

1828

1. ZONING PLAN—TOWNSHIP TRUSTEES REQUIRED TO HOLD PUBLIC HEARING—AFTER RECEIPT OF CERTIFICATION OF ZONING PLAN FROM TOWNSHIP ZONING COMMISSION—THIRTY DAYS' NOTICE OF HEARING—PUBLICATION OF NOTICE AND DATE FOR HEARING SET BEFORE RECEIPT OF PLAN WILL NOT INVALIDATE FINAL ACTION—ELEMENT OF TIME, THIRTY DAYS—SECTION 3180-32 G.C.
2. ZONING REGULATION—ADOPTED BY TOWNSHIP TRUSTEES—STORE ERECTED FOR SALE OF FOOD AND OTHER MERCHANDISE—OWNER COULD NOT LATER ERECT MOTEL—MOTEL NOT EXTENSION OF STORE BUILDING—SECTIONS 3180-32, 3180-43 G.C.

SYLLABUS:

1. Section 3180-32, General Code, requires township trustees, after receiving the certification of a zoning plan from the township zoning commission, to hold a public hearing thereon, and that at least thirty days' notice of the time and place of such hearing shall be given. The fact that said trustees set the date for such hearing and published notice thereof before the receipt by them of such plan will not invalidate their final action on such plan, provided the full period of thirty days has elapsed between such certification and such hearing.

2. Under the provision of Section 3180-43, General Code, and the provisions of a zoning regulation adopted by township trustees pursuant thereto, authorizing the extension of a non-conforming use, an owner of land in the area regulated, having previously erected a store for the sale of food and other merchandise, could not thereafter erect a motel, which is forbidden by such zoning regulations, and the fact that he had contemplated the erection of such motel prior to the adoption of such regulation, and intended to sell food from such store to the occupants of the motel, would not constitute such motel an extension of such store building.

Columbus, Ohio, September 9, 1952

Hon. Paul J. Mikus, Prosecuting Attorney
Lorain County, Elyria, Ohio

Dear Sir:

I have before me your communication, in which you request my opinion reading as follows:

"I would appreciate an opinion from your office concerning the interpretation of General Code Section 3180-30 and 3180-32 concerning the enactment of a township zoning resolution.

“These are the facts on which your legal opinion is sought:

“Township B duly appointed a Zoning Commission which brought forth a proposed Zoning Plan for said township. Said Commission gave public notice as required in General Code Section 3180-30 on May 16th to hold such public hearing on June 21st. However, the Board of Trustees of said township before the certification of said Zoning Plan from said township’s Zoning Commission as required in General Code Section 3180-32 caused a notice to be published on June 9th for a public hearing to be held by said trustees on said Zoning Plan on July 26th.

“Query: Is the notice procedure in compliance with the statutes, or, in other words, is such ‘telescoping’ legal?

“Will you also give me your opinion as to the interpretation of General Code Section 3180-18 which concerns itself with non-conforming use of buildings on land not affected by zoning on the following factual information:

“Township B has enacted the following section concerning non-conforming uses:

“The lawful use of any dwelling, building or structure and of any land or premises, as existing and lawful on the date this resolution or any amendment hereto becomes effective, may be continued although such use does not conform with the provisions of this resolution or amendments hereto. If any such non-conforming use is voluntarily discontinued for two years or more, any future use of said land shall be in conformity with the provisions of this resolution or amendments hereto.

“A dwelling, building or structure designed and planned for an otherwise lawful use which does not conform to the types of uses permitted in the district in which it is located, actual and bona fide construction of which having been commenced prior to the date this resolution became effective or prior to the date an amendment hereto becomes effective if such use was a conforming use prior to such amendment, may be completed and used for the purpose for which it was designed; provided, however, that the owner of such dwelling, building or structure under construction shall present sufficient evidence to satisfy the Township Zoning Inspector that said dwelling, building or structure was designed and planned for such non-conforming use and obtain a Zoning Certificate before completion of said construction and before commencing such non-conforming use.

