September 13, 2000

OPINION NO. 2000-034

The Honorable Michael G. Spahr
Washington County Prosecuting Attorney
205 Putnam Street
Marietta, Ohio 45750

Dear Prosecutor Spahr:

We have received your request for an opinion regarding township zoning. Your question asks about the procedure that should be followed to zone additional territory of a township in which some zoning is in effect.

Your question has arisen with respect to Muskingum Township in Washington County. A portion of that township was zoned in the 1950's. Residents in another portion of the township, adjacent to the area originally zoned but separated by a river, now wish to have their property zoned. They are following statutory directives and would like to have the issue placed on the November ballot, but there is some uncertainty about the procedure that should be followed. You ask whether the zoned area may be enlarged by the amendment of the existing zoning resolution and zoning map, or whether the issue must be presented to the voters as an original zoning plan. In either case, you ask whether the issue is submitted only to electors residing in the newly zoned area or both to electors residing in the newly zoned area and electors residing in the previously zoned area. You also ask whether there is authority for a separate zoning commission, zoning plan, zoning map, and zoning resolution.

Let us begin our consideration of your question with a brief overview of township zoning. It is firmly established that townships have no inherent or constitutionally-granted police power to enact zoning legislation and are limited to such zoning authority as they are granted by statute. *See Board of Bainbridge Township Trustees v. Funtime, Inc.*, 55 Ohio St. 3d 106, 563 N.E.2d 717 (1990) (syllabus, paragraph 1).[1] Pursuant to R.C. Chapter 519, a township is

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[1] Townships have statutory authority to adopt a limited home rule government. R.C. Chapter 504. We are informed that the township in question has not adopted a limited home rule government, and this opinion does not address the authority of townships that have adopted such governments.

authorized, for the purpose of promoting the public health, safety, and morals, and when acting in accordance with a comprehensive plan, to adopt certain types of zoning regulations governing all or any part of the unincorporated territory of the township. R.C. 519.02. The comprehensive plan requirement serves to prevent zoning that is arbitrary or unreasonable. *See Cassell v. Lexington Township Bd. of Zoning Appeals*, 163 Ohio St. 340, 127 N.E.2d 11 (1955); *Monsanto Co. v. Board of Elections*, No. C-950735, 1996 Ohio App. LEXIS 4433 (Ct. App. Hamilton County Oct. 9, 1996); *see also Rumpke Waste, Inc. v. Henderson*, 591 F. Supp. 521 (S.D. Ohio 1984).[2]

To proceed with the zoning process, a board of township trustees must pass a resolution declaring its intention and must create and establish a township zoning commission. R.C. 519.03-.04. The township zoning commission prepares a plan, including text and maps, that sets forth its recommendations "for the carrying out by the board of township trustees of the powers, purposes, and provisions set forth [in R.C. Chapter 519], including additions to territory in which a township zoning plan is in effect." R.C. 519.05.

Various procedural steps must be followed for an initial zoning plan to be adopted. The township zoning commission must hold at least one public hearing on the plan and must submit the plan to the county or regional planning commission, if one exists, before certifying the plan to the board of township trustees. R.C. 519.06-.07. The board of township trustees must hold a public hearing, may follow prescribed procedures to make changes in the recommended zoning plan, and then must vote upon the adoption of the zoning resolution. R.C. 519.08-.10. If the board of township trustees adopts the zoning resolution, the board must submit the question of putting the proposed plan into effect "to the electors residing in the unincorporated area of the township included in the proposed plan of zoning." R.C. 519.11. A majority of the votes cast must be in favor of the proposed plan for zoning regulations to be put into effect. *Id*.

A separate procedure is established for amending a zoning resolution after it has been adopted. R.C. 519.12; *see* 1972 Op. Att'y Gen. No. 72-118, at 2-452 (R.C. 519.12 "provides the only means by which such zoning regulations may be amended or supplemented"). The township zoning commission must submit its recommendations to the board of township trustees. R.C. 519.12. There are notice and hearing requirements, but it is not necessary to

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[2] It should be noted that the language requiring that township zoning power be exercised "in accordance with a comprehensive plan" was omitted from the statute in the 1953 code revision that produced the Ohio Revised Code and was reinserted by amendment in 1957. *See* 1956-1957 Ohio Laws 363, 369 (Am. S.B. 403, eff. Sept. 17, 1957). During that time, authorities noted that there had been no intent to change the law, *see* R.C. 1.30, and construed R.C. 519.02 to include the comprehensive plan requirement that had appeared in the predecessor section, G.C. 3180-26. *East Fairfield Coal Co. v. Miller*, 71 Ohio Law Abs. 490, 500-03 (C.P. Mahoning County 1955); 1964 Op. Att'y Gen. No. 1500, p. 2-395, at 2-396 to 2-397.

submit an amendment to the electors prior to its adoption. Rather, an amendment to a zoning resolution becomes effective thirty days after its adoption, unless a valid petition for referendum is filed. R.C. 519.12(H). To be valid, a petition for referendum must be signed by a specified percentage of "registered electors residing in the unincorporated area of the township or part thereof included in the zoning plan." *Id*. If a valid petition is filed, the matter must be submitted to the electors of that area for approval or rejection. *Id*.

Separate statutory provisions govern the repeal of a township zoning plan. R.C. 519.25. A township zoning plan may be repealed by the vote of the electors residing in the area included in the zoning plan. *Id*.; *see Savage v. Reed*, No. 89-CA-1854, 1990 Ohio App. LEXIS 4978 (Ct. App. Scioto County Nov. 8, 1990).[3]

Let us now consider which of the statutory procedures outlined above should be followed to extend township zoning to an area that previously was not zoned. As noted above, the provisions of R.C. 519.05 governing the initial preparation of a proposed plan by the township zoning commission for submission to the board of township trustees refer specifically to "additions to territory in which a township zoning plan is in effect." R.C. 519.05. The statutory language indicates that the zoning commission's plan is to consist of recommendations concerning the exercise of various township zoning powers, among them the power to make additions to territory in which a township zoning plan is in effect. By its terms this language encompasses the extension of township zoning to an area that previously was not included in a township zoning plan.

The "additions to territory" language of R.C. 519.05 indicates that, when additional territory is to be zoned, the additional territory must be designated in a plan prepared by the township zoning commission, certified to the board of township trustees, and submitted to the electors pursuant to the procedures established for initial township zoning. R.C. 519.03-.11; *see* 1960 Op. Att'y Gen. No. 1279, p. 274, at 276 (discussing statutory amendment that inserted

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[3] It has been concluded that, if a zoning plan is to be repealed, it must be repealed in its entirety and cannot be repealed only in part. 1964 Op. Att'y Gen. No. 1500, p. 2-395. The opinion reaching that conclusion also states:

> It is quite significant that the statute requires township trustees to effect zoning via a comprehensive plan. The selection of such language imparts the intent of the General Assembly to have the township trustees cover a zoning matter under consideration completely, culminating in a plan the integral parts of which are dependent, each on the other. The entire zoning plan, conceived for the general welfare, must be approved or rejected by the electors residing in the unincorporated area of the township included in the proposed plan of zoning.

Id. at 2-397.

"additions to territory" language into R.C. 519.05, *see* 1956-1957 Ohio Laws 363, 370 (Am. S.B. 403, eff. Sept. 17, 1957), and stating that one of its effects was "to permit the existing township commission to perform the functions required in [R.C. Chapter 519], as they pertain to the addition of new territory to a then existing township zoning plan"); *see also* 1964 Op. Att'y Gen. No. 1299, p. 2-325, at 2-329 (considering analogous statute governing county zoning, *see* R.C. 303.05, and stating: "it may be concluded from the insertion of the language 'including additions to territory in which a county zoning plan is in effect,' that an unzoned area in the unincorporated part of a county may be brought within an existing county zoning plan in the same manner that the existing plan was adopted, viz., by following the procedures set forth in [R.C. 303.03-.11]").[4]

