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

BULLETIN 255. JUNE 27, 1938.

1. TIED HOUSES - THE STATUTE CONSTRUED AND THE SCOPE DETERMINED - HEREIN OF THE NASSAU TAVERN AND THE NEO-MEDIEVAL RESTORATION AT PRINCETON.

June 18, 1938.

Dear Sir: In Re: Application of Princeton Municipal Improvement, Inc. for license.

On behalf of Mr. Edgar Palmer of Princeton, New Jersey, the president of Princeton Municipal Improvement, Inc., a corporation organized under the laws of New Jersey, I am submitting for your consideration and ruling the question whether Princeton Municipal Improvement, Inc. as the owner and operator of Nassau Tavern at Princeton, New Jersey, is qualified to receive a liquor license because of the fact that its principal stockholder, Mr. Edgar Palmer, is also the owner of certain shares of stock in two companies engaged in either the manufacture or sale of alcoholic beverages.

For brevity, I shall hereafter refer to the applicant as "P.M.I."

The facts are briefly these:

P.M.I. was organized by Mr. Palmer some nine or ten years ago as a real estate development company to carry out a project conceived by him many years ago for the development of a civic center in Princeton, in which would be preserved and recreated the traditional architecture of Princeton as it existed from the seventeenth to the nineteenth centuries. The site selected for this civic center has an area of about five acres with a frontage of about four hundred feet on Nassau Street directly opposite the University campus.

About two years ago, the work on this improvement was commenced by razing numerous old shacks situate on this site as well as the outmoded business buildings and apartments along the Nassau Street frontage. The construction of many of the contemplated improvements was then undertaken. To date, the tavern known as Nassau Tavern, a theatre, a power plant and a series of two story buildings of colonial style having stores on the ground floor and apartments above, running along the westerly side of the square, have been completed. It is contemplated that there will be a series of two story buildings of similar design erected along the easterly side of this site. The center of the community will be a large landscaped square.

The tavern, which is of course open to the public, is but one of the many buildings forming a part of this general plan of improvement and restoration.

Mr. Palmer owns about two-thirds of the capital stock of P.M.I. I might mention that The Trustees of Princeton University hold some of this stock. While the company is a business corporation and, as such, organized for profit, there has been no return to the stockholders. Practically all of the moneys require

for this improvement have been advanced and invested by Mr. Palmer. At the present time, his investment in this undertaking amounts to more than three millions of dollars.

Mr. Palmer is, of course, a man of substantial wealth, and his investments cover a very broad field. Among his many stockholdings are 425 shares of the Class "A" stock of Bellows & Company, importers and dealers in wines and liquors, representing less than 2% of the outstanding Class "A" shares of that company, and 2,500 shares of the New England Distillers Company, representing 2½% of its capital stock. Mr. Palmer is not a director of either of these companies and takes no part in their management. The market value of these two blocks of stock, I am informed, is substantially $14,500.00.

I would greatly appreciate your prompt consideration of this application for a ruling on the question whether Mr. Palmer's holdings in the Bellows Company and the New England Distillers Company would be deemed to be in violation of Section 40 of the Alcoholic Beverage Control Act.

Believe me

Very truly yours,
Wm. E. Bardusch

June 21, 1938

William E. Bardusch, Esq.,
63 Wall Street,
New York City.

Dear Mr. Bardusch:

I have yours of the 18th and appreciate your candor.

The statute, read literally, would deprive the Nassau Tavern of a license unless and until Mr. Palmer sold, "out and out", his stock in the two concerns engaged in the manufacture or wholesaling of alcoholic beverages.

It reads (R. S. 33:1-43, Control Act, Sec. 40):

> "It shall be unlawful for any.....stockholder or officer or director of any corporation.....interested in any way whatsoever in the retailing of alcoholic beverages to.....be a shareholder.....of a corporation....., directly or indirectly, interested in any brewery, winery, distillery, rectifying and blending plant, or wholesaling .....interests of any kind whatsoever outside of the State."

In order to determine whether this drastic language applies to the instant case, it is necessary to ascertain the legislative intent. Its purpose was to prevent control of retail outlets by manufacturers and wholesalers, i. e., a recurrence of "Tied houses" which were responsible for many of the social and economic abuses which brought about Prohibition.

In their book "Toward Liquor Control" (Harper's, 1933), setting forth their conclusions after intensive research, Fosdick and Scott said:

"The 'tied house,' and every device calculated to place the retail establishment under obligation to a particular distiller or brewer, should be prevented by all available means. 'Tied houses,' that is, establishments under contract to sell exclusively the product of one manufacturer, were, in many cases, responsible for the bad name of the saloon. The 'tied house' system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales. He saw none of the abuses, and as a non-resident he was beyond local social influence. The 'tied house' system also involved a multiplicity of outlets, because each manufacturer had to have a sales agency in a given locality. In this respect the system was not unlike that now used in the sale of gasoline, and with the same result: a large excess of sales outlets. Whether or not this is of concern to the public in the case of gasoline, in relation to the liquor problem it is a matter of crucial importance because of its effect in stimulating competition in the retail sale of alcoholic beverages. 'Tied houses' should, therefore, be prohibited, and every opportunity for the evasion of this system should, if possible, be foreseen and blocked.

