

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

BULLETIN 1799

July 16, 1968

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1. APPELLATE DECISIONS - SALISBURY v. POINT PLEASANT and SCHIFF.

Claude Salisbury, Jr. et als.,)
 Appellants,)
 v.) On Appeal
Mayor and Council of the Borough) CONCLUSIONS
of Point Pleasant, and Morris) AND ORDER
Schiff, t/a Spirit Shoppe,)
 Respondents.)
- - - - -

LeRoy H. Stampfle, Esq., Attorney for Appellants.
Hiering, Grasso, Gelzer & Kelaher, Esqs., by Milton H. Gelzer, Esqs.,
 Attorneys for Respondent Mayor and Council.
Harold A. Schuman, Esq., Attorney for Respondent Morris Schiff.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This appeal addresses itself to the action of respondent Mayor and Council of the Borough of Point Pleasant (hereinafter Council) whereby on July 18, 1967, it granted the application of respondent Morris Schiff for a plenary retail distribution license for premises to be constructed at the southwest corner of State Highway #88 and Bridge Avenue, Point Pleasant, for the period expiring June 30, 1968.

The petition of appeal, as amended, alleges that the Council rescinded its action of July 18 by resolution dated August 1, 1967, and thereafter, on August 15, adopted another resolution whereby it reinstated and "reissued" the said license to Schiff. Appellants allege that the action of the Council was erroneous and should be reversed for reasons which may be briefly summarized as follows:

1. Grant of the application on July 18 was contrary to the public interest and constituted an abuse of discretion.
2. Issuance of the license was "in violation of the local zoning ordinance" and failed to consider a new master plan for zoning which was in the process of adoption.
3. Certain members of the Council prejudged applications for the license in finally approving the application of respondent Schiff.
4. No written resolution was submitted for adoption, nor were any reasons set forth for Council's action.
5. The Council failed to advise the public of the

cut-off date for acceptance of applications, thus prejudicing appellants.

6. The Council's action was taken at a meeting at which such action was not listed on the formal agenda.

7. Since the application of respondent Schiff was incomplete, it was improperly considered.

8. Appellants "believe that the respondent, Morris Schiff, has a beneficial interest in at least two other alcoholic beverage retail licenses."

The answer of the Council admits the jurisdictional allegations, denies the substantive allegations of the petition, and sets forth certain affirmative contentions as follows:

After the passage of Ordinance No. 324 on February 7, 1967, authorizing the issuance of a second plenary retail distribution license, numerous applications for the said license were filed with the borough clerk, hearings were scheduled and notices served. The first hearing was held on May 4 and, after objections were received, further hearings were held on June 13 and July 18. The Council sets forth its reasons pursuant to Rule 8 of State Regulation No. 2 for its approval of Schiff's application as follows:

(a) Public hearings were held with respect to the issuance of the said license.

(b) After due consideration and being satisfied that Schiff complied with the statutory requirements, it issued the said license to Schiff.

(c) Such issuance was in the "best interest of the Borough of Point Pleasant."

Mr. Schiff also filed an answer in which he denies that the Council's action on August 15 constituted either a "rescission" or a "reissuance" of the license.

The appeal was heard de novo pursuant to Rule 6 of State Regulation No. 15, with full opportunity for the parties to present evidence and to cross-examine witnesses.

I

Several threshold issues were raised by appellants with respect to the hearings before the Council and other jurisdictional matters which they alleged fatally affected the issuance of this license. On July 18, the Council adopted the following resolution:

"WHEREAS, Morris Schiff, trading as The Spirit Shop has applied for plenary retail distribution license for a proposed new building to be erected on the southwest corner of Highway 88 and Bridge Avenue, more particularly known as Block 212, Lots 1, 2, 3 and 4 as shown on the official Tax Map of the Borough of Point Pleasant; and

"WHEREAS Ordinance Number 324 of this municipality, duly adopted by the Mayor and Borough Council of the

Borough of Point Pleasant permits the issuance of such plenary retail distribution license; and

"WHEREAS, a copy of plans and specifications for said proposed new building, said plans and specifications having been prepared by Martin Nosenchuk, architect, Teaneck, New Jersey, having been submitted to this governing body; and

"WHEREAS, the said Morris Schiff trading as The Spirit Shop has furnished this governing body with proof of publication showing that the necessary notice of application was published in the Ocean County Leader, a newspaper printed and published in Point Pleasant Beach, New Jersey, in the issues of April 20 and April 27, 1967; and

