

**Opinion No. 65-42**

March 8, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

**TO:** Senator James R. Patton, State Senate, State Capitol, Santa Fe, New Mexico

**QUESTION**

QUESTION

Is the following ordinance enacted by the City of Las Cruces constitutional?

ORDINANCE NO. 570 AN ORDINANCE PROHIBITING THE VENDORS OF USED MERCHANDISE FROM DISPLAYING, STORING OR OFFERING TO SELL SAME EXCEPT IN COMPLETELY ENCLOSED BUILDINGS OR COMPLETELY ENCLOSED YARDS AND ESTABLISHING MINIMUM STANDARDS FOR FENCES OR WALLS, PROVIDING PENALTIES AND DECLARING AN EMERGENCY.

BE IT ORDAINED by the City Commission of the City of Las Cruces, New Mexico:

SECTION I. From and after the effective date hereof, it shall be unlawful for any vendor of used merchandise to display, store or offer to sell any used merchandise in any place other than a completely enclosed building or area completely enclosed by a fence or wall, provided, however, said requirement shall not apply in the following cases in the instances of usable or operable items:

- A. Vehicles
- B. Construction equipment, machinery or supplies
- C. Tires
- D. Amusement enterprises
- E. Vending machines
- F. Boats
- G. Cotton gins and their products
- H. Farm equipment

SECTION II. Any fence constructed or used to enclose used merchandise as hereinabove provided shall be of solid construction of boards, brick or other similar materials not less than seven (7) feet in height, above the level of the ground and maintained in a sightly, safe and secure condition, and the contents therein shall be maintained in such a manner as to prohibit the spread of disease and in accordance with the health standards of the City of Las Cruces and the State of New Mexico.

SECTION III. Any person who shall violate provisions of this Ordinance shall upon conviction be punished by a fine not exceeding Three Hundred Dollars (\$ 300) or imprisonment for a term not exceeding ninety (90) days, or both such a fine and imprisonment in the discretion of the City Police Judge. Each day's failure to comply with any provision of this Ordinance shall constitute a separate offense.

SECTION IV. Whereas, the immediate operation of the provisions of this Ordinance is necessary for the preservation of the public peace, health and safety, and an emergency is hereby declared to exist, and this Ordinance shall be in full force and effect from and after its passage by the City Commission of the City of Las Cruces and publication as required by law.

## CONCLUSION

See Analysis.

## OPINION

### {\*73} ANALYSIS

We see then that this ordinance relates to what are generally denominated secondhand stores or shops. Our state statutes specifically provide that "The legislative or governing bodies of cities, towns and villages shall have the power to license and regulate dealers in secondhand goods, junk dealers . . ." Section 14-42-8 and Section 14-21-46, N.M.S.A., 1953 Compilation. Thus the enabling legislation permitting the regulation of the type of vendors covered by Ordinance 570 is present.

Initially we would point out that duly enacted ordinances are presumed to be valid. See **State v. Armijo**, 38 N.M. 73, 28 P. 2d 511.

With respect to ordinances passed in the exercise of the police power, they cannot be declared unconstitutional unless their provisions are clearly arbitrary and unreasonable, having no relation to the public health, safety, morals or public welfare. **Village of Euclid v. Ambler Realty Co.**, 272 U.S. 365. Nevertheless, the ordinance must be a bono fide exercise of the police power and not an arbitrary interference with personal rights under the guise of an exercise of that power. **Jell-O Co. v. Brown**, 3 F. Supp. 132.

There is no set formula by which the reasonableness of an ordinance can be tested. The validity of an ordinance depends, to a considerable extent, upon surrounding circumstances and its purposes and operation. **Continental Oil Company v. Twin Falls**, Idaho, 286, Pac. 353. Otherwise stated, the reasonableness of an ordinance, while a question of law, is dependent upon the particular facts in each case. **Lusk v. Dora**, 224 Fed. 650; **McQuillin, Municipal Corporations**, Section 18.06 (1949).

In determining the constitutionality of an ordinance as measured by the police power, it has been said that the only inquiries essential are: (1) whether the ordinance {74} is an unreasonable, arbitrary and oppressive exercise of the police power, and (2) whether it is reasonably designed to accomplish a purpose falling within the scope of the police power. **City of Springfield v. Hurst**. Ohio, 57 N.E. 2d 425.

Municipalities also have the power to abate nuisances. Section 14-21-30, N.M.S.A., 1953 Compilation. However, the general rule is that secondhand stores and junk yards are not nuisances per se. **People v. Busse**, Ill., 88 N.E. 831; **McQuillin, Municipal Corporations**, Section 24.352 (1949). In fact, such endeavors have been held to be legitimate and useful businesses. **Vermont Salvage Corp. v. Village of St. Johnsbury**, Vt., 34 A. 2d 188. Thus, while secondhand stores and junk yards may be regulated, any ordinance relating to them must have a definite, obvious and real relationship to one of the purposes of the police power, to wit, the public health, safety, morals, welfare or convenience. **McQuillin, Municipal Corporations**, Section 24.353 (1949); **Pfister v. Municipal Council of City of Clifton**, N.J., 43 A. 2d 275.

While we do not know the reasons why the ordinance in question was adopted, we would point out that an ordinance based purely on aesthetic considerations was held to be unconstitutional as an unreasonable exercise of the police power in **Town of Vestal v. Bennett**, 104 N.Y.S. 2d 380. To the same effect was the decision in **Definance v. Killion**, Ohio, 186 N.E. 2d 634. In the case of **Town of Howell v. Sagorodny**, N.J., 134 A. 2d 452, the ordinance required the type of businesses here involved to be maintained in a "sightly" manner. It was held to be void as relating only to aesthetics and not to the public welfare.

The case most closely in point here is **Vassallo v. Board of Commissioners of City of Orange**, N.J., 15 A. 2d 603. The ordinance in question required a junk yard to be enclosed by a solid fence eight feet high. This requirement was adjudged to be unreasonable and void.

This office does entertain certain doubts as to the constitutionality of this ordinance, not only because it may be unreasonable, but also because it may be discriminatory in view of the numerous exemptions. An ordinance must operate uniformly upon all who are similarly situated. **Brown v. Foley**, 29 So. 2d 870.

However, we hasten to point out three things. First, the question of reasonableness is for the legislative body initially and for the judiciary in the last analysis. Second, only one who is prejudiced by an ordinance may raise the question of constitutionality. **Kohler v.**

**Benckhart**, Ky., 252 S.W. 2d 854; **Santa Barbara v. Modern Neon Sign Co.**, 189 Cal. App. 2d 188. Third, a municipal ordinance is presumed to be valid and the one who attacks its constitutionality bears the burden of proving its invalidity. **City of Lovington v. Hall**, 68 N.M. 143, 359 P. 2d 769.