

OPINION NO. 90-081**Syllabus:**

1. Property included in the Department of Agriculture's Conservation Reserve Program pursuant to 16 U.S.C. §§3831 through 3836 and 7 C.F.R. §§704.1 through 704.31 is not exempt from a township zoning regulation enacted pursuant to R.C. 519.02, which prohibits the use of such land by a sportsman's club for purposes of hunting and fishing.
2. Property included in a licensed shooting preserve pursuant to R.C. 1533.72 is not exempt from a township zoning regulation enacted pursuant to R.C. 519.02, which prohibits the use of such land by a sportsman's club for purposes of hunting and fishing.
3. When, pursuant to a variance granted under R.C. 519.14(B), a property owner has established a land use on only part of his property, a new variance is not required to expand that use to the remaining property unless the original variance limited the area of the property which could be devoted to such use.
4. When a variance granted pursuant to R.C. 519.14(B) describes the property involved by street or house number only, the variance applies to the entire property located at that address unless the public records pertaining to the variance or to the assignment of such numbers indicate that the number as used in the variance pertains to only part of that property.

To: Gerald L. Heaton, Logan County Prosecuting Attorney, Bellefontaine, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, November 9, 1990

I have before me your request for my opinion on the extent to which a variance from township zoning allows operation of a sportsman's club for purposes of hunting and fishing on certain property located in your county. In your letter and in a phone conversation with a member of my staff you have provided the following facts.

The property in question is located in an area zoned for agricultural use pursuant to township zoning ordinances. This property has been placed in the United States Department of Agriculture's Conservation Reserve Program as agricultural property pursuant to 16 U.S.C. §§3831 through 3836 and 7 C.F.R. §§704.1 through 704.31 and is also a licensed shooting preserve pursuant to R.C. 1533.72. Under both the federal and state programs, hunting is permitted. The sportsman's club applied for and received a variance from the township some years ago, prior to beginning its operation. This variance did not describe the property upon which the variance was granted other than to list the address. At the time the variance was granted, the sportsman's club allowed hunting on approximately 200 acres of the 600 acres owned by the club at that time. Since receiving the variance, the club has expanded its hunting area to the additional acreage, which is across a road dividing the property,

while maintaining the same address. Both the Conservation Reserve Program and shooting preserve license cover this expanded hunting area.

Based on the foregoing, you ask the following questions:

1. Does township zoning apply to the Sportsman's Club under these facts assuming that the zoning ordinance does have provisions for the regulation of such an entity;
2. Has the Sportsman's Club placed itself under the control of the Township zoning Regulations by making application and receiving a variance years ago;
3. If the Township Zoning is applicable, does the original variance cover all of the land owned and operated by the Sportsman's Club at the address listed in the variance, or does the variance apply only to the land in use at the time it was issued requiring a new variance for the expanded area[?]

Your first question requires that I examine whether the fact that hunting is permitted on lands included in the federal Conservation Reserve Program and on state licensed shooting preserves removes those lands from any township zoning restrictions imposed upon the use of the land for hunting by a sportsman's club.¹ It is axiomatic that both federal and state statutes take precedence over township zoning regulations in conflict therewith. Townships "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...." *Yorkavitz v. Board of Township Trustees*, 166 Ohio St. 349, 351, 142 N.E.2d 655, 656 (1957). As township zoning authority constitutes an exercise of state legislative power, township zoning regulations are subject to the mandate of the Supremacy Clause, U.S. Const. art. VI, that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land...any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Further, as a matter of state law, since zoning authority of townships "is limited to that which is expressly delegated to them by [state] statute," it follows 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...." *Yorkavitz*, 116 Ohio St. at 351, 142 N.E.2d at 656-57; accord *Fox v. Johnson*, 28 Ohio App. 2d 175, 275 N.E.2d 637 (Mahoning County 1971); 1985 Op. Att'y Gen. No. 85-053 at 2-199; 1981 Op. Att'y Gen. No. 81-065 at 2-270.

¹ For purposes of this opinion, I assume that the township zoning regulations involved do impose restrictions which would otherwise be applicable to the land in question. In so doing, I note that township zoning authority is granted in R.C. 519.02, which states that "[f]or 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 uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of such township...." R.C. 519.14(B) further provides that the township board of zoning appeals may "[a]uthorize, upon appeal, in specific cases, such variance from the terms of the zoning resolution as will not be contrary to the public interest...." A variance as defined by the Ohio Supreme Court, "authorizes a land owner to establish or maintain a use which is prohibited by the zoning regulations." *Nunamaker v. Board of Zoning Appeals*, 2 Ohio St. 3d 115, 118, 443 N.E.2d 172, 175 (1982) (quoting *Boston v. Montville Township Zoning Bd. of Appeals*, 32 Ohio Misc. 118, 120, 289 N.E.2d 184, 186 (C.P. Medina County 1972)); accord *In re Appeal of Clements*, 2 Ohio App. 2d 201, 207, 207 N.E.2d 573, 578 (Cuyahoga County 1965). It is, thus, implicit under the facts you have presented, that the operation of a sportsman's club for purposes of hunting and fishing was not a permitted land use in areas zoned for agricultural use at the time the variance was granted.

The fact that a federal or state statute governs the same subject matter as a township zoning regulation does not, however, necessarily create a conflict which invalidates the township zoning regulation. See *Set Products, Inc. v. Bainbridge Township Bd. of Zoning Appeals*, 31 Ohio St. 3d 260, 510 N.E.2d 373 (1987) (syllabus, paragraph three) ("power of townships to enact zoning resolutions to regulate surface mining, pursuant to R.C. Chapter 519, has not been preempted by enactment of R.C. Chapter 1514"); *Jones Metal Products Co. v. Walker*, 29 Ohio St. 2d 173, 281 N.E.2d 1 (1972) (syllabus, paragraph one) ("federal law enacted to regulate a subject regulated by state law is not, *ipso facto*, deemed to be preemptive of the state law" (citation omitted)).

I turn first to the question of whether the provisions of the Conservation Reserve Program (CRP) preempt township zoning regulations otherwise applicable to lands in that program. There are three tests for federal preemption:

Congress may expressly preempt state authority in a given area. *Jones v. Rath Packing Co.* (1977), 430 U.S. 519. Absent express preemption, where state law conflicts with or frustrates federal law or its objectives, federal law may supersede state law. *Florida Lime & Avocado Growers, Inc. v. Paul* (1963), 373 U.S. 132. Additionally, if a scheme of federal regulations is so pervasive as to leave no room for the states to supplement it, federal preemption may be found. *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218.

State ex rel. Miller v. Industrial Comm'n, 26 Ohio St. 3d 110, 111, 497 N.E.2d 76, 77 (1986), *aff'd*, 486 U.S. 174 (1988); see also *Jones Metal Products* (syllabus, paragraph two) ("test to determine if a state law must yield to a federal law is whether both laws can be enforced without impairing the federal superintendence of the field" (citation omitted)).

The CRP is governed by 16 U.S.C. §§3831 through 3836 and regulations promulgated thereunder at 7 C.F.R. §§704.1 through 704.31. The purpose of the CRP is "to assist owners and operators of highly erodible cropland in conserving and improving the soil and water resources of their farms or ranches." 16 U.S.C. §3831(a). To achieve this purpose, the Secretary of Agriculture is authorized to enter into contracts to provide payments to eligible owners and operators for converting highly erodible land to permanent vegetative cover. 16 U.S.C. §§3832-3834; 7 C.F.R. §704.1(a). Land may be placed in the CRP, provided that, *inter alia*, the land has been planted to produce an agricultural commodity in two of the five crop years, 1981 through 1985, and consists of soils which have been identified as highly erodible or have been classified as being in one of the specified Land Capability Classes. 7 C.F.R. §704.7. With certain exceptions, the person entering the CRP contract must have owned or operated the land for at least three years. 16 U.S.C. §3835; 7 C.F.R. §704.6. Under the terms of the CRP contract, *inter alia*, the owner or operator must not use the land for agricultural purposes except as permitted by the contract, must establish and maintain vegetative cover on the land, and must not conduct harvesting or grazing, or make other commercial use of the forage or trees on the land except as expressly permitted in the contract. 16 U.S.C. §3832(a); 7 C.F.R. 704.12. Contracts are for a period of ten to fifteen years. 16 U.S.C. §3831(e). Violations of the contract terms may result in termination of the contract, forfeiture of payments, and liquidated damages. 16 U.S.C. §3832(a)(5); 7 C.F.R. §704.22.

Applying the three tests for federal preemption described in *State ex rel. Miller*, I note first that there is no express language prohibiting the exercise of state authority over lands covered by CRP contracts. Nor is the federal regulatory scheme so pervasive as to leave no room for any state regulations pertaining to the same land. The CRP does not address comprehensive land use planning for entire geographic areas, which is the purpose of local zoning. Rather the CRP sets out eligibility criteria, based in part on existing land use, and then sets out certain prohibitions and requirements for future use, which are assumed voluntarily by individual owners or operators in order to receive payments. Additionally, the CRP statutes and regulations are silent as to any number of land uses which are neither expressly required or prohibited as conditions of the contract. Given the limited scope of the CRP regulatory scheme, I cannot infer therefrom a congressional intent to preempt all state regulatory authority with respect to CRP lands.

The relevant test, therefore, in determining whether the CRP preempts township zoning, is whether the zoning regulation you have described interferes with or frustrates the provisions or objectives of the CRP or whether both can be enforced without impairing the federal regulatory scheme. *See State ex rel. Miller*, 26 Ohio St. 3d at 111, 497 N.E.2d at 77; *Jones Metal Products* (syllabus, paragraph two). It is implicit in the facts presented in your request, that the use of land by a sportsman's club for purposes of hunting and fishing is prohibited on lands zoned for agricultural use. The federal statutes and regulations governing the CRP are silent with respect to the use of CRP lands for hunting and fishing by a sportsman's club or any other entity. You state in your request that hunting is permitted on CRP lands. It does appear that operation of a sportsman's club for purposes of hunting and fishing would not violate any of the contractual requirements imposed on the owners or operators of CRP lands. It may also be that such use is expressly permitted in the specific contract involved. The fact that hunting is permitted, however, whether expressed in the CRP contract or implied from the statutory scheme, simply means that such use will not violate the contract. It does not mean that hunting is a required use of the land under the provisions of the CRP.

It is further apparent that a township zoning restriction on hunting does not in any way frustrate the objectives of the CRP. The purpose of the CRP is to promote the conversion of highly erodible agricultural land to vegetative cover. The restriction on hunting does not prevent such conversion and does not interfere with any of the obligations imposed on CRP participants.² Therefore, I conclude that township zoning regulations governing the use of land by a sportsman's club for purposes of hunting and fishing are not preempted by the federal CRP statutes and regulations with respect to lands included in the CRP.

I turn now to the question of whether the state statutes governing licensed shooting preserves have preempted township zoning authority over the land in such preserves. Questions of state law preemption of local zoning authority must first be considered in light of the express language of the statute involved. *See, e.g.*, R.C. 3734.05(E)(3) (expressly providing that, with respect to hazardous waste facilities authorized by permits pursuant to R.C. Chapter 3734, no political subdivision shall require any additional zoning approval). Where the statutory language is unclear, the question is resolved by examining whether the purposes of zoning are incompatible or inconsistent with the purposes of the other statutory scheme involved.³ *See Hulligan v. Columbia Township Bd. of Zoning Appeals*, 59 Ohio App. 2d 105, 107, 392 N.E.2d 1272, 1274 (Lorain County 1978) ("[t]he jurisdictional line between the [local zoning and state environmental regulations] is drawn by the particular protection each desires to achieve"); *Set Products, Inc.* (comparing legislative purpose of township zoning authority and R.C. Chapter 1514 governing surface mining); *Yorkavitz* (comparing purposes of township zoning authority and R.C. Chapter 4561 governing aviation and airports); *accord* 1988 Op. Att'y Gen. No. 88-051; Op. No. 85-053; Op. No. 81-065.

