

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark 2, N. J.

BULLETIN 960

MARCH 16, 1953.

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1. COURT DECISIONS - WALINSKI v. GLOUCESTER CITY ET AL. - HEREIN THAT SUNDAY IN R. S. 33:1-47 MEANS 24-HOUR PERIOD FROM MIDNIGHT SATURDAY TO MIDNIGHT SUNDAY.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, CAMDEN COUNTY
Docket No. C-627-52

ANDREW J. WALINSKI,

Plaintiff,

-vs-

MAYOR AND COUNCIL OF THE CITY
OF GLOUCESTER; THOMAS WINKELSPECHT,
Chief of Police of the City of
Gloucester; and DOMINIC A. CAVICCHIA,
Director of the Division of Alcoholic
Beverage Control of the State of New
Jersey,

Defendants.

Civil Action.

CONCLUSIONS.

Mr. Frank M. Lario for Plaintiff.

Mr. William E. Hughes for Defendants Mayor and Council of the City of Gloucester City, and Thomas Winkelspecht, Chief of Police of the City of Gloucester City.

Mr. Theodore D. Parsons, Attorney General (Mr. Samuel B. Helfand, Deputy Attorney General, of counsel), for Defendant Dominic A. Caviicchia, Director of the Division of Alcoholic Beverage Control of the State of New Jersey.

HANEMAN, J. S. C.

The plaintiff herein originally demanded relief in two counts, (1) a declaratory judgment concerning a certain referendum held in the City of Gloucester City, and (2) an injunction against allegedly extra-legal acts of the defendants in a purported enforcement of the law resulting from said referendum as defendants interpreted it.

At the pretrial conference the issue was narrowed to the relief demanded in the first count.

Under the pleadings here present, and in the present posture of this case, the defendants have conceded that this is a proper matter for determination under N. J. R. S. 33:1-47.

The problem arises under N. J. R. S. 33:1-47, which reads as follows:

"Whenever a petition, signed by at least fifteen per centum (15%) of the qualified electors of any municipality as evidenced by the total number of votes cast for members of the General Assembly, at the then next preceding general election held for the election of all of the members of the General Assembly, in such municipality, shall be presented to the governing board or body thereof, requesting a referendum on the question hereinafter stated, such governing board or body shall adopt forthwith a resolution directing the clerk of the county in which said municipality is situated to print, pursuant to Title 19, Elections, hereinafter referred to as the 'general election law,' upon the official ballot to be used in such municipality at the next ensuing general election, a question to read: 'Shall the sale of alcoholic beverages be permitted on Sundays in this municipality?' Thereupon the clerk or secretary of the governing board or body of such municipality shall forthwith deliver to such county clerk a certified copy of such resolution. If such copy shall be delivered to the county clerk not less than thirty days before such general election, he shall cause such question to be printed in an appropriate place on the ballot to be used in such municipality at the next ensuing general election, pursuant to the general election law and thereupon all proceedings with respect to the referendum on such question shall be subject to and governed by the general election law as in other cases of the submission of public questions to the electorate.

"If a majority of the legal voters voting upon the question shall vote 'Yes,' the clerk of the governing board or body of such municipality shall forthwith in writing notify the commissioner and municipal board, if any, having authority to issue such licenses, of the action taken by the legal voters of such municipality and the sale of alcoholic beverages on Sundays pursuant to the provisions of this chapter shall be permitted in such municipality.

"If a majority of the legal voters voting upon the question shall vote 'No,' then the clerk of the governing board or body of such municipality shall forthwith in writing notify the commissioner and municipal board, if any, as the case may be, having authority to issue such licenses of the action taken by the legal voters of such municipality, and thereupon it shall be unlawful for any person to sell alcoholic beverages in such municipality on Sundays and such sale shall constitute a violation of this chapter." (Underscoring supplied).

The facts in connection herewith are as follows:

Pursuant to the above cited law, a proper petition having been presented to the governing body of the City of Gloucester (see John Anthony, et al. v. Philip V. Rea, et al., Docket No. L7125-51) there was included on the ballot for the general election held on November 4, 1952, this question:

"Shall the sale of alcoholic beverages be permitted on Sundays in this municipality?"

As a result of a recount it was determined that there were 3,328 votes cast in the negative and 2,373 votes cast in the affirmative on said question.

The plaintiff, a holder of a plenary retail consumption license under N. J. S. 33:1 et seq., seeks to have determined the effect of the statute and referendum, to the end that it may be concluded whether the sale of alcoholic beverages is prevented in the City of Gloucester from midnight Saturday to midnight Sunday (as contended by defendants) or from 2 A.M. Sunday to midnight Sunday, as contended by plaintiff.

The plaintiff's statement of his contention is set forth in paragraph 9 of the complaint, which reads as follows:

"9. Plaintiff avers and contends that within the meaning and intent of the said provisions of the said ordinance and by reason of the result of the said public question as aforesaid, the sale of alcoholic beverages within the said City of Gloucester is prohibited after 2 A.M. on a Sunday to 7 A.M. Monday morning. The said 2 A.M. being the closing hour of Saturday, the weekday preceding the said Sunday and the 2 A.M. being the closing hour as provided in said ordinance and that the said referendum did not affect that closing hour."

