

**OPINION
46-204**

May 16, 1946 (OPINION)

MUNICIPAL LIQUOR STORES

RE: Substitutes for

This will acknowledge your letter of May 8, 1946, relative to the necessity of making application to the securities commission for license to sell stock in the Mohall Improvement, Inc., which recently has been granted a charter by the secretary of state.

As I understand the organization of this corporation, it is in the nature of a private corporation engaged in the sale of intoxicating liquors in the city of Mohall. The by-laws provide that it is a private corporation with capital stock of \$25,000.00, divided into preferred and common stock, of which 24,900 shares are preferred stock, and I assume they sell at \$1.00 per share. This preferred stock is guaranteed to yield dividends not to exceed four percent per annum and to be retired by the corporation as soon as possible when the profits of the corporation become available for that purpose. The owners of the preferred stock have no voice in the operation or management of the corporation and no vote. One hundred shares of common stock are to be issued which is to be the voting stock which manages the corporation, but no dividend thereof is allowed nor is any remuneration connected therewith, and the same may not be assigned without the consent of the board of directors.

I note that it is the plan of the incorporators to retire the preferred stock as fast as possible, and that as soon as this is done to amend the articles of incorporation to provide for a nonstock, nonprofit organization.

I note that you canvassed the city of Mohall and have taken subscriptions for stock in this corporation from thirty-two business and professional men, the majority of whom took one hundred shares of preferred stock and one share of common stock. One took fifty shares of preferred stock and a few took twenty-five shares. The sale of stock at the time of your letter yielded the sum of \$2907.00.

The articles of incorporation contain the names of seven incorporators who serve as a temporary board of directors until the first regular stockholders' meeting.

The question arises as to whether or not the sale of stock in the Mohall Improvement, Inc., comes within the terms of chapter 10-04 of the North Dakota Revised Code of 1943, involving the "Supervision of Issue and Sale of Securities." The term "securities" is defined in section 10-0402, subsection 1, as follows: "Stock certificates, shares, bonds, debentures, certificates of participation, service contracts, preorganization certificates and subscriptions, and agreements to incorporate or mutual incorporation contracts involving more than twenty-five proposed incorporators."

There are other securities mentioned in this section, but the balance

of the section is not pertinent to the situation existing in connection with the organization of the Mohall Improvement, Inc.

If the preferred shares are to be sold generally to the public, or to anyone who desires to buy the same, it would appear to me that the sale of such stock would come within the terms of chapter 10-04 of the 1943 Revised Code. It is true that you have only seven original incorporators. But your letter indicates that you have already sold stock to thirty-two businessmen, and I assume that if you sell the balance of the stock up to the limit of \$25,000.00, which is the proposed capital stock of the corporation, that the sale thereof will be made to the public.

I can find no exemption covering the type of security which you will offer, to wit, the preferred stock of the Mohall Improvement, Inc. Section 10-0403 of the 1943 Revised Code deals with securities exempted from the provisions of chapter 10-04, and none of the exemptions cover the type of security which you are offering for sale.

If, therefore, you propose to sell the balance of the preferred stock to the public generally, I think the only safe course of procedure is to apply to the Securities Commission for permission to sell or offer for sale the preferred stock of the Mohall Improvement, Inc., and set forth the prerequisites of the sale of such securities in the application outlined in section 10-0405 of the 1943 Revised Code.

NELS G. JOHNSON

Attorney General