



STATE OF KANSAS

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February 1, 1982

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ATTORNEY GENERAL OPINION NO. 82-19

Richard C. Dearth
City Attorney
P. O. Box 1037
Parsons, Kansas 67357

Re: Intoxicating Liquors and Beverages -- Misdemeanors
and Nuisances -- City Ordinances Prohibiting Trans-
portation of Open Containers of Alcoholic Liquor

Synopsis: Pursuant to the provisions of K.S.A. 41-208, the legislature has the exclusive power to regulate the transportation of alcoholic liquor, and cities are preempted from legislating in this area, except to the extent authorized by the legislature. However, K.S.A. 41-208 permits the adoption of city ordinances which declare as unlawful or prohibited any act which is unlawful or prohibited under the Kansas Liquor Control Act, and such ordinances may prescribe penalties for violations consistent with the penalties prescribed under the Liquor Control Act. Accordingly, a city may adopt an "open container" ordinance prohibiting those acts proscribed by K.S.A. 41-804 and prescribing penalties for violations thereof, including authorization for the municipal court to suspend or restrict the driver's license or operating privileges of a person convicted under such ordinance, to the extent provided in K.S.A. 41-804. Cited herein: K.S.A. 1980 Supp. 8-1567, K.S.A. 41-101, 41-208, 41-804, Kan. Const., Art. 12, §5.

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Dear Mr. Dearth:

You indicate that the City of Parsons is considering the adoption of an ordinance which would authorize the city's municipal court to suspend a person's driver's license upon

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such person's conviction of the ordinance's prohibition against transportation of an open container of alcoholic liquor. As the Parsons city attorney, you have requested our opinion whether a city has the authority to empower its municipal court to suspend a driver's license under such circumstances.

It is our understanding that the proposed "open container" ordinance is to be patterned after K.S.A. 41-804. Subsection (a) of this statute prohibits a person from transporting alcoholic liquor in a vehicle, except under specified conditions, while subsection (b) declares a violation of such prohibition to be a misdemeanor, punishable by a fine of not more than \$200 or by imprisonment for not more than six months. The statute then provides in subsection (c), as follows:

"(c) Except as provided in subsection (f) upon conviction or adjudication of a violation of this section, the judge, in addition to any other penalty or disposition ordered pursuant to law, shall suspend the person's driver's license or privilege to operate a motor vehicle on the streets and highways of this state. Upon conviction or adjudication of the first violation by such person, the suspension shall be for three months. Upon adjudication of a second or subsequent violation, the suspension shall be for one year."

The entirety of subsection (c) was added by amendment in 1981, as were subsections (d), (e) and (f). See L. 1981, ch. 201, §1. Subsection (d) provides for the surrender of the convicted person's driver's license to the court, provides for the court's transmittal of such license to the Division of Vehicles and prescribes the conditions and procedures for the return of the license to the licensee. Subsection (e) provides by reference for definitions of "highway" and "street," and subsection (f) prescribes a procedure for restricting the licensee's privilege of operating motor vehicles, in lieu of suspending the license as provided in subsection (c).

Initially, we think it appropriate to compare K.S.A. 41-804 with K.S.A. 1980 Supp. 8-1567, which prohibits the operation of a vehicle while under the influence of intoxicating liquor or drugs. A comparison clearly indicates that the legislature has patterned subsections (c), (d) and (f) of 41-804 after subsections (d) and (e) of 8-1567. The corresponding provisions of these statutes are substantially identical, except in one significant respect -- 8-1567 explicitly authorizes the judge of a municipal court to suspend the license

or restrict the operating privileges of a person convicted of violating a city ordinance which declares it unlawful to operate a vehicle either under the influence of intoxicating liquor or under the influence of drugs. On the other hand, 41-804 contains no such comparable provision. Thus, the question arises as to the effect such absence of express statutory authority has on the power of a city to adopt an "open container" ordinance which authorizes the municipal judge to suspend the license or restrict the operating privileges of a person convicted under the ordinance.

A city's legislative power, of course, emanates from Article 12, Section 5 of the Kansas Constitution, known as the home rule amendment, which empowers cities "to determine their local affairs and government," subject to specified restrictions. As explained in City of Junction City v. Griffin, 227 Kan. 332 (1980):

"By virtue of this constitutional amendment cities are no longer dependent upon the State legislature for authority to determine their local affairs and government. Cities have power granted directly from the people through the constitution. They no longer need specific legislative authorization to pass a particular ordinance. Clafin v. Walsh, 212 Kan. 1, Syl. ¶1, 509 P.2d 1130 (1973). This home rule power of a city is subject, however, to optional control by legislative action in four specific areas mentioned in the Clafin case." Id. at 334, 335.

Considering the constitutional powers of cities, then, we must ascertain whether the legislature has taken action to preclude cities from enacting an "open container" ordinance. Here, the Griffin case, supra, provides guidelines for our consideration:

"The court has consistently rejected the doctrine of implied preemption of a particular field. Legislative intent to reserve exclusive jurisdiction to regulate in an area must be clearly manifested by State law. City of Lyons v. Suttle, 209 Kan. 735, 738, 498 P.2d 9 (1972); City of Junction City v. Lee, 216 Kan. 495, 503, 532 P.2d 1292 (1975); Garten Enterprises, Inc. v. City of Kansas City, 219 Kan. 620, Syl. ¶3, 549 P.2d 864 (1976). Legislative intent to preempt a field is only the first of two requirements for preemption when it concerns the rights of cities.

". . . The second requirement is uniform application of the State law to all cities." Id. at 336.

With these two requirements in mind, we have examined the 1981 enactment (L. 1981, ch. 201) in which K.S.A. 41-804 was amended, and we find nothing therein which would render it non-uniform in its application to all cities. Thus, it is necessary to determine whether the legislature has preempted the field, since even a uniformly applicable statute of statewide concern does not foreclose the adoption of city ordinances which do not conflict with the statute, unless the legislature has preempted the field. See, e.g., Blue Star Supper Club, Inc. v. City of Wichita, 208 Kan. 731 (1972).

In this regard, we note that K.S.A. 41-804 is part of the Kansas Liquor Control Act, K.S.A. 41-101 et seq. Another section of that act is K.S.A. 41-208, which states, in part, as follows:

"The power to regulate all phases of the control of the manufacture, distribution, sale, possession, transportation and traffic in alcoholic liquor and the manufacture of beer regardless of its alcoholic content, except as specifically delegated in this act, is hereby vested exclusively in the state and shall be exercised as provided in this act. 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."

The foregoing provisions were construed by the Court in Blue Star Supper Club, supra, to have preempted certain municipal legislative action. The Court stated:

"It occurs to us that what the legislature intended by including the pre-emptive provisions of 41-208 as part of the Liquor Control Act was to give the state exclusive power to control and regulate the traffic in alcoholic liquor and the manufacture of beer. To such end it was provided that the power to regulate and control the 'manufacture, distribution, sale, possession, transportation and traffic in alcoholic liquor and the manufacture of beer regardless of its alcoholic content' should be vested exclusively in the state." 208 Kan. at 733.

It is clear, therefore, that the legislature has the exclusive power to regulate the "manufacture, distribution, sale, possession, transportation and traffic in alcoholic liquor." Accordingly, with the state occupying the field of regulatory activity to the exclusion of cities, cities may exercise only those powers regarding this area as are delegated to them by the legislature. In this regard, we note the remaining provisions of K.S.A. 41-208:

"Nothing contained in this section shall be construed as preventing any city from enacting ordinances declaring acts prohibited or made unlawful by this act as unlawful or prohibited in such city and prescribing penalties for violation thereof, but the minimum penalty in any such ordinance shall not exceed the minimum penalty prescribed by this act for the same violation, nor shall the maximum penalty in any such ordinance exceed the maximum penalty prescribed by this act for the same violation."

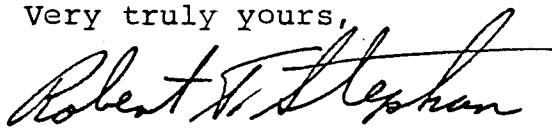
In our judgment, the foregoing provisions clearly authorize a city to adopt an ordinance which declares to be unlawful the transportation of alcoholic liquor, to the extent prescribed by 41-804(a), and which provides for imposition of a fine or imprisonment upon conviction, to the extent provided in 41-804(b). Moreover, it is our opinion that K.S.A. 41-208 empowers a city to include in such ordinance provision for the municipal court to suspend or restrict the driver's license or operating privileges of a person convicted of violating the ordinance. In our judgment, the suspension or restriction of a driver's license or operating privileges must be regarded as a penalty within the contemplation of K.S.A. 41-208.

In State v. Finley, 199 Kan. 615 (1967), the Court found that "[i]n its plain and ordinary sense 'penalty' means to be put to a disadvantage, loss or hardship due to some action, such as a transgression or error." Id. at 620. We think it scarcely can be contended that the suspension or restriction of a person's driver's license or privilege to operate motor vehicles on the highways of this state does not constitute a disadvantage, loss or hardship for such person. Our conclusion is reinforced by a consideration of the courts' recognition of the significant interest a person has in the entitlement to operate a motor vehicle on a state's highways. The United States Supreme Court has determined that, irrespective of whether such entitlement is denominated a "right" or a "privilege," the termination of such entitlement is subject to procedural due process. Bell v. Burson, 402 U.S. 535, 539, 29 L.Ed.2d 90, 94 (1971). See, also, Elrod v. Burns, 427 U.S. 347, 361, 49 L.Ed.2d 547, 558 (1976).

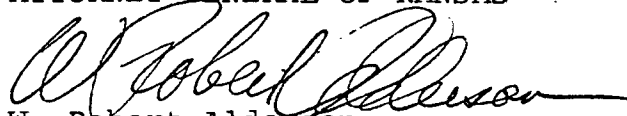
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In summary, therefore, it is clear that the legislature, pursuant to the provisions of K.S.A. 41-208, has the exclusive power to regulate the transportation of alcoholic liquor, and cities are preempted from legislating in this area, except to the extent authorized by the legislature. However, K.S.A. 41-208 permits the adoption of city ordinances which declare as unlawful or prohibited any act which is unlawful or prohibited under the Kansas Liquor Control Act, and such ordinances may prescribe penalties for violations consistent with the penalties prescribed under the Liquor Control Act. Accordingly, it is our opinion that a city may adopt an "open container" ordinance prohibiting those acts proscribed by K.S.A. 41-804 and prescribing penalties for violations thereof, including authorization for the municipal court to suspend or restrict the driver's license or operating privileges of a person convicted under such ordinance, to the extent provided in K.S.A. 41-804.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



W. Robert Alderson
First Deputy Attorney General

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