"WHEREAS, the said Morris Schiff trading as The Spirit Shop has tendered with said application the proper fees to the municipality; and

"WHEREAS, the governing body of this municipality has considered at public hearings held May 4 and June 13, 1967 the arguments of all persons in favor and against the issuance of such license; and

"WHEREAS, the governing body of the Borough of Point Pleasant has fully considered and discussed all matters in connection with the application for such license;

"NOW, THEREFORE, BE IT RESOLVED by the MAYOR and BOROUGH COUNCIL of the Borough of Point Pleasant, in the County of Ocean and State of New Jersey, as follows:

"1. That a plenary retail distribution license be and the same is hereby authorized to be issued to Morris Schiff trading as The Spirit Shop, 127 E. Kennedy Blvd., Lakewood, New Jersey; that such license shall be used at a new building to be located at premises known as Lots 1, 2, 3 and 4 in Block 212, as shown on the official Tax Map of the Borough of Point Pleasant, which premises are situate on the southwest corner of Highway 88 and Bridge Avenue, in the said Borough, if and when the new building has been constructed and completed in accordance with the plans and specifications prepared by Martin Nosenchuk, architect, filed with this body in conjunction with and as a part of the said application, provided, however, that a building permit shall be obtained from the said Borough within six months of the date of this Resolution, namely January 18, 1968 and provided, further, that the new premises shall be constructed on or before January 18, 1969.

"2. The said plenary retail distribution license shall not be physically delivered to the licensee unless and until the said new proposed building has been constructed in accordance with the plans and specifications aforesaid."

On August 1, the matter was again presented to the

Council because of some question as to whether or not the resolution, as adopted, had been reduced to writing at the time its action was taken. The attorney for the Council explained that in the past, resolutions had been passed by the Council even though they were not then reduced to writing but were subsequently prepared and considered adopted as of the adopted date. He admitted that the resolution had not been prepared in writing prior to the vote. A resolution was then introduced purporting to rescind the prior resolution and was adopted by a vote of three to one. The resolution reads as follows:

"WHEREAS, N.J.S.A. 40:49-1 provides in part:

The term 'resolution' when used in this subtitle means and includes any act or regulation of the governing body of any municipality required to be reduced to writing, but which may be finally passed at the meeting at which it is introduced.

and legally requires that all ordinances and resolutions be in writing; and,

"WHEREAS, a certain 'resolution' purporting to grant a plenary retail distribution liquor license to one Morris Schiff, trading as The Spirit Shop, appears in the proposed minutes of the July 18, 1967 meeting of the Borough of Point Pleasant even though:

"(a) The aforementioned 'resolution' was not reduced to writing before Governing Body action was taken thereon;

"(b) The 'resolution' contains terms and conditions as well as other matters which were not discussed or in any way considered by the Governing Body at the July 18, 1967 meeting and was not reduced to writing until at least July 26, 1967;

"(c) It would appear that three members of Council, namely Councilmen Jackson, Miller and Crescenzo, had previously determined and decided in concert the action they would take before the formal vote was taken in the public chambers on the night of July 18, 1967.

"NOW THEREFORE be it resolved by the Governing Body of the Borough of Point Pleasant as follows:

"(1) That the minutes of the meeting of the Governing Body on July 18, 1967 be approved in all particulars except for the 'resolution' mentioned in the preamble hereof which said 'resolution' shall be deleted and removed from said minutes."

The matter was again brought up for consideration by the Council and a resolution purporting to authorize the reissuance of the said license was offered by Councilman Miller. The statement he made preparatory to the introduction is of interest and reads in its pertinent part as follows:

"On July 18, 1967, I moved on a resolution granting a plenary retail distribution license to one Morris

Schiff. This resolution was passed by Mayor and Council.

"This license was granted principally on location and proximity to other liquor establishments, and no adverse record of the applicant. After careful consideration of all applications, this license was granted in good faith and without political consideration and with honesty and integrity, and for the good of the Boro of Point Pleasant. The purpose in granting this license was to establish and encourage new business, a liquor tax income of \$900 per annum plus the value of a new ratable.

