Deputy Director Stockburger

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

BULLETIN 1741 July 31, 1967

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ITEM

STATE OF NEW JERSEY
Department of Law and Public Safety
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1. PUBLIC EMERGENCY - GOVERNOR'S PROCLAMATION OF - TOGETHER WITH DIRECTOR'S IMPLEMENTING AND TERMINATING NOTICES AND OF EXTENSION OF CREDIT AND ISSUANCE OF SPECIAL TRANSPORTATION PERMITS TO AFFECTED RETAILERS.

WHEREAS, on July 14, 1967, pursuant to the powers vested in me by the Constitution and Laws of the State of New Jersey, particularly pursuant to the authority granted to me under the Laws of 1942, chapter 251, (Disaster Control During Emergency) and all amendments and supplements thereto, I have declared that a state of emergency exists in the City of Newark, and

WHEREAS, the Laws of 1942, chapter 251, (Disaster Control During Emergency) and all amendments and supplements thereto, authorized the promulgation of such orders, rules and regulations as are necessary to meet the various problems presented by the emergency,

NOW, THEREFORE, in accordance with the Laws of 1942 chapter 251, section 13, as amended, I do hereby promulgate declare the following regulations to be in effect until such time as it is declared that an emergency no longer exists in the City of Newark, which shall be in addition to all other laws of the State of New Jersey:

1. There shall be no movement of vehicular traffic in the City of Newark between the hours of 10:00 P.M. and 6:00 A.M. of the following day, except for the movement of police, fire, National Guard and such other vehicles as may be permitted by the Governor. This regulation shall not be effective as to the Garden State Parkway, New Jersey Turnpike and State Highways Nos. 1 and 22.

2. There shall be no vehicular traffic within such areas of the City of Newark as the Governor may, from time to time, designate and at such hours as he shall designate during periods other than the hours expressed in Regulation No. 1 aforesaid.

3. No person shall remain in or upon the public streets, ways and places of the City of Newark between the hours of 11:00 P.M. and 6:00 A.M. of the following day, except as shall be authorized by the Governor.

4. All persons licensed under the Alcoholic Beverage Control Law to dispense alcoholic beverages at retail or for on-premise consumption shall cease operation of their business during the pendency of this emergency, except that hotels may remain open for the service of food and supplying other accommodations to guests.

5. No person, other than the State Police, National Guard, local police authorities or any other person as may be authorized by the Governor, shall carry, hold, or possess in any motor vehicle, carriage, motorcycle, or other vehicle, or

carry on or about his clothes or person, or otherwise have in his possession, or under his control, alcoholic beverages, narcotics, firearms or explosives of any kind during this emergency.

6. The State Police, the National Guard, and local police authorities are hereby directed and ordered to take any and all measures requisite to quell disturbances and outbreaks of violence, to secure areas within the City of Newark, to prevent and deter actual or threatened harm to persons or properties and generally to take all actions necessary to implement and effectuate these regulations.

RICHARD J. HUGHES, GOVERNOR
STATE OF NEW JERSEY

ATTEST:

Lawrence Bilder
Secretary to the Governor

NOTICE TO ALL RETAIL LIQUOR LICENSEES IN THE CITY OF NEWARK:

The City of Newark is presently experiencing an outbreak of lawlessness, which in the last few days has resulted in assaults on innocent persons and wanton destruction of property. These outbreaks of violence which started in the Central Ward have spread to other sections of Newark, and the public safety and welfare is being threatened in those areas.

Upon consultation with Governor Richard J. Hughes, Attorney General Sills and Newark's Mayor Addonizio, it was decided that a public emergency exists in the City of Newark, and that the public interest mandates the temporary closing of all retail liquor licensed premises until conditions in Newark are normalized.

Under the authority of Rule 2A of State Regulation No. 20, it has been determined that a public emergency presently exists in the City of Newark and that all retail liquor licensees subject to the provisions of that regulation are to be closed until further notice.

Rule 2A provides that:

> "No licensee shall sell, serve or deliver or allow, permit or suffer the sale, service or delivery of any alcoholic beverage, at retail, or allow, permit or suffer the consumption of any alcoholic beverage on the licensed premises, or allow, permit or suffer the retail licensed premises to be open, during any period for which any duly constituted state, county or municipal law enforcement authority, because of a public emergency or investigation of crime, has ordered the licensed premises to be closed, unless excepted by such authority to permit continuing conduct of business other than the sale of alcoholic beverages."

Any licensee violating this order shall be subject to immediate disciplinary proceedings directed toward revocation of his license.

JOSEPH P. LORDI
DIRECTOR

Dated: July 14, 1967

IMMEDIATE RELEASE TO NEWS MEDIA

Pursuant to a proclamation issued by Governor Richard J. Hughes on July 14, 1967 I promulgated an order under the authority of Rule 2A of State Regulation No. 20 directing that all retail liquor licensees in the City of Newark cease operation of their licensed premises until further order.

Upon consultation with the Governor, Attorney General Sills, Newark Mayor Hugh J. Addonizio and Police Director Dominick Spina, it was decided that the said retail liquor licensees may now resume operations of their licensed premises.

Accordingly, it is on this 19th day of July, 1967,

ORDERED that, effective immediately, all retail liquor licensees in the City of Newark may reopen and commence operations of their licensed premises as heretofore authorized.

