
George Michaels Rest., Inc. v. Council of Borough of Lodi
Cite as 2 *N.J.A.R.* 318

**GEORGE MICHAELS RESTAURANT, INC.,
t/a GEORGE MICHAELS DINER,**
Appellant,
v.
**BOROUGH COUNCIL OF THE BOROUGH
OF LODI,**
Respondent.

Decided March 20, 1980

Initial Decision

SYNOPSIS

The local municipality denied an application for a person-to-person and place-to-place transfer of a plenary retail consumption license on the grounds that the proposed premises would be located within 500 feet of an already existing license in violation of a borough ordinance.

The administrative law judge determined that the applicant had shown by a preponderance of the evidence that the denial of the transfer was unreasonable and inconsistent with existing case law. Under such law, the distance from the proposed premises to the nearest licensed premises is more than 500 feet when measured, not in a straight line across a highway, but in the normal way that a pedestrian would lawfully walk. Thus, the transfer should be approved.

Jeffrey J. Grenell, Esq., for the Appellant

John M. DiMaria, Esq., for the Respondent

SAMUELS, ALJ:

The appellant, George Michaels Restaurant, Inc., t/a George Michaels Diner, applied to the respondent, Borough Council of the Borough of Lodi, for a person-to-person and place-to-place transfer of Plenary Retail Consumption License Number 0231-33-045-001. By resolution, dated June 14, 1979, the respondent denied the transfer, based upon the appellant's alleged inability to comply with a Borough ordinance that prohibits issuance or transfer of a plenary retail consumption license to an applicant whose premises would be located within 500 feet or less from an already existing

license. An appeal was filed by the appellant alleging that the respondent improperly interpreted and applied the ordinance in measuring the distance between the applicant's premises and another existing licensee.

The matter was transmitted to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A. 52:14F-1 et seq.* A hearing was held on December 4, 1979, in the Bergen County Courthouse, Hackensack, New Jersey. Post-hearing Briefs and Memoranda were filed by the parties and the record was closed on January 22, 1980.

The sole issue to be decided is whether the appellant's premises are located more than or less than 500 feet from another licensed premises (The Cottage Inn). The answer to this question depends upon how the distance between the two premises should be measured. The method of measurement depends upon an interpretation of the relevant portion of the Borough ordinance. The parties stipulated that, except for the above dispute, all other proceedings in the application process were properly taken and no other impediments existed in connection with the application.

Ordinance No. 925 provides as follows, in pertinent part:

Section 1. No plenary retail consumption liquor licenses or plenary retail distribution liquor license except renewals for the same premises and transfer of licenses from person-to-person within the same premises shall be granted, or transferred to other premises within a distance of 500 feet from any other premises then covered by, (a) any other plenary retail consumption liquor license, (b) or any plenary distribution liquor license, provided, however, that a transfer shall be granted for any existing license to the same licensee only, to the other premises within 750 feet of the premises from which the transfer is made, notwithstanding that the license so transferred is within 500 feet of an existing plenary retail consumption or distribution liquor license, provided, however, that such transfer shall be made in good faith and shall be solely for the benefit of the same licensee.

Section 2. The aforesaid 500 feet as set forth in Section 1 above shall be measured in the normal way that a pedestrian would properly walk from the nearest entrance of licensed premises to the nearest entrance of the premises sought to be licensed. . . .

How should the 500 feet be measured - "*in the normal way that a pedestrian would properly walk*" from the nearest entrance of an already licensed premises (The Cottage Inn) to the nearest entrance of the premises sought to be licensed (Michaels Diner)?

The two premises involved are located on opposite sides of U.S. Highway 46. If the measurement is made on a direct straight line across the road (the method used by the Borough of Lodi), then the two premises are no more than 200 or 300 feet from each other and the ordinance would be violated

if the transfer of license is granted to the applicant. On the other hand, if the measurement is made by going east or west along one side of the highway, approximately one-half mile to a vehicular turn-around, and then back one-half mile along the other side of the highway (as urged by the appellant), then the two premises would be approximately one mile (5,280 feet) apart, and the ordinance would not be violated by issuance of the license. These approximate distances are not in dispute, having been stipulated by the parties.

William E. Jerlat, President of the South Bergen County Licensed Beverage Association, testified for the respondent regarding the intent of the Borough when the ordinance was passed 17 years ago. Mr. Jerlat had assisted in drafting the ordinance. Prior to 1962, Route 46 in Lodi was known as the "Sin Strip" due to the large number of bars and taverns, on both sides of the highway, catering to undesirable elements who moved back and forth across the highway from one bar to another. The problems caused by the "Sin Strip" culminated in the shooting and killing of two policemen in one of the bars. The Borough then passed the ordinance in question, in an attempt to clean up the strip. According to Mr. Jerlat, the ordinance has served its purpose. Ten or twelve bars in 1962 have been reduced to five licensed establishments now located on the same length of highway, and all of them are characterized as restaurants instead of merely bars or taverns.

