

Opinion No. 43-4379

September 9, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Richard F. Rowley, Assistant District Attorney, Clovis, New Mexico

In your telephone conversation today you requested an opinion relative to two questions; first, whether the State Department of Public Health has the power to close a restaurant which is being operated in such a manner as to constitute a nuisance; second, when the owner or occupant fails to comply with an order to remove a nuisance and the Department proceeds to cause the removal itself, who pays the expense and in what manner is reimbursement of such expense to be forced.

Section 71-104 of the 1941 Compilation authorizes the State Department of Public Health to abate nuisances endangering the public health and to establish, maintain and enforce such rules and regulations as may be necessary to carry out the intent of the act. This statute does not provide the procedure for abatement of nuisances and, in such a case, it is necessary to look to the common law for authority to summarily abate a nuisance. The power to abate a public nuisance per se by a public officer existed at common law, and such power resides in the State Department of Public Health under its authority contained in the above mentioned section. Ordinarily this power is not exercised, inasmuch as the public officer acts at his peril in determining whether or not a nuisance exists, and if he makes an error of judgment he might be subject to damages. As to the existence of such power at common law see *Eccles v. Ditto*, 23 N.M. 234, 167 P. 726 L. R. A. 1918B 126, and *Lawton v. Steele*, 119 N. Y. 226, 23 N. E. 878, 16 Am. St. Rps. 813, 7 L. R. A. 134.

If it is necessary, in order to abate a nuisance, to close a place of business, the State Board has that power. It has been held that the running of a bawdyhouse constitutes a nuisance per se, and the same may be summarily abated by stopping use of the premises, which, in effect, means closing the establishment. This summary power, however, should be exercised only in cases of extreme emergency. Ordinarily, the better procedure would be by way of injunction and temporary restraining order. If the nuisance can be abated merely by the removal of certain conditions which entail expenditure of money, the State Board is authorized to do this after notice to the owner or occupant, under the provisions of Section 71-301 of the 1941 Compilation. In following this procedure the State Board would necessarily have to pay the expense involved in abating the nuisance and could then bring a legal action to recover the amount, in addition to the penalties provided by statute.

By C. C. McCULLOH,

First Asst. Atty. General