

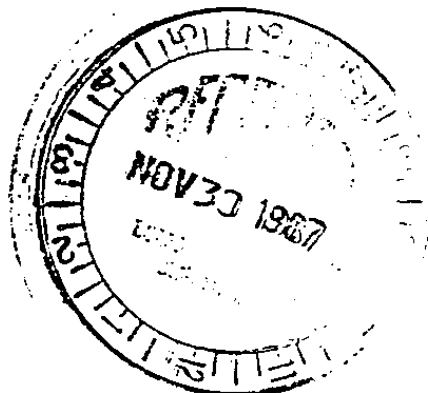
OCT 30 1987

87 081

The Honorable Michael Miller
Franklin County Prosecuting Attorney
Hall of Justice
369 South High Street
Columbus, Ohio 43215

SYLLABUS:

1. A free-standing billboard which possesses the components necessary to constitute a "building," as that term is defined in R.C. 3781.06(B), is subject to regulation by the Board of Building Standards.
2. Pursuant to the zoning powers conferred upon a board of county commissioners and a board of township trustees by R.C. 303.02 and R.C. 519.02, respectively, such boards may regulate by resolution the location, height, bulk, and size of free-standing billboards in the unincorporated area of such county or township.





Attorney General
Anthony J. Celebrezze, Jr.

OCT 30 1987

OPINION NO. 87 081

The Honorable Michael Miller
Franklin County Prosecuting Attorney
Hall of Justice
369 South High Street
Columbus, Ohio 43215

Dear Prosecutor Miller:

I have before me your opinion request concerning the regulation of the structural characteristics of free-standing billboards which are not associated with another use of the premises on which they are located in the unincorporated areas of the county. You specifically ask:

1) Is a free standing billboard, not associated with another use of a premises and situated in an unincorporated area, within the jurisdiction of the Ohio Board of Building Standards and subject to the rules and regulations promulgated by that agency which deal with [structural] characteristics of such billboards?

2) If such free standing billboards are not subject to Ohio Board of Building Standards regulation, may a county or township undertake such regulation; if so, under what authority would such regulation be undertaken?

3) If neither the Board of Building Standards or county or township may regulate the structural characteristics of such billboard[s], are they subject to regulation by any governmental agency?

Your first question concerns the authority of the Board of Building Standards with respect to the regulation of the structural characteristics of free-standing billboards in the unincorporated areas of the county. As stated in 1986 Op. Att'y Gen. No. 86-076 at 2-422: "The Board of Building Standards is a creature of statute with such authority, express or implied, as it is granted by statute." It is, therefore,

necessary to examine various provisions of R.C. Chapter 3781 concerning the powers and duties of the Board of Building Standards.

Initially, I note that R.C. 3781.06 sets forth the general requirements for the construction and maintenance of buildings. R.C. 3781.06 states:

Any building which may be used as a place of resort, assembly, education, entertainment, lodging, dwelling, trade, manufacture, repair, storage, traffic, or occupancy by the public, and all other buildings or parts and appurtenances thereof erected within this state shall be so constructed, erected, equipped, and maintained that they shall be safe and sanitary for their intended use and occupancy, except that sections 3781.06 to 3781.18 and 3791.04 of the Revised Code, shall be considered as model provisions with no force and effect when applied to single-family, two-family, and three-family dwelling houses which have not been constructed or erected as industrialized one-family, two-family, or three-family units or structures within the meaning of the term "industrialized unit" as provided in section 3781.10 of the Revised Code, except where the context specifies mandatory applicability. Sections 3781.06 to 3781.18 and 3791.04 of the Revised Code shall not apply to buildings, or structures which are incident to the use for agricultural purposes of the land on which such buildings or structures are located, provided such buildings or structures are not used in the business of retail trade. Sections 3781.06 to 3781.18 and 3791.04 of the Revised Code shall not apply to existing single-family, two-family, and three-family detached dwelling houses for which applications have been submitted to the director of human services pursuant to section 5104.03 of the Revised Code for the purposes of operating type A family day-care homes as defined in section 5104.01 of the Revised Code.

As used in these sections:

(A) "Agricultural purposes" include agriculture, farming, dairying, pasturage, apiculture, horticulture, floriculture, viticulture, ornamental horticulture, olericulture, pomiculture, and animal and poultry husbandry;

(B) "A building" is any structure consisting of foundations, walls, columns, girders, beams, floors, and roof, or a combination of any number of these parts, with or without other parts or appurtenances.

A building is considered safe when free from danger or hazard to the life, safety, health, or welfare of persons occupying or frequenting it, or of the public and from danger of settlement, movement, disintegration, or collapse, whether such danger arises from the methods or materials of its construction or from equipment installed therein, for the purpose of lighting, heating, the transmission or utilization of electric current, or from its location or otherwise.

A building is sanitary when it is free from danger or hazard to the health of persons occupying or frequenting it or to that of the public, if such danger arises from the method or materials of its construction or from any equipment installed therein, for the purpose of lighting, heating, ventilating, or plumbing. (Emphasis added.)

Pursuant to R.C. 3781.06, all structures, with certain exceptions, which come within the definition of the word "building," as set forth in R.C. 3781.06(B), must be "so constructed, erected, equipped, and maintained that they shall be safe and sanitary for their intended use and occupancy."

In order to carry out the purposes of R.C. 3781.06-.18 the Board of Building Standards shall:

(A) Formulate and adopt rules governing the erection, construction, repair, alteration, and maintenance of all buildings or classes of buildings specified in section 3781.06 of the Revised Code, including land area incidental thereto, the construction of industrialized units, the installation of equipment, and the standards or requirements for materials to be used in connection therewith. Such standards shall relate to the conservation of energy in and to the safety and sanitation of such buildings. The rules shall be the lawful minimum requirements specified for such buildings or industrialized units, except that no rule which specifies a higher requirement than is imposed by any section of the Revised Code shall be enforceable; the rules shall be acceptable as complete lawful alternatives to the requirements specified for such buildings or industrialized units in any section of the Revised Code; and the board shall on its own motion, or on application made under sections 3781.12 and 3781.13 of the Revised Code, formulate, propose,

adopt, modify, amend, or repeal the rules to the extent necessary or desirable to effectuate the purposes of sections 3781.06 to 3781.18 of the Revised Code. (Emphasis added.)

R.C. 3781.10. Thus, the Board of Building Standards has a duty to promulgate rules governing, among other things, the erection, construction, repair, alteration, and maintenance of those buildings or classes of buildings specified in R.C. 3781.06, including land area incidental thereto, and the standards or requirements for materials to be used in connection therewith. See 1978 Op. Att'y Gen. No. 78-041; 1977 Op. Att'y Gen. No. 77-058; 1956 Op. Att'y Gen. No. 6382, p. 247. Further authority for the Board of Building Standards to adopt rules is found in R.C. 3791.04 which empowers the Board to adopt rules concerning the approval of building plans and specifications.

In order to determine whether the type of structure to which you refer as a "free-standing billboard" is subject to regulation by the Board of Building Standards, it is necessary to determine whether such a billboard comes within the definition of a "building" as described in R.C. 3781.06(B). Although your opinion request does not specify the manner in which the billboards about which you ask are constructed, it appears that the broad definition of "building" set forth in R.C. 3781.06(B) would ordinarily include such billboards. As set forth above, a "building" is defined as, "any structure consisting of foundations, walls, columns, girders, beams, floors, and roof, or a combination of any number of these parts, with or without other parts or appurtenances." R.C. 3781.06(B). It is not possible to determine whether every structure to which you refer as a free-standing billboard meets the definition of a building. Such a determination would have to be made by examination of the particular structure. It is apparent, however, that most such structures would have to consist of at least a combination of one or more of the elements specified in R.C. 3781.06(B), and would, thus, constitute a building as defined in that division. See Op. No. 77-058 at 2-210 ("[i]n light of the broad nature of the definition of 'building' set forth in R.C. 3781.06, it is apparent that the scope of structures subject to the coverage of Chapter 3781 is also quite broad"). In answer to your question, I conclude, therefore, that to the extent that a free-standing billboard consists of a combination of any number of the parts described in R.C. 3781.06(B), it is a building subject to, among other things, the requirements of R.C. 3781.06 concerning safety and sanitation and the rules promulgated by the Board of Building Standards under R.C.

