STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

January 5, 1976

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.

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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 legislature 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 therefrom, 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 Schneider

CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj