OPINION NO. 2009-041

Syllabus:

2009-041

1. Pursuant to R.C. 519.21(A), officials of a township that has not adopted a limited home rule government under R.C. Chapter 504 may not regulate the location, height, bulk, or size of a free-standing outdoor sign that is located on a lot greater than five acres and deemed to be a structure when the use of the sign relates directly and immediately to the use for agricultural purposes of the lot on which the sign is located.

2. The use of a free-standing outdoor sign is directly and immediately

[1] Your letter of request mentions the possibility that construction of the proposed fitness center may serve a proper public purpose and would thereby conform to the limitation that public funds may be expended only for a public purpose. *State ex rel. McClure v. Hagerman*, 155 Ohio St. 320, 98 N.E.2d 835 (1951). The county commissioners' lack of statutory authority to make the expenditure you propose makes it unnecessary, however, to consider whether such an expenditure would serve a public purpose.

related to the use for agricultural purposes of the lot on which the sign is located when the sign advertises the sale of agricultural products derived from the lot on which the sign is located.

3. The use of a free-standing outdoor sign is not directly and immediately related to the use for agricultural purposes of the lot on which the sign is located when the sign advertises the sale of (1) agricultural products not derived from the lot on which the sign is located or (2) things other than agricultural products.

4. Township officials may consider any information or facts they deem necessary and relevant in order to determine in a reasonable manner whether the use of a free-standing outdoor sign is directly and immediately related to the use for agricultural purposes of the lot on which the sign is located or an attempt to promote an activity that is not conducted in conjunction with, and secondary to, the production of the agricultural products derived from the lot on which the sign is located.

To: James J. Mayer, Jr., Richland County Prosecuting Attorney, Mansfield, Ohio
By: Richard Cordray, Ohio Attorney General, October 20, 2009

You have requested an opinion whether R.C. 519.21(A) prohibits officials of a township that has not adopted a limited home rule government under R.C. Chapter 504 from regulating the location, height, bulk, or size of a free-standing outdoor sign when the sign is located on a lot greater than five acres and used to advertise an activity that relates to the use for agricultural purposes of the lot on which the sign is located.[1]

Pursuant to R.C. 519.02, township officials have the authority to "regulate by resolution, in accordance with a comprehensive plan, the location, height, bulk, number of stories, and size of buildings and other structures." This authority includes the power to enact a zoning resolution that regulates the location, height, bulk, or size of a free-standing outdoor sign that is a structure used as an advertising device. *See* 1987 Op. Att'y Gen. No. 87-081 (pursuant to R.C. 519.02, a board of township trustees may regulate the location, height, bulk, and size of free-standing billboards and other outdoor advertising devices). *See generally* R.C. 519.20 (for

[1] A township is authorized by R.C. Chapter 504 to adopt a limited home rule form of township government under which the township exercises a greater measure of authority, in a greater number of matters, than the authority granted to townships generally by the other provisions of R.C. Title 5. Because your question concerns the authority of the officials of a township that has not adopted a limited home rule government under R.C. Chapter 504, this opinion does not consider the zoning authority of township officials when the township has adopted a limited home rule government under R.C. Chapter 504.

purposes of R.C. 519.02-.25, "outdoor advertising shall be classified as a business use and be permitted in all districts zoned for industry, business, or trade, or lands used for agricultural purposes").

The authority of township officials in this regard is not unlimited, however. Several exceptions to this authority are set forth in R.C. Chapter 519. Your question concerns R.C. 519.21(A)'s exception pertaining to lots used for agricultural purposes.[2] This exception provides, in part:

> Except as otherwise provided in division (B) of this section, [R.C. 519.02-.25] 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*

[2] Insofar as your particular question asks about the limitation imposed by R.C. 519.21(A) on the zoning authority of township officials, this opinion does not consider the authority of township officials to impose zoning regulations on a farm market that qualifies for the limited exemption from township zoning authority under R.C. 519.21(C). *See generally* 2002 Op. Att'y Gen. No. 2002-029 at 2-198 n.6 ("[i]n common parlance, a 'farm market' is a place where farmers gather to sell their produce and agricultural products to the general public"). Pursuant to R.C. 519.21(C), township officials have no authority under R.C. 519.02-.25 "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." R.C. 519.21 thus bars township officials from prohibiting the use of a free-standing outdoor sign to advertise a farm market in districts zoned for agriculture, industrial, residential, or commercial uses when "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." *See also* R.C. 519.20.

