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

BULLETIN 420 AUGUST 21, 1940.

1. APPELLATE DECISIONS - SIBLEY AND BRANNON v. SHIP BOTTOM-BEACH ARLINGTON.

MARGUERITE SIBLEY and REBECCA BRANNON, :

Appellants :

-vs- :

BOROUGH COUNCIL OF THE BOROUGH OF SHIP BOTTOM-BEACH ARLINGTON and EMILIO GUIDA, :

Respondents. :

(Cases No. 1 and No. 2) :

.. .. :

On Appeal

CONCLUSIONS AND ORDER

Howard Ewart, Esq. and Joseph A. Citta, Esq., Attorneys for Appellants.
Francis Tanner, Esq., Attorney for Respondent, Borough Council.
Franklin H. Berry, Esq., Attorney for Respondent, Emilio Guida.

These are two appeals, the first from the granting of a plenary retail consumption license for the fiscal year 1939-40 to Emilio Guida for premises on lots Nos. 51-56, block 109, N/S Eighth Street near Central Avenue, in the Borough of Ship Bottom-Beach Arlington, in the County of Ocean, and the second from a renewal of said license for the present fiscal year.

In the first place, appellants contend that the granting of the licenses is precluded by P.L. 1939, c. 61, which provides:

> Section 1. "No new plenary retail consumption license shall be issued within any municipality situate within a county of the sixth class unless and until the ratio of such licenses issued and outstanding to the population within a municipality shall be less than one such license to every five hundred persons resident within said municipality as determined by the last preceding Federal census."
>
> Section 13. "The term 'last preceding Federal census' where used in this act shall be deemed to mean the Federal census which is taken immediately previous to the date on which an application for a license is filed."

On April 15, 1940, respondent Guida applied for a new, as distinguished from a renewal license, for the balance of the 1939-40 license year. Thereafter, he applied for and was granted a renewal license for the fiscal year 1940-41. The Borough of Ship Bottom-Beach Arlington is situate within Ocean County, which is a county of the sixth class. The population of the Borough, according to the Federal census of 1930 was two hundred and seventy-seven, and according to the preliminary official returns, subject to correction, the Federal census of 1940 discloses that the Borough has a population of three hundred and eighty-two.

I conclude, however, that because of the decision rendered by the New Jersey Supreme Court in Township of Dover vs. Van Kirk, et al, 123 N.J.L. 507, the provisions of P.L. 1939, c. 61, are no longer in force and effect so as to bar the issuance of the licenses considered herein. In the case cited, the Supreme Court declared unconstitutional R.S. 33:1-21, which purported to authorize the granting of retail liquor licenses by the Judges of the Court of Common Pleas in sixth class counties. In the course of the opinion, the court said:

> "The act interferes with both municipal regulation and revenue and has no sound or general bearing upon the welfare of the people. Although the regulation of the sale of liquor is within the police power of the state, there is no apparent reason why the problem in Ocean and Cape May Counties is different from the problem in adjoining counties bordering on the Atlantic Ocean."

P.L. 1939, c. 61, appears to be subject to the same criticism as a local or special law.

In a memorandum submitted on behalf of appellants, numerous authorities are cited to show that a ministerial or administrative officer has no right or power to declare an act of the legislature unconstitutional. In reaching the present result, however, I am not assuming the prerogative of the courts in declaring an act unconstitutional. I cannot, however, in construing the provisions of the Alcoholic Beverage Law, disregard the effect of the decision of the Supreme Court rendered in Township of Dover vs. Van Kirk, supra.

R.S. 33:1-23 provides:

> "It shall be the duty of the commissioner to administer and enforce this chapter."

R.S. 33:1-19 provides:

> "It shall be the duty of the governing board or body of each municipality *** to administer the issuance of all other licenses within their respective municipality in accordance with this chapter ***."

The question which I must decide is whether the power thereby granted by the legislature to the governing board or body of each municipality, is restricted only by the provisions of R.S. 33:1-22, or is further restricted by the provisions of P.L. 1939, c. 61. Since the Supreme Court has declared unconstitutional R.S. 33:1-21, and since P.L. 1939, c. 61, is based on the same classification which was condemned therein as unconstitutional, I am following the decision of the Supreme Court in holding that said act does not limit the power granted to respondent by R.S. 33:1-19. This conclusion is in accordance with the opinion previously expressed by the late Commissioner Burnett in Re Tanner, Bulletin #373, Item #9, which was rendered on January 7, 1940 and has guided the action of municipalities in sixth class counties since that date.

Appellants also contended that the granting of the license was erroneous because the municipality was already adequately supplied with licensed establishments; public necessity and convenience did not require the granting of the license; the operation

of another licensed establishment would tend to create an immoral and unhealthful condition; the granting of the license was an imposition upon, and a disadvantage to, the residents and home owners of the municipality; the Borough Council was corruptly motivated in granting the license; and because "overwhelming" public sentiment was opposed to the granting of the license.

The only testimony in support of the contention that the Borough was adequately supplied with licensed premises was that of one of the appellants, whose sole direct testimony was:

> "I think there are plenty for the small borough; there are five places where they sell liquor, and that is enough, and in my opinion too many."

One witness on behalf of the appellants testified:

> "I feel we have enough . . . we have more than we need."

But this testimony indicates merely a disagreement with the opinion of the Borough Council -- not an oversupply of licensed places. In view of the fact that the summer population of the Borough is estimated at five to seven thousand, I cannot conclude that the Borough Council abused its discretion in granting a fourth plenary retail consumption license.

Appellants, who have the burden of proof, offered no evidence to establish that public convenience and necessity did not require the granting of an additional license, that the licensing of the premises would create an immoral and unhealthful condition, or that the licensing of the premises was an imposition upon, and disadvantage to, the home owners of the community. All three grounds must, therefore, be deemed abandoned.

The allegation that the granting of the license was corruptly motivated was unsupported by any evidence. It was sought to be sustained by proof that Guida purchased the property in question from the Borough, making his offer for the purchase of the lots on the same day that he filed his application for license. From this, appellants seek to raise an inference that there was a collateral understanding between the Borough and Guida that in consideration of his purchase of the lots he would be granted a liquor license. That the inference is unjustified appears from testimony by Guida, the Borough Clerk, and the only Councilman who testified, all of whom unequivocally denied that such understanding existed.

The objection that the license was granted contrary to "overwhelming" public sentiment of residents of the Borough finds its support, if at all, in the fact that three petitions bearing one hundred forty-nine names, objecting to the granting of the license, were filed with the Borough Council, and sixty-seven separate letters of protest were also received by the Borough Council. However, the petitions objected to not only the granting of the instant license but also to that sought by Edmundo Carmona for premises at the other end of the Borough. The Councilman who appeared testified that in his opinion the objections were directed primarily to the Carmona application, since most of the objectors resided in the vicinity of the Carmona premises. Examination of the letters of protest, which were received in evidence, discloses that of the sixty-seven, only nine referred specifically to the Guida application. That the alleged "over-

whelming" public sentiment against the granting of the Guida license does not really exist is apparent from the fact that only two residents appeared at the hearing herein, one being an appellant and the other residing twenty-one blocks away from the instant premises.

The action of the respondent Borough Council of Ship Bottom-Beach Arlington in granting a plenary retail consumption license to respondent Emilio Guida is, therefore, affirmed.

Accordingly, it is, on this 16th day of August, 1940,

ORDERED, that the appeals be and the same are hereby dismissed.

E. W. GARRETT,
Acting Commissioner.

2. APPELLATE DECISIONS - BURSTEIN v. CLOSTER.

BERNARD BURSTEIN, NORMAN H. LAWTON, EUGENE B. FITLER, and EDWIN V. S. BOGERT,

Appellants,

-vs-

BOROUGH COUNCIL OF THE BOROUGH OF CLOSTER, RICHARD BRADSHAW and ALDO GORIA,

Respondents

ON APPEAL
CONCLUSIONS AND ORDER

- -

Mattocks & Wittriech, Esqs., by Andrew W. Wittriech, Esq., Attorneys for Appellants.
Tipping & Schneider, Esqs., by C. Conrad Schneider, Esq., Attorneys for Respondent, Borough Council.
Abram A. Lebson, Esq., by Seymour A. Smith, Esq., Attorney for Respondents, Bradshaw and Goria.

This is an appeal from an increase in the limitation of plenary retail distribution licenses from two to three, and from the granting of such a license to the respondents, Bradshaw and Goria.

On June 17, 1937 the respondent Borough adopted an ordinance limiting the issuance of plenary retail distribution licenses to two and plenary retail consumption licenses to nine. On January 18, 1940 an ordinance was introduced proposing to increase distribution licenses from two to three, with no change in the number of consumption licenses. This ordinance was passed on February 16, 1940 and formally adopted, over the Mayor's veto, on March 21, 1940.

The license in question was granted on February 16, 1940. Appellant contends that the increase in the quota, with resultant issuance of this license, is socially undesirable, contrary to public convenience and necessity, and motivated in bad faith.

