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ATTORNEY GENERAL OPINION NO. 79-261

Mr. William E. Gusenius
Altenborg and Gusenius
Box 328
Lindsborg, Kansas 67456

Re: Intoxicating Liquors and Beverages--Cereal Malt Beverages--Local Regulations

Synopsis: A city may, in the exercise of its statutory authority and its inherent police powers, preclude minors from entering upon the premises of establishments licensed to sell cereal malt beverages. Such ordinances must be reasonable in scope and must not unfairly classify, or discriminate against, businesses similarly situated.

Thus, under an ordinance designed to protect minors from the undesirable and demoralizing influences of taverns, the section which prohibits minors from entering upon the premises of all establishments licensed to sell cereal malt beverages except bowling alleys is unreasonably broad, and the classification therein established is not reasonably related to the purpose of the section. For these reasons, the ordinance violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

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Dear Mr. Gusenius:

You have submitted for our review and opinion a copy of the cereal malt beverage license ordinance recently adopted by the City of Lindsborg. The ordinance sets forth the licensure requirements, regulations for operation, license fees, and grounds for revocation and suspension of licenses. You inquire specifically about section 4, paragraph E of the ordinance, which provision states:

> "No person under the age of eighteen years shall be permitted in or about a place of business licensed to sell under a general license, except on Sunday between the hours of ten a.m. and ten p.m., provided, however, that this section shall not apply to a place of business operating as a bowling alley. For purposes of this act, a bowling alley is defined as a building or structure enclosing two or more long, narrow, planked floors for playing the game of tenpins." (Emphasis added.)

As you have noted, the above-quoted section allows minors to enter the premises of a bowling alley licensed to sell cereal malt beverages for consumption on the premises, but prohibits them from entering any other place of business licensed to sell such beverages for consumption on its premises. You have asked for our opinion whether this section constitutes an unreasonable exercise of the police power or constitutes an unreasonable classification in violation of equal protection.

K.S.A. 41-2701 et seq. provides for the licensure of businesses by city and county governments to authorize the sale and consumption of cereal malt beverages, subject to certain limitations and restrictions. K.S.A. 41-2704 empowers cities and counties, "[i]n addition to the requirements of this act" to "prescribe hours of closing, standards of conduct, and rules and regulations concerning the moral, sanitary and health conditions of the places licensed and . . . [to] establish zones within which no place of business may be located not inconsistent with the provisions of this act."

Significantly, that section further provides that the licensed establishment must remain open to the public and to the police at all times during its business hours, except those businesses licensed as private clubs. The section next refers to persons under 18 years of age, providing, in pertinent part:

> "No person under eighteen (18) years of age shall be permitted to buy or drink any of such beverages in or about said place of business. Any person under eighteen (18) years of age who purchases or attempts to purchase any cereal malt beverages in any licensed place of business shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished as provided by law."

Also, we note that an establishment's license may be revoked or suspended for "the sale of cereal malt beverages to those under the age of eighteen (18) years" and "for the employment of persons under eighteen (18) years of age in dispensing cereal malt beverages." K.S.A. 41-2708(e), (i).

Thus, we find that state law does not make it unlawful for persons under 18 years of age to enter such licensed establishments. State law only prohibits the purchase and consumption of cereal malt beverages by minors, and sales by minors, in or about such establishments. An important question to be considered first, then, is whether a city may ordain that persons under 18 years of age shall not enter upon the premises of any licensed establishment.

In consideration of this first question, we note that the legislature has expressly authorized local governments to exercise concurrent regulatory powers with respect to the sale and consumption of cereal malt beverages, including the power to make "rules and regulations concerning the moral . . . conditions of the places licensed." Moreover, as we said in Attorney General Opinion No. 79-186 concerning the power of cities to prohibit retail sales of liquor at times not specified by state law:

> "Municipalities may, in accord with two Kansas Supreme Court decisions, provide by city ordinance restrictions greater than the state has set forth. Both Leavenworth Club Owners Association v. Ralph Atchison, 208 Kan. 318 (1971) and Garten Enterprises v. City of Kansas City, Kansas, 219 Kan. 620 (1976), stand for such proposition.
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> "'The fact the state has enacted legislation on a subject does not necessarily deprive a city of the power to deal with the same subject by ordinance; a field can be the subject of concurrent concern and legislation. A municipality may legislate on the same subject so long as the municipal ordinance does not conflict with state law.' 219 Kan. at 620, Syl. para. 6.

> "'Where both statute and ordinance are prohibitory but the ordinance goes further than but not counter to the prohibition of the statute and the ordinance does not attempt to authorize what the statute forbids or forbid what the statute expressly licenses, authorizes or requires, there is nothing so contradictory between the provisions of statute and ordinance that the two cannot coexist.' 208 Kan. at 318, Syl. para. 4."

Applying these principles, we conclude that a city may, in the exercise of its statutory authority and its inherent police powers, preclude minors from entering upon the premises of establishments licensed to sell cereal malt beverages. The remaining question is whether, in so doing, the city, under its police power and consistent with the constitutional requirement of equal protection of the laws, may also determine that minors may enter only certain licensed premises but not others.

In consideration of questions of constitutionality of the ordinance, you have advised that the city's rationale for the section in question is protection of minors (persons under the age of eighteen) from the undesirable or demoralizing influences of taverns. An exception to the prohibition is made for licensees who are also operators of bowling alleys to give the city's youth access to a recreational facility. While we find the subject of the regulation to be within the scope of the city's police power, it is our judgment that the section in question is unreasonably broad in its application and that the classification of licensees is not based on differences reasonably related to the purpose of the ordinance.

The Fourteenth Amendment to the Constitution of the United States guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The Fourteenth Amendment does not preclude a state (or its political subdivisions) from making reasonable classifications in the exercise of its regulatory powers. As the Kansas Supreme Court declared in State, ex rel., v. Consumers Warehouse Market, 185 Kan. 363 (1959):

> "[A] state has broad discretion in classification in the exercise of its power of regulation, and the Constitution of the United States does not require that things which are different in fact are to be treated in law as though they were the same, but discrimination in a state regulatory statute must be based on differences that are reasonably related to the purpose of the statute, and the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. Distinctions cannot be justified if the discrimination has no reasonable relation to the differences." Id. at 369-370. (Emphasis added.)

Applying the foregoing principles, the Court determined that the "Unfair Practices Act" (G.S. 1949, 50-401 to 408, repealed, L. 1961, ch. 263) violated the "equal protection" clause of the Fourteenth Amendment, and held the entire act unconstitutional. The Court found that that portion of the act which exempted "grain and feed dealers" from the scope and operation of the act constituted "an arbitrary, fictitious and unreasonable statutory discrimination." 185 Kan. at 369. In support of the above-quoted principles, the Court cited Morey v. Doud, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957), and summarized that case in the following excerpt:

> "[T]he Supreme Court of the United States had before it an Illinois statute which excepted money orders of the American Express Company from the requirement that any firm selling or issuing money orders in the state must secure a license and submit to state regulation. A competing firm attacked the law on the ground the exception stated in the statute worked a denial of the 'equal protection of the laws' clause in the 14th Amendment. In upholding this contention the court said:

> "'Taking all of these factors in conjunction--the remote relationship of the statutory classification to the Act's purpose or to business characteristics, and the creation of a closed class by the singling out of the money orders of a named company, with accompanying economic advantages--we hold that the application of the Act to appellees deprives them of equal protection of the laws.'" 185 Kan. at 370.

The Kansas Supreme Court considered that case to be analogous precedent, and concluded thus:

> "[W]e are of the opinion the statutory exemption of grain and feed dealers from the operation of the [Unfair Practices] Act, thus singling them out as a closed class to receive special privileges, amounts to an arbitrary and unreasonable statutory discrimination having no relation to the expressed purpose of the Act . . . which deprives defendant of the equal protection of the laws." Id. at 370-371. (Emphasis added.)

See also, City of Derby v. Hiegert, 183 Kan. 68 (1958) (anti-peddler ordinance held void for unreasonably discriminatory classifications); Matheny v. City of Hutchinson, 154 Kan. 682 (1942) (ordinance imposing license fee on operators of vending machines applying only to owners of four or more machines held void for creating an arbitrary, unreasonably discriminatory classification).

Measured against the above-cited principles and precedents, we find the ordinance in question to be constitutionally invalid. The ordinance establishes two classes within a larger class of otherwise similarly situated businesses eligible for cereal malt beverage licenses: businesses with bowling alleys and all other businesses without bowling alleys. The ordinance grants a special privilege to one business, or class of business, while denying that privilege to all other businesses similarly situated. Of course, no licensee may sell cereal malt beverages to minors, or allow

minors to consume such beverages on the premises. But, the licensee who operates a bowling alley stands to benefit from the non-beverage trade of young people while other licensees may not, since minors are not allowed in their places of business.

For example, let us suppose that a local restaurateur wishes to include cereal malt beverages on the restaurant's menu, and obtains a license to do so. Under the ordinance, the restaurateur must bar entry to persons under the age of eighteen. Thus, the ordinance operates to substantially impair the restaurant's opportunity to serve youth and young families, while the bowling alley operator's business is not so impaired. The ordinance confers a special economic benefit on the licensee who operates a bowling alley which other licensees may not enjoy because of the classification.

Moreover, it seems apparent that the governing body, in drawing the ordinance as it did, made a determination that bowling alleys present a lesser danger of promotion of the evils at which the section is aimed than do taverns, and thus should be exempted from the prohibition. The restaurant owner, however, could forcefully argue that the demoralizing or undesirable atmosphere of taverns is not present in his family restaurant either. Thus, as applied to the restaurant owner and other businesses similarly situated, the distinction between the classes established by the section is not reasonably related to the purpose of the section.

In sum, the section in question operates unequally and unfairly among a class of businesses similarly situated. It confers a special privilege and special economic benefit upon a narrow class of licensees. Further, the classification is not reasonably related to the purpose for which the section was adopted, the protection of minors. For these reasons, we conclude that the ordinance violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Very truly yours,

Robert T. Stephan

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RTS:WRA:SC:gk