A board of township trustees may, in accordance with R.C. 519.02, "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." R.C. 519.21(C). In light of the authority set forth in R.C. 519.21(C), a board of township trustees may regulate the use of a free-standing outdoor sign to advertise a farm market that qualifies for the limited exemption from township zoning authority when such regulation is authorized by R.C. 519.21(C). *See generally* 1997 Op. Att'y Gen. No. 97-002 (syllabus, paragraph 1) ("[w]hen a farm market qualifies for the limited exemption from township zoning authority under R.C. 519.21(C), a township may regulate factors pertaining to the farm market in addition to those expressly listed in R.C. 519.21(C), provided that the additional factors bear a clear similarity to those expressly listed, that such regulation is necessary to protect the public health and safety, and that the regulation as applied does not prohibit the use of any land for a farm market in a district zoned for agricultural, industrial, residential or commercial uses").

> *structures incident to the use for agricultural purposes of the land on which such buildings or structures are located.* (Footnote and emphasis added.)

The first clause of this provision refers to R.C. 519.21(B), which empowers township officials in some instances to regulate structures incident to the use of land for agricultural purposes on lots that are not greater than five acres. R.C. 519.21(B) does not, however, confer any power on township officials "to regulate agriculture, buildings or structures, and dairying and animal and poultry husbandry on lots greater than five acres." Thus, pursuant to R.C. 519.21(A), township officials have no authority to regulate the location, height, bulk, or size of a free-standing outdoor sign located on a lot greater than five acres and used for advertising if the sign is a structure incident to the use for agricultural purposes of the lot on which the sign is located.

The determination whether a free-standing outdoor sign used for advertising is a structure incident to the use for agricultural purposes of the lot on which the sign is located is dependent upon the specific facts existing in a particular situation at a particular time and the judgment of township officials, or, ultimately, the judiciary.[3] *See Bd. of Trustees of Allen Township v. Chasteen,* 97 Ohio App. 3d 250, 257, 646 N.E.2d 542 (Ottawa County 1994); *Keynes Bros., Inc. v. Pickaway Township Trustees,* Case No. 86 CA 27, 1988 Ohio App. LEXIS 1028, at *11-12 (Pickaway County Mar. 25, 1988); *State v. Huffman,* 20 Ohio App. 2d 263, 253 N.E.2d 812 (Hancock County 1969). While such a determination cannot be made by means of an opinion of the Attorney General, *see* 1990 Op. Att'y Gen. No. 90-111 at 2-502, we will describe the analysis for making this determination.

The analysis for determining whether a free-standing outdoor sign used for advertising is a structure incident to the use for agricultural purposes of the lot on which the sign is located is two-fold. First, it requires ascertaining whether a free-standing outdoor sign used for advertising is a structure for purposes of R.C. 519.21(A).

The term structure, as used in R.C. 519.21(A), has not been statutorily defined for purposes of R.C. 519.21(A). Nor has this term acquired a technical or particular meaning. The term is therefore accorded its common, everyday meaning. R.C. 1.42.

Black's Law Dictionary 1559 (9th ed. 2009) defines a "structure" as "[a]ny construction, production, or piece of work artificially built up or composed of parts purposefully joined together." The term structure, as used in R.C. 519.21(A), thus denotes something that is constructed or built. This means that a free-standing outdoor sign used for advertising is a structure for purposes of R.C. 519.21(A) when the sign constitutes something that is constructed or built.

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[3] Township officials may consider any information or facts they deem necessary and relevant when determining whether a free-standing outdoor sign used for advertising is a structure incident to the use for agricultural purposes of the lot on which the sign is located. *See* 2002 Op. Att'y Gen. No. 2002-029 at 2-196.

