

OPINION NO. 1500

Syllabus:

1. A comprehensive zoning plan adopted pursuant to Chapter 519, Revised Code, may not be repealed for a part only of the territory included within the zoning plan but must be repealed vel non as a whole.
2. The electors residing within the unincorporated area of the township included within the zoning plan shall vote upon the repeal of that zoning plan.
3. A referendum seeking repeal of a township zoning plan may be held in the same year the plan was approved by the electorate.

To: Donald D. Simmons, Wood County Pros. Atty., Bowling Green, Ohio
By: William B. Saxbe, Attorney General, October 30, 1964

Your request for my opinion is as follows:

"The Trustees for Perrysburg and Middleton Townships have adopted resolutions to submit the question as to whether zoning ordinances should be repealed in a part of the portion zoned to the voters residing in the area where it is proposed that the ordinance be repealed. Both resolutions were adopted after the presentation of petitions with the requisite number of signers under the provisions of Section 519.25 of the Ohio Revised Code. Several questions have arisen as a result of the certification of such resolutions to the board of elections:

- "1. Can a zoning ordinance be repealed for a part only of the territory included within the zoning plan?
- "2. If so, who shall vote upon the same -- all of those residing in the unincorporated area included in the zoning plan or only those residing within the area in which it is proposed that the plan be repealed?
- "3. Can such a referendum be held in the same year in which the electorate approved the zoning ordinance?"

All zoning laws and regulations are founded on enhancing and protecting the public health, the public safety, and the public morals by means of a comprehensive plan. Pritz v. Messer, 112 Ohio St., 628.

The enabling legislation for township zoning, Section 3180-26, General Code, is as follows:

"Section 26. For the purpose of promoting public health, safety, morals, comfort or general welfare; to conserve and protect property and property values; to secure the most appropriate use of land; or to facilitate adequate but economical provision of public improvements, all in accordance with a comprehensive plan, the board of trustees of any township is hereby empowered to 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 said 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 said township trustees may determine. 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 1953 code revision produced Section 519.02, Revised Code, as follows:

"The board of township trustees may 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."

Notable among the omissions in the revised text of the code were "* * * for the purpose of promoting the public health, safety, and morals, * * *", and "* * * in accordance with a comprehensive plan * * *." Despite the enactment of Section 1.24, Revised Code, which declared the General Assembly's

intent not to change the law, the One Hundred Second General Assembly in 1957 felt compelled to reassert the noted omissions. Hence, Section 519.02, Revised Code, is substantially as it was when originally enacted:

"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."

It is quite significant that the statute requires township trustees to effect zoning via a comprehensive plan. The selection of such language imparts the intent of the General Assembly to have the township trustees cover a zoning matter under consideration completely, culminating in a plan the integral parts of which are dependent, each on the other. The entire zoning plan, conceived for the general welfare, must be approved or rejected by the electors residing in the unincorporated area of the township included in the proposed plan of zoning. Section 519.11, Revised Code, further stipulates that none of the proposed regulations shall be effective unless a majority of the votes cast on that issue is favorable to the proposed plan. Section 519.11, Revised Code, is as follows:

"If the zoning resolution is adopted by the board of township trustees, such board shall cause the question of whether or not the proposed plan of zoning shall be put into effect to be submitted to the electors residing in the unincorporated area of the township included in the proposed plan of zoning for their approval or rejection at the next primary or general election, or a special election may be called for this purpose. Such resolution shall be filed with the board of elections not later than four p.m. of the ninetieth day before the day of the election. No zoning regulations shall be put into effect unless a majority of the vote cast on the issue is in favor of the proposed plan of zoning. Upon certification by the board of elections the resolution shall take immediate effect, if the plan was so approved."

Chapter 519, Revised Code, dealing with township zoning,

was but a part of the 1947 enactment by the General Assembly of the rural zoning enabling act. The other part of that act emerged from the 1953 code revision as Chapter 303, Revised Code, and that chapter deals with county zoning. A vote by the electorate for approval or rejection of a zoning plan is also required in that chapter under Section 303.11, Revised Code, as follows:

"If the zoning resolution is adopted by the board of county commissioners, such board shall cause the question of whether or not the proposed plan of zoning shall be put into effect to be submitted to the electors residing in the unincorporated area of the county included in the proposed plan of zoning for their approval or rejection at the next primary or general election, or a special election may be called for this purpose. Such resolution shall be filed with the board of elections not later than four p.m. on the ninetieth day before the day of the election. No zoning regulations shall be put into effect in any township, unless a majority of the vote cast on the issue in that township is in favor of the proposed plan of zoning. Upon certification by the board of elections the resolution shall take immediate effect in all townships which voted approval, eliminating from the plan any township which did not vote approval."

Note that Section 519.11, Revised Code, differs from its Chapter 303, Revised Code, counterpart. Section 303.11, Revised Code, permits approval and effectuation of less than the whole plan as submitted to the electorate.

The repeal sections for Chapters 303 and 519, Revised Code, differ also. Section 303.25, Revised Code, is as follows:

"In any township in which there is in force a plan of county zoning, the plan may be repealed by the board of county commissioners, as to such township, in the following manner:

"(A) The board may adopt a resolution upon its own initiative.

"(B) The board shall adopt a resolution, if there is presented to it a petition signed by a number of qualified voters residing in the unincorporated area of such township included in the zoning plan equal to not less than eight per cent of the total vote cast for all candidates for governor in such area at the last preceding general election at which a governor was elected, requesting the question of whether or not the plan of zoning in effect in such township shall be repealed, to be submitted to the electors residing in the unincorporated area of the township included in the zoning plan at the next primary or general election. The resolution adopted by the board of county commissioners to cause such question to be submitted to the electors shall be

certified to the board of elections not later than ninety days prior to the day of election at which said question is to be voted upon. In the event a majority of the vote cast on such question in the township is in favor of repeal of zoning, then such regulations shall no longer be of any effect. Not more than one such election shall be held in any two calendar years."

Thus, this section of the code would permit repeal of less than the entire plan approved by the voters. Section 519.25, Revised Code, is as follows:

"In any township in which there is in force a plan of township zoning, the plan may be repealed by the board of township trustees in the following manner:

"(A) The board may adopt a resolution upon its own initiative.

"(B) The board shall adopt a resolution if there is presented to it a petition, signed by a number of qualified electors residing in the unincorporated area of such township included in the zoning plan equal to not less than eight per cent of the total vote cast for all candidates for governor in such area at the last preceding general election at which a governor was elected, requesting that the question of whether or not the plan of zoning in effect in such township shall be repealed be submitted to the electors residing in the unincorporated area of the township included in the zoning plan at the next primary or general election. The resolution adopted by the board of township trustees to cause such question to be submitted to the electors shall be certified to the board of elections not later than ninety days prior to the day of election at which said question is to be voted upon. In the event a majority of the vote cast on such question in the township is in favor of repeal of zoning, then such regulations shall no longer be of any effect. Not more than one such election shall be held in any two calendar years."

Here, the General Assembly implicitly denies repeal of less than the entire plan which was previously approved by the electors residing in the unincorporated area of the township included in the zoning plan.

Having arrived at the inescapable conclusion that a comprehensive township zoning plan, adopted pursuant to Chapter 519, Revised Code, must be repealed vel non as a whole, the second question is rendered moot. Section 519.25, Revised Code, supra, clearly states that the electors residing within the unincorporated area of the township included within the zoning plan are to determine the issue of whether to repeal that zoning plan.

There is no reason why a referendum to repeal a zoning plan adopted pursuant to Chapter 519, Revised Code, cannot be held in the same year in which the electorate approved the zoning plan. The limitation contained in the last sentence of Section 519.25, Revised Code, limits the number of times a referendum election may be held in a two year period. It does not otherwise limit the year in which a referendum may be held.

In conclusion, it is my opinion and you are advised:

1. A comprehensive zoning plan adopted pursuant to Chapter 519, Revised Code, may not be repealed for a part only of the territory included within the zoning plan but must be repealed vel non as a whole.

2. The electors residing within the unincorporated area of the township included within the zoning plan shall vote upon the repeal of that zoning plan.

3. A referendum seeking repeal of a township zoning plan may be held in the same year the plan was approved by the electorate.