

1965

1. BAKERY MAINTAINED AND OPERATED IN CONNECTION WITH DEPARTMENT STORE, GROCERY STORE OR FOOD MARKET—MAY BE LOCATED IN BASEMENT OR CELLAR IF VENDOR OR PROPRIETOR WERE ENGAGED IN BUSINESS THERE PRIOR TO EFFECTIVE DATE OF SECTION 1012 G.C., MAY 28, 1943.
2. ESTABLISHMENT OPERATED STRICTLY AS BAKERY CAN NOT CONDUCT BAKING OPERATIONS IN CELLAR OR BASEMENT.
3. DEPARTMENT OF INDUSTRIAL RELATIONS—RESPONSIBLE TO ENFORCE LAW PROHIBITING OPERATION OF BAKERIES IN CELLARS OR BASEMENTS.

SYLLABUS:

1. A bakery maintained and operated in connection with a department store, grocery store or food market may be located in a basement or cellar provided such department store, grocery store or food market was engaged in business prior to the effective date of Section 1012, General Code (May 28, 1943).

2. An establishment operated strictly as a bakery cannot conduct its baking operations in a cellar or basement.

3. It is the responsibility of the department of industrial relations to enforce the provisions of law prohibiting the operation of bakeries in cellars or basements.

Columbus, Ohio, June 12, 1947

Hon. Frank Farnsworth, Director of Agriculture
Columbus, Ohio

Dear Sir:

I am in receipt of your communication which reads:

“In order that the duties of the Division of Foods and Dairies of the State Department of Agriculture may be administered in a fair and legal manner, I am requesting a formal opinion regarding the operation of a bakery in a cellar or basement. Answers to the foregoing questions are requested:

Can a bakery operated in connection with a department store, grocery store or food market, legally conduct baking operations in a cellar or basement?

Can an establishment operated strictly as a bakery legally conduct baking operations in a cellar or basement?

Who is responsible for the enforcement of those sections of law governing the operation of a bakery in a cellar or basement?"

The seventy-second General Assembly in 1896 passed a law known as an act for the regulation of the manufacture of flour and mill food products. The act contained ten sections (92 O. L. 393). In 1898 the seventy-third General Assembly amended this act and repealed all the sections of the prior enactment (93 O. L. 159). This act was carried into Bates Revised Statutes and numbered sections 4364-71 to 4364-79 inclusive. Section 4364-71 revised statutes provided in part:

"* * * and no cellar or basement not now used as a bakery, shall be hereafter used and occupied as a bakery, and a cellar heretofore occupied shall, when once closed, not be reopened, unless the proprietor shall have previously complied with the provisions of this Act."

The above act became a part of the General Code when the code was adopted by the General Assembly in 1910, and was codified as sections 1012 to 1019 inclusive. Pursuant to the general purpose of the legislature to present the sections of the new code in a clear and concise form, section 1012 (revised statute 4364-71) was amended to read:

"All bakeries shall be drained and plumbed in a sanitary manner and provided with such airshafts, windows or ventilating pipes, as the chief inspector of workshops and factories or a district inspector directs. No cellar or basement shall be used as a bakery * * *"

This section remained unchanged from 1910 to 1943, when the following language was added after the last word of the old section (120 O. L. 334):

"except that the foregoing provision as to the prohibition of the use of a cellar or basement as a bakery shall not apply to establishments in which the sale of bakery products is not the primary business and which were doing business under the laws of Ohio on and before the effective date of this act."

Section 1012 of the General Code has always been in the chapter of the code relating to the chief inspector of workshops and factories. By virtue of Section 871-11, General Code, the legal existence of the department of chief inspector of workshops and factories was terminated on the first day of September 1913, and pursuant to Section 871-24, General Code, the duties, liabilities, powers and privileges of this department were immediately conferred upon the industrial commission of Ohio. Effective May 15, 1934, Section 154-45, General Code was amended, and the powers and duties of the industrial commission in so far as they related to the functions of the former department of chief inspection of workshops and factories were vested in the department of industrial relations.

In 1921 the eighty-fourth General Assembly passed an act relating to the establishment, construction and operation of bakeries (109 O. L. 604). This act was codified as Sections 1090-22 to 1090-43, General Code and the administration of this law was placed in the department of agriculture. An examination of these sections discloses that they pertain primarily to the sanitary conditions of operation, the weight and purity of the ingredients used, labelling of the product, etc.

Section 1090-22, General Code, provides the definition of a bakery and reads :

“The word bakery is defined, for the purpose of this act (General Code Sections 1090-22 to 1090-43), as a building or part of a building wherein is carried on the production, preparation, packing, storing, display or sale of bread, cake, pies or other bakery products, including any separate room or rooms used for the convenience or accommodation of the workers; Provided, that Sections three, four, six, seven, eight and twenty shall not apply to retail stores where bakery products are sold but not produced.”

In none of the statutes relative to the powers, duties and functions of the Department of Agriculture is there any specific provision relating to the construction or operation of bakeries in cellars or basements. Section 1090-42 touches upon the construction of bakeries and provides :

“No new bakery shall be established unless the building plans and equipment proposed to be used have been approved by the department of agriculture or by the board of health of the city or town. Said department or board shall refuse a permit to such

bakery if the building and equipment do not comply with the provisions of this act and the rules and regulations made hereunder ; and a hearing shall be afforded in accordance with the provisions of the administrative procedure act."

