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STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street, Newark 2, N. J.

BULLETIN 1064 MAY 26, 1955.

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ITEM

STATE OF NEW JERSEY
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BULLETIN 1064 MAY 26, 1955.

1. APPELLATE DECISIONS - COHEN v. WRIGHTSTOWN.

HARRY COHEN, t/a HARRY'S GRILL & HARRY'S LIQUOR STORE, Appellant, v.	ON APPEAL
BOROUGH COUNCIL OF THE BOROUGH OF WRIGHTSTOWN, Respondent.	CONCLUSIONS AND ORDER

Sidney Simandl, Esq., Attorney for Appellant.
Parker, McCay & Criscuolo, Esqs., by Robert W. Criscuolo, Esq., Attorneys for Respondent.

BY THE DIRECTOR:

This is an appeal from respondent's denial of appellant's application (filed December 14, 1954) for transfer of his plenary retail consumption license from premises on the west side of Fort Dix Road to premises proposed to be constructed directly opposite on the east side of Fort Dix Road.

On August 30, 1950, appellant's application for transfer to premises planned to be constructed at the same proposed location was unanimously granted by the Borough, but appellant abandoned that application. On October 12, 1954, appellant reapplied for such transfer. That application was procedurally defective and on November 23, 1954, a motion to grant the application failed of passage. Appellant filed anew on December 14, 1954 (with plans and specifications for the proposed premises and with the required statement concerning such plans and specifications included in the Notices of Application), and on December 28, 1954, after a hearing on that date, a motion to grant the application was unseconded. Appellant's attorney then requested action by the Borough through motion to deny but no such motion was made.

Prior to the December 28th hearing appellant's attorney had presented to the members of Council a brief citing and quoting from Bivona et al. v. Hock et al., 5 N.J. Super. 118 (App. Div., 1949), and citing also various administrative decisions wherein, on appeal, a municipal denial of license transfer to nearby premises in the same business section was reversed.

On December 29, 1954, appellant's attorney forwarded by registered mail to then-Acting Mayor Billetdoux the following excerpt from my Conclusions and Order in Vogel et al. v. Matawan and Malinconica, Bulletin 1043, Item 1:

> "With respect to the third contention, while the question of public necessity and convenience ordinarily is paramount, the situation is different where the place-to-place transfer is from one location in a particular neighborhood to another location in the same neighborhood. In such cases

it has been held that the mere fact that other licenses also serve the same neighborhood, is not a valid reason for denying a place-to-place transfer from one location in a neighborhood to another location in the same neighborhood, since no greater concentration of licenses is created by such transfer. Palmer v. Atlantic City, Bulletin 1017, Item 1; O'Bertz v. Perth Amboy, Bulletin 1011, Item 1; Kupay v. Passaic, Bulletin 803, Item 9; Costa v. Verona, Bulletin 501, Item 2."

The registered letter to the Acting Mayor was not accepted and was returned to appellant's attorney. A copy thereof, sent by regular mail to the Borough Clerk, was not returned.

The new Mayor, Edwin L. Davis, took office on January 1, 1955. By letter of January 5, 1955, appellant's attorney requested that action be taken, one way or another, on appellant's application and that appellant be advised thereof accordingly. At a special meeting of the Mayor and Council held January 7, 1955, no action on the application was taken. At that meeting an ordinance reading, in the body thereof, as follows was passed on first reading:

"No alcoholic beverage license shall hereafter be issued for, or transferred to, premises any part of which is within 50 feet of any part of premises for which an alcoholic beverage license is outstanding, provided, however, that this limitation shall not prevent the renewal or person-to-person transfer of a license for premises licensed when this ordinance becomes effective. The 50 feet shall be measured along the shortest and most direct straight line running from the part of the licensed premises nearest to the premises sought to be licensed."

On January 25, 1955, after hearing, the ordinance was finally adopted; and promptly thereafter appellant's application for transfer was denied.

Councilman Staller was a councilman in 1950 when appellant's application, later abandoned, was granted by unanimous vote.

The distance-between-premises ordinance was introduced by Councilman Sperling. On January 25, on motion of Councilman Sperling seconded by Councilman Wax, the ordinance was passed on second and final reading by the following vote: Ayes- Sperling, Wax, Harris, Mayor Davis; Nays- Staller, Hansen, Croshaw. Later on January 25, on motion by Councilman Croshaw, seconded by Councilman Hansen, that appellant's application be granted, the vote was: Ayes- Croshaw, Hansen; Nays- Mayor Davis, Sperling, Wax, Harris, Staller not voting. The Mayor declared the application denied.

The petition of appeal contends that respondent's denial of appellant's application was erroneous and should be reversed for the following reasons:

"(a) There was a direct need and convenience to be served to the residents of the Borough of Wrightstown and to the public generally by the granting of said transfer, in that the proposed building to be constructed by appellant on the east side of Fort Dix Road was to be a newly constructed, modern building,

containing the most modern equipment and having a parking area in the rear to accommodate from fifteen to twenty cars. The premises now operated by appellant does not have any off-street parking facilities on the west side of the road.

