Gossweiler

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark 2, N. J.

BULLETIN 1497 MARCH 8, 1963

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ITEM

STATE OF NEW JERSEY
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1. APPELLATE DECISIONS - LETHE, INC. v. HARRINGTON PARK.

Lethe, Inc., Appellant, v. Mayor and Council of the Borough of Harrington Park, Respondent.	)	On Appeal CONCLUSIONS and ORDER

Major & Major, Esqs., by James A. Major, Esq., Attorneys for Appellant
Walter W. Gehringer, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of respondent which by resolution dated July 16, 1962, denied appellant's application for renewal of its plenary retail consumption license C-1 for the 1962-63 license year for premises located at 12 Tappan Road, Harrington Park.

"Upon the filing of the appeal the Director entered an order on August 10, 1962, extending the term of the license until further order herein.

"Appellant in its petition of appeal sets forth the following stated reasons for respondent's action:

> 'That the building on the premises at 12 Tappan Road in which the license is requested to be operated has been abandoned for more than a year and during this period and at present has been and is in such state of repair that it cannot be operated for the purpose intended.'

and alleges therein that respondent's action was erroneous in that:

> '(A) There has been no such abandonment as set forth in the resolution.
>
> (B) No hearing was afforded to the appellant on the ground of the alleged abandonment and no notice was given appellant that such a ground was in fact asserted.
>
> (C) The Mayor and Council were in fact advised that the appellant contemplated extensive renovation of the building at 12 Tappan Road and this advice was received by the Mayor and Council prior to the action herein challenged.
>
> (D) No testimony was taken before the Mayor and Council on which to predicate any finding of abandonment.'

"The undisputed facts herein show that 12 Tappan Road, Harrington Park, is in a residential zone as a non-conforming use

and consists of approximately six acres of land upon which a fifty-year-old building stands and that the premises have been licensed for about thirty-five years. On June 9, 1960, the license held by Harrington Mayfair Corporation was transferred to Harrington Inn, Inc., the principal stockholders of which were Daniel D. Blum (president and majority stockholder of appellant corporation herein) and Robert O'Connor. In July 1960 the license was renewed for the 1960-61 license year and Harrington Inn, Inc. applied for and was granted a building permit to make extensive alterations to the building. In December 1960, after expending about $5,000 on the alterations, Harrington Inn, Inc. became insolvent. A receiver was appointed and the license was extended to him on March 27, 1961. On June 19, 1961, the license was transferred to appellant Lethe, Inc. and thereafter appellant's application for renewal of the license for the 1961-62 license year was granted by respondent. No business has been conducted on the licensed premises since June 9, 1960.

"Section 10, par. 5, of the Zoning Ordinance of the Borough of Harrington Park reads as follows:

'Abandonment. Whenever a non-conforming use has been discontinued for a period of one year, such use shall not thereafter be reestablished and any future use shall be in conformity with the provisions of this ordinance.'

"When appellant filed application for renewal of its license for the 1962-63 license year, respondent denied the application for the stated reasons as hereinabove set forth in appellant's petition of appeal.

"Daniel Blum, appearing on behalf of appellant, testified that he is president of appellant corporation which was formed in 1957 or 1958; that at the time the license was transferred to it appellant had a right of possession under a lease from the owners; that at the time appellant sought a renewal of the license for the 1961-62 license year the Mayor and Council asked him what he intended to do with the property and that he informed them that he had had a heart attack on February 1, 1961, and that, as soon as his health allowed him to and he was given the okay by his physician, he intended to put the place in good repair and run a much finer place than had the prior licensed operator of the premises; that respondent renewed the license and thereafter he had a firm of architects prepare a rendering of a proposed new building (Swiss-Chalet type); that in May 1962 he saw Mr. Quantmeyer (the building inspector) who, referring to some rules and regulations pertaining to abandonment, 'made suggestions as to procedures I would have to go through in order to do any construction, including going to the County Board of Health and getting approval and various permits.' He further testified that on August 23, 1961, appellant entered into an agreement with Brady Kemper Greer and Beulah C. Greer to purchase the property in question for the sum of $30,000; that the corporation thereafter took title to the property; that, if the license is renewed for the 1962-63 license year, he intends 'to get the place in proper repair, properly furnished and operate it;' that 'I have actually, as of this date (September 7, 1962) submitted actual plans, signed and stamped and sealed by Parsons and John,' architects; and that he anticipates spending about $35,000 to make the premises available for license purposes.

"Fred Quantmeyer, appearing on behalf of respondent, testified that he is the building inspector for the Borough of Harrington Park; that on July 8, 1960, he granted an application for a building permit to Harrington Inn, Inc. to make alterations and repairs; that shortly thereafter construction work was started and continued until December 1960 when it was terminated without

being completed; that no further alterations or repairs have been made since that time; that prior to July 1, 1962, Mr. Blum spoke to him concerning alterations and repairs which he desired to make; that he informed Mr. Blum 'that it's impossible to do it because his business had been discontinued more than a year;' that he appeared before the Mayor and Council on July 16, 1962, when they considered appellant's application for renewal and told them that he had informed Mr. Blum that the repairs and alterations could not be made because of the provisions of the zoning ordinance; that in August 1962 appellant filed a formal application for a permit to alter and repair the premises in question and that he refused to issue the permit on the ground that no business had been conducted on the premises for a period of one year.

