



STATE OF KANSAS

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ATTORNEY GENERAL

November 6, 1978

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ATTORNEY GENERAL OPINION NO. 78-357

Mr. James J. Smith
Attorney at Law
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Humboldt, Kansas 66748

Re: Cities--Home Rule--Cereal Malt Beverage License Fees

Synopsis: A city may by charter ordinance exempt itself from the limitations upon cereal malt beverage license fees prescribed by K.S.A. 41-2702, and provide substitute and additional limitations in lieu thereof.

* * *

Dear Mr. Smith:

You inquire concerning that portion of K.S.A. 41-2702 which provides for the fixing of fees for licenses to sell cereal malt beverages at retail, and which states in pertinent part as follows:

"Such [license] application shall be accompanied by a fee of not less than twenty-five dollars (\$25) nor more than one hundred dollars (\$100) as may be prescribed by the board of county commissioners or the governing body of the city, as the case may be, except in counties that have a population in excess of one hundred sixty-five thousand (165,000) persons, such application shall be accompanied by a fee of not less than twenty-five dollars (\$25) nor more than two hundred dollars (\$200) as may be prescribed by the board of county commissioners or the governing body of the city, as the case may be"

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In addition, the last paragraph prescribes fees for licenses to sell at retail cereal malt beverages in original and unopened containers, to be not less than twenty-five dollars (\$25) nor more than fifty dollars (\$50).

You advise that the City of Humboldt proposes by charter ordinance to exempt itself from the quoted language, and to increase the cereal malt beverage license fees in that city, and you request my opinion whether the city may do so, noting that the statute does not apply uniformly to all cities.

Article 12, § 5(b) of the Kansas Constitution provides in pertinent part thus:

"Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions except when and as the levying of any tax, excise, fee, charge or other exaction is limited or prohibited by enactment of the legislature applicable uniformly to all cities of the same class: Provided, That the legislature may establish not to exceed four classes of cities for the purpose of imposing all such limitations or prohibitions."

Clearly, K.S.A. 41-2702 does not apply to all cities uniformly. Some cities are permitted to prescribe a fee for licenses for the sale of cereal malt beverages consumption on the premises of up to \$100, while other cities, those located in counties with a population in excess of 165,000, may prescribe such fees of up to \$200.

Article 12, § 5(b) constitutes a direct constitutional grant of legislative power to levy taxes, excises, fees, charges and other exactions except when and as such power is limited or prohibited by "enactment of the legislature applicable uniformly to all cities of the same class," and the legislature may create "not to exceed four classes . . . for the purpose of imposing all such limitations or prohibitions."

It may be argued here that the legislature has indeed created two classes of cities for the purpose of imposing limitations upon cereal malt beverage license fees, i.e., cities in counties

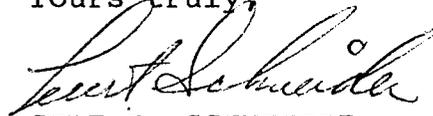
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with a population in excess of 165,000, and all other cities. The differential in license fees was enacted by amendment of K.S.A. 41-2702 in 1970. See ch. 188, § 1, L. 1970. Although the legislature did treat cities in more populous counties differently from other cities, nothing in the amendment suggests that the legislature created any classes of cities whatever for that purpose. Article 12, § 5(b) is explicit, that the "legislature may establish not to exceed four classes of cities" The legislature must create the classes; the classification is not to be left to conjecture and inference. Where the legislature has intended to create classes of cities for the purpose of imposing limitations upon the cities' power to assess taxes, fees and the like under Article 12, § 5(b), it has done so expressly. See, e.g., ch. 56, § 2, L. 1978, which commences thus:

"The following classes of cities are hereby established for the purpose of imposing limitations and prohibitions upon the levying of sales and excise taxes or taxes in the nature of an excise"

In K.S.A. 41-2702, the legislature has treated some cities differently from others for the purpose of limiting cereal malt beverage license fees, but it has not created any classes of cities for the purpose of doing so. As a result, because the section does not apply uniformly to all cities, it is my opinion that the city may by charter ordinance exempt itself from those limitations, and provide substitute or additional limitations in lieu thereof.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj