

# Bulletin

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140 East Front Street, P.O. Box 087, Trenton, New Jersey 08625-0087

BULLETIN 2478

FEBRUARY 25, 1998

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# Bulletin

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BULLETIN 2478

FEBRUARY 23, 1998

1. REQUEST FOR OPINION - ISSUANCE OF A NEW LICENSE - POPULATION  
LIMITATION.

January 12, 1998

Messrs. Charles M. Leusner, Deputy Mayor  
and James E. Alexis, Business Administrator  
33 Mechanic Street  
Middle Township  
Cape May Court House, NJ 08210-2221

RE: REQUEST FOR OPINION: ISSUANCE OF A NEW LICENSE

Gentlemen:

The inquiry by Deputy Mayor Charles M. Leusner dated November 24, 1997 to Director John G. Holl has been referred to me for consideration and response. Additionally, subsequent to Mr. Leusner's initial inquiry, it has been my pleasure to discuss this issue with James Alexis, Business Administrator for Middle Township.

You have advised that according to a newspaper article appearing in the Atlantic City Press on Friday, November 21, 1997, Middle Township has experienced a 5.5% increase in it's population between the years of July 1990 through July 1996. You state that according to information provided by the U.S. Census Bureau the population in Middle Township as of July 1996, is 15,578. Based on this information you request an opinion whether Middle Township is qualified to issue two new liquor licenses; one, a plenary retail consumption license and the second, a plenary retail distribution license. According to Division records, Middle Township currently has four plenary retail consumption licenses and one plenary retail distribution license. The 1990 decennial Federal Census establishes the population of Middle Township at 14,771.



N.J.S.A. 33:1-12.14 establishes limitations with respect to population on issuance of retail licenses:

Except as otherwise provided in this act, no new plenary retail consumption or seasonal retail consumption license shall be issued in a municipality unless and until the combined total number of such licenses existing in the municipality is fewer than one for each 3,000 of its population as shown by the last then preceding Federal census; and no new plenary retail distribution license shall be issued in a municipality unless and until the number of such licenses existing in the municipality is fewer than one for each 7,500 of its population as shown by the last then preceding Federal census.

From the above it is apparent that Middle Township may issue one new plenary retail distribution and one new plenary retail consumption license at the point that its population exceeds 15,000 "as shown by the last then preceding Federal census." Determination of what constitutes "last then preceding Federal census" was discussed in William J. Hare Enterprises v. Mayor and Borough Council of the Borough of Lindenwold et al. A.B.C. Bulletin 2235, Item 2. In this case, at the request of Lindenwold, the Bureau of Census conducted a special census for Lindenwold during the summer of 1973. The certified copy of the official census establishing the population at 16,265 was filed with the Secretary of State of New Jersey on November 2, 1973. The Secretary of State officially certified that figure to be the population of the Borough of Lindenwold. The 1970 decennial Federal census had established the population of Lindenwold at 12,199. Prior to that time only one plenary retail distribution license had been issued by Lindenwold. However, based on the Special Census the council adopted an ordinance approving an application for an additional plenary retail distribution license.

The action of Lindenwold was appealed by the existing plenary retail distribution licensee who contended that the legislative intent was that the words "Federal census" shall mean a decennial census and not a special census. The appellant argued further that the intention of the law was that the issuance of licenses shall be frozen for a ten year period in accordance with decennial census.

Director Lerner found such contentions to be without merit since the legislature did not employ the denomination "decennial census" in connection with the alcoholic beverage law. Therefore, a Federal Special Census could be utilized by the local issuing authority in determining the population cap provided the figures for such census were properly promulgated. In order to meet such requirements the census must be performed by the Federal Bureau of Census and duly filed with the Secretary of the State of New Jersey for certification.

In the case of Middle Township, there has been no showing that the increase in population referred to in a newspaper article resulted from an official certified census. Absent such certification, Middle Township is without authority to issue a new plenary retail distribution license based on an increase in population. However, if this special census has in fact been received and certified by the Office of the Secretary of State, the results of such certification could be used by Middle Township to issue an additional plenary retail distribution and plenary retail consumption license.

I hope that the above is responsive to your inquiry. Should you have additional questions please do not hesitate to contact me.

Very truly yours,

/S/ DAVID N. BREGENZER  
DAVID N. BREGENZER  
Deputy Attorney General-In-Charge  
Licensing Bureau

2. REQUEST FOR OPINION - TWO LICENSE LIMITATION LAW.

February 5, 1998

Anthony J. Napodano, Esq.  
Napodano & Raffo, Esqs.  
Birch Pointe Center  
3840 Park Avenue  
Suite 203-204  
Edison, NJ 08820

RE: REQUEST FOR OPINION: TWO LICENSE LIMITATION LAW

Dear Mr. Napodano:

Your correspondence dated November 17, 1997 to Director Holl has been referred to me for consideration and response. In your letter you advise that you are counsel to Fairway Plaza Liquors & Bar, Inc. ("Fairway Plaza"), located in Old Bridge, New Jersey. You advise that Fairway Plaza is owned and operated by Mr. James Dorsey as its sole shareholder. In addition to his interest in the retail consumption license used at Fairway Plaza in Old Bridge, Mr. Dorsey also holds an interest in a plenary retail consumption license with broad package privilege issued by Franklin Borough used at ShopRite Liquors of Franklin.

You further advise that Fairway Plaza is interested in acquiring a plenary retail distribution license in Old Bridge to replace the plenary retail consumption license currently operated at its location. Fairway Plaza proposes to file simultaneous person-to-person and place-to-place transfer applications to de-activate and place the plenary retail consumption license in "pocket" status and to license the Fairway Plaza location under the plenary retail distribution license.

You state that the sole purpose of Fairway Plaza in this undertaking is to operate the premises under the distribution license as a full service package goods store and to sell the consumption license to a bona fide third party purchaser. You inquire whether or

not Mr. Dorsey's temporary interest in three licenses, with the inactive plenary retail consumption license being held only for sale is permissible under N.J.S.A. 33:1-12.31. This statute provides that:

On and after the effective date of this act no person, as the same is defined in R.S. 33:1-1, shall, except as hereinafter provided, acquire a beneficial interest in more than a total of two alcoholic beverage retail licenses, but nothing herein shall require any such person who has, on August 3, 1962, such an interest in more than two such licenses to surrender, dispose of, or release his interest in any such license or licenses.

A cursory review may give the appearance that, under your proposal, James Dorsey will hold a beneficial interest in three licenses contrary to N.J.S.A. 33:1-12.31, since such ownership interest must be considered" ... in the broad or equitable sense rather than in the narrow or technical sense". Grand Union Company al. v. Sills et al., 43 N.J. 390. However, the legislature has recognized a number of exceptions to the two license limitation law including an additional license or licenses issued for certain hotels, restaurants, bowling alleys and for use on the premises within the grounds of an international airport. N.J.S.A. 33:1-12.32. Arguably, if the distribution license is acquired and the consumption license held by Fairway Plaza is de-activated simultaneously it is impossible to ascertain whether a violation of N.J.S.A. 33:1-12.31 occurs until the consumption license is again activated. If it is used under circumstances qualifying as an exception noted above, a violation would not occur.

Moreover, under the facts and circumstances as you have described them, there appears to be no impermissible motivation on the part of the applicant that would cause the Division to believe that he is speculating in the acquisition of multiple licenses for profit purposes or to stifle business competition within a geographic area. Rather the applicant intends to acquire a type of license more suitable for his business enterprise and to quickly sell the license that it currently holds. As such, his proposal is in no way contrary

to the legislative intent to prevent chain store multiple holdings of licenses. See Grand Union at 405-406.

Consequently, it does not appear that your client's proposed course of action violates the two license limitation law contained in N.J.S.A. 33:1-12.31. The opinion contained herein is subject to the following conditions:

1. The consumption license located at Fairway Plaza will be held in inactive status once the premises become licensed under the distribution license until such time that it can be activated for a purpose qualifying as an exception to N.J.S.A. 33:1-12.31, or until such time that it is transferred to a bona fide third party purchaser.
2. In order to prevent even the appearance of speculating on the acquisition of multiple licenses for profit purposes or stifling competition, the inactive retail consumption license shall be subject to the condition that it must be sold to an unrelated bona fide third party or activated at a qualifying premises within one year of the date of activation of the distribution license.

Finally, please note that the approval herein is based upon review of the facts as described in your letter. Should the actual circumstances prove inconsistent with your description or result in violation of State statute or Division regulations, the Division reserves the right to take appropriate action, if required.

Very truly yours,

/s/ DAVID N. BREGENZER  
DAVID N. BREGENZER

Deputy Attorney General-In-Charge  
Licensing Bureau

3. PROPOSAL TO ENTER INTO A LICENSING AGREEMENT FOR A "BUDWEISER BREWHOUSE" AT NEWARK AIRPORT.

February 9, 1998

Karen Manders  
Anheuser-Busch  
One Busch Place  
St. Louis, MO 63118

Re: Proposal to Enter into a Licensing Agreement for a "Budweiser Brewhouse" at Newark Airport

Dear Ms. Manders:

Thank you for submitting the above referenced proposal to us for our review. Briefly, Anheuser-Busch seeks permission to enter into an agreement with CA-One, a licensed retailer at Newark Airport to create the image of a "Budweiser Brewhouse" on the retailer's premises. The undertaking includes written licensing and loan agreements. Among other things, the retail licensee would be required to construct, decorate and furnish its premises in strict conformity with standards promulgated by the company. Anheuser-Busch would provide the retailer with a variety of items on a loan basis. Any "default" by the retailer would allow Anheuser-Busch to enter the retailers premises and retrieve their property.

New Jersey statutes and regulations prohibit a supplier from being directly or indirectly interested in the retailing of alcoholic beverages. When a supplier's marketing initiative requires or anticipates the type of joining together described in the documents you submitted, the Division of ABC must carefully scrutinize the proposal to determine whether its implementation would be prohibited by our statute and regulations.

In this case, Anheuser-Busch's proposal would require the supplier and retailer to be closely connected in the retailing of alcoholic beverages on the licensed premises. In addition, our statute specifically prohibits a brewery from making any loan, directly or

indirectly, to any retail licensee (N.J.S.A. 33:1-43.1). The interaction required by the agreements submitted is not permitted by our statute and regulations and is disapproved.

Very truly yours,

/s/ CHARLES D. SAPIENZA  
Charles D. Sapienza  
Deputy Attorney General  
Regulatory Bureau

4. REQUEST FOR OPINION - "SAMUEL ADAMS BREWHOUSE" AT NEWARK AIRPORT.

February 9, 1998

Lisa S. Derman, Esq.  
McDermott, Will & Emery  
50 Rockefeller Plaza  
New York, NY 10020-1605

Dear Ms. Derman:

Thank you for submitting, on behalf of your client (Boston Beer Company) the very complete and detailed proposal for the establishment of a "Samuel Adams Brewhouse" at the Newark International Airport. You indicated that your client and CA-One, a retail licensee at Newark Airport, were currently in negotiations regarding the creation of this simulated brewhouse at the airport bar. Those negotiations included a trademark licensing agreement which carefully and comprehensively sets forth a joint undertaking between your client and the retailer to create what is popularly known as a "Faux Brew Pub" at that location. The correspondence between us sets forth the details of that agreement.

Our statute and regulations prohibit a supplier from being directly or indirectly interested in the retailing of alcoholic beverages in this State. When a supplier's marketing initiative requires or anticipates a cooperative undertaking with a retailer to

market the supplier's products this Division must carefully scrutinize the proposal to determine whether its implementation would be permitted by our laws.

In this case, the proposed agreement between your client and the retail licensee would require Boston Beer Company to become intricately involved in the manner in which the retailer conduct his business. For that reason, this proposal is disapproved.

Very truly yours,

/s/ CHARLES D. SAPIENZA  
Charles D. Sapienza  
Deputy Attorney General  
Regulatory Bureau

**5. REQUEST FOR OPINION - MILLER BREWING COMPANY - PROVISION OF SIGNAGE AND OTHER POINT-OF-SALE MATERIALS TO RETAILERS.**

February 9, 1998

William J. MacKnight, Jr., Esq.  
Wormser, Kiely, Galef, Jacobs LLP  
711 Third Avenue  
New York, NY 10017-4014

Dear Mr. MacKnight:

This is in reply to your prior correspondence and oral representations describing a proposal by your client (Miller Brewing Company) to provide signage and other point-of-sale materials to retailers in the State of New Jersey. Your client would like to provide inside signage and point-of-sale materials so that the retailer might install them in a manner that would give the appearance of a Miller brew pub at that location. It is clear from your letters that your client would like to begin this with the retailer at Newark Airport.

Your letters state that your client would allow any retailer who desires to undertake this to utilize your client's trade name/trademark without the necessity for signing any licensing agreement or any other similar document. The retail licensee would not be required to pay any royalty, commission or other compensation for use of the trade name/trademark or for the signage and other point-of-sale materials. In short, such materials would be given to the retailer (not loaned or leased or sold) at the retailer's request. The only documentation that a retailer would be expected to sign would be a basic request form to receive the materials and a receipt when they are delivered.

Your client would not require the retailer to carry Miller alcoholic beverage brands and it would be entirely up to the retailer how these materials would be displayed. Your client would not impose any requirements on the retail licensee of any kind. In short, your client requests permission to give interior signage and point-of-sale materials to retailers in New Jersey to do with as they see fit.

New Jersey statutes and regulations prohibit a supplier from being directly or indirectly interested in the retailing of alcoholic beverages in the state. When a supplier's marketing initiative requires or anticipates cooperative activity between himself and the retailer to foster the sale of the supplier's products, the Division of ABC must carefully scrutinize the proposal to determine whether its implementation is permitted.

N.J.S.A. 33:1-43 specifically states that no interest in retailing of alcoholic beverage shall be deemed to exist by reason of the delivery of interior signs designed for and exclusively used for advertising a product or products offered by the brewery to a retail licensee. Under these facts, your client's proposal is approved.

You are also advised that this marketing initiative must be maintained in your client's marketing manual as required by N.J.A.C. 13:2-24.6. In addition, your client must abide by all of the other

alcoholic beverage regulations and in specific, those prohibiting discrimination in terms of sale (N.J.A.C. 13:2-24.1) and in services, facilities or equipment (N.J.A.C. 13:2-24.2).

Very truly yours,

/s/ CHARLES D. SAPIENZA  
Charles D. Sapienza  
Deputy Attorney General  
Regulatory Bureau

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Publication of Bulletin 2478 is hereby directed this  
25th Day of February, 1998



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JOHN G. HOLL, DIRECTOR  
DIVISION OF ALCOHOLIC BEVERAGE CONTROL