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ATTORNEY GENERAL OPINION NO. 89- 36

Tom Hanna
Director
Alcoholic Beverage Control Division
512 S.W. 6th Street, 2nd Floor
Topeka, Kansas 66603

Re: Intoxicating Liquors and Beverages--Licensure and
Regulation of Sale of Liquor by the
Drink--Qualifications for License; Municipal
Corporations

Constitution of the State of Kansas--Corporations--
Cities' Powers of Home Rule

Synopsis: The City of Salina, as a municipal corporation,
is not specifically precluded from obtaining a
license to operate a drinking establishment as long
as it is otherwise qualified and meets relevant
requirements. The City may only hold such license
to further a public purpose, such as operating the
concession at the Bicentennial Center. Cited
herein: K.S.A. 17-6004; K.S.A. 1988 Supp. 41-2608;
41-2613; 41-2619; 41-2622; 41-2625; Kan.
Const., Art. 12, §5; K.A.R. 14-21-2.

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Dear Director Hanna:

You have requested our opinion regarding whether the City of
Salina may hold a drinking establishment license. You
advise that the club and drinking establishment act, K.S.A.
41-2601 et seq., contemplates issuance of licenses to

corporations in general, but question the appropriateness of issuing a corporate license to a city in its capacity as a municipal corporation.

References to corporate applicants in the club and drinking establishment act, while apparently geared toward corporations organized under the general corporation code, K.S.A. 17-6001 et seq., do not specifically or by operation preclude the issuance of such a license to a municipal corporation. Thus, as long as the City of Salina can meet statutory qualifications and requirements, the act itself does not preclude the city from holding a drinking establishment license. In this regard, the question has arisen whether a city can comply with the requirements of K.S.A. 1988 Supp. 41-2625 which provides in part:

"(a) No corporation shall be issued a license as a club, drinking establishment or caterer unless such corporation first appoints a citizen of the United States, and resident of Kansas, as its agent and files with the director a duly authenticated copy of a duly executed power of attorney authorizing such agent to: (1) Accept service of process from the director and the courts of this state; and (2) exercise full authority of such corporation and full authority, control and responsibility for the conduct of all business and transactions of the corporation within the state relative to the business licensed. Such agent must have the qualifications of a licensee except for the qualification of residence. Such agent shall at all times be maintained by such corporation.

"(b) No corporation shall be issued a license as a club, drinking establishment or caterer unless such corporation first files with the director a copy of its articles of incorporation and its bylaws."

It appears that subsection (a) of this provision can be met by appointing the mayor of the City as its resident agent and filing the requisite power of attorney. Subsection (b) requires filing with the director copies of the corporation's articles of incorporation and bylaws. The City of Salina

was incorporated November 20, 1870 (pursuant to L. 1868, ch. 26) and has a charter to evidence its lawful formation. As defined in K.S.A. 17-6004, the term "articles of incorporation" means any instrument evidencing the lawful formation of the corporation, including charters. See K.S.A. 17-6004, Kansas Comment; 2 McQuillin, Municipal Corporations §9.02 (1988). Thus, the City's charter, and any amendments thereto, constitutes its articles of incorporation. Further, a city's bylaws are its ordinances. Black's Law Dictionary 182 (5th Ed. 1979). Thus, it is at least possible for the City of Salina to comply with the requirements of K.S.A. 1988 Supp. 41-2625.

There is an administrative regulation, K.A.R. 14-21-2(b)(1), which appears to disqualify the City from licensure as a municipal corporation in that it requires corporate drinking establishment licensees to be for-profit. In reviewing the authorizing and implemented statutes listed in the regulation's history, however, we find no statutory authority for this requirement. We therefore believe this portion of the regulation is unenforceable against municipal corporations as it is beyond the agency's scope of authority. State, ex rel. v. Columbia Pictures Corp., 197 Kan. 448, 454 (1966).

A final consideration is the authority of a city to operate a drinking establishment. The Kansas Supreme Court in Clafin v. Walsh, 212 Kan. 1 (1973), discussed the powers of cities in general:

"Prior to the home rule amendment . . . [c]ities existed by and through statutes and had only such powers as were expressly conferred by statute without resort to implication. This concept was substantially changed by the home rule amendment effective July 1, 1961. . . . No longer are cities dependent upon the state legislature for their authority to determine their local affairs and government. Since home rule, cities have power granted directly from the people through the constitution without statutory authorization." Id. at 6 (citations omitted). See also Moore v. City of Lawrence, 232 Kan. 353, 356 (1982).

As a general rule, cities have broad authority to hold property and expend public funds in furtherance of public

purposes. See, e.g., Duckworth v. City of Kansas City, 243 Kan. 386 (1988). We are told that the drinking establishment license applied for is to allow the City of Salina to operate a concession at the Bicentennial Center. We believe the courts would hold that such an activity promotes a public purpose. We feel compelled to note, however, that holding a drinking establishment license may place the City in an unseemly position insofar as it has certain enforcement responsibilities under the drinking establishment act. See K.S.A. 1988 Supp. 41-2608; 41-2613; 41-2619; 41-2622(b). We do not believe, however, that this would preclude the City from obtaining a license, particularly since the Alcoholic Beverage Control Division has concurrent jurisdiction in most instances.

In conclusion, The City of Salina, as a municipal corporation, is not specifically precluded from obtaining a license to operate a drinking establishment as long as it meets relevant qualification requirements. The City may only hold such license to further a public purpose, such as operating the concession at the Bicentennial Center.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General

RTS:JLM:jm