



STATE OF KANSAS

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February 16, 1984

ATTORNEY GENERAL OPINION NO. 84- 18

Dennis L. Phelps
Rose Hill City Attorney
707 N. Waco, Suite 101
Wichita, Kansas 67203

Re: Intoxicating Liquors and Beverages--Cereal Malt
Beverages--Retailers' Licenses; Application to
City or County; Fees

Synopsis: A city may, by charter ordinance, exempt itself
from the limitations upon cereal malt beverage
license fees prescribed by K.S.A. 41-2702. Such
a charter ordinance may prescribe the amount of
such license fees, or may authorize the governing
body to prescribe the amount by ordinary ordinance
adopted by the governing body. Cited herein:
K.S.A. 41-2702.

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Dear Mr. Phelps:

You request our opinion as to the "constitutionality" of a
proposed charter ordinance whereby the city of Rose Hill would
exempt itself from the limitations upon cereal malt beverage
license fees prescribed by K.S.A. 41-2702.¹ The proposed
ordinance, a copy of which is attached hereto, adopts the
licensure requirement imposed by the aforesaid statute, and

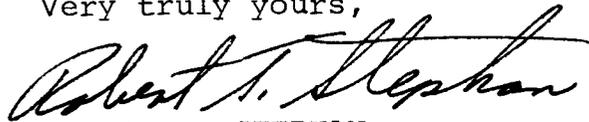
¹This office has previously opined that K.S.A. 41-2702
is subject to a charter ordinance. See Kansas Attorney General
Opinion No. 78-357.

requires an application for a retailers' license in language which is similar to subsection (e) of K.S.A. 41-2702. Section 4 of the charter ordinance imposes a fee of \$100 for a license to sell cereal malt beverages at retail in original and unopened containers and not for consumption on the premises, and states that "all applications for the sale of cereal malt beverage for consumption on the premises shall be accompanied by a fee of \$.". It is the failure to prescribe a fee amount in the latter provision that prompts your inquiry.

In determining the constitutionality of an ordinance, it is the court's duty to uphold an ordinance under attack rather than defeat it, and, if there is any reasonable way to construe an ordinance as constitutionally valid, that will be done. Cardarella v. City of Overland Park, 228 Kan. 698, 700 (1980). In this regard, the failure to fill in the blank provided for the amount of a license fee for the sale of cereal malt beverages for consumption on the premises might be interpreted as imposing no fee for such a license. Another possible construction might be that the charter ordinance authorizes the governing body to fix the amount of the subject license fee by a separate ordinary ordinance adopted by the governing body. The actual construction which would be adopted by a court depends, in our opinion, upon the intent of the governing body. However, given a court's duty to uphold an ordinance under attack, rather than defeat it, and given the "greater leeway" afforded ordinances regulating business as opposed to those proscribing criminal conduct (see Cardarella v. City of Overland Park, *supra* at 706), it is our opinion that the subject ordinance is valid.

Although what has been said above is dispositive of the question which has been posed, we are impelled to recommend that the subject ordinance be redrafted to eliminate the ambiguity referred to above. As presently drafted, the ordinance invites legal challenges, and we perceive no reason why such an ordinance should be adopted, given the fact that all ambiguities may be easily eliminated.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
Assistant Attorney General

Charter Ordinance No. _____

A charter ordinance exempting the City of Rose Hill, Kansas, from the provisions of K.S.A. 1978 Supp. 41-2702 and providing substitute and additional provisions on the same subject, relating to the retail sale of cereal malt beverages and establishing license fees and the procedure for obtaining a license.

BE IT ORDAINED BY THE GOVERNING BODY
OF THE CITY OF ROSE HILL, KANSAS:

Section 1. The City of Rose Hill, Kansas, by the power vested in it by Article 12, Section 5, of the Constitution of the State of Kansas, hereby elects to exempt itself from and make inapplicable to it the provision of K. S. A. Supp. 41-2702 and hereby provides substitute provisions as hereinafter set forth.

Section 2. For the purpose of this ordinance, all words, terms and phrases shall have the meanings ascribed to them by K.S.A. 1978 Supp. 41-2701, where the same are defined in such statute.

Section 3. No persons shall sell any cereal malt beverage at retail in the City of Rose Hill, Kansas, without first securing a license for each place of business as herein provided. The application for such license shall be made to the Governing Body and filed with the City Clerk of said City. The application shall be verified and upon a form prepared by the Attorney General of the State of Kansas and shall contain:

- a. The name and residence of the applicant;
- b. The length of time the applicant has resided within the State of Kansas;
- c. The particular place of business for which a license is desired;
- d. The name of the owner of the premises upon which the place of business is located;
- e. A statement that the applicant is a citizen of the United States and not less than twenty-one (21) years of age and that he has not within two (2) years immediately preceding the date of making application been convicted of a felony, any crime involving moral turpitude, drunkenness, driving a motor vehicle while under the influence of intoxicating liquor or violation of any other intoxicating liquor law of any state or of the United States.
- f. Such additional information as may be required by the Governing Body by ordinance.

Section 4. All applications for a license to sell cereal malt beverages at retail in original and unopened containers and not for consumption on the premises shall be accompanied by a license fee of \$100.00, and all applications for the sale of cereal malt beverage for consumption on the premises shall be accompanied by a fee of \$

Section 5. All licenses issued in accordance with the provisions of this ordinance shall be for a term of one (1) year and shall not be transferrable to another person or to another location.

Section 6. This is a charter ordinance and shall take effect sixty-one (61) days after final publication unless a sufficient petition for a referendum is filed and referendum held on the ordinance as provided in Article 12, Section 5, Subdivision (c)(3) of the Constitution of the State of Kansas, in which case the ordinance shall become effective if approved by a majority of electors voting thereon.

Passed and adopted by the Governing Body of the City of Rose Hill, Kansas, with not less than two-thirds of the members elect voting in favor thereof, this _____ day of _____, 198__.

John P. Ewing, Mayor

(SEAL)

ATTEST:

Cecelia A. Bollig, City Clerk