the chassis of the truck but upon the weight including any equipment built into or upon such chassis in such manner as to become a part thereof.

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

1. When a farmer or group of farmers purchases a truck chassis and equip it with a feed grinder, corn sheller, hay baler, fodder shredder, silo filler or other farm apparatus to be used in his or their farm enterprises, such device is not subject to the license tax provided by Am. S. B. 328.

2. When a truck chassis is equipped with, or there is built thereon a feed grinder, corn sheller, hay baler, silo filler or other machine ordinarily used by farmers in their operations, and such apparatus so constructed is operated by an individual or corporation as his or their principal business in the grinding of feed, shelling of corn, baling of hay, shredding of fodder, etc., for farmers, for hire, such apparatus is a motor vehicle within the purview of Section 6290, General Code, as amended, and being such, the tax should be computed thereon at its weight, which includes such equipment as is built into, and becomes a part of such vehicle.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3933.

PUBLIC DANCE—MAYOR WITH-HOLDING PERMIT SOLELY FOR REASON OF TRAFFIC CONGESTION, ACTS IMPROPERLY—SAME APPLICABLE TO BOXING EXHIBITIONS.

SYLLABUS:

Where the mayor of a municipality denies dancing permits provided for in Section 13393, *General Code, and boxing exhibition permits provided for in Section* 12803, *General Code, solely for the reasons that such affairs cause congestion of traffic, violations of parking rules and complaint about congested parking by citizens living in the vicinity, and where he indicates that he would grant such permits but for these reasons, he withholds such permits improperly.*

COLUMBUS, *Ohio,* January 9, 1932.

HON. FRANK D. HENDERSON, *Adjutant General, Columbus, Ohio*

DEAR SIR:—Acknowledgment is made of your communication stating that the mayor of Berea, Ohio, refuses to issue permits for dancing and boxing and other functions at the new state armory there, for the reasons that such affairs cause congestion of traffic, violation of parking rules and complaint about congested parking by citizens living in the vicinity, and asking whether the mayor may prohibit the holding of such functions in a state-owned armory for the reasons given. It is important to note that the letter which you enclose, addressed to you by Captain Ursprung of the 145th Infantry Regiment, stationed at Berea, states that the mayor stated to the captain that he would issue such permits if a parking space were built in the rear of the building, but that the captain says that

there is space in the rear of the building for only about thirty to thirty-five cars, and that it would not be sufficient to remedy the congested parking.

Section 13393, General Code, governing permits for dances, reads:

> "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." (Italics the writer's.)

First, it is clear that the section just quoted requires a permit for dances and like entertainments only when they are public. No permit is required if such functions are private. 1927 Opinions of the Attorney General, page 1538. The distinction between "public" and "private" in this sense has been discussed in a number of former opinions of this office, and it is deemed necessary now only to refer their citations to you: 1927 Opinions of the Attorney General, page 521; 1927 Opinions of the Attorney General, page 1536.

In 1922, the Supreme Court had occasion, in *Rowland* vs. *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 permits for public dancing. Defendant 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 whomsoever to give a public dance in the village. At that time, Section 13393, General Code, read:

> "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 * * *."

The Supreme Court sustained defendant's conviction, remarking in the syllabus:

> "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." (Italics the writer's.)

In the body of the opinion, the court said:

> "It should be observed that the statute in a general way outlaws 'a

> public dance'. * * * It is classified under offenses against public policy. 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.
>
> *
>
> The legislature wisely determined that this is a proper matter for the head of the local government, the mayor, to determine. 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.*" (Italics the writer's.)

From this case, one might gather a cursory impression that a mayor may whimsically refuse a dancing permit, or assign any basis therefor regardless of how arbitrary and unreasonable it may be. But a thorough analysis of the case and related cases presiding over the same fundamental principles discloses the error in such first impression.

Concededly, the issuance of permits under Section 13393 is confined in the mayor's discretion. Furthermore, it is true generally that an official's decision in discretionary matters is final. But there are exceptions to this general rule. Many times, the courts of Ohio have declared that they will intervene in discretionary matters where the refusal to do the act requested is such as to constitute fraud, bad faith, arbitrariness, tyranny or abuse of discretion. *State* vs. *Carter,* 111 O. S. 526, 530-531; *State* vs. *Truax,* 117 O. S. 78, 86; *State* vs. *Board,* 104 O. S. 360, 362-363; *State* vs. *Industrial Commission,* 100 O. S. 500, 503; *State* vs. *Graves,* 90 O. S. 311, 318; *Board* vs. *State,* 80 O. S. 133, Syllabus No. 1; *State* vs. *Moore,* 42 O. S. 103, Syllabus No. 3; *Riegel* vs. *State,* 20 O. A. 1, 6; *State* vs. *Wiegand,* 26 O. A. 154, 156, 161; *State* vs. *McCune,* 27 N. P. (N. S.) 77, 91; *State* vs. *Police Board,* 10 Dec. Repr. 256, 257.

The exception just stated is as applicable to the situation where abuse colors an officer's discretion in refusing a permit, as it is to any other. A liberal number of authorities is cited in 38 Corpus Juris 743, under the title of "Permits", to substantiate the following rule,

> "* * * Where the officer or board intrusted with such duties is vested with discretion in the matter of issuing permits, mandamus does not ordinarily lie to compel the issuance thereof. Nevertheless this discretion must be exercised in a reasonable, and not in an arbitrary and capricious manner; if the refusal is arbitrary and capricious, mandamus will lie to compel the issuance of the permit.",

among which is *State* vs. *Spiegel,* 22 O. C. C. (N. S.) 337. In the Spiegel case, the Court of Appeals granted a writ of mandamus to compel the mayor of Cincinnati to issue a permit for public street meetings, although the city ordinance, which is very similar in tenor to Section 13393, General Code, provided "That all * * * street assemblages * * * are forbidden, unless a permit therefor shall have previously been obtained from the mayor", it appearing that the reasons given by the mayor for his refusal were arbitrary and unreasonable.

In 1925, former Attorney General Crabbe, having Section 13393, General Code, under consideration, expressly stated that mandamus would lie to reach a mayor's action if his discretion were abused in refusing a dance permit. 1925 Opinions of the Attorney General, p. 388.

One of the most pronounced situations in which courts have afforded relief in discretionary matters is that in which the reasons given for refusal to act are entirely impertinent to the purpose for which discretion in the matter was confided in the official. Thus, in the article on "Mandamus", it is stated in 38 Corpus Juris 598-599, under the heading "Abuse of Discretion":

> "While the contrary view has been upheld, the great weight of authority is to the effect that an exception to the general rule that discretionary acts will not be reviewed or controlled exists when the discretion has been abused. The discretion must be exercised under the established rules of law, and it may be said to be abused within the foregoing rule where the action complained of has been arbitrary or capricious * * *. If by reason of a mistaken view of the law or otherwise there has been no actual and bona fide exercise of judgment and discretion, as, for instance, where the discretion is made to turn upon matters which under the law should not be considered, or *where the action is based upon reasons outside the discretion imposed,* mandamus will lie." (Italics the writer's.)

To the same effect are 26 Cyc. 161-162 and 19 Am. & Eng. Enc. Law 739. *French* vs. *Jones,* 191 Mass. 522, is a leading case. There, it was sought by mandamus to compel the superintendent of streets of Waltham to grant a license to break and dig up the surface of a street in order to remove rails and ties purchased by petitioner from the receivers of a railway company. The city ordinance provided that "No person, unless authorized by law, shall break or dig up any part of any street * * * without a written license from the superintendent of streets". It was established in court that defendant's refusal to issue the license did not result from the exercise of his judgment or discretion as to the proper care of the streets, or from the adverse determination of any question connected with such care or with the protection of the public travel, but from a desire to keep the rails in the streets in the hope that some person or corporation would operate street cars over them; and that the rails could be removed without any permanent injury to the street or any unreasonable disturbance of public travel. The court granted a writ commanding the defendant to hear and determine the petitioner's application without regard to any hope or desire that some person or corporation would operate cars over the tracks, but merely in the exercise of his sound discretion as an officer charged with the care of the streets, and said: (p. 530)

> "He has a right to refuse to grant the license asked for if in the proper exercise of his judgment and official discretion he decides that it ought not to be granted; but *he has not the right to refuse it merely for a reason which lies outside the scope of his duty.*" (Italics the writer's.)

See also *State* vs. *Sayre,* 15 C. C. (N. S.) 257, Syllabus No. 3, affirmed 86 O. S. 362, and, on rehearing, reaffirmed 87 O. S. 459; *Larkin Company* v. *Schwab,* 242 N. Y. 330, 335-336.

Furthermore, where an officer clothed with discretionary power, denies a request solely on a ground outside of his discretion and would have granted it but

for that reason, it has been held that mandamus will lie to compel him to do the specific act, on the theory that he has exercised his discretion and has decided all questions properly within its scope in favor of the relator, and that the act remaining to be performed by him is merely a ministerial duty. 18 R. C. L. 127-128; Annotation, 7 L. R. A. (N. S.) 525, et seq.; *People* vs. *Collis,* 45 N. Y. S. 282.

