

STATE OF NEW JERSEY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

744 Broad Street, Newark, N. J.

BULLETIN NUMBER 28.

May 16, 1934

1. MUNICIPAL RESOLUTIONS - VALIDITY - PAYMENT OF MUNICIPAL TAX ARREAR

May 13, 1934

Mr. David Sofield,
Township Clerk,
Denville, N. J.

Dear Mr. Sofield:

Resolutions of your Township Committee adopted January 17th and May 2nd, enacting rules and regulations, are approved as submitted.

Re your resolution of April 4th, reading:

"WHEREAS, it appears upon the Tax Books of the Collector of Taxes a large amount of unpaid Taxes levied and assessed against the properties where Liquor business is being carried on and conducted by either the owner or tenant,

"BE IT RESOLVED, therefore, that no License shall be hereafter issued to any owner, tenant or occupant to conduct the sale of alcoholic beverages unless such applicant shall show before such License is issued that the tax levied by the Township of Denville shall have been paid in full on the day application shall be made for such License."

I am in hearty sympathy with the natural desire of your Township Committee to use every proper means to force the payment of taxes in your municipality. The question before me, however, is not the worthiness of the motive but whether the power exists. The resolution does not impose the above condition to accomplish the objects of the Control Act (Sec. 29). Neither does it regulate the conduct of the business nor the nature and conditions of the licensed premises (Sec. 37). Its avowed purpose is the collection of municipal taxes which objective, however laudable, has nothing in common with Liquor Control.

The resolution cannot be grounded on Section 30. The back taxes which an applicant must pay to be entitled to a license are there stated to be those taxes "which shall have accrued pursuant to the provisions" of certain named Acts providing for taxes on sales of alcoholic beverages. The express specification of those taxes excludes by implication all other taxes from the operation of that Section.

Therefore, I disapprove the resolution of April 4th.

Kindly acknowledge receipt to complete my records.

Very truly yours,

D. Frederick Burnett,
Commissioner.

New Jersey State Library

2. MUNICIPAL RESOLUTIONS - VALIDITY - VARIOUS QUESTIONS AND SUGGESTIONS.

May 13, 1934.

Dear Mr.-----:

I cannot approve the resolution of December 4th, for this was before the Control Act became effective on December 6th.

In enacting new resolution the following points and comments should be taken into consideration:

1 - The chapter number of the laws should be incorporated.

2 - As your resolution stands, all licenses under it continue until February 4th "and no longer". That was all right for the temporary licenses, but you are issuing licenses under municipal resolution which continue until June 30th. Really, it would be preferable to recast Sec. 2 omitting all reference to the date of termination of licenses as the law itself takes care of that. So also as to making them subject to revocation unless you wish that in for psychological effect.

3 - Section 4 will have to be amended because the law on the points contained therein has in several respects been radically changed, as, for instance, the 200 ft. rule and the exceptions thereto. As a matter of fact, substantially all of this section could be safely omitted because it is taken care of by the Control Act anyway, and therefore by omitting it the Council saves itself the necessity of continually amending its resolution as changes are made in the law from time to time. In any event, that part of Section 4 which provides that the license may not be issued to any applicant who has failed to pay any taxes to the City is not valid for, as worded, it is broad enough to include real estate taxes. For reasons see Bull. 28, Item 1.

4 - I heartily applaud the idea of your Council in providing for a recognizance conditioned, as you have it, not to keep a disorderly house nor suffer gambling, but to keep order and comply with the rules and regulations. The only thing requiring change therein is the recital that the licensee is licensed "until the fourth day of February, 1934." In prescribing a form I think it best not to use a specific date in the form because by so doing it requires a new resolution every year. This could be kept as a standard form by simply omitting the words above quoted.

5 - In Section 7 you have an admirable clause, if such is your policy, requiring a full, unobstructed view of the interior of the licensed premises, but I am very doubtful of the validity of the exceptions that you have made thereto in favor of clubs operated by fraternal organizations, or holding companies thereof, and in favor of hotels which serve drinks in the public dining room without a bar. Perhaps it was all right at the time it was adopted, but since then the Legislature has provided for club licenses and has not distinguished between clubs operated by fraternal organizations or by social, or benevolent, or charitable, or religious, or recreational, or athletic organizations. While I am a member of two fraternal organizations myself, and prize them highly, I do not see why a legitimate exception can be made in their favor. My present impression is that this language must be carefully revamped. I am not passing on the point now because the resolution must be disapproved as a whole on the ground first above mentioned, i.e. that it was enacted before the authority to enact it had itself become a law. But

I mention it in passing as a matter to be taken into careful consideration upon reframing your resolution.

It may be that on reconsideration you may deem that the provisions of Section 7 are pretty broad when you require "a full, unobstructed view of the interior may be had from the street". I doubt very much if that is practical. I can imagine many situations where a restaurant or a tavern might have recesses or right angle spaces which could not possibly be seen in full from the street. Do you not think that you should reconsider this just as a matter of policy? Candidly, it strikes me as rather severe. Certainly it would put out of commission any hotel which does have a bar on the premises unless perchance the whole interior of the hotel is viewable from the street. Is this desirable, even on the first floor? Perhaps if this rigorous requirement is ameliorated and modified, no exceptions will be necessary, and in that event serious questions of validity arising from favoring certain classes of licensees will be obviated.

6 - Section 8 may also give you trouble. As applied to a saloon, your provision that sale or service of alcoholic beverages is prohibited in side rooms, back rooms, and booths, is well conceived and neatly worded, but it gives rise to many questions about rooms in a hotel or club, and perhaps should be changed to confine the prohibition to the places where it is really intended.

7 - I cannot approve Section 11 as written. It purports to confer a power upon the Mayor to suspend the operation of a license during the time that the five days notice required for revocation is running. Section 28 distinctly states that no suspension of any license shall be made until a five day notice of the charges preferred has been given to the licensee, and reasonable opportunity to be heard thereon given to the licensee. The Legislature having so provided no contrary result can be accomplished through the medium of the municipality reserving to itself a greater right to revoke or suspend than the Legislature itself has allowed. The only exception that I have recognized to the requirement of notice, charges, and an opportunity to be heard, commonly called due process of law, is that set forth in Bulletin 24, item 4. That exception was grounded on sheer necessity and the existence of a true public emergency. It was there said:

"It is recognized, however, that situations may arise which require immediate action by duly constituted police authorities. The health, safety and lives of the public are the supreme law, and, in cases of public emergency, warrant the exercise of the reserved police power of the State to protect its inhabitants. Rules and requisites laid down to govern the normal may have to give way in emergencies. Thus, an order to close instantly all saloons in case of a riot and to keep them closed until the mob was under control, is undebatably proper. But scrupulous caution must be exercised to make sure that a real emergency actually exists. And the dispensation is good only so long as the emergency continues.

"Tested by these principles, the action of the Director of Public Safety in closing the place immediately upon commission of the homicide was eminently proper. On the other hand, there is no warrant whatsoever for keeping it closed after the investigation was completed. That order should be abrogated forthwith.

"If the Police Department have valid grounds for revocation, the proper procedure should be taken. Unless and until the case is fairly adjudicated against the licensee, her rights must be honored."

Temporary license was issued. Subsequently, all conditions precedent to the issuance of a permanent license were complied with by Appellant pursuant to the Control Act.

Appellant, relying on the action of the Issuing Authority in granting him a temporary license, changed his position by equipping his place of business and purchasing supplies.

No objections to the granting of the license were filed or were developed by investigation.

The Issuing Authority refused, however, to issue a permanent license on the grounds:- (1) that the licensee was selling groceries and other commodities besides alcoholic beverages; (2) that the Township could not support two liquor stores, and one license had already been issued; (3) that after the issuance of the temporary license, the personnel of the Township Committee had changed and that the present Committee is not bound by the act of its predecessor in issuing a temporary license.

The first two reasons are insufficient because no resolution was passed prior to the issuance of the temporary license, either prohibiting licenses to stores selling commodities other than alcoholic beverages or limiting the number of licenses.

The third ground is also untenable. The action of the Township Committee, as constituted in 1933, in issuing the temporary license was the action of the municipality. Once a license has been issued and acted upon by the licensee, it is too late for the municipality to rescind it in the absence of any fraud or deceit in obtaining it, if the licensee is otherwise qualified. The present Committee, as well as the municipality itself, is therefore bound since there was no

fraud or deceit in obtaining the temporary license and the fact is that nothing has been found after investigation or hearing to indicate that the licensee was unworthy or the licensed premises unfit.

The action of the Millstone Township Committee in denying a permanent license to Appellant is therefore reversed.

Dated: May 14, 1934. D. Frederick Burnett
Commissioner

5. APPELLATE DECISIONS - BERKELHAMMER VS. TRENTON.

ISIDOR BERKELHAMMER,
Appellant,
vs.
MUNICIPAL BOARD OF ALCOHOLIC
BEVERAGE CONTROL OF TRENTON,
Respondent.

ON APPEAL
CONCLUSIONS

I. Herbert Levy, Esq., Attorney for Appellant.

Romulus P. Rimo, Esq., Attorney for Respondent.

BY THE COMMISSIONER:

Appellant conducted, without complaint or reproach, a saloon in Trenton from 1900 until 1919 when Prohibition became effective. In April, 1933, after Congress sanctioned sale of 3.2 beer, the municipal authorities granted him a license to sell such beer at #223 North Clinton Avenue, Trenton.

Upon the passage of the Control Act, the Appellant duly applied in December, 1933, to the Respondent for a plenary retail consumption license and paid the full license fee for the period expiring June 30th, 1934, and received a receipt therefor, duly executed by the City Clerk of the City of Trenton.

