

1921

SUBDIVISION—SURVEY AND PLAT LANDS CONVEYED RECORDER, RECORDS SUCH PLAT—TRANSFER OF SUCH LAND BY AUDITOR—APPROVAL OF PLAT BY COUNTY HEALTH COMMISSIONER—CHAPTER 711., .011(B), .40, .05, .04, .041 R.C.

SYLLABUS:

1. A one acre tract sold off from a farm outside a municipal corporation is a subdivision within the purview of division (B) of Section 711.001, Revised Code. (Opinion No. 3285, Opinions of the Attorney General for 1953, page 654, approved and followed.)

2. Under the provisions of Section 711.40, Revised Code, where a subdivision is so created, there is no duty to survey and plat the lands conveyed unless the board of county commissioners, pursuant to Section 711.05, Revised Code, has adopted a rule requiring a survey and plat thereof with respect to *any* subdivision of land by the owner thereof; and in the absence of such a rule, there is no duty to comply with Sections 711.04 and 711.041, Revised Code.

3. Where a plat has been completed, and certified and acknowledged in accordance with Section 711.04, Revised Code, the recorder has a duty to record such plat upon application.

4. Where a survey and plat thereof of land are required under Chapter 711., Revised Code, or under a rule adopted by the board of county commissioners pursuant to Section 711.05, Revised Code, Section 711.121, Revised Code, precludes the transfer of such land by the auditor until the provisions of said Chapter 711. are complied with; however, when such provisions are fulfilled, the auditor has a mandatory duty under Section 319.20, Revised Code, to transfer the land on application.

5. A board of county commissioners may not require that the county health commissioner approve a plat before the board gives its approval under Sections 711.041 and 711.05, Revised Code.

Columbus, Ohio, December 23, 1960

Hon. John H. Barber, Prosecuting Attorney
Fulton County, Wauseon, Ohio

Dear Sir:

I have for consideration your request for my opinion in which you ask questions as follows:

“(1) For example, does a one acre tract sold off from a farm outside a municipal corporation come under the definition of a subdivision as set forth in section 711.001 (B)?

“(2) Does such an example require a plat and approval of the County Commissioners under section 711.041 ORC?

“(3) If so, does this require the county auditor to transfer such plat and the recorder to record such plat in the plat record?

“(4) Is it proper for the County Commissioners to require the approval of the County Health Commissioner upon such plats before endorsing their approval?”

Your first specific question pertains to Section 711.001, Revised Code, which reads as follows:

“As used in sections 711.001 to 711.38, inclusive, of the Revised Code:

“(A) ‘Plat’ means a map of a tract or parcel of land.

“(B) ‘Subdivision’ means:

“(1) The division of any parcel of land shown as a unit or as contiguous units on the last preceding tax roll, into two or more parcels, sites, or lots, any one of which is less than five acres for the purpose, whether immediate or future, of transfer of ownership provided, however, that the division or partition of land into parcels of more than five acres not involving any new streets or easements of access, and the sale or exchange of parcels between adjoining lot owners, where such sale or exchange does not create additional building sites, shall be exempted; or

“(2) The improvement of one or more parcels of land for residential, commercial or industrial structures or groups of structures involving the division or allocation of land for the opening, widening or extension of any street or streets, except private streets serving industrial structures; the division or allocation of land as open spaces for common use by owners, occupants or lease holders or as easements for the extension and maintenance of public sewer, water, storm drainage or other public facilities.”

While I am not at all certain as to the meaning of the words "for the purpose, whether immediate or future, of transfer of ownership" as used in division (B) (1) of said Section 711.001, it would appear that the definition of the word "subdivision" includes a one acre tract sold off from a farm outside a municipal corporation. In this regard it is stated in the first paragraph of the syllabus of Opinion No. 3285, Opinions of the Attorney General for 1953, page 654:

"1. A 'subdivision,' as defined in Section 711.001, Revised Code, may be created either (1) by a conveyance of a part of a single parcel of land whereby either the part conveyed or the part remaining is less than five acres, or (2) by a survey and plat thereof by an owner who elects to 'lay out a village, or subdivision or addition to a municipal corporation' as provided in Section 711.01, Revised Code."

Accordingly, I answer your first question in the affirmative.

Your second question asks whether when a one acre tract is sold as in the first question, a plat and approval of the board of county commissioners under Section 711.041, Revised Code, is required. Said Section 711.041 reads as follows:

"No plat certifying lands outside a municipal corporation may be recorded without the approval thereon of the board of county commissioners of the county wherein such lands are situated.

"The approval of a plat by the board of county commissioners shall not be deemed to be an acceptance of the dedication of any public street, road, or highway dedicated on such plat.

"This section does not apply to such plats as are required by section 711.09 or 711.10 of the Revised Code to be approved by a planning commission."

Obviously, Section 711.041, *supra*, applies only where a plat must be recorded, thus, the question arises whether a survey and platting is required when a subdivision is created by a mere conveyance of land. Regarding the surveying and platting of a subdivision, Section 711.01, Revised Code, reads:

"Any person may lay out a village, or subdivision or addition to a municipal corporation, by causing the territory to be surveyed, and by having a plat of it made by a competent surveyor. The plat shall particularly describe the streets, alleys, commons, or public grounds, and all in-lots, out-lots, fractional-lots, within or adjacent to such village. The description shall include the courses, boundaries, and extent."

Thus, a person may lay out a subdivision by causing the territory to be surveyed, and by having a plat of it made by a competent surveyor. This method of creating a subdivision, however, differs from that where under the definition of division (B) (1) of Section 711.001, *supra*, a subdivision is created by a mere conveyance. Regarding this difference, it is stated in Opinion No. 3285, *supra*, starting at page 660:

“Finally it must be pointed out that in Section 711.101, Revised Code, reference is made to ‘plats and plans required by sections 711.05, 711.09 and 711.10 of the Revised Code.’ The reference to these sections with no similar reference to any such requirements of Section 711.01, Revised Code, would indicate the legislative understanding that *such section does not impose the duty to survey and to make up a plat thereof in those instances in which a subdivision is created merely by a conveyance, as distinguished from the method described in this section.*” (Emphasis added)

And at page 671 of that opinion, the writer concluded:

“It is thus to be seen from a thorough examination of the provisions of Sections 711.001 and 711.14, inclusive, that although Section 711.01, Revised Code, imposes a duty to make a survey and plat in every instance in which an owner of land elects to ‘lay out’ a subdivision within the historical meaning of such term, there is nowhere therein to be found any mandatory duty to survey and plat every subdivision, as this term is defined by statute, although provision is made for the promulgation of rules imposing such duty. * * *”

The reference to “promulgation of rules imposing such duty” in the above-quoted language refers to the interpretation given to Sections 711.05, 711.09 and 711.10, Revised Code, by the writer of Opinion No. 3285, *supra*. Under this interpretation, with which I concur, Section 711.05, *supra*, authorizes a board of county commissioners to adopt rules requiring a survey and a plat thereof with respect to any subdivision of land by the owners thereof, *however, effected*; a city or village planning commission would have the same authority under Section 711.09, *supra*; and a county or regional planning commission under Section 711.10, *supra*.

The above interpretation was followed in Opinion No. 3343, Opinions of the Attorney General for 1953, page 688, the first paragraph of the syllabus summarizing what I believe to be the correct conclusion as follows:

“1. Where a subdivision, as defined in Section 711.001, Revised Code, is created by the conveyance by metes and bounds of

a tract less than five acres in extent from a single parcel of land, there is no requirement under the provisions of Chapter 711., Revised Code, that such subdivision be platted except as such procedure is required by the terms of a rule promulgated by a local authority as provided in Sections 711.05, 711.09 or 711.10, Revised Code; but any such requirement in the rule of a local authority is subject to the exception set forth in Section 711.131, Revised Code, in the case of subdivisions which do not involve (1) the opening or alteration of new streets and roads, nor (2) more than five lots."

Further on this question, the provisions of Section 711.40, Revised Code, appear to strengthen the conclusion noted above. This section which was enacted subsequent to the issuance of Opinion Nos. 3285 and 3343, *supra*, reads as follows:

"Unless required by rules and regulations adopted pursuant to the provisions of sections 711.05, 711.09 and 711.10 of the Revised Code, the provisions of sections 711.01 to 711.39, inclusive, of the Revised Code, shall not apply to the division of any parcel of land by an instrument of conveyance."

Answering your second question, therefore, I conclude that, in the absence of a rule to the contrary, where a subdivision is created merely by a conveyance, as in the first question here considered, there is no duty to survey and plat the lands conveyed and thus no duty to comply with the provisions of Section 711.041, *supra*.

Coming to your third question, since there is no requirement that a subdivision created by a mere conveyance be platted unless the local authority concerned adopts a rule requiring such platting, there would be no plat to be transferred and recorded in the absence of such a rule. Assuming that in the cases to which you refer the local authority (the county) has not adopted such a requirement, my answer to the second question would be dispositive of the third. Assuming, however, that the county has adopted a requirement that all subdivisions be surveyed and platted, and that in a particular case a plat has been approved by the board of county commissioners under Section 711.041, *supra*, and recorded under Section 711.04, Revised Code (relating to acknowledgment and recording), your third question may be considered.

Section 711.04, *supra*, states:

"After a plat of a subdivision is completed, it shall be certified by the surveyor and acknowledged by the owner before an officer

authorized to take the acknowledgment of deeds, which officer shall certify his official act on the plat. If any owner is a non-resident of the state, his agent, authorized by writing, may make such acknowledgment. Such plat, and if the execution is by agent, his written authority, shall thereupon be recorded in the office of the county recorder.”

The words of the above section that the plat *shall* thereupon be recorded in the office of the county recorder lead me to the conclusion that after a plat of a subdivision is completed and acknowledged under Section 711.04, *supra*, and is approved by the board of county commissioners under Section 711.041, *supra*, the plat should be presented to the county recorder for recording, and he has a duty to record it.

As to the transfer of land by the county auditor, if pursuant to Section 711.05, *supra*, the board of county commissioners has adopted a rule requiring that where a subdivision is created by a mere conveyance a survey and plat is required, the auditor may not transfer the property or record the deeds or leases until the provisions of Chapter 711., Revised Code, are complied with. In this regard, Section 711.121, Revised Code, reads:

“The county auditor and the county recorder shall not transfer property or record deeds or leases which attempt to convey property contrary to the provisions of Chapter 711. of the Revised Code. In case of doubt, the county auditor or county recorder may require the person presenting such deed or lease to give evidence of the legality of a conveyance by metes and bounds by an affidavit as to the facts which exempt such conveyance from the provisions of Chapter 711. of the Revised Code.”

Also, Section 711.13, Revised Code, provides:

“Whoever, being the owner or agent of the owner of any land within or without a municipal corporation, willfully transfers any lot, parcel, or tract of such land from or in accordance with a plat of a subdivision as specifically defined in this chapter, before such plat has been recorded in the office of the county recorder, shall forfeit and pay the sum of not less than ten nor more than five hundred dollars for each lot, parcel, or tract of land so sold. The description of such lot, parcel, or tract by metes and bounds in the deed or transfer shall not serve to exempt the seller from the forfeiture provided in this section.

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Where in such a case the provisions of Chapter 711., *supra*, are complied with, the auditor has a duty to make the transfer of land on application

(See Section 319.20, Revised Code; Opinion No. 5142, Opinions of the Attorney General for 1942, page 351; *State, ex rel. v. Godfrey*, 62 Ohio St., 18, at 23).

Your last question as to approval by the board of county commissioners apparently refers to the approval required by Section 711.041, *supra*. Here again for the purpose of the instant question, it must be assumed that the board has adopted a rule requiring a survey and plat thereof with respect to any subdivision of land by the owners thereof. Said Section 711.041 was set forth earlier. Section 711.05, *supra*, pertaining to approval or rejection by the board, reads as follows:

“Upon the submission of a plat for approval, in accordance with section 711.04 of the Revised Code, the board of county commissioners shall certify thereon the date of such submission, and the approval of the board required by such section or the refusal to approve shall take place within thirty days thereafter or such further time as the applying party may agree to, otherwise such plat is deemed approved and may be recorded as if bearing such approval. The board may adopt general rules and regulations governing plats and subdivisions of land falling within its jurisdiction, to secure and provide for the co-ordination of the streets within the subdivision with existing streets and roads or with existing county highways, for the proper amount of open spaces for traffic, circulation, and utilities, and for the avoidance of future congestion of population detrimental to the public health, safety, or welfare but shall not impose a greater minimum lot area than 4800 square feet. Where under the provisions of section 711.101 of the Revised Code the board of county commissioners has set up standards and specifications for the construction of streets, utilities, and other improvements, for common use, such general rules and regulations may require the submission of appropriate plans and specifications for approval. The ground of refusal to approve any plat, submitted in accordance with section 711.04 of the Revised Code shall be stated upon the record of the board and, within sixty days thereafter, the person submitting any plat which the board refuses to approve may file a petition in the court of common pleas of the county in which the land described in said plat is situated to review the action of such board.”

While said Section 711.05 does authorize the board to adopt general rules and regulations governing plats and subdivisions and to require the submission of appropriate plans and specifications for approval, there is no authority for the board to require the approval of the county health commissioner before endorsing its approval of a plat. Also, for the board to adopt such a policy would amount to a delegation of authority by the board

and would be invalid (32 Ohio Jurisprudence, Section 86, page 946). Accordingly, I conclude that the board may not require the approval of the county health commissioner as described in your last question.

Answering your specific questions, therefore, it is my opinion and you are advised:

1. A one acre tract sold off from a farm outside a municipal corporation is a subdivision within the purview of division (B) of Section 711.001, Revised Code. (Opinion No. 3285, Opinions of the Attorney General for 1953, page 654, approved and followed.)

2. Under the provisions of Section 711.40, Revised Code, where a subdivision is so created, there is no duty to survey and plat the lands conveyed unless the board of county commissioners, pursuant to Section 711.05, Revised Code, has adopted a rule requiring a survey and plat thereof with respect to *any* subdivision of land by the owner thereof; and in the absence of such a rule, there is no duty to comply with Sections 711.04 and 711.041, Revised Code.

3. Where a plat has been completed, and certified and acknowledged in accordance with Section 711.04, Revised Code, the recorder has a duty to record such plat upon application.

4. Where a survey and plat thereof of land are required under Chapter 711., Revised Code, or under a rule adopted by the board of county commissioners pursuant to Section 711.05, Revised Code, Section 711.121, Revised Code, precludes the transfer of such land by the auditor until the provisions are fulfilled, the auditor has a mandatory duty under Section 319.20, Revised Code, to transfer the land on application.

5. A board of county commissioners may not require that the county health commissioner approve a plat before the board gives its approval under Sections 711.041 and 711.05, Revised Code.

Respectfully,

MARK McELROY

Attorney General