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1. MUNICIPALITY — ZONING ORDINANCE — CAN NOT BE CONSTRUED TO APPLY TO A COUNTY VESTED WITH RIGHT OF EMINENT DOMAIN—USE OF LOTS FOR PUBLIC PURPOSES—LOTS NOT ACQUIRED BY APPROPRIATION PROCEEDINGS—ACQUIRED BY PURCHASE.

2. USE OF A LOT BY COUNTY—ERECTION, STEEL STORAGE BUILDING—USE OF COUNTY ENGINEER—PUBLIC PURPOSE.

SYLLABUS:

1. The zoning ordinance of a municipality cannot be construed as applying to a county vested with the right of eminent domain in the use of lots for public purposes.

2. The zoning ordinances of a municipality cannot be construed as applying to a county vested with the right of eminent domain in the use of lots for public purposes even though said lots were not acquired by appropriation proceedings, but were acquired by purchase.

3. The use of a lot by a county for the erection of a steel storage building to be used by the county engineer, is a public purpose.

Columbus, Ohio, October 7, 1949

Hon. Webb D. Tomb, Prosecuting Attorney
Seneca County, Tiffin, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Will you please furnish the writer an opinion upon the following proposition submitted to this office?

Seneca County is the owner of a vacant lot in a section of the City of Tiffin, Ohio, which is zoned as an 'A' Residence District in the City's Zoning Ordinance. The County Commissioners contemplate the erection of a steel storage building for the storage of road equipment owned by the County and used by the County Engineer. Section 3 of the Ordinance allows use of lots in this district only for single and two-family dwellings, churches, municipal buildings, farms, municipal recreational buildings, playgrounds, parks, but does not permit use for buildings of the type contemplated. Must the County Commissioners submit to the restrictions imposed by this Ordinance?

It happens that the lot in question was recently acquired by the County, but is adjacent to a lot formerly owned by the County and used for the same purpose. When erecting the first storage building the City's ordinance was ignored by the County Commissioners, and no steps were taken by anyone to prevent or stop the erection of that building. Would these facts affect your opinion on the first proposition?"

Section 3 of Article XVIII of the Constitution of the State of Ohio reads as follows:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

This constitutional provision grants to municipalities the function of local self-government, and the legislature under such grant, in Sections 4366-1 to 4366-12 of the General Code, has empowered cities to provide for city planning commissions, upon whose recommendation the council of municipalities by ordinance may provide for the zoning or districting of municipalities and the regulation of the location, bulk, height and uses of buildings and other structures. See Pritz v. Messer, 112 O. S. 628.

In conformity with the provisions of the above sections of the General Code the council of the city of Tiffin on the fourth day of December, 1939 passed Ordinance No. 922 which was regularly approved by the mayor on the same date. So much of Section III of said Ordinance as is applicable to the question here reads as follows:

"'A' RESIDENCE DISTRICT

In an 'A' Residence District, no building or premises except as herein provided in this ordinance, shall be erected, altered, or

used, except for one or more of the following uses:

(1) One-Family Dwelling;

(2) Two-Family Dwelling;

(3) The taking of boarders, or the leasing of rooms by a resident family, provided, however, that space for one roomer be allowed in any case, and space for one additional roomer for each 150 square feet of floor area by which the total floor area of the building exceeds 625 square feet;

(4) The serving of meals, excluding beer, wine or liquor, to tourists or private parties, other than boarders or regular roomers, by a resident family, between 6:00 o'clock A.M. and 12:00 o'clock midnight, when the same is done only upon reservation or solicitation by those served, and when such use is incidental to resident occupancy which is bona fide, and not for the purpose of avoiding the provisions of this ordinance, and where such added incidental use does not permanently displace any resident occupancy, or require or occasion any structural change in the dwelling so used, and provided further that no signs or other advertising visible from the exterior of such dwelling are employed other than herein authorized for customary home occupation.

(5) Cemetery;

(6) Churches and other places of worship;

(7) Clubs, lodges, social and community center building, except those, a chief activity of which, is a gainful service, or activity conducted as a business;

(8) Farms, truck gardens, nurseries and greenhouses;

(9) Institutions of an educational, religious or philanthropic character other than correctional institutions;

(10) Hospitals or sanitariums, but not for contagious diseases, nor for the care of epileptics, or drug or liquor patients, nor for the care of the insane or feeble-minded;

(11) Municipal recreational buildings, playgrounds, and parks;

(12) Municipal buildings;

(13) Railroad or public service passenger stations, including accessory services therein and rights-of-way, not including switching, storage or freight yards, or sidings;

(14) Accessory uses customarily incident to any of the above uses, but not including the conduct of a business, or industry where such business or industry occupies more than 25% of lot area nor shall such accessory building be located within twenty feet of any dwelling; * * *".

The primary question you raise is whether a zoning ordinance duly adopted by a municipality is effective as against a county. The answer to this question involves a consideration of these ordinances, and their effect upon other bodies of government. The question of the constitutionality of these ordinances has been passed upon on numerous occasions and any further reference to that question would be of little value. The principal case in Ohio on the question you present is Doan v. The Cleveland Short Line Ry. Co., 92 O. S. 461, 172 N. E. 505, wherein the question before the court was whether restrictive covenants contained in deeds to land within a specific allotment were effective as against a railroad company possessing the right of eminent domain. The court held as disclosed by the syllabus:

> "1. Where an allotter adopts a plan for the improvement of his allotment whereby the use of the lots is restricted exclusively for residence purposes, such restriction cannot be construed as applying to the state or any of its agencies vested with the right of eminent domain in the use of the lots for public purposes.
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> "2. Where a company or any agency of the state vested with the right of eminent domain has acquired lots in such an allotment and is using the same for public purposes no claim for damages arises in favor of the owners of the other lots on account of such use."

Newman, J., speaking for the court laid down the rule on page 468, which has been followed in subsequent decisions:

> "*No covenant in a deed restricting the real estate conveyed to certain uses and preventing other uses can operate to prevent the state, or any body politic or corporate having the authority to exercise the right of eminent domain, from devoting such property to a public use.* The right of eminent domain rests upon public necessity, and a contract or covenant or plan of allotment which attempts to prevent the exercise of that right is clearly against public policy and is therefore illegal and void."
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> (Emphasis added.)

It will be noted in the Doan case that the defendant Railway Company purchased the lots in the allotment. Although defendant possessed the power of eminent domain they did not exercise that power.

It has been decided in Ohio and elsewhere that the Federal Government is not bound by municipal zoning ordinances and building codes. Thus, in the case of Curtis v. The Toledo Metropolitan Housing Authority et al., 36 O. O. 423, it is stated in the third branch of the syllabus:

> "In the construction of temporary housing units under the Lanham Act the United States Government is not bound by municipal zoning ordinances and building codes."

The authority relied upon by Judge Carey in the Curtis case was United States v. The City of Chester, 144 Fed. 2d 415.

In Opinions of the Attorney General for 1945, being Opinion No. 495, the then attorney general was of the opinion that a zoning ordinance duly adopted by a municipality is not effective as against the state in locating, acquiring, constructing or using such public buildings and institutions as it deems necessary in the performance of its duties enjoined by law. I concur in the conclusion and reasoning of that opinion.

Under Section 2446 of the General Code, counties are given authority to appropriate property for certain purposes. That section reads as follows:

> "When in the opinion of the commissioners it is necessary to procure real estate, or the right of way, or easement for a court house, jail, or public offices, or for a bridge and the approaches thereto, or other lawful structure, or public market place or market house, and they and the owner or owners thereof are unable to agree upon its purchase and sale, or the amount of damages to be awarded therefor, the commissioners may appropriate such real estate, right of way or easement, and for this purpose they shall cause an accurate survey and description to be made of the parcel of land needed for such purpose, or in case of a bridge, or the right of way and easement required and shall file it with the probate judge. Thereupon the same proceedings shall be had, as are provided for the appropriation of private property by municipal corporations."

In my opinion the erection of a steel storage building is a lawful purpose, for which land may be appropriated by the county under Section 2446 supra, the case of Bingham v. Doane, 9 Ohio Reports 165, to the contrary notwithstanding. In the Doane case it was held that the erection of a warehouse was not such a purpose for which the power of eminent domain might be exercised. However, in that case, the warehouse was held by an individual for his private benefit only, while in the instant case it is to be used by the county for the storage of road equipment owned by the county and used by the county engineer. Further, I believe the erection of the building is a public purpose within the meaning of that term as it is used in the above and subsequent cases cited herein.

In the case of State ex rel. Helsel v. Board of County Commissioners, 37 O. O. 58, affirmed in 83 O. App. 388, one of the issues decided by the

court was whether zoning restrictions of municipalities are effective to prevent a county from using property for the public purpose for which it has been taken under the power of eminent domain. The lower court decision, which is reported in 37 O. O. 58, said in the second and third branches of the syllabus:

> "2. Section 2433-2, General Code, which confers authority upon counties to own and operate airports, is constitutional.
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> "3. Zoning restrictions of municipalities are not effective to prevent a county from using property for the public purpose for which it has been taken under the power of eminent domain."

On page 61 in 37 O. O., Judge McNamee gave the following reasons for his conclusion:

> "The issue here considered may be resolved by *determining whether zoning restrictions of municipalities are effective to prevent a county from using property for the public purpose for which it has been taken under the power of eminent domain.* The right of eminent domain comprehends the power to use, as well as the power to take. To suppose that zoning ordinances may limit or prevent the public use for which land is taken is to invest municipalities with power to restrict the exercise of the power of eminent domain. The nature of this power is defined in 29 C.J., Sec. 2, p. 777, as follows:
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> 'Eminent domain is an inherent and necessary attribute of sovereignty, existing independently of constitutional provisions and superior to all property rights.'
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> "Again at page 779 of the same text it is stated:
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> 'Such right antedates constitutions and legislative enactments, and exists independently of constitutional sanctions or provisions, which are only declaratory of previously existing universal law. The right can be denied, or restricted, only by fundamental law, and is a right inherent in society, and superior to all property rights.'
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> "It was held in Fountain Park Co. v. Hensler, 195 Ind. 95; 155 N. E., 465; 50 A. L. R., 1518, that—
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> 'Constitutional provisions regarding the power of eminent domain are not grants of power but limitations upon the use of the power which otherwise would be without limit.' Am. Jur.
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> "The Ohio view of the nature of the power of eminent domain is in harmony with the foregoing. 15 O. J., 691.
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> "The exercise of the power of eminent domain resides in the general assembly *but may be delegated by it.* When so delegated it is limited by the uses for which it is conferred.

'* * * the right of eminent domain *can be delegated only by statute.* When the right of eminent domain is given, it *is a delegated right,* and its exercise is *limited by the uses* for the furtherance of which, on the ground of public policy, it is conferred.' 15 O. J., 773.

"Consistent with these principles the *power of eminent domain can not be limited by restrictive covenants in deeds or by zoning ordinances of municipalities.* In Doan v. Cleveland Short Line Railway Company, 92 Ohio St., 461, the Supreme Court held that *restrictive covenants in deeds have no application to the state or any of its agencies vested with the right of eminent domain.*

"In Norfolk & Western Ry. Co. v. Gale, 119 Ohio St., 110, the Supreme Court had before it the question whether an amended petition setting forth both restrictive covenants in deed and the provisions of a zoning ordinance of the city of Columbus stated a cause of action for injunctive relief against the public use of the restricted and zoned land. *Citing and relying upon Doan v. Cleveland Short Line Railway (supra) the Supreme Court held that no cause of action was stated.*

"In Cincinnati v. Wegehoft, 119 Ohio St., 136, it was urged that the provisions of a zoning ordinance *which exempted the municipality from the building restrictions thereof was unconstitutional.* In denying the validity of this contention the Supreme Court said:

'It might well be said that paragraph 7 of the ordinance was not at all necessary in order to clothe the city with the power to acquire property upon which to erect necessary public building in the restricted residential zone.'

"To the same effect is Decatur Park District v. Becker; 368 Ill., 442, 14 N. E. (2d) 490, wherein it was held that the zoning ordinance of the city of Decatur which zoned certain districts as 'A' residence property, *did not prohibit the use of the land so zoned for public parks.* In passing upon the question there presented the court observed that 'regardless of the fact that the property was zoned as "A" residence property, the park district could condemn and use it for park purposes.'

"In petition of the City of Detroit (airport site), 308 Michigan, 480, 14 N. W. (2d), 140, 142, it was *held that a township ordinance specifically prohibiting the use of the lands in question for an airport was unenforceable and void as being in conflict with a state statute empowering designated public authorities to acquire land for such purposes.*

"Both principle and authority support the view that restrictions in zoning ordinances of municipalities are ineffective to pre-

vent the use of land by a county for the public purpose for which it has been appropriated.

