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

BULLETIN 714 JUNE 12, 1946.

TABLE OF CONTENTS

ITEM

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

BULLETIN 714 JUNE 12, 1946

1. APPELLATE DECISIONS - CARUSO ET AL. v. KENILWORTH AND ZHELESNIK.

FRANK CARUSO and NEW JERSEY TAVERN ASSOCIATION, Appellants, -vs- BOROUGH COUNCIL OF THE BOROUGH OF KENILWORTH and SANDOR ZHELESNIK, Respondents	ON APPEAL
WALTER F. HOAGLAND, Appellant, -vs- BOROUGH COUNCIL OF THE BOROUGH OF KENILWORTH and SANDOR ZHELESNIK, Respondents	CONCLUSIONS AND ORDER

William C. Egan, Esq., Attorney for Appellants.
No appearance on behalf of Respondent Borough Council.
Anton A. Vit, Jr., Esq., Attorney for Respondent Sandor Zhelesnik.

These appeals have been filed from the granting by respondent Borough Council of a plenary retail consumption license to respondent Sandor Zhelesnik for premises known as Lots 27, 28, 29 and 30 in Block 160 on Boulevard near Michigan Avenue, Borough of Kenilworth. Since both appeals concern substantially similar issues, they will be decided together.

Appellant Frank Caruso is the holder of a plenary retail consumption license in the Borough of Kenilworth. Appellant New Jersey Tavern Association is an association composed of liquor licensees operating in various municipalities in New Jersey, and appellant Walter F. Hoagland resides on Michigan Avenue near the Boulevard, Borough of Kenilworth.

The license was granted to respondent Zhelesnik at a meeting of the Borough Council held on February 13, 1946. No building has been erected to date, but plans and specifications for a building were filed with the application. Re Harris, Bulletin 183, Item 11. The license was granted after respondent Borough Council had previously amended its ordinance so as to increase the permissible number of plenary retail consumption licenses from eight to ten. See Caruso v. Kenilworth, decided herewith.

Appellants contend that the "action of respondent Borough Council was erroneous in that there were already issued and outstanding in said Borough more such licenses than community needs justified." Appellant Walter F. Hoagland also alleges that the action of respondent Borough Council was erroneous because it "failed to consider the fact that the location of a licensed premises in our neighborhood was not desired by the residents."

At the hearing held herein, appellant Frank Caruso testified that he has operated a tavern for the past six years on 21st Street near the Boulevard, a distance of approximately four blocks from the premises owned by Zhelesnik. He stated that in his opinion there was no need for an additional license at the premises owned by Zhelesnik. He admitted that Michigan Avenue, which connects Roselle Park with Highway 29, is a busy highway. The Clerk of the Borough testified that seven plenary retail consumption licenses are presently operating in the Borough; that an eighth license of this type was granted to one Neville prior to the amendment of the ordinance, and that similar licenses were granted to Zhelesnik and one Fitzpatrick after the amendment to the ordinance. No operations are being conducted under the eighth, ninth and tenth licenses mentioned herein because these three licenses have been granted upon plans and specifications filed with the respective applications.

Walter F. Hoagland testified that he resides at 11 Michigan Avenue, and that the side of his property adjoins the rear line of the property owned by Zhelesnik. He further testified that the property located on the Boulevard in the vicinity of Michigan Avenue is, for the most part, undeveloped land, but stated that there are a number of homes on Michigan Avenue south of the Boulevard. He admitted that there were many factories on Michigan Avenue north of the Boulevard, and that there was an industrial section on the Boulevard some distance east of Michigan Avenue. Hoagland testified that in his opinion there was no need for an additional license at the Zhelesnik premises.

Sandor Zhelesnik testified that, shortly after his discharge from military service in June 1945, he made an informal application for a liquor license for premises on Woodland Avenue, Borough of Kenilworth. He was advised by the municipal authorities that it would be impossible to obtain a license in that section of the Borough because the section is residential in character. He then arranged to purchase from the Borough the four lots on the Boulevard where he plans to build his licensed premises. These lots are zoned for business purposes although at the present time this section of the Boulevard appears to be undeveloped. Zhelesnik testified that the nearest licensed place to his property is conducted by Caruso, and is located about 1,500 feet away; that the nearest licensed place on the Boulevard is known as the Kenilworth Inn and is located about 2,000 feet away. He further testified that there are 126 homes and six factories within a radius of 1,000 feet from his property. He further testified that there is heavy traffic on both Michigan Avenue and the Boulevard, and that on a recent Sunday afternoon he counted two hundred automobiles passing the intersection of these streets within a period of one hour.

Mayor Berzin testified that in his opinion public interest would be served by the issuance of a license for Zhelesnik's premises because the six factories referred to employ from four hundred to five hundred people. Applications have also been made for additional industrial buildings in this industrial area of the Borough, and for business buildings on the Boulevard. Councilman Emde testified that he voted in favor of granting the license principally because of the transient trade, since both the Boulevard and Michigan Avenue are County roads. Councilman Arthur stated that he voted in favor of the granting of the license because the Kenilworth Inn is crowded. Councilmen Neville, Venice and Koth also testified that they voted in favor of granting the license in question.