If a free-standing outdoor sign used for advertising is a structure for purposes of R.C. 519.21(A), it must then be determined whether use of the sign is "incident" to the use for agricultural purposes of the lot on which the sign is located. The use of the term "incident" in R.C. 519.21(A) indicates that the use of such a sign must be directly and immediately related to the use for agricultural purposes of the lot on which the sign is located in order for R.C. 519.21(A) to apply. *See Tergo v. Township of Freedom Bd. of Zoning Appeals,* Case No. 89-P-2048, 1990 Ohio App. LEXIS 1222, at *7-8 (Portage County Mar. 30, 1990); *Keynes Bros., Inc. v. Pickaway Township Trustees,* at *12-13; *State v. Huffman,* at 269; 1989 Op. Att'y Gen. No. 89-067 at 2-309.

The use of a free-standing outdoor sign for advertising is directly and immediately related to the use for agricultural purposes of the lot on which the sign is located when the sign's use is derived from agriculture conducted on the lot on which the sign is located. *See Tergo v. Township of Freedom Bd. of Zoning Appeals,* at *7-8; *Keynes Bros., Inc. v. Pickaway Township Trustees,* at *12-13; *State v. Huffman,* at 269; 1989 Op. Att'y Gen. No. 89-067 at 2-309; 1961 Op. Att'y Gen. No. 2280, p. 307. In the context of R.C. 519.21(A), courts and prior Attorneys General have long stated that agriculture includes those activities listed in R.C. 519.01. *See, e.g., Mentor Lagoons, Inc. v. Zoning Bd. of Appeals of Mentor Township,* 168 Ohio St. 113, 119, 151 N.E.2d 533 (1958); *Bd. of Trustees of Springfield Township v. Anderson,* 2007-Ohio-1530, 2007 Ohio App. LEXIS 1398, at ¶17-22 (Lucas County Mar. 30, 2007); *Tergo v. Township of Freedom Bd. of Zoning Appeals,* at *7-8; *Keynes Bros., Inc. v. Pickaway Township Trustees,* at *12-13; 2002 Op. Att'y Gen. No. 2002-029 at 2-193; 1989 Op. Att'y Gen. No. 89-067 at 2-307; 1983 Op. Att'y Gen. No. 83-044 at 2-169; 1961 Op. Att'y Gen. No. 2280, p. 307.

Under R.C. 519.01, agriculture encompasses such activities as:

> farming; ranching; aquaculture; apiculture; horticulture; viticulture; animal husbandry, including, but not limited to, the care and raising of livestock, equine, and fur-bearing animals; poultry husbandry and the production of poultry and poultry products; dairy production; the production of field crops, tobacco, fruits, vegetables, nursery stock, ornamental shrubs, ornamental trees, flowers, sod, or mushrooms; timber; pasturage; any combination of the foregoing; the processing, drying, storage, and *marketing of agricultural products when those activities are conducted in conjunction with, but are secondary to, such husbandry or production.* (Emphasis added.)

"Agriculture," as defined in R.C. 519.01, thus includes the "marketing of agricultural products" when the marketing is conducted in conjunction with, and secondary to, the production of the agricultural products.[4]

2002 Op. Att'y Gen. No. 2002-029 at 2-195 and 2-196 examined the phrase

[4] For purposes of R.C. 519.01, an "agricultural product" is "something resulting from or necessarily following from" agriculture. *Merriam-Webster's Collegiate*

''marketing of agricultural products,'' as used in R.C. 519.01, and determined that this phrase includes activities that promote or advertise the sale of agricultural products:

> The term ''marketing'' thus commonly denotes the act of holding forth property for sale and the aggregate of activities involved with such act. Further, activities associated with the sale of property, and thus included within the definition of ''marketing,'' include, *inter alia,* promoting and merchandising the sale of property.
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> In light of the meaning of the term ''marketing,'' it reasonably follows that, if a banquet, reception, party at which entertainment is provided, theatrical show, music festival, clambake, pig roast, or other entertainment or special event is being held to promote or merchandise the sale of grapes or wine, such event constitutes the ''marketing of agricultural products.''
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> . . . . If township zoning officials determine that an event is being held to promote or merchandise the sale of grapes or wine, the event constitutes the ''marketing of agricultural products.''
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> Although township zoning officials may determine that an event is being held to promote or merchandise the sale of grapes or wine, and thus, constitutes the ''marketing of agricultural products,'' such marketing is not ''agriculture,'' as defined in R.C. 519.01, unless the marketing is conducted in ''conjunction'' with, and ''secondary'' to, the production of grapes or wine. (Citations omitted.)

However, as indicated in 2002 Op. Att'y Gen. No. 2002-029, in order for advertising to qualify as agriculture, as defined in R.C. 519.01, it is essential that the advertising be conducted in conjunction with, and secondary to, the production of the agricultural products being advertised. 2002 Op. Att'y Gen. No. 2002-029 at 2-196 and 2-197 examined this requirement and explained the limitation it imposes as follows:

> Neither the word ''conjunction'' nor ''secondary'' has been defined for purposes of R.C. 519.01. These words thus should be construed according to their common, ordinary meaning. R.C. 1.42; *see* 1997 Op. Att'y Gen. No. 97-002 at 2-10. A common meaning for the word ''conjunction'' is ''occurrence together : concurrence esp. of events or routes.'' *Webster's Third New International Dictionary* at 480. The word ''secondary,'' when used as an adjective, commonly denotes ''of second rank, importance, or value : next below the first in grade or class . . . : of less than first value or importance : inferior, subordinate.'' *Webster's Third New International Dictionary* at 2050.

Dictionary 991 (11th ed. 2005) (defining the term ''product''); *see* 2002 Op. Att'y Gen. No. 2002-029 at 2-196 n.5. *See generally* R.C. 1.42 (''phrases shall be read in context and construed according to the rules of grammar and common usage'').

> Under these definitions, any event that is being held to promote or merchandise the sale of grapes or wine must occur together with, and be of lesser importance or value than, the production of grapes or wine in order to constitute "agriculture," as defined by R.C. 519.01. If the land used for the holding of an event to promote or merchandise the sale of grapes or wine is not used for the production of grapes or wine, the event does not occur together with the production of grapes or wine, and thus, is not "agriculture," as defined by R.C. 519.01. *See generally* 1961 Op. Att'y Gen. No. 2280, p. 307 (syllabus) ("[w]here a district is zoned exclusively for agricultural under [R.C. 519.01-.02], sales of agricultural products may be made in the district provided such products are produced by the seller on the premises from which they are sold"). Also, if the event to promote or merchandise the sale of grapes or wine is of a greater value or importance than the production of grapes or wine, the event is not secondary to the production of grapes or wine, and thus, is not "agriculture," as defined by R.C. 519.01. *See generally Columbia Twp. Trustees v. French,* C.A. NO. 93CA005658, 1994 Ohio App. LEXIS 1497 (Lorain County Apr. 6, 1994) (where the principal use of the land is running the business of a sawmill, the sawmill could not qualify under an agricultural exemption).

2002 Op. Att'y Gen. No. 2002-029 thus determined further that the term "agriculture," as defined in R.C. 519.01, includes an activity that advertises the sale of agricultural products derived from the lot on which the activity occurs. *See Bd. of Franklin Township Trustees v. Armentrout,* 2001-Ohio-8719, 2001 Ohio App. LEXIS 5660, at *5-6 (Portage County Dec. 14, 2001); *State v. Spithaler,* Case No. 98-T-0197, 2000 Ohio App. LEXIS 809, at *8-9 (Trumbull County Mar. 3, 2000). The term does not include an activity that advertises the sale of (1) agricultural products not derived from the lot on which the activity occurs or (2) things other than agricultural products. *See Ghindia v. Buckeye Land Dev., LLC,* 2007-Ohio-779, 2007 Ohio App. LEXIS 694, at ¶34 (Trumbull County Feb. 23, 2007); *Marik v. KB Compost Services, Inc.,* Case No. 19393, 2000 Ohio App. LEXIS 157, at *14-16 (Summit County Jan. 26, 2000). Accordingly, the use of an advertising device is directly and immediately related to the use for agricultural purposes of the lot on which the sign is located when the device advertises the sale of agricultural products derived from the lot on which the device is located. The use of an advertising device is not, however, directly and immediately related to the use for agricultural purposes of the lot on which the device is located when the device advertises the sale of (1) agricultural products not derived from the lot on which the device is located or (2) things other than agricultural products.[5]

