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HEALTH BOARD DISTRICT — AUTHORITY TO ADOPT AND ENFORCE PLUMBING REGULATIONS — UNINCORPORATED PORTION OF COUNTY — COUNTY COMMISSIONERS WITHOUT ANY SUCH AUTHORITY—SECTIONS 1261-42, 2480 GC.

SYLLABUS:

A district board of health has authority by virtue of Section 1261-42, General Code, to adopt and enforce plumbing regulations in the unincorporated portion of a county, but the county commissioners do not have such authority under the provisions of Section 2480 of the General Code, or under any other provision of the statutes.

Columbus, Ohio, June 24, 1953

Hon. Mathias H. Heck, Prosecuting Attorney
Montgomery County, Dayton, Ohio

Dear Sir:

I have before me your communication, requesting my opinion, and reading as follows:

> "The Board of County Commissioners of Montgomery County, Ohio, have requested this office for an opinion as to their authority under and by virtue of Section 2480 and 2481 of the Ohio General Code to create a plumbing inspection department

within the office of the Montgomery County Building Inspector and grant to said officer the authority to issue plumbing permits to inspect and approve installations within unincorporated parts of the county.

In re. Section 2480, your attention is called to the following clause within the said Section which reads as follows:

> 'In no case shall said regulations go beyond the scope of regulating the safety, health and sanitary conditions of such buildings.'

This office, in turn, is requesting an opinion from the Attorney General for the reasons subsequently given.

"The issuance of plumbing permits and the inspection and installation approval of plumbing is now being handled by the local health district as created by Section 1261-16 of the Ohio General Code.

"The District Board of Health, by emergency legislation, adopted regulations extending their authority to types of private dwellings. The date of said regulations was January 6, 1942. Enclosed is a copy of said regulations. Section 18 of said regulations specifically concerns itself with the issuance of plumbing permits and Section 19 sets the fees which are to be paid for said inspection and permit. Your attention is called to Section 1261-42 relative to rules and regulations.

"It is of interest to note that in the Montgomery County Building Code as adopted on the 17th day of June, 1947, Section 121, paragraph c, entitled 'Plumbing Permits', states that:

> 'Unless and until otherwise prescribed, plumbing and private sewage disposal permits, inspection and installation approval must be secured from and the required fees paid to the Plumbing Inspector of the Board of Health of the Montgomery County Health District.'

"The above is quoted to give to your office the history of plumbing permits in this county since the adoption of regulations by the Health District and the adoption of the Montgomery County Building Code.

"Your attention is further called to Section 1261-2 through and including Section 1261-15 relative to the State Inspector of Plumbing.

"The District Board of Health by Section 1261-26 is granted authority to charge a fee for the service of inspection and presumably for permits.

"If the Building Inspector can issue permits, he can presumably charge fees for such service.

"The questions to which we respectfully request your consideration are:

"1. Does the Board of County Commissioners have authority
" under Section 2480 or any other section of the Code to create a county plumbing inspection department?

"2. Does the Board of County Commissioners have authority by virtue of Section 2480 to pass sanitary regulations for the purpose of plumbing inspection?

"3. Is such plumbing inspection and installation approval exclusive with the local Health District for the county under Section 1261-16 through and including Section 1261-43?

"The situation is one which has statewide application and needs clarification due to the apparent lack of clarity in reference to county commissioners under Section 2480 and the laws relative to local health districts and state plumbing inspection rules under the state department of health, Section 1232 through and including 1261-68."

The question you present requires consideration of the powers granted to the local or district health authorities on the one hand, and the county commissioners on the other, relative to sanitary regulations.

I note from your letter that up to the present time the district board of health has exercised its power of establishing plumbing regulations, the issuance of plumbing permits, and the inspection and approval of plumbing installations, and that the county commissioners have not seen fit to exercise their authority, if any, in these matters. I note further that the board of health has adopted quite comprehensive regulations of this matter and that the present code of regulations has been in effect for approximately ten years.

These regulations are adopted under the provisions of Section 1261-42 of the General Code, which reads as follows:

"The board of health of a general health district may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances, and shall have the power to require that no human waste, animal waste, or household wastes from sanitary installations within the district be discharged into a storm sewer, open ditch or water course without a permit therefor having been first secured from the board of health of the health district under such

terms and conditions as the board may from time to time require. All orders and regulations not for the government of the board, but intended for the general public, shall be adopted, recorded and certified as are ordinances of municipalities and record thereof shall be given in all courts of the state the same force and effect as is given such ordinances, but the advertisements of such orders and regulations shall be by publication in one newspaper published and of general circulation within the general health district. Publication shall be made once a week for two consective weeks and such orders and regulations shall take effect and be in force ten days from date of first publication. Provided, however, that in cases of emergency caused by epidemics of contagious or infectious diseases, or conditions or events endangering the public health, such boards may declare such orders and regulations to be emergency measures and such orders and regulations shall become immediately effective without such advertising, recording and certifying."

The above section is a part of the Act known as the Hughes Act, 108 Ohio Laws, 236, as amended by the Griswold Act, 108 Ohio Laws, 1085, establishing health districts for cities and counties. Under the provisions of these acts every city is a health district, and the townships and villages in every county outside of the cities constitute what is called a general health district. The entire plan contemplates a statewide organization for public health under the general supervision of the state department of health, and the organization of these local health districts is mandatory.

Referring to this section, the Supreme Court held in Weber v. Board of Health, 148 Ohio St., 389:

"General Code § 1261-42 which provides that 'the board of health of a general health district may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances * * *,' but does not provide specific standards for guidance, is a valid and constitutional enactment."

The court further held that such board has wide discretion in enacting regulations for the protection of public health.

By an Act of the General Assembly originally passed in 1941, 119 Ohio Laws, 671, Sections 2480 to 2483, inclusive, of the General Code were enacted, giving authority for building regulations to be established

by the county commissioners, to be operative in the unincorporated portions of their respective counties. Section 2480, General Code, reads in part, as follows:

> "The board of county commissioners of any county, in addition to the powers already granted by law, may adopt, administer and enforce regulations, not in conflict with the Ohio state building code, pertaining to the erection, construction, repair, alteration and maintenance of residential buildings, offices, mercantile buildings, workshops or factories including public or private garages, within the unincorporated portion of any county. In no case shall said regulations go beyond the scope of regulating the safety, health and sanitary conditions of such buildings. * * *
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> "Whoever violates any such regulation of the board of county commissioners under sections 2480 to 2483 inclusive of the General Code shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding three hundred dollars, and every day during which such illegal erection, construction, repair, alteration or maintenance continues may be deemed a separate offense. * * *"

Section 2481 General Code, authorizes the appointment of a building inspector. It will be observed that these provisions are not mandatory but are simply powers given to the county commissioners of any county to be exercised or not, at their option. It will be noted also that primarily the regulations to be adopted by the county commissioners relate to the erection, construction, alteration and maintenance of residential buildings, etc. By way of restriction, it is provided that such regulations may not "go beyond the scope of regulating the safety, health and sanitary conditions of such buildings."

The words just quoted are the only words in the entire law which suggest any intention on the part of the legislature to confer power on the commissioners to deal with problems of health and sanitation. We may call attention to the well settled rule that a county is merely an administrative agency, created for limited purposes of political organization and local administration. Futhermore, it has only such powers as the legislature has seen fit to confer upon it. As said in 11 Ohio Jurisprudence, 244:

> "Generally speaking, the function of the county is to serve as an agency or instrumentality of the state for purposes of political organization and local administration, through which the legislature may perform its duties in this regard more understandingly, efficiently, and conveniently than it could if acting

> directly. As such agency, the county is a creature in the hands of its creator, subject to be molded and fashioned as the ever-varying exigencies of the state may require. Except as restricted by the state Constitution, the power of the legislature, through which the sovereignty of the state is represented and exercised, over counties, is supreme, and that body may exercise plenary power with reference to county affairs, county property, and county funds. Counties, therefore, possess only such powers and privileges as may be delegated to, or conferred upon them by statute."

Citing State, ex rel. Treadwell v. Hancock County, 11 Ohio St., 183; Lake County v. Ashtabula County, 24 Ohio St., 393; Portage County v. Gates, 83 Ohio St., 19.

As to county commissioners, their powers are strictly limited to those granted to them by statute, and such powers are administrative, purely, and not legislative; and in case of doubt as to the existence of a power, the doubt is resolved against it. Jones v. Lucas County, 57 Ohio St., 189; Peter v. Parkinson, 83 Ohio St., 36; State ex rel. Locher v. Menning, 95 Ohio St., 97.

Accordingly, since I can find no specific grant of power given to the commissioners to promulgate rules as to health involving such a technical calling as plumbing, I must conclude that the reference in Section 2480 supra, to health and sanitation is not sufficient to authorize the county commissioners to adopt and enforce a plumbing code, or require permits for plumbing installation, and that their powers, so far as they pertain to health and sanitation should be confined to measures concerning the cleanliness of buildings and premises. This conclusion will, I believe, be fortified by a consideration of the attitude of the courts and other authorities toward plumbing as a part of the problem of public health. It has long been recognized by our courts that the business of plumbing is so closely related to the health of the public, that it is the proper subject of regulation by law. In the case of State v. Gardner, 58 Ohio St., 599, it was held:

> "The business of plumbing is one which is so nearly related to the public health that it may, with propriety, be regulated by law, and reasonable regulations, tending to protect the public against the dangers of careless and inefficient work, and appropriate to that end, do not infringe any constitutional right of the citizen pursuing such calling."

The case there presented involved only the validity of a statute requiring licenses of persons engaged in plumbing or house drainage, and

so did not directly touch the powers of a subdivision or a board of health to require such license. However, the opinion by Judge Spear indicates the seriousness with which the court regards the business of plumbing, as related to the public health. Speaking of the plumber and his qualifications, the court said:

> "That it is of the highest importance that the drainage and sewerage of our public buildings and private tenements should be as skillfully planned and executed as the modern standard of science admits, would seem not to be open to question. And surely it is reasonable to suppose that one who has been educated to understand the scientific principle necessarily involved in work of this character, and to comprehend the reasons and teachings of experience upon which it is based, and the evil results which may follow neglect to observe it, will be more likely to provide the needful safeguards than one who is ignorant upon the subject. It is conceded by those who doubt the power as well as the propriety of regulation of the work itself, that the legislature has power to provide for a careful sanitary inspection of plumbing work, and in this way secure a result, as to its system and sufficiency, which will tend toward the protection of the health of the general public. But it is difficult to perceive a reason for the exercise of the power last referred to which does not as well apply to the other, for if it be wise to devise means by which a good result may be obtained by careful inspection, it would seem clear that methods which are calculated to reduce the hazards of careless inspection would tend in the same direction. And, defects revealed by inspection would, it would seem be more likely to be remedied if the hands which should be called upon to do the work of correction, were guided by minds trained in the science of the business as well as skilled in the mere manipulation of the tools."

While I do not find any specific language in the statutes which grants to boards of health the power to adopt regulations governing the business of plumbing, requiring permits and inspection, and even the licensing of plumbers, I am convinced that they have these powers, by a fair implication from the general powers granted them by the statutes, particularly Section 1261-42 supra. Local health authorities are held to possess implied powers as well as express powers, in conserving the public health and the powers conferred upon them by statute should be liberally construed. 20 Ohio Jurisprudence, 557, 39 Corpus Juris Secondum, 822, 823.