"(b) There are at present located on the west side of Fort Dix Road five plenary retail consumption licenses including that of appellant and only one plenary retail consumption license on the east side of the Road within a distance of approximately two blocks, and if appellant's application for transfer were to be granted, there would be two consumption licenses on the east side of the Road and four on the west side of the Road, thereby lessening the concentration of licenses on one side of the Road within that area.

"(c) Appellant is the owner of both parcels of land involved. At present he utilizes the premises on the east side of the Road for the purpose of parking but his patrons constantly complain of the danger in crossing the Road at that point in order to patronize his present licensed premises.

"(d) At the present time appellant operates with a broad package privilege. Appellant has a barroom, but operates principally for the sale of package goods for off-premises consumption and maintains hours of sale in his business which are ordinarily maintained by package stores. Appellant intends to continue to operate in the same fashion and on the same principal at the new premises across the street.

"(e) The two-block area is a business zone area occupied by businesses only, and appellant intends to continue to operate his business in the same manner on the east side of the Road, if his application is granted.

"(f) Because upon all the evidence presented, it was unlawful to refuse to take action upon appellant's application for transfer.

"(g) Because upon all the evidence presented, it was unlawful to refuse to issue said transfer of license, when in effect and contemplation of law said application was actually granted by the action taken and conduct of the Borough Council that met on December 28, 1954.

"(h) Because by the conduct and action of the Borough Council they indicated clearly a pre-conceived intention to deny appellant's application for transfer and by reason of all facts and circumstances concerning and pertaining to said application have in legal contemplation and in fact denied said application.

"(i) Because the evidence presented at the hearing on December 28, 1954 preponderated in favor of the applicant and against the objector, who refused to be sworn or cross-examined, and therefore the application should have been promptly granted.

"(j) Because the action of the respondent Board was in all things unreasonable, arbitrary, discriminatory, prejudicial and not in accordance with the laws of the State of New Jersey, the rules and regulations of the Director of Alcoholic Beverage Control, and the decisions of the Director of Alcoholic Beverage Control covering similar applications.

"(k) Because upon the evidence produced before the respondent Board, appellant was entitled to an approval of his application according to the law as recorded in the Superior Court cases and the bulletins of the Director of Alcoholic Beverage Control and rules and regulations and laws of the State of New Jersey pertaining to the sale of alcoholic beverages."

(In explanation of Items (f), (g) and (h), it is to be pointed out that the petition of appeal was presented on January 18 and that, as hereinabove set forth, respondent's actual denial of the application took place on January 25.)

In its answer respondent sets forth as reasons for denial of the application: (1) the transfer would place appellant's premises next door to another licensed premises; (2) to grant the transfer would contravene the provisions of the distance-between-premises ordinance adopted January 25, 1955, effective on final publication January 26, 1955.

Appellant's lot on the east side of Fort Dix Road, to which location transfer is sought, is adjacent to the plenary retail consumption licensed premises of Joseph Sadofski who filed written objection to the transfer and who, through his attorney, objected at the local hearing on December 28, 1954. Under a granting of the transfer sought, the distance (driveway and ground on appellant's lot) between appellant's building and Sadofski's licensed building would be twenty-eight feet.

The distance between appellant's now licensed premises and the nearest other licensed premises is forty-four feet, and the distance between two other licensed premises in the Borough is fifty-three feet. With respect to the indicated forty-four feet distance, it is to be noted that the Borough's January 25 ordinance excepts renewals and person-to-person transfers, as is customary and proper in distance-between-premises ordinances. Furthermore, no member of respondent Council voting for the ordinance and for denial of appellant's application was on the Council when the licenses were granted for the above indicated premises respectively forty-four feet and fifty-three feet apart.

It is estimated that approximately fifty per cent. of appellant's customers are pedestrians. Appellant introduced pictures, taken in January of 1955, to show the busy traffic condition on Fort Dix Road. He testified: "*** I had those pictures taken to show on this appeal of mine that my transfer was refused, and it was a hardship for me that my patrons were coming into the store from a lot across the street and before they're able to cross the street there was an awful lot of traffic and once they get over into the store and they had made their purchase, on the way back to the car they had the same trouble getting back. And it was inconvenient for the patrons to make a purchase at my establishment." Then appellant was asked: "Is that the paramount reason that actuates you now in making the application to build a building that you have?" He answered: "That's positively the only reason."

Appellant had filed with respondent a petition signed by forty-six of his customers (mostly soldiers from Fort Dix) requesting the granting of his application.

Councilman Croshaw testified that he voted for the transfer for two reasons: "one, I couldn't see any reason for the difference being on one side of the street or the other; and the other one I felt that the ordinance was passed for the sole

purpose of denying him the privilege." It was stipulated that if Councilman Hansen were called to the stand his testimony would be the same as Mr. Croshaw's.

Councilman Sperling testified that he voted against the application because "I don't think that two businesses of that type should be right next door to each other." When asked whether he knew the closest distance between any two licensed premises in the Borough, the Councilman replied: "I would say between fifty-five and sixty foot." When asked whether he had any reason for feeling that fifty feet (the ordinance distance) was the proper limitation in the Borough of Wrightstown, the Councilman answered: "Yes. Wrightstown is compact, it's only two blocks long, and you couldn't very well make it more, like 300 or 200, you wouldn't have room. So 50 feet seemed reasonable because you could put another kind of business in between the two businesses. *** If one goes next door to another one it kind of creates undue competition *** advertising, I believe you could say soliciting trade. I wouldn't say illegal intention but it just don't work out so good."

On cross-examination Councilman Sperling was asked: "You introduced this ordinance for the express purpose of denying the Cohen application, did you not?" He answered: "Yes." But on further cross-examination the Councilman, when asked the same question, replied that the specific purpose of the ordinance was "to deny his application and any further trouble or difficulties through applications like that."

Appellant's license carries the "broad package privilege" under P.L. 1948, c.98, and State Regulations No. 32, and he has been operating a package liquor store with no sales for on-premises consumption. Councilman Sperling was asked at the hearing what he would find objectionable "in a situation which would exist if Mr. Cohen were to be permitted to conduct a package store business [no barroom] at the proposed new place which would be separated by some twenty-eight feet from the premises of Mr. Sadofski, who *** operates a regular on premises consumption place." The Councilman answered: "A package business is still objectionable to me. It's a liquor license next door to each other." Then the Councilman was asked by appellant's attorney: "And there is no question right along, Mr. Sperling, that since November 23rd, when you voted to deny this, that you intended to, you had it in your mind to put in this ordinance for the express purpose of seeing that Harry Cohen did not move across the street where he wanted to, isn't that so?" The answer: "No, that's not so. I had it in mind after the first hearing with Mr. Cohen that we denied his license, to amend the present ordinance to take care of any further happenings of that sort, not in particular Mr. Harry Cohen; anyone." Then, on redirect examination, the Councilman was asked: "Was it the Cohen application that brought to your attention the necessity for such an ordinance?" He replied: "Yes." Councilman Sperling testified, also, that he had discussed the prospective ordinance with other councilmen and with the Borough Attorney prior to the meeting of December 28, 1954.

It was stipulated that, if called to the stand, Mayor Davis and Councilmen Wax and Harris would testify substantially as did Councilman Sperling. Mayor Davis, however, was later called as a witness for respondent. He was asked, on cross-examination, whether it would make a difference if appellant

operated exclusively as a package store at the new location, and the Mayor answered: "I still feel that they should be separated 50 or 60 feet as good regulation for the liquor industry." Then, Question: "You don't think 28 feet is sufficient?" Answer: "I do not." Question: "So you make a difference between 28 and 50?" Answer: "That's correct."

No one is entitled to an alcoholic beverage license as a matter of right (Zicherman v. Driscoll, 133 N.J.L. 586 (Sup.Ct., 1946)), nor is there any inherent right to a license transfer. In the exercise of its discretionary power an issuing authority may grant or deny an application for transfer of a license. If denied on reasonable ground the action will be affirmed. Fafalak v. Bayonne, Bulletin 95, Item 5; VanSchoick v. Howell, Bulletin 120, Item 6; Craig v. Orange, Bulletin 251, Item 4; Semento v. West Milford, Bulletin 253, Item 2; Masarik v. Milltown, Bulletin 283, Item 10; Biscamp & Hess v. Teaneck, Bulletin 821, Item 8; Kemo v. Trenton, Bulletin 983, Item 2.

On appeal from the granting or denying of application for place-to-place transfer the burden of establishing that the action was erroneous and should be reversed is on the appellant (Rule 6, State Regulations No. 15). If on appeal from denial of a transfer it appears that the action was arbitrary or unreasonable, the action will be reversed. Shapley v. Delaware, Bulletin 294, Item 7; Maliken v. Neptune City, Bulletin 915, Item 2.

A memorandum of law filed on behalf of appellant cites again Bivona et al. v. Hock et al., supra, and decisions by the State Commissioner (now Director) in which, on appeal, municipal denial of place-to-place transfer was found to be unreasonable and was reversed when application was for transfer to premises in the same vicinity and where granting of the transfer would not aggravate to any appreciable degree the existing concentration of licenses in that area. But in the cases cited (including Costa v. Verona, supra; Leonia Liquors, Inc. v. Leonia, Bulletin 766, Item 1; Meister v. Passaic Township, Bulletin 1030, Item 1), no applicable ordinance in prohibition of the transfer had been adopted.

The well established general rule is that it is not the status of the law prevailing at the time of application for a license or permit that controls, but the status of the law prevailing at the time the court or agency decision is rendered. Socony-Vacuum Oil Co., Inc. v. Mt. Holly Township, 135 N.J.L. 112 (Sup.Ct., 1947); Franklin Stores Co. v. Elizabeth, Bulletin 61, Item 1; Bock Tavern, Inc. v. Newark, Bulletin 952, Item 1. Clearly distinguishable is Baker v. Newark et al., Bulletin 1018, Item 1, in which the appeal was not from denial but from grant of a transfer and in which the transfer was fully lawful when granted before the ordinance which would have prohibited the transfer was adopted. Very properly, in that case, the ordinance was deemed not retroactive.

The memorandum of law for appellant quotes the following from my Conclusions and Order in Baker v. Newark et al., supra:

> "Even in the case of a denial of a permit, a later prohibitory ordinance will not always be given retrospective effect and, on occasion, such ordinances have been set aside as arbitrary and capricious. Vine v. Zabriskie, 122 N.J.L.(Sup.Ct. 1939); Ridgefield Terrace Realty Co. v. Ridgefield, 136 N.J.L. 313 (Sup.Ct. 1947); Kerrigan Development Co. v. Newark, 2 N.J.Super. 592 (Super. Ct.

Law Div. 1949). Similarly, a prohibitory ordinance adopted after delay in acting upon an application for a permit was set aside. Brown v. Terhune, 125 N.J.L. 618 (Sup.Ct. 1941), appeal dismissed 127 N.J.L. 554 (E. & A. 1941)."

It is well to point out that those decisions had to do with zoning ordinances - not with an alcoholic beverage ordinance involving the privilege of transfer; that the Vine and Ridgefield Terrace cases turned on an unreasonable and arbitrary interference with the prosecutor's use of private property; that the ordinance in the Kerrigan case was held to be invalid as not based upon a uniform or comprehensive scheme; and that in the Terhune case the Court's opinion was that the change in the zoning ordinance seemed to bear no relation to the public health, safety, morals or general welfare but seemed, instead, arbitrary and for no other purpose than to preclude prosecutor's long-lawful use of his premises.

I should not hesitate on this appeal to find the ordinance invalid or unreasonable in its application to appellant if the evidence established any improper motivation or if there were no evidence of any reasonable basis for the ordinance. But improper motivation has not been established, nor can I conscientiously find on the full record before me (albeit, had I been a member of Council, I might well have voted the other way) that there is no reasonable basis for the fifty-feet ordinance. And I may appropriately remark that there is nothing damning in an admission that the ordinance was introduced and adopted to prevent the transfer unless there were no proper and reasonable ground for wishing to prevent the transfer in the first place. In the absence of bad faith the ordinance stands as a formal manifestation of policy against placing alcoholic beverage licensed establishments too close together.

The operative and binding ordinance prohibits the transfer sought, and respondent's action will be affirmed.

Accordingly, it is, on this 9th day of May, 1955,

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.

2. APPELLATE DECISIONS - BALZER v. PENNSAUKEN, CIRCLE TAVERN, INC., AND CORK 'N BOTTLE, INC.

WILLIAM P. BALZER, Appellant, v. TOWNSHIP COMMITTEE OF THE TOWNSHIP OF PENNSAUKEN, CIRCLE TAVERN, INC., AND CORK 'N BOTTLE, INC., Respondents.	ON APPEAL CONCLUSIONS AND ORDER

Joseph W. Cowgill, Esq., Attorney for Appellant.
Thomas F. Salter, Esq., Attorney for Respondent Township Committee.
Neil F. Deighan, Jr., Esq., Attorney for Respondent Circle Tavern, Inc.
Albert B. Melnik, Esq., Attorney for Respondent Cork 'N Bottle, Inc.

BY THE DIRECTOR:

This is an appeal from the action of respondent Township Committee on December 13, 1954, whereby it (1) issued to respondent Circle Tavern, Inc. 1954-55 license C-3 for the sole purpose of permitting a person-to-person and place-to-place transfer of said license to respondent Cork 'N Bottle, Inc., for premises on the Southeast corner of Admiral Wilson Boulevard at Rosemont Avenue (said license having been previously renewed, on June 21, 1954, for the 1954-55 licensing period, subject to special condition requiring completion of premises), and (2) granted the transfer to said respondent Cork 'N Bottle, Inc.

Appellant, in his petition of appeal, contends that such action was erroneous because (1) no valid license then existed, (2) no "effective" published notice of the proposed transfer had been given, (3) there was no public necessity and convenience to be served by the transfer, and (4) such transfer would further increase traffic congestion at the proposed new location.

Respondents in their answers denied these allegations.

This appeal was heard de novo pursuant to Rule 6 of State Regulations No. 15. At the hearing held February 4, 1955, a number of witnesses testified and numerous exhibits were introduced in evidence from which it appears that commencing March 10, 1934, Airport Grills, Inc., t/a Weber's Hofbrau, held a license for premises located on the East side of Crescent Boulevard at Airport Circle which was variously described in the official certifications to this Division (formerly Department) as "Central Airport, Pennsauken", "East side of Crescent Boulevard at Central Airport", "Central Airport and Crescent Boulevard" and "East side Crescent Boulevard at Central Airport." The license was renewed annually and, beginning with the 1936-37 licensing period, has been designated C-3.

