OPINION NO. 75-085

Syllabus:

1. Even though a city planning commission has adopted rules and regulations for subdivisions within the authorized three mile jurisdiction of such city, as provided in R.C. 711.09 and R.C. 711.101, the municipality is under no duty to extend public utility services to such areas beyond the corporate limits.

2. The area of jurisdiction of a municipality and its planning commission may be reduced by agreement to less than three miles of the corporate limits, and the county planning commission may exercise jurisdiction over the remaining area within that three mile zone.

3. The jurisdiction of a municipality and its planning commission may not be increased beyond the three mile zone provided for in R.C. 711.09 regardless of any agreement to the contrary between the municipality and the county.

To: B. Edward Roberts, Marion County Pros. Atty., Marion, Ohio
By: William J. Brown, Attorney General, December 8, 1975

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

> "1. If a City Planning Commission has developed rules and regulations for subdivisions within the authorized three mile juris-

diction of said city as provided in Section 711.101, O.R.C. is the city responsible for provision of any facilities or services within said jurisdiction?

"2. If a city is, in fact, responsible for providing utilities and services of said city within the three mile area of jurisdiction and the city is not providing utilities or services, does that city lose control of establishing standards and specifications for subdivisions?

"3. Under Section 711.09 a municipal corporation is given jurisdiction three miles beyond its corporate limits. The question to be addressed is, may the area of jurisdiction of a municipality be reduced, for example, to a mile and one half, if both municipal and county jurisdictions mutually agree to such reduction?

"4. By the same token, may the jurisdiction of a municipality be increased, for example, to four miles, if mutually agreed upon by both effected jurisdictions?"

Your first question is a focus upon a city's responsibility to provide public utility services in an area beyond the city's corporate limits, but within three miles of the city limits. The question is whether there is any such responsibility where the city's planning commission has exercised its jurisdiction in that three mile area.

At the outset it is important to point out that what a city planning commission does with respect to plans and plats of areas within three miles of the city limits is different than what the city itself might otherwise do with respect to providing public utilities in that same area.

R.C. 713.01 provides for the establishment of a city planning commission which may then adopt rules and regulations, pursuant to R.C. 711.101, "setting standards and requiring and securing the construction of improvements shown on plats and plans required by sections 711.05, 711.09 and 711.10 of the Revised Code." More important, a city planning commission, once established, controls the planning and approves the plats for specified areas beyond the city limits. R.C. 711.09 provides in pertinent part:

"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 exercise of jurisdictional authority by a city planning commission was described by my predecessor in 1962 Op. Att'y Gen. 3285, first syllabus, as follows:

"Pursuant to Section 711.101, Revised Code, the legislative authority of a city may adopt rules and regulations establishing standards and specifications for the construction of streets, sanitary sewers, sidewalks, curbs and gutters, and such rules and regulations may require compliance therewith as a condition precedent to the approval of the plat required by Section 711.09, Revised Code, by the planning commission."

These powers, which are contained in Title 7 of the Revised Code, however, are not the basis upon which a city, as opposed to its planning commission, provides "public utilities" either inside or outside its limits. Instead, that authority derives from Article XVIII, Sections 4 and 6 of the Ohio Constitution, which provide:

Section 4. Public utilities; acquisition.

"Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

Section 6. Public utilities; disposition of surplus product.

"Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty percent for the total service or product supplied by such utility within the municipality, provided that such fifty percent limitation shall not apply to the sale of water or sewage services."

These constitutional provisions grant very broad powers to municipalities. In 1973 Op. Att'y Gen. No. 73-021, I pointed out that:

"The Ohio Supreme Court has held that a municipality may properly refuse such services under the broad power over its utilities granted by Article XVIII, Sections 4 and 6 of the Ohio Constitution."

In State, ex rel. Indian Hills Acres, Inc. v. Kellogg, 149 Ohio St. 461 (1948), the court held that a municipality, absent contract, has full power to determine the terms upon which surplus water will be sold to consumers outside the

municipality and may even require annexation as a condition of such service.

Therefore, it has been clearly established that municipalities have full control over their public utilities and may determine whether such services shall be extended beyond corporate limits. Absent a contractual obligation, a municipality is under no duty to extend public utility service beyond its corporate limit.

Just how much control municipalities possess over their utilities was also evidenced in State, ex rel. McCann v. Defiance, 167 Ohio St. 313 (1958) where the court, at 316, stated:

> "With respect to a municipally operated public utility, the municipality's powers, rights, and privileges are derived directly from the people, pursuant to the provision of Sections 4 and 6 of Article XVIII of the Constitution, and not from the General Assembly. Nothing is said in the Constitution to indicate that the powers, rights and privileges so conferred upon municipalities are to be subject to any legislative power other than that conferred by the various sections of Article XVIII of the Constitution."

In McCann, supra, the court held a statute unconstitutional to the extent that it required a municipality to furnish water to non-inhabitants of the municipality.

In holding that boards of health may not require a municipality to extend its services beyond corporate limits despite a grant of authority to control such areas, it was stated in McCann, supra, as follows:

> "[M]unicipalities have full control of their utilities, except insofar as the legislature regulates them to protect the public health. Absent a clear grant of authority to boards of health to require municipalities to dispose of their surplus in such a way, I will not imply such a grant."

