RESTAURANTS: City Ordinance governing sanitary conditions.

September 14, 1933 9/18

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Mr. Joe Myers,
Sanitation Officer,
Columbia, Missouri

Dear Sir:

We acknowledge receipt of your letter as follows:

> "Enclosed you will find a tentative ordinance for controlling the sanitation of restaurants which we, of the health department, propose to make recommendations to the City Council for its adoption. However, we would like to have your decision as to the legality of such an ordinance in a third class city before we carry the matter further."

Several sections of our statutes confer police powers. That cities of the third class have the power to regulate by ordinance any business which has to do with the health of the inhabitants there can be no doubt. Section 680 R. S. 1929, reads as follows:

> "The mayor and council of each city governed by this article shall have 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 health of the inhabitants thereof."

Section 6811 R. S. 1929, reads thus:

> "The City Council shall have power, by ordinance, to secure the general health of the inhabitants of the city by any measure to regulate, suppress or abate, etc."

The power to suppress or abate in said section 6811 Supra, must be enumerated in said section.

In Davison v. Lill, 35 S. W. (2d) l. c., 942, our Supreme Court said:

> "Several sections of our statutes confer police powers. Section 6811, R. S. of Mo. 1929, grants cities of the third class power 'to regulate or prevent the carrying on of any business which may be dangerous or detrimental to the public health' and by section 6803 (Supra) to pass ordinances '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.'"

In Hays v. Poplar Bluff, 263 Mo. l. c. 634, our Supreme Court said:

> "But the vice most important in this ordinance is its general scheme by which the city council places its parental hand upon the interests of the people of the city with the manifest intention of gathering to itself the unrefined and arbitrary power to determine who shall have the special privilegeof erecting buildings of combustible material in these areas, and who shall be denied, without being entitled to the courtesy of a reason. This cannot be done."

In Elkhart v. Murray, 165 Ind. 304, the Supreme Court of Indiana said:

> "If an ordinance upon its face restricts the right of dominion which the owner might otherwise exercise without question, not according to any uniform rule, but so as to make the absolute enjoyment of his own dependent upon the arbitrary will of the city authorities, it is invalid because it fails to furnish a uniform

> rule of action and leaves the right of property subject to the will of such authorities, who may exercise it so as to give exclusive profits or privileges to particular persons."

In the case of St. Louis v. Russell, 116 Mo. 248-257, the Court held an ordinance invalid:

> "For the reason that by its provisions one citizen is permitted to erect a livery stable in a certain locality by obtaining the written consent of the owners of one-half the ground in the block, while another of like merit would not be permitted to do so for want of consent."

In Barthet v. New Orleans, 24 Fed. 63, in which an ordinance of New Orleans was held invalid which made it unlawful to maintain a slaughter house:

> "Except permission be granted by the council of the City of New Orleans."

In State v. Mahner, 43 La. Ann.496, in which an ordinance forbidding the keeping of more than two cows by any person within certain prescribed limits in the city without a permit from the city council was held void.

In Richmond v. Dudley, 129 Ind. 112, in which an ordinance forbidding the storing of inflammable or explosive oils within the limits of the city of Richmond without the permission of the common council was held void.

In State v. Dubarry, 44 La.Ann. 1117, in which an ordinance of the city of New Orleans was held void because it prohibited the setting up of any private market without permission of the city council.

In case of Newton v. Belger, 143 Mass., 598, an

ordinance permitting the Board of Alderman to exercise their discretion in granting or refusing permits for the erection of buildings within the fire limits was held invalid.

In case of State v. Tenant, 110 N. C. 609-12, an ordinance forbidding the erection of a building in the city of Ashville, without first having applied to the aldermen and obtained permission for that purpose, was held void.

All the above cases were decided upon principals, as stated in Elkhart v. Murray (Supra). They were held unconstitutional and void because they failed to furnish a uniform rule of action and leaves the right of property subject to the despotic will of aldermen who may exercise it so as to give exclusive profits or privileges to particular persons.

Now, with reference to your proposed ordinance, our conclusion is that Sections II and IX would render the ordinance void because it is not within the legislative powers delegated to cities of the third class, by our statutes; because it would violate the fundamental principal inherent in our constitutional system, that when a municipal corporation seeks by ordinance to restrict for the public good, the rights of individuals otherwise incident to the ownership of property, it must do so by a rule applicable to all alike under the same circumstances and cannot make his enjoyment of his own depend upon the arbitrary will or caprice of the municipal legislature or their agent, the Health officer, which amounts to a delegation of the legislative power of the city to the Health officer.

The authorities, as we have tried to point out above,

clearly hold that an ordinance of this kind which requires the obtaining of a permit or ordinance as a prerequisite in the opening up and conducting a business, is void as a discrimination between individuals of a municipality with respect to the use of their property and the conduct of their business.

In case of Davison v. Lill (Supra.) the Court said:

> "An ordinance seeking to regulate citizens in the lawful conduct of their business must specify rules and conditions to be observed in such property or business so that all citizens alike may comply with them, and must not exercise or create or permit the opportunity for the exercise of arbitrary and uncontrolled discrimination between citizens so applying, otherwise such ordinance will be void and violative of Article IV, Clause 26 of Section 53 of the Constitution of Missouri."

We very much regret that you have been delayed in receiving this opinion earlier, but your request came at one of the very busiest seasons this office has.

Yours very truly,

Barnes
Assistant Attorney General.

APPROVED

Attorney General.