

**OPINION NO. 91-028****Syllabus:**

1. Notwithstanding the provisions of R.C. 303.21, R.C. 3781.06, and R.C. 3781.061, R.C. 307.37(A)(2) authorizes a county to include, in its building code, regulations needed for participation in the National Flood Insurance Program, 42 U.S.C. §§4001 *et seq.*, including regulations that govern the prohibition, location, or construction of buildings or structures for agricultural purposes in unincorporated areas of the county located within the floodplain; further, R.C. 307.85 provides general authority for a county to participate in the National Flood Insurance Program by adopting procedures or taking actions that are not prohibited by the Ohio Constitution or in conflict with the laws of Ohio.
2. Because of the exemption provided in R.C. 1521.13(L), it cannot conclusively be determined that, in every instance, there will be a state or local governmental entity with legal authority to regulate an electric light company, or its subsidiaries or affiliates, in such manner as to assure compliance with floodplain management regulations that meet minimum standards established under the National Flood Insurance Plan, 42 U.S.C. §§4001 *et seq.*
3. R.C. 1521.14(C)(1), read in conjunction with R.C. 3733.02(A), authorizes the public health council to adopt rules that satisfy minimum requirements established under the National Flood Insurance Plan, 42 U.S.C. §§4001 *et seq.*, with respect to all "development," as defined in 44 C.F.R. §59.1 (1990), in manufactured home parks, except development consisting of buildings regulated by the Board of Building Standards pursuant to R.C. 3781.06. R.C. 1521.14(C)(1) authorizes the Board of Building Standards to adopt and enforce such rules with respect to R.C. 3781.06 buildings located in manufactured home parks.

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**To: George V. Volnovich, Governor, Columbus, Ohio**

**By: Lee Fisher, Attorney General, June 19, 1991**

You have requested my opinion on several questions relating to implementation of the National Flood Insurance Program (NFIP). That program was established pursuant to the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, which in part amended the 1968 Act. *See* 42 U.S.C. §§4001 *et seq.* The Federal Emergency Management Agency (FEMA) is responsible for carrying out the National Flood Insurance Program. *See* 42 U.S.C. §4011 (1988). Federal law prohibits FEMA from making flood insurance coverage available unless a community has adopted floodplain management regulations that meet minimum NFIP standards and is enforcing these regulations with respect to all development in flood hazard areas. *See* 42 U.S.C. §§4012, 4022 (1988); 44 C.F.R. §60.3 (1990). "Development" is defined at 44 C.F.R. §59.1 (1990) as "any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials." FEMA has raised questions concerning the capacity of Ohio communities to satisfy these standards and to retain NFIP eligibility. The common issue in all of these questions is that FEMA has been unable to find authority under Ohio law for either the state or a local governmental entity to require certain kinds of developments to comply with the minimum NFIP standards, thereby creating impermissible exceptions to the regulatory scheme.

In addressing FEMA's concerns, you have raised the following questions:

1. FEMA has stated that it appears that existing statutes do not provide Ohio counties with the authority to apply their floodplain management regulations to the construction of buildings and structures used for agricultural purposes in the floodplain. It is

not certain if FEMA considered the authority granted in ORC 307.37 and 307.85 and how it relates to authority and exemptions provided in ORC 3781.06, 3781.061 and 303.21. What is your opinion on whether ORC 307.37 and 307.85 provide the counties with authority to regulate those structures?

2. ORC 1521.13(L) exempts all electrical utilities from state floodplain management requirements. Does the State or local government have the legal authority to regulate electrical utilities located in the 100-year floodplain?
3. Does Substitute Senate Bill 396 of the 118th General Assembly sufficiently authorize the Department of Health to adopt rules that would satisfy NFIP minimum requirements? Please be advised that it appears the Department has exclusive regulatory authority over manufactured home parks and, to the best of our knowledge, has not adopted rules which meet the minimum requirements.

#### I. Agricultural Purposes

Your first question is whether R.C. 307.37 and R.C. 307.85 provide the counties with authority to apply floodplain management regulations to the construction of buildings and structures used for agricultural purposes in the floodplain. From its examination of R.C. 3781.06, R.C. 3781.061, and R.C. 303.21, FEMA questions whether the counties have such authority. R.C. Chapter 303 grants a board of county commissioners authority to adopt zoning regulations governing unincorporated territory within the county. See R.C. 303.02. R.C. 303.21 provides that zoning powers granted by that chapter do not include the power "to prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located," to require a zoning certificate for such buildings or structures, or to regulate agriculture or buildings or structures on lots greater than five acres. R.C. 3781.06 and R.C. 3781.061 exempt buildings or structures used in agriculture from certain statutes providing for regulation by the Board of Building Standards or by local building departments certified by the Board. Based upon its examination of these statutes, FEMA concludes that existing state statutes do not provide Ohio counties with the authority to apply their floodplain management regulations to the construction of buildings and structures used for agricultural purposes in the floodplain. As your letter indicates, however, it does not appear that FEMA considered R.C. 307.37 and R.C. 307.85.

#### A. Revised Code §307.37(A)(2)

R.C. 307.37(A)(2) relates directly to the National Flood Insurance Program. It states:

*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 floodproofing 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. (Emphasis added.)*

The term "permanent structure," as defined in R.C. 1506.01(F), includes "any...agricultural building." R.C. 307.37(A)(2) thus explicitly authorizes a county to

adopt building code regulations that govern "the prohibition, location, erection, construction, redevelopment, or floodproofing" of agricultural buildings in unincorporated areas of the county, as necessary for participation in the National Flood Insurance Program. See 1989 Op. Att'y Gen. No. 89-025 at 2-114 n. 2. While the rules so adopted "shall not conflict" with the Ohio Building Code, this does not appear to be a problem, since the Ohio Building Code simply does not apply to agricultural buildings or structures. See R.C. 3781.06-.061; Op. No. 89-025 at 2-115 ("[t]here can be no conflict between state law and local ordinance with regard to matters to which state law does not apply").

FEMA apparently believes that the provisions of R.C. Chapter 303 that exempt agricultural facilities from local zoning prevent a county from undertaking any regulation of the location of agricultural buildings or structures. That does not, however, appear to be the case. As a creature of statute, a board of county commissioners has only such powers as it is granted by statute. See, e.g., *State ex rel. Shriver v. Board of Commissioners*, 148 Ohio St. 277, 74 N.E.2d 248 (1947). R.C. 303.21 provides that the zoning powers granted to counties do not include the power to zone land, buildings, or structures for agricultural purposes. That exception is not phrased in terms of a prohibition; it is, rather, a failure to confer particular authority. The fact that local zoning provisions do not authorize a county to regulate agricultural buildings or structures does not preclude the county from obtaining such authority from a different statutory source. R.C. 307.37(A)(2) directly addresses the prohibition, location, erection, construction, redevelopment, and floodproofing of buildings, structures, and other developments, including agricultural buildings, and expressly authorizes a county to regulate these matters, as required for participation in the NFIP, through its building code. The zoning limitations were in existence prior to the enactment of R.C. 307.37(A)(2). See 1987-1988 Ohio Laws, Part I, 120 and 1975-1976 Ohio Laws, Part II, 2801 (enacting language now appearing in R.C. 307.37(A)(2)); 1947 Ohio Laws 597, 604 (enacting G.C. 3180-20, predecessor to R.C. 303.21). Further, R.C. 307.37(A)(2) is focused specifically upon compliance with the NFIP, rather than upon general land use issues. It is, thus, evident that the General Assembly intended that counties be authorized pursuant to R.C. 307.37(A)(2) to regulate the matters addressed in that provision, and that the General Assembly also intended that such authority be granted in addition to the zoning powers provided under R.C. Chapter 303. See, e.g., R.C. 1.51 ("[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail"); R.C. 1.52(A) ("[i]f statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails").

#### B. Revised Code §307.85

You have also referenced R.C. 307.85 as a possible source of authority for county regulation of agricultural buildings and structures in the floodplain. R.C. 307.85(A) states:

The board of county commissioners of any county may participate in, give financial assistance to, and cooperate with other agencies or organizations, either private or governmental, in establishing and operating any federal program enacted by the congress of the United States, and for such purpose may adopt any procedures and take any action not prohibited by the constitution of Ohio nor in conflict with the laws of this state.

