

MUNICIPAL CORPORATIONS: City of third class cannot pass ordinance requiring prescription for the sale of sulfanilamide and barbiturates.

September 20, 1940

Dr. Harry F. Parker
State Health Commissioner
Jefferson City, Missouri

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Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"I should like to know if it would be legally possible for the City of Cape Girardeau to pass an ordinance prohibiting the sale of sulfanilamide and barbiturates except upon the prescription of a physician."

At the outset it is necessary to determine the nature of the product sought to be regulated.

A barbiturate is a soporific; a sleep inducing drug or medicant. (Webster's New International Dictionary.) The working and effect of "sleeping pills" is well known and something of which we may take judicial notice. (Childers v. Ins. Co., 37 S. W. (2d) 490; Smiley v. Ins. Co., 52 S. W. (2d) 12.) It is common knowledge that any type of barbiturates taken in moderation is not harmful, but an overdose is likely to result in serious complications and even death.

The drug sulfanilamide is, however, not so well known by the general public and its efficacious properties in regard to disease is still in the seminal stage in so far as the medical profession is concerned.

Although the drug was discovered thirty years ago, by one Gelmo, an industrial chemist employed by a German chemical manufacturer, still it was not until the last four or five years that its curative powers have been definitely established. (Mellon's Sulfanilamide therapy, Bacterial Infections.)

Sulfanilamide is a white powder derived from coal tar. It has great curative powers and germ killing ability. (Pfeiffer's Sulfanilamide - Harper's, March, 1939, page 393.)

As stated above this drug is of recent discovery and doctors do not agree as to its deleterious effects. It seems that the drug causes such symptoms as dizziness, headache, nausea, weakness, jaundice and rashes. (Hygeia, October, 1938; Harper's Magazine, March 1939; Popular Science Monthly, March, 1939.)

A heavy dosage with the drug seems seriously to affect the red or the white blood cells, or both, with development of serious conditions and with some fatalities.

John Pfeiffer, writing in Harper's Magazine, quotes Dr. Mellon as saying: "The drug is clearly not a uniform remedy to be bought and used by anyone who bothers to walk into the corner drug store."

Donald Armstrong in Hygeia, October 1938, says: "For normal human beings it is extremely dangerous to treat one's self with it, or to have it used except under the most careful medical supervision."

However, both authors point out that these symptoms, caused by an over use of the drug, seem to be controllable by a physician without endangering the patient. Moreover, as J. D. Ratcliffe points out in Collier's, December 24, 1938, three pounds of the medicine would be necessary to bring on death in a hundred and eighty pound man.

A conclusion of all the writers seems to be that sulfanilamide is dangerous only when taken in excess, but that due to its different reaction upon different types of people, that the drug should be taken under a doctor's supervision.

The power under which everything necessary to the protection of the health and comfort of the public may be done is called the police power. This power as defined by Blackstone, concerns "The due regulation and domestic order of the Kingdom." (4 Bl. Com. 162.) The source of the police power of a municipal corporation is the state (State ex inf. Barker v. St. Louis Merchants Exchange, 269 Mo. 346, 190 S. W. 903; 43 C. J. 203), and although this police power primarily inheres in the state, the Legislature may delegate such power to the municipal corporations (McQuillin on Municipal Corporations, Vol. 3, Sec. 949; Jackson vs. Railroad, 157 Mo. 621, 58 S. W. 32).

As was said in Tiedeman's on Limitation of Police Powers, page 639: "The police power of a municipal corporation must depend upon the will of the Legislature and in order that a city, town or county may exercise that particular police power it must be fairly included in the grant of powers by the charter."

In St. Louis v. King, 226 Mo. 334, l. c. 345, our Supreme Court said:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and none others: First, those granted in express words. Second, those necessarily or fairly implied in or incident to the powers expressly granted. Third, those essential to the declared objects and purposes of the corporation -- not simply convenient, but indispensable. * * *"

While it has been held that there is no inherent police power in a municipal corporation (43 C. J. 205; McQuillin's Municipal Corporations, Vol. 3, paragraph 949), still it appears, from the rule laid down above, that if the power is essential to the declared objects and purposes of the corporation then it may be exercised.

A review of the statutes relating to cities of the third class, to which class Cape Girardeau belongs (Section 6092, R. S. Mo. 1929), discloses many sections relating to the police power delegated by the legislature to the municipal corporation (Sections 6803 to 6811, R. S. Mo. 1929). A reading of these sections discloses no specific delegation of the right to regulate harmful drugs. The section that deals closest with this matter is Section 6803, R. S. Mo. 1929, which is known as the general welfare section. (St. Louis v. World Publishing Company, 126 S. W. 1019, 227 Mo. 146.) This section (6803) provides as follows:

"The mayor and council 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."

