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

BULLETIN 1483 November 19, 1962

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ITEM

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

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1. COURT DECISIONS - NORTH CENTRAL COUNTIES RETAIL LIQUOR STORES ASSOCIATION v. EDISON, R. H. MACY & CO., INC. AND DIVISION OF ALCOHOLIC BEVERAGE CONTROL - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-587-61; A-588-61

NORTH CENTRAL COUNTIES RETAIL LIQUOR STORES ASSOCIATION,

Appellant,

vs.

MUNICIPAL COUNCIL OF THE TOWNSHIP OF EDISON, R. H. MACY & CO., INC., t/a BAMBERGER'S NEW JERSEY, and DIVISION OF ALCOHOLIC BEVERAGE CONTROL, DEPARTMENT OF LAW AND PUBLIC SAFETY, STATE OF NEW JERSEY,

Respondents.

Argued October 15, 1962--Decided October 26, 1962

Before Judges Conford, Gaulkin and Kilkenny

Mr. Samuel J. Davidson argued the cause for appellant (Mr. Samuel Moskowitz, attorney).

Mr. William F. Tompkins argued the cause for respondent R. H. Macy & Co., t/a Bamberger's New Jersey (Messrs. Lum, Biunno & Tompkins, attorneys; Mr. Charles H. Hoens, Jr., on the brief).

Mr. Herbert S. Alterman argued the cause for respondent Division of Alcoholic Beverage Control (Mr. Arthur J. Sills, Attorney General, attorney; Mr. Samuel B. Helfand, Deputy Attorney General, of counsel).

PER CURIAM

The intent of this court in determination of the appeal in North Central Counties Retail Liquor Stores Association v. Township of Edison, 68 N.J. Super. 351 (1961) (reprinted in Bulletin 1395, Item 1), was to allow the licensee a reasonable time to bring its operation into compliance with the statute as interpreted in our opinion. We cannot find, under all the circumstances shown, that it did not do so.

We are not impressed by the legal argument that the 1961-1962 license was rendered by our decision a new, rather than renewal, license, issued in violation of statutory restrictions.

Judgment affirmed (North Central Counties Retail Liquor Stores Association v. Edison and R. H. Macy & Co., Inc., Bulletin 1440, Item 3).

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2. APPELLATE DECISIONS -·O'HARA AND YUTTAL v. WEST ORANGE AND MAYFAIR FARMS HOLDING CORPORATION.

Frank O'Hara and Philip Yuttal, Appellants,	)	
v.	)	On Appeal
Municipal Board of Alcoholic Beverage Control of the Town of West Orange, and Mayfair Farms Holding Corporation, Respondents.	)	CONCLUSIONS AND ORDER

Robert W. Wolfe, Esq., Attorney for Appellants
Louis Lando, Esq., Attorney for Respondent Municipal Board
VanRiper & Belmont, Esqs., by Charles E. Villanueva, Esq., Attorneys for Respondent Mayfair Farms.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"Respondent Mayfair Farms Holding Corporation (hereinafter Mayfair) applied to the respondent Municipal Board of Alcoholic Beverage Control of the Town of West Orange (hereinafter Board) for a place-to-place and person-to-person transfer from J. & L. Beverage Mart to itself and from premises at 18 Main Street, West Orange, to premises under construction at a large new shopping center, to be known as Korvette City, at the northwest corner of Eagle Rock and Prospect Avenues, in the Town of West Orange.

"After a full hearing before the Board at which the appellants entered their objections to the said application and were represented by counsel, the Board unanimously granted the application of J. & L. Beverage Mart for renewal of its License D-2 for the year 1962-63 and granted the application of the respondent Mayfair for the transfer as requested in the following resolution adopted June 29, 1962:

'WHEREAS, J. & L. Beverage Mart has applied for a renewal of its License No. D2 for premises at 18 Main Street, Town of West Orange, New Jersey, for the year 1962-1963; and,

'WHEREAS, Mayfair Farms Holding Corporation has applied for a transfer to it of said license from person-to-person and place-to-place to premises now being constructed at the North-West corner of Eagle Rock and Prospect Avenues, Town of West Orange, New Jersey; and, at a hearing duly held regarding said transfer the testimony of Mayfair Farms Holding Corporation established that it is a qualified applicant for said license and that it has complied with all requirements of R.S. 33:1-1, et seq. regarding said transfer and that it is in the public interest and there is a public necessity for said transfer, and there being no testimony provided by any objectors;

'It is, therefore, on this 29th day of June, 1962, on motion duly made and seconded,

'RESOLVED AND ORDERED, that License No. D2 issued

by the Board of Alcoholic Beverage Control of West Orange, New Jersey, to J. & L. Beverage Mart for the premises known as 18 Main Street, West Orange, New Jersey, be and hereby is renewed for the year 1962-1963; and it is further

'RESOLVED AND ORDERED that the License No. D2 issued to J. & L. Beverage Mart for the year 1962-1963 be and hereby is transferred to Mayfair Farms Holding Corporation subject to the express condition that the premises as described in the plans and specifications prepared and submitted by the applicant, Mayfair Farms Holding Corporation and found acceptable by the Board of Alcoholic Beverage Control of the Town of West Orange shall first be completed.'