Respondent municipality is largely residential, having only one main business section stretching over several blocks. The premises of respondents Bradshaw and Goria is located right in the heart of this business section. The municipality is still in

the stages of development, with new homes being built at a steadily increasing pace, with its several large industrial plants showing recent spurts in business, and with its population growing gradually.

One of the original two package store licenses is held by the appellant Burstein in premises operated also as a drug store, and the other by an A. & P. store. The premises of respondents Bradshaw and Goria has been conducted as a grocery store for many years. The testimony of the members of the Borough Council shows that, among other reasons, they voted in favor of issuing the additional distribution license to the respondents because of the sentiment of a substantial number of residents of the community that there should be available in the municipality a third establishment where package liquors could be purchased. It appears that, of the nine consumption licenses, seven are located on the main highways and cater substantially to transients, and that only one tavern makes any pretense whatsoever of selling package liquors. They also testified that many residents of the municipality were compelled to purchase their bottled liquor in other communities, and that deliveries of alcoholic beverages were made to residents of the Borough by licensees of outlying municipalities; that, in their opinion, it was socially desirable to have more package goods stores and less taverns in the Borough.

No citations are needed to support the proposition that the number of licenses to be issued in a municipality rests in the sound discretion of the local issuing authority and that, in the absence of a showing that the number is arbitrary or unreasonable or adopted in bad faith, the action of the authority will not be disturbed. Where, as here, the evidence indicates that the population is on the increase, that a large proportion of the residents are in accord, that the municipality is developing industrially, and that the Borough Council are genuinely convinced that an additional license is compatible with the public interest, I cannot say that an increase in the number of distribution licenses from two to three is an unwarranted exercise of such discretionary power. Especially is this so in this case, since it appears that four of the six Councilmen who voted in favor of the ordinance increasing the quota and the issuance of the license were not members of the Council at the time of the adoption of the original ordinance in 1937. While, in the interest of uniformity, it might be desirable that a succeeding governing body adhere as closely as possible to the policies theretofore enunciated by a former body, it cannot be said, in view of the changed conditions confronting the present Council and its apparent difference in outlook, that a deviation from those policies is necessarily arbitrary or unreasonable.

Other reasons assigned for reversal are either already disposed of by the foregoing or not supported by any competent evidence.

The action of the respondent Borough Council is, therefore, affirmed.

Accordingly, it is, on this 16th day of August, 1940,

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

E. W. GARRETT,
Acting Commissioner.

3. APPELLATE DECISIONS - CARMONA v. SHIP BOTTOM-BEACH ARLINGTON.

EDMUNDO CARMONA, Appellant	:	On Appeal
-vs-	:	CONCLUSIONS AND ORDER
THE BOROUGH OF SHIP BOTTOM-BEACH ARLINGTON, Respondent	:	

Robert Lederer, Esq., Attorney for Appellant.
Francis J. Tanner, Esq., Attorney for Respondent.
Howard Ewart, Esq., Attorney for Marguerite Sibley, an Objector.
Joseph A. Citta, Esq., Attorney for Rebecca Brannon, an Objector.

Appellant appeals the denial of plenary retail consumption license for premises located at 26th Street and Long Beach Boulevard in the Borough of Ship Bottom - Beach Arlington.

The granting of the license was vigorously protested by residents in the vicinity of the proposed licensed premises. Petitions bearing one hundred forty-nine names were submitted to the Borough Council, and sixty-seven individual letters of protest were received. The reasons advanced by the objectors why the application should be denied ran the gamut. In its answer the respondent set forth five separate reasons in justification of the denial, only one of which need be considered since it is dispositive, viz.: that public necessity and convenience does not require the granting of the license sought.

Notwithstanding that the issue was raised by respondent's answer, appellant, who has the burden of proof, produced no evidence that public necessity and convenience do require the granting of an additional license. The record is barren of any evidence that the four plenary retail consumption licenses issued and outstanding are insufficient to serve the needs of the entire community (area 7/10 square mile, year round population two hundred seventy-seven, summer population five to seven thousand), or any particular vicinity thereof. Respondent's action should be sustained unless it clearly appears there is need for an additional license. Hall v. Shrewsbury, Bulletin 397, item 8; Mascolo v. Camp, Bulletin 268, item 2.

Apparently appellant's appeal was based on the theory that he had been arbitrarily and unreasonably discriminated against by reason of the granting of a similar license to Emilio Guida (itself the subject of appeal in Sibley v. Ship Bottom - Beach Arlington, Bulletin 420, item 1) at the same meeting at which his license was denied. The granting of the Guida license is not evidence that public necessity and convenience requires that a license should also be granted to appellant. The municipality might well need one additional license without necessarily needing two. Faced with two applications, and desiring to grant but one, the issuing authority may choose one and deny the other. It is under no compulsion to grant both. A choice between applicants will not be upset as arbitrary and discriminatory unless unreasonable. Walker v. Verona, Bulletin 91, item 4; Wenger v. Ridgewood,

Bulletin 110, Item 3; Giberti v. Franklin, Bulletin 150, Item 3; Kristen v. Pequannock, Bulletin 169, Item 1. Where, as here, a substantial number of the residents of one vicinity are in strong protest against the granting of a license in that vicinity, and the protests against the granting of a license in the other vicinity are comparatively meager, I cannot conclude that the issuing authority acted unreasonably in granting the one additional license desired by it in the area from which the fewest objections came.

The action of the respondent is therefore affirmed.

Accordingly, it is, on this 16th day of August, 1940,

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

E. W. GARRETT,
Acting Commissioner.

4. DISCIPLINARY PROCEEDINGS - 10 DAYS' SUSPENSION FOR POSSESSING ILLICIT LIQUOR ("REFILLS") - 10 DAYS FOR SELLING TO A MINOR.

In the Matter of Disciplinary Proceedings against

VITO LA CORTE,
294 - 15th Avenue,
Newark, N. J.,

Holder of Plenary Retail Consumption License C-85 issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

CONCLUSIONS AND ORDER

Richard E. Silberman, Esq., Attorney for the State Department of Alcoholic Beverage Control.
Ralph A. Villani, Esq., Attorney for the Licensee.

The licensee is charged with:

(1) Possessing illicit liquor at his tavern on February 10, 1940, contrary to R. S. 33:1-50.

(2) Selling and serving alcoholic beverages to minors, on April 4 and May 1, 1940, contrary to R. S. 33:1-77 and Rule 1 of State Regulations 20.

As to (1): On February 10, 1940 Federal Agents took ten partially filled bottles of whiskey from the back bar of the licensed premises. The Federal Chemist's report, admitted in evidence by consent, shows that the contents of the ten bottles varied in each case from the contents of genuine samples in solids and acids and other details; that seven of the bottles, bearing various labels, contained liquor similar in composition, and therefore appear to have been refilled with the same spirits; that no denaturants were found. One of the agents testified that his tests disclosed the contents of all ten bottles to be straight whiskey whereas each bottle was labeled blended whiskey.

I conclude that the bottles were refilled and their contents illicit alcoholic beverages. P.L. 1939, c. 177. The possession of such beverages is a violation of R. S. 33:1-50. See Re Haney, Bulletin 304, Item 13; Re Jacobs, Bulletin 315, Item 8; Re Tumen, Bulletin 316, Item 8; Re Clover Inn, Bulletin 327, Item 2.

The licensee is unable to account for the fact that the bottles contained liquor not genuine as labeled and puts the blame on a former bartender with whom he claims to have had some difficulty leading to his discharge. This is an old alibi. It does not relieve the licensee from his responsibility for the violation.

As to the penalty: There is no evidence that the licensee himself refilled the bottles or authorized or acquiesced in the refilling. There is no evidence that the licensee or his employees engaged in the practice of refilling or that the liquor is bootleg. I shall suspend the license for ten days on the first charge. Re Orbach, Bulletin 406, Item 10.

As to (2): Licensee's bartender admits that on April 4 he served the minor, a girl eighteen years of age, with an alcoholic beverage, but claims that he did so upon a previous oral representation that she was over twenty-one. Even if this were true, it is no valid excuse since the licensee can only be protected if he obtains a written representation of age from the minor and otherwise conforms to the provisions of R. S. 33:1-77. Pietz v. Maplewood, Bulletin 408, Item 2.

With respect to the alleged offense on May 1, the minor, a girl sixteen years of age, testified that she was served with two glasses of beer and a Tom Collins on that day although refused the next day because of her age. The bartender says that he did not serve her with alcoholic beverages on the day in question although he admits that she was in the tavern for over an hour and was seated at a table for part of the time. Nevertheless he claims that while she was in the tavern she had nothing to drink of any nature. This, to say the least, appears to be unusual. On the other hand, no satisfactory reason appears why the minor's testimony should be doubted. I find the licensee guilty on the second charge.

As to the penalty on this charge: Since no aggravating circumstances appear, his license will be suspended for a period of ten days; or a total suspension of twenty days on the charges.

Subsequent to the institution of these proceedings, the above mentioned license has expired and has been renewed by the issuance of Plenary Retail Consumption License C-409 for the present fiscal year.

Accordingly, it is, on this 16th day of August, 1940, ORDERED, that Plenary Retail Consumption License C-409, heretofore issued to Vito La Corte by the Municipal Board of Alcoholic Beverage Control of the City of Newark, be and the same is hereby suspended for a period of twenty days, effective August 19th at 3:00 A.M. (DST).

E. W. GARRETT,
Acting Commissioner.

5. DISCIPLINARY PROCEEDINGS - CHARGES THAT STATE BEVERAGE DISTRIBUTOR LICENSEE AIDED NON-LICENSEES TO EXERCISE PRIVILEGES OF ITS LICENSE, THAT IT WAREHOUSED LIQUOR AT UNLICENSED PREMISES, AND THAT IT SOLICITED BUSINESS FROM HOUSE TO HOUSE, ARE DISMISSED.

In the Matter of Disciplinary Proceedings against NORHUDSON BEVERAGE & DISTRIBUTING CORP., 119-121 and 131 - 24th Street, Guttenberg, N. J., Holder of State Beverage Distributor's License No. SBD-147, issued by the State Commissioner of Alcoholic Beverage Control.	CONCLUSIONS AND ORDER

Harry Nehms, Esq., Attorney for Licensee.
Samuel B. Helfand, Esq., Attorney for Department of Alcoholic Beverage Control.

On February 7, 1939 charges were served upon the licensee alleging, in substance, that:

(1) and (2) - It aided and abetted Henry Ruhmschottel, Bernard Wiesel, Antonio Mauro, Andrew Deublein and Joseph Loeffler, non-licensees, in exercising the privileges of a license and selling and distributing alcoholic beverages without a license, contrary to R. S. 33:1-52;

(3) It warehoused alcoholic beverages in violation of the terms of its license, contrary to R. S. 33:1-2;

(4) It solicited and permitted the solicitation of, the purchase of alcoholic beverages, from house to house, contrary to Rule 3 of State Regulations No. 20.

As to Charges (1) and (2): Licensee was incorporated in July 1933. The five individuals mentioned in the charges were, at the time of hearing and always had been, its sole stockholders. Prior to July 1933 each of these five individuals had conducted his own route for the sale of 3.2 beer. When the corporation was organized, each assigned, by bill of sale, to the corporation the truck he then owned and contributed $125.00 as capital in return for twenty per cent. of the capital stock. The corporation held a State Beverage Distributor's license continuously from July 1, 1934 to June 30, 1939, but it has held no license since July 1, 1939. The method of operation raised a suspicion that the individual stockholders were operating separate businesses but the evidence is not sufficient to show that the corporation was a mere "cloak". I shall dismiss Charges (1) and (2).

As to Charge (3): Prior to the time of the first investigation in September 1938, Ruhmschottel, Wiesel, Deublein and Loeffler unquestionably stored overnight unsold cases of beer in their individual garages instead of returning said cases to the licensed premises. Ruhmschottel testified that they did so because they had been told by an unnamed investigator that they would be allowed to do so provided they put the boxes on the floor in the garage; that thereafter they were advised that this was not

allowed and that, since that time, they had been bringing the unsold cases of beer to the warehouse every night. On August 9, 1938 it was ruled, in Re Majestic Wines and Spirits, Inc., Bulletin 265, Item 15, that it was permissible to store alcoholic beverages overnight in an unlicensed garage only during the course of regular and bona fide deliveries and returns and, in that ruling, it was said:

> "During the course of deliveries you must of necessity park your truck from time to time, but it cannot be said that the moment motion ceases so does transportation."

While it would appear that the alleged warehousing in the present case goes beyond the permission granted in said ruling, I feel that the question as to the legality of overnight storage away from the licensed premises was an open one, at least until August 9, 1938. In view of that fact, I shall find licensee not guilty as to Charge (3).

As to Charge (4): There is no evidence in the case that licensee solicited or permitted the solicitation or the purchase of alcoholic beverages from house to house. Charge (4) is, therefore, dismissed.

Accordingly, it is, on this 16th day of August, 1940,

ORDERED, that the charges herein be dismissed.

E. W. GARRETT,
Acting Commissioner.

6. DISCIPLINARY PROCEEDINGS - FRONT - REAL OWNER DISQUALIFIED BECAUSE OF LACK OF RESIDENCE - 10 DAYS' SUSPENSION ON GUILTY PLEA AND SITUATION BEING CORRECTED.

In the Matter of Disciplinary Proceedings against VINCENT CERAVOLO, T/a The Paddock, Jamesburg-Dayton Road, Jamesburg, N. J., Holder of Plenary Retail Consumption License C-11, issued by the Township Committee of the Township of Monroe, County of Middlesex.	CONCLUSIONS AND ORDER

John J. Flaherty, Esq., Attorney for the Defendant-Licensee.
Stanton J. MacIntosh, Esq., Attorney for the State Department of Alcoholic Beverage Control.

The licensee has pleaded non vult to charges of (1) falsifying his license application for the 1939-40 period by denying that any person other than himself was interested in the license applied for and the business to be conducted thereunder, and (2) knowingly aiding and abetting a non-licensee to exercise the rights and privileges of his license.

It appears that Vincent Ceravolo, the licensee, secured the license in his name although, in fact, Joseph Zarrelli, who was disqualified on the point of residence, was the real party in interest. The licensee owned and operated another business in a nearby town while he permitted Zarrelli to conduct the licensed business. The licensee has since severed all connections with the other establishment; has purchased Zarrelli's interest in the licensed business; invested his own money in the current license and the premises and presently devotes his entire time to the conduct of the licensed business. Zarrelli has completely withdrawn his interest in the license and business conducted thereunder.

It thus appears that the improper set-up has been effectively corrected.

In accordance with the principles enunciated in Re King, Bulletin 404, Item 5 and Re Club Parsippany, Inc., Bulletin 411, Item 8, the license will be suspended for ten (10) days.

Since the institution of these proceedings, License C-11 for the 1939-40 period had been renewed by issuance of License C-11 for the 1940-41 period.

Accordingly, it is, on this 16th day of August, 1940,

ORDERED, that Plenary Retail Consumption License C-11, heretofore issued to Vincent Ceravolo for premises on Jamesburg-Dayton Road by the Township Committee of Monroe Township, Middlesex County, be and the same is hereby suspended for a period of ten (10) days, effective August 19, 1940, at 3:00 A.M.

E. W. GARRETT,
Acting Commissioner.

7. APPELLATE DECISIONS - RANDALL v. CAMDEN.

L. IRVING RANDALL, Appellant, -vs- MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF CAMDEN and CHOICE LIQUORS, INC., Respondents	ON APPEAL CONCLUSIONS AND ORDER

S. Rusling Leap, Esq. and William R. Smith, Esq., Attorneys for Appellant.
Edward V. Martino, Esq., Attorney for Respondent Municipal Board.
Benjamin Asbell, Esq., Attorney for Respondent Choice Liquors, Inc.
Thomas M. Madden, Esq., of Counsel.

Appellant appeals the granting of a transfer of a plenary retail consumption license from Dorothy M. Myers for premises 517 Market Street, Camden, to Choice Liquors, Inc., for premises 3512 Westfield Avenue, Camden.

Appellant urges that the action of the respondent Board should be reversed for the reasons (1) that the vicinity of the

premises at 3512 Westfield Avenue is residential and the residents are in protest; (2) that the licensing of the premises would create a traffic hazard; (3) that the granting of the transfer violates a local ordinance limiting the number of plenary retail consumption licenses.

Appellant's first contention is without merit for the reasons stated in Jones v. Camden and Caromano, Bulletin 121, Item 4. That case, decided May 23, 1936, was an appeal from the issuance of a plenary retail consumption license for premises at 3336 Westfield Avenue, approximately four hundred feet from the instant premises at 3512. There an identical contention was made, but it was found as a fact that Westfield Avenue, although not entirely given over to business, was essentially so, for which reason the action of the issuing authority was affirmed. In the instant appeal, appellant testified that there has been no change in the character of Westfield Avenue since 1936 except that a few more businesses have been established there.

Appellant's second contention is also without merit. No proof was adduced to indicate how the licensing of the instant premises would increase already existing traffic congestion to an extent any greater than that produced by the establishment of any other business at those premises. It does not follow that a traffic hazard will be created merely because licensed premises are located on a heavily traveled thoroughfare.

Appellant's third contention is likewise without merit. The ordinance presently in effect in the City of Camden, limiting the number of plenary retail consumption licenses, is that of December 27, 1934, as amended July 9, 1936. It provides, so far as applicable:

> "Section 7. No more than 200 Plenary Retail Consumption licenses shall be in effect in this municipality at any one time hereafter, and no new such licenses shall be issued for any premises within five hundred (500) feet of any other Plenary Retail Consumption licensed premises."

