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

BULLETIN 2206 November 21, 1975

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ITEM

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

BULLETIN 2206 November 21, 1975

1. COURT DECISIONS - HOWELL'S SPORTSMAN'S INN v. DIVISION OF ALCOHOLIC BEVERAGE CONTROL - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-445-74

HOWELL'S SPORTSMAN'S INN
t/a HOWELL'S SPORTSMAN'S INN, INC.,

Appellant,

v.

DIVISION OF ALCOHOLIC BEVERAGE CONTROL,
Department of Law and Public Safety,
State of New Jersey,

Respondent.

Submitted September 8, 1975 - Decided September 24, 1975.

Before Judges Allcorn, Kole and Gaulkin.

On appeal from New Jersey Department of Law and Public Safety, Division of Alcoholic Beverage Control.

Robert E. Levy, attorney for the appellant.

William F. Hyland, Attorney General, attorney for the respondent (David S. Piltzer, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

(Appeal from the Director's decision in Re Howell's Sportsman's Inn, Bulletin 2169, Item 3. Director affirmed. Opinion not approved for publication by Court Committee on Opinions).

2. COURT DECISIONS - WILLIAM MARI v. LONG BRANCH ET AL. - DIRECTOR AFFIRMED.

WILLIAM MARI,

Appellant,

v.

CITY COUNCIL OF THE CITY OF LONG BRANCH and COURT LIQUORS, INC.,

Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-528-74

Argued September 9, 1975 - Decided September 17, 1975.

Before Judges Halpern, Crane and Michels.

On appeal from the Division of Alcoholic Beverage Control.

Mr. Paul M. Griffin argued the cause for appellant (Messrs. Norton and Kalac, attorneys).

Mr. Peter S. Falvo, Jr. argued the cause for respondent Court Liquors Inc. (Messrs. Morgan & Falvo, attorneys).

Mr. William F. Hyland, Attorney General of New Jersey, filed a statement in lieu of brief for the Division of Alcoholic Beverage Control (Mr. David S. Piltzer, Deputy Attorney General, of counsel).

PER CURIAM.

(Appeal from the Director's decision in Re Mari v. Long Branch et al., Bulletin 2170, Item 3. Director affirmed. Opinion not approved for publication by the Court Committee on Opinions).

3. APPELLATE DECISIONS - SHOP-RITE OF HUNTERDON COUNTY, INC. v. RARITAN ET AL.

Shop-Rite of Hunterdon County, Inc.)

Appellant,

v.

Township Committee of the Township of Raritan (Hunterdon County) and Robert A. Yard,

Respondents.

On Appeal

CONCLUSIONS AND ORDER

Lee B. Roth, Esq., and Daniel E. Knee, Esq., Attorneys for Appellant
Jefferson, Jefferson & Vaida, Esqs., by Richard G. Jefferson, Esq., Attorneys for Respondent Township
Herr & Fisher, Esqs,, by Edmund R. Bernhard, Esq., Attorneys for Respondent Yard.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

On November 26, 1973, Conclusions and Order were entered in the within matter granting a motion by respondents to dismiss the appeal filed therein as being untimely filed.

Thereafter, upon appeal taken from the Director's Conclusions and Order, the Superior Court, Appellate Division (A-959-73; A-2084-73), December 9, 1974, reversed and remanded this matter to the Director with the directive that he determine the primary issue presented by the petition of appeal and the answers thereto. A plenary hearing de novo on the appeal was held in this Division in accordance with the said mandate, and pursuant to Rule 6 of State Regulation No. 15.

The factual background giving rise to the action of the Respondent Township, complained of in this appeal, is not in controversy. In accordance with a valid ordinance, the Township increased the number of plenary retail distribution licenses available by one. Appellant, Shop-Rite of Hunterdon County, Inc., (hereinafter Shop-Rite) and respondent, Robert A. Yard (hereinafter Yard) were among twenty or more applicants for the new license. It was the grant of this new license to Yard by the Township Committee (hereinafter Committee) and the steps leading to Yard's selection over appellant and all others that are the matters raised in this appeal.

The petition of appeal complained that the determination of the Committee was made in other than a public meeting, and was thus violative of the New Jersey "Right to Know" Law (N.J.S.A. 10:4-1 et sec). The petition further contended that the grant to Yard resulted from conflicts of interest by certain of the committeemen.

Both respondents denied appellant's contentions, and averred that the action of the Township was procedurally proper and devoid of improper motivations. The committee contended that the grant of license to Yard was in the best interests of the municipality.

Appellant introduced the testimony of the municipal clerk, John L. Opdyke, Committeemen Donald R. Griffin and Andrew G. Tirpok and Mayor Louis F. Lentine. Opdyke related the sequence of events that followed the receipt of some twenty applications for a new plenary retail distribution license, during June of 1972. Shortly thereafter, a memorandum was distributed among the applicants setting forth "General Application Procedures" and announcing a cut-off date for further applications.

In January 1973, the Committee met in executive session and established specific uniform standards upon which they would individually judge each of the applications. They also decided to interview each of the applicants at two succeeding informal sessions. Following the interviews, the Committeemen were furnished with "tally sheets" on which to insert their respective judgment of the weight of each of the applicants on a scale of from one to fifteen, based upon the location, ratable and character or each.

At a regular meeting of the Committee, February 12, 1973, the total votes for each of the applicants were tallied, and Yard received the greatest number of points. At the next regular meeting, February 26, 1973, a resolution was introduced awarding the license to Yard; the resolution was not adopted however, because the Committee's attorney advised it of an irregularity in the balloting procedure by one of the members of the Committee. Action on the matter was, thereupon, tabled until a subsequent meeting.

On March 26, 1973, tally sheets for the balloting on the respective applicants were presented to the members of the Committee at the commencement of its regular meeting. The Ballots were tallied and, again, Yard received the largest number of votes. The offending resolution, awarding the license to Yard, was then adopted by a four-to-one vote of the members of the Committee. Copies of the individual tally sheets of the respective committeemen were attached to the resolution and made part of the record.

Opdyke denied that the public had been excluded from any of the meetings held by the Committee, save for the executive sessions at which the "ground rules", upon which the members would make their individual judgments, were explored. He added that, at almost every public session of the Committee held subsequent

to the acceptance of the applications, the appellant, by its attorney or principal officer was in attendance, at which it advocated that it be selected. Material in printed form furnished by appellant had been distributed among the members of the Committee for their perusal. He denied that the individual applications, records of meetings and correspondence were withheld from inspection by anyone.

Committeeman Donald R. Griffin testified that he participated with his colleagues in the determination made to select Yard as the successful applicant, save for one hearing when some of the applicants were interviewed. He admitted that he had made an early judgment of his own that Yard was, the most qualified; hence he awarded all fifteen points available to each candidate only to Yard, giving none to any of the other applicants. He made no specific determination of the character, potential ratable or location of any other.

In the course of his testimony, he acknowledged that he had served on the Industrial Committee of the Township of which body Yard was a member. Additionally, he stated that Yard is his neighbor and resides near his home, on the same street.

Mayor Louis F. Lentine testified that he initially suggested the procedure and criteria used for the selection of the successful applicant; and that there had been no objection to this procedure voiced by the appellant or any other candidate. He denied that any of the selection mechanics were done in closed session, and recalled that, at the interviewing sessions, a reporter from a local paper was present. On his tally, Yard had received merely six points, the appellant ten points and two others had received fifteen.

Committeeman Andrew G. Tirpok, testified that he gave four of the candidates fifteen votes, one of whom was Yard and another was Dora Lesanics. The appellant had received merely seven points, for he believed appellant's proposed premises were too near to four other present licensed premises.

I.

Appellant contends that the members of the Committee came to their conclusions as the result of several executive sessions from which the public was barred; hence their action was void as it was violative of the "Right to Know Law" (N.J.S.A. 10:4-5) which prohibits official determinations being made in a non-public session.

