

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

BULEETIN 1455

JUNE 29, 1962

TABLE OF CONTENTS

ITEM

1. APPELLATE DECISIONS - BILLY MILLER'S CLUB 88 INC.
v. NEWARK.
2. APPELLATE DECISIONS - BARONE'S LOUNGE, INC. v.
PATERSON.
3. APPELLATE DECISIONS - HIDDEN BROOK LOUNGE, INC. v.
BLOOMFIELD.
4. DISCIPLINARY PROCEEDINGS (Paterson) - VIOLATION OF
STATE REGULATION NO. 38 - PRIOR SIMILAR RECORD -
LICENSE SUSPENDED FOR 30 DAYS, LESS 5 FOR PLEA.

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

BULLETIN 1455

JUNE 29, 1962

1. APPELLATE DECISIONS - BILLY MILLER'S CLUB 88 INC. v. NEWARK.

BILLY MILLER'S CLUB 88 INC.,)	
t/a BILLY MILLER'S CLUB 88,)	
)	
Appellant,)	
)	
v.)	ON APPEAL
)	CONCLUSIONS.
)	AND ORDER
MUNICIPAL BOARD OF ALCOHOLIC)	
BEVERAGE CONTROL OF THE)	
CITY OF NEWARK,)	
)	
Respondent.)	

Joseph A. D'Alessio, Esq., Attorney for Appellant.
Vincent P. Torppey, Esq., by Peter Adubato, Esq., Attorney
for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of respondent whereby it suspended appellant's license for twenty days, effective November 13, 1961, after appellant was adjudged guilty of a charge that on June 11, 1960, it permitted an act of violence in and upon its licensed premises in violation of Rule 5 of State Regulation No. 20. The licensed premises are located at 88 14th Avenue, Newark.

"Upon the filing of the appeal an order was entered on November 10, 1961, staying respondent's order of suspension until further order of the Director. R.S. 33:1-31.

"In its petition of appeal, appellant alleges respondent's action was erroneous for the following reasons:

- (a) The verdict was contrary to the clear weight of the evidence.
- (b) It was unreasonable and unlawful.
- (c) The respondent failed to consider the evidence and testimony of the witnesses for the appellant.
- (d) Appellant alleges that the incident arose from an attempt on the part of the patron involved to attack the licensee [sic], necessitating self-defense on his part and summoning of the police by him.

"Respondent in its answer denies that such is the fact.

"The attorneys for both parties agreed to submit upon the transcript of the testimony taken in the disciplinary proceedings heard by respondent on October 18, 1961. The procedure is authorized by Rule 8 of State Regulation No. 15.

"The record discloses that prior to the hearing appellant entered a plea of not guilty to the following charge:

You did on or about 8:30 p.m., on Saturday, June 11, 1960, allow, permit and suffer in and upon the licensed premises a brawl, act of violence, disturbance and unnecessary noises, and allowed, permitted and suffered your licensed place of business to be conducted in such manner as to become a nuisance; in violation of Rule 5 of State Regulation #20.

"At the close of the hearing the respondent found appellant guilty on the charge and adopted a resolution suspending appellant's license for fifteen days on the charge herein and for five additional days for a prior dissimilar violation, or a total of twenty days effective November 13, 1961.

"It appears from the transcript of the testimony that respondent called as witnesses three local police officers and Gladys Whitley.

"Officer William Lanno testified that he was assigned to investigate an alleged assault upon Gladys Whitley by Joseph Cietta at the licensed premises on June 11, 1960; that, as a result of his investigation, a complaint of atrocious assault and battery was made against Cietta and Cietta filed a counter charge of assault and battery against Miss Whitley; that the former was referred to the Grand Jury; that he believes the latter was dismissed by a local magistrate and that Miss Whitley was hospitalized.

"Officer William Suckey testified that he accompanied Lanno in the investigation and that he had taken a statement from Cietta.

"Officer James Simpson testified that on June 11, 1960, at about 4 p.m., while on a routine patrol of the area, he and his partner observed Miss Whitley lying in an alley adjacent to the licensed premises; that Miss Whitley told them that she had been assaulted by Cietta at the licensed premises; that they confronted Cietta with Miss Whitley; that Cietta informed them that Miss Whitley came to see him 'for some personal reason'; that he (Cietta) had refused to comply with a 'request' made of him by Miss Whitley; that an argument ensued; that Miss Whitley 'struck him with some kind of an instrument and he struck back with something'; and that Miss Whitley denied she had struck Cietta.

