STATE OF NEW JERSEY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark, 2, N. J.

BULLETIN 695 FEBRUARY 19, 1946

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ITEM

STATE OF NEW JERSEY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark, 2, N. J.

BULLETIN 695 FEBRUARY 19, 1946

1. MORAL TURPITUDE - LARGE-SCALE (AND COMMERCIAL) VIOLATION OF ALCOHOLIC BEVERAGE LAW AND MAINTAINING DISORDERLY HOUSE FOUND TO INVOLVE MORAL TURPITUDE.

DISQUALIFICATION - APPLICATION TO LIFT - FACTS EXAMINED - REMOVAL OF DISQUALIFICATION FOUND NOT TO BE IN PUBLIC INTEREST - APPLICATION TO LIFT DENIED.

In the Matter of an Application)
to Remove Disqualification be-
cause of a Conviction, Pursuant) CONCLUSIONS AND ORDER
to R. S. 33:1-31.2.)

Case No. 467

BY THE COMMISSIONER:

Petitioner herein, pursuant to the provisions of R. S. 33:1-31.2, seeks the removal of the statutory disqualification resulting from his convictions of crime involving moral turpitude, which prevents him from holding a liquor license in this State and from being employed by or connected in any business capacity whatsoever with the holder of such a license.

In 1922 petitioner was arrested for a violation of the National Prohibition Law. While there does not appear to be any record of the disposition of the case; petitioner reports that he paid a fine in an unnamed amount. It has heretofore been held that a violation of the National Prohibition Law, in the absence of aggravating circumstances, would not ordinarily involve moral turpitude.

On January 23, 1936, petitioner, then the holder of a plenary retail consumption license, following a plea of guilty to an indictment charging a violation of Sections 2 and 48 of the Alcoholic Beverage Law, was sentenced by a Judge of a Court of Quarter Sessions to pay a fine of $100.00 and was placed on probation for approximately a year.

A violation of the Alcoholic Beverage Law may not be per se a crime involving moral turpitude. However, in this case, it would appear that the petitioner was involved in bootlegging activities on a more or less commercial scale. Under the circumstances herein, I must hold that the above conviction involves the element of moral turpitude.

In 1940, petitioner pleaded non vult to an indictment charging him with maintaining a disorderly house and was sentenced by a Judge of a Court of Quarter Sessions to six months in a county jail. Petitioner was released from jail on September 28, 1940.

It should be noted that in 1940 petitioner was the holder of a plenary retail consumption license, operating a tavern and restaurant. As part of the entertainment offered his patrons, he

permitted and allowed the showing of lewd and indecent motion pictures as well as permitted immoral "dances" on his licensed premises. Without detailing the exact nature of the "show", it is sufficient to say that it was of a highly erotic nature, calculated to present sex in a vile and depraved manner, and that it tended to corrupt the morals of those witnessing it. Such an exhibition, by its very nature, indicates a lack of the moral standards demanded by society. This statment applied to the participants as well as to those who promote or make the performance possible.

I believe that a conviction for maintaining a disorderly house based upon the acts herein described, which acts can certainly be described as "acts of baseness, vileness or depravity in the private and social duties which a man owes to his fellow man or to society in general contrary to the accepted and customary rule of right and duty between man and man" involves moral turpitude. This very apt description of the actions herein described is taken from a definition of "moral turpitude" as found in Bouvier's Law Dictionary (Rawle 3rd ed. Vol. 2 Page 234). I conclude that the last mentioned conviction involved moral turpitude.

As a result of charges before the local Alcoholic Beverage Control Board, based on the same "show", petitioner's license was revoked.

Petitioner testified that since his conviction in 1940 he has not been employed in or connected in any way with the alcoholic beverage industry. It also appears that he has been in no further difficulty with the police.

In view of the petitioner's previous record and his repeated violations of the law while he was a licensee, I have reached the conclusion that it would not be in the public interest (or in petitioner's private interest) to lift his disqualification and thereby permit him to resume his "association with the alcoholic beverage industry". I have reached this conclusion despite the fact that it appears that for the five years last past the applicant has conducted himself in a law-abiding manner. It is apparent from the record that when the petitioner is associated with the liquor industry, he finds it difficult to withstand the temptation to violate the law. Apparently, when he is not part of that industry, he is able to conduct himself in a law-abiding manner. It would, therefore, appear to be in his own best interests for him to remain apart from an association that may have been the cause for his unhappy criminal record.

Accordingly, it is, on this 7th day of February, 1946,

ORDERED that the petition herein be and the same is hereby denied.