JOSEPH P. LORDI
DIRECTOR

TO STATE LICENSEES SELLING ALCOHOLIC BEVERAGES TO RETAILERS:

Because of the recent unfortunate situation arising in Newark and adjoining towns, there has been serious disruption in the alcoholic beverage business. As a result of either the complete or intermittent closing of retail establishments by either my directive, based on the Governor's proclamation, or by local authorities, during this emergency, many have been placed in a position of being unable to pay invoices due for alcoholic beverages as of certain dates.

The affected areas are:

Newark	East Orange	Hillside	Nutley
Belleville	East Newark	Kearny	North Arlington
Bloomfield	Elizabeth	Lyndhurst	Orange
Caldwell	Harrison	Maplewood	Rutherford
Cedar Grove	Irvington	Montclair	South Orange

Verona
West Orange

I am concerned over undue hardships which may be thrust upon such retail licensees who heretofore acted in strict compliance with our credit regulations (Regulation No. 39) but now find themselves unable to meet their obligations.

Hence, to alleviate this burden I herewith rule that licensees, in the affected area, who purchased alcoholic beverages between June 14, 1967 and June 30, 1967 shall be granted an extension of credit until July 31, 1967 before being reported in default for non-payment of the invoice.

This will in no way affect licensees who purchased alcoholic beverages prior to June 14, 1967 and who are presently on the default list except that payment of these invoices may have been delayed because of the cessation of postal services during the emergency. In these instances payment shall not be considered as "late" payment and may be accepted. If any such licensees were reported in default please advise this Division by mail and the default notice will be disregarded.

In addition to the above, situations may arise concerning licensed premises which were looted and large quantities of alcoholic beverages stolen. In these instances licensees may be given further extension by submitting an affidavit to me setting forth all pertinent information which will be the basis for my determination.

To further aid licensees who were unable to obtain deliveries of alcoholic beverages because of the emergency or who may have lost merchandise because of the looting, I am making an exception to the long established policy of prohibiting delivery during the dates designated by wholesalers as those on which no sales or deliveries will be made.

I am permitting deliveries of alcoholic beverages by these licensees on Friday and Saturday, July 21 and 22, 1967.

If retail licensees wish to pick up alcoholic beverages at wholesale licensed premises on these dates, this may be done either in the retail licensee's vehicle which bears a transit insignia or one for which a special emergency transportation permit has been obtained.

To further assist licensees I have reduced the fee for these special permits during this emergency period to five dollars and will have a staff at my office on July 21 and 22, 1967 between 9:00 a.m. and 5:00 p.m. to process permits.

JOSEPH P. LORDI
DIRECTOR

Dated July 20, 1967

TO THE STAFF:

During the recent emergency in the City of Newark this Division was required to close and police many thousands of licensed premises. The manner in which Division personnel applied themselves to this formidable task deserves the thanks and appreciation of all persons directly affected by the emergency. Your dedication and efficiency played no small part in helping to control the situation and bring peace and order once again to this troubled area.

My special thanks and commendation to Major Stockburger and those enforcement agents given specific assignments. During the emergency they worked many hours under the most trying conditions with maximum effort and effectiveness. No greater tribute can be made other than to say they acted in the finest tradition of the Division and brought added glory to a regulatory agency which through the years has enjoyed an enviable reputation.

My profound gratitude to all staff members who contributed to a job well done.

JOSEPH P. LORDI
DIRECTOR

Dated July 21, 1967

2. APPELLATE DECISIONS - AIELLO v. WEST MILFORD AND PELLEGRINO.

John Aiello,

Appellant,

v.

Township Committee of the Township of West Milford, and Frank and Mary Pellegrino, t/a West Milford Shopping Plaza Bar & Liquors,

Respondents.

On Appeal

CONCLUSIONS and ORDER

Joseph A. D'Alessio, Esq., and William Osterweil, Esq.,
Attorneys for Appellant
Wallisch & Wallisch, Esqs., by Louis Wallisch, Jr., Esq.,
Attorneys for Respondent Township
Harrison & Ferrante, Esqs., by Carmen A. Ferrante, Esq.,
Attorneys for Respondents Frank and Mary Pellegrino

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of respondent Township Committee of the Township of West Milford (hereinafter Township) whereby on the 20th day of September 1966 it unanimously granted the application of respondents Frank and Mary Pellegrino, t/a West Milford Shopping Plaza Bar & Liquors (hereinafter Pellegrino) for a person-to-person and place-to-place transfer of a plenary retail consumption license from Lakeview Development Corp., t/a Lakeview Lounge, to Pellegrino and from premises on Greenwood Lake Turnpike to premises on Union Valley Road, West Milford.

The petition of appeal alleges that the action of the Township was erroneous and should be reversed for reasons which may be briefly summarized as follows: (1) there was no evidential basis to sustain such action and the findings were based on matters "extraneous to the evidence", (2) said transfer would create "too great a concentration of liquor licenses in a small geographic area", (3) the proposed site was too close to church and school property and may have an adverse effect on the neighborhood, (4) the said action "was likely to cause an undue economic hardship to the other licensees who have been in the area for many years and that it could possibly result in the lowering of business standards" (5) that there was no need or necessity for such transfer, (6) that Pellegrino's true purpose was to conduct a package store type of operation under its plenary retail consumption license at the new location.

The answers filed by Township and Pellegrino deny the substantive allegations of the said petition and, in addition, the answer of the Township sets forth the following statement of grounds on which it bottomed its determination, to wit:

"The members of the Township Committee in expressing their vote in favor of the transfer from person to person and from place to place stated the following grounds: Committeeman Little:

1. That the proposed premises will not be a liquor store as such, but will be a C type license as are all others in the Township.

2. That the concentration of taverns in this area will not be changed by this transfer.

3. That there has been no trouble with liquor licensees in the Township and no objections from any church groups.

4. That he did not consider the proposed location to be any detriment to the people in the area.

5. That in his opinion there would be no adverse effects to the area or the township by this transfer.

He voted in favor of the transfer.

Committeeman Dunnigan:-

1. He concurred with the comments made by Committeeman Little.

2. He added that the proposed premises would be four hundred and ninety feet from the road and that there are no adjacent houses in the area.

3. He considered that there is no hardship being created by the transfer.

He voted in favor of the transfer.

Mayor Fredericks:-

1. That there would be no greater concentration of licenses since the license being transferred is from the same geographical area.

2. That the proposed location is well over the minimum distance from the church which the regulations require.

3. That the shopping center will bring more people to the area and therefore there will be no hardship to existing licensees.

4. That all present licensees have the right to open the type business operation being applied for.

He voted in favor of the transfer."

The adoptive resolution was approved with a special condition that "the transfer shall not be endorsed and made effective unless and until the building is completed in accordance with plans and specifications approved and found acceptable by the governing body of the Township of West Milford, New Jersey."

This appeal was heard de novo, with full opportunity for counsel to present evidence under oath and cross-examine witnesses pursuant to Rule 6 of State Regulation No. 15.

To set in perspective the issues raised by the pleadings herein, a brief summary of the facts is necessary. Pellegrino applied to the Township for a person-to-person and place-to-place transfer of a license formerly conducted in conjunction with a bowling alley at the address hereinabove stated to a proposed location in a newly created shopping center. This shopping center is located within 2,000 feet from the existing location and, in the opinion of the Township, is in the same general area as the prior location. Township of West Milford is geographically a large municipality consisting of at least eighty square miles. The proposed location is in a largely populated summer resort area near Greenwood Lake, and it was conceded that the Greenwood Lake area largely patronized this shopping center. Evidence further discloses that this municipality has experienced a tremendous population growth during the past decade.

According to the testimony of Mayor Wilbur Fredericks, when he first started doing business in the area there were about 2,025 people in the entire township and that has grown to between twelve and fourteen thousand year-round residents and twenty or twenty-five thousand summer residents. As a member of the Township planning board, he noted that during the past year alone there have been over seven hundred sub-division applications for new construction in this community. It was further developed that the proposed location is at least five hundred feet distant from a church located diagonally opposite the said shopping center and that there is a school adjacent to the said church. There is a large parking area fronting the proposed location at Union Valley Road. The Township Clerk testified that there were thirty-five licenses issued in this municipality in 1940, 1950 and 1960, and that the same number exists at the present time. The immediate area, within one thousand feet, contains three plenary retail consumption licenses.

John Aiello (the appellant herein) is a liquor licensee, whose licensed premises are located about seven hundred feet from the proposed location. His principal objection appears to be that this area cannot support another license and that there is no public need to be served by such transfer. He also is apprehensive that children would be tempted to play in the parking area adjacent to the proposed premises. On cross examination he admitted that his own licensed premises consist of a hotel, restaurant and tavern which are adjacent to a candy and pizza store, as well as a grocery store, which attract a considerable number of children. He further admitted that this area attracts many persons from upper Greenwood Lake and has experienced a substantial population growth. Finally, he granted that most of the people who patronize his establishment and who would patronize the shopping center come there by motor vehicle; that in fact there are no sidewalks in the vicinity of, or contiguous to, the said shopping center.

Reverend James Mulhern, testifying in behalf of the appellants, felt that "there are enough taverns in the town now." He stated that his original reason for objecting to this transfer was that he was opposed "to the establishment of this tavern in that location;" that he has no objection to a package store. On cross examination he admitted that this was in fact a transfer of an existing license and not the grant of a new license. However, he insisted that he was opposed to having it "so close to the church."

Francis J. McKinley (the operator of the West Milford Great Oak Inn which commenced operation on September 3, 1965) also objected to this transfer because he felt that there was not enough present business "to merit another place of business, another tavern there. There simply isn't that much business in the neighborhood." He also explained that, when he originally objected at the hearing before the Township, he was under the impression that the Pellegrinos were going to operate a package store. Nevertheless he still felt at this hearing that the area cannot support another plenary retail consumption licensee.

Mary E. Barrett expressed the views of five other residents who appeared at this hearing in opposing the said transfer because the proposed location was "directly across from my church and the school and the children playing in the school yard." She also felt that taverns in general are noisy and a not very healthy atmosphere for children in the area.

Mayor Fredericks reiterated the reasons set forth hereinabove in the minutes for his support of Township's action. He felt that the tremendous populational growth warranted such action. He also stated that in his opinion the development of the major shopping center would encourage more business for all merchants because it would attract many more people to the area. He explained that this was not the grant of a new application but was merely the transfer of a pre-existing license to a location within the same area. He also asserted that he took into consideration the location of the church but, nevertheless, felt that the proposed site was "a proper site for a tavern or a C license in view of its position in reference to the church."

Robert L. Little (a Township committeeman) similarly reiterated the reasons assigned to him hereinabove. He particularly emphasized that he did not consider the likelihood of children playing in the area as an influential factor because "ninety per cent of our children are transported to their schools and from their schools by bus. And the setup in this shopping area is such that I don't think it would be more or less of a hangout as the corner drugstore, as they consider a corner drugstore or candy or ice cream parlor or something like that. It's a modern shopping center and I think a license in that area is much better than some of the present licenses that are actively operating." He also felt that all businesses in the area, including the appellant's business, would improve by reason of the development of the shopping center, and concluded that, based on the large area of the community and the number of existing licenses, the said transfer would serve the best interests of the community.

It was stipulated that the testimony of Township Committeeman William Dunnigan would be corroborative of that of Little and Fredericks.

The burden of establishing that the action of the respondent issuing authority was erroneous and should be reversed rests with the appellant. Rule 6 of State Regulation No. 15.

It is well established that no one has a right to the issuance or transfer of a license to sell alcoholic beverages. Zicherman v. Driscoll, 133 N.J.L. 586; Biscamp v. Teaneck, 5 N.J. Super. 172 (App.Div. 1939). The decision as to whether or not the license will be transferred to a particular locality rests within the sound discretion of the local issuing authority in the first instance. Hudson-Bergen County Retail Liquor Stores Association v. North Bergen et al., Bulletin 997, Item 2. Each municipal authority has wide discretion in the transfer of a liquor license, subject to review by this Division in the event of any abuse. Passarella v. Board of Commissioners of Atlantic City et als., 1 N.J. Super. 313.

As Justice Jacobs pointed out in Borough of Fanwood v. Rocco et al., 33 N.J. 404, at p. 414:

> "Although New Jersey's system of liquor control contemplates that the municipality shall have the original power to pass on an application for ... license or the transfer thereof, the municipality's action is broadly subject to appeal to the Director of the Division of Alcoholic Beverage Control. The Director conducts a de novo hearing of the appeal and makes the necessary factual and legal determinations on the record before him....Under the settled practice, the Director abides by the municipality's grant or denial of the application so long as its exercise of judgment and discretion was reasonable...."

See also Essex County Retail Liquor Stores Assn. v. Newark et al., 77 N.J. Super. 70 (1962).

The Director's function on appeals of this kind 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 views. Larijon, Inc. v. Atlantic City, Bulletin 1306, Item 1; Bertrip Liquors, Inc. v. Bloomfield, Bulletin 1334, Item 1. In other words, the action of the municipal issuing authority may not be reversed by the Director unless he finds the "act of the board was clearly against the logic and effect of the presented facts." Hudson-Bergen County Retail Liquor Stores Association v. Hoboken, 135 N.J.L. 502. Cf. Fanwood v. Rocco, supra.

And further, in evaluating the action of the respondent herein it might be well to state the view which was expressed in Ward v. Scott, 16 N.J. 16 (1954), wherein the Supreme Court, dealing with an appeal from a zoning ordinance, set forth the following general principle:

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

As was clearly articulated by the Township's statement of reasons, and as the evidence unmistakably demonstrates, this

transfer did not aggravate the number of licenses in the area since the transfer effected a change of location within the same area. A proposed location within one thousand feet of the old location in a municipality which has a total area of eighty square miles must reasonably be considered to be within the same general area. See Henderson v. Teaneck and Stanley's Inc., Bulletin 1588, Item 1; Smith et als. v. Newark and Black, Bulletin 1481, Item 2; Bivona v. Hock, 5 N.J. Super. 118, reprinted in Bulletin 860, Item 1; L. Kubisky Inc. v. Paterson, Bulletin 1662, Item 2; Bomwell v. Newark, Bulletin 1639, Item 1, aff'd id nom. (App.Div. 1966), not officially reported, recorded in Bulletin 1667, Item 1.

The appellant further advocates that, although the proposed location is sufficiently distant from the church and school so that it may be legally sustainable, it nevertheless "does not add to the dignity of the church; as a matter of fact, it could have an adverse effect on the children that attend the school conducted by the church." I am persuaded, however, to the contrary. My inspection of the exhibits offered in evidence satisfies me that the proposed location, separated as it is by the road and a wide parking area, would have no deleterious effect on the church or its school. The minister of the church, although warranting that he had spoken to some parishioners, did not represent, nor did his view reflect, so far as the record shows, the majority sentiment of the church. Nor, indeed, has there been any objection to this transfer on the part of any of the school authorities. The Township fully considered this objection but nevertheless, as stated above, felt that this transfer would have no such adverse effect. So far as the children are concerned, I am also convinced that there is no probable likelihood of their being unduly attracted to this area, since most of them are transported to the school and church by school bus.

Counsel for appellant also charges that the real intent of Pellegrino is to operate their business as a package goods store rather than as a tavern or bar; that such intended operation would be in effect a violation of the Alcoholic Beverage Law in making a package goods store out of a tavern where the original license called for a plenary retail consumption license. This was vigorously denied by Pellegrino who, in support of his position, introduced into evidence a response to his letter of September 13, 1966, to this Division wherein he submitted for approval a plan of proposed premises. This plan was examined and, in an ex parte opinion dated September 14, 1966, the following pertinent part of the Division's reply is set forth:

> "You have, on September 13, 1966, submitted for approval a plan of proposed premises at Warwick Turnpike, Union Valley Road, West Milford, to which you and your wife, Mary, have applied to transfer the plenary retail consumption license, without 'broad package privilege', presently held by the above corporate licensee.
>
> "Please be advised that it is our opinion, ex parte, that the proposed premises as shown on the latest plan would not be in violation of the 'Broad Package Privilege Law' (R.S. 33:1-12.23 et seq.) or State Regulation No. 32, with respect to the sale or display for sale of package goods, provided that the depicted 26' bar will be utilized only as a bar and

will be equipped with hand rail, foot rail, sink, drainboard, hot and cold running water, utensils for preparing mixed drinks, and a sufficient number of opened bottles for the service of drinks of alcoholic beverages to be consumed upon the licensed premises and that no floor display or other obstructions are placed in the barroom.

"We also advise that this approval applies only to the premises in question if it is completed in accordance with the submitted plan. You are therefore cautioned to submit to this office for advance approval any proposed change in the plan, particularly with respect to the display of package goods other than on the perimeter walls of the barroom.

"You are also advised that you may not advertise the licensed premises in any way that implies that a liquor store is being conducted thereon. Rule 6 of State Regulation No. 21; Rule 2 of State Regulation No. 26. In this connection, we find your proposed use of 'West Milford Shopping Plaza Bar & Liquors' to advertise your business unobjectionable, provided that the word 'BAR' contained therein will be at least as prominent as the word 'LIQUORS'.

"When the proposed premises have been completed, please advise us so that we may cause an inspection to be made of the licensed premises."

It is, of course, understood that failure of Pellegrino to comply with the appropriate provisions of the Alcoholic Beverage Law and regulations in future operation under the license may result in disciplinary proceedings to either suspend or revoke the license. In this connection it might well be added that it is assumed that the premises in general will be conducted in a law-abiding manner. If that is so, children and other persons patronizing the shopping center have nothing to fear. If the operation is conducted in an improper manner so as to cause annoyance or otherwise in violation of the Alcoholic Beverage Law, the licensees will similarly subject their license to either suspension or revocation. Cf. Monmouth County Retail Liquor Stores Assn. et al. v. Middletown, Bulletin 1572, Item 1.

One further observation: There has been no definitive or uniform policy in the municipalities of New Jersey with respect to the operation of liquor licenses in shopping centers. A number of communities, however, have set individual policies which have frequently been translated into ad hoc ordinances. This township has not heretofore had any definite policy with respect to this matter. However, it is clear that township is in favor of such operation and considers the integrality of such facility in this shopping center consistent with the best interests, needs and convenience of the community. Its position in this respect is similar to that taken by numerous other local issuing authorities. See North Jersey Retail Liquor Stores Association v. Paterson and Shoppers Liquor Inc., Bulletin 1676, Item 2. The transfer of a liquor license to a shopping center is based on the same applicable principles as a transfer to any other section of the community.

The number of licensed premises to be permitted in a particular area, and the determination as to whether a

shopping center is a suitable location for such facility, have been held to be matters confided to the sound discretion of the local issuing authority. Cf. DiGioacchino v. Atlantic City, Bulletin 1030, Item 3. In such matters, the responsibility of a municipal issuing authority is "high", its discretion "wide" and its guide the public interest. Lubliner v. Paterson, 33 N.J. 428 (1960); cf. Fanwood v. Rocco, supra. The Township has, in my opinion, understood its full responsibility; its polestar was the best interests of the community.

After reviewing the entire record herein, including the memoranda of counsel and arguments therein in summation, I conclude that appellant has failed to sustain the burden of showing that the action of the Township was arbitrary, unreasonable or an abuse of its discretion. Rule 6 of State Regulation No. 15.

An addendum to the foregoing becomes pertinent because of the following: The within hearing on appeal took place on December 28, 1966. After the final memorandum in summation was submitted on March 27, 1967, and after the above report was prepared, I was in receipt of a letter from appellant's attorney which called attention to the fact that, since the grant of the application for transfer, "the Township of West Milford passed an ordinance providing that a license could be transferred within 1500 ft. of its present location. If the transfer sought is beyond the 1500 ft. limitation, then the said situs for the transfer must be at least 1/2 mile from any other licensed premises." He reasons that, since the subject transfer is more than 2,000 feet from its former location and only 750 feet from existing licensed premises, it follows that respondent did not act in good judgment and in fact "acted arbitrarily" in granting the said transfer.

The attorney for respondent Township Committee answers that the ordinance was passed on February 7, 1967, effective February 22, 1967, after the hearing on the appeal, and that it was thus "not proper ...to refer to the ordinance which was not in effect at the time of the action and hearing in above matter."

My reading of the ordinance adopted on February 7, 1967 indicates that appellant's version of its contents appears to be somewhat inexact. This ordinance supplements Chapter 3 ("Alcoholic Beverages") of the Revised Ordinances of the Township of West Milford, New Jersey, 1958, by adding section 3-11 entitled "Rules as to transfer of licenses" as follows (in so far as applicable):

> "1. No plenary retail consumption license except renewals for the same premises and transfers of license from person to person within the same premises, shall be granted or transfer made to other premises within a distance of two thousand five hundred feet from any other premises then covered by a plenary retail consumption license, provided, however, that the Township Committee may, in its discretion, grant a transfer of an existing license to the same licensee to other premises within one thousand five hundred feet of the premises from which the transfer is made, notwithstanding that the premises to which the license is so transferred is within two thousand five hundred feet of an existing plenary retail consumption licensed premises."

Paragraph 2 of the said supplement (in so far as applicable to the facts sub judice) states:

> "2. This ordinance or amendment shall not apply to any transfer of any license, where an application for such transfer has been filed with the Township Clerk on or before the effective date hereof ...."

The law in this State is well established by a long line of adjudicated cases to the effect that the status of the municipal ordinance prevailing at the time the appellate authority renders its decision is controlling, rather than the status of the ordinance at the time the municipal authority rendered its determination. Roselle v. Wright, 37 N.J. Super 507; Socony-Vacuum Oil Co., Inc. v. Mount Holly Township, 135 N.J.L. 112; DeVries v. Passaic et als., Bulletin 1457, Item 4. Cf. Ziffrin v. United States, 318 U.S. 73; 87 L. Ed. 621.

However, by virtue of Paragraph 2 of this ordinance, the Township specifically excepted transfers based upon applications filed before the effective date of the said ordinance as supplemented and, therefore, the general rule is not applicable within the factual complex herein.

No challenge has been made to the validity of the ordinance itself. Phillipsburg v. Burnett, 125 N.J.L. 157, 161 (Sup.Ct. 1940). Nor is there any suggestion that the members of Township were improperly motivated. Therefore, appellant's contention that the Township Committee did not act in good judgment and, indeed, arbitrarily must be rejected.

For the reasons aforesaid, it is recommended that an order be entered affirming the action of respondent Township Committee and dismissing the appeal.

Conclusions and Order

Pursuant to the provisions of Rule 14 of State Regulation No. 15, exceptions to the Hearer's report and argument in support thereof were filed by the attorney for the appellant. Answers to the exceptions and written argument in support thereof were thereupon filed by the attorney for the respondent Township.

In his exceptions the appellant's attorney states:

> "In examining the Hearer's Report, you will note that in the early part of the report he refers to the distance within which the transfer involved in this matter was made, as '2000ft.' In the determination towards the end of his report, he refers to the distance as '1000 ft.' Actually, the distance involved was 2000 ft. and the Hearer is mistaken in his determination when he determines the distance as being 1000 ft."

This statement is inaccurate and at variance with the testimony. While the Hearer's report apparently contains a typographical error in stating the distance as 2000feet, the testimony of Mayor Fredericks is to the effect that the distance between the prior location and the proposed premises is "about ten, twelve hundred feet." The Mayor testified that the transfer was within the same area and was then asked:

"Q Not closer to three thousand?
A No.
Q Ten, twelve hundred feet away?
A About twelve hundred feet.

Since he felt that it was within the same general area, such transfer did not aggravate the exiting concentration of licenses. L. Kubisky, Inc. v. Paterson, Bulletin 1662, Item 2; Costa v. Verona, Bulletin 501, Item 2.

Appellant's attorney further argues that the present operative ordinance expresses the true intent of the Township with respect to distance requirements and, therefore, should militate against this transfer. The fact is, however, that the ordinance was not adopted "a very short time after the determination in this case," as argued by appellant, but was in fact passed on February 17, 1967, five months after the Township's action herein. The Hearer pointed out that Paragraph 2 of the ordinance specifically exempted transfers or applications for transfers which were "filed with the Township Clerk on or before the effective date hereof." It is abundantly clear that the Township was fully cognizant of its action and the facts relating to the subject transfer, when it adopted the present ordinance.

Appellant's attorney further advocates that the denial of this application for transfer would in effect "reduce the number of alcoholic beverage outlets throughout the state, which in many cases are greater in number than the limitations set by the statute." He urges that this would be consistent with the policy of the Director. The short answer to this is that, if such action were motivated primarily by a desire to reduce the number of licenses in a community, such action would be arbitrary. As was pointed out in Tp. Committee of Lakewood Tp. v. Brandt, 38 N.J.Super. 462, at p. 466:

> "The desire of these committeemen to reduce the number of licenses, because too many were outstanding, is commendable. But this they should have attempted through some less arbitrary means than through destroying the transferability of outstanding licenses."

And further:

> "An owner of a license or privilege acquires through his investment therein, an interest which is entitled to some measure of protection in connection with a transfer."

Therefore this contention must be rejected.

I have considered each of the exceptions filed by the appellant and find that they do not present sufficient reasons in law or in fact to reverse the recommendations of the Hearer.

After careful consideration of the entire record herein, including the transcript of the testimony, the exhibits, the arguments of counsel, the Hearer's report, the exceptions and arguments thereto, and the answer to the exceptions, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 17th day of May, 1967,

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

JOSEPH P. LORDI,
DIRECTOR

3. APPELLATE DECISIONS - LEOSCH INC. v. ELIZABETH.

Leosch Inc., t/a Midtown Tavern,

Appellant,

v.

City Council of the City of Elizabeth,

Respondent.

On Appeal

CONCLUSIONS AND ORDER

Matthew D. F. Wade, Esq., Attorney for Appellant
Edward W. McGrath, Esq., by Frank P. Trocino, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the unanimous action of respondent whereby it suspended appellant's license for a period of fifteen days effective February 13, 1967. Appellant was adjudged guilty in disciplinary proceedings on a charge alleging that on May 15, 1966 it sold, served and delivered alcoholic beverages at its licensed premises to a 17-year-old minor, in violation of Rule 1 of State Regulation No. 20. The licensed premises are located at 1213 Magnolia Avenue, Elizabeth.

Upon the filing of the appeal an order was entered on February 10, 1967 staying respondent's order of suspension until further order of the Director.