"He further testified that, prior to the transfer of the license to Harrington Inn, Inc., the condition of the building was such that a business could be run there and that the present disrepair of the building was due to the incompleted renovations made by that corporation.

"Appellant's attorneys have submitted a brief in which they contend that R.S. Title 33 does not confer any authority on an issuing authority to deny a license on the ground asserted by respondent, viz., 'the alleged discontinuance of a non-conforming use and *** the so-called state of disrepair.' They further contend that 'the section of the ordinance on which the municipality relies is illegal and void,' citing numerous cases of this and other jurisdictions in substantiation thereof.

"Respecting the first contention, it appears that the reasons embodied in respondent's resolution do not state that appellant's application was denied because a non-conforming use was discontinued. The word 'abandoned' appearing therein connotes a non-user of the license. The primary responsibility of determining whether premises are suitable for a retail license rests with the local issuing authority (R.S. 33:1-24 and Monroe Tavern, Inc. v. Elizabeth and Higgins, Bulletin 1022, Item 3), as does the question of non-user of the license. Re Tarantola, Bulletin 570, Item 5. In the Tarantola case Commissioner Driscoll said:

> 'So far as the State Alcoholic Beverage Law and Regulations are concerned, discontinuance of business during the license term does not affect the existence or validity of the license during the term; nor would non-user of itself prevent renewal for the license year 1943-44 (assuming, in the case of a renewal, that premises exist and are approved). This is not to say that an applicant whose premises are closed and are not to be operated for the purposes of the licensed business has a "right" to obtain a renewal. A local issuing authority might decide to refuse to issue the renewal on the ground that licenses are issued for outlets to be used to serve the public convenience and necessity -- that it is against public policy to issue a license for closed premises not to be used for purposes of the license applied for. In other words, the question in the first instance must be decided by the local issuing authority.'

See also Prickett v. Southampton, Bulletin 1484, Item 2.

"With respect to the second contention, it has heretofore been established that the validity of a zoning ordinance can be determined only by a civil court of competent jurisdiction and cannot be determined in these proceedings. Matthews et als. v. Orange et al., Bulletin 936, Item 9. Since a local issuing authority is not required to conduct a hearing as a requisite to denial of a new or renewed license (Lipman v. Newark, Bulletin 356, Item 6;

Nordco, Inc. v. Newark, Bulletin 1148, Item 2; Rule 8 of State Regulation No. 2), appellant's allegations (B) and (D) have no merit.

"Considering all the facts and circumstances appearing herein, I find that the photographs in evidence show that the building sought to be licensed is presently in such a state of disrepair that it cannot be used for license purposes and that the testimony shows that it has been in that condition for over a year. I further find that, when appellant applied for a renewal of its license for 1961-62, respondent granted it upon being assured that the building would be put in good repair and the business operated in a finer manner than had the previous operator of the premises. Yet nothing was done thereafter in fulfillment of the assurances. I further find that the unduly protracted non-user of the license does violence to the paramount principle underlying the issuance of licenses, to wit, that licenses shall be issued only in the interest of the public necessity and convenience. I further find that the uncorroborated testimony of Mr. Glum, that he had a heart attack on February 1, 1961, is not a justifiable reason why appellant corporation could not have completed the repairs and alterations left unfinished by its predecessor; and I further find that there is nothing in the evidence to indicate that respondent Mayor and Council were improperly motivated.

"I conclude, therefore, that appellant has failed to sustain the burden imposed upon it of establishing that respondent's action was erroneous, and I recommend that an order be entered affirming the action of respondent Mayor and Council in denying appellant's application for renewal of the license for the 1962-63 license year, and that the appeal herein be dismissed."

Pursuant to Rule 14, State Regulation No. 15, the attorney for appellant filed written exceptions to the Hearer's Report. Thereafter the attorneys presented oral argument before me in this matter. At the oral argument the attorney for appellant advised that a separate action for determination of the validity or invalidity of Paragraph 5 of Section 10 of the zoning ordinance was then in the Court.

Having carefully considered the entire record and the oral argument in this appeal, I disagree with the Hearer's recommendation.

An application for license renewal for premises not suitable for operation may properly and lawfully be granted subject to a completion-of-renovation or completion-of-alterations special condition (R.S. 33:1-32).

The circumstances in the instant appeal are far different from those in Prickett v. Southampton, supra (Bulletin 1484, Item 2) and in Hall v. Mt. Ephraim, Bulletin 786, Item 2, cited therein, and in Re Smith, Bulletin 784, Item 5, also cited therein. In the Prickett case the period of non-user was more than six year and the evidence showed clearly that the last application for renewal was made not with any intention of operating under the license but solely to keep the license alive so as to permit person-to-person and place-to-place transfer. In the Hall case there was no convincing evidence adduced in explanation and justification of the non-user, and the evidence indicated that there was no intention of operating at the premises sought to be licensed. In the Smith case there was a complete lack of bona fides, with six years of non-user and with the intention to "sell" the license and never to operate under it.