It is equally correct to state that a city planning commission is not given a clear grant of authority to provide for the extension of the city's service beyond corporate limits. This is true in spite of the fact that the planning commission may adopt rules and regulations by statute that affect areas outside the municipality pursuant to R.C. 711.09 and 713.101. These statutory provisions are legitimate exercises of the police power of a municipality, and the authority to exercise jurisdiction in this case extends to three miles beyond the corporate limits. Nevertheless, merely because a municipality and its planning commission exercise such authority and adopt rules and regulations for subdivisions in areas outside the city limits, that does not impose a duty upon the municipality to extend public utility services beyond the city limits.

The city planning commission simply has no authority to require a municipality to extend its services outside the

corporate limits. A municipality may properly refuse to extend such services, even though the authority granted by R.C. 711.09 and R.C. 713.101, with regard to areas outside corporate limits, has been exercised. Thus, in response to your first question, I conclude that, even though a city planning commission has adopted rules and regulations for subdivisions within the authorized three mile jurisdiction of such city as provided in R.C. 711.101, the municipality is under no duty to extend services and facilities to such areas beyond the corporate limits.

In light of the above conclusion, it is not necessary to analyze your second question.

You next inquire if it is permissible for county and municipal jurisdictions to agree to the limitation of the city planning commission's authority, to an area of less than three miles beyond the corporate limits. This would be an agreement between a county planning commission and a city planning commission, and it would relate to developmental plans and approval of plats but would not properly address providing of public utility services.

As noted above, a city planning commission is not required to exercise any jurisdiction beyond city limits. Further, R.C. 711.09, provides, in pertinent part, as follows:

> "Whenever a city planning commission adopts a plan for the major streets or thoroughfares and for the parks and other open public ground 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 plant 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. . . ."
>
> (Emphasis added.)

From this clear language it is apparent that a city planning commission may exercise its authority beyond the corporate limits up to three miles, but it may adopt rules and regulations for any area less than the three miles, or no area at all beyond the city limits. However, when a city planning commission has adopted a plan under R.C. 711.09 (which includes rules and regulations), it has exclusive jurisdiction as to the approval of plats in the areas in which it has exercised its jurisdiction. See 1962 Op. Att'y Gen. No. 3285.

R.C. 713.22 provides for the establishment of county planning commissions whose authority for the adoption of plans and approval of plats is limited to the area of the county not within the jurisdiction of the city planning commission. See R.C. 711.10.

It was stated in 1966 Op. Att'y Gen. No. 66-147, concerning the jurisdiction of a regional planning commission:

> "[B]ut under the provisions of Section 711.09, supra, such commission has no authority within three miles of any city when there are

> less than five cities in the county and in such city or cities has assumed jurisdiction over such area beyond its territorial boundaries.
>
> "Conversely, the regional planning commission would have jurisdiction over subdivision plats within three miles of a city in a county containing fewer than five cities, if such city has not adopted a plan encompassing the three mile area adjacent to the city."

For purposes of analysis here there is no distinction between a regional planning commission and a county planning commission and, accordingly, the above-quoted statement is directly applicable to a county planning commission and its relationship to a city planning commission. Thus a county planning commission may exercise jurisdiction within three miles of a city's corporate limits if that city's planning commission has not exercised jurisdiction in that entire area. I find nothing, on the other hand, to prevent the city and county planning commissions from agreeing to a geographic division of responsibility within three miles of the city's corporate limits. Accordingly, the answer to your third question is that a city and county planning commission may by agreement exercise jurisdiction within three miles of the city's corporate limit in such a fashion that the city's jurisdiction is, in practice, reduced to less than the three mile area.

Your last inquiry, however, presents a different issue. You ask whether a city may increase its jurisdiction, beyond that statutorily provided for, by an agreement of the city and county through their respective planning commissions.

It should be presumed that the Legislature used language advisably and intelligently and expressed its intent by use of the words found in the statute. Bryan Chamber of Commerce v. Board of Tax Appeals, 5 Ohio App. 2d 195 (1966).

The legislative intent to allow a city and its planning commission to exercise jurisdiction only up to three miles beyond the corporate limits is very clear. The statutory language is not ambiguous.

The Legislature has delegated the responsibility for unincorporated lands in a county, beyond the three mile zone, to the county or its planning commission. Any agreement to allow the city or its planning commission jurisdiction over lands beyond three miles of the corporate limits would be a delegation of power from the county to the city.

The well established rule relating to the delegation of power is expressed in Rapp et al. v. The City and the Storrs and Sedamsville R.R. Co., 12 W.L.B. 119, as being:

> "There is one exception to the maxim, 'Qui facet per alium, facit per se,' which is founded in justice and in reason, and which is, though not of as extensive application as the other, as certain in the application, and its limitations are as well understood as the maxim first

spoken of, and that is that a delegated power cannot be redelegated.

Thus, I must conclude that the jurisdiction of a municipality and its planning commission may not be increased beyond the three mile zone, regardless of any agreement to the contrary.

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

"1. Even though a city planning commission has adopted rules and regulations for subdivisions within the authorized three mile jurisdiction of such city, as provided in R.C. 711.09 and R.C. 711.101, the municipality is under no duty to extend public utility services to such areas beyond the corporate limits.

"2. The area of jurisdiction of a municipality and its planning commission may be reduced by agreement to less than three miles of the corporate limits, and the county planning commission may exercise jurisdiction over the remaining area within that three mile zone.

"3. The jurisdiction of a municipality and its planning commission may not be increased beyond the three mile zone provided for in R.C. 711.09 regardless of any agreement to the contrary between the municipality and the county."