

4936.

APPROVAL, BONDS OF CITY OF TOLEDO, LUCAS COUNTY,
OHIO, \$35,000.00.

COLUMBUS, OHIO, November 25, 1935.

Industrial Commission of Ohio, Columbus, Ohio.

4937.

LIQUOR CONTROL DEPARTMENT—CLASS D-3, D-4 and D-5
PERMITS MAY NOT BE ISSUED WHEN—ELECTORS
VOTED AGAINST REPEAL—LOCAL OPTION—TOWNSHIPS
AND MUNICIPALITIES.

SYLLABUS:

1. *The Department of Liquor Control cannot issue a Class D-3, Class D-4 or Class D-5 permit to the owner or operator of a hotel, restaurant or club which is located in a municipality or in a township exclusive of a municipal corporation wherein the electors at the November, 1933, election voted against the repeal of Section 9 of Article XV of the Ohio Constitution.*

2. *The provision of Section 6064-17, General Code, which prohibits the issuance by the Department of Liquor Control of Class D-3, Class D-4 and Class D-5 permits in townships and municipalities wherein the electors at the November, 1933, election, voted against the repeal of constitutional prohibition, does not prevent the Department of Liquor Control from issuing the other classes of permits authorized by Section 6064-15, General Code, which classes of permits in general, allow the manufacture and sale of beer, wine, prepared cocktails, and highballs, malt beverages containing more than 3.2% alcohol by weight and not exceeding 7% alcohol by weight and the sale of wine, alcohol and spirituous liquor by the holders of G permits, subject to the restrictions contained in Sections 6064-15 and 6064-23, General Code.*

COLUMBUS, OHIO, November 25, 1935.

HON. T. B. WILLIAMS, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR:—I am in receipt of your communication requesting my opinion which reads as follows:

“At the recent election held in the village of Crooksville, this

county, there was submitted to the electors of said municipality the five questions under section 6064-33 of the General Code.

First (a) 'Shall the sale of any intoxicating liquor be permitted in the municipal corporation of Crooksville, Perry County, Ohio. And the same questions under that section as to wine and spirituous liquors were also submitted. And on all the five questions submitted the result, by a great majority, was against the sale.'

Second—At said election there was also submitted to the electors, under section 6212-62, the question, 'Shall the sale of beer as defined by section 6212-63 of the General Code, be permitted in the municipal corporation of Crooksville, Perry County, Ohio.' At said election a majority of the electors voted against the sale.

The township outside of the municipal corporation at the November election, 1933, a majority of the electors voting thereon voted against the repeal of section 9, Article XV of the Ohio Constitution, and the question has never since been submitted to the voters of said township.

Such township having voted against the repeal of section 9 of Article XV of the Ohio Constitution, I desire to know whether or not:

First:—Can permits be legally issued to persons to sell spirituous liquors for beverage purposes in such township under class D-3 as mentioned in sections 6064-15 and 6064-17 and as defined in section 6064-1 under the term 'Spirituous Liquors?'

Second:—Can beer or other liquids and compounds referred to in the first paragraph of section 6064-1, General Code, as 'intoxicating liquor', be sold for beverage purposes in such township.

Third:—Section 9 of Article XV prior to the 'Repeal' provided, 'The sale and manufacture for sale of *Intoxicating Liquors* as a beverage are hereby prohibited. * * *

The township having voted against the repeal and which repeal related to 'intoxicating liquors' only and the statute (section 6212-63) define non-intoxicating beer as a beverage containing not more than 3.2 per cent alcohol by weight. Is it legal to sell 3.2 beer in such township?"

