

Jacobs.

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

BULLETIN NUMBER 161.

FEBRUARY 4th, 1937.

1. ADVERTISING - SLOGAN AND LIMERICK CONTESTS DISAPPROVED -
HEREIN OF BLANK'S BEER AND THE FUROR SCRIBENDI ENGENDERED.

January 22, 1937.

Dear Mr. Burnett:

One of our clients wishes to run a contest which will be announced through newspaper and radio advertising.

The contest will probably be a typical slogan or limerick contest in which the consumer writes a slogan or a limerick and also writes a short letter on "Why I like Blank's Beer."

Is there any objection to the use of such a contest in the advertising of beer in your state?

Yours very truly,

THE REUBEN H. DONNELLEY CORPORATION

January 24, 1937.

The Reuben H. Donnelley Corporation,
New York, N.Y.

Gentlemen:

I have your inquiry of the 22nd.

Slogan and limerick contests to advertise beer or liquor are disapproved because tending unduly to increase the consumption of alcoholic beverages.

It is not that I desire to quench the divine inflatus of potential presidents or embryo poets, or to quell the furor scribendi which is supposed to seize a consumer of Blank's Beer, but, rather, to stop at the source all commercial devices which exploit the public at the expense of making it beer or whiskey conscious.

Very truly yours,

D. FREDERICK BURNETT,
Commissioner.

2. APPELLATE DECISIONS - BONA vs. BORDENTOWN

JOHN BONA,)
Appellant)

-vs-

TOWNSHIP COMMITTEE OF THE)
TOWNSHIP OF BORDENTOWN,)
Respondent)

On Appeal

CONCLUSIONS

New Jersey State

Frank J. Backes, Esq., Attorney for Appellant
Samuel F. Garrison, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

Appellant appeals from the denial of his application for a plenary retail consumption license for premises located on Homestead Avenue, Piersonville, Township of Bordentown.

The premises are the same as those considered in White vs. Bordentown, Bulletin #130, Item 4.

At a meeting held July 28, 1936, the Township Committee issued a plenary retail consumption license in respect to another place which had previously been licensed, thereby making a total of eight such licenses then issued and outstanding. The Committee thereupon passed, on first reading, an ordinance limiting the number of such licenses to eight.

At the same meeting, it appears that appellant's attorney requested, on behalf of his client, a form of license application, which was refused for the stated reason that there had been a remonstrance filed against the granting of any license for the premises. The appellant himself was informed at the same meeting that there were already eight licenses issued and that there would be no more. The limiting ordinance was adopted on final reading August 11, 1936.

The refusal to give appellant an application blank is not cause for appeal. The seeming discourtesy was probably based on the Committee's unwillingness to take appellant's money, knowing their intention to limit the number of licenses. If appellant wanted to stand on his rights, he should have insisted. Instead, he acquiesced. As his lawyer candidly testified:

"I said if that is the case, there is no use of going ahead until I see whether or not my client wants to take a chance of forfeiting the ten per cent."

Not until after the final adoption of the ordinance did appellant advertise his notice of intention to apply, the first insertion appearing on August 14th. The application is too late. Appellant did not take any chances while there was yet time.

It is urged, however, that appellant, in substance, applied for a license on July 28, 1936; was improperly refused and, therefore, should not be subject to the limitation which was enacted two weeks later. Without dwelling again upon the facts that appellant was gambling with nothing at stake, or that there was no actual application before the Committee either to grant or deny, but conceding for argument's sake that appellant did in effect apply on July 28th, this contention cannot be sustained. The denial was neither arbitrary nor unreasonable. The eighth license application was already before the Committee. They very properly felt that eight taverns were a sufficient number to satisfy the needs of a population of between 800 and 900. Neighborhood residents were opposed to the licensing of appellant's premises. Under the circumstances, respondent was under no duty to give preference to appellant's application. See Walker vs. Verona, Bulletin #91, Item 4. The limitation, therefore, is not

unreasonable in its application to the appellant. Cf. in re Hill vs. Blairstown, Bulletin #144, Item 9.

The action of respondent is, accordingly, affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: January 25, 1937.

3. TRADE ORGANIZATIONS-- RESOLUTION DENYING TO ANY OFFICER OR DIVISION THE RIGHT TO DEFEND ANY LICENSEE CHARGED WITH PARTICIPATION IN ILLICIT ALCOHOLIC BEVERAGES COMMENDED

January 26, 1937.

Neil F. Deighan, President,
New Jersey Licensed Beverage Association,
R.F.D., Palmyra, N.J.

Dear Mr. Deighan:

I have before me the resolution of the Executive Council of your Association whereby it "records itself as opposed to and denies the right to any officer of this association or of any division thereof, whether elected or appointed, of defending or representing any person whether a licensee or not, charged with or being tried for the offense of possession, transportation or sale of illicit alcoholic beverages. The aforesaid prohibition to apply both to criminal proceedings and revocation proceedings."

This resolution strikes a new high and is worthy of emulation by all organizations in the liquor trade. It not only repudiates all persons charged with possession, transportation, or sale of bootleg, but dissociates your organization in public mind from any effort to defend or in anywise "protect" an offending member.

The ethics command respect. The practical effect is a body blow at illicit liquor. The action is heartening to clean enforcement.

Very truly yours,

D. FREDERICK BURNETT,
Commissioner.

4. APPELLATE DECISIONS - BRECHKA vs. CARTERET

ANTON BRECHKA,)	
Appellant)	
-vs-)	On Appeal
THE MAYOR AND COUNCIL OF THE)	CONCLUSIONS
BOROUGH OF CARTERET,)	
(MIDDLESEX COUNTY),)	
Respondent.)	

Ambrose J. Mudrak, Esq., Attorney for Appellant.
A. D. Glass, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

Appellant appeals from denial of renewal of his plenary retail consumption license for premises located at 54 Wheeler Avenue, Borough of Carteret.

On November 18, 1935 respondent amended a resolution, which was then in effect, so as to read as follows:

"That the maximum number of licenses of the type called 'plenary retail consumption license' *** be fixed on and upon a basis of two licenses to be granted per 1,000 people of the Borough of Carteret, as determined by the last Federal census; provided, however, that this limitation shall not affect those persons, firms or corporations who are now holding or may renew such a license in the Borough of Carteret."

At that time there were forty-one (41) consumption licenses outstanding in the Borough, which has a population of about fifteen thousand (15,000). Appellant had been a licensee in Carteret from the time of Repeal to June 30, 1935. He was not actually engaged in business on November 18, 1935, but at that time there was pending before respondent an application for renewal of Brechka's license which remained pending before respondent until May 19, 1936, when it issued to him a renewal of his license for the balance of that fiscal year. Brechka did business under that renewal from May 19, 1936 to June 30, 1936. It is apparent that if Brechka had filed an application for renewal of his license for the present fiscal year prior to June 24, 1936, (the significance of this date will appear later), respondent would have considered it an application for renewal within the exception set forth in its resolution of November 18, 1935. Brechka's difficulties in this case arise from the fact that he did not file his application for renewal prior to June 24, 1936, or perhaps even prior to July 1, 1936.

It appears that at a meeting held on June 15, 1936, the Mayor stated that June 24th was the limit for filing applications for renewals of licenses, and that an adjournment was then taken until June 29th, at which time licenses were to be granted. On the latter date appellant presented an application for renewal of his license, and the application was not accepted at that time because it was not accompanied by the license fee. The evidence shows that appellant made arrangements with a bank on July 7th to obtain the necessary fee; that he went to the Mayor on that day and was told to wait until the next meeting, to be held on July 20th. On the latter date he presented his application, together with the bank check, to the Clerk of the Borough. The matter came before the Council at its meeting held that evening and, while no formal action was taken at that time, it is clear that Mr. Brechka was advised at said meeting that the license would not be granted because filed too late; that his application, Federal stamp and all other papers were thereupon returned to him, and that the check was returned to the bank on the following day. At a later meeting, held on August 3rd, respondent adopted a resolution reading in part as follows:

"Whereas the said Council refused a renewal of said license on July 20, 1936, by reason of the application not having been made in time, to wit, prior to

July 1, 1936, and this resolution is to confirm such action,

"Now, therefore, be it resolved and it is hereby resolved *** that the Borough Council refuse to issue a plenary retail consumption license to Anthony Brechka for his premises at #54 Wheeler Avenue, Carteret, N.J., upon his failure to file an application to renew his plenary retail consumption license within the time set forth in the rules and regulations of the municipal issuing authority, the Borough Council of the Borough of Carteret."

I look in vain for any municipal regulation requiring applications for renewals to be filed before July 1, 1936. The only reference to any limitation of time contained in the minutes is the statement by the Mayor, made at the meeting of June 15, that all applications for renewal must be made on or before June 24, and it is admitted that no notice was given to Brechka or any other licensee that this time limit had been fixed. In the absence of notice to appellant of the fixing of a time limit, it would be unfair to permit respondent to base its refusal to renew upon the ground that application had not been filed within the limited time.

There remains to be considered the question as to whether or not appellant's application was an application for a renewal so as to bring him within the terms of the resolution of November 18, 1935. That he intended to renew his license is clear. He apparently could not raise the money for his license until July 7 and had to wait until July 20 to receive consideration by respondent. There is no evidence of any intent to abandon the business. I conclude that the matter should be considered as an application for renewal. Pride of Union Lodge vs. Elizabeth, Bulletin #145, Item 3.

While the action of respondent in refusing to grant the renewal was improper, I cannot order the issuance of the license because the Borough Clerk has returned the check for the license fee to the bank, and because the application and all other papers were returned to appellant by the respondent after its meeting held on July 20. Although appellant accepted the return of his papers at that meeting, I am satisfied that he did not intend thereby to abandon his right to appeal.

The matter will be remanded to respondent for further action. Appellant may re-file forthwith his application, in proper form, together with the necessary license fee and Federal stamp. Appellant will thereafter publish his notice of intention in accordance with the statutory requirements, and respondent will reconsider the application upon compliance with these requirements and upon the filing of proper proof of publication of the notice of intention. While appellant advertised a notice of intention in the early part of June 1936, such publication was premature because made before application filed. Appellant has had no opportunity to properly advertise because his application was denied by respondent on the same day upon which it was filed with the Clerk. Appellant will, therefore, be given an opportunity to comply with the statutory requirements as to advertising notice of intention.

The matter is, therefore, remanded to respondent for further action, in accordance with the procedure set forth herein.

D. FREDERICK BURNETT
Commissioner.

Dated: January 27th, 1937.

5. APPELLATE DECISIONS - McDONALD vs. CLAYTON

JAMES R. McDONALD,)
Appellant)

-vs-

On Appeal

THE BOROUGH COUNCIL OF THE)
BOROUGH OF CLAYTON,)
Respondent.)

CONCLUSIONS

Fred A. Gravino, Esq., Attorney for Appellant.
No appearance for Respondent.
William Patton, for Board of Education, an Objector.

BY THE COMMISSIONER:

Appellant's application for a consumption license at 327 Aura Road, Clayton, was denied solely because of an objection by the Board of Education to the issuance thereof.

The Board of Education adopted a resolution expressing the opinion that it would be unwise for respondent to issue the license sought,

"because of the proximity of said proposed establishment to the Clayton Public School, its probable influence upon the pupils thereof, and the increased accident hazard attendant thereto."

A copy of this resolution was presented to the Borough Council. Without granting appellant an opportunity to be heard, Council denied the application "for the reason stated in the written objection of the Board of Education ***; without prejudice, however, to the said James R. McDonald to make a reapplication for a license at a different location."

Clayton public school is located on a large triangular plot bounded by Aura Road, Academy Street and the railroad. Appellant's premises are located on Aura Road on the opposite side of the railroad tracks. Measured from the entrance to the premises in question, the nearest point of the school grounds is 468 feet away; the nearest point of the school building is 1068 feet away; the nearest entrance to the school is somewhat more than 1068 feet away. The children's playground adjoins the school. A grove of trees on the school plot prevents one in the school or playground from seeing the premises in question.

Clayton public school is a combined grammar and high school. Practically all of its pupils live in an opposite direction from the school than the direction in which the premises in question are located. Very few, if any, of its pupils have occasion to pass appellant's premises which are situated on the outskirts of the Borough, near the Elk Township line.

Issuing authorities have a right to decline licenses for premises reasonably considered by them as being too near churches or schools but, nevertheless, beyond two hundred feet therefrom. Staciewicz vs. Trenton, Bulletin #35, Item 10; Persi vs. Trenton, Bulletin #46, Item 13; Serafin v. Bayonne, Bulletin #107, Item 3.

In the present case, however, I conclude that respondent's determination was unreasonable because (1) nearly all the pupils live in a different direction from and need not pass appellant's property; (2) it cannot be assumed that appellant, whose good character is admitted, will violate the law by serving drinks to high school pupils who might happen to wander in the direction of his place of business - if he does, his license may be revoked; (3) the record is barren of evidence that an additional traffic hazard would be created. This conclusion is strengthened by the fact that for some time past a licensed place has existed on Academy Street about the same distance away from Clayton public school and, so far as the record shows, no evils such as those anticipated herein by the Board of Education have arisen from the existence of that licensed place. No more so should such evils arise from the issuance of this license.

The action of respondent is reversed. Respondent is ordered to issue the license as applied for upon payment of the proper license fee and the filing of the Federal stamp. This condition is imposed because it appears from the evidence that respondent returned the check for the license fee, and the Federal stamp, to appellant at the time it denied his application. There is no evidence that appellant accepted the return of his fee and thus in effect withdrew his application. In fact, the check is still in his possession and he promptly appealed from the action of respondent in denying his license.

D. FREDERICK BURNETT,
Commissioner

Dated: January 27, 1937.

6. PLENARY RETAIL DISTRIBUTION LICENSES - ONE PER PERSON - THE POWER TO RESTRICT LICENSES TO ONE PER PERSON MAY BE ADOPTED BY ORDINANCE WITH RESPECT TO ONE OR MORE PARTICULAR CLASSES.

PLENARY RETAIL DISTRIBUTION LICENSES - OTHER MERCANTILE BUSINESS - REGULATION BARRING THE ISSUANCE OF DISTRIBUTION LICENSES TO PREMISES ON WHICH OTHER MERCANTILE BUSINESS IS CONDUCTED ON SUNDAY APPROVED.

