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1. WHERE POPULATION OF MUNICIPAL CORPORATION, FORMERLY CLASSIFIED AS VILLAGE, IS FIVE THOUSAND OR MORE, SAID MUNICIPAL CORPORATION IS PART OF GENERAL HEALTH DISTRICT OF COUNTY UNTIL OFFICERS OF MUNICIPAL CORPORATION HAVE BEEN ELECTED AND QUALIFIED AS CITY OFFICERS.

2. WHERE NO ELECTION OF CITY OFFICERS IS HELD, ELECTORS OF MUNICIPAL CORPORATION SHOULD VOTE AT GENERAL ELECTION ON QUESTION OF A LEVY FOR HEALTH PURPOSES—§§703.06, 3709.01, R.C.—OPINION 3354, OAG FOR 1941, PAGE 9.

SYLLABUS:

1. Where, pursuant to Section 703.06, Revised Code, the secretary of state has proclaimed the population of a municipal corporation, which had been classed as a village, to be five thousand or more, said municipal corporation is a part of the general health district of the county under Section 3709.01, Revised Code, until the officers of the municipal corporation have been elected and qualified as city officers. Opinion No. 3354, Opinions of the Attorney General for 1941, page 9, approved and followed.

2. Where such a proclamation has been made but no election of city officers has been held, the electors of the municipal corporation should vote at the general election on the question of a levy for health purposes to meet expenses of the general health district, even though thirty days has elapsed since the issuance of the proclamation.

Columbus, Ohio, September 29, 1961

Hon. Harry Friberg, Prosecuting Attorney
Lucas County, Toledo 2, Ohio

Dear Sir :

I have before me your request for my opinion which reads as follows :

“The Commissioners of Lucas County recently passed a resolution declaring that the amount of taxes to be raised within the ten mill limitation will be insufficient to provide for the necessary requirements of the general health district and that it is necessary to levy a tax for health purposes as provided in Section 3709.29 of the Revised Code. This levy will appear on the ballot in November 1961 in the area comprising the general health districts in this County.

“One of the Villages in this County—Sylvania—was recently proclaimed a City as a result of the federal decennial census of 1960. The City has not as yet elected its officers but such election will take place in November and the officials elected will take office January 1, 1962.

“Quere: Should the electors of the City of Sylvania vote in November on the levy for health purposes to meet expenses of the general health district?”

Section 3709.29, Revised Code, authorizes the submission of a tax levy such as you mention, by a board of county commissioners, to the electors of a general health district.

Section 3709.01, Revised Code, provides :

“The state shall be divided into health districts. Each city constitutes a health district and shall be known as a ‘city health district.’

“The townships and villages in each county shall be combined into a health district and shall be known as a ‘general health district.’

“As provided for in sections 3709.07 and 3709.10 of the Revised Code, there may be a union of two or more contiguous

general health districts, not to exceed five, or a union of a general health district and a city health district located within such general health district.”

Since a village is a part of the general health district and a city (where there is no union) constitutes a “city health district,” the answer to your question is dependent upon the date when the village becomes a city within the purview of Section 3709.01, *supra*. As to a village becoming a city, Section 703.06, Revised Code, provides :

“When the result of any federal census or an enumeration as provided in sections 703.02 to 703.05, inclusive, of the Revised Code, is officially made known to the Secretary of State, he forthwith shall issue a proclamation, stating the names of all municipal corporations having a population of five thousand or more, and the names of all municipal corporations having a population of less than five thousand, together with the population of all such municipal corporations. A copy of the proclamation shall forthwith be sent to the mayor of each such municipal corporation, which copy shall forthwith be transmitted to the legislative authority of such municipal corporations, read therein, and made a part of the records thereof. Thirty days after the issuance of such proclamation each municipal corporation shall be a city or village as the case may be.”

Under the terms of this section it would appear that the city of Sylvania will be a city by November 7, 1961, the date of the election. One of my predecessors, however, in Opinion No. 3354, Opinions of the Attorney General for 1941, page 9, reached a contrary opinion as to a village remaining a part of the general health district, stating :

“A village, the population of which has increased so as to make it a city thirty days after proclamation of the Secretary of State pursuant to Section 3498, General Code, continues to be part of the general health district until the election and qualification of a mayor and council of such municipal corporation as city officers. Opinions of the Attorney General, 1922, Vol. 1, page 167, and Opinions of the Attorney General, 1931, Vol. 1, page 85, overruled.”

The 1941 opinion was based upon the Supreme Court ruling in *State, ex rel. Heffernan v. Serp*, 125 Ohio St., 87, wherein the court stated at pages 95 and 96 of its opinion :

“The Legislature clearly had the right to provide for the method of transition; that is to say, the code of procedure by which the village government should end and the city government

begins. It could have expressly provided that, from the time of the filing of the proclamation of the secretary of state in the office of the mayor, the village officers then in office might immediately begin to exercise powers of corresponding city officers. What the Legislature in fact did was to continue the village officers in office until succeeded by the proper officers of the new corporation at the next regular election. The village officers were elected because of their presumed qualifications to discharge the duties devolving upon those officers respectively. Applying the rule of strict construction, they should not be held to be empowered to discharge other duties essentially different, without specific legislative authority therefor, on the sole theory that such powers are implied because of the failure of the Legislature to make them express. The analysis of the implications made necessary by immediately regarding the city government to be in effect, with the village officers exercising undefined powers, could only be justified upon the maxim that 'necessity knows no law.' If, on the other hand, the mandate of the Legislature be followed only to the extent that the officers continue in office until the next regular election, without giving them any implied powers whatever, but limiting them strictly to those expressly conferred, the transition from one form of government to the other is made without difficulty and without inconvenience. It must therefore be presumed that such was the legislative intent."

Basing his conclusion on the *Heffernan* case, *supra*, my predecessor stated at page 15 of the 1941 opinion:

"It is true that Section 3498, General Code, provides that a village whose population has increased to five thousand shall become a city thirty days after proclamation by the Secretary of State, but this change does not increase the powers of the officers of such corporation nor change its form of government until new officers are elected.

"The Circuit Court of Appeals for the Sixth Circuit in the case of *City of Oakwood v. Hartford Accident Company*, 81 Fed. (2d), 717, had this to say concerning the transition of an Ohio village into a city pursuant to these statutes:

" 'While change of status had been initiated, it had not yet been completed and there was therefore no immediate change in the form of government.'

"Since the mayor and council elected while the municipal corporation was a village cannot exercise the powers granted by law to the mayor and council of a city, a board of health could not be established by such officers pursuant to the provisions of Section 4404, General Code, and no other authority of the city would have such power. The city therefore should not be regarded

as having 'failed or refused' to establish a board of health within the meaning of such terms as used in Section 4405, General Code. The General Assembly has divided the entire state into health districts and if the officers of a municipal corporation during the period of transition from village into city do not have the power or authority necessary to establish the machinery for a city health district, such municipal corporation should not be regarded as separated from the general health district until after the next ensuing election."

I also find that one of my predecessors in Opinion No. 2103, Opinions of the Attorney General for 1952, page 763, in considering a somewhat similar question concerning the effect of county zoning in an area which has incorporated, concluded that the newly organized village remains subject to the zoning regulations of the county commissioners until the village officials are elected and qualified.

On reviewing the problem presented and the past rulings on the question, I am constrained to agree with the reasoning of Opinion No. 3354, *supra*, and conclude that the city in question will remain a part of the general health district until the city officers have been elected and qualified.

Answering your specific question, therefore, it is my opinion and you are advised:

1. Where, pursuant to Section 703.06, Revised Code, the secretary of state has proclaimed the population of a municipal corporation, which had been classed as a village, to be five thousand or more, said municipal corporation is a part of the general health district of the county under Section 3709.01, Revised Code, until the officers of the municipal corporation have been elected and qualified as city officers. Opinion No. 3354, Opinions of the Attorney General for 1941, page 9, approved and followed.

2. Where such a proclamation has been made but no election of city officers has been held, the electors of the municipal corporation should vote at the general election on the question of a levy for health purposes to meet expenses of the general health district, even though thirty days has elapsed since the issuance of the proclamation.

Respectfully,

MARK McELROY
Attorney General