Appellant charges that the Committee met in several executive sessions during which criteria for the selection of the successful applicant were made. Appellant cites Scott v. Bloomfield, 94 N.J. Super. 592, 98 N.J. Super. 321 (App. Div. 1967) and Kramer v. Sea Girt, 80 N.J. Super. 445 (Law Div. 1963) in support of its argument that, as decisions were made in executive session which affected the rights of all applicants, including appellant, the final determination by the Township was void.

The factual complex in both Scott and Kramer, supra, are not analagous to the instant situation. In both cited cases, the official determination was made in meetings from which the public was excluded; in the instant matter, no official determinations were concluded in executive sessions other than the formulations of guidelines and criteria upon which all applications would be weighed. An announcement of those standards which would be applied in the later determination of the merits of each application was furnished to all applicants, including appellant, as well as to the public at large.

At a public meeting, the members of the Committee scored their "tally sheets" and the award to the successful applicant was presumably made by adding the point totals received by each applicant. The resolution reflecting the composite scores was adopted at such public meeting where appellant, as well as other applicants had full opportunity to be heard.

I find that the appellant's contention that the "Right to Know Law" was violated is without substance.

II.

Appellant further contends that award of new license to Yard resulted from favoritism, conflict of interest, and an imbalance in the scoring of totals given by each of the committeemen. In that connection, the "tally sheets" prepared by each member of the Committee was received into evidence. It was further stipulated that, as a factual matter, Yard had been the Mayor of that township, had served on its Committee; and, is, presently a member of the Planning Board.

Committeeman Lesanics is the brother-in-law of applicant Dora Lesanics. Committeeman Griffin has served with Yard on a public body in the township, lives nearby on the same street and considers Yard his friend.

Such connections, in and by themselves, would not vitiate the action of the Committee. It is well settled that bias and prejudice or improper motivation may not be presumed, but must be established by convincing proof. Gentile v. Manalapan, Bulletin 1514, Item 2; Levine v. Harrison, Bulletin 1032, Item 1.

However, there appears to be sufficient proof that the individual judgments of the Committee members in two instances, did not follow the procedure or apply the criteria adopted by the Committee upon which they had agreed to weigh their individual determinations.

Each committeeman settled for the practice of making some point award, from zero to fifteen, for each applicant on the basis of character, location and ratables. For the most part, each committeeman did enter scores alongside the names of

each applicant. Mayor Lentine, for example, gave one applicant a score of four, another three received six, one seven, two eight, four nine, four ten, two eleven and two fifteen. Committeemen Tirpok and Haas awarded points to each applicant on a relative scale.

Committeeman Lesanics awarded up to nine points to each of the applicants except to applicant Dora Lesanics, to whom he gave fifteen points. Committeeman Griffin gave a score point of zero to each applicant with the exception of Yard, who received all fifteen points.

Thus, by adding the point totals for each applicant from each tally sheet, Yard received a disproportionate share of the total votes cast. In short, as appellant maintains, the effect of counting the ballots in the way they did, the Committee was the victim of "bullet voting" by Committeeman Griffin, and the vote was not, therefore, reflective of combined valid concensus of the Committee as a whole.

It is a well-established legal principle that a quasi-judicial action of a municipal body is rendered voidable by the participation of a member thereof, who is, at the time, subject to a direct or indirect private interest which is at variance with the impartial performance of his public duty. Aldom v. Roseland, 42 N.J. Super. 495 (App. Div. 1956),

The rule of law governing "disqualifying interest" is set forth in McNamara v. Saddle River Borough, 64 N.J. Super. 426, 429 (App. Div. 1960) wherein it was held:

> "If there is 'interest' there is disqualification automatically, entirely without regard to actual motive, as the purpose of the rule is prophylactic, that is, to prevent the possibility of an official in a position of self-interest being influenced thereby to deviate from his sworn duty to be guided only by the public interest in voting as such official. Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958); Griggs v. Princeton Borough, 33 N.J. 207, 219 (1960)."

The issue of disqualification of municipal officials because of a conflict of interest is whether there is a potential for conflict, not whether the public servant succumbs to the temptation or is even aware of it (Emphasis added), Griggs v. Princeton Borough, supra. In all of these cited cases, the persons were men of integrity and were motivated by sincerity of purpose. Nevertheless, the court held that it was the existence of such interest which was decisive, not whether such interest was actually influential. Zell v. Roseland, 42 N.J. Super. 75, 82 (App. Div. 1956).

Committeeman Lesanics, by making his brother's widow, applicant Dora Lesanics, his overwhelming choice on his tally sheet,

exhibited some interest in her welfare, undoubtedly resulting from his devotion to his late brother. The effect of such interest was treated in Aldom v. Roseland, supra, thusly:

> "That there was a psychological pressure on him moving against unqualified devotion to public duty throughout the pendency of the problem, no one would deny. That pressure consciously or unconsciously would have the natural tendency to turn him in the direction in which his vote was cast. In such a situation the rule of law, based as it is on human experience, safeguards him and the public against extraneous influence; it causes the 'cup' to pass from him. It disqualifies him from acting at all." P. 507.

Committeeman Griffin's admitted prejudgment in favor of Yard, to whom he ascribed a full fifteen votes, giving none to any of the other candidates, even after the Committee had requested him to evaluate those applicants on the basis of their presentations before the Committee, completely destroyed the validity of the agreed method or mechanics used by the Committee in making its selection. The granting of a liquor license has been held to involve action judicial in nature. Dufford v. Nolan, 46 N.J.L. 87 (1884). Thus, the standards of disqualifying interest applicable in the instant matter can be no less exacting than in the case of purely judicial action. Freehold v. Gelber, 26 N.J. Super. 388 (App. Div. 1953).

It is, of course, difficult for a municipal issuing authority to make a selection, from among many qualified applicants, of one who would best serve the needs of the community. Mayor Louis Lentine testified that he devised a method, submitted and approved by his colleagues, by which each would make independent evaluations of the applicants relating to the three basic variables and ascribe a numerical score for each applicant. As previously indicated herein, the total of the "points" received by each applicant would serve as an indication of who among them would serve the best interests of the community.

Committeeman Griffin acceded to this method, but failed to follow it. By his devaluing all other applicants and giving the maximum number of "points" to his friend Yard, the arithmetic balance from which fair totals could be determined, the scoring method proposed, did not truly reflect the total of the independent judgments of the respective Committee members. Thus, the added "points" given by Lesanics and Griffin destroyed the otherwise impartial method conceived by Mayor Lentine. Hence, by such improper weights, the final action of the Committee became erroneous, capricious and arbitrary.

It is of interest to note that had Committeemen Griffin and Lesanics abstained from voting on their selections, a tally of the remaining votes indicated that applicant Corona would have been the successful applicant; and applicant Flemington Travel Inn would be the second choice. The successful applicant, Yard tied with three others for third place. It is apparent that the selection

method, so well intentioned by Mayor Lentine, was totally aborted by the actions of these Comitteemen.

Accordingly, I find that the appellant has maintained its burden of showing that the action of the respondent Township Committee was erroneous and should be reversed, as required by Rule 6 of State Regulation No. 15.

I, therefore, recommend that the action of the Committee be reversed.

Conclusions and Order

Written Exceptions to the Hearer's Report were filed by appellant, and respondent, Robert A. Yard, purusnat to Rule 14 of State Regulation No. 15.

The Exceptions filed by appellant consists of a repetition of its contention that the "Right to Know Law" is applicable and dispositive of the matter. I agree with the Hearer that it is inapplicable; this contention was considered and correctly resolved by the Hearer.

