STATE OF NEW JERSEY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark 2, N. J.

BULLETIN 784 NOVEMBER 25, 1947.

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ITEM

STATE OF NEW JERSEY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
1060 Broad Street Newark 2, N. J.

BULLETIN 784 NOVEMBER 25, 1947.

1. APPELLATE DECISIONS - KUGLER v. LINDENWOLD.
KUGLER v. LINDENWOLD, DODELIN AND MENTINE.

JOHN P. KUGLER,

Appellant,

-vs-

MAYOR AND COUNCIL OF THE BOROUGH OF LINDENWOLD,

Respondent

Cases No. 1 & No. 2

ON APPEAL
CONCLUSIONS AND ORDER

JOHN P. KUGLER and MABEL B. RICHMAN,

Appellants,

-vs-

MAYOR AND COUNCIL OF THE BOROUGH OF LINDENWOLD, and BERTRAM V. DODELIN, t/a BERT'S TAVERN, and SAMUEL S. MENTINE, t/a MENTINE'S INN,

Respondents

James Hunter, III, Esq., Attorney for Appellants, Kugler and Richman.
George D. Rothermel, Esq., Attorney for Respondent, Borough of Lindenwold.
Albert B. Melnik, Esq., Attorney for Respondent, Dodelin.
Edwin Segal, Esq., by George Tartar, Esq., Attorney for Respondent, Mentine.

BY THE COMMISSIONER:

The above appeals were filed to review the action of respondent Mayor and Council whereby said respondent, on April 29, 1947, denied a seasonal retail consumption license to appellant Kugler, and granted seasonal consumption licenses to respondents Dodelin and Mentine; and also to review the action of respondent Mayor and Council whereby said respondent, on May 14, 1947, granted plenary retail consumption licenses to respondents Dodelin and Mentine.

The following facts were disclosed at the hearing:

(1) On August 13, 1942, the Mayor and Council of the Borough of Lindenwold adopted an ordinance which provided that the number of plenary retail consumption licenses outstanding in the Borough at the same time "shall not exceed six in number". The ordinance, however, permitted renewal of the nine licenses of this type which were then outstanding.

(2) The above ordinance did not limit the number of seasonal retail consumption licenses.

(3) On May 1, 1945, respondent Dodelin was granted a seasonal retail consumption license for premises known as "Kirkwood Log Cabin". This license expired by its terms on November 1, 1945. On May 1, 1946, Dodelin was granted a seasonal retail consumption license for the same premises. This license expired by its terms on November 1, 1946. It appears that the licensee was required to pay during the summer of 1946 twice the rental he had paid during the previous

summer. Dodelin thereafter erected new premises on Berlin-Laurel Road and, on December 14, 1946, was granted a seasonal retail consumption license for his new premises. This license expired by its terms on April 15, 1947.

(4) On August 29, 1945, respondent Mentine was granted a seasonal retail consumption license for premises known as "Overbrook Inn". Thereafter, he obtained seasonal retail consumption licenses for the same premises for the winter and summer seasons to and including the license which expired on April 15, 1947.

(5) On March 25, 1947, appellant Kugler applied for a seasonal retail consumption license, for the summer season from May 1, 1947 to November 1, 1947, for the premises known as "Kirkwood Log Cabin". On April 7, 1947, respondent Dodelin applied for a similar license for the same term for his new premises on Berlin-Laurel Road, and Mentine applied for a similar license for the same term for "Overbrook Inn". At its meeting on April 29, 1947, respondent Mayor and Council considered the above applications in the following order: Mentine, Dodelin, Kugler. They granted the Mentine and Dodelin applications and denied the Kugler application.

(6) At the same meeting held on April 29, 1947, respondent Mayor and Council passed on first reading an ordinance which provided that the number of plenary retail consumption licenses outstanding in the Borough at the same time "shall not exceed eleven in number", and further providing that "from and after the final passage of this ordinance no seasonal retail consumption license shall be granted to any person or for any premises". Section 4 of this ordinance provided that it "shall take effect upon its final passage and proper publication". On May 12, 1947, the ordinance was adopted on final reading. On May 14, 1947, respondent Mayor and Council granted plenary retail consumption licenses to Dodelin and Mentine for the respective premises for which they held seasonal retail consumption licenses. On May 15, 1947 the ordinance was published.

Appellant contends that he should have been granted a seasonal retail consumption license on April 29, 1947. This contention is based in part upon the fact that his application was filed before the applications filed by Dodelin and Mentine. This, however, is not controlling. In Giberti v. Franklin, Bulletin 150, Item 3, the Commissioner said:

> "The true principle in matters affected with a public interest is not who made the original and first claim, but who will serve best."

In the present case, appellant's premises had been previously licensed but the premises of the other two applicants had also been previously licensed. Appellant had never held a license in the Borough; the other applicants had held licenses. The selection made between the applicants was not unreasonable. Giberti v. Franklin, supra; Curry v. Margate, Bulletin 472, Item 7; Healey v. Waterford, Bulletin 633, Item 12.

Appellant is not entitled to a license as a matter of right. In view of the existence of the Dodelin license within one-half mile of "Kirkwood Log Cabin", there would appear to be sufficient licenses in that section of the Borough. In addition, there is a very serious question whether appellant is a bona fide resident of New Jersey. The action of respondent Mayor and Council, taken on April 29, 1947, will, therefore, be affirmed.

Appellant's objections to the granting, on May 14, 1947, of plenary retail consumption licenses to respondents Dodelin and Mentine are technical in character. He alleges that the applications were not

filed until after publication of the Notice of Application. The evidence leads me to believe that the applications were filed prior to publication, namely, on April 29, 1947, when the fees were paid. He alleges also that no hearing was held on said applications, but it appears that no written objections had been filed and, hence, no hearing was necessary. His contention that the licenses are void because issued before publication of the ordinance is without weight for reasons set forth in Goldberg v. Lincoln Park, Bulletin 733, Item 1. The objection that the Dodelin application for a plenary retail consumption license was not signed is true but immaterial. The affidavit incorporated in the application was signed and duly sworn to. The lack of the signature in the body of the application may be rectified. Zager v. Passaic, Bulletin 385, Item 9; cf. Meyers v. Plainfield, Bulletin 164, Item 2. For the reasons aforesaid, the action of respondent, on May 14, 1947, in granting plenary retail consumption licenses to respondents Dodelin and Mentine will also be affirmed.

Accordingly, it is, on this 17th day of November, 1947,

ORDERED that the appeals herein be and the same are hereby dismissed.

ERWIN B. HOCK
Commissioner.

2. DISCIPLINARY PROCEEDINGS - ILLICIT LIQUOR - LICENSE SUSPENDED FOR 30 days, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

JOHN V. KLIMAS
T/a GREAT MEADOWS HOTEL
Main Street
Independence Township
P.O. Great Meadows, N. J.,

Holder of Plenary Retail Consumption License C-7, issued by the Township Committee of the Township of Independence.

CONCLUSIONS AND ORDER

John V. Klimas, Defendant-licensee, Pro Se.
Edward F. Ambrose, Esq., appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

The defendant pleaded guilty to a charge alleging that he possessed seven bottles of illicit alcoholic beverages, in violation of R. S. 33:1-50.

On October 5, 1947, an ABC agent seized the seven bottles in question, composed of different brands of popular whiskies, after testing the defendant's open stock of twenty-eight bottles of liquor. The defendant admitted, in writing, that he had refilled each of the seven bottles with another whiskey "which (he) wanted to get rid of."

The license will be suspended for thirty days, less five days for the plea, or a net penalty of twenty-five days. Re Harris, Bulletin 745, Item 9.

Accordingly, it is, on this 18th day of November, 1947,

ORDERED that Plenary Retail Consumption License C-7, issued by the Township Committee of the Township of Independence to John V. Klimas,

t/a Great Meadows Hotel, for premises on Main Street, Independence Township, be and the same is hereby suspended for a period of twenty-five (25) days, commencing at 3:00 a.m. November 24, 1947, and terminating at 3:00 a.m. December 19, 1947.

ERWIN B. HOCK
Commissioner.

3. SEIZURE - FORFEITURE PROCEEDINGS - ALCOHOLIC BEVERAGES PEDDLED FROM MOTOR VEHICLE - MOTOR VEHICLE OWNED BY PARTNERS, AND ALCOHOLIC BEVERAGES, ORDERED FORFEITED DESPITE ONE PARTNER'S CLAIM OF INNOCENCE.

In the Matter of the Seizure on August 23, 1947 of a Ford truck, a quantity of beer and soda, and other articles, on Windsor Road, in the vicinity of the Hand farm, in West Windsor Township, in the County of Mercer and State of New Jersey.	Case No. 7161 ON HEARING CONCLUSIONS AND ORDER

Maurice A. Ross, Esq., Attorney for Emma Allen.
Harry Castelbaum, Esq., appearing for the Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

This matter comes before me pursuant to the provisions of Title 33, Chapter 1 of the Revised Statutes to determine whether a Ford truck, a quantity of beer and soda, and other articles, described in a schedule attached hereto, seized on August 23, 1947 on Windsor Road, West Windsor Township, New Jersey, constitute unlawful property and should be forfeited.

It appears that the State Department of Alcoholic Beverage Control received a specific complaint that beer was being sold in the above vicinity to farm hands from a motor vehicle. Accordingly, an ABC agent and a New Jersey State trooper went to that location on the afternoon of the day in question and, having the description of the vehicle and its driver, halted the Ford truck driven by Thomas Roberts.

There was a cooler or ice box on the truck. Twenty-two cans of beer and 24 bottles of Pepsi Cola were on ice in this cooler. The officers told Roberts that there was a complaint that he had been selling alcoholic beverages. Roberts told the officers that he was an itinerant farm hand, recently arrived from Florida; that he had been at the Will Hand farm for about a week; that he had that day driven the truck to other farms, selling soda to the farm hands, and was returning to the Hand farm. Roberts said that during his stay on the farm he had made a practice of purchasing two or three cases of beer at a time and that the beer in his truck was the remainder of two cases which he had purchased the previous day.

