

OPINION NO. 74-003**Syllabus:**

Neither the board of health of a general health district, nor a county or regional planning commission, may by regulation require the owner of unimproved residential land to secure the approval of such board or commission for the sewage facilities before presenting a conveyance of title to the county auditor for recording.

To: Harry A. Sargeant, Jr., Sandusky County Pros. Atty., Fremont, Ohio
By: William J. Brown, Attorney General, January 21, 1974

Your request for my opinion reads as follows:

"I respectfully request your opinion as to whether or not a County Health Department can enact a rule or regulation which would require an owner of a parcel of unimproved residential land to secure the approval of the Board of Health as to the sewage facilities for the land

prior to presenting an instrument of conveyance therefor to the county auditor for transfer of record title.

"If such a regulation could not be made by the County Health Department, could a County or Regional Planning Commission enact such a regulation."

Under the Hughes and Griswold Acts, enacted in 1919, the powers of local health administration were removed from the municipalities and conferred upon newly created health districts which cover the entire state and which derive their authority directly from the state. Each city now constitutes a "city health district," and the townships and villages of each county constitute a "general health district." R.C. 3709.01; State, ex rel. Cuyahoga Heights v. Zangerle, 103 Ohio St. 566 (1920); State, ex rel. Mowrer v. Underwood, 137 Ohio St. 1,4-5 (1940); Opinion No. 71-078, Opinions of the Attorney General for 1971; Opinion No. 72-088, Opinions of the Attorney General for 1972. Each district is headed by a board of health. R.C. 3709.02 and 3709.05.

In general, the boards are empowered to take measures to prevent, abate and remove all nuisances deleterious to the public health and comfort. Thus, R.C. 3707.01 provides as follows:

"The board of health of a city or general health district shall abate and remove all nuisances within its jurisdiction. It may, by order, compel the owners, agents, assignees, occupants, or tenants of any lot, property, building, or structure to abate and remove any nuisance therein, and prosecute such persons for neglect or refusal to obey such orders. Except in cities having a building department, or otherwise exercising the power to regulate the erection of buildings, the board may regulate the location, construction, and repair of water closets, privies, cesspools, sinks, plumbing, and drains. In cities having such departments or exercising such power, the legislative authority, by ordinance, shall prescribe such rules and regulations as are approved by the board and shall provide for their enforcement.

"The board may 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.

"When a building, erection, excavation, premises, business, pursuit, matter, or thing, or the sewerage, drainage, plumbing, or ventilation thereof is, in the opinion of the board, in a condition dangerous to life or health, and when a building or structure is occupied or rented for living or business purposes and sanitary plumbing and sewerage are feasible and necessary, but neglected or refused, the board may declare it a public nuisance and order it

to be removed, abated, suspended, altered, or otherwise improved or purified by the owner, agent, or other person having control thereof or responsible for such condition, and may prosecute him for the refusal or neglect to obey such order. The board may, by its officers and employees, remove, abate, suspend, alter, or otherwise improve or purify such nuisance and certify the costs and expense thereof to the county auditor, to be assessed against the property and thereby made a lien upon it and collected as other taxes."

In furtherance of these powers, the boards of health are given authority to adopt such rules and regulations as are necessary. R.C. 3709.20, 3709.21. The latter Section, which governs the board of a general health district, provides in part as follows:

"The board of health of a general health district 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. Such board may require that no human, animal, or household wastes from sanitary installations within the district be discharged into a storm sewer, open ditch, or watercourse without a permit therefor having been secured from the board under such terms as the board requires. * * *"

It will have been noted that the language of R.C. 3707.01, provides a board of health with various means to enforce its orders and regulations, and an examination of Chapters 3707. and 3709. of the Revised Code reveals that the General Assembly has given the board the option of exercising various other specific methods of enforcement. Thus, R.C. 3707.02 provides in part:

"When an order of the board of health of a city or general health district, made pursuant to section 3707.01 of the Revised Code, is neglected or disregarded, in whole or in part, the board may elect to cause the arrest and prosecution of all persons offending, or to perform, by its officers and employees, what the offending parties should have done. If the latter course is chosen, before the execution of the order is begun, the board shall cause a citation to issue and be served upon the persons responsible, if residing within the jurisdiction of the board, but if not. such citation shall be mailed to such persons by registered letter, if the address is known or can be found by ordinary diligence. * * *

"If the persons cited appear, they shall be fully apprised of the cause of complaint and given a fair hearing. The board shall then make such order as it deems proper, and if material or labor is necessary to satisfy the order, and the persons cited promise, within a definite and reasonable time, to furnish them, the board shall grant such time. If no promise is made, or kept, the board shall furnish the material and labor, cause the work to be done, and certify the cost and ex-

pense to the county auditor. If the material and labor are itemized and the statement is accompanied by the certificate of the president of the board, attested by the clerk, reciting the order of the board and that the amount is correct, the auditor has no discretion, but shall place such sum against the property upon which the material and labor were expended, which shall, from the date of entry, be a lien upon the property and be paid as other taxes are paid."

And R.C. 3709.211 provides as follows:

"When an order of the board of health of a city or general health district made pursuant to section 3709.20 or 3709.21 of the Revised Code is not complied with in whole or in part, the board may petition the court of common pleas for injunctive or other appropriate relief requiring all persons to whom such order of the board is directed to comply with such order. The court of the county in which such offense is alleged to be occurring may grant such injunctive or other appropriate relief as the equities of the case require."

