

**OPINION NO. 74-008****Syllabus:**

1. Neither R.C. Chapter 3721. nor the Ohio Fire Code are applicable to county homes and county nursing homes. (Opinion No. 70-164, Opinions of the Attorney General for 1970, approved and followed.)

2. Orders of the Fire Marshal issued pursuant to R.C. Chapter 3737. are applicable to county homes and county nursing homes. Such orders must be based upon generally accepted standards of safety concerning such homes. (Opinion No. 3044, Opinions of the Attorney General for 1948, approved and followed.)

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**To: James Caldwell, State Fire Marshal, Dept. of Commerce, Columbus, Ohio**  
**By: William J. Brown, Attorney General, February 8, 1974**

I have before me your request for my opinion which reads as follows:

"As you know, there are numerous rest homes and nursing homes in Ohio. Chapter 3721, Ohio

Revised Code, defines and classifies such homes; provides certain standards for their operation; and requires licensure by the Director of Health, where such homes are operated by a 'person, firm, association, or corporation.'

"My office is particularly interested in the fire safety provision (standards) relating to these homes. These provisions are contained in Chapter 3721, in the Ohio Fire Code, and in the Ohio Building Code. (Also see House Bill 1086, copy attached.)

"My problem stems from the fact that county operated rest homes and nursing homes are apparently not licensed by the Director of Health. This non-licensure is no problem of itself, but it has led to the feeling of some county operated homes (and of their attorneys) that because they need not be licensed, neither are they subject to fire safety regulations pertaining to rest homes and nursing homes.

"Therefore, my questions are:

- '1. Can we enforce orders on county homes under 3737.01?
- '2. Can we enforce standards described in 3721.03 in county homes?
- '3. Can we enforce 3721.071?
- '4. Can we enforce sections 11.6, 14.4a and 14.6b, OFC in county homes?

"We are in need of resolving this problem as soon as is practical. The Ohio Fire Code and House Bill 1086 have only recently become effective and a number of the standards set out therein have deadlines for compliance by rest homes and nursing homes."

County homes are publicly-owned institutions under the control of the board of county commissioners, who have sole power to contract for the construction of new buildings and repair of existing buildings constituting a county home. R.C. 5155.01. County nursing homes "are established as facilities separate and distinct from the county homes and yet are, in fact, a part thereof \* \* \*." Opinion No. 70-164, Opinions of the Attorney General for 1970. The line between them sometimes blurs, as in the case of a county home which provides nursing care in a medical unit for its residents requiring such care. Opinion No. 70-164, supra.

Your first question is whether your office can enforce orders with respect to county homes, under R.C. 3737.01. I understand that you are using the term "homes" in the broad sense, as it is used in R.C. Chapter 3721., to refer to rest homes, homes for the aging, and nursing homes. Therefore, your question pertains to both county homes and county nursing homes.

My predecessor has advised, and I see no reason to disagree, that county homes and county nursing homes are not subject to the provisions of R.C. Chapter 3721. The reason is that "statutory construction of the words 'person, firm, partnership, association, or corporation' °R.C. 3721.051 has consistently concluded that this phraseology excludes the state or a political subdivision from otherwise operable provisions of statutory law." Opinion No. 70-164, Opinions of the Attorney General for 1970. Therefore, county homes and county nursing homes need not be licensed under R.C. Chapter 3721., and the regulations of the fire marshal adopted pursuant to R.C. 3721.02 and the requirement of an automatic fire sprinkler system and fire alarm system (R.C. 3721.071) do not apply. Your second and third questions, then, must be answered in the negative, with respect to such homes. So also must your fourth question, which pertains to provisions of the Ohio Fire Code, promulgated by the Fire Marshal, which apply to nursing homes, rest homes, and homes for the aging as defined in R.C. 3721.01.

