

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

BULLETIN 1154

March 7, 1957

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

BULLETIN 1154

March 7, 1957

APPELLATE DECISIONS - UNION COUNTY RETAIL LIQUOR STORES ASSN. v.
ELIZABETH, LENAHAN AND COLLAZO, AND STEVENS.

Union County Retail Liquor Stores Association,)
Appellant,)
v.) ON APPEAL
Municipal Board of Alcoholic Beverage Control of the City of) CONCLUSIONS and ORDER
Elizabeth and Michael Lenahan)
and Frank Collazo, t/a 182 Club,)
and Joseph P. Stevens,)
Respondents.)

Julius R. Pollatschek, Esq., Attorney for Appellant.
Jacob Pfeferstein, Esq., by John L. Ard, Esq., Attorney for
Respondent Municipal Board
John B. Stone, Jr., Esq., Attorney for individual Respondents.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the unanimous action of respondent Board whereby it granted an application to transfer a plenary retail consumption license (with broad package privileges) from respondent Joseph P. Stevens and from his premises at 410 Magnolia Avenue to respondents Michael Lenahan and Frank Collazo and to their premises at 182 Third Street, and whereby at the same time it granted an application to transfer a plenary retail consumption license (without broad package privileges) from respondents Michael Lenahan and Frank Collazo and from their premises at 182 Third Street to Joseph P. Stevens and to his premises at 410 Magnolia Avenue, Elizabeth.

"On June 27, 1956, the licenses aforementioned, as transferred, were renewed by respondent Board for the 1956-57 licensing period.

"Appellant in its petition of appeal contends that the action of the respondent Board was erroneous and should be reversed on the following grounds:

- '(a): The transfers above set forth constitute in effect an exchange of licenses which is not authorized under the statute of the State of New Jersey with reference to licenses issued for the sale of alcoholic beverages;
- '(b): The broad package privilege attaching to the license previously held by Joseph P. Stevens and now held by virtue of said transfer by Michael Lenahan and Frank Collazo was abandoned by said Joseph P. Stevens at the time he transferred his licensed premises from

400 Magnolia Avenue to 410 Magnolia Avenue in August 1950 and has continued in a state of abandonment and has never been renewed.

- '(c): Said exchange of licenses were issued in violation of Section 5 of the ordinance of the City of Elizabeth relating to the sale of alcoholic beverages.
- '(d): The premises at 410 Magnolia Avenue are located in a residential E zone as established by the zoning ordinance of the City of Elizabeth, which said zone prohibits the conduct of any business at said location.
- '(e): The action of the respondent Board was arbitrary, improper and capricious.'

"A license with a broad package provision is distinct from one without such privilege and grants the holder thereof more extensive rights. Since the Alcoholic Beverage Law does not provide for the exchange of existing licenses, both applications here must be considered as applications for transfer within the provisions of N.J.S.A. 33:1-26. See Petrangeli v. Barrett, et al., N.J. Super. 378, page 383.

"The record in the instant case discloses that respondent Stevens has held a plenary retail consumption license since 1934; that he formerly operated his licensed premises at 400 Magnolia Avenue when, as a result of the New Jersey Turnpike Authority obtaining the property, he was compelled to move from said premises; that on August 9, 1950, he was granted a place-to-place transfer to premises at 410 Magnolia Avenue, where he has continuously operated his liquor establishment; that no one appeared at the hearing before the local issuing authority in 1950 to oppose his application for transfer; that the building to which his license had been transferred had in prior years been occupied by a library, a pool room, a barber shop, a butcher shop and as a clubhouse for social clubs.

"The record in this case discloses that the location of the property at 410 Magnolia Avenue is in a zone known as residence 'E' which prohibits the operation of business establishments therein. Stevens alleges that for many years in the past the said premises contained various business establishments. Even though we may assume that the conduct of said businesses in a residential zone was not improper, the sale of alcoholic beverages therein would constitute a prohibited use and not a nonconforming use in existence at the time of the adoption of the ordinance.

"There can be no collateral attack, herein, upon the validity of the zoning ordinance. Unless and until it is set aside by a court of competent jurisdiction, I shall assume that its provisions are reasonable. See Murchio v. Wayne Township, Bulletin 379, Item 7; Cf. M. O'Neil Supply Co., et al. v. Ocean et al., Bulletin 278, Item 1.

"An operative municipal ordinance is binding upon the action of the local issuing authority so that such issuing authority has no jurisdiction to grant a license in violation thereof. Tube Bar, Inc. v. Commuters Bar, Inc., 18 N.J. Super. 351 (App. Div. 1952); Bachman v. Phillipsburg, 68 N.J.L. 552 (Sup. Ct. 1902). Thus the transfer to respondent Stevens for premises at 410 Magnolia Avenue was in violation of the zoning ordinance. Consequently, and for many years (and properly, I am convinced), the State Commissioner (now Director) has taken jurisdiction to reverse on appeal municipal action granting licenses

in violation of zoning ordinances. Roberts v. Long Branch, et al., Bulletin 1010, Item 2, and cases cited therein. Thus the transfer to respondent Stevens would ordinarily be reversed.

"However, under the peculiar circumstances existing herein in lieu of a reversal of respondent Board's action with respect to the transfer of the license from Lenahan and Collazo to Stevens for premises at 410 Magnolia Avenue and of the renewal thereof, I recommend a conditional affirmance to permit Stevens to proceed as hereinafter outlined. Principal among such peculiar circumstances is respondent Stevens' compulsion in the 1950-51 licensing year, to vacate his premises at 400 Magnolia Avenue because of the New Jersey Turnpike Authority's acquisition of the respective site; a complete absence of malafides in connection with Stevens' seeking of the transfer to 410 Magnolia Avenue and further the fact that there were no objections voiced to said transfer at the hearing before the local issuing authority at the time. Moreover, respondent Stevens has operated a liquor establishment continuously since 1934 in the City of Elizabeth. I recommend that said transfer granted by respondent Board be approved with the proviso that respondent Stevens within 90 days after the date of the decision herein apply to the proper municipal authority for and obtain from said authority a modification of the present zoning ordinance to enable him lawfully to carry on the retail liquor business at 410 Magnolia Avenue. I further recommend that there shall be no sales or operation under the license at the Magnolia Avenue address after the expiration of 90 days from the date of the decision herein unless the zoning requirement be modified so as to permit the operation of a liquor licensed premises at the premises in question. Cf. Echo Wines & Liquors, Inc. v. Elizabeth, et. al., Bulletin 1131, Item 2.

"There appears no valid reason advanced why the transfer from Joseph P. Stevens and from premises 410 Magnolia Avenue to respondents Michael Lenahan and Frank Collazo and to premises 182 Third Street should be disturbed. Thus, I recommend that respondent Board's action in this regard should be sustained."

After the Hearer filed his report, the attorney for appellant filed written exceptions thereto and written argument thereon. The attorney for the individual respondents filed written answering argument and the attorney for respondent Board advised me that he was relying on the argument filed by the other respondents in the case. Thereupon I notified all attorneys that I desired oral argument in the case and oral argument was had before me.

After carefully considering the entire record, including the Hearer's Report, the briefs and oral argument, I agree with the finding of facts as set forth in the Hearer's Report. However, I disagree with the conclusion of law therein as to the transfer from Lenahan and Collazo to Stevens and from 182 Third Street to 410 Magnolia Avenue. Had the question of the zoning ordinance been raised in 1950, when Stevens obtained a transfer from 400 Magnolia Avenue to 410 Magnolia Avenue, in apparent violation of the ordinance, the action would probably have been reversed on appeal. However, no appeal was then taken and five renewals have since been granted for the same location without objection. It ill behooves this Division at this late stage to step in on appeal and decide a zoning matter. Cf. Atlantic County Licensed Beverage Assn. v. Hamilton et al., Bulletin 879, Item 5. In my opinion, this, of itself, would be a collateral attack upon the action of the local issuing authority and redress, if any, is to the courts.

Under all of the circumstances of this case I find that appellant has not sustained the burden of proof in showing that the ac-

tion of respondent Municipal Board of Alcoholic Beverage Control was erroneous and, hence, I shall affirm said action.

Accordingly, it is, on this 3rd day of January, 1957,

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

WILLIAM HOWE DAVIS
Director

2. APPELLATE DECISIONS - DeLOTTO, PAPENDICK AND McGEARY v. WEST PATERSON

Louis DeLotto, George Papendick and Owen B. McGeary, trading as McBride Liquors,)	
)	
Appellants,)	On Appeal
v.)	CONCLUSIONS AND ORDER
Borough Council of the Borough of West Paterson,)	
)	
Respondent.)	
-----))	

Louis P. Bertoni, Esq., Attorney for Appellants
Dominic Barra, Esq., Attorney for Respondent.
Peter Hofstra, Esq., by Howard Stern, Esq., Attorney for Objector.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

"This is an appeal from respondent's action whereby it denied appellant's application for the transfer of Plenary Retail Consumption License C-9 from Lambert DeBlock and Dorothy DeBlock to appellants and from 532 McBride Avenue to 1011 McBride Avenue, West Paterson.

"The petition of appeal alleges, and the answer admits, that respondent adopted the following resolution denying the application:

'BE ITRESOLVED by the Board of Council of the Borough of West Paterson that the application for the transfer of Plenary Retail Consumption License C-9 from person to person and place to place be denied on the basis of a new sketch of the premises submitted at the hearing held on August 10 (sic) 1956.'

