OPINION NO. 85-053

Syllabus:

Pursuant to R.C. Chapter 519, a township may, for the purpose of promoting the public health, safety, and morals and in accordance with a comprehensive plan, enact zoning resolutions which regulate land use in such a manner as to control sediment and stormwater runoff from urban development, so long as its resolutions do not come into direct conflict with rules adopted by the Chief of the Division of Soil and Water Conservation under R.C. 1511.02(E), with rules pertaining to urban sediment control which are adopted by a county under R.C. 307.79, or with other laws of the state.

To: Joseph J. Sommer, Director, Department of Natural Resources, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, September 17, 1985

I have before me a request from your predecessor concerning the authority of townships to regulate sediment and stormwater runoff from urban development.

The issue arises in light of various state statutes relating to the abatement of urban sediment pollution.

R.C. 1511.02(E) grants the Chief of the Division of Soil and Water Conservation within the Department of Natural Resources (DNR), subject to the approval of the Director of Natural Resources and the Soil and Water Conservation Commission, certain authority to adopt rules relating to urban sediment pollution abatement. The relevant portions of R.C. 1511.02(E) state:

> The chief of the division of soil and water conservation, subject to the approval of the director of natural resources, shall:
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> (E) Subject to the approval of the soil and water conservation commission adopt, amend, or rescind rules pursuant to Chapter 119. of the Revised Code. Rules adopted pursuant to this section:
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> (2) Shall establish technically feasible and economically reasonable standards to achieve a level of management and conservation practices which will abate wind or water erosion of the soil or abate the degradation of the waters of the state by soil sediment in conjunction with land grading, excavating, filling, or other soil disturbing activities on land used or being developed for nonfarm commercial, industrial, residential, or other nonfarm purposes, and establish criteria for determination of the acceptability of such management and conservation practices. The standards shall be designed to implement applicable areawide waste treatment management plans prepared under section 208 of the "Federal Water Pollution Control Act," 86 Stat. 816, 33 U.S.C. 1288, as amended. Such standards and criteria shall not apply in any municipal corporation or county that adopts ordinances or rules pertaining to sediment control, nor to lands being used in a strip mine operation as defined in section 1513.01 of the Revised Code, nor to lands being used in a surface mining operation as defined in section 1514.01 of the Revised Code.
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> (3) May recommend criteria and procedures for the approval of urban sediment pollution abatement plans and issuance of permits prior to any grading, excavating, filling, or other whole or partial disturbance of five or more contiguous acres of land owned by one person or operated as one development unit and require implementation of such plan. Areas of less than five contiguous acres shall not be exempt from compliance with other provisions of this chapter and rules adopted thereto.
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> (5) Shall establish procedures for administration of rules for agricultural pollution abatement and urban sediment pollution abatement and for enforcement of rules for animal waste management;
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> (9) Shall not, insofar as the rules relate to urban sediment pollution, be applicable in a municipal corporation or county that adopts ordinances or rules for urban sediment control. Such rules shall not exempt any person from compliance with municipal ordinances enacted pursuant to Section 3, Article XVIII, Ohio Constitution. (Emphasis added.)

Thus, subject to the necessary approval, the Chief of the Division of Soil and Water Conservation may adopt rules which establish standards for urban sediment pollution abatement that are designed to implement areawide waste treatment management plans prepared under §208 of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1288, and may, further, adopt rules which recommend criteria and procedures for the approval of urban sediment pollution abatement plans and permit programs. R.C. 1511.02(E)(2), (3). Any such rules relating to urban sediment pollution will not, however, apply in a municipal corporation or county that adopts ordinances or rules pertaining to urban sediment control. R.C. 1511.02(E)(9). In

addition, lands used in strip mining or surface mining are exempted by R.C. 1511.02(E)(2) from rules adopted under that subdivision.

