FUNERAL DIRECTORS: Municipal license requirements to operate.

November 12, 1938

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Honorable Harry F. Parker, M.D.
State Health Commissioner
Jefferson City, Missouri

Dear Doctor Parker:

This will acknowledge receipt of your letter requesting an opinion from this Department on the following matter:

> "Attached please find a copy of a proposed ordinance for licensing St.Louis funeral directors, sent us by the City of St.Louis.
>
> "Before I approve it, I would appreciate an opinion as to its legality. I am greatly concerned about any proposed legislation which would be unfair to undertakers located outside of the City of St.Louis but doing business there.
>
> "I would like to have your comment on that phase along with your opinion, as affected by the proposed ordinance."

Answering your request we will deal first with the legality of the proposed ordinance in its affect upon funeral directors, residents of St.Louis, and, secondly, the affect of such ordinance on non-resident funeral directors.

I.

We will enumerate the several questions that arise concerning the validity of such ordinance, as follows:

(1) The authority of the city to enact this ordinance must be based on Article I, Sec. 1, or Article XX, or both, of the City Charter to license, regulate and tax occupations, among which "undertakers" are specified, or such authority must be based upon the general police power of the city under its charter.

If the ordinance is one in the exercise of the City's license or taxing power, we note that it is one pertaining to "funeral directors" and not "undertakers", at least by name. We are unable to find either legal or dictionary definition of "funeral director", whereas the term "undertaker", has both legal definition or construction and dictionary definition. Although the ordinance construes the term "funeral director" to be substantially the same as the term "undertaker", as defined, nevertheless there is no acknowledged recognition by either court or dictionary construction that the terms are synonymous. Hence, the charter aforesaid limiting the City's right to license and tax the occupation of "undertaker", Section 7287 R.S. Missouri 1929, is pertinent, which Section is as follows:

> "No municipal corporation in this state shall have the power to impose a license tax upon any business, avocation, pursuit or calling, unless such business avocation, pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

Consequently, the charter provision first mentioned not providing for the licensing of "funeral directors", at least by such term, a serious question arises as to whether or not the ordinance covers a vocation or occupation for which a license is required.

(2) Can the ordinance be attributed to the police power of the City? The exercise by a city of its police power is confined solely to regulating the conduct of a business, vocation or calling, from and during the time that such business, vocation or calling begins and continues to function. Incidently, the City can levy a tax sufficient only to pay the cost of municipal police, fire and kindred protection, and also protection against unfair dealing if the business is of a public calling. As we read the ordinance in question we are unable to find any provisions for regulation of the business concerned from and after the time the applicant has procured the required license enabling the applicant to begin business. In fact, it would appear that it was intended to be a tax or revenue measure by reason of the graduated license tax provided for, inasmuch as a City in affording police, fire, etc., protection does not discriminate in such protection between the large and small business, but renders the same protection to both regardless of the amount of license or property tax paid by one or the other. Furthermore, it can be seen by reading the provisions of the ordinance itself, that it is confined to stated requirements for a license and stated grounds for revocation of such license and not a regulation of the business.

Hence, we believe the validity of the ordinance must be determined as a tax or revenue ordinance and not as a police regulation, and consequently we repeat that the ordinance in its present form apparently does not provide for the licensing of a business or vocation that is specifically named as one which the city can license and tax.

(3) Another questionable feature of the ordinance arises as to whether or not there is an unwarranted delegation of power to the proposed Board of Funeral Directors. Section 5 of the ordinance provides for a form of application and what it shall state to be executed by the person seeking a license to be presented to the license collector and by him referred to the Board, and upon the approval by the Board the collector will issue or renew such license.

Section 6 provides for an examination of the applicant according to rules and regulations that are to be prescribed by the Board.

Section 7 sets up certain requirements for the applicant to meet relative to character and as to mental and physical equiptment in order to obtain a license.

Recurring to Section 6, it is apparent therein that the municipal legislative body neither provided for nor indicated any rule or guide for the board to follow as to what kind or character or subjects of examination would be reasonably necessary for an applicant to qualify, but on the other hand such feature is left entirely in the discretion of the Board as to what should be required.

