

OPINION NO. 87-087

Syllabus:

1. The zoning power granted to a board of township trustees does not include the power "to enact zoning regulations prohibiting airports throughout the unincorporated territory of [the township] by declaring that airports are nuisances per se." Yorkavitz v. Board of Township Trustees, 166 Ohio St. 349, 142 N.E.2d 655 (1957) (syllabus, paragraph 2).
2. Pursuant to R.C. 519.02, and subject to the limitations contained in R.C. 519.21 and R.C. 519.211, a board of township trustees may adopt zoning provisions regulating structures in a public or private airport, airstrip, or hazard area within an unincorporated area of the township, even if an airport zoning board has been created under R.C. 4563.03.
3. Pursuant to R.C. 4563.04, if a zoning regulation adopted by a board of township trustees under R.C. Chapter 519 conflicts with a zoning regulation adopted by an airport zoning board under R.C. 4563.01-.21, the limitation or requirement best calculated to insure safety shall govern.

To: John J. Plough, Portage County Prosecuting Attorney, Ravenna, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, November 2, 1987

I have before me your request for an opinion dealing with a township's authority to use zoning provisions to regulate structures in public or private airports or airstrips or in hazard areas adjacent to such airports or airstrips. You are concerned with regulation of such matters as type, set backs, and use of the structures. Specifically, you ask the following questions:

1. May township trustees pursuant to Ohio Revised Code Section 519.02 regulate structures on a public airport, airstrip or hazard area where the county airport zoning authority has not acted to promote the public health and safety?
2. Do township trustees pursuant to Ohio Revised Code Section 519.02 have authority to regulate structures on a private airport, airstrip or hazard area to promote the public health and safety even though township trustees, through a zoning resolution, have no authority to prohibit airports or airstrips?

Before addressing your specific questions, I find it helpful to examine the general zoning authority of a township. R.C. 519.02 authorizes a board of township trustees to adopt zoning provisions governing the unincorporated territory of the township, as follows:

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, size 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.

The procedures for adopting township zoning resolutions are set forth in R.C. Chapter 519. See, e.g., R.C. 519.04 (creation of township zoning commission); R.C. 519.10 (voting by township trustees upon adoption of recommended zoning plan); R.C. 519.11 (submission of zoning plan to electors); R.C. 519.12 (amendments to zoning resolution).

The authority of a township to adopt zoning provisions is, however, restricted in certain respects by related statutory provisions. R.C. 519.21 limits the capacity of township zoning to interfere with agricultural activities, stating:

(A) 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 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...and no zoning certificate shall be required for any such building or structure.

(B) A township zoning resolution, or an amendment to such resolution, may in any platted subdivision approved under section 711.05, 711.09, or 711.10 of the Revised Code, or in any area consisting of fifteen or more lots approved under section 711.131 of the Revised Code that are contiguous...regulate:

- (1) Agriculture on lots of one acre or less;
- (2) Buildings or structures incident to the use of land for agricultural purposes on lots greater than one acre but not greater than five acres by: set back building lines; height; and size;
- (3) Dairying and animal and poultry husbandry on lots greater than one acre but not greater than five acres....

....
(C) Such sections confer no power on any township zoning commission, board of township trustees, or board of zoning appeals to prohibit in a district zoned for agricultural, industrial, residential, or commercial uses, the use of any land for a farm market where fifty per cent or more of the gross income received from the market is derived from produce raised on farms owned or operated by the market

operator in a normal crop year. However, a board of township trustees, as provided in section 519.02 of the Revised Code, may regulate such factors pertaining to farm markets as size of the structure, size of parking areas that may be required, set back building lines, and egress or ingress, where such regulation is necessary to protect the public health and safety.

See generally 1983 Op. Att'y Gen. No. 83-044.

Additional limitations on township zoning are set forth in R.C. 519.211, as follows:

Sections 519.02 to 519.25 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.

Such sections confer no power on any township zoning commission, board of township trustees, or board of zoning appeals to prohibit the sale or use of alcoholic beverages in areas where the establishment and operation of any retail business, hotel, lunchroom, or restaurant is permitted.

Such sections do not confer any power on any township zoning commission, board of township trustees, or board of zoning appeals to prohibit the use of any land owned or leased by an industrial firm for the conduct of oil or natural gas well drilling or production activities or the location of associated facilities or equipment when such oil or natural gas obtained by the industrial firm is used for the operation of its own plants.