However, these conclusions do not apply to R.C. Chapter 3737., relating to the authority of the Fire Marshal. R.C. 3737.01 reads as follows:

"If the fire marshal, his assistants, or any officer mentioned in section 3737.14 of the Revised Code, upon an examination or inspection, finds a building or other structure, which for want of proper repair, by reason of age and dilapidated condition, defective or poorly installed electrical wiring and equipment, defective chimneys, defective gas connections, defective heating apparatus, or for any other reason, is especially liable to fire or endangers life or other buildings or property, such officer shall order such buildings to be repaired, torn down, demolished, materials removed, and all dangerous conditions remedied. If such officer finds in a building or upon any premises any combustible or explosive material, rubbish, rags, waste, oils, gasoline, or inflammable conditions of any kind, dangerous to the safety of such buildings, premises, or property, he shall order such materials removed or conditions remedied. If such officer finds that any building, structure, tank, container, or vehicle used for the storage, handling, or transportation of flammable or combustible liquids, or of liquefied petroleum gases, or the pumps, piping, valves, wiring, and materials used in connection therewith does not comply with the standards or orders of the marshal, he shall make such order as may be reasonably necessary to insure such compliance. Such order shall be made against, and served personally or by registered letter upon, the owner, lessee, agent, operator, or occupant of such buildings, or premises and thereupon such order shall be complied with by the owner, lessee, agent, operator, or occupant within the time fixed in said order."

Note that there is no specification of the type of owner, operator, occupant, etc., to which this statute applies. Thus, the statutory language is distinguished from that of R.C. 3721.05, which refers to any "person, firm, partnership, association, or corporation," and therefore was held by my predecessor not to apply to county homes and county nursing homes. Opinion No. 70-164, supra.

A general statute does not apply to the state unless expressly so provided in the statute. See, e.g., State, ex rel. v. Cappeller, 39 Ohio St. 207 (1883), Opinion No. 7436, Opinions of the Attorney General for 1956. However, this rule does not apply to political subdivisions of the state, as opposed to state agencies. In Opinion No. 7436, supra, my predecessor advised that the board of health of a general health district has jurisdiction over county-owned property but not state-owned property. The reason for the lack of jurisdiction over state-owned property was a line of Opinions of the Attorney General, discussed at 823-824, based upon the rule that general statutes do not apply to the sovereign unless expressly made applicable. My predecessor did not mention this rule with respect to the county, concluding that the broad language of the applicable statutes and the overriding state interest in public health indicated a legislative intent to grant boards of health jurisdiction over county property. He stated at 823 as follows:

"If the county commissioners should allow conditions in a county building to become highly unsanitary and a menace to the public health, or sewage wastes from such building to be discharged into an open ditch or upon a public highway, is it possible that the district board of health would be powerless to compel them to remedy such condition or abate such nuisance? Even if the board of health could not revert to the criminal penalties prescribed by the law, they could certainly have the right to the aid of the courts, by way of injunctive relief.

"I can see no reason, therefore, why the jurisdiction of a district board of health should not extend as well to buildings and properties owned by the county situated within its jurisdiction as well as to properties owned by private individuals and corporations."

Therefore, the mere fact that R.C. Chapter 3737. does not expressly apply to political subdivisions does not preclude it from applying to them by implication.

Aside from this consideration, another of my predecessors has advised that the forerunner of R.C. 3737.01 applied to a board of education, even though such board is in effect an agency of the state. Opinion No. 3044, Opinions of the Attorney General for 1948. However, my predecessor concluded that the doctrine of sovereign immunity would shield the board of education from civil liability. The syllabus of the Opinion reads as follows:

"Where a board of education fails to comply with an order of the state fire marshal given pursuant to Section 835, General Code, to tear down a school building belonging to said district, but continues to use said building for the reason that no other suitable building or rooms are available, such board of education will not be liable for damages to one who suffers loss or injury because of fire or other catastrophe in the condemned building."

My predecessor hinted, but did not state, that members of the board could be subject to criminal penalties under the forerunners of R.C. 3737.27 and 3791.02, the latter relating to building regulations. He stated at 187 as follows:

"While your letter does not raise the question of criminal liability, I have noted the last above quoted statute as indicating a determination of the legislature to make the law as effective as possible, even to the extent of imposing a criminal liability on members of boards of education who disregard an order of the state fire marshal as to the demolition of dangerous buildings. For the purpose of this opinion we may assume that the order in question was justified."

With respect to possible civil liability of the board members, as opposed to the board of education itself, my predecessor stated as follows at 188-189:

"As to the personal liability of individual members of the board, that question does not appear to relate to the official duties of a prosecuting attorney, as to which, under Section 343, General Code, I am to give advice, and accordingly I do not deem it proper to discuss that question, and I am therefore confining my opinion to the question of the liability of the board."