R.C. 307.85(A) in effect authorizes a board of county commissioners to participate in the National Flood Insurance Program by taking any actions not prohibited by the Constitution of Ohio or in conflict with the laws of Ohio. If the authority granted by R.C. 307.37(A)(2) were in any respect insufficient to enable a county to regulate agricultural buildings and structures to the extent required for participation in the National Flood Insurance Program, the authority granted by R.C. 307.85 would be available to remedy the insufficiencies. See generally 1984 Op. Att'y Gen. No. 84-038 (finding that R.C. 307.85(A) authorizes a board of county commissioners to contract with the federal government to participate in a flood control program under

33 U.S.C. §701s, provided that there is no conflict with state law). I am aware of no provision of the Ohio Constitution or of state law that would prohibit any such necessary action; to the extent that state statutes address these matters, they consist of grants of authority that do not extend to the actions required, rather than prohibitions against action. As discussed above, for example, R.C. 303.21 exempts agricultural land, buildings, and structures from local zoning, but it does not preclude the county from obtaining regulatory authority over agricultural uses from a different source. Thus, since no state statute prohibits a county from taking action necessary to comply with NFIP requirements, such action would not conflict with state law. See, e.g., Op. No. 89-025.

In specific response to your first question, I conclude that, notwithstanding the provisions of R.C. 303.21, R.C. 3781.06, and R.C. 3781.061, R.C. 307.37(A)(2) authorizes a county to include, in its building code, regulations needed for participation in the National Flood Insurance Program, 42 U.S.C. §§4001 *et seq.*, including regulations that govern the prohibition, location, or construction of buildings or structures for agricultural purposes in unincorporated areas of the county located within the floodplain; further, R.C. 307.85 provides general authority for a county to participate in the National Flood Insurance Program by adopting procedures or taking actions that are not prohibited by the Ohio Constitution or in conflict with the laws of Ohio.

## II. Electrical Utilities

Your second question asks whether the state or local government has legal authority to regulate electrical utilities located in the 100-year floodplain. This question arises in connection with R.C. 1521.13, recently enacted by Sub. S.B. 396, 118th Gen. A. (1990) (eff. April 11, 1991). R.C. 1521.13 gives the Chief of the Division of Water of the Ohio Department of Natural Resources responsibility for coordinating the floodplain management activities of the state and its subdivisions with federal activities on that subject, including the NFIP. R.C. 1521.13(K) authorizes the chief of the Division of Water to establish, by rule, flood damage reduction standards governing development by state agencies within one hundred year floodplains, and provides that such standards shall be consistent with and no less stringent than the minimum floodplain management criteria of the NFIP. R.C. 1521.13(J) authorizes the adoption of similar rules relating to development by entities other than the state and provides that such standards shall be no more stringent than the minimum floodplain management criteria of the NFIP. R.C. 1521.13(L) exempts from these rules electric light companies and their subsidiaries or affiliates, as follows:

Rules adopted under this section and standards established under those rules do not apply to developments or modifications at facilities owned or operated by an electric light company, as defined in section 4905.03 of the Revised Code, or to any subsidiaries or affiliates of an electric light company, that are below the one hundred year floodplain.

The rules and standards established pursuant to R.C. 1521.13 come into effect pursuant to R.C. 1521.14, which states, in part:

(C)(1) *Any state agency that funds or finances developments or that has regulatory jurisdiction over the siting of developments for which the state has sole jurisdiction over siting shall require that, before awarding funding or financing or granting a license, permit, or other siting authorization for a development that is or is to be located within a one hundred year floodplain, the applicant therefor demonstrate to the satisfaction of the agency that the development will comply with the flood damage reduction standards established in rules adopted under division (J) of section 1521.13 of the Revised Code.*

(2) *Any state agency that undertakes any development that is or is to be located within a one hundred year floodplain shall ensure that the development complies with the minimum flood damage reduction standards established in rules adopted under division (K) of section 1521.13 of the Revised Code.*

(3) Prior to the disbursement of any state disaster assistance funds in connection with any incident of flooding to or within a municipal corporation or county that is not listed by the chief as being in compliance under division (D)(1) of section 1521.18 of the Revised Code, each state agency having the authority to disburse such funds shall require the municipal corporation or county to enter into an agreement with the agency that requires the municipal corporation or county to promptly take those actions necessary to establish participation in the national flood insurance program under the "National Flood Insurance Act of 1968," 82 Stat. 572, 42 U.S.C.A. 4001, as amended, and to adequately administer and enforce the approved floodplain management ordinance or resolution as a condition for participation in that program.

