STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 Commerce Drive Cranford, N.J. 07016

BULLETIN 2110 August 8, 1973

TABLE OF CONTENTS

ITEM

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 Commerce Drive Cranford, N.J. 07016

BULLETIN 2110

August 8, 1973

1. APPELLATE DECISIONS - BALZER'S DELICATESSEN INC. v. TEANECK.

Balzer's Delicatessen Inc., t/a Heritage Liquors,
Appellant,
v.
Township Council of the Township of Teaneck,
Respondent.

On Appeal

CONCLUSIONS and ORDER

Samuel J. Davidson, Esq., Attorney for Appellant
Jacob Schneider, Esq., by Stephen J. Draisin, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the Township Council of the Township of Teaneck (hereinafter Council) which on February 7, 1973 suspended appellant's plenary retail distribution license for premises 1356 Teaneck Road, Teaneck, for nine days after finding appellant guilty of a charge alleging that on January 3, 1973 it sold alcoholic beverages to a minor, age 17, in violation of Rule 1 of State Regulation No. 20. No specific dates were set for the said suspension by the Council.

Appellant contends that the action of the Council was erroneous in that (1) it ignored the defenses available to appellant under N.J.S.A. 33:1-77; (2) its findings were based upon insufficient evidence and were arbitrary, capricious and contrary to law. The Council denied these contentions and asserted that its decision was based upon sufficient evidence, upon which it based its determination.

The appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15; on its behalf, counsel for appellant introduced into evidence transcript of the proceedings before the Council, pursuant to Rule 8 of State Regulation No. 15.

At the outset of the hearing counsel for both parties stipulated the admission into evidence of (a) a copy of the statement of the charge, (b) admission that the minor involved appeared to be over eighteen years of age, (c) copy of the report of the arresting police officer, and (d) originals of certifications received by appellant from persons appearing under the age of eighteen that they had reached their majorities, covering period January 1 through January 3, 1973.

Appellant produced the testimony of the three corporate owners of appellant corporation. James R. Brown testified that on January 2, 1973 (the day prior to the alleged offense), the minor Michael --- visited the licensed premises and purchased some beer after signing a representation form based upon the production of a license or permit to drive. The following day the minor returned, at about 6 p.m., to purchase more beer and Brown advised his associate Alfred Hairston, then tending the counter, that Michael --- had previously produced proof of age and was eligible to make a purchase. All of the slips obtained from apparent minors during that day and the previous day were shown to the witness who averred that one of them had been signed by Michael but he could not identify which one, as Michael had given a fictitious name.

The certificates in evidence bore both the signature of the apparent minors as well as that of the person who had made the sale. On the bottom line of these slips is a place for "Identification presented", on some of which the words "Driver License" appear, others "Birth Cert."

Alfred Hairston, another corporate owner of appellant corporation, testified that he had been on duty in the licensed premises on January 3 between 6:00 and 10:30 p.m. He had seen Michael --- in the store on that evening on two occasions -- the first about 6:15 p.m. when Michael exhibited a license and birth certificate but indicated that he had produced such identification on the day previous, whereupon Hairston inquired of Brown if that was the fact and, receiving assurance from Brown, served Michael without requiring further written representation.

Hairston admitted on cross examination that he never saw the written representation allegedly signed by Michael, and relied solely on Brown's assurance.

The remaining corporate owner, Ronald A. Augustus, testified solely in corroboration of the procedure used when apparent minors wish to make purchases. They must produce proof of age by some official identification and sign a representation form similar to those in evidence.

Neither the minor nor the arresting officer was called upon to testify at the hearing in this Division, reliance being placed upon testimony adduced at the hearing before the Council. The then testimony of the minor revealed him to be an uncommunicative witness whose laconic responses were far from positive. However, he admitted producing a driver's permit which he had found and later threw away, and with it obtained the beverages. His visit to the licensed premises on the evening in question was a solitary visit; he had last been in the premises two weeks previously. He denied signing any representation of age.

