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“The power of the boards of institutions of higher education provided in this constitution to supervise their respective institutions and control and direct the expenditure of the institutions' funds shall not be limited by this section.”

The people have conferred constitutional authority upon the constitutional body designated as the state board of education to generally plan and coordinate all public education, including higher education, and power to advise the legislature as to the financial requirements in connection therewith. The vesting of such constitutional powers in the state board of education compels the conclusion that it is beyond the power of the legislature and the governor to provide for the creation of a state commission on higher education and to give it powers of planning, coordinating and advising as to the financial needs of public higher education. A commission on higher education cannot assume to exercise authority vested by the Constitution solely in the state board of education. The people, speaking through their Constitution, have so decreed. See *State Board of Agriculture v Auditor General*, 226 Mich. 417, 426 (1924).

The general power to plan and coordinate public higher education and to advise the legislature as to the financial needs of the same, as well as all matters incidental thereto, are vested by the people only in the state board of education and in no other governmental body. Thus it is beyond the power of the legislature or the governor to establish a commission on higher education to exercise such powers even on a temporary basis.

Therefore, it is my opinion that neither the legislature nor the governor has authority to establish a commission on higher education, even on a temporary basis, to plan, coordinate and to advise as to the financial requirements of public higher education, as well as all matters incidental thereto.

FRANK J. KELLEY,
Attorney General.

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TOWNSHIPS: Ordinances.

LICENSING: Commercial Establishments.

Township is without authority to enact ordinance requiring all commercial establishments per se to obtain a license or permit to operate each such commercial establishment on a yearly basis.

No. 4740

February 24, 1972.

Honorable Donald E. Bishop
State Senator
The Capitol
Lansing, Michigan

By recent letter you have asked my opinion on the following question:

May a non-charter township under the regulatory power granted to it

by statute enact an ordinance requiring all commercial establishments in the township to obtain a license or permit to operate such commercial establishments on a yearly basis?

Non-charter townships are those organized under R.S. 1846 Chap. 16, being M.C.L.A. 41.1 et seq.; M.S.A. 5.1 et seq., which provides at section 4 in pertinent part as follows:

"The inhabitants of each township may, at any legal meeting, by a vote of the qualified electors thereof, make all such orders and by-laws for . . . directing and managing the prudential affairs of the township, as they shall judge most conducive to the peace, welfare, and good order thereof." M.C.L.A. 41.4; M.S.A. 5.4.

1945 PA 246, authorizing township boards to adopt ordinances and regulations to secure the public health, safety, welfare and convenience, being M.C.L.A. 41.181 et seq.; M.S.A. 5.45(1) et seq., provides at section 1 in pertinent part as follows:

"The township board of a township may, at any regular or special meeting by a majority of the members elect of such township board, adopt ordinances regulating the public health, safety and general welfare of persons and property, fire protection, the licensing or use of bicycles, traffic and parking of vehicles, sidewalk maintenance and repairs, the licensing and regulating of hawkers, vendors, peddlers, solicitors, circuses, carnivals and public amusements, and provide penalties for the violation thereof, and shall enforce the same, and may for that purpose employ and establish a police department with full power and authority to enforce all local township ordinances and state laws, . . ."

It is also relevant to note that Article VII, Section 17 of the Michigan Constitution of 1963 provides that:

"Each organized township shall be a body corporate with powers and immunities provided by law."

Article VII, Section 34 of the Michigan Constitution of 1963 provides in pertinent part as follows:

"The provisions of this constitution and law concerning . . . townships . . . shall be liberally construed in their favor. Powers granted to . . . townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution."

It is well established in Michigan case law that townships have no inherent power or authority, but have only such authority as is prescribed by law. See, for example, *Hanslovsky v. Township of Leland*, 281 Mich. 652 (1937). This case denied recovery on notes which had been issued by its officers without authority to borrow money for emergency expenses under the circumstances occurring in that case.

In O.A.G. 1629, Report of the Attorney General, 1952-1954, p. 108, my predecessor ruled that a township is without power to enact an ordinance to license juke boxes or pinball machines. In course of opinion the then Attorney General Millard remarked that section 4 of the township ordinance act (quoted as amended hereinabove) ". . . obviously does not confer authority to pass ordinances pertaining to juke boxes and pinball machines. . . ." Similarly, in O.A.G. 1722, Report of the Attorney General, 1952-1954,

p. 265, it was ruled that a non-charter township has no authority to adopt an icebox ordinance. This opinion contains an analysis of the public health and safety powers conferred upon local units such as townships pursuant to delegated general police power, and it was found that under the then statutes governing non-chartered townships, there was no authority to adopt an ordinance dealing with the safety as distinguished from the health of the inhabitants.¹