"The petition of appeal alleges that the action of respondent was contrary to law, arbitrary and capricious and evidently the result of bias, prejudice, passion or mistake.

"The evidence shows that appellants filed their application on July 2, 1956. Attached thereto was a rough sketch of the manner in which they intended to set up their premises. This sketch (marked in evidence herein as O-1) indicates that the premises as thus set up would have the appearance of a package goods store, with counter and shelves in the front part of the room and a small bar, partly hidden by other shelves and booths, far to the right rear of the room. The license in question does not have the 'broad package privilege' and

the arrangement set forth in this sketch might well be considered as an attempt to circumvent the provisions of N.S. 33:1-12.23. Passaic County Retail Liquor Dealers' Association v. Paterson et al., Bulletin 1021, Item 1. Respondent held lengthy public hearings on the pending application on July 11, 1956, and August 8, 1956. Shortly before the close of the second hearing appellants produced another sketch (marked in evidence herein as A-1) which was then made part of the application and which quite evidently is the sketch referred to in the resolution denying the application. This sketch shows a twelve-foot bar with back bar in the front part of the room and no shelving. The rear part of the room, visible to patrons, contains booths separated from the bar by a four-foot partition. The attorney for the objector (president of a corporation holding a D license for nearby premises) then contended that the applicants were required to readvertise their application because the second sketch was substituted for the first sketch. This contention was without merit. The second appeal entitled Passaic County Retail Liquor Dealers' Association v. Paterson, Bulletin 1043, Item 3, is distinguished in its facts because the applicant therein filed a new application after changing its corporate name. However, it is difficult to determine from the wording of respondent's resolution, adopted at the close of the hearing after a short recess, what effect, if any, this contention had upon the decision to deny.

"At the hearing herein it was indicated that one of the members of the Borough Council is the landlord of the corporation licensee whose president objected to the transfer of the license. A member of a municipal issuing authority who owns premises leased by a retail licensee is disqualified from participating in or voting upon any matter involving alcoholic beverage control. Petrusha v. Mine Hill, Bulletin 146, Item 8; Gardner v. Sea Bright, Bulletin 171, Item 9. It is not clear from the record herein whether a disqualified member participated in the second hearing held on August 8, 1956.

"Under the circumstances, I recommend that the case be remanded to respondent for further consideration upon the merits of the case, and that an order be entered accordingly."

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

After carefully considering the record in this case I agree with the conclusions in the Hearer's Report and adopt them as my conclusions herein.

Accordingly, it is, on this 3rd day of January, 1957,

ORDERED that the case be remanded to respondent Borough Council for further consideration upon the merits of the case.

WILLIAM HOWE DAVIS
Director

3. APPELLATE DECISIONS - SUSSEX BAR & GRILL v. WOOD-RIDGE

Sussex Bar & Grill (corp.),)

Appellant)

v.)

On Appeal

Mayor and Council of the)
Borough of Wood-Ridge,)

CONCLUSIONS AND ORDER

Respondent)

-----)

Chandless, Weller & Kramer, Esqs., by Julius E. Kramer, Esq.,
Attorneys for Appellant
Charles L. Bertini, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from respondent's action whereby on June 20, 1956, it denied appellant's application for an alleged renewal of Plenary Retail Consumption License C-2 for the 1956-57 licensing year. The premises in question are located at 277 Hackensack Street, Wood-Ridge.

"Appellant contends that respondent's action was erroneous in that it was arbitrary, capricious and improper.

"Respondent contends, in substance, that its action was based upon the fact that the premises in question were completely gutted by fire on May 18, 1955; that the plans and specifications covering the proposed restoration of said premises violate the Municipal Zoning Ordinance; and that the application considered herein is not an application for renewal because appellant's application for renewal of its license for the 1955-56 licensing year had been denied by respondent on April 11, 1956 and no appeal was filed therefrom.

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

"The record discloses that a tavern had been conducted on the premises known as 277 Hackensack Street, Wood-Ridge for approximately twenty years; that appellant was issued a license for said premises for the 1954-55 licensing year; that on May 18, 1955, the premises were completely gutted by fire; that on May 22, 1955 appellant filed application for renewal of its license for the 1955-56 licensing year; that plans and specifications were not filed with said application and that the Notices of Application did not state that "Plans and specifications for premises to be constructed may be examined at the office of the Municipal Clerk"; that on June 15, 1955, respondent, on motion, granted appellant's application for renewal but withheld delivery of the license; that on November 23, 1956, the Division, at the request of the municipality and basing its conclusions on information supplied to it by the municipality respecting the license in question, advised as to the procedure to be followed by it and the applicant; that on December 21, 1955, the respondent notified appellant that it did not hold a proper license and ordered it to show cause on January 11, 1956 why the license should not be deemed null and void; that on January 25, 1956, appellant filed plans and specifications and readvertised in accordance with State Regulation No. 2; that thereafter written objections were filed with the clerk protesting the reopening of the tavern; that on April 11, 1956, a public hearing was held at which appellant's application for renewal of the license for the 1955-56 licensing year was denied by a vote of six to one for the following reasons: (1) The location of the proposed licensed premises is adjacent

