

Opinion No. 63-157

November 19, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. Alexander F. Sceresse District Attorney County Court House Albuquerque, New Mexico

QUESTION

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1. Are the provisions of the Itinerant Vendor Act repealed by implication by Section 15-36-25 authorizing counties to license, regulate and set the license fee for peddlers?
2. Does the Itinerant Vendor Act preclude the county from adopting a "green river ordinance" or a modification thereof, in regard to itinerant vendors and peddlers?

CONCLUSIONS

1. No, but the county can accomplish its aims by an implementing ordinance.
2. No.

OPINION

{*367} ANALYSIS

Prior to answering your questions, we would first point out that some courts have made a distinction between itinerant vendors and peddlers. See 94 A.L.R., 1083. However, our Itinerant Vendor Act, Section 60-2-1, et seq., defines itinerant vendor as including peddlers and hawkers, but the Act only covers those vendors, peddlers and hawkers who are "transient or temporary."

Under the Itinerant Vendor Act a county license is required in addition to a state license and the fee therefor is set out in Section 60-2-9, N.M.S.A., 1953 Compilation. As we pointed out in Opinion No. 63-131, we must presume that the Itinerant Vendor Act is constitutional and not confiscatory, unreasonable or prohibitive.

In answer to your first question, Section 15-36-25, authorizing counties to regulate and license certain persons, including peddlers, does not repeal the Itinerant Vendor Act by implication. Not only are repeals by implication not favored, but both of these statutory enactments can be harmonized and given effect.

An ordinance "implementing" the Itinerant Vendor Act can be adopted so long as the fees set forth in Section 60-2-9, supra, are used. Section 60-2-10, N.M.S.A., 1953 Compilation, provides that when the itinerant vendor makes application for a county license, presents his state license to the county clerk for inspection, files a copy of it with the County Clerk and presents a receipt from the treasurer showing the payment of the proper license fee, the county clerk " **shall** issue to the applicant a county license authorizing him to do business as an 'itinerant vendor' in that county for one year from the date of the issuing of such county license **in the particular manner described in such license.**"

(Emphasis added).

It is the underlined portion of the above-quoted statutory provision that leads us to speak in terms of an implementing ordinance. As we understand it, the county may wish to adopt a "green river ordinance" or a modification thereof. Such an ordinance would not violate Section 60-2-1, et seq., {368} supra, but the terms of the ordinance should be printed on the license.

Green river ordinances, named for the Wyoming town where the question first arose, generally provide that solicitors, peddlers, hawkers, itinerant merchants and transient vendors of merchandise cannot go in or upon private residences unless they have been requested to do so by the individual owner or occupant. **Town of Green River v. Bunger**, Wyo., 58 P. 2d 456.

Such ordinances have generally been upheld as within the police power, and our own Supreme Court has so ruled. **Green v. Town of Gallup**, 46 N.M. 71. The rationale for upholding this type ordinance is that since householders individually have the right to exclude solicitors and peddlers, there is no valid reason why they cannot do so collectively through their elected local governing body. The presumption is that in adopting such an ordinance the local governing body expresses the wishes of the majority of householders. **Rowe v. City of Pocatello**, Idaho, 218 P.2d 695; **McCormick v. City of Montrose**, Colo., 99 P.2d 969; **Ex Parte Lewis**, Tex., 147 S.W. 2d 478.

As we mentioned, the Itinerant Vendor Act covers only transient or temporary vendors, hawkers and peddlers. Thus the county can, if it wishes, utilize the authority confined in Section 15-36-25 and enact an ordinance regulating **all** peddlers. As to the nontransient and non-temporary peddlers it can also set the license fee.

By: Oliver E. Payne

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