

OPINION NO. 95-038**Syllabus:**

1. A board of supervisors of a soil and water conservation district may not enact regulations to regulate the drainage of surface water from residential subdivisions within the district.

¹ R.C. 9.20 provides general authority for various public entities to receive and hold gifts, devises, or bequests of moneys, land, or other properties. A citizens advisory board, however, does not come within any of the categories listed in that provision.

2. A board of supervisors of a soil and water conservation district may enter into an agreement with the Chief of the Division of Soil and Water Conservation pursuant to R.C. 1511.05 or the board of county commissioners pursuant to R.C. 307.79 whereby the board of supervisors implements the rules pertaining to urban sediment pollution abatement adopted by the Chief of the Division of Soil and Water Conservation under R.C. 1511.02 or by a board of county commissioners under R.C. 307.79.
3. The statutory duties and responsibilities of a county engineer and a board of supervisors of a soil and water conservation district with respect to surface water drainage do not preempt the authority of a board of township trustees to enact zoning regulations that regulate land use in such a manner as to control the drainage of surface water from residential subdivisions.
4. A soil and water conservation district, county engineer, and county building inspection department may not require land use or deed restrictions to prevent home builders from constructing basements in poor soil types or in areas of poor drainage, or in areas designated as wetlands.
5. A county planning commission may not require deed restrictions or impose land use restrictions to prevent home builders from constructing basements in poor soil types or in areas of poor drainage, or in areas designated as wetlands. However, in accordance with R.C. 713.23, a county planning commission may make studies, maps, plans, recommendations, and reports regarding the suitability of a tract of land for home sites, and may enact, pursuant to R.C. 711.10, subdivision regulations to provide for adequate and convenient open spaces for recreation, light, air, and for the avoidance of congestion of population that may affect the lands that are available for the construction of homes in a residential subdivision.
6. A board of county commissioners may enact a regulation pursuant to R.C. 307.37 prohibiting a builder from constructing basements in poor soil types or in areas of poor drainage, or in areas designated as wetlands, provided the regulation is reasonable and lawful, and does not go beyond the scope of regulating the safety, health, and sanitary conditions of single-family, two-family, and three-family dwelling houses.
7. A county planning commission does not have the authority to require a developer to present proof of a National Pollutant Discharge Elimination System permit, issued pursuant to Ohio Admin. Code Chapter 3745-33 or 3745-38, as a condition precedent to the approval of a plat of a residential subdivision.

8. A board of county commissioners has no duties with respect to the adoption of a comprehensive zoning plan by a township.
9. With respect to the adoption of a comprehensive zoning plan by a township, a county planning commission is required to provide to a township zoning commission information, maps, and data pertinent to township zoning, to prepare or make available to a township zoning commission a zoning plan, and to approve, disapprove, or suggest changes to a zoning plan.
10. The duties of a township in the adoption of a comprehensive zoning plan include the formation of a township zoning commission to prepare the zoning plan, the adoption of the plan by a board of township trustees, the submission of the plan to the electors residing in the unincorporated area of the township, and the filing of a voter approved plan with the county recorder and the appropriate planning commission.

To: Charles E. Coulson, Lake County Prosecuting Attorney, Painesville, Ohio
By: Betty D. Montgomery, Attorney General, December 8, 1995

Your predecessor requested an opinion concerning the powers and responsibilities of a township, soil and water conservation district, county building inspection department, county engineer, and board of county commissioners with respect to the planning and zoning of residential subdivisions located in the unincorporated area of townships. According to his letter, a number of Lake County offices and townships have requested opinions regarding zoning, planning, and other interrelated matters. In this regard, he asked the following questions,¹ which have been reworded for ease of analysis:

1. Is a soil and water conservation district authorized to regulate the drainage of surface water from residential subdivisions?
2. Does the authority of a county engineer and soil and water conservation district with respect to surface water drainage preempt the authority of a township to enact zoning regulations that regulate land use in such a manner as to control the drainage of surface water from residential subdivisions?

¹ Your predecessor's request set forth ten questions concerning the planning and zoning of residential subdivisions. 1994 Op. Att'y Gen. No. 94-098, issued by my predecessor on December 30, 1994, addressed those questions pertaining to a township's zoning powers and responsibilities with respect to surface water drainage within the unincorporated territory of the township. This particular opinion addresses your predecessor's remaining questions that relate to the authority of a soil and water conservation district, county building inspection department, county engineer, and board of county commissioners to plan residential subdivisions and to regulate surface water drainage in such subdivisions.

3. Does a soil and water conservation district, county engineer, county building inspection department, or county planning commission have the authority to require land use or deed restrictions to prevent home builders from constructing basements in poor soil types or in areas of poor drainage, or in areas designated as wetlands?
4. May a county planning commission require a developer to present proof of a National Pollutant Discharge Elimination System permit as a prerequisite to the approval of a plat of a residential subdivision?
5. What are the duties of a county planning commission, township, and board of county commissioners with respect to the adoption of a comprehensive plan by a township?

I. Authority of a Soil and Water Conservation District to Regulate Surface Water Drainage

Your predecessor's first question is whether a soil and water conservation district is authorized to regulate the drainage of surface water² from residential subdivisions. R.C. 1515.03 requires each county to create a soil and water conservation district coextensive with the geographic area of the county. Each soil and water conservation district is a political subdivision of the state that is administered by a board of supervisors. R.C. 1515.03; R.C. 1515.05; *see* R.C. 1515.08. Because the board of supervisors of a soil and water conservation district is a creature of statute, it may regulate the drainage of surface water from residential subdivisions only if it is so authorized by statute. *See, e.g., Trustees of New London Township v. Miner*, 26 Ohio St. 452, 456 (1875) (a board of township trustees, as a creature of statute, may exercise only those powers expressly provided by statute or necessarily implied thereby); *see also* 1981 Op. Att'y Gen. No. 81-026 at 2-97 (public officers have only such powers as are expressly delegated to them by statute and such as are necessarily implied by those delegated).

The powers and duties of a board of supervisors of a soil and water conservation district are set forth in R.C. 1515.08, which states in relevant part:

The supervisors of a soil and water conservation district have the following powers in addition to their other powers:

(A) To conduct surveys, investigations, and research relating to the character of soil erosion, floodwater and sediment damages, and the preventive and control measures and works of improvement for flood prevention and the conservation, development, utilization, and disposal of water needed within the district, and to publish the results of those surveys, investigations, or research, provided that no district shall initiate any research program except in cooperation or after consultation with the Ohio agricultural research and development center;

(B) To develop plans for the conservation of soil resources, for the control and prevention of soil erosion, and for works of improvement for flood

² "Surface waters are those waters which are diffused over the surface of the ground, derived from falling rains and melting snows or which rise to the surface in springs, and continue to be such until it reaches some well-defined channel." *Frost v. Bank One of Freemont*, 7 Ohio App. Unrep. 179, 182 (Sandusky County 1990).

prevention and the conservation, development, utilization, and disposal of water within the district, and to publish those plans and information;

(C) To implement, construct, repair, maintain, and operate preventive and control measures and other works of improvement for natural resource conservation and development and flood prevention, and the conservation, development, utilization, and disposal of water within the district lands owned or controlled by this state or any of its agencies and on any other lands within the district, which works may include any facilities authorized under state or federal programs, and to acquire, by purchase or gift, to hold, encumber, or dispose of, and to lease real and personal property or interests in such property for those purposes;

(D) To cooperate or enter into agreements with any occupier of lands within the district in the carrying on of natural resource conservation operations and works of improvement for flood prevention and the conservation, development, utilization, and management of natural resources within the district, subject to such conditions as the supervisors consider necessary;

....
(F) To adopt, amend, and rescind rules to carry into effect the purposes and powers of the district;

....
(L) To enter into agreements or contracts with the department [of natural resources] for the determination, implementation, inspection, and funding of agricultural pollution abatement and urban sediment pollution abatement measures whereby landowners, operators, managers, and developers may meet adopted state standards for a quality environment...;

(M) To conduct demonstrations and provide information to the public regarding practices and methods for natural resource conservation, development, and utilization;

(N) Until June 1, 1996, to conduct surveys and investigations relating to the incidence of the multiflora rose within the district and of the nature and extent of the adverse effects of the multiflora rose on agriculture, forestry, recreation, and other beneficial land uses;

(O) Until June 1, 1996, to develop plans for the control of the multiflora rose within the district and to publish those plans and information related to control of the multiflora rose;

(P) Until June 1, 1996, to enter into contracts or agreements with the chief of the division of soil and water conservation to implement and administer a program for control of the multiflora rose and to receive and expend funds provided by the chief for that purpose;

(Q) Until June 1, 1996, to enter into cost-sharing agreements with landowners for control of the multiflora rose....

(R) To enter into contracts or agreements with the chief [of the division of soil and water conservation] to implement and administer a program for urban sediment pollution abatement and to receive and expend moneys provided by the chief for that purpose....

Thus, a board of supervisors of a soil and water conservation district is primarily responsible for natural resource conservation, flood prevention, and control of the multiflora rose within the district. *See* 1956 Op. Att'y Gen. No. 6807, p. 500.

No provision within R.C. 1515.08 or elsewhere in either R.C. Chapter 1515 or in the other chapters of the Revised Code expressly authorizes a soil and water conservation district to enact regulations to regulate the drainage of surface water. Further, no such authority may be inferred from any of those provisions that address in express language the powers, duties, and responsibilities of a soil and water conservation district and its governing board. Rather, where the General Assembly intends to authorize a governmental entity to regulate a matter, it has expressly done so. *See, e.g.*, R.C. 303.02 (authorizing a board of county commissioners to regulate land use in the unincorporated territory of the county); R.C. 307.79 (authorizing a board of county commissioners to adopt rules concerning the abatement of urban sediment pollution); R.C. 519.02 (authorizing a township to regulate land use in the unincorporated territory of the township); R.C. 3707.01 (authorizing a board of health to "regulate the location, construction, and repair of yards, pens, and stables, and the use, emptying, and cleaning of such yards, pens, and stables and of water closets, privies, cesspools, sinks, plumbing, drains, or other places where offensive or dangerous substances or liquids are or may accumulate"); R.C. 3709.21 (a board of health "may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances"); R.C. 3733.02 (the public health council "shall adopt, and has the exclusive power to adopt, rules of uniform application throughout the state governing the review of plans, issuance of flood plain management permits, and issuance of licenses for manufactured home parks; the location, layout, construction, drainage, sanitation, safety, and operation of those parks; blocking and tiedowns of manufactured homes in those parks; and notices of flood events concerning, and flood protection at, those parks"); *cf.* 1979 Op. Att'y Gen. No. 79-033 at 2-112 ("[w]hen the General Assembly has intended to confer a right upon a public body to purchase insurance, it has done so in a clear and express fashion").

Although a board of supervisors of a soil and water conservation district may not enact regulations to regulate the drainage of surface water from residential subdivisions within the district, the board may implement the rules pertaining to urban sediment pollution abatement that are adopted either by the Chief of the Division of Soil and Water Conservation within the Department of Natural Resources, or by a board of county commissioners. R.C. 1511.02(E), which grants the Chief of the Division of Soil and Water Conservation authority to adopt rules relating to urban sediment pollution abatement, provides in pertinent part:

The chief of the division of soil and water conservation, subject to the approval of the director of natural resources, shall do all of the following:

....

(E) Subject to the approval of the Ohio soil and water conservation commission, adopt, amend, or rescind rules pursuant to Chapter 119. of the Revised Code. Rules adopted pursuant to this section:

....

(2) Shall establish technically feasible and economically reasonable standards to achieve a level of management and conservation practices that will abate wind or water erosion of the soil or abate the degradation of the waters of the state by soil sediment in conjunction with land grading, excavating, filling, or other soil-disturbing activities on land used or being developed for nonfarm commercial, industrial, residential, or other nonfarm purposes, and establish criteria for determination of the acceptability of such management and conservation practices. The standards shall be designed to implement applicable areawide waste treatment management plans prepared under section 208 of the "Federal Water Pollution Control Act," 86 Stat. 816 (1972), 33 U.S.C.A. 1288,

as amended. The standards and criteria shall not apply in any municipal corporation or county that adopts ordinances or rules pertaining to sediment control....

(3) May recommend criteria and procedures for the approval of urban sediment pollution abatement plans and issuance of permits prior to any grading, excavating, filling, or other whole or partial disturbance of five or more contiguous acres of land owned by one person or operated as one development unit and require implementation of such plan. Areas of less than five contiguous acres shall not be exempt from compliance with other provisions of this chapter and rules adopted under them.

(4) Shall establish procedures for administration of rules for agricultural pollution abatement and urban sediment pollution abatement and for enforcement of rules for agricultural pollution abatement;

....

(12) Shall not, insofar as the rules relate to urban sediment pollution, be applicable in a municipal corporation or county that adopts ordinances or rules for urban sediment control....³ (Footnote added.)

Similarly, R.C. 307.79, authorizing a county to adopt rules concerning the abatement of urban sediment pollution, states, in part:

The board of county commissioners may adopt, amend, and rescind rules establishing technically feasible and economically reasonable standards to achieve a level of management and conservation practices which will abate wind or water erosion of the soil or abate the degradation of the waters of the state by soil sediment in conjunction with land grading, excavating, filling, or other soil disturbing activities on land used or being developed for nonfarm commercial, industrial, residential, or other nonfarm purposes, and establish criteria for determination of the acceptability of such management and conservation practices. The rules shall be designed to implement the applicable areawide waste treatment management plan prepared under section 208 of the "Federal Water Pollution Control Act," 86 Stat. 816, 33 U.S.C. 1228, as amended....

The rules may require persons to file sediment control and water management plans incident thereto, before clearing, grading, excavating, filling, or otherwise wholly or partially disturbing five or more contiguous acres of land

³ This opinion quotes the language of R.C. 1511.02 as it appears in Am. Sub. S.B. 226, 120th Gen. A. (1994) (eff. Jan. 1, 1995). Am. Sub. S.B. 226, however, does not reference the amendments to R.C. 1511.02 set forth in Am. Sub. S.B. 182, 120th Gen. A. (1994) (eff. Oct. 20, 1994) and Am. Sub. S.B. 73, 120th Gen. A. (1994) (eff. Aug. 10, 1994). "If amendments to the same statute are enacted at the same or different sessions of the legislature, one amendment without reference to another, the amendments are to be harmonized, if possible, so that effect may be given to each." R.C. 1.52(B). With respect to the provisions of division (E) of R.C. 1511.02, it does not appear that the amendments are substantively irreconcilable. *See generally* R.C. 1.52(B) ("[t]he fact that a later amendment restates language deleted by an earlier amendment, or fails to include language inserted by an earlier amendment, does not of itself make the amendments irreconcilable. Amendments are irreconcilable only when changes made by each cannot reasonably be put into simultaneous operation").

owned by one person or operated as one development unit for the construction of nonfarm buildings, structures, utilities, recreational areas, or other similar nonfarm uses. Areas of less than five contiguous acres shall not be exempt from compliance with other provisions of this section or rules adopted pursuant to this section.

Thus, the Chief of the Division of Soil and Water Conservation and boards of county commissioners may adopt rules to regulate urban sediment pollution abatement. *See* 1985 Op. Att'y Gen. No. 85-053 at 2-200 ("[t]he General Assembly has, by the enactment of R.C. 307.79 and R.C. 1511.02(E), established a scheme under which rules which establish standards and criteria for the regulation of sediment and stormwater runoff from urban development and which are designed to implement applicable areawide waste treatment management plans prepared under the FWPCA [Federal Water Pollution Control Act] are to be in effect throughout the state, either in the form of rules adopted by the Chief of the Division of Soil and Water Conservation under R.C. 1511.02(E), or in the form of municipal or county regulations, see R.C. 1511.02(E)(9) [now R.C. 1511.02(E)(12)]").

