CITIES:)
) Cities of fourth class or other cities may limit the number of
INTOXICATING LIQUORS:) places where intoxicating liquors may be sold.

June 21, 1935.

Hon. E. McQuerry
City Attorney
Mound City, Missouri

Dear Sir:

This will acknowledge your telegram of recent date requesting an opinion from this department which reads as follows:

> "May fourth class cities limit number of stores retailing liquor in original packages by refusing license to persons otherwise qualified. * * *"

We endeavor in this opinion to point out the general law respecting what cities may do towards enacting ordinances not inconsistent with the general laws of the State concerning the sale of intoxicating liquors and applicable statutes thereto. We also point to cases and authorities respecting the limiting of the number of places where intoxicating liquors may be sold and set forth the reasoning of the courts regarding same.

There is no provision in the Liquor Control Act limiting the number of places in a city where intoxicating liquor may be sold.

Section 7018 of R.S. Mo. 1929, regarding cities of the fourth class provides in part:

> "* * * and shall have power to enact and ordain any and all ordinances not repugnant to the Constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order,

> the benefit of trade and commerce and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same. ****"

It is evident from the above section of the statutes that the cities may enact or ordain ordinances not inconsistent or repugnant to the Constitution or Laws of the State as they deem expedient for the preservation of peace and good health of their inhabitants.

Inasmuch as the sale of intoxicating liquors in the different cities presents various problems akin only to themselves, the Legislature, since giving the right to cities to regulate and control the sale of intoxicating liquors within their limits, contemplated that cities would enact ordinances as they deemed expedient to give effect to the power granted provided that such ordinances be not inconsistent with the provisions of the Liquor Control Act.

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We direct your attention to Section 25 of the Liquor Control Act which provides in part that cities may charge for licenses and regulate the sale and control of sale of all intoxicating liquors within their limits. Said section 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."

In construing the words "regulation" and "control", we submit the following cases.

The Court in the case of State ex rel. v. Fields et al., 218 Mo. App., loc. cit. 167, in defining the word "regulate" said:

> "To 'regulate' means 'to adjust, order, or govern by rule, method, or established mode; direct or manage according to certain standards or laws; subject to rules, restrictions or governing principles.'
> ****"

The word "control" is defined in City of St. Louis v. Howard, 119 Mo. loc. cit. 46, by the Court as follows:

> "The word 'control' means power or authority to check or restrain; **"

In the case of In Re Wan Yin, (U. S.) 22 Fed. 701, the Court said:

> "The words 'control and regulate' ex vi termini imply to restrain, to check, to rule and direct; ****".

In the case of State ex rel. v. Berryman, 142 Mo. App. loc. cit. 384, the Court in construing the right of municipalities to pass by-laws under general welfare clause said:

> "In State v. Butler, 178 Mo. 272, we find the rule to be declared as follows: 'The powers of a municipal assembly to pass by-laws under a general welfare clause, can never be exercised to enlarge or annul specific provisions.'"

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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 laws upon the same subject."

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

The general proposition of law respecting the enactment of ordinances by municipalities regulating the sale of intoxicating liquors within their limits is found in 33 Corpus Juris, page 521 et. seq., Section 70. Said section reads as follows:

> "In respect to the enactment of ordinances prohibiting or regulating the traffic in liquors, municipal corporations have been consistently held to have only such powers as are expressly conferred upon them by their charters or by statute, or such as are necessarily or fairly implied in or incident to the powers expressly granted, and further it has been held that their charters or enabling acts will be construed with a reasonable degree of strictness in this particular, the rule being that the power claimed must be shown to exist either explicitly or by proper implication, and that it is not sufficient to show merely that its exercise has not been forbidden. If the statute designates the municipal board or officers who are to be vested with the authority of the municipality in this regard, its terms are to be taken as absolutely exclusive. And if express power to control the sale of liquor is given to a city, village, or town, this will exclude any similar authority on the part of the county in which it is situated.

> **** When a municipal corporation is invested with power to license or regulate the sale of intoxicating liquors, it has implied authority to make all such ordinances as may be necessary to make the grant of power effectual, and to preserve the public peace, good order and security against dangers arising from the traffic in such liquors. It is only required that such ordinances should be within the scope of the powers granted, and not unreasonable, unjust, or unduly oppressive, or unfairly discriminating. ****"

In 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 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 same 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.'

> "Under power conferred on cities of the fourth class 'to regulate and to license' dramshops, there is no authority to wholly prohibit or suppress. Where there is mere power in a municipality to regulate in a State with a general policy of conducting licensed saloons, authority to prohibit is excluded. 'The difference between regulation and prohibition is clear and well marked. The former contemplates the continuance of the subject-matter in existence or in activity; the latter implies its entire destruction or cessation.' Black on Intox. Liq., section 227; 17 Amer. & Eng. Ency. Law (2 Ed.), pp. 285, 286, 1 Dillon on Munic. Corp. (3 Ed.), section 357, note 2, section 363 and notes; Berry v. Cramer, 58 N. J. Law 378; Steffy v. Monroe City, 135 Ind. 466; Champer v. Greencastle, 138 Ind. 339; Ex Parte Hinkle, 104 Mo. App. 104."

In People v. Harrison, 99 N. E. loc. cit. 904 and 905, the Supreme Court of Illinois, in discussing the right of the City to limit the number of saloons based upon the population, had the following to say:

> "The business of selling intoxicating liquor is attended with danger to the community and is a recognized subject for regulation by the police power of the state. **** The manner and extent of its regulation, if permitted to be carried on at all, are to be determined by the state, so as to limit, as far as possible, the evils arising from it. Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620. In cities, authority for such regulation **** has been conferred by the Legislature upon the city councils, and all sales of intoxicating liquor are unlawful and are prohibited unless made by virtue of a license granted under an ordinance. The power conferred upon the city is co-extensive with that of the state, and includes authority to adopt any means to reduce the evils arising from the sale of intoxicating liquor, reasonably adapted to that end, which do not violate constitutional rights.****

> "The city council having determined that the interests of the municipality will be subserved by limiting the number of saloons within its boundaries, its discretion cannot be controlled by the court, even if the latter should not agree with the conclusion. No one's constitutional right is impaired, and, if the limitation prevents some persons from keeping dramshops who might do so under an unlimited ordinance, that result is merely an incidental effect, which does not affect the validity of the limitation imposed with a view to the public welfare in the reasonable exercise of the police power of the state. Everybody has an equal right to apply for a license, and when the number authorized by the ordinance has been granted everybody is equally excluded from the business. It was said in People v. Gregier, supra, though the specific question was not involved in that case (138 Ill. 421, 28 N. E. 817): 'There can be no doubt that said reservation, by the ordinance, of a discretion as to the number of licenses to be granted was valid, as it was clearly a reasonable exercise of the power over the subject given to the village board by the statute, and the same thing appears inferentially from the fact that precisely the same discretion is given by the dramshop act to county boards in respect to the territory under their jurisdiction.' The limitation of the number of saloons within a municipality in proportion to the population has been uniformly sustained by the courts. Decie v. Brown, 167 Mass. 290, 45 N. E. 765; In re. Jorgensen, 75 Neb. 401, 106 N. W. 462; State v. Common Council of City of Northfield, 94 Minn. 81, 101 N. W. 1063; Schweirman v. Town of Highland Park, 130 Ky. 537, 113 S. W. 507."

In the case of Schweirman v. Town of Highland Park, 113 S. W. loc. cit. pages 508 and 509, one Mr. Schweirman sought by mandamus to compel the board of trustees of a city of the sixth class to issue him a license for the sale of intoxicating liquors inasmuch as the city had voted for the sale of intoxicating liquors within their limits and had already issued four licenses to persons who were qualified. The Kentucky statute provided that under the circumstances the board of trustees of such town had no right, power, privilege or dis-

cretion to refuse to issue licenses for the sale of intoxicating liquors within their limits. The court, in the above mentioned case, very thoroughly discussed the right of the board of trustees to limit the number of saloons in cities of the class above mentioned and had the following to say:

> "The board of trustees in these towns are elected by the people for the purpose of managing and controlling the affairs of the town within statutory limits. It is to be presumed that they will perform faithfully their duties by carrying out the reasonable will and wish of the people in respect to municipal affairs. It was not intended by the statute to take from these boards the exercise of all discretion, and to compel them, although it might be manifestly detrimental to the growth and prosperity of the town, hurtful to its morals, and injurious to its business, to issue licenses to every applicant who possesses the statutory qualifications and complied with the other requisites. But, as well said in Riley v. Rowe, supra, the object of the statute was to deny these boards the right to refuse to grant licenses to any person, thereby defeating the will of the people after they had declared in favor of the sale of liquor at an election held for that purpose. Of course, it is difficult to say how many saloons shall do business in a town, or what number of licenses the board may be compelled to grant, or at what point the mandatory requirements of the statute shall be satisfied, so that each case must be adjudged by the facts and circumstances applicable to it. But manifestly there is a point in respect to numbers alone beyond which the statute does not enjoin upon the trustees the imperative duty of issuing licenses. There is a place at which in this particular their discretion begins, and this discretion the courts will not interfere with or seek to control unless it is clearly abused. Although the board in cases like this cannot refuse to grant any licenses, we hold that they may exercise a reasonable discretion in determining how many saloons are necessary to afford the citizens of the town the privilege they obtained by voting in favor of the sale of

