OPINION NO. 2003-024

Syllabus:

1. A board of township trustees is authorized by R.C. 519.02 to zone for the purpose of promoting the public health, safety, and morals. The development and maintenance of an infrastructure sufficient to serve the needs of a township's population meet this purpose, and may support a temporary moratorium on the construction of residential units, depending upon the terms of the particular zoning resolution, as well as the circumstances of the moratorium's enactment.

2. In order to comport with constitutional guarantees of equal protection, any distinction or classification made in a township zoning resolution must, as a general matter, be rationally related to a legitimate state interest. If, however, the resolution affects a suspect classification or fundamental right, it will be subject to strict scrutiny and must be narrowly drawn to serve a compelling state

interest. Proof of discriminatory intent or purpose is required to show that application of a zoning resolution, neutral on its face, constitutes a violation of equal protection.

3. In order to meet constitutional requirements of substantive due process, a township zoning resolution may be neither arbitrary nor unreasonable, and must bear a substantial relation to the public health, safety, morals, or general welfare. A township's need to slow residential growth until its infrastructure is improved to adequately meet the demands of the township's population is a legitimate governmental interest properly addressed through zoning legislation, and may support a temporary moratorium on the construction of residential units, depending upon the terms of the particular resolution, as well as the circumstances of the moratorium's enactment.

4. The application of a zoning resolution to a landowner's property constitutes a taking for which the landowner must be compensated if the resolution does not substantially advance legitimate state interests or denies the landowner the economically viable use of his property.

5. A temporary moratorium on development does not deprive the property of all of its economic value, and therefore, the balancing test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) must be applied to determine whether a compensable taking has occurred.

To: David L. Landefeld, Fairfield County Prosecuting Attorney, Lancaster, Ohio
By: Jim Petro, Attorney General, July 25, 2003

You have asked whether a board of township trustees may impose a moratorium on certain construction within the township. You have explained that Violet Township has experienced an extremely high growth rate over the past decade, and the board of trustees would like to consider imposing a temporary moratorium on the construction of new housing. The moratorium would give the township an opportunity to improve its infrastructure, such as roads and sewer and water facilities, to meet the demands of its growing population. You have stated that Violet Township currently has a zoning plan.

You have provided additional details about the proposed resolution. The proposal, which would be adopted and agreed to by Violet Township and the City of Pickerington, would impose a two-year moratorium on the issuance of zoning and building permits for single residential units. The ban would not apply to any person who, at the time the resolution became effective, had a pending contract with a builder for the construction of a single residential unit for his personal use. Also exempt would be the construction of units on plats that had received final approval as of the effective date of the resolution, if the unit would constitute a housing or care facility for persons fifty-five years of age and older, or where a person intended to construct his primary residence on a lot he owned prior to the effective date of the ordinance.

The proposal would also include a mandate that Violet Township and the City of Pickerington develop a joint growth management and capital improvement plan. Upon final

approval of the plan, the moratorium would be lifted and permits would be issued in accordance with the plan.

We will begin with an examination of whether a board of township trustees has the statutory authority to impose a temporary moratorium on the construction of residential units for the purpose of improving its infrastructure in response to the township's growth rate. We will then set forth the constitutional standards that a moratorium would be required to meet. Although it is beyond the scope of this opinion to analyze the statutory schemes (other than R.C. Chapter 519) that could potentially affect the validity of a resolution such as you have described, we note that, as a general rule, township zoning resolutions may not conflict with state or federal law. *See, e.g., Epicenter of Steubenville, Inc. v. City of Steubenville*, 924 F. Supp. 845 (S.D. Ohio 1996) (city moratorium on the establishment of any new group housing for the mentally disabled impermissibly discriminated and violated the federal Fair Housing Act). *See also* 1994 Op. Att'y Gen. No. 94-098; 1994 Op. Att'y Gen. No. 94-040.

Statutory Authority—R.C. 519.02

As summarized in 2000 Op. Att'y Gen. No. 2000-034 at 2-211, "townships have no inherent or constitutionally-granted police power to enact zoning legislation and are limited to such zoning authority as they are granted by statute." *See Board of Township Trustees v. Funtime, Inc.*, 55 Ohio St. 3d 106, 563 N.E.2d 717 (1990); *Ketchel v. Bainbridge Township*, 52 Ohio St. 3d 239, 557 N.E. 2d 779 (1990). R.C. 519.02 authorizes a board of township trustees, "[f]or the purpose of promoting the public health, safety, and morals," to "regulate by resolution the location, height, bulk, number of stories, and size of buildings and other structures, including ... 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 ... and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of such township" (emphasis added).[1] The scope of a board of township trustees' authority to zone includes that which may be necessarily implied under R.C. 519.02. *See, e.g., Rumpke Waste, Inc. v. Henderson*, 591 F. Supp. 521 (S.D. Ohio 1984) (township had the statutory authority pursuant to R.C. Chapter 519 to exclude landfills from land zoned agricultural); *Ketchel v. Bainbridge Township* (a township's authority in R.C. 519.02 to regulate density of population includes the power to establish minimum lot sizes); *Torok v. Jones*, 5 Ohio St. 3d 31, 448 N.E.2d 819 (1983) (syllabus, paragraph one) ("[i]n the absence of contrary direction from the General Assembly, a zoning ordinance provision which limits the life of a zoning permit to six months is a reasonable exercise of the power to zone contained in R.C. Chapter 519"); *Carlton v. Riddell*, 72 Ohio L. Abs. 254, 132 N.E.2d 772 (App. Medina County 1955) (a township is statutorily authorized to adopt a zoning resolution prohibiting the establishment of a trailer park within the township).

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[1]In order to enforce its zoning regulations, a board of township trustees may provide for a system of zoning certificates. R.C. 519.16. As stated in R.C. 519.17, "[n]o person shall locate, erect, construct, reconstruct, enlarge, or structurally alter any building or structure within the territory included in a zoning resolution without obtaining a zoning certificate, if required under section 519.16 of the Revised Code, and no such zoning certificate shall be issued unless the plans for the proposed building or structure fully comply with the zoning regulations then in effect." *See also* R.C. 519.23; R.C. 519.24; R.C. 519.99 (penalties for violation of zoning resolution and remedies for possible violations).

A board of township trustees is thus authorized by R.C. 519.02 to regulate through zoning the density of population in the unincorporated territory of the township, so long as the purpose of any such zoning regulation is to promote the "public health, safety, and morals."[2] *See Ketchel v. Bainbridge Township*; *Zeltig Land Development Corp. v. Bainbridge Township Board of Trustees*, 75 Ohio App. 3d 302, 599 N.E.2d 383 (Geagua County 1991). *See generally Smith v. Juillerat*, 161 Ohio St. 424, 119 N.E.2d 611 (1954) (syllabus, paragraph two) ("[t]he purpose of a zoning ordinance is to limit the use of land in the interest of the public welfare"). The need to ease, or maintain at current levels, demands on the public infrastructure or on public health and safety services has been found to bear a reasonable relationship to the public health and safety and thus a valid interest upon which to base a zoning provision. *See, e.g., Ketchel v. Bainbridge Township* (protection of an adequate and safe supply of water for domestic use is a proper objective of zoning); *Fischer Development Co. v. Union Township*, No. CA99-10-100, 2000 Ohio App. LEXIS 1873 at *12 (Clermont County May 1, 2000) (zoning amendment which would rezone an area that permitted multi-family uses to one permitting only single-family detached residential structures may bear "a reasonable relationship to public safety in that there is some evidence that multifamily housing creates increased demands on public safety services"); *Zeltig Land Development Corp. v. Bainbridge Township Board of Trustees* (the desire to maintain low density development is a proper governmental interest to justify a zoning regulation, although the township was, in this instance, unable to show how a five-acre lot size requirement furthered the health, safety, and morals of the community).

Although a determination under R.C. 519.02 of whether a particular resolution bears a reasonable relationship to the public health, safety and morals will depend upon the specific terms of that resolution, as well as the circumstances of the resolution's enactment, it appears that, as a general matter, a temporary moratorium on the construction of residential units for the purpose of allowing the township to develop and maintain an infrastructure sufficient for the township's population would meet this standard. Furthermore, the nature of a zoning regulation's purpose, and the relationship of the regulation to that purpose, are intertwined with the analysis of various constitutional issues addressed below and will be discussed in greater detail in connection therewith. *See, e.g.*, note 13, *infra*.

Constitutional Issues

Any zoning resolution must, of course, conform to all constitutional limitations. As noted in 1994 Op. Att'y Gen. No. 94-040 at 2-208, "the determination of whether a particular zoning resolution is reasonable and consistent with constitutional provisions is dependent upon the factors existing in a particular township at a particular time and cannot be determined by opinion of the Attorney General." We will, however, describe the analyses for determining the constitutionality of zoning resolutions that have been developed over time by the federal courts and the courts of this state. The most frequent challenges are that the zoning legislation: (1) violates equal protection guarantees; (2) deprives a landowner of a

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[2]The zoning power of a township is expressly limited by statute in several instances. R.C. 519.21 provides that a township zoning authority has no power to prohibit the use of land for agricultural purposes or the construction or use of buildings incident to the use of land for agricultural purposes. R.C. 519.211 divests a township of the authority to regulate the structures and use of land by public utilities and railroads, and to prohibit the sale or use of alcoholic beverages in areas where retail businesses, hotels, and restaurants are permitted. R.C. 519.211 also limits the township with respect to zoning telecommunications towers and gas and oil well drilling and production activities.

property interest without due process of law; and, (3) constitutes a "taking" of property for which the landowner must be compensated.[3]

A. Equal Protection

Zoning legislation must comply with constitutional guarantees of equal protection.[4] As summarized in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985), "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *See also Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Berger v. City of Mayfield Heights*, 154 F.3d 621 (6th Cir. 1998); *Court Street Development v. Stow City Council*, No. 19648, 2000 Ohio App. LEXIS 3900 (Summit County Aug. 30, 2000). However, zoning legislation that affects a suspect classification or fundamental right is subject to strict scrutiny and must be "suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. at 440.[5]

The proposed resolution, as explained above, would exempt from the moratorium any unit that would constitute housing or a care facility for persons fifty—five years of age and older, if constructed on a plat that had received final approval as of the effective date of the resolution. The proposed resolution also states the intent to exempt senior housing and care facilities from any residential growth controls developed as part of the joint growth management plan adopted by the township and city. Age is not a suspect classification under the Equal Protection Clause, and thus, a legislative distinction based on age will pass constitutional muster if it is rationally related to a legitimate state interest. *See Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *Gregory v. Ashcroft*, 501 U.S. 452 (1991). *See also Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972, 1981-82 (2003); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. at 441. In *Schenck v. City of Hudson*, 997 F. Supp. 902, 905-906 (N.D. Ohio 1998) (*Schenck III*), *aff'd*, No. 98-3353, 2000 U.S. App.

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[3]Zoning legislation is, on occasion, alleged to infringe on other constitutional guarantees. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (freedom of speech); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974) (rights of travel, association, privacy); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992) (freedom of speech and freedom of religion); *Epicenter of Steubenville, Inc. v. City of Steubenville*, 924 F. Supp. 845, 851 n.3 (S.D. Ohio 1996). *See also City of Solon v. Bergen*, Cuyahoga App. No. 80594, 2002-Ohio-7224, 2002 Ohio App. LEXIS 7039 (vagueness); *West Chester Township Zoning v. Fromm*, 145 Ohio App. 3d 172, 762 N.E.2d 400 (Butler County 2001) (same).

[4]The Fourteenth Amendment to the United States Constitution prohibits any State from denying "to any person within its jurisdiction the equal protection of the laws." Ohio Const. art. I, § 2, Ohio's Equal Protection Clause, has been determined to be "'functionally equivalent,'" to the Fourteenth Amendment, "necessitating the same analysis." *State v. Thompson*, 95 Ohio St. 3d 264, 2002-Ohio-2124, 767 N.E.2d 251, at ¶11 (quoting *American Association of University Professors v. Central State University*, 87 Ohio St. 3d 55, 59, 717 N.E.2d 286 (1999)).

[5]*City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) represents an instance where the Court held that the least stringent standard of review, the rational basis test, should be applied, but went on to find that the zoning ordinance, which required group homes for the mentally retarded to secure a special use permit, violated the Equal Protection Clause of the Fourteenth Amendment since it bore no rational relationship to a legitimate state interest.

LEXIS 3220 (6th Cir. Feb. 23, 2000) (*Schenck IV*), the court found that an ordinance capping residential development for the purpose of easing demands on the city's infrastructure, but including special provisions benefiting the elderly, disabled, and people who had received previous plat approval, did not violate the Equal Protection Clause. *See* note 11, *infra*.

It is arguable that the proposed resolution, including the exemption for housing for older residents, has a discriminatory impact on families, even though it is silent on its face as to familial status. *Cf. Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (note 9, *infra*). However, proof of discriminatory intent or purpose is required to show that application of legislation, neutral on its face, constitutes a violation of the Equal Protection Clause; disproportionate impact alone is insufficient to prove a violation, although it is relevant. *Village of Arlington Heights v. Metropolitan Housing Development*, 429 U.S. 252 (1977); *Stratford Chase Apartments v. City of Columbus*, 137 Ohio App. 3d 29, 738 N.E.2d 20 (Franklin County 2000).[6] Tellingly, the federal Fair Housing Act exempts from its prohibitions against discrimination based on familial status, housing for older persons as defined in the Act. 42 U.S.C. § 3607(b). *See generally Gibson v. County of Riverside*, 181 F. Supp. 2d 1057 (C.D. Cal. 2002) (discussing at length the "housing for older persons" or "HOP" exception).

