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ORDINANCE, VILLAGE—TO PROHIBIT THE SALE OF INTOXICATING LIQUOR BY ANY ONE NOT HOLDER OF PERMIT ISSUED BY DEPARTMENT OF LIQUOR CONTROL—SALE AUTHORIZED—SUCH VILLAGE IS NOT A “VILLAGE IN WHICH THE SALE OF INTOXICATING LIQUOR IS PROHIBITED BY AN ORDINANCE”— TERM USED IN SECTION 13206 G. C.

SYLLABUS:

A village which has an ordinance prohibiting the sale of intoxicating liquor by anyone who is not the holder of a permit issued by the Department of Liquor Control, which authorizes such sale, is not, by reason of such ordinance, a “village in which the sale of intoxicating liquor is prohibited by an ordinance” within the meaning of said term as the same appears in Section 13206, General Code.

Columbus, Ohio, January 21, 1947

Hon. V. F. Rowland, Prosecuting Attorney, Harrison County
Cadiz, Ohio

Dear Sir:

Your request for my opinion reads:

“There is located in Harrison County, Ohio, a business establishment, the owner and operator of which is the holder of certain

permits issued by the Department of Liquor Control of the State of Ohio under the authority of Section 6064-15 of the General Code of Ohio authorizing him to sell beer, wine, prepared and mixed beverages and spirituous liquors by the drink for consumption on the premises where sold, and in limited quantities beer, wine and prepared and bottled mixed beverages, by the bottle, for consumption off the premises. This establishment is located within one mile of the Harrison County Children's Home, viz: approximately eight tenths of a mile. The said Harrison County Children's Home is located between the aforesaid business establishment and the municipal corporation lines of the village of Cadiz, Ohio. The said Harrison County Children's Home is located within one mile of the municipal corporation line of the village of Cadiz, Ohio.

There is an ordinance of the village of Cadiz, Ohio, which pertains to the sale of liquor and said ordinance is in the following words:

'Sec. 32.2. Manufacture, possession or sale of intoxicating liquor without a permit; penalty. Whoever, not being the holder of a Class A permit issued by the Department of Liquor Control in force at the time, and authorizing the manufacture thereof, or an agent, or employe of the department of liquor control authorized by law and by said department to manufacture such beer or intoxicating liquor, either directly or indirectly, himself or by his clerk, agent, or employe manufacture any beer or intoxicating liquor for sale, or manufacture spirituous liquor; or

Whoever, not being the holder of a class B, class C, class D, class E, class F, class G, or class I permit issued by the Department of Liquor Control, in force at the time, and authorizing the sale thereof, or an agent or employe of the department of liquor control or the department of taxation authorized by law and by said departments to sell such beer, intoxicating liquor, or alcohol, either directly or indirectly, himself or by his clerk, agent or employe, sells, keeps or has in possession for sale to any persons other than those authorized by the liquor control act of the State of Ohio, to purchase any beer or intoxicating liquor or sell any alcohol at retail, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars, nor more than one thousand dollars, or be imprisoned not less than thirty days nor more than six months, or both. Whoever, being the holder of a permit issued by the Department of Liquor Control, either directly or indirectly himself or by his clerk, agent or employe, sells, keeps or has in his possession for sale any intoxicating liquor not purchased from the Department of Liquor Control or from the holder of a permit issued by the Department of Liquor Control authorizing the sale of such intoxicating liquor unless the same has been purchased with special

consent of the department shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars, and be imprisoned not less than thirty days nor more than six months.' (General Code 6064-54.)

The above stated ordinance was adopted by the village of Cadiz, Ohio, March 10, 1944.

In 1936 by local option the sale of liquor, wine and beer was voted out in the village of Cadiz, Ohio.

Question: Taking into consideration the rule as to strict interpretation of penal statutes in Ohio, is the above stated ordinance of such a character, nature and wording to meet the legal requirements and within the meaning of that part of General Code Section 13206 of Ohio, which refers to the fact that the Children's Home must be 'within one mile of a County Children's Home of a county of the state situated within one mile of an incorporated village or city in which the sale of intoxicating liquors is prohibited by an ordinance of such village or city.' As will be noted the wording of the ordinance above set out is practically a reproduction of General Code Section 6064-54 of Ohio."

