Mrs. Dora P. Rothschild

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

BULLETIN 1450 May 29, 1962

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

BULLETIN 1450 May 29, 1962

1. APPELLATE DECISIONS - GAYLORD v. SOUTH BRUNSWICK, ET AL.

JULES GAYLORD, Appellant, v. TOWNSHIP COMMITTEE OF THE TOWNSHIP OF SOUTH BRUNSWICK, AND NORMAN H. FIELDING & GEORGE A. ABOUZEID, Respondents.	)	ON APPEAL CONCLUSIONS AND ORDER

Samuel Moskowitz, Esq., and Samuel J. Davidson, Esq., Attorneys for Appellant.
David M. Greene, Esq., Attorney for Respondent Township Committee.
Arnone and Zager, Esqs., by Abraham J. Zager, Esq., Attorneys for Respondents Fielding and Abouzeid.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of respondent Committee in approving by a two-to-one vote respondents Fielding and Abouzeid's application for a new plenary retail distribution license for premises 3578 Lincoln Highway at the Kendall Park Shopping Center, South Brunswick.

"The petition of appeal alleges that the action of the respondent Committee was erroneous for the following reasons:

a. The license was issued in violation of R.S. 33:1-25 and the rules and regulations of the Division of Alcoholic Beverage Control.

b. Respondent Committee's action was both arbitrary and unreasonable and constituted an abuse of discretion.

c. No inquiry was made to determine whether the issuance of the said license would 'serve the greatest need and necessity of the community.'

"For a proper understanding of the objections advanced by the appellant, it is perhaps advisable to set forth the events which occurred previous to approval of application filed by respondent licensees.

"It appears that twenty applications were filed for the license in question. At a meeting on October 3, 1961, of respondent Committee, the Chairman thereof announced that, after reviewing the various applications for the license, it was ascertained that only five applicants appeared qualified. After lengthy discussion of the respective qualifications of each of the five applicants aforementioned, the proposed location and the assurance that the

license would not be issued for speculative purposes, the Chairman stated that the action of the respondent Committee 'would be deferred at this time so that a further study and investigations could be made.' Thereafter, at a subsequent meeting on December 5, 1961, the application of respondent licensees was approved for premises 3578 Lincoln Highway.

"Appellant herein was one of the unsuccessful applicants.

"On two occasions during the time the matter was pending before respondent Committee, the respondent licensees, by letter, informed the said Committee of changes in addresses for the proposed premises. Appellant claims that, since the changes of address for the proposed premises (especially the last one to which location the application for the license was approved) was not verified with the same solemnity as the application itself, the respondent Committee lacked jurisdiction to approve the application and, thus, its action should be reversed.

"In Lozowick & Denes et als. v. Newark et als., Bulletin 1183, Item 1, the issuing authority permitted the application for the transfer to be amended to provide another entrance to the premises sought to be licensed so that the distance between the entrance of the old location and that of the new location would be within 750 feet of each other, pursuant to the requirements of a footage ordinance. On appeal it was ruled that, since the change of entrance at the new location had not affected any of the rights of potential objectors, the permission given by the respondent Board to amend the application for transfer was not improper. While it is true that all questions are material and must be answered accurately, the method used by the respondent licensees to amend the application was a substantial compliance with the statutory requirement. Moreover, respondent Committee was well aware of the true facts and could not have been misled. I might also add that respondent licensees re-advertised their notice of intention wherein the issuance of the license was requested for premises 3578 Lincoln Highway. I find no error on the part of the respondent Committee in permitting the amendment in question under the circumstances here involved. It might also be noted that R.S. 33:1-34 provides that, whenever any change shall occur in the facts as set forth in any application for license, the licensee shall notify the issuing authority in writing of such change within ten days after its occurrence. This section of the law does not provide that the notice in writing must be verified.

"I have considered the other reasons advanced by the appellant for reversal of the respondent Committee's action but fail to find any facts which would warrant the reversal of respondent Committee's action. There was absolutely no evidence presented which might indicate in any way whatsoever that any member of the said respondent issuing authority who voted in this matter was improperly motivated. In view of the many applicants and the number of meetings held to consider to whom the license should be issued, I am satisfied that in all respects proper consideration was given by the members of the respondent Committee before action was taken in the case.

"I conclude that appellant has failed to sustain the burden of establishing that the action of the respondent Committee was arbitrary, unreasonable, an abuse of discretion or that there was prejudice against any one on the part of the members thereof. Rule 6 of State Regulation No. 15. I recommend, after careful examination of all of the evidence adduced herein, that the action of the respondent Committee in approving the issuance of the license to respondent licensees for the premises in question be affirmed,

and that the appeal filed herein be dismissed."

Pursuant to the provisions of Rule 14 of State Regulation No. 15, appellant's attorneys filed exceptions to the Hearer's Report submitted herein, together with written argument thereto. Respondent licensees' attorneys filed answering argument to that filed by appellant's attorney as aforementioned.

Having carefully considered the entire record, including the testimony taken, the exhibits introduced into evidence at the hearing of the appeal, the Hearer's Report, the exceptions and the respective arguments of the attorneys with reference thereto, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein. Hence, I shall enter an order in accordance with the Hearer's recommendation.

Accordingly, it is, on this 4th day of April, 1962,

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

WILLIAM HOWE DAVIS
DIRECTOR

2. NEW LEGISLATION - MINORS - POSSESSION OR CONSUMPTION OF ANY ALCOHOLIC BEVERAGE BY A MINOR IN A PUBLIC PLACE OR PLACE OF PUBLIC ASSEMBLY OR IN A MOTOR VEHICLE PROHIBITED - PENALTIES, INCLUDING SUSPENSION OR REVOCATION OF DRIVING PRIVILEGE.

Senate No. 199 was approved by the Governor on April 25, 1962 and thereupon became Chapter 36 of the Laws of 1962, effective immediately. The act, which was an amendment of the Disorderly Persons Law (N.J.S. 2A:170-54.1, set forth in Bulletin 1204, Item 5) and not of the Alcoholic Beverage Law, amends the cited section to read as follows:

> "Any person under the age of 21 years who knowingly shall possess or consume any alcoholic beverage in any public place or place of public assembly or in any motor vehicle is a disorderly person and shall be punished by a fine of not more than $50.00, or be imprisoned in the county jail for not more than 30 days, or both, and whenever any such offense is committed in a motor vehicle, the magistrate may, in addition to said penalty or penalties, or in lieu thereof, suspend or revoke the driving privilege of any person found guilty thereof. There shall be a rebuttable presumption against each and every person charged with the offense of possession of alcoholic beverage in a motor vehicle that he was knowingly in possession thereof.
>
> "Nothing in this section shall apply to possession of alcoholic beverage by any such person while actually engaged in the performance of employment pursuant to an employment permit issued by the director of the division of alcoholic beverage control, or for a bona fide hotel or restaurant, in accordance with the provisions of section 33:1-26 of the Revised Statutes."

WILLIAM HOWE DAVIS
DIRECTOR

Dated May 7, 1962

3. APPELLATE DECISIONS - UNION COUNTY RETAIL LIQUOR STORES ASSOCIATION v. PLAINFIELD, et als.

UNION COUNTY RETAIL LIQUOR STORES ASSOCIATION, A CORPORATION OF NEW JERSEY,	)	
Appellant,	)	ON APPEAL CONCLUSIONS
v.	)	AND ORDER
COMMON COUNCIL OF THE CITY OF PLAINFIELD, MULLIGAN'S BAR, INC., AND JOSEPH A. GABRUK, t/a LEES BAR & LOUNGE,	)	
Respondents.	)	

Kein, Scotch & Pollatschek, Esqs., by Julius R. Pollatschek, Esq., Attorneys for Appellant.
Sachar, Sachar & Bernstein, Esqs., by Edward Sachar, Esq. Attorneys for Respondent Common Council.
Dughi & Johnstone, Esqs., by Irvine B. Johnstone, Jr., Esq., Attorneys for Respondent Mulligan's Bar, Inc.
John P. Romer, Esq., Attorney for Respondent Joseph A. Gabruk.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of respondent Common Council of the City of Plainfield (hereinafter referred to as Council) whereby on September 5, 1961, it granted the application for a person-to-person and place-to-place transfer of a plenary retail consumption license held by Joseph A. Gabruk, t/a Lees Bar & Lounge, from premises at 137-139 North Avenue, Plainfield, to Mulligan's Bar, Inc., for premises at 1405 (also known as 1451) South Avenue, Plainfield.

"The petition of appeal alleges that the action of the respondent Council was erroneous and should be reversed for reasons which may be summarized as follows:

(a) There was no public convenience or necessity served by the said transfer.

(b) It will create a traffic hazard.

(c) The authorizing resolution is legally defective and void.

(d) The proposed new building does not conform with the sanitary code of the city.

(e) Said transfer is socially undesirable.

(f) The license transferred does not contain a 'broad package privilege'. The applicant Mulligan's Bar, Inc. really intends to operate the same as a liquor store, and will use a bar operation as a 'subterfuge'.

(g) The transfer will create an additional liquor store in the City of Plainfield, thus creating an additional such store in excess of those authorized by the limitation statute.

(h) On December 5, 1960, an application for a transfer of said license to another location was denied by this Council and, therefore, the transfer of this license in a similar location constitutes aribtrary discrimination and an abuse of discretion.

(i) Council's action was arbitrary, capricious and constituted an abuse of discretion.

"Respondent Mulligan's Bar, Inc., in its answer, admits the allegations contained in paragraph one of the petition, but generally denies the remaining allegations of the petition of appeal and sets forth two separate defenses:

(a) That the action of the Council was proper, based upon the evidence presented and was within its reasonable discretion.

(b) That the action of the Council was in accordance with the desire and convenience of the City of Plainfield.

"The respondent Council filed substantially the same defense and includes the following additional separate defenses:

(a) That in its opinion, the said transfer did not create a traffic hazard and was in keeping with the general character of the neighborhood into which said transfer was made.

(b) That there were no similar existing licenses in the vicinity of the premises to which this license was transferred.

(c) An investigation and report by its police department indicated that such transfer would be of benefit to the community.

(d) The transfer would result in the elimination of an undesirable type of licensed premises and the creation of a new, more attractive licensed premises.

(e) The transfer would reduce the concentration of such licenses in the business section and serve an area not presently being served with this type of license.

"The respondent Joseph A. Gabruk also filed an answer generally denying the allegations of the petition of appeal and setting up, in his defenses, that the Council acted reasonably, with proper use of discretion and in accordance with the desire and convenience of the residents of this municipality. The appeal before this Division was heard de novo with full opportunity for counsel to present testimony under oath and cross-examine the witnesses. Rule 6 of State Regulation No. 15. Shapiro v. Long Branch, Bulletin 901, Item 2.

"At the outset of this hearing, counsel for Joseph Gabruk, the transferor, was advised that the transferor is neither a necessary nor a proper party to these proceedings. Bartges et als. v. Atlantic City et als., Bulletin 1372, Item 1. However, he was permitted to assist counsel for the other respondents who conducted

the actual presentation of respondent's case.

"For the purpose of disposition of this appeal, it will be appropriate to discuss the facts as they apply to the substantive arguments raised by the appellant. On August 8, 1961, respondent Mulligan's Bar, Inc. made application before the respondent Council for a person-to-person and place-to-place transfer of plenary retail consumption license No. C-17, theretofore issued to Joseph Gabruk, t/a Lees Bar & Lounge, 137 North Avenue, in the City of Plainfield. On September 5, 1961 the said application was granted, subject to the condition that the proposed premises comply with all appropriate building code and zoning ordinance requirements.

"The plans for the proposed building (and the amended plans which were first presented at this hearing) were introduced into evidence. They reflect a cinder-block, brick-veneer, glass and aluminum building to be erected on the east side of and adjacent to a large supermarket at 1408 South Avenue, Plainfield. Under the amended plan, this facility will contain a sales area of 23 feet by 50 feet, a 14 foot bar, fully equipped with eight to ten stools, and other conveniences and equipment usually component of this type of licensed premises. In the sales area, there will be display shelves and packaged goods will be dispensed therefrom. This operation will be under the control of a full-time bartender or bartenders, in accordance with the needs of this operation.

"The appellant contends (a) that the action of the governing body was erroneous because respondents failed to establish a need for additional liquor outlets in the vicinity of the proposed licensed premises, and public convenience and necessity were already being adequately serviced.

"To support this allegation, the appellant called Robert C. Maddox, a councilman, who participated in the Council's decision and voted to permit the transfer. He was asked how it was that he voted to deny an application for a transfer to 1344 South Avenue, nine months prior to September 5, 1961, and then voted in favor of this transfer on September 5, 1961. His explanation: 'Well, I felt this way in the change in the vote, which goes to answer your question, sir, looking at the city's map, which was introduced at that time, with the existing establishments in the City of Plainfield, that this area here did not have such a facility that would be offered by the transfer; and that with the subsequent change in the location and the subsequent change in the parking situation, that that was the basis on my change in vote to allow the transfer in the September meeting'. He reaffirmed the basis for his decision as that grounded upon public convenience and necessity being adequately served in the area. He also explained that this location was in an 'industrial zone', as compared to a 'special light manufacturing zone' in the location hereinabove referred to. This location was not surrounded by private residences and, in his opinion, would not interfere with the privacy of residents in the area. An additional factor that was taken into consideration was the present availability of adequate parking facilities.

"Councilman Orestes Cembrola, testifying on behalf of the appellant, testified that he was one of three out of nine councilmen who voted to deny this application for the reason that he was not satisfied with the adequacy of the parking spaces, nor was he convinced that the respondent Mulligan's bar intended to conduct a consumption business rather than a package business. (It should be borne in mind that this license authorizes the holder thereof to conduct both types provided package goods are sold in the bona fide barroom.) He also felt that there were adequate facilities in the

area and, thus, that this would not serve public convenience and necessity.

"On cross-examination, he admitted that he was aware of a local police report which recommended the granting of the said application; but he insisted that this did not have any influence on his decision.

"Sergeant Daniel S. Hennessey of the Plainfield Police Department testified that, as a result of an investigation made by the Police Department, a report was issued to the effect that this transfer would serve the best interests of the community. He stated that the present premises of the transferor are old and shabby, located in a congested area in the business district, with no parking facilities; that the new location would be located in a well-constructed premises with adequate parking, and would be a great convenience to persons shopping in that area. The Police Department definitely recommended the approval of this application.

