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

BULLETIN NUMBER 191 JUNE 30, 1937.

1. APPELLATE DECISIONS - LITTLE COTTON CLUB v. CALDWELL.

MEYER PALLIE, trading as LITTLE COTTON CLUB, Appellant,	:	
-vs-	:	ON APPEAL CONCLUSIONS
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CALDWELL, Respondent.	:	

Samuel Ferster, Esq., and Bernard G. Goldstein, Esq., Attorneys for Appellant.
Robert Shaw, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

Appellant appeals from the action of respondent, on June 5, 1937 revoking his plenary retail consumption license, because of (1) alleged sale to minors; (2) knowingly employing unqualified persons; (3) permitting lewd activities; and (4) permitting immoral activities.

I have carefully reviewed the voluminous transcript of testimony taken on this appeal and find:

1. Two boys, one of seventeen, the other eighteen, both of very youthful appearance, each testified they were served five glasses of beer on the same day in the licensed premises. Investigators Briscoe and Flynn testified that on another day another boy of twenty bought a beer for himself and vermouth for a girl with him, and that about the same time still another youth of eighteen was served a beer by the bartender; that both these last mentioned boys were drinking the beer when the Investigators seized the glasses and placed the bartender under arrest for selling to minors. The bartender and one Kelly and the two boys united in testifying that it was Kelly, of full age, not they, who purchased three glasses of beer and left two on the bar for these two boys who, elsewhere at the time, on return some ten minutes later found that the beer was flat and unfit to drink. This, of course, is directly contrary to testimony of the Investigators, but fails to consider what the boys would have done with the beer if it hadn't gone flat and the "explanation" itself is considerably flattened by the fact that the bartender later pleaded guilty to selling alcoholic beverages to minors.

The first count is sustained.

2. The charge that the licensee <u>knowingly</u> employed unqualified persons is not sustained by the evidence. Respondent is acquitted on this count.

3. The charge of lewd activities is not so easily disposed of. A strip-tease dance was performed by a female entertainer at 4:00 A.M. There is much testimony of panties and scanties, and brassieres and bandeaux, and "G" strings and veils, but the licensee contends the dance was not lewd, because the girl was not nude; that all that finally showed was the flesh between panties

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and brassiere. In view of current deshabille' in so-called legitimate places, I conclude that the dance was more tease than strip. The most I find was exposure. What was done, aside from what was seen, was not lewd. The count on this point is not sustained.

4. The remaining inquiry as to immoral activities centers about a song sung by a colored male comedian. The licensee opined that the song was not indecent and produced the entertainer who gave his version of it which differed in many respects from the testimony given by the staff Investigators. Accepting the entertainer's version, the least that can be said of it is that it was rotten in its suggestiveness. Even the hat check girl employed there, in response to questions asked by the appellant's own attorney, testified:

"Q. Were there any words actually that could be characterised as lewd or indecent?
A. No.
Q. Was it a song from which a double meaning might be inferred?
A. Yes.
Q. Would you consider that song, unless you wanted to, lewd or indecent?
A. No."

On cross-examination of the staff witnesses, the attorney sought to abash them by imputing that the evil was in their own minds, thus:

" . . .
Q. Go ahead.
A. This gentleman sat on the chair, like this -- arms outstretched -- 'Oh, baby, I am all set to go, I am all set to ride --', his stomach was revolving.
Q. He sang words which certain people whose minds might be in the gutter might take as being indecent?
A. My mind was not in the gutter.
Q. But they were words from which you might get a double meaning?
A. Possibly.
Q. But nothing direct?
A. 'I am all set and laying Baby' -- what do you call that?
Q. You are positive he said 'I am all set and laying Baby' -- what does that mean?
THE HEARER: I think we can draw our own conclusions."

And again, in summation, the attorney declared:

"You observed the entertainer. He recited his song. I concede, if you have a mind that is in the gutter, you can draw other inferences."

The left-handed compliment of having one's mind in the gutter is not at all novel. When the Devil is on trial, he ever seeks to be decoded in terms of the Cloth. One doesn't have to be a guttersnipe so "we can draw", as the Hearer well said, "our own conclusions." It is not the literal words that count, but what goes with them - the gestures, the wink of the eye, the shrug of the shoulders, the drawl, the falsetto, the calculated physical and psychical emphasis - that deliberately achieves the very result intended from the outset, viz.: a double entendre, the innocent meaning of which is thrown in for a life line and the indelicate one susceptible of but one reasonable inference and that - suggestive, indecent, and immoral. This performance was no crossword puzzle to ponder; no "Lady or the Tiger", to wonder

what was meant. Nothing was left to the imagination except to inflame it. The attorney characterized that meaning as of the gutter. He thereby pronounces the sentence. What belongs in the gutter is out of place in taverns.

I find the licensee guilty on the fourth count as well as the first.

Hence, the revocation was justified.

The action of respondent is, therefore, affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: June 26, 1937.

2. DISCIPLINARY PROCEEDINGS - HARBORING CRIMINALS AND RESULTANT STABBING - OUTRIGHT REVOCATION PLUS TWO-YEAR DISQUALIFICATION OF PREMISES.

June 26, 1937

Arthur Lozier, Clerk,
Borough Council of Paramus,
Hackensack, R. D. 1,
New Jersey.

