3182

MUNICIPAL CORPORATION MAY NOT LICENSE AMUSEMENT DEVICES AT COUNTY FAIRS—MUNICIPAL CORPORATION MAY LICENSE AMUSEMENT DEVICES ON COUNTY FAIRGROUNDS EXCEPT AT THE COUNTY FAIR—§§715.48, R.C., 715.63, R.C., 3765.01, R.C., 1711.11, R.C., Opinion 1600, OAG, 1933, Opinion 1500, OAG 1960, 718.01, R.C.

SYLLABUS:

1. Notwithstanding the general authority granted to municipal corporations in Sections 715.48 and 715.63, Revised Code, to license shows or amusement devices, the legislature, by enacting Section 1711.11, Revised Code, expressly providing for state licensing of shows and amusement devices at county fairs, has pre-empted the field insofar as county fairs are concerned, and a municipal corporation, therefore, may not require the operator of a show or amusement device at a county fair to secure a license from the municipal corporation to operate such a show or amusement device.

2. Under the authority of Sections 715.48 and 715.63, Revised Code, a municipal corporation may require the operator of a show or amusement device to secure a license from the municipal corporation to operate such a show or amusement device on the county fairgrounds, except at the county fair, when the fairgrounds is located within the municipal corporation.

Columbus, Ohio, August 3, 1962

Hon. James B. Patterson, Jr., Prosecuting Attorney
Madison County, London, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The Board of County Commissioners of Madison County, have asked me to request a written legal opinion from your office concerning the following situation.

"Sections 715.48 and 715.63 of the Revised Code of Ohio apparently authorizes the Mayor of a Municipal Corporation to charge a fee for licensing of a show or amusement device.

"The City of London has in effect an ordinance (711.01 of the City Code) imposing a fee of $25.00 for the first day and $10.00 for each additional day, on any theatrical exhibitions, public shows or performances or carnivals for which money or other rewards is demanded or received.

"In the near future the annual Madison County Fair will be held, at the County Fair Grounds, located within the Municipal Corporation. The Fair Grounds are owned by the county, and are controlled and supervised by the Madison County Fair Board and the Commissioners of Madison County.

"1. Under these circumstances, may the Mayor of the City of London legally require the operator of a carnival or amusement device on the fairgrounds, to apply for a license and pay the fee as outlined above.

"2. If a carnival, other than a county fair is conducted on the fairgrounds, by a service organization, such as the Rotary, Kiwanis or Lions Clubs, the proceeds of which are used for charitable purposes, may the municipal corporation impose and collect the license fee referred to above.

"3. In an addition to the above, the Mayor has imposed, 'again authorized by city ordinance' a tax of 3% of the net take of each amusement device, operated at any carnival or fair, held at the County Fairgrounds. Can he legitimately do this?

"Because the opening date of the Madison County Fair is in the very near future, your immediate attention to this matter is urgently requested."

According to the facts as given in your request, the City of London, which operates under the statutory form of municipal government, has in effect an ordinance authorizing the mayor to license shows or amusement devices and to charge a fee therefor. Since I have not seen the ordinance, I shall assume, for the purposes of this opinion, that the ordinance was properly adopted under the police power and in accordance with Sections 715.48 and 715.63, Revised Code. I further assume that the charge is a license fee and not a tax, because a municipal corporation has no power to assess a tax under the guise of a license. 51 Ohio Jurisprudence 2d, 31, Taxation, Section 15.

The power of a municipal corporation to license activity in a particular field depends, among other things, on whether the state has pre-

empted that field by licensing the same activity. For example, in *Mayor* v. *Ames,* 133 Ohio St., 458 (1938), the plaintiff contended that the state, by licensing motor vehicles, had pre-empted that field so that a municipal ordinance requiring a motor vehicle to be licensed after passing a safety inspection was invalid. The court dismissed this contention, however, stating at page 467 of the majority opinion as follows:

> "* * * The state has not legislated on the subject of inspection nor has the city here levied a tax. The city has exercised its police power, while the state has employed its power of taxation. *Had the state preempted the inspection field a different question would be presented.* * * * (Emphasis added)

Gorman, J., in a concurring opinion, stated at page 470 as follows:

> "Since the state has not legislated on the subject, a municipality has the right to adopt an inspection ordinance under its power to regulate the use of the streets. * * *"

The case of *Columbus Legal Amusement Assoc.* v. *Columbus,* 50 Ohio Law Abs., 353 (C. A. Frankin Co.—1947), involved the power of a municipal corporation to license amusement devices operated by coins or slugs. The court posed the question, "Does it appear that the State has manifested a purpose to pre-empt the field in which licenses may be issued?" The court answered this question in the negative insofar as amusement devices operated by coins or slugs was concerned. This case is not dispositive of the questions presented in the instant matter, however, because it did not involve amusement devices operated on county fairgrounds. The question here is whether it appears that the state has manifested a purpose to pre-empt the field of licensing shows or amusement devices at county fairs or on the county fairgrounds.