That the minor purchased alcoholic beverages in appellant's premises is not in dispute, nor is there any question concerning his appearance resembling a person over the age of eighteen. The sole and remaining question is the crucial issue in this matter -- was the sale to the minor made according to and in reliance of N.J.S.A. 33:1-77 and, if so, was the procedure used by appellant consonant with both that statute and the regulation pertaining to it. Rule 1 of State Regulation No. 20.

The above statute (N.J.S.A. 33:1-77), which details available defenses to charges of selling to minors, requires that the minor (a) falsely represents that he is of age. Michael readily admitted that he did make such false representation; further, (b) that the appearance of the minor would lead a prudent person to believe that representation. Such appearance was admitted by both parties hereto. Finally, the representation relied upon must be in writing, with reliance placed upon such written representation. (Underscore added.)

Appellant contends that, as it obtained a written representation from each apparent minor, including Michael ---, and relied upon such representation, its defense is secure. Counsel for appellant vigorously contended that the reliance upon representation was no mere conjecture but, rather, a conclusive result of inferential proof. Citing Riker v. John Hancock Mutual Life Ins. Co., 129 N.J.L. 508 at 511 (1943), in which the court said:

> "... It is not easy to lay down with precision the line of demarcation between a just and reasonable inference and mere conjecture or surmise. The accepted standard of persuasion governing the triers of the facts is that the determination be probably founded in truth.... A mere quantitative preponderance does not suffice. It is requisite that the evidence be such as to lead a reasonably cautious mind to that conclusion...."

Argument was advanced that the procedure admittedly used by appellant respecting the garnering of information from apparent minors must surely have been applied to the sale to the apparent minor here. Further reference was made to Loew v. Union Beach, 56 N.J. Super. 93 (App.Div. 1959), in which the court, at p. 104, cited Joseph v. Passaic Hospital Association, 26 N.J. 557 (1958):

> "'Reasonable probability' is the standard of persuasion, that is to say, evidence in quality sufficient to generate belief that the tendered hypothesis is in all human likelihood the fact; the measure of the weight of the evidence is the feeling of probability which it engenders."

In applicability of that doctrine, counsel further cited a series of decisions in this Division maintained to be applicable to the matter sub judice. Perlowski v. Jersey City, Bulletin

1458, Item 1; Collazo v. Elizabeth, Bulletin 1410, Item 1; Wasserman v. Newark, Bulletin 1590, Item 1; Lysaght v. Denville, Bulletin 1490, Item 1. Other cases cited (Luisi v. Orange, Bulletin 1814, Item 3, and Re Vacston Co., Bulletin 2036, Item 4) have no applicability to the issue herein; they do not involve sale to minors or establish principles pertinent here. The matters above cited, upon which appellant relies however, each involves a situation where the premises from which the minor allegedly obtained the liquor was in dispute; such is not the situation present in the instant case and, hence, the cited matters have no pertinency.

Reviewing the testimony of appellant's witnesses, as well as the items introduced into evidence as written representations of age of apparent minors, it is glaringly apparent that the sale to the subject minor which resulted in his apprehension and the preferment of the charge against appellant did not fall within the protective cloak of N.J.S.A. 33:1-77. Although the words "Driver License" or "Birth Cert." appear, there appears no corrollary information indicating either the number of the certificate, reference to height and weight, color of eyes, all of which appears on such licenses, or the place of birth and names of parents which appear on birth certificates. Additionally, Hairston, the sales clerk, admitted no written representation was made by Michael at the time of sale; that he relied solely upon the word of Brown who had presumably obtained the same the day before the date charged herein.

Display of a driver's license has long been held to be insufficient upon which a sale to a minor posing as an adult could be used as a defense. Sportsman 300 v. Nutley, 42 N.J. Super. 488 (App.Div. 1957). This doctrine has been long since followed and most recently in Re Ano, Inc., Bulletin 2092, Item 4; Re Camden Liquor Corp., Bulletin 2076, Item 5; Re Urna, Bulletin 2042, Item 7; Re Druda, Bulletin 2033, Item 4; Re Obay, Inc., Bulletin 2014, Item 5.