At the hearing, the present population of the Borough was estimated to be between 3,500 and 4,000. Considering only the ratio of

licensed premises to population, it might appear that the granting of the license in question was unnecessary. However, the evidence herein discloses that no other plenary retail consumption license has been issued in this particular section of the Borough; that there are a large number of persons employed in nearby factories; that the Boulevard and Michigan Avenue are both well-traveled highways, and that it is planned to develop the Boulevard for business purposes.

Under all the circumstances, the appellants have not sustained the burden of proof in establishing that respondent Borough Council abused its discretionary power in granting a license to respondent Zhelesnik. The objection of appellant Hoagland can be accorded little weight because he resides on a side street, and it is apparent that the Boulevard will be developed for various business purposes. The allegation that appellant Caruso was not granted a hearing upon his written objection has also been considered. It appears that Caruso was present on the evening of February 13, 1946, when the license was granted, but that he did not make any request to be heard. This may well have been because, as he stated at the hearing herein, "I didn't think it would do any good." He has been heard at the hearing held herein.

As the Commissioner said in Williams v. Atlantic City and Rich, Bulletin 700, Item 1:

> "My duty in these cases is not to inflict or substitute my opinion upon or for the opinion of the municipal issuing authority but, rather, to determine, if 'reasonable grounds' support their action and, if so, to affirm whatever their view and irrespective of my own. In this case, as in many others, the existence of 'reasonable grounds' may depend upon whether or not public convenience and necessity support the granting of an additional license. Where it is apparent, as in this case, that the respondent issuing authority has carefully considered this vital issue, there exists a presumption that the issuing authority acted properly and in accord with the discretionary authority vested in it by the Alcoholic Beverage Law."

Applying the above test, I cannot hold that the action of respondent Borough Council was so unreasonable as to require a reversal of its action. The action of respondent Borough Council must, therefore, be affirmed.

Accordingly, it is, on this 5th day of June, 1946,

ORDERED, that the appeals herein be and the same are hereby dismissed.

ERWIN B. HOCK
Deputy Commissioner.

2. APPELLATE DECISIONS - CARUSO ET AL. v. KENILWORTH AND FITZPATRICK.

FRANK CARUSO and NEW JERSEY TAVERN ASSOCIATION,

Appellants,

-vs-

BOROUGH COUNCIL OF THE BOROUGH OF KENILWORTH and WILLIAM J. FITZPATRICK,

Respondents

ON APPEAL
CONCLUSIONS AND ORDER

William C. Egan, Esq., Attorney for Appellants.
No appearance on behalf of Respondent Borough Council.
Philip Ox, Esq., Attorney for Respondent William J. Fitzpatrick.

This is an appeal from the granting, by respondent Borough Council, of a plenary retail consumption license to respondent William J. Fitzpatrick, for premises on Michigan Avenue near Highway 29, Borough of Kenilworth.

The status of appellants herein is discussed in Caruso v. Kenilworth and Zhelesnik, decided herewith.

The license in question was granted to respondent Fitzpatrick at a meeting of the Borough Council held on February 26, 1946. No building had been erected on the premises in question at the time of the hearing, but plans and specifications for a building were filed with the application. Re Harris, Bulletin 183, Item 11.

Numerous reasons for reversal are set forth in the petition of appeal. At the hearing no evidence was presented to support many of these reasons, and the evidence presented as to other reasons set forth therein is altogether inadequate. The only meritorious question concerns appellants' allegations that (1) previous to the issuance of the Fitzpatrick license there were more than sufficient licenses issued in Kenilworth to take care of the needs of the entire Borough, and (2) there was no public necessity for said license in the neighborhood where the said licensed premises are located.

As set forth in Caruso v. Kenilworth and Zhelesnik, supra, the Borough has a population of between 3,500 and 4,000, with seven plenary retail consumption licensees presently operating and three plenary retail consumption licenses granted but not yet issued pending completion of buildings in accordance with plans and specifications filed.

It appears also from the testimony that one of the plenary retail consumption licensees who is now operating conducts business in a picnic grove located at the corner of State Highway 29 and Michigan Avenue. The Fitzpatrick license has been granted for premises on Michigan Avenue approximately five hundred feet south of State Highway 29 and almost directly opposite a plot of ground for which a license has been granted, but not yet issued, to Mr. Neville.

The fact that one consumption license has been issued for each 400 inhabitants of the Borough might indicate, in the absence of any peculiar circumstances, that there was no need for any additional consumption license in the Borough. The fact that George's Grove is presently operating a short distance away, and that another license has been granted to Neville, might indicate an abuse of discretion by respondent Borough Council in issuing a third license in this section of the Borough.

It appears, however, that, for many years prior to 1942, premises known as the "Log Cabin" were operated as licensed premises at the site now owned by respondent Fitzpatrick. At that time the nearby picnic grove was also licensed. The "Log Cabin" building was destroyed by fire in 1942, but the foundations of the building remain intact. Respondent Fitzpatrick has been engaged in the restaurant business for many years. On June 19, 1945, after making a survey as to the possibility of opening a restaurant and tavern on the site, he purchased the plot of ground formerly occupied by the "Log Cabin." He thereafter purchased from the United States Government two buildings which had been erected at a CCC Camp and dismantled them with the intention of moving them, piece by piece, to the premises for which he seeks a license. It appears that there was then a vacancy in the local ordinance limiting the number of consumption licenses because at that time only seven of the eight licensees provided for therein had been issued. Some time thereafter respondent Borough Council granted the eighth license to Neville upon his plans and specifications filed for a building almost directly opposite the Fitzpatrick property. That was the situation when the Borough Council thereafter amended its ordinance to permit the granting of additional licenses to Zhelesnik and Fitzpatrick.

At the hearing herein, Mayor Berzin and Councilman Arthur testified that they voted to grant the Fitzpatrick license because the "Log Cabin" had previously done a good business at this site and because of the heavy traffic on State Highway 29 and Michigan Avenue. At the hearing Fitzpatrick testified that, in conducting his restaurant and tavern, he intends to cater principally to transient trade, particularly to salesmen and truck drivers. As indicated above, Neville is not operating and, so far as appears, he has made no attempt to proceed with his building, whereas Fitzpatrick has testified that his premises would be completed within a few months.

The fact that the Borough of Kenilworth has a number of industrial plants and that a well-traveled highway passes through the Borough must be taken into consideration in deciding whether the increase in the number of licenses from eight to ten was unreasonable. Under all the evidence presented I cannot conclude that such an increase was unreasonable. It is apparent that three licenses in the northeast section of the Borough are not needed to take care of the needs of the residents of the Borough. However, the explanation given by the respondent Fitzpatrick indicates that he intends to conduct a restaurant and tavern principally for transients. Moreover, it would seem inequitable to permit the prior granting of the Neville license (under which it is possible that no liquor activity will ever take place) to bar respondent Fitzpatrick (who appears to be taking active steps to complete his premises) from obtaining a liquor license to operate on the site of the former "Log Cabin."

In these cases it is not my duty to inflict or substitute my opinion upon or for the opinion of the municipal issuing authority but, rather, to determine if reasonable grounds support their action and, if so, to affirm whatever their view and irrespective of my own. Re Williams v. Atlantic City and Rich, Bulletin 700, Item 1.

After considering all the testimony, I conclude that appellants have not sustained the burden of proof in establishing that the action of respondent Borough Council was so unreasonable as to require a reversal of its action. The action of respondent Borough Council must, therefore, be affirmed.

Accordingly, it is, on this 5th day of June, 1946,

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

ERWIN B. HOCK
Deputy Commissioner.

3. APPELLATE DECISIONS - CARUSO ET AL. v. KENILWORTH.

FRANK CARUSO ET AL.,
Appellants,
-vs-
BOROUGH COUNCIL OF THE BOROUGH OF KENILWORTH,
Respondent

ON APPEAL
CONCLUSIONS AND ORDER

Earl Pollack, Esq., Attorney for Appellants.
Norbert T. Burke, Esq., Attorney for Respondent.

This is an appeal from the action of respondent, on November 13, 1945, whereby it amended an ordinance limiting the number of plenary retail consumption licenses in the Borough of Kenilworth.

The notice of appeal is signed by Frank Caruso, the holder of a plenary retail consumption license in the Borough of Kenilworth, and by fifty other individuals who are described as residents of the Borough of Kenilworth.

The evidence herein discloses that, on June 27, 1939, respondent adopted Ordinance #154 which, among other things, provided that no more than eight plenary retail consumption licenses should be issued and outstanding in the Borough of Kenilworth. For the fiscal year beginning July 1, 1945, seven plenary retail consumption licenses were issued, thus leaving one vacancy under Ordinance #154. After July 1, 1945, three individuals, namely, Robert N. Neville, Jr., Sandor M. Zhelesnik and William J. Fitzpatrick, indicated their intention to apply to respondent for plenary retail consumption licenses. Neville and Zhelesnik were veterans who had purchased, or arranged to purchase, lands owned by the Borough of Kenilworth; Fitzpatrick was a non-veteran who had purchased, or arranged to purchase, property formerly occupied by the "Log Cabin" which, prior to 1942, had been operated as licensed premises. Apparently respondent, at some time after July 1, 1945, granted the eighth plenary retail consumption license to Neville for the vacant land which he had purchased, and then introduced Ordinance #196 which amended Ordinance #154 so as to permit the issuance of ten, instead of eight, plenary retail consumption licenses.