While Section 7 sets up requirements to be met by the applicant, yet it cannot be readily determined from the ordinance itself, whether or not the requirements are to be developed through the examination provided for in Section 6, or through some other source. However, it is manifest that the requirement of the physical setup of the funeral home has no relation to an examination of the skill, knowledge or mental ability of the applicant. Consequently, in view of what we have said there does not appear to be a sufficient, if any, connecting up between these three sections mentioned so as to determine whether the "approval by the Board" of an applicant has or has not some limitation of the discretion of the Board as to who it will approve, that is to say, there is nothing in Section 6 to show what subjects the applicant is required to undergo examination on, and what shall be deemed a satisfactory showing on the part of the applicant, but on the contrary such matter is lodged within the unlimited discretion of the Board to prescribe whatever rules and regulations they choose and to change same at will. Furthermore, even though the applicant meets the requirements called for in Section 7, and should pass satisfactorily whatever kind of examination is set up under Section 6, there is no provision in Section 5 that the applicant thereupon as a matter of right, upon paying the license fee and filing bond, is entitled to a license, but to the contrary, the applicant is still subject to the "approval by the Board" to be given or withheld as the Board sees fit.

In this connection we call attention to the requirements for a state license in the case of physicians, attorneys, dentists, nurses, optometrists, osteopaths and embalmers. The legislature in creating the several respective Boards to determine the qualifications of applicants in these several callings specifically defined and limited the respective boards to what should be the qualification of applicants, and what subjects the applicants should be examined on, and in some cases set the minimum passing grade on the examination. In each and every case it is provided that all applicants who meet the prescribed requirements and pass the prescribed subjects of examination shall, as a matter of right, be entitled to a license. In other words the legislature has not delegated to the various boards mentioned the authority to set up its own requirements of applicants for a license, nor does the legislature leave it to the sole discretion of a board to determine whether or not it will grant a license even though its own requirements are satisfactorily met. The pertinent legal principle involved here is set forth by the Supreme Court in Lux vs. Insurance Company, 15 S.W. (2d) 343, l. c. 345, wherein the Court said:

> "The general rule is that any ordinance which attempts to clothe an administrative officer with arbitrary discretion, without a definite standard or rule for his guidance, is an unwarranted attempt to delegate legislative functions to such officer, and for that reason is unconstitutional."

In view of the foregoing it appears to us that the ordinance in its present form is subject to attack as an unwarranted delegation of power to the Board of Funeral Directors.

(4a) In the requirements called for in Section 7, the applicant must possess, among other requirements, skill and knowledge in "sanitation, preservation of the dead, and disinfecting the bodies of deceased persons." We are not sufficiently advised as to whether or not the above quoted

terms mean the services performed by an embalmer, and if so, whether or not from a practical standpoint the vocation of funeral directors necessarily comprehends and includes that of embalmers. As mentioned above the vocation of embalming is specifically provided for by statute, Section 13535 et seq. R.S. Missouri 1929, and an embalmer is not required to be a funeral director. Furthermore, the charter of the City aforesaid, does not authorize the city to require a license of embalmers, nor impose a license tax on such vocation.

Hence, it is our view that a funeral director, as such, cannot be required to possess the qualifications of an embalmer, nor stand an examination on such subject as any part of an examination as to qualifications as a funeral director. An apt case on this point is State vs. Whyte (Wis.) 23 A.L.R. 67, l. c. 70, wherein the Court said:

> "Since embalming is not compulsory, since it is not universally practised, why require every undertaker to have an embalmer's license before he can bury the dead? The qualifications required for obtaining an embalmer's license would add nothing to his fitness for burying an unembalmed body. It would add nothing to public health, safety, convenience, comfort, or morals. A police regulation restricting to the extent of prohibition an ancient, honorable, and necessary calling must justify its validity on the ground that it is essential to the public health, safety, convenience, comfort, or morals. This statute has no such sanction. It was beyond the power of the legislature to make it a valid enactment. State vs. Redmon, 134 Wis. 89, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 114 N.W. 137, 15 Ann. Cas. 408. As was aptly stated by the Supreme Court of Massachusetts in Wyeth v. Board of Health, 200 Mass. 479, 23 L.R.A. (N.S.) 147, 128 Am. St. Rep. 439, 86 N.E. 927,

> decided in 1909: 'Except in those cases where embalming is desired for a special reason, we know of nothing connected with the duties of an undertaker that calls for the work of a licensed embalmer. When such work is desired, a proper person can be procured to perform it. In cases generally, it is not an essential part of the duties of an undertaker, and it has no relation to the public health.'"

(b) Another of the requirements of Section 7 is that the applicant must possess a funeral establishment at a specific location, devoted exclusively to the care and preparation for burial of dead human bodies, and the establishment in question to be of the kind described in the ordinance.

We are inclined to believe that such requirements cause that part of the ordinance to fall within the legal classification of ordinances held to be unreasonable and hence void.

It is common knowledge that all funerals are not conducted from funeral homes or establishments, but are conducted from the residence of the deceased. So far as we know there is no law to prevent a funeral director or undertaker, who so desires, to confine his business or vocation to funerals conducted from the residence of the deceased. Consequently, in such case the funeral establishment called for in the ordinance would be unnecessary and hence classed as an unreasonable requirement under such circumstances.

Apparently the ordinance calls for a funeral establishment physically disconnected from any other building. Again we know of no law which would prevent an applicant from using a residence building jointly as a place of business and also for his home; nor would an applicant be legally prevented from operating his business in a building occupied by other business tenants. Furthermore, we question that an applicant can be required to have an establishment consisting of the three rooms specified--and especially the room and supplies designated for embalming, inasmuch as an

ordinance cannot compel a funeral director to become an embalmer if the two vocations are separable. In view of the fact that doctors, lawyers, dentists and osteopaths are privileged to and in instances do, have their offices or place of business as a part of and in conjunction with their residence; and in fact it is seldom that those who follow such vocations have a separate establishment or place of business separate and apart from all others, we believe as a consequence that it would seem unreasonable to single out and mandatorily require funeral directors to have a separate establishment or one having a specified number of rooms each to be devoted to a specified purpose without some recognized sound reason for so doing. At this time we are not advised of any such reason.

It is a well established rule of law in this state that unreasonable provisions in an ordinance are of no force and effect. As an illustration of the principle involved here, we refer to the case of City of Lancaster vs. Reed, 207 S.W. 868, wherein the court said:

> "Municipal corporations are prima facie the sole judges of the necessities of their ordinances, and the courts will not ordinarily review the reasonableness of such ordinances when they are passed in compliance with authority given by the state. City of Windsor vs. Bast, 199 S.W. 722; City of Hannibal vs. Mo. & Kans. Telephone Co., 31 Mo. App. 23; City of St.Louis vs. Green, 70 Mo. 562. However, courts should declare an ordinance void if upon inspection it appears to be unreasonable. City of Windsor vs. Bast, supra; City of St.Louis vs. St.Louis Theater Co., 202 Mo. 690, 100 S.W. 627. The ordinance seeks to make it a complete offense for one person to associate with another of opposite sex upon the public streets or sidewalks of the city if either person is one of ill repute, without requiring that there be any commission of any offense against the law, or any attempt to commit such an offense.

> "We have no hesitancy, in view of the many decisions of our Supreme Court on the point, in declaring the ordinance unreasonable and void as infringing upon the rights of personal liberty."

(c) Section 10 of the ordinance creates grounds for suspension or revocation of a license, among which grounds, as set forth in subsection (h), is the prohibited connection in any manner by the licensee with a so-called burial society or association. We seriously question that this provision could withstand a legal test for invalidity. We said at the outset that the ordinance viewed as a whole should be ascribed to the licensing or taxing power of the city rather than to its police power. However, it may be that Section 10 is intended as an indirect method of police power regulation by means of license revocation. Nevertheless, an ordinance although enacted under the police power, must be reasonable in its terms the same as a license ordinance.

The operation of a burial association is given legal sanction in this state by statute and hence if such association operates in conformity to law and deals fairly and honestly with its members, an ordinance provision by which the license of a funeral director could be revoked if he had any interest in such character of burial association would be both artibrary and unreasonable. The police power can be exercised only when it is reasonably clear that regulation is needed, in a given case, to protect the public. Manifestly the public interest could not be injuriously affected by reason of the funeral director being connected with a burial association if such is conducted according to law. However, if the funeral director associates himself with any association wherein there is any element of fraud, or practice of certain of the inhibitions set forth in said Section 10, in the conduct of the business of such association, a different case might present itself, but the ordinance makes no distinction between the good and the bad.

