April 18, 2000

OPINION NO. 2000-022

The Honorable Dean Holman
Medina County Prosecuting Attorney
60 Public Square
Medina, Ohio 44256

Dear Prosecutor Holman:

You have asked for an opinion concerning the relative authority of the Ohio Department of Health and local zoning authorities to determine whether a mobile home park continues to constitute a nonconforming use.[1] Your request presents the following questions:

1. Do the Department of Health and Public Health Council have the power to determine whether a mobile home park continues to be a "nonconforming use" that is exempt from a local zoning code, or does that power rest with a local zoning authority?

2. If a local zoning authority has the power to decide what is a nonconforming use, may it consider each lot within a mobile home park to be a nonconforming use, or is it the park as a whole that constitutes the nonconforming use?

You have explained that the Department of Health contends that a mobile home park should be considered, as a whole, to constitute the nonconforming use, and that unless the

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[1] An existing use of property which is lawful at the time a township zoning resolution or municipal zoning ordinance is enacted, but which does not comply with the new resolution or ordinance, is called a "nonconforming use." *See Jackson Township Board of Trustees v. Donrey Outdoor Advertising Co.*, No. 98AP-1326, 1999 Ohio App. LEXIS 4341 (Franklin County Sept. 21, 1999); *City of Kettering v. Lamar Outdoor Advertising, Inc.*, 38 Ohio App. 3d 16, 525 N.E.2d 836 (Montgomery County 1987). As will be explained in greater detail, *infra*, a nonconforming use is allowed to continue subsequent to the enactment of the zoning provision until it is voluntarily discontinued for a period of time specified in the resolution or ordinance. *Id.*

operations of the entire park are closed down for a period longer than that provided for in the local zoning provision for reestablishment of a nonconforming use, the park owner may continue to rent lots to owners of mobile homes, even though a particular lot within the park may have remained vacant for a period longer than that allowed for reestablishing a nonconforming use. However, local townships and villages are contending that each lot within the park constitutes the nonconforming use, and that if a lot remains vacant for a period in excess of the time provided for reestablishment of a nonconforming use, then the park owner may no longer rent that lot to a mobile home owner. They assert that the Department of Health has no authority to preempt zoning regulations with regard to nonconforming use. The Department argues that a park owner is licensed for a certain number of lots and to deny the owner the use of a vacant lot in a licensed mobile home park is to deny the owner the right he has to the use of that lot.

In order to answer your questions, it is first necessary to examine the respective authority of the Department of Health and the Public Health Council under R.C. 3733.01-.08 and local zoning authorities to regulate manufactured home parks.[2] Let us consider each of these in that order.

I. Regulation of Manufactured Home Parks

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[2] For purposes of R.C. Chapter 3733, the term "manufactured home" has the meaning set forth in R.C. 3781.06(C)(4) and "mobile home" has the meaning set forth in R.C. 4501.01. R.C. 3733.01(D). R.C. 3781.06(C)(4) defines "manufactured home" as "a building unit or assembly of closed construction that is fabricated in an off-site facility and constructed in conformance with the federal construction and safety standards established by the secretary of housing and urban development … and that has a permanent label or tag affixed to it, as specified in 42 U.S.C.A. 5415, certifying compliance with all applicable federal construction and safety standards." The term "mobile home" is defined in R.C. 4501.01(O) to mean "a building unit or assembly of closed construction that is fabricated in an off-site facility, is more than thirty-five body feet in length or, when erected on site, is three hundred twenty or more square feet, is built on a permanent chassis, is transportable in one or more sections, and does not qualify as a manufactured home as defined in [R.C. 3781.06(C)(4)] or as an industrialized unit as defined in [R.C. 3781.06(C)(3)]." The provisions of R.C. 3733.01-.08 cover both in like manner, *see* Am. Sub. S.B. 142, 122nd Gen. A. (1998) (eff. March 30, 1999), and the rules promulgated by the Public Health Council use the terms interchangeably. 6 Ohio Admin. Code 3701-27-01(K). Likewise, this opinion will use these terms, along with the term "house trailer," interchangeably. *See* 1983-84 Ohio Laws, Part I, 790 (Am. S.B. 231, eff. Sept. 20, 1984) (changing the terms "house trailer" and "house trailer park" to "manufactured home" and "manufactured home park" throughout the Revised Code). *See also LuMac Development Corp. v. Buck Point Ltd. Partnership*, 61 Ohio App. 3d 558, 573 N.E.2d 681 (Ottawa County 1988); 1991 Op. Att'y Gen. No. 91-020 at 2-101 n.2. *But cf. Groff v. Heath*, 116 Ohio App. 3d 300, 688 N.E.2d 18 (Ashtabula County 1996) (a restrictive covenant prohibiting "trailers" did not prohibit manufactured homes).

A. Authority of the Department of Health and Public Health Council

At the state level, manufactured home parks are regulated by the Department of Health and the Public Health Council.[3] R.C. 3733.02 sets forth the responsibilities of the Public Health Council with regard to manufactured home parks,[4] and reads, in part, as follows:

> (A)(1) The public health council, subject to Chapter 119. of the Revised Code, shall adopt, and has the exclusive power to adopt, rules of uniform application throughout the state governing the review of plans, issuance of flood plain management permits, and issuance of licenses for manufactured home parks; the location, layout, density, construction, drainage, sanitation, safety, and operation of those parks; blocking and tie-downs of mobile and manufactured homes in those parks; and notices of flood events concerning, and flood protection at, those parks.

