

Opinion No. 16-1880

October 9, 1916

BY: H. S. CLANCY, Assistant Attorney General

TO: Mr. Keith W. Edwards, Fort Sumner, New Mexico.

Villages cannot restrict the number of pool halls, but may prohibit the maintaining of them at particular localities.

OPINION

{*428} This office is in receipt of your letter of the 5th instant in which you ask for its opinion upon the action taken by the village council of Fort Sumner in which it "has attempted to restrict, by ordinance, the number of licenses it will issue for pool rooms, and has refused to issue licenses, irrespective of the qualifications of the applicants or the manner in which the pool rooms might be conducted, for more than one in each block."

I assume that the village authorities have enacted this ordinance under the power conferred upon it by Section 3775 of the Codification, which gives it power to **regulate** all "theaters, halls or other houses of entertainment." Assuming a pool room is a house of entertainment, the only power conferred upon village authorities is to regulate the same, and it seems to have been well settled that the power given a municipality to "regulate" does not authorize it to suppress or prohibit business, as the very essence of regulation is the existence of something to be regulated. It is our opinion, therefore, that your village cannot restrict the number of pool halls within the municipality, but it would seem that the courts hold that the word "regulate" implies a power to say where such a business is to be conducted. Judge Dillon, in his work on Municipal Corporations, fifth edition, Sec. 665, says:

"Whether the power be conferred simply as power "to regulate", or the power to regulate be granted in conjunction with other powers not importing an absolute prohibition, it may be laid down as a general rule, subject to some exceptions, {*429} that the power to regulate does not authorize the absolute prohibition of the subject matter upon which the authority is to be exercised; much depends upon the nature of such subject matter as to the scope of the power. In the exercise of the power to regulate, a city may exercise all reasonable forms of restraint over the thing regulated so long as it stops short of actual prohibition. To regulate is to govern by or subject to certain rules or restrictions. It implies a power of restriction and restraint certainly within reasonable limits as to the manner of conducting a specified business, and also as to the building or erection in or upon which the business is to be conducted. By virtue of the power to regulate it has been held that the city council may by ordinance prohibit the carrying on of a business within certain specified portions of the city. By virtue of a similar power to regulate, it has been held that it is within the authority of the common council

reasonably to limit the manner in which an act may be done by prohibiting one or more methods. By the weight of authority, although the decisions are not uniform, another form of regulation which may be prescribed by virtue of the power to regulate is the power to require a license to follow particular trades or occupations with an accompanying prohibition in the event of failure to procure the license. The implied authority to license which flows from authority to regulate confers authority on the city council to require the licensee to pay a reasonable license fee, but it cannot, under the guise of a license or a license fee or by virtue of its power to regulate, impose a tax upon the occupation."

As before stated, there can seem to be no doubt that the village council cannot restrict the number of pool halls, but that it may prohibit the maintaining of them at certain particular localities within the municipality.