

TOWNSHIPS—CHANGES IN BOUNDARIES—BOARD OF COUNTY COMMISSIONERS—DISCRETION IN GRANTING APPROVAL—§503.07 R.C.—SECOND PARAGRAPH OF SYLLABUS, 4642 OAG 1954, OVERRULED; 12 INFORMAL OAG 1957, 2686 OAG 1958, MODIFIED.

SYLLABUS:

The provision in Section 503.07, Revised Code, that the board of county commissioners "may" change township boundaries in the circumstances therein stated is not mandatory and such board may act in its discretion in such matters. Second paragraph of the syllabus in Opinion No. 4642, Opinions of the Attorney General for 1954, p. 648, overruled; Informal Opinion No. 12, Informal Opinions of the Attorney General for 1957, and Opinion No. 2686, Opinions of the Attorney General for 1958, modified.

Columbus, Ohio, February 6, 1959

Hon. Earl W. Allison, Prosecuting Attorney
Franklin County, Columbus 15, Ohio

Dear Sir:

I have for consideration your request for review of the ruling in Opinion No. 2686, Opinions of the Attorney General for 1958, to the effect that under Section 503.07, Revised Code, there is a mandatory duty on the county commissioners to effect a change in township boundaries when petitioned to do so as therein provided. The 1958 opinion, *supra*, was merely in affirmation of Opinion No. 4642, Opinions of the Attorney General for 1954, p. 648, the syllabus in which reads in part:

"* * * 2. Section 503.07, Revised Code, is mandatory to the extent that where the legislative authority of a municipal corporation properly petitions the board of county commissioners for a change in township limits, in order to make them identical, in whole or in part, with the limits of a municipal corporation, or to erect a new township out of the portion of the township included within the limits of the municipal corporation, said board must, upon the presentation of such petition and in regular or adjourned session, change the limits of the township or erect a new township as provided by Section 503.14, Revised Code. * * *"

The reasoning by which this conclusion was reached is found in the following language in the body of that opinion :

“* * * Although Section 503.07, *supra*, uses the permissive ‘may’ with respect to the change of the boundaries of the township upon the petition of the legislative authority of the municipality I am nevertheless of the opinion that such a boundary change is mandatory upon the board of county commissioners if as and when a proper petition is presented by the municipal corporation. My conclusion in this respect is based largely on the provisions of Section 503.14, Revised Code, which provides as follows :

‘When the change of boundaries of townships is required by reason of the extension of the limits of a municipal corporation, such change shall be made by annexation to the township in which the municipal corporation or the greater part of it was previously situated, of such parts of other townships as are covered by such extension.’

“The section above quoted was originally enacted as section 482 of the Municipal Code in 70 Ohio Laws, 4. As originally enacted it provided substantially the same as present Section 503.14, Revised Code, except that after the word “required” the words ‘under Section 480’ appeared. Section 480 of the former Municipal Code is now substantially Section 503.07, Revised Code. Notwithstanding that this section reference was eliminated upon the incorporation of the Municipal Code into the General Code and subsequently upon the incorporation of the General Code into the present Revised Code, I am nevertheless convinced that no substantial change was intended and that the use of the word “required” was intentional and not accidental, and indicated a legislative understanding that when a petition was duly presented to the Board of County Commissioners for an appropriate change in the township boundaries, that such change was then a ‘required’ one and was therefore mandatory. * * *”

In *State, ex rel. Contie v. Kuhn, et al.*, an unreported decision of the Court of Appeals of Stark County, Case No. 2782, decided October 7, 1957, the precise question here presented was under consideration. The court in the opinion by Putnam, J., referred to Opinion No. 4642, *Supra*, and rejected the conclusion therein reached. Commenting on the Attorney General’s ruling the court said :

“* * * The Relator herein base their contention primarily upon an opinion of the Attorney General appearing in 1954 Attorney General Reports, at Pg. 648, and being Opinion No. 4642, in which the Attorney General holds that in this Section the word “may” means “shall” and upon the presentation of a proper petition by the City, the change must be made. In our judgment there are several things wrong with this pronouncement.

“In the first place, the same is obiter dictum. It was not necessary in the decision of the question before the Attorney General at that time. In the second place, the decision is based entirely upon the wording of Section 503.14 R. C., above quoted, and the interpretation of the word “required” in this Section. The Attorney General thinks that this Section is in *pari materia* and is controlling.

“We do not follow that reasoning. In the first place, if, in reading this Section the emphasis is placed upon the word “when”, a different meaning can be obtained than when the emphasis is placed upon the word “required”. In the second place, the word “required” can just as easily be interpreted as referring to a situation which exists *after* the Board of County Commissioners passes favorably upon the petition of the City, under Section 503.07. It would be at that point when a change would be required.

“The interpretation which the Attorney General gives it, to our mind, is strained and is contrary to the rules of legislative construction heretofore commented upon.

“For all of these reasons the demurrer to the petition is sustained and the Relator not desiring to plead further, the petition is dismissed.”

This decision was not appealed and that being so we cannot consider that it definitely establishes the law of Ohio on the point here involved, and I should not hesitate to reject this ruling and to adhere to the 1954 Opinion, *supra*, if, in my view, the latter were clearly correct and the former were plainly unsound. These views I do not entertain, although I regard the question as one which is honestly debatable. In deference to the judicial process, therefore, I am impelled to regard the *Contie* decision as declarative of the law until such time as the point in question has been more authoritatively decided.

Accordingly, you are advised that the provision in Section 503.07, Revised Code, that the board of county commissioners “may” change township boundaries in the circumstances therein stated is not mandatory and such board may act in its discretion in such matters. Second paragraph of the syllabus in Opinion No. 4642, Opinions of the Attorney General for 1954, p. 648, overruled; Informal Opinion No. 12, Informal Opinions of the Attorney General for 1957, and Opinion No. 2686, Opinions of the Attorney General for 1958, modified.

Respectfully,

MARK MCELROY

Attorney General