Even as the express reference in R.C. 519.05 to additions to territory in which a township zoning plan is in effect indicates that territory may be added to a zoning plan pursuant to R.C. 519.05, the absence of such a reference in R.C. 519.12 indicates that territory cannot be added to a zoning plan by the amendment of the plan pursuant to R.C. 519.12. *See* 1964 Op. Att'y Gen. No. 1299, p. 2-325, at 2-327 (considering analogous statute governing county zoning, stating that the statutory language governing amendments seems to exclude the expansion of territory, and noting that it would be contrary to the intention of the General Assembly to allow zoning to take effect without a vote of the electors in the area affected, as would occur under R.C. 519.12 if a referendum were not requested); *see also* 1953 Op. Att'y Gen. No. 3145, p. 520, at 524-25 (noting that R.C. 519.12 "contains no suggestion of adding new territory to a district which has been zoned" and concluding that R.C. 519.12 "cannot be construed to affect in any way the territorial boundary of such district").

This conclusion is appropriate because an amendment pursuant to R.C. 519.12 does not require approval of the electors, but provides for the matter to be submitted to the electors only if a petition for zoning referendum is filed. R.C. 519.12(H); *see Savage v. Reed*, 1990 Ohio App. LEXIS 4978, at *12-13 ("[w]e consider it significant that the General Assembly deemed township zoning of such importance that it delegated board authority to enact zoning by resolution only upon approval of the voters"). *See generally Kreutz v. Lauderbaugh*, 60 Ohio Op. 48, 136 N.E.2d 627 (C.P. Franklin County 1956) (discussing prior statutory scheme). After township zoning regulations have been enacted for a particular area, however, any attempt to amend or supplement them must follow the procedures set forth in R.C. 519.12. 1972 Op. Att'y Gen. No. 72-118; *see also Debert v. Martin*, No. 98 CAE 02-008, 1998 Ohio App. LEXIS 4692 (Ct. App. Delaware County Sept. 18, 1998).

The answer to your initial question, then, is that in a township in which a zoning resolution has been adopted for a portion of the unincorporated territory, additional territory may

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[4] In an earlier opinion, issued prior to statutory amendments mentioned in 1960 Op. Att'y Gen. No. 1279, p. 274 and 1964 Op. Att'y Gen. No. 1299, p. 2-325, *see* 1956-1957 Ohio Laws 363, 370 (Am. S.B. 403, eff. Sept. 17, 1957), it had been found necessary to appoint an additional township zoning commission to act in a new area to be zoned. 1953 Op. Att'y Gen. No. 3145, p. 520.

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. The procedure set forth in R.C. 519.03 through R.C. 519.11 requires that there be a vote approving the zoning of additional territory.

This conclusion, however, does not address all your concerns. Having concluded that the addition of territory to the zoned area of a township must be performed as initial township zoning in accordance with R.C. 519.03 through R.C. 519.11, we now consider whether the issue of zoning additional territory is submitted only to voters in the territory to be newly zoned, or whether the issue of zoning additional territory must be submitted also to the voters who live within the territory previously zoned.

The question of how to add territory to an area that was previously zoned was addressed in 1964 Op. Att'y Gen. No. 1299, p. 2-325, which considered provisions governing county zoning that are analogous to those governing township zoning. *See* R.C. Chapter 303. The 1964 opinion states that zoning may be extended to additional territory either by the adoption of a second zoning plan or by the repeal of the existing plan and the initiation of a new zoning resolution including the area originally zoned and the area to be added. 1964 Op. Att'y Gen. No. 1299, p. 2-325, at 2-327. That opinion also states that an unzoned area may be brought within an existing zoning plan in the same manner that the existing plan was adopted. *Id*. at 2-329.