Plaintiff as well contends that "in accord with custom the word Sunday *** should be considered or interpreted to mean the business day of Sunday, beginning with the opening of business on that day."

In support of this argument, plaintiff submits the following in an attempt to show the interpretation of Sunday by the governing body of the City of Gloucester:

(1) A resolution of the City of Gloucester adopted December 8, 1933, which reads in part as follows:

"(12) HOURS OF SALE: Any place for the sale of, consumption or distribution of the alcoholic beverages defined herein shall not open before the hour of 6 A. M. and shall close at 2 A. M. and shall remain closed without engaging in the sale of alcoholic beverages between the hours of 2 A. M. and 6 A. M. of any weekday. Said places shall not be opened at any time on Sunday or engage in the sale or distribution of said alcoholic beverages."

(2) A resolution of the City of Gloucester dated January 3, 1935, which reads as follows:

"BE IT RESOLVED BY COMMON COUNCIL of the City of Gloucester City, County of Camden, from and after the passage of this resolution, that the sale of alcoholic beverages by licensed beverage dealers in the City of Gloucester, shall be legal until the hour of 2 A.M., local time, on Sunday, the first day of the week, commencing Sunday, January 6, 1935.

All resolutions and parts of resolutions inconsistent herewith are hereby repealed."

(3) A resolution of the City of Gloucester dated March 7, 1935, which reads as follows:

"BE IT RESOLVED by Common Council of the City of Gloucester City, County of Camden, from and after the passage of this resolution, that the sale of alcoholic beverages by licensed beverage dealers in the City of Gloucester City shall be legal until the hour of 2 A.M., local time, on Sunday, the first day of the week; and from the hour of 3 P.M., local time, on Sunday, the first day of the week until the hour of 2 A. M. local time, Monday.

All resolutions and parts of resolutions inconsistent herewith are hereby repealed."

(4) An ordinance of the City of Gloucester adopted February 4, 1938, which reads in part as follows:

"Section 3. No alcoholic beverage shall be sold, served or delivered nor shall any licensee suffer or permit the sale, service or delivery of any alcoholic beverage upon any licensed premises directly or indirectly, between the hours of 2 A. M. and 7 A. M. any weekday or between 2 A. M. and 3 P. M. on any Sunday; provided, however, that beginning with the last Sunday in April of each year and ending with the last Sunday in September of each year the time as aforesaid shall be computed in accordance with Daylight Saving Time."

"Section 10. Whenever New Year's Day falls on any day except Sunday, in addition to the opening hours above provided for, this said opening hour shall also be from 2 A.M. to 7 A.M. on New Year's Day."

It is inconceivable that the actions of the governing body of the municipality could be binding upon the question of the intent of the statute. But admitting this to be true, merely for the sake of argument, an examination of the several resolutions and ordinances clearly demonstrates that the said governing body itself clearly recognized that there was no distinction between a "business" day and a calendar day. They demonstrated that express, special and separate provisions must be made for Sunday, i.e., from midnight Saturday to midnight Sunday, from that made for a weekday. This is contrary to plaintiff's present position. Plaintiff's argument, insofar as local action is concerned, in the light of the above official action, is in any event, without merit.

In addition, plaintiff argues that the interpretation by the Director of the Division of Alcoholic Beverage Control, or his predecessors, has accorded to the word Sunday, as used in the pertinent statute, the meaning for which he argues. He has cited various conclusions of the Alcoholic Beverage Commissioner to sustain his position. Such constructions are entitled to be given great weight, since they embody long standing statutory construction by the Director. *Passarella v. Board of Commissioners*, 1 N. J. Super. 313 (App. Div. 1949); *Cino v. Driscoll*, 130 N. J. L. 535 (Sup. Ct. 1943).

The case of *William Vassos and Charles Murphy, trading as Golden Moon v. Township Committee of the Township of Springfield (Burlington County)*, Bulletin 793, Item 6, cited by plaintiff, does not sustain his position. As a matter of fact, the Commissioner there decided that a referendum which prevented Sunday alcoholic beverage sales prohibited such sales from midnight Saturday to midnight Sunday. The balance of plaintiff's argument as to the effect of this conclusion is too strained for consideration.

The remaining rulings cited by the plaintiff do not sustain his position.

In further substantiation of the conclusion that the said Director has interpreted this provision as now argued by defendants, they have cited Bulletin 520, Item 7, which again reiterates the conclusion that such a referendum prevents sales at any time on Sunday. Although this bulletin does not come within the confines of *Cino v. Driscoll*, 130 N. J. L. 535, it is significant that the legislature has failed to indicate its disapproval thereof since the Director published the bulletins in question. *Rutherford Lodge No. 547 v. Hock*, 1 N. J. Super. 223 (App. Div. 1949).