See also R.C. 3707.021, 3707.04, 3707.48, 3707.49, 3707.51, 3707.53, 3707.99, 3709.22, 3709.99.

All legislative power remains, of course, in the General Assembly, and the rules and regulations which a board of health may adopt are only in implementation of the authority granted to it by the Assembly and may not exceed that authority. In the syllabus of Weber v. Board of Health, 148 Ohio St. 389 (1947), the Court said:

"Under the provisions of Section 1261-42, General Code *R.C. 3709.211, the board of health of a general health district has a wide latitude in making and enforcing rules and regulations for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisance, but when such board passes a resolution which prohibits a business not unlawful in itself and which is susceptible to regulations which will prevent it from becoming either a health menace or a nuisance, such board transcends its administrative rule-making power and exercises legislative functions in violation of Section 1 of Article II of the Constitution of Ohio."

In the opinion striking down the regulation by which the board of health attempted to suppress a nuisance in that case the Court said (148 Ohio St. at 398-399):

"If plaintiff or anyone else violates any provision of that statute, he can be tried, convicted and punished in accordance therewith, but nowhere has it been claimed that the mere feeding of swine with animal or vegetable waste is of itself detrimental to health. In fact, the resolution permits the feeding of such waste if produced on the premises, and it is difficult to see how waste produced on the premises can be different

in its effect than waste gathered from hotels and restaurants. Surely the board of health could effectively and reasonably regulate the importation of waste products so that they would in no way constitute a menace to the health or welfare of the community, without the necessity of an absolute prohibition of such importation and thus discriminate between the waste produced on the premises and that brought from the outside."

The regulation proposed in your request would require the owner of unimproved residential land to secure the board's approval of the sewage facilities before presenting a conveyance of title to the county auditor for recording. This seems to be clearly an effort by the board to enforce its other regulations designed to prevent nuisances deleterious to the public health. As we have just seen, the General Assembly has given to the boards of health numerous specific methods of enforcement, but the proposed regulation does not fit into any of these categories. It is, therefore, beyond the authority of the board. In another recent opinion, the question was the validity of a municipal ordinance which prohibited a building and loan association, which had contracted to finance the purchase of a dwelling, from disbursing the escrow funds until the seller had obtained a certificate from municipal building authorities. In holding the ordinance invalid, I pointed out that building and loan associations are regulated exclusively by the state, and that the ordinance, which was designed to enforce the municipal building code, was in conflict with the general law of the state. Opinion No. 73-098, Opinions of the Attorney General for 1973; see also Opinion No. 73-039, Opinions of the Attorney General for 1973. In my opinion, an effort by the board of health to adopt a method of enforcement, not included among the specific methods granted to it by the General Assembly, would also conflict with the general laws of the state.

Furthermore, the proposed regulation appears to add another requirement over and above the general laws of the state providing that all transfers of title be approved by the county auditor and recorded with the county recorder. R.C. 317.22, 319.20, 319.202, 5301.25, 5309.37. The duties imposed by these Sections of the Revised Code upon the auditor and recorder have been held to be mandatory. Opinion No. 69-139, Opinions of the Attorney General for 1969. Consequently, they would have to act without regard for such a regulation of the board of health.

The same reasoning applies to a county or regional planning commission. To begin with, such bodies are, as the name clearly implies, primarily planning agencies. They have the power only to recommend regulations, including those covering sewage facilities, which must be complied with before the plat of a new subdivision can be approved. The regulations have no force and effect until adopted by the board of county commissioners. But the power to determine whether the plat complies with the regulations has been delegated by the General Assembly to the planning commission. In a recent opinion, Opinion No. 72-020, Opinions of the Attorney General for 1972, after quoting the pertinent Sections of the Revised Code (R.C. 711.001, 711.10, 711.101, 711.102, 713.21, 713.23), I summarized the authority of a planning commission as follows:

"To summarize briefly the general purport of the above statutes, the owner of undeveloped land who wishes to develop it, either by subdividing

it into lots to be sold to individual purchasers, or by improving the entire tract himself for residential, commercial or industrial purposes, must submit a plat of the subdivision showing the portions of the tract which are to be allocated for use as streets, easements, or common open spaces. Where a regional planning commission has been established, the authority to formulate rules and regulations governing the submission of plats in the region and the ultimate approval of such submitted plats has been delegated to the commission. The rules and regulations must provide for a proper arrangement of streets, for adequate open spaces for traffic, utilities, light and air, and for avoidance of congestion of population, and such rules must be approved by the boards of county commissioners in the region. If the regional planning commission refuses to approve a submitted plat, the person submitting it is allowed sixty days within which to petition the court of common pleas for a review of the board's action."

See also Opinion No. 73-040, Opinions of the Attorney General for 1973. It is apparent, therefore, that a planning commission could not itself enact the type of regulation proposed in your letter.

Nor do I think the board of county commissioners could adopt such a regulation on the recommendation of the planning commission. This would, again, be a method for enforcement of the platting regulations. But the General Assembly has already provided a specific enforcement measure in R.C. 711.012, under which a civil action may be brought in the court of common pleas for a forfeit of up to \$1000 for violations of such regulations. Neither the planning commission nor the board of county commissioners may, by regulation, authorize a different method of enforcement.

In specific answer to your question it is my opinion, and you are so advised, that neither the board of health of a general health district, nor a county or regional planning commission, may by regulation require the owner of unimproved residential land to secure the approval of such board or commission for the sewage facilities before presenting a conveyance of title to the county auditor for recording.