Appellant alleges in its petition of appeal that the action of the respondent was "clearly contrary to the weight of the evidence" and that the suspension imposed was "too severe" in view of the charge and the evidence presented in substantiation thereof.

Respondent's answer denies the aforesaid allegations set forth in the appellant's petition herein.

The hearing on appeal was de novo, pursuant to Rule 6 of State Regulation No. 15.

The parties agreed to submit the matter upon a stenographic transcript of the proceedings held before respondent, pursuant to Rule 8 of State Regulation No 15, which was supplemented at the hearing herein by testimony of police officer Herman Engel.

It appears from the testimony of Leo --- (who was born on March 15, 1949 and 17 years of age at the time) that on May 15, 1966 he purchased a gallon of beer in a glass container from the appellant herein; that, after leaving the premises and walking across the street to the rear of the local newspaper office, he dropped the container but returned to the appellant's premises and obtained a refill of beer; that during the hearing below he pointed out Leo Schneider as the person who sold and served the beer to him; that, while in the process of consuming the beer in the rear of the building where the local newspaper had its office, he observed a police officer and, in an attempt to evade apprehension, met with an accident; that thereafter he was taken to a local hospital where he was interrogated by police officers. He stated that he was accompanied at the time by two companions who waited for him when he visited the appellant's licensed premises to make the purchase of beer.

James Kaszuba and Carl Warnander testified that, while with Leo on May 15, 1966, they saw him go into the appellant's licensed premises and, although neither of them saw him come out of the premises, when he joined them he had a gallon of beer.

Officer James Smith testified that at about 5:50 p.m. on May 15, 1966 he observed four or five youths with containers in their hands; that, when he pulled up in the police car, Leo attempted to flee and in so doing ran into an eight-foot metal pole which is part of a "Cyclone" fence in the back of the newspaper building; that, as a result of striking the pole, he received a laceration on the left side of his head and was then taken to a hospital for treatment. Officer Smith questioned the youth to ascertain where he had obtained beer, and Leo stated that "a colored male bought it for him at the Plaza Bar at Jefferson and Magnolia Avenue." Leo appeared unable to give him (Officer Smith) an identification of the person who had purchased the beer for him as alleged.

Officer Herman Engel testified that on May 15, 1966 he and Officer Smith investigated an occurrence on or near the property owned by the Elizabeth Daily Jounal newspaper; that, as a result of his arrival at the place in question, he observed four or five youths drinking beer from paper quart containers, which containers were dropped by the youths when they saw him and Officer Smith. Officer Engel further stated that he did not see any glass containers at the time. Officer Engel also stated that he was present at the hospital when Leo contended that a colored man had bought the containers of beer.

Detective Albert Krug testified that Leo accompanied him to the appellant's licensed premises and, in his presence, identified Leo Schneider as the person who had sold him the beer on the date in question.

Leo Schneider testified that he is an officer of appellant and was on duty as a bartender on May 15, 1966; that the first time he had ever seen Leo was "when the detective brought him into the tavern, that was the first time. I never saw the youngster before that. At that time, he hung his head. He wouldn't even look at me." Leo Schneider denied that he had ever seen the other two youths who were alleged to have accompanied Leo to the vicinity of appellant's premises and denied that he had ever at any time sold any beer to Leo. When asked whether or not he does sell beer for off-premises consumption in gallon glass containers, Mr. Schneider stated that he did.

Leo was recalled to testify and, in answer to a question by Councilman Gora concerning the first glass jar or container which he was alleged to have purchased and dropped, Leo answered that it fell on the grass, slipped from his hand, and that he went back to appellant's tavern and got it refilled. Furthermore, he stated that, when he had finished the contents of the glass container, he placed it by the fence and there were "other guys" who had obtained their own drinks which had been in cardboard containers. Although the testimony of the two police officers who had gone to the hospital when Leo was taken there for first aid treatment was to the effect that Leo stated he did not make the purchase of the beer in appellant's licensed premises, at the hearing and while under oath he admitted that he actually did make the purchase as alleged. Moreover, the two youths who had accompanied him at the time in question to the vicinity of appellant's premises testified that Leo went into appellant's tavern and subsequent thereto he had in his possession a gallon of beer.

Leo Schneider, who admitted being on duty as bartender at the time, stated that beer is sold for off-premises consumption in one-gallon glass containers.

We are dealing in this matter with a purely disciplinary action, and such action is civil in nature and not criminal. In re Schneider, 12 N.J.Super. 449 (App.Div. 1951). Thus the proof must be supported by a fair preponderance of the credible evidence. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956).

Although the testimony in this matter is somewhat conflicting, I am satisfied with the authenticity of the testimony of Leo that he purchased the beer in question at appellant's licensed premises. He identified Leo Schneider while with Detective Krug at appellant's premises and did likewise, without hesitation, at the hearing before respondent. I am aware that testimony to be believed must not only proceed from the mouth of credible witnesses but must be credible in itself, and must be such as common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App.Div. 1961).

I am not impressed with the testimony of Mr. Schneider, the sole person on duty on the day in question, that he had never seen Leo before the time he was brought there by police officers.

The Director's function in a matter of the kind now under consideration is not to reverse the determination of a local issuing authority unless he finds as a fact that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by the respondent City Council. Schulman v. Newark, Bulletin 1620, Item 1. I therefore find as a fact that, under all the circumstances presented herein, there has been sufficient proof to establish appellant's guilt. I conclude with reference thereto that appellant has failed to meet the burden that respondent's action was erroneous and against the weight of the evidence as required by Rule 6 of State Regulation No. 15.