"On August 1, 1967, after approximately two hours of heated discussion by local residents, who claimed that there had been insufficient time to file, that Boro employees had given inadequate information as to the status of lots and filing time, and considerable discussion as to who deserved this license, a resolution to rescind the license was introduced and passed by the Mayor and Council. I voted in favor of this resolution.

"The Boro Council on Feb. 7, 1967, passed an ordinance on final reading authorizing a second plenary retail distribution license. On July 18th, 1967, this license was granted. The time lapse here was approximately 5 months and 11 days. This in my estimation is ample time for any business man to apply for a license. Our Boro attorney advised the council at the second license hearing that the ABC would not let council set a deadline date for applications.

"As to complaints that Boro employees gave inadequate information about the status of lots and filing time, I find that this is without foundation.

"I now realize that I voted in favor of this resolution because of the pressure of the moment. Even at the time of the vote, I had considerable reservations, but I went along with this for a strictly selfish reason -- to make friends for myself.

"It is neither pleasant nor satisfying to sit here and make enemies. I know this overshadowed the courage of my convictions. However, honesty and integrity mean more to me as an individual than popularity as a councilman."

Thereupon, on August 15, the following resolution was adopted:

"WHEREAS, the Mayor and Borough Council of the Borough of Point Pleasant did on July 18, 1967 vote by majority vote in favor of granting of a plenary retail distribution license to one Morris Schiff, trading as The Spirit Shop, for premises located at the southwest corner of Highway 88 and Bridge Avenue, more particularly known as Block 212, Lots 1, 2, 3 and 4 as shown on the Tax Map of the Borough of Point Pleasant; and

"WHEREAS, on August 1, 1967, Mayor and Borough Council of the Borough of Point Pleasant did by majority vote rescind the granting of said plenary retail distribution license; and

"WHEREAS, since the date of such rescission each of the reasons upon which such rescission was based has been carefully analyzed and investigated; and

"WHEREAS, it has now been verified that the granting of the said plenary retail distribution license to the said Morris Schiff, trading as The Spirit Shop would be to the best interest of the Borough of Point Pleasant.

"NOW, THEREFORE, BE IT RESOLVED by the Mayor and Borough Council of the Borough of Point Pleasant, in the County of Ocean and State of New Jersey, on this 15th day of August, 1967.

"1. That the said plenary retail distribution license be granted to the said Morris Schiff, trading as The Spirit Shop.

"2. That the resolution of August 1, 1967 be and is hereby declared to be null and void and of no effect."

In considering the sequence of events relating to the adoption of the appropriate resolution, I am persuaded that the resolution of July 18 was valid and binding upon the Council. It is well established that the vote thereon need not be based upon a written resolution but can be upon motion. Red Ranch, Inc. v. Wall, Bulletin 1773, Item 2; Woodhull v. Manahan, 85 N.J. Super. 157 (App. Div. 1964). The fact that the resolution substantially embodying the action of the Council was prepared later, operated merely to clarify and did not invalidate the effective motion. There is no dispute that the resolution did, in fact, incorporate the expression of the Council's action of July 18.

Where an issuing authority reaches a final determination on an application for liquor license, in the absence of mistake of law or fact or fraud perpetrated upon the issuing authority (not claimed here), it may not reconsider its action. Cascio v. Roselle Park, Bulletin 1579, Item 1; Essex County RLS Assn. v. Newark et al., Bulletin 1457, Item 3; Lantz v. Hightstown, 46 N.J.L. 102. This doctrine has been followed in this Division since the beginning of its administration of alcoholic beverage control. See Re Hendrickson, Bulletin 47, Item 10; Tyler's Country Club, Inc., v. Newark, Bulletin 1311, Item 1.

From a practical standpoint, furthermore, since the Council has reaffirmed, by its resolution of August 15, its valid action of July 18, no harm has been done to nor prejudice suffered by appellants. They have incurred no substantial obligations in reliance upon the Council's action of August 1 and no equitable doctrine of estoppel may justifiably be raised. Their position is the same as if neither the resolution of August 1 nor August 15 had been considered and acted upon. Cf. Borkowski v. Clifton, Bulletin 139, Item 5.

In any event, appellants have been given ample opportunity to be heard on this appeal de novo, to produce testimony and cross-examine witnesses. Any pro forma infirmities arising by reason of the subsequent resolutions, or by any alleged denial of a fair, impartial and complete hearing before the Council, have been cured. Cino v. Driscoll, 130 N.J.L. 535 (Sup. Ct. 1943); Heven, Inc., v. Jackson, Bulletin 1775, Item 3.

Appellants make the additional allegation that Councilman Miller improperly voted on the application for this license on July 18 because he expressed a personal interest in the proposed location of the licensed premises, thus prejudging the merits or lack of merit of certain other applicants.

At this plenary de novo hearing, Miller admitted that he signed a petition for appellant Charles Salisbury, Jr., in which he apparently favored a location other than that finally accepted by the Council in its approval of Schiff's application. Appellants now contend that this would support their charge that Councilman Miller had prejudged this matter and was voting contrary to his declared expression. I consider this reasoning to be absurd and illogical. The evidence argues strongly to the contrary.

The general rule is that where a member of the Council has an interest in the subject matter which may deleteriously affect his judgment, his voting on the resolution would be considered prejudicial or disqualifying. Aldom v. Roseland, 42 N.J. Super. 495. It is difficult to see where Councilman Miller's interest is even remotely associated with the interests of any of the applicants, including that of Schiff. Councilman Miller stated that he signed the petition merely affirming that he had no objection to a liquor license in the general neighborhood in which he lived. I then asked the appellants' attorney the following:

"THE HEARER: What is there, Mr. Stampfle, that you think this petition will set forth more than this witness' general agreement that he has no objection to the creation of another liquor license?"

"MR. STAMPFLE: I don't believe anything more, your Honor."

The inference sought to be drawn therefrom by appellants is that Councilman Miller changed his mind in voting to grant the Schiff application. I find that no disqualifying interest was proved on the part of Miller or any of the members of the Council. Upon voting on these applications, each councilman was required to weigh all of the matters before him and, as shall be pointed out later, Councilman Miller did take all of the applications into consideration and based his vote of July 18 upon substantial reasons. It is fair to conclude that Miller acted fairly and objectively, with no probative manifestation of a disqualifying interest.

Appellants further allege that Schiff presented an elaborate set of plans for a complex of stores to be erected on the site. However, in applying for a building permit, he applied for a permit only for a building to house the licensed premises. Appellants tender the conclusion that Schiff intended to "defraud, deceive and mislead" the Council.

The fact is that the Council had before it the plans and specifications for inspection. I cannot conceive that it was misled by Schiff. If the converse were true, namely, that he had submitted incomplete plans and the residents of the municipality were misled as to the general set-up of the licensed premises, there might be some validity to appellants' argument. This contention is clearly frivolous.

Similarly, in their amended petition, appellants advocate that they "believe" Schiff has a beneficial interest in at least two other alcoholic beverage retail licenses. No adequate probative proof was offered at the hearing in support thereof. The matter was continued to another date in order to afford appellants the further opportunity to investigate certain aspects with relation thereto and to produce testimony in sustenance thereof. Subsequent to the date of the continued hearing, the Division received communications from the attorneys for the respective parties in which it was agreed that this matter would be submitted on the testimony heard on December 20, 1967. Since the record does not contain support for this allegation, it must be assumed that appellants have abandoned such offer of proof. Thus this allegation is rejected.

II

The crucial assault on the action of the Council was premised upon the contention that it was not based upon considerations of the public interest. We pause here to observe that this entire issue was a highly controversial one in this community. As the attorney for the Council noted, the issuance of this liquor license became a "very, very hot and explosive item in the borough, and for the entire year since January through this month [December] this has been a topic for conversation pro and con." This was especially true since the ultimate award was given to Schiff, a non-resident of the Borough. (He resides in Lakewood).

The first argument advanced in support of appellants' allegation that the Council's action was contrary to the best interests of the community is that the license was granted although the master plan had not as yet been adopted. The master plan apparently was to act as the catalyst for the allocation of various businesses in the community. It is interesting to note, however, that Councilman Bernard Daly (who voted against the grant of this license) conceded that his only objection was that Schiff's application was approved prior to adoption of the master plan. He further testified:

- "Q You had no objection to this particular application as such then, did you?
 A No, sir, I did not.
 Q That master plan was in fact adopted in the fall of 1967, wasn't it?
 A This was after the license had been issued, yes, sir.
 Q And there is nothing inconsistent with that license and the master plan as it was adopted, is there?
 A As of right now, no, there isn't."

