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Local Government Law and Liquor Licensing: A Sobering Vignette

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DEVELOPMENTS IN GEORGIA LOCAL GOVERNMENT LAW

LOCAL GOVERNMENT LAW AND LIQUOR LICENSING: A SOBERING VIGNETTE

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I. INTRODUCTION

An earlier effort in this *Review* sought to probe the general topic of local government power and its exercise in Georgia.[1] Although perhaps not the most exciting of subjects, the exercise of power assumes pivotal practical prominence for both the local government and the citizen. It was somewhat surprising, therefore, to find few settled legal guidelines for approaching the issue and to discover that power problems frequently must be litigated in a judicial vacuum.

Moreover, the few constants that were uncovered offset themselves in an intriguing balance. On the one hand, and emanating from the "creature of the state" concept, local governments possess only the powers granted to them, and those grants typically are subject to the strictest of judicial constructions. On the other hand, once a particular power is judicially determined to exist, the law presumes that the local government's exercise of that power is reasonable. Thus, the challenger of a specific local-government action ordinarily bears the burden of rebutting this legal presumption if he is to establish an unreasonable exercise of power or, as the

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[1] Sentell, *Discretion in Georgia Local Government Law*, 8 GA. L. REV. 614 (1974), *reprinted in* R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 651 (3d ed. 1977). *See also* Sentell, *Reasoning By Riddle: The Power to Prohibit in Georgia Local Government Law*, 9 GA. L. REV. 115 (1974), *reprinted in* R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 693 (3d ed. 1977).

courts frequently phrase it, a governmental "abuse of discretion."

At this juncture, the "right-privilege" dichotomy protruded. That is, it appeared that local governments possessed virtually absolute discretion in dealing with "privileges," and the challenger's hurdle of rebuttal was almost insurmountable.

Although a great deal of the earlier effort remains fairly accurate, subsequent developments quickly dated the treatment of local government alcoholic beverage licensing. In that subject area, classically characterized as a "privilege," federal courts administered a vigorous infusion of constitutional rights to impinge upon the discretion of local government. Immediately, disgruntled license applicants sought to foist that infusion to fruition in the Georgia Supreme Court, and all attention shifted to that court's reaction.

The effect of this development upon the earlier effort warrants a brief update.

II. GEORGIA: AS IT WAS

As noted, the law of local government licensing traditionally has made considerable use of the classic distinction between "rights" and "privileges." If the courts deemed the licensed activity to constitute a "mere privilege," then broad local government discretion in the licensing process was sanctioned.[2] Among the activities historically so designated, none assumed a more elevated profile than the sale of alcoholic beverages.

Instances of the judicial exercise are legend. As early as 1880,[3] the Supreme Court of Georgia rejected the plea of an applicant who alleged the county's refusal to issue a license "though he offered to pay for it and comply with the terms of the law."[4] The court declared that the county commissioners were invested with discretion in the matter and thus "have power to grant or refuse a license to retail liquors."[5]

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[2] *See generally* Sentell, *Discretion in Georgia Local Government Law*, 8 GA. L. REV. 614 (1974), *reprinted in* R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 651 (3d ed. 1977).

[3] Brock v. State, 65 Ga. 437 (1880).

[4] *Id.* at 437. The plea was offered as a defense to a prosecution for retailing without a license.

[5] *Id.* at 437-38. The court did counsel the defendant in the remedy of mandamus for an "arbitrary" refusal to issue the license but gave no indication of the standard for making

In the mid-1930's, the General Assembly contributed to the mosaic by enacting statutes expressly characterizing as a "privilege" the sale of both spiritous liquors[6] and malt beverages.[7] The supreme court promptly seized upon that characterization in dealing with disgruntled license applicants. In the 1936 case of *Harbin v. Holcomb*,[8] for example, the court sustained a demurrer to an applicant's effort to mandamus the county to fix a fee and issue a malt beverage license. The statute, countered the court, "empowers county authorities to grant such licenses; but the power to act is left to the discretion of the local authority," and "mandamus will not control his discretion."[9] Rebuffing contentions of violations of the state constitution,[10] the court concluded as follows:

> The refusal of a license to the petitioner does not deprive him of life, liberty, or property. The sale of malt beverages is declared by the act to be a privilege, and denial of a license does not deprive the petitioner of anything to which he has an absolute right.[11]

The court decreed the same fate for the even more forceful alle-

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that determination.

[6] 1937-38 Ga. Laws Extra. Sess. 103, 121 (repealed 1981)(formerly GA. CODE ANN. § 58-1068): "Nothing in this Chapter shall be construed as giving any person a right to sell spiritous liquors as herein defined, but the manufacture, sale and distribution of spiritous liquors is declared to be a privilege in this State and not a right." This statute was enacted in 1937. The "Georgia Alcoholic Beverage Code," 1980 Ga. Laws 1573, enacted in 1980 and effective July 1, 1981, expressly repealed Code title 58, but also expressly continues the "privilege" characterization: "The businesses of manufacturing, distributing, selling, handling, and otherwise dealing in or possessing alcoholic beverages are declared to be privileges in this State and not rights." GA. CODE ANN. § 5A-501 (1981).

[7] 1935 Ga. Laws 73, 80 (repealed 1981) (formerly GA. CODE ANN. § 58-718):

> The privilege of manufacturing, distributing and selling by wholesale or retail of beverages provided in this Chapter is purely a privilege and no business legalized by this Chapter shall be conducted in any county or incorporated municipality of this State without a permit from the governing authority of such county or municipality, which said authority is hereby given discretionary powers as to the granting or refusal of such permits.

This statute was enacted in 1935. The "Georgia Alcoholic Beverage Code," 1980 Ga. Laws 1573, although repealing Code title 58, expressly continues the "privilege" characterization. *See* note 6 *supra*.

[8] 181 Ga. 800, 184 S.E. 603 (1936).

[9] *Id.*

[10] These included an argument sounding in due process.

[11] 181 Ga. at 801, 184 S.E. at 604.

gations of the applicant in *Hart v. Head*.[12] There, the plaintiff's petition included charges that the county commissioner had granted licenses to others and had promulgated rules and regulations for issuance with which the plaintiff had complied.[13] Again, the court's aloofness to the contention of arbitrary treatment was emphatic:[14]

> The act does not grant to any one the right to a permit, but as to this matter refers only to a privilege, "purely a privilege." The plaintiff is dependent on this statute if she is to obtain a permit. The act confers on the county authorities the right to grant or refuse a license in their discretion, but the entire matter is left to their discretion; and where a permit has been refused by them, the courts will not control their discretion by the writ of mandamus.[15]

Over the years, and continuing into modern times, the supreme court remained steadfast in its perspective. The 1961 case of *Weathers v. Stith*[16] is but one illustration: a suit by license holders challenging a municipal ordinance entirely prohibiting the sale or distribution of malt beverages.[17] Said the court: "It is clear that the plaintiffs, having neither alleged nor proved that they have been denied any legal right, were not legally harmed or prejudiced and therefore it was not error on the part of the lower court to deny the mandamus absolute or the injunction."[18]

III. The Federal Infusion

The judicial jolt came in 1964; it was delivered not by the Georgia court but in a Georgia case decided by the United States Court of Appeals for the Fifth Circuit. In the now legendary case of

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[12] 186 Ga. 823, 199 S.E. 125 (1938).

[13] The plaintiff also alleged that even the commissioner admitted the plaintiff to be "a fit and proper person" to conduct the business. *Id.*

[14] Plaintiff alleged that the denial was based upon the commissioner's arbitrary preference that beverages not be sold at the particular location although that location violated no published regulations.

[15] 186 Ga. at 824, 199 S.E. at 126.

[16] 217 Ga. 39, 120 S.E.2d 616 (1961).

[17] The plaintiffs alleged themselves to possess both state and municipal licenses. *Id.* at 41, 120 S.E.2d at 617.

[18] *Id.* at 40, 120 S.E.2d at 617.

Hornsby v. Allen,[19] an unsuccessful liquor-license applicant alleged that municipal officials denied her application without reason even though she met all prescribed qualifications for a license.[20] The plaintiff charged the officials with employing a system of "ward courtesy"[21] and claimed deprivation of civil rights as well as violations of both due process and equal protection.

Reversing the district court's dismissal,[22] a majority of the Fifth Circuit first delineated the functions performed by the municipal officials. Although the prescription of license standards was legislative, said the court, the determination on a specific application was a judicial act to which the "fundamental requirements of due process" were applicable.[23] Those requirements, the court specified, include "adequate notice and a fair hearing."[24]

The court's opinion then turned to discrediting the notion that local liquor regulation fell within a special category of immunity. First, the court dealt with the privilege precept: "Merely calling a liquor license a privilege does not free the municipal authorities from the due process requirements in licensing and allow them to exercise an uncontrolled discretion."[25] Second, the court declared that "states do not escape the operation of the 14th Amendment in dealing with intoxicating beverages by reason of the 21st Amendment."[26] Third, the court focused upon the potentially harmful influence of liquor in the community: those "dangers do not justify depriving those who deal in liquor, or seek to deal in it, of the customary constitutional safeguards."[27]

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[19] 326 F.2d 605 (5th Cir. 1964).

[20] Those qualifications went to moral character and proposed location. *Id.* at 607.

[21] Under that system, plaintiff alleged, licenses would be granted only upon the approval of one or both of the aldermen of the ward in which the liquor store was to be located. *Id.*

[22] The district court viewed the controversy to deal with motives of a legislative body and to fall within the discretion of the municipal governing authority.

[23] 326 F.2d at 608. "A governmental agency entrusted with the licensing power therefore functions as a legislature when it prescribes these standards, but the same agency acts as a judicial body when it makes a determination that a specific applicant has or has not satisfied them." *Id.*

[24] *Id.*

[25] *Id.* at 609.

[26] *Id.* The court said that under the twenty-first amendment a state may discriminate against imports of intoxicating beverages but had no greater authority to control the sale of liquor than the sale of other commodities within the state.

[27] *Id.* "If one applicant for a license is preferred over another equally qualified as a political favor or as the result of a clandestine arrangement, the disappointed applicant is injured,

Finally, the court enumerated the plaintiff's crucial allegations which, if proved, would demonstrate a violation of the fourteenth amendment. First, the alleged system of ward courtesy would deprive plaintiff of the required hearing and of knowledge of objective standards for obtaining a license. Second, the officials' alleged failure to reveal the basis for denial would violate the plaintiff's right to findings based on evidence adduced at a hearing. Consequently, the court counseled the municipal officials as follows:

> If there are too many qualified applicants, then the proper remedy is for the Board of Aldermen to adopt reasonable rules and regulations which will raise the standards of eligibility or fix limits on the number of licenses which may be issued in an area; the solution is not to make arbitrary selections among those qualified.[28]

Moreover, the court held that the alleged violations of due process and equal protection, "since done under color of state statute, constituted a violation of 42 U.S.C. § 1983."[29]

Accordingly, the court formulated the following directions to the trial court:

> If it develops that no ascertainable standards have been established by the Board of Aldermen by which an applicant can intelligently seek to qualify for a license, then the court must enjoin the denial of licenses under the prevailing system and until a legal standard is established and procedural due process provided in the liquor store licensing field.[30]

A dissenting opinion in *Hornsby* questioned the appropriateness of the court's order and expressed the fear of a resulting "flood of applications for licenses."[31] Apparently, that fear was not ill-founded; on a number of subsequent occasions, the Fifth Circuit was confronted with actions by disgruntled beverage-license appli-

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but the injury to the public is much greater." *Id.* at 609-10.

[28] *Id.* at 610.

[29] *Id.* at 612. The civil rights claim was important, said the court, because the plaintiff had not invoked jurisdiction under a federal question.

[30] *Id.* at 612.

[31] *Id.* The dissent disagreed with the necessity of the "legislative-judicial" distinction, with extending civil rights jurisdiction to this controversy, and with the overbreadth of the directives to the lower court.

cants. The court disposed of several of those complaints on grounds of mootness: because some local governments adopted licensing procedures for only one year at a time, by the time a rejected applicant got his case to the court, the government had adopted a new ordinance and the applicant's appeal became moot.[32] In still other contexts, the court simply declared *Hornsby* "inapposite."[33]

Finally, in 1968, and in not too subtle a fashion, the Fifth Circuit indicated a waning of its exuberance in the matter. In *Atlanta Bowling Center, Inc. v. Allen*,[34] the municipal board refused, for five stated reasons, to issue a liquor license for a nightclub to be located in a bowling alley. The license applicant challenged the refusal on two grounds: due process, in that the denial rested upon a basis not promulgated in the municipal liquor ordinance; and equal protection, in that the board had issued licenses to others meeting the requirements expressed in the ordinance. In defense, the municipal board made what appeared to be two important concessions: first, the board conceded that the applicant met all stated requirements of the liquor ordinance; second, the board acknowledged that its reasons for denial were not articulated expressly in the ordinance. However, the board maintained, the terms of the liquor ordinance were broad enough to encompass implicitly the board's stated reasons for denial of the license.[35]

In resolving the controversy, a unanimous court was emphatic as to the license applicant's source of argument: she relied, the court said, "as do all other unsuccessful aspirants, on our now famed decision in Hornsby v. Allen . . . ."[36] The court was equally forceful as to its view of *Hornsby*. That case, the court explained, was

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[32] This was the court's approach in Moon v. City of Athens, 374 F.2d 887 (5th Cir. 1967), and in Moran v. Carswell, 384 F.2d 720 (5th Cir. 1967). *See also* Chesser v. Johnson, 387 F.2d 341 (5th Cir. 1967).

[33] This was Crews v. Undercofler, 371 F.2d 534, 535 (5th Cir. 1967), a challenge to the State Revenue Commissioner's denial of a liquor license on Jekyll Island. The court sustained the denial on the ground that no local license had first been issued by the Jekyll Island Authority, a prerequisite to the Commissioner's issuance of a license. The court reasoned that *Hornsby* "turned on the failure of the City of Atlanta to adopt proper licensing standards and to afford procedural due process to liquor license applicants." *Id.* at 535.

[34] 389 F.2d 713 (5th Cir. 1968).

[35] Those reasons enumerated such factors as location, a family recreation center, the attraction to minors, and the absence of other nightclubs in bowling alleys. *Id.* at 715 n.5.

[36] *Id.* at 715.

"mistakenly thought by too many to be a pledge that if local authorities would not, a Federal Court would, grant a liquor license . . . ."[37] *Hornsby*, the court elaborated, "is far from a holding that the Federal Courts sit as a super liquor board or a sort of extra-hierarchical appellate court in the stream of state jurisprudence to review non-constitutional errors of substance or procedure made by state licensing agencies."[38] Rather, the court concluded, *Hornsby* simply insisted "that state licensing of activities even so traditionally amenable to the widest discretion as the liquor business is subject to the minimal demands of the Fourteenth Amendment's due process and equal protection requirements . . . ."[39]

Within the context of *Atlanta Bowling Center*, *Hornsby*'s "ascertainable standards" inquiry translated into whether the municipal liquor ordinance "arguably furnishes a sufficient basis upon which an applicant would reasonably have to anticipate that the Board would consider and then act upon all or some of the five factors assigned for the denial."[40] This was the test, stressed the court, even if the draftsmanship of the ordinance left open "much room for interpretation, including *mis*interpretation, by the state agency."[41] Applying the test, the court conceded the ordinance's imprecision but nevertheless accorded it a liberal reading because "the traditional local interest in regulating the liquor business calls for the use of broad discretion and flexible procedures."[42] This reading extracted from the ordinance its emphasis upon "public interest and welfare" and its attention to "location."[43] Those matters, the court held, related sufficiently to some of the board's reasons for denial, which also mentioned "location." Thus, "in the setting of this case the ordinance put the applicant on fair notice."[44]

Finally, the court fleetingly disposed of the plaintiff's equal pro-

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[37] *Id.* at 714.

[38] *Id.* at 716.

[39] *Id.* at 715-16.

[40] *Id.* at 716.

[41] *Id.* "We need not assay just when state interpretation orbits to a constitutional apogee . . . ." *Id.* at 716 n.10.

[42] *Id.* at 716.

[43] The ordinance mentioned location in relation to such aspects as traffic congestion and surrounding property values.

[44] 389 F.2d at 716. The court admitted that the ordinance did not mention bowling alleys and nightclubs but noted that it also failed to mention churches, schools, and other places "where it is simply just not in 'the public interest and welfare' for liquor to be sold." *Id.*

tection claim by noting that "[t]here was no factual showing that other bowling alleys contain night clubs selling liquor by the drink."[45] The court declared: "The Equal Protection Clause does not take the power away from the States to make classifications. It commands only that the classifications not be arbitrary."[46]

For those still not convinced of a cooling of the federal judicial ardor, the 1976 case of *Sandbach v. City of Valdosta*[47] presented the Fifth Circuit with the complaint of yet another disappointed license applicant. In *Sandbach,* the municipality had deleted, in November 1974, an ordinance provision prohibiting the issuance of a beer license to an establishment within 200 feet of a church. Almost immediately, the plaintiff, owner of a convenience store so located, applied for a license. At its December meeting, the municipal council tabled the plaintiff's application until the January 1975 meeting.[48] At the January meeting, the council first reinstated the beer ordinance's 200-feet prohibition and then denied the application. Upon the plaintiff's complaints of unconstitutionality, the district court entered judgment for the municipality.

In considering the plaintiff's appeal, the Fifth Circuit first explicated its understanding of *Hornsby:*[49] "[L]iquor licensing agencies must set forth clear standards giving adequate notice, and must afford procedural due process in their application."[50] This did not mean that "the Federal Courts sit as a super liquor board,"[51] however, and this case was distinguishable from *Hornsby.* In *Hornsby,* the applicant's action was dismissed on the pleadings; here, the applicant had received a trial on the merits in the district court. The trial judge had found that no applicant similarly situated had received a beer license, and this applicant had failed to prove that finding "clearly erroneous."[52] In *Hornsby,* moreover, the due process violations occurred "in the application of longstanding licensing standards";[53] here, the distance requirement was "short-lived,

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[45] *Id.* at 717.

[46] *Id.* The court thus affirmed the lower court's decision against the applicant.

[47] 526 F.2d 1259 (5th Cir. 1976).

[48] *Id.* at 1260. A group of citizens had appeared at the December meeting and complained about the elimination of the distance requirement. *Id.*

[49] The court said that the applicant "relies most heavily on *Hornsby v. Allen* . . . ." *Id.*

[50] *Id.*

[51] *Id.* (quoting Atlanta Bowling Center, Inc. v. Allen, 389 F.2d 713, 716 (5th Cir. 1968)).

[52] *Id.* at 1261. This was the plaintiff's burden on appeal.

[53] *Id.*

and was never applied to any applicant at all."[54] Thus, the plaintiff was challenging "the legislative determination of licensing standards rather than the adjudicatory application of established standards."[55] This distinction was important, for "[w]e accord great flexibility and discretion to the legislative phase of liquor licensing."[56] Conceding that at the time of the December 1974 meeting "there was no legal reason why the application could not have been granted,"[57] the court nevertheless affirmed the judgment for the municipality: "Having set a standard which on second thought proved unsound, the City certainly acted within its discretionary legislative power in changing that standard before applying it to any license application."[58]

IV. GEORGIA: THE REACTION

The Georgia Supreme Court took little official note of the Fifth Circuit's 1964 announcement in *Hornsby v. Allen.* Indeed, in 1970 the court decided *Goldberg v. Mulherin*[59] without even a reference to the federal case. *Goldberg* presented an applicant's complaint alleging compliance with all county requirements for the sale of alcoholic beverages and the county's denial of his application.[60] Summarily affirming the trial judge's dismissal of the complaint,[61] a majority of the supreme court still relied heavily upon the statutory "privilege" characterization. Quoting from its earlier decisions on discretion and mandamus,[62] the court was adamant that "the argument that the issuance of such licenses should be a right rather than a privilege is a matter which addresses itself to the legislature rather than this court."[63] The court disagreed with the applicant's equal protection argument on the ground that " '[s]ince

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[54] *Id.*

[55] *Id.*

[56] *Id.* "The discretionary right of the state to regulate liquor sales, a dimension of its police power, is broad." *Id.*

[57] *Id.* at 1260.