The reasons given by Berea's mayor do not furnish a legitimate basis for the refusal of public dancing permits. In delimiting the bounds of the mayor's discretion under Section 13393, General Code, it is imperative to construe that statute in the light of the objects which the legislature sought to attain and the mischiefs against which it aimed to guard, thereby. See 1927 Opinions of the Attorney General, Vol. II, page 1538. On this point, the Supreme Court, in *Rowland* vs. *State,* 104 O. S. 366, 369, spoke most explicitly, thus:

> "It * * * is sought to restrain the use of the property * * * only as to public dances where all classes of people, regardless of morals, health, peace, or safety, are permitted to assemble, hodge podge, and associate together."

Accumulative authority on the same matter is found in the following statement relative to Section 13393 made in Opinion No. 1987, rendered June 13, 1930:

> "The evil aimed at by this legislation is the indiscriminate gathering of persons at dances."

These pronouncements make it clear that the reasons given by Berea's mayor are wholly irrelevant to the purposes for which discretion in the matter is lodged, by the statute, in municipal executives. It was the legislature's intention that the mayor's discretion should be utilized to protect the municipality against certain gatherings of people, and not against the congestion of vehicles; to guard the morals, health, peace and safety of the community against the evils that inhere in the promiscuous intermixing of all classes of people at a public dance, and not against annoyances which are not peculiar to public dances as distinguished from other assemblages. Otherwise, mayors would be given the same discretionary powers over private dances, church services and picnics. Otherwise, the occupation of all downtown buildings would be placed in the mayor's discretion, because their use makes traffic complications most acute at its focal point. Traffic jams have no necessary relation to the evils of the public dance. The latter existed long before the day of the automobile.

The assignment of reasons outside of the scope of the mayor's discretion especially presents a strong basis for relief in the situation you present, because the mayor has indicated that he will grant permits if a parking space is built. By thus imposing a condition which relates to a matter outside his sphere and by indicating that he would otherwise grant permits, the mayor has made it plain that, in his judgment, exercised within the legitimate bounds of his discretion, public dancing *itself,* in the armory, would not subvert the morals, health, peace or safety of the community.

This situation is basically distinguishable from that in *Rowland* vs. *State,* supra. There it appeared that the mayor gave no reason other than that he would permit no public dancing in the village. In the Rowland case, therefore, it may be presumed that, due to the peculiar conditions which prevailed in the village, the mayor, in the proper area of his judgment, concluded that the protection of the community's welfare against the *inherent evils of public dancing itself* demanded

a complete abstinence therefrom. Furthermore, any intimation which the Rowland case might seem to encourage to the effect that the mayor's power is despotically absolute is dispelled by the fact that the court uses a whole paragraph to show that, on the facts, the mayor did not act in an arbitrary and discriminating manner.

Next, consideration will be given to permits for boxing exhibitions. Of course, prize fights are absolutely prohibited by statute and cannot be licensed regardless of the place at which they occur or of the parties who may promote them. Section 12800, General Code, *Seville* vs. *State,* 49 O. S. 117; In re Athletic Clubs, 7 N. P. 457. However, the General Code makes the following provision concerning public sparring or boxing exhibitions:

Sec. 12802.

"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."

Sec. 12803.

"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."

Few words are necessary to show that the mayor's refusal to issue permits for boxing exhibitions falls within the same category as his refusal concerning dancing. The statutes just quoted date back to a time when one could saunter leisurely from any corner of the main street intersection of any Ohio metropolis to the diagonally opposite corner without risk or molestation. These statutes were not conceived with any idea of mitigating traffic perplexities. When, therefore, the mayor indicates that he would grant boxing exhibition permits except for reasons relating merely to traffic—something which the statute did not have in contemplation—it is apparent that he has decided, within the proper limitations of his discretion, that the evils which may inhere in a boxing exhibition itself in some places, do not exist in his bailiwick.

Answering your question specifically, it follows that where the mayor of a municipality denies dancing permits provided for in Section 13393, General Code, and boxing exhibition permits provided for in Section 12803, General Code, solely for the reasons that such affairs cause congestion of traffic, violation of parking rules and complaint about congested parking by citizens living in the vicinity, and where he indicates that he would grant such permits but for these reasons, he withholds such permits improperly.

Respectfully,

GILBERT BETTMAN,
Attorney General.