Ambrose

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark, N. J. 07102

BULLETIN 1991 August 5, 1971

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ITEM

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark, N. J. 07102

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1. APPELLATE DECISIONS - BARNETT'S WINES& LIQUORS, INC. v. CRANFORD ET AL.

#3481
Barnett's Wines and Liquors, Inc., et als.,

Appellants,

v.

Township Committee of the Township of Cranford, and J. & P. Spirits, Inc.,

Respondents.

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#3483
Mary DeFabio,

Appellant,

v.

Township Committee of the Township of Cranford, and J. & P. Spirits, Inc.,

Respondents.

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#3484
Ralph Della Serra,

Appellant,

v.

Township Committee of the Township of Cranford, and J. & P. Spirits, Inc.,

Respondents.

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On Appeal

CONCLUSIONS and ORDER

Ira D. Dorian, Esq., Attorney for Appellants Barnett's Wines and Liquors, Inc., et als.
Sheldon and Freda, Esqs., by Robert L. Sheldon, Esq., Attorneys for Appellant DeFabio
Harry Kay, Esq., Attorney for Appellant Della Serra
Donald R. Creighton, Esq., Attorney for Respondent Township Committee
Frigola and Toy, Esqs., by Edward J. Toy, Esq., Attorneys for Respondent J. and P. Spirits, Inc.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Appellants challenge the actions of the respondent Township Committee of the Township of Cranford (Committee) which on February 10, 1970, adopted resolutions whereby it (a) rejected the

objections of the appellants to the grant of a plenary retail distribution license to the respondent J. and P. Spirits, Inc., (J. and P. Spirits) and (b) approved the application of J. and P. Spirits for a plenary retail distribution license. The said grant was conditioned upon the following:

1. Such license shall not be issued until the proposed premises were fully completed in accordance with plans filed; and

2. That the said license "shall not be sold, assigned or transferred by the licensee for a period of five (5) years after its issuance unless the consent of the township is first had and obtained...."

The latter resolution further stated that "since there are no other licenses available at this time, the applications of Ralph Della Serra, Mary DeFabio and Fred Hayeck be and they hereby are denied."

Barnett's Wines and Liquors, Inc., a New Jersey corporation, Sidney Breen, t/a Breen's Liquor Store, and Sidney Milton Scher, t/a Scher's Liquor Store, appeal from the grant of the said license to J. and P. Spirits, Inc. Mary DeFabio and Ralph Della Serra appeal from the grant of the said license to J. and P. Spirits, Inc., and from the denial of their applications for the said license.

Since these appeals involve common questions of law and fact, they were heard at the same time and will be the subject of a single Hearer's Report.

The petition of appeal of Barnett's Wines and Liquors, Inc., et al., (Barnett's) alleges that the action of the Committee was erroneous for reasons which may be briefly summarized as follows:

a. The license was issued after the adoption of a local ordinance increasing the number of plenary retail distribution licenses authorized; the said ordinance was adopted because of favoritism and not public welfare or in the public interest. Accordingly, the license issued thereunder was invalid.

b. There is no public need or convenience to be served by the issuance of the said additional license.

c. The issuance of the license to J. and P. Spirits was based upon "favoritism and for the benefit of one individual and not the public welfare or in the public interest."

d. The Committee failed to hold a public hearing on objections to the application for the said license as required by Rule 7 of State Regulation No. 2, and R.S. 33:1-24.

e. The Committee failed to state the reasons for its action as required by Rule 8 of State Regulation No. 2.

f. The conditions for the issuance of the said license as set forth in the resolution were not first submitted for approval by the Director pursuant to R.S. 33:1-32.

g. That subsequent to the issuance of the said license to J. and P. Spirits, the Director determined that one of the conditions was invalid and, therefore, "this renders the issuance of the license invalid."

h. The standards set by the Committee as a basis for determining the issuance of the said license were "unlawfully tailored to restrict the issuance of the license to Jerry De Rosa, President of J. & P. Spirits, Inc."

i. The notice of intention of J. & P. Spirits, Inc., to apply for the license was published prior to the enactment of the ordinance increasing the number of licenses and was, therefore, invalid.

j. The Committee did not limit the term of the license to one year, as required by R.S. 33:1-26, but for an indefinite term; and

k. The action of the Committee was "arbitrary, illegal, unreasonable and constitutes an abuse of discretion."

De Fabio alleges, in her petition of appeal, the following additional grounds:

a. The application of J. and P. Spirits was made prior to the introduction of the ordinance increasing the authorized number of plenary retail distribution licenses.

b. The hearing in connection with the objections to the issuance of a license to J. and P. Spirits, was conducted by the Committee as constituted for the year 1969, whereas the issuance of the license was accomplished by a newly constituted Committee in 1970. The Committee for 1970, which was composed of new members "conducted no hearing with respect to the objections raised in the year 1969, nor was said issuing authority in the year 1970 in receipt of a formal report, nor was it aware of the subject matter of the objections raised against the issuance of a license" to J. and P. Spirits.

c. The issuance of the license to J. and P. Spirits at the proposed premises was "contrary to the public health, safety, and welfare."

d. That the proposed location of the premises owned by DeFabio is more suitable than that of J. and P. Spirits, because it is in an area not properly served by any existing license; and

e. The refusal to grant the license to DeFabio was contrary to the "public good and convenience and in disregard of the public health, safety, and welfare and the result of arbitrariness, partiality and prejudice."

Della Serra incorporates in his petition of appeal several of the allegations heretofore set forth and urges that the denial of his application was similarly erroneous and constituted an abuse of discretion.

Answers to these petitions were filed on behalf of the Committee and J. and P. Spirits. These answers admit the jurisdictional allegations of the petitions and deny the substantive allegations.

They defend that:

a.J. and P. Spirits advertised in accordance with law;

b. They deny that two of the members were not familiar with the objections;

c. The objections of J. and P. Spirits to the issuance of a license to DeFabio was withdrawn and, therefore, no hearing was required as to De Fabio;

d. The need or necessity for the issuance of an additional license is not a proper subject matter of this appeal because the ordinance increasing the number of plenary retail distribution licenses from three to four was finally adopted on November 25, 1969, and the time within which appellants may appeal from such action of the committee, has long since expired;

e. The failure of the Committee to comply with the provisions of R.S. 33:1-32 with respect to the imposition of conditions should not affect the validity of the license, but only of the conditions imposed;

f. Full public hearings were held and the Committee determined and set forth in its resolution that the issuance of the said license was in the public interest.

These appeals were heard de novo, with full opportunity afforded counsel to present testimony and cross-examine witnesses. Rule 6 of State Regulation No. 15.

I

Before considering the substantive matters raised in the pleadings, it may be well to resolve several threshold matters raised in the petitions of appeal. The appellants assert that J. and P. Spirits advertised its notice of intention and filed its application prior to the adoption of the ordinance authorizing the increase of plenary retail distribution licenses from three to four, on November 25, 1969.

However, the record discloses that J. and P. Spirits filed its application for the license with the Committee on November 10, 1969, and that notice of its intention to apply for the said license was published in a local newspaper on November 20, and December 14, 1969, and therefore, it was in substantial compliance with Rules 1, 2 and 3 of State Regulation No. 2.

All of the other applications were likewise filed and published as required by the said regulation.

A hearing date was set for December 16, 1969, at which time several of the objectors to the application of J. and P. Spirits were heard. At that time the Committee consisted of Mayor Gill, and Committeemen Pringle, Meyer, McVey and Kent. After January 1, 1970, two members of that Committee who were not re-elected, namely, Messrs. Gill and Kent, left the Committee. The Committee was thereupon reorganized, and constituted a new Committee. Committeemen Burton Goodman and Warren T. Praster joined Pringle, Meyer and McVey, and at the hearing held on February 10, 1970, Goodman and Praster abstained from voting on the resolution rejecting the objections of the other appellants. Furthermore, when the resolution authorizing the issuance of the additional license was acted upon, the two new members opposed it.

Appellants advocate that the Committee is not a continuous body. The terms of several of its members expire each year and an annual meeting must be held to select a chairman and mayor. Andrews v. Lamb, 141 N.J. Eq. 548, 57 A. 2d 365 (Super. Ct. 1948);

R. S. 40:146.2; R.S. 40:146-13.1. Similarly, it has been held that a Board of Aldermen was not a continuous body beyond one year. Paterson and R.R. Co., et al., v. Mayor of Paterson et al., 74 N.J.L. 738. See also Gulnac v. Freeholders of Bergen, 74 N.J.L. 543, (E. & A. 1906).

Thus, the appellants contend that the Committee was not a continuous body and could not act without a full hearing on matters which were heard by the previous Committee.

They reason that the Committee of 1970 was different from that of 1969 and therefore it did not conduct the hearing as required by the pertinent statute and Rule.

The Committee argues, nevertheless, that the fact that two of the members of the Committee, namely, Gill and Kent were succeeded by Goodman and Praster on January 1, 1970, could not affect the validity of the proceedings. They assert that Goodman and Praster were actually present at the hearing held on December 16, 1969. Although they were not at the December 6 hearing in an official capacity, they were both present at the hearing, and at conferences which were held after January 1, 1970.

The attorney for the Committee points out that the important fact is that Pringle, McVey and Meyer constituted a majority and since a majority vote was all that was required to adopt the resolution it would be a futile and useless gesture to require the Committee to hold new hearings simply because two of the former committeemen were no longer members of the Committee.

This argument has no merit because the two new members of the Committee were entitled to participate openly at the hearings of objections. Their views officially expressed in caucus may well have influenced one or more of the others to vote otherwise. I believe that there was no strict compliance with the Rule and statute as aforesaid.

I believe that the appellants were entitled to a full hearing before the Committee, conducted in the manner articulated

in Handlon v. Town of Belleville, 4 N.J. 99, 105 (1950). However, under the facts and circumstances herein I perceive no prejudice. It is said that in every case, the right to a hearing de novo in the Division on testimony taken there cures any infirmity allegedly arising by reason of a denial of a hearing before the local board. Cino v. Driscoll, 130 N.J.L. 535; cited with approval in Nordco, Inc. v. State, 43 N.J. Super. 277, 287 (App. Div. 1957).

