

Opinion No. 14-1317

September 4, 1914

BY: FRANK W. CLANCY, Attorney General

TO: Mr. R. N. Williams, Mayor of Texico, Texico, New Mexico.

TOWN ORDINANCE.

As to proposed ordinance of the town of Texico.

OPINION

{*172} I have just received your letter of the 3rd inst. enclosing copy of ordinance No. 26 of the town of Texico, and also the opinion of Hon. S. G. Bratton of Farwell, Texas, relative to said ordinance. {*173} You request me to look over the ordinance and also the opinion and let you have my opinion at my earliest convenience.

The opinion of Mr. Bratton is, in the main, correct, being based upon the general rule that where a state legislature has legislated as to any particular subject, such as the creation of a statutory offense and the fixing of a punishment therefor, power to pass ordinances on the same subject cannot be exercised by municipal corporations. In accordance with this rule the courts would probably hold to be invalid the second clause of Section 3 of your ordinance which reads as follows:

"and during the hours the said saloons are required to be and remain closed, it shall be unlawful for any person or persons to sell, vend, exchange or give away any spiritous, vinous, malt or fermented liquors or any other kind or character of intoxicating drinks anywhere upon the premises which any saloon is or may hereafter be situate or located in the limits of the town of Texico."

I am of the opinion, however, that it is within the power of the town to enact such a provision as is contained in the first clause of said section and to provide a punishment for its violation. That clause reads as follows:

"Each and every saloon in the town of Texico shall be cleared of all persons, screens, curtains, colorings or stains on window panes, and all other obstructions to a plain view of the interior thereof removed, and same securely closed so as not to permit the ingress or egress of any person or persons, object or objects from twelve o'clock each Saturday night until twelve o'clock the Sunday night following;"

The so-called Sunday law enacted by our legislature, does not cover these provisions. The statute is not a Sunday closing law, but is aimed only at the performance of labor, with certain exceptions, on Sunday, that is so far as applicable to the matter now under consideration. The last quotation from your ordinance makes it necessary that saloons

shall be closed and cleared of obstructions to a plain view of the interior so that it may be known whether they are closed or not. I am of the opinion that this is quite within the power of the town to enact and to make a violation thereof an offense for which punishment can be inflicted, and as it is easily separable from the other part of the same section, I see no difficulty about its being held valid as a lawful exercise of the police power of the town.

The foregoing covers all that is contained in Mr. Bratton's opinion as to the ordinance in question, but you ask me to examine the ordinance generally, and therefore, it seems proper to consider Section 2 as well, which section reads as follows:

"No person, firm or corporation operating or conducting a saloon in the town of Texico shall hereafter engage in or practice, or permit any other person or persons to practice or engage in any kind or character of game of contest with any kind or character of device or contrivance for money, drinks or for anything of value, either in the saloon or upon the {*174} premises upon which any saloon is or may hereafter be located."

There is an objection to this section which is of the same character as the one which I believe well-founded, to the second clause of Section 3 and that is that our state legislature has, I believe, fully covered the subject provided for in that section of the ordinance. Sections 1 and 2 of Chapter 24 of the laws of 1913 are as follows:

"Section 1. That any person who shall play for money or other thing of value any game of chance, by whatsoever name known or howsoever played, upon conviction thereof shall be punished by a fine of not more than One Hundred Dollars, or by imprisonment for not to exceed three months, or both.

"Section 2. That any person who conducts or operates any such game, or who knowingly permits such game to be played upon premises of which he is the owner, lessee or occupant, upon conviction thereof shall be punished by a fine of not more than Five Hundred Dollars, or by imprisonment for not more than six months, or both."

The offense denounced by said Section 2 is fully covered by the above quoted statute and persons who commit any such offense should be prosecuted under the statute and not under the ordinance.

There can be no doubt that Section 4 which is intended to preserve order in saloons and to facilitate the punishment of any disorder therein, is quite within the lawful power of the town.

Mr. Bratton in his opinion, considers another question and that is as to the power to cancel or revoke a retail liquor license and he reaches the conclusion, in consequence of the provisions of Section 4 of Chapter 115 of the Laws of 1905, that the only way in which such a license could be cancelled would be by a hearing and a trial before the municipal authorities and an order from such body to that effect. I think there may be some room for dispute as to the correctness of this conclusion. The Act of 1905 refers

to licenses "granted as provided for by law," and covers licenses issued for saloons outside of municipal corporations as well as within them and might be reasonably held to apply only to the same class of licenses, whether within or without a town, which are obtained from the county authorities under the provisions of statutes. By the eighteenth sub-division of Section 2402 of the Compiled Laws of 1897, municipal corporations are given the right to license, regulate or prohibit the liquor business within the limits of the city or town and there is some reason at least to contend that the town would have power to provide not only how such town license should be issued, but how it might be revoked.