Section 13206, General Code, provides:

"Whoever sells intoxicating liquors or keeps a house of ill-fame at or within twelve hundred yards of the administration or main central building of the Columbus state hospital, Dayton state hospital, Athens state hospital, Toledo state hospital, soldiers' and sailors' orphans' home, or any other orphans' home in this state, or within two miles of the boundary line of the boys' industrial school, south of Lancaster, Fairfield county, or within two miles of the place where an agricultural fair is being held, or *within one mile of a county children's home of a county of the state situated within one mile of an incorporated village or city in which the sale of intoxicating liquors is prohibited by an ordinance of such village or city*, shall be fined not less than twenty-five dollars nor more than one hundred dollars, or imprisoned not more than thirty days, or both. The place wherein such intoxicating liquors are sold shall be shut up and abated as a nuisance by order of the court upon conviction of the owner or keeper thereof." (Emphasis added.)

Section 6064-1, et seq., General Code, known as the Liquor Control Act, provides a system of control for the manufacture, importation, distribution and sale of wine, beer and other intoxicating liquors, including a state monopoly for the sale of spirituous liquors.

Section 6064-14, General Code, provides :

“No person shall directly or indirectly, himself or by his clerk, agent, or employee, manufacture, manufacture for sale, offer, keep or possess for sale, furnish or sell, or solicit the purchase or sale of any beer or intoxicating liquor in this state, or transport or import or cause to be transported or imported, any beer or intoxicating liquor or alcohol in or into this state for delivery, use or sale herein, unless such person shall have fully complied with the provisions of the liquor control act or shall be the holder of a permit issued by the department of liquor control and in force at the time. * * *.”

Section 6064-15, General Code, enumerates the various types and classes of permits to be issued by the Department of Liquor Control authorizing the manufacture, distribution and sale of intoxicating liquor at wholesale and retail.

Section 6064-20, General Code, provides :

“Each class and kind of permit issued under authority of the liquor control act shall authorize the person therein specified at the place or in the boat, vessel or classes of dining car equipment therein described, for a period of one year commencing on the day after the date of its issuance, and no longer subject to suspension, revocation or cancellation as authorized or required by this act; and no such permit shall be deemed to authorize the person named therein to carry on the business therein specified at any place or in any vehicle, boat, vessel or class of dining car equipment other than that named therein, nor to authorize any person other than the one therein named to carry on such business at the place or in the vehicle, boat, vessel or class of dining car equipment named therein; excepting in either case, pursuant to compliance with the rules, regulations and orders of the department of liquor control, governing the assignment and transfer of permits, and with the consent of the department as herein provided; and excepting further in case of class C permits, the holder thereof may substitute the name of another registered pharmacist for that entered on the permit, subject to rules and regulations of the department. * * *.”

Section 6064-17, General Code, in so far as pertinent, provides :

“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 or 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."

By virtue of the foregoing sections, therefore, the Department of Liquor Control is authorized to issue permits for the sale of intoxicating liquor in any municipal corporation or township or part thereof in accordance with the terms and conditions thereof, and upon proper issuance of any permit to any person, such person becomes authorized to engage in the sale of intoxicating liquor at the location within such taxing district for which such permit is issued.

Such permits shall remain effective for one year unless cancelled or revoked by the Board of Liquor Control or unless the privilege of sale granted by such permit shall become suspended as a result of a successful local option election as provided in Sections 6064-31, 6064-32, 6064-33, 6064-34 and 6064-35, General Code.

By Section 3, Article XVIII of the Ohio Constitution, municipal corporations are authorized "to exercise all powers of local self-government and to adopt and enforce within their limits such local, police, sanitary and other similar regulations as are not in conflict with general laws."

In 28 O. Jur., 444, it is said:

"In determining whether an ordinance is in conflict with general laws, the general test is whether the ordinance permits or licenses that which the statute forbids or prohibits or *vice versa*. But a municipal ordinance which prohibits the performance of acts which are affirmatively authorized by the general law is usually regarded as contravening such general law."

The ordinance set forth in your communication does not purport to generally prohibit the sale of intoxicating liquors but merely prohibits the sale of intoxicating liquor by persons who are not the owners of permits authorizing the sale of intoxicating liquor.

I cannot therefore consider such ordinance as being one prohibiting the sale of intoxicating liquor within the meaning of Section 13206, General Code, and must further conclude that the village of Cadiz would be

without authority to enact such an ordinance for the reason that the same would be in conflict with the general provisions of the Ohio Liquor Control Act.

In specific answer to your question therefore it is my opinion that Section 32.2 of the Ordinances of the village of Cadiz is not an ordinance prohibiting the sale of intoxicating liquor within the meaning of that part of Section 13206, General Code, prohibiting the sale of intoxicating liquor within one mile of a county children's home of a county of the state situated within one mile of an incorporated village or city in which the sale of intoxicating liquor is prohibited by ordinance.

Respectfully,

HUGH S. JENKINS,
Attorney General.