The other jurisdictional matters require no comment in view of my determination infra, based upon one of the substantive allegations raised in the petitions of appeal.

II

The crucial, and indeed, dispositive issue raised on these appeals relates to the allegation that the amendatory ordinance increasing the authorized number of plenary retail distribution licenses from three to four was enacted because of favoritism to J. and P. Spirits, and was not based on public welfare. Therefore, the issuance of the license to J. and P. Spirits, based upon the said ordinance was invalid. It is well established that the Director of the Division of Alcoholic Beverage Control does not have the authority to invalidate or repeal any municipal ordinance. An administrative agency does not have that power; it resides in a court of plenary jurisdiction. However, the Director may invalidate and cancel a license issued by a local issuing authority based upon an ordinance which was the product of favoritism. See Phillipsburg v. Burnett, 125 N.J.L. 157 (S. Ct. 1940); D'Amico v. Blanck, 85 N.J. Super. 297, 302.

My examination of the entire record herein leads to the following findings of fact: The Township of Cranford had a population of 26,424 according to the 1960 census. Prior to the adoption of the subject amendatory ordinance, it had by ordinance permitted only three plenary retail distribution licenses. In 1967 it rejected a request for a license to Philip Morin, Jr., who was prepared to open a facility with a $300,000 ratable.

De Rosa is a close personal friend of Mayor Pringle and has been so for the past twelve years. He is also a friend of Committeeman Gill, and has been active with him in political and social organizations.

In June 1969, De Rosa, the president of J. and P. Spirits, submitted a presentation of himself for a plenary retail distribution license for premises on Raritan Road in that municipality. This application was rejected but Mayor Pringle told him that if he would submit an application for such license located in the center of town, the Committee would look upon the same favorably. Mayor Pringle told De Rosa that he was the type of person that he would like to see get a liquor license.

De Rosa had occasion to discuss this matter with Committeeman Meyer, who testified that he thought that De Rosa had made a good move in applying for a license in the center of town and bringing in a $30,000 ratable.

De Rosa also had discussed the matter of a license with former Mayor Gill on many occasions.

In October 1969, De Rosa again submitted a brochure presentation which included a long statement of his background and experience as a liquor licensee. This brochure also included architect's plans of the building, letters of recommendation, etc. Upon the receipt of this presentation, the Committee directed its attorney to prepare an ordinance increasing the number of licenses from three to four.

De Rosa then filed a formal application which included building plans, on November 10, 1969, the day before the ordinance was passed on first reading, increasing the number of licenses from three to four. He published a notice of intention to apply for the license on November 10, which was prior to the date that the ordinance was finally adopted on November 25, 1970.

On December 2, 1969, after the adoption of the said ordinance, the appellants filed written objections to the said application of J. and P. Spirits, and on December 16, 1969, a hearing was held

on the said objections. However, no action was taken thereon by the Committee.

It is significant that on November 28, 1969, De Rosa reserved, by written order with the New Jersey Bell Telephone Company, the installation of telephone service and listings on December 31, 1969, at the proposed premises to be licensed. It seems manifest that De Rosa was assured that the license would be issued to him. There was testimony at this de novo hearing of a statement made by De Rosa to one Edmund Kiamie in December of 1969 to the effect that the Committee would have issued a license to him in June, but they had to wait until he obtained a lease on the proposed premises. In fact, J. and P. Spirits entered into a lease to the said premises on September 2, 1969, which was prior to the date when such amendatory ordinance was even introduced.

The uncontradicted testimony (De Rosa did not testify at the hearing before me, although he was present) further shows that De Rosa who holds a liquor license in Jersey City, supplied liquor for cocktail parties at the mayor's home, for the mayor's daughter's wedding and for various political affairs in which the members of the majority of the Committee participated.

When the ordinance was passed on first reading, Pringle publicly announced that the ordinance was introduced because De Rosa had requested a liquor license. The following was asked of Pringle:

> "Q Isn't it true that the Ordinance was modified because he [De Rosa] had requested the liquor license?
>
> A He had requested a liquor license. As I say, I cannot tell you whether or not he made application or not. I was aware of the fact that he was interested in a liquor license."

Mayor Pringle clearly expressed a personal interest in De Rosa and having him obtain the said license.

Committeeman Goodman, who entered into office on January 1, 1970, testified that it appeared to him that it was a foregone conclusion that J. and P. Spirits would get the license.

Committeeman Praster who was also elected to office as of January 1, 1970, testified that he was present on November 10, 1969 when De Rosa's presentation was received and he also sat in on all executive and public meetings prior to the time that he assumed office. It was his opinion that the amendatory ordinance was adopted for the sole benefit of De Rosa, and that there was no question in his mind that De Rosa would receive a license when the said ordinance was adopted.

Committeeman Kerwin testified that, in his opinion, the amendatory ordinance was adopted and the license granted to De Rosa as a result of favoritism. He explained that the ordinance was adopted and the license granted to De Rosa because of friendship of the majority members of the Committee with De Rosa.

Former Mayor Gill (who served in that capacity when the ordinance was adopted) admitted that at the time that the ordinance was introduced he looked favorably upon the application of De Rosa and acknowledged that De Rosa's application was the only one submitted when the ordinance was being considered.

De Rosa appeared to know,well in advance of the adoption of the resolution granting his application for license, that the said license would definitely be granted to him, because on the date of the said adoption, February 10, 1970, he ran a party to celebrate the grant of his application. This party was prepared in advance and ostensibly was made to thank those who helped him get the license. He invited members of the Committee to the party and indeed, Committeemen Meyer and Gill, as well as the committee clerk, attended the party.

While each one of these factors standing by itself may not establish favoritism, yet the totality of the circumstances when woven together into a single fabric, clearly established in my opinion that the adoption of the ordinance was the result of favoritism and partiality shown to De Rosa and J. and P. Spirits.

Members of a local issuing authority are required to act with complete impartiality and fairness when acting in both a legislative and quasi-judicial capacity. A public office is a public trust. Committee members, as fiduciaries and trustees of the public interest, must serve that interest with the highest fidelity. They must demonstrate, not only in fact but also in deed, an exclusive loyalty to the community they serve and a judgment in municipal matters which is unfettered by anything which might redound to their interest as individuals. The law tolerates no partisanship nor mingling of self interest. Cf. Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 474 (1952); cert. denied Bell v. Driscoll, 344 U.S. 838, 73 Sup. Ct. 34 (1952). The mere fact that the members of the Committee apparently had nothing to gain personally or financially by their action, except perhaps to do a favor as an act of friendship to De Rosa, who had worked with them politically, and had been actively associated with them in social and political organizations, does not remove such action from the scope, or immunize it from the principle applicable to self interest.

And, in the determination of this issue the court in Aldom v. Roseland, 42 N.J. Super. 493, at p. 502 stated:

> "...too much refinement should not be engaged in by the court in an effort to uphold the municipal action on the ground that his interest is so little or so indirect. Such an approach gives recognition to the moral philosophy that next in importance to the duty of the officer to render a righteous judgment is that of doing it in such a manner as will beget no suspicion of the pureness and integrity of his action."

The statute gives the power to the Director to review the action of the Committee so as not only to eliminate favoritism but "any aura of it which might diminish the public feeling that there is strict impartial supervision and control of the liquor industry." Blanck v. Magnolia, 38 N.J. 484 (1962). We must also bear in mind the strong language of R.S. 33:1-73 that the basic legislative philosophy and intent of the Alcoholic Beverage Control Law is "to be remedial of abuses inherent in liquor traffic and shall be liberally

construed", and of R.S. 33:1-23 that the Director shall "do, perform, take and adopt all other acts, procedures and methods designed to insure the fair, impartial, stringent and comprehensive enforcement of the Alcoholic Beverage Control Act." See Kasser Distillers Product Corp. v. Sills, 85 N.J. Sup. 351.

Finally, it is well settled that the Director possesses the final agency review of the action of a local board relating to liquor licenses. Neiden Bar & Grill, Inc., v. Newark, 40 N.J. Super. 24, 29 (App. Div. 1956).

I am persuaded, and find from the evidence that the ordinance was adopted as a result of favoritism for the sole benefit of De Rosa and J. and P. Spirits.

Counsel for the Committee alleges that the failure of the appellants to take an appeal from the adoption of the said ordinance acts as an estoppel of their right to challenge the ordinance or any licenses issued thereunder. Their failure to take an appeal is wholly irrelevant to these proceedings; thus this argument lacks merit.

III

Notwithstanding the above findings, I should like briefly to discuss the challenges to the grant of the license to J. and P. Spirits based on the amendatory ordinance. I find that the application of J. and P. Spirits was granted because of favoritism and partiality rather than because of public need and convenience, as the facts hereinabove have clearly established.

Even in biblical times, it will be recalled that Jethro, in assisting Moses in appointing judges, insisted that they be men of truth, hating injustice (Exodus 18, 21). Also, a judge may not sit in judgment where his friend or his enemy was a party (M. T. Sanhedrin, II, 7).

The charge of partiality and bias is a very serious one where it concerns judges or those standing in the position of judges in judicial or quasi-judicial proceedings. The position of the judge is to discover objective truth. If the judge has any

personal bias or friendship, such objectivity becomes distorted and true justice cannot prevail. Cf. Cardozo in "Nature of the Judicial Process", 173; Freehold v. Gelber, 26 N.J. Sup. 388.

It should be noted that the resolution granting the application was adopted by a vote of three to two. Those who voted against the application felt that there was no need for an additional license in this municipality. With that I agree. There has been no substantial evidence to establish that another plenary retail distribution license was needed. The rule is well established that even where a municipal governing body passes an ordinance fixing the number of package stores, it may reasonably decline to issue licenses beyond the number less than the maximum prescribed in the ordinance. Fanwood v. Rocco, 33 N.J. 404.

