

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

BULLETIN 235

MARCH 29, 1938.

1. TAXES - PROPOSED FEDERAL INCREASE - COMMENTS OF THE COMMISSIONER.

March 11, 1938

D. FREDERICK BURNETT, Commissioner of Alcoholic Beverage Control for the State of New Jersey, was interviewed by the Newark Evening News today in respect to the vote of the House of Representatives for increase in liquor tax. He said:

"The proposed increase in liquor tax, as approved by the House, means more work for the Department and less revenue for the State. The present Federal Tax is \$2.00 per gallon, to which the State adds \$1.00, which makes a \$3.00 tax on an article which costs less than 20¢ a gallon to produce. That's why we have bootleggers in spite of Repeal. The additional tax of 25¢ a gallon is thus a tax of 125 per cent on the cost of production. Adding this to the present 1500 per cent makes a total of 1625 per cent.

"No wonder we have bootleggers! The more the illicit alcohol, the less the revenue to the State. Why add fat to the prize already so tempting to the bootleggers!"

D. FREDERICK BURNETT  
Commissioner

2. DISCIPLINARY PROCEEDINGS - SUPPRESSION OF MATERIAL FACTS AND SALES ON SUNDAYS IN VIOLATION OF REFERENDUM - LICENSE SUSPENDED FOR BALANCE OF TERM.

March 12, 1938

Frank A. Priest, Township Clerk,  
Hamilton Township,  
Trenton, N. J.

Dear Mr. Priest:

I have staff report of the proceedings before the Township Committee of Hamilton Township against Lillian Rose Higham, charged with (a) having suppressed from the Township Committee, in her application for the license, the fact that the real owner of the business sought to be licensed was her husband, George Higham, and (b) having sold and served alcoholic beverages on the licensed premises on Sunday, in violation of referendum and local ordinance.

The report states:

"On Saturday, February 5, 1938, at about 11:45 P. M., Investigators Grover and Hoffman entered the licensed premises. Investigator Perry remained outside to observe activities. Grover and Hoffman found about 150 people in the place. They remained until about 2:50 A.M. Sunday morning and all during that time observed sales and service of alcoholic beverages. They report that the place was 'wide open.' At about three o'clock, Investigator Perry entered and the investigators made known their identity to George Higham, husband of the licensee. He

New Jersey State Library

stated that he knew he should close at 12:00 midnight on Saturday but that this was the only time he did any real business and so he remained open after the closing hour.

"Questions asked Higham by the investigators led to the belief that he was in fact the licensee. In a written statement, he admitted this to be true and stated that his wife was only a 'front' and that he had obtained the license in her name because he is the building inspector of the Township and did not desire his name on the license. His wife, the licensee, in a written statement, admitted that sales and service of alcoholic beverages had been made on the licensed premises in violation of the referendum and the local ordinance.

"Sentence - License suspended from March 16, 1938, for the balance of its term, viz., to June 30, 1938."

Entertaining no opinion on the merits of the case, it would seem that, if the adjudication of guilt was properly made, the suspension of the license for the rest of its term is a penalty befitting the offenses.

Please extend my sincere thanks to the members of the Township Committee for their prompt and effective action.

Very truly yours,  
D. FREDERICK BURNETT,  
Commissioner.

3. DISCIPLINARY PROCEEDINGS - SURRENDER OF A LICENSE UNDER FIRE IS A SUBSTITUTE FOR AND DISPENSES WITH PROOF OF GUILT.

March 7, 1938.

Harvey G. Wismer, Esq.,  
Town Clerk,  
Phillipsburg, N. J.

Dear Mr. Wismer:

I have staff report and your certification of the proceedings before the Board of Commissioners of Phillipsburg against R-Gent Social Club, charged with (a) having sold alcoholic beverages to non-members in violation of the terms of its club license and (b) having sold alcoholic beverages on Sunday in violation of local regulation. The report states:

"Complaint had been received by this Department that alcoholic beverages were being sold to non-members. Accordingly, investigation was ordered.

"On Saturday, January 22, 1938, Investigators Slater and Ratti visited the licensed premises and were admitted without

any question. They ordered and were served alcoholic beverages at the bar. They remained until 1:35 A. M. on Sunday morning at which time the place was still open, selling and serving alcoholic beverages.

"On Sunday, January 30, 1938, Investigators Thievon and Roxbury arrived at the licensed premises at about 1:30 A. M. and before entering observed people leaving and entering the club. The investigators had no trouble being served alcoholic beverages at the bar until 2:10 A. M. At that time they identified themselves to Thomas Azzalina who stated that he was the second steward in charge at the premises. He admitted to the investigators that he was familiar with the local ordinance prohibiting sales on Sunday and also of the fact that no sales could be made under the terms of the Club license to non-members. He said he thought he recognized Investigator Roxbury as a member.

"The investigators were not called upon to testify as they were informed that the licensee had surrendered its license.

"Certification received from the Town Clerk of Phillipsburg reveals the following:

"On the day of the hearing, the president of the Club appeared before the Commissioners and voluntarily surrendered the license. Therefore, there was no hearing held due to the fact that this was their second violation and they were of the opinion that the license would be revoked."

"Please thank the members of the Board of Commissioners for their prompt action in this case.

"You ask if this licensee is eligible for another license. I suppose your question arises because of the fact that there was a surrender of the license instead of a formal adjudication of guilt carrying with it a suspension or revocation. The answer is that this licensee is ineligible to receive another liquor license in New Jersey. The reason for that conclusion is:

(1) My records show that on January 3 1937, the club license of this R-Gent Social Club was suspended for thirty days by your Board of Commissioners after an adjudication of guilt that sales had been made to non-members in violation of the terms of its license.

(2) The present violation which resulted in a surrender of the license was also based upon a similar charge. A surrender of a license after a charge has been filed against a licensee is an admission of guilt as eloquent as a written confession. Surrender under fire is a substitute for and dispenses with any further proof of guilt.

R.S. 33:1-25 (Control Act, Section 22) provides that no license shall be issued to any person who has committed two or more violations of said Act. The R-Gent Social Club having committed two such violations, is hence permanently barred from receiving another liquor license in New Jersey.

Very truly yours,

D. FREDERICK BURNETT  
Commissioner

4. LICENSES - APPLICATIONS - HEREIN OF THE MEANING AND EFFECT OF A MUNICIPAL REQUIREMENT THAT THE APPLICANT PRESENT THE APPLICATION.

HOTELS - NUMBER OF ROOMS - DEFINITION.

My dear Mr. Burnett:

In "An Ordinance to Regulate the Sale of Alcoholic Beverages in the Borough of Dunellen, in the County of Middlesex," Section 4 reads as follows:

'No license shall be issued except after written application presented by the proposed licensee,.....'

Question: Can the meaning of this section be so construed as to mean that proposed licensee may not or shall not appoint a representative to appear in his stead?

Section 6, last sentence, reads:

"A Hotel within the meaning of this subdivision shall be such as is considered an Inn of the better class, which shall provide lodging (not less than five (5) bedrooms,....."

Question: Is not this part of the section illegal, since it is in conflict with a decision handed down in Re Corona, Bulletin 29, Item 5, which reads:

"An hotel is not to be arbitrarily defined by the number of rooms it contains, but rather by the purposes which it serves"?

Respectfully yours,

Milton Sussman

March 14, 1938

Mr. Milton E. Sussman,  
Dunellen, N. J.

My dear Mr. Sussman:

Your question in respect to requirement in Section 4 of "written application presented by the proposed licensee" as to whether this means that the applicant may not or shall not appoint a representative to appear in his stead indicates that you are placing entirely too much emphasis upon the word "presented." The last quoted word cannot be tortured to mean personal presence. If so, how could a corporation be personally present? To present means to bring or introduce; to exhibit or offer to view or notice; to lay or put before a person for acceptance; to submit. Thus, a person presents a memorial, a petition, or an application. Grand juries present indictments. The fact of one's own personal presence is not a factor in the verb. What one does through another, he does himself.

The statement in Section 6 that "A Hotel within the meaning of this subdivision shall be such as is considered an Inn of the better class, which shall provide lodging (not less than five (5) bedrooms,...", while not a wholly adequate definition, does not destroy the effectiveness of the section. The statute expressly provides (R.S. 33:1-12, Control Act, Sec. 13-1) that for hotel premises, among others, plenary retail consumption licenses may be issued. In the absence of any definition of

"hotel" in the Act, the term must be given the common meaning that it has acquired. It is true that a hotel may be a bona fide one regardless of the number of rooms it contains. Re Butera, Bulletin 180, Item 3; Re Bond, Bulletin 125, Item 4; Re Jeffrey, Bulletin 115, Item 11; Re Corona, Bulletin 29, Item 5. I am not bothered overmuch by the Dunellen requirement that an establishment, in order to be called a hotel, shall contain at least five bedrooms, for I should hardly dignify by such name any place which contained less.

Very truly yours,

D. FREDERICK BURNETT  
Commissioner

5. PLENARY RETAIL DISTRIBUTION LICENSES - MUNICIPAL ORDINANCE PROHIBITING OTHER MERCANTILE BUSINESS ALLOWS ONLY THE SALE OF ALCOHOLIC AND NON-ALCOHOLIC ACCESSORY BEVERAGES AND NOT THE SALE OF FOODSTUFFS SUCH AS PRETZELS, NUTS, RELISHES, CANDIES, CHERRIES, OLIVES, ETC. - THE TEST IS NOT WHAT MAY BE SERVED WITH LIQUOR BUT WHETHER THE NON-ALCOHOLIC ACCESSORY IS A BEVERAGE.

Dear Commissioner:

Will you kindly advise whether it is permissible for a liquor dealer, holding a retail distribution license in a town where combination stores are prohibited from selling liquor, to sell such items as pretzels, peanuts, relishes, imported candies, cherries, olives and nuts, etc., and such other miscellaneous items which may be used in mixing drinks or serving with same.

Very truly yours,

Morris N. Scharf

March 14, 1938.

Morris N. Scharf, Esq.,  
Ramsey, N. J.

My dear Mr. Scharf:

I understand that the liquor dealer of whom you write holds a plenary retail distribution license for premises situated in a municipality in which the governing body has adopted an ordinance, pursuant to R.S. 53:1-12 (Control Act, Sec. 13-3a), prohibiting the issuance of such licenses for premises in which any mercantile business other than the sale of alcoholic beverages is carried on.

Under his license, he could sell only alcoholic beverages and such non-alcoholic beverages as ginger ale and soda commonly used for mixing or in conjunction with alcoholic beverages. The sale of such accessory beverages is not, within the contemplation of the Act, another mercantile business. See Re Schmidt's, Bulletin 197, Item 12, Re Smith, Bulletin 57, Item 17, also Bulletin 41, Item 2, copies of which are enclosed.

But that is as far as the exception goes.

The pretzels, peanuts and other items mentioned may be, and often are, served with liquor, but that does not make them drinkables. Liquor may be served with soup, shellfish or savories, as gustative fancy impels. But that doesn't mean that your client can go into the food business in a municipality which has prohibited the transaction of any other mercantile business on premises where the sale of alcoholic beverages is conducted. After all, all your client has is a liquor license.

The pretzels, peanuts, etc. are out.

Very truly yours,

D. FREDERICK BURNETT  
Commissioner

6. MUNICIPAL ORDINANCES - ORDINANCE REQUIRING RESTAURANT LICENSE FOR THE SALE OF FOOD FOR ON-PREMISES CONSUMPTION, AS DISTINGUISHED FROM ORDINANCE REGULATING THE SALE OF LIQUOR, NOT SUBJECT TO APPROVAL.

MUNICIPAL ORDINANCES - SUNDAY SALES - ORDINANCE PROHIBITING SUNDAY SALES EXCEPT IN LICENSED RESTAURANTS WITH MEALS APPROVED.

March 17, 1938.

Jay B. Tomlinson, Esq.,  
Bordentown, N. J.

My dear Mr. Tomlinson:

Re: Borough of Fieldsboro

I have your letter of the 11th and the copies of two ordinances which have passed first reading and will come up for final adoption at the meeting of the Fieldsboro Borough Council on March 21st.

I am not considering for approval the ordinance requiring the issuance of a license to maintain a restaurant in the Borough. While in requiring the licensing of restaurants it would necessarily include, among others, those for which liquor licenses have been issued, its purpose, I gather, is solely to license premises being conducted as restaurants, i.e., for the sale of food for on-premises consumption. If it involved the imposition of an additional fee for the sale of alcoholic beverages, I could not approve it. See Re McNaughton, Bulletin 64, Item 3; Re Shurts, Bulletin 64, Item 6; Re Camp, Bulletin 86, Item 11. But being confined solely to restaurants, I do not see why it cannot exist independently of resolutions and ordinances regulating the sale of alcoholic beverages. See Re Wilson, Bulletin 69, Item 6; Re Reed, Bulletin 222, Item 3. I am, therefore, expressing no opinion as to its validity. It is a matter of general municipal law, as to which you as Counsel for the Borough should advise, and entirely outside of my jurisdiction.

The proposed amendment to Section 3 of ordinance adopted on December 7, 1937, which provides:

"SECTION 3. There shall be no sale of Alcoholic Beverages made during the day of the week known as 'Sunday' and all places licensed for the sale of Alcoholic Beverages shall be closed upon that day except licensed restaurants where bona fide meals are served and there sales of Alcoholic Beverages may be made only when the same are served with meals."

will, upon final adoption, be approved as submitted.

Whether alcoholic beverages are to be sold at all in Fieldsboro on Sundays is, in the absence of referendum, a matter to be decided in the discretion of the Borough Council. Generally speaking, whatever hours of sale the municipality fixes must apply to all licensees in the class. The only exception I have allowed is in the case of municipal regulations permitting sales of alcoholic beverages on Sundays in bona fide hotels and restaurants with meals. Of course, to allow some members of the license class to sell when others are prohibited from doing so is certainly discriminatory. It is justifiable, if at all, only on the ground of serving a public purpose. Allowing restaurants to sell on Sundays may carry out such a purpose. I have, therefore, given such regulations tentative approval where they appear to be so drawn as to foster legitimate trade and sales and not make a mockery of the law. See Re Hauck & Felter, Bulletin 130, Item 3; Re Bowers, Bulletin 170, Item 11; Re Warren, Bulletin 207, Item 10.

Very truly yours,

D. FREDERICK BURNETT  
Commissioner

7. LICENSEES - SALES TO RELIEF AND W.P.A. CLIENTS - NOT ILLEGAL IN THE ABSENCE OF APPROVED LOCAL REGULATION.

March 18, 1938.

Dear Sir:

Information:- What authority has the Police Department to order licensed liquor dealers to discontinue the sale of liquor to Relief and W.P.A. clients.

The Overseer of the Poor of the Borough of Westwood, N.J. has requested that we instruct our licensed liquor dealers to discontinue the sale of liquor to Relief and W.P.A. clients threatening revocation of license.

If we have any authority in this matter kindly inform us at once as to the proper procedure - in instructing licensed liquor dealers, also procedure to follow if the sale is continued.

As I believe this matter will be brought before the Governing Body of the Borough at the next regular meeting of Tuesday, March 22nd, would appreciate an immediate reply.

Thanking you for your cooperation, I beg to remain,

ALVIN C. LICH  
Chief of Police.

March 18, 1938.

Alvin C. Lich,  
Chief of Police  
Westwood, New Jersey

Do not order licensees to discontinue sale of liquor to relief and WPA clients Stop if governing body desires to submit for approval a regulation in this respect I will be glad to give it

early and earnest consideration Stop in absence of approved regulation there is nothing illegal about the practice of which the Overseer of the Poor complains Stop hence do not make any threat of revocation which cannot be carried out.

D. FREDERICK BURNETT  
Commissioner

8. LICENSEES - SALES TO UNLICENSED GROCERS - MISDEMEANORS INDICATED - IF A GROCER DESIRES TO DABBLE IN LIQUOR HE WILL HAVE TO TAKE OUT A LICENSE.

Gentlemen:

We have a client who has asked us to get an opinion on certain propositions. Our client has a liquor license for the retail sale of liquor. One of his customers, who runs a grocery store gets calls for liquor and buys from our client. What he wishes to know is:

1. Is it permissible for our client to sell him.
2. Is it permissible for the grocery man to buy liquor from us and to deliver it for the convenience of his customers and to satisfy the calls for liquor.
3. Does the grocery man need any sort of license to deliver the liquor.

Very respectfully yours,

Hammer & Hammer

March 19, 1938.

Hammer & Hammer, Esqs.,  
Passaic, N. J.

Gentlemen:

1: Your retailer client has no right to sell to the grocer for the purpose of resale. To do so is a misdemeanor.

2: Delivery of alcoholic beverages by the non-licensed grocer to his customer would constitute a sale of alcoholic beverages as defined in R.S. 33:1-1. Sales can be made only by licensees. Each sale by a non-licensee is a misdemeanor. R.S. 33:1-50. Tell the grocer to stop the practice pronto.