"On cross-examination Officer Simpson reiterated his direct testimony and further testified that Miss Whitley spoke coherently; that he did not receive a call to go to the licensed premises; that he made a routine check of the immediate area of the licensed premises; that his partner went into the same, and that he did not find any blunt instrument. In response to questioning by the chairman of respondent Board, Simpson stated that he detected no odor of alcohol on Miss Whitley; that he observed scratches, lacerations and bruises on Miss Whitley's face; that Cietta had a few scratches on his shoulder and neck and that Cietta's shirt was torn.

"Gladys Whitley testified that, pursuant to a telephone call from Cietta, she came to the licensed premises to get some money which was due to her under a court order for the support

of a child born out of wedlock; that she and Cietta argued back and forth over the payment of the same, following which Cietta came from behind the bar, pushed her and she pushed him; that Cietta retaliated by knocking her to the floor with a blow on her nose; that Cietta kept striking her about the face, in the course of which she scratched his face; and that thereafter Cietta 'dragged' her into the alley.

"Miss Whitley further testified that, as a result of the aforesaid attack, she was confined to a hospital for seventy-two hours and that she had sustained a fractured nose and a cut under her eye which necessitated stitching.

"On cross-examination Miss Whitley testified that she had not consumed any alcoholic beverages prior to visiting the licensed premises on the day in question; that she did not ask Cietta for a drink and, in response to a question by a member of the Board, stated that prior to June 11 aforesaid she had visited the premises on two or three occasions to collect payments from Cietta.

"Joseph Cietta, on behalf of the licensee, denied that he had telephoned Miss Whitley; denied that she had not asked for a drink; denied that he had struck her and further testified that he operates the licensed premises; that Miss Whitley staggered into the premises; that he refused to serve her a drink; that she heaped abuse upon him; that in the presence of two patrons, she 'lunged at me from the outside of the bar with a knife'; that she had missed her mark, fell and struck her head on the bar; and that he picked her up, 'took her out into the yard' and called the police.

"On cross-examination Cietta repeated his direct testimony and further testified that he detected no odor of alcohol on Miss Whitley; that Miss Whitley dropped the knife in the premises; that neither he nor his bartender found the knife; that Miss Whitley was bleeding from one of her eyes; and that Officer Simpson and another policeman arrived in a radio car about five or ten minutes after he had called the Police Department. On further cross-examination Cietta testified that he had been directed by the court to make weekly payments to Miss Whitley for the support of the child; that Miss Whitley did not ask him for any money; and that he was not certain whether he was in arrears with his payments.

"Anthony Volpe, on behalf of the licensee, testified that on the evening in question he was in the licensed premises; that he came there to relieve Cietta for a few hours; and that, exclusive of the allegation that Miss Whitley had a knife in her hand, he substantially corroborated Cietta's direct testimony.

"On cross-examination Volpe testified that he was unable to observe whether Miss Whitley had any object in her hand and that he neither looked for nor found a knife or weapon in the premises.

"I have carefully examined all the evidence in the case. The hearing in this case was attended by the Board's three members. It is my opinion that the Board, before rendering its decision, carefully scrutinized the testimony and considered the demeanor of all the witnesses. I find as a fact that on June 11, 1960, Miss Whitley came to the licensed premises at the invitation of Cietta; that she was not intoxicated; that Cietta assaulted her; that Cietta did not summon the police; and that, notwithstanding Cietta's testimony, he acted unreasonably and imprudently. Hence, I

further find as a fact that on Saturday, June 11, 1960, the appellant allowed, permitted and suffered a brawl in and upon its licensed premises as charged. Under the circumstances, the appellant has failed to sustain the burden of establishing that the action of respondent was erroneous (Rule 6 of State Regulation No. 15). I recommend, therefore, that an order be entered affirming respondent's action and dismissing the appeal, and fixing the effective dates for suspension imposed by respondent and stayed pending the entry of the order within."

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

After carefully considering the evidence in the case, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 1st day of May 1962,

ORDERED that the action of respondent be and the same is hereby affirmed; and it is further

ORDERED that the twenty-day suspension heretofore imposed by respondent, and stayed during the pendency of this appeal, be restored to commence at 2 a.m. Tuesday, May 8, 1962, and terminate at 2 a.m. Monday, May 28, 1962.

WILLIAM HOWE DAVIS
DIRECTOR

2. APPELLATE DECISIONS - BARONE'S LOUNGE, INC. v. PATERSON.

BARONE'S LOUNGE, INC.,)	
Appellant,)	ON APPEAL
v.)	CONCLUSIONS
)	AND ORDER
BOARD OF ALCOHOLIC BEVERAGE CONTROL)	
FOR THE CITY OF PATERSON,)	
Respondent.)	

