



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

August 14, 1978

ATTORNEY GENERAL OPINION NO. 78-262

Ms. Juanita Scott
City Clerk
Fifth and Main Streets
Galena, Kansas 66739

Re: Cities--Cereal Malt Beverages--Conduct on Licensed Premises

Synopsis: A city governing body has authority under K.S.A. 41-2704 to prescribe standards of conduct for premises licensed for the sale and dispensing of cereal malt beverages. A city may regulate conduct and entertainment on such premises by regulations which substantially parallel those upheld by the United States Supreme Court in *California v. LaRue*, 409 U.S. 109 (1972). An ordinance prescribing such standards and regulations need not be enacted as a charter ordinance, but should be enacted by ordinary ordinance.

* * *

Dear Ms. Scott:

At the request of the city council of the City of Galena, Kansas, you request our opinion concerning Charter Ordinance No. 78-1 of that city. Section 2 thereof states thus:

"It shall be unlawful for any owner, operator, manager or employee of any place of business licensed pursuant to KSCA [sic] 41-2701, et. seq., to provide service or provide entertainment to members or other patrons of said place of business in such

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a manner as to expose to said members, patrons or other persons: (A) his or her genitals, pubic hair, buttocks, perineum, anal region or pubic hair region; (B) any device, costume or covering which gives the appearance or simulates the genitals, pubic hair or buttocks, perineum, anal or pubic hair region, or (C) any portion of the areola of the female breast."

K.S.A. 41-2704 authorizes the city governing body to establish standards of conduct, and "rules and regulations concerning the moral, sanitary and health conditions of the places licensed."

The question which is raised is whether the ordinance quoted above comports with the First Amendment. In *California v. LaRue*, 409 U.S. 109, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972), the Court considered regulations which had been promulgated by the California Department of Alcoholic Beverage Control concerning the types of entertainment which may be offered in bars and nightclubs which it licensed. In pertinent part, those regulations prohibited the following kinds of conduct on licensed premises, as quoted by the Court:

- "(a) The performance of acts, or simulated acts, of 'sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.';
- (b) The actual or simulated 'touching, caressing or fondling on the breasts, buttocks, anus, or genitals';
- (c) The actual or simulated 'displaying of the pubic hair, anus, vulva or genitals';
- (d) The permitting by a licensee of 'any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus' "

The Court acknowledged that these regulations proscribed some forms of visual presentations which would not be found obscene under its decisions, and some performances which fall within the limits of the constitutional protection of freedom of expression. However, it continued thus:

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"[T]he critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments which it licenses to sell liquor by the drink

The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur simultaneously at premises which have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area which the Twenty-First Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution."

As stated in *Craig v. Boren*, 429 U.S. 1124, 51 L. Ed. 2d 574, 97 S. Ct. 1161 (1976), the Court in *LaRue* "relied upon the Twenty-First Amendment to 'strengthen' the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances 'partake more of gross sexuality than of communication. . . .'"

The Twenty-First Amendment vests substantial authority in the state respecting "alcoholic liquors." For purposes of the Kansas Liquor Control Act, K.S.A. 41-101 *et seq.*, the term "alcoholic liquor" is defined to exclude "any beer or cereal malt beverage containing not more than three and two-tenths percent (3.2%) of alcohol by weight." In *Craig v. Boren*, *supra*, in which the Court considered Oklahoma laws permitting the sale of 3.2 beer to males at age 21 and to females at age 18, the state invoked the Twenty-First Amendment in support of this classification. Although the Court rejected the argument that the amendment permitted discriminations which were forbidden by the Equal Protection Clause, it did not reject the argument on the basis that 3.2 beer was not an alcoholic beverage. Thus, the fact that the regulations govern conduct in premises licensed for the sale of 3.2 beer does not render the Twenty-First Amendment inapplicable, insofar as may be deemed to "strengthen" the local police power to prescribe and enforce standards of conduct therein.

The conduct described and prohibited by section 2 of the ordinance substantially parallels that which is prohibited by the regulations considered and upheld in *LaRue*, *supra*. Following that decision, I have no basis upon which to conclude that the ordinance described above it not within the authority of the city governing

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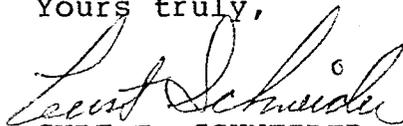
body. The conduct which is prohibited substantially parallels similar prohibitions which the Supreme Court has upheld, applicable to premises where alcoholic beverages are dispensed.

Concerning a second question, the ordinance is titled a charter ordinance. Article 12, § 5(c)(2) commences thus:

"A charter ordinance is an ordinance which exempts a city from the whole or any part of any enactment of the legislature as referred to in this section and which may provide substitute and additional provisions on the same subject. Charter ordinances shall be so titled, shall designate specifically the enactment of the legislature or part thereof made inapplicable to such city by the adoption of such ordinance and contain the substitute and additional provisions, if any, and shall require a two-third vote of the members-elect of the governing body of such city."

Clearly, the ordinance in question does not comply with the foregoing, for it does not exempt the city from any legislative enactment whatever. As a charter ordinance, the ordinance is facially defective. Given the failure of the ordinance to comply with the constitutional requirements governing the enactment of charter ordinances, it is entirely unclear whether the ordinance may nonetheless be enforced as a valid ordinary ordinance. That question appears not yet to have been decided by the Kansas Supreme Court. I suggest that this ordinance be repealed and that a new ordinance be enacted as an ordinary rather than a charter ordinance, in order to forestall any unnecessary arguments which might jeopardize its effective enforcement.

Yours truly,


CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj