

LIQUOR: Funeral parlor chapel can not be classed as a church because religious services are held there weekly. No statutory requirement that a 3.2 beer licensee have good moral character. Suspension of 3.2% beer license not statutory grounds for refusal of subsequent application for similar license. Filing of criminal prosecution is not in itself a conviction requiring the refusal of a 3.2% beer license for one year. Cities can not suppress or prohibit sale of intoxicating liquor authorized by statute.

February 28, 1939

Honorable G. Derk Green
Prosecuting Attorney
Linn County
Marceline, Missouri



Dear Sir:

We have received your letter of February 16th in which you have asked three questions. The first part of your letter embracing the first question reads as follows:

"Sometime back Mr. A. L. Burns, city attorney of Marceline, addressed you in regard to an application made for a beer license in the City of Marceline, and at that time you rendered an opinion upon the facts given. This was requested by him at the insistence of the city council. Now they have asked that I communicate with you concerning the same matter, but setting out different facts. The situation is as follows:

'The Baptist Church, of the City of Marceline, is situated one-half block from the business section. Services are held regularly in this church on Sundays and on certain days during the week. As a part of the church program the pastor conducts services each Saturday afternoon at three o'clock in a funeral home located in the business section of the town. This service has been conducted in the funeral home for approximately eleven months, and has been conducted regularly at the stated time. The services at the funeral home were

authorized by the governing body of the Baptist Church in regular session, the governing body being the congregation. At these services Bible study, preaching, singing, and praying takes place in almost identical manner as at any regular church service on Sunday at the church. The purpose of this service on Saturday is to enable members of the church living in the rural sections to attend the services at the same time they are in the city for the purpose of buying their groceries, or transacting other business, when they would not be able to attend church on Sundays and make an extra trip to town. Of course, members of other denominations are welcome and many residents of the city attend the services. The building in which these services are held is an ordinary one story business building suitably arranged for a funeral home and chapel from which funerals services are conducted. The owner of the funeral home also maintains his business office in one room of the building, and uses the entire building on any occasion for conducting a funeral service. Located in less than one hundred feet of this funeral home is another building, and an application has been presented to the city council for the issuance of a license to sell 5 per cent beer in this business building. No consent to the issuance of this license has been given by the governing body of the Baptist Church. This church has three trustees whose duty it is to attend to the physical properties of the church. It also has a Board of Deacons whose duty it is to assist in the management of the church affairs by making recommendations to the congregation. The governing authority of the church is vested in the congregation or membership meeting in regular conference each month or at any special or called conference, which special conference may be called upon one weeks notice.

We would like your opinion as to whether or not the described above situation prohibits the issuance of this 5 percent beer license under the 'Missouri Statutes,' with reference thereto."

On August 17, 1938, this office addressed an opinion to Mr. A. L. Burns, City Attorney of Marceline, in connection with the exact and same situation. In his opinion request, Mr. Burns stated that for several months prior thereto preaching, praying, Bible Study and song service had been held in this chapel "by many denominations and is apparently not restricted to any particular church or creed". He also inferred, without making a definite statement, that such services were regularly held. A part of our opinion in response to that request reads as follows:

"It is a well known fact that on account of crowded conditions in church buildings, the Sunday School and Bible classes are sometimes held in courthouses or other buildings about a city, but we do not think that the lawmakers contemplated that such building would be classed as a building used regularly as a place of religious worship, which would prohibit locating a place of selling intoxicating liquor within a certain distance therefrom. We think that the lawmakers had in mind, when they referred to 'other building regularly used as a place of religious worship,' such building as a particular religious denomination may have control over and which building is governed through its board of managers. We do not think that the building and the use thereof which you have described in your request comes within that class.

We are therefore of the opinion that the use of the building mentioned in your request is not such a continuous and consistent use for religious worship that it could be classed as a building regularly used for

for religious worship, but that such use is more in the class of occasional or casual use. That being the case, the applicant for the license to sell intoxicating liquor would not be required to obtain the written consent of the board of managers, if any, of those worshipping in the building which you have mentioned in your request."

The gist of the facts concerning the same matter as you have outlined them is that the governing body of the Baptist Church of the City of Marceline has authorized the regular Saturday afternoon services in the funeral parlor chapel and the pastor of that church conducts said services; while members of other churches attend, yet the same are in fact Baptist services; that the building is primarily a funeral home and the governing body of the Baptist Church has not consented to any license being issued within the statutory distance from the funeral home.

Section 44-a-14, Laws of Missouri 1935, page 285, reads as follows:

"No license shall be granted for the sale of intoxicating liquor, as defined in this act, within one hundred (100) feet of any school, church or other building regularly used as a place of religious worship, without the applicant for such license shall first obtain the consent in writing of the majority of the Board of Directors of such school, or the consent in writing of the majority of the managing board of such church or place of worship. The Board of Aldermen, City Council or other proper authorities, of any incorporated City, town or village, may by ordinance, prohibit the granting of a license for the sale of intoxicating liquor within a distance as great as three hundred (300) feet. In such cases, and where such ordinance has been lawfully enacted, no license of any character shall

issue in conflict with such ordinance while such ordinance is in effect."

The question then is whether under the facts the funeral chapel can be classed as a "church or other building regularly used as a place of religious worship." We do not think that it can be so classified.

In our opinion addressed to Mr. Burns, we quoted from 15 R.C.L., Section 137, page 373, a part of which reads as follows:

"Any structure used principally for religious worship and Bible Study is included although some of its rooms may be used by societies incidental to the church, or closely allied to its principles, or by individuals connected with or peculiarly eligible to membership in the church; and it is not necessary that the organization be incorporated. In the application of such legislation, however, the courts properly refrain from including what in reason cannot and in common conception ordinarily is not regarded as a church. The restraint is usually held not to apply to places used occasionally for preaching, or a building used by an organization devoted to the reformation of fallen women, unconnected with any church, or a building occasionally used for entertainments for the benefit of a church, or used by an unorganized body as a mission for Bible study and meetings, when most of the building is used for residential and commercial purposes."

In the case of George vs. Board of Excise of the City of Elizabeth 73 N.J.L. 366, the court in construing a similar situation said:

"The legislature clearly did not intend that wherever religiously inclined per-

sons meet together for Bible study and the like a church existed within the meaning of this excise regulation, but unless the statute has a meaning as broad as this it does not include the conditions that constitute the prosecutor's case. The action of the municipal board brought up by this writ is affirmed."

In the case of In Matter of Korndorfer 49 N.Y.S. 559, the court said:

"The law does not undertake to define or restrict the definition of the words "occupied exclusively as a church," and I think it must be left to such reasonable construction as will accomplish the purpose intended by the legislature, viz. to prevent the traffic of liquor in proximity to such class of buildings."

In the case of Matter of Rupp 106 N.Y.S. 483, the court said:

"The statute was designed to protect such buildings only as were at the time of the issuance of the certificate used exclusively for religious worship, that is, "as a church;" a church, referred to as an edifice, in popular comprehensive meaning "a building set apart" for religious worship. Webster's Unabr. Dict."

In the case of In Re Vail 77 N.Y.S. 903 the building, which it was claimed was occupied as a church, was located in an alley way and was a small building ten by sixteen feet. It was occasionally used by a religious association, which had regular quarters elsewhere. In holding that this was not a church as intended by the legislature and that the facts "all indicate that the purpose of its erection and use was solely to defeat the purpose

of Mrs. Lennon to procure a liquor tax certificate," the court said further:

"It may be that a very considerable majority of the law-abiding citizens of the village of Islip are opposed upon moral grounds to the opening of another saloon upon the main street of that village; but conceding that sentiment is entitled to the highest respect and consideration, still it is better that the evil be endured than that the law should be brought into contempt by an application thereof manifestly made to meet a particular case. Proceedings dismissed, with costs."

