

upon whether the legislature has so authorized. *Butcher v Township of Grosse Ile*, 387 Mich 42, 52; 194 NW2d 845, 848 (1972); *Advisory Opinion re Constitutionality of 1973 PA 1 and 2*, 390 Mich 166, 184; 211 NW2d 28, 34 (1973).

It is the opinion of the Attorney General that an intermediate school district presently is not authorized by statute to call and hold an election to increase the tax rate limitation for a period of not to exceed 20 years for general operating purposes.

It should be noted, however, that an intermediate school district is authorized to levy taxes within the 15 mill limitation for general operating purposes,³ and is assured of a tax rate of at least one-tenth of a mill.⁴ Further, under the provisions of the state school aid act, 1972 PA 258, as amended, § 81; MCLA 388.1181; MSA 15.1919(581), an intermediate school district receives state school aid monies that may be used for general operating purposes.

FRANK J. KELLEY,
Attorney General.

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CONSTITUTIONAL LAW: Public Health.

DAIRIES AND DAIRY PRODUCTS: Milk Containers.

The use of three-quart milk containers is legal as a statute prohibiting their use bears no reasonable relationship to the public health, safety and welfare.

Opinion No. 4845

January 13, 1975.

B. Dale Ball, Director
Michigan Department of Agriculture
Lewis Cass Building
Lansing, Michigan

You have requested my opinion on the legality of the use of three-quart milk containers for the sale of milk in Michigan. Specifically, you inquire whether the fluid milk act, 1965 PA 233, § 6, as amended by 1969 PA 84, § 1; MCLA 288.26; MSA 12.617(106), prohibits the use of such containers. The language of the statute in question, 1965 PA 233, § 6, *supra*, is as follows:

“All fluid milk and milk products shall be packaged for retail sale only in units of 1 gill, ½ liquid pint, 10 fluid ounces, 1 liquid pint, 1 liquid quart, ½ gallon, 1 gallon, 1½ gallons, 2 gallons, 2½ gallons or multiples of 1 gallon. Packages in units of less than 1 gill shall be permitted. Each container shall be plainly marked as to its capacity and shall deliver the amount marked on the container.”

³ The School Code of 1955, § 298a, as last amended by 1974 PA 109; MCLA 340.298a; MSA 15.3298(1).

⁴ The Property Tax Limitation Act, § 11; MCLA 211.211; MSA 7.71.

The three-quart container is not allowed under the express language of the statute. However, one must further inquire whether the failure to allow the use of three-quart containers which amounts to a prohibition of their use in 1965 PA 233, § 6, *supra*, is constitutional.

A series of cases dealing with the constitutionality of laws regulating food and the handling of food illustrates the extent of the police power of the state to regulate in this field. *Carolene Products Co v Thomson*, 276 Mich 172; 267 NW 608 (1936) involved a challenge of the Michigan filled milk act. The act prohibited the sale of skimmed milk to which vegetable oils had been added. The court held that the law was unconstitutional as in excess of the police power of the state and therefore violative of the due process clauses of the Federal and State constitutions. In reaching its decision the court reasoned that the police power of the state is based on the need to protect the health and welfare of the people of the state. However, in this case, there was no valid public health reason to prohibit the sale of the product and there was no reasonable relationship between the evils sought to be remedied and the manner in which the law acted. In reaching its decision the court held:

"The power of the legislature to regulate the production and sale of milk and its derivatives cannot be doubted. But the police power of regulation does not include the absolute prohibition of trade in useful and harmless articles of commerce. Being prohibitory, the act must be declared invalid." *Carolene Products Co v Thomson, supra*, 178

The court further reasoned:

"Prohibition of manufacture and sale of a nutritious food product which is harmless to public health cannot be justified under the police power to preserve public health, because the remedy has no reasonable relation to the purpose unless, at least, it appears that other similar products, dangerous to health, are on the market and that prohibition of all is reasonably necessary to protect the public health because of the impracticability of separating the good from the bad. There is no such claim here." *Carolene Products Co v Thomson, supra*, 180

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"Even if they actually deceive, a few casual and individual deceptive offers of a product would not constitute public fraud and, therefore, would not afford such reasonable relation between a public wrong and the remedy as to justify absolute prohibition of sale of the product. If it were otherwise, the police power over the constitutional right to do business would be without practical limit as the possibility of misrepresentation exists in the sale of any article." *Carolene Products Co v Thomson, supra*, 180-181

Grocers Dairy Co v Department of Agriculture Director, 377 Mich 71; 138 NW2d 767 (1966), is directly on point. This case involved a challenge to the constitutionality of the Michigan law prohibiting the sale of milk in one-gallon containers. The court cited with approbation *Carolene Products Co v Thomson, supra*, and enunciated the standard for constitutionality of state regulatory laws as follows:

"The power of the legislature to regulate the production and sale of milk is not in dispute, but the police power of regulation does not include the absolute prohibition of trade in useful and harmless articles of commerce. The principles involved are well settled. The Constitution guarantees to citizens the general right to engage in any business which does not harm the public. This constitutional right to engage in business is subject to the sovereign police power of the State to preserve public health, safety, morals and public welfare.

"The primary determination of public need and character of remedy in the exercise of the police power is in the legislature, and its statutes must be sustained unless the remedy is palpably unreasonable and arbitrary so as needlessly to invade property or personal rights as protected by the Constitution. *Carolene Products Co v. Thomson, supra.*" *Grocers Dairy Co v Department of Agriculture Director, supra*, 76

In applying this standard to the question of the sale of milk in one-gallon containers, the court looked to the record below and found that there was no deception or confusion created by the sale of milk in one-gallon containers. The sale of milk in one-gallon containers was legal in other states. The court further found that the sale of milk in one-gallon containers did not present a health hazard that was different than that presented by the sale in other size containers. It concluded that there was no basis in the public health, safety or welfare for denying the sale of milk in one-gallon containers.

The above discussed series of cases set forth the standards which the Michigan courts will apply to test the constitutionality of state regulatory laws. The courts will scrutinize a law which is prohibitive of the sale or use of a product more closely than that which merely regulates. 1965 PA 233, § 6, *supra*, limits the allowable container sizes thus prohibiting the use of three-quart milk containers. Therefore, the law is subject to the strictest scrutiny of the courts; it must reasonably regulate or prohibit the evil which it is designated to correct.

Although the standardizing of the size of milk containers, 1965 PA 233, § 6, *supra*, can enhance quality and price competition because odd size containers can make it difficult for the consumer to determine unit cost, three-quart milk containers have not been demonstrated to be a harmful or hazardous product. For the above reasons, the absolute prohibition of its use in the State of Michigan bears no reasonable relationship to an evil which 1965 PA 233, § 6, *supra*, was designed to correct.

Therefore, for the above reasons, it is my conclusion that the failure of 1965 PA 233, § 6, *supra*, to permit the sale of milk in three-quart containers is an unconstitutional infringement on the right to engage in business. This opinion reaffirms the authority of the legislature to establish container sizes that protect the consuming public from deception that might ensue from a proliferation of irregular size containers.

FRANK J. KELLEY,
Attorney General.
