

5068.

APPROVAL, BONDS OF CITY OF EUCLID, CUYAHOGA COUNTY, OHIO, \$52,000.00.

COLUMBUS, OHIO, December 31, 1935.

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

5069.

APPROVAL, BONDS OF CITY OF EUCLID, CUYAHOGA COUNTY, OHIO, \$17,000.00.

COLUMBUS, OHIO, December 31, 1935.

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

5070.

LIQUOR CONTROL DEPARTMENT—LIMITATION ON ESTABLISHMENT OF LIQUOR AGENCIES.

SYLLABUS:

1. *The Department of Liquor Control has authority to establish a liquor agency in any municipality in which there is operated as a separate establishment a state liquor store by the Department of Liquor Control, subject however, to the provision in Section 6064-11, General Code, which limits the number of liquor stores that may be established in a county by the Department of Liquor Control.*

2. *The aggregate number of state liquor stores and liquor agencies which may be established, and in existence at any one time, in any county may not exceed one for each forty thousand (40,000) population or major fraction thereof.*

COLUMBUS, OHIO, December 31, 1935.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter which reads as follows:

“An examination of the records and accounts of the Department of Liquor Control, State of Ohio, discloses that the Department has, in many instances, established State Liquor Agencies in municipalities in which the Department previously has established a State Liquor Store; likewise, in some instances, the total number of stores and agencies within any given county has exceeded the allocation by population.

Section 6064-11, General Code of Ohio, reads in part as follows:

‘Subject to the local option provisions of the liquor control act, one state liquor store may be established in each county; and one additional store may be established in any county for each forty thousand of population of such county or major fraction thereof in excess of the first forty thousand, according to the last preceding federal census. In any location in which the department may deem it inadvisable to establish and maintain a state liquor store as a separate establishment, and in every municipality in which there is no such state liquor store, the department may appoint a person who is engaged in a mercantile business thereat as its agent for the sale of spirituous liquor and fix his compensation in such manner as it may deem fit, providing, however, that in no event shall the compensation paid such agent exceed seven percent of the gross sales made by such agent in any one year; * * *’

We desire your official opinion as to the following:

1. Does the Department of Liquor Control have authority to establish an agency in any municipality in which there is now being operated by the Department a State Liquor Store?
2. Does the Department have authority to establish stores and agencies in excess of one for each 40,000 of population in any such county or major fraction thereof in excess of the first 40,000?”

The answer to your first inquiry depends upon that part of Section 6064-11, General Code, which reads:

“ * * * In any location in which the department may deem it inadvisable to establish and maintain a state liquor store as a separate establishment, and in every municipality in which there is no such state liquor store, the department may appoint a person who is engaged in a mercantile business thereat as its agent for the sale of spirituous liquor * * *.”

The language in this provision is clear and decisive and grants to the Department of Liquor Control the power to establish agencies, either in places where the state liquor stores are already established providing the Department deems it inadvisable to open and operate a state liquor store as a separate establishment at a particular location therein, or in municipalities wherein there are no state liquor stores.

The use by the legislature of the clear and unequivocal terms "in any location" in the forepart of the sentence prevents any possible construction of Section 6064-11, General Code, which would limit the establishment of liquor agencies only to locations in municipalities which did not have state liquor stores. It is evident from a reading of that part of Section 6064-11, General Code, which pertains to the establishment of agencies, that the legislature did not intend to confine the Department of Liquor Control in the establishment of agencies, only to municipalities wherein no state liquor stores were established. The fact that the legislature provided that an agency could be established "in any location" whereat it was deemed inadvisable by the Department to establish a state liquor store as a separate establishment without qualifying or restricting the term "in any location" to a municipality which did not have a state liquor store, clearly shows that the legislature intended that agencies might be established wherever the Department of Liquor Control found it inadvisable to establish a state liquor store as a separate establishment.

If the legislature had intended to limit agencies to municipalities which did not have state liquor stores it would not have been necessary for it to have enacted the proviso which reads:

"In any location in which the Department may deem it inadvisable to establish and maintain a state liquor store as a separate establishment."

On the other hand, if the legislature had intended to restrict agencies only to municipalities without state liquor stores, it could have accomplished that purpose by merely enacting that part of Section 6064-11, General Code, which reads:

"In every municipality in which there is no such state liquor store, the Department may appoint a person who is engaged in the mercantile business thereat as its agent for the sale of spirituous liquor."

Moreover, that provision is not a condition precedent which must occur before the Department of Liquor Control can establish an agency whereat the Department believes it inadvisable to open and operate a state liquor store as a separate establishment.

It may be argued that such a construction makes meaningless the language which provides that agencies may be established by the Department in a municipality wherein there is no state liquor store and that it was unnecessary for the legislature to enact such a provision since the phrase "in any location" includes places both within and without municipalities. The obvious purpose of construing a statute is to ascertain and give effect to the intent of the legislature enacting it. *Slingluff et al. vs. Weaver et al.* 66 O. S. 621. The rule is stated as follows in the fourth paragraph of the syllabus in the case of *Cochrel vs. Robinson et al.*, 113 O. S. 527:

"4. In the construction of a statute the primary duty of the court is to give effect to the intention of the legislature enacting it. Such intention is to be sought in the language employed and the apparent purpose to be subserved, and such a construction adopted which permits the statute and its various parts to be construed as a whole and give effect to the paramount object to be attained."

See also *State, ex rel. Peebles Sons Co. vs. State Board of Pharmacy, et al.*, 127 O. S., 513.

If it is argued that the construction given Section 6064-11, General Code, in respect to agencies, is unreasonable and erroneous because it renders nugatory and useless the language pertaining to agencies in municipalities without state liquor stores, the answer to that argument is that the obvious intent and policy of the legislature in respect to agencies would be defeated if agencies could be established only in municipalities which did not have state liquor stores. The provision providing for agencies in municipalities could be disregarded under the rules of statutory construction if in order to give effect to the language in that provision it is necessary to defeat the obvious intent of the legislature in respect to agencies as expressed in the forepart of the sentence under discussion. Thus in the case of *State, ex rel. Patterson vs. Bates*, 96 Minn., 110, it was held in the syllabus:

"Where the first section of a statute conforms to the obvious policy and intent of the legislature, it is not rendered inoperative by inconsistent provisions in a later section which do not conform to this policy and intent. In such case the later provision is nugatory and will be disregarded."

See also *McCormick vs. Alexander*, 2 Ohio Reports, 60 at page 74.

However, such a construction need not be adopted because the reason for enacting the provision in question is clear. In establishing an agency in a municipality which does not have a state liquor store it is not necessary for the Department of Liquor Control to determine whether it is inadvisable to

establish such store as a separate establishment, whereas, the Department is required by Section 6064-11, General Code, to make that determination and finding whenever it desires to establish an agency at a location in a municipality where a state liquor store is already established. In other words, any municipality without a state liquor store justifies and empowers the Department to establish an agency without making any determination such as is required of the Department in establishing agencies elsewhere.

Reading Section 6064-11, General Code, in that light no doubt explains the reason why the legislature enacted that part of Section 6064-11, General Code, which provides for the establishment of agencies in municipalities which do not have state liquor stores. A construction such as I have given to Section 6064-11, General Code, gives effect to all of the language contained in the provisions with respect to agencies without, on one hand, limiting and qualifying the provisions relating to agencies at locations where it is deemed inadvisable to establish state liquor stores as separate establishments, and on the other hand, without disregarding as surplusage, the language which relates to agencies in municipalities which do not have state liquor stores. The construction adopted of the sentence as a whole and in part gives effect to the paramount object sought to be accomplished by the legislature in providing for agencies and is, I believe, a reasonable construction.

The fact that the legislature used the word "and" instead of the word "or" in the sentence of Section 6064-11, General Code, under discussion does not change the manifest effect of that sentence, since it is a well established rule of statutory construction that the words "and" and "or" may be substituted for the other as the sense of the language requires. That the words "and" and "or" may be used interchangeably in a statute is recognized in Section 27, General Code, which provides in part:

"In the interpretation of parts first and second, unless the context shows that another sense was intended, the word * * * 'and' may be read 'or' * * * if the sense requires it; * * *."

The substitution of the word "or" for the word "and" merely emphasizes the conclusion I have already expressed herein concerning the meaning of the sentence in Section 6064-11, General Code, which authorizes the Department of Liquor Control to appoint agents for the sale of spirituous liquor by the package.

