STATE OF KANSAS

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April 19, 1978

ATTORNEY GENERAL OPINION NO. 78-150

The Honorable Lynn W. Whiteside
State Representative
3rd Floor - State Capitol
Topeka, Kansas 66612

The Honorable Ardena Matlack
State Representative
3rd Floor - State Capitol
Topeka, Kansas 66612

The Honorable Lee Hamm
State Representative
3rd Floor - State Capitol
Topeka, Kansas 66612

Re: Intoxicating Liquors--Open Saloon--Private Club Act

Synopsis: A license issued under § 14(b)(3)(B) of 1978 Senate Bill No. 952 does not authorize the sale of alcoholic liquor. Assuming, for the purposes of argument, that such a license did authorize the holder to engage in the sale of alcoholic liquor, this bill authorizes the operation of a facility for the sale of alcoholic liquor by the drink to members of the public on the premises of a licensed food service establishment, independently of the sale and consumption of food, and such a facility may constitute an "open saloon" in violation of Article 15, § 10 of the Kansas Constitution.

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Dear Representatives:

Apparently for the first time in Kansas history, the Kansas Legislature has purported to authorize the sale of alcoholic liquor

by the drink. The vehicles for doing so are Senate Bill 952 and Substitute for Senate Bill 849. You inquire concerning the constitutionality of these measures.

Section 14(b)(3)(B) of Senate Bill 952 amends the Kansas Private Club Act, K.S.A. 41-2601 *et seq.*, to enlarge the definition of "class B club" to include

> "[a] premises which is a licensed food service establishment, as defined by K.S.A. 1977 Supp. 36-501 and amendments thereto, of which not less than fifty percent (50%) of the gross receipts in each calendar year are from the sale of food for consumption on the premises."

In addition, section 14(d) exempts these private clubs from the operation of liquor pools, and sections 16 and 17 exempt licensed restaurant clubs from the prohibition against the sale of alcoholic liquor, either by the bottle, case, barrel, keg, cask or drink. In addition, 1978 Senate Bill 849 amended the Kansas Liquor Control Act to provide that nothing in that act shall prohibit the sale of alcoholic liquor by the newly licensed restaurant clubs. Thus, the legislature has exempted the licensed restaurant clubs from every prohibition in both the Liquor Control Act and the Private Club Act which prohibit the sale of alcoholic liquor. The question remains whether a class B club license which is granted to a restaurant under this bill grants the holder permission to sell alcoholic liquor.

The Private Club Act, K.S.A. 41-2601 *et seq.*, was passed in 1965, and its constitutionality was upheld by the Kansas Supreme Court in *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 749, 408 P.2d 864 (1965). A license granted thereunder conferred upon the holder authority to dispense alcoholic liquor belonging to the members, either from a liquor pool or from the member's own bottle, and the licensed premises are constituted a lawful place of consumption. Under the existing Private Club Act, a license does not confer upon the holder the authority to *sell* alcoholic liquor, but only to dispose liquor as the agent of its members.

Senate Bill 952 and Substitute for Senate Bill 849 removes all statutory prohibitions against the sale of alcoholic liquor by

licensed restaurant clubs. However, there is no language which affirmatively states that the license empowers the holder to *sell* alcoholic liquor. Under conventional legal doctrine, a license is a privilege granted under the authority of the state to carry on a particular business, profession or other activity described in the statutory authority under which the license is granted. There is no language in the existing Private Club Act or in either of the bills considered here which affirmatively indicates that a private club license, issued to any class of club, authorizes the licensee to sell alcoholic liquor. Certainly, the legislature has repealed all statutory prohibitions against the sale of alcoholic liquor by class B restaurant licensees. Absent those statutory prohibitions, a class B restaurant licensee is authorized to sell alcoholic liquor only if the statutory authority under which the license is granted permits the holder to do so. It may be argued that the granting of such authority, to sell alcoholic liquor, should be inferred from the legislative action repealing the statutory prohibitions; *i.e.*, if it is not prohibited, it is permitted. However, if sales are permitted, it is only because the license itself entitles the holder to make such sales. If it was the legislative intent that the holder of a class B license be authorized by that license to sell alcoholic liquor, the legislature could well have said so. It did not, however. If sales are permitted by licensed restaurant clubs, it is only because the statutory language under which the license is granted permits such sales. While it was removing prohibitions against the sales, the legislature did not, at the same time, amend the substantive authority which a class B restaurant club license entails, so as to authorize the sale of alcoholic liquor by such licensees.