The grant of zoning authority contained in R.C. 519.02 is, by its terms, broad enough to permit a board of township trustees to regulate structures in an airport or airstrip or in a hazard area adjacent to an airport or airstrip.¹ The

¹ Townships are authorized by R.C. Chapter 519 to adopt zoning regulations governing all property within the zoned areas. There may, however, be some instances in which a particular public body is not required to comply with such regulations. Brownfield v. State, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980), overruled, in part, on other grounds in Racing Guild of Ohio v. State Racing Commission, 28 Ohio St. 3d 317, ___ N.E.2d ___ (1986), stands for the proposition that, unless there is a direct statutory grant of immunity, a public body should attempt compliance with local zoning provisions; if compliance with zoning regulations would frustrate or significantly hinder the public purpose of such body, then a balancing test should be applied. Brownfield v. State states, in part: "the correct approach in...cases where conflicting interests of governmental entities appear would be in each instance to weigh the general public purposes to be served by the exercise of each power, and to resolve the impasse in favor of that power which will serve the needs of the greater number of our citizens." 63 Ohio St. 2d at 285, 407 N.E.2d

trustees are, however, subject to the provisions of R.C. 519.21 and R.C. 519.211, which prevent them from regulating certain types of structures or activities. It follows that, unless conflicting provisions appear elsewhere, a board of township trustees may, under R.C. 519.02, adopt zoning provisions regulating structures in an airport, airstrip, or hazard area, subject to the limitations contained in R.C. 519.21 and 519.211.²

Your first question asks about the authority of a township to adopt zoning provisions governing structures in and around a public airport in a situation in which the county airport zoning authority has not acted. R.C. Chapter 4563 governs airports, and R.C. 4563.03 creates a zoning board for each publicly-owned airport, as follows:

(A) When an airport is publicly owned and all airport hazard areas appertaining to such airport are located inside the territorial limits of one political subdivision, the legislative authority of the political subdivision shall constitute the airport zoning board. Such legislative authority, acting as the airport zoning board, may adopt, administer, and enforce airport zoning regulations for such airport hazard area....

(B) When an airport is publicly owned and any airport hazard area appertaining to such airport is located in more than one political subdivision, the

at 1367. See also City of East Cleveland v. Board of County Commissioners, 69 Ohio St. 2d 23, 430 N.E.2d 456 (1982) (approving and following Brownfield v. State); 1986 Op. Att'y Gen. No. 86-026 (syllabus, paragraph 1) ("[t]he Adjutant General, in constructing, repairing, or using armories, airfields, buildings, or other facilities of the Ohio National Guard, must make a reasonable attempt to comply with applicable requirements of local zoning, building, and fire codes. If such attempts fail and a court determines that the proposed construction, repair, or use...would serve the needs of the greater number of citizens than construction, repair, or use in accordance with applicable requirements of the local codes, then the Adjutant General will be excused from complying with those requirements"); 1985 Op. Att'y Gen. No. 85-098 (syllabus, paragraph 1) ("[t]he board of education of a local school district must attempt to comply with village zoning regulations....If compliance...would frustrate or hinder the public purpose underlying the use of the board's property..., a court must balance the competing governmental interests..."); 1983 Op. Att'y Gen. No. 83-005. You have not inquired about the extent to which particular governmental bodies must comply with township zoning provisions, and I am not addressing that question.

² It is possible that state or federal regulatory schemes may have an impact upon township zoning of airports, airstrips, and hazard areas. See generally, e.g., R.C. Chapter 4561; 49 App. U.S.C. §§1303, 1305 (1982 & Supp. III 1985). You have, however, inquired only about a township's zoning authority under the provisions of R.C. Chapter 519, and I am limiting my analysis to those provisions.

board of county commissioners of each county in which such airport or such airport hazard area may exist, shall constitute the airport zoning board, which shall have the same power to adopt, administer, and enforce airport zoning regulations as provided in division (A) of this section....

See also R.C. 4563.05 (appointment of airport zoning commission); R.C. 4563.06-.07, .09-.12 (adoption and scope of airport zoning regulations). Pursuant to R.C. 4563.01(A), "[a]n airport is 'publicly owned' if the portion thereof used for the landing and taking off of aircraft is owned, operated, leased to, or leased by the United States, any agency or department thereof, this state or any other state, or any political subdivision of this state or any other state, or any other governmental body, public agency, or public corporation, or any combination thereof." See generally note 1, supra.

R.C. 4563.01(D) designates municipal corporations, townships, and counties as political subdivisions for purposes of R.C. Chapter 4563. "Airport hazard" and "airport hazard area" are defined as follows:

(B) "Airport hazard" means any structure or object of natural growth or use of land within an airport hazard area which obstructs the air space required for the flight of aircraft in landing or taking off at any airport or is otherwise hazardous to such landing or taking off of aircraft.

(C) "Airport hazard area" means any area of land adjacent to an airport which has been declared to be an "airport hazard area" by the division of aviation in connection with any airport approach plan recommended by such division.

R.C. 4563.01. Your reference to a county airport zoning authority indicates that you are concerned with a situation in which the airport hazard areas are not located exclusively within the territorial limits of the township. In that situation, the legislative authority of the county, rather than that of the township, is the airport zoning board under R.C. 4563.03. Because the township trustees do not constitute the airport zoning board under R.C. 4563.03, they do not derive any additional authority under R.C. Chapter 4563. See generally R.C. 4563.05.

Your question is, therefore, whether a board of township trustees may exercise its zoning authority under R.C. Chapter 519 even if a county airport zoning authority has been created under R.C. 4563.03. Your letter references 1963 Op. Att'y Gen. No. 449, p. 472, which states, at 475, that "there cannot be more than one airport zoning authority in effect in regard to the same airport or hazard area in a single county at a particular time." The limitation to a single airport zoning authority clearly applies to airport zoning authorities created under R.C. Chapter 4563. 1963 Op. No. 449 does not address the issue of township zoning under R.C. Chapter 519.

I am aware of no provision of law that prevents the exercise of township zoning authority simply because a county airport zoning authority has been created under R.C. Chapter 4563. In fact, R.C. 4563.04 expressly addresses a situation in which airport zoning regulations adopted under R.C. 4563.01-.21 conflict with zoning regulations adopted by another local body:

In the event of conflict between any airport zoning regulations adopted under sections 4563.01 to 4563.21, inclusive, of the Revised Code, and any other zoning regulations applicable to the same area, whether the conflict be with respect to the height of structures or objects of natural growth, the use of land, or any other matter, and whether such other regulations were adopted by the political subdivision which adopted the airport zoning regulations or by some other political subdivision, the limitation or requirement best calculated to insure safety shall govern. (Emphasis added).

It was, thus, clearly contemplated by the General Assembly that areas that are subject to zoning regulation by an airport zoning board under R.C. 4563.03 should remain subject to zoning regulation by other local bodies. The authority of township trustees to zone within such an area is that granted to the trustees by R.C. 519.02, subject to the limitations contained in R.C. 519.21 and R.C. 519.211. Township zoning provisions may, accordingly, be adopted in accordance with a comprehensive plan for the purpose of promoting the public health, safety, and morals. See generally 1985 Op. Att'y Gen. No. 85-053.

Your letter describes a situation in which the county airport zoning authority "has not acted to promote the public health and safety." That fact is, however, not relevant to an analysis of your question. Regardless of whether the county airport zoning authority has acted, a board of township trustees may exercise its authority under R.C. 519.02, subject to the limitations of R.C. 519.21 and R.C. 519.211, to adopt zoning regulations governing airports, airstrips, or hazard areas within unincorporated areas of the township.

Your letter phrases your first question in terms of the authority of a township to "regulate structures on a public airport, airstrip or hazard area." The reference to a "public" airport was presumably included because an airport zoning board is created under R.C. 4563.03 only for an airport that is publicly owned. Thus, no conflict between airport zoning regulations adopted under R.C. 4563.01-.21 and township zoning regulations would occur with respect to a privately-owned airport or airstrip. I note, however, that the authority of township trustees to adopt zoning provisions extends to both public and private airports within the unincorporated territory of the township. See generally note 1, supra.

In response to your first question, I conclude, accordingly, that, pursuant to R.C. 519.02, and subject to the limitations contained in R.C. 519.21 and R.C. 519.211, a board of township trustees may adopt zoning provisions regulating structures in an airport, airstrip, or hazard area within an unincorporated area of the township, even if an airport zoning board has been created under R.C. 4563.03. Pursuant to R.C. 4563.04, if a zoning regulation adopted by a board of township trustees under R.C. Chapter 519 conflicts with a zoning regulation adopted by an airport zoning board under R.C. 4563.01-.21, the limitation or requirement best calculated to insure safety shall govern.

