

INTOXICATING LIQUORS(1) Cities cannot pass ordinances respecting searches and seizures - power reserved to State under Liquor Control Act. (2) Cities may pass ordinances similar to State Law where consistent.

8-26

August 20, 1935.

Hon. Elmer A. Strom
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

"An opinion is requested of your department pertaining to the following questions which have arisen under the Liquor Control Act as same applies to the power of Cities of the Third Class to include the provisions of the Act in its City ordinances.

"Under the provision of the Act authorizing a municipality to pass such ordinances for the regulation and control of the sale of intoxicating liquor as it may seem fit so long as they are not inconsistent with the Act, has not the city the right to provide ordinances similar to the State law relative to the sale and possession of illegal liquor, i.e. bootleg liquor?

"Also is it not within the power of the city to provide for a search and seizure ordinance within the limits of the city, the search warrants to be issued by the Police Judge, who is an ex officio justice of the peace within the limits of the city's jurisdiction.

"The City of Cape Girardeau, a city of the third class, operating under the alternative form of government is now drafting its city ordinances and apparently expects to confine its regulations to the licensing and control of licensed places only and therefore an immediate opinion on the

above questions will be helpful to determine if the City should not accept its portion of the load in the enforcement of the liquor laws within its city limits."

We point to applicable statutes and authorities relating to what cities may do to pass ordinances where not inconsistent with the provisions of the Liquor Control Act.

Section 25 of the Liquor Control Act provides in part as follows:

"**** The Board of Aldermen, City Council or other proper authorities of incorporated cities, may charge for licenses issued to manufacturers, distillers, brewers, wholesalers and retailers of all intoxicating liquor, located within their limits, fix the amount to be charged for such license, subject to the limitations of this act, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors within their limits, provide for penalties for the violation of such ordinances, where not inconsistent with the provisions of this act."

We direct your attention to Section 7289, R. S. Mo. 1929, applicable to municipalities enacting laws in conformity with State laws. Said section reads as follows:

"Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the State, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject."

It is evident from a careful reading of the above section that municipalities must confine their ordinances to and in conformity with State laws upon the same subject.

In the case of State ex rel. v. McCammon, 111 Mo. App. loc. cit. pages 631 and 632, the Court quoted approvingly Black on "Intoxicating Liquor", Section 223, and said:

"The powers conferred upon a municipal corporation must be exercised in conformity to the general laws of the State, unless it is clear that the exclusive control of the subject is given to the municipality or that the general law is to be superseded or suspended by the charter. A statute granting authority to a city to pass ordinances in relation to the liquor traffic does not repeal the general laws on that subject. The rule is that the municipal ordinances cannot be set aside, limit or enlarge the statute law of the State, unless its power to do so can be shown in express terms or by necessary implication." And again at section 224 the said author says:

"Whenever a change of policy takes place in the State on the subject of its liquor legislation, by the adoption of a different system -- as when general prohibition, or prohibition for particular localities is enacted by a constitutional amendment or general statute, or when the Legislature provides a uniform and general system for the licensing of the traffic -- this has the effect to repeal all inconsistent provisions in municipal charters and the ordinances adopted under them'."

In light of the foregoing, it is our opinion that cities may enact ordinances where similar to the State law regarding the sale and possession of illegal liquor and provide the penalties for violation of said ordinances in order to give effect to the regulation and control of the sale of intoxicating liquors within their limits.

The Legislature in passing Section 25, supra, of the Liquor Control Act had in mind that the General Assembly could not pass any laws levying a license tax for municipal purposes; therefore, enacted the above section giving the cities the right to enact ordinances providing for licenses, charge for

licenses and also regulate and control the sale of intoxicating liquors within their limits where not inconsistent with the provisions of the Act. This is the only power that has been expressly delegated to the cities. (Section 10, Article X of Missouri Constitution.)

There is no provision in the Liquor Control Act giving cities any right to pass ordinances respecting searches and seizures. We must necessarily construe that as meaning the power was reserved to the State itself.

The general proposition of law respecting what cities may do towards enacting ordinances providing for searches and seizures is found in 43 Corpus Juris, Section 271 at page 261, and Section 569 at page 431, as follows:

"(Sec. 271) 9. Seizure and Forfeiture of Property. Neither seizure nor forfeiture of property may be made unless statutory power is given to the municipal corporation, whether it be forfeiture of property or of a license. But such power may exist by virtue of express grant. Such extraordinary power is least of all to be inferred where the legislature has provided other means for enforcing municipal regulations. And no forfeiture may be adjudged without due process of law."

"(Sec. 569) 113. Searches and Seizures. A municipal corporation in the absence of express authority may not authorize the search for, and seizure of, property kept for unlawful use." \ |

In light of the foregoing, it is the opinion of this department that cities cannot enact an ordinance providing for searches and seizures within the limits of the cities in view of the fact that that power has been reserved to the State.

Very truly yours,

APPROVED:

RUSSELL C. STONE
Assistant Attorney-General.

JOHN W. HOFFMAN, Jr.
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RCS/afj