Commissioner Burnett
Sent to Regular Mailing List

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

BULLETIN NUMBER 144 OCTOBER 26, 1936.

1. DRUNKEN DRIVERS - WHO ARE - HEREIN OF THE RESPONSIBILITY OF LICENSEES NOT TO SELL TO INTOXICATED PERSONS.

October 21, 1936

Mr. Philip W. Buxton,
Courier-Post,
Camden, N. J.

Dear Mr. Buxton:

I have been reading with interest and profit your series of special articles on drunken drivers.

You do well to focus public attention on this fearful menace to life and limb. If attention ripens into action, immeasurable good will have been done, not only in your community, but in our State at large. The law is sufficient. What is needed is men to enforce it. That means arrest, convict and put the offender in jail. If this is done, without fear or favor, in every case of conviction for just one week, the effect will be electrifying. It will bring home to our citizenry that the public outcry against drunken driving is not aimed at "the other fellow" but means us and each of us.

There is a popular but misleading conception that one is not a drunken driver unless he is "soused, pickled or plastered". With this in the back of their heads, it is no wonder that warnings so often go unheeded. Those who brag they can "hold it", are cocksure that they are immune. But this is NOT the law. Our Court of Last Resort declared:

> "***it is not essential *** that the driver of the automobile be so intoxicated that he cannot <u>safely</u> drive a car. The expression - under the influence of intoxicating liquor - covers not only all the well known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging, <u>in any degree,</u> in intoxicating liquors and which tends to deprive him of that clearness of intellect and control of himself which he would otherwise possess."

The state-wide rule concerning conduct of licensees provides:

> "No licensee shall sell, serve, deliver or allow, permit or suffer the service or delivery of any alcoholic beverage, directly or indirectly, *** to any person actually or apparently intoxicated, or allow, permit or suffer the consumption of alcoholic beverages by any such person upon the licensed premises."

Retail licensees as a class throughout the State are keenly alive to the evil, and have set their face dead against it. I am sure they will backstop you. If any of them, however, violate the rule, revocation proceedings will be prosecuted without compunction.

I am indebted to you for the constructive work you have already accomplished.

Cordially yours,

D. FREDERICK BURNETT,
Commissioner.

2. ISSUING AUTHORITIES - DISQUALIFICATION - WHERE A MEMBER OF THE ISSUING AUTHORITY IS ALSO ON THE BOARD OF DIRECTORS OF A BANK WHICH OWNS PREMISES TO WHICH LICENSE IS SOUGHT TO BE TRANSFERRED HE OUGHT NOT TO TAKE ANY PART IN THE PROCEEDINGS WHATSOEVER - THE BOARD ITSELF, HOWEVER, AFTER EXCLUDING SUCH MEMBER FROM PARTICIPATION IN THE DECISION, IS NOT DISQUALIFIED TO ACT - HEREIN OF THE EFFORT TO REACH THE PRACTICAL POINT WHERE FAIR AND CLEAN CONTROL OF ALCOHOLIC BEVERAGES IS EXERCISED IN THE LIGHT OF MODERN BUSINESS RELATIONSHIPS.

October 21, 1936.

Harry S. Reichenstein, Secretary,
Municipal Board of Alcoholic Beverage Control,
Newark, N. J.

Dear Mr. Reichenstein:

I have yours of the 20th re transfer of the Mohawk Restaurant license.

In view that Commissioner Cluesmann is a member of the Board of Directors of the Bank which owns the premises for which the license is sought, I am clear that it would be the better judgment that he take no part in the proceedings whatsoever and thus eliminate any question of bias or self-interest.

As regards your question whether your Board (assuming that Commissioner Cluesmann shall not participate in the decision) is disqualified to act in this case, the answer is not so obvious.

In re Bailey, Bulletin 70, Item 5, the question was whether a license may be issued by a local excise board for premises leased from a member of that board. Section *18A provides that no license shall be issued by any issuing authority to any member thereof or to any corporation, organization or association, in which any member thereof is interested, directly or indirectly, but that in such case application may be made direct to the State Commissioner. In the Bailey case, the member of the excise board was neither the applicant nor interested in the applicant, except to the extent that the applicant was seeking a license to be located on premises owned by the Board member. I therefore held the local Board disqualified. That decision deliberately gave a liberal construction to Section *18A in order to effectuate its manifest purpose of preventing issuing authorities passing upon applications in which any of their members were interested. I believe it correct, and would apply it here if Commissioner Cluesmann were himself the landlord. Frankly it stretched the letter of the Section in order to carry out its spirit.

The present question, therefore, is whether Section *18A should be further stretched to include a case where the member of the excise board is not the landlord but is a director of a corporation which owns the property.

If the corporation itself were engaged in the liquor business, I should unhesitatingly apply the ruling in the Bailey case. But the Union National Bank, which happens to own the premises to which transfer is sought, has no legal power to engage in the liquor business. Neither does it have any legal right to acquire real property except as part of its banking business, as for instance and presumably in this case by way of foreclosure of a mortgage, or sale under a judgment, and even then it is required by law to dispose of such property with all due dispatch. The interest of a director of a banking corporation in a saloon license on property temporarily owned by the Bank is quite remote compared to his exclusively personal interest when he himself is the permanent owner of those premises. There must be a point where interest although deducible and traceable becomes too remote for practical purposes. That point is not discoverable by applying theory or carrying out logic to blind conclusions. It is a matter of degree. It is ascertainable only by common sense in the light of ordinary human experience. There is nothing wrong in a member of an excise board being a director of a Bank. There is no obligation on him to resign from other legitimate business activity merely because he is appointed to the Excise Board. If a matter arises in the line of his official duties which directly concerns the Bank, then, of course, he ought not to act in such case because he cannot serve two masters at the same time. But that fact should not disqualify the other members of the excise board from passing judgment on the matter unless the law explicitly so declares. Section *18A does not by its terms expressly effect such disqualification. I am therefore unwilling to extend its operation by disqualifying the whole board because of the remote interest of one of its members, due to his dual capacity as director of the bank which happens to own the property for which its tenant is seeking a license.

In re Grant, Bulletin 124, item 7, the interest of a Councilman who had been the real estate agent in leasing the premises was held too remote to disqualify him where the letting was not in anywise contingent upon the issuance of the license; also that the Councilman had not disqualified himself by placing insurance on such premises.

So, in re Gallagher, Bulletin 138, item 6, the interest of a member of an issuing authority employed as agent for a bar fixture concern was held too remote to disqualify him generally.

So, in re Frank, Bulletin 113, item 8, I reversed an earlier ruling as unnecessarily severe and held that the interest of a director of a brewery in a club, of which he was a member and also a director, was too remote to bar that Club from obtaining a retail consumption license.

These rulings are my gropings in the direction of and in the effort to reach the practical point where fair and clean control of alcoholic beverages is exercised in the light of modern business relationships.

Your Board itself is not disqualified under the facts presented. It should therefore complete the hearing and determine the issues involved.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

3. RULES CONCERNING CONDUCT OF LICENSEES AND USE OF LICENSED PREMISES - GAMBLING - GAMBLING DEVICES - "CRANE" AND "DIGGER" MACHINES ARE GAMBLING DEVICES PER SE WITHIN THE MEANING OF THE RULES AND MAY NOT BE MAINTAINED ON LICENSED PREMISES.

October 21, 1936.

Mr. W. G. Irons,
Metropolitan Inn,
Burlington, N. J.

Dear Sir:

The Rules Concerning Conduct of Licensees and Use of Licensed Premises prohibit lotteries, slot machines, gambling and gambling devices on licensed premises. The essence of gambling is the payment of money or other property with the hope of obtaining a disproportionate gain by chance. See State vs. Shorts, 32 N.J.L. 398 (Sup. Ct. 1868). Devices designed to enable such conduct are gambling devices. See Bulletin #51, Item #3.

The mode of operation of the "Crane" or "Digger" machine is comparatively well known. After insertion of a coin, the operator may manipulate a handle so as to place the crane directly over any one of the "prizes" contained in the case. To that extent the operation of the machine is, in the main, within his control. Thereafter, however, from the moment the crane begins to descend, it is beyond the control of the operator. Whether the claws on the crane will attach to the prize with sufficient firmness to raise it, is fortuitous. It may hardly be doubted that the controlling element in the entire operation is chance.

In the recent case of International Mutoscope Reel Co. vs. Valentine, 286 N.Y. Supp. 806 (Sup. Ct. 1936), affirmed on another ground in 3 N.E. (2d) 453 (N.Y. 1936), the Court held that the "Crane" or "Digger" machine is a gambling device per se, and in the course of its opinion said:

> "Observation and inspection of the 'crane' slot machine indicates that the element of chance not only exists, but that it predominates."

It is the Commissioner's ruling that the "Crane" and "Digger" machines are gambling devices per se within the meaning of the Rules Concerning Conduct of Licensees and the Use of Licensed Premises and therefore may not be maintained at any time on licensed premises.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

By:
Nathan L. Jacobs
Chief Deputy Commissioner
and Counsel

4. FLAVORING EXTRACTS - POSSESSION OF EXTRACTS DESIGNED OR INTENDED FOR USE IN THE HOME MANUFACTURE OF LIQUOR IS PROHIBITED - DRUG STORE HOLDING DISTRIBUTION LICENSE MAY MAINTAIN, IN OPEN CONTAINERS IN ITS PHARMACY DEPARTMENT, ALCOHOL AND ALCOHOLIC BEVERAGES NOT EXCEEDING IN THE AGGREGATE ONE (1) QUART FOR USE IN THE BUSINESS OF SAID DEPARTMENT.