3: Delivery of alcoholic beverages can be made only by the holder of a transportation license or by other licensees in their own vehicles. R.S. 33:1-28. One who unlawfully transports liquor is guilty of a misdemeanor. R.S. 33:1-50. Besides that, the vehicle will be forfeited.

If the grocer desires to dabble in liquor, he will have to take out a license.

Very truly yours,

D. FREDERICK BURNETT  
Commissioner

9. NEW LEGISLATION - AMENDMENT TO R.S. 35:1-10 (CONTROL ACT, SEC. 11)-  
BONDED WAREHOUSE BOTTLING LICENSE

Senate Committee Substitute for Assembly Bill No. 156 was approved by Governor Moore on March 16, 1938 and thereupon became Chapter 30 of the Laws of 1938.

It is effective immediately.

It adds to Section 11 of the Control Act a paragraph providing for bonded warehouse bottling licenses (the rest of the section remaining the same) which reads:

"Bonded warehouse bottling license. 5. The holder of this license shall be entitled, subject to rules and regulations, to bottle alcoholic beverages in bond on behalf of all persons authorized by Federal and State law and regulations to withdraw alcoholic beverages from bond. The fee for this license shall be five hundred dollars. This license shall be issued only to persons holding permits to operate Internal Revenue bonded warehouses pursuant to the laws of the United States."

D. Frederick Burnett  
Commissioner

10. SOLICITORS' PERMITS - MORAL TURPITUDE - FACTS EXAMINED - CONCLUSION

Re: Case 214

March 18, 1938.

A permit was issued to solicitor, pursuant to his sworn application and questionnaire containing denial of conviction of any crime. Departmental check-up on his fingerprint record, however, disclosed that he had been convicted in 1931 for violation of the National Prohibition Act, fined \$200, and released on two years' probation. Accordingly, a hearing was held to determine whether solicitor's permit should be revoked because of conviction of a crime involving moral turpitude within R.S. Sec. 33:1-25 (Control Act, Sec. 22) or whether any other action should be taken.

Solicitor describes the crime of which he was convicted as follows: that on the occasion in question, he had purchased half a gallon of whiskey from a bootlegger for a party being staged by himself and others at a local hotel in North Carolina; that while carrying this whiskey into the hotel, he was arrested by a Federal agent and several local police officers; that these officials had apparently witnessed his visit to the bootlegger's place and had followed him back to the hotel.

Illegal transportation of liquor during the Prohibition days is not per se a crime involving moral turpitude within R.S. Sec. 33:1-25 (Control Act, Sec. 22). Since no aggravating circumstances appear, solicitor's crime is free of that element. Re Hearing #177, Bulletin 205, Item 6, and cases therein cited; Re Case #211, Bulletin 231, Item 12.

There remains, however, the fact that solicitor, in

his application and questionnaire, falsely swore that he had never been convicted of any crime. He explains that he did not classify his case as a real conviction, because he had been released on probation. This theory of solicitor's, however, seems to have been born of his desire to conceal his criminal record.

It is recommended that, because of his false swearing, solicitor's permit be suspended for 10 days, effective March , 1938.

Nathan Davis  
Attorney

Approved as to non-turpitude. Disapproved as to lying about it. Thirty days suspension will remind him of the fine he paid and the two years' probation so that next time he will tell the truth. His permit is suspended for the month of April.

D. Frederick Burnett  
Commissioner

11. BONDED WAREHOUSE BOTTLING LICENSE - RECTIFIER - RECTIFIER MAY HAVE ITS ALCOHOLIC BEVERAGES BOTTLED IN BOND BY BONDED WAREHOUSE BOTTLING LICENSEE AND MAY SELL THE PRODUCT THUS BOTTLED.

March 23, 1938.

John H. Yauch, Jr., Esq.,  
Newark, N. J.

Dear Sir:

I have your letter of March 16th inquiring whether a New Jersey rectifier may have its alcoholic beverages bottled in bond by the holder of a bonded warehouse bottling license and thereafter sell the product thus bottled.

Heretofore it has been impossible for New Jersey licensees to have their alcoholic beverages bottled in bond within this State since no rectifier was the holder of a permit to operate an Internal Revenue bonded warehouse. To correct this situation, the Legislature enacted P.L. 1938, c. 30, which authorizes the Commissioner to issue bonded warehouse bottling licenses to any holders of permits to operate Internal Revenue bonded warehouses. Under the statute, such licensees will be authorized "to bottle alcoholic beverages in bond on behalf of all persons authorized by Federal and State law and regulations to withdraw alcoholic beverages from bond". Federal regulations allow licensed rectifiers to withdraw alcoholic beverages from bond and there is no State regulation which restricts such withdrawal. Consequently, the new statutory provision should be construed to allow the holder of a bonded warehouse bottling license to bottle alcoholic beverages in bond on behalf of licensed rectifiers. By necessary implication it should likewise be construed to authorize licensed rectifiers to have their alcoholic beverages bottled in bond by such bonded warehouse bottling licensees and to sell the product thus bottled.

Your inquiry is therefore answered in the affirmative.

Very truly yours,

D. FREDERICK BURNETT  
Commissioner.

By: Nathan L. Jacobs  
Chief Deputy Commissioner  
and Counsel

12. GAMBLING - SLOT MACHINE WITH PAY-OFF IN GOLF BALLS - HEREIN  
A HARDENED OFFENDER IN A NEW SPRING DRESS.

March 25, 1938.

Upper Montclair Country Club,  
Upper Montclair, N. J.

Gentlemen: Att: Louis G. Lamb, Superintendent

I have yours of March 13, 1938, with prospectus of the "Mills Golf Ball Vender," a "combined amusement and service-vending machine," operated by inserting a quarter in a slot, pushing a lever to set the machine in motion and, depending entirely upon luck, the player may receive 1 - 3 - 5 - 7 or 20 seventy-five cent golf balls for his quarter or -- without emphasis -- just experience. I recognize the same old plums and lemons, the same old hope to get three in a row, the same old jackpot.

The fact that the pay-off is in golf balls, instead of money, does not alter the fact that it is a gambling device per se -- a slot machine, the possession of which constitutes a misdemeanor. Its presence on licensed premises violates Regulations #20, Rule #8, viz:

"8. No licensee shall possess, allow, permit or suffer on or about the licensed premises any slot machine or device in the nature of a slot machine which may be used for the purpose of playing for money or other valuable thing."

Violation means revocation or suspension of your liquor license.

So, don't!

Very truly yours,

D. FREDERICK BURNETT  
Commissioner

13. CLUB LICENSEES - BARTENDERS - NOT NECESSARY THAT BARTENDER BE  
HIMSELF A MEMBER OF THE CLUB.

Dear Sir:

Inquiry has been made to me as to whether it is legal for a fraternal association, licensed under a club license, to hire a person, who is not a member thereof, as a bartender

It is my opinion that inasmuch as clubs are limited to sell alcoholic beverages, under a club license, to bona fide club members and their guests, the person hired as a bartender must be a member of the association or club.

I would appreciate a reply from you relative to the question.

Very truly yours,

Albert Fioravanti

March 25, 1938.

Albert Fioravanti, Esq.,  
Plainfield, N. J.

Dear Mr. Fioravanti:

It is not necessary that the bartender of a Club Licensee be himself a member. Imagine the consternation at some swanky country club if it were required that some member be "elected" to don a white apron and serv  as butler to the rest. The point is that restrictions on such a license as to whom liquor may be sold have nothing to do with determining by whom it may be served.

If you have it in mind that the barkeeper is to be a customer as well, then, of course, he must be a member.

Very truly yours,

D. FREDERICK BURNETT  
Commissioner

14. RETAIL LICENSES - INVALIDITY OF LICENSES ISSUED BY MUNICIPALITY IN EXCESS OF LOCAL LIMITATION OF NUMBER - SUCH LICENSES MUST EITHER BE CANCELLED OR CORRECTIVE PROCEDURE TAKEN TO VALIDATE THE LICENSES ISSUED IN EXCESS OF THE LIMITATION.

March 27, 1938.

Dominick J. Livelli,  
Township Clerk,  
Lyndhurst, N. J.

My dear Mr. Livelli:

I have before me resolution adopted by the Board of Commissioners on March 19, 1936, which provides:

"The number of Plenary Retail Consumption Licenses which may be issued and outstanding at the same time shall not be in excess of the number of such licenses outstanding on July 1, 1936. It is the purpose and intention of this resolution that no further or additional Retail Consumption Licenses shall be issued after July 1, 1936 unless and until there has been a revocation, surrender or abandonment of one or more of the licenses in force and effect on said date."

I understand from your letter that for the fiscal year 1935-36, 42 plenary retail consumption licenses were issued, that during the course of the year three were surrendered, that on June 30, 1936 there were 39 outstanding and that consequently 39 was the quota that the Board considered the resolution of March 19, 1936 to fix.

The resolution of March 19, 1936 does not, however, fix the quota as of June 30, 1936. It fixes the quota, by its terms, as of July 1, 1936. Hence, it is not the number outstanding on June 30th to which you are limited, but the number outstanding on July 1st.

According to my records, on July 1, 1936, 34 plenary retail consumption licenses were issued.

It would, therefore, appear that 34 was the quota.

It would also appear that all those in excess of that quota, viz., Nos. 36 and 37 for the year 1936-37 (there is no record of a No. 35) and Nos. 35 through 39 for the year 1937-38, were issued contrary to the resolution.

I appreciate that the situation has evidently arisen from a misunderstanding of the effect of the March 19, 1936 resolution. It is, nevertheless essential, in order to give validity to licenses heretofore issued in excess of the limitation, that the Township Committee repeal at once the resolution of March 19, 1936. Then, if it is the thought of the Board that a new limitation should be enacted, I suggest the adoption of an ordinance reading:

"BE IT ORDAINED: That the number of plenary retail consumption licenses issued and outstanding in the Township of Lyndhurst at the same time, shall not exceed -----."

If it is desired to fix a quota less than the number presently outstanding, then add to the foregoing a further proviso exempting renewals, the form of which you will find set forth in Re Sahl, Bulletin 198, Item 11.

Unless the limiting resolution is repealed as above indicated within three weeks from date, proceedings will have to be instituted to cancel the licenses erroneously issued, in accordance with the procedure in Re Loeb, Bulletin 206, Item 14.

Kindly acknowledge receipt of this letter and certify to me the action taken by the Board.

Very truly yours,  
D. FREDERICK BURNETT,  
Commissioner.

15. LIMITATION OF LICENSES - REPEAL, ALTERATION OR AMENDMENT - SUCH A LIMITATION CANNOT BE REPEALED OR CHANGED EXCEPT BY ORDINANCE EVEN THOUGH THE ORIGINAL LIMITATION WAS ESTABLISHED BY A MERE RESOLUTION.

March 28, 1938

Dominick J. Livelli,  
Township Clerk,  
Lyndhurst, N. J.

My dear Mr. Livelli:

Supplementing my letter of March 27th:

I wrote you that, in order to validate licenses heretofore issued in excess of the Lyndhurst limitation, it was essential that the Township Committee repeal at once the resolution of March 19, 1936.

I did not think, until today, to call your attention to the manner in which the repeal, if made, must be done.

Since the limitation was effected by a resolution, the normal procedure, as one would naturally think, would be

by the Board of Commissioners on February 8, 1938, which provides:

"WHEREAS, an Ordinance to limit the number of Plenary Retail Consumption Licenses in the Town of West New York, was adopted December 22, 1936;

"BE IT RESOLVED, that this limitation shall not prevent the surrender of any club license outstanding at the time the limitation was adopted and the issue of a renewal of a Plenary Retail Consumption License in its place."

It is good policy for clubs to hold plenary retail consumption licenses and thereby reduce the work of enforcement in seeing to it that they do not transgress the narrow privilege limits of a club license. I have advocated such conversions. Re White Beeches Golf & Country Club, Bulletin 126, Item 15; Re Keevil, Bulletin 158, Item 11. While, therefore, I am heartily in favor of the spirit of your resolution of February 8th, it is inoperative and of no legal effect for the following reasons:-

The ordinance adopted December 22, 1936 provides that no plenary retail consumption license shall be issued until the number issued and outstanding shall be less than 70, with certain exceptions not here material. The resolution, therefore, in effect amends the ordinance, since it permits the issuance of plenary retail consumption licenses to clubs holding club licenses, regardless of the number of plenary retail consumption licenses outstanding.

But an ordinance cannot be amended by mere resolution. It can be amended, repealed or superseded only by another ordinance. American Malleables Co. v. Bloomfield, 83 N.J.L. 728; see also Re Jessen, Bulletin 192, Item 2 which collects the previous rulings to the same effect.

In addition to the general law that ordinances cannot be amended by resolution, there is a further reason why this particular resolution is ineffective. R.S. 33:1-40 (Control Act, Sec. 37) which now requires that all limitations of licenses be enacted by ordinance, further provides that any preexisting limitation, whether adopted by ordinance or resolution, shall continue in full force and effect until repealed, amended or otherwise altered by ordinance.

I appreciate that plenary retail consumption license No. 88 was issued to the J. Beier Theurer Ass'n., Inc., as a result of a bona fide mistake. It is essential, nevertheless, to give validity to the license, that the Board of Commissioners at once adopt an appropriate ordinance amending the December 22, 1936 limitation. You will find a discussion in Re Perry, Bulletin 199, Item 3, of exceptions in regulatory limitations which permit the issuance of plenary retail consumption licenses to replace club licenses then outstanding which may be of help to you.

Unless such an ordinance is adopted within three weeks from date, proceedings will have to be instituted to cancel the license, in accordance with the procedure in Re Loeb, Bulletin 206, Item 14.

Kindly acknowledge receipt of this letter and certify to me the action taken by the Board.

Very truly yours,

D. FREDERICK BURNETT  
Commissioner

## 17. REFERENDUM - SUNDAY SALES - EFFECT ON WHOLESALERS.

MUNICIPAL ORDINANCES - PROHIBITION OF ALL RETAIL LICENSES - EFFECT ON WHOLESALERS.

STATE LICENSES - CONDITIONS - HEREIN OF CONDITIONS WHICH MAY BE INSERTED IN STATE LICENSES IN PROPER CASES PROHIBITING ALL SUNDAY ACTIVITIES AS WELL AS SALES IN MUNICIPALITIES WHERE SUNDAY SALES HAVE BEEN FORBIDDEN BY REFERENDUM OR BY ORDINANCE.

Dear Sir:

A wholesale beer distributor now doing business in Gloucester, N.J. desires to purchase a piece of property in Westville, N.J. and move his business to this point.

However, the party is somewhat confused because Westville has a closed Sunday and before purchasing he has asked me to get an opinion from your office as to whether or not the closed Sunday would affect him as a wholesaler. In addition I would also like to know if at any time the town would go dry by a vote of the people, would this affect him in any way.

Very truly yours,

Ernest R. Lewis

March 27, 1938.

Mr. Ernest R. Lewis,  
Westville, N.J.

My dear Mr. Lewis:

My records disclose that a referendum was held in Westville on November 2, 1937 on the question "Shall the sale of alcoholic beverages be permitted in the Borough of Westville on Sunday?" and a majority voted in the negative.

In such case, the statute (R.S. 33:1-47; Control Act, Sec. 44) provides that "...it shall be unlawful for any person to sell alcoholic beverages in said municipality on Sundays...." The prohibition is against all Sunday selling, and therefore applies equally to retailers and wholesalers.

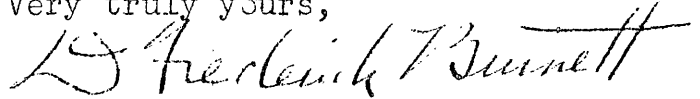
To give full effect to a prohibition of Sunday sales, I have ruled that the sale occurs at the place of delivery. Re Weston. Bulletin 171, Item 1.

Therefore, no wholesaler, wherever his licensed premises are located, may deliver alcoholic beverages to retailers in Westville on Sunday, because such a delivery amounts to a sale in violation of the referendum.

Whether wholesalers located in Westville may on Sundays accept orders, load trucks, and deliver to other municipalities where Sunday sales are not prohibited, will depend on the neighborhood and how this phase of the business is conducted. It is not, to be sure, governed by the referendum for that only prohibits Sunday selling. But independent of that, and on my own motion, where reasonable well-founded objection is made to and there is substantial local sentiment against the transaction of any business on Sundays by liquor licensees, I have, on occasion, imposed a condition on a State license prohibiting all Sunday activity at the licensed premises. Re Sacca, Bulletin 190, Item 5.

If Westville were to go "dry", it could do so only by referendum pursuant to R.S. 33:1-46 (Control Act, Sec. 43), or by ordinance of the Borough prohibiting the issuance of all retail licenses pursuant to R.S. 33:1-12 (Control Act, Sec. 13). Since both the referendum and the ordinance would apply only to retail licenses, a wholesaler having an established business in the municipality would not be affected by either.

Very truly yours,



Commissioner