

## Opinion No. 63-38

April 18, 1963

**BY:** OPINION of EARL E. HARTLEY, Attorney General

**TO:** Albert L. Cass County Clerk Union County Clayton, New Mexico

### QUESTION

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Is a drive-in movie theatre located outside the limits of an incorporated municipality subject to a county occupation license tax under N.M.S.A., 60-1-4 (1953)?

#### CONCLUSION

Yes.

### OPINION

#### {\*78} ANALYSIS

N.M.S.A. 60-1-4 (1953) provides: "-- All persons who are the owners, or have under their control or management any building or premises used as a place of public amusement or entertainment and who shall rent or hire the same for theaters, public balls and public entertainments for hire, where such hall or building has a seating capacity of three hundred (300) persons, shall pay a license tax of ten dollars (\$ 10.00) per annum, and where such hall or building has a seating capacity of more than three hundred (300) persons, shall pay a license tax of twenty-five dollars (\$ 25.00) per annum: Provided, this shall not apply to {\*79} any building used in whole or in part as an educational institution.

The tax is placed on those who are the owners or managers of buildings or premises used for amusement enterprises and is measured by the seating capacity of the building.

Is a drive-in movie a building within the meaning of Section 60-1-4? In **State v. Ornelas**, 42 N.M. 17, 74 P. 2d 723 (1938) the New Mexico Court had occasion to define the word "building." The court said that building had no very specific meaning, but that it should be defined in terms of the context in which it is used. A building need not necessarily be a walled structure used to house people as the **Ornelas** case, supra, demonstrates with its holdings that a water tank is a building. In **Lowdon v. Jefferson County Excise Board**, 190 Okla. 276, 122 P. 2d 991 (1942) an outdoor stadium was held to be a building.

It is apparent that the legislature intended to place an occupational license tax on permanent or semipermanent entertainment enterprises measured by the seating capacity of their auditoriums. Compare N.M.S.A. 60-4-1 through 60-4-12 and 15-36-25 which provide for taxes on occasional and itinerent entertainment enterprises.

We believe that reading the statute as a whole and considering the definition of the term "building" in **Lowden** and **Ornelas** cases, supra, it does no damage to the statute to advise that a drivein move theatre is a building within the meaning of Section 60-1-4.

It is our conclusion, therefore, that drive-in movie theatres located outside the limits of an incorporated municipality are subject to a county occupation license tax.

By: Joel M. Carson

Assistant Attorney General