Roberts claimed that this beer was for his personal consumption. However, upon being questioned further, he admitted to the officers that he had sold two cans of beer to a farm hand employed at the Hand farm. Roberts was then arrested on charges of selling alcoholic beverages without a license and possessing alcoholic beverages with intent to sell same unlawfully and the ABC agent seized the truck and its contents.

Roberts later gave the ABC agent a signed statement concerning his activities, including admissions that he sold one can of beer on Sunday, August 17th, and another can of beer to the same person on

Friday, August 22nd, and that he made these sales from the truck in question, parked outside his cabin on the Hand farm.

Roberts has since pleaded guilty to the charge of selling alcoholic beverages without a license.

The evidence is consistent with and warrants the conclusion that Roberts was peddling beer on the day he was apprehended and that he intended to sell the beer which was in his truck. Consequently there is sufficient legal basis to conclude that the cans of beer constitute illicit alcoholic beverages and, together with the truck, are subject to seizure and forfeiture. The truck is also subject to forfeiture because of Roberts' admission that on August 17th and August 22nd he sold beer from the truck in violation of the Alcoholic Beverage Law (the truck obviously having been used to transport such beer). Roberts' signed statement is sufficient to establish this fact and furnishes ground for forfeiture, even though such forfeiture is for a past, and not a present, violation of the liquor laws. Cf. Seizure Case No. 7070, Bulletin 768, Item 8.

When the matter came on for hearing pursuant to R. S. 33:1-66, counsel for Emma Allen sought return of the truck, title to which is registered in the name of Emma Allen and Thomas Roberts. It is suggested that Thomas Roberts was not present at the hearing because then in jail, unable to pay his fine.

Mrs. Allen seeks favorable exercise of my discretionary authority to return property subject to forfeiture to a person who has acted in good faith and had no knowledge of the unlawful use to which the property was put or such facts as would have led a person of ordinary prudence to discover such use. R. S. 33:1-66(f).

According to Mrs. Allen she and Roberts purchased the truck in 1947 in Florida for $1,100.00, of which she contributed $900.00 and Roberts contributed a car as a trade-in, at the value of $200.00.

Mrs. Allen says she and Roberts formed a partnership whereby they used the truck to transport migrant workers from one farm to another; that they brought 15 workers from Florida to a farm in New York, and brought 10 of these workers to the Hand farm; that the farmers paid Mrs. Allen and her partner and they, in turn, paid the workers, and that she used the truck to haul for the farmers the crops that were picked. When they came to the Hand farm, she and Roberts occupied the same cabin.

Mrs. Allen testified that it is the usual practice for contractors who furnish migrant workers to peddle soda and sandwiches to them in the field as a time-saving measure, the contractors making a profit on the sales; that this practice was followed by Mrs. Allen and Roberts; that the ice box or cooler was in the truck for that purpose when they came from Florida; and that the stock of beverages was kept there at all times. She claimed, however, that Roberts paid for the soda and sandwiches and kept the profits.

Mrs. Allen further claimed that she did not know that Roberts sold any beer; that they had a case of beer a week for personal consumption and had purchased two cases in total. The presence of six or eight cartons of empty beer bottles, readily visible in front of her cabin, is forcible evidence to the contrary.

Moreover, various details of her story are in conflict with other evidence in the case. She testified that when she and Roberts came

to this state they went directly to the Hand farm and were there for about a month. Roberts, in his signed statement, says that they spent two weeks at a farm in Allentown, New Jersey, then came to the Hand farm, and were there for a week before the seizure. The testimony of Mr. Hand's stepson, who supervises the operation of the farm, corroborates Roberts' statement. This witness further testified that Mrs. Allen and Roberts were in Long Island, and came to his farm because they happened to know his contractor; that they did not have a crew helping him but merely came as workers, who were paid by Hand's contractor, and that the truck in question was not used on his farm to haul any crops. All of this directly contradicts Mrs. Allen's story.

I am inclined to the view that Mrs. Allen had actual knowledge that Roberts was peddling beer from the truck. However, even if she did not have any actual knowledge thereof, such knowledge is legally imputed to her because of her close relationship with Roberts, as a partner or otherwise.

Mrs. Allen and Roberts were engaged in, and used the truck in, a partnership commercial enterprise, and each is chargeable, in forforfeiture proceedings, with the unlawful use to which the partnership motor vehicle was put, irrespective of the fact that one of the partners may be personally innocent in the matter. Seizure Case No. 6556, United States v. O'Neill, 19 F. 2nd 934.

Hence, for the reasons herein expressed, I am compelled to deny Mrs. Allen's request for return of the Ford truck.

Accordingly, it is DETERMINED and ORDERED that the seized property, more fully described in Schedule "A" attached hereto, constitutes unlawful property, and the same be and hereby is forfeited in accordance with the provisions of R. S. 33:1-66, and that it be retained for the use of hospitals and state, county and municipal institutions, or destroyed in whole or in part at the direction of the State Commissioner of Alcoholic Beverage Control.

ERWIN B. HOCK
Commissioner.

Dated: November 17, 1947.

SCHEDULE "A"

22 - bottles of beer
24 - bottles of Pepsi Cola
1 - ice box
1 - tarpaulin
1 - Ford truck - Engine #186861174, Florida Registration 23GH229

4. APPELLATE DECISIONS - SHORTMAN v. HAWTHORNE.

ROSE E. SHORTMAN, trading as ANDY'S DIAMOND BAR,

Appellant,

-vs-

BOARD OF COMMISSIONERS OF THE BOROUGH OF HAWTHORNE,

Respondent

ON APPEAL
CONCLUSIONS AND ORDER

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Alexander E. Fasoli, Esq., Attorney for Appellant.
Francis Caminetti, Esq., Attorney for Respondent.
Hymen D. Goldberg, Esq., Attorney for Objectors.

BY THE COMMISSIONER:

This is an appeal from respondent's denial of appellant's application for transfer of her plenary retail consumption license from premises at 204 Diamond Bridge Avenue to premises to be constructed at 314-318 Lincoln Avenue, in the Borough of Hawthorne.

The denial was predicated upon the residential character of the neighborhood surrounding the proposed location.

The proofs support respondent's contention that the neighborhood is preponderantly residential, despite the fact that Lincoln Avenue is zoned for business purposes. In the strict sense, there are no commercial businesses, or even any neighborhood stores, in the vicinity of the proposed site. The area in question is not a shopping center. The only structures that are there located, in addition to the residences, are two gasoline stations, an automobile sales agency which also includes repair service, a small electroplating concern, and a veterinarian who conducts his profession at his private home. These structures are all on the same side of Lincoln Avenue as the contemplated premises. Across the street there are no businesses of any kind. All of the intersecting streets are exclusively residential, composed substantially of one-family homes.

In a highly residential area where, as here, the neighboring residents are in protest and there is no probative evidence of any public necessity, a local issuing authority is amply justified in refusing an application for a liquor license, even though a mercantile business may be situated there under the terms of a zoning ordinance. Cf. Parker v. Newark et als., Bulletin 425, Item 12.

There is a suggestion in the record that the respondent is guilty of discrimination because it has licensed an establishment located in a residential district about one-half mile north of the premises covered by the appellant's application. The evidence indicates that this establishment is "an old landmark and has been there for more than fifty years", is conducted as a restaurant, was licensed for many years prior to Prohibition and has been licensed ever since Repeal. The suggestion is devoid of merit.

The action of respondent is affirmed.

Accordingly, it is, on this 19th day of November, 1947,

ORDERED that the appeal herein be and the same is hereby dismissed.

ERWIN B. HOCK
Commissioner.

5. DISCIPLINARY PROCEEDINGS - FALSE STATEMENTS IN APPLICATIONS FILED FOR LICENSES DURING PAST SIX YEARS - OBTAINING LICENSE FOR STRUCTURE WHICH HAD BEEN DEMOLISHED - LICENSE REVOKED.

In the Matter of Disciplinary Proceedings against

S. MONTE SMITH
T/a MANSION HOUSE
Cor. Main St. & Washington Pl.
Hackensack, N. J.,

Holder of Plenary Retail Consumption License C-41 issued for the 1946-47 licensing year by the City Council of the City of Hackensack, and transferred during that licensing year and renewed for the current licensing year (C-50) to

MANSION HOUSE WINES & LIQUORS, INC.,

for premises known as 52 Main Street, Hackensack, N. J.

CONCLUSIONS AND ORDER

S. Monte Smith, Defendant-licensee, Pro Se.
Ernest Weller, Esq., by Dominick Fondo, Esq., Attorney for the City of Hackensack.
Jerome J. Sonnabend, Esq., Attorney for Mansion House Wines & Liquors, Inc.
Jules E. Tepper, Esq., Attorney for Ambirn Realty Corporation, Helen Ribman and Louis Schwartz.
Edward F. Ambrose, Esq., appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

The defendant, S. Monte Smith, pleaded not guilty to charges which, in substance, allege:

(1) In his various applications for license, dated February 23, 1944, June 12, 1944, May 22, 1945, and May 11, 1946, he failed to disclose the interest of Ambirn Realty Corporation, all of whose stockholders were non-residents, in the license applied for thereunder.

(2) His predecessor in interest, Angelina J. Guerra, in her various applications for license dated May 17, 1941, June 3, 1941, May 29, 1942, and June 8, 1943, failed to disclose the interest of a banking institution in the licenses applied for thereunder.

(3) In the defendant's application dated May 11, 1946, he described as the licensed premises a structure which had theretofore been demolished.

Despite the plea, the defendant does not dispute any of the facts proven by the Department. These facts show that, in June 1941, one of the local banks foreclosed a mortgage which it held on the building containing the licensed premises in question and, at the same time, purchased the liquor license then issued for premises known as 50 Main Street, Hackensack, N. J. This licensed premises was one of several stores located in the aforesaid building. Because the bank did not desire to appear as a licensee, either because it would be ultra vires or for reasons of its own, it caused the license to be placed in the name of one of its clerks, Angelina J. Guerra.

This clerk held the license in her name, on behalf of the bank, until March 6, 1944, when it was transferred to the defendant, S. Monte Smith. This transfer was occasioned as a result of the sale of the building containing the licensed premises to the Ambirn Realty Corporation, which was disqualified from holding a liquor license because all of its stockholders were non-residents of this state. See R. S. 33:1-25.

Smith continued as the nominal holder of the license until June 2, 1947, when it was transferred to the Mansion House Wines & Liquors, Inc., the present licensee, for premises in the same building known as 52 Main Street, Hackensack, N. J. Both the transfer, and the renewal for the current licensing year, were conditioned by the local issuing authority on the outcome of the proceedings then pending against Smith.

With respect to the third charge, it appears that in December 1945 or January 1946, the premises covered by the license, known as 50 Main Street, was demolished but that, nevertheless, the license was renewed for the same non-existent premises upon an application which failed to disclose that the store previously known as 50 Main Street had been torn down and was no longer in existence.

I find the defendant, S. Monte Smith, guilty as charged.

In view of the perpetuation of the "fronts" over a period extending for more than six years, and the false representation concerning the existence of the structure purported to be licensed by the municipality, the appropriate penalty would appear to be an outright revocation of the license. Any doubt that there may have been on this score is completely eliminated, however, when it is further considered that the record indicates that, throughout the entire period covered by the instant proceedings, the liquor license was not used and no business whatsoever was conducted thereunder. As an official of the banking institution which had previously owned the property explained, the license was retained and renewed from year to year only because "the property was much more valuable with a liquor license than without". This practice of non-user over a substantial length of time does violence to the paramount principle underlying the issuance of licenses, to wit, that licenses shall be issued only in the interest of the public necessity and convenience.

The proceedings against the present licensee, Mansion House Wines & Liquors, Inc., contains five charges which, in sum, allege that, in its application for transfer, it falsely listed certain persons as officers, directors and stockholders, and also that a minority stockholder had an undisclosed interest in the stock held by the majority stockholder. A review of the record fails to convince me that these charges have been sufficiently proved and they are, therefore, dismissed.

The notice of charges also called upon the licensee to show cause why its license should not be cancelled for the reason that it did not have the requisite right to possession of the premises for which its license had been issued. This show cause notice may also be dismissed since, in view of the revocation of the license, the issue therein has become moot.

Accordingly, it is, on this 19th day of November, 1947,

ORDERED that Plenary Retail Consumption License C-50, issued by the City Council of the City of Hackensack for the current licensing year to Mansion House Wines & Liquors, Inc., for premises known as 52 Main Street, Hackensack, be and the same is hereby revoked, effective immediately.

ERWIN B. HOCK
Commissioner.

6. APPELLATE DECISIONS - WILLNER'S LIQUORS v. ELIZABETH.

WILLNER'S LIQUORS, Appellant, -vs- MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF THE CITY OF ELIZABETH, Respondent	ON APPEAL CONCLUSIONS AND ORDER
In the Matter of an Application by WILLNER'S LIQUORS Elizabeth, N. J., For Relief under the Provisions of Section 6, Ch. 94, of the Laws of 1947.	ON PETITION DETERMINATION

Harry G. Cohen, Esq., Attorney for Appellant and Petitioner.
Raymond A. Leahy, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

Appellant has filed an appeal from the action of respondent whereby respondent denied appellant's application for transfer of its 1946-47 plenary retail consumption license from 1125 Elizabeth Avenue to 16 West Scott Place, and also appellant's application for a renewal of said license for the present fiscal year for premises at 16 West Scott Place, Elizabeth.

After the answer had been filed in the appeal case, Willner's Liquors filed a petition for relief under the provisions of Section 6 of Ch. 94 of the Laws of 1947. Both matters may be disposed of at the same time.

The facts are not in dispute. Willner's Liquors was the holder of Plenary Retail Consumption License C-111 issued by respondent for the 1946-47 fiscal year for premises at 1125 Elizabeth Avenue. On November 30, 1946, it lost possession of its licensed premises because the owner of the building planned to rebuild the premises. No application was made to transfer the license to other premises prior to the expiration of the license on June 30, 1947.

On July 30, 1947, Willner's Liquors filed the two applications which are the subject of the appeal case herein. On September 2, 1947, respondent denied both applications for the reason that the license had expired and could not be the subject of transfer or renewal, and for the further reason that no new license could be issued by reason of statutory limitation.

Respondent was correct in its determination that it had no power to transfer the license which had been issued for the 1946-47 fiscal year. That license had expired by its terms on June 30, 1947. In Re Madden & Goldstein, Bulletin 198, Item 1, it was said:

> "*** a license may not be transferred where no application for transfer was ever approved by the issuing authority within the term of the license, and where the applicant failed to comply with the statutory requisites before the license sought to be transferred had expired. ***"

It follows that the application filed for the present fiscal year for 16 West Scott Place would have to be considered as an application for

a new license and not as an application for renewal of the license held for the prior fiscal year. R. S. 33:1-96, as amended by R. L. 1944, c. 187. The distinction is important in this case because of an ordinance adopted by the Mayor and City Council of the City of Elizabeth on May 7, 1947. Section 1 of said ordinance provides:

> "No license for the sale and consumption of alcoholic beverages whatsoever, excepting renewals, shall be granted for any licensed premises within the area of a circle having a radius of 1500 feet, and having for its central point an existing licensed premises ***."

The evidence shows that there are ten licensed premises already existing within the area of a circle having a radius of 1,500 feet and having for its central point premises known as 16 West Scott Place. Hence the issuance of a new license for the premises known as 16 West Scott Place is barred by the local ordinance.

As to the petition for relief: The petition sets forth that between November 30, 1946 and June 30, 1947, numerous unsuccessful efforts were made to obtain premises to which the 1946-47 license might be transferred. The petition is filed upon the erroneous assumption that Section 2 of Ch. 94 of the Laws of 1947 prohibits the issuance of a new plenary retail distribution license in the City of Elizabeth. The assumption is erroneous because the number of plenary retail distribution licenses existing in the municipality is in fact fewer than one to each three thousand of the population as shown by the 1940 Federal census. The application for "renewal" should have been considered as an application for a "new" license but, as indicated above, the issuance of a new license is prohibited by the distance limitation set forth in the local ordinance. Under these circumstances no benefit to petitioner would accrue by any determination I might make under the provisions of Section 6 of Ch. 94 of the Laws of 1947 because, in any event, I could not require respondent to consider the application filed for the present fiscal year as an application for renewal of the expired license. Even under the terms of said Section, it must be considered as an application for a "new" license. The petition will be denied.

Under all the circumstances, the action of respondent will be affirmed because the application for transfer was filed after the 1946-47 license had expired and because granting of the application for a license for different premises for the present fiscal year would have been contrary to the provisions of the local ordinance.

Accordingly, it is, on this 19th day of November, 1947,

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

ERWIN B. HOCK
Commissioner.

7. DISCIPLINARY PROCEEDINGS - SALE OF ALCOHOLIC BEVERAGES BELOW FAIR TRADE MINIMUM - FALSE STATEMENT IN LICENSE APPLICATION - PRIOR RECORD - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

JOSEPH TAYLOR
T/a KERRY BAR
4615 Bergenline Avenue
Union City, N. J.,

Holder of Plenary Retail Consumption License C-147 for the licensing years 1946-47 and 1947-48, issued by the Board of Commissioners of the City of Union City.

CONCLUSIONS AND ORDER

Aro G. Gabriel, Esq., Attorney for Defendant-licensee.
William F. Wood, Esq., appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Defendant pleaded non vult to charges alleging (1) sale of an alcoholic beverage below the minimum consumer price, in violation of Rule 6 of State Regulations No. 30, and (2) failure to disclose in his application for his 1946-47 license that a license formerly held jointly by the defendant and one Carroll in West New York, N. J. had been suspended for ten days for being open and doing business during prohibited hours, such failure being in violation of R. S. 33:1-25.

The record discloses that on February 17, 1947, an employee of defendant sold a 4/5 quart bottle of The Christian Brothers Burgundy Wine to an ABC investigator for $1.32. The minimum retail price of this product as established in Department Bulletin 740, effective December 16, 1946, was $1.59.

In alleged mitigation of this offense, defendant points out that the brand name of the product, priced at $1.32, was indexed in the previous Fair Trade listing (Bulletin 708, effective May 6, 1946) under the letter "C" (for Christian Brothers) in the list of domestic wines, whereas in the Fair Trade listing in effect at the time of the violation (Bulletin 740, effective December 16, 1946) the brand name was indexed under the letter "T" (for The Christian Brothers) in the list of domestic wines. In effect, defendant claims that he was misled into failure to increase his pricing of the product by reason of the change in indexing of the brand name.

The defendant's argument implicitly contends that brands of alcoholic beverages be listed in a fixed and immutable position within the price list. This contention is without merit since the positions of a particular item may vary from list to list by necessity. The only sure way is to check the entire price list against inventory. The failure to find a listed item cannot be accepted as an excuse. To hold otherwise would open wide the door for violation, deliberate or innocent. The alleged mitigation urged by defendant constitutes no reason for imposition of less than the established minimum penalty for violations of this type. Cf. Re Grant Lunch Corporation, Bulletin 517, Item 3; certiorari denied, U.S. Sup. Ct. sub nom Grant Lunch Corporation v. Driscoll, 320 U. S. 801, Bulletin 601, Item 10.

