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Municipal Corporations -- Sunday Closing Ordinances -- Reasonableness of Classification

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Municipal Corporations—Sunday Closing Ordinances—Reasonableness of Classification

Defendant, operator of a curb market in the City of High Point, kept his place of business open on Sunday, July 26, 1953, selling tomatoes, peaches, and toilet paper. He was found guilty of violating an ordinance of the City of High Point which made it unlawful for a place of business to open on Sunday for selling or offering for sale goods, wares, merchandise or services, but which excepted particular kinds of businesses furnishing certain enumerated articles of merchandise.[1]

On appeal, defendant contended that the basis of classification in the ordinance was arbitrary, unreasonable, and discriminatory in that the businesses permitted to remain open on Sunday sold certain articles of merchandise similar to those which he sold and were therefore his competitors. The Supreme Court of North Carolina, in *State v. Towery*,[2] held that defendant was in error in attempting to make competition between classes the test, rather than discrimination within a class, and that he had shown "no arbitrary or unreasonable exercise of the police power in the classification and selection of businesses to be closed on Sunday."[3]

The ordinance challenged in the *Towery* case is a common type of Sunday closing ordinance, containing a provision stating generally that all businesses will close on Sunday, with a second provision exempting certain types of businesses from the operation of the first. A necessary element of ordinances of this type is the classification of businesses, and such ordinances have been attacked as unconstitutional on the ground that the classification applied was arbitrary and unreasonable, or that it was discriminatory.[4] To be a valid classification, all those similarly

[1] Section 17.32 of The Code of the City of High Point, as amended June 17, 1952, which reads in part: "It shall be unlawful for any place of business to remain open for the purpose of selling or offering for sale goods, wares, merchandise or services between the hours of midnight Saturday and midnight Sunday, except as follows: hotels; boarding houses; restaurants; cafes, delicatessen and sandwich shops furnishing meals and selling bread, cooked or prepared meats incidental to the operation of such business; filling stations furnishing petroleum products and automobile accessories; garages furnishing repair work or storage; ice cream or confectionary stores, furnishing ice cream, cigars, tobacco, nuts and soft drinks only; cigar stands and newsstands furnishing cigars, tobacco, candies, nuts, newspapers, magazines and soft drinks only; drug stores furnishing medical or surgical supplies, cigars, tobacco, ice cream, candies, nuts, soft drinks, newspapers and magazines; ice dealers, for the manufacture and sale of ice; dairies, for the manufacture and sale of dairy products; bakeries, for the manufacture, sale and delivery of bakery products. . . ." Quoted in State v. Towery, 239 N. C. 274, 275, 79 S. E. 2d 513, 514 (1954).

[2] 239 N. C. 274, 79 S. E. 2d 513 (1954).

[3] *Id.* at 278, 79 S. E. 2d at 516.

[4] In addition to this type of Sunday closing ordinance, two other types have been challenged on the ground of arbitrary and unreasonable classification: (1) Where there is a general provision that all businesses must close on Sunday and a second provision exempting the sale of certain articles from the operation of the first; (2) Where there is no general closing provision and the ordinance requires

situated must receive equal treatment, and the classification must not be arbitrary or unreasonable.[5] It is not necessary, however, that it be made with "abstract symmetry" or with "mathematical nicety."[6] Classification in Sunday ordinances will generally be upheld if it rests upon any reasonable basis, and if it has any reasonable relation to the public health, morals, safety, or general welfare.[7]

Ordinances requiring businesses in general to close on Sunday, but exempting certain enumerated kinds of businesses, have generally been held to be reasonable and not arbitrary,[8] and a reasonable basis for a distinction between businesses is usually found.[9] In *State v. Medlin*,[10] an ordinance exempting drug stores for the sale of drugs all day on Sunday, and during certain specified hours on Sunday for the sale of "mineral waters, soft drinks, cigars and tobacco only," was held by the North Carolina court to be reasonable on the ground that since drug stores were open for the sale of drugs and medicines all day on Sunday, as a matter of necessity, they could be permitted to sell, during the specified hours, articles of common use which are to many persons "quasi-necessities."[11] Some courts have held, however, that such distinctions

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only a particular type of business to close. See Broadbent v. Gibson, 105 Utah 53, 140 P. 2d 939 (1943).

