



STATE OF KANSAS

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December 12, 1985

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ATTORNEY GENERAL OPINION NO. 85- 174

The Honorable Michael R. O'Neal
State Representative, 104th District
P.O. Box 1868
Hutchinson, Kansas 67504

Re: Constitution of the State of Kansas --
Constitutional Amendment and Revision -- Proposals
by Legislature; Approval by Electors

Synopsis: As previously noted in Attorney General Opinion No. 85-110, a concurrent resolution containing a constitutional amendment adopted by the legislature during the 1985 session may be amended during the 1986 session prior to being submitted to the voters in November, 1986. At present, Chapter 360 of the Laws of 1985 provides for the submission to the voters of an amendment to Article 15, Section 10, which would allow liquor by the drink under certain circumstances. The amendment must be approved by a majority of the voters of the entire state in order to be adopted and a majority of the voters in a particular county before becoming effective in that county. Such a "dual purpose" is clearly disclosed in the explanatory statement which is to be printed on the ballot with the proposed amendment. Further, since the Kansas Constitution limits, rather than confers, power, the people of the state may amend the constitution in any manner they deem appropriate, subject only to the limits of the United States Constitution. Cited herein: K.S.A. 41-301; L. 1985, Chs. 360, 364; Kan. Const., Art. 14, §1; Art. 15, §10; Kan. Bill of Rights, §§2, 20.

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Dear Representative O'Neal:

As State Representative for the 104th District, you request our opinion concerning language used in the proposed liquor by the drink amendment adopted by the 1985 Legislature for submission to the voters in November of 1986. L. 1985, Ch. 360. Specifically, you inquire about the effect of a "yes" vote by a voter on the amendment. It is your understanding that such a vote would have a dual effect, namely to help the amendment receive the simple majority it needs across the state in order to be approved, and also to allow liquor by the drink in the individual county of the voter's residence. You seek our opinion as to whether such a system is in fact contemplated by the amendment, and, if so, whether this would be constitutional.

As you note in your letter, this office has recently issued an opinion concerning the ability of the legislature to amend a proposed constitutional amendment prior to its submission to the voters. In Attorney General Opinion No. 85-110, we concluded that the legislature could, by two-thirds affirmative vote, alter the terms of the proposed classification amendment contained in Chapter 364 of the 1985 Session Laws. Accordingly, should we conclude that a defect exists in the provisions of the liquor by the drink amendment, the 1986 Legislature could, if it desired, remedy the problem in time for the general election in the fall.

However, in examining this question, it is our opinion that no defect exists in the language of the proposed amendment which would require such action, although the legislature is always free, as our prior opinion noted, to make whatever changes it desires prior to submission to the voters. The proposed amendment would alter the provisions of Article 15, Section 10 of the state constitution, which was last changed in 1948. At that time, language was inserted which forever prohibited the "open saloon." This language has subsequently been interpreted by the Kansas Supreme Court to prohibit any arrangement whereby an establishment is open to the public, without any limit on who may enter or purchase alcoholic beverages which are to be consumed on the premises. State ex rel. v. Kennedy, 225 Kan. 13, Syl. §13 (1978). The proposed amendment would strike the reference to open saloons, and would insert in its place the following:

"The sale of intoxicating liquor by the individual drink in public places is prohibited, except that the legislature

may permit, regulate, license and tax the sale of intoxicating liquor by the drink in public places in a county where the qualified electors of the county approve, by a majority vote of those voting on this proposition, to adopt this proposition, but such sales shall be limited to: (1) Public places where gross receipts from sales of food for consumption on the premises constitute not less than 30% of the gross receipts from all sales of food and beverages on such premises; or (2) public places for which a temporary permit has been issued as authorized by law"
." (Emphasis added.)

Also on the ballot is to be this explanatory statement:

"This proposed amendment would authorize the legislature to permit, license, regulate and tax the sale of intoxicating liquor by the drink in public places which are located in a county where the voters have approved such sale in their county.

"A vote for the proposed amendment would permit the sale of liquor by the drink in public places which are located in a county where the voters approve such sale in their county.

"A vote against the proposed amendment would continue the current prohibition against the sale of liquor by the drink in public places." (Emphasis added.)

In our opinion, it is clear from a reading of both the proposed amendment and the explanatory statement that a "dual function" is in fact to be given to each person's vote in the November, 1986 election. As is always the case for constitutional amendments, the proposition itself must be approved by a majority of those persons voting on the issue. Kansas Constitution, Article 14, Section 1. At the same time, an affirmative vote on the proposition by the residents of a particular county will allow the sale of intoxicating liquor by the drink in public places in that county, subject to either the restriction for 30% food sales or under a temporary permit. (The specifics of such permits will doubtless be

provided by future legislative action, in that the language concerning such permits is not self-executing.)

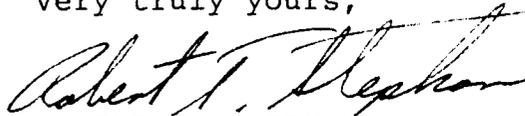
In adopting such a course of action, the legislature intends to avoid the need for a subsequent election in each county on the same question. We note that a similar procedure was once employed in a similar context, for when the voters in the 1948 general election approved the present language in Article 15, Section 10, the legislature subsequently determined that no city of the first or second class whose voters rejected the amendment was authorized to issue licenses for the sale of alcoholic liquor in retail outlets. K.S.A. 41-301. In this way, a "no" vote on the 1948 proposition was given a dual effect after the fact. The distinction in the present case lies in the fact that such a dual effect is clearly disclosed to the voters at the outset, but we find this difference to be of no legal importance.

Nor can we conclude that the action of the legislature in presenting the issue in this fashion is somehow unconstitutional, or that the voters cannot approve it in this format. The state constitution is the paramount and fundamental law of Kansas, and limits the powers of the people's government, rather than conferring such powers. Kansas Bill of Rights, §§2, 20; Lemons v. Noller, 144 Kan. 813, 816-17 (1936); Atkinson v. Woodmansee, 68 Kan. 71 (1904); Prohibitory Amendment Cases, 24 Kan. 700, 711-12 (1881). Accordingly, while a statute may be found to be inconsistent with the grant of power made by the people to the legislature, a constitutional amendment cannot be unconstitutional, unless the procedures used in adopting it themselves contravene those set forth in the constitution for such amendments [Kansas Constitution, Article 14, Section 1; Moore v. Shanahan, 207 Kan. 645, 651-55 (1971)], or the amendment is in conflict with the United States Constitution or the Federal Bill of Rights. Van Sickle v. Shanahan, 212 Kan. 426, 449-51 (1973). In such cases, the proposition submitting the amendment to the people is void, and the election of no effect. Moore, supra. Although you did not inquire about the propriety of the procedures used to adopt the concurrent resolution, we know of no defect along these lines which would nullify it and so vitiate the results of an election on the liquor by the drink question.

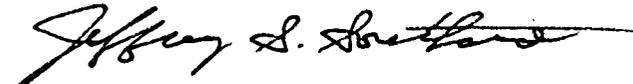
In conclusion, as previously noted in Attorney General Opinion No. 85-110, a concurrent resolution containing a constitutional amendment adopted by the legislature during the 1985 session may be amended during the 1986 session prior to

being submitted to the voters in November, 1986. At present, Chapter 360 of the Laws of 1985 provides for the submission to the voters of an amendment to Article 15, Section 10, which would allow liquor by the drink under certain circumstances. The amendment must be approved by a majority of the voters of the entire state in order to be adopted and a majority of the voters in a particular county before becoming effective in that county. Such a "dual purpose" is clearly disclosed in the explanatory statement which is to be printed on the ballot with the proposed amendment. Further, since the Kansas Constitution limits, rather than confers, power, the people of the state may amend the constitution in any manner they deem appropriate, subject only to the limits of the United States Constitution.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Deputy Attorney General

RTS:JSS:crw