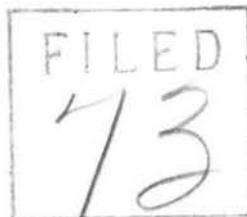


CITY MANAGER GOVERNMENT: Ordinance permitting marble and sld machines to operate and pay occupation tax illegal.

g-28

August 21, 1935.



Dr. H.D. Poe, Captain,  
In Charge of Reserve Police Corps,  
Excelsior Springs, Missouri.

Dear Sir:

This department is in receipt of your letter of some time ago wherein you request an opinion regarding certain questions therein contained as they relate to the City of Excelsior Springs, which has changed from the aldermanic to the city manager form of government in 1923. Your first question is as follows:

"To be perfectly legal, according to law in this state, should not the City Council have enacted certain ordinances complying with the Missouri statutes relating to the appointment of such police officers as were desired or necessary for the good government of our city, establishing and defining their duties, etc?"

Section 6937, R.S. Mo. 1929, relating to the powers of the Council under city manager form of government is as follows:

"Except as herein otherwise provided the council of any city organizing under this article shall have all the powers now or hereafter given to the council or to the mayor and council jointly, under the law by which such city adopting this article was governed under its former organization; and shall have such power over and control of the administration of the city government as is provided in this article.

"It shall be the duty of the council to pass all ordinances and other

measures conducive to the welfare of the city and to the proper carrying out of the provisions of this article. It shall appoint a suitable person not a member of the council to be the administrative head of the city government whose official title shall be 'city manager'. The council shall also provide for all offices and positions in addition to those herein specified, which may become necessary for the proper carrying on of the work of the city, and shall fix the salary and compensation of all officers and employes of the city not herein provided for. All officers of the city shall be paid in equal monthly installments for their services and all employes of the city shall be paid monthly or at such shorter periods as the council shall determine. The creation of all offices and salaries attached thereto, which may be provided for by the council under this article shall be by ordinance, and they shall all be for an indefinite term. The council shall also provide office rooms at the city hall or at some other convenient and suitable place in the city for the transaction of the business of the city and for the convenience of its officers."

In view of the terms of Section 6937, supra, we are of the opinion that it is the duty of the City Council, when the city manager form of government is adopted, to enact all ordinances in conformity with the statutes in order to make effective the terms of Sections 6930 to 6945, R.S. Mo. 1929, inclusive.

Your second and third questions are:

"Are the police who have been appointed without the enactment of such proper ordinances, legally and duly appointed officers in every sense of the word?"

" \* \* \* In the month of May this year our City Manager came to my office complaining that the town was full of marble machines and asked that I \* \* \* make a survey of the city and get a list of the number of machines, find out who the agents were who were planing them around throughout the city, etc.

"I complied with his request, \* \* \* \* Upon submitting my report I asked this question: 'Are you going to run these machines out of town?' Answer: 'No, we are going to create an ordinance wherein the agents placing such machines will pay an occupation tax so much per machine per year.' \* \* \* \*

"Is not such an ordinance illegal, in as much as it makes the city an abettor to the act of having possession or in aiding the placing of such machines?"

Referring again to Section 6937, supra, in order for the appointment of various police officers to have been legal in every sense of the word, it is our opinion that the City Council should have passed appropriate ordinances in compliance with the statutes; however, bearing in mind that there are two classes of officers, i.e., de jure and de facto officers, we are of the opinion that regardless of the fact that the Council failed to pass appropriate ordinances, the officers acted and carried out the duties of police officers and are at least De facto officers; therefore, as such defacto officers, their acts may be considered legal.

A decision bearing on this question is the case of State ex rel. v. Cartwright, 122 Mo. App. 1.c. 204-205, wherein the Court said:

"We readily concede that the appointment of the district clerk should have been made by the board at a regular or special meeting thereof. (Pugh v. School District No. 5, 114 Mo. App. 688) And as this was not done, that Mr. Cartwright was not the district clerk de jure. But it does not follow that he must be regarded as a mere interloper and his acts in the discharge of the

duties of the office held to be void because of the absence of his formal appointment. In a recent case, this court, speaking through Ellison, J., quoted with approval the doctrine in State v. Carroll, 38 Conn. 449, that, 'An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be, etc.' (Usher v. Telegraph Co., (not yet reported)). The school board by a course of conduct extending over a period of years recognized Mr. Cartwright as district clerk, adopted and profited by his official acts and knowingly permitted the county officers and the general public to deal with him as a legal officer. These facts constituted him such officer de facto and the enumeration taken and filed by him in 1905 in the usual way and in compliance with the requirements of the statute must be deemed to have been authorized by the school board. That body 'caused it to be taken and forwarded to the county clerk' within the meaning of the statute."

