STATE OF NEW JERSEY

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

744 Broad Street, Newark, N. J.

BULLETIN NUMBER 57 December 18, 1934

1. VIOLATIONS OF CONTROL ACT - JURISDICTION OF POLICE MAGISTRATES - CRIMINAL PROCEDURE

December 15, 1934

Hon. Ernest M. Ritchie,
Mayor of Gloucester City,
Gloucester City, N. J.

My dear Mayor:

I have your letter wherein you request my opinion as to your jurisdiction as a Magistrate of the Police Court of the City of Gloucester City, to try a defendant charged with a violation of Section 48 of the Alcoholic Beverage Control Act. You state that your original action was to hold the defendant under bail for the Grand Jury of your county, but after reading the provisions of said Act there is a question in your mind as to whether the case may not be disposed of in your court by imposing a fine of not less than $100 or more than $500.

It is my understanding that the City of Gloucester City is a city of the second class, having a population of between 13,000 and 14,000 and is therefore subject to laws regulating the proceedings in police courts of cities of said class. A violation of the Control Act is a misdemeanor. Hence, being an indictable offense, no defendant can be tried on the merits until after indictment by a Grand Jury unless he signs a waiver of Grand Jury action and consents to trial without a jury. I have been unable to find any provision in the laws of this State that would permit a trial for violation of Section 48 of the Control Act, carrying with it, as it does, a penalty of a fine of not less than $100 or more than $500, or imprisonment of not less than 30 days or more than 6 months, or both, in a police or recorder's court in a city of the second class. Chapter 163 of the Laws of 1919 gives jurisdiction to police courts in cities of the second class <u>having a population of over 30,000</u> to try, among other crimes, for any criminal offense, the penalty for which does not exceed a fine of $100 or imprisonment not exceeding 6 months, provided that the defendant waives indictment and trial of jury.

It would therefore appear that even in a city of the second class where the population is over 30,000, no right to try a defendant for violation of Section 48 of the Control Act would lie in the police court, as the penalty under the said Act may be greater than $100.

Hence, your original action in holding the defendant for the Grand Jury of your county was the proper proceeding.

I am indebted to you for your pledge of cooperation in enforcing the law. I have noted with keen interest in the public prints your recent activities. We, in turn, will cooperate with you in every way.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

2. PLENARY RETAIL CONSUMPTION LICENSEES - MAY SELL DISTILLED AS WELL AS MALT BEVERAGES

December 15, 1934

Mr. F. F. Birch,
Plainsboro, N. J.

Dear Mr. Birch:

I have yours of the 8th. If you have a plenary retail consumption license, you are entitled to sell not only brewed malt beverages and naturally fermented wines, but also all distilled alcoholic beverages and no municipality has the right to prevent you unless that municipality by referendum pursuant to Section 41 of the Control Act shall have voted against retail sale of alcoholic beverages other than brewed malt alcoholic beverages and naturally fermented wine. Same answer in respect to selling and consumption on the premises.

The reason is that the Legislature has not provided any form of consumption license limited only to brewed malt beverages and naturally fermented wines. Hence no such license may be issued, and, furthermore, there can be no legal prohibition of plenary retail consumption licensee selling distilled alcoholic beverages either for consumption on the premises or off premises consumption.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

3. TAXATION - LIQUOR IS SUBJECT TO TAXATION SAME AS OTHER PERSONAL PROPERTY

December 15, 1934

Board of Assessors,
Township of Cranford, N. J.

Attention: Willis T. Wild, Secretary

Gentlemen:

I have yours of the 12th.

A stock of merchandise owned by a tavern keeper is personal property, and therefore may be assessed for personal tax.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

4. APPELLATE DECISIONS - VICARI VS. BLOOMFIELD

CARMELO VICARI t/a GROVE MARKET,
Appellant
-vs-
MAYOR AND TOWN COUNCIL OF THE TOWN OF BLOOMFIELD,
Respondent

ON APPEAL
CONCLUSIONS

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Maurice H. Samuels, Esq., Attorney for Appellant
Edward C. Pettit, Esq., Attorney for Respondent

BY THE COMMISSIONER

This is an appeal from the denial of an application for a limited retail distribution license.

Respondent contends the application was properly denied by virtue of its resolution limiting the number of limited retail distribution licenses to be issued in the Town of Bloomfield to 25. Although such limitation is subject to appeal, it should not be upset on appeal unless it clearly appears to be unreasonable in its adoption or application to appellant. Ryman vs. Branchburg, Bulletin #37, Item #18.

Appellant does not question the reasonableness of the adoption of the limitation, but contends that the application thereof to the exclusion of himself was improper.

Respondent had adopted a policy not to issue more than one license of this class in any one vicinity, but to spread the same throughout the town. This policy has been uniformly applied by respondent and clearly is proper. Twenty-three limited retail distribution licenses had been issued by respondent at the time appellant's application was denied. One of these had been issued for premises within three doors of appellant's, prior to the time appellant's application was filed. The denial of said application was therefore reasonable.

The action of respondent is affirmed.

D. FREDERICK BURNETT,
Commissioner

Dated: December 16, 1934

5. APPELLATE DECISIONS - DE BRAUN VS. MADISON

EDWARD L. DE BRAUN,
Appellant
-vs-
THE MAYOR AND COUNCIL OF THE BOROUGH OF MADISON,
Respondent

ON APPEAL
CONCLUSIONS

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John A. Matthews, Esq., Attorney for Appellant
Henry G. Pilch, Esq., Attorney for Respondent

BY THE COMMISSIONER;

This is an appeal from the denial of an application for a plenary retail consumption license.

Respondent contends that the application was properly denied by virtue of its resolution of June 8, 1934, limiting the number of plenary retail consumption licenses to five and the issuance of the allotted number. Such a limitation will be

reviewed upon appeal, but will not be upset on appeal unless clearly unreasonable either in its adoption or in its application to appellant. Ryman vs. Branchburg, Bulletin #37, Item #18.

No evidence was introduced to show the limitation was unreasonable in its adoption. Madison is almost entirely a residential communting town and the Mayor testified that the existing five licensed places adequately service all the needs of the municipality. Nor can appellant successfully maintain that the limitation was improperly applied to him since the five licenses were issued prior to the filing of appellant's application and were renewals of licenses issued for the preceding license period.

The action of respondent is affirmed.

D. FREDERICK BURNETT,
Dated: December 16, 1934 Commissioner

6. APPELLATE DECISIONS - ENGLE VS. DOWNE

SAMUEL ENGLE,
Appellant
-vs-
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF DOWNE (CUMBERLAND COUNTY),
Respondent
ON APPEAL
CONCLUSIONS

McAllister & McAllister, Esqs., by Albert R. McAllister, Jr., Esq., Attorneys for Appellant.
Russell S. Henderson, Esq., Attorney for Respondent

BY THE COMMISSIONER:

This is an appeal from the denial of an application for a plenary retail consumption license.

Pending determination by the Commissioner of the issue involved, a referendum was held in the Township of Downe pursuant to Section 42 of the Control Act. The question voted upon was: "Shall the retail sale of all kinds of alcoholic beverages, for consumption on the licensed premises by the glass or other open receptacle pursuant to the 'Act concerning alcoholic beverages' be permitted in this municipality?" The majority of the legal voters voting upon said question voted "No".

Section 42 further provides that if a majority of the legal voters voting upon said question shall vote "No", then, after the clerk of the governing board or body certifies the result of the election to the Commissioner and to the municipal board, if any, having authority to issue such licenses, it shall be unlawful for the issuing authority to issue any license with respect to such municipality which shall permit such prohibited sale.

All necessary certifications have been made by the Township Clerk of the Township of Downe, and the prohibition contained in Section 42 is now in effect. It would, therefore,

be unlawful for the issuing authority to issue any plenary retail consumption license to appellant.

The appeal is therefore dismissed.

D. FREDERICK BURNETT,
Commissioner

Dated: December 16, 1934

7. APPELLATE DECISIONS - SKWARA and PRONESKA VS. TRENTON

FRANK A. SKWARA and
WILLIAM PRONESKA,
Appellants
-vs-
MUNICIPAL BOARD OF ALCOHOLIC
BEVERAGE CONTROL OF TRENTON,
Respondent

ON APPEAL
CONCLUSIONS

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Edgar T. Cohen, Esq., Attorney for Appellant
Romulus P. Rimo, Esq., Attorney for Respondent

BY THE COMMISSIONER:

This is an appeal from the denial of an application for a plenary retail consumption license for premises known as #912 Brunswick Avenue, Trenton.

Respondent contends that the application was properly denied because appellants are each twenty-three (23) years of age and, therefore, unfit to receive a license. This is a perfect non-sequitur. The mere fact of youth is no indicia of unfitness. It is eminently proper to refuse "to set up kids in the liquor business" if they are under age, but these appellants are not within the disabilities of the law.

Respondent further contends that there are sufficient licensed places in the vicinity of appellants' premises to meet the needs of the locality and in support thereof points to the number of licensed places in an adjoining municipality for a distance of about five blocks from appellants' premises. While the denial of an application because of the existence of sufficient licensed places in the vicinity is proper, nevertheless there is room to contend that the question should be determined on the basis of the number of licensed places within the municipality in which the premises sought to be licensed are located lest otherwise the residents of one municipality be seriously prejudiced by the action of an adjoining municipality. Each municipality should have the power of self-determination as to policy and action. On the other hand, there is nothing to prevent a municipality, if it so chooses, from taking into consideration conditions existing in other municipalities in determining its own action. Respondent is charged with the duty of determining the policy in respect to the City of Trenton. Therefore, I would normally affirm its refusal to grant a license in the particular case in the outskirts of Trenton even though the congestion of licensed places to which the respondent referred was in an adjoining municipality.

But I do not find, however, that respondent has ever in fact adopted and uniformly applied any policy or exercised any

precaution with reference to the number of licensed places existing in a given vicinity. Respondent has heretofore issued as many as five or six licenses for premises in a single block. See Kaplan v. Trenton, Bulletin #41, Item #9. Throughout the municipality licenses have been issued with abandon, the distances intervening between the licensed premises in numerous instances being considerably less than one block. See Zebrowski vs. Trenton, Bulletin #56, Item #9. In view thereof, respondent's contention in the instant case cannot be sustained.

The action of respondent Board is reversed.

D. FREDERICK BURNETT,
Commissioner

Dated: December 16, 1934

8. APPELLATE DECISIONS - SPERANZO VS. MILLBURN

ANGELO NICHOLAS SPERANZO,
Appellant,
-vs-

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MILLBURN (ESSEX COUNTY),
Respondent

ON APPEAL
CONCLUSIONS

Messrs. E. A. and W. A. Schilling, by Edward A. Schilling, Esq., Attorneys for Appellant
Reynier J. Wortendyke, Esq., by Alfred H. Grimminger, Esq., Attorney for Respondent

BY THE COMMISSIONER:

This is an appeal from the denial of an application for a plenary retail consumption license for premises located at #247 Main Street, Millburn.

