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January 20, 1981

ATTORNEY GENERAL OPINION NO. 81-19

Douglas A. Price
Humboldt City Attorney
701 Bridge Street
Humboldt, Kansas 66748

Re: Intoxicating Liquors and Beverages--Cereal Malt Beverages--Fees for Retailers' Licenses

Synopsis: Pursuant to its constitutional home rule powers, a city may, by charter ordinance, exempt itself from the provisions of K.S.A. 1980 Supp. 41-2702 prescribing license fees cities may charge cereal malt beverage retailers, since such provisions are not uniformly applicable to all cities. In lieu thereof, a city may establish a classification scheme for such retailers whereby the classes of retailers so established are charged license fees in differing amounts. Such classification is a valid exercise of the city's police power and does not deny equal protection of the laws, if the distinctions effected by the classification scheme are reasonably related to the purpose of the of the ordinance, i.e., the regulation of cereal malt beverage retailers. Similarly, since the classification scheme is regulatory in nature, the amount of any license fee established thereby must be reasonably related to the cost of regulating the retailer from whom it is exacted. (Affirming Attorney General Opinion No. 78-357.) Cited herein: K.S.A. 1980 Supp. 41-2702, Kan. Const., Art. 12, §5, U.S. Const., Amend. XIV.

* * *

Dear Mr. Price:

As city attorney for the City of Humboldt, Kansas, you have posed essentially three questions concerning the city's issuance of cereal malt beverage licenses.

First, you have inquired whether the Humboldt City Council may adopt a charter ordinance exempting the city from the application of K.S.A. 1980 Supp. 41-2702. An identical question posed by the City of Humboldt was answered in the affirmative by Attorney General Opinion No. 78-357. There, Attorney General Curt Schneider concluded that, because subsection (d) of 41-2702 authorized the imposition of license fees of varying amounts, depending on the size of the county in which the city issuing the license was located, the statute was of non-uniform application to cities and subject to exemption therefrom, by charter ordinance, under the city's home rule powers. (See Kan. Const., Art 12, §5.) We concur in that opinion. Even though 41-2702 was amended subsequent to the issuance of Opinion No. 78-357 (see L. 1978, ch. 189, §2), the conclusion reached therein remains valid, since the 1978 amendments did not alter the non-uniform applicability of the statute.

Your second and third questions are interdependent, permitting them to be considered together. Anticipating our answer to the first question, you have asked whether a city, having exempted itself from 41-2702 by charter ordinance, may differentiate, with respect to the amount of license fees, between retailers licensed to sell cereal malt beverages for off-premises consumption. You also have inquired whether a similar differentiation may be made in the amount of fees charged various retailers licensed to sell cereal malt beverages for on-premises consumption. Specifically, your second question inquires whether the city may establish fees for taverns that are different from the fees for other "establishments, such as restaurants, which obtain the bulk of their revenue from sources other than the sale of cereal malt beverages."

In considering these questions, it should first be noted that we are aware of no statutory provisions, other than 41-2702, that classifies cereal malt beverage retailers. Thus, in adopting a charter ordinance exempting the city from the provisions of 41-2702, the city "may provide substitute and additional provisions on the same subject" covered by the statute. Kan. Const., Art. 12, §5. Since 41-2702 establishes a classification of cereal malt beverage retailers, it is abundantly clear that the city's charter ordinance may also provide for a classification of such retailers.

However, any classification scheme so established must be scrutinized in light of the Fourteenth Amendment to the U.S. Constitution, which guarantees, inter alia, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Such guarantees apply with equal force to a state's political subdivisions, such as cities. City of Atchison v. Beckenstein, 143 Kan. 440 (1936) (and cases cited therein.) Such proscription does not, however, preclude a state or any of 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." (Emphasis added.) Id. at 369-370.

Furthermore, as the court in Matheny v. City of Hutchinson, 154 Kan. 682 (1942), pointed out at 690: "As long as the classification is a reasonable one the ordinance is valid." The Court went on to state: "[A] city may differentiate between classes when levying a license tax as long as the tax is levied equally and without discrimination on all businesses or avocations exercising the same privileges within each class." Id.

Therefore, it would appear that the city may establish its own classification scheme for the issuance of retail cereal malt beverage licenses, as long as the different classifications are based on differences which are reasonably related to the purpose of the ordinance, and as long as the various classifications do not discriminate between businesses within each class. "In any event, differing license exactions on businesses, activities or things are justified only upon the basis of classification that is reasonable and not discriminatory." (Footnote omitted.) 9 McQuillin Mun. Corp. §26.32c (3rd ed.), at 68.