3781.10(A). Cf. Op. No. 78-041 (to the extent that a "tent" or a "place of outdoor assembly" possesses the necessary component parts as outlined in R.C. 3781.06(B), it may be regulated as a "building" by the Board of Building Standards).

Concerning regulation of the structural characteristics of free-standing billboards by the Board of Building Standards, I refer you to 5 Ohio Admin. Code 4101:2-19-99, which, in defining the scope of the chapter, states in part:

1900.1 Scope: This chapter of the OBBC shall include "Article 19" of the "BOCA Basic/National Building Code," entitled "Signs," except for amendments, deletions and substitutions as set forth herein.

The provisions of this article shall govern the construction, alteration, repair and maintenance of all signs attached to the buildings or structures or incidental to the land use thereof, together with their appurtenant and auxiliary devices in respect to structural and fire safety.^[1] (Emphasis added and footnote deleted.)

1 5 Ohio Admin. Code 4101:2-19-99 states in part: "The provisions of this article shall govern the construction, alteration, repair and maintenance of all signs attached to the buildings or structures or incidental to the land use thereof...." (Emphasis added.) I note, however, that a free-standing billboard which possesses the requisite components is, itself, a "building," as defined in R.C. 3781.06(B). It is, therefore, subject to the statutory requirements for the construction of any such structure, whether or not it is considered to be a sign for purposes of 5 Ohio Admin. Code Chapter 4101:2-19. See generally Ohio Basic Building Code (OBBC) §201 (defining "sign" and "ground sign"). Whether or not the free-standing billboards about which you ask are subject to OBBC Article XIX, they do, if possessed of the necessary components outlined in R.C. 3781.06(B), constitute buildings subject to regulation by the Board of Building Standards. See 1977 Op. Att'y Gen. No. 77-058 at 2-210 ("[i]n interpreting any statutory enactment, it is necessary to first look to the actual words used by the General Assembly in its definition. Where the General Assembly defines terms that are used in a statute, the well-settled rule is that such definitions must control in the application of the statute. In light of the broad nature of the definition of 'building' set forth in R.C. 3781.06, it is apparent that the scope of structures subject to the coverage of Chapter 3781 is also quite broad" (citation omitted)).

I note that 5 Ohio Admin. Code 4101:2-2-01 (OBBC §201) prescribes general definitions of terms used in Ohio Admin. Code Chapter 4101. The word "sign" is defined in part as: "Any fabricated sign or outdoor display structure, including its structure...constructed, attached, erected, fastened or manufactured in any manner whatsoever so that the same shall be used for the attraction of the public to any place, subject, [or] person...and displayed in any manner out of doors for recognized advertising purposes." (Emphasis added.) Contained within this definition are various types of signs, including a "ground sign," defined as, "[a] sign supported by uprights or braces in or upon the ground surface." See generally rule 4101:2-2-01 (defining a "structure" as, "[t]hat which is built or constructed"). A ground sign, thus, appears to encompass the type of structure to which you refer as a free-standing billboard.

Concerning the regulation of structural characteristics, the Ohio Basic Building Code (OBBC) §1907.1 requires that all signs, including ground signs, be designed and constructed in accordance with the provisions for materials, loads and stresses set forth in 5 Ohio Admin. Code Chapter 4101:2-9 (structural loads and stresses); 5 Ohio Admin. Code Chapter 4101:2-10 (foundation systems); 5 Ohio Admin. Code Chapter 4101:2-11 (materials and tests); 5 Ohio Admin. Code Chapter 4101:2-12 (steel, masonry, concrete, gypsum and lumber construction) and the requirements of OBBC Article XIX. Thus, from the foregoing examples, it is apparent that in its regulation of signs, the Board of Building Standards may regulate the structural characteristics of structures like those to which you refer as free-standing billboards which fall within the definition of a "building" set forth in R.C. 3781.06(B).

Your second question asks: "If such free standing billboards are not subject to Ohio Board of Building Standards regulation, may a county or township undertake such regulation; if so, under what authority would such regulation be undertaken?" In answer to your first question, I concluded that the structural characteristics of those free-standing billboards which come within the definition of a "building" set forth in R.C. 3781.06(B) are subject to regulation by the Board of Building Standards. The question remains, however, whether those free-standing billboards which do not possess the characteristics necessary to constitute a building and, thus, are not subject to regulation by the Board of Building Standards are subject to regulation by a county or township.

The regulation of outdoor advertising devices or billboards by counties and townships in unincorporated areas of the county or township may occur through the political subdivision's power of zoning. See generally R.C. 303.20 (for purposes of county rural zoning, "outdoor advertising shall be classified as a business use and be permitted in all districts zoned for industry, business, trade, or lands used for agricultural purposes"); R.C. 519.20 (for township zoning purposes, "outdoor advertising shall be classified as a business use and be permitted in all districts zoned for industry, business, or trade, or lands used for agricultural purposes").

Pursuant to R.C. 303.02 and R.C. 519.02 the board of county commissioners and the board of township trustees, respectively, have the express power "[f]or the purpose of promoting the public health, safety, and morals" to:

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 [county or township], and for such purposes may divide all or any part of the unincorporated territory of the [county or township] into districts or zones of such number, shape, and area as the board determines. (Emphasis added.)

I note that the regulation of the structural characteristics of billboards as related to the public safety has generally been approved by Ohio courts. See, e.g., Sun Oil Co. v. City of Upper Arlington, 55 Ohio App. 2d 27, 32, 379 N.E.2d 266, 270 (Franklin County 1977) (finding the set-back, height, and safety considerations of a municipal ordinance regulating free-standing billboards to be particularly appropriate, stating: "A free-standing sign is more likely to constitute a traffic hazard or contribute to traffic problems than a sign mounted on a building"); Central Outdoor Advertising Co. v. Village of Evendale, 54 Ohio Op. 354, 356, 124 N.E.2d 189, 193 (C.P. Hamilton County 1954) (referring to R.C. 303.20, 519.20, and 715.20, stating: "These provisions also recognize that billboards and advertising signs are not inherently dangerous and a nuisance per se, although they may become so by reason of

the manner of construction, etc., and therefore are subject to regulation"); Thomas Cusack Co. v. City of Cincinnati, 9 Ohio N.P. (n.s.) 466, 467 (C.P. Hamilton County 1910) ("the power and authority of [city] council to regulate bill boards as well as other structures falls under what is known as the police power of the state; the power which inheres in every community to [conserve] its safety and welfare").

As noted above, R.C. 303.20 provides that for purposes of R.C. 303.01-.25, "outdoor advertising shall be classified as a business use and be permitted in all districts zoned for industry, business, trade, or lands used for agricultural purposes." R.C. 519.20 contains a similar provision with respect to zoning by townships. Therefore, it is clear that pursuant to R.C. 303.20 and R.C. 519.20, the board of county commissioners and the board of township trustees respectively, have the express power to regulate outdoor advertising devices, such as free-standing billboards, in the unincorporated territory of the county or township, respectively.² See generally 1985 Op. Att'y Gen. No. 85-074 (discussing situation where both county and township wish to zone the same unincorporated area). Consequently, insofar as a billboard is an outdoor advertising device, the board of county commissioners and the board of township trustees have the authority to regulate free-standing billboards as to location, height, bulk, and size for the purpose of promoting the public health, safety, and welfare, when such billboards are located in the unincorporated area of the county or township.