R.C. 3733.03(A)(1) requires any person who intends to operate a manufactured home park to secure an annual license to operate the park from the appropriate board of health of the local health district, called the "licensor." *See* R.C. 3733.01(I).[5] No manufactured home park may be maintained or operated without a license. R.C. 3733.03(A)(4). Before issuing a license and annually thereafter, or more frequently if necessary, the licensor must inspect a manufactured home park to monitor compliance with R.C. 3733.01-.08 and the rules adopted thereunder. R.C. 3733.03(B)(1). The licensor may "refuse to grant, may suspend, or may revoke any license granted to any person for failure to comply with sections 3733.01 to 3733.08 of the Revised Code or with any rule adopted by the public health council under section 3733.02 of the Revised Code." R.C. 3733.05. A license must show the maximum number of manufactured

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[3] The Public Health Council is created within the Department of Health, R.C. 3701.02. The duties of the Council are set forth in R.C. 3701.34, and include adoption of the state's sanitary code, hearing appeals from decisions made by the Director of Health, and "consider[ing] any matter relating to the preservation and improvement of the public health and advis[ing] the director thereon with such recommendations as it considers wise." *Id. See also* R.C. 3701.341-.344.

[4] A "[m]anufactured home park" is defined for purposes of R.C. Chapter 3733 as "any tract of land upon which three or more manufactured or mobile homes used for habitation are parked, either free of charge or for revenue purposes, and includes any roadway, building, structure, vehicle, or enclosure used or intended for use as a part of the facilities of the park." R.C. 3733.01(A).

[5] A health district must be approved by the Department of Health in order to act as a licensor of manufactured home parks. R.C. 3733.031.

homes for which the park is licensed, 6 Ohio Admin. 3701-27-03 (1999-2000 Supp.), and once licensed, an operator of a manufactured home park has "the right to rent or use each lot … for the parking or placement of a manufactured home, [or] mobile home … without interruption for any period coextensive with any license or consecutive licenses." R.C. 3733.06(A).

In order to secure and retain a license, the operator of a manufactured home park must ensure it is "remote from public health hazards, is well drained and is not subject to recurring flooding." 6 Ohio Admin. Code 3701-27-07. Indeed, much of the State's regulation of manufactured home parks revolves around flood plain management. *See, e.g.,* R.C. 3733.022-025; 6 Ohio Admin. Code 3701-27-07 through –075; 1991 Op. Att'y Gen. No. 91-028. Regulations adopted by the Public Health Council also govern lot size and placement of the manufactured home on a lot, fire safety, the securing and support of the manufactured homes, specifications for streets, walkways, and parking, water systems, lighting, storm water systems, water and sewer line location, plumbing fixtures, laundry facilities, connections from the homes' drainage system to the sanitary sewer, waste collection, pests, and electrical systems. 6 Ohio Admin. Code 3701-27-08 through –26.

While the Public Health Council, with the assistance of local health authorities, is responsible for inspecting and licensing manufactured home parks, and setting health and safety standards for their operation once licensed, the Director of Health must review and approve plans for development within any part of a manufactured home park.[6] R.C. 3733.021. No person may proceed with development within a manufactured home park until plans for the development have been submitted to, and reviewed and approved by, the Director. *Id.*

Prior to submitting plans to the Director of Health, a developer must have the licensor conduct an evaluation of the proposed location and obtain flood level information to ensure it will be protected from flooding. 6 Ohio Admin. Code 3701-27-06(A) (1999-2000 Supp.). Plans submitted to the Director must be accompanied by written verification from the local fire protection authority that adequate fire protection is provided and fire codes will be met in the construction and operation of the park, and must provide designs for drainage of surface and storm waters, area lighting, the sanitary sewerage and water systems, verification the plans have been approved by the Environmental Protection Agency, the method of storage and collection of solid wastes, and utility distribution plans and connections. 6 Ohio Admin. Code 3701-27-06(B) (1999-2000 Supp.). The plans must also provide the total area of land to be used for park purposes, and the location, numbers, and sizes of lots. *Id.*

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[6] "Development" is defined for purposes of R.C. Chapter 3733 to include "any artificial change to improved or unimproved real estate, including, without limitation, buildings or structures, dredging, filling, grading, paving, excavation or drilling operations, or storage of equipment or materials, and the construction, expansion, or substantial alteration of a manufactured home park." R.C. 3733.01(S).

B. Authority of Local Zoning Authorities

We turn now to the regulation of manufactured home parks by local zoning authorities.[7] Townships have the statutory authority to adopt zoning codes pursuant to R.C. Chapter 519. R.C. 519.02 reads in 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 … 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 … 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.

Once the zoning resolution is adopted by the board of township trustees, it is submitted to the electors residing in the unincorporated area of the township for their approval or rejection. R.C. 519.11.

A village, as a municipality, has both the constitutional and statutory authority to enact a zoning plan. *Pritz v. Messer*, 112 Ohio St. 628, 637, 149 N.E. 30, 33 (1925) (a municipality is "doubly empowered" to enact zoning legislation, "having been given such authority both by the Legislature and by the Constitution"); *Sanders v. Snyder*, 113 Ohio App. 370, 178 N.E.2d 174 (Williams County 1960). It has long been held that a municipality has the authority to enact zoning laws as an exercise of its police power granted under home rule, Ohio Const. art. XVIII, § 3. *See Rispo Realty & Development Co. v. City of Parma*, 55 Ohio St. 3d 101, 564 N.E.2d 425 (1990); *Pritz v. Messer*; *State v. Skilwies*, No. 17077, 1999 Ohio App. LEXIS 20 (Montgomery County Jan. 8, 1999); *Gentzler Tool & Die Corp. v. City of Green*, 113 Ohio App. 3d 489, 681 N.E.2d 467 (Summit County 1996); *City of Pepper Pike v. Landskroner*, 53 Ohio App. 2d 63, 371 N.E.2d 579 (Cuyahoga County 1977).[8] However, as a police power regulation, a municipal

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[7] You have specifically mentioned townships and villages in your request for an opinion, and accordingly the analysis will, for ease for discussion, be limited to these political subdivisions. Cities and counties, however, also have zoning powers. The zoning authority of cities is governed by the same constitutional and statutory provisions as those governing village zoning, and county zoning is governed by R.C. Chapter 303.

[8] Both chartered and nonchartered municipalities have the authority under Ohio Const. art. XVIII, § 3 to adopt zoning ordinances that are not in conflict with state general law. *Rispo Realty & Development Co. v. City of Parma*, 55 Ohio St. 3d 101, 564 N.E.2d 425 (1990)

zoning ordinance may not conflict with the general laws of Ohio and must, of course, comply with the state and federal constitutions. *See Rispo Realty & Development Co. v. City of Parma; City of Canton v. Whitman*, 44 Ohio St. 2d 62, 337 N.E.2d 766 (1975); *Pritz v. Messer; State v. Skilwies*; *Gentzler Tool & Die Corp. v. City of Green*. The statutory scheme enacted by the General Assembly governing the adoption of a zoning plan by municipalities may be found at R.C. 713.06-.15. *See also Rispo Realty & Development Co. v. City of Parma*.

Local zoning codes may not, as a constitutional matter, apply retroactively to preexisting uses of property, but must provide for the gradual, prospective elimination of nonconforming uses without depriving a property owner of a vested property right. *See City of Akron v. Chapman*, 160 Ohio St. 382, 116 N.E.2d 697 (1953); *State ex rel. Fairmount Center Co. v Arnold*, 138 Ohio St. 259, 34 N.E.2d 777 (1941); *Jackson Township Board of Trustees v. Donrey Outdoor Advertising Co.*, No. 98AP-1326, 1999 Ohio App. LEXIS 4341 (Franklin County Sept. 21, 1999); *City of Kettering v. Lamar Outdoor Advertising, Inc.*, 38 Ohio App. 3d 16, 525 N.E.2d 836 (Montgomery County 1987). This constitutional principle has been codified in the statutes providing for nonconforming use. *See* R.C. 519.19 (townships); R.C. 713.15 (municipal corporations).

II. Authority to Make Nonconforming Use Determinations in the Case of Manufactured Home Parks Rests Exclusively with Local Zoning Authorities

The State's regulation of manufactured home parks under R.C. 3733.01-.08 and the zoning regulations of local governments are both intended to preserve and promote the public health, safety, and welfare. *See City of Akron v. Chapman*; *City of Kettering v. Lamar Outdoor Advertising, Inc.* While the regulations of R.C. Chapter 3733 certainly help to protect the larger surrounding community, *see Stary v. City of Brooklyn*, 162 Ohio St. 120, 121 N.E.2d 11 (1954); 1977 Op. Att'y Gen. No. 77-038; 1958 Op. Att'y Gen. No. 2111, p. 297, their focus is clearly on protecting the well-being, physical safety, and living conditions of the inhabitants of the park.

In contrast, the focus of a local zoning code is on land use and planning for the welfare of the larger community, regulating either the size and placement of buildings or other structures on

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(nonchartered)*; Gentzler Tool & Die Corp. v. City of Green*, 113 Ohio App. 3d 489, 681 N.E.2d 467 (Summit County 1996) (chartered). *See generally Garcia v. Siffrin Residential Assn*, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980); *City of Canton v. Whitman*, 44 Ohio St. 2d 62, 337 N.E.2d 766 (1975); *Pritz v. Messer*, 112 Ohio St. 628, 149 N.E. 30 (1925). However, nonchartered municipalities are bound by statute with respect to the procedure that must be followed for adopting zoning ordinances and thus must comply with R.C. 713.12. *Village of Wintersville v. Argo Sales Co.*, 35 Ohio St. 2d 148, 299 N.E.2d 269 (1973); *Morris v. Roseman*, 162 Ohio St. 447, 123 N.E.2d 419 (1954). *See also Rispo Realty & Development Co. v. City of Parma*.

property within specified areas, or the use to which the structures and property within specified districts may be put. *See Willott v. Village of Beachwood*, 175 Ohio St. 557, 197 N.E.2d 201 (1964); *Village of Moscow v. Skeene*, 65 Ohio App. 3d 785, 585 N.E.2d 493 (Clermont County 1989); *Hulligan v. Columbia Township Board of Zoning Appeals*, 59 Ohio App. 2d 105, 392 N.E.2d 1272 (Lorain County 1978); 1991 Op. Att'y Gen. No. 91-028. *See also Goldberg Companies, Inc. v. Council of the City of Richmond Heights*, 81 Ohio St. 3d 207, 690 N.E.2d 510 (1998); *City of Akron v. Chapman; Estadt v. Board of Zoning Appeals*, No. 14-97-1, 1997 Ohio App. LEXIS 2800 (Union County June 6, 1997). Provision for nonconforming use is part of a township's or village's zoning code, and determinations of nonconforming use are directly related to enforcement of that zoning code. Thus, such determinations are squarely within the purview of the local zoning authority.

Granted, the language of R.C. 3733.02(A)(1) expansively gives the Public Health Council the "exclusive power to adopt, rules of uniform application throughout the state" governing manufactured home parks, including licensure, location, density, review of plans, layout, and operation of the parks. However, it has been consistently held that the provisions of R.C. 3733.01-.08 do *not* preempt local zoning provisions so long as the local provisions are not in conflict with R.C. 3733.01-.08. *See Mentor Green Mobile Estates v. City of Mentor*, No. 90-L-15-135, 1991 Ohio App. LEXIS 4052 (Lake County Aug. 23, 1991) at *7 n.1 ("[i]t seems apparent that the exclusivity clause was added primarily to dispose of the possible conflict between the State Board of Health and local health boards in the monitoring of mobile home parks"); 1994 Op. Att'y Gen. No. 94-040 at 2-205 (the State's statutory scheme for regulating manufactured home parks and federal safety requirements for the construction of manufactured homes may preempt certain township regulatory powers, but "[t]he preemption of local regulation in these instances does not … extend to matters of local zoning," and thus a township is not prevented from prohibiting the placement of mobile homes within its boundaries); 1991 Op. Att'y Gen. No. 91-028 at 2-158 ("the exclusive authority of the public health council [under R.C. 3733.02(A)] to regulate the location of manufactured home parks for purposes of health and safety does not preempt local zoning authority over such parks enacted for purposes of land use planning," and a local zoning authority may disapprove a site that has been approved by the Public Health Council); 1981 Op. Att'y Gen. No. 81-097 at 2-367 and 2-368 (R.C. 3733.02 does not "give the Public Health Council the exclusive power to make rules pertaining to house trailer parks, but only the exclusive power to make rules pertaining to house trailer parks which are of '*general application throughout the state,*'" and the Public Health Council does not have "the power to override local zoning concerns, but only the power to exclusively make state-wide rules of general application") (emphasis in original). *See also Davis v. McPherson*, 58 Ohio Op. 253, 132 N.E.2d 626 (App. Summit County 1955), *appeal dismissed*, 164 Ohio St. 375, 130 N.E.2d 794 (1955) (upholding a township zoning ordinance banning trailer parks from the township,

even though plans for a park had been approved by the State and permits had been issued by the county department of health); 1958 Op. Att'y Gen. No. 2111, p. 297.[9]

Even the enactment in 1955 of R.C. 3733.06, *see* 1955-1956 Ohio Laws 740 (Am. H.B. 292, eff. Oct. 5, 1955), which provides a licensed operator of (what was then called) a house trailer park the right to rent or use each lot or space for house trailers "without interruption for any period coextensive with any license or consecutive licenses," was found not to evidence a legislative intent that R.C. 3733.01-.08 preempt the field in reference to house trailer parks. Commenting upon the enactment of R.C. 3733.06,[10] and its effect on *Davis v. McPherson* and other earlier decisions, 1958 Op. Att'y Gen. No. 2111, p. 297, states at 300-301:

> Bearing in mind that the public health council is merely an arm of the state department of health, whose sole function is to conserve the public health, I cannot ascribe to the legislature an intention to make of the health council a zoning board, with power to override the authority of those agencies to which the legislature had long before given explicit authority to enact zoning regulations.
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> In my opinion the power given by Section 3733.02 … to "make *regulations of general application* throughout the state governing the *location*, layout, construction, drainage, sanitation, safety and operation of house trailer parks" was intended to preserve and conserve the health and welfare of the occupants of these house trailers and of the residents of the surrounding community by the adoption of such general regulations, and was never designed to permit the local health board to invade a territory which had been lawfully restricted against such house trailer parks, and to designate a spot where, merely by reason of a license to operate, the trailer park might be placed and, during the period of the license, permitted to remain, regardless of the zoning prohibition. (Emphasis in original.)

In concluding that the Public Health Council and local board of health were without authority to approve the location of a trailer park in a township where a zoning regulation

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[9] At the time *Davis v. McPherson*, 58 Ohio Op. 253, 132 N.E.2d 626 (App. Summit County 1955), *appeal dismissed*, 164 Ohio St. 375, 130 N.E.2d 794 (1955) and 1958 Op. Att'y Gen. No. 2111, p. 297 were rendered, R.C. 3733.02 (former G.C. 1235-1) read as follows: "The public health council … shall have the power to make regulations to be of general application throughout the state governing the location, layout, construction, drainage, sanitation, safety, and operation of house trailer parks." 1951 Ohio Laws 77 (Am. H.B. 113, eff. Aug. 8, 1951).

[10] 1955-1956 Ohio Laws 740 (Am. H.B. 292, eff. Oct. 5, 1955) also enacted R.C. 3733.07 providing that fees charged under R.C. 3733.04 "shall be in lieu of all license and inspection fees on or with respect to the operation or ownership of trailer parks within the state of Ohio."

forbade the operation of trailer parks, the opinion notes, "the enactment of [R.C. 3733.06], while it may have been intended to protect a licensee against *unlawful* interference with the enjoyment of his grant, did not have the effect of authorizing the district board of health to grant a license to locate and operate a house trailer park in a district from which such trailer parks had been barred either by municipal ordinance or township zoning regulation" (emphasis in original). 1958 Op. Att'y Gen. No. 2111, p. 297, at 301.[11] *Cf. Anderson v. Brown*, 13 Ohio St. 2d 53, 233 N.E.2d

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[11] The Department of Health contends that the General Assembly, in amending R.C. 3733.02 to include density as a matter which is governed by the Public Health Council, *see* Am. Sub. S.B. 142, 122nd Gen. A. (1998) (eff. March 30, 1999), gave the Public Health Council "clear authority to address park density," which is "directly related to the regulation of lots contained within a manufactured home park."

The Public Health Council, however, has been authorized to regulate "location" under R.C. 3733.02 since 1951 when G.C. 1235-1, the statutory predecessor of R.C. 3733.02, was enacted. *See* 1951 Ohio Laws 77 (Am. H.B. 113, eff. Aug. 8, 1951). Location, like density, is an attribute that is also a proper matter for regulation under a local authority's zoning power. *See, e.g.,* R.C. 519.02. However, this ability has not, according to the authorities discussed above, given the Public Health Council the power to preempt a local jurisdiction's zoning authority.

Like the term, "location," the term, "density," as used in R.C. 3733.02(A), must be read within the full context of the Council's authority to regulate manufactured home parks, which, as described above, emphasizes the living conditions of a park's inhabitants. The Public Health Council has, in fact, adopted rules that may be characterized as relating to park density and that fall squarely within its jurisdiction. *See, e.g.,* 6 Ohio Admin. Code 3701-27-03 (1999-2000 Supp.) (licensure of a park is for a maximum number of manufactured homes); 6 Ohio Admin. Code 3701-27-06 (1999-2000 Supp.) (in its application for approval, a developer must specify, *inter alia*, the total area of land to be used for the park and the location, numbers, and sizes of manufactured home lots); 6 Ohio Admin. Code 3701-27-08 (1999-2000 Supp.) (requirements for lot size and location of homes on lots).

