Ambrose

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

BULLETIN 1648 December 13, 1965

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ITEM

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1. APPELLATE DECISIONS - HACKENSACK MOTEL CORPORATION v. LITTLE FERRY.

Hackensack Motel Corporation, Appellant, v. Mayor and Council of the Borough of Little Ferry, Respondent.	On Appeal CONCLUSIONS and ORDER

Walter H. Jones, Esq., by Marvin H. Gladstone, Esq., Attorney for Appellant
Scott, Fox & Walsh, Esqs., by Frank V. Walsh, Jr., Esq., of Counsel.
Robert S. Krause, Esq., Attorney for Respondent.
Robert W. Wolfe, Esq., Attorney for Objector, South Bergen Licensed Beverage Association.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

This is the second appeal filed from the denial of appellant's application for a plenary retail consumption license for the fiscal year 1964-65, made pursuant to the exception in favor of hotels contained in R.S. 33:1-12.20.

Appellant is the operator of a franchised "Holiday Inn" motel on the Bergen Turnpike, north of the Route 46 traffic circle, Little Ferry. This motel was recently constructed at a cost of approximately $2,000,000 and contains a restaurant and banquet facilities. On April 7, 1965, appellant filed an application for a license for the said motel; and, as stipulated, it has complied with all preliminary statutory requirements.

Respondent's resolution dated April 20, 1965, denied said application, stating as its reason for the denial "that the Boro of Little Ferry has already exceeded the maximum number of Plenary Retail Consumption Licenses." In Conclusions and Order entered June 3, 1965, the Director determined that the said stated reason was based upon a misapprehension of law because "respondent failed to consider the exception to the limitation law", as follows:

> "Nothing in this act shall prevent the issuance, in a municipality, of a new license to a person who operates a hotel containing fifty sleeping rooms or who may hereafter construct and establish a new hotel containing at least fifty sleeping rooms." R.S. 33:1-12.20.

A "hotel" has been judicially determined to be synonymous with "motel". Silver Sands Motel v. Point Pleasant Beach, Bulletin

1624, Item 1. The Director accordingly ordered that the matter be "remanded to the respondent for further consideration in accordance with the conclusions herein." Hackensack Motel Corporation v. Little Ferry, Bulletin 1626, Item 4.

Thereafter, on June 22, 1965, the matter was heard on remand and the application was again denied. No statement of reasons was given therefor by respondent, as required by Rule 10 of State Regulation No. 6, which states in its pertinent part as follows:

> "In every action adverse to an applicant or objector, the issuing authority shall state the reasons therefor."

The petition of appeal filed herein urges reversal of respondent's action for reasons which may be summarized as follows:

1. Respondent was motivated by objections voiced by existing licensees "off the record" that such issuance might depreciate the value of their licenses;

2. Its action was arbitrary, capricious and unreasonable and constituted a delegation of its responsibility and discretion "to a group of local licensees"; and

3. It was not based on the merits of the application but was influenced by "irrelevant and prejudicial pressures."

Respondent's answer admits the jurisdictional allegations of the petition and generally denies the substantive allegations contained therein.

For the first time at this hearing, the South Bergen Licensed Beverage Association, represented by Counsel, voiced objections to appellant's application.

This is an appeal de novo with full opportunity for counsel to be heard, to present evidence under oath and cross-examine witnesses. Rule 6 of State Regulation No. 15; Reed v. South Toms River et al., Bulletin 1628, Item 2.

William E. House, the manager of appellant's facility, testified as follows: This motel, consisting of 120 rooms, is located in a commercial area on a busy highway circle. About 80% of its business is commercial. It contains a coffee shop, a banquest room accommodating about 350 persons, a restaurant seating 125 persons, and a cocktail lounge. Many of its patrons have requested alcoholic beverages and, from his forty years of experience in the hotel business, it is his opinion that such facility cannot be practically operated without a liquor license.

On cross examination, he acknowledged that there was a bar at the Valley Fair, a discount house located across the road, but he insisted that most of his patrons would refuse to patronize that bar.

Ann D. Goodbee, house counsel for appellant, testified that a lease was entered into with the owners of the land, requiring a net rental of $126,000 a year. It was her understanding from her conversations with the lessor that there would be no difficulty in obtaining a liquor license for these premises.

