic Beverage Control requesting good cause authorization, pursuant to *N.J.S.A.* 33:1-12.36, *nunc pro tunc* by the Director of the Division of Alcoholic Beverage Control, for the applications

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for license renewals for the licensing years 1978-1979 and 1979-1980. These applications had been approved by the governing body of the Borough of Bound Brook without the prior authorization required by *N.J.S.A.* 33:1-12.39. Upon receipt of this pocket license petition, pursuant to *N.J.S.A.* 33:1-12.39, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

Prior to the date of hearing, petitioners filed a motion for a ruling holding that *N.J.S.A.* 33:1-12.39 is inapplicable to the renewal of the said plenary retail consumption license for the 1978-1979 and 1979-1980 renewals, inasmuch as the statute should have prospective and not retrospective application. A further motion was made for a ruling holding that the Director of the Division of Alcoholic Beverage Control may grant the relief requested, by the petitioners *nunc pro tunc*. This decision is the disposition of those two motions.

I. DOES *N.J.S.A.* 33:1-12.39 HAVE RETROSPECTIVE OR PROSPECTIVE APPLICATION?

Generally, a retrospective law is a law which looks backward on things that are past and acts on things that have already occurred. It takes away, or impairs vested rights acquired under laws existing at a time in the past, and creates new obligations, imposing a new duty, or attaches a new disability in respect to transactions or considerations already passed. 82 *C.J.S.* § 412. Statutory terms will not be given a retroactive effect "unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intent of the Legislature cannot otherwise be satisfied." *Kopczynsky v. County of Camden*, 2 *N.J.* 419, 424 (1949), and *See also LaParre v. Y.M.C.A. of The Oranges*, 30 *N.J.* 225, 229 (1959); *In Re Glen Rock*, 25 *N.J.* 241, 249 (1957); *Nichols v. Board of Education, Jersey City*, 9 *N.J.* 241, 248 (1952). The words "heretofore," "theretofore," "has been," or other expressions denoting past time expressly give a statute a retrospective operation. *Cf. Nervo v. Mealey*, 25 *N.Y.S.* 2d 632, 175 *Misc.* 952. All statutes are generally to be construed as having only a prospective operation and not as having retrospective one. *Neel v. Ball*, 6 *N.J.* 546 (1951) and *Morin v. Becker*, 6 *N.J.* 457 (1951). However, in the absence of any words expressing clear intention, whether a statute operates prospectively or retrospectively is a matter of ascertaining the legislative intent. *Allord v. Henry Muhs Company*, 10 *N.J. Misc.* 1230, *aff'd.* 111 *N.J.L.* 237 (E. & A. 1933). *See also Sagarese v. Board of Health of the Town of Morristown*, 31 *N.J. Super.* 526 (Law Div. 1954);

Terracciona v. Magee, 53 *N.J. Super.* 557 (Cty. Ct. 1959). More specifically, statutes generally will be held to operate prospectively, unless the purpose and intention of the Legislature to give them a retrospective effect clearly appears, *cf. Hannan v. Employers' Commercial Union Insurance Co.*, 117 *N.J. Super.* 485 (Law Div. 1971) or appears from a clear and fair implication. *Nichols v. Board of Education of Jersey City*, 9 *N.J.* 241 (1952), *Burdett v. Municipal Employees Pension Commission of the City of Newark*, 129 *N.J.L.* 70 (E. & A. 1942) and *Connell v. Carpenter*, 9 *N.J. Super.* 236 (App. Div. 1950), or unless retrospective application is necessary to fulfill the legislative intent. *Cf. Hannan, supra* at 489.

In the present matter, the holding in *Kopczynski v. the County of Camden*, 2 *N.J.* 419, 424 (1949) is particularly relevant:

A cardinal rule in the interpretation of statutes is that words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or *unless the intent of the Legislature cannot otherwise be satisfied*. (Emphasis added)

See also *Alongi v. Schatzman*, 57 *N.J.* 564, 578 (1971); *Rothman v. Rothman*, 65 *N.J.* 219, 224 (1974) and *Nickell v. Gall*, 49 *N.J.* 186, 189 (1967).

When seeking to ascertain the intent of the Legislature, factors to be considered (apart from the actual wording) are:

1. The previous state of the law,
2. The circumstances leading to the enactment of the statute, and
3. The evils the statute seeks to remedy. *Chambers v. Toohey*, 14 *N.J. Misc.* 780 (Sup. Ct. 1936). The legislative intent is the "guiding star" *cf. Clarkson v. Ley* 106 *N.J.L.* 380 (1930).

The act in question, *N.J.S.A.* 33:1-12.39, provides as follows:

No Class C license, as the same is defined in R.S. 33:1-12, shall be renewed if the same has not been actively used in connection with the operation of a licensed premises within a period of 2 years prior to the commencement date of the license period for which the renewal application is filed unless the director, for good cause and after a hearing, authorizes a further application for renewal; provided, however that, if the licensee has been deprived of the use of the licensed premises as a result of eminent domain fire or other casualty, and establishes by affidavit filed with the director that he is making a good faith effort to resume active use of the license in connection with the operation of the licensed premise[s] then the period of 2 years provided for in this section shall be automatically extended for an additional period of 2 years.

This statute was designed to end the practice whereby some local issuing

authorities repeatedly renewed licenses without a situs for many years (commonly referred to as pocket licenses), despite the lack of a suitable situs for the license. The statute deprived the local issuing authority of the jurisdiction to renew these licenses unless and until the Director found good cause for the period of inactivity. There was thus established a prior review by the Director which was a *sine qua non* to further renewal by the local issuing authority. Once the Director found that a good cause for the delay and non- activity existed, the local authority was then free to renew if it so wished.

In the statement to Assembly Bill No. 1875 (*N.J.S.A.* 33:1-12.39), dated June 10, 1976, the Assembly Commerce Banking and Insurance Committee stated that:

This legislation (*N.J.S.A.* 33:1-12.39) would prohibit the renewal of a Class C liquor license in the event that such license has not been actively used in connection with the operation of a licensed premises within a period of two years prior to the commencement date of the license period, for which the renewal is filed unless such renewal is authorized by the Director of the Division of Alcoholic Beverage Control.

Similarly, the New Jersey State Senate Law Public Safety and Defense Committee in its statement to Assembly Bill No. 1875, dated November 8, 1976, stated that:

The purpose of this bill (*N.J.S.A.* 33:1-12.39) is to provide for the retirement of unused Class C alcoholic beverage licenses by prohibiting their renewal if they are not actively used for two years preceding the renewal date.

It is clear then that the legislative intent in this matter was to retire and restrict the number of Class C licenses in existence at the time of the passage of the bill. The bill was finally adopted by the State Senate on June 27, 1977, and was enacted into law on October 3, 1977.

If one were to accept the prospective application urged by petitioners, Colalillo and Malloy, it would result in the local issuing authorities not being able to cancel any Class C licenses until the 1980-1981 license year. The 1978-1979 license year would be the first year of inactivity. Therefore, the first year in which a local issuing authority would be bound by the dictates of a statute would be the 1980-1981 renewal license year. This clearly was not the intent of the Legislature.

I **FIND** and **CONCLUDE** that this position is totally inapposite to the legislative intent in this matter. I **FIND** and **CONCLUDE** that the Legislature intended this statute to apply to licenses which were pending for renewal in the next license year after its adoption, *i.e.*, the 1978-1979

renewal year. Therefore, any licenses that were not being actively used since July 1, 1976, would be subject to its provisions.

It should also be noted that this interpretation is consistent with the opinion of the Director of the Division of Alcoholic Beverage Control, dated April 14, 1978 (found in Bulletin 2289, dated July 27, 1978). In the aforementioned bulletin, the Director is of the opinion that:

Any Class 'C' license which has not been used in connection with the operation of a licensed premises since July 1, 1976, becomes subject to the act this year (i.e., 1978-1979).

Although the Director did not cite any authority for this proposition, I **FIND** and **CONCLUDE** that this executive directive was consistent with the applicable provisions of law hereinbefore cited.

In the present matter, the license was last operated in June 1976. There was no application to the Director for good cause authorization for the renewal years 1978-1979, or 1979-1980. It was not necessary to obtain good cause renewal for the 1977-1978 renewal year because the statute had not yet taken effect. (In point of fact the application to the Director for good cause relief was not filed until September of the year 1979.)

I, therefore, **FIND** and **CONCLUDE** that *N.J.S.A.* 33:1-12.39 applies to all licenses which have not been used in connection with an operation of a licensed premises subsequent to July 1, 1978 and all renewals beginning with the 1978-1979 license year became subject to the provisions of the act, as well as the license here in question.

II. DOES THE DIRECTOR OF THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL HAVE AUTHORITY TO GRANT GOOD CAUSE RENEWAL UNDER *N.J.S.A.* 33:1-12.39 "NUNC PRO TUNC?"

Petitioners, in the alternative, seek current good cause authorization by the Director as an application for *nunc pro tunc* order by the Director, that is, they seek to have an order entered now as of the license renewal for the license years 1978-1979 and 1979-1980.

In this matter, instead of filing with the Director under *N.J.S.A.* 33:1-12.39 for good cause renewal, petitioners first obtained approval from the local issuing authority, the Borough of Bound Brook, and filed for good cause approval with the Director some fourteen months later for the 1978-1979 renewal. It should be noted, however, that copies of the petitioners' renewal applications for both years were also filed with the Division of Alcoholic Beverage Control and therefore the Division was always on notice of the state of petitioners' license. Petitioners now seek to correct the

situation by applying to the Director for relief *nunc pro tunc*.

The threshold issue is whether or not the Director has the authority to issue the relief requested by the petitioners. It has been held that:

In the absence of some legislative restriction, administrative agencies have the inherent power to reopen or to modify and to rehear orders that have been entered. . . . [T]he power must be exercised reasonably and application seeking its exercise must be made with reasonable diligence. *Ruvoldt v. Nolan*, 63 *N.J.* 171 (1973), *Burlington County Evergreen Park Mental Hospital v. Cooper*, 56 *N.J.* 579, 600 (1970).

The Director of the Division of Alcoholic Beverage Control is given wide supervisory powers in regard to the manufacture, distribution, and sale of alcoholic beverages in the State of New Jersey. *N.J.S.A.* 33:1-3. As such, he is empowered: to make general rules and regulations, special rulings, and findings as may be necessary for the proper regulation and control of the manufacture, sale and distribution of alcoholic beverages, *N.J.S.A.* 33:1-39; to hear appeals from the suspension or revocation of retail consumption licenses by local issuing authorities, *N.J.S.A.* 33:1-31; to hire and maintain suitable headquarters, and appoint deputies, employees, inspectors, experts and counsel, *N.J.S.A.* 33:1-4; to cancel plenary retail consumption licenses in self-initiated proceedings, *Liptak v. Division of Alcoholic Beverage Control*, 44 *N.J. Super.* 140 (App. Div. 1957); and, with particular note in this matter, to find good use for the renewal of plenary retail consumption licenses which have not been actively used in connection with the operation of a licensed premises within a period of two years. *N.J.S.A.* 33:1-12.39. The Director may promulgate such rules as relate to matters that are or may become necessary in the "comprehensive administration" of the Alcoholic Beverage Act, *N.J.S.A.* 33:1-39. The aforesaid indicates the broad scope of the Director's legitimate field of operation and leaves no doubt that the Director has the authority to issue a *nunc pro tunc* order for a license that has been improvidently granted by a local issuing authority for a prior license renewal year. The Director's broad authority to act in such a fashion has long been recognized by the courts. *Cf. Brush v. Hock*, 137 *N.J.L.* 257 (Sup. Ct. 1948).

It next must be decided whether or not the order *nunc pro tunc* should be entered. In the present matter, if the order is not entered, it will result in a forfeiture of the petitioners' plenary retail consumption license. Forfeitures are not favored by the law, and are to be avoided unless absolutely compelled. *Ali v. Towe*, 30 *N.J. Super.* 19 (App. Div. 1954), *see also Defeo v. Smith*, 17 *N.J.* 183 (1955). Petitioners' plenary retail consumption license was renewed for the 1978-1979 license year and 1979-

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1980 license year by the Borough of Bound Brook, even though there was not resort to the proper statutory procedure, as set forth in *N.J.S.A.* 33:1-12.39. The statute was designed to end the practice of issuing licenses which did not have a situs, and deprived the local issuing authorities of jurisdiction to renew licenses which have not been actively used within a two-year period, unless and until the Director found good cause as set forth in the statute. The objectors set forth the position that these municipal renewals, without the prior authorization of the Director as required by the statute, were a nullity. Such an interpretation would result in forfeiture of the petitioners' license. The Borough of Bound Brook was well aware of its responsibilities under the license, particularly in light of Bulletin No. 2289, dated July 27, 1978, which was issued by the Director of the Division of Alcoholic Beverage Control on April 14, 1978. It was the responsibility of the Borough to advise the licensee, when it discovered that there was no license situs on the license application that the licensee must avail itself of the procedures set forth in *N.J.S.A.* 33:1-12.39. To hold that this licensee must be penalized because of the failure of the municipal issuing authority to advise the licensee that it could not properly renew its license would be inequitable. The authority delegated to an administrative agency should be construed as to permit the fullest accomplishment of legislative intent and the purpose of the statute in question. *Hyland v. Ponzio*, 159 *N.J. Super.* 233 (App. Div. 1978). The purpose of the present statute is not to forfeit licenses which had good cause for not being presently active but to require a preliminary "hearing" in order to ascertain whether or not there was good cause for the non-use of the license. To state, as the objectors urge, that the license should be forfeited, due to an error on the part of the local issuing authority, would be contrary to the statutory intent.

I, therefore, **FIND** and **CONCLUDE** that an order *nunc pro tunc* should be entered setting down a good cause hearing as required by *N.J.S.A.* 33:1-12.39 for the renewal of the petitioners' plenary retail consumption license for good cause hearing for the license years 1978-1979 and 1979-1980.

I further **FIND** and **CONCLUDE** that the hearings on good cause for the license years 1978-1979 and 1979-1980 shall be merged into one hearing.

After reviewing this Initial Decision the
Division of Alcoholic Beverage Control on
May 5, 1981 issued this Final Decision

Having carefully considered the entire record herein, including the transcripts of the testimony, the motions filed, the legal memorandum

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submitted by the parties, the Initial Decision on the Motions, and the written Exceptions filed thereto by the petitioners and the objectors, I concur in the findings and recommendations of the administrative law judge and adopt them as my conclusions herein.