STATE OF KANSAS

Office of the Attorney General

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

Curt T. Schneider
Attorney General

June 21, 1977

ATTORNEY GENERAL OPINION NO. 77-207

Mr. Delton M. Gilliland
Coffman, Jones & Gilliland
Tiffany Building
Lyndon, Kansas 66451

Re: Cereal Malt Beverages--Cities--Hours of Closing

Synopsis: A city may impose hours of closing upon licensees for the sale of cereal malt beverages which are more restrictive than those fixed by statute. A city by ordinance may require a cereal malt beverage licensee to close at an hour earlier than 12:00 p.m.; however, any closing hour fixed by the city must be reasonably related to the public safety, morals and welfare.

* * *

Dear Mr. Gilliland:

You request my opinion whether the City of Quenemo may prescribe a closing hour for the sale of cereal malt beverages earlier than 12:00 p.m. I enclose a copy of an opinion dated June 30, 1955, issued by Attorney General Harold Fatzer, in which he concluded that cities do have the power to regulate the hours of closing of cereal malt beverage establishments. I also enclose a copy of an opinion on a related question by Attorney General Robert Londerholm, dated December 13, 1968.

You advise that it has been suggested that the closing hour be fixed at a somewhat earlier hour in order to reduce the police problems resulting from the gathering of motorcyclists in or near the community. In particular, a closing hour of 8:00 p.m. is being considered. Any closing hour which is fixed by the city must meet the test of reasonableness, and the criteria therefor are ably set out in the last paragraph of the opinion of Attorney

General Fatzer. Whether this hour would in fact be upheld as reasonable would depend upon the specific local problems sought to be dealt with, the effect of such a closing hour on the business of the licensee, and whether this particular closing hour bears a reasonable relationship to the public safety, morals and welfare. This question is necessarily a highly factual one, which we cannot resolve as a matter of law. What is reasonable must be determined in the first instance by the city council, subject to review, of course, by a court which is empowered to hear evidence concerning the several factual considerations which affect the determination of reasonableness.

Yours truly,

Curt T. Schneider

CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj

STATE OF KANSAS

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June 30, 1955

Honorable John D. Bower
Representative Fourth District
McLouth, Kansas

Dear John:

This will acknowledge your recent letter wherein you inquire concerning the power of local officials to fix hours of closing for premises licensed for the sale of cereal malt beverages. My staff has given this problem considerable attention and we are inclined to the view that the statutes authorize such restrictions to be imposed by local governing bodies.

The sale of cereal malt beverages at retail is governed by the provisions of Article 27, Chapter 41, General Statutes of 1949, as amended. Authority to license premises for the sale of cereal malt beverages is vested in local governments. In incorporated cities the power to license is conferred upon the governing body of the city; whereas, in areas outside the limits of incorporated cities the licensing authority is vested in the board of county commissioners. Minimum standards for the operation of such premises and the conduct of persons thereon are set out in the statutes. However, section 41-2704 of the 1953 Supplement to the General Statutes provides in part:

> "In addition to the requirements of this act the board of county commissioners of any county of the state of (or) the governing body of any city may prescribe hours of closing, standards of conduct, and rules and regulations concerning the moral, sanitary and health conditions of the places licensed and may establish zones within which no place of business may be located not inconsistent with the provisions of this act: . . ."

The authority vested in licensing bodies to impose additional restrictions on the hours of closing for taverns is by no means an anomaly in the law. It is apparently settled that a municipality or county can under specific authorization or under its general police power make regulations governing the hours of closing for certain businesses. Such regulations have been consistently upheld by the courts where they are reasonable and based on a fair classification and where they are germane to the legitimate objections of the police power, towit, the protection of the public health, safety, morals and welfare. Manifestly, taverns licensed for the sale of cereal malt beverage constitute a special problem with respect to the public safety, public morals and public welfare, and to set them apart as the subject of special regulation is not an unreasonable classification.

Thus, it is our view that the statute quoted above, which specifically empowers local authorities to establish hours of closing, in addition to the minimum standards established in the state law, is constitutional and valid and that governing bodies of counties and cities may properly exercise the power conferred therein. The additional regulation imposed by local governing bodies will always be subject to the test of reasonableness. We do not here presume to suggest what may or may not be reasonable. Standards of reasonableness would be determined by the specific factors present in any given situation. However, we do express the opinion that in those cases where a governing body of a municipality or a board of county commissioners in good faith imposes restrictions on business hours of premises licensed for the sale of cereal malt beverages, and where it can be demonstrated that such restrictions are germane to public safety, public morals and public welfare, the courts will not be inclined to interfere with such exercise of discretion.

If we can be of further assistance we shall be happy to do so.

Very truly yours,

HAROLD R. FATZER
Attorney General

PEW:mlb

STATE OF KANSAS

Office of the Attorney General

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

December 13, 1968

Mr. David K. Clark
Ogden City Attorney
229-A Poyntz Avenue
Manhattan, Kansas 66502

Dear Mr. Clark:

You have furnished us a copy of Ordinance No. 170 as passed by the City of Ogden, Kansas, a third-class city, in 1944. You have asked us for an opinion as to the validity of this ordinance as it relates to the closing of all places where malt beverages are sold between the hours of 12:00 midnight and 6:00 o'clock A.M., on Sundays and election days.

In examining K.S.A. 1967 Supp. 41-2704, we find that this statute gives to the governing body of any city or the board of county commissioners of any county authorization to prescribe hours of closing, standards of conduct, and rules and regulations concerning the morals, sanitary and health conditions of the places licensed, and to establish zones within which no place of business may be located not inconsistent with provisions of the cereal malt beverage act. The question which you have presented for our consideration is whether or not the effective exercise of these express powers to regulate the hours of closing necessitates the implied authority to require such establishments to close completely during the time in which sales are forbidden. Inasmuch as this particular question has not been presented to our Supreme Court, we must look to other jurisdictions for guidance.

In Cleveland v. Rice County, 56 N.W.2d 641, 238 Minn. 180, the court held that the express delegation to the board of county commissioners of the power to license, regulate, and restrict the hours of sale of non-intoxicating malt beverages includes, by implication, as necessary to the effective exercise of that power, the authority to require that the premises on which such sale is licensed must close completely during the hours in which sales are prohibited.

The court cited a previous statement it had made in the case of City of Duluth v. Cerveny, 218 Minn. 511, 516, 16 N.W.2d 779, 783:

> ". . . When a municipal corporation is invested with power to license or regulate the sale of intoxicating liquors, it has implied authority to make all such ordinances as may be necessary to make the grant of power effectual, and to preserve the public peace, good order and security against dangers arising from the traffic in such liquors."

The court went on to say that although this language was used in connection with the authority of cities to deal with intoxicating liquor, similar considerations apply to the power of a county to deal with non-intoxicating malt liquor. The intent of the legislature to invest these subdivisions with the power to regulate other activities of a licensee which conflict with, or are closely related to, the sale of such beverages may and should be implied, insofar as such regulation is reasonably necessary to effectuate the control expressly conferred. Other businesses conducted on the same premises on which the sale of such beverages is licensed are such related activities. The sale of non-intoxicating malt liquors has always been subject to public control. The license to sell such beverages is not a property right but is in the nature of a privilege and, as such, subject to reasonable regulations. In citing Abeln v. City of Shakopee, 224 Minn. 262, 28 N.W.2d 642, the court stated:

> "The disadvantage of most 'privileges' is that to obtain them one must give up certain 'rights.' The simple result in this case is that to enjoy the profits of this type of business, one must make certain concessions, among them the possibility of being restricted in the use of the premises on which such sale is licensed."

We are inclined to agree with the answer made by the Minnesota court to the argument that the community is inconvenienced by the restrictions on other activities of the licensee, the court's answer being that such arguments relate to the advisability of the restriction, not to the legality of it, and

should be addressed to the legislative authorities rather than to the courts. It is for the legislature to decide whether the burdens of such a restriction on the community outweigh the benefits.

In reviewing the provisions of our cereal malt beverage act, we find that K.S.A. 41-2701(c) defines "place of business" as any place at which cereal malt beverages are sold. We find that the legislature did not provide for any exceptions, and therefore must conclude that the authority granted to the local governing bodies to regulate the premises licensed for the sale of cereal malt beverages applies to all such premises.

Therefore, it is our opinion that an ordinance which has the effect of regulating the hours of all places of business where cereal malt beverages are sold is authorized.

Very truly yours,

ROBERT C. LONDERHOLM
Attorney General

SAP/rv