Respondent contends that the application was properly denied because the appellant is personally unfit to receive a license. On appeal such determination will be given great weight and, if reasonable, will be sustained. See Moss & Convery vs. Trenton, Bulletin #29, Item #12.

At the hearing on the appeal there was introduced in evidence by consent of counsel a transcript of the hearing before the Township Committee which resulted in the denial of the application. From this transcript the following facts appear.

Under the 3.2 Beer Act appellant desired to obtain a license. His son, however, who at that time was unemployed, applied for the license in his own name and admitted to the Township Committee that he did so because he felt the business would not be properly conducted by his father, and because he knew that there was an objection to his father's being granted a license. He also told a member of the Township Committee at that time that he was glad his father did not get a license.

After this 3.2 Beer License was issued to the son, he obtained employment and the business was carried on by his father

in a shack in the rear of the premises known as #247 Main Street. This was contrary to the understanding of the Township Committee since the licensee had represented that the shack would be torn down, the insides would be ripped out and a beer garden substituted therefor. The reason given for this apparent violation of the oral condition upon which the license was issued was that after the son obtained employment he did not have time to construct the beer garden. Such construction was, in fact, begun and then abandoned.

The son further admitted that the business conducted by his father under the 3.2 Beer License issued to himself "was not continued up to snuff". Exactly what this means and the reason therefor is not apparent from the transcript.

The Chief of Police of Millburn testified he had received numerous complaints with reference to the sale of alcoholic beverages by appellant, but admitted that he was unable to discover any violations on the premises when he inspected the same. He testified that in 1933 he told appellant about these complaints and further told him that, due to his large family, he would be given an opportunity to quit. At that time Mrs. Speranzo requested the Chief not to bother her husband as they had a hard time to get along. She was advised that if she would see that appellant sold no more hard liquor, he would not be bothered. That these complaints were not without foundation appears from the statement of appellant's son, that there has been no liquor sold on the premises for a long time. Neither the appellant nor the son have ever had a license under the present Act. All the transactions above recited occurred previous to December 6, 1933, when the present Act went into effect. There is no conviction against appellant let alone conviction of a crime involving moral turpitude. Nevertheless, it is competent for municipal issuing authorities to confine their selection of applicants to those who are clearly worthy. There is sufficient in the record to show that the respondent's adverse determination to appellant was not unreasonable.

The action of respondent is therefore affirmed.

D. FREDERICK BURNETT,
Commissioner

Dated: December 16, 1934

9. APPELLATE DECISIONS - MILLER VS. GREENWICH

WYATT MILLER, )
Appellant
-vs- )

TOWNSHIP COMMITTEE OF THE ) ON APPEAL
TOWNSHIP OF GREENWICH ) CONCLUSIONS
(CUMBERLAND COUNTY), )
Respondent

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Harry Adler, Esq., Attorney for Appellant
David S. Bowen, Esq., Attorney for Respondent

BY THE COMMISSIONER:

This is an appeal from the denial of an application

for a plenary retail consumption license.

Respondent contends that the application was properly denied because in its capacity as governing body of Greenwich it had adopted a resolution reading:

> "WHEREAS it is the opinion of the Township Committee of the Township of Greenwich in the County of Cumberland that it would not be for the best interest of the said Township to issue licenses for 1934 for the sale of alcoholic beverages, pursuant to an act entitled 'An Act covering alcoholic beverages chapter 432 of the laws of 1933 of the State of New Jersey.'
>
> THEREFORE, BE IT RESOLVED BY THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF GREENWICH IN THE COUNTY OF CUMBERLAND that no licenses for the sale of alcoholic beverages be granted or issued in the Township of Greenwich during the year 1934.
>
> Passed January 26, 1934."

In accordance with this resolution, no licenses have been issued and no license fees have been fixed.

Whether a municipality may properly, by resolution, enact that no licenses shall be issued under the Control Act may be seriously questioned. It may be argued that the Control Act does not contemplate prohibition; that it is a license law and not a prohibitory enactment. See Berry vs. Cramer, 58 N.J.L. 278, 33 Atl. 201 (Sup. Ct. 1885). It may be argued further that Section 43 of the Control Act provides for a referendum on the question of whether any sales of alcoholic beverages at retail shall be permitted and that since such express mechanism to accomplish this end has been provided by the Act, the Legislature did not intend the power to be exercised by the governing body of the municipality through a resolution. Additional force to this argument comes from the fact that while under the Control Act, as originally passed, power was expressly given to the governing board or body of a municipality to prohibit by resolution the sale of all alcoholic beverages at retail, the provision whereby such power was conferred was subsequently deleted by amendment. Sec. 37, P.L. 1933, c. 436, as amended by P.L. 1934, c. 85. Furthermore, while the Act expressly provides that a municipality may by ordinance enact that no limited retail distribution license or club license shall be issued within the municipality, no such provision exists with reference to the remaining retail licenses. And, Section 18 makes it the duty of local excise boards "to administer the issuance" of all municipal retail licenses "in accordance with this act".

Without attempt to decide the above contention, the preliminary question arises as to the remedy of one who is prevented from obtaining a license because of the resolution and of the failure or rather refusal of the governing body of Greenwich to fix any license fees.

The power to fix license fees for municipal retail licenses is conferred by the Act on the governing board or body of the municipality in which the premises sought to be licensed

are located. These fees, within the limits fixed by the act, rest in the discretion of such governing board or body. In the instant case the governing body has refused to exercise its discretion, and no license fees have been fixed.

While the Commissioner has power, on appeal, to order the issuance of a municipal retail license, such order may be made only where the appellant has complied with all the statutory prerequisites pertaining to his application. One of such prerequisites is the payment of the fee fixed by the governing board or body. Mango vs. Plainfield, Bulletin #38, Item #17. Where no fee is fixed, no matter what the reason, there can be no compliance in fact with this statutory requirement and, therefore, the Commissioner is without power to order the issuance of a license. The Commissioner himself has neither original nor appellate power to fix those fees.

Question is raised whether this proceeding may be considered an appeal, not from the denial of appellant's application, but from the failure of respondent to fix any license fees whatsoever. In other words, may the Commissioner order the governing board or body to exercise its discretion and fix a schedule of license fees? I will answer this question merely as a matter of power and not as one of policy, for I have grave doubts of the wisdom of any policy which would compel a municipality to issue licenses where the majority sentiment in the community is against the issuance of licenses. The question, then, to which I address myself, is one merely of the existence of power, irrespective of policy.

No mechanics have been provided in the act for determining what the fee shall be in the event that the members of the governing board fail to agree. It is a matter of judgment and discretion. No law can coerce the proper performance of such a duty. For instance, if there are three councilmen and one deems that the fee for a certain kind of license should be $2,000., another $1,000. and a third $200., no court could compel them to agree if they point blank refused. Hence insuperable difficulties arise.

The ordinary procedure to compel a municipality to exercise a discretionary power which it is under a duty to exercise is by application to the Supreme Court for a writ of mandamus. Reock vs. Newark, 33 N.J.L. 129 (Sup. Ct. 1868). See also Cleveland vs. Jersey City, 38 N.J.L. 259 (Sup. Ct. 1876).

It follows that if appellant has any remedy, which I frankly doubt, it is to apply to the Supreme Court for a writ of mandamus to compel the Township Committee of the Township of Greenwich in its capacity as governing body of said municipality to fix a schedule of license fees.

Until these fees are determined, no license may properly be issued in the Township of Greenwich.

The appeal is, therefore, dismissed.

D. FREDERICK BURNETT,
Commissioner

Dated: December 17, 1934

10. APPELLATE DECISIONS - REED VS. INDEPENDENCE TOWNSHIP and NYKUN

JOHN M. REED,
Appellant
-vs-
TOWNSHIP COMMITTEE OF INDEPENDENCE TOWNSHIP (WARREN COUNTY) and ANDREW NYKUN,
Respondent

ON APPEAL
CONCLUSIONS

John H. Dahlke, Esq., Attorney for Appellant
Michael P. Danna, Esq., Attorney for Andrew Nykun
No appearance for Respondent, Township Committee of Independence Township

BY THE COMMISSIONER:

This is an appeal from the issuance of a plenary retail consumption license to respondent Andrew Nykun, for premises located at Main Street, Great Meadows, made by a resident taxpayer of Independence Township who has a hotel across the street from the Nykun premises. Appellant holds a plenary retail consumption license issued by the Township Committee of Independence Township for this hotel.

Appellant contends that the Nykun license was improperly issued because no proof of publication was filed with the application. It appears that the licensee did properly publish notice of his intention to apply for a license and that proper proof thereof was filed with the issuing authority the night the application was granted. This is sufficient.

Appellant further contends that the application should have been denied because the Nykun premises are within 200 feet of the St. Nicholas Greek Catholic Church, which is the fact.

Without passing upon the right of appellant, who has no connection with the church in question, to raise this objection, the contention itself cannot be sustained under the facts.

The pertinent portion of Section 76 declares:

> "* * * for the benefit not of property but of persons attendant therein, no license shall be issued for the sale of alcoholic beverages within two hundred (200) feet of any church * * *; provided, however, that the protection of this section may be waived at the issuance of the license and at each renewal thereafter, by the duly authorized governing body on authority of such church * * *, such waiver to be effective until the date of the next renewal of the license".

By virtue of the foregoing provision, a municipality may issue a license for premises within two hundred (200) feet of a church where a proper waiver has been filed. Hancy et al vs. Keyport, Bulletin #39, Item #5.

The St. Nicholas Church had filed a proper waiver

with respect to the Nykun premises for the period expiring June 30, 1934. The issuing authority, the church and Mr. Nykun all believed in good faith that this waiver automatically applied to the current license period. When the church authorities learned that the waiver had expired by force of law, they immediately executed a new waiver for the current license period. In view thereof, this contention is without force.

Applicant further contends that Nykun conducts another mercantile business upon his licensed premises and therefore that his license was improperly issued in violation of section 13 (1) of the Control Act.

Section 13 (1) creates a plenary retail consumption license and defines the privileges afforded thereby. The portion relied upon reads:

> "* * * On and after July first, one thousand nine hundred and thirty-four, this license shall not be issued to permit the sale of alcoholic beverages in or upon any premises in which a grocery, delicatessen, drug store or other mercantile business * * * is carried on".

The licensed premises are in a building owned by the licensee. This building also contains another store in which the licensee operates a general merchandise store. Both stores front on Main Street and have entrances thereon and both have rear doors leading into the living room of the quarters where the licensee and his family reside. Thus, from his living room, the licensee can, by separate doors enter either the general store or the liquor store. This living room is also used as a restaurant in connection with the sale of alcoholic beverages. It is therefore part of the licensed premises. Thus, the licensed premises are connected by means of a door with the store in which the licensee carries on another mercantile business.

The question of whether a prohibited business is being conducted on the licensed premises within the meaning of Section 13 (1) of the Control Act, depends on whether the conduct of the respective businesses and their independence of location renders them substantially separate and distinct. Re City of Newark, Bulletin #38, Item #16; Re City of Millville, Bulletin #35, Item #15. As was said in the latter opinion:

> "The fact that two stores, having a solid partition between them and being operated separately though owned by the same person, are under the same roof will not constitute a disqualification. If, however, an open archway is maintained between the stores so as to enable free access from one to the other, they cannot be said to be entirely separate and distinct".

In the instant case there is an open door between the licensed premises and the general store. If this door were permanently closed, compliance would be had with Section 13 (1) and the rulings made pursuant thereto. In such event, no valid objection could be raised to the issuance of the license.

Accordingly, the action of respondent, Township Committee of Independence Township is affirmed on condition that respondent, Andrew Nykun, forthwith permanently close the door leading from the living room-restaurant to the general store by walling it up and that no alcoholic beverages be sold in said general store at any time.

The case is therefore remanded to the Township Committee of Independence Township with instructions to order respondent Nykun forthwith permanently to close the door leading from the living room-restaurant to the general store by walling it up and for said Township Committee to certify to the Commissioner within twenty (20) days from the date hereof whether the condition upon which this case is affirmed has been complied with.

D. FREDERICK BURNETT,
Commissioner

Dated: December 17, 1934

11. APPELLATE DECISIONS - HAENELT VS. HAWORTH

OTTO HAENELT,
Appellant
-vs-
MAYOR AND COUNCIL OF THE BOROUGH OF HAWORTH (BERGEN COUNTY),
Respondent.

ON APPEAL
CONCLUSIONS

Morris B. Kantoff, Esq., Attorney for Appellant
Frank Hennessy, Esq., Attorney for Respondent

BY THE COMMISSIONER:

This is an appeal from the denial of an application for a plenary retail consumption license.

Respondent contends the application was properly denied for the reason that during the preceding license period three licenses had been issued, and the demands of the residents of the Borough were adequately taken care of by the renewal of said three licenses. A resolution had been adopted embodying the above concensus of opinion of respondent board and restricting the licenses to be issued to a renewal of the existing licenses.

The three licenses which had been issued were respectively a plenary retail consumption license, a limited distribution license and a club license. All three were renewed for the current license period.

Haworth, with a population of approximately 1303, is admittedly a highly residential community. The business district is small and consists of a few stores located about a mile from appellant's premises. The premises in question front upon a principal highway and, except for two gasoline stations, are entirely surrounded by private residences. Petitions both in favor of and in opposition to the issuance of the license were filed. One of appellant's witnesses testified that local opinion on the advisability of issuing a license to appellant was divided, but he did not say which was the more prevalent opinion. The Mayor of Haworth testified that there was no demand for the issuance of the license and that most of the residents of the Borough were opposed thereto. Appellant admitted that he expected to get abou half his business from persons traveling on the highway.

In view of the foregoing, it cannot be said that appellant has sustained the burden of proving that public necessity or convenience dictated the issuance of an additional license. Cf. Furman vs. Springfield, Bulletin #49, Item #6.

The action of respondent is affirmed.

D. FREDERICK BURNETT,
Commissioner

Dated: December 17, 1934

12. APPELLATE DECISIONS - U.S.PIPE & FOUNDRY CO. VS. BURLINGTON

U. S. PIPE & FOUNDRY CO.,
Appellant
-vs-
COMMON COUNCIL OF THE CITY OF BURLINGTON (BURLINGTON COUNTY), and PHILIP SOZIO,
Respondents

ON APPEAL
CONCLUSIONS

Howard Eastwood, Esq., Attorney for Appellant
Thomas Begley, Esq., Attorney for Respondent, Common Council of the City of Burlington
Richard J. Hughes, Esq., Attorney for Respondent, Philip Sozio

BY THE COMMISSIONER:

This is an appeal from the issuance of a plenary retail consumption license to respondent, Philip Sozio.

Appellant contends that the license was improperly issued for the reason, among others, that the licensee is not the sole person interested in the business; that his father is the real person interested; that the application failed to disclose the existence of said interest.

This issue, so far as the record discloses, was not raised before the issuing authority. It was raised, however, upon appeal.

Question at once arises as to what extent the Commissioner should entertain objections to the issuance of a license, which were not raised before the issuing body. If this were the ordinary common law procedure, the obvious answer would be that no objections would be entertained on appeal that were not raised in the tribunal below. It would be an invidious procedure to reverse the action of the Common Council of the City of Burlington upon an issue on which the Common Council had no occasion or necessity to pass specifically.

It appears from the testimony on appeal that the licensed premises are owned by the licensee's father, who held a plenary retail consumption license thereon for the period expiring June 30, 1934; that the father filed an application for a renewal of his license for the current period; that appellant filed written objections to such renewal on the ground that the father was personally disqualified; that the father thereupon withdrew his application and requested that the money deposited by him be applied on account of the application of the present licensee, which was filed simultaneously with the withdrawal of the father's application; that this request was granted; that thereafter the father gratuitously transferred his entire stock of goods to his son; that the son has been unemployed for the past 12 years, during which time he and his family have been supported principally by his father.

On these facts, it would be open to the issuing authority to find that the licensed premises are not only owned by the father but that his money financed the entire business; that the application

was filed by the son only because of valid objections as to the father's personal qualifications; that the father was in fact interested in the business to be conducted under the license; that the failure of the application to disclose this interest rendered the application fatally defective. Turano vs. Trenton, Bulletin #46, Item #12.

This situation existed, if at all, at the time that the application was passed upon by the City Council. The issue should have been submitted to it for determination.

While there is no express power given to the Commissioner by the Control Act to remand, the Commissioner is given the power "to make all findings, rulings, decisions and orders as may be right and proper and consonant with the spirit of this act."

Accordingly this case is remanded to the Common Council of the City of Burlington to determine whether the contentions of appellant made upon this appeal are true in fact or not, and to take all necessary procedure to determine the facts including the fixing of a time and place for hearing and the issuance of proper notice to the appellant and to the respondent, Philip Sozio, and to conduct such hearing, and thereupon to certify and report the result of same to the Commissioner for further action in the premises.

There is one other matter to be acted upon by the Common Council of the City of Burlington. The city fee for a plenary retail consumption license is Four Hundred ($400.00) Dollars. This fee was paid in the instant case by applying on account of the licensee's application the amount deposited with the father's application after he withdrew that application. This was done at the request of the father. I advert to it, not only because it tends to substantiate appellant's contention, but also because the law itself is involved.

Section ~~22~~ 25 of the Control Act provides that where an application for a license is denied, the issuing authority should deduct as an investigation fee 10% of the amount deposited with the application, and refund 90% thereof to the applicant. In the instant case the father's application was not formally denied because withdrawn by the applicant. The withdrawal was motivated by the fear that the application would be denied due to the personal unfitness of the applicant. There is no provision in the Control Act which permits the withdrawal of an application. All withdrawals are in effect denials, and the amount to be refunded is subject to the deduction of the statutory 10% investigation fee. Otherwise, upon word leaking out that any issuing authority purposed to deny an application or even contemplated such action, an applicant would be enabled to defeat the right of the issuing authority to retain 10% of the amount deposited as an investigation fee. Therefore, the most the respondent issuing authority could have refunded to the father upon the withdrawal of his application was 90% of the amount deposited by him, to wit, $360.00. By the same token, this was the maximum amount which could have been applied on account of the son's application. It follows that the full license fee has not been paid by the licensee. Under such circumstances, the issuing authority should not have accepted the application at all. Mango vs. Plainfield, Bulletin #38, Item #17. See also Bulletin #15, Item #1.

Respondent must therefore at once insist upon immediate payment of the balance of $40.00 remaining due on account of the license fee and this, irrespective of the outcome of the re-hearing.

The case is remanded to respondent Common Council of the City of Burlington for further and immediate action in accordance with the foregoing conclusions.

Dated: December 17, 1934

D. FREDERICK BURNETT,
Commissioner

13. APPELLATE DECISIONS - ROMEIKO VS. KEARNY

JAMES ROMEIKO, )
Appellant
-vs- )

MAYOR AND COMMON COUNCIL ) ON APPEAL
OF THE TOWN OF KEARNY CONCLUSIONS
(HUDSON COUNTY), )
Respondent
- - - - - - - - - - - - - - - )

Carl Olsan, Esq., Attorney for Appellant
Arthur B. Archibold, Esq., Attorney for Respondent

BY THE COMMISSIONER:

This is an appeal from respondent's action in revoking appellant's plenary retail consumption license.

Respondent's action was based on the fact that a short time prior thereto, appellant had been convicted in the Recorder's Court of the Town of Kearny for possessing illicit alcoholic beverages with intent to sell the same, in violation of Section 48 of the Act. Respondent admits, however, that no notice of said charge was ever served upon appellant and that he was afforded no opportunity to be heard by respondent before its action was taken.

Section 28 of the Control Act provides that any issuing authority may suspend or revoke any license issued by it for violation of any of the provisions of the Act. It further provides:

> "No suspension or revocation of any license shall be made until a five-day notice of the charges preferred against the licensee shall have been given him personally or by mailing the same by registered mail addressed to him at the licensed premises and a reasonable opportunity to be heard thereon afforded him."

Possession of illicit alcoholic beverages upon the licensed premises may justify the revocation of the license. See Schwartz vs. Township Committee of Millstone Township, Bulletin #46, Item #4. Nevertheless, even where there seems to be no question of the truth of the charge upon which revocation proceedings are based, fairness to the licensee requires that the opportunity to be heard provided for by the Act be extended to him. Assuming that appellant had committed the violation charged, the penalty which respondent could fix varies from a minor suspension to absolute revocation entailing the licensee's disqualification for a period of two (2) years. It is conceivable that appellant may have been able to present evidence of extenuating circumstances which would have deterred respondent from imposing the most extreme penalty. The Act requires that he should have been afforded an opportunity to do so. However guilty appellant may have been in fact, it goes against the grain to revoke his license without making a specific charge against him and giving him a chance to be heard. It is not due process of law.

The action of respondent Board is, therefore, reversed, without prejudice, however, to the right of respondent to institute revocation proceedings in accordance with the Act.

D. FREDERICK BURNETT,
Commissioner

Dated: December 17, 1934

14. APPELLATE DECISIONS - BASSAU VS. OAKLAND

LOUIS BASSAU, )
Appellant )
-vs- )
ON APPEAL
MAYOR AND COUNCIL OF THE ) CONCLUSIONS
BOROUGH OF OAKLAND, )
Respondent )

Dominick F. Pachella, Esq., Attorney for Appellant
Walter W. Weber, Esq., Attorney for Respondent
Ralph Hendrickson, Esq., Attorney for Objectors

BY THE COMMISSIONER:

This is an appeal from the dismissal of an application for reconsideration of respondent's refusal to issue a plenary retail consumption license to appellant for the period expiring June 30, 1935.

The license application was denied by respondent on July 14, 1934. Within 30 days thereafter, appellant requested respondent to reconsider its denial. Respondent took this request under advisement and on September 12, 1934 refused to reconsider its original denial.

It has been held that an issuing authority has no jurisdiction to reconsider its action after denying an application for a license. Re Hendrickson, Bulletin #47, Item #10. Accordingly, respondent's action in dismissing the request for reconsideration was proper.

While counsel for appellant stated that this appeal was from the action of respondent in refusing to reconsider its original denial, nevertheless his attack was directed at the propriety of denial of the license application.

Section 19 of the Control Act provides that where the "issuing authority shall refuse to issue any license, the applicant * * * may within thirty (30) days * * * appeal to the Commissioner * * *".

In the instant case, no appeal from the denial of the license application was filed within this 30 day period for the reason that respondent took appellant's request for reconsideration under advisement and did not act thereon until more than 30 days had elapsed. It cannot therefore be said that appellant is entirely at fault for failing to file an appeal within the statutory 30 day period. Whether under such circumstances appellant is barred from appealing to the Commissioner, need not be determined, for the denial of the license application was justified on the merits.

Respondent denied the license application for the reason that appellant had improperly conducted his place of business under the license issued to him by respondent for the period expiring June 30, 1934.

There is undisputed testimony that appellant engaged a minor female to serve alcoholic beverages. The girl, appellant's step-daughter, is 17 years of age. Appellant knew this. Section 23 of the Control Act provides that "no person who would fail to qualify as a licensee under this Act shall be knowingly employed by or engaged in any business capacity whatsoever with the licensee". Section 22 of the Act provides that no license of any class shall be issued to any person under legal age. A minor, therefore, would fail to qualify as a licensee, and may not knowingly be employed by or engaged in any business capacity whatsoever with a licensee. Thus appellant violated Section 23 while operating under his license.

There is also testimony that the premises conducted by appellant under his previous license were conducted in such fashion as to become a nuisance to persons in the vicinity. On many occasions, loud noises, singing, yelling and swearing emanated from the licensed premises and persons congregating on the adjoining grounds long after the 1 A.M. closing hour fixed by respondent's resolution then in effect. There is uncontradicted testimony that when appellant was advised by one of the residents that unless the nuisance ceased complaints would be made to respondent, appellant replied, "To hell with the Council. They could not do anything anyway". One of appellant's witnesses testified that on two or three occasions after 1 A.M., he was served alcoholic beverages in appellant's living room, in the licensed building. Other witnesses testified to sales made after the municipal closing hour. Cf. Cinelli vs. Mt. Ephraim, Bulletin #49, Item #1.

Furthermore, there is testimony that on July 5, 1934, after the license which had been issued to appellant for the preceding license period had expired, appellant's employee sold alcoholic beverages. Thus, appellant was selling alcoholic beverages without a license in defiance of the law. See Wizner vs. Kingwood, Bulletin #42, Item #8.

In view of the foregoing, respondent's determination that appellant had improperly conducted his business under his prior license was eminently proper.

The action of respondent is affirmed.

D. FREDERICK BURNETT,
Commissioner

Dated: December 18, 1934

15. RULES CONCERNING LICENSEES AND USE OF LICENSED PREMISES - GAMBLING - PENALTIES RECOMMENDED

December 17, 1934

Hon. Ernest M. Ritchie,
Mayor of Gloucester City,
Gloucester City, N. J.

My dear Mayor:

Herewith synopsis of our File #C-3103, Case #928, concerning Ernest S. Barnes, 217 Burlington Ave., Gloucester

City; your license #C-15, issued June 28, 1934.

Rules 6 and 7 concerning licensees and the use of licensed premises are:

"6. No licensee shall allow, suffer or permit any lottery to be conducted, or any ticket or participation right in any lottery to be sold or offered for sale, on or about the licensed premises.

"7. 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."

It appears from the enclosed report of Inspector Cook that this licensee was making book on horse races, was arrested by my men, and convicted and fined by Justice Getser.

I am transmitting this report to you with the request that your municipal governing body immediately institute revocation proceedings against Barnes for violation of Rules 6 and 7.

General suggestions as to the procedure on revocation and appropriate forms are set forth in Bulletin 52, Items 9-14 both inclusive. See also Bulletin 53, Item 5. Your Municipal Clerk has these Bulletins. As indicated therein, the sample forms concern violations of the Election Day rule, so appropriate changes are to be made so as to charge violation of the particular rule and commission of the exact offense. If you wish us to formulate the changes, we will be glad to draft for you the necessary clauses.

As soon as you have fixed the date for hearing let us know in ample time and we will send our men to you as witnesses.

If you find the licensee is guilty of violating the Rules, I shall not be satisfied with any nominal penalty such as was meted out in some cases in the recent Election Day violations. It is not fair to the thousands of licensees who live up to the law. There is nothing new about the gambling rules. They are, in substance, mere restatements of existing laws. So long as those laws are on the books, they must be obeyed. So long as those laws represent the declared sentiment of the people, liquor licensees, at least, must live up to them. If municipalities do their full duty and inflict red-blooded penalties for violation of these rules, there will be no occasion for me to conduct such proceedings myself. It is preferable that each community clear its own porch.