(D) *All state agencies shall comply with this section, rules adopted under section 1521.13 of the Revised Code, and any applicable local floodplain management ordinance or resolution. (Emphasis added.)*

The question, then, is whether, in light of R.C. 1521.13(L), any state entity or local government has authority to regulate electrical utilities located in the floodplain. R.C. 1521.13(L) refers to the definition of "electric light company" appearing in R.C. 4905.03. With respect to electric light companies, R.C. 4905.03 states:

As used in this chapter:

(A) Any person, firm, copartnership, voluntary association, join-stock association, company, or corporation, wherever organized or incorporated, is:

....

(4) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state....

....

Nothing in this section shall be construed to mean that an electric light company operated not for profit, owned and operated exclusively by and solely for its customers, or owned or operated by a municipal corporation, is subject to sections 4905.66, 4905.67, 4905.68, and 4905.69 of the Revised Code.

Your question does not expressly address the subsidiaries and affiliates of electric light companies; it does, however, seem appropriate to consider them in connection with your question, since they will not necessarily be engaged in the business of supplying electricity.

It is clear, pursuant to R.C. 1521.13(L), that the Chief of the Division of Water does not have authority to regulate electric light companies, or their subsidiaries or affiliates. It is also clear that no state agency can use R.C. 1521.14 to impose upon an electric light company, or its subsidiaries or affiliates, flood damage reduction standards adopted pursuant to R.C. 1521.13, since those rules do not apply to such companies, subsidiaries, or affiliates. *See* R.C. 1521.13(L). Further, if a state agency were itself to undertake the activities of an electric light company, within the meaning of R.C. 4905.03, that activity would also appear to be exempted by R.C. 1521.13(L) from the standards established pursuant to R.C. 1521.13; it is, however, my understanding that this matter is not in issue at the current time because the state does not own any electrical utilities.

#### A. Regulation of Electrical Utilities

Various statutory provisions permit state and local governmental entities to regulate electric light companies, and their subsidiaries or affiliates, in manners that may affect the NFIP requirements. As discussed above, R.C. 307.37(A)(2) authorizes a county, through its building code, to regulate development in unincorporated territory for the purpose of participating in the National Flood Insurance Program. The only restriction set forth in R.C. 307.37(A)(2) is that rules adopted pursuant to that provision may not conflict with the Ohio Building Code. Further, R.C.

307.85(A) permits a board of county commissioners to take any actions necessary to participate in the NFIP, provided that the actions are not prohibited by the Ohio Constitution or in conflict with state law.

As noted above, a board of county commissioners has only such powers as it is granted by statute. In carrying out its powers under R.C. 307.37(A)(2) or R.C. 307.85(A), a board of county commissioners may not adopt rules that conflict with the Ohio Building Code or take actions that conflict with state law. The Ohio Building Code does not, however, prohibit a county from regulating electrical utilities pursuant to R.C. 307.37(A)(2). Further, provisions authorizing county zoning fail to grant regulatory power over utilities, but do not prohibit such regulation. See R.C. 303.211 ("[R.C. 303.01-.25] do not confer any power on any board of county commissioners or board of zoning appeals in respect to the location, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement of any buildings or structures of any public utility or railroad, whether publicly or privately owned, or the use of land by any public utility or railroad for the operation of its business"). See generally Op. No. 89-025. Similarly, the fact that electric light companies are exempted from rules established by the Chief of the Division of Water pursuant to R.C. 1521.13 does not affect the authority of a county to regulate those companies pursuant to R.C. 307.37(A)(2) or R.C. 307.85. Thus, there do not appear to be any prohibitions or conflicts that would prevent a county from adopting and enforcing NFIP standards pursuant to R.C. 307.37(A)(2) or R.C. 307.85.