It may be argued that a local zoning authority's position, that a single lot may no longer be rented to the owner of a manufactured home if it remains vacant for a time in excess of that provided by resolution or ordinance, affects density within the park and thus conflicts with the authority of the Public Health Council to regulate density within the park. However, the fact that the Council may set density requirements for the area within the park, which operators must meet in order to be licensed, does not mean that it has the authority to preclude a local authority from finding that a lot within a manufactured home park no longer constitutes a nonconforming use and may no longer be used as a site for another manufactured home. *See also* R.C. 3733.021(F) (approval of plans for development does "not constitute an exemption from the land use and building requirements of the political subdivision in which the manufactured home park" is

584 (1968) (striking down a village ordinance providing for the licensing of trailer parks for a fee as in conflict with R.C. 3733.06); *Noland v. City of Sharonville*, 4 Ohio App. 2d 7, 211 N.E.2d 90 (Hamilton County 1964) (local ordinance requiring licensing and inspection fees for trailer parks, prescribing safety and sanitary regulations, requiring parks to keep records, and giving municipal officers a right of entry for inspection, was legislating in a field preempted by the State and in conflict with R.C. 3733.06 and R.C. 3733.07 so as to be void); 1972 Op. Att'y Gen. No. 72-033 at 2-129 (with R.C. 3733.06 and .07, the State has preempted the regulation of house trailers and trailer parks and a township may not impose its own license tax on owners of trailer parks, although "[i]t is true that the board of trustees of the township may, under its authority to adopt zoning regulations, control the *original establishment* of a trailer park" (emphasis in original)).

Thus, the fact that the Public Health Council has the authority to adopt rules governing the operation of manufactured home parks and to license such parks, and may have, in fact, licensed a park within a particular township or village, does not mean that the township or village is precluded from enforcing its zoning regulations with regard to that park. The issue of nonconforming use relates to conformance to the *zoning code*, not conformance to the regulations of the Department of Health and Public Health Council. A manufactured home park is licensed as a whole and enforcement of the State's regulations is tied to such licensure. However, the fact that a park is licensed is immaterial for determining application of the local zoning code. Indeed, the Public Health Council appears to recognize this distinction between its authority and that of local jurisdictions in 6 Ohio Admin. Code 3701-27-06(B)(19) (1999-2000 Supp.), which now requires any person who proposes to develop a manufactured home park to submit to the Director of Health, along with the plans for development, "[w]ritten verification from the local zoning authority that the land use has been zoned and approved for the development of a manufactured home park."[12] *See also* R.C. 3733.021(F) (approval of plans for

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located). According to the authorities set forth above, the State's licensure function does not empower it to preempt zoning regulations. (Interestingly, the local authority's position could actually result in lower density, and thus, more favorable living conditions for park residents than the rules of the Public Health Council.)

[12] This is not to say that the Department's position, that a lot cannot be isolated for treatment from the park as a whole, is inconsistent with the manner in which a manufactured home park is regulated for purposes of R.C. 3733.01-.08. As discussed above, state law provides for licensure of the manufactured home park in its entirety. The operator is licensed for a certain number of lots, and once licensed, the operator is entitled to use each lot for the placement of a manufactured home "without interruption for any period coextensive with" the license. R.C. 3733.06(A). *See* 1977 Op. Att'y Gen. No. 77-038 at 2-134 and 2-135 ("[s]ince all the utilities roadways and common areas are owned and controlled by a single entity, the status of an individual lot [within a house trailer park] is always inextricably related to the total park concept … the individually owned lots can still function for many practical purposes only as a total

development does "not constitute an exemption from the land use and building requirements of the political subdivision in which the manufactured home park" is located).

III. Principles that Govern Nonconforming Use Determinations of Local Zoning Authorities

Let us now consider the second question presented by your request, whether a township or village may subject each lot within a manufactured home park to determination that its nonconforming use has been discontinued and may not be reestablished, or whether such determination may only be made with respect to the park as a whole. Resolution of this question requires that we examine the statutory authority of townships and villages with respect to nonconforming use determinations, rulings of the Ohio courts upon the propriety of such determinations, and certain principles of constitutional law that also govern such determinations.

A. Statutory Authority and Controlling Ohio Case Law

The zoning authority of a township is limited to that conferred by statute.[13] *Yorkavitz v. Board of Township Trustees*, 166 Ohio St. 349, 142 N.E. 2d 655 (1957). R.C. 519.19 addresses the issue of "nonconforming use" with respect to township zoning and reads as follows:

> The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enactment of a zoning resolution or amendment thereto, may be continued, although such use does not conform with such resolution or amendment, but if any such nonconforming use is voluntarily discontinued for two years or more, any future use of said land shall be in conformity with sections 519.02 to 519.25, inclusive, of the Revised Code. *The board of township trustees shall provide in any zoning resolution for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses upon such reasonable terms as are set forth in the zoning resolution.* (Emphasis added.)

R.C. 519.19 requires townships to include in their zoning codes provision for nonconforming use.[14] *See generally Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102,

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development"). *See also* 1991 Op. Att'y Gen. No. 91-020 (the effect of the regulatory scheme of R.C. Chapter 3733 is to impose a requirement that when three or more manufactured homes are located on a tract, the entire tract must be developed as a unit); 1982 Op. Att'y Gen. No. 82-061.

[13] Townships are authorized to adopt a limited home rule government. R.C. Chapter 504. *See* Am. Sub. H.B. 187, 123rd Gen. A. (1999) (eff. Sept. 20, 1999). However, this opinion is limited to a discussion of the zoning powers of townships that have not done so.

271 N.E. 2d 834 (1971) ("shall" indicates that a provision is mandatory). Such provision may not, however, conflict with R.C. 519.19 and must allow for voluntary discontinuation of any nonconforming use for at least two years. *See Donham v. E.L.B., Inc.*, 8 Ohio Misc. 2d 31, 457 N.E.2d 953 (C.P. Clermont County 1983) (a township zoning resolution cannot be more restrictive than R.C. 519.19, and thus cannot provide that any nonconforming use discontinued for only twelve months must be in conformity with the zoning regulations); 1984 Op. Att'y Gen. No. 84-029 (a township zoning resolution that provides a method for termination of a nonconforming use in addition to that provided in R.C. 519.19, voluntary discontinuation for two years or more, is in conflict with R.C. 519.19 and void).

