

do not deem it necessary to extend the discussion on this point as I assume that Kentucky as one of the sovereign states of the Union will pay without question whatever taxes are legally assessed on this property.

Respectfully,

JOHN W. BRICKER,

Attorney General.

1635.

ATHLETIC EXHIBITIONS—BOXING AND/OR WRESTLING COMMISSIONS, CREATION, AUTHORITY AND SUPERVISION BY MUNICIPALITY — LICENSE FOR EXHIBITION — REVENUE DERIVED THEREFROM.

SYLLABUS:

The law-making body of either a charter or non-charter municipality may by ordinance create boxing and/or wrestling commissions with power to regulate, supervise and govern the holding of such athletic exhibitions. Council may confer upon a boxing and/or wrestling commission the power to issue permits or licenses for the holding of boxing or wrestling exhibitions and may also provide that a fee based on a percentage of the gross receipts be charged for the issuance of such permits or licenses. However, before a boxing exhibition can be held in a municipality so as to be subject to the regulation and supervision of a boxing commission created by council, written permission to hold a boxing exhibition first must be obtained from the mayor of the municipality as provided by section 12803.

All moneys collected in the exercise of its powers by a boxing and/or wrestling commission created by council of a charter municipality must be deposited as provided by either charter, ordinance or statute. A charter city, in the expenditure of money collected by a boxing and/or wrestling commission, is controlled and governed by the provisions of sections 5625-29 to 5625-33, inclusive, and a charter municipality which has adopted any one of the plans of government described in sections 3515-1 to 3515-44, inclusive, is in addition to sections 5625-29 to 5625-33, inclusive, also subject to the provisions contained in sections 3515-46, 3515-58 and 3515-63. Moneys collected by a boxing and/or wrestling commission of a non-charter municipality must be paid to the treasurer of the municipality and can be expended only on appropriation of council. Council of a non-charter municipality by ordinance cannot provide that moneys collected by a boxing and/or wrestling commission shall be deposited in the name of the commission to be expended by that body as it may deem proper and necessary.

Section 12803 does not empower a mayor of a municipality to create or appoint a boxing commission or advisory board for the purpose of approving applications for permission to hold boxing exhibitions within a municipality or for the purpose of supervising and regulating such events after permission to hold the same has been granted by the mayor. Neither does section 12803 authorize the mayor of a municipality to charge a fee for granting permission to hold a boxing exhibition within a municipality.

The power to appoint a boxing and/or wrestling commission may be conferred upon a mayor of either a charter or non-charter municipality by charter or ordinance.

COLUMBUS, OHIO, September 27, 1933.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your letter of recent date which reads in part as follows:

“Many municipalities, both charter and non-charter, have passed ordinances creating boxing and/or wrestling commissions, in some of which the authority to issue the permit for such an exhibition is delegated to the commission, and in all of these ordinances a fee is provided, to be collected from the promoter of the exhibition on the basis of a certain percentage of the gross receipts. * * *

Question 1. May municipalities by ordinance create boxing and/or wrestling commissions?

Question 2. (a) If such commission may be legally created, can the authority to issue boxing and/or wrestling permits, be delegated to this commission?

(b) If such commission may be legally created and a fee to be collected is provided in the ordinance of council, may the ordinance provide for the deposit of the amount of the fee collected by the commission, other than for the deposit of same in the municipal treasury, to be expended upon appropriation in the same manner as all other funds of the municipality are deposited and expended?”

In addition to that request for my opinion, I am also in receipt of a letter from your office which reads in part as follows:

“Question 1. By virtue of the provisions of Section 12803, General Code, may the mayor appoint, without authorization or consent of council, a board or commission to approve applications for permission to hold boxing exhibitions, and to supervise and control the holding of such exhibitions?

Question 2. If such commission may be legally appointed, may it establish rules whereby a share of the gate receipts is required to be paid over to the boxing commission, in consideration for the approval of the application for holding the boxing exhibition and supervising the same?

Question 3. If a boxing commission may be established in this manner and may collect fees for services rendered by it, may such commission dispose of such moneys in any manner other than by the deposit of the same in the municipal treasury?”

The Supreme Court of Ohio in the case of *Village of Perrysburg, et al., vs. Ridgway, et al.*, 108 O. S. 245, held, in the first and third paragraphs of the syllabus, that:

“1. Since the Constitution of 1912 became operative, all municipalities derive all their ‘powers of local self-government’ from the Constitution direct, by virtue of Section 3, Article XVIII, thereof.”

“3. The above constitutional grant of power to municipalities is ‘self-executing,’ in the sense that no legislative action is necessary in order to make it available to the municipality.”