In order to obtain compliance with the rules pertaining to urban sediment pollution abatement, the Chief of the Division of Soil and Water Conservation or board of county commissioners is authorized to enter into an agreement with a board of supervisors of a soil and water conservation district whereby the board of supervisors implements the rules. R.C. 307.79; R.C. 1511.05; *see* 1979 Op. Att'y Gen. No. 79-018 at 2-59 and 2-60 (R.C. 1515.31 (now R.C. 1511.05) authorizes the Chief of the Division of Soil and Water Districts (now Chief of the Division of Soil and Water Conservation) "to enter into cooperative agreements with the board of supervisors of any soil and water conservation district to obtain compliance with the Chief's rules and orders pertaining to agricultural and urban sediment pollution abatement"); *see also* R.C. 1515.08(L) (a board of supervisors of a soil and water conservation district may enter into an agreement or contract with the Department of Natural Resources "for the determination, implementation, inspection, and funding of agricultural pollution abatement and urban sediment pollution abatement measures whereby landowners, operators, managers, and developers may meet adopted state standards for a quality environment"). Accordingly, pursuant to R.C. 1511.05 and R.C. 307.79, a board of supervisors of a soil and water conservation district may enter into an agreement with the Chief of the Division of Soil and Water Conservation or board of county commissioners, respectively, whereby the board of supervisors implements the rules pertaining to urban sediment pollution abatement adopted by the Chief of the Division of Soil and Water Conservation under R.C. 1511.02 or by a board of county commissioners under R.C. 307.79.

In light of the foregoing, it is clear that a board of supervisors of a soil and water conservation district may not enact regulations to regulate the drainage of surface water from residential subdivisions within the district. A board of supervisors of a soil and water conservation district may enter into an agreement with the Chief of the Division of Soil and Water Conservation pursuant to R.C. 1511.05 or the board of county commissioners pursuant to R.C. 307.79 whereby the board of supervisors implements the rules pertaining to urban sediment pollution abatement adopted by the Chief of the Division of Soil and Water Conservation under R.C. 1511.02 or by a board of county commissioners under R.C. 307.79.

II. Preemption of a Township Zoning Regulation

The second question of your predecessor is whether the authority of a county engineer and soil and water conservation district with respect to surface water drainage preempts the authority of a township to enact zoning regulations that regulate land use in such a manner as to control the drainage of surface water from residential subdivisions. 1994 Op. Att'y Gen. No. 94-098 examined whether a township may adopt zoning regulations that will operate to control the drainage of surface water, and concluded as follows in syllabus paragraph one:

Pursuant to R.C. Chapter 519, a board of township trustees may, for the purpose of promoting the public health, safety, and morals and in accordance with a comprehensive plan, enact zoning regulations that regulate land use in such a manner as to control the drainage of surface water from residential subdivisions, provided the regulations conform to constitutional limitations and do not conflict with rules adopted by the Chief of the Division of Soil and Water Conservation under R.C. 1511.02(E), with rules pertaining to urban sediment control that are adopted by a county under R.C. 307.79, or with other state or federal laws.

See Op. No. 85-053 (a board of township trustees may enact zoning regulations that regulate land use in such a manner as to control sediment and stormwater runoff from urban development, so long as its regulations do not come into direct conflict with rules adopted by the Chief of the Division of Soil and Water Conservation under R.C. 1511.02(E), with rules pertaining to urban sediment control that are adopted by a county under R.C. 307.79, or with other state laws). It is thus clear that a township may, through its zoning powers, regulate surface water drainage in the unincorporated territory of the township.

A. Authority of a Board of Supervisors of a Soil and Water Conservation District With Respect to Surface Water Drainage Does Not Preempt a Township's Zoning Authority

As stated above, a board of supervisors of a soil and water conservation district has no authority to enact regulations pertaining to the drainage of surface water from residential subdivisions. Instead, a board of supervisors may enter into an agreement with the Chief of the Division of Soil and Water Conservation pursuant to R.C. 1511.05 or the board of county commissioners pursuant to R.C. 307.79 whereby the board of supervisors implements the rules pertaining to urban sediment pollution abatement adopted by the Chief of the Division of Soil and Water Conservation under R.C. 1511.02 or by a board of county commissioners under R.C. 307.79.

An examination of R.C. 1511.02, R.C. 1511.05, and R.C. 307.79 discloses that no provision within those sections expressly indicates that the implementation of urban sediment pollution abatement rules by a board of supervisors of a soil and water conservation district under the authority of those sections preempts the authority of a township to regulate land use in such a manner as to control the drainage of surface water from residential subdivisions located within the township. The absence of such preemptive language in R.C. 1511.02, R.C. 1511.05, and R.C. 307.79 implies that the General Assembly did not intend implementation of the urban sediment pollution abatement rules by a soil and water conservation district under the authority conferred in those sections to supersede the authority of a township to enact zoning regulations that regulate land use in such a manner as to control soil erosion. *See* 1988 Op. Att'y Gen. No.

88-051 at 2-228 n.2 (the absence of preemptive language in R.C. Chapter 3707 and R.C. Chapter 3709 evidences a legislative intent that the approval of a septage disposal site under the authority conferred in those chapters does not supersede otherwise applicable zoning regulations); *cf.* 1993 Op. Att'y Gen. No. 93-021 at 2-118 ("[i]n the absence of a congressional intention to the contrary, it must be concluded that R.C. 135.14 is not preempted by subchapter 12 U.S.C. §§ 1716-1723i (1988 & Supp. IV 1992)").

Moreover, "when two authorities have the power to regulate an activity or use of land, there must be compliance with the regulations of both." Op. No. 88-051 at 2-228; *see Hülligan v. Columbia Township Bd. of Zoning Appeals*, 59 Ohio App. 2d 105, 392 N.E.2d 1272 (Lorain County 1978) (permit issued by the Ohio Environmental Protection Agency does not supersede township zoning); 1981 Op. Att'y Gen. No. 81-065 at 2-270 ("although the Chief of the Division of Reclamation must, pursuant to R.C. 1514.02, grant a permit authorizing a surface mining operation to an operator meeting the regulatory requirements of R.C. Chapter 1514, the issuance of such a permit does not override a township's application of its zoning resolution to regulate such a mining operation"); *see also Rumpke Waste, Inc. v. Henderson*, 591 F. Supp. 521, 531 (S.D. Ohio 1984) ("that Ohio permits landfills does not mean that a particular smaller governmental entity must permit landfills. The Ohio legislature has expressly authorized townships to adopt any zoning resolutions so long as they are pursuant to a comprehensive plan and for the purpose of promoting public health, safety and morals. Ohio Rev. Code § 519.02. It is for the zoning body itself to make the determinations as to the most appropriate land uses"). Accordingly, a developer of a residential subdivision in the unincorporated area of a township is subject to any applicable rules pertaining to urban sediment pollution abatement adopted by the Chief of the Division of Soil and Water Conservation under R.C. 1511.02 or by a board of county commissioners under R.C. 307.79, and township zoning regulations that do not conflict with those rules. *See generally* Op. No. 94-098 (a township may not enact zoning regulations that conflict with rules adopted by the Chief of the Division of Soil and Water Conservation under R.C. 1511.02(E) or by a county under R.C. 307.79). It is thus clear that the authority of a board of supervisors of a soil and water conservation district to implement the rules pertaining to urban sediment pollution abatement adopted by the Chief of the Division of Soil and Water Conservation under R.C. 1511.02 or by a board of county commissioners under R.C. 307.79 does not preempt the authority of a township to enact zoning regulations that regulate land use in such a manner as to control the drainage of surface water from residential subdivisions. *See* 1981 Op. Att'y Gen. No. 81-097 (syllabus) ("[t]he Public Health Council's regulation of house trailer parks pursuant to R.C. 3733.01 through R.C. 3733.08 does not preempt the application of a county planning commission's rules, adopted pursuant to R.C. 711.10, regulating the development of house trailer parks, as long as the commission's rules do not come into direct conflict with those rules of general state-wide application lawfully implemented by the Public Health Council").