Dear Mr. Lozier:

I have staff report of the proceedings before the Borough Council of Paramus against Violet Wright, t/a Twin Oak Restaurant, charged with (a) having sold and served alcoholic beverages to minors, (b) having allowed and permitted a known criminal to remain in and upon the licensed premises in violation of State Rule, and (c) having allowed and permitted a brawl to take place on the licensed premises, as a result of which a minor was stabbed by the party of criminal record.

I note the licensee was adjudicated guilty and that her license was revoked; that the licensed premises were rendered ineligible to receive another license for two years.

Expressing no opinion on the merits of the case because it might come before me by way of appeal, I wish, however, to thank the members of the Council and its attorney, Charles Schmidt, Esq., for their prompt and most effective action. Licensees who flaunt the law and the Rules despite repeated warnings, are in the wrong business. There is no reason why any municipality should tolerate such conditions as apparently existed at this tavern. The decision of your Council is eloquent of its intention to keep Paramus free of such places.

The two-year disqualification of the premises will bring home to owners of buildings that they must be on their guard against tenants who have no regard for the law or the rules governing conduct of their business.

Cordially yours,
D. FREDERICK BURNETT,
Commissioner.

3. SOLICITORS' PERMITS - MORAL TURPITUDE - FACTS EXAMINED - CONCLUSIONS.

June 26, 1937

In Re: Case No. 57.

Solicitor denied he had ever been convicted of a crime. Fingerprint reports disclosed (1) that he had been arrested in California in 1928 "on suspicion of Grand Theft; (2) arrested in same state, in 1929, "on suspicion of murder"; (3) arrested in in New York, in 1935, for violation of Section 37 of U. S. Tariff Act.

Hearing was held to determine if solicitor had ever been convicted of a crime.

As to his first arrest, he testified that, while in Michigan, he purchased an automobile which he later drove to California; that he arranged to sell his car in the latter state and that when a letter was sent to the Michigan company requesting information as to the balance of payments due, the latter swore out a warrant charging "Grand Theft," on which solicitor was arrested in California; that subsequently the sale of the car was completed, the Michigan company fully paid and prosecution dropped.

As to his second arrest, solicitor stated that he was arrested with another man whom he had met shortly prior to the date of arrest. The other man was wanted in Chicago on a murder charge and was subsequently returned to that city. After police investigation was completed, solicitor was released.

As to his third arrest, the charge concerned importation of lottery slips from Canada. Report from the U. S. Attorney of the District in which arrest was made says: "the facts in the case did not warrant prosecution so the case was closed without prosecution."

I find no convictions of record against solicitor and recommend, therefore, that the permit be granted.

Edward J. Dorton,
Attorney-in-Chief.

Approved:

D. FREDERICK BURNETT,
Commissioner.

4. SPECIAL PERMITS - PREMISES WHERE SOCIAL AFFAIRS ARE HELD ARE "LICENSED PREMISES" FOR THE TIME BEING AND ARE SUBJECT TO ALL MUNICIPAL REGULATIONS IN EFFECT.

MUNICIPAL REGULATIONS - DANCING - APPLIES TO PREMISES FOR WHICH SPECIAL PERMITS ARE ISSUED AS WELL AS LICENSED PREMISES.

MUNICIPAL ORDINANCES - APPROVAL - WHEN REQUIRED.

June 25, 1937.

Frank Gordon,
Clerk of Kingwood Township,
Baptistown, New Jersey.

My dear Mr. Gordon:

I have your letter of the 21st regarding the application

for a special permit to sell alcoholic beverages at a dance to be held on Sunday, July 4th.

I understand that resolution adopted by the Township Committee June 19, 1937 prohibits dancing on Sunday on premises for which liquor licenses have been granted. I take it that it does not prohibit sales of alcoholic beverages on Sundays - only dancing. Such a resolution regulates the conduct of licensed businesses. It must, therefore, according to Section 37 of the Act, be approved by me before it can be effective. It has not yet been submitted. I suggest that you send me a certified copy at once. Until duly approved by me it is of no force or effect.

Special permits are, in effect, one-day licenses. The premises for which they are issued, are for that day, a licensed premises. They are, therefore, subject to the regulations applicable to premises operating under the regular plenary retail consumption licenses. It follows that if the regular licensees are prohibited by regulation duly enacted and approved, from having dancing on Sundays, the holders of special permits are also.

Special permits are for the purchase and sale of alcoholic beverages. Their principal purpose is to secure compliance with the provisions of the Alcoholic Beverage Control Act. The dancing which may be held at the affairs for which the permits are issued, concerns me only incidentally to the end that the municipal regulations are complied with. It is to insure compliance with the local regulations that the application must bear the Clerk's approval and that the permit itself is expressly so conditioned.

The thing for you to do is to send the resolution down at once. I will notify you by return mail whether or not it is approved. If approved you will be justified in withholding your consent unless the organization agrees to forego the dancing.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

5. APPELLATE DECISIONS - CONROY v. PEMBERTON TOWNSHIP.

JAMES J. CONROY,)
Appellant,)
-vs-) ON APPEAL CONCLUSIONS
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF PEMBERTON,)
Respondent)

James J. Conroy, Esq., Pro Se.
Walter H. Stull, Township Clerk, Appearing for Respondent.