Villages likewise are required to provide for nonconforming use in their zoning codes. Nonconforming use for purposes of village zoning is governed by R.C. 713.15. It is analogous to R.C. 519.19, except for the time period a village must allow for voluntary discontinuation of the nonconforming use. R.C. 713.15 provides that, "if any such nonconforming use is voluntarily discontinued for two years or more, or for a period of not less than six months but not more than two years that a municipal corporation otherwise provides by ordinance," then any future use must be in conformity with applicable zoning restrictions. *See Bell v. Rocky River Board of Zoning Appeals*, 122 Ohio App. 3d 672, 702 N.E.2d 910 (Cuyahoga County 1997).

Although, as discussed above, villages, unlike townships, possess constitutional home rule power, R.C. 713.15 is considered to be a "general law" and any village ordinance that conflicts with R.C. 713.15 is considered void. *See State v. Skilwies* at *11 ("R.C. 713.15 has been held to be a general law that confers rights to non-conforming users rather than restricting municipal home-rule powers … [t]hus, municipal zoning laws that violate R.C. 713.15 may also violate Article XVIII, Section 3 of the Ohio Constitution"); *Bell v. Rocky River Board of Zoning Appeals* (R.C. 713.15 controls over an ordinance that does not incorporate the element that the discontinuation be voluntary); *Village of Kelley's Island v. Johnson*, No. E-95-030, 1996 Ohio App. LEXIS 173 (Erie County Jan. 26, 1996) (a municipal ordinance prohibiting the replacement of one mobile home with another, outside a mobile home park, conflicts with R.C. 713.15 and may not be enforced since the word "substitution" as used in R.C. 713.15 means the replacement of the nonconforming use with a similar nonconforming use, and the ordinance only provides for the substitution of the nonconforming use with a conforming use); *Sun Oil Co. v. City of Upper*

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[14] As mentioned above, nonconforming uses must be accommodated by local zoning authorities as a constitutional matter, as well as pursuant to statutory mandate, unless the preexisting use constitutes a nuisance. *See City of Akron v. Chapman*, 160 Ohio St. 382, 116 N.E.2d 697 (1953); *Sun Oil Co. v. City of Upper Arlington*, 55 Ohio App. 2d 27, 379 N.E.2d 266 (Franklin County 1977); *Meuser v. Smith*, 75 Ohio L. Abs. 161, 143 N.E.2d 757 (C.P. Franklin County 1955), *aff'd*, 74 Ohio L. Abs. 417, 141 N.E.2d 209 (App. Franklin County 1956). *See also Kessler v. Smith*, 104 Ohio App. 213, 218, 142 N.E.2d 231, 235 (Cuyahoga County 1957) ("[a] trailer camp or park is not per se a nuisance").

Arlington, 55 Ohio App. 2d 27, 379 N.E.2d 266 (Franklin County 1977) (R.C. 713.15 is a "general law" for purposes of the Home Rule Amendment to the Constitution, Ohio Const. art. XVIII, § 3, and will prevail over a conflicting municipal zoning ordinance).

Neither R.C. 519.19 nor RC. 713.15 prohibits *per se* a zoning code from categorizing each lot within a manufactured home park as a nonconforming use. Thus, in order to analyze whether a local zoning authority has the ability to apply the nonconforming use exception to a lot within a manufactured home park, rather than to the manufactured home park as a whole, it would first be necessary to examine whether its zoning code authorizes or may be interpreted as authorizing such application, and then, if it does, whether such provision is constitutional.

The weight of authority suggests that, in the absence of a resolution or ordinance to the contrary, the manufactured home park as a whole, rather than individual lots within the park, would be considered the nonconforming use.[15] *See Peck v. Peterson*, No. CA-3325, 1988 Ohio App. LEXIS 4427 (Licking County Oct. 24, 1988) (where four adjacent parcels of land had been operated as a single mobile home park prior to the enactment of a zoning ordinance, then all four parcels constituted a nonconforming use even though some parcels had only utility hookups and improvements for the mobile homes prior to enactment of the ordinance); *Balch v. Austin Square, Inc.*, No. 5291, 1980 Ohio App. LEXIS 13943 at *5 (Stark County July 30, 1980) ("a single project for the development of a mobile home park on a fifty-five acre tract of land is not divisible"); *In re Appeal of Maywood*, No. 801, 1979 Ohio App. LEXIS 9287 (Geauga County Oct. 22, 1979) (mobile home park had right to develop additional acreage within property owned by it at the time the nonconforming use was created); *In re Appeal of Maywood*, at *5-6 (Hofstetter, J., concurring) ("unless the zoning resolution sets forth specifically what area of a parcel owned by a landowner is nonconforming at the inception of zoning, the entire parcel is nonconforming"); *Dusi v. Wilhelm*, 25 Ohio Misc. 111, 266 N.E.2d 280 (C.P. Mahoning County

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[15] This is not to say that a township or village would be without the authority to prohibit a nonconforming manufactured home park from expanding. *See, e.g., Coy v. Clarksfield Township Board of Zoning Appeals*, No. H-96-041, 1997 Ohio App. LEXIS 1714 (App. Huron County April 25, 1997) (a property owner has no vested right to expand the size of his mobile home, a nonconforming use, and his constitutional challenge has been repeatedly rejected by the courts); *Beck v. Springfield Township Board of Zoning Appeals*, 88 Ohio App. 3d 443, 624 N.E.2d 286 (Summit County 1993) (a township resolution which prohibits the expansion of a nonconforming use is not in conflict with R.C. 519.19 and may be applied to prohibit construction of additional mobile homes on the remaining undeveloped acres of a mobile home park); *Village of Williamsburg v. Milton*, 85 Ohio App. 3d 215, 619 N.E.2d 492 (Clermont County 1993) (a village ordinance limiting the expansion of a nonconforming use does not conflict with R.C. 713.15 and may be applied to prevent the replacement of two mobile homes on property not within a mobile home park with larger mobile homes). *See also Rolfes v. Harlem Township Board of Trustees*, No. 94CA E 12 038, 1995 Ohio App. LEXIS 5916 (Delaware County Nov. 15, 1995) (abandonment of nonconforming mobile home park).