The test in the establishment and issuance of liquor licenses is whether the public good requires it. Paul v. Gloucester County, 50 N.J. L. at p. 585. In Zicherman v. Driscoll, 133 N.J.L. 586, 588 (Sup. Ct. 1946) the court said, "The common interest of the general public should be the guidepost in the issuing and renewing of licenses."

Likewise, the Director may cancel licenses issued by local issuing authorities when not warranted by public need. Brush v. Hock, 137 N.J.L. 257; Blanck v. Magnolia, supra. (38 N.J. 484, 491, 492).

From my examination of the testimony, I am convinced that the proposed location of the premises of J. and P. Spirits, would be the least desirable location in this community for such license. A map of the Township shows that almost all of the present licenses are located in the center of town, and that within one block of these premises there is an existing plenary retail distribution license; directly across the street there is a tavern and a hotel which sell package goods; and within one and one-half blocks are located a tavern and three retail licenses.

This municipality is small (4.96 square miles in size) and it is quite apparent that there is an ample availability of existing facilities.

I am unimpressed with the fact that J. and P. Spirits intends to convert a garage and dry cleaning plant, which will produce a ratable of $30,000, especially in view of the fact that an application, which would have brought a ratable of $300,000 was rejected two years before because the Committee saw no need for an additional facility.

Several members of the majority who voted for the application stated that one of their reasons for voting was that they believed in competition. Thus, Mayor Pringle said that he felt that since there was competition in the business in which he was engaged (electronic manufacturer) that there should be competition in the liquor business.

Unlike other businesses, the dimension of competition is not applicable to the liquor industry and cannot be used as a basis for th issuance of liquor licenses. The court in Fanwood v. Rocco, 33 N.J. 404, 413, noted this distinction, citing Eckert v. Jacobs, 142 S.W. 2d 374, 377 (Texas Civ. App. 1940) where the court in sustaining a zoning ordinance which excluded the sale of beer from a designated area, pointed out that it is common knowledge that the sale of intoxicating beverages is accompanied by "objections not common to other types of commercial enterprises." From the earliest history of our State, the sale of intoxicating liquor has been dealt with by the Legislature in an exceptional way. Because of its sui generis nature and significance, it is a subject by itself, to the treatment of which all the analogies of the law, appropriate to other administrative agencies, cannot be indiscriminately applied. Paul v. Gloucester, supra. This field is peculiarly subject to strict governmental control. Franklin Stores Co. v. Burnett. 120 N.J.L. 596, 598 (Sup. Ct. 1938). Thus, unlike other businesses, the

liquor traffic has been singled out for peculiar limitation. See Hudson-Bergen County Retail Liquor Stores Assn. v. Hoboken, 135 N. J. L. 502 (1947). Thus, the test for the establishment of a liquor facility is whether there is a public need or convenience to be served.

My assessment of the merits of the other applicants is as follows:

The proposed location of Ralph Della Serra suffers from the same infirmity because it, too, is located in the center of town and too close to the other facilities.

With respect to the application of Mary De Fabio, I find that she did not establish by substantive evidence that a need or convenience would be served by the grant of her spplication, or that the public good required it. Furthermore, in view of the determination hereinabove, no license could validly be issued to the appellants.

Finally, the findings hereinabove make it unnecessary to reach the other allegations of the petitions of appeal.

It is, accordingly, recommended that an order be entered (1) reversing the action of the Committee in granting the application of J. and P. Spirits and (2) affirming the action of the Committee in denying the applications of Mary De Fabio and Ralph Della Serra, for a plenary retail distribution license.

## Conclusions and Order

Pursuant to Rule 14 of State Regulation No. 15, written exceptions to the Hearer's Report and Argument in support thereof have been filed by the Township Committee, J. & P. Spirits, Mary DeFabio and Ralph Della Serra. Answering argument to such exceptions and argument (other than Della Serra's) have been filed by the objectors Barnett's Wines and Liquors, Inc., et als. Additionally, oral argument was had before me and subsequent thereto

each of said parties submitted to me a memorandum of law on the issues raised at such oral argument.

The Hearer's Report recommends a finding that the amendatory ordinance in question was adopted as a result of favoritism by the Township Committee for J. & P. Spirits, Inc. and its principal, Jerry DeRosa, and, therefore, the approval of J. & P. Spirits' license application must be set aside and that no license could validly be issued to anyone, including the two unsuccessful applicants who are appellants herein. This is so, it is suggested, because, without a valid amendatory ordinance increasing the number of plenary retail distribution licenses which may be issued in the Township, the pre-existing municipal quota of such licenses was already filled.

The Hearer's Report further recommends a finding that the approval of J. & P. Spirits' application is likewise the product of favoritism and that, in any event, there was no need for an additional license in the municipality, and particularly not at the proposed licensed premises which is characterized as the least desirable location in the community. However, no explicit finding is recommended in the Hearer's Report that the municipality's determination with respect to the need for such additional license and at such proposed location constituted an abuse of its discretionary power, nor is the discretionary nature of the municipality's authority discussed by the Hearer. ("The issuance, renewal and transfer of liquor licenses rest in the sound discretion of the issuing authority and will not be judicially disturbed in the absence of a clear abuse of discretion." Paul v. Brass Rail Liquors, Inc., 31 N.J. Super 211, 214 (App.Div. 1954)).

I

In Blanck v. Mayor and Borough Council of Magnolia, 73 N.J. Super. 306 (App.Div. 1962), the Court held that the Director of Alcoholic Beverage Control does not have the power to rule invalid an ordinance, which provided for the issuance of a new liquor

license, upon the ground that its adoption was the result of the self-interest of a member of the municipal governing body who later, after resigning his office, was issued the license made possible by the ordinance. The basis of the Court's ruling was one of jurisdiction - an attack alleging an ordinance was adopted contrary to law must be litigated in a plenary suit in a judicial proceeding, not in an administrative agency appeal proceeding.

On appeal, the Supreme Court reversed the Appellate Division of the Superior Court (38 N.J. 484 (1962)) and held that the action in question, being "unique in its facts", required that the Director determine whether the basis for enactment of the ordinance was favoritism towards the member and, if so, no license should be issued to any applicant. (The issue of "self-interest" or conflict of interest, involving mere prohibited relationships, rather than actual pre-judgment in favor of a party, was not discussed.) The Supreme Court's opinion did not expressly state that the Director's authority to assess the governing body's reason for passing such ordinance should be limited to cases in which the person obtaining a license is a member of the governing body at the time the ordinance creating and authorizing the license is introduced and passed, nor did it expressly state that such authority was of general application, directly contrary to the Appellate Division's holding.

Question therefore arises as to whether the instant case, admittedly not involving a successful applicant for license who was a member of a governing body, comes within the ambit of the Supreme Court decision so as to authorize this Division to inquire into the motivation of the Township Committeemen who voted for the ordinance. However, in view of my determination hereafter set forth, it is not necessary to resolve this question at this time.

II

I have carefully examined the entire record herein and as a result I am unable to agree with the Hearer's determination

of favoritism with respect to either the ordinance or license application proceeding. Notwithstanding my resolution of this case on other determinative issues hereinafter discussed, I will detail my reasons for variant conclusions on this point because of the public importance and sensitivity of the issue in question.

It is said that DeRosa wasaclose personal friend of Mayor Pringle for the past 12 years. The record discloses that Mayor Pringle saw DeRosa socially "on the order of once a year", had been in his house approximately 6 or 7 times in 12 years and did not consider him one of his closest friends. Their relationship was based primarily on the fact that they had resided in adjacent houses until Mayor Pringle changed his residence about two and a half years before the adoption of the ordinance.

It is said that DeRosa was a friend of Edward Gill, who was Mayor at the time the ordinance was adopted, and was active with him in political and social organizations. In this connection, the record shows that Gill knew DeRosa for about five years; considered himself a close friend of his, but came in contact with him in organizations primarily "through church"; saw him through political organizations about 10 or 12 times in five years; saw him socially "on a few occasions"; was a guest of his at only one affair; and received from him only one gift, one bottle of bourbon.

It is said that DeRosa reserved telephone service and listings at the proposed licensed premises prior to his corporation receiving favorable action on its license application, and, therefore, he "was assured that the license would be issued to him". But such action does not bespeak assurance of license issuance; it is a normal prudent precaution not uncommonly taken by businessmen in such a situation. Similarly, the fact J. & P. Spirits entered into a lease for the proposed licensed premises prior to the date when the amendatory ordinance was introduced does not show that DeRosa had been assured by the Township Committee, its members or anyone else that the enabling ordinance would be passed or that

J & P Spirits would receive a license, particularly where, as here, the lease contained a clause making it effective only upon the tenant obtaining a license issued by the Township and approved by the Division of Alcoholic Beverage Control.

The record discloses that DeRosa had a conversation with Edmund Kiamie in December of 1969 and advised him, in response to Kiamie's inquiry as to why he waited until after the November elections to apply for the license, that he "could have had the liquor license in June but they couldn't give it to him because he didn't have a lease and they had to wait until he had a lease before they could give it to him." Is this evidence of DeRosa having been promised a license by the Township officials, or that it was merely his belief that he would eventually receive the license? Is this conversation to be interpreted as establishing pre-judgment upon the part of the Township Committee although none of its members participated in it? I think not.

It is said that DeRosa, through the Jersey City licensee with whom he is associated, supplied liquor for "cocktail parties" at the Mayor's (Gill) house, for the Mayor's daughter's wedding and for various political affairs in which members of the Township Committee participated. It is noted that no allegation is made that full payment was not made for this liquor. Furthermore, the "cocktail parties" in question actually were limited to one affair - a "Mayor's Reception" sponsored by the local political organization to which the Mayor was affiliated.

It is said that Mayor Pringle "expressed a personal interest in DeRosa and having him obtain the said license." I find that Mayor Pringle, as Committeeman, voted for the amendatory ordinance because "DeRosa and others" were interested in obtaining a license, but not because he had then decided to vote for its issuance to DeRosa. It is common practice for one or more persons to precipitate the consideration and passage of enabling municipal legislation to create potential additional licenses because they are interested in establishing a licensed business. This is the case here.

