Mr. Gossweiler

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark 2, N. J.

BULLETIN 1332 MARCH 31, 1960

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New Jersey State Library

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1. COURT DECISIONS - VOLPE v. DIVISION OF ALCOHOLIC BEVERAGE CONTROL - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-187-59

JOHN L. VOLPE,

Appellant,

vs.

DIVISION OF ALCOHOLIC
BEVERAGE CONTROL,
DEPARTMENT OF LAW AND
PUBLIC SAFETY,

Respondent.

Argued February 29, 1960 -- Decided March 11, 1960

Before Judges Conford, Freund and Haneman

Mr. E. Gustave Greenwald argued the cause for appellant.

Mr. Samuel B. Helfand, Deputy Attorney General, argued the cause for respondent (Mr. David D. Furman, Attorney General of New Jersey, attorney).

The opinion of the court was delivered by FREUND, J.A.D.

John L. Volpe filed an application with the Division of Alcoholic Beverage Control for a plenary winery license for premises in Nutley. An objection was made to the granting of the license by the New Jersey Vintners Association, and, after taking testimony, it was recommended by the hearer that the license be granted. The Director reviewed the testimony, filed his findings, and in conclusion denied the issuance of the license.

The applicant presently operates a grocery store at 18 Washington Avenue. The upper two floors are occupied by tenants. Volpe testified that he has experimented in the making of wine. He testified that he has "discovered" a new process for making a "pure grape sparkling wine, out of pure grapes," without the use of other products and without carbonation. The application states that the winery is to be located in a room, 12 feet by 24 feet, separated from the grocery store by a partition, and in the basement, 24 feet by 32 feet. The rear room is to be used for the bottling and the basement for storage purposes.

Volpe testified that he intends to purchase bulk California wine from a manufacturer of wine located in New Jersey. He plans to filter and bottle the wine for distribution to local retailers. Until it is matured and bottled, the wine will be stored in 500-gallon glass-lined tanks located in the basement. He plans to invest in his proposed winery $6,000, obtained partially from relatives, with an initial outlay of $738 for tanks, filtering and bottling machines.

The only witness in support of the applicant was Mario Sinocola, a baker, who conceded that he was not an expert on wines. His testimony related mostly to the taste of wines.

After taking the testimony the hearer stated that the investigator who made the preliminary investigation reported "that to his knowledge there appeared no reason why the application should not be approved." The hearer also stated that the objector presented no meritorious reason why the license should not be issued, and he concluded by recommending issuance of the license.

After reviewing the testimony, the Director rejected the recommendation of the hearer and denied the application. He pointed out the applicant had no practical experience in manufacturing wine for commercial purposes and he stated that it was his policy and that of his predecessors "to require that any applicant for a new license establish that there is a definite public need for issuance of such a license to him" and "a new license is not properly issuable to serve private, individual interests." He also commented that the "market [is] already over-abundantly supplied."

On this appeal no question is raised as to the absence of support for, or the regularity of, the Director's consideration of the facts stated in his conclusions. It is urged as grounds for reversal that the Director was not vested with authority to deny a license under the circumstances presented and that his action in denying the license was discriminatory. It is argued that the Director improperly disregarded all the facts presented at the hearing as well as the recommendation of the hearer. It is claimed that the applicant is entitled to a license since he has satisfied the formal procedural requirements and demonstrated his personal qualifications. He argues that to deny him a license because he intends to have a small operation will result in monopoly by larger wineries.

The regulation and supervision of the production and sale of liquor have long been dealt with by legislation. It is sui generis. There is no inherent right or privilege to sell intoxicating liquor, as in ordinary commercial enterprises. A license is not a contract, but a privilege to pursue an occupation which is otherwise illegal. Mazza v. Cavicchia, 15 N. J. 498, 505 (1954); Benedetti v. Bd. of Com'rs. of Trenton, 35 N. J. Super. 30, 35 (App. Div. 1955); Hudson Bergen, &c., Assn. v. Hoboken, 135 N. J. L. 502, 506 (E. & A. 1947). The mere filing of an application does not mean that a license must be issued even though the applicant is qualified.

Whether a plenary wine license should be issued rests in the sound discretion of the issuing authority. Unless there has been a clear showing of an abuse of discretion, we will not interfere with the denial of a license by the constituted authority. The burden rests upon the applicant to rebut the presumption of validity and regularity of the administrative act of the Director. Butler Oak Tavern v. Div. of Alcoholic Bev. Control, 36 N. J. Super. 512, 516 (App. Div. 1955).

It is contended that the denial of the application was discriminatory in that it constitutes an unlawful suppression of competition. This claim seems to stem from the conclusions of the Director to the effect that the "market already [is] over-abundantly supplied" and the further statement that he was not so sure that the "secret method of manufacturing a superior type of sparkling wine" claimed by Volpe would create a public demand for this new product.