Bruno L. Leopizzi, Esq., Attorney for Appellant.
William J. Rosenberg, Esq., Attorney for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of respondent whereby it suspended appellant's license for a period of fifteen days, effective February 12, 1962, after finding the appellant guilty of the sale and delivery of alcoholic beverages in original containers for off-premises consumption on Sunday, December 17, 1961, in violation of Rule 1 of State Regulation No. 38, and for failing to have its entire premises closed, in violation of local ordinance.

"Upon the filing of the appeal, an order was entered on February 9, 1962 staying respondent's order of suspension until further order of the Director. R.S. 33:1-31.

"Appellant, in its petition of appeal, alleges that respondent's action was erroneous because its decision was

contrary to the weight of the evidence.

"Respondent, in its answer, denies appellant's allegation and contends that its determination was fair, reasonable and just, and was based upon the factual testimony adduced before it.

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

"The transcript of the proceedings before the respondent Board was received in evidence, and additional testimony was presented by appellant, in accordance with Rule 6 of such Regulation.

"A local police captain testified in support of the within charge before the local Board and his testimony was supported by additional testimony adduced on this appeal by a fellow officer, and John Miller, the alleged purchaser. The evidence in support of this charge, succinctly stated, reflects the following facts: As a result of information obtained by the local police authorities, police officers stationed themselves in a police car within one-half block from the licensed premises, on Sunday, December 17, 1961, at approximately 9:20 a.m. Shortly thereafter, Miller was observed entering a hallway leading to the rear entrance of the said premises and, about fifteen minutes thereafter, was observed emerging therefrom with a six-pack container of beer. After he proceeded about 25 yards therefrom, he was apprehended by the said officers and questioned with respect thereto. He stated that he had purchased these alcoholic beverages on the previous evening, and had merely stopped by at the licensed premises to pick them up.

"The officers returned with him to the tavern where they questioned Louis Barone, the manager, and, in the presence of Barone, Miller then admitted that he had purchased these beverages on that morning. Barone denied making the sale or the delivery. Present at the time of this confrontation was a woman (later identified as Dorothy Mundrick) and a man who was employed as a porter by the licensee. Barone and Miller then proceeded to Police Headquarters in the company of the two officers, and Miller again recanted the story to the effect that he had purchased these beverages on the previous night and simply returned to pick them up. However, upon further questioning, he reverted to his account given in the tavern, namely, that he had made that purchase on that morning.

"John Miller, in furtherance of his account of the purchase, testified that he was a former employee of the licensee and is presently employed at a local hospital as a handyman; and, on the morning in question, was requested by some friends of his landlord to make a purchase of alcoholic beverages. He was handed ten dollars and he proceeded to these premises, purchased a pint of whiskey and a six-pack of Ballantine beer. He further testified that he was admitted into the premises by a porter; that Barone sold him the beer and the whiskey and gave him change for the ten dollars. After he was accosted by the police officers and returned to the premises, he then gave the whiskey to the woman who was seated at the bar, and was undetected in this maneuver by the officers. However, he did not mention anything about the purchase of the whiskey until he testified at the hearing before this Division. He denied that he had any personal animosity toward the licensee, but took strong exception to a newspaper article which referred to him as having been discharged by the appellant about a year ago.

"Louis Barone, the manager of the said premises, testified that the first time he saw Miller that morning was when he obtained entrance into the premises, in the company of police officers. He denied that he had made any sale of alcoholic beverages to Miller, and does not even recall that Miller made such purchases on the previous evening, although he was in the tavern at that time.

"On cross-examination he was asked:

Q. 'Now, all that time you heard the detectives asking Mr. Miller these questions and Mr. Miller was giving the answers; isn't that right?'

A. 'That's right.'

Q. 'And you were sitting there?'

A. 'That's right.'

Q. 'Did you say anything?'

A. 'No.'

Q. 'You just stated you didn't make any statement?'

A. 'Nothing.'

Q. 'Did you tell the detectives that you wanted to give a statement and deny the allegations?'

A. 'No.'

Q. 'You didn't voluntarily give a statement?'

A. 'No. I don't believe it was my business. It was not my business to give any.'

Q. 'This morning, this Sunday morning when you were down at the Detective Bureau, you didn't give any statement at all?'

A. 'No, I didn't.'

"He explained that the reason that Miller made this inculpatory allegation was that Miller did not like him, and had tried to get him into trouble because he had 'fired' him previously.