Advanced in respondent's behalf was a challenge as to the merits of Daniel Blum's "heart attack" as an explanation of the delay in continuing with the renovation, and the Hearer more gently questioned the merits in that regard in his finding that the "heart attack" was not a justifiable reason for the delay. I find that the period of non-user was not unduly protracted, and that the circumstances surrounding the delay, followed by appellant's eagerly seeking to proceed with the renovation, may fairly and reasonably be considered extenuating.

I now quote from the opinion by Gaulkin, J.A.D., in Lubliner v. Paterson Board of Alcoholic Beverage Control, 59 N.J. Super. 419 (1960) at p. 433:

> "Appellants argue that the approval of the transfer was illegal and erroneous because the Paterson zoning ordinance prohibits a tavern at this location. It is not clear from the evidence that the ordinance does so provide, but even if it does that does not make the grant of the transfer improper or its approval by the Director error. 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 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."

The Appellate Division affirmed the grant of the license transfer and its decision was affirmed by the Supreme Court (Lubliner v. Paterson Board of Alcoholic Beverage Control, 33 N.J. 428 (1960)), in which case the opinion (at p. 435) by Judge Jacobs, after remarking that the zoning contention had apparently been abandoned, contained the following language:

> "*** In dealing with that contention (re the zoning ordinance) 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." (Underscoring added)

I shall reverse respondent's denial of appellant's application for license renewal, but my reversal will be a qualified one (cf. Saint Paul and Saint Philips Episcopal Church and Lowenstein v. Newark and Cilio, Bulletin 993, Item 1).

Respondent shall grant appellant's application for 1962-63 license renewal subject to the outcome of the pending court proceeding concerning Paragraph 5 of Section 10 of the zoning ordinance, and subject to a completion-of-alterations special condition. If the indicated paragraph of the zoning ordinance is found valid or if the Court finds that in fact and in law appellant abandoned the non-conforming use (see the concurring opinion by Goldman, S.J.A.D., in Donovan v. Gabriel and Gruber, 57 N.J. Super. 542 (1959)), there shall be no operation under a license at the premises now sought to be licensed. If the indicated paragraph of the zoning ordinance is found invalid and if the Court does not find that appellant abandoned the non-conforming use, appellant may (following issuance of a building permit) proceed with renovation and alterations. If thereafter renovation and alterations, although begun, shall not have been duly completed prior to July 1, 1963, I suggest that respondent amend its grant of the application for 1962-63 license renewal

so as to make the 1962-63 license effective immediately for the purpose of permitting grant, conditionally, of application for 1963-64 renewal.

Accordingly, it is, on this 18th day of January 1963,

ORDERED that the action of respondent be and the same is hereby reversed, and respondent is hereby ordered and directed to grant appellant's application subject to the conditions hereinabove indicated.

WILLIAM HOWE DAVIS
DIRECTOR

2. APPELLATE DECISIONS - LOW'S LIQUORS, INC. v. WEST NEW YORK.

Low's Liquors, Inc.,

Appellant,

v.

Board of Commissioners of the Town of West New York,

Respondent.

On Appeal

CONCLUSIONS and ORDER

Theodore Cohen, Esq., Attorney for Appellant
Samuel L. Hirschberg, Esq., by Alexander A. Abramson, Esq., Attorney for Respondent.
Silver & Smith, Esqs., by Morris Silver, Esq., Attorneys for M & M Delicatessen & Restaurant, a corporation
Samuel Moskowitz, Esq., and Samuel J. Davidson, Esq., Attorneys for Hudson-Bergen County Retail Liquor Stores Association, Objector.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of the respondent whereby it denied an application for transfer of plenary retail consumption license C-41 from M & M Delicatessen & Restaurant, a New Jersey corporation, to appellant, and from premises at 5609 Bergenline Avenue, West New York, to premises at 5600 Bergenline Avenue, West New York.

"The resolution of respondent denying the application, adopted August 1, 1962, in its pertinent part reads as follows:

> 'WHEREAS, the Board of Commissioners are of the opinion that the application would not be in the best interest of the Town of West New York.
>
> 'NOW, THEREFORE, BE IT RESOLVED, that the application for the 1961-1962 license has become moot and no action is required in connection therewith, and
>
> 'BE IT RESOLVED, that it is hereby determined that it is to the best interests of the Town of West New York that the said application for the transfer of the 1962-1963 Plenary Retail Consumption License be and the same is hereby denied.'

"In its petition of appeal the appellant alleges that the action of the respondent was erroneous for the following reasons:

(a) Appellant had complied with all the rules and regulations of the Town of West New York applicable to the transfer of plenary retail consumption licenses:

(b) Appellant is fully qualified as a licensee;

(c) The denial was not justified under the laws of the State of New Jersey, ordinances of the Town of West New York, and regulations of the Division of Alcoholic Beverage Control;

(d) The denial was not justified for the reason advanced that the location to which transfer was sought was in an area adequately served at present;

(e) The denial was invalid because the place of transfer was directly across the street, approximately fifty feet from the present location;

(f) The denial was arbitrary, capricious and unreasonable and detrimental to the rights of appellant and the intending transferor M & M Delicatessen & Restaurant.

