

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

BULLETIN 234

MARCH 10, 1938.

1. LICENSES - ISSUANCE - EFFECT OF LOCAL LIMITATION OF NUMBER.

March 6, 1938.

B. Lehr Scull,
Clerk of Hamilton Township,
Mays Landing, N. J.

My dear Mr. Scull:

I have your letter of the 2nd regarding the application of Mary Repici for plenary retail consumption license for premises 201 North Main Street.

My records indicate that Dominic Repici, her husband, held a license for the same premises for the fiscal year 1936-37, that on June 28, 1937 his application for renewal was denied and that on August 11, 1937 (Repici v. Hamilton, Bulletin 201, Item 8), because of evidence of continual disturbance and misconduct on the premises, the denial was affirmed.

It does not appear that Dominic Repici's license was actually revoked. The "revocation" of August 15, 1937, to which you refer, was not a revocation but merely a vacation of the order continuing his license pending decision on the appeal.

If that were all, there would be no objection to the issuance of a license at the present time to Mary Repici, provided, of course, the applicant was qualified and the premises suitable. And in such case, the special conditions designed to prevent the recurrence of the bad conduct that the Township Committee suggests would be wholly proper.

There is, however, no power to grant the pending application and issue the license to Mary, because to do so, would be contrary to resolution adopted by the Township Committee on May 3, 1937, which provides:

"BE IT RESOLVED by the Township Committee of the Township of Hamilton, County of Atlantic and State of New Jersey, that the number of Plenary Retail Consumption licenses issued by the Township of Hamilton, under the Alcoholic Beverage Control Act be limited to the number of twenty-one (21), with the provision, that, this number be reduced to the number of fifteen (15) as those now issued in excess of this number be relinquished by loss through violations of regulations, causing revocation or by lapsing for want of renewal as provided; with the provision, that, such licensees be permitted to make sale of their businesses as going concerns and that license may issue as provided to such purchasers, and

"BE IT FURTHER PROVIDED that such licensees for cause be permitted to transfer existing licenses to other premises."

According to my records, there are presently outstanding in the Township eighteen plenary retail consumption licenses. Mary has never held a license in the Township before. Her application could not, therefore, be considered a renewal. See Re Perry, Bulletin 199, Item 1; Berger v. Carteret, Bulletin 213, Item 9.

It follows that so long as the resolution of May 3, 1937 stands as at present, no plenary retail consumption license could be issued to Mary until the number outstanding is less than fifteen. The situation is the same as in Cirigliano v. Hamilton, Bulletin 192, Item 4, and is governed by that case.

Noting that the limitation has been enacted by resolution, I call to your attention R. S. 33:1-40 (Control Act, Sec. 57) which provides that after July 1, 1937, all limitations of licenses must be enacted by ordinance. See Bulletin 185, Item 3. Hence, if the Township Committee contemplates changing the limitation, it should be borne in mind that the resolution may be amended, repealed or otherwise superseded in the future only by ordinance. Any new limitation which may now be imposed must likewise be enacted by ordinance. For form of ordinance limiting the number of licenses, see Re Sahl, Bulletin 198, Item 11.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

2. APPELLATE DECISIONS - MAGEE vs. ORANGE.

SAMUEL J. MAGEE,	)	
Appellant,	)	
-vs-	)	ON APPEAL
MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE)	)	<u>CONCLUSIONS</u>
CONTROL OF THE CITY OF ORANGE,	)	
Respondent.	)	

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Russell A. Riley, Esq., Attorney for Appellant.
Louis J. Goldberg, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

Appellant, the holder of a consumption license for 26 Main Street, Orange, appeals from a suspension of his license for two days.

On November 10, 1937, the Orange Police seized a machine known as a "Bowlo-Bump" on the licensed premises. The sole question is whether licensee's possession of this machine on the licensed premises rendered him guilty of any of the three charges preferred against him summarized as follows:

- (1) You did set up, keep and maintain on your licensed premises a device for the purpose of gaming, in violation of the Second Section of an ordinance of the City of Orange, an ordinance to Amend an ordinance entitled "An Ordinance to Restrain and Suppress Disorderly and Gaming Houses and Houses of Ill-fame as well as all Instruments and Devices Used for Gaming; and to Prohibit and Prevent all Gaming and Fraudulent Devices of Every Kind", approved April 11, 1888, and the amendments and supplements thereto to date, which reads as follows:

"No person or persons shall set up, keep or maintain, or permit to be set up, kept or maintained, in any house or premises occupied by him, any faro table, faro bank, roulette or other device or game of chance, hazard of address, for the purpose of gaming; or any boxing ring, cockpit or other plan for the exhibition of animals in fight, under the penalty of not less than \$100.00 for each offense and not more than \$200.00 for each offense; and it shall be the duty of the police and they are hereby authorized and empowered to enter upon any premises where any instruments or devices employed in gaming shall be used contrary to the provisions of this ordinance; and except in the case of ball alleys, bowling alleys and billiard tables, to carry away and destroy same."

- (2) You did allow, permit or suffer a device or apparatus designed for gambling on or about your licensed premises, in violation of Rule 7 of State Rules Concerning Conduct of Licensees and Use of Licensed Premises, which said Rule reads as follows:

"No licensee shall engage in or allow, permit or suffer any pool-selling, book-making or any playing for money at faro, roulette, rouge et noir or any unlawful game or gambling of any kind, or any device or apparatus designed for any such purpose, on or about the licensed premises."

- (3) You did suffer or permit the storing or caching of, the possession of, ownership or custody of a gambling device, in violation of Section 10 of an ordinance of the City of Orange entitled "An Ordinance to Regulate the Sale and Distribution of Alcoholic Beverages and Fixing a Penalty for Violation of the Provisions Thereof", passed July 7th, 1936, and the amendments and supplements thereto to date, which reads as follows:

"No licensee, his servant, agent or employee shall suffer or permit any form of gambling whatsoever on the licensed premises, nor shall any licensee, his servant, agent or employee suffer or permit the storing or caching of any gambling device, lottery or number slip or slips in and about the licensed premises, and no licensee, his servant, agent or employee shall have possession of, ownership or custody of any gambling device, lottery or number slip or slips."

Since there was no evidence of actual gambling, the dispositive question under the several charges arising out of the same transaction are respectively as follows: Under the first charge:- is Bowlo-Bump a "device or game of chance for the purpose of gaming;" under the second:- a "device or apparatus designed for the purpose of gambling;" under the third:- a "gambling device." These phrases as used in the City

ordinances and State rules; when considered in their context, have practically the same meaning.

In State vs. Murzda, E. & A. 1935, 116 N.J.L. 219, the Court said:

"The term 'gambling device' has no settled and definite meaning; it was not defined by the common law."

Article IV of Section VII, sub-division 2, of the Constitution of the State of New Jersey, provides, among other things:

"***nor shall any gambling device, practice or game of chance now prohibited by law be legalized ***."

R.S. 2:135-2 makes it a misdemeanor for any person to keep in his place of business or other premises any slot machine or device in the nature of a slot machine which may be used for the playing of money or other valuable thing.

R.S. 2:178-7 authorizes the destruction of "any furniture or implements made or used for the playing of the game of faro, roulette, rouge et noir or any unlawful game."

The constitutional provision and the Statutes cited are not particularly helpful except as they apply specifically to slot machines or implements used for the playing of faro, roulette or rouge et noir. Such machines and their implements are clearly prohibited on licensed premises under Rules 7 and 8 of Rules Concerning Conduct of Licensees and Use of Licensed Premises (Regulations 20). Rule 7 has hereinbefore been quoted. Rule 8 is expressly addressed to slot machines and forbids that licensees shall possess or allow on or about the licensed premises "any slot machine or device in the nature of a slot machine which may be used for the purpose of playing for money or other valuable thing."

While properly no charge of possession of a slot machine was made against this licensee, Rule 8 is mentioned for the sake of completeness of discussion of the present problem and because no one can start to play Bowlo-Bump, as will hereafter appear, without placing a coin in the slot. That, however, does not make it a "slot machine" within the meaning of the statutes and the rules. As I said In Re Conover, Bulletin 51, Item 6.

"It is apparent that Rule 8 does not create new law but is a mere restatement of existing law. Both under the Law and the Rule, the test of an illegal machine is not the presence of the slot but rather that it is a machine 'which may be used for the purpose of playing for money or other valuable thing.' Therefore, you must distinguish on the one hand between harmless bagatelle games and variations thereof, such as the baseball game, where the primary purpose is skill and amusement, and on the other hand, the commontype of so-called slot machine which contains coins and pays money or other valuable thing to the player if he is lucky enough to draw certain combinations when he operates the lever which spins the wheels. The gist of gambling is the payment of money for the opportunity to win more money by a scheme of chance. The vice of gambling is

the chance of a gain disproportionate to the price of the chance. A slot machine, the deposit of money in which entitles the player to a chance to get money from the machine, is illegal per se. Its mere presence on licensed premises violates both the Law and the Rule. A machine of this type is quite different from bagatelle and kindred games which do not pay out or deliver to the player at any time, however lucky he may be, any money or other valuable thing. To be sure, those games may be used illegally, in which event they violate both the Law and the Rule (See Re: Bernards Inn, Bulletin 51, Item 1, and Re Albright, Bulletin 51, Item 2), yet intrinsically they are not illegal. If the slot machines which you mention are the common type which pay money itself to the lucky player, you do not have to pause to determine the sometimes difficult question as to whether the use made thereof is illegal, because, to use the words of Vice Chancellor Buchanan in Pure Mint Co. vs. LaBarre, 96 N.J. Eq. 186, 'the machines are intended to do what they in fact do', and hence their very presence is illegal, irrespective of the use made of them. Such slot machines are gambling devices. Hence there is no necessity for you to see it being actually operated by a player, or to determine anything more than that such machine is on the licensed premises."

Bowlo-Bump is a machine which has the general characteristics of the ordinary bagatelle machine plus other features hereafter described. When a player places five cents in the slot, the machine ejects five balls for the player's use. At the same time a light appears behind one number on an electric score board at the opposite end of the machine facing the player. The number which thus lights before actual play begins constitutes the player's handicap and is entirely beyond the control of the player and may be any number from 100 to 900. The player then bowls his first ball up the inclined chute at the right of the machine. After the ball passes a wire at the end of this chute, it is apparently beyond the control of the player. If, after passing through this chute, the ball strikes either of two pegs at the upper end of the machine, the electric score board adds 1000 to the player's score. Thereafter, the ball returns down the incline to the left of the chute and, each time the ball touches wires surrounding the other posts, the electric score board adds 100 to the previous score. If the ball in its return passes through a certain alley, the player's score is automatically doubled on the electric score board. After the player has bowled each of his five balls, a light appears behind his total score and remains lighted for a period of about a minute. A police officer of Orange, who played the game four times, testified that his score varied between 5,000 and 11,600.

It cannot be seriously contended that Bowlo-Bump is a game of skill. Even if it be admitted that the manner in which the player bowls the balls would determine his ultimate score, nevertheless, the handicap which he received before beginning to play is pure luck. Hence, the machine does not come within previous rulings permitting games of skill on licensed premises. Re Simandl, Bulletin 161, Item 10 (shuffle-boards, quoits, badminton, ping-pong, bowling alleys); Re Benson, Bulletin 161, Item 8 (skew-ball); Re Kelly, Bulletin 164, Item 7 (checkers); Re Hanks, Bulletin 204, Item 5 (radio rifle).

On the other hand, the machine is not a slot machine since it returns no money, tokens or merchandise to the player.

It is not prohibited within the rulings made In re Irons, Bulletin 144, Item 3 (crane and digger machines), In re Kass, Bulletin 156, Item 6 (cash register receipts as participation tickets), In re Shipp, Bulletin 100, Item 1 (bean guessing contests), In re Mancine, Bulletin 194, Item 6 (tickette machines).

It clearly appears that Bowlo-Bump is not played against the machine itself as in the case of a slot machine or one in the nature thereof. So far as the device itself is concerned, it is, with its pretty lights and electric score board, its arbitrary handicaps and glistening baubles, an amusement harmless to any child. The ennui if grown-ups plumbs new depths if a plaything of this kind can hold their attention long. There is nothing intrinsic about it which makes it a device or apparatus designed for any unlawful game or gambling. Of course, it can be used for that purpose. So can any other game. If it is so used, that is something different. If gambling is going on and the licensee tolerates the use of the machine for such a purpose, then the licensee should be brought up on charges based on actual gambling but of this there is no evidence in the instant case. While one may well be suspicious that the machine is played against the house, the belief is not a substitute for proof of the fact. The mere possession of the machine on the licensed premises is not a violation of either the City Ordinances or the State Rule.

Accordingly, the action of respondent, in suspending appellant's license, is reversed.

D. FREDERICK BURNETT
Commissioner

Dated: March 6, 1938.

6. APPELLATE DECISIONS - COLUMBIAN DEMOCRATIC LEAGUE vs. HACKENSACK.

COLUMBIAN DEMOCRATIC LEAGUE OF	)	
HACKENSACK, NEW JERSEY,	)	
	)	
Appellant,	)	
	)	
-vs-	)	ON APPEAL
	)	
CITY COUNCIL OF THE CITY OF	)	<u>CONCLUSIONS</u>
HACKENSACK,	)	
	)	
Respondent.	)	
	)	
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Dominick F. Pachella, Esq., Attorney for Appellant.
Donald M. Waesche, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

This appeal is from the denial of a club license for appellant's club-quarters located at 34 Fair Street, Hackensack.

Respondent denied appellant's application, filed September or October, 1937, on the ground that appellant is a so-called political club and therefore is ineligible under the law to obtain a club license.

It appears from the undisputed evidence that appellant is a political organization which has been in active existence in Hackensack since 1926-7; that it was incorporated as a non-pecuniary association in May 1934; that its members (of whom there are now 130) must be persons pledged to the support of the Democratic Party and must be approved by appellant's Executive Committee; and that appellant has remained in continuous and exclusive possession of club-quarters in Hackensack since 1928. There is no contention or indication that it has been or is being conducted for pecuniary gain. Respondent's sole contention is that appellant, being a political club, does not come within the purposes set forth in R.S. Sec. 33:1-12(5) (Control Act, Sec. 13(5)), which provides:

"Club licenses may be issued only to such corporations, associations and organizations as are operated for benevolent, charitable, fraternal, social, religious, recreational, athletic, or similar purposes and not for private gain..."

The objects of appellant, as shown by its Certificate of Incorporation, are:

"To spread among the voters an interest and a determination to procure impartial government, equal justice, and uniform opportunity for all; to stimulate active interest among the voters in the conduct of the affairs of the Nation, State and County, and especially in local government; to cooperate with other associations and organizations whether of a civic or political nature, in procuring economy in government and especially the reduction of excessive taxation; to encourage education and good citizenship among people of foreign birth and descent; to promote the advancement of a spirit of sociability among its members"

--objectives worthy of Republicans!

The Certificate also declares that the purpose of the Club is "to develop a further interest in the loyal support of the Democratic party."

Advancement or support of a political party is certainly fraternal and social, and may be charitable, and, on occasion, even athletic! Even if a political club does not come directly within the express designations delineated in the statute, it certainly comes within the term "similar purposes", i.e., purposes which resemble although they may not be identical with those specifically mentioned. Fletcher vs. Interstate Chemical Co., 94 N.J.L. 332, affirmed 95 N.J.L. 543.

Since the only ground on which the license was refused was respondent's belief that a political club was disqualified from obtaining a club license, it follows that respondent's action must be and it is hereby reversed.

Respondent is directed to issue a club license to appellant as applied for.

D. FREDERICK BURNETT
Commissioner

Dated: March 7, 1938.

1. APPELLATE DECISIONS - SCHULER vs. MIDDLETOWN TOWNSHIP.

MADLINE SCHULER, JOHN	)	
LONERGAN, FRANK DOOLEY and	)	
ANNA GERARD,	)	
Appellants,	)	
-vs-	)	ON APPEAL
TOWNSHIP COMMITTEE OF THE TOWN-	)	<u>CONCLUSIONS</u>
SHIP OF MIDDLETOWN (MONMOUTH COUNTY)	)	
and CARL BACHSTADT,	)	
Respondents.	)	
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William C. Egan, Esq., Attorney for Appellants.
Howard W. Roberts, Esq., Attorney for Respondent Township Committee.
Nicholas W. Kaiser, Esq., Attorney for Respondent-Licensee
Carl Bachstadt.

BY THE COMMISSIONER:

This is an appeal from the issuance of a plenary retail consumption license for premises located at Bray Avenue and Sea Breeze Avenue, East Keansburg, Township of Middletown.

Two of appellants are permanent residents and two are summer residents owning property in the immediate vicinity of the premises for which the license was granted. It does not appear that any of said appellants filed objections below. They contend herein that the license should not have been granted because: (1) the premises in question are already covered by a plenary retail consumption license; (2) said license was issued in violation of the established policy of the issuing authority to keep licensed premises widely separated*** and in violation of the resolutions and ordinances of the Township of Middletown; (3) there were sufficient licensed premises in the vicinity before this license was issued to take care of neighborhood needs.

The circumstances of this case are peculiar. Bachstadt's premises consist of a two-story frame structure. Immediately to the north thereof is a one-story frame structure now licensed for consumption in the name of Rudolph Bertche. At one time both of these structures constituted a single building owned by Frank Markstein. In 1934 Markstein obtained a consumption license cover-

ing both structures. His license was renewed for the year 1935-1936. In April 1936 a mortgage which covered only the two-story portion of the building, but not the one-story addition thereto, was in the process of foreclosure. At that time Markstein agreed to transfer his then outstanding license to Carl Bachstadt. Subsequently, and before action was taken on the application to transfer said license, Markstein notified the Township Committee that he withdrew his consent and that he was going to operate the license "in the small addition on Bray Avenue." The correspondence concerning this matter is set forth in Re Roberts, Bulletin 129, Item 5. After the answer to Mr. Roberts, the matter was referred to the Township Committee, but no action was taken on the application to transfer because the licensing period had almost expired. Markstein meanwhile had erected a partition between the two-story portion of the building and the one-story addition, and continued to operate in the latter portion of the building.

In June 1936 Markstein and Bertche applied for a consumption license for the one-story addition to the premises. Carl Bachstadt applied for a consumption license for the two-story portion of the building. The application of Markstein and Bertche was granted. The application of Bachstadt was denied because he had not yet obtained title.

In June 1937 Rudolph Bertche filed application for a consumption license for the one-story addition to the premises for the current fiscal year, and his application was granted. At about the same time an application was filed by George Borbas for the two-story addition. This application was denied because said applicant lacked the proper residential qualifications. On August 27, 1937, Carl Bachstadt filed another application for said two-story portion of the building and the Township Committee, on September 9, 1937, after satisfying itself that the applicant now had title to the premises, granted his application. It is from this action of the Township Committee that appellants appeal.

Since it appears that Markstein has placed a partition between the portion of the building which he retained and the portion of the building which he lost through foreclosure (now owned by Bachstadt), it sufficiently appears that the two premises have been rendered distinct. The issuance of the current license to Bertche does not purport to give him any right to sell on the premises owned by Bachstadt and, hence, the first contention of appellants, namely, that the premises in question are already covered by a plenary retail consumption license, is not supported by the evidence.

It appears that there is no ordinance or resolution in the Township of Middletown limiting the number of licenses or limiting the distance between licensed premises. Hence, the only portion of appellants' second contention which needs to be considered is whether or not the license was issued in violation of an established policy. Testifying as to an alleged policy, Commissioner Lawley said:

"The Township has never gone on record as adopting a specific policy for the granting of licenses other than the policy that we would not look upon the granting of licenses as a source of revenue, but would investigate and apply a specific rule as far as possible and that would be that licenses would be granted in the various communities for no other reason than that of actual necessity or to fill an actual need."

The evidence shows that the Township Committee has repeatedly denied licenses where the members thereof were convinced that there were already sufficient existing licenses in the vicinity applied for. Snyder v. Middletown, Bulletin 56, Item 2; Connolly v. Middletown, Bulletin 81, Item 11; Errath v. Middletown, Bulletin 101, Item 4. In the Connolly case the application was denied because the premises in question were within one hundred fifty feet of the premises for which Markstein then held his license.

Respondent Township Committee contends herein that the effect of its action in granting the license to Bachstadt is not to establish a new licensed place, because the building owned by Bachstadt was previously licensed for the sale of alcoholic beverages; that, in so far as appellants are concerned, it is immaterial whether the entire premises are licensed to a single individual, as they were when Markstein originally obtained his license, or occupied by two competing licensees, as they are at the present time. It does not appear that appellants will be any more annoyed from the operation of two separate businesses under the same roof than they would be if a single licensee continued the business throughout both portions of the structure. It may be that the arrangement will constitute severe competition to Bertche. The question as to whether or not the issuance of this license was fair to an existing licensee is a matter within the discretion of the Township Committee. Referring to the attitude of the issuing authority, Commissioner Lawley testified:

"He (Bachstadt) was owner of the property and, in my opinion, that location warranted a license. Our question was whether we should refuse one of these men each year or whether to grant them both a license under the same roof practically. We decided that it would be to the best interests of everybody, having in mind our population, to grant no new additional licenses, but merely putting into operation what had always been there before, a license in that property; we felt no one could be hurt and everyone would be getting a square deal by granting the license to Bachstadt. * * * We felt this premises was a legitimate place for a license, and the fact that there were two owners and the circumstances surrounding the application were such as to make us reason that in fairness to everyone that no one would be harmed if there were two licenses granted in the same premises."

The Township Committee was faced with a difficult situation in weighing and adjusting the equities of the parties. The evidence does not show that the Township Committee abused its discretion or violated its policy in issuing the license to Bachstadt. What they did seems eminently fair.

The determination of the question as to the number of licensed premises which should be permitted in any given vicinity is a matter confided to the sound discretion of the issuing authority. Kalish v. Linden, Bulletin 71, Item 14. Under the circumstances of this case, I find that appellants have not sustained the burden of proof in showing that there were sufficient licensed premises in the vicinity before this license was issued to take care of neighborhood needs.

The action of respondent Township Committee of the Township of Middletown in issuing the license to Carl Bachstadt is, therefore, affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: March 7, 1938.

EDITH LOUISE GOFF,
Appellant,
-VS-
TOWNSHIP COMMITTEE OF THE
TOWNSHIP OF PISCATAWAY,
Respondent

Isadore I. Schwartz, Esc., for the Appellant.
Maurice M. Bernstein, Esq., for the Respondent.

This appeal is from the denial of a plenary retail consumption license for premises located at 300 Hazelwood Place, Township of Piscataway.

Piscataway is approximately 19 square miles in area and contains some 6000 inhabitants. At present there are 13 consumption licenses outstanding in the municipality. Appellant's premises are located in the north end of the Township, in a general vicinity where six consumption establishments already exist, the nearest being approximately 2000 feet and the farthest approximately one mile from appellant's premises. A liquor license has been outstanding for these premises since the days following repeal until July 1, 1936.

Respondent denied the present application on the ground that there are sufficient liquor establishments in the Township. It is settled that a local issuing authority may validly refuse to issue a license if a sufficient number is already outstanding in the municipality, even though, as here, there is no formal ordinance or resolution limiting the number of licenses. Haycock v. Roxbury, Bulletin 101, Item 3, and cases therein cited; Dunster v. Bernards, Bulletin 121, Item 11, and cases therein cited; Widlansky v. Highland Park, Bulletin 209, Item 7.

There is no substantial proof that respondent's judgment on this issue is unreasonable. Although the number of consumption licenses in the Township has been reduced by two within the last two years, nevertheless there is no showing that the 13 consumption establishments presently outstanding are insufficient for the Township; or that the six consumption establishments in the general vicinity of appellant's premises are insufficient to service that area.

In addition, Piscataway, despite its area and population, has a limited police force of but three men (and one automobile), which respondent believes will be unable to cope satisfactorily with local policing problems if the present number of consumption licenses be increased. There is nothing to show that respondent is unreasonable in this belief. Cf. Zakarew v. South Bound Brook, Bulletin 216, Item 4.

Appellant contends, however, that respondent's reason, as given above, for denial of her application is not bona fide. A review of the evidence, however, convinces me of respondent's good faith. During the last two years, it has informally discouraged five prospective applicants for a consumption license in the Township from formally pursuing any application by frankly advising them of its belief that the municipality contains sufficient liquor

establishments. Within that time, no new license has been issued. Although appellant contends that the resolution denying her application made no mention of sufficiency of licenses in the Township as a ground for denial, nevertheless a copy of the resolution itself, together with the testimony of the Municipal Clerk and the three Township Committeemen who appeared at the hearing on appeal, negatives this contention. And although appellant further attacks the bona fides of respondent by declaring that the Clerk and one of the Committeemen had advised her attorney that application be made, if at all, for the Fellowship Farms section of the Township, nevertheless the Municipal Clerk denies that he gave any such advice, and the Committeeman testifies that such advice as he gave went no further than a mere suggestion.

Appellant further contends that respondent's action was erroneous because one of its members, Committeeman Robert Murray, is a consumption licensee in Piscataway. As such, Murray was disqualified from acting or voting upon appellant's application; and had he so acted or voted, the present denial would for that reason be invalid. Marsteller v. Hagenbucher and Somers Point, Bulletin 95, Item 10; Petrusha v. Mine Hill, Bulletin 146, Item 8; Gardner v. Seabright, Bulletin 171, Item 9, and cases therein cited; Re Lederer, Bulletin 196, Item 15; Re Ford, Bulletin 225, Item 8. However, appellant's contention on this issue fails since the undisputed evidence reveals that Murray did not act or vote upon the present application or enter into any discussion thereon.

Appellant relies upon the following facts for her next contention: That her application was first considered by respondent on November 3, 1937, was then referred to an investigating committee, and was finally acted upon on November 16, 1937; that on November 4, 1937, a local newspaper carried an erroneous news item to the effect that her application had been granted. Appellant contends that because of this error, persons who favored her application were misled and therefore did not appear at the meeting when her application was rejected. This contention carries little weight. The error was known to appellant and her attorney on November 5 or 6, 1937, thus allowing ample time for appellant to notify persons who desired to appear in her behalf at the meeting on November 16, 1937. Furthermore, appellant had ample opportunity to present those persons at the hearing on this appeal. Instead, appellant merely presented to respondent below a favoring petition containing 26 signatures. The weight to be given to this petition was a matter properly within the discretion of respondent. Re Powell, Bulletin 59, Item 15; Dunster v. Bernards, Bulletin 99, Item 1; Schick v. Millville, Bulletin 133, Item 8; De Blasio v. Trenton, Bulletin 175, Item 6; Shor & Reibel v. Linden, Bulletin 190, Item 9.

Appellant further argues that the resolution denying her application had been prepared in advance of respondent's meeting on November 16th, and therefore indicates that respondent had prejudged her application. However, it was not erroneous for respondent, aware of its judgment that sufficient liquor establishments were outstanding in the municipality, to prepare a resolution of denial in advance. The essential fact is that it afforded appellant ample opportunity to be heard and to present her views to respondent, and that the vote upon the resolution was honest and based upon valid ground.

Appellant last contends that respondent made no actual investigation in her case and that respondent's retention of a ten percent investigation fee, upon denying her application, was therefore erroneous.

Respondent's denial is not impeached by the alleged lack of investigation. There is no requirement that the members of a local issuing authority must, in denying an application, act only upon facts which are uncovered to them through an independent investigation of the application at hand. They may use any knowledge they possess, irrespective of how obtained. If that knowledge is faulty, the applicant has his opportunity to demonstrate that fact and to secure proper relief on appeal to the Commissioner. In the present case, appellant does not contend that the Township Committeemen lacked adequate knowledge to conclude that sufficient liquor establishments exist in the Township and hence to deny her application.

It is true that R. S. Sec. 33:1-24 (Control Act, Sec. 21) provides that it "shall be the duty" of a local issuing authority "to investigate applicants and to inspect premises sought to be licensed." This provision, however, does not bar a local issuing authority from, as here, denying an application upon valid grounds independent of any inquiry into the appellant's fitness or suitability of his premises. It properly applies only to the instance when a license is granted; in such instance, it enjoins the local issuing authority to have first investigated and determined the questions of personal fitness and suitability of the premises.

Much may be said for the practice of a local issuing authority, although convinced that an application must be denied on a specific ground, nevertheless to examine the application on all vital issues so as to determine and state all its objections thereto. In this way, a rejected applicant is thoroughly apprised of his position and may also obtain a complete disposition of his case in a single appeal to the Commissioner. Re Marritz, Bulletin 222, Item 10. Nevertheless, the denial of an application, if based upon valid ground, cannot be reversed on appeal merely because the local issuing authority has not inquired into other issues.

Nor does the alleged lack of investigation prove that respondent's retention of the "investigation fee" is erroneous. R. S. Sec. 33:1-25 (Control Act, Sec. 22) provides that ninety percent of the license fee which an applicant must post with his application "shall be returned to the applicant....if the application is denied, and the remaining ten percent shall constitute an investigation fee...." This retained fee, though characterized in the statute as an "investigation fee", is not, however, dependent upon an actual investigation. It is, in purpose and effect, a uniform fee charged against all denied applicants so as to offset the general municipal work and expense occasioned by their applications. Cases may arise where, as here, the denial is based upon a ground which requires no independent investigation, yet the "investigation fee" must still be retained. Cf. Morton v. Lodcr, Bulletin 45, Item 9. Similarly, the withdrawal of an application is treated as equivalent to a denial of that application and the "investigation fee" is therefore to be deducted. Cf. U. S. Pipe & Foundry Co. v. Burlington, Bulletin 57, Item 12; Re Trenton, Bulletin 59, Item 5; Re Sakin, Bulletin 67, Item 13.

The "investigation fee" is automatic upon the denial of an application, and affirmance of the denial ipso facto sustains retention of that fee. The disappointed applicant may not litigate how much, if any, of the ten percent fee was "earned" by the local issuing authority and to seek a pro tanto return. To recognize such a right would lead to a type of litigation for which there is neither express nor implied statutory authority.

The action of respondent in denying appellant's application and in retaining ten percent of the posted license fee is, therefore, affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: March 8, 1938.

3. DISPLAY OF ALCOHOLIC BEVERAGES FOR SOLICITATION OR ORDER - NOT PERMISSIBLE BY NON-LICENSEES.

Gentlemen:

We are in receipt of advice from the DuPont people that it will be possible for us to have an exhibit in their display at Atlantic City, and inasmuch as we do not hold a license in the State of New Jersey and being unacquainted with your State laws, we are wondering if this is contrary to your regulations. We would therefore appreciate having you advise if it is possible for us to take advantage of this space.

Very truly yours,
Century Distilling Company.

March 7, 1938

Century Distilling Company,
Chicago, Ill.

Gentlemen:

There would be no objection if your display consisted only of advertising matter.

Since you are not a licensee of this State, you could not have or display alcoholic beverages at the exhibit nor could you solicit or take any orders for your products within this State. In other words, your participation would be restricted to a display of signs and the passing out of advertising literature without any solicitation.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

4. MUNICIPAL ORDINANCES - LIMITATION OF LICENSES - PRINCIPLES APPLICABLE

MUNICIPAL ORDINANCES - DISTANCE BETWEEN LICENSED PREMISES - MANNER OF MEASUREMENT - EXEMPTION IN FAVOR OF RENEWAL OF EXISTING LICENSES.

March 7, 1938

Charles M. Deull, Esq.,
Atlantic City, N. J.

My dear Mr. Deull:

I have your letter of February 24th setting forth ordinance that the Beverage Association proposes to submit to the Galloway Township Committee, reading:

"1. No more than twenty-seven plenary retail consumption licenses nor more than one club license shall be issued during any license year in Galloway Township, Atlantic County, New Jersey.

"2. Be it further resolved that no new license or transfer of license be granted to persons for any premises within seven hundred and fifty feet (750) of an existing licensed premise.

"Providing, however, that the foregoing limitation shall not prevent the renewal of plenary retail consumption licenses to persons holding such licenses at the time this Ordinance was adopted."

The proposed ordinance, I note, is a revision of the ordinance adopted by the Township Committee on June 19, 1937, the subject of Re Guenther, Bulletin 206, Item 15.

Section 1, by its terms, limits the number of licenses which may be issued during any license year. If you have a quota on the number to be issued, then, as soon as that number is issued, none further may be granted despite the fact that in the meantime some may have been surrendered or revoked. In other words, if the quota had been filled and some dropped out, none could be granted in their stead. It would be better, instead of limiting the number to be issued, to limit the number which may be outstanding in the Township at the same time.

I am not at all impressed with the numerical limitation of a single club license. If a club is really bona fide and is not operated for commercial gain, why should one social group of men get the privilege and another be denied? Why should there be any limitation at all in respect to club licenses? If it be said that they are not bona fide organizations or are one-man clubs, and then only in name, or that they do not obey the law, the answer is, why not establish that as a fact and then take the appropriate measures to weed out the unworthy and the disobedient? That's something quite different from refusing to give to a worthy group of men who have clubbed together for benevolent, fraternal, social or recreational purposes, any chance at all to dispense liquor in their own club house except they pay the full fee as if they were conducting the enterprise for private gain or commercial exploitation.

Section 2 provides that licenses shall not be issued or transferred for premises within 750 feet of an existing licensed premises, but does not specify the manner in which the distance shall be measured. I have ruled that where municipal regulation requires distance between licensed premises, in the absence of specification of how the distance shall be measured, the manner of measurement set up by Section 76 of the Control Act is to be used. See Re Guenther, supra.

I note the concluding proviso that the limitation shall not prevent the renewal of plenary retail consumption licenses to persons holding such licenses at the time the ordinance is adopted.

If this is meant to apply, as I presume it is, to the limitation imposed in Section 1, then it would be necessary only if more than twenty-seven plenary retail consumption licenses were presently outstanding. My records indicate, however, that there are only twenty-seven. Hence, all could be renewed within the terms of the limitation. The proviso, although it does no harm, is therefore really not needed.

The proviso, by its terms, applies only to the limitation, that is, to Section 1. It has no effect on Section 2. Hence, if two premises presently licensed were within 750 feet of each other, the Township Committee would have to decide, when the time for renewal came around, which one would have to be denied as being too close to the other, or if the regulation prevented the issuance of both. So unless all of the licensed premises in the Township are now 750 feet apart, there should be an exception in Section 2 in favor of renewals.

It is my suggestion that the proposed ordinance be revised as follows:

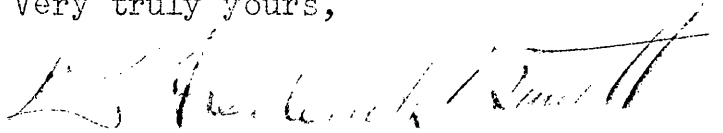
"1. The number of plenary retail consumption licenses issued and outstanding in Galloway Township at the same time shall not exceed twenty-seven. The number of club licenses issued and outstanding in Galloway Township at the same time shall not exceed one.

"2. No license shall be issued for, or transferred to, any premises within 750 feet of an existing licensed premises, provided, however, that this shall not prevent the renewal for the same premises of licenses outstanding at the time this ordinance is adopted."

If it is your thought that a quota less than the number presently outstanding should be fixed, then add to Section 1 a further proviso exempting renewals, the form of which you will find set forth in Re Sahl, Bulletin 198, Item 11.

In giving you the foregoing, I express no opinion one way or the other as to the policy or desirability, or the necessity for the adoption of the regulations. I indicate merely the revision necessary to get them into proper form. Whether or not the number of licenses shall be limited and if so, the quota to be fixed, and whether or not a minimum distance between licensed places shall be imposed, are matters exclusively in the discretion, in the first instance, of the Township Committee.

Very truly yours,



Commissioner.