OPINION
46-159

August 12, 1946 (OPINION)

INTOXICATING LIQUOR

RE: County Commissioners Authority to Prohibit Sale of in

Unincorporated Territory

This will acknowledge your letter of July 30, 1946, in which you state that the board of county commissioners at a recent meeting passed a resolution providing that no licenses to sell liquor should be granted in territory outside of the limits of incorporated cities and villages of the county. The resolution previously existing provided for the licensing of one liquor establishment outside of incorporated villages and cities. In other words, the present resolution is an amendment to the previous resolution.

The question therefore arises as to whether or not a board of county commissioners is legally authorized, by resolution or ordinance, to prohibit the sale of beer or liquor in territory under its jurisdiction, that is territory located outside of cities and incorporated villages.

Section 5-0208 of the 1943 Revised Code provides:

> The board of county commissioners of each county shall have the same powers, relative to the retailing of beer or ale in the territory in each county outside of incorporated cities and villages, as are granted to the governing boards of incorporated cities and villages in section 5-0207."

With reference to the sale of liquor, section 5-0320 of the 1943 Revised Code provides:

> The governing body of any city, village, or county may revoke licenses for cause and may regulate the retail sale of liquor within its jurisdiction, subject to review by the courts of the state."

The power to regulate does not include the authority to entirely prohibit the sale of intoxicating liquor. In 33 Corpus Juris, section 71, page 524, it is said:

> The grant to a municipal corporation, by charter or general statute, of the power to 'regulate,' 'license,' or 'tax' the sale of intoxicating liquors within its limits does not confer authority totally to prohibit such sale."

In the case of Perry v. City Council of Salt Lake, 25 Pac., 739, the supreme court of Utah passed upon a statute which reads as follows:

> The city council shall have the following powers: To license, regulate, and tax manufacturing, selling, giving away, or disposing of in any manner, any * * * intoxicating liquors."

In its opinion in that case, the court said:

> It is apparent from the act under consideration, that the intention of the legislature in conferring on the council the power to regulate the sale of liquor was to enable that body to protect society from the evils attending it. The benefit of the dealer was not the chief end. Therefore the duty of the council with respect to him must depend largely on the good of the neighborhood. It follows that it is the duty as well as the right of the council to use all reasonable means to give such protection as the public welfare demands. We are of the opinion that the council, in the regulation of the business, has a wide discretion, but it it not arbitrary discretion. Under the power to regulate, the business may not be prohibited. The authority is delegated to the councilmen as reasonable men, and with the expectation that they will employ reasonable means. To intrust the privilege of selling intoxicating liquors to persons whose antecedents, habits, and characters are such as to inspire confidence in them, and warrant the belief that they would not violate the law by selling to minors, habitual drunkards, or intoxicated persons, and would be likely to conduct their business in other respects with due regard to good morals and the peace and happiness of society, would appear to be within that discretion included in the right to regulate. The exercise of a reasonable discretion as to the localities in which the business shall be carried on would appear to be within the power to regulate."

It is, of course, a well established principle of law that no one has a constitutional or vested right to engage in the sale of liquors or to operate a saloon. See 30 Am. Jr. sec. 20, p. 263. Granting a license to sell intoxicating liquor confers a privilege - not a vested right. When the people of North Dakota repealed section 20 of our state constitution and approved the beer and liquor control acts, they still regarded the liquor traffic as an evil, but they felt that the licensed sale of intoxicating liquor would be preferable to the flagrant and numerous violations of the old law under prohibition.

The supreme court of our state has stated in the case of Thielen v. Kostelecky, 69 N.D. 417, that the power to regulate a particular business includes the authority to prescribe reasonable rules and regulations and conditions upon which such business may be permitted, which includes the limitation of the number of places to be licensed within the jurisdiction of the governing body.

It is, therefore, my opinion that although a board of county commissioners does not have the legal authority to prohibit the sale of beer or liquor in territory under its jurisdiction, nevertheless, the board may limit the number of places to be licensed in such territory and is vested with the discretion to grant or refuse any application for a license, and the action of the board in refusing to grant a license is subject to review by the district court.

It is further my opinion that a citizen of North Dakota has a right to make application for a beer or liquor license, but that the board, in its discretion, may refuse to grant such application. In other

words, it is my opinion that a county board cannot adopt a resolution or ordinance prohibiting the sale of intoxicating liquor in territory under its jurisdiction and thus, in effect, deny the right to make application for a license. The board, in my opinion, is required to consider and pass upon every application presented. But the board may, in its discretion, deny the granting of each such application.

The board of county commissioners may, for example, find that the territory or location in which the applicant proposes to open a beer or liquor tavern is sufficiently near an incorporated village or city where liquor or beer may be conveniently purchased by the people of the community. Or the board may find that there are other valid reasons for denying the application. The objection may be voiced that this construction authorizes a county board to deny any and all applications and thus, in effect, prohibit the sale of intoxicating liquor outside of cities and incorporated villages. While this may be so, it is my opinion that a county board must consider each application presented and that it can deny each such application for license, but that its action is subject to review by the district court, and that the only question which the court can pass upon and determine is whether or not in the case in question the board has abused its discretion in the denial of the application for the license.

As stated in the case of Perry v. City Council of Salt Lake, supra, the board of county commissioners as reasonable men may examine the antecedents, habits, and character of any applicant desiring a liquor or beer license, and if, in their opinion, the applicant does not have the proper antecedents, habits, and character to warrant the issuance of a license, I believe it is within their discretion to deny the same. If the background of the applicant is not such as to inspire confidence and warrant the belief that he would not violate the law by selling to minors, habitual drunkards, or intoxicated persons, and that he would be likely to conduct his business with due regard and respect for good morals, then I believe it is within the regulatory powers of the board of county commissioners to deny the license.

The object of regulation is to enable the board vested with such power to safeguard the morals and welfare of the community, and the only manner in which a board can accomplish that purpose is by the denial of an application to an individual who does not, in their estimation, have the power qualifications for the issuance of the license. In other words, there are other considerations involved in the granting of an application for a liquor license than the mere possession of the applicant of the legal prescribed requisites provided by the statutes.

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