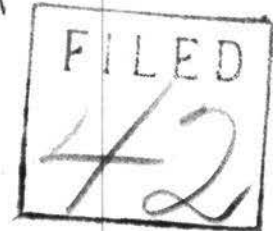


CITIES OF 4TH CLASS: ILLEGALITY OF PART OF PROPOSED
ORDINANCE.

October 7, 1940.



Hon. Jerome L. Howe
8825a Manchester
St. Louis, Missouri

Dear Sir:

In accordance with your letter of September 27th, as follows:

"When I visited your office on Wednesday, Sept. 25th, with Senator William J. Doran requesting an opinion on the legality of a proposed Brentwood, Missouri, police ordinance, you advised that I should make an official request in writing, enclosing therewith copy of the ordinance that the police department is being operated under at present and the proposed new ordinance. I am, therefore, enclosing Ordinance #277 approved the 12th of May, 1936, which is the ordinance under which the police department is being operated at present and copy of Ordinance No. 316 approved April 27th, 1937, which sets up the salaries of the various members of the Police Department and also a copy of the new proposed Police Ordinance.

"I believe this proposed Ordinance to be illegal and on the attached sheets I have set forth various facts and arguments that I believe support the contention that it is illegal. As we discussed, our next Board meeting being Oct. 8th, 1940, I would greatly appreciate it, if it would be possible for you to furnish me with this opinion as early as possible prior to October 8th. * * * "

we are herewith furnishing you opinion and returning to you the copies of two ordinances and the copy of proposed bill for an ordinance.

In order to determine the legality of this proposed ordinance it is necessary to refer to the sections

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of the Statutes applicable to a City of the fourth class and consider the proposed ordinance as those sections and the decisions under them affect it.

"The propositions of law involved and the contentions in behalf of defendant are succinctly stated by his attorneys as follows: 'The City of Richland is a City of the fourth class and was incorporated under the statute of this State permitting the same and derived all of its power from Article V of Chapter 84, Revised Statutes of Missouri, 1909; in other words, the above article is the Constitution for the city and the document to which it must look for all of its rights and privileges and from which it must derive all of its power. It can not act except under the provisions of such article, or under the authority of its own ordinance enacted and created by the authority given by such statute.'****". City of Richland v. Null, 194 M. A. 176, l.c. 177-8.

"Municipal corporations possess only such powers as are granted in express words, or those necessarily incident to or implied in the powers expressly granted. (City of Independence v. Cleveland, 167 Mo. 384, 67 S. W. 216.) And if there is a fair, reasonable doubt concerning the existence of power in the charter of a city, it will be resolved against the city and the exercise of the power denied. 'State v. Butler, 178 Mo. 272, 77 S. W. 560.)" State ex rel v. Wilson 151 M. A. 719, l. c. 726-7."

The sections of the Statutes applicable to the problem are found in Article 8, Chapter 38, Revised Statutes of Missouri, 1929.

Section 6951 authorizes the city to make provision for the election of a Marshall; section 6975 prescribes some of his duties and enumerates the powers of the Marshall.

Section 6920 authorizes the city to make provision for the appointment of a nightwatchman by the Mayor.

Section 6976 furnishes the authority for the Board of Aldermen to make provision for the appointment of additional policemen.

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Section 6971 authorizes the city to make provision for the compensation of its officers and further provides that the salary of no officer shall be changed during the time for which he was elected or appointed.

Section 6969 sets the qualifications for the officers with the exception of the Mayor and Aldermen, with whom we are not concerned.

Section 6993 provides an additional duty for the Marshall in the manner of handling the collection of fines.

Section 6974 furnishes the authority for the Board of Aldermen to prescribe the duties, powers and privileges not defined in said Article 8, Chapter 38.

Section 6957 authorizes provision to be made for removal officers.

And Section 7018 is what might be considered as the general welfare section of the chapter. It is as follows:

"The Mayor and Board of Aldermen of each city governed by this article shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the Constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify, or repeal the same."

The title to the proposed ordinance and the first paragraph of Section 2 indicate that it is the intention to create a new office, that of Assistant Marshall or Chief of Police. There is no authorization for this office. Only the Marshall, nightwatchman and policemen being authorized. The fact is recognized that in the event of inability of the Marshall to perform his duties they must be performed by some one. A reading of the paragraph indicates that it might be the intention merely to provide for one of the regular policemen performing the duties of the Marshall in the event of his inability to act. That is within the powers of the Board of Aldermen but not to create a new

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office. At no place is authority conferred to create new office.

The third paragraph of Section 2 seeks to delegate to the Public Safety Committee the duty of making rules and regulations for the police department. This is the power and duty of the Board of Aldermen and we find no authority for such a delegation of power.

The third paragraph of Section 3 seeks to make an additional qualification for the office of Marshall. The qualifications prescribed by Section 6969, supra, are, "* * * be qualified voters under the laws and Constitution of this state and the ordinances of the city. * * *". This added qualification is without authority of law.

Paragraphs 17, 18 and 19 seek to set up a method of taking care of property which is found. Some of the provisions of these paragraphs are in conflict with the provisions of Chapter 128 Revised Statutes of Missouri, 1929, concerning found property.

Paragraph 20 of Section 3 fixes the compensation of the Marshall. By the terms of the ordinance under which the city is now operating the salary of the Marshall is fixed at \$1.00 per year and under the proposed ordinance it is fixed at \$1980.00 per year. The ordinance under which the City is now operating seeks to take from the Marshall his statutory duties and place them upon an Inspector of Police, this is without authority. It is impossible to tell whether this provision is legal or not for the reason that it can not be determined whether this is an attempt to increase the compensation of the Marshall during his term or merely to compensate him for additional duties. Added compensation for added duties being within the authority of the Board of Aldermen.

"We think the question presented by this appeal was ruled adversely to plaintiff's contention in State ex rel Harvey v. Sheehan, 269 Mo. 421, in which we held (quoting from Syllabus 4: 'An act which enjoins on an officer new and additional duties and provides merely a compensation therefor, is not violative of the provision of the Constitution prohibiting any increase in the pay of an officer during his term of office.'" Denney v. Silvey, 302 Mo. 665 1. c. 671-2.

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The first paragraph of Section 4 is subject to the same objection as is the title and the first paragraph of Section 2.

First paragraph, Section 5, in accordance with the authority conferred by Section 6976, supra, seeks to provide for the appointment of additional policemen. It is vague and indefinite. Prior to 1895, when the present act was passed there was no provision for the appointment of additional policemen or assistants to the Marshall. This section requires the Board of Aldermen to set up the method by ordinance and this paragraph of the ordinance is silent on the method, whether by ordinance, resolution, or motion. The use of the word "employ" in the proposed ordinance might result in confusion but in two Missouri cases, *Gracey v. St. Louis* 213 Mo. 384, l. c. 394-5 and *State ex rel v. Truman* 84 SW 2d 105, l. c. 107 the words "employ" and "appoint" have been held to be synonymous.

CONCLUSION

It is the opinion of this department that the purpose of the ordinance is within the power of the Board of Aldermen; that in the instance of the attempt to create a new office, that of assistant Marshall or Chief of Police it exceeds the statutory power of the Board of Aldermen; that the method of appointing additional policemen is so vague as to prescribe no method; that the actual duties performed by the Marshall with those prescribed by the new ordinance should be compared in order to determine whether or not the pay as proposed is contrary to the power of the City; that the ordinance seeks to set up method unlawful in part concerning found property.

"Municipal ordinances, like statutes, may be valid in some of their provisions and invalid as to others. Where the portion of an ordinance which is invalid is distinctly separable from the remainder, and the remainder in itself contains the essentials of a complete enactment, the invalid portion may be rejected and the remainder will stand as valid and operative." 43 C. J. par. 854. 547.

Respectfully submitted.

W. O. JACKSON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(ACTING) Attorney General
WOJ/mc