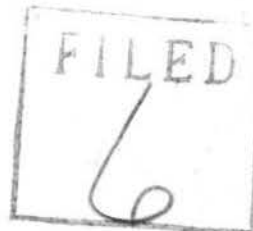


INTOXICATING LIQUOR: City Ordinance permitting licensees of intoxicating liquor to sell 3.2% beer on Sunday is in conflict with State law, and void.

April 9, 1936



Honorable E. J. Becker
Supervisor of Liquor Control
Liquor Control Department
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting an opinion from this office, which reads as follows:

"The Supervisor requests an immediate opinion upon the following subject:

"The Board of Aldermen of the City of St. Louis has recently passed an ordinance over the Mayor's veto, permitting 3.2% beer to be sold between the hours of 12:01 A. M., Sunday to 1:30 A. M., Monday, and between the hours of 1:00 P. M. Sunday to 1:30 A. M., Monday.

"May permittees holding permits to sell all kinds of intoxicating liquors by the drink sell 3.2% beer on Sundays under their by the drink permit?

"Also may persons holding 5% beer permits sell 3.2% beer on Sundays under said 5% beer permits?

"In your opinion is this ordinance, as passed by the Board of Aldermen, valid, and does said ordinance prevent this department from enforcing the provisions of the liquor control act, covering the time and hours of sale of intoxicating liquors, as provided in sections 15 and 15-A of the act, and also the privileges as provided in section 22 of the act? "

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The ordinance about which you inquire, recently passed by the Board of Aldermen of the City of St. Louis, is Section 9 of Ordinance Number 40630 which repealed Section 9 formerly enacted. Said section is long and would serve no useful purpose to set it out in full. Briefly, it provides for a license for the sale of 3.2% beer and intoxicating liquor at retail by the drink for consumption in the place where sold, which includes the sale of intoxicating liquor in the original package and such non-intoxicating beer in the original package. Said ordinance also provides for a license to sell malt liquor not in excess of five per cent by weight, at retail, by the drink, which license also permits the holder thereof to sell non-intoxicating beer. It also provides for a license to sell intoxicating liquor in the original package containing not in excess of five per cent of alcohol by weight, which also permits the holder to sell non-intoxicating beer in the original package direct to the consumers. Said ordinance provides further that no person licensed to sell intoxicating liquor shall sell, give away or otherwise dispose of or suffer the same to be done in, upon or about his premises, any intoxicating liquor on the first day of the week commonly called Sunday, or upon the day of any general, municipal, special or primary election in the City of St. Louis; provided, that the sale of such intoxicating liquor may be resumed on any such election day after the expiration of thirty (30) minutes following the hour or time fixed by law for the closing of the polls of any such election. The part of the section about which you are especially concerned provides that all licensees authorized under the provisions of Section 9 to sell non-intoxicating beer of not more than 3.2% alcohol by weight, are permitted to sell such non-intoxicating beer between the hours of 12:01 A. M. Sunday to 1:30 A. M. Sunday, and between the hours of 1:00 P. M. Sunday to 1:30 A. M. Monday. As licensees to sell all kind of intoxicating liquor at retail for consumption on the premises, and licensees to sell five per cent beer by the drink, and also licensees to sell intoxicating liquor in the original package containing not in excess of five per cent of alcohol by weight, are permitted to sell 3.2% beer, this ordinance, if valid, would permit such licensees to sell non-intoxicating beer between the hours of 12:01 A. M. Sunday to 1:30 A. M. Sunday and between the hours of 1:00 P. M. Sunday to 1:30 A. M. Monday.