CONCLUSION

Therefore, placing a reasonable construction on Section 44-a-14, we are of the opinion that the funeral home, which is built and designed as such, ordinarily used as such and which is not owned by or controlled in any way by the Baptist Church can not be construed as a "church or other building regularly used as a place of religious worship." If the opposite construction were to be placed on this section, it would follow that the laws authorizing the sale of intoxicating liquor could be nullified by a systematic selection of rooms over a city for periodical church services or Sunday School classes. We do not believe that the legislature had any such application of the law in mind when Section 44-a-14 was enacted into law. Rather, we believe that the legislature had in mind the protection of church buildings built or designed and actually used for such purposes primarily, and which buildings would be under the control and management of the managing board of the church involved. In other words, it referred to the church home itself and not other suitable rooms such as a funeral parlor chapel, town hall, court house or lodge hall, all of which are primarily and regularly used for other purposes, but in which religious services might be permitted periodically or otherwise.

II.

The second question contained in your letter is in the following language:

"In this same connection we would like further to ask your opinion upon this additional statement of facts.

The applicant for this license has at the present time a license to sell 3.2 per cent beer at another location in Marceline. Sometime back, but within the past year he was taken to Jefferson City to appear before the commissioner on a charge of having sold whiskey by the drink in this beer place. The testimony at that hearing was to the effect that two inspectors purchased liquor by the drink and saw it purchased by others at this place, and that it was served by one of the clerks hired by the licensee. The licensee testified that he was not present at the time of such sales and knew nothing about it, and they were made without his knowledge or consent. The commissioner suspended his license for a period of five days. Now a criminal charge has been filed against the licensee, charging him with selling intoxicating liquor without a license.

Do these facts justify or authorize the city council to refuse the issuance of another license to the applicant on the theory that these sales, the suspension of his license, and the charge now pending against him indicate that he is not a person of the good moral character required by the statute?"

There is no law in connection with the manufacture or sale of 3.2 per cent beer which states that a licensee must be a person of good moral character. Consequently, there is no authorization to refuse a license on the ground that the applicant is

not of good moral character as far as the statutes are concerned. Likewise, there is no statute to the effect that the suspension of a 3.2 per cent beer license by the Supervisor of Liquor Control constitutes grounds for such a refusal. Section 13139-y of the non-intoxicating beer laws, Laws of Missouri 1933, page 264, provides that if any person who holds a 3.2 per cent beer license is convicted under the authority of that article, the license shall thereupon be void "and the holder thereof shall not thereafter, for a period of one year after date of such conviction, be entitled to any permit for any purpose authorized under this article."

However, the person you have in mind has apparently not, as yet, been convicted. A complaint filed is not in itself a conviction. Should the person be acquitted, there would be no conviction and the terms of Section 13139-y would not apply.

CONCLUSION

Consequently, under the statutory law governing the licensing of 3.2 per cent beer dealers, there is no requirement that an applicant for such a license must be a person of good moral character. Likewise, the suspension of such a license by the Supervisor of Liquor Control is not by statute made a ground for refusing a subsequent application for a similar license. If any person is convicted of violating the provisions of the non-intoxicating beer laws, then such person can not receive a license for a period of one year after date of such conviction. However, the filing of a complaint against the person is not in itself a conviction and the one year period does not begin until there is an actual conviction.

III.

Your last question is in the following language:

"We would like further to ask your opinion as to the discretion that the council has in granting or refusing

any application for license made to it if the applicant is a person of good moral character and possesses the qualifications provided by the statute, and the location is not within any restricted area, does the city council have any discretion in granting or refusing to grant a license?"

In other words, you are inquiring as to whether the council has the right to suppress or even prohibit the sale of intoxicating liquor within the city limits. If an applicant has every qualification for a license and yet is refused, such refusal would amount to a suppression of the sale of intoxicating liquor, at least to that extent. If one eligible person could thus be refused, all eligible persons could likewise be refused with the result that the city would thereby be wholly suppressing such sales. In this connection, we are enclosing copy of an opinion written by this office on February 26, 1938 and addressed to Mr. Donald B. Dawson, Prosecuting Attorney of Bates County, Missouri. In that opinion, a similar question was asked and we held that the city council had only the authority to regulate and control the sale of intoxicating liquor within the limits of the city in a manner not inconsistent with the laws of the state and that the power to regulate and control said business did not confer on the city the right to suppress or prohibit such sales.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General
JFA:RT