Furthermore, an additional question arises concerning this prohibited connection of a funeral director with a burial association, in this, can such prohibition stand in the face of Federal Constitutional guarantee of freedom of contract?

In view of the fact that both features of subsection (h) of the ordinance now under discussion has been passed on by the Supreme Court of Rhode Island relative to a legislative act of that state, which act contained substantially identical provisions as does the ordinance in question relative to a funeral director or undertaker's connection with burial associations, we here cite the case of Prata Undertaking Company vs. State Board of Embalming, 182 Atl. 808, 104 A.L.R. 1. c. 398, 399, wherein the Court said on the question relative to any connection with a burial association as follows:

> "Other issues are raised by the appellants under section 13, as amended by section 2 of the act in question. This section designates the persons who are not entitled to a certificate of registration under chapter 1886 of Public Laws 1932. The first clauses of the section set out that among such persons are those who participate 'in any scheme or plan in the nature of a burial association or a burial certificate plan wherein the rights of the public are not properly protected, or wherein there is any element of fraud.'
>
> "The manifest object of the provision concerning fraud is to afford protection to the general public in relation to such plans or schemes. Fraud has frequently been passed upon and considered by courts and the term has a recognized meaning in the law. This proviso, therefore, appears to us to be clearly valid, in that it is reasonable and relates to the general welfare of the public. Whether or not any particular scheme or plan of the above nature is fraudulent will have to be determined upon the facts in any given case."

On the question concerning freedom of contract the Court said, l. c. 399, 400:

> "If one participating in any scheme or plan in the nature of a burial association or a burial certificate plan is to be entitled to a certificate of registration, without which he cannot lawfully conduct the undertaking business, it would appear that this part of the section precludes him from contracting with a person in regard to the details of the latter's own funeral. The practical effect of this part of section 13, likewise, would be to prevent an individual from so contracting with a funeral director or undertaker who was participating in any such plan or scheme.* * * *
>
> "A statute, or any part thereof, cannot be given effect if, under the guise of the police power in the public interest, but actually to bring about some object outside of the proper scope of that power, it arbitrarily or oppressively interferes with a person or property in relation to recognized guaranteed rights. No good reason has been called to our attention, and none occurs to us, which makes it necessary in the interest of the general public that an individual, if he desires, should not be free to make a contract concerning the details of his own funeral with an undertaker who is conducting a burial association scheme or burial certificate plan, or that such undertaker should not be able in like manner to enter into a binding contract with a person concerning the latter's funeral, without placing himself in the class of those not

> entitled to a certificate, and therefore not able to do business. The clause in question seems to go beyond the general purpose of the act in its relation to the public welfare. After careful consideration, and realizing fully the seriousness of our duty in passing upon the validity of an act of the Legislature, we are of the opinion that the part of section 13 now under consideration constitutes an unreasonable and oppressive restriction upon the liberty of contract secured by section 1 of the Fourteenth Amendment to the United States Constitution, and that this part of the act in question is clearly and palpably in excess of legislative power, and, therefore, that it is in violation of the provisions of said Fourteenth Amendment, and unconstitutional."

Hence, based upon this cited case which is peculiarly in point, the aforesaid subsection (h) of the ordinance in its present form is invalid.

II.

Taking up your second question, namely, the affect of the ordinance on non-resident funeral directors, it necessarily follows that if the whole, or any part of the ordinance is invalid as to resident funeral directors, it is likewise invalid to the same extent as to non-resident funeral directors.

However, for the purpose of this part of the discussion, we will presuppose the entire ordinance to be valid, and inasmuch as we are not furnished with any facts as to the character and extent of operations of the non-residents within the city we are forced to hypothesise facts in order to reach a conclusion.

(a) If the operations of a non-resident within the city are infrequent or casual only, and with no place of business maintained in the city, or if the operations of the non-

resident are confined solely to transporting a dead person from inside the city to a point outside the city for the necessary or customary burial preparation and interment at such point outside the city, or if such operations are confined to transporting a deceased persom from a point outside the city to a cemetery in the city for the purpose of interment in such city cemetery where the customary burial preparations, and burial cermonies, if any, are conducted at a point outside such city, we believe such hypothesized cases are covered in principle by the ruling of the Supreme Court to the end that such non-residents would not be affected by the ordinance. In the case of City of St. Charles vs. Nolle, 51 Mo. 1. c. 125, a city ordinance required a license and tax on all wagons hauling for hire inside the city and into and out of the city. The defendant hauled for hire lumber in his wagon from a point out of the city into the city. The Court said:

> "So much of the ordinance under consideration, as attempted to impose a tax upon wagons hailing into and out of the city, we think was void as not being authorized by the charter, and in my opinion the legislature could give no authority to pass such an ordinance."

This case was reviewed at a later day by the St.Louis Court of Appeals in City of St.Clair vs. George, 33 S.W. (2d) 1021, wherein the Court said:

> "Some question has been made as to the proper interpretation of the Nolle Case, but we do not see how the plain language employed can be misunderstood. The court clearly holds that the city of St.Charles had no power to impose a license tax upon the wagons of an outside resident, engaged in the business of hauling into and out

> of the city, and that the Legislature could confer upon the city no such power. The court manifestly places its holding on the ground that an outside resident so engaged in the business of hauling, was in legal contemplation engaged in such business outside, and not within, the city."

In the City of St.Clair case the defendant, a resident of St.Louis, hauled merchandise from the City of St.Louis to a Kroeger Store in St. Clair, and from such Kroeger Store in St.Clair to the City of St.Louis. Defendant was fined under a city of St. Clair ordinance requiring a license for carrying on a hauling and transfer business in the City of St. Clair. The Court in disposing of the case in defendant's favor, said:

> "We conclude that defendant in the present case was not carrying on the business of transporting merchandise within the limits of the city of St.Clair, and was not subject to the imposition of a license tax by said city."

(b) On the other hand, if the non-resident regularly operates in the City and holds himself out there as doing business within the city, and performs within the city the same or substantially the same acts in the preparation for and the burial of deceased persons as are performed by the city funeral directors,(and especially so if the non-resident maintains a place of business within the city), we believe what is said by Judge Gray in his concurring opinion in the case of Carterville vs. Blystone, 160 Mo. App. l. c. 205, is pertinent, and from which we quote as follows:

> "If the testimony in this case disclosed nothing more than the facts that the transfer company had an office in Joplin, and that its teams and equipment were kept there also, and that occasionally it was employed to haul goods which required

> its teams to enter upon the streets of Carterville, I do not believe it could be required by Carterville to pay a license tax on the vehicle thus using the streets. But the record in this case discloses that the city of Joplin is but a few miles distant from the city of Carterville, and that said cities, together with the city of Webb City, which lies between Joplin and Carterville, comprise one trade area and district from which the company obtained its transfer business, and in which it held itself out to the public as being engaged in such transfer business, and ready to serve all who required its services. Under these circumstances it appears to me that the transfer company was engaged in the transfer business in Carterville, and, therefore, that city has the right to require the company to pay a license tax on its vehicles used in conducting its business in the city."

We are aware of the fact that the operations in this state of a large number of the so-called burial associations are not in the public interests as conducted, and that the provisions of said subsection (h) of the ordinance are well intended and are, or would be salutory in such cases, yet it would be of no avail to pass such provisions as valid if in fact they are invalid in their present form.

CONCLUSIONS

It is our opinion that the ordinance in question in its present form is of questionable validity, if not in fact invalid in the following particulars:

(1) It undertakes to require a license of a vocation not required to be licensed by charter.

(2) It contains an unwarranted delegation of legislative power to the Board of funeral directors in approving applicants for a license.

(3) It contains unreasonable provisions as to requirements of an applicant in order to obtain a license, and also as to revocation of license in the respect hereinbefore mentioned in paragraph 4 of this opinion.

(4) Non-resident funeral directors would be affected according to the character and extent of their operation within the City as discussed in point 2 of the opinion.

Respectfully submitted,

J. W. BUFFINGTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JWB:MM