It is to be noted that this matter is of minor novel impression in that to date the determination of majority had as criteria the age of twenty-one; this matter falls under the new statute (Chapter 81, Laws of 1972) which establishes age eighteen as the age of majority. Upon the passage of and effective date of that statute, the Director of this Division promulgated a notice to be sent to all licensees (see Bulletin 2075, Item 7). That notice contained the following advisory that is pertinently applicable, as follows:

> "The State Alcoholic Beverage Law (N.J.S.A. 33: 1-81.2 et seq.) presently provides for the issuance by county clerks of identification cards to persons who have reached the age of 21 years. The cards bear the applicant's photograph and attest to such persons's age. The cards are issued for the purpose of aiding liquor licensees to determine whether a prospective purchaser of alcoholic beverages is in fact 21 years of age or older. The cards are to be shown at the request of a licensee,

but their presentation does not relieve a licensee from his responsibility to prevent any sale of an alcoholic beverage to a minor. In order for a licensee to be relieved of his responsibility for such a sale, the licensee must still obtain from the under-age patron a signed statement in the form found on page 87 of the Division's Rules and Regulations Pamphlet, that he or she is of legal age, the patron must reasonably appear to be of legal age, and the sale must have been made in good faith and reliance upon such signed statement and reasonable appearance.

"Although the new law giving 18 year-olds the right to purchase alcoholic beverages on and after January 1, 1973 does not expressly refer to the right of any 18, 19, or 20 year-old to obtain such an identification card from a county clerk, the Attorney General has ruled that the new law should be interpreted to effect such change. Thus, effective January 1, 1973, county clerks may issue these cards to persons 18 years of age or older and liquor licensees should request their presentation from persons who appear to be less than 18 years of age."

Thus, the form referred to on Page 87 of the above pamphlet, while in the form of that used by appellant, was of little use in the absence of such an identification basis as hereinabove required. Appellant's employees not only did not require the proper identification card, but did not obtain such supplementary data, as hereinabove described, upon which their good faith could be predicated. I therefore conclude that this charge was established by a fair preponderance of the credible evidence. Hence appellant has failed to establish that the action of the Council was erroneous and should be reversed, as required by Rule 6 of State Regulation No. 15.

Accordingly, it is recommended that an order be entered affirming the action of the Council, dismissing the appeal, and fixing the effective dates for the suspension imposed by Council and not effectuated by the Council pending determination of this appeal.

Conclusions and Order

Written exceptions to the Hearer's Report were filed by the attorney for appellant pursuant to Rule 14 of State Regulation No. 15.

I find that the matters contained in the exceptions have either been considered and satisfactorily resolved by the Hearer in his report or are without merit. Particularly addressing the subject of the duty of the licensee to comply with the applicable statute, N.J.S.A. 33:1-77, a sale to an apparent minor must be predicated upon a written representation.

While appellant contended that the apparent minor had, in fact, given such representation on the previous day (which was denied by the said minor) the sale in question was not predicated upon a written representation then given for that sale. Licensees should be further admonished that failure to support their action with such supplementary data derived from the documentation relied upon, such as driver's registration number and the physical characteristics indicated thereon, lead to the inescapable conclusion that such reliance was not made in good faith. The Hearer properly referred to the Notice submitted to all licensees as set forth in Bulletin 2075, Item 7.

Having carefully considered the entire record herein, including the transcript of the testimony, the Hearer's report and the exceptions filed thereto, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 5th day of June 1973,

ORDERED that the action of respondent be and the same is hereby affirmed and the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that the prior order staying the suspension imposed by respondent pending the determination of this appeal, be and the same is hereby vacated; and it is further

ORDERED that Plenary Retail Distribution License D-5, issued by the Township Council of the Township of Teaneck to Balzer's Delicatessen Inc., t/a Heritage Liquors for premises 1356 Teaneck Road, Teaneck, be and the same is hereby suspended for nine (9) days commencing 2:00 a.m. on Tuesday, June 19, 1973 and terminating 2:00 a.m. on Thursday, June 28, 1973.

Robert E. Bower
Director

2. APPELLATE DECISIONS - JAY-BAR CORP. ET ALS. v. CLIFTON ET AL.

Jay-Bar Corp., et als.,

Appellants,

v.

Municipal Board of Alcoholic Beverage Control of the City of Clifton, and Botany Village Liquors, t/a Village Spirits Shoppe,

Respondents.

On Appeal

CONCLUSIONS and ORDER

Ladislas F.Feher, Esq., Attorney for Appellants
Arthur J. Sullivan, Jr., Esq., by Leon Klein, Esq., Attorney for Respondent Municipal Board
William P.Schey, Esq., Attorney for Respondent Botany Village Liquors

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the Municipal Board of Alcoholic Beverage Control of the City of Clifton (hereinafter Board) which on November 1, 1972 approved a person-to-person and place-to-place transfer of a plenary retail distribution license from Johan Giezen, t/a Willy's Wines & Liquors, to respondent Botany Village Liquors, t/a Village Spirits Shoppe, and from premises 110 Knapp Avenue to 9 Botany Village Square, Clifton.

Appellants' petition of appeal challenges the Board's action on the following grounds: (a) its action was arbitrary; (b) its determination impairs the public welfare of the citizens; (c) its action results in an over-saturation of like businesses in the area; (d) its action was contrary to the area redevelopment concept; (e) the statements of members of the Board at the adoption of its resolution reflect an erroneous view of the powers of the Board, and (f) the application was erroneous and incomplete and should not have been approved.

The Board and respondent Botany Village Liquors both denied these contentions; the Board denial was merely pro forma without stating the reasons for its actions.

The hearing in this Division was de novo pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded counsel to introduce evidence and cross-examine witnesses.

At the outset of the hearing counsel for appellants moved for a directed verdict on the pleadings against respondents based upon the Board's failure to state the reasons for its action in its answer, citing the requirement of Rule 4 of State Regulation No. 15 which requires "... The answer filed by the respondent issuing authority shall include a statement of the grounds for its action." Appellants contended that the Board's answer "Respondent denies the allegations of Paragraph 2 of the Petition of Appeal" is not compliance with the aforesaid Rule.

Determination of the motion was reserved pending the preparation of this report and its recommendations. The apparent reason behind the rule is to provide for proper notification to appellant so that the burden of establishing that the action of respondent issuing authority was erroneous could be properly met. It is noted in the instant matter that the answer to the petition as filed by respondent Botany Village Liquors does allege that the Board considered all of the facts and circumstances pertaining to the transfer. That response coupled with the general denial of the Board does apprise appellants of the issue to be resolved and the absence of a particular statement of the grounds for action as required by Rule 4 does not in this matter unduly prejudice appellants. It is recommended that the motion be denied. Cf. Cino v. Driscoll, 130 N.J.L. 535 (Sup. Ct. 1943).

Two of its members testified on behalf of the Board. Board member William Carlson testified that he voted affirmatively on the resolution approving the transfer for the reasons that the ordinance limitation of five hundred feet distance between plenary retail distribution licensees was not violated, and the new area to which the transfer was approved will, with the advent of new shoppers to this new shopping area, result in no over-saturation of licenses. Additionally he stated that the operation of the licensed business at the old location was in a general residential area and the business was only casually operated. He was candid in his admission that he had not noted several omissions in the application.

Another Board member, Joseph Kolodziej, testified that he voted against the transfer because the area was already saturated with licensed premises and that the establishment of Botany Village provided an area for new type businesses and was not intended as a place for transfer of existing businesses.

Appellants each testified in the same manner, registering their objections to the transfer on the basis of the number of licensed premises in the area of Botany Village, the oversaturation of licenses, and that their understanding of the concept upon which the project was initially encouraged was to provide for new and different businesses to be attracted to that area.

Two neighbors to the area (William M. Zerden and Howard C. Johnson) both voiced disapproval at the transfer because of the

number of licensed premises in the area. Zerden is a member of the Botany Village Merchants Association composed of businessmen in the area. That association registered its objection to the transfer by a letter to the Board, a copy of which letter was introduced into evidence.

The Director of the Urban Renewal Projects for the City of Clifton (William R. Walters) testified at length on the background and development of the Botany Village Project. This twenty-seven acre area immediately adjacent to the neighboring city (Passaic) and the large industrial plants was sorely in need of rehabilitation. Through the assistance of the Federal Housing and Urban Development Agency, the city received the necessary financial assistance to demolish all of the buildings in one city block of the twenty-seven acre area. That block was designed to provide for an 'L' shaped shopping plaza surrounding a large parking area. At the juncture of the 'L', provision was made for one large store, about to be occupied by an A&P supermarket, on either side of which were other stores for a variety of businesses. One of these stores is the proposed location of the transferred premises. At the end of the 'L' is located a restaurant which possesses a 'C' license. There is no other plenary retail distribution license facility in the complex itself. He denied that such a package-goods store would violate the initial concept of the shopping plaza but admitted he counseled the Botany Village Merchants Association in connection with its objections to one.

Board Chairman Herman Schmidt did not testify. Board member Kolodziej admitted that prior to the hearing he had already made up his mind that the application should be denied because of the concentration of licenses in the area. As noted, Board member Carlson had voted affirmatively.

The Board Secretary (Irene Olivo) testified that she takes stenographic notes at the meetings and, while such notes are not a transcription of all oral statements, they are an outline of the pertinent things the members, attorneys and members of the public say. She offered the minutes of the meetings of the Board held on October 11 and November 1, 1972, respectively. The resolution of the Board adopted November 1, 1972, in connection with the subject transfer was introduced. The expressions of the individual Board members have pertinency with respect to the Board's action. Such comments are as follows:

> "Commissioner Carlson: I have looked into this situation and find that these applicants meet the requirements of the City. I also feel that other licensees in the area had equal opportunity to request a transfer into this mall area if they so desired. I have reviewed the area and find a variety of business already there. For these reasons I must vote in favor of transfer."

> "Commissioner Kolodziej: No for the following reasons: I believe the area is over-saturated with licenses and two, Botany Village was constructed to

introduce new businesses and to generate an interest for the entire area."

"Commissioner Schmidt: I have to agree with Mr. Kolodziej on most of his reasons but I must vote 'yes' for the following reasons: Council has set rules and regulations as to distance and this applicant meets the requirements also, this Board does not have the power to decide whether the area is too crowded; therefore I must vote yes for the reasons as set forth."

The distance requirement as referred to by Board Chairman Schmidt is covered by the local ordinance (Section 5-4: Alcoholic Beverages) which provides the following:

"No plenary retail distribution license shall be issued for, nor transferred to, any premises being within a radius of 500 feet of any other plenary retail distribution licensed premises. The said distance shall be measured from the nearest front entrance of the existing licensed premises to the nearest front entrance of the premises sought to be licensed...."

Reference was made throughout the testimony to a plan of the area, Botany Village, dated 1970 upon which were inserted locations of both "C" and "D" licenses in the area. That plan indicated that the place to which the present transfer was approved was not violative of the above distance proscription.

The burden of establishing that the action of the Board in granting the transfer was erroneous and should be reversed rests with appellant. Rule 6 of State Regulation No. 15. It has been consistently ruled that no one has a right to the issuance or transfer of a license to sell alcoholic beverages. Zicherman v. Driscoll, 133 N.J.L. 586 (Sup.Ct. 1946); Biscamp v. Teaneck, 5 N.J. Super. 172 (App.Div. 1949). The decision as to whether or not a license will be transferred to a particular locality rests in the first instance within the sound discretion of the local issuing authority. Hudson-Bergen County Retail Liquor Dealers Assn. v. North Bergen et als., Bulletin 997, Item 2. Where there is an honest difference of opinion in the exercise of discretion for or against the transfer of a liquor license, the action of the issuing authority in approving the transfer should not be disturbed. Paul v. Brass Rail Liquors, 31 N.J. Super. 211 (App.Div. 1954). A local issuing authority has been held to possess wide discretion in the transfer of a liquor license, subject, of course, to review by this Division in the event of any abuse thereof. Passarella v. Atlantic City et als., 1 N.J. Super. 313 (1949).

In Fanwood v. Rocco, 33 N.J. 404, 414 (1960), Justice Jacobs stated:

> "Although New Jersey's system of liquor control contemplates that the municipality shall have the original power to pass on an application for a tavern or package store license or the transfer thereof, the municipality's action is broadly subject to appeal to the Director of the Division of Alcoholic Beverage Control. The Director conducts a de novo hearing of the appeal and makes the necessary factual and legal determinations on the record before him.... Under his settled practice, the Director abides by the municipality's grant or denial of the application so long as its exercise of judgment and discretion was reasonable...."

In short, the action of the municipal issuing authority should not be reversed by the Director unless he finds the "act of the board was clearly against the logic and effect of the presented facts." Hudson-Bergen County Retail Liquor Stores Assn. v. Hoboken, 135 N.J.L. 502, 511. Cf. Teofilak v. Wildwood et al., Bulletin 1782, Item 2.

It is apparent that Board Chairman Schmidt misconstrued the power and authority of the Board in citing as the reason for the approval of the transfer that, as the new place did not violate the ordinance, the Board possessed no power to reject it. Obviously the Board does possess such power, subject, of course, to appeal to the Director of this Division.

While mere conjecture, it could well have been possible that the remarks of the Chairman, capsulated as they were by the Board Secretary to one sentence, were meant in different context than the quoted result. In view of the evidence presented before the Board, the Chairman could well have concluded that the area is saturated with licenses, as stated by his colleague Kolodziej, but such saturation would not negate the benefits of such location to the general public, recognizing that the distance requirement was not violated.

The new location admittedly offers a parking facility not available to other locations, and a package goods store could well be a favorable adjunct to the adjacent supermarket. Such speculation is added merely to indicate that the abbreviated opinion of the Chairman, tendering an erroneous legal conclusion, could well have clothed an intended opinion. Certainly Board member Carlson's testimony that the old location of the license was not in full use does not appear as one of the reasons for his vote. Nor does the forthright admission of Board member Kolodziej that he had determined his action before the hearing.

As Justice Francis opined in Lyons Farms Tavern v. Newark, 55 N.J. 292, 303 (1970);

> "The conclusion is inescapable that if the legislative purpose is to be effectuated the Director and the courts must place much reliance upon local action. Once the municipal board has decided to grant or withhold approval of a premises-enlargement application of the type involved here, its exercise of discretion ought to be accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of its discretion...."

The mandate of the issuing authority in the matter sub judice was patently clear, i.e., two votes against one vote. However, what was latently clouded was the reasoning upon which such mandate was based. While no clear abuse, unreasonable or arbitrary exercise of its discretion was present, the expressions of the Board members gave rise to an inescapable conclusion that their individual determinations were based upon a faulty understanding of their legal function: Board Chairman Schmidt's unfortunate misapplication of the law and Board member Kolodziej's regrettable prejudgment of the issues.

Several sets of petitions containing the names of hundreds of persons were presented at the hearing in this Division. It was admitted that all of them were obtained after the November 1st hearing before the Board and for the sole purpose of bolstering the appeal. While petitions have a place as an expresion of public sentiment and may ordinarily be considered in matters of this kind (cf. Fanwood v. Rocco, supra), the petitions were not before the Board. Additionally, it may be noted that, unlike the petitions collected in the matter of Lyons Farms Tavern, supra, which were obtained through the efforts of civic and religious organizations, the petitions in the instant matter were developed by appellants (all licensees) who encouraged signatures from their customers and friends. Such petitions are likely to be petitions of convenience rather than positive expression of local sentiment. Furthermore, while a petition serves as a convenient medium for presenting to the governing body the views of the group, the weight to be accorded it, after proper discount for self-interest and the irresponsible way in which petitions are often signed as friendly accommodations without any considered thought of contents or effect on the arguments on the other side, depends on what the petition states, who signs it, and how it accords with the policy and common sense of the officials responsible for the administration of the law and whose duty and privilege it is to hear both sides. The ultimate determination as to its weight is within the discretion of the issuing authority. Re Powell, Bulletin 59, Item 15; Re Dunster, Bulletin 99, Item 1; Henderson v. Teaneck et al., Bulletin 1588, Item 1. In any event, the Board should have been presented with such petitions so that whatever value they had could be properly weighed. Cf. Millie & Paul's Corporation v. Hampton, Bulletin 1860, Item 2.

Appellants' contention that notice of application for transfer published by respondent Botany Village Liquors failed to state that plans of building to be constructed may be examined at the office of the Board and was therefore violative of the requirements of Rules 2 and 4 of State Regulation No. 6 and Rule 1 of State Regulation No. 2 is without substance. All of these rules deal with the necessity of filing plans for a building not yet constructed. Hudson-Bergen Package Stores Assn. v. Bayonne, Bulletin 2012, Item 1. No proof was adduced that at the time of the application the building had not been constructed and, save for the inclusion of shelving, was not ready for occupancy.

A primary contention advanced throughout all of the testimony offered on behalf of appellants that the area is oversaturated with licenses avoids the long-established principle that the number of licensed premises to be permitted in a particular area has been held to be a matter residing in the sound discretion of the local issuing authority. Lakewood v. Brandt, 38 N.J. Super. 462 (App.Div. 1955); Zicherman v. Driscoll, supra. Since the municipal action is discretionary, appellants must show manifest error or clear abuse of discretion. Rajah Liquors v. Div. of Alcoholic Beverage Control, 33 N.J. Super. 598 (App.Div. 1955). In matters involving transfer of liquor licenses the responsibility of the municipal issuing authority is "high", its discretion is "wide" and its guide "the public interest." Lubliner v. Paterson, 33 N.J. 428 (1960).

In sum, I find that, were the matter sub judice to be determined solely on the factual presentation surrounding the adopting resolution, a recommendation of affirmance of that action would be forthcoming. As hereinabove noted, the action of the majority of the Board in determining that the transfer should be approved could not be assailed as arbitrary, erroneous or unreasonable. However, as hereinabove noted, the Board's action was clearly not based upon such determination alone but was subject to the interjection of peripherial approaches, i.e., the misunderstanding and interpretation of the law by Chairman Schmidt and the predetermination of the issues by Board member Kolodziej, which precludes an objective fair resolution of this matter.

For these reasons, as well as for the legal principles herein cited, it is recommended that the matter be remanded to the Board for a plenary hearing on the issue of place-to-place transfer.

It is further recommended that respondent Botany Village Liquors comply with statutory requirements in the completion of its application; that the record of the proceeding on appeal before this Division be made part of the record on remand and be fully considered therein; and that proper notice of prompt hearing be given to all parties, with full opportunity

afforded for the introduction of any additional relevant and non-cumulative evidence.

Supplemental Hearer's Report

An appeal was filed in this Division challenging the action of the Board and a hearing was held thereon as reflected in Hearer's report heretofore filed. That report recommended a remand to the Board in that the action of the Board resulted in a patent misapplication of the law by its Chairman. Written exceptions to the report were filed by appellants.

Upon reviewing the transcript of testimony, the exhibits, the Hearer's report and the written exceptions thereto, the Director ordered a supplemental hearing to be held for the sole purpose of obtaining testimony of Board Chairman Herman Schmidt respecting remarks originally attributed to him in the stenographic notes taken at the hearing before the Board and his explanations thereof.

A supplemental hearing for that sole purpose was then held in this Division. Appellant challenged the propriety of such hearing in that no provision for a supplemental hearing is provided in State Regulation No. 15. Attention is called to Rule 15 of that regulation which authorizes relaxation of the rules when "strict adherence to them will result in injustice." By virtue of this rule, supplemental hearings are, in some instances, customarily afforded. Cf. Re Ronald Scalzo, Inc., Bulletin 2075, Items 5 and 6.

Herman Schmidt testified that he is the Chairman of the Board and was such on November 1, 1972 (the date of the Board's hearing on appellants' application). He admitted that the statement attributed to him in the stenographic notes accompanying the adoptive resolution contained his words but added that such statement was only a brief part of a much longer statement made at the time. He asserted that his longer explanation of his opinions then given contained statements to the effect that the Board did possess power of discretion over the granting or rejection of the application. He had then amplified his remarks by indicating that only when the distance requirements have been met by the applicant may the Board act.

