

Subject Cities
Copy to Gaming
Licenses - Liquor
Private Clubs



STATE OF KANSAS

Office of the Attorney General

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

VERN MILLER
Attorney General

July 15, 1974

Opinion No. 74- 230

Daniel B. Denk
Assistant City Attorney
Legal Department of Kansas City
Ninth Floor - Municipal Office Bldg.
One Civic Center Plaza
Kansas City, Kansas 66101

Dear Mr. Denk:

You inquire concerning a proposed zoning ordinance which is being considered for adoption by the City of Kansas City, Kansas, having especial application to private liquor clubs licensed under K.S.A. 41-2601 et seq.

The changes effected by the ordinance entail, first, amendment of the zoning classification ordinance to delete private club use from any specific classification. Thus, under the proposed ordinance, private clubs may be operated only under the authority of annual special permits issued pursuant to the ordinance.

Section 27-103(1) of the proposal states thus:

"The lawful use of land, except for use as a private club, existing at the time of adoption of this article may be continued, although such use does not conform to the provisions hereof, but if such nonconforming use is discontinued, any future use of such premises shall be in conformity with the provisions of this article."

Proposed section 27-103(3) states thus:

"The lawful use of land or building for private club purposes existing at the time of the adoption of this section may be continued, although such land or building does not conform with the provisions hereof, provided that if such use is discontinued

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for a period of six (6) months or longer or if any change of ownership of the land or building occurs or any alteration of the named club licensee occurs, then any future use of such land or building shall be in conformity with the provisions of this article."

Proposed section 27-103(4) requires that a permit be obtained from the City Commission authorizing any new nonconforming use for a private club. The application for such a permit is to be reviewed by the Planning Department, with the Development Review Committee, on the basis of, but not limited to, nine enumerated criteria or considerations. With one conspicuous exception, these criteria or considerations are those generally pertinent to zoning actions generally, i.e., whether the proposed use will destroy aesthetics of the surrounding development, result in increased traffic or objectionable noise, vibration, dust or lighting, will pollute the air or water, would destroy an irreplaceable natural resource, would result in excessive erosion, or would result in overcrowding of land or cause an undue concentration of population. The last-numbered criterion is thus:

"Whether granting of the special permit will adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare of the community."

This, of course, is but a statement of the general basis of the police powers of the city, and in and of itself, is too general and nondescriptive of any pertinent identifiable factors which might appropriately be considered in reviewing and acting upon a permit application. Thus, an applicant might satisfy all of the enumerated specific criteria, but yet be found wanting for a reason entirely unrelated to traditional zoning considerations, i.e., that for unspecified and unidentifiable reasons granting of the permit for a new conforming use for a private club would "adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare," or all of these, of the community.

In addition, a nonreturnable fee of \$20 is required to accompany any permit application.

This proposed ordinance must be considered in light of state laws regarding both zoning and liquor control.

K.S.A. 12-707 states in pertinent part thus:

"The governing body of any city is hereby authorized by ordinance to divide such city into zones or

districts, and regulate and restrict the location and use of buildings and the uses of the land within each district or zone. Such zones or districts may be created for the purpose of restricting the use of buildings and land . . . for dwellings, business, industry, conservation . . . or for other purposes deemed necessary. The use of buildings and land and the regulations and restrictions upon the use of the same shall be uniform as to each zone or district but the uses and regulations and restrictions in any one zone or district may differ from those in other zones or districts. [Emphasis supplied.]

By deleting private club use from all zoning use classifications, the proposed ordinance becomes in effect, as to private clubs, not a zoning ordinance at all, but a separate licensing procedure applicable specifically not to the use of land or buildings in any particular zone or district, but to the operation of a private club anywhere in the city. The result of the ordinance is to constitute the city a separate and independent licensing entity for private clubs, unrelated to and independent of the licensing authority of the state pursuant to K.S.A. 41-2601 et se.

The question is then posed whether the city may undertake such a role, or whether the licensing of private clubs is solely within the province of the state, subject, of course, to compliance by the licensee with bona fide zoning laws of the appropriate political subdivision. K.S.A. 41-2631 states in part thus:

"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."

This statute was considered in Leavenworth Club Owners Ass'n. v. Atchison, 208 Kan. 318, 492 P.2d 183 (1971), wherein the court considered a city ordinance prescribing closing hours more restrictive than those prescribed by K.S.A. 41-2614:

"No club licensed hereunder shall allow the serving, mixing or consumption of alcoholic liquor on its premises between the hours of 3 a.m. and 9 a.m. on any day other than a Sunday nor between the hours of 3 a.m. and 12 noon on a Sunday."