"There are many devices used by brewers and distillers to achieve this same end, such as the furnishing of bars, electric signs, refrigerating equipment, the extension of credit, the payment of rebates, the furnishing of warranty bonds when required to guarantee the fulfillment of license conditions and of bail bonds when the dealer is hailed into court.

"A license law should endeavor to prohibit all such relations between the manufacturer and the retailer, difficult though this may be." (p. 43)

In Reichelderfer v. Johnson, 72 F. (2d), 552 (Dist. of Columbia, 1934), the Court said:

"One of the well-recognized objections to the methods of sale and distribution of liquors prior to the era of prohibition was the fact that brewers and wholesalers frequently monopolized and controlled the retail trade. As stated by Judge Nichols in Marks v. Conrad Seipp Brewing Co., 74 Ind. App. 50, 128 N. E. 620, 621: 'It is a matter of history that a part of the corrupting influence of saloons emanated from the fact that many of them were owned or controlled by the breweries, by whom they were placed in the hands of irresponsible persons who were dependent upon the breweries for their financial support. Public policy demanded that such a condition of dependence and irresponsible operation be abrogated, and the act above mentioned resulted.'.....

"We think it apparent from the legislative history of this provision that Congress intended a divorce a vinculo between the business of brewing beer and the retail sale thereof, and to give the Commissioners wide latitude in enforcing this manifest purpose."

In the endeavor to prevent the recurrence of the evil which the statute was designed to prevent, rulings and decisions have been made which I believe exemplify the proper scope of the

drastic statute, viz.: A consumption license was denied where it appeared that the licensed premises and the fixtures were owned by a brewery and the applicant had promised to handle its beer exclusively, Velivis v. Trenton, Bulletin 56, Item 7; ruled that a wholesaler's license may not be issued to a corporation whose stock was entirely owned by a holding company which in turn had interlocking or common officers, directors and stockholders with another holding corporation owning all the stock of a retail licensee, Re Osborne, Bulletin 70, Item 6; license application denied when it appeared that an officer of a package goods store was also an officer in a wholesale liquor house; Parker Liquor Stores v. Jersey City, Bulletin 77, Item 12; sign regulations promulgated prohibiting the display on the exterior of retail licensed premises of signs bearing the name, brand or trademark of a manufacturer or wholesaler, Bulletin 78, Item 1; Solicitor's Permit denied to a retailer who sought to solicit orders for a brewery, Re Burton Products, Bulletin 86, Item 10; ruled that a brewery officer may not acquire and hold mortgage on licensed retail establishment, Re Lindabury, Bulletin 103, Item 2; ruled that a wholesaler may not take back a conditional bill of sale upon goods sold on credit to a retail licensee, Re Gerber, Bulletin 109, Item 15; ruled that wholesalers may not sell alcoholic beverages to retailers on a consignment basis, Re Schlesinger, Bulletin 123, Item 11; three State Beverage Distributors licenses suspended for taking chattel mortgages upon the goods and fixtures of retail licensees, Re Bade, Bulletin 127, Item 6; Re Carabelli, Bulletin 174, Item 15; Re Rosenberg, Bulletin 217, Item 8; ruled that ownership by a wholesaler or manufacturer of alcoholic beverages of stock in a retail licensee is prohibited even though such ownership results from a bona fide reorganization of the retail licensee, Re Kanter, Bulletin 137, Item 11; ruled that a solicitor for a wholesaler may not tend bar or do other missionary work for a retailer even gratuitously, Re City Brewing Corporation, Bulletin 159, Item 5; ruled that an employee of a wholesaler before becoming manager for a retailer must first sever all of his connections with the wholesaler, Re Talmadge, Bulletin 176, Item 8; ruled that agreements for exclusive sale of brewery products is prohibited, Re Hogan, Bulletin 196, Item 14; ruled that a State Beverage Distributor may not place signs in retail stores stating that orders may there be taken, Re Glickenhaus, Bulletin 204, Item 1.

The instant question is whether the facts which you present fall within the prohibition of the statute.