A petition containing the names of one hundred sixty-five persons, who allegedly opposed the increase in the number of licenses, was presented to respondent and a public hearing upon Ordinance #196 was held on November 13, 1945, at which the objectors were heard. After the objectors had been heard, respondent adopted Ordinance #196 by a 3-2 vote. Hence this appeal.

It is apparent that respondent carefully considered this matter before adopting Ordinance #196. The minutes of the meeting held on November 13, 1945 contain the following statement which summarized the situation when Ordinance #196 was considered for adoption:

> "Mayor Berzin stated that prior to a public hearing on the ordinance he would like to acquaint everyone with the circumstances surrounding the introduction of the ordinance. The Mayor stated that we had one application from a gentleman who purchased the land on Michigan Avenue where the

> Cabin was located(1) and we have another application from a veteran who applied for a license in a residence A district. Being in a Residence A district the Zoning Board refused permission and the veteran is now purchasing land in a business district.(2) We then received an application from a third person who was also a veteran and he put in his application for a license on the west side of Michigan Avenue.(3) There was only one application open and we had a problem to see who should get the license. We had several meetings and we decided we would grant the license who already had the property,(3) forgetting the man who had the property first but was not a veteran.(1) Now we have another veteran applying for a license(2) and it is getting to be a problem and that is the reason we are increasing the number of licenses from eight to ten."

In Phillipsburg v. Burnett, 125 N. J. L. 157, the Supreme Court said:

> "The proposition that a state administrative officer may flatly repeal a municipal ordinance solemnly passed in accordance with statutory authority contained within the immediate text, is rather startling."

In the same case the Court said:

> "The invalidating of an ordinance fixing a maximum in the number of licenses is not reasonably essential, in our opinion, to the accomplishment of any of the designated purposes inasmuch as the actual limitation in the issuance of licenses may be kept by the commissioner, as the appellate authority under R. S. 33:1-22, at a lesser number when the circumstances justify."

The decision of the Supreme Court in the Phillipsburg case, supra, would cause me to hesitate to set aside a limiting ordinance duly adopted unless it appeared that such action was absolutely necessary for the proper enforcement of the provisions of the Alcoholic Beverage Law. Where the permissible number of licenses has been increased, objectors have a right to appeal from the subsequent issuance of any license pursuant thereto and thereby to test the reasonableness of the issuing authority's action increasing the number of licenses. This procedure was actually followed, so far as the question of additional licenses in Kenilworth is concerned. It has been established in the cases decided herewith that the granting of two additional licenses was not unreasonable. See Caruso v. Kenilworth and Zhelesnik, Bulletin 714, Item 1; Caruso v. Kenilworth and Fitzpatrick, Bulletin 714, Item 2.

Since it appears that the additional licenses issued pursuant to Ordinance #196 were not improperly granted, it follows that the ordinance itself, which increased the permissible number of licenses from eight to ten, is not unreasonable.

The action of respondent is affirmed.

Accordingly, it is, on this 5th day of June, 1946,

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

ERWIN B. HOCK
Deputy Commissioner.

- - - - - - - - - - - - - -

(1) Refers to Fitzpatrick application;
(2) Refers to Zhelesnik application;
(3) Refers to Neville application.

4. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES TO MINORS - FALSE ANSWER IN LICENSE APPLICATION CONCEALING MATERIAL FACTS - PREVIOUS RECORD - LICENSE SUSPENDED FOR A PERIOD OF 60 DAYS, LESS 5 FOR GUILTY PLEA.

In the Matter of Disciplinary Proceedings against

ANTHONY KASICA
2 Monroe Street
Garfield, N. J.,

Holder of Plenary Retail Consumption License C-65, issued by the City Council of the City of Garfield.

CONCLUSIONS AND ORDER

Anthony Kasica, Defendant-licensee, Pro se.
William F. Wood, Esq., appearing for Department of Alcoholic Beverage Control.

Defendant pleads guilty to charges alleging that: (a) on March 31, 1946, he sold alcoholic beverages to minors in violation of R. S. 33:1-77 and Rule 1 of State Regulations No. 20, and (b) in his application filed with the City Council of the City of Garfield, upon which application he obtained his plenary retail consumption license, he misrepresented and suppressed material facts in that he failed to disclose adequately that licenses which he previously held had been suspended on two separate and distinct occasions; such misrepresentation, evasion and suppression being in violation of R. S. 33:1-25.

The file herein discloses that on the early morning of March 31, 1946, Alfred B---, age 20, Doris B---, age 17, Edward C---, age 17, Eugene P---, age 16, and Alfred S---, age 15, were observed by ABC agents consuming beer on the licensed premises.

No reasonable or justifiable excuse may be accepted for the sale and service of alcoholic beverages to 15, 16 or 17-year-old boys and girls.

Defendant has a previous adjudicated record. Effective January 2, 1936, defendant's license was suspended for a period of seven days by the local issuing authority after having been found guilty of having slot machines in the cellar of his licensed premises and possessing illicit liquor. Again, effective August 19, 1940, defendant's license was suspended for a period of four days by the local issuing authority after being adjudged guilty of an "hours" violation and employing hostesses. In his application for a license for the current fiscal year, defendant did not disclose his first suspension although he substantially disclosed his second suspension.

