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October 14, 1992

ATTORNEY GENERAL OPINION NO. 92-127

Elmo Lund
Oberlin City Attorney
P.O. Box 267
Oberlin, Kansas 67749

Re: Constitution of the State of Kansas--
Miscellaneous--Intoxicating Liquors; Legislative
Authority to Allow Proposition to Limit Sale of
Liquor by the Drink

Intoxicating Liquors and Beverages--Licensure and
Regulation of Sale of Liquor by the Drink--Sale of
Liquor by the Drink in Public Places; Election to
Prohibit or Permit; Temporary Permits

Synopsis: Article 15, section 10 of the Kansas constitution
does not preclude the legislature from amending
K.S.A. 1991 Supp. 41-2646 to allow counties to
consider a proposition to limit sales of liquor by
the drink in public places to those places which
obtain a temporary permit. K.S.A. 1991 Supp.
41-2642 would need to be amended as well, should
the legislature choose to do this. Cited herein:
K.S.A. 1991 Supp. 41-2642; 41-2646; L. 1947, ch.
248, § 1; Kan. Const., art. 15, § 10.

* * *

Dear Mr. Lund:

You request our opinion regarding the extent of the
legislature's authority under article 15, section 10 of the
Kansas constitution. Specifically you ask whether the

legislature may amend K.S.A. 1991 Supp. 41-2646 to allow the voters of a county to consider a proposition to allow the sale of liquor by the drink only in places for which a temporary permit has been issued.

K.S.A. 1991 Supp. 41-2646 currently authorizes submission to and consideration by the voters of any county three propositions: Prohibition of liquor by the drink in public places in that county; permission of liquor by the drink in public places in that county which derive at least 30% of their gross receipts from the sale of food for consumption on the premises; and permission of liquor by the drink in public places in that county without a food sale requirement. Subsection (b) of K.S.A. 1991 Supp. 41-2646 sets forth the petition requirements, providing in part:

"The appropriate version following shall appear on the petition:

"We request an election to determine whether the sale of alcoholic liquor by the individual drink in _____ county shall be (prohibited in public places) (allowed in public places where at least 30% of the gross receipts are from sale of food for consumption on the premises) (allowed in public places without a requirement that any portion of their gross receipts be from sales of food)."

Similarly, in subsection (c) if a resolution is adopted or a valid petition submitted calling for an election on this issue,

"the county election officer shall cause the appropriate version of the following proposition to be placed on the ballot. .

. .

"Shall sale of alcoholic liquor by the individual drink in _____ county be (prohibited) (allowed in public places where at least 30% of the gross receipts are from sales of food for consumption on the premises) (allowed in public places without a requirement that any portion of their gross receipts be from sales of food)?"

The legislature has not provided for submission of a proposition to allow the sale of liquor by the drink in only certain public places (except for the food sale requirement) or only pursuant to a temporary permit. Rather, the authorized propositions would either prohibit sale of liquor by the drink in public places completely in that county, or open it up to any licensed establishment meeting the food sale requirement, if there is one.

To determine whether the legislature may authorize an additional proposition alternative to allow sale of liquor by the drink in public places only pursuant to a temporary permit (but not in drinking establishments), we must look to the constitution. Article 15, section 10 provides as follows:

"(a) The legislature may provide for the prohibition of intoxicating liquors in certain areas.

"(b) The legislature may regulate, license and tax the manufacture and sale of intoxicating liquors, and may regulate the possession and transportation of intoxicating liquors.

"(c) 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 approved, 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.

"At any subsequent general election, the legislature may provide by law for the submission of propositions to qualified electors of counties for: (1) The prohibition of sales of intoxicating

liquor by the individual drink in public places within the county; (2) the regulation, licensing, taxing and sale of intoxicating liquor by the drink in public places within the county without a requirement that any portion of their gross receipts be derived from the sale of food; or (3) the regulation, licensing, taxing and sale of intoxicating liquor by the drink in public places within the county which derive not less than 30% of their gross receipts from the sale of food for consumption on the premises. Temporary permits for the sale of intoxicating liquor may be issued in any county in which the regulation, licensing, taxation and sale of intoxicating liquor by the drink in public places is approved pursuant to this section, but no temporary permit shall be issued for the sale of intoxicating liquor by the drink within any county in which the regulation, licensing, taxation and sale of intoxicating liquor by the drink in public places is prohibited."

This version of article 15, section 10 was approved by a majority of the voters of the state, and thereby adopted, on November 4, 1986. Previously this section prohibited "open saloons" (L. 1947, ch. 248, § 1), which had been defined by the Kansas Supreme Court to include any establishment open to the public without any limit on who may enter or purchase alcoholic beverages to be consumed on the premises. State ex rel. v. Kennedy, 225 Kan. 13, syl. § 13 (1978); Attorney General Opinion No. 85-174. The 1986 amendment authorized the legislature to allow, regulate, license and tax "open saloons" in certain circumstances. If a majority of the residents of a county voted to adopt the constitutional amendment, sale of liquor by the drink in that county was automatically allowed in public places meeting the 30% food sale requirement or public places having obtained a temporary permit, subject to legislative authorization. [The constitutional provision is not self-executing. Colorado Interstate Gas Co. v. Board of Morton County Comm'rs, 247 Kan. 654, 659 (1990).] The legislature enacted such authorization in 1987. L. 1987, ch. 182, § 88, now codified at K.S.A. 1991 Supp. 41-2642. Alternatively, counties in which a majority of voters did not approve the constitutional amendment could still submit such a

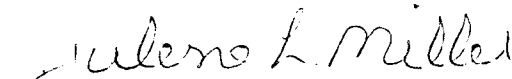
proposition to the electors at a later time, subject to legislative authorization. The authorization is contained in K.S.A. 1991 Supp. 41-2646. Further, counties that had approved the constitutional amendment, or that later voted to allow liquor by the drink, could submit a proposition to drop the 30% food sales requirement pursuant to legislative authorization. This authorization also is contained in K.S.A. 1991 Supp. 41-2646. Finally, any county having liquor by the drink in public places could submit a proposal to prohibit it. K.S.A. 1991 Supp. 41-2646. Article 15, section 10 is self-executing in one respect: it allows issuance of temporary permits for the sale of liquor by the drink in public places in any county in which liquor by the drink is not prohibited.

In our opinion, article 15, section 10 gives the legislature much discretion in determining when and where liquor by the drink may be permitted, subject to an election by the county. Legislative authority to allow submission of a proposition to limit sale of liquor by the drink in a county to public places holding temporary permits would be consistent with the courts' view of the legislature's power in the area of liquor control. See Tri-State Hotel v. Londerholm, 195 Kan. 748 (1965); State v. Payne, 183 Kan. 396 (1958). Therefore, in our opinion, article 15, section 10 of the Kansas constitution does not preclude the legislature from amending K.S.A. 1991 Supp. 41-2646 to allow counties to consider a proposition to limit sales of liquor by the drink in public places to those which obtain a temporary permit. K.S.A. 1991 Supp. 41-2642 would need to be amended as well, should the legislature choose to do this.

Very truly yours,



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