"In its answer the respondent admits the jurisdictional allegations of the appeal and denies the substance of the allegations. In addition, it sets forth a Statement of the Grounds for its Action, as follows:

(1) Respondent desires to prevent a concentration of licenses in any one particular area;

(2) Appellant intends to use the license not for a tavern but for the sale of package liquors for off-premises consumption;

(3) Respondent, after careful investigation and in the exercise of its sound discretion, determined that the area did not require a licensed premises 'embodying all the characteristics of a package liquor store;'

(4) Under Section 1 of an ordinance dated May 16, 1961, appellant is not a proper applicant for license. In this paragraph of the Answer, as amended by counsel for respondent at the hearing on the appeal de novo, it was stated that the said ordinance specifies that the limitation, in so far as distance is concerned, applies only as to place-to-place transfers by the holder of the license at that particular time and not from person to person and place to place;

(5) The operation contemplated by the proposed licensee at the premises proposed would be 'contrary to the best interest of the public health, welfare and morals of the community;'

(6) The said transfer was denied because of lack of off-street parking facilities and the apprehension that there would be an increase in traffic congestion;

(7) Respondent exercised its reasonable discretion;

(8) Respondent acted in good faith and in the best interests of the municipality.

"The hearing on appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15, with full opportunity for counsel to present testimony under oath and cross examine witnesses. Sidoroff et al, v. Jersey City and Niebanck, Bulletin 1310, Item 1.

"The essential facts which are required for the dispositive consideration of this appeal are as follows: The appellant seeks to obtain a transfer of the plenary retail consumption license presently held by M & M Delicatessen & Restaurant for premises at 5609 Bergenline Avenue to itself and for premises located directly across the street at 5600 Bergenline Avenue in the Town of West New York. The premises to which the license is sought to be transferred are 225 feet from the nearest existing licensed premises (Frank John Feibel, t/a Botta Wine & Liquor Store, 5514 Bergenline Avenue) and 450 feet from licensed premises of Henry R. Eismeier, t/a Harmony Hall Bar & Restaurant, 5501-03-05 Bergenline Avenue. This is reflected in the survey and is stipulated by counsel. The premises are thus within 750 feet, which is the limitation imposed by the ordinance later mentioned herein.

"According to the testimony of Irving Low (the president of the corporate appellant), he plans to operate the premises in accordance and in compliance with the local ordinances and the Rules and Regulations of this Division. However, he has not crystalized plans and specifications because he considers that making such final plans and specifications would be premature prior to the action of respondent in granting the said person-to-person and place-to-place transfer. He denied that he intends to operate a package goods store for the purpose of selling package goods for off-premises consumption. The license in question does not contain broad-package privileges.

"Appellant produced one James R. Manalio (a licensed surveyor) who testified with respect to the exact measurements and distances between the particular locations, and a survey was introduced into evidence reflecting such distances. He also testified with respect to the location of other licensed premises in the general area, within the statutory limitations.

"A resident and a real estate expert also testified on behalf of appellant with respect to the desirability of the proposed location of the licensed premises, the concentration of licensed premises in the general area, the parking facilities offered in the said area, and in support of the other allegations raised by the petition herein. No witnesses were offered on behalf of respondent.

"The decisive and crucial issue carved out of the pleadings and the considerable testimony presented herein is as follows: Does the ordinance permit such single, combined person-to-person and place-to-place transfer as sought by appellant?

"Respondent advocates that Section 1 of Ordinance No. 889 proscribes such action. Section 1 of the ordinance, in so far as it relates to the issue, reads:

> 'No new license or transfers of existing Plenary Retail Distribution Licenses, Plenary Retail Consumption Licenses, or Limited Distribution Licenses for the sale of alcoholic beverages shall hereafter be issued for or transferred to premises within 750 feet of premises for which a Plenary Retail Distribution License, Plenary Retail Consumption License or Limited Distribution License for the sale of alcoholic beverages is outstanding, provided, however, that this limitation shall not prevent the renewal or person to person transfer of a license for premises licensed when this Ordinance becomes effective. Nothing herein contained shall be deemed to prevent transfer of a license to within 250 feet of the premises licensed at the

time of the adoption of this Ordinance.'

"The controlling question is whether, under the imperative language of this ordinance, respondent has the authority to grant such transfer or whether it is prohibited by the language thereof from taking such affirmative action.

"In Willner's Liquors v. Jersey City, Bulletin 1332, Item 3, the Director, after discussing the facts of that case, cited the opinion of the then Director in Jersey City Retail Liquor Dealers' Association v. Jersey City and Dal Roth, Inc., Bulletin 976, Item 4, as follows:

> 'Provisos and exceptions in an ordinance are to be strictly construed and in keeping with the measure's principal purpose. N.J. State Board of Optometrists v. S.S. Kresge Co., 113 N.J.L. 287 (Sup. Ct. 1934); modified in 115 N.J.L. 495 (E. & A. 1935); United States v. Dickson, 15 Pet. 141, 59 Corpus Juris, § 639 (2), notes 42, 43 and 44. Manifestly, the basic purpose of the ordinance in question is to effect a stricture against place-to-place transfers (Finbar et al. v. Municipal Board of Alcoholic Beverage Control of the City of Jersey City and Commuters Bar, Inc., et al. Bulletin 917, Item 1) and it would seem abundantly clear that the main provision and the exceptions therefrom relate to place-to-place transfers only.
>
> 'For the reasons hereinabove set forth, I find that *** respondent Board either misinterpreted or disregarded the terms of the ordinance which it was its duty to observe and that the transfer was granted in violation of the ordinance. Its action granting the transfer will be reversed.***'

"The ordinance, in its operative language, is similar to Section 4 of a Jersey City ordinance which was discussed by the court in Dal Roth, Inc. v. Division of Alcoholic Beverage Control, 28 N.J. Super. 246. In that case the Jersey City Municipal Board of Alcoholic Beverage Control granted the application of Dal Roth, Inc. for a person-to-person and place-to-place transfer of a plenary retail consumption license from Joseph A. Davis, Receiver for Commuters Bar, Inc., to the said Dal Roth, Inc., and from 35 Enos Place to premises at 9-B Journal Square Station Building, Jersey City. The ordinance there provided that no plenary retail distribution license, except renewals and transfers from person to person, shall be granted for any premises the entrance of which is within an area in a circle having a radius of 750 feet. In the event a licensee desires to transfer to another premises, he shall be permitted to do so within 750 feet of the premises wherein he is located at the time of said transfer.

"In Dal Roth, Inc. v. Division of Alcoholic Beverage Control, supra, Judge Goldmann, in discussing Section 4 of the Jersey City ordinance, stated as follows:

> 'The clear and unequivocal language of the proviso in section 4 of the ordinance permits of no other construction than that the benefit of the exception is limited to those licensees who, through no fault of their own, find themselves in the predicament of being deprived of their licenses if the 750-foot provision were mandatorily to be controlling in all place-to-place transfers. The proviso speaks of 'licensee' throughout. Dal Roth, Inc. was not a licensee which had been compelled to vacate premises. It was a mere applicant for a license, hoping to take advantage of the fact that the former licensee had gone out

of business, and it had no premises to vacate, it being stipulated that it had never become a tenant or entered into possession of the premises at 35 Enos Place.

'The judicial goal in the construction of ordinances is the discovery and effectuation of the local legislative intent, and in general this inquiry is governed by the same rules as apply to the interpretation of statutes, Wright v. Vogt, 7 N.J. 1, 5 (1951). The ordinance was correctly interpreted by the Director of the Division of Alcoholic Beverage Control. The Jersey City board misapplied the provisions of section 4 of the ordinance in granting the transfer in question.***

'There seems to be no reason why, on the basis of public policy, we should say that the escape clause should not be limited to those licensees who themselves are forced to vacate. There is no compelling consideration for giving licensees so circumstanced the right to transfer the license to someone else who could then locate within the 500-foot radius area of the vacated licensed premises. It seems entirely reasonable to keep the door of the escape clause as nearly shut as possible. If the licensee is forced to vacate, the policy behind the ordinance and the law pursuant to which it was adopted will be relaxed to take care of his hardship, but if he is forced not only to vacate but also to sell, no aid can be extended to him. This is not so arbitrary a matter as to require us to hold the ordinance unreasonable and therefore void; the law does not have to undertake to provide for his license. Restrictive liquor regulations may, and ofttimes do, result in individual hardships. However, where larger social interests justify a restrictive policy, private individual interests must give way.'

"Further, it is apparent, in reading the clear and unequivocal language of Section 1 of the ordinance of the Town of West New York that, like the exception in Section 4 of the Jersey City ordinance, it does not run in favor of an applicant for place-to-place transfer but runs only in favor of a licensee seeking transfer of his license to within 250 feet of the premises licensed at the time of the adoption of the said ordinance.

"Counsel for the respondent has energetically argued that this ordinance must be read in conjunction with and as part of all other ordinances of the Town of West New York relating to holders of such licenses. However, no specific ordinances were specified nor was there any attempt to show any relationship between this ordinance and other general ordinances. I do not believe that this ordinance, with its ad hoc provisions relating to the specific situation herein considered, is affected by any other ordinance or ordinances. No satisfactory evidence has been produced, or demonstrated, to the contrary. Therefore, the reason assigned by respondent in its resolution of August 1, 1962, denying the appellant's application for transfer was irrelevant although it manifested the bona fide of the action of respondent.

"The law is well settled that, when a commission, board, body or person is authorized by ordinance passed under a delegation of legislative authority to grant or deny a license or permit, the grant or denial (or transfer) must be in conformity with the terms of the ordinance authorizing such grant or denial. Tube Bar, Inc. v. Commuters Bar, Inc., 18 N. J. Super. 351; 9 McQuillin, Municipal Corporations (3d ed.1950) sec. 26.73; Bohan v. Weehawken, 65 N.J.L. 490. Nor can such commission, board, body or person set aside, disregard or suspend the terms of the ordinance except in some manner prescribed by law.

Public Service Railway Co. v. Hackensack Imp. Com. 6 N.J. Misc. 15; 62 C.J.S., Municipal Corporations, sec. 439.

