

particular school corporation and only to the extent and in the manner authorized by such other statute.

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OFFICIAL OPINION NO. 78

August 5, 1946.

Hon. Burrell E. Diefendorf, Chairman,  
Indiana Alcoholic Beverage Commission,  
Illinois Building,  
Indianapolis, Indiana.

Dear Sir:

Your letter of recent date requests an official opinion on the following question:

“Is it legal for the Indiana Alcoholic Beverage Commission to issue a retail permit to sell alcoholic beverages on premises where such sale is restricted by a covenant in the chain of title of the premises involved and said covenant has been upheld by a decision of the higher Courts as in the case of Sorrentino v. V. Cunningham (1941), 111 Ind. App. 212, in the area of the Original Town of Irvington?”

The restrictive covenant involved is contained in the plat of the Original Town of Irvington, and restricted original and subsequent owners of the land covered by said plat from selling any intoxicating beverages on the premises except for sacramental, medicinal or mechanical purposes. The case you refer to was an action for an injunction by certain owners of real estate against the defendant, and the injunction enjoined the defendant from “selling, or suffering to be sold, any intoxicating beverages, except for sacramental, medicinal or mechanical purposes.” The Appellate Court of Indiana in affirming the action of the trial court, held the restrictive covenants valid, that there was no such change in conditions that established the right of the permittee to ignore and violate the restrictive covenants in question, and that the plaintiffs had not been guilty of laches seeking equitable relief. A rehear-

ing was denied by the Appellate Court on March 24, 1942, and transfer to the Supreme Court was denied on May 1, 1942.

Sorrentino v. Cunningham, et al. (1942), 111 Ind. App. 212, 39 N. E. (2d) 473.

Restrictive covenants become a matter of contract between the original owners of the real estate, and also subsequent owners, any of whom may bring an action for the breach thereof. Such covenants have been held property rights, and subject to the protection of courts of equity.

Bachman v. Colpaert Realty Corporation (1935), 101 Ind. App. 306.

Since 1933, under the various acts dealing with the regulation of alcoholic beverages, it has been the practice of the various authorities empowered by statute to issue permits for the retail sale of alcoholic beverages to issue permits without any regard to the existence of restrictive covenants on the real estate on which the retail business may be located.

The present alcoholic beverage Act defining the rights, power and duties of the Indiana Alcoholic Beverage Commission does not prohibit the issuance of a permit for premises upon which there may be a restrictive covenant against the sale of alcoholic beverages. However, it is the general principle of law that the fact that a license may be issued is not a defense against private rights that may be asserted by third parties.

In the case of Ewbank, Trustee v. Yellow Cab Company (1925), 84 Ind. App. 144, the court held that an attempt by the City of Indianapolis to license taxi-cabs to use a stand in front of private property, and so block the right of ingress and egress thereto, was not a defense against an action to enjoin the impairing of property rights.

Nor could it be contended that a license or permit from the Indiana Alcoholic Beverage Commission would render invalid any restrictive covenant against the sale of alcoholic beverages, since to do so would be an impairment of the obligation of contract by the state, which is specifically prohibited by both Section 10 of Article 1 of the Federal Constitution and Section 24 of Article 1 of the Constitution of Indiana.

In *Guyer v. Auers* (1907), 132 Ill. App. 520, the court said:

“While a municipality has the sole right to issue a municipal license for the sale of liquor, it does not furnish a place for such sale. An applicant for a license must furnish the location. If he does not possess the right to sell liquor on the premises, the license cannot give him such right. \* \* \*”

It has been suggested that your commission can not be a court, and therefore is not empowered to try judicial issues. This is correct, and in general a commission is not authorized to pass upon judicial questions. Since restrictive covenants are matters of private contract rights between the parties, to which there may be many equitable defenses including change of conditions, acquiescence, change of position, inequitable conduct on the part of the plaintiff, etc., the fact that a restrictive covenant exists would not necessarily mean that the same would be enforceable. Nor should the Indiana Alcoholic Beverage Commission attempt to decide the enforceability of such covenants, since this is a matter for the courts to determine.

However, in the land covered by the plat of the Original Town of Irvington, your Commission is in a different position than it is with reference to the question of issuance of permits for business premises where restrictive covenants exist which have not been adjudicated by either the Supreme Court or Appellate Court of Indiana.

In *Sorrentino v. Cunningham, et al.* (1942), 111 Ind. App. 212, 39 N. E. (2d) 473, *supra*, the court in fact did construe and did decide that the covenant was valid, that there had been no change in conditions of the use of the property such as to justify a disregarding of the covenant, and that there had been no laches in the prosecution of the act. The judicial facts were found by the court, and your Commission, should it issue permits for this land, would be in an anomalous position of disregarding a precedent of both the Appellate Court and Supreme Court of Indiana, which precedent although not *res adjudicata* as to other owners or their tenants within the Original Town of Irvington, is yet a precedent in the same sense that any other decision of these courts is a precedent.

An exhaustive search of legal indexes has been made and very few authorities have been found which bear directly upon the question you submit. I find but one case decided by the court of last resort in this country. This is the case of *Barnegat City Beach Ass'n. v. Busby* (1882), 44 N. J. L. 627, where the court said at page 629:

“\* \* \* The question of jurisdiction is not affected by the existence of covenants and conditions against open bars for the sale of intoxicating drinks, contained in the deeds for lands in this locality. However binding they may be upon the parties to such instruments, they are in no wise obligatory upon the court in the exercise of its statutory discretion to grant licenses for the public convenience, nor can such provisions render licenses granted invalid.”