Pursuant to the rule-making power granted to the Department of Agriculture in Sections 1090-23 and 1098, General Code the following regulation was adopted :

"All bakeries and work rooms shall be thoroughly clean and be free from dust, foul atmosphere and contamination and shall be well lighted. *At least one square foot of glass surface exposed to natural light unobstructed by buildings, or other devices nearer than ten feet, shall be provided for each ten square feet of floor space or surface of work room.*"

Under the provisions of Section 1090-42 supra a new bakery cannot be established unless its building plans have been approved by the Department of Agriculture or the local board of health. This section further provides that a permit of approval *shall* be refused if such building does not comply with the rules and regulations adopted by the Department of Agriculture.

We are not here concerned with the wisdom of the General Assembly in granting such rule making power to the Department of Agriculture, or the reasons underlying the adoption of the above cited regulation of that department. Where a regulation is adopted which is within the scope and purpose of the law and pursuant to the authority delegated, such rules have the force and effect of law. *State v. Friedkin*, 244 Ala. 494, 14 So. (2nd) 363; *Standard Oil Co. v. Johnson*, 316 U. S. 481, 86 L. Ed. 1611, 62 S. Ct. 1168.

It is fundamental that in the exercise of the police power the State may make all such provisions as are reasonable, necessary and appropriate for the protection of the public health and comfort. *State ex rel Milhoof v. Board of Education*, 76 O. S. 297; *Disposal Company v. State*, 89 O. S. 230; *State ex rel v. Zangerle*, 103 O. S. 566.

Therefore it will be seen from the foregoing that whether a bakery is located in a cellar or basement, or elsewhere, is not the test as to the jurisdiction of the Department of Agriculture. It is conceivable that a bakery may be located above ground and fail to meet the requirements of the statutes and the regulation, while on the other hand a bakery could

possibly be located in a cellar or basement and yet fulfill all statutory requirements, including a sufficient glass surface exposed to natural light unobstructed by buildings, as required by the above regulation.

While Section 1090-42, General Code, quoted above, states that a permit shall be refused a bakery if the building and equipment does not comply with the provisions of that act (Sections 1090-22 to 1090-43) nevertheless it is obvious that the Department of Agriculture should not issue a permit to a bakery that was operating or contemplating operation in direct violation of the provisions of Section 1012 as to the prohibition of cellar or basement bakeries.

Section 1012, General Code, as amended effective May 28, 1943, now permits the operation of bakeries in cellars or basements in certain instances, that is, where the sale of bakery goods is not the primary business, and further provided that such place was doing business under the laws of Ohio on or before the effective date of the act. This amendment provides an exception to the plenary prohibition contained in the old act. While the language of the amendment is not entirely clear and free from doubt, it would appear that any establishment can now operate a bakery in a cellar or basement provided it meets the two statutory conditions mentioned above, i.e. that its primary business is not that of the sale of bakery goods and that it was in existence on the effective date of the act. Most any type of business could meet the broad definition of the term "establishment." Webster defines establishment as :

"The place where one is permanently fixed for residence or business; residence, including grounds, furniture, equipage, etc., with which one is fitted out; also any office or place of business, with its fixtures; as to keep up a large establishment; a manufacturing establishment."

If the term "establishment" as used in the amended section is used in its commonly accepted sense, and there appears no reason why it should not be so used, then there is nothing to prohibit any hardware or clothing store, or even a billiard parlor from starting a sideline of selling bakery products with its bakery in the basement.

It will be noted that the term "and" is used between the requirement that the sale of bakery goods is not the primary business, and the requirement of doing business on the effective date of the act. It seems

clear that both requirements must be fulfilled, otherwise the disjunctive term "or" would have been used. It is a general rule that when the term "and" is used it is presumed to be used in the conjunctive sense unless the legislative intent is clearly contrary. *Ahrweiler v. Board of Sup'rs. Mahaska Co.*, 226 Iowa 227, 283 N. W. 889 (1939); *Heckathorn v. Heckathorn*, 284 Mich., 677, 280 N. W. 79 (1938); *State v. Steiner*, 160 Wis. 175, 151 N. W. 256 (1915).

It is conceivable that a bakery being operated in a basement or cellar in conjunction with another business could provide just as many hazards to health and sanitation as one whose sole business was the sale of bakery products. Why the legislature thought it wise to prohibit the operation of a basement bakery where that was the principal business engaged in, and to permit such bakeries where it was not the primary business is a matter which must be left to its judgment, and if that body thinks that the present statute provides sufficient safeguards to secure the health, comfort and general welfare of the state then their judgment is not open to question by this office.

Therefore, in view of the foregoing and in specific answer to the first question you present you are advised that a bakery maintained and operated in connection with a department store, grocery store or food market may be located in a basement or cellar provided such department store, grocery store or food market was engaged in business prior to the effective date of Section 1012, General Code (May 28, 1943).

Your second question must necessarily be answered in the negative, that is, an establishment operated strictly as a bakery cannot conduct its baking operations in a cellar or basement.

It is the responsibility of the department of industrial relations to enforce the provisions of law prohibiting the operation of bakeries in cellars or basements.

Respectfully,

HUGH S. JENKINS,
Attorney General.