

LIQUOR CONTROL:

City council of third class city cannot delegate power to issue non-intoxicating permits. Duty of mayor to sign license issued is ministerial.

September 6, 1938

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Honorable M. Ralph Walsh
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Dear Sir:

This will acknowledge receipt of your letter of August 4, 1938, requesting an opinion on the following question:

"A city of the third class in my County, by ordinance, has provided that 3.2% beer licenses must be signed by the Mayor of the city.

"The City Council by a majority vote has voted to issue a 3.2% beer license to a citizen of the city.

"The Mayor arbitrarily refuses to sign the license, maintaining that in as much as the ordinance provides for his signature, he has a right to veto or refuse the license in his own discretion.

"Query: Can the Mayor legally refuse to sign the license, and is he within his rights in doing so?"

We have not been supplied with a copy of the ordinance in question, so do not know its exact import and cannot determine whether the ordinance itself attempts to invest veto power in the mayor with reference to the

issuance of said license. All we can determine is whether or not this power could legally be delegated to the mayor by ordinance.

The authority of a city of the third class to issue a license to a person desiring to engage in the liquor traffic is contained in Section 13139-e, Laws 1935, page 396. This section provides: "The Board of Aldermen, City Council or other proper authorities of incorporated cities, * * * may charge for licenses issued to * * * retailers of non-intoxicating beer within their limits, * * *."

Section 6791, R. S. Mo. 1929 concerns how licenses are to be issued. This section provides: "All license tax shall be regulated by ordinance, * * *. Licenses shall be signed by the mayor and clerk, and countersigned by the collector, and the clerk shall affix the corporate seal of the city thereto."

In Hays v. Poplar Bluff, 263 Mo. 1.c. 531, it is said: "* * that, under our system of government, municipal corporations possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or by other statutes applicable to them.* * "

Under this rule a third class city may only issue a non-intoxicating beer permit as the statute directs, and in no other way. And we might add that only the body authorized to issue the permit may do so.

In 33 Corpus Juris, page 521, section 69, it is stated that the, "Power granted by the legislature to a municipal corporation to * * * license the sale of liquor, cannot be delegated by the municipality to any other body or individual. Thus, if the power is conferred upon the council of a city, it cannot be delegated by the council to the mayor." However, an exception is recognized to this rule. It is stated in 43 Corpus Juris, page 243, section 242 that: "Where the thing regulated is of such a character, * * * that the prosecution of the business * * * under certain circumstances is calculated to endanger the * * safety * * or welfare of the public, and those conditions and circumstances are not in their

nature susceptible of being foreseen and made the subject of common prescription, then the right to the prosecution of such an enterprise * * * may be left by the council to the discretionary determination of some appropriate board or officer."

In determining who may issue a beer license in a city of the third class we must, of course, look to the statute. It says: "the Board of Aldermen, city council or other proper authorities." To determine who might be included within "other proper authorities", we apply the rule of ejusdem generis. The application of this rule is concisely stated in Puritan Pharmaceutical Company v. Penn. Ry. Company, 77 S. W. (2d) 1.c. 511, to be: "that, where general words in a statute follow specific words, designating special things, the general words will be considered as applicable only to things of the same general character as those which are specified." Thus, the phrase, "other proper authorities" means other bodies of the same character as the Board of Aldermen or City Council.

The city council of a city of the third class is the proper licensing authority. It is plain that this authority cannot be delegated because the exception to the rule above stated does not apply in that all conditions and circumstances surrounding the liquor traffic are "susceptible of being foreseen and made the subject of common prescription."

Also another applicable rule is that officers cannot delegate their powers and duties if in their exercise a discretion is called for. The act of determining whether one is qualified to hold a beer permit calls for the exercise of discretion on the part of the city council.

With the city council having no power to delegate their authority to issue non-intoxicating beer permits, then what is the significance to be attached to section 6791, supra, wherein it is provided: "Licenses shall be signed by the mayor"? Does this provision confer on the mayor of said city the right to withhold his signature and in effect veto a license issued by the council?

In State ex rel. v. Russell, 131 Mo. App. 638, a

mandamus suit, a question very similar to the instant question was considered. In this case the Board of Aldermen of Jackson, Missouri, passed on an application for a dramshop license. They found it sufficient and ordered the license issued. The mayor of said city was required by statute to sign said license and this he refused to do. He asserted as reason for his action that the application for said license was not sufficient. In deciding this question the court said at l.c. 649:

"* * We think the effect of the general ordinance which had been adopted by the city of Jackson relating to saloon licenses, was to constitute the board of aldermen a tribunal clothed with authority to pass on the sufficiency of a particular application and petition, and that in doing this the board acts judicially instead of legislatively. This question of the character of the proceedings by a board of aldermen in granting dramshop licenses is decisive, not only against the right of the mayor to participate in the proceedings as being municipal legislation, but of the conclusiveness of the board's action on the rights of the applicant. In an opinion by Judge BLAND, wherein the subject was carefully examined, this court declared the decision by a board of aldermen of a fourth-class city, of whether an applicant for saloon license had complied with the law and entitled himself to a license was no less judicial than a similar decision by a county court or excise commissioner, which has always been regarded as judicial. (Weber v. Lane, 99 Mo. App. 69, 71 S. W. 1099, and cases cited in opinion.) We adhere to said ruling as well supported by principle and precedent. After the board of aldermen of Jackson had found

in favor of relator's petition and qualifications, and had ordered a license to issue, he submitted his bond, the board approved it, he paid all fees, took the collector's receipt for same, the city clerk issued the license and said clerk and the collector signed it as the law provides. (R. S. 1899, sec. 5951.) The statute reads as follows:

'All license tax shall be regulated by ordinance, and no license shall be issued until the amount prescribed therefor shall be paid to the city collector, and no license shall in any case be assigned or transferred. Licenses shall be signed by the mayor and clerk and countersigned by the collector, and the clerk shall affix the corporate seal thereto.'

"Under said section it was as much the duty of respondent, the mayor, to sign relator's license, as it was the duty of the city clerk and collector. And we think in the instance of each of said officials, the duty was ministerial and not discretionary--was intended not as an additional determination by them of relator's right to a license, but as an attestation that one had been granted him.* * * * *"

Thus, under this holding it is clear that the duty of the mayor of a third class city to sign a non-intoxicating beer permit is ministerial and not discretionary, and that if he refuses he may be compelled to do so in a proper proceeding. The mayor of a third class city is not vested with any discretion with reference to signing beer licenses, nor could he be so authorized by any ordinance which the city council might adopt.

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CONCLUSION

Therefore, it is our opinion that the mayor of a third class city is not and cannot be invested with any discretion in the issuance of non-intoxicating beer licenses; that his duty to sign licenses authorized and issued by the city council is purely ministerial and upon his refusal to sign a license so issued he may be compelled to do so by a proper action in the courts.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
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