

2. If the answer to question 1 is in the negative, what, if any, regulations on power of arrest are applicable under Florida law and the directives of the Police Standards Board?

SUMMARY:

The police reserves cannot operate in that capacity without meeting the requirements established by the Police Standards Board. Their authority to make arrests, if they have not met those requirements, is no broader than that of a private citizen.

Until the adoption by the legislature of part IV, Ch. 23, F. S., and in particular Ch. 71-125, Laws of Florida, which added to the aforementioned chapter §§23.061 (4) and 23.067 (2), part-time reserve or auxiliary police officers were not controlled by the Police Standards Board. That is to say that the training and qualification requirements authorized to be imposed by that board had no application thereto. Since that time, of course, the Police Standards Board has promulgated rules and regulations regarding part-time or auxiliary police officers. Said rules and regulations are, respectively, Rule 9A-10.07 which establishes an auxiliary recruit minimum curriculum, and Rule 9A-10 which determines the function of part-time and auxiliary police officers as well as establishing classification, qualification, and training for auxiliary police officers and for part-time police officers.

I am satisfied that it makes no difference whether one considers the Daytona Beach 100-man reserve force to be auxiliary or part-time police officers, but they must come under the aforementioned rules as well as the general requirements as set out by part IV of Ch. 23, F. S., relating to the Police Standards Board. Please understand that I do not minimize the importance of the availability of such a force to law enforcement in the Daytona Beach area. I am satisfied they are both needed and desirable when used in accordance with the laws applicable thereto.

I am taking the liberty of enclosing a copy of AGO 073-14 rendered by me regarding the general subject matter, a reading of which will prove interesting in the circumstances.

Over and above that matter, I make the following observations: I know of no reason why the Daytona Beach Police Reserves Force cannot operate as an adjunct of local law enforcement, including the carrying of arms and exercising the power of arrest, so long as its membership meets the requirements established by the Police Standards Board. To hold otherwise would be to permit them to function whenever deemed necessary by the city manager without any restraint such as that routinely imposed on full-time line law enforcement officers. In other words, the reserves would have blanket authority, while the line officers would have to meet the requirements of police standards. Accordingly, your first question is answered in the negative.

Since I have answered your initial question in the negative, it follows that the scope of authority of the Daytona Beach Police Reserves with regard to arrest and such other police functions as they may carry out is, unless each member meets the requirements of the Police Standards Board, no greater than that of a private citizen. In other words, they act at their own peril.

073-399—October 25, 1973

TAXATION

**MUNICIPAL OCCUPATIONAL LICENSE TAX—VENDING
MACHINES, BUSINESSES, OCCUPATIONS**

To: William E. Weller, City Attorney, Cocoa Beach

Prepared by: Stephen E. Mitchell, Assistant Attorney General

QUESTIONS:

1. From whom may a municipality collect an occupational license fee when the distributor of pinball machines and music boxes has his place of business in the county but installs his machines within the city?
2. Is the same result reached if the machines to be taxed dispense merchandise rather than games or music?
3. Is the three dollar fee to transfer a license valid inasmuch as this fee may be equal to or greater than the original license fee?
4. Is the period of delinquency unreasonably long since some businesses may stay in operation until the end of the period and then go out of business, depriving the municipality of income?
5. Under what standards may a license fee be imposed on businesses or occupations which were not taxed as of the effective date of Ch. 72-306, Laws of Florida?
6. What restrictions may a municipality impose on a contractor licensed in the county or another municipality regarding bonding, insurance, state registration, or display of license?

SUMMARY:

The operation of a vending machine constitutes a single taxable privilege under the Local Occupational License Tax Act, and depending upon the facts and the ordinance in question, the liability may lie with either the owner/distributor or the establishment where the machine is located. There is no distinction in the application of the occupational license tax law on the basis of whether the machine dispenses merchandise or performs a service.

The three dollar transfer fee and the delinquency penalty fixed by the legislature in Ch. 205, F. S., are presumptively valid and reasonable, and are required to be given effect unless and until declared by the judiciary to be arbitrary, unreasonable, or otherwise invalid.

Chapter 205, F. S., does not prohibit occupational license taxation of businesses, occupations, and professions which were not taxed by the municipality before October 1, 1971, and a municipality may, upon complying with the terms and conditions of §205.042, establish new classifications and rates applicable thereto for such prior untaxed businesses, occupations, or professions.

A municipality that may not require an occupational license tax from a contractor because the contractor does not maintain a permanent place of business or branch office within the municipality may impose upon both registered and certified contractors those restrictions provided for in §468.113, F. S., including regulation of quality and character of work performed, submission to and approval by the municipality of plans and specifications, and exaction of inspection fees. In addition, the several municipalities may test the competency of registered contractors for their respective territorial areas. A municipality may not require certified contractors to show evidence of liability insurance or to post a performance bond. Pursuant to a proper nondiscriminatory regulatory ordinance, these requirements may be imposed on registered contractors as prerequisites to the issuance of a local regulatory license or certificate of competency.