With respect to respondent Yard's Exceptions, the matter of disqualifying interest was considered in detail and properly resolved in the Hearer's report. Furthermore, in a recent decision involving the matter of voting participation of a Committee member who at the time was subject to a direct or indirect private interest which is at variance with the impartial performance of his public duty, the court, in West Orange Licensed Beverage Ass'n. v. West Orange, N.J. Super., App. Div. (Docket A-181-74), decided July 18, 1975 cited, with approval Hochberg v. Borough of Freehold, 40 N.J. Super. 276, 284 (Appl Div. 1956) for the principle that, in these circumstances there must be disqualification "so that not the faintest shadow be cast on the integrity of the determination of the Committee." Aldom v. Borough of Roseland, supra; Zell v. Roseland, supra.

I find the Exceptions lacking in merit, as hereinabove stated.

Having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the argument of counsel in summation, the Hearer's Report and the Exceptions thereto, which I find have either been satisfactorily resolved in the said Hearer's Report or are lacking in merit, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 12th day of September 1975,

ORDERED that the action of the respondent, Township Committee of the Township of Raritan in granting the application

of Robert A. Yard for a plenary retail distribution license be and the same is hereby reversed, and the said license be and the same is hereby cancelled, effective immediately.

LEONARD D. RONCO
DIRECTOR

4. APPELLATE DECISIONS - ALEXGOOD TAVERN, INC. v. PATERSON.

Alexgood Tavern, Inc., t/a Club Mustang

Appellant,

v.

Board of Alcoholic Beverage Control for the City of Paterson,

Respondent.

On Appeal

CONCLUSIONS AND ORDER

Krugman, Chapnick & Grimshaw, Esqs., by Matthew M. Keshishian, Esq., Attorneys for Appellant
Joseph A. LaCava, Esq., by Ralph L. De Luccia, Jr., Esq., Attorneys for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

The Board of Alcoholic Beverage Control for the City of Paterson (hereinafter Board), on February 26, 1975, denied appellant's application for a place-to-place transfer of its Plenary Retail Consumption Licensed C-168, from premises 50 West Broadway to 38 Bridge Street, Paterson. This appeal followed.

Appellant contends that a huge urban renewal project has embraced not only the location of its licensed premises but a total area including many city blocks. It maintains, therefore, that the Board was in error in not recognizing an unusual hardship facing it and should have approved the transfer. The Board denied this contention, and defended that the local Ordinance (Se. 2:3-3, Title 2, Chapter 3, Revised Ordinances) does not establish a right of appellant to move to the proposed location.

An appeal de novo hearing took place in this Division pursuant to Rule 6 of State Regulation No. 15 with full opportunity afforded the parties to introduce evidence and to cross-examine witnesses.

The facts involved in this appeal are not in substantial dispute. The straight-line distance from the present premises to the proposed location approximates 1,875 feet. The Board maintains that the shortest walking distance between them is 2,710 feet. Neither estimate was controverted. Additionally, it is agreed that another licensed facility is located about 100 feet from the proposed location.

The applicable ordinance, above referred to, limits the placement of retail consumption licensed premises to within 1,000 feet of another, with two exceptions. Firstly, an existing license may be transferred to another location (subject, or course, to Board approval) within 600 feet. Secondly, a transfer may be permitted if the existing premises is "being taken for any municipal, county, state or federal project...." to another location within 1,500 feet from its former location. This latter situation applies to the instant matter.

As the distance between existing and proposed sites involved in appellant's application far exceeds the maximum permitted distance, the Board is obviously without authority to permit such transfer.

Although it is legally impermissible for the Board to grant a transfer beyond the 1,500 foot limitation set by the applicable ordinance, appellant raises the novel contention that, as the huge sprawling urban renewal area carried with it the destruction of all buildings and streets within a thousand feet or so of the existing licensed premises, the "hardship" provision of the ordinance is totally inapplicable. Thus, appellant should not be confined to the limited distance requirements of the subject ordinance.

As the court held in Wright v. Vogt, 7 N.J. 1,2 "Ordinances are to receive reasonable construction and application to serve apparent legislative purpose, and aim is to ascertain sense in which terms were employed by legislative body." The applicable ordinance is clear and its limitation specific. It allows no room for interpretative bending to accommodate appellant's purpose.

Appellant further argues that by the application of the ordinance, it is being deprived of a property without due process resulting in constitutional infirmity. Appellant's challenge of the constitutionality of the ordinance is without merit. The Division lacks jurisdiction to entertain a challenge to the validity of an ordinance. An ordinance must be accepted in this Division as valid on its face. Suits to challenge the validity of an ordinance must be brought in a court of competent jurisdiction. Blanck v. Magnolia, 73 N.J. Super. 306 (App. Div. 1962), reversed on other grounds, 38 N.J. 484 (1962); Gach v. Irvington, Bulletin 2058, Item 1; Seamark, Inc. v. Wildwood, Bulletin 2132, Item 4.

Thus the issue here must remain narrowed to the applicability of the pertinent ordinance and "it has long been

established that a local governing body has no jurisdiction to grant or transfer a license in violation of the terms of a local ordinance. Bachman v. Phillipsburg, 68 N.J.L. 552 (1902). The rule is aptly stated in Tube Bar Inc. v. Commuters Bar, Inc. 18 N.J. Super. at p. 354." Petrangeli v. Barrett, 33 N.J. Super. 378, 384 (App. Div. 1954).

I, thus, conclude that the appellant has failed to meet the burden of establishing that the action of the Board was erroneous and should be reversed, as required by Rule 6 of State Regulation No. 15.

It is, accordingly, recommended that the action of the Board be affirmed, and the appeal herein be dismissed.

Conclusions and Order

No Exceptions to the Hearer's report were filed pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including the transcript of testimony, the argument of Counsel in summation, and the Hearer's report, I concur in the findings and recommendations of the Hearer, and adopt them as my conclusions herein.

Accordingly, it is, on this 16th day of September, 1975

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

Leonard D. Ronco
Director

5. APPELLATE DECISIONS - TOWN HOUSE LIQUORS & BAR, INC. v. PEQUANNOCK ET AL.

Town House Liquors & Bar, Inc., t/a Town House Liquors and Bar, Appellant v. Township Committee of the Township of Pequannock, and Pompton Plains Bar and Liquors, A N.J. Corporation, Respondents.	On Appeal CONCLUSIONS and ORDER

Scangarella and Feeney, Esqs., by Frank Scangarella, Esq., Attorneys for Appellant
Sosland & Stein, Esqs., by Karl Z. Sosland, Esq., Attorneys for Respondent Pequannock Township
Marcus, Rosen, Breslow, Levy, Jaffe & Fiorello, Esqs., by Alfonse J. Cifelli, Esq., Attorneys for Respondent, Pompton Plains Bar and Liquors

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the Township Committee of the Township of Pequannock (hereinafter Committee) which, on June 10, 1975, approved an application to transfer Plenary Retail Consumption License C-4, issued by it for premises 3 Mead Place to 444 State Highway #23, Pompton Plains.

Appellant is a licensee in Pequannock, whose place of business is located along State Highway #23 diagonally opposite to the premises to which transfer was approved. These premises are about three-hundred feet apart. The local municipal ordinance prohibits the movement of a licensed premises to within 1,500 feet of other licensed premises; and, based upon this prohibition, appellant contends the transfer herein granted is invalid.

Respondents admit the proximity of the two licensed locations to each other, but deny the subject ordinance has been violated in that the fifteen-hundred foot limitation is qualified by this language:

> "The distance shall be measured in the normal way that a pedestrian would properly walk from the nearest entrance of the licensed premises to the nearest entrance of the premises sought to be licensed."

It is stipulated that if a pedestrian wished to walk from and to the subject locations other than crossing the highway at the nearest points, the distance would encompass far more than fifteen-hundred feet.

New Jersey Highway #23 is one of the major arteries of northern New Jersey and runs generally in a northwesterly-southeasterly direction, bisecting a portion of Pequannock Township. Its total width approximates one hundred and twenty feet and its dual roadways are divided by grassy median about twenty-five feet in width.