BY THE COMMISSIONER:

This is an appeal from denial of a plenary retail consumption license for premises located at "Canoe Club House," on Mirror Lake, Brown's Mills, Burlington County.

Respondent denied the license because of the number of protests received against its issuance.

Appellant contends that said protests are based upon the belief of residents that his property is restricted against the sale

of alcoholic beverages, whereas, he contends, it is not.

The "Canoe Club House" was originally a community house on a large tract known as the "Press" tract, which was developed by a Philadelphia newspaper. The majority of lots in this development were restricted originally against the sale of liquor but there is a doubt as to whether, in fact, the "Canoe Club House" was so restricted.

It is not my function to pass on the validity of covenants in deeds restricting property against the sale of liquor. Jones v. Caromano and Camden, Bulletin 121, Item 4. If this were all there was to the case, the decision might well be in favor of appellant.

The evidence, however, clearly shows that the sentiment of those residing in this residential section of Brown's Mills near the bathing beach is predominantly against the issuance of a liquor license in that section of the Township of Pemberton. There are numerous licensed places on the opposite side of Mirror Lake, on the main highway, but not located on the "Press" tract, or near the bathing beach.

A municipal issuing authority is justified in keeping a residential and recreational area free from taverns and the accompanying danger of disturbing activity. Cf. Jennings v. Vernon, Bulletin 186, Item 13; Kaline and Theringer v. Burlington, Bulletin 188, Item 2.

In view of the large number of protests received, I find nothing unreasonable in the action of respondent in denying the license.

The action of respondent is, therefore, affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: June 26, 1937.

6. APPELLATE DECISIONS - DRIES v. HAINESPORT.

ALEXANDER DRIES, Appellant, -vs- TOWNSHIP COMMITTEE OF THE TOWNSHIP OF HAINESPORT, Respondent.	ON APPEAL CONCLUSIONS

Robert Peacock, Esq., Attorney for Appellant.
Powell & Parker, Esqs., by Harold T. Parker, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This appeal is from the denial of a plenary retail consumption license for premises located at Washington Street, Hainesport Township, Burlington County.

Appellant's application and notice of intention are faulty, but it is unnecessary for the purpose of this appeal to consider other than the following defect which was urged by respondent, viz.:

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Appellant failed to submit the license fee either with his application as required by Section 22 of the Control Act, or thereafter. He relies upon the fact that one of the township committeemen informally told him that it was unnecessary to pay the license fee until his application had been granted. His advice cannot bind the municipality or waive the statutory prerequisite that the license fee must be submitted together with (or before) the application. Bulletin 105, Item 4; Radich v. Woodbridge, Bulletin 88, Item 4; Bulletin 15, Item 1; cf. Bulletin 180, Item 6.

This of itself was sufficient to justify respondent in denying the license.

Consideration of the merits leads to the same result. Respondent's position is that the denial was reasonable because (1) objection was made by many residents in the vicinity, which is residential in character, and (2) the proposed tavern will exert a bad influence upon a nearby public school.

Hainesport Township numbers but 900 inhabitants and contains four centers of population: The "village" of Hainesport, located in the center of the township; Claremont, in the east; Rancocas Heights, in the west; and Easton, a general farming district with about ten or twelve families.

The proposed tavern is to operate in the village of Hainesport. This community extends some six or seven blocks in length and about two or three blocks in width, has 200-odd houses and 300 to 350 residents. The proposed site is located near the municipal hall, the public school, and some of the "nice" residences.

The village is of the type familiar in rural communities in New Jersey. The houses are scattered, some close together, some comparatively far apart, but a homogeneous residential atmosphere prevailing throughout. There are but two stores, each located in a remodeled residence, carrying a small stock and catering to the grocery and confectionery needs of the community.

A petition objecting to the license contains the signatures of some 76 nearby inhabitants of the village. A petition favoring it contains 73 signatures, but only half of these represent residents of the village. Where there is, as here, a homogeneous residential community of the rural type, which has allowed no liquor stores since Repeal, the bona fide objection of a large part of the population is of great weight. See Dunster v. Bernards, Bulletin 121, Item 11; Thomas v. Evesham, Bulletin 80, Item 2; Hackman v. Greenwich, Bulletin 71, Item 13; Hickey v. Lopatcong, Bulletin 68, Item 1; Apgar v. Tewksbury, Bulletin 66, Item 2; and Bowlbyville Beer Garden v. Randolph, Bulletin 81, Item 12.

Appellant fails to prove that public necessity or convenience requires that the license should be granted despite the local sentiment. An effort to show that "bootleg" sales are frequent in Hainesport is entirely unwarranted by the evidence; even if warranted, it would fail to establish a requisite public necessity or convenience to require a reversal. While, personally, I believe that the simplest, cleanest and most effective way of dealing with the liquor problem is to bring it out into the open by licensing worthy applicants and then controlling them and the places they run with an iron fist, I cannot say that any other view is arbitrary and unreasonable. Hence, I affirm the local issuing authority despite my personal views, just as I did in Kaline v. Burlington, Bulletin 188, Item 2.

Appellant also contends, inter alia, that licenses have been granted in other parts of the township which are as residential

in character as Hainesport. I find the facts to be otherwise. Of the four licensed premises in the township, two are located on a main artery, away from any residential area; the other two are located in Rancocas Heights which, while perhaps residential in aspect, is also in the nature of a summer resort. In addition, there is no suggestion in the case of these licensees that a school is located in the proximity, or that a number of nearby residents lodged any protest.

The action of respondent is, therefore, affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: June 27, 1937.

7. JUSTICES OF THE PEACE - COORDINATION WITH THE DEPARTMENT.

February 16, 1937.

Dear Commissioner Burnett:

I am making a survey of the justice of the peace system in New Jersey, in connection with some work in the Department of Politics of Princeton University, and wish to ascertain the extent to which various agencies of the State Government make use of the justices in enforcing the statutes and regulations pertaining to their respective fields of activity. I should, therefore, greatly appreciate your writing me or having someone in your office write me, as fully as your time and good nature will permit, regarding the types of cases, if any, in which you make use of the justices of the peace, your experience with them, and the advantages or disadvantages of using the justice rather than a district court, recorder, or other magistrate.

Thanking you in advance for your cooperation, I am

Very truly yours,
Edward E. Reilly.

March 3, 1937

To: Commissioner Burnett
From: E. W. Garrett

Re: Justices of the Peace.

Official contact by the Department with magistrates in general is governed by the Control Act (P. L. 1933, Chapter 436 as amended by P. L. 1934, Chapter 85, P. L. 1935, Chapter 257), which provides in part (Section 1 (L)):

"'Magistrate.' A judge of the court of quarter sessions in and for any county, or a judge of a city or district criminal court, or a police judge or justice or recorder of any municipality, and all justices of the peace; provided, however, that no justice of the peace shall sit as a magistrate under this act within the corporate limits of a municipality having a police judge or justice or recorder, or a city criminal court or within the corporate limits of any municipality included in any criminal district in which there shall be a district criminal court."

With this provision in mind this consideration of justices of the peace will be restricted to those communities in which justices may properly exercise jurisdiction as magistrates.

Wherever the jurisdiction of the justices extends, this Department has made the fullest use of their services. This has included all violations of the Control Act which are declared to be misdemeanors. The majority of these violations in rural communities have been found to be possession of illicit liquor and possession, ownership or operation of an unregistered still.

The Control Act requires the issuance and execution of a search warrant in all instances wherein a search of private property is involved, (P. L. 1933, Chapter 436, Sections 54 to 63, inclusive). Justices of the peace serve as issuing magistrates. Again, where this Department effects an arrest for violation of the Control Act, a justice of the peace accepts the complaint and issues the warrant to arrest and subsequent commitment papers. Justices sit as magistrates for arraignment of persons, and upon the presentation of a <u>prima facie</u> case, set bail and hold defendants for the action of the county grand juries. Initial disposition of the case upon arraignment rests in the discretion of the justice. In addition to this inception of grand jury action, the justices enforce the provisions of any existing local ordinances which may also be violated. For their services as issuing and committing magistrates the justices receive compensation by way of the following statutory fees:

FEES:	Justice	Constable
Complaint and Affidavit	$ 1.00	
Warrant and Service	.75	$ 1.50
Mileage, 6 cents per mile		
Subpoena, Justice 25 cents each: Service, Constable, 50 cents each if over one mile; if not over one mile, 35 cents		
Examination in writing, 30 cents per folio; otherwise	2.00	
Swearing witnesses, 25 cents each		
Commitment,	1.00	1.00
Mileage, as before		
Recognizance	.75	
Discharge of Prisoner	.75	
Drawing Conviction	.75	
Certifying costs	.50	

No estimate can be accurately made of the number of Departmental cases in which justices of the peace are used. However, it has been found almost without exception that the justices have rendered the fullest possible cooperation to any request made of them by this Department. In return, this Department reciprocates by attempting, so far as possible, to prepare all necessary papers before presentation to the justices of the peace. In this way the justices who, for the most part do not have adequate facilities, eliminate the inconvenience of clerical work.

Because of the delineation drawn by the Control Act it is impossible to compare the work of police recorders of district criminal courts with that of justices of the peace in the same communities. The former exercises jurisdiction in thickly populated, well policed communities. The latter are restricted to the rural districts in which neighbors are scarce and police officials scarcer. Consequently, it would be obviously unfair to comment upon the relative advantages or disadvantages of either system when there exist the variable factors of population, public opinion and local police administration.

E. W. Garrett,
Deputy Commissioner.

8. APPELLATE DECISIONS - MEMORIAL PRESBYTERIAN CHURCH v. NEWARK.

MEMORIAL PRESBYTERIAN CHURCH OF NEWARK, N. J., a religious Corporation, Appellant, -vs- MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF NEWARK and PETER VICARI and RUDOLPH SCAVONE, Respondents	ON APPEAL CONCLUSIONS

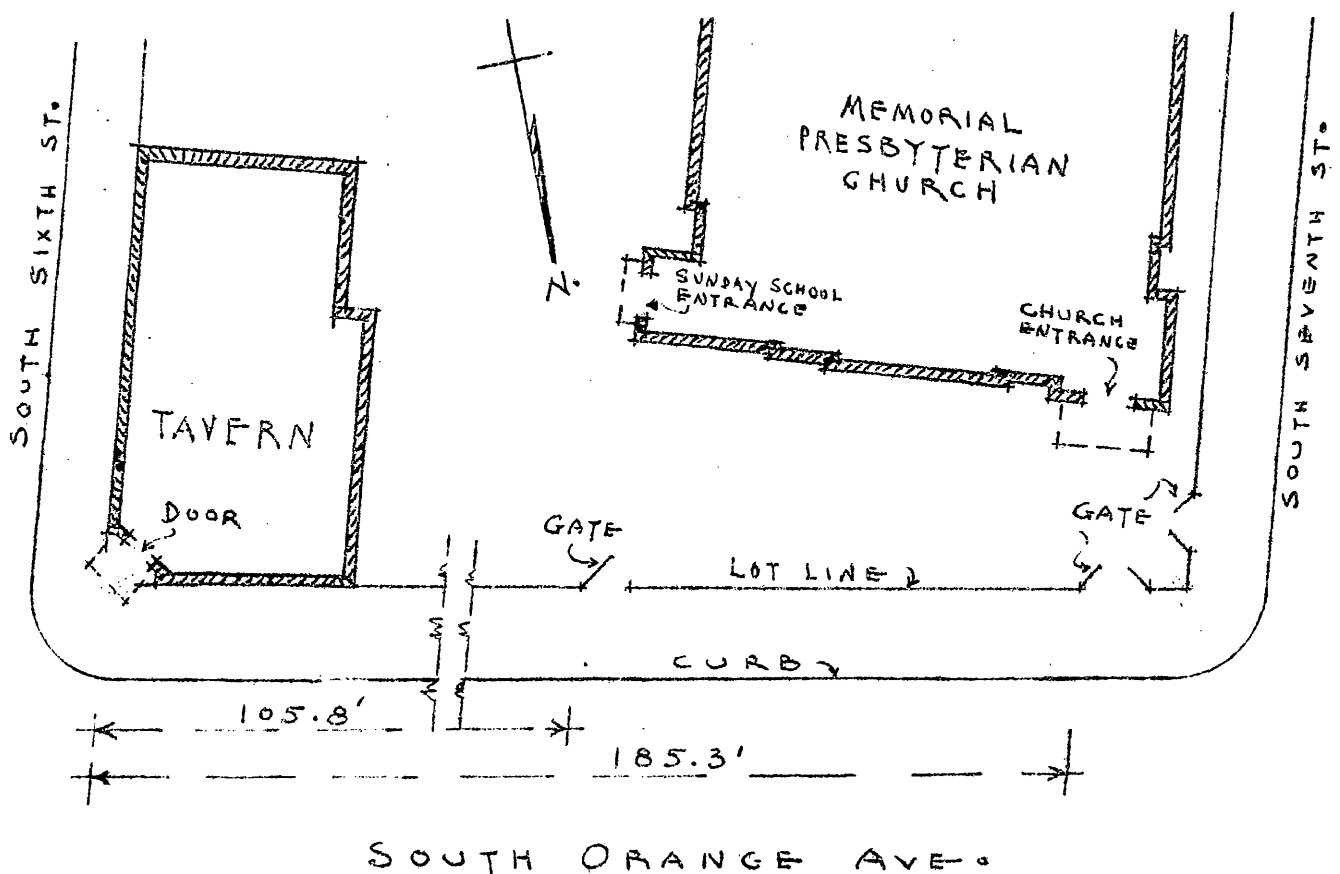
Louis Miraglia, Esq., Attorney for Appellant
Ralph A. Villani, Esq., Attorney for Licensees, Peter Vicari and Rudolph Scavone.
James F. X. O'Brien, Esq., by Joseph B. Sugrue, Esq., Attorney for Respondent, Municipal Board of Alcoholic Beverage Control of the City of Newark

BY THE COMMISSIONER:

This appeal is from the transfer of a plenary retail consumption license covering premises at 623 Springfield Avenue to premises at 300 South Orange Avenue, City of Newark.

Appellant contends that the tavern to which the license has been transferred is located within 200 feet of appellant's church, contrary to Section 76 of the Control Act.

The tavern and the church are located on the same side of South Orange Avenue, Newark, at opposite ends of the same block. The tavern is at the corner of South Orange Avenue and South 6th Street; the church, at the corner of South Orange Avenue and South 7th Street, thus:-



The church premises are separated from the public way on South Orange Avenue and South 7th Street by an iron fence which runs along the property line. Set in this fence and leading to the church building are three gates, one on South 7th Street near South Orange Avenue (hereinafter called the west gate), one on South Orange Avenue near South 7th Street (hereinafter called the north gate), and another on South Orange Avenue in the middle of the block (hereinafter called the east gate).

The north and the west gates are used as the main gateways, each issuing upon a short concrete walk which leads directly to the main entrance into the church building.

The surveyor has computed the distance from the tavern to the north gate at 207 feet 1 inch. In order to "achieve" the coveted distance, he has started his measurement at the recessed door-lintel of the tavern, the entrance to which is at a cater-corner. From the lintel he measures 10 feet, diagonally away from the church, out to the middle of the sidewalk; then trning left at an acute angle, the middle of the public sidewalk is taped to a point opposite the center of the north gate of the church and there a 90 degree angle is turned to the left and up to the gate. This method of measurement, calculated to squeeze in as many additional feet as plausible and throwing in the entire width of the sidewalk for good measure, was expressly disapproved in Aldarelli v. Asbury Park, Bulletin #186, item #12. The rule therein laid down requires that the distance shall be measured in straight lines along the side of the walls and the street lines nearest to church and tavern. So measured, the distance is 185.3 feet.