to and abuts on a residential area; (2) the plans and specifications as submitted by applicant do not provide for sufficient off-street parking to serve adequately prospective customers of the proposed licensed premises; (3) the location of aforesaid premises is close to Wood-Ridge School No. 2, 258 Hackensack Street; and (4) there is no public need for a tavern at this location. The record further discloses that no appeal was taken from respondent's action on April 11, 1956; that on April 18, 1956, new owners to whom the destroyed premises were deeded on December 13, 1955, applied for a building permit and submitted plans and specifications identical to those filed by appellant; that on May 16, 1956, the Building Inspector refused to issue a permit because the plans and specifications did not comply with the requirements of the Municipal Zoning Ordinance; that on June 7, 1956, appellant filed an application for renewal of the license for the 1956-57 licensing year and submitted the same plans and specifications it had previously filed; and that on June 20, 1956, respondent denied said application for the reasons stated in its answer on appeal as hereinabove set forth.

"Where, as here, the application is for a license for premises not yet constructed, the Notices of Application must contain a statement that "Plans and specifications for building to be constructed may be examined at the office of the Municipal Clerk". (Rule 1 of State Regulation No. 2).

"Where an application is for a license for premises not yet constructed or completed, the most an issuing authority may do is to grant the application subject to the express condition that the license shall not be issued unless and until the premises as described in the plans and specifications submitted to and found acceptable by the issuing authority shall first be completed. Re Harris, Bulletin 183, Item 11; Re Salter, Bulletin 184, Item 8.

"The records herein shows that appellant filed no plans and specifications with its application filed on May 22, 1955 and that appellant's published Notices of Application in connection therewith contained no mention of any plans and specifications. Since these definitely essential requirements were not followed, respondent did not have jurisdiction to grant said application. Simmons, et al. v. Lawnside, et als., Bulletin 1016, Item 4, and cases cited therein.

"Appellant might have filed an appeal within thirty days from the action of respondent on April 11, 1956 whereby its application for renewal for the 1955-56 year was denied. Having failed to file such appeal, it may not question the validity of said proceedings in this appeal.

"Because of the provisions of R.S. 33:1-12.14, respondent has no jurisdiction to issue a new license. In the absence of a valid 1955-56 license, there could be no legal grant of a renewal thereof for the 1956-57 licensing year. R. S. 33:1-12.13.

"I, therefore, recommend that respondent's action in denying appellant's application for renewal of Plenary Retail Consumption License C-2, for the 1956-57 licensing year, be affirmed."

Exceptions were taken to the Hearer's Report within the time limited by Rule 14 of State Regulation No. 15.

I have carefully considered the transcript of the testimony herein, together with the Hearer's Report and the Exceptions thereto filed by appellant, and I concur in and adopt the recommended conclu-

sions of the Hearer. I shall affirm respondent's action.

Accordingly, it is, on this 3d day of January 1957,

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

WILLIAM HOWE DAVIS
Director

4. STATE BEVERAGE DISTRIBUTOR'S LICENSE - OBJECTIONS TO TRANSFER HELD TO BE MERITORIOUS - APPLICATION FOR TRANSFER DENIED.

In the Matter of an Application)
 by)
 Edward C. Walkiewicz and)
 Joseph R. Walkiewicz,)
 t/a White Eagle Bottling Co.,)
 177-181 South Street,)
 Newark, N. J.,)
)
 for Transfer of State Beverage)
 Distributor's License SBD-5 held by)
)
 Anthony Rotella,)
 t/a Rotella Distributing Co.,)
 45 Downing Street,)
 Newark, N. J.)
 -----)

CONCLUSIONS

Leo J. Berg, Esq., Attorney for Applicants.
 Braff, Litvak & Ertag, Esqs., by Jerome Litvak, Esq., Attorneys
 for Aaron Auerbach, t/a Pacific Wine & Liquors, Objector.
 Vincent P. Torppey, Esq., by James E. Abrams, Esq., Appearing for
 City of Newark.

BY THE DIRECTOR:

Written objections having been filed herein, a hearing was held pursuant to Rules 8 and 9 of State Regulation No. 6.

At the hearing the attorney for Aaron Auerbach stated that his client objected because there was no need for an additional license in that section of Newark and because the premises to which transfer is sought are within two hundred feet of a school. The attorney for the City of Newark stated that his objection was based on the contention that there are sufficient outlets for the distribution of beer in that particular area.

