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BOARD OF TOWNSHIP TRUSTEES NOR TOWNSHIP BOARD OF ZONING APPEALS—PAY THE REASONABLE AND NECESSARY COSTS OF POSTAGE AND ADVERTISING—WHERE A STENOGRAPHER RECORD IS MADE OF A HEARING, THE COST SHOULD BE BORNE BY THE PARTY WHICH REQUESTED THE RECORD—§519.15, R.C., O.A.G. No. 7111 for 1956, O.A.G. No. 895 for 1959.

SYLLABUS:

1. Neither a board of township trustees nor a township board of zoning appeals is authorized to require that the appellant in an appeal to such board of zoning appeals, made pursuant to Section 519.15, Revised Code, must pay the reasonable and necessary costs of postage and advertising relative to such appeal nor to require a deposit as security for the payment of such costs by the party filing the appeal.

2. Where a stenographic record is made of a hearing conducted by a township board of zoning appeals under Section 519.15, Revised Code, the costs of such record should be borne by the party which requested or ordered that the record be made.

Hon. John S. Ballard, Prosecuting Attorney  
Summit County, Akron, Ohio

Dear Sir :

I have your letter requesting my opinion reading as follows :

“Opinion No. 7111, Opinions of the Attorney General for 1956, states that a reasonable fee may be charged by a township zoning inspector to cover the cost of issuing the zoning certificates and making inspections contemplated by law. Opinion No. 895, Opinions of the Attorney General for 1959, states that a board of township trustees may not charge a fee as a condition precedent to the filing or submission of an application to amend a township board of zoning resolution. In view of the fact that a township board of zoning appeals is in a sense a cross between the above mentioned officers and bodies, we have been asked to obtain your opinion on the following questions :

“May a board of township trustees by legislation or a township board of zoning appeals by rule :

1. Provide that a party appealing to the board of zoning appeals must pay all reasonable and necessary costs of advertising, postage and stenographic service.
2. Provide reasonable deposit by the party appealing to the board of zoning appeals to secure such costs as a condition precedent to the filing of an appeal.
3. Provide that such cost shall be paid by the appellant only if the appellant fails to obtain part or all of the relief prayed for.”

Township trustees possess only such powers as are expressly conferred upon them by statute or are by necessary implication requisite to perform the duties imposed upon them. The statutes under which they act are in derogation of the common law and are strictly construed. Hence, the trustees of a township cannot, in general, do any act foreign to the purpose of their creation. 30 Ohio Jurisprudence, Townships, Section 46, pages 306 and 307.

An examination of Title V of the Revised Code, which contains the chapters pertaining to townships, fails to disclose that a board of township trustees possesses any legislative powers. If the regulatory authority given to such boards by the General Assembly in regard to zoning con-

tained in Chapter 519., Revised Code, should be considered as quasi-legislative, such authority is strictly circumscribed and limited by the express provisions of said chapter. For example, it has been held that the board of township trustees does not have the authority to regulate and enforce zoning regulations, granted in Chapter 519., Revised Code, until such time as a favorable vote of electors is certified by the board of elections. *Henn v. Universal Atlas Cement Co.*, 76 Ohio Law Abs., 439.

Your question as to whether a board of township trustees may by legislation provide for the payment, by a party appealing to the board of zoning appeals, of all reasonable costs of advertising postage and stenographic service must, therefore, be answered in the negative. The remaining question is whether or not such objective may be accomplished by the township board of zoning appeals, by the adoption of a rule to such effect.

Provisions for the creation of a township board of zoning appeals are set forth in Section 519.13, Revised Code. Powers of such boards are spelled out in Section 519.14, Revised Code. To such section appeals under three sets of circumstances are provided for; the concluding paragraph reading as follows:

“\* \* \*

“In exercising the above-mentioned powers, such board may, in conformity with such sections, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination as ought to be made, and to that end shall have all powers of the officer from whom the appeal is taken.”

The powers of a township board of zoning appeals, as above set out, are clearly of a judicial nature. Pursuing the question here considered, Section 519.15, Revised Code, provides:

“The township board of zoning appeals shall organize and adopt rules in accordance with the zoning resolution. Meetings of the board of zoning appeals shall be held at the call of the chairman, and at such other times as the board determines. The chairman, or in his absence the acting chairman, may administer oaths, and the board of zoning appeals may compel the attendance of witnesses. All meetings of the board of zoning appeals shall be open to the public. The board of zoning appeals shall keep minutes of its proceedings showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board of township trustees and be a public record.

“Appeals of the board of zoning appeals may be taken by any person aggrieved or by any officer of the township affected by any decision of the administrative officer. Such appeal shall be taken within twenty days after the decision by filing, with the officer from whom the appeal is taken and with the board of zoning appeals, a notice of appeal specifying the grounds. The officer from whom the appeal is taken shall forthwith transmit to the board of zoning appeals all the papers constituting the record upon which the action appealed from was taken.