On April 11, 1951, the Hofbrau premises were completely destroyed by fire. Thereafter, in June 1951, Airport Grills, Inc., properly applied for a place-to-place transfer of the Weber's Hofbrau license for a building to be constructed, in accordance with plans and specifications filed with the Township Clerk, to replace the buildings destroyed by fire and described the premises as Crescent Boulevard at Airport Circle. This transfer was applied for to permit the location of the license at a new building not yet constructed and, thus, not previously licensed. The published notices of this application described the licensed premises as "located on Crescent Boulevard at Airport Circle" and referred to the buildings on said premises as having been destroyed by fire April 11, 1951. By resolution dated June 25, 1951, respondent Township Committee authorized the transfer and referred to a new concrete and stucco building to be constructed on the site destroyed by fire, situated on Crescent Boulevard at Airport Circle, but provided that the transfer should not become effective until the premises were completed. By further resolution dated June 25, 1951, respondent Township Committee authorized the endorsement of the transfer for the sole purpose of permitting the 1951-52 renewal of the license.

At the same time, in June 1951, Airport Grills, Inc. filed an application for a 1951-52 renewal of the Weber's Hofbrau license for premises described as "Crescent Boulevard

at Circle Airport." The application stated that there was to be erected a new concrete block and stucco building to replace the buildings destroyed by fire on April 11, 1951, and indicated that construction would be in accordance with plans and specifications filed with the Township Clerk. The published notices of application for the renewal described the licensed premises as "situated at Weber's Hofbrau, East side of Crescent Boulevard at Central Airport." By another resolution dated June 25, 1951, respondent Township Committee authorized the 1951-52 renewal of the license, but provided that the license should not be actually issued unless and until the premises were completed.

In both the transfer application and the renewal application Airport Grills, Inc., stated that they were leasing the licensed premises from Bridge Circle Estates, Inc., and the plans and specifications were filed with the Clerk.

By application dated April 15, 1952, respondent Circle Tavern, Inc., filed for person-to-person transfer of the license of Airport Grills, Inc. and described therein the premises as "Crescent Blvd.--at Airport Circle." The building was described as a new concrete block and stucco building to replace one destroyed by fire and referred to plans and specifications filed with the municipality. Respondent Township Committee adopted a resolution dated May 12, 1952, authorizing the issuance of the 1951-52 license to Airport Grills, Inc., for the sole purpose of permitting the transfer from Airport Grills, Inc., to the Circle Tavern, Inc., and adopted another resolution, also dated May 12, 1952, authorizing the transfer, but provided that the transfer should not become effective until the building was completed. The published notices of this application described the premises as "Crescent Boulevard at Airport Circle", and the resolutions dated May 12, 1952, also described the premises as situated on Crescent Boulevard at Airport Circle.

By application dated June 2, 1952, Circle Tavern, Inc., filed for a 1952-53 renewal of the license, again describing the premises as located at Crescent Boulevard at Airport Circle and again describing the building as a new concrete block stucco building to replace buildings destroyed by fire. The published notices of application also described the premises as situated at Crescent Boulevard at Airport Circle. By resolutions dated June 16, 1952, respondent Township Committee authorized the transfer of the 1951-52 license for the sole purpose of permitting the 1952-53 renewal and granted the renewal, but provided that the 1952-53 license should not actually be issued until the premises were completed. In both resolutions the premises were described as situated at Crescent Boulevard at Airport Circle.

By application dated June 4, 1953, respondent Circle Tavern, Inc., filed for the 1953-54 renewal of the license but, for the first time, described the location of the premises as follows: "West side of Crescent Boulevard near Airport Circle." The building was still described as "cement block and stucco" with the added legend "one story to be built." Under Question No. 4, "trade name", appeared the words "PARK CREST." This, however, was stricken through with red pencil. The published notices of application described the premises as situated at Crescent Boulevard at Airport Circle. By resolutions dated June 28, 1953, respondent Township Committee authorized the

issuance of the 1952-53 license for the sole purpose of permitting the 1953-54 renewal and granted such renewal, but provided that the license should not be actually issued until the premises were completed. Both resolutions described the premises as located at Crescent Boulevard at Airport Circle.

By application dated June 1, 1954, respondent Circle Tavern, Inc., filed for the 1954-55 renewal of the license and again described the location of the premises as "West side of Crescent Boulevard near Airport Circle." The building was described as "one story, cement block and stucco to be erected." Again the name "PARK CREST" appeared under Question No. 4, "trade name", but was partially obliterated by the use of the letter "X" (typewriter). The published notices of application described the premises as situated at Crescent Boulevard at Airport Circle.

By resolutions dated June 21, 1954, respondent Township Committee authorized issuance of the 1953-54 license for the sole purpose of permitting the 1954-55 renewal and granted such renewal but provided that the 1954-55 license should not be actually issued until the premises were completed. The premises were described in both resolutions as situated on Crescent Boulevard at Airport Circle.

By application dated November 30, 1954, respondent Cork 'N Bottle, Inc., filed for the transfer (person-to-person and place-to-place) which is the subject of this appeal. The premises sought to be licensed were described as "Southeast corner Admiral Wilson Boulevard at Rosemont Avenue" and the building was described as "brick." In the published notices of application it was stated that the transfer was sought for the Admiral Wilson Boulevard location for license No. C-3, heretofore issued to Circle Tavern, Inc., "West side of Crescent Boulevard near Airport Circle." By resolutions dated December 13, 1954, respondent Township Committee authorized the issuance of the 1954-55 license to Circle Tavern, Inc., for the sole purpose of permitting the transfer and granted the transfer. In said resolutions the former location of the premises was set forth as "situated on Crescent Boulevard at Airport Circle."