On behalf of applicants, Edward C. Walkiewicz testified that applicants have conducted the business of manufacturing and selling soft drinks at their premises for the past seven years; that they have contracted to purchase three hundred to four hundred accounts and a truck from Rotella and that they seek the transfer of the license so that they may sell beer to these accounts and to approximately the same number of accounts now on their books. Rotella's customers are located principally in Essex County. The premises known as 45 Downing Street are about ten or eleven blocks from 177-181 South Street.

Investigation made by an ABC agent before the hearing indicated that applicants' premises were not within two hundred feet of the South Street School located at 151 South Street. At the hearing Ann Auerbach, wife of the individual objector, testified that the distance between the entrance to the applicants' premises and the entrance to the playground of said school was 153 feet. After the hearing I instructed the agent to recheck his measurements and it now appears from the agent's subsequent report that the distance between the entrance to the applicants' premises and the gate to the playground of said school is 192 feet 10 inches. This gate, and not the door, constitutes the "entrance" from which measurement is to be made. Bely v. Bayonne, Bulletin 266, Item 4; Re Miller, Bulletin 347, Item 10. The transfer may not be granted because of the provisions of R.S. 33:1-76.

The evidence also satisfies me that there are an ample number of licensed places nearby and there appears to be no need or necessity for establishing another liquor outlet in that section of Newark.

For the reasons aforesaid, the application for the transfer in question will be denied.

DATED: January 3, 1957

WILLIAM HOWE DAVIS
Director

STATE BEVERAGE DISTRIBUTOR'S LICENSE - OBJECTIONS TO TRANSFER
HELD TO BE MERITORIOUS - APPLICATION FOR TRANSFER DENIED.

In the Matter of Objections to)
the Transfer of State Beverage)
Distributor's License No. SBD-90)
held by)
Edward Kabot,)
t/a Home Beverage Service,)
from 130 North Dean Street (rear))
Englewood, N. J., to)
Corner Lot #1, Block B,)
Lafayette Place & Genesee Ave.)
Englewood, N. J.)
- - - - -)

CONCLUSIONS

Emil M. Wulster, Esq., Attorney for Applicant
Objectors appearing pro se.

BY THE DIRECTOR:

Written objections, signed by twenty-one property owners and residents of the area to which transfer is sought, having been filed, a hearing was duly held thereon.

The written objections alleged, in effect, that (a) a business of this sort is undesirable because of its nature, (b) two churches are located less than 1000 feet from the proposed premises, (c) a traffic hazard would be created, (d) the size of the plot is inadequate to permit off-street parking, and (e) the business is prohibited by the zoning ordinance of Englewood.

At the hearing one objector, who resides at 210 Lafayette Place and whose property adjoins the property to which the applicant

desires to transfer his license, testified that her objections were substantially those set forth above. Six persons who reside on Genesee Avenue also appeared at the hearing and stated that their objections would be the same as those of the witness who testified.

At the hearing applicant testified that he has conducted business under his license for six years at 130 North Dean Street and that the City is condemning land including that owned by his landlord. He further testified that he has entered into a contract with Mr. Graham to purchase the plot of land, 48 feet on Lafayette Place and 121 feet on Genesee Avenue, whereon he intends to erect a building, plans and specifications for which have been filed with his application for transfer. He further testified that, if the transfer is granted and the building erected, he will receive about sixteen deliveries a month and that his truck will leave the premises daily about 9 a.m. and return about 4 p.m.; that the nearest church is about 1,000 feet away; that his trucks will be loaded and unloaded in the building; that his proposed premises are in a district zoned for business and that there are various places of business nearby on both sides of Lafayette Place. He admits, however, that there is a garden apartment on the same side and a number of homes on the opposite side of Lafayette Place.

This is a close case because, after reading the testimony herein, it appears to me that the objections are not very substantial in character. However, on December 5, 1956, after the hearing was held herein, the City Clerk of Englewood forwarded to me a certified copy of the following resolution adopted by the Common Council at a meeting held on December 4, 1956:

"WHEREAS, many protests against the establishment of such business at the proposed new location have been made before the Common Council at several regular meetings by many citizens residing in the vicinity; and

"WHEREAS, the Common Council is always desirous of maintaining all residential areas on a high plane to protect the neighborhood; and

"WHEREAS, it is the opinion of the Common Council that the establishment of the business of Edward Kabot at the corner of Lafayette Place and Genesee Avenue would be detrimental to the neighborhood;

"THEREFORE BE IT RESOLVED BY THE COMMON COUNCIL OF THE CITY OF ENGLEWOOD:

"That the Common Council desires to maintain the neighborhood around Lafayette Place and Genesee Avenue in its present high grade character and desires to protect the vicinity from any further encroachment of business; and

"That the State Alcoholic Beverage Director be and is hereby requested to refuse any transfer of such license of Edward Kabot to the proposed new location."