“The board of zoning appeals shall fix a reasonable time for the public hearing of the appeal, give at least ten days’ notice in writing to the parties in interest, give notice of such public hearing by one publication in one or more newspapers of general circulation in the county at least ten days before the date of such hearing and decide the appeal within a reasonable time after it is submitted. Upon the hearing, any person may appear in person or by attorney.”

It will be noted that under Section 519.15, *supra*, the board of zoning appeals is required after fixing a reasonable time for the public hearing of an appeal, to give at least ten days’ notice in writing to the parties in interest; further, to give notice of such public hearing by one publication in one or more newspapers of general circulation in the county at least ten days before the date of such hearing.

The only provision which speaks of rule-making authority of a township board of zoning appeals is contained in Section 519.15, *supra*, where such board is authorized to adopt rules “in accordance with the zoning resolution.” I do not believe that the phrase, “in accordance with the zoning regulation,” can be construed as meaning that a township board of zoning appeals has the authority to provide by regulation the things spelled out in the three questions here considered. The right of appeal to the board of township zoning appeals is statutory and would not exist in the absence of such statutory provisions. Accordingly, authority of such board to provide for the payment of costs by rule cannot be read into the words “in accordance with the zoning resolution,” in view of the fact that such resolution owes its existence to action by the board of township trustees (Section 519.10, Revised Code) which board clearly cannot confer upon the board of zoning appeals an authority it does not, itself, possess.

I examined Opinion 7111, Opinions of the Attorney General for 1956, and Opinion 895, Opinions of the Attorney General for 1959, mentioned

in your letter, and find that the conclusions arrived at in such opinions can be easily distinguished from what appears to be the answer to the questions here considered. In Opinion No. 7111, *supra*, it was held on the authority of *Realty Company v. Youngstown*, 118 Ohio St., 204, in the first paragraph of the syllabus of such opinion:

“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 such inspection.”

As I noted above, the right of appeal here discussed is a creature of statute, for which reason the phrase “in accordance with the zoning resolution” in Section 519.15, *supra*, cannot be used as a means of clothing a township board of zoning appeals with an authority the board of township trustees does not have. Supporting my thinking on the question at hand, impliedly, at least, is the conclusion I reached in Opinion No. 895, *supra*.

In the course of that opinion I stated:

“Nowhere in the township zoning statutes can I find any authorization for the charging of a fee as a condition precedent for the submission of an application to amend a zoning resolution under Section 519.12, *supra*.”

It was accordingly held in such opinion that under Section 519.12, Revised Code, a board of township trustees may not charge a fee as a condition precedent to the filing or submission of an application to amend a township zoning resolution, regardless of claim there made that the processing of such application entailed a cost of approximately \$150.00.

Section 519.15, *supra*, as already noted, requires the township board of zoning appeals, to give notice to the parties in interest and to publish a notice of public hearing on an appeal in one or more newspapers of general circulation in the county. While such a board obviously performs a judicial function it is not a court. Therefore, its authority in this regard cannot be enlarged beyond the express provisions of statute under which such board operates, as is the case with courts, which may, in the absence of statutory authority, award and tax costs and apportion them between

the parties. See Section 2323.44, Revised Code. Hence, I must conclude that a board of township zoning appeals does not have the authority to provide by rule for the payment of costs of postage and advertising by a party that files an appeal with such board, or to require such party to make a deposit for the securing of such costs, or for the payment of such costs by the appellant in case a part or all of the relief prayed for is not obtained.

Section 519.15, *supra*, is silent in regard to stenographic service in connection with hearings by the township board of zoning appeals. From such silence it may be reasonably concluded that the party, whether such board or the appellant, which requests or orders a stenographic record of a hearing, is required to pay the costs of such record. Such conclusion is fortified by a comparison of Section 519.15, *supra*, with Section 119.08, Revised Code, dealing with certain adjudication hearings before an administrative agency of the state, where it is expressly provided for the making of a stenographic record, at the expense of the agency.

Therefore, in answer to your specific questions, it is my opinion and you are advised:

1. Neither a board of township trustees nor a township board of zoning appeals is authorized to require that the appellant in an appeal to such board of zoning appeals, made pursuant to Section 519.15, Revised Code, must pay the reasonable and necessary costs of postage and advertising relative to such appeal; nor to require a deposit as security for the payment of such costs by the party filing the appeal.

2. Where a stenographic record is made of a hearing conducted by a township board of zoning appeals under Section 519.15, Revised Code, the costs of such record should be borne by the party which requested or ordered that the record be made.

Respectfully,

MARK MCELROY

Attorney General