

1832

TOWNSHIP TRUSTEES—ZONING, §519.03 R.C.—ZONING PLAN REJECTED—NO ZONING REGULATIONS IN EFFECT; ZONING COMMISSION MAY BE ABOLISHED BY BOARD OF TOWNSHIP TRUSTEES.

SYLLABUS:

Where a board of township trustees has elected by resolution, adopted upon their own initiative, as provided in Section 519.03 (A), Revised Code, to exercise the powers relating to zoning conferred on them in Chapter 519, Revised Code, and has proceeded to "create and establish" a township zoning commission, as provided in Section 519.04, Revised Code, and where a zoning plan recommended by such commission has been rejected by the electors at an election held under the provisions of Section 519.11, Revised Code, and where no township zoning regulations are in effect in such township, such board of trustees may act by resolution to abolish such commission, such power of abolition being coexistent with the power of creation.

Columbus, Ohio, March 12, 1958

Hon. James K. Leedy, Prosecuting Attorney
Wayne County, Wooster, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"I am writing you with reference to Section 519.04 of the Revised Code of Ohio. Said section provides in part that the Board of Township Trustees of any township proceeding under

Sections 519.02 to 519.25, inclusive, of the Revised Code, shall create and establish a Township Zoning Commission composed of five members . . . the terms of the members so arranged that the term of one member will expire each year. Each member shall serve until his successor is appointed and qualified.

“Prior to the general election held in November, 1957, the Board of Township Trustees, Chippewa Township, Wayne County, Ohio, in proceeding according to Chapter 519., of the Revised Code of Ohio, appointed said five member zoning commission. At the general election mentioned aforesaid, the zoning proposal was overwhelmingly rejected. The present Board of Township Trustees, Chippewa Township, Wayne County, Ohio, two members of which are new, has requested me to obtain from you an opinion as to what method said five member zoning commission might be abolished. As I interpret said Section 519.04, it appears to me that each member will serve on said Commission until such time as his term expires, and until his successor is appointed and qualified.”

It is understood that the board of township trustees in the case at hand has acted upon its own initiative as provided in Section 519.03 (A), Revised Code, in setting in motion the proceedings to exercise township zoning powers. This section reads:

“Before availing itself of the powers conferred by section 519.02 of the Revised Code, the board of township trustees shall pass a resolution declaring its intention to proceed under sections 519.02 to 519.25, inclusive, of the Revised Code. The board may act in the following manner:

“(A) It may adopt such a resolution upon its own initiative.

“(B) It shall adopt such a resolution if there is presented to it a petition, signed by a number of qualified voters residing in the unincorporated area of the township or part thereof to be included in the zoning plan equal to not less than eight per cent of the total vote cast for all candidates for governor in such area at the last preceding general election at which a governor was elected, requesting the board to proceed with township zoning under such sections.”

Had the board acted in response to a petition as provided in Division (B) of this section, I should seriously doubt their power to abolish the zoning commission thus brought into existence. In such case, the board would be merely performing the ministerial task of carrying out the mandate invoked by such petition; it could not be said that such board in any

but a technical sense had created the commission; and hence, could not be thought to have the power to abolish as an incident of the power to create this agency.

Provision for the office here in question is made in Section 519.04, Revised Code, which reads in part:

“The board of township trustees of any township proceeding under sections 519.01 to 519.99, inclusive, of the Revised Code, shall create and establish a township zoning commission. The commission shall be composed of five members who reside in the unincorporated area of the township, to be appointed by the board, and the terms of the members shall be of such length and so arranged that the term of one member will expire each year. * * *”

Although this statute appears to confer on the township trustees the power to “create and establish” the township zoning commission, it will be noted that the General Assembly has provided by statute the term of the members. Elsewhere in Chapter 519., Revised Code, are extensive statutory provisions defining the powers of the commission and prescribing the mode of its proceedings. This being so, it is recognized that an argument of some force can be made to the effect that the office of member of this commission is “created” by statute, and that all that is delegated to the township trustees is the power to determine when the legislative enactment comes into effect. See 42 American Jurisprudence, 904,

However this may be, I see little distinction that can be made between (1) the legislative power to create the office, and (2) the power of local officials to determine whether such statutory office is to be brought into existence in the local jurisdiction which they serve, for in the latter case the local officials do, in a very real sense, “create” the office in such local jurisdiction. For this reason, I conclude that the rules relative to the abolition of public office are equally applicable to an office which is thus brought into existence by local action.

In 32, Ohio Jurisprudence, 1072, it is said:

“It is well settled that an office of legislative creation may be abolished by the power which created it except in so far as its powers in this respect are restrained and limited by some higher authority—such as constitutional provisions thereon. * * *”

In the case at hand neither the constitution, nor the statute restrains the action of the township trustees in the abolition of the office which was “created” by their own action.

In 42 American Jurisprudence, 905, the rule is stated in this language :

“* * * A county empowered by the legislature to create an office may, if unrestricted, abolish it, and the same is true of a township or of a city.”

In *Elyria v. Vandemark*, 100 Ohio St., 365, the court was concerned with the abolition of a municipal office by municipal ordinance providing for a merger of it with another office. Although the statute purporting to authorize such an ordinance was declared invalid as being based on a population classification contrary to Section 1, Article XVIII, Ohio Constitution, its validity on any other score seems not to have been questioned. In the course of the opinion by Matthias, J., we find this remark :

“* * * The authority to create an office and the power to abolish the same are co-existent, and hence the tribunal authorized to create an office may abolish such office at any time it chooses, either during or at the end of the term of any incumbent of such office. * * *”

As I have indicated above, I deem it appropriate to apply these rules in the case at hand and to conclude that the power of the township trustees to bring a zoning commission into existence within the township which they serve includes the power to reverse such action and to abolish such agency within such township, at least in a case where, as you have indicated, the only zoning plan recommended by the commission has been rejected by vote of the electors to whom it was submitted as provided in Section 519.11, Revised Code, and where, as I understand is the case here, no zoning plan has become effective.

Where a zoning plan has been finally approved and has become fully effective, one might well entertain some doubt whether the trustees could abolish the commission without first effecting the repeal of such plan as provided in Section 519.25, Revised Code, for unless this were done it would not be possible, lacking a commission, to amend or supplement the plan from time to time as provided in Section 519.12, Revised Code. However, I do not understand that you are confronted with this problem and it is hence unnecessary here to express an opinion on the point.

In specific answer to your query, it is my opinion that where a board of township trustees has elected by resolution, adopted upon their own initiative, as provided in Section 519.03 (A), Revised Code, to exercise the powers relating to zoning conferred on them in Chapter 519., Revised

Code, and has proceeded to “create and establish” a township zoning commission, as provided in Section 519.04, Revised Code, and where a zoning plan recommended by such commission has been rejected by the electors at an election held under the provisions of Section 519.11, Revised Code, and where no township zoning regulations are in effect in such township, such board of trustees may act by resolution to abolish such commission, such power of abolition being coexistent with the power of creation.

Respectfully,

WILLIAM SAXBE

Attorney General