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

BULLETIN 1465 August 13, 1962

TABLE OF CONTENTS

ITEM

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

BULLETIN 1465 August 13, 1962

1. APPELLATE DECISIONS - CLEMENCICH v. MANALAPAN

Julius Clemencich, Appellant, v. Township Committee of the Township of Manalapan, Respondent.	On Appeal CONCLUSIONS AND ORDER

Harry Sagotsky, Esq., Attorney for Appellant.
Samuel S. Sagotsky, Esq., Attorney for Respondent Township Committee of Manalapan Township.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"The appellant, Julius Clemencich, applied to the respondent Township Committee of Manalapan (hereinafter respondent) on the 11th day of January, 1962, for the issuance of a plenary retail distribution license for premises located at Highway No. 9 in the Township of Manalapan. Three other applications were similarly filed by Mrs. Thomas J. Maloney, George and Catherine Nicholas and Eugene Gentile, and all applicants complied with the statutory prerequisites prior to the date of the hearing thereon on January 25, 1962.

"These applications were discussed by the Mayor and a committeeman at the hearing, and by all three Committeemen of the respondent in executive session. One of the committeemen then absented himself from the meeting and a further discussion was had. No formal action was taken on any of these applications, nor was any resolution offered with respect thereto. The only resolution passed by respondent on this date was to the effect that the certified checks of $300 each be returned to the four applicants, and this was accordingly done. The other three applicants accepted their checks which were submitted with their applications, but the appellant refused to accept the return of his check.

"The petition of appeal filed herein urges reversal of respondent's action (sic) or what is really meant, its inaction, for the reasons which may be summarized as follows:

(1) That Committeeman James Sobechko participated at the meeting of January 25, 1962, and, more particularly, with respect to appellant's application, although the said James Sobechko was an officer and stockholder in Mainbrook Tavern, Inc., which is licensed by the Township of Manalapan. Thus, any action taken by the respondent with respect to these applications was ipso facto illegal and of no effect.

(2) That the Mayor, by permitting Committeeman Sobechko to so participate, demonstrated a measure of arbitrary behavior, which should have eliminated him from participating in consideration of this application and,

therefore, there was no legal quorum available to properly consider and take effective action.

(3) That, because James Sobechko did participate in this matter relating to the issuance of a plenary retail distribution license, notwithstanding his interest in a similar license and an injunction by the Director of the Division of Alcoholic Beverage Control to refrain from such participation, in letters sent to the respondent and in an order dated September 20, 1961, therefore, this matter should be disposed of entirely de novo by this Division on appeal.

(4) Since respondent repassed an ordinance to cure the taint of illegality of the existing ordinances as determined by the order of the Director of this Division on September 20, 1961, such action thereby created a strong inference that there is a necessity for the issue of a plenary retail distribution license in Manalapan Township. Appellant further suggests that the fact that so many petitions were filed in his favor raises 'a strong presumption in favor of Julius Clemencich that he should have been awarded the plenary retail distribution license in Manalapan Township (over the other three applications filed)'.

(5) That there was no resolution offered or seconded for the issuance of said license, although a valid ordinance was in existence (this appears to be the fact and clearly inconsistent with the prior statement contained in paragraph 10 of the petition of appeal to the effect that respondent 'denied' the application of appellant for such license).

(6) The action of the respondent was 'tainted with intentional and willful illegality, it was arbitrary, unjustifiable, unreasonable, whimsical, prejudicial, biased and political, and was done without reasonable basis for use of discretion or sound judgment'.

(7) That the license should have been issued to this appellant for good cause shown, as a public necessity and public convenience.

"Respondent, in its answer, denies the appellant's substantive allegations, and states affirmatively that it challenges the right of the appellant to have this matter disposed of de novo by the Director on appeal.

"Eugene Gentile, one of the applicants mentioned hereinabove, who was (improperly) joined by this appellant as a respondent to this appeal, also filed an answer in which he denies all matters which are within his knowledge as set forth in the petition of appeal. He further affirmatively requests that if the Director of this Division asserts the power and right to substitute himself for respondent, that he be given the opportunity to be heard 'with respect to being considered for the granting of such license to him'.

"The appeal was heard de novo, pursuant to Rule 6 of State Regulation No. 15, with full opportunity to present testimony under

oath and cross-examine witnesses. Shapiro v. Long Branch, Bulletin 901, Item 2.

"A brief summary of the history and the facts herein should be given, in order to set into focus the primary issues involved in this appeal. On March 30, 1961, respondent, by resolution duly adopted, granted an application by Eugene Gentile for the issuance of a plenary retail distribution license in Manalapan Township and, at the same time, denied a similar application then pending by the present appellant for such license. An ordinance then in effect authorized the issuance of one such license in this municipality. Thereupon, the appellant, Julius Clemencich, appealed to this Division from the action of the respondent in approving such application, and, by Order dated September 20, 1961 in Clemencich v. Manalapan et al., Bulletin 1419, Item 1, the Director reversed the action of the respondent in approving such application. Briefly, the Director held that, since Committeeman Sobechko admitted that he was the president and stockholder of Mainbrook Tavern, Inc., a liquor licensee in Manalapan, his participation in proceedings involving the issuance of a liquor license tainted such proceedings with illegality, quoting at length from Re Siracusa, Bulletin 89, Item 9.

"Thereafter, on September 28, 1961, the respondent Committee introduced a new amendment to the basic ordinance and, on December 28, 1961, passed such amendment effective January 11, 1962, authorizing the issuance of one plenary retail distribution license in the said municipality. This ordinance was passed without the active participation of Committeeman Sobechko and presumably cured the prior existing ordinance with reference thereto. Thereupon, the appellant and the individuals named all filed applications, complied with the statutory advertising and other requisites, and a hearing thereon was held on January 25, 1962. At this meeting, the applications and written objections thereto were then considered in executive session with all three Committeemen participating. However, Committeeman Sobechko did not return to the meeting chambers and the business was then transacted by the other two Committeemen, Mayor Kerwin and Committeeman Cycak. Mayor Kerwin then stated, according to his testimony before me, that his position was well known since he had voted for the granting of the application of Mr. Gentile at the time of the filing of the prior application, and so he had decided that 'in abstaining from voting --that I voted, in my opinion, against everyone'.

"Committeeman Walter Cycak testified at this appeal de novo that he favored the application of appellant because, in his opinion, appellant had the only suitable location for such license. He objected to the other three applicants because they were located on Route 33 and the appellant was the only one who was located on Route 9 in that Township. He also stated that a building was already in existence and that there were some 140 names contained in a petition for the appellant. In addition to that, the appellant's premises were located in an area adjacent to a new housing development containing approximately 200 new homes and would serve the convenience of these new residents.

"However, no resolution was introduced and, consequently, no vote was taken with respect to any of the applications then pending.

-1-

"This appeal is presumably taken from the denial of appellant's application for the issuance of a plenary retail distribution license by the respondent Committee, as asserted in paragraph 10 of the petition of appeal. In support of this contention, appellant argues that the action of Mayor Kerwin in abstaining from voting was

a 'negative vote against the appellant and not an abstaining vote as he erroneously labeled it'. He cites in support thereof State v. Goodfellow, 111 N.J.L. 604, 607, and Kozusko v. Garretson, 102 N.J.L. 508, 510.

"In the Kozusko case, the issue presented was whether a resolution may be altered or amended by a majority vote of the members then present where the rules of the Common Council provide that such resolution may be so altered or amended 'by a majority of the members present voting therefor'. Six members were present, three voted for the resolution of amendment and the other three 'refused to vote for the resolution'. The court there held that the ordinary rule applicable to those remaining silent or merely declining to vote was not applicable, and that it was improper to count the votes of the three recalcitrants in the affirmative. The court there stated:

> 'At such a meeting, if a vote is taken, and no one dissents, all who do not vote are considered as voting with the majority for the motion. And a vote of three ayes at a meeting of twenty, where no one dissents, is considered as the affirmative vote of all present. But the obvious corollary is that when a member does dissent, his vote cannot properly be counted in the affirmative. The common sense of the matter seems to be that it should be recorded in the negative.
>
> 'We conclude that in law and fact there were only three affirmative votes of six present in favor of the resolution, and that it was not legally adopted.'

"The rationale of this case was that since a majority was made available, the resolution would thereby fail.

"In the Goodfellow case, three members voted on a resolution and three members of the body did not vote, and were recorded in the negative. The Mayor declared the vote a tie and himself cast the deciding vote in favor of the appointment. The court there held that in that quo warranto proceeding, the court did not have the authority to decide the issue of his occupancy of the office of councilman since it was a collateral attack upon his occupancy of the said office. These cases differ from the case sub judice, because they presented a specific resolution upon which action was taken. In the instant case, there was no resolution presented and no vote was taken. The expressions of Mayor Kerwin and Committeeman Cycak were no substitute for clear formal action upon which the appellants would have a basis to appeal to this Division.

"It would have been better practice for Committeeman Cycak, who apparently expressed his support so vigorously for the approval of the appellant's application, to offer a resolution. Had he offered the same, the failure of the Mayor to second his motion would have served as a sound legal basis for review of appellant's action, or in reality, its inaction.

"In Ridgefield Delicatessen v. Ridgefield, Bulletin 908, Item 4, the appellant was advised by letter that his application was denied and no formal action was taken upon the resolution denying the application at the meeting. The Director held in this case that there was no action from which an appeal could be taken and the matter was remanded to the respondent for the purpose of adopting, in proper form, a resolution granting or denying the appellant's application. The Director referred to the case of Vrabel v. Florence, Bulletin 114, Item 12. In this case there was

no formal action taken on an application for the issuance of a license. There was merely an informal discussion between the members of the Township Committee and the appellant, and the appellant was informed that he could not obtain a license for various stated reasons. On the hearing on appeal, the respondent agreed to reconsider the appellant's application on its merits at the next meeting, and the appeal was withdrawn without prejudice.

"In Bon-Hood, Inc. v. Atlantic City, Bulletin 1318, Item 2, there was no formal action taken to grant or deny the appellant's application for the transfer of the license. The Director held that there was no action from which an appeal may be taken and, under these circumstances, remanded the case to the respondent for further consideration and action, citing Gelber v. Freehold et al., Bulletin 957, Item 2.

"In the Ridgefield Delicatessen v. Ridgefield, supra, the Director also stated that an appellant has a right to appeal from the unwarranted failure to take action within a reasonable time after request so to do. Cf. Higgins v. Elizabeth, Bulletin 1081, Item 5.

"The situation in the case sub judice is somewhat different from the cases hereinabove cited. Here, while the Committee took no formal action with respect to the granting or denying the application, it passed a resolution directing the return of the deposits required with each application. Thus, from a practical standpoint, it appears that it was clearly the intention of the Committee to take no action. Such inaction would be tantamount to a denial and, in fairness, would support an appeal such as is here presented. There is no other logical inference that can be drawn regardless of the sentiments expressed by the committeemen favoring or opposing the appellant's application.

"It may be argued that Committeeman Cycak realized the impracticability of offering a motion pro forma, because of the expression of opposition by Mayor Kerwin. However, it is clear that the resolution to return the deposit acted as a formal expression on the part of the respondent Committee. Under these circumstances, a remand is required for the purpose of adopting in proper form a resolution reflecting the sentiment of the respondent Committee. That resolution should state specifically the reasons upon which its action is grounded, after a consideration of the merits upon rehearing.

"As was stated in Rosenvinge v. Metuchen, Bulletin 249, Item 6, 'The fair, four square, American way of dealing with one's fellow men in judicial capacity is not only to give them a chance to be heard, but also if it is necessary to render a decision against them to state the reasons for so doing.' Cited with approval in Harrison Wine & Liquor Co., Inc. v. Harrison, Bulletin 1308, Item 1. The reasons given should not be arbitrary or capricious, but reflect sound judgment according to the circumstances therein existing.

-2-

"Appellant next urges that there is a need for the issuance of a plenary retail distribution license in the municipality and that, on the basis of the proofs offered by him is support of his allegation, the respondent Committee should have favored and approved the same. In support of this contention, he cites the passage of the amended ordinance on December 28, 1961 providing for the issuance of one such license in this Township. He further

asserts that the very fact that the Township passed this ordinance raises a presumption that such license would serve the best interests of the municipality, and would be needed at that time.

"The mere fact that the respondent Committee has passed this ordinance does not require that it implement its provisions by the issuance of a license at this time. It may, in its sound discretion, withhold action until such time as it may decide that the interests of the community require such issuance, or it may refuse to issue a license at any time. It is understandable and may be reasonably argued by the respondent Committee that it would want to wait and see whether the new housing development has finally been completed, if that is indeed a factor in its consideration, or it may have other factors which may operate in its determination.

"It has been so well established, as not to require lengthy citation of authority, that the issuing authority's discretionary powers are broad, and it has the power to determine, in the first instance, whether or not a license should be granted. The Director's function on appeals of this type is not to substitute his personal opinion for that of the issuing authority, but merely to determine whether reasonable cause exists for its opinion and, if so, to affirm, irrespective of his personal view. Broadley v. Clinton and Klingler, Bulletin 1245, Item 1; Bertrip Liquors, Inc. v. Bloomfield, Bulletin 1334, Item 1; Larijon Inc. v. Atlantic City, Bulletin 1306, Item 1.

"Generally speaking, the action of a local issuing authority will be affirmed if it is necessary and proper to accomplish the objects of the Alcoholic Beverage Law and secure compliance with its provisions, e.g., that the premises is suitable or that there are too many licenses in the vicinity. Alario and Centanni v. Newark, Bulletin 1210, Item 1; Gruhler and Edwards v. Phillipsburg, Bulletin 718, Item 3.

-3-

"The appellant further urges that the evidence presented at the hearing below clearly established that he should have received favorable action by the respondent Committee, over and above the other applicants. He cites the fact that his cause was supported by a petition containing over 140 names; that his premises is located in an area which is a substantial distance away from any other licensed premises; and that his premises would serve the needs and conveniences of a large housing development contiguous to his premises.

"It has, however, been clearly established that the determination as to whether an applicant shall receive such license shall reside in the first instance within the discretionary authority of the local issuing authority. So that appellant may understand the guidelines and basic principles upon which such local boards operate in their deliberations, it may be appropriate to quote the exact language of Mr. Justice Field in Crowley v. Christensen, 137 U.S. 620, at page 624:

> 'There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the

> power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the State, or one which can be brought under the cognizance of the courts of the United States.'

See Fanwood v. Rocco, 59 N.J. Super. 306.

"The mere fact that there are no other licenses in the immediate vicinity, of course, is no reason why there should be one. As the court stated in Fanwood v. Rocco, supra:

> 'The primary purpose of the act is to promote temperance... Because these are the purposes there is a sharp and fundamental distinction between the power of the Director when a license is denied by the municipality and when one is granted, because refusing a license cannot lead to intemperance or to any of the other evils the act is intended to prevent.'

The court also stated:

> 'No one has a right to demand a license. A license is a special privilege granted to a few, denied to the many....
>
> 'Local officials who are thoroughly familiar with their community's characteristics and interests and are the proper representatives of its people, are undoubtedly the best equipped to pass initially on such applications.'

"The submission by the appellant of a petition supporting his application, and the testimony of local residents both at the hearing below and before me are, of course, persuasive. However, the mere counting of noses cannot serve as a substitute for the considered determination of the local issuing authority in its obligation and responsibility as the elected governing body of a municipality.

"As the late Commissioner Burnett stated in Dunster v. Bernards, Bulletin 99, Item 1:

> 'There is no objection to any person or group presenting a petition. It serves as a convenient medium for presenting to the governing body the views of the group, but the weight to be accorded it, after proper discount for self-interest and the irresponsible way in which petitions are often signed as friendly accommodation without any considered thought of contents or effect or the argument on the other side. depends on what the petition states, who signs it, and how it accords with the policy and common sense of the officials responsible for the administration of the law and whose duty and privilege it is to hear both sides.
>
> 'A petition is not a substitute for, nor may it in any way dispense with independent investigation to determine... (whether the application) is in fact worthy. Neither does it suffice as proof of non-compliance or of unworthiness. Such matters are not proved either way by merely counting noses...'

-4-

"The appellant next advocates that the whole proceedings below had a taint of illegality because Committeeman Sobechko participated in the deliberations in the executive session--although it is agreed that he was not actually present at the time that the public discussion took place. Sobechko testified at this hearing that he was in fact qualified to participate, since he had, prior to January 25, 1962, disposed of his stock interest in the Mainbrook Tavern, Inc. and, therefore, had no direct or indirect interest in any alcoholic beverage license.

"He testified that some time in January, 1962, he made a transfer of his stock to his father for a consideration of one dollar, because he felt that the business of Mainbrook Tavern was not profitable; and he wanted to divest himself of his interest therein. There was no adequate proof offered that a legally effective transfer of the stock took place. The corporate minutes of Mainbrook Tavern do not reflect a meeting held in accordance with the provisions of the General Corporation Act, and Sobechko states that all the transactions relating to the transfer of the stock were handled by his attorney.

"In any event, the evidence does not satisfactorily disclose whether Mayor Kerwin was served with a copy of this resignation prior to, or at the meeting of January 25, 1962.

"Thomas E. Higgins, the Clerk of the respondent Committee, also testified that he was unaware of such resignation at the time of the meeting; that the letter of resignation was not handed to him, but was left on the table at some time during that night.

"James O'Rourke, Secretary of the Mainbrook Tavern, Inc., testified that in a conversation which he had with the attorney for the appellant on March 22, 1962, he informed him that he was unaware of any transfer of stock from Committeeman Sobechko to the father of the Committeeman.

"From the totality of the testimony, and the proofs offered, I am not persuaded that Committeeman Sobechko had divested himself of his stock on or before January 25, 1962. If he had so divested himself, it would appear to be logical for him to have returned to the meeting room, and to have participated in the proceedings. The fact that he did not return raises a strong presumption that he considered himself ineligible to vote, or to participate in matters relating to alcoholic beverage licenses.

-5-

"It is finally urged by the appellant that the Director make a determination upon the merits herein, as to whether or not appellant's application for the issuance of a plenary retail distribution license should be granted. As I have hereinabove pointed out, the better practice imperatively requires that such determination, in the first instance, be made by the local issuing authority. Cf. Ward v. Scott, 16 N.J. 16; Tranchito v. Elizabeth, Bulletin 1296, Item 1. The facts and circumstances at the posture of the appeal do not suggest, in my opinion, that such determination should be made without remanding this matter for reconsideration and rehearing of the merits by the respondent Committee.

"Gentile, improperly joined as a respondent, has filed an answer, in which he has requested that if the Director asserts the power to substitute himself for the respondent Committee, that he

be given the opportunity and right to be heard and considered for the granting of such license to him.

"This is not the proper way to proceed. Since Gentile has accepted the return of the deposit, he therefore cannot now be considered as an applicant by this method; his answer does not correct the fatal defect. He should have filed a separate appeal. He cannot come in through the back door, as it were, in these proceedings, in order to receive consideration by this Division on the application formerly filed with the respondent Committee and voluntarily withdrawn.

"It should be added, parenthetically, that if this Division were to assume jurisdiction and make a final determination on the merits, Gentile would surely have been given the opportunity to correct this procedural deficiency. In administrative agencies, it has been consistently held that wide latitude is given to parties, so that a full, fair and impartial hearing is afforded. Davis, 'Administrative Law', page 239; Cf. Londoner v. Denver, 210 U.S. 373, 386, 28 S.Ct. 708, 714, 52 L. Ed. 1103 (1908); Rep. Atty. Gen. Comm. Ad. Proc. 105 (1941). See also Forkosch, 'A Treatise on Administrative Law', P. 298-299, and cases therein cited.

"However, I would recommend that this matter be remanded to respondent for its reconsideration upon the merits, and for its action within a reasonable time from the date of service upon it of the Order of Remand. At the present hearing on appeal, the only party properly before me is, of course, the appellant herein. Justice and fairness to all parties would suggest that Gentile, Nicholas and Mrs. Maloney be then afforded an opportunity to reapply if they desire, upon compliance with the statutory requirements.

"Perhaps at this time, too, Committeeman Sobechko will have corrected any deficiencies which may have existed on January 25, 1962 with respect to his eligibility to participate in these proceedings, so that the full Committee may act hereon.

"It is further recommended that the respondent be ordered to act with dispatch, so that its action or inaction, within a reasonable time, may provide the basis for such other proceedings as may be thereby indicated. It is also suggested that the Committee take into consideration the paramount issue of public necessity and convenience, as well as the best interests of the community, in its determination. Passarella v. Board of Commissioners, 1 N.J. Super. 313 (App. Div. 1949); R.S. 33:1-1 et seq.; Tevoli et al v. Camden et al, Bulletin 933, Item 1."

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

Having carefully considered the entire record herein, including the testimony taken, the exhibits introduced in evidence at the hearing of the appeal, the written arguments and briefs submitted by counsel at the conclusion thereof, the Hearer's Report and the specific recommendations included therein, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein. Hence, I shall enter an order as recommended.

Accordingly, it is, on this 12th day of June, 1962,

ORDERED that the within appeal be and the same is hereby remanded to respondent Township Committee for its further action consistent with this order and with particular consideration of and emphasis upon the specific recommendations in the Hearer's Report herein adopted.

WILLIAM HOWE DAVIS
DIRECTOR

2. APPELLATE DECISIONS - WILLNER'S LIQUORS v. BAYONNE

Willner's Liquors, a Corporation,
Appellant,
v.
Board of Commissioners of the City of Bayonne,
Respondent,

On Appeal

CONCLUSIONS and ORDER

Samuel W. Lucas, Esq., Attorney for Appellant
Frank J. Ziobro, Esq., Attorney for Respondent Board of Commissioners
Samuel Moskowitz, Esq., and Samuel J. Davidson, Esq., Attorneys for Objector Hudson-Bergen County Retail Liquor Stores Assn.
Robert W. Wolfe, Esq., Attorney for Objector Bayonne Tavern Owners' Association

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of respondent whereby it unanimously denied an application for a person-to-person transfer of plenary retail distribution license D-16 from Kathlu, Inc., t/a Melnick's, to appellant for premises 891 Broadway, Bayonne.

"The pertinent part of the resolution of respondent denying the application for transfer reads as follows:

> 'WHEREAS, it is the opinion of this Board that the type of operation conducted by Willner's Liquors, involving as it does large sales of alcoholic beverages consisting of brands generally sold below the market price of standard brands, is not in the interest of enforcement of laws relating to alcoholic beverages; and
>
> 'WHEREAS, in the attempt to meet such competition other retail distribution licensees in the City of Bayonne may be inclined to violate the rules and regulations of the State Director and other laws relating to alcoholic beverages; and
>
> 'WHEREAS, the location, because of its lack of off-street parking areas, is not satisfactory from a traffic standpoint for a chain store operation; now, therefore, be it
>
> 'RESOLVED, that the application of Willner's Liquors of 596 Orange Street, Newark, New Jersey, for transfer to it of Plenary Retail Distribution License No. D-16 at 891 Broadway, which license is now held by Kathlu, Inc., t/a Melnick's, be denied.'

"The appellant alleges, among other things, that the action of said respondent constituted an abuse of discretion and should be reversed because it 'was arbitrary, unreasonable, capricious, the result of bias, prejudice, passion or mistake, in violation of the legal rights of the appellant, and contrary to law.'

"Respondent's answer denies the aforesaid allegations and contends that:

'(a) the operation as is contemplated by the proposed licensee at the premises proposed would be contrary to the best interests of the public health, welfare and morals of the community;

(b) the operation as is contemplated by the proposed licensee would create undue incentive purchasing and consumption of intoxicating liquor in the area of the license and also the community at large;

(c) the operation as is contemplated by the proposed licensee constitutes a threat to sobriety of the area and to temperance of the residents of the area and also the community at large;

(d) the transfer was denied to the appellant because its operation is repugnant to the entire scheme of liquor legislation designed to protect the public by promoting temperance.'

"The stenographic record of the hearing held by respondent, as well as the evidence presented and statements made by the attorneys for the respective parties at the hearing of the instant appeal, show the main objection to the transfer of the license in question to be the type of merchandising methods used by appellant.

"There appears to be substantial agreement that appellant operates a number of liquor outlets in various municipalities and, although appellant sells nationally advertised brands (known usually as 'Standard brands') of alcoholic beverages, a large part of its business is devoted to the sale of private label brands; that ordinarily the latter brands are sold to the consumer at lower prices compared to the prices charged for alcoholic beverages referred to as 'standard brands;' that the respondent is apprehensive if appellant is permitted to operate its liquor business at the proposed location the traffic situation will be aggravated and the sale to and consumption of liquor (by appellant's potential customers) will greatly increase; that such competition will have an adverse effect on the other liquor establishments in the community so that, in order to remain in business, they would be impelled to reduce the prices of the various brands of liquor in violation of the minimum fair trade law.

"It is undisputed that appellant has operated liquor stores in New Jersey for many years and its disciplinary record appears clear. Furthermore, no proof has been offered which in anywise has shown appellant's officers or stockholders to be statutorily disqualified from being associated with the alcoholic beverage industry in this State.

"Officers of liquor associations, attorneys representing the associations and several liquor licensees entered objections to the transfer in question, emphasizing that the so-called chain operation of appellant would disrupt the orderly liquor business

in the community and, in their opinion, would promote intemperance on the part of the people in the community.

"Rev. Alfred W. Burlingame, Rector of the Calvary Episcopal Church which is located 'three or four blocks' from the present licensed premises, testified that he opposes the transfer because less expensive liquor would result in increased consumption especially among the young people.

"The Mayor and the other four members of the respondent Board (the testimony of two being admitted by stipulation of the attorneys for the respective parties) testified that they oppose the transfer on several grounds. They were also of the opinion that sale of liquor at a price less than that of the 'prevailing brands' would increase consumption; that parking problems would become more acute, and that present licensees might be induced to violate the law by selling liquor below the minimum price for said items.

"It has been ruled at this Division that a transfer of a liquor license to another person or persons is not an inherent or automatic right because the issuing authority may grant or deny such transfer in the exercise of reasonable discretion. If denied on reasonable ground, such action will be affirmed. On the other hand, where it appears that the refusal of a transfer is arbitrary or unreasonable, the action denying the transfer will on appeal be reversed. VanSchoick v. Howell, Bulletin 120, Item 6.

"If appellant had sought a place-to-place transfer to another section of the municipality, or if it had been adequately shown that the present licensed premises had been conducted in an improper manner, the action of respondent in refusing to approve said application would ordinarily be sustained on appeal to this Division. See Bramberger v. Clifton, Bulletin 971, Item 1, and Eana, Inc. v. Pleasantville, Bulletin 1024, Item 2, respectively. Although appellant has held and still holds liquor licenses in various municipalities, no record appears of its having violated the Alcoholic Beverage Law or Regulations. Moreover, in this case the appellant is merely requesting that the license be transferred from a liquor licensee who has a liquor license for the same premises.

