

OPINION NO. 2007-040**Syllabus:**

R.C. 4301.62(B)(3) prohibits a person from having in the person's possession an opened container of beer or intoxicating liquor in an outdoor area located on private property that is used by a nonprofit cultural arts organization to present an artistic event when (1) no permit allows the consumption of beer or intoxicating liquor at the event; (2) the container of beer or intoxicating liquor was brought to the event by the person; (3) the outdoor area is fenced off from public property; and (4) the public at large may enter the outdoor area by purchasing tickets to the event.

To: Julie S. Henahan, Executive Director, Ohio Arts Council, Columbus, Ohio

By: Marc Dann, Attorney General, November 16, 2007

You have requested an opinion concerning the application of R.C. 4301.62(B)(3) to a person possessing an open container of beer or intoxicating liquor in an outdoor area located on private property that is used by a nonprofit cultural arts organization to present an artistic event.¹ For the purpose of this opinion, you have informed us that neither the nonprofit cultural arts organization nor the property owner has a permit that allows the consumption of beer or intoxicating liquor at the event site. The container of beer or intoxicating liquor is brought to the event by the person. You also explain that the outdoor area is fenced off from public property and that the public at large may enter the outdoor area by purchasing tickets to the event. In light of these particular facts, you wish to know whether R.C. 4301.62(B)(3) prohibits a person from having in the person's possession an opened container of beer or intoxicating liquor in an outdoor area located on private property that is used by a nonprofit cultural arts organization to present an artistic event when (1) no permit allows the consumption of beer or intoxicating liquor at the event; (2) the container of beer or intoxicating liquor was brought to the event by the person; (3) the outdoor area is fenced off from public property; and (4) the public at large may enter the outdoor area by purchasing tickets to the event.

Provisions of the Open Container Law

R.C. 4301.62(B) prohibits a person from having in the person's possession an opened container of beer or intoxicating liquor in the following circumstances:

- (1) In a state liquor store;
- (2) Except as provided in division (C) of this section, on the

¹ R.C. 4301.01 defines "beer" and "intoxicating liquor" for purposes of R.C. 4301.62, as follows:

(A) As used in the Revised Code:

(1) "Intoxicating liquor" and "liquor" include all liquids and compounds, other than beer, containing one-half of one per cent or more of alcohol by volume which are fit to use for beverage purposes, from whatever source and by whatever process produced, by whatever name called, and whether they are medicated, proprietary, or patented. "Intoxicating liquor" and "liquor" include wine even if it contains less than four per cent of alcohol by volume, mixed beverages even if they contain less than four per cent of alcohol by volume, cider, alcohol, and all solids and confections which contain any alcohol.

....

(B) As used in [R.C. Chapter 4301]:

....

(2) "Beer" includes all beverages brewed or fermented wholly or in part from malt products and containing one-half of one per cent or more, but not more than twelve per cent, of alcohol by volume.

premises of the holder of any permit issued by the division of liquor control;

(3) *In any other public place;*

(4) Except as provided in division (D) or (E) of this section, while operating or being a passenger in or on a motor vehicle on any street, highway, or other public or private property open to the public for purposes of vehicular travel or parking;

(5) Except as provided in division (D) or (E) of this section, while being in or on a stationary motor vehicle on any street, highway, or other public or private property open to the public for purposes of vehicular travel or parking. (Emphasis added.)

The clear import of R.C. 4301.62(B)(3) is that a person may not have in the person's possession an opened container of beer or intoxicating liquor in an outdoor area located on private property that is used by a nonprofit cultural arts organization to present an artistic event when the outdoor area is a public place.

Exceptions to R.C. 4301.62(B)(3)'s prohibition are listed in R.C. 4301.62(C). This division provides, in part:

(1) A person may have in the person's possession an opened container of any of the following:

(a) Beer or intoxicating liquor that has been lawfully purchased for consumption on the premises where bought from the holder of an A-1-A, A-2, D-1, D-2, D-3, D-3a, D-4, D-4a, D-5, D-5a, D-5b, D-5c, D-5d, D-5e, D-5f, D-5g, D-5h, D-5i, D-5j, D-5k, D-7, D-8, E, F, F-2, or F-5 permit;

(b) Beer, wine, or mixed beverages served for consumption on the premises by the holder of an F-3 permit or wine served for consumption on the premises by the holder of an F-4 or F-6 permit;

(c) Beer or intoxicating liquor consumed on the premises of a convention facility as provided in [R.C. 4303.201];

(d) Beer or intoxicating liquor to be consumed during tastings and samplings approved by rule of the liquor control commission.

(2) A person may have in the person's possession on an F liquor permit premises an opened container of beer or intoxicating liquor that was not purchased from the holder of the F permit if the premises for which the F permit is issued is a music festival² and the holder of the F permit grants permission for that possession on the premises during the period for which the F permit is issued....

² As used in R.C. 4301.62(C)(2), a "music festival" is "a series of outdoor live musical performances, extending for a period of at least three consecutive days and located on an area of land of at least forty acres." R.C. 4301.62(C)(2).

(3)(a) A person may have in the person's possession on a D-2 liquor permit premises an opened or unopened container of wine that was not purchased from the holder of the D-2 permit if the premises for which the D-2 permit is issued is an outdoor performing arts center, the person is attending an orchestral performance, and the holder of the D-2 permit grants permission for the possession and consumption of wine in certain predesignated areas of the premises during the period for which the D-2 permit is issued.³ (Footnotes added.)

Accordingly, except as provided in R.C. 4301.62(C), a person is prohibited from having in the person's possession an opened container of beer or intoxicating liquor in an outdoor area located on private property that is used by a nonprofit cultural arts organization to present an artistic event when the outdoor area is a public place.

Definition of a Public Place for Purposes of R.C. 4301.62(B)(3)

We must now determine whether an outdoor area located on private property that is used by a nonprofit cultural arts organization to present an artistic event is a public place for purposes of R.C. 4301.62(B) when the outdoor area is fenced off from public property and the public at large may enter the outdoor area by purchasing tickets to the event. If the outdoor area is a public place, we must then determine whether any of the exceptions set forth in R.C. 4301.62(C) apply.

The Revised Code does not define the term "public place" for purposes of R.C. 4301.62(B)(3). The term "public place" thus is accorded its common meaning. R.C. 1.42.

Black's Law Dictionary 1230 (6th ed. 1990) defines a "public place" as follows:

A place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public (*e.g.* a park or public beach).

³ For purposes of R.C. 4301.62(C)(3)(a), the terms "orchestral performance" and "outdoor performing arts center" are defined as follows:

(i) "Orchestral performance" means a concert comprised of a group of not fewer than forty musicians playing various musical instruments.

(ii) "Outdoor performing arts center" means an outdoor performing arts center that is located on not less than eight hundred acres of land and that is open for performances from the first day of April to the last day of October of each year.

R.C. 4301.62(C)(3)(b).

Accord State v. Britton, 2007-Ohio-2147, 2007 Ohio App. LEXIS 2006, at ¶12 (Lucas County May 4, 2007).

In addition, Ohio courts, as well as courts of other jurisdictions, have determined that “evidence that property is privately or publicly owned is not determinative of whether such property constitutes a public place.” *City of Green v. Rhoades*, C.A. No. 20169, 2001 Ohio App. LEXIS 1132, at *5 (Summit County Mar. 14, 2001); *see also Thrasher v. State*, 168 Ala. 130, 53 So. 256 (1910); *State v. Lowman*, C.A. No. 05CA0006-M, 2005-Ohio-4545, 2005 Ohio App. LEXIS 4104 (Medina County Aug. 31, 2005); *State v. Van Dyne*, 26 Ohio App. 3d 95, 498 N.E.2d 221 (Franklin County 1985); *Austin v. State*, 57 Tex. Crim. 611, 124 S.W. 639 (1910). Rather, private property is deemed to be a public place when the public at large is “invited to either enter, remain on and/or cross the property.” *City of Green v. Rhoades*, at *6; *accord State v. Lowman*, at ¶6; *see Thrasher v. State; Tooke v. State*, 4 Ga. App. 495, 61 S.E. 917 (1908); *State v. Van Dyne; Austin v. State*. Accordingly, for purposes of R.C. 4301.62(B)(3), an outdoor area located on private property that is used by a nonprofit cultural arts organization to present an artistic event is a public place when the public at large may attend the event. *See generally City of Green v. Rhoades*, at *7 (a grassy area surrounding an apartment complex is not a public place when “only tenants and their invited guests are permitted to enter and remain on the [grassy area and all] others are either asked to leave or escorted off the premises”).

An Outdoor Area Located on Private Property Becomes a Public Place When the Public at Large May Purchase Tickets to an Event Held in the Outdoor Area

Whether the public at large may attend an artistic event held on private property is a question of fact that must be resolved on a case-by-case basis since R.C. 4301.62 is a criminal statute. *See generally* R.C. 2901.05(A) (“[e]very person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution”); R.C. 4301.99(A) (“[w]hoever violates ... [R.C. 4301.62] ... is guilty of a minor misdemeanor”). This opinion, therefore, only considers whether the artistic event described in your letter is open to the public at large.

As explained in your letter, attendance at the event is not limited to persons specifically invited to the event by the property owner or nonprofit cultural arts organization. Instead, any person may attend the event by purchasing a ticket to the event. In such a situation, an outdoor area located on private property that is used by a nonprofit cultural arts organization to present an artistic event becomes a public place for purposes of R.C. 4301.62(B)(3) since the public at large may enter the outdoor area by purchasing tickets to the event. *See generally State v. Walters*, 440 So.2d 115 (La. 1983) (where no special credentials were required to enter theater and to view live conduct alleged to be obscene other than simple payment of prescribed fees, the viewing occurs in a public place); *Yarbrough v. State*, 20 Ala. App. 250, 101 So. 321 (1924) (a show to which the public is invited and expected to come is a public place); *State ex rel. Nasal v. BJS No. 2, Inc.*, 127 Ohio Misc. 2d

101, 2003-Ohio-7323, 806 N.E.2d 208, at ¶11 (C.P. Miami County 2003) (a couch-dance area is a public place when all persons paying for a couch dance have access to the area upon paying for a couch dance).

Moreover, the fact that the outdoor area where the artistic event is being held is fenced off from public property has no bearing on the determination as to whether the outdoor area is a public place. Once the public at large is permitted to attend an artistic event in an outdoor area located on private property, the character of the outdoor area during the time the event is held changes from a private place to a public place regardless of any attempt by the property owner or organizers of the event to enclose the outdoor area with a fence. *See generally State v. Walters* (where conduct alleged to be obscene takes place in an enclosed area operated to receive the public at large, the conduct occurs in a public place); *State ex rel. Bowers v. Elida Rd. Video & Books, Inc.*, 120 Ohio App. 3d 78, 84, 696 N.E.2d 668 (Allen County 1997) (an enclosed video booth of an adult bookstore is a public area). Therefore, R.C. 4301.62(B)(3) prohibits a person from having in the person's possession an opened container of beer or intoxicating liquor in an outdoor area located on private property that is used by a nonprofit cultural arts organization to present an artistic event when the outdoor area is fenced off from public property and the public at large may enter the outdoor area by purchasing tickets to the event unless one of the exceptions set forth in R.C. 4301.62(C) applies.

Application of R.C. 4301.62(C)'s Exceptions

A review of the exceptions set forth in R.C. 4301.62(C) discloses that several of the exceptions require the person to be located on a liquor permit premises in order to have in the person's possession an opened container of beer or intoxicating liquor in a public place. *See, e.g.*, R.C. 4301.62(C)(1)(a) (a person may have in the person's possession an opened container of "[b]eer or intoxicating liquor that has been lawfully purchased for consumption on the premises where bought from the holder of an A-1-A, A-2, D-1, D-2, D-3, D-3a, D-4, D-4a, D-5, D-5a, D-5b, D-5c, D-5d, D-5e, D-5f, D-5g, D-5h, D-5i, D-5j, D-5k, D-7, D-8, E, F, F-2, or F-5 permit"); R.C. 4301.62(C)(1)(b) (a person may have in the person's possession an opened container of "[b]eer, wine, or mixed beverages served for consumption on the premises by the holder of an F-3 permit or wine served for consumption on the premises by the holder of an F-4 or F-6 permit"); R.C. 4301.62(C)(1)(c) (a person may have in the person's possession an opened container of beer or intoxicating liquor on the premises of an entity that holds an F-1 permit); R.C. 4301.62(C)(2) ("[a] person may have in the person's possession on an F liquor permit premises an opened container of beer or intoxicating liquor that was not purchased from the holder of the F permit if the premises for which the F permit is issued is a music festival and the holder of the F permit grants permission for that possession on the premises during the period for which the F permit is issued"); R.C. 4301.62(C)(3)(a) ("[a] person may have in the person's possession on a D-2 liquor permit premises an opened or unopened container of wine that was not purchased from the holder of the D-2 permit if the premises for which the D-2 permit is issued is an outdoor performing arts center, the person is attending an orchestral performance, and the holder of the D-2 permit grants permission for the possession and consumption of

wine in certain predesignated areas of the premises during the period for which the D-2 permit is issued”). Because your question presents a situation in which the event is not held on a liquor permit premises, none of the exceptions pertaining to the possession of an opened container of beer or intoxicating liquor on a permit premises apply.

Moreover, the event is held to afford persons the opportunity to enjoy the arts, rather than to provide patrons of the event with tastings and samples of beer or intoxicating liquor. As a result, the exception allowing a person to have in the person’s possession an opened container of beer or intoxicating liquor that is “to be consumed during tastings and samplings approved by rule of the liquor control commission” does not apply. R.C. 4301.62(C)(1)(d); *see, e.g.*, 10 Ohio Admin. Code 4301:1-1-30 (authorizing in certain instances beer, wine, mixed beverage, or spirituous liquor tasting); 10 Ohio Admin. Code 4301:1-1-32 (authorizing the distribution of samples of alcoholic beverages in certain situations); 10 Ohio Admin. Code 4301:1-1-33 (authorizing under certain conditions consumer tasting and sampling of alcoholic beverages at a retail permit premises). Therefore, since none of the exceptions set forth in R.C. 4301.62(C) apply, it follows that R.C. 4301.62(B)(3) prohibits a person from having in the person’s possession an opened container of beer or intoxicating liquor in an outdoor area located on private property that is used by a nonprofit cultural arts organization to present an artistic event when (1) no permit allows the consumption of beer or intoxicating liquor at the event; (2) the container of beer or intoxicating liquor was brought to the event by the person; (3) the outdoor area is fenced off from public property; and (4) the public at large may enter the outdoor area by purchasing tickets to the event.

Conclusion

In summary, it is my opinion, and you are hereby advised that R.C. 4301.62(B)(3) prohibits a person from having in the person’s possession an opened container of beer or intoxicating liquor in an outdoor area located on private property that is used by a nonprofit cultural arts organization to present an artistic event when (1) no permit allows the consumption of beer or intoxicating liquor at the event; (2) the container of beer or intoxicating liquor was brought to the event by the person; (3) the outdoor area is fenced off from public property; and (4) the public at large may enter the outdoor area by purchasing tickets to the event.