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**MARLBORO MANOR, INC.;**  
**A NEW JERSEY CORPORATION,**  
Appellant,  
v.  
**ALCOHOLIC BEVERAGE CONTROL BOARD**  
**OF THE TOWNSHIP OF MONTCLAIR,**  
Respondent.

Initial Decision: November 13, 1981 Final Agency Decision: December 22, 1981

Superior Court, Appellate Division Decision Appears at: 187 *N.J. Super.* 359 (1982)

**SYNOPSIS**

After the Township Council of Montclair denied appellant a place-to-place transfer of its liquor consumption license, an appeal was taken to the Division of Alcoholic Beverage Control and the matter was assigned to an administrative law judge.

The administrative law judge found that although the proposed site was in a primarily commercial zone and that while it met the 200 foot distance requirement from nearby churches, the churches had expressed adverse sentiments to locating the license at the proposed site.

The judge concluded that the respondent had acted unreasonably in its action denying the transfer in that it had failed to determine broad community sentiment and it had placed too great an emphasis on the objections of the churches. Accordingly, the judge ordered that the license be granted.

Upon review the Director of the Division of Alcoholic Beverage Control rejected the judge's initial decision determining that the judge had substituted his judgment on the facts for that of the Board of Commissioners.

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**Jack Gold, Esq.,** for appellant  
**Joseph C. Dickson, Jr., Esq.,** for respondent

**Initial Decision**

**JAHNKE, ALJ:**

This is an appeal from the action of respondent Alcoholic Beverage Control Board of the Township of Montclair, New Jersey, which by

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resolution dated August 4, 1981, denied licensee's application for a place-to-place transfer of plenary retail consumption license No. 0713-33-013-003, from 334 Grove Street to 600 Bloomfield Avenue.

The resolution states the denial is grounded upon substantial opposition from two churches not within the statutory prohibition 200 feet, but within close proximity thereto and further, that it is not within the public interest that alcoholic beverages be dispensed at the proposed location.

In its petition of appeal, the appellant contends that the action of respondent was erroneous. Further, such action was arbitrary, capricious and an unreasonable abuse of discretion in that the proposed location is available, is commercially zoned and is well beyond 200 feet of a church or school.

In its answer, respondent denies it acted arbitrarily or capriciously, denies that its action was an abuse of its discretion and avers its determination was made after full consideration of the public interest.

Respondent elected to offer the transcribed record of the proceeding before the local issuing authority in lieu of producing witnesses at this appeal *de novo* (*N.J.A.C.* 13:2-17-8). Appellant elected to present evidence. Respondent thereupon requested and was granted the right to present rebuttal witnesses. It was further stipulated and agreed by the parties that the proposed location to which the transfer is sought does not violate the 200 feet prohibition distance from a church or public school or private school not conducted for pecuniary profit (see *N.J.S.A.* 33:1-76).

The license herein was purchased by the present corporate licensee at a bankruptcy sale in January 1981, as an inactive license which had formerly been housed at the Marlboro Manor, located in a residential zone.

Appellant, having purchased the license, has sought to transfer the license to a commercial zone. Accordingly, appellant found the proposed site herein and made its application for transfer. Objections were filed, a hearing was conducted below, at which the local issuing authority voted to deny the transfer. By resolution incorporated with the minutes of the Township Council meeting of August 4, 1981, the local issuing authority voted to deny, based on substantial opposition from two nearby churches not within 200 feet of the proposed premise, but within close proximity and further, that it is not within the public interest that alcoholic beverages be dispensed at the proposed location.

The minutes further disclose the statement of Mayor Mochary in which she comments that she is aware of the difficulties in finding a

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location not proximate to a school or church, and further, she felt the proposed site was not large enough. Two council members further commented. One expressed concern regarding the proximity to a church and hoped the applicant could find a more suitable location. The other commented that the decision to deny supported the public's wish as expressed by the various witnesses who appeared.

The transcript of the proceedings below, on which respondent relies, contains statements of several local residents, representatives of local churches and arguments from respective counsel. That record closes with an agreement to more precisely pursue the appropriate measurement of the distance from the proposed site to the several churches involved. At the instant hearing, the stipulation by counsel that the proposed site does not violate the "200-foot" rule resolves that matter.