Municipal consent is not a statutory prerequisite to the issuance or transfer of a license. Re DeAscentiis, Bulletin 1091, Item 11; Re South Bergen Distributing Corp., Bulletin 1113, Item 6. However, in a case concerning the character of a neighborhood, the

request of the governing body of the municipality to deny the issuance or transfer of a license carries great weight. The transfer of a license, whether State or municipal, is not a privilege inherent in a license. Re Variety Beers, Bulletin 1000, Item 6. In the exercise of my discretion, after considering all the facts herein I have decided to deny the application for transfer.

Dated: January 3, 1957

WILLIAM HOWE DAVIS
Director

6. APPELLATE DECISIONS - ROACH v. BUTLER

Mary E. Roach,)	
)	
Appellant,)	On Appeal
)	
v.)	CONCLUSIONS AND ORDER
)	
Borough Council of the)	
Borough of Butler,)	
)	
Respondent)	
-----))	

Mackerley & Friedman, Esqs., by William J. McGovern, Esq.,
Attorneys for Appellant.

Young & Sears, Esqs., by John J. Genoble, Esq., Attorneys for
Respondent.

Scheck, Smith & King, Esqs., by Alten W. Read, Esq., Attorneys
for Objectors.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

"This is an appeal from the action of respondent on July 17, 1956, whereby it denied an application filed by appellant for the transfer of License C-6 from 5 Kiel Avenue to 1 Roach Lane, Borough of Butler.

"The petition of appeal alleges that the action of respondent was erroneous because (a) its discretionary power was improperly exercised; (b) no authority existed for refusing the transfer or for the reason upon which the refusal was based, and (c) the denial was arbitrary and capricious.

"The evidence discloses that the premises known as 5 Kiel Avenue are located approximately 60 to 75 feet west of Boonton Avenue. During the past few years License C-6 has been issued for said premises to Anita R. Marquette, who obtained a renewal of said license for said premises for the present licensing year. Respondent granted a person-to-person transfer of said license from Mrs. Marquette to appellant, who then filed an application with respondent for a place-to-place transfer from 5 Kiel Avenue to a building which she proposes to erect at 1 Roach Lane. A person going from the present premises to the proposed premises would have to travel approximately 60 or 75 feet to Boonton Avenue; thence in a southerly direction along Boonton Avenue approximately 100 feet; thence in an easterly direction along Roach Lane a distance of approximately 170 feet to a point opposite the entrance to the proposed building, and thence in a northerly direction approximately 50 feet to said entrance. The evidence indicates that there is a down-grade from Boonton Avenue to the prem-

ises and that Roach Lane is only 15 feet wide for a distance of 86 feet between Boonton Avenue and a bridge crossing Trout Brook. Appellant proposes to erect her building near Trout Brook on a tract of land containing 2.64 acres which is owned by her and adjoins said Brook. Directly to the east of the land owned by Appellant is a large tract of land owned by the Butler Methodist Church and a wire fence is erected along the boundary line between said tracts. The church itself faces on Bartholdi Avenue, and the distance between the nearest entrance to the proposed premises and the nearest entrance to the church is at least 700 feet measured as a person would ordinarily walk, although the distance between the proposed building and land owned by the said church is only 150 feet measured in a straight line.

"It appears that at the hearing below the Borough Clerk advised the members of the Borough Council that 'he had a petition signed by 72 names and also 74 letters against this transfer. That also on file was a petition from the friends of the church with 264 names;' that Rev. J. Mark Odenwelder, Pastor of the Butler Methodist Church, and two other residents of the Borough spoke against the granting of the transfer and that, after hearing said witnesses and the argument of attorney for the applicant, the members of the Borough Council voted unanimously to deny the transfer.

"At the hearing herein appellant testified and three residents of the Borough testified on her behalf that, in their opinion, appellant's proposed premises were a proper location for licensed premises. On behalf of respondent Councilman Lawrence F. Brinster testified in substance that the application was denied because of the numerous objections received, the traffic conditions on Roach Lane and because the section to which the transfer was sought is 'the cultural center of the town.' The Pastor of the Butler Methodist Church testified that he objected to the transfer because of the proximity of the proposed premises to the church property. He further testified that there was then under construction an addition (150 feet long and 145 feet wide) to the rear of the church for Sunday School purposes and youth activities. It was stipulated that seven members of his church who were present at the hearing would testify to the same effect if they were called to testify.

"It is well established that there is no inherent right to transfer a license to other premises. The issuing authority, in the exercise of its discretion, may grant or deny such transfer. If denied on reasonable grounds, such action will be affirmed. Bryson v. Beverly, Bulletin 1120, Item 3, and cases therein cited.