"Charles Clark, a real estate and insurance broker, testifying on behalf of the respondent, stated that he has been engaged in the real estate business in this municipality since 1935 and is thoroughly familiar with the neighborhood wherein the proposed new quarters are to be located. This witness is a person of impressive background and substantial experience in his field. He prepared a land-use map of this area and convincingly demonstrated the desirability of this new location. He pointed out that this was an 'industrial' zone, as distinguished from the 'light manufacturing' zone at 1344 South Avenue, and is therefore more suitable for this use: 'I don't know what other zone or where else you could put it that it would have less effect on the adjoining properties, and I think the operation would serve a need in the east end of the town where we do not have it now'. He further testified that, in his opinion, there was no undue concentration of bars in this area and it would serve a definite need.

"Consideration of undue concentration of licensed premises in the area, and possible traffic hazards, are matters entrusted to the sound discretion of the issuing authority. Miles et al. v. Paterson et al., Bulletin 1306, Item 2; Shiloh Baptist Church v. Atlantic City et al., Bulletin 1387, Item 2. The question as to whether premises should be permitted in a section of a mixed residential and business character is primarily to be determined in the sound discretion of the local issuing authority. Londa v. Elizabeth et als., Bulletin 901, Item 1.

"The question whether a license should not be transferred to a particular location is a matter confided to the sound discretion of the issuing authority. The burden of showing that the issuing authority abused its discretion rests with the appellant. The Great Atlantic and Pacific Tea Company v. Passaic, Bulletin 1196, Item 1; Buyer v. West Orange, Bulletin 1205, Item 2.

"In this case, it is clearly a matter of judgment and discretion on the part of the respondent Council. That there was a difference of honest opinion was reflected in the vote, which was six to three for approval of the transfer. The function of the Director on appeal is not to substitute his opinion for that of the issuing authority, but rather to determine whether reasonable cause exists for its opinion and, if so, to affirm irrespective of his personal views. Fanwood v. Rocco, 59 N.J.S. 306, 157 Atl. 2nd 712, aff'd. 33 N.J. 404, 165 Atl. 2nd 183. Guarino v. Newark et al., Bulletin 1069, Item 2; Hudson-Bergen County Retail Liquor Stores Association v. North Bergen et al., Bulletin 997, Item 2. I am therefore persuaded that the respondent Council, in its discretion, reasonably determined that public convenience and necessity would be served by the grant of this transfer.

"The appellant next contends (b) that the establishment of a liquor outlet at the proposed new premises will create a traffic hazard. There is no affirmative evidence in this case to sustain this allegation. The testimony of Councilman Maddox clearly delineates the opinion of the majority of the councilmen to the effect that the question of traffic congestion was resolved in their view in the following language: 'We gave consideration to traffic congestion at that time, but we felt, at least I felt, that with the location... in view of the fact that they had an area they could pull in and out of the way there wouldn't be the traffic problem...'. He further testified that there were about 250 parking spaces available for this facility.

"In addition, the police department made an investigation of the traffic situation and confirmed the views expressed by Edward Gettis, the president of the transferee Mulligan's Bar, Inc., that there was no traffic problem or traffic hazard created by the proposed transfer.

"Appellant next contends (c) that the resolution is legally defective and void. This contention must be rejected because there is not the slightest scintilla of evidence in this case in support thereof.

"A condition imposed upon the granting of this application is that the proposed new building will conform with the sanitary code (d) and all other municipal regulations of the City of Plainfield. Thus, appellant's contention that it does not conform is without merit. Cf. Lubliner v. Board of Alcoholic Beverage Control of the City of Paterson, 59 N.J.S. 419 (App. Div. 1960) aff'd. 33 N.J. 428 (1960).

"With respect to paragraph (e) hereinabove relating to the contention that the granting of said transfer is socially undesirable, I want to make the further observation that I have been impressed with the testimony and the attitude of Edward Gettis, president of Mulligan's Bar, Inc., regarding his proposed operation of the new premises. He impressed me as being a person of integrity and substance, successful in his operation of several supermarkets and apparently dedicated to a high standard of operation of these premises. It is clear that the present operation of this license at the old address is less desirable both in its physical facility and method of operation than that contemplated for the proposed new location.

"Sergeant Hennessey testified that the new location would serve an area not now served by this type of license and would be a great convenience to residents of that area as well as out-of-towners. It was his opinion, and it apparently reflects the judgment of the law enforcement agency of that community, that the granting of this application would be in its best interest and socially desirable. It is my conviction, therefore, that respondent Council had a right to find, on the basis of the evidence presented, that the granting of the transfer was socially desirable and in the best interest of the community. Trinity Methodist Church v. Rahway et al., Bulletin 972, Item 3; Hudson-Bergen County Retail Liquor Stores Association v. North Bergen et al., supra.