After the filing of his application and until midnight, February 5, 1934, Appellant conducted his business at #223 North Clinton Avenue in regular course, upon the understanding that the filing of his application and the receipt for payment of the license fee were equivalent to a temporary license. Indeed, the general understanding among the applicants was to this effect. Appellant and

the other applicants had been informed, through newspaper articles, that they could operate without interference until further notice. Although the members of the Board were aware that Appellant and most of the other applicants were so operating, they took no action and acquiesced in the general understanding, prevailing in that community, that such applicants could continue to do business until the expiration date of temporary licenses.

The foregoing indicates not only that the Appellant considered himself to be a temporary licensee but also that the respondent treated him as such. In view of their duty to stop all unlicensed persons from selling any alcoholic beverages at all, it must have been their concept that the paid receipt was the legal equivalent of a temporary license. Inaction, when there is a duty to act, may be as eloquent as stereotyped words in a printed permit. A formal temporary license should have been issued by the respondent as contemplated by Section 46 of the Control Act. Its failure to do so should not prejudice Appellant nor deprive him of any of the privileges which would have inured to him if a formal temporary license had been issued. Appellant complied with all of the formal requirements pertaining to his application. It is not suggested that his application contained any false statements. The character and fitness of the applicant are unquestioned. The testimony, together with the photographs introduced in evidence, established the suitability of the premises sought to be licensed and the change of position of Appellant in reliance on the aforesaid general understanding.

The respondent Board contends, however, that it limited the number of licenses to be issued in the City of Trenton to 250 and that Appellant's application was properly denied in view of this limitation.

It does appear that when, in December 1933, the members of the respondent Board began their examination of the applicants and the premises sought to be licensed, they tentatively agreed to limit the number of licenses to 250, but no resolution was adopted to this effect until February 3, 1934. Until then, there was no official final determination binding upon the temporary licensees. Bull. 6, Item 5; Bull. 17, Item 4. Until then, the limitation could not prevent prior temporary licensees, or applicants whose paid receipts were treated as tantamount to temporary licenses, who were otherwise qualified, from obtaining permanent licenses. Schwartz vs. Millstone Township, Bull. 28, Item 4.

Considerable testimony was introduced by Appellant to prove that, even if the limitation had been enacted prior to the filing of his application, the denial thereof was, nevertheless, improper. Appellant does not contend, on this score, that the limitation itself was unreasonable but does assert that the respondent Board failed to exercise properly its judgment in excluding him from the 250 applicants to be licensed. At the time of the denial of the Appellant's application only 172 applications had been granted. Two applications were granted for places of business in the immediate vicinity of Appellant's premises. One of these successful applicants had had no previous experience in the sale of alcoholic beverages; the other had apparently continued in such business during Prohibition but had been

convicted of violating the National Prohibition Act. A member of the Board testified that violations of the Prohibition Act were entirely disregarded upon the misconception that they were not crimes, and that no investigation had been made to ascertain whether the applicants had been engaged in the sale of alcoholic beverages prior to Prohibition.

It would serve no useful purpose to review the testimony relating to this issue. It need not be determined in this case since the action of the respondent Board in denying the application of the Appellant must be reversed for the reasons above stated.

Dated: May 14, 1934.

D. Frederick Burnett,
Commissioner

6. APPELLATE DECISIONS - PROCOLI VS. TRENTON

ALBERTO PROCOLI,

Appellant,

vs.

MUNICIPAL BOARD OF ALCOHOLIC
BEVERAGE CONTROL OF TRENTON,

Respondent.

ON APPEAL

CONCLUSIONS

Sidney Goldmann, Esq., Attorney for Appellant.

Romulus P. Rimo, Esq., Attorney for Respondent.

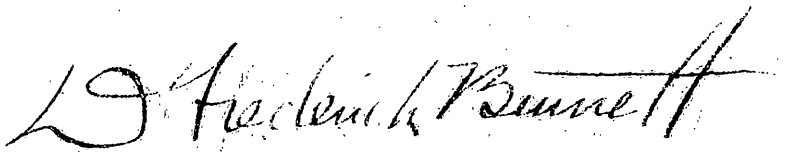
BY THE COMMISSIONER:

Appellant leased premises located at 1101 Chestnut Avenue, Trenton, and thereafter duly filed application for a plenary retail consumption license. On December 21, 1933, application was denied and appeal filed with the former Alcoholic Beverage Appeals Board. Under the recent amendment to the Control Act the jurisdiction of the Appeals Board was transferred to the Commissioner and the appeal has come on for hearing.

At the hearing it appeared that, pending the appeal, Appellant had surrendered his lease and a new tenant has taken possession of the leased premises. Appellant admitted that he has no interest of any kind, present or in contemplation, in the premises sought to be licensed.

Section 23 of the Control Act provides that the effect of every license is confined to the licensed premises. It is clear that no retail license may be issued except for a specified place of business. Since Appellant's interest in the premises sought to be licensed has heretofore ceased, the subject matter of the appeal has become moot.

Accordingly the appeal herein is dismissed.

A handwritten signature in cursive script, reading "Frederick Bennett". The signature is written in dark ink and is positioned to the right of the date.

Dated: May 14, 1934.

Commissioner.