



STATE OF KANSAS

*Office of the Attorney General*

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612  
February 10, 1975

CURT T. SCHNEIDER  
Attorney General

Opinion No. 75- 53

MR. MELVIN M. GRADERT  
City Attorney - Burrton, Kansas  
809 Main Street  
Newton, Kansas 67114

Licensing of Taverns --  
City Council's Approval --  
Entrance to Residence  
through Tavern.

Dear Mr. Gradert:

You have sought this office's opinion concerning the legality of the action taken by three members of Burrton City Council in convening a special meeting of the council that approved the issuance of a cereal malt beverage license to sell at retail for consumption on the premises, in the absence of the Mayor. You have further inquired as to the City's authority or discretion in regard to the issuance of such a license.

In respect to the convening of the meeting by the three councilmen, it can generally be stated that a municipal council can act only as a body when in legal session as such, either in a regular or specially called meeting, and that actions of the council members separately is not action of the council. See 56 Am. Jr. 2d, Municipal Corporations, Etc., § 155. K.S.A. 15-106 concerns meetings of council of cities of the third class and specifically provides that "[s]pecial meetings may be called by the mayor or acting mayor, on written request of any three members of the council, specifying the object and purpose of such meeting, which request shall be read at the meeting and entered at length on the journal. After review of Botts v. City of Valley Center, 124 K. 9, Bluff City v. Western Light & Power Co., 137 K. 169, and West v. Unified School District, 204 K. 29, it seems clear that requirements of the statute must be strictly followed, with all members given notice of such special meetings and provided reasonable opportunity to attend.

In the situation you pose the Mayor did not call the meeting, no written request being made, nor were all members given notice and opportunity to attend. Therefore, the convening of meeting by the three councilmen in the temporary absence of the Mayor was illegal and any action taken at that time was not lawfully done.

As to the discretion of a city council in issuing a license, your attention is directed to K.S.A. 41-2703 which provides that "[t]he governing body of the city shall, if the applicant is qualified as provided by law, issue a license to said applicant." As pointed out in Curless v. Board of County Commissioners, 197 K. 580, the above is a departure from the language used in the statute prior to 1949 when the provision read as follows:

"After examination of the board of county commissioners or the governing body of the city, or the department of inspections and regulations, shall if they approve the same, issue a license to the applicant."

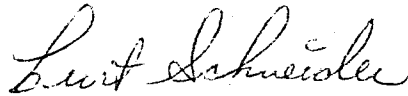
By placing the provision for issuance by the governing body of a city in a separate sentence and changing the language to the more imperative statement "...shall, if the applicant is qualified as provided by law, issue a license," the Court clearly considered it mandatory for a city to issue a cereal malt beverage license to a qualified applicant. The qualifications for obtaining a license are specifically spelled out in the statute and K.S.A. 41-2702 requires an applicant to file a verified application showing that he meets the qualifications. If after investigation it is ascertained that the individual is not a disqualified person, the city council would have no discretion and they must direct the clerk to issue the license.

You further question whether the holder of a cereal malt beverage license may maintain a residence in a portion of the premises, with the residence's ingress and egress only through the front door of the establishment where the patrons enter.

No statute exists prohibiting this specific arrangement. K.S.A. 41-2704 does provide that "[n]o private rooms or closed booths shall be operated in said place of business...., "with K.S.A. 41-2701 defining "place of business" as "any place at which cereal malt beverages are sold." While our Court has not discussed the intent of the prohibition, a similar ordinance was examined in State v. Barge, 82 Minn. 256, 84 N.W. 911. There the Court felt the intent of such a prohibition was to not afford unsavory individuals "opportunities....to lounge, drink, and carouse in

secrecy, free from the observation of the police and all other persons" which would be demoralizing and corruptive. Clearly the intent of the language used was not to make unlawful the maintenance of a tavern under the same roof and contiguous to a residence. Therefore the arrangement you have posed would not be unlawful under our statutes as long as patrons are not allowed to enter and consume in the residence. The applicant should, nevertheless, be required to state the particular place for which a license is desired as mentioned in K.S.A. 41-2702.

Very truly yours,

A handwritten signature in cursive script, reading "Curt T. Schneider". The signature is written in dark ink and is positioned above the typed name.

CURT T. SCHNEIDER  
Attorney General

CTS:WMS:eb