This argument relates solely to the issue of fact as to the public need for the production and distribution of this particular wine. But it has been held that:

> "It is clearly the duty and right of the licensing authority to weigh the evidence presented and all of the circumstances and conclude whether there is public need and whether such license will be in the public interest." Mauriello v. Driscoll, 135 N. J. L. 220 (Sup. Ct. 1947)

Cf. Tp. Committee of Lakewood Tp. v. Brandt, 38 N. J. Super. 462, 465-66 (App. Div. 1955). The only proof offered by applicant in this regard is the testimony of Sinocola, who testified that he had no knowledge of wine other than its taste. Although plaintiff's counsel stated to the hearer that he was going to prove the feasibility and the need for the proposed product, he failed to adduce any proof of public demand or public necessity for the issuance of a winery license. There is no proof in the record that there is any lack in present winery facilities for the production, bottling and distribution of other wines. Rather does the record point to the contrary.

We conclude, for the reasons expressed, that the Director was entirely within his authority in denying the application.

Affirmed.

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2. APPELLATE DECISIONS - DEW DROP INN, INC. v. PATERSON.

Dew Drop Inn, Inc.,	)	
Appellant,	)	ON APPEAL
v.	)	CONCLUSIONS
Board of Alcoholic Beverage Control for the City of	)	AND
Paterson,	)	ORDER
Respondent.	)	

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Bruno L. Leopizzi, Esq., Attorney for Appellant.
William J. Rosenberg, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of respondent whereby on August 6, 1959 it suspended appellant's license for a period of twenty days effective August 17, 1959, after finding the appellant guilty on a charge alleging that on July 21, 1958 appellant did allow, permit and suffer on its licensed premises located at 90 Straight Street, Paterson, a certain Winifred ---, a known prostitute, and did further allow, permit or suffer the said licensed premises to be used by said Winifred --- in furtherance or aid of prostitution, in violation of Rules 4 and 5 of State Regulation No. 20.

"Upon the filing of the appeal, an order was entered on August 17, 1959 staying respondent's order of suspension until further order of the Director. R.S. 33:1-31.

"Appellant in its petition of appeal alleges that respondent's action was erroneous in that (1) it was against the weight of the evidence and (2) that the charges were not substantiated by competent evidence.

"Respondent in its answer alleges that its action was valid and legal and that it acted within its discretionary authority.

"Respondent called as its witnesses William Harris, clerk of respondent Board; Rudolph Bugar and Howard Kline, a police officer.

"Mr. Harris testified that he recorded the minutes of the respondent's meeting of August 6, 1959. These minutes were received in evidence over the objection of appellant's attorney.

"Mr. Bugar testified that on July 21, 1958 between 11:00 a.m. and 12 o'clock noon, he entered the defendant's licensed premises for the first time; that ten minutes thereafter while standing at one end of the bar, he was approached by a male (identified as Arthur Hall) who offered to procure a female to engage in sexual intercourse with him for $3; that this offer and his acceptance of the same were made by gestures of the hands because of his limited ability to speak and understand the English language; that he does not remember what the bartender was doing at that particular time; that after aforesaid arrangements were made, Hall left him and returned in a few minutes with a female, Winifred ---, and that about ten minutes later he left the premises in their company.

"Bugar further testified that the bar was crowded; that there were many patrons in the licensed premises; that when he was approached by Hall, the bartender, Wesley Hawthorne, was behind the bar (a distance of about six feet); that he had observed the bartender speaking with some men in the presence of Hall; that he did not hear their conversation; that he had not observed the bartender and Winifred in any conversation; that the bartender did not offer to procure any female companion for him and that he did not inform the bartender of the arrangements he had made with Hall.

"Officer Kline testified that on July 22, 1958 he visited the defendant's licensed premises to investigate a complaint of assault and robbery which had taken place in the area of the defendant's licensed premises and that in connection therewith he questioned Mr. Frank Vitrone, the president of the defendant corporate-licensee; Hawthorne, its bartender; Winifred and Bugar, the victim of aforesaid assault and robbery. Mr. Kline further testified that to his knowledge Winifred is a known prostitute; that she has a police record; that she is presently confined in the Clinton Reformatory for Women; that prior to July 21, 1958 he had seen her in the defendant's licensed premises on two occasions; that on these visits he had not informed the licensee or its employees that Winifred was a known prostitute or that she had a police record; that Winifred's reputation was probably known by Hawthorne and that he doubted if it were known by the other employees or officers of the licensee; that he understood that Hawthorne had posted bail for Winifred on one occasion when she was arrested for prostitution and that he was not sure what disposition was made of that arrest.

"On cross-examination Mr. Kline reiterated that prior to July 22, 1958 he had nothing in his records to indicate that Winifred was a known prostitute; that to his personal knowledge Winifred had the reputation of a prostitute for approximately two years and that he had known her for the same length of time.

"Appellant's witnesses were Frank Vitrone, president of the defendant corporate-licensee and Wesley Hawthorne, its bartender. Mr. Vitrone testified that he had no personal knowledge of Winifred's reputation; that prior to July 21st aforesaid he had known Winifred for about three or four months; that he did not know her means of livelihood; that she was an irregular visitor to the licensed premises;

that while he was on duty as bartender Winifred conducted herself in an orderly manner and that her conduct never gave him any cause for concern. Mr. Vitrone further testified that for the past five years he had known Hall as any other individual in the neighborhood and as an impecunious person; that Hall was an infrequent visitor to the licensed premises; that he had no knowledge what Hall did for a living and that prior to July 21, 1958 he had not seen Winifred in the company of Hall.

"Mr. Hawthorne testified that on July 21, 1958 at about 11:30 a.m. he was on duty behind the bar when Bugar entered the licensed premises and took a seat at the front end of the bar; that Winifred and Hall were in the premises at the time; that he recognized Bugar as a new customer and engaged him in a short friendly conversation; that about ten minutes later Hall joined Bugar at the bar and entered into a conversation with Bugar; that he did not hear any part of the same because he was busy taking care of the patrons; that he had served two bottles of beer to Bugar and one to Hall and that Bugar paid for these drinks with a ten-dollar bill. Hawthorne further testified he did not see Winifred in the company of Bugar and Hall; that while Bugar was on the premises he did not observe Winifred and Hall in any conversation; that he did not see Winifred, Bugar or Hall leave the licensed premises; that he had known Winifred for about ten or eleven years; that she was an irregular patron of the licensed premises; that he never experienced any difficulties with her and that she was married and separated from her husband. In addition Hawthorne stated that there was no close friendship between Winifred and Hall; that Hall did not act as a procurer for Winifred in the licensed premises and that Winifred did not solicit for prostitution.

"I have carefully examined the testimony of the respondent's witnesses and do not find that it contains any conclusive proof that Winifred was a known prostitute. The usual history and background (arrests and convictions for soliciting) of a prostitute are definitely lacking in this case. On cross-examination Officer Kline was asked, 'Do your records indicate that she is a prostitute?' and Mr. Kline replied, 'I don't have anything in my records that indicate that she was a known prostitute prior to the time that I had an opportunity to question her with reference to the assault and robbery, sir.' Nor does Bugar say that he had any sexual relations with Winifred or that the bartender was aware of Hall's aforesaid illicit proposal to him.

"In addition the respondent has failed to produce any competent evidence or adequate proof that the officers of the licensee or its employees had any knowledge or should have known that Winifred was a prostitute and used the licensed premises in furtherance of prostitution. The gist of the charge is that appellant did allow, permit or suffer a prostitute on its premises. 'Mere proof that a prostitute was present on the licensed premises is insufficient to establish the offense charged. There must, in addition, be adequate proof that the licensee knew that she was a prostitute and nevertheless acquiesced in her presence at the premises.' Cf. Re Kass, Bulletin 239, Item 1 and Re Foster & Clauss, Bulletin 248, Item 4.

"I am more inclined to believe that Hall used Winifred as a ruse to lure Bugar to a place where he could rob him and that Hall's immoral offer to Bugar was a mere subterfuge.

"Considering all the evidence herein, I find that the testimony adduced by the respondent is insufficient to support a finding of appellant's guilt, and conclude that respondent has failed to establish by a fair preponderance of the evidence the violations charged. I recommend, therefore, that the action of the respondent be reversed, and that the charges preferred against appellant be dismissed. Cf. Lipshitz, Inc. v. Newark, Bulletin 1243, Item 1."

No exceptions were taken to the Hearer's Report within the time limited by Rule 14 of State Regulation No. 15.

Having carefully considered the facts and circumstances herein, I concur in the findings and conclusions of the Hearer and adopt his recommendation.

Accordingly, it is, on this 24th day of February, 1960

ORDERED that the action of respondent be and the same is hereby reversed.

WILLIAM HOWE DAVIS
DIRECTOR

3. APPELLATE DECISIONS - WILLNER'S LIQUORS v. JERSEY CITY.

Willner's Liquors, a corporation of the State of New Jersey, Appellant,	ON APPEAL
v.	CONCLUSIONS
Municipal Board of Alcoholic Beverage Control of the City of Jersey City, Respondent.	AND ORDER

Samuel W. Lucas, Esq., Attorney for Appellant.
Ezra L. Nolan, Esq., by Francis M. McInerney, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of respondent whereby it denied an application for the transfer of plenary retail distribution license D-90 from Hildegard L. Stuckenschmidt, trading as Duncan Delicatessen, to appellant, and from premises at 680-682 Bergen Avenue to premises 686 Bergen Avenue, Jersey City.

"The appeal was submitted, pursuant to Rule 8 of State Regulation No. 15, on the stenographic transcript of the proceedings before the issuing authority, a stipulation of an agreed statement of facts, and various exhibits.

"The resolution of respondent denying the application reads in pertinent part:

> '...having considered the arguments of counsel representing the various protestants and also the letters of protests from various religious organizations and the matter of the number of licensed premises to be permitted in any particular area being a matter that is confided to the sound discretion of the issuing authority, it is
>
> THEREFORE RESOLVED BY THE BOARD OF ALCOHOLIC BEVERAGE CONTROL OF JERSEY CITY that the interest of the public at large would be best served by not granting the application in question'....

"The letters of protest referred to consisted of a letter from a liquor trade association, a letter from a competitor and four letters from religious organizations located in the neighborhood. These protests may be summarized as voicing the objection to another liquor store in the area and its impact upon teenagers in the neighborhood and that other licensees in the area should be protected from unfair competition. In the words of the pastor of one church:

> 'It is my belief that there are enough liquor stores in the neighborhood now. Fortunately, their managers have been conducting their business quietly and decently. There is no need for a chain-store. I fear that by selling cheap, cut-rate wines and liquors it will attract undesirable characters from other parts of the city, be a temptation to some of the youths of the neighborhood and a nuisance to respectable people.
>
> I have stressed "neighborhood" in this letter, because I think your Board should consider this factor. A chain-liquor store may be all right at Journal Square but not for McGinley Square and what it represents.'

"The argument of counsel for the trade association was that the business practices of appellant are based upon the theory of cut rate with emphasis on non-advertised, low-priced liquors and beer, with indiscriminate price cutting, excessive advertising of bargain values and cut prices, which is detrimental to the proper operation of the liquor industry and contrary to the interests of temperance; that appellant's operation is of a chain-store variety, geared for great volume and would attract bargain hunters to the area, termed the best section of the city.

"Counsel for one of the licensees urged that the objection was to the change in the type of competition for business, from the incidental sale of alcoholic beverages in a delicatessen store to a full-fledged 100 per cent package store in much larger quarters with four other package store licensees in the area of three blocks; that by reason of appellant's chain of stores, it is enabled to purchase what is described as private brands of liquor, of which it has exclusive use, rather than nationally advertised brands, and this enables appellant to offer such private brands at a much cheaper price than so-called standard brands; that the other licensees are not concerned with competition whereby all sell the same product for the same price, whereas under appellant's trade practices the competing licensees stand the chance and possibility of being undersold by private brand merchandise not available to them because they do not have the benefit of a chain-store operation and its greater purchasing power and funds.

"Counsel for appellant counters these contentions by stating that he is an officer of the corporation for the past fifteen years; that it has most attractive stores and a highly respectable reputation without any record of violation of the liquor laws and makes a practice of selling alcoholic beverages at the lowest possible price with a reasonable profit; that while it handles nationally advertised brands, its major business is in exclusive private label brands; that other licensees operating a single store also handle private brands to a lesser degree; that the quality of the alcoholic beverages in private brands is equal in taste, quality and content to nationally advertised brands; that appellant's only purpose is to be able to give better bargains to the economic advantage of its customers and that, hence, the expression 'cut prices' has no application to its business practices.

"The attitude of the trade association members expressed by

counsel for appellant and concurred in by counsel for the trade association is that the objecting licensees did not care to increase their business but would be satisfied with the present volume of their business and that of Mrs. Stuckenschmidt, but if the license was transferred to appellant, it would do more business than Mrs. Stuckenschmidt and thus would result in unfair competition and tend to increase consumption of alcoholic beverages.

"The transfer would not result in undue concentration of licensed premises since both locations are in the same building, next to each other. Mere general objections would not justify refusal by an issuing authority to transfer a license in a business district, especially where it is merely to a building next door. Laschitzki v. Bordentown, Bulletin 564, Item 5. Thus, the controlling issue on this appeal is brought into sharp focus. The question is whether an issuing authority has any basis for refusing to transfer a license on the sole ground that the transferee would, for the most part, sell private brands of alcoholic beverages. On a thorough consideration of all the facts, it clearly appears that the issuing authority cannot treat such a licensee in a manner different from other licensees. Whether or not it will be a chain-store enterprise is merely incidental and such does not form the basis for denial of the transfer in the instant case.

"Application for transfer of licensed premises to a more attractive and larger premises does not, of itself, furnish any basis for denial of such transfer. Bivona v. Hock, 5 N. J. Super. 118 (App. Div. 1949). Obviously, initiative and enterprise of a licensee for the purpose of increasing his business is not conduct which may legitimately be considered objectionable.

"Under the circumstances, it must be concluded that the appellant, who admittedly has in the past maintained well-conducted establishments, cannot adversely affect the character of the neighborhood if permitted to establish a place of business at the location in question. The speculative effect it may have on competition is not a proper ground for denial of the transfer applied for. The new method of operation would not appear to be detrimental to the liquor business or to the other licensed establishments in the neighborhood.

"I therefore conclude that the action of the respondent Board in denying the transfer of the license was arbitrary and unreasonable and I recommend that said action be reversed."

At oral argument (Rule 14, State Regulation No. 15) held before me on January 26, 1960, I raised the question of the City's distance-between-premises ordinance; and, thereafter, briefs were filed on that subject.

I am unable to agree with the recommendation of the Hearer.

At the hearing below the appellant's attorney stated:

> "I respectfully refer to the rules and regulations of the Division of Alcoholic Beverage Control of the State of New Jersey, and refer to State Regulation No. 6, Rule No. 14, which reads, and I read verbatim:
>
> > 'Transfers of licenses, both as to person and place, may be applied for simultaneously and in a single application,' which is the warrant for this twofold application here.
>
> "I might discuss a further technicality here, just to clear up the record. There has been some statement to the effect that only a licensee may apply for a

transfer from place to place. The technicality is covered by this: In our twofold application, if the Board sees fit, and we are unobjectionable, the transfer would take place from Mrs. Stuckenschmidt to Willner's Liquors in the first instance, making us a licensee, after which consideration can be given to the transfer from place to place, which therefore makes the whole procedure proper, legal and overcomes any question as to that phase."

