INTOXICATING LIQUOR: City may not prohibit sale of intoxicating liquor within a distance greater than 300 feet of a school or church

July 28, 1936

Opinion No. 97

Mr. Mark W. Wilson
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office, which reads, in part:

> "Further, it is my understanding that a county, town, city or village may enact ordinances, etc. but that the same must not limit the application of the liquor statutes. In this connection I am dealing with a city ordinance which prohibits the operation of a retail liquor store within 500 feet of a school or church. The store in question is located 400 feet from a school. Section 44-a-14 permits a municipality to prohibit the operation of such stores within 300 feet of a school or church, but by implication denies the right of the city to increase this zone. In the case at hand the ordinance was amended to make the distance 500 feet rather than 200 feet. I will appreciate your opinion as to the right of the municipality to increase this zone beyond the 300 feet set forth in the statutes."

Section 44-a-14 of the Liquor Control Act, about which you inquire, 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."

Section 70, 33 Corpus Juris, page 521, reads, in part, as follows:

> "In respect to the enactment of ordinances prohibiting or regulating the traffic in liquors, municipal corporations have been inconsistently 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, * * * *."

15 Ruling Case Law, Section 16, page 262, states the law as follows:

> "The general legislative powers of municipalities are elsewhere discussed and it need be observed in this connection merely that they are confined to those expressly granted by the Legislature and those to be inferred from general grants of power are necessarily incident to those granted."

From the above, it is plain that a municipal corporation's power to regulate the traffic in intoxicating liquor is confined to those expressly granted by the Legislature and those to be inferred from general grants of power which are necessarily incident to those granted. It has uniformly been held by the courts that a city ordinance which is inconsistent with a state statute on the same subject is void.

In the case of St. Louis v. Tielkemeyer 226 Mo. l. c. 140, the court said:

> "It is insisted by appellant that the city ordinance in question is void because inconsistent with the State statute on the same subject.
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> "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. Appellant contends that the ordinance under which he was convicted is in conflict with the statute law of the State in several particulars, which

will be hereinafter discussed."

In the case of State ex rel. v. McCammon 111 Mo. App. 1. c. 630, 631, the Court quoted with approval Black on Intoxicating liquors, section 223, as follows:

> "'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:
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> "' 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 of 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.'"

CONCLUSION

In view of all the above, it is the opinion of this

department that a municipal corporation does not have the authority to prohibit the sale of intoxicating liquor within a distance greater than three hundred feet of a school, church or other building regularly used as a place of religious worship.

It is our further opinion, that a city ordinance, prohibiting the sale of intoxicating liquor within a distance of five hundred feet of a school or church, would be in conflict and inconsistent with Section 44-a-14 of the Liquor Control Act of the State of Missouri and therefore void.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

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