

**STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL**

IN THE MATTER OF REVENUE-SHARING)
AGREEMENTS BETWEEN THE BOROUGH)
OF CARTERET AND SPECIAL)
CONCESSIONAIRE PERMITEES)
_____)

SR 2021-16
SPECIAL RULING AUTHORIZING
BOROUGH OF CARTERET TO SHARE IN
ALCOHOLIC BEVERAGE REVENUES

BY THE DIRECTOR:

This matter involves a request by the Borough of Carteret (Carteret) for relief of the Division’s longstanding policy regarding percentage leases and the payment of alcoholic beverage sales proceeds as a form of compensation. Due to the unique circumstances of this matter and for the reasons set forth herein, the Division will grant relief to Carteret by allowing it to receive up to 20 percent of alcoholic beverage revenues from concessions at its new performing arts center, marina and ferry terminal.

I. Background.

In conjunction with a comprehensive multimillion-dollar downtown and waterfront redevelopment and revitalization project, Carteret recently completed construction of a 55,000-square-foot performing arts center and nearby 200-slip municipal marina along the Arthur Kill River in Middlesex County. The performing arts center and marina are located on properties owned by Carteret, a political subdivision of the State of New Jersey. *See* N.J.S.A. 33:1-42.¹ Future plans include the construction of a three-story ferry terminal, with ferry service to

¹ Pursuant to N.J.S.A. 33:1-42 and N.J.A.C. 13:2-5.2, authorization to sell alcohol on public property requires a special concessionaire permit issued by the Division.

Manhattan. In July 2020, the Carteret Business Partnership (a 501(c)(3) business improvement district) issued a notice of request for proposals (RFP), soliciting bids to provide food, beverage and catering services for the performing arts center. The RFP required the winning bidder to pay a monthly concession fee, the greater of either (1) a fixed fee of \$7,500 or (2) not less than 15 percent of gross revenues from food, beverage and catering services. The winning bidder was also required to apply for and receive a “concessionaire liquor license” from the Division to sell alcohol. In May 2021, Carteret issued another notice of RFP, soliciting bids to operate a concession for food and beverages (including alcoholic beverages if licensed) at the marina. The RFP required the winning bidder to pay a monthly concession fee, the greater of either (1) a fixed fee of \$5,000 or (2) 20 percent of gross revenues. Carteret expects to issue another notice of RFP to operate a food-and-beverage concession at the ferry terminal.

Carteret is seeking approval to collect up to 20 percent of gross revenues from alcoholic beverage sales from these three concessions. According to Carteret, a percentage arrangement to share alcohol revenue is necessary because the performing arts center, marina and ferry terminal are new and unique destination venues, and there is no historic rental data that the borough or the bidders can rely on to accurately formulate a fair rental value. In addition, the economic instability caused by the novel coronavirus 19 (“COVID-19”) pandemic has made it difficult to project a “guaranteed fixed rent” over a term of years. Carteret claims that without the proposed revenue sharing arrangement it would be prevented from building these amenities, depriving residents and visitors of the full benefit of the redevelopment and impeding the public entity’s ability to recoup its costs within a reasonable time. Carteret also asserts that the proposed revenue-sharing arrangements would enable it to maximize the monetary benefit from its properties.

II. Legal Analysis.

The Director has a duty to supervise the manufacture, distribution and sale of alcoholic beverages in a manner that fulfills the policies of the Alcoholic Beverage Control Act (“ABC Act”), N.J.S.A. 33:1-1 to 4-1. Pursuant to N.J.S.A. 33:1-26 of the ABC Act, a non-licensee cannot exercise or benefit from the privileges of a licensee. The purpose of this statute is to protect the license or permit “from any device which would subject it to the control of persons other than the licensee[.]” Boss Co. v. Bd. of Comm’rs of Atlantic City, 40 N.J. 379, 388 (1963). A license or permit to sell alcoholic beverages in New Jersey must remain within the exclusive supervision and control of the licensee or permittee. Fayette Fair Trade, Inc. v. Governing Body of City of Perth Amboy, 395 N.J. Super. 453, 467 (App. Div. 2007).

The Division’s longstanding policy has been that allowing a landlord or third party to receive a “substantial percentage” of a licensee’s alcoholic beverage revenues would effectively give the landlord an interest in the license, in violation of N.J.S.A. 33:1-26. See ABC Bulletin 1564, Item 2 (1964). This is especially true if a lease imposes an inflexible minimum rent equal to the full fair rental value of the property while entitling the landlord to additional rent if alcoholic beverage sales revenues exceed a certain sum. “[I]f the landlord is guaranteed what would clearly be considered the maximum fair rental value of the property, any additional rent by way of a percentage of gross receipts might be considered a share in the value of the licensed business.” Ibid.

In 1964, New Jersey Attorney General Arthur J. Sills issued a formal opinion involving “percentage leases,” i.e., leases that provide for a landlord to receive a percentage of a licensed tenant’s gross sales of alcoholic beverages. See ABC Bulletin 1564, Item 2 (1964). At the time, the Division deemed a percentage of 6 percent or less to be reasonable if the lease was bona fide

and legitimate and not an attempt to conceal an improper profit-sharing arrangement. Attorney General Sills did not impose a ceiling on the percentage, but recommended instead that any leasing arrangement be scrutinized to ensure it does not circumvent the ABC Act. Relevant factors include: the extent of the landlord's participation in gross receipts; any pre-existing relationships of the parties; and whether or not the landlord has any right to control the tenant's business. The essential question is whether the leasing arrangement represents a reasonable method of compensating the landlord for the use of the premises or whether it is merely a device whereby the landlord can also derive benefits equivalent to participation in the licensed business.

A. Division's Review.

In the present matter, the Division is aware of concerns about establishing a precedent whereby a municipality receives a percentage of alcoholic beverage proceeds so high that it goes beyond reasonable compensation for use of the permitted premises and effectively gives the municipality a financial stake in the permittee's operation. Other municipalities would be incentivized to adopt percentage leases for their properties and award contracts to whichever bidder offers the highest percent of its alcoholic beverage sales, regardless of other considerations. Municipalities may take actions to promote alcoholic beverage sales on their properties and compromise on enforcement in order to maximize their share of the revenues, potentially at the expense of retail licensees and the public. Such actions could undermine competition in the industry and disrupt a regulatory scheme that has existed and thrived for 88 years. Municipalities can adequately address their revenue needs by setting the maximum fair rental value for their properties and concessionaire permit locations without requiring a sizeable share of the alcoholic beverage revenues and effectively becoming business partners with the permittees.²

² Municipalities can also avoid the regulatory restrictions of the ABC Act by negotiating a share

B. Fair Rental Value.

Notwithstanding these concerns, after analyzing the legal and policy implications of the 1964 Attorney General Opinion and applying that analysis to the facts presented by Carteret, the Division finds that the concession arrangements proposed by Carteret are not unlawful. The performing arts center, marina and future ferry terminal are new and unique destination venues, and according to Carteret, there is no historical rental data it can rely on to accurately calculate fair rental values. Accepting this representation as true, the minimum base fees (\$7,500 a month for the performing arts center and \$5,000 a month for the marina) may be less than the maximum fair rental value that Carteret is entitled to receive, and any additional rent from a percentage of gross receipts may be fair, reasonable and mutually beneficial to the borough and concessionaires. The proposed percentage of 20 percent (i.e., one-fifth) of gross receipts (net of taxes) is unquestionably sizeable but not necessarily so high as to give Carteret a financial interest in the concessionaires, in violation of N.J.S.A. 33:1-26.³

In addition, Carteret solicited bidders in conformity with public contracting laws, and the Division understands the bidding process as open, transparent, bona fide and arms-length.⁴ There is nothing in the RFPs to suggest that Carteret would exercise managerial control over the concessionaires' operations; the concession agreement for the performing arts center makes clear

of a permittee's food and non-alcoholic beverage revenues.

³ For comparison, the New Jersey Department of Environmental Protection's State Park Service imposes a fee of 10 percent of gross revenue for a ticketed event at the Central Railroad Terminal of Liberty State Park in Jersey City. N.J.A.C. 7:2-17.3(d)(5). In Utah, the maximum percentage of revenue from alcohol sales allowed in a percentage lease is 20 percent. See Utah Admin. Code r. R82-1-208.

⁴ Presumably, the future ferry terminal concession will be awarded in conformity with public contracting laws, and the minimum base fee for this concession will be less than the maximum fair rental value that Carteret is entitled to receive.

that the parties are not entering into a “partnership” or “joint venture” and the winning bidder will be an “independent Concessionaire.”

III. Conclusion.

Based on the foregoing, and assuming the winning bidders meet the qualifications for holding special concessionaire permits, Carteret is authorized to receive up to 20 percent of alcoholic beverage revenues from concessions at its performing arts center, marina and ferry terminal. The relief granted in this Special Ruling will remain in effect as long as the performing arts center, marina and ferry terminal remain on publicly-owned properties. It shall not be modified or rescinded absent a change in circumstances or upon petition for further relief by Carteret for good cause.

The Division emphasizes that this is extraordinary relief based upon the facts and circumstances and any request by a public entity for relaxation of this type will be carefully and rigorously considered on that basis.



JAMES B. GRAZIANO
DIRECTOR

Dated: November 9, 2021
APW/RL