HOURS OF SALE - UNLESS ACCURATELY STATED MAY RESULT IN INEFFECTUAL REGULATION.

MINORS, MENTAL DEFECTIVES, HABITUAL DRUNKARDS - SALES - REGULATIONS PROHIBITING SALES OF ALCOHOLIC BEVERAGES TO MINORS, MENTAL DEFECTIVES OR HABITUAL DRUNKARDS SHOULD PROHIBIT SALES BOTH FOR CONSUMPTION ON OR OFF THE LICENSED PREMISES.

CREDIT - MUNICIPAL REGULATION PROHIBITING CREDIT BY CONSUMPTION LICENSEES BUT ALLOWING CREDIT BY DISTRIBUTION LICENSEES PERMISSIBLE ALTHOUGH INADVISABLE.

SERVICE TO WOMEN DIRECTLY OVER THE BAR - HEREIN OF GODFATHERS AND THE STRANGE PRANKS OF A COMMA.

MUNICIPAL ORDINANCES - PENALTY CLAUSES - CONSIDERATIONS APPLICABLE.

January 26, 1937

Fred Toegel, Esq.,
City Clerk,
Plainfield, N. J.

Dear Mr. Toegel:

I have before me the ordinance concerning alcoholic beverages adopted by your Common Council on June 1, 1936, amending Sections of the ordinance adopted September 4, 1934, which last mentioned ordinance had previously been amended by ordinance adopted April 1, 1935.

* * * * *

(2) The new provision that no more than one distribution license shall be issued to any person, partnership or corporation in the City of Plainfield is a statutory option which needs no approval. The new provision that all sales must be effected on the licensed premises and that orders may not be taken elsewhere meets my approval, not only on general principles but also because it ties in nicely with the other new provision above mentioned.

I also note that effective July 1, 1937, no plenary retail distribution license shall be issued, unless it be for a separate and independent store premises, to anyone who operates a store on Sunday for the sale of other merchandise. I take it that the original Section 9 which required that during the prohibited selling hours, distribution licensees must segregate their alcoholic beverages in a particular section of the licensed premises and keep them locked, has not worked out satisfactorily. The amended provision amounts to a declaration, in furtherance of the requirement that distribution premises be closed between 1:00 A. M. Sunday and 8:00 A.M. Monday, that if a person wants to transact other mercantile business on Sunday he will have to obtain his liquor license for separate premises. Since a municipality may bar all other mercantile business on licensed premises at all times to distribution licensees, Control Act, Section 13, it follows that a provision which has the effect of barring them part of the time is proper. I therefore approve it.

One other matter concerning Section 9 in both amendments: It speaks of "the hours of one o'clock Saturday night and eight o'clock Monday morning." Really there is no such thing as "one o'clock Saturday night." Undoubtedly what is meant is "Sunday 1:00 A. M." I think it would be better to say so. Otherwise, someone seeking escape from conviction under your ordinance will light upon this loophole and urge with grave face that since penal statutes and ordinances are always strictly construed, there are no closed hours actually fixed by the ordinance!

* * * * *

(7) Section 16 as amended June 2, 1936 provides in part: "....licensees.....shall not sell or serve to any minor, mental defective or habitual drunkard any alcoholic beverage for consumption on the premises, nor make sales on credit;.....provided, however, that holders of plenary retail distribution licenses may sell on credit, anything in this section notwithstanding."

This section, excepting the proviso, deals with sales for consumption on the licensed premises. It does not include sales of alcoholic beverages to minors, mental defectives or habitual

drunkards for consumption off the licensed premises. The statute, Section 77, makes any sale of an alcoholic beverage to a minor a misdemeanor. Rule 1 of the State Rules Concerning Conduct of Licensees prohibits licensees from selling, serving or delivering alcoholic beverages to minors whether for consumption on or off the premises. If sales of alcoholic beverages for consumption on the licensed premises to mental defectives and habitual drunkards are undesirable, such sales for consumption off the licensed premises are, I believe, equally as undesirable. I approve this section in this respect so far as it goes but suggest for consideration of your Council that its provisions be amplified as above indicated.

Now, as regards sales on credit: I note that you prohibit sales on credit by all licensees except plenary retail distribution. This means that under your ordinance neither plenary retail consumption nor club licensees may sell on credit but plenary retail distribution licensees may.

On December 6, 1936, I abrogated the State credit rule. After four months of trial, I found it to be practically unenforceable. I venture the opinion that eventually as regards your rule you will find the same. I am not, however, demanding that you discard your rule. If the Council wishes to keep it and try it out, well and good. It is approved. I merely point out what my experience has been and offer for your consideration the thoughts expressed in my Notice to Retail Licensees of December 6, 1936, Bulletin #151, Item #7, setting out the reasons for abrogating the State Rule.

* * * * *

(9) Section 19 of the original ordinance now reads:

"No woman shall be served with alcoholic beverages directly over any bar, nor shall minors be allowed in any room in which any bar is located, unless accompanied by a parent."

I suggest that you excise the comma which follows the word "located." I take it that you want to prohibit minors from being in barrooms unless the minor is accompanied by a parent and also that you want to prohibit the serving of alcoholic beverages to a woman directly over the bar regardless of whether or not she is accompanied by a parent. The comma in question permits such service provided she has the requisite parental escort. As it stands, I must disapprove it. It takes more than the presence of an austere parent to banish her charm which, after all, is the underlying reason why she may be banned at all from the bar. No benefit to sinful mankind is perceived or public policy served by excluding her from the bar when she is alone or escorted by mere husband but permitting her when accompanied by one of her parents. I am sure your Council intended no such result. If so, Plainfield would have an overcrop of "God-fathers."

Whether or not service of alcoholic beverages to women directly over the bar is to be prohibited is a matter to be decided in the first instance according to the judgment and discretion of the Council. So far as the policy is concerned, I express no official opinion or comment one way or the other. Eventually, I suppose the matter will have to be decided on appeal but then I shall have the benefit of argument on both sides. For the reasons given in Re Bocca, Bulletin #105, Item #7, which considered the matter at some length, I presently believe such a regulation to be valid. Hence, if the comma is excised, I shall tentatively approve the section.

(10) Section 22 as amended purports to penalize by fine or imprisonment or both any person, except a police officer acting in the course of duty, who shall knowingly purchase, receive or

procure any illicit alcoholic beverage. Section 23, as amended, purports to penalize by fine or imprisonment or both any person who shall manufacture, sell, distribute, bottle, blend, rectify, treat, fortify, mix, process, warehouse or transport any alcoholic beverage in violation of the ordinance or who shall possess alcoholic beverages with intent to do so or who shall possess implements for that purpose with intent so to use the same or who shall aid or abet another in so doing. Section 24 purports to penalize by fine or imprisonment or both any person who shall knowingly violate any of the other provisions of the ordinance.

There are a number of considerations involved.

Section 23 goes too far in purporting to penalize the unlicensed manufacturing, bottling, blending, rectifying, treating, fortifying, mixing, processing or warehousing of alcoholic beverages. Section 37 of the Control Act, as last amended by Chapter 257, P. L. 1935 on June 8, 1935, confers authority upon municipal governing bodies to make, enforce, amend and repeal such ordinances as it may deem necessary to prevent "the possession, sale, distribution and transportation of alcoholic beverages within its municipality in violation of this act." That is as far as the statute goes. That means that you cannot penalize by ordinance conduct which has nothing to do with the subject matters set forth in Section 37 of the Control Act. The very fact that the Legislature expressly named certain subjects, viz., possession, sale, distribution and transportation of alcoholic beverages, concerning which local ordinances might be enacted, excludes by implication every other subject matter such as manufacturing, rectifying, fortifying or the possession of implements or paraphernalia for such manufacture and processing. As to this, refer to the discussion of the question in Re Red Bank, Bulletin #91, Item #2.

Further: Even if power had been expressly delegated by statute to your municipality to make ordinances concerning the manufacturing and processing of liquor and the other subject matters covered by your Section 23 but which are not within the scope of the authority actually delegated by Section 37 of the Control Act as above mentioned, the ordinance itself, as drawn, would not sustain a conviction for such manufacturing, processing, etc., because no mention is made anywhere in the ordinance of such manufacturing, processing, possession of an unlicensed still, etc., except in the penalty clause. Now, it is true that the penalty clause does provide, among other things, that any person who shall own, possess, keep or store in Plainfield any implement or paraphernalia for the manufacture, sale, distribution, bottling, rectifying, blending, treating, fortifying, mixing, processing, warehousing or transportation of alcoholic beverages shall be deemed and adjudged a disorderly person and fined or imprisoned or both. But all these proscribed acts are penalized only when done, as your Section 23 states, "in violation of this ordinance." Since the ordinance is otherwise silent, the penalty clause is utterly ineffective to punish matters "in violation of it" which the ordinance itself, aside from the penalty clause, does not even attempt to regulate. As incisively said by Judge McGrath in Plainfield v. Pereira, Bulletin #91, Item #3, in considering this very ordinance:

"Obviously, the penalty clause cannot impose a penalty for acts which are not mentioned in the body of the ordinance and which the ordinance was not intended to regulate and does not regulate."

Further: Sections 22, 23 and 24 set forth both minimum and maximum penalties of fine or imprisonment which may be imposed for violations of the ordinance. The Home Rule Act prohibits the stipulation of mandatory penalties. Minimum penalties are mandatory

penalties. Hence, if your municipality is governed by the Home Rule Act, the minimum penalties must be omitted. See Re Hillside, Bulletin #69, Item #9. There is also question as to the maximum amounts of the penalties of fine and imprisonment set forth in these sections. It occurs to me that the Home Rule Act imposes a top limit of \$200.00 fine and ninety days in jail. Inasmuch as the Alcoholic Beverage Control Act is silent with respect to the nature and extent of penalties of fine or imprisonment which may be imposed pursuant to municipal ordinances adopted in accordance therewith, all such penalties should be controlled by the statutes which govern your particular municipality.

If, therefore, it were my duty to approve or disapprove Sections 22 through 24 inclusive, I should have to disapprove them. As pointed out, however, in Re Red Bank, Bulletin #91, Item #2, my approval, while requisite to ordinances regulating the conduct of licensed businesses and the nature and condition of licensed premises and with respect to conditions imposed upon the issuance of licenses, is not necessary in respect to penalty clauses. My function in that respect is, therefore, purely advisory. In the effort to be cooperative, I do cordially suggest to your Council that these sections be carefully reconsidered and rewritten in order that the ordinance may stand up when tested in court and convictions thereunder may be sustained.

When you reconsider these sections, I suggest that you refer also to Re Orange, Bulletin #52, Item #1, Re Boonton, Bulletin #53, Item #9, Re Laurel Springs, Bulletin #55, Item #6, Re Orange, Bulletin #69, Item #3, Re Winne and Banta, Bulletin #87, Item #4, and especially Plainfield v. Pereira, Bulletin #91, Item 3 and the masterly analysis of Judge McGrath and the exhaustive authorities cited therein.

* * * * *

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

7. APPELLATE DECISIONS - HUDSON COUNTY RETAIL LIQUOR STORES ASSOCIATION v. JERSEY CITY and TERMINAL WINE AND LIQUORS, INC.

HUDSON COUNTY RETAIL LIQUOR STORES ASSOCIATION,)

Appellant,)

-vs-)

ON APPEAL
CONCLUSIONS

BOARD OF COMMISSIONERS OF CITY OF JERSEY CITY and TERMINAL WINE AND LIQUORS, INC.,)

Respondents)

-----)

Samuel Moskowitz, Esq., Attorney for Appellant.

N. Louis Paladeau, Jr., Esq., Attorney for Respondent Board of Commissioners of City of Jersey City.

Charles Hershenstein, Esq., Attorney for Respondent Terminal Wine and Liquors, Inc.

BY THE COMMISSIONER:

This is an appeal from the renewal of a plenary retail distribution license issued to respondent Terminal Wine and Liquors, Inc. (hereafter called "Terminal"), for premises located at 92 Sip Avenue, Jersey City.

Pursuant to stipulation, it is submitted for decision on the pleadings.

It appears therefrom that the same corporate set-up and same state of facts existed at the date of the local hearing herein as existed at the hearing on the previous appeal in respect to the distribution license issued to Terminal for premises at 322 Central Avenue, Jersey City. Appellant contends that, since the Central Avenue license was held void on that appeal, Hudson County Retail Liquor Stores Association v. Terminal Wine and Liquors, Inc. and Jersey City, Bulletin #127, Item #1, so must the Sip Avenue license be held on this appeal.

The fallacy of the argument is that it loses sight of, or, more accurately, ignores the effect of a later statute which is dispositive of the controversy.

By reference to the case above cited, it will appear that the Central Avenue license was applied for in January 1936, at which time P. L. 1935, Chap. 254, Section 5 (Section *22 Control Act reprint) had become effective, viz., on July 4, 1935. This section forbade issuance of retail licenses to any corporation unless each owner, directly or indirectly, of more than ten per centum of its stock qualified in all respects as an individual applicant. It was because of non-compliance with that statute that the Terminal license at Central Avenue was set aside.

The Terminal license, for the year beginning July 1, 1935, at Sip Avenue, then outstanding, was not affected by that decision because it had been issued on June 28, 1935, which was before that statute became effective on July 4th, as aforesaid.

The Sip Avenue license for the current year beginning July 1, 1936, which is the subject matter of the present controversy, would have been affected by Chapter 254 of the Laws of 1935 if it had not been for the enactment of Chapter 188 of the Laws of 1936 which expressly provided that the aforesaid Section 5 of Chapter 254 of the Laws of 1935 (Section *22 Control Act Reprint) "shall not apply to renewals of licenses."

Since the current Sip Avenue license was a renewal and since it was issued after P. L. 1936, Chapter 188 became effective, it follows that P. L. 1935, Chapter 254, non-compliance with which was fatal to the Central Avenue license, had no bearing or effect whatsoever upon the issuance of the Sip Avenue license.

Hence, the corporate set-up and the individual qualifications of the stockholders were immaterial so far as the Sip Avenue renewal license was concerned.

The action of the respondent Board of Commissioners of Jersey City is, therefore, affirmed.

D. FREDERICK BURNETT,
Commissioner.

Dated: January 29, 1937.

8. RULES CONCERNING LICENSEES AND THE USE OF LICENSED PREMISES -
SKEE BALL - PERMISSIBLE IF USED SOLELY FOR SKILL AND AMUSEMENT BUT
MAY NOT BE PLAYED AGAINST THE HOUSE.

January 27, 1937

Dear Sir:

The Benson Novelty Co. of which I am the general manager, has instructed me to write to you for the purpose of ascertaining your opinion with respect to the installation of skill ball miniature bowling alleys (sometimes known as skee ball) in taverns in the State.

I respectfully request your attention to the fact that these games are instruments of skill and dependent entirely upon the ability and adroitness of the player. These games are no different from large size bowling alleys which have been associated with taverns from time immemorial. The only distinction is the size of the game and in place of pins being thrown down the machine registers the skill of the balls thrown in the different pockets provided therefor.

Very respectfully yours,
BENJAMIN STEINBERG,
General Manager.

January 31, 1937

Benson Novelty Co.,
277 Coit Street,
Irvington, N. J.

Gentlemen: Attention of Benjamin Steinberg,
General Manager.

I have yours of the 27th re Skee Ball alleys.

The alleys appear to be bowling devices not designed intrinsically for gambling purposes.

There is no objection to clean games of skill and innocent amusements in taverns. Hence, so long as skee ball is used solely for skill and amusement, it does not come within the rules prohibiting gambling or gambling devices on licensed premises.

When, however, the alleys are played "against the house," viz.: the player gets cash or a drink or anything else of value graduated according to the score that he makes, that is gambling, and if done on licensed premises makes the license subject to revocation.

The licensee will, at all times, be responsible for any illegal use made of the alleys.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

9. RULES CONCERNING LICENSEES AND THE USE OF LICENSED PREMISES -
LOTTERIES - SEVEN DAY SUSPENSION - HEREIN OF THE CHARGE OF
MR. JUSTICE HEHER TO THE PASSAIC GRAND JURY CONCERNING GAMBLING.

February 1, 1937

Hon. Palmer M. Way,
Judge of the Court of Common Pleas
of Cape May County,
Wildwood, New Jersey.

My dear Judge:

I have staff report and your letter of January 28 enclosing certification of the proceeding had before you on January 27 last, against Jack Breslow, holder of plenary retail consumption license C-49, issued by you for premises 217 Washington Avenue, Woodbine - charged with having conducted a lottery on his licensed premises at which a pig - the prize described on the ticket - was awarded to a resident of Woodbine.

I note Breslow was adjudicated guilty and that you suspended his license for a period of seven days - January 28 to February 3, 1937.

Expressing no opinion on the merits because the case may come before me by way of appeal, I wish to thank you for your wholly salutary action.

Supreme Court Justice Heher charging the January Grand Jury of Passaic County is reported by the Press to have said: "Government cannot survive if law and order break down."

"I have been advised, and this is the only matter that requires particular mention," said Justice Heher, "that what may be termed gambling in a petty form exists in this county in some of the stores and business establishments. I am told that in some of these places there is permitted to be conducted what is known as one-ball or one-shot pin tables, or bagatelle tables.

"Now, of course, we knew that gambling in any form is unlawful, no matter what the individual view of the wisdom of that policy may be, the Legislature has so determined by outlawing it and that is sufficient reason for punishing the violators of the law. But I cannot conceive of any reasonable doubt as to the wisdom of that policy.

"GAMBLING IS CRIME."

"Gambling, after all, is crime, a device by which the man who has no desire to earn a living in a legitimate way acquires sustenance through practicing upon the cupidity and the gullibility of his fellow citizens.

"I am told that the young as well as the old are permitted to use these devices. Of course, whether it concerns young or old, it is a crime. It is particularly vicious when means are afforded to the youth to gamble away their own money, or possibly someone else's money, and I ask you to inquire into this and wherever the evidence warrants return an indictment, because there is no reason in law or morals why these conditions should be permitted to continue.

"It not only takes the money of those who can least afford it, but it creates temptation to them to resort to larceny, embezzlement, and other means to acquire money, either to make good losses or with which to speculate at the gambling table in the hope that a profit may come."

Your action in inflicting such a substantial penalty indicates that you share the belief that the only proper course for law enforcement authorities to take is that, so long as the law against gambling remains on our books, it is our duty to enforce it.

I sincerely appreciate your active cooperation in law enforcement.

Cordially yours,
D. FREDERICK BURNETT,
Commissioner.

10. GAMBLING - SHUFFLE-BOARDS, QUILTS, BADMINTON, PING-PONG, BOWLING ALLEYS, BAGATELLE AND SKEE-BALL ARE NOT GAMBLING GAMES OR DEVICES PER SE - SO LONG AS THEY ARE NOT USED FOR GAMBLING THEIR USE ON LICENSED PREMISES IS NOT PROHIBITED.

MERCANTILE BUSINESS DEFINED - DOES NOT INCLUDE SHUFFLE-BOARDS, QUILTS, BADMINTON, PING-PONG, BOWLING ALLEYS, BAGATELLE OR SKEE-BALL.

February 1, 1937

Sidney Simandl, Esq.,
Newark, N. J.

Dear Mr. Simandl:

A licensee may have shuffle-boards, quilts, badminton, ping-pong, bowling alleys, bagatelle and skee-ball, so long as none of the games are used for gambling and no gambling is permitted. Gambling and gambling devices on licensed premises are prohibited by Rules 6, 7 and 8 of the State Rules Concerning Conduct of Licensees. The games or devices aforementioned are not necessarily gambling apparatus per se. Of course, they may be put to such use. Any game, for whatever use designed, can be converted into a gamble. It is a question of fact. So long as they are not used for gambling, there will be no violation of the State rules. The licensee will, however, be held fully responsible at all times for their use and conduct on his licensed premises. See re Bernards Inn, Bulletin #51, Item #1, copy enclosed.

The games are not barred by the prohibition in your client's plenary retail consumption license against other mercantile business. I have ruled, in re Mercantile Business Defined, Bulletin #47, Item #6, and re Boonton, Bulletin #57, Item #17, that bowling alleys, shuffle-boards and pool tables are not within the generally accepted meaning of the term "mercantile business" in that they do not involve the purchase and sale of goods, merchandise or commodities. Copies of both of these items are enclosed.

It makes no difference that a fee is charged for playing some of the games and not others provided there is no gambling against the house.

Very truly yours,
D. FREDERICK BURNETT
Commissioner

11. LICENSES - SUSPENSION - AN ORDER OF SUSPENSION DOES NOT PREVENT A LICENSEE FROM CONTINUING TO CONDUCT A RESTAURANT BUT MAY IMPOSE A CONDITION THAT THE LICENSEE SHALL REMOVE ALL LIQUOR FROM THE LICENSED PREMISES DURING THE TERM OF SUSPENSION - SPECIAL PERMIT WILL BE ISSUED BY THE STATE COMMISSIONER TO COMPLEMENT THE ORDER OF THE LOCAL ISSUING AUTHORITY.

February 3, 1937.

William A. Miller,
City Manager,
Clifton, N. J.

Dear Mr. Miller:

Abe Sperber has today filed application for special permit, authorizing the removal of all alcoholic beverages from his licensed premises, 67 Center Street, to his home, 302 Washington Avenue, Clifton, and there to stay during the sixty day period of suspension.

He represents to me that your Mayor and Council are willing that he continue his restaurant business on condition that he remove from and have no alcoholic beverages whatsoever upon his premises during the period of suspension.

Permission to continue the restaurant business, upon compliance with such condition, is proper and within the ruling made in Re Spindel, Bulletin #89, Item #14. In that case a licensee, whose license had been suspended, desired to repair and redecorate during the time of suspension. I there ruled:

"A liquor license confers a privilege by entitling the holder to do the things specified in his license. A revocation extinguishes the license and, therefore destroys the privilege entirely. A suspension is a partial revocation, that is, it destroys the privilege during the term of the suspension. Hence, during that term, the licensee may not lawfully exercise any of the rights conferred by his license.

"The right to repair and to redecorate the interior of one's premises is a common law right which every person has and is not a right conferred by the liquor license. Hence, it is not affected by the suspension.

"The repairs and redecoration may, therefore, lawfully be made but the premises must not be open for liquor business in any sense while the suspension is effective."

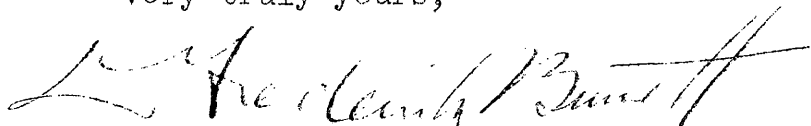
So, in the instant case, the right to operate the restaurant end of the business, since it was not conferred by the liquor license, is not affected by its suspension.

The condition which he tells me has been imposed by your Mayor and Council is wholly in the public interest since it assures that the premises will not be open for liquor business in any sense while the suspension is effective.

The condition is, therefore, approved, and assuming that it was in fact imposed as represented, it is hereby incorporated in and made a part of the order of suspension so as to implement such order and assure compliance with its mandate.

The Special Permit will, therefore, be issued to complement the action of your Mayor and Council, providing that you will confirm Mr. Sperber's representations aforesaid of the wishes of your Mayor and Council, as to which, please advise me. Needless to say, the permit will confer upon him no privileges whatsoever to use, sell, or otherwise dispose of the beverages so removed.

Very truly yours,

A handwritten signature in cursive script, appearing to read "D. Frederick Burnett". The signature is written in dark ink and is positioned above the typed name.

D. Frederick Burnett
Commissioner