

OPINION NO. 91-019**Syllabus:**

1. Should the registrar of motor vehicles find that a market place, other than a dealer's location licensed under R.C. Chapter 4517, where a space or location is provided for a fee or compensation to a seller to exhibit and offer motor vehicles for sale or trade is open to a particular segment of the population equivalent to the community at large, such place constitutes a flea market, as that term is defined in R.C. 4517.01(U).
2. R.C. 4517.02(A)(6), in part, prohibits the provision of a location or space for the sale of motor vehicles at a flea market, absent licensure as a dealer under R.C. 4517.01-.45.

To: Charles D. Shipley, Director, Department of Highway Safety, Columbus, Ohio

By Lee Fisher, Attorney General, April 16, 1991

I have before me your predecessor's request for an opinion concerning the sale and display of used motor vehicles in a particular setting and the possible need for licensing under R.C. Chapter 4517. The letter of request describes the planned operation as follows. An Ohio for-profit corporation proposes to operate a used auto and recreational vehicle show and market. The corporation plans to establish a "non-profit club" whose members, along with members of other unspecified "auto-related clubs," will be permitted to display, view, sell, or purchase vehicles at the market. The corporation intends to lease space at the market to club members who may use the space for the display and sale of their vehicles to other club members or to members of the other auto-related clubs. Membership in the club will be open to everyone upon payment of the required annual dues in an amount yet to be determined. As described in the letter, "[t]he dues paid by Club members will be held by the Corporation in a segregated fund and expended exclusively for Club expenses and the provision of benefits to the Club members...Any funds existing when the Club ceases to operate will be distributed as a full refund of dues paid to the members in reverse order of their becoming a member until exhausted." Based upon these facts, the following questions were asked:

- (i) [W]ould the Corporation's provision of a display area for a fee constitute a "flea market" as defined in R.C. 4517.01(U)?
- (ii) [S]hould the Corporation be required to obtain a license as a dealer under R.C. 4517.01 to 4517.45?
- (iii) [W]ould the Corporation or the Club be subject to any other licensing or regulatory requirements of R.C. Chapter 4517?

The first question concerns the application of the term "flea market," defined in R.C. 4517.01(U) as meaning, "a market place, other than a dealer's location licensed under this chapter, where a space or location is provided for a fee or compensation to a seller to exhibit and offer for sale or trade, motor vehicles to the general public."¹

¹ The term "flea market" is used in R.C. 4517.02 which states in part:

(A) Except as otherwise provided in this section, *no person shall:*

...
 (6) Make more than five casual sales of motor vehicles in a twelve-month period, nor provide a location or space for the sale of motor vehicles at a flea market, without obtaining a license as a dealer under [R.C. 4517.01-.45]; provided however that nothing in this section shall be construed to prohibit the disposition without a license of a motor vehicle originally

Your predecessor specifically asked whether the market place to be leased by the corporation in the circumstances described in his letter would constitute a flea market, as defined in R.C. 4517.01(U). Whether or not a particular operation meets the definition of a flea market is, in part, a question of fact. Since it is inappropriate to use the opinion-rendering function of the Attorney General as a means for making findings of fact, 1990 Op. Att'y Gen. No. 90-020; 1986 Op. Att'y Gen. No. 86-076, I cannot make such a determination. I note, however, that, pursuant to R.C. 4501.02, there is created within the Department of Highway Safety a bureau of motor vehicles which is administered by a registrar of motor vehicles. The duties of the registrar are set forth in R.C. 4501.02 in part, as follows:

The registrar shall administer the laws of the state relative to the registration of and certificates of title for motor vehicles, and the licensing of motor vehicle dealers.... He may, with the approval of the director of highway safety, adopt such forms and rules as are necessary to carry out all laws he is required to administer....

....

All laws relating to the licensing of motor vehicle dealers,...designating and granting power to the registrar shall be liberally construed to the end that the practice or commission of fraud in the business of selling motor vehicles...may be prohibited and prevented.

Thus, whether a particular operation constitutes a flea market, subject to the licensing requirements of R.C. 4517.01-45, as set forth in R.C. 4517.02(A)(6), is a matter to be determined in the first instance by the registrar. I can, however, provide you with a discussion of the statutory elements which you must find in order to classify a particular operation as a flea market.

From the information provided, the proposed operation appears to constitute a market place which is not licensed under R.C. Chapter 4517 as a dealer's location and where space is provided for a fee to a seller who will use the space to sell a motor vehicle. The concern appears to be with the last element of the definition of "flea market," i.e., whether the circumstances under which persons are admitted to the market, as described in the request, are such that the vehicles are being displayed and offered to the "general public." R.C. 4517.01 provides no definition of the term "general public," as used therein. It is well settled that in the absence of a technical or particular meaning, words in a statute are to be read in context and given their common meanings. R.C. 1.42. As defined in *Webster's New World Dictionary* 1148 (2d college ed. 1978), the noun "public" means: "1. the people as a whole; community at large 2. a specific part of the people; those people considered together because of some common interest or purpose [the reading *public*]." (Emphasis in original.) Thus, the word "public" is susceptible of a broad or narrow reading. In order to determine the legislature's intent in the use of the term "general public" in R.C. 4517.01, it is, therefore, necessary to utilize the rules of statutory construction.

It is well settled that where the meaning of a statute is ambiguous, one may consider the object sought to be attained by the legislature in enacting the statute. R.C. 1.49(A). As summarized in *Ohio Motor Vehicle Dealers Board v. Central*

acquired and held for purposes other than sale, rental, or lease to an employee, retiree, officer, or director of the person making the disposition, to a corporation affiliated with the person making the disposition, or to a person licensed under [R.C. 4517.01-45]. (Emphasis added.)

Under this statute, a person is prohibited, with certain exceptions, from providing a location or space for the sale of motor vehicles at a flea market, unless he has obtained the necessary license under R.C. 4517.01-45. Pursuant to R.C. 4517.99(C): "Whoever violates [R.C. 4517.02] is guilty of a minor misdemeanor on a first offense; on each subsequent offense such person is guilty of a misdemeanor of the first degree."

Cadillac Co., 14 Ohio St. 3d 64, 65, 471 N.E.2d 488, 490 (1984): "The General Assembly has enacted R.C. Chapter 4517 to regulate the business activities of motor vehicle dealers. These regulations afford protection to the consumer and facilitate the prevention and discovery of automobile thefts." See generally *Auto Realty Service, Inc. v. Brown*, 27 Ohio App. 2d 77, 82, 272 N.E.2d 642, 646 (Franklin County 1971) ("[t]he clear intent of the legislature in enacting the automobile dealers' licensing laws was to prevent fraud upon the public in the sale of motor vehicles. The language as used is quite broad, and encompasses within it the regulation of all commercial dealings involving the selling of motor vehicles").

In *North Dixie Theatre, Inc. v. McCullion*, 613 F. Supp. 1339 (S.D. Ohio 1985), plaintiff flea market operator challenged the constitutionality of the portion of R.C. 4517.02 (A)(6) that requires a flea market operator to obtain a motor vehicle dealer's license in order to rent space to people who want to sell their motor vehicles, while not imposing the same requirement upon a person who leases real property to a car dealer. Specifically concerning the object sought to be attained in the regulation of flea markets under R.C. Chapter 4517, the court stated:

Ohio has classified persons who lease property to others for the purpose of selling automobiles thereon into two categories: those...who operate flea markets and those who do not. Only those who operate flea markets are required by §4517.02(A)(6) to obtain licenses. The latter group is not subject to a similar requirement....

Herein, Plaintiff concedes that the licensure requirement was passed for the broad purpose of preventing fraud in the sale of automobiles...This is a legitimate state purpose. Additionally, this court is of the opinion that the classification devised is rationally related to that goal. While the person who leases real property to a car dealer is not required to obtain a license, the dealer himself will be required to have such a license. See Ohio Rev. Code §4517.02(A). On the other hand, although Plaintiff [flea market operator] must obtain a license, his patrons are not required to obtain licenses. *Id.* Thus, in each situation, one party is required to be licensed. Moreover, there is a real and substantial difference between the lease of property to a car dealer and the business in which Plaintiff engages. It is the dealer, rather than the lessor, with whom the customers will deal. The dealer will have the long-term presence so that customers can return to them if the need arises. However, with a flea market, one of Plaintiff's patrons will sell his or her car and be gone. Plaintiff is the only long-term presence to whom a customer may be able to look. Thus, the State of Ohio requires a licensing of the party to each lease arrangement who will be available for the purchaser of a car to look to for satisfaction....