Walter H. Jones, who appeared as counsel for appellant (his associate actually tried the case), testified as a witness in these proceedings. He gave the following account: On June 15, 1965, he advised the mayor of respondent that he represented appellant. The mayor informed him that "the license would not be issued" because a number of local licensees had banded together and expressed privately to respondent their opposition to grant of a license to appellant. He testified:

> "The Mayor said that the matter was strictly a political question and issue. He said that both the Republicans and the Democrats did not feel that they wanted to get in between the local licensees. He said that the local licensees had great capacity for local political influence with the residents and that there was an election coming up in which he himself was a candidate, and while he had expected, as did the Mayor and Council, to readily grant this license in the first instance, that as a result of the political pressure and the political conditions of the town, that he and the rest of the men on the Council did not see any reason why they should, I suppose the word is they shouldn't, they didn't see any reason why they should expose their political skins to the licensees and issue this permit."

He also testified that the mayor further stated that the only reason for the refusal to grant the license was because of political considerations and that the mayor indicated in the conversation that, so far as he and the council were concerned, they would not take the "responsibility" for it and felt that respondent's issuance of the said license should be directed by this Division.

On cross examination by counsel for the objector, this witness stated that the mayor clearly indicated that he was "speaking for himself and for the Council and so represented." Respondent's counsel did not cross-examine this witness.

Four local licensees testified on behalf of the objector. The substance of their testimony was that they opposed the issuance of this license because there were a sufficient number of licenses to satisfy the needs and requirements of the community; that, in fact, too many licenses were already issued based on the present population and that issuance of another license "would be a hindrance to our business."

One of the objectors, Arthur Krieger, admitted that he had offered to "sell" his license to appellant for $40,000 but the deal, quite apparently, was not consummated.

No witnesses were called on behalf of respondent, with the exception of the borough clerk for the purpose of introducing into evidence the minutes of the meeting of June 22, 1965.

Before commenting on the evidence adduced herein, it might be well to set forth the applicable legal principles upon which a determination may be based. The issuance of a liquor license is not an inherent or automatic right. If denied on reasonable grounds, such action will be affirmed. Richmon, Inc. v. Trenton, Bulletin 1560, Item 4. On the other hand, where it appears that the denial was unreasonable, arbitrary or improperly motivated, the action will be reversed. Tompkins v. Seaside Heights, Bulletin 1398, Item 1. Silver Sands Motel v. Point Pleasant Beach, supra.

The basic issue to be determined in this case is whether or not respondent properly exercised its discretion in denying

appellant's application for license. Conversely, it must be determined whether or not there was an unreasonable or improper exercise of discretion and thus an abuse of discretion. Discretion must be based on right judgment, governed by reason, fair, and suitable in the circumstances. 75 C.J.S. 634, and cases therein cited. What is reasonable must, of course, be determined according to the context and circumstances of each particular case. As the court pointed out in Bivona v. Hock, 5 N.J.Super. 118,121:

> "...the Legislature has not sought to delegate unlimited 'discretion' to these agencies, but rather has spelled out a system within the principles of which the agencies shall act. Accordingly, the courts must measure the propriety of the administrative action by the authority granted, and may not merely surrender the subject matter to the agencies on the premise that theirs is a discretion exercisable on the basis of any and all factors which pertain to the political issue of prohibition."

I

Appellant convincingly advocates that respondent did not consider this matter on the merits and did not understand the nature of the statute under which this application was made.

As was pointed out hereinabove, the application was made under the exception provided for in R.S. 33:1-12.20, which permits licenses to be issued to hotels regardless of the number of other retail liquor licenses theretofore issued in the municipality. Appellant argues that the Legislature considered hotel licenses to be in a special class and clearly intended, in enacting the exception to the limitation law, that issuing authorities shall not be proscribed by the maximum allowable quota based on population, as defined in the statute. The reason for this appears to be quite obvious. The hotel and motel industry caters to transients, as well as to people in the community; and it appeared to be the feeling of the Legislature that the accommodation of such transients would generally serve the best interests of the community. Thus, the arguments advanced by the objector lose considerable force and vitality.

My examination of the minutes of the June 22 meeting convinces me that these factors were not considered by respondent. Councilman Rostan stated that "there are already 11 consumption licenses in the Boro, with a population of approximately 7000. If future motels met various requirements, could not stop them from obtaining licenses as law states it is permissible. Law does not state that license must be issued."

