1983

1. COUNTY COMMISSIONERS, BOARD OF—NO AUTHORITY TO ADOPT REGULATIONS TO PROHIBIT CARRYING ON BUSINESS OF PLUMBING ANYWHERE IN UNINCORPORATED AREA OF COUNTY BY UNLICENSED PLUMBERS—SECTION 2480 G. C.

2. NO AUTHORITY FOR BOARD TO ADOPT ZONING REGULATIONS TO PREVENT LOCATION OF SANATORIUMS, HOSPITALS, PENAL INSTITUTIONS, MOTELS OR TRAILER CAMPS WITHIN PARTICULAR DISTANCE OF SCHOOLS.

3. NO AUTHORITY FOR BOARD TO ADOPT REGULATIONS TO RESTRICT LOCATION OF PLACES OF BUSINESS WHERE OPERATORS NOT PROPERLY LICENSED UNDER OHIO LIQUOR CONTROL ACT.

SYLLABUS:

1. A board of county commissioners 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.

2. A board of county commissioners has no authority under the provisions of Section 2480, General Code, to adopt zoning regulations which would prevent the location of sanatoriums, hospitals, penal institutions, motels or trailer camps within a particular distance of schools.

3. A board of county commissioners has no authority under Section 2480, General Code, to adopt regulations restricting the location of places of business the operators of which have been properly licensed under the Ohio Liquor Control Act.

Columbus, Ohio, June 30, 1950

Hon. Thomas H. Blakely, Prosecuting Attorney
Lake County, Painesville, Ohio

Dear Sir:

Your request for my opinion reads as follows:

> "I respectfully request your opinion on the following matters:
>
> "Section 2480 of the General Code of Ohio provides 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. * * *'
>
> "(1) May a Board of County Commissioners under the above section of the code prohibit the use of dwellings for the sale of beer, spirituous liquors, intoxicating liquors and prohibit the location of sanitoriums, hospitals, penal institutions, motels, or trailer camps, within ½ mile of any public, parochial or private school?
>
> "(2) Has a Board of County Commissioners, under the above section of the code, the right to license plumbers and prohibit plumbing being done anywhere in the unincorporated area of the county by unlicensed plumbers?"

The questions which you have presented require a consideration of the extent to which the legislature may clothe the board of county commissioners with administrative rule-making power. The constitutional provision applicable in this situation is Section 1, Article X of the Ohio Constitution which reads as follows:

> "The general assembly shall provide by general law for the organization and government of counties, and may provide by general law alternative forms of county government. No alternative form shall become operative in any county until submitted to the electors thereof and approved by a majority of those

voting thereon under regulations provided by law. Municipalities and townships shall have authority, with the consent of the county, to transfer to the county any of their powers or to revoke the transfer of any such power, under regulations provided by general law, but the rights of initiative and referendum shall be secured to the people of such municipalities or townships in respect of every measure making or revoking such transfer, and to the people of such county in respect of every measure giving or withdrawing such consent."

This constitutional provision was the subject of consideration in State, ex rel. Helsel v. Board of County Commissioners, et al., 37 O. O. 58 (affirmed 38 O. O. 437; appeal dismissed 149 O. S. 583). Branch 1 of the syllabus in that case reads as follows:

"Article X, Section 1 of the Ohio Constitution contains no express or implied prohibition against the delegation by the General Assembly to counties of those sovereign powers which the state itself may exercise or which the state may assert through any of its political subdivisions."

The nature of a county as a political subdivision was defined in State, ex rel. Ranz v. City of Youngstown, 140 O. S. 477 as follows:

"3. A county which has not adopted a charter or alternative form of government is a wholly subordinate political division or instrumentality for serving the state."

It should be remembered, of course, that the legislature cannot delegate its legislative power to a board of county commissioners nor to any special board created by statute. Thus, in Beldon v. Union Central Life Insurance Company, 143 O. S. 329, the following rule is stated in the 3rd branch of the syllabus:

"It is no violation of the constitutional inhibition against the delegation of legislative power for the General Assembly to establish a policy and fix standards for the guidance of administrative agencies of government while leaving to such agencies the making of subordinate rules within those fixed standards and the determination of facts to which the legislative policy applies."

This rule was quoted with approval in Strain v. Southerton et al., 148 O. S. 153-161, and the rule was further defined in branch 1 of the syllabus of that case which reads as follows:

"Section 26, Article II of the Constitution of Ohio inhibits

> the General Assembly from delegating its power to make a law, but that body may properly enact a law conferring authority or discretion on a designated governmental agency to carry provisions of such law into execution and granting such agency the power to inquire into and determine facts under rules of its own creation which conform to the standards and policy contained in the law."

The rule as stated above is somewhat broadened in those cases which involve the making of rules and regulations by boards for the purpose of protecting the public morals, health, safety or general welfare. The leading case expressive of this rule is Matz v. Curtis Cartage Company, 132 O. S. 271, the 6th and 7th branches of the syllabus in that case reading as follows:

> "6. The General Assembly cannot delegate legislative power to an administrative board and any enactment which in terms does so is unconstitutional and void; but laws may be passed which confer on such a board administrative powers only.
>
> "7. As a general rule a law which confers discretion on an executive officer or board without establishing any standards for guidance is a delegation of legislative power and unconstitutional; but when the discretion to be exercised relates to a police regulation for the protection of the public morals, health, safety or general welfare, and it is impossible or impracticable to provide such standards, and to do so would defeat the legislative object sought to be accomplished, legislation conferring such discretion may be valid and constitutional without such restrictions and limitations."

The power of the legislature to clothe the board of health of a general health district with authority to make and enforce rules and regulations for the promotion of public health and the prevention or restriction of disease was considered at length in Weber v. Board of Health, 148 O. S. 389. In that case the board had been authorized by statute, Section 1261-42, General Code, to make and enforce rules regarding public health or prevention and restriction of disease. Pursuant to such authority the board adopted a rule prohibiting the collection and disposal of garbage within the health district except in such cases as persons engaged in such business might secure the permission of the health commissioner to do so. The rule of the board of health in this respect left to the sole discretion of the health commissioner the issuance of such permits and it established no standard by which such commissioner was to be guided in acting upon any application made to him for such permits.

The court in considering the legality of such rule concluded that it was a departure from proper administrative rule-making and constituted an attempt to exercise legislative functions. Branch 3 of the syllabus in the Weber case reads as follows:

> "3. Under the provisions of Section 1261-42, General Code, the board of health of a general health district has a wide latitude in making and enforcing rules and regulations for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisance, but when such board passes a resolution which prohibits a business not unlawful in itself and which is susceptible to regulations which will prevent it from becoming either a health menace or a nuisance, such board transcends its administrative rule-making power and exercises legislative functions in violation of Section 1 of Article II of the Constitution of Ohio."

The majority opinion indicates that this conclusion was reached for two reasons. First, there was an attempt by the board to prohibit a business which was not unlawful in itself and which was susceptible to regulations which would prevent it from becoming a health menace and, second, there was an attempt by the board to clothe the health commissioner with sole discretion to issue what amounted to a license without providing that official with any standard for his guidance.

With these rules of law in mind, we can proceed to a consideration of the specific questions which you have presented. For the purposes of logical development, the question of licensing plumbers will be considered first. It was held as early as 1898 that the business of plumbing is one which is so nearly related to public health that it might with propriety be regulated by law. The second branch of the syllabus in State v. Gardner, 58 O. S. 599 reads as follows:

> "2. 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."

From this it would appear that the board of county commissioners who are authorized by Section 2480, General Code, to adopt regulations regulating the safety, health and sanitary conditions of buildings would have the power to adopt and enforce such rules regulating the business

of plumbers as would promote such health, safety and sanitary conditions. However, I think it is clear from the rule stated in the 3rd branch of the syllabus in the Weber case, supra, that the board of commissioners, in the absence of more specific statutory authority, could not lawfully adopt a rule which would prohibit the business of plumbing except as the persons engaged in that business were licensed under the authority of such rules. I think it is equally clear that the board of commissioners could adopt rules prescribing standards by which the business of plumbing must be conducted provided such rules do not go beyond the scope of regulating the safety, health and sanitary conditions of buildings within the unincorporated portion of the county.

As to the remaining questions which you have presented, while it might be thought that the location of certain of the installations named in your inquiry should be governed by the same broad rule stated in branch 7 of the syllabus of the Matz case, supra, on the ground that a question of public morals is concerned, I think that that rule could be applied to such installations only within the strict limits of the language of Section 2480, General Code. It is significant to note in that portion of this section which you have quoted in your inquiry that there is the provision that "in no case shall such regulations go beyond the scope of regulating the safety, health and sanitary condititons *of such buildings.*" (Emphasis added.)

Because your inquiry indicates that the board of county commissioners have in mind regulating the *location* of certain installations with reference to schools, it seems clear that the problem is one of zoning rather than one of regulating the safety, health and sanitary conditions *of such buildings.*

If it is assumed that the proposal of the board of county commissioners to regulate the location of certain buildings is in fact a zoning measure, such proposed action on their part would be subject to the additional objection that the zoning of areas within the unincorporated portion of a county is dealt with in another statute, namely Section 3180-1, et seq., General Code, enacted effective September 25, 1947. Accordingly, applying the rule that the implied and the general statute must be restricted by that which is particular and specific, I think it is evident that the board of county commissioners would have no power to adopt any zoning measures under the authority of Section 2480, General Code.

As to the question of restricting or prohibiting the use of certain types of buildings for the sale of beer and intoxicating liquors, it would appear that this proposal is subject to the same objection. Here, too, the legislature has adopted a specific and particular legislative provision, in Section 6064-16, General Code, with reference to the location of such places of business with relation to schools. Such specific and particular legislative provisions would, of course, restrict the implied and general provisions of Section 2480, General Code. Moreover, the legislature has delegated to the Department of Liquor Control the authority to issue permits of various kinds for the sale of beer and intoxicants and has prescribed by statute (Sections 6064-16 and 6064-17, General Code) the standards under which such permits may be issued. Here, again, I think the particular and specific provisions of the Liquor Control Act must prevail over any implied or general authority given to the board of county commissioners under the provisions of Section 2480, General Code.

Accordingly, and in specific answer to your inquiry, it is my opinion that:

1. A board of county commissioners 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.

2. A board of county commissioners has no authority under the provisions of Section 2480, General Code, to adopt zoning regulations which would prevent the location of sanatoriums, hospitals, penal institutions, motels or trailer camps within a particular distance of schools.

3. A board of county commissioners has no authority under Section 2480, General Code, to adopt regulations restricting the location of places of business the operators of which have been properly licensed under the Ohio Liquor Control Act.

Respectfully,

HERBERT S. DUFFY,
Attorney General.