² Your facts do not present a situation where a township zoning regulation prohibits a land use required by a CRP contract. I render no opinion as to whether such a regulation, enacted either before or after a CRP contract goes into effect, is preempted by the CRP statutes and regulations.

³ I note that, as a matter of construction, the initial presumption is that the purposes of other statutory provisions are not incompatible with the purposes of zoning. Because the General Assembly is the source of the authority for both zoning and the other statutory scheme touching on the same subject area, it should be presumed that the other statutes address matters not included in zoning. *Hulligan v. Columbia Township Bd. of Zoning Appeals*, 59 Ohio App. 2d 105, 107, 392 N.E.2d 1272, 1273 (Lorain County 1978).

Licensed shooting preserves are governed by the provisions of R.C. 1533.70 through R.C. 1533.80. Shooting preserve licenses must be renewed annually⁴ with the division of wildlife of the department of natural resources. *Id.* As a condition of the license, the applicant is required to deliver a certain number of pheasants or quail to the division for release on non-private hunting preserves, R.C. 1533.72(B), and also to liberate a certain number of pheasants or quail upon the licensed preserve before the specified hunting season, R.C. 1533.72(C).⁵ Under a shooting preserve license, licensed hunters who are authorized by the licensee to shoot on the preserve may hunt game birds on the licensed land without regard to sex and daily bag limits which would otherwise be applicable. R.C. 1533.72. Thus the purpose of licensing shooting preserves is to induce private citizens and organizations to assist in the maintenance of the state's wildlife population by offering a relaxation of hunting restrictions to those participating in the program.

Although the statutes governing licensed shooting preserves do not expressly address their relationship to local zoning authority, R.C. 1533.72 states:

The division may, upon payment of such fee [\$100 per annum], issue to the applicant such a license under the following conditions:

(A) The operation of such licensed shooting preserve *does not conflict with a prior reasonable public interest.* (Emphasis added.)

R.C. 519.02 provides that the purpose of a comprehensive township zoning plan is to promote the public health, safety, and morals. *See also Set Products, Inc.*, 31 Ohio St. 3d at 265, 510 N.E.2d at 378. The specific intent of zoning, within the more general purpose of promoting the public health, safety and welfare, "is concerned with land use and planning, and the systematic and orderly development of specific areas, or zones, for various uses and utility...." *Hulligan*, 59 Ohio App. 2d at 107, 392 N.E.2d at 1274. The Ohio Supreme Court has held that:

determination of the question of whether regulations prescribed by a zoning ordinance have a real or substantial relation to the public health, safety, morals or general welfare is committed, in the first instance, to the judgment and discretion of the legislative body....The legislative, not the judicial, authority is charged with the duty of determining the wisdom of zoning regulations.

Willott v. Beachwood, 175 Ohio St. 557, 560, 197 N.E.2d 201, 204 (1964); *accord Ketchel v. Bainbridge Township*, 52 Ohio St. 3d 239, 246, 557 N.E.2d 779, 785 (1990). Thus, township zoning regulation constitutes a reasonable public interest, absent a judicial determination of abuse of discretion. The division of wildlife, as a part of the executive branch of government, has no authority to set aside such a legislative determination. Accordingly, R.C. 1533.72(A) prohibits the division of wildlife from licensing a shooting preserve when such use of the land conflicts with local zoning regulations. I find, therefore, that township zoning regulations governing the use of land by a sportsman's club for purposes of hunting and fishing are not preempted with respect to lands licensed as a shooting preserve pursuant to R.C. 1533.72.

