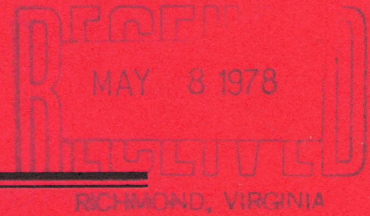


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CLERK
SUPREME COURT OF VIRGINIA



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD No. 771719

VIRGINIA ALCOHOLIC BEVERAGE
CONTROL COMMISSION,

Appellant,

v.

YORK STREET INN, INC.,

Appellee.

APPENDIX

By WILLIAM P. BAGWELL, JR.
Assistant Attorney General

MARSHALL COLEMAN
Attorney General of Virginia
Supreme Court Building
Richmond, Virginia 23219

WILLIAM P. BAGWELL, JR.
Assistant Attorney General
Post Office Box 27491
Richmond, Virginia 23261

[1]

BILL FOR DECLARATORY JUDGMENT

Filed October 14, 1976

Now Comes the Complainant, York Street Inn, Inc., and represents to the Court the following:

1. That it is a corporation duly organized and existing under the laws of the State of Virginia with its principal office in the city of Norfolk, Virginia.

2. That it is the owner and operator of a certain motel located in the city of Williamsburg, Virginia, a part of which motel is a restaurant facility.

3. That it is the owner of a permit granted by the Respondent agency, to serve mixed drinks in said restaurant.

4. Your Complainant purchased at considerable expense a food counter for use in said restaurant, which counter is inlaid with several backgammon boards for decorative purposes and for use by the patrons of the facility.

5. The Respondent agency has rendered an opinion that the food counter with inlaid game boards is a device which "fails to meet the definition of a 'table' or 'counter' at which alcoholic drinks may be served under the Mixed Beverage Laws and Regulations, [2] whether the device is located in a 'dining room' or a 'designated room.' "

6. Your Complainant now desires to install said counter and serve mixed drinks thereon.

7. A dispute has arisen between your Complainant and the Respondent agency, or its duly authorized agent, over the application and interpretation of § 41 of the Alcoholic Beverage Control Regulations with respect to this counter.

8. An actual controversy exists between your Complainant and the Respondent, based upon an actual antagonistic assertion and denial of right, which controversy involves the interpretation of administrative regulations of the State of Virginia pertaining to alcoholic beverages.

9. Because of said controversy, your Complainant has been prevented from installing and making use of the aforesaid counter for fear

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of prosecution by the Respondent agency or its duly authorized agents pursuant to Title 4 of the Virginia Code, with the result that your Complainant has been and is being denied the full use of the aforesaid counter, and has been and is being denied the right to decorate its restaurant and lounge facility in the manner in which it desires.

WHEREFORE, your Complainant prays that this Court enter a declaratory judgment adjudicating the rights of your Complainant to install and serve mixed beverages at the aforesaid counter and that your Complainant may have such other and further relief as to the Court may seem proper or to equity may be meet.

[4]

DEMURRER

Filed November 1, 1976

1. The respondent says the bill is insufficient in law because:
 - (a) It fails to state a cause of action against him; and
 - (b) He is immune from suit as to the matters and things alleged in the bill.
2. The Circuit Court of the City of Richmond is without jurisdiction of the alleged cause of action.

OPINION OF TRIAL JUDGE OVERRULING DEMURRER

Dated April 27, 1977

[7] The Complainant has filed a Bill for Declaratory Judgment in which the complainant has alleged that he is the owner and operator of a motel in Williamsburg, Virginia, a part of which motel is a restaurant facility; that it is the owner of a permit granted by respondent Board to serve mixed drinks in said restaurant; that the complainant purchased at considerable expense a food counter for use in said restaurant, which counter is inlaid with several backgammon boards for decorative purposes and for use by the patrons of the facility; that the respondent Board has rendered an opinion that the food counter with inlaid backgammon boards is a device which fails to meet the definition of a "table" or "counter" at which alcoholic drinks may be served under the Mixed Beverage Laws and Regulations; that a dispute has arisen between the complainant and respondent over the application and

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interpretation of Section 41 of the Alcoholic Beverage Control Regulations with respect to this counter; that an actual controversy exists between the complainant and the respondent based upon an actual antagonistic assertion and denial of right, which controversy involves the interpretation of administrative regulations of the respondent pertaining to alcoholic beverages; and the complainant prays that this court enter a declaratory judgment adjudicating the rights of the complainant to install and serve mixed beverages at the aforesaid counter.

[8] The respondent, Virginia Alcoholic Beverage Control Commission, which will sometimes be referred to as Commission has filed a demurrer, which alleges that the bill is insufficient in law for the following reasons:

- (a) It fails to state a cause of action against it;
- (b) It is immune from suit as to the matters and things alleged in the bill;
- (c) The Circuit Court of the City of Richmond is without jurisdiction of the alleged cause of action.

With its demurrer, the Commission filed a memorandum in support of said demurrer, which sets forth the arguments on behalf of the Commission in regard to the reasons set forth above.

