June 17, 1994

OPINION NO. 94-040

The Honorable Mark E. Spees
Auglaize County Prosecuting Attorney
Auglaize County Court House
P.O. Box 1992
Wapakoneta, Ohio 45895

Dear Prosecutor Spees:

You have requested an opinion of the Attorney General regarding township zoning authority with respect to mobile homes. Specifically you ask: "[D]o the township trustees, upon recommendation of the township zoning commission, have the power and authority under Chapter 519 of the Ohio Revised Code to ban mobile homes within the township or would such an amendment to the zoning resolution amount to a violation of the Ohio or United States Constitutions?" Under the current township zoning plan, mobile homes are a permitted use in areas designated as agricultural districts, subject to restrictions as to size, foundations, plumbing, skirting, parking, and general height and area requirements. The township zoning commission now wishes to propose an amendment to ban mobile homes from the township altogether.[1]

The term "mobile home" is not defined in the current zoning code nor has a definition been developed for purposes of the amendment. A representative of your office has, however, stated that the term "mobile home" is commonly used by the township trustees and members of the zoning

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[1] Amendments to a township's zoning plan, such as the prohibition of mobile homes contemplated in your request, may be initiated by the township zoning commission, the board of township trustees, or affected property owners. R.C. 519.12(A). After a public hearing, which must include consideration of the recommendations of the county or regional planning commission if one exists, the township zoning commission must recommend approval or denial of the amendment to the board of township trustees. R.C. 519.12(A)-(E). After an additional public hearing, the board of township trustees may adopt or deny the amendment or adopt some modification thereof, which becomes effective within thirty days unless a petition for a referendum is filed. R.C. 519.12(E)-(H). While your question references this process, it does not present any procedural issues that require discussion in this opinion.

commission to refer to a type of housing that is on wheels and could be pulled to another site and not to refer to units that have no wheels (or have had wheels removed) and are permanently affixed to real property. *See, generally, e.g.*, 1993 Op. Att'y Gen. No. 93-078 (conversion of a manufactured home to real property); *Webster's New World Dictionary* 912 (2nd college ed. 1984) (defining "mobile home" as "a movable dwelling with no permanent foundation, but connected to utility lines and set more or less permanently at a location"). This opinion considers the authority of a township to adopt zoning provisions that ban the placement within the township of mobile homes that are on wheels and are not permanently affixed to real property.

Statutory Limits of Township Zoning Authority

Township zoning authority is set out in R.C. 519.02, which states:

> *For the purpose of promoting the public health, safety, and morals*, the board of township trustees may *in accordance with a comprehensive plan regulate by resolution the location, height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches*, percentages of lot areas which may be occupied, set back building lines, sizes of yards, courts, and other open spaces, the density of population, *the uses of buildings and other structures including tents, cabins, and trailer coaches*, and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of such township, and for such purposes may divide all or any part of the unincorporated territory of the township into districts or zones of such number, shape, and area as the board determines. All such regulations shall be uniform for each class or kind of building or other structure or use throughout any district or zone, but the regulations in one district or zone may differ from those in other districts or zones. (Emphasis added.)

The zoning authority of a township is limited to that conferred by statute. *See Yorkavitz v. Board of Township Trustees*, 166 Ohio St. 349, 351, 142 N.E.2d 655, 656 (1957) (townships "have no inherent or constitutionally granted police power, the power upon which zoning legislation is based. Whatever police or zoning power townships of Ohio have is that delegated by the General Assembly, and it follows that such power is limited to that which is expressly delegated to them by statute"); *accord Atwater Township Trustees v. B.F.I. Willowcreek Landfill*, 67 Ohio St. 3d 293, 297 n.6, 617 N.E.2d 1089, 1092 n.6 (1993); *Ketchel v. Bainbridge Township*, 52 Ohio St. 3d 239, 557 N.E.2d 779 (1990), *cert. denied*, 498 U.S. 1120 (1991).

Although there may be some questions regarding the precise definition of the term "mobile home," the category "buildings and other structures, including tents, cabins, and trailer coaches"[2] is broad enough to encompass "mobile homes" no matter how the township zoning ordinances might

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[2] The term "trailer coach" is not defined. The only other place it appears in the Revised Code is R.C. 303.02, which sets out county zoning authority.

define that term.[3] R.C. 519.02. Therefore, pursuant to R.C. 519.02, a township may regulate "the location, height, bulk, number of stories, and size" and also "the uses" of mobile homes. The more difficult question is whether the authority to regulate the uses of mobile homes includes the power to prohibit them entirely.

By statute, township zoning authority expressly *excludes* the power "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." R.C. 519.21(A). Some zoning of agricultural uses on lots smaller than five acres is permitted in certain circumstances pursuant to R.C. 519.21(B), and limitations are placed on the zoning of farm markets pursuant to R.C. 519.21(C). Whether a particular use of a mobile home is an agricultural use is a question of fact. In general, however, the fact that a dwelling is used as the residence of an individual who is engaged in agricultural pursuits is not in itself sufficient to constitute an agricultural use. *See* 1962 Op. Att'y Gen. No. 3440, p. 949 (syllabus, paragraph 1) ("[a] structure used only as a dwelling house for a person engaged in agriculture is not a structure incident to an agricultural use of land so as to be exempt by the terms of [R.C. 519.21] from the provisions of a zoning regulation enacted pursuant to [R.C. Chapter 519]"); *see also Weber v. Clinton Township Board of Zoning Appeals*, No. 91FU000027, slip op. at 3-4 (Ct. App. Fulton County Aug. 7, 1992) (stating that "as a matter of law" the agricultural use exception of R.C. 519.21 did not apply to a manufactured home used as a dwelling where "the evidence is uncontroverted that the manufactured home at issue houses a person who is engaged in an agricultural business in the vicinity of the property, but that the actual one acre parcel itself is not used for agricultural purposes"); 1993 Op. Att'y Gen. No. 93-034.

R.C. 519.211 establishes additional restrictions on township zoning authority, stating that, with certain limitations, a township has no power to zone property used by a public utility or railroad for the operation of its business. Again, whether a mobile home is used for such a purpose is a question of fact, but for the most part it appears unlikely that such use would be very frequent.

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[3] A zoning provision relating to mobile homes should, for purposes of clarity, define the types of units to which it applies. A number of different terms -- such as "house trailer," "trailer coach," "manufactured home," "prefabricated housing," "modular housing," and "industrialized unit" -- are used to describe various types of transportable housing. Some of those terms are defined by statute. *See, e.g.*, R.C. 1151.294(A)(1) *and* R.C. 1161.40(A)(1) ("mobile home" defined for purposes of investment in mobile home chattel paper); R.C. 3781.10(J) ("industrialized unit"); R.C. 4501.01(O) ("manufactured home"); *see also* 42 U.S.C. §5402(6) (1988) ("manufactured home" defined for purposes of federal manufactured home standards). *See generally, e.g., Enberg v. Canton Township Board of Zoning Appeals*, 78 Ohio App. 3d 828, 605 N.E.2d 1365 (Stark County 1992); *Village of Moscow v. Skeene*, 65 Ohio App. 3d 785, 585 N.E.2d 493 (Clermont County 1989); *Village of Columbiana v. Keister*, 5 Ohio App. 3d 81, 449 N.E.2d 465 (Columbiana County 1981); *City of Pepper Pike v. Landskroner*, 53 Ohio App. 2d 63, 371 N.E.2d 579 (Cuyahoga County 1977); note 4, *infra*.

It follows from R.C. 519.21 and 519.211 that a township has no authority to ban mobile homes from agricultural uses permitted under R.C. 519.21 or from public utility or railroad uses permitted under R.C. 519.211. In order to answer your question, it is also necessary to consider whether the township zoning authority granted by R.C. 519.02 permits a township to prohibit the use of mobile homes within its boundaries for uses that are not covered by R.C. 519.21 or 519.211.

Although the authority to regulate does not usually include authority to prohibit, use of the word "regulate" in the township zoning statute does not preclude all prohibitions as a matter of law. *See East Fairfield Coal Co. v. Booth*, 166 Ohio St. 379, 143 N.E.2d 309 (1957); *Smith v. Juillerat*, 161 Ohio St. 424, 119 N.E.2d 611 (1954). Nor does the existence of a statutory scheme regulating a particular use necessarily preclude a zoning prohibition of that use. *Id.* Rather, the prohibition is subject to the constitutional test for deprivation of property without due process of law, described by the court in *East Fairfield Coal* as follows:

> [W]hether the power exists to forbid the use must not be considered abstractly, but in connection with all the circumstances and locality of the land itself and its surroundings.... Hence viewed in that light, is the impact of the ordinance on plaintiffs' land reasonable or arbitrary? Is it regulation or is it confiscation ... without due process of law?

Id. at 382, 143 N.E.2d at 311 (quoting with approval the opinion of the Mahoning County Court of Common Pleas (concurred in by the Court of Appeals), which cited *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)). Using this test, the court in *East Fairfield Coal* upheld the lower courts' conclusion that a township zoning provision prohibiting strip mining was arbitrary and unreasonable and could not be applied to the plaintiff's land because the physical characteristics of that land made it virtually worthless for any other use. *Id.* at 383-84, 143 N.E.2d at 312 (relying on U.S. Const. amend. XIV and Ohio Const. art. I, §§1, 16, 19).

In situations where state statutes affirmatively encourage a particular use, however, the Ohio Supreme Court has found that blanket zoning prohibitions not specifically tailored to local conditions are impermissibly in conflict with state law. For example, the case of *Yorkavitz v. Board of Township Trustees* involved a township zoning resolution that prohibited as a nuisance the establishment of airports anywhere in the township. Because the General Assembly had established by statute a policy of promoting and encouraging the development of aviation and the establishment of airports, the court held that the township zoning authority could not include the power totally to prohibit airports as a nuisance.

More recently, in *Newbury Township Board of Township Trustees v. Lomak Petroleum (Ohio), Inc.*, 62 Ohio St. 3d 387, 583 N.E.2d 302 (1992), the court considered a township zoning resolution prohibiting the drilling of oil or gas wells in any residential district. Although preempting some aspects of local regulation, the statutes governing oil and gas wells expressly preserved the right of municipalities, counties, and townships to enact health and safety standards for oil and gas well drilling and exploration. The court found that these statutes embodied a policy to encourage oil and gas production when it can be accomplished safely. *Id.* at 389, 583 N.E.2d at 304. Further, the

court found that because parts of the area zoned residential were traditionally appropriate for oil and gas wells, the prohibition was not based on health or safety concerns. Because the township had simply prohibited drilling in residential areas without considering local factors and tailoring the regulation of drilling accordingly, the zoning provisions had the effect of declaring the wells to be nuisances in contravention of the state policy. The fact that drilling was allowed in some areas of the township did not cure the overbreadth of the provisions with respect to the residential areas. Relying on *Yorkavitz*, the court held that the zoning resolution "attempted to prohibit that which the state encourages" and thus exceeded the township's authority. *Id.* at 391, 583 N.E.2d at 305.

In light of *Yorkavitz* and *Lomak*, it is necessary to examine whether a prohibition of mobile homes in a township would be in conflict with any statutes that embody a policy of encouraging the use of mobile homes. There is no statutory scheme that regulates the use of "mobile homes" as such. *See* note 1, *supra*. A statutory scheme has been established for the regulation of manufactured home parks. *See, e.g.*, R.C. 3733.02(A) (requiring the Public Health Council to adopt rules for licensing manufactured home parks and rules governing "the location, layout, construction, drainage, sanitation, safety, and operation" of manufactured home parks and the blocking and tiedowns of manufactured homes in those parks); R.C. 3733.021 (requiring approval by the Director of Health of plans for development within a manufactured home park). Manufactured homes built after 1974 must meet federal safety requirements and display federal certification, and the federal requirements preempt state and local regulation of construction and safety standards for manufactured homes. *See Village of Moscow v. Skeene*, 65 Ohio App. 3d 785, 585 N.E.2d 493 (Clermont County 1989); 42 U.S.C. §§5401-5426 (1988 & Supp. IV 1992) (National Manufactured Housing Construction and Safety Standards Act of 1974); 1993 Op. Att'y Gen. No. 93-002. State law governs construction and safety standards applicable to industrialized units and preempts local regulation of those matters. *See* R.C. 3781.10, .12; Op. No. 93-002. The preemption of local regulation in these instances does not, however, extend to matters of local zoning. *See Village of Moscow v. Skeene*; Op. No. 93-002 at 2-17 n.2. *See generally Hulligan v. Columbia Township Board of Zoning Appeals*, 59 Ohio App. 2d 105, 392 N.E.2d 1272 (Lorain County 1978); 1981 Op. Att'y Gen. No. 81-065. Further, existing regulation does not appear to constitute a policy affirmatively encouraging the use of "mobile homes," as you have defined that term, so as to prohibit a township from adopting a blanket zoning prohibition.[4] The conclusion that mobile homes are not so protected by a state policy is evidenced

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[4] It might be argued that there is a state policy favoring industrialized units, so that townships may not prohibit the use of those units within the township. *See, e.g.*, R.C. 3781.11(A)(3) (rules adopted by the Board of Building Standards are required to "[p]ermit, to the fullest extent feasible, ... the use of industrialized units which tend to reduce the cost of construction and erection without affecting minimum requirements for the health, safety, and security of the occupants or users"); R.C. 3781.12 (the approval process for industrialized units constitutes "approval for their use anywhere in Ohio"); *In re Decertification of Eastlake*, 66 Ohio St. 2d 363, 367, 422 N.E.2d 598, 601 (1981) (considering the provisions of R.C. Chapters 3781 and 3791 governing industrialized units and stating that "the thrust of these sections dealing with industrialized units is to encourage their use throughout the state"), *cert. denied*, 454 U.S. 1032 (1981); 1993 Op. Att'y Gen. No. 93-002. As noted in Op. No. 93-002, it is possible for a manufactured home or other type of mobile facility to be certified as an industrialized unit. To the extent that township zoning attempts to ban such units, the

by the case law dealing with mobile homes in various contexts.

Although the Ohio Supreme Court has never ruled directly on the issue of total exclusion of mobile homes from a zoning jurisdiction, Ohio case law supports the proposition that township zoning may regulate or completely prohibit the use of truly "mobile" homes as dwellings. In *Stary v. City of Brooklyn*, 162 Ohio St. 120, 121 N.E.2d 11 (1954), *appeal dismissed*, 348 U.S. 923 (1955), the court held that a municipality could impose time limits on the occupancy of house trailers located in state-regulated trailer camps. The court found that such regulation was reasonably related to public health and safety and did not conflict with state law. Relying on *Stary*, lower courts have held that a township zoning provision could completely exclude trailer parks. *See Carlton v. Riddell*, 58 Ohio Op. 380, 132 N.E.2d 772 (Ct. App. Medina County), *appeal dismissed*, 164 Ohio St. 322, 130 N.E.2d 704 (1955); *Davis v. McPherson*, 58 Ohio Op. 253, 132 N.E.2d 626 (Ct. App. Summit County), *appeal dismissed*, 164 Ohio St. 375, 130 N.E.2d 794 (1955); *see also* 1972 Op. Att'y Gen. No. 72-033 at 2-129 (noting that although the state has preempted aspects of the regulation of house trailers and trailer parks, a township may adopt zoning regulations controlling the original establishment of a trailer park). Courts in subsequent cases reasoned further that, if trailer parks could be prohibited, the placement of mobile homes on individual lots could also be prohibited. *See Village of Columbiana v. Keister*, 5 Ohio App. 3d 81, 449 N.E.2d 465 (Columbiana County 1981) (holding, however, that the particular mobile home involved was permitted as an incidental business use); *Board of Health v. Deacon*, No. 4125 (Ct. App. Lorain County March 18, 1987). Both *Keister* and *Deacon* involved provisions that applied only to structures that were movable or on temporary foundations, and these are the sorts of structures addressed in your question.[5] *See also Village of Williamsburg v. Milton*, 85 Ohio App. 3d 215, 619 N.E.2d 492 (Clermont County) (village zoning ordinance prohibited the placement of mobile homes anywhere within the village; an order for the removal of two mobile homes was upheld on the grounds that the homes constituted an expansion of a nonconforming use that was not properly permitted), *motion to certify overruled*, 66 Ohio St. 3d 1494, 613 N.E.2d 236 (1993); *Cloyd v. Danbury Township Board*

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analysis set forth in this opinion may not be applicable.