Pursuant to §205.042, F. S. [Ch. 72-306, Laws of Florida], municipalities may levy an occupational license tax upon the exercise of certain privileges within the corporate limits when the taxpayer maintains a permanent business location or branch office in the municipality. See AGO's 073-172 and 072-236. Section 205.042(3), however, does not require maintenance of a permanent business

location or branch office when the person transacts any business or engages in any occupation or profession in interstate commerce (where such license tax is not prohibited by the U.S. Constitution). Cf. AGO's 073-162 and 071-76. There does not appear to be any state preemption in the license tax field in relation to vending machines.

Considering a vending machine to be a "permanent business location or branch office" so that the owner/distributor of the machine operates within the purview of §205.042, F. S., i.e., engages in business at a place of business within the municipality's jurisdiction, a municipality has the legislative authority to levy such a tax on the owner/distributor of the machines. In the alternative, the municipality could levy the tax upon the establishment where the vending machine is located. See §205.551(2), F. S. 1971. As this activity constitutes a single taxable privilege, one license tax may be levied and the municipality may legislatively determine upon which party the liability will lie depending upon the fact situation involved.

No distinction in application of a municipal occupational license tax ordinance covering vending machines is necessary on the basis of whether the machine dispenses merchandise or provides a service or amusement. "A machine actuated by a coin deposit, which performs a service of value is as clearly within the statute as a machine which dispenses valuable merchandise." *Overstreet v. Pulver*, 125 So.2d 122, 123 (3 D.C.A. Fla., 1960). See also §205.551(1)(c), F. S. 1971.

Questions 3 and 4 relate to legislative policy determinations. The three-dollar transfer fee is mandatory to assist in defraying administrative costs. Section 205.043(3), F. S.; AGO 072-397. Section 205.053(1), F. S., provides a delinquency penalty of 10 percent for the month of October and 5 percent for every month thereafter until paid; however, the total delinquency penalty shall not exceed 25 percent of the license fee for such delinquent establishments. The validity and reasonableness of these provisions is presumed as they are within the prerogative of the legislature, and the transfer fee and the delinquency penalty fixed by the legislature are required to be given effect unless and until the judiciary should rule in an appropriate proceeding that either the fee or the penalty is arbitrary, unreasonable, or otherwise invalid.

While §205.043(1)(b), F. S., imposes a condition on the authority of the municipal governing body to levy license taxes that "[n]o occupational license tax levied . . . shall be at a rate greater than that now in effect . . . for the year beginning October 1, 1971," §205.042, *supra*, empowers the governing body to levy a license tax for the privilege of engaging in or managing any business, occupation, or profession within its jurisdiction. The statute does not prohibit the taxation of businesses, occupations, and professions which were not taxed by the municipality before October 1, 1971, or the effective date of Ch. 72-306, Laws of Florida, (April 25, 1972). Rather §205.042(1) authorizes the municipality to levy the license tax on "[a]ny person who maintains a permanent business location . . . within said municipality, for the privilege of engaging in or managing any business within its jurisdiction," subject only to the several conditions prescribed by §205.043, F. S. Thus, a municipality may, upon complying with the terms and conditions of §205.042, establish new classifications and rates applicable thereto, irrespective of whether the business, occupation, or profession so classified and taxed was being taxed on or before October 1, 1971.

It might be noted that Ch. 73-129, Laws of Florida, effective October 1, 1973, authorizes a municipality to raise, by taxation and licenses authorized by the Constitution or general law, amounts of money which are necessary for the conduct of municipal government and to enforce their receipt and collection in the manner prescribed by ordinance not inconsistent with law. Section 166.201, F. S.

It should be noted that Ch. 73-144, Laws of Florida, effective June 11, 1973, repealed §4 of Ch. 72-306, which section would have repealed all of Ch. 72-306 on September 30, 1973.

Your final question relates to topics within the purview of a municipality's

police power rather than its taxing power. Chapter 73-129, Laws of Florida, the Municipal Home Rule Powers Act (effective October 1, 1973), provides in new §166.221, F. S.:

A municipality may levy reasonable business, professional and occupational regulatory fees, commensurate with the cost of the regulatory activity including consumer protection, on such classes of businesses, professions and occupations *whose regulation has not been preempted by the state or a county pursuant to a county charter.* (Emphasis supplied.)

Section 205.022(1), F. S., recognizes the regulatory power of the various governmental entities and distinguishes occupational licenses based on the taxing power from those regulatory licenses and fees derived from the police power:

"Local occupational license" . . . shall not mean any fees or licenses paid to any board, commission, or officer for permits, registration, examination, or inspection. Unless otherwise provided by law, these are deemed to be regulatory and in addition to, and not in lieu of, any local occupational license imposed under the provisions of this chapter.

