OPINION NO. 74-014

Syllabus:

The sanitary regulations adopted by the Public Health Council constitute a minimum standard with which the regulations of city health districts and general health districts must comply, but this does not prevent a city or a general health district from adopting a more stringent regulation when the condition of the public health within the jurisdiction of the board of such district may reasonably be said to require such action.

To: Wayne C. Gerlt, Secretary, Public Health Council, Dept. of Health, Columbus, Ohio

By: William J. Brown, Attorney General, February 22, 1974

I have before me your predecessor's request for an opinion which reads as follows:

> "Division (A) of section 3701.34 provides the following:
>
> 'The public health council shall:
>
> '(A) Make and amend sanitary regulations to be of general application throughout the state. Such sanitary regulations shall be known as the sanitary code;'
>
> "When the Public Health Council adopts sanitary regulations under this provision, we should like to have your opinion as to whether or not boards of health of city and general health districts have authority under Chapters 3707. or 3709. of the Revised Code to adopt more stringent regulations on the same subject."

An understanding of the relationship between the Public Health Council on the one hand, and the city and general health districts on the other, requires some review of the legislative history of the Department of Health of the State of Ohio. It has always been recognized that the subject of the public health, falling as it does within the police powers of the state, is a matter the regulation of which can be preempted by the state to the exclusion of all local

governments - counties, townships, and municipalities. In State Board of Health v. Greenville, 86 Ohio St. 1 (1912), the Court said (at p. 21):

> "This particular legislation now under consideration is designed to preserve and protect the public health and comfort, and, therefore, falls directly within the police power of the state. This power includes anything which is reasonable and necessary to secure the peace, safety, health, morals and best interests of the public. It is now the settled law that the legislature of the state possesses plenary power to deal with these subjects so long as it does not contravene the Constitution of the United States or infringe upon any right granted or secured thereby, or is not in direct conflict with any of the provisions of the Constitution of this state, and is not exercised in such an arbitrary and oppressive manner as to justify the interference of the courts to prevent wrong and oppression. * * *" (Emphasis added.)

At the time of the Greenville case the state had not fully exercised its right of preemption in local health matters. The statutes, then in effect, "authorized municipalities to establish and appoint boards of health as part of their local governments." State, ex rel. Mowrer v. Underwood, 137 Ohio St. 1, 5 (1940). These local boards were subject to supervision by the State Board of Health, but a local board could challenge the judgment of the State Board and have the question submitted "to a board of arbitration composed of men skilled in sanitary work * * *." State Board of Health v. Greenville, supra, 86 Ohio St. at 18, 24-26. The Home Rule amendments to the Ohio Constitution (Sections 3 and 7 of Article XVIII), which were not adopted until several months subsequent to the opinion in the Greenville case, undoubtedly gave rise to some uncertainty as to the authority of the State Board. Cf. Bucyrus v. Department of Health, 120 Ohio St. 426 (1929). In 1917 the General Assembly did away with the State Board and created a new Department of Health consisting of a Commissioner (now the Director) and a Public Health Council which was given authority to review the Commissioner's acts in substitution for the old arbitration proceeding. 107 Ohio Laws, 522-525; Ex parte Company, 106 Ohio St. 50 (1922). Finally, in 1919 the General Assembly enacted the Hughes and Griswold Acts, which removed the powers of local health administration from the municipalities and conferred them upon newly created "city" and "general" health districts which derive their authority directly from the state. 108 Ohio Laws, Part 1, 236-251, Part 2, 1085-1093; State, ex rel. Cuyahoga Heights v. Zangerle, 103 Ohio St. 566 (1920); State, ex rel. Mowrer v. Underwood, supra, 137 Ohio St. at 4-5; Opinion No. 71-078, Opinions of the Attorney General for 1971; Opinion No. 72-088, Opinions of the Attorney General for 1972; Opinion No. 73-003, Opinions of the Attorney General for 1973. The reason for the change was, apparently, the feeling of the legislature that health matters had been "indifferently administered" in certain localities. Board of Health v. State, 40 Ohio App. 77, 81 (1931); Opinion No. 1355, Opinions of the Attorney General for 1933.

With this background in mind I consider your question. The powers of the Public Health Council, which remain substantially as originally enacted in 1917, are presently contained in R.C. 3701.34 which provides:

> "The public health council shall:
>
> "(A) Make and amend sanitary regulations to be of general application throughout the state. Such sanitary regulations shall be known as the sanitary code;
>
> "(B) Take evidence in appeals from the decision of the director of health in a matter relative to the approval or disapproval of plans, locations, estimates of cost, or other matters coming before the director for official action. In the hearing of such appeals the director may be represented in person or by the attorney general;
>
> "(C) Conduct hearings in cases where the law requires that the department shall give such hearings and reach decisions on the evidence presented, which shall govern subsequent actions of the director with reference thereto;
>
> "(D) Prescribe, by regulations, the number and functions of divisions and bureaus and the qualifications of chiefs or [of] divisions and bureaus within the department;
>
> "(E) Enact and amend bylaws in relation to its meetings and the transaction of its business;
>
> "(F) Consider any matter relating to the preservation and improvement of the public health and advise the director thereon with such recommendations as it may deem wise.
>
> "The council shall neither have nor exercise executive or administrative duties."

The powers of the city health districts and general health districts appear in several Sections of the Revised Code. As to both types of district, R.C. 3707.01 provides in part:

> "The board of health of a city or general health district shall abate and remove all nuisances within its jurisdiction.
>
> "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. * * *".

As to the city health districts, R.C. 3709.20 provides in part:

> "The board of health of a city 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. * * *"

As to the general health districts, R.C. 3709.21 provides in part:

> "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. Such board may require that no human, animal, or household wastes from sanitary installations within the district be discharged into a storm sewer, open ditch, or watercourse without a permit therefor having been secured from the board under such terms as the board requires. * * *"

It should be noted that the General Assembly evidently intended the Public Health Council to exercise the quasi-judicial powers of the Department of Health. Cf. Forest Hills Utility Co. v. Gardner, 31 Ohio St. 2d 78 (1972); Bucyrus v. Department of Health, 120 Ohio St. 426, 430-431 (1929). The executive and administrative powers of the Department are placed in the hands of the Director; and the Director is to initiate sanitary regulations to be approved by the Public Health Council. R.C. 3701.03 - 3701.04. The Council, on the other hand, has neither executive nor administrative authority. R.C. 3701.34, supra.

It should also be noted that the Council, the city health districts, and general health districts, are all agencies of the state. There is, therefore, no question here of a clash between local municipal law and general state law. All of the statutes involved have general application throughout the state. The question is whether those Sections of the Revised Code, which give the city and general health districts discretion to adopt such regulations, within their own jurisdictions, as are necessary for the public health, are limited by the sanitary code approved by the Public Health Council.

The Supreme Court has held that the boards of city and general health districts have wide latitude in adopting regulations for the protection of the health of the public within their respective jurisdictions. In Weber v. Board of Health, 148 Ohio St. 389, 396, 397 (1947), the Court said:

> "Ordinarily, in delegating to boards and commissions the authority to make rules and regulations, the General Assembly must establish the legal policy by adopting standards and authorizing the boards and commissions to make their rules in

accordance with such standards. * * * However, it is recognized that there are many occasions where the nature of the problem makes it impossible to lay down standards, and as a result rule-making bodies must be allowed a wide discretion without anything as their guide except the general policy of the law-making body and the law that such bodies must not legislate or make rules which are unreasonable, discriminatory or contrary to constitutional rights.

"That situation is usually present in reference to questions of public morals, health, safety or general welfare; * * *

"We hold, therefore, that Section 1261-42, General Code [R.C. 3709.21], is a constitutional enactment and that under it the Board of Health of the Butler County General Health District had authority to enact reasonable, nondiscriminatory and legal rules and regulations, in reference to garbage and hog feeding within its district."

* * * * * * * * *

(Emphasis added.)

In addition to recognizing the broad discretion accorded generally to local health districts by the Hughes and Griswold Acts, the Court has also pointed out that the Acts make allowance for the fact that the problems of one district might vary considerably from those of another. In State, ex rel. Cuyahoga Heights v. Zangerle, 103 Ohio St. 566, 573-574 (1921), the Court said:

"* * *Both the Hughes act and the Griswold act make a classification of cities, villages and townships, and contain provisions for the cities which are different from those relating to villages and townships. There is also a difference in the provisions relating to the officials and the administrative powers of each. In other words, the legislature undertook to make a classification and made specific provisions with reference to the territory within the different classes. The legislature obviously felt that certain sections of the state are so populated as to make it advisable that there should be a series of city health districts, as distinguished from the general health district for which it provided in other sections, and that the administrative machinery for the purpose of carrying out the law and accomplishing the purposes of the legislature should be somewhat different in the different districts.

> "The whole scheme of the legislation under examination is regulatory in its nature and was passed in the exercise of the police power. The necessity for classification in regulatory legislation in order that it may be definite and efficient to accomplish its object has long been recognized."

The purpose of the General Assembly must have been to permit the Public Health Council to adopt regulations having effect throughout the state, and at the same time to leave the local boards free to adopt such measures as are considered necessary to deal with nuisances within their respective jurisdictions. I conclude, therefore, that the regulations of the Public Health Council constitute a minimum standard of state-wide application which the city health districts and general health districts must observe. On the other hand, the local boards have discretion to adopt more stringent regulations if a particular health problem within their particular jurisdictions may reasonably be said to require such action. Any other interpretation would defeat the wide latitude granted to the local boards to take such action as is necessary in order to protect the general health of the residents of the particular district. A statute must not, of course, be so interpreted as to produce an unreasonable result. Canton v. Bowling Lanes, 16 Ohio St. 2d 47, 53 (1968); State, ex rel. Cooper v. Savord, 153 Ohio St. 367, 371 (1950).

It may be urged that compliance with such local regulations will result in wide variances of cost from district to district. But this is inherent in the problem for which the General Assembly sought to provide. One district may be comparatively free from nuisance, while its neighbor is less fortunate. In a somewhat analogous situation, R.C. 711.05 requires that boards of county commissioners, in order to prevent congestion detrimental to the public health, shall adopt regulations providing that the lots in each subdivision shall be at least 4800 square feet in area. On the other hand, township zoning regulations have been upheld which imposed minimum lot sizes of 20,000 square feet and 80,000 square feet. State, ex rel. Pugden Development Co. v. Kiefaber, 113 Ohio App. 523 (1960); State, ex rel. Grant v. Kiefaber, 114 Ohio App. 279 (1960); Opinion No. 70-074, Opinions of the Attorney General for 1970.

In specific answer to your request it is my opinion, and you are so advised, that the sanitary regulations adopted by the Public Health Council constitute a minimum standard with which the regulations of city health districts and general health districts must comply, but this does not prevent a city or a general health district from adopting a more stringent regulation when the condition of the public health within the jurisdiction of the board of such district may reasonably be said to require such action.