

LICENSE DELIVERY TRUCKS - CITY CANNOT PASS ORDINANCE IMPOSING LICENSE TAX ON DELIVERY TRUCKS OF NON-RESIDENTS USING STREETS AND AT THE SAME TIME EXCEPT DELIVERY TRUCKS OF RESIDENTS WHO HAVE PLACE OF BUSINESS IN SAID CITY.

420  
April 17, 1934.



Honorable Philip A. Land  
City Clerk  
Marshall, Missouri

Dear Sir:

This department is in receipt of your enclosure and letter dated March 23, 1934, requesting an official opinion. Your letter of the 23rd reads as follows:

"Enclosed please find copy of Ordinance Number 1786 of the City of Marshall, Missouri.

"Kindly note Section 2, of this Ordinance and please advise me your opinion as to the legality of the same.

"We have in this city been enforcing this ordinance from its passage and approval June 2, 1930, and it has never been tried out in our courts. Under this Ordinance we have been collecting a license from foreign Bakery Trucks who come into our city deliver, sell, and collect for their bread.

"We have one concern in Kansas City who have protested the Ordinance, while there are other baking firms coming into Marshall from Kansas City paying this license tax."

Your enclosure - copy of Ordinance Number 1786 - reads in part as follows:

"ORDINANCE NUMBER 1786

"AN ORDINANCE PROVIDING FOR THE LEVY

OF A LICENSE TAX UPON \*\*\*AND CARRIERS  
AND DISTRIBUTORS OF MERCHANDISE IN  
THE CITY OF MARSHALL, MISSOURI.

"SECTION 1. \* \* \* \* \*

"SECTION 2. Every person, firm or corporation operating a truck or other vehicle on the streets of the City of Marshall for the delivery and sale of goods, wares, and merchandise within said city shall be required to obtain a license from the City Clerk for each such truck or vehicle so used, and shall pay for such license the sum of \$20.00 for each year. Provided, however, no such license shall be required on a delivery truck or other vehicle of any merchant having a place of business in the City of Marshall and who pays a regular merchants license tax thereon; and Provided further that no license tax shall be required of any person or firm delivering or selling agricultural or horticultural products raised or grown by such person in his usual course of business.

"SECTION 3. Any person violating any of the provisions of this Ordinance shall on conviction there of be fined not less than \$10.00 or more than \$100.00 for such offense.

"SECTION 4. This Ordinance shall be in full force and effect from and after its passage and approval.

C. G. Glass  
President of City Council.

Approved this 2nd day of June 1930

C. G. Glass  
Mayor.

"Filed this 2nd day of June 1930  
C. D. Alexander  
City Clerk.

(I hereby certify the above to be a true and correct copy of Ordinance #1786.

(signed) Philip A. Land. )"

Section 2. of Article IV. of the Constitution of the United States reads as follows:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Section 1. at pages 577 and 581, of the Fourteenth Amendment to the Federal Constitution provides in part as follows:

\*\*\*\*\*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 6092, R. S. Mo. 1929, classifies cities of the third class and states as follows:

"All cities and towns in this state containing three thousand and less than thirty thousand inhabitants, which shall elect to be a city of the third class, shall be cities of the third class."

United States Department of Commerce, Bureau of the Census of the United States for the year 1930, in tabulating the population of incorporated places of Missouri states that Marshall had 8,103 people. We shall therefore assume throughout our opinion that the City of Marshall is a City of the Third Class, as set out in Section 6092, R. S. Mo. 1929, supra.

Section 6840, Laws of 1931, provides that a license tax may be levied by the council in cities of the third class and provides in part as follows:

"The council shall have power to levy and collect license tax on wholesale houses, auctioneers, architects, druggists, grocers, banks, brokers, wholesale merchants, merchants of all kinds,

confectioners, delivery trucks, ice trucks, transfer trucks, laundry wagons, milk wagons, merchant delivery companies, \*\*\*\*, baker and bakeries, bakery delivery wagons, and deliver autos, \*\*\*\*."

37 Corpus Juris, page 205, deals with discrimination against non-residents and states as follows:

"As a general rule, an act or ordinance is unconstitutional as a denial of the equal protection of the laws, and particularly is a violation of the constitutional provision that 'citizens of each state shall be entitled to all privileges and immunities of citizens of the several states' where it confines the right to a license to citizens of the state, or taxes the business or occupation of a non-resident in a different manner or at a different rate from that of a resident; and this applies even where the discrimination operates only within the limits of a municipality."

17 Ruling Case Law, Section 34, page 513, in discussing discriminatory licenses, says:

"It is a basic rule of law relating to licenses that a state or municipality should not arbitrarily discriminate against persons or classes of persons. A statute or ordinance which, in imposing license taxes, discriminates in favor of residents of the city or state as against nonresidents in the same class is unconstitutional. \*\*\*\*\*"

In the case of City of Fort Smith v. Scruggs, 69 S.W. 679, 1.c. 682, the Court had under consideration an act authorizing a tax on the privilege of using the streets of a city for driving. The Court said:

"It is true that nonresidents of the city also use the streets with their wagons and other vehicles, and it may be true that certain of them use the streets as much or more than certain of the residents of the city, but as

a class, they do not use the streets as much as residents of the city, and this furnishes a reasonable basis for the distinction made in the act between the two classes. The requirement of the statute that the tax must be imposed on residents of the city only is but an adoption by the Legislature of the common policy of making each community keep up its own highways. This does not discriminate unjustly in favor of those who live beyond the city limits, for they have to keep other highways, which the people of the city may in turn use free of charge. \*\*\*\*"

We quote from the Court's syllabus (3) in the case of In Re. Jarvis, 66 Kansas 339, which reads as follows:

"\*\*\*\*So far as it exacts the payment of a license-tax by non-residents, from which certain residents of the state are exempted by the fact of their residence, is repugnant to the provision of the federal constitution that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The Court, on page 333 of the above case, said:

"The petitioner claims that the statute is unconstitutional upon several grounds, only one of which it will be necessary to consider. It provides that it shall be a misdemeanor for any one to deal as a pedler without procuring and paying for a license from the county clerk, but expressly exempts from its operation the owner of goods peddling them in the county in which he is a resident taxpayer, or in any county immediately adjoining thereto. The statute, therefore, attempts to impose a tax on non-residents of the State from which certain residents of the State are exempted by the fact of such residents. This is an obvious discrimination in favor of the resident and against the non-resident and is repugnant to Section 2. of Article 4.,

of the federal constitution, which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. \*\*\*\*\*

Again, in the case of Fecheimer v. City of Louisville, 2 S. W. 65, l.c. 67, the Court said:

"If the city of Louisville, through its council, can impose taxes or exact a license, so as to discriminate against all those who live out of the city, and are engaged in like business, and all other cities and towns within the State, by way of retaliation, or for their own protection, should impose like restrictions, it would be a practical destruction of all trade and commerce between this and any other state, and in fact between towns and cities in our own State. \*\*\*\*  
That the resident merchant pays taxes for the improvement of the streets, the support of the public schools, and for the maintenance of the poor in the city is no reason why this discrimination should be made. He is supposed to, and in fact does, receive benefits from the duties thus imposed that do not pertain to the non-resident; and, whether so or not, that there is a palpable discrimination in this case is evident, and therefore the ordinance is in violation of the federal constitution.\*\*\*\*\*"

We further see in the case of Shell Co., v. Industrial Accident Commission, 172 Pac. 610, l.c. 611; 88 Cal. App. 744, the Court said:

"The petitioner contends that the ordinance unjustly discriminates against him in that it requires from him a license fee of \$60. per year, while it exacts but \$13. per year from others

similarly situated, except that his place of business is without, while theirs are within, the city of Venice. He points to Section 21. of Article I. of the Constitution of California, providing that no 'citizen, or class of citizens' shall 'be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens,' and to the Fourteenth Amendment to the Constitution of the United States, Section I, to the same effect that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

\* \* \* \* \*

"The petitioner relies upon the Matter of Hines, 33 Cal. App. 45, 164 P. 339. In that case, one who operated and maintained a laundry wagon was under imprisonment for a failure to take out a license under an ordinance of the City of Venice. He delivered laundry work in Venice from an establishment outside of the corporate limits of the city in the same manner that laundry work was delivered to the people of the city from laundries within its limits. A greater license fee was sought to be required from him for operating and maintaining his wagon than from those conducting laundry businesses within the city for the conduct of such businesses. In the opinion in the case, we said:

"We are of the opinion that the provisions of the ordinances under which petitioner has been convicted attempt to create and enforce a discrimination not based upon the differences in the nature of the business being transacted or differences in the manner of conducting the same business, or any other difference other than the mere fact of difference in destination of the goods collected, and delivered by wagons collect-

ing for laundries located outside the city and the destination of goods collected for delivery to laundries within the city. The license provisions in question are plainly devised as a protective tariff for the benefit of laundries located in the city of Venice, or laundry wagons doing business with laundries located in the City of Venice and apparently they have no other purpose."