[5] For purposes of enforcing township zoning, the nature of a structure must be determined from its use at the site and not from its use or condition at some prior time. *Sylvester v. Howland Township Board of Zoning Appeals*, 34 Ohio App. 3d 270, 518 N.E.2d 36 (Trumbull County 1986). When an element of the zoning definition of a mobile or manufactured home is mobility or being on a temporary foundation, a prohibition or regulation of the use of mobile or manufactured homes will not be enforced against a unit that is no longer mobile or is placed on a permanent foundation. *Id.; see also Village of Moscow v. Skeene*, 65 Ohio App. 3d 785, 585 N.E.2d 493 (Clermont County 1989). Even a definition that does not require mobility will not necessarily be applied to a unit that has been permanently affixed to real estate. In at least one instance, a court has struck down as ill-conceived, arbitrary, and unreasonable the attempt to use zoning to permit modular homes but exclude mobile homes that are placed on permanent foundations. *See Village of Kelleys Island v. Spinelli*, No. E-85-45 (Ct. App. Erie County Nov. 28, 1986). This, however, is not the situation presented in your request.

of Zoning Appeals, No. 93OT045 (Ct. App. Ottawa County March 18, 1994) (remanding decision on a variance from a township zoning provision that precluded the placement of a mobile home or house trailer in an area zoned agricultural); *Brill v. Henrietta Township*, No. 2998 (Ct. App. Lorain County Oct. 15, 1980) (upholding township zoning ordinance allowing a trailer coach to be used as a residence only on a temporary basis and stating, slip op. at 7, of an individual whose permit had expired: "If he accepted the ordinance then as valid, we believe it should be considered a valid restriction in this township now").

Existing case law thus supports the conclusion that there is no provision of state law or general state policy promoting mobile homes that prevents a township from prohibiting the placement of mobile homes within its boundaries, if such a prohibition is adopted through the proper exercise of the township's zoning power. *See Village of Columbiana v. Keister*, 5 Ohio App. 3d at 83-84, 449 N.E.2d at 469 (if existing law on trailer parks and trailers is to be reexamined in light of differences between "trailers" and "mobile homes," the proper forum for such reexamination is the Ohio Supreme Court). A township may, accordingly, adopt a zoning provision that prohibits the placement of mobile homes within the township, provided that the provision complies with the requirements that govern zoning generally: it must be reasonable and may not be arbitrary or constitute confiscation of property without due process of law. *East Fairfield Coal v. Booth*, 166 Ohio St. at 382, 143 N.E.2d at 311.

Constitutional Restrictions on Zoning

A township's zoning authority is subject to the constitutional limits on exercise of the police power and government interference with private property established by the due process and takings clauses of the state and federal constitutions. The Fifth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, *see Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980), provides that no person shall "be deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Ohio Constitution, article I, section 16 protects citizens from deprivation of property without due process of law. *See City of Akron v. Chapman*, 160 Ohio St. 382, 116 N.E.2d 697 (1953). Article I, section 19 of the Ohio Constitution provides that compensation must be made for private property taken for public use.

A taking of private property for purposes of the Fifth Amendment of the United States Constitution and article I, section 19 of the Ohio Constitution occurs, *inter alia*, when a governmental regulation such as zoning deprives the property owner of all reasonable economic use of the property. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899-2900 (1992); *see also First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Columbia Oldsmobile, Inc. v. City of Montgomery*, 56 Ohio St. 3d 60, 564 N.E.2d 455 (1990), *cert. denied*, 111 S. Ct. 2854 (1991); 1990 Op. Att'y Gen. No. 90-056 at 2-236. Two factors thus exist for you to consider in connection with the issue you have raised. First, a deprivation of property without due process of law for constitutional purposes occurs when, even though the regulation leaves the owner with some economically feasible use of the land, the regulation deprives the owner of an otherwise legal use without substantially advancing a legitimate governmental interest in the health,

safety, or welfare of the community. *See Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Columbia Oldsmobile*, 56 Ohio St. 3d at 65, 564 N.E.2d at 460; *Ketchel v. Bainbridge Township*, 52 Ohio St. 3d at 243, 557 N.E.2d at 783. Second, if land is not suitable for any other use, a zoning provision that prohibits its use as a mobile home site may be found to constitute confiscation of the property without due process of law. *See, e.g., Dusi v. Wilhelm*, 25 Ohio Misc. 111, 266 N.E.2d 280 (C.P. Mahoning County 1970) (use of land for mobile home park). *See generally Village of Columbiana v. Keister*.

Within these broad constraints, the determination of whether a particular zoning resolution is reasonable and consistent with constitutional provisions is dependent upon the factors existing in a particular township at a particular time and cannot be determined by opinion of the Attorney General. As discussed above, various townships have adopted zoning provisions prohibiting or restricting the use of mobile homes. Each board of township trustees is given discretion to determine whether such a provision is reasonable and appropriate as applied to its township, and whether it serves the purposes of township zoning as set forth in R.C. 519.02. *See Willott v. Village of Beachwood*, 175 Ohio St. 557, 560, 197 N.E.2d 201, 204 (1964) ("[t]he determination of the question of whether regulations prescribed by a zoning ordinance have a real or substantial relation to the public health, safety, morals or general welfare is committed, in the first instance, to the judgment and discretion of the legislative body .... The legislative ... authority is charged with the duty of determining the wisdom of zoning regulations ..."). *See, generally, e.g., Smythe v. Butler Township*, 85 Ohio App. 3d 616, 622, 620 N.E.2d 901, 905 (Montgomery County) (finding in matter of township zoning that factors including aesthetics and traffic safety were important to the health, safety, welfare and morals of the community), *motion to certify overruled*, 67 Ohio St. 3d 1450, 619 N.E.2d 419 (1993); *Davis v. McPherson*, 58 Ohio Op. at 254, 132 N.E.2d at 627-28 (finding that a zoning provision that prohibited trailer parks within a township was not purely fanciful or aesthetic but was reasonable and comprehensive in its coverage and had a relation to the public health, morals, and safety). *But see Dusi v. Wilhelm*, 25 Ohio Misc. at 116, 266 N.E.2d at 283 ("[i]t is in the public interest to permit the establishment of mobile home parks to alleviate the serious housing shortage with which we are afflicted").

There are state and federal provisions, referenced above, that govern the safety and construction of mobile homes and preempt certain regulatory powers of townships in those respects. Nonetheless, a township retains the authority to adopt zoning provisions that promote the public health, safety, and morals in accordance with R.C. 519.02, provided that they do not violate constitutional principles or conflict directly with provisions of state or federal law. *See Village of Moscow v. Skeene*; *Hulligan v. Columbia Township Board of Zoning Appeals*.

Conclusion

It is, therefore, my opinion, and you are advised as follows:

1. Pursuant to R.C. 519.02, township trustees in a zoned township may, for the purpose of promoting the public health, safety, and morals, regulate by resolution the location, height, bulk, number of stories,

size, and uses of buildings and other structures, including mobile homes, except as provided in R.C. 519.21 with respect to agricultural uses and as provided in R.C. 519.211 with respect to uses by public utilities or railroads.

2. Township trustees in a zoned township may adopt a resolution banning the placement within the township of mobile homes that are on wheels and are not permanently affixed to real property if the resolution is not in direct conflict with state or federal law, is reasonable and consistent with constitutional limitations, and serves the purpose of promoting the public health, safety, and morals as required by R.C. 519.02.

3. There is no existing state law or general state policy that prevents a township from adopting zoning provisions banning the placement

within the township of mobile homes that are on wheels and are not permanently affixed to real property.

Respectfully,

LEE FISHER
Attorney General

June 17, 1994

The Honorable Mark E. Spees
Auglaize County Prosecuting Attorney
Auglaize County Court House
P.O. Box 1992
Wapakoneta, Ohio 45895

SYLLABUS: 94-040

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3. There is no existing state law or general state policy that prevents a township from adopting zoning provisions banning the placement within the township of mobile homes that are on wheels and are not permanently affixed to real property.