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1. TOWNSHIP TRUSTEES—SECTION 519.02 ET SEQ. R. C.—MAY PROVIDE IN ZONING REGULATIONS FOR INSPECTION OF PROPOSED BUILDING, ERECTION OR ALTERATION PERMITS, PAYMENT OF REASONABLE FEES FOR INSPECTION AND ISSUING PERMITS.
2. TOWNSHIP TRUSTEES—NO AUTHORITY TO IMPOSE FEES—EXCEPT BY ZONING REGULATIONS PROVISION OR AMENDMENT—SECTION 519.12 R. C.
3. ENFORCEMENT—TOWNSHIP TRUSTEES—NO AUTHORITY TO REQUIRE BOARD OF EDUCATION TO SECURE PERMIT FOR PUBLIC SCHOOL BUILDING.

SYLLABUS:

1. A board of township trustees, in adopting zoning regulations as authorized by Section 519.02 et seq. of the Revised Code, and being authorized by Sections 519.16 and 519.17 Revised Code, to provide for inspection of buildings proposed to be erected or altered in the zoned area and to require permits for such erection or alteration, has implied power to provide in such regulations for the payment of reasonable fees for issuing such permits and for such inspection.

2. The township trustees are without authority to impose such fees except by provision in such zoning regulations or by amendment thereto adopted as provided by Section 519.12, Revised Code.

3. In the enforcement of zoning regulations adopted by a board of township trustees, pursuant to Section 519.02 et seq. Revised Code, the trustees are without authority to require that a permit be secured by a board of education for the erection of a public school building.

Columbus, Ohio, September 14, 1956

Hon. Alva J. Russell, Prosecuting Attorney
Summit County, Akron, Ohio

Dear Sir:

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

“The Board of Trustees of Richfield Township, Summit County, Ohio, have duly enacted a comprehensive zoning plan for the unincorporated area of said Township. Pursuant to Section 519.16 R. C., their resolution provides for a zoning inspector

and a system of permits, and provides that no person shall build without obtaining a building permit.

“Nothing in the resolution provides for fees payable by the person receiving a permit, but the Board of Trustees, at various times by resolution, have established fees to be paid by applicants for zoning permits. These resolutions setting fees are not passed as part of the zoning resolution; neither is the statutory procedure of zoning amendments followed as provided by Section 519.12 R. C. They have recently set a fee of one and one-half cent per square foot for residential building, and one cent per square foot for public buildings, not to exceed \$50 maximum.

“The Bath-Richfield Board of Education, having recently purchased a building site in Richfield Township, have started construction of a new elementary school building on said site. The Zoning Inspector insists that the school board obtain a building permit, that he has the right of inspection of said building, and upon receiving the maximum charge of \$50 for the permit.

“I have been requested to ask your opinion on the following :

“1. Does a board of township trustees have the legal right to charge a fee for a zoning permit in the absence of specific authority in the zoning sections of the Revised Code, 519.01 et seq.?

“2. If the answer to question one is yes, must such fee system be set up in the Zoning Resolution in accordance with the statutory procedure provided for by R. C. 519.01 et seq.?

“3. Is a proposed public school building within the jurisdiction of a township zoning resolution so that a permit need be applied for by a board of education?”

The provisions of the statute relative to township zoning are found in Chapter 519 of the Revised Code. In Section 519.02, Revised Code, it is provided :

“The board of Township Trustees may 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, 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."

The sections which follow outline the procedure required leading to the final adoption by the township trustees, of the zoning resolution. Section 519.16, Revised Code, provides in part as follows:

"For the purpose of enforcing the zoning regulations, the board of township trustees may provide for a system of zoning certificates, and for this purpose may establish and fill the position of township zoning inspector, together with such assistants as the board deems necessary, fix the compensation for such positions, and make disbursements for them. * * *"

Section 519.17, Revised Code, reads as follows:

"No person shall locate, erect, construct, reconstruct, enlarge, or structurally alter any building or structure within the territory included in a zoning resolution without obtaining a zoning certificate, if required under section 519.16 of the Revised Code, and no such zoning certificate shall be issued unless the plans for the proposed building or structure fully comply with the zoning regulations then in effect."

Underlying all of your questions it should be noted that all zoning regulations, whether by municipalities, counties, or townships, are based upon the exercise of police power inherent in the state. Under this power it is recognized by numerous authorities that the right of private property and its free enjoyment, which is guaranteed by the Fourteenth Amendment to the Constitution of the United States, and recognized by the several states, is not absolute but must yield to a certain extent to the superior interests of the public. This overriding right of the public is well stated by Sedgwick on Statutory and Constitutional Law, page 499:

"All property is derived directly or indirectly from the government and is held subject to those general regulations which are necessary to the common good and general welfare. Likewise, all property like other social and conventional rights, is subject to such reasonable restraint and regulations established by law, as the legislature under the governing and controlling power vested in them, may think necessary and expedient."

Moreover, let it be noted that the power to establish zoning regulations, which is well established by the decisions of the United States and our own

state, is rested exclusively on a consideration of the public health, safety and public morals. This principle was announced as to a municipal zoning ordinance by our Supreme Court in *Pritz v. Messer*, 112 Ohio St., 628, where the court held, as shown by the first syllabus :

“1. Laws enacted in the proper exercise of the police power, which are reasonably necessary for the preservation of the public health, safety and morals, even though they result in the impairment of the full use of property by the owner thereof, do not constitute a ‘taking of private property’ within the meaning of the constitutional requirements as to making compensation for the taking of property for public use and as to the deprivation of property without due process of law.”

The court further held that an ordinance of a municipality “dividing the whole territory of a municipality into districts according to a comprehensive plan, which in the interest of the public health, public safety and public morals regulates the uses and location of buildings etc.,” was a valid and constitutional enactment.

A year later, in a strong statement of the same principles the Supreme Court of the United States, in the case of *Amber v. Village of Euclid*, 272 U. S., p. 365, announced the same conclusion and reaffirmed the same principles.

With this background I proceed to a consideration of the several questions which you have submitted.

1. You inquire whether the township trustees have the right to charge a fee for a zoning permit. I have already pointed out the provisions of the law which require any person before locating, erecting or constructing any building within the territory included within a zoning resolution, to obtain a zoning certificate, and as a condition precedent to obtaining such certificate to submit plans for the proposed building, which must be found to comply with the zoning regulations. I have also called attention to the power of the township trustees to establish and fill the position of township zoning inspector. Plainly, the purposes of these positions could not be carried out without an inspection not only of the plans but also of the structures erected pursuant thereto. These services must certainly involve an expenditure on the part of the township.

The question then arises whether or not the authority given to the township trustees to establish these zoning regulations, to issue permits for

any building or structure which might be affected by them, and to create an inspection department, gives rise to a right on the part of the township trustees to establish a schedule of fees for the issuance of such permits and for such inspection. In the case of Realty Company v. Youngstown, 118 Ohio St., 204, the question was presented to the court as to the validity of a city ordinance which provided for the payment of fees to a planning commission of the city for examining and checking plats of lands in the three mile zone outside of the city. There was no specific grant in the statutes of authority to charge such fees. The court held as shown by the second syllabus:

“A city ordinance which provides for payment of fees to the planning commission of such city for examining and checking plats of lands within such city or within three miles of the corporate limits of such city is valid so far as amount of fees is concerned, if the fees permitted to be charged by the provisions of such ordinance are reasonable and designed to cover the cost and expense of maintaining the planning commission.”

The court, at page 214 said:

“* * * It is not necessary that the statute should specifically give to the municipality power to charge and collect a fee to cover the cost of inspection and regulation. *Where the authority is lodged in the municipality to inspect and regulate, the further authority to charge a reasonable fee to cover the cost of inspection and regulation will be implied. * * **” (Emphasis added.)

The court, in the course of its opinion, pointed out that municipalities have the right under their home rule powers granted by Article XVIII of the Constitution, to provide for inspection in such matters without statutory authority within their own limits, but that they would have no extra-territorial authority without a grant from the legislature. The above case was relied upon and applied by the Court of Common Pleas of Summit County in the case of McGowen v. Shaffer, 65 O. L. A., 138, which case involved the validity of a sanitary code passed by the Summit County Board of Health. The fifth headnote of that opinion, reads as follows:

“Where authority is given the board of health of a general health district to regulate plumbing, it follows that to regulate they must inspect, and impliedly, the right to inspect gives the board the right to charge for that inspection.”

While it is true that that case involved regulations of the board of health, the principle stated is equally applicable to regulations contained

in the zoning resolution, because, as already pointed out, zoning regulations are also based upon considerations of public health, safety and welfare, and are adopted as a part of the exercise of the police power.

