



STATE OF KANSAS

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November 16, 1977

ATTORNEY GENERAL OPINION NO. 77-360

Mr. Robert C. Johnson
City Attorney of Herington
2 North Broadway
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Herington, Kansas 67449

Re: Cities--Home Rule--Alcoholic Liquor Consumption

Synopsis: Under Article 12, § 5 of the Kansas Constitution, the City of Herington may not exempt itself from the prohibitions of K.S.A. 41-719, so as to authorize the consumption of alcoholic liquor on the premises of a municipally-owned community building.

* * *

Dear Mr. Johnson:

You inquire whether the City of Herington may by charter ordinance exempt its community building, a publicly owned facility, from the prohibition against consumption of alcoholic liquor thereon which is imposed by K.S.A. 41-719, and adopt in lieu thereof other restrictions and prohibitions.

K.S.A. 41-719 was originally enacted as section 82 of ch. 242, L. 1949, the 1949 Liquor Control Act. Insofar as pertinent here, as originally enacted it forbade any person "to drink or consume alcoholic liquor . . . upon property owned by the state or any governmental subdivision thereof." As a result of subsequent amendments, certain cities and counties are permitted to exempt themselves from this prohibition, as follows:

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"[B]y ordinance, any city having a population of more than two hundred thousand (200,000) may by ordinance exempt certain property, title of which is vested in such city, from the provisions of this act: And provided further, That the board of county commissioners of any county having a population of not less than one hundred and fifty thousand (150,000) may exempt, by resolution, specified property, the title of which is vested in such county, from the provisions of this act."

Thus, the provision does not apply uniformly to all cities or counties, and you inquire whether the City of Herington may, in the exercise of its constitutional home rule authority, exempt itself from this provision. Insofar as pertinent here, Article 12, § 5(b) of the Kansas Constitution provides thus:

"Cities are hereby empowered to determine their local affairs and government Cities shall exercise such determination by ordinance passed by the governing body only in such cases as prescribed by the legislature, subject only to enactments of the legislature of statewide concern applicable uniformly to all cities, [and] to other enactments of the legislature applicable uniformly to all cities"

On the face of the matter, the consumption of alcoholic liquor on the premises of the community building of the City of Herington is preeminently a local affair, having no extralocal application whatever. Thus, it is an appropriate subject for local legislation under Article 12, § 5, subject to legislation which is "applicable uniformly to all cities." K.S.A. 41-719 is demonstrably not applicable uniformly to all cities, and thus, again on the face of the matter, the city may legislate on the subject by the enactment of a charter ordinance. Article 12, § 5(c)(1) prescribes how the legislative power of the city shall be exercised under the home rule article thus:

"Any city may by charter ordinance elect in the manner prescribed in this section that

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that the whole or any part of any enactment of the legislature applying to such city, other than enactments of statewide concern applicable uniformly to all cities, other enactments applicable uniformly to all cities, and enactments prescribing limits of indebtedness, shall not apply to such city."

It may be argued, however, that regardless of the nonuniform application of K.S.A. 41-719, that the legislature has withdrawn from Kansas cities all legislative authority whatever to permit or prohibit consumption of alcoholic liquor contrary to that section. K.S.A. 41-208 states in pertinent part thus:

"The power to regulate all phases of the control of the manufacture, distribution, sale, possession, transportation and traffic in alcoholic liquor . . . 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." [Emphasis supplied.]

Preemption extends, thus, only to manufacture, distribution, sale, possession, transportation and traffic in alcoholic liquor. The proposed charter ordinance does not relate to any of these subjects, but only to consumption.

In Blue Star Supper Club, Inc. v. City of Wichita, 208 Kan. 713, 495 P.2d 524 (1972), the court considered the validity of an ordinance of the City of Wichita prescribing hours of closing for clubs licensed under the Kansas Private Club Act, K.S.A. 41-2601 et seq. It was urged against that ordinance that it violated the preemptive clause of K.S.A. 41-208, supra, and that the city has no power whatever to prescribe lawful hours of consumption. The court disagreed:

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"In our opinion the pre-emptive provisions of the foregoing statute are not as broad or as inconclusive [sic] as the plaintiff suggests. By its own terms, the statute applies only to the act of which it is a part -- the Liquor Control Act of 1949

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. . . . This pre-emptive clause contains no reference whatever to the consumption of alcoholic liquor, nor were any restrictions placed upon consumption in the entire Liquor Control Act, with one exception. [K.S.A. 41-719]" 208 Kan. at 733.

Moreover, the court found no preemptive provision respecting the consumption of alcoholic liquor in the Private Club Act, and accordingly, it concluded thus:

"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"
208 Kan. at 735.

See also, City of Lyons v. Suttle, 209 Kan. 735 at 738, 498 P.2d 9 (1972).

Concluding, then, that the legislature has not preempted municipalities from regulating the consumption of alcoholic liquors by the express preemptive language of the first sentence of

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K.S.A. 41-208, the question remains whether the proposed charter ordinance is affected by the second sentence of that section 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 sentence applies uniformly to all cities, imposing upon them equally the burden of compliance with each provision of the act, whether each such provision is uniformly or nonuniformly applicable to all cities. Thus, while the legislature has not preempted municipal regulation of the consumption of alcoholic liquor, it has by a statute which is uniformly applicable to all cities so restricted the exercise of that power as effectively to preclude the exercise of home rule power by a city to exempt itself from K.S.A. 41-719, despite its unequal application to all cities.

Thus, I must conclude that the city may not exempt itself by charter ordinance from K.S.A. 41-719 so as to authorize the consumption of alcoholic liquor on the premises of a municipally-owned community building.

Yours truly,


CURT T. SCHNEIDER
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