"In paragraph (f), the appellant contends that the applicant Mulligan's Bar, Inc. really intends to operate a liquor store without broad package privileges and that the proposed bar 'constitutes a subterfuge'. There is nothing in the evidence which substantially supports this allegation. The contrary appears to be the fact. It is clear on the basis of the testimony of Gettis, the president of Mulligan's Bar, Inc., that package goods for off-premises consumption will be sold in the same sales area and in the same room in which the

bar is located. This is the only real distinction between this type of license and the license which permits the sale of package goods in a separate but adjacent store. It has been pointed out, and properly so, by Council, that the annual license fee for this type of operation is clearly in excess of the package goods license, i.e., it is $1200 for this license as against $500. Certainly, the licensee has a legal right to dispense package goods in his proposed facility, and this cannot constitute a valid objection to approval of this application.

"The evidence clearly shows that the operation is bottomed upon a retail consumption operation. The size of the bar and the type of equipment planned by the transferee reflects an intention to provide the standard type of retail consumption operation. Mr. Gettis was quite forthright in stating that he intends to make this business a success, whichever department appears to meet the greater demand, 'If it happens to be the bar that is more successful, I will extend that. I am only interested in success'. I cannot agree that this is a subterfuge. The operation will be in accordance with the specific requirements of this license and should not serve as a bar to the approval of this application.

"In view of the expression by the transferee, I do not conceive that the operation of the said licensed premises under a plenary retail consumption license permitting the sale of package goods will result in an additional liquor store in the City of Plainfield as advocated in paragraph (g) of appellant's petition.

"In paragraph (h) appellant contends that on December 5, 1960, an application for the transfer of said license from 137-139 North Avenue to 1344 South Avenue was denied by the city. 1344 South Avenue is approximately two-tenths of a mile from 1451 South Avenue. Appellant alleges that there was no change of this area wherein both of the above premises are located, and, thus, the granting of this application changes an established city policy and constitutes arbitrary discrimination.

"It was pointed out by Charles Clark, a witness testifying on behalf of the respondents, as referred to hereinabove, that these two areas are entirely distinct areas and cannot be treated in the same manner. According to his testimony, 1344 South Avenue is in a 'special light manufacturing' zone. The first paragraph of the zoning code describes that zone as follows: 'This zone was created primarily to encourage the most useful occupation of the land, but is distinguished from the light manufacturing zone because of the special consideration given to the adverse effect it might have on the adjoining residential property'. It is thus apparent that within the contemplation of this statute, the location of a tavern at that address would be undesirable because it would impose upon a residential area and be completely surrounded by private residences. On the other hand, according to Clark, the present proposed location is in an 'industrial' zone and would have a minimum effect on adjoining property. Clark stated further that it would be socially desirable and would serve the need in the east end of the town where no such facility presently exists. His testimony was supported by Sergeant Hennessey and reflected the thinking of the majority of the Council when this application was under consideration. Thus, I am persuaded that this factor was important in the final determination with respect thereto.

"Finally, in paragraph (i), appellant alleges that the respondent Council was unjust, arbitrary and capricious and its action constituted an abuse of discretion. I can conceive of no case where a matter was more carefully and more circumspectively considered as

was this application. The fact is that the Council did not agree unanimously, but voted in favor of the granting of this application by a six to three vote. The transfer of a liquor license is not a right inherent in the license, but is rather a privilege which the issuing authority may grant or deny in the exercise of its reasonable discretion, and when so exercised, its action will be affirmed. Buyer v. West Orange, supra; Morris County Tavern Owners Association et al. v. Parsippany-Troy Hills et al., Bulletin 1318, Item 1.

"In all of these appeals to the Director, the burden of proof to establish that the action of respondent is erroneous rests with the appellant. Rule 6 of State Regulation No. 15. The evidence herein does not indicate any arbitrary or capricious action, nor is there any indication of improper motivation on the part of the members of the respondent Council. In my judgment, appellant has failed to sustain the burden of proof resting upon it. Prior and Kesse v. Clifton et al., Bulletin 1072, Item 2.

"I therefore recommend that the action of the respondent Council be affirmed and the appeal herein be dismissed."

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

Having carefully considered all the facts and circumstances herein, I concur in the Hearer's findings and conclusions and adopt his recommendations.

Accordingly, it is, on this 4th day of April 1962,

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

WILLIAM HOWE DAVIS
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - SALE TO INTOXICATED PERSON _ LICENSE SUSPENDED 15 DAYS.

In the Matter of Disciplinary Proceedings against	)	
JAMES B. SULLIVAN t/a SEA BRIGHT INN 1030-32 Ocean Avenue Sea Bright, N. J.	)	CONCLUSIONS AND ORDER
Holder of Plenary Retail Consumption License C-4, issued by the Mayor and Council of the Borough of Sea Bright.	)	

James F. McGovern, Jr., Esq., Attorney for Licensee.
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"Licensee pleaded not guilty to the following charge:

'On Wednesday night, October 4, 1961, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, directly or indirectly, to a person actually or apparently intoxicated and allowed, permitted and suffered the consumption of such beverages by such person in and upon your licensed premises; in violation of Rule 1 of State Regulation No. 20.'

