

Opinion No. 63-40

April 18, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. Clay Buchanan, Director Legislative Council Service State Capitol Building
Santa Fe, New Mexico

QUESTION

FACTS

The Municipality of Gallup has recently adopted an ordinance which regulates the size of price signs which gasoline stations must use and which prohibits the use of other price signs within seventy-five feet of any public street on, at, near or about the premises on which gasoline is sold. The ordinance also prohibits certain fraudulent practices in the sale of gasoline and prescribes penalties.

QUESTIONS

1. Does the Ordinance cover subject matter which may legitimately be covered by a municipal ordinance?
2. Are any of the provisions of this ordinance constitutionally objectionable?

CONCLUSIONS

1. Yes.
2. The seventy-five foot provision relative to price advertising signs may well be unconstitutional.

OPINION

{*82} ANALYSIS

Our State statutes specifically grant to municipal corporations the power to adopt ordinances for the purpose of "carrying into effect or discharging the powers and duties conferred by law" upon such municipalities. Section 14-25-1, New Mexico Statutes Annotated, 1953 Compilation. While an ordinance cannot conflict with a State statute, it is proper for an ordinance to cover the same subject matter as a State law. Local ordinances and State statutes may, and often do, complement, support, implement and strengthen one another.

Examining the provisions contained in the ordinance in question in this light, we find that the section governing fraudulent practices in the sale of petroleum products (Municipal Code 5-2-4) is essentially the same as that contained in State Law. Section 65-6-2 through 65-6-6, N.M. S. A., 1953 Compilation. This portion of the ordinance does not conflict with State law and is a proper exercise of the municipal police power.

The section setting forth the requirements for the posting of gasoline prices on the pumps (Municipal Code 5-2-2) is also within the general police power of the municipality. Section 14-25-1, New Mexico Statutes Annotated, 1953 Compilation. Further, Section 14-48-8 New Mexico Statutes Annotatde, 1953 Compilation specifically provides that municipal governing bodies have the authority to regulate dealers in "gasoline and oil filling stations."

Section 5-2-3 of the ordinance is considerably more difficult. It provides as follows:

"except as provided in section 5-2-2 of the municipal code of Gallup, 1961 Codification, it shall be unlawful for any person, firm or corporation to post, erect or maintain within seventy-five (75) feet of any public street on, at, near or about the premises on which gasoline is sold or offered for sale any sign or placard stating or referring directly or indirectly to the price or prices of gasoline by the use of numbers, either in words or figures."

Municipalities do have the power to abate nuisances (Section 14-21-30, N.M.S.A., 1953 Compilation) and under Section 14-21-5, New Mexico Statutes Annotated, 1953 Compilation, municipalities have the power to regulate and prevent the use of streets, sidewalks and public grounds for signs and advertisements. Section 14-42-8, New Mexico Statutes Annotated, 1953 Compilation, grants municipalities the power to regulate "bill posters, bill boards and advertising signs".

The ultimate question in connection with this particular portion of the ordinance is whether this provision is reasonable and non-discriminatory.

Signs suspended over streets, sidewalks, or other public ways, or in close proximity thereto, generally are subject to municipal regulation to the ends of keeping the streets open to normal public travel, free from obstruction, interference or danger and also to reduce fire hazards. The general rule is that a sign is a nuisance where it obstructs or restricts the public use of a street. But ordinances regulating signs must be reasonable in their terms and uniform {*83} in their operation. 6 **McQuillin on Municipal Corporations**, Section 24.587 (1949).

While there is no cut-and-dried formula by which the reasonableness of an ordinance can be tested, it seems questionable whether this particular provision is a reasonable exercise of the police power. The provision limits the use of private property for advertising gasoline prices only. No other type of price advertising is so restricted. Further, the ordinance probably cannot be upheld in the interest of safety, since it is not all signs relating to gasoline stations which are prohibited; it is only the signs relating to

prices which are proscribed. We entertain serious doubts as to the constitutionality of the seventy-five foot "no price advertising" portion of the ordinance. Even so, we wish to point out that a municipal ordinance is presumed to be valid and that the one who attacks it has the burden of proving its invalidity. **City of Lovington v. Hall**, 68 N.M. 143, 359 P.2d 769.

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