The same court in the case of *Holsman vs. Thomas*, 112 O. S. 397, held that:

“Under Article XVIII, Section 3, of the Ohio Constitution, municipalities ‘have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.’”

Although municipalities have the power to enact local police and sanitary measures, the exercise of that power must not conflict with a general law enacted by the legislature on the same subject matter. In other words, the legislative body of the municipality cannot enact a regulation fixing, prescribing or requiring a standard of conduct which is contrary to, or inconsistent with, a standard of conduct fixed by statute concerning the same subject matter. This rule of law was announced in the case of *City of Youngstown vs. Evans*, 121 O. S. 342, wherein it was held:

“The power conferred upon municipalities to enforce within their limits local police, sanitary and other similar regulations is only limited by general laws in conflict therewith upon the same subject matter.”

To the same effect is the case of *Schneiderman vs. Sesanstein*, 121 O. S. 80. The first and second paragraphs of the syllabus read:

“1. An ordinance of a municipality which prescribes a manner of driving or a rate of speed of automobiles in conflict with the provisions of the statute is invalid.

2. The provision of an ordinance of a municipality which makes unlawful a rate of speed exceeding fifteen miles per hour, regardless of whether such speed is greater than reasonable and proper, considering the width, traffic, use and the general and usual rules of such road or highway, is in conflict with Section 12603, General Code, and therefore invalid.”

The test to determine whether an ordinance of a municipality conflicts with a general law on the same subject matter is stated by Matthias, J., in the case of *Schneiderman vs. Sesanstein*, supra, at page 85:

“In determining whether the provisions of the ordinance in question conflict with the general law covering the same subject, a proper test may be applied by the inquiry: Does the ordinance prohibit an act which the statute permits, or permit an act which the statute prohibits?”

Incidentally, the Supreme Court has held in several cases that where there is a clear conflict between the provisions of a charter and the provisions of a statute relating to the same subject matter, the provisions of the latter prevail over the former. See *Berry vs. City of Columbus*, 104 O. S. 607; and *State, ex rel. Osborne vs. Williams*, 111 O. S. 400.

The legislature has acted in reference to the holding of boxing exhibitions in this state by enacting sections 12802 and 12803, General Code. Section 12802 reads:

“Whoever agrees to fight and wilfully fights or boxes at fisticuffs or engages in a public sparring or boxing exhibition without gloves or with gloves, or aids, assists or attends such boxing exhibition or glove fight, or being an owner or lessee of grounds, or a lot, building, hall or structure, permits it to be used for such exhibition or purpose, shall be fined not more than two hundred and fifty dollars or imprisoned not more than three months, or both.”

Section 12803 provides:

“The next preceding section shall not apply to a public gymnasium or athletic club, or any of the exercises therein, if written permission for the specific purpose has been obtained from the sheriff of the county, or, if the exercises or exhibition are within the limits of a municipal corporation, from the mayor of such corporation.”

The prohibition contained in section 12802 in reference to boxing exhibitions is modified by the provisions of section 12803, when boxing exhibitions are conducted in a public gymnasium or in an athletic club and written permission is obtained from the sheriff if the boxing exhibition is held in a county or from the mayor if the boxing exhibition is held in a municipality.

It was held in the case of *Fischer vs. City of Cleveland*, 42 O. App. 75, that the provisions of section 12803 were an exception to the provisions of section 12802 and that under section 12803 the holding of boxing exhibitions within a municipality was lawful, provided written permission was obtained from the mayor as required by section 12803.

To the same effect is the case of *Newburgh Heights vs. Tegg, Mayor*, 32 O. App. 248, wherein the court, at page 252, said:

“Unconditionally the language of Section 12803, General Code, makes the holding of boxing exhibitions lawful, and not subject to penalty, if written permission for the specific purpose has been obtained from the mayor of the corporation.”

In the *Fischer* case, *supra*, the taxpayer sought to enjoin the mayor, city manager and the members of the boxing and wrestling commission of the City of Cleveland from allowing the holding of a boxing exhibition in that city. Cleveland, a charter city, had, by an ordinance, created a boxing and wrestling commission. Written permission to hold the boxing exhibition had been obtained from the mayor as required by section 12803. The court, through Vickery, J., at page 86, said:

“Now the record shows that this match was to be held in a public gymnasium, which brings it clearly within the *exception* to Section 12802, General Code, namely, within Section 12803, General Code, which makes boxing and fighting legal if permission is granted by the mayor. The record shows that all these requisite steps were taken, as found by the trial court, and we do not see upon what basis this court could base a judgment for reversing the decision.”

