

**OPINION NO. 88-051****Syllabus:**

1. The use of land primarily for the disposal of septage gathered by a septic tank cleaning business is not an agricultural use of that land, and is not incidental to agriculture even though some crops are grown on the land.
2. Land that has been approved by a county board of health as a site for the commercial disposal of septage, remains subject to applicable township zoning regulations.

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**To: Gregory J. Brown, Ashtabula County Prosecuting Attorney, Jefferson, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, July 6, 1988**

I have before me your request for my opinion on the following two questions:

1. Is the use of land primarily as a disposal site for septage pumped out of household septic tanks by a person in the business of cleaning septic tanks, even if some crops are grown on the land, a use which is incidental to agriculture?
2. If such a use violates township zoning regulations, does the issuance of a valid permit by a district board of health approving the site for the disposal of septage preempt the township zoning regulations?

You indicate that your questions concern a licensed septic tank cleaner who charges a fee for cleaning out septic tanks. He plans to dispose of the septage on land he owns in the township. You state that although he may grow some crops on the site, you are assuming that his use of the site will be for the primary purpose of disposal of septage in the course of his business activities. The township trustees have zoned the land in question for agricultural or low density residential use.<sup>1</sup>

R.C. Chapter 519 governs township zoning. Pursuant to R.C. 519.02 a board of township trustees may adopt zoning resolutions that regulate, *inter alia*, the size and location of buildings and the use of land in the unincorporated areas of the township. The zoning authority of the township trustees is limited by R.C. 519.21(A), as follows:

Except as otherwise provided in division (B) of this section, sections 519.02 to 519.25 of the Revised Code confer no power on any township zoning commission, board of township trustees, or board of

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<sup>1</sup> Since you do not raise the issue in your request letter, I will assume without further analysis that the use of the property in question to dispose of septage is not a residential use of the land.

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 for 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.

Your letter indicates that the land in question is already zoned for agricultural use. Therefore, if the proposed use is agricultural the owner will not need a variance. Similarly, if the proposed use is viewed as an agricultural use of the land then that use may not be prohibited under the authority of R.C. Chapter 519. In order to determine whether or not the disposal of septage is an agricultural use of the land it is necessary to examine the meaning of the word "agriculture." R.C. 519.01 defines "agriculture" as including "agriculture, farming, dairying, pasturage, apiculture, horticulture, floriculture, viticulture, and animal and poultry husbandry." *Webster's New World Dictionary* 27 (2d college ed. 1984) defines "agriculture" as "the science and art of farming; work of cultivating the soil, producing crops, and raising livestock." Based upon these definitions of the word "agriculture," I conclude that the use of land as a disposal site for septage collected by a septic tank cleaning business is not an agricultural use of that property. Disposal of septage in the course of the business activities of a licensed septic tank cleaner is not engaging in agriculture under these definitions.

Having concluded that the use of the land for the disposal of septage is not itself an agricultural use of the land, I turn to a related issue raised in your letter. Because some crops may be grown on the land, you ask whether the septage disposal is a use incidental to agriculture. This question arises because of the well-recognized legal principle that a zoning regulation which restricts the use of land to certain purposes nonetheless allows accessory use of the land in a manner which is customarily incidental to its primary use. *See Samsa v. Heck*, 13 Ohio App. 2d 94, 284 N.E.2d 312 (Summit County 1967) (syllabus, paragraph two). *See also* R.C. 519.21(A) (R.C. Chapter 519 does not confer authority upon a township to prohibit "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"). For the following two reasons, I find that the proposed use is not a use incidental to agriculture. First, you state in your request that the primary use of the site will be disposal of septage in the course of a business, which I have concluded is not an agricultural use of land. Second, the disposal of large amounts of septage is not an accessory use customarily incidental to agriculture. *See Samsa v. Heck*, 13 Ohio App. 2d at 101, 234 N.E.2d at 317 ("[t]he word 'incident,' when used in connection with the use of property, is generally said to mean anything which is usually connected with the principal use, something which is necessary, appertaining to, or depending upon, the principal use"). Therefore, in response to your first question, I conclude that the use of land primarily for the disposal of septage gathered by a septic tank cleaning business is not an agricultural use of the land, and that such a use is not incidental to agriculture even if some crops are grown on the land.