As to charge (2): As alleged in said charge, a license held jointly by defendant and another was suspended for ten days, effective January 28, 1939, as a result of sale of alcoholic beverages during prohibited hours. In addition, a license held individually by defendant had been suspended for two days, effective November 1, 1942, for

permitting view of the interior of the licensed premises to be obstructed during hours of curfew. Although the latter suspension was revealed in defendant's application for license, the prior suspension was wholly concealed by defendant's failure to disclose it in answer to the appropriate question in the license application.

Obviously, there is no excuse for failure to disclose requested information in an application for license, more particularly when the answers to such application are given under oath.

Under all of the circumstances I shall suspend defendant's license for a period of 25 days, less five days' remission for the plea herein, leaving a net suspension of 20 days.

Accordingly, it is, on this 19th day of November, 1947,

ORDERED that Plenary Retail Consumption License C-147, issued for the 1947-48 licensing year by the Board of Commissioners of the City of Union City to Joseph Taylor, t/a Kerry Bar, for premises 4615 Bergenline Avenue, Union City, be and the same is hereby suspended for a period of twenty (20) days, commencing at 3:00 a.m. December 2, 1947, and terminating at 3:00 a.m. December 22, 1947.

ERWIN B. HOCK
Commissioner.

8. APPELLATE DECISIONS - BRYCE ET AL. v. AVON-BY-THE SEA AND STRATFORD INN.

LORETTA BRYCE and ARTHUR B. MULLALY,

Appellants,

-vs-

BOARD OF COMMISSIONERS OF THE BOROUGH OF AVON-BY-THE SEA, and STRATFORD INN,

Respondents

ON APPEAL
CONCLUSIONS AND ORDER

Parsons, Labrecque, Canzona & Combs, Esqs., by Robert H. Maida, Esq., Attorneys for Appellants.
Samuel Y. Hampton, Esq., Attorney for Respondent Board of Commissioners.
Ward Kremer, Esq., Attorney for Respondent Stratford Inn.

BY THE COMMISSIONER:

Appellants, who are taxpayers, appeal from the action of respondent Board of Commissioners in granting a summer seasonal retail consumption license to respondent Stratford Inn for premises on the northwest corner of Second and Garfield Avenues, Avon-by-the-Sea.

Appellants allege that the action of the Board of Commissioners was erroneous because, among other reasons, said license was granted without regard for the general welfare of the community and the granting of the license constituted an abuse of discretion.

According to the 1940 Federal census, the permanent population of the Borough was 1,211. Prior to May 15, 1947, when the State Limitation Law (P.L. 1947, ch. 94) became effective, two seasonal retail consumption licenses had been issued in the Borough -- one to Avon Inn and the other to the Buckingham Hotel. A Borough ordinance which was then in effect limited the number of seasonal retail consumption licenses to two. Although Stratford Inn came within the exception set forth in Section 8 of P.L. 1947, ch. 94, because it

was operated as a hotel and contained 78 sleeping rooms, it was then prevented from obtaining a new license because Section 9 of P.L. 1947, ch. 94, provides that the Act is in addition to, and not in exclusion of, municipal regulations limiting the number of licenses to sell alcoholic beverages at retail.

Chiefly through the efforts of Edward Gately, President of Stratford Inn, a petition accompanying a proposed ordinance to increase the permissible number of seasonal retail consumption licenses from two to three was prepared and presented to respondent Board of Commissioners. The petition was signed by electors equal in number to fifteen per cent of the votes cast at the last preceding general election. When the Board of Commissioners refused to pass the proposed ordinance, a special election, as provided by statute, was held on July 22, 1947. At said election 458 votes were cast in favor of the proposed ordinance, and 245 votes were cast against the proposed ordinance. In accordance with the provisions of R. S. 40:74-18, the proposed ordinance thereupon became a valid and binding ordinance of the municipality. Thus the Board of Commissioners was empowered after July 22, 1947, to issue a new license to Stratford Inn, although not required to do so, whereas prior thereto it was prevented from issuing said license by Section 9 of P.L. 1947, ch. 94.

On July 24, 1947, an application for a summer seasonal retail consumption license was filed by Stratford Inn. Numerous written objections were filed by residents of the Borough to the issuance of the license, and two hearings were held upon said objections. Many of these objectors were summer residents who own their homes but who had been unable to vote at the special election because they were not permanent residents of, and hence not registered voters in, the Borough. It appears, however, that at said hearings these objectors were given full opportunity to be heard and that they based their objections chiefly upon the ground that there was no need for an additional license in Avon and that the issuance of the additional license would cause disturbances and depreciate the value of their property. Despite the objections, the Board of Commissioners voted to grant the license. Admittedly the members of the Board were influenced to a great extent by the result of the special election, but I cannot say that they ighored the question of the general welfare of the community. It appears that all the arguments of the objectors were fully presented to the Board before a decision was reached.

As to the need for an additional license, the evidence shows that the lowest estimate of the summer population of the Borough is 4,000. Stratford Inn is a large hotel, and liquor licenses had previously been issued to two other large hotels in the Borough. As to the other objections, there is no reason to anticipate that the operation of the licensed premises will result in annoyance to nearby residents or depreciate the value of their property. Because there are residences nearby, the officers of Stratford Inn should take special precautions to prevent any unnecessary noise. No parking problem should arise because the Stratford Inn has a parking lot in the rear of its premises which can accommodate thirty-five or forty cars.

Considering all the evidence, I conclude that appellants have not sustained the burden of proof to show that the Board of Commissioners, in granting the license in question, abused the discretion conferred by R. S. 33:1-19 and 24.

Appellants also contend that the license was issued in violation of the zoning ordinance of the Borough of Avon-by-the-Sea. However, the evidence shows that the property is located in Residence Zone "C" wherein hotels, boarding houses and rooming houses are permitted.

Appellants also contend that, in the application filed for the license, Edward Gately falsely denied that he had ever been convicted of a crime, whereas in fact he had been convicted in 1924 and 1925 of

violating the National Prohibition Act. The record shows that a person of the same name was so convicted, but Edward Gately, the President of Stratford Inn, denies that he was ever arrested or convicted, and specifically denies that he was convicted in 1924 or 1925 of violating the National Prohibition Act. On the evidence presented I must conclude that appellants have failed to establish that the question in the application was falsely answered or that Edward Gately is ineligible to hold more than ten per cent of the stock of the licensed corporation because of any conviction of a crime involving moral turpitude.

The question of restrictive covenants in the deed which, allegedly, would prevent the sale of alcoholic beverages on the licensed premises is being litigated in the Court of Chancery. That question has not been considered in this appeal. See Barnegat Beach Association v. Busby, 44 N.J.L. 627.

For the reasons aforesaid, I shall affirm the action of the respondent Board of Commissioners.

Accordingly, it is, on this 20th day of November, 1947,

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

ERWIN B. HOCK
Commissioner.

9. DISCIPLINARY PROCEEDINGS - SALES DURING PROHIBITED HOURS IN VIOLATION OF LOCAL REGULATION - SALE DURING PROHIBITED HOURS IN VIOLATION OF RULE 1 OF STATE REGULATIONS NO. 38 - SEPARATE VIOLATIONS - LICENSE SUSPENDED FOR 30 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against ROBERT TROMBLEY T/a WONDER BAR 135 Hamilton Avenue Seaside Heights, N. J., Holder of Plenary Retail Consumption License C-9, issued by the Mayor and Borough Council of the Borough of Seaside Heights.	CONCLUSIONS AND ORDER

Robert Trombley, Defendant-licensee, Pro Se.
Edward F. Ambrose, Esq., appearing for Department of Alcoholic Beverage Control.

BY THE COMMISSIONER:

Defendant pleads guilty to the following charges:

"1. On August 22, 1947, you sold, served, delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages and allowed the consumption of such beverages on your licensed premises between 2:00 a.m. and 7:00 a.m., in violation of Section 2 of Ordinance adopted by the Mayor and Borough Council of the Borough of Seaside Heights on May 18, 1940.

"2. On Friday, August 22, 1947, at about 3:55 a.m., you sold and delivered and allowed, permitted and suffered the sale and delivery of an alcoholic beverage at retail in its original container for consumption off the licensed premises, thereby violating Rule 1 of State Regulations No. 38, which prohibits any such sale or delivery before 9:00 a.m. or after 10:00 p.m. on weekdays."

The departmental file in the instant case discloses that on Friday, August 22, 1947, drinks were sold to numerous customers long after 2:00 a.m. At 3:56 a.m., ABC investigators purchased two drinks of alcoholic beverages on defendant's licensed premises. At or about the same time one of the ABC agents purchased a bottle of whiskey from the defendant for off-premises consumption.

Defendant has no previous adjudicated record. The two violations constitute two separate offenses. Cf. Wayne v. United States, 138 F. 2d 1. Each offense carries a minimum suspension of fifteen days, making a total suspension of defendant's license for a period of thirty days. Five days will be remitted for the plea entered herein, leaving a net suspension of twenty-five days. Re Healey, Bulletin 600, Item 4.

Accordingly, it is, on this 20th day of November, 1947,

ORDERED that Plenary Retail Consumption License C-9, issued by the Mayor and Borough Council of the Borough of Seaside Heights to Robert Trombley, t/a Wonder Bar, for premises 135 Hamilton Avenue, Seaside Heights, be and the same is hereby suspended for a period of twenty-five (25) days, effective at 2:00 a.m. November 28, 1947, and terminating at 2:00 a.m. December 23, 1947.

ERWIN B. HOCK
Commissioner.

10. STATE LICENSES - NEW APPLICATIONS FILED.

United Distillers of America, Inc.
350 Fifth Ave.
New York, N. Y.
Application for Plenary Wholesale License filed November 20, 1947.

Chicago Express, Inc.
507 West St.
New York, N. Y.
Application for Transportation License filed November 24, 1947.

Erwin B. Hock
Commissioner.