

OPINION NO. 84-078**Syllabus:**

A board of township trustees may not levy a pass through service charge upon resources removed from land situated in the unincorporated territory of the township, as an incident of the zoning authority vested in the board by R.C. Chapter 519.

To: David L. Landefeld, Fairfield County Prosecuting Attorney, Lancaster, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 18, 1984

I have before me your request for my opinion regarding the question of whether a board of township trustees may, as an exercise of township zoning authority, levy a "pass through service charge" on resources removed from land in the unincorporated territory of the township. You advise that the board of township trustees in question has adopted an ordinance that requires the prospective operator of a surface, strip, pit or shaft mine to obtain a permit prior to conducting mining operations. The ordinance further requires that the land on which mining operations are to be conducted be zoned industrial or that the operator possess a permit allowing mining as a conditional use of the land. The ordinance mandates that the board of township trustees levy a pass through service charge of five cents per ton on all resources removed by the mine operator, the revenue from which is to be used for the maintenance of township roads. If this levy is deemed a lawful exercise of the zoning authority of the board of township trustees, you further desire to know whether the levy may be enforced against a municipal corporation.

R.C. Chapter 519 prescribes the nature and scope of the zoning authority vested in boards of township trustees. R.C. 519.02 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.

Further, township trustees may, by resolution or amendment, establish "planned-unit development" regulations for the purposes of integrating residential land use with collateral uses. R.C. 519.021.

A board of township trustees may, pursuant to its authority to zone, regulate mining operations, as long as such regulations are not in conflict with state law, and as long as such regulations are related to the health, safety, and welfare of the township's citizens. See Smith v. Juillerat, 161 Ohio St. 424, 119 N.E.2d 611 (1954); Kane v. Kreiter, 93 Ohio L. Abs. 17, 195 N.E.2d 829 (C.P. Tuscarawas County 1963); East Fairfield Coal Co. v. Miller, 71 Ohio L. Abs. 490 (C.P. Mahoning County 1955), aff'd sub nom. East Fairfield Coal Co. v. Booth, 166 Ohio St. 379, 143 N.E.2d 309 (1957); 1981 Op. Att'y Gen. No. 81-065. See generally Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926); Pritz v. Messer, 112 Ohio St. 628, 637-38, 149 N.E. 30, 33 (1925) ("[u]nder the police power society may restrict the use of property without making compensation therefor, if the restriction be reasonably necessary for the preservation of the public health, morals or safety").

It is clear that the pass through service charge or levy that is the subject of your question is not related to the exercise of a board of township trustees' zoning authority, inasmuch as the levy does not pertain to the regulation of land use. The charge or levy does not, of itself, purport to prohibit, restrict, or regulate the conduct of mining operations in the unincorporated territory of the township. The pass through service charge is a taxation or revenue-raising measure, contained in the township zoning ordinances, rather than a provision designed to protect the health, safety, or welfare of the township's inhabitants.

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." Yorkavitz v. Township Trustees, 166 Ohio St. 349, 351, 142 N.E.2d 655, 656 (1957), quoted in Op. No. 81-065 at 2-269. By R.C. Chapter 519, and in particular, by R.C. 519.02, quoted above, the General Assembly has delegated to townships the power to regulate land use in the unincorporated territory of such townships. I can find no statute contained in R.C. Chapter 519, however, which expressly or implicitly empowers a board of township trustees to impose a service charge upon resources extracted from land as an incident to the board's zoning authority. Therefore, I conclude that a board of township trustees may not assess a pass through service charge against resources removed from the unincorporated territory of the township as a function of the exercise of the board's zoning power.²

¹ Cf. R.C. 505.20 (the board of township trustees may levy a tax for the purpose of drilling an oil or gas well in the township); R.C. 5705.03 (the taxing authority of each subdivision, including a township, may levy taxes on the real and personal property in the subdivision for the purpose of paying current operating expenses and acquiring or constructing permanent improvements); R.C. 5705.06(F) (within the ten-mill limitation, a township may levy a tax for the construction, reconstruction, resurfacing, and repair of roads and bridges).

² I note that a board of township trustees has the implied authority to charge a reasonable fee for a zoning permit, as long as the fee is reasonably related to the cost of inspecting the site and issuing the permit. See 1979 Op. Att'y Gen. No. 79-051.

Having reached the conclusion stated above, I find it unnecessary to address your question of whether the pass through service charge may be enforced against a municipal corporation.

Therefore, it is my opinion, and you are so advised, that a board of township trustees may not levy a pass through service charge upon resources removed from land situated in the unincorporated territory of the township, as an incident of the zoning authority vested in the board by R.C. Chapter 519.