

5837.

APPROVAL—BONDS OF BROWN TOWNSHIP RURAL SCHOOL DISTRICT, MIAMI COUNTY, OHIO, \$5,000.00.

COLUMBUS, OHIO, July 14, 1936.

Industrial Commission of Ohio, Columbus, Ohio.

5838.

APPROVAL—BONDS OF CLEVELAND CITY SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO, \$10,000.00.

COLUMBUS, OHIO, July 14, 1936.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

5839.

LIQUOR PERMITS—DEPARTMENT OF LIQUOR CONTROL MAY ISSUE PERMIT TO PERSON WHERE PERMIT HAS BEEN REVOKED FOR CONVICTION UNDER PROVISIONS OF LIQUOR CONTROL ACT—WIDE DISCRETION IN ISSUANCE OF PERMITS.

SYLLABUS:

(1) Section 6064-25, General Code, does not prohibit the Department of Liquor Control from issuing a permit to a person whose permit has been revoked because of a conviction of the permit holder or his agent or employe of violating the penal provisions of the act.

(2) The Department of Liquor Control has discretionary power in the issuance of permits and is authorized to prescribe reasonable requirements from applicants for permits. It is reasonable, and in keeping with the policy as disclosed by the legislature in the enactment of the Liquor Control Act, to refuse the issuance of a permit to a person whose permit has been revoked because of a conviction of the permit holder, his agent or employe, of violating the penal provisions of the Liquor Control Act.

COLUMBUS, OHIO, July 15, 1936.

HON. J. W. MILLER, *Director, Department of Liquor Control, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion which reads as follows:

“Under Section 6064-25 it is mandatory on the Department of Liquor Control to revoke a permit in case ‘of conviction of the holder, or his agent or employee, for violating any of the penal provisions of this act or for a felony.’

The question has been raised as to whether or not the Department has the authority to issue a permit to an individual who has been convicted of violating any penal provisions of the Liquor Control Act, or to issue another permit where the individual formerly was the holder of a permit or permits issued by the Department which were revoked by the Department by reason of the fact of this individual, his agent or his employee, having been convicted for violating the penal provisions of the Liquor Control Act.

I will appreciate your formal opinion as to whether or not there is any provision in the law prohibiting the Department from issuing permits under these circumstances.

There are a number of cases pending before the Department in which this question is involved and I would appreciate having your formal opinion at the earliest possible date.”

It is a fundamental principle of law that state officers, boards and commissions have such power and only such power as is expressly granted by statute or which is necessarily implied in the powers granted to carry into effect said powers. *State, ex rel. Hunt v. Commissioners*, 8 N. P. (n. s.), 281; *Peter v. Parkinson*, 83 O. S., 36; *State, ex rel. Bentley & Co. v. Pierce*, 96 O. S., 44; *Frisbie Co. v. East Cleveland*, 98 O. S., 266; *State, ex rel. Clark v. Cook*, 103 O. S., 465.

Section 6064-25, General Code, referred to in your letter, reads as follows:

“The board of liquor control may revoke any permit issued pursuant to the liquor control act for violation of any of the applicable restrictions of this act or of any lawful rule or regulation of the board or other sufficient cause, and must revoke any such permit for any of the following causes:

1. In case of conviction of the holder or his agent or employee for violating any of the penal provisions of this act or for a felony.

2. For making any false material statement in an application for a permit.

3. For assigning, transferring or pledging a permit contrary to the rules and regulations of the board of liquor control adopted pursuant to this act.

4. For selling or promising to sell beer or intoxicating liquor to a wholesale or retail dealer who is not the holder of a proper permit at the time of the sale or promise.

5. For failure or default of the holder of a permit to pay an excise tax or any part thereof together with any penalties imposed by or under the provisions of the law relating thereto and for violation of any rule or regulation of the tax commission of Ohio in pursuance thereof.

The board of liquor control shall cancel any permit issued pursuant to the liquor control act:

1. When required to do so by the provisions of section 6064-37 of the General Code.

2. Excepting as otherwise provided in the rules and regulations of the board of liquor control relative to the transfer of permits, in the event of the death or bankruptcy of the holder thereof, the making of an assignment for the benefit of the creditors of the holder thereof, or the appointment of a receiver of the property of such holder.

Any person or his employee or agent who has been determined by a court having jurisdiction, to have violated section 12940 of the General Code of Ohio, or any part thereof, shall forthwith forfeit any permit granted to him. In addition to the board, such court shall have the power to order such forfeiture. Any place granted such permit by the department, shall be deemed a place of public accommodation, within the meaning of said section 12940. Application for another permit shall not be considered by the department under one year from date of said forfeiture."

It is to be noted from a reading of this section that the legislature has made it mandatory upon the Board of Liquor Control to revoke any permit held by a person who is convicted of violating any of the penal provisions of the Liquor Control Act or of a felony, or, in the case of

the conviction of the permit holder's agent or employee. This provision is mandatory and the board is without discretion in acting upon the revocation.

This section of the Liquor Control Act relates to the cancellation and revocation of permits theretofore issued by the Department of Liquor Control through its executive officer, the Director. The person must be the holder of a permit at the time of conviction. There is no express language in this section which inhibits the Department from issuing another permit to a person whose permit has been revoked, except the provision contained in the last paragraph of this section which expressly prohibits the Department from issuing another permit for a period of one year to a person who has been convicted of violating Section 12940, General Code.

Section 12940, General Code, makes it a criminal offense for a proprietor of a restaurant or eating place to discriminate against a citizen because of color or race.

The legislature having expressly provided that the Department shall not issue another permit for a period of one year to a person who has been convicted of violating this section, the question of interpretation raised by your inquiry is brought within the principle of statutory construction expressed by the Latin maxim of "expressio unius est exclusio alterius", that is, the express mention by the legislature of certain limitations is to the exclusion of all others. This principle of statutory construction has been recognized by the Supreme Court in many decisions. *Cincinnati v. Roettinger*, 105 O. S., 145; *Devine v. State, ex rel. Tucker*, 105 O. S., 288; *Madjorous v. State*, 113 O. S., 427; *Curtis v. State*, 108 O. S., 292, 37 O. Jur., 555, Sec. 295.

The sole aim and purpose of statutory construction is to arrive at the true intention of the legislature. Did the legislature intend by enacting Section 6064-25, General Code, to forever prohibit the issuance of a permit to a person whose permit was revoked because of the conviction of the permit holder or his agent or employe, of violating a penal provision of the Liquor Control Act? Applying the principle of statutory construction above referred to of "expressio unius est exclusio alterius" in interpreting the language employed by the legislature in the enactment of Section 6064-25, no other conclusion can be reached but that the Department of Liquor Control is not prohibited by this section from issuing another permit to a person whose permit has been revoked because of a violation. That is, the legislature having expressly provided in Section 6064-25 that the Department shall not issue another permit to a person whose permit has been forfeited for a period of one year because of a violation of Section 12940, General Code, has in effect said in other cases

of revocation that the Department is not precluded from issuing another permit.

The next questions which logically follow from your inquiry are, what is the extent of the discretion of the Department in the issuance of the various classes of permits, or is it mandatory on the part of the Department to issue a permit to everyone who technically meets the requirements for the particular class of permit and tenders the proper fees to the Department without regard to the particular circumstances in each case?

As above stated, all state officers, boards and commissions must act within the authority granted by law and at no time can they act in an arbitrary and unreasonable manner. The courts, however, have upheld very strict regulations even to the extent of prohibiting the sale and manufacture of intoxicating liquor as a valid exercise of the police power of the state. *Bloomfield v. State*, 88 O. S., 253; *State, ex rel. Zugravu v. O'Brien, et al.*, 130 O. S., 23; *Foster v. Kansas*, 112 U. S., 206; *Eberle v. Michigan*, 232 U. S., 700; *National Prohibition Cases*, 253 U. S., 351; *Cooley's Constitutional Limitations*, 8th Edition, page 1250.

The *Zugravu* case, *supra*, is a recent case arising under the present Liquor Control Act which was an original suit in mandamus filed in the Supreme Court praying for a writ of mandamus requiring the Department of Liquor Control to reinstate a permit which had been revoked. The court denied the writ and upheld as constitutional the provisions of the Liquor Control Act providing for the revocation of permits. The syllabus of this case reads as follows:

"1. Within constitutional limitations, the General Assembly may, in the exercise of the police power, limit or restrict, by regulatory measures, the traffic in intoxicating liquors.

