STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

September 7, 1978

ATTORNEY GENERAL OPINION NO. 78- 286

Mr. L. O. Bengtson
City Attorney
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Salina, Kansas 67401

Re: Cities--Home Rule--Alcoholic Liquor Consumption

Synopsis: Under Article 12, § 5 of the Kansas Constitution, a city may by charter ordinance exempt itself from the prohibition of K.S.A. 41-719, so as to authorize the consumption of alcoholic liquor on the premises of a municipally-owned community building, under such terms and conditions as may be prescribed by such ordinance. Opinion No. 77-360 is withdrawn.

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Dear Mr. Bengtson:

We have your letter of September 5, 1978, asking that we review and reconsider Opinion No. 77-360. In that opinion, we responded to an inquiry from the city attorney of Herington, Kansas, asking whether that city could by charter ordinance exempt itself from K.S.A. 41-719, prohibition against the consumption of alcoholic liquor on public property, and authorize such consumption on the premises of a community building owned by the city there.

As we pointed out in that opinion, K.S.A. 41-719 was first enacted in 1949, as a part of the Kansas Liquor Control Act. Insofar as originally enacted, it forbade any person "to drink or consume alcoholic liquor . . . upon property owned by the state or any governmental subdivision thereof." As a result of subsequent amendments, this prohibition no longer applies uniformly to all cities or counties in the state:

> "[B]y ordinance, any city having a population of more than two hundred thousand (200,000) may by ordinance exempt certain property, title of which is vested in such city, from the provisions of this act: And provided further, That the board of county commissioners of any county having a population of not less than one hundred and fifty thousand (150,000) may exempt, by resolution, specified property, the title of which is vested in such county, from the provisions of this act."

We pointed out that "the consumption of alcoholic liquor on the premises of the community building of the City of Herington is preeminently a local affair, having no extralocal application whatever. As purely a local matter, it is an appropriate subject of local municipal legislation, under Article 12, § 5 of the Kansas Constitution. Recognizing this in the earlier opinion, however, we noted a portion of K.S.A. 41-208, also of the 1949 Liquor Control Act, which states thus:

> "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." [Emphasis supplied.]

We took the view that this legislative preemption stripped cities of their power to exempt themselves from the prohibition against the consumption of alcoholic liquor on public property. Upon reconsideration, I am persuaded that this conclusion was in error, and the cited opinion is withdrawn.

In 1949, when the Liquor Control Act was adopted, Kansas cities had no constitutional home rule powers. The home rule amendment to the Kansas Constitution was approved by the voters at the November, 1960, general election, and became effective July 1, 1961. Insofar as here pertinent, Article 12, § 5(b) provides thus:

> "Cities are hereby empowered to determine their local affairs and government . . . . Cities shall exercise such determination by ordinance . . . subject only to enactments of the legislature of statewide concern applicable uniformly to all cities . . . ."

If a matter is determined to be local in nature, cities have direct constitutional power to exercise their local legislative authority with respect to such local matters, subject *only* to enactments of the legislature which apply uniformly to all cities. The legislature cannot, by legislation, take from cities powers which they enjoy directly from the constitution itself. Stated otherwise, the legislature may not by statute amend Article 12, § 5. In 1940, certainly, as the court pointed out in *Claflin v. Walsh*, 212 Kan. 1, 509 P.2d 1130 (1973), "[c]ities existed by and through statutes and had only such powers as were expressly conferred by statute . . . ." The legislature at that time could indeed preempt the cities from dealing with a local matter, even by legislation which did not apply uniformly to all cities. That is no longer true. If the issue in question is indeed a local matter, cities retain their constitutional legislative authority to deal with it, unless and until the legislature preempts the cities' authority in the only manner now permitted by the state constitution, *i.e.*, by the passage of legislation which applies uniformly to all cities.

The statute in question, K.S.A. 41-719, does not apply uniformly to all cities. Any city with a population in excess of two hundred thousand persons may by ordinance exempt specific property, title to which is vested in the city, from the prohibition. As the court pointed out in *Claflin v. Walsh*, *supra*, "[i]n order for a statute to be applicable uniformly to *all* cities there must be no exceptions." 212 Kan. at 9. [Emphasis by the court.] Because the consumption of alcoholic beverages on the property of a city is clearly a local matter, and because the referenced statute no longer applies uniformly to all cities, a city may, in my judgment, exempt itself from the prohibition, and enact substitute provisions in lieu thereof, thereby authorizing the consumption of alcoholic beverages upon municipal property, under the terms and conditions specified in the charter ordinance.

The preemptive statute, in and of itself, applies uniformly to all cities. The legislature may not preempt by statute, however, powers which cities enjoy directly from the state constitution,

except in the fashion prescribed by the constitution. The pre-emptive statute purported to restrict the police powers of all cities equally, to enactment of ordinances which complies strictly with the other provisions of the act, including that provision dealing with the consumption of alcoholic liquor on municipal property. Since 1949, however, the legislature has amended that prohibition to treat some cities differently from others. Under Article 12, § 5(d), the "[p]owers and authority granted cities pursuant to this section shall be liberally construed for the purpose of giving to cities the largest measure of self-government." Where the legislature, as here, purports to preempt the cities from dealing with a particular subject, the consumption of alcoholic liquor on municipal property, and thereafter amends the specific prohibition in order that it applies unequally to all cities, the constitutional home rule powers of the city must be measured, in my judgment, not against the general and uniform preemptive statute, but against the specific prohibition involved. If the latter applies unequally to all cities, the city may assert its home rule powers to exempt itself therefrom.

The home rule amendment was drafted and approved by the voters so as to circumscribe in some measure the authority of the legislature to restrict cities' powers. The central restriction upon that legislative authority was the requirement that the legislature act uniformly as to all cities. If it chose not to, and instead chose to legislative as to individual cities or groups thereof, the cities would retain direct constitutional legislative authority to exempt themselves from that legislation. To conclude that cities were bound by a preemptive statute which purported to prevent them from exempting themselves from other statutes which themselves did not apply uniformly to all cities would seriously erode the limitations upon the legislature, and the uniformity principle which is the central safeguard of cities' legislative authority. It is in the interest of assuring the largest possible measure of municipal home rule, and the fullest scope of local self-government, that I am compelled to withdraw the earlier opinion, and to conclude that the decision whether to permit the consumption of alcoholic beverages upon municipal property should and must be determined by each individual community, in light of its own needs and views.

Yours truly,

CURT T. SCHNEIDER
Attorney General

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