Mayor Heinige expressed the fear of local residents with respect to "devaluation of their present licenses." How he arrived at this conclusions escapes me in view of the fact that a two million dollar facility, with obvious increased ratables to the municipality, has been built.

Councilman Ebenau stated that "local tavern owners object to the issuance of another license." The same feeling was expressed by Councilman Vozeh. It is clear that no consideration was given to the special category in which a hotel license was placed by legislative fiat. There is an inescapable feeling in reading these minutes that respondent did not want to take responsibility for issuing this license, for reasons which appellant considered improper and arbitrary, but preferred to have the Division order such issuance. I have the additional feeling that none of the councilmen was conscientiously opposed to grant of the application except for reasons which are invalid.

There was no official statement of reasons for respondent's action, other than the expressions of its individual members as reflected in the minutes. In Blanck v. Magnolia, 38 N.J. 484, 491, it is stated that "the test in the establishment and issuance of liquor licenses is whether the public good requires it." While it is clear that there is no "must" in the issuance of liquor licenses, consideration in the case of hotel licenses must include the legislative intendment within its framework, as well as the best interests of the community. Silver Sands Motel v. Point Pleasant Beach, supra; Blanck v. Magnolia, supra. Thus it must be established that such issuance was in the best interests of the community.

My canvass of the entire record convinces me that this was not considered by respondent. On the contrary, I am convinced that there is a reasonable need for the issuance of this license and that the denial of appellant's application was against the logic and sum of the presented facts. Cf. Hudson Bergen County Retail Liquor Stores Assn. v. Hoboken, 135 N.J.L. 502. Although this would be dispositive of the appeal, it is desirable, in order more fully to understand the motivations of respondent, to explore the further allegation of appellant.

II

The principal and, I think, most compelling argument of appellant was that respondent's action was improperly motivated, based upon political considerations, and, therefore, was arbitrary and unreasonable. The testimony of Mr. Jones, appellant's principal witness, is forthright and illuminating. He testified in detail with reference to the frank position concerning appellant's application taken by the mayor, speaking for himself and for respondent.

The charge of political motivation and influence is a serious one. It was made unequivocally and with a great measure of frankness. Because of the seriousness of the charge, I suggested to respondent's attorney that members of respondent should be given an opportunity to appear at this plenary de novo hearing and offer rebuttal testimony, if the same could be traversed. I used the following language:

> "Mr. Jones made some very compelling arguments here, one of which was that there were political considerations and I note that this was not rebutted. Does that mean that you actually admitted that there were political considerations?
>
> "MR. KRAUSE: I have no way of rebutting it at this time because none of the councilmen are here. The only thing, I was present during caucus meetings when this matter was discussed by the Council. I mean there was nothing discussed politically except that the councilmen discussed the objections of the present licensees and that they did not feel that they would, and this is expressed in their motion on the night of the hearing, that they were not going to act.
>
> "Now, if Mr. Jones impugned (imputed) political motives to that, why that's his prerogative...
>
> "Now, if they were political in leading up to this conclusion, why I have no way of telling because I don't know what goes on in their mind."

In view of the serious charge made against respondent, it became the duty of its members to challenge such charge of political motivation, if, in fact, the charge could be refuted. The general rule is that the failure of a party to appear or testify as to material facts within its knowledge creates an inference that it refrained from appearing or testifying because the truth, if made to appear, would not aid its contention. Such failure of a party to testify may invite the indulgence against it of every inference warranted by the evidence presented by its adversary. 31A C.J.S. 156(4) Evidence, p. 422, and cases therein cited.

As appellant's attorney stated, the allegations are "true and they could only but corroborate what the testimony was, if they were called," And further:

> "So a material reply to the material question that you ask is that there is nothing that the Mayor could say or the Council could say that would make the testimony adduced in this hearing any different than it is. And so I say to your Honor that it is clear, as far as this record is concerned, that this license was denied for purely political purposes."

The grant of (or the refusal to grant) a liquor license involves action judicial in nature. Dufford v. Nolan, 46 N.J.L. 87. The standards are no less exact in the case of judicial actions. The duty of the judge is to discover objective truth. If the judge has any personal favoritism or bias or friendship or partiality, his action becomes distorted. Cf. Cardozo, Nature of the Judicial Process, 173.

A public office is a public trust. Council members, as fiduciaries and trustees of the public interest, must serve with the highest fidelity. The law tolerates no partisanship or mingling of self-interest. It demands exclusive loyalty. Cf. Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433 (1952); certiorari denied Bell v. Driscoll, 344 U.S. 838, 73 S.Ct. 34, 97 L.Ed. 652 (1952). The court in Driscoll added:

> "They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly." 8 N.J. at p. 475.