Your second question asks whether township trustees have authority under R.C. 519.02 to regulate structures in a private airport, airstrip, or hazard area for the purpose of promoting the public health and safety. This question was prompted by

Yorkavitz v. Board of Township Trustees, 166 Ohio St. 349, 142 N.E.2d 655 (1957), in which the Supreme Court of Ohio held that the zoning power granted to a board of township trustees does not include the power "to enact zoning regulations prohibiting airports throughout the unincorporated territory of [the township] by declaring that airports are nuisances per se." Yorkavitz v. Board of Township Trustees (syllabus, paragraph 2). The court based that conclusion on the fact that other statutory provisions indicate a state interest in promoting aviation. See, e.g., R.C. 4561.06 ("[t]he department of transportation [formerly the Ohio Aviation Board] shall encourage the development of aviation and the promotion of aviation education within this state as, in its judgment, may best serve the public interest"); R.C. 4561.13 ("[e]very state, county, and municipal officer charged with the enforcement of state or municipal laws shall aid...in the enforcement of" R.C. 4561.01-.16). The court in Yorkavitz stated:

Since, then, the General Assembly has indicated in its general laws that airports are beneficial to the public of Ohio and are to be promoted and encouraged, it follows that in delegating to township trustees the power to zone it did not include in that delegation the power to circumvent the general law by completely prohibiting airports, throughout the unincorporated territory of a township, as being nuisances per se.

166 Ohio St. at 352-53, 142 N.E.2d at 657. See also City of Heath v. Licking County Regional Airport Authority, 16 Ohio Misc. 69, 237 N.E.2d 173 (C.P. Licking County 1967) (finding, on the basis of the Yorkavitz case, that a municipal ordinance prohibiting commercial aviation fields as a nuisance conflicts with R.C. Chapter 4561 and is invalid). As your letter notes, in Abell v. Russell Township, No. 884 (Ct. App. Geauga County Dec. 30, 1980) (unreported), it was held that a regulation that prohibited within the township "[a]viation fields, landing strips, or other facilities for the use, storage, servicing and maintenance of aircraft, whether operated for commercial purposes or for private purposes accessory to another permitted principal use" was invalid on the basis of Yorkavitz as applied to private landing strips as well as commercial aviation fields. Abell v. Russell Township, slip op. at 3-4. See generally 1981 Op. Att'y Gen. No. 81-065 (township zoning authority does not generally include the power to completely prohibit a certain use of land throughout the township, but that power may exist if there is a real or substantial risk to the public health, safety, morals, or general welfare).

Your letter acknowledges that, in light of Yorkavitz and similar decisions, a township may not prohibit airports or airstrips within its boundaries, and asks whether a township may, under R.C. 519.02, regulate structures in a private airport, airstrip, or hazard area to promote the public health and safety. The discussion of your first question is directly applicable to this question. The zoning authority of township trustees under R.C. 519.02, R.C. 519.21, and R.C. 519.211 does not turn on the ownership of the property in question but, rather, extends to both public and private airports and airstrips and to hazard areas adjacent to such airports or airstrips. See generally note 1, *supra*. Yorkavitz stands for the proposition that a township may not use its zoning power to prohibit airports throughout its unincorporated territory by declaring that they are nuisances. Cf. Samsa v. Heck, 13 Ohio

App. 2d 94, 234 N.E.2d 312 (Summit County 1967) (distinguishing Yorkavitz and upholding a finding that, under township zoning regulations, the maintenance of a private airstrip on residential property was not permitted since it was not an accessory use "customarily incident" to residential use within the meaning of the regulations). The principles set forth in Yorkavitz do not, however, prevent the regulation of structures in a public or private airport or airstrip or in a hazard area adjacent to such an airport or airstrip. Rather, the general authority granted by R.C. 519.02 permits a township to adopt zoning provisions regulating such structures within the unincorporated territory of the township for the purpose of promoting the public health, safety, and morals, subject to the limitations contained in R.C. 519.21 and R.C. 519.211.

It is, therefore, my opinion, and you are hereby advised, as follows:

1. The zoning power granted to a board of township trustees does not include the power "to enact zoning regulations prohibiting airports throughout the unincorporated territory of [the township] by declaring that airports are nuisances per se." Yorkavitz v. Board of Township Trustees, 166 Ohio St. 349, 142 N.E.2d 655 (1957) (syllabus, paragraph 2).
2. Pursuant to R.C. 519.02, and subject to the limitations contained in R.C. 519.21 and R.C. 519.211, a board of township trustees may adopt zoning provisions regulating structures in a public or private airport, airstrip, or hazard area within an unincorporated area of the township, even if an airport zoning board has been created under R.C. 4563.03.
3. Pursuant to R.C. 4563.04, if a zoning regulation adopted by a board of township trustees under R.C. Chapter 519 conflicts with a zoning regulation adopted by an airport zoning board under R.C. 4563.01-.21, the limitation or requirement best calculated to insure safety shall govern.