

OPINION NO. 77-051

Syllabus:

1. A board of county commissioners, which is vested with the power of eminent domain with respect to the construction of a county courthouse, is not required to comply with the municipal zoning code in order to construct an addition to a courthouse located in the municipality. (1949 Op. Att'y Gen. No. 1084, p. 728, approved and followed)
2. A board of county commissioners must, pursuant to R.C. 713.02, attempt to secure the approval of the city planning commission before it may construct an addition to a courthouse located in the municipality, if the commission has made a plan of the municipal corporation.

To: Lowell S. Petersen, Ottawa County Pros. Atty., Port Clinton, Ohio
By: William J. Brown, Attorney General, October 1, 1977

I have before me your request for my opinion on the following questions:

1. Must a Board of County Commissioners comply with the City zoning code of the City in which the County Court House is located when constructing an addition to said Court House?
2. Must a Board of County Commissioners secure the approval of the City Planning Commission of the City in which the County Court House is located pursuant to Ohio Revised Code Section 713.02 before constructing an addition to the present County Court House?

It is clear that a municipality may by ordinance provide for the zoning or districting of the municipality and regulate the location, bulk, height and uses of buildings and other structures. A municipality's power to enact zoning regulations is derived from Ohio Const. art. XVIII, §3, which grants to municipalities the function of local self-government, and is expressly enumerated in R.C. Chapter 713. The validity of zoning regulations has been upheld by decisions both of the Ohio Supreme Court and of the Supreme Court of the United States. E.g., Euclid v. Ambler Realty Company, 272 U.S. 365 (1926); Pritz v. Messer, 112 Ohio St. 628 (1925).

For the purposes of this opinion, I shall assume that the zoning code of the City of Port Clinton was properly enacted and adopted pursuant to R.C. 713.12 and, therefore, is valid and enforceable.

Assuming this, I shall proceed to consider whether the board of county commissioners must comply with the zoning code when constructing an addition to a courthouse located in the city.

In a series of cases the Ohio Supreme Court has developed the view that zoning ordinances of municipalities are ineffective to prevent or restrict the use of land by the state or any of its subdivisions or agencies vested with the right of eminent domain in the use of land for public purposes. In Doan v. The Cleveland Short Line Ry. Co., 92 Ohio St. 461 (1915), the court was asked to consider whether restrictive covenants contained in deeds to land within an allotment were effective to curtail the activities of a railroad company which possessed the right of eminent domain. The court held that the restrictive covenants were not enforceable against the railroad company and stated its rationale at 468 as follows:

No covenant in a deed restricting the real estate conveyed to certain uses and preventing other uses can operate to prevent the state, or any body politic or corporate having the authority to exercise the right of eminent domain, from devoting such property to a public use. The right of eminent domain rests upon public necessity, and a contract or covenant or plan of allotment which attempts to prevent the exercise of that right is clearly against public policy and is therefore illegal and void.

In Norfolk & Western Ry. Co. v. Gale, 119 Ohio St. 110 (1928), the court considered whether restrictive covenants in deeds and the provisions of a municipal zoning code stated a cause of action for injunctive relief against the public use of the restricted and zoned land. Citing and relying on Doan, supra, the Supreme Court held that no cause of action was stated. Moreover, in Cincinnati v. Wegehof, 119 Ohio St. 136 (1928), the court upheld the validity of a provision in a municipal zoning code which exempted the municipality from its own building restrictions. The court commented, however, at 137 that the express exemption "was not at all necessary to clothe the city with the power to acquire property on which to erect necessary public buildings in the restricted residential zone."

The rationale for the principle that the state or any instrumentality vested with the power of eminent domain is exempt from the provisions of a municipal zoning code is discussed in great detail in the case of State ex rel. Helsel v. Board of County Commissioners, 37 Ohio Op. 58 (1947), aff'd, 83 Ohio App. 388 (1948), appeal dismissed, 149 Ohio St. 583 (1948), which held that zoning restrictions of municipalities are not effective to prevent a county from using property for the public purpose for which it has been taken under the power of eminent domain. It is sufficient for the purposes of this opinion to note the following observation made by the Cuyahoga County Court of Common Pleas at 61.

The nature of this power is defined in 29 C.J., Sec. 2, p. 77 as follows: Eminent domain is an inherent and necessary attribute of sovereignty, existing independently of constitu-

tional provision and superior to all property rights.

. . . .

Such right antedates constitutions and legislative enactments, and exists independently of constitutional sanctions or provisions, which are only declaratory of previously existing universal law. The right can be denied, or restricted, only by fundamental law, and is a right inherent in society, and superior to all property rights.

The connecting link between the foregoing discussion and your specific question is provided by R.C. 307.08, which specifically grants to a board of county commissioners the power of eminent domain with respect to the construction of a county courthouse. R.C. 307.08 provides as follows:

When, in the opinion of the board of county commissioners, it is necessary to procure real estate, a right-of-way, or an easement for a courthouse, jail, or public offices, or for a bridge and the approaches thereto, or other structure, or public market place or market-house, proceedings shall be had in accordance with sections 163.01 to 163.22, inclusive, of the Revised Code.

R.C. Chapter 163. sets forth the procedures through which the power of eminent domain may be exercised.

You do not indicate in your letter whether the county acquired the site of the existing courthouse through the exercise of its powers of eminent domain. This fact is, however, not essential to the disposition of the issue. In both Doan and Norfolk & Western Ry. Co., supra, the railway companies had acquired the property in question by purchase rather than through the power of eminent domain. Thus, it is sufficient that the county has the power of eminent domain. It is not necessary that that power be exercised in the particular case in question.

In 1949 Op. Att'y Gen. No. 1084, p. 728, one of my predecessors was asked to consider whether a board of county commissioners could erect a steel storage building on land previously purchased by the county in a zone where such structures were not permitted under the municipal zoning code. The opinion cites Doan and Norfolk & Western Ry. Co., supra, as authority for the following conclusions set forth in the syllabus.

1. The zoning ordinance of a municipality cannot be construed as applying to a county vested with the right of eminent domain in the use of lots for a public purpose.
2. The zoning ordinances of a municipality cannot be construed as applying to a county vested with the right of emi-

nent domain in the use of lots for public purposes even though said lots were not acquired by appropriation proceedings, but were acquired by purchase.

Thus, it is my opinion that a board of county commissioners, which is vested with the power of eminent domain with respect to the construction of a county courthouse, is not required to comply with the municipal zoning code in order to construct an addition to a courthouse located in the municipality. (1949 Op. Att'y Gen. No. 1084, p. 728, is approved and followed)

You have also inquired whether a board of county commissioners must, pursuant to R.C. 713.02, secure the approval of the city planning commission before constructing an addition to an existing courthouse located in the city.

R.C. 713.02, which sets forth the powers and duties of a city planning commission, provides in relevant part as follows:

Whenever the commission makes a plan of the municipal corporation, or any portion thereof, no public building or structure, . . . or part thereof shall be constructed or authorized to be constructed in the municipal corporation or planned portion thereof unless the location character, and extent thereof is approved by the commission. In case of disapproval the commission shall communicate its reasons therefor to the legislative authority of the municipal corporation and to the head of the department which has control of the construction of the proposed improvement or utility. The legislative authority, by vote of not less than two-thirds of its members and of such department head, together may overrule such disapproval. If such public way, ground works, building, structure, or utility is one the authorization or financing of which does not, under the law, or charter provisions governing it, fall within the province of a municipal legislative authority or other municipal body or official, the submission to the commission shall be by the state, school, county, district, or township official, board, commission, or body having such jurisdiction, and the commission's disapproval may be overruled by such official, board, commission, or body by a vote of not less than two-thirds of its membership. . . . The commission may make recommendations to any public authorities or to any corporations or individuals in such municipal corporation or the territory contiguous thereto, concerning the location of any buildings, structures, or works to be erected or constructed by them. (Emphasis added)

For the purpose of this opinion, I shall assume that the Port Clinton planning commission has in fact made a plan of the municipality which contains general recommendations for the location, character and extent of public improvements within the municipality.

Considering whether the provisions of R.C. 713.02 are mandatory or merely directory in application to your situation, I am persuaded to reach the former conclusion for the following reasons. The statute expressly requires that a county shall submit plans for the construction of any public building or structure, or parts thereof, under its jurisdiction to the planning commission in the city where such construction is undertaken. Although the term "structure" is not defined for the purposes of R.C. 713.02, it is unquestionable that a proposed addition to a building is a structure.

I have also noted that where the General Assembly has provided exceptions to the submission and approval requirements in R.C. 713.02, it has done so in express terms. For example, R.C. 165.14(A), which deals with the construction of industrial development projects by public authorities, expressly provides that such projects "shall not be subject to the requirements relating to public buildings, structures, grounds, works, or improvements imposed by section 125.82, 713.02, or 713.25 of the Revised Code or any other similar requirements which may be lawfully waived by this section." No such waiver is contained in the provisions of R.C. 307.80, which authorizes a board of county commissioners to construct a courthouse.

Moreover, it cannot be said that the provisions of R.C. 713.02 are ineffective against public authorities vested with the power of eminent domain. The provisions of R.C. 713.02 are, unlike the zoning powers of a municipality, exclusively limited in their application to public authorities, all of which are vested with the power of eminent domain. Thus, to construe the statute as ineffective against public authorities vested with the power of eminent domain would render the statute nugatory. Such a result is impermissible under R.C. 1.51 which states that "[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both."

I am also persuaded to conclude that the procedural requirements of R.C. 713.02 are mandatory by the discussion of this statute in Cleveland Electric Illuminating Co. v. Painesville, 15 Ohio St. 2d 125 (1968). The Ohio Supreme Court found therein that the City of Painesville had established a city planning commission, pursuant to R.C. 713.01, and that the commission had promulgated a city plan recommending general locations for the placement of utilities. Based on these findings, the Court states at 132 that "[u]nder Section 713.02, Revised Code, the commission may require that plans as to the location be submitted for its approval. Although commission disapproval is subject to review by higher governmental authority, the city does have the opportunity to seek compliance with its overall community plan."

Thus, it is my opinion that the procedural requirements set forth in R.C. 713.02 are mandatory. A board of county commissioners must attempt to secure the approval of a city planning commission, which has made a plan for the city, before it may construct an addition to a county courthouse located in the city. If the city planning commission disapproves the project, the board of county commissioners may, pursuant to R.C. 713.02, overrule the commission's disapproval by a vote of not less than two-thirds of its membership.

Thus, it is my opinion and you are so advised that:

1. A board of county commissioners, which is vested with the power of eminent domain with respect to the construction of a county courthouse, is not required to comply with the municipal zoning code in order to construct an addition to a courthouse located in the municipality. (1949 Op. Att'y Gen. No. 1084, p. 728, approved and followed)
2. A board of county commissioners must, pursuant to R.C. 713.02, attempt to secure the approval of the city planning commission before it may construct an addition to a courthouse located in the municipality, if the commission has made a plan of the municipal corporation.