The statement, although not objected to, bespoke a serious misunderstanding. The full text of Rule 14, State Regulation No. 6 is as follows:

"Transfers of licenses both as to person and place may be applied for simultaneously and in a single application; but if there is such combined application for person-to-person and place-to-place transfer, the license shall not be transferred to the applicant unless the place-to-place transfer is also effected." (underscoring added).

In a supplemental brief filed, after oral argument, in behalf of the appellant, the misconception persists as follows:

"...Granting, but again without prejudice, that only a licensee may transfer, then the subject joint application may be treated in this fashion. First the application from person to person is considered and if approved, the applicant becomes the LICENSEE, and temporarily and momentarily before consideration of the remaining application, is deemed to be located in the old premises. Then the place to place application is considered and if approved, the premises of the new licensee, the applicant herein, are transferred from the old location to the new approved location."

To the contrary, the person-to-person and place-to-place transfer aspects of such a combined application are one and inseparable and as noted, under the clear language of Rule 14, State Regulation No. 6 a license "shall not be transferred to the applicant unless the place-to-place transfer is also effected."

Section 5 of an ordinance adopted by the Jersey City Board of Commissioners on October 5, 1937, as amended by an ordinance adopted April 1, 1941, reads as follows:

"No Plenary Retail Distribution License, excepting renewals and transfers from person to person, shall be granted for or transferred to any premises the entrance of which is within the area of a circle having a radius of seven hundred and fifty (750) feet, and having as its central point the entrance of an existing licensed premises covered by a Plenary Retail Distribution License. In the event a licensee desires to transfer to another premises, he shall be permitted to do so within seven hundred and fifty (750) feet of the premises wherein he is located at the time of said transfer, but shall comply with the provision aforementioned when transferring to premises in excess of seven hundred and fifty (750) feet from the premises from which a transfer is sought."

On November 19, 1952, the Jersey City A.B.C. Board granted application of Dal Roth, Inc., for a person-to-person and place-to-place transfer of a plenary retail consumption license from Joseph A. Davis, Receiver for Commuter's Bar, Inc., to said Dal Roth, Inc., and from 35 Enos Place to premises at 9-B Journal Square Station Building, Jersey City, N. J. An appeal from the grant was taken by the Jersey City Retail Liquor Dealers' Association. On the appeal the evidence disclosed that several plenary retail consumption licensed premises were located within 750 feet of the premises at 9-B Journal Square Station Building, but that the distance from the premises at 35 Enos Place to the premises at 9-B Journal Square Station Building was less than 500 feet.

The primary distance (distance from proposed premises to other existing licensed premises) in the ordinance's Section 4 (plenary retail consumption licenses) is the same as in Section 5 (plenary retail distribution licenses) -- 750 feet. The here-pertinent difference in the two sections is that Section 4 permits place-to-place transfer to premises within 500 feet of the premises from which transfer is sought, while the distance, in that regard, in Section 5 is 750 feet. In his Conclusions and Order on the appeal (Jersey City Retail Liquor Dealers' Association v. Jersey City and Dal Roth, Inc., Bulletin 976, Item 4, June 19, 1953) the State Director said:

> "A sustaining of the transfer here in question would call for a finding that Respondent Dal Roth, Inc., meets the requirements of the proviso contained in the ordinance...
>
> "It was stipulated that respondent Dal Roth, Inc., never had possession or right to possession of premises 35 Enos Place from which the transfer was made. Yet, the opinion of the Assistant Corporation Counsel, upon which respondent Board apparently relied, and the brief for respondent Dal Roth, Inc., both contend for a construction of the ordinance which would include not only a situation where a licensee is compelled to vacate but also the case of application for person-to-person and place-to-place transfer where the proposed transferor was compelled to vacate...
>
> "Provisos and exceptions in an ordinance are to be strictly construed and in keeping with the measure's principal purpose. N.J. State Board of Optometrists v. S.S. Kresge Co., 113 N.J.L. 287 (Sup. Ct. 1934); modified in 115 N.J.L. 495 (E. & A. 1935); United States v. Dickson, 15 Pet. 141; 59 Corpus Juris, 639 (2), notes 42, 43 and 44. Manifestly, the basic purpose of the ordinance in question is to effect a stricture against place-to-place transfers (Finbar, et al. v. Municipal Board of Alcoholic Beverage Control of the City of Jersey City and Commuters Bar, Inc., et al., Bulletin 917, Item 1) and it would seem abundantly clear that the main provision and the exceptions therefrom relate to place-to-place transfers only.
>
> "For the reasons hereinabove set forth I find... that respondent Board either misinterpreted or disregarded the terms of the ordinance which it was its duty to observe and that the transfer was granted in violation of the ordinance. Its action granting the transfer will be reversed..."

The Director's decision of reversal was appealed, and the Director was affirmed (Dal Roth v. Division of Alcoholic Beverage Control, 28 N.J. Super. 246, Appellate Division, 1953). In its Opinion, delivered by Goldman, J.A.D., the Court said:

> "The clear and unequivocal language of the proviso in Section 4 of the ordinance permits of no other construction than that the benefit of the exception is limited to those licensees who, through no fault of their own, find themselves in the predicament of being deprived of their licenses if the 750-foot provision were mandatorily to be controlling in all place-to-place transfers. The proviso speaks of 'licensee' throughout. Dal Roth, Inc., was not a licensee which had been compelled to vacate premises. It was a mere applicant for a license hoping to take advantage of the fact that the former licensee had gone out of business, and it had no premises to vacate, it being stipulated that it had never become a tenant or entered into possession of the premises at 35 Enos Place.
>
> "The judicial goal in the construction of ordinances is the discovery and effectuation of the local legislative intent, and in general this inquiry is governed by the same rules as apply to the interpretation of statutes. Wright v. Vogt, 7 N.J. 1, 5 (1951). The ordinance was correctly interpreted by the Director of the Division of Alcoholic Beverage Control. The Jersey City board misapplied the provisions of Section 4 of the ordinance in granting the transfer in question...
>
> "There seems no reason why, on the basis of public policy, we should say that the escape clause should not be limited to those licensees who themselves are forced to vacate. There is no compelling consideration for giving licensees so circumstanced the right to transfer the license to someone else who could then locate within the 500-foot radius area of the vacated licensed premises. It seems entirely reasonable to keep the door of the escape clause as nearly shut as possible. If the licensee is forced to vacate, the policy behind the ordinance and the law pursuant to which it was adopted will be relaxed to take care of his hardship, but if he is forced not only to vacate but also to sell, no aid can be extended to him. This is not so arbitrary a matter as to require us to hold the ordinance unreasonable and therefore void; the law does not have to undertake to provide for his license. Restrictive liquor regulations may, and ofttimes do, result in individual hardships. However, where larger social interests justify a restrictive policy, private individual interests must give way..."

As will have been observed the ordinance's Section 5, here in issue, does not contain the "compelled to vacate" provision of Section 4. Instead, as noted, Section 5 reads (with respect to plenary retail distribution licensees): "In the event a licensee desires to transfer to another premises he shall be permitted to do so within seven hundred and fifty (750) feet of the premises wherein he is located at the time of said transfer, but shall comply with the provision aforementioned (no transfer to within 750 feet of other existing plenary retail distribution licensed premises) when transferring to premises in excess of seven hundred and fifty (750) feet from the premises from which the transfer is sought." (underscoring added).

I find that on the controlling issue here present the exception in Section 5, like the exception in Section 4, does not run in favor of an applicant for person-to-person and place-to-place transfer, but runs only in favor of a licensee seeking transfer from place to place.

(It should be pointed out, in passing, that Section 5 is too broad when it says "he shall be permitted to do so" (to transfer to within 750 feet of the premises from which transfer is sought). Even where grant of a transfer would not be in violation of a distance ordinance, the determination to grant or deny an application for such transfer rests, subject to appeal to the State Director, in the discretion of the municipal issuing authority (R.S. 33:1-26)).

At the hearing below it was conceded by the attorney for the appellant that the premises licensed to Paula Bros. Wine & Liquor Stores, Inc. (D-67) at 698 Bergen Avenue are within 750 feet of the premises sought to be licensed by the appellant. The Division's careful measurement (nearest entrance to nearest entrance) reveals that the distance between the two premises is 206 feet. Furthermore the distance, so measured, from the premises sought to be licensed by the appellant to the premises licensed to Astor J. Tsibekas, t/a Royal Delicatessen (D-4) at 730 or 732 Bergen Avenue is 664 feet. I must find, therefore, that if the City's Alcoholic Beverage Control Board had granted the appellant's application, such grant would have been in violation of the ordinance's Section 5. Thus, the Board's denial of the application will be affirmed.

Accordingly, it is, on this 24th day of February 1960,

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

WILLIAM HOWE DAVIS
DIRECTOR

4. APPELLATE DECISIONS - BACUS v. GUTTENBERG

Peter Joseph Bacus, Appellant, v. Mayor and Board of Council of the Town of Guttenberg, Respondent. — ON APPEAL CONCLUSIONS AND ORDER

Alexander A. Abramson, Esq., Attorney for Appellant
John Tomasin, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"Appellant appeals from the action of respondent whereby on October 19, 1959, it revoked his license C-34, effective immediately. Appellant's premises are located at 6800 Park Avenue, Guttenberg.

"Upon the filing of the appeal herein the Director, on October 21, 1959, entered an order denying a stay of the order of revocation. R.S. 33:1-31.

"The license was revoked after respondent held a hearing in disciplinary proceedings involving five charges previously served on appellant. The first three charges allege, in effect, that on September 23, 1959, appellant sold and permitted the sale of alcoholic beverages to Edward V---(a minor) and permitted said minor to consume said beverages on his licensed premises in violation of Rule 1 of State Regulation No. 20. Charges 4 and 5 are as follows:

'4. On September 23, 1959, in connection with your operation of your tavern business in the above licensed premises, in exercise of said license you allowed, permitted and suffered in and upon the licensed premises a violation of the Alcoholic Beverage Law, namely, that although you had knowledge of the commission of a High Misdemeanor in your tavern, namely, the shooting of a patron therein, you concealed same from the investigating police and did not report same to the investigating police, and thereby hindered and delayed a police investigation of the said premises with respect to such shooting therein contrary to R.S. 33:1-35.