Under all the circumstances in the instant case, I shall suspend defendant's license for a period of sixty days, with five days' remission because of the plea of guilty entered herein, making a net suspension of fifty-five days.

Accordingly, it is, on this 4th day of June, 1946,

ORDERED, that Plenary Retail Consumption License C-65, issued by the City Council of the City of Garfield to Anthony Kasica, for premises 2 Monroe Street, Garfield, be and the same is hereby suspended for the balance of its term, effective at 4:00 a.m. June 12, 1946; and it is further

ORDERED, that if any license be issued to this licensee or any other person for the premises in question for the 1946-47 fiscal year, such license shall be under suspension until 4:00 a.m. August 6, 1946.

ERWIN B. HOCK
Deputy Commissioner.

5. APPELLATE DECISIONS - KOODRAY v. PATERSON (CASE NO. 3).

Case No. 3
ALICE KOODRAY,

Appellant,

-vs-

BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF PATERSON,

Respondent

ON APPEAL
CONCLUSIONS AND ORDER

John C. Barbour, Esq., Attorney for Appellant.
George Surosky, Esq., Attorney for Respondent.
James V. McNamara, Esq., Attorney for Objectors.

This is the third appeal filed from denial of applications to transfer a plenary retail consumption license from Carmine Cetrano to appellant herein, and from premises at 350 Preakness Avenue to premises at 259 Park Avenue, Paterson.

The first appeal was discontinued by consent on November 27, 1944. Koodray v. Paterson, Bulletin 641, Item 3.

On May 9, 1945, respondent denied a second application by appellant for a transfer of the license issued to Carmine Cetrano for the fiscal year 1944-45, and appellant again appealed to the Commissioner. After the second appeal had been heard, the license which was the subject of the appeal expired by its terms on June 30, 1945, before any decision was rendered by the Commissioner. However, on February 18, 1946, the Commissioner entered Conclusions and Order in the second appeal which, of necessity, were of an advisory nature and merely for the guidance of the parties in the event of a similar application. In said Conclusions and Order the Commissioner, upon the record then before him, reversed the action of respondent and stated:-

"The two locations are over two miles apart. It is not a transfer within the same general neighborhood and the desire of the municipality not to concentrate unduly licensed establishments in any one section is entitled to great weight. Even where the application for a transfer has been within the same general neighborhood, I have sustained the municipality where the testimony supported its opposition to the undue concentration of licensed premises. See Willner's Liquors v. Camden, Bulletin 669, Item 14.

"Respondent's denial of the application, however, appears to rest principally on the alleged residential character of the neighborhood rather than upon the number of licenses required to service the neighborhood. As previously stated, the neighborhood appears to be of a mixed residential and business character, with the emphasis on business. Accordingly, on the basis of the testimony presented herein, this ground does not appear to be a sufficient reason for denying the transfer. Further, the testimony does not disclose whether or not there would be an overcrowding of licenses in the neighborhood when compared with other areas in the City of Paterson if the application for transfer had been granted.

"The announced purpose of the respondent to prevent overcrowding is commendable. It may very well be that, on the basis of testimony available to the Board but not available on this appeal, its action was justified. On the record presented before me, however, the testimony left much to be desired.

"The action of the respondent is reversed. As already explained, this decision, since the license in question has expired, is advisory and merely for the guidance of the parties herein in the event of a similar application. Both parties are, of course, free in any future application to offer testimony in addition to that already offered in these proceedings, either with respect to the present issues or such additional issues as may be raised."

See Koodray v. Paterson (Case #2), Bulletin 696, Item 9.

On March 27, 1946, respondent unanimously denied appellant's third application for a transfer to her of the Cetrano license issued for the fiscal year 1945-46. Hence this appeal.

It is clear, as stated in the Conclusions previously rendered by the Commissioner, that the immediate neighborhood of appellant's premises is of a mixed residential and business character, with the emphasis on business. Appellant's premises are located at the northwest corner of Park Avenue and Madison Avenue. There are a number of business places and residences on Park Avenue in a westerly direction from Madison Avenue for a distance of at least two blocks to East 18th Street. There are also a number of business places, including a bus garage, on Madison Avenue in a northerly direction between Park Avenue and the railroad. However, Madison Avenue in a southerly direction from Park Avenue appears to be devoted principally to residences, and the entire section east of Madison Avenue is a highly residential district, with small neighborhood stores in certain locations. It is clearly a section in which a license may not be denied merely because of the character of the neighborhood. Barthold v. Clifton, Bulletin 160, Item 7; Temperino v. Vineland, Bulletin 240, Item 8; Brummer v. North Arlington, Bulletin 426, Item 11. If this were the only reason for denial of the transfer, I would be required to reverse the action of respondent.