1970) (where plans had been made to use an entire parcel of property for a mobile home park and where a portion of the parcel that had been zoned single family residence could not be used for a single-family dwelling, then it is logical to use the entire parcel for mobile homes and the owner cannot be deprived of his right to use the property for the purpose for which he bought it); *Meuser v. Smith*, 75 Ohio L. Abs. 161, 143 N.E.2d 757 (C.P. Franklin County 1955), *aff'd*, 74 Ohio L. Abs. 417, 141 N.E.2d 209 (App. Franklin County 1956) (where land was bought as one tract for the purpose of developing a trailer park on the entire tract and the landowners would not have undertaken to construct a part of the project if they had not expected to be able to develop the entire tract for this use because it would not be economically feasible to operate a trailer park on only a part of the tract, then the tract is not divisible for purposes of establishing a nonconforming use even though the owners had leased to a third party part of the acreage for agricultural purposes and did not have the right to possession until a time after passage of the zoning resolution). *See also Hunziker v. Grande*, 8 Ohio App. 3d 87, 456 N.E.2d 516 (Cuyahoga County 1982) (nonconforming use restrictions are meant to apply to the area of the use and not to inventory); *Zumberge v. Odebrecht*, 37 Ohio Misc. 71, 303 N.E.2d 919 (C.P. Mercer County 1973) (owners of two adjoining lots, both of which initially had mobile homes located on them prior to the passage of a county zoning resolution, but one of which then became vacant prior to passage of the resolution, could place a new mobile home on the vacant lot after enactment of the zoning resolution since all the connections for utilities were left on the site and there was no change in the essential purpose of the lot's use). *But see Beck v. Springfield Township Board of Zoning Appeals*, 88 Ohio App. 3d 443, 624 N.E.2d 286 (Summit County 1993) (zoning resolution prohibiting the expansion of the area on which a nonconforming use was located prohibited landowners who owned a parcel of land upon which some mobile homes were located prior to the enactment of the resolution from constructing additional mobile homes on the remaining undeveloped acres); *State ex rel. Howland Township Trustees v. Bailes*, 87 Ohio L. Abs. 321, 179 N.E.2d 527 (App. Trumbull County 1961) (where a property owner had installed all the necessary equipment for a trailer park for a certain number of trailers and had trailers in place, a nonconforming use was established to the extent of the facilities provided, but not as to every parking space).

B. Constitutional Standards that Must be Observed When Making Nonconforming Use Determinations

If, however, a local zoning authority has adopted or is proposing to adopt an ordinance or resolution providing for the discontinuation of nonconforming use as to each lot within a manufactured home park,[16] then the terms of such ordinance or resolution and the application

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[16] You provided with your request for an opinion an example of a zoning ordinance governing nonconforming use that was enacted by the Village of Lodi. Section 1280.05 of the Lodi Village Zoning Code provides that, whenever a nonconforming use has been discontinued for 6 months or more, it shall not be re-established and that, "[i]n the case of nonconforming mobile homes, their absence or removal from the lot shall constitute discontinuance from the

thereof must comport with pertinent constitutional limitations. Although the authority to determine the constitutionality of legislative enactments rests solely with the judiciary and may not be exercised by the Attorney General, *see Maloney v. Rhodes*, 45 Ohio St. 2d 319, 345 N.E.2d 407 (1976), we will set forth the standards that have been developed by the courts in judging the constitutionality of zoning regulations.

A board of township trustees or village legislative authority has the discretion to determine whether a zoning provision is reasonable, bears a real and substantial relation to the public health, safety, and welfare, and is appropriate as to local circumstances, and such determinations will not be disturbed unless clearly erroneous. *See Willott v. Village of Beachwood*; *City of Kettering v. Lamar Outdoor Advertising, Inc.*; 1994 Op. Att'y Gen. No. 94-040. Zoning enactments are presumed to be constitutional, and the party challenging the constitutionality of the enactment has the burden of proof and "must prove unconstitutionality beyond fair debate." *Goldberg Companies, Inc. v. Council of the City of Richmond Heights*, 81 Ohio St. 3d at 209, 690 N.E.2d at 511-12. A comprehensive zoning code, "which has a substantial relationship to the public health, safety, morals and the general welfare and which is not unreasonable or arbitrary, is a proper exercise of the police power." *City of Akron v.*

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time of absence or removal." It is beyond the scope of this opinion to interpret a particular ordinance or determine its constitutionality. However, in *Village of Lodi v. Ward*, No. 1918, 1991 Ohio App. LEXIS 1155 (Medina County March 20, 1991), the court considered this precise language. In that case, the owners of a mobile home park, which constituted a nonconforming use, were charged with violations of the zoning code because they allegedly permitted mobile homes to be placed on two lots within the park after abandoning the lots for six months or more. The owners contended that the use of the property constituted a legal nonconforming use and denied abandoning the nonconforming use, even though the lots were not occupied by mobile homes for more than six months, because the electric, sewer, and water connections remained intact at the lot sites, thereby precluding a discontinuance of the nonconforming use. The State offered no evidence to the contrary and failed to prove the owners of the mobile home park did not have a nonconforming use. Consequently, the court found in favor of the owners.

Thus, there is authority for the proposition that even though no mobile home occupies a lot within the mobile home park for over six months, the lot will not cease to be a nonconforming use if utility connections remain. *See also Schreiner v. Russell Township Board of Trustees*, 60 Ohio App. 3d 152, 156, 573 N.E.2d 1230, 1234 (Geagua County 1990) (the presence of streets and utilities argued against the contention that the lots in question "were merely vacant and unused real estate," and the trial court correctly determined the lots had a nonconforming use). However, the Lodi case is not instructive as to whether the court would have found that the owners had abandoned those two lots and were precluded from permitting mobile homes to be placed on the lots, if the utility lines had been disconnected for over six months, even though the owners continued to operate the park as a whole.