I conclude, therefore, that it is within the power of the township trustees in adopting zoning regulations to impose reasonable fees to cover the cost of issuing permits and making inspections contemplated by the law.

2. Your second question seems to arise out of the statement in your letter that the provisions for fees for the issuance of permits and for making inspections were not contained in the zoning resolution adopted by the township trustees under Section 519.02, Revised Code, but were adopted from time to time after the adoption of such zoning resolution and without formal procedure by way of amendment of the zoning resolution. It seems evident that an attempt on the part of the trustees to enact regulations in an informal way, either prescribing or changing fees, would be an attempt to amend the zoning regulations without compliance with the law. The process of amendment is set forth in Section 519.12, Revised Code, in which it is stated:

“Amendments or supplements to the zoning resolution may be made as provided by sections 519.02 to 519.11, inclusive, of the Revised Code, * * *”

I am clearly of the opinion that the procedure which appears to have been taken is not within the power of the township trustees and that regulations so adopted and fees so imposed would not be valid.

3. Your third question is as follows:

“Is a proposed public school building within the jurisdiction of a township zoning resolution so that a permit need be applied for by a board of education?”

It seems to be well settled that a regulation adopted by any political subdivision or by any board or commission thereof, can have no effect to control the action of the State or the location or erection of buildings by the State. In Opinion No. 5110, Opinions of the Attorney General for 1955, page 182, I held:

“A board of county commissioners is without authority to impose a building inspection or to exact an inspection fee under county regulations for the inspection of buildings constructed by the Ohio Turnpike Commission and owned by the State of Ohio.”

That opinion was based largely on the proposition that the turnpike commission is an agency of the state, and the state being sovereign is not subject to regulations which a subdivision is authorized to impose on *persons*, in the absence of express provision in the statute making the state and its agencies subject to such regulations.

It remains, therefore, to consider whether the relation of the school system to the State is such that the same rule would apply in reference to the location and erection of public school buildings. In the case of *Niehaus v. State, ex rel. Board of Education*, 111 Ohio St., 47, the question was whether the building regulations adopted by a city were applicable to a public school building, to the extent that the city might charge a fee as a condition precedent to the issuance of a building permit. It was held as shown by the syllabus:

"2. The General Assembly of the state having enacted a general law requiring the building inspection departments of municipalities having a regularly organized building inspection department to approve plans for the construction of public school buildings erected within such municipalities, a municipality is without power to thwart the operation of such general law by the enactment of an ordinance requiring the payment of a fee as a condition precedent to compliance therewith."

The court in the course of the opinion referred to the provisions of the Constitution placing the entire conduct of the public schools in the hands of the legislature, particularly Section 3 of Article VI which provides:

"Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds."

The opinion at page 52, proceeds as follows:

"The state in the exercise of its police power enacted Section 1035, General Code, and thereby made it the duty of the building inspection department of cities having such department regularly organized to pass upon the plans of buildings such as the schoolhouse here in question."

After discussing the home rule powers of municipalities and the limitation on such powers the court said:

"Hence, the power to exercise sovereignty in local self-government, and local police power not in conflict with general

law, does not confer upon municipalities the power to enact and enforce legislation which will obstruct or hamper the sovereign in the exercise of a sovereignty not granted away.”

Certainly the principle thus applied to a city, which has very large powers under the home rule provisions of the Constitution, would apply with even greater force to a county or township. Furthermore, the statute involved in that case did give the city authority to pass on the plans for a school building, whereas the law which we are now considering contains no such grant of authority.

It is accordingly my opinion that the trustees of a township in adopting and enforcing a zoning resolution, would be without authority to require a board of education to secure a permit for the erection of a public school building within the zoned area of such township.

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

1. A board of township trustees, in adopting zoning regulations as authorized by Section 519.02 et seq. of the Revised Code, and being authorized by Sections 519.16 and 519.17 Revised Code, to provide for inspection of buildings proposed to be erected or altered in the zoned area and to require permits for such erection or alteration, has implied power to provide in such regulations for the payment of reasonable fees for issuing such permits and for such inspection.

2. The township trustees are without authority to impose such fees except by provision in such zoning regulations or by amendment thereto adopted as provided by Section 519.12, Revised Code.

3. In the enforcement of zoning regulations adopted by a board of township trustees, pursuant to Section 519.02 et seq., Revised Code, the trustees are without authority to require that a permit be secured by a board of education for the erection of a public school building.

Respectfully,

C. WILLIAM O'NEILL

Attorney General