The police officers in question have been acting and carrying out their duties as such officers--are recognized by the general public as the officers of the city--therefore, we are of the opinion that their acts in carrying out their official duties would be legal, and the same would not constitute a defense by lawyers in criminal cases.

Your next question, relating to marble and slot machines which have by ordinance been permitted to be operated by payment of an occupation tax, is as follows:

"If the prosecutor of this county should order a raid on places having such machines in their place of business and order the destruction of same, would not the city be in rather a precarious position, both from a legal standpoint and from a standpoint of civil suit for damages by the agents and syndicates putting out such machines?"

The question arises as to whether or not such machines are gambling devices within the meaning of Section 4287, R.S. Mo. 1929, which is as follows:

"Every person who shall set up or keep any table or gaming device commonly called A B C, faro bank, E O, roulette, equality, keno, slot machine, stand or device of whatever pattern, kind or make, or however worked, operated or manipulated, or any kind of gambling table or gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property and shall induce, entice or permit any person to bet or play at or upon any such gaming table or gambling device, or at or upon any game played or by means of such table or gambling device or on the side or against the keeper thereof, shall, on conviction, be adjudged guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than five years, or by imprisonment in the county jail for a term not less than six nor more than twelve months."

Assuming, as you state in your letter, that such machines are gambling devices, has the city the authority to pass ordinances licensing them to operate? Section 7289, R.S. Mo. 1929 states that all ordinances must conform to the state laws, providing as follows:

"Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject."

In the case of *State ex rel. Nigro v. Kansas City*, 325 Mo., 1.c. 101, the Court said:

"But the Board can in no case relieve from a substantial compliance with the ordinance; their administrative discretion is limited to the narrow compass of the statute; they can not merely pick and choose as to the individuals of whom they will or will not require a strict compliance with the ordinance. (*State v. Christopher*, 317 Mo. 1179, 1196, 298 S.W. 720)."

Likewise, in the case of *St. Louis v. Bernard*, 249 Mo. 1.c. 56:

"The design of said last named provisions of our Constitution, statutes and the Scheme and Charter of St. Louis is to prevent the enactment of city ordinances which are not in conformity with the general laws of the State.

"The defendant's motion to quash designates several alleged reasons why the information is defective, but the trial court made no finding

of facts and gave no declarations of law. Therefore, we are not fully informed on what ground the information of the city attorney was quashed. However, the attorneys for both plaintiff and defendant have, in their briefs, assumed that the information was quashed on account of the alleged conflict between the ordinance and said sections 4804 and 4805, Revised Statutes 1909; and we will treat that alleged conflict as the issue upon which the judgment of the court of criminal correction must be affirmed or reversed.

"We think it is perfectly clear that the plaintiff city cannot by ordinance authorize the doing of any act which the general laws of the State have prohibited; and where the statutes of the State expressly restrict or limit the power of a city to legislate upon a given subject, such city cannot legally overstep the boundaries marked out for it by the General Assembly. Agreeable to these views it was held in the case of City of St. Louis v. Meyer, 185 Mo. 583, that St. Louis could not levy a peddler's license tax upon a farmer who sold products of his farm in said city, for the reason that section 9516, Revised Statutes 1909, prohibits all incorporated cities in the State from levying any such tax."

#### CONCLUSION

It is the opinion of this department that an ordinance permitting marble and slot machines to be operated by paying an occupation tax is illegal because same sanctions that which the State statutes prohibit. The Prosecuting Attorney or Sheriff would have power to raid places wherein such devices were operated and prosecute the operators on the grounds that such machines are gambling devices, irrespective

of a city ordinance permitting the operation of same.

Respectfully submitted,

OLLIVER W. NOLEN,  
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APPROVED:

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JOHN W. HOFFMAN, Jr.,  
(Acting) Attorney General.

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