In Opinion No. 4380, Opinions of the Attorney General for 1941, page 886, it was held:

> "District boards of health of general health districts may by order or regulation in the interest of public health or for the prevention or restriction of disease provide for the inspection of trailer camps and impose reasonable standards in connection therewith. The cost of such inspection and the issuance of a permit certifying that there has been compliance with the standards may be charged to the operators of said camps."

In the course of the opinion it was said:

> "While the statute does not expressly authorize the board to charge a fee for the costs of inspection and the issuance of a permit certifying that there has been a compliance with the orders or regulations *this authority is implied.*" (Emphasis added.)

In a letter subsequent to your original request, you have called my attention to an unreported decision of the Common Pleas Court of Summit County. This was the case of McGowen v. Shaffer, et al., No. 187,507. It was an action brought against the board of health of the general health district of Summit County, to determine the validity of a sanitary code adopted by that board, which provided, among other things, for licensing of master and journeyman plumbers, for requiring permits for plumbing installations and for the payment of fees for inspection.

The court in a somewhat exhaustive opinion held the regulations to be within the implied powers of such board of health, saying:

> "This court is of the opinion that while the statutes do not expressly give the defendant board the right to license master plumbers and register journeymen for a fee, by reason of the powers given the Board by statute there is an implied authority to so license and register, as well as the fact that it constitutes a proper and inherent exercise of police power."

While the question you present to me does not directly call for a ruling as to the power of the board of health to require licensing of plumbers, yet that decision does strengthen the conclusion which I have above indicated, that such board has broad powers in the regulation of plumbers and plumbing as a part of its function as guardian of the public health. Concurring with the ruling of the court in the case last cited, I have held in Opinion No. 2760, issued June 24, 1953, that district boards of health do possess the implied power to license plumbers.

By way of contrast let us compare the statutes granting powers to the board of health on the one hand and to county commissioners on the

other. As to the first, it is provided that such board "may make such orders and regulations as it deems necessary * * * for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances." All such orders or regulations are to be adopted with the same formality as are ordinances of municipalities. And Section 4414, General Code, provides for fine and imprisonment for violation of any such regulations.

On the other hand, note that the county commissioners are merely authorized to adopt and enforce regulations relating to the "erection, construction, repair, alteration and maintenance" of certain buildings, and "in no case shall said regulations go beyond the safety, health and sanitary *conditions* of such buildings." This reference to "health and sanitary conditions" appears to be rather by way of limitation than affirmative grant.

My immediate predecessor in Opinion No. 1983, Opinions of the Attorney General for 1950, page 473, had occasion to consider Section 2480, General Code, which I have quoted, in answer to a question as to the power of the county commissioners to license plumbers and prohibit plumbing being done anywhere in the unincorporated area of the county by unlicensed plumbers. His holding was as follows:

> "A board of county commissionrs has no authority under the provisions of Section 2480, General Code, to adopt regulations which would prohibit carrying on the business of plumbing anywhere in the unincorporated area of the county by unlicensed plumbers."

This opinion did not hold affirmatively that county commissioners have the power under said Section 2480, to adopt and enforce plumbing regulations, although it is apparent that he considered that they do have that power. His holding was merely against the power to license plumbers.

Even as against municipalities, which have by explicit legislative grant, Section 3637, General Code, as well as under their broad home rule powers the power to license plumbers, it was held that regulations of like character promulgated by a district board of health should have preeminence in case of conflict. In Opinion No. 5564, Opinions of the Attorney General for 1942, page 759, it was held:

> "3. The council of a village has concurrent jurisdiction with the board of health of a general health district in the enactment of regulations affecting sanitation and the public health,

> including the regulation of plumbing, but such ordinances, to the extent that they are inconsistent with the regulations of such general health district, will be invalid."

In the light of the foregoing, it is my opinion that a district board of health has authority by virtue of Section 1261-42, General Code, to adopt and enforce plumbing regulations in the unincorporated portion of a county but that the county commissioners do not have such authority under the provisions of Section 2480 of the General Code, or under any other provision of the statutes.

Respectfully,

C. WILLIAM O'NEILL
Attorney General