
The Iliad & Odyssey, Inc. v. Northvale
Cite as 9 *N.J.A.R.* 382

THE ILIAD & ODYSSEY, INC.,
Appellant,
v.
MAYOR AND BOROUGH COUNCIL
OF THE BOROUGH OF NORTHVALE,
Respondent.

Initial Decision: April 13, 1983

Final Agency Decision: May 31, 1983

Approved for Publication by the Director of the Division of Alcoholic Beverage Control, John F. Vassallo, Jr.: October 30, 1986

SYNOPSIS

Appellant appeals from the action of the local issuing authority which approved its person-to-person license transfer application but placed a condition upon the transfer that it only operate as a restaurant and could not operate as a discotheque unless it obtained the appropriate zoning board approvals.

The administrative law judge assigned to the case found that at the time of the license transfer, the appellant had consented to the condition placed upon the license but concluded that such action did not constitute a waiver of its fundamental right to appeal. The judge determined that before a condition could be imposed upon the license, the Director of the Division had to first approve that condition. The judge found that the action by the issuing authority approving the transfer "subject to" local zoning board approval was an impermissible condition precedent and thus should be reversed.

Upon review, this decision was rejected by the Director of the Division. Here, the basic transfer (and use) of the premises was fully effectuated; the respondent issuing authority merely required that, before the appellant changed the use of the premises, it first get the approval of the appropriate zoning authorities. The condition was technically surplusage because it merely restated applicable law and imposed no new obligations or restrictions on the appellant.

Accordingly, the special condition imposed by the local issuing authority was affirmed.

Burton C. Cohen, Esq., for Appellant, Iliad & Odyssey, Inc. (Okin, Pressler & Shapiro, Esq., attorneys)

William P. Schuber, Esq., for Respondent, Mayor and Council of Northvale (Contant, Contant & Schuber, attorneys)

ROSA, JR., ALJ:

This is an appeal from the action of the Mayor and Council of the Borough of Northvale, which by resolution, dated July 28, 1982 approved a person-to-person transfer of plenary retail consumption license No. 0240-33-007-002 from William F. Touhey, as trustee in bankruptcy from the North Restaurant Corp. to the Iliad & Odyssey, Inc., and placed a condition, upon the transfer, which limited its operation to a restaurant, and forbade the premises being used as a discotheque.¹ The restriction was further limited and stated that the appellant could not operate a discotheque until it had obtained local zoning board approval.

On August 17, 1982, the appellant allegedly violated the condition by operating a disco on the premises prior to receiving zoning board approval. On August 18, 1982, the Borough issued a notice of charges alleging as follows:

Violation of the "restaurant only" restriction of your license. Said violation allegedly occurred at 10:25 p.m. on the 17th day of August 1982 at which time disco music and dancing were permitted on your licensed premises.

The appellant entered a plea of "not guilty" to the charges.

On August 23, 1982, the appellant filed a Notice of Petition and Appeal with the Division of Alcoholic Beverage Control. In its Petition of Appeal, the licensee contended that the action of the Borough was erroneous in that the action was mistaken, arbitrary, a gross abuse of discretion, that the condition was not intended to accomplish any object of the Alcoholic Beverage Law, that the condition was not supported by any evidence before the issuing authority, that the condition imposed sought to prohibit under the Alcoholic Beverage Law

¹At the meeting of July 28, 1982, Mayor John Rooney stated that all parties agreed that the definition of discotheque was that as could be found in Webster's Dictionary. In Webster's New Collegiate Dictionary, a "discotheque" is defined as "a small intimate nightclub for dancing to live or recorded music; broadly a nightclub often featuring psychedelic and mixed-media attractions (slides, movies, special lighting effects, and kinetic sound). For the purposes of this decision, such definition will be accepted.

what was specifically permitted by the municipal land use law, and that the condition imposed was without notice or opportunity for hearing on the necessity therefore.

On September 8, 1982, an Answer was filed on behalf of the issuing authority which claimed that the imposition of the condition was a proper exercise of the discretion vested in the local issuing authority.

