



STATE OF KANSAS

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August 13, 1991

ATTORNEY GENERAL OPINION NO. 91- 91

Jack A. Murphy
City Attorney
602 Ames St.
P.O. Box 764
Baldwin City, Kansas 66006

Re: Intoxicating Liquors and Beverages -- Licensure and Regulation of Sale of Liquor by the Drink -- Election to Prohibit or Permit; City's Authority to Prevent Licensure

Synopsis: A city has no authority to prevent licensure under the drinking establishment act, unless the applicant's premises is located in an area not zoned for such purposes. Pursuant to K.S.A. 41-301, the director of alcoholic beverage control may not issue a retailer's license for a premises located in a city or township which has elected to prohibit packaged sales. Cited herein: K.S.A. 1990 Supp. 19-101a; K.S.A. 41-301; 41-302; K.S.A. 1990 Supp. 41-2605; 41-2606; 41-2608; 41-2609; 41-2611, as amended by L. 1991, ch. 148, § 1; 41-2620; 41-2622; 41-2631; 41-2646; Kan. Const., Art. 12, § 5; Art. 15, § 10.

* * *

Dear Mr. Murphy:

As attorney for Baldwin City, you request our opinion regarding local regulation of liquor sales. You state that Baldwin City is located in a county which elected, pursuant to article 15, section 10 of the Kansas constitution, to allow sales of liquor by the drink; however, pursuant to K.S.A.

41-301, Baldwin City does not allow sales of packaged liquor in the city limits. Currently, the Midland Historical Railway, which has its depot in Baldwin City, is applying for a drinking establishment license, giving rise to these questions:

"1. Whether the city, through its home rule powers, has the right not to issue drinking establishments, private club, caterers, or temporary permit holder license; and

"2. Whether an election is still required pursuant to K.S.A. 41-301 et seq. for the issuance of a license for the sale of packaged liquor."

We will address your questions in the order asked.

The Kansas Supreme Court recently reviewed home rule powers of cities and counties in Blevins v. Hiebert, 247 Kan. 1 (1990). The court held that home rule can be utilized in two instances: If there is no statute on point, i.e. if the legislature is silent, cities and counties may legislate in any area of local government other than those prohibited by article 12, section 5 of the Kansas Constitution or K.S.A. 1990 Supp. 19-101a; if there is a statute which is not uniformly applicable to all cities, or all counties, a municipality may "charter out" of the statute, in which case the ordinance may conflict with the statute. Id. at 5, 9. The court stated further that, aside from home rule, a city or county may legislate under its police power. "We conclude that a municipality has the right to legislate by ordinary ordinance or resolution non-conflicting local police power laws even though there are state laws on the subject uniformly applicable to all municipalities. This is a court-imposed exception to constitutional and statutory home rule. The legislature may prohibit such local authority by expressly preempting the field." Blevins, 247 Kan. at 8. With regard to non-police power issues, however, home rule is prohibited where there is a statute uniformly applicable to all cities or counties. Id. at 5, 9.

Even though some counties are wet and others dry, the drinking establishment act, K.S.A. 41-2601 et seq., is uniformly applicable to all counties choosing to come within it. See Blevins at 11. Since its provisions are uniformly applicable, Baldwin City cannot charter out of the drinking establishment act. The city can, however, enact non-conflicting police power laws in this area. See K.S.A.

41-2631; Blue Star Supper Club, Inc. v. City of Wichita, 208 Kan. 731 (1972); Garten Enterprises, Inc. v. City of Kansas City, 219 Kan. 620 (1976). In our opinion, local legislation to prohibit the issuance of licenses under the drinking establishment act or to require licensure by the city as well as the state would be in conflict with the act and therefore would not be permissible under the police power exception to home rule. Pursuant to article 15, section 10 of the Kansas constitution and K.S.A. 1990 Supp. 41-2646, the question of whether to permit or prohibit the sale of liquor by the drink is one for the county as a whole to determine, not individual cities. Further, the act contemplates licensure by the state rather than local units of government. See K.S.A. 1990 Supp. 41-2605; 41-2606; 41-2609; 41-2611; 41-2620. If an applicant meets the qualifications for licensure, the state is required to issue a license. See K.S.A. 1990 Supp. 41-2605; Attorney General Opinion No. 83-70. The city's only role in licensing under the drinking establishment act is to certify whether the applicant's premises is in a location zoned for that purpose. K.S.A. 1990 Supp. 41-2608. Cities and counties are specifically precluded from exacting occupational taxes and fees in excess of those provided for in K.S.A. 1990 Supp. 41-2622(b). K.S.A. 1990 Supp. 41-2622(c). We therefore conclude that Baldwin City cannot prevent licensure under the drinking establishment act except by way of appropriate zoning regulation.

You also inquire whether a city election is still required for the issuance of a retailer's license. K.S.A. 41-301 provides:

"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: Provided, That no such retailer's license shall be issued for any premises within any city of the first or second class wherein a majority of the qualified electors of such city who voted on the proposition to amend section 10 of article 15 of the constitution of the state of Kansas at the general election held in November, 1948, shall have voted

against the adoption of such proposition or in cities of the third class located in a township, or townships, wherein a majority of the qualified electors of such township, or townships, who voted on said proposition to amend the constitution at said election shall have voted against its adoption, until a majority of the qualified electors of such city voting at an election held as provided by K.S.A. 41-302, shall have declared by their votes to be in favor of the licensing of the sale of alcoholic liquor by the package in such city."

You inform us that in 1948 Baldwin City voted against allowing sales of packaged liquor. We assume that the electors of Baldwin City have not altered this position pursuant to K.S.A. 41-302. These statutes have not been substantially amended or revoked, nor have they been struck down by the courts. It therefore appears that an election is still necessary before a retailer's license may be issued for a premises located in Baldwin City.

Very truly yours,



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ATTORNEY GENERAL OF KANSAS



Julene L. Miller
Deputy Attorney General

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