"Two ABC agents testified with respect to an alleged sale of alcoholic beverages to a person actually or apparently intoxicated. The theme of their testimony is as follows:

"They entered the licensed premises on October 4, 1961, at about 9:20 p.m. At about 10:30 p.m. they observed a male enter the said premises and he appeared to be intoxicated. He swayed and staggered as he walked to a seat at the northeast corner of the bar. He was served a scotch and soda by the bartender (later identified as William A. Devine) and paid sixty cents therefor, with a dollar bill, and was given forty cents change which remained on the bar. Shortly thereafter this male person got up from his seat and walked to the telephone booth, swaying from side to side. The agents observed that his eyes were very glassy; that he mumbled as he talked, and that he walked with some difficulty. When he got to the booth, which was located near the southeast corner of the bar, he examined the telephone book for about ten minutes and then entered the telephone booth. He started to dial but then stopped and went back to the telephone book. After referring to this book a few minutes, he re-entered the 'phone booth and proceeded to dial again. This procedure was repeated when he emerged the last time from the telephone booth and walked in a swaying manner to the southwest corner of the bar and sat down. When the bartender approached him, he accused the bartender of taking his drink and money, and was then informed that both the drink and the money were at the place where he had originally been seated. He then proceeded to his original seat and consumed the drink. Agent D then observed to the bartender, 'He's in good shape, isn't he?', to which the bartender replied, 'He's loaded but he isn't driving; he takes a taxi when he gets in that condition.'

"At about 11 p.m., according to the testimony of these agents, this male person again proceeded to the telephone booth, walking thereto in a swaying and unsteady manner. He emerged therefrom, went to the telephone book, and shortly thereafter re-entered the telephone booth. After he left the 'phone booth he proceeded again to the far corner of the bar and the bartender then brought the remaining portion of his drink and money from his original seat to him. He consumed the drink and ordered another one which was served to him.

"The agents then observed this person leave his seat, stagger to the front of the premises toward a cigarette machine and, without purchasing any cigarettes, finally swayed to the telephone booth. He went into the telephone booth, made no attempt to make any calls and emerged therefrom and returned to the bar. His eyes at this time appeared increasingly glassy and he continuously mumbled under his breath. He then ordered another drink and the bartender told him to get his money up, saying 'I'll give you another drink but get your money up or I'll throw you out the door.' He produced another dollar bill and was thereupon served with a scotch. Agent D then asked the bartender, 'Are you sure he's not driving?', to which the bartender replied, 'I'm positive. He never drives when he drinks like this.'

"The agents further testified that at this point they approached this person, seized the remaining portion of his drink, identified themselves and asked him to identify himself. An argument ensued and this person refused to identify himself. It was then necessary to call the Sea Bright Police Department, and Patrolman John Keenan responded. This police officer finally succeeded in calming this person and ascertained that his name was Joseph Lockwood. The officer then stated to the agents that he was satisfied that Lockwood was intoxicated, but he was primarily interested in whether or not he was driving. The bartender then asserted that he ascertained that Lockwood was not driving before he served him and further observed that, if he was driving, he would not have served him.

"William A. Devine (employed as a bartender by the licensee) testified on his behalf as follows: He had known Lockwood for approximately six months and, on the night in question, Lockwood entered the tavern and asked him to cash a check for him, which he did. He served him a total of three drinks that night, and his observation did not indicate that Lockwood was intoxicated. He further testified that, when the agents asked Lockwood to identify himself, there was loud talking and he went up to determine the cause of this commotion. He denied that there was any disturbance, but merely a loud conversation. He stated further, 'He (Lockwood) may have clowned a little, kiddingly. But to my belief and knowledge he was not intoxicated.'

"On cross-examination, he was asked:

'Q. Well, does he (Lockwood) always appear to be intoxicated?
A. Well, to me the man don't look like everyone should.

Q. What, is he a heavy drinker?
A. No, he's not a heavy drinker. But he's a type of a man that you might think he was drinking and he's not.'

He was then asked whether he knew why Lockwood, upon emerging from the telephone booth, went to a seat on the opposite corner of the

bar instead of resuming his original seat. The bartender stated that he knew of no reason except that Lockwood might 'have forgot where he was at.' He then admitted that he stated to the agents that, if Lockwood didn't behave himself, he'll have to leave, which was prompted by the agent's comment that Lockwood was 'loaded.' He explained that the reason for this statement was that Lockwood was 'clowning like.'

"Joseph Lockwood testified he resides in Little Silver, New Jersey, which is approximately seven or eight miles from the licensed premises, and that night he took a taxi cab from his home and arrived at these premises at about 10:30 p.m. He stated that when he entered the premises he had a check cashed and then proceeded to have a total of three drinks that evening. He had had three drinks during the day prior to his arrival at these premises. He stated that he had been drinking, was under the influence of liquor but was not drunk. After he had consumed about a drink-and-a-half, he then went to make a telephone call and, upon emerging from the telephone booth, went to the far end of the bar to join with several acquaintances.

"When the agents approached him, seized his drink and asked for his identification, he refused because they had not clearly identified themselves. He continued to refuse to show his identification until a police officer arrived, at which time he complied. On cross-examination he reaffirmed his testimony to the effect that he had his car parked in a parking lot near the railroad station but that he had actually come to these premises by taxi cab and intended to return to his home in that manner. He further stated that he had dinner in a hotel in Red Bank and arrived at his home at around 7:30 p.m. He stayed at home for several hours, and then came by cab to the tavern about ten o'clock.

"On further cross-examination he stated that he has a bad left leg but it does not restrict or impede his walking and on this night he was walking in a normal manner. After he left the telephone booth he proceeded to the far end of the bar because he thought he knew somebody but, as it turned out, it 'wasn't who I thought it was.' He also admitted that he had discussed this matter with the bartender on a subsequent occasion before this hearing.

"John Joseph Keenan (a police officer employed by the Sea Bright Police Department) testified that he was directed to respond to a call for assistance and obtained the cooperation of Lockwood in identifying himself. At his request Lockwood finally produced his driver's license. He further testified that the agents suggested that he give Lockwood a sobriety test, but he felt that this was out of order because he was satisfied that Lockwood was not driving. He stated that, in his opinion, this man had been drinking but was not intoxicated.

"On cross-examination he stated that he first entered the tavern at around 11:40 p.m., and thereafter saw Lockwood walk across the beach about a quarter of a mile from the tavern near closing time (3 a.m. is closing time in Sea Bright). At that time he noticed nothing unusual about this man's gait.

"Andrew B. Keating testified that he is an insurance agent and a patron of the licensee, and was present on October 4 at the time mentioned hereinabove. He observed Lockwood seated in the rear of the bar with two ladies and he joined the party. According to his testimony, Lockwood was not glassy-eyed, was sober, and he did not see him stagger. Lockwood was then approached by the two ABC agents and asked to identify himself, which he refused to do. He reaffirmed on cross-examination that, in his opinion, Lockwood was not intoxicated but

stated that he did not offer an opinion to the agents at the time of this incident as to whether or not Lockwood was either sober or drunk.

"Mrs. Eleanor Pace, testifying on behalf of the licensee, similarly stated that she was a patron of the licensee for several years and was in the licensed premises until about 11 p.m. on that evening. She testified further that Lockwood spoke clearly and was able to conduct a conversation.

"On cross-examination she insisted that she did not see Lockwood 'clown' or do anything unusual. It was agreed by stipulation of counsel that the testimony of her husband, who accompanied her, would be substantially the same as her own testimony.

"The description of the actions, demeanor and appearance of Lockwood are consistent by common experience with the definitive test of actual or apparent intoxication at the time that the drinks were served to him. Lockwood's glassy eyes, his swaying and staggering walk, his uncertain behavior at the telephone booth, his clowning or boisterous attitude at the bar, his failure and apparent inability to remember where he was originally seated, his accusation of the bartender and, finally, his unreasonable and unreasoning refusal to furnish identification, which necessitated the calling of local police assistance, all add up to the inevitable judgment that this person was actually or apparently intoxicated. It is well-established that whether a man is sober or intoxicated is a matter of common observation, not requiring any special knowledge or skill. Castner v. Sliker, 33 N.J.L. 95; McHugh v. Borough of Hasbrouck Heights, 144 Atl. Rep. 799.

"On the surface there would appear to be a sharp conflict between the testimony of the agents and that of the bartender. However, an analysis of the bartender's testimony persuades me that it tends to corroborate much of the Division's case. It seems obvious to me that the bartender's comment that he would not have served Lockwood any drinks if he knew that Lockwood was driving indicates that he was aware that Lockwood was apparently intoxicated or atleast had had so much of alcoholic beverages that he would be incapable of driving the car, and his further statement that, if Lockwood didn't behave himself, he would 'throw him out', indicate to me that the bartender knew that Lockwood had had too much to drink.

"Officer Keenan's testimony is not convincing and he was less than forthright in his answers to many of the questions propounded to him. Yet, even he testified that Lockwood caused a commotion but that he did not feel justified in giving him a sobriety test because he was not convinced that Lockwood intended to drive an automobile. He denied that he had stated to the agents that he was convinced that Lockwood was intoxicated. The testimony of the other two witnesses must be viewed in the light of their frequent patronage of the licensee and their obvious desire to help him. However, their testimony in certain important respects differs from that of the bartender. In fact, Mrs. Pace testified that she noticed no clowning or unusual behavior on the part of Lockwood, although the bartender himself testified as to such clowning and behavior.

"The cardinal issue in this case is whether or not Lockwood was actually or apparently intoxicated at the time the drinks were served to him. It is generally understood that one who is actually or apparently intoxicated must be so far under the influence of liquor that his conduct and demeanor are not up to standard and such conduct and demeanor should be reasonably discernible to a person of ordinary experience. State exrel. Gutter

v. Hawley, Ohio App. 41, N.E. 2nd 815.

"After considering the evidence herein I conclude that, as the agents testified, Lockwood was glassy-eyed, swayed and staggered as he walked; his speech was slurred, he was boisterous and reacted in a manner which convinced the agents that he was either actually or apparently intoxicated. I, therefore, accept the agents' description of Lockwood's condition and thus conclude that he was apparently intoxicated. It is sufficient to show that the sale, service or delivery was made to a person apparently intoxicated, without the necessity of showing that the person was actually intoxicated. Re Carbone and Benedetto, Bulletin 1236, Item 8.

"Liquor licensees who operate their businesses by way of privilege, rather than as a right, are under strict obligation not to serve intoxicated persons. Regulations of this Division prohibiting service to or consumption by any person 'actually or apparently intoxicated' were not intended to benefit intoxicated persons alone, but were intended for the protection of the general public as well. Cf. Rappaport v. Nichols (Sup.Ct. 1959), 31 N.J. 188, 205, 156 Atl. 2nd, 1.

"Under all of the circumstances herein, I am constrained to conclude that the Division has sustained the burden of proof of licensee's guilt by a fair preponderance of the believable evidence, and it is recommended, therefore, that licensee be found guilty as charged. Re Russell, Bulletin 1357, Item 1.

"Licensee has no prior adjudicated record. I, therefore, recommend that an order be entered suspending the license for a period of fifteen days, the minimum suspension for the violation set forth in the charge herein. Re Venuto, Bulletin 1255, Item 2."

No exceptions were taken to the Hearer's Report, and I have been advised by telegram from the attorney for the licensee that he does not intend to take exceptions to the said Report within the time limited by Rule 6 of State Regulation No. 16.

After carefully considering the facts and circumstances herein, including the entire record, the oral argument of licensee's attorney at the hearing, and the Hearer's Report, I concur in the Hearer's findings and conclusions and adopt his recommendation.

Accordingly, it is, on this 3rd day of April 1962,

ORDERED that Plenary Retail Consumption License C-4, issued by the Mayor and Council of the Borough of Sea Bright to James B. Sullivan, t/a Sea Bright Inn, for premises 1030-32 Ocean Avenue, Sea Bright, be and the same is hereby suspended for fifteen (15) days, commencing at 2 a.m. Thursday, April 5, 1962, and terminating at 2 a.m. Friday, April 20, 1962.

WILLIAM HOWE DAVIS
DIRECTOR

5. DISCIPLINARY PROCEEDINGS - GAMBLING (HORSE RACE BETS) - LOTTERY (NUMBERS AND HORSE RACE POOL) - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

RICHARD CALLAHAN
t/a CALLAHAN'S
400 Passaic Avenue
East Newark, PO Harrison, N. J.

Holder of Plenary Retail Consumption License C-15, issued by the Borough Council of the Borough of East Newark.

CONCLUSIONS AND ORDER

Licensee, Pro se.
Edward F. Ambrose, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to charges alleging that on January 27, February 10, 17, 24 and March 3, 1962, he permitted the acceptance of horse race and numbers bets and the conduct of a horse race pool, in violation of Rules 6 and 7 of State Regulation No. 20.

Absent prior record, the license will be suspended for twenty-five days, with remission of five days for the plea entered, leaving a net suspension of twenty days. Cf. Re Kelty, Bulletin 1403, Item 5; Re Gavenas, Bulletin 1374, Item 3.

Accordingly, it is, on this 29th day of March, 1962,

ORDERED that Plenary Retail Consumption License C-15, issued by the Borough Council of the Borough of East Newark to Richard Callahan, t/a Callahan's, for premises 400 Passaic Avenue, East Newark, be and the same is hereby suspended for twenty (20) days, commencing at 2:00 a.m. Tuesday, April 10, 1962, and terminating at 2:00 a.m. Monday, April 30, 1962.

WILLIAM HOWE DAVIS
DIRECTOR

6. STATE LICENSES - NEW APPLICATIONS FILED.

Shore Beverage Co. Inc.
502 Atkins Avenue
Neptune, New Jersey
Application filed May 22, 1962 for Limited Wholesale License for the 1962-63 fiscal year. This licensee presently holds Plenary Wholesale License W-79 for the 1961-62 fiscal year.

Dennis & Huppert Inc.
1790 Broadway
New York, New York
Application filed May 23, 1962 for Wine Wholesale License for the 1962-63 fiscal year.

William Howe Davis
Director

New Jersey State Library