

OPINION NO. 74-070

Syllabus:

1. An owner of real estate cannot be required to dedicate a portion of it as a public street if the owner is unwilling to do so; the city must resort to appropriation procedures.

2. If the owner of a tract of land in a city desires to develop it, the city planning commission need not approve the plat of such proposed subdivision unless it is consistent with a duly adopted city plan, and the legislative authority of the city may, by reasonable regulations, require the developer to construct streets, curbs, gutters and sidewalks.

To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio

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

You have requested my opinion on the following questions:

"Does the Ohio Revised Code require, or may a city enact ordinances to require, dedication of right-of-way or street widening? If such dedication is, or may be required, may the developer be required to pave the dedicated portion and install curbs, gutters and sidewalks?"

You also ask that the questions posed be answered for a series of fact situations set out in your letter.

Strictly speaking, the "dedication" of a right-of-way is the voluntary surrender of real estate by its owner to the public for use as a public street. Three elements are necessary: an intent by the owner to give up his private rights in the property for the benefit of the public; an unequivocal act evidencing such intent; and an acceptance by the proper public authority. Doud v. Cincinnati, 152 Ohio St. 132, 135 (1949); Railway Co. v. Village of Carthage, 36 Ohio St. 631, 636-637 (1881); 17 Ohio Jur. 2d 6, 22-62. Since by definition the procedure is voluntary, there is no method by which an unwilling owner of real estate can be required to "dedicate" a right-of-way which the city judges to be in the public interest. See Opinion No. 358, Opinions of the Attorney General for 1963. The city's remedy is to exercise its right of eminent domain and proceed to appropriate the property under R.C. Chapter 719. and R.C. 163.01-163.22. O'Neil v. Board of Commissioners, 3 Ohio St. 2d 53, 56-57 (1965); State, ex rel. Sun Oil Co. v. Euclid, 164 Ohio St. 265, 270-271 (1955). In the Euclid case the Court said (at p. 270):

"The Constitution and statutes of Ohio grant to municipal corporations the power to establish streets and highways within their corporate limits and prescribe the procedure by which such power shall be exercised. * * * In the instant case, it undertook to appropriate the specific property in question by passing a resolution of intent, as authorized by Section 719.04, Revised Code."

However, when the owner of a tract of land within a city does desire to subdivide it and to dedicate certain portions as streets, the city has authority under the Revised Code to refuse to accept the dedication unless the proposed streets conform to duly adopted regulations. R.C. 711.09, 711.101, 723.03. The original form of this last Section, enacted in 1852, was designed to protect municipalities from needless and burdensome dedications. Wisby v. Bonte, 19 Ohio St. 242, 246-247 (1869).

Furthermore, even if the owner of a tract, who desires to subdivide it, does not dedicate any portion of it as streets, the city may refuse to approve the proposed subdivision unless provision is made for streets if called for by the plan and regulations adopted by the city planning commission. In Opinion No. 72-020, Opinions of the Attorney General for 1972, which dealt specifically with the authority of a board of county commissioners and a regional planning commission, I said:

"Your request calls for an examination of Chapters 711 and 713 of the Revised Code. Whenever the owner of a large, undeveloped, contiguous tract of land desires to subdivide it into lots for the purpose of development, either by selling the lots as units to others, or by improving them for future residential, commercial or industrial use, Chapter 711, supra, requires that he submit a 'plat' or map of the proposed 'subdivision' which must be approved by the proper city or county authority. In Opinion No. 1044, Opinions of the Attorney General for

1964, my predecessor said that '[t]he purpose of platting under this Chapter [711] is to provide for the co-ordination of streets within a subdivision with existing streets and roads, * * *.' See also Opinion No. 71-083, Opinions of the Attorney General for 1971. Chapter 713, supra, deals with the establishment and the duties of city, county and regional planning commissions to which approval of the plats of proposed subdivisions has largely been delegated."

Then, after quoting the Sections of the Revised Code pertinent to a board of county commissioners and a regional planning commission, the Opinion continues:

"To summarize briefly the general purport of the above statutes, the owner of undeveloped land who wishes to develop it, either by subdividing it into lots to be sold to individual purchasers, or by improving the entire tract himself for residential, commercial or industrial purposes, must submit a plat of the subdivision showing the portions of the tract which are to be allocated for use as streets, easements, or common open spaces. Where a regional planning commission has been established, the authority to formulate rules and regulations governing the submission of plats in the region and the ultimate approval of such submitted plats has been delegated to the commission. The rules and regulations must provide for a proper arrangement of streets, for adequate open spaces for traffic, utilities, light and air, and for avoidance of congestion of population, and such rules must be approved by the boards of county commissioners in the region. If the regional planning commission refuses to approve a submitted plat, the person submitting it is allowed sixty days within which to petition the court of common pleas for a review of the board's action."