"From this action appellants appeal and in their petition of appeal allege that the action of the Board was 'erroneous, illegal, arbitrary and constituted an abuse of discretion, and was contrary to the Rules and Regulations of the DIVISION OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF NEW JERSEY.'

"Respondent Mayfair filed an answer in which it denies the substantive complaint of the appeal and sets forth, in addition, the following five separate defenses:

1. That the petition failed to state any facts which would justify a reversal;

2. That the appellants failed to produce any evidence 'whatsoever of the hearing before the Board' and therefore are precluded from producing the same in this appeal;

3. That the appellants are not proper parties to this appeal;

4. That the Board acted reasonably and with sound discretion;

5. That the appellants failed to show any unreasonable, arbitrary, capricious or illegal action on the part of the Board or any abuse of discretion.

It thus concluded that the action of the Board should be sustained and the appeal dismissed.

"The Board filed an answer in which it denies the substantive charge of the petition, and annexed to its answer a copy of the Statement of Grounds for Action taken by the Board pursuant to Rule 4 of State Regulation No. 15.

"The appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15. The minutes of the proceedings before the respondent Board were received in evidence, and additional testimony was presented by the appellants and the respondents in accordance with Rule 6 of said Regulation.

"The precursory information relating to the hearing on June 26, 1962, can be imparted in summary fashion. The appellants represented by counsel appeared before the Board on June 26 and objected to the application which was then made for the person-to-person and place-to-place transfer by the respondent Mayfair. According to the minutes of June 26, 1962, meeting which were introduced in evidence, it appears that counsel for the objectors requested an adjournment because he stated that he had just been retained 'yesterday' by the objectors. The Board thereupon offered

to adjourn this matter to June 29 but counsel for the objectors decided that they would proceed with the testimony at that time.

"Thereupon counsel asked the Board to dismiss this matter because of an alleged defective application. Examination of the application disclosed that Question 22 was not answered completely as required by the statute for the reason that the amount of stock owned by each of the principals was not therein disclosed. The names of the directors and officers of the Mayfair were disclosed and the information lacking was supplied at the time of the meeting. The objectors further raised the charge that there was no public necessity for the said transfer because there were numerous other licenses in the vicinity.

"Mayfair produced several of its officers who gave testimony with respect to the transfer and also produced another witness who gave testimony with respect to the general area. The matter was then adjourned to June 29, and at that meeting the resolution hereinabove recited was passed. This resolution clearly reflected the Board's determination that the answers in the application were set forth in sufficient detail; that the incomplete answer to Question 22 was technical in nature, and that the applicant complied with the statutory requirements with respect thereto. The Board further discussed and reviewed the question of public need and necessity, and determined that the public need would be served by the said place-to-place and person-to-person transfer. Accordingly, they unanimously voted in favor of granting the transfer subject to the special condition (R.S. 33:1-32) that the building be completed in accordance with the plans filed before the license is actually issued.

"The appellants produced no members of the Board to support their allegation that the Board had acted unreasonably, arbitrarily or in abuse of its dicretion. They sought to prove these allegations by their own testimony with respect to their allegation that there was no public need or necessity.

"Philip Yuttal (one of the appellants) testified that he is the holder of a D license and objects to this transfer because 'it tends to make competition.' He also testified that there were a number of licenses in the general area although they are all C licenses and not a D license as applied for by Mayfair.

"On cross examination he stated that he is at his present location for about one and one-half years and moved to his present location because business was not very good at his former location on the same street. He did not know how many D licenses were within a mile of the proposed site and admitted that his premises were located about two miles from the said site.

"Frank O'Hara (the other appellant) testified that he has a C license, with the broad package privilege, located at Pleasant Valley Way and Eagle Rock Avenue which is in the Pleasantdale section of West Orange. He stated that he and the co-appellant were represented at the hearing below, and the reason he objected to this transfer was that he feared that Mayfair would sell private brand liquors which would be in serious competition with his business.

"On cross examination he testified that his place of business is about seven-eighths of a mile from the said proposed site. He also admitted that Pal's Cabin and Mayfair Farms, which have consumption licenses with the broad package privilege, are primarily restaurants but that 'you can get a bottle there, there's no question about it.'

"Respondent Mayfair produced at this hearing W. Donald Horn (a stockholder and director of Mayfair) who testified in effect that Mayfair holds at present two C licenses, with broad package privileges, in its operation of Mayfair Farms and Pal's Cabin; both are primarily restaurants. He asserted that both of these establishments sell practically no package goods and estimated that the approximate total sales of package goods by Pal's Cabin do not exceed $50 per year. He further insisted that the total sales were even less than that at the Mayfair Farms.

"On cross examination he was asked specifically about the omission of amounts of stock held by the stockholders and directors in answer to Question 22 of the said application. He admitted that that was a technical omission and counsel for Mayfair, several times during this hearing and in summation, stated that this technical omission was made through his own inadvertence; there was no intention to conceal or hide the extent of the interest, and this information was fully revealed to the Board at the time of the original hearing.

"The respondents produced Frank A. Schlesinger (a real estate broker) and Harold H. Goldberg (a real estate and business broker) who testified that there are insufficient licenses of this type in the area and that there was a need for such licenses. They justified their opinions on the basis of the tremendous increase in the population in this particular section of West Orange. According to the master plan with which Schlesinger was familiar as a former zoning board member of West Orange, the west ward section in which this shopping center is being constructed has an annual population increase of one thousand persons and will continue to have such increase, according to his estimate, for the next ten years. Thus, it is clear that this section is the new and growing section and the establishment of the Korvette Shopping City was generated by the increased needs of that section. The testimony of these experts was to the effect that the Korvette Shopping City will be a regional shopping center, which they define as a center consisting of one or two major tenants with supplementary tenants, which encompass all of those products which are generally sold for consumer goods such as were normally found heretofore in a complete integrated department store. They stated that the regional shopping center would draw many customers from within a radious of from ten to fifteen miles, and that the best interests of the community would undoubtedly be served by the action of the respondent Board.

I

"At the appeal de novo herein appellants challenge the jurisdiction of the respondent Board in approving the application for the reason that the said application omitted a statement of the amount of stock held by the stockholders of Mayfair. Counsel cites specifically R.S. 33:1-25, the third paragraph of which states:

> 'In applications by corporations, except for club licenses, the names and addresses of, and the amount of stock held by, all stockholders holding one or more per cent (1%) of any of the stock thereof, and the names and addresses of all officers and of all members of the board of directors must be stated in the application, and if one or more of such officers or members of the board of directors would fail to qualify as an individual applicant in all respects, except as to citizenship, residence or age, no license of any class shall be granted.'

Counsel contends that every element of this section must be complied with and that, since this is a jurisdictional requirement, it cannot be waived. In support of this contention counsel cites Lending v. Palisades Park et al., Bulletin 1329, Item 1. This case (involving

the question of which newspaper was the proper one to publish the notice of application) and other cases cited by the appellants do not apply to the matter at issue because they refer generally to substantive matters, particularly with reference to advertising.

"The test appears to be whether the misstatement was intentional and substantial. As with all administrative tribunals, the spirit of the Alcoholic Beverage Law and its administration must be read into the regulations. This does not mean that their ingredients need not be complied with. However, the rule is to be applied rationally and with fair recognition of the fact that justice is always the pole-star. Barbire v. Wry, 75 N.J. Super. 327; Martindell v. Martindell, 21 N.J. 341, at 349 (1956).

"Counsel for respondent Mayfair has asserted that the omission of the actual amount of stock owned by the stockholders holding one or more per cent of any of the stock thereof was inadvertent, and that this was supplied to the Board at the time of the hearing. No one was prejudiced; no one complained of any fraud or intentional wrongdoing; indeed, no one contended that there was any concealment of any material fact at the time of the hearing. It is apparent that the omission was not intentional and, therefore, does not constitute sufficient ground for denial of the application. Vuono v. Belleville, Bulletin 163, Item 2; Club Benmar v. Paterson, Bulletin 921, Item 1. Cf. Sears-Roebuck & Co. v. Absecon & Jones, Bulletin 185, Item 10, where errors more serious than those committed in this matter were the subject of the appeal and where, even after decision of appeal, the licensee was permitted to file a corrected application.

"There is considerable decisional authority to support the principle that much weight should be given to the municipal issuing authority's resolution of consent. Such consent was given herein specifically after consideration of the objections to the answer to Question 22 of the application. The Board felt that, since the stockholders and directors were fully revealed and their identities made known, that the omission in the application of the actual amount of stock held by each member of this family owned and controlled corporation was sufficiently insubstantial to warrant approval thereof. Re Falbo, Bulletin 1357, Item 2. Cf. Re The Columbian Association of Livingston, Bulletin 1221, Item 7.

"Counsel raises the further point that the resolution order discloses that there was a transfer for the period 1962-63 but that in fact there has never been filed a notice of intention for a 1962-63 license. It is clear that the regular procedure has been followed whereby a renewal is granted on the license of the proposed transferor and the said license could not be transferred until the building was completed. Thus the practical effect is that the transfer must be of the 1962-63 license. This procedure is no different from that followed in Zelko v. Hillside, N. J. App. Div., decided June 13, 1960, not officially reported, reprinted in Bulletin 1343, Item 1, and Re Falbo, supra (citing Re The Columbian Association of Livingston, supra). Cf. Passarella v. Atlantic City, 1 N.J. Super. 313. I, therefore, consider this argument to be without merit.

II

"Counsel has raised an omnibus contention in the petition of appeal and at this appeal de novo hearing that the action of respondent Board was erroneous, arbitrary and consitituted an abuse of discretion. Translated more particularly, appellants assert that there was no adequate proof of need or necessity and such 'public need and necessity' must be proved at this appeal de novo.

"The burden of proving that the respondent abused its discretion falls upon the appellant and he must make out his case by a preponderance of the proofs. Family Finance Corp. v. Gaffney, 11 N.J. 565, 575 (1953); Buyer v. West Orange, Bulletin 1205, Item 2. The appellant's burden becomes heavy upon his appeal to this Division since, in a discretionary matter such as this, he must show manifest error or some abuse of discretion below. Nordco v. State, 43 N.J. Super. 277, at 287; Rajah Liquors v. Division of Alcoholic Beverage Control, 33 N.J. Super. 598, 600 (App. Div. 1955); First National Stores, Inc. v. Dumont, Bulletin 1451, Item 1.

"In this case the adopted Resolution makes manifest the careful consideration and deliberation by the Board of all the facts and circumstances and the evidence before it before it reached its determination that the best interests of the public were served by its granting this transfer. These specific reasons were set forth therein and are strong arguments in support of the reasonableness of its actions and its discretion.

"It has long been established that the number of licenses which should be permitted in any particular area and the determination of whether or not a license will be transferred to a particular location are matters within the sound discretion of the issuing authority, and that the Director's function on appeal is not to substitute his opinion for that of the issuing authority but, rather, to determine if proper cause exists for its opinion and, if so, to affirm irrespective of his personal views. Rothman v. Hamilton, Bulletin 1091, Item 1; Food Fair Stores of New Jersey, Inc. v. Union, Bulletin 1129, Item 1; Grand Union Company v. West Orange, Bulletin 1155, Item 3. This view is stated more affirmatively in Ward v. Scott, 16 N. J. 16 (1934) where the Supreme Court dealt with an appeal from a zoning ordinance which had been granted by a municipality:

> '***Local officials who are thoroughly familiar with their community's characteristics and interests and are the proper representatives 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). Where, as here, the application for variance has been given careful and conscientious consideration by the zoning board and the town council and has been acted upon by both of them in strict conformity with the procedural and substantive terms of the statute, the ultimate interests of effective zoning will be advanced by permitting the action of the municipal officials to stand, in the absence of an affirmative showing that it was manifestly in abuse of their discretionary authority.'

The action of the local Board may not be reversed by the Director unless he finds 'the action of the Board was clearly against the logic and effect of the presented facts.' Hudson-Bergen County Retail Liquor Stores Association, Inc. v. Hoboken, 135 N.J.L. 508, at 511. Cf. Fanwood v. Rocco, 59 N.J. Super. 306, 317. I was not persuaded by the testimony of the appellants that the Board abused its discretion by finding contrary to fact that there was no public need or necessity. As is pointed out hereinabove, both appellants are licensees who apparently fear competition, and assert that as their primary argument in objecting to this transfer. Significantly,

the nearest holder of a D license (Packard-Bamberger & Co.), located seven-eights of a mile from the proposed site, has not entered any objection thereto, nor has there been any expression on the part of any other residents of the community.

"After reviewing and considering all of the evidence, the exhibits, and the articulate oral arguments of counsel, I conclude that appellants have failed to sustain the burden of proof in showing that the action of the respondent Board was erroneous. Rule 6 of State Regulation No. 15; Helms v. Newark et al., Bulletin 1398, Item 3.

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

Written exceptions and argument to the Hearer's Report by the appellants' attorney, as well as answering argument by the respondents' attorneys, were filed with me pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the record herein, including the exhibits, the oral arguments of counsel, the Hearer's Report, and the written exceptions, argument and answering argument with respect thereto, I concur in the findings and conclusions of the Hearer and adopt his recommendation.

Accordingly, it is, on this 11th day of October, 1962,

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

WILLIAM HOWE DAVIS
DIRECTOR

3. APPELLATE DECISIONS - MC CARTHY v. ORANGE.

Margaret McCarthy, t/a McCarthy's Tavern, Appellant,	)	On Appeal
v.	)	CONCLUSIONS AND ORDER
Municipal Board of Alcoholic Beverage Control of the City of Orange, Respondent.	)	

Thomas E. Durkin, Jr., Esq., Attorney for Appellant.
John R. Murray, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of the respondent whereby on May 28, 1962, it suspended appellant's license for five days, effective June 13, 1962, after appellant was adjudged guilty on a charge alleging that on January 27, 1962, she sold during prohibited hours alcoholic beverages in their original containers for off-premises consumption and allowed, permitted and suffered the removal of the alcoholic beverages from the licensed premises, in violation of Rule 1 of State Regulation No. 38. The licensed premises are located at 647 Scotland Road, Orange.

"Upon the filing of the appeal, an order was entered on June 12, 1962, staying respondent's order of suspension until further order of the Director. R.S. 33:1-31.

"In her petition of appeal, appellant alleges respondent's action was erroneous in that:

'(a) The facts adduced in support of the charges were insufficient to establish guilt of the alleged charge.

'(b) As a matter law, the contentions of the Respondent are insufficient to establish a violation of the Rules and Regulations of the Division of Alcoholic Beverage Control.

