

OPINION NO. 97-002**Syllabus:**

1. When a farm market qualifies for the limited exemption from township zoning authority under R.C. 519.21(C), a township may regulate factors pertaining to the farm market in addition to those expressly listed in R.C. 519.21(C), provided that the additional factors bear a clear similarity to those expressly listed, that such regulation is necessary to protect the public health and safety, and that the regulation as applied does not prohibit the use of any land for a farm market in a district zoned for agricultural, industrial, residential or commercial uses.
2. Farm markets qualified for the limited exemption from township zoning authority under R.C. 519.21(C) may be regulated by means of conditional use permits authorized pursuant to R.C. 519.14(C), provided that local

zoning regulations governing conditional use permits may be applied to such qualified farm markets only to the extent that the regulations are within the substantive limits imposed by R.C. 519.21(C).

To: Gregory A. White, Lorain County Prosecuting Attorney, Elyria, Ohio
By: Betty D. Montgomery, Attorney General, January 6, 1997

I have received your letter asking the following questions: (1) May a township regulate factors pertaining to qualified farm markets in addition to those expressly listed in R.C. 519.21(C)? (2) May a township use conditional use permits as a means of regulating qualified farm markets pursuant to R.C. 519.21(C)?

I begin with the general proposition that townships are vested with the authority to zone areas under their jurisdiction. Specifically, the ability to regulate land use derives from R.C. 519.02 which provides in pertinent part:

For the purpose of promoting the public health, safety, and morals, the board of township trustees may in accordance with a comprehensive plan 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.

Since a township is a creature of statute, it has only those powers expressly granted by statute or necessarily implied therefrom. *State ex rel. Shriver v. Board of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947). Township zoning authority is limited to those powers expressly delegated by statute and any doubt as to the extent of those powers must be resolved in favor of the free use of property. *See generally Board of Township Trustees v. Funtime, Inc.*, 55 Ohio St. 3d 106, 563 N.E.2d 717 (1990) (syllabus, paragraph one) (approving and following *Yorkavitz v. Board of Trustees*, 166 Ohio St. 349, 351, 142 N.E.2d 655, 656 (1957)); *Saunders v. Clark County Zoning Dep't*, 66 Ohio St. 2d 259, 261, 421 N.E.2d 152, 154 (1981).

While a township may zone, its authority is subject to several significant exceptions. Your inquiry is addressed to one such exception, codified at R.C. 519.21(C), concerning "qualified farm markets." It is my understanding, an assumption for purposes of this opinion, that by the term "qualified farm market" you mean a farm market that meets the gross income requirements set out in R.C. 519.21(C).

R.C. 519.21(C) states:

[Sections 519.02 to 519.25 of the Revised Code]¹ confer *no power* on any township zoning commission, board of township trustees, or board of zoning appeals *to prohibit* in a district zoned for agricultural, industrial, residential, or commercial uses, *the use of any land for a farm market* where fifty per cent or more of the gross income received from the market is derived from produce raised on farms owned or operated by the market operator in a normal crop year. However, a board of township trustees, as provided in section 519.02 of the Revised Code, *may regulate such factors pertaining to farm markets as size of the structure, size of parking areas that may be required, set back building lines, and egress or ingress, where such regulation is necessary to protect the public health and safety.* (Emphasis and footnote added.)

R.C. 519.21(C) expressly limits the scope of a township's general ability to zone as it applies to qualified farm markets. This limitation is further emphasized by the stated purpose of R.C. 519.21(C), which is "to forbid township and county² zoning from restricting certain farm markets." 1981-1982 Ohio Laws, Part I, 249 (Am. Sub. S.B. 78, eff. June 29, 1982) (preamble) (footnote added). Accordingly, where there is doubt about the scope of township zoning authority over qualified farm markets, R.C. 519.21(C) must be interpreted in favor of the unregulated operation of such farm markets.

The language of R.C. 519.21(C) specifically provides that, although none of the various township zoning authorities may prohibit qualified farm markets in specified zoning districts, a board of township trustees does have authority to impose some regulation.³ Succinctly stated, an

¹ The farm market provisions of R.C. 519.21(C) open with the phrase "[s]uch sections," which refers to R.C. 519.02 through R.C. 519.25 as cited in division (A) of R.C. 519.21. When first enacted, the farm market provisions followed immediately after the paragraph that is now division (A), and the meaning of the phrase "such sections" was apparent. See 1981-1982 Ohio Laws, Part I, 249, 250-51 (Am. Sub. S.B. 78, eff. June 29, 1982). The subsequent enactment of division (B) has obscured this reference somewhat, but the meaning remains the same.

² Identical restrictions on county zoning authority over farm markets are found at R.C. 303.21(C).