Since it is clear that the Council's action is entirely consistent with the master plan now in effect, the position of appellants in this respect is sterile and without weight.

Another argument advanced against the grant of this application was that the Council did not make a complete and unified study of the applicants and their applications prior to its action herein.

In this connection, reference is made to the testimony of Harry E. Odell, the borough clerk, who testified in great detail about the procedure used by the Council in examining and evaluating applications for license. He stated that at the public hearings, all of the applications were presented to the Council and "individually and privately members of the governing body came to my office at evenings or during the days, and they went over the applications and plans and specifications, so the applications were reviewed by the members." He noted that practically all of them, including Councilmen Jackson, Crescenzo, Miller, Quinter and Mayor Brown examined the applications at his office.

Mayor Brown testified that there had been a discussion at the July 18 meeting with reference to Schiff's application. He recalled specifically that Councilman Miller expressed the opinion that the license should go to "that individual that could afford us the greatest ratable;" that Councilman Crescenzo stated, "If we award the license to an out-of-towner the local applicants could not accuse us of playing favorites."

Councilman Charles Miller appeared to be most vocal in his approval of Schiff's application. He explained that he had signed the petition for Salisbury because he was not opposed to having a liquor license located in his neighborhood. Thereafter, he examined and evaluated all of the applications submitted and reached the conclusion that Schiff's application was the most desirable and in the public interest. He voted in favor of the application primarily because that location would help develop a new business area which was undeveloped at the time in the borough. "I felt that this particular site has more potential, and I would say it is the best business corner in the Borough of Point Pleasant, potential business corner." While he took into consideration an increase in the community's ratables, that was not the sole or controlling consideration when he so voted. It was his feeling that since the location was not near a similar liquor store, it would best serve the needs and convenience of the people of the community.

Admitting that he voted on August 1 to rescind the prior resolution, he explained that his vote was motivated by the fact that he had lost friends as a result of his July 18 vote. He added that he had considerable reservations but went along for strictly selfish reasons. When the matter again came up for vote on August 15, after deliberate reflection and soul searching, he voted in accordance with his conscience, affirmatively and to the same effect as he had on July 18.

No attack has been made upon the personal character and fitness of Schiff to hold a liquor license. In fact, Police Chief William H. Beecroft testified that he made an investigation of all of the applicants, including Schiff, and found nothing derogatory with respect to him. By letter received from the Lakewood Chief of Police, he was advised that Schiff's background and character as a liquor licensee were good.

The only personal challenge made as to Schiff was the charge that he had a beneficial interest in more than two liquor licenses at the time he made this application. Schiff categorically denied such interest and stated that he only had an interest in Spot Enterprises which operates a liquor license in Lakewood. As noted hereinabove, no satisfactory proof was offered to support the allegation that Schiff had any more than that interest.

In considering the facts and circumstances herein and the contentions raised in the pleadings, it will be appropriate to restate the basic principles which guide us in this matter. No one has a right to the issuance, renewal or transfer of a license to sell alcoholic beverages. Zicherman v. Driscoll, 133 N.J.L. 586 (Sup. Ct. 1946); Biscamp v. Teaneck, 5 N. J. Super. 172 (App. Div. 1949). The decision as to whether or not a license shall be issued rests within the sound discretion of the local issuing authority in the first instance. In Ward v. Scott, 16 N.J. 16 (1954), a Supreme Court decision of an appeal from a zoning ordinance, cited in Fanwood v. Rocco, 59 N.J. Super. 306, 322, the following general principles were stated:

"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... 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)."

In the Fanwood case, supra, it was stated at p. 321:

"The Legislature has entrusted to the municipal issuing authority the right and charged it with the duty to issue licenses (R.S. 33:1-24) and place-to-place transfer thereof '[O]n application made therefor setting forth the same matters and things with reference to the premises to which a transfer of license is sought as are required to be set forth in connection with an original application for license, as to said premises.' N.J.S.A. 33:1-26. As we have seen, and as respondent admits, the action of the local board may not be reversed by the Director unless he finds 'the act of the board was clearly against the logic and effect of the presented facts.' Hudson Bergen County Retail Liquor Stores Ass'n, Inc. v. Board of Com'rs. of City of Hoboken, supra, 135 N.J.L., at page 511."