Because the statutes governing township zoning closely parallel those governing county zoning, the 1964 opinion thus indicates that additional area of a township may be brought within township zoning through the submission of the proposal to electors residing in the area to be newly zoned. It also indicates that electors residing in an area that has previously been zoned may vote on an initial zoning proposal under R.C. 519.03 through R.C. 519.11 only if the previous zoning has been repealed pursuant to R.C. 519.25 and a new plan has been submitted pursuant to R.C. 519.03 through R.C. 519.11. *See generally* 1972 Op. Att'y Gen. No. 72-118, at 2-452 (the alternative to amending zoning regulations under R.C. 519.12 is to repeal them under R.C. 519.25 and enact a new plan); 1962 Op. Att'y Gen. No. 2963, p. 316 (syllabus, paragraph 2) (considering analogous provisions governing county zoning and stating that a zoning resolution "must be submitted for approval or rejection to all of the voters residing in the area included within the plan"); 1951 Op. Att'y Gen. No. 226, p. 80 (syllabus, paragraph 2) ("[w]here a proposed plan of rural zoning … includes part but not all of the territory of a township, only the electors residing in that portion of the township so included are entitled to vote").

The conclusion that zoning may be accomplished in a township through the adoption of proposed plans by electors of different areas of the township was reached in 1953 Op. Att'y Gen. No. 3145, p. 520, under statutes then in effect. 1953 Op. Att'y Gen. No. 3145, p. 520 at 522-23 ("[i]t is to be noted that in every step leading to the adoption of a zoning plan the particular area proposed to be zoned is treated as a separate entity"). The statutes were subsequently amended to indicate that each township should have a single zoning commission, but the various steps leading to the adoption of a zoning plan were not substantially modified. Thus, it appears that, when it is proposed that an additional area of a township be zoned pursuant to R.C. 519.03

through R.C. 519.11, that additional area may be treated as a separate entity for purposes of submitting the zoning issue to the electors. This conclusion permits residents of various parts of a township to avail themselves of the rights given by law to establish zoning regulations for the area in which they reside. *Id*. at 523; *see Debert v. Martin*, 1998 Ohio App. LEXIS 4692, at *1-6 (voters adopted separate zoning resolutions for the eastern half and the western half of the township in 1951 and 1956, and the halves were joined by amendment under one comprehensive zoning resolution in 1987).

This conclusion reflects our understanding that submission of an initial proposed plan of zoning to the electors of an area within a township in accordance with the procedure set forth in R.C. 519.03 through R.C. 519.11 is the procedure by which residents of that area consent to become subject to township zoning. Once electors residing in an area of township territory have consented to such zoning, the question is not extended to them again unless the zoning has been repealed. Rather, as noted above, subsequent changes to the zoning of that area are made by amendment pursuant to R.C. 519.12. Subsequent proposals to add territory in which township zoning is in effect are submitted to the electors of the territory that is to be newly zoned, giving those electors an opportunity to determine whether to be included in the territory that is subject to township zoning.

Therefore, 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.

You have also asked whether the newly zoned area might be kept separate, with its own zoning commission, zoning plan, zoning map, and zoning resolution. 1960 Op. Att'y Gen. No. 1279, p. 274, states clearly that, following its amendment in 1957, R.C. 519.04 permits a board of township trustees to establish only one township zoning commission. 1960 Op. Att'y Gen. No. 1279, p. 274 (syllabus, paragraph 1); *see* note 4, *supra*. We concur in this conclusion. As noted above, however, an area to be newly zoned is treated as a separate entity. Therefore, the existence of a single zoning commission does not preclude the existence of more than one zoning plan, zoning map, and zoning resolution. Thus, a township is permitted to have only one zoning commission, but it may have more than one zoning plan, zoning map, or zoning resolution.

Therefore, it is my opinion and you are advised:

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.)

Respectfully,

BETTY D. MONTGOMERY
Attorney General

September 13, 2000

The Honorable Michael G. Spahr
Washington County Prosecuting Attorney
205 Putnam Street
Marietta, Ohio 45750

SYLLABUS: 2000-034

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.)