Your final question asks: "If neither the Board of Building Standards or county or township may regulate the structural

² Although your second question asks about the power of a county or township to regulate a free-standing billboard in the event that such billboard is not subject to regulation by the Board of Building Standards, I note that the zoning authority of counties and townships relates to "buildings and other structures." R.C. 303.02; R.C. 519.02. A county or township, therefore, has equal zoning authority with respect to a billboard, which constitutes a "building," as defined in R.C. 3781.06(B), and which is, as such, subject to regulation by the Board of Building Standards. See Hulligan v. Columbia Township Board of Zoning Appeals, 59 Ohio App.2d 105, 392 N.E.2d 1272 (Lorain County 1978) (a sanitary landfill, although subject to regulation by the Environmental Protection Agency, must also comply with local zoning requirements); 1985 Op.

The Honorable Michael Miller

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characteristics of such billboard[s], are they subject to regulation by any governmental agency?" In light of my answer to your first and second questions, it is unnecessary to address this issue.³

It is, therefore, my opinion, and you are hereby advised, that:

1. A free-standing billboard which possesses the components necessary to constitute a "building," as that term is defined in R.C. 3781.06(B), is subject to regulation by the Board of Building Standards.
2. Pursuant to the zoning powers conferred upon a board of county commissioners and a board of township trustees by R.C. 303.02 and R.C. 519.02, respectively, such boards may regulate by resolution the location, height, bulk, and size of free-standing billboards in the unincorporated area of such county or township.

Respectfully,



ANTHONY J. CELEBREZZE, JR.
Attorney General

Att'y Gen. No. 85-053 at 2-199 ("the fact that a state agency has authority to regulate a certain activity does not, in itself, mean that a township may not enact zoning regulations which affect that activity").

³ Although your opinion request does not mention possible regulation of billboards located in unincorporated areas by entities other than the Board of Building Standards, counties, and townships, I note that R.C. Chapter 5516 sets forth various requirements and limitations upon outdoor advertising devices located along certain highways and provides for regulation of such devices by the Director of Transportation.

moderate income persons at prices not fixed by the market.

It should be noted, however, that a dissenting opinion in *Oakwood at Madison* spoke approvingly of mandatory inclusionary ordinances as remedial measures, pointing out that ordinances similar to that invalidated in *DeGroff Enterprises* have been implemented in several parts of the country. The opinion criticizes *DeGroff* for its "excessively narrow" view of the zoning power, and asserts that the taking argument can be avoided by making certain that developers receive a fair and reasonable return on their investment.

However, perhaps because of the ultra vires and taking arguments and perhaps also due to the opposition from developers, these inclusionary ordinances do not appear to have been adopted on a widespread basis.

CHAPTER VIII

AESTHETICS AND PRESERVATION OF HISTORICAL AND CULTURAL RESOURCES

§ 1. Introduction

Zoning, as previously discussed, is predicated on the police power. This relates to such tangibles as health and safety, but it also relates to the general welfare. Is it within the "general welfare" to regulate land use based upon aesthetic considerations alone? Can you measure what is aesthetically acceptable when beauty, in the old cliché, lies in the eyes of the beholder? Is it valid to regulate land use for the purpose of preserving our historical and cultural heritage? This brief chapter deals with these issues.

§ 2. Sign and Billboard Regulations

The amortization device is often employed in regard to signs. However, some ordinances limiting the size of signs, without utilizing amortization provisions, have been upheld. *State v. Diamond Motors*, 50 Haw. 33, 429 P.2d 825 (1967), predicated such a decision on the acceptance of "beauty as a proper community objective, attainable through the use of the police power." But the majority of courts have found it necessary to uphold such

ordinances on the basis of traditional considerations such as health, safety or morals, to accept aesthetic considerations only as a side benefit, and to strike down ordinances which solely achieve aesthetic objectives. See, e.g., *Thomas Cusack Co. v. Chicago*, 242 U.S. 526 (1917); *Baltimore v. Mano Swartz, Inc.*, 268 Md. 79, 299 A.2d 828 (1973). The trend, however, seems to be in favor of viewing aesthetics alone as a valid basis for exercising the police power to preserve the appearance of the community. (See, e.g., *People v. Goodman*, 31 N.Y.2d 262, 338 N.Y.S.2d 97, 290 N.E.2d 139 (1972); *S.W.2d 439* (1983).)