B. Authority of a County Engineer Does Not Preempt a Township's Zoning Authority

Your predecessor's request also concerns the relationship between the authority of the county engineer with respect to surface water drainage and the authority of the township to enact zoning regulations that regulate land use in such a manner as to control the drainage of surface water from residential subdivisions. The duties, powers, and responsibilities conferred upon the county engineer are described and enumerated throughout several chapters of the Revised Code. R.C. 315.08 describes the general duties of the county engineer as follows:

The county engineer shall perform for the county all duties authorized or declared by law to be done by a registered professional engineer or registered surveyor, except those duties described in Chapters 343., 6103., and 6117. of the Revised Code. He shall prepare all plans, specifications, details, estimates of cost, and submit forms of contracts for the construction, maintenance, and repair of all bridges, culverts, roads, drains, ditches, roads on county fairgrounds, and other public improvements, except buildings, constructed under the authority of any board within and for the county. The engineer shall not be required to prepare plans, specifications, details, estimates of costs, or forms of contracts for emergency repairs authorized under section 315.13 of the Revised Code, unless he deems them necessary.

Other duties of the county engineer are set forth in R.C. Chapter 315, as well as R.C. Chapters 5541 (county highway system), 5543 (duties of county engineer), 5553 (county roads — establishment; alteration; vacation), 5555 (county road improvement), 5559 (plating territory road improvement), and 5571 and 5573 (township trustees; township road improvement). The provisions of these various chapters vest in the county engineer a wide range of duties and powers with regard to the lands and public improvements of the county, and the construction, repair, improvement, and maintenance of roads, highways, and bridges within the county and its townships. 1985 Op. Att'y Gen. No. 85-100 at 2-426.

A review of the powers and duties of the county engineer discloses that the county engineer has no authority to regulate the drainage of surface water from lands within the unincorporated territory of the county. In addition, none of his statutory duties and responsibilities with respect to surface water drainage would, as a matter of law, conflict with a board of township trustees' authority to enact zoning regulations that regulate land use in such a manner as to control the drainage of surface water from residential subdivisions. *See, e.g.*, R.C. 315.08 (the county engineer shall prepare all plans, specifications, details, estimates of cost, and submit forms of contracts for the construction, maintenance, and repair of all drains and ditches on county fairgrounds and other public improvements); R.C. 5543.09 ("[t]he county engineer shall supervise the construction, reconstruction, improvement, maintenance, and repair of the ... culverts under the jurisdiction of the board of county commissioners.... When the engineer has charge of the ... culverts within his county, and under the control of the state, he shall also supervise their construction, reconstruction, improvement, and repair"); R.C. 5559.15 (the improvement by grading, draining, paving, constructing storm sewers, sidewalks, curbs, and gutters of any road, street, alley, or portion thereof lying within or bounded on both sides by any platted lands, and situated outside a municipal corporation shall be done under the general care and superintendence of the county engineer). Accordingly, it is reasonable to conclude that the authority of a county engineer with respect to surface water drainage does not preempt the authority of a board of township trustees to enact zoning regulations that regulate land use in such a manner as to control the drainage of surface water from residential subdivisions. *See generally* Op. No. 81-065 at 2-270 ("[t]he doctrine of preemption applies when a law or regulation on one level of government is found invalid because it is contrary to the will of another level of government").

III. Land Use and Deed Restrictions to Prevent Home Builders from Constructing Basements in Poor Soil Types or in Areas of Poor Drainage, or in Areas Designated as Wetlands

The third question is whether a soil and water conservation district, county engineer, county building inspection department, or county planning commission has the authority to require land use or deed restrictions to prevent home builders from constructing basements in poor soil types or in areas of poor drainage, or in areas designated as wetlands. Because creatures of statute have only those powers and duties expressly granted by statute or necessarily implied by such express grants, *see Schultz v. Erie County Metro. Park Dist. Bd.*, 26 Ohio Misc. 68, 69, 269 N.E.2d 72, 73 (C.P. Erie County 1971), resolution of this question turns on whether a soil and water conservation district, county engineer, county building inspection department, or county planning commission is authorized to regulate the construction of homes in the unincorporated territory of a county.

A. Soil and Water Conservation District

Pursuant to R.C. 1515.08, a board of supervisors of a soil and water conservation district may conduct surveys, investigations, and research relating to soil erosion, floodwater and sediment damages and preventive and control measures in connection therewith, develop plans for the conservation of soil resources and the prevention of soil erosion, and carry out preventive and control measures in connection with soil conservation and soil erosion. *See* 1956 Op. No. 6807. In addition, the board may, until June 1, 1996, conduct surveys and investigations relating to the incidence of the multiflora rose and the nature and extent of the adverse effects of the multiflora rose on agriculture, forestry, recreation, and other beneficial land uses, develop plans for the control of the multiflora rose, and enter into contracts or agreements with the Chief of the Division of Soil and Water Conservation within the Department of Natural Resources to implement and administer a program for control of the multiflora rose. R.C. 1515.08.

A soil and water conservation district's authority under R.C. 1515.08, however, does not include the power to enact rules regulating the construction of homes in the unincorporated territory of a county.⁴ Accordingly, a soil and water conservation district has no authority to require land use or deed restrictions to prevent home builders from constructing basements in poor soil types or in areas of poor drainage, or in areas designated as wetlands.

B. County Engineer

As stated above, various statutes vest in the county engineer a wide range of duties and powers with regard to the lands and public improvements of the county, and the construction,

⁴ As indicated in the text above, a board of supervisors of a soil and water conservation district may enter into an agreement with the Chief of the Division of Soil and Water Conservation or the board of county commissioners whereby the board of supervisors implements rules pertaining to urban sediment pollution abatement. Because the digging of basements by home builders involves land grading, excavating, filling, or other soil disturbing activities on land used or being developed for residential purposes, a home builder is required to comply with any applicable urban sediment pollution abatement rules. A soil and water conservation district thus may require a home builder to dig a basement in accordance with urban sediment pollution abatement rules adopted by the Chief of the Division of Soil and Water Conservation or by a board of county commissioners.

repair, improvement, and maintenance of roads, highways, and bridges within the county and its townships. *See* Op. No. 85-100 at 2-426. No statute, however, authorizes a county engineer to regulate the construction of homes within the unincorporated territory of the county. In the absence of such statutory authority, a county engineer may not require land use or deed restrictions to prevent home builders from constructing basements in poor soil types or in areas of poor drainage, or in areas designated as wetlands. *See generally AFSCME, Local 1045 v. Polta*, 59 Ohio App. 2d 283, 284, 394 N.E.2d 310, 311 (Erie County 1977) ("[t]he office of the county engineer is a creature of statute. The holder of such office has only such powers and duties as are expressly given to him by statute, or as are naturally and necessarily implied from the language of the statute").

C. County Planning Commission

A county planning commission is created in accordance with R.C. 713.22, and is vested, pursuant to R.C. 713.23, with the following powers and duties:

(A) The ... county planning commission may make studies, maps, plans, recommendations and reports concerning the physical, environmental, social, economic, and governmental characteristics, functions, services, and other aspects of the ... county.... The commission may make such studies, maps, plans, recommendations, and other reports as to areas outside the ... county concerning the physical, environmental, social, economic, and governmental characteristics, functions, services, and other aspects which affect the development and welfare of the ... county....

(B) The duties of the planning commission include, but are not limited to:

(1) Preparing the plans, including studies, maps, recommendations, and reports on:

(a) Regional goals, objectives, opportunities, and needs, and standards, priorities, and policies to realize such goals and objectives;

(b) Economic and social conditions;

(c) The general pattern and intensity of land use and open space;

(d) The general land, water, and air transportation systems, and utility and communication systems;

(e) General locations and extent of public and private works, facilities, and services;

(f) General locations and extent of areas for conservation and development of natural resources and the control of the environment;

(g) Long-range programming and financing of capital projects and facilities.