"Proximity to churches or schools is a valid ground for denial of license transfer albeit beyond the distance of 200 feet prohibited by R. S. 33:1-76. Staciewicz v. Trenton, Bulletin 35, Item 10; Price v. Millburn, Bulletin 976, Item 3, affd. 29 N. J. Super. 103; Hickey v. Alpine, Bulletin 994, Item 2, affd. 31 N. J. Super. 114.

"After considering the evidence and the briefs submitted herein, I conclude that appellant has not sustained the burden of proof in establishing that the action of respondent was erroneous (Rule 6 of State Regulation No. 15), and I recommend that an order be entered accordingly."

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

After carefully considering the evidence and exhibits herein, I concur in the conclusions set forth in the Hearer's Report and adopt them as the conclusions herein.

Accordingly, it is, on this 7th day of January, 1957,

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

WILLIAM HOWE DAVIS
Director

7. APPELLATE DECISIONS - UTRECHT v. HOPATCONG.

Edward Utrecht,)	
)	
Appellant,)	On Appeal
)	
v.)	CONCLUSIONS and ORDER
)	
Mayor and Council of the)	
Borough of Hopatcong,)	
)	
Respondent.)	
-----)	

Edward A. Haffer, Esq., Attorney for Appellant.
Dolan & Dolan, Esqs., by John T. Madden, Esq., Attorneys for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

"This is an appeal from respondent's action denying renewal of appellant's plenary retail consumption license for the 1956-57 licensing year for premises located on Point Pleasant Road, Hopatcong.

"The petition of appeal alleges that said action was erroneous in that (1) appellant received a verbal and not a written notice on July 1 that his license would not be renewed; (2) no formal charges were served upon him pursuant to R.S. 33:1-31; (3) no hearing was conducted by respondent and appellant was not afforded an opportunity to obtain counsel and prepare a defense to any charges. The answer alleges that the notice of application for renewal was not properly submitted and that appellant intended to 'surrender and give up' his plenary retail consumption license and evinced such intention to the respondent.

"Considering the grounds advanced by appellant seriatim:

(a) The provisions of the statute (R.S. 33:1-22) providing for the service of personal notice or by registered mail by the issuing authority of its refusal to issue a license is for the purpose of fixing the date from which an appellant has thirty days to appeal from such action. Aside from the fact that the appellant appears to have had personal notice, it does not present any ground for reversal since respondent has not raised any contention that the appeal is out of time;

(b) R.S. 33:1-31, which by its terms requires formal charges to be served upon a licensee, applies only to proceedings to revoke or

suspend a license and not to applications for renewal of license;

(c) No hearing need be held if the issuing authority on its own motion, after the regular statutory investigation, shall have determined not to issue the license. Rule 8 of State Regulation No. 2. Garcia v. Fair Haven, Bulletin 1149, Item 1; Nordco v. Newark, Bulletin 1148, Item 2.

"The appeal might well be dismissed because the grounds advanced do not establish a cause for a reversal and, further, upon the technical ground that, prior to taking the appeal, appellant on July 14, 1956, signed a document wherein he stated that he had no intention of filing any notice of petition of appeal from the denial of the application and further requested that there be refunded immediately to him the amount of the application fee. On that day such fee was actually returned to him. While appellant claims that he was required to sign this document before he could obtain return of his money, nevertheless he requested its return and there appears to have been no compulsion upon him to sign this document; rather, it was normal procedure of requiring a receipt evidencing the transaction. It appears clear that appellant's intention was to abandon his application and thus, by his own act, he destroyed the subject of the appeal. Gimber v. Galloway, Bulletin 427, Item 9.

"Moreover, the action of respondent in refusing to renew appellant's license is justified by the evidence presented.

"First, on the procedural ground that the application for renewal was not advertised in accordance with the State Regulations: The application for renewal was filed on June 27, 1956. Notice of the application was published in a newspaper on June 14 and June 21. An application for license must be filed with the issuing authority before the first insertion of advertisement. Rule 1 of State Regulation No. 2. Rigamonti v. Blairstown, Bulletin 692, Item 13. Staiker et al. v. Roxbury et al., Bulletin 804, Item 3.

"The same result is reached from a consideration of the merits of the case. Some light is cast upon appellant's attitude with respect to renewal of his license by the facts that he had some trouble with some boys at his tavern on June 27; that he made no protest to any of the respondent's officials when his license was not renewed, despite the fact that his licensed business was thereby terminated, and after two weeks requested the return of his application fee, and only thereafter consulted an attorney concerning an appeal.

"On respondent's behalf, the Clerk of the Borough testified that on July 14 appellant told him that he desired to obtain return of the fee deposited with his application; that it was not his original intention to request renewal of the license because of his trouble with juveniles, and that it was at his wife's request that he had submitted the application for renewal.

