

## OPINION NO. 86-079

## Syllabus:

A municipal or county board of building appeals certified pursuant to R.C. 3781.20 has no authority to charge a fee to a person bringing an appeal before the board.

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To: Gerald O. Holland, Chairman, Board of Building Standards, Department of Industrial Relations, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, November 13, 1986

I have before me your predecessor's request for my opinion concerning the authority of municipal and county boards of building appeals certified pursuant to R.C. 3781.20. The request letter reads as follows:

Section 3781.20, R.C., provides that "the Board of Building Standards may certify municipal and county board[s] of building appeals to hear and decide appeals from adjudication orders pertaining to the enforcement of Chapters 3781. and 3791. of the Revised Code and any rules adopted pursuant thereto." The Board has certified [nine] local appeal boards. Recently, the Board of Building Standards has received several complaints that the local certified boards of appeals are charging fees ranging from fifty to one hundred dollars (\$50-\$100) to exercise the right of appeal. The Board's review of Sections 3781.10, 3781.20, and 3781.031 reveals no statutory authority for municipal or county boards of building appeals to charge a fee to an aggrieved party to exercise his right of appeal.

The letter raises the following question:

Do municipal or county boards of building appeals certified pursuant to Section 3781.20 of the Revised Code have legal authority to charge a fee for an appeal of an adjudication order pertaining to the enforcement of Chapters 3781. and 3791. of the Revised Code and the state building code adopted pursuant to Section 3781.10(A)?

It is my understanding that the fees charged by certified municipal or county boards of building appeals are used to defray costs incidental to the appeal proceedings before such certified local boards.

It is helpful to begin with an outline of the statewide scheme governing building standards. See R.C. Chapters 3781 and 3791. R.C. 3781.07 establishes a State Board of Building Standards and places it in the Department of Industrial Relations. The State Board of Building Standards consists of a designated employee of the Department of Health, a designated employee of the Industrial Commission, a designated employee of the Department of Education, and nine members appointed by the Governor. R.C. 3781.07. The State Board of Building Standards has various powers and duties, including the authority to formulate and adopt rules setting forth uniform building standards. See R.C. 3781.10; R.C. 3781.11. Rules promulgated

by the Board of Building Standards appear in 5 Ohio Admin. Code Chapters 4101:2-1 through 4101:2-99. Chapters 4101:2-1 to 4101:2-51 comprise the Ohio building code, known as the "Ohio Basic Building Code." See 5 Ohio Admin. Code 4101:2-1-03.

R.C. 3781.03 provides for the enforcement of R.C. Chapters 3781 and 3791 and regulations adopted thereunder. R.C. 3791.04 requires plan approval before construction is begun on certain buildings. See R.C. 3781.06. R.C. 3781.10(E) authorizes the Board of Building Standards to "[c]ertify municipal, township, and county building departments to exercise enforcement authority, to accept and approve plans and specifications, and to make inspections, pursuant to sections 3781.03 and 3791.04 of the Revised Code." R.C. 3781.031 provides that, before any department or agency of the state or a political subdivision attempts to enforce R.C. Chapters 3781 and 3791 or rules adopted thereunder, it shall issue an adjudication order within the meaning of R.C. 119.06-.13, or a stop work order. An adjudication hearing is required on each such adjudication order pursuant to R.C. 119.06-.13. See R.C. 3781.031; R.C. 3781.19.

R.C. 3781.19 establishes the Board of Building Appeals, consisting of three members appointed by the Governor, and places it in the Department of Industrial Relations. Under R.C. 3781.19, the Department of Industrial Relations is the "agency referred to" in R.C. 119.07, 119.08, and 119.10 for purposes of providing notice concerning the right to an adjudication hearing on an adjudication order. The Board of Building Appeals conducts such adjudication hearings, except where the Board of Building Standards has certified a municipal or county board of building appeals to conduct such hearings. See R.C. 3781.20(A) ("[t]he board of building standards may certify municipal and county boards of building appeals to hear and decide appeals from adjudication orders pertaining to the enforcement" of R.C. Chapters 3781 and 3791 and rules adopted thereunder). See generally R.C. 307.381 (authorizing the establishment, in certain circumstances, of a county board of building appeals); R.C. 3781.20(C) (prescribing the membership requirements of a local board of building appeals); R.C. 3781.20(D) and (E) (establishing the certification procedure for local boards of building appeals); 1984 Op. Att'y Gen. No. 84-100; 1978 Op. Att'y Gen. No. 78-008. Pursuant to R.C. 3781.19:

The appropriate municipal or county board of appeals, where one exists, certified pursuant to section 3781.20 of the Revised Code shall conduct the adjudication hearing referred to in sections 119.09 to 119.13 and required by section 3781.031 of the Revised Code. If there is no certified municipal or county board of appeals, the board of building appeals shall conduct the adjudication hearing.

See R.C. 307.381 (upon certification under R.C. 3781.20, "the county board of building appeals shall hear and decide appeals from adjudication orders of the county building inspector or other officer assigned to perform his duties pertaining to the enforcement within his jurisdiction of [R.C. Chapters 3781 and 3791] and any rules adopted pursuant thereto"); R.C. 3781.20(B) ("[a] certified local board of building appeals has exclusive jurisdiction to hear and decide all adjudication hearings arising from rulings of the local chief enforcement official concerning the provisions of [R.C. Chapters 3781 and 3791] and

any rules adopted pursuant thereto"). Local boards of building appeals certified pursuant to R.C. 3781.20 "have the same powers to reverse or modify orders of the local enforcement official and to grant variances as are conferred on the board of building appeals by [R.C. 3781.19]." R.C. 3781.20(F). Following an adjudication hearing before a certified municipal or county board of appeals, application may be made to the State Board of Building Appeals for a de novo hearing, or appeal may be made directly to the court of common pleas under R.C. 3781.031. R.C. 3781.19.

The specific question presented is whether a municipal or county board of building appeals certified pursuant to R.C. 3781.20 may charge a fee to persons who bring an appeal before the board. A certified county board of building appeals is a creature of statute, in that a board of county commissioners is authorized to establish a county board of building appeals upon meeting certain statutory requirements, see R.C. 307.381, and the Board of Building Standards must certify a county board of building appeals if it finds that specific statutory requirements are met, see R.C. 3781.20(E). As a creature of statute, a certified county board of building appeals has only those powers that are expressly granted by statute or may be implied therefrom as reasonably necessary to make the express powers effective. See State ex rel. A. Bentley & Sons Co. v. Pierce, 96 Ohio St. 44, 117 N.E. 6 (1917); State ex rel. Kahler-Ellis Co. v. Cline, 69 Ohio L. Abs. 305, 125 N.E.2d 222 (C.P. Lucas County 1954). No provision of which I am aware expressly authorizes a certified county board of building appeals to charge a fee to persons bringing appeals before the board or expressly permits a board of county commissioners to empower a certified county board to charge such a fee, even if the fee is designed only to cover costs incidental to proceedings before such board.

Further, I do not believe that the provisions governing certified county boards of building appeals may be read as implying the authority for a certified county board to charge a fee to persons bringing appeals before the board. Where the General Assembly has intended to authorize the imposition of a fee, it has done so in clear statutory language. See, e.g., R.C. 3781.10(G) (authorizing the Board of Building Standards to formulate rules and establish reasonable fees for the review of applications for authority to use a new material, assembly, or product of a manufacturing process); R.C. 3781.102(C) (providing that the political subdivision associated with each municipal, township, and county building department certified by the Board of Building Standards under R.C. 3781.10(E) "may prescribe fees for the acceptance and approval of plans and specifications, and for the making of inspections, pursuant to [R.C. 3781.03 and 3791.04]"); R.C. 3783.03 (authorizing the Board of Building Standards to prescribe an application fee to be paid by a person taking an examination to qualify for a certificate of competency as an electrical safety inspector); R.C. 3783.04 (authorizing Board of Building Standards to prescribe a fee for the issuance of a renewal or duplicate certificate to an electrical safety inspector); R.C. 3783.05 (providing that fees collected by the Board of Building Standards pursuant to R.C. Chapter 3783 shall be paid into the state treasury); R.C. 3791.07 (authorizing the Board of Building Standards to "establish such reasonable inspection fee schedules as it determines necessary or desirable" relating to the inspection of industrialized units and of plans and specifications). In the absence of language authorizing a certified county board of

building appeals to charge a fee to persons bringing appeals before the board, I conclude that a county certified board of building appeals may not charge such a fee, even where the fee is designed merely to cover costs incidental to the proceedings before the board. See generally Cooperative Pure Milk Association v. Board of Health, 20 Ohio App. 2d 109, 114, 252 N.E.2d 182, 185 (Clermont County 1969) ("the powers of [a county board of health] to regulate wagons or other vehicles delivering food and drink do not include the power to impose an inspection fee..."); 1979 Op. Att'y Gen. No. 79-089 (syllabus, paragraph two) ("[c]osts of a proceeding may be assessed only where an express statutory provision grants the power to do so; because no such authority has been expressly granted to the Environmental Board of Review, the Board lacks the power to assess costs in hearings before it"). But see generally, e.g., 1974 Op. Att'y Gen. No. 74-073 and 1966 Att'y Gen. No. 66-172 (concluding that the right to inspect implies the authority to charge a fee covering the costs of inspection).

With regard to certified municipal boards of building appeals, there is a corresponding lack of express authorization for the charging of a fee to cover costs incidental to proceedings before such boards. I note, however, that R.C. 3781.01 states, in part: "[R.C. Chapters 3781 and 3791] do not prevent the legislative authority of a municipal corporation from making further and additional regulations, not in conflict with such chapters or with the rules and regulations of the board of building standards."<sup>1</sup> See R.C. 715.26-.30; R.C. 3781.20. This recognition of municipal authority is consistent with Ohio Const. art. XVIII, §3, which states: "Municipalities shall have authority to exercise all 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." It has been firmly established that the provisions of R.C. Chapters 3781 and 3791, which relate to building standards, "are general laws of the state and constitute police regulations," and that a

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<sup>1</sup> R.C. 3781.11 states in part:

The rules of the board of building standards shall supersede and govern any order, standard, or rule of the department of commerce, division of fire marshal, the department of industrial relations and the division of workshops and factories in it, and the department of health, and of counties and townships, in all cases where such orders, standards, or rules are in conflict with the rules of the board of building standards, except that rules adopted and orders issued by the fire marshal pursuant to Chapter 3743. of the Revised Code prevail in the event of a conflict.

The construction, alteration, erection, and repair of buildings including industrialized units, and the materials and devices of any kind used in connection with them and the heating and ventilating of them and the plumbing and electric wiring in them shall conform to the statutes of this state or the rules adopted and promulgated by the board of building standards, and to provisions of local ordinances not inconsistent therewith.

municipality may not adopt regulations that conflict with such provisions. In re Decertification of Eastlake, 66 Ohio St. 2d 363, 368, 422 N.E.2d 598, 601, cert. denied, 454 U.S. 1032 (1981); see Bogen v. Clemmer, 125 Ohio St. 186, 180 N.E. 710 (1932); Op. No. 84-100; Op. No. 78-008. See generally 1985 Op. Att'y Gen. No. 85-101 at 2-431 ("a municipality may not enact a provision in conflict with [a statute which has been enacted pursuant to the state's police power]"). Thus, pursuant to R.C. 3781.01, and in accordance with Ohio Const. art. XVII, §3, the legislative authority of a municipality may adopt its own regulations, providing that such regulations do not conflict with R.C. Chapters 3781 and 3791 or other general laws, or with the rules of the Board of Building Standards.

It remains to be determined, then, whether a regulation providing for the imposition of a fee for the appeal of an order to a certified municipal board of building appeals would present a conflict with R.C. Chapter 3781 and 3791 or other general laws, or with the rules and regulations of the Board of Building Standards. I believe that it would present such a conflict.

The test for determining whether a conflict exists was discussed in In re Decertification of Eastlake, as follows: "In determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute prohibits and vice versa. A city ordinance cannot forbid and prohibit what a statute permits and licenses" (citations omitted). 66 Ohio St. 2d at 368, 422 N.E.2d at 601-02. The Eastlake case concluded:

As expressed in R.C. Chapters 3781 and 3791, the state has manifested a statewide concern for uniformity in building industrialized units. When the state by comprehensive statutory plan has imposed regulations statewide where there is a genuine statewide concern for uniformity in building industrialized units, any ordinance which differs from the statutes by imposing more restrictive requirements is in "conflict" therewith and is ipso facto invalid. State, ex rel. Klapp, v. Dayton P. & L. Co. (1967), 10 Ohio St. 2d 14; State, ex rel. Arey, v. Sherrill (1944), 142 Ohio St. 574; Cleveland Tel. Co. v. Cleveland (1918), 98 Ohio St. 358.

66 Ohio St. 2d at 369, 422 N.E.2d at 602.

Even as R.C. Chapters 3781 and 3791 reflect a statewide concern for uniformity in building industrialized units, see R.C. 3781.11(A), (D); R.C. 3781.12, I believe that they also reflect a statewide concern for uniformity in the manner in which the right to an appeal of an enforcement order may be exercised. R.C. 3781.19 states that "[t]he appropriate municipal or county board of appeals, where one exists, certified pursuant to [R.C. 3781.20] shall conduct the adjudication hearing referred to in [R.C. 119.09-.13] and required by [R.C. 3781.031]." The use of the word "shall" indicates that the duty to conduct an adjudication hearing is mandatory. See generally Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971). There is no provision for the imposition of a fee as a condition precedent to the holding of the hearing. See generally R.C. 119.09-.13; R.C. 3781.20(B) (granting a certified local board of building appeals exclusive jurisdiction to hear and decide

adjudication hearings under R.C. Chapters 3781 and 3791 and rules adopted pursuant thereto).

Further, R.C. 3781.031 states expressly: "Notwithstanding the provisions of Chapter 119. of the Revised Code relating to adjudication hearings and the proceedings thereon, a stenographic or mechanical record of the testimony and other evidence submitted shall be taken at expense of the agency...." It is, thus, clear that the governmental agency is to bear at least some of the costs involved in holding adjudication hearings pursuant to R.C. 3781.031. Certain provisions of R.C. Chapter 119 similarly seem to contemplate that costs involved in holding adjudication hearings under that chapter are to be paid by the appropriate governmental body. See R.C. 119.09 ("[f]ees and mileage [for the sheriff and witnesses] shall be paid from the fund in the state treasury for the use of the agency in the same manner as other expenses of the agency are paid"; "[a]t any adjudication hearing required by [R.C. 119.01-.13], the record of which may be the basis of an appeal to court, a stenographic record of the testimony and other evidence submitted shall be taken at the expense of the agency"); cf. R.C. 119.092 (providing for the award of compensation for reasonable attorney's fees for a prevailing eligible party); R.C. 119.12 (providing that in appealing an order of an agency to the court of common pleas, "[t]he appellant must provide security for costs satisfactory to the court of common pleas...[and] the agency shall furnish at the cost of the party requesting it a copy of the stenographic report...and a copy of the complete record").

R.C. 3781.19 does not authorize the State Board of Building Appeals to charge fees when it conducts hearings, and as discussed above, a certified county board of building appeals has no authority to charge such fees. To permit a municipal corporation to impose a fee upon a person appealing a decision under R.C. Chapter 3781 and 3791 to a certified municipal board of building appeals would provide a variation from the scheme established by general law and would, in my judgment, conflict with that scheme.

A similar conclusion was reached in City of East Cleveland v. Board of County Commissioners, 69 Ohio St. 2d 23, 430 N.E.2d 456 (1982), with respect to the question whether a municipality has the authority to charge a county a fee for the review by the municipality's building department of plans and specifications for the construction of a county project. The court held that a municipality did not have such power, in light of the fact that R.C. 3791.07 expressly authorized the State Board of Building Standards to charge a fee for review of plans and specifications and no statute contained such an express authorization for municipalities.<sup>2</sup> With respect to

<sup>2</sup> I note that R.C. 3781.102(C) now states:

The political subdivision associated with each municipal, township, and county building department certified by the board of building standards pursuant to division (E) of section 3781.10 of the Revised Code may prescribe fees for the acceptance and approval of plans and specifications, and for the making of inspections, pursuant to sections 3781.03 and 3791.04 of the Revised Code.

See 1983-1984 Ohio Laws, Part II, 3403 (Am. Sub. H.B. 300, eff. Sept. 25, 1984).

the operation of the general law contained in R.C. Chapters 3781 and 3791, the court in the City of East Cleveland stated: "In the absence of such a provision for municipalities [authorizing the charging of a fee for the review of plans and specifications] we must infer that the General Assembly intends that municipalities not charge a fee for review of plans and specifications." 69 Ohio St. 2d at 32, 430 N.E.2d at 462. In support of its conclusion, the court relied upon Nienaus v. State ex rel. Board of Education, 111 Ohio St. 47, 144 N.E. 433 (1924) (syllabus, paragraph two):

The General Assembly of the state having enacted a general law requiring the building inspection departments of municipalities having a regularly organized building inspection department to approve plans for the construction of public school buildings erected within such municipalities, a municipality is without power to thwart the operation of such general law by the enactment of an ordinance requiring the payment of a fee as a condition precedent to compliance therewith.

See generally 1956 Op. Att'y Gen. No. 6326, p. 166.

The principles discussed above are applicable to the situation you have presented. The General Assembly has enacted a statutory scheme for the appeal of decisions under R.C. Chapters 3781 and 3791. That scheme does not provide for the payment of a fee by a person seeking to exercise the right to appeal. To permit a municipal corporation to impose such a fee as a condition precedent to an appeal would thwart the operation of the general statutory scheme. See generally Anderson v. Brown, 13 Ohio St. 2d 53, 233 N.E.2d 584 (1968)(syllabus, paragraph three)("a license for the operation of a house trailer park issued by the district board of health pursuant to [R.C. 3733.06] gives the person to whom it is issued the right to operate such a park, and a municipal ordinance which prohibits the operation of such a park within the limits of the municipality without a municipal license, which is obtainable only upon paying a fee, is in conflict with [R.C. 3733.06]"); Auxter v. City of Toledo, 173 Ohio St. 444, 183 N.E.2d 920 (1962); Op. No. 84-100. I conclude, therefore, that a certified municipal board of building appeals may not charge a fee to a person bringing an appeal before the board.

I note that R.C. 3781.20(A) authorizes any certified local board of building appeals to "contract with any municipal corporation or county certified to enforce [R.C. Chapters 3781 and 3791] to provide for appeals from adjudication orders arising from the certified municipal corporation or county." It is clear that, since neither a certified municipal board of building appeals nor a certified county board of building appeals may charge a fee to a person bringing an appeal before the board, a certified municipal or county board of building appeals may not charge such a fee when it operates under a contract pursuant to R.C. 3781.20(A). See generally Op. No. 78-008.

It is, therefore, my opinion, and you are hereby advised, that a municipal or county board of building appeals certified pursuant to R.C. 3781.20 has no authority to charge a fee to a person bringing an appeal before the board.