OPINION NO. 1178

Syllabus:

1. Counties and townships may control the drilling for gas and oil and the production of gas and oil through comprehensive zoning regulations adopted pursuant to Chapter 303, Revised Code, and Chapter 519, Revised Code, respectively, so long as such zoning regulations do not conflict with state statutes on the subject or with administrative rules or regulations adopted pursuant to statutory authority.

2. Under comprehensive zoning regulations drilling for oil and gas may be prohibited in certain areas, if reasonably necessary for the protection of public health, safety and general welfare.

3. Municipal corporations may enact local police regulations for the regulation of the drilling for gas and oil and the production of gas and oil so long as such regulations do not conflict with "general laws."

4. The rules and regulations of the Chief of the Division of Mines, Department of Industrial Relations, effective May 10, 1964, constitute general laws within the meaning of Section 3, Article XVIII, Constitution of Ohio.

5. A permit fee required for the drilling of oil and gas cannot exceed an amount reasonably necessary to defray the cost of issuing the permit and of exercising proper police regulation, and such fees may be used for these purposes only.

To: George Cleveland Smythe, Delaware County Pros. Atty., Delaware, Ohio
By: William B. Saxbe, Attorney General, June 30, 1964

I am in receipt of your request for my opinion on a series of questions pertaining to the regulation of drilling for oil and gas by political subdivisions. You have asked first whether a political subdivision , having zoning regulations, has the power to regulate and control the drilling of oil and gas within that subdivision.

This is a very general question and therefore, only a very general answer can be given. Zoning laws are adopted and enforced pursuant to the police power, and therefore are justifiable on the basis of their tendency to further the public safety, health, morals and general welfare. Clifton Hills Realty Co. v. Cincinnati, 60 Ohio App. 443. It follows that if the zoning regulations tend to further any one of these purposes, and are reasonable, they are proper controls over oil and gas drilling and are within the powers of a political subdivision having zoning regulations.

Your second question is "Without zoning regulations does a political subdivision have any such power?"

You do not set forth the political subdivisions involved. However, referring to counties and townships, your question must be answered in the negative. Counties and townships have only such powers as have been given them by the state legislature. Hopple v. Brown Twp., 13 Ohio St. 311. There has been no delegation by the legislature of the power to regulate the oil and gas industry. Therefore, any regulations affecting the oil and gas industry by townships and counties must be as an incidental application of the delegated zoning power.

In contrast, a municipal corporation, under authority of Section 3, Article XVIII of the Ohio Constitution, commonly referred to as the Home Rule Amendment, may regulate any trade, occupation or business, the unrestrained pursuance of which might injuriously affect the public health, morals, safety, or comfort. Dayton v. Jacobs, 120 Ohio St. 225; Renker v. Brooklyn, 139 Ohio St. 484. Local police, sanitary and other similar regulations of a municipal corporation, however, cannot be in conflict with "general laws." 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, or vice versa. Struthers v. Sokal, 108 Ohio St. 263; Columbus v. Barr., 160 Ohio St. 209.

You also ask "do State regulations concerning the drilling for oil and gas preempt the field and make zoning regulations of local subdivisions in that regard ineffective?" I assume you mean by this does the regulation of the production of oil and gas through the rules and regulations promulgated by the chief of the Division of Mines, Department of Industrial Rela-

tions, effective May 10, 1964, preclude counties, or townships or municipal corporations from regulating the use of land for the production of oil and gas through comprehensive zoning regulations.

I think the answer is clearly that this state action does not preclude application of county, township or municipal zoning regulations to the production of oil and gas. The rules and regulations of the Division of Mines operate directly to regulate the exploration for and production of gas and oil. Zoning regulations on the other hand regulate the use of land and only indirectly regulate the drilling for and production of gas and oil (assuming of course a valid exercise of the zoning power). The two types of regulatory enactments may operate consistently upon this same subject matter. Manifestly a zoning regulation may not undertake to legalize anything made illegal by the legislature but such zoning regulation may be more restrictive as applied to land use than the rules and regulations of the chief of the Division of Mines. Cf. City of Columbus v. Barr, supra.

The more difficult question and one inherent in your request is whether municipal corporations operating under the power of local self-government may enact regulatory legislation which conflicts with the rules and regulations of the chief of the Division of Mines. As discussed above, Section 3, Article XVIII authorizes municipalities "to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." The regulation of the drilling for gas and oil and the production of gas and oil would seem to constitute "local police * * * regulations" within the meaning of this limitation. See City of Cincinnati v. Gamble et al., 138 Ohio St. 220. The question, then, is whether the rules and regulations of the chief of the Division of Mines constitute "general laws" within the meaning of this same constitutional limitation.

At the outset I would observe that I consider this question disparate from the question of whether an administrative rule or regulation has "the effect or force of law" (the question I perceive to have been before the court in State, ex rel. Kildow v. Industrial Commission, 128 Ohio St. 573 and State, ex rel. Kroger v. Industrial Commission, 37 O.L.A. 509). An affirmative answer to the latter question does not in my opinion determine whether an administrative rule or regulation is a general law within the meaning of Section 3, Article XVIII.

With the possible exception of The Neil House Hotel Co. v. City of Columbus, 144 Ohio St. 248 (1944), the precise question appears not to have been answered by the Supreme Court. In two earlier cases (Leis v. The Cleveland Railway Co., 101 Ohio St. 162 (1920); The State, ex rel. Arey v. Sherrill, 142 Ohio St. 574 (1944)) the court held that the words "general laws" referred to laws passed by the legislature. In neither case, however, was the specific question before the court.

In The Neil House Hotel Co. v. City of Columbus, supra, the court concluded as disclosed by the third branch of the syllabus:

"Sections 6064-15 and 6064-22, General Code, a part of the Liquor Control Act, and

Regulation No. 30 of the Board of Liquor Control validly adopted and promulgated under the express provisions of Section 6064-3, General Code, permit the sale and consumption of beer and intoxicating liquors on the premises of designated permit holders after the hour of midnight, and a municipal ordinance which fixes midnight as the time when the sale and consumption of such beverages must cease, is in conflict therewith and invalid in that respect."

It is apparent from a reading of this case that the single question before the court was the validity of an ordinance fixing a closing time earlier than that fixed by statute. The regulation of the Board of Liquor Control merely parroted the closing time fixed by the statute and it appears that there was no real issue over the efficacy of the regulation. However, this may be, The Neil House Hotel Co. case is cited for the proposition that the regulation of an administrative agency is a general law for the purpose of the non-conflict provision. See, Williams v. Jackson, 82 O.L.A. 177; Farrell-Ellis, Ohio Municipal Code 11th ed. Sec. 1.31, p.41.

While recognizing that a contrary conclusion might be logically reached (See for instance Delta County v. City of Gladstone, 305 Mich. 50, 8 N.W. 2d 908 (1943); Maner v. Dykes, 183 Ga. 118, 187 S.E. 699 (1936)). I am constrained to conclude -- largely on the basis of The Neil House Hotel Co. v. City of Columbus, supra -- that the term "general laws" contained in Section 3, Article XVIII, includes administrative rules and regulations promulgated pursuant to statutory authority, as well as enactments of the General Assembly. I am, therefore, of the opinion that a municipal corporation whether or not operating under charter authority may not enact regulations for drilling for oil and gas and for the production of oil and gas within its territorial jurisdiction which are in conflict with the rules and regulations promulgated by the chief of the Division of Mines, effective May 10, 1964.

You also ask "If a local subdivision by zoning regulations can require a drilling permit, how high can the permit fee be set?"

It is well settled that a fee for a permit granted under the police power cannot exceed an amount reasonably necessary to issue the licenses and to provide proper police regulation, in view of the nature of the business and the character of the police regulation required. 32 Ohio App. 472. Such a fee, if imposed upon a business which is essentially useful or harmless, cannot be prohibitory, extortionate, confiscatory or in unlawful restraint of trade. Cincinnati v. Bryson, 15 O. 625, 45 Am. Dec. 593; Youngstown v. Harrington, 17 Ohio Law Abs. 154; Cincinnati v. Criterion Adv. Co., 32 Ohio App. 472.

You ask further "If in such case a permit fee can be charged, for what purpose may the proceeds therefrom be used? May such fees be used to maintain and repair local roads damaged by heavy loads necessary in oil and gas operations?"

I believe that this question has been answered by the pre-

vious answer. Cincinnati v. Criterion Advertising Co., supra. In my opinion, such fees may not be used to repair and maintain roads, since this is not a part of the enforcement of the regulations or cost of issuing the permit.

You also ask "If a local subdivision can enact zoning regulations concerning drilling, can they bar drilling in certain areas in their districts?" Although this exact question has never been decided in Ohio, case law in other states clearly indicates drilling can be barred in certain areas. Friel v. Los Angeles, 172 Cal. App. 2d 142, 342 P. 2d 374; Winkler, et al. v. Anderson, et al., 104 Kan. 1, 177 P. 521; K. & L. Oil Co. v. Oklahoma City, 14 Fed. Supp. 492. In these and other similar cases the courts based their decisions on whether the laws were reasonably necessary for the protection of public health, safety and general welfare, the present and past uses and character of the area in question as well as the adjoining areas, and the future growth of the municipality in relation to the questioned area.

You also ask "Is there anything that a local subdivision can do to prevent road damage from heavy loads other than as prescribed by the laws relating to load limits?"

If, as you say, the damage is from heavy loads in excess of legal limits, the best preventative to road damage is a vigorous enforcement of the present limitations on loads. This appears to be an adequate solution and I would recommend no different or additional action.

I have reviewed the proposed county wide regulations attached to your opinion request. They appear reasonable with the exception of 17.743 which requires landscaping around a drilling site. Since drilling is a temporary operation involving a matter of days and, in most cases, involves unsuccessful results, it appears to be an unreasonable burden to require that the drilling site be landscaped.

Your supplemental questions are also included herewith. You ask:

> "1. If a zoning regulation is silent on the question of drilling for oil and gas is it considered that such activity is prohibited?"

Without the benefit of the regulation before me, it is extremely difficult to answer this question. However, zoning regulations are commonly classified as being either "Inclusive" or "Exclusive." With an "inclusive" regulation, only those uses which are specifically named, are permitted, whereas, an "exclusive" regulation, admits all uses which are not specifically excluded. (Metzenbaum Law of Zoning, p. 1811, Chapter XI.)

You also ask:

> "2. In determining whether 10 acres has been obtained under a single lease for a unitized lease can or may the area in a city or village street be computed and included in arriving at the total acreage where the street either abuts the other lands or where the other lands are on

both sides of the street? In such case if the street area can be or is included is it necessary that the city or village join in said lease and if it does, can it participate in the income from a well produced on said unit?"

Yes, the area in a village or city street may be computed and included in arriving at the total acreage in such an instance.

In order to properly administer and enforce Section 4151.03, and Sections 4159.01 to 4159.23, inclusive, Revised Code, and to prevent waste of oil and gas reserves in the State of Ohio to promote the maximum ultimate recovery of oil and gas from the various pools, fields and reservoirs in the state through conservation, and to protect the health and safety of persons as well as their correlative rights, the rules and regulations were adopted April 28, 1964, by the Chief of the Division of Mines, Department of Industrial Relations, to become effective May 10, 1964, entitled "Rules and Regulations Governing the Issuance of Permits for the Drilling of Wells for the Production of Oil or Gas and the Operation Thereof." Rule IV (C) (1) (a) and Rule IV (D) (1) are as follows:

"(1) No permit shall be issued to drill, deepen, reopen, or plug back a well for the production of oil or gas unless the proposed well is located

"(a) upon a tract or drilling unit containing not less than 10 acres;

"The 'owners' of separate adjoining tracts may agree to pool such tracts to form a drilling unit. Such agreement shall be in writing, a copy of which shall be submitted to the Division with the application for a permit. Parties to a pooling agreement shall designate one of their number as the applicant for a permit and each shall furnish evidence of his qualifications as an 'owner', as provided in Rule II (A) (2)."

The ten acre requirement had as its basis the conservation of gas and oil, and that aim must be kept in mind. The ordinary uses of the surface of the land have no effect upon the conservation of oil and gas.

The fee title of the streets in a city or village is in trust for street purposes. Hamilton, G. & C. Traction Co. v. Parish, 67 Ohio St. 181; Kraus v. Halle Bros. Co., 60 Ohio Law Abs. 418. A municipality does not own an absolute fee simple in the street but owns only a determinable or qualified fee, and a municipal corporation holds its title to the real estate in the street in trust for street uses, and street uses only, so that it may perform its statutory duty of keeping the streets open, in repair, and free from nuisance. Sorg v. Oak Harbor, 20 Ohio App. 313. Jurisdiction of municipalities for the control of streets extends, territorially, to the space above and below the surface of the ground only to such height or depth as the

same is needed for street purposes. Cincinnati Inclined Plane R. Co. v. City & Surburban Tel. Assn., 48 Ohio St. 390

Abutting owners have a property right in the streets which is said to be a private right of the nature of an incorporeal hereditament. Callen v. Columbus Edison Electric Light Co., 66 Ohio St. 166, and numerous other cases. The fee title to the space above and below the surface of the street beyond that which is needed for street purposes remains in the owners of the abutting property and may be used for any purpose which does not interfere with the rights of the public; Henry v. Cincinnati, 1 C.C. (N.S.) 289, 25 C.C. 178; Federal Gas & Fuel Co. v. Townsend, 1 N.P. (N.S.) 289, 14 O.D. 5. Further, in The City of Dayton v. Haines, 12 Ohio App. 439, in an action involving a street improvement, the court held that the abutting property owner was entitled to the dirt and gravel which was not necessary to the street improvement. Oil and gas are minerals far below any part which could possibly be used for street purposes. The abutting land owner is an "owner," as defined by Rule I (A) (10) "Rules and Regulations Governing the Issuance of Permits for the Production of Oil or Gas and the Operation Thereof," effective May 10, 1964.

> "'Owner' means the Person who has the right to drill on a tract or drilling unit and to drill into and produce from a Pool and to appropriate the oil or gas that he produces therefrom, either for himself or for others."

Therefore, it is clear that, since the city or village has no interest in the land except for street purposes, and this interest extends only far enough below the surface of the land to carry out the street purposes, it is not necessary that it join in a lease which concerns mineral rights.

It must be kept in mind, that I am speaking generally and it is possible that a municipal corporation may, by deed, acquire a fee simple absolute estate in land purchased by it for street purposes. Avery v. United States, 104 F. 711. If such is the case, Section 721.01, Revised Code, empowers the municipality to execute a lease on municipal property.