Plaintiff's remaining argument concerns itself with the contention that the legislature did not intend, by the use of the word

Sunday to designate the calendar first day of the week, or the Sabbath, but rather, as he states, the "business days" and, in effect, that the referendum does not supersede the existing ordinance.

He here argues that under the ordinance above cited, adopted February 4, 1938, the period of time from midnight Saturday until 2 A. M. Sunday is to be deemed a portion of the Saturday "business" day and that hence the sales of alcoholic beverages are to be prohibited only from 2 A. M. on Sunday. The solution of this contention requires an analysis and interpretation of the statute.

In order to ascertain the intent of this section of the Act we must examine the whole of the context of the Act, and the Acts or parts of Acts in pari materia. The parts of a statute are to be viewed in relation to the whole to carry out the reasonably probable legislative intent. *Maritime Petroleum Corp. v. City of Jersey City*, 1 N. J. 287 (Sup. Ct. 1949); *Hackensack Water Co. v. Ruta*, 3 N. J. 139 (Sup. Ct. 1949).

There are three methods by which the sale of alcoholic beverages may be limited on Sunday under the statute.

R. S. 33:1-40 provides in part as follows:

"The governing board or body of each municipality may, as regards said municipality, by ordinance or resolution, limit the hours between which the sale of alcoholic beverages at retail may be made, prohibit the retail sale of alcoholic beverages on Sunday ***."

R. S. 33:1-47 has already been quoted.

R. S. 33:1-47.1 provides in part as follows:

"Whenever a petition, signed by at least fifteen per centum (15%) of the qualified electors of any municipality as evidenced by the total number of votes cast as (sic) the then next preceding general election, held for the election of all of the members of the General Assembly in such municipality, shall be presented to the governing board or body thereof, requesting a referendum on any proposed questions as to whether the hours between which the sale of alcoholic beverages at retail may be made in such municipality on week days, Sundays, either or both, shall be fixed as provided in such petition ***."

"If a majority of the legal voters shall vote affirmatively on the question of whether the hours of sale shall be fixed in the manner set forth in such question or questions, the clerk of the governing board or body of such municipality shall forthwith in writing notify the commissioner and municipal board, if any, of the action taken by the legal voters of such municipality and thereafter the retail sale of alcoholic beverages may be made only within the hours fixed by such referendum. Such sale at any other time within such municipality shall be unlawful and constitute a violation of this chapter."

"If a majority of legal voters voting upon such question or questions shall vote in the negative on the question of whether the hours of sale shall be fixed in the manner set forth in such question or questions, the clerk of the governing board or body of such municipality shall forthwith in writing notify the commissioner and municipal

board, if any, of the action taken by the legal voters of such municipality and thereafter the hours between which the sale of alcoholic beverages at retail may be made may be regulated as theretofore in such municipality."

It is plain, therefore, that it was the intent of the legislature, in the first instance, to vest the power to determine the hours during which sales may be made on any weekday and Sunday in the local governing body. There is an express provision vesting similar power to declare a complete prohibition on Sunday in said body. R. S. 33:1-40, supra. This authority, however, is subject to the control of the "qualified electors" in the community in two respects, by R.S. 33:1-47 and R.S. 33:1-47.1.

By virtue of R. S. 33:1-47 the complete prohibition of sales on Sunday is provided. Upon the ascertainment of the result of such a referendum, this statute provides:

"If a majority of the legal voters voting upon the question shall vote 'Yes,' the clerk of the governing board or body of such municipality shall forthwith in writing notify the commissioner and municipal board, if any, having authority to issue such licenses, of the action taken by the legal voters of such municipality and the sale of alcoholic beverages on Sundays pursuant to the provisions of this chapter shall be permitted in such municipality."

"If a majority of the legal voters voting upon the question shall vote 'No,' then the clerk of the governing board or body of such municipality shall forthwith in writing notify the commissioner and municipal board, if any, as the case may be, having authority to issue such licenses of the action taken by the legal voters of such municipality, and thereupon it shall be unlawful for any person to sell alcoholic beverages in such municipality on Sundays and such sale shall constitute a violation of this chapter." (underscoring supplied).

The only conclusion which can be drawn from this language is that if the vote is in the affirmative the governing body still retains control of the hours by virtue of R. S. 33:1-40 ("the sale of alcoholic beverages on Sunday pursuant to the provisions of this chapter shall be permitted in such municipality" -- see above quoted statute), but if the vote is in the negative, the governing body retains no control and may not permit any sales on Sunday ("it shall be unlawful *** to sell alcoholic beverages on Sundays" -- see above quoted statute).

By virtue of R. S. 33:1-47.1 there is an affirmative provision for a referendum on sales only during the specified hours on "weekdays, Sundays." An affirmative vote on such a referendum makes a sale during such designated hours only legal, and a sale on other than the designated hours illegal. It so removes the control to permit sales on such other than the designated hours from said governing body. A negative vote leaves the control of hours to the governing body as it existed before the referendum.

It is plain that the action of the electorate in the event of a negative vote under R. S. 33:1-47 and an affirmative vote under R.S. 33:1-47.1 removes completely from the local governing body the power to authorize such sales except as provided by the referendum.

It becomes necessary, therefore, to decide what the legislature intended by the reference to weekdays and Sundays.

The repeated use of the word Sunday in R. S. 33:1-40 and R. S. 33:1-47.1, coupled with the use in the latter statute of the word weekday, shows an apt, intentional distinction between said days. Upon reading these two statutes in the light of R. S. 33:1-47, the legislative purpose to treat sales on weekdays and Sundays as two distinct problems, becomes clear.

In statutory construction, the generally accepted meaning of a word should be accorded to it. In the absence of an explicit indication of a special meaning, words are to be given their common usage. N. J. S. 1:1-1; *Ford Motor Co. v. N. J. Dept. of Labor and Industry*, 5 N. J. 494 (Sup. Ct. 1950).

The true meaning of any word is that which best comports with the subject and general object of an act. *Maritime Petroleum Corp. v. City of Jersey City*, 1 N. J. 287 (Sup. Ct. 1949). The statute itself furnishes the best means of its own exposition; and the legislative purpose here is evident when the whole of the provision is related to the obvious policy and purpose. The intent is the essence and the life of the law. *Glick v. Trustees of Free Public Library*, 2 N. J. 579 (Sup. Ct. 1949). On construing a statute, legislative intent controls and the intent and enforcement by the court must be consistent with such intent and not consistent with some supposed unexpressed intent. *Hoffman v. Hock*, 397 (Sup. Ct. 1952); *Lynch v. Borough of Edgewater*, 8 N. J. 279 (Sup. Ct. 1951).

Plaintiff has admitted that normally the word Sunday connotes the first day of the calendar week, or the Christian Sabbath. Nor can we see how he could deny such a meaning. In addition, the normal meaning of the word day is the period of time during which the earth makes one revolution on its axis. A day begins at midnight and ends the following midnight twenty-four hours later.

Webster's New International Dictionary, 2d Edition, contains the following definitions:

"Day: The period of the earth's revolution on its axis -- ordinarily divided into twenty-four hours. It is measured by the interval between two successive transits of a celestial body over the same meridian, and takes a specific name from that of the body ***."

"The mean solar day used in ordinary reckoning of time, and among most modern nations beginning at mean midnight: its hours are usually numbered in two series each from one to twelve."

"Weekday: Any day of the week except Sunday."

"Sunday: The first day of the week, regarded by most Christians as a day for rest from secular employments and for religious worship; the Christian Sabbath; the Lord's day. It is kept as a weekly commemoration (sic) of the day of Christ's resurrection and as the Christian analogue of the Jewish Sabbath."

See also State v. Reade, 98 N. J. L. 596 (Sup. Ct. 1923); State v. Williams, 30 N. J. L. 102 (Sup. Ct. 1862); Houtsch v. Jersey City, 29 N. J. L. 316 (Sup. Ct. 1861); Richards v. Bayonne, 61 N. J. L. 496 (Sup. Ct. 1898).

The legislative intent seems clear to make a distinction in the control of the sale of alcoholic beverages on weekdays and Sundays. The ordinary and true meaning of the words weekday and Sunday is as above stated. As here used, the word Sunday means the calendar twenty-four hour day which commences at midnight on Saturday and ends at midnight on Sunday. In view of the apparent legislative intent to vest absolute control in the adoption of permissive hours by referendum under R. S. 33:1-47 in the electorate, and the removal of any power from the governing body to designate hours where, as here, there was a majority negative vote, it follows that the true intent was as well to repeal, at least by implication, any ordinance which had been adopted by the governing body prior thereto and inconsistent therewith.

Judgment will be entered accordingly, to the effect that as a result of the above referendum, all sales of alcoholic beverages in the City of Gloucester City during that twenty-four hour period from midnight Saturday to midnight Sunday are prohibited, and that any sale during such period of time is illegal, as in N. J. S. 33:1-47 made and provided.

Decided: February 24, 1953.

2. APPELLATE DECISIONS - FOOD FAIR STORES OF NEW JERSEY, INC. v. CLIFTON AND KORDUSZEWSKI.

FOOD FAIR STORES OF NEW JERSEY, INC.,
Appellant,

-vs-

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF CLIFTON and ADAM KORDUSZEWSKI,
Respondents.

ON APPEAL
CONCLUSIONS AND ORDER

Stein and Stein, Esqs., by Frederick Z. Feldman, Esq., Attorneys for Appellant.
John G. Dluhy, Esq., Attorney for Respondent Municipal Board of Alcoholic Beverage Control.
Frank W. Shershin, Esq., Attorney for Objectors.

BY THE DIRECTOR:

This is an appeal from the denial of a transfer of a limited retail distribution license from Adam Korduszewski to appellant, and from premises 74 Knapp Avenue to premises 527 Piaget Avenue (Route No. 6), City of Clifton. The two premises mentioned herein are located in different sections of the City of Clifton.

At a meeting of respondent Board of Alcoholic Beverage Control on September 22, 1952, the members thereof voted unanimously to deny the transfer of the license in question.

In its answer filed herein, respondent Board advances as reasons for its action that: (1) the public interests and welfare of the community will not be served by such transfer; (2) there are sufficient

plenary retail distribution and consumption licensees and limited retail distribution licensees in the vicinity in the proposed location to serve the needs of the community; (3) the neighborhood surrounding the proposed location is such that the proposed establishment is not desirable or conducive to the health or welfare of the community.

At the hearing Sidney W. Ellse, employed as Assistant Store Manager by appellant, testified that the neighborhood wherein appellant's premises are located is both residential and business in character; that the residential sections are composed mostly of garden apartments; that appellant serves "**** between seven to eight thousand customers a week"; that two package goods stores and a tavern are located on the same side of the highway as appellant's premises, at a distance of "about three blocks".

This is the only witness produced by appellant in an effort to establish a need for and a convenience to be served by the transfer of the license to appellant's premises.

It further appears, from the evidence presented by two objectors, that there are five licensed premises within a mile of appellant's premises at 527 Piaget Avenue.

The transfer of a liquor license to other persons or premises 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 a reasonable discretion. When the transfer is denied on reasonable grounds, such action will be affirmed. Drucker v. Trenton, Bulletin 474, Item 9; Kuensell v. Pemberton, Bulletin 832, Item 11; DeCapua v. Ocean, Bulletin 941, Item 1, and cases cited therein.

The question whether a license should 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 appellant. Biscamp, et al. v. Teaneck, Bulletin 821, Item 8; Kuensell v. Pemberton, supra; Minsky v. Woodbridge, Bulletin 897, Item 3; DeCapua v. Ocean, supra.

The State Director's function on appeals of this type is not to substitute his 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 his personal view on the subject. Kuensell v. Pemberton, supra.

After consideration of all the evidence in the instant case, I am unable to find that the action of the members of the respondent Board of Alcoholic Beverage Control in denying the application for transfer was arbitrary and unreasonable so as to constitute an abuse of discretion warranting a reversal of its action. In view of this fact, it is unnecessary to consider any other matter raised by the respondent Board of Alcoholic Beverage Control herein.

The action of the respondent Board of Alcoholic Beverage Control in denying the application for transfer is hereby affirmed.

Accordingly, it is, on this 24th day of February 1953,

ORDERED that the action of the respondent Municipal Board of Alcoholic Beverage Control be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

DOMINIC A. CAVICCHIA
Director.

3. ALIENS - HEREIN OF TREATIES BETWEEN UNITED STATES AND FOREIGN COUNTRIES - LIST OF TREATY COUNTRIES.

The New Jersey Alcoholic Beverage Law prohibits aliens from holding licenses or holding in excess of 10% of stock in any corporate retail licensee (except, in the case of a corporation, for premises operated as a bona fide hotel or, in certain instances, at an airport). Such law further prohibits the employment of any alien upon licensed premises unless such alien has obtained an employment permit from the Division of Alcoholic Beverage Control. Revised Statutes 33:1-24, 25; Rule 5, State Regulations No. 13.

Where, however, a treaty is in existence between the United States and a foreign country, whereby nationals of the foreign country are guaranteed the same trade privileges as United States citizens, such treaty supersedes the New Jersey Alcoholic Beverage Law and State Regulations with the consequent result that alien nationals of such foreign country are eligible for license and for employment without permit. Re Guskind, Bulletin 130, Item 5; Re McGuigan, Bulletin 228, Item 2; Re Sacks, Bulletin 942, Item 9.

According to our most recent advice from the United States Department of State, alien nationals of the countries listed below are afforded reciprocal trade privileges with United States citizens. Accordingly, alien nationals of these countries, who are otherwise properly qualified, may (a) hold licenses; (b) hold stock in licensed corporations; (c) be employed upon licensed premises without permit.

Argentina	Greece
Austria	Honduras
Belgium	Ireland
Bolivia	Italy
Borneo	Latvia
China	Liberia
Colombia	Norway
Costa Rica	Paraguay
Denmark	Spain
El Salvador	Switzerland
Estonia	Thailand
Ethiopia	Turkey
Finland	Yugoslavia
Great Britain, including nationals of Scotland and other British territory in Europe, but not including nationals of British territory not in Europe, such as Canada	

The foregoing list supersedes all previous lists of treaty countries.

DOMINIC A. CAVICCHIA
Director.

Dated: March 9, 1953.

4. APPELLATE DECISIONS - SCHWANWEDE v. FAIRVIEW.

FRANCES SCHWANWEDE,)

Appellant,)

-vs-

ON APPEAL
CONCLUSIONS AND ORDER

BERGHOUGH COUNCIL OF THE BOROUGH)
OF FAIRVIEW,)

Respondent.)

Bernard S. White, Esq., Attorney for Appellant.
Frank J. Raia, Esq., Attorney for Respondent.
Cohen and Turtz, Esqs., by Sydney I. Turtz, Esq., Attorneys
for Objectors.

BY THE DIRECTOR:

This is an appeal from respondent's action, taken on October 6, 1952, whereby it denied appellant's simultaneous applications for (a) the transfer of a plenary retail consumption license from William J. Winn to appellant, and (b) the transfer of said license from premises at 408-410 Fairview Avenue to premises at 332 Bergen Boulevard, Fairview. The Bergen Boulevard premises are approximately a quarter of a mile distant from the Fairview Avenue premises.

The petition of appeal alleges in effect that the action of respondent on October 6, 1952, was erroneous in that (1) it attempted without authority, to revoke a previous granting of said applications on September 23, 1952, and (2) it was capricious and did not constitute a valid exercise of discretion.

The evidence in this case establishes the following facts:

The applications were filed with respondent on September 17, 1952;

Notice of the making of said applications was published in a newspaper on September 19, 1952, and September 26, 1952;

At a regular meeting held on September 23, 1952, respondent adopted a resolution, the pertinent portions of which were recorded as follows:

***The Clerk reported he had received two applications from Frances Schwanwede for transfer of Plenary Retail Consumption License held by William J. Winn for premises 408-410 Fairview Avenue; and another for transfer for the same person from 408-410 Fairview Avenue to 322 Bergen Boulevard, Fairview. The Clerk read the report of the Chief of Police, William D. Ackerman, who said he had investigated the applicant and found no reason why the transfer could not be granted for the premises. Councilman Hanna, Chairman of the Beverage Committee moved, seconded by Councilman Hofmeister, that the request be granted effective September 26, 1952. President of the Council Castel requested the roll be called on the applications. Voting 'Aye' President of the Council Castel, Councilmen Hofmeister, Focorelli, Hanna, Corday, and Stetka. Carried";

On September 25, 1952, a petition objecting to the transfer of the license and signed by twenty-one persons was filed with the Borough Clerk. The Clerk immediately notified the Mayor and the members of the Borough Council, and was instructed not to transfer the license until a hearing could be held on the petition;

On September 29, 1952, a public hearing was held by respondent, at which all interested parties were given an opportunity to be heard. At the conclusion of the hearing the Borough Clerk was directed not to "issue" a license until a decision had been reached;

At a special meeting held on October 6, 1952, respondent adopted a resolution, the pertinent portions of which were recorded as follows:

"WHEREAS, a public hearing was held by the Mayor and Council on September 29, 1952, at which time the applicant and the objectors were given an opportunity to be heard; and

"WHEREAS, after hearing all the arguments pro and con at said meeting, the Mayor and Council have determined that:

- (1) The building at 322 Bergen Boulevard is an open-front construction in the nature of a roadstand, located on a very heavily traveled highway.
- (2) That the business now conducted on said premises is the sale of clams, oysters, frankfurters and soda to the general public.
- (3) The odors and noises emanating therefrom are not conducive to good health.
- (4) The sale of alcoholic beverages on said premises would attract undesirable patrons, and thus intensify the noises which would further disturb the peace and quiet of the neighborhood.
- (5) Automobiles entering and leaving said premises would cause a serious traffic hazard, thus necessitating traffic and police control.
- (6) The granting of the transfer applied for would tend to invite similar type of roadstands and business in the area.
- (7) There are at present four other Plenary Retail Consumption Licenses in the immediate vicinity, which, in the opinion of the Mayor and Council, are too many licenses for the area.

"NOW, THEREFORE, BE IT RESOLVED, that for the reasons abovementioned, the Mayor and Council of the Borough of Fairview, does hereby deny the application for transfer of Plenary Retail Consumption License C-18 from 408-410 Fairview Avenue to 322 Bergen Boulevard; and

"BE IT FURTHER RESOLVED, that copies of this resolution be forwarded to interested parties.

"On roll call, voting 'Aye': Castel, Hofmeister, Focorelli, Hanna, Corday and Stetka. Carried."

At a regular meeting held on October 14, 1952, respondent adopted a resolution, recorded as follows:

"WHEREAS, a misunderstanding exists as to the actual motion made by Councilman Hanna, Chairman of the Beverage Committee, on the action to be taken on the application for transfer of Plenary Retail Liquor License from 408-410 Fairview Avenue to 322 Bergen Boulevard presented at the regular meeting of the Mayor and Council held on September 23, 1952; and

"WHEREAS, Councilman Hanna states that his motion was in effect as follows: 'That the matter be referred to the Beverage Committee with power to act to grant said request if no objections be raised, to be effective September 26, 1952'; and

"WHEREAS, Councilman Hofmeister, who seconded said motion, states that he recollects the motion as above stated;

"NOW, THEREFORE, BE IT RESOLVED, by the Mayor and Council of the Borough of Fairview that so much of the minutes of the regular meeting of September 23, 1952, relating to the transfer of the liquor license above referred to, be corrected to read as follows: 'Councilman Hanna, Chairman of the Beverage Committee, moved, seconded by Councilman Hofmeister, that the matter be referred to the Beverage Committee with power to act to grant said request, if no objections be raised, to be effective September 26, 1952.'

"On roll call, voting on above resolution: Councilman Castel, Hofmeister, Focorelli, Hanna, Corday and Stetka. Carried."

In view of the above facts, we may now turn to a consideration of the merits of the appeal.

As to allegation (1) hereinabove set forth: If the minutes of the regular meeting held on September 23 are considered as corrected in accordance with the minutes of the regular meeting held on October 14, it is apparent that there was no valid granting of said applications on September 23, 1952. If the minutes are not considered as so corrected, the action taken by respondent on September 23 was nevertheless improper. R. S. 33:1-25 and 26 require that an applicant for a license or transfer of a license "shall cause a notice of the making of such application to be published in a form prescribed by rules and regulations, once a week for two weeks successively in a newspaper ***." It is true that in Re Novack, Bulletin 174, Item 6, Commissioner Burnett approved a procedure whereby a local issuing authority may grant a license prior to the second publication of a notice, but he required that the resolution granting the license shall be made subject to "the special condition that the advertising of notice of intention be completed and proof of publication submitted, provided, however, that such license shall not be actually issued until two whole days shall have elapsed after the second publication of notice of intention, not counting the day on which such publication may be made, and, further provided, that if within such period, or at any time before the license is actually issued, an objection, or a protest shall be filed against the issuance of such license, the license shall not be issued until the further determination of this board or governing body." The same procedure was approved as to transfers of licenses. Re Valicenti, Bulletin 238, Item 13; cf. Franklin Stores v. Newark et al., Bulletin 390, Item 5. In this case the procedure approved in Re Novack was not followed. Moreover, it appears that objections were filed before the license was transferred and, in fact, before the second publication. Hence, it cannot be maintained that there was a valid granting of the applications on September 23. I find that allegation (1) is without merit.

As to allegation (2) hereinabove set forth. It appears that all interested parties were given an opportunity to be heard at the public hearing on September 29. At the hearing of this appeal Joseph Castel, President of the Borough Council, testified that, after the objections were filed, the members of the council discussed the question from all phases and from all angles. He further testified as follows:

"We took everything into consideration: the number of taverns that is on the Bergen Boulevard at the present time. We have four in an area of about a half mile or more. We took into consideration the people that objected along Jersey Avenue, whose homes, the rear of their homes are behind this property

of Mr. Schwanwede. They run very close to Mr. Schwanwede. I think in one case it might run behind Mr. Schwanwede's property. We took the traffic hazard into consideration. We took the type of building into consideration, because of the other four establishments that have anywhere from twenty-five to a hundred thousand dollars involved in their business. But one of the outstanding features was, it was within the past year or so, that we objected to the construction of hot dog stands on Bergen Boulevard. And we were afraid at the time that we might leave the door open for others to come in and open up a stand of a similar nature. Of course, we are very close to the Borough of Fort Lee, and we know the experience that the Borough of Fort Lee has had on similar types of stands *** where beer and liquor is served at these hot dog stands. *** And from past experience around the area, we know that most of these hot dog stands, most of these clam bars, are patronized by teen-agers more than grown-ups, and for that reason, and other reasons, we thought we'd deny the transfer of the application to this particular spot."

Mayor Battaglia testified that Mr. Castel had substantially set forth the reasons for the denial of the applications.

Now, it is clear from the evidence that, at the present time, there are a large number of taverns on Bergen Boulevard in this section of the Borough. One, known as Bren Lodge, adjoins appellant's premises and the buildings are approximately seventy feet apart. On the opposite side of Bergen Boulevard, Gay's Tavern is located approximately three hundred feet; Sauter's is located approximately eight hundred feet, and the Paradise is located approximately nine hundred feet from appellant's premises. At the hearing herein five persons who reside in the immediate vicinity objected to the transfer of the license because, among other reasons, the building is "in the nature of a roadstand" and because there are sufficient licensed premises in the neighborhood. Admittedly, appellant operates a clam bar, specializing in the sale of clams, hot dogs and soda. There is little, if any, evidence that there are odors or noises emanating from appellant's premises, or that the transfer of the license would create a traffic hazard or parking problem. There is, however, sufficient evidence to sustain respondent's action based on the other reasons for denial set forth in the resolution of October 6, 1952. Certainly it lies within the sound discretion of the local issuing authority to determine whether an additional liquor establishment in a particular area would result in an undue concentration of licensed places in that area. See DeCapua v. Ocean, Bulletin 941, Item 1, and cases therein cited.