John Palino is a principal in the Cottage Inn, located directly across Route 46 from Michaels Diner. The Cottage Inn has been holder of a plenary retail consumption liquor license in the same location for 25 years. Mr. Palino testified that people often cross Route 46 on foot, going directly from his premises to Michaels Diner. According to Mr. Palino, many of his customers regularly walk across the road to the diner for coffee or breakfast. Truck drivers park on his premises and go across, also. There is a trailer park adjacent to the diner, and Mr. Palino sees children who live there cross the highway every school day to go home after being dropped off by the school bus. In the morning, the same children cross Route 46 to wait for the bus. In addition, people alighting from commuter buses cross the highway. Mr. Palino also testified that, in the summer, employees of Michaels Diner purchase ice from his establishment. They walk across Route 46 with an empty barrel and return the same way after he fills it for them with ice. Mr. Palino stated that the above situation has existed for all of the 25 years he has been there. He has never seen police stopping any of these pedestrians when they cross the highway.

A series of photographs were introduced into evidence illustrating the highway and the areas in question. Among other things shown in these

George Michaels Rest., Inc. v. Council of Borough of Lodi
Cite as 2 *N.J.A.R.* 318

photographs are school children alighting from a school bus and walking across the highway. No traffic control device, marked crosswalk or crossing guard is present.

An unbroken median strip or island divides the highway for many hundreds of yards in each direction in the vicinity of Michaels Diner and The Cottage Inn. The median strip is five to six feet wide and is paved with asphalt between concrete curbing. The paving is turtlebacked or convex, reaching a height in the center of approximately eight to ten inches from the road surface on either side. Route 46 is a major U.S. highway that traverses the entire State of New Jersey from east to west. Its speed limit in the heavily traveled four-lane section in Lodi is 55 miles per hour, and there is no marked or controlled pedestrian crossing in sight in either direction near the two establishments involved.

Michael Kumaras, an officer of George Michaels Diner, Inc., testified that if he wanted to cross Route 46 near his diner without walking directly across the road, he would have to walk at least a quarter mile east to west to the nearest overpass or crossroad and than a quarter mile back, totalling approximately a half-mile for the complete trip from his diner to The Cottage Inn. Mr. Kumaras also has seen people regularly crossing on foot. He acknowledged that it might be hazardous, but when his establishment needs ice they don't think of that. He opined that those who cross knowingly assume the risk of being hit by an automobile.

Harry Baker is a licensed real estate broker who was produced by the appellant to testify more accurately to the distances and physical layout of Route 46. Mr. Baker indicated that the nearest pedestrian crossings to Michaels Diner are seven-tenths of a mile in either direction, east or west.

In drafting Ordinance No. 925, the governing body clearly looked to a closely related State statute for a standard by which distance should be measured. *N.J.S.A.* 33:1-76 prohibits the sale of alcoholic beverages within 200 feet of any church or school. The statute further specifies the manner in which the 200 feet should be measured:

. . . Said two hundred feet shall be measured in the normal way that a pedestrian would properly walk from the nearest entrance of said church or school to the nearest entrance of the premises sought to be licensed. . . .

The language of Ordinance No. 925 is identical in the above respect and no different or additional criteria for measurement are expressed in the ordinance. Therefore, the existing interpretation of the method of measurement applied by the courts to *N.J.S.A.* 33:1-76 should be applied to Ordinance No. 925.

In each of the cases involving disputed methods of measurement under

N.J.S.A. 33:1-76, the courts have attempted to decide whether a route that might be taken by a pedestrian to get from Point A to Point B would be considered a *proper* route, or one by which "a pedestrian would properly walk." Once a route or routes have been declared to be proper, then the shorter of two such proper routes would govern. *Karam v. Alcoholic Bev. Control Bd. of West Orange*, 102 *N.J. Super.* 291 (App. Div. 1968).

The question was dealt with at length in *Hopkins v. Municipal Board of Alcoholic Beverage Control of City of Newark*, 4 *N.J. Super.* 484 (App. Div. 1949), where the court ruled that it was "lawful" for pedestrians to cross a street within the confines of a "T" intersection, despite the fact that there was no traffic signal or marked crosswalk at that location. In *Hopkins*, the court cited *Clarkson v. Ley*, 106 *N.J.L.* 380 (E. & A. 1929), where the court also discussed and referred to crossing at the intersection of streets.

In *Presbyterian Church, etc. v. Div. of Alcoholic Beverage Control*, 53 *N.J. Super.* 271 (App. Div. 1958), the court held that the average pedestrian could rightfully assume that a painted crosswalk on a county road was authoritative and, therefore, such average pedestrian would properly follow the painted sidewalk, even though local police authorities had failed to obtain the approval of the Director of Motor Vehicles. The crosswalk was intended to be part of a county crosswalk traffic program.