Thus, a municipality may impose regulatory measures upon contractors, even though an occupational license tax may not be exacted, to the extent the regulation of contractors has not been preempted by part II of Ch. 468, F. S.

If a certified contractor, per §468.106, F. S. 1971, as amended by §5, Ch. 73-205, Laws of Florida, enters another municipality in which he maintains neither a branch office nor place of business, the only prerequisite to contracting in that area is the exhibition to the city building official of evidence of a current certificate and payment of the building permit fee. Section 468.106(6). Pursuant to §468.113, F. S. (1972 Supp.), as amended by §8, Ch. 73-205, Laws of Florida, this other city may exact inspection fees, regulate the quality and character of work performed, and require submission to and approval by the municipality of plans and specifications of work to be performed.

Except as above noted, the regulation of certified contractors is preempted to the state by part II of Ch. 468, F. S., within the meaning of §166.221, *supra*. Attorney General Opinion 070-48. Thus, the other city may not impose other regulatory measures such as bonding restrictions or requirements, registration requirements, or insurance requirements—which are regulated by §468.106(4) as amended by Ch. 73-205, Laws of Florida. The city may require the certified contractor to exhibit this current certificate or evidence thereof to the building official—§§468.106(6) and 468.113(5)—but the city could not otherwise require such certificate to be "displayed."

A registered contractor is one who is licensed to engage in the business of contracting within a specified area. My predecessor in office concluded that a municipality in which a contractor registered in that area was seeking to build could not impose any bonding or other similar requirements as a prerequisite to the issuance of a building permit. Attorney General Opinion 070-48. However, unlike the statutory provisions for certification, Ch. 468, F. S., makes no attempt to require the state agency to investigate the financial stability of the registered contractor or require him to carry liability insurance. Therefore, the city could require evidence of liability insurance and the posting of a performance bond as prerequisites to issuance of a *regulatory* license or prior to obtaining a competency certificate from the local board. See §468.105(2), as amended by Ch. 73-205, Laws of Florida, and §468.113(6), F. S. (1972 Supp.). Of course, in the event of such an ordinance under Ch. 73-129, Laws of Florida, the Municipal Home Rule Powers Act, the ordinance would have to require the same regulations for those registered contractors having their place of business or a branch office within the city as for those based without.

In addition to the competency examination mentioned above, which a municipality may require only for registered contractors, the city may impose the same regulations as those named for certified contractors.

073-400—October 30, 1973

COUNTIES

EXPENDITURES UNDER TENTATIVE BUDGET PENDING APPROVAL TO TAX ROLL AND FINAL BUDGET

To: Alton M. Towles, Attorney, Gadsden County Commission, Quincy

Prepared by: Rebecca Bowles Hawkins, Assistant Attorney General

QUESTION:

May county funds be disbursed for payroll and other operating expenses of the county in accordance with a tentative budget approved by the board of county commissioners pending final approval of the tax roll and county budget for the fiscal year that began on October 1, 1973?

SUMMARY:

Pending legislative or judicial clarification, county funds may be disbursed under a tentative budget duly adopted by the county commissioners in accordance with the procedure required by law, until such time as the county tax assessment roll is finally approved and its final budget is adopted.

It was ruled in AGO 062-136 that the provisions of §129.03, F. S., prescribing the procedure for the preparation of the county budget,

. . . contemplate the preparation of a tentative county budget, based on the tentative figures furnished by the county assessor of taxes under §129.03(1), F. S., and final county budget after the millages have been ascertained and fixed through the use of the equalized and final assessment valuations.

Until there is a legal final county budget duly made and adopted for each and every fiscal year, no county expenditures are authorized. This being true, expenditures made from county funds prior to the making of the final budget would seem to be illegal and unauthorized.

However, it was ruled administratively by the comptroller in 1966, following a court decision requiring counties to assess property at its "fair market value" [Walter v. Schuler, 176 So.2d 81 (Fla. 1965)], that counties could operate on a tentative budget, pending the completion of tax assessment reappraisals that could not possibly be completed prior to the time for final approval of the budget. This ruling is in accordance with the decision in Dickinson v. Geraci, 190 So.2d 368 (3 D.C.A. Fla., 1966), affirming the trial court's judgment that Hillsborough County's 1966 tax roll, prepared in accordance with the procedure followed in prior years, should be accepted by the comptroller, pending a reappraisal of the property. Noting that it was physically impossible to complete the reappraisal in time for use in preparing the 1966 tax rolls, the court quoted with approval the opinion by the late Mr. Justice Thorne in State *ex rel.* Glynn v. McNayr, 133 So.2d 312 (Fla. 1961), as follows:

We think also that within the area of discretion available to him in a mandamus proceeding, the trial judge properly denied the peremptory writ on the ground that the command of the requested writ, even if valid,