'5. On September 23, 1959, in connection with your operation of your tavern business in the above licensed premises, in exercise of said license you allowed, permitted and suffered in and upon the licensed premises a violation of the Alcoholic Beverage Law, namely, that although your Bartender, Vincent Bacus, had knowledge of the commission of a High Misdemeanor in your tavern, namely, the shooting of a patron therein, your Bartender, Vincent Bacus, concealed same from the investigating police and did not report same to the investigating police, and thereby hindered and delayed a police investigation of the said premises with respect to such shooting therein contrary to R.S. 33:1-35.'

"At the hearing herein Edward V--- testified that he was twenty years of age on September 23, 1959, and that on said date he entered appellant's premises at about 6:15 p.m. and remained there until about 9 p.m.

"As to the first three charges, Edward --- testified that during this period of time he was served about fifteen drinks of alcoholic beverages, all of which he consumed; that these drinks consisted of two or three vodkas and about a dozen beers; that all of these drinks, except one, were served by a patron named Kuhle who went behind the bar, and that the last drink of beer was served by Vincent Bacus (a brother of appellant).

"As to Charges 4 and 5, Edward --- testified that about 8 p.m. Kuhle left the premises and returned with a paper bag from which he removed a belt, two holsters and two pistols; that Kuhle placed one pistol behind the bar and fired a bullet from the other pistol at a cuckoo clock on the wall. Edward further testified that, later, he went to the men's room and, as he emerged therefrom, Kuhle fired a second bullet which passed through the calf of his left leg; that he returned to the men's room where he washed his leg; that he then walked to the bar where he met a friend who had a drink with him and then walked with his friend from the bar to the front door and left the premises; that, eventually, he was taken to the North Hudson Hospital in Weehawken where he was detained. It is apparent that, when Edward --- was first questioned at the hospital, he said that he had been shot on 72nd Street in North Bergen but that thereafter he said he had been shot in appellant's premises. It is also apparent that the Guttenberg Police Department was notified and started an investigation.

"On behalf of respondent, Sergeant Harry F. Neumann, of the Guttenberg Police, testified that he questioned appellant at Guttenberg Police Headquarters about 1 a.m. on September 24; that appellant then admitted to him that Edward --- had been in his premises on the previous evening, but denied that Edward had received any alco-

holic beverages or that he had been shot on the premises. The appellant also denied that any shots had been fired on the premises. Sergeant Neumann testified that he questioned Vincent Bacus during the early morning hours of September 24; that Vincent then admitted that he had served a glass of beer to Edward but denied that Edward had been shot on the premises. Vincent also denied that any shot had been fired on the premises. The aforesaid testimony was corroborated by Officer Charles Parker who was present while appellant and his brother were being questioned. Sergeant Neumann also testified that he entered appellant's premises at about 2 a.m. on September 24; that he observed no cuckoo clock but extracted a spent .22 lead pellet from one of a number of holes in a wall where, admittedly, a cuckoo clock had hung at some time in the past, and that he observed what appeared to be fresh blood spots on the floor of the premises. Sergeant Neumann testified that Edward --- told him that he had at first stated he was shot on a street in North Bergen because he didn't want to make trouble for appellant.

"On behalf of respondent, Chief Dennis J. Campbell of the Guttenberg Police Department testified that appellant and his brother Vincent both denied to him that they knew anything about a shooting or the firing of a gun in the tavern. He also testified that he visited appellant's premises about 9 a.m. on September 24 and observed several holes in the wall and about a dozen spots of blood on the floor between the men's room and the front door.

"On behalf of appellant, Peter Joseph Bacus testified that he was at the licensed premises on September 23, 1959, between 6 p.m. and 9 p.m. except for a period of about twenty minutes shortly after 8 p.m. He admitted that Edward --- and Kuhle were on the premises but denied that Edward had any alcoholic beverages or that Kuhle was behind the bar. He also denied that he saw a gun or heard any shots or that Edward was shot on the premises. He said that a former owner had a gun collection and that the pellet extracted from the wall might have been there prior to the time he started to operate the business in March 1958. However, it should be noted that Sergeant Neumann expressed the opinion that the extracted pellet was 'a fresh one.' Appellant also testified that the cuckoo clock had been removed from the wall about two weeks prior to the date in question.

"On behalf of appellant, Vincent Bacus testified that he arrived at the premises on September 23 at about 8 p.m. and relieved his brother behind the bar from 8:05 p.m. until 8:25 p.m. when his brother returned. He further testified that he left the premises about 9 p.m. and returned about 11 p.m. He testified that Edward ---, Kuhle, Edward Fantry and Robert Smith were in the premises but denied that he served any alcoholic beverages to Edward --- or that he heard any shots or saw any gun. When questioned as to a written statement wherein he admitted that he had served a beer to Edward ---, he said that he meant that he had served the drink to Edward Fantry, but the statement clearly sets forth the last name of the minor.

