OPINION NO. 82-052

Syllabus:

A privately owned and operated landfill which in fact makes its services available to all the residents of the township where it is located is a public utility for the purposes of R.C. 519.21 and, therefore, is not subject to a township zoning plan.

To: David E. Lighttiser, Licking County Prosecuting Attorney, Newark, Ohio
By: William J. Brown, Attorney General, July 30, 1982

I have before me your request for my opinion regarding the operation of township zoning regulations upon privately owned landfills. In particular you ask

whether a privately owned landfill is a public utility for the purpose of R.C. 519.21, and, therefore, is exempt from a zoning plan promulgated by a board of township trustees.

R.C. Chapter 519 provides the authority, and sets out the procedure, for the adoption of zoning plans by townships. This authority, however, is limited by R.C. 519.21, which states in pertinent part:

> Such sections [R.C. 519.02 to R.C. 519.25] 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. (Emphasis added.)

If a privately owned and operated landfill is a public utility, it is not subject to the township zoning plan.

At least one court has noted that "[t]he determination of whether a concern is a public utility is a mixed question of law and fact." Motor Cargo, Inc. v. Board of Township Trustees, 52 Ohio Op. 257, 258, 117 N.E.2d 224, 225 (C.P. Summit County 1953). In Southern Ohio Power Co. v. Public Utilities Commission, 110 Ohio St. 246, 143 N.E. 700 (1924) (syllabus 2), the court held that:

> To constitute a "public utility," the devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately, or there must be the acceptance by the utility of public franchises or calling to its aid the police power of the state.

It is my understanding that the privately owned landfill in question has neither accepted a public franchise nor called to its aid the state's police power. Therefore, in deciding whether this landfill is a public utility the consideration must be whether its operation constitutes a devotion to public use, and if it does, whether the landfill makes its service available indiscriminately to the public.

Neither Southern Ohio, nor subsequent case law, provides a clear definition of "devotion to public use." However, I have had occasion to opine that a landfill operated by a board of county commissioners was a public utility within the meaning of R.C. 519.21. 1972 Op. Att'y Gen. No. 72-042. Implicit in this conclusion is the determination that a landfill constitutes a devotion to public use. This conclusion is supported by North Sanitary Landfill v. Board of County Commissioners, 52 Ohio App. 2d 167, 369 N.E.2d 17 (C.A. Montgomery County 1976), where the court, noting the public necessity of stemming what it termed a flood of garbage and refuse, deemed a landfill constructed and operated by a board of county commissioners a public utility.[1] Thus, while there is no clear definition of "devotion to public use," a prior opinion and case law indicate operation of a landfill does constitute "devotion to public use."

The conclusion that a landfill constitutes a public use is not, however, dispositive; it also must be determined whether the landfill in question in fact indiscriminately provides its service to the public. It is my understanding, based upon telephone conversations between a member of my staff and a representative from your office, that the privately owned and operated landfill in question makes its services available to all members of the township in which it is located, without restriction. A privately owned and operated landfill, being devoted to public use,

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[1] I note that in Hulligan v. Board of Zoning Appeals, 59 Ohio App. 2d 105, 392 N.E.2d 1272 (C.A. Lorain County 1978), the court held that a landfill is subject to regulation by both the Environmental Protection Agency and a township zoning plan. However, the issue of whether the landfill in question was a public utility was not before the court.

which actually makes its services available to the general public is in fact a public utility and, therefore, is not subject to the township zoning plan by operation of R.C. 519.21. The fact the landfill is privately owned and operated is immaterial, as R.C. 519.21 exempts public utilities from township zoning plans, "whether publicly or privately owned." It should be noted, however, that the severence of service to the public ends an entity's status as a public utility. Southern Ohio (syllabus 3). Thus, if a landfill that is deemed a public utility, and therefore exempt from township zoning plan, ceases to makes its services available to the general public, such landfill would no longer be a public utility under R.C. 519.21 and would become subject to a township zoning plan.

Based on the foregoing analysis, it is my opinion, and you are advised, that a privately owned and operated landfill which in fact makes its services available to all the residents of the township where it is located is a public utility for the purposes of R.C. 519.21 and, therefore, is not subject to a township zoning plan.