liquor. It is also well to keep in mind that it is the interest of the town and its people, and not the interest of the applicant or the particular citizen, not only in respect to liquor licenses but concerning municipal affairs generally, that the board of trustees is charged with the duty of looking after. When the people in Highland Park voted in favor of the sale of whisky, they simply meant to assert that they were in favor of licensed saloons and the sale of liquor thereat; not that they wished to fix the number of saloons or designate the persons who should obtain licenses. Nor does the statute undertake to declare how many persons shall be licensed, but only that licenses must be granted to some person. If the board of trustees of a little town in which there are four licensed saloons have no discretion to refuse licenses to other applicants, then every person possessing the proper qualifications who is willing to pay the license fee must upon proper application be granted a license, without regard to the convenience, necessities, or demands of the people, and although the number might greatly exceed the needs of the community and be a positive disadvantage to all persons engaged in the business, to say nothing of the inhabitants generally, or some applicant must be discriminated against. Along this line the argument is made that if the trustees have the authority to limit the number of licenses, and the persons to whom they may be granted, it will result in favoritism-- that licenses will only be granted to those who have the ear of the board. This may in some instances be true, but we know of no scheme that has ever been devised that will prevent this sort of inequality. In every case in which boards or bodies of men are vested with the discretion to appoint persons to office or place or give them privileges not enjoyed by the body of the people, there is an occasional abuse of discretion, but this is not an argument against the power. It is merely a manifestation of one of the infirmities of government that cannot be remedied or cured. If there are a number of applicants for a place or privilege, and all cannot be satisfied, one or more of

> them in the very necessity of things must be refused; and this, everything else being equal, amounts to discrimination. And so in the granting of liquor licenses, except that in respect of these, the discrimination cannot be so pronounced, as in other cases, because such a license is not a privilege or right that any citizen may demand or have for the asking. It is rather in the nature of a favor that may or may not be granted by those in authority. There is no disagreement among the authorities on this point. Hence we have little difficulty in reaching the conclusion that the argument in respect to discrimination and favoritism that might be urged with great force as to other harmless employments or pursuits, is weakened when it is attempted to be extended to a business that has always been the subject of police regulation and is generally regarded as a tolerable evil. This idea is well illustrated by the fact that it is always competent to inquire into the character of the applicant for license to retail liquor and to refuse license if his reputation is immoral or objectionable. And so in respect to the locality at which it is proposed to conduct the business. Here,a reasonable discretion may be exercised and license refused if it would not be proper to have a saloon at the proposed place. There are localities in every town in which it would be offensive to the common sense of all good people to have saloons, as, for instance, near by or adjacent to schools or churches or in residence neighborhoods; and boards in the exercise of a discretion may refuse to license a grogshop next door to a school-house, in front of a church, or in the center of a street set apart for residential purposes. Following out this theory, we see no reason why this discretion may not be extended to numbers as well as to persons and localities. *****

In the case of State ex rel. Howie v. Common Council of City of Northfield, 101 N. W. loc. cit. 1064, the Supreme Court of Minnesota said:

> ***** It is contended that the council has no right arbitrarily to limit the number of saloons to be licensed; that,

> if it determines to grant licenses at all, it must grant them to all applicants who bring themselves within the provisions of the law. We do not concur in this contention. The provisions of the charter vest in the common council authority to regulate and control the sale of intoxicating liquors within the city, and in exercising that authority the council is clothed with discretionary powers, the exercise of which cannot be controlled by the courts. The power to regulate and control includes the power to do all that is deemed, in the judgment of the council, for the best interests of the municipality and its inhabitants. It necessarily confers the power to refuse a license, or to limit the number of licenses to be granted, when, in the judgment of the council, the welfare of the city suggests such action. ****" Perry v. City Council, 25 Pac. Rep. 739.

From a careful reading of the above authorities, municipal authorities cannot limit, set aside or enlarge the general laws of the State unless such power to do so can be done in express terms or necessary implications. The power given to cities to regulate and control the sale of intoxicating liquors within their limits would not be such a power given that the cities of the fourth class or any other city could wholly prohibit or suppress the sale of intoxicating liquors, in that the regulation and control of the sale of intoxicating liquors would contemplate the continuance of the subject-matter in existence.

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It is evident from a reading of Section 25, supra, that the Legislature intended that cities may enact ordinances dealing with the various situations presented in each city, In giving effect to the power thus conferred, the interests of the municipalities would be subserved by limiting the number of places where intoxicating liquors may be sold, provided however, any ordinance limiting the number of places where intoxicating liquor may be sold be not inconsistent with the provisions of the Liquor Control Act.

CONCLUSION.

It is the opinion of this department that since Section

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25 of the Liquor Control Act has given the city the power to license and charge for licenses issued to those engaged in business of the manufacture, wholesale and retail of intoxicating liquors within its limits, fix the amount to be charged for licenses 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 violation of such ordinances, we rule that any city may enact and ordain ordinances regulating and controlling the sale of intoxicating liquors as they deem expedient for the peace, health and good order of the inhabitants thereof; provided, however, that such ordinances be not unreasonable, arbitrary or inconsistent with the provisions of the Liquor Control Act.

We conclude that a city may limit the number of stores engaged in the sale of intoxicating liquor by ordinance if such ordinance or ordinances be not unreasonably or arbitrarily enacted with a view of creating a monopoly in one or more persons or with a view of prohibiting rather than reasonably controlling the sale of intoxicating liquors.

Very truly yours,

RUSSELL C. STONE
Assistant Attorney-General.

APPROVED:

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(Acting) Attorney-General.

RCS/afj

(See Zinn v. City of Steelville, 173 S.W.2 398, in connection with the above subject)