



STATE OF KANSAS

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June 29, 1984

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ATTORNEY GENERAL OPINION NO. 84- 63

Mr. Wendell J. Barker
Franklin County Attorney
Court Building
Ottawa, Kansas 66067

Re: Intoxicating Liquors and Beverages--Cereal Malt Beverages--
Issuance of Retailer's Licenses--Effect of Township Board
Recommendation

SYNOPSIS: K.S.A. 41-2702(b) authorizes township boards to receive notice of all applications for licenses to sell cereal malt beverages at retail within their respective townships and to submit advisory recommendations to the board of county commissioners. K.S.A. 41-2702(f) further provides that a board of county commissioners, when presented with an application for a license to sell cereal malt beverages at retail in original and unopened containers for off-premise consumption, must issue the license if the applicant meets the qualifications enumerated in the applicable statutes. Under the provisions of K.S.A. 41-2703(a), however, the board of county commissioners retains the discretion to grant or deny a cereal malt beverage license for any other form of retail sale. Cited herein: K.S.A. 41-2702, 41-2703.

* * *

Dear Mr. Barker:

As County Attorney for Franklin County, and on behalf of the Board of County Commissioners, you have requested our opinion regarding the issuance of cereal malt beverage licenses. In particular, you have asked, "In the instance in which the application [for a cereal malt beverage retailer's license] has been submitted to

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the appropriate township board pursuant to K.S.A. 41-2702(f) and such township board has recommended denial of the permit, we are specifically interested in whether or not the board of county commissioners can then deny the otherwise properly submitted application based upon the township's board's recommendation.

K.S.A. 41-2702 states, in pertinent part:

"(b) A board of county commissioners shall not issue or renew a retailer's license without giving the clerk of the township where the place of business is to be located written notice by registered mail, of the filing of the application for licensure or renewal. The township board may within ten (10) days file advisory recommendations as to the granting of such license or renewal and such advisory recommendations shall be considered by the board of county commissioners before such license is issued. If an original license is granted and issued, the board of county commissioners shall grant and issue renewals thereof upon application of the license holder, if the license holder is qualified to receive the same and the license has not been revoked as provided by law."

* * *

"(f) The board of county commissioners of the several counties or the governing body of a city shall issue a license upon application duly made as otherwise provided for herein to any retailer engaged in business in said county or city and qualified to receive said license, to sell only cereal malt beverages in original and upopened containers, and not for consumption on the premises. The annual license fee for such a license shall be not less than twenty-five dollars (\$25.00) or more than fifty dollars (\$50.00)." (Emphasis added.)

The proper interpretation of subsection (b) of K.S.A. 41-2702 was discussed at some length in Attorney General's Opinion No. 82-123. That opinion summarized a township board's authority under K.S.A. 41-2702(b) by observing that "A township board may file 'advisory recommendations' with a board of county commissioners... but the board of county commissioners is required only to consider these recommendations and such recommendations do not restrict or otherwise alter the power of the board of county commissioners to determine whether the license should issue." That opinion concluded that:

"...a township board has no express or implied authority to prohibit or restrict the issuance of such licenses."

This conclusion is reinforced by a review of the history of K.S.A. 41-2702. Prior

to 1970, if a township board recommended disapproval of an application for a license, the board of county commissioners was required to reject the application. An amendment made that year deleted any veto authority of the township board, leaving such bodies with advisory authority only. Thus under the clear language of K.S.A. 41-2602(b), a township board cannot exercise any authority greater than the rendering of advisory opinions.

The Kansas Supreme Court has recognized that not all the subsections of K.S.A. 41-2702 are of equally broad applicability. "It will be noted that K.S.A. 41-2702, at the beginning of the section, covers all sales of cereal malt beverages at retail without regard to whether the retail sale is for consumption on the premises or for sale in the original or upopened container." [Horyna v. Board of County Commissioners, 194 Kan. 445, 449, (1965)]. The Court also recognized in Horyna, that subsection (f) of K.S.A. 41-2702 applies to retail sales of cereal malt beverages in the original and unopened containers only.

The matter of issuing cereal malt beverage licenses for sale at retail is also discussed in K.S.A. 41-2703 in the following language:

"(a) After examination of an application for a retailer's license, the board of county commissioners or the director shall, if they approve the same, issue a license to the applicant. The governing body of the city shall, if the applicant is qualified as provided by law, issue a license to said applicant."

The proper construction of this statutory provision was discussed at some length in Attorney General's Opinion No. 83-70. That opinion concluded that the first sentence of K.S.A. 41-2703(a), in stating that the board of county commissioners "...shall, if they approve the same..." (emphasis added) issue a cereal malt beverage license, reserved to the commissioners' discretion the grant or denial of a license, even if the applicant meets all the qualifications that are enumerated in K.S.A. 41-2703. By contrast, the language stating that a city "...shall, if the applicant is qualified by law, issue a license..." (emphasis added) removes any discretion to a city to refuse to issue a license to any fully qualified applicant.

A well recognized rule of statutory construction is that statutes in pari materia should be read together in such a way as to harmonize their respective provisions, if it is reasonably possible to do so [Callaway v. City of Overland Park, 211 Kan. 626, 650, (1973)]. It is not necessary that statutes were enacted at the same time for them to be regarded as in pari materia [Clafin v. Walsh, 212 Kan. 1, 8, (1973)]. The respective provisions of K.S.A. 41-2702 and 41-2703 can be read in harmony only if each provision is given weight and significance. This can be done only if K.S.A. 41-2702(f) is interpreted to govern the issuing of licenses for retail sales of cereal malt beverages in original or unopened containers for off-premise consumption; and if K.S.A. 41-2703(a) is interpreted to govern the issuing of licenses for all other types of retail sales of cereal malt beverages.

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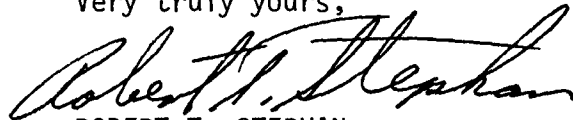
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The exact language in K.S.A. 41-2702(f), "The board of county commissioners of the several counties or the governing body of a city shall issue a license... to any retailer...qualified to receive said license..." (emphasis added) closely parallels the language in the second sentence of K.S.A. 41-2703(a). Following this parallel language as interpreted by Attorney General's Opinion No. 83-70, it is logical to conclude that the provisions of K.S.A. 41-2702(f) require that a license to sell cereal malt beverages at retail in original and unopened containers for off-premise consumption be issued to any applicant who meets the qualifications enumerated in the applicable statutes. Accordingly, in that the board of county commissioners has no discretion over such a matter, the presence or absence of advisory recommendations from the affected township board is in the final analysis irrelevant.

In conclusion, it is our opinion that K.S.A. 41-2702(b) authorizes township boards to receive notice of all applications for licenses to sell cereal malt beverages at retail within their respective townships and to submit advisory recommendations to the board of county commissioners. K.S.A. 41-2702(f) further provides that a board of county commissioners, when presented with an application for a license to sell cereal malt beverages at retail in original and unopened containers for off-premise consumption, must issue the license if the applicant meets the qualifications enumerated in the applicable statutes. Under the provisions of K.S.A. 41-2703(a), however, the board of county commissioners retains the discretion to grant or deny a cereal malt beverage license for any other form of retail sale.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Richard Hodson
Assistant Attorney General

RTS:RH:bf