It is further uncontroverted that there is no place along Route #23 within Pequannock which has been set aside or marked for a pedestrian crossing. Hence, as appellant maintains, pedestrians do cross the highway in a catch-as-catch-can manner throughout the day. Respondents contend,however, that no pedestrians can "properly walk" across the highway, hence the footage restriction does not apply in this novel situation.

Thus, the single issue presented by this appeal is: Is a State Highway which contains a grassy median separating its high-speed lanes, such a roadway across which a pedestrian would properly walk? If so, the ordinance has been violated; if not, the grant of transfer should be affirmed.

The statute applicable to pedestrian crossings of highways (N.J.S.A. 39:4-34) carries this admonition:

> "It shall be unlawful for a pedestrian to cross any highway having roadways separated by a medial barrier, except where provision is made for pedestrian crossing...."

It is uncontroverted that there is no provision existing in the subject area for pedestrian-crossing on Route #23. Peter Schotanus, testifying on behalf of appellant, recalled that, almost a decade ago, the municipal officials induced the then State Highway Department to fill in those portions of the median areas through which vehicles could then lawfully cross, as the hazard of turning vehicles was extracting a ghastly loss of life. No provision whatever was made for pedestrian-crossing following the closure of the turn areas.

The Township Committeemen, the Township Manager and the Township Chief of Police all concurred that pedestrians could not safely cross Route #23.

Appellant urges that the grassy median is not a "barrier" as referred to in N.J.S.A. 39:4-34, in that persons are not obstructed in their attempts to cross as they would be if the highway was divided by cement walls used on some New Jersey highways.

A barrier is defined as "a factor (as a topographic feature or a physical or physiological quality) that tends to restrict the free movement and mingling of individuals or populations." Webster's Third New International Dictionary, 1961, p. 179.

It is a well established principle that the accepted and proper method of measurement in a matter of this kind is not between building entrances but between points on the public way intersecting any walk which a person would use in entering the properties in question. Presbyterian Church of Livingston v. Div. of Alcoholic Bev. Con., et al, 53 N.J. Super. 271 (App. Div. 1958).

In Karam, et al. v. Division of Alcoholic Beverage Control and West Orange, 102 N.J. Super. 291, 297, (App. Div. 1968), the court, in considering the various methods by which a pedestrian might walk as envisioned by the statute stated:

> "...Others [other pedestrian routes] involved walking along the building line of the sidewalk on Pleasant Valley Way and Eagle Rock Avenue, and traversing the intersection of those streets within their cross-walks but not stepping up on the curb corners. We incline to the view that the latter method was impermissible in terms of pedestrian safety." (underscore added).

The long-established principles of measurement in these cases are readily applicable to situations where the distances may be measured along a public street having a regular sidewalk.

Route #23, across which the proposed transfer site is located measured from appellant's premises, has existed as a public highway for fifty or more years. From a series of photographs placed into evidence, it is apparent that no provision has been made for a cross-highway walkway in the area, in expectation of any pedestrian traffic.

The "proper" way pedestrian-walk measurement should be calculated must be a "safe" way. Karam v. West Orange, supra,. Pedestrian-crossing of Route #23 is impermissible in terms of public safety, hence distances cannot be calculated across this highway, in the absence of some aisle or lane designated for pedestrian crossing. Cf. Szarko's Liquor Store, Inc. et al, v. Hillside, Bulletin 2160, Item 1.

I, therefore, find that the appellant has failed to meet the burden of establishing that the action of the Committee was erroneous and should be reversed, as required by Rule 6 of State Regulation No. 15.

It is, accordingly, recommended that the action of the Committee be affirmed and the appeal herein be dismissed.

Conclusions and Order

No Exceptions to the Hearer's report were filed pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire matter herein including the transcript of testimony, the exhibits, the written summation of counsel, and the Hearer's report, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 18th day of September 1975,

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

Leonard D. Ronco
Director