OFFICIAL OPINION NO. 54

October 5, 1961

Mr. Joe A. Harris, Chairman
Indiana Alcoholic Beverage Commission
911 State Office Building
Indianapolis, Indiana

Dear Mr. Harris:

This will acknowledge receipt of your letter of August 21, 1961, requesting an Official Opinion. Your question is:

> What constitutes a church within the meaning of the Indiana Alcoholic Beverage law wherein it is stated "* * * Provided, no permit of any kind hereunder shall be issued in respect to any premises situated within a distance of 200 feet from any school or church * * *."
>
> [Acts 1935, Ch. 226, Sec. 6, as amended, and found in Burns' (1956 Repl.), Section 12-402.]

Your letter is accompanied by a brief submitted by an applicant for an alcoholic permit.

A.

The 1935 Indiana Liquor Control Act does not define the word "church," nor is the word "church" used anywhere in the act outside of the paragraph quoted from Burns' 12-402, *supra.*

There are no Indiana cases directly in point on your question, and I have been unable to find any instances in which the same or similar question has been presented to our Supreme or Appellate Courts, directly or collaterally, in relation to any prior liquor control statute.

Generally speaking, liquor control statutes have been construed liberally by the courts for the protection of the public welfare, health and morals in the public interest, but strictly in respect to the private interests of individuals who are seeking privileges thereunder, for their own advantage.

> Sutherland, Statutory Construction, 3rd Ed., Vol. 3, Sec. 7203, pp. 403, 404;

Indiana Law Encyclopedia, Vol. 26, Statutes, § 171.

The 1935 Indiana General Assembly, in enacting the Liquor Control Act, laid down guides in the statute itself for the construction of the act, viz.:

> "* * * all of the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be limited and temperance encouraged * * *."
>
> Acts 1935, Ch. 226, Sec. 2, as found in Burns' (1956 Repl.), Section 12-302.

and,

> "This act shall be deemed an exercise of the police powers of the state, for the protection of the economic welfare, health, peace and morals of the people of the state, and to prohibit forever the open saloon; and it is hereby declared that all the provisions of this act and the classifications and differentiations herein made and/or authorized to be made, are actually and substantially related to the accomplishment of the object of this act and necessary to effectuate its purpose; and it is declared that alcohol and all beverages containing alcohol shall be subject to the provisions of this act; and all of the provisions of this act shall be liberally construed for the accomplishment of this purpose."
>
> Acts 1935, Ch. 226, Sec. 1, as found in Burns' (1956 Repl.), Section 12-301.

Notable are the expressions of the courts of other states respecting the rules of construction as applied to the particular question you have presented. So, in the recent case of Szcyenpniak v. License Appeal Comm. (1956), 11 Ill. App. (2d) 193, 136 N. E. (2d) 562, 59 A. L. R. (2d) 1437, the Court said at page 1438:

> " 'The primary purpose of statutory construction is to ascertain the legislative intent, by examining not only the language employed, but the evil to be remedied and the end to be attained. * * *' " [Quoting from Smith v. Ballas (1948), 335 Ill. App. 418, 82 N. E.

(2d) 181, which in turn quoted United States Industrial Alcohol Co. v. Nudelman (1940), 375 Ill. 342, 31 N. E. (2d) 594.]

And in Calvary Presbyterian Church v. State Liquor Authority (1935), 245 App. Div. 176, 281 N. Y. S. 81, the Court said at page 85:

> "Because of the many evils attendant upon traffic in liquor, it is subject to regulation by the state in the exercise of the police power. It is fundamental that regulations by way of exceptions in respect to churches and schools must be liberally construed in their favor, and strictly against applicants for licenses to sell liquor, wine and beer within prescribed distances. * * *"

To the same effect see:

Stubbs *et al.* v. Texas Liquor Control Board (1942), Tex. Civ. App., 166 S. W. (2d) 178, 180;

In re Korndorfer (1897), 49 N. Y. S. 559, 560;

In re Place (1898), 27 App. Div. 561, 50 N. Y. S. 640, 645 (as applied to construction of a grandfather clause);

Shipbaugh v. City of Sarasota (1957), Fla., 94 So. (2d) 728, 729.

There would appear to be little doubt that the language quoted from the cases immediately above states the controlling rules of construction of the Indiana Liquor Control Act on the point raised by your question. For an excellent and extensive consideration of the 1935 Indiana Liquor Control Act relating to its purpose, intent and construction, see:

1950 O. A. G., page 151, No. 43, and Indiana cases cited and quoted.

See also: 1951 O. A. G., page 51, No. 18, and cases cited.

B.

The necessity to define the word "church" has arisen in innumerable court actions, e.g., wills, debts, land transfers,

restrictive covenants, tax exemptions and zoning variations. The considerations given and purposes to be accomplished in each such situation necessarily differ from the considerations given and the purposes to be accomplished under the liquor control laws.