"We then declared the assailed provisions of the ordinance to be void. We are convinced that the provisions which are attacked of the ordinance now before us are also 'devised as a protective tariff for the benefit' of businesses located in the city of Venice, and that 'apparently they have no other purpose. \*\*\*\*'"

In the case of Ward Baking Co., v. City of Fernandina, 29 F. (3d) 789, the Court had under consideration whether an ordinance fixing a higher license to be paid by non-resident bakeries delivering within the city than for resident bakeries, was constitutional. The Court said:

"Complainants complain that that part of the ordinance above quoted is unconstitutional, in that it discriminates between residents and nonresidents of the City of Fernandina, Fla., by fixing a higher license tax to be paid by non-residents for engaging in the identical business that residents may engage in upon the payment of a smaller license tax. \*\*\*\*."

"The ordinance plainly discriminates between nonresidents and residents engaged in the same occupation. The classification upon which the difference in tax is based is not according to occupation, but according to residence. Upon well-settled principles the ordinance is void as violating Article 4., Section 3, of the Federal Constitution. \*\*\*\*."

In the case of Nafziger Baking Company, et al., v. City of Salisbury, et al., 48 S. W. (2d) 563, I.C. 563-564, the Court had before it an ordinance exacting a higher annual license on non-resident seller of goods as against residents. The Court said:

"The effect of the ordinance is very apparent. It is intended to and does operate as an advantage to the local merchants, who have an established place of business within the City of Salisbury, over those who have not. It destroys the competition encountered by local merchants with the merchants, as plaintiffs, that deliver the merchandise in trucks to their customers within the city. \*\*\*\*\*"

"Such ordinances, being discriminatory and unjust, have often been condemned as being violative of the provisions of the Constitution. \*\*\*\*\*".

#### CONCLUSION.

We are of the opinion that Ordinance No. 1786, Section 2., supra, discriminates between residents and non-residents of the city of Marshall, Missouri, by compelling "every person, firm or corporation operating a truck or other vehicle on the streets of the City of Marshall to obtain a license therefor, \*\*\*\* provided, however, no such license shall be required on a delivery truck or other vehicle of any merchant having a place of business in the city of Marshall \*\*\*\*\*". The classification upon which the difference in tax is based is not according to occupation, but according to residence. Upon well-settled principles the ordinance is void as violating article IV, Section 2, of the Federal Constitution, which guarantees to citizens of each State the privileges and immunities of citizens in the several states, and in that it violates the provisions of the Fourteenth Amendment to the Federal Constitution, which prohibits any State from making or enforcing any law which abridges the privileges or immunities of citizens of the United States, and which prohibits the States from depriving any person of liberty, or property without due process of law, and from denying any person the equal protection of the laws.

An examination of the ordinance in question shows that it is an attempt to enforce its provisions in a discriminatory manner; that it is invalid, illegal, and void, in that the City of Marshall has extended its powers granted to it by Section 6840, Laws of Mo. 1931, supra, defining the power of the City Council in levying license tax in cities of the third class. We are of the opinion that it is not the purpose of the ordinance to regulate the affairs of the City of Marshall under the police powers. Its primary purpose operates to grant an apparent and real advantage to the resident merchant of the city of Marshall who has an established place of business within the corporate limits of said city, exempting such merchant from a revenue tax which it seeks to impose on the outside business by reason of the fact that such business does not maintain a place of business within the city. It is discriminatory in its application and in reality attempts to build a barrier wall around the corporate limits of said city, and attempts to eliminate and prohibit all competitors who have no fixed or established place of business within the corporate limits of said city. It is a classification studiously, artfully, and comprehensively drawn, but nevertheless discriminatory and violative of the Federal Constitution.

It is true that Section 6840, Laws of Mo. 1931, supra, provides that a license tax may be levied by the Council on various kinds of trucks but it does not give the council power to distinguish between trucks of residents and non-residents. The "foreign bakery trucks" are using the streets as much as or more than certain of the residents of the city and whatever may be the justice of the complaint that the transient merchant does not pay his share of the taxes, the remedy is not to be found in outlawing or destroying his business or by creating a monopoly for the resident merchant. Assuming that both lines of business are honestly conducted, one is as legitimate as the other and entitled to like protection, and the laws should not be converted into a weapon by which either competitor may annihilate the business of the other.

It is quite common in these latter days for certain classes of citizens - those engaged in this or that business - to appeal to the government national, state or municipal, to aid them by legislation against another class of citizens engaged in the same business. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is

directed but also at the expense and to the detriment of the many, for whose benefit all legislation should be framed and devised.

We are, therefore, of the opinion that Ordinance No. 1786, Section 3, supra, of the City of Marshall, Missouri, approved and filed the 2nd day of June, 1930, is illegal and void.

Respectfully submitted,

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WM. ORR SAWYERS  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

MW/afj