Thus, it is my opinion that a class B club license which is granted to a licensed food service establishment under Senate Bill 952 does not authorize the licensee to engage in the sale of alcoholic liquor.

If, however, the license did authorize such sales, the question then arises whether the operation of such an establishment would constitute an "open saloon" in violation of Article 15, § 10 of the Kansas Constitution. In 1880, the Kansas Constitution was amended to provide that the "manufacture and sale of intoxicating liquors shall be forever prohibited in this state, except for medical, scientific and mechanical purposes." In 1948 the voters approved an amendment repealing this language and stating thus:

> "The legislature may provide for the prohibition of intoxicating liquors in certain areas. Subject to the foregoing, the legislature may regulate, license and tax the manufacture and sale of intoxicating liquors, and may regulate the possession and transportation of intoxicating liquors. *The open saloon shall be and is hereby forever prohibited.*" [Emphasis supplied.]

The "open saloon" prohibition is thus a relatively recent addition to the Kansas Constitution, despite its anachronistic language. The Constitution does not define the term "open saloon." 48 C.J.S., *Intoxicating Liquors*, § 15, the writer states thus:

> "As a word of modern origin, the term 'saloon' has a very definite general meaning, which is well-known, and generally understood as a place where intoxicating liquors are sold at retail, and consumed or drunk; a building or place where liquors are kept for sale at retail; a place for retailing spirituous liquors; a place to which the general public has access where liquors are sold by the drink, over a bar, to be drunk on the premises. In its popular sense, a saloon is a room rather than a building with several rooms, although it may include more than one room . . . ." [Footnotes omitted.]

Senate Bill 952 has been represented by its proponents as doing no more than permitting persons dining in restaurants and other food service establishments to purchase and be served alcoholic liquors by the drink with their meals. Thus, there has been much debate whether an "open saloon" is a place where only alcoholic liquor and no, or very little, food is served, or whether a saloon includes any place, including a restaurant, where alcoholic liquor is sold and served by the drink. I find only one case where this question was addressed. In *Lendholm v. People*, 55 Colo. 467, 136 P. 70 (1913), the defendant appealed from a conviction for

keeping open on Sunday a restaurant where alcoholic liquors were served, under a statute which required every "saloon, bar, other place where" liquors are sold, to be closed on Sunday. The defendant argued that because a "restaurant" was not specifically mentioned, it did not fall within this statute because it was not a saloon. The court addressed the question at some length, from which we quote some limited portion:

> "A restaurant that is used solely as an eating saloon, therefore, does not come within the terms of the statute. . . . It is equally certain, however, that a restaurant where intoxicating liquors are kept and habitually sold to the public in small quantities does come within its terms, for it is then a 'saloon or other drinking place' within the meaning of the law.
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> The name by which a place is called does not, in law, fix its status. The character of a place, what it really is, is fixed and determined by that which habitually takes place therein. If the place be open to the public to whom meals are regularly served, it is an eating saloon; but if intoxicating liquors are likewise so habitually served therein, it is also a drinking saloon. Nor can this be affected by the comparative number of sales of food and sales of liquor, or the comparative revenue derived from one or the other. The test of the character of the place cannot be: What is its principal business, but what business is there habitually carried on? If it consists, in whole or in part, of habitually selling intoxicating liquors in quantities less than one quart, to the public generally, it is a saloon or other drinking place within the meaning of the law." 136 Pac. at 70, 71.

Under this case, of course, a restaurant is an "open saloon" if alcoholic liquors are sold and consumed there. In *Covert v. State Board of Equalization*, 173 P.2d 545 (Calif. 1946), the court considered a dispute arising under a provision of the California Constitution which prohibited the sale or consumption of intoxicating liquors in any "public saloon, public bar or public barroom," but permitted such sale and consumption in

> "any bona fide hotel, restaurant, cafe . . . or other public eating place."

Because the California Constitution expressly permitted sale and consumption in restaurants, and the court was faced only with determining whether a particular restaurant operation was a "bona fide" restaurant, the case affords little guidance in construing our own "open saloon" prohibition to determine whether it includes any restaurant which sells and serves alcoholic liquor by the drink.