"Dorothy Mundrick testified that she is employed as a part-time bookkeeper for the licensee and entered the premises a few minutes prior to the return of Miller to the premises, who was accompanied by the police officers. In her presence, Miller stated that he had purchased the beer on the night before, but that he was drunk and therefore left the carton there until that morning. She also asserted that Barone denied the sale of any alcoholic beverages on that morning and, shortly thereafter, the four men left to go to Police Headquarters.

"On cross-examination, she explained her presence as part of her regular weekly duties is making an inventory of the open stock of the licensee.

"This case represents a sharp conflict in the testimony

produced by both sides and its fundamental aspect must be determined by an evaluation of the credibility and veracity of the witnesses. Having carefully considered the testimony herein, having observed the demeanor of one of the police officers, and Miller, who were the only witnesses who testified before me, I am persuaded that a sale and delivery of alcoholic beverages were made to Miller on the morning in question.

"I am mindful of the alternating version of what appeared on this morning as given by Miller and I do not either justify or condone his changing testimony, or his attitude. However, a realistic analysis of his testimony would indicate that when he appeared under oath before me, he related a credible and accurate story.

"I believe that when he was first apprehended by the police officers, he tried to protect the licensee (although this also would have included his apprehension on possible criminal charges against him). When he returned to the premises with the officers, he then admitted that he made the purchase on that morning. I believe it is inconsonant with experience and common sense to accept an explanation that these alcoholic beverages were purchased on the previous night and that he was merely obtaining delivery thereof of this morning. In fact, Barone says that he did not see Miller in the premises on the previous night, and, according to his testimony, Miller had never entered the premises after he was discharged from his employment at that place.

"I do not believe that Miller intended to enter into a conspiracy to inculcate the appellant; on the contrary his actions bespeak a desire to save it harmless, until he was questioned in detail by the police officers and decided to tell the truth.

"The general principle of law is that a trier of facts may accept in whole, or reject in whole, or may accept in part, or reject in part, the testimony of a witness. He must determine the credibility of a witness, and act accordingly. 98 C.J.S., page 321.

"The reasonableness or probability of a witness' testimony bears on his credibility. 98 C.J.S. at page 340 and cases cited therein. Based on these principles, I cannot believe that, considering the strained relationship between Miller and the appellant, its agents and employees, Miller would have purchased alcoholic beverages and left it on its premises for redemption at a later time. If he was sober he would certainly have taken such beverages with him; if he was drunk as is suggested by the appellant's testimony, no beverages should have been sold to him (if indeed they were on that night), nor would Miller have had the mental capacity to authorize the appellant to hold such purchase in escrow. Thus, this testimony must be weighed on the scale of common experience.

"The most positive testimony of a witness may be contradicted by circumstances in evidence or by common experience or by common principles by which the conduct of mankind is governed. Cf. Tierney v. Hotz, 141 N.J. Eq. 114, 56 Atl. 2nd 39.

"All of the testimony of a witness is to be considered in determining his credibility, and in that context, the trier of facts must make his own evaluation. Cf. State v. Guida, 118 L. 289, 192 Atl. 445; 119 N.J.L. 464, 196 Atl. 711. The version

given by Miller and the police officers is consistent with such experience and common sense.

"Barone, the manager, refused to make any statement in explanation or in denial; and such refusal in the face of this serious accusation raises a strong inference that he could not honestly deny the same.

"The testimony of the police officers appears to be forthright and credible, and there is no evidence or indication of any improper motivation on their part. On the other hand, the testimony of Mrs. Mundrick is flavored by strong partiality because of her friendship for and employment by the manager of the appellant. In addition, she was not present at the time of the alleged purchase and, therefore, could not testify with respect thereto.

"I am therefore persuaded that the respondent has established its case by a fair preponderance of the believable evidence. Meyer's Tavern v. Newark, Bulletin 1271, Item 2.

"I conclude therefore that appellant has failed to carry the burden of establishing that respondent's action was erroneous and against the weight of the evidence; and I recommend that an order be entered affirming the action of the respondent, and fixing the date during which the fifteen-day suspension shall be effective."

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

After carefully considering the evidence and exhibits herein and the oral argument presented at the hearing, I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 2nd day of May, 1962,

ORDERED that the action of the respondent be and the same is hereby affirmed; and it is further

ORDERED that the fifteen-day suspension heretofore imposed by respondent, and stayed during the pendency of this appeal, be restored against license C-105 held by Barone's Lounge, Inc., for premises 217-219 Straight Street, Paterson, to commence at 3:00 a.m., Wednesday, May 9, 1962, and to terminate at 3:00 a.m., Thursday, May 24, 1962.

WILLIAM HOWE DAVIS
DIRECTOR

3. APPELLATE DECISIONS - HIDDEN BROOK LOUNGE, INC. v. BLOOMFIELD.

HIDDEN BROOK LOUNGE, INC.,)
)
 Appellant,)
)
 v.)
)
 TOWN COUNCIL OF THE TOWN OF)
 BLOOMFIELD,)
)
 Respondent.

ON APPEAL
CONCLUSIONS
AND ORDER

 Camarata & Colonna, Esqs., by Michael T. Colonna, Esq., Attorneys
 for Appellant
 Joseph D. Lintott, Esq., by Henry Sant'Ambrogio, Esq., Attorney
 for Respondent

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

"This is an appeal from the action of respondent Town Council whereby on February 28, 1962, the Mayor of the Town of Bloomfield vetoed a resolution passed by the respondent Council on February 19 which in effect acted as a denial of the appellant's application for the transfer of a plenary retail consumption license from Cornelius Devine to appellant Hidden Brook Lounge, Inc., and from premises 122 Bloomfield Avenue to a building to be constructed at 13-15 Henry Street, Bloomfield. Four members of the local issuing authority voted to grant and three members, including the Mayor, voted to deny said application. Thereafter the Mayor vetoed said resolution.

"The petition of appeal alleges in effect that the action of respondent's Mayor in vetoing the resolution of February 19 for the reasons set forth in his letter of veto was arbitrary, unreasonable and an abuse of discretion on the part of the issuing authority.

"The answer of the respondent sets forth in effect that

- (1) The Mayor had the authority to veto the resolution passed by the Council and did exercise his prerogative of the right to veto, which was within his discretion so to do;
- (2) A copy of the Mayor's letter of veto annexed to the answer sets forth that his reason for so vetoing is that the resolution, if permitted to take effect, would transfer the said license to a location on which there is no existing building from which a cocktail lounge or tavern business might be conducted, nor is there any construction under way at the site of the proposed transfer.
- (3) That the respondent's action in denying said application was valid and lawful in all respects.

"When the notice of appeal was filed the transferor Cornelius Devine, t/a Neil's Bar and Grill, was included as a party appellant. Prior to the hearing the petition of appeal was properly amended to delete the name of the transferor as a

party appellant since the transferor is not a proper party to these proceedings. Barrasso v. Irvington et al., Bulletin 1319, Item 2.

"At the hearing herein a stipulation of facts was submitted in evidence in accordance with the provisions of Rule 8 of State Regulation No. 15. Oral argument was offered on behalf of the appellant and the respondent. The appellant also submitted a written brief and leave was given to the respondent to file an answering brief thereto.

"The picture, as reflected by the stipulation of facts, is as follows: The appellant entered into an agreement with the transferor to purchase the aforesaid plenary retail consumption license and have it transferred to a vacant site on which a building is to be constructed. Application was made for the said transfer; a copy of the plans and specifications was filed with the building inspector and the Town Clerk pursuant to Rule 2 of State Regulation No. 6, and full advertising compliance was had preparatory to said application.

"The stipulation further sets forth that the premises to which the transfer is sought are located in an industrial and business zone, and such zoning permits 'restaurants, tea rooms, cafes and other places serving food or beverages.' Thus the establishment of a cocktail lounge and restaurant in said zone is not contrary to such zoning requirements.

"This application for a place-to-place and person-to-person transfer was set down for a hearing before the Town Council on February 5, 1962. At that time the Mayor announced that the matter would be adjourned to February 19, 1962, during which period the matter would be discussed at a regular conference meeting of the Council. On February 19, 1962, this matter was opened for action. No persons appeared in objection to the transfer, and the only person who spoke in connection therewith was the attorney for the appellant who urged that the resolution be adopted. The resolution was thereupon adopted by a vote of four-to-three (with the Mayor opposed) in the following form:

'BE IT RESOLVED, by the Town Council of the Town of Bloomfield that Plenary Retail Consumption license #C-28 of Cornelius Devine, t/a Neil's Bar-Grill, 122 Bloomfield Avenue, Bloomfield, New Jersey, be transferred to Hidden Brook Lounge, Inc., t/a Hidden Brook Lounge, 13-15 Henry Street, Bloomfield, New Jersey, and

'BE IT FURTHER RESOLVED, that the approval of this Council of such transfer be made by written endorsement thereof upon the face of the license in the form prescribed by law and become effective at 12:01 a.m. on February 20, 1962; it being understood that said license shall be held in Escrow by the Town Clerk until the building is completed at the premises 13-15 Henry Street, Bloomfield, New Jersey.'
(Emphasis ours.)