[58] *Id.* at 1261.

[59] 226 Ga. 785, 177 S.E.2d 667 (1970).

[60] The applicant sought a mandamus to require the issuance of the license. *Id.* at 785, 177 S.E.2d at 667.

[61] The county moved to dismiss because the action failed to show on its face a clear legal right to the license. *Id.*

[62] *E.g.,* Weathers v. Stith, 217 Ga. 39, 120 S.E.2d 616 (1961).

[63] 226 Ga. at 786, 177 S.E.2d at 668.

no right, but a mere privilege, is involved here, the petitioner is not in a position to assert the denial of a right guaranteed by the State or Federal Constitution.' "[64] Apparently, this was also the court's answer to a dissenting opinion which maintained that a prior decision of the United States Supreme Court[65] "rules out completely the exercise of arbitrary and unbridled discretion whether the thing sought is a right in the citizen or a mere privilege granted to citizens conditionally."[66]

Two years later little had changed. In *Massell v. Leathers*,[67] an applicant sought to enjoin the municipality's refusal to issue a beer license, and a majority of the supreme court reversed the trial judge's grant of the injunction. Again the court quoted the statutory declaration of "privilege" and cited prior decisions[68] which "uniformly upheld the statute."[69] Responding to the applicant's argument that federal decisions mandated due process and equal protection for licensing, the court denigrated those decisions as either "not controlling" or "not in point."[70] Specifically, "[t]he case of Hornsby v. Allen . . . is not controlling on this court."[71]

Massell also featured a forceful dissenting opinion by two of the justices[72] maintaining that statutory authorization for a local government's arbitrary denial of beer licenses was unconstitutional and void.[73] Federal decisions had terminated the prior distinction between rights and privileges, the dissent contended, concluding as follows:

> The retail sale of beer in 1972 is nothing more than a regulated business with numerous retail outlets; its sale is regu-

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[64] *Id.* (quoting Kicklighter v. City of Jesup, 219 Ga. 744, 135 S.E.2d 890 (1964)).

[65] Niemotko v. Maryland, 340 U.S. 268 (1951).

[66] 226 Ga. at 786, 177 S.E.2d at 668. Justice Felton wrote the dissenting opinion.

[67] 229 Ga. 503, 192 S.E.2d 379 (1972).

[68] *E.g.*, Harbin v. Holcomb, 181 Ga. 800, 184 S.E. 603 (1936).

[69] 229 Ga. at 503, 192 S.E.2d at 380.

[70] *Id.* at 504, 192 S.E.2d at 380. For instance, the court distinguished Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), on the point that the United States Supreme Court expressly had refused to determine whether the practice of law was a privilege or a right.

[71] 229 Ga. at 504, 192 S.E.2d at 380.

[72] Justice Gunter wrote the dissenting opinion, which was joined by Justice Hawes.

[73] "I would therefore declare that the attempt by the General Assembly of Georgia in the 1935 Malt Beverages Act to confer arbitrary power upon a municipal government to grant or deny retail beer permits to citizens is unconstitutional and void." 229 Ga. at 506, 192 S.E.2d at 381 (Gunter, J., dissenting).

> lated but little more than other normal general merchandise; and the earlier decisions of this court upholding the power of a municipality to arbitrarily deny a permit to a qualified citizen are, in my opinion, relics of the early post-prohibition era; and in light of the "equal protection" mandates of the Georgia and Federal Constitutions, those decisions should now be given a peaceful repose.[74]

Finally, in 1977, thirteen years after it was decided by the Fifth Circuit, *Hornsby* became respectable in the Georgia Supreme Court. The celebrated occasion was *City of Atlanta v. Hill*,[75] an appeal by a municipality from the trial judge's grant of a mandamus for the issuance of a beer license. Accepting the trial judge's determination that the applicant met all the requirements of municipal ordinances,[76] a majority of the supreme court focused the "transcending question" of the case: "Is the refusal by a municipality to grant an alcoholic beverage license to an applicant who meets the requirements of the city's ordinances subject to the writ of mandamus?"[77] Agreeing with the municipality that both *Goldberg* and *Massell* answered that question in the negative, the court announced that those decisions "can no longer be followed" and that "in the area of federal constitutional law the death knell has been sounded to the right-privilege distinction."[78] The court elaborated:

> The seminal 5th Circuit decision in Hornsby v. Allen . . . stands for the basic proposition that in the field of licensing municipal authorities cannot free themselves from the constraints of the due process and equal protection clauses merely because the state has labeled an alcoholic beverage license a privilege.[79]

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[74] *Id.*

[75] 238 Ga. 413, 233 S.E.2d 193 (1977).

[76] The municipality denied this but the court found no reason to disturb the trial judge's findings and conclusions on the point.

[77] 238 Ga. at 414, 233 S.E.2d at 193.

[78] *Id.* The court cited the following decisions by the United States Supreme Court: Mathews v. Eldridge, 424 U.S. 319 (1976); Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1971); Goldberg v. Kelly, 397 U.S. 254 (1969); Shapiro v. Thompson, 294 U.S. 618 (1968).

[79] 238 Ga. at 414, 203 S.E.2d at 194. The court said it was unnecessary "to determine the full extent to which the due process clause applies to proceedings involving the grant, revo-

Rather, concluded the court, upon an applicant's meeting the prescribed requirements, "a refusal by the municipal authorities to issue the license constitutes a denial of equal protection, entitling the applicant to a writ of mandamus in state court."[80]

A specially concurring opinion in *Hill* agreed that prior Georgia decisions were no longer valid but qualified that "the constitutional rights of alcoholic beverage licensees and license applicants must be balanced against a state's prerogatives under the Twenty-first Amendment."[81] Noting both *Atlanta Bowling Center* and *Sandbach,* the concurring opinion cautioned that "Hornsby v. Allen, cited by the majority opinion, has been limited."[82]

One year later, a divided court extended the *Hill* rationale to a somewhat different licensing scheme in *Bozik v. Cobb County.*[83] The county ordinance challenged in *Bozik* prohibited the issuance of an alcoholic beverage license to any location within 300 feet of a private residence "if such resident shall appear at the hearing on applicant's license and object to the issuance of the license."[84] On the complaint of a rejected applicant,[85] a majority of the court quoted from its opinion in *Hill* and framed the issue as whether the county could delegate licensing authority to the specified residents. Although affected citizens were free to voice objections, the court acknowledged, the county commissioners had been elected to exercise the licensing authority and to determine whether applicants met the prescribed standards.[86] The commissioners "may not abdicate that responsibility to others,"[87] the court concluded, holding that "such an arbitrary delegation constitutes a gross abuse of discretion by the county commissioners and

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cation or renewal of alcoholic beverage licenses." *Id.*

[80] *Id.* at 414-15, 233 S.E.2d at 194.

[81] *Id.* at 415, 233 S.E.2d at 194. Justice Undercofler wrote the opinion.

[82] *Id.* at 416, 233 S.E.2d at 194.

[83] 240 Ga. 537, 242 S.E.2d 48 (1978).

[84] *Id.*

[85] It was undisputed that the plaintiff's applications were in proper form and were denied solely because of a resident's objections. The applicant sought both a declaratory judgment and a mandamus.

[86] The court said that the commissioners "as local elected officials must exercise the authority vested in them by the General Assembly to determine whether Bozik is entitled to the licenses under the rules and regulations set out in the ordinances." 240 Ga. at 538, 242 S.E.2d at 49.

[87] *Id.*

as such denies the applicant due process of law."[88] Moreover, the court added, "the denial of the license on such arbitrary grounds constitutes a violation of equal protection, and mandamus will lie."[89]

There were two other opinions in *Bozik*. A concurring justice, from a more precisely explicated perspective, viewed *Hill* to preclude the governing authority from irrationally denying a license to an applicant who met all other requirements.[90] Accordingly, that precept should also prevent the governing authority "from allowing a private citizen an irrational denial of a beverage permit when all other requirements are met."[91] A dissenting opinion for two of the justices urged that "[n]onobjection by neighbors is merely one of the standards which must be met by the applicant in order to obtain a license."[92] The dissent constructed the premise that the commissioners validly could prohibit completely the issuance of licenses in a residential area,[93] and utilized that premise to formulate the following quandary: "If it is not arbitrary and an abuse of discretion to prohibit the license altogether, how is it arbitrary and a gross abuse of discretion of constitutional proportions to decide to issue the license in a residential neighborhood unless those residents object?"[94] Obviously, the dissent's resolution of that quandary would sustain the validity of the ordinance.[95]

In retrospect, and at this juncture, *Bozik* appears to represent the high-water mark of the Georgia court in the logistics of liquor licensing; seven months later a unanimous court decided *Hernandez v. Board of Commissioners*.[96] That case presented the chal-

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[88] *Id.*

[89] *Id.* The court thus invalidated the challenged section of the county ordinance and directed the trial judge to mandamus the commissioners to entertain the plaintiff's applications without regard to that section.

[90] Justice Hill was the author of the concurring opinion.

[91] 240 Ga. at 539, 242 S.E.2d at 49-50 (Hill, J., concurring). The neighbor's veto might be cast out of spite rather than for the public welfare.

[92] *Id.* at 539-40, 242 S.E.2d at 50 (Undercofler, P.J., dissenting). Presiding Justice Undercofler wrote the dissent with which Justice Jordan joined.

[93] For this premise the dissent cited cases upholding prohibitions of licenses within specified distances of churches. *Id.*

[94] *Id.* at 539, 242 S.E.2d at 50.

[95] The dissent cited prior cases sustaining similar ordinances upon the rationale that "the activity is forbidden unless waived by those persons most affected by the licenses' issuance." *Id.* at 540 n.1, 242 S.E.2d at 50 n.1.

[96] 242 Ga. 76, 247 S.E.2d 870 (1978).

lenge of a complainant whose application for a license to retail beer at a drive-in theatre had been denied by county commissioners following a hearing at which considerable citizen opposition was demonstrated.[97] The applicant alleged compliance with all "legal requirements" for a license and the commissioners' "arbitrary" and "illegal" denial of his application.[98]

The court initiated its review of the matter by staking out the principles previously settled. The court recalled *Hill* for the following point: "When an applicant for a retail beer and wine license has met the prescribed standards for obtaining it, a refusal by the municipal authorities to issue the license constitutes a denial of equal protection entitling the applicant to a writ of mandamus."[99] The rule of *Bozik* could be stated even more succinctly: "The denial of a liquor license on arbitrary grounds constitutes a violation of equal protection for which a writ of mandamus will lie."[100] The court then set out to establish why neither of those precepts controlled *Hernandez.* The local determination on an application must be made under rules and regulations contained in an ordinance, the court reasoned, and to demonstrate compliance with those rules and regulations, the applicant must plead and prove the ordinance in the trial court. Here, said the court, that had not been done,[101] and "[i]n the absence of such ordinance in the record appellant cannot show a clear legal right entitling him to a writ of mandamus and, therefore, we presume that the trial court was correct in denying the applicant's petition."[102] Noting evidence of citizen opposition to the license, the court was unwilling to hold the commissioners' denial arbitrary or to order a mandamus.[103]

If *Hernandez* could be viewed as a first tentative step away from the *Hill-Bozik* movement, the court's stride became more pronounced approximately two months later when it decided *Levendis*

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[97] As opposition, the minutes of the hearing noted several petitions and the presence of a delegation of 14 persons at the hearing. *Id.* at 76, 247 S.E.2d at 871.

[98] *Id.* The trial judge denied the plaintiff's petition for a mandamus.

[99] *Id.* at 77, 247 S.E.2d at 871-72.

[100] *Id.* at 77, 247 S.E.2d at 872.

[101] "In the instant case, the appellant did not introduce into evidence the Camden County ordinance governing the issuance of retail beer and wine licenses which was in effect at the time of his petition and, therefore, the ordinance, the requirements of which appellant contends he fully met, is not a part of the record before this court on appeal." *Id.*

[102] *Id.*

[103] The court thus affirmed the judgment of the trial court. *Id.*

v. Cobb County.[104] There, a rejected license applicant confronted the court with the following county ordinance, contending that the ordinance was unconstitutional or, alternatively, that its application to the plaintiff was arbitrary and capricious:

> The Board of Commissioners may in its discretion, issue or deny any license . . . where there is evidence that, even though there is compliance with the minimum distances from schools and churches, the type and number of schools or number of churches in the vicinity causes minors to frequent the immediate area.[105]

Taking note of the applicant's reliance upon *Hill* and *Bozik*, a unanimous court depicted those decisions generally to "stand for the proposition that ordinances resulting in the arbitrary denial of license applications are not to be considered constitutional . . . ."[106] But neither of those cases, qualified the court, "should be interpreted as removing all discretion from local governing authorities in the issuance of retail liquor licenses."[107] Indeed, the court continued, the twenty-first amendment invested broad power in states to specify "times, places and circumstances where liquor may be sold,"[108] counterbalanced only by *Hornsby*'s due process requirement of "ascertainable standards" by which applicants intelligently can seek to qualify.[109] Within this context, the *Levendis* court announced a comparison of the challenged ordinance with the ordinance sustained by the Fifth Circuit in *Atlanta Bowling Center, Inc. v. Allen*.[110] That comparison, in turn, yielded "sufficient objective standards to control the discretion of the governing authority and adequate notice to applicants of the criteria for issuance of a license."[111]

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[104] 242 Ga. 592, 250 S.E.2d 460 (1978).

[105] *Id.* at 593, 250 S.E.2d at 461. The applicant argued that the ordinance was "so vague and overbroad as to set no guidelines for its application." *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.* at 594, 250 S.E.2d at 462.

[109] *Id.* "The question before this court is whether this ordinance in question is drawn with sufficient specificity to apprise an applicant of common intelligence of the standards which he should anticipate the governing body will consider." *Id.*

[110] 389 F.2d 713 (5th Cir. 1969). For a discussion of this case, see notes 34-46 and accompanying text *supra*.

[111] 242 Ga. at 594, 250 S.E.2d at 462.

On the point of arbitrary and capricious denial, the court reviewed "uncontradicted evidence" that the applicant's location was near public schools, "a cluster of churches," a public library, and a large public park, all of which caused teenagers to congregate.[112] The court held the evidence sufficient to support the trial judge's determination that the county commissioners validly exercised their discretion in denying the license application.[113]

In a valiant effort to revive the *Hill-Bozik* judicial spirit, the plaintiff in *Tipton v. City of Dudley*[114] sought to mandamus the municipal governing authority to issue a beer license and challenged the validity of a municipal resolution prohibiting both the sale of beer and the issuance of licenses. Again the effort was unsuccessful, and again the Georgia Supreme Court was unanimous. Although *Hill* required local governing authorities to adopt ordinances prescribing standards for licenses, explained the court, this only applied to authorities that first decide to permit the sale of alcoholic beverages.[115] In that event, the court conceded, "[w]hen an applicant for a license meets these standards, a refusal by the governing authority to issue the license constitutes a denial of equal protection, entitling the applicant to a writ of mandamus."[116] In *Tipton,* however, the municipal governing authority had never made the necessary first determination; indeed, it had decided to issue no licenses at all. Given that decision, the court was emphatic: "Since the [municipality] has prohibited the sale of malt beverages or beer within its incorporated area and denied licenses to all applicants, the trial court did not err in denying the writ of mandamus."[117]

The trial of temperance continued with the 1980 case of *Mayor of Hapeville v. Anderson,*[118] yet another attempt to mandamus a municipal governing authority to issue an alcoholic beverage license.[119] Specifically, the disgruntled applicant attacked the valid-

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[112] *Id.*

[113] *Id.* The court thus affirmed the denial of a mandamus.

[114] 242 Ga. 807, 251 S.E.2d 545 (1979).

[115] "The right to sell malt beverages or beer is subject to the determination of the governing authorities of a city or county; they have the right to prohibit its sale and deny all applicants a license." *Id.* at 808, 251 S.E.2d at 546.

[116] *Id.*

[117] *Id.*

[118] 246 Ga. 786, 272 S.E.2d 713 (1980).

[119] The plaintiff had applied for a "consumption on the premises" license for the sale of

ity of the ordinance upon which the municipality's denial was based,[120] an ordinance tying the number of available liquor licenses to the number of municipal inhabitants.[121] In the trial court, the plaintiff carried the day; the court found that the ordinance contained no standard for measuring population, that it was susceptible to more than one reasonable interpretation, and that it was void for vagueness.[122]

On appeal, a unanimous supreme court recounted the presumption of validity for municipal ordinances, as well as the rule of construction preferring a valid over an invalid interpretation. However, the court also recalled *Hornsby*'s due process mandate that "objective standards be set out to afford notice to applicants of requirements for obtaining a license."[123] Inquiring whether the ordinance met the mandate,[124] the court had little difficulty in finding the population limitation to constitute a clear objective standard: "There can be no question that the population of a municipality is a finite and definite number."[125] The court conceded that several methods existed by which population could be ascertained but refused to view that fact as rendering the ordinance void for vagueness. On the contrary, said the court, the state officially, continually, and in a variety of contexts has employed the federal decennial census to determine population.[126] Thus, the current version of that census "is a rational, logical and consistent means of determining population when the word is used in the . . . ordinance."[127] So understood, the court declared, "the ordinance in question here is vague neither as to the standard set forth nor as to the method of ascertaining it, and the judgment of the trial court

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alcoholic beverages. *Id.* at 786, 272 S.E.2d at 713.

[120] That ordinance had been effective in the municipality from 1974 until 1978. *Id.*

[121] The ordinance provided that when the licenses issued numbered more than one for each one thousand persons residing in the municipality, no further licenses should be permitted. *Id.*

[122] The trial judge granted the plaintiff's petition for a writ of mandamus. *Id.*

[123] *Id.* at 786, 272 S.E.2d at 714.

[124] "The basic question is, therefore, whether the standards set forth in the Hapeville ordinance were sufficiently definite to give applicants the notice which due process requires." *Id.*

[125] 246 Ga. at 787, 272 S.E.2d at 714.

[126] The court noted instances of constitutional and statutory references, apportionment of the General Assembly, and population statutes. *Id.*

[127] 246 Ga. at 787-88, 272 S.E.2d at 714.

must be reversed."[128]

By way of benediction, the supreme court's most recent confrontation with the issue was also one of the most intriguing. In the 1981 case of *Grandpa's Store, Inc. v. City of Norcross*,[129] an action to mandamus issuance of a beer and wine license, the contending equities balanced off in an interesting pattern. On the one hand, the plaintiff alleged that the municipality had rejected his application for a license but had permitted beverage sales by another establishment without a license. On the other hand, it did not appear that the municipality had ever issued a license or adopted an ordinance setting forth any prescribed standards. The plaintiff relied upon the *Hill-Bozik* mandate that if licenses are to be issued, the local government must adopt an ordinance prescribing standards and issue licenses to all applicants meeting those standards. In opposition, the municipality invoked *Tipton*'s authority to prohibit the sale of beverages and to issue no licenses at all.