B. Substantive Due Process

Furthermore, a zoning resolution may not, in derogation of the United States and Ohio Constitutions, deprive a landowner of his property without due process of law.[7] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). As an exercise of the state's police power, zoning legislation is constitutionally infirm if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.*, 272 U.S. at 395.[8] *Accord Shemo v. Mayfield Heights*, 88 Ohio St. 3d 7, 722 N.E.2d 1018 (2000); *Goldberg Companies, Inc. v. Council of the City of Richmond Heights*, 81 Ohio St. 3d 207, 690 N.E.2d 510 (1998). *See Wilson v. Union Township Trustees*, No. CA98-06-036, 1998 Ohio App. LEXIS 5025 at *8 (Clermont County Oct. 26, 1998) ("[z]oning ordinances are an exercise of the government's police power," which "simply 'does not extend to arbitrary,

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[6]*Cf. Fair Housing Advocates Association, Inc. v. City of Richmond Heights*, 209 F.3d 626 (6th Cir. 2000) (violations of the federal Fair Housing Act may be established by showing discriminatory intent or discriminatory effect or impact); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *on remand from Village of Arlington Heights v. Metropolitan Housing Development*, 429 U.S. 252 (1977) (under some circumstances, a violation of the Fair Housing Act, may be "established by a showing of discriminatory effect without a showing of discriminatory intent").

[7]U.S. Const. Amend. XIV prohibits a State from depriving any person of property without due process of law. Ohio Const. art. I, § 16 provides that, "every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) (the question of whether a zoning regulation is invalid as a deprivation of property without due process of law is the same under the U.S. and Ohio Constitutions).

[8]This standard is used to judge whether zoning legislation constitutes a deprivation of substantive due process. Zoning regulations must also provide landowners with procedural due process. *See Nasierowski Brothers Investment Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991). *See also Pond Brook Development, Inc. v. Twinsburg Township*, 35 F. Supp. 2d 1025 (N.D. Ohio 1999) (discussing notice provisions of R.C. 519.12 within context of procedural due process claim).

capricious and unreasonable' actions..... [a]n ordinance which is enacted outside this permissible scope is unconstitutional because any ordinance that bears no relation to valid police power violates the requirements of the due process of law" (citations omitted)).[9] *See generally Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992) (discussing at length substantive due process within the context of zoning legislation). Zoning laws are "presumed constitutional," and the "party challenging the constitutionality of a zoning ordinance bears the burden of proof and must prove unconstitutionality beyond fair debate." *Goldberg Companies, Inc. v. Council of the City of Richmond Heights*, 81 Ohio St. 3d at 209, 214. *See also Central Motors Corp. v. City of Pepper Pike*, 73 Ohio St. 3d 581, 653 N.E.2d 639 (1995); *Wilson v. Union Township Trustees*. A determination of constitutionality depends upon all relevant facts and circumstances. *Mays v. Board of Trustees* at ¶10, 11.

As explained in *Ambler Realty*, the "line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation," and "varies with circumstances and conditions." *Id.*, 272 U.S. at 387. *See also Village of Hudson v. Albrecht, Inc.*, 9 Ohio St. 3d 69, 72, 458 N.E.2d 852 (1984) ("the nature of the police power is elastic, as it must be able to expand or contract in response to changing conditions and needs"). However, the courts have found that the "'[t]he power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life'" (citations omitted). *Schenck v. City of Hudson*, 114 F.3d 590, 593-94 (6th Cir. 1997) (*Schenck II*). *See also Central Motors Corp. v. City of Pepper Pike*, 73 Ohio St. 3d at 587 (finding that the city had "demonstrated that its zoning ordinance [for low-density townhouse use] implemented a coherent land-use policy derived from a rational consideration of the needs of the community as a whole"); *C. Miller Chevrolet, Inc. v. City of Willoughby Hills*, 38 Ohio St. 2d 298, 303, 313 N.E.2d 400 (1974) ("the orderly development of an area is a legitimate goal of zoning regulations"); *Willott v. Village of Beachwood*, 175 Ohio St. 557, 197 N.E.2d 201 (1964); *Pritz v. Messer*, 112 Ohio St. 628, 645, 149 N.E. 30 (1925) ("[t]aking a long view into the future...and looking back into the past, to remind ourselves what detriment the unrestricted congestion in city life, both of traffic and housing, has already done the public welfare, we do see a real relation between the substantial material welfare of the community and this effort of the city to plan its physical life").[10]

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[9]Zoning legislation that impinges on fundamental personal rights has been judicially subjected to a higher standard of scrutiny than that affecting economic interests. *See Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (wherein the Court found that an ordinance limiting occupancy of a dwelling to members of a family, but narrowly defining "family" as essentially parents and their children, intruded upon family life and was not entitled to the usual judicial deference, stating that, "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation"). *See also Saunders v. Clark County Zoning Department*, 66 Ohio St. 2d 259, 421 N.E.2d 152 (1981) (interpreting the definition of "family," as used in a zoning resolution, to include foster families, and stating that, "any resolution seeking to define this term narrowly would unconstitutionally intrude upon an individual's right to choose the family living arrangement best suited to him and his loved ones.... [a] family unit, which performs the social function of child-rearing ... is constitutionally protected against governmental intrusion not supported by a compelling governmental interest").

[10]*See also, e.g., Village of Euclid v. Ambler Realty Co.* (zoning regulations related to the promotion of police and fire safety, traffic safety, and noise control have been found to be a proper exercise of the police power for purposes of due process analysis); *Central Motors*

Once a zoning authority establishes that the purpose of its legislation reflects a legitimate state interest, it need only show that the legislation is rationally related to that purpose. *Schenck II*, 114 F.3d at 594-95. *See Pritz v. Messer*, 112 Ohio St. at 643 ("the question is ... not whether congestion of traffic and enhanced public health and improved public morals will certainly result from the enactment of such [zoning] measures, but whether there is a reasonable connection between such measures and the public health, morals, and safety"). *Cf. Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (zoning ordinance, as applied to landowner's property, did not bear a substantial relation to the public health, safety, morals, or general welfare); *Clarke v. Warren County Board of Commissioners*, 150 Ohio App. 3d 14, 2002-Ohio-6006, 778 N.E.2d 1116 (Warren County) (*see* note 15, *infra*).

Of particular interest in analyzing your question is the decision in *Schenck II*, wherein the U.S. Court of Appeals for the Sixth Circuit explicitly held that a city's desire "to control growth of residential areas until such time as its infrastructure is able to meet current and future needs" is a legitimate governmental interest properly addressed through zoning legislation. *Id.*, 114 F.3d at 594.[11] *See also Schenck III*, 997 F. Supp. at 905 (under its police power, the city had "the right to maintain its character and to grow at a slower pace to allow orderly provision of services, including infrastructure service levels. ... to insure that the costs of development do not exceed revenue available from such development. ... [and] to limit the density of population to prevent congestion"); *Wilson v. Union Township Trustees* at *9-10 (upholding a zoning ordinance intended to limit population growth and thus avoid greater strain on public resources, the infrastructure, and safety services such as police and fire); *Rolfes v. Harlem Township Board of Trustees*, No. 94CAE12038, 1995 Ohio App. LEXIS 5916 (Delaware County Nov. 15, 1995) at *12 ("[i]nfrastructure needs and abilities are clearly within the meaning of public health and safety. Density is a legitimate goal of local self-government"). The Sixth Circuit further held in *Schenck II* that the city's allotment system, capping the number of homes built each year based on the previous year's

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Corp. v. City of Pepper Pike, 73 Ohio St. 3d 581, 653 N.E.2d 639 (1995) (traffic safety, elimination of traffic congestion and reduction of air and noise pollution are subject to regulation through zoning).

[11]It is useful at this point to explain the history and posture of the *Schenck* litigation. Plaintiff landowners, developers, and builders initially filed in federal district court for a preliminary injunction to bar enforcement of a city zoning ordinance, capping residential construction, against developers who had already received preliminary or final plat approval. Finding that the plaintiffs had established a likelihood of proving that the ordinance was arbitrary and irrational as applied to owners of platted lots, and therefore not rationally related to the health, safety or welfare of the community (and resolving the other factors for issuing a preliminary injunction in favor of plaintiffs), the court preliminarily enjoined the city from enforcing the zoning ordinance as to any lots that had obtained preliminary or final plat approval and been improved with certain infrastructure. *Schenck v. City of Hudson Village*, 937 F. Supp. 679 (N.D. Ohio 1996) (*Schenck I*).

The Court of Appeals for the Sixth Circuit reversed the district court, finding that plaintiffs had not established a likelihood of success, dissolved the injunction, and remanded the case for proceedings on the merits. *Schenck v. City of Hudson*, 114 F.3d 590 (6th Cir. 1997) (*Schenck II*). In light of the Court of Appeals' extensive analysis and ruling in *Schenck II*, the district court, upon remand, granted the city's motion for summary judgment, 997 F. Supp. 902 (N.D. Ohio 1998) (*Schenck III*), and not surprisingly, the Court of Appeals affirmed, No. 98-3353, 2000 U.S. App. LEXIS 3220 (6th Cir. Feb. 23, 2000) (*Schenck IV*).

level of residential development and the ability of the city's infrastructure to cope with the new development, bore a rational relationship to the city's interest in improving its infrastructure without straining resources. *Id.*, 114 F.3d at 594-95.

Thus, a township's need to slow residential development for the purpose of developing its infrastructure may support a moratorium on the construction of residential units for purposes of due process. As noted above, a determination of whether a particular zoning ordinance rationally relates to a legitimate government interest is fact-specific and depends upon the circumstances and conditions of each situation. Mentioned as part of the court's determination in *Schenck II* that the ordinance related to the city's need to control growth in order to sufficiently develop its infrastructure were the following factors: (1) the ordinance was based upon findings of fact developed from studies documenting the inadequacy of the city's sewer and water treatment and distribution systems, roads, emergency services, and police force; (2) provision was made for developers who had already received plat approval and for landowners who could demonstrate particular hardship; and, (3) the system was developed to accommodate changes in the growth rate, was efficient to administer, and offered an objective decision-making process that provided for the equitable treatment of landowners.

Also of interest is *November Properties, Inc. v. City of Mayfield Heights*, No. 39626, 1979 Ohio App. LEXIS 10604 (Cuyahoga County Dec. 6, 1979), wherein the court addressed the legality of a city's moratorium on the issuance of building permits that was imposed due to the city's inadequate sewer system. The court upheld the moratorium but qualified its approval by obligating the municipality to act promptly to remedy the inadequacy, stating that, a "municipality cannot deny a property owner the immediate use of his property because of inadequate public services and then fail to act or refuse to provide these services." *Id.* at *45. Finding that due process required there to be, "coupled with this moratorium, a reasonable plan for the installation of adequate sewers within a reasonable period of time," *id.*, at *44, the court further cautioned that a "municipality may temporarily deny a person the use of his property because of inadequate municipal services such as sewers, but this denial must be based on actual inadequacy of such services and not a mere allegation of inadequacy of such services." *Id.*, at *44-45.

C. Taking

Even if a zoning regulation is found not to constitute a violation of due process, it may nonetheless constitute a taking as to a particular piece of property for which the landowner must be compensated.[12] *State ex rel. R.T.G., Inc. v. State of Ohio*, 98 Ohio St. 3d 1,

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[12]U.S. Const. Amend. V states that: "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." This provision is made applicable to the states through the Fourteenth Amendment. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 306 n.1 (2002); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122 (1978).

Ohio Const. art. I, § 19 states that:

> Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation

2002-Ohio-6716, 780 N.E.2d 998; *Goldberg Companies, Inc. v. Council of the City of Richmond Heights*; *Mays v. Board of Trustees*, at ¶12. In *Agins v. City of Tiburon* 447 U.S. 255 (1980), the United States Supreme Court held that the application of a zoning law to particular property constitutes a taking if "the ordinance does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land." *Id.*, 447 U.S. at 260. The *Agins* test is disjunctive; that is, a compensable taking may result *either* if application of the zoning ordinance to particular property does not substantially advance legitimate state interests *or* it denies the landowner the economically viable use of his property. *State ex rel. Shemo v. City of Mayfield Heights*, 95 Ohio St. 3d 59, 63, 765 N.E.2d 345 (2002). "[S]atisfaction of either prong of the *Agins* test establishes a taking." *Id.*, 95 Ohio St. 3d at 64.

Under the first prong of *Agins*, application of a zoning law to particular property will constitute a taking if it does not substantially advance legitimate state interests. As noted in *Wilson v. Union Township Trustees* at *11, "[o]bviously, the first prong of the Agins test directly overlaps with the analysis for a claim that an ordinance is unconstitutional as applied" (substantive due process).[13] The extent of this overlap is unclear however. In support of this "first prong," the Court in *Agins* cites *Ambler Realty*, 447 U.S. at 261, which, as discussed above, was decided on grounds of substantive due process. However, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court stated, with respect to the *Agins* taking standard, "[o]ur cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." *Id.*, 483 U.S. at 834. The decision continues:

> [O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved [citing *Agins*], not that "the State *'could rationally have decided'* that the measure adopted might achieve the State's objective."... But there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical...." (Citations omitted and emphasis in original.)

Id., 483 U.S. at 834 n. 3. *Cf. City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999) ("this Court has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests

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> shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

[13]Likewise, the first prong of *Agins* and the substantive due process analysis appear to overlap with the determination, discussed above, of whether a zoning resolution promotes the public health, safety, and morals as required by R.C. 519.02. *See also* note 15, *infra*.

outside the context of required dedications or exactions," citing note 3 of *Nollan*, an exactions case).

Nonetheless, the Court in *Agins* upheld the density restrictions at issue, finding that they "substantially advance[d] legitimate governmental goals" and were a proper exercise of the city's police power to protect its residents from "the ill effects of urbanization.... [s]uch governmental purposes long have been recognized as legitimate" (footnote and citations omitted). *Id.*, 447 U.S. at 261.[14] Even in *Nollan*, the Court notes that a "broad range of governmental purposes and regulations satisfies these requirements" (that land-use regulations substantially advance legitimate state interests). *Id.*, 483 U.S. at 835.

The latest perspective of the U.S. Supreme Court on the second, "economic viability" prong of the taking analysis was set forth in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). *Tahoe-Sierra* affirmed that, if a regulation has deprived property of less than 100% of its economically beneficial use, then the balancing test developed in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), must be applied to determine if a compensable taking has resulted. The *Penn Central* analysis involves "ad hoc, factual inquiries," *id.*, 438 U.S. at 124, "designed to allow 'careful examination and weighing of all the relevant circumstances'" to determine whether a regulatory taking has occurred, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. at 322. *See also Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) ("[w]here a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors").[15] Of significance are the "economic impact of the regulation on the

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[14]The *Agins* Court further found that: "The zoning ordinances benefit the appellants [landowners] as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas. There is no indication that the appellants' 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer." *Id.*, 447 U.S. at 262.

[15]In *State ex rel. Shemo v. City of Mayfield Heights*, 96 Ohio St. 3d 379, 2002-Ohio-4905, 775 N.E.2d 493, the court explained that, "*Tahoe-Sierra* did not involve the first prong of the regulatory takings test set forth in *Agins v. Tiburon.*" *Id.* at ¶14. In both *Tahoe-Sierra* and *Penn Central* the Court noted that the landowners did not dispute that the regulation at issue substantially advanced a legitimate state interest. *State ex rel. Shemo v. City of Mayfield Heights* at ¶10, 14. However, the purpose of a land use regulation and the regulation's relationship to that purpose are part of the *Penn Central* analysis as well. *See Penn Central Transportation Co. v. New York City*, 438 U.S. at 127 ("a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose"); *Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring) (stating that, under *Penn Central*, the "purposes served, as well as the effects produced, by a particular regulation inform the takings analysis," citing cases to the effect that use restrictions on real property may constitute a taking under *Penn Central* "'if not reasonably necessary to the effectuation of a substantial public purpose'").

To further highlight the interdependent nature of the various statutory and constitutional inquiries we have discussed herein, *see* note 13, *supra*, and associated text, we cite *Clarke v. Warren County Board of Commissioners*, 150 Ohio App. 3d 14, 2002-Ohio-6006, 778

claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.... So, too, is the character of the governmental action." *Penn Central Transportation Co. v. New York City*, 438 U.S. at 124. *See also State ex rel. R.T.G., Inc. v. State of Ohio* at ¶34.

If, however, the regulation "deprives the property of all of its economic value, there is no need to examine the policy behind the regulation, and a compensable taking results, unless the regulation merely prevents use of the property in a manner that creates a nuisance under state law." *State ex rel. R.T.G., Inc. v. State of Ohio* at ¶38, citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The rule in *Lucas*, recognizing a per se or categorical taking, applies only where the owner is deprived of *all* economically beneficial uses of his land. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency; Palazzolo v. Rhode Island; Lucas v. South Carolina Coastal Council; State ex rel. R.T.G., Inc. v. State of Ohio* at ¶37, 39.[16] As the Court pinpointed in *Tahoe-Sierra*, "the categorical rule would not apply if the diminution in value were 95% instead of 100%." *Id.*, 535 U.S. at 330.

Moratoria

Tahoe-Sierra is especially useful in analyzing your question since the case involved two moratoria that were imposed on residential development for a total of thirty-two months by a regional planning agency pending study of the impact of development and formulation of a comprehensive land-use plan. The Court held that imposition of a temporary moratorium on development is not per se a taking, and the factors set forth in *Penn Central*, rather than the categorical rule of *Lucas*, should be applied.[17] Emphasizing that, under *Penn Central*, the analysis should focus on the parcel as a whole,[18] the Court noted:

N.E.2d 1116 (Warren County), where the court found that, "[w]hile the economic-feasibility analysis is directly related to the taking issue," it was also related to a substantive due process analysis of the zoning designation at issue in that case. *Id.* at ¶21.

