March 4, 2010

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870-2636

SYLLABUS: 2010-009

R.C. 519.21(B) does not prohibit the board of trustees of a non-home rule township from using its zoning powers under R.C. Chapter 519 to regulate the construction and use of buildings and structures on lots greater than five acres when the buildings and structures are not incident to the use for agricultural purposes of the land on which the buildings and structures are located.

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

March 4, 2010

OPINION NO. 2010-009

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870-2636

Dear Prosecutor Baxter:

You have requested an opinion whether R.C. 519.21(B) prohibits the board of trustees of a non-home rule township from using its zoning powers under R.C. Chapter 519 to regulate the construction and use of buildings and structures on lots greater than five acres.

R.C. Chapter 519 sets forth the general authority of a township to impose zoning regulations. Under this chapter, a township that has adopted a zoning resolution is empowered to do the following:

> Except as otherwise provided in this section, in the interest of the public health and safety, the board of township trustees *may regulate by resolution, in accordance with a comprehensive plan, the location, height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas that 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 the township*. Except as otherwise provided in this section, in the interest of the public convenience, comfort, prosperity, or general welfare, the board by resolution, in accordance with a comprehensive plan, *may regulate the location of, set back lines for, and 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 the township, and may establish reasonable landscaping standards and architectural standards excluding exterior building*

> *materials in the unincorporated territory of the township*. Except as otherwise provided in this section, in the interest of the public convenience, comfort, prosperity, or general welfare, the board *may regulate by resolution, in accordance with a comprehensive plan, for nonresidential property only, the height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas that may be occupied, sizes of yards, courts, and other open spaces, and the density of population in the unincorporated territory of the township*. (Emphasis added.)

R.C. 519.02(A).

Pursuant to R.C. 519.02(A), a board of township trustees may regulate the construction and use of buildings and structures in the unincorporated territory of the township. Nothing in the language of R.C. 519.02(A) qualifies the board's exercise of its regulatory authority on the basis of lot size. R.C. 519.02(A) thus authorizes a board of township trustees to enact and enforce regulations concerning the construction and use of buildings and structures regardless of the size of the lots on which the buildings and structures are situated. *See generally Pioneer Linen Supply Co. v. Evatt*, 146 Ohio St. 248, 251, 65 N.E.2d 711 (1946) ("exceptions to a general law are not favored and … what is not clearly excluded from the operation of a law is clearly included therein"); *Morris Coal Co. v. Donley*, 73 Ohio St. 298, 76 N.E. 945 (1906) (syllabus, paragraph 1) ("[a]n exception to the provisions of a statute not suggested by any of its terms should not be introduced by construction from considerations of mere convenience").

Certain limitations on the exercise of township zoning authority, however, are also set forth in R.C. Chapter 519. Your question concerns the application of a limitation imposed by R.C. 519.21(B). This division of R.C. 519.21 provides:

> A township zoning resolution, or an amendment to such resolution, may in any platted subdivision approved under [R.C. 711.05, R.C. 711.09, or R.C. 711.10] or in any area consisting of fifteen or more lots approved under [R.C. 711.131] that are contiguous to one another, or some of which are contiguous to one another and adjacent to one side of a dedicated public road, and the balance of which are contiguous to one another and adjacent to the opposite side of the same dedicated public road regulate:
>
> (1) Agriculture on lots of one acre or less;
>
> (2) Buildings or structures incident to the use of land for agricultural purposes on lots greater than one acre but not greater than five acres by: set back building lines; height; and size;
>
> (3) Dairying and animal and poultry husbandry on lots greater than one acre but not greater than five acres when at least thirty-five per cent of the lots in the subdivision are developed with at least one building, structure, or improvement that is subject to real property taxation or that is subject to the tax on manufactured and mobile homes under [R.C. 4503.06]. After thirty-five per cent of the lots are so developed, dairying and animal and poultry husbandry shall

> be considered nonconforming use of land and buildings or structures pursuant to [R.C. 519.19].
>
> *Division (B) of this section confers no power on any township zoning commission, board of township trustees, or board of zoning appeals to regulate agriculture, buildings or structures, and dairying and animal and poultry husbandry on lots greater than five acres.* (Emphasis added.)

In your letter you explain that some township officials in your county have interpreted the final paragraph of R.C. 519.21(B) "as completely abrogating a township's ability to regulate buildings and structures on lots greater than five acres regardless of whether the building[s] or structures are incidental to an agricultural use." The reasoning of these township officials is as follows:

> In sections (A) and (B)(1) of R.C. 519.21, "buildings or structures" are described in the context of being "incidental to an agricultural use." In Section (B)(3) "buildings or structures" appears to stand alone, with no express requirement that they be "incidental to an agricultural use." Thus, it is argued that a township cannot regulate "buildings or structures" on lots that are more then five acres, or require zoning certificates when an individual seeks to build a structure regardless of the zoning district and regardless of the intended use. Under such an argument, an individual owing more than five acres of land would not have to comply with township setback, area and height requirements. It would therefore be possible to build any size building anywhere on the land without interference from township zoning requirements.

For the reasons that follow, we cannot accept this argument. It is a cardinal rule of statutory interpretation that "words and phrases in a statute must be read in [the] context of the whole statute." *Commerce & Indus. Ins. Co. v. City of Toledo*, 45 Ohio St. 3d 96, 102, 543 N.E.2d 1188 (1989); *accord* R.C. 1.42. This means that in reviewing a statute, the entire statute must be considered and one sentence should not be disassociated from the statute's larger context. *State v. Jackson*, 102 Ohio St. 3d 380, 2004-Ohio-3206, 811 N.E.2d 68, at ¶34 (2004); *State v. Dickerson*, 45 Ohio St. 3d 206, 209, 543 N.E.2d 1250 (1989). *See generally Humphrys v. Winous Co.*, 165 Ohio St. 45, 49, 133 N.E.2d 780 (1956) ("[t]he primary duty of a court in construing a statute is to give effect to the intention of the Legislature enacting it. In determining that intention, a court should consider the language used and the apparent purpose to be accomplished, and then such a construction should be adopted which permits the statute and its various parts to be construed as a whole and gives effect to the paramount object to be attained").

Read as a whole, R.C. 519.21 clearly concerns limiting the authority of a board of township trustees to enact and enforce zoning regulations pertaining to agriculture under R.C. 519.02.[1] R.C. 519.21(A) states:

> *Except as otherwise provided in division (B) of this section*, [R.C. 519.02-.25] confer no power on any township zoning commission, board of township trustees, or board of zoning appeals to prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located, including buildings or structures that are used primarily for vinting and selling wine and that are located on land any part of which is used for viticulture, and no zoning certificate shall be required for any such building or structure. (Emphasis added.)

R.C. 519.21(A) effectively provides that "a township's zoning authority, *with the exception set forth in R.C. 519.21(B)*, does not extend to the prohibition of the use of land for agricultural purposes" or "prohibit the construction or use of buildings or structures incident to the use for agricultural purposes of the land where the buildings or structures are located." 1989 Op. Att'y Gen. No. 89-067 at 2-307 (emphasis added).

R.C. 519.21(B), in turn, sets forth specific instances in which "[s]ome zoning of agricultural uses on lots smaller than five acres is permitted." 1994 Op. Att'y Gen. No. 94-040 at 2-204. In addition, R.C. 519.21(C) authorizes a board of township trustees to impose zoning regulations on farm markets when certain conditions exist.

Succinctly stated, R.C. 519.21(B) and (C) are exceptions to R.C. 519.21(A)'s mandate that a township may not "prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located." *See generally Bresher v. Smith*, Case

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[1] For purposes of R.C. 519.02-.25, "agriculture" includes the following activities:

> farming; ranching; aquaculture; apiculture; horticulture; viticulture; animal husbandry, including, but not limited to, the care and raising of livestock, equine, and fur-bearing animals; poultry husbandry and the production of poultry and poultry products; dairy production; the production of field crops, tobacco, fruits, vegetables, nursery stock, ornamental shrubs, ornamental trees, flowers, sod, or mushrooms; timber; pasturage; any combination of the foregoing; the processing, drying, storage, and marketing of agricultural products when those activities are conducted in conjunction with, but are secondary to, such husbandry or production.

R.C. 519.01.

No. CA92-11-021, 1993 Ohio App. LEXIS 4194, at *4-5 (Preble County Aug. 30, 1993) ("R.C. 303.21(B)(3) is an exception to the rule that a county rural zoning commission cannot prohibit the use of any land for agricultural purposes");[2] 1997 Op. Att'y Gen. No. 97-002 at 2-8 (R.C. 519.21(C) is an exception to R.C. 519.21(A)). Accordingly, reading R.C. 519.21(B) in conjunction with the other provisions of R.C. 519.21 discloses that the General Assembly did not intend for R.C. 519.21(B) to apply to buildings and structures that are not incident to the use for agricultural purposes of the land on which the buildings and structures are located.

The legislative history of R.C. 519.21(B) provides additional support for this conclusion. *See generally* R.C. 1.49 ("[i]f a statute is ambiguous, the court, in determining the intention of the legislature, may consider … [t]he legislative history"). In 1987 the General Assembly added to R.C. 519.21(B) the language stating that this division "confers no power on any township zoning commission, board of township trustees, or board of zoning appeals to regulate agriculture, buildings or structures, and dairying and animal and poultry husbandry on lots greater than five acres." 1985-1986 Ohio Laws, Part III, 5165, 5168 (Am. Sub. H.B. 582, eff. Mar. 5, 1987). The same legislation also added to the statute the three specific instances in which a board of township trustees may regulate the use of land for agricultural purposes on the basis of lot size. R.C. 519.21(B)(1)-(3).

In its analysis of this bill, the Legislative Service Commission (LSC) stated that R.C. 519.21(B) was being amended to authorize a township to regulate agriculture on the basis of lot size in three different situations and that the authority granted to a township to thus regulate agriculture did not grant to the township the power to regulate agriculture on lots greater than five acres. Ohio Legislative Service Comm'n, Analysis, Sub. H.B. 582 (as reported by the Senate Agriculture Committee) (May 23, 1986). It thus appears that the intended purpose of the language of R.C. 519.21(B) stating that this division "confers no power on any township zoning commission, board of township trustees, or board of zoning appeals to regulate agriculture, buildings or structures, and dairying and animal and poultry husbandry on lots greater than five acres" was to make it clear that the authority conferred upon a board of township trustees to regulate agriculture in the situations set forth in R.C. 519.21(B) did not include the authority to regulate agriculture on lots greater than five acres. The LSC bill analysis therefore provides further support for the conclusion that R.C. 519.21(B) does not prohibit the board of trustees of a non-home rule township from using its zoning powers under R.C. Chapter 519 to regulate the construction and use of buildings and structures on lots greater than five acres when the buildings and structures are not incident to the use for agricultural purposes of the land on which the buildings and structures are located. *See generally Meeks v. Papadopulos*, 62 Ohio St. 2d 187, 191, 404 N.E.2d 159 (1980) (although a court is not bound by a LSC bill analysis, the court may refer to the analysis when the court finds it helpful and objective).

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[2] R.C. 303.21 addresses county zoning issues and is virtually identical to R.C. 519.21.

In conclusion, it is my opinion, and you are hereby advised that R.C. 519.21(B) does not prohibit the board of trustees of a non-home rule township from using its zoning powers under R.C. Chapter 519 to regulate the construction and use of buildings and structures on lots greater than five acres when the buildings and structures are not incident to the use for agricultural purposes of the land on which the buildings and structures are located.

Respectfully,

RICHARD CORDRAY
Ohio Attorney General