

**OPINION NO. 72-042****Syllabus:**

1. The provisions of Chapters 303 and 519, Revised Code, controlling conflicts between county and township zoning regulations, have no applicability to the creation of a garbage and refuse disposal facility by a board of county commissioners under Chapter 343, Revised Code.

2. Township zoning resolutions cannot regulate the location of a public utility.

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**To: John D. Martin, Fairfield County Pros. Atty., Lancaster, Ohio**  
**By: William J. Brown, Attorney General, May 16, 1972**

Your predecessor's request for an opinion, addressed to my predecessor, poses the following questions:

"(1) Is the Board of County Commissioners given authority under Section 343.01 of the Revised Code of Ohio to create and operate a garbage and refuse disposal facility in an area in a township, in spite of an existing Zoning Resolution passed under Chapter 519 R. C. which specifically excludes garbage and refuse disposal in such area? That is, does R. C. 343.01 supersede Chapter 519 R.C. in the area of garbage and refuse disposal?"

"(2) If your answer is no, are the following provisions under the Greenfield Township

Zoning Resolution sufficiently explicit to exclude the operation of a garbage and refuse disposal facility by the County by the 'land fill' method in the district involved?:

"One Family Residence District

"\* \* \* \* \*

"B. Uses Not Permitted.

"1. No junk yard, stone quarry, riding academy, outdoor theater, motel, or other thing offensive to a good residence neighborhood shall be maintained.

"2. Public Dumping Ground.

"a. No area shall be used as a public dumping ground, or as a private dumping ground, without the approval of the Greenfield Township Zoning Commission."

It appears from your predecessor's letter that Greenfield Township has a duly enacted zoning resolution, which became effective on January 6, 1959. Over ten years later, on May 5, 1969, Fairfield County created a county-wide waste disposal district, and it now wishes to establish a garbage and waste disposal facility within Greenfield Township on land which is restricted to one-family dwellings under the township zoning resolution.

The authority of a board of county commissioners to create a garbage disposal district is established by Section 343.01 Revised Code, which reads in part as follows:

"(A) Any board of county commissioners may, by resolution, lay out, establish, and maintain one or more garbage and refuse disposal districts within its respective county  
\* \* \*."

This Section provides broad authority for the construction and operation of garbage disposal plants and facilities, including landfills, and reads in part as follows:

"\* \* \*The board may acquire, by purchase or lease, construct, improve, enlarge, replace, maintain, and operate such garbage and refuse collection systems within any such district and such garbage and refuse disposal plants and facilities within or without any such district as are necessary for the protection of the public health."

The location of the district's boundaries and the specifications of the facilities are set out in detail in a plan prepared by the county engineer (with provision for modification), as provided by Section 343.04, Revised Code, which reads as follows:

"The board of county commissioners may,

after the establishment of any garbage and refuse disposal district, have a general plan of garbage and refuse disposal facilities for such district prepared by the county sanitary engineer. After such general plan has been approved by the board, it shall have the engineer prepare detailed plans, specifications, and estimates of the cost of such improvement, which, upon approval by the board, shall be carefully preserved in the office of the board or the engineer, and shall be open to inspection by all persons interested in such improvement. After approval of the detailed plans, specifications, and estimates of cost, the board shall adopt a resolution declaring that such improvement is necessary for the preservation and promotion of public health and welfare, designating the character of the improvement referring to the plans, specifications, and estimates of cost, stating the place where such plans, specifications, and estimates are on file and may be examined, and stating what part of the costs of such improvement shall be paid by the county at large and what part shall be paid by the issuance of bonds payable from the revenues of the improvement as provided by section 343.07 of the Revised Code.

"Such resolution shall contain a description of the boundaries of the garbage and refuse disposal district and shall designate when and where objections to the improvement or the boundaries of the district will be heard by the board. The date of such hearing shall not be less than twenty-four days after the date of the first publication of such resolution. The board shall cause such resolution to be published once a week, for two consecutive weeks, in a newspaper of general circulation within the county. Notice of such hearing shall be mailed to the clerk of any municipal corporation any part of which lies within such district. A hearing shall be granted by the board to all parties interested at the time and place fixed by such resolution and notice. Written objections to or indorsements of the proposed improvement or the boundaries of the district shall be received by the board for a period of five days after the hearing, and no action shall be taken by the board until after such period has elapsed. The minutes of the hearing, showing the persons who appear in person or by attorney and all written objections, shall be entered on the journal of the board and shall be preserved and filed in its office."