Regarding shows, Section 3765.01, Revised Code, provides 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 county auditor of the county in which it is intended to 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:
>
> "(A) In counties containing a population not exceeding twenty-five thousand by the last federal census, twenty-five dollars;

"(B) In counties containing a population of more than twenty-five thousand and not exceeding forty thousand by such census, forty dollars;

"(C) In other counties, sixty dollars."

The legislature apparently recognized that the enactment of Section 3765.01, *supra,* might be construed as pre-empting the field of licensing shows, so it provided in Section 3765.02, Revised Code, as follows:

"Section 3765.01 of the Revised Code shall not interfere with the power of a municipal corporation to impose a license upon all shows exhibited in such municipal corporation in addition to that imposed in such section."

Regarding a license to operate a show or amusement device *at a county fair,* Section 1711.11, Revised Code, provides as follows:

"(A) No person shall operate any side show, amusement, game, or device, or offer for sale any novelty by auction or solicitation, at any county or independent agricultural society fair without first obtaining from the director of agriculture a license to do so; nor shall any officer, agent, or employee of a county or independent agricultural society grant a privilege or concession to any person to do so, unless such person holds such a license.

"(B) Such a license shall be issued by the director only upon a written application containing a detailed description of the concession. Blank applications for such licenses shall be prepared and furnished by the director.

"(C) No such license shall be issued until the applicant has paid a fee of five dollars to the director, who shall pay such fee into the state treasury to the credit of the general revenue fund.

"(D) A license issued under this section shall contain a detailed description of the concession licensed, shall expire on the thirty-first day of December following the date of issue, and shall be kept by the licensee in a conspicuous place where his concession is in operation.

"(E) This section does not require the officers of any such society to grant any privilege or concession to any such licensee.

"(F) The director shall enforce this section and make all rules and regulations not contained in this section that are necessary for its enforcement, and if he finds that this section has been violated, he shall, after giving notice to the violating licensee, revoke such licensee's license.

"(G) Any person holding a license issued to him under this section who permits or tolerates at any place on the fair-

ground where his concession is in operation, any immoral show, lottery device, game of chance, or gambling of any kind, including pool selling and paddle wheels, or who violates the terms of the license issued to him, shall forfeit his license, and the director shall not issue any other license to said person until after a period of two years from such forfeiture."

In regard to Section 1711.11, *supra,* I have been unable to find any provision stating that such section shall not interfere with the power of a municipal corporation to impose a license upon shows and amusement devices at county fairs. In the absence of such a provision, I must conclude that the state has pre-empted the field of licensing shows and amusement devices at the county fairs. My conclusion is strengthened by the fact that Section 1711.11, *supra,* is a specific statute, which was enacted subsequent to the general statutes (Sections 715.48 and 715.63, *supra*) authorizing municipal corporations to license shows or amusement devices.

Shows or amusement devices operated on the fairgrounds, other than at the county fair, present a different question. In this regard, paragraph 4 of the syllabus in Opinion No. 1600, Opinions of the Attorney General for 1933, Volume II, page 1452, reads as follows:

"4. In the event the County Agricultural Society leases their fair grounds owned by the County to an individual, firm or corporation for the purpose of conducting a street fair or carnival, these laws (G. C. Sec. 9884-5 to 9884-11, inclusive) do not apply to the lessee, but the provisions of Sections 13062 et seq. of the Criminal Code, with regard to gambling, should be enforced by the Sheriff and the Prosecuting Attorney at such fairs and carnivals."

The laws (G.C. §§9884-5 to 9884-11) referred to in Opinion No. 1600, *supra,* are now found in Section 1711.11, Revised Code. The lessee of a fairgrounds is thus not required to obtain a license under Section 1711.11, *supra,* in order to conduct a carnival on the fairgrounds, and the state has not pre-empted the field of licensing shows or amusement devices on the fairgrounds, other than at the county fair itself.

Does the fact that the fairgrounds are owned by the county, although located within the municipal corporation, prevent the municipal corporation from licensing operators of shows and amusement devices on the fairgrounds, when such shows or devices are operated other than at the county fair?

A municipal corporation cannot require another political subdivision to obtain a license from the municipal corporation. In this regard, the syllabus in Opinion No. 1500, Opinions of the Attorney General for 1960, page 436, provides as follows:

> "A municipality has no power under Article XVIII, Section 3, Ohio Constitution, to compel a city school district to comply with the city building code in construction on property belonging to the school district, and located within the limits of the municipality, and a municipality may not require of any person a performance bond conditioned on compliance with the city building code for construction work on such property of a school district."

The county, however, is not the one required to obtain a license in the instant case. The operator of a show or amusement device is the one required to obtain the license. The mere fact that the show or amusement device is to be operated on the county-owned fairgrounds would not, in my opinion, exempt the operator from securing a license from the municipal corporation.

Does the fact that the proceeds from such shows or amusement devices will be used for charitable purposes prevent the municipal corporation from requiring the operator to obtain a license and pay the fee therefor?

In 33 American Jurisprudence, 369, Licenses, Section 47, it is stated:

> "Although there is English authority to the contrary, it is held in this country that persons who are carrying on the business or activity for which a license is required must comply with such requirements, regardless of the motive with which it is carried on, even though other than for commercial gain or advantage." (Citing Com. v. Anderson, 272 Mass. 100, 172 NE 114, holding requirement for peddler's license applicable to persons selling religious pamphlets at cost of manufacture.)

An annotation on licenses for charitable or social organizations in 1 A.L.R. 268, contains the following comment:

> "In Mobile v. Kiernan (1911) 170 Ala. 449, 54 So. 102, where a camp of the U. C. V. contracted with an amusement company to hold a street fair, the camp to receive a share of the net receipts, and to furnish all necessary licenses, it was held that the fair was not exempt from the license tax imposed on amusements and exhibitions of the character conducted and carried on, though, so far as the camp was concerned the enterprise was purely charitable, the court saying that the state had not exempted charities, or empowered the municipality to do so, and that, more-

over, so far as the amusement company was concerned, it carried on the business for gain and profit. There had been an ineffectual attempt by the city councli to exempt the fair, but it is not stated whether or not the camp had any exemption from general taxation."

Since we are assuming that the charge in question is a license fee and not a tax, it will not be necessary to determine whether the operator has any exemption from general taxation.

The last question set forth in your request, however, does concern a tax. According to your request, the mayor has imposed, "again authorized by city ordinance," a tax of 3% of the net take of each amusement device, operated at any carnival or fair, held at the county fairgrounds. Since I have not seen the ordinance in question, it is difficult to give an opinion on the tax. Certain observations may, however, be helpful.

A tax of 3% of the "net take" mgiht be construed to be an income tax. In this regard Section 718.01, Revised Code, provides in part as follows:

"No municipal corporation with respect to that income which it may tax shall tax such income at other than a uniform rate.

"No municipal corporation shall levy a tax on income at a rate in excess of one per cent without having obtained the approval of such excess by at least fifty-five per cent of the electors of such municipality voting on the question at a general election or sixty per cent at a special or primary election. * * *

"* * * * * * * * *

" No municipal corporation shall exempt from such tax, compensation for personal services of individuals over eighteen years of age or the net profit from a business or profession.

"* * * * * * * * *

Thus, if the tax in question is an income tax, it is invalid because it is in excess of one per cent and is aimed at only one business or profession.

If the tax is not considered to be an income tax but is considered to be a tax based merely on or measured by the income of the amusement operator's business, then it might be construed as an excise tax. See 51 Ohio Jurisprudence 23, Taxation, Section 8.

According to your request, the tax is on the net take of each amusement device, operated at any carnival or fair, held at the county fairgrounds. Thus, the tax is not imposed on the net take of all amusement devices, but only on those operated at any carnival or fair. The tax is

further limited to carnivals or fairs at the county fairgrounds. A serious question arises, therefore, as to the uniformity and equality of this tax.

It is an essential and fundamental requisite to the exercise of the power of taxation that the burden be imposed or apportioned with all practicable equality and justice. *Exchange Bank* v. *Hines,* 3 Ohio St., 1 (1853). In 51 Ohio Jurisprudence 2d, 89, Taxation, Section 65, it is stated as follows:

> "The exercise of the taxing power is subject to the equal protection provisions of article 1 of the Ohio Constitution and of the fourteenth Amendment to the Federal Constitution. It is said that the equal protection provision of the Ohio Constitution may be assumed to require that the substance of a tax law in respect of the same kind of property be uniform, including the manner of assessment of the taxes and the manner of collection. * * *"

Accordingly, a tax of three per cent of the net take of each amusement device, operated at any carnival or fair, held at the county fairgrounds, is in my opinion invalid, whether it is considered to be an income tax or an excise tax. Not having a copy of the ordinance imposing the tax in question before me, however, I do not have a specific opinion on that ordinance.

It is my opinion, therefore, and you are accordingly advised:

1. Notwithstanding the general authority granted to municipal corporations in Sections 715.48 and 715.63, Revised Code, to license shows or amusement devices, the legislature, by enacting Section 1711.11, Revised Code, expressly providing for state licensing of shows and amusement devices at county fairs, has pre-empted the field insofar as county fairs are concerned, and a municipal corporation, therefore, may not require the operator of a show or amusement device at a county fair to secure a license from the municipal corporation to operate such a show or amusement device.

2. Under the authority of Sections 715.48 and 715.63, Revised Code, a municipal corporation may require the operator of a show or amusement device to secure a license from the municipal corporation to operate such a show or amusement device on the county fairgrounds, except at the county fair, when the fairgrounds is located within the municipal corporation.

Respectfully,
MARK MCELROY
Attorney General