ATTORNEY GENERAL OPINION NO. 77-346

Mr. Robert M. Corbett
Attorney
Department of Health and Environment
Building 740, Forbes AFB
Topeka, Kansas 66620

Re: Restaurants--Food Service Establishments--Licenses

Synopsis: A grocery store or convenience store which sells prepared sandwiches in individual portions, whether for consumption on or off the premises, constitutes a "food service establishment" for which a license is required by K.S.A. 1976 Supp. 36-501 et seq.

Dear Mr. Corbett:

You request our opinion concerning the applicability of the food service and lodging licensing requirements of K.S.A. 1976 Supp. 36-501 et seq. to grocery stores, supermarkets and convenience stores which sell prepared food in individual portions generally for consumption off the immediate premises.

In an opinion dated December 8, 1967, Attorney General Robert Londerholm concluded that Kwik-Shop stores, convenience grocery stores which sold individual portions of prepared food which were generally consumed off the store premises, constituted "restaurants," as that term was defined by K.S.A. 1976 Supp. 36-301(c). He stated that

"any retail store which sells individual portions of food to the public falls within...
broad scope of the definition of a restaurant. Indeed, the operation which you are questioning differs little from a sandwich shop, roadside stand or food vending machine."

Since that time, the food service and lodging licensing act has been amended in some parts. See K.S.A. 1976 Supp. 36-501 et seq. K.S.A. 1976 Supp. 36-503(a) provides that it shall be

"unlawful for any person to engage in the business of conducting a food service establishment unless such person shall have in effect a valid license therefor issued by the secretary of health and environment . . . ."

The term "food service establishment" is defined by K.S.A. 1976 Supp. 36-501(e) to mean

"any place in which food is served or is prepared for sale or service on the premises or elsewhere. Such term shall include, but not be limited to, fixed or mobile restaurant, coffee shop, cafeteria, short-order cafe, luncheonette, grill, tea room, sandwich shop, soda fountain, tavern, private club, roadside stand, industrial-feeding establishment, catering kitchen, commissary and any other private, public or nonprofit organization or institution routinely serving food and any other eating or drinking establishment or operation where food is served or provided for the public with or without charge."

It is urged by the Dillon company, you indicate, that the food service licensing law does not apply to their stores which sell prepared sandwiches in individual portions, on the grounds that the sandwiches are prepared in Hutchinson, and not on the store premises, and that there are no facilities provided for consumption on the store premises. The definition quoted above, enacted in 1975, is broader and more inclusive than that applied by General Londerholm in 1967. Clearly, the legislature did not intend to
restrict application of the licensing law in any fashion as con-
strued and applied prior thereto. The amended language specifi-
cally includes "any place in which food is served," and "any place in which food . . . is prepared for sale or service on the prem-
ises or elsewhere." The lack of facilities for on-premise consump-
tion is not, thus, determinative, nor is the fact that the sand-
wiches are prepared elsewhere than on the store premises. The
sandwiches are provided for sale to the vendor's customers on
the store's premises, and whether they are served to individual
purchasers by waiters or waitresses, or made available through
self-service merchandising, nonetheless, the food is served on
the premises in prepared individual portions, and this fact sub-
jects the premises to the licensing requirements of the act.
The breadth of the 1975 amendment suggest a clear legislative
purpose to include every operation in which processed edible
substances are made available to consumers, to provide adequate
state inspection of the conditions under which food is prepared,
stored or served, in the interest of the public health. This
interest is clearly at issue, in my judgment, in any operation in
which prepared foodstuffs are provided for sale in individual
portions to the public, such as the sale of prepared sandwiches
as described in your letter. The 1975 amendment represents, if
anything, an approval of the 1967 opinion of General Londerholm,
and a clear legislative direction to broaden, rather than to
restrict, the application of the act. I find no justification
to recede from the 1967 opinion.

This interpretation is supported further by the decision in State
v. Helgerson, 212 Kan. 412, 511 P.2d 221 (1973). There, the de-
defendants sold hot dogs from several concession stands at the Henry
Levitt Arena on the Wichita State University campus. Precooked
hot dogs and buns were delivered to the appellee's cooler, located
at the arena, and later transferred to various concession stands
where they were warmed and offered for sale. Whether the sand-
wiches involved in the present instance are warmed on the prem-
ises, the operation there is distinctly analogous to that described
in Helgerson, in which the applicability of the licensing act
was undisputed, the sole issue being whether separate licenses
were required for each stand, as distinguished from one license
for the entire operation.

It is therefore my opinion that a retail store which sells in-
dividual portions of prepared food to consumers falls within the
36-501(3), for which a valid license is required.

Yours truly,

CURT T. SCHNEIDER
Attorney General