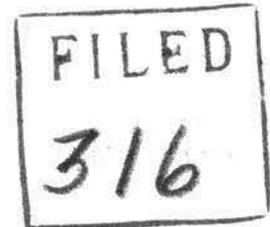


BOARD OF PHARMACY:
ZONING:
ADMINISTRATIVE LAW:

Restrictions imposed by city ordinance provide no basis for the Missouri Board of Pharmacy to refuse to license a pharmacy which is otherwise qualified for license.

Opinion No. 316

September 16, 1964



Mr. Lloyd W. Tracy, Secretary
Missouri State Board of Pharmacy
Room 130, State Capitol Building
Jefferson City, Missouri

Dear Mr. Tracy:

Several weeks ago, in your official capacity as Secretary of the Board of Pharmacy, you requested and received from this office advice concerning an application for a pharmacy license which was pending before the Board. Since that time, this office has received a request for an official opinion on the same subject matter which will be answered by means of this opinion directed to you.

As we understand the facts of the case, they are: The applicant for a pharmacy license is a duly registered pharmacist who owns an office building in the City of Columbia. The building is occupied, or will be shortly, mainly by physicians; and the pharmacist proposes to operate a pharmacy in the building. The pharmacy has been furnished and equipped in accordance with all applicable statutes and regulations and would qualify for licensure in all respects, unless a zoning ordinance of the City of Columbia could be regarded as disqualifying the premises from being licensed.

The zoning ordinance restricts the operation of pharmacies in the area in question to those which are "accessory" to hospitals, sanitariums, or clinics where the pharmacy is "incident and subordinate to the main use, and is an integral part of the main building; is operated only during the hours of the main building, and in no case before the hour of seven o'clock in the morning, nor after the hour of six o'clock in the evening, and further provided that no retail sales are made or completed therein other than the sale of drugs and medicines prescribed by a physician or surgeon, or that is listed in the latest edition of The United States Pharmacopeia (sic)."

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The arguments advanced against the issuance of the license under these circumstances are:

(a) that the ordinance would so inhibit the function of a pharmacy that the pharmacy could not be operated in accordance with state law;

(b) that the pharmacy may be operated only by the owner of the hospital, sanitarium, or clinic;

(c) that the ordinance purports to limit any pharmacy within the area to the dispensing of drugs that are either prescribed by a "physician or surgeon" or those which are listed in the United States Pharmacopoeia. With regard to the former restriction, it has been noted that, in addition to physicians and surgeons, prescriptions may also be written by dentists, veterinarians, and chiropractors. With regard to the latter restriction, it has been noted that a licensed pharmacy in this state must be so equipped that "United States Pharmacopoeia and National Formulary preparations (may be) properly compounded" Section 338.250, RSMo 1959 (Emphasis and parenthetical matter supplied.)

We have carefully examined all of the foregoing arguments which have been advanced as reasons for the Board's refusal to issue the license in question. We fail to find merit in these arguments whether they are viewed individually or collectively and have concluded that the Board has no choice but to issue the license, if the applicant meets all other requirements.

The City of Columbia operates under a constitutional charter. Since the charter itself must be "consistent with and subject to the constitution and laws of the state," Mo. Const., 1945, Art. 6, § 19, it follows that the ordinances enacted by the city must also be consistent with the statutes of this state at peril of their invalidity. See *Turner v. Kansas City*, (Mo. Sup., 1945) 191 SW2d 612, 615, and *State ex rel. Collins v. Keirnan*, (Mo. App., 1947) 207 SW2d 49, 53, where the Kansas City Court of Appeals, quoting approvingly from *Corpus Juris*, said, "A municipal corporation can have no other source than a sovereign power, its creation is an attribute of sovereignty. It is a political creature, and the creature cannot be greater than its creator."

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Therefore, if there be a conflict between the ordinance and the statutes of this state which regulate the operation of pharmacies, then the ordinance, at least to the extent of the conflict, is invalid. Undoubtedly, the ordinance places stringent restrictions upon the operation of the pharmacy in question. However, we do not believe that the resolution of this problem by this office or by the Board requires a determination as to the validity of the ordinance.

Assuming without deciding that the ordinance is valid, it is clear that a pharmacy operating within the limitations and restrictions set out by the ordinance would still require a license as contemplated by Sections 338.210 through 338.310, RSMo 1959. That is to say, even if all of the arguments against the issuance of the license, which are set out above as paragraph (c), were conceded, the license would be necessary even for the pharmacy to operate within the restrictions. Hence, even if the pharmacy, in accordance with the ordinance, dispensed only drugs on prescription, it could not operate lawfully unless it had a pharmacy license issued by the Board. Regardless of whether the pharmacy fills prescriptions of dentists and veterinarians, it is beyond dispute that a license is necessary in order to compound prescriptions of physicians and surgeons. The ordinance in no way prevents a pharmacy from being so equipped as to be capable of compounding National Formulary preparations on prescription. The "accessory use" section simply limits the sale of drugs other than those listed in the United States Pharmacopoeia to those sold upon prescription.

In that connection, it should be noted that Section 338.210, RSMo 1959, defines the term pharmacy as used in the pharmacy licensing laws as ". . . any pharmacy, drug, chemical store, or apothecary shop, conducted for the purpose of compounding, and dispensing or retailing of any drug, medicine, chemical or poison when used in the compounding of a physician's prescription." Thus, for purposes of the instant problem, a pharmacy is only a store where drugs are sold on prescription of a physician, and the ordinance in question in no way purports to control or regulate what drugs may be sold on prescription or how they will be compounded upon such prescription.

A fair reading of the ordinance fails to reveal any necessary conflict with the provisions of Sections 338.210 through 338.310 which relate to public health and safety or

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the integrity of prescriptions to be compounded in pharmacies affected by it. Therefore, any incidental inhibition of the operation of the pharmacy, (a), supra, is of no official concern to the Board and works no disqualification of the applicant under the state statutes in question. It would be equally unreasonable to deny a license to a pharmacy which, in accordance with local ordinance, closed its doors at midnight in spite of the fact that pharmacy licenses authorize the compounding of prescriptions at any time.

If the ordinance purports to engraft another requirement upon the applicant for a pharmacy license, i.e., that the pharmacy be owned by the owner of the clinic, (b), supra, then the Board may and should disregard such attempted amendment of the statutes by city ordinance and leave to the individual applicant the enforcement of his rights against the city, after the pharmacy license is issued. The statutes relating to pharmacy licenses make no requirement nor impose any restrictions as to the ownership of the premises, only that the pharmacy be under the supervision of a registered pharmacist "or an owner or employee of the owner, who has at his place of business a registered pharmacist. . ." to compound prescriptions.

In short, the enforcement and implementation of city zoning ordinances is not a function of the State Board of Pharmacy. Nor is compliance with zoning ordinances by an applicant for a pharmacy license a properly cognizable condition precedent to the issuance of the license. Where the operation of the pharmacy will be in compliance with the statutes of this state and the regulations of the Board, the Board should leave to local determination the question of whether such operation will conform to local zoning ordinances.

CONCLUSION

On the basis of the foregoing, it is the opinion of this office that restrictions imposed by a city zoning ordinance provide no basis for the Missouri Board of Pharmacy to refuse to license a pharmacy where the pharmacy is otherwise qualified for a license and where such restrictions in no way affect the actual filling of prescriptions.

Yours very truly,



THOMAS F. EAGLETON
Attorney General