The transcript presents the testimony of numerous citizens, most of whom spoke on behalf of either the Union Baptist Church or the Valley Road Convent Church. The testimony of Reverend Albert L. Markwell, Pastor of Union Baptist Church, summarized the testimony of other objectors: John Marts, John Red, Richard Peters, Charles Morgan and John Fimel. That testimony is essentially that no more alcoholic beverage outlets are necessary, and the location of the proposed premises is too close to their various church-related buildings even if it does not precisely violate the "200-foot" rule. There are numerous evening activities, including girl scouts and senior citizens taking place virtually every evening.

Additionally, the Council heard the statements of Richard and Gladys Peters, as well as Carol Tyson, who own retail businesses in the area, who expressed their concern that a licensed premises which would dispense alcoholic beverages for on-premises consumption will bring a disruptive and degrading influence to the immediate area. Donna Nero, a self-described "concerned citizen," also expressed her opinion that such a licensed premises creates abusive patrons and has a disrupting influence. Interspersed throughout the comments of these various citizens is the continuing comment that there is no need for this establishment in the area and no public benefit would derive therefrom.

The appellant presented the testimony of John Torpy, John York, Robert Weiss, James Holler, Richard Oscar and Salvatore Lazzarotti.

Joseph Torpy testified that he has been in the restaurant business for 15 years in New Jersey and Florida. He has built five restaurants of his own. The appellant hired him to make a study of the proposed

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location to determine its feasibility for a restaurant. He was hired in November 1980.

He described the general area as being exclusively commercial, in a state of decline and clearly appropriate for the establishment of a restaurant. While other food-dispensing businesses and several taverns exist in the area, none provide the full course luncheon and dinner facilities contemplated in the instant location. The restaurant will be 5,000 square feet, will seat 60-70 luncheon and dinner patrons and will provide a small bar in addition. There is a public parking lot adjacent to the proposed premises with space for 100-150 cars. Due to the decline in business, it is substantially underutilized, particularly in the evenings. He surveyed three other commercial areas for proposed sites and found that parking was inadequate, single family residences are nearby and one possible location is directly across the street from an elementary school.

He was aware that several churches existed in the area, but none were within the statutory 200-foot prohibition. He concluded, based on his experience and expertise in the restaurant business that the proposed site is appropriate because there is ample on-street and off-street parking, the area has no similar establishment, it will not interfere with private residences and it is sufficiently distant from the neighborhood churches as not to interfere with their activities.

John York testified that he is the present owner of the proposed location and has operated a pharmacy at the location for 21 years. The area is in a state of decline; businesses are leaving the area. The business community has shifted from this area to the "Montclair area" and replacement businesses have not been of the same quality. The area has no "respectable" restaurant for lunch and a drink. On-street and off-street parking are more than adequate. The churches in the area have moderate traffic on Sunday mornings. He is not aware of any evening activities at the churches, but is aware that the parking facilities in the area are underutilized. The purchase price of his property is \$90,000 and he will not relocate his business in the area. There are several taverns and liquor stores in the area, but none similar to that contemplated by this licensee.

Robert Weiss testified that he has been a real estate broker in Montclair for 21 years and is directly involved in this transaction. Approximately one and one-half miles of Bloomfield Avenue is commercially developed and is the only truly commercial avenue in Montclair, although smaller commercial areas do exist. The Montclair municipal offices, a Sears Roebuck store and the Public Service offices all have recently left the area. There are several liquor stores

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and taverns in the area, but none is a bona fide restaurant such as this licensee contemplates. He is aware of several churches in the area which are approximately a five-minute walk from the proposed premises and none is within the statutorily proscribed 200 foot distance. The current population of Montclair is approximately 13,000 and has begun to decline within the past three years.

James Holler is a sales manager at a new car agency located approximately one-half mile from the proposed premises. The business is open four nights per week until 9:00 p.m. The only restaurants available for dinner at that hour are a local private club and a restaurant which caters primarily to an older clientele. An additional restaurant is available, but parking is a problem.

Richard Oscar testified that he operates three restaurants in the immediate area and has done so for three years. His restaurants provide light lunches, sandwiches, etc., and none are licensed to dispense alcoholic beverages. One of his restaurants remains open until 9:00 p.m. The others close somewhat earlier. The business area is in general decline, particularly during evening hours.

Salvatore Lazzarotti testified that he has resided in the area of the Marlboro Manor for eight years, and it was in existence when he moved in, although it did not then have a liquor license. The neighborhood is a quiet area made up of private, one-family residences. Almost immediately after the Manor received a liquor license, traffic increased substantially, parking problems developed and the streets in the area became congested. After the Manor closed its doors and liquor was no longer dispensed, the neighborhood returned to its former tranquility. The Marlboro Manor had inadequate parking facilities, which was the primary cause of the congestion.

Two witnesses for the applicant are directly, monetarily affected by the outcome of this matter. Mr. York is the present owner of the premises and it is clear that the completion of the sale will be determined by the outcome of this appeal. Also, Mr. Weiss, notwithstanding his obvious knowledge and expertise in commercial real estate ventures, is the real estate broker directly involved in this transaction. His pecuniary interest is therefore clear. The testimony of Mr. Holler and Mr. Oscar is more revealing. To be sure, their businesses may be somewhat enhanced by the presence of a restaurant such as is contemplated herein. Nonetheless, they are already in business and are, therefore, committed to their respective ventures with or without the presence of this restaurant. They are both firmly of the opinion that this restaurant will have a positive impact and will generate the kind of commercial activity needed in this declining area.

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The testimony of Mr. and Mrs. Peters, as well as Ms. Tyson, which appears in the transcript of the hearing below, is generally conclusory in nature and expresses concern regarding a possible adverse impact on the area. This opinion is speculative at best and is substantially neutralized by the testimony of Mr. Holler and Mr. Oscar. No evidence has been introduced to support the opinion of Mayor Mochary that the proposed premises “. . . was just not a large enough spot for the kind of operation proposed”. Apart from this testimony, which is neutralized by the testimony of Mr. Holler and Mr. Oscar, the remaining witnesses object substantially because of the proximity to the churches.

The issue, therefore, is reduced to the question whether objections of two churches proximate to the proposed site, but not within 200 feet as “. . . measured in the normal way that a pedestrian would properly walk from the nearest entrance of said church. . . to the nearest entrance of the premises sought to be licensed” (*N.J.S.A.* 33:1-76; see also, *Karam v. Alcoholic Beverage Control Board of West Orange*, 102 *N.J. Super.* 291 (App. Div. 1968)), can justify the respondent's action denying the transfer.

Initially, it should be observed that there is no inherent or automatic right to the transfer of alcoholic beverage licenses. *Zicherman v. Driscoll*, 133 *N.J.L.* 586 (Sup. Ct. 1946); *Biscamp v. Teaneck*, 5 *N.J. Super.* 172 (App. Div. 1949). The issuance or transference of a retail liquor license in the first instance rests within the sound discretion of the local issuing authority. *Hudson-Bergen County Retail Liquor Association v. North Bergen, A.B.C. Bulletin No. 1981*, Item 1; *Paul v. Brass Rail Liquors*, 31 *N.J. Super.* 211 (App. Div. 1954). The local issuing authority is vested with a high responsibility and wide discretion, and is to have as its principal guide in licensure matters the public interest. *N.J.S.A.* 33:1-19.24. See also, *Rajah Liquors v. Division of Alcoholic Beverage Control*, 33 *N.J. Super.* 598 (App. Div. 1955), and *Blanck v. Mayor and Council of Magnolia*, 38 *N.J.* 484 (1962). In the absence of an abuse of such discretion, the action of this local authority should not be disturbed by the Director of the Division, and the Director may not reverse its action in the absence of such manifest mistake or abuse of discretion. Cf., *Florence Methodist Church v. Twp. Committee, Florence Twp.*, 38 *N.J. Super.* 85 (App. Div. 1955).

If the decision of the local Board represented a reasonable exercise of discretion on the basis of the evidence presented, that ends the matter of review by both the Director and the courts (See, *Lyons*

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*Farm Tavern v. Municipal Board of Alcoholic Beverage Control of the City of Newark*, 55 N.J. 292, 307 (1970)).

A municipal governing body may reasonably decline to issue a license because of the proximity of the premises to a church or school, even though the church or school is beyond the 200-foot area outlined by *N.J.S.A. 33:1-76 Fanwood v. Rocco*, 33 N.J. 404, at 412 (1960).

Although a liquor license is a privilege, the owner "acquires through his investment therein, an interest which is entitled to some measure of protection in connection with a transfer." *Township Committee of Lakewood v. Brandt*, 38 N.J. Super. 462, 466 (App. Div. 1955).