"It is elementary that any administrative effort to accommodate an individual licensee must be accomplished within the framework of existing legislation construed in terms of the overriding public policy. See Dal Roth, Inc. v. Division of Alcoholic Beverage Control, supra.

"As a further corollary of this rule, it has been well established that an issuing authority may not issue or transfer a license in violation of the terms of a local regulation. Monroe Tavern, Inc. v. Elizabeth and Stadeck, Bulletin 994, Item 4; Echo v. Elizabeth, Bulletin 1131, Item 2; Bachman v. Town of Phillipsburg, 68 N.J.L. 552.

"A factual converse to the matter sub judice was most recently considered in Essex County Retail Liquor Stores Association v. Newark et als., App. Div., decided Nov. 2, 1962, not yet officially reported; reprinted in Bulletin 1484, Item 1. That was an appeal from an order of the Director of the Division affirming two transfer orders issued by the ABC Board of Newark. The holder of a retail consumption license obtained a place-to-place transfer of his license and, shortly thereafter, the respondent Home Liquors applied for and obtained a person-to-person transfer to it of the said license at the new premises.

"The pertinent ordinance of the City of Newark was similar to the one considered herein. The court, in affirming the Director's action, distinguished this case from Dal Roth, supra, and Willner's Liquors v. Jersey City, supra. It pointed out that those cases involved (as in the instant matter) a single, combined application, not by the licensee but by the proposed transferee for a place-to-place and person-to-person transfer of a plenary retail consumption license under the Jersey City ordinance which forbade the granting of the transfer of a plenary retail consumption license to any premises whose entrance was within 750 feet of the entrance to an existing licensed premises, but permitted an exception in the case of an existing licensee seeking a transfer who was compelled to vacate for reasons not caused by an action on his part. Said the court:

> '***intent (of the ordinance) must be found in the language used. See Brundage v. Randolph Tp., 54 N.J. Super. 384, 396 (App. Div. 1959), affirmed on opinion 30 N.J. 555 (1959); Wright v. Vogt, 7 N.J. 1, 5-6 (1951). Ordinances are to receive a reasonable construction and application, to serve the apparent legislative purpose. We will not depart from the plain meaning of language which is free of ambiguity, for an ordinance must be construed according to the ordinary meaning of its words and phrases. These are to be taken in their ordinary or popular sense, unless it plainly appears that they are used in a different sense. Sexton v. Bates, 17 N.J. Super. 246, 253 et seq. (Law Div. 1951), affirmed on opinion below, 21 N.J. Super. 329 (App. Div. 1952); 6 McQuillin, Municipal Corporations (3rd ed. 1949), sec. 20.47, p. 114; cf. R.S. 1:1-1.***'

"Thus the respondent, under the terms of this ordinance, decided in its wisdom that only a place-to-place transfer, and not a person-to-person and place-to-place transfer, within the area limited by said ordinance could be legally granted. The reasons behind the adoption of such ordinance are many. The primary one may be, as it was in the Jersey City ordinance, that concern for the licensee in hardship cases may require special consideration. Within the legis-

lative power of a local issuing authority, it has the authority to limit licenses or, by proper regulation, to refuse to issue any licenses at all. The public policy behind R.S. 33:1-40, which permits a governing body, by ordinance, to limit the number of liquor outlets in a community, supports an ordinance which would provide for place-to-place transfer and prohibit place-to-place and person-to-person transfer; and it may also provide for an ordinance which contains an escape clause limited to those licensees who themselves are forced to vacate.

"The action of respondent in denying the application of appellant for a transfer was proper, although not for the reasons assigned in the effective resolution. Since the dispositive issue has been identified and determined, it is unnecessary to discuss the other matters raised in the pleadings.

"It is, therefore, my recommendation that an order be entered herein affirming the action of respondent and dismissing the appeal."

Pursuant to Rule 14, State Regulation No. 15, the attorney for appellant filed written exceptions to the Hearer's Report. Thereafter the attorneys presented oral argument before me in this matter.

Having carefully considered the entire record and the oral argument in this appeal, I agree with the Hearer's recommendation. With reservations as to its absoluteness, I agree with the conclusion of the Hearer regarding the operation and effect of the ordinance; and I agree, also, on the point that the dispositive issue in this appeal de novo has to do with the ordinance.

It is well to point out, in passing, that my decision in O'Bertz v. Perth Amboy, Bulletin 1011, Item 1, cited for appellant, is not in point. In that case the application was for place-to-place transfer, only.

Admittedly, the language of the exception in the last sentence of Section 1 of the hereinabove-quoted West New York distance-between-premises ordinance is not as explicit on the crucial point (that the exception shall run only in favor of place-to-place transfer and not in favor of person-to-person and place-to-place transfer) as the exception in the Jersey City ordinance and in the Newark ordinance, copies of which ordinances were presented during oral argument before me. The Jersey City ordinance sets forth that the exception applies to "said licensee" and the Newark ordinance uses the words "the same licensee only", and "that such transfer shall be made in good faith and shall inure solely for the benefit of the same licensee." I cannot, however, find that respondent's construction of its ordinance is improper; indeed, such construction appears to be altogether sound and logical. The ordinance excepts from the major 750 feet provision renewals and transfers from "person to person". Manifestly, the primary and basic purpose of the measure is in restriction of place-to-place transfers, but the construction that the 250 feet exception applied remedially to place-to-place "hardship" situations is in no way inconsistent with the other provisions of the local regulation. The language of the 250 feet exception may not be as "clear and unequivocal" as the pertinent language of the Jersey City ordinance, but striking those words the hereinabove-quoted commentary by Judge Goldman in Dal Roth, Inc. v. Division of Alcoholic Beverage Control might readily and eloquently be applied in commenting upon the instant ordinance.