R.C. 307.79 expressly authorizes a board of county commissioners to adopt rules for urban sediment pollution abatement that are designed to implement areawide waste treatment management plans prepared under the FWPCA and to operate in the place of rules adopted pursuant to R.C. 1511.02(E). R.C. 1511.02(E)(9). R.C. 307.79 states, in part:

> The board of county commissioners may adopt, amend, and rescind rules establishing technically feasible and economically reasonable standards to achieve a level of management and conservation practices which will abate wind or water erosion of the soil or abate the degradation of the waters of the state by soil sediment in conjunction with land grading, excavating, filling, or other soil disturbing activities on land used or being developed for nonfarm commercial, industrial, residential, or other nonfarm purposes, and establish criteria for determination of the acceptability of such management and conservation practices. The rules shall be designed to implement the applicable areawide waste treatment management plan prepared under section 208 of the "Federal Water Pollution Control Act," 86 Stat. 816, 33 U.S.C. 1228 [sic], as amended. Such rules shall not apply to lands being used in a strip mine operation as defined in section 1513.01 of the Revised Code or land being used in a surface mine operation as defined in section 1514.01 of the Revised Code.
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> The rules may require persons to file sediment control and water management plans incident thereto, before clearing, grading, excavating, filling, or otherwise wholly or partially disturbing five or more contiguous acres of land owned by one person or operated as one development unit for the construction of nonfarm buildings, structures, utilities, recreational areas, or other similar nonfarm uses. Areas of less than five contiguous acres shall not be exempt from compliance with other provisions of this section or rules adopted pursuant to this section. The rules may impose reasonable filing fees for plan review.
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> No permit or plan shall be required for a public highway, transportation, or drainage improvement or maintenance thereof undertaken by a government agency or political subdivision in accordance with a statement of its standard sediment control policies that is approved by the board or the chief of the division of soil and water districts.
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> The rules shall not apply inside the limits of municipal corporations. (Emphasis added.)

No statute expressly provides for the regulation of urban sediment pollution by a municipal corporation. It is, however, clear that a municipality has power to undertake such regulation pursuant to its constitutional authority for home rule. See Ohio Const. art. XVIII, §3; R.C. 1511.02(E)(9); Meisz v. Village of Mayfield Heights, 92 Ohio App. 471, 111 N.E.2d 20 (Cuyahoga County 1952); 1979 Op. Att'y Gen. No. 79-018. Under R.C. 1511.02(E)(9), if a municipality adopts ordinances or rules relating to urban sediment pollution, rules on that subject which are adopt d by the Chief of the Division of Soil and Water Conservation under R.C. 1511.02(E) will not apply within the municipal corporation.

The question considered herein is whether, in light of the aforementioned authority of the Chief of the Division of Soil and Water Conservation, counties, and municipal corporations to regulate urban sediment pollution abatement, townships have any authority to provide for such regulation. The issue is, in particular, whether the regulation of sediment and stormwater runoff from urban development is a legal exercise of township zoning powers.

I note, first, that no Ohio statute expressly authorizes a township to adopt standards which are designed to implement applicable areawide waste treatment management plans; thus, a township does not have authority which parallels that of

a county or DNR with respect to the regulation of urban sediment pollution for purposes of compliance with federal law. See R.C. 307.79; R.C. 1511.02(E)(2). See generally Op. No. 79-018. Since a township, as a creature of statute, has only such power as it is granted by statute, see Hopple v. Trustees of Brown Township, 13 Ohio St. 311 (1862), it is clear that a township may not adopt regulations for the sole purpose of regulating sediment and stormwater runoff from urban development with the intent of implementing §208 of the FWPCA. I turn now to the question whether a township may, pursuant to its zoning power, adopt regulations which will operate to control sediment and stormwater runoff from urban development.

The Ohio Supreme Court discussed the zoning authority of townships in Yorkavitz v. Board of Township Trustees, 166 Ohio St. 349, 351, 142 N.E.2d 655, 656 (1957), as follows:

> [T]he townships of Ohio have no inherent or constitutionally granted police power, the power upon which zoning legislation is based. Whatever police or zoning power townships of Ohio have is that delegated by the General Assembly, and it follows that such power is limited to that which is expressly delegated to them by statute.

Statutory provisions governing township zoning appear in R.C. Chapter 519. R.C. 519.02 grants a township the following authority to adopt zoning regulations:

> 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. (Emphasis added.)

This language authorizes the board of township trustees, for the purpose of promoting the public, health, safety, and morals, and in accordance with a comprehensive plan, to regulate the uses of land for various purposes in the unincorporated territory of the township. Certain limitations on the zoning power are set forth in R.C. 519.21; none is directly applicable to matters of urban sediment pollution.[1] Thus, it appears that R.C. Chapter 519 authorizes a board of township trustees to regulate the uses of land in such a manner as to control urban sediment pollution, provided that such regulation is performed by resolution, in accordance with a comprehensive plan, and for the purpose of promoting the public health, safety, and morals. See generally Meisz v. Village of Mayfield Heights (the court held that the zoning power of a municipality includes the power to regulate the removal and stripping of topsoil, provided that the regulations adopted bear a reasonable relation to the public health, safety, morals, and general welfare; zoning regulations governing the removal and stripping of topsoil were upheld on the basis that such activities may affect erosion and drainage patterns and have a detrimental effect on the public health). As was stated in Smith v. Juillerat, 161 Ohio St. 424, 428-29, 119 N.E.2d 611, 614 (1954) (citations omitted):

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[1] R.C. 519.21 restricts the authority of a township to zone on matters involving agricultural purposes, farm markets, public utilities or railroads, the sale or use of alcoholic beverages, and the drilling or production of oil or natural gas.

> The purpose of a zoning ordinance is to limit the use of land in the interest of the public welfare. If a zoning ordinance is general in its application, the classifications as to uses to which the property may be devoted are reasonable, and pre-existing vested rights are recognized and protected, it is a valid exercise of the police power.

See also Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926) (the legislative classification contained in a zoning regulation will be upheld if it is fairly debatable). The conclusion that local zoning may affect urban sediment pollution is reflected in the federal law relating to areawide waste treatment management plans. See 33 U.S.C. §1288(b)(2)(H) (providing that an areawide waste treatment management plan shall include "a process to (i) identify construction activity related sources of pollution and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources"). See generally Op. No. 79-018.

In Hulligan v. Columbia Township Board of Zoning Appeals, 59 Ohio App. 2d 105, 392 N.E.2d 1272 (Lorain County 1978), the court considered the relationship between the authority of a township to adopt zoning regulations and the authority of the Ohio Environmental Protection Agency (EPA) to regulate sites used for solid waste disposal. The court noted that the authority of each body was granted by the General Assembly and that the initial presumption should be that the statutory provisions relating to both were not incompatible or inconsistent. The court found that the purposes of local zoning and EPA regulations were distinct but harmonious, and that a landfill should be required to comply with both types of regulation. The court stated, id. at 107-08, 392 N.E.2d at 1273-74:

> R.C. 519.02 states that the purpose of the board of township trustees in adopting a comprehensive zoning plan is to protect the public health, safety and morals; whereas, R.C. 3734.02 prescribes that the Director of EPA regulate such sites for solid waste disposal to eliminate the possibility of nuisance, water pollution or a health hazard. With these aims in mind, the court in Columbia Township v. Williams, [unreported, Nos. 76-AP-109, 76-AP-153 (Ct. App. 10th Dist. August 5, 1976)], at page 11, held that the purpose of township zoning is inherently different than that of the EPA.
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> "Pursuant to Chapter 519, local zoning authority has been extended to townships in Ohio. Such is a grant of police power for local determinations concerned with land use and planning, and the systematic and orderly development of specific areas, or zones, for various uses and utility, such as residential, commercial or industrial uses. All such exercise of this police power is for the purpose of insuring the health, welfare and safety of the local communities.
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> "Such zoning laws do not have inherently within them provisions or guidelines for the establishment of clean air or water quality standards, or standards for the treatment of our waste waters, or standards for the disposal and the handling of our solid wastes. In contrast, the goals of the EPA, and the determinations as made by the director thereof toward the accomplishments of such goals, are to conserve, protect and enhance the environmental quality of the state in all respects including air and water quality, waste treatment procedures and standards, and solid waste handling and disposal."
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> In an additional discussion of this same matter, the Tenth District Court of Appeals in City of Garfield Heights v. Williams, unreported, Nos. 77 AP 449 through 484, decided September 29, 1977 held, at pages 12 and 13:
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> "* * *the Environmental Protection Agency does not have jurisdiction to change or affect local zoning by the issuance of a permit. Instead the permitted use continues to be subject to local zoning. However, the director has the prerogative of granting a permit that is final so far as environmental considerations within his purview are concerned, even though the activity is not permitted by local zoning. Even if not expressly stated in the director's order, the permit issued is subject to local zoning and remains subject thereto.* * *

> "* * *The fact that there is authority under Chapter 3734. through the Environmental Protection Agency to regulate landfill operations or to issue permits therefor does not preempt the field so far as local zoning is concerned.* * *"
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> We agree with and adopt these propositions of law. The intents of local zoning approval and EPA regulations are distinct but harmonious. The jurisdictional line between the two is drawn by the particular protection each desires to achieve. Only the final result to be reached is different; the final and complete approval of a sanitary landfill stems from the endorsement by both authorities. (Emphasis added.)

It is clear from the analysis adopted in the Hulligan case that the fact that a state agency has authority to regulate a certain activity does not, in itself, mean that a township may not enact zoning regulations which affect that activity. Cf. R.C. 3734.05(D)(3) (expressly providing that, with respect to hazardous waste facilities authorized by installation and operation permits issued pursuant to R.C. Chapter 3734, no political subdivision shall require any additional zoning or other approval). The role of DNR in enacting rules pursuant to R.C. 1511.02(E) is, in many respects, analogous to the role of the EPA in enacting regulations for solid waste disposal sites, since both have as their goal the improvement of the environment and compliance with applicable federal requirements. It follows that, even as township zoning and EPA regulation may coexist because they serve different purposes, township zoning and DNR regulation of urban sediment pollution may coexist because they serve different purposes.[2] Thus, provided that a township adopts zoning regulations in accordance with R.C. 519.02—that is, for "the purpose of promoting the public health, safety, and morals," and in accordance with a comprehensive plan—a township may adopt zoning regulations which regulate the uses of land in such a manner as to control sediment and stormwater runoff from urban development.

There are, however, limitations upon the authority of a township to enact zoning resolutions on matters which are affected by other forms of regulation. In Yorkavitz v. Board of Township Trustees, 166 Ohio St. at 351, 142 N.E.2d at 657, the court noted "the inescapable conclusion that the General Assembly can not be held to have delegated to township officials the authority to adopt zoning resolutions which are in contravention of general laws previously enacted by the General Assembly." See also Fox v. Johnson, 28 Ohio App. 2d 175, 275 N.E.2d 637 (Mahoning County 1971) (if a conflict exists between a township zoning ordinance and a state statute, the state statute controls).

It was, similarly, stated by my predecessor in 1981 Op. Att'y Gen. No. 81-065 (syllabus, paragraph 1) that, "[p]ursuant to R.C. Chapter 519, a township may enact resolutions to regulate surface mining, so long as its resolutions do not come into direct conflict with R.C. Chapter 1514, by which the General Assembly regulates the method of surface mining, or other laws of the state." See East Fairfield Coal Co. v. Miller, 71 Ohio L. Abs. 490 (C.P. Mahoning County 1955), aff'd sub. nom. East Fairfield Coal Co. v. Booth, 166 Ohio St. 379, 143 N.E.2d 309 (1957). See generally 1981 Op. Att'y Gen. No. 81-097.

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[2] The fact that the power to zone is different from the power to regulate urban sediment pollution for purposes of implementing §208 of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1288, is evidenced by the fact that counties have been granted both powers by separate statutory provisions. See R.C. 303.02 (authorizing a board of county commissioners to adopt zoning provisions; the language is identical to that of R.C. 519.02, which bestows zoning power upon township trustees); R.C. 307.79 (authorizing a board of county commissioners to regulate urban sediment pollution for purposes of implementing §208 of the FWPCA). If the power to zone completely encompassed the purposes served by rules for the regulation of urban sediment pollution, there would have been no need for the General Assembly to enact R.C. 307.79.