(2) Promoting understanding of and recommending administrative and regulatory measures to implement plans of the region;

(3) Collecting, processing, and analyzing social and economic data, undertaking continuing studies of natural and human resources, coordinating such research with other governmental agencies, educational institutions, and private organizations;

(4) Contracting with and providing planning assistance to other units of local government, councils of governments, planning commissions, and joint planning councils; coordinating the planning with neighboring planning areas;

cooperating with the state and federal governments in coordinating planning activities and programs in the region;

(5) Reviewing, evaluating, and making comments and recommendations on proposed and amended comprehensive land use, open space, transportation, and public facilities plans, projects, and implementing measures of local units of government; and making recommendations to achieve compatibility in the region;

(6) Reviewing, evaluating, and making comments and recommendations on the planning, programming, location, financing, and scheduling of public facility projects within the region and affecting the development of the area;

(7) Undertaking other studies, planning, programming, conducting experimental or demonstration projects found necessary in the development of plans for the ... county, and coordinating work and exercising all other powers necessary and proper for discharging its duties;

(8) Carrying out all of the functions and duties of a director of economic development under division (B) of section 307.07 of the Revised Code pursuant to any agreement with a county under division (A)(1) of that section.⁵ (Footnote added.)

A copy of a county plan prepared by the county planning commission pursuant to R.C. 713.23 must be certified to the planning commission of each municipal corporation of the county, the board of county commissioners, and the county or regional planning commission of each county or region or part thereof included in the plan. R.C. 713.24. A county plan is of no legal effect within the unincorporated territory of the county until it is adopted by the board of county commissioners. *State ex rel. The Ohio Power Co. v. Franklin County Regional Planning Comm'n*, 158 Ohio St. 496, 498, 110 N.E.2d 415, 415 (1953); *see also* R.C. 713.25 (authorizing a board of county commissioners to adopt a county plan so far as it relates to nonmunicipal territory).

A county planning commission thus is responsible for preparing various plans, studies, maps, recommendations, and reports concerning the development and welfare of the county. R.C. 713.23. *See generally* 1994 Op. Att'y Gen. No. 94-034 at 2-163 ("[a] major duty of a county planning commission is the preparation of a county plan, which includes such matters as regional goals and policies for realizing those goals, the general pattern and intensity of land use and open space, the general locations and extent of public and private facilities and services, and the general locations and extent of areas for conservation and development of natural resources"). Accordingly, pursuant to R.C. 713.23, a county planning commission may make

⁵ R.C. 307.07(A)(1) authorizes the board of county commissioners to enter into an agreement with the county planning commission whereby the commission is authorized to hire and employ technical and advisory personnel, enter into agreements with federal, state, and local governments and agencies thereof and with public, private, or nonprofit organizations, make loans or grants and provide other forms of financial assistance for the purpose of economic development, receive and accept grants, gifts, and contributions of money, property, labor, and other things of value, establish with the board of county commissioners any funds that are necessary for the deposit and disbursement of gifts or contributions of money accepted for economic development purposes, design, implement, monitor, oversee, and evaluate economic development plans, programs, strategies, and policies, and perform all acts necessary to fulfill the functions and duties of the office of economic development. *See* R.C. 307.07(B).

studies, maps, plans, recommendations, and reports regarding the suitability of a tract of land for home sites.

In addition, R.C. 711.10 authorizes a county planning commission to adopt a plan for the major streets or highways of the county and general rules governing plats and subdivisions of land falling within its jurisdiction:

Whenever a county planning commission ... adopts a plan for the major streets or highways of the county ..., then no plat of a subdivision of land within the county ..., other than land within a municipal corporation or land within three miles of a city or one and one-half miles of a village as provided in section 711.09 of the Revised Code, shall be recorded until it is approved by the county ... planning commission and the approval is endorsed in writing on the plat....

Any ... county ... planning commission shall adopt general rules, of uniform application, governing plats and subdivisions of land falling within its jurisdiction, to secure and provide for the proper arrangement of streets or other highways in relation to existing or planned streets or highways or to the county ... plan, for adequate and convenient open spaces for traffic, utilities, access of fire fighting apparatus, recreation, light, air, and for the avoidance of congestion of population.

See generally R.C. 711.101 (authorizing a board of county commissioners, acting with respect to land falling within the jurisdiction of its planning commission, to adopt general rules setting standards and requiring and securing the construction of improvements shown on the plats and plans required by R.C. 711.10).

Pursuant to R.C. 711.10, a county planning commission may adopt rules governing the platting and subdividing of lands. No plat of a subdivision of land within the county, other than land within a municipal corporation or within three miles of a city or one and one-half miles of a village, as provided in R.C. 711.09, may be recorded until the approval of the county planning commission is endorsed on the plat. R.C. 711.10; *see* Op. No. 94-034 at 2-164. A county planning commission may refuse to approve a plat of a residential subdivision that is not in conformance with its subdivision regulations. Op. No. 94-034 at 2-164; *see* 1988 Op. Att'y Gen. No. 88-054. It follows, accordingly, that no developer may proceed with the construction of homes in a residential subdivision without first complying with the subdivision regulations that provide for adequate and convenient open spaces for recreation, light, air, and for the avoidance of congestion of population. *See* Op. No. 94-034 at 2-164 ("a county planning commission may impose a requirement that, in order to obtain plat approval, a subdivision must include an appropriate amount of space for parks"); 1956 Op. Att'y Gen. No. 7113, p. 679 (syllabus, paragraph two) ("[a] county ... planning commission may, under the terms of [R.C. 711.10], require, within the limits of its territorial jurisdiction, as a condition precedent to its approval of a plat, compliance with rules ... requiring the dedication of a reasonable amount of land for park purposes"); *cf.* 1974 Op. Att'y Gen. No. 74-070 (a city planning commission may refuse to approve the plat of a proposed subdivision if the plat is inconsistent with the plan or applicable regulations"). Therefore, while subdivision regulations adopted by a county planning commission pursuant to R.C. 711.10 may not directly regulate the construction of homes in a residential subdivision, such regulations may affect the lands that are available for the construction of homes in a residential subdivision.

In light of the foregoing, it is clear that a county planning commission may not require deed restrictions or impose land use restrictions to prevent home builders from constructing basements in poor soil types or in areas of poor drainage, or in areas designated as wetlands. However, in accordance with R.C. 713.23, a county planning commission may make studies, maps, plans, recommendations, and reports regarding the suitability of a tract of land for home sites, and may enact, pursuant to R.C. 711.10, subdivision regulations to provide for adequate and convenient open spaces for recreation, light, air, and for the avoidance of congestion of population that may affect the lands that are available for the construction of homes in a residential subdivision.

D. County Building Inspection Department

R.C. 307.37 authorizes a board of county commissioners to create a county building department to enforce the county building code, and to exercise enforcement authority and to accept and approve plans pursuant to R.C. 3781.03 and R.C. 3791.04 for any kind or class of building in the unincorporated territory of the county:

(A)(1) The board of county commissioners, in addition to its other powers, may adopt, amend, rescind, administer, and enforce regulations pertaining to the erection, construction, repair, alteration, redevelopment, and maintenance of single-family, two-family, and three-family dwellings within the unincorporated territory of the county, or the board may establish districts in any part of the unincorporated territory and may adopt, amend, rescind, administer, and enforce such regulations in the districts. When adopted, all such regulations, including service charges, shall be uniform within all districts in which building codes are established; however, more stringent regulations may be imposed in flood hazard areas and in the Lake Erie erosion hazard area identified under section 1506.06 of the Revised Code in order to prevent or reduce the hazard resulting from flooding and from erosion along Lake Erie. In no case shall such regulations go beyond the scope of regulating the safety, health, and sanitary conditions of such buildings....

(2) A county building code may include regulations for participation in the national flood insurance program established in the "Flood Disaster Protection Act of 1973," 87 Stat. 975, 42 U.S.C. 4002, as amended, and regulations adopted for the purposes of section 1506.04 or 1506.07 of the Revised Code governing the prohibition, location, erection, construction, redevelopment, or flood-proofing of new buildings or structures, substantial improvements to existing buildings or structures, or other development in unincorporated territory within flood hazard areas identified under the "Flood Disaster Protection Act of 1973," 87 Stat. 975, 42 U.S.C. 4002, as amended, or within the Lake Erie erosion hazard area identified under section 1506.06 of the Revised Code, including, but not limited to, residential, commercial, institutional, or industrial buildings or structures or other permanent structures, as that term is defined in section 1506.01 of the Revised Code. Rules adopted under division (A)(2) of this section shall not conflict with the Ohio building code.

....
(E) The board may provide for a building regulation department and may employ such personnel as it determines to be necessary for the purpose of enforcing such regulations. Upon certification of the building department under

section 3781.10 of the Revised Code,⁶ the board may direct the county building department to exercise enforcement authority and to accept and approve plans pursuant to sections 3781.03 and 3791.04 of the Revised Code for any kind or class of building in the unincorporated territory of the county." (Footnote added.)

See R.C. 307.38; 9 Ohio Admin. Code 4101:2-1-44(A). The county building code regulates the erection, construction, repair, alteration, redevelopment, and maintenance of single-family, two-family, and three-family dwellings in the unincorporated territory of the county.

R.C. 3781.03 and R.C. 3791.04, in turn, authorize a county building inspection department to enforce the provisions of the Ohio Basic Building Code (OBBC).⁷ R.C. 3781.03 provides, in part:

[T]he building inspector or commissioner of buildings in counties whose building departments have been certified by the board of building standards under section 3781.10 of the Revised Code, shall enforce all the provisions in such chapters and any regulations adopted pursuant thereto relating to construction, arrangement, and the erection of all buildings or parts thereof, as defined in section 3781.06 of the Revised Code, including the sanitary condition of the same in relation to heating and ventilation.

See generally 9 Ohio Admin. Code 4101:2-1-16(A) ("[t]he building official shall enforce all the provisions of OBBC relating to construction, arrangement, and erection of all buildings or parts thereof as defined in OBBC"). R.C. 3791.04 requires the submission of plans and specifications to a county building department before any building may be constructed, erected, or manufactured:

Before beginning the construction, erection, or manufacture of any building to which section 3781.06 of the Revised Code is applicable, including all industrialized units, the owner thereof, in addition to any other submission of plans or drawings, specifications, and data required by law, shall submit the plans or drawings, specifications, and data prepared for the construction, erection, and equipment thereof, or the alteration thereof or addition thereto, which plans or

⁶ R.C. 3781.10(E) authorizes the board of building standards to certify county building departments and the personnel of such departments to exercise enforcement authority, to accept and approve plans and specifications, and to make inspections, pursuant to R.C. 3781.03 and R.C. 3791.04.

⁷ "Chapters 4101:2-1 to 4101:2-69 of the Administrative Code shall be collectively known as the 'Ohio Basic Building Code,' for which the designation 'OBBC' may be substituted." [1994-1995 Monthly Record] Ohio Admin. Code 4101:2-1-01 at 1856; see also [1994-1995 Monthly Record] Ohio Admin. Code 4101:2-1-03(A) at 1856 ("[t]he 'BOCA National Building Code 1993, Twelfth Edition, First Printing, Chapters 2 to 35' as well as the 'BOCA National Mechanical Code 1993, Eighth Edition, First Printing, Chapters 2 to 21' as published by the 'Building Officials and Code Administrators International, Inc. (BOCA),' are incorporated fully as if set out at length herein with deletions, substitutions and amendments as hereinafter set forth").

drawings, and specifications shall indicate thereon the portions that have been approved pursuant to section 3781.12 of the Revised Code, for which no further approval shall be required, to the municipal, township, or county building department having jurisdiction if such department has been certified as provided in division (E) of section 3781.10 of the Revised Code, and if there is no certified municipal, township, or county building department, to the chief of the division of workshops and factories, for approval.

No owner shall proceed with the construction, erection, alteration, or equipment of any such building until such plans or drawings, specifications, and data have been so approved, or the industrialized unit inspected at the point of origin. No plans or specifications shall be approved or inspection approval given unless the building represented thereby would, if constructed, repaired, erected, or equipped according to the same, comply with Chapters 3781. and 3791. of the Revised Code and any rule made under such chapters.

See 9 Ohio Admin. Code 4101:2-1-17; 9 Ohio Admin. Code 4101:2-1-18(A).

The provisions set forth in the OBBC apply to the following buildings:

Any building which may be used as a place of resort, assembly, education, entertainment, lodging, dwelling, trade, manufacture, repair, storage, traffic, or occupancy by the public, and all other buildings or parts and appurtenances thereof erected within this state shall be so constructed, erected, equipped, and maintained that they shall be safe and sanitary for their intended use and occupancy, except that sections 3781.06 to 3781.18 and 3791.04 of the Revised Code, shall be considered as model provisions with no force and effect when applied to single-family, two-family, and three-family dwelling houses which have not been constructed or erected as industrialized one-family, two-family, or three-family units or structures within the meaning of the term "industrialized unit" as provided in section 3781.10 of the Revised Code, except where the context specifies mandatory applicability.

R.C. 3781.06(A) (emphasis added). Thus, the OBBC does not apply to any single-family, two-family, and three-family dwelling houses which are not constructed of industrialized units, except where the context specifies mandatory applicability. *Accord* [1994-1995 Monthly Record] Ohio Admin. Code 4101:2-1-09(A) at 1856.

In regards to your specific inquiry, it is clear that no statute either expressly or by necessary implication authorizes a county building department to enact rules to regulate the construction of homes within the unincorporated territory of the county. Instead, pursuant to R.C. 307.37, a board of county commissioners may adopt a county building code to regulate the erection, construction, repair, alteration, redevelopment, and maintenance of single-family, two-family, and three-family dwellings in the unincorporated territory of the county. Accordingly, a board of county commissioners may enact a regulation pursuant to R.C. 307.37 prohibiting a builder from constructing basements in poor soil types or in areas of poor drainage, or in areas designated as wetlands. However, any such regulation must be reasonable and lawful, and must not go beyond the scope of regulating the safety, health, and sanitary conditions of single-family, two-family, and three-family dwelling houses. R.C. 307.37(A)(1).

For the reasons discussed above, a county building inspection department may not require land use or deed restrictions to prevent home builders from constructing basements in poor soil types or in areas of poor drainage, or in areas designated as wetlands. A board of county commissioners may enact a regulation pursuant to R.C. 307.37 prohibiting a builder from constructing basements in poor soil types or in areas of poor drainage, or in areas designated as wetlands, provided the regulation is reasonable and lawful, and does not go beyond the scope of regulating the safety, health, and sanitary conditions of single-family, two-family, and three-family dwelling houses.

IV. A County Planning Commission May Not Require a Developer to Present Proof of a National Pollutant Discharge Elimination System Permit as a Prerequisite to the Approval of a Proposed Subdivision

Your predecessor's fourth question is whether a county planning commission is authorized to require a developer to present proof of a National Pollutant Discharge Elimination System (NPDES) permit as a prerequisite to the approval of a plat of a residential subdivision. 33 U.S.C. § 1342 provides for the issuance of NPDES permits for discharges of pollutants into navigable waters as follows:

(a)(1) Except as provided in sections 1328 and 1344 of this title, the Administrator [of the Environmental Protection Agency] may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

....
(5) The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State....

(b) At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title,⁸ the Governor of each State desiring

⁸ 33 U.S.C. § 1314(i)(2) provides, in part:

The Administrator shall ... within sixty days from October 18, 1972, promulgate guidelines establishing the minimum procedural and other elements of any State program under section 1342 of this title, which shall include:

- (A) monitoring requirements;
- (B) reporting requirements (including procedures to make information available to the public);
- (C) enforcement provisions; and
- (D) funding, personnel qualifications, and manpower requirements (including a requirement that no board or body which approves permit applications or portions thereof shall include, as a member, any person who

to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program....

(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

33 U.S.C. § 1342 (1988 & Supp. V 1993) (footnote added). *See generally* 40 C.F.R. pt. 122 (1994) (EPA administered permit programs: NPDES).

In Ohio, NPDES permits are issued by the Director of Environmental Protection. *See* R.C. 6111.03(J); 7 Ohio Admin. Code 3745-33-02; 7 Ohio Admin. Code 3745-33-03; 7 Ohio Admin. Code 3745-38-02 through 3745-38-04. Specific provisions concerning the issuance, modification, transfer, revocation, and termination of NPDES permits are set forth in chapters 3745-33 and 3745-38 of the Ohio Administrative Code. *See also* 40 C.F.R. § 122.21 (1994) (application for a permit); 40 C.F.R. § 122.28 (1994) (general permits); 40 C.F.R. §§ 122.61-.64 (1994) (transfer, modification, revocation and reissuance, and termination of permits).

As indicated above, R.C. 711.10 confers upon a county planning commission authority to review the plats of proposed subdivisions and to approve the plats that are in accord with the rules adopted by the commission to govern plats and subdivisions of land. *See* Op. No. 94-034 at 2-163 and 2-164; 1981 Op. Att'y Gen. No. 81-075 at 2-297; 1973 Op. Att'y Gen. No. 73-040. The rules governing plats and subdivisions of land must provide for the proper arrangement of streets or other highways in relation to existing or planned streets or highways or to the county or regional plan, for adequate and convenient open spaces for traffic, utilities, access of fire fighting apparatus, recreation, light, air, and for the avoidance of congestion of population. R.C. 711.10. The rules also may provide for the modification thereof by the county planning commission in specific cases where unusual topographical and other exceptional conditions require such modification, require the county health department to review and

receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit).

See generally 40 C.F.R. pt. 123 (1994) (state program requirements).

comment on a plat before the county planning commission acts upon it, or require proof of compliance with applicable township zoning resolutions regarding lot size, frontage, and width as a basis for approval of a plat. *Id.*

R.C. 711.10, however, does not clearly prescribe the adoption of a NPDES permit as a means by which a county planning commission may regulate the platting of residential subdivisions. A rule that would require a developer to present proof of a NPDES permit as a condition precedent to the approval of a plat of a residential subdivision is not a rule that provides for the proper arrangement of streets or other highways in relation to existing or planned streets or highways or to the county or regional plan, for adequate and convenient open spaces for traffic, utilities, access of fire fighting apparatus, recreation, light, air, and for the avoidance of congestion of population. Therefore, absent a legislative intention to the contrary, the authority of a county planning commission to adopt a rule to require a developer to present proof of a NPDES permit as a condition precedent to the approval of a plat of a residential subdivision should not be implied. *See generally* Op. No. 81-075 (a county planning commission does not have the authority to enforce township zoning).⁹

Moreover, as indicated above, the Director of Environmental Protection is vested with the authority and discretion to issue NPDES permits. The Director is also required to investigate or make inquiries into any alleged act of pollution or failure to comply with R.C. Chapter 6111 or any rule promulgated pursuant thereto. R.C. 6111.05. The General Assembly thus has vested the Director with the authority to determine when a developer of a residential subdivision must obtain a NPDES permit. Accordingly, a county planning commission does not have the authority to require a developer to present proof of a NPDES permit, issued pursuant to Ohio Admin. Code Chapter 3745-33 or 3745-38, as a condition precedent to the approval of a plat of a residential subdivision.

V. Adoption of a Comprehensive Plan by a Township

A. The Term "Comprehensive Plan," as Used in R.C. 519.02, Refers to a Zoning Plan Adopted Pursuant to R.C. 519.05-11

Your predecessor's final question concerns the duties of a county planning commission, township, and board of county commissioners in the adoption of a comprehensive plan by a township. R.C. 519.02 authorizes a township to enact zoning regulations:

For the purpose of promoting the public health, safety, and morals, the board of township trustees may *in accordance with a comprehensive plan* regulate by resolution the location, height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas which may be occupied, set back building lines, sizes of yards, courts,

⁹ R.C. 711.10 has been amended since the issuance of 1981 Op. Att'y Gen. No. 81-075. The statute now expressly provides that the rules governing plats and subdivisions may "require proof of compliance with applicable township zoning resolutions regarding lot size, frontage, and width as a basis for approval of a plat." *See* 1989-1990 Ohio Laws, Part IV, 5739, 5744 (Am. Sub. H.B. 563, eff. July 24, 1990).

and other open spaces, the density of population, the uses of buildings and other structures including tents, cabins, and trailer coaches, and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of such township, and for such purposes may divide all or any part of the unincorporated territory of the township into districts or zones of such number, shape, and area as the board determines. All such regulations shall be uniform for each class or kind of building or other structure or use throughout any district or zone, but the regulations in one district or zone may differ from those in other districts or zones. (Emphasis added.)

Cf. R.C. 303.02 (authorizing a board of county commissioners to enact, in accordance with a comprehensive plan, zoning regulations for the unincorporated territory of the county). Thus, R.C. 519.02 requires that a township zoning regulation be in accordance with a comprehensive plan. *Accord Cassell v. Lexington Township Bd. of Zoning Appeals*, 163 Ohio St. 340, 127 N.E.2d 11 (1955).

Although no provision within the Revised Code expressly provides for the adoption of a comprehensive plan by a board of township trustees, see *Ketchel v. Bainbridge Township*, 79 Ohio App. 3d 174, 183, 607 N.E.2d 22, 28 (Geauga County 1992) (no provision within the Revised Code requires "that the comprehensive plan be independently adopted [by a township], and there is no case law supporting this proposition"), the provisions set forth in R.C. 519.05-.11 reasonably may be read as requiring township trustees to adopt a zoning plan prior to enacting zoning regulations. Because statutes relating to the same matter or subject, although passed at different times and making no reference to each other, are to be construed together to ascertain and effectuate the legislative intent, *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956) (syllabus, paragraph two), it appears that the General Assembly used the term "comprehensive plan" in R.C. 519.02 to refer to a township zoning plan adopted pursuant to R.C. 519.05-.11. See *East Fairfield Coal Co. v. Miller*, 71 Ohio Law Abs. 490, (C.P. Mahoning County 1955); 1964 Op. Att'y Gen. No. 1500; see also R.C. 519.03 ("[b]efore availing itself of the powers conferred by section 519.02 of the Revised Code, the board of township trustees shall pass a resolution declaring its intention to proceed under sections 519.02 to 519.25 of the Revised Code"). Accordingly, a township may only enact a zoning regulation that is in accordance with a comprehensive zoning plan adopted pursuant to R.C. 519.05-.11. See generally *Kreutz v. Lauderbaugh*, 60 Ohio Op. 48, 50, 136 N.E.2d 627, 628-29 (C.P. Franklin County 1956) (R.C. 303.02, which provides for county rural zoning, "was passed for the purpose of avoiding spot zoning without a compliance with the statutes providing for such purposes and to set up a uniform or overall zoning of the unincorporated area for the purpose of future planning within the boundaries of the county. We might say that this statute was passed so that the average citizen would be able by looking at said plan to determine where he might build a residence, industry, a supermarket or any other business").

B. Adoption of a Township Zoning Plan

Pursuant to R.C. 519.04, any board of township trustees that proposes to enact zoning regulations under R.C. Chapter 519 must create and establish a township zoning commission. The powers and duties of a township zoning commission are set forth in R.C. 519.05 as follows:

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.

The zoning commission may, within the limits of the moneys appropriated by the board for the purpose, employ or contract with such planning consultants and executive and other assistants as it deems necessary. The zoning commission shall organize, adopt rules for the transaction of its business, and keep a record of its actions and determinations....