Your second question asks whether the sportsman's club placed itself under control of the township zoning regulations by making application for and receiving a variance years ago. As I understand this question, you wish to know, in the event that inclusion in the CRP or licensure as a shooting preserve would operate to exempt the land in question from township zoning authority, whether the sportsman's club waived such exemption by virtue of submitting to the variance process. As I have determined that neither of these programs operate to preempt applicable township zoning regulations, it is not necessary to discuss this question.

⁴ R.C. 1533.72 provides that "[a]ll licenses issued under this section shall expire on the thirtieth day of April of each year."

⁵ The owner of the shooting preserve either raises these game birds pursuant to a propagation license issued under R.C. 1533.71 or acquires them from a source similarly authorized to raise and sell such birds.

I turn now to your third question in which you ask: "If the Township Zoning is applicable, does the original variance cover all of the land owned and operated by the Sportsman's Club at the address listed in the variance, or does the variance only apply to the land in use at the time it was issued requiring a new variance for the expanded area[?]" A variance authorizes a land use which is otherwise prohibited by the applicable zoning regulations. *Nunamaker v. Board of Zoning Appeals*, 2 Ohio St. 3d 115, 118, 443 N.E.2d 172, 175 (1982); *see also n.1, supra*. A variance, once granted, runs with the land. *Set Products, Inc.*, 31 Ohio St. 3d at 263, 510 N.E.2d at 376; *accord Fox v. Johnson*, 28 Ohio App. 2d 175, 181, 275 N.E.2d 637, 641 (Mahoning County 1971); *State ex rel. Parker v. Konopka*, 119 Ohio App. 513, 515, 200 N.E.2d 695, 696 (Summit County 1963). Although the Revised Code does not expressly provide for conditional variances, the courts have recognized that variances may be unrestricted or may impose certain conditions, which the owner may seek to alter or remove by applying for a new variance. *See, e.g., Set Products, Inc.* (variance involving a ten-year limitation on use); *Bettis v. Gilbert*, No. 89AP-562 (Ct. App. Franklin County Jan. 16, 1990) (slip. op.) (variance limiting expansion of building and location of parking), *juris. motion overruled*, No. 90-462 (Ohio Sup. Ct. May 23, 1990); *State ex rel. Casale v. McLean*, No. 89-T-4200 (Ct. App. Trumbull County Dec. 15, 1989) (slip. op.) (original variance unconditional, unqualified and unrestricted); *Ron Joy Nursing Home v. Board of Zoning Appeals*, No. 84CA162 (Ct. App. Mahoning County Dec. 17, 1986) (unreported) (variance limiting area of lot used for parking); *Haba v. Cuff*, 28 Ohio Op. 2d 266, 201 N.E.2d 343 (Ct. App. Summit County 1963) (unconditional variance), *appeal dismissed*, 176 Ohio St. 374, 199 N.E.2d 736 (1964), *cert. denied sub nom. Cuff v. Van Bogart*, 379 U.S. 964 (1965), *reh'g denied*, 380 U.S. 927 (1965); *Konopka* (variance limited to three-family residence); *Staker v. Brown*, 41 Ohio Misc. 144, 324 N.E.2d 793 (C.P. Scioto County 1974) (variance limited to residential use); *see also R.C. 519.14(D)* (authorizing the revocation of a variance for extraction of minerals if conditions of the variance are violated). Accordingly, whether the original variance granted to the sportsman's club limited the area of the property to be used for hunting in such a way as to require a new variance for expansion must be determined from the terms of the variance itself. From the facts you have presented, such a limitation would have to be derived from the fact that only part of the property was originally used for hunting or from the reference to the address of the club in describing the property involved. I will, therefore, examine whether either of these factors can serve to limit the area of land for which the variance was granted.

The right to establish a land use permitted by a variance does not expire from non-use, absent an express limitation in the variance. *See Konopka* (limited variance granted to landowner, but never used, held to run with the land to subsequent owner, who was thereby entitled to establish the use granted in the variance). It follows that the use permitted by the variance you have described is not limited by the fact that only part of the property was actually devoted to such use after the grant of the variance, absent a condition to that effect in the variance.⁶ I note, however, that the minutes of a township board of zoning appeals constitute the public record of a variance. *See* 1990 Op. Att'y Gen. No. 90-068, slip op. at 2; R.C. 519.15 (the township board of zoning appeals shall keep minutes of its official action on file in the office of the board of township trustees as a public record). Such minutes may provide a record of a limitation not apparent in the language of the variance itself. *See, e.g., Staker*, 144 Ohio Misc. at 145, 324 N.E.2d at 795 (variance from set back requirements further limited by court because "minutes of the Zoning Board of Appeals reflect that the variance was

⁶ A variance differs in this respect from a nonconforming use. A nonconforming use is establishing by actual use of a property prior to the enactment of zoning that prohibits the use, and the subsequent zoning operates to control the expansion of that use. *See R.C. 519.19*. Thus, in *Davis v. Miller*, 163 Ohio St. 91, 126 N.E.2d 49 (1955), where county zoning provided that the nonconforming use of any lot could be continued, the court held that the nonconforming use could not expand across a road which divided appellant's property into distinct "lots," because the property across the road had not been in actual use prior to the zoning.

granted only after assurance by Mr. Essman that the building would not be used for a commercial purpose"). In the absence of such evidence of limitation, however, the variance must be construed, as are all zoning regulations, in favor of full use of the property by its owner. See *Bettis*, slip. op. at 6, 8-9. See generally *In re Appeal of University Circle, Inc.*, 56 Ohio St. 2d 180, 383 N.E.2d 139 (1978).

The only other possible limitation on the land area to which the variance applies which is suggested in your letter is the fact that the property is described by its address rather than by its physical dimensions. There is no case law in Ohio defining or limiting how much of a landowner's property is described by reference to a street address. House and building numbers in unincorporated areas are assigned by either the county commissioners, R.C. 303.021, or the township, R.C. 503.30. The language of these statutes would indicate the numbers refer to buildings rather than land areas. However, since it is unlikely that a variance to hunt would be limited to a building, it is apparent that such reference in the variance reflects a more general use of the address to identify the land involved. I note that such use of a street address to identify land as well as a particular building thereon is recognized in R.C. 2329.23, which provides for the use of such addresses in notices of sheriff's sales. Evidence that use of the street address was meant to describe only part of the property owned by the sportsman's club may appear in the minutes of the board of zoning appeals or from public records related to the assignment of house and building numbers by the township or county commissioners. In the absence of such evidence, however, the variance should be construed broadly in favor of the landowner, see *Bettis*, as encompassing the entire acreage owned by the club at that location at the time the variance was granted.

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

1. Property included in the Department of Agriculture's Conservation Reserve Program pursuant to 16 U.S.C. §§3831 through 3836 and 7 C.F.R. §§704.1 through 704.31 is not exempt from a township zoning regulation enacted pursuant to R.C. 519.02, which prohibits the use of such land by a sportsman's club for purposes of hunting and fishing.
2. Property included in a licensed shooting preserve pursuant to R.C. 1533.72 is not exempt from a township zoning regulation enacted pursuant to R.C. 519.02, which prohibits the use of such land by a sportsman's club for purposes of hunting and fishing.
3. When, pursuant to a variance granted under R.C. 519.14(B), a property owner has established a land use on only part of his property, a new variance is not required to expand that use to the remaining property unless the original variance limited the area of the property which could be devoted to such use.
4. When a variance granted pursuant to R.C. 519.14(B) describes the property involved by street or house number only, the variance applies to the entire property located at that address unless the public records pertaining to the variance or to the assignment of such numbers indicate that the number as used in the variance pertains to only part of that property.