"Following the adoption of the resolution the transferor closed his place of business on February 20, discharged his employees and notified his landlord that he would vacate the premises on or before March 31, 1962.

"The stipulation further sets forth that the charter of the Town of Bloomfield vests in the Mayor the power of veto and

that in accordance therewith (by letter dated February 28, 1962, addressed to the Town Clerk) the Mayor exercised said veto. In the said letter the Mayor set forth as his reason for vetoing the said resolution that no building exists at the proposed place of transfer, nor is there any construction of any kind on the way at the premises at this time. He stated further that, after the building was completed, the Town Council would be able to decide from the actual physical facilities whether the location was suitable for the sale of alcoholic beverages.

"The matter was reintroduced at the next meeting of the respondent on March 5, 1962, and a resolution to override the Mayor's veto, which required the affirmative vote by at least two-thirds of the vote of the members, was defeated, the vote to override being four in favor and three opposed.

"It was further stipulated that the contract between the transferee and transferor, and the closing of title to the major portion of the premises on which this facility is to be constructed, were contingent upon the approval of this application, it being the intention of the appellant to build a combination bowling alley, cocktail lounge and restaurant at an estimated cost of approximately \$600,000.

I

"This appeal is not from the action of the respondent Town Council (although the effect is probably the same) but is actually an appeal from the 'arbitrary and unreasonable action of the Mayor in using a power of veto to thwart the will of a majority of that issuing authority because he happens to be a member of the minority opposed to the transfer.' This is the language employed by counsel for the appellant in his well prepared and articulate brief. Counsel has suggested in his oral argument before me (although nowhere is it mentioned in the written memorandum) that the Mayor's right to veto is limited to legislative acts of the Council and not to administrative acts.

"This argument appears to me to carry much force and logic. In the case before us the Council, by a majority vote, granted the said application. When the Council did so it acted not as the legislative branch of the municipality but as an excise board operating under the authority of New Jersey R.S. 33:1-19 which reads as follows:

"It shall be the duty of the governing board or body of each municipality, except in such municipalities as shall have created municipal boards pursuant to this chapter, in which latter event it shall be the duty of such respective municipal boards, to administer the issuance of all other licenses within their respective municipalities, in accordance with this chapter, and forthwith to report the issuance of all such licenses to the commissioner. The issuing authorities constituted by this section are sometimes hereinafter referred to as "other issuing authority." (Under-scoring added.)

"Nowhere in this section is the Mayor given the authority or power to veto the actions of such 'other issuing authority' and, thus, the actions of this excise board are governed by the common law principle that a majority of the quorum present constitutes valid action. It is the well established rule that, where a veto power is vested in the Mayor, it relates to legislative, as distinguished from merely administrative, acts.

Wilson v. Potts, 120 N.J.L. 131, 198 Atl. Rep. 388. See 62 C.J.S. Municipal Corporations, Sec. 423 (p. 810).

"In Manno v. Clifton, 14 Super. 100, the plaintiffs were charged with violations of the Alcoholic Beverage Law. A hearing was held on those charges by the municipal Council consisting of seven members, five of whom were present at the hearing, and they found the plaintiffs guilty of the said charges. Plaintiffs then urged before the court that the affirmative vote of a majority of all seven members of the Council was necessary to take action thereon, citing the pertinent statute of the Municipal Manager Act under which the said Council assertedly acted. The court held differently and stated:

'In the instant case, the municipal council was not exercising any power granted to it by the Municipal Manager Act; it was acting pursuant to the provisions of the Alcoholic Beverage Control Act, R.S. 33:1-1 et seq., from which statute a municipality derives its power as the "other issuing authority," R.S. 33:1-19. The state-wide policy of the Legislature as evidenced by the Alcoholic Beverage Control Act governs the procedure applicable to municipal bodies acting as the "other issuing authority." The act contains no provision requiring a majority vote of all members for valid action. Accordingly, the common law rule applies. Hutchinson v. Belmar, 61 N.J.L. 443, 449 (Sup. Ct. 1898), affirmed 62 N.J.L. 450 (E. & A. 1898); Housman v. Earle, 98 N.J.L. 379 (Sup.Ct. 1922); Matthews v. Asbury Park, 113 N.J.L. 205 (Sup.Ct. 1934).'