There are presently outstanding more than 200 plenary retail consumption licenses in Camden. The ordinance, while fixing a quota for such licenses in the city, in no way purports to restrict their transferability, either from person to person or from place to place. The right of such transfer, conferred by R. S. 33:1-26, cannot be nullified or otherwise diminished by municipal regulation. That a transfer from person to person may not be denied in aid of attaining a quota, see Re Kessel, Bulletin 160, Item 5; Luzzi v. Nutley, Bulletin 244, Item 5; Kirschoff v. Millville, Bulletin 254, Item 8; DiMattia v. Bellmawr, Bulletin 294, Item 4. Similarly, with transfers from place to place. Van Schoick v. Howell, Bulletin 120, Item 6; Re Rothermel, Bulletin 293, Item 4. Conceding that the ordinance does not preclude transfers from person to person or from place to place, appellant nevertheless urges that the granting of a transfer from person to person and place to place is tantamount to the granting of a new license and hence is prohibited by the ordinance. Similar contention was made in Schwarz Drug Stores, Inc. v. Newark, Bulletin 343, Item 5, wherein it was held:

"If an objective may be lawfully accomplished in two moves, i.e., first, a transfer from place to place, and, second, a transfer from person to person, there is no rule or principle which declares that the two moves cannot be consolidated into one. There is no requirement to make two bites out of a cherry!"

The action of the respondent Municipal Board of Alcoholic Beverage Control in granting the transfer appealed from is, therefore, affirmed.

Accordingly, it is, on this 16th day of August, 1940,

ORDERED, that the appeal be and it hereby is dismissed.

E. W. GARRETT,
Acting Commissioner.

8. DISCIPLINARY PROCEEDINGS - FAIR TRADE - SALES AT CUT RATES - THIRD OFFENSE - SUSPENSION FOR BALANCE OF TERM ON PLEA OF GUILT.

In the Matter of Disciplinary Proceedings against CHARLES JOSEPH MAIRE, 428-432 E. First Avenue, Roselle, New Jersey, Holder of Plenary Retail Distribution License D-3, issued by the Mayor and Council of the Borough of Roselle.	CONCLUSIONS AND ORDER

Robert R. Hendricks, Esq., Attorney for the Department of Alcoholic Beverage Control.
John M. Kerner, Esq., Attorney for Defendant-Licensee.

The defendant-licensee has pleaded guilty to a charge of selling three 1-quart bottles of Park and Tilford Reserve Whiskey below the Fair Trade price in violation of State Regulations No.30, Rule 6.

In a memorandum accompanying the plea, the defendant asks that the penalty to be imposed be mitigated on the ground that the sale below the regular Fair Trade price would not have been consummated had it not been for the solicitation and subterfuge of the investigator who made the buy. The facts upon which the plea is based are set forth in the memorandum as follows:

"The licensee states that on the day in question, two men entered his licensed premises (the two men later determined as being Investigators Hill and Ritter [sic]). Investigator Ritter approached the counter and asked for 3 bottles of Park & Tilford. The 3 bottles were put on the counter and were ready to be put into a bag when investigator Ritter said 'How much?' and the licensee replied '$6.75' (the Fair Trade price). Ritter then stated 'That's too much, there must be some mistake, I was told that I could get these for $1.59 a quart.' Licensee

thereupon said: 'That's impossible.' After a few moments' hesitation, Ritter said: 'You know Mr. McLane, he sent me up.' The licensee said: 'Who is Mr. McLane?' and Ritter replied: 'He's from the Kelly Press.' After a few more moments, licensee said to his wife (also behind the counter), 'All right, let him have it.' Thereupon the sale was completed, the price being $5.82 for the 3 bottles of Park & Tilford."

The defendant admits that the circumstances surrounding the sale as above set forth were not such as would have supported a defense of entrapment. It is equally apparent that they present no excuse or reason for mitigation of the penalty which must follow the guilty plea.

The records of this Department, moreover, show that the defendant has twice before pleaded to charges of selling alcoholic beverages below the Fair Trade minimum price. For the first offense, his license was suspended for five days (Bulletin 344, Item 14; Bulletin 362, Item 1); for the second, fifteen days (Bulletin 392, Item 4).

The Fair Trade regulations were made to be obeyed. The present violation constitutes the defendant's third offense. In view of defendant's multiple violations and his persistent failure to abide by the rules, his license will be suspended for the balance of its term.