[5] City of Springfield v. Smith, 332 Mo. 1129, 19 S. W. 2d 1 (1929); State v. Trantham, 230 N. C. 641, 55 S. E. 2d 198 (1949); 6 McQUILLIN, MUNICIPAL CORPORATIONS § 24.192 (3rd ed., 1949).

[6] People v. Friedman, 302 N. Y. 75, 96 N. E. 2d 184 (1950).

[7] State v. McGee, 237 N. C. 633, 75 S. E. 2d 783 (1953).

[8] Lane v. McFadyen, ___ Ala. ___, 66 So. 2d 83 (1953); Richman v. Board of Commissioners of City of Newark, 122 N. J. L. 180, 4 A. 2d 501 (1939); People v. Friedman, 302 N. Y. 75, 96 N. E. 2d 184 (1950); State v. Sopher, 25 Utah 318, 71 Pac. 482 (1903); State v. Nichols, 28 Wash. 628, 69 Pac. 372 (1902).

[9] In *Ex parte* Sumida, 177 Cal. 388, 170 Pac. 823 (1918), an ordinance requiring businesses to close on Sunday, excepting (among others) bakeries, livery stables, drug stores, confectioneries, ice cream parlors and garages, was held not to be discriminatory, since in the case of the businesses excepted it was the custom to keep them open, as well as to some extent necessary to do so, since persons might need something from these businesses which they could not prepare for on Saturday nor wait for until Monday.

In Lane v. McFadyen, —— Ala. ——, ——, 66 So. 2d 83, 88 (1953), a statute prohibiting a "merchant or shopkeeper" from keeping open on Sunday, druggists excepted, was found to be a reasonable classification and not clearly arbitrary, the court stating that "in order to have a place where drugs might be obtained on Sunday, a bona fide druggist should be permitted to dispose of those articles usually and customarily sold in drug stores other than drugs." For discussion of this statute, see Comment, 5 ALA. L. REV. 349 (1953).

[10] 170 N. C. 682, 86 S. E. 597 (1915).

[11] It was further stated that it is not unreasonable to forbid other businesses to open even during the specified hours on the ground that "people might there congregate to the public scandal and to the dissatisfaction of the public, who expect a decent, reasonable observance of Sunday." State v. Medlin, 170 N. C. 682, 684, 86 S. E. 597, 598 (1915).

A reasonable basis has generally been found for ordinances singling out a particular class of business and prohibiting its operation on Sunday. People v. Krotkiewicz, 286 Mich. 644, 282 N. W. 852 (1938) (sale and distribution of groceries); Komen v. City of St. Louis, 316 Mo. 9, 289 S. W. 838 (1926) (bakeries); State v. Loomis, 75 Mont. 88, 242 Pac. 344 (1925) (dance halls); Mazzarelli v. City of

between businesses are arbitrary and unreasonable and not a valid exercise of the police power.[12] There must be a valid and substantial reason for the law to operate only upon certain classes rather than upon all, and it is not sufficient simply because all within a certain class are affected in the same way.[13]

Where classification in a Sunday ordinance permits a business to remain open on Sunday and sell articles of merchandise similar to those sold by a business prohibited from opening, is the ordinance discriminatory and unconstitutional? The more recent cases have generally found such ordinances to be arbitrary and unreasonable.[14] Such businesses are in competition with each other, are similarly situated with respect to the subject matter of the ordinance, and it is declared to be unreasonable and arbitrary to allow sales by an exempted business and deny that privilege to a business required to close.[15] Where such ordinances have been upheld, the courts reason that as long as all of one class are affected equally under the ordinance, it is reasonable and not arbitrary.[16]

Elizabeth, 11 N. J. Misc. Rep. 150, 164 Atl. 898 (Sup. Ct. 1933) (butcher shop); *Ex parte* Johnson, 77 Okla. Crim. 360, 141 P. 2d 599 (1943) (barber shop). For citation of cases sustaining similar ordinances and also cases holding them invalid, see 6 McQUILLIN, MUNICIPAL CORPORATIONS § 24.197 (3rd ed., 1949).