"A Borough Councilman, who is also Police Commissioner, testified that within the past two or three years he had received numerous complaints of disturbances in appellant's tavern and alleged sales of alcoholic beverages to minors; that on many occasions the appellant's attention had been called to these complaints; that at the meeting an objector appeared who represented a number of residents in the immediate vicinity of the tavern. Another councilman testified that he was in general accord with the testimony of his fellow-councilman and, in addition, testified that he resided in the immediate vicinity of appellant's tavern and had personal knowledge of disturbances there; that neighbors complained to him personally about such disturbances; that an incident occurred on June 27, wherein there was a disturbance involving juveniles which resulted in police

charges and counter-charges, and that this last incident crystallized the councilmen's dissatisfaction with the manner in which the licensed business was conducted.

"The Chief of Police of the Borough testified that he had personal knowledge of many complaints of disturbances at the tavern over the past few years; that he spoke with the appellant and his wife concerning such disturbances, and on at least four occasions notified them that there were complaints of sales to minors at the establishment. The Chief further testified as to the various details of the disturbances on June 27, and stated that, although the appellant's tavern is the smallest in size of eighteen licensed establishments in the Borough, appellant's tavern caused more trouble than any other one with regard to disturbances.

"It has been repeatedly held that, although no disciplinary proceedings have been instituted against the licensee, renewals have been denied and upheld on appeal because of previous misconduct of the licensee. Downie v. Somerdale, Bulletin 1135, Item 1, and cases therein cited.

"For the reasons above expressed, I, therefore, recommend that the action of respondent be affirmed and the appeal dismissed."

After the Hearer's Report was filed herein the attorney for appellant filed written exceptions thereto and written argument pursuant to Rule 14 of State Regulation No. 15.

I have carefully considered the entire record in this case, including the transcript of testimony, the Hearer's Report and the exceptions and arguments of appellant's counsel. The majority of the exceptions merely repeat various contentions set forth in the petition of appeal and which are fully covered in the Hearer's Report. I do not agree with the contention of appellant's attorney that there was a denial of judicial process in this case. Considering all the circumstances, I shall adopt the conclusions in the Hearer's Report as my conclusions herein and, hence, I shall affirm the action of the Mayor and Council.

Accordingly, it is, on this 8th day of January, 1957,

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

WILLIAM HOWE DAVIS
Director

8. AUTOMATIC SUSPENSION - LICENSE PREVIOUSLY SUSPENDED BY DIRECTOR - APPLICATION TO LIFT GRANTED.

Auto. Susp. #129)
In the Matter of a Petition by)

Marie Dawson Read,)
t/a Rustic Grill,)
Tuckahoe Road, Marmora,)
Upper Township, New Jersey,)

ON PETITION
ORDER

To Lift the Automatic Suspension of)
Plenary Retail Consumption License)
C-4, issued by the Township Committee)
of Upper Township.)

Lipman & Casella, Esqs., by Philip L. Lipman, Esq., Attorneys for
Petitioner.

BY THE DIRECTOR:

It appears from a verified petition herein that on December 7, 1956, petitioner, Marie Dawson Read, was fined \$100 in the County Court of Cape May County after she pleaded guilty to a charge of selling alcoholic beverages to a minor, in violation of R. S. 33:1-77. Said conviction resulted in the automatic suspension of her license for the balance of its term. R. S. 33:1-31.1. Her license certificate was picked up by ABC agents on January 15, 1957. The petition requests the lifting of said suspension.

By order dated September 10, 1956, I suspended petitioner's license for thirty days (less five for the plea) after she pleaded non vult in disciplinary proceedings alleging that she sold alcoholic beverages to said minor. Said suspension was effective from 3 a.m. September 17, 1956, to 3 a.m. October 12, 1956. Bulletin 1135, Item 6.

Since the suspension imposed in the disciplinary proceedings is adequate, the relief sought herein will be granted.

Accordingly, it is, on this 18th day of January, 1957,

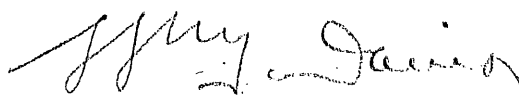
ORDERED that the automatic suspension of License C-4, issued by the Township Committee of Upper Township to Marie Dawson Read, t/a Rustic Grill, for premises on Tuckahoe Road, Marmora, Upper Township, be and the same is hereby lifted and said license is restored to full force and operation, effective immediately.

WILLIAM HOWE DAVIS
DIRECTOR

9. STATE LICENSES - NEW APPLICATION FILED.

Diehl Beer & Beverage Co., Inc.
E. 90 Ridgewood Avenue
Paramus, New Jersey

Application filed March 5, 1957 for person-to-person transfer of State Beverage Distributor's License No. SBD-94 from Charles A. Diehl, t/a Diehl Beverage Co.



William Howe Davis
Director