The latest case to discuss the question was *Karam et al. v. Alcoholic Beverage Control, et al., supra*, which was primarily decided because a wall was built as a device to compel people to walk around to a more distant entrance of a licensed premises, in order to artificially extend the distance between premises. In discussing the question of measurement, *Karam* refers to a route as being impermissible because of pedestrian safety.

All of the foregoing are concerned with whether a pedestrian route is proper or lawful. The courts have looked for and found intersecting streets, or crosswalks painted by municipalities, to indicate normal pedestrian routes across the streets; which routes indicate some attempt at regulating safe and proper places at which pedestrians are normally expected to cross. None of these normal indicators of propriety or lawfulness are present in the case at hand.

N.J.S.A. 39:4-34 was cited by the court in *Hopkins, supra*, to support approval of a proper crossing at the "T" intersection. The statute reads, in part:

Where traffic is not controlled and directed either by a police officer or a traffic control signal, pedestrians shall cross the roadway within a crosswalk or, in the absence of a crosswalk, and where not otherwise prohibited, at right angles to the roadway, and when crossing at a point other than at a crosswalk shall yield the right of way to all vehicles on

George Michaels Rest., Inc. v. Council of Borough of Lodi
Cite as 2 *N.J.A.R.* 318

the roadway. It shall be unlawful for a pedestrian to cross any highway, having roadways separated by a medial barrier, except where provision is made for pedestrian crossing. . . .

The second sentence of the above statute is cited by the appellant here, who argues that it specifically renders crossing U.S. Highway 46 and its medial barrier in Lodi unlawful, where there is no provision for a proper pedestrian crossing.

There was some doubt expressed by counsel for the respondent as to whether the median strip involved in this matter can qualify as a "medial barrier," within the meaning of the above statute.

A median strip is defined in *Webster's Third New International Dictionary of the English Language, Unabridged*, 1976 edition, as a "paved or planted strip of ground dividing a highway into lanes according to direction of travel." The word "medial" is defined as "being situated or occurring in the middle." The word "barrier" is defined as "an object that separates or keeps apart."

The obvious conclusion is that the median strip or island involved in this matter is a medial barrier as contemplated by the statute.

The Borough argues that those who cross Route 46 on foot are doing so in "the normal way that a pedestrian would properly walk" because some pedestrians regularly tempt the fates by making the crossing. Approval of such an interpretation by this court would produce a strained result and would sanction continuation of an exceedingly dangerous practice by pedestrians, especially unaccompanied school children. The fact that the police do not enforce *N.J.S.A.* 39:4-34 by issuing summonses to persons crossing the road and its medial barrier does not render the pedestrian practice proper or lawful.

As an additional argument in favor of applying the 500-foot distance restriction to this situation, the respondent has shown that the intent of the ordinance, when passed in 1962, was to cut down on the number of bars and taverns on both sides of Route 46. It is contended that, if the 500-foot distance cannot be measured directly across the road, then the foregoing intent can be thwarted. Evidently, the ordinance has not been challenged before in this regard and it has produced the desired result over the past 17 years. However, nowhere in the language of the ordinance is the above intent expressed or even implied. Section 2 of the ordinance clearly adopts the language of *N.J.S.A.* 33:1-76 in fixing the standard of measurement.

The Borough could easily have drawn the ordinance and the standard for measurement in a manner that would have expressed its intent, but it did not do so. The actual intent of the Borough, as testified to, is completely extrinsic from the language of the ordinance, which only parrots the

foregoing State statute. As has been said:

. . . this court is not free to indulge in a presumption, arising from a subsequent extrinsic exposition, that the local governing body intended something other than what was expressed. . . . Our courts will interpret and enforce the legislative will as written and not according to some supposed unexpressed intention. . . . *Petrangeli v. Barrett*, 33 *N.J. Super.* 378, 385-386 (App. Div. 1954)

See also, State v. Port Authority of N.Y. & N.J., 151 *N.J. Super.* 127, 137 (Law Div. 1977); *Siegal v. Newark*, 38 *N.J.* 57 (1962).