[12] Henderson v. Antonacci, 62 So. 2d 5 (Fla. 1952) (no reason why the health, morals, or general welfare would be better safeguarded by requiring used car dealers to close than by allowing them to operate along with proprietors of tourist attractions); City of Mt. Vernon v. Julian, 369 Ill. 447, 17 N. E. 2d 52 (1938) (no reason why the public welfare was served by closing a grocery store while a confectionery store remained open).

[13] Henderson v. Antonacci, 62 So. 2d 5 (Fla. 1952).

In Elliott v. State, 29 Ariz. 389, 242 Pac. 340 (1926), a closing ordinance was held to grant special privileges and immunities to certain classes of citizens while denying them to others without legal excuse, the court stating that it is not legitimate discrimination to close groceries, shoe stores, and hardware stores, while allowing jewelers, dealers in second-hand goods and tailoring establishments to open without restriction.

[14] Deese v. City of Lodi, 21 Cal. App. 2d 631, 69 P. 2d 1005 (1937); Allen v. City of Colorado Springs, 101 Colo. 498, 75 P. 2d 141 (1937); City of Mt. Vernon v. Julian, 369 Ill. 447, 17 N. E. 2d 52 (1938); Arrigo v. City of Lincoln, 154 Neb. 537, 48 N. W. 2d 643 (1951); Broadbent v. Gibson, 105 Utah 53, 140 P. 2d 939 (1943).

[15] Arrigo v. City of Lincoln, 154 Neb. 537, 48 N. W. 2d 643 (1951). There an ordinance requiring grocery stores and meat markets to close on Sunday, excepting, among other businesses, drug stores, cigar stores, ice cream parlors, and fruit stores, and providing that they should not sell groceries or articles ordinarily sold from a grocery store except fresh fruits, ice, bread and milk, was held invalid to the extent that it required grocery stores to close on Sunday, excluded them from exceptions permitting similar businesses to be open for necessary purposes, and barred them from the sale of fruits, ice, bread and milk.

A statute discriminates between persons similarly situated, which permits confectionery stores to open on Sunday and sell soft drinks and confections while grocery stores selling the same items have to close. Broadbent v. Gibson, 105 Utah 53, 140 P. 2d 939 (1943).

There is no basis for the discrimination by an ordinance under which a drug store can sell staple groceries on Sunday, while the operator of a grocery store is prohibited from selling the same items. Allen v. City of Colorado Springs, 101 Colo. 498, 75 P. 2d 141 (1937).

[16] State v. Nicholls, 77 Ore. 415, 151 Pac. 473 (1915) (defendant contended

In the prior North Carolina case of *State v. Trantham*,[17] the court indicated that a Sunday ordinance might be unreasonably discriminatory if under it there was competition between a permitted and a prohibited business in the same articles of merchandise, the permitted business being allowed to sell them on Sunday. The court there stated, in holding that defendant could not challenge the constitutionality of an ordinance[18] similar to the one in the *Towery* case, that it was not made to appear that defendant kept in stock for sale one of the enumerated salable articles,[19] and that no competitor of his had been accorded a privilege which was denied to him. Only where there is discrimination between those of a particular group or class who are similarly situated with reference to the subject matter of the legislation is the ordinance unconstitutional.[20]

Under the *Towery* case, however, classification is declared not discriminatory although articles of merchandise permitted to be sold on Sunday by an exempted business are also sold by a business prohibited from opening on Sunday.[21] The court relies on *State v. Medlin*, where

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that his cigar store, selling cigars and candy, had to close on Sunday while under the same statute a drug store might open and sell the same items; yet the statute was held reasonable since it applied to all persons coming within the prohibited class, and the businesses excepted "minister to wants more imperative"); Richman v. Board of Commissioners of City of Newark, 122 N. J. L. 180, 4 A. 2d 501 (1939) (ordinance was attacked as discriminatory and unreasonable in prohibiting the opening of grocery stores and not affecting other merchants, many of whom sold foodstuffs not classified as groceries, but was found valid since it was general and applied to all grocery stores in the city without exception); State v. Cranston, 59 Idaho 561, 85 P. 2d 682 (1938) (statute limiting exemptions to places *primarily* established for the sale of certain necessaries or where the articles are made or produced is not unjust discrimination, since it is not necessary to exempt all businesses where such articles *might* be sold).

[17] 230 N. C. 641, 55 S. E. 2d 198 (1949).