Section 22 of the Liquor Control Act provides that a license issued for the sale of malt liquor not in excess of five per cent by weight, by the drink, for consumption on the premises where sold, shall also permit the holder thereof to sell non-intoxicating beer. A licensee authorized to sell malt liquor containing not in excess of five per cent of alcohol by weight, in the original package, is also authorized to sell non-intoxicating

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beer in the original package. This section, however, contains the proviso which reads as follows:

"Provided, however, that no licensee holding a license to sell malt liquor containing alcohol in excess of three and two-tenths per cent (3.2%) by weight or any other kind or character of intoxicating liquor, shall sell, give away or otherwise dispose of, or suffer the same to be done in, upon or about his premises any non-intoxicating beer in any quantity, either in the original package or by the drink, on the first day of the week commonly called Sunday, or upon the day of any general, special or primary election in this state, or upon any county, township, city, town or municipal election day. Provided, the sale of such intoxicating liquors may be resumed on any such election day after the expiration of thirty minutes next following the hour or time fixed by law for the closing of the polls at any such election. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor."

It is plain from the above that the city ordinance in question is inconsistent and in conflict with section 22 of the State Liquor Control Act. The only authority of a city to regulate and control the sale of intoxicating liquor within its limits is found in Section 25 of the Liquor Control Act, which reads, 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."

The above section specifically prohibits a city from passing an ordinance inconsistent with the provisions of the Liquor Control Act.

Section 7289, Revised Statutes Missouri 1929, 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 a well recognized principle of law that when the Legislature provides a uniform system for the regulation, control and licensing of the liquor traffic that it has the effect to repeal all inconsistent provisions of municipal charters and the ordinances adopted under them. In other words, the only authority that a city now has to regulate and control the sale of intoxicating liquor is found in Section 25 of the Liquor Control Act.

In the case of State ex rel. v. McCammon 111 Mo. App. 1. c. 630, 631, the Court said:

"We are of the opinion that the charter powers relied upon do not confer authority upon the city to overturn the general law on the subject of dramshops. Indeed, the charter itself, as above quoted, shows

that the city has no power to pass ordinances on any subject which are repugnant to the laws of the State. So therefore when the State law says that a license shall be granted on the petition of two-thirds of the inhabitants of a block, the board of aldermen have not the authority to say that there shall be a petition of two-thirds of the entire city. Though the city is authorized to regulate a dramshop, it cannot regulate it in those particulars which would be inconsistent with the regulations made by the State. For instance, it is a part of the State regulation that dramshop keepers shall not sell to minors, nor to habitual drunkards. Nor shall they keep open on Sunday, or keep music halls or gambling devices; nor shall they allow sparring contests or cockfighting. Certainly, a city of the fourth class, under the charter power to regulate dramshops above mentioned, could not, by ordinance, permit such things."

In the case of *St. Louis v. Tielkemeyer* 226 Mo. 1. c. 140, it was said:

"It is insisted by appellant that the city ordinance in question is void because inconsistent with the State statute on the same subject.

"The city of St. Louis has express authority under its charter 'to license, tax and regulate . . . saloons, beer houses, tippling houses, dramshops and gift enterprises.' (Art. 3, sec. 26, clause 5.)

"The State, however, has the sovereign power to regulate those matters and its authority being paramount, it follows that a city ordinance is not valid if it is in conflict with the law of the State on the same subject."

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CONCLUSION

In view of all the above, it is the opinion of this Department that a person licensed to sell intoxicating liquor of any kind, whether five per cent beer or intoxicating liquor of all kinds, is prohibited from selling 3.2% beer on Sundays under the provisions of Section 22 of the Liquor Control Act. If such a licensee should sell 3.2% beer on Sunday he would be guilty of a misdemeanor and subject to prosecution and his license would be subject to be revoked, under the provisions of Section 13 of the Liquor Control Act.

It is the further opinion of this Department that that part of the ordinance in question giving persons licensed to sell intoxicating liquor the right to sell non-intoxicating beer between the hours of 12:01 A. M. Sunday to 1:30 A. M. Sunday, and between the hours of 1:00 P. M. Sunday to 1:30 A. M. Monday, is inconsistent and in conflict with the State law on the same subject, and, is therefore void. In any event the State law being paramount, such ordinance would not prevent your Department from enforcing the provisions of the Liquor Control Act.

Very truly yours,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC