

Towns, villages and cities of fourth class cannot prohibit sale of "Non-intoxicating beer" within three hundred feet of church, but can regulate and control same, and how.

HB 23 Laws 33

June 2, 1933. 6-9



Hon. J.F. Kincannon,  
Mayor - City of Anderson,  
Anderson, Missouri.

Dear Sir:

Your letter of May 8, 1933 has been received regarding the Baptist Church by its pastor and certain of its members urging the Mayor and Council to enact an ordinance prohibiting the sale and consumption of 3.2 per cent beer within 300 feet of the church on the ground that 3.2 per cent beer is intoxicating.

In answer to the same will say that under Sec. 4496 R.S. of No. 1929, intoxicating liquor is defined as follows:

" The phrases, 'intoxicating liquor', or 'intoxicating liquors', whenever used in this article, shall be construed to mean and include any distilled, malt, spirituous, vinous, fermented or alcoholic liquor, all alcoholic liquids whether proprietary, patented or not, which contain one-half of one per centum of alcohol by volume and which are potable or capable of being used as a beverage."

Then comes a proviso, which is as follows:

" Provided, however, that when the above mentioned phrases, 'intoxicating liquor', or 'intoxicating liquors' are hereafter defined in the laws of the United States, then such definition by Congress shall supersede and take the place of the definition of said phrases in this section and shall apply to the provisions of this article with the same force and effect as if the same were written herein."

Under this proviso you will notice that if the United States by act of Congress shall define same differently, then said act of Congress and the definition thereunder shall supersede and become the definition instead of the first foregoing definition, so that when Congress recently passed what is known as the "Beer Bill", the definition given same by Congress as being "non-intoxicating" supersedes and takes the place of the first above definition of all intoxicating liquors that do not have more than 3.2 per cent of alcohol by weight.

Then also, the law in Missouri was changed by House Bill No. 23 passed by the 57th General Assembly, Sec. 13139z2 of which reads as follows:

"The phrase 'non-intoxicating beer' as used in this article shall be construed to refer to and to mean any beer manufactured from pure hops or pure extract of hops, and pure barley malt or other wholesome grains or cereals, and wholesome yeast, and pure water, and free from all harmful substances, preservatives and adulterants, and having an alcoholic content of more than one-half of one per cent (1/2 of 1%) by volume and not exceeding 3.2 per cent by weight."

So that under the present law, if the beverage does not exceed 3.2 per cent of alcohol by weight, it has been by LAW declared to be non-intoxicating.

Under Sec. 2 of said House Bill No. 23 last above referred to, all laws and parts of laws in this state in conflict with the provisions of House Bill No. 23 in so far as such laws and parts of laws are so in conflict are repealed.

It is our opinion, however, that under the general police power, cities of your class have the right to regulate and control, but not absolutely prohibit, the sale of the beer herein referred to within 300 feet of the church (in the usual travelled way). Your city would also have the power and right to regulate and prevent and/or control in a general way so that the handling of same would not become a nuisance (in which event it could be abated entirely), either under the "Common Law" or under "Statute", as well as under police regulating power.

(Honl J.F. Kincannon)

In City of Sturgeon v. Wabash Ry. Co. et al,  
17 S.W. (2d) 616, l.c. 619, the court said:

"The nuisance need not affect everybody,  
in order to be a public one, if it affects  
all those who are using a right which is in  
common to all."

See also: Secs. 7071 and 7097 R.S.  
of Mo., 1929.

Yours very truly,



GEORGE B. STROTHER,  
Assistant Attorney General

Approved:

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ROY McKITTRICK,  
Attorney General

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