"In enacting zoning ordinances, municipalities in this state act pursuant to the powers of local self-government conferred by Article XVIII, Section 3 of the Constitution. Pritz v. Messer, 112 Ohio St., 628. Zoning ordinances are upheld on the theory that they bear a real and substantial relation to the public welfare. Their validity rests upon the principle that the exercise of rights incident to the ownership of private property may be restricted in the interest of the general welfare of the inhabitants of the municipality. Through the medium of zoning ordinances municipalities may insist that private rights in real property yield to the general good of the community, *but the presumption is that the use of public property for public purposes is designed to promote the general welfare also, and no case or textual authority has been cited, that supports the view that municipalities by zoning ordinances, may restrict or limit the use of public property for public purposes.*

"It is not to be understood from the foregoing that the court is indicating an opinion that municipalities or private citizens are powerless to prevent counties or other public bodies from constructing public improvements in neighborhoods within municipalities that are palpably unsuited to the proposed public use. Nor is the court unmindful of the principle of law that protects property within a municipality from the encroachment of public works constituting or creating nuisances. *These matters involve want of good faith on the part of administrative public officials in the selection of locations and in all such cases appropriate relief will be granted by the courts.* No evidence of bad faith on the part of the county commissioners in selecting the site has been shown. The land is located in sparsely settled areas of two of the smaller suburban municipalities of Cuyahoga county. Many small farms are located nearby, and it does not appear that the use of the site as an airport will constitute an intrusion upon highly developed *residential sections of either municipality.*"

(Emphasis added.)

The Court of Appeals in 83 O. App. 388, at page 392, said as follows:

"We find that we are in full accord with the judgment of the Court of Common Pleas for the reasons set forth in the opinion of the trial judge, wherein the questions of fact and propositions of law applicable thereto are fully and ably discussed."

It is not my prerogative to determine the good faith of the Seneca County Commissioners or the question of whether the erection of the

storage building will constitute a nuisance. I do, however, call to your attention the fact that Judge McNamee, in the body of the opinion, did not limit his decision to those cases where the power of eminent domain had been exercised, but seemed to extend it to all cases where the power alone was present.

In the case of Norfolk & Western Railway Company v. Gale, 119 O. S. 110, appeal dismissed in 278 U. S. 571; 73 L. Ed. 512; 49 S. C. 93, the railway company purchased certain property in the Eastgate Addition to the City of Columbus, which addition was restricted to residence purposes. Although the railway company had the power of eminent domain, there was no resort to appropriation proceedings. The owners of the lots, after the purchase by the railway company brought suit in the Common Pleas Court asking that the railway company be enjoined from using the property purchased until appropriation proceedings were brought and prosecuted whereby the rights under the restrictive covenants contained in the deeds of plaintiffs were acquired by such railway company. An amended petition was filed, plaintiff setting up the form of the deeds and also the zoning ordinances of the City of Columbus regulating the location, use and height of the structures which plaintiffs claimed were related to the property in question.

The court in the Gale case supra, was of the opinion that the case of Doan v. Cleveland Short Line Ry. Company, supra, was decisive and controlling, i. e. where the use of lots is restricted exclusively for residence purposes such restriction cannot be construed as applying to the State or any of its agencies vested with the right of eminent domain in the use of the lots for public purposes.

In the light of the above and in conclusion it is my opinion:

1. The zoning ordinances of a municipality cannot be construed as applying to a county vested with the right of eminent domain in the use of lots for public purposes.

2. The zoning ordinances of a municipality cannot be construed as applying to a county vested with the right of eminent domain in the use of lots for public purposes even though said lots were not acquired by appropriation proceedings, but were acquired by purchase.

3. The use of a lot by a county for the erection of a steel storage building to be used by the county engineer is a public purpose.

In view of the above, an answer to your second question is unnecessary.

In arriving at this conclusion I am aware of decisions in other jurisdictions to the contrary. Thus in the case of County of Cook v. City of Chicago, 311 Ill. 234; 42 N. E. 512; 31 A. L. R. 442, it was held that the city's building regulations did apply to a county where the county was building a county jail. However, I do not believe the decisions in Ohio uphold this conclusion, and it is therefore my opinion that counties are not bound by municipal zoning regulations where the county has been vested with the right of eminent domain in the use of lots for public purposes.

Respectfully,

HERBERT S. DUFFY,
Attorney General.