2. Permits to carry on the liquor business which are issued under the provisions of the Liquor Control Act are more licenses, revocable as therein provided, and create no contract or property right.

3. Where authority to revoke such a permit is conferred upon an executive or administrative officer by legislative enactment with right of appeal to an administrative board, and with provision therein for giving notice to permittee, and for adequate hearing and the summoning of witnesses both before such officer and reviewing board, but without provision for recourse to the courts by appeal or error, such legislation does not amount to a denial of due process of law under the state or federal Constitution."

Without expressly referring to all the restrictions contained in the Liquor Control Act pertaining to the issuance of the various classes of permits as provided in Section 6064-15, General Code, it is pertinent to note that Section 6064-17, General Code, places certain restrictions with respect to citizenship. This section also provides that "no person heretofore convicted of any felony, shall receive or be permitted to retain any permit under the Liquor Control Act; nor shall any such person have an interest, directly or indirectly, in any permit authorized to be issued under the Liquor Control Act. No holder of a permit shall sell, assign, transfer, or pledge the permit granted without the written consent of the Department of Liquor Control."

Section 6064-3, General Code, grants to the Board of Liquor Control very broad rule-making powers with respect to the carrying into effect of the provisions of the Liquor Control Act. Paragraph (c) of subsection 1 of this section grants to the Board of Liquor Control the power to adopt rules regulating the conduct of a retail permit holder's business. This section authorizes the adoption of:

"Rules, regulations, and orders providing in detail for the conduct of any retail business authorized under permits issued pursuant to this act, with a view to insuring compliance with the provisions of this act and other laws relative thereto, and the maintenance of public decency, sobriety, and good order in any place licensed under such permits."

It is to be also noted that Section 6064-25, General Code, quoted supra, grants to the Board of Liquor Control the authority to revoke permits "for violation of any of the applicable restrictions of this act or of any lawful rule or regulation of the board or *other sufficient cause*".

In the case of *State of Ohio, ex rel. The Home Life Insurance Company v. Matthews*, 58 O. S., 1, it was held that the Superintendent of Insurance was justified in refusing a license to transact insurance business in this state where there existed grounds for revoking the license should one have been granted. The court in the course of the opinion stated at page 3:

"If, upon this ground, he may revoke a license previously issued, it would seem to, unquestionably, follow that he may also, upon such ground, refuse to issue or renew such license to the defaulting company."

After the amendment of 1912 to the state Constitution providing for the licensing of the traffic in intoxicating liquors, an act of the legis-

lature (103 O. L., 216) was upheld as constitutional which granted to the licensing board the authority to determine that all applicants for license were of good moral character. The court held that this was not an unwarranted and unreasonable delegation of legislative authority. *Meyer v. O'Dwyer, et al.*, 13 O. N. P. (n. s.), 129.

In 33 C. J., Sec. 147, page 552, the following statement appears with respect to the discretionary power in issuing licenses to sell intoxicating liquor:

"A few decisions hold that, if a person who desires a liquor license brings himself within the terms of the law, by complying with all the statutory preliminaries and possessing the requisite moral and other qualifications, he is entitled as a matter of law to be licensed, and the license cannot be withheld from him. But it is usually held that the court or board charged with the duty of issuing licenses is invested with a sound judicial discretion, to be exercised in view of all the facts and circumstances of each particular case. But this discretion is a sound judicial discretion and must be based upon solid legal reasons and not exercised arbitrarily or capriciously. The determination of the locality in which a saloon may be conducted is in the discretion of the licensing authorities. Licensing authorities must treat alike all applications possessing the legal qualifications, and they cannot license favored persons and exclude others possessing similar qualifications. One who is charged with some merely ministerial duty as to the issuing of a license has no discretion in the matter."

To the same effect is the statement to be found in 37 C. J., Sec. 97, page 240, under the title of "Licenses":

"The power vested in the board or officer to grant licenses upon the applicant complying with the prescribed conditions, unless mandatory in terms, carries with it, either expressly or impliedly, the power of exercising, within the limits prescribed by the act or ordinance, a reasonable discretion in granting or refusing licenses. But this discretion must be exercised reasonably, and not arbitrarily, and furthermore arbitrary power in this respect ordinarily cannot be conferred on such board or officer. In exercising this discretion the board or officers should consider all the circumstances against, as well as in favor of, granting the license, and act in accordance with what they believe to be in the interest of the public safety or public welfare, and if for

good reasons they are satisfied that the license ought not to be granted, they are justified in refusing it."

In the recent case of *Parents v. State Board of Equalization*, 36 Pac. (2nd), 437, it was held that the Board of Equalization of California, in passing upon applications for "on sale" beer and wine licenses, had the power to determine the suitability and fitness of the premises where the sales were proposed to be made, including the location of the building.

In a decision of the Supreme Court of New York in the case of *Fenson v. State Liquor Authority*, 273 N. Y. S., 751, 152 Misc., 446, it was held that although the granting of a proposed retail liquor license would not violate the state board's rules as to ownership and location of premises, the county and state boards were not precluded from considering the neighborhood and number of licenses in the vicinity. The court upheld the rejection of the application and held it was not an abuse of discretion. To similar effect is the ruling in the case of *San Diego Cotton Club v. State Board of Equalization*, 34 Pac. (2nd), 749, wherein it was held that mandamus does not lie to require the issuance of a liquor license.

In the case of *Scott v. Township Bd. of Arcada Twp.*, 255 N. W., 752, 268 Mich., 170, it was held by the Supreme Court of Michigan that the township board acted within its authority in rejecting an application of an operator of a roadside filling station for a license to sell beer and wine in a restaurant operated in conjunction with the filling station and that the action of the township board was not reviewable by the courts.

See also the following cases which hold that there is broad discretionary powers in the issuance of liquor licenses: *Quitt v. Stone*, 46 Fed. (2nd), 405; *Wynne v. Romanat*, 46 Fed. (2nd), 29; *Talarico v. City of Davenport*, 244 N. W., 750.

From the authorities cited above and from a reading of all the provisions of the Ohio Liquor Control Act, it is my view that the Department of Liquor Control has certain discretion in the issuance of the various classes of permits and has the authority to prescribe certain standards in addition to the express requirements contained in the Liquor Control Act, with the view of effecting the policy therein disclosed. The Liquor Control Act was adopted by the legislature in order to control the traffic in intoxicating liquors and the Department has been authorized to adopt rules and regulations to accomplish this purpose. It, however, must be kept in mind that the requirements must be reasonable and in keeping with the policy as declared by the legislature.

By way of summary and in specific answer to your inquiry, it is my opinion that:

1. Section 6064-25, General Code, does not prohibit the Department of Liquor Control from issuing a permit to a person whose permit has

been revoked because of a conviction of the permit holder or his agent or employe of violating the penal provisions of the act.

2. The Department of Liquor Control has discretionary power in the issuance of permits and is authorized to prescribe reasonable requirements from applicants for permits. It is reasonable, and in keeping with the policy as disclosed by the legislature in the enactment of the Liquor Control Act, to refuse the issuance of a permit to a person whose permit has been revoked because of a conviction of the permit holder, his agent or employe, of violating the penal provisions of the Liquor Control Act.

Respectfully,

JOHN W. BRICKER,
Attorney General.

5840.

APPROVAL—TRANSCRIPT OF PROCEEDINGS, SALE, ABANDONED CANAL LANDS AT LANCASTER, OHIO—LULA E. CARMON, LANCASTER, OHIO.

COLUMBUS, OHIO, July 15, 1936.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: This is to acknowledge the receipt of your recent communication with which you submit for my examination and approval a transcript of your proceedings as Superintendent of Public Works and as Director of said Department, relating to the sale of a parcel of abandoned Hocking Canal lands to one Lula E. Carmon of Lancaster, Ohio.

The parcel of land here in question is Marginal Tract No. 7, as the same is designated on the plat of marginal lands prepared as provided for by House Bill No. 417, 114 O. L., page 536, and copies of which plat have been filed with the Governor, the Superintendent of Public Works and the Mayor of the city of Lancaster, Ohio, as required by said act; said Marginal Tract No. 7 being more particularly described by metes and bounds as follows:

Beginning at the point of intersection of the southerly line of the alley between lots Nos. 214 and 215, in the city of Lancaster, and the northeasterly line of said canal property, and running thence westerly with the southerly line produced of said alley, forty-eight and four-tenths (48.4') feet, to the easterly line of the sixty-six (66') foot highway, as established by the