The authority of a county to regulate electrical utilities pursuant to R.C. 307.37(A)(2) extends to unincorporated territory within the county. The authority to carry out such regulation in incorporated areas is vested in municipal corporations which, pursuant to Ohio Const. art. XVIII, §3, "have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations, as are not in conflict with general laws." As part of the exercise of their police powers, municipal corporations may adopt zoning and building regulations that do not conflict with general laws of the state. See, e.g., Op. No. 89-025; see also R.C. Chapter 713; R.C. 715.26. 1984 Op. Att'y Gen. No. 84-037 found expressly that a municipal corporation may, pursuant to its police power, adopt ordinances in order to comply with the NFIP.

R.C. 1521.13(L) exempts electric light companies, and their subsidiaries and affiliates, from rules and standards established by the Chief of the Division of Water pursuant to R.C. 1521.13 and enforced by various state agencies pursuant to R.C. 1521.14. The exemption contains no reference to floodplain regulation imposed under any other constitutional or statutory authority. Therefore, R.C. 1521.13(L) does not exempt electric light companies, or their subsidiaries or affiliates, from compliance with county or municipal floodplain management regulations enacted for participation in the NFIP.

#### B. State Preemption

It appears, accordingly, that electric light companies, and their subsidiaries and affiliates, may be regulated by counties or municipal corporations in such manner that compliance with NFIP minimum requirements may be achieved, *except in instances in which the state has preempted some or all of that local regulation*. Such preemption occurs, for example, in the case of certification of major utility facilities by the Power Siting Board, a state board created pursuant to R.C. Chapter 4906. R.C. 4906.01(B) defines a "major utility facility" to include an "[e]lectric generating plant and associated facilities designed for, or capable of, operation at a capacity of fifty megawatts or more" and an "electric transmission line and associated facilities of a design capacity of one hundred twenty-five kilovolts or more," but not to include electric distributing lines. R.C. Chapter 4906 requires, with certain exceptions, that, before constructing a major utility facility in Ohio, a person obtain a certificate from the Power Siting Board. See R.C. 4906.04; 4906.05. A major utility facility authorized by such a certificate is not subject to local regulation. R.C. 4906.13 states:

No public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the

construction or initial operation of a major utility facility authorized by a certificate issued pursuant to Chapter 4906. of the Revised Code. Nothing herein shall prevent the application of state laws for the protection of employees engaged in the construction of such facility nor of municipal regulations that do not pertain to the location or design of, or pollution control and abatement standards for, a major utility facility for which a certificate has been granted under this chapter.

In *City of Columbus v. Ohio Power Siting Commission*, 58 Ohio St. 2d 435, 390 N.E.2d 1208 (1979), R.C. 4906.13 and related provisions, as then in effect, were found to be unconstitutional to the extent that they authorized the Power Siting Commission (predecessor to the Power Siting Board) to evaluate and determine a municipality's need for a proposed municipal utility and the public service and convenience of such a utility. The issue of constitutionality appears to have been resolved by statutory amendments restricting the factors that the Board may consider in rendering a decision on an application for a construction certificate. See R.C. 4906.03. In any event, the preemption of local regulation is clearly valid with respect to regulation by local subdivisions that do not exercise police powers pursuant to constitutional grant. See, e.g., Ohio Const. art. X, §3; Ohio Const. art. XVIII, §§3, 7. The authority of non-charter counties to regulate major utility facilities is, thus, preempted by R.C. Chapter 4906.

Where state preemption of local regulation occurs, there is authority to enforce compliance with NFIP standards only if the state agency that is responsible for regulation has such authority. The state agency cannot use R.C. 1521.13 and 1521.14 to assure compliance by electric light companies, or their subsidiaries or affiliates, since those companies, subsidiaries, and affiliates are, by R.C. 1521.13(L), exempted from the standards established under R.C. 1521.13. Such a state agency may, however, have independent authority that permits it to enforce compliance with NFIP standards. For example, R.C. 4906.03(C) authorizes the Power Siting Board to "[a]dopt rules establishing criteria for evaluating the effects on environmental values of proposed and alternative sites," and R.C. 4906.03 and R.C. 4906.10 authorize the Board to grant a certificate for the construction of a major utility facility after considering, *inter alia*, the nature of the probable environmental impact and finding that the facility represents the minimum adverse environmental impact. The Board might, thus, consider the potential impact of a major utility facility upon a floodplain.

It is not, however, clear that the Power Siting Board's authority to impose requirements upon the construction of a major utility facility extends to all factors that may be required under the NFIP. This is the case particularly in light of the fact that electric light companies are expressly excluded from regulation under R.C. 1521.13 and 1521.14; there is no indication of a legislative intent that R.C. Chapter 4906 be used to impose upon certain major utility facilities standards that may not be imposed upon such utilities pursuant to R.C. 1521.13 and 1521.14. The statutes governing the Power Siting Board nowhere expressly authorize the Board to take all actions required for compliance with the NFIP.

Even more troublesome is the fact that R.C. 1521.13(L) applies also to the subsidiaries or affiliates of an electric light company. Such subsidiaries or affiliates need not themselves be electric light companies. They may be engaged in activities that are regulated by various other provisions of the Revised Code, and local regulation may be preempted by the state without any provision for the state to apply NFIP standards. Since the category of possible subsidiaries or affiliates of an electric light company is not defined, I am unable to examine all statutes that may affect such entities. I must conclude, accordingly, that there is no basis for assuring that each such entity will be subject to regulation by a state or local entity with authority to enforce NFIP standards.

The letter from FEMA that is attached to your request suggests that R.C. 1521.13(L) creates a gap in the floodplain management regulatory scheme of the State of Ohio, and I concur in that judgment. The state statutory scheme permits various state and local entities to regulate aspects of development within the floodplain. In light of R.C. 1521.13(L), there can, however, be no assurance that

every aspect of such development will be subject to regulation by a state or local entity with authority to adopt and enforce all NFIP standards. The exemption of electric light companies, and their subsidiaries and affiliates, from the minimum flood damage reduction standards established by the Chief of the Division of Water serves to exclude those entities from the state's most comprehensive scheme authorizing the enforcement of flood damage reduction standards; there is no assurance that other state or local regulation is authorized in all instances.

In direct response to your second question, I conclude, accordingly, that R.C. 1521.13(L) creates a gap in the state scheme for adoption and enforcement of floodplain management regulations. Under existing state law, it cannot conclusively be determined that, in every instance, there will be a state or local governmental entity with legal authority to regulate an electric light company, or its subsidiaries or affiliates, in such manner as to assure compliance with floodplain management regulations that meet minimum NFIP standards. Obviously, the simplest way to close this gap would be to eliminate R.C. 1521.13(L) and thereby remove the troublesome exemption. An alternate route would be to enact language specifying that the exemption set forth in R.C. 1521.13(L) does not apply when the state preempts local regulatory authority.

### III. Manufactured Home Parks

#### A. Revised Code §3733.02(A)

Your third question relates to the authority of the Department of Health to adopt rules governing manufactured home parks and imposing standards that comply with NFIP minimum requirements. The Department of Health is given authority to exercise the police power of the state on matters of public health and safety. *See generally Ex Parte Company*, 106 Ohio St. 50, 139 N.E. 204 (1922); R.C. 3701.03; R.C. 3701.13; R.C. 3701.34. The public health council is a part of the Department of Health vested with rulemaking and quasi-judicial authority. *See generally* R.C. 3701.02; R.C. 3701.34. As an arm of a state agency, it may exercise only such authority as is expressly conferred by statute or necessarily implied therefrom. *See generally Burger Brewing Co. v. Thomas*, 42 Ohio St. 2d 377, 329 N.E.2d 693 (1975). R.C. 3733.02(A) grants the public health council authority to regulate manufactured home parks, as follows:

The public health council, subject to sections 119.01 to 119.13 of the Revised Code, shall make, and has the exclusive power to make, rules of general application throughout the state governing the issuance of licenses, location, layout, construction, drainage, sanitation, safety, tiedowns, and operation of manufactured home parks. Such rules are not to apply to the construction, erection, or manufacture of any building to which section 3781.06 of the Revised Code is applicable.