[16]Also, a categorical taking will be found without case-specific inquiry where a physical possession of property, rather than a regulatory taking, occurs. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. at 323 ("we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use); *Palazzolo v. Rhode Island*, 533 U.S. at 617 ("[o]ur cases establish that even a minimal 'permanent physical occupation of real property' requires compensation under the [Takings] Clause"); *State ex rel. R.T.G., Inc. v. State of Ohio*, 98 Ohio St. 3d 1, 2002-Ohio-6716, 780 N.E.2d 998 at ¶36.

[17]The Court did not, however, determine in *Tahoe-Sierra* whether the moratoria in question met the *Penn Central* test. The landowners had not appealed the district court's ruling that they could not show a taking under *Penn Central*, but rather based their appeal on the argument that a temporary deprivation of all economically viable uses of their land constituted a categorical taking under *Lucas*, and *Penn Central* should not apply. The Court's holding is limited, therefore, to a declaration that the moratoria were not a categorical or per se taking of property so that *Penn Central*, rather than *Lucas*, applied, and does not extend to an application of the *Penn Central* factors to the moratoria.

[18]*Cf. State ex rel. R.T.G., Inc. v. State of Ohio* (syllabus) ("[i]n determining the relevant parcel for a takings analysis, pursuant to the Takings Clause of the Ohio Constitution, Section 19, Article I, coal rights are severable and may be considered as a separate property interest if the property owner's intent was to purchase the property solely for the purpose of mining the coal").

> An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest.... Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely cause a diminution in value is not. *Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.* (Emphasis added.)

Id., 535 U.S. at 331-32. *Cf. State ex rel. Howland Township Board of Trustees v. Casale*, No. 98-T-0176, 1999 Ohio App. LEXIS 4669 (Trumbull County Sept. 30, 1999) (four and one-half year delay in issuing zoning permit did not constitute a deprivation of property without due process or a taking of property).

In *Tahoe-Sierra*, the Court discusses at some length the value of a moratorium as part of effective land-use planning. *Id.*, 535 U.S. at 337-341. Recognizing the public interest served by granting regulatory agencies adequate time to engage in "informed decisionmaking" without imposing "severe costs on their deliberations," *id.*, 535 U.S. at 339, the Court observes at 340-41:

> Indeed, the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel.... At least with a moratorium there is a clear "reciprocity of advantage" ... because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted.

Although *Tahoe-Sierra* is a "second prong" takings case, the Court's recognition of the value of moratoria, and its support of moratoria as "essential tool[s] of successful development," *id.*, 535 U.S. at 338, are informative in considering all of the statutory and constitutional issues discussed above.

Conclusions

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

1. A board of township trustees is authorized by R.C. 519.02 to zone for the purpose of promoting the public health, safety, and morals. The development and maintenance of an infrastructure sufficient to serve the needs of a township's population meet this purpose, and may support a temporary moratorium on the construction of residential units, depending upon the terms of the particular zoning resolution, as well as the circumstances of the moratorium's enactment.

2. In order to comport with constitutional guarantees of equal protection, any distinction or classification made in a township zoning resolution must, as a general matter, be rationally related to a legitimate state interest. If, however, the resolution affects a suspect classification or fundamental right, it will be subject to strict scrutiny and must be narrowly drawn to serve a compelling state interest. Proof of discriminatory intent or purpose is required to

show that application of a zoning resolution, neutral on its face, constitutes a violation of equal protection.

3. In order to meet constitutional requirements of substantive due process, a township zoning resolution may be neither arbitrary nor unreasonable, and must bear a substantial relation to the public health, safety, morals, or general welfare. A township's need to slow residential growth until its infrastructure is improved to adequately meet the demands of the township's population is a legitimate governmental interest properly addressed through zoning legislation, and may support a temporary moratorium on the construction of residential units, depending upon the terms of the particular resolution, as well as the circumstances of the moratorium's enactment.

4. The application of a zoning resolution to a landowner's property constitutes a taking for which the landowner must be compensated if the resolution does not substantially advance legitimate state interests or denies the landowner the economically viable use of his property.

5. A temporary moratorium on development does not deprive the property of all of its economic value, and therefore, the balancing test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) must be applied to determine whether a compensable taking has occurred.