Appellant additionally asserts that the penalty herein was arbitrary and unduly harsh and oppressive. It has con-

sistently been held by this Division that a suspension imposed in a disciplinary proceeding rests in the first instance within the sound discretion of the local issuing authority and that the power of the Director to reduce or modify it must be sparingly exercised and only with the greatest of caution. Harrison Wine and Liquor Co., Inc. v. Harrison, Bulletin 1296, Item 2.

Under the circumstances of this case I cannot say that the suspension of fifteen days imposed herein was severe or that such penalty would be a basis for reversal or even modification on this appeal. I might add that, for an unaggravated case for sale of alcoholic beverages to a 17-year-old minor, a minimum penalty of twenty days is customarily imposed by the Director. See, for most recent example, Re Joseph Sandor Bar, Inc., Bulletin 1725, Item 7.

I therefore recommend that an order be entered affirming the Council's action and dismissing the appeal, and fixing the effective dates for the suspension imposed by the Council and stayed pending the entry of the order herein.

Conclusions and Order

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

I find that the matters contained in the exceptions, which involve a purely factual question, were considered in detail by the Hearer in his report and that they lack merit.

Having carefully considered the entire record, including the exceptions filed, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 15th day of May, 1967,

ORDERED that the action of respondent be and the same is hereby affirmed and the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that Plenary Retail Consumption License C-202, issued by the City Council of the City of Elizabeth to Leosch Inc., t/a Midtown Tavern, for premises 1213 Magnolia Avenue, Elizabeth, be and the same is hereby suspended for fifteen (15) days, commencing at 2:00 a.m. Monday, May 22, 1967, and terminating at 2:00 a.m. Tuesday, June 6, 1967.

JOSEPH P. LORDI,
DIRECTOR

4. STATUTORY AUTOMATIC SUSPENSION - ORDER LIFTING SUSPENSION.

Auto. Susp. #304 In the Matter of a Petition to Lift the Automatic Suspension of Plenary Retail Distribution License D-23 Issued by the Municipal Board of Alcoholic Beverage Control of the City of Clifton to Johan Giezen t/a Willy's Wines & Liquors 110 Knapp Avenue Clifton, N. J.	On Petition O R D E R

BY THE DIRECTOR:

It appears from the petition filed herein and the records of this Division that on April 4, 1967, licensee-petitioner was fined $50 and $5 costs in the Clifton Municipal Court after pleading guilty to a charge of sale of alcoholic beverages to a minor on March 30, 1967, in violation of R.S. 33:1-77. The conviction resulted in the automatic suspension of petitioner's license for the balance of its term. R.S. 33:1-31.1. Because of the pendency of this proceeding, the statutory automatic suspension has not been effectuated.

It further appears that in disciplinary proceedings conducted by the municipal issuing authority, the license was suspended for ten days effective 9:00 a.m. Monday, May 29, 1967, and terminating at 9:00 a.m. Thursday, June 8, 1967, on a charge alleging sale of alcoholic beverages to the same minor, which sale was the subject of the previous criminal conviction. Hence, I shall lift the automatic suspension in anticipation of the service of the municipal suspension. Re Velky, Bulletin 1715, Item 8.

Accordingly, it is, on this 24th day of May, 1967,

ORDERED that the statutory automatic suspension of said license D-23 be and the same is hereby stayed in the meantime and is lifted effective 9:00 a.m. Thursday, June 8, 1967.

JOSEPH P. LORDI,
DIRECTOR

5. DISCIPLINARY PROCEEDINGS - ORDER IMPOSING DEFERRED SUSPENSION.

In the Matter of Disciplinary Proceedings against	)	
DiDonato's Bowling Center, A Corporation t/a DiDonato's Bowling Center 1151 White Horse Pike Hammonton, New Jersey	)	SUPPLEMENTAL ORDER
Holder of Plenary Retail Consumption License C-15 issued by the Town Council of the Town of Hammonton	)	

Curcio, Donio & DeMarco, Esqs., by Samuel A. Curcio, Esq., Attorneys for Licensee.
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

On May 17, 1966, I entered an order herein suspending the license for thirty-five days for sale during prohibited hours and false statement in the license application, and deferring the license suspension because it appeared that the licensed business was not being conducted by reason of destruction of the licensed premises by fire on May 8, 1966. Re DiDonato's Bowling Center, Bulletin 1681, Item 4.

Report of recent inspection discloses that the licensed business is now being conducted pursuant to current license issued May 12, 1966, following reconstruction of the licensed premises and issuance of a certificate of occupancy. Hence, I am satisfied that the deferred suspension may now be imposed.

Accordingly, it is, on this 25th day of May, 1967,

ORDERED that Plenary Retail Consumption License C-15, issued by the Town Council of the Town of Hammonton to DiDonato's Bowling Center, A Corporation, t/a DiDonato's Bowling Center, for premises 1151 White Horse Pike, be and the same is hereby suspended for the balance of its term, viz., until midnight, June 30, 1967, commencing at 2:00 a.m. Monday, May 29, 1967; and it is further

ORDERED that any renewal license that may be granted shall be and the same is hereby suspended until 2:00 a.m. Monday, July 3, 1967.

Joseph P. Lordi,
Director