It arises not because Princeton Municipal Improvement, Inc., owner and proprietor of the Nassau Tavern, holds stock in a manufacturer or wholesaler of alcoholic beverages, or vice versa, but simply because of the accidental circumstance that Mr. Palmer, its leading sponsor, happens individually as an investment to hold a sizeable though small minority of stock in such other concerns. In them, he has no control nor does he participate in their management. As to him, they are a thing apart. As to his brain-child in Princeton, they are strangers. The tavern which is a part of the neo-medieval restoration is a mere incident, not its principal factor. While the Princeton enterprise is not officially a part of the University, its atmosphere permeates the college life. While it is organized as a full-fledged business company, its primary purpose is not profit, but the creation and maintenance of a civic center.

On the facts presented, the thought of a tied house is so remote as to be merely academic and wholly negligible. It would be

shooting at windmills to treat this case as coming within the purview of the statute. As the Federal Supreme Court well said: "The intent, not the letter, of the statute constitutes the law." National Bank v. Matthews, 98 U.S. 621 (1878).

So, heretofore, on the principle that when the reason of the rule fails, the rule itself falls, I have held that a country club is not precluded from obtaining a license because of the mere coincidence that one of its members or directors happened to be an officer of a brewery. Re Frank, Bulletin 113, Item 8. So also that a corporation actually operated under judicial control in proceedings under Section 77B of the Bankruptcy Act may hold a retail license so long as such control continues notwithstanding its interest in a foreign wholesaler and manufacturer. Re Schulte, Inc., Bulletin 179, Item 9.

I therefore hold that the language of the statutory section cannot be extended to embrace situations not intended to be governed thereby, and hence that Mr. Palmer's holdings in Bellows & Company, and the New England Distillers Company, are not in violation thereof.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

2. APPELLATE DECISIONS - MAENNER'S CAFE, INC., vs. SOMERS POINT.

MAENNER'S CAFE, INC., a corporation of New Jersey, Appellant, -vs- COMMON COUNCIL of the CITY OF SOMERS POINT, Respondent.	ON APPEAL CONCLUSIONS

. . . . . .

Emory J. Kiess, Esq., Attorney for Appellant.
Enoch A. Higbee, Jr., Esq., Attorney for Respondent.
John Rauffenbart, Esq., by Martin Bloom, Esq., Attorney for William Krumm, stockholder and director of Appellant Corporation.

BY THE COMMISSIONER:

Appellant appeals from the denial of a transfer of his plenary retail consumption license from 936 Shore Road to a building to be constructed on premises known as the easterly 100 feet of Lot B. No. 2 of High Bank, Lots on plan of the division of the estate of R. L. Somers, the remaining part of Lot 18, in said City of Somers Point.

Plans for a new building were filed with the application. Respondent has raised no objections to the proposed build-

ing.

The transfer seems to have been denied solely because a majority of those members of Common Council who voted upon the application were opposed to the establishment of a saloon at an entrance to a park. The motion to deny this transfer was carried by a vote of three in favor and one against; all other members of the Common Council being absent or excused from voting. The resolution denying the transfer states no reasons therefor, but the three Councilmen who voted in favor of the resolution to deny testified at the hearing of the appeal that they were not in favor of establishing a saloon at an entrance to a park. The so-called park is presently non-existent.

A week or two prior to the meeting at which appellant's application was considered, the City of Somers Point acquired title to a large parcel of land called High Bank, which, it was testified, the City plans to develop as a park. The plot acquired by the City adjoins the plot of ground to which appellant seeks to transfer his license, and has a frontage on Great Egg Harbor Bay of 2800 feet. Despite the fact that the land recently acquired by the City is at the present time unimproved, respondent's alleged reasons for denying the transfer would be entitled to great weight were it not for other factors which appear in this case. Testimony shows, however, that, within a few days after the City acquired the High Bank property, a portion thereof, which immediately adjoins the plot to which appellant seeks to transfer his license, was sold by the City to one Kugler. Thereafter, Kugler's wife applied for a plenary retail consumption license for a building to be erected on said plot and her application was granted on the same evening upon which appellant's application to transfer its license was denied. Kugler's was a new license and was granted by a unanimous vote of the members of Common Council.

It is difficult to reconcile the solicitude alleged in the instant case to keep saloons away from the entrance to this so-called park with the fact that, at the very same meeting, respondent granted a new license on an adjoining plot of ground which in fact is nearer to the so-called park. The three members of Council who voted to deny the transfer attempted to explain that they favored the granting of a license to Kugler because she intended to conduct a restaurant with a ten foot bar, whereas appellant intended to conduct a saloon with a fifty-six foot bar. Quite feeble! There is nothing to prevent Mrs. Kugler from installing a larger bar at any time she desires.

It is clear that respondent discriminated unjustly against appellant in granting the license to Kugler and denying appellant's application for a transfer. The non-existent park is a mere afterthought, better left unsaid in view that the action of granting a liquor license even nearer the "park" speaks louder than words.

Respondent lastly contends that granting of this transfer would be in violation of its resolution adopted on April 20, 1936, wherein it was resolved that there be no additional licenses granted for the sale of alcoholic beverages for establishments along the Shore Road of the City of Somers Point. The plot of ground upon which appellant intends to conduct its business has a frontage of fifty feet, more or less, on Broadway and fifty-one feet, more or less, on another road which may be considered as either part of the traffic circle or part of Shore Road. The

plans call for a building having a width of thirty-five feet and a depth of approximately sixty feet. Appellant has consented to have the entrance to its property on Broadway. I find no violation of the resolution dated April 20, 1936, will ensue.

William Krumm appeared herein as an objector. It appears that he is the holder of five shares of stock of Maenner's Cafe, Inc., which constitutes twenty-five per centum of the outstanding stock. He alleges he is President of the Corporation and that the application to transfer the license is fatally defective because it is not signed by the proper officers. It is unquestioned that Krumm was elected President of the Corporation on June 4, 1937. At a meeting of the directors of the Corporation held on April 8, 1938, however, Joseph Maenner was elected President and Floyd Marshall elected Secretary and Treasurer. The application was signed, on April 11, 1938, in the name of the Corporation by Joseph Maenner, President, and Floyd Marshall, Secretary. Thus, it appears that these officers were at least de facto if not de jure, officers of the Corporation at the time the application was executed. The rights of a corporation acting by its de facto officers cannot be attacked in a collateral proceeding of this nature. This is not the proper forum in which Krumm may test his right to corporate office. On its face, the application is in proper form. Hence, the objections of Mr. Krumm are dismissed.

The action of respondent in denying the transfer is reversed, and respondent is directed to grant the application subject to the express condition that the premises, as described in the plans and specifications submitted, shall first be built. The transfer, of course, may not become effective until the special condition has been complied with.

D. FREDERICK BURNETT
Commissioner

Dated: June 19, 1938.

3. DISCIPLINARY PROCEEDINGS - LEWD SHOWS - ONLY 6-1/2 DAYS' SUSPENSION INFLICTED BY BOROUGH COUNCIL OF LITTLE FERRY FOR THE VILEST SHOW - FUTURE DISCIPLINARY PROCEEDINGS AGAINST LITTLE FERRY LICENSEES TO BE HANDLED DIRECT BY THE STATE COMMISSIONER.

June 21, 1938.

Borough Council of Little Ferry,
c/o William Stika, Clerk,
Little Ferry, N. J.

Sirs:

I have before me copy of minutes of your special meeting of June 14th, at which you conducted a hearing on charges against Emil Vanek, 49 Washington Avenue, Little Ferry.

I note that Vanek pleaded guilty to a charge of permitting lewd and immoral activities on the licensed premises, and that the Council, after hearing testimony from one of my men as to the nature of the performance he witnessed, imposed a suspension from 2:00 A. M. June 16th to 7:00 P. M. June 23rd.

This is the only penalty imposed for running one of the vilest, most outrageous lewd shows that it has been the unpleasant duty of this Department to investigate. Never before has such an

affront to common decency come to my attention. During the show three women performed absolutely in the nude, straddling the men, flaunting themselves and inviting the men to maul and paw them; two of the women committed acts of perversion (known in the vernacular as "The Circus" or "The 69"); one of the women lay prone inviting the pitching of coins into her vulva and exciting the passions of the men to such an extent that a young man from the audience climaxed the show by actual sexual intercourse in the presence of the crowd. I mention the sordid details only because too long has prudish squeamishness been the cloak under which girl-degradation shows have been hushed, and licensees white-washed.

And for this you imposed but six days and a half!

What does a licensee have to do in Little Ferry to have his license revoked?

In view of the disgraceful abdication, I shall handle all future disciplinary proceedings against Little Ferry licensees myself until such time as your Council can convince me that it has awakened to realize the enormity of its dereliction of its duty.

The proceedings in the instant case will be certified to the Prosecutor for appropriate action.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

4. DARTS - STEEL OR METAL TIPPED DARTS MAY BE USED ON LICENSED PREMISES PROVIDED THAT STRICT COMPLIANCE IS MAINTAINED AT ALL TIMES WITH REGULATIONS HEREBY PROMULGATED - THE REGULATIONS.

On June 9th ruling was made (Bulletin 252, Item 10) that steel or metal tipped darts may not be used or possessed on licensed premises but that the game may be played with rubber tipped darts.

The distinction was made, as by reference to the Bulletin will appear, "in order to maintain safe conditions in taverns and prevent unnecessary hazard to the public."

On June 20th, on the representation of the New Jersey Licensed Beverage Association that the game, even when played with steel tipped darts, had not been productive of any serious injuries in the past and that the hazard of such darts was for practical purposes as negligible as when the game was played with darts tipped with rubber cup or disc which adhered to the target by suction, I conducted a hearing at which both kinds of darts were demonstrated.

The testimony taken was clear and convincing that, whatever the theoretical danger, actual experience with the game over a period of 25 years had failed to produce a single case of damage to one's eye or any other serious injury. One of the members candidly said that he had had occasion, in two or three isolated instances, to caution a player who, in idle jest as he believed, had threatened to throw a dart at or to stick one into a by-stander probably for the supposed "fun" of seeing him wince, but that no such thing had occurred and he had had

no difficulty in maintaining control at all times, once he let his customers know he meant business.

Admittedly, the game itself is a harmless diversion entirely dependent on skill. The darts could, if used for purposes other than the game, be dangerous. But so would an iron shuffleboard weight or even a beer mug be dangerous if hurled with deadly precision. But that is not the game. Neither is it classic according to Sagittarius.

At the conclusion of the conference, I appointed a committee consisting of Archie McNew, Walter Rhaesa, John Pennington and William Wellhofer, all of whom have had long and intensive experience with the operation of dart boards, to submit a code of conduct of dart games on which the rules hereinafter mentioned are substantially based.

Accordingly, the ruling made on June 9th aforesaid is hereby superseded to the extent that it prohibits steel or metal tipped darts. Such darts may be used on licensed premises provided strict compliance is maintained at all times with the rules hereby promulgated, viz:

1. All dart boards shall be placed on a wall with their center sixty-three (63) inches from the floor.

2. The play line, which must be toed and strictly observed, may not be more than eighty-seven (87) inches from the wall.

3. Dart boards must be placed so that they are clear from any passageway and the space between the play line and the board must not be used for any other purpose whenever darts are in use.

4. No two or more dart boards shall be placed adjacent to each other.

5. Darts must not be over six (6) inches in length over all nor weigh more than three-quarters (3/4) of an ounce each.

6. All darts must be kept in the possession of the licensee or his employees until requested by the players and returned promptly when the game is discontinued.

7. No minors or persons actually or apparently intoxicated shall be permitted to play darts.

8. Dart games shall be played for skill only and there shall be no pay-off "by the house".

9. Licensees shall be held strictly accountable for the proper conduct of the game at all times.

The foregoing rules are effective immediately.

D. FREDERICK BURNETT
Commissioner

June 22, 1938.

5. BULLETIN ITEM SUPERSEDED.

Ruling in Bulletin 252, Item 10, is superseded by Bulletin 255, Item 4.

D. FREDERICK BURNETT
Commissioner

6. DISCIPLINARY PROCEEDINGS - NEWARK LICENSEES - GAMBLING - BAGATELLE MACHINE.

In the Matter of Disciplinary Proceedings against

ESTHER BLOOMENTHAL, t/a GREEN VILLAGE TAVERN (or Inn) 218 Mulberry Street Newark, New Jersey

Holder of Plenary Retail Consumption License C-132 Issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

CONCLUSIONS AND ORDER

. . . . . .

Richard E. Silberman, Esq., Attorney for the State Department of Alcoholic Beverage Control.
Esther Bloomenthal, Licensee, Pro Se.

BY THE COMMISSIONER:

The defendant, a Newark licensee, is charged with allowing gambling upon her licensed premises, in violation of Rule 7 of State Regulations #20.

On May 20, 1938, at 3:30 p. m., Detective George J. Elsey of the Newark Police Department entered defendant's tavern to investigate a complaint that a bagatelle machine was there being used for gambling. He discovered a group of young men around a bagatelle machine of the ordinary ball-and-plunger type, costing a nickel per game. Under the top-glass of the machine was a card declaring that a score of 300 represented "1 point", 310 - "2 points", 320 - "3 points", etc. The detective heard one of the young men ask the bartender "What does this machine pay out on?", and the bartender answer "300, it pays". He later observed this young man, upon reaching a score of 320 on the machine, state to the bartender "I have 320. Give me the three nickels", which the bartender accordingly paid out to him from the tavern's cash-register. The detective thereupon confiscated the bagatelle machine and arrested the bartender, who later was convicted in police court in Newark and fined $25. for violation of a local ordinance prohibiting operation of a bagatelle machine for gambling.

The defendant, who at the time of the gambling and arrest was upstairs in her living quarters above the tavern, testified that the bagatelle machine had been in the tavern for the last 4 years, and had been continuously licensed with the City in accordance with local regulation; that she believed the machine

was being used only as a game of skill and not for the purpose of gambling; that she thought the card under the top-glass merely indicated the degree of skill achieved by the players; that she had never given instructions to the bartender to "pay off" on the machine; that the bartender told her he paid the 15¢, not as a "pay off" on the machine, but merely because it was demanded of him by a customer and "the customer is always right." She further testified, however, that she paid all the expenses for the defense of the bartender at the police court; that she continued to employ him as a bartender until the present charges were served upon her; that, although on the occasion in question she shouted down to the bartender from "upstairs" that there was to be no "pay off" on the bagatelle machine, she did this only after the bartender had shouted up to her that he had just been arrested for "paying off".

I find the licensee guilty as charged.

It is true that bagatelle machines are not gambling devices per se and are presently permitted upon licensed premises. Re Simandl, Bulletin 161, Item 10; Magee v. Orange, Bulletin 234, Item 2. Nevertheless, licensees who allow them to remain on their premises are under the strict duty of insuring that the machines, easily suspectible of gambling, are not used for that purpose.

The defendant's license will be suspended for five (5) days.

Accordingly, it is, on this 22nd day of June, 1938, ORDERED that Plenary Retail Consumption License C-132 heretofore issued to Esther Bloomenthal, t/a Green Village Tavern (or Inn), be and the same is hereby suspended for a period of five (5) days, commencing June 26, 1938, at 3:00 A. M. (Daylight Saving Time).

D. FREDERICK BURNETT
Commissioner

7. FAIR TRADE - PRICE CUTTING IN VIOLATION OF FAIR TRADE AGREEMENT - THE SITUATION PENDING PROMULGATION OF RULES.

June 14, 1938.

Dear Sir:

I am the holder of a retail consumption license.

I would like to entertain a price cut feature on package liquor and advertise prices on the same in the newspapers in violation of "fair trade agreements."

In the event I do so, as far as your department is concerned, will disciplinary action be taken?

I would appreciate an immediate reply to the above query. Thank you.

Yours truly,

Harry Gott.

June 22, 1938.

Mr. Harry Gott,
122 Central Avenue,
Passaic, N. J.

Dear Mr. Gott:

I have before me your egregious letter of the 14th.

As I have not as yet, in the peak of the licensing season, promulgated any Rules or Regulations codifying the powers recently delegated by the Legislature, no disciplinary action will be taken by this Department. But, in view of your deliberate intention to violate a Fair Trade Agreement, I should have no compunction in subjecting you to such proceedings the instant the Rules are promulgated, and without a moment's warning -- in fact, before you could say "Harry Gott."

So don't.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

8. APPELLATE DECISIONS - GALLUCCIO AND SCIARRABONE vs. BELMAR.

PAUL GALLUCCIO and VINCENT SCIARRABONE, trading as GALLUCCIO AND SCIARRABONE,

Appellants,

-vs-

BOARD OF COMMISSIONERS of the BOROUGH OF BELMAR,

Respondent.

ON APPEAL

CONCLUSIONS.

. . . . . .

Simon Dimond, Esq., Attorney for Appellant.
Joseph Silverstein, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

Appellants appeal from the denial of a plenary retail consumption license for premises known as 703 Tenth Avenue, Belmar.

Respondent denied the application because of an ordinance limiting the number of such licenses to seven, and the prior issuance of the allotted number.

On April 26, 1938 appellants filed their application. On May 3, 1938 an ordinance limiting the number of licenses in the Borough of Belmar was adopted on first reading. Section 1 of said ordinance provides:

"1. That the number of plenary retail consumption licenses issued and outstanding in the Borough of Belmar at the same time shall not exceed seven."

On May 10, 1938, the application of appellants was denied. On May 17, 1938 the ordinance in question was passed at third and final reading. There are now and have been since July 1937 seven consumption licenses outstanding in the Borough aside from that applied for by appellants.

The evidence shows that on June 16, 1936 respondent adopted a resolution which recited that eight plenary retail consumption licenses had been issued whereby it was resolved "that no new applications for the sale of alcoholic beverage license be considered under any plan whatsoever until a vacancy shall arise." At the time of the adoption of said resolution, one of the eight outstanding consumption licenses had been issued to Belmar Casino, which operated during the summer of 1936. On February 2, 1937 respondent adopted a resolution which recited that, whereas since June 16, 1936 the Belmar Casino temporarily closed its place of business and surrendered its license, and whereas said Casino premises were always licensed in the years prior to Prohibition and since the repeal of Prohibition, now, therefore, be it resolved "that no additional plenary retail consumption alcoholic beverage license shall be granted in the Borough of Belmar unless the said application shall pertain to the Belmar Casino premises, for which place said vacancy has been reserved."

Appellants contend that the ordinance finally adopted on May 17, 1938 cannot have any retroactive effect; that the resolution of February 2, 1937 is void because it discriminates in favor of the Belmar Casino, and that the only resolution which controls the present situation is that adopted on June 16, 1936, under which there is a vacancy, since said resolution limits the number to eight and only seven licenses are now outstanding.

Appellants' contention that the ordinance of May 17, 1938 can have no retroactive effect is the same contention considered and disposed of adversely several times and most recently in Cocciolone vs. West Deptford, Bulletin 247, Item 3, which quoted at length the leading case of Franklin Stores vs. Elizabeth, Bulletin 61, Item 1. All that remains on this score is the point brought out in Widlansky vs. Highland Park, Bulletin 209, Item 7, wherein I said:

"The ordinance is a factor because I ought to take it into consideration in determining whether the license should be granted now. In cases, however, where the ordinance is enacted after application is denied, appellant should have an opportunity to contest the reasonableness of the municipal regulation and its application to him."

Appellants have had such an opportunity in the present case. On this point it appears that they have conducted a restaurant on the opposite side of Tenth Avenue since October 1936 but they have never held a liquor license. They have just completed the building at 703 Tenth Avenue for which application has been made, and have or intend to transfer their restaurant business to the new premises. The evidence given by appellants is the sole evidence as to necessity.

On the other hand, Mayor Titus, who has held office since May 1935, testified that no new consumption licenses have been issued in the Borough since he took office; that all the present licenses are renewals of licenses then outstanding, and that respondent has adopted a policy not to issue any more licenses in the Borough. He and Commissioner Abbott and Commissioner Schroeder all testified that in their opinion there are too many licenses at the present time in the Borough of Belmar.

The evidence introduced by appellants is not sufficient to show that the ordinance adopted on May 17, 1938 is unreasonable in itself or as applied to them, especially in view of the fact that there is a consumption license outstanding for premises located on the same side of Tenth Avenue approximately sixty feet from appellants' premises.

Under the circumstances, it seems that the ordinance adopted on May 17, 1938 merely carried out the policy theretofore adopted by respondent. Since said ordinance is not unreasonable in itself or as applied to appellants, it remains in full force and effect and bars the issuance of appellants' application. Hence, it is unnecessary to consider the effect of the resolutions dated June 16, 1936 or February 2, 1937. In passing, however, it may not be inappropriate to add that both of these resolutions are wiped out and extinguished by the later ordinance.

The action of respondent is,therefore, affirmed.

D. FREDERICK BURNETT
Commissioner

Dated: June 23, 1938.

9. APPELLATE DECISIONS - NINETY-ONE JEFFERSON STREET, PASSAIC, INC. vs. PASSAIC.

NINETY-ONE JEFFERSON STREET, PASSAIC, INC.,
Appellant,
-vs-
BOARD OF COMMISSIONERS OF THE CITY OF PASSAIC,
Respondent.

ON APPEAL

CONCLUSIONS

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Martin Klughaupt, Esq., Attorney for Appellant.
Joseph J. Weinberger, Esq., Attorney for Respondent.
John R. Blanda, Esq., Attorney for Slovak Catholic Sokol, owner of appellant's premises.
Arthur Stein, Esq., Attorney for Objectors, Jefferson Apartments and Edward Cohn.
Nitto & Gason, Esqs., by Carl F. Nitto, Esq., Attorneys for Objector, Children's Day Nursery.
Hymen Siegendorf, Esq., Attorney for Objector, Whal Realty Co.

BY THE COMMISSIONER:

This appeal is from the denial of a person-to-person and place-to-place transfer of a plenary retail consumption license from Mary Baldanza for 80 First Street to appellant for 89-91 Jefferson Street, Passaic.

Both R.S. 33:1-26 (Control Act, Sec. 23) and Rule 7 of State Regulations #3 require that an applicant for transfer, whether from person to person or place to place, shall advertise his notice of intention for any such transfer "once a week for two weeks successively". This means that the second advertisement shall appear not sooner than a full week after the first advertisement. Bulletin 11, Item 1. Since this requirement is mandatory, appellant's advertisement (appearing on March 22 and 28, 1938) was fatally defective and respondent was not in error in denying appellant's application upon such ground. Cf. Vrabel vs. Florence Bulletin 114, Item 12.

If the case were dismissed on this technical ground, it might well lead to a new application properly advertised, a fresh denial, and a further appeal in which the same issues herein fought out would have to be rethreshed. Hence, I shall consider the merits, irrespective of the defective advertisement.

The proposed site -- a double-store and combined dance-hall -- is equipped to operate as a "night club". The premises are located just off the intersection of Jefferson Street and Columbia Avenue, in a neighborhood, which although zoned for business purposes, is nevertheless of a mixed residential and business character. The Hearer, under agreement of counsel, personally viewed this vicinity, to clarify and supplement the evidence produced at the hearing as to its character.

He reports that at the intersection of Jefferson Street and Columbia Avenue, immediately east of the proposed site, there is a gasoline station; in the middle of the block, some 150 or 200 feet distant from appellant's place, there is an automobile service station, and also a tavern; toward and at the far end of the block, there are various neighborhood stores, with a second tavern being located just beyond. Seven residences are located across the street from, and 3 residences are located along-side, appellant's premises. Several others are scattered along the block. Toward and extending to the far end of the block, there is on one side of the street a double 62 family apartment house and on the other side a so-called tenement house (both buildings containing some of the aforementioned neighborhood stores). The block on Jefferson Street antecedent to the proposed site is distinctly residential in character.

Within fairly close range of appellant's place, but on that side of the neighborhood which is away from the 2 mentioned taverns, are the Passaic Children's Day Nursery, the Hebrew Free School, the Temple B'nai Jacob, the St. Nicholas Parochial School and affiliate home of the Sisters of Charity.

Written protests, signed by some 80 persons residing or owning property in the neighborhood, were filed below against appellant's application. At the hearing on appeal, a representative of the owner of the double apartment house, the president of the Day Nursery, the vice-president of the Hebrew Free School, and 7 other persons, resident or owning property in the vicinity, testified against the application. These objectors protest, inter alia, that the 2 taverns already in existence in this area are

ample for it; that the proposed "night club" will disturb and be offensive to the surrounding residents, as was demonstrated when a "night club" operated at these premises during 1934-5. Respondent, persuaded by these arguments, accordingly denied appellant's application.

Determination of the number of licensed places to be permitted in any particular area is a matter confided to the sound discretion of the issuing authority. Lingelbach vs. North Caldwell, Bulletin 180, Item 8; Santoriello vs. Howell, Bulletin 252, Item 8, and cases therein cited. The privilege of a place-to-place transfer of an outstanding license is subject, among other things, to the reasonable and bona fide exercise of that discretion. Lingelbach vs. North Caldwell, supra; cf. Craig vs. Orange Bulletin 251, Item 4.

In the present case, considering the mixed character of the neighborhood and the protests of many residents therein, the type of place appellant plans to operate (viz., a "night club"), and the proximity of the Nursery and mentioned religious and educational institutions, it cannot be said that respondent was arbitrary in determining that this third liquor place should not be permitted in this area. Indeed, either of the two taverns presently outstanding there would seem to be adequate.

There is no merit to appellant's contention that a transfer should nevertheless be granted because the landlord of the proposed premises, after having acquired them by foreclosure in 1934, invested a large sum of money in equipping it as a "night club". This, of itself, conferred no franchise. Speculative ventures under our capitalisitic system may lawfully yield handsome profits to go into the private pockets of those who have the foresight and the courage to take the chances but there is no obligation on the public to support the enterprise or to guarantee its existence or to warrant that it must forever and a day enjoy the privileges and perquisites from which it at one time or another garnered private profits. Use of premises for the retail sale of liquor is subject to the wholesome power in the issuing authority to deny a municipal license on the ground that, all circumstances weighed, sufficient liquor places exist in the neighborhood. Premises, though extensively remodeled in anticipation of a liquor license, are nevertheless subject to the reasonable exercise of this police power. Rainbow Grill of Bordentown vs. Bordentown, Bulletin 245, Item 4. In any conflict between the private interests of an individual property owner and the interests of the public, which cannot be otherwise harmonized or satisfactorily ironed out, the latter must prevail. Lingelbach vs. North Caldwell, supra.

While it is true that these premises were licensed from Repeal through 1934-5-6, nevertheless they remained idle during 1935-6 and have gone without license since June 30, 1936. The mere fact that respondent issued the previous licenses several years ago, does not require that a license shall now be issued to this new applicant. Cf. Rainbow Grill of Bordentown vs. Bordentown, supra; Cocciolone vs. West Deptford Township, and Trovato vs. West Deptford Township, Bulletin 247, Item 3. Issuing authorities do well to learn by experience and avoid past mistakes. Bednarski vs. Hamilton, Bulletin 162, Item 11; Lojewski vs. Bayonne, Bulletin 201, Item 1 Respondent was not unreasonable in respecting the reaction of surrounding residents and property owners against the "night club" which was allowed to operate in

their midst during 1934-5, and in heeding their present protests.

Nor is there merit to appellant's contention that it was denied a fair hearing and determination by respondent. The latter conducted a 3 hour public hearing on appellant's application, at which free voice was allowed to both appellant and to objectors. The mere fact that the members of respondent, as is their wont, then retired to the Mayor's office (with the City Solicitor), and there reached their decision in closed "executive session" is in nowise irregular. There is no evidence that anything untoward occurred at the "executive session" in respect to appellant's case. Why should not judges confer before announcing their decision?

The action of respondent is affirmed.

June 24, 1938.

L. Heulenleigh Bennett

Commissioner