“A non-conforming use may be maintained, reconstructed or extended within the limits of the lot, separately owned and filed for record in the office of the Recorder of Lorain County, Ohio, prior to the date on which this resolution becomes effective or

prior to the date an amendment hereto becomes effective, if such use was a conforming use prior to such amendment, on which such non-conforming use was existing prior to the effective date of this resolution or such amendment thereto: Provided, however, that such reconstruction or extension shall conform to the set-back usable floor space, open area and other regulations and limitations for the zoning district involved.'

"The owner of a parcel of land amounting to .81 of an acre in said township constructed a small building which was used by him for sale of general merchandise and food articles as well as garden produce to the general public and was also intended to supply and sell to the occupants of a contemplated motel by said owners on said land, all before the effective passage date of the Zoning Resolution by said township as provided for in General Code Section 3180-35.

Query: May the interpretation of General Code Section 3180-18 be now construed by the administrative officials concerned with said township zoning to permit the construction of said motel facilities within the provisions of the above sections concerning non-conforming use in said township?"

1. Your first question relates to the procedure by township trustees in the adoption of township zoning regulations. The order of procedure as outlined in Sections 3180-26 to 3180-50, General Code, is, in brief, as follows:

The adoption by the trustees of a resolution of intention to proceed with township zoning. Section 3180-27, General Code.

The appointment by the township trustees of a township zoning commission. Section 3180-28, General Code.

Preparation by the commission, of a plan, after the employment of planning consultants and consultation with public officials, departments and agencies, such plan to include text and maps of the unincorporated area of the township or such portion of same as the commission includes in the zoning plan. Section 3180-29, General Code.

Section 3180-30, General Code, requires said commission, before submitting its recommendation of a zoning plan to the board of township trustees, to hold at least one public hearing thereon, notice of which shall be given by one publication, in one or more newspapers of general circulation in the township, at least thirty days before the date of such hearing.

Section 3180-31, General Code, provides that following such hearing or hearings, the commission shall submit the proposed plan to the county or regional planning commission, if there be such commission, for approval, disapproval or suggestions. If the regional planning commission disapproves of the proposed plan or suggests any material change therein, the township zoning commission shall hold a public hearing on same, due notice of which shall be given as provided in Section 3180-30, General Code. "When the township zoning commission has thus completed its recommendations for a zoning plan, it shall certify same to the board of trustees."

Section 3180-32, General Code, reads as follows:

"After receiving the certification of a zoning plan from the township zoning commission and before adoption of any such zoning resolution, the board of township trustees shall hold a public hearing thereon, at least thirty days' notice of the time and place of which shall be given by one publication in a newspaper of general circulation in the township." (Emphasis added.)

Section 3180-34, General Code, requires the township trustees to vote finally on the adoption of the plan, after which, pursuant to Section 3180-35, General Code, it is submitted to a vote of the electors of the area included in the proposed plan.

It appears, therefore, that the regular order of procedure requires the township trustees, as their final act before adoption of the plan, to hold a public hearing on the proposed plan *after receiving it from the township zoning commission*, of which hearing the trustees must give at least thirty days' notice.

The facts stated in your letter indicate this procedure has been followed, except that the township trustees have not waited to receive the recommended plan from the zoning commission before fixing a time for their final hearing thereon and giving the required public notice. It is to be observed however that Section 3180-32 *supra* does not require that the trustees wait 'until the receipt of the plan before fixing a time for hearing, but merely that the hearing must be after receipt of the plan, and that thirty days' notice of such hearing shall be given. Manifestly, they have assumed that the plan would reach them promptly after the June 21st hearing, to be held by the zoning commission and for the sake of speeding final action have set the date for their final hearing.

The manifest purpose of these several hearings is to give the public, and particularly the electors who are to vote on the plan, abundant opportunity to become acquainted with its details, and the period of thirty days' notice for each of such hearings would certainly have to be provided in full. If the action of the township trustees in anticipating the filing of the plan by the zoning commission and fixing a time for hearing, should prove to be premature, by reason of delays in getting the plan approved by the commission and transmitted to the trustees, then the trustees might find it necessary to fix a new date for hearing, and give new notice. If, however, the plan was duly filed by the zoning commission with the township trustees at such time that the electors had the full thirty days thereafter to consider it before the date fixed by the township trustees for final hearing, then it appears to me that the apparent haste on the part of the township trustees could do no harm and that the law was substantially complied with. Your letter does not state the time when the plan was actually filed with the township trustees, and I must therefore leave any conclusion in this regard to be subject to determination by the facts.