As stated above, the "open saloon" prohibition was added to the Kansas Constitution by the voters at the general election in 1948. The 1949 legislature enacted the Liquor Control Act, section 92 of which defined the term for the purposes of that act thus:

> "It shall be unlawful for any person to own, maintain, operate or conduct either directly or indirectly, an open saloon. For the purposes of this section, the words 'open saloon' mean any place, public or private, where alcoholic liquor is sold or offered for sale or kept for sale by the drink or in any quantity of less than one-half pint, or sold, offered for sale, or kept for sale for consumption on the premises where sold."

This definition is not, of course, binding upon subsequent legislatures, nor, most certainly, is it binding on the courts of this state in construing the breadth of the constitutional prohibition. The legislature took the term from the constitution, obviously, and the statute may be taken as a legislative effort to implement

by penal statutes the constitutional prohibition. The legislative interpretation is not binding upon the courts, but it is certainly instructive of the construction given the prohibition by the elected representatives of the voters who approved it at the 1948 general election.

The 1978 legislature, with a grandiose view of its own powers, purported to amend the constitution by legislation. Section 13 of Senate Bill 952 is amended to state thus:

> "*As used in section 10 of article 15 of the constitution of the state of Kansas* and this section [K.S.A. 41-803 as amended], 'open saloon' means any place, public or private, where alcoholic liquor is sold or offered or kept for sale by the drink or in any quantity of less than two hundred (200) milliliters (6.8 fluid ounces) or sold or offered or kept for sale for consumption on the premises where sold, but does not include any class B club licensed in accordance with K.S.A. 41-2601 to 41-2634, inclusive, and amendments thereto."

In *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 749, 408 P.2d 864 (1965), the court pointed out that legislative attempts such as this to amend the constitution were ineffectual:

> "We agree with the plaintiffs' contention that the legislature cannot amend Article 15, Section 10, by its fiat in defining an arrangement for the dispensing of alcoholic liquor by the drink as being not an 'open saloon.'" 195 Kan. at 757.

In the balance of the paragraph, the court went on to hold that licensed clubs did not constitute an "open saloon" because there was no sale of alcoholic liquor: the club purchased the liquor from a licensed retail dealer as the agent of its members, and the liquor disposed by the club was, at least in the eyes of the

law, the members' own property, and not that of the club. The suggestion that a club might not be held to be a saloon because meals might also be sold there was not raised nor, apparently, considered.

I find altogether too little guidance to offer an opinion whether the term "open saloon" in Art. 15, § 10 is used as a constitutional euphemism, to prohibit absolutely the sale of alcoholic liquor by the drink under any and all circumstances. The 1949 legislature so defined it for the purposes of the Liquor Control Act; the dictum in *Tri-State Hotel Co. v. Londerholm*, *supra*, quoted above, inferentially suggests that the court has so viewed it; and the Colorado court in *Lendholm v. People*, *supra*, so construed the term as used in a state penal statute. On the other hand, even in that case, one justice dissented, stating in pertinent part thus:

> "The words 'saloon,' standing alone, has several definitions, but as employed in the statute under consideration should be given that meaning which the word usually conveys, namely, a place to which the general public has access where liquors are sold by the drink, over a bar, to be drunk upon the premises. No one would think of designating a dining room of a hotel or regular restaurant, where liquors are furnished in connection with meals, a saloon, but would employ the word only in designating a public place where liquors are sold over a bar, or by the glass. This is the popular understanding of what constitutes a saloon, and this restricted meaning should always be given where the context or circumstances require it." 136 Pac. at 72.

The Kansas Supreme Court might reiterate and reaffirm its dictum in *Tri-State* quoted above, or it might qualify or recede from that position in some manner, such as adopting the view represented in the foregoing dissent, and hold that a "saloon" does not include a "restaurant" in which alcoholic liquors are sold. I find no firm and definitive holding in prior decisions of the Kansas Supreme

Court, no dictum which I can confidently assume would be reaffirmed in response to arguments which might be made concerning the particular statutory language in this bill, and no clear weight of authority from other jurisdictions upon which to fashion an instructive and helpful opinion regarding the precise scope of the term "open saloon."