Although the hours prescribed by the city obviously differed from those allowed by statute, the court took the view that they were neither "in conflict with or contrary to" those hours --

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merely different. The point might seem merely semantic. In Blue Star Supper Club v. City of Wichita, 208 Kan. 731, 495 P.2d 524 (1972), the court elaborated somewhat on the general question:

"In concluding that the regulation and control of the consumption of alcoholic liquor is not an area exclusively reserved by the state we believe it is significant that when the legislature adopted K.S.A. 1971 Supp. 41-2631 as a component part of the Private Club Act, and forbade therein the enactment of any ordinance conflicting with the act, it did not include a pre-emptive provision. We cannot view the omission as unintentional. The legislature was perfectly aware of the method by which it could have vested exclusive control and regulation of liquor consumption in the state had it so intended, as is evidenced by its inclusion of the pre-emptive provision contained in K.S.A. 41-208."

Thus, the court declined to view the Private Club Act as preemptive of municipal powers as a general matter. Specific provisions of the act, however, may by clear and express direction, or by reasonable inferences therefrom, preclude municipal action in particular matters. Licensing, in our view, is such a matter. K.S.A. 41-2622 provides in pertinent part thus:

"At the time application is made to the director for a club license under the terms of this act, the applicant shall pay an annual fee of two hundred fifty dollars (\$250): Provided, That in addition to such license fee, any city in which a licensed class B club is located or if such licensed premises is not located in a city, the board of county commissioners of the county where the licensed premises is located, shall levy and collect an annual occupation or license tax on such club in an amount not less than one hundred dollars (\$100) nor more than two hundred fifty dollars (\$250): . . . but no other occupational or excise tax or license fee shall be levied by any city or county against or collected from such club licensee." [Emphasis supplied.]

Clearly and expressly, no other tax or license fee may be exacted for the privilege of operating a private club. By, in our view, equally clear and direct inference, no city or county has the power to grant or withhold a license for the privilege to conduct and operate a private club. Indeed, the city or county is directed to levy an occupation or license tax on any licensed

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club located in its territory. Inferentially, the city has no power to impose such a fee or license for the privilege of operating a club upon or against an applicant who seeks to establish a club not yet located in the city or county. Similarly, in our view, a city or county has no power to require a municipal license, with or without fee, for the privilege of operating a private club other than that which is required by the Private Club Act. It is clear, moreover, that under K.S.A. 41-2609, only the Director is empowered to revoke or suspend a license of a private club. Under section 27-103(b) of the proposed ordinance, the city would in effect assume a similar power unto itself, through the power to refuse renewal, or to revoke a permit once issued or removed.

Under K.S.A. 41-2605, the director "shall" issue a license to any person qualifying under the act. This license entitles the holder thereof to operate a private club on duly licensed premises in any city or county in the State of Kansas, the only deference to local authority being that of K.S.A. 41-2608, which directs that no license shall be issued for premises unless the "city, township or county zoning code allows a clubhouse or club-room at that location."

Insofar as concerns private clubs, the proposed ordinance considered in its entirety is not a zoning ordinance envisioned by K.S.A. 12-707, dividing the city into zones or districts and regulating the uses of land and buildings thereon, but a separate licensing act for private clubs, which in our view, is prohibited by K.S.A. 41-2601 et seq.

A rather more technical objection may be raised, in addition, to section 27-103(3), which prescribes that an existing nonconforming use is abandoned "if any change of ownership of the land or building occurs or any alteration of the named club licensee occurs" At 8A McQuillin, Municipal Corporations, § 25.191, the writer states thus:

"[T]he mere transfer or change of ownership is not an abandonment of the right to a nonconforming use, which is sometimes said to 'run with the land,' and which may be transferred to a successor in title. And a lessee has the right to use premises for a nonconforming use to the extent of the prior use by the lessor or a former tenant. In fact, an attempt by ordinance to abridge the continuing character of the right to a nonconforming use has been deemed invalid." [Footnotes omitted.]

We have not done extensive research on this particular point, but offer this citation for whatever consideration it may merit.

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In sum, to recapitulate, we cannot but conclude that the licensing requirements of the proposed ordinance are beyond the scope of permissible municipal authority under K.S.A. 41-2601 et seq.

Yours very truly,



VERN MILLER
Attorney General

VM:JRM:jsm

cc: Frank Bien
League of Kansas Municipalities
112 West Seventh
Topeka, Kansas 66603