'(c) The Respondent misapplied the interpretative case law to the factual situation involved in the instant case, thereby causing an erroneous conclusion.

"Respondent in its answer denies appellant's allegations.

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

"Respondent called as its witness Salvatore J. Rizzo, a local police officer. Appellant's witness was Martin Sheridan (her bartender).

"Officer Rizzo testified that for the past ten years he has been a member of the Orange Police Department; that the licensed premises are located on the westerly side of Scotland Road, about 35 to 40 feet from the northwesterly corner of the intersection of Scotland Road and Chestnut Street; that on January 27, 1962, at about 1:40 A.M., he was on duty on the southwesterly corner of the intersection; that he observed a male (later identified as John Shilling) walking past him on Scotland Road in the direction of the licensed premises and entering the same; that Shilling had made the trip to the licensed premises from his residence located on the westerly side of Scotland Road about 100 feet south of the licensed premises; that at about 1:45 A.M. he observed Shilling emerge from the licensed premises in possession of a brown paper bag; that Shilling, in retracing his steps to his home, passed him on the southwesterly corner of the intersection; that he twice called to Shilling to stop; that Shilling ignored his command and that he overtook Shilling in front of his home.

"Officer Rizzo further testified that he inspected the contents of the bag; that it contained two quart bottles of Schaefer beer; that the beer was 'very, very' cold; that the bag was 'very, very' dry and that he took possession of the beer and bag.

"On cross examination, Officer Rizzo reiterated the pertinent parts of his direct testimony and further testified that he kept the licensed premises under surveillance from the time Shilling entered the same until he departed therefrom; that in the interim he did not see any other person leave the premises; that he observed Shilling in his itinerary from the tavern to his home; and that he had felt the bottles with his bare hands and that the bottles were cold and dry.

"At the close of the respondent's case, counsel for the appellant moved to dismiss the charge on the ground that the evidence adduced by the respondent was insufficient to sustain the charge. I see no merit in this contention. It is quite clear that the respondent has presented sufficient evidence to prove

a prima facie case. Cf. Essex Holding Corp. v. Hock, 136 N.J.L. 28. I recommend that the motion be denied.

"Martin Sheridan, on behalf of the licensee, testified that on January 26, 1962, at about 9:20 P.M., he sold Shilling the two bottles of beer (exhibit R-3 in evidence) for off-premises consumption; that he put the bottles in a bag and handed the package to Shilling; that he had no conversation with Shilling as to when he would leave the premises; that thereafter he had served Shilling three or four drinks; that as Shilling was about to leave the premises, he met a friend and returned to the bar accompanied by his companion; that he served Shilling a few more drinks and that Shilling left the premises 'about a quarter to ten, quarter after ten, I think.'

"Sheridan further testified that at about 'one-thirty or twenty after two' the following morning, Shilling returned to the licensed premises; that the premises were still crowded; that he served Shilling a glass of beer and made change for him to purchase cigarettes; that he made no sale of alcoholic beverages for off-premises consumption to Shilling when the latter returned to the premises as aforesaid; that he did not know whether Shilling had removed the beer in question from the premises at the time of its purchase (at 9:20 P.M. aforesaid); and that he did not see Shilling take the two bottles of beer with him when he left the premises at about 1:40 the following morning.

"On cross examination Sheridan testified that he has been employed as the night bartender by the licensee for three years; that at the times in question, he was the only bartender on duty; that the premises were otherwise unattended; that there were forty patrons in the premises when Shilling entered the same at 9:00 P.M. and returned thereto at about 1:30 the following morning.

"On further cross examination, Sheridan testified that when Shilling came back to the bar with his friend, he had assumed that Shilling had deposited the bag containing the two bottles of beer on a coat rack located in the rear of the premises; that at the time he had no knowledge of the same; that Shilling had informed him and the 'court up in Orange' to this effect 'after he (Shilling) was locked up'; and that the two bottles of beer in question were taken from the cooler located behind the bar and in the center thereof.

"On re-direct examination, Sheridan stated that when he removes bottles from the cooler, they are wet.

"The undisputed testimony of Officer Rizzo is that at about 1:40 A.M. on January 27, 1962, he observed Shilling enter the premises and five minutes later emerge therefrom with a bag containing the two bottles of Schaefer beer; that he felt the bottles with his bare hands and that the bottles were cold. The bartender testified that at about 9:30 P.M. on January 26, 1962, he delivered two bottles of beer to Shilling; that he did not know when Shilling removed the beer from the premises; and that Shilling had informed him that he (Shilling) had left the beer on a coat rack (from about 9:45 P.M. on January 26, 1962 to 1:40 the following morning).

"Significantly, Shilling was not produced as a witness by appellant, nor was his non-production explained, except by argument that he should have been produced by respondent.

"I am not favorably impressed with the testimony of the bartender. On the basis of the evidence and the inferences arising therefrom, I find as a fact that on January 27, 1962, at about 1:30 A.M., the bartender sold Shilling the two quart bottles of Schaefer beer for off-premises consumption and allowed, permitted and suffered the removal of the alcoholic beverages from the licensed premises, in violation of Rule 1 of State Regulation No. 38.