Moreover, as pointed out in Freund's Police Power, page 133: "The prohibition of articles of consumption possibly, but not undoubtedly, injurious to health, may under certain circumstances be conceded to the Legislature of the state, but cannot be introduced by local authorities under mere general grants of power."

In Knapp v. Kansas City, 48 Mo. App. 485, it is said:

"The general welfare clause of a charter of a city which follows a long list of specific powers like

the one here, should not be construed so as to enlarge the powers of the city further than is necessary to carry into effect the specific grant of powers."

It seems to be the rule that rights recognized by the general laws cannot be restrained by an ordinance without the Legislative grant expressed or implied. (St. Louis v. Dorr, 145 Mo. 466, 41 S. W. 1094; State ex rel. v. Berryman, 142 Mo. App. 373; 43 C. J. 217.

Section 13152, R. S. Mo. 1929, provides for the regulation of the sale of poisons and reads as follows:

"It shall be unlawful for any person to retail any poisons enumerated in schedules 'A' and 'B,' except as follows: Schedule 'A'--arsenic and its preparations, biniodide of mercury, cyanide of potassium, hydrocyanic acid, strychnia, and all other poisonous vegetable alkaloids and their salts, and the essential oil of bitter almonds. Schedule 'B'-- opium and its preparations, except paregoric and other preparations of opium containing less than two grains to the ounce, aconite, belladonna, colchicum, conium, nux vomica, henbane, savin, ergot, cotton root, cantharides, creosote, veratrum, digitalis, and their pharmaceutical preparations, croton oil, chloroform, chloral hydrate, sulphate of zinc, corrosive sublimate, red precipitate, white precipitate, mineral acids, carbolic acid, oxalic acid, without labeling the box, vessel or paper in which the said poison is contained, and also the outside wrapper or cover with the name of the article, the word 'poison' and the name and place of

business of the seller. Nor shall it be lawful for any person to sell or deliver any poisons enumerated in schedules 'A' and 'B' unless, upon due inquiry, it be found that the purchaser is aware of its poisonous character and represents that it is to be used for legitimate purposes. Nor shall it be lawful for any registered pharmacists to sell any poisons included in schedule 'A' without, before delivering the same to the purchaser, causing an entry to be made in a book kept for that purpose, stating the date of sale, name and address of purchaser, the name of poison sold, the purpose for which it was represented by the purchaser to be required and the name of the dispenser--such book to be always open for inspection by the proper authorities, and to be preserved for at least five years. The provisions of this section shall not apply to the dispensing of poison in not unusual quantities or doses upon the prescription of practitioners of medicine. Nor shall it be lawful for a licensed or registered druggist or pharmacist to retail, sell or give away any alcoholic liquors or compounds as a beverage."

It will be seen that under the general laws of this state that poisons may be sold without prescription if certain records are kept as to the purchaser and if the buyer is apprised of the nature of his purchase.

The ordinance in question here lays down a stricter requirement than that provided for by the statute. And this ordinance applies to a drug not poisonous in small quantities but harmful only if taken in large doses.

In *St. Louis v. King*, 226 Mo. 334, the city of St. Louis had passed an ordinance preventing obscene advertisements and which went further than the statutes concerning such objectionable advertisements. After quoting the law upon the subject the court, at l. c. 347, said:

"From these cases we deduce this principle, that although an act sought to be prohibited by city ordinance is vicious and properly within the power of a State Legislature to consider, it is not a proper subject for municipal legislation, unless the charter grants the power to the municipality. In the consideration of the validity or non-validity of this section 1447 of the municipal code, we are not called upon to consider the question of medical ethics, nor yet a question of private individual morals, but a question as to power and the scope of the grant of power by the State to the city of St. Louis, and unless authority can be found either in the express language of the charter or necessarily or fairly implied in the powers expressly granted or essential to the declared objects and purposes of the corporation, then the mere fact that it is aimed to prevent the practice of something that is immoral, or even which a State Legislature might punish, will not sustain the ordinance. The advertisement in question does not fall within the condemnation of sections 2176, 2177, and 2178, which have announced the legislative policy of this State with respect to objectionable advertisements and it is quite evident that the ordinance in this case goes further than this legislative enactment and does not fall within the express authority given by the charter and is not indispensably necessary to the powers therein expressly granted. * * *"

We believe the above quotation is especially applicable to the situation in this case, and, upon such authority, we hold that an ordinance such as the one in question is not within the power of the city of Cape Girardeau to pass. We wish to point out, however, that we do not pass upon the right of the State Legislature to enact such a law or to grant specifically such right to a municipal corporation.

CONCLUSION.

It is therefore, the opinion of this department that a city of the third class cannot pass an ordinance requiring sulfanilamide and barbiturates to be sold only upon the prescription of a physician or doctor.

Respectfully submitted,

ARTHUR O'KEEFE
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APPROVED:

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