When undertaking the consideration of the decision of a court of another state in relation to legislative intent on a specific point, such as a liquor control statute prohibiting sales in proximity to churches, it is imperative that a full examination be given to the exact language employed in the statute there under scrutiny by the court, and a most careful comparison be made between such statutory wording and the language of the statute immediately before the examiner. The inclusion of qualifying, limiting or definitive words as legislative standards in one statute not present in the other, may defeat the very utility of giving further consideration to the foreign court's decision in the construction of the foreign statute.

Therefore, where statutes or ordinances contain legislative, definitive or restrictive standards involving a prohibited proximity of liquor sales in relation to a "church" differ from the inclusive language of Burns' 12-402, *supra,* and/or where the evils to be remedied, the ends to be attained or the purposes to be accomplished in statutes, ordinances or other legal instruments using the word "church" differ from the evils to be remedied, the ends to be attained or the purposes to be accomplished under liquor control laws, such statutes, ordinances or legal instruments and the meanings of the word "church" involved therein are not pertinent to construction of the word "church" necessitated by your question. Thus, to the extent that the decisions of the courts are dependent upon different considerations and purposes in defining the word "church," those decisions and definitions must be deemed inapplicable here.

> Szcyenpniak v. License Appeals Comm., quoted *supra* and *infra.*

The quoted language of the Indiana Liquor Control Act from Burns' 12-402, *supra,* is stated in terms of "any * * * church," without elaboration, condition, restriction, qualifica-

tion, limitation, or inclusion of legislative standard for definition purposes whatsoever, and the prohibition is stated in mandatory terms.

The several cases handed down throughout the United States and Canada which apparently concern themselves with the meaning of the word "church," or the like, within statutes prohibiting liquor sales within a specified distance thereof, are almost all noted in the excellent annotation in 59 A. L. R. (2d) 1439.

The vast majority of the cases purporting to determine the intent of a legislature in prohibiting sales of liquor in proximity to churches had before the court a statute containing language so used and phrased as to differ materially from the wording of our Indiana statute. The expressions concerning "churches" in statutes before the courts in the cases listed below used limitations, restrictions, qualifications or other legislative standards. (Cases cited in the brief accompanying your letter have been marked with an asterisk.) This majority of cases turned primarily on such statutory expressions as:

(a) a building or structure *used exclusively* as a church,

In re Rupp (1907), 55 Misc. 313, 106 N. Y. S. 483;

In re Zinzow (1896), 18 Misc. 653, 43 N. Y. S. 714;

*Mandelcorn v. Bruckman (1943), 226 App. Div. 908, 42 N. Y. S. (2d) 716;

People *ex rel.* Deutsch v. Dalton (1894), 9 Misc. 249, 30 N. Y. S. 407;

In re Liquor Tax Certificate No. 14,111 (1898), 23 Misc. 446, 51 N. Y. S. 281;

People *ex rel.* Sweeney v. Lamberts (1896), 18 Misc. 343, 40 N. Y. S. 1107;

In re Vail (1902), 38 Misc. 392, 77 N. Y. S. 903;

In re Korndorfer (1897), 49 N. Y. S. 559;

In re McCusker (1900), 47 App. Div. 111, 62 N. Y. S. 201;

Calvary Presbyterian Church v. State Liquor Authority (1935), 281 App. Div. 176, 281 N. Y. S. 81.

(b) *an entire* house or *structure set apart primarily for use for purposes of public worship,* in which religious services are held and *with which a clergyman is associated.* The entire house or structure is kept for that use and not put to any other use substantially inconsistent therewith,

Tabaczka v. Mich. Liquor Control Comm. (1955), 342 Mich. 370, 70 N. W. (2d) 689;

Staiger v. Liquor Control Comm. (1953), 336 Mich. 630, 59 N. W. (2d) 26.

(c) no license shall be issued to anyone to open up and establish a *new* bar or saloon within the specified distance of a church,

*Starks v. Presque Isle Circuit Judge (1912), 173 Mich. 464, 139 N. W. 29;

Parnes v. Board of Excise Commissioners (1912), 82 N. J. L. 285, 82 Atl. 313;

In re Her-Bell, Inc. (1954), 176 Pa. Sup. 206, 107 Atl. (2d) 572;

George *et al.* v. Board of Excise of City of Elizabeth (1906), 73 N. J. L. 366, 63 Atl. 870.

(d) the prohibition applied to a situation within a specified distance of an *established* church,

Shipbaugh v. City of Sarasota (1957), Fla., 94 S. E. (2d) 728.

(e) the prohibition applied to a situation within a specified distance of a specifically named church, such as Sanford M. E. Church,

Jones v. Moore County Commissioners (1890), 106 N. C. 436, 11 S. E. 514.

(f) a building or structure *occupied* exclusively as a church,

*Dougherty v. Kentucky Alcoholic Beverage Control Board (1939), 279 Ky. 262, 130 S. W. (2d) 756.

Some of the immediately foregoing cases, and others, e.g., *Corwin *et al.* v. Board of Liquor Control (1960), 170 Ohio St. 304, 164 N. E. (2d) 412, and In re Her-Bell, Inc., *supra,* turned in whole or in part on the sufficiency of the evidence to support the *discretionary* determination of the liquor control board as to the propriety of granting or denying a liquor license at a site within the specified distance of a church. To the degree that such cases rested upon this factor as a basis for decision, their holding is not applicable to a consideration of the legislative intent of the Indiana statutory language. Likewise, Dougherty v. Kentucky ABC Board, *supra,* wholly turned on a collateral point that the liquor control board had, by promulgation of an invalid regulation, further illegally restricted the definition of the word "church" more narrowly than had the statute itself.

From an examination of the cases, and the statutes concerned in each, there would seem to be but five (5) such cases in which the holding, or at least one direct point thereof, was based on, or concerned with, a statute expressing itself in terms of "any church" without further definition, limitation, restriction or incorporation of legislative standard, and four of these had distinguishing facts, thus:

The case of State v. Midgett (1881), 85 North Caro., Records 538, concerned the meaning of the word "church" within a criminal statute making it a misdemeanor to sell liquor, "* * * within one and one-half miles of any church in Hyde County * * *." The Court avoided the direct construction of "any church" and based its decision on the expressions in the deed of the donor of the property to show his intent that the property be used primarily as a school while providing that preaching was permissible.

In the case of George v. Board of Excise of the City of Elizabeth, *supra,* the Court, in applying the proximity provision of the liquor code to an institution, recited that the evidence showed that the institution was a sewing school for children, with religious services held there on certain evenings and on Tuesday afternoons, but not on Sunday mornings, and that it was a mission promoted by "Faith Curists" with an upstairs dwelling, a downstairs back storage room, and a downstairs front room with chairs for services conducted by

a Mr. Bennett, and that the institution had a sign outside proclaiming "Mount Zion Mission," all of which evidence the Court held insufficient to show that any religious organization held in the prescribed area any stated meetings for church services. The Court further stated that the Legislature did not intend mere meetings for Bible study to be a church within the liquor code.

In the case of In re Her-Bell, Inc., *supra,* one of the questions before the Court was whether an institution protesting the issuance of a liquor license was a church within the contemplation of the liquor code wherein was used the words "any church." Here, the Court disposed of the question, saying at page 574:

> "* * * 'Used in its primary and more general meaning, the word "church" may be defined as a building consecrated to the honor of God and religion, with the members of the congregation using it united in the profession of the same Christian faith.' * * * The size of the building or of the place used for worship does not necessarily determine whether it is or is not a church, that is, a building or part thereof regularly used for religious worship; nor is the number of parishoners a determining factor."

and the Court then went on to point out that the Liquor Control Board's action was not contingent on a protest by the institution involved.

The case of Calvary Baptist Church v. Coonrad (1956), 163 Neb. 25, 77 N. W. (2d) 821, is not quite in point for the question before the Court concerned the method of measurement of the prescribed distance, and the statute provided, "No license shall be issued for the sale at retail of any alcoholic liquor within 150 feet of any church, * * *." In the course of discussion on the method of measurement the Court did consider generally, however, the meaning of "church" under this statute, which it summarized and expressed most clearly in the Court's own syllabus, as:

> "The plain, ordinary and popular meaning of the word 'church' is a building in which people assemble for the worship of God and for the administration of such offices and services as pertain to that worship."

The only case which I have found which I believe to be directly in point, in that the sole question before the Court involved the legislative intent of a liquor control statute worded identically with that in the Coonrad case, *supra,* and almost identically with that of Burns' 12-402, *supra,* except as to the number of feet and application to retail sales only, is the Illinois case of Szcyenpniak v. License Appeal Comm., *supra.* The question was whether the Alverno Home Nursing Center was a church within the meaning of the liquor law. The Center was primarily a convent for nursing sisters who visited patients, but within the Center was a chapel open to the public for mass, benediction, prayers and devotions, fully equipped for all the ordinary functions of the Catholic Church and used for religious services continuously since establishment of the Center. The Court said, at page 1438 of 59 A. L. R. (2d), and page 562 of 136 N. E. (2d):