It appears, however, from the testimony herein that plenary retail consumption licenses have been heretofore issued for premises at 229 Park Avenue and 222 Park Avenue. These premises are, respectively, about 270 feet and 390 feet westerly from appellant's premises. There has also been issued a plenary retail consumption license for premises at 723 Madison Avenue, approximately 400 feet northerly from appellant's premises. Commissioner Wegner, who has lived in Paterson all of his life, and Commissioner Fogarty, who formerly resided in this section of Paterson, testified at the hearing herein that the licenses presently in existence are adequate to take care of the needs of persons residing in this section of the city. Eleven objectors, who also testified at the hearing herein, stated that in their opinion there were a sufficient number of licensed premises in the neighborhood of Park Avenue and Madison Avenue.

In an effort to demonstrate that, despite the above testimony, there is need for an additional license in this section of Paterson, appellant produced twelve residents who testified that the licensed premises conducted by Glazer at 222 Park Avenue, and the licensed premises known as Nick's at 229 Park Avenue, were so overcrowded that they were unable to service their customers in a proper manner. These witnesses testified that at noon-time and during the late hours of the evening they had to wait from five to twenty minutes for service in these places. It was also intimated that licensed premises at

723 Madison Avenue were so small that they could accommodate only a few patrons. On the other hand, five of the objectors testified that they visited Glazer's and Nick's and that these premises were never overcrowded. Commissioner Wegner stated that he watched the two existing places on Park Avenue on a Sunday afternoon and several nights, and that at no time was there any overflow. Referring to these places, Commissioner Fogarty testified that "As far as crowding between 5, 7 and 11, I noticed no crowding. There is never a crowd in either of these places."

The case presents a wide difference of opinion as to the need for an additional license in this section of Paterson. However, the proof presented upon the present appeal shows that the members of respondent Board, who are familiar with local conditions, have decided that this additional license is not necessary to take care of the needs of persons who reside in this section of Paterson. Appellant has not sustained the burden of proof in showing that this decision was arbitrary or unreasonable. As the Commissioner said in Spector v. Roselle, Bulletin 703, Item 1:

> "It is now well established that my function in these cases is not to inflict or substitute my opinion upon or for the issuing authority but, rather, to determine if reasonable grounds support its decision and, if so, to affirm whatever their view and irrespective of my own."

As to alleged discrimination, appellant introduced evidence which showed that, in other sections of the City of Paterson, five or six consumption licenses are concentrated in one neighborhood. At the hearing herein Commissioner Wegner testified that nearly all of these places have been licensed for years and that they were licensed prior to the creation of respondent Board. He testified that none of the sections in which the undue concentration of licenses existed was similar in character to the neighborhood considered in this appeal and that most of this undue concentration was found in the principal business districts of the city or near the Wright Aeronautical Corporation plant. As the Commissioner said in Vedde v. Lyndhurst, Bulletin 693, Item 3:

> "The fact that a large number of licensed premises exist in close proximity to each other in other sections of the township does not show any undue discrimination against appellant. That condition in other sections has existed for a number of years and respondent should be permitted to eliminate gradually rather than be required to create or perpetuate that unsatisfactory condition in any section of the municipality."

The right to transfer is not inherent in a license. I do not find, upon the evidence produced, that respondent acted arbitrarily or unreasonably or unduly discriminated against appellant in refusing her application for a transfer of the license in question. For the reasons aforesaid, I shall affirm the action of respondent.

Accordingly, it is, on this 4th day of June, 1946,

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

ERWIN B. HOCK
Deputy Commissioner.

6. APPELLATE DECISIONS - ROCKAWAY TOWNSHIP TAVERN ASSOCIATION ET AL. v. ROCKAWAY TOWNSHIP AND MEROLLE.

ROCKAWAY TOWNSHIP TAVERN ASSOCIATION, MORRIS COUNTY, NEW JERSEY, and MORRIS COUNTY LICENSED BEVERAGE ASSOCIATION,

Appellants,

-vs-

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF ROCKAWAY and AUGUSTUS L. MEROLLE,

Respondents

ON APPEAL
CONCLUSIONS AND ORDER

Sidney Simandl, Esq., Attorney for Appellants.
Frank C. Scerbo, Esq., Attorney for the Respondent, Township Committee of the Township of Rockaway.
Albert J. Biederman, Esq. and Edward Brigadier, Esq., Attorneys for the Respondent-licensee, Augustus L. Merolle.
Henry L. Janowski, Esq., Attorney for Henry Meury, a license holder and objector.

This is an appeal from the granting of a plenary retail consumption license to respondent Merolle by respondent Township Committee for a building located on the Dryden Estate, Green Pond Road, in the Green Pond section of Rockaway Township.

The instant license was granted on December 15, 1945 by a two-to-one vote of the members of the Township Committee. On October 13, 1945 the same members of the Township Committee had unanimously denied an application by one Garneau for a similar license for the entire premises known as the Dryden Estate, for the stated reason, according to the minutes of that meeting, that there were sufficient licenses outstanding to serve the needs of the community.

This case, therefore, is substantially on all fours with Taylor v. South River, Bulletin 520, Item 4, wherein the Commissioner held:

> "It is axiomatic that, under the Alcoholic Beverage Law, the question of issuance (or transfer) of a municipal liquor license is entrusted, in the first instance, to the sound and bona fide discretion of the local issuing authority. In discharge of that function, the local issuing authority, when acting upon an application, is not bound by any doctrine of res judicata to reach the same decision as upon some previous application involving the same applicant and premises. To the contrary, each individual application is necessarily to be considered on its own full merits. Cf. Lavelle v. Way, Bulletin 140, Item 1; Bradford v. Paulsboro, Bulletin 410, Item 3. The evident and salutary purpose of such a doctrine is to enable the municipality to benefit by its own sound experience and to avoid repetition of what it honestly believes to have been a past mistake.
>
> "However, while giving full recognition to this doctrine, proper liquor control clearly dictates that an issuing authority may not be permitted to 'back and fill' in the applications before it without sound reason therefor. Where, as here, it has squarely reversed its position, the burden is upon it to convincingly explain such reversal. VanKesteren et al. v. Camp, Bulletin 296, Item 7; Merkowsky et al. v. Bayonne et al., Bulletin 386, Item 4. Cf. Northend Tavern, Inc. v. Northvale, Bulletin 493, Item 5." (Underscoring added.)

In this case, testimony by the vacillating members of the Committee was that both changed their minds and their votes because they had heard a rumor that the Dryden Estate, if the license were not granted, would be sold to some organization which would use it for charitable purposes, thereby causing a loss of $1300.00 in annual taxes to the municipality. As additional reasons, one Committeeman testified that he was influenced to grant the license because of his belief that an unlawful traffic in licenses existed which would be impeded by the granting of the instant license, and that the licensing of the premises would bring business to the community. The other testified that he believed in the issue of liquor licenses without restriction to all who sought them.

The reasons motivating the change of heart can scarcely be considered as related in any way to the basic question whether public necessity and convenience required the issuance of the license sought. Regarding the possible loss of ratables resulting from use of the property for charitable purposes, it has long been established that the collection of taxes has nothing to do with liquor control. Re Sofield, Bulletin 28, Item 1; Bettlewood Republican Club v. Haddon, Bulletin 527, Item 2. Nor are the other indicated reasons in any way related to the public convenience and necessity warranting the granting of a liquor license. It follows that the issuing authority has not sustained the burden of convincingly explaining its reversal of position. The cases of Kavookjian et al. v. Highlands, Bulletin 663, Item 2 and Hearty et al. v. Liberty, Bulletin 671, Item 5, are not contrary to the ruling in the Taylor case above quoted, since they are distinguishable on their facts. In this case, Merolle has testified that he intends to cater only to business and personal acquaintances.

Consideration of the merits leads to the same result. Rockaway Township has a population of 2,423, according to the 1940 Federal census, with fifteen plenary retail consumption licenses (excluding Merolle's) issued and outstanding -- a ratio of one to every 161 persons. In comparison with the ratio of one to 1,000 established by P. L. 1946, c. 147, the community would seem adequately supplied. See Hudson Bergen County Retail Liquor Stores Association v. Hoboken, Bulletin 699, Item 5; Williams et al. v. Atlantic Highlands, Bulletin 700, Item 3 (certiorari denied en banc, Bulletin 711, Item 12). That the rural vicinity is adequately serviced appears from the fact that a plenary retail consumption license is issued and outstanding for premises immediately adjoining the Dryden Estate. There appears to be absolutely no public need for the license issued to Merolle.

Furthermore, there appears to be a grave jurisdictional defect which would have precluded the granting of the license had it been properly considered by the issuing authority. There is at least grave doubt that Merolle was a bona fide resident of New Jersey at the time of application as required by R. S. 33:1-25. He had been a resident of Brocklyn, New York, until November 1, 1945, from which date he claims establishment of residence in New Jersey. However, he merely "moved in" with "friends" in Bayonne but, curiously, left his family in Brooklyn and continued to drive his automobile, with New

York registration plates, as late as the hearing on appeal. It is significant in this connection that Garneau, whose application for license had been denied on October 13, 1945, was then loosely associated with Merolle in the pending negotiations for purchase of the Dryden Estate. The original application was apparently made by Garneau instead of by Merolle, because Garneau had been a resident of New Jersey for twenty-five years. Only when Garneau "lost interest" in the joint venture following denial of his application did Merolle become a "resident" of New Jersey under the circumstances aforementioned and file application in his own name. While admittedly residence is a matter of intention, mere acquisition of an address, especially when coupled with evidence of failure to terminate a previous residence, falls far short of an unequivocal manifestation of intention to acquire a new residence. Re Meyers and Phelan, Bulletin 635, Item 4; Re Heesch, Bulletin 635, Item 9.

Respondent has attacked appellants' status as proper parties to prosecute this appeal, claiming that they are not "aggrieved persons" within the intendment of R. S. 33:1-22. This contention is without merit since the standing of an association of liquor dealers to prosecute an appeal has long been established. Retail Liquor Distributors v. Polonsky, Bulletin 88, Item 10; Hudson Bergen County Retail Liquor Stores Association v. Loris, Bulletin 254, Item 10. The salutary reasons inducing a broad interpretation of the phrase "aggrieved person" as used in the Alcoholic Beverage Law are set forth at great length in East Brunswick Board of Adjustment v. East Brunswick, Bulletin 223, Item 5.

The action of the issuing authority will be reversed and the license cancelled.

Accordingly, it is, on this 4th day of June, 1946,

ORDERED, that the action of respondent, Township Committee of the Township of Rockaway, in granting the application for plenary retail consumption license of the respondent Merolle be and the same is hereby reversed; and it is further

ORDERED, that the plenary retail consumption license issued to respondent Augustus L. Merolle by the Township Committee of the Township of Rockaway, be and the same is hereby declared null and void, set aside and cancelled, and said Augustus L. Merolle is hereby directed forthwith to cease all alcoholic beverage activity under the license heretofore issued to him.

ERWIN B. HOCK
Deputy Commissioner.

7. APPELLATE DECISIONS - CEDAR LAKE LODGE, INC. v. BLAIRSTOWN.

CEDAR LAKE LODGE, INC.,)
Appellant,)
-vs-) ON APPEAL
) CONCLUSIONS AND ORDER
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BLAIRSTOWN,)
Respondent)

Sewell and Levey, Esqs., by William E. Sewell, Esq., Attorneys for Appellant.
Archie Roth, Esq., Attorney for Respondent.

This is an appeal from the denial of appellant's application for a seasonal retail consumption license.

At a regular meeting, on February 8, 1946, the Township Committee, respondent herein, adopted a resolution declaring in part that "***it would be for the best interests and welfare of the community that an Ordinance be passed *** prohibiting the issuance of seasonal retail consumption *** licenses in said township." Pursuant to the said resolution, and to give effect thereto, on February 13, 1946 an ordinance limiting plenary retail consumption licenses and forbidding most other types of licenses (including seasonal retail consumption licenses) in said Township was introduced and passed on first reading. On the same day, appellant's application for a seasonal retail consumption license was filed with the Township Clerk.

On February 14, notice of passage of the ordinance and of a hearing thereon was duly published. On March 1st (at a special meeting) the ordinance was passed on final reading and by operation of law (nothing in the ordinance to the contrary) became effective, after final advertising, on March 7, 1946.

On March 8, 1946, the next regular meeting of the Township Committee after the filing of the application, the application was denied because of the aforesaid ordinance. Other reasons were advanced for the denial, but in view of the result herein they need no comment.

Respondent's authority to adopt the ordinance prohibiting seasonal retail consumption licenses is clear. R. S. 33:1-12(2) provides in part:

> "The governing board or body of each municipality may, by ordinance, enact that no seasonal retail consumption license shall be granted within its respective municipality."

Thus, the matter is left solely to the discretion of the municipality. The State Commissioner has no jurisdiction to review the action of the municipal governing body in adopting such an ordinance. Cf. Italian American Citizens Club v. Township of Greenwich, Bulletin 392, Item 9; Forest Hill Boat Club v. Cinnaminson, Bulletin 372, Item 7; Tenenbaum v. Salem, Bulletin 109, Item 1; Re Gordon, Bulletin 151, Item 12.

It is contended that the ordinance, if it is effective in prohibiting seasonal retail consumption licenses, cannot be applied to prohibit such a license on the application of appellant because the same was filed prior to the adoption of the ordinance.

A somewhat similar situation occurred in Franklin Stores v. Elizabeth, Bulletin 61, Item 1. In that case, the ordinance had not

been finally adopted at the time of denial, but it was in actual, bona fide contemplation and was finally adopted before the hearing of the appeal. In rendering his decision in that case, Commissioner Burnett said:

> "The contention of appellant fails, not because the application was barred by the ordinance but rather because to grant it now would be in defiance of the local policy manifested by the ordinance in active, bona fide contemplation at the time the application was denied."

The present case is even stronger than the Franklin case because, in addition to the municipal policy exhibited by the ordinance which has been in effect as a formal regulation since March 7, 1946, it appears that the ordinance was finally adopted before appellant's application was denied.

There is some attempt to exempt the application in the instant case because it is a "renewal" application.

The application on its face is designated a "new application" and is by law just that. The law is clear. R. S. 33:1-96. The application under consideration fails to meet a very important requirement in order to be considered as a renewal license, i.e., no license had ever been held by the appellant corporation. Even if material to the issue, it is clear that the application is not a "renewal" application.

The action of respondent is affirmed.

Accordingly, it is, on this 6th day of June, 1946,

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

Erwin B. Hock

Deputy Commissioner.