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ATTORNEY GENERAL OPINION NO. 81-114

Mr. Michael J. Malone
District Attorney
Judicial and Law Enforcement Center
Lawrence, Kansas 66044

Re: Intoxicating Liquors and Beverages -- Misdemeanors and Nuisances -- "Open Saloon" Defined and Prohibited

Synopsis: K.S.A. 1980 Supp. 41-803 is a valid, legislative enactment which prohibits the operation of an "open saloon." Pursuant to that statute, it would be unlawful for a private, closed membership organization that is not a licensed private club to sell or offer for sale alcoholic liquor by the drink to organization members and their guests for consumption at an organization meeting. Cited herein: K.S.A. 41-2601, K.S.A. 1980 Supp. 41-803, Kan. Const., Art. 15, §10.

* * *

Dear Mr. Malone:

You inquire whether it is lawful for a private, closed membership organization to sell alcoholic liquor by the drink to its members and their guests at a regular meeting of the organization held in a building which has neither a cereal malt beverage license nor a private club license. In presenting this inquiry, you question whether the Supreme Court of Kansas expressly struck down subsection (b) of K.S.A. 41-803 by the decision in State ex rel. Schneider v. Kennedy, 225 Kan. 13 (1978).

Article 15, Section 10 of the Kansas Constitution provides:

> "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."

The foregoing was adopted by the voters of Kansas at the general election held on November 2, 1948. In 1949 the Kansas Legislature enacted the Kansas Liquor Control Act (L. 1949, ch. 242) containing a statutory prohibition of the open saloon which provided, in part:

> "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." L. 1949, ch. 242, §92.

The foregoing definition remained intact until 1978 when it (then codified at K.S.A. 41-803) was amended so as to state the meaning of "open saloon," both as used in K.S.A. 41-803 and as contained in the Kansas Constitution. This amendment was contained in subsection (b) of K.S.A. 1978 Supp. 41-803, which provided:

> "As used in section 10 of article 15 of the constitution of the state of Kansas and this section, '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 State ex rel. Schneider v. Kennedy, 225 Kan. 13 (1978), the 1978 amendments to K.S.A. 41-2601 et seq. and K.S.A. 41-803 were challenged as violative of the open saloon prohibition

of the Kansas Constitution. In addressing the legislative definition of "open saloon," the Supreme Court of Kansas stated:

> "By this amendment the legislature disclosed it was redefining 'open saloon' as used in section 10 of article 15 of the constitution of the State of Kansas. The people of Kansas, however, did not give the legislature the right to define an 'open saloon' in the Kansas constitution." Id. at 26.

In recognition of the need for a judicial definition of the constitutional term, the Court stated:

> "We hold an open saloon is any establishment open to the public, without discrimination, where alcoholic beverages are dispensed or sold or served for consumption on the premises." Id. at 24.

Thus, the Supreme Court of Kansas, by defining the term "open saloon" as contained in the Kansas Constitution, effectively overruled the definition set out in K.S.A. 1978 Supp. 41-803 only as it purported to define a constitutional term. In so doing, however, the Court recognized the power of the legislature to enact legislation harmonious with a constitutional prohibition.

> "It is true as the respondent argues that the legislature may enact legislation to facilitate or assist in the operation of a prohibitory provision provided the legislation adopted is in harmony with and not in derogation of the provisions of the constitution. See State ex rel., v. Board of Education, 212 Kan. 482 Syl. 7, 511 P.2d 705 (1973). However, this does not give the legislature carte blanche to circumvent the mandates of the constitution." Id. at 22.

The Court also considered the statutory definition of "open saloon" which had been in effect from 1949 to 1978.

> "For 30 years the legislature followed its definition of an 'open saloon' as set forth in K.S.A. 41-803 in 1949. It distinguished private consumption and sale of intoxicating liquor by the drink from public consumption and sale in the Private Club Act of 1965.

> That definition of an 'open saloon' and the enactments which followed are reasonably within the parameters of the construction given the term 'open saloon' in the Kansas Constitution by the Supreme Court in this opinion." Id. at 25.

Having considered the history of the statutory definition of "open saloon," it is necessary to consider the proscriptions of K.S.A. 1980 Supp. 41-803, which provides the current definition of this term:

> "(a) It shall be unlawful for any person to own, maintain, operate or conduct either directly or indirectly, an open saloon.
>
> "(b) As used in this section, '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 club licensed pursuant to article 26 of chapter 41 of the Kansas Statutes Annotated.
>
> "(c) Any violation of the provisions of this section is a misdemeanor punishable by a fine of not more than five hundred dollars ($500) and by imprisonment for not more than ninety (90) days. " (Emphasis added.)

It is clear that the definition of open saloon set out in K.S.A. 1980 Supp. 41-803(b) differs from the judicial definition of the constitutional term provided in State ex rel. Schneider v. Kennedy, supra. While the former defines the term to include both public and private places (excluding licensed private clubs), the latter defines the term to include only establishments which are open to the public. Thus, because of the broader scope of the statutory definition, the proscription of K.S.A. 1980 Supp. 41-803 is more restrictive than the open saloon prohibition in the constitution, and in our judgment, this represents a valid exercise of the legislature's authority.

In the course of carrying out its constitutionally vested power to regulate intoxicating liquors, the legislature may enact legislation which is more restrictive than the provisions of the constitution require. Since the legislature has

the power to absolutely prohibit the sale and possession of intoxicating liquor, lesser legislatively-prescribed restrictions can hardly be considered invalid, so long as they do not circumvent the mandates of the constitution. Colby Distributing Co. v. Lennen, 227 Kan. 1979 (1980).

In conclusion, therefore, it is our opinion that K.S.A. 1980 Supp. 41-803 is a valid legislative enactment which is in harmony with and facilitates the open saloon prohibition established in Article 15, Section 10 of the Constitution of the State of Kansas. By virtue of this statute, it would be unlawful for a private, closed membership organization that is not a licensed private club to sell or offer for sale alcoholic liquor by the drink to organization members and their guests for consumption at an organization meeting.

Very truly yours,

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RTS:WRA:JEF:hle