Mr. MacIntosh

STATE OF NEW JERSEY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
744 Broad Street, Newark, N. J.

BULLETIN 467 JULY 1, 1941.

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ITEM

STATE OF NEW JERSEY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
744 Broad Street, Newark, N. J.

BULLETIN 467 JULY 1, 1941.

1. APPELLATE DECISIONS - DeCICCO AND RULA v. MANVILLE.

SUFFICIENT LICENSES IN VICINITY - DENIAL AFFIRMED.

JACK DeCICCO and JOHN RULA,)
Appellants,)
-vs-) ON APPEAL
) CONCLUSIONS AND ORDER
BOROUGH COUNCIL OF THE BOROUGH OF MANVILLE,)
Respondent.)

Milton A. Weiss, Esq., Attorney for Appellants.
Alexander Zydallas, Chairman of Alcoholic Beverage Committee, appearing on behalf of Respondent.

This appeal is from the refusal of the Borough Council of Manville to grant a transfer of John Rula's plenary retail consumption license to Jack DeCicco and to grant a simultaneous transfer of such license from 300 South Main Street, its present site, to premises known as the Parkway Alleys on North Main Street in the Borough.

At the outset, it must be noted that the Mayor, who presided over and conducted the hearing below on the present application, is a member and director of a club, the Polish Home Inc., which holds a plenary retail consumption license in the Borough (such license having been issued to the club by this Department under R. S. 33:1-20).

The Mayor, because of such connection with that licensee, was thereby disqualified from participating in any way in any of the Council's actions in alcoholic beverage matters. See Re Butera, Bulletin 257, Item 4. Hence, even though the Mayor apparently did not express any opinion or cast any vote at the hearing below, nevertheless his participation in the proceedings, by way of presiding over the hearing, vitiates the Council's action. See Petrusha v. Mine Hill, Bulletin 146, Item 8. Also see Hill v. Runnemede, Bulletin 296, Item 9. The Mayor should, similar to the action of one of the Councilmen who is a member and also an employee (manager) of the Polish Home Inc., have stepped out of the hearing entirely.

Hence I would normally be compelled to reverse respondent's denial in this case and remand the matter to the Borough Council for full consideration anew without the Mayor (or any other disqualified person) participating in any way in the case. See Bartole v. Harrison, Bulletin 304, Item 2.

However, appellant has expressly waived the defect of the Mayor's participation in this case and asks for a determination on the merits. In view of such waiver and the fact that I find nothing to impugn the good faith of either the Mayor or the Council, the respondent's action will therefore be viewed as though it had been taken in proper course.

As to the merits: There are in Manville a total of twenty consumption and three so-called "package store" licenses, all being located at the same sites since July 1, 1939 (except that, on apparently two instances, place to place transfer of license was permitted merely to enlarge the licensed premises by adding adjoining premises). On September 28, 1939 the Borough adopted an ordinance limiting consumption and "package store" licenses to the outstanding numbers of twenty and three respectively.

The consumption license in question is located at the southern end of Manville in a vicinity (loosely called "Weston") which is described as "modestly" developed. It stands virtually alone as a liquor place at that end of the Borough, the nearest liquor places being two taverns approximately one-half mile to the north.

The proposed site of the transfer is at the other or northern end of the Borough, which is apparently quite well settled and which is described as the fastest growing part in Manville. It is either part of or contiguous to a general vicinity where there are at least eight taverns, although none is in the immediate locale, the nearest being some three hundred fifty yards from the proposed site.

The proposed transfer was apparently denied for the reason (at least among others) that it would, in view of the recited facts, leave the southern end of the Borough without any nearby licensed place, and, on the other hand, bring an additional liquor place to at least the outskirts of a vicinity where more than sufficient taverns already exist.

This Department has repeatedly held that, in accordance with the principle of "home rule," determination as to the geographic distribution of retail liquor licenses in a municipality and as to the number of licenses to be permitted in any area lies within the sound and bona fide discretion of the local issuing authority. See Rosenvinge v. Metuchen, Bulletin 249, Item 6, and Raynor v. West Deptford, Bulletin 462, Item 5, and cases there cited.

In the present case I cannot say that respondent abused such discretion. Being limited under Borough ordinance to the existing number of licenses, it is not unreasonable for it to object to a transfer which, as here, would maldistribute those licenses by blanking the southern end of the Borough and adding another license at or near a general vicinity where a number of taverns exist.

The case would stand on different footing if there were adequate proof that, irrespective of location of the other liquor places, public need and convenience require a liquor license at the proposed site. However, I find no such proof in the record. Although appellants point out that there is a large nearby factory, the Johns-Manville Asbestos Co., employing "over three thousand people", and further, that the northern end of Manville is the Borough's developing section, it would nevertheless appear that the congregated taverns, at least four of which are not very far distant, are adequate to cope with this situation. Likewise, the further fact that bowling alleys are being operated at the proposed site and that various patrons there have expressed desire to be able to drink with their game falls far short of any requisite public need mandating a license for the proposed premises. The two bowling places in the Borough which have liquor licenses seem sufficient for those bowlers who need the refreshment of alcoholic beverages at their play.

Hence, since I find no reason for reversal in this case, respondent's action is therefore affirmed.

It is unnecessary to consider the question whether or not the application for the proposed transfer was fatally defective in that the applicant's "notice of intention" erroneously described the application as being by Jack DeCicco for original issuance of a license for the proposed site instead of being an application by DeCicco for person to person and place to place transfer of an existing license. For the pertinent regulations governing application for such transfers and proper form of "notice of intention," see State Regulations No. 3.

Accordingly, it is, on this 21st day of June, 1941,

ORDERED, that this appeal be and hereby is dismissed.

E. W. GARRETT,
Acting Commissioner.

2. SEIZURES - CONFISCATION PROCEEDINGS - VERMOUTH EXTRACT MANUFACTURED FOR EXPERIMENTAL PURPOSES WITH BOOTLEG ALCOHOL BY NEW YORK LICENSEE AT HIS HOME IN NEW JERSEY - EXTRACT AND EQUIPMENT FORFEITED - IMPORTED HERBS RETURNED.

In the Matter of the Seizure on April 25, 1941, of various alleged alcoholic beverages, a large quantity of herbs and other articles, from Cesare Boccafogli, at 244 Van Houten Avenue, in the City of Passaic, County of Passaic and State of New Jersey.	Case No. 6012 ON HEARING CONCLUSIONS AND ORDER

Nicholas Martini, Esq., Attorney for Cesare Boccafogli.
Harry Castelbaum, Esq., Attorney for Department of Alcoholic Beverage Control.

On April 25, 1941, investigators of this Department, acting upon information that illicit alcoholic beverage activity took place at a dwelling located at 244 Van Houten Avenue, Passaic, visited the premises where they identified themselves to Cesare Boccafogli, the occupant, and with his consent searched the premises, finding in the basement a large quantity of vermouth extract, various herbs, a 5-gallon can of untaxed alcohol, a number of empty 5-gallon cans and other items mentioned in Schedule "A" annexed hereto. Boccafogli was arrested and subsequently made a voluntary signed statement in which he said that for experimental purposes he had manufactured vermouth extract in his home and had utilized the bootleg alcohol in its manufacture.

At the hearing Boccafogli did not contest forfeiture of the alcohol or the empty cans but resisted forfeiture of the other seized items, particularly the vermouth extract and the herbs.

The alcohol is presumably bootleg because, although fit for beverage purposes, it bore no tax stamps. P.L. 1939, c. 177. Moreover, Boccafogli admits and concedes that the alcohol is illicit. Hence, it and all the other property seized upon the premises in which the alcohol was found are subject to confiscation. R. S. 33:1-66(b). It is determined that the seized property constitutes unlawful property.

The sole issue is whether, under equitable principles, I should exercise my discretion and return any or all of the seized property to Boccafogli.

Boccafogli is the President of Societa Vinicola Torino, Inc., the holder of a New York winery license. The winery, although in corporate form, is actually operated under a partnership agreement between Boccafogli and one Fioravera, each the owner of a half interest in the corporation, whereby Boccafogli manufactures vermouth and Fioravera manufactures all other wines, each paying out all expenses and receiving all profits in connection with their respective enterprises. It appears that in the trade there is constant experimentation to invent and improve vermouth formulae which have considerable value and are closely safeguarded. Boccafogli states that, partly to envelop his experiments in secrecy (apparently being somewhat distrustful of his partner) and partly for convenience and as a hobby, he conducted experiments on new formulae in his home. He admits that he has been doing this since 1936 but emphatically denies that any of the extract produced as a result of his experiments has at any time been used in conjunction with or transported to the New York winery.

Subsequent investigation by this Department failed to uncover any evidence that Boccafogli had, in fact, used, in the winery, any of the essences manufactured in his home, and vermouth experts who testified on his behalf stated that it was impossible, with the limited facilities in his basement, for Boccafogli to manufacture the finished product upon a commercial scale. If this were all, I would, perhaps, be inclined to excuse his conduct and return the extract under a special permit or license retroactively validating its manufacture, but the fact remains that he used in the experimentation bootleg alcohol which he claims was foisted upon him by a gangster to whom he had loaned some money and who, under threats of personal violence, had forced him to take the alcohol in cancellation of the debt. Boccafogli is a liquor licensee. He knew he would have no excuse if he was caught with this bootleg, and although he may have been afraid, as he says, to call the police when the alcohol was delivered to him against his will, he cannot offer any explanation for his failure to destroy it. Under the circumstances, he does not merit return of the extract, which contains bootleg alcohol.

As to the herbs: It appears from Boccafogli's testimony that the herbs which were imported from Greece, Italy, France and other countries in the vicinity of the Mediterranean Sea were purchased by Boccafogli some two years ago; that it is virtually impossible to obtain another supply due to the war; that they represent a four year supply, and if they are not returned, it will mean the ruination of his business, as he would have to scrap his present manufacturing processes.

Boccafogli has no prior criminal record and has heretofore had a clean slate with the New York and Federal liquor authorities. He has been fully cooperative, not only with this Department but with the police authorities as well. Several character witnesses have testified as to his excellent reputation as a law-abiding citizen. Under all the circumstances, and in view that he has already been criminally convicted and fined for his offense and must stand to lose all the other seized property (the extract alone being valued at $2,000.00), I believe that forfeiture of the herbs, with its attendant business consequences upon Boccafogli, would result in undue hardship and be unnecessarily severe. I will return the herbs.

