

OPINION NO. 72-088

Syllabus:

1. The legislative authority of a city within the jurisdiction of a board of health of a general health district is not required to adopt by ordinance a regulation of such board, which has the power to enforce its own regulations throughout the district.
2. The legislative authority of a city, which has under consideration a minimum standards housing code, is required by Section 3707.01, Revised Code, to submit for approval of the board of health of a general or city health district within whose jurisdiction the city lies, only those provisions of the code relating to "the location, construction, and repair of water closets, privies, cesspools, sinks, plumbing, and drains."

To: Lawrence S. Huffman, Allen County Pros. Atty., Lima, Ohio
By: William J. Brown, Attorney General, October 5, 1972

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

"The Allen County General Health District has under consideration a regulation controlling the hygiene, sanitation and maintenance of dwellings. The authority for the adoption of this regulation is Section 3707.01 R.C. The City of Lima is within the territorial jurisdiction of the Allen County General Health District. The City of Lima has a department exercising the power to regulate the erection of buildings. In the event the Board of Health adopts the sanitary regulation as described above:

"1. Is the legislative authority of the City of Lima required to adopt the regulation by ordinance and provide for its enforcement?

"2. If the answer to question (1) is yes, what remedy is available to the Board of Health if the legislative authority declines to do so?

"3. If the answer to question (1) is no, is the regulation in effect in the areas of the health district other than the City of Lima?

"The legislative authority of the City of Lima has under consideration a minimum standards housing code, covering some of the same areas as the resolution proposed by the Board of Health. It does, however, cover many other areas. No portion of the housing code has been submitted to the Board of Health for approval.

"4. In the event the housing code is enacted, does Section 3707.01 R.C. require that it be submitted to the Board of Health for approval?

"5. In the event that the housing code does not meet with the approval of the Board, is it void by reason of such lack of approval?"

Section 3707.01, Revised Code, reads as follows:

"The board of health of a city or general health district shall abate and remove all nuisances within its jurisdiction. It may, by order, compel the owners, agents, assignees, occupants, or tenants of any lot, property, building, or structure to abate and remove any nuisance therein, and prosecute such persons for neglect or refusal to obey such orders. Except in cities having a building department, or otherwise exercising the power to regulate the erection of buildings, the board may regulate the location, construction, and repair of water closets, privies, cesspools, sinks, plumbing, and drains. In cities having such departments or exercising such power, the legislative authority, by ordinance, shall prescribe such rules and regulations as are approved by the board and shall provide for their enforcement.

"The board may regulate the location, construction, and repair of yards, pens, and stables, and the use, emptying, and cleaning of such yards, pens, and stables and of water closets, privies, cesspools, sinks, plumbing, drains, or other places where offensive or dangerous substances or liquids are or may accumulate.

"When a building, erection, excavation, premises, business, pursuit, matter, or thing, or the sewerage, drainage, plumbing, or ventilation thereof is, in the opinion of the board, in a condition dangerous to life or health, and when a building or structure is occupied or rented for living or business purposes and sanitary plumbing and sewerage are feasible and necessary, but neglected or refused, the board may declare it a public nuisance and order it to be removed, abated, suspended, altered, or otherwise improved or purified by the owner, agent, or other person having control thereof or responsible for such condition, and may prosecute him for the refusal or neglect to obey such order. The board may, by its officers and employees, remove, abate, suspend, alter, or otherwise improve or purify such nuisance and certify the costs and expense thereof to the county auditor, to be assessed against the property and thereby made a lien upon it and collected as other taxes."

Section 3709.01, Revised Code, provides for the formation of city and general health districts. A union of city and general health districts is permitted by Section 3709.07, Revised Code. From the facts stated in your letter, I surmise that the general health district of which you speak is a product of this Section.

Before turning to your first question, I direct your attention to Opinion No. 1921, Opinions of the Attorney General for 1940, which states that health districts exist as separate subdivisions of the state for purposes of local health administration. In addition, I point out the decision reached in State ex rel., v. Spitler, 47 Ohio App.114 (1933), which describes the relationship between a city health district and the municipality with which it is coextensive:

"We find no provision of law making a board of health of a city health district subject or amenable in any way to the government of the municipality with which the district is co-extensive, except that appointments of the board are made by the mayor of such municipality, and such board, under the law, constitutes a governmental agency separate and distinct from such municipality and not in any way subject to the jurisdiction of the municipality. * * *"

Although State ex rel., v. Spitler, *supra*, was directed to the question of city health districts, its principles are equally applicable to the relationship between a general or combined health district and a municipality within its territorial authority.

A historical approach to the health district-municipality relationship confirms their independent status. The passage of the Hughes-Griswold Act, 108 Ohio Laws, 236, 1085 (1919), reorganized the state's health system. The manifest purpose of this Act was to take the control of health matters largely out of the hands of municipalities and other legal bodies and place it directly under the state through the creation of these health districts which, while in some cases coextensive with municipalities, are nevertheless regarded as independent of the municipalities as such. Opinion No. 5882, Opinions of the Attorney General for 1943. Section 3709.36, Revised Code, reads in part as follows:

"The board of health of a city or general health district hereby created shall exercise all the powers and perform all the duties formerly conferred and imposed by law upon the board of health of a municipal corporation, * * *."

Section 3709.21, Revised Code, grants to the general health districts the power to make regulations and reads, in pertinent part, as follows:

"The board of health of a general health district may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances. * * *"

The independent status of the general health district makes the adoption of its regulations by the municipal legislative authority unnecessary.

Section 3707.02, Revised Code, grants to the general health district the power to enforce its own regulations. Section 3709.99, Revised Code, enumerates the penalties decreed for violation of the general health district's regulations. Thus, the board has power to enforce its regulations throughout the district. In the absence of specific statutory authority for the board to require a city's

legislative body to adopt its regulations, there is no requirement for such adoption, nor any necessity or reason for such a requirement.

There is a provision in Section 3707.01 which may appear to grant such specific authority. It reads as follows:

"* * * Except in cities having a building department, or otherwise exercising the power to regulate the erection of buildings, the board may regulate the location, construction, and repair of water closets, privies, cesspools, sinks, plumbing, and drains. In cities having such departments or exercising such power, the legislative authority, by ordinance, shall prescribe such rules and regulations as are approved by the board and shall provide for their enforcement."

Since your question states that "the City of Lima has a department exercising the power to regulate the erection of buildings," the second sentence of this provision applies. This sentence gives the legislative authority of the city power to initiate, and the board of health power to approve, regulations concerning "the location, construction, and repair of water closets, privies, cesspools, sinks, plumbing, and drains." My predecessor has construed this provision, in Opinion No. 5882, Opinions of the Attorney General for 1943, at page 132, as follows:

"This would seem to leave the right of regulation of plumbing and similar sanitary matters to boards of health generally but to require such regulations, in a city having a building department or otherwise exercising the power to regulate the erection of buildings, to be by the concurrent action of the council and the board of health. Or, to state it a little more exactly, it requires that in all such cities the effective action and enforcement shall devolve upon the municipal officers by the enactment and enforcement of regulations which have had the approval of the board of health.

* * * * *

Because of the provisions of Section 4420, [General Code, now Section 3707.01, Revised Code], relating explicitly to plumbing regulations, I am of the opinion that the ordinance in question, being an enactment only of the board of health, is invalid and that the proper and necessary procedure is for the city council to enact such an ordinance as the board of health shall approve, such enactment to be made according to the laws relative to the passage of municipal ordinances generally. * * *

Thus, the board of health has no power to require the adoption of such regulations by the city's legislative authority, since they can be passed only by the concurrence of both bodies.

There is no other provision which appears to grant the board of health power to require a municipality to adopt its regulations, and I conclude that the board has no such power.

Since the answer to your first question is negative, an answer to your second question is unnecessary. In response to your third question, a regulation adopted by a board of health of a general health district pursuant to Section 3707.01, is in effect throughout the entire district. Such a sanitary ordinance has the force of law within the district's jurisdiction and can be enforced by the Board. See Weber v. Board of Health, 148 Ohio St. 389 (1947), and McGowen v. Shaffer, 65 Ohio L. Abs. 138 (1953).

Your fourth and fifth questions refer to a minimum standards housing code, which the legislative authority of the city is considering, apparently pursuant to Sections 715.26 through 715.29, Revised Code. See also Section 3781.01, Revised Code. Your specific questions can be answered on the basis of the foregoing discussion. Only those provisions of the housing code relating to "the location, construction, and repair of water closets, privies, cesspools, sinks, plumbing, and drains" need be submitted to the board of health for approval, under Section 3707.01. Those provisions will be void if disapproved. The provisions which are submitted and approved, and those which need not be submitted, will take effect.

I should also point out that, whether or not the board's approval of a municipal ordinance is required, the ordinance is void insofar as it conflicts with a regulation of the board of health. This well-established rule is based on the "home-rule" provision of the Ohio Constitution (Article XVIII, Section 3), which reads as follows:

"Municipalities shall have the authority to exercise the powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The regulations of a board of health of a general or city health district, which is an agency of the state, are considered "general laws" for purposes of this constitutional provision. Opinion No. 4292, Opinions of the Attorney General for 1945; Opinion No. 5564, Opinions of the Attorney General for 1942. On the troublesome question of the meaning of "conflict", see my Opinion No. 71-018, Opinions of the Attorney General for 1971; Dayton v. Stearns, 55 Ohio Op. 2d 194 (1971); Vaubel; "Municipal Corporations and the Police Power in Ohio", 29 Ohio St. L.J. 29 (1968).

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

1. The legislative authority of a city within the jurisdiction of a board of health of a general health district is not required to adopt by ordinance a regulation of such board, which has the power to enforce its own regulations throughout the district.

2. The legislative authority of a city, which has under consideration a minimum standards housing code, is required by Section 3707.01, Revised Code, to submit for approval of the board of health of a general or city health district within whose jurisdiction the city lies, only those provisions of the code relating to "the location, construction, and repair of water closets, privies, cesspools, sinks, plumbing and drains."