February 17, 2010

The Honorable Gerald L. Heaton
Logan County Prosecuting Attorney
117 East Columbus Avenue, Suite 200
Bellefontaine, Ohio 43311

SYLLABUS: 2010-006

1. Under R.C. Chapter 519, a township is permitted to have only one zoning commission. The township zoning commission has authority over all the unincorporated territory of the township and may serve multiple separately-zoned areas within the township. (2000 Op. Att'y Gen. No. 2000-034, syllabus, paragraph 3, approved and followed.)

2. Under R.C. 519.04, members of the township zoning commission must reside in the unincorporated territory of the township and may reside in either a zoned area or an area that has not been zoned. (1960 Op. Att'y Gen. No. 1279, p. 274, syllabus, paragraph 2, approved and followed.)

3. R.C. Chapter 519 permits an individual who resides in a zoned area within the unincorporated territory of a township to serve as a member of the township zoning commission and, in that capacity, to participate in the exercise of authority over all the unincorporated territory of the township, including zoned areas other than the zoned area in which the individual member resides.

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

February 17, 2010

OPINION NO. 2010-006

The Honorable Gerald L. Heaton
Logan County Prosecuting Attorney
117 East Columbus Avenue, Suite 200
Bellefontaine, Ohio 43311

Dear Prosecutor Heaton:

We have received your request for an opinion concerning the organization and authority of a township zoning commission. You have asked the following questions:

1. Does R.C. 519.04 permit one zoning commission to serve multiple, separately zoned areas within a single township?

2. Where portions of a township are not subject to a zoning resolution, does R.C. 519.04 require that zoning commission members reside within a zoned area?

3. Does R.C. 509.04 permit a resident of one zoned area to serve on a zoning commission that covers another zoned area?

Your opinion request describes a situation in which a township has two separate zoning resolutions covering two separate areas and has a separate zoning commission for each area. Each zoning commission consists of members residing within the zoned area covered by the resolution governing that area. You have stated that, due in part to the limited population of the zoned areas, it is difficult to find enough people willing to serve on the two township zoning

commissions. The township has expressed an interest in combining these two zoning commissions and has prompted you to submit the questions set forth above.[1]

Township Zoning Commissions

R.C. Chapter 519 establishes the authority of a township to use zoning to regulate land use in the unincorporated territory of the township—that is, in the part of the township that is not included in a village or city. *See, e.g.*, R.C. 519.02; 2000 Op. Att'y Gen. No. 2000-034, at 2-211; *see also* Ohio Const. art. XVIII, §§ 1, 2; R.C. 503.07; 2005 Op. Att'y Gen. No. 2005-043. Under R.C. 519.04, a township that chooses to exercise its zoning power must "create and establish a township zoning commission" composed of five members appointed by the board of township trustees. The members must "reside in the unincorporated area of the township." R.C. 519.04. There may also be two alternate members who attend meetings in the place of absent regular members. Terms of the regular members must be arranged so that the term of one member expires each year. *Id*.

The question whether one zoning commission may serve multiple separately-zoned areas within a single township was addressed in detail in 2000 Op. Att'y Gen. No. 2000-034, which concluded not only that one zoning commission may serve multiple separately-zoned areas within a single township, but that "[a] township is permitted to have only one zoning commission." 2000 Op. Att'y Gen. No. 2000-034 (syllabus, paragraph 3). We find 2000 Op. Att'y Gen. No. 2000-034 persuasive and we approve and follow its analysis and conclusions. The conclusion that a township may have only one zoning commission is consistent with various provisions of R.C. Chapter 519, including R.C. 519.02(A), which requires that zoning regulations be established "in accordance with a comprehensive plan"; R.C. 519.05, which provides for the township zoning commission to submit a zoning plan "including additions to territory in which a township zoning plan is in effect"; and various provisions that refer simply to *the* township zoning commission, *see, e.g.*, R.C. 519.07-.10, .12, .16. The 2000 opinion discusses the zoning commission's role in the adoption of an initial zoning plan and the various procedures by which the initial plan may be expanded to include additional territory.[2]

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[1] You have informed us that the township in question has not adopted a limited home rule government under R.C. Chapter 504. Accordingly, this opinion does not address any issues as they pertain to a township with a limited home rule government. *See* 2000 Op. Att'y Gen No. 2000-034, at 2-211 n.1. *See generally* 2002 Op. Att'y Gen. No. 2002-032 (syllabus) ("[a] township that has adopted a zoning resolution pursuant to R.C. Chapter 519 and has adopted a limited home rule government pursuant to R.C. Chapter 504 may amend its zoning resolution solely under the authority and procedures of R.C. 519.12").

[2] The syllabus to 2000 Op. Att'y Gen. No. 2000-034 reads as follows:

R.C. 519.04 addresses your second question, stating plainly that the members of the township zoning commission must "reside in the unincorporated area of the township" and establishing no other restrictive residence requirements. As explained in 2000 Op. Att'y Gen. No. 2000-034, the electors residing within an area to be zoned must approve the zoning plan, map, or resolution for that area. *See* R.C. 519.03-.11. However, the township zoning commission has authority to take action with respect to all unincorporated territory within the township, and members of the township zoning commission may reside anywhere within the unincorporated territory of the township.

The answer to your third question follows directly from the discussion set forth above. Because a township is permitted to have only one zoning commission, an individual who lives in a zoned area within the unincorporated territory of the township and serves as a member of the township zoning commission may, as a member of the commission, participate in the exercise of zoning authority throughout the unincorporated territory of the township, including zoned areas other than the zoned area in which the member resides.

History of the Single Township Zoning Commission Requirement

The conclusions set forth above are based upon current township zoning provisions. However, as described in 2000 Op. Att'y Gen No. 2000-034 and 1960 Op. Att'y Gen. No. 1279, p. 274, there was a time when Ohio townships could have more than one zoning commission.

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1. In a township in which a zoning resolution has been adopted for a portion of the unincorporated territory, additional territory may be zoned as provided in R.C. 519.05 pursuant to the procedure for initial township zoning set forth in R.C. 519.03 through R.C. 519.11, and not by amendment of the zoning resolution pursuant to R.C. 519.12.

2. In a township in which a zoning resolution has been adopted for a portion of the unincorporated territory, additional territory may be zoned either: (1) by initiating a new zoning resolution in accordance with R.C. 519.03 through R.C. 519.11 for the area to be newly zoned and submitting the issue to electors residing in the area to be newly zoned; or (2) by repealing the existing zoning plan following the procedure set forth in R.C. 519.25, initiating a new zoning resolution in accordance with R.C. 519.03 through R.C. 519.11 to include the area originally zoned and the area to be added, and submitting the issue both to electors residing in the area originally zoned and to electors residing in the area to be added.

3. A township is permitted to have only one zoning commission, but it may have more than one zoning plan, zoning map, or zoning resolution. (1960 Op. Att'y Gen. No. 1279, p. 274, syllabus, paragraph 1, approved and followed.)

Prior to September 17, 1957, R.C. 519.04 (and, earlier, G.C. 3180-28) required that a township zoning commission consist of five members residing "in the unincorporated area of the township to be zoned." 1953 Op. Att'y Gen. No. 3145, p. 520, at 523. If an additional area was to be zoned, it was necessary to appoint an additional township zoning commission consisting of five members residing in the new area to be zoned. 1953 Op. Att'y Gen. No. 3145, p. 520, at 522-23.

However, legislation that went into effect in 1957 changed this arrangement, amending R.C. 519.04 to provide for a township zoning commission to be composed of "five members who reside in the unincorporated area of the township," and amending R.C. 519.05 to authorize the township zoning commission to submit a plan "including additions to territory in which a township zoning plan is in effect." 1956-1957 Ohio Laws 363, 370 (Am. S.B. 403, eff. Sept. 17, 1957). The effect of these amendments was:

> first, to eliminate the requirements of the township zoning commissioner to be a resident of the area to be zoned and, second, to permit the existing township commission to perform the functions required in Chapter 519., Revised Code, as they pertain to the addition of new territory to a then existing township zoning plan.

1960 Op. Att'y Gen. No. 1279, p. 274, at 276. Under the amended language, which is still in effect,[3] a member of the township zoning commission may reside anywhere within the unincorporated territory of the township, and the township zoning commission may exercise zoning authority throughout the unincorporated territory of the township.

The 1960 opinion addressed the procedure for changing from two or more township zoning commissions to a single township zoning commission following the 1957 legislation.[4]

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[3] R.C. 519.05 has not been amended since 1957. Additional amendments were made to R.C. 519.04 in 1998. *See* 1997-1998 Ohio Laws, Part II, 3248, 3250-51 (Am. Sub. H.B. 388, eff. July 22, 1998). Those amendments provide for the appointment of alternate members to the township zoning commission. They are part of current law, but they do not affect the analysis set forth in this opinion.

[4] 1960 Op. Att'y Gen. No. 1279, p. 274, states, at 277-78:

> Your letter indicates, however, that in some instances townships may not have followed the procedure for appointment of a zoning commission as specified by Section 519.04, *supra*, since September 17, 1957. As I understand it, not all commissions existing as of that date were abolished and, further, in some townships more than one zoning commission has been appointed since that date. Such is, of course, contrary to the intent of the section and the question arises as

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to the validity of the acts taken by such township zoning commissions since September 17, 1957.

Since all existing township zoning commissions were abolished as of September 17, 1957, the terms of office of the members of such commissions ended as of that date. In this regard, the general rule of law is stated in 32 Ohio Jurisprudence, page 1074, as follows:

> "The effect of the abolition of an office always is to terminate the term of the incumbent, since he cannot be an officer or incumbent of an office which has ceased to exist; in other words, he cannot be a de facto officer of an office no longer in existence. He can recover no salary thereafter; and it is his duty to transfer to the proper authorities all property connected therewith.
> "* * *"

Any commissioners not properly appointed, therefore, in taking action since September 17, 1957, were not acting as *de facto* officers of the former commissions, since a person cannot be a *de facto* officer of a non-existent office. Such actions, however, could be considered actions as *de facto* officers of a valid township zoning commission which could have been appointed pursuant to Section 519.04, *supra*, even if such appointment was not actually made. In this regard it is stated in 32 Ohio Jurisprudence, Section 225, page 1080:

. . . . [lengthy quotation omitted]

The acts of a township zoning commission not appointed in accordance with the provisions of Section 519.04, Revised Code, as effective September 17, 1957, would have been identical with a person acting "without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action supposing him to be the officer he assumed to be." Thus, the acts of such a commission which are otherwise valid could not be invalidated merely because of a failure of formal appointment. (32 Ohio Jurisprudence, Section 242, page 1097.)

Accordingly, while all township zoning commissions are required to be appointed under the provisions of Section 519.04, Revised Code, as now existing, I am of the opinion that the acts of commissions not so appointed were not made invalid because of failure to comply with such requirement.

That 1960 opinion concluded that the September 17, 1957 amendments "had the effect of abolishing all existing township zoning commissions; and, as of such date, in any township, only one zoning commission, made up of five residents of the unincorporated territory of the township, could validly be appointed under Section 519.04, Revised Code." 1960 Op. Att'y Gen. No. 1279, p. 274 (syllabus, paragraph 2). *See generally State ex rel. Wilson v. Gulvas*, 63 Ohio St. 3d 600, 589 N.E.2d 1327 (1992). Thus, the appropriate procedure was to create a new township zoning commission with members appointed in compliance with the amended provisions of R.C. 519.04 and to have that be the only zoning commission in the township. 1960 Op. Att'y Gen. No. 1279, p. 274, at 277.

The 1960 opinion noted, however, that there were instances in which a township appointed members to more than one zoning commission after September 17, 1957, and indicated that the actions taken by those commissions could be considered valid. *See* note 4, *supra.* In such instances, it would be sufficient to take prospective action to create a single township zoning commission in compliance with statutory requirements.

Thus, under R.C. Chapter 519, a township is permitted to have only one zoning commission. The township zoning commission has authority over all the unincorporated territory of the township and may serve multiple separately-zoned areas within the township. Under R.C. 519.04, members of the township zoning commission must reside in the unincorporated territory of the township and may reside in either a zoned area or an area that has not been zoned. As a result, R.C. Chapter 519 permits an individual who resides in a zoned area within the unincorporated territory of a township to serve as a member of the township zoning commission and, in that capacity, to participate in the exercise of authority over all the unincorporated territory of the township, including zoned areas other than the zoned area in which the individual member resides. In the situation you have described, appropriate action should be taken to comply with the single zoning commission requirement established under current law.

This opinion is based upon R.C. 519.04, R.C. 519.05, and related provisions as currently in effect. If a different result is sought, appropriate legislative changes may be made. *See Bd. of Educ. v. Fulton County Budget Comm'n*, 41 Ohio St. 2d 147, 156, 324 N.E.2d 566 (1975); 2009 Op. Att'y Gen. No. 2009-006, at 2-47.

Conclusions

For the reasons discussed above, it is my opinion, and you are advised, as follows:

See also R.C. 519.122 (no action challenging the validity of a zoning resolution, amendment, variance, or conditional use certificate on the basis of a procedural error may be brought more than two years after the action occurred); 1958 Op. Att'y Gen. No. 1832, p. 147 (authority of township to abolish zoning commission in certain circumstances).

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Respectfully,

RICHARD CORDRAY
Ohio Attorney General