"In Matthews v. Asbury Park, supra, the court refers to the Housman case as emphasizing that the common law rule, by reason of an absence of statutory provisions, was followed, namely, that a majority of the quorum was all that was necessary. The court stated that, when the councilmen (in Matthews v. Asbury Park, supra) issued the license, they did not act under the Home Rule Act but did so by virtue of the provisions of the Alcoholic Beverage Control Act under which they were constituted as the issuing authority; 'that since the Control act does not prescribe how many in number of the issuing authority shall constitute a quorum and since it does not prescribe how many votes shall be necessary to issue a license, therefore, the common law rule, as announced in Housman v. Earle, supra, is applicable.' This principle was affirmatively quoted in Broadley v. Clinton et al., Bulletin 2245, Item 1.

"Thus it is clear that, since there is nothing in the Alcoholic Beverage Control Act which permits the Mayor to exercise the right of veto of acts of the issuing authority, the common law prevails wherein the Mayor does not have that right and valid action can be obtained by the affirmative vote of a mere majority of a quorum. I, therefore, believe that the Mayor's action in this case was invalid regardless of his reason, and that the affirmative action of the Council in granting said application should be sustained.

II

"The crucial issue herein, as conceived by the attorneys for the appellant, is whether the respondent Mayor acted arbitrarily and with an abuse of discretion (assuming that he had the authority to act) when he vetoed the subject resolution for the assigned reason that there was no building constructed or in the process of construction at the time of the consideration of the said application for transfer. The Mayor further stated in his letter of veto:

'After the building is constructed at 13-15 Henry Street, the Town Council will be able to decide from actual physical facilities whether the proposed location is a suitable place for the retail dispensing of alcoholic beverages.'

"In the Stipulation of Facts it is agreed that the premises at 13-15 Henry Street are presently vacant and do not contain thereon any building in which alcoholic beverages might be sold or served. It was further stipulated that a copy of the plans, with specifications thereon, was filed in full compliance with Rule 2 of State Regulation No. 6. It is clear that the issuing authority has the right to grant the license or the transfer subject to an express condition that the license shall not be issued unless and until the premises described in the plans and specifications submitted shall first be completed. Haines v. Pemberton Bulletin 851, Item 10.

"The Mayor was either unaware or misinformed of N.J. R.S. 33:1-32, which reads as follows:

'Subject to rules and regulations, each issuing authority by resolution, first approved by the commissioner (now director), may impose any condition or conditions to the issuance of any license deemed necessary and proper to accomplish the objects of this chapter and secure compliance with the provisions hereof, and all such licenses shall become effective only upon compliance with the conditions so stated and shall be revocable for subsequent violation thereof.'

And Rule 1 of State Regulation No. 2 provides, in pertinent part:

'If the application is for a building not yet constructed, plans and specifications of the proposed building shall accompany the application',

clearly indicating the propriety of licensing premises not yet constructed, subject, of course, to appropriate special condition imposed pursuant to R.S. 33:1-32. It is emphasized that the license does not become effective until the conditions are complied with, i.e., until the building meets with the approval of the local authorities charged with seeing to it that the buildings were constructed in accordance with the filed plans and specifications. Re Murphy, Bulletin 389, Item 11.

"The resolution herein contains the express condition that 'it being understood that said license shall be held in escrow by the Town Clerk until the building is completed at the premises 13-15 Henry Street, Bloomfield, New Jersey.' It is implicit that the building will not only be completed but in full accordance with the plans as approved by the building inspector.

"However, it would be unfair and unnecessary, in my opinion, to require appellant to spend hundreds of thousands of dollars for construction and implementation without first ascertaining the attitude of the issuing authority. A similar situation existed in Passarella v. Atlantic City, 1 N.J. Super. 313. This was an appeal from the granting of a transfer by a local issuing authority to premises on which there was no building. Judge Eastwood, speaking for the Superior Court of New Jersey, said:

'*** While the applicable law makes no specific reference to the issuance or transfer of liquor licenses to vacant lands subject to the erection and construction of a proper building within which to conduct a liquor business, the Commissioner, under authority delegated to him by the Legislature and expressly found in R.S. 33:1-23 and R.S. 33:1-39, has consistently ruled that the municipal issuing authority may grant an application for liquor license pursuant to R.S. 33:1-32 upon "the express condition (imposed in the authorizing resolution, pursuant to Revised Statutes, 33:1-32) that the premises as described in the plans and specifications prepared and submitted by the applicant and found acceptable by the issuing authority shall first be completed. (Re Harris, Bulletin 183, Item 11; Re Salter, Bulletin 184, Item 8; Re Murphy, Bulletin 389, Item 11.)" Under the authority of this rule, the municipal body may not actually issue the license until the premises are completed in accordance with the filed plans and specifications.'

"Judge Eastwood discussed the problem imposed as to whether an applicant can expect an affirmative expression on the part of the issuing authority prior to the construction of a building in the following language:

'*** In addition, Venafro's application for transfer of his license was justified, to the end that he might ascertain the attitude of the municipal body with respect thereto. Otherwise he would have been burdened with the expenditure of a large sum of money to erect and construct a building on the vacant lot in question at the risk of the possible refusal of the municipal body to approve such a transfer.***'

Cf. Zelko v. Hillside et al., Bulletin 1315, Item 1.

"The very purpose of filing plans and specifications is to give the issuing authority the opportunity to determine whether the proposed building and premises meet their requirements and are suitable. It would be unfair and highly prejudicial to require that, in addition to the filing of the plans, an applicant spend considerable sums of money before the issuing authority expresses its attitude. To insist that such be done and to assign that as the full reason for vetoing a resolution is, in my judgment, an arbitrary and unreasonable act.

"I am, therefore, persuaded that, even if the Mayor had the authority to veto, his actions herein were clearly arbitrary and such action would require a reversal.

III

"The principle is well established that the transfer of a liquor license is not inherent in the license but is, rather, a privilege which the issuing authority may grant or deny in the exercise of reasonable discretion. Rokay Wines & Liquors, Inc. v. Passaic, Bulletin 1198, Item 1. On the other hand, where it appears that the refusal of a transfer is arbitrary and unreasonable, the action of the respondent in denying the transfer will be reversed. Witty's Liquors, Inc. v. Rahway, Bulletin

1261, Item 1. I am persuaded that the 'other issuing authority' fully considered the merits of this application and, in their votes at two meetings, decided that such approval would be in the best interests of the community. I believe that the respondent Mayor did not have the authority to veto and that, even if he did have the authority, he acted arbitrarily in vetoing the same for the reason assigned by him therefor.

"Because of the reasons herein stated I, therefore, recommend that an order be entered herein reversing respondent's action and directing respondent to grant the transfer of the license in accordance with the application filed by appellant and upon the express conditions imposed in the subject resolution."

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

It should be pointed out that the Hearer inadvertently referred to a purported resolution introduced at a Council meeting after the Mayor vetoed the original resolution referred to hereinabove. This was in error. The fact, as set forth in the Stipulation of Facts, is that no new resolution was introduced. Counsel for the appellant sought to have respondent introduce an overriding resolution which would have required a two-thirds vote of the Council for passage but, after the two councilmen expressed their opinion that they would not change their vote as previously recorded on any resolution to override the Mayor's veto, no such resolution was introduced.

I have carefully considered the evidence, exhibits, written briefs of counsel submitted at the conclusion of the hearing, the written exceptions and answers thereto, and I concur in the findings and conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 2nd day of May 1962,

ORDERED that the action of the respondent be and the same is hereby reversed, and the respondent is directed to grant the transfer of the license in accordance with the application filed by appellant and upon the express conditions imposed in the subject resolution.

WILLIAM HOWE DAVIS
DIRECTOR

4. DISCIPLINARY PROCEEDINGS - VIOLATION OF STATE REGULATION NO. 38 - PRIOR SIMILAR RECORD - LICENSE SUSPENDED FOR 30 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against 74 Hamilton Ave. Corp. t/a Joy House 74 Hamilton Avenue Paterson 1, N. J.

CONCLUSIONS AND ORDER

Holder of Plenary Retail Consumption License C-231, issued by the Board of Alcoholic Beverage Control for the City of Paterson.

George S. Grabow, Esq., Attorney for licensee. Edward F. Ambrose, Esq., Appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Licensee pleads non vult to a charge alleging that at 11:00 p.m. on Wednesday, February 7, 1962, it sold a pint bottle of wine for off-premises consumption, in violation of Rule 1 of State Regulation No. 38.

Licensee has a previous record of similar violation, by reason of which its license was suspended by the Director for ten days effective November 20, 1961. Re 74 Hamilton Ave. Corp., Bulletin 1428, Item 9. The prior record considered, the license will be suspended for thirty days, with remission of five days for the plea entered, leaving a net suspension of twenty-five days. Re Corris & Riccardi, Bulletin 1407, Item 8.

Accordingly, it is on this 7th day of May, 1962,

ORDERED that Plenary Retail Consumption License C-231, issued by the Board of Alcoholic Beverage Control for the City of Paterson to 74 Hamilton Ave. Corp., t/a Joy House, for premises 74 Hamilton Avenue, Paterson, be and the same is hereby suspended for twenty-five (25) days, commencing at 3:00 a.m. Monday, May 14, 1962, and terminating at 3:00 a.m. Friday, June 8, 1962.

[Handwritten signature of William Howe Davis]

William Howe Davis Director