As Mr. Justice Jacobs pointed out in Fanwood v. Rocco, 33 N.J. 404, 414:

"Although New Jersey's system of liquor control contemplates that the municipality shall have the original power to pass on an application for a tavern or package store license or the transfer thereof, the municipality's action is broadly subject to appeal to the Director of the Division

of Alcoholic Beverage Control. The Director conducts a de novo hearing of the appeal and makes the necessary factual and legal determinations on the record before him... Under his settled practice, the Director abides by the municipality's grant or denial of the application so long as its exercise of judgment and discretion was reasonable."

See Common Council of Hightstown v. Hedy's Bar, 86 N.J. Super 561.

Thus the Director must determine whether or not the Council properly and reasonably exercised its discretion in approving Schiff's application for the license. Discretion must be based on right judgment, governed by reason, fair and suitable in the circumstances. 75 C.J.S. 634, and cases therein cited. What is reasonable must, of course, be determined according to the context and circumstances of each particular case.

As the court pointed out in Blanck v. Magnolia, 38 N.J. 484, 491:

"The test in the establishment and issuance of liquor licenses is whether the public good requires it."

My examination and assessment of the testimony in this case persuade me that the Council acted reasonably and in the public interest in granting Schiff's application. I am also convinced that the Council considered all the matters raised by appellants, including the location of the premises, the question of public need and convenience, and the personal character of Schiff. It is obvious that it determined that the proposed location of the licensed premises would serve the greater potential of the community in its commercial development.

There is no affirmative evidence before me on this appeal of any improper motivation on the part of any member of the Council; in fact, the contrary has been sufficiently established.

An additional point has been raised with respect to the zoning situation, appellants arguing that the issuance of such license was made for premises in violation of the local zoning ordinance. From an examination of the zoning ordinance, I do not find, nor has there been any credible evidence to support this contention. In any event, Schiff would have to comply with all applicable statutes and ordinances, including zoning ordinances, before the license is issued to him. See Lubliner v. Paterson, 33 N.J. 428 (1960). Additionally, it is evident that, as noted hereinabove, the Council's action herein is quite consistent with the adopted master plan and the zoning ordinance now in effect.

I have reviewed the other matters raised in the petition of appeal and do not find them of substantial merit. Appellants have failed to sustain the burden of proof of showing that the action of the Council was erroneous. Rule 6 of State Regulation No. 16; Gentile v. Manalapan, Bulletin 1514, Item 2.

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

Conclusions and Order

No exceptions were taken to the Hearer's report pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the argument of counsel in summation, and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt his recommendation.

Accordingly, it is, on this 13th day of May, 1968,

ORDERED that the action of respondent Mayor and Council of the Borough of Point Pleasant be and the same is hereby affirmed and that the appeal be and the same is hereby dismissed.

JOSEPH M. KEEGAN
DIRECTOR

2. APPELLATE DECISIONS - UNION COUNTY PACKAGE STORES ASSOCIATION v. ELIZABETH and GROCHMAL.

Union County Package Stores Association,)	
)	
Appellant,)	On Appeal
)	
v.)	CONCLUSIONS AND ORDER
)	
City Council of the City of Elizabeth and Walter Grochmal, t/a Walt's Beverages,)	
)	
Respondents.)	

Kein, Scotch, Pollatschek, Iacopino & Kein, Esqs., by Julius R. Pollatschek, Esq., Attorneys for Appellant.
Edward W. McGrath, Esq., by William J. McCloud, Esq., Attorney for Respondent City Council.
Sauer and Boyle, Esqs., by John M. Boyle, Esq., Attorneys for Respondent Crochmal.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of respondent City Council which, by a vote of four to one of its members, with one abstaining, granted a place-to-place transfer of respondent licensee's plenary retail distribution license from 640 Pearl Street to 766 Trumbull Street, Elizabeth, the distance between premises being approximately 4500 feet.

Appellant, in substance, alleges in its petition of appeal that the action of respondent Council was erroneous

because (a) said transfer was in violation of the local ordinance pertaining to place-to-place transfers of retail liquor licenses, (b) no need existed for an additional license in the proposed area, and (c) said action was arbitrary, capricious and unreasonable.

Respondent City Council (hereinafter Council) and respondent Walter Grochmal (hereinafter licensee) filed answers herein denying the aforesaid allegations in appellant's petition of appeal.