Accordingly, it is ORDERED that the seized property, more fully described in Schedule "A" annexed hereto, be and the same is hereby forfeited in accordance with the provisions of R.S.33:1-66, and that it be retained for the use of hospitals and State, County and municipal institutions, or destroyed in whole or in part at the direction of the Commissioner.

E. W. GARRETT,
Acting Commissioner.

Dated: June 21, 1941.

SCHEDULE "A"

15 - 50-gallon barrels of vermouth extract
34 - containers with approximately 135 gallons of vermouth extract
1 - 5-gallon can of alcohol
1 - 5-gallon bottle of alcoholic beverages
1 - wine press and stand
1 - 100-pound barrel of orange peel
7 - quart bottles of whiskey and 6 bottles of wine
8 - bottles of vermouth and 8 bottles of wine
38 - empty 5-gallon cans
a quantity of labels and tinfoil tops

3. APPELLATE DECISIONS - R. & F., INC. v. TEANECK.

RENEWAL OF LICENSE DENIED BECAUSE OF NOISE AND ANNOYING NEON LIGHTS - DENIAL REVERSED TO AFFORD THE MUNICIPALITY THE OPPORTUNITY OF CONSIDERING THE QUESTION ANEW UPON APPLICATION FOR CURRENT RENEWAL.

R. & F., INC.,)
Appellant,)
-vs-)
MAYOR AND COUNCIL OF THE TOWNSHIP OF TEANECK,)
Respondent.)

ON APPEAL
CONCLUSIONS AND ORDER

Leland F. Ferry, Esq., Lloyd L. Schroeder, Esq., and Cyril W. O'Gorman, Esq., Attorneys for Appellant.
Donald M. Waesche, Esq., Attorney for Respondent.
S. Charles Savona, Esq., Attorney for M. Contant, an Objector.

This is an appeal from denial of renewal of a plenary retail consumption license for premises located at 653 Cedar Lane, Township of Teaneck.

After appellant had filed its application for renewal, written objections thereto were filed by persons who reside in the vicinity of the licensed premises. These objections were, among others, that appellant had conducted its business in such a manner as to be a constant threat to the health and welfare of persons living in the immediate vicinity, and that appellant had violated conditions imposed by respondent upon its license for the prior fiscal year. After two lengthy hearings upon said objections, two

Councilmen voted in favor of renewal, two Councilmen voted against renewal, and the Mayor cast the deciding vote against the renewal of the license.

Appellant's premises are located on a portion of Cedar Lane which is zoned for and devoted to business purposes. Said premises were formerly used as an auto salesroom and adjoin a large garage which is located east of said premises facing Cedar Lane. Appellant was incorporated in September 1938 and shortly thereafter obtained transfer of a plenary retail consumption license from other premises to the former auto salesroom at 653 Cedar Lane. At first it operated the place as a tavern but now conducts the premises as a restaurant and so-called "supper club," with music, dining and dancing until the closing hours, namely, 2:00 A.M. on weekdays, and 3:00 A.M. on Sundays.

The objectors who appeared at the hearings below and at the three hearings herein reside on Beverly Road, which parallels Cedar Lane to the rear of the licensed premises, and on Catalpa Avenue, which runs between Cedar Lane and Beverly Road. The rear of some of the properties on Catalpa Avenue adjoin a parking lot which is located west of the licensed premises and operated in conjunction therewith.

So far as appears, none of the objectors has ever visited appellant's place of business. They complained of the noises from the parking lot and the licensed premises, the presence of intoxicated persons in the vicinity of the licensed premises, and the existence of a large neon sign located on the westerly side of the licensed building, which sign is kept lighted until the closing hours and shines in the bedrooms of some of the objectors.

At the hearings held herein, Mr. MacIntosh, who resides on Beverly Road, testified that the noises from the parking lot keep him from sleeping until two, three and four o'clock in the morning; that he can hear music from the licensed premises when the window is open. Mrs. MacIntosh corroborated her husband's testimony and also stated that she had seen two intoxicated men and two intoxicated women leaving the licensed premises.

Mrs. Jones, who resides on Beverly Road, testified that there was noise in the middle of the night, caused by the slamming of doors of automobiles parked in the lot which adjoins appellant's premises.

Mr. Smith, who resides on Catalpa Avenue, testified that the neon light makes it inconvenient to use his bedroom; that there is excessive noise in the parking lot and that there is noise from the licensed premises which the air conditioning has not stopped. Mrs. Smith corroborated her husband's testimony and said also that she had seen a number of intoxicated men leaving appellant's place of business.

Mr. Clapp, who resides on Beverly Road, testified that there is a loud noise from autos in the parking lot until two and three o'clock in the morning.

Mr. Shequine, who resides on Catalpa Avenue, testified that the noise from the parking lot continues as late as 4:30 A.M. and that he is bothered by the lights from the neon sign shining into his bedroom and affecting his sleep. Mrs. Shequine corroborated her husband's testimony.

The evidence further shows that prior to the renewal of this license for the fiscal year beginning July 1, 1939 and ending June 30, 1940, a number of residents had objected because of music and noise upon the licensed premises until early hours of the morning, the parking of cars in the vicinity of their homes, and the existence of the neon sign. Respondent renewed the license for the fiscal year 1939-40, but inserted the following conditions therein:

> "This license is granted upon the condition that there shall be no dancing or the playing of any kind of music upon the licensed premises that shall disturb the peace and quiet of the neighborhood of said premises between the hours of eleven o'clock in the evening, daylight saving time or standard, whichever time is in use, and the hour for closing the premises according to the liquor ordinance.
>
> "The licensee shall not allow, permit or suffer in or upon the licensed premises any disturbances, lewdness, immoral activities, brawls, or unnecessary noises, or allow, permit or suffer the licensed place of business to be conducted in such manner as to become a nuisance.
>
> "Any violation of these conditions shall be sufficient cause for immediate revocation of the license."

In an attempt to prevent recurrence of the objectionable conditions, appellant installed an air conditioning system at a considerable expense and made arrangements for the use of the parking lot on the westerly side of its premises so as to remedy the parking condition. Its attorney also verbally assured the members of the Township Committee that the neon light would be shut off at midnight.

At the hearing herein, appellant produced numerous witnesses who testified that the premises have always been conducted in an orderly manner. The President of appellant corporation denied that he had any knowledge of any intoxicated people on or about the licensed premises and testified that he had hired an attendant for the parking lot on Friday and Saturday nights to prevent unnecessary noises in the parking lot.

The complaints of objectors in this case principally concerned objectionable lights; slamming of car doors, and other forms of noise chiefly in connection with the parking of cars on an adjacent lot. The Chief of Police of Teaneck informs me that since the final hearing in this matter on September 5, 1940, his Department has received but one complaint from a neighbor of the licensee and that concerned noise. Noise is a subjective thing. It can be cured. So can objectionable lights.

This case involves a close question. I have considered it long and carefully. The licensee has been operating now for more than nine months since the date of the last hearing and there appears on the Police Blotter only one complaint, namely, that of noise heretofore mentioned. In view of the nature of the objections, I shall reverse the action of the respondent so that it may have an opportunity to consider anew the question when the application for renewal is presented.

Accordingly, it is, on this 23rd day of June, 1941,

ORDERED, that the action of the respondent be and it hereby is reversed and respondent is directed to issue the license as applied for.

E. W. GARRETT,
Acting Commissioner.

4. MORAL TURPITUDE - PETIT LARCENY, POSSESSION OF LOTTERY SLIPS, NON-SUPPORT - NO AGGRAVATING CIRCUMSTANCES - NOT MORAL TURPITUDE.

DISQUALIFICATION - APPLICATION TO LIFT - WHERE THERE HAS BEEN NO CONVICTION OF A CRIME INVOLVING MORAL TURPITUDE, THERE IS NO DISQUALIFICATION TO BE REMOVED.

In the Matter of an Application to Remove Disqualification because of a Conviction, pursuant to R. S. 33:1-31.2.

Case No. 157.

ON HEARING
CONCLUSIONS AND ORDER

Petitioner, who has a criminal record, seeks in this proceeding to have determined whether the crimes of which he stands convicted involve moral turpitude, and in the event that they do, to have the statutory disqualification, resulting from such conviction or convictions, removed, pursuant to R. S. 33:1-31.2.

In 1932 petitioner, while twenty-three years of age, became implicated, along with three other young men, in the pilfering of several bathing suits from a clothes line, and, as a result, was convicted in police court of petit larceny and was placed on probation and ordered to make restitution. Petit larceny is not a crime which, per se, involves moral turpitude. Re Case No. 213, Bulletin 232, Item 6. That petitioner's offense was an unaggravated one is indicated by the leniency of the penalty imposed. I find no moral turpitude involved in this crime.

In 1933, in police court, and again in 1934, in the county court, petitioner was convicted on charges of possessing lottery slips. On the first occasion he was fined $25.00; the second time he was sentenced to sixty days in the workhouse. Both convictions resulted from his apprehension, while in possession of lottery slips which he was "writing" on a commission basis. It appears that petitioner was neither a principal nor an aide intimately connected with the conduct and operation of the lottery enterprise. Under these circumstances, neither offense involves moral turpitude. Re Case No. 354, Bulletin 435, Item 2; Re Case No. 315, Bulletin 396, Item 4; Re Case No. 296, Bulletin 353, Item 12; Re Case No. 295, Bulletin 351, Item 10.

While multiple convictions for the same type of offense may show such reckless disregard for law as to warrant a conclusion that the last similar offense actually involves the element of moral turpitude (see Re Case No. 314, Bulletin 393, Item 9), a mere second similar conviction for possessing lottery slips, in the absence of aggravating circumstances, does not warrant such conclusion. Cf. Re Case No. 378, Bulletin 460, Item 1; Re Case No. 354, supra.

Petitioner's record shows, further, that in 1933 he was charged with neglect and refusal to support his wife and child and that he consented, at that time, to the entry of an order requiring him to pay $5.00 a week for the support of his wife and child. It further appears that in 1935 he was convicted on the same charges and placed on probation and ordered to resume weekly payments for the support of his wife and child.

At the hearing petitioner testified that in 1933 his wife, from whom he had been separated following her desertion, had taken him into court for the purpose of requiring him to contribute toward

her support and the support of their child; that, as a result, he had consented to the entry of an order requiring him to pay $5.00 a week to his wife; that some time prior to 1935, his wife having become ill and having entered a hospital, he assumed the care of the child and made weekly payments to the hospital; that because of his failure to pay, in addition, to his wife, the weekly payments provided for in the original court order, she again charged him with refusal to support and he was again ordered to resume payments. The Probation Office of the county wherein petitioner resides reports that payments were made regularly after that time.

The crime of neglect and refusal to support may or may not involve moral turpitude, depending upon the circumstances surrounding commission of the offense. There is no evidence that petitioner's marital offenses were attended by such aggravating circumstances as to warrant finding that the element of moral turpitude was therein involved.

I find that petitioner has never been convicted of a crime involving moral turpitude. No order, therefore, removing disqualification because of conviction, is required. Re Case No. 131, Bulletin 451, Item 7; Re Case No. 77, Bulletin 387, Item 9; Re Case No. 68, Bulletin 364, Item 3; Re Case No. 1, Bulletin 208, Item 6.

E. W. GARRETT,
Acting Commissioner.

Dated: June 24, 1941.

5. SEIZURES - CONFISCATION PROCEEDINGS - ORDER AMENDED RETURNING IRREPLACEABLE SPANISH ORANGE PEEL.

In the Matter of the Seizure on April 25, 1941, of various alleged alcoholic beverages, a large quantity of herbs and other articles from Cesare Boccafogli, at 244 Van Houten Avenue, in the City of Passaic, County of Passaic and State of New Jersey.	Case No. 6012 ON PETITION ORDER

Nicholas Martini, Esq., Attorney for Cesare Boccafogli.
Harry Castelbaum, Esq., Attorney for Department of Alcoholic Beverage Control.

On June 21, 1941 Conclusions and Order were entered herein (Bulletin 467, Item 2), whereby certain herbs seized by this Department were returned to Cesare Boccafogli and certain other personal property belonging to him, including a 100-pound barrel of orange peel, was determined to be unlawful property and ordered forfeited an retained for the use of hospitals and State, County and municipal institutions, or destroyed in whole or in part at the direction of the Commissioner.

Cesare Boccafogli subsequently filed a verified petition reciting that the orange peel comes from the Pyrenees Mountains in Spai that another supply is unobtainable at the present time because of th disturbed world-wide conditions, and praying that the Order heretofor entered be amended to provide for the return of the orange peel to petitioner.

Under the circumstances, petitioner's request will be granted and I will return the orange peel to him, together with the herbs.

Accordingly, it is ORDERED that Schedule "A," annexed to the Conclusions and Order dated June 21, 1941, is hereby amended to read as follows:

SCHEDULE "A"

15 - 50-gallon barrels of vermouth extract
34 - containers with approximately 135 gallons of vermouth extract
1 - 5-gallon can of alcohol
1 - 5-gallon bottle of alcoholic beverages
1 - wine press and stand
7 - quart bottles of whiskey and 6 bottles of wine
8 - bottles of vermouth and 8 bottles of wine
38 - empty 5-gallon cans
a quantity of labels and tinfoil tops

E. W. GARRETT,
Acting Commissioner.

Dated: June 26, 1941.

6. APPELLATE DECISIONS - LARRY'S SHAMROCK TAVERN v. FORT LEE.

SUFFICIENT LICENSES IN VICINITY - PUBLIC CONVENIENCE AND NECESSITY NOT SHOWN - DENIAL AFFIRMED.

LARRY'S SHAMROCK TAVERN, a New Jersey corporation,
Appellant,
-vs-
MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF FORT LEE,
Respondent.

ON APPEAL
CONCLUSIONS AND ORDER

Weitz & Lasser, Esqs., by Carl Weitz, Esq. and Walter J. Freund, Esq., Attorneys for the Appellant.
Lawrence A. Cavinato, Esq., Attorney for the Respondent.

Respondent denied appellant's application for transfer of Mary Viggiano's plenary retail consumption license for premises 121 Main Street to appellant for premises 1282 Palisade Avenue, Fort Lee. Hence this appeal.

Respondent assigns as one reason for its denial that there are sufficient licensed premises now outstanding on Palisade Avenue. The evidence shows that within a space of 2200 feet there are seven consumption establishments. In one direction there are three such establishments within 400 feet, and in the other there are two within 700 feet. The vicinity in question, although zoned since December 1938 for residential purposes, is, for the most part, undeveloped land. The only other businesses of any kind in the area are two gasoline service stations. No more that fifteen homes are located in the neighborhood, only two of which front on Palisade Avenue.

It is clear that the present number of licenses existing within the area in question is more than ample to service the needs of the residents in that vicinity. Appellant argues, however, that Palisade Avenue is a heavily traveled State highway and that an additional license is there necessary to cater to the needs of transient trade. However, with seven licensed places now concentrated within a space of 2200 feet, it can hardly be said that respondent is unreasonable in its determination that no further license is needed there, despite the substantial vehicular traffic. Although the needs of transients may be taken into consideration in a determination of whether an additional license shall issue, proof of such needs must be most compelling to overcome the primary consideration of the issuing authority when reaching such determination, namely, the needs of its own residents. Levitt v. Liberty, Bulletin 169, Item 4; Granda v. Rockaway, Bulletin 282, Item 7; Watts v. Princeton, Bulletin 301, Item 2; Owen v. Medford, Bulletin 463, Item 8. In the latter case, it was said: "Liquor is not such a necessitous commodity that it must be made readily accessible to a person who, when leaving one licensed establishment, must drive his automobile twenty-nine miles farther before being able to obtain another drink."

Appellant also contends that respondent's policy of limiting the number of licenses in the vicinity in question has not been uniformly applied and that, therefore, respondent has unlawfully discriminated against it in refusing to grant its application. It argues that, despite the fact that Palisade Avenue has been a residential zone since December 1938, three consumption licenses have been issued there since that time. It points out that its proposed premises was previously licensed between September 6, 1939 and February 5, 1941, when the license was transferred to a different location; that a transfer into the area was granted to a new building on September 6, 1939 and that an original license was issued for another new building on January 18, 1939.

The testimony shows that the latter two licenses were issued because the owners of those premises had obtained building permits prior to the adoption of the zoning ordinance in December 1938, in anticipation of obtaining liquor licenses, and that respondent, therefore, felt morally bound to grant the applications for such premises; further, that the license for the premises here involved was issued because no objections were received thereto from any of the Borough residents.

There is no question that the action of the Borough Council with respect to these three applications was, to say the least, open to criticism. This Department has consistently taken the position that liquor licenses may not be issued in violation of local zoning ordinances. Talbot v. Keppler, Bulletin 117, Item 1; Corradi v. Closter, Bulletin 219, Item 3; East Brunswick Township Board of Adjustment v. East Brunswick, Bulletin 223, Item 5; Nugent and Hignett v. Linden, Bulletin 263, Item 7; Marinaccio v. Ocean, Bulletin 264, Item 11; Re Frank Bardessono, Bulletin 266, Item 3; M. O'Neill Supply Co. et al. v. Ocean et al., Bulletin 278, Item 1; Marra v. Cedar Grove, Bulletin 302, Item 15; Murchio v. Wayne, Bulletin 379, Item 7. Timely appeals to this Department might well have led to reversals of the issuances in all three cases.

However, despite the apparent disregard of the zoning ordinance, there is no showing that respondent's policy of granting no more licenses in the particular vicinity has been abused. There seems to be some doubt as to just when this policy originated. It apparently did not exist in December 1938 when the zoning ordinance was adopted

because the evidence indicates that this ordinance was motivated not from a desire to limit the number of liquor licenses on Palisade Avenue but rather to restrict the operation of any further hot dog stands there.

In any event, I find that, at least since May 1940, this policy has been in effect. At that time respondent denied an application for the transfer of a consumption license from 1365 Palisade Avenue to 1345 Palisade Avenue, an intervening distance of but 200 feet. On appeal this Department reversed such denial. See Dame v. Fort Lee, Bulletin 428, Item 5. It was there said that respondent could not arbitrarily deny such transfer merely because of its desire to reduce the number of liquor licenses there located. It was further said:

> "Thus, were appellant actually located outside this vicinity of roadstands and seeking to transfer into it *** respondent would, I believe, be reasonable in denying such a transfer and I would hence sustain such a denial."

The facts of this case come within the language of the cited paragraph from the Dame case. Here appellant desires to transfer a license covering premises "actually located outside this vicinity of roadstands and seeking to transfer into it." Although the Dame case was concerned with an outright roadstand, appellant has not presented sufficient proof that its proposed premises will be conducted in so different a manner as to deserve any special consideration or that it warrants any exception from the general policy against placing any more consumption licenses in the vicinity in question.

There must be a time at which an issuing authority has a right to take a bona fide stand that the saturation point has been reached. Cf. Baselici v. Asbury Park, Bulletin 381, Item 4; Hall v. Shrewsbury, Bulletin 397, Item 8. Respondent has, apparently since May 1940, determined upon a policy of restricting the number of licensed premises that it will allow on Palisade Avenue. Such policy, in view of the present number of licensed premises there located, is wholly salutary and should not be upset except upon proof of public necessity and convenience therefor. I find no such proof in this case.

Lastly, appellant asserts that it made certain alterations at the proposed premises in reliance upon assurances by several of respondent's members that its application would be granted. These conversations are alleged to have taken place at an informal meeting held by respondent prior to convening in regular session on April 16, 1941, twelve days before it voted unanimously (5 - 0) to deny the application. There is a conflict in the record as to whether such conversations actually occurred. However, even if true, informal expressions by individual members are not binding on the governing board as a whole. As was said in Hobbs v. Lower Penns Neck, Bulletin 372, Item 6:

> "Counting noses and lining up a favorable majority is often helpful but does not insure results where men do their duty. True, in fairness, members of issuing authorities should refrain from expressing any opinions which might lead wishful thinkers to color with green, as a 'GO' sign, instead of cautionary yellow, which might turn to red. However, a license issuing authority is not bound by any informal remarks made by its members

or action taken prior to the hearing on objections filed. Stein v. West New York, Bulletin 101, Item 7; Held v. Deptford, Bulletin 269, Item 4; Granda v. Rockaway, Bulletin 282, Item 7. Cf. Lewis v. Phillipsburg, Bulletin 232, Item 13. It acts only in formal meeting assembled and not on the street. Curbstone opinions of its members are a vain thing for safety. The fact that a municipal official, in advance of a public hearing, may tell an importunate constituent that, as presently informed, he sees no objection, is no reason why he must vote that way after he has heard the other side. That's the object of having a hearing. Government by 'buttonhole' has no standing in a democracy."

Since the foregoing is dispositive of the instant appeal, it is unnecessary to consider the other reasons assigned by respondent for its denial of appellant's application.

The action of respondent is affirmed.

Accordingly, it is, on this 27th day of June, 1941,

ORDERED, that the petition of appeal be and the same is hereby dismissed.

E. W. GARRETT,
Acting Commissioner.

7. TRANSPORTATION INSIGNIA, ALCOHOL PERMITS AND BLANKET EMPLOYMENT PERMITS EXTENDED TO JULY 15.

June 27, 1941

TO ALL LAW ENFORCEMENT AUTHORITIES:

Transportation Insignia, Special Permits to possess and sell alcohol at retail, Special Blanket Employment Permits and Special Permits to employ Caddies and Pin Boys expire at midnight, June 30, 1941. New Insignia and the above mentioned types of permits must be obtained for such transportation and employments for the fiscal year beginning July 1st.

In many instances, certification of the issuance of licenses has not been received from clerks of municipal issuing authorities. Due to the consequent delay, a large number of retail licensees will be without new Insignia or permits on July 1st.

It would be unfair to retailers who have obtained licenses and applied for Transportation Insignia and Special Permits, to deprive them of delivery privileges or keep some person out of work because of this omission beyond their power to control.

I have, therefore, granted an extension of 1940-41 Insignia, Special Alcohol Permits, Special Blanket Employment Permits and Special Permits to employ Caddies and Pin Boys to midnight July 15, 1941 to those licensees who have been issued licenses for the fiscal year beginning July 1, 1941.

BUT at the expiration of this extension, the law will be enforced and arrests made.

E. W. GARRETT,
Acting Commissioner.

8. APPELLATE DECISIONS - FISCH v. HILLSBOROUGH.

TRANSFER FROM PERSON TO PERSON DENIED ALLEGING FAILURE TO FILE TAX RELEASE WITH APPLICATION AND PERSONAL UNFITNESS OF APPLICANT - TAX RELEASE SUBSEQUENTLY FILED - UNFITNESS NOT SHOWN - DENIAL REVERSED.

HARRY FISCH,

Appellant,

-vs-

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF HILLSBOROUGH,

Respondent.

ON APPEAL
CONCLUSIONS AND ORDER

Daniel G. Kasen, Esq., Attorney for Appellant.
Clarkson A. Cranmer, Esq., Attorney for Respondent.

This appeal is from respondent's refusal to grant appellant a person to person transfer of Willie Green's plenary retail consumption license for a tavern, the Belle Mead Rest, on Route 31 in the Belle Mead section of Hillsborough Township.

The tavern caters to colored trade. Originally, one Bruce Williams, a negro, applied for liquor license for these premises in 1938 when the premises were the club quarters for the Belle Mead Country Club, a colored organization. Respondent's denial of that license was, on appeal, reversed by the late Commissioner on theory that there appeared to be nowhere else in the Township where these colored folk could freely go for a drink. See Williams v. Hillsborough, Bulletin 268, Item 7.

Records of this Department show that thereafter, in September 1938, the Township Committee, in accordance with such decision, issued a plenary retail consumption license to Williams for these premises; that later, when Williams' license expired on June 30, 1939, the Township Committee issued a license for these premises to Maron A. Craig for the 1939-40 fiscal year; that, on November 9, 1939, Craig's license was transferred by the Township Committee to Willie Green, who, when such license expired, renewed it for the current (1940-1) fiscal year. Green, a negro, has apparently been conducting the premises as a tavern for colored folk.

In September 1940 Green installed appellant and his son, white persons, as managers of the tavern with option of purchase. Arrangements having been made for appellant to exercise this option, he thereupon obtained Green's consent to transfer of the license to himself and filed the present application for that transfer. Apparently appellant, if obtaining the license, intends to continue the premises as a tavern catering to colored trade.

In its Answer respondent, as justification for denying the transfer, sets forth (1) that the application was not accompanied by the requisite "tax release" from the State Tax Commissioner; and (2) that, in sum, appellant has demonstrated himself to be an unfit person to hold a license for this tavern.

As to (1), viz., the "tax release": Rule 3 of State Regulations No. 3, adopted by this Department, requires that every application for transfer of liquor license be accompanied by a so-called "tax release" from the State Tax Commissioner certifying "that the transferring licensee is not delinquent in the payment of any tax or in the filing of any report required by the provisions of the Alcoholic Beverage Tax Act."

In the present case, such certificate was apparently not filed with respondent until after the application was denied and shortly before the hearing on appeal. At that hearing respondent stated that, since the certificate was then on hand, it was abandoning ground (1).

If actually the late filing of the "tax release" is to be deemed a fatal defect in the application, then such defect may not be thus waived by the local issuing authority, but, instead, requires a dismissal of this appeal. See, for example, Trotto v. Trenton, Bulletin 46, Item 11.

Now, the evident purpose for the Department's regulation in requiring the "tax release" is merely to ensure that no license be transferred unless the holder is shown to be in good standing as regards his State liquor taxes and reports. In view of such purpose, it follows that the regulation is actually satisfied so long as the "tax release" is filed at any time before the transfer being sought actually becomes effective. Hence I deem that an application which has been submitted without the "tax release" is not thereby fatally defective but may, as here, be satisfactorily corrected by filing the release at any stage in the proceedings for the transfer, whether before the local issuing authority or pending appeal to this Department. Indeed, it has heretofore been ruled in Re deValliere, Bulletin 282, Item 2, that even if the transfer actually be granted without filing of the "tax release," this Department will still allow a reasonable time thereafter to file such release before taking action against the licensee.

To be distinguished are those cases which involve filing of license fee and federal stamp; for the statutory requirement (R. S. 33:1-25) as to filing such fee and stamp serves a substantially different purpose from the Department's requirement in question. See Andreach v. Keansburg, Bulletin 73, Item 14; Thorman v. Mt. Ephraim, Bulletin 169, Item 7; Powell v. Westville, Bulletin 210, Item 5; Bodrato v. Northvale, Bulletin 433, Item 1. As to whether defect in filing the fee or federal stamp is correctible, see Jones v. Absecon, Bulletin 218, Item 1; Siciliano v. Asbury Park, Bulletin 341, Item 3.

As to (2), viz., appellant's fitness, etc.: Respondent's case rests mainly upon the fact that State troopers (who have barracks in the Township and help provide local police protection) have been called to the tavern on four occasions since appellant and his son have been managing it.

Although this fact, on its face, lends strong warrant for respondent's claim of unfitness, a full recital of the facts as to those incidents leads me to the only fair conclusion that, in actuality, appellant and his son have been merely taking no chances in their management of the tavern.

Thus, it appears that appellant or his son telephoned for the troopers in all four instances, two troopers being sent to the tavern in answer to each call; that, as to the first three instances, the occasion for the call was a verbal quarrel (and in one instance seemingly a fight) between two patrons at the tavern; that the troopers were called on these instances as a means of suppressing the trouble-makers; that, when the troopers reached the tavern, the troublesome patrons had already left and all was quiet.

It further appears that as to the fourth (and apparently only serious) incident, a fight occurred at the tavern during the early hours of New Year's Day last while a crowd of patrons were celebrating the advent of 1941; that the fight arose in a group of four patrons (three men and a woman) when one of the male patrons pushed another; that during the course of this fight the woman hit one of the three men over the head with a soda-pop bottle, another man received a wound at the mouth from the blow of the fist, and the third man received what might have been a knife wound in his hand; that appellant, his son and the bartender quieted the rumpus but called the troopers to "play safe" and prevent any further possible flare-up; that, when the troopers reached there, everything appeared to be under control.

One of the troopers who went to the tavern on this last occasion testified that the group of four seemed to be drunk. Appellant testified that they were "happy" when they entered the tavern (about three-quarters of an hour before the fight) and hence were served only soft drinks.

In all fairness, I cannot view these incidents as warranting a conclusion that appellant is unfit or unqualified to hold a liquor license. From what appears, appellant and his son, in managing the tavern for the present licensee, have been wholly cautious to control the colored and ebullient trade. They do not appear to have been in any way negligent or at fault as to any of the altercations. They took wholly proper and efficient action on each of the four occasions, even in the last instance (which was, in all reasonable likelihood, more the result of "New Year's Eve" hilarity than anything else).

This conclusion is supported by the fact that several other employees at the tavern claim that appellant and his son had been exercising a firmer hand there than the licensee, and by the fact that respondent has never taken any disciplinary action against the licensee on the basis of these four incidents.

Nor do I find anything of substance in the rest of the case to sustain a conclusion of unfitness. Although it is pointed out that an automobile accident and, on another occasion, a fight occurred on the highway, with the latter and perhaps also the former incident involving patrons who had left the tavern; there is no actual evidence linking either of these occurrences with anything (such as improper sales of liquor at the tavern, etc.) to show personal misbehavior by appellant. As to the somewhat surprising testimony of the respondent's Chairman that he put weight upon the fact that appellant and his son, in managing the tavern, had advertised it in colored newspapers outside the municipality, I find nothing in that fact to suggest unfitness. As to mentioned complaints about the tavern, the only complainant at the hearing on appeal, a nearby neighbor, identified merely the fight on the highway.

Now, this Department has consistently and properly ruled that the question whether an applicant should be deemed generally worthy of a retail liquor license lies within the sound judgment of the issuing authority; and that its determination of unfitness is accordingly entitled to great weight. See, for example, Sylvester v. South Belmar, Bulletin 38, Item 15; Re Reservation of Discretion, Bulletin 43, Item 9; Tuccillo v. Princeton, Bulletin 97, Item 11; Zupkus v. Linden, Bulletin 172, Item 6; Chmielinski v. Clifton, Bulletin 240, Item 5; Alper v. Paterson et al., Bulletin 312, Item 11; Spitz v. Pemberton, Bulletin 379, Item 8. However, it is equally clear that, in full fairness, any such determination of unfitness must be based upon sound and adequate ground. See Skwara and Proneska v. Trenton, Bulletin 57, Item 7. Cf. Colacuori v. Orange, Bulletin 87,

Item 8; Sudol v. Wallington, Bulletin 276, Item 7. In the present case, I do not find such sufficient ground in the record. Cf. Auletto v. Camden, Bulletin 137, Item 3.

Hence, I shall reverse respondent's action and shall give appellant his chance at the license. Should he in any way misconduct the tavern, respondent has it wholly within its power to take swift and effective disciplinary measures for suspension or revocation of the license.

Accordingly, it is, on this 28th day of June, 1941,

ORDERED, that the action of the Township Committee of the Township of Hillsborough in denying the transfer in question be and hereby is reversed, and further, that such Township Committee shall grant the transfer forthwith as applied for.

C. W. Harrett

Acting Commissioner.