> "It is sufficient (to show that they) abnegated their positions of public trust...by failing to exercise their discretion in good faith and on fair and intelligent consideration free from corrupting influences." 8 N.J. at p. 477.

The testimony is persuasive that the true reason that the members of respondent refused to act favorably upon this application was that they felt that local licensees had such political influence in the community that such action would cause them to be defeated at the polls. It is significant to note that throughout the minutes of the meeting in consideration of this license, and in the conversation of Mr. Jones with the mayor, there was expression of the opposition of local licensees but there was a complete absence of the sentiment of other residents in the community. The licensees appear to have a strong political grip in this community and respondent apparently refused to do anything that might antagonize them. Thus, I

conclude that the members of respondent were acting solely in their own self-interest in their determination to deny appellant's application. As the court said in Aldom v. Borough of Roseland, 42 N.J. Super. 495, 502:

> "The interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of paramount importance. It may be indirect; it is such an interest as is covered by the moral rule: no man can serve two masters whose interests conflict... the duty of the officer to render a righteous judgment is that of doing it in such a manner as will beget no suspicion of the pureness and integrity of his action."

Cf. McNamara v. Saddle River Borough, 64 N.J.Super. 426; S & L Associates v. Washington Township et al., 61 N.J.Super. 312.

Public officials, acting in a quasi-judicial capacity, must act in such manner as to feflect a genuine regard for the public interest and welfare. Acting in their own interest, such as in this case, must be discouraged for, if such practice is permitted, the public will no longer have confidence in the impartial administration of the Alcoholic Beverage Law in the State of New Jersey.

Considering all the facts and circumstances herein, I conclude that appellant has established, by a fair preponderance of the evidence, that the action of respondent in denying appellant's application for license was arbitrary and improperly motivated.

At the hearing, it was agreed that the determination herein should apply to any application for license that might be filed by appellant for these premises for the licensing year 1965-66. I therefore recommend that an order be entered reversing respondent's action and directing the issuance by respondent of an appropriate license for the current licensing period upon filing of a new application for the 1965-66 licensing year.

Conclusions and Order

No exceptions to the Hearer's report were filed by the respondent within the time limited by Rule 14 of State Regulation No. 15. The last date for filing such exceptions was August 31st. However, pursuant to a request made by Robert W. Wolfe, Esq., attorney for an objector (South Bergen Licensed Beverage Association), the time for filing exceptions was extended to the said objector and written exceptions to the Hearer's report and written arguments in substantiation thereof were filed in its behalf on September 17th.

Answer to the said written exceptions was filed by the appellant on September 24, 1965.

The objector also filed a petition for rehearing herein on September 15th. In the said petition the petitioner (South Bergen Licensed Beverage Association) sets forth that it is informed that the "statements of Senator Jones at the hearing were not the statements of the members of the Council to the Mayor of Little Ferry, and that the Petitioner, through its members, has received a signed letter addressed to the New Jersey Alcoholic Beverage Control, the original of which is attached [to the said petition]." The petitioner therefore requests that "further hearing" be held herein.

An affidavit of George W. Tonks (a member of the Association objector) annexed to the said petition is offered in verification of the said petition, together with an unverified statement signed by the Councilmen members of respondent Mayor and Council of the Borough of Little Ferry.

In the unverified and unsworn statement the signers state that they were not notified of the de novo hearing held at this Division on July 19, 1965; they deny the testimony of Jones with respect to the reasons for their action in voting against the application; and they assert that their reason for voting as they did was that the "town has eleven Plenary Retail Consumption Licenses, two Club Licenses and two Package Store Licenses with a population of 6,000 persons."

It is significant to point out that the petition for rehearing was not joined in by the attorney for the respondent Mayor and Council. The Division file discloses that notice of this hearing was sent to Mr. George Kupp (Borough Clerk) who was also the Clerk of the respondent on June 28, 1965, and a copy of the notice of hearing was also sent to Mr. Krause, its counsel. Since there is evidence that adequate notice has been received by the respondent, the contention in their unverified statement must be rejected.

My examination of the record further discloses that counsel for the objector fully participated in the plenary de novo hearing. He was present when the Hearer suggested to the respondent's attorney that members of the respondent issuing authority be given an opportunity to appear at a continued date and offer rebuttal testimony if in fact the same could be traversed. The attorney for the respondent did not choose to take advantage of such offer. This was the proper time for the attorney for the objector either to produce such witnesses or move for such continued hearing if he intended to subpoena them in order to offer such rebuttal testimony. This he did not do.

The Hearer therefore had properly concluded that the failure of respondent's witnesses to appear or testify in refutation of those material facts within its knowledge created an inference that it refrained from appearing or testifying because the truth, if made to appear, would not aid its contention. Such failure of a party to testify may invite the indulgence against it of every inference warranted by the evidence presented by its adversary. 31A C.J.S. 156(4) Evidence, p. 422, and cases therein cited. See State v. Clawans, 38 N.J. 162, 170 (Sup.Ct. 1962).

Thus an application made for the reopening of this matter for the purpose as stated in the petition (the objector here is in the same position as the respondent on this application) cannot be entertained because it is supported only by an affidavit based on hearsay and not by valid affidavit of the Councilmen members of the respondent Mayor and Council. Furthermore, it does not meet the requirements for such motion. In State v. Puchalski, 45 N.J. (at p. 107) the court stated:

> "The guidelines for the consideration of such an application are stated in State v. Artis, 36 N.J. 538, at p. 541 (1962), as follows:
>
> 'A motion for a new trial is addressed to the sound discretion of the trial court, and its determination will not be reversed on appeal unless there has been a clear abuse of that discretion. State v. Smith, 29 N.J. 561, 573 (1959). To entitle a party

> to a new trial on the ground of newly discovered evidence, the new evidence must be (1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the original trial and not discoverable by reasonable diligence prior thereto; and (3) of the sort which would probably change the jury's verdict if a new trial was granted. State v. Johnson, 34 N.J. 212, 222 (1961); State v. Bunk, 4 N.J. 482, 486 (1950). To sustain a motion for a new trial the proffered evidence must meet all three aspects of the test. State v. Johnson, supra, 34 N.J., at p. 223.'

See also State v. Sullivan, 43 N.J. 209, 232-233 (1964)." See also Christie v. Petrullo, 101 N.J.L. 492 (Sup.Ct. 1925); Wilkotz v. Ziss, 137 N.J.L. 3(Sup.Ct. 1948). The same rule or tests apply in both criminal and civil cases. State v. Bunk, 4 N.J. 482, 487 (Sup.Ct. 1950).

It is interesting, furthermore, to point out that the petition for rehearing was not filed until after a Hearer's report was filed and received by the objector with the recommendation adverse to its position. Since this application was filed at a late date and does not meet the tests as set forth above, it is accordingly denied.

In its written exceptions counsel for the objector argues as follows: The Director reversed the original action of the respondent by order dated June 3, 1965, for the express reason that "Respondent failed to consider the exception to the limitation law." He therefore reasons that the respondent knew of this and considered the same and there was "no legal testimony that they did not consider same."

I agree with the finding of the Hearer that, while the members of the Council undoubtedly knew the reason for the earlier reversal of their action, there is no official statement of the reasons for respondent's action other than the expression of its individual members as reflected in the minutes. In fact, the respondent failed to comply with Rule 8 (as amended) of State Regulation No. 2 which states in pertinent part:

> "No hearing need be held if no such objections shall be lodged (but this in no wise relieves the issuing authority from the duty of making a thorough investigation on its own initiative), or if the issuing authority, on its own motion, after the requisite statutory investigation, shall have determined not to issue a license to such applicant. In every action adverse to any applicant or objector, the issuing authority shall state the reasons therefor." (emphasis added)

Therefore we are obliged to examine the minutes of the special meeting of June 22, 1965, in order to obtain some reflection of the thinking of the members of the respondent Council. I find in those minutes, for example, that Councilman Ebenau stated that "local tavern owners object to the issuance of another license. Wants State to order issuance of license." The Mayor stated that he does not favor the issuance of a new license unless ordered to do so by the ABC. Councilman Vozeh stated that "if another is to be issued then the A.B.C. must direct the Mayor and Council to do so." Councilman Rostan stated "if future motels met various requirements, could not stop them from obtaining licenses as law states it is permissible. Law does not state that license must be issued." Nowhere in the minutes is there any

manifestation of any consideration given on this application to an exception permitted under R.S. 33:1-12.21, especially in view of the fact that this municipality has not adopted a limiting ordinance; nor is there any indication that there was a genuine and conscientious feeling on the part of the members of the respondent Council in voting to deny this application. Whatever their motives, it appears that they "passed on" to the State Director the responsibility which was theirs in the first instance, i.e., to act on the basis of the presented facts and the best interests of the community.