I recommend in these cases a minimum suspension of three months, but that is merely the minimum, and should be given only in cases where extenuating circumstances clearly and cogently appear. You have it in your power to revoke out and out and also, if you deem it proper, to bar the use of the premises for any other liquor license for a period of two years. As a matter of commanding respect for the law, one revocation is worth ten suspensions.

Kindly acknowledge receipt of this letter and enclosure.

Also send me full report of the proceedings and of the action taken by your governing board. Please thank them in advance for their cooperation.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner

16. ALCOHOLIC BEVERAGES - TRANSPORTATION - IMPORTATION - SPECIAL PERMIT

November 20, 1934

Pitney, Hardin & Skinner, Esqs.,
Newark, N. J.

Gentlemen:

The verified petition of L. Bamberger & Co., filed on November 15, 1934, sets forth that it is the holder of a plenary retail distribution license and an alcohol beverage import permit issued by the Federal Alcohol Control Administration; that in the ordinary course of its business it sells many alcoholic beverages not purchasable from manufacturers or wholesalers situated in New Jersey, some of which are not purchasable in the United States; that petitioner has purchased in foreign countries certain alcoholic beverages specifically described in schedules annexed to the petition; that said beverages have been shipped to the United States and are stored in a bonded warehouse in Newark; and that under the rules promulgated on July 2, 1934, said alcoholic beverages may not be withdrawn by the petitioner from the bonded warehouse without a special permit, for which the petitioner prays.

The main objectives of the rules of July 2d, governing the transportation of alcoholic beverages into New Jersey, were to insure the payment of all taxes payable to the State of New Jersey and to place foreign dealers, seeking to do business in New Jersey with retail licensees, on an equal competitive basis with New Jersey licensed manufacturers and wholesalers.

Generally, when a special permit is sought to permit dealers in States other than New Jersey to ship to New Jersey retail licensees, the payment of taxes can readily be assured by a bond. The other objective, however, will, in the main, not be attained for the result of the liberal issuing of such permits will be to permit such dealers to do business in New Jersey with retail licensees without first obtaining a New Jersey wholesaler's license. Accordingly, the Commissioner has announced that such applications will not be granted, except in instances where special cause therefor is shown.

The present application, however, presents a somewhat different situation. The payment of taxes will be assured prior to the issuance of the permit. It may well be contended that the vendors of the alcoholic beverages in question are not, in any real sense, doing business in New Jersey and that consequently the other objective is substantially attained. The

foreign vendors have not solicited any business in New Jersey or sold any alcoholic beverages therein. They have sold, in their respective countries, alcoholic beverages to licensed United States importers. It can hardly be said that they are competing unfairly with New Jersey wholesalers simply because their products reach New Jersey retailers who are licensed to import. Indeed, an express modification of the rules of July 2d, authorizing importations from foreign countries by New Jersey licensees of any class authorized to so import, has been suggested and is presently being considered.

Petitioner's application for a special permit has been granted by the Commissioner.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner
By:
Nathan L. Jacobs,
Chief Deputy Commissioner
and Counsel

17. MUNICIPAL ORDINANCES - PLENARY RETAIL DISTRIBUTION LICENSES - MERCANTILE BUSINESS - WHAT CONSTITUTES

December 17, 1934

Mr. Albert P. Smith, Town Clerk,
Boonton, New Jersey.

Dear Sir:

I have the proposed ordinance to fix license fees, to regulate the sale and distribution of alcoholic beverages and to provide penalties for violation thereof, passed first reading on December 3, 1934 by your Board of Aldermen, pursuant to the Alcoholic Beverage Control Act as amended and supplemented.

Section 8 provides: "No plenary retail distribution license shall be issued to permit the sale of alcoholic beverages in or upon any premises in which a grocery, delicatessen, drug store or other mercantile business (except the keeping of a hotel or restaurant, or the sale of cigars and cigarettes at retail as an accommodation to patrons, or the retail sale of non-alcoholic beverages as accessory beverages to alcoholic beverages) is carried on, but this shall not apply to premises in which bowling alleys, shuffle boards and pool tables are being operated."

I have ruled, with respect to the statutory prohibition of the issuance of plenary retail consumption licenses for premises in which any mercantile business other than the sale of alcoholic beverages is carried on, that restaurants, hotels and bowling alleys or similar businesses are not, in the generally accepted meaning of the term, considered to be mercantile businesses in that they do not entail the purchase and sale of goods, merchandise or commodities. See in re: Mercantile Business Defined, Bulletin 47, item 6. In the instant case, however, you have excepted also shuffle boards and pool tables. With this further exception I shall go along, for there is no

question in my mind that if the operation of bowling alleys does not constitute mercantile business, neither does the operation of shuffle boards or pool tables. Accordingly, the ruling above referred to (Bulletin 47, item 6) is extended to include the latter two.

But what about the sale of cigars and cigarettes at retail? Is not that a mercantile business, the conduct of which is, essentially, the buying and selling of a commodity, independent of the sale of alcoholic beverages in original containers for consumption off the licensed premises? I believe it is and, therefore, will approve Section 8 if exception in favor of the sale of cigars and cigarettes is deleted. The further proviso in favor of the sale of non-alcoholic beverages as accessory beverages to alcoholic beverages is merely a saving clause to insure that the sale of ordinary accessories to alcoholic beverages is not classed as another mercantile business. See Bulletin 41, item 2. This latter exception permits, of course, only the sale of bottled goods, for the sale of non-alcoholic beverages for consumption upon the premises could not be construed as accessory to the sale of alcoholic beverages under a plenary retail distribution license.

Very truly yours,

Commissioner