³ In contrast, R.C. 519.21(A) totally exempts agricultural uses from township zoning authority, by providing that the township zoning authorities may neither prohibit the use of land for agricultural purposes nor require zoning certificates for such use. The inability to require zoning certificates effectively prevents any regulation of agricultural uses. See 1980 Op. Att'y Gen. No. 80-058. Since R.C. 519.21(C) creates a separate category for qualified farm markets, they are not treated as an agricultural use. I note, however, that as recently amended, the definition of "agriculture" now includes "marketing of agricultural products when those activities are conducted in conjunction with, but are secondary to, such husbandry or production." R.C. 519.01 (as amended by 1993-1994 Ohio Laws, Part I, 1150, 1155-56 (Am. Sub. S.B. 134, eff. June 20 1994)). Thus, some farm markets may now constitute an agricultural use which is totally exempt from zoning regulation under R.C. 519.21(A), if the use of particular land as a farm market is secondary to the use of that land for animal husbandry or agricultural production. The more limited zoning exemption available to farm markets that qualify under R.C. 519.21(C) requires only that the market meet the gross income requirement set out in division (C). It does not require that the farm market also be secondary to agricultural use of the land.

exception to the exception. The power over farm markets expressly delegated to the board of township trustees by R.C. 519.21(C) is to "regulate *such factors...as* size of the structure, size of parking areas that may be required, set back building lines, and egress or ingress." (Emphasis added.) Use of the phrase "such...as" indicates that the four factors expressly listed are not the only factors that may be regulated. At the same time, the phrase "such...as" indicates that any additional factors must be similar to those that are listed. See *Behlen Sons' Co. v. Ricketts*, 30 Ohio App. 167, 176, 164 N.E. 436, 439 (Hamilton County 1928) ("the phrase 'such as' should here be construed to mean 'similar to;' that the list of specified examples...should not be regarded as a complete or exhaustive category"); 1985 Op. Att'y Gen. No. 85-100 at 2-243 ("use of the words 'such as' indicates that other similar types...may be included"); accord 1986 Op. Att'y Gen. No. 86-009. See generally *Webster's Third New International Dictionary* 2283 (unabridged ed. 1993) ("of a kind or character about to be indicated; suggested, or exemplified"). Thus, the plain language of the statute indicates that a township may regulate additional factors pertaining to qualified farm markets, provided that they are similar to the factors expressly listed in R.C. 519.21(C).

The more difficult underlying issue is the determination of what additional factors are sufficiently similar to the four listed in R.C. 519.21(C) to allow regulation thereof. There are no cases considering this issue in precisely those terms. Related case law on the scope of township zoning authority, however, indicates that there are at least two factors pertaining to farm markets that a township should not attempt to regulate.

The first of these factors is what is sold at the farm market. Several courts have held that a township has no zoning authority to regulate what a farm market sells, except to require compliance with the gross income requirement of R.C. 519.21(C). See *Hambrecht v. Whiting*, No. 1032 (Ohio Ct. App. Geauga County Jan. 14, 1983) (unreported); *Board of Township Trustees v. Cornerstone Partnership*, No. 95 CV-H-11-403 (Ohio C.P. Delaware County Mar. 20, 1996) (slip op.). The townships in these cases had argued that markets selling nonagricultural products in addition to the owners' own produce could be regulated, even though fifty per cent of the gross income of these markets was derived from sales of the owners' produce. The analysis in the opinions focuses on the meaning of the term "farm market;" there is no express discussion of the "such...as" clause. It is implicit in the holdings, however, that the gross income requirement is the only permissible limitation on what can be sold at a farm market and that no authority to regulate sales arises from the "such...as" clause.

The second factor not subject to regulation is the hours of operation. The Ohio Supreme Court has held that a township has neither express nor implied authority under R.C. 519.02 to regulate the hours of operation of an otherwise lawful commercial enterprise. *Funtime, Inc.*, 55 Ohio St. 3d 106, 563 N.E.2d 717 (syllabus, paragraph two). R.C. 519.02 defines the general zoning authority of a township by setting out a list of factors pertaining to land use that a township may regulate. This list is more extensive than the list of factors pertaining to farm markets that is subject to regulation under R.C. 519.21(C). As I stated previously, the purpose of R.C. 519.21(C) is to narrow the scope of township zoning authority as it applies to qualified farm

markets. It follows that if a power cannot be implied under R.C. 519.02, it cannot be implied from the more limited grant of authority in R.C. 519.21(C).