On September 1, 1982, the Director of the Division of Alcoholic Beverage Control, John F. Vassallo, Jr., entered an Order staying imposition of the special condition pending the outcome of the appeal. The matter was then transmitted to the Office of Administrative Law, by the Division, for determination as a contested case pursuant to *N.J.S.A. 52:14F-1 et seq.* and *N.J.S.A. 52:14B-1 et seq.*

A hearing *de novo*, pursuant to *N.J.A.C. 2:17-6*, was held on February 25, 1983, before Administrative Law Judge Joseph Rosa, Jr. At the hearing, pursuant to *N.J.A.C. 1:1-3.1 et seq.*, all parties were given an opportunity to be heard and to cross-examine witnesses.

At the hearing, the parties agreed to submit a Stipulation of Facts on the issues, with the exception of the issue of the possible consent to the condition by the licensee.

The only witnesses presented at the hearing were those who testified in regard to the issue of the possible consent of the licensee to the imposition of the condition. Testifying initially on behalf of the respondent was Ruth Pribish. She testified that:

She is the borough clerk of the Borough of Northvale and was present at the meeting of mayor and Council held on July 28, 1982. She prepared the notes and minutes of the meeting which were submitted in evidence. She stated that the minutes were an accurate reflection of the events that transpired at the meeting, and that to the best of her recollection, Mr. Musico, representing the Iliad and the Odyssey, indicated that he agreed to the restriction which was placed on the license.

Under cross-examination, Mrs. Pribish admitted that her notes of the meeting were not typed up until sometime after the meeting, approximately in the month of September. She admitted that there was sound recording of the meeting, but that it was partially inaudible. She said her notes were the primary basis of the minutes. She admitted that she could not exactly recall what was stated at the meeting.

The next witness on behalf of the respondent was John Rooney. He stated that he was the mayor of the Borough of Northvale, and was present at the meeting in question. Prior to the meeting, he had

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ascertained that the license, before being issued to the Iliad & Odyssey, Inc., had not been used for a disco. He and the rest of the governing body, therefore determined that they would not issue the license without a restriction as to its operation as a disco.

He specifically recalls himself, and the Borough attorney, asking the applicant, on at least two occasions, if this condition, *i.e.*, that it not be operated as a disco without prior zoning board approval, was acceptable to the applicant, and the applicant agreed that it was.

Under cross-examination, Mayor Rooney admitted that the minutes of the meeting were not a verbatim reflection of the meeting and also that the applicant did not have an attorney at the meeting when he allegedly agreed to the imposition of the condition.

Testifying on behalf of the appellant was Rocky C. Musico. He stated that:

He was the brother of the applicant for the transfer, and was present at the meeting when the transfer took place. He did not specifically recall any mention of Board of Adjustment approval at the transfer hearing, and stated that his brother never agreed to the imposition of the disco condition.

Under cross-examination, he admitted that he did hear Mayor Rooney speak about a disco, but did not recall the mayor saying that the premises could not be used as a disco.

After carefully reviewing all the evidence and testimony, I **FIND** that:

1. The foregoing discussion and the uncontroverted facts contained therein are incorporated herein by reference.
2. The appellant Iliad & Odyssey, Inc., is the holder of plenary retail consumption license No. 0240-33-007-002, heretofore issued by the Borough of Northvale.
3. The Stipulation of Facts agreed to by the parties is incorporated herein as if set forth fully.
4. The licensee consented to the condition placed upon the transfer of the license.

In view of the foregoing, I **CONCLUDE** that the appellant has proven by a preponderance of the believable evidence that the action of the respondent issuing authority was erroneous, and should be **REVERSED**.

In licensure proceedings (*e.g.*, renewals, transfers, good cause, etc.) the decision of the municipality in granting or denying an application is to be upheld by the Director so long as its exercise of judgment and discretion was reasonable. *Fanwood v. Rocco*, 33 *N.J.*

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404, 414-415 (1960); *Lyons Farm Tavern v. Municipal Board of Alcoholic Beverage Control of the City of Newark*, 55 N.J. 292 (1970); and *Nordco, Inc. v. State*, 43 N.J. Super. 277 (App. Div. 1957). The municipality's action must not be an arbitrary exercise of its discretion.

It should also be observed that it is firmly established that no one has a right to the issuance, or transference, of an alcoholic beverage license. *Zicherman v. Driscoll*, 133 N.J.L. 586 (Sup. Ct. 1946); *Biscamp v. Township of Teaneck*, 5 N.J. Super. 172 (App. Div. 1949). The decision as to whether or not a license should be transferred rests within the sound discretion of the local issuing authority. *Paul v. Brass Rail Liquors*, 31 N.J. Super. 211 (App. Div. 1954), which has the initial authority to approve or disapprove place-to-place transfers. The authority is vested with a high responsibility, a wide discretion and is to have as its principal guide the public interest. *N.J.S.A.* 33:1-19, 24. See also, *Rajah Liquors v. Division of Alcoholic Beverage Control*, 33 N.J. Super. 598 (App. Div. 1955); and *Blanck v. Mayor and Council of Magnolia*, 38 N.J. 484 (1962). The action of the local issuing authority in either approving or denying an application for a transfer may not be reversed by the Director unless in the first instance he finds its action to be contrary to logic based on the presented facts, see, *Hudson-Bergen County Retail Liquor Store Assoc. v. Hoboken*, 135 N.J.L. 502, 511 (E.&A. 1947); and *Passarella v. Board of Commissioners, Atlantic City*, 1 N.J. Super. 313 (App. Div. 1949). The Director conducts a *de novo* hearing on appeal, *N.J.A.C.* 13:2-17.6, and makes the necessary factual and legal determinations on the record before him. The Director will abide by the municipality's grant or denial of the application so long as the exercise of the judgment and discretion of the local board is reasonable. If the decision of the local board,

... represent(s) a reasonable exercise of discretion on the basis of the evidence presented ... it ends the matter of review by both the Director and by the courts. *Lyons Farm Tavern v. Municipal Board of Alcoholic Beverage Control of the City of Newark*, 55 N.J. 292, 307 (1970).

This standard has been set down because the courts have felt that in reviewing licensure matters, it is improper for the Director to "intervene and to substitute his judgment for that of the Board" *Lyons Farm, supra.* at 307. The courts and the Legislature have thus recognized that, ordinarily, local officials are thoroughly familiar with their community's characteristics, and the nature of a particular area

where a license is proposed to be located. The Director and the courts, therefore, place great reliance on local action and local opinion. Absent a manifest mistake, or abuse of discretion, the Director may not reverse the action of a local board. Cf. *Florence Methodist Church v. Township Committee, Florence Township*, 38 N.J. Super. 85 (App. Div. 1955) and *Fanwood v. Rocco*, 33 N.J. 404, 414-415 (1960). Even if there is an honest difference of an opinion in the exercise of discretion for or against the license transfer, the action of the local issuing authority in approving or denying the transfer should not be disturbed. *Paul v. Brass Rail Liquors*, 31 N.J. Super. 211 (1954).

However, if the municipal action is unreasonable, improperly grounded, or not based on the facts presented, the Director may grant such relief or take such action as is appropriate. *Common Council of Hightstown v. Hedy's Bar*, 86 N.J. Super. 561 (App. Div. 1965); *N.J.S.A. 33:1-26*; *N.J.S.A. 33:1-22*; *N.J.S.A. 33:1-38*; *Mayor and Council, Borough of Totowa v. Chicken Barn, Inc.*, 41 N.J. Super. 459 (App. Div. 1956); and *South Jersey Retail Record Dealers Assoc. v. Burnett*, 125 N.J.L. 105 (Sup. Ct. 1940).

Special conditions can be attached to a license, pursuant to *N.J.S.A. 33:1-32* and *N.J.A.C. 13:2-2.13*. They may be attached to a license at issuance, transfer or renewal. The local board has the full right and power to impose conditions on the issuance of the license, *Mayor and Council of Hoboken v. Greiner*, 68 N.J.L. 592 (Sup. Ct. 1902); and *Board of Commissioners of Belmar v. Division of Alcoholic Beverage Control*, 50 N.J. Super. 423 (App. Div. 1958).

There are, however, certain restrictions upon the imposition of the conditions. Among these conditions is the requirement of the prior approval of the Director. Tangentially, it should be noted that in the present proceeding, the issuing authority did not have the condition given the prior approval of the Director, and on that basis alone, their action was unreasonable.

I further **CONCLUDE** that the action of the issuing authority, i.e., that is the approval of the transfer subject to local zoning board approval is in clear contravention of the holding in *Lubliner v. Board of Alcoholic Beverage Control of the City of Paterson*, 59 N.J. Super. 419 (App. Div. 1960), aff'd, 33 N.J. 428 (1960). Where the Appellate Division held:

The issuance of a license or the grant of a transfer does not permit the licensee to operate without complying with all applicable statutes and ordinances, including zoning ordinances, building codes, health codes and the like. It may be that Hutchins will

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need a variance or other relief before he can operate a tavern at 39 Carroll Street, but he is not required to obtain it before the grant of the transfer. Cf., *Passarella v. Board of Comm.*, 1 N.J. Super. 313 (App. Div. 1949).

The disposition of this issue was affirmed by the Supreme Court.

In dealing with that contention the Appellate Division properly pointed out that the grant of Mr. Hutchins' application would in nowise permit him to operate in contravention of any applicable zoning provisions; if he ever attempts to so operate, relief is readily available. *Lubliner, supra* at 435. See, *Garrou v. Teaneck Tryon Co.*, 11 N.J. 294 (1953).

It is clear that the local issuing authority had no authority to condition the transfer of the license upon subsequent zoning board approval, and on those grounds their action should be reversed.

There is also the issue present in this matter of whether or not the applicant agreed to the imposition of the condition thus creating an estoppel situation which would bar the transferee from raising the issue of the illegality of the condition at a subsequent date. There was conflicting testimony as to whether or not the applicant agreed to the imposition of the condition. The minutes of the meeting, and the testimony on behalf of the respondent indicated that he had. The testimony on behalf of the applicant indicated that he had not. This issue, therefore, becomes a question of acceptance or rejection of the respondent's or the applicant's testimony as to whether or not consent was given. The choice of accepting or rejecting the testimony of witnesses rests with the trier of fact. *Atkinson v. Parsekian*, 37 N.J. 143 (1962). I have chosen to accept the testimony offered by the respondent in this regard. Both the mayor and the Borough Clerk testified as to the recollections of the meeting. Their recollections are buttressed by the minutes of the meeting. Although the minutes are not a verbatim transcript of the meeting, they have not been shown by the licensee to be inherently unreliable. All that the applicant has shown is the somewhat clouded recollection of the brother of the applicant, and it was his opinion that his brother did not consent to the condition. Mr. Musico did however say that he remembered Mayor Rooney speaking about a disco. I choose to believe that the respondent was not attentive enough at the meeting, and did not hear his brother consenting to the condition.

However, I **CONCLUDE** that even if the applicant agreed to the condition he did not agree to waive his right to appeal that condition. There is a strong presumption against waiver of fundamental rights.

State v. Bellucci, 81 *N.J.* 531, 544 (1980). Certain rights may be waived only with sufficient awareness of the relevant circumstances and likely consequences. *United States v. Dolan*, 570 *F.2d* 1177, 1181 (3d Cir. 1978); *State v. Morgenstein*, 147 *N.J. Super.* 234, 237 (App. Div. 1977). I agree with the applicant's contention that "any consent to an illegal condition, given at a public meeting, without benefit of counsel, and without explanation of appellant's rights with respect thereto, cannot amount to a waiver." I agree that in the present matter the action of the applicant at the meeting would not bar him from subsequently appealing the imposition of the condition. I therefore **CONCLUDE** that the action of the local issuing authority was erroneous and should be **REVERSED**.

It is therefore **ORDERED** that the application for transfer of plenary retail consumption license No. 0240-22-007-002 from the trustee and bankruptcy of North Restaurant Corp. to the Iliad & Odyssey, Inc. is hereby approved without any special condition upon the license.

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 exceptions to the initial decision were filed by the parties in connection with the above captioned proceeding, pursuant to *N.J.A.C.* 13:2-17.14. Nevertheless, for the reasons stated below, I shall reject the decision of the administrative law judge in this case, and uphold the action of the respondent-local issuing authority.

The appellant is appealing the action of the respondent-issuing authority which, when it approved a person-to-person transfer to the appellant, placed a condition upon the transfer, which limited appellant's operation to a restaurant, and forbade the premises from being used as a discotheque without receiving an appropriate zoning variance. The administrative law judge, in concluding that the action of the issuing authority was erroneous and should be reversed, based his conclusions on three grounds.

The judge initially concluded that before a condition could be imposed on the license, the Director had to first approve that condition. Secondly, the judge found that the approval by the issuing

authority of the transfer, was "subject to" local zoning board approval, and therefore was in contravention of the case law. Finally, although the judge found, as a finding of fact, that the licensee consented to the condition placed upon the transfer of the license, the judge concluded that he had not waived his right to appeal that condition.

Regarding the judge's first conclusion, I note that he has incorrectly applied the law concerning the Director's "required" prior approval of a special condition. Finding none, he determined that the proceedings below, on that basis alone, were unreasonable. In fact, it has long been the position of the Division, that the failure to submit special conditions for approval by the Director prior to the issuance of a license is a mere technicality, and, when timely raised, will be considered on the merits, *nunc pro tunc*. *DeLuccia v. Paterson, A.B.C. Bulletin No. 1240*, Item No. 1 (Sept. 10, 1958).

The judge further erred when he concluded that, the action of the issuing authority in approving the transfer "subject to" local zoning approval, was in clear contravention of the holding in *Lubliner v. Board of Alcoholic Beverage Control of the City of Paterson*, 59 N.J. Super. 419 (App. Div. 1960), *aff'd*, 33 N.J. 428 (1960).

It is clear that, in the within referenced case, the license was *not* transferred *subject to* zoning board approval. It was transferred with the special condition attached that should the appellant wish to use the premises as a discotheque rather than as a restaurant, it would have to first obtain zoning board approval.

The *Lubliner* case held that an approval of the transfer would not be illegal or erroneous because the premises, when transferred might be placed in a location which, by zoning ordinance, prohibited taverns. The *Lubliner* case, therefore, merely indicated that a local issuing authority could approve a transfer without first waiting to determine whether the licensee had obtained all appropriate zoning clearances. Although it is true that proceedings before an alcoholic beverage issuing authority should not decide factual zoning matters, *Lubliner* does not prevent a transfer of a license whose activation is made subject to such determinations. In fact, it specifically permits such a procedure. *See also, Holiday Inn, Inc. v. Paramus, A.B.C. Bulletin No. 2315*, Item No. 3 (March 14, 1979).

Nevertheless, the present case is even further removed from the *Lubliner* situation. Here we have the basic transfer (and use) of the premises fully effectuated; the respondent-issuing authority merely

required that, before the appellant change the use of its premises, it first get the approval of the appropriate zoning authorities. Such acts were required both by ordinance and case law. *Lubliner, supra*, at 433. Since this special condition merely restated applicable law, at the most it can be considered no more than surplusage and without effect, by itself, on the rights of the appellant.

Finally, it is not necessary to address the judge's finding that the appellant, by agreeing to the condition of the local hearing, did not waive his right to appeal that condition. Factual situations in any case may or may not support such proposition. To evaluate same herein is not required since the condition has been sustained.

While the initial decision references the preferment of disciplinary charges against the appellant on August 18, 1982, for alleged violation of the special condition on August 17, 1982, there is no record of any disposition of that matter. Since the within appeal does not address any disciplinary action, the Order herein shall concern the actions of the local issuing authority on appellant's transfer application.

A review of the record indicates no evidence that the condition imposed was an improper one or an unreasonable exercise of the respondent's authority. Therefore, since such condition was not unreasonable nor was it an improper exercise of the issuing authority's power, I find the conclusions reached by the judge to be without foundation.

Accordingly, it is on this 31st day of May, 1983,

ORDERED that the action of the Mayor and Council of the Borough of Northvale be and the same is hereby affirmed, and the appeal therefrom be and is hereby dismissed; and it is further

ORDERED that the order entered September 1, 1982, staying the imposition of the special condition pending determination of the appeal, be and same is hereby vacated.

**You must check the New Jersey Citation Tracker in
the companion looseleaf volume to determine the
history of this case in the New Jersey courts.**