

5920.

APPROVAL—CONTRACT FOR HIGHWAY IMPROVEMENT IN
COSHOCTON COUNTY, OHIO.

COLUMBUS, OHIO, August 3, 1936.

HON. JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

5921.

APPROVAL—BONDS OF MAPLE HEIGHTS CITY SCHOOL
DISTRICT, CUYAHOGA COUNTY, OHIO, \$5,000.00.

COLUMBUS, OHIO, August 3, 1936.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

5922.

APPROVAL—BONDS OF TOLEDO CITY SCHOOL DISTRICT,
LUCAS COUNTY, OHIO, \$50,000.00.

COLUMBUS, OHIO, August 3, 1936.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

5923.

SHOW PERMIT—COUNTY AUDITOR HAS DISCRETION IN
ISSUANCE OF PERMIT, WHEN.

SYLLABUS:

1. *A county auditor is vested with discretionary power in the issuance of a permit, provided for by Section 6374, General Code.*
2. *A county auditor, who agrees to the issuance of such a permit and who issues a pay-in order to the treasurer, has no further discretion in the issuance of the permit after the money has been paid into the county treasury.*

COLUMBUS, OHIO, August 3, 1936.

HON. PAUL A. BADEN, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion, which reads as follows:

"Section 6374 provides for the issuance of a permit by the county auditor to the proprietor or agent of a traveling public show.

I would like to have your opinion upon the following question: If the proprietor or agent of such a traveling public show pays into the county treasury the amount provided for by this section (in this county \$60.00 per day) must the auditor issue such permit to the proprietor or agent?

In other words, after the fee is paid to the county treasurer does the county auditor have any discretion as to whether or not the permit shall be issued or is it mandatory upon him to issue such permit?"

Section 6374, General Code, referred to in your letter, reads as follows:

"A proprietor, or his agent, of a traveling public show, shall not exhibit a natural or artificial curiosity, or exhibit horsemanship in a circus, or otherwise, for a price, until a permit has been obtained from the auditor of the county in which it is intended to so exhibit, specifying the time and place such show may exhibit in the county.

Such auditor shall not issue such permit until there has been paid into the county treasury the following sums for each day such show is to be exhibited, to-wit: in counties containing a population not exceeding twenty-five thousand by the last federal census, twenty-five dollars; in counties containing a population of more than twenty-five thousand not exceeding forty thousand by such census, forty dollars; and in other counties, sixty dollars."

In your request for my opinion you inquire whether or not any discretion is placed in the county auditor in the issuance of permits under the above quoted section, if the proper fee has been paid into the county treasury. Statutes similar to the one in question have been universally upheld under the police or reserved powers of the state. Such statutes have been consistently upheld under the view that they have a direct relationship to public morals, public safety and general welfare. See, for

example, the case of *Marmet v. State*, 45 O. S., 63. Other citation of authorities would be at best cumulative and would serve no useful purpose. While there is a fee connected with the securing of a permit under the section in question, it cannot be said as a matter of law that it amounts to a tax. The fee to be charged is not totally incommensurate with the regulations necessary to carry out the purpose of the statute and therefore its validity should not be tested with reference to the taxing authority of the state but rather with reference to the police power of the state. The evident purpose of this section is to declare public policy to be against such exhibitions, unless such proprietor, as a condition precedent, obtain a permit from the county auditor, who is designated by the Legislature as the proper representative of the people in the particular county to preserve peace, health and good order in this instance. Not all shows are prohibited but only traveling public shows described in the statute charging an admission price and where all classes of people, regardless of morals, health, peace or safety, are permitted to assemble and associate.

It is to be noticed that Section 6347, General Code, *supra*, prohibits the county auditor from issuing the permit until the proper fee has been paid into the county treasury. However, this does not mean that if the fee is tendered, the county auditor must, under any or all circumstances, issue the permit. The fee is intended to cover the cost of issuing the permit and properly supervising the event and is not intended as a tax. Of course, if the statute were intended purely as a revenue measure, there would be some merit in the contention that the county auditor must issue the permit if the proper fee has been paid.

