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BOARD OF TOWNSHIP TRUSTEES—MAY CREATE AND ESTABLISH ONLY ONE TOWNSHIP ZONING COMMISSION—§519.04, R.C.

SYLLABUS:

1. Under the provisions of Section 519.04, Revised Code, as effective September 17, 1957, the board of township trustees of any county may create and establish only one township zoning commission; and there may be only one township zoning commission in any one township.

2. The amendment to Chapter 519., Revised Code, effective September 17, 1957 (Amended Senate Bill No. 403 of the 102nd General Assembly, 127 Ohio Laws, 363) had the effect of abolishing all existing township zoning commissions; and, as of such date, in any township, only one zoning commission, made up of five residents of the unincorporated territory of the township, could validly be appointed under Section 519.04, Revised Code.

Columbus, Ohio, April 20, 1960

Hon. Geo. Cleveland Smythe, Prosecuting Attorney
Delaware County, Delaware, Ohio

Dear Sir:

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

“Does the amendment of Section 519.04, R. C., by omitting the words ‘to be zoned’ change the rule announced by 1953 O.A.G. No. 3145?”

“In other words may there still be more than one township zoning commission in a township which has created more than one zoning area therein?”

“If only one zoning commission is permitted for a township how is that body selected where two zoning districts have been previously created?”

“Your early advice will be greatly appreciated.”

Opinion No. 3145, Opinions of the Attorney General for 1953, page 520, held, in effect, that when an unincorporated area of a township which was not governed by the then existing zoning regulations in said township, desired to adopt a township zoning plan, the procedure prescribed in Chapter 519., of the Revised Code must be followed, including the appointment of a second or additional township zoning commission. This second or additional commission would act only in and for the new area to be zoned. The reason for this conclusion of the then Attorney General was primarily the requirement in Section 519.04, Revised Code, which, in 1953, read in part as follows :

“The board of township trustees of any township proceeding under sections 519.02 to 519.25, inclusive, of the Revised Code, shall create and establish a township zoning commission. The commission shall be composed of five members who reside in the unincorporated area of the township *to be zoned*, * * *”
(Emphasis added)

There was no provision in 1953 in Chapter 519., Revised Code, whereby additional territory could be included in an existing township zoning regulation. Because of this fact, it would become necessary to institute proceedings anew, under the provisions of Chapter 519., Revised Code, for the additional territory desiring zoning. Since the residence requirement for a township zoning commissioner was restricted to the area to be zoned, it necessarily followed that a new commission would have to be appointed in order to effect zoning in an unzoned area of a partially zoned township.

Amended Senate Bill No. 403 of the 102nd General Assembly (127 Ohio Laws, 363) amended, along with other sections of the Revised Code, Sections 519.04 and 519.05, Revised Code. These sections, so as amended, became effective September 17, 1957. The pertinent part of Section 519.04, Revised Code, as then amended and as presently existing, reads as follows :

“The board of township trustees of any township proceeding under Sections 519.01 to 519.99, inclusive of the Revised Code, shall create and establish a township zoning commission. The commission shall be composed of five members who reside in the unincorporated area of the township, to be appointed by the board, * * *”

Section 519.05, Revised Code, as amended effective September 17, 1957, now reads in part as follows:

“The township zoning commission shall submit a plan, including both text and maps, representing the recommendations of the zoning commission for the carrying out by the board of township trustees of the powers, purposes, and provisions set forth in sections 519.01 to 519.99, inclusive, of the Revised Code, *including additions to territory in which a township zoning plan is in effect.*”

(Emphasis added)

The effects of these amendments are, first, to eliminate the requirements of the township zoning commissioner to be a resident of the area to be zoned and, second, to permit the existing township commission to perform the functions required in Chapter 519., Revised Code, as they pertain to the addition of new territory to a then existing township zoning plan.

It must be presumed that the legislature, in enacting this amendment, was cognizant of the effect of the law as it existed prior to the amendment. There can be no question from a reading of these statutes and from the effect of the above mentioned amendments that the legislature intended that there be no more than one township zoning commission in each township. I conclude, therefore, that under Section 519.04, Revised Code, as now existing, the board of township trustees of any township may create and establish only one township zoning commission, and that there may be only one township zoning commission in any one township.

Your second question asks how the zoning commission is selected where two zoning districts have been previously created. This in turn raises the question of the effect of the September 17, 1957 amendments on zoning commissions existing at that time. In this regard it will be noted that said amendments made a substantial change in the laws governing a township zoning commission. Where Chapter 519., Revised Code, prior to September 17, 1957, permitted, and in some instances required, more

than one township zoning commission in one township, the present law definitely stipulates that there should be only one such commission in a township. Further, where a member of the commission formerly was required to be a resident of a certain area to be zoned, now the only requirement is that a member be a resident of the unincorporated area of the township. I am of the opinion, therefore, that the September 17, 1957 amendments abolished all township zoning commissions existing at that time.

Where a township zoning commission was created since September 17, 1957, and the appointments were in compliance with Section 519.04, *supra*, as effective on that date, the commission would be a valid commission providing, of course, that it was the only commission in the township.

Your letter indicates, however, that in some instances townships may not have followed the procedure for appointment of a zoning commission as specified by Section 519.04, *supra*, since September 17, 1957. As I understand it, not all commissions existing as of that date were abolished and, further, in some townships more than one zoning commission has been appointed since that date. Such is, of course, contrary to the intent of the section and the question arises as to the validity of the acts taken by such township zoning commissions since September 17, 1957.

Since all existing township zoning commissions were abolished as of September 17, 1957, the terms of office of the members of such commissions ended as of that date. In this regard, the general rule of law is stated in 32 Ohio Jurisprudence, page 1074, as follows :

“The effect of the abolition of an office always is to terminate the term of the incumbent, since he cannot be an officer or incumbent of an office which has ceased to exist; in other words, he cannot be a *de facto* officer of an office no longer in existence. He can recover no salary thereafter; and it is his duty to transfer to the proper authorities all property connected therewith.

“* * *”

Any commissioners not properly appointed, therefore, in taking action since September 17, 1957, were not acting as *de facto* officers of the former commissions, since a person cannot be a *de facto* officer of a non-existent office. Such actions, however, could be considered actions as *de facto* officers of a valid township zoning commission which could have been appointed pursuant to Section 519.04, *supra*, even if such appoint-

ment was not actually made. In this regard it is stated in 32 Ohio Jurisprudence, Section 225, page 1080:

“An officer de facto is variously defined or described by the authorities. Lord Ellenborough has given the following definition: ‘A defacto officer is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.’ Another and a more comprehensive definition is as follows: A person is a de factor officer where the duties of the office are exercised: ‘First: *Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action supposing him to be the officer he assumed to be.* Second. Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like. Third. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public. Fourth. Under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such.’ He has also been described as one who actually performs the duties of his office with apparent right under claim of color of appointment or election. He is neither an officer de jure because not in all respect qualified and authorized to exercise the office, nor a usurper who presumes to act officially without any just pretense or color of title.”

(Emphasis added)

The acts of a township zoning commission not appointed in accordance with the provisions of Section 519.04, Revised Code, as effective September 17, 1957, would have been identical with a person acting “without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action supposing him to be the officer he assumed to be.” Thus, the acts of such a commission which are otherwise valid could not be invalidated merely because of a failure of formal appointment. (32 Ohio Jurisprudence, Section 242, page 1097.)

Accordingly, while all township zoning commissions are required to be appointed under the provisions of Section 519.04, Revised Code, as now existing, I am of the opinion that the acts of commissions not so appointed were not made invalid because of failure to comply with such requirement.

In conclusion, therefore, it is my opinion and you are advised:

1. Under the provisions of Section 519.04, Revised Code, as effective September 17, 1957, the board of township trustees of any county may create and establish only one township zoning commission; and there may be only one township zoning commission in any one township.

2. The amendment to Chapter 519., Revised Code, effective September 17, 1957 (Amended Senate Bill No. 403 of the 102nd General Assembly, 127 Ohio Laws, 363) had the effect of abolishing all existing township zoning commissions; and, as of such date, in any township, only one zoning commission, made up of five residents of the unincorporated territory of the township, could validly be appointed under Section 519.04, Revised Code.

Respectfully,

MARK McELROY

Attorney General