> "* * * To all intents and purposes it is a place for public worship.
>
> "Paragraph 127 of the Illinois Liquor Control Act * * * provides in part as follows:
>
> > " 'No license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church * * *.'
>
> "The statute does not define the term 'church' as used therein, nor are there any cases in point. There are decisions defining the statute exempting church property from taxations, but this relates to 'property used exclusively for religious purposes.' Such cases are obviously not in point here, except that it should be noted that the legislature did not use similar words in the Liquor Control Act.
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> "In Smith v. Ballas, 335 Ill. App. 418, 82 N. E. 2d 181, the building for which a liquor license was sought was situated 101 feet and 1 inch from a high school building and 87 feet and 8 inches from the nearest point of the real estate on which the building was located. The issue involved was whether the word 'school' in Section 127 meant the structure or the real estate. The court referred to Paragraph 94 of the Act,

requiring liberal construction in the interest of the public welfare. It said, 335 Ill. App. at page 421, 82 N. E. 2d at page 183:

> "'* * * It would seem that the legislature, by the very act of legislating on the subject and enacting Paragraph 127, was not unmindful that a tavern does not furnish a wholesome environment for school children.'

"Likewise, a tavern does not furnish a wholesome environment for a convent and chapel.

"* * * The administrative agencies have concluded that this is a church and the evidence is sufficient to support their conclusion."

C.

Proper cognizance should be taken of the four Indiana cases in which some meaning of the word "church" was before the Court although, as has been noted heretofore, because of differences in statutes or the ways in which the questions arose, prior determinations are not necessarily of great weight in answering your specific question.

In the case of Orr v. Baker (1853), 4 Ind. 86, the Court had before it a statute providing for the tax exemption of church property. The evidence showed that the church owned a tract of real estate with the church building located on but one side of it. The church organization built several business houses on the other part of the tract which were rented out to business concerns. The Court said, on the question of tax exemption on the business property, at page 89:

> "* * * Where, however, any part of the lot is diverted to secular uses for gain, it ceases to be exempt. The house of worship is no longer situate on such part, within the meaning of the statute."

The case of Gaff *et al.* v. Greet *et al.* (1882), 88 Ind. 122, 45 Am. Rep. 449, was entirely concerned with the meaning of the word "church" within the instruments and covenants of self-government of the church itself.

In the case of Keeling v. Board of Zoning Appeals (1946), 117 Ind. App. 314, 69 N. E. (2d) 613, the question before the Court concerned a zoning variance for an institution proposing a new church building and including a parking lot, a gymnasium, recreation building, playground and outside amphitheatre, all constructed as a single unit. The Court held, at page 326:

> "We hold that the right to erect and use a modern church building may in a proper case, such as the one before us, include a parking lot for the use of members attending church services and any meetings held by the church, and all such rooms and facilities under one roof as ordinarily form and constitute a part of the building, equipment, and are deemed necessary, or useful, in connection with a modern church of the particular denomination involved. * * *"

In the case of Board of Zoning Appeals v. Wheaton (1947), 118 Ind. App. 38, 76 N. E. (2d) 597, the question before the Court also concerned a zoning variance for a Catholic church building, priest's mansion, sisters' convent, school, and parking lot, and whether the building of the convent might be fairly termed a church purpose. The Court said, at page 46:

> "* * * The word 'church' applies not only to a building used for worship, but to any body of Christians holding and propagating a particular form of belief, as for instance, the Baptist Church, the Methodist Church, or the Catholic Church; and any building intended to be used primarily for purposes connected with the faith of such religious organization may be said to be used for church purposes. * * * and in this sense the erection of the convent is as much a church purpose as a house of general worship.
>
> "* * * We are of the opinion that a convent or 'sisters' home' must be considered an integral part of any Roman Catholic church project * * *."

The length and breadth of the position taken by the Indiana Appellate Court as to the nature of a "church" in the Keeling and Wheaton cases, *supra,* should be kept in mind inasmuch

as any presentation of your question under the Liquor Control Act before an Indiana Court would probably involve at least a review of these cases.

Therefore, it is my opinion that the Legislature intended "any * * * church" as used in Burns' 12-402, *supra,* to embrace a whole or a part of a building or place, regardless of size, which is regularly used for public religious worship, and also to embrace the members of the congregation, regardless of number, who use it united in the profession of the same faith; that such an institution should probably have some recognizable form of organization and hold, in addition to religious and other necessarily concomitant activities and purposes, stated meetings for church services, and that such an institution should be intended for all such purposes.

It is also my opinion that any inconsistency of evidentiary fact, in a given case of an institution which might possibly be a church, when measured alongside the foregoing factors, would not necessarily cause it to fall by the wayside as something other than a church in light of the rules of construction of the liquor control laws of practically every state and territory, including this state. This much can, however, be said with reasonable certainty: Upon the premise that a church is a place where persons regularly assemble for purposes of public religious worship which place is so intended and so used, a determination of the Indiana Alcoholic Beverage Commission on the question of whether a given institution is or is not a church under the Liquor Control Act will withstand challenge where it is substantially supported by legitimate evidence of probative value and not influenced by improper considerations under the law; that is, the proof before the Commission, taken as a whole, must support the conclusion reached.