

OPINION NO. 1299

Syllabus:

A township may be made subject to an existing zoning plan in the unincorporated part of a county by the procedures set forth in Sections 303.03 to 303.11, inclusive, Revised Code.

To: James H. DeWeese, Miami County Pros. Atty., Troy, Ohio
By: William B. Saxbe, Attorney General, August 18, 1964

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

"The trustees of one of the townships in Miami County desire to incorporate the township into the present County Zoning Plan. Upon examination of the zoning statutes there does not appear to be any specific provisions whereby a township can become associated with a county zoning plan, after the county zoning plan has already been in existence. This particular township does not have township zoning.

"It is requested that you advise as to procedure to be followed for the purpose above indicated."

In your letter of request you specifically limit consideration to the incorporation of a township into a presently operative county zoning plan. It is presumed that there is a valid county plan in praesenti and that the existing plan is not effective as to the township in question.

Amendments to county zoning resolutions are permitted by Section 303.12, Revised Code, which provides:

"Amendments or supplements to the zoning resolution may be initiated by motion of the county rural zoning commission, by the passage of a resolution therefor by the board of county commissioners or by the filing of an application therefor by one or more of the owners or lessees of property within the area proposed to be changed or affected by the proposed amendment or supplement with the county rural zoning commission. The board of county commissioners shall upon the passage of such resolution certify it to the county rural zoning commission.

"Upon the adoption of such motion, or the certification of such resolution or the filing of such application the county rural zoning commission shall set a date for a pub-

lic hearing thereon, which date shall not be less than twenty nor more than forty days from the date of adoption of such motion or the date of the certification of such resolution or the date of the filing of such application. Notice of such hearing shall be given by the county rural zoning commission by one publication in one or more newspapers of general circulation in each township affected by such proposed amendment or supplement at least fifteen days before the date of such hearing.

"If the proposed amendment or supplement intends to re-zone or re-district ten or less parcels of land, as listed on the tax duplicate, written notice of the hearing shall be mailed by the zoning commission, by first class mail, at least twenty days before the date of the public hearing to all owners of property within and contiguous to and directly across the street from such area proposed to be re-zoned or re-districted to the addresses of such owners appearing on the county auditor's current tax list or the treasurer's mailing list and to such other list or lists that may be specified by the board of county commissioners. The failure of delivery of such notice shall not invalidate any such amendment or supplement. The published and mailed notices shall set forth the time and place of the public hearing, the nature of the proposed amendment or supplement and a statement that after the conclusion of such hearing the matter will be referred for further determination to the county or regional planning commission and to the board of county commissioners as the case may be.

* * * * *

"Such amendment or supplement adopted by the board shall become effective in thirty days after the date of such adoption unless within thirty days after the adoption of the amendment or supplement there is presented to the board of county commissioners a petition, signed by a number of qualified voters residing in the unincorporated area of the township or part thereof included in the zoning plan equal to not less than eight per cent of the total vote cast for all candidates for governor in such area at the last preceding general election at which a governor was elected, requesting the board to submit the amendment or supplement to the electors of such area, for approval or rejection, at the next primary or general election.

"No amendment or supplement for which

such referendum vote has been requested shall be put into effect unless a majority of the vote cast on the issue is in favor of the amendment. Upon certification by the board of elections that the amendment has been approved by the voters it shall take immediate effect."

While ordinarily an alteration of a zoning resolution to include territory not included originally would be thought of either as an "amendment" or "supplement" to the original resolution, I agree with you that this appears not to be the case under Section 303.12, supra. In the first place the language employed in this statute seems to exclude changes of this type. See Opinion No. 3145, Opinions of the Attorney General for 1953. Secondly, an amendment or supplement under this section may be had without a vote of the electors in the area affected (assuming there is no petition initiated by electors to require a vote) and to apply this section to effect zoning of an area or territory not previously zoned appears to be contrary to the intention of the General Assembly in the enactment of Section 303.01 to 303.25, inclusive, Revised Code. Thus, it is provided in Section 303.11, Revised Code, that a zoning resolution adopted by the board of county commissioners--after notice and public hearings in each township affected--shall cause the question of whether the proposed resolution shall be put into effect to be submitted to the electors in the areas to be affected. From this I conclude that an existing county zoning resolution cannot be broadened to include territory not previously affected by the procedure set forth in Section 303.12, Revised Code.

Even without the availability of this procedure, however, it appears that there are two ways that the result sought may be, in essence, effected. The first is by repealing the existing plan following the procedure set forth in Section 303.25, Revised Code, and initiating a new zoning resolution in accordance with Section 303.03 through 303.11, Revised Code, to include the area originally zoned and that area to be added.

Secondly, the present plan may be continued in existence and (following the procedure set forth in Section 303.03 to 303.11, inclusive, Revised Code) a second zoning plan may be adopted embracing that area not included in the first plan. In support of this second possibility I call your attention to Opinion No. 3145, Opinions of the Attorney General for 1953, the syllabus of which is as follows:

"Where proceedings have been had under Section 519.02, Revised Code, Section 3180-26 G. C., et seq., pursuant to which a designated portion of a township has been zoned, there is nothing to prevent the zoning by the same proceedings of another portion of the same township, and successive actions may be taken as to other remaining portions of the township, looking to the same end."

In the text of the opinion it is stated:

* * * * *

"All of these provisions make it very clear that the entire proceeding that was originally had for zoning a certain area of Smith Township, related to, and concerned that area alone. If, thereafter, the residents in all or part of the remaining area of the township desire to avail themselves of the rights given by the law to establish zoning regulations for their area, I can see no reason why they should not have the same right to do so. An attempt to foreclose that right would appear to be a clear invasion of the fundamental right of all citizens to enjoy equal rights and the equal protection of the law. There is certainly nothing in the law that purports to give the residents of a portion of a township any preemptive right to resort to this procedure on their own behalf, and thereby preclude residents of another part of the township from exercising the same right.

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The supporting value of this opinion regarding the addition of territory to a township zoning plan, under Chapter 519, Revised Code, is strengthened by the fact that Sections 303.01 to 303.25, inclusive, Revised Code, and Sections 519.01 to 519.25, inclusive, Revised Code, are parts of the same act (122 Ohio Laws, 597), passed June 9, 1947, and the two enactments are identical in all essential particulars except with respect to the authorities to whom powers and functions are committed.

Effective September 17, 1957, Section 519.04, Revised Code, was amended to provide in part:

"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, and the terms of the members shall be of such length and so arranged that the term of one member will expire each year.* * *"

This amendment eliminated the words "to be zoned" following the word "township" in the last quoted sentence, permitting township zoning commissioners to be from any part of the unincorporated area of the township. At the same time Section 519.05, Revised Code, was amended to provide to the extent material:

"The township rural 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)

It was concluded in Opinion No. 1279, Opinions of the Attorney General for 1960, that the amendments eliminated the requirement that a zoning commissioner be a resident of the area to be zoned, and permitted the existing commission to perform the statutory functions pertaining to the addition of new territory to a then existing township zoning plan. More important (to this opinion) these amendments clearly seem to reflect legislative recognition that there may be more than one zoning plan or resolution in a township following the procedures set forth in Chapter 519, Revised Code.

In the same act (127 Ohio Laws, 363) which amended Sections 519.04 and 519.05, Revised Code, the General Assembly amended Section 303.05, Revised Code. This section now provides in pertinent part:

"The county rural 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 county commissioners of the powers, purposes, and provisions set forth in sections 303.01 to 303.99, inclusive, of the Revised Code, including additions to territory in which a county zoning plan is in effect.

"* * * * *
 (Emphasis added)

While Section 303.04, Revised Code, still requires that members of a county rural zoning commission reside in the unincorporated area of the county to be zoned, I am nonetheless of the opinion that it may be concluded from the insertion of the language "including additions to territory in which a county zoning plan is in effect," that an unzoned area in the unincorporated part of a county may be brought within an existing county zoning plan in the same manner that the existing plan was adopted, viz., by following the procedures set forth in Sections 303.03 to 303.11, inclusive, Revised Code.

In specific answer to your question, therefore, it is my opinion and you are advised that a township may be made subject to an existing zoning plan in the unincorporated part of a county by the procedures set forth in Sections 303.03 to 303.11, inclusive, Revised Code.