"On behalf of appellant, Edward Fantry and Robert Smith testified that Edward --- and Kuhle were on the premises but denied that they had seen any alcoholic beverages served to Edward --- or that they heard any shots. A third witness testified that he entered as Edward --- and his friend were leaving the premises.

"After examining the evidence and exhibits and considering the oral arguments of both attorneys, I conclude that the written admission by Vincent Bacus and the testimony of the minor establish the guilt of appellant as to the first three charges. The evidence of the minor that he was shot on the premises is supported by the pellet extracted from the wall, which indicates that a shot had been recently fired in the premises, and by the blood stains on the floor. It is impossible to

believe that two shots had been fired while appellant or his brother were on the premises without either having any knowledge thereof. The denial of such knowledge to the police officers of Guttenberg constituted a hindering of their investigation and, hence, establishes the guilt of appellant as to Charges 4 and 5. Kleinberg v. Newark, Bulletin 1168, Item 1.

"Appellant's license was suspended by the Director for thirty days effective May 18, 1959, after he had been found guilty of hindering an investigation and permitting assaults and batteries on ABC agents. Bulletin 1280, Item 4; Bulletin 1280, Item 5. Considering the evidence herein and appellant's prior record, revocation was fully warranted. It is recommended, therefore, that an order be entered affirming respondent' action and dismissing the appeal."

No exceptions to the Hearer's Report were filed within the time limited by Rule 14 of State Regulation No. 15.

Having carefully considered all the facts and circumstances of the case, I concur in the Hearer's conclusions and adopt them as my conclusions herein.

Accordingly, it is, on this 25th day of February, 1960,

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

WILLIAM HOWE DAVIS
DIRECTOR

5. DISCIPLINARY PROCEEDINGS - ALCOHOLIC BEVERAGES NOT TRULY LABELED - PRIOR RECORD - LICENSE SUSPENDED FOR 20 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against)

The Glen Cocktail Bar, A Corporation)
699-701 Bloomfield Avenue)
Bloomfield, New Jersey)

Holder of Plenary Retail Consumption License C-31, issued by the Town Council of the Town of Bloomfield.)

CONCLUSIONS AND ORDER

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Saul C. Schutzman, Esq., Attorney for Defendant-licensee.
William F. Wood, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Defendant pleaded non vult to a charge alleging that it possessed on its licensed premises alcoholic beverages in bottles bearing labels which did not truly describe their contents, in violation of Rule 27 of State Regulation No. 20.

On October 1, 1959, an ABC agent tested defendant's open stock of liquor and seized a number of bottles for further tests by the Division's chemist. Subsequent analysis by the chemist disclosed that the contents of two of the seized bottles were too high in solids when compared with samples of the genuine product of the same labeled brand.

Joseph Berger, president of and twenty per cent shareholder in the corporate-licensee herein, stated that the night bartender

had informed him that he had refilled quart bottles with whiskey decanted from half gallon bottles of the same labeled brand. The analysis of the Division's chemist is to the contrary.

Defendant and its predecessors-in-interest have a prior adjudicated record. When the aforesaid Joseph Berger held fifty per cent of the stock of the Club Murray Corporation, 1140½ Broad Street, Newark, the license for that corporation was suspended by this Division for forty-five days, effective March 31, 1941, for (1) employing a criminally disqualified person, (2) front and false statement in its license application and (3) an "hours" violation. Re Club Murray Corporation, Bulletin 452, Item 3. Effective June 21, 1954 a license held by Joseph, Sylvia and Morton Berger for the premises herein was suspended for ten days by this Division for allowing indecent songs and stories on the licensed premises. Re Berger, Bulletin 1023, Item 4. Effective August 8, 1957 the same license was suspended for twenty-five days by the local issuing authority for allowing a brawl on the licensed premises. Finally, effective June 1, 1959 the license herein was suspended for fifteen days by this Division for sales to minors (Re The Glen Cocktail Bar A Corporation, Bulletin 1283, Item 4). The 1941 and 1954 dissimilar violations occurred more than five years ago and will not be considered in fixing the penalty herein. However, the minimum suspension of fifteen days usually imposed in "refill" cases involving two bottles (Re Broad Street Bar, Inc., Bulletin 1246, Item 5) will be increased by five days because of the prior dissimilar violations which occurred within a five-year period. Re Skrobiszeski, Bulletin 1300, Item 5. I shall therefore suspend defendant's license for twenty days and remit five days for the plea entered herein, leaving a net suspension of fifteen days.

Accordingly, it is, on this 1st day of March, 1960,

ORDERED that Plenary Retail Consumption License C-31, issued by the Town Council of the Town of Bloomfield to The Glen Cocktail Bar, A Corporation, for premises 699-701 Bloomfield Avenue, Bloomfield, be and the same is hereby suspended for fifteen (15) days, commencing at 2:00 a.m., Tuesday, March 8, 1960, and terminating at 2:00 a.m., Wednesday, March 23, 1960.

William Howe Davis
Director

New Jersey State Library