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RE: Municipal Keg Registration Ordinances
Advisory Opinion on the Permissibility of Such Ordinances under New Jersey Law

Dear Mr. Baker:

This letter is in reply to your request for an advisory opinion regarding the above-captioned ordinances. Various municipalities have made similar queries concerning the permissibility of local ordinances requiring the registration of beer kegs and regulating related behavior. Such ordinances have been adopted in several municipalities already, while others are contemplating following suit. This opinion will address these ordinances, and issues and concerns regarding their enforcement and effectiveness within the legislatively prescribed scheme of alcoholic beverage regulation.

The following outlines the facts presented. Several New Jersey municipalities have considered, or passed, ordinances requiring that licensed retailers of alcoholic beverages within their jurisdictions "register" any kegs of beer they may sell. Notable among these municipalities are Riverside, Belmar, and Freehold, whose ordinances have been submitted to me, either by them or by other municipalities, asking advice regarding such ordinances, for consideration in the formulation of this opinion.

The submitted ordinances provide that retailers may not sell beer kegs unless they affix "an identification label or tag" to each, and specify what types of materials may be used to do so, and when the retailer must affix them. The labels must include the licensed retailer's name, address, and telephone number; a unique identification number for the keg; and a prominent warning against intentional removal or defacement of the tag. Retailers must also keep a record of the sales. Riverside requires that these records include the number of the purchaser's driver's license,



government-issued identification card, military identification card, or valid United States or foreign passport; the date and time of the purchase; the identification number of the keg purchased, and the purchaser's signature. Belmar and Freehold additionally require the purchaser's name, date of birth, and address.

Under all three ordinances, it is a violation for any person other than a retailer, a wholesaler, a peace officer, or an agent or employee of the New Jersey Division of Alcoholic Beverage Control to intentionally remove the identification tag from a beer keg. Riverside adds health officers and the Township's Clerk to those permitted to do so. With regard to the record-keeping requirements of its ordinance, Riverside creates an affirmative defense for retailers, allowing them to prove by a preponderance of the evidence that they reasonably and in good faith relied on the identification provided by the purchaser, should information in the records be found false. Belmar's ordinance also provides that it is a violation for anyone other than a retailer, wholesaler, peace officer, or Alcoholic Beverage Control employee to be in possession of a beer keg without an identification label. Freehold's ordinance clarifies that these listed persons must be acting in the course of their official duties while in possession of the unregistered keg, to escape penalty.

These ordinances are intended to reduce consumption of alcohol by people under the legal age of 21, by making it more difficult for them to purchase kegs, or for of-age friends and family members to purchase kegs for them. By affixing a registration tag to a keg, a licensee would enable local law enforcement, upon discovering the keg at a social gathering attended by underage persons, to "track" the purchase back to the licensed premises. The retailer's records would then be checked, and the person responsible for the purchase located and penalized. Additionally, the ordinances are intended to provide an incentive to licensed retailers to diligently check for purchasers' identification before selling them kegs.

The permissibility of these ordinances must be determined with an eye to the unique regulatory scheme adopted by the New Jersey Legislature with regard to alcoholic beverages. The alcoholic beverage industry has always been considered "extraordinary," and in need of careful regulation. Lyons Farm Tavern, Inc. v. Municipal Bd. Of Alcoholic Beverage of Newark, 68 N.J. 44, 49 (1975); Treasurer of City of Plainfield v. Pereira, 13 N.J. Misc. 698, 700 (1935). To that end, the Legislature enacted Title 33, the Alcoholic Beverage Control Act, and delegated the power to oversee the manufacturing and sale of alcoholic beverages within the State to the Division of Alcoholic Beverage Control (ABC) and its Director. N.J.S.A. 33:1-3. The Director is given great authority over the industry and its regulation within the statute, and the New Jersey courts have stated that this power is to be liberally construed. Canada Dry v. F&A Distributing Co., 28 N.J. 444, 454 (1958). Title 33 also includes various powers and duties given to municipal governing authorities in the area of alcoholic beverage control. See e.g., N.J.S.A. 33:1-19 (granting to municipalities the duty to act as local issuing authorities for licenses); N.J.S.A. 33:1-24 (imposing a duty to investigate licensees and hold conduct hearings). Together, the provisions of the statute create a detailed and comprehensive system of control on both State and local levels, that is intended to fully cover the subject matter of alcoholic beverages. A.B.C. Bull. 663, Item 9 (April 23, 1945).

The New Jersey courts have consistently made it clear that, where such a system exists, municipalities may regulate in the covered area only “within the framework of the statutes provided for such purpose.” Magnolia Development Co., Inc. v. Coles, 10 N.J. 223, 227-228 (1952). It is axiomatic that a municipality is a “creature of the State” and that the Legislature may “withhold, grant, or withdraw powers and privileges” from it “as it sees fit.” Trenton v. New Jersey, 262 U.S. 182, 187 (1923). Thus, where a comprehensive statute specifically grants power to municipalities in one instance but such power is not mentioned in another, courts have found that municipal action in the latter case has been preempted by the State statute. Paramus v. Martin Paint Stores, Inc., 121 N.J. Super. 595, 601-602 (County Ct. 1972) (“It is obvious that where the Legislature has sensed the need for local control . . . it has granted such authority.”). Especially in areas where there is a great need for meticulous and uniform control, and where the Legislature has accordingly enacted legislation setting a State division, commission, or board in place to supervise, courts have found that municipalities are preempted from exercising local control over those areas, “except to the extent expressly reserved by the Legislature to the municipality in the Act [creating State-level control] or by statutory enactments in *pari materia*.” State v. Stockl, 85 N.J. Super. 591, 599-600 (County Ct. 1964); Galante v. Teaneck, 70 N.J. Super. 362, 369-369 (Law Div. 1961).

It follows that, with regard to alcoholic beverages, a commodity known to be in need of careful control, the Legislature similarly intended to preclude municipal action outside of those powers specifically granted under Title 33. According to the court in Treasurer of City of Plainfield v. Pereira, 13 N.J. Misc. 698, 799 (1935), “[b]efore there can be an ordinance regulating intoxicating liquor there must be a statute authorizing such ordinance, and the ordinance cannot be any broader than the authority which supports it.” Title 33 is intended by the Legislature to be controlling in the area of alcoholic beverages, and as such, broad and general delegations of power, such as those found in a municipality’s charter or in New Jersey’s police power statute, will not be enough to establish authority in that area. Salerno v. Passaic, 88 N.J.L. 87, 90 (Sup. Ct. 1915) (“[S]omething more than language conferring general municipal governmental powers is needed to indicate the intent of the lawmaking body that a municipality . . . may take to itself . . . control of the liquor traffic.”) As explained by one former Commissioner of ABC, “Clearly our present statute was intended to lay down the only rules and delimit all public action—state and local—dealing with alcoholic beverage control.” A.B.C. Bull. 663, Item 9 (April 23, 1945). Therefore, if a municipality wishes to take certain actions in this field, it must find its authority within the statutory scheme of Title 33.

With regard to the keg registration ordinances being evaluated here, municipalities can find the authority for their adoption within Title 33, specifically in N.J.S.A. 33:1-40. This provision allows the governing board or body of each municipality to limit the number of retail licenses they wish to issue; to limit the hours during which alcoholic beverages may be sold at retail; to prohibit the retail sale of alcoholic beverages on Sundays, and, “*subject to the approval of the commissioner first obtained, [to] regulate the conduct* of any business licensed to sell alcoholic beverages at retail and the nature and condition of the premises upon which any such business is to be conducted” (emphasis added). Ordinances requiring the registration of beer kegs by licensees clearly fall under the heading of ordinances that “regulate the conduct” of a licensed business. This broad type of

ordinance has been noted in the past to include local legislation that prohibited the serving of women directly over a bar, A.B.C. Bull. 41, Item 1 (July 13, 1934); that restricted sales on Sundays to sales with “bona fide meals,” A.B.C. Bull. 196, Item 7 (July 14, 1937), and that required a licensee to obtain a permit before allowing dancing or live music on the premises, A.B.C. Bull. 154, Item 10 (December 12, 1936). All of these share a common characteristic with the keg registration ordinances at hand. They require that a licensee perform or refrain from performing a certain action or actions. Here, these actions are the placement of identification tags on all beer kegs and the keeping of certain records regarding sales of those kegs.

As a result, municipalities have indeed been given the authority by the Legislature under Title 33 to adopt ordinances requiring the registration of beer kegs. However, it must also be recalled that N.J.S.A. 33:1-40 is not an unconditional grant of power in the area of conduct ordinances. Rather, the approval of the Director of ABC must be obtained. This process is supported by case law, which has emphasized the necessity that, especially where as here the power granted to municipalities has been closely circumscribed by the Legislature, all “provisions and procedures” prescribed within the statute granting that power are complied with. Magnolia, 10 N.J. at 227. The requirement of the Director’s approval in N.J.S.A. 33:1-40 specifically has been upheld by the New Jersey courts, which have stated that this approval is required “before any regulations adopted by a municipality become effective.” Gober v. Pemberton, 185 N.J. Super. 323 (Law Div. 1982). Thus, it is within the authority of the Director of ABC to review all keg registration ordinances that are adopted by the municipalities of this State, and to determine whether they will serve the goals of the Legislature in enacting Title 33. Where a municipal action will “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature” in creating a State-level scheme of regulation, this action is preempted. Overlook Terrace Management Corp. v. West New York, 71 N.J. 451, 462 (1976).

One of the most crucial aims of the Legislature when it enacted Title 33 was to impose a degree of uniformity on the regulation of the alcoholic beverage industry in the State of New Jersey. As suggested above, this industry must be dealt with carefully, and it was to that end that the Legislature created the Division of ABC and its Director, to oversee it. The language of N.J.S.A. 33:1-40 more specifically evinces an intent to impose uniform standards on ordinances regulating the conduct of licensed business. By expressly granting to municipalities the ability to create certain types of ordinances only with the review and approval of the Director, the Legislature has shown a belief that these ordinances, unlike other types that do not need approval, require a degree of supervision, to ensure that they are in keeping with the greater purposes of Title 33. In short, they must be reviewed and approved by the Director to see that they comply with a uniform standard. In addition to this intent to create a system of uniform requirements for licensee conduct, the Legislature has also stated that its intentions by enacting Title 33 were to “strictly regulate” the sensitive and potentially hazardous alcoholic beverage industry “to protect the health, safety, and welfare” of New Jersey citizens, and to “foster moderation and responsibility” among consumers of alcohol. N.J.S.A. 33:1-12.40. Thus, standards of uniformity, strict regulation, protection, and the promotion of moderation, must be kept in mind when evaluating any conduct ordinance submitted for approval.

The keg registration ordinances that have thus far been submitted for consideration in conjunction with this opinion are similar in what they require licensees to do, to be in compliance. All require generally that retailers affix tags on each keg that they sell, which include certain identifying information, and which are to be removed and replaced by the retailer upon return of the keg. All require that retailers keep certain records regarding keg sales. Finally, all make it a violation for anyone but licensees and certain officials to intentionally remove the tags or to deface them. The overriding intent of the municipalities passing such ordinances to curb drinking by underage persons through these provisions is laudable, and is reflective of general statewide policy.

However, there are some key aspects of the ordinances that are of concern. Particularly problematic is a provision in both Belmar and Freehold's ordinances that imposes a penalty on anyone, save a licensee or certain official, who is found in possession of an unregistered keg. The inclusion of such a violation, while likely well-intentioned, can easily become problematic if a citizen of either of those towns purchases a keg in a municipality that has no registration requirement. Such a citizen, if discovered, will face a penalty even if that citizen is of legal age, and the retailer that the citizen chose to patronize complied with all State statutes and ordinances of its own municipality when making the sale.

This type of provision impermissibly penalizes private citizens. Under N.J.S.A. 33:1-40, a municipality is authorized to adopt ordinances that regulate the conduct of "any business licensed to sell alcoholic beverages at retail." This provision, then, does not encompass the conduct of average citizens in choosing where to purchase alcohol. Additionally, there is no other section of Title 33 that authorizes such a penalty. The statute contains provisions that directly regulate the conduct of private citizens regarding their consumption of alcohol in very few instances. For example, N.J.S.A. 33:1-81 makes it unlawful for a person under the legal age to purchase or consume alcohol. Any penalties for mere possession of alcohol, even illicit alcohol, are conspicuously absent from the statute. As in Martin Paint Stores, above, it may be said that "where the Legislature has sensed the need for local control . . . it has granted such authority." 121 N.J. Super. at 601-602. Since the authority to regulate private conduct, as opposed to the conduct of licensees, has not been granted here, any provision within a registration ordinance that would penalize citizens for merely possessing unregistered kegs is preempted as outside the parameters of local control that the Legislature intended to allow.

