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1. VILLAGE—ORGANIZATION NOT COMPLETE UNTIL ELECTION OF OFFICERS—SECTION 3536 G. C.
2. ZONING REGULATIONS—ADOPTED BY COUNTY COMMISSIONERS—TOWNSHIP AFTERWARDS INCORPORATED AS VILLAGE—INTERVAL—REGULATIONS REMAIN IN FULL FORCE UNTIL PROCEEDINGS FOR INCORPORATION OF VILLAGE ARE COMPLETED—ELECTION OF VILLAGE OFFICERS—SECTION 3180-1 ET SEQ., G. C.

## SYLLABUS:

1. The organization of a village is not complete until an election of officers has been held as provided in Section 3536 of the General Code.
2. Zoning regulations adopted by the county commissioners, pursuant to Section 3180-1 et seq., General Code, covering a township which is afterwards incorporated as a village, will remain in full force until the proceedings for the incorporation of such village are completed by the election of village officers.

Dayton, Ohio, December 2, 1952

Hon. Mathias H. Heck, Prosecuting Attorney  
Montgomery County, Dayton, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

In re: In the interval between the creation of a village in a township and the election of officers by the village when the corporate limits of the village are identical to those of the township, are rural zoning regulations for the township adopted previously by the Board of County Commissioners applicable, or are they made non-applicable by the provisions of Section 3180-17 G. C.?

"At an election held in November, 1950, the electors of Van Buren Township, Montgomery County, adopted a plan of zoning for the township pursuant to the provisions of Sections 3180-1 to 3180-25 G. C. A county board of zoning appeals was appointed, zoning regulations were adopted and zoning in the township became effective soon thereafter.

"At the election held in November, 1952, the electors of Van Buren Township voted in favor of incorporating the township into a village by petition to the township trustees under Section 3526 G. C. A majority of the ballots cast at the election held under the law were in favor of incorporation.

"The corporate limits of the village so incorporated are identical to those of the township which brings the effect of the proceedings under Section 3512 G. C.

"Under Section 3530 G. C., a transcript of the proceedings before the township trustees shall be certified to the County Recorder. The County Recorder shall certify the record to the Secretary of State.

"Section 3531 G. C. provides when that is done: 'The corporation shall then be a village under the name adopted in the petition, with all powers and authorities given to villages by this title.'

"Section 3180-17 of the county rural zoning provides as follows: '3180-17 entitled Regulations not applicable within municipalities. Regulations enacted by a board of county commissioners under the authority of this act shall not apply within municipal corporations.'

"Section 3536 G. C. provides that the first election of officers for such corporation may be a special election held at any time not exceeding six months after the incorporation. Unless such special election is held, the first election of officers for such corporation shall be held at the first municipal election after its creation.

"This leaves an interval between the creation of the corporation under Section 3531 and the election of its officers under Section 3536 G. C.

"Under the ruling of the Attorney General in 1912, found on page 1510, Volume two Attorney General's Opinions, he held concerning this interval:

'Therefore the township officers should continue to perform their duties as township officers until such duties can be performed by the newly elected village officers.'

"Under Section 4366-7 villages have the same zoning authority as cities. Under Section 4366-1 villages may establish a city planning commission. Therefore the village may establish its own plan of zoning.

"I do not find that the rural zoning officials can be classified as township officials. There is much conflicting opinion in the township concerning the functioning of rural zoning during this

interval. The planning commission, the trustees are of the opinion that an early ruling from your office will forestall threatened litigation, and help the trustees in their present situation."

Sections 3180-1 to 3180-25, General Code, to which you refer, relate to the adoption of a county zoning plan. Section 3180-17, General Code, reads as follows:

"Regulations enacted by a board of county commissioners under the authority of this act shall not apply within municipal corporations."

The question which you raise appears to me to be closely related to the broader question of the status of a newly formed municipal corporation during the interval between the final steps in its incorporation and the election and qualification of its officers.

The statutes relative to the incorporation of a village are quite ancient and have undergone very little change since their original enactment. In 1869 an act was passed by the General Assembly entitled, "An Act to provide for the organization and government of municipal corporations." This is found in Volume 66 of the Ohio Laws, at page 149 et seq. Chapter II of this Act relates to the creation of incorporated villages, and embodies substantially the same provisions now found in Sections 3517 to 3525, General Code. The method there provided was by proceedings before the county commissioners.

This Chapter II was later embodied in Chapter 2, of Division 2 of Title XII, of the Revised Statutes, and embraced Sections 1553 to 1561a of the Revised Statutes.

In 1896, the General Assembly enacted another series of provisions relative to incorporation of villages, by petition to the township trustees, followed by a favorable vote of the electors. These sections were designated by this Act as Sections 1561a<sup>o</sup> to 1561c, of the Revised Statutes, and later became, in substance, Sections 3526 to 3530 of the General Code. I think it important to note that portion of Section 1561c, Revised Statutes, which read as follows:

"When the recorder has so made said record, he shall certify and forward to the secretary of state, a transcript of the same. The corporation shall then be a village or hamlet, as the case may be, under the name adopted in the petition, with all powers and authorities, and be recognized as such, *the same as if such in-*

*corporation had been organized under chapter 2, division 2, title 12 of the Revised Statutes of Ohio, but no injunction shall be brought, as provided in section 1562 of the Revised Statutes of Ohio, unless the same be instituted within ten days from the filing of the papers with the county recorder; provided, however, that the right of petition to the court of common pleas for error, shall exist as is provided for in the following sections of this chapter.”*

(Emphasis added.)

It will be observed that these two modes of procedure adopted at different times, were tied together by the provisions just quoted, in so far as they relate to the final acts which complete the incorporation of a village. I call special attention to that provision of Section 1561 of the Revised Statutes embodied in the original Act, which read as follows:

*“So soon as said record shall be made, the inhabitants residing within the limits of the territory described in the petition, shall be deemed and held to be an ‘incorporated village for special purposes,’ or ‘an incorporated village, as the case may be, to be organized and governed under the provisions of this act; and so soon as such corporation shall be organized by the election of officers as hereinafter provided, notice of its existence as such shall be taken in all judicial proceedings in this state.”*

(Emphasis added.)

Note that when the record of the incorporation had been made, the territory was deemed to be an incorporated village “to be organized and governed under the provisions of this act.”

The words, “to be organized” contemplate that while the territory has become a village, it yet remains to be organized. I regard as very significant the further provision that, “so soon as such corporation shall be organized by the election of officers as hereinafter provided, notice of its existence as such shall be taken in all judicial proceedings in this state.”

This leads me to the quotation of Section 3525 of the General Code, which reads:

“When the record is made, the corporation shall be deemed the village of \_\_\_\_\_, to be organized and governed under the provisions of this title. Thereupon the recorder shall make, and certify under his official seal, two transcripts of the record, one of which he shall forward to the secretary of state, and, on demand, deliver the other to the agent of the petitioners, with a certificate thereon that the duplicate has been forwarded to the

secretary of state. *When a municipal corporation is organized by the election of its officers, notice of its existence shall be taken in all judicial proceedings.*" (Emphasis added.)

In view of this provision of the Code, which, as I have pointed out, is to apply to a village whether organized through the county commissioners or by action of the township trustees and the vote of the electors, it appears to me very clear that the law does not consider a village organized until it has elected its officers. It is true that after a transcript of the proceedings has been filed with the county recorder, recorded by him and certified to the Secretary of State, as required by Section 3530, General Code, Section 3531, General Code, makes the following provision:

"The corporation shall then be a village under the name adopted in the petition, with all powers and authorities given to villages by this title, \* \* \*."

Standing alone this section might lead to the conclusion that the village is completely and finally organized by the filing of this transcript, without waiting for an election of the first village officers and that the township officers have ceased to have any authority over it. This in my opinion would be a condition that the law would never tolerate, since many months might elapse before an election would be required to be held. The provision for election is found in Section 3536, General Code, which reads as follows:

"The first election of officers for such corporation may be a special election held at any time not exceeding six months after the incorporation at a time to be fixed by the agent of the petitioners. Unless such special election is held, the first election of officers for such corporation shall be at the first municipal election after its creation."

It must be remembered that when a part of a township is annexed to a municipality or is incorporated under the law as a village, it does not cease to be a part of the township, and in my opinion the fact that the whole township has been incorporated as a village does not sever it from its relation to the township, or in any way affect the authority of the township authorities, at least until it is finally organized as such. When that final stage is reached and the village has acquired a set of officers who have qualified as such, then it appears to me that the provisions of Section 3512 would apply. This section reads as follows:

"When the corporate limits of a city or village become identical with those of a township, all township offices shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village, except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employes. Such justices and constables shall be elected at municipal elections. All property, moneys, credits, books, records and documents of such township shall be delivered to the council of such city or village. All rights, interests or claims in favor of or against the township may be enforced by or against the corporation."

Section 3512, supra, is a part of the chapter relating to the classification of municipalities. It is so general in its scope that it can apply as well to the incorporation of a municipality as to changes brought about by annexation or detachment of territory. It will be noted that when the township offices are abolished the duties thereof shall *thereafter* be performed by the corresponding officers of the city or village. This certainly presupposes that the village must have progressed to the point where it has a set of officers who can take over the duties of the township officers; and it is a fair inference that the legislature never intended the township trustees to cease to function until that condition is reached.

The case of State, ex rel. Heffernan v. Serp, 125 Ohio St., 87, while dealing with a different matter yet throws strong light on the question we are considering. That case dealt with the transition of a village into the status of a city pursuant to Sections 3498 and 3499 of the General Code. Section 3498 provides for a proclamation by the Secretary of State announcing the population of all municipalities as shown by the decennial federal census. The section concludes with the following sentence:

"From and after thirty days after the issuance of such proclamation each municipal corporation shall be a city or village, in accordance with the provisions of this title."

Section 3499, General Code, reads as follows:

"Officers of a village advanced to a city, or of a city reduced to a village, shall continue in office until succeeded by the proper officers of the new corporation at the next regular election, and the ordinances thereof not inconsistent with the laws relating to the new corporation shall continue in force until changed or repealed."

The mayor of a certain village which was shown by the proclamation to have become a city, undertook after the lapse of thirty days, to appoint a civil service commission, a function which under Section 486-19, General Code, could only belong to the mayor of *a city*. The question being as to his right so to do, the court held as disclosed by the third paragraph of the syllabus :

"It is the true intent and meaning of Section 3499, General Code, that village officers shall continue in office, with the powers and duties only of village officers until the first regular election after the proclamation of the secretary of state has been filed with the mayor of the municipality as provided by Section 3498, General Code."

Commenting on that proposition the court said in the opinion:

"It is impossible to conceive of a government without officers, and equally impossible to conceive of officers without their duties being defined."

In an opinion of one of my predecessors, to wit, No. 713, Opinions of the Attorney General for 1912, page 1510, it was held:

"When proceedings were had for the incorporation of all the territory comprising Northfield township into a village, under Sections 3526 et seq., General Code, and when an election was held for the officer of such village, under 3536, General Code, which election resulted in a tie vote, as to two candidates for village treasurer; held:

"That under Section 3536, General Code, the election must be conducted as prescribed for the election of township officers and that, therefore, under Section 5113, General Code, the clerk of the township shall determine by lot which of the candidates for village treasurer was elected.

"Although Section 3512, General Code, expressly provides that all township offices shall be abolished, such section does not contemplate the abolition of such offices until after the village organization has been perfected and after its officers have been elected."

In the opinion, at page 1513, it was said:

"It is not the purpose of the statute that the territory shall be entirely without officers and government during the interval between the incorporation of the village and the election of the first officers. On the other hand the statute contemplates that the

township officers shall continue in office until the new village officers have been elected and qualified. The newly incorporated territory is a village *in name* from the time of its incorporation but it is not in full organization until the officers are elected and qualified."

(Emphasis added.)

Cited with approval in Opinion No. 2413, Opinions of the Attorney General for 1925, page 244. I heartily concur in the last above quoted statement.

The foregoing discussion leads me to the certain conclusion that the proposed village to which your letter refers, is only in the planning stage, and will not be a village in the legal sense until its first officers have been elected. Until that final step has been taken it is a village in name only.

It follows that the provision of Section 3180-17 supra, that "regulations enacted by a board of county commissioners under the authority of this act shall not apply within municipal corporations" would have no application to the situation you present, since there is not as yet any municipal corporation embracing any portion of the territory which has been zoned. It follows further that until the proposed village in Van Buren Township has been duly organized as a village, all of the zoning regulations established for that township will continue in force and all boards and officers set up in connection with such zoning will continue to exercise their powers and perform their duties.

This conclusion is not in conflict with the opinion of my immediate predecessor, viz., No. 2499, Opinions of the Attorney General for 1950, page 734. It was there held:

"Where a township zoning plan has been effected under the provisions of Section 3180-27 et seq. of the General Code, and a part or all of the area in such plan is incorporated into a municipality or is annexed to a municipality, the regulations affecting such zone shall cease to apply to such area incorporated or annexed when such incorporation or annexation is effected."

The question there under consideration was as to what would happen to township zoning regulations if all or a portion of a township included in zoned territory should be annexed to a city or incorporated into a village. There was no question raised and no discussion as to the steps necessary to incorporate a village, or as to when the incorporation is complete.

Accordingly, in specific answer to your question, it is my opinion:

1. The organization of a village is not complete until an election of officers has been held, as provided in Section 3536 of the General Code.
2. Zoning regulations adopted by the county commissioners, pursuant to Section 3180-1 et seq., General Code, covering a township which is afterwards incorporated as a village, will remain in full force until the proceedings for the incorporation of such village are completed by the election of village officers.

Respectfully,

C. WILLIAM O'NEILL

Attorney General