[18] The ordinance had a general closing provision with a proviso that it did not apply to "garages and filling stations, drug stores, cigar stores, confectionery stores, shops, stands and bakeries which shall be allowed to operate on Sunday for the sale of gas and oil, drugs, medicines, druggist sundries, cigars, tobacco, fruits, ice, ice cream, confections, nuts, soda and mineral waters, bread, pies, cakes, newspapers, periodicals, and for no other purpose." Section 199 of the Code of the City of Asheville, as quoted in State v. Trantham, 230 N. C. 641, 642, 55 S. E. 2d 198, 199 (1949).

[19] The defendant had sold groceries on Sunday.

[20] State v. Trantham, 230 N. C. 641, 55 S. E. 2d 198 (1949). *Cf.* State v. McGee, 237 N. C. 633, 75 S. E. 2d 783 (1953), where the defendant, operator of a motion picture theater, challenged the validity of a city ordinance permitting theaters charging a fee to operate only during specified hours on Sunday, on the ground it discriminated against him in that it permitted radio and television stations to operate while he was required to be closed. The court, after stating that defendant did not claim the ordinance discriminated against him insofar as it applied to persons similarly situated and engaged in the theater business, held that the motion picture theater was an entirely different business from a radio or television station, and further, that no fee was charged to listen to the radio or watch a television show.

[21] It would seem there is room for argument as to whether a grocery store should be in a different class from a drug store, in regard to articles of merchandise which they both ordinarily sell. Could it not be argued that the two businesses are similarly situated with regard to those articles?

the ordinance construed excepted drug stores for the sale of "drugs, medicines, mineral waters, soft drinks, cigars and tobacco only," but the ordinance in the principal case excepted drug stores furnishing enumerated items, not *expressly* limiting them to sales of such items *only*. Whether a drug store could sell staple groceries on Sunday under the ordinance the court does not decide, and it is open to question whether the court would hold an ordinance discriminatory under such circumstances.

Ordinances such as the one considered in the *Towery* case seem to place more significance upon the name of the business than upon what business it in fact does. Where an ordinance excepts drug stores from its operation, for instance, should a store still be considered a drug store although its primary business consists of the sale of articles other than drugs and medicines? It has been stated that at the present time "a 'drug store' could mean anything from a place where drugs alone are sold to one where anything from an aspirin tablet to an automobile could be purchased."[22] It is submitted that the better Sunday closing ordinance is one with a general closing provision and which does not except particular kinds of businesses from its operation, but rather excepts only enumerated articles or items which can be sold on Sunday.[23]

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Negotiable Instruments—Defenses of Lack and Failure of Consideration as Affected by Seal

In an action on promissory notes under seal, it was held that if the defendant could show a total failure of consideration, this would be a good defense, since the presumption of consideration arising from the seal is rebuttable.[1]

The origin of the seal is traceable to times when few people could write, and accordingly identified themselves by the use of a distinctive

[22] *See* Henderson v. Antonacci, 62 So. 2d 5, 10 (Fla. 1952) (concurring opinion).

[23] Statutes with this type of classification have generally been upheld. State v. Justus, 91 Minn. 447, 98 N. W. 325 (1904); State v. Diamond, 56 N. D. 854, 219 N. W. 831 (1928); People v. Zimmerman, 48 Misc. Rep. 203, 95 N. Y. Supp. 136 (Sup. Ct. 1904).

Under such a statute, it has been said that where tobacco and candy are excepted from its operation, a large department store could open for the sale of those items, although there is doubt whether it would be economically feasible for them to do so. State v. Grabinski, 33 Wash. 2d 603, 206 P. 2d 1022 (1949).

Such an ordinance has been held arbitrary in permitting the sale of a can of beer on Sunday, while prohibiting the sale of a can of orange juice or coffee. Gronlund v. Salt Lake City, 113 Utah 284, 194 P. 2d 464 (1948).

[1] Mills v. Bonin, 239 N. C. 498 (1954). The distinction between *want* and *failure* of consideration should be noted. "Want of consideration embraces transactions or instances where none was intended to pass, while failure of consideration implies that a valuable consideration, moving from obligee to obligor, was contemplated." *In re* Killeen's Estate, 310 Pa. 182, 187, 165 Atl. 34, 35 (1932).