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ATTORNEY GENERAL OPINION NO. 80-53

Thomas J. Kennedy, Director
Alcoholic Beverage Control
Department of Revenue
Fifth Floor, State Office Building
Topeka, Kansas 66612

Re: Intoxicating Liquors and Beverages--Licensing and Regulation of Clubs--Hours of Operation

Synopsis: The language of K.S.A. 41-2614 is plain and unambiguous in prescribing only the hours during which alcoholic liquor may be served, mixed or consumed on the premises of a private club. Neither this nor any other statute conveys a legislative intent and purpose that a private club be limited as to the times it may provide other lawful services to its members and their guests. Therefore, an administrative policy that prescribes general closing hours for private clubs, whether embodied in administrative rules and regulations or otherwise, is without legal force and effect.

* * *

Dear Mr. Kennedy:

You have requested our interpretation of K.S.A. 41-2614, which reads as follows:

> "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."

In your letter of request you have advised that the Division of Alcoholic Beverage Control "has for years interpreted that statute" as prescribing the actual hours of operation for private clubs licensed under and regulated by the provisions of K.S.A. 41-2601 et seq. However, you advise that recently legal counsel for one of the private clubs in Johnson County has questioned this interpretation, suggesting that K.S.A. 41-2614 prescribes nothing more than the hours during which alcoholic liquor may be served, mixed or consumed on a club's premises, and that neither this statute nor any other statute prescribes the actual hours of operation for a private club during which other services, such as the serving of food, may be provided a club's members. You indicate that the Division's interpretation has not been codified by promulgation as a rule or regulation, and you have solicited our advice and counsel.

The question you have raised is primarily one of statutory construction, and there are several rules enunciated by the Kansas Supreme Court which we believe to be of pertinence to this issue. Of principal significance is the following statement in Southeast Kansas Landowners Ass'n v. Kansas Turnpike Auth., 224 Kan. 357 (1978):

> "The fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs when that intent can be ascertained from the statutes. Easom v. Farmers Insurance Co., 221 Kan. 415, Syl. 2, 560 P.2d 117 (1977); Thomas County Taxpayers Ass'n v. Finney, 223 Kan. 434, 573 P.2d 1073 (1978); Brinkmeyer v. City of Wichita, 223 Kan. 393, 573 P.2d 1044 (1978)." 224 Kan. at 367.

The Court also has provided guidance in ascertaining the legislature's intent, and we believe the following statement of the Court to be of relevance here:

> "A primary rule for the construction of a statute is to find the legislative intent from its language, and where the language used is plain and unambiguous and also appropriate to the obvious purpose the court should follow the intent as expressed by the words used and is not warranted in looking beyond them in search of some other legislative purpose or extending the meaning

> beyond the plain terms of the Act. (Alter v. Johnson, 127 Kan. 443, 273 Pac. 474; Hand v. Board of Education, 198 Kan. 460, 426 P.2d 124; City of Overland Park v. Nikias, 209 Kan. 643, 498 P.2d 56; Hunter v. Haun, 210 Kan. 11, 499 P.2d 1087.)" City of Kiowa v. Central Telephone & Utilities Corporation, 213 Kan. 169, 176 (1973).

Of similar import is the Court's pronouncement in Lakeview Gardens, Inc. v. State, ex rel. Schneider, 221 Kan. 211 (1976):

> "[T]his court must ascertain and give effect to the intent of the legislature. In so doing we must consider the language of the statute; its words are to be understood in their plain and ordinary sense. (Hunter v. Haun, 210 Kan. 11, 13, 499 P.2d 1087; Roda v. Williams, 195 Kan. 507, 511, 407 P.2d 471.) When a statute is plain and unambiguous this court must give effect to the intention of the legislature as expressed rather than determine what the law should or should not be. (Amoco Production Co. v. Armold, Director of Taxation, 213 Kan. 636, 647, 518 P.2d 453; Jolly v. Kansas Public Employees Retirement System, 214 Kan. 200, 204, 519 P.2d 1391.)" 221 Kan. at 214.

Also, without unduly burdening this opinion by further quotation, we commend to your attention the following cases in support of the foregoing rules of statutory construction: Henre v. Board of Education, 201 Kan. 251, 253 (1968); Phillips v. Vieux, 210 Kan. 612, 617 (1972); Weeks v. City of Bonner Springs, 213 Kan. 622, 629 (1974); Underwood v. Allmon, 215 Kan. 201, 204 (1974); State v. V.F.W. Post No. 3722, 215 Kan. 693, 695 (1974); Sampson v. Rumsey, 1 Kan.App.2d 191, 193 (1977); Jackson County State Bank, 1 Kan.App.2d 649, 650 (1977); and Rosedale State Bank & Trust Co. v. Stringer, 2 Kan.App.2d 331, 339 (1978).

Based on these authorities, it is our opinion that K.S.A. 41-2614 cannot be read as prescribing the general closing hours of a private club for all purposes. The language of this statute is plain and unambiguous in prescribing only the hours during which alcoholic liquor may be served, mixed or consumed on a club's premises, and we believe this interpretation gives effect

to the legislative intent manifested by the words employed, to be understood in their plain and ordinary sense. Thus, there is no justification for "reading into" this statute more than the legislature intended to be included within its purview.

Because of ancillary issues raised in the correspondence submitted with your request, we are disposed to note two additional rules of statutory construction which support the foregoing conclusion. First, it is to be noted that any violator of 41-2614 is subject to the criminal penalties prescribed by K.S.A. 1979 Supp. 41-2633. For this reason alone, we are constrained to limit our discernment of the intent and purpose of 41-2614 to that which is expressed by its plain and unambiguous language. In this context, the rule of construction reiterated in State v. Howard, 221 Kan. 51 (1976), is relevant:

> "We are not unaware or unmindful of the rule requiring strict construction of penal statutes in favor of the persons sought to be subjected to their operation. State, ex rel., v. American Savings Stamp Co., 194 Kan. 297, 398 P.2d 1011; State v. Bishop, 215 Kan. 481, 483, 524 P.2d 712. The rule simply means that ordinary words are to be given their ordinary meaning. It does not permit or justify a disregard of manifest legislative intention appearing from plain and unambiguous language. State v. Walden, 208 Kan. 163, 166, 167, 490 P.2d 370." 221 Kan. at 54.

In accord is State v. Logan, 198 Kan. 211 (1967), wherein the Court states: "A penal statute should not be read so as to add that which is not readily found therein, or to read out what, as a matter of ordinary language, is in it." Id. at 213.

In addition, it has been suggested that the heading of 41-2614 compels a broader interpretation of that statute than we have expressed herein. This statute's caption, which was not supplied by the legislature when the statute was enacted (L. 1965, ch. 316, §14), but furnished instead by the revisor of statutes in carrying out his statutory duties, reads as follows: "Hours of operation for clubs." As noted in State v. Logan, supra at 217: "[T]he heading of a statute forms no part of the statute itself." See, also, Becker v. Roothe, 184 Kan. 830, 836 (1959), cited as authority for the foregoing quote from Logan.

Kansas case law on this point is in accord with general authorities:

> "For the purpose of explaining and clearing up ambiguities in the enacting clauses of statutes, reference may also be had to the headings of portions of statutes, such as titles, articles, chapters, and sections; but, where the meaning of the enacting clause is clear, it cannot be controlled by the headings thereof, especially where the headings have been prepared by the compilers and not by the legislature. The heading may not be used to create an ambiguity, or to extend or restrict the language contained in the body of the statute, although where it is part of the rule or statute, it limits and defines its effect. The wording of headings has little, if any, weight as an official interpretation, and the headings are but guides to the intent of the legislature. A heading which does not appear on the bill when passed, and which is ascertained and added to the act after its passage, is entitled to little, if any, weight." (Footnotes omitted.) 82 C.J.S. Statutes, §350.

Of similar import:

> "Where headings of chapters, articles, or sections are mere arbitrary designations inserted for convenience of reference by clerks or other persons who have no legislative authority, such heads are held not to be proper matters for consideration in the interpretation of the statute. In any event, where the language of an act itself is clear and unambiguous, resort may not be had to the heading of a section, or other subdivision heading, to create an ambiguity. A subtitle may not be used to restrict the scope of a statute which is clear." (Footnotes omitted.) 73 Am.Jur.2d Statutes, §96.

We believe one final comment regarding the intepretation of 41-2614 is appropriate. While the issue considered in this opinion has not been addressed squarely by the Kansas Supreme Court, its opinions indicate the Court's understanding of this statute's meaning that is consonant with our conclusion.

In Leavenworth Club Owners Assn. v. Atchison, 208 Kan. 318 (1971), the Court had under consideration the question whether a municipal ordinance was in conflict with 41-2614. In concluding that there was no conflict, the Court had occasion to restate in its own words the language of the statute, as follows:

> "[T]he wording is that no club licensed (under the act) shall allow the serving, mixing or consumption of alcoholic liquor on its premises between the hours of 3 a.m. and 9 a.m. or, on Sundays, 3 a.m. and noon." (Emphasis by the Court.) 208 Kan. at 319.

Similarly, in Blue Star Supper Club, Inc. v. City of Wichita, 208 Kan. 731 (1972), the Court also determined that there was no conflict between this statute and an ordinance of the City of Wichita, requiring that private clubs be closed to members and the public except during specified times which were identical to the hours prescribed in 41-2614 for the serving, mixing or consumption of alcoholic liquor. The following statement of the Court is pertinent in revealing the Court's understanding of this statute:

> "While the statute relates to the hours during which alcoholic liquor may be served, mixed or consumed on licensed club premises, the ordinance simply imposes closing hours. Those hours do not interfere with the time limitations of the statute. Although the hours set by ordinance for closing coincide with the hours during which the serving, mixing or consumption of alcoholic liquor is prohibited by statute, this coincidence does not imply that the statute and ordinance are at cross purposes, or that the ordinance contravenes the provisions of the statute. There is no disharmony between the two enactments; they may coexist with amity." (Emphasis added.) 208 Kan. at 732.

In our judgment, the foregoing quoted language clearly indicates the Court's impression that 41-2614 relates only to those times when alcoholic liquor may not be served, mixed or consumed, and does not prescribe general closing hours for all club functions. The subsequent opinion in Garten Enterprises, Inc. v. City of Kansas City, 219 Kan. 620 (1976), reaffirms our judgment. There, after noting that 41-2614 provides for the hours of operation of private clubs, the Court qualifies this statement by noting that the statute prohibits "them from allowing the serving, mixing or consumption of alcoholic liquor on their premises between the hours of 3:00 a.m. and 9:00 a.m. on any day other than Sunday and between the hours of 3:00 a.m. and 12:00 o'clock noon on Sundays." 219 Kan. at 623.

Before concluding, we believe it appropriate to consider the authority of the Division of Alcoholic Beverage Control to enforce its interpretations of the statutes that it administers. The case of Willcott v. Murphy, 204 Kan. 640 (1970), provides assistance in this regard. There, the Court considered an interpretive policy of the Director that the retail sale of refrigerated beer was not permitted, even though statutes did not expressly so provide. Such policy, stated in a memorandum of the Director, was found not to be authorized by the statutes it purported to implement and interpret. In addressing the fact that such statutes did not make a distinction between the sale of "warm" and "cold" beer, the Court stated:

> "Since the legislature chose not to do so, it is not the court's prerogative to question its wisdom in this regard, nor is it within the director's authority to legislate such a prohibition by means of regulations and memoranda. (State ex rel., v. Columbia Pictures Corporation, 197 Kan. 448, 417 P.2d 255.)
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> "Our decision is not to be construed to mean that the legislature does not have the power to prohibit the refrigeration of beer by a retailer, our holding is merely that it has not done so.

> "Since the enactment of the Kansas Liquor Control Act we have repeatedly said the legislature has full and complete power to regulate and control all phases of traffic in alcoholic liquor. (State v. Logan, 198 Kan. 211, 424 P.2d 565; State v. Payne, 183 Kan. 396, 327 P.2d 1071; and State v. Larkin, 173 Kan. 112, 244 P.2d 686.)
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> "We have also recognized that the director is clothed with broad discretionary powers to govern all phases of the traffic in alcoholic liquor and is authorized to adopt and promulgate such rules and regulations as shall be necessary to carry out the intent and purposes of the Liquor Control Act. (Chambers v. Herrick, 172 Kan. 510, 241 P.2d 748.) The power, however, must stem from the intent and purposes of the Act and does not include authority to take away by administrative regulation the right granted to a licensee to sell any legally packaged beer falling within the statutory definition thereof. The power to regulate, though declared to be broad, nevertheless, falls short of the power to legislate." 204 Kan. at 647, 648.

Even though the foregoing excerpt from Willcott concerns the powers of the Director under the Kansas Liquor Control Act, the principles stated therein are of general application in circumscribing the scope of administrative rules and regulations. Therefore, it is our further opinion that, under the present statutory scheme, the Secretary of Revenue, with the approval of the ABC Director, may not promulgate administrative rules and regulations which prescribe the general closing hours for private clubs. K.S.A. 41-2614 clearly prescribes the hours during which alcoholic liquor may not be served, mixed or consumed on the premises of a private club. However, neither this nor any other statute conveys a legislative

intent or purpose that a private club be limited as to the times it may provide other lawful services to its members and their guests.

Very truly yours,

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