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1. COUNTY COMMISSIONERS—AUTHORITY TO REQUIRE THOSE AFFECTED BY BUILDING REGULATIONS CONTROLLING CONSTRUCTION TO OBTAIN PERMIT PRIOR TO CONSTRUCTION—PAY FEE TO COVER COST OF ISSUING PERMIT—SECTION 307.37, R. C.
2. COUNTY COMMISSIONERS—SECTION 303.02 R. C. AUTHORITY TO REGULATE SETBACK BUILDING LINES BY ZONING RESOLUTION—NO AUTHORITY TO ADOPT “BUILDING CODE” SECTION 307.37 R. C.

SYLLABUS:

1. Under the terms of Section 307.37, Revised Code, the board of county commissioners is empowered to require those affected by building regulations controlling construction in unincorporated areas to apply to a county building inspector for a permit prior to beginning construction of a building, and may require the payment of a fee therefor in an amount reasonably designed to cover the cost of inspection incident to the issuance of such permit.

2. Although a board of county commissioners is authorized, under the provisions of Section 303.02, Revised Code, by a zoning resolution to regulate setback building lines, such board may not exercise such regulation by the adoption of a "building code" under authority of Section 307.37, Revised Code.

Columbus, Ohio, November 26, 1956

Hon. Robert E. Cook, Prosecuting Attorney
Portage County, Ravenna, Ohio

Dear Sir:

I am in receipt of your request for my opinion, which reads as follows:

"At the present time the County Commissioners are contemplating passing a resolution setting up a 'building code' under Section 307.37 of the Revised Code of Ohio. In making a preliminary study of such a building code the following questions have come up.

"Under the authority of Revised Code 307.37, does the Board of County Commissioners have the power to require those affected by the regulations controlling construction in unincorporated areas, to apply to a County Building Inspector for a 'permit' and, further, does the Board of County Commissioners have the power to require such an applicant to pay a pre-designated fee for such a permit?

"The second question arising is whether the County Commissioners have the power, under R. C. 307.37 to regulate setback building lines, which would require a party to construct his building a certain specified distance from a street or highway. In connection with this question, your attention is respectfully called to Section 303.02, in which it states that County Commissioners may regulate, among other things, setback building lines, as part of a county rule zoning plan. Is the regulation of setback building restricted to zoning resolutions or may such regulations be made in a 'building code?'"

Section 307.37, Revised Code, reads in part as follows:

“The board of county commissioners, in addition to its other powers, may adopt, administer, and enforce regulations 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 such regulations go beyond the scope of regulating the safety, health, and sanitary conditions of such buildings. * * *”

Section 307.38, Revised Code, creates the office of county building inspector and assigns to that officer the duties of administration and enforcement of the building regulations.

Section 307.40, Revised Code, provides in part:

“No person shall erect, construct, alter, repair, or maintain any residential building, office, mercantile building, workshop, or factory, including a public or private garage, within the unincorporated portion of any county, wherein the board of county commissioners has enacted building regulations as provided in section 307.37 of the Revised Code, unless such building regulations are fully complied with. * * *

Your first question is whether a board of county commissioners can require persons wishing to construct a building within an unincorporated area of a county subject to county building regulations to secure from the county building inspector a permit before they can lawfully proceed with such construction. The statutes I have cited do not specifically provide for the issuance of building permits. It is certain, none the less, that inspection, not only of completed buildings, but of buildings in the process of construction and of the plans therefor is a necessary element of the enforcement of building regulations. The issuance of a building permit, as evidence of inspection and approval of the plans, logically follows. I am of the opinion, then, that the power to enforce building regulations reasonably implies the power to require persons desiring to build in the regulated area to secure building permits prior to beginning construction.

The second part of your first question asks whether the board of county commissioners can require the payment of a predesignated fee for the building permit. In my opinion No. 7111, dated September 14, 1956, I held as follows:

“1. A board of township trustees, in adopting zoning regulations as authorized by Section 519.02 et seq. of the Revised Code

and being authorized by Sections 519.16 and 519.17 Revised Code, to provide for inspection of buildings proposed to be erected or altered in the zoned area and to require permits for such erection or alteration, has implied power to provide in such regulations for the payment of reasonable fees for issuing such permits and for such inspection.

"2. The township trustees are without authority to impose such fees except by provision in such zoning regulations or by amendment thereto adopted as provided by Section 519.12, Revised Code."

In support of my conclusion in Opinion No. 7111, I cited Realty Company v. Youngstown, 118 Ohio St., 204. That case dealt with the validity of a city ordinance which provided for payment of fees to a city planning commission for examining plats of land in the three-mile zone outside the city. There was no specific statutory authority for charging such fees. The court held, as shown by the second paragraph of the syllabus:

(2) "A city ordinance which provides for payment of fees to the planning commission of such city for examining and checking plats of lands within such city or within three miles of the corporate limits of such city is valid so far as amount of fees is concerned, if the fees permitted to be charged by the provisions of such ordinance are reasonable and designed to cover the cost and expense of maintaining the planning commission."

The court, at page 214 said:

"* * * It is not necessary that the statute should specifically give to the municipality power to charge and collect a fee to cover the cost of inspection and regulation. *Where the authority is lodged in the municipality to inspect and regulate, the further authority to charge a reasonable fee to cover the cost of inspection and regulation will be implied.* * * *" (Emphasis added.)

You will note that the authority there in question was extra-territorial authority and so was not derived from the home-rule powers.

What I said in Opinion No. 7111 concerning the power to charge a reasonable fee being implied in the power to inspect applies equally to the case of inspection and issuance of permit in the enforcement of county building regulations.

In McQuillan on Municipal Corporations, Volume 2, page 609, it is said:

“* * * It has been held that express authority conferred on a municipality to enact inspection ordinances includes, as an incident thereto, the power to charge a fee for the inspection.”

I turn now to your second question, which is whether under Section 307.37, Revised Code, the board of county commissioners has the power to regulate setback building lines. As you have observed the county commissioners are specifically authorized to provide setback building lines by Section 303.02, Revised Code, a section dealing with zoning, while there is no such authorization in the sections concerning building regulation, Sections 307.37, et seq., Revised Code. In the chapter of the Revised Code dealing with municipal corporations you will note that Section 713.09, Revised Code, one of the sections concerning zoning in municipal corporations, there is specific authorization for regulations creating setback building lines, while in Section 715.26, Revised Code, concerning municipal building regulations, there is no such authorization. I am of the opinion that the legislature did not intend to authorize regulation of setback building lines by the terms of Section 307.37, Revised Code. If it had so intended, we must presume that it would have used the specific words found in Section 303.02, Revised Code, or in Section 713.09, Revised Code.

Accordingly, I am of the opinion and advise you that:

1. Under the terms of Section 307.37, Revised Code, the board of county commissioners is empowered to require those affected by building regulations controlling construction in unincorporated areas to apply to a county building inspector for a permit prior to beginning construction of a building, and may require the payment of a fee therefor in an amount reasonably designed to cover the cost of inspection incident to the issuance of such permit.

2. Although a board of county commissioners is authorized, under the provisions of Section 303.02, Revised Code, by a zoning resolution to regulate setback building lines, such board may not exercise such regulation by the adoption of a “building code” under authority of Section 307.37, Revised Code.

Respectfully,

C. WILLIAM O'NEILL
Attorney General