I find that under respondent's reasonable construction of the ordinance the denial of appellant's application was proper and lawful and imperative.

Accordingly, it is, on this 15th day of January, 1963,

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

WILLIAM HOWE DAVIS
DIRECTOR

3. APPELLATE DECISIONS - PACKARD-BAMBERGER & CO., INC. V. OAKLAND.

Packard-Bamberger & Co., Inc.,)
Appellant,)
v.)
Borough Council of the Borough of Oakland,) On Appeal
) CONCLUSIONS and ORDER
Respondent.)

Daniel Amster, Esq., Attorney for Appellant
Nathan Bernstein, Esq., Attorney for Respondent
Samuel Moskowitz, Esq., Attorney for Objectors

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of respondent whereby it denied an application for a person-to-person transfer to appellant of plenary retail consumption license C-7 for the current licensing period, for premises 23 Doty Road, Oakland.

"The petition filed by appellant sets forth as ground for reversal of respondent's action that:

> 'The action of the respondent was erroneous in that: The "beneficial" interest of the Appellant, was actually and in reality acquired prior to the adoption of the Assembly Bill 415 when the Applicant and Appellant filed with the Borough of Oakland evidence of its having contracted for the purchase of the interests of the Pleasureland, a New Jersey Corporation, in license No. C-7. By virtue of said contract, the applicant, Appellant, became the equitable owner of the interests of Pleasureland in said License, thus acquiring "a beneficial" interest therein prior to the adoption of the said Bill, which is excepted from the provisions thereof by virtue of the provisions of paragraph 1 thereof.'

"The appeal herein was submitted by the parties thereto on the following Agreed Statement of Facts:

> 'On or about July 20th, 1962, the appellant, Packard-Bamberger & Co., Inc., filed an application with the defendant, the Mayor and Council of the Borough of Oakland, a Municipal Corporation for the transfer of Liquor License No. C-7, issued to Pleasureland, a New Jersey Corporation, for premises at 23 Doty Road, Oakland, New Jersey. Notice and Advertisement of said application was duly published on July 26th and again on August 2nd in the Oakland Bulletin, a local legal newspaper published and distributed in the Borough of Oakland. This application was first considered by the Mayor and Council on August 7th, 1962, but

the said Mayor and Council not being certain as to the effect of Assembly Bill No. 415 on this application, which had been adopted by the Legislature of the State of New Jersey and signed into law by the Governor on August 3rd, 1962 decided to hold the matter in abeyance until its next meeting to be held August 14th, 1962, when a decision might be received from the Attorney General's office as to the effect of the same on this application. It being understood that the applicant was the holder of two or more liquor licenses in the State of New Jersey. The matter was carried until August 14th, 1962, but the Mayor and Council, or its attorney still not having received any information from the Attorney General's office, the matter was again carried until the next regular meeting of the Mayor and Council of the Borough of Oakland, held on September 4th, 1962. At the meeting of the Mayor and Council of the Borough of Oakland, held on September 4th, 1962 the Mayor and Council was again requested to hold the matter in abeyance until it or its attorney received a decision from the Attorney General's office in view of the fact that one still had not been received. The matter was nevertheless disposed of by the Mayor and Council on the theory advanced by the Borough Attorney, who was requested to give his opinion as to the effect of Assembly Bill A415 on the application of the Appellant, Packard-Bamberger & Co., Inc. It was the opinion of the Borough Attorney that the applicant had not acquired an interest prior to the Governor's signing of Assembly Bill A 415 and that the Mayor and Council should therefore deny the application. The same was then duly denied by the said Mayor and Council.'

"The pertinent section of Assembly No. 415 (Chapter 152 of the Laws of 1962) reads as follows:

'1. On and after the effective date of this act no person, as the same is defined in section 33:1-1 of the Revised Statutes, shall, except as hereinafter provided, acquire a beneficial interest in more than a total of 2 alcoholic beverage retail licenses, but nothing herein shall require any such person who has, on the effective date of this act, such interest in more than 2 such licenses to surrender, dispose of, or release his interest in any such license or licenses.'

"The term 'person' is defined and shall be deemed to include 'corporation' pursuant to R.S. 33:1-1(r).

"Appellant, presently the holder of more than two alcoholic beverage retail licenses, contends that, because it had entered into a contract for transfer of the license and had filed an application for said transfer with respondent prior to the effective date of the law, it had acquired 'a beneficial interest' in the license by reason of which the statute would not be applicable to its transfer to appellant.