See also Opinion No. 73-040, Opinions of the Attorney General for 1973; Opinion No. 71-083, Opinions of the Attorney General for 1971; Opinion No. 3166, Opinions of the Attorney General for 1962; and Opinion No. 7113, Opinions of the Attorney General for 1956.

The Revised Code confers comparable powers upon municipal legislative authorities and upon city planning commissions, which commission, I assume from the terms of your request, has been established in the city of which you speak. A city may establish such a commission under R.C. 713.01, and its powers are prescribed by R.C. 713.02 which provides in part as follows:

"The planning commission established under section 713.01 of the Revised Code shall make plans and maps of the whole or

any portion of the municipal corporation, and of any land outside thereof, which, in the opinion of the commission, is related to the planning of the municipal corporation, and make changes in such plans or maps when it deems it advisable. Such maps or plans shall show the commission's recommendations for the general location, character, and extent of streets, alleys, ways, * * *. * * *. With a view to the systematic planning of the municipal corporation, the commission may make recommendations to public officials concerning the general location, character, and extent of any such public ways, * * *.

* * * * * * * * *

"Whenever the commission makes a plan of the municipal corporation, or any portion thereof, no public building or structure, street, boulevard, parkway, * * * shall be constructed or authorized to be constructed in the municipal corporation or planned portion thereof unless the location, character, and extent thereof is approved by the commission. * * *."

Under R.C. 711.09 a city planning commission has authority to approve or disapprove the plats of proposed new subdivisions, and to adopt rules and regulations governing such plats and subdivisions. The regulations must, however, be approved by the legislative authority of the city. In pertinent part the Section reads as follows:

"Whenever a city planning commission adopts a plan for the major streets or thoroughfares and for the parks and other open public grounds of a city or any part thereof, or for the unincorporated territory within three miles of the corporate limits thereof or any part thereof, then no plat of a subdivision of land within such city or territory shall be recorded until it has been approved by the city planning commission and such approval indorsed in writing on the plat. * * *.

* * * * * * * * *

"The planning commission, platting commissioner, or legislative authority of a village may adopt general rules and regulations governing plats and subdivisions of land falling within its jurisdiction in order to secure and provide for the co-ordination of the streets within the subdivision with existing streets and roads or with the plan or plats of the municipal corporation, for the proper amount of open spaces for traffic, circulation, and utilities, and for the avoidance of future con-

gestion of population detrimental to the public health or safety but shall not impose a greater minimum lot area than forty-eight hundred square feet. Such rules and regulations may provide for the modification thereof by such planning commission in specific cases where unusual topographical or other exceptional conditions require such modification.

"However, no city or village planning commission shall adopt any rules or regulations requiring actual construction of streets or other improvements or facilities or assurance of such construction as a condition precedent to the approval of a plat of a subdivision unless such requirements have first been adopted by the legislative authority of the city or village after a public hearing. * * *."

Finally, in R.C. 711.101 provision is made for the adoption of rules and regulations, by the legislative authority of a city, specifically governing the construction of streets, curbs, gutters and sidewalks shown on the plat of a proposed new subdivision. The Section provides in part as follows:

"As to land falling within its jurisdiction or the jurisdiction of its planning commission, the legislative authority of a municipal corporation, or the board of county commissioners, may adopt general rules and regulations setting standards and requiring and securing the construction of improvements shown on the plats and plans required by sections 711.05, 711.09 and 711.10 of the Revised Code.

"Such rules and regulations may establish standards and specifications for the construction of streets, curbs, gutters, sidewalks, street lights, water mains, storm sewers, sanitary sewers, and other utility mains, piping, and other facilities, may require complete or partial installation of such improvements, and may make such installation a condition precedent to the sale or lease of lots in a subdivision or the issuance of a building permit for the improvement of a lot, and may require in lieu of actual construction a performance agreement and the furnishing of a performance bond or other guarantee or security for the purpose of assuring the installation of such improvements deemed necessary or appropriate in the public interest. The legislative authority of a municipal corporation or the board of county commissioners may accept such performance bond or other guarantee or security, under such conditions and time limitations as it may determine.

However, any actual construction or performance bond required by the legislative authority of a municipal corporation or board of county commissioners shall be limited to improvements and facilities directly affecting the lots to be improved or sold.

"Such rules and regulations may require the submission of plans and specifications for the improvements set forth in this section for approval as a condition precedent to the approval of a plat required by sections 711.05, 711.09, and 711.10 of the Revised Code, and may require the actual construction or agreement or assurance of such construction as a condition precedent to the approval required under said sections.

(Emphasis added.)

" * * * * * " * * * * "

Such regulations must, of course, bear some rational relationship to the particular subdivision in question. I would refer you to McKain v. Toledo Plan Commission, 26 Ohio App. 2d 171, 176-177 (1971), in which the Court stated:

" * * *. A municipality may require in subdivision regulations that a developer provide streets that are necessitated by the activity within the subdivision and such developer may be required to assume any costs which are specifically and uniquely attributed to his activities which would otherwise be cast upon the public, but this does not authorize a municipality to require a developer to dedicate a strip of land to the municipality without payment in order to widen a main thoroughfare 700 feet distant from and totally unrelated to the proposed subdivision. * * * If the subdivision requirement is within the statutory grant of power to the municipality and and if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then, the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of constitutional prohibitions, rather than a reasonable regulation under the police power. * * *."

I conclude, therefore, that when the owner of a tract of land in a city desires to develop it the city planning commission need not approve the plat of such proposed subdivision unless it is consistent with the duly adopted city plan, and the legislative authority of the municipal corporation may, by reasonable regulations, require the developer to construct the streets, curbs, gutters and sidewalks.

The eight specific fact situations, to which you request that the answers to your general questions be applied, read as follows:

"Fact Situation 1:

"Property owner has a tract of land less than five (5) acres. He desires to develop the property by dividing the tract into three (3) parcels, the existing manor house and two (2) building lots.

"Fact Situation 2:

"Same as above except that only (2) lots are to be created, the manor house and one (1) additional lot.

"Fact Situation 3:

"Property owner of a tract of land of less than five (5) acres wants to divide his property into two (2) parcels for the purpose of creating an additional building site.

- (a) It is zoned single family.
- (b) It is zoned multi-family,
- (c) It is zoned business.

"Fact Situation 4:

"Property owner of a tract of land of less than five (5) acres wants to subdivide the tract of land into the maximum number of lots for single family houses.

"Fact Situation 5:

Property owner of a five (5) acre tract of land wishes to proceed with improving by construction of a building thereon.

"Fact Situation 6:

"Property owner has a tract of land less than five (5) acres fronting on a main thoroughfare, with frontage of 200 feet and depth of 850 feet. Owner proposes to divide property, but width of land prohibits the installation of a roadway. (See Exhibit 'A').

- (a) It is zoned 'Reb'. (Residential Estates).

"Fact Situation 7:

"Property owner of a tract of land on a private, undedicated roadway. (See Exhibit 'B').

"Fact Situation 8:

"Three (3) separate property owners of three (3) separate tracts of land, each less than one-half acre in size and land locked (lots do not front on any thoroughfare or public way). (See Exhibit 'C').

(a) Zoned 'Single-Family residential'."

I assume that none of these property owners is willing to dedicate any of his property to the public for use as a street, and that this has occasioned your questions. As I noted at the outset, none of them can be required to make such a "dedication". The city may, however, under its general authority to open streets, proceed to appropriate the necessary land. R.C. 723.01 and 723.02; State, ex rel. Sun Oil Co. v. Euclid, supra. The provisions of R.C. 723.02 read as follows:

"The legislative authority of a municipal corporation may open, straighten, alter, divert, narrow, or widen any street, alley, or public highway within the limits of the municipal corporation. The legislative authority shall provide for such improvement by ordinance, which shall briefly and in general terms describe the part of the street, alley, or public highway to be abandoned by reason of such change, and the property to be appropriated for such purposes. The proceeding for such appropriation shall be as provided by sections 719.01 to 719.21, inclusive, of the Revised Code."

In situations 5, 7 and 8 appropriation would appear to be the only remedy since none of these owners intend to subdivide their properties and submit plats for approval.

In the other five situations the owners apparently do intend to subdivide their properties and to submit plats for approval by the city planning commission. As to these it is impossible, on the facts supplied, to make any specific application of my answers to your two general questions. The most that can be said is that the planning commission need not approve a proposed plat which is inconsistent with the city plan adopted by the commission or with the rules and regulations adopted by the legislative authority. If the plat makes no provision for streets in locations where the city plan requires that streets be opened, the commission will not approve the proposed subdivision.

In specific answer to your two questions it is my opinion, and you are so advised, that:

1. An owner of real estate cannot be required to dedicate a portion of it as a public street if the owner is unwilling to do so; the city must resort to appropriation procedures.

2. If the owner of a tract of land in a city desires to develop it, the city planning commission need not approve the plat of such proposed subdivision unless it is consistent with a duly adopted city plan, and the legislative authority of the city may, by reasonable regulations, require the developer to construct streets, curbs, gutters and sidewalks.