The present versions of the statutes mentioned as possibly imposing criminal liability upon the members of the board of education read as follows:

R.C. 3737.27:

"No owner, occupant, lessee, or agent of buildings or premises, and no owner, lessee, operator, or person having the direction and control of any tank, container, vehicle, piping, or equipment, used for the manufacture, storage, handling, sale, or transportation of products subject to sections 3731.01 to 3731.18, inclusive, 3737.01 to 3737.28, inclusive, and 3739.01 to 3739.19, inclusive, of the Revised Code shall willfully fail, neglect, or refuse to comply with any order of the fire marshal or any officer acting under him in the performance of the duties imposed by such sections, within the time prescribed in such order, unless an appeal is taken therefrom or from the final order of the marshal, or of the court on such appeal."

R.C. 3737.99:

\* \* \*                      \* \* \*                      \* \* \*

"(D) Whoever violates section 3737.27 of the Revised Code shall be fined not less than ten nor more than fifty dollars for each day's neglect.

" \* \* \* \* \*"

R.C. 3791.02:

"No owner, or person having the control as an officer or member of a board or committee or otherwise of any opera house, hall, theater, church, schoolhouse, college, academy, seminary, infirmary, sanitarium, children's home, hospital, medical institute, asylum, memorial building, armory, assembly hall, or other building for the assemblage or betterment of people shall fail to obey any order of the fire marshal, the department of industrial relations, the building inspector or commissioner in cities having a building inspection department, or the department of health under Chapters 3781. and 3791. of the Revised Code or rules or regulations adopted pursuant thereto.

"Whoever violates this section shall be fined not more than one thousand dollars."

The last-quoted statute applies to county homes and county nursing homes because of the phrase "infirmary", formerly used in the statutes to refer to county homes; and in any event, the catch-all phrase "or other building for the assemblage or betterment of people", read in light of the foregoing specific terms, covers county homes and county nursing homes.

It may be seen, then, that county homes and county nursing homes are subject to inspection by the Fire Marshal even though R.C. Chapter 3721. does not apply to them. However, not all the enforcement provisions of R.C. Chapter 3737. are applicable. R.C. 3737.28 authorizes an officer who has issued an order to repair or demolish a building, upon noncompliance and exhaustion of appeals remedies, to repair or demolish the building at the expense of the owner, occupant, etc. If payment is not forthcoming, the officer may certify the expense to the county auditor, together with a twenty-five percent penalty, which becomes a special charge against the real estate upon which the building is or was situated, to be collected as taxes. Obviously this remedy cannot be used on county-owned property, which is not subject to taxation by the county.

While not all of the enforcement provisions of R.C. Chapter 3737. are applicable to publicly-owned facilities, the foregoing discussion makes it clear that the Legislature intended the Fire Marshal to have jurisdiction over county homes and

county nursing homes. The proper remedy for enforcement of orders in such a case, as suggested by my predecessor in Opinion No. 7436, supra, would be injunction or mandamus action.

The question remains of what standards the fire marshal should apply with respect to county homes and county nursing homes. R.C. 3737.01 applies to "a building or other structure, which \* \* \* is especially liable to fire or endangers life or other buildings or property \* \* \*." Criteria for standards are set out in R.C. 3737.19, which reads as follows:

"The standards and orders of the fire marshal shall be such as are reasonably necessary for the protection of the persons and property of the public and shall be in substantial conformity with generally accepted standards of safety concerning the subjects thereof. Before making effective any such order, the marshal shall submit the same to the advisory council and shall receive and consider the advice and suggestions of the council with respect thereto."

As I mentioned previously, the licensing requirements of R.C. Chapter 3721. do not apply to county homes and county nursing homes, and therefore neither do that Chapter's requirements of an automatic fire sprinkler system and fire alarm system. However, such requirements may be considered strong evidence of "generally accepted standards of safety" for purposes of the Fire Marshal's orders under R.C. Chapter 3737. Thus, I see no reason why the Fire Marshal could not impose a similar requirement upon county homes and nursing homes, in his sound discretion, after consultation with the seven-member advisory council created by R.C. 3737.06 concerning such a standard.

In specific answer to your question, it is my opinion and you are so advised that:

1. Neither R.C. Chapter 3721. nor the Ohio Fire Code are applicable to county homes and county nursing homes. (Opinion No. 70-164, Opinions of the Attorney General for 1970, approved and followed.)
2. Orders of the Fire Marshal issued pursuant to R.C. Chapter 3737. are applicable to county homes and county nursing homes. Such orders must be based upon generally accepted standards of safety concerning such homes. (Opinion No. 3044, Opinions of the Attorney General for 1948, approved and followed.)