STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

June 3, 1981

ATTORNEY GENERAL OPINION NO. 81-126

The Honorable James L. Francisco
Kansas Senate Chambers
Senate District 26
217 East English
Mulvane, Kansas 67110

Re: Intoxicating Liquors and Beverages -- Licensing and Related Provisions -- Effect of Annexation on Retailer's License

Synopsis: Riverside Township, in accordance with the provisions of K.S.A. 41-301, 41-302 and 41-303, is a separate, distinct entity for the purpose of exercising "local option" in the matter of sale of alcoholic liquors by the package. For that reason, the holder of a valid retail liquor license in that township may continue operation and annually renew such license, notwithstanding annexation of the property by the City of Derby, until such time as the City of Derby, including the territory annexed, conducts an election at which the majority of the electors vote against licensing the sale of alcoholic liquors by the package. Cited herein: K.S.A. 41-301, 41-302 and 41-303.

* * *

Dear Senator Francisco:

On behalf of a retail liquor licensee doing business in Riverside Township you have requested our opinion regarding what effect annexation of the retailer's property by the City of Derby would have on the retailer's license. It is our understanding that the electors of Riverside Township voted to permit the sale of alcoholic liquors by the package in the general election of 1948, and that Riverside Township has qualified for the issuance of retail liquor licenses in accordance with K.S.A. 41-303. Further, we understand that the electors of the City of Derby voted in the general election of 1948 and in an election held in 1965 to prohibit the

retail sale of alcoholic liquors by the package. Thus, you question what effect annexation by a "dry" city would have on an existing liquor retailer located in a qualifying, "wet" township.

The general provision for the issuance of a retail license is contained in K.S.A. 41-301 which provides, in part:

> "The director shall issue to qualified applicants, who have filed the bond and paid the registration and license fees required by this act, licenses to sell alcoholic liquor at retail in the original package within the corporate limits of cities and outside the corporate limits of cities in certain townships as provided in this act . . . ."

Further guidance for the issuance of retail licenses is set out in K.S.A. 41-302, which provides, in part:

> "In the absence of any vote on the question of licensing the sale of such liquors in cities of the first and second class wherein a majority of the qualified electors of such city who voted on the proposition to amend §10 of article 15 of the constitution of the State of Kansas at the general election held in November, 1948, shall have voted in favor of the adoption of such proposition and in cities of the third class located in townships wherein a majority of the qualified electors voted in favor of such constitutional amendment and in the absence of any further vote in cities of the first, second or third class in which a majority of the qualified electors of such city shall have voted at any special or general city election in favor of the licensing of the sale of alcoholic liquor by the package, the director shall continue to issue licenses to sell the same by the package therein for periods of one year, subject to all the terms and conditions of this act."

With respect to issuance of retail licenses outside the corporate limits of a city, K.S.A. 41-303 provides, in pertinent part:

> "The director may license the sale of alcoholic liquor at retail in the original package on premises not located in an incorporated city for use or consumption off the premises,

> if such premises are located in any township having a population of more than eleven thousand (11,000)."

From the foregoing statutory provisions it is clear that retailers' licenses may be issued in cities and selected townships which voted "wet" in the general election of 1948 until such time as an election results in a "dry" vote.

Although K.S.A. 41-302 establishes the status of a retailer's license when a city which was previously "wet" votes to become "dry," and K.S.A. 41-303 addresses the situation wherein a retail licensee located in a qualifying township is annexed by a "wet" city; we are unable to locate any specific statutory language or Kansas decisional law which considers annexation of a "wet" area by a "dry" city.

The reverse situation, i.e., the annexation of a "dry" area by a "wet" city has been considered by other jurisdictions. Rich-Hills Catering Company, Inc. v. Slattery, 448 S.W. 2d 379 (Ky. 1969); Canton v. Imperial Bowling Lanes, Inc., 16 Ohio St. 2d 47, 242 N.E. 2d 566 (1968); Blanchard v. Gauthier, 248 La. 1107, 184 So. 2d 531 (1966). In these cases it was determined that the status of the territory could not be altered by mere annexation, merger or re-designation of boundaries.

> "It is hardly conceivable that our General Assembly would grant to the people of the various governmental subdivisions the right to create 'dry' territory by their vote and at the same time vest in the legislative department of a city the right to nullify that vote by annexing the 'dry' territory into a 'wet' city.
>
> "We conclude that, when the people of any county, city, district or precinct have voted in favor of prohibition, a 'dry' status has been created that attaches to the involved territory and that status is unalterable unless it is changed by a vote of the people as provided by K.R.S. 242.200." Rich-Hills Catering Company v. Slattery, supra at 383.

The general rule with respect to local option status is summarized in an annotation in 25 A.L.R. 2d 863 as follows:

> "Because the theory of local option laws is that the people of a political or governmental unit shall have the right to determine their status, and the correlative right to change

> it, according to the provisions of those laws, a status once adopted is usually considered to attach to the territory which was originally bound by the vote, and to remain operative, unless lawfully changed, notwithstanding changes for other purposes in the designation, boundaries, or organization of the unit." Id. at 864.

The general rule regarding annexation to a municipal corporation is that the territory annexed is subject to the same burdens and same privileges as that territory within the original corporate limits. 56 Am. Jur. 2d, Municipal Corporations §56. Were the area to be annexed a portion of a township which did not qualify for the issuance of retailers' licenses pursuant to K.S.A. 41-303, it is our opinion that the general rule cited above would apply, and the annexed territory would be subject to the "dry" status of the annexing city. In the instant case, however, Riverside Township constitutes a separate, distinct entity with regard to "local option" considerations. Additionally, the electors of the area to be annexed have had no opportunity to participate in elections of the City of Derby relating to the retail sale of alcoholic liquor.

Based upon the general principles of law cited herein, it is our opinion that the "wet" status created in Riverside Township would not be altered due to annexation by the City of Derby. For that reason, it is our opinion the holder of a valid retail liquor license in Riverside Township may continue operation and annually renew their retailer's license until such time as the City of Derby, including the newly annexed territory, conducts an election at which the majority of the electors vote against licensing the sale of alcoholic liquors by the package.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

James E. Flory

James E. Flory
Assistant Attorney General

RTS:WRA:JEF:hle