R.C. 3733.02(A) states expressly that the public health council has the "exclusive power" to make rules of general application throughout the state governing various aspects of manufactured home parks. This grant of authority does not expressly include the power to require compliance with NFIP standards. It is, however, quite broad and in effect grants the public health council exclusive authority to regulate the matters enumerated therein for purposes of public health and safety. Because the NFIP requirements are themselves directed to health and safety issues, it is apparent that, pursuant to R.C. 3733.02(A), the public health council has exclusive authority to impose upon manufactured home parks many – but arguably not all – of the NFIP minimum requirements. *See* 44 C.F.R. §59.1 (1990).

#### B. Revised Code §1521.14(C)

In light of the exclusive nature of the authority given the public health council in R.C. 3733.02(A), your third question asks whether Sub. S.B. 396 grants the Department of Health sufficient authority to enforce NFIP requirements that are arguably outside the scope of authority granted in R.C. 3733.02(A). The relevant provision of Sub. S.B. 396 is codified at R.C. 1521.14(C)(1), which states:



(C)(1) *Any state agency that funds or finances developments or that has regulatory jurisdiction over the siting of developments for which the state has sole jurisdiction over siting shall require that, before awarding funding or financing or granting a license, permit, or other siting authorization for a development that is or is to be located within a one hundred year floodplain, the applicant therefor demonstrate to the satisfaction of the agency that the development will comply with the flood damage reduction standards established in rules adopted under division (J) of section 1521.13 of the Revised Code. (Emphasis added.)*

R.C. 1521.13(J) provides for the adoption of standards "no more stringent" than the NFIP minimum criteria. The effect of R.C. 1521.14(C)(1), thus, is to expressly authorize the state agencies described therein to regulate development within designated flood hazard areas as is required for participation in the NFIP. With respect to state agencies with regulatory jurisdiction over siting developments, this authority is granted only when the development is one "for which the state has sole jurisdiction over siting." R.C. 1521.14(C)(1).

It is not immediately clear, however, whether this situation is an instance in which the state has "sole jurisdiction over siting." Even though the authority of the public health council under R.C. 3733.02(A) is "exclusive," it does not extend to all matters which might be considered "siting." R.C. 3733.02(A) excludes from the jurisdiction of the public health council "any building to which section 3781.06 of the Revised Code is applicable." Further, the exclusive authority of the public health council to regulate the location of manufactured home parks for purposes of health and safety does not preempt local zoning authority over such parks enacted for purposes of land use planning. 1981 Op. Att'y Gen. No. 81-097. *See generally North Sanitary Landfill, Inc. v. Board of County Commissioners*, 52 Ohio App. 2d 167, 172, 369 N.E.2d 17, 21 (Montgomery County 1976) ("[w]hen different laws are adopted by a common authority [the General Assembly], the initial presumption is that each relates to a different matter and that they are not incompatible or inconsistent"); *Hulligan v. Columbia Township Bd. of Zoning Appeals*, 59 Ohio App. 2d 105, 107, 392 N.E.2d 1272, 1274 (Lorain County 1978) (zoning is "concerned with land use and planning, and the systematic and orderly development of specific areas, or zones, for various uses and utility"). I must, therefore, consider whether either of these factors removes the public health council from the scope of R.C. 1521.14(C)(1).

The apparent intent of R.C. 1521.14(C)(1) is to provide that, when a state agency has been given statutory authority which preempts local governments from regulating a development in accord with NFIP standards, the state agency has sufficient authority to fill the regulatory gap. The requirement of R.C. 1521.14(C)(1) that the state have "sole jurisdiction over siting" must be understood in this context. In other words, when a state agency is the only entity with authority to enforce NFIP requirements with respect to a particular type of development, R.C. 1521.14(C)(1) expressly augments the authority of that state agency to the extent needed to achieve total compliance with NFIP standards.

As discussed above, the public health council has exclusive regulatory jurisdiction over the location of manufactured home parks for reasons of health and safety. The NFIP imposes various requirements for floodplain management for purposes of health and safety. Thus, the public health council has exclusive jurisdiction over the types of factors that are at issue in NFIP regulations. It is clear that a manufactured home park may not be sited without compliance with public health council rules adopted pursuant to R.C. 3733.02(A); the fact that a local zoning authority may disapprove a siting that has been approved by the public health council does not lessen the necessity of compliance with the public health council's rules. Accordingly, the public health council is a state agency with regulatory jurisdiction over the siting of manufactured home parks and such parks are developments "for which the state has sole jurisdiction over siting" for purposes of R.C. 1521.14(C)(1). The public health council must, therefore, before granting a license, permit, or other siting authorization for a manufactured home park in a floodplain, require that the applicant demonstrate compliance with the flood damage reduction standards established in rules adopted under R.C. 1521.13(J).

