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

BULLETIN 1827 November 20, 1968

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1. COURT DECISIONS - KARAM AND FRANK O'HARA, INC. v. WEST ORANGE AND RALLO'S RESTAURANT & PANTRY - DIRECTOR REVERSED - DECISION PREVIOUSLY RECORDED IN BULLEIN 1813, ITEM 1 NOW APPROVED FOR PUBLICATION.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1283-66

EMILE J. KARAM, Individually, and t/a The Crest, and FRANK O'HARA, INC., a Corporation of the State of New Jersey, t/a O'Hara's Cafe,

Plaintiffs-Appellants,

vs.

ALCOHOLIC BEVERAGE CONTROL BOARD OF WEST ORANGE, and RALLO'S RESTAURANT & PANTRY, et als,

Defendants-Respondents.

102 N.J. Super. 291

Argued May 6, 1968 -- Decided August 8, 1968

Before Judges Conford, Collester and Labrecque.

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

Mr. William J. Gearty argued the cause for appellant Emile J. Karam, &c., and Mr. Harry P. Durkin argued the cause for appellant Frank O'Hara, Inc., &c.

Mr. Harry A. Margolis argued the cause for respondent Board of Alcoholic Beverage Control of West Orange (Messrs. Margolis & Margolis, attorneys), and Mr. Martin Gelber argued the cause for respondent Rallo's Restaurant & Pantry, et als.

The opinion of the court was delivered by

CONFORD, S. J. A. D.

Two neighboring owners of licensed premises appeal from the affirmance by the Division of Alcoholic Beverage Control of the approval by the West Orange Board of Alcoholic Beverage Control (West Orange Board) of a transfer of a plenary retail consumption license from Green's Hotel, Inc., at 103 Pleasant Valley Way, to Rallo's Bar, Inc. (Rallo's), at premises theretofore designated as 650 Eagle Rock Avenue, but changed to 3 Beasley Street (identical

premises) for purposes of the application for the transfer. (Karam v. West Orange, Bulletin 1739, Item 1.)

The significant issue raised is whether the location of the transferee was impermissible under the provisions of the West Orange ordinance which bars the grant or transfer of such a license to premises "within a distance of 500 feet from any other premises then covered by" a similar license. Specifically, appellants argue that their respective premises, each of which has such a license, are less than 500 feet from Rallo's premises. We decide that Rallo's is less than 500 feet from O'Hara's Cafe, thereby invalidating the transfer, and consequently do not reach the question of illegal propinquity to the other premises in question, The Crest.

A review of the legal criteria for measurement of the pertinent distance will precede an outline of the facts.

The ordinance provides that the 500-foot distance "shall be measured in the same manner as required by statute for the measuring of 200 feet relative to schools or churches." That statute, N.J.S.A. 33:1-76, provides that the "two hundred feet shall be measured in the normal way that a pedestrian would properly walk from the nearest entrance of said church or school to the nearest entrance of the premises to be licensed." Of the various ways, if more than one, by which a pedestrian can properly go from one place to another, the shortest is to govern. Presbyterian Church, etc. v. Div. of Alcoholic Bev. Con., 53 N.J.Super. 271, 279 (App. Div. 1958). Finally, applying the practical construction by the Division for many years of the term, "nearest entrance," as recognized by us in the case just cited, the measurement should be "between points on the sidewalk intersecting (sic) any walk which a person would use in entering the properties in question." (Id. at 276). We take this to mean the point at which the line between the sidewalk and the premises proper would intersect a line from the entrance door to the nearest sidewalk which a pedestrian would normally traverse in leaving or entering the premises, as the case might be.

For some time prior to the original application giving rise to this dispute Rallo's Restaurant had been operating (under the same proprietary interest), pursuant to a zoning variance necessitated by the fact that it was in a residential zone, in a two and one-half story converted dwelling on the south side of Eagle Rock Avenue in West Orange, about 80 feet east of the southeast corner of the intersection of Eagle Rock Avenue and Pleasant Valley Way. O'Hara's Cafe, the other measuring point here pertinent, is situate on the west side of Pleasant Valley Way, distant about 75 feet north of the northwest corner of the same street intersection. The entrance to Rallo's was always on Eagle Rock Avenue, the natural front of the building, with a prominent name sign affixed thereon. The records of the municipal zoning board, building inspector and tax assessor show the address of the premises to have been 650 Eagle Rock Avenue. The distance from this entrance on Eagle Rock Avenue to the point where a line from O'Hara's Cafe's entrance intersects the sidewalk in front of it, by any normal pedestrian route, is less than 290 feet. Thus the distance between the respective critical locations was prima facie substantially under the 500-foot minimum of the ordinance.

Not abashed by the foregoing difficulty, Rallo's filed for approval of the transfer with the West Orange Board by specifying its address as 3 Beasley Street (that being the street intersecting Eagle Rock Avenue to the east of the premises). This

was deemed colorable, since Rallo's has a parking lot east of its building occupying the southwest corner of the intersection of Eagle Rock Avenue and Beasley Street, [1] and the building had a side entrance on its east side (apparently originally a delivery entrance), designated on the application for the transfer as the "bar entrance." Thus the "distance" from O'Hara's Cafe was swollen by the assumption that the hypothetical patron-pedestrian, bored with the variety of drink (or company) available at O'Hara's, and eager to sample that afforded by Rallo's, would saunter right past Rallo's front entrance on Eagle Rock Avenue, proceed around the corner, walk southerly up the sidewalk on Beasley Street to a point sufficient to make the total distance traversed 500 feet, and effect his entry to the premises therefrom across the parking lot.

However, the West Orange Board did not view the matter as quite that simple. Although three of its five members were sympathetic with the objective of adding another fine restaurant, suitably accoutered with a liquor license, to an area already noted for fine dining places, [2] they wisely perceived that the thirsty patron enroute from O'Hara's might enter Rallo's from its front entrance, or failing that, by its side entrance but <u>via</u> the parking lot <u>from Eagle Rock Avenue</u>, proceeding directly along the east side of the building to that entrance. This would not increase the distance from O'Hara's Cafe anywhere near enough to add up to the 500 feet which the ordinance commanded as the patron-pedestrian's minimum journey. But the Board was ready with a solution to the applicant's problem. It approved the transfer but subject to the following conditions:

> "1. Construction of a new entrance on the Beasley Street side of the premises in accordance with the plans submitted to the Board, said entrance to be appropriate in design for use as a main entrance.
>
> 2. Sealing of all entrance doors to the premises located on Eagle Rock Avenue except for those doors to be used as fire exits as may be required by the Fire Department.
>
> 3. Construction of a 3-½ foot high masonry wall of decorative design with no openings therein from point abutting building on Eagle Rock Avenue to the point on Beasley Street shown on plan submitted by applicant, said point being more than 500 feet from nearest holder of a Plenary Retail Consumption License."

Rallo's undertook to comply with the specified conditions. It can be seen that now the hypothetical pedestrian was physically barred from going into the premises from Eagle Rock Avenue, whether by the front door or the side door. He was blocked by a masonry wall built right up to the building, and he had to walk around the Beasley Street corner. But not far enough, according to the Division of Alcoholic Beverage Control, which on the first appeal thereto in this matter found that, according to the testimony of applicant's expert surveyor (who is also Town Engineer of West Orange), the

---

1 Beasley Street makes a "T" intersection with Eagle Rock Avenue, the through street.

2 As testified to by one of its members before the Division.

distance the pedestrian would traverse on Beasley Street -- 62.6 feet -- would not suffice to make the total trip from O'Hara's consume the necessary 500 feet. It was only 493.7 feet. Thus the Division was "constrained" by the shortage of 6.3 feet to reverse the West Orange Board and deny the application, but "without prejudice to the filing of a new application based upon such facts as will meet the distance requirements of the applicable ordinance."

On a renewed application to the West Orange Board, Rallo's expert surveyor chose another route from O'Hara's to the end of the new wall on Beasley Street which, he testified, made the distance 507.2 feet. This was accomplished apparently by using different cross-overs at the Eagle Rock-Pleasant Valley Way intersection from those the expert had used at the initial hearing. The objectors contested this showing with testimony of their own expert, who purported to lay out six pedestrian routes between O'Hara's and Rallo's altered entrance, all to the end of the newly constructed wall, five of which measured less than 500 feet.

One such route of less than 500 feet involved travelling the north rather than the south side of Eagle Rock Avenue going easterly from the intersection, and crossing that thoroughfare on the extension of a line of the sidewalk running along the west side of Beasley Street. This might well be supported by the decision in Hopkins v. Municipal Bd. of Alcoholic, etc. Newark, 4 N.J.Super. 484 (App.Div. 1949), which seemingly approves a crossing at a "T" intersection. Others 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. However, we do not pass upon it, or upon the controlling status of the route arguably validated by the Hopkins case, supra, as we are clear that the device of building the wall to compel the pedestrian to go around the Beasley Street corner to gain access to the premises was a fundamentally improper evasion of the letter and spirit of the ordinance in the light of the adjudicated cases. We disapprove of the countenancing of this device by the determination of the Division under review. In affirming the determination of the Board, the Division accepted the testimony of Rallo's surveyor that all proper courses of travel would measure over 500 feet.

On countless occasions our courts have emphasized the sensitive nature of liquor control legislation. Local ordinances attuned to the public policy involved in this area should be fairly enforced, not regarded as nuisance hurdles to be sidestepped or evaded in the interest of a municipal policy, not reflected in any ordinance, of a contrary import. The obvious purpose of the 500-foot ordinance is the salutary one to prevent an undue concentration of licensed premises in any area. It should be administered in the spirit of its policy, not grudgingly. In other words, so long as such an ordinance is on the municipal books, it cannot be evaded to serve the object of building up a concentrated area of restaurants with appendant alcoholic consumption licenses.

We would concede that any functionally legitimate purpose in fixing the entrance of a licensed premises in one part of a building rather than another should not be vetoed by a court merely because an incidental result thereof would be the increase

of the distance to another licensed premises enough to comply with a distance ordinance such as the present one. But here the long-standing and natural entrance to Rallo's was its front entrance on Eagle Rock Avenue, and a pedestrian normally going there from O'Hara's Cafe would use that entrance. We have severe doubts whether closing it off and forcing the trade to use the side entrance for the sole purpose of increasing the pedestrian's walking distance from O'Hara's to meet the ordinance is a valid method of achieving legal compliance with it.

But even if that problem were overcome, the building of the wall as here projected constitutes an evasion device which cannot be condoned. Without the wall, the patron coming from O'Hara's, even if required to use the side entrance, would normally get there by the shortest route by walking from Eagle Rock Avenue across the parking lot, along the east wall of the building. The measuring point, in that event, would be the sidewalk on Eagle Rock Avenue adjacent to the east wall. Presbyterian Church, etc. v. Div. of Alcoholic Bev. Con., supra. The resulting distance from O'Hara's would be a little over 300 feet -- well short of the requirement.

In our view, it is an impermissible evasion of the ordinance to build a physical obstruction on licensed premises for no other purpose than to make it impossible for a pedestrian-patron to effect normal entrance to the building via the nearest sidewalk -- and this solely in order to inflate the walking distance to the nearest licensed premises above the ordinance minimum.

And if all the foregoing were not enough, the final nail in the coffin of evasion was driven when the wall on Beasley Street was extended southerly well past a right-angle line from the side-entrance (now made the entrance to the premises) to the Beasley Street sidewalk. That maneuver was employed because termination of the wall at that point, which would have afforded the patron the shortest walk from Beasley Street to the entrance, would not have provided the necessary 500 feet from O'Hara's. Thus the wall as extended blocked off some 15 feet of the previous Beasley Street driveway to the parking lot. By the logic of the argument of the respondents, if O'Hara's were 100 feet nearer Rallo's than it is, and Rallo's had enough additional land to the south on Beasley Street, the wall could have been extended for the necessary additional 100 feet, and the tired but still thirsty patron-pedestrian relegated to the long walk along the wall, around it and all the way back to the side-entrance -- all in perfect compliance with the ordinance.

We conclude that Rallo's was not in compliance with the ordinance either before or after the physical tailoring of the premises to meet the conditions imposed by the West Orange Board. We need not explore the additional contention of appellants that the Hearer in the Division erred in excluding evidence concerning the zoning effects of the transfer.

Judgment reversed.

2. APPELLATE DECISIONS - SIR GENE LOUNGE v. PASSAIC.

Sir Gene Lounge (corporation), t/a Sir Gene Lounge, Appellant,	)	
v.	)	On Appeal
Municipal Board of Alcoholic Beverage Control of the City of Passaic, Respondent.	)	O R D E R

Appellant, by Eugene Grimsley, President, Pro se
Charles E. Miller, Esq., by Milton J. Pashman, Esq., Attorney for Respondent

BY THE DIRECTOR:

Appellant appeals from the denial by respondent on June 24, 1968 of its application for renewal for the license year 1968-69 of its plenary retail consumption license for premises 168 Market Street, Passaic.

Prior to the hearing, appellant advised me that the appeal was withdrawn.

Accordingly, it is, on this 10th day of October 1968,

ORDERED that the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that the order entered herein extending the term of appellant's 1967-68 license pending determination of the appeal be and the same is hereby vacated.