In many instances, this dichotomy leaves the remaining problem of a

[5] While township officials may regulate the location, height, bulk, or size of a structure that is a free-standing outdoor sign not directly and immediately related to use for agricultural purposes of the lot on which the sign is located, 1987 Op. Att'y Gen. No. 87-081, such officials may not prohibit such a sign in "districts zoned for industry, business, or trade, or lands used for agricultural purposes," R.C. 519.20;

"mixed use" for both the lot and the advertising device, where the lot may be used for the sale of multiple items, including both agricultural products derived from the lot on which the device is located and agricultural products not so derived as well as things other than agricultural products. In these situations, township officials may consider any information or facts they deem necessary and relevant in order to determine in a reasonable manner whether the use of an advertising device is directly and immediately related to the use for agricultural purposes of the lot on which the device is located or an attempt to promote an activity that is not conducted in conjunction with, and secondary to, the production of the agricultural products derived from the lot on which the device is located. *See* R.C. 519.01; 2002 Op. Att'y Gen. No. 2002-029 (syllabus, paragraph 2); note 2, *supra* (explaining the "farm market" exemption of R.C. 519.21(C), which is intended to address the "mixed-use" dynamic in that situation).

Therefore, in specific response to your question, it appears that R.C. 519.21(A) prohibits township officials from regulating the location, height, bulk, or size of a free-standing outdoor sign that is located on a lot greater than five acres and deemed to be a structure when the use of the sign relates directly and immediately to the use for agricultural purposes of the lot on which the sign is located. Further, the use of a free-standing outdoor sign is directly and immediately related to the use for agricultural purposes of the lot on which the sign is located when the sign advertises the sale of agricultural products derived from the lot on which the sign is located. Also, the use of a free-standing outdoor sign is not directly and immediately related to the use for agricultural purposes of the lot on which the sign is located when the sign advertises the sale of (1) agricultural products not derived from the lot on which the sign is located or (2) things other than agricultural products. Finally, township officials may consider any information or facts they deem necessary and relevant in order to determine in a reasonable manner whether the use of a free-standing outdoor sign is directly and immediately related to the use for agricultural purposes of the lot on which the sign is located or an attempt to promote an activity that is not conducted in conjunction with, and secondary to, the production of the agricultural products derived from the lot on which the sign is located.

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. Pursuant to R.C. 519.21(A), officials of a township that has not adopted a limited home rule government under R.C. Chapter 504 may not regulate the location, height, bulk, or size of a free-standing outdoor sign that is located on a lot greater than five acres and deemed to be a structure when the use of the sign relates directly and immediately to the use for agricultural purposes of the lot on which the sign is located.

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see Scioto Township Trustees v. Monst, Case No. 87 CA 43, 1989 Ohio App. LEXIS 3480, at *6-7 (Pickaway County Sept. 5, 1989); *East Fairfield Coal Co. v. Miller*, 71 Ohio Law Abs. 490, 506, 1955 Ohio Misc. LEXIS 328 (C.P. Mahoning County Nov. 10, 1955).

2. The use of a free-standing outdoor sign is directly and immediately related to the use for agricultural purposes of the lot on which the sign is located when the sign advertises the sale of agricultural products derived from the lot on which the sign is located.

3. The use of a free-standing outdoor sign is not directly and immediately related to the use for agricultural purposes of the lot on which the sign is located when the sign advertises the sale of (1) agricultural products not derived from the lot on which the sign is located or (2) things other than agricultural products.

4. Township officials may consider any information or facts they deem necessary and relevant in order to determine in a reasonable manner whether the use of a free-standing outdoor sign is directly and immediately related to the use for agricultural purposes of the lot on which the sign is located or an attempt to promote an activity that is not conducted in conjunction with, and secondary to, the production of the agricultural products derived from the lot on which the sign is located.