Gentlemen:

Upon a most courteous visit today from your office by two investigators a question arose on one or two points upon which you will please render your opinion:

1. As a retail distributor am I permitted to have upon my premises open or closed bottles of these so called flavoring extracts such as creme de menthe - juniper - rye - benedictine etc. I have an assortment of these both in closed bottles and in open bottles and I would appreciate your opinion as to whether same can be retained by me for further sale or will it be necessary to dispose of same at once.

2. We use alcohol in our Prescription Department and occasionally whiskey. Am I permitted to keep open bottles of same in my store, and if so, how should we keep those in order that it may distinctly be shown that these are used for the Prescription Department and not for any other purpose (as an open bottle may lead one to infer).

3. We carry alcohol and whiskey for sale to our customers - am I permitted to draw this from my own stock when the use is required in the Prescription Room. By that I infer that the sealed pint or quart bottle of alcohol that is sold to the customers - am I permitted to have one of these open in the Prescription Room.

Our use of this in the Prescription Room is very small - still I am writing to get this information so that there can be no further misunderstanding as arose today, in any further investigations.

Respectfully yours,

HARRY G. KOMISHANE

October 20, 1936.

Mr. H. G. Komishane,
Newark, N. J.

Dear Sir:

Under the Control Act, home-made liquor is intended to be outlawed and Section 64(d) is designed to effectuate this intent. It provides that "any contrivance, preparation, compound, tablet, substance or recipe advertised, designed or intended for use in the manufacture of alcoholic beverages for personal consumption or otherwise" in violation of the Act is unlawful. It does not interfere with legitimate flavoring extracts for culinary purposes, but does proscribe so-called extracts which are, in fact, designed or intended for use in the home manufacture of liquor. See Bulletin #104, Item #6.

In the event that you desire a determination as to whether any particular article will be considered by this Department to be within the statutory proscription, you may submit it for examination, together with a detailed statement of the facts and circumstances surrounding its display and sale.

The regulations of this Department provide that "no retail distribution licensee shall permit any alcoholic beverages sold by him to be consumed on the licensed premises, nor shall he permit their containers to be opened on the licensed premises". The purposes underlying the foregoing provision can readily be achieved without interfering with legitimate activities of registered pharmacists. Accordingly, it is the ruling of the Commissioner that where a drug store has separate pharmacy and liquor departments, open containers of alcohol and alcoholic beverages, not exceeding in the aggregate one (1) quart at any one time, may be maintained in the pharmacy department, provided they are intended for and are actually used in the business of the pharmacy department and are not sold for beverage purposes. Within the foregoing limitation, alcoholic beverages may be transferred from the liquor department to the pharmacy department.

Very truly yours,

D. FREDERICK BURNETT
Commissioner

BY:
Nathan L. Jacobs
Chief Deputy Commissioner
and Counsel

5. APPELLATE DECISIONS - BERINGER vs. CAMDEN.

FRIDA BERINGER and NEW JERSEY LICENSED BEVERAGE ASSOCIATION, a corporation of New Jersey,

Appellants,

-vs-

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL OF CAMDEN, and FANNIE MAZER,

Respondents.

ON APPEAL

CONCLUSIONS

Harry M. Mendell, Esq., Attorney for Appellants.

Edward V. Martino, Esq., Attorney for Respondent, Municipal Board of Alcoholic Beverage Control of Camden.

Isadore H. Hermann, Esq., Attorney for Respondent, Fannie Mazer.

BY THE COMMISSIONER:

This is an appeal from the issuance of plenary retail consumption license for premises 201 Federal Street, Camden.

During the past fiscal year, a license for the premises was held by one Harold Clark. He stopped doing business in June, 1936, about one week prior to the expiration of the license period. The premises were closed the entire month of July and during most of that time there were "For Rent" signs posted. Respondent Fannie Mazer filed her application on July 22, 1936. Notice of Intention was published on July 23rd and July 30th.

The license was issued and the new licensee opened for business on Saturday, August 1st.

On July 9, 1936, the City of Camden passed an ordinance effective July 19, 1936 providing, in part as follows:

> "Section 7. No more than 200 Plenary Retail Consumption licenses shall be in effect in this municipality at any one time hereafter, and no new such licenses shall be issued for any premises within five hundred (500) feet of any other Plenary Retail Consumption licensed premises."

The ordinance further provides:

> "Section 19. Nothing herein contained shall prevent the transfer of a license from person to person as provided in P. L. 1935, Chapter 257, and any such transfer shall not be affected by the limitation hereby placed upon the issuance of new licenses."
>
> "Section 20. Nothing contained in Section 19 shall apply to the issuance of renewals of licenses already issued or applications pending at the time of the passage of this ordinance nor to the renewal of licenses issued or transferred in accordance with this ordinance."

The application of Fannie Mazer was for a new license and not for a renewal or a transfer. The cases cited by her counsel were decided under an early statute which distinguished between new and old places of business. Lockwood v. Boonton, 88 N. J. L. 561 (Sup. Ct. 1916). There is no basis, however, for making such a distinction under the present Alcoholic Beverage Control Act. See In Re: N. J. Licensed Beverage Ass'n. Bulletin #141, Item #2; Rajca v. Belleville, Bulletin #101, Item #1.

At the time the instant application was made there were issued and outstanding 210 Plenary Retail Consumption Licenses, 10 more than permitted by the local regulation; and there were seven other taverns within a radius of 500 feet of the premises. The issuance of this license was therefore directly at variance with the limitation fixed by the ordinance.

An ordinance, until repealed or set aside, is binding upon the respondent municipality. Franklin Stores Co. v. Belleville, Bulletin #102, Item #2, and cases therein cited; Blum v. Pompton Lakes, Bulletin #126, Item #4. See also Bachman v. Phillipsburg, 68 N. J. L. 552; 53 Atl. 620 (Sup. Ct. 1902).

There is nothing in the record to show that this ordinance is unreasonable or that it should not be invoked against the respondent licensee. Her application was not pending at the time of the passage of the ordinance and therefore is not saved by Section 20 thereof. At the hearing, she offered to relate a conversation which she alleged took place in the Spring of 1936 with Mrs. Baumgartner, the Secretary of the Municipal Board of Alcoholic Beverage Control of Camden, in which she made known her desire to apply for a transfer of the license held by Harold Clark for the premises in question but was advised by Mrs. Baumgartner to wait until the expiration of the license period because of charges pending against Clark. That period

expired June 30, 1936. Taking it at the strongest, Mrs. Baumgartner advised her only to wait until the new licensing period began, not until the ordinance had been passed. Mrs. Mazer was therefore in no way misled by Mrs. Baumgartner. Such a conversation was too remote to effect the legality of an application made on July 22, more than three weeks after the commencement of the new licensing period and after the limiting ordinance had been regularly advertised and passed. Without deciding whether an estoppel may be legally worked against a municipality, the evidence offered was wholly inadequate in character to warrant invoking this doctrine. Stein vs. West New York, Bulletin #101, Item #7; Zdenek v. Freehold, Bulletin #76, Item #9.

The license having been issued in violation of the limiting ordinance must be set aside. See Talbot v. Mendham, Bulletin #117, Item #1, and cases therein cited.

The action of the respondent Municipal Board in issuing the license is reversed. The license is hereby declared void. All activity thereunder must cease forthwith.

D. FREDERICK BURNETT
Commissioner

Dated: October 22, 1936.

6. APPELLATE DECISIONS - BUDENSTEIN vs. ATLANTIC CITY.

SIMON BUDENSTEIN,)
Appellant,)
-vs-)
THE BOARD OF COMMISSIONERS OF THE CITY OF ATLANTIC CITY,) ON APPEAL
) CONCLUSIONS
Respondent.)
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William Charlton, Esq., Attorney for Appellant.

Samuel Backer, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

Appellant appeals from the denial of his application made on June 11, 1936 for plenary retail distribution license for premises #3109 Atlantic Avenue, Atlantic City. Respondent denied the application on June 25, 1936 because there were allegedly a sufficient number in the neighborhood.

The premises are located on the main business thoroughfare which runs through the entire city. Respondent's witnesses testified that the neighborhood was in fact a residential and not a business neighborhood. However, it is clear from the entire record including photographs of the immediate vicinity that this characterization applies rather to the intersecting side-streets than to Atlantic Avenue itself. The premises are surrounded by commercial properties and were themselves occupied until March of this year by a wholesale liquor licensee.

There is already licensed a plenary retail distribution store within two and a half blocks; there are also five retail tavern licenses between 3000 and 3300 Atlantic Avenue, and a licensed hotel nearby which also may sell package goods for off-premises consumption. Under these circumstances it is difficult to find any real need for an additional retail distribution license in spite of the fact that the section is heavily populated. See Franklin Stores Co. v. Belleville, Bulletin #102, Item #2; Colonna v. Montclair, Bulletin #39, Item #8. On the other hand the evidence discloses a complete lack of any uniform policy on the part of the respondent in denying applications because of alleged sufficient number in the vicinity. A policy which is not applied fairly and uniformly is of no moment on appeal. Guenther v. Parsippany-Troy Hills, Bulletin #121, Item #8; Vonella v. Long Branch, Bulletin #71, Item #12. If this were all, I would be inclined to grant the application because of such apparent arbitrary discrimination.

Respondent's action, however, must be sustained on another ground. On July 16, 1936, an ordinance was passed by the respondent municipality, which, inter alia, limited the number of plenary retail distribution licenses to 25, saving renewals, however. There were already issued and outstanding 30 such licenses. Hence there are no subsisting vacancies. An ordinance until repealed or set aside is binding upon the action of the issuing authority. Beringer v. Camden, Bulletin #144, Item #5; Blum v. Pompton Lakes, Bulletin #126, Item #4; Franklin Stores Co. v Belleville, supra, and cases therein cited. See also Bachman v. Phillipsburg, 68 N. J. L. 552, 53 Atl. 620 (Sup. Ct. 1902). The fact that the ordinance was passed subsequent to the denial does not exclude it from consideration on appeal. The municipal policy exhibited by the Atlantic City ordinance, properly enunciated and in force at the time of this decision, is the true criterion on which this decision must be based rather than the factual situation as it existed at the time of the denial of the application. Tenenbaum v. Salem, Bulletin #109, Item 1; Bumball v. Bernardsville, Bulletin #66, Item #9; Franklin Stores v. Elizabeth, Bulletin #61, Item #1.

There is no evidence to show that the ordinance in question is unreasonable either in its adoption or in its application to the appellant.

The action of respondent is, accordingly affirmed.

D. FREDERICK BURNETT
Commissioner

Dated: October 22, 1936.

7. APPELLATE DECISIONS - YACULA vs. JERSEY CITY.

STEVE YACULA and KATHRIN YACULA,

Appellants,

-vs-

THE BOARD OF COMMISSIONERS OF THE MAYOR AND ALDERMEN OF JERSEY CITY, AND JOHN ZARZECKI,

Respondents.

ON APPEAL

CONCLUSIONS

John B. Graf, Esq., Attorney for Appellants.
N. L. Paladeau, Esq., Attorney for Respondent, The Board of Commissioners of the Mayor and Aldermen of Jersey City.
Stephen P. Piga, Esq., Attorney for Respondent, John Zarzecki.

BY THE COMMISSIONER:

This is an appeal from the issuance of a Plenary Retail Consumption License for premises 341 Warren Street, Jersey City.

The substance of the grounds of objection to the issuance of the license as set forth in the petition of appeal is (1) the licensee failed to disclose in his application the fact that a person other than himself was interested in the licensed business, and (2) that the licensee has not a sufficient interest in the premises to permit the issuance of a license to him.

The respondent licensee, John Zarzecki, purchased the premises together with the business, stock and fixtures from Stanley and Sofia Guzik, by an installment contract dated October 25, 1934. Under this agreement the benefits and risks of ownership passed to the licensee. However, the contract provided that legal title to the real estate was not to pass until the purchase price had been paid in full. As additional security for the payment of the purchase price, the vendor received from the licensee a chattel mortgage covering the fixtures and an assignment of any rents and profits remaining after the payment of "interest on mortgages, insurance premiums, water rents, municipal taxes, assessments, repairs, replacements and salaries and other incidental expenses in connection with the maintenance" of the property; both of which instruments were executed on the same day as the agreement of sale.

Legal title to the premises is still in the vendors, Stanley and Sofia Guzik. The licensee stated in his application that he was the owner and that no other person had "any interest, directly or indirectly, in the license applied for or in the business to be conducted under said license". In explanation of these answers he stated that since he paid the taxes, the interest on the first mortgage and repairs to the premises, he felt that he was the sole owner and the sole party in interest. Upon receiving notice from the Liquor Bureau of Jersey City that his title to the premises had been questioned, he immediately explained the situation to the Lieutenant of Police in charge and the application was corrected with the consent of the attorney for the Bureau. This occurred before the license was issued. Under the circumstances it cannot be said that the licensee knowingly misstated a material fact contrary to Section 22 of the Control Act.

Subsequent to the filing of the application, but before the license was issued, appellants purported to purchase at an execution sale, the licensee's interest in the goods and chattels contained in the premises. Assuming the validity of the execution sale, this did not deprive the licensee of his interest in the premises. He was still entitled to possession and there was nothing to prevent him from refurnishing the establishment. While the applicant for a license must have a legal interest in the place sought to be licensed, there is no requirement as to the quantum of such interest. Beekwilder v. Wayne, Bulletin #122, Item #3, and cases therein cited.

Accordingly, the action of respondent municipality in issuing the license to respondent, John Zarzecki, is affirmed.

D. FREDERICK BURNETT
Commissioner

Dated: October 22, 1936.

8. APPELLATE DECISIONS - SPERANZA vs. MONROE TOWNSHIP

CROCE SPERANZA,)

Appellant,)

-vs-) ON APPEAL

TOWNSHIP COMMITTEE OF THE TOWN-) CONCLUSIONS
SHIP OF MONROE (MIDDLESEX COUNTY), and JOSEPH LENA,)

Respondents.)

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Edmund A. Hayes, Esq., by Joseph J. Takacs, Esq., Attorney for Appellant.

Wilton T. Applegate, Esq., Attorney for Respondent, Township Committee of the Township of Monroe.

O. C. Bianchi, Esq., Attorney for Respondent, Joseph Lena.

BY THE COMMISSIONER:

This is an appeal from the renewal of a plenary retail consumption license issued to respondent, Joseph Lena, by respondent Township Committee.

Appellant contends that the renewal should not have been granted by reason of the alleged improper manner in which the premises were conducted in the past.

The tavern is located in a rural section. There are only six houses within two thousand feet of the premises. The appellant and several other neighbors testified that they have been constantly annoyed by the boisterous, noisy conduct and profanity of the patrons; that drunkenness and brawls were not infrequent; that the parking and starting of cars along the street created a nuisance; and that patrons used the street for a toilet during all hours of the day and night.

On the other hand there were several neighbors who testified to the orderly manner in which the premises were conducted. They were fully corroborated by two members of the Township Committee, the Township Clerk, the Chief of Police and two police officers. The only complaints ever received by the Police Department about the premises arose out of parking difficulties. One of appellant's witnesses testified that this condition has been largely corrected. The licensee maintains a special officer on duty from about eight o'clock in the evening until closing time for the purpose of keeping order in the street.

The patronage of the saloon is principally colored. The neighborhood itself is composed of both colored and white. One of appellant's witnesses stated that he did not like any colored people. Appellant's daughter testified that he does not like the licensee. One of appellant's principal witnesses lives about six blocks from the licensed premises and could not have observed the conduct of the premises as closely as her testimony might otherwise indicate. The Township Committeemen, the Township Clerk, the Chief of Police and the members of the Police Department are unbiased by any participation in neighborhood differences. Their

testimony clearly indicates that they have given the premises a careful and frequent supervision and that they have fairly concluded that the licensee's conduct is satisfactory. There is no reason to question their good faith in making such a determination.

The evidence, when the testimony on the one side is balanced against that on the other, falls short of the definite and convincing proof that should support a finding that this licensee has been guilty of such improper conduct as to deprive him of a renewal of a license which he has held for two licensing periods. Auletto v. Camden, Bulletin #137, Item #3; Pingatore v. Red Bank Bulletin #133, Item #3; Ford v. Knowlton, Bulletin #84, Item #5; Yole v. Trenton, Bulletin #45, Item #2.

Accordingly, the action of respondent Township Committee in renewing the license of respondent Joseph Lena is affirmed.

D. FREDERICK BURNETT
Commissioner

Dated: October 23, 1936.

9. APPELLATE DECISIONS - SUPPLEMENTAL HEARING - CONSIDERATIONS INVOLVED.

APPELLATE DECISIONS - HILL v. BLAIRSTOWN.

October 23, 1936

William P. Tallman, Esq.,
Phillipsburg, N. J.

Egbert Rosecrans, Esq.,
Blairstown, N. J.

W. Howard Demarest, Esq.,
Newark, N. J.

Gentlemen: Re: John C. Hill v. Township Committee of the Township of Blairstown, Warren County

The Commissioner has carefully examined the transcript of hearing in the above entitled matter. However, in view of the meager testimony introduced, he considers it desirable that a supplemental hearing be held at the offices of this Department on Friday, the 30th day of October, 1936, at 2:00 o'clock in the afternoon, to clarify the issues. The following expressions of the tentative views of the Commissioner may be of assistance to counsel in their presentation of further testimony and arguments at the supplemental hearing:

(1) The fact that services are conducted at the premises sought to be licensed on Sunday mornings would not, in the light of the circumstances, be ground for denial of the application. The evidence indicates that the applicant is the owner of the premises; that he has granted the use thereof for the conduct of services on Sunday mornings to the Catholic Mission in Blairstown; that he has made arrangements with the Pastor of the Catholic Mission to provide necessary partitions and separate entrances and to suspend business during the actual conduct of services; and that in view of the foregoing the Pastor has no objection to the issuance of the license. It may seriously be questioned whether the conduct of Sunday services as aforesaid would constitute the premises a "church" within the meaning of Section 76. Cf. George v. Board of Excise, 73 N. J. L. 366 (Sup. Ct. 1906); Newark Athletic Club v. Board of Adjustment of Newark, 7 Misc. 55 (Sup. Ct. 1929). In any event,

the Mission has waived whatever statutory privileges it possessed and does not oppose the application.

Although respondent's answer sets forth, as a ground for denial of the application, that appellant falsely stated in his application that the premises were not within 200 feet of any church or school, no evidence pertaining thereto was introduced at the hearing and the contention was apparently abandoned. It may be questioned whether the assertion that the premises are not within 200 feet of a church is technically inaccurate. Cf. George v. Board of Excise, supra; and Newark Athletic Club v. Board of Adjustment of Newark, supra. Apparently, there was no intent to mislead or misstate the facts.

(2) The contention is advanced that since the premises consist of a dance hall, attended by many minors, the issuance of a license therefor would be undesirable. A municipal policy to this effect, uniformly applied, would be sustained by the Commissioner. See Bulletin #16, Item #8; and Bulletin #81, Item #9. The difficulty in the instant case is that the record is not clear as to whether such uniform policy exists. There is evidence that a dance hall is operated in conjunction with the license held by Rocco Bunino and there is no substantial evidence in the record to indicate whether this place of business is distinguishable from the appellant's.

(3) Although the answer contains no mention of a numerical limitation, counsel for objectors urged at the hearing that the denial of the application should be sustained because there was a numerical limitation of six (6), which had been exhausted. The reasonableness of the limitation was not attacked. The evidence established, however, that the appellant's application came up for consideration on June 24, 1936, and decision thereon was reserved until June 29, 1936. On the latter date, five (5) applications for renewal of licenses were granted; there were two (2) applications remaining, namely, one by appellant and another by George E. Mitchell for premises which had previously been licensed. The appellant's application was considered sixth in order and was denied. In so far as the record shows, the denial was not based on the limitation nor on the thought that, as between the appellant and Mitchell, the latter's application was more desirable. It was apparently based upon the allegation that the issuance of a license for a dance hall and church was undesirable. Assuming, for the purpose of argument, that this ground is adjudged to be erroneous in the light of the facts presented, it would seem that the appellant should obtain his license despite the subsequent issuance of another license by the respondent; otherwise, the statutory appeal would be rendered futile. Cf. Bulletin #42, Item #6. The foregoing is not inconsistent with the rulings exemplified by Walker v. Verona, Bulletin #91, Item #4. In that case the Commissioner held that where an application is tabled for sufficient reason and another license thereafter is issued, exhausting a municipal limitation, the tabled application may properly be denied. In that case there was no denial because of an erroneous ground. On the contrary, the application was tabled because of circumstances which were found by the Commissioner to be sufficient and when the application finally came up for consideration it was properly denied because of the limitation, which had, in good faith, been exhausted.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

By: Nathan L. Jacobs,
Chief Deputy Commissioner
and Counsel.

10. MUNICIPAL ORDINANCES - LIMITATION OF LICENSES - REGULATION LIMITING NUMBER OF PLENARY RETAIL CONSUMPTION LICENSES EXCLUSIVE OF BONA FIDE CLUBS APPROVED - HEREIN OF THE NECESSITY FOR PROVIDING THAT SUCH EXEMPT CLUBS CONTINUE TO BE BONA FIDE CLUBS.

October 24,1936

R. J. Wortendyke, Jr., Esq.,
Newark, New Jersey.

Dear Mr. Wortendyke:

I have carefully considered the proposed ordinance relating to alcoholic beverages which you intend to introduce at the meeting of the Millburn Township Committee to be held on October 26th.

Under the terms of Section 37 of the Act, the limitations of the number of plenary retail consumption and distribution licenses imposed in Sections 5 and 6 are not made subject to the Commissioner's approval. They are instead, as provided for in Section 38, subject to review on appeal after which they may be set aside, amended or otherwise modified as the Commissioner may order. See Bulletin #43, Item #2. But I thought that as a matter of courtesy, I should, nevertheless, give you my thoughts in connection with the exception in favor of clubs contained in Section 5. I understand what you are trying to do. You want to limit the number of commercial consumption licenses without restricting their issuance to bona fide clubs which will continue to operate as clubs after they have obtained the license. But the clubs must not be allowed to revert to ordinary commercial places. That would circumvent and set at naught the limitation. The suggestion I am about to make will, I believe, reduce the possibility of evasion.

Section 5 concludes:

> "No more than eleven (11) Plenary Retail Consumption Licenses shall be issued and in effect at any time in said municipality, provided that this limitation shall not apply to a Club holding any form of license hereunder if such Club could qualify as a Club under the Statute and rules governing Club Licenses."

The mere restriction that the club qualify for a club license will not insure the result you are trying to attain. Bear in mind that it is not a club license which is being issued. It is the regular plenary retail consumption license. Under it, the club has the privilege of selling to the general public and conducting its business for private gain. True, it may or may not do so as it chooses but it has the legal right and that is dispositive of the question. I grant you that the chances that the Short Hills Club or the Canoe Brook Country Club will open their premises to the public and conduct their businesses purely for private gain, are exceedingly remote. But that is beside the point. Under your regulation, they could do so if they wished. If they (or some club subsequently licensed) chose to do so, you would have more than eleven commercial consumption places. Eleven, I understand, is all the Township Committee wants.

It is for this reason that I suggest you add to Section 5 the following: "Licenses issued to clubs by virtue of the foregoing exception are hereby expressly conditioned that such clubs shall continue to be bona fide clubs. Violation shall be cause for revocation of the license." I think it necessary to carry out the purpose of the regulation.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

11. LICENSEES - EMPLOYMENT OF WOMEN AS WAITRESSES - PRECLUDED IN SOME BUT PERMITTED IN OTHER MUNICIPALITIES - HEREIN OF THE OPERATION OF LOCAL REGULATIONS AND WHY SUBSTANTIAL DIFFERENCES SOMETIMES OCCUR IN ADJACENT COMMUNITIES.

October 14, 1936

Dear Sir:

We were recently called on by the Irvington Police Department because of a complaint that we employ waitresses to serve beer. We have since employed waiters to comply with the request of the police.

We would like to know why it is that we can't have waitresses when there are many places in Newark that do. The waitresses we have served food with the drinks, they are not at all immoral, each one is a young married woman and each is respectable. WE DO NOT EMPLOY HOSTESSES, which is commonly done in many other places.

Behind the bar we have a man for bartending and this place has never had any complaint against it because of our personnel. Can you please let us know what is wrong with our employing waitresses in Irvington, because in Newark many places have them. We are only a block from the Newark City line.

We are sure the complaint was not on account of the girls and we believe the purpose was only the malicious intent of some other tavern keeper. Business has dropped off and will probably keep on dropping off because of the waiters.

Yours very truly,
APOLLO RESTAURANT,
Klea Gula.

October 25, 1936

Mrs. Klea Gula,
Irvington, N.J.

Dear Mrs. Gula:

I have yours of the 14th regarding your waitresses.

According to our records, Section 18 of Ordinance 1403 adopted by the Irvington Board of Commissioners on August 14th, 1934 provides:

> "The right of females to serve, sell or in any manner engage in the actual dispensing of alcoholic beverages shall be limited to the licensee or members of the immediate family of the licensee over the age of twenty-one years."

It was undoubtedly because of this ordinance that the Irvington police directed you to terminate the employment of the waitresses, and not because of any complaint on account of the character of your girls.

The regulation having been adopted by the local municipal governing body applies only to licensed places in Irvington. It does not apply to licensed places in Newark. When licensed premises are near the dividing line, licensees often wish, as you do, that

local regulations were uniform. A frequent instance is different closing hours. The Legislature, however, has given each municipality the right to make its own local regulations, deeming it the better policy in reasonable observance of the principles of home rule. Everybody in the same class within the particular community must, of course, be treated alike. The Irvington Police were, therefore, entirely right in directing you to conform to the Ordinance as well as every other licensee in Irvington.

Very truly yours,
D. FREDERICK BURNETT,
Commissioner.

October 22, 1936

12. IN MEMORIAM

In Honor of Senior Inspector William C. Carr, who died this morning at Holy Name Hospital, Teaneck, following an operation for double hernia, the Enforcement Division is excused from service on Saturday.

The funeral will be held at the Pioneer Masonic Temple, State and Warren Streets, Hackensack, at 2:30 P. M., Saturday, October 24th. Those of you who would like to have a last look upon his face may do so tonight, tomorrow night and until 11:00 A.M. Saturday, at his home, 26 Brinkerhoff Avenue, Teaneck. Members of the other Divisions desiring to attend the funeral will also be excused from service upon application to Deputy Commissioners Jacobs or Hock as the case may be.

Bill Carr was one of my best men. He gained and held my implicit confidence. His services were distinguished by industry, intelligence and integrity. The Department has suffered a grievous loss. I feel it deeply and will the more so as the days go by.

Sincerely yours,

D. Frederick Burnett

Commissioner.