"In Voight v. Board of Excise Commissioners of the City of Newark, 59 N.J.L. 358, 360, Justice Gummere, speaking for the Supreme Court, said:

'***A license is in no sense property. It is a mere temporary permit to do what otherwise would be illegal, issued in the exercise of the police power.***'

See also Takacs v. Horvath, 3 N.J. Super. 433; In re Schneider, 12 N.J. Super. 449.

"In order for appellant to have acquired a beneficial interest in the license in question, approval by the local issuing authority of the application for transfer would have been required. However, before respondent considered the application for transfer, the statute prohibiting a person from acquiring a beneficial interest in more than a total of two alcoholic beverage retail licenses had become effective.

"In Socony-Vacuum Oil Co. v. Mt. Holly Twp., 135 N. J. L. 112, 117, Justice Perskie, speaking for the New Jersey Supreme Court, stated:

> '***there can no longer be any question as of the time when the status of the applicable law controls. It is neither the status of the law prevailing at the time of the application for the permit nor the status of the law prevailing at the time of the application or allowance of the rule to show cause. It is the status of the law prevailing at the time of the decision by the court that is controlling.'

Vide DePadova v. Little Falls, Bulletin 770, Item 9.

"Under the circumstances appearing herein, the respondent could not approve the transfer of the license to appellant as such action would have been contrary to the existing statute. Chapter 152 of the Laws of 1962. Thus it is recommended that an order be entered affirming the action of respondent in denying the transfer sought herein and dismissing the appeal."

Pursuant to Rule 14 of State Regulation No. 15, exceptions to the Hearer's Report were filed with me by the attorney for the appellant.

I have carefully considered the entire record herein, the Hearer's Report and the brief filed by the attorney for the appellant which was referred to in his exceptions to the Hearer's Report.

The operative facts giving rise to this appeal are as follows: On or about July 20, 1962, appellant filed an application with the respondent Borough Council of the Borough of Oakland for the transfer of plenary retail consumption license C-7 issued to Pleasureland, a New Jersey corporation, for premises 23 Doty Road, Oakland. No question has been raised as to the validity of the notice and advertisement of said application and the same was duly published on July 26 and August 2 in the "Oakland Bulletin", a local newspaper published and distributed in the Borough of Oakland.

On August 3, 1962, Assembly Bill No. 415 was signed by the Governor and became effective on that date.

Admittedly the appellant, on September 4, 1962, was already the holder of two alcoholic beverage retail licenses. On that date the Borough Council of the Borough of Oakland denied the transfer of License C-7 on the ground that Assembly Bill No. 415 prohibited the transfer of this license since the appellant was already the holder of at least two alcoholic beverage retail licenses.

At the time the within application for transfer was presented to the Mayor and Council of the Borough of Oakland, Assembly Bill No. 415 represented the law of this State. The applicable section of that statute has been referred to in the Hearer's Report.

As the Hearer noted, the Mayor and Council of the Borough of Oakland were obligated to apply to the transfer before them the law in effect at that time. Therefore, no valid transfer of license C-7 could have been made by that issuing authority.

I also note that the agreement between Pleasureland and the appellant, which was attached to appellant's brief, provides that the same shall be null and void in the event the municipal authorities or the Division of Alcoholic Control or the courts of this State do not permit the transfer of the subject license. Hence, by virtue of the terms of the contract itself, appellant obtained no interest whatsoever in license C-7 for the entire contract is conditioned upon a valid transfer of that license.

Notwithstanding that in this case there was, by the terms of the agreement, no interest in the alcoholic beverage license, it is unnecessary to include that observation in this determination for it has long been the law of this State that a license is in no sense property but is merely a temporary permit to do what would otherwise be illegal. Voight v. The Board of Excise Commissioners of the City of Newark, 59 N.J.L.358; In re Schneider, 12 N.J. Super. 449; Takacs v. Horvath, 3 N.J. Super. 433.

For the reasons herein expressed, it is, on this 18th day of January 1963,

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.

WILLIAM HOWE DAVIS
DIRECTOR

4. DIRECTOR OF DIVISION - DESIGNATION OF ACTING DIRECTOR.

To the Staff:

Effective Monday, January 21, 1963, I am going on leave of absence for an indefinite period.

Effective the same date, Deputy Director Emerson A. Tschupp is designated as Acting Director during my absence, pursuant to R.S. 33:1-35.

WILLIAM HOWE DAVIS
Dated: January 18, 1963 DIRECTOR

5. STATE LICENSES - NEW APPLICATIONS FILED.

Penn Beverage Company, Inc., Room #1, 1113 Boardwalk, Atlantic City, New Jersey
Application filed March 1, 1963 for place-to-place transfer of Additional Salesroom License AW-32, issued pursuant to Limited Wholesale License WL-29, to include additional space at Washington Highway, Route 24 and Hensfoot Road, Lopatcong Township, N. J.

Carlsberg Agency, Inc., 104 East 40th Street, New York, N. Y.
Application filed March 5, 1963 for Limited Wholesale License.

Eastern Brewing Corporation, 332-40 & 329 No. Washington St., Hammonton, N. J.
Application filed March 6, 1963 for Limited Brewerylicense.

Emerson A. Tschupp
Acting Director