"In Willner's Liquors v. Jersey City, Bulletin 1332, Item 3, where similar reasons objecting to appellant's methods of merchandising were advanced, it was therein stated as follows:

> '*** The question is whether an issuing authority has any basis for refusing to transfer a license on the sole ground that the transferee would, for the most part, sell private brands of alcoholic beverages. On a thorough consideration of all the facts, it clearly appears that the issuing authority cannot treat such a licensee in a manner different from other licensees. Whether or not it will be a chain-store enterprise is merely incidental and such does not form the basis for denial of the transfer in the instant case.
>
> 'Application for transfer of licensed premises to a more attractive and larger premises does not, of itself, furnish any basis for denial of such transfer. Bivona v. Hock, 5 N.J. Super. 118 (App.Div. 1949). Obviously, initiative and enterprise of a licensee for the purpose of increasing his business is not conduct which may legitimately be considered objectionable.

'Under the circumstances, it must be concluded that the appellant, who admittedly has in the past maintained well-conducted establishments, cannot adversely affect the character of the neighborhood if permitted to establish a place of business at the location in question. The speculative effect it may have on competition is not a proper ground for denial of the transfer applied for. The new method of operation would not appear to be detrimental to the liquor business or to the other licensed establishments in the neighborhood.'

"It can be readily appreciated that the so-called chain store operation may not be curtailed by arbitrary action of the local issuing authorities in refusing transfer of licenses to such licensees. This appears to be a problem for the Legislature to consider if it thinks advisable. Until such time appellant and others operating liquor establishments in a similar manner must not be discriminated against if they are legally carrying on their liquor businesses.

"I have read the voluminous memoranda submitted by the attorneys for the respective parties. I have also examined and considered the other reasons given for the respondent's action, but find them insufficient to deny the transfer sought herein. Under the circumstances I find the action of respondent to be arbitrary and unreasonable, and recommend that the action of respondent be reversed and that an order be entered directing respondent to grant the transfer as applied for by appellant."

Pursuant to Rule 14 of State Regulation No. 15, written exceptions to the Hearer's Report and written argument in support thereof were filed with me by the attorney for the respondent. On May 22, 1962, at my request the attorneys for the respective parties and the attorneys appearing for objectors at the appeal hearing presented oral argument before me.

It appears from the record herein that respondent issuing authority has adhered to a policy to refuse licenses to "chain liquor stores." The reasons given by respondent for such policy is to protect its own taxpayers who operate individual retail liquor outlets against what it terms "unfair competition" of chain liquor stores which specialize in private label brands which are sold at a reduced price compared to standard brands of alcoholic beverages; that such method of operation is an inducement for increased consumption of alcoholic beverages by persons who would be inclined to purchase greater quantities thereof; that the members of respondent Board fear that the "independent" operators would be likely to "cut" prices in an attempt to meet the competition provoked by the chain store and then violate tha Alcoholic Beverage Law, and that an increase in traffic conditions would result if the chain store operation were permitted.

There is no question that respondent acted in good faith in following the policy hereinbefore mentioned (and this was admitted at oral argument by the attorney for appellant), being firmly convinced that the denial of the transfer to appellant was in the best interest of the municipality.

I am not unmindful that in Conover v. Burnett et al., 118 N.J.L. 483 (Sup.Ct. 1937) Commissioner Burnett was upheld in reversing Judge Conover's denial to renew the six licenses of the Great Atlantic and Pacific Tea Company for the 1936-37 licensing term wherein some facts appear which are substantially similar to those in the instant case. However, in the present case (and not involved in Conover v. Burnett, supra) the contention is that, because of the

present traffic congestion existing in the area in question, the members of respondent Board are apprehensive that an acute parking problem will develop as a result of the method of merchandising used by appellant. This in itself is a sufficient reason to deny a transfer of a license where no parking space is available, and the applicant's method of operation might bring about such an aggravated condition.

Local officials, thoroughly familiar with the best interests of their constituents, are the proper representatives to pass initially on liquor applications involving transfers. Cf. Tranchito v. Elizabeth, Bulletin 1296, Item 1; Ward v. Scott, 16 N.J. 16. It is not my function on appeal to substitute my personal opinion for that of the local issuing authority, but to merely determine whether reasonable cause exists for its determination and, if so, to affirm irrespective of my own personal views.

After careful consideration of the facts and circumstances appearing in this matter, I am convinced that the respondent did not abuse its discretion in denying the application of appellant for a person-to-person transfer of the liquor license to it at the proposed premises. Thus, I shall reverse the recommendation of the Hearer, affirm the action of the respondent and dismiss the instant appeal.

Accordingly, it is, on this 12th day of June 1962,

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

3. DISCIPLINARY PROCEEDINGS - ALCOHOLIC BEVERAGES NOT TRULY LABELED - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against)

Rustic Tavern, Inc.)
t/a "Rustic Tavern")
Marlton Pike & Cornell Avenue) CONCLUSIONS
Cherry Hill Township) AND
PO Merchantville, New Jersey) ORDER

Holder of Plenary Retail Consumption)
License C-17, issued by the Board of)
Commissioners of Cherry Hill Township.)

Wallace, Douglas & Gerry, Esqs., by John F. Gerry, Esq., Attorneys for Licensee.
David S. Piltzer, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that on January 16, 1962, it possessed alcoholic beverages in six bottles bearing labels which did not truly describe their contents, in violation of Rule 27 of State Regulation No. 20.

Absent prior record, the license will be suspended for twenty-five days (the minimum period where six bottles are involved), with remission of five days for the plea entered, leaving a net suspension of twenty days. Re Club 29, Inc., Bulletin 1444, Item 7.

Accordingly, it is, on this 12th day of June, 1962,

ORDERED that Plenary Retail Consumption License C-17, issued by the Board of Commissioners of Cherry Hill Township to Rustic Tavern, Inc., t/a Rustic Tavern, for premises Marlton Pike and Cornell Avenue, Cherry Hill Township, be and the same is hereby suspended for the balance of its term, effective at 3:00 a.m., Tuesday, June 19, 1962; and it is further

ORDERED that any renewal license that may be granted shall be and the same is hereby suspended until 3:00 a.m., Monday, July 9, 1962

WILLIAM HOWE DAVIS
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - ORDER DEFERRING EFFECTIVE DATE OF SUSPENSION.

In the Matter of Disciplinary Proceedings against

Rustic Tavern, Inc.
t/a "Rustic Tavern"
Marlton Pike & Cornell Avenue
Cherry Hill Township
PO Merchantville, New Jersey

Holder of Plenary Retail Consumption License C-17, issued by the Board of Commissioners of Cherry Hill Township.

AMENDED ORDER

Wallace, Douglas & Gerry, Esqs., by John F. Gerry, Esq., Attorneys for Licensee.
David S. Piltzer, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

On June 12, 1962, I entered an order suspending the license herein for a period of twenty days commencing June 19, 1962. The licensee has now filed a petition requesting that the imposition of the suspension be deferred and, for good cause appearing therein, I shall grant such petition.

Accordingly, it is, on this 19th day of June, 1962,

ORDERED that the previous order of suspension herein is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License C-17, issued by the Board of Commissioners of Cherry Hill Township to Rustic Tavern, Inc., t/a Rustic Tavern, for premises Marlton Pike and Cornell Avenue, Cherry Hill Township, be and the same is hereby suspended for the balance of its term, effective 3:00 A. M. Tuesday, June 26, 1962; and it is further

ORDERED that any renewal license that may be granted shall be and the same is hereby suspended until 3:00 A. M. Monday, July 16, 1962.

WILLIAM HOWE DAVIS
DIRECTOR

5. DISCIPLINARY PROCEEDINGS - ALCOHOLIC BEVERAGES NOT TRULY LABELED - LICENSE SUSPENDED FOR 15 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

John & Eleanor Zeilmeier
t/a Wedgewood Inn
Route #24
Franklin Township
PO Broadway, N. J.

Holders of Plenary Retail Consumption License C-3, issued by the Township Committee of the Township of Franklin, Warren County.

CONCLUSIONS AND ORDER

Licensees, Pro se.
David S. Piltzer, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensees plead non vult to a charge alleging that on April 16, 1962, they possessed alcoholic beverages in two bottles bearing labels which did not truly describe their contents, in violation of Rule 27 of State Regulation No. 20.

Absent prior record, the license will be suspended for fifteen days, with remission of five days for the plea entered, leaving a net suspension of ten days. Re Colucci, Bulletin 1435, Item 8.

Accordingly, it is, on this 13th day of June, 1962,

ORDERED that Plenary Retail Consumption License C-3, issued by the Township Committee of the Township of Franklin, County of Warren to John and Eleanor Zeilmeier, t/a Wedgewood Inn, for premises on Route #24, Franklin Township, be and the same is hereby suspended for ten (10) days, commencing at 7:00 A. M. Tuesday, June 19, 1962, and terminating at 7:00 A. M. Friday, June 29, 1962.

WILLIAM HOWE DAVIS
DIRECTOR

6. STATE LICENSES - NEW APPLICATION FILED.

Netti Wholesale Beverages Inc.
700 East Hiawatha Boulevard
Syracuse, New York
Application filed August 7, 1962 for Limited Wholesale License.

William Howe Davis

Director