....
...[I]t is apparent that the potential for fraud exists in flea market sales.

Id. at 1347-48. In determining whether the operation described in the opinion request constitutes the display and offering of motor vehicles for sale or trade to the general public, it is, therefore, necessary to bear in mind that the legislature enacted R.C. 4517.02(A)(6) to prevent fraud in the flea market sale of automobiles by assuring buyers of a long-term presence to whom they may resort for satisfaction.

In *Auto Realty Service, Inc. v. Brown*, the court considered whether a particular corporation's operation was actually a used car dealership subject to licensure under R.C. Chapter 4517. The corporation claimed to be acting only as a brokerage service for owners of used motor vehicles who wished to sell their vehicles and further claimed to provide only a listing service of the vehicles, while never itself owning, having title to, or selling the vehicles. After noting that the legislature's purpose in enacting R.C. Chapter 4517 was the prevention of fraud in the sale of motor vehicles to consumers, the court stated:

It is true that the plaintiff has been conducting its business in an entirely different fashion than would a traditional licensed used car dealership. However, the fact remains that the commodity around

which its operation revolves is automobiles, and the transactions involved are those of buying and selling such automobiles.

The clear intent of the legislature in enacting the automobile dealers' licensing laws was to prevent fraud upon the public in the sale of motor vehicles. The language as used is quite broad, and encompasses within it the regulation of all commercial dealings involving the selling of motor vehicles. We hold that such sections are broad enough in their scope to encompass the business operations of the plaintiff.

27 Ohio App. 2d at 82, 272 N.E.2d at 646.² The court thus used a broad interpretation of the language of the statutes in order to encompass within the conduct prohibited by statute plaintiff's business activity.

In a situation analogous to that described in the opinion request, the court in *Securities and Exchange Commission v. Sunbeam Gold Mines*, 95 F.2d 699 (9th Cir. 1938), examined the meaning of the term "public." In *Sunbeam Gold Mines*, the issuer of certain securities did not provide to the public the detailed information required by law when making a public offering. As noted by the court, the purpose of the Securities Act was, in part, to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce, and to prevent fraud in the sale thereof. The issuer claimed, however, that since the offering was made only to the 323 stockholders of the offering company and the 207 stockholders of the company seeking to merge with the offeror, the offering was private rather than public. In determining that the meaning of the word "public" must depend on the circumstances under which the distinction is sought to be established and the purposes sought to be achieved by the distinction, the court adopted appellant's reading of the term "public," stating:

[T]he word public "is one familiar to everyone, but of the most varied and indefinite connotations. In its broadest meaning the term 'public' distinguishes the populace at large from groups of individual members of the public segregated because of some common characteristic. Yet such a distinction is inadequate for practical purposes; manifestly, an offering of securities to all red-headed men, to all residents of Chicago or San Francisco, to all existing stockholders of the General Motors Corporation or the American Telephone & Telegraph Company, is no less 'public,' in every realistic sense of the word, than an unrestricted offering to the world at large. Such an offering, though not open to everyone who may choose to apply, is none the less 'public' in character, for the means used to select the particular individuals to whom the offering is to be made bear no sensible relation to the purposes for which the selection is made. For the purposes of an offering of securities, red-headed men, residents of San Francisco, and stockholders of General Motors are as much members of the public as their antithetical counterparts. To determine the distinction between 'public' and 'private' in any particular context, it is essential to examine the circumstances under which the distinction is sought to be established and to consider the purposes sought to be achieved by such distinction."

95 F.2d at 701. The question to be resolved by the registrar is, therefore, whether the means used to select the persons who will be admitted to the market place as potential buyers bears a sensible relationship to the purposes for which admission is so limited. If the registrar finds that the admission of potential buyers is so

² The court in *Auto Reality Service, Inc. v. Brown*, 27 Ohio App. 2d 77, 272 N.E.2d 642 (Franklin County 1971), rejected plaintiff's claims that the statutes at issue, being regulatory in nature, as is R.C. 4517.02(A)(6), should be strictly interpreted in plaintiff's favor and not construed so broadly as to encompass matters not specifically included within the original enactment. See generally note 1, *supra* (concerning the penal nature of R.C. 4517.02(A)(6)).

unrestricted that the resulting group of admittees is the equivalent of the general public for whose protection the licensure requirements of R.C. Chapter 4517 have been enacted, such factor may indicate that the operation does constitute a flea market for purposes of R.C. 4517.02(A)(6).

As a final matter, in the determination of whether the operation as described above constitutes a flea market in light of the circumstances in which persons qualify for admission, the fact that a membership fee is charged to club members, who constitute only a portion of the group to which the vehicles are displayed and offered, does not compel the conclusion that the vehicles are displayed and offered to other than "the general public." As concluded in *Gerke v. Purcell*, 25 Ohio St. 229 (1874) (syllabus, paragraph three):

The fact that the use of property is free, is not a necessary element in determining whether the use is public or not. If the use is of such a nature as concerns the public, and the right to its enjoyment is open to the public upon equal terms, the use will be public, whether compensation be exacted or not. Whether the use is free or not, becomes material only where some other element is involved than that of its public character, as, for instance, whether the use is charitable as well as public.

See also Cincinnati Gymnasium & Athletic Club v. Edmondson, 13 Ohio N.P. (n.s.) 489, 491 (C.P. Hamilton County 1912) ("[p]ublic does not mean free; but rather that which is open to a class or kind on equal conditions, or rather where all may go who can comply with certain necessary and reasonable requirements – restrictions").

In answer to the first question, should the registrar find that a market place, other than a dealer's location licensed under R.C. Chapter 4517, where a space or location is provided for a fee or compensation to a seller to exhibit and offer motor vehicles for sale or trade is open to a particular segment of the population equivalent to the community at large, such place constitutes a flea market, as that term is defined in R.C. 4517.01(U).

The second question asks whether the corporation described in the request must obtain a license as a dealer under R.C. 4517.01-.45. The answer to this question depends on whether the operation described constitutes a flea market. If it is a flea market, R.C. 4517.02(A)(6) prohibits the provision of a location or space for the sale of motor vehicles at such location, absent licensure as a dealer under R.C. 4517.01-.45.

The final question asks whether either the club or the corporation described in the request would be subject to any other licensing or regulatory requirements of R.C. Chapter 4517. R.C. Chapter 4517 establishes a variety of licensing provisions, governing, among others, new motor vehicle dealers, used motor vehicle dealers, motor vehicle leasing, motor vehicle auctioning, and the distribution of motor vehicles. R.C. Chapter 4517 also prohibits specific acts by any person with regard to, among other things, the sale and leasing of motor vehicles. *See, e.g.*, R.C. 4517.02. Additionally, R.C. Chapter 4517 contains various provisions regulating the activities of entities licensed under that chapter. *See, e.g.*, R.C. 4517.20 (activities prohibited to licensed motor vehicle dealers); R.C. 4517.22 (motor vehicle shows); R.C. 4517.25 (mileage disclosure statement). It is not possible, within the scope of an Attorney General's opinion, to address all possible statutory provisions to which a particular entity may be subject. Rather, should you have specific questions as to the interpretation or application of specific provisions, such questions could be addressed in a subsequent opinion.

Based upon the foregoing, it is my opinion, and you are hereby advised, that:

1. Should the registrar of motor vehicles find that a market place, other than a dealer's location licensed under R.C. Chapter 4517, where a space or location is provided for a fee or compensation to a seller to exhibit and offer motor vehicles for sale or trade is open to a particular segment of the population equivalent to the community at large, such place constitutes a flea market, as that term is defined in R.C. 4517.01(U).

2. R.C. 4517.02(A)(6), in part, prohibits the provision of a location or space for the sale of motor vehicles at a flea market, absent licensure as a dealer under R.C. 4517.01-.45.