This being a hearing de novo, it remains for the Director to determine whether the appellant has established by a preponderance of the evidence that the issuance of a license is in the public interests, and that the action of respondent in denying the same was arbitrary and unreasonable.

I am satisfied from examination of the entire record that respondent's actions were arbitrary and unreasonable; that the Hearer properly concluded that there is "a reasonable need for the issuance of this [hotel] license and that the denial of appellant's application was against the logic and sum of the presented facts." In affirming that conclusion I have considered the fact that there are no other similar facilities in this community; that this facility has been built at a cost of approximately two million dollars, and that such issuance would be in consonance with the intendment of the Legislature in enacting the exception with respect to hotels having over fifty sleeping rooms as delineated hereinabove.

I want additionally to reitefate that no exceptions to the Hearer's report were filed by the respondent Mayor and Council, and that no resident of the community opposed this application either at the hearing before the respondent Mayor and Council or at the de novo hearing, with the exception of liquor licensees who were represented at this de novo appeal by this objector. Further, the objection that the issuance of such license would devalue the property of the other licensees finds not a scintilla of supportive evidence in the entire record. I further associate myself with the Hearer's conclusion that the granting of this application would serve the best interests of the community.

Having carefully considered the record herein, including the transcript of the testimony, the argument of counsel in summation, the exhibits, the written exceptions and argument in support thereof by the objector, answers to the said exceptions, and the Hearer's report, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 11th day of October 1965,

ORDERED that the petition for rehearing be and the same is hearby dismissed; and it is further

ORDERED that the action of the respondent be reversed, and respondent is ordered to issue the license to the appellant in accordance with the application filed by the said appellant.

JOSEPH P. LORDI,
DIRECTOR

APPELLATE DECISIONS - BERKOWITZ V. DELRAN and BACCHUS ENTERPRISES, INC.

Max Berkowitz, Appellant, v. Township Committee of Delran Township, and Bacchus Enterprises, Inc., t/a West Jersey Liquor Mart, Respondents.	)	On Appeal CONCLUSIONS and ORDER

Max Berkowitz, Appellant, Pro se
William B. Colsey, III, Esq., Attorney for Respondent Township Committee.
Samual P. Orlando, Esq., by Michael A. Orlando, Esq., Attorney for Respondant Bacchus Enterprises, Inc.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

This appeal is from the action of respondent Township Committee (hereinafter Committee) granting an application for a plenary retail distribution license to Bacchus Enterprises, Inc., t/a West Jersey Liquor Mart (hereinafter Bacchus) for premises to be constructed in accordance with plans and specifications on Block 65, Lot 16A on Route 130, Township of Delran.

Four of the five members of the Committee voted to grant the application of Bacchus and one member voted in opposition.

Appellant (also an applicant for the license in question) in his petition of appeal in substance alleges that the action of the Committee was erroneous and should be reversed because (a) the Township Committee was in error to receive any applications filed after June 30, 1964; (b) the Township Committee failed to notify other applicants that it intended to consider applications filed after June 30, 1964, and (c) that Bacchus filed its application on March 25, 1965 without accompanying said application with a certified check representing the license fee.

The answers filed by respondents, inter alia, contend that the action of the Committee was a valid and lawful exercise of its discretion.

The grounds set forth by appellant in his petition of appeal are few in number. However, in order to present a better understanding of the matter which resulted in the within appeal, and this being a hearing de novo, I shall discuss the merits of the case.

It appears from the record herein that on December 12, 1946 an ordinance was approved and adopted by the then Township Committee providing that no plenary retail distribution license should be issued in the Township of Delran. The aforesaid ordinance remained in effect until December 26, 1963, when an amendment thereto was approved and adopted by the Committee providing for the issuance of one plenary retail distribution license.

(Issuance of more than one such license is prohibited also by the State Limitation Law -- R.S. 33:1-12.14.) After receipt of a number of applications for the license, the Township Clerk was directed by the Committee on May 14, 1964 to insert a notice in a newspaper with reference to any additional applications which might be filed. Pursuant thereto a notice was placed in a newspaper (The New Era) that "Applications will be received on or before June 30, 1964 for Delran Township Plenary Retail Distribution Licenses."

On November 12, 1964 the minutes of a meeting of the Committee disclosed the receipt of an application for a plenary retail distribution license. When Committeeman Makin questioned the propriety of the acceptance of same beyond the date of June 30, 1964, the Township attorney (not the attorney representing the Committee herein) ruled that it was his understanding that applications could be filed at any time prior to the date fixed by the Committee to take action on the applications.

On December 18, 1964 hearings were held by the Committee on nine applications for the license, and at the close of the session Chairman Lipinsky stated "that all applications will be considered later." Thereafter, at the meeting of March 25, 1965, it was reported that two more applications were received, including that of Bacchus. On April 8, 1965 a hearing was held on the aforementioned two applications and, when questioned by the attorney for Bacchus concerning the time a decision could be expected, Committee Chairman Bozarth said, "a notice will be given when we are ready."

On April 22, 1965 the license in question was granted to Bacchus. In view of the fact that no premises had been constructed on the site for which the license was granted, an amended resolution dated May 13, 1965 was adopted which provided that issuance of the license be withheld until the proposed premises were duly completed in accordance with plans and specifications filed with the application.

Now I shall consider the grounds of appeal as set forth in appellant's petition, viz., that Bacchus failed to accompany its application with a certified check in the amount of $1,000 and that the deadline for filing applications for the said license should have been on June 30, 1964, and that no applications received thereafter might be considered.

Nothing in the Alcoholic Beverage Law or State Regulations requires that the check for the license fee must be certified when the application for a liquor license is filed with the Clerk. The records represent that the check which accompanied the application of respondent-licensee was deposited to the credit of the Township by the treasurer thereof and was duly paid.

That applications should be received up until the time when action on all applications is taken by the local issuing authority is proper since any other procedure might tend to arbitrarily exclude worthy applicants from proper consideration.

Committeeman Bozarth testified that he voted to approve the application of the respondent-licensee as he was of the opinion that the licensed premises at the proposed site would tend to develop the area and thus would be advantageous to the people of the Township.

Committeeman Lipinsky testified that:

"My personal reasons for voting for the Bacchus Company application was, being in my position as a township official, I have to represent all people concerned, approximately eight thousand people, and I felt, in my own deliberations and investigations, that this was the most beneficial to each individual of the township rather than an individual person. I felt that the applicants were well qualified and I also felt that it was in an area of a town that we are trying to build up and it would be possibly an enticement to build up this particular area of the town. And the overall picture, the conclusion I have drawn on the application, that I was representing eight thousand people rather than a small minority, individual group."

Committeeman Makin testified that he voted in favor of the approval of the respondent-licensee's application because the location of the building to be erected would be in an area which he would like to see developed and, furthermore, that the proposed building "is a beautifully designed building." Moreover, he testified that in his opinion the respondent-licensee was "the most worthwhile for this application." The Committeemen represented that they spent many hours considering the various applications before arriving at a conclusion as to whom the license should be issued. It was finally agreed that the community would best be served by the issuance of the license to respondent-licensee.

The order of filing in point of time is not important with reference to the issuance of a license. The true criterion in matters affected with public interest is not who filed the first application but which application, if granted, will serve the interest of the community best. Curry v. Margate City, Bulletin 472, Item 7; Giberti v. Franklin Township, Bulletin 150, Item 3. It is not the prerogative of the Director to indicate his personal views or the manner in which he might have voted as a member of the Committee, but to determine whether the ultimate selection made by the Committee was fair and based upon reasonable grounds. Nothing has been presented herein which would indicate that the Committee acted other than for the best interest of the municipality. The fact that the refusal to issue the license in question to the appellant may have been a disappointment to him and contrary to his economic interest is not sufficient reason for setting aside the grant by the Committee to Bacchus. Knast et al. v. Camden et al., Bulletin 810, Item 2.

After fully considering the evidence presented herein, I am satisfied that proper consideration to the matter was given by the members of the Committee before action was taken. I conclude that appellant has failed to sustain the burden of establishing that the action of the Committee was arbitrary, unreasonable or an abuse of discretion, or that there was any prejudice or improper motivation on the part of any member of the Committee. Rule 6 of State Regulation No. 15.

Hence, after careful examination of all of the evidence adduced herein, I recommend that the action of the Committee in granting the license to Bacchus for the proposed site subject to completion of premises special condition be affirmed and that the appeal herein be dismissed.

Conclusions and Order

Exception to the Hearer's Report was filed by appellant pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire record, including the exception filed by appellant, the transcript, the exhibits and the Hearer's Report, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 13th day of October, 1965,

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

JOSEPH P. LORDI,
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - SALE TO MINOR - LICENSE SUSPENDED FOR 20 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against Matterhorn Restaurant, Inc. 1425-1431 Springfield Avenue Irvington, N.J. Holder of Plenary Retail Consumption License C-35, issued by the Municipal Council of the Town of Irvington	CONCLUSIONS and ORDER

Licensee, by Frank Bonadies, President, Pro se.
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads guilty to a charge alleging that on October 2, 1965, it sold drinks of alcoholic beverages to three minors, two age 18 and one age 19, in violation of Rule 1 of State Regulation No. 20.

Absent prior record, the license will be suspended for twenty days (Re Chatterbox, Inc., Bulletin 1431, Item 4), with remission of five days for the plea entered, leaving a net suspension of fifteen days.

Accordingly, it is, on this 27th day of October, 1965,

ORDERED that Plenary Retail Consumption License C-35, issued by the Municipal Council of the Town of Irvington to Matterhorn Restaurant, Inc. for premises 1425-1431 Springfield Avenue, Irvington, be and the same is hereby suspended for fifteen (15) days, commencing at 2:00 a.m. Wednesday, November 3, 1965, and terminating at 2:00 a.m. Thursday, November 18, 1965.

JOSEPH P. LORDI,
DIRECTOR

STATUTORY AUTOMATIC SUSPENSION - ORDER STAYING SUSPENSION.

Auto. Susp. #268 In the Matter of a Petition to Lift the Automatic Suspension of Plenary Retail Distribution License D-25, issued by the Board of Commissioners of the City of Passaic to Vincent Anthony Donatacci t/a Monroe Wines & Liquors 203 Monroe Street Passaic, N.J.	)	On Petition O R D E R

Harry Kampelman, Esq., Attorney for Petitioner.

BY THE DIRECTOR:

It appears from the petition filed herein and the records of this Division that on October 1, 1965, the licensee-petitioner was fined $50 and $10 costs in the Passaic Municipal Court after being found guilty of a charge of sale of alcoholic beverages to a minor on September 10, 1965, 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. The statutory automatic suspension was effectuated at 1:00 p.m. on October 27, 1965.

It further appears that disciplinary proceedings are presently pending before the municipal issuing authority against the licensee because of said sale of alcoholic beverages to the minor. A supplemental petition to lift the automatic suspension may be filed with me by petitioner after the disciplinary proceedings have been decided. In fairness to petitioner, I conclude that at this time the effect of the automatic suspension should be temporarily stayed. Re Stein's Cafe, Inc., Bulletin 1614, Item 7.

Accordingly, it is, on this 28th day of October, 1965,

ORDERED that the aforesaid automatic suspension be stayed effective at 9:00 a.m. October 28, 1965, pending the entry of a further order herein.

JOSEPH P. LORDI,
DIRECTOR

5. DISCIPLINARY PROCEEDINGS -- SALE IN VIOLATION OF STATE REGULATION NO. 38 - LICENSE SUSPENDED FOR 15 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)	
John Joseph Baron t/a Baron's Tavern 96-98 Third St. Passaic, N. J.	)	CONCLUSIONS and ORDER
Holder of Plenary Retail Consumption License C-4, issued by the Board of Commissioners of the City of Passaic	)	

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

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on October 6, 1965, he sold six cans of beer for off-premises consumption during prohibited hours, in violation of Rule 1 of State Regulation No. 38.

Absent prior record, the license will be suspended for fifteen days, with remission of five days for the plea entered, leaving a net suspension of ten days. Re Mirault, Bulletin 1640, Item 5.

Accordingly, it is, on this 25th day of October, 1965,

ORDERED that Plenary Retail Consumption License C-4, issued by the Board of Commissioners of the City of Passaic to John Joseph Baron, t/a Baron's Tavern, for premises 96-98 Third Street, Passaic, be and the same is hereby suspended for ten (10) days, commencing at 3:00 a.m. Monday, November 1, 1965, and terminating at 3:00 a.m. Thursday, November 11, 1965.

Joseph P. Lordi
Director