In addition, the provision against possession of unregistered kegs attempts to regulate conduct outside the borders of the municipality adopting the ordinance, by indirectly imposing the registration requirement on another town's licensees, should they wish to continue serving citizens of municipalities with registration ordinances. This is improper; a municipality is authorized to regulate the alcoholic beverage industry through ordinances passed under N.J.S.A. 33:1-40 only "as regards said municipality." The provision would also affect commerce between municipalities. It seems as though citizens of towns with ordinances like Belmar and Freehold's may only purchase kegs in a certain, as yet small, number of municipalities that have adopted similar ordinances, thus restricting choices within the market. This again may have a noble intent, to perhaps encourage

more municipalities to enact keg ordinances to avoid a loss of patronage, but the fact remains that it is not the province of one municipal governing body to impose its will and decisions upon another.

Riverside's ordinance does not contain the type of provision discussed above, but it is nonetheless problematic. While Belmar and Freehold distinguish licensees who violate their ordinances from the general public by creating a separate ABC penalty for the former group, Riverside simply provides that *any* person found guilty of violating its ordinance may be fined or incarcerated. For other violations regarding alcoholic beverages, licensees are typically subjected to administrative penalties, such as suspension or revocation of their licenses. N.J.S.A. 33:1-31. Indeed, it has been held that actions against a license are meant to be civil and disciplinary in nature, rather than criminal. Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 20 N.J. 373, 378 (1956). Thus, criminal enforcement of keg registration ordinance violations, which stem from licensee conduct similar to violations of other ordinances that provide for disciplinary hearings, is at odds with the Legislature's goal in setting forth the penalty system of N.J.S.A. 33:1-31.

For the above-discussed reasons, the keg registration ordinances that have been submitted for evaluation for the purposes of this opinion do not comply with the provisions of and intent behind Title 33, and they thus cannot be approved as written.

Moreover, it does not matter how precisely a keg registration ordinance is drafted. No ordinance will be proper and effective, because the ordinance will lack uniform enforcement. Thus, the registration of beer kegs is a matter that must be addressed on a statewide basis, either through agency regulation or legislative enactment. Cross-jurisdictional issues may persist despite the deletion of provisions like those in the Belmar and Freehold ordinances, if different municipalities require different information to be included on registration tags or kept in records. Kegs may regularly be bought in one municipality and used in another, making it difficult for police and ABC authorities to coordinate enforcement, even where both places have adopted similar ordinances. Should multiple different versions of keg registration ordinances, all seemingly proper in themselves, be permitted, it may be possible for patrons to seek out the most lenient municipalities to make their purchases, thus undermining the intentions of both local governing bodies and the Legislature. Importantly, as discussed above, Title 33 does not currently authorize municipalities to penalize private citizens for possessing unregistered kegs, and as a result there is little to prevent this kind of avoidance from occurring.

Finally, since municipalities cannot be required to pass any given ordinance, many may choose to remain without any registration requirement at all, thus creating havens for underage persons to procure kegs. This hardly promotes the Legislature's goals of moderation and strict regulation.

The Legislature's goal of uniformity, Overlook Terrace Management Corp., 71 N.J. at 461, requires that keg registration be addressed on a statewide basis. Although keg registration may be addressed through agency regulation, ABC only regulates those holding liquor licenses. Since a keg registration scheme may impose requirements and penalties on both liquor licensees and individuals

possessing kegs, the issue of keg registration is a matter best addressed by the Legislature. Moreover, the Legislature has considered keg registration in the past and has not acted on it. This may indicate that the Legislature questions the need for such a scheme.

As it seems that statewide action may be the only way to achieve the intent of the Legislature to promote uniformity and strictness in the area of alcoholic beverage control in this instance, a municipal ordinance that can be approved under N.J.S.A. 33:1-40 is an impossibility. Municipalities might choose instead to encourage the Legislature to enact a State statute on the matter.

In summary, municipalities are authorized to adopt keg registration ordinances under N.J.S.A. 33:1-40, which allows local ABC boards and governing bodies to make ordinances regarding the conduct of licensees. However, municipalities are preempted from enacting any such ordinance without the approval of the Director, who must determine whether submitted local legislation serves the goals of the Legislature in creating Title 33, and does not move outside the boundaries of the powers carefully and specifically delegated to municipalities within that statute. Because the ordinances submitted for consideration contain provisions that undermine legislative objectives and create jurisdictional and enforcement issues, they are not approved. A better course of action would be a statewide initiative on this matter. Given the scope of the proposed ordinances, it appears that such a statewide initiative would be best addressed by the Legislature.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jerry Fischer", with a large, sweeping flourish above the name.

Jerry Fischer
Director

JF:mh