Testimony by Committeemen Goodman and Praster, each of whom voted against the J. & P. Spirits' application, that it was their opinion that such application approval was "in the bag" is not helpful in resolving the favoritism issue in the absence of supportive testimony indicating that the three approving Committeemen, collectively or individually, had pre-judged the matter. Otherwise, any voting minority could impugn the majority's action by merely asserting prohibited predetermination based upon personal favoritism, rather than "favoritism" on the merits of the applicant and its proposed business and location.

The testimony of former Committeeman Kerwin (he was not in office during the pertinent period of this matter) that the Committee (which members are not specified) acted upon friendship to DeRosa suffers from the same infirmity. Any citizen could offer his unsubstantiated opinion to the effect that the Committeemen's vote was the basis of personal friendship, and not the merits of the case. This lacks probative value.

And, finally, there is the matter of the party run by DeRosa on the night of February 10, 1970 after the J. & P. Spirits' application had been approved. While it may have been unwise judgment for Township officials involved in the licensing proceedings to have attended the party, I cannot find that this established their bad faith, nor does it establish that DeRosa was sure of favorable action on his firm's application.

A charge that Township elected officials have violated their sworn duty to vote on official proceedings according to the merits thereof and have been improperly influenced by extraneous matters is not to be taken lightly; local officials should not be tainted with improprieties unless the charge is amply supported in the record. Levitt v. Liberty, Bulletin 169, Item 4. Circumstantial evidence may be utilized to establish such influence. However, the proof in this case falls far short of sustaining the charge herein. Cf. Blanck v. Magnolia, Bulletin 1534, Item 1, affirmed D'Amico v. Blanck, 85 N.J. Super. 297 (App.Div. 1964), a

case in which the strength of the proof was sufficient to support a finding that the members of a governing body had decided to vote favorably toward one of their members obtaining a liquor license.

I find that the facts upon which appellants rely to establish favoritism are equally consistent with the Committeemen having voted upon both the ordinance and the license application upon their merits. The fact that DeRosa's interest in obtaining a license was a factor in the amendment of the ordinance and the approval of his firm's application is of limited significance. Otherwise, a municipality would be precluded from granting a license to such an applicant, notwithstanding the finding that he is in fact, the most qualified applicant. Here, the Township Committee's action in amending its ordinance was based upon the majority's honest opinion that the public interest warranted the issuance of another license, as particularly testified to by Committeeman Meyer.

In sum, I conclude that the evidence preponderates in favor of findings that (1) there was no conflict of interest in the mere relationship of the Township Committeemen and J. & P. Spirits and (2) neither the vote on the ordinance or the license application was the product of favoritism toward the successful applicant.

III

The other issues which are deemed necessary to decision herein involve the procedural aspects of the hearing afforded the applicants and the public, and the special condition concerning restrictions on the transfer of the license for five years.

A.

By letter of December 15, 1969, one of the appellants herein, Sidney Scher, filed with the Township Committee written objection to the issuance of a license to J. & P. Spirits or Ralph Della Serra or of any "additional liquor license". By letters of December 5 and 8, 1969, Ira D. Dorian filed similar written

objections on behalf of his clients, 3 plenary retail distribution and 6 retail consumption licensees in the Township.

Rule 6 of State Regulation No. 2, concerning objections to an application for municipal license, provides:

> "Each municipal clerk shall immediately upon receipt of a written objection, duly signed by an objector, transmit forthwith to the issuing authority of the particular municipality said objection and everything pertaining thereto, whereupon it shall become the duty of each issuing authority to afford a hearing to all parties and immediately notify the applicant and the objector of the date, hour and place thereof."

The hearing required to be conducted by the Township Committee was a public hearing. R.S. 33:1-24; Florence Meth. Church v. Florence Township, 38 N.J. Super. 85, 90 (App.Div. 1955). "The granting of a liquor license involves action judicial in nature." Tp. Committee of Freehold v. Gelber, 26 N.J. Super 388, 392 (App. Div. 1953). In Handlon v. Town of Belleville, 4 N.J. 99, 105 (1950), the Supreme Court, with respect to the hearing to be held in a "quasi-judicial" administrative hearing, said:

> "The requirement of a 'hearing' has reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts and the issue determined uninfluenced by extraneous considerations which might not be exceptionable in other fields involving purely executive action. The 'hearing' is 'the hearing of evidence and argument'".

Nevertheless, the record discloses that in addition to the public hearing held by the Township Committee on December 16, 1969, private hearings were afforded the applicants before the Committee on January 29, 1970 and February 9, 1970, Della Serra appearing on the latter date and the other three applicants on the former. No member of the public was able to attend these "hearings", nor does

it appear that any transcript or minutes were taken of these meetings at which the applicants sought to establish their worthiness to receive the license and they were questioned by the Committee members. Furthermore, the December 16th hearing dealt only with the applications of J. & P. Spirits and Della Serra and not the other two applicants.

This procedure was contrary to Rule 6 of State Regulation No. 2 and R.S. 33:1-24 and improper. Written objections having been received to the issuance of any license, the Township Committee should have held a public hearing or hearings on all four applicants and each hearing should have been open to the public. And, even if written objection had been received only as to one of the applicants, a consolidated public hearing should have been held as to all since acceptance of one was tantamount to rejection of the others, as noted by the Township Committee in its resolution approving the J. & P. Spirits' application.

No private hearings should have been held to hear the applicants. The objectors and the general public in such case are entitled to have an opportunity to meet any information or allegation considered by the issuing authority. Since the record above does not show what transpired at these executive sessions, it cannot be said that the lack of public hearings was not pre-judicial to any of the rights of the appellants herein. Nor do I agree with the Hearer that this impropriety was cured by the de novo Division hearing, which again did not disclose what occurred at these meetings. The cases cited by the Hearer on this part are inapposite, particularly where, as here, the Division review is of the exercise of a discretionary power by the municipal issuing authority and the burden upon any appellant-objector is a heavy one to establish abuse of discretion.

B.

Each applicant was asked by the Township Committee whether it would be willing to assure the Committee that the applicant

would operate the licensed business for at least five years if the applicant were awarded the license. At least one applicant, DeFabio, questioned the legality of imposing such a restriction and indicated she might not be able to comply with same.

The condition imposed upon the approval of J. & P. Spirits' application was predicated upon the Township Committee's obvious apprehension about the possibility of someone speculating upon the obtaining of the license and immediately reselling it at a profit. The condition was not meant merely to point out the fact that all transfers of licenses, place-to-place or person-to-person or both, must be first approved by the issuing authority. R.S. 33:1-26. What was apparently sought to be attained by the condition was the assurance that the licensee would not even make such transfer application or transfer any shares of its corporate stock within the proscribed period. Such attempted "freeze" of the license is not in accord with the legislative design as expressed in our State Alcoholic Beverage Law and is therefore disapproved. R.S. 33:1-32.

The reluctance of an applicant to express willingness to comply with this invalid condition may well have influenced the final decision of the Township Committee in granting respondent the license. For this reason, and because of the procedural deficiencies hereinabove delineated, the February 10, 1970 resolution must be set aside.

C.

Under the circumstances, this matter would normally be remanded to the Township Committee for further proceedings with respect to all four applications in conformity with this decision. However, on June 7, 1971, Governor Cahill signed Senate Bill No. 652, which thereupon became Ch. 196 of the Laws of 1971. This law amended R.S. 33:1-12.14 to provide that no new plenary retail distribution license shall be issued in any municipality unless and until the number of such licenses in such municipality is fewer than one for each 7,500 of its population as shown by the last preceding Federal census, instead of 5,000, as theretofore.

This amendatory law, by its terms, remains inoperative until the promulgation of the 1970 decennial Federal census. The promulgation of the 1970 decennial Federal census takes effect upon the governor filing in the office of the secretary of state a copy of the bulletin issued by the director of the national census or other officer having charge thereof. R.S. 52:4-1. I have received from the New Jersey Secretary of State and I take judicial notice of a certified copy of the 1970 Federal census filed with the Secretary of State on February 25, 1971, by the Governor. However, the effective date of such census has been delayed to May 1, 1971 by the passage of Ch. 14 of the Laws of 1971, approved January 28, 1971, which provides that, with exceptions not here pertinent, the Federal census of 1970 shall become effective May 1, 1971 or on the date of the filing of the bulletin provided for in R.S. 52:4-1 whichever is later.

According to the 1970 Federal census, the population of the Township of Cranford is 27,391. Under the applicable State quota, only three plenary retail distribution licenses may now be issued in the Township. Division records disclose that there are presently in existence in the Township three plenary retail distribution licenses. Thus, no new such license may be issued at this time and it would therefore be pointless to remand this case to the municipal issuing authority for further proceedings. In such posture, no remand order will be entered.

IV

In view of such determination, it is unnecessary to decide at this time the basic "discretion" issue or the question of the continuous nature of the municipal governing body. However, in connection with the latter issue, it is noted that Committeeman Praster should not have voted on the license application since his testimony reveals that he was not present at the December 16th public hearing and no transcript or record of the hearing was

available for him to review. City of Asbury Park v. Dept. of Civil Service, 17 N.J. 419, 422-3 (1955); In re Shelton College, 109 N.J. Super 488 (App.Div. 1970); whether his vote was prejudicial in this instance, in view of the other three affirmative votes of the majority, remains an open question.

Accordingly, it is, on this 18th day of June 1971,

ORDERED that resolution of the respondent Township Committee of the Township of Cranford adopted February 10, 1971, rejecting the objections to the applications for license by J. & P. Spirits, Inc. and Ralph Della Serra and approving the license application of J. & P. Spirits, Inc., with conditions and denying the license application of Ralph Della Serra, Mary DeFabio and Fred Hayeck be and the same is hereby set aside and the action of the Township Committee in approving said license application is hereby reversed.

Richard C. McDonough
Director



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