January 5, 1976

Curt T. Schneider  
Attorney General

ATTORNEY GENERAL OPINION NO. 76-1

Mr. Dan E. Turner  
City Attorney of Topeka  
Legal Department  
217 East Seventh Street  
Topeka, Kansas 66603

Re: Cities--Private Clubs--Licensing

Synopsis: A municipal ordinance requirement that a private club obtain a city license in order to serve alcoholic beverages after 12:00 p.m., which license and fee therefor is in addition to the license and fee which cities are directed to require and assess under K.S.A. 41-2622 as amended by ch. 252, § 3, L. 1975, is prohibited by that section and K.S.A. 41-2631.

Dear Mr. Turner:

You request my opinion concerning the validity of Ordinance No. 12742 of the City of Topeka as applied to a private club licensed by the Kansas Director of Alcoholic Beverage Control. In pertinent part, section 1 of that ordinance, codified as § 19-1302 of the Code of the City of Topeka provides thus:

"It shall be unlawful for any person, persons or corporation to operate or carry on any business from and after the effective date of this article when under the ordinary operation or conduct of said business it is necessary that said place of business remain open between the hours of twelve (12) o'clock
midnight and six (6) o'clock a.m. unless said person, persons or corporation have made application to and have been granted a license by the Board of Commissioners of the City, giving said person, persons or corporation the right and privilege to so operate and carry on said business between the hours of twelve (12) o'clock and six (6) o'clock a.m. . . . ."

Under § 19-1303, any person seeking such a license must apply therefor to the City of Topeka, and pay an annual fee of $25, "as payment for investigation and costs of processing said application, for a license to operate or carry on said business between the hours of twelve (12) o'clock midnight and six (6) o'clock a.m." The chief of police may suspend the license, and the board of city commissioners may reinstate or cancel the license thereafter.

K.S.A. 41-2622, as amended by ch. 252, § 3, L. 1975, provides fees to be assessed by the Director for licenses for class A and class B clubs. That section goes on to enumerate specifically the annual occupational or license taxes which a city may levy and collect on a club located therein, and to specify that

"no other occupational or excise tax or license fee shall be levied by any city or county against or collected from such club licensee."

In Leavenworth Club Owner Association v. Atchison, 208 Kan. 318, 492 P.2d 183 (1971), the court considered a municipal ordinance which forbade the serving of alcoholic liquor in private clubs after 1:30 a.m. A provision of the club law, then K.S.A. 1971 Supp. 41-2614, prohibited serving of alcoholic beverages after 3:00 a.m. It was urged that by prescribing hours when serving was prohibited, the legislature had preempted the field, and that local authorities thus had no power to enact more restrictive serving hours. The court took the view that although the hours prescribed by the city obviously differed from those allowed by statute, they were neither in conflict with nor contrary to those permitted by the state, but merely different, and that local action was not thus prohibited by K.S.A. 41-2631:

"No city shall enact any ordinance in conflict with or contrary to the provisions
of this act and any ordinance of any
city in effect at the time this act takes
effect or thereafter enacted which is in
conflict with or contrary to the provisions
of this act shall be null and void."

In Blue Star Supper Club v. City of Wichita, 208 Kan. 731,
495 P.2d 524 (1972), the court elaborated on the question of
preemption:

"In concluding that the regulation and
control of the consumption of alcoholic liquor
is not an area exclusively reserved by the
state we believe it is significant that when
the legislature adopted K.S.A. 1971 Supp. 41-
2631 as a component part of the Private Club
Act, and forbade therein the enactment of any
ordinance conflicting with the act, it did not
include a pre-emptive provision. We cannot
view the omission as unintentional. The legis-
lature was perfectly aware of the method by
which it could have vested exclusive control
and regulation of liquor consumption in the
state had it so intended, as is evidenced by
its inclusion of the pre-emptive provision
contained in K.S.A. 41-208."

Thus, the court declined to view the Private Club Act as preemptive
of municipal powers of the sale and consumption of alcoholic liquor
as a general matter. However, specific provisions of the act, may
by clear and express direction, or by reasonable inference there-
from, preclude municipal action in particular matters. Licensing,
as we have stated in earlier opinions, is such a matter. K.S.A.
41-2622 specifically prohibits any city or county from levying
and collecting any occupational or excise tax or license fee from
a private club other than as in the amounts fixed by that section.

While under Blue Star and Leavenworth, supra, a city may by local
action regulate hours of serving, it cannot regulate those hours
through the requirement of any additional license for which a fee
is charged, for the legislature has specifically fixed the amounts
which cities and counties may permissibly levy and charge as any
occupational or excise tax or for any license fee levied against
or collected from a private club. In Opinion No. 74-230, Attorney
General Vern Miller concluded thus:
"Clearly and expressly, no other tax or license fee may be exacted for the privilege of operating a private club. By, in our view, equally clear and direct inference, no city or county has the power to grant or withhold a license for the privilege to conduct and operate a private club. Indeed, the city or county is directed to levy an occupation or license tax on any licensed club located in its territory. Inferentially, the city has no power to impose such a fee or license for the privilege of operating a club upon or against an applicant who seeks to establish a club not yet located in the city or county. Similarly, in our view, a city or county has no power to require a municipal license, with or without fee, for the privilege of operating a private club other than that which is required by the Private Club Act. It is clear, moreover, that under K.S.A. 41-2609, only the Director is empowered to revoke or suspend a license of a private club."

I fully concur in this view. The city may not, in my opinion, exercise its power to impose more restrictive limits on serving hours as a means of imposing an additional licensing requirement upon private clubs, and may not condition serving during certain hours upon the holding of an additional license issued by municipal authorities. Accordingly, I agree fully with you that the application of § 19-1301 et seq. of the Code of the City of Topeka to private clubs located therein and licensed under the Kansas Private Club Act is prohibited by K.S.A. 41-2622 and 2631.

Yours very truly,

CURT T. SCHNEIDER
Attorney General