The zoning commission shall make use of such information and counsel as is available from appropriate public officials, departments, and agencies and *such officials, departments, and agencies having information, maps, and data pertinent to township zoning shall make them available for the use of the zoning commission.*

In any county where there is a county or regional planning commission, the zoning commission may request such planning commission to prepare or make available to the zoning commission a zoning plan, including text and maps, for the unincorporated area of the township or any portion of the same. (Emphasis added.)

Thus, R.C. 519.05 requires a township zoning commission to prepare and submit a comprehensive zoning plan to the board of township trustees. In addition, the statute requires a county planning commission to provide information, maps, and data pertinent to township zoning to a township zoning commission, and to prepare or make available, upon the request of a township zoning commission, a zoning plan.

However, prior to submitting a zoning plan to the board of township trustees, the township zoning commission must hold at least one public hearing. R.C. 519.06. After the public hearing provided for in R.C. 519.06, "the township zoning commission shall submit the proposed zoning resolution, including text and maps, to the county or regional planning commission of the county or district in which the township is located, if there is such a commission, for approval, disapproval, or suggestions." R.C. 519.07; *see also* R.C. 713.23(B)(5) (a county planning commission may review, evaluate, and make comments and recommendations on proposed and amended comprehensive land use plans of local units of government and may make recommendations to achieve compatibility in the region). If the county or regional planning commission disapproves of the proposed zoning resolution or suggests any material change, the township zoning commission shall hold a public hearing on the resolution.¹⁰ R.C. 519.07. "When the zoning commission has completed its recommendations for a zoning plan it shall certify the plan to the board of township trustees." *Id.*

"After receiving the certification of a zoning plan from the township zoning commission, and before adoption of any zoning resolution, the board of township trustees shall hold a public hearing on the resolution." R.C. 519.08. If a board of township trustees wants to make a change in or depart from the text or maps, as certified by the township zoning commission, the board must resubmit the proposed change to the township zoning commission for approval,

¹⁰ Notice of the public hearing required by R.C. 519.07 "shall be given as provided in section 519.06 of the Revised Code." R.C. 519.07.

disapproval, or suggestions. R.C. 519.09. After a board of township trustees receives the recommendation of the township zoning commission regarding the proposed change, the board must hold a second public hearing. *Id.* Subsequent to receiving the recommended zoning plan from the township zoning commission and holding the public hearing provided for by R.C. 519.08, the board of township trustees shall consider such recommendations and vote upon the adoption of the zoning resolution.¹¹ R.C. 519.10.

A township zoning plan that has been adopted by a board of township trustees must be submitted to and approved by the electors residing in the unincorporated territory of the township before the board has the authority to regulate and enforce zoning. *See Henn v. Universal Atlas Cement Co.*, 76 Ohio Law Abs. 439, 144 N.E.2d 917 (C.P. Montgomery County 1957). In this regard, R.C. 519.11 provides in part:

If the zoning resolution is adopted by the board of township trustees, such board shall cause the question of whether or not the proposed plan of zoning shall be put into effect to be submitted to the electors residing in the unincorporated area of the township included in the proposed plan of zoning for their approval or rejection at the next primary or general election, or a special election may be called for this purpose. Such resolution shall be filed with the board of elections not later than four p.m. of the seventy-fifth day before the day of the election. No zoning regulations shall be put into effect unless a majority of the vote cast on the issue is in favor of the proposed plan of zoning. Upon certification by the board of elections the resolution shall take immediate effect, if the plan was so approved.

Within five working days after the resolution's effective date, the board of township trustees shall file it, including text and maps, in the office of the county recorder. The board shall also file duplicates of the same documents with the regional or county planning commission, if one exists, within the same period.

C. Duties of a County Planning Commission, Township, and Board of County Commissioners in the Adoption of a Comprehensive Plan by a Township

A review of the provisions of R.C. 519.05-.11 discloses that a board of county commissioners has no duties with respect to the adoption of a comprehensive zoning plan by a township. A county planning commission is required to provide to a township zoning commission information, maps, and data pertinent to township zoning, to prepare or make available to a township zoning commission a zoning plan, and to approve, disapprove, or suggest changes to a zoning plan. *See Holiday Homes, Inc. v. Butler County Bd. of Zoning Appeals*, 35 Ohio App. 3d 161, 166, 520 N.E.2d 605, 610-11 (Butler County 1987) ("the county planning commission's role in zoning, as the commission's name suggests, is limited to such things as

¹¹ If proposed changes are disapproved by the township zoning commission, "the provision so disapproved must receive the favorable vote of the entire membership of the board of township trustees in order to be adopted." R.C. 519.09.

planning, gathering pertinent information, and making recommendations based thereon (concerning zoning and conditions created by existing zoning laws and the effects of proposed zoning changes)"). Finally, the duties of a township in the adoption of a comprehensive zoning plan include the formation of a township zoning commission to prepare the zoning plan, the adoption of the plan by a board of township trustees, the submission of the plan to the electors residing in the unincorporated area of the township, and the filing of a voter approved plan with the county recorder and the appropriate planning commission.

VI. Conclusion

Based on the foregoing, it is my opinion and you are advised that:

1. A board of supervisors of a soil and water conservation district may not enact regulations to regulate the drainage of surface water from residential subdivisions within the district.
2. A board of supervisors of a soil and water conservation district may enter into an agreement with the Chief of the Division of Soil and Water Conservation pursuant to R.C. 1511.05 or the board of county commissioners pursuant to R.C. 307.79 whereby the board of supervisors implements the rules pertaining to urban sediment pollution abatement adopted by the Chief of the Division of Soil and Water Conservation under R.C. 1511.02 or by a board of county commissioners under R.C. 307.79.
3. The statutory duties and responsibilities of a county engineer and a board of supervisors of a soil and water conservation district with respect to surface water drainage do not preempt the authority of a board of township trustees to enact zoning regulations that regulate land use in such a manner as to control the drainage of surface water from residential subdivisions.
4. A soil and water conservation district, county engineer, and county building inspection department may not require land use or deed restrictions to prevent home builders from constructing basements in poor soil types or in areas of poor drainage, or in areas designated as wetlands.
5. A county planning commission may not require deed restrictions or impose land use restrictions to prevent home builders from constructing basements in poor soil types or in areas of poor drainage, or in areas designated as wetlands. However, in accordance with R.C. 713.23, a county planning commission may make studies, maps, plans, recommendations, and reports regarding the suitability of a tract of land for home sites, and may enact, pursuant to R.C. 711.10, subdivision regulations to provide for adequate and convenient open spaces for recreation, light, air, and for the avoidance of congestion of population that may affect the lands that are available for the construction of homes in a residential subdivision.

6. A board of county commissioners may enact a regulation pursuant to R.C. 307.37 prohibiting a builder from constructing basements in poor soil types or in areas of poor drainage, or in areas designated as wetlands, provided the regulation is reasonable and lawful, and does not go beyond the scope of regulating the safety, health, and sanitary conditions of single-family, two-family, and three-family dwelling houses.
7. A county planning commission does not have the authority to require a developer to present proof of a National Pollutant Discharge Elimination System permit, issued pursuant to Ohio Admin. Code Chapter 3745-33 or 3745-38, as a condition precedent to the approval of a plat of a residential subdivision.
8. A board of county commissioners has no duties with respect to the adoption of a comprehensive zoning plan by a township.
9. With respect to the adoption of a comprehensive zoning plan by a township, a county planning commission is required to provide to a township zoning commission information, maps, and data pertinent to township zoning, to prepare or make available to a township zoning commission a zoning plan, and to approve, disapprove, or suggest changes to a zoning plan.
10. The duties of a township in the adoption of a comprehensive zoning plan include the formation of a township zoning commission to prepare the zoning plan, the adoption of the plan by a board of township trustees, the submission of the plan to the electors residing in the unincorporated area of the township, and the filing of a voter approved plan with the county recorder and the appropriate planning commission.