Chapman, 160 Ohio St. at 385, 116 N.E.2d at 699. *See also City of Kettering v. Lamar Outdoor Advertising, Inc.*

However, any zoning resolution or ordinance will be deemed to be unconstitutional if it is clearly arbitrary or unreasonable, with no substantial relation to the public health, safety, morals, or general welfare. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Goldberg Companies, Inc. v. Council of the City of Richmond Heights.* Even where a zoning law is found to be constitutional, a particular landowner may be entitled to compensation if a court finds the zoning deprives him of the economically viable use of his property and thus constitutes a taking. *Goldberg Companies, Inc. v. Council of the City of Richmond Heights. See also City of Kettering v. Lamar Outdoor Advertising, Inc.*; *Dusi v. Wilhelm*. As summarized in *City of Akron v. Chapman*, 160 Ohio St. at 386-88, 116 N.E.2d at 699-700, wherein the court reviewed a municipal ordinance providing that a nonconforming use could be discontinued whenever city council deemed such use had been permitted to exist for a reasonable time:

> …Zoning ordinances contemplate the gradual elimination of nonconforming uses within a zoned area, and, where an ordinance accomplishes such a result without depriving a property owner of a vested *property right*, it is generally held to be constitutional.
>
> Thus the denial of the right to resume a nonconforming use after a period of nonuse has been upheld, as well as the denial of the right to extend or enlarge an existing nonconforming use. The denial of the right to substitute new buildings for those devoted to an existing nonconforming use and to add or extend such buildings has also been upheld.…
>
> But in the instant case no such situation exists. We are asked by the [city council] to uphold the provision of a municipal ordinance, which in effect denies the owner of property the right to continue to conduct a lawful business thereon, which use was in existence at the time of the passage of the ordinance and has continued without expansion or interruption ever since….
>
> …
>
> What is property? It has been defined as not merely the ownership and possession of lands or chattels but the unrestricted right of their use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right….
>
> The right to continue to use one's property in a lawful business and in a manner which does not constitute a nuisance and which was lawful at the time it was acquired is within the protection of Section 1, Article XIV, Amendments, Constitution of the United States, and Section 16, Article I of the Ohio Constitution, which provide that no person shall be deprived of life, liberty or *property* without due process of law. (Emphasis in original.)

See also Negin v. Board of Building and Zoning Appeals, 69 Ohio St. 2d 492, 496-97, 433 N.E.2d 165, 169 (1982) ("[t]he requirement of a municipal ordinance that a landowner purchase additional property before he is permitted to improve a substandard lot, which was platted and held in single and separate ownership prior to the enactment of the ordinance, renders that lot useless for any practical purpose … [and] goes beyond mere limitation of use and becomes a confiscation"); *Schreiner v. Russell Township Board of Trustees*, 60 Ohio App. 3d 152, 155, 573 N.E.2d 1230, 1233 (Geagua County 1990) (resolution requiring that landowners holding contiguous lots not conforming to minimum size requirements combine the lots, and prohibiting the sale or transfer of any such lots until they were re-subdivided, constituted a "taking" because it "'totally restrict[ed]' the owners in the use of their property absent compliance with the zoning restrictions … [and] these restrictions render the property as it is presently situated, 'effectively … valueless'").

Thus, a local zoning resolution or ordinance must comport with constitutional guarantees, and may not deprive the owner or operator of a manufactured home park of the economically viable use of his land without just compensation. An ordinance or resolution that denies the owner or operator of a manufactured home park the ability to rent a lot within the park to a new home owner after the lot has been vacant for a time longer than that allowed for reestablishment of a nonconforming use, even though the park as a whole is an ongoing concern, would be of questionable validity for the following three reasons.

First, there would be some question whether the nonconforming use had, in fact, been discontinued. As discussed in note 16, *supra*, the fact that utilities, streets, and other improvements an operator is required by the Public Health Council to provide for a manufactured home park remain, even though a lot within the park has no manufactured home parked on it, argues that the lot continues as a nonconforming use.

Second, such an ordinance or resolution would likely render any such lot that had been vacated useless for any practical purpose. The lot could not be rented to another manufactured home owner, and any use would have to comport with the zoning code. In all probability, no other use could be made of the lot so long as the park remained operational.

Third, such an ordinance or resolution arguably would interfere with the owner's or operator's right to conduct his business as a whole. Indeed, a landowner who is denied on an incremental basis, lot by lot, the use and economic benefit of his property, may in some respects be seen as suffering more of a deprivation than if he were barred outright from using the tract as a whole for a particular purpose. Assuming that the park continues to operate lawfully, a denial of the owner's or operator's ability to make full use of that property as it operated at the time the ordinance or resolution was enacted may deny to him the economically viable use of his land. Thus, even if the ordinance or resolution were found to be constitutional as enacted, the courts may find that the owner or operator is entitled to compensation for the deprivation of his right to continue to conduct his business.

Conclusions

Therefore, it is my opinion, and you are advised, as follows:

1. The Ohio Department of Health and Public Health Council have no authority to determine whether a manufactured home park, or the lots within the park, constitute a nonconforming use for purposes of a township or village zoning code. Such determination is within the purview of the township or village that enacted the zoning code.

2. In the absence of a zoning resolution or ordinance to the contrary, the manufactured home park as a whole rather than individual lots within the park shall be considered the nonconforming use. A township zoning resolution or village zoning ordinance governing nonconforming use must be consistent with constitutional limitations, and may not deprive the owner or operator of a manufactured home park of the economically viable use of his land without just compensation.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

April 18, 2000

The Honorable Dean Holman
Medina County Prosecuting Attorney
60 Public Square
Medina, Ohio 44256

SYLLABUS: 2000-022

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