The determination of whether other unlisted factors may be regulated will require an examination of their similarity to the listed factors. Since the factors expressly listed in R.C. 519.21(C) have not been defined by the General Assembly, this determination will of necessity require an exercise of judgment in each particular instance. When interpreting undefined terms in zoning legislation, the scope of what is permitted to a property owner "is determined by considering the common and ordinary meaning of those terms, liberally construing them in favor of the permitted use so as not to extend the restrictions of the ordinance to any limitation of use not therein clearly prescribed." *State ex rel. Spiccia v. Abate*, 2 Ohio St. 2d 129, 207 N.E.2d 234 (1965) (syllabus), *disapproved on other grounds by State ex rel. Sibarco Corp. v. City of Berea*, 7 Ohio St. 2d 85, 89, 218 N.E.2d 428, 431 (1966); *see also Rotellini v. West Carrollton Bd. of Zoning Appeals*, 64 Ohio App. 3d 17, 580 N.E.2d 500 (Montgomery County 1989). In keeping with this standard, any distinctions between factors listed in R.C. 519.21(C) and other factors that the board of township trustees might wish to regulate should be construed in favor of the farm market, so as not to extend the restrictions beyond what is clearly authorized by the statute. Authority to regulate additional factors should be extended only to factors that bear a clear similarity to the listed factors.

The scope of permissible regulation is further limited by two additional provisions of R.C. 519.21(C). First, no township zoning authority has the power, in districts zoned for specified uses, to "prohibit...the use of any land" for a qualified farm market. Second, permissible regulation by a board of township trustees is limited to that "necessary to protect the public health and safety." Ordinarily, landowners cannot object to the application of a zoning regulation that completely prevents a particular land use on their property, as long as the regulation does not totally deprive the landowners of "the economically viable use of their land without substantially advancing a legitimate interest in the health, safety, or welfare of the community." *Ketchel v. Bainbridge Township*, 52 Ohio St. 3d 239, 243, 557 N.E.2d 779, 783 (1990); *see also Gerijo, Inc. v. City of Fairfield*, 70 Ohio St. 3d 223, 638 N.E.2d 533 (1994), *cert. denied*, 115 S. Ct. 1101 (1995). The statutory standard for protection of the use of land as a qualified farm market, however, rises above this constitutional minimum. Because the township may not prohibit the use as a qualified farm market of "any land" in the specified kinds of districts, a regulation as applied cannot completely prevent the use of a particular piece of land as a market, even if other economically viable uses of that land remain. Additionally, the standard that the farm market regulation be "necessary to protect the public health and safety" is narrower than the general zoning regulation standard stated in R.C. 519.02 of "promoting the public health, safety, and morals," or, as characterized above by the court in *Ketchel*, "substantially advancing...the health, safety and welfare of the community." When a township's zoning authority is restricted to regulation of health and safety, particular zoning regulation must be based on "legitimate health and safety concerns," rather than "an attempt to prohibit, in the guise of a health and safety regulation, that which the state encourages." *Newbury Township Bd. of Trustees v. Lomak Petroleum, Inc.*, 62 Ohio St. 3d 387, 391, 583 N.E.2d 302, 305-06 (1992).

In answer to your first question, therefore, I conclude that a township may establish factors pertaining to qualified farm markets in addition to those expressly listed in R.C. 519.21(C),

provided that the additional factors bear a clear similarity to those expressly listed, that such regulation is necessary to protect the public health and safety, and that the regulation as applied does not prohibit the use of any land for a farm market in a district zoned for agricultural, industrial, residential or commercial uses.

I turn now to your second question, which asks whether a township may regulate qualified farm markets by means of conditional use permits. R.C. 519.21(C) provides that a board of township trustees may regulate "as provided in section 519.02 of the Revised Code." R.C. 519.02 provides, in turn, that a board of township trustees may "regulate by resolution," in accord with a comprehensive plan. Thus, pursuant to R.C. 519.21(C), if a township wishes to regulate qualified farm markets, it must do so as part of a comprehensive township zoning resolution.⁴ The specific means by which a board of township trustees may adopt, amend, and administer regulations in the township zoning resolution are provided throughout R.C. Chapter 519. While R.C. 519.21(C) places limits on the regulation of farm markets, it does not place limits on the manner in which a board of township trustees may adopt, amend, or administer regulations that are within those limits.

The authority for conditional use permits is set out at R.C. 519.14(C), which states that a township board of zoning appeals may "[g]rant conditional zoning certificates for the use of land, buildings, or other structures *if such certificates for specific uses are provided for in the zoning resolution.*" (Emphasis added.) By enacting provisions for conditional use certificates or permits, a board of township trustees provides for the inclusion of certain uses in a district "only upon administrative approval granted in accordance with legislatively prescribed standards and conditions." *Gerzeny v. Richfield Township*, 62 Ohio St. 2d 339, 341, 405 N.E.2d 1034, 1036 (1980). A conditional use permit "authorizes a use that is permitted by zoning regulations, subject to the issuance of such a permit or conditional certificate...under the circumstances mandated by the zoning ordinance or resolution." See *Nunamaker v. Board of Zoning Appeals*, 2 Ohio St. 3d 115, 118, 443 N.E.2d 172, 175 (1982) (citing *Boston v. Montville Township Zoning Bd. of Appeals*, 32 Ohio Misc. 118, 120-21, 289 N.E.2d 184, 186 (C.P. Medina County 1972)). As these authorities demonstrate, a conditional use is not a prohibited use. The conditional use process is a means of administering the zoning regulations that pertain to specified permitted uses. The board of zoning appeals administers the regulations, but it is authorized to do so by resolution of the board of township trustees and the regulations that it administers are promulgated by the board of township trustees. The board of zoning appeals has no power, with respect to conditional use permits independent of that granted by the zoning regulations enacted by the township trustees. *Gerzeny*, 62 Ohio St. 2d at 342, 405 N.E.2d at 1036. Thus, the regulation of farm markets by means of conditional use permits constitutes regulation "by resolution" of the board of township trustees, consistent with the requirements of R.C. 519.21(C) and R.C. 519.02.

⁴ I do not mean to imply that a board of township trustees must enact a set of zoning regulations that pertain specifically or exclusively to farm markets. If a regulation pertains to a category of uses that includes farm markets, that regulation may be applied to farm markets even though they are not expressly named – provided, of course, that the regulation is within the substantive limits of R.C. 519.21(C).

I see no reason, therefore, that a board of township trustees cannot require conditional use permits for farm markets that qualify for limited protection from zoning under R.C. 519.21(C). A township board of trustees may enact conditional use regulations that pertain expressly to farm markets or to a category of uses that includes farm markets without expressly naming them. Any such regulation of qualified farm markets by means of conditional use permits, however, remains subject to the limits imposed by R.C. 519.21(C). Thus, conditional use regulations can be applied to qualified farm markets only to the extent that they authorize a board of zoning appeals to consider and regulate "such factors...as size of the structure, size of parking areas that may be required, set back building lines, and egress or ingress, where such regulation is necessary to protect the public health and safety." R.C. 519.21(C). Further, the township board of zoning appeals may not apply the regulations so as to prohibit the use of any land as a farm market. To the extent that local conditional use regulations bestow any greater authority on a board of zoning appeals, R.C. 519.21(C) prohibits their application to farm markets.

I note, by way of example, that local conditional use regulations, in addition to setting standards for building size and setback lines which the board of zoning appeals is to administer, often also authorize the board of zoning appeals to consider the general compatibility of a proposed use with adjacent uses and structures. In applying such local conditional use regulations to a use other than farm markets, the board of zoning appeals would have discretion to deny a permit solely on the basis of incompatibility with adjacent uses, even if the proposed use met the setback and building size requirements. See, e.g., *Community Concerned Citizens v. Union Township Bd. of Zoning Appeals*, 66 Ohio St. 3d 452, 613 N.E.2d 580 (1993); *Tempo Holding Co. v. Oxford City Council*, 78 Ohio App. 3d 1, 603 N.E.2d 414 (Butler County 1992), *motion overruled*, 65 Ohio St. 3d 1420, 598 N.E.2d 1171 (1992). In applying these same local conditional use regulations to farm markets, however, R.C. 519.21(C) limits the authority of the board of zoning appeals to application of the regulations governing setback and building size.

I conclude, therefore, in response to your second question, that farm markets qualified for the limited exemption from township zoning authority under R.C. 519.21(C) may be regulated by means of conditional use permits authorized pursuant to R.C. 519.14(C), provided that local zoning regulations governing conditional use permits may be applied to such qualified farm markets only to the extent that the regulations are within the substantive limits imposed by R.C. 519.21(C).

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

1. When a farm market qualifies for the limited exemption from township zoning authority under R.C. 519.21(C), a township may regulate factors pertaining to the farm market in addition to those expressly listed in R.C. 519.21(C), provided that the additional factors bear a clear similarity to those expressly listed, that such regulation is necessary to protect the public health and safety, and that the regulation as applied does not prohibit the use of any land for a farm market in a district zoned for agricultural, industrial, residential or commercial uses.
2. Farm markets qualified for the limited exemption from township zoning authority under R.C. 519.21(C) may be regulated by means of conditional use permits authorized pursuant to R.C. 519.14(C), provided that local zoning regulations governing conditional use permits may be applied to

such qualified farm markets only to the extent that the regulations are within the substantive limits imposed by R.C. 519.21(C).