In presenting its case, appellant relied solely on the following documents, namely, (1) certified copy of deed disclosing that the property upon which the licensee's premises were formerly located had been conveyed by the owner thereof to St. Elizabeth Hospital, (2) the ordinance and amendments thereof relating to the sale of alcoholic beverages in the municipality, and (3) a map of the City of Elizabeth showing nine liquor establishments within a radius of 1500 feet from the proposed premises.

It might be advisable to set forth chronologically the events which led to the filing by the licensee of the application for the place-to-place transfer in question. By deed dated April 1, 1964, St. Elizabeth Hospital became the owner of the property upon which the licensee had operated his alcoholic beverage business. A notice dated December 21, 1966, that the licensed premises be vacated was served upon the licensee by the hospital and, as a result thereof, on March 27, 1967, the attorney representing the licensee appeared before the Council. After making his mission known, he was told by the Council that it could not consider the matter until approval of the proposed site for use as licensed premises was given by the local planning board and board of adjustment. It appears that the licensee followed instructions and obtained the necessary approvals. The matter was scheduled for hearing before the Council on September 27, 1967, at which time a written objection was filed by appellant but no one appeared on its behalf.

Councilman Thaddeus Gora testified that one reason for his favorable vote to transfer the license was an opinion given by the City Law Department to the effect that the transfer of the liquor license was a matter within the discretion of the Council.

The pertinent sections of the ordinance, as amended July 15, 1965, concerning transfer of retail liquor licenses, read as follows:

"Section 7. No licenses, excepting club licenses and excepting renewals and person to person transfers of other licenses now outstanding, shall be granted for or transferred to premises within a radius of 1,500 feet of then existing licensed premises.

"Nothing in this section shall prevent transfer of a license to premises located within a radius of 1,500 feet of the premises for which the license sought to be transferred is issued and outstanding at the time this ordinance is adopted.

* * *

"This section shall not apply in situations covered by supplemental section 7A, in the ordinance adopted June 29, 1954, concerning transfer from premises destroyed by fire, earthquake, hurricane or other disaster.

"Nothing in this section shall be deemed to apply with respect to place to place transfer of a license, the premises of which are taken for turnpike, highway or road purposes, or for purposes of any federal, state, county or municipal project."

The question to be resolved is whether, under the language of the ordinance, the Council has the authority to grant the transfer or whether it is prohibited by the language thereof from taking such affirmative action.

In Willner's Liquors v. Jersey City, Bulletin 1332, Item 3, the Director, after discussing the facts of that case, cited the opinion in Jersey City Retail Liquor Dealers' Association v. Jersey City and Dal Roth, Inc., Bulletin 976, Item 4, as follows:

"Provisos and exceptions in an ordinance are to be strictly construed and in keeping with the measure's principal purpose. N.J. State Board of Optometrists v. S.S. Kresge Co., 113 N.J.L. 287 (Sup. Ct. 1934); modified in 115 N.J.L. 495 (E. & A. 1935); United States v. Dickson, 15 Pet. 141; 59 Corpus Juris, sec. 639 (2) notes 42, 43 and 44. Manifestly, the basic purpose of the ordinance in question is to effect a stricture upon place-to-place transfers (Finbar et al. v. Municipal Board of Alcoholic Beverage Control of the City of Jersey City and Commuters Bar, Inc. et al, Bulletin 917, Item 1) and it would seem abundantly clear that the main provision and the exceptions therefrom relate to place-to-place transfers only.

"For the reasons hereinabove set forth I find... that respondent Board either misinterpreted or disregarded the terms of the ordinance which it was its duty to observe and that the transfer was granted in violation of the ordinance."

The law is well settled that when a commission, board, body or person is authorized by ordinance passed under a delegation of legislative authority to grant or deny a license or permit, the grant or denial (or transfer) must be in conformity with the terms of the ordinance authorizing such grant or denial. Tube Bar, Inc. v. Commuters Bar, Inc., 18 N.J. Super. 351; 9 McQuillin Municipal Corporations (3d ed. 1950) sec. 26.73; Bohan v. Weehawken, 65 N.J.L. 490. Nor can such commission, board, body or person set aside, disregard or suspend the terms of the ordinance except in some manner prescribed by law. Public Service Ry. Co. v. Hackensack Imp. Com., 6 N.J. Misc. 15; 62 C.J.S. Municipal Corporations, sec. 439.

Any administrative effort to accommodate an individual licensee must be accomplished within the framework of existing legislation construed in terms of the overriding public policy.