At the hearing held February 4, 1955, appellant testified that he lives one-mile-and-a-half from the proposed new location on Admiral Wilson Boulevard and approximately the same distance from the former location of Weber's Hofbrau on Crescent Boulevard at Airport Circle; that he read of the transfer a day or two after it was granted; that he did not see the Notice of Application published in the "Community News" (to which he does not subscribe); that he believed there were enough licenses in the Township; and that the license in question had formerly been held by Weber's Hofbrau (Airport Grills, Inc.) but that the building had burned down. He further testified that he thought that the license terminated with the fire; that his grievance stemmed from the issuance and transfer of a license he believed to be "dead" after several years of non-use and denied that he represented anyone but himself in this appeal.

Jack Gordon, holder of a plenary retail consumption license at 2250 Admiral Wilson Boulevard, Camden, testified on behalf of appellant. He testified that his licensed premises are in the City of Camden; that there are no residents in the area between the Township boundary line and the Baird Boulevard crossing of Admiral Wilson Boulevard on the West side of Crescent Boulevard; that Admiral Wilson Boulevard is a ten-lane highway which cannot be crossed by automobiles; that there are no pedestrian crossings except at Baird Boulevard; that the highway is very heavily traveled; and that his premises are not overcrowded. On cross-examination he admitted that there was a large development of houses north of Admiral Wilson Boulevard; that there had been a large increase in the population of the Township in the last two or three years, and admitted that he would like to see the transfer denied. He expressed the opinion that the transfer would create a traffic hazard, but admitted that all businesses (including his own), to a certain extent, create traffic hazards. He further admitted that few of his customers are nearby residents; that most of them are transients, but expressed it as his opinion that there is no need for another license at that location. However, he admitted that his premises are approximately one thousand feet from the proposed new location and that the nearest similarly licensed premises are two miles away.

The assistant to the Town Clerk, testifying with respect to the renewal applications for the years 1953-54 and 1954-55, which described the licensed premises as being on the West side of Crescent Boulevard, stated that she knows of no transfer from the East side of Crescent Boulevard to the West side of Crescent Boulevard. She further testified that plans and specifications were filed with the Township Clerk after the fire; that the proposed building was to be erected at the site of the fire; that there are not many residences in the area to which the transfer is sought, and that no business has been conducted under license C-3 since the fire. She further testified with respect to the history of the various applications and resolutions.

On behalf of respondents, J. William Markheim testified at length with respect to the area in the neighborhood of the Airport. He testified that he is vice president and treasurer of Bridge Circle Estates, Inc., which owns land on both the East side and the West side of Crescent Boulevard at the Airport; that he had an interest in Airport Grills, Inc., t/a Weber's Hofbrau; that Mr. Weber had also been associated with Bridge Circle Estates, Inc.; that he (Markheim) is a stockholder, officer and director of Circle Tavern, Inc., which acquired license C-3 by transfer from Airport Grills, Inc., as hereinabove stated; that Circle Tavern, Inc., also held another license for smaller premises on the West side of Crescent Boulevard near Airport Circle known as "PARK CREST;" that the Hofbrau premises on the East side of Crescent Boulevard had done an annual volume of business of $500,000 to $700,000; that the State Highway Department had first contemplated and then actually made changes in the airport traffic circle; that the Highway Department did not want the Hofbrau rebuilt on the East side of Crescent Boulevard; that they planned to bar access to said property from the Boulevard; that highway construction was delayed; that, for these reasons, Circle Tavern, Inc., planned to transfer license C-3 to the West side of Crescent Boulevard; that he believed that said transfer had been accomplished; that these matters were handled by the attorneys for the corporation and that, if there was anything wrong, it was the fault of the attorneys. He further testified that there had previously been a

plenary retail consumption license at the proposed new location and also testified with respect to the traffic conditions in the area.

After the transcript of testimony and the exhibits introduced at the hearing held February 4, 1955, were read and examined, it became apparent that further testimony and exhibits would be required. Through inadvertence the application for transfer from person-to-person and place-to-place which is the subject of this appeal was not introduced in evidence. Furthermore, the confused situation with respect to whether the Hofbrau premises were located on the West side of Crescent Boulevard or the East side of Crescent Boulevard and further explanation with respect to the appearance of the trade name "PARK CREST" on the 1953-54 and 1954-55 renewal applications required further explanation. Accordingly, a supplemental hearing was scheduled for April 27, 1955, at which time the application, which is the subject of this appeal, was introduced and further testimony taken.

