

OPINION NO. 89-025**Syllabus:**

A charter county government organized pursuant to Ohio Const. art. X, §3, to the extent authorized by the terms of its charter, may regulate the construction of agricultural buildings not used in retail trade and may require the owners of such buildings to submit plans and to obtain building permits prior to construction; such regulation is not in conflict with any provision of R.C. 3781.06.

To: Gerald O. Holland, Chairman, Board of Building Standards, Department of Industrial Relations, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 15, 1989

I have before me your request for my opinion regarding the local regulation of agricultural buildings which are exempted from statutory regulation by R.C. 3781.06. Specifically you ask:

Can a charter county government organized pursuant to Article X of the Ohio Constitution regulate the construction of agricultural buildings not used in the business of retail trade and require the owners of such buildings to submit plans and obtain building permits prior to the construction of an agricultural building?

In answering your question, it is helpful to first examine the home rule authority of a charter county with regard to the regulation of buildings. Ohio Const. art. X, §3 states, in pertinent part:

The people of any county may frame and adopt or amend a charter as provided in this article....[The charter] shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities....

Thus a county charter must provide all powers vested in counties by law and may provide any powers vested in municipalities by constitution or law. The authority granted by law to counties over agricultural buildings not used in retail trade is limited to zoning regulations, R.C. 303.02,¹ and to building code regulations

¹ R.C. 303.02 states that "the board of county commissioners may...regulate by resolution the location, height, bulk, number of stories, and size of buildings and other structures,...percentages of lot areas which may be occupied, set back building lines, sizes of yards, courts, and other open spaces, the density of population, the uses of buildings and other structures...."

necessary for participation in the national flood insurance program. R.C. 307.37.² The constitutional and statutory authority of municipalities with regard to buildings is not limited either to particular types of regulations or to particular types of buildings. Pursuant to Ohio Const. art. XVIII, §3, "[m]unicipalities 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." Building regulations are police regulations within the meaning of Ohio Const. art. XVIII, §3. See *City of Dayton v. S.S. Kresge Co.*, 114 Ohio St. 624, 627, 151 N.E. 775, 776 (1926). See also R.C. Chapter 713 (municipal zoning authority); R.C. 715.26 ("[a]ny municipal corporation may: (A) Regulate the erection of buildings or other structures..."). Thus the extent of the authority of a home-rule county to regulate agricultural buildings not used in retail trade will depend upon the terms of its charter. The Summit County charter, adopted pursuant to Ohio Const. art. X, §3, provides not only for the statutory authority given to all counties, but also for the exercise of the full panoply of municipal powers. Summit County Charter art. I, §1.01.³ Therefore, Summit County may impose any regulations on agricultural buildings which do not conflict with the general laws of the state.⁴ Ohio Const. art. X, §3; Ohio Const. art. XVIII, §3.

The provisions of the state building code, found in R.C. Chapters 3781 and 3791, are general laws of the state. *City of Eastlake v. Ohio Bd. of Bldg. Standards*, 66 Ohio St. 2d 363, 368, 422 N.E.2d 598, 601 (1981), *cert. denied*, 454 U.S. 1032 (1981); *Bogen v. Clemmer*, 125 Ohio St. 186, 180 N.E. 710 (1932);

² The general authority of a county to regulate buildings, found at R.C. 307.37(A)(1), is limited to "single-family, two-family, and three-family dwellings within the unincorporated territory of the county." However, pursuant to R.C. 307.37(A)(2), county building code regulations adopted for participation in the national flood insurance program or for purposes of coastal flood hazard management pursuant to R.C. Chapter 1506, may govern buildings "including, but not limited to, residential, commercial, institutional, or industrial buildings or structures or other permanent structures, as that term is defined in Section 1506.01 of the Revised Code." (Emphasis added.) R.C. 1506.01(F) defines "permanent structure" as "any residential, commercial, industrial, institutional, or agricultural building...." (Emphasis added.)

³ Summit County Charter art. I, §1.01 states, in pertinent part:

The County is responsible for the exercise within its boundaries of all powers vested in and the performance of all duties imposed upon counties and county officers by law. In addition, the County may exercise all powers specifically conferred by this Charter or incidental to powers specifically conferred by this Charter and all other powers which the Constitution and laws of Ohio now or hereafter grant to counties to exercise or do not prohibit counties from exercising, including the concurrent exercise by the County of all or any powers vested in municipalities by the Ohio Constitution or by general law. (Emphasis added.)

⁴ Such regulations are, of course, subject to the same constraints which apply to any exercise of the police power; in order to be valid they may not be arbitrary, capricious, or discriminatory and must be reasonably related to the public health, safety and general welfare. See *Benjamin v. City of Columbus*, 167 Ohio St. 103, 146 N.E.2d 854 (1957) (syllabus, paragraphs five and six), *cert. denied*, 357 U.S. 904 (1958). *Accord City of Cleveland v. Raffa*, 13 Ohio St. 2d 112, 235 N.E.2d 138 (1968), *cert. denied*, 393 U.S. 927 (1968). Your question does not raise the issue of the substantive validity of the particular regulations involved. I assume, for purposes of this opinion, that the regulations would meet the above standard, if the county's authority to regulate is established.

Niehaus v. State ex rel. Bd. of Education, 111 Ohio St. 47, 144 N.E. 433 (1924). Therefore, a charter county may not impose regulations on buildings which conflict with R.C. Chapters 3781 and 3791. See also R.C. 307.37 ("[r]ules adopted under division (A)(2) [county regulations in flood hazard areas] of this section shall not conflict with the Ohio building code"); R.C. 3781.01 (allowing municipalities to make "further and additional regulations, not in conflict with such chapters or with the rules and regulations of the board of building standards").

The Ohio Supreme Court has enunciated a clear standard for determining the existence of a conflict. "In determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923) (syllabus, paragraph two). Accord *In re Decertification of Eastlake*, 66 Ohio St. 2d at 368, 422 N.E.2d at 601-602; *State ex rel. Cities Service Oil Company v. Orteca*, 63 Ohio St. 2d 295, 299, 409 N.E.2d 1018, 1021 (1980).

R.C. 3781.06 specifies the classes of buildings subject to the statutory provisions of the state building code and the regulatory authority of the board of building standards. See R.C. 3781.10 ("board of building standards shall: (A) [f]ormulate and adopt rules governing...all buildings and classes of buildings specified in section 3781.06..."). In general, R.C. 3781.06 provides that the state building code regulates "[a]ny building which may be used as a place of resort, assembly, education, entertainment, lodging, dwelling, trade, manufacture, repair, storage, traffic, or occupancy by the public, and all other buildings or parts and appurtenances thereof erected within this state...." However, R.C. 3781.06 expressly exempts three classes of buildings from the coverage of the state building code: single, two, and three-family dwellings that are not constructed as industrial units, agricultural buildings that are not used in retail trade, and specific types of day care homes. With respect to agricultural buildings, R.C. 3781.06 states:

Sections 3781.06 to 3781.18 and 3791.04 of the Revised Code shall not apply⁵ to buildings, or structures which are incident to the use for agricultural purposes of the land on which such buildings or structures are located, provided such buildings or structures are not used in the business of retail trade. (Emphasis and footnote added.)

Clearly, the effect of R.C. 3781.06 is that the state building code neither "forbids or prohibits" the exempted agricultural buildings nor does it "permit or license" them. By its own terms, the code simply does not apply. There can be no conflict between state law and local ordinance with regard to matters to which state law does not apply. See *Fondessy Enterprises, Inc. v. City of Oregon*, 23 Ohio St. 3d 213, 217, 492 N.E.2d 797, 801 (1986) (stating that a statute held to be a general law "may be utilized only to limit the legislative power of municipalities by the precise terms it sets forth"); *City of Cleveland v. Raffa*, 13 Ohio St. 2d 112, 114, 235 N.E.2d 138, 140 (1968) ("[i]n the field of regulation and control...the rationale of the *Sokol* and *Scalera* [135 Ohio St. 65, 19 N.E.2d 279] cases is that the state must positively permit what the ordinance prohibits, or vice versa, regardless of the existence of extensive state regulation, before a conflict arises") (citations omitted, emphasis added), cert. denied, 393 U.S. 927 (1968). Accord *City of Cincinnati v. Hoffman*, 31 Ohio St. 2d 163, 169, 285 N.E.2d 714, 719 (1972), appeal dismissed, cert. denied, 410 U.S. 920 (1973).

In conclusion, it is my opinion, and you are hereby advised, that a charter county government organized pursuant to Ohio Const. art. X, §3, to the extent

⁵ Review of R.C. Chapters 3781 and 3791 reveals that R.C. sections 3781.06 to 3781.18 and 3791.04 contain the regulatory provisions governing the buildings specified in R.C. 3781.06. The remaining sections of R.C. Chapters 3781 and 3791 provide definitions, procedures for enforcement and appeal, or regulations for specific types of buildings (none of which are agricultural buildings). Thus, as a practical matter, no other provisions of R.C. Chapters 3781 or 3791 have any effect on agricultural buildings.

authorized by the terms of its charter, may regulate the construction of agricultural buildings not used in retail trade and may require the owners of such buildings to submit plans and to obtain building permits prior to construction; such regulation is not in conflict with any provision of R.C. 3781.06.