The section under discussion is similar to Section 13393, General Code, in so far as it relates to discretionary power in a local authority. Section 13393, General Code, reads as follows:

“No person shall give a public dance, roller skating or like entertainment in a city, village or township without having previously obtained a permit from the mayor of such city or village if such public dance, roller skating or like entertainment is given within the limits of a municipal corporation, or from the probate judge if such public dance, roller skating or like entertainment is given outside a city or village, or permit another so to do. All permits issued under the authority of this section shall be subject to revocation at all times. The provisions of this section shall not apply to charter cities where the licensing authority is vested in some other officer than the mayor.”

The Supreme Court had occasion in the case of *Rowland v. State*, 104 O. S., 366, to construe Section 13393, General Code, and to voice its

opinion concerning the sufficiency of reasons motivating a municipal executive in refusing a permit for a public dance. The defendant in that case was indicted for giving a public dance without having obtained a permit from the mayor of the village. The defendant had asked the mayor for a permit and had offered to comply with any rule, regulation, requirement or condition that the mayor might impose. The mayor's refusal was based solely on the ground that it was a public dance and that he would not issue a permit to any person for a public dance. Section 13393, General Code, read at the time of the Rowland case, *supra*, as follows:

“Whoever gives a public dance, roller skating or like entertainment in a building, hall, room or rink in a city or village without having previously obtained a permit from the mayor thereof, or permits another so to do, or, being the owner or lessor of a building containing a dance hall, room or rink fails to post in a conspicuous place therein a copy of this section, shall be fined not less than fifteen dollars nor more than one hundred dollars or imprisoned not more than sixty days, or both.”

The syllabus of the Rowland case reads as follows:

“1. Section 13393, General Code, relating to public dancing without a permit from the mayor of a city or village, is a valid and constitutional enactment.

2. By virtue of that statute, the mayor is vested with full power and authority to either issue or refuse to issue such a permit to any and all persons and places within a city or village without giving any reasons therefor, and such exercise of such power under such statute is not an arbitrary abuse of the statutory or constitutional power.”

The following language in the opinion appears at pages 369 and 370:

“* * * The Legislature declared public policy to be against public dances in cities and villages, unless the one giving such dance should secure a permit from the mayor, who, in the preservation of the public peace and good order, is the people's representative in affairs of government. In short it was left to the judgment and discretion of the mayor, having regard to the local conditions in the city or village, to determine whether or not public dances might be allowed notwithstanding the statute.

* * * * * * * * *

“He is the proper representative of the people, chosen by the people, responsible to the people, and is no doubt representative

of the people so far as the public morals, peace, safety, and welfare are concerned—at least so far as they may be affected by public dancing.”

An examination of Sections 6374 and 13393, General Code, indicates that the Legislature intended, as a means of protection to the public health, morals and safety under two similar circumstances that a discretionary power should be vested and should be a paramount consideration in construing and administering both sections.

It is stated in *Black on Interpretation of Laws*, page 338, as follows:

“There is no absolute formal test for determining whether a statutory provision is to be construed mandatory or directory. The meaning and intention of the Legislature must govern; and these are to be ascertained not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it one way or the other.”

While the Rowland case, *supra*, might indicate that the discretion of the mayor is absolute in the issuance of a dance permit, it would seem that such discretion is limited by the general rule of law that the same may not be arbitrary or amount to an abuse of discretion. See Opinions of the Attorney General for 1932, Volume I, page 36. This same general principle is, of course, applicable to the present question.

While your question is not altogether clear, I have assumed that your question pertains to the discretionary power of the auditor in the issuance of a permit if the person seeking the permit offers to pay the required fee. From your letter, it might be inferred that the auditor has agreed to the issuance of a permit, has issued a pay in order to the treasurer and the applicant has already paid the money into the treasury and secured a receipt. Obviously, under such circumstances there is no discretion in the auditor and he should issue the permit. In view of the above it is my opinion:

1. A county auditor is vested with discretionary power in the issuance of a permit, provided for by Section 6374, General Code.
2. A county auditor who agrees to the issuance of such a permit and who issues a pay-in order to the treasurer has no further discretion in the issuance of the permit after the money has been paid into the county treasury.

Respectfully,

JOHN W. BRICKER,
Attorney General.