OPINION
48-120

August 18, 1948 (OPINION)

LIQUOR

RE: Fees by Municipality

I am in receipt of a reply to my letter addressed to the City Attorney at Fargo, North Dakota, relative to the fees a municipality may charge for a liquor license.

In his letter it is stated:

> "We have not found any authority on the matter and feel that it is a nice question as to whether the courts, in view of the authority given cities to regulate and license liquor dealers, would permit a situation to exist where a fee to any person desiring to engage in both types of sale would be $4000.00. We have not searched the legislative journals and do not know whether they would throw any light on the matter, but certainly do not feel that section 5-0303 is entirely determinative to this matter. As stated, our opinion was purely an informal one and we told the commission to go ahead and set up such a schedule of fees if they wished to do so."

I have also conferred personally with the States Attorney of Cass County and he has stated that in his opinion a municipality may, if they desire, levy a lesser fee for "off sale" than for "on sale." He particularly points out that it is a matter of common knowledge that a place engaged only in "off sale" will not do one half the volume of business that a place licensed for "on sale" will do.

I have checked the legislative journals and followed the bill from the presentment to its adoption but was unable to find anything that would shed light on the legislative intent and especially on the phrase "the license fees shall be the same to each individual within each of the said political subdivisions" as used in the original acts as contained in chapter 259 of the 1937 Session Laws and in our recent legislative enactment, chapter 11 of the 1947 Session Laws.

In further review of this inquiry, we take note of an opinion written on May 10, 1947, by the Attorney General and addressed to E.M. Brothun of Crosby wherein it was said:

> "I know of no basis in law which would allow a city to attempt to classify licenses and charge some persons more than others. In other words, I do not know upon what basis a classification could be made which would validate an ordinance providing for a lesser fee for a liquor license to a club or lodge than to private individuals."

With reference to the above quoted opinion the City Attorney of Bismarck feels it should be applicable to the point now in question and that the law does not permit discrimination in the amount of fee to be charged by the municipalities. However, I also have had the

benefit of other attorneys opinions on the subject and some of them are of the opinion the law means no discrimination for a certain particular class of license, that is, all "on sale" licenses must be the same and all "off sale" licenses must be the same but there may be a difference between the classes. There is, of course, no inconsistency between opinions as the problems are entirely different.

It is also interesting to note that the phrase "off sale" or "on sale" is not found in any of the statutes with which we are concerned. In fact, the only place where such terms are used is with reference to the state licenses for such beverages as shown by chapter 50 of the 1945 Session Laws.

A municipal corporation has no inherent power to license or tax the sale of alcoholic beverages as such power resides in the legislature. It is competent, however, for the legislature to confer such power on municipalities and such statute must be reasonably construed in accordance with the legislative intent. What, then, was the intent of the legislature?

I believe we now would be authorized to take into consideration the administrative practice of the issuance of "off sale" or "on sale" licenses by municipalities at a different fee since the time of the original statute and consequently arrive at the conclusion that cities and villages do have the power to issue an "off sale" license at a fee somewhat less than that charged for the "on sale" license. That such has been the practice in this state, I believe, will be conceded.

In adopting a statute, the legislature is presumed to have acted with knowledge of the previous construction of similar statutes, and to have adopted such construction not only as construed by the courts, but also as previously construed by the executive or administrative department of the government. Vantura v. Montana Liquor Board (1942) 124 P 2 d 569.

If the legislature contemplated a rule other than that announced by the Attorney General, it would seem plain that it would have clarified the law in this particular. Not having done so we must conclude that the legislature was satisfied with the interpretation placed upon the act by the Attorney General. See page 571 of Vantura v. Montana Liquor Board supra.

A municipal liquor license ordinance is not invalid because it fixes differential rates for license fees, based on a reasonable and proper principle of classification, and does not discriminate between persons in the same class. 48 C.J.S. section 51, page 191.

Hence, it is my opinion, and the opinion of this office that the rule as announced by I. A. Acker in his opinion of June 27, 1947, is correct; that is, an ordinance may be legally enacted prescribing a small license fee for the "off sale" of liquor than "on sale" and a larger fee for both "off sale" and "on sale".

P.O. SATHRE

Attorney General