

OPINION NO. 81-065**Syllabus:**

1. Pursuant to R.C. Chapter 519, a township may enact resolutions to regulate surface mining, so long as its resolutions do not come into direct conflict with R.C. Chapter 1514, by which the General Assembly regulates the method of surface mining, or other laws of the state.
2. Pursuant to R.C. 519.12, township trustees may amend their zoning resolution to prevent the mining for shale (surface mining) in the unincorporated area of the township if they find that such use of land would create a real or substantial risk to the public health, safety, morals, or general welfare of the township's citizens.

To: Roger L. Kline, Pickaway County Prosecuting Attorney, Circleville, Ohio
By: William J. Brown, Attorney General, October 29, 1981

I have before me your request for my opinion regarding township zoning. You have asked: "Can a township amend its zoning resolution to prevent the mining for shale (surface mining)?" Because your question is of general interest, I have elected to respond by means of a formal opinion.

In answering your question, it is first necessary to determine whether state law regarding surface mining preempts township zoning resolutions on the same subject. Such a determination requires an examination of both the General Assembly's power and a township's power to regulate surface mining. The General Assembly's power to regulate surface mining is derived from Ohio Const. art. II, §1, which provides that "[t]he legislative power of the state shall be vested in a general assembly," and art. II, §36, which authorizes legislation "to provide for the regulation of methods of mining." Pursuant to this constitutional grant of power, the General Assembly has enacted R.C. Chapter 1514 to govern surface mining in Ohio.

Townships, on the other hand, "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). By R.C. Chapter 519, the General Assembly has delegated to townships the power to regulate the uses of lands in the unincorporated territory of such townships. R.C. 519.02, which permits the board of township trustees to adopt zoning resolutions, provides in pertinent part:

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 uses of land for

trade, industry, residence, recreation, or other purposes in the unincorporated territory of such township.

It is clear, therefore, that both the General Assembly and townships have certain powers to regulate surface mining. Your request prompts a concern as to how these different powers interact.

Generally, by entering a field with laws of general application, the General Assembly preempts the particular field to the extent that local bodies cannot make laws that are in direct conflict with the state laws. The doctrine of preemption applies when a law or regulation on one level of government is found invalid because it is contrary to the will of another level of government. Under this doctrine, when a township zoning ordinance is in conflict with a state statute, the state statute is controlling. Fox v. Johnson, 28 Ohio App. 2d 175, 275 N.E.2d 637 (Mahoning County 1971); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). It does not, however, follow that all township ordinances concerning subjects which the General Assembly has addressed by a statutory enactment are rendered invalid.

In a case involving legal issues similar to those in your request, 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),² the court considered the legality of a township zoning ordinance which regulated strip mining in the township. The court held that the relevant state statutes, contained in R.C. Chapter 1513, governed only the method of strip mining, and did not act in limitation of a township's power to regulate land use. Although specific statutory provisions of both R.C. Chapter 1513 and R.C. Chapter 1514 have been amended since that time to provide more detailed regulation, the analysis in East Fairfield is still applicable. The argument adopted by that court may be applied directly to R.C. Chapter 1514 and a township's authority to regulate surface mining. Based upon the analysis of the court in East Fairfield, I conclude that a township may, under R.C. Chapter 519, enact resolutions to regulate surface mining, so long as its resolutions do not come into direct conflict with R.C. Chapter 1514 or other laws of the state. I note, consequently, that, although the Chief of the Division of Reclamation must, pursuant to R.C. 1514.02, grant a permit authorizing a surface mining operation to an operator meeting the regulatory requirements of R.C. Chapter 1514, the issuance of such a permit does not override a township's application of its zoning resolution to regulate such a mining operation.³

Pursuant to R.C. 519.12, a board of township trustees has the authority to amend or supplement zoning resolutions by following the procedures set forth

¹Such power to regulate is limited by R.C. 519.21, which provides certain exemptions from the operation of township zoning. However, the legislature, by not including surface mining among those areas which are specifically exempted from the purview of township zoning resolutions, evidently intended that townships should be permitted to enact resolutions regulating surface mining. See 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).

²Although East Fairfield addresses strip mining, upon careful comparison of R.C. Chapter 1513, which concerns strip mining, and R.C. Chapter 1514, which concerns surface mining, I believe that the holding of the court is pertinent to your request. See the definitions of strip mining and surface mining in R.C. 1513.01(R) and R.C. 1514.01(A), respectively. See also Call v. G. M. Sader Excavating & Paving, Inc., 68 Ohio App. 2d 41, 50, ___ N.E.2d ___ (1980) (R.C. Chapters 1513 and 1514 to be considered in pari materia).

³See Hinkle v. Williams, No. 77AP-622 (Ct. App. Franklin County Dec. 1, 1977) (permit issued by the Ohio Environmental Protection Agency does not supersede local zoning).

therein. I understand your question to be whether an amendment which would prevent the mining for shale in a township would be a valid amendment. Of course, as illustrated above, a valid zoning regulation may not conflict with state laws of general application. Further, in Smith v. Juillerat, 161 Ohio St. 424, 428-29, 119 N.E.2d 611, 614 (1954), the court, citing Village of Euclid v. Ambler Realty Co., held that: "If a zoning ordinance is general in its application, the classifications as to uses to which the property may be devoted are reasonable, and pre-existing vested rights are recognized and protected, it is a valid exercise of the police power." Thus, in adopting any amendment to its zoning resolutions, the board of township trustees must be certain that its amended resolution will not infringe upon the constitutional rights of citizens to freely use and dispose of their property. See East Fairfield v. Miller.

Moreover, while the board of township trustees may amend zoning resolutions for the general welfare of the community, it may not arbitrarily prohibit or prevent a valid business recognized by the state; surface mining clearly constitutes such a business. R.C. 519.02 authorizes the board of township trustees to "regulate" land use. In Frecker v. City of Dayton, 88 Ohio App. 52, 62, 85 N.E.2d 419, 423 (Montgomery County 1949), aff'd, 153 Ohio St. 14, 90 N.E.2d 851 (1950), the court stated: "'Regulation' does not by any ordinary or usual definition include 'prohibition.' On the contrary the grant of power to regulate would seem to negative the power to prohibit." Thus, generally, a board of township trustees does not have the power to completely prohibit a certain use of land throughout the township. See 1979 Op. Att'y Gen. No. 79-058. However, in cases where a substantial harm to the community may occur, a board of township trustees may prohibit or prevent a certain activity. The court in East Fairfield v. Miller, at 506, stated that "whether 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." (Citation omitted.) Thus, it may be concluded that in certain factual patterns, a township may prohibit a certain use of land as a proper exercise of its police power if there is a potentially harmful situation that will impair the well-being of its citizens. In a similar case, the court in Kane v. Kreiter, 93 Ohio L. Abs. 17, 20, 195 N.E.2d 829, 831 (C.P. Tuscarawas County 1963), stated:

Township trustees under a zoning ordinance have authority to regulate and prohibit the removal of natural mineral resources contained in the township but the power to prohibit strip-mining must have a real or substantial relationship to the public health, safety, morals or general welfare, and must be such as to change a potential nuisance into an actual nuisance. The removal of coal by the strip-mining method is subject to regulation, control, and under some circumstances, prohibition, as a proper exercise of the police power. (Citation omitted; emphasis added.)

I conclude, therefore, that in those circumstances where a real or substantial risk to the public health, safety, morals or general welfare of its citizens exists, a board of township trustees, pursuant to its zoning power under R.C. 519.02, has the authority to prohibit a certain use of unincorporated township land.

In specific answer to your question, it is my opinion, and you are advised, that:

1. Pursuant to R.C. Chapter 519, a township may enact resolutions to regulate surface mining, so long as its resolutions do not come into direct conflict with R.C. Chapter 1514, by which the General Assembly regulates the method of surface mining, or other laws of the state.
2. Pursuant to R.C. 519.12, township trustees may amend their zoning resolution to prevent the mining for shale (surface mining) in the unincorporated area of the township if they find that such use of land would create a real or substantial risk to the public health, safety, morals, or general welfare of the township's citizens.