He explained that, when the application was first scheduled for hearing in October 1972, applicant was not then present but several objectors were. At that meeting he was under the impression that approval of the application by the Board was mandatory, and said so. As these statements were made

in the presence of the same objectors who were present at the later hearing, and as he had learned in the interim between those meetings that his impression of the law was mistaken, he took pains to explain his actions at the November meeting, resulting in the inaccurate capsulating of his remarks.

Addressing himself to the merits of the application, he expressed the belief that the test of approval or disapproval of an application is how it affects the people of the community. He indicated that the shopping complex into which the premises were to be transferred would bring in a large number of people, many from out of the community, and the facility proposed would add to the services available in the shopping center. As the nearest other licensed premises for off-premises consumption is more than five hundred feet away, such distance from the shopping complex would be an inconvenience to the shoppers.

On cross-examination Schmidt said he agreed with some of the views of his fellow Board members who had voted against the application, but not all of them. He explained that in his six years as a Board member, twice as its Chairman, the instant matter was only the second in which vigorous opposition to a transfer had been voiced and the approach to such situation required additional consideration. He denied the area is "oversaturated", basing his denial upon the lack of definition as to what "saturation" actually represents in a given situation. He concluded by indicating that the newly generated business in the shopping complex would bring in new patronage and not necessarily reduce business of the existing licensees; if the numbers of persons were sizably increased, this could result in an increase of business to all.

By such testimony it may now be concluded that the affirmance of the application for transfer based on the majority of the Board resulted from a fair consideration of the merits of the application by each Board member. Chairman Schmidt's testimony was forthright and convincing and, despite vigorous cross-examination, remained unshaken. His candid admission of a misconception of the powers of the Board expressed at a prior meeting but corrected before the hearing on the instant application, coupled with his obvious sincerity in the approach to the extensive objections, lead to the inescapable conclusion that his statements were meant as a paliative to assuage the feelings of the objectors rather than a means of formalizing legal conclusions.

In short, it is now apparent that, had the expressions of the Chairman been fully recorded, or had his testimony been offered at the initial hearing in this Division, the recommendations made in the prior Hearer's report would not have resulted.

Based upon the legal principles enunciated in the prior report with reference to Fanwood v. Rocco, supra, and Lyons Farms Tavern v. Newark, supra, it is equally apparent that the Board acted circumspectly, each member weighing the issue by the standard of his own values against those of the common good. In such situation the Director's function is limited to an affirmance of the local action. Cf. Lyons Farms Tavern, Inc. v. Newark, 55 N.J. 292, 303 (1970).

Accordingly, it is recommended that the action of the Board in approving the place-to-place transfer to respondent Botany Village Liquors, t/a Village Spirits Shoppe, be affirmed and the appeal be dismissed.

Conclusions and Order

Written exceptions to the Hearer's Report and Supplemental Hearer's Report with supportive argument were filed by the attorney for appellant, pursuant to Rule 14 of State Regulation No. 15. Written answer to the said exceptions with supportive argument was filed by the attorney for respondent.

I find that the matters contained in all of the exceptions have either been considered and satisfactorily resolved by the Hearer in his report or are without merit.

Having carefully considered the entire record herein, including the transcripts of the testimony, the Hearer's Report, the Supplemental Hearer's Report, the exceptions and answers to all of the exceptions filed with respect thereto, I concur in the findings and conclusions of the Hearer and adopt his recommendations.

Accordingly, it is, on this 6th day of June 1973,

ORDERED that the action of the respondent be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

ROBERT E. BOWER
DIRECTOR

3. STATE LICENSES - NEW APPLICATION FILED.

William Grant & Sons, Inc.
130 Fieldcrest Avenue
Raritan Center
Edison, New Jersey

Applications filed August 2, 1973 for place-to-place transfer of Plenary Wholesale License W-40 and Rectifier and Blender's License R-4, from 48-52 Essex Street & 41-47 Morris Street, Jersey City, New Jersey.

Robert E. Bower
Director