

**OPINION NO. 72-003**

**Syllabus:**

A board of county commissioners is not authorized by the provisions of Section 6103.02, Revised Code, under which the board may contract with a municipal corporation for a water supply in the county, to assent to a provision in the contract under which the municipal zoning ordinances take precedence over the zoning resolutions of the townships affected by the contract.

To: Robert E. Mohler, Summit County Pros. Atty., Akron, Ohio  
By: William J. Brown, Attorney General, January 25, 1972

Your letter requesting my opinion as to the validity of certain provisions of a water contract between the City of Akron and the Board of Commissioners of Summit County reads as follows:

"We enclose herewith copy of proposed water contract between Summit County and the City of Akron together with copy of their Ordinance No. 516 amending said contract.

"The Board of County Commissioners has requested that we submit these to you for an opinion of whether or not the Board of County Commissioners would have authority to bind the county to such a contract.

"The central question which is to be resolved is:

"'Can the City of Akron and the Board of County Commissioners enter into a contract for supply of water to the various townships in the county on the condition that the City of Akron zoning ordinances take precedence over any particular township zoning resolution or other city zoning ordinances in which there may be a conflict with the City of Akron zoning ordinance?'

"In our county all townships, cities and villages have separate zoning resolutions under their own authority and the County Commissioners have ever established county wide zoning under Chapter 303 for reason of their belief that the former existence of township zoning under Chapter 519 took precedence over any authority the Commissioners might have.

"We attach copy of our own memorandum on these documents."

The question is whether a board of county commissioners may, pursuant to its power to enter into a contract with a municipality for a supply of water to townships in the county, agree that the zoning ordinances of the municipality shall take precedence over existing township zoning resolutions. The reason for the inclusion in the contract of the provision respecting zoning is not apparent from the documents or the general situation described. I must, therefore, confine myself to the question you specifically posed.

The authority of a board of county commissioners to enter into such a water supply contract with a municipality appears in Section 6103.02, Revised Code, which provides in pertinent part as follows:

"For the purpose of preserving and promoting the public health and welfare, and providing fire protection, any board of county commissioners may by resolution acquire, construct, maintain, and operate any public water supply or water-works system within its county for any sewer district, and may provide for the protection thereof and prevent the pollution and unnecessary waste thereof. By contract with any municipal corporation, or any person firm, or private corporation, or any person, firm, or private corporation furnishing a public water supply within or without its county, the board may provide such supply of water to such district from the water-works of such municipal corporation, person, firm, or private corporation \* \* \*. The board may make, publish, and enforce rules and regulations for the construction, maintenance, protection, and use of public water supply in the county outside of municipal corporations, and of public water supplies within municipal corporations in its county wherever such water supplies are constructed or operated by such board or are supplied with water from water supplies constructed or operated by such board, including the establishment of connections. Such rules and regulations shall not be inconsistent with the laws of the state or the rules and regulations of the department of health \* \* \*."

The county commissioners also have authority to adopt a comprehensive zoning plan for such parts of the county as fall within their jurisdiction. See Chapters 303 and 713, Revised Code.

On the other hand, the township trustees also have authority to adopt a comprehensive zoning plan regulating, among other things, "the uses of land for trade, industry, residence, recreation, or other purposes" within the township. Section 519.02, Revised Code. The trustees are required to create a township zoning commission (Section 519.04, Revised Code); to consider and vote upon adoption of any plan submitted by the zoning commission (Section 519.10, Revised Code); and to submit the plan to a vote of the concerned electors (Section 519.11, Revised Code). Finally, Section 519.23, Revised Code, specifically provides:

"\* \* \*[N]o land shall be used in violation of any resolution \* \* \* adopted by any board of township trustees under sections 519.02 to 519.25, inclusive, of the Revised Code. \* \* \*"

Cf. State, ex rel. Kearns v. Ohio Power Co., 163 Ohio St. 451 (1955).

It is obvious that conflicts will occasionally arise between township and county zoning provisions, and in such cases the Gen-

eral Assembly has given precedence to whichever provision is prior in time. Thus, Section 303.22, Revised Code, gives precedence to a township zoning plan which has been approved prior to the adoption of a county rural zoning resolution. That Section reads as follows:

"When the people of any township or part thereof have approved township zoning regulations in accordance with sections 519.02 to 519.25, inclusive, of the Revised Code, prior to the adoption of a county rural zoning resolution by the board of county commissioners, and the county plan includes any area covered by the township zoning plan, the zoning resolution adopted by the board of township trustees shall take precedence over the zoning resolution adopted by the board of county commissioners, unless a majority of the voters in such zoned area of the township voting on the issue have voted to have the township plan of zoning replaced with the plan of county rural zoning."

Where, on the other hand, the county zoning plan is prior in time, that plan takes precedence over a subsequent township plan. The statute which so provides, Section 519.22, Revised Code, simply reverses the word order of Section 303.22, supra. Both Sections also provide that the prior plan may be replaced by one adopted subsequently, if "a majority of the voters in such zoned area of the township voting on the issue have voted" for such replacement. Sections 303.22 and 519.22, supra. There is further provision for the repeal of either a county or a township zoning plan. Sections 303.25 and 519.25, Revised Code. In Opinion No. 2963, Opinions of the Attorney General for 1962, one of my predecessors said:

"\* \* \* I am of the opinion that the provisions of Section 519.25, Revised Code, provide for a method of repeal of township zoning resulting from a vote on the question raised pursuant to Section 303.11 and 303.22, Revised Code.

It is readily apparent that the General Assembly has carefully protected the local option rights of township voters in this respect. Any zoning plan must be approved by the concerned electors of the township; no land may be used in violation of the adopted plan; in case of conflict a prior township plan prevails over any later plan adopted by the board of county commissioners; and any change in the plan must be approved by a majority of the voters concerned. To permit the board of county commissioners to make a wholesale substitution, by contract, of the zoning ordinances of the City of Akron for the plans of the townships involved would plainly subvert the General Assembly's clear intention to preserve the local option rights of the townships. This is not a case of location of a specific building

or use of a specific piece of land by a public utility (which would override the township plan under the authority of Section 519.21, Revised Code), but of a complete substitution of the municipal plan for that of the township. Nor is this a case of appropriation of township land by a municipality for the purpose of providing a municipal water supply under Sections 163.01 to 163.22 and 719.01 (M), Revised Code. Cf. Opinion No. 1084, Opinions of the Attorney General for 1949.

I can find no language in Section 6103.02, supra, or in any other section of the Revised Code which would permit the board of county commissioners to enter into a contract of this nature, and the powers of the board are, of course, limited to such as are delegated to it by the General Assembly. Wymer-Harris Construction Co. v. Glass, 122 Ohio St. 398 (1930); State v. Commissioners, 107 Ohio St. 465, 47 (1923).

In specific answer to your question it is my opinion, and you are so advised, that a board of county commissioners is not authorized by the provisions of Section 6103.02, Revised Code, under which the board may contract with a municipal corporation for a water supply in the county, to assent to a provision in the contract under which the municipal zoning ordinances take precedence over the zoning resolutions of the townships affected by the contract.