CITIES: Cities of fourth class can pass and enforce an ordinance requiring dogs to be licensed and
MUNICIPALITIES: immunized against rabies.

August 3, 1938

8-5

FILED
85

Hon. Roy W. Starling
City Attorney
Eldon, Missouri

Dear Mr. Starling:

We have received your letter of July 28, which reads as follows:

> "I am enclosing herewith a copy of Ordinance No. 253 of the City of Eldon and would appreciate an opinion on whether a city of the Fourth Class has the authority to pass and enforce an ordinance of this kind and require every dog within the City to be immunized, collared, licensed and tagged regardless of whether or not the dog is running at large or is being confined within the owners own premises.
>
> "I now have before me a complaint of the Poundmaster that a certain individual within the city has a dog on his premises which is not immunized, licensed and tagged as provided in the enclosed ordinance. I learn that it is conceded that this owner does not allow this dog off his premises but is kept thereon and not allowed to run at large over the streets.
>
> "It appears that by Sec. 7021 cities of the fourth class are empowered to enforce ordinances regulating, taking, restraining and

> prohibiting the running at large of dogs and again by Sec. 7023 the Board of Aldermen may 'make regulations to secure the general health of the City'and I wish to inquire if by authority of this and other statutory authority a city of the fourth class may require that every dog within the City be immunized against rabies as a prerequisite to the securing a license or if such a city can only make such requirements of dogs running at large. "

Section 7021 R. S. Mo. 1929 dealing with the powers of the board of aldermen of cities in the fourth class provides in part that:

> "The board of aldermen may also tax, regulate and restrain and prohibit the running at large of dogs, and provide for their destruction when at large contrary to ordinance, and impose penalties on the owners or keepers thereof." (R.S. 1919, Section 8472.)

Practically this same wording was contained in the charter of the City of Carthage which provided that the city should have power

> "to tax, regulate, restrain and prohibit the running at large of dogs or cats and provide for the impounding or destruction of either or both and all of them when found running at large contrary to ordinance."

In the case of the City of Carthage v. Rhodes, 101 Mo. 175, from which the above quotation was taken, the Supreme Court determined that the right was thereby given to the city to impose a per capita tax upon dogs by way of a license. In this case the court said:

"By section 11, article 5, of the charter of the city of Carthage (Sess. Acts, 1875, p. 169) it is provided that the city shall have power 'to tax, regulate, restrain and prohibit the running at large of dogs or cats and provide for the impounding or destruction of either or both and all of them when found running at large contrary to ordinance.' The power granted in this section is to tax dogs, and regulate dogs, and is not limited simply to the power to restrain and prohibit dogs from running at large, and the question is, can the city exercise the power to tax or regulate dogs by requiring the owner or keeper of a dog to pay a specific sum for a license to keep such dog within the city limits, or in other words by imposing a tax per capita upon dogs, by way of a license. There being an express grant of power to regulate, there can be no question as to the power in the city to regulate by way of a license for which a specific sum may be charged, unless the exercise of the power is precluded by the constitutional provision requiring all property to be taxed in proportion to its value. Const., art. 10, sec. 4.

"Taxation may be for the purpose of raising revenue, or for the purpose of regulation; where for the purpose of regulation it is an exercise of the police power of the state. They are both distinct, co-existent powers in the state and either or both may be exercised through a municipal corporation. In this case, by the terms of the charter, both powers are granted to the city of Carthage as to the dogs of that city. The dog-license tax required by its ordinances is easily referable to the exercise of the police power granted. While, in a sense, dogs are property, and the owner may invoke the aid of the law for their protection as property by civil action, and by statute they have been made the subject of larceny, yet, they are a base sort of property, having no market or assessable value, do not enter into the estimate of the appreciable wealth of the state, and never have been considered proper subjects of taxation for revenue. On the other hand

> their almost utter worthlessness in a crowded city for any purpose except to please the whim or caprice of their owners, the half savage nature and predatory disposition of so many of them, rendering them destructive of animals of real value, and their liability to the fatal malady of hydrophobia which in so many instances has sent them abroad as messengers of death to man and beast, point them out as subjects peculiarly fit for police regulation.
>
> "The ordinances in question being an exercise of the police power granted by the state are not obnoxious to the constitutional provision quoted, which is not a limitation upon the police power, but upon the taxing power of the state. Without discussing the question further it is sufficient to say that the foregoing propositions are sustained by the great weight of authority, from which we cite the following." (Citing cases.)