"The attorney for appellant has submitted a memorandum contending, among other matters, that I should have ruled on his motion at the end of the respondent's case. There is no merit to this contention. This is an exclusive prerogative of the Director. See Rule 14 of State Regulation No. 15.

"Since it appears that appellant's attorney has predicated his other arguments for a reversal of the local Board's decision on a factual premise contrary to my recommended findings, I find no need to answer the other contentions set forth in the memorandum.

"After reviewing the evidence, the exhibits and the memoranda submitted by the attorneys for the litigants, I conclude that the appellant has failed to sustain the burden of establishing that the action of the respondent was erroneous (Rule 6 of State Regulation No. 15). I recommend, therefore, that an order be entered affirming respondent's action and dismissing the appeal, and fixing the effective dates for suspension imposed by respondent and stayed pending the entry of the order within."

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

Having carefully considered the entire record herein, including the exhibits and the briefs of the respective attorneys, 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 October 1962,

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

ORDERED that the five-day suspension heretofore imposed by respondent, and stayed during the pendency of this appeal, be restored and reinstated against License C-4 held by Margaret McCarthy, t/a McCarthy's Tavern, for premises 647 Scotland Road, Orange, to commence at 2 a.m. Monday, October 22, 1962, and to terminate at 2 a.m. Saturday, October 27, 1962.

WILLIAM HOWE DAVIS
DIRECTOR

4. APPELLATE DECISIONS - OAK INN, INCORPORATED v. ELIZABETH.

Oak Inn, Incorporated,

Appellant,

v.

City Council of the City of Elizabeth,

Respondent.

On Appeal

CONCLUSIONS and ORDER

Wilentz, Goldman, Spitzer & Sills, Esqs., by Warren W. Wilentz, Esq., Attorneys for Appellant
John M. Boyle, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"Appellant Oak Inn, Incorporated, filed an application with the local issuing authority (herein respondent) for renewal of its plenary retail consumption license for premises located at 1023 Magnolia Avenue, in the City of Elizabeth. After an investigation and hearing on June 26, 1962, respondent, by unanimous action of its members present, adopted the following resolution denying appellant's application:

'WHEREAS, the City Council, acting as the Municipal Board of Alcoholic Beverage Control, has questioned the advisability of renewing the Plenary Retail Consumption License No. C-116, Oak Inn, Inc., for premises located at #1023 Magnolia Avenue, for the license period commencing July 1, 1962 and terminating June 30, 1963, for the reason that the licensed premises were conducted improperly and in violation of the Rules and Regulations of this Board and of the Division of Alcoholic Beverage Control of the State of New Jersey, as set forth in the attached reports annexed hereto and made a part hereof and labelled Exhibits A and B.; and

'WHEREAS, the Board, after proper investigation, has carefully evaluated the past record of the licensee and the application for renewal of said license, and it is the considered opinion of the Board that the licensee is unfit to operate said licensed premises for the reason that the said licensed premises were conducted improperly and in violation of the Rules and Regulations pertinent and relating to the conduct of the licensed premises; and

'WHEREAS, it would be contrary to the best interest of the public health, safety, welfare and morals to approve the application for renewal of said licensed premises; now, therefore,

'BE IT RESOLVED, that the application of Oak Inn, Inc., for renewal of Plenary Retail Consumption License No. C-116, for premises #1023 Magnolia Avenue, for the license period beginning July 1, 1962 and terminating June 30, 1963, be and the same is hereby denied.'

"Appellant thereupon filed a petition of appeal alleging that the action of the respondent was erroneous for reasons which may be summarized as follows:

(a) There was no factual basis for such denial;

(b) It was not given an opportunity to see certain specific complaints upon which the respondent purportedly based its determination;

(c) Its action was 'arbitrary, capricious and in violation of (appellant's) Constitutional rights.'

"Respondent in its answer denied the essential allegations of the petition and incorporated therein the resolution and a copy of police reports reflecting a total of fourteen incidents relating to the licensed premises herein which required police action.

"In addition thereto there is attached a record of disciplinary proceedings which were subsequently stipulated and admitted into evidence and which indicate the following: (1) on September 18, 1958, the appellant entered a plea of non vult to violations of Rule 5 of State Regulation No. 20 (maintaining a nuisance) and Rule 1 of State Regulation No. 38 (sale in original containers after legal hours) which resulted in the suspension of its license for five days from October 5 to October 10, 1958; (2) the appellant pleaded non vult to the charge that it sold alcoholic beverages in original containers after hours, in violation of Rule 1 of State Regulation No. 38, and on November 13 the local issuing authority suspended its license for twenty days from December 1 to December 21, 1958. In addition thereto it was 'placed on probation' from November 14, 1958, to January 1, 1959; (3) at a hearing before the local issuing authority held on February 25, 1960, the appellant entered a plea of non vult to a charge that it sold alcoholic beverages after hours in violation of Rule 1 of State Regulation No. 38, and its license was suspended for fifty-five days effective from March 7 to May 1, 1960.

"Upon the filing of this appeal the Director on June 29, 1962, entered an order extending the term of the license then held by the appellant pending the determination of this appeal and until entry of a further order herein. R.S. 33:1-22.

"This was an appeal de novo and the crucial issue is whether the evidence before me justifies the action of the respondent in refusing to renew appellant's license. Nordco, Inc. v. Newark, Bulletin 1148, Item 2; Borden v. Newark, Bulletin 148, Item 8; Ritter v. North Bergen, Bulletin 546, Item 2. The burden of proof in all these cases which involve discretionary matters where the applicant seeks a renewal of the license falls upon the appellant to show manifest error or that the local issuing authority abused its dicretion. Downie v. Somerdale, 44 N.J. Super. 84, at 87; Nordco, Inc. v. State, 43 N.J. Super. 277, at 287 (1957).

"The only witness called by appellant was Russell Epstein. He testified that he is the president of the corporate appellant and that he visits and supervises the operations of the licensed premises from 10 a.m. to 5 p.m. daily. He admits that he never visits the premises at night and, therefore, was unaware of any of the incidents which are alleged to have taken place during the evening hours. He further testified that he didn't know about the numerous charges contained in the police report and that he first learned about them at the time of the hearing.

"On cross examination he admitted that he told the respondent at the original hearing that he was not familiar with any of the charges or any of the violations (except one) that had occurred during the previous licensing year. His explanation was that, since he spends only approximately six or seven hours at the tavern, he does not know what occurred during the hours that he was not present. He further stated that his bartenders never informed him of these violations. However, he did state that his bartender admitted that

there were violations but that some of those violations occurred outside the premises. Moreover, his information is based entirely upon what he was told and not what he knows of his own knowledge.

"The bartenders were not produced to testify with respect to their knowledge of any of the violations charged against these premises. Nor were any of the members of the local issuing authority subpoenaed by appellant to support its allegation that they had acted capriciously or arbitrarily or unreasonably and in violation of the constitutional rights of the appellant.

"Sergeant Alfred R. Goegelman, of the Elizabeth Police Department, called as a witness on behalf of the respondent, testified that in his opinion the licensed premises were a 'trouble spot.' Because of the numerous incidents that occurred there and because of complaints of card-playing, congregating and loud noise in and about the said premises, the police were instructed to, and did, indeed, check these premises three times daily. He stated that the police report contained a total of fourteen alleged violations which occurred during the licensing year from July 1, 1961, through June 30, 1962. He admitted on cross examination that he did not have any personal knowledge other than what was told to him by other police officers under his command, and what is reflected on the police reports.

"It is clear from the evidence presented that the manner in which the appellant's licensed premises were permitted to be operated and conducted constituted a trouble spot which was detrimental and inimical to the best interests of the community.

"In Conte v. Princeton, Bulletin 139, Item 8, the principle was clearly enunciated that a licensee is responsible for conditions in and outside of his licensed premises which are caused by patrons thereof. This principle has been uniformly followed to date. Cf. Garcia v. Fair Haven, Bulletin 1149, Item 1, where the Director cites Essex Holding Corp. v. Hock, 136 N.J.L. 28 (Sup.Ct. 1947) as follows:

> 'Although the word "suffer" may require a different interpretation in the case of a trespasser, it imposes responsibility on a licensee, regardless of knowledge, where there is a failure to prevent the prohibited conduct by those occupying the premises with his authority. Gustamachio v. Brennan, 128 Conn. 356; 23 Atl. Rep. (2nd) 140.'

"The fact that the chief corporate officer of the appellant disclaimed personal knowledge of the incidents which are part of the police record does not absolve the appellant from its liability and its responsibility for the proper conduct of these premises.

"It was the clear obligation of the appellant to produce the bartenders or employees who were present during the evenings on which these alleged violations occurred if it seriously disputed the facts contained therein. Epstein, of course, admitted that the appellant had pleaded non vult to the charges preferred against it by the local issuing authority and had been suspended as hereinabove stated. However, in a brief submitted by counsel for appellant the hearing below was challenged as being unfair and thus appellant was 'deprived of due process,' citing Nordco, Inc. v. State, supra; Fifth Street Pier Corp. v. City of Hoboken, 122 N.J. 326, 336-339 (1956), and 73 Corpus Juris Secundum, Public Administrative Bodies & Procedure, at Secs. 131 and 132.

"Epstein, the president of the appellant corporation, admitted that he was familiar with the ABC convictions of the appellant, but not with police reports of incidents at the subject prem-

ises requiring police action. He testified that he was first notified of these reports on the night of the hearing.

"It should be noted that the subject resolution sets forth as one of the primary reasons for its action that 'the said licensed premises were conducted improperly and in violation of the Rules and Regulations pertinent and relating to the conduct of the licensed premises.' Annexed to said resolution was the list of convictions of ABC charges by the appellant (with which he was familiar), also a list of relevant police reports relating to said premises.

"The decisive answer to this contention is, however, that appellant's basic rights are herein safeguarded and forfeited at the hearing on this appeal de novo. Before this tribunal appellant has been given full opportunity through its counsel to present testimony under oath, to examine and cross examine witnesses. Shapiro v. Long Branch, Bulletin 901, Item 2; Sideroff et als. v. Jersey City and Niebanck, Bulletin 1310, Item 1; Rule 6 of State Regulation No. 15. See also Klein v. Township of North Bergen, 10 N. J. Super 128 (App.Div. 1950); Benzoni v. Dept. of Civil Service, 10 N.J. Super. 103 (App.Div. 1950); Davis, Administrative Law 269 (1951).

"The applicable principles dispositive of the substantive issues raised by the appellant were enunciated by Justice Oliphant in Zicherman v. Driscoll, 133 N.J.L. 586, wherein he said:

> 'The question of a forfeiture of any property right is not involved. R.S. 33:1-26. A liquor license is a privilege. A renewal license is in the same category as an original license. There is no inherent right in a citizen to sell intoxicating liquor by retail, Crowley v. Christensen, 137 U.S. 86, and no person is entitled as a matter of law to a liquor license. Bumball v. Burnett, 115 N.J.L. 254; Paul v. Gloucester, 50 Id. 585; Voight v. Board of Excise, 59 Id. 358; Meehan v. Excise Commissioners, 73 Id. 382; affirmed, 75 Id. 557. No licensee has vested right to the renewal of a license. Whether an original license should issue or a license be renewed rests in the sound discretion of the issuing authority. Unless there has been a clear abuse of discretion this court should not interfere with the actions of the constituted authorities. Allen v. City of Paterson, 98 Id. 661; Fornarotto v. Public Utility Commissioners, 105 Id. 28. We find no such abuse. The liquor business is one that must be carefully supervised and it should be conducted by reputable people in a reputable manner. The common interest of the general public should be the guide post in the issuing and renewing of licenses.'

See Freddie's Blue Room, Inc. v. Elizabeth, Bulletin 1422, Item 1.

"The worthiness of persons applying for a license or for a renewal of a license is a matter which resides within the sound discretion of the issuing authority. It is proper for the local issuing authority, in passing upon applications for renewal of liquor licenses, to take into account not only conduct of licensee but also conditions not attributable to its conduct which render a continuance of a tavern in a particular location against public interest. Nordco, Inc. v. State, supra. Where, as here, the applicant has been thrice penalized for violations of the Alcoholic Beverage Law, and where it appears as a fact that the police were summoned on fourteen occasions during the licensing year to the appellant's premises for trouble which occurred both within and without the premises, the evidence would thus indicate that, in the language of the operative Resolution, '***the licensee is

unfit to operate said licensed premises for the reason that the said licensed premises were conducted improperly and in violation of the Rules and Regulations***.' Thus it would be sufficient to warrant the denial of the renewal of the license. Zicherman v. Driscoll, supra; Haino v. Newark, Bulletin 352, Item 4; N.J.S.A. 33:1-19; 33:1-24; 33:1-26; 33:1-35; 33:1-38. Nakrosis v. Harrison, Bulletin 885, Item 3.

"There is not a scintilla of evidence to indicate any improper motivation on the part of the authorities in the action thus taken, and there appears to be substantial evidence to support its determination herein. 279 Club, Inc. v. Newark, Bulletin 1405, Item 2; Hornauer v. Division of Alcoholic Beverage Control, 40 N.J. Super. 501 (1956); Paul v. Brass Rail Liquors, 31 N.J. Super. 211, 106 Atl. 2nd 307.

"My careful consideration of all of the evidence presented, exhibits and the briefs submitted by counsel herein lead me to the inescapable conviction that the respondent exercised its discretion reasonably, circumspectly and in the best interest of the community in refusing to renew the appellant's license for the current licensing period.

"Accordingly, it is recommended that the respondent's action in denying appellant's application for the renewal of the appellant's license be affirmed and the appeal herein be dismissed."

Pursuant to Rule 14 of State Regulation No. 15, exceptions to the Hearer's Report and argument thereto were filed with me by the attorneys for appellant.

Having carefully considered the record herein, including the memoranda of counsel, the exhibits, the Hearer's Report and the exceptions and written arguments thereto, I concur in the conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 16th day of October 1962,

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

WILLIAM HOWE DAVIS
DIRECTOR

5. STATE LICENSES - NEW APPLICATIONS FILED.

Alfred Maiolino, t/a Frank Boccanera Beverage Service
14 Mitchell Street, West Orange, N. J.
Application filed November 19, 1962 for person-to-person transfer of State Beverage Distributor's License SBD-62 from Marguerite Boccanera, Executrix of the Estate of Frank Boccanera.

Eastern Brewing Corporation
334 North Washington Street
Hammonton, N. J.
Application filed November 19, 1962 for Limited Wholesale License.

William Howe Davis
Director