I turn now to your second question, in which you ask whether a permit issued by a district board of health preempts the zoning regulations of a township. R.C. 519.02, which grants zoning authority to boards of township trustees, provides that "[f]or 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...." R.C. 3707.01 provides that boards of health may regulate the "emptying and cleaning...of water closets, privies, cesspools...or other places where offensive or dangerous substances or liquids are or may accumulate." R.C. 3709.21 provides that boards of health "may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances." The Ashtabula County Board of Health has adopted regulations concerning the disposal of septage, and has issued a permit to the owner of the land in question to use his property as a septage disposal site. However, since the land is zoned for agricultural use, and since I have concluded that a septage disposal site is not an agricultural use of land, it appears that the proposed use violates the applicable township zoning regulations.

You ask whether the board of health permit preempts application of the township zoning regulations. The Ohio Supreme Court recently addressed a similar issue in *Set Products, Inc. v. Bainbridge Township Board of Zoning Appeals*, 31 Ohio St. 3d 260, 510 N.E.2d 373 (1987). In that case a mine operator obtained a surface mine permit from the Ohio Department of Natural Resources pursuant to R.C. 1514.02. However, when the operator sought a variance from the township board of zoning appeals in order to operate the surface mine it was denied. The operator appealed and argued that R.C. Chapter 1514 superseded the township zoning regulations. The court held that "[t]he power of townships to enact zoning resolutions to regulate surface mining, pursuant to R.C. Chapter 519, has not been preempted by enactment of R.C. Chapter 1514." *Id.* (syllabus, paragraph three). The court noted that "[t]he final and complete approval of the operation stems from the endorsement by both the state and local authorities." *Id.* at 265, 510 N.E.2d at 378. In *Hulligan v. Columbia Township Board of Zoning Appeals*, 59 Ohio App. 2d 105, 392 N.E.2d 1272 (Lorain County 1978), the court came to a similar conclusion. *Hulligan* involved property owners who wanted to use their lands as a sanitary landfill site. The owners sought both a permit from the Ohio Environmental Protection Agency (EPA) and township zoning approval for the site. The court concluded that although the Ohio EPA has statutory authority to regulate and issue permits for landfill operations, this "does not preempt the field so far as local zoning is concerned." *Id.* at 108, 392 N.E.2d at 1274 (citation omitted). The court further noted that "the final and complete approval of a sanitary landfill stems from the endorsement by both authorities." *Id.* See also *Rumpke Waste, Inc. v. Henderson*, 591 F. Supp. 521, 531 (S.D. Ohio 1984) ("that Ohio permits landfills does not mean that a particular smaller governmental entity must permit landfills....It is for the zoning body itself to make the determinations as to the most appropriate land uses"); *North Sanitary Landfill, Inc. v. Board of County Commissioners*, 52 Ohio App. 2d 167, 369 N.E.2d 17 (Montgomery County 1976), *motion to certify overruled* (Ohio Sup. Ct. Apr. 29, 1977) (syllabus, paragraph two) ("[t]he authority of the Environmental Protection Agency to license, supervise and inspect disposal systems does not restrict or preempt and is not inconsistent with the authority of a board of county commissioners operating a disposal system to approve or disapprove another disposal facility within its district").

The issue at hand is analogous to both *Set Products* and *Hulligan* in that two separate authorities have jurisdiction over the use of the land for disposal of septage. The board of health has authority to regulate the method and manner in which the septage is handled. The township has authority to impose zoning regulations regarding the appropriate use of the land. I conclude, in accordance with the cases cited above, that when two authorities have the power to regulate an activity or use of land, there must be compliance with the regulations of both.<sup>2</sup> Therefore, in answer to your second question, I conclude that land that has been approved by a county board of health as a site for the commercial disposal of septage remains subject to applicable township zoning regulations.

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<sup>2</sup> I note that neither R.C. Chapter 3707 nor Chapter 3709 expressly indicates that approval of a septage disposal site by a board of health preempts application of local zoning regulations. In contrast, R.C. 3734.05(D)(3) specifies the following:

No political subdivision of this state shall require any additional zoning or other approval, consent, permit, certificate, or other condition for the construction or operation of a hazardous waste facility authorized by a hazardous waste facility installation and operation permit issued pursuant to this chapter, nor shall any political subdivision adopt or enforce any law, ordinance or regulation that in any way alters, impairs, or limits the authority granted in the permit.

The absence of such preemptive language in R.C. Chapters 3707 and 3709 certainly implies that the General Assembly did not intend approval of a septage disposal site under the authority conferred in those chapters to supersede otherwise applicable zoning regulations.

Therefore, it is my opinion and you are advised that:

1. The use of land primarily for the disposal of septage gathered by a septic tank cleaning business is not an agricultural use of that land, and is not incidental to agriculture even though some crops are grown on the land.
2. Land that has been approved by a county board of health as a site for the commercial disposal of septage, remains subject to applicable township zoning regulations.