However, there are a line of cases in the inferior courts of Pennsylvania which treat this problem from many angles and arrive at contradictory conclusions in many instances. The latest of these cases being *Johnson's License* (1938), 34 D & C. (Pa.) 205, where the court holds that the liquor control board of that state is not justified in refusing on its own initiative to issue a retail license for premises upon the sole ground that a restrictive covenant prohibiting the sale of liquor exists where the evidence shows that the covenant has in effect been abandoned because of a change in the nature of the neighborhood and the existence of other liquor stores in the neighborhood.

In *Laage's Appeal* (1938), 33 D & C. (Pa.) 466, the court held that it was within the power of the liquor control board on its own motion to refuse an application for a retail license where it appears that the deed to the premises sought to be licensed, contains a restriction prohibiting the use of the premises for this purpose unless there is proof showing an extinguishment of the restriction, and it was there held that the present owners of the entire tract had mutually released the restriction and the liquor control board was ordered by the court to issue the license.

These decisions are illustrative of the many that have been decided by the Pennsylvania inferior courts, all of which are

founded upon Fanning's License (1903), 23 Pa. Super. 622, where the court says at page 625 :

“\* \* \* Nor are we willing to say as matter of law that it is the duty of the court of quarter sessions to grant a license to an applicant for the retailing of intoxicating drinks upon a lot of land conveyed to him by a deed in which there is a plain covenant that said lot of ground or any part thereof or any building thereon erected or to be erected shall not be used or occupied in any way whatever for the manufacture, sale or storage of spirituous, vinous or malt liquor for all times after a date named. It does not seem to us that the applicant had any right to expect the court below to grant him a license to do that which was a violation of the plain restriction or covenant contained in the deed for the premises upon which he desired to sell the intoxicating liquors. Indeed it might be argued that the applicant failed to show the court that he had possession of any place where he could lawfully engage in the retail liquor business because an examination of his title showed that he was plainly restricted from selling intoxicating liquors in any building erected on the land referred to or any part of it. It can hardly be contended that a court of equity would not restrain a man from engaging in the same of intoxicating liquors upon premises conveyed to him by a deed containing a covenant or restriction like the one under consideration. Certainly he would be restrained if a bill were filed by his grantor, and it is not at all certain that he would not be so restrained if the bill were filed by property owners in the vicinity who could satisfy the court that they had purchased their property and established their homes in that locality for the reason that the grantor of the lots in that vicinity had prohibited the sale of intoxicating liquors upon such premises. If we are correct in this conclusion it cannot be contended with much force that the court of quarter sessions should grant a license to an applicant to sell intoxicating liquors when the same judges sitting on the equity side of the court might be called upon as soon as the licensee undertook to engage in the sale of

liquors to restrain him from so doing. We are of the opinion that in addition to this there is a question of public policy involved which ought not to be lightly brushed aside. Suppose for instance that the owner of a tract of land subdivides it into building lots, and sells these lots to a large number of persons, inserting in the deed of each a restriction or covenant against the sale of intoxicating liquors like the one under consideration, then suppose the purchasers erect residences, churches, schoolhouses and such buildings, and institutions as are necessary and convenient for the accommodation of a quiet, thrifty neighborhood. After all this has been accomplished is it to be tolerated that a few of these purchasers can go into the court of quarter sessions and procure licenses to retail intoxicating liquors among these homes, schoolhouses and churches? We think not. We are of the opinion that the petitioner having purchased his land with a restriction against engaging in the liquor business thereon plainly set out in his deed, ought not to be granted a license which authorizes him to violate this restriction or covenant."

With the exception of specific provisions of the laws of Indiana limiting the authority of the Commission in the issuance of permits, the general grant of power to the Commission by Chapter 357 of the Acts of 1945 is broad.

"Sec. 11. No person shall be deemed to have any property right in any beer \* \* \* retailer's permit, \* \* \* liquor \* \* \* retailer's permit, \* \* \* wine retailer's permit, \* \* \* nor shall said permit itself or the enjoyment thereof be considered a property right, *and the same shall be issued, suspended or revoked in the absolute discretion and judgment of the commission.* \* \* \*" (My emphasis.)

12-443 Burns' 1942 Replacement (Pocket Supp.), Section 11, Ch. 357, Acts of 1945.

Your specific question is limited to the real estate within the issues of the Sorrentino case, and this opinion is limited to the real estate in that particular area. In my opinion under

the above cases the Indiana Alcoholic Beverage Commission does have the power to issue retail permits under Chapter 357 of the Acts of 1945 and prior laws on the regulation of alcoholic beverages, but I cannot advise your Commission to disregard the decision of our Appellate and Supreme Courts any more than I would advise the Public Service Commission or any other board, commission or officer to disregard the latest precedents of our courts.

If as a matter of policy your Commission should issue retail permits for this area, the permit would not be any defense to other actions similar to the Sorrentino case. If your policy should be to refuse such permits, any applicant would still be in a position to bring an action for declaratory judgment in a court of competent jurisdiction to have the restrictive covenant declared invalid (16 Am. Jur. Sec. 32, p. 307, Sec. 2-220 Burns' 1933, Bd. of Commrs. of Vanderburgh Co. v. Sanders (1940), 218 Ind. 43), which action, if successful, would supersede the precedent established by the Sorrentino case.

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OFFICIAL OPINION NO. 79

August 9, 1946.

Department of Financial Institutions,  
State House,  
Indianapolis, Indiana.

Gentlemen:

I have your letter in which you ask for my official opinion upon the following questions:

"1. May a foreign banking corporation not admitted to do business in Indiana as a foreign corporation, be licensed under the Retail Installment Sales Act?

"2. May a foreign banking corporation, which has been admitted to do business in Indiana be licensed under the Retail Installment Sales Act?

"3. Would a foreign banking corporation, if licensed to engage in business in Indiana under the Retail In-