ALFRED E. DRISCOLL
Commissioner

2. FAIR TRADE - FIRE SALES - DISPOSAL OF DAMAGED MERCHANDISE.

February 6, 1946

Dear Commissioner:

I would appreciate your advising me whether your regulation covers the situation where a retail package liquor store suffers damage from fire and the licensee thereof desires to sell salvage liquor stock at a reduced price.

Appreciate your reply, I am,

Very truly yours,

BERTRAM M. SAXE

February 7, 1946

Bertram M. Saxe, Esq.,
Atlantic City, N. J.

Dear Sir:

Rule 6 of State Regulations No. 30 provides, in effect, that whenever a contract and price list is duly filed and published, no retail licensee shall sell any product affected thereby except (a) at the price stipulated therein by the manufacturer or wholesaler, or (b) pursuant to and within the terms of a special permit obtained from the Department of Alcoholic Beverage Control.

Rule 8 of State Regulations No. 30 provides, among other things, that where the product is damaged or deteriorated in quality and notice is given to the public thereof, application will be entertained for a special permit authorizing the sale of any particular product affected by a Fair Trade contract without regard to the price stipulated therein.

So-called "fire sales" are entirely out of place so far as the sale of alcoholic beverages is concerned and, accordingly, I have uniformly refused to issue any special permits for the sale to consumers below the Fair Trade price of any stock of alcoholic beverages damaged by fire.

Where a fire occurs in licensed premises as a result of which labels or tax stamps are destroyed or marred, new labels and tax stamps may be placed on the bottles in accordance with the requirements of the Federal authorities. Information as to the Federal regulations may be obtained by communicating with the District Supervisor, Bureau of Internal Revenue, Alcohol Tax Unit, 60 Park Place, Newark, N. J. As an alternative, I might suggest that efforts be made to return the damaged merchandise to the wholesaler or manufacturer from whom purchased so that it may be eventually reconditioned by the producer.

Very truly yours,

ALFRED E. DRISCOLL
Commissioner

3. RETAIL LICENSES - LOSS OF INTEREST IN LICENSED PREMISES DOES NOT VOID THE LICENSE OR NECESSITATE ITS SURRENDER

PROCEEDINGS AGAINST LICENSEE FOR LACK OF PREMISES AND NONUSER OF LICENSE - HEREIN DISCUSSION CONCERNING SUCH PROCEEDINGS PURSUANT TO PARAGRAPH "i" OF R. S. 33:1-31.

February 7, 1946

Louis Wallisch, Jr., Esq.
Counsel, Township of West Milford
Passaic, N. J.

Dear Mr. Wallisch:

I have your letter of February 4th containing the following paragraphs:

"A retail consumption licensee's lease has expired, and he was unable to effect a renewal. He applied to the township committee for a transfer of the license to another place, and after objections filed, the committee denied the same.

"As the matter now stands, the said licensee has no place of business in fact he has taken employment elsewhere. He is no longer in the tavern business; but has made statements that in the future he would resume as soon as he has found a suitable place.

"The committee desires to ascertain whether or not it can compel this person to surrender the license, in view of the fact that he has no place of business."

A licensee who loses possession of licensed premises during the term need not surrender his license. Despite such loss and lack of premises he still holds the license; and although no use could then be made of it in the absence of licensed premises he is entitled to apply, as did the licensee in question, for its transfer to new premises. (See, Re Kappelmann, Bulletin 211, Item 1; Re Strotbeck, Bulletin 236, Item 2; Re Dator, Bulletin 238, Item 8; Re Potanski, Bulletin 279, Item 9; Re Becker, Bulletin 252, Item 11.

Our records show that the Township's amendatory ordinance adopted May 5, 1944, limits the number of plenary retail consumption licenses to thirty five (35), and there are now thirty-five such licenses outstanding in the Township. It is clear, of course, that the ordinance prohibits the issuance of a new plenary retail consumption license in West Milford unless and until the number outstanding is fewer than thirty-five.

The Alcoholic Beverage Law defines "license renewal" as follows:

"l. Any license for a new license term, which is issued to replace a license which expired on the last day of the license term which immediately preceded the commencement of said new license term or which is issued to replace a license which will expire on the last day of the license term which immediately precedes the commencement of said new license term shall be deemed to be a renewal of the expired or expiring license; PROVIDED, that said license is of the same class and type as the expired or expiring license, covers the same licensed premises, is issued to the holder of the expired or expiring license and is issued pursuant to an application therefor which shall have been filed with the proper issuing authority prior to the commencement of said new license term or not later than thirty days after the commencement thereof. Licenses issued otherwise than as above herein provided shall be deemed to be new licenses." (my

underscoring; P.L. 1939, c. 281 as amended by P.L. 1944, c. 187.)

It would appear that under the quoted statutory defination a dispossessed licensee who fails to secure a place-to-place transfer during the license term and fails to regain possession or right to possession of the original premises could not be granted a renewal for the succeeding license year. It is to be understood, of course, that a municipal issuing authority's action upon an application for renewal (as upon an application for a new license or a license transfer) is appealable to the State Commissioner pursuant to Revised Statutes, 33:1-22.

The State Alcoholic Beverage Law (Revised Statutes, 33:1-31) provides that a license may be suspended or revoked for specified causes, including the following:

> "i. Any other act or happening, occurring after the time of making of an application for a license which if it had occurred before said time would have prevented the issuance of the license."

Section 33:1-31 of the Revised Statutes provides, further:

> "In the event of any suspension or revocation of any license by the other (municipal) issuing authority, the licensee may, within thirty days after the date of service or of mailing of said notice of suspension or of revocation, appeal to the commissioner from the action of the other issuing authority in suspending or revoking the license..."

I appreciate the soundness of the general proposition that alcoholic beverage licenses are issued to meet and serve the public convenience and necessity and not to lie unused. But I recall no instance in which a municipal issuing authority has proceeded against a license under the authority granted in hereinabove quoted Paragraph "i" of Revised Statutes, 33:1-31, and on the ground that a licensee, having been dispossessed of premises, failed to secure approved premises upon which to continue operation of the licensed business.

It may be possible that an issuing authority could, pursuant to Paragraph "i" properly suspend a license for the balance of the term in a given situation of nonuser--where, for example, a licensee failed from the start and for a protracted period to operate under his license; or where a license was secured with no purpose or intent to operate a licensed establishment, but solely to effect a monetary profit through a subsequent transfer of the license to another. (In addition to these comments respecting Paragraph "i" of Revised Statutes, 33:1-31, it is pertinent to point out here that: "Fraud, misrepresentation, false statements, misleading statements, evasions or suppression of material facts in the securing of a license are grounds for suspension or revocation of the license.") (Revised Statutes, 33:1-25).

But it is my present thought that action could not properly be taken under Paragraph "i" in a situation where a licensee has secured a license in good faith, has operated thereunder, has been dispossessed of premises, and has made reasonable efforts toward securing approved premises upon which to resume operation of the business. Obviously, and quite apart from any legal questions which might be involved, the matter would be one of common fairness.

Yours truly,

4. APPELLATE DECISIONS - NEW JERSEY TAVERN ASSOCIATION ET AL. V. KEANSBURG AND WIMMER.

NEW JERSEY TAVERN ASSOCIATION and BAYSHORE TAVERN ASSOCIATION, Appellants,	)	On Appeal
v.	)	CONCLUSIONS AND ORDER
MAYOR AND MUNICIPAL COUNCIL OF THE BOROUGH OF KEANSBURG and JULIA WIMMER, t/a Hotel Belvedere, Respondents.	)	

William C. Egan, Esq., Attorney for Appellants.
John M. Pillsbury, Esq., Attorney for Respondent Mayor and Municipal Council of the Borough of Keansburg.
J. Frank Weigand, Esq., Attorney for Respondent-licensee, Julia Wimmer.

BY THE COMMISSIONER:

This is an appeal from the issuance by respondent Mayor and Municipal Council, on June 8, 1945, of a plenary retail consumption license to respondent Wimmer for premises known as the "Hotel Belvedere" for the license period ending June 30, 1945; and from the issuance (renewal) by said respondent, on June 26, 1945, of a plenary retail consumption license for the same premises for the license year 1945-46.

Appellants allege that the action of respondent Borough was erroneous because (1) "there were" (at the time of the granting of the Wimmer license) "already issued and outstanding in the municipality more such licenses than community needs justified"; (2) there were sufficient licenses in the neighborhood; (3) and (4) applicant, in her application for a license, suppressed material facts that should have been disclosed.

Appellants appear to have instituted the appeal at the request of one of their members who operates a tavern in the immediate neighborhood of respondent Wimmer's hotel. This licensee, one of four located in the neighborhood, did not appear and testify.

Appellants' only witness testifying to factual issues is the Clerk of the respondent Borough who states that there has, except during the time the Borough owned the Wimmer premises, always been four licenses in the particular area of the municipality now being considered. The neighborhood is an amusement center and adjacent to a proposed boat harbor site. It is located in a summer resort having a summer population of approximately 70,000. Many of the licensees operate only seasonally. When the Wimmer license was granted there were only two licenses in existence in this section of the Borough. After the Wimmer license was granted, a fourth license was granted in this section for the present fiscal year. Significantly, no appeal was taken from the granting of this license.

This appeal was heard "de novo", State Regulations No. 15, Rule 6. It must be decided squarely on the merits as the same appear in the record developed at the appellate hearing. On this point, however, it is important to note that the respondent municipality in its consideration of the application was performing a quasi-judicial function. Accordingly, its decision is presumably correct until evidence to the contrary is offered. Cf. South Jersey Retail Liquor Dealers Assn. v. Burnett, 125 N. J. L. 105.

Whether or not an additional retail license should be issued and the number of licenses required to meet public convenience and necessity are questions confined in the first instance to the sound discretion of the local issuing authority. R. S. 33:1-19. It is for this reason among others that, where respondent municipality offers some testimony that a public convenience will be served by the issuance of an additional license, the burden of proof (State Regulations No. 15, Rule 6) rests upon the appellant to show affirmatively that such discretion has been abused or unreasonably exercised. Cf. Northend Tavern Inc. v. Northvale & Payne, Bulletin 493, Item 5; Stalker v. Voorhees, Bulletin 689, Item 8.

In the instant case, no proof has been offered by the appellants in support of their third and fourth grounds for reversal. Hence, they must be considered as abandoned. The first and second grounds of appeal are similar in effect and attack the discretionary exercise of the authority of the respondent Borough of Keansburg. Both respondents have offered testimony in support of the action of the Mayor and Municipal Council. In the absence of any testimony by the appellants on the question of public need and convenience, the conclusion of the respondent Borough appears to be reasonable.

My function on appeals of this type is not to substitute my personal opinion for that of the issuing authority, but merely to determine whether reasonable cause exists for its opinion, and, if so, to affirm, irrespective of my personal view on the subject. Rafalowski v. Trenton, Bulltin 155, Item 8; Northend Tavern, Inc. v. Northvale & Payne, supra; Petti v. Bayonne, Bulletin 564, Item 7.

The appellants having failed to sustain the burden of proof in establishing a prima facie case against the respondents, the action of the municipal issuing authority must be affirmed.

Accordingly, it is, on this 8th day of February, 1946,

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

ALFRED E. DRISCOLL
Commissioner

5. APPELLATE DECISIONS - HUDSON BERGEN COUNTY RETAIL LIQUOR STORES ASSOCIATION v. TENAFLY AND FOXEN.

HUDSON BERGEN COUNTY RETAIL LIQUOR STORES ASSOCIATION,

Appellant,

v.

BOROUGH COUNCIL OF THE BOROUGH OF TENAFLY, and WILLIAM J. FOXEN and THOMAS J. FOXEN, trading as Bill and Tom's Liquor Store,

Respondents.

On Appeal

CONCLUSIONS AND ORDER

Samuel Moskowitz, Esq., and Samuel J. Davidson, Esq., Attorneys for Appellant.
Walter R. Huck, Esq., Attorney for Respondent Borough Council.
Abram A. Lebson, Esq., Attorney for Respondents William J. and Thomas J. Foxen.

BY THE COMMISSIONER:

This is an appeal from the action of respondent Borough Council on December 11, 1945, whereby it granted a plenary retail distribution license to respondents William J. Foxen and Thomas J. Foxen for premises located at 24 County Road, Tenafly.

Appellant alleges that respondent Borough Council abused its discretion in issuing the license because the previously existing licensed places in the Borough were sufficient to take care of all the needs of the community.

The sole witness who testified on behalf of appellant was the Secretary of appellant Association. He testified that, at the time the license in question was issued, there were already ten plenary retail consumption licenses and three plenary retail distribution licenses outstanding in the Borough. He further testified that, in his opinion, the population of the Borough is approximately 8,000 and that the section of the Borough in which the Foxen license was granted is predominantly residential.

It is admitted by appellant that both William J. Foxen and Thomas J. Foxen are fully qualified to hold a liquor license.

The Borough of Tenafly is bisected by the Northern Railroad of New Jersey. Apparently the principal business section of Tenafly is located on the West side of the railroad, and two plenary retail distribution licenses have been issued for premises in that section. The Foxen premises are located on the East side of the railroad. On the East side of the railroad there is outstanding a plenary retail distribution license held by one Kempton for a store located on Highwood Avenue approximately 660 feet from the Foxen premises. There is also in existence a plenary retail consumption license issued for premises on Jay Street and approximately midway between the Kempton and the Foxen premises. Jay Street runs at right angles to and connects County Road and Highwood Avenue.

County Road in the vicinity of the Foxen premises contains many

small business places, and it is my conclusion from the evidence that the section is a mixed business and residential section rather than a predominantly residential section as contended by the appellant.

On behalf of respondent Borough Council, Stanley D. Cattelle, a member of the Council, and Glenn H. Campbell, President of the Council, testified that the vote to grant the Foxen license was unanimous and that, in the opinion of the members of the Council, it was felt that the issuance of the additional license to Foxen would be advantageous and would serve the interests of the community. This conclusion seems to be based to some extent upon the fact, as alleged, that Tenafly has a shopping population of from 10,000 to 15,000 persons, many of whom reside in small surrounding communities.

On appeal the burden rests upon appellant to show that the action of respondent was arbitrary or so unreasonable as to amount to an abuse of discretion. The evidence given by the members of the Borough Council discloses that there was a reasonable basis for their belief that an additional license was necessary to meet the public convenience of a large number of people who shop in Tenafly.

Upon the evidence presented, I conclude that the appellant has failed to sustain the burden of proof. I must, therefore, affirm the action of the Borough Council. The result reached herein does not in any way change my personal belief that, in general, there are too many liquor licenses in existence in the State of New Jersey.

Accordingly, it is, on this 11th day of February, 1946,

ORDERED that the action of the Borough Council in granting a plenary retail distribution license to William J. Foxen and Thomas J. Foxen, trading as Bill and Tom's Liquor Store, be and the same is hereby affirmed and the appeal herein be and the same is hereby dismissed.

ALFRED E. DRISCOLL
Commissioner

6. APPELLATE DECISIONS - PASTUCHA AND PASTOR v. LINDEN

AUGUST C. PASTUCHA and PAULA PASTOR, trading as Auggies Rendezvous,

Appellants,

v.

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF LINDEN,

Respondent.

On Appeal

CONCLUSIONS AND ORDER

John L. McGuire, Esq., Attorney for Appellants.
Lewis Winetsky, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This is an appeal from a twenty-day suspension of plenary retail consumption license C-46 held by appellants for premises 126-128 South Wood Avenue, Linden. Upon the filing of the appeal an order was entered, on July 16, 1945, staying the suspension, in accordance with the provisions of R. S. 33:1-31.

Respondent imposed the suspension after it had found appellants guilty in disciplinary proceedings of a charge of selling alcoholic beverages to minors.

The resume of testimony given by witnesses before the local issuing authority, as prepared and reported by the City Clerk and incorporated as part of the minutes of the meeting of respondent Board of April 9, 1945 and May 14, 1945, was admitted in evidence without objection for the purpose of the instant appeal. (Exhibit R-1)

The testimony discloses that a fight occurred on the licensed premises on the evening of December 16th or early morning of December 17th, 1944. One of the participants, Seaman Carmine ---, was summoned to the police court as a result of a complaint made by appellant Pastucha. Neither of the licensees was involved in the affray. Charges were thereafter preferred against appellants by the local issuing authority alleging sale of alcoholic beverages to Edward ---, age 18, and Carmine ---, age 17 years, on November 19, 1944, and to Carmine and his brother Thomas, age 20 years, on December 16th and 17th, 1944.

At the hearing before the municipal issuing authority Carmine testified that he had been visiting appellants' premises for a year and a half and that, on November 19, 1944, he was served whiskey and a beer chaser while his companion Edward --- was served beer. Carmine also stated that he and Thomas were sold whiskey and beer chasers on the evening of December 16th and early morning of December 17th, 1944. Carmine admitted that two or three days after his arraignment in police court, he made a statement that "he would get even" with appellant Pastucha who had filed the complaint. Edward, in the armed forces at the time of the appeal, testified at the hearing below and corroborated the testimony of Carmine relative to their presence in appellants' licensed premises on November 19, 1944. Edward testified on November 19, 1944, he "ordered and received three or four glasses of beer and Carmine ordered whiskey with beer chasers", and that a Frank J. Mannuzza was also present on the evening in question. Frank J. Mannuzza, a witness produced by respondent at the hearing herein, testified that he accompanied Edward to the tavern on one occasion and had seen him in appellants' place of business "two or three times". Thomas did not testify before respondent Board nor at the hearing herein.

Three witnesses produced by appellants, in addition to appellant Pastucha and his two employees, testified that only birch beer was served to Carmine and Thomas while in appellants' tavern on December 16th and 17th, 1944. Pastucha and the bartender, Anatonakas, both deny, however, ever seeing Edward --- on the licensed premises.

In view of Carmine's animosity toward August Pastucha, as evidenced by his statement that he would "get even with him", his testimony alone might not be sufficient to support the finding of the respondent. Edward's testimony, however, has not been discredited in any manner whatsoever. He visited appellants' premises three times prior to November 19, 1944. Appellants' attorney admitted that the boys were in the tavern on different occasions. Although appellant Pastucha and his employee, Anatonakas, may not have observed Edward on the licensed premises on the evening of November 19, 1944, I am satisfied from all the testimony that he was there and that both he and Carmine were served alcoholic beverages.

The hearing on the appeal was "de novo". I am satisfied, however, that there was sufficient evidence before the respondent to

support the finding that on November 19, 1944, alcoholic beverages were sold and served Carmine and Edward. The evidence before me likewise supports that conclusion.

I will give the defendants the benefit of the doubt that exists in my mind with respect to the alleged sales on December 16th and 17th.

In view of the age of the two minors, Carmine 17 and Edward 18, the suspension of twenty days will not be disturbed.

Accordingly, it is, on this 13th day of February, 1946

ORDERED that the twenty-day suspension heretofore imposed against appellants' license by respondent, and held in abeyance pending disposition of this appeal, is hereby restored to commence at 2:00 a.m. February 20, 1946, and to terminate at 2:00 a. m. March 12, 1946.

ALFRED E. DRISCOLL
Commissioner.

7. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES TO MINORS, IN VIOLATION OF R. S. 33:1-77 AND RULE 1 OF STATE REGULATIONS NO. 20 - PREVIOUS RECORD - LICENSE SUSPENDED FOR A PERIOD OF 15 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

Andrew Sandy, Jr.
108 Market Street
Paterson, N. J.

Holder of Plenary Retail Consumption License C-153, issued by the Board of Alcoholic Beverage Control of the City of Paterson.

CONCLUSIONS AND ORDER

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Andrew Sandy, Jr., Defendant-licensee, Pro se.
Anthony Meyer, Jr., Esq., Appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

The defendant pleaded non vult to charges alleging the sale, service and delivery of alcoholic beverages to two minors, in violation of R. S. 33:1-77 and Rule 1 of State Regulations No. 20.

On February 2, 1946, two minor sailors, one aged 19 and the other 20, were each served a bottle of beer by the defendant's son, who was acting as bartender.

In April, 1945, the defendant's license was suspended for ten days upon his non vult plea to a charge of possessing illicit liquor. See Bulletin 664, Item 10. Under the circumstances, a penalty of fifteen days will be imposed for the instant offense. Five days will be remitted for the plea, leaving a net suspension of ten days.

Accordingly, it is, on this 13th day of February, 1946,

ORDERED that Plenary Retail Consumption License C-153, issued by the Board of Alcoholic Beverage Control of the City of Paterson to Andrew Sandy, Jr., for premises 108 Market Street, Paterson, be and the same is hereby suspended for a period of ten (10) days, commencing at 3:00 a. m., February 18, 1946, and terminating at 3:00 a. m., February 28, 1946.

ALFRED E. DRISCOLL
Commissioner

8. APPELLATE DECISIONS - NEW JERSEY TAVERN ASSOCIATION v. SPARTA TOWNSHIP AND PANKUCH

NEW JERSEY TAVERN ASSOCIATION,
Appellant,
v.
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF SPARTA AND JOHN ALFRED PANKUCH, t/a Mohawk Inn,
Respondents.

On Appeal

CONCLUSIONS AND ORDER

William C. Egan, Esq., Attorney for Appellant.
Vito A. Concilio, Esq., Attorney for Respondent John Alfred Pankuch.
Dolan and Dolan, Esqs., by William A. Dolan, Esq., and John T. Madden, Esq., Attorneys for Respondent Township Committee.

BY THE COMMISSIONER:

Appellant appeals from the action of respondent Township Committee, taken on August 7, 1945, whereby it granted a plenary retail consumption license to respondent Pankuch for premises known as Mohawk Inn, Lake Mohawk, Sparta Township. Numerous grounds of appeal were set forth in the petition of appeal. Many of these grounds were either abandoned at the hearing or no substantial proof was presented with reference thereto. The only issue in the case is whether or not respondent Township Committee abused its discretion by amending an existing ordinance to increase the number of permissible plenary retail consumption licenses from thirteen to fifteen and thereafter issuing the license in question to respondent Pankuch.