The Department of Liquor Control is empowered by the Liquor Control Act to establish state liquor stores for the purpose of selling and distributing liquor by the package. Section 6064-8, General Code, reads in part as follows:

"The department of liquor control shall have all the powers and duties vested in and imposed upon a department. The powers

of the board of liquor control shall be exercised by the board in the name of the department. In addition thereto, the department shall have and exercise the following powers:

* * * * * * * * *

3. To put into operation, manage and control a system of state liquor stores for the sale of spirituous liquor at retail and to holders of permits authorizing the sale of such liquor, to be established throughout the state as hereinafter provided; and thereby and by means of such manufacturing plants, distributing and bottling plants, warehouses and other facilities as it may deem expedient in connection therewith, to establish and maintain a state monopoly of the distribution of such liquor and the sale thereof in packages or containers; and for such purpose to manufacture, buy, import, possess, and sell spirituous liquors in the manner provided in the liquor control act and in the regulations adopted and promulgated by the board pursuant to the liquor control act; * * *

* * * * * * * * *

5. Subject to the provisions of the liquor control act, to determine the location of all state liquor stores and manufacturing, distributing and bottling plants required in connection therewith. * * * ”

In establishing state liquor stores, the Department of Liquor Control may establish one state liquor store in each county irrespective of the population of the county and one additional store in a county for each forty thousand (40,000) of population or major fraction thereof in the county in excess of the first forty thousand of population.

The term “state liquor store” as used throughout the Liquor Control Act is generic and includes both liquor stores operated by the Department, as well as liquor agencies. This is evident from a reading of Sections 6064-3, 6064-8, 6064-11, 6064-22 and 6064-33, General Code.

Section 6064-3, General Code, reads in part:

“The board of liquor control shall have power:

* * * * * * * * *

2. From time to time to fix the wholesale and retail prices at which the various classes, varieties, and brands of spirituous liquor shall be sold by the department. Such retail prices shall be the same at all state liquor stores which may be established pursuant to this act. In fixing selling prices, the department may compute an anticipated gross profit of not to exceed thirty per cent, based on costs, plus the sum required by section 6064-10 of the General Code to be paid into the state treasury. * * * ”

liquor agencies would, to my mind, nullify that very provision, since the Department, by establishing liquor agencies, could do indirectly what it could not do directly.

If the phrase "state liquor store" were to be interpreted as applying only to liquor stores established and operated by the Department and did not include agencies, it would follow that spirituous liquor sold by the Department through agencies would not be subject to the regulatory restrictions contained in Section 6064-22, nor would the electors of a liquor control district be able to vote out an agency under Section 6064-33, which provides for local option elections on the question of whether spirituous liquor shall be sold by the state through state liquor stores. It is evident that the legislature did not intend such results since the sale of spirituous liquor by the package through liquor agencies is merely in furtherance of the state monopoly of liquor, by which monopoly it was intended to control and restrict the sale and distribution of spirituous liquor by the package to the state of Ohio.

The language of Section 6064-11, General Code, in reference to agencies also supports the conclusion that such agencies come within the purview of the term "state liquor store" since it is provided in Section 6064-11, General Code, that the Department may establish an agency wherever it deems it inadvisable to establish and maintain a state liquor store as a separate establishment.

I believe the construction which I have adopted of Section 6064-11, General Code, *supra*, is further supported by a consideration of the purpose and intent of the Liquor Control Act. The primary intent of this law establishing a liquor monopoly is to curtail rather than encourage the consumption of spirituous liquor, but at the same time to make lawful liquor reasonably available for those who desire it. To say that agencies may be established in unlimited numbers without regard to population, thus returning to pre-prohibition conditions, would be directly contrary to this manifest purpose.

Concluding, it is my opinion that:

1. The Department of Liquor Control has authority to establish a liquor agency in any municipality in which there is operated as a separate establishment a state liquor store by the Department of Liquor Control, subject, however, to the provision in Section 6064-11, General Code, which limits the number of liquor stores that may be established in a county by the Department of Liquor Control.

2. The aggregate number of state liquor stores and liquor agencies which may be established, and in existence at any one time, in any county may not exceed one for each forty thousand (40,000) population or major fraction thereof.

Respectfully,

JOHN W. BRICKER,

Attorney General.