In this instance, since the fees are imposed as a condition precedent to engaging in business as a retailer, it is apparent that the purpose of such classification is regulatory in nature and is established as an exercise of the city's police power. As noted in Duff v. Garden City, 122 Kan. 390 (1927), "license fee" is a "term usually applied to charges for regulation, restriction and control." Id. at 393. Also, a "regulatory charge has sometimes been said to be a condition precedent to the right 'to carry on' an occupation, whereas the tax for revenue is exacted merely because the occupation 'is carried on' within the municipal limits." (Footnotes omitted.) 9 McQuillin Mun. Corp. §26.19 (3rd ed.), at 35, 36. This distinction is clearly apparent here. Thus, the relative amounts of the fees charged the various classes of retailers must be judged accordingly.

"The general rule is that a license fee or tax or a charge for a permit must be reasonable in amount, and an excessive exaction is void." (Footnotes omitted.) 9 McQuillin Mun. Corp. §26.32c (3rd ed.), at 68.

In considering the reasonableness of a city ordinance, the Court in Watson v. City of Topeka, 194 Kan. 585 (1965), concluded that it was a factual question requiring a determination of "whether the fees fixed by the ordinance are reasonably related to the expenses they were intended to pay." Id. at 591. In Matheny v. City of Hutchinson, supra, the Court quoted from City of Leavenworth v. Booth, 15 Kan. 627 (1875), regarding the elements to be considered in justifying the amount of a license fee:

> "'In granting licenses the items which may be taken into consideration as elements in fixing the costs of the same would seem to be about as follows: First, the value of the labor and material in merely allowing and issuing the license; second, the value of the benefit of the license to the person obtaining the same; third, the value of the inconvenience and cost to the public in protecting such business, and in permitting it to be carried on in the community; fourth, and in some cases an additional amount imposed as a restraint upon the number of persons who might otherwise engage in the business. (p. 634.)'" (Emphasis added.) Matheny v. City of Hutchinson, supra, at 689.

The determination of reasonableness, in the first instance, rests within the sound discretion of the governing body enacting the regulatory measure. "Ordinarily, the courts will decline to interfere on the ground that the amount is oppressive or unreasonably large, unless there is a manifest abuse of police power in fixing the amount." (Footnotes omitted.) 9 McQuillin Mun. Corp., supra. As stated in City of Beloit v. Lamborn, 182 Kan. 288 (1958): "This court has held that there must be a wide discretion vested in the governing bodies of cities as to the amount of a license fee; that the courts will not interfere unless the fee imposed is flagrantly excessive." (Emphasis added.) Id. at 294. In that case, the Court was unable to conclude that the ordinance there under consideration was "excessive or oppressive." Id. at 295.

From the foregoing, it is to be concluded that the amounts of the various license fees established by the City of Humboldt must be reasonable. They must be reasonably related to the cost of regulating the various classes of cereal malt beverage retailers to which they are applicable. However, such fees are to be regarded as unreasonable only if they are so excessive or oppressive as to constitute a manifest abuse of the city's police power.

In summary, it is our opinion that pursuant to its constitutional home rule powers, a city may, by charter ordinance, exempt itself from the provisions of K.S.A. 1980 Supp. 41-2702 prescribing license fees

cities may charge cereal malt beverage retailers, since such provisions are not uniformly applicable to all cities. In lieu thereof, a city may establish a classification scheme for such retailers whereby the classes of retailers so established are charged license fees in differing amounts. Such classification is a valid exercise of the city's police power and does not deny equal protection of the laws, if the distinctions effected by the classification scheme are reasonably related to the purpose of the ordinance, i.e., the regulation of cereal malt beverage retailers. Similarly, since the classification scheme is regulatory in nature, the amount of any license fee established thereby must be reasonably related to the cost of regulating the retailer from whom it is exacted.

Because the determination of reasonableness is a factual question and we have not been apprised of all the relevant facts necessary thereto, we cannot express an unequivocal opinion as to the validity of the classification scheme outlined in your letter. However, we trust that the foregoing will be of assistance to you in this regard, and that the principles of law enunciated herein may be applied to the factual circumstances so as to properly evaluate said classification scheme.

Very truly yours,

Robert T. Stephan

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