One of the most striking facets of the court's opinion was its return, for the first time since *Hill,* to the "right-privilege" terminology:[130] "The legislature has vested the . . . city officials with discretionary powers in the granting and refusal of licenses or permits for the privileges of retail selling of beer . . . and wine."[131] From that familiar point of departure, the court reasoned that "the privilege . . . is conditional upon the city's exercise of its discretion in performing an affirmative act in either granting or refusing a permit or license . . . ." [132] So armed, the court confronted plaintiff's contention that the municipality had triggered *Hill* when it "knowingly consented by implication" to unlicensed beverage sales.[133] On the contrary, countered the court, "sales by 'implied consent' are not authorized or legal"; accordingly, "the fact that one or more businesses were selling beer and/or wine in violation of the statutes, even if proved, would not give the plaintiff any right to have

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[128] *Id.* at 788, 272 S.E.2d at 714-15.

[129] 247 Ga. 350, 275 S.E.2d 59 (1981).

[130] The court also stressed the "clear legal right" requirement for mandamus. Justices Smith and Undercofler concurred in the judgment only.

[131] 247 Ga. at 351, 275 S.E.2d at 61.

[132] *Id.* at 352, 275 S.E.2d at 61.

[133] "The plaintiff here alleges a denial of equal protection in that the city has allegedly knowingly consented by implication to the sale of beer and wine without a license by a business establishment within the city limits." *Id.* at 351-52, 275 S.E.2d at 61.

a permit issued to it."[134] The court therefore rebuffed the applicant's equal protection argument and sustained the trial judge's refusal to grant a mandamus.[135]

V. Summary and Observation

The twisting trail of litigation sketched above portends a less than inviting journey to one concerned with (or partaking of) alcoholic beverages. The route's point of origin is far more perceptible than its destination. At the beginning, the applicant at least understood that licensing in general was a function affording the local government broad discretion, that the discretion was even more pervasive for judicially defined "privileges" than for "rights," and that no activity was more conclusively a "privilege" than the sale of alcoholic beverages. Possessed of that understanding, the applicant for an alcoholic beverage license scarcely could plead surprise at either local government elusiveness or judicial aloofness. The trail was tough but tangible.

Continuing events only reinforced the past. Following a state prohibition statute, there was the eighteenth amendment to the United States Constitution in 1919, its explosive repeal and replacement by the twenty-first amendment in 1933, and the lingering anti-alcohol sentiments of the post-prohibition era. It was, indeed, at the threshold of that era that the Georgia General Assembly expressly characterized the sale of beverages as a "privilege" and seemingly sought to vest licensing authorities with wide discretion.

The Georgia Supreme Court required little encouragement and proceeded forthwith to accord the legislative expressions a literal application. The court routinely turned away disgruntled license applicants, summarily dismissing their complaints in a wide spectrum of settings. The applicants' desires for coercive relief were alien to the discretion centered in local authorities, the court reasoned, and those authorities seemed virtually incapable of

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[134] *Id.* Later in its opinion, the court said that the plaintiff actually had not shown unlicensed sales: "[A]lthough part of the Big Star store which sells beer and wine is situated within the city limits, the remainder of the store is within Gwinnett County, by permit from which governing authority the store is selling beer and wine." *Id.* at 353, 275 S.E.2d at 62.

[135] "[T]he plaintiff failed to allege a clear legal right to have the license issued. Therefore, the trial judge did not manifestly abuse his discretion to the injury of the plaintiff in opening the default and denying a default judgment in this type of action . . . ." *Id.*

arbitrariness sufficient to impel judicial intervention. That the applicants alleged complete compliance with the local government's stated requirements for a license appeared devoid of moment. Contentions of constitutional violations fared no better; with no "legal right" at stake, applicants could scarcely invoke rights guaranteed by the state or federal constitution.

It was this settled scene upon which *Hornsby v. Allen*[136] burst in 1964, compliments of the United States Court of Appeals for the Fifth Circuit. Federal due process applied to the "judicial act" of passing upon a license application, declared the *Hornsby* court, as it discounted the significance of such factors as a legislatively designated "privilege," the impact of the twenty-first amendment, and the potentially harmful effects of alcoholic beverages. Emphasizing the necessity of "adequate notice and a fair hearing," the court stressed the complainant's charge of unannounced and unrevealed standards for denial and directed the trial court to abide no further denials until the local government had established "ascertainable standards . . . by which an applicant can intelligently seek to qualify for a license."[137]

Having delivered its momentous pronouncement, accompanied by apparent signals of a new day for both local governments and liquor-license applicants, the federal court encountered a strange phenomenon. Although ensuing litigation was plentiful, the court began to experience considerable difficulty in discovering cases with attributes that triggered the new rule. The court expressed its predicament by various manifestations. Some of the cases suffered from the malady of mootness; in some the new rule was simply "inapposite"; and in still others the court was less discreet. Indeed, within four years after *Hornsby,* the Fifth Circuit was openly critical of those who envisioned it as a "super liquor board" and trekked to it upon each disappointment at the local licensing level.[138] *Hornsby,* the court lectured, brought to bear only "minimal demands" of due process and equal protection in the local liquor licensing milieu. Proving its point, the court proceeded to turn a cold shoulder to an applicant who admittedly met all stated requirements for a license but whose application was denied for

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[136] 326 F.2d 605 (5th Cir. 1964).

[137] *Id.* at 612.

[138] Atlanta Bowling Center, Inc. v. Allen, 389 F.2d 713 (5th Cir. 1968).

reasons not expressed in the local liquor ordinance. It was "minimally" sufficient, the court held, that some aspects mentioned in the ordinance implicitly related to some factors mentioned in the reasons for denial. *Hornsby*'s mandate, "ascertainable standards . . . by which an applicant can intelligently seek to qualify," was downgraded to an "arguably . . . sufficient basis upon which an applicant would reasonably have to anticipate" that the local government would act.[139] The gap between those tests left considerable room for imprecisely drafted liquor ordinances, admittedly subject to local misinterpretation, but falling within the "broad discretion" traditionally possessed "in regulating the liquor business."[140]

Nor did the Fifth Circuit's retreat pale with age. As recently as 1976, the court found no substantive inconsistency between its *Hornsby* precept and a local government's rejection of a license application admittedly meeting all existing requirements at the time of both submission and the local government's original consideration.[141] The court took cover behind the points that the requirements had been effective for only a short time, that they never were applied to any applicant, and that the local government changed them before it eventually denied the plaintiff's application. On the basis of those points, the court maneuvered the thrust of the plaintiff's challenge as going to the "legislative" function of setting standards rather than the "adjudicatory" function of applying them. It is doubtful, of course, that the plaintiff whose application had been rejected fully appreciated that differentiation. The court distinguished *Hornsby* as involving the application of "long-standing" requirements; a backward glance at that decision, however, reflects complaints of unannounced and unrevealed requirements. In any event, the court could find nothing in *Hornsby* to preclude the local government "on second thought" from pleading slippance.

Back in Georgia, business as usual continued into the new decade. The lengthening line of disgruntled applicants, meeting all stated requirements but nevertheless suffering denial, received little judicial sympathy; indeed, when they dared to raise *Hornsby*,

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[139] *Id.* at 716.

[140] *Id.*

[141] Sandbach v. City of Valdosta, 526 F.2d 1259 (5th Cir. 1976).

they received little judicial civility. Both statutory privilege and local government discretion continued domination of the day. In 1977, however, the Georgia Supreme Court rushed to overtake the principle from which the Fifth Circuit was then retreating; as the federal court distinguished and diluted, the Georgia court convincingly clasped the *Hornsby* concept. In *City of Atlanta v. Hill,*[142] a majority of the court expressly overruled its prior decisions and gonged the "death knell" for the "right-privilege" distinction. The court exuberantly expounded that a local government's refusal to issue a license to an applicant meeting prescribed requirements entitled the applicant to a mandamus.[143] It was left to a special concurrence to caution judicial restraint and to point out that the Fifth Circuit had by then "limited" *Hornsby.*

In a relatively brief intervening time, the Georgia Supreme Court has witnessed enthusiastic and innovative invocation of the *Hill* principle by rejected license applicants. Although a majority of the court extended the *Hill* principle in *Bozik*[144] to bar a local government from basing its license determination upon objections by residents, the court seems to be experiencing a syndrome similar to that observed in the Fifth Circuit. Thus, for an applicant to demonstrate compliance with local requirements, he must plead and prove the existence of the local legislative measure containing those requirements.[145] Even so, the court restated the perceived

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[142] 238 Ga. 413, 233 S.E.2d 193 (1977).

[143] Not to downplay the importance of *Hill,* it should nevertheless be noted that the court's position there in respect to liquor licensing has long been its position in respect to other activities which were judicially but not legislatively designated "privileges." Thus, in the case of McWhorter v. Settle, 202 Ga. 334, 43 S.E.2d 247 (1947), the court mandamused a municipality to issue a taxicab permit, even conceding that the operation of taxicabs was a privilege and within the discretion of the municipality. The point was that the municipality had prescribed standards for permits and the applicant had met those standards:

> [T]he city by such ordinance, instead of providing for the issuance of a permit, subject to the discretion of the governing authorities to be exercised at the time of the consideration of the application for a permit, thereby exercises and fixes its discretion as to licensing such transportation by making lawful the operation of a taxicab for hire upon the streets of the city by all persons who comply with the requirements of the ordinance, and entitles them to engage in such business.

Id. at 335. *See also* City of Decatur v. Fountain, 214 Ga. 225, 104 S.E.2d 117 (1958). This development and its ramifications are treated rather extensively in Sentell, *Discretion in Georgia Local Government Law,* 8 GA. L. REV. 614, 626-36 (1974), *reprinted in* R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 651 (3d ed. 1977).

[144] Bozik v. Cobb County, 240 Ga. 537, 242 S.E.2d 48 (1978).

[145] Hernandez v. Board of Comm'rs, 242 Ga. 76, 247 S.E.2d 870 (1978).

principles of both *Hill* and *Bozik* and restricted them to their facts. In another context, the court simply rejected an over-expansive invocation: *Hill* and *Bozik* did not declare all Georgia localities "wet," and a local government was still free to draft no requirements, to issue no licenses, and to prohibit all beverage sales.[146]

In remaining instances, however, substantive points loomed large and the distinctions called for considerable judicial ingenuity. For example, the court permitted denial of an application under a local ordinance which specified "minimum" distance requirements but then expressly reserved rejection discretion to local authorities.[147] Analogizing to the Fifth Circuit's retreat and resurrecting the "broad power" invested by the twenty-first amendment, the court ferreted sufficient "objective standards" from the ordinance to meet the mandates of the new rule. After all, the court insisted, neither *Hill* nor *Bozik* removed all discretion in the matter from the local governing authorities. Indeed, it appeared in later litigation that the traditional presumption of validity still prevailed to the extent of salvaging a stated standard which even the court conceded might be ascertained by several different methods.[148] Staking out the court's view of the "rational, logical, and consistent" method, the court snatched the ordinance from the jaws of voidness for vagueness.

As of 1981, the Georgia Supreme Court had come full circle, at least in terminology.[149] Exorcising *Hill*'s death rattle from the "right-privilege" dichotomy, the court once again hoisted the historic statutory declaration of "privilege" and the delegation of broad local government discretion in beverage licensing. The court appeared to assay the *Hill-Bozik* mandates to apply when the local government affirmatively decides to issue licenses; then the government must legislate standards and issue licenses to complying applicants. When the local government permits illegal sales without licenses, however, it has not performed the requisite "affirmative act"; then, because a license applicant necessarily could not show compliance with nonexisting standards, that applicant also could

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[146] Tipton v. City of Dudley, 242 Ga. 807, 251 S.E.2d 545 (1979).
[147] Levendis v. Cobb County, 242 Ga. 592, 250 S.E.2d 460 (1978).
[148] Mayor of Hapeville v. Anderson, 246 Ga. 786, 272 S.E.2d 713 (1980).
[149] Grandpa's Store, Inc. v. City of Norcross, 247 Ga. 350, 275 S.E.2d 59 (1981).

not establish illegal, unequal treatment entitling him to a license. With this tempestuous, temporary termination of the trail, the look of the future increasingly became that of the past.

VI. Conclusion

As originally studied, local government power, once judicially construed to exist, enjoyed the momentum of a presumption of reasonableness when exercised. That momentum was especially forceful when government exercised the power upon a "privilege," and alcoholic beverage licensing was nothing if not a privilege. Thus, the rejected license applicant faced an awesome task in undertaking to establish a governmental abuse of discretion.

Soon, however, the local government's discretion in the matter encountered withering fire from the Fifth Circuit. That court demonstratively discounted the significance of the "privilege" characterization and exuberantly expounded upon the mandates of the fourteenth amendment. In a delayed reaction time of thirteen years, the Georgia Supreme Court announced a correction in its prior course and enthusiastically embraced the constitutional concepts of the Fifth Circuit. It appeared prophetic to project that the fashion of the future differed dramatically from the portrait of the past.

That projection, however, may have been premature. Even as change was wrought, the past persisted. Indeed, long before the Georgia court's conversion, the Fifth Circuit distinguished and diluted, and appeared openly hostile to those who would extract the maximum rather than the minimum from its past performance. As if by emulation, the Georgia court also promptly tempered its initial enthusiasm and moved to distinctions and qualifications. Presently, the court is back to the square of broad local government discretion and legislatively characterized "privileges."

If there is a lesson, perhaps it is that around the corner from the future, the past frequently awaits.