In all appeals to the Director, the burden of proof to establish that the action of respondent was erroneous rests with appellant. Rule 6 of State Regulations No. 15. After careful review of the evidence presented herein, there is no indication that respondent's denial was capricious or that it did not constitute a valid exercise of discretion. I find, therefore, that appellant has failed to carry the burden of proof. The denial of appellant's application will, therefore, be affirmed.

Accordingly, it is, on this 24th day of February, 1953,

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

DOMINIC A. CAVICCHIA
Director.

5. APPELLATE DECISIONS - MEVOLI AND WALLACE v. CAMDEN AND SHAPIRO (CASE NO. 2).

Case No. 2)
MARION R. MEVOLI and MARY WALLACE,)
Appellants,)

-vs-)

MUNICIPAL BOARD OF ALCOHOLIC)
BEVERAGE CONTROL OF THE CITY OF)
CAMDEN, and GEORGE SHAPIRO,)
Respondents.)

ON APPEAL
ORDER OF DISCONTINUANCE

-----)
William T. Cahill, Esq., Attorney for Appellants.
John J. Crean, Esq., Attorney for Respondent Municipal Board.
E. George Aaron, Esq., Attorney for Respondent George Shapiro.

BY THE DIRECTOR:

This is an appeal from the action of respondent Municipal Board whereby it granted the transfer of a plenary retail consumption license (for the 1951-52 licensing year) from Zenon Bubnoski to respondent George Shapiro, and from premises at 1425 Mt. Ephraim Avenue to premises at 580 Chestnut Street, Camden.

The attorneys for the respective parties herein have filed a written consent to the entry of an order of discontinuance herein. No reason appearing to the contrary,

It is, on this 25th day of February, 1953,

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

DOMINIC A. CAVICCHIA
Director.

6. STATE LICENSES - NEW APPLICATIONS FILED.

Peter Hand Brewery Company
1000 West North Avenue
Chicago 22, Illinois.
Application filed March 9, 1953 for Limited Wholesale License.

Lawrence A. Piccirillo
71-77 Nichols Street
Newark, N. J.
Application filed March 9, 1953 for additional warehouse at
107 Main Street, Avon, N. J.

DOMINIC A. CAVICCHIA
Director.

7. DISCIPLINARY PROCEEDINGS - STATE BEVERAGE DISTRIBUTOR LICENSEE - FAILURE TO FILE WITH DIRECTOR NOTICE OF DEFAULT BY RETAIL LICENSEE AND SALE OTHER THAN SALE FOR CASH TO RETAILER ON DEFAULT LIST, IN VIOLATION OF REGULATIONS NO. 39 - LICENSE SUSPENDED FOR 5 DAYS.

In the Matter of Disciplinary Proceedings against)

ROMEO DiLUIGI)
 T/a ATLANTIC BOTTLING WORKS)
 211-213 N. Massachusetts Avenue)
 Atlantic City, N. J.,)

CONCLUSIONS AND ORDER

Holder of State Beverage Distributor's License SBD-204, issued by the Director of the Division of Alcoholic Beverage Control.)

Leo J. Berg, Esq., Attorney for Defendant-licensee.
 David S. Piltzer, Esq., appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Defendant has pleaded non vult to the following charges:

- "1. On June 6, 10, 13, 20 and July 7, 1952, each date being more than three days after a New Jersey retail licensee became in default to you pursuant to Rule 2(a) of State Regulations No. 39, you failed to file with the State Director of Alcoholic Beverage Control a notice of such default, in that you failed to notify said Director that retail licensee ... had failed to make payment for beer delivered to it by you on May 2, 3, 7, 9, 16 and 29, 1952, respectively; in violation of Rule 5(b) of State Regulations No. 39.
- "2. On June 14, 18, 21, 27, July 2, 5, 12, 19, 26, August 1, 2, 6, 9, September 6 and 19, 1952, you sold and delivered alcoholic beverages not for payment in cash on delivery to New Jersey retail licensee ..., which licensee was, at the time of said deliveries, listed on the default list of the State Division of Alcoholic Beverage Control, in that you made deliveries of beer on said dates to said retailer on credit; in violation of Rule 4(a) of State Regulations No. 39."

The charges herein are so explicit as to facts relating to this proceeding that it would be redundant to repeat the facts.

Defendant alleges that the violations occurred through an oversight. He was given an opportunity to obtain a special permit. See Bulletin 849, Items 1 and 3. Having failed to do so, the present proceedings were instituted.

Defendant has no prior adjudicated record. Considering all the circumstances and the plea entered herein, I shall suspend defendant's license for a period of five days. Re O.K. Bottling Co., Inc., Bulletin 914, Item 11.

Accordingly, it is, on this 19th day of February, 1953,

ORDERED that State Beverage Distributor's License SBD-204, issued by the Director of the Division of Alcoholic Beverage Control to Romeo DiLuigi, t/a Atlantic Bottling Works, 211-213 N. Massachusetts Avenue, Atlantic City, be and the same is hereby suspended for five (5) days, commencing at 7:00 a.m. March 2, 1953, and terminating at 7:00 a.m. March 7, 1953.