The *Goodman* case upheld an ordinance limiting the size of signs on buildings (although allowing nonconforming signs to exist for a period of two years unless destroyed or changed). The court pointed out that the state and local governments could regulate outdoor advertising under the police power and that communities had statutory power to regulate various kinds of signs. Although this ordinance was predicated upon aesthetic considerations, promotion of the appearance of the community was viewed as a valid police power objective. An ordinance regulating "off-site" signs or billboards was upheld in California with regard to signs which had been fully amortized, but as to a few signs not fully amortized, the court ruled that a reasonable amortization period would have to be

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allowed. *National Advertising Co. v. County of Monterey*, 1 Cal.3d 875, 83 Cal.Rptr. 577, 464 P.2d 33, cert. denied 398 U.S. 946 (1970). This decision obviously depended upon the amortization approach. This is more common, and sign regulation ordinances without some traditional police power considerations and without reasonable amortization periods will normally fail.

The principal argument against the "aesthetics alone" rule, as suggested in the introduction, is that since beauty is in large measure in the eye of the beholder, then decisions based on aesthetic considerations would be subjective determinations governed by personal feelings and attitudes. The answer to that may be that if such attitudes are in capricious use of the police power, such decisions can be invalidated in the same manner as arbitrary zoning classifications. The problem is the lack of objective criteria and, in that respect, it might be compared to the obscenity cases.

An important United States Supreme Court decision which bears upon this problem was *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), which involved a ban on off-site billboards while permitting on-site signs. The ordinance was challenged on the basis that it prohibited noncommercial speech and violated the First Amendment. Political campaign signs had been specifically exempted from the ordinance's application. The plurality of four justices stated that the ordinance's

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purpose of promoting aesthetics and traffic safety were valid goals, but it did not regard the ban on off-site, noncommercial advertising as valid because such speech is afforded greater protection than commercial speech, and the city could not choose permissible subjects of noncommercial discourse. The ordinance was thought to reach "too far into the realm of protected speech." A concurring opinion of two justices stated that the city had failed to justify its substantial restriction on protected activity and had also, due to the partial ban, failed to show a sufficient governmental interest in promoting aesthetics in this manner.

Federal and state efforts to beautify the highways by control of billboards has produced mixed results. The 1958 Federal act relied on the state police power to control outdoor advertising. Most of the states which passed upon these acts upheld the state legislation as being within the general welfare in promoting natural beauty. The 1965 Federal act contained just compensation provisions based on use of the power of eminent domain. The enforcement of the just compensation requirement was attacked in a lawsuit by a state legislator who wanted to rely on police power controls. His suit was dismissed due to his lack of standing to sue. *Lamm v. Volpe*, 449 F.2d 1202 (10th Cir.1971). Either compensation or reasonable amortization provisions are obviously "safer" in terms of legality, but the earlier decisions based on preservation

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of scenic beauty provide a basis for arguing that these largely aesthetic considerations should suffice for regulation and removal.

§ 3. The Appearance of Structures: Architectural Considerations

Cases have upheld ordinances which regulate architectural "appeal" and functions on the theory that protection of property values is a legitimate concern of the police power in that such regulations promote the general welfare. *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217, cert. denied 350 U.S. 841 (1955). That case stated that it was immaterial whether the sole objective was to protect property values. Such decisions are not predicated upon aesthetics alone, although *Berman v. Parker*, 348 U.S. 26 (1954), contained dictum suggesting that aesthetic considerations alone were a sufficient basis for the exercise of zoning powers. *Berman v. Parker* stated that the public welfare concept was broad enough to include aesthetics. In a Missouri case involving the much-protected St. Louis suburb of Ladue, an ordinance required that a board approve plans and specifications for structures in order to promote conformity to "minimal architectural standards" and prevent "unsightly, grotesque and unsuitable structures." When the ordinance was challenged by someone whose proposed residence was described by the city as "a monstrosity

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