Accordingly, it is, on this 16th day of August, 1940,

ORDERED, that Plenary Retail Distribution License D-3, heretofore issued by the Mayor and Council of the Borough of Roselle to Charles Joseph Maire, 428-432 E. First Avenue, Roselle, be and the same is hereby suspended for the balance of the term, effective August 19, 1940, at 2:00 A.M. (Daylight Saving Time).

E. W. GARRETT,
Acting Commissioner.

9. DISCIPLINARY PROCEEDINGS - FAIR TRADE - SALES AT CUT RATES - 5 DAYS ON GUILTY PLEA.

In the Matter of Disciplinary Proceedings against)
)
JOHN KOLIBAS,) CONCLUSIONS
48 Warren Street,) AND ORDER
Carteret, N. J.,)
)
Holder of Plenary Retail Consumption License C-20 issued by the Borough Council of the Borough of Carteret.)
- - - - - - - - - - - - - - - - - -)

Richard E. Silberman, Esq., Attorney for the Department of Alcoholic Beverage Control.
John Kolibas, Pro Se.

The licensee has pleaded guilty to a charge of selling a pint bottle of Wilson "That's All" Whiskey below the minimum consumer price published in Bulletin 416, in violation of Rule 6 of State Regulations 30.

By entering this plea in ample time before the date set for hearing, the Department has been saved the time and expense of proving its case. The license will be suspended for a period of five (5) days instead of ten (10) days.

Accordingly, it is, on this 19th day of August, 1940,

ORDERED, that Plenary Retail Consumption License C-20, heretofore issued to John Kolibas by the Borough Council of the Borough of Carteret, be and the same is hereby suspended for a period of five (5) days, effective August 21, 1940, at 2:00 A.M. Eastern Standard Time.

E. W. GARRETT,
Acting Commissioner.

10. RETAIL LICENSEES - CATERING - PLENARY RETAIL CONSUMPTION LICENSEE WHILE CATERING AT PRIVATE HOME MAY SERVE THE HOST'S LIQUOR - SPECIAL PERMIT REQUIRED IF LIQUOR BELONGS TO LICENSEE - SUCH SPECIAL PERMIT ISSUED ONLY FOR AN AFFAIR IN THE SAME MUNICIPALITY WHERE LICENSEE'S PREMISES ARE LOCATED - WARNING AGAINST SUBTERFUGE OF "RETURNS" OF UNCONSUMED LIQUOR.

August 19, 1940

Frank G. Shattuck Company,
New York, N. Y.

Gentlemen: Att: Mr. L. O. Duncklee

- - - - (In answer to a letter of inquiry) - - - -

In effect, you state that you hold a plenary retail consumption license in Newark and also engage in the catering business, and ask whether you may, in catering at a private home in New Jersey, serve the host's liquor as part of your catering agreement with him.

The answer is that you may, so long as the liquor thus being served actually belongs outright to the host and you are doing no more than merely mixing and serving it as part of your caterer's function in serving the meal or food. For, in such case, you are in effect acting in lieu of the host himself in thus mixing and serving his liquor and, in a sense, as his servant. It is immaterial, if you are catering the affair in this fashion, whether the host's liquor was originally sold by you or another liquor licensee, or whether the home where the affair is being catered is outside the municipality where your licensed premises are located.

However, on the other hand, you may not, in catering an affair, bring a quantity of your liquor to the home, serve drinks therefrom, and charge the host for the liquor consumed and return with the rest. By such a practice you would, in effect, be actually selling and dispensing liquor at the home just as though it were a part of your licensed premises (except that the host would be paying for all drinks). Such a practice is permissible only if, in addition to your plenary retail consumption license, you also obtain, for each affair, a special permit, costing Ten Dollars ($10.00), from this Department (under R. S. 33:1-74) authorizing you

to cater the affair in this fashion. However, such permit will be issued only for an affair which you cater in the same municipality where your licensed premises are located. See Re Zogg, Bulletin 132, Item 10, which, although relating to an analogous type of case, shows the reason for such a restriction.

One further thought: You may not seek to avoid such special permit by nominally selling all the liquor to the host and later accepting a return of the unconsumed liquor and giving the host a credit therefor. Such a practice, besides smacking of mere subterfuge, is prohibited since it would constitute, in effect, a resale of the liquor from the host to you. Such a resale would be illegal since the host would have no license to make it and, further, since you, as a retail licensee, may purchase liquors only from persons licensed in this State to sell to retailers.

If you wish further information about the special permit or how it should be applied for, I shall expect to hear from you.

Very truly yours,

E. W. Garrett

Acting Commissioner.