Having heard the testimony, observed the witnesses and reviewed the exhibits, the court **FINDS** the following facts, by a preponderance of the credible evidence:

1. The foregoing discussion is incorporated herein by reference.
2. In June 1979, the appellant, George Michaels Restaurant, Inc., t/a George Michaels Diner, applied for transfer of Plenary Retail Consumption License Number 0231-33-45-001 to its premises on U.S. Highway No. 46 in the Borough of Lodi.
3. U.S. Highway No. 46 at the above location is approximately 120 feet in width.
4. A restaurant known as The Cottage Inn is located directly across U.S. Highway 46 from Michaels Diner. The Cottage Inn is the holder of an existing plenary retail consumption liquor license.
5. The nearest entrance of Michaels Diner is approximately 200-300 feet from the nearest entrance of The Cottage Inn, measured by the shortest distance directly across U.S. Highway 46.
6. Ordinance No. 925 of the Borough of Lodi prohibits the issuance or transfer of a plenary retail consumption license for premises within a distance of 500 feet from the premises of any already existing plenary retail consumption licensee. The ordinance states that the 500 feet shall be "measured in the normal way that a pedestrian would properly walk from the nearest entrance of licensed premises to the nearest entrance of the premises sought to be licensed."
7. The respondent, Borough Council of the Borough of Lodi, denied the application for transfer, based upon its finding that the two premises are less than 500 feet apart, and that Ordinance No. 925 would be violated by issuance of the license. The Borough intended that the 500-foot measurement should be taken directly across the highway from one establishment to the other.
8. At the location in question, Route 46 is a four-lane major highway, running east and west, heavily traveled, with a speed limit of 55 miles per hour. It is divided in the center by an island or median strip five to six feet

George Michaels Rest., v. Council of Borough of Lodi
Cite as 2 *N.J.A.R.* 318

wide, paved with asphalt between concrete curbing, having a maximum height in the center of eight to ten inches above the road surfaces on both sides.

9. The median strip and the highway is continuous and unbroken for at least one half mile in both directions from the location of the George Michaels Diner and The Cottage Inn.

10. There are no traffic control devices, marked crosswalks or other visible provisions for pedestrian crossing over all of the distance of Route 46 described above.

11. Beyond the approximate half mile of distance in both directions from the affected premises, there are vehicular overpasses or crossroads that enable vehicles to exit Route 46 into other roads or turn back onto Route 46 going in the opposite direction. A round trip to Michaels Diner from The Cottage Inn or vice versa, by using either one of the vehicular overpasses or intersections in either direction would cover a distance of approximately one mile.

12. Various people regularly and habitually cross Route 46 and its median strip on foot, going directly to Michaels Diner from The Cottage Inn or vice versa. Such persons include those going from the restaurant to the diner for coffee or an early breakfast, truck drivers, commuters who alight from buses on each side of the highway, school children who are returning home or leaving on school buses, and employees of Michaels Diner who purchase ice from The Cottage Inn. When crossing the road in the above manner, all of the above persons walk only 200 to 300 feet from the nearest entrance of Michaels Diner to the nearest entrance of The Cottage Inn.

13. There is no traffic control device, marked crosswalk or other type of indicated pedestrian crossing at the above location. The flow of traffic on Route 46 is unrestricted, and those who cross do so at their peril by taking care to avoid oncoming vehicles.

14. Pedestrians crossing the median strip described above do so unlawfully, in violation of traffic regulations of the State of New Jersey, *N.J.S.A.* 39:4-34.

15. Persons crossing Route 46 on foot, going directly from The Cottage Inn on the north side of the highway to Michaels Diner on the south side of the highway, do not do so in the normal way that a pedestrian would properly walk.

16. There is no way that a pedestrian can properly walk to cross the highway at the location described above, except by using the same roundabout route normally used by motor vehicles. The nearest such overpass or turnaround is at least one-half mile from the two affected premises in either direction. That distance is far in excess of the 500-foot

George Michaels Rest. v. Council of Borough of Lodi
Cite as 2 *N.J.A.R.* 318

prohibition in the ordinance.

Under the foregoing facts and circumstances, this court is constrained to follow the prevailing case law, as discussed above, in applying standards for measuring the distance between the two establishments on opposite sides of Route 46; and the reasonableness of the municipality's action must be viewed in the light of such standards. *Fanwood v. Rocco*, 33 *N.J.* 404, 414 (1960).

It is, therefore, **CONCLUDED** that:

The appellant has shown, by a preponderance of the credible evidence, that the municipality's exercise of judgment and discretion in denying the transfer of license to the appellant was not reasonable and was inconsistent with the state of existing case law applicable to the foregoing facts. Under such law, as applied to the facts of this case, the distance from the appellant's premises to the premises of the nearest licensed premises is more than 500 feet, when measured in the normal way that a pedestrian would properly walk. Ordinance No. 925 would not be violated by the transfer.

It is, therefore, **ORDERED** that the denial by the respondent of the appellant's application for person-to-person and place-to-place transfer of the license be **REVERSED** and the transfer should be approved.

After reviewing this Initial Decision, the Division of
Alcoholic
Beverage Control on March 20, 1980 issued the
following Final Decision

Having carefully considered the entire rendered decision, I concur in the findings and recommendations of the administrative law judge, and adopt them as my conclusion review.