Section 6064-17, General Code, is pertinent to your inquiry and reads in part as follows:

“ * * * * * * * * * * ”

No class D-3, class D-4 or class D-5 permit shall be issued in any municipal corporation, or in any township exclusive of any municipal corporation or part thereof therein, in which at the November,

1933 election a majority of the electors voting thereon voted against the repeal of section 9 of Article XV of the Ohio constitution, unless the sale of spirituous liquor by the glass shall be authorized by a majority vote of the electors voting on the question in such municipal corporation or township or part thereof, hereinafter in this section designated as the liquor control district at an election held pursuant to this section of by a majority vote of the electors of the liquor control district voting on question (d) at a special local option election held in such district pursuant to section 6064-33 of the General Code.

Upon the petition of fifteen per cent of the number of voters voting for governor at the last election in any such liquor control district, filed with the board of elections of the county in which such political subdivision or part thereof is located sixty days before a general election, such board of election shall cause ballots to be prepared and hold an election at such general election upon the question of allowing spirituous liquor to be sold by the glass in such liquor control district. Such ballots shall be approved in form by the secretary of state. The results of such election shall be certified by the board of elections to the secretary of state, who shall certify the same to the state department of liquor control.

* * *

It is apparent from a reading of the provisions of Section 6064-17, General Code, quoted supra, that it was the intention of the Legislature, on the enactment of the Liquor Control Act, to prevent the issuance of certain types of permits authorizing primarily, the sale of spirituous liquor by the drink for consumption on the premises, that is, intoxicating beverages containing more than 21% alcohol by volume, in municipalities and in townships wherein the majority of the electors in those governmental subdivisions had voted against the repeal of constitutional prohibition in Ohio.

Under the Liquor Control Act holders of Class D-3, Class D-4, and Class D-5 permits issued by the Department of Liquor Control are authorized primarily to sell spirituous liquor by the drink for consumption on the premises where sold. Holders of Class D-4 and Class D-5 permits, in addition to the privilege of selling spirituous liquor by the drink, are also authorized to sell beer and other beverages which contain more than 3.2% alcohol by weight and not exceeding 21% alcohol by volume.

Section 6064-15, General Code, as amended in Substitute Senate Bill No. 2 (116 O. L.) reads in part as follows:

“The following classes of permits may be issued:

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Permit D-3: A permit to the owner or operator of a hotel or restaurant licensed pursuant to section 843-2 of the General Code, or a club, boat or vessel, to sell spirituous liquor and wine at retail, by the drink in glass and/or from the container, for consumption on the premises where sold, only at tables where meals are sold. The fee for this permit shall be four hundred dollars for each location, boat or vessel.

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Permit D-4: A permit to a club which shall have been in existence for a period of three years or more prior to the issuance thereof, to sell beer and any intoxicating liquor to its members only, in glass or container, for consumption on the premises where sold. The fee for this permit shall be one hundred dollars. No such permit shall be granted or retained, unless and until, all duly elected officers of such organization controlling such club, shall have filed with the department of liquor control, a statement certifying that such club is operated in the interest of the membership of a reputable organization which is maintained by a dues paying membership, setting forth the amount of initiation fee and yearly dues. All such matter shall be contained in a statement signed under oath and accompanied by a surety bond in the sum of one thousand dollars and such bond shall be declared forfeited for any false statement contained, in such certificate and the surety shall pay the amount of the bond to the department of liquor control.

Permit D-5: A permit to the owner or operator of a night club to sell beer and any intoxicating liquor, at retail, in glass and from the container, for consumption on the premises where sold, only at tables where meals are served. A person who is the holder of both a D-3 and D-3a permit shall not be required to obtain a D-5 permit. The fee for this permit shall be one thousand dollars.

* * *

A Class D-3 permit can be issued only to the owner or operator of a hotel or restaurant. A "restaurant" is defined in Section 6064-1, General Code, as follows:

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'Restaurant' means a place located in a permanent building provided with space and accommodations wherein, in consideration of the payment of money, hot meals are habitually prepared, sold and served at noon and evening, as the principal business of the place; but the meaning of said word excludes drug stores, con-

fectionary stores, lunch stands, night clubs and filling stations.
* * *

A Class D-4 permit can only be issued to a club which likewise is defined in Section 6064-1, General Code, as follows:

* * * * * * * *

'Club' means a corporation or association of individuals organized or formed in good faith for social, recreational, benevolent, charitable, fraternal, political, patriotic, or athletic purposes, which is the owner, lessor, or occupant of a permanent building or part thereof operated solely for such purposes and membership in which entails the prepayment of regular dues and includes the place so operated. * * *

A Class D-5 permit can only be issued to an owner or operator of a night club which is defined in Section 6064-1, General Code, as follows:

* * * * * * * *

'Night club' means a place regularly and habitually operated for profit after the hour of midnight, where food is served for consumption on the premises and one or more forms of amusement are provided or permitted for a consideration which may be in the form of a cover charge, or may be included in the price of the food and beverages, or both, purchased by the patrons thereof. * * *

I will be observed on a careful reading of Section 6064-17, General Code, that the Legislature has expressly provided that no Class D-3, Class D-4 or Class D-5 permit shall be issued by the Department of Liquor Control to anyone in any municipal corporation or in any township exclusive of any municipal corporation in which at the November, 1933, election a majority of the electors of said governmental subdivisions voting on the question of the repeal of constitutional prohibition in Ohio, voted against the repeal of Section 9 of Article XV of the Ohio Constitution. The provisions of Section 6064-17, General Code, were construed by the Supreme Court of Ohio in the case of *State, ex rel. Olympia Athletic Club vs. The Department of Liquor Control et al.*, 129 O. S. 140. The syllabus reads as follows:

"Where a township, exclusive of the territory of a municipal corporation situated therein, voted against the repeal of Section 9 of Article XV of the Ohio Constitution at the November, 1933 election, and at the same time one of the two township voting precincts therein voted for repeal, a class D-4 permit can not law-

fully be issued under Section 6064-17, General Code, in the precinct so voting. In such case the township, exclusive of such municipal territory, and not the voting precinct, is the liquor control district."

It is evident from a reading of Section 6064-17, General Code, that the Legislature intended to confine the effect of a vote against the repeal of constitutional prohibition only to the issuance of certain types and classes of permits and not to prevent the sale and distribution of beer and all intoxicating liquor. The terms "beer", "intoxicating liquor", "alcohol", "wine" and "spirituous liquor" are defined in Section 6064-1, General Code, as follows:

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As used in and for the purposes of this act: The phrase 'intoxicating liquor' includes any and all liquids and compounds containing more than 3.2 per centum of alcohol by weight and are fit for use for beverage purposes, from whatsoever source and by whatsoever process produced, by whatsoever name called and whether or not the same are medicated, proprietary, or patented; alcohol and any and all solids which contain any alcohol, and any and all confections which contain any alcohol.

The term 'alcohol' means ethyl alcohol, whether rectified or diluted with water or not, whatever may be the origin thereof, and includes synthetic ethyl alcohol; but such term excludes denatured alcohol and wood alcohol.

'Beer' includes all malt beverages containing one-half of one per centum or more of alcohol by weight but not more than 3.2 per centum of alcohol by weight.

'Wine' includes all intoxicating liquor containing not less than 3.2 per centum of alcohol by weight and not more than 21 per centum of alcohol by volume, which is made by the fermentation of the juices of sound, ripe and undried grapes, fruits and includes pure wine and compound wine as those terms are defined in Sections 5798 and 5800 of the General Code and not exceeding the alcoholic content herein provided.

The term 'spirituous liquor' includes all intoxicating liquors containing more than twenty-one per centum of alcohol by volume.

* * *"

The term "intoxicating liquor", it will be observed, includes not only wine and spirituous liquor, but also includes beer and other malt beverages that contain more than 3.2% alcohol by weight.

If the Legislature had intended to allow the vote on constitutional pro-

hibition to be a referendum on the question of whether beer and intoxicating liquor should be sold in a municipal corporation or township, it would have so provided by appropriate language. From the language used by the Legislature in Section 6064-17, General Code, it is self-evident that the principle of a referendum was not in the mind of the Legislature when it enacted Section 6064-17, General Code. As I construe the provisions of Section 6064-17, General Code, it appears to me that the Legislature, by enacting Section 6064-17, General Code, intended to prevent the issuance of certain enumerated liquor permits authorizing primarily, the sale of spirituous liquor by the drink on the premises where sold, only to persons residing in communities which voted against the repeal of the prohibition provision in the Constitution of the State of Ohio. There is no provision in Section 6064-17, General Code, which expressly or impliedly denies to the Department of Liquor Control the power to issue other classes of permits which authorize the sale of beer, malt beverages and intoxicating liquor. There is no language in the Liquor Control Act or in Section 6064-17, General Code, which provides that the Department of Liquor Control shall not issue Class C-1, Class C-2, Class D-1, Class D-2 and G permits to persons in municipalities and townships wherein a majority of the electors at the November, 1933, election had voted against the repeal of constitutional prohibition in Ohio. Likewise, there is no language in Section 6064-17, General Code, which would indicate that the effect of such a vote was to prohibit the sale of all kinds of intoxicating liquor in such governmental subdivisions, under liquor permits other than Class D-3, D-4 and D-5.

As previously pointed out the Legislature in the enactment of Section 6064-17, General Code, took into account and consideration the viewpoint and sentiments of the citizens of this state as expressed by their vote on the question of the repeal of constitutional prohibition in Ohio in determining whether Class D-3, D-4 and D-5 permits should be issued by the Department of Liquor Control for municipalities and townships. The Legislature expressly recognized the sentiments of opposition to repeal by providing that in townships and municipalities the Department of Liquor Control should not issue any permits authorizing the sale of wine and spirituous liquor by the drink by holders of Class D-3 permits, and beer, wine, spirituous liquor and other intoxicating liquor by holders of Class D-4 and Class D-5 permits until a majority of the electors in those governmental subdivisions should, at a general election held for such purpose, authorize the sale of spirituous liquor by the drink. This conclusion finds support in that part of Section 6064-17, General Code, which reads as follows:

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Upon the petition of fifteen percent of the number of voters voting for governor at the last election in any such liquor control

district, filed with the board of elections of the county in which such political subdivision or part thereof is located sixty days before a general election, such board of elections shall cause ballots to be prepared and hold an election at such general election upon the *question of allowing spirituous liquor to be sold by the glass in such liquor control district*. Such ballots shall be approved in form by the secretary of state. The results of such election shall be certified by the board of elections to the secretary of state, who shall certify the same to the state department of liquor control. * * *” (Italics the writer’s).

Concluding it is my opinion that:

1. The Department of Liquor Control cannot issue a Class D-3, Class D-4 or Class D-5 permit to the owner or operator of a hotel, restaurant or club which is located in a municipality or in a township exclusive of a municipal corporation wherein the electors at the November, 1933, election voted against the repeal of Section 9 of Article XV of the Ohio Constitution.

2. The provision of Section 6064-17, General Code, which prohibits the issuance by the Department of Liquor Control of Class D-3, Class D-4 and Class D-5 permits in townships and municipalities wherein the electors at the November, 1933, election, voted against the repeal of constitutional prohibition, does not prevent the Department of Liquor Control from issuing the other classes of permits authorized by Section 6064-15, General Code, which classes of permits in general, allow the manufacture and sale of beer, wine, prepared cocktails, and highballs, malt beverages containing more than 3.2% alcohol by weight and not exceeding 7% alcohol by weight and the sale of wine, alcohol and spirituous liquor by the holders of G permits, subject to the restrictions contained in Sections 6064-15 and 6064-23, General Code.

Respectfully,

JOHN W. BRICKER,

Attorney General.

4938.

APPROVAL, BONDS OF SEAMAN VILLAGE SCHOOL DISTRICT, ADAMS COUNTY, OHIO, \$55,000.00.

COLUMBUS, OHIO, November 25, 1935.

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