The evidence shows that on August 23, 1944, respondent Township Committee adopted an ordinance limiting the number of plenary retail consumption licenses to thirteen. On July 24, 1945, when thirteen licenses of this type were in existence, the ordinance was amended to provide for fifteen plenary retail consumption licenses. Thereafter the Township Committee issued one license to another individual and no appeal has been taken from the issuance thereof. The Township Committee also issued the license in question to respondent Pankuch.

The permanent population of the Township of Sparta according to the 1940 Federal census, was 1,729, and it is apparent that no additional licenses are necessary to take care of the needs of the permanent population. However, Lake Mohawk is a summer resort and the evidence discloses that, during the summer season, this section of the Township has a population of more than 4,000. Prior to the issuance of the Pankuch license there were three premises licensed to sell alcoholic beverages for consumption located in the center of the Lake Mohawk business district and in close proximity to Mohawk Inn. The objectors contend that these existing licenses were sufficient to take care of the needs of the summer residents and permanent residents.

Councilman VanSant testified that the existing licensees in the Mohawk Lake area close their premises on certain weekdays during the summer season, and that there was a greater influx of people during the past summer than there was during previous summers "due to the gas rationing loosening up". Councilman Comes offered similar testimony, stating that it was the unanimous opinion of the members

of the Township Committee that there was need for the additional license issued to respondent Pankuch. The evidence shows that the other licensees in the Lake Mohawk area did close their premises on certain weekdays, even during the summer season.

The change in the policy adopted only a year earlier, as expressed by the amendment to the ordinance in July 1945, if completely unexplained, might naturally raise an inference that the action of the Township Committee was unreasonable. However, the evidence given by the members of the Township Committee discloses that there was a reasonable basis for their belief that an additional license was necessary because of the increase in number of summer residents and summer visitors to Lake Mohawk and the manner in which the other licensees of the Lake Mohawk area operate their respective businesses. Nothing has been presented on the appeal indicating that the members of the Township Committee acted other than with proper motives.

The Commissioner should and does take notice of the particular circumstances surrounding each application, as well as the nature of the area in which the licensed premises are situated. It is not my function, on appeals of the character now before me, to substitute my opinion for that of the issuing authority but, rather, to determine whether the decision of the latter may reasonably be supported and, if so, to affirm its action.

Appellant having failed to sustain the burden of proving that the action of the issuing authority was either arbitrary or unreasonable, and there being some evidence of public need or convenience to be served by the license, respondent's decision to issue and grant a plenary retail consumption license to respondent John Alfred Pankuch will be affirmed.

Accordingly, it is, on this 14th day of February, 1946,

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

ALFRED E. DRISCOLL
Commissioner

9. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES BELOW FAIR TRADE MINIMUM, IN VIOLATION OF RULE 6 OF STATE REGULATIONS NO. 30 - LICENSE SUSPENDED FOR A PERIOD OF 10 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

Mack Drug Co., Inc. of Hackensack
197-197A Main Street
Hackensack, New Jersey

Holder of Plenary Retail Distribution License D-14, issued by the City Council of the City of Hackensack.

CONCLUSIONS AND ORDER

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Seymour Klein, Esq., Attorney for Defendant-licensee.
Harry Castelbaum, Esq., Appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Defendant, a reputable licensee, pleads non vult to a charge

that it sold a 4/5 quart bottle of J. & F. Martell Cognac below the minimum consumer price, thus violating Rule 6 of State Regulations No. 30, the "Fair Trade" regulations.

On December 11, 1945, the licensee sold to an agent of the State Department of Alcoholic Beverage Control a 4/5 quart bottle of J. & F. Martell Cognac for the price of $7.70. The minimum retail (consumer) price for this item, as contained in the "Minimum Resale Price Supplement", effective May 21, 1945, was $8.12. See Bulletin 668.

Defendant seeks to excuse the violation with the explanation that it was "an error on the part of an employee", and that the violation was unintentional and inadvertent. This explanation, while carrying a sympathetic appeal, does not excuse the violation. Defendant is required by State Regulations No. 30 to sell its merchandise at prices not less than those listed in the then current (for this item) "Minimum Resale Price Supplement", as published in Bulletin 668, on May 18, 1945, by the Department of Alcoholic Beverage Control. This supplement contains a notice, as does all official price lists, in part, as follows: "Until official notice of any change in price lists is published in a later bulletin issued by the Department, retail licensees are prohibited (unless otherwise authorized by special permit) from selling the described products except in accordance with the price lists appearing herein." The prices are listed in dollars and cents and require no calculation or effort by the licensee, except to read and follow.