Once granted, a license is protected against arbitrary revocation, suspension or refusal to renew. *The Boss Co. Inc. v. Bd. of Com'rs of Atlantic City*, 40 N.J. 379, 384 (1963). The license has value of a monetary nature that arises "from the power possessed by the licensee to substitute with the municipal consent, some other person in his place as licensee." *The Boss Co.*, *supra*, at 384. See also *B & L Liquors v. Bayonne*, 42 N.J. 131 (1964).

It is clear that the holder of a license can claim certain "equities" which an applicant for a new license cannot, *Fanwood v. Rocco*, 59 N.J. Super. 306, 322 (1960), and the local issuing authority should "concern itself with the equities" in the case. *Cf.*, *Common Council of Hightstown v. Hedy's Bar*, 86 N.J. Super. 561, 565 (App. Div. 1965).

However, when the municipal action is unreasonable or improperly grounded, the Director may grant such relief or take such action as is appropriate. *Common Council of Hightstown v. Hedy's Bar* 86 N.J. Super. 459 (App. Div. 1956), and *South Jersey Retail Liquor Dealers Association v. Burnett*, 125 N.J.L. 105 (Sup. Ct. 1940).

*Fanwood v. Rocco*, 33 N.J. 404 (1960), holds that such action may reasonably be taken, but the factual pattern therein differed appreciably from that herein. The transfer was sought from the outskirts to the center of the municipality, and to a location at which no plenary retail licenses had ever been permitted. Further, the mayor and all councilmen appeared at the appeal and expressed their opinion based upon a broad review of the expressed opinions of many members of the community, as well as the churches which had objected.

The local issuing authority had denied the application for transfer. The denial was subsequently reversed by the Director. On appeal by the local issuing authority from the action of the Director, the Appellate Division reversed the Director. The Supreme Court in *Fanwood*,

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*supra*, at 412, held “. . . it appears clear to us that consistent with the foregoing, the municipal governing body may reasonably honor local statements by declining to license taverns and package stores in designated areas of the community.”

Here, however, the factual pattern is substantially different. There is not present in the instant matter that broad overview and expression of public sentiment. Indeed, the testimony of those favorable to the transfer is approximately equal to that of those unfavorable, but for the objection of the two churches involved. Nor is there any evidence that the local issuing authority herein has consistently refused to permit the transfer of plenary retail licenses in the general vicinity. Several plenary retail licenses already exist in the general area. The mayor and those council persons whose opinions were expressed in the minutes have expressed the hope that the appellant will find a suitable location. The evidence has established that there are few, if any, locations elsewhere in the community which are suitable. The local issuing authority, having afforded the appellant the opportunity to purchase the license, being aware of the problems involved at the location where it was formerly housed and being aware of the severely restricted areas available for transfer, has acted unreasonably in denying this transfer. The equities favor the appellant herein and the transfer was therefore unreasonably denied.

Based on the above, I **FIND**:

1. Appellant purchased an inactive license housed in a premises located in a one-family residential zone.
2. Respondent granted the person-to-person transfer for Marlboro Inn to Marlboro Manor, Inc.
3. The location, 334 Grove Street, has inadequate parking and is unwelcome in the neighborhood as a premises licensed to dispense alcoholic beverages for on-premises consumption.
4. The proposed site, 600 Bloomfield Avenue, is located in a primarily commercial zone.
5. Adequate off-street parking exists such that undue traffic congestion will not be created.
6. Bloomfield Avenue is a substantially wider thoroughfare than Grove Street.
7. No significant community sentiment adverse to this transfer has been expressed except for that of two churches in the area.
8. The distance from the nearest entrance at the proposed site to the nearest entrance of either of those churches measured by the normal way that a pedestrian would properly walk exceeds 200 feet.

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9. No valid reason for denying the transfer has been demonstrated.

10. The equities in this matter clearly favor the appellant.

Based on the above, I **CONCLUDE** that the respondent acted unreasonably in its action denying the transfer, in that it failed to determine broad community sentiment, it failed to recognize the difficulty extant in the transfer of the license it had transferred to appellant, and it placed too great an emphasis on the objection of two churches sufficiently distant from the proposed site. In short, it failed to adequately consider the equities in favor of the appellant.

Accordingly, it is **ORDERED** that the action of the Alcoholic Beverage Control Board be **REVERSED**, and that the instant application for transfer be **GRANTED**.

This initial decision may be affirmed, modified, or rejected by the Director of the Division of Alcoholic Beverage Control, who by law is empowered to make the final decision in this matter.

**FINAL DECISION BY THE DIRECTOR OF THE DIVISION OF  
ALCOHOLIC BEVERAGE CONTROL:**

Written exceptions to the initial decision were filed by the respondent, and written answers were submitted thereto by appellant, pursuant to *N.J.A.C.* 13:2-17,14.

In its exceptions, the Board of Commissioners of the Town of Montclair contends that the conclusions of the administrative law judge represents an impermissible substitution of judgment and conflicts with the well-established standards of review embodied in *Lyons Farms Tavern Inc. v. Municipal Board of Alcoholic Beverage Control, Newark*, 55 *N.J.* 292 (1970). It submits that a proper evaluation of the proofs before the Board, and a correct application of the Division's review standard require an affirmance of the Board's action.

Appellant, in its answer to exceptions, supports the recommended action in the initial decision. It argues that the proper appellate review standard was applied, and that the evidence failed to support the Town Council's decision.

I concur with respondent's exceptions and I shall reject the conclusion of the administrative law judge.

It is evident that the administrative law judge substituted his judgment on the facts for that of the Board of Commissioners. That is not authorized under the Alcoholic Beverage Law. *Margate Civic Assoc. v. Board of Commr's. Margate*, 132 *N.J. Super.* 58, 63 (App. Div. 1975). The issue for resolution in this appeal is whether reasonable

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support for the conclusion reached exists in the record, and the decision is not illegally grounded. Stated in another perspective, the Appellate Division in *Fanwood v. Rocco*, 59 N.J. Super. 306, 321-322, (App. Div.), *aff'd*, 33 N.J. 404 (1960) cited *Hudson Bergen County Retail Liquor Store Ass'n. Inc. v. Hoboken*, 135 N.J.L. 502 (E. & A. 1947) and noted:

The Legislature has entrusted to the municipal issuing authority the right and charged it with the duty to issue licenses (R.S. 33:1-24) and place-to-place transfers thereof . . . N.J.S.A. 33:1-26. As we have seen, and as respondent admits, the action of the local board may not be reversed by the Director unless he finds "the act of the Board was clearly against the logic and effect of the presented facts."

The proofs before the Town Council were cogent, reasoned and persuasive arguments in opposition to the appellant's application for transfer. The witnesses testified to an adequacy of retail liquor dispensing outlets in the area, the proximity of the proposed licensed premises to several churches, possible traffic and parking difficulties, and, in general, a community desire to restrict further alcoholic beverage outlets in that area. The Town Council's acceptance of such was *not* "clearly against the logic and effect of the presented facts."

The emphasis and dominance accorded by the administrative law judge to the testimony adduced by the appellant is indicative that there may be an "honest difference of opinion" on the facts presented. Yet, in such cases, the local issuing authority's determination must take precedence. *Paul v. Brass Rail Liquors*, 31 N.J. Super. 211, 214-215 (App. Div. 1954).

I specifically reject the conclusion of the administrative law judge that the "equities" for appellant make the Town Council's decision "unreasonable." The factual matrix in *Common Council of Hightstown v. Hedy's Bar*, 86 N.J. Super. 561 (App. Div. 1965) was strikingly different, and not analogous to the matter *sub judice*. In that case, an active license lost its site because of eminent domain. In the instant case the appellant unilaterally decided to acquire an inactive pocket license. It cannot create its own equities. Several other substantive distinguishing factors also appear, which need not be set forth now.

Further, the conclusion that the proposed use by appellant will have a "positive impact and will generate the kind of commercial activity needed in this declining area" is speculative, and disregards competent testimony that the proposed activity of appellant would contribute nothing to the area and, indeed, might exacerbate existing liquor-related problems.

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Finally, there is no right to transfer approval merely because the proposed situs is properly zoned. *Fanwood v. Rocco*, 33 *N.J.* 404, 412-413 (1960). The Town Council concluded it would not be in the "public interest" to liquor license the proposed situs. This is the ultimate factor in license issuance, transfer and renewal cases. The decision is supportable, and was well within the parameters of respondent's reasonable exercise of its lawful discretion.

Having carefully considered the entire record in this matter, including the transcripts of the testimony, the exhibits, the initial decision, the written exceptions filed by the respondent, and the written answers submitted thereto by the appellant, I reject the conclusion of the administrative law judge. I shall affirm the action of the Town Council.

Accordingly, it is, on this 22nd day of December, 1981

**ORDERED** that the action of the Town Council of the Town of Montclair be and the same is hereby affirmed, and the appeal be and is hereby dismissed.