MUNICIPAL CORPORATIONS: City of Fourth Class may enact an ordinance prohibiting gravel pits in the city limits which endanger the safety and health of the citizens of the city.

May 20, 1940

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Hon. Theodore R. Riefling
Mayor
Valley Park, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of May 17th, 1940, which reads as follows:

"The Rock Hill Stone & Gravel Company of Rock Hill, Missouri has come before our Board of Aldermen to secure a building permit to build a building on property which they acquired through tax sale, situated in the City of Valley Park on the Meramec River. The building we well know would be used in digging of gravel to a great depth which would endanger the property of other citizens who have residences and club houses on the river. This property is situated so as if a large excavation were made there would be a strip of land owned by others which would have the Meramec River on one side and a large lake on the other, thereby endangering their property by an underflow from the lake to the river. The Board of Aldermen did not refuse a permit but delayed the issue until the next board meeting so as to give the citizens time to present evidence that

the digging would endanger their property.

"A committee appointed by the Mayor to investigate the situation reported that the digging operations would be detrimental to the property owners.

"The digging of gravel would be at a tremendous rate over a short period of years and when completed would leave a large lake which would be of no use to anyone except as a breeding place of mosquitoes and other vermin.

"We would like to know if the City could prevent these operations by passing and ordinance prohibiting digging of sand and gravel on property within the City Limits. Are we within our rights in refusing them a building permit which would endanger the property of others."

Under the 1930 Federal census the population of the city of Valley Park was 1,772. I am presuming that the city of Valley Park is a city of the fourth class.

Under Section 6093 R. S. Missouri, 1929, cities of the population of not less than five hundred and less than three thousand are classified as cities of the fourth class.

Article 8, Chapter 38, R. S. Missouri, 1929, applies to cities of the fourth class and Section 7018 of Article 8, reads 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."

Under the above section cities of the fourth class may enact ordinances that are not repugnant to the Constitution and the laws of this State which are beneficial to the health of the inhabitants.

In the case of Bellerive Inv. Co. v. Kansas City, 13 S. W. (2d) 628, l.c. 635, the court in upholding a city ordinance of Kansas City in reference to the fire protection in the Bellerive Hotel, said:

> "In the Slaughter-House Cases, 16 Wall. (83 U. S.) 36, 62 (21 L. Ed. 394), Mr. Justice Miller said, in discussing the sources and extent of the police power: '"Unwholesome trades, slaughterhouses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the build-

ing with combustible materials, and the burial of the dead, may all," says Chancellor Kent (2 Commentaries, 340), "be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community." This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise. This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. "It extends," says another eminent judge, "to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; * * * and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the

perfect right of the Legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."'

"Nor does the mere fact that the ordinance, in section 2 thereof, prescribes only a pecuniary penalty, by way of a fine to be assessed against a violator of its provisions, render the ordinance any other than a police regulation, referable to the police power of the municipality. The power to punish by pecuniary penalty or fine is generally held to to be implied from the power to enact police ordinances or regulations. 43 C. J. 265; St. Louis v. Sternberg, 69 Mo. 289, 302; St. Louis v. Green, 70 Mo. 562. Consequently, it cannot well be said, we think, that the ordinance in controversy is any the less referable to the police power of the municipality because it does not specifically declare the subject-matter of the ordinance to be a nuisance, and does not provide for the abatement thereof, but merely prescribes a pecuniary penalty or fine for violation of the requirements and regulatory provisions of the ordinance.

"The jurisprudence of this state abounds with decisions wherein statutes and ordinances have been held to be fairly referable to the police power of the state or the municipality, and therefore have been held not to invade or transgress the constitutional rights and guaranties of persons, natural or corporate, charged with the violation of such statutes and ordinances. * * * * * "

The court further said at l. c. 639:

"It may be that an ordinance which attempts to inhibit the keeping or storing of any class of specified things in a considerable number or amount in any place or establishment whatsoever might properly be subject to the merited contention and claim that it is unreasonable and arbitrary in its effect and application, but, where the inhibition against the keeping or storing of the class of specified things is limited by the terms of the ordinance (as in the instant case) to a place underneath any room, place or establishment used, occupied or let for living or sleeping quarters, then the ordinance is to be viewed and construed in an entirely different light, and whether the ordinance is unreasonable and purely arbitrary in its effect and application depends upon the purpose and object of its enactment, and the dangers and hazards to society or humanity at large at which it is directed, as disclosed either upon the face of the ordinance, or by evidence aliunde. 43 C. J. 312; City of Windsor v. Bast (Mo. App.) 199 S. W. 722; Cusack Co. v. Chicago, 267 Ill. 344, 349, 108 N. E. 340, Ann. Cas. 1916C, 488. In other words, the reasonableness or unreasonableness of an ordinance is to be determined from the whole and entire terms and provisions of the ordinance in the light of the evils, dangers, or hazards at which it is aimed and directed. As

> is said in 43 C. J. 308: 'The courts will have regard to all the circumstances and subjects sought to be attained, and the necessity which exists for the regulation.'
> * * * "

The main question of ordinances in regard to health and safety depends upon the reasonableness of the ordinance and further depends upon the facts in the case. Unreasonable ordinances are subject to attack, but, under the facts set out in your case we do not believe that an ordinance enacted to protect the health of the community would be considered unreasonable. Also, in the case of State v. McKelvey, 256 S. W. 489, l.c. 495, which was an appeal on a fine for violating a zoning ordinance by having a junk yard in violation of the city ordinance of the city of St. Louis, the court held the ordinance under the facts in the case were unreasonable and deprived the use of defendant's property without compensation or due process of law. The court in that case stated as follows:

> "* * * It is clear that the exercise of the police power in reference to private occupations is limited to such regulations as may be reasonably necessary for the protection of the peace, health, and comfort of society. Livery stables, dairies, laundries, soap and glue factories-- in short, all trades and occupations prejudicial to the health, morals, and good government of the citizens may be restricted. But in all cases whether the business or occupation is a nuisance or not is a question of fact. Regulations based

> on aesthetic considerations are not in accord with the spirit of our democratic institutions. It must be assumed that defendants conducted their business in accordance with the ordinance regulating dealers in junk. That is necessarily conceded by appellant's contention that it is unlawful because it is prohibited.
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> "'The owners of city lots or other property in a city may keep them and use them as they wish, free from interference on the part of the municipality, provided that in so doing they do not create and maintain a nuisance or cause inconvenience, damage or harm to others.' 28 Cyc. 735.
> * * * "

In all of the cases the validity of the ordinances depended upon the reasonableness of the ordinance and the facts under which the ordinance was enacted.

CONCLUSION.

In view of the above authorities, it is the opinion of this department that an ordinance would be valid which would prohibit the digging of gravel to a great depth which would endanger the health of the citizens of the city of Valley Park.

We are basing this opinion on the fact that you state that the pit remaining after the gravel is removed would leave a large lake which would be of no use to

anyone except as a breeding place of mosquitoes and other vermin.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB:RW