The east gate is even nearer, being 105.8 feet from the entrance to the tavern. Respondent contended, however, that the east gate was not actually employed as a normal entrance to the church. It opens upon a concrete walk that runs 45 feet in a direct line to the side entrance into the church vestibule which communicates with the Junior Auditorium (where Sunday School is held) and the Main Auditorium (where the regular church services are conducted). The east gate is habitually and extensively used by the Sunday School members, the choir, the Sexton, and some of the church communicants. Being a gate in an enclosure which separates the church premises from the adjoining public way, it is an "entrance" within Section 76 of the Control Act. Re: F. & A. Distributing Co., Bulletin #127, item #4; Giuliano vs. Trenton, Bulletin #50, item #2. That section, requiring measurement of the proscribed distance of 200 feet to be made from the "nearest entrance" of an affected church, contemplates more than one entrance. The "nearest entrance" need not be the main but may be a side entrance. See Balzarett vs. Paterson, Bulletin #37, item #9; cf. George vs. Travis, 152 N.W. 207 (Mich. 1915), and In re: Lewis, 57 N.Y.S. 676 (1919).

I find then that the tavern is within 200 feet of the church whether measured from either the north gate or the east gate.

Respondent licensees contend, however, that appellant has either waived the benefit of Section 76 or has estopped itself to assert the benefit of that Section.

Section 76 provides that the 200 feet protection "may be waived at the issuance of the license and * * * each renewal thereafter, by the duly authorized governing body on authority of such church * * *, such waiver to be effective until the date of the next renewal of the license * * *"

The waiver contemplated by this section is one based on actual consent. Cf. Bulletin #3, item #7. There is no contention that appellant has, in fact, assented to the transfer, either formally or informally.

Respondent licensees contend, however, that appellant should nevertheless be estopped now to object because it did not object at the hearing below; and because the premises in question have been licensed for the last several years without objection from the church; and because the new licensees have made extensive alterations to the premises without protest from appellant.

Appellant's failure to appear at the hearing below does not estop it from now complaining. There is no evidence that actual knowledge of that hearing was brought home to appellant in time to make any objection. To the contrary, it was testified by Rev. Orion C. Hopper, the Pastor of the church, that as soon as he discovered the fact that a tavern was to be operated at the premises in question, he immediately made protest, but that the transfer had already been effected.

Even if it be assumed that the extensive alterations of respondent licensees, if done with the knowledge and without protest from the responsible authorities of the church, might have estopped appellant from now objecting, no such estoppel arises here in view of appellant's prompt objection after discovery of the purpose of the alterations.

The fact that alcoholic beverages had been sold for three years under a previous license at the premises in question without protest from appellant is without force. The premises were then occupied as a confectionery store. The only beverage dispensed was beer. Appellant believed that it was only bottled beer. The management was different. Even if the church had expressly consented to the sale of bottled beer on those premises, the waiver was good only for the fiscal year for which it was given and the fact that it was given once is no reason why it must be given again. Re Gordon O'Neil Co., Bulletin #189, item #13. I there said:

> "All churches of whatever creed are to be protected to the full extent of the law. The requirement of annual renewal of the waiver is a most excellent check upon the manner in which business is conducted on the licensed premises. The consent will probably be forthcoming again if the place is properly run. No assurance, however, can be given. The Synagogue has the absolute right, without assignment of reasons, to determine for itself whether it will renew the consent or not. Temporary privileges conferred as a matter of generosity are not the stuff on which permanent rights may be founded, either by adverse possession or estoppel or otherwise."

I have heretofore ruled in Re Heart of Jesus Polish National Church, Bulletin #127, item #4, that the statutory protection afforded to churches and schools was not to be lightly whittled away. Municipalities have been sustained in denial of licenses when deemed too close to churches or schools even though they were located at a greater distance than the minimum 200 feet. Staciewicz v. Trenton, Bulletin #35, item #10; Persi v. Trenton, Bulletin #46, item #13; Space v. Wantage, Bulletin #77, item #13; Serafin v. Bayonne, Bulletin #107, item #3. The policy is also exemplified in Re Borough of Upper Saddle River, Bulletin #77, item #6 (municipal regulation approved extending protected area to a distance of 1000 feet from churches or schools); Re Milltown Bulletin, Bulletin #73, item #8 (special condition attached to license providing that licensee by his acceptance of the license waived any exemption under Section 76 should a school subsequently be built within 200 feet, approved.); Re Rossy, Bulletin #24, item #11 (a municipality could issue seasonal license for premises within 200 feet of a school

during the period the school was closed for the summer upon express condition that the license be effective only during such period); Re Ezzo and Carcucci v. Trenton, Bulletin #49, item #13 (the fact that proposed licensed premises were exempt by statute from the 200 feet rule would not make the issuance of the license mandatory); and St.Mary's Greek Catholic Church v. Manville, Bulletin #187, item #1 ("I have repeatedly indicated that this 200 feet was a real distance and not to be frittered away by the creation of imaginary remoteness.") Judicial determinations properly reflect extreme reluctance to estop a church from the benefit of protective provisions like Section 76. Re Hering, 89 N.E.450 (N.Y.1909); Calvary Baptist Church v. State Liquor Authority, 281 N.Y.S. 81 (A.D.1935) at p.35.

The real fault, if there is any, lies with respondent licensees in taking a chance. The church, with its various gateways, was openly visible to them. If they saw fit to renovate the premises for an entirely different type of liquor dispensing establishment without first seeking a waiver from appellant or assuring themselves that the church was beyond the prescribed distance of 200 feet, the risk is upon their own shoulders.

Respondent licensees further contend that the Commissioner's jurisdiction on this appeal is limited solely to a review of the record below. This contention is devoid of support either in the language of the statute or in the adjudicated cases. Section 35 expressly authorizes the Commissioner to establish appellate "procedure and rules," and the rules governing appeals in force since May 4, 1934, provide that all appeals shall be heard de novo. Indeed, the courts have held that general statutory language authorizing an administrative "appeal" similar to that contained in Section 19, without more, contemplates an appeal de novo rather than on the record below. See Schwartzrock v. Board of Education of Bayonne, 90 N.J.L. 370 (Sup.Ct. 1927); City of Paterson v. Baker, 5 N.J.Misc. 1075 (Sup.Ct.1927); McCrory Co. v. Commissioner of Corporations and Taxation, 280 Mass. 273, 182 N.E. 481 (1932); Alwen v. Fisher, 279 Fed. 164 (D.Wash. 1922). In the Schwartzrock case, supra, the New Jersey Supreme Court held that the administrative "appeal" under the School Law, contemplated a hearing de novo; and in the Baker case, supra, the New Jersey Supreme Court likewise declared that the administrative "appeal" under the Tax Act, was a hearing de novo.

The foregoing construction of the Control Act is fortified by a well-established administrative practice. Since the appellate functions under the Act were transferred to the Commissioner, approximately 700 appeals have been heard; each, de novo. The substantial weight which should be given to this administrative practice is well expressed in Norwegian Nitrogen Products Co. v. United States of America, 288 U.S. 294, 315, 77 L.Ed. 796, 807 (1933). In addition, it is significant that although the Control Act has on numerous occasions been amended subsequent to the adoption of the administrative practice, there has been no material change in the pertinent appeal provisions. See Central Railroad Company v. Thayer Martin, 114 N.J.L. 69 (Sup. Ct. 1934), where the Court quoted with approval the following excerpt from United States v. Dakota-Montana Oil Co., 288 U.S. 458, 466, 77 L.Ed. 893, 898 (1933):

> "The administrative construction must be deemed to have received legislative approval by the reenactment of the statutory provisions, without material change. No. 80, Murphy Oil Co. v. Burnet (decided December 5th, 1932), 287 U.S. 299, ante 318; 53 S.Ct. 161; Brewster v. Gage, 280 U.S. 327,337; 74 L.Ed. 456, 463; 50 S.Ct. 115."

The action of respondent is reversed and the transfer is declared void effective immediately.

D. FREDERICK BURNETT,
Commissioner.

Dated: June 28, 1937.

9. APPELLATE DECISIONS - CONWAY v. HADDON TOWNSHIP.

FRANKIE CONWAY,)
Appellant,)
-vs-) ON APPEAL CONCLUSIONS
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF HADDON,)
Respondent)

Frank M. Lario, Esq., Attorney for Appellant.
Mark Marritz, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

Appellant applied for a transfer of his license No. C-10 from Black Horse Pike to 18 Cuthbert Road, Township of Haddon. His application was denied; hence this appeal.

Respondent denied the license on three grounds: (1) The section to which appellant seeks to transfer his license is residential in character; (2) There are a sufficient number of licensees in the section of the Township to which the license is sought to be transferred; (3) Petitioner's application for a transfer was not exercised with due diligence.

The dividing line between the Township of Haddon and Collingswood lies in Cuthbert Road. The premises in which 18 Cuthbert Road is located consist of a two-story building containing two stores, located at the southeast corner of Cuthbert Road and Atlantic Avenue. The corner store in this building is used as a barber shop. The other store which appellant has rented was formerly a delicatessen and has been used for business purposes since the building was erected. Appellant plans to conduct a restaurant and sandwich shop. A railroad runs along Atlantic Avenue at street level, crossing Cuthbert Road. A small station known as "Cuthbert" is located at the intersection of these streets. On the southwest corner of Atlantic Avenue and Cuthbert Road is a grocery store, and on the northwest corner of these streets in Collingswood is another grocery store. While there are five or six small homes on the same side of Cuthbert Road between the place for which the license is sought and a garage and gasoline station at the corner of Haddon Avenue, and a number of small homes on the opposite side of Cuthbert Road in Collingswood, it appears, nevertheless, that 18 Cuthbert Road is located in a small business district centered around the railroad station.