Retailers are required to keep all official price lists and supplements on their counters, available for their use and the convenience of the public. Licensees must not depend upon any other source, including their own calculation, for resale prices of merchandise subject to "Fair Trade" regulations.

I find the defendant guilty.

The defendant has no prior adjudicated record. I shall suspend the license for a period of ten days, less five days for the plea, leaving a net suspension of five days. Cf. Re Gold's Drug Stores, Bulletin 640, Item 9.

Accordingly, it is, on this 13th day of February, 1946,

ORDERED that Plenary Retail Distribution License D-14, issued by the City Council of the City of Hackensack to Mack Drug Co., Inc. of Hackensack, for premises 197-197A Main Street, Hackensack, be and the same is hereby suspended for a period of five (5) days, commencing at 9:00 a. m., February 18, 1946, and terminating at 9:00 a. m., February 23, 1946.

ALFRED E. DRISCOLL
Commissioner

10. APPELLATE DECISIONS - SANNINO v. UPPER TOWNSHIP AND CLEAK.

HARRY SANNINO,

Appellant,

v.

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF UPPER, and THOMAS E. CLEAK, trading as Triton Bar,

Respondent.

On Appeal

CONCLUSIONS AND ORDER

J. Bernard Rogovoy, Esq., Attorney for Appellant.
Charles A. Bonnell, Esq., Attorney for Respondent Township of Upper.
Benjamin M. Cohen, Esq., Attorney for Respondent Thomas E. Cleak.

BY THE COMMISSIONER:

This is an appeal from a transfer by the respondent Township Committee of the plenary retail consumption license of Thomas E. Cleak, from premises on State Highway Route No. 47 to premises at the intersection of State Highway Route No. 50 and Marmora Road, Township of Upper.

The petition of appeal states as the only reason for reversal that the action of respondent Township Committee "was erroneous in that it was arbitrary, unreasonable and discriminatory".

The testimony of appellant and his two sons discloses that Harry Sannino was Cleak's landlord and owned the premises from which the license was transferred. No arbitrary, unreasonable or discriminatory action by the issuing authority is evident in permitting the transfer from premises owned by appellant. A transfer of a license may not be refused merely because the landlord objects. To hold otherwise would be to serve the private interests of property owners by giving them a strangle hold on their tenants and permitting them to exact exorbitant rents or to demand a price based upon a value created by a license specifically having no value as property. R. S. 33:1-26. (Cf. Metropolitan Liquor Corporation v. Jersey City, Bulletin 645, Item 1.) The desire of a property owner to perpetuate a license for his premises is not a valid reason for the refusal of a place to place transfer.

The only other suggestion of error in the granting of the transfer is that in 1934 the then issuing authority (not the Township Committee as now) denied a license for the premises herein upon its finding that the premises as then existing were a traffic hazard. On appeal the action of the issuing authority was affirmed. See Reed v. Way, Bulletin 78, Item 2.

Whether or not a traffic hazard exists under present conditions is a question of fact. The question must be determined, as of today, especially when as here it appears that there has been substantial changes in the physical condition of the premises. There is no dispute that the traffic hazard question was considered by the respondent Township Committee. Their approval of the transfer was predicated upon certain changes that have been or are about to be made in the physical layout of the property. There is uncontradicted testimony that in the opinion of the county engineer these changes

are calculated to remove the former traffic hazard. At the time of the decision in Reed v. Way, supra, the building was practically in the apex of the acute angle formed by the intersection of State Highway Route No. 50 and Marmora Road and the balance of the lot was covered by trees. Now the building has been moved 118 feet southeast of its former location. The building is now over 140 feet from the apex and 40 to 50 feet from the right of way lines of the two roads and 63 and 75 feet, respectively, from the paved portion of these roads. The trees have been removed, the property graded and driveways provided to make a large parking area.

In all appeals the burden of proof is on appellant. Rule 6 of State Regulations No. 15. In Reed v. Way, supra, the other issuing authority had determined that the premises as then existing were a traffic hazard. Sufficient proof to overcome the presumption against error below was not presented.

In the present case, because of the substantial changes in the physical aspects of the premises, the action of the Township Committee based upon its determination that the transfer did not create a traffic hazard does not appear to be unreasonable or capricious. Neither is there proof in the record supporting the charge that the action of the Township Committee approving the transfer of the Cleak license to premises at the intersection of State Highway Route No. 50 and Marmora Road was arbitrary or discriminatory.

The action of the Township Committee is affirmed.

Accordingly, it is, on this 18th day of February, 1946,

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

Alfred E. Driscoll

Commissioner.