I note, however, that R.C. 3733.02(A) specifically provides that public health council rules "are not to apply to the construction, erection, or manufacture of any building to which section 3781.06 of the Revised Code applies." Building is defined at R.C. 3781.06(B) as "any structure consisting of foundations, walls, columns, girders, beams, floors, and roof, or a combination of any number of these parts...." R.C. 3781.06(A) provides that virtually all buildings are subject to the jurisdiction of the board of building standards, except one-to three-family dwellings which are not industrialized units and buildings incident to agricultural use of the land. Since, pursuant to R.C. 3733.02(A) the public health council has no regulatory jurisdiction over such buildings, R.C. 1521.14(C)(1) cannot grant the public health council authority to require the buildings to comply with NFIP standards. This, however, does not create a regulatory gap. R.C. 1521.14(C)(1) operates to authorize and require the Board of Building Standards to promulgate the rules necessary to cover R.C. 3781.06 buildings inside manufactured home parks. These rules are then enforced by local building departments certified for that purpose. *See generally* R.C. 3781.10(E).

In specific response to your third question, I conclude that R.C. 1521.14(C)(1), read in conjunction with R.C. 3733.02(A), authorizes the public health council to adopt rules that satisfy National Flood Insurance Plan minimum requirements, 42 U.S.C. §§4001 *et seq.*, with respect to all "development," as defined in 44 C.F.R. §59.1 (1990), in manufactured home parks, except development consisting of buildings regulated by the Board of Building Standards pursuant to R.C. 3781.06. R.C. 1521.14(C)(1) authorizes the Board of Building Standards to adopt and enforce such rules with respect to R.C. 3781.06 buildings located in manufactured home parks. As the above discussion indicates, however, there is a certain degree of ambiguity in the statutes involved. For purposes of clarification, it might be helpful to amend R.C. 3733.02(A) to specify that the public health council has authority to impose all regulations necessary for compliance with the NFIP. In the alternative, R.C. 1521.14(C) should be amended to clarify that it applies whenever state regulatory authority precludes local regulatory entities from imposing and enforcing NFIP requirements.

It is, therefore, my opinion, and you are advised, as follows:

1. Notwithstanding the provisions of R.C. 303.21, R.C. 3781.06, and R.C. 3781.061, R.C. 307.37(A)(2) authorizes a county to include, in its building code, regulations needed for participation in the National Flood Insurance Program, 42 U.S.C. §§4001 *et seq.*, including regulations that govern the prohibition, location, or construction of buildings or structures for agricultural purposes in unincorporated areas of the county located within the floodplain; further, R.C. 307.85 provides general authority for a county to participate in the National Flood Insurance Program by adopting procedures or taking actions that are not prohibited by the Ohio Constitution or in conflict with the laws of Ohio.
2. Because of the exemption provided in R.C. 1521.13(L), it cannot conclusively be determined that, in every instance, there will be a state or local governmental entity with legal authority to regulate an electric light company, or its subsidiaries or affiliates, in such manner as to assure compliance with floodplain management regulations that meet minimum standards established under the National Flood Insurance Plan, 42 U.S.C. §§4001 *et seq.*
3. R.C. 1521.14(C)(1), read in conjunction with R.C. 3733.02(A), authorizes the public health council to adopt rules that satisfy minimum requirements established under the National Flood Insurance Plan, 42 U.S.C. §§4001 *et seq.*, with respect to all "development," as defined in 44 C.F.R. §59.1 (1990), in manufactured home parks, except development consisting of buildings regulated by the Board of Building Standards pursuant to R.C. 3781.06. R.C. 1521.14(C)(1) authorizes the Board of Building Standards to adopt and enforce such rules with respect to R.C. 3781.06 buildings located in manufactured home parks.