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ZONING, TOWNSHIP—AREAS OF USE DESIGNATION—  
§519.02 R.C.—NO AREA FOR INDUSTRIAL USES—ZONING  
PROPER WHEN LIMITED TO SAFETY, HEALTH AND  
MORALS—§519.21 R.C.

SYLLABUS:

1. All township zoning regulations are subject to the limitations contained in Section 519.21, Revised Code, relative to use for agricultural purposes and public utility or railroad structures; and relative to buildings of mercantile and retail establishments in any area zoned for trade or industry.

2. Within the limitations of Section 519.02, Revised Code, township trustees and a township zoning commission may by resolution lawfully divide the township into a residential area, an agricultural area, and an area for retail business, and thereby exclude industrial and manufacturing plants from the township, provided such division of the township is substantially related to the health, the safety and morals of the inhabitants of the township, and provided pre-existing vested rights are recognized and protected.

3. Future construction of buildings in a township may be regulated and controlled within the limitations provided in Section 519.02, Revised Code, without dividing the township into use areas as to land.

Columbus, Ohio, April 21, 1959

Hon. Charles W. Ayers, Prosecuting Attorney  
Knox County, Mount Vernon, Ohio

Dear Sir :

I have received your request for my opinion in regard to the following questions :

“(1) Under Sections 519.01 to 519.99, Revised Code, may township trustees and a township zoning commission adopt a zoning resolution and divide the township into a residential area, an agricultural area and an area for retail business, but exclude entirely from the township all forms of industrial and manufacturing plants?

“(2) May a township completely ignore the restriction on use of land within the township and dividing the township into different use areas, but merely regulate and control future construction of buildings within the township?”

I shall take up your questions in the order in which they are presented. Section 519.02, Revised Code, provides :

“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)

Section 519.21, Revised Code, contains certain prohibitions as to the power a board of township trustees or board of zoning appeals may exercise with reference to zoning regulations. This section reads :

“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 to prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures incident to the use of agricultural purposes of the land on which such buildings or structures are located, and no zoning certificate shall be required for any such building or structure.

“Such sections 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.

“Such sections confer no power on any board of county commissioners, board of township trustees, or board of zoning appeals to prohibit the use of any land for the construction of a building, or the reconstruction, change, alteration, maintenance, enlargement, or use of any building for the maintenance and operation of any mercantile or retail establishment, drugstore, hotel, lunchroom, restaurant, or place of entertainment in any area zoned for trade or industry.”

The provisions of this section are plain and simple. The concluding paragraph of the section, with its prohibition against regulations that would in any manner whatsoever limit the use of land of mercantile or retail establishments, drug stores, hotels, lunchrooms, restaurants, or places of entertainment “in any area zoned for trade or industry,” clearly means what it says. It surely does not make the establishment of an industrial zone a condition for the lawful division of a township into various use districts.

It appears that the precise problem at hand has not been presented to a court for judicial interpretation, and it thus becomes necessary to seek the answer to the question, whether township authorities may lawfully *exclude* industrial and manufacturing plants from a township, in pronouncements of the courts on zoning generally, trusting that therein some guiding principle will be found which will lead to a proper legal conclusion. In *Village of Euclid v. Ambler Realty*, 272 U. S. 366, the court stated at page 387 :

“The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as ap-

plied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim 'sic utere tuo ut alienum non laedas,' which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clue."

Of considerable interest here is *Valley View Village, Inc. v. Proffett*, 221 F. (2d) 412, 57 O. Ops. 274, decided by the U. S. Court of Appeals, 6th District, on April 23, 1955. The zoning ordinance of the village was under attack because it established only one zone, residential, for the entire village, and it was held:

"A zoning ordinance, adopted by a non-charter municipality, which puts the entire area of the municipality into a single use district, is valid."

In *Cleveland Trust Co. v. Brooklyn*, 92 O. App. 351, appeal dismissed for want of debatable constitutional question, 158 Ohio St., 258, it was held in the third paragraph of the syllabus:

"The presumption of validity which attaches to legislative acts in general applies with equal force to zoning ordinances and regulations and the facts to justify interference by courts with the legislative function must clearly appear from the evidence. *If the legislative classification for zoning purposes is fairly debatable the legislative judgment must be allowed to control.*"

(Emphasis added)

Another aspect of the constitutional issue involved in zoning regulations was stressed in *Krieger v. Cleveland*, 143 N.E. (2d) 142, where a zoning ordinance was being assailed on the ground that by placing the plaintiff's property in a Class 3, or two-family, district, it deprived him of the right to use it for industrial purposes, and therefore constituted a taking of property without due process of law. The ruling of the Court of Appeals of Cuyahoga County is described in headnote 1 of the reported decision as follows:

"Zoning, under constitutional rights, must not be made static; but when constitutionality of a zoning law is questioned, a court is required to base its judgment *on existing facts, and not speculate on whether future developments, when and if they come into being, may render the zoning unconstitutional as to changed conditions.*" (Emphasis added)

It should be mentioned in this connection that Section 713.07, Revised Code, from which the zoning authority of municipal corporations is

derived, contains the words, "regulate and *restrict*," where as in Section 519.02, Revised Code, township authorities may only "regulate" in the premises. Is the power of a township thereby made narrower than that of a municipal corporation? In *East Fairfield Coal Co. v. Booth*, 166 Ohio St., 379, where an ordinance, *adopted subsequently*, to prohibit stripmining in an agricultural area was declared unconstitutional, the court stated in the course of the opinion at page 382:

"The enabling statute permits the township 'to regulate' uses. The word, 'regulate,' does not ordinarily include 'prohibit' (*although it may*, as in *Smith v. Juillerat, supra*) and express authority to regulate as a general rule negatives by implication the power to prohibit." (Emphasis added)

In *Smith v. Juillerat*, 161 Ohio St., 424, it was held in the second and third paragraphs of the syllabus:

"The purpose of a zoning ordinance is to limit the use of land in the interest of the public welfare.

"Where 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, the ordinance is a valid exercise of the police power."

In *Carlton v. Riddell*, 58 Ohio Opinions, 380, (motion to certify overruled in case No. 34520, November 23, 1955) the Court of Appeals in Medina County, declared a township regulation against trailer camps valid, it being stated in the second headnote of the reported decision:

"The synonyms for the word 'regulate' are: 'adjust, dispose, methodize, arrange, direct, order, rule, govern, control'."

Summarizing the foregoing citations relative to your first question, I am of the opinion that township trustees and a township zoning commission may, subject to the limitations of Section 519.21, Revised Code, by resolution lawfully divide the township into a residential area, an agricultural area, and an area for retail business, and thereby exclude industrial and manufacturing plants from the township, provided such division of the township is substantially related to the health, the safety and morals of the inhabitants of the township, and provided pre-existing rights are recognized and protected.

Your second query involves an interpretation of the provisions of the first part of Section 519.02, Revised Code, up to and including the words

“and trailer coaches,” and, of course, requires the observance of Section 519.21, Revised Code, already discussed in connection with your first question. A township may apparently provide for zoning either by regulation of uses of land, or of buildings thereon, or it may do this in both ways, provided it does so according to a comprehensive plan.

Therefore, it is my opinion and you are advised that subject to provisions of Section 519.21, Revised Code, future construction of buildings in a township may be regulated and controlled within the limitations provided in Section 519.02, without dividing the township into use areas as to land.

In the light of authorities cited herein, I am of the opinion that :

1. All township zoning regulations are subject to the limitations contained in Section 519.21, Revised Code, relative to use for agricultural purposes and public utility or railroad structures ; and relative to buildings of mercantile and retail establishments in any area zoned for trade or industry.

2. Within the limitations of Section 519.02, Revised Code, township trustees and a township zoning commission may by resolution lawfully divide the township into a residential area, an agricultural area, and an area for retail business, and thereby exclude industrial and manufacturing plants from the township, provided such division of the township is substantially related to the health, the safety and morals of the inhabitants of the township, and provided pre-existing vested rights are recognized and protected.

3. Future construction of buildings in a township may be regulated and controlled within the limitations provided in Section 519.02, Revised Code, without dividing the township into use areas as to land.

Respectfully,

MARK McELROY

Attorney General