In O.A.G. 3659, Report of the Attorney General, 1961-1962, p. 375, I ruled that a township cannot adopt an ordinance regulating the discharge of firearms so as to interfere with the hunting of wild birds or animals as permitted by state law, noting at p. 378 that non-charter townships have never possessed broad authority to enact police power ordinances, and determining that where the state had pre-empted the field of hunting with respect to the means of hunting game and the kinds of fire arms that can be used, townships may not do by indirection that which cannot be done directly so as to defeat the state pre-emption. Reference was therein made to *Miller v. Fabious Township*, 366 Mich. 250 (1962), holding that a township could regulate water skiing in a manner not in conflict with the state law, where the state statute did not fully pre-empt the area.

With respect to the regulation of businesses, it is well established that any ordinance regulatory of business must be reasonable. See, for example, *Hitchman v. Township of Oakland*, 329 Mich. 331 (1951), a zoning case discussing various cases holding that arbitrary or unreasonable exercise of authority by municipalities, including townships, may not be justified.

Turning now to the statute under construction, there can be no question that unchartered townships now have authority pursuant to M.C.L.A. 41.181; M.S.A. 5.45(1) to regulate "hawkers, vendors, peddlers, solicitors, circuses, carnivals and public amusements"

A "hawker" or "peddler" has been defined as one who travels about selling small wares which he carries with him, to be delivered then or in the future. *People v. Sawyer*, 106 Mich. 428 (1895); *City of Muskegon v. Hanes*, 149 Mich. 460 (1907); *Jewel Tea Co. v. Board of Pharmacy*, 335 Mich. 673 (1953). And see *Colonial Baking Co. v. Sparta*, 366 Mich. 407 (1962). A peddler or hawker is distinguished from a merchant, the latter being one who is engaged in buying or selling merchandise at a fixed place of business in distinction to one who travels about from place to place making petty sales, *City of Alma v. Clow*, 146 Mich. 443 (1906); *Allport v. Murphy*, 153 Mich. 486 (1908).

To extend this language by implication to include the annual licensing of all commercial establishments of whatsoever kind or nature is clearly arbitrary and unreasonable. There are many "commercial establishments" which are not "vendors."² The enumeration of the kinds of commercial enterprises which can be regulated necessarily exhibits a legislative intent

¹ It will be noted that as currently amended M.C.L.A. 41.181; M.S.A. 5.45(1), cited *supra*, now specifically includes safety and general welfare as well as public health.

² Cf. *Megge v. United States*, 344 F.2d 31, 33 (1965), affirming 241 F. Supp. 29 (1963), holding an army clerk not a "vendor" under the Michigan pawn shop act.

not to extend the licensing power of townships with respect to businesses beyond those enumerated.

"Expressio unius est exclusio alterius." *Sebewaing Industries, Inc. v. Village of Sebewaing*, 337 Mich. 530, 545 (1953).

In answer to your question, I therefore advise you that an unchartered township is without authority under its statutory regulating power to require all commercial establishments in the township to obtain a license or permit to operate such establishments on a yearly basis. I add, however, the cautionary note that with respect to commercial establishments the operation of which can be officially determined to affect the public health, safety or welfare of the inhabitants of the township, section 1 of the township ordinance act, cited *supra*, will permit such licensing requirement. Similarly, with respect to commercial establishments consisting of an organization of the activities of vendors, hawkers and peddlers, the township may regulate the individual vendor, hawker and peddler by requiring the commercial establishment employing each such operative to obtain licenses or permits for the vending, hawking and peddling activities.

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TAXATION: Homestead Exemption.

The beneficial owner of real property in a "grantorship trust" is entitled to claim the statutory homestead exemption from real estate taxation.

No. 4737

March 15, 1972.

Hon. Edgar A. Geerlings
State Representative
The Capitol
Lansing, Michigan

You have posed a problem as follows: An individual who previously qualified for the homestead exemption from real estate taxation creates an irrevocable inter vivos trust. In order to avoid probate proceedings in the event of the Settlor's death or disability, the Settlor conveys all his assets, including the homestead, to the trustee or trustees of the trust. The Settlor is the sole lifetime beneficiary of the trust and may or may not serve as a co-trustee with another individual or a bank.

You then ask the question, whether a beneficial owner of the *res* in a grantorship trust is an owner within the meaning of the Senior Citizens' Tax Exemption.

A survey of the relevant law bearing on the issue indicates that the answer to the question depends upon the nature of the interest of the beneficiary of the trust. In the trust above mentioned, the purpose was avoidance of probate. For purposes of this opinion, we assume that the trustee had no duties to perform. Such a trust should be characterized as a passive trust.