Six persons appeared at the hearing and objected to the transfer because of the residential character of the neighborhood. Five of the objectors, however, resided on Lindisfarne Avenue, which is a residential side-street running into Cuthbert Road. The sixth objector resided on Cuthbert Road but nearer to the garage and gasoline station located on Haddon Avenue than to the premises for which the license is sought. Since there is much traffic on Cuthbert Road, and since this small business section has sprung up in the vicinity of the railroad station, I conclude that the immediate neighborhood is not of such a residential character as to warrant refusal of the transfer on this ground alone. Guenther v. Parsippany, Bulletin 121, Item 8; DeChristie v. Gloucester, Bulletin 121, Item 10; Conn v. Kearny, Bulletin 173, Item 1.

As to the second reason alleged by respondent for denying the license, appellant and his wife testified that the nearest place licensed for consumption is known as the "Sandwich Shop" on

Haddon Avenue. Appellant's wife testified that she checked the distance between 18 Cuthbert Road and the Sandwich Shop on the speedometer of her automobile and found the distance to be about one mile. There are two distribution licenses which are located nearer than the Sandwich Shop, but distribution licenses do not serve the same purpose as consumption licenses. It appears also that since this application for transfer was filed respondent has granted a new consumption license to one Lennox for a place located closer to existing licensees than the place for which this transfer is sought. It appears from the evidence that there is no place licensed for consumption within a radius of about a mile from 18 Cuthbert Road. In view of this fact and the subsequent issuance of the Lennox license in closer proximity to an existing place, the second reason alleged by respondent is not sufficient.

As to the third reason alleged by respondent, it appears that applicant closed his place of business on Black Horse Pike in August 1936. Appellant did not immediately apply for a transfer, apparently because he was at first contemplating a request to transfer the license to 14 Haddon Avenue where he conducted a restaurant, but later decided to locate at 18 Cuthbert Road. An unreasonable delay in seeking a transfer may be fatal where the policy of a local issuing authority to reduce the number of outstanding licenses is alleged, but in this case it appears that after appellant's application for the transfer was denied respondent issued another consumption license and it does not appear that respondent's position has been changed in any way because of appellant's delay in filing his application for the transfer.

While the transfer of a liquor license to another premises is not an inherent privilege, nevertheless, if no fair question is made of the personal character of the applicant or the suitability of the premises to which he desires transfer, the transfer cannot be arbitrary. VanSchoick v. Howell, Bulletin 120, Item 6.

The action of respondent is, therefore, reversed. Respondent is directed to issue the transfer as applied for.

D. FREDERICK BURNETT,
Commissioner.

Dated: June 28, 1937.

10. APPELLATE DECISIONS - BURDO v. HILLSIDE.

ISIDORE BURDO, Appellant, -vs- MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE TOWNSHIP OF HILLSIDE, Respondent	ON APPEAL CONCLUSIONS

Jules Leviss, Esq., Attorney for Appellant.
Sigurd A. Emerson, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This is an appeal from denial of a plenary retail distribution license for premises located at 327 Hillside Avenue, Township of Hillside.

Respondent denied the license "on the ground that sufficient licenses are now in force."

Appellant is a man of good character and has conducted a grocery and delicatessen store at his premises for the past nine years. There is considerable vehicular traffic on Hillside Avenue, and a number of neighborhood stores in the immediate vicinity of appellant's premises, nearly all of which have living apartments on the upper floors.

The evidence shows that the present population of Hillside is approximately twenty thousand (20,000). There are a total of twenty-seven licenses outstanding in the Township, five of which are distribution licenses. The nearest distribution license to appellant's place of business is located about a quarter of a mile away, on Maple Avenue, and there is another distribution license about the same distance away, located on Liberty Avenue. A consumption license has been issued for premises on the opposite side of Hillside Avenue about a block from appellant's premises.

Aside from appellant's testimony, which consisted of statements made by him that a number of his customers had suggested that it would be a convenience to them if he had a distribution license, the only evidence of necessity was given by three other people who reside near appellant's store. On cross-examination of the latter witnesses, however, it developed that they could purchase at the existing places without any great inconvenience to them.

The mere fact that the issuance of a distribution license would benefit appellant is not a sufficient reason for the issuance of such license. Moran v. West Orange, Bulletin 143, Item 8. The test to be applied is whether or not the general welfare of the community and the needs of those residing therein require the issuance of another license. Considering the population of Hillside, the number of licenses already outstanding, the existence of other nearby licensed places, and the lack of evidence that the needs of those residing in the community require the issuance of an additional distribution license, I cannot say that respondent's determination was arbitrary or unreasonable. Rapp v. Linden, Bulletin 185, Item 9; Shor v. Linden, Bulletin 190, Item 9.

It further appears from the evidence that on June 23, 1937 respondent adopted an ordinance providing "that the number of plenary retail distribution licenses to be used in the Township of Hillside is hereby limited to five in number." The evidence is not sufficient to show that said limitation is unreasonable in itself, or as applied to appellant. The fact that the ordinance was adopted after appellant's application was filed does not prevent its consideration herein. The question to be decided is whether a license should be granted now in view of all of the circumstances which are found to exist at the present time. Franklin Stores Co. v. Elizabeth, Bulletin 61, Item 1.

The action of respondent is, therefore, affirmed.

D. Frederick Burnett

Commissioner.

Dated: June 28, 1937.

Inspected by:
E. E. B. ANDERSON
and found O. K.

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