Section 343.05, Revised Code, provides for the board's ratification of the plan, by adoption of an "improvement resolution". Section 343.06, Revised Code, provides that if no landowner has taken an appeal ten days after adoption of the improvement resolution, the board "may proceed to issue and sell bonds to construct such improvement". While none of these Sections expressly grant power to specify the location of facilities ("improvements"), such

power is necessarily implied, since without it the board could not determine the exact facilities needed or estimate the cost, and it certainly could not begin construction.

The Greenfield Township Zoning Resolution is authorized by Section 519.02, Revised Code, which grants to boards of township trustees power to adopt a comprehensive zoning plan regulating, among other things, "the uses of land for trade, industry, residence, recreation, or other purposes" within the township. The trustees are required to create a township zoning commission (Section 519.04, Revised Code); to consider and vote upon adoption of any plan submitted by the zoning commission (Section 519.10, Revised Code); and to submit the plan to a vote of the concerned electors (Section 519.11, Revised Code). Finally, Section 519.23, Revised Code, specifically provides:

"\* \* \* [N]o land shall be used in violation of any resolution \* \* \* adopted by any board of township trustees under sections 519.02 to 519.25, inclusive, of the Revised Code. \* \* \*"

Since the county also has power to adopt comprehensive zoning provisions (Sections 303.02 and 303.03 et seq., Revised Code), it is obvious that conflicts will occasionally arise between township and county. In such cases, the General Assembly has given precedence to whichever provision is prior in time. Section 303.22, Revised Code, gives precedence to a township zoning plan which has been approved prior to the adoption of a county rural zoning resolution. That Section reads as follows:

"Where the people of any township or part thereof have approved township zoning regulations in accordance with sections 519.02 to 519.25, inclusive, of the Revised Code, prior to the adoption of a county rural zoning resolution by the board of county commissioners, and the county plan includes any area covered by the township zoning plan, the zoning resolution adopted by the board of township trustees shall take precedence over the zoning resolution adopted by the board of county commissioners, unless a majority of the voters in such zoned area of the township voting on the issue have voted to have the township plan of zoning replaced with the plan of county rural zoning."

Where, on the other hand, the county zoning plan is prior in time, that plan takes precedence over a subsequent township plan. The statute which so provides, Section 519.22, Revised Code, simply reverses the word order of Section 303.22, supra, referring specifically to Sections 303.02 to 303.25, Revised Code.

However, this priority rule is specifically made applicable only to conflicts between zoning resolutions passed under Chapters 303 and 519, Revised Code. It has no application to the county's establishment of a garbage disposal district under Chapter 343, Revised Code.

Furthermore, Section 519.21, supra, provides that public utilities are exempted from the zoning power of a township. That Section reads, in pertinent part, as follows:

"[Sections 519.02 to 519.25, inclusive, of the Revised Code] confer no power on any board of township trustees or board of zoning appeals in respect to the location, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement of any buildings or structures of any public utility or railroad, whether publicly or privately owned, or the use of land by any public utility or railroad, for the operation of its business."

In this respect, the power of townships is to be distinguished from that of counties which do have a right to regulate the location of a public utility through regional and county planning commissions. Sections 713.21 to 713.27, Revised Code; State ex rel. Kearns v. Ohio Power Co., 163 Ohio St. 451 (1955); State ex rel. Barbuto v. Ohio Edison, 16 Ohio App. 2d 55 (1969), affirmed 16 Ohio St. 2d 54 (1968).

The landfill in the present case is a publicly-owned public utility, under the broad definition of "public utility" in Ohio Power Co. v. Attica, 23 Ohio St. 2d 37 (1970) (applied in my Opinion No. 71-029, Opinions of the Attorney General for 1971), because it serves all members of the community without restriction. Since township zoning resolutions cannot regulate the location of public utilities, the county can locate its landfill without regard to the township zoning resolution.

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

1. The provisions of Chapters 303 and 519, Revised Code, controlling conflicts between county and township zoning regulations, have no applicability to the creation of a garbage and refuse disposal facility by a board of county commissioners under Chapter 343, Revised Code.

2. Township zoning resolutions cannot regulate the location of a public utility.