Mr. Markheim returned to the stand and explained, in detail, his connection with various corporations active in the area including Bridge Circle Estates, Inc., which owned property on both the East side and West side of Crescent Boulevard and Central Airport Flying Service, Inc., to which the property formerly occupied by Weber's Hofbrau had been sold. He testified that there had been a five-year lease with options to renew for five-year periods between Weber's Hofbrau and Bridge Circle Estates, Inc.; that he and Mr. Weber and a Mr. Ludington had been the stockholders of Airport Grills, Inc. (Weber's Hofbrau); that they had also been stockholders in Bridge Estates, Inc.; that the rent for the Hofbrau property had been $25,000 a year; that the property was sold to Central Airport Flying Service, Inc., in 1952; that the rent was reduced to $15,000 a year after the buildings burned down; that rent was paid at that rate until March 31, 1954; that no rent was paid thereafter, and that the premises were available but that right to possession would have to depend on further arrangements with the owner of the land. He further testified that he had been retained to manage the property and that the owners were anxious to have a restaurant and bar on the premises and that the discussions on that subject had taken place as far back as a year ago.

Mr. Charles M. French testified on behalf of respondents that he is vice president of Central Airport Flying Service, Inc.; that he is familiar with the situation at the site of Weber's Hofbrau; that the rent had been reduced as testified by Mr. Markheim; that there was no building on the premises; that the owners wanted to have a restaurant and bar at that location; that rent had been paid to March 31, 1954; that no rent had been paid since that time; that the premises are still available for a restaurant and bar, and that Mr. Markheim was the rental agent. On cross-examination he admitted that no particular place had been reserved for a licensed business. On redirect examination he stated that some other sites were available but that the former Hofbrau site was preferable.

In his memorandum counsel for appellant contended in effect that (1) there was no valid license in existence when respondent Township Committee took its action, (2) the condition

imposed (completion of premises) had not been met, (3) the license had expired by non-use, (4) since there was no proper renewal of the license, it is a new license prohibited by the State Limitation Law (P.L. 1947, c. 94), (5) the issuance of the license would cause a traffic hazard, and (6) there is no need for the license at the proposed new location. The contention with respect to lack of proper publication is without merit and was not pressed.

Counsel for the various respondents in their memoranda replied to and denied these contentions. Their memoranda are to the same general effect except with respect to the question of whether or not a transfer to the West side of Crescent Boulevard had been effected.

From the foregoing brief digest of the evidence it is apparent that there is considerable confusion with respect to the latter question. Indeed, the supplemental hearing on April 27, 1955, was scheduled in the hope that this situation might be clarified. While the hoped for clarification did not materialize, and whatever the ultimate intention was, one thing is clear, i.e., there never was a transfer of the license in question from the site of Weber's Hofbrau on the East side of Crescent Boulevard to any location on the West side thereof. Reviewing the situation and procedures taken: The licensed premises were located on the East side of Crescent Boulevard from 1934 until the fire in April 1951. Thereafter, following the proper procedure in such cases, a place-to-place transfer of the 1950-51 license was sought to cover a new building to be erected on the same site and said transfer was authorized for the sole purpose of permitting a renewal for the 1951-52 licensing period. The license was thereafter renewed for the 1951-52 licensing period, subject to a completion-of-premises special condition. The license applications and the published notices and the resolutions granting such applications described the licensed premises as located on Crescent Boulevard at Airport Circle (the same premises as had been licensed to Airport Grills, Inc., trading as Weber's Hofbrau).

Thereafter, on May 12, 1952, respondent Township Committee approved an application for transfer of the license person-to-person from Airport Grills, Inc., to Circle Tavern, Inc., but the transfer was not to become effective until the building was completed.

In June 1952, and annually thereafter, respondent Township Committee passed resolutions permitting the issuance of the particular license for the sole purpose of permitting the renewal for the next ensuing license period and the premises were always described as being situated on Crescent Boulevard at Airport Circle. It was not until the application for the 1953-54 renewal that the premises were described as "West side of Crescent Boulevard near Airport Circle." The applications for the 1953-54 and 1954-55 licensing years described the location of the premises as being on the West side of Crescent Boulevard, but the published notices and the resolutions of the Township Committee continued to describe the licensed premises as situated on Crescent Boulevard at Airport Circle.

Circle Tavern, Inc., was the holder of another license (C-6) for premises known as "PARK CREST" located on the West side

of Crescent Boulevard near Airport Circle. It is entirely possible, indeed probable, that whoever filled out the license applications for Circle Tavern, Inc., copied the trade name "PARK CREST" and the location of the licensed premises properly applicable to license C-6 when filling out the application for the license in question (C-3). The words "PARK CREST" appear on the two applications in question (1953-54 and 1954-55) but were stricken out. Evidently the words "PARK CREST" were stricken because it was realized that that trade name did not apply to license C-3, but the erroneous description of the location of the licensed premises was not changed. I am convinced that at no time did respondent Township Committee think it was granting license C-3 for premises on the West side of Crescent Boulevard. The published notices of the applications and the resolutions of respondent Township Committee all referred to the licensed premises as being located on Crescent Boulevard at Airport Circle, the same location as for the premises which had been licensed to Weber's Hofbrau.

It is equally clear that respondent Circle Tavern, Inc., did not have right to possession to premises on the West side of Crescent Boulevard. On the other hand it appears from the testimony at the supplemental hearing that Circle Tavern, Inc., had exclusive right to possession to the old Hofbrau premises on the East side of Crescent Boulevard and actually paid rent therefor until March 31, 1954. Thereafter no further rent was paid, and the most that can be said on the question of right to possession is that the premises were "available" at all times. If in June 1954, when application was made for the renewal of license C-3 for the 1954-55 licensing period, proper objection had been made based upon lack of exclusive right to possession, such objection might well have prevailed. However, no such objection was made and no appeal was taken within the thirty-day period prescribed by law (R.S. 33:1-22). As was pointed out in Atlantic County Licensed Beverage Association, et al. v. Hamilton, et al., Bulletin 879, Item 5, matters of this kind should be corrected upon direct appeal in the manner and within the limitations expressly provided in the statute and not collaterally. With respect to this matter appellant is out of time in this appeal. Furthermore, in the factual situation before us, any lack of right to possession to premises at or near Airport Circle is of small moment since there is no attempt to conduct the licensed business at that location and, since the license is being transferred to a wholly new location, no one was harmed by the erroneous description (in the published notices of application) of the premises from which the transfer was sought. I find that there was a valid license in existence capable of being transferred.

With respect to the contention that the special condition requiring completion of premises had not been met, it has long been held that the local issuing authority may grant a license for the sole purpose of permitting a renewal and may renew the license subject to a completion-of-premises special condition, but that the license may not actually be issued until the special condition has been complied with. See Passarella v. Board of Commissioners, 1 N.J.Super. 313 (App.Div. 1949). It has also been held that the issuing authority may, in that situation, grant a person-to-person and place-to-place transfer if, prior to such granting, it passes a resolution authorizing the issuance of the license for the sole purpose of permitting the transfer. Thatcher v. Washington Township, Bulletin 889, Item 1. That was done here.

With respect to non-user, while, generally speaking, licenses are issued to serve a public need and, consequently, the privilege ought to be exercised, mere non-user does not invalidate the license. As was said in Empire Liquor Co. v. Newark, Bulletin 995, Item 2:

> "Mere non-user does not affect the legal status of a license. Protracted non-user might, in a given case, cause a municipal issuing authority to determine against granting renewal [Re Tarantola, Bulletin 570, Item 5], but such a circumstance is not present in the instant appeal."

From the record in the instant case it is clear that the non-user was due largely to the activities of the State Highway Department which contemplated, and apparently actually made, some structural changes at Airport Circle.

I find no merit in the contention that there was no proper renewal and that the license was in fact a new license. The detailed recitation of respondent Township Committee's action in this regard speaks for itself.

Nor do I find any merit in the contention that the issuance of the license would create a traffic hazard. Even those who made the claim admitted that any business established along the highway in question would result in a traffic hazard. Mr. Gordon admitted that his own business caused somewhat of a traffic hazard.

With respect to the question of the need for a license at the proposed new location, a finding that such need existed is implicit in respondent Township Committee's action. The factual situation disclosed by the record in this case, including the fact that Admiral Wilson Boulevard is most heavily traveled and, thus, carries many transients; the fact that Mr. Gordon admitted that most of his customers are transients, and the further fact that there formerly was a plenary retail consumption license at the same premises to which this transfer is sought amply justified the finding that such public need existed.

Under all the facts and circumstances of this case, I find that appellant has failed to carry the burden imposed by Rule 6 of State Regulations No.15 of establishing that the action of the respondent issuing authority was erroneous and should be reversed.

Accordingly, it is, on this 12th day of May, 1955,

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

WILLIAM HOWE DAVIS,
Director.

3. LOTTERIES - SALE ON LICENSED PREMISES OF TICKETS IN LICENSED RAFFLE - WHEN PERMISSIBLE AND NOT PERMISSIBLE.

LICENSED PREMISES - SALE OF ALCOHOLIC BEVERAGES NOT PROHIBITED DURING CONDUCT OF LICENSED RAFFLE.

May 10, 1955.

E. Marco Stirone, Esq.,
Town Attorney,
Morristown, N. J.

This acknowledges your letter of May 3d concerning sale of tickets in a licensed raffle on liquor licensed premises and sale of alcoholic beverages during the conduct of such raffles.

So far as the Alcoholic Beverage Law and regulations are concerned, there is no objection to the sale of such tickets on liquor licensed premises in the municipality which has licensed the raffle or in municipalities which by referendum have adopted the provisions of the Raffles Licensing Law (R. S. 5:8-50). See Rules 6 and 7 of State Regulations No. 20, which exclude from their prohibition of sale of lottery tickets on licensed premises tickets in raffles being conducted pursuant to the Raffles Licensing Law. However, the sale of such tickets is prohibited by the cited rules on licensed premises in municipalities which have not adopted the provisions of the Raffles Licensing Law. Cf. R. S. 5:8-51 and 67.

With respect to sale of alcoholic beverages during the conduct of the actual raffle (as distinguished from the conduct of bingo games), you will note that there is no prohibition of such sale contained in the cited rules. In this connection, compare the provisions of R. S. 5:8-32 (which prohibits conduct of bingo games in rooms or outdoor areas where alcoholic beverages are sold and served during the progress of the games) and R. S. 5:8-60 (a companion provision as to raffles, which contains no similar prohibition).

WILLIAM HOWE DAVIS,
Director.