September 1, 2000

The Honorable Robert D. Rinfret
Holmes County Prosecuting Attorney
91 South Monroe Street
Millersburg, Ohio 44654

SYLLABUS: 2000-032

Other than through the zoning powers conferred upon boards of county commissioners by R.C. Chapter 303, such boards are without authority to regulate the placement of advertising devices along roads or highways within the county that have been designated as scenic byways by the Ohio Director of Transportation pursuant to R.C. 5516.05.

September 1, 2000

OPINION NO. 2000-032

The Honorable Robert D. Rinfret
Holmes County Prosecuting Attorney
91 South Monroe Street
Millersburg, Ohio 44654

Dear Prosecutor Rinfret:

You have requested an opinion concerning the authority of a board of county commissioners to regulate the placement of off-premises outdoor advertising signs along state primary and secondary highways in the county. Your office has advised us that the county commissioners' specific concern is whether they have authority, other than through their zoning powers, to regulate off-premises signs on highways in the county that have been designated as "scenic byways" by the Ohio Director of Transportation in accordance with R.C. Chapter 5516.[1]

In answering your question, we must begin by noting that a board of county commissioners is a creature of statute with only those powers and duties imposed upon it by statute. *See Geauga County Bd. of Comm'rs v. Munn Road Sand & Gravel*, 67 Ohio St.3d 579, 582, 621 N.E.2d 696, 699 (1993) ("[c]ounties … may exercise only those powers affirmatively granted by the General Assembly"). Thus, we must determine whether the General Assembly has conferred upon county commissioners the authority to regulate the placement of such signs in the locations you describe.[2]

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[1] Your question refers specifically to "off-premises" signs. R.C. 5516.05 prohibits the erection of advertising devices on highways designated thereunder as scenic byways, with limited exceptions for devices advertising, among other things, the sale or lease of, or activities occurring on, the premises on which the device is located. *See, e.g.*, R.C. 5516.02(B), (C), and (D). We assume, therefore, that your reference to "off-premises" signs refers to devices that advertise matters not related to the premises on which the devices are located.

[2] Because you have stated that the county commissioners are not interested in regulating the placement of the signs you describe through county zoning, we will not address the powers conferred upon county commissioners by R.C. Chapter 303. *See generally* 1987 Op. Att'y Gen. No. 87-081 (syllabus, paragraph two) ("[p]ursuant to the zoning powers conferred upon a board of

As noted in your opinion request, specific authority has been granted to the Director of Transportation with respect to the designation of certain highways as "scenic byways." Pursuant to R.C. 5516.05:

> The director of transportation may designate any portion of the *interstate system*, *national highway system*, or *primary system* as a *scenic byway*.[3] The director shall exclude from designation as a scenic byway any segment of a highway in a zoned or unzoned commercial or industrial area that is determined by the director to be inconsistent with the designation of a scenic byway.
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> *No advertising device may be erected upon a designated scenic byway, except* in accordance with [R.C. 5516.02(A), (B), or (C)], [R.C. 5516.06(A), (B), (C), (D), (E), or (G)], or [R.C. 5516.061(A), (B), (C), or (D)].[4] Any advertising device lawfully in existence prior to the designation of a scenic byway, upon such designation, is a nonconforming advertising device under [R.C. 5516.07 (standards for maintenance and removal of nonconforming advertising device)]. (Emphasis and footnotes added.)

Thus, pursuant to R.C. 5516.05, it is within the discretion of the Director of Transportation to designate any portion of certain highways as a scenic byway. Once such designation has been made, R.C. 5516.05 prohibits, with certain statutory exceptions, the erection of any advertising device upon such scenic byway.

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county commissioners and a board of township trustees by R.C. 303.02 and R.C. 519.02, respectively, such boards may regulate by resolution the location, height, bulk, and size of free-standing billboards in the unincorporated areas of such county or township").

[3] As defined in R.C. 5516.01(C), "[i]nterstate system" means "that portion of the interstate system, or the national highway system, located within this state, as designated by the [Director of Transportation] and approved by the secretary of transportation of the United States, pursuant to 23 U.S.C.A. 103(b) and (e)." "Primary system" means "that portion of the state highway system or national highway system located within this state as designated by the [Director of Transportation] and approved by the secretary of transportation of the United States, pursuant to 23 U.S.C.A. 103(b)." R.C. 5516.01(G). "Scenic byway" means "any linear transportation corridor as designated … by the [Director of Transportation] under the Ohio scenic byways program as having outstanding scenic qualities." R.C. 5516.01(M).

[4] The exceptions from the prohibition against the placement of advertising on roads designated as scenic byways include, among others, conforming directional and official signs, signs advertising the sale or lease of the property upon which they are located, conforming advertising devices "indicating the name of the business, activities, or profession conducted on such property or that identify the goods produced, sold, or services rendered on such property, and that conform to rules adopted by the director," R.C. 5516.06(C), and precautionary signs relating to the premises on specific types of highways.

R.C. Chapter 5516 also regulates advertising devices upon other types of highways within the state. *See, e.g.*, R.C. 5516.02 (prohibiting, with certain exceptions, the erection or maintenance of an advertising device, as defined in R.C. 5516.01(A), "within six hundred sixty feet of the edge of the right-of-way of a highway on the *interstate system*" (emphasis added)); R.C. 5516.06 (prohibiting, with certain exceptions, the erection or maintenance of an advertising device "within six hundred sixty feet of the edge of the right-of-way of a highway on the *primary system*" (emphasis added); R.C. 5516.061 (prohibiting, with certain exceptions, the erection of an advertising device outside of urban areas "between six hundred sixty feet and three thousand feet of the right-of-way of the main traveled way of a highway on the *interstate or primary system* if such device would be visible from such main traveled way" (emphasis added)).

As part of this regulatory scheme, the General Assembly has imposed various duties upon the Director of Transportation. For example, R.C. 5516.03 requires the Director of Transportation to "adopt, amend, and enforce rules, consistent with the customary use of outdoor advertising, the safety of the traveling public, and national policy as are necessary to carry out the provisions of this chapter." *See, e.g.*, 16 Ohio Admin. Code Chapter 5501:2-2 (highway and interstate advertising). In addition, R.C. 5516.04 establishes the procedure by which the Director of Transportation may effect the removal or remediation of any device that violates R.C. 5516.02, R.C. 5516.06, or R.C. 5516.061. Another duty of the Director of Transportation is prescribed by R.C. 5516.10, which establishes a system for the issuance of permits for the erection, use, maintenance, operation, and construction of advertising devices in those locations described in R.C. 5516.10(A)(1), or for the maintenance of a nonconforming advertising device. *See generally* [1999-2000 Ohio Monthly Record vol. 1] Ohio Admin. Code 5501:2-2-09 at 315 (treatment of requests for advertising device permits for proposed scenic byway).

The General Assembly has also addressed the role of local authorities with respect to advertising devices. Pursuant to R.C. 5516.11:

> This chapter does not affect the authority of a state, *county*, municipal, or other local *zoning authority* to zone areas for commercial or industrial purposes under its respective zoning laws. Whenever a state, county, municipal, or other local zoning authority has adopted comprehensive zoning and established rules and regulations controlling the size, lighting, and spacing of outdoor advertising devices, that are equivalent to and consistent with the intent of this chapter, such rules and regulations will be accepted in lieu of the controls provided in [R.C. 5516.02(D)][5]

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[5] R.C. 5516.02 states in pertinent part:

> No advertising device shall be erected or maintained within six hundred sixty feet of the edge of the right-of-way of a highway on the interstate system except the following:
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> ….

> and in [R.C. 5516.061][6] in the commercial and industrial zones within the geographical jurisdiction of such authority.
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> Whenever a zoning authority establishes new comprehensive zoning rules or regulations, a copy thereof shall be furnished to the director of transportation within thirty days after its passage.
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> [R.C. Chapter 5516] shall not be construed to allow the erection of an advertising device in an area *zoned by* state, *county*, municipal, or other local *authorities* to exclude such devices. (Emphasis and footnotes added.)

The General Assembly has, therefore, expressly provided that R.C. Chapter 5516 does not preclude local zoning authorities from zoning for commercial or industrial purposes. *See Weir v. Rimmelin*, 15 Ohio St. 3d 55, 57, 472 N.E.2d 341, 344 (1984) ("[a]lthough the state's regulatory power is quite apparent, we do not find any legislative intent in the federal Highway Beautification Act, or R.C. Chapter 5516, to preempt municipal regulation of outdoor advertising signs").

Moreover, in the event that a local zoning authority adopts a comprehensive zoning plan that is equivalent to, and consistent with, R.C. Chapter 5516, the local regulations will prevail over the provisions of R.C. 5516.02(D) and R.C. 5516.061 in the commercial and industrial zones covered by the zoning plan. *See also* R.C. 5516.10(C) (stating in part, "[i]f a permit is issued by a zoning authority pursuant to its ordinances, rules, or regulations controlling outdoor advertising devices, a copy thereof shall be furnished to the director with any application for a new permit required by this section or within thirty days of its issuance by a zoning authority"). The final paragraph of R.C. 5516.11 specifically recognizes that county and other local authorities may prohibit the erection of advertising devices through the adoption of local zoning regulations that exclude such devices.

Additional authority is granted to, among others, a county zoning authority by R.C. 5516.08, pursuant to which the zoning authority may, in accordance with the appropriation procedure described therein, order the removal of nonconforming advertising devices that are lawfully maintained in accordance with R.C. 5516.07 or a zoning ordinance or regulation. *See generally* R.C. 5516.01(L) (defining "[n]onconforming advertising device," as used in R.C. Chapter 5516); R.C. 5516.07 (stating in part, "[a] nonconforming advertising device found to be in violation of any of the provisions of this Chapter or the rules adopted thereunder may be subject to removal without compensation"). The authority conferred by R.C. 5516.08 is specifically granted to "the director of

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> (D) Advertising devices that are located in commercial or industrial zones traversed by segments of the interstate system within the boundaries of a municipal corporation as such boundaries existed on September 21, 1959, and that conform to rules adopted by the director….

[6] R.C. 5516.061 prohibits, with certain exceptions, the erection of any advertising device outside of urban areas "between six hundred sixty feet and three thousand feet of the right-of-way of the main traveled way of a highway on the interstate or primary system if such device would be visible from such main traveled way."

transportation, or a state, county, municipal, or other local zoning authority." A county that has not proceeded with county zoning, as described in R.C. Chapter 303, however, has no county zoning authority through which it may act under R.C. 5516.08.

In addition to its power to regulate the placement of outdoor advertising devices through the adoption of zoning regulations, a board of county commissioners has been granted certain authority with respect to obstructions in any highway that is not part of the state highway system. R.C. 5547.04, in part, prohibits the erection or maintenance of obstructions within the bounds of a highway. R.C. 5547.04 imposes upon the board of county commissioners the duty of enforcing the prohibition therein against the maintenance of obstructions within the bounds of a highway. In addition, R.C. 5547.04 prohibits an obstruction erected prior to July 16, 1925, from remaining in a road or highway that is not part of the state highway system unless the board of county commissioners first consents. Specifically concerning the placement of advertising on or near highways, R.C. 5547.04 states: "All advertising or other signs and posters erected, displayed, or maintained on, along, or near any public highway, and in such a location as to obstruct, at curves or intersecting roads, the view of drivers using such highway, are obstructions."

Thus, R.C. 5547.04 imposes a duty upon a board of county commissioners to enforce the prohibitions therein against the placement or maintenance of obstructions on roads and highways other than those roads and highways on the state highway system.[7] Should an advertising device be located in such a manner that it constitutes an obstruction in a road or highway that is not part of the state highway system, the county commissioners shall enforce the provisions of R.C. 5547.04 requiring removal of any such obstruction.[8]

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[7] R.C. 5547.04 authorizes a board of county commissioners to utilize the procedures of R.C. 5547.03 in its enforcement of R.C. 5547.04. Among the powers conferred upon a board of county commissioners by R.C. 5547.03 are the power to consent to and approve of the relocation of properties within the bounds of highways, bridges, or culverts, and, in certain instances, to proceed with the removal or relocation of the obstruction. R.C. 5547.03 also authorizes the county engineer to determine whether any properties located within the bounds of a highway, bridge, or culvert "constitute obstructions or interfere with the construction, improvement, maintenance, or repair of such highways, bridges, or culverts, or the use thereof by the traveling public."

[8] *See generally* R.C. 163.31-.33 (concerning payment by a public agency, including a county, of just compensation to the owner of an advertising device and to the owner of land on which the advertising device is located prior to the removal of the device pursuant to law); *Ellis v. Ohio Turnpike Comm'n*, 162 Ohio St. 86, 120 N.E.2d 719 (1954) (syllabus, paragraph two) ("[t]he Ohio Turnpike Act ([R.C. 5537.01-.23]) does not authorize the Turnpike Commission to acquire by appropriation proceedings the right to prohibit the erection and maintenance of billboards, signs, notices, posters or other advertising devices on the remaining lands of an owner whose property is taken for turnpike construction purposes"); *Wray v. Stvartak*, 121 Ohio App. 3d 462, 700 N.E.2d 347 (Lucas County 1997) (distinguishing between the power to remove advertising devices under

Apart from the authority granted to boards of county commissioners by R.C. 5547.04 to remove any advertising device that constitutes an obstruction in a road or highway that is not part of the state highway system, however, no provision of law authorizes a board of county commissioners, other than through its zoning authority under R.C. Chapter 303, to regulate the placement of advertising devices along highways within the county.

Based upon the foregoing, it is my opinion, and you are hereby advised that, other than through the zoning powers conferred upon boards of county commissioners by R.C. Chapter 303, such boards are without authority to regulate the placement of advertising devices along roads or highways within the county that have been designated as scenic byways by the Ohio Director of Transportation pursuant to R.C. 5516.05.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

R.C. 5516.08 and the appropriation of property that results in the removal of advertising devices in accordance with R.C. 163.31-.33).