
In re: Silwad Corp.
Cite as 9 *N.J.A.R.* 215

**IN THE MATTER OF THE APPLICATION OF
SILWAD CORPORATION FOR RELIEF
PURSUANT TO THE PROVISIONS OF
N.J.S.A. 33:1-12.39**

Initial Decision: November 2, 1984

Final Agency Decision: February 25, 1985

Approved for Publication by the Director of Division of Alcoholic
Beverage Control, John F. Vassallo, Jr.: October 20, 1986

SYNOPSIS

Silwad Corp. applied to the Director of the Division of Alcoholic Beverage Control for authorizations to renew its plenary retail consumption license, pursuant to *N.J.S.A.* 33:1-12.39, for the 1984-85 license term. In addition, since the license had been inactive since 1974 and the petitioner had received no previous authorizations to renew the license in its inactive state, the petitioner was required to apply for relief for the six previous license terms, *nunc pro tunc*, since this law became effective with the 1978-79 license term.

The matter was forwarded to the Office of Administrative Law for a determination as to whether the petitioner had established good cause as required by the statute.

The administrative law judge assigned to the case ultimately concluded that good cause had been established. Upon review, the Director of the Division of Alcoholic Beverage Control rejected certain aspects of the initial decision concerning findings of fact and conclusions of law, but did concur that petitioner was entitled to relief.

The Director noted that *N.J.S.A.* 33:1-12.39 was enacted to ensure that licenses which are inactive will resume active status within a two-year period or lapse unless the licensee can demonstrate to the Director's satisfaction that good cause exists to allow a license to continue in its inactive status. While good cause will be determined on a case by case basis, the Director will examine those factors which demonstrate a willingness on the part of the applicant to attempt to activate the license. Those factors include: the specific efforts taken; those factors outside the control of the applicant which thwart or delay the efforts to activate; the monetary expenditures incurred towards activation; the need or necessity for any further licenses in the community; and the prognosis as to when the license will be activated.

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The Director further noted that the statute indicates that if the licensee is deprived of the use of the licensed premises because of fire, eminent domain or casualty, a standard of "good faith effort to resume active use" will be applied. In all other cases, "good cause" is required for renewal. In establishing good cause, recognition must be given to the concept that a petitioner must not only demonstrate efforts to activate the license, but also show a realistic prognosis as to when it expects the license to be actively used as well.

In applying those factors to the present case and in reviewing the testimony, the petitioner demonstrated that the license would be activated presumably before the end of the current term. In addition, the licensee noted that for the previous license terms, it had filed the necessary application and fees and the municipality renewed the license, albeit improperly. Therefore, the licensee assumed nothing additional was necessary to complete the renewal process and to a certain extent relied to its potential detriment on the actions of the municipality. The Director authorized renewal of the licensee for the current license term and granted relief for the previous license terms, *nunc pro tunc*, subject to a special condition that no further applications for renewal would be allowed unless the license was being actively used in an approved location on or before June 30, 1985.

Peter J. Melchionne, Esq., for petitioner (Robert S. Damiano, attorney)

Beverly M. Wurth, Esq., for the Borough of East Rutherford (Alfred A. Porro, Jr., attorney)

PERSELAY, ALJ:

This is an application to the Director of the Division of Alcoholic Beverage Control pursuant to the provisions of *N.J.S.A.* 33:1-12.39 to approve a further application for renewal of plenary retail consumption license No. 0212-22-019-001 held by the Silwad Corporation. The license was last used in 1974 and the petitioner corporation made application and received approval from the Division, dated July 13, 1978, authorizing an application for renewal for the 1978-1979 license term.

The Silwad Corporation petitioned the Director under date of May 25, 1984 for authority and approval to renew the aforesaid

alcoholic beverage license for the year 1984-85. A supplemental petition, dated June 15, 1984 was filed. The petition was forwarded to the Office of Administrative Law as a contested case pursuant to the provisions of *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.* and was docketed there on June 27, 1984. The transmittal was accompanied by a memorandum to the Acting Director, Office of Administrative Law from the Deputy Director, Regulatory Bureau. Particularly, requests were made to ascertain the status of the license and applications for the period 1979-1980 through 1983-1984 license terms.

The matter was scheduled for hearing August 16, 1984 and was adjourned at the request of the petitioner's attorney. A hearing was held September 14, 1984 and the record was extended to September 20, 1984 to entertain the receipt of certain documents by the petitioner.

The factual basis for the failure to locate the license between the years 1975 and 1984 are fully set forth in the supplemental petition, dated June 15, 1984, which is incorporated herein by reference as though fully set forth. At the hearing, the president of Silwad Corporation, Amin Gani, testified to the various efforts made to locate the license during the period of time it has been inactive and that an arrangement has now been made for him to purchase all or part of a restaurant known as Catanzaro Seafood House in East Rutherford.

The petitioner submitted into evidence unsigned licenses bearing the license number for the following years:

1979-1980
1980-1981
1981-1982
1982-1983
1983-1984
1984-1985

Mr. Gani testified that each year he made appropriate application and paid the necessary fees to the clerk of the Borough of East Rutherford, including a fee for the State of New Jersey. Each such license fails to contain the seal of the Borough of East Rutherford and the signature of the borough clerk. The licenses have been retained in the borough clerk's office after they had been received by the borough clerk from the Division of Alcoholic Beverage Control.

The petitioner appears to have made reasonable effort to relocate the license in question. Relocation in a small borough with numerous alcoholic beverage licenses, as well as schools and churches, constitutes a difficult situation. Additionally, an attempt was made to locate the license in the industrial section, but that attempt was

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thwarted by title questions. A further attempt was made to place the license in a proposed shopping center which has been the subject of lengthy litigation and the commitment which the petitioner had was dishonored by the appointed receiver in that litigation.

It is apparent to this judge that the applicant has made a good faith effort to relocate its license. It would appear that good cause has been shown that the applicant has made a reasonable and active effort to resume the active use of the license, but has been thwarted in its pursuit by circumstances existing within the community. It is readily apparent that prior application for approval to renew the license between the years 1980 and the present application would have been inappropriate since there was no location in which to renew this license. The purpose of this statute is not to forfeit licenses which had good cause for not being presently active, but to require a preliminary hearing to ascertain if there was good cause for the non-use of the license.

Accordingly, I **FIND** and **CONCLUDE** that the applicant has shown good cause as required by *N.J.S.A.* 33:1-12.39 for the renewal of its plenary retail consumption license. I further **CONCLUDE** that it is appropriate for the Director to authorize a further application for renewal for the year 1984-1985 for premises known as 423 Paterson Avenue, East Rutherford, New Jersey 07073, pursuant to the provisions of *N.J.S.A.* 33:1-12.39.

This recommended decision may be affirmed, modified or rejected by the **DIRECTOR OF THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL, JOHN F. VASSALLO, JR.**, who by law is empowered to make a final decision in this matter.

FINAL DECISION BY THE DIRECTOR OF THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL, JOHN F. VASSALLO, JR.:

No written exceptions were filed by any party with regards to the above-captioned initial decision as provided by *N.J.A.C.* 13:2-19.6. The time provided the Director to make a final determination of this matter was extended until February 26, 1985, by properly executed Orders of Extension dated December 6, 1984 and February 1, 1985, respectively.

The Silwad Corporation petitioned the Director under date of May 25, 1984, for authorization to renew Plenary Retail Consumption License Number 0212-22-019-001 issued by the Mayor and Council of the Borough of East Rutherford for 1978-79, 1979-80, 1980-81, 1981-82, 1982-83, 1983-84, *nunc pro tunc* and the 1984-85 license term.

A supplemental petition, dated June 15, 1984, was received and filed by the Division. The petition was forwarded to the Office of Administrative Law as a contested case, pursuant to the provisions of *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.* and was docketed on June 27, 1984.

The matter was heard on September 14, 1984, and the record was extended to June 20, 1984, to entertain the receipt of certain documents by the petitioner.

At the hearing, the only witness to testify was Amin Gani, president of the petitioner, Silwad Corporation. Mr. Gani testified that the license became inactive during the year 1974 when the lease for the licensed premises was terminated by the owner of the building. The witness further testified that since that time, he has attempted to find a suitable location to place the license and reactivate it but has been unsuccessful due in large part to the 500 foot distance between licensed premises ordinance of the Borough of East Rutherford. The witness states that since 1974, it has made approximately eight attempts to locate the license at various locations within the municipality. Four of these locations violated the distance between premises ordinance of the municipality. One, at the time of closing, was allegedly voided for lack of clear title. Another was voided since the proposed use violated the zoning laws regarding the Meadowlands Development. One was voided as a result of the corporation's entering into receivership and one was not consummated since the building was considered an historical site and apparently pursuant to Borough ordinances, the building's structure could not be changed. The witness testified that at some point in time, he consulted with his attorney who drew a map of the Borough with all the existing premises and found that there was a "very, very slim chance of finding an available location" that was not within 500 feet of an existing premises.

I note that there was no corroborating or documentary evidence submitted to the court or was the map, as testified to by the witness, submitted which would have demonstrated the extent and the efforts that the witness testified to in placement of the license at the different locations. In addition, the petitions as previously set out above were submitted and included by the Office of Administrative Law Judge as part of the record. These petitions basically reiterate the petitioner's testimony and list those locations in which, in the eleven year period, the petitioner attempted to locate the license. Again, no additional documentation was submitted to substantiate the statements and testimony given by the petitioner. In addition, the petitioner submitted

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for evidence a Resolution dated June 19, 1984, by the mayor and Council of the Borough of East Rutherford, stating that it has no objection to the renewal of the subject license.

The petitioner stated that over the last three or four years, it has been negotiating a transfer of the license to an existing restaurant which does not violate the issuing authority distance ordinance or any other distance requirements set out in State statute or regulation. The petitioner indicates that if the relief requested is granted, that the municipality will authorize the transfer.

I note that nowhere in the record is there any documentation of this transaction such as signed contracts or agreements substantiating this testimony.

The licensee further testified that for the years in question, he filed the necessary license renewal applications together with the municipal and State fees, all of which were accepted and that the mayor and Council of the Borough of East Rutherford in each of those years with the exception of the 1984-85 license term renewed the license without informing him that anything additional was necessary in order to complete the renewal procedure. With regards to the 1984-85 license application, the witness testified that the borough clerk informed him that the license could not be renewed by the municipality until authorization was received from the Director of the Division of Alcoholic Beverage Control, pursuant to *N.J.S.A.* 33:1-12.39.

The administrative law judge in recommending authorization to renew pursuant to the above captioned statute for the previous years, *nunc pro tunc* and for the 1984-85 license term, stated in his recommendations,

It is apparent to this judge that the applicant has made a *good faith effort* to relocate its license. It would appear that good cause has been shown that the applicant has made reasonable and active efforts to resume the active use of the license, but has been thwarted in its pursuit by circumstance existing within the community. *It is readily apparent that the prior application for approval to renew the license between the year 1980 and the present application would have been inappropriate since there was no location in which to renew the license.* The purpose of the statute is not to forfeit licenses which had good cause for not being presently active, but to require preliminary hearing to ascertain if there was good cause for the non-use of the license. (Emphasis added).

I totally disagree with this statement and, therefore, reject these findings of the administrative law judge.

A license is not an asset or a property right, but rather “(a) license is a temporary privilege to conduct business in a sensitive and strictly regulated industry.” *Butler Oak Tavern v. the Director of the Division of Alcoholic Beverage Control*, 20 *N.J.* 373, 381 (1956); *In the Matter of the Great Atlantic and Pacific Tea Company, Inc.*, *ABC Bulletin No. 2351*, Item 2 (May 12, 1980). This privilege is for one licensing term, namely from July 1 through June 30 of the following year and must annually be renewed by the issuing authority, pursuant to *N.J.S.A.* 33:1-12.13. In October of 1977, the State placed a condition upon the renewal of any inactive Class C license with the passing of *N.J.S.A.* 33:1-12.39. The obvious purpose of the statute was initially to halt the continuous renewal of licenses which had no status and were not actively used. This is noted in the sponsor’s statement of the act which stated, “the purpose of this bill is to prohibit the renewal of Class C. Alcoholic Beverage Licenses in certain cases.” *L.1977, c.246, §1.*

In addition, the Assembly Committee on Commerce, Banking and Insurance stated, “[this] legislation 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. . . .” The New Jersey Senate Committee on Law, Public Safety and Defense, commented that “[the] purpose of this bill 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.”

The operative purpose or effect of the statute was to insure that licenses which are inactive will resume active status within the two year period or be terminated unless the licensee can demonstrate to the Director’s satisfaction “good cause” to allow the license to continue in its inactive state. The licensee has the burden of proving by a preponderance of evidence that “good cause” exists. *In re Norwick, Inc.*, *ABC Bulletin No 2368*, Item 2 (Oct. 6, 1980).

The Legislature, by choosing not to specifically define the factors that establish good cause, has left the same to the Director who will determine whether good cause exists on a case-by-case basis. *In re The Petition of the Great Atlantic and Pacific Tea Company*, *ABC Bulletin No 2351*, Item 1 (May 12, 1980). “Good cause” ultimately involves an evaluation of the facts and circumstances of each individual case to determine whether the inability of an applicant under

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N.J.S.A. 33:1-12.39 to activate its license is justifiable. Consideration is given to those factors which demonstrate a willingness on the part of the applicant to attempt to activate the license, the specific efforts taken, factors outside the control of the applicant which delay or thwart the efforts to activate, the monetary expenditures incurred towards activation, the need or necessity for any further active licenses in the community, and the prognosis as to when the license will be activated. See *In the Matter of the Petition of the Great Atlantic and Pacific Tea Company*, *ABC Bulletin No 2350*, Item 2 (May 7, 1980). *In the Matter of the Petition of Great Atlantic and Pacific Tea Company*, *ABC Bulletin No 2351*, Item 1 (May 12, 1980). *In the Matter of the Petition of Samuel T. Garrison and Robert C. Garrison*, *ABC Bulletin No 2352*, Item 3 (May 27, 1980). *In the Matter of the Petition of T-J's Liquor and Lounge, Inc.*, *ABC Bulletin No 2359*, Item 3 (July 9, 1980). *In the Matter of the Petition of 4200 Corporation*, *ABC Bulletin No. 2363*, Item 3 (Aug. 8, 1980). *In the Matter of the Petition of Yorkview Corporation*, *ABC Bulletin No. 2365*, Item 1 (Aug. 25, 1980). *In the Matter of the Petition of Normic, Inc.*, *ABC Bulletin No. 2368*, Item 2 (Oct. 6, 1980). *In the Matter of the Petition of Lincoln Motors, Inc.*, *ABC Bulletin No. 2376*, Item 2 (Nov. 12, 1980). *In the Matter of the Petition of Thomas and Rina Francesconi*, *ABC Bulletin No 2410*, Item 1 (Aug. 31, 1981). *In the Matter of the Petition of Giacomo Menei*, *ABC Bulletin No 2412*, Item 3 (Sept. 23, 1981). *In the Matter of the Petition of Magfra, Inc.*, *ABC Bulletin No. 2412*, Item 2 (Sept. 23, 1981).

In evaluating the issue of "good cause," it should also be noted that the statute indicates that if the licensee is deprived of the use of the licensed premises because of fire, eminent domain or casualty, a standard of "good faith effort" to resume active use of the license shall be applied. It is significant that the Legislature required good cause for renewal in other cases involving two years of license inactivity. Thus, the Legislature distinguished "good cause" from "good faith." Therefore, to establish good cause to the satisfaction of the Director, a petitioner must not only demonstrate efforts to activate the license but emphasis must be directed to proof of a realistic prognosis as to when it expects the license to be actively used based upon the facts and circumstances of each individual case. See, *In the Matter of the Petition of the West End Racquet Club*, *ABC Bulletin No. 2367*, Item 1. To construe this distinction in any other matter would not only render the distinction meaningless but would undermine the operative intent of the statute.

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In reviewing the testimony, I will grant authorization to renew the license for the 1984-85 license term based upon the licensee's testimony that the license will be activated presumably before the end of the current license term. I note, however, that without this testimony, such authorization would have been denied.

The petitioner produced no evidence that demonstrated in the past that the continued inactivity was the result of a temporary or finite situation which, when resolved, would allow the immediate activation of the license. The factors presented clearly established that the overwhelming reason for inactivity was the fact that the number of existing licenses issued by the Borough of East Rutherford far exceed the available locations for placing them. This situation represents one which is prevalent throughout the State. There are currently 525 municipalities that issue plenary licenses. Currently, the Division records reveal that 467 of those municipalities either exceed or are at the maximum number of licenses based upon the population limitation as set out in *N.J.S.A.* 33:1-12.13 *et seq.* In addition, of the 9,933 plenary retail consumption and distribution licenses issued in the State of New Jersey, 619 or 6.23 percent are inactive. Therefore, it is readily apparent that due to the excess number of existing licenses, those licenses that are currently inactive in many instances, will be unable to realistically meet the statutory requirements of *N.J.S.A.* 33:1-12.39 since they will be unable to locate alternative premises. With specific regards to the present petition, the evidence indicates that the ordinances of the municipality at least passively seek to freeze the existing licenses to the existing locations. Thus, should the existing site become unavailable, the ability to relocate the license as has been demonstrated by the petitioner, are almost nonexistent. Therefore, to require only good faith efforts without a prognosis of reactivation as indicated by the Office of Administrative Law judge's recommendations would not only be illogical but contrary to the legislative intent of the statute. The petitioner, however, testified that a location is available to place the license which meets the municipal restrictions of the municipal ordinances and it should be activated upon transfer. I will, therefore, based upon the particular facts of this case, authorize renewal of the license for the 1984-85 license term.

The Office of Administrative Law recommendations also note that the prior applications for approval to renew the license for the prior years would be inappropriate since no location existed. I note a review of the statute does not exempt those inactive licenses from the requirements of the statute. As previously indicated, a majority

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of the inactive licenses are inactive because they do not have locations available. To exempt these licenses from the statutory requirements is not only illogical but would create the very situation the Legislature sought to cure. The licensee, however, states that its failure to petition the Director in those previous license terms was based upon the action of the municipality of East Rutherford which accepted the petitioner's application form and necessary fees and renewed the license. The petitioner claims that by such action, it was led to believe that it had completed all the necessary steps or requirements for renewal and that no further action was required on its part to complete the renewal process. It was not until the current license term when the Division notified the Borough that the license could not be renewed without the Director's authorization, that it became aware of the statutory requirements. While the failure or negligence of the Borough of East Rutherford did not eliminate the licensee's statutory responsibility, I do find that the licensee relied to its detriment upon the municipal action and assumed the license was valid. Therefore, although no petition for authorization pursuant to the aforementioned statute, was filed for the 1978-79, 1979-80, 1980-81, 1981-82, 1982-83, 1983-84 license terms, and that these renewals were improperly granted, I shall in this instance, based upon the facts as presented, grant such authorization for renewal for the license terms 1978-79, 1979-80, 1980-81, 1981-82, 1982-83, 1983-84 *nunc pro tunc*. See, *In the Matter of the Petition of Joseph A. Colillo and Donald Malloy, ABC Bulletin No. 2402, Item 1* (June 12, 1981).

Accordingly, it is on this 25th day of February, 1985

ORDERED that the mayor and Council of the Borough of East Rutherford, be and the same, are hereby authorized to consider the application for renewal of the subject license for 1978-79, 1979-80, 1980-81, 1981-82, 1982-83, 1983-84 *nunc pro tunc* and for the 1984-85 license term, and to thereupon, grant or deny such application in the reasonable exercise of its discretion, and it is further

ORDERED that should the mayor and Council of the Borough of East Rutherford grant renewal of said license for the 1984-85 license term, it shall place a condition upon said license stating that no further renewals of this license shall be allowed unless the license is being actively used at an approved location on or before June 30, 1985.

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the companion loose-leaf volume to determine the
history of this case in the New Jersey courts.**