JOSEPH M. KEEGAN
DIRECTOR

3. APPELLATE DECISIONS - McNABB v. KEARNY.

Ethel M. McNabb, Robert McNabb and John R. McNabb, Appellants,	)	On Appeal
v.	)	CONCLUSIONS AND ORDER
Town Council of the Town of Kearny, Respondent.	)	

Joseph F. McCarthy, Esq., Attorney for Appellants
Paul J. McCurrie, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the respondent (hereinafter Council) whereby on June 26, 1968, it denied the application of the appellants for a place-to-place transfer of their plenary retail consumption license from premises 69-71 Halstead Street to 83-85 Johnston Avenue, Kearny.

Council's statement of reasons for denial sets forth the following:

> "The evidence clearly shows that there is a parking congestion in the neighborhood and that several other licensed premises existing in the immediate neighborhood attract persons who misconduct themselves so as to create a public nuisance; namely, the evidence showed that there were numerous occasions of acts of public drunkenness and use of obscene and vulgar language in the presence of homeowners and their families, and that an additional licensed premises in the area would compound the aforesaid problems and be detrimental to the public health, safety and welfare. Additionally, the area in question is zoned as a R-3 district (garden apartment district) and that the licensed premises would therefore be in violation of the zoning ordinance."

The petition of appeal alleges that the action of the Council was erroneous for reasons which may be summarized as follows: (1) Appellants had no intention of conducting a liquor business and advised the Council that they sought to keep the license "alive" in order that they be given an opportunity to "sell" the same; (2) Council failed to take into consideration the fact that this application was based upon the destruction of the existing premises; (3) although such transfer might be in violation of the zoning ordinance, appellants did not intend to conduct a business at the proposed site, and they were prepared to stipulate that a restriction in the resolution of approval of the transfer would so state; and (4) one of the members of the issuing authority unduly influenced the other members of the Council because he indicated his opposition to said transfer before the conclusion of the hearing.

The answer of the Council admits the jurisdictional allegations, denies the substantive allegations and sets forth as a statement for the grounds of Council's action:

> "From the evidence produced at the hearing of this matter the Mayor and Council of the Town of Kearny made the determination as set forth in paragraph 3 of the Petition that the transfer of the license would be detrimental to the public welfare and in violation of the zoning ordinance."

The transcript of the proceedings before the Council was submitted and, by stipulation of the parties, it was agreed that the determination herein shall be based thereon in lieu of a de novo hearing. Rule 8 of State Regulation No. 15.

The transcript reflects the following: At the hearing before the Council, the attorney for the appellants made the principal statement on their behalf, and his representations were supported by the testimony of the co-licensee Ethel McNabb, to the following effect:

Appellants have been in the tavern business for about thirty-five years at their present location. Mrs. McNabb had operated these premises with her two sons; her two sons left the tavern business to take employment elsewhere and, because she was not well, she closed the tavern on July 27, 1967, and has not operated this business since that time. The premises were subsequently destroyed by fire and they sought other premises within which to relocate the license so that they could sell their interest in the license.

The proposed location, in a residential area, was picked "not with the intent of conducting a business there or placing fixtures or operating a bar there, but merely to have the legal effect to keep her license in operation and be given a further opportunity to sell it."

Numerous objectors appeared at the hearing opposing the said application, including Councilman Doyle (elected from the ward in which the proposed new premises are located) who, disqualifying himself as a member of the Council from hearing this application, spoke in opposition as a resident. Their objections may be briefly summarized as follows: (a) The area is saturated with taverns and licensees and, as one witness stated, "There is roughly eighteen licensed dealers in that same vicinity" thus there is no need or necessity for an additional license in that area. (b) The introduction of a new license would further increase a serious traffic problem. (c) The proposed premises to which this license would be transferred is within one block of a school and the children of this school would have to pass the tavern going to and from the said school and would be subjected to obscene language from intoxicated persons. (d) The residents of this area have been troubled by drunks and undesirable persons who frequent the taverns in this area and the addition of this facility would increase the hazards which the residents already face. (e) The proposed premises to which this license is sought to be transferred is in a residential zone and, in fact, the very premises is an apartment and not a store since the owner of the building had been granted his application by the zoning board to convert the store into an apartment. (f) The residents feel that appellants may sell this license to another operator who would, in fact, operate a bar and tavern at these premises.

Appellants' attorney suggested that the Council "embody in the resolution of transfer that it does grant it only for the purpose of preserving the license, with the direct prohibition of conducting a tavern business on the premises in question."

It is well established that the transfer of a liquor license is not an inherent or automatic right, and that the issuing authority may grant or deny the transfer in the exercise of its reasonable discretion. Ware v. Newark, Bulletin 1420, Item 3. If denied on reasonable grounds, such action will be affirmed. Richmon, Inc. v. Trenton, Bulletin 1560, Item 4, and cases cited therein. In considering whether or not the license should be transferred to this area, Council properly concluded that the addition of this license in an area already saturated with liquor licensees would be contrary to the public interest. The number of licenses which may be permitted in any particular area, and due determination as to whether or not a license should be transferred to a particular location, come within the sound discretion of the issuing authority.

The Director's function on appeal is not to substitute his opinion for that of the issuing authority but, rather, to determine whether proper cause exists for its opinion and, if so, to affirm irrespective of his personal views. Rothman v. Hamilton, Bulletin 1091, Item 1; Schujas v. Bridgeton, Bulletin 1791, Item 4.

In Fanwood v. Rocco, 59 N.J.Super. 306, 321 (App. Div. 1960), Judge Gaulkin stated:

> "The Legislature has entrusted to the municipal issuing authority the right and charged it with the duty to issue licenses (R.S. 33:1-24) and place-to-place transfers thereof '[O] n application made therefor setting forth the same matters and things with reference to the premises to which a transfer of license is sought as are required to be set forth in connection with an original application for license, as to said premises.' N.J.S.A. 33:1-26."

As was stated in Ward v. Scott, 16 N.J. 16, 23 (1954):

> "Local officials who are thoroughly familiar with their community's characteristics and interests and are the proper representatives of its people, are undoubtedly the best equipped to pass initially on such applications... And their determinations should not be approached with a general feeling of suspicion, for as Justice Holmes has properly admonished: 'Universal distrust creates universal incompetence.' Graham v. United States, 231 U.S. 474, 480, 34 S.Ct. 148, 151, 58 L.Ed. 319, 324 (1913)."

The court pointed out in Fanwood, supra, at p. 320:

> "No person is entitled to either [transfer of a license or issuance of an original license] as a matter of law" and "If the motive of the governing body is pure, its reasons, whether based on morals, economics, or aesthetics, are immaterial."

In the matter sub judice, the municipality did not grant, but denied, the application. The action of respondent may not be reversed by the Director unless he finds "the act of the board was

clearly against the logic and effect of the presented facts." Hudson Bergen County Retail Liquor Stores Assn. et al. v. Hoboken et al., 135 N.J.L. 502, at p. 511.

Appellants assert that they have no real intention of operating the license at the proposed premises and are merely using these premises for the purpose of affording them an opportunity to "sell" the said license (unlawful under R.S. 33:1-26, second paragraph). And, in fact, they are prepared to have that condition set forth in the resolution granting their application for transfer.

While the Council appears to be sympathetic to the situation confronting appellants, it is clear that the Council determined that this particular location was not suitable for the transfer of this license for any reason. It is quite obvious that the premises are unsuitable for such operation and that the Council is also convinced that good faith in seeking a bona fide transfer to suitable premises is lacking in these circumstances. Furthermore, the course suggested by appellants' attorney would do violence to both the spirit and letter of the Alcoholic Beverage Law. Cf. Nordco, Inc. v. State, 43 N.J.Super. 277, 289.

The issue has also been raised to the effect that the proposed new premises would be in a residential area and would be violative of the zoning ordinance. The established principle of law with respect thereto is that a liquor license may be properly issued or transferred to a location wherein the zoning ordinance prohibits such type of business. However, such issuance or transfer does not permit the licensee to operate without complying with all applicable statutes and ordinances, including zoning ordinances. See Lubliner v. Paterson, 59 N.J.Super. 419; aff'd 33 N.J. 428. As a practical matter, however, appellants have admitted that they do not intend to operate at these premises nor could they operate in view of the present zoning restriction.

Nevertheless, the matter of zoning is not a factor which is considered in the determination of this appeal.

Petitions signed by 150 residents in the immediate area were submitted in opposition to this transfer and the arguments of the numerous objectors were persuasive in their reasons for opposing such transfer. The members of the Council were clearly convinced that this transfer would be contrary to the best interests of the community; and it is elementary that concern for appellants' own financial misfortune cannot be elevated above the public interest. Cf. Hudson Bergen County Retail Liquor Stores Assn. v. Hoboken, supra; Ware v. Newark, supra.

In order to warrant the reversal of the action of the Council, appellants must show by a preponderance of the evidence that the Council abused its discretion in denying the application for the transfer of appellants' license. To meet this burden it is necessary that appellants show manifest error or some abuse of discretion on the part of the Council. Rajah Liquors v. Div. of Alcoholic Beverage Control, 33 N.J.Super. 598 (App. Div. 1955). As we have indicated, where a municipality decides in good faith, and not with the intention of oppressing the individual, that the area has adequate liquor facilities, the Director is not authorized to reverse such findings.

I further find that there has been no undue influence on the part of any of the members of the Council or any improper action which resulted in the aforesaid determination. Nor is there any indication that the Council's refusal to grant this ap-

plication was inspired by improper motives.

After careful consideration of the transcript of testimony, I conclude that appellants have failed to sustain the burden of establishing that the action of the Council in denying the transfer was unreasonable, arbitrary or constituted an abuse of its discretionary power. Rule 6 of State Regulation No. 15. Hence, I recommend that an order be entered affirming Council's action and dismissing the appeal.

Conclusions and Order

Pursuant to Rule 14 of State Regulation No. 15, written exceptions to the Hearer's report and argument in support thereof were filed by the attorney for appellant, and answer to the said exceptions, with supportive argument, was filed by the attorney for the respondent.

I have fully analyzed and considered the exceptions, and find that they have either been answered in the Hearer's report or are lacking in merit.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibit, the Hearer's report, written exceptions filed thereto and answer to the said exceptions, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 10th day of October 1968,

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.

JOSEPH M. KEEGAN
DIRECTOR

4. SEIZURE - FORFEITURE PROCEEDINGS - UNLAWFUL TRANSPORTATION AND SALE OF ALCOHOLIC BEVERAGES IN SPEAKEASY - CLAIM OF OWNER OF MOTOR VEHICLE DENIED ABSENT GOOD FAITH - MOTOR VEHICLE, CASH, PERSONAL PROPERTY AND ALCOHOLIC BEVERAGES ORDERED FORFEITED.

In the Matter of the Seizure on May 26, 1968 of a quantity of alcoholic beverages, a 1953 Ford Pick-up Truck, $98.70 in cash and miscellaneous personal property at the unlicensed premises of Lambda Sigma Delta Fraternity, 1405 Hooper Avenue, in the Township of Dover, County of Ocean and State of New Jersey.	On Hearing CONCLUSIONS and ORDER

Lambda Sigma Delta Fraternity by Fred J. Homschek, Jr., claimant.
Edward J. Doyle, Jr., Pro Se.
I. Edward Amada, Esq., appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

This matter came on for hearing pursuant to R.S. 33:1-66 and State Regulation No. 28 to determine whether seven containers of alcoholic beverages, $98.70 in cash and miscellaneous personal property, more particularly set forth in an inventory attached hereto, made part hereof and marked Schedule "A", seized on May 26, 1968 at the unlicensed premises of Lambda Sigma Delta fraternity, located at 1405 Hooper Avenue, Dover Township, New Jersey constitute unlawful property and should be forfeited.

The seizure was made by ABC agents because of alleged unlawful sales of alcoholic beverages at the said premises.

When the matter came on for hearing pursuant to R.S. 33:1-66, the Lambda Sigma Delta fraternity, appearing pro se through one of its authorized members, appeared and sought the return of the alcoholic beverages and seized cash.

Edward J. Doyle, Jr., appearing pro se sought return of the seized truck.

The file of this Division was admitted into evidence by stipulation of the said claimants and contained the affidavit of mailing, affidavit of publication, the chemist's report certified by the Director, the recording of the "marked" money and the "marked" ten-dollar bill.

Reports of ABC agents and other documents in the said file disclosed the following: On Sunday, May 26, 1968 at about 1:00 P.M. two ABC agents entered the premises in question. These premises consist of a two-story frame building with a front and rear entrance and a two-story frame garage in the rear of the said building. Upon arrival at the front entrance of the house, the agents were greeted by a male, later identified as William Schroeder, who was seated at a card table. This table held a small metal box containing money, a rubber stamp, an ink pad and a roll of theater-type tickets.

One of the agents gave Schroeder three "marked" one-dollar bills and the other agent gave him a "marked" ten-dollar bill, all of which Schroeder placed in the metal box. He thereupon stamped the back of the hand of each agent with the rubber stamp and, under his guidance, they departed the house through its rear and entered the garage. The interior of the garage contained a make-shift bar, behind which the agents observed two one-half kegs of beer and an untapped keg. The agents exhibited their stamped hands to a male, (later identified as Alan B. Piticolas), who was engaged as a bartender on duty behind the bar. This satisfied him that they had paid admission, and they were promptly served beer in two paper cups.

The agents observed about 55 male and female patrons consuming beer in these premises and also noted that a male (later identified as Howard D. Levine), was serving beer in paper cups to some of the patrons.

Shortly thereafter, by pre-arrangement, other ABC agents and local police entered the premises, identified themselves, and seized cash in the sum of $98.70, including the "marked" ten-dollar bill from the metal box. They also seized a Ford pick-up truck parked to the right of the garage, which contained five kegs of iced beer. The truck bore License No. X3M-340 registered in the name of Edward J. Doyle of Bricktown, Ocean County, N. J. The truck was parked on premises occupied by the aforementioned fraternity.

William Schroeder was arrested, charged with selling and possessing alcoholic beverages with intent to sell the same without a license contrary to R.S. 33:1-2 in violation of R.S. 33:1-50(a).

Lewis Manzione, the president of the fraternity and Howard D. Levine were also arrested, charged with aiding and abetting in the sale and possession with intent to sell; and Alan B. Piticolas was arrested, charged with sale and possession with intent to sell alcoholic beverages without a license contrary to R.S. 33:1-2 and R.S. 33:1-50 (b and d). They were released in bail pending arraignment in the Dover Township Municipal Court.

On June 4, 1968 the Division chemist analyzed samples of the seized beer and his certified report establishes that they are alcoholic beverages fit for beverage purposes, with an alcoholic content by volume of 4.50%.

The records of this Division do not disclose any license or permit authorizing the sale of alcoholic beverages to Edward J. Doyle, Howard D. Levine, Lambda Sigma Delta Fraternity, or for the premises in question.

The seized alcoholic beverages are illicit because they were intended for sale without a license. R.S. 33:1-1(i). Such illicit alcoholic beverages, all of the personal property and the cash, set forth in Schedule "A" herein, constitute unlawful property and are subject to forfeiture. R.S. 33:1-2; R.S. 33:1-66. This is equally applicable to the cash which was clearly commingled with the monies obtained from the ABC agent. Thus, all of the monies, as well as the fixtures, furnishings and equipment are subject to forfeiture. Seizure Case No. 11,860, Bulletin 1749, Item 5; Seizure Case No. 11,909, Bulletin 1779, Item 6.

Fred J. Homschek, Jr., testifying on behalf of the Lambda Sigma Delta fraternity, in support of its claim for the return of the seized property, exclusive of the truck, stated that he was

authorized to appear and testify at this hearing by Lewis Manzione, the president of the fraternity. He acknowledged that the admission charge included the right to be served alcoholic beverages as well as food; that the alcoholic beverages were purchased with fraternity money; that patrons were entitled to eat the food, drink the liquor, listen to the band, and participate fully in this function.

He explained that the fraternity probably would make a token profit; that the profit realized from this activity, as in other functions sponsored by this fraternity, would be used for scholarships and similar purposes.

It was clearly admitted by this claimant that it had no license or permit authorizing the sale of alcoholic beverages. Obviously the service of alcoholic beverages was included in the price of admission and constituted a sale, as defined by the applicable statute. R.S. 33:1-1(w) defines a sale as:

> "Every delivery of an alcoholic beverage otherwise than by purely gratuitous title, including deliveries from without this State and deliveries by any person without this State intended for shipment by carrier or otherwise into this State and brought within this State, or the solicitation or acceptance of an order for an alcoholic beverage, and including exchange, barter, traffic in, keeping and exposing for sale, serving with meals, delivering for value, peddling, possessing with intent to sell, and the gratuitous delivery or gift of any alcoholic beverage by any licensee."

See Seizure Case No. 11,622, Bulletin 1693, Item 8. The motives of the claimant in engaging in illegal sales of alcoholic beverages for the ultimate destination of the monies obtain by unlawful activity are irrelevent and uninfluential under the clear statutory mandate. It is accordingly, therefore, recommended that the Lambda Sigma Delta Fraternity's application for the return of the seized property be denied and that an order be entered forfeiting the same.

Edward J. Doyle, Jr., the owner of the seized truck, gave the following account in support of his claim thereof. He loaned the truck to the fraternity since Lewis Manzione, the president of the said fraternity, is his partner. He was aware that the truck has previously been used to haul alcoholic beverages but insisted that he was unaware that it was a violation of the Alcoholic Beverage Law to transport beer or alcoholic beverages without a license or special permit.

He also admitted that he "...had an idea..." that the truck was going to be used to transport beer for the fraternity.

He was then asked:

> "Q Didn't you know they were going to use the truck to bring beer and other things to the fraternity house?
>
> A Yes, I knew they were going to bring stuff to the fraternity house.
>
> Q Including beer?
>
> A No, I didn't actually know. I had an idea they might but I didn't actually know."

And further:

"Q And you say you knew the party was going to have beer?

A I knew about it."

And further:

"Q You had an idea they were going to use it to bring beer, didn't you?

A Yes."

His proffered ignorance of the law is obviously no excuse for permitting his truck to be used for such illicit liquor activity. It is difficult to believe that this claimant, who impressed me as being intelligent, believed that substantial quantities of alcoholic beverages could be transported in his vehicle without license or special permit.

The Director has the discretionary authority to return property subject to forfeiture to a claimant who has established to his satisfaction that he has acted in good faith, and did not know, or have any reason to believe that his property would be used in unlawful liquor activity. In the absence of such showing, the Director does not have the authority, under the compulsion of the statute and the applicable regulation to authorize the return thereof.

It is, accordingly, recommended that the claim of Edward J. Doyle, Jr. for the return of the said property be rejected, and that an order be entered forfeiting the said Ford pick-up truck. Seizure Case No. 11,164, Bulletin 1565, Item 5; Seizure Case No. 11,931, Bulletin 1787, Item 2; R.S. 33:1-2; R.S. 33:1-66.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 4 of State Regulation No. 28.

After carefully considering the facts and circumstances herein, I concur in the recommended conclusions and I adopt them as my conclusions herein.

Accordingly, it is on this 16th day of October, 1968

DETERMINED and ORDERED that the claim of Edward J. Doyle, Jr. for the return of the Ford pick-up truck be and the same is hereby denied; and it is further

DETERMINED and ORDERED that the claim of Lambda Sigma Delta Fraternity for the return of the seized alcoholic beverages, $98.70 in cash and miscellaneous personal property be and the same is hereby denied; and that the same be and are hereby forfeited in accordance with the provisions of R.S. 33:1-66, and that they be retained for the use of hospitals and State, county and municipal institutions or destroyed, in whole or in part, at the direction of the Director of the Division of Alcoholic Beverage Control.

JOSEPH M. KEEGAN
DIRECTOR

SCHEDULE "A"

7 - containers of alcoholic beverages
1 - 1953 Ford pick-up truck, Serial No. F10D3C10287, N.J. Registration X3M-340
$98.70 - cash
Miscellaneous personal property

5. DISCIPLINARY PROCEEDINGS - SALE TO A MINOR - LICENSE SUSPENDED FOR 15 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

Lillian Ehrlich
t/a Fred's Cedar Gate Inn
292-294 Princeton Ave.
Brick Township
P.O. Brick Town, N. J.,

Holder of Plenary Retail Consumption License C-7, issued by the Township Committee of the Township of Brick.

CONCLUSIONS and ORDER

Licensee, Pro se
Louis F. Treole, Esq., Appearing for Division of Alcoholic Beverage Control

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on September 26, 1968 she sold two quart containers of beer to a minor, age 19, in violation of Rule 1 of State Regulation No. 20.

Absent prior record, the license will be suspended for fifteen days, with remission of five days for the plea entered, leaving a net suspension of ten days. Re Hardin, Bulletin 1806, Item 8.

Accordingly, it is, on this 16th day of October 1968,

ORDERED that Plenary Retail Consumption License C-7, issued by the Township Committee of the Township of Brick to Lillian Ehrlich, t/a Fred's Cedar Gate Inn, for premises 292-294 Princeton Avenue, Brick Township, be and the same is hereby suspended for ten (10) days, commencing at 2 a.m. Tuesday, October 22, 1968, and terminating at 2 a.m. Friday, November 1, 1968.

JOSEPH M. KEEGAN
DIRECTOR

6. STATE LICENSES - NEW APPLICATION FILED.

Trentacoste Bros. Inc.
t/a Carabelli Beverage Co.
320-324-328 Stokes Avenue
Ewing Township, PO Trenton, New Jersey

Application filed November 19, 1968 for person-to-person transfer of Limited Wholesale License WL-14 from Pietro Carabelli, t/a P. Carabelli Bev. Co.

Joseph M. Keegan
Director

New Jersey State Library