We must conclude, therefore, that under the wording of said Section 7021 as construed by the Supreme Court in the above case, cities of the fourth class have the authority to pass and enforce ordinances requiring that every dog within such city shall be collared, licensed and tagged regardless of whether any such dog is running at large or is being confined entirely on the owner's own premises. The Carthage case undoubtedly gives the power to license dogs within the city whether they are running at large or not.

We now approach the question as to whether or not a city of the fourth class can enforce that part of the ordinance which requires all dogs to be immunized against rabies. Section 4 of the ordinance which you enclosed reads as follows:

> "At the time of the application of the license aforesaid the owner or keeper shall furnish satisfactory proof, in writing, to the City Collector that the dog sought to be licensed has been immunized from rabies by administration of Anti-Rabic Virus within thirty-(30) days of the date of the application and

> the City Collector shall issue no license until such proof is furnished."

As said in the Carthage case, "The power granted in this section is to tax dogs, and regulate dogs and is not limited simply to the power to restrain and prohibit dogs from running at large * * *." We do not find that the precise question as to whether or not cities have the right to require all dogs to be immunized against rabies has ever been passed upon by any court. We quote, however, the following general statement found in 19 R.C.L. 822 which reads as follows:

> "The keeping of dogs in thickly settled municipalities is subject to rigid police regulations without much regard to rights of the owners in such animals as property. Beasts which have been thoroughly tamed, and are used for burden or husbandry, or for food, such as horses, cattle and sheep, are as truly property of intrinsic value, and entitled to the same protection, as any kind of goods. But dogs and cats, even in a state of domestication, never wholly lose their wild nature and destructive instincts, and are kept either for uses which depend on retaining and calling into action those very natures and instincts, or else for the mere whim or pleasure of the owner; and therefore, although a man might have such a right of property in a dog as to maintain trespass or trover for unlawfully taking or destroying it, yet he was held, in the phrase of the books, to have 'no absolute and valuable property' therein and consequently is not entitled to the same constitutional protection as in the case of other animals. A municipality may accordingly require all dogs kept or found within its limits to be muzzled, and provide that all dogs found running at large unmuzzled shall be summarily killed and such an ordinance is not objectionable because it is in terms in force only upon proclamation by the mayor of the existence of danger of hydrophobia. So also it is within the power of a municipality to require all persons keeping dogs within

> the city limits to register and procure badges for the same. Such an ordinance may be enforced by a civil action to recover a penalty, brought by the municipality against the offender or by the summary killing of an unlicensed dog, even upon the premises of his owner."

In a recent case decided by the Supreme Court of South Carolina entitled Ward v. Town of Darlington, 190 S.E. 826, the town council passed an ordinance to confine the keeping of cows within the limits of the town. One of the requirements of the ordinance reads as follows:

> "All cows must be tuberculin tested at least every three (3) years and all cows must also be kept free from bangs disease."

The court in holding that the city had the power by ordinance to make such requirements and that the same were reasonable said:

> "We need not stop to consider whether the town council had power to pass an ordinance to regulate the keeping of cows within the limits of the Town of Darlington.
>
> "Section 7233, vol. 3, Code, 1932, gives the authority in these words:
>
> "'Power to Enact Rules or Ordinances for Police Government.-The city councils and town councils of the cities and towns of the State shall, in addition to the powers conferred by their respective charters, have power and authority to make, ordain and establish all such rules, by-laws, regulations and ordinances respecting the roads, streets, markets, police, health and order of said cities and towns, or respecting any subject as shall appear to them necessary and proper for the security, welfare and convenience of such cities and towns, or

> for preserving health, peace, order and good government within the same.'
>
> "It was for long the established rule in this jurisdiction that the reasonableness of a municipal ordinance, which on its face declared it to be reasonable, could not be inquired into by the courts."(Citing cases.)
>
> "That rule has been superseded in this jurisdiction, and others, by the more logical rule that the courts may inquire into the action of the municipality to determine whether it has exercised its power in accordance with the constitutional and statute laws of the United States, and the several states, and may determine whether its ordinance is reasonable."
>
> "* * * *We hold that the ordinance is not unconstitutional on any of the grounds urged by plaintiffs. It is not arbitrary, nor discriminatory. It is a legitimate exercise of the police power vested in the Town Council."

It is also the rule in Missouri as it is in practically all of the states that cities can, under their police power, pass any reasonable ordinances for the protection of its inhabitants. If the provisions of any such ordinance in question are not unreasonable, it will stand. On this question the Supreme Court of Missouri in the case of Bellerive Inv. Co. v. Kansas City, 13 S.W. (2d) 628 said:

> "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.'

> "Furthermore, the presumption is always in favor of the reasonableness of a municipal ordinance or regulation, and every intendment is to be made in favor of the reasonableness of the exercise of municipal power to make regulations pursuant to, and in promotion of, its police powers; and the burden of proof to show the unreasonableness of a municipal ordinance or regulation rests upon the person asserting it, unless, of course, its unreasonableness is apparent upon its face. 43 C.J. 310, 311. As is aptly said in Harrigan & Reid v. Burton, 224 Mich. 564, 569, 195 N.W. 60, 62 (33 A.L.R. 142): 'The generally accepted rule is that a presumption prevails in favor of the reasonableness and validity in all particulars of a municipal ordinance unless the contrary is shown by competent evidence, or appears on the face of the enactment.' It is said by our own court, in St. Louis v. Theatre Co., 202 Mo. 690, 699, 100 S.W. 627, 629: 'It is true that a court can declare an ordinance unreasonable upon its face, by a mere inspection of the ordinance, if the ordinance upon its face chances to be of that character. (City of Hannibal v. M. & K. Tel. Co., 31 Mo. App. loc. cit. 32, and cases cited.) But courts move cautiously in such cases. (Commonwealth v. Robertson, 5 Cush. (Mass.) 438.) And it is further true that the courts can and will declare ordinances unreasonable, upon the showing of a state of facts which makes them unreasonable. (Citing cases.) * * * Unless the unreasonableness of the ordinance is apparent upon the face thereof, the burden is upon the person asserting it to be unreasonable to so show by the facts. These facts have not been developed in this case.* * * To our mind the party attacking the validity of an ordinance upon the ground of its unreasonableness, must clearly show the facts, before the courts can act.'"

We do not think that it can possibly be said that an ordinance requiring dogs to be immunized against rabies is an unreasonable requirement on the part of any city. Such an ordinance

is obviously designed to protect the health and welfare and the lives of the inhabitants. Even though a particular dog is generally confined in the premises of the owner, it is not beyond all possibility that such a dog might occasionally break loose and escape. Delivery boys, postmen, neighbors and visitors go on the premises and are all thereby endangered. The owner of such a dog himself could be harmed. The purpose of the ordinance very apparently is designed to protect the citizens, of which the owner is one, and any ordinance designed to accomplish such a purpose cannot in our opinion be called unreasonable.

We conclude, therefore, that a city of the fourth class has the authority to pass and enforce an ordinance requiring dogs to be periodically immunized against rabies.

CONCLUSION

Our conclusion is that Section 7021, R.S. Mo. 1929 authorizes cities of the fourth class to pass and enforce ordinances requiring every dog within any such city to be licensed and immunized against rabies whether such dog is confined entirely to the premises of the owner or not.

Respectfully submitted

J. F. ALLERACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JFA/w