However, the saloon-restaurant argument does not fully respond to all the questions raised by Senate Bill 952. At least some of its supporters have sought to justify the bill as merely permitting the sale of alcoholic liquor in conjunction with meals in licensed food service establishments. Such claims grossly misrepresent the effect of the bill. Nothing in the bill would prohibit a class B restaurant licensee from erecting on the licensed food service premises a room which was designed and equipped solely for the sale of alcoholic beverages to the public for consumption on the premises, independently of the sale or consumption of food. Stated otherwise, the bill permits a licensee to operate on the licensed food service premises a bar separated by partition from a dining area or completely enclosed therefrom and connected only by a passageway, solely for the sale of alcoholic beverages by the drink to members of the public who resort thereto solely for that purpose. Hours of sale of alcoholic beverages are not restricted to hours during which food service is provided, and the sale of alcoholic beverages is not restricted to persons utilizing the restaurant facilities.

Giving the term "open saloon" its most restrictive definition, *i.e.*, as a place to which the general public has access for the purchase and consumption of alcoholic liquors by the drink over a bar, to be drunk on the premises, this bill would permit a class B restaurant licensee to operate such a facility, *i.e.*, an "open saloon," in conjunction with a food service establishment so long as the receipts from sale of alcoholic beverages, or *i.e.*, receipts from operation of the saloon, did not exceed fifty percent of the total gross receipts of the entire facility.

For the reasons stated above, I cannot resolve the question whether a restaurant, in which alcoholic liquor is sold by the drink for consumption with meals served there, constitutes an "open saloon." To recapitulate the views expressed herein, it is my view, first, that a class B restaurant license issued under § 14(b)(3)(B) of 1978 Senate Bill No. 952 does not authorize the holder thereof to engage in the sale of alcoholic liquor. In addition, it is

my opinion that, assuming *arguendo* that the license did carry such authority, it would permit the operation of an establishment which would constitute an "open saloon," in conjunction with a bona fide restaurant operation, in violation of Article 15, § 10 of the Kansas Constitution, and therefore I would advise the Director of Alcoholic Beverages to decline to issue a license to a licensed food service establishment under § 14(b)(3)(B) of the bill when and if an application is received therefor from a qualified applicant in a county in which the voters have approved such issuance at the general election in November of this year.

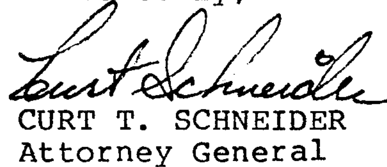
I understand that additional legislation is being planned to clarify whether the bill permits the issuance of such licenses commencing prior to July 1, 1978, or requires that licenses issue only after approval by the voters of the question authorizing such licenses at the general election in 1978. In my judgment, section 19 of the bill as it now stands forbids the issuance of a class B restaurant license to an applicant in any county until the voters have approved such licensure. However, legislative clarification of any troublesome ambiguities on this point would, of course, be helpful.

You do not indicate for what purpose you request my opinion concerning this measure. I offer, it, however, in order to offer guidance to the Legislature in the consideration of any amendments which it may deem appropriate to these bills during the remaining portion of the session. If the bill is not substantially amended, its validity must, of course, be determined, by a court of appropriate jurisdiction. I note an impatience in the media, as well as among many legislators, for an almost immediate determination as to its constitutionality. I have noted no such impatience respecting a single other measure passed by this session.

It is my judgment that the Director of Alcoholic Beverage Control, upon receiving an application for a license from an applicant from a county in which the voters have approved the issuance thereof, should decline to issue a license under § 14(b)(3)(B) of Senate Bill 952. To issue such a license, in my judgment, would be to mock the Constitution of this state which he, as well as myself, is sworn to uphold. The Kansas Constitution prohibits an "open saloon" absolutely, and it does not exclude those which are operated in conjunction with a restaurant, or in a restaurant, for that matter. The existing Private Club Act has led to the dispensing of alcoholic liquor by the drink on a legalized basis, hedged about with legal fictions and sham pretenses. If we, as a people,

are to deal forthrightly with the question, in my judgment, the people of the state must be permitted to vote on an appropriate amendment to the Kansas Constitution. Enforcement of this bill is fraught with grave difficulties. Circumvention of the Kansas Constitution by this bill, if it is upheld, will lead to gross abuses, unacceptable to those opposed, as well as to those in favor of, careful regulation of the sale and consumption of alcoholic liquor in this state.

Yours truly,



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