Dal Roth, Inc. v. Div. of Alcoholic Beverage Control, 28 N.J. Super. 246. As a further corollary of this rule, it has been well established that an issuing authority may not issue or transfer a license in violation of the terms of a local regulation, Monroe Tavern, Inc. v. Elizabeth and Stadeck, Bulletin 994, Item 4; Echo Wines & Liquors, Inc. v. Elizabeth, et als., Bulletin 1131, Item 2; Bachman v. Phillipsburg, 68 N.J.L. 552.

On behalf of respondents, it has been argued that since St. Elizabeth Hospital, as well as other hospitals in the city, receive contributions from the city to be used by the hospital for the welfare of Elizabeth residents, the hospital should be considered in the category of a municipal project and thus the transfer of the license comes within the exception provided in the ordinance.

I cannot agree with this contention. The hospital gave notice to the licensee to vacate the premises because it desired to construct an extension to its main building, which extension was to be utilized for service to patients. The language of the ordinance pertaining to the transfer in question is free from ambiguity and thus the ordinance must be construed according to the ordinary meaning of its words and phrases. These are to be taken in their ordinary or popular sense unless it plainly appears that they are used in a different sense. Sexton v. Bates, 17 N.J. Super. 246 (Law Div. 1951), aff'd 21 N.J. Super. 329 (App. Div. 1952).

Under the circumstances appearing herein the action of the Council in approving the licensee's application for transfer of his license was improper. As already indicated, there are nine retail liquor licensees within a radius of 1500 feet of the location sought for transfer. Inasmuch as the transfer of the license was in violation of the ordinance in question it is unnecessary to consider any other grounds of appeal. Therefore it is recommended that an order be entered reversing the action of the Council in this matter.

Conclusions and Order

No exceptions to the Hearer's report were filed pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire record, including the transcript, the exhibits, the argument of counsel for the respective parties and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 13th day of May 1968,

ORDERED that the action of the respondent City Council in granting the application of respondent Walter Grochmal, t/a Walt's Beverages, for a place-to-place transfer of his plenary retail distribution license be and the same is hereby reversed.

JOSEPH M. KEEGAN
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - SALE FOR OFF-PREMISES CONSUMPTION BY CLUB LICENSEE - SALE DURING PROHIBITED HOURS - SALE BELOW FILED PRICE - LICENSE SUSPENDED FOR 40 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against)

Lincoln Engine Company #2)
354 Lincoln Street)
Phillipsburg, N. J.)

CONCLUSIONS AND ORDER

Holder of Club License CB-144 issued by the Board of Commissioners of the Town of Phillipsburg)

Licensee, by Karl E. Karabinus, Vice-President, Pro se.
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to charges alleging that on March 30, 1968, it sold two six-packs of beer (1) for consumption off its club licensed premises, in violation of Rule 9 of State Regulation No. 7, (2) during hours prohibited by Rule 1 of State Regulation No. 38 and (3) below filed price, in violation of Rule 5 of State Regulation No. 30.

Absent prior record, the license will be suspended on the first charge for fifteen days (Re Lt. Louis J. Faller Post #4290 VFW, Inc., Bulletin 1686, Item 6), on the second charge for fifteen days (Re Kicey, Bulletin 1787, Item 4) and on the third charge for ten days (Re Buddy Rogers, Inc., Bulletin 1783, Item 7), or a total of forty days, with remission of five days for the plea entered, leaving a net suspension of thirty-five days.

Accordingly, it is, on this 13th day of May, 1968,

ORDERED that Club License CB-144, issued by the Board of Commissioners of the Town of Phillipsburg to Lincoln Engine Company #2 for premises 354 Lincoln Street, Phillipsburg, be and the same is hereby suspended for thirty-five (35) days, commencing at 1:00 a.m. Monday, May 20, 1968, and terminating at 1:00 a.m. Monday, June 24, 1968.

JOSEPH M. KEEGAN
DIRECTOR

4. STATE LICENSES - NEW APPLICATION FILED.

Fleming & McCaig, Inc.
312-324 Frelinghuysen Avenue, Newark, N. J.
Application filed July 9, 1968 for place-to-place transfer of Plenary Wholesale License W-36 from 1 Peerless Place, Newark, New Jersey.


Joseph M. Keegan
Director
New Jersey State Library