2. Your second question deals with a non-conforming structure in a territory that has been zoned. You refer to Section 3180-18, General Code, which is a part of the law relating to county zoning, but since it is substantially identical with Section 3180-43, General Code, which is a part of the township zoning law, I will quote the latter section. It reads as follows:

"The lawful use of any dwelling, building or structure and of any land or premises as existing and lawful at the time of enactment of a zoning resolution or amendment thereto, may be continued although such use does not conform with the provisions of such resolution or amendment, but if any such non-conforming use is voluntarily discontinued for two years or more, any future use of such land shall be in conformity with the provisions of this act. The board of township trustees shall provide in any zoning resolution for the completion, restoration, reconstruction, extension or substitution of non-conforming uses upon such reasonable terms as may be set forth in the zoning resolution."

It will be noted that this section requires the township trustees to provide in the zoning resolution for the completion or extension of non-conforming uses "upon such reasonable terms as may be set forth in the zoning resolution." This gives the trustees a measure of discretion in determining to what extent an existing use may be completed or extended.

It appears that Township B has adopted a regulation relative to the maintenance, reconstruction or *extension* of a non-conforming use. In substance it provides that such use may be maintained or extended, provided "such extension shall conform to the set-back, usable floor space, open area and other regulations and limitations for the zoning district involved."

This regulation does not appear to me to provide a rule by which we can measure, with accuracy, the "extension" to which you refer. It appears that the owner had constructed, prior to the taking effect of the zoning regulation, a small building, which was used for the sale of general merchandise and food articles for the general public, and "was also intended to supply and sell to the occupants of a contemplated motel by said owners on said land." The precise question therefore is whether a building of a different character from the previously existing building which was "contemplated" by the owner when the zoning regulation became effective, can be regarded as an extension, within a reasonable construction of the statute and the regulation. If this proposed motel had been partially constructed, and had included a store for the sale of food and other supplies, there would seem to be no doubt about the right to complete or extend the motel. Or, if a store had been constructed in connection with a motel theretofore erected, there would appear to be no difficulty about permitting the enlargement of the store. Here, however, it appears that a store had been built, but that nothing whatsoever had been done looking to the erection of a motel, except that a plan was in the mind of the owner of the store to build such motel and to sell to occupants merchandise from the store. In 58 American Jurisprudence, Section 149, page 1022, it is said:

"Ordinarily, where no work has been commenced, or where only preliminary work has been done without going ahead with the construction of the proposed building, the fact that plans had been made for the erection of a building before the adoption of a zoning ordinance prohibiting the kind of building contemplated is held not to exempt the property from the operation of the zoning regulation. * * *"

In 147 A. L. R., page 168, we find a number of citations in support of that proposition. There are cases without number, dealing with the right of owners who had commenced the construction of buildings which were forbidden by a zoning regulation, but I have found none where such building could be started and constructed after the adoption of such regulation, merely because it was contemplated prior thereto by the owner.

In the case of *Chayt v. Board*, 177 Md., 428, the proprietors of a race track were enjoined, after a district had been zoned as a residential district, from building stables on lots in such area adjacent to the track, which they had previously purchased, with the intent of using them for that purpose.

It is my opinion that the building of an entirely different type of structure could not be regarded as an extension either within the law or the terms of the regulation which you have quoted. Certainly the mere fact that it was contemplated by the owner of the land, would not give it such character.

In *State ex rel. City Ice Company v. Stegner*, 120 Ohio St., 418, it appeared that prior to the adoption of a zoning ordinance, a property owner maintained a building, used for the purpose of storing ice. After the adoption of the zoning regulation, he applied for a permit to make an addition to the building so as to make it a commercial ice plant. The ordinance in question provided that existing non-conforming use might be extended throughout any parts of a building which are manifestly arranged or designed for such use. The court held that the proposed addition would create a new and different use and accordingly denied the application for a writ of mandamus to compel the issuance of the permit.

Assuming that the erection of a motel in the area in question was forbidden by the zoning regulations, I am of the opinion that it could not be justified as an extension of the store building theretofore erected.

Respectfully,

C. WILLIAM O'NEILL
Attorney General