In the light of the rules of law stated herein and the statutes cited, it follows that a charter city may pass an ordinance providing for a boxing commission,

but, in the issuance of permits for boxing exhibitions to be held in a public gymnasium or in an athletic club, council cannot disregard the provisions of section 12803 which require that the permits for such events shall be issued by the mayor of the municipality. In other words, the power of the legislative body of a charter city to create a boxing commission to supervise and regulate boxing exhibitions does not enable a law-making body to clothe the commission with authority to permit boxing exhibitions without written permission first being obtained from the mayor as required by section 12803. An ordinance of a charter city that did disregard the express language of section 12803 in respect to the issuance of permits for boxing exhibitions, would be violative of the familiar rule of law stated herein that police regulations of a municipality must not be in conflict with a general law on the same subject matter.

Sections 3616, 3657 and 3672 of the General Code are pertinent as to whether the law-making body of a municipality other than a charter city can create a boxing commission. Section 3616 reads:

“All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them.”

Sections 3657 and 3672, in the same chapter as section 3616, are germane to the question. Section 3657 provides:

“To regulate, by license or otherwise, restrain or prohibit theatrical exhibitions, public shows and athletic games of whatever name or nature, for which money or other reward is demanded or received; to regulate, by license or otherwise, the business of trafficking in theatrical tickets, or other tickets of licensed amusements, by parties not acting as agents of those issuing them, but public school entertainments, lecture courses and lectures on historic, literary or scientific subjects, shall not come within the provisions of this section.”

Section 3672 reads in part:

“To license exhibitors of shows or performances of any kind, not prohibited by law, * * * . Such council may confer upon, vest in and delegate to the mayor of the corporation authority to grant, issue and revoke licenses.”

By virtue of the provisions of those sections, it is evident that council of a non-charter municipality can create a boxing commission. This conclusion finds support in the case of *Newburgh Heights vs. Tegg, Mayor, supra*, wherein Levine, J., after referring to the statutes quoted, said at page 251 that:

“Council of the village no doubt may by ordinance provide for the creation of a boxing and wrestling commission, * * * .”

The next question that arises is whether council, on creating a boxing commission, can prohibit the holding of boxing exhibitions within a municipality unless permits for such events first have been obtained from the boxing commission. The terms of such an ordinance enacted by the law-making body of

a municipality under its broad authority to regulate and prohibit theatrical exhibitions, public shows or athletic games, as provided by sections 3657 and 3672, would be in apparent conflict with the provisions of section 12803 which deal with a particular subject matter, to wit, the holding of boxing exhibitions in this state. In view of the fact that section 12803 relates particularly to how and when boxing exhibitions may be held in this state, the provisions of that statute must be considered as being a limitation on the exercise of the powers granted by the legislature to councils of non-charter municipalities by sections 3657 and 3672. In other words, the provisions of section 12803 would control and prevail over any provision in an ordinance enacted by council of a municipality by virtue of sections 3616, 3657 and 3672 in respect to securing written permission to hold a boxing exhibition.

The rule of statutory interpretation to be followed construing the provisions of sections 3657, 3672 and 12803 is stated in *Ex parte Fleming*, 123 O. S. 16, at page 21 :

“In statutory construction it is a well-known rule that, ‘where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one.’ 36 Cyc., 1151.”

See also *Thomas, Sheriff, vs. Evans*, 73 O. S. 140. Applying that rule of statutory interpretation to the statutes in question, it follows that council of a non-charter municipality can by means of a boxing commission regulate and supervise the holding of boxing exhibitions and also require the taking out of licenses for such events. However, the issuance of such a license by a boxing commission will not obviate the necessity of written permission being secured from the mayor of the municipality, as required by section 12803, before such boxing exhibition can be held.

In view of the fact that there is no provision in the General Code expressly regulating or prohibiting the holding of wrestling exhibitions in this state, council of either a charter or non-charter municipality can create a wrestling commission to govern the holding of such athletic performances. Likewise, the law-making body of a charter city, under its power of home rule, and the law-making body of a non-charter city, by virtue of sections 3657 and 3672, can require as a prerequisite to the holding of wrestling exhibitions that licenses be obtained from the wrestling commission. Incidentally, the power to issue licenses or permits can be delegated by council of a non-charter city to the mayor as provided in section 4258, General Code, which reads in part as follows:

“He shall sign all commissions, licenses, and permits granted by authority of the council, or authorized by this title, and such other instruments as by law or ordinance may require his certificate.”

Incidentally, the power and duty of supervising boxing and wrestling exhibitions in a municipality may be combined by council and granted to a single

commission. However, as previously pointed out herein, boxing exhibitions in a municipality cannot be held until written permission of the mayor is obtained as provided by section 12803.

Your next inquiry is whether the fees collected by a boxing and/or wrestling commission can be deposited in the name of the commission and expended in any manner the commission may deem proper. As far as charter municipalities are concerned, the matter of depositing funds collected by such a commission is one which may be controlled and governed by charter provision. If there is no inhibition contained in a charter, council may provide by ordinance the manner and method in which money collected by a boxing commission shall be deposited. In respect to the expenditure of money collected by a boxing and/or wrestling commission of a charter municipality, the matter is one solely of statutory enactment, inasmuch as the power of charter municipalities to expend public funds may be limited or restricted by general laws. It was held in the case of *City of Mansfield vs. Endly*, 38 O. App. 529, that the legislature had the power "to control municipalities as regards tax limitation, maximum indebtedness, and expenditure of public funds (Article XIII, Section 6, Article XVIII, Sections 3 and 13, Constitution)." The deposit and expenditure of public funds of charter municipalities operating under any one of the plans of municipal government set forth in sections 3515-1 to 3515-44, inclusive, are controlled by sections 3515-46, 3515-58, 3515-63 and 5625-29 to 5625-33, inclusive. Charter municipalities which have not adopted any of the plans of municipal government described in sections 3515-1 to 3515-44, inclusive, must comply with the provisions of sections 5625-29 to 5625-33, inclusive, in respect to the expenditure of public funds, including money collected by a boxing and/or wrestling commission.

In reference to money collected by a boxing and/or wrestling commission created by council of a non-charter city, the matter of depositing and using such money is controlled by sections 4227-3, 4240, 4285, 4286, 4294, 4295, 4298, 4300 and 5625-29 to 5625-33, inclusive. Section 4240 reads:

"The council shall have the management and control of the finances and property of the corporation, except as may be otherwise provided, and have such other powers and perform such other duties as may be conferred by law."

Section 4285 provides:

"The auditor shall not allow the amount set aside for any appropriation to be overdrawn, or the amount appropriated for one item of expense to be drawn upon for any other purpose, or unless sufficient funds shall actually be in the treasury to the credit of the fund upon which such voucher is drawn. When any claim is presented to him, he may require evidence that such amount is due, and for this purpose may summon any agent, clerk or employe of the city, or any other person, and examine him upon oath or affirmation concerning such voucher or claim."

Section 4286 reads:

"On the first Monday of each month, detailed statements of the receipts and expenditures of the several officers and departments for the preceding month shall be made to the auditor by the heads thereof. The

auditor shall countersign each receipt given by the treasurer before it is delivered to the person entitled to receive it, and shall charge the treasurer with the amount thereof. If the auditor approves any voucher contrary to the provisions of this title, he and his sureties shall be individually liable for the amount thereof."

Section 4294 reads in part:

"Upon giving bond as required by council, the treasurer may, by and with the consent of his bondsmen, deposit all funds and public moneys of which he has charge in such bank or banks, situated within the county, which may seem best for the protection of such funds, and such deposit shall be subject at all times to the warrants and orders of the treasurer required by law to be drawn."

Section 4295 provides in part:

"The council may provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer, in such bank or banks, situated within the municipality or county, as offer, at competitive bidding, the highest rate of interest and give a good and sufficient bond issued by a surety company authorized to do business in the state, * * * ."

Section 4298 provides:

"The treasurer shall demand and receive from the county treasurer taxes levied and assessments made and certified to the county auditor by authority of the council, and by the auditor placed on the tax-list for collection, and from persons authorized to collect or required to pay them, moneys accruing to the corporation from judgments, fines, penalties, forfeitures, licenses, and costs taxed in the mayor's or police courts, and debts due the corporation, and he shall disburse them on the order of such person or persons as may be authorized by law or ordinance to issue orders therefor."

Section 4300 reads:

"The treasurer shall receive and disburse all funds of the corporation including the school funds, and such other funds as arise in or belong to any department or part of the corporation government."

It is apparent from those statutes that all money collected by a boxing and/or wrestling commission by a non-charter municipality must be paid to the treasurer of the municipality who is required to deposit the same as may be provided by council. The money so collected cannot be drawn from the treasury until the same has been appropriated by council.

The last question raised by your letters is one involving the powers and duties incident to the office of mayor of a municipality. The power to create offices, positions and commissions is generally vested in the law-making body and in this state the power to create or abolish offices in municipalities, other than those created by statute, has been reserved to the law-making body of the

municipality. See sections 3515-17, 3515-25, 3515-34, 4211, 4214 and 4219, General Code. Sections 3515-34 and 4214 are typical of the statutes cited. Section 3515-34 reads:

"The council shall have authority to create and discontinue departments and offices other than those provided for in this act, and to provide for the appointment of all such officers, but the functions and number of subdepartments, and the number and salaries of subordinates and employes shall be fixed by the executive heads of the various departments, all of which provisions, however, shall be subject to the rules and regulations of the civil service commission as authorized by law."

Section 4214 reads in part:

"Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required."

There is no provision in the General Code of Ohio which empowers a mayor to create or appoint a boxing and/or wrestling commission either as an advisory board or otherwise. Section 12803, which permits the holding of boxing exhibitions in municipalities, provided written permission is obtained from the mayor of the municipality, cannot be considered as granting authority to a mayor to create a boxing commission or an advisory board to assist him in the furtherance of the duty placed upon him by the legislature in section 12803. The exercise of the power to grant permits, conferred upon a mayor by section 12803, has been delegated by the legislature solely to the mayor. The power so conferred can be exercised only by the mayor of the municipality and cannot be delegated by him to any advisory board or commission created either by him or by council. It is quite evident, on a reading of section 12803, that the power to create a boxing commission is not expressly or impliedly granted to the mayor of a municipality. The act of issuing permits for boxing exhibitions being discretionary with the mayor, the exercise of that express power does not necessitate or require the creation of a boxing commission or advisory board in order that the mayor may properly exercise the authority granted to him in section 12803. It is also to be noted that there is no statute, including section 12803, which authorizes the mayor of a municipality to charge a fee for granting permission to hold a boxing exhibition as provided by section 12803, and the collection of a fee for the granting of such permission is clearly unauthorized. In view of the fact that a mayor of a municipality cannot under section 12803 create or appoint a boxing commission, it follows that the creation by the mayor of such a commission or an advisory board is clearly without authority and illegal unless otherwise authorized by ordinance. This is also true in respect to charter municipalities, unless the power to create a boxing commission has been conferred upon the mayor by charter or ordinance.

Specifically answering your letters, I am of the opinion that:

The law-making body of either a charter or non-charter municipality may by ordinance create boxing and/or wrestling commissions with power to regulate,

supervise and govern the holding of such athletic exhibitions. Council may confer upon a boxing and/or wrestling commission the power to issue permits or licenses for the holding of boxing or wrestling exhibitions and may also provide that a fee based on a percentage of the gross receipts be charged for the issuance of such permits or licenses. However, before a boxing exhibition can be held in a municipality so as to be subject to the regulation and supervision of a boxing commission created by council, written permission to hold a boxing exhibition first must be obtained from the mayor of the municipality as provided by section 12803.

All moneys collected in the exercise of its powers by a boxing and/or wrestling commission created by council of a charter municipality must be deposited as provided by either charter, ordinance or statute. A charter city, in the expenditure of money collected by a boxing and/or wrestling commission, is controlled and governed by the provisions of sections 5625-29 to 5625-33, inclusive, and a charter municipality which has adopted any one of the plans of government described in sections 3515-1 to 3515-44, inclusive, is in addition to sections 5625-29 to 5625-33, inclusive, also subject to the provisions contained in sections 3515-46, 3515-58 and 3515-63. Moneys collected by a boxing and/or wrestling commission of a non-charter municipality must be paid to the treasurer of the municipality and can be expended only on appropriation of council. Council of a non-charter municipality by ordinance cannot provide that moneys collected by a boxing and/or wrestling commission shall be deposited in the name of the commission to be expended by that body as it may deem proper and necessary.

Section 12803 does not empower a mayor of a municipality to create or appoint a boxing commission or advisory board for the purpose of approving applications for permission to hold boxing exhibitions within a municipality or for the purpose of supervising and regulating such events after permission to hold the same has been granted by the mayor. Neither does section 12803 authorize the mayor of a municipality to charge a fee for granting permission to hold a boxing exhibition within a municipality.

The power to appoint a boxing and/or wrestling commission may be conferred upon a mayor of either a charter or non-charter municipality by charter or ordinance.

Respectfully,

JOHN W. BRICKER,
Attorney General.

1636.

APPROVAL, NOTES OF FRANKLIN TOWNSHIP RURAL SCHOOL DISTRICT, MORROW COUNTY, OHIO, \$494.00.

COLUMBUS, OHIO, September 27, 1933.

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