An amendment changing the style of the case has been agreed upon by counsel for the parties and has been entered by the court and this apparently takes care of and disposes of argument number one in respondent's memorandum.

Argument number two of the memorandum alleges that the Circuit Court of the City of Richmond is without jurisdiction of the alleged cause of action and the memorandum sets forth at length the position of the Commission with respect to Section 9-6.14:16 of the Code of Virginia.

A "case decision" as defined in Section 9-6.14:4(D) means any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or if threatened or contemplated private action, either is, is not, or may or may not be

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(i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.

The court feels that complainant upon the facts as alleged in the bill comes within the definition set forth in this section of the code and therefore the allegations constitute a “case decision.”

Section 9-6.14:16 provides that any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision shall have a right to the direct review thereof either (i) by proceeding pursuant to express provisions thereof in the basic law under which the agency acted or (ii), in the absence, inapplicability, or inadequacy of such special statutory form of court review proceeding, by an appropriate and timely court action against the agency in the manner provided by the rules of the Supreme Court of Virginia. Such proceedings include those for declaratory judgment, mandamus, or equitable relief by [9] way of prohibitory or mandatory injunctions.

The court finds that the complainant in this case is a party aggrieved by claiming unlawfulness of a case decision and therefore the complainant has a right to the direct review by an appropriate and timely court action against the agency in the manner provided by the rules of the Supreme Court of Virginia. There is, of course, no proceeding provided for in the ABC law providing express provisions for review by a court.

The respondent has argued that the Supreme Court of Virginia has not provided any rules providing for an appeal from the Commission and further cites the Revisers Notes to the effect that the Rules of Court have no provision for direct appellate review from the Commission. It appears that the view of the respondent is that the complainant may have a right but that there is no remedy due to the fact that the Supreme Court of Virginia has not established any rules providing for an appeal from the Commission.

The court is of the opinion that the statute does not require that any special rules be promulgated by the Supreme Court of Virginia and that the present rules of court are sufficient for the purpose. The present

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rules of court have been established for all proceedings before the Supreme Court and are particularly adapted for appeals from all of the circuit courts in Virginia to the Supreme Court of Virginia. Although there are some special provisions for appeals from the Industrial Commission and from the State Corporation Commission, all proceedings before the Supreme Court of Virginia are substantially in conformity with the rules. The court feels that if the Supreme Court of Virginia had thought that a special set of rules were necessary for an appeal from the Alcoholic Beverage Control Commission that the same would have been established long before this time. Furthermore, the legislative history as set forth in the memorandum filed by the complainant is persuasive.

The respondent has also argued that a suit for a declaratory judgment is not a proper proceeding to be brought by the complainant and states that declaratory judgment suits are intended to supplement rather than to supersede ordinary causes of action and also states that in common cases where a right has matured or a wrong has been suffered, customary processes of the court, where they are ample and adequate, should be adopted.

Section 8-578 is the declaratory judgment statute and states that controversies involving the interpretation of statutes, municipal ordinances and other governmental regulations may be so determined and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right. Furthermore, the Administrative Process Act, Section 9-6.14:16 states that such [10] proceeding includes those for declaratory judgment.

Therefore, the court finds that a declaratory judgment suit is an appropriate proceeding to review matters that properly come before the court on review from the Alcoholic Beverage Control Commission such as the present case involving a case decision of the Alcoholic Beverage Control Commission.

The complainant further argues that this case does not involve any interpretation of a rule or regulation of the Alcoholic Beverage Control Commission, but rather involves the sole question of fact—is the article of furniture a “table” or a “counter” as defined in the ABC Regulation, Section 41. The respondent argues that the Commission is required by

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statute to ascertain the fact basis for their decision of cases through informal conference or consultation proceedings, and that such decision of fact is not subject to review by a court proceeding.

I believe that the above argument is disposed of by an interpretation of Section 9-6.14-17 of the Code of Virginia. This section places the burden upon the party complaining of agency action to designate and demonstrate an error of law that may be subject to review by the court. But the statute then goes on and defines what are errors of law. The statute states that such issues of law include: (1) accordance with constitutional right, power, privilege, or immunity, (2) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made and the factual showing respecting violations or entitlement in connection with case decisions, (3) observance of required procedure where any failure therein is not mere harmless error, and (4) the substantiality of the evidential support for findings of fact.

It is obvious from the above that this case does not involve issues (1), (2) and (3). However, we are faced with an interpretation of (4) above.

This code section states that one issue of law to be determined upon review is "the substantiality of the evidential support for findings of fact." This indicates to me that as a matter of law the court has to inquire into whether there has been substantial evidence produced before the Alcoholic Beverage Control Commission to support its findings of fact. The above Section 9-6.14:17 proceeds on to describe exactly what the court is to consider in its review of the facts. The statute states that the determination of such fact issue is to be made upon the whole evidential record provided by the agency. When the decision on [11] review is so to be made on such agency record, the duty of the court with respect to issues of fact is limited to ascertaining whether there was substantial evidence in the agency record upon which the agency as the trier of the facts could reasonably find them to be as it did. Where there is no such agency record so required and made, any necessary facts in controversy shall be determined by the court upon the basis of the agency filed, minutes, and the records of its proceedings under applicable sections of the code, if need be, by the agency pursuant to order of the court

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or supplemented by any allowable and necessary proofs adduced in court except that the function of the court shall be to determine only whether the result reached by the agency could reasonably be said, on all such proofs, to be within the scope of the legal authority of the agency. The statute also states that the court shall take into account the presumption of official regularity, the experience and specialized confidence of the agency, and the purposes of the basic of law under which the agency has acted.

Therefore, the court finds that it has jurisdiction to review this case decision of the Alcoholic Beverage Control Board, within the limitations as set out above. The court therefore feels that the demurrer filed herein should be overruled and that the respondent should be required to answer the bill for declaratory judgment filed herein.

I am enclosing herewith a copy of an order which the court has this day entered and I trust that counsel will have a conference in regard to further proceedings in this matter and particularly concerning the record that may be available to come to the court for review.

OPINION OF TRIAL JUDGE ON THE MERITS

Dated August 25, 1977

[17] The facts of this case are not in dispute. Based upon the record, and representations of counsel for both parties before the Court (all of which were agreed to by both), York Street Inn, Inc. is the owner and operator of a motel in Williamsburg, Virginia, a part of which motel is a restaurant facility. York is the holder of a permit to serve mixed drinks in the restaurant.

In order to accomplish its goal of attracting a high quality clientele, York sought to create an atmosphere of style and quality compatible with the location of the facility and the surrounding community. In early 1976 York undertook to renovate its restaurant with a view towards creating a tasteful and unique facility which would enhance its patronage.

As a part of this decorative scheme, research was done on the recreational pastimes of colonial days, and it was determined that backgammon was a game which the Colonists enjoyed. At about this time back-

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gammon was undergoing a considerable revival, and was being featured in various leisure time magazines. As a result of this it was decided to use backgammon as a part of the motif in the renovated restaurant. A countertop with inlaid backgammon boards was designed and constructed. There were to be five tables in the restaurant, and each was to be seven feet long, as shown by pictures in the file. One position would be [18] set up for food and the next position would contain the backgammon design. At the backgammon position a person could eat food if he desire, he would have a drink, or he could ask for backgammon paraphernalia and play backgammon, or he could do a combination of any of the above activities. In a case decision the Alcoholic Beverage Control Board refused York permission to use the inlaid backgammon counters.

The Secretary of the Alcoholic Beverage Control Board by letter dated June 11, 1976, transmitted the decision of the Board to counsel for York in the following language:

"The above matter has been considered at length by the Board and it is of the opinion the subject device fails to meet the definitions of a "table" or "counter" contained in Section 41 of our regulations, copy of which is attached. More specifically, it does not appear the facility is one designed to accommodate the serving of food and refreshments as far as the surface area is concerned, in the context of a bona fide, full service restaurant as referred to in Section 4-98.1, Code, and considering especially the nature of the game involved."

Rule 41 of the Alcoholic Beverage Control regulations in force at the time is as follows:

Section 41. Service to be at tables and counters in restaurants or hotels having mixed beverage restaurant licenses; "table" and "counter" defined; counters; limitations as to tables and counters; exception.—(a) Service—A person holding a mixed beverage license issued for a hotel or restaurant shall not serve any alcoholic beverage or beverage for consumption in a dining room or designated room to a person who is not seated at a table or at a counter as herein defined, provided, however, that nothing herein shall be construed to prohibit consumption while standing.

(b) "Tables" defined—A "table" shall be considered to be an

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article of furniture generally having a flat top surface supported by legs, a pedestal or a solid base and designed to accommodate the serving of food and refreshments (though such food and refreshments need not necessarily be served together) and provided with seating for customers.

(b2) “Counter” defined.—While the definition of a “table” hereinabove set forth shall be sufficient to include a “counter,” insofar as the surface area is concerned, a “counter” shall have characteristics sufficient to make it readily distinguishable from the “tables” used by a licensee, either by the manner of service and use provided, or by the type of seating provided for patrons, or in both such regards.

[19] Counters shall be located only in dining rooms or designed rooms and the seating capacity of counters shall not exceed twenty-five per centum (25%) of the seating of the dining room or designated room in which the counters are located.

Section 4-98.1 is as follows:

“The terms defined in § 4-2 shall have the same meanings when used in this chapter, and the term “mixed beverage” or “mixed alcoholic beverage” shall mean a spirits drink composed in whole or in part of alcoholic beverages having an alcoholic content of more than fourteen per centum by volume and served to an individual in a quantity less than the quantity contained in a closed package for consumption on premises licensed under this chapter.

“Meals,” as used in this chapter, shall mean an assortment of foods commonly ordered in bona fide, full-service restaurants as principal meals of the day. Such restaurants shall include establishments specializing in full course meals with a single substantial entree.”

Before this court counsel for the Alcoholic Beverage Control Board stated that there was nothing in the game of backgammon itself that was objectionable to the Alcoholic Beverage Control Board, although Mr. Wilkinson in his letter used the phrase “considering especially the nature of the game involved.”

As I view the argument of the Alcoholic Beverage Control Board, their contention is that the backgammon counter is objectionable because “it does not appear the facility is *one designed to accommodate the*

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serving of food and refreshment as far as the surface area is concerned (italics supplied).”

It is clear from the evidence that the backgammon table meets the definition of “table” and “counter” under Rule 41. It is an article of furniture having a flat top surface supported by legs and designed to accommodate the serving of food and refreshments (though such food and refreshments need not necessarily be served together) and provided with seating for customers.

I further find that all of the evidence supports the proposition that the backgammon table as described herein and as demonstrated before the court is designed to accommodate the serving of food and refreshments, and that the Board acted arbitrary and capricious in finding that the backgammon board was not so designed, and I [20] draw this conclusion upon the evidence after taking into consideration the presumption of official regularity, the experience and specialized competence of the Alcoholic Beverage Control Board.

[21]

ORDER

Dated August 25, 1977

It appearing to the Court, upon an examination of the record and after hearing argument by counsel that (1) nothing in § 41 of the regulations of the Alcoholic Beverage Control Commission or anywhere else in said regulations or in § 4-98.2 of the Code of Virginia, as amended, forbids complainant’s use of its twenty-one foot counter inlaid with five backgammon tables for both the service of food and alcoholic beverages for the amusement of its patrons; (2) that said counter is a table or counter designed to accommodate the serving of food and refreshments; and (3) that the action previously taken herein by the Alcoholic Beverage Control Commission, through its representatives, in denying Complainant the right to install and utilize said counter in its restaurant was a mininterpretation of the regulations of the Alcoholic Beverage Control Commission and of § 4-98.2 of the Code of Virginia, as amended, it is

ORDERED that the action previously taken herein by the Alcoholic Beverage Control Commission is suspended, and for [22] reasons set

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forth in a memorandum opinion dated August 25, 1977, this matter is remanded for further proceedings in accordance with this determination.

[27]

AMENDED ASSIGNMENTS OF ERROR

Filed September 22, 1977

Virginia Alcoholic Beverage Control Commission alleges that the Circuit Court of the City of Richmond, Division I, erred:

1. In failing to sustain Commission's demurrer on the ground that the Court was without jurisdiction.
2. In holding that an actual controversy existed within the meaning of the declaratory judgment statute. (Code § 8-578)
3. In holding that the factual situation represented a "case decision" within the meaning of § 4 of the Administrative Process Act. (Code § 9-6.14:4)
4. In holding that the Commission acted arbitrarily and capriciously in denying its licensee's request to use as a "table" or "counter" an article of furniture having a built-in backgammon board.

[Pl. Ex. 1, p. 1]

Hon. M. F. Cole
Circuit Court of Richmond,
Division I
417 Courts Building
Richmond, Virginia 23219

York Street Inn, Inc. v. Archer L. Yeatts,
Jr., et al., In Chancery No. G-24-2

Dear Judge Cole:

Enclosed is the record for review in the above styled matter, all of which has been agreed to by the parties with the exception of one paragraph of Mr. DeHaan's testimony (see below).

The record includes the following documents:

1. Internal memoranda of the Commission (11 pages);

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2. May 25, 1976 letter from Thomas G. Johnson, Jr., counsel for York Street Inn to W. B. Wilkinson, Secretary, Dept. of Alcoholic Beverage Control;
3. Copy of ABC Regulations § 41 which defines "table" and "counter";
4. June 11, 1976 letter from Wilkinson to Johnson;
5. June 30, 1976 letter from Wilkinson to Johnson;
- [Pl. Ex. 1, p. 2] 6. July 12, 1976 letter from Wilkerson to Johnson;
7. Summary of testimony of Martin H. DeHaan [the concluding paragraph thereof is not agreed to by the Commission].

The remainder of the record is comprised of "hard evidence"—the counter in question, as it was presented at the hearing, with place settings and playing pieces.

We look forward to the trial of this matter and appreciate your assistance.

Very truly yours,

Guy R. Friddell, III

P.S. By letter today from your secretary we are informed that our trial will take place on August 8 at 10:00 a.m. Thank you very much for your consideration and flexibility in scheduling this matter.

G.R.F., III

Pl. Ex. 1, p. 3, ABC State License Receipt for 1976-77 in the amount of \$500.00 for a Mixed Beverage Restaurant Hotel License to the York Street Inn, Inc. was designated by counsel but unsuitable for reproduction.

[Pl. Ex. 1, p. 4]

To: Mr. S. S. Adams, Sr., Richmond.
From: C. A. Bruce, Sandston.
Subject: York Street Inn, Inc., May 12, 1976.
Ramada Inn
351 York Street
Williamsburg, Va.
W & B on & off & M/B 4608 & Z04608

Regarding my Memo dated May 3, 1976 concerning changes in establishment. This is to advise that 9 30" round tables have been removed and replaced with 9 48" x 24" tables seating 4 each.

Total seating at present 165.

May 17, 1976

[Pl. Ex 1, p. 5]

York Street Inn, Inc.
Ramada Inn
351 York Street
Williamsburg, Virginia 23185

Gentlemen:

Pursuant to your recent request, the "King William Lounge" (30' x 50') approved as a "designated room" by our letter dated August 7, 1972, and the private meeting or convention room (45' x 52') originally included as a part of the licensed premises upon issuance of your Mixed Beverage license, are now considered to be parts of the main dining room approximately 118' x 82' excluding the kitchen area approximately 52' x 60'.

Very truly yours,

Virginia Alcoholic Beverage Control Board

/s/ J. David Shobe, Jr.

By: J. David Shobe, Jr., Director
Division of Licenses

[Pl. Ex. 1, p. 6]

To: Mr. C. E. Alsop, Richmond.
From: C. A. Bruce, Sandston.
Subject: York Street Inn, Inc. May 3, 1976.
Ramada Inn
351 York Street
Williamsburg, Va. 23185
W & B on & off & M/B 4608 & Z04608 (Hotel)

Attached sketch shows the establishment since changes have been made. Wall was removed from room used as area for private parties or banquet type operation. The bar was removed from rear of establishment and new one constructed in front of dining area. A food counter was constructed 20" x 22' and it has 5 Back-Gammon boards inlaid in counter top. At present time the Back-Gammon boards are covered so counter can be used for serving patrons food and beverages. Was informed Attorney for this Company would contact the Board regarding using the counter with the back-gammon boards for serving food and beverages.

The establishment will have no "Designated Area" and kitchen will be open at all times the dining rooms are open.

Total seating capacity 165

License paying maximum license tax.

Pl. Ex. 1, p. 7, a sketch of the layout of York Street Inn, Inc. was designated by counsel but unsuitable for reproduction.

[Pl. Ex. 1, p. 8]

To: Mr. R. L. Garian, Deputy for Regulations.
From: C. E. Alsop, Division of Inspection.
Subject: Game Tables, April 28, 1976.

Your attention is called to the attached correspondence regarding the above subject.

In connection with the above, please note that all of the tables are of the electronic or mechanical type.

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We have one known establishment that has a cocktail type "backgammon" table in the lounge. This table is used for "backgammon" purposes; however, we have not allowed it to be used for the service of alcoholic beverage drinks.

As you may note from the attached memorandum of April 16, 1976 from Inspector C. A. Bruce, we now have a request involving a food bar (counter).

I think we will have to treat the counter "backgammon" request just as we have the cocktail "backgammon" table; i.e., prohibit its use for alcoholic beverage service.

For further thinking it should be noted that the "backgammon" table and counter are inlaid type games that are played manually, such as checkers, as opposed to the others which involve electronic or mechanical features.

I am somewhat inclined to recommend that we allow the "backgammon" type tables and counter to be used for various reasons, including the one that their use may cause more people to be seated while consuming as opposed to standing as allowed by the new legislation.

[Pl. Ex. 1, p. 9]

To: Mr. J. L. Sullivan, Richmond.

From: C. A. Bruce, Sandston.

Subject: Amusement Devices and Game Tables, April 16, 1976.

Regarding your Memo dated April 1, 1976.

Have M/B establishment with several (6 or 7) "Back Gammon Tables" built into a food bar. Top of this bar cost in the thousands. Can drinks be served on this bar if the game is not played and no dice or circular disc in area? This food bar is located in dining room and no designated area in establishment.

**MINUTES OF THE MEETING OF THE VIRGINIA ALCOHOLIC
BEVERAGE CONTROL COMMISSION ON JULY 8, 1976**

[Pl. Ex. 1, p. 10] The Virginia Alcoholic Beverage Control Commission met on July 8, 1976, at 2:05 p.m., in the Commission Room.

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Present: A. L. Yeatts, Jr., Chairman; Robert W. Jeffrey, Member; W. B. Wilkinson, Secretary, and Larry E. Gilman, Assistant Secretary.

* * *

Next considered was the renewed request of the York Street Inn, Inc., Ramada Inn East, 351 York Street, Williamsburg, to allow the establishment to have certain counters with inlaid backgammon boards used for the service of alcoholic beverages. After due consideration of the report of a committee headed by Mr. Layman delegated to meet with representatives of the licensee, the Commission decided that the subject counters still could not be considered a "table," as defined in our Regulations, at which alcoholic beverages may be served in mixed beverage establishments.

* * *

City of Richmond, Virginia

[Pl. Ex. 1, p. 11] The Virginia Alcoholic Beverage Control Commission met on July 12, 1976, at 10:30 a.m. in the Commission Room.

Present: Robert W. Jeffrey, Chairman pro tempore; T. Rodman Layman, Member; W. B. Wilkinson, Secretary, and Larry E. Gilman, Assistant Secretary.

* * *

City of Richmond, Virginia

[Pl. Ex. 1, p. 12] The Virginia Alcoholic Beverage Control Board met on June 7, 1976, at 2:00 p.m., in the Board Room.

Present: A. L. Yeatts, Jr., Chairman; T. Rodman Layman and Robert W. Jeffrey, Member; Robert L. Garian, Deputy For Regulation; Shirley B. Lickey, Deputy For Distribution; Frank J. McNally, Director of Information; W. B. Wilkinson, Secretary, and Larry E. Gilman, Assistant Secretary.

* * *

[Pl. Ex. 1, p. 13] Next considered was the request of counsel for York Street Inn, Ramada Inn East, Williamsburg, for approval of certain counters inlaid with backgammon boards as "counters" on which mixed beverages may be served. After due consideration the Board, upon motion duly made and seconded, decided not to approve such request. Such disapproval was based on the fact that having such a game played on the counter would render it a gaming device and not a table designed to

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accommodate the serving of food and refreshments. Further, the game involves the throwing of dice and could involve illegal gambling.

* * *

[Pl. Ex. 1, p. 14]

[Letterhead Omitted]

May 25, 1976

Mr. W. B. Wilkinson,
Secretary,
Department of Alcoholic Beverage Control,
Virginia Alcoholic Control Board,
Richmond, Va.

Re: York Street Inn., Inc.,—Backgammon Game

Dear Mr. Wilkinson:

I spoke with you last week, while you were in the middle of your move into your new office, regarding the problem which has arisen at Ramada Inn East, Williamsburg Virginia regarding a food counter which has been installed as the part of the renovation of the restaurant and lounge in the Motor hotel. As I explained, the food counter has been inlaid with several backgammon boards for use by the patrons, of the facility. While I am not an experienced backgammon player, it has been explained to me that the game is much like parchessi.

I have spoken with Mr. Bruce the local inspector and he advised me that he had reported, as part of his inspection of the renovations, that this counter had been installed. He advised that approval of the counter had not been received because there is some question as to whether or not the counter qualified as a "table," as that item is interpreted under ABC board regulations. Mr. Bruce advised that the food counter had been approved as long as the backgammon boards were covered, which has been done pending a resolution of the matter.

I am frank to say that I do not understand how a food counter, which, when the backgammon boards are covered, qualifies as a table, is somehow less fit for the service of food and drink when the backgammon boards are visible. The boards in no way [Pl. Ex. 1, p. 15] affect the useability of the counter for the service of food and drink. They are not mechanical or electrical, in nature, but are made entirely of inlaid wood.

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It is my understanding and my client has recently confirmed this with the management of the Hotel Roanoke, that that hotel has for some years permitted backgammon boards in the lounge area of the hotel without incident or without suggestion that to do so violates the ABC laws.

My client also advises that he has done some research and a Williamsburg historian has advised him that backgammon has been played in Williamsburg since colonial days.

In view of the impending tourist season at Williamsburg, my client is quite anxious that this matter be resolved as soon as possible. I would hope that it can be worked out without the need for a formal hearing and my client is prepared to come to Richmond for an informal hearing and, in fact, to bring the counter so that it may be viewed if that is thought necessary for a decision.

Thank you very much for your cooperation and I look forward to hearing from you at your earliest convenience.

With best regards, I remain.

Your very truly,

Thomas G. Johnson, Jr.

* * *

[Pl. Ex. 1, p. 16]

REGULATIONS

Section 41. Consumption to be at tables and counters in restaurants or hotels having mixed beverage restaurant licenses; "table" and "counter" defined; counters; limitations as to tables and counters; exception.—(a) *Consumption*.—A person holding a mixed beverage restaurant license issued for a hotel or restaurant shall not allow a patron to consume in a dining room or designated room any alcoholic beverage or beverage except when seated at a table or at a counter as herein defined.

(b1) *"Table" defined*.—A "table" shall be considered to be an article of furniture generally having a flat top surface supported by legs, a pedestal or a solid base and designed to accommodate the serving of food and refreshments (though such food and refreshments need not necessarily be served together) and provided with seating for customers.

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(b2) *“Counter” defined.*—While the definition of a “table” hereinabove set forth shall be sufficient to include a “counter,” insofar as the surface area is concerned, a “counter” shall have characteristics sufficient to make it readily distinguishable from the “tables” used by a licensee, either by the manner of service and use provided, or by the type of seating provided for patrons, or in both such regards.

Counters shall be located only in dining rooms or designated rooms and the seating capacity of counters shall not exceed twenty-five per centum (25%) of the seating of the dining room or designated room in which the counters are located.

(c) *Limitations as to tables.*—Tables located in dining rooms and designed to accommodate two or more persons shall have a surface area of not less than seven hundred and twenty (720) square inches. Further, the number of tables having a surface area of less than seven hundred and twenty (720) square inches shall not exceed ten per centum (10%) of the total number of tables in any [Pl. Ex. 1, p. 17] dining room nor shall the surface area of any such smaller tables be less than five hundred and seventy-six (576) square inches.

If any table is located between two backed benches, commonly known as a booth, at least one end of the structure shall be open permitting an unobstructed view therein.

(d) *Exception.*—This section shall not be applicable to a room otherwise lawfully in use for private meetings or private parties limited in attendance to members and guests of a particular group.

Section 42. Restrictions on construction, arrangement and lighting of rooms and seating of mixed beverage restaurant licensees.—The construction, arrangement and illumination of the dining rooms and designated rooms and the seating arrangements therein of an establishment of a person holding a mixed beverage restaurant license shall be such as to permit ready access and reasonable observation by law enforcement officers and by agents of the Board. The interior lighting shall be sufficient to permit ready discernment of the appearance and conduct of patrons in all portion of such rooms.

* * *

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[Pl. Ex. 1, p. 18]

[Letterhead Omitted]

June 11, 1976

Mr. Thomas G. Johnson, Jr., Attorney
Willcox, Savage, Lawrence, Dickson & Spindle, P.C.
Suite 1800
Virginia National Bank Building
Norfolk, Virginia 23510
Re: York Street Inn, Inc.,—Backgammon Game

Dear Mr. Johnson:

This is to confirm my recent telephone statements to you regarding your letter of May 25, 1976, relating to a counter at the above establishment with an inlaid backgammon board.

The above matter has been considered at length by the Board and it is of the opinion the subject device fails to meet the definitions of a "table" or "counter" contained in Section 41 of our regulations, copy of which is attached. More specifically, it does not appear the facility is one designed to accommodate the serving of food and refreshments as far as the surface area is concerned, in the context of a bona fide, full service restaurant as referred to in Section 4-98.1, Code, and considering especially the nature of the game involved.

Accordingly, it would appear to be contrary for mixed beverages, other alcoholic beverages or beverages to be served at the above device under Section 41 until further notice.

Very truly yours,

Virginia Alcoholic Beverage Control Board

Secretary
/s/ W. B. Wilkinson

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[Pl. Ex. 1, p. 19]

[Letterhead Omitted]

June 30, 1976

Mr. Thomas G. Johnson, Jr., Attorney
Willcox, Savage, Lawrence, Dickson & Spindle, P.C.
Suite 1800
Virginia National Bank Building
Norfolk, Virginia 23510

Re: York Street Inn, Inc., Ramada Inn, Williamsburg, Virginia

Dear Mr. Johnson:

This is simply to confirm that a conference with the regulatory personnel of the Board and representatives of the above firm regarding a counter with an inlaid backgammon board has been arranged for July 1, 1976 at 11:00 a.m. in the offices of the Board.

Very truly yours,

/s/ Larry E. Gilman
Assistant Secretary

[Pl. Ex. 1, p. 20]

[Letterhead Omitted]

July 12, 1976

Mr. Thomas G. Johnson, Jr., Attorney
Willcox, Savage, Lawrence, Dickson & Spindle, P.C.
Suite 1800
Virginia National Bank Building
Norfolk, Virginia 23510

Re: York Street Inn, Inc., Ramada Inn, Williamsburg, Virginia

Dear Mr. Johnson:

Commissioner T. Rodman Layman has relayed to the Commission the substance of the recent conference regarding the device at the above establishment which has an inlaid backgammon board and the Commission has discussed the matter further and reviewed its decision of June 11.

I regret to advise you that the Commission fails to find good cause for modifying its previous opinion that the device fails to meet the definition of a "table" or "counter" at which alcoholic drinks may be served under the Mixed Beverage Laws and regulations, whether the device is located in a "dining room" or "designated room." On the contrary, the device still appears to the Commission to be one designed as much, if not more so, for amusement purposes than food service, and, in fact, there is sentiment here for at least limiting the number of such devices in "dining rooms" and possibly confining them to "designated rooms" altogether, lest the bona fide, full service restaurant concept envisioned by the General Assembly in the Mixed Beverage Laws be unduly jeopardized.

Very truly yours,

/s/ W. B. Wilkinson
Secretary

[Pl. Ex. 1, p. 21]

**SUMMARY OF TESTIMONY OF MARTIN H. DeHAAN, PRESIDENT
OF YORK STREET INN, INC., BEFORE THE ALCOHOLIC
BEVERAGE CONTROL COMMISSION ON JULY 1, 1976**

Mr. DeHann is the sole proprietor of DeHaan Company, of Norfolk, Virginia, which is in the business of developing and managing Ramada Inn motor hotels. The DeHaan Company manages five Ramada Inns, of which Mr. DeHaan is either the principal stockholder or the sole general partner. Mr. DeHaan is one of five franchisee representatives appointed to the Governing Board of the Ramada Inn National Association, the national association of Ramada Inn motel owners.

All of the food and beverage operations of the motor hotels managed by the DeHaan Company are directly operated by the motor hotel rather than such facilities being leased, as is the custom in many motor hotels. The reason for this is that the DeHaan Company believes that the manner in which the food and beverage facilities are operated not only controls the food and beverage results, but also has a tremendous "spill-over" effect on the lodging part of the motor hotel.

The DeHaan Company strives to operate the food and beverage operations of its motor hotels in a manner designed to attract the best

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available clientele. It is the philosophy of the DeHaan Company that by attracting the best available patrons to the restaurant and related facilities, the [Pl. Ex. 1, p. 22] revenues of those facilities can be maximized, and in addition, the quality atmosphere generated by such operations will enhance the reputation of the lodging aspects of the motor hotel, and attract a similar clientele for the rental of rooms.

In order to accomplish the goal of attracting a high quality clientele, the DeHaan Company seeks to create an atmosphere of style and quality compatible with the location of the facility and the surrounding community. This atmosphere is created through tasteful decorations, quality entertainment and the introduction, where appropriate, of novel themes or attractions.

The DeHaan Company management technique has been quite successful in its operations. For example, the Security Boulevard Ramada Inn, in Baltimore County, Maryland, has consistently sustained average monthly revenues in its food and beverage operation of approximately \$100,000.00.

In early 1976, York Street Inn, Inc., at the suggestion of DeHaan Company, undertook to renovate its restaurant with a view towards creating a tasteful and unique facility which would enhance its patronage. This renovation and remodeling was done at a cost of approximately \$40,000.00. A new name, the "Billsburg Greenery," was adopted and plants and special lighting effects were introduced in order to establish a distinctive atmosphere. [Pl. Ex. 1, p. 23] As a part of this decorative scheme, research was done on the recreational pastimes of Colonial days, and it was determined that backgammon was a game which the Colonists enjoyed. At about this time, by coincidence, backgammon was undergoing a considerable revival, and was being featured in various leisure time magazines.

As a result of this, it was decided to incorporate backgammon as a part of the overall motif in the renovated restaurant. A countertop with inlaid backgammon boards was commissioned at a price of \$2,400.00. Care was taken to insure that the design would be tasteful, attractive, and compatible with the facility's blend of Colonial and contemporary themes. The counter was to become a focal point of the facility.

As a result of the inability to use the backgammon counter and fully develop the promotional theme associated therewith, Mr. DeHaan estimated that the food and beverage operations of the motor hotel would suffer a substantial loss of revenue.

**REGULATIONS OF VIRGINIA ALCOHOLIC BEVERAGE
CONTROL COMMISSION**

[Pl. Ex. 5, p. 21]

Section 51. Definitions and qualifications for retail on-premises and on-and-off premises licenses; meals; designated rooms; full service restaurants.—(a) *Generally*.—The following definitions shall apply to retail licensees where appropriate:

1. Designated room.—A room in which a licensee may exercise the privileges of his license, the location, equipment and facilities of which room have been approved by the Board.
2. Dining car, buffet car or club car.—A vehicle operated by a common carrier of passengers by rail, in interstate or intrastate commerce, and in which food and refreshments are sold.
3. “Meals.”—In determining what constitutes a “meal” as the term is used in this section, the Board may consider the following factors, among others:
 - (a) The assortment of foods commonly offered for sale.
 - (b) The method and extent of preparation and service required.
 - (c) The extent to which the food served would be considered a principal meal of the day as distinguished from a light repast or “snack.”
 - (d) The extent to which the food served is sufficient to provide sustenance for normal daily living.
4. “Habitual” sales.—In determining what constitutes “habitual” sales of specified foods, the Board may consider the following factors, among others:
 - (a) The business hours observed as compared with similar type businesses.
 - (b) The extent to which such food or other merchandise is regularly sold.

- (c) Present and anticipated sales volume in such food or other merchandise.
- (d) Location and type of present and anticipated patronage.
- (e) The extent to which the operation of such place is similar to the operations of qualified licensed establishments of the same type in the area.

(b) *Wine and beer*.—The following shall apply to retail wine and beer licensees where appropriate:

1. Boat.—A common carrier of passengers operating by water on regular schedules in interstate or intrastate commerce, habitually serving in a dining room meals prepared on the premises.
2. Restaurant.—A bona fide dining establishment habitually selling meals prepared on the premises.

(c) *Beer*.—The following shall apply to retail beer licensees where appropriate:

1. Boat (beer).—A common carrier of passengers operating by water on regular schedules in interstate or intrastate commerce, habitually serving in a dining room food prepared on the premises.
2. Restaurant (beer).—An establishment habitually selling food prepared on the premises.
3. Tavern.—An establishment where food and refreshments, including beer or beverages, are habitually sold for on-premises consumption.

(d) *Mixed beverage licensees*.—The following shall apply to mixed beverage licensees where appropriate:

1. Designated room.—A room in which a licensee may exercise the privileges of his license, the location, equipment and facilities of which have been approved by the Board. The facilities shall be such that patrons may order and be served food prepared on the premises at tables at all times that mixed beverages are offered for sale therein. The seating area of such designated room or rooms shall not exceed the seating area of the required dining room or rooms, nor shall the [Pl. Ex. 5, p. 22] seating

capacity of such designated room or rooms be included in determining eligibility qualifications.

2. Dining room.—An outside terrace or patio, the location, equipment and facilities of which have been approved by the Board, shall be deemed to be included in the statutory definition of “dining room.” No such area shall be approved that is immediately adjacent to a public sidewalk, street or alley, nor shall the seating capacity of such area be included in determining eligibility qualifications.
3. “Bona fide, full service restaurant.”—An established place of business where meals with substantial entrees are habitually sold to persons and which has adequate facilities and sufficient employees for cooking or preparing and serving such meals for consumption at tables in dining rooms on the premises.