LEGAL ASPECTS OF CODE ENFORCEMENT: FROM ADOPTION THROUGH LITIGATION

Ohio Township Association
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I. PROCESS TO ADOPT ZONING

A. Adoption of a Resolution stating the Board’s Intent to Proceed (Ohio Revised Code §519.03)

Before the Township can appoint a Zoning Commission or proceed with discussing a Zoning Resolution and Zoning Map, the Board of Trustees must first pass a resolution stating their intention to proceed under Ohio Revised Code §§519.02-519.25.

B. Appointment of Zoning Commission (Ohio Revised Code §519.04)

Once a Resolution is passed stating the Board of Trustees intent to proceed, the Board must then appoint a Zoning Commission who will be tasked with preparing a Zoning Resolution and Zoning Maps in accordance with the powers and provisions granted to Townships in accordance with the Ohio Revised Code. The Zoning Commission shall consist of five (5) members and two (2) alternates. The Board shall determine and when and how the alternates will be utilized. Each member shall be appointed such that the term of one member will expire each year. The Zoning Commission shall also be compensated for its expenses and receive any other compensation the Board of Trustees approves or provides.

C. Creation of a Zoning Resolution and Maps in Accordance with a Comprehensive Plan (Ohio Revised Code §§519.02, 519.04)

Powers are conferred on a Board of Township Trustees under ORC §519.02 to regulate the location, size, and use of buildings and land in the unincorporated areas of the Township in accordance with a comprehensive plan. As stated previously, the Zoning Commission is appointed and tasked with preparing such Zoning Resolution and Zoning Maps. We will need to discuss the comprehensive plan requirement, especially in light of recent case law. The comprehensive planning process is typically accomplished through work sessions and can be aided by outside counsel, consultants, and any information held by public officials, departments, and agencies that are beneficial or relevant to Blendon Township. Again, we will need to discuss this item.

D. Submittal of recommended Zoning Resolution and Maps (Ohio Revised Code §519.05)

Once the Zoning Commission has completed their recommended Zoning Plan, that Resolution and Map will be submitted for review at a public hearing.

E. Public Hearing on Recommendations of the Zoning Commission (Ohio Revised Code §519.06)
One public hearing must be held by the zoning commission, whereby the zoning text and zoning maps are made available for review and examination to the residents of the unincorporated area of Blendon Township. A notice of the location and time of the hearing must be published in a newspaper of general circulation in the Township at least thirty (30) days prior to the public hearing.

F. Submittal of Recommendations after the Public Hearing to the Regional or County Planning Commission for comment (Ohio Revised Code §519.07)

Once a public hearing has been held, the Zoning Commission must then submit the Zoning Plan to the Regional Planning Commission for review. They will approve, disapprove, or make recommendations to the Zoning Commission regarding the Zoning Plan as submitted. Approval of the Zoning Plan can be assumed if Blendon Township does not hear from the Regional Planning Commission within twenty (20) days.

However, if the Regional Planning Commission disapproves or makes significant changes to the Zoning Plan, the Zoning Commission must hold another public hearing in accordance with Step #5 of this outline.

G. Certification of Zoning Resolution and Maps to the Board of Trustees (Ohio Revised Code §519.07)

Once the Zoning Plan has been through a public hearing(s) and approved by the Regional Planning Commission, the Zoning Commission must then certify the Zoning Plan to the Board of Trustees for further public review and comment.

H. Public Hearing by the Board of Trustees (Ohio Revised Code §519.08)

Once the Zoning Plan has been certified to the Board of Trustees, a public hearing must be held. A notice of the location and time of the hearing must be published in a newspaper of general circulation in the Township at least thirty (30) days prior to the public hearing. If no changes are proposed by the Board of Trustees after the public hearing has closed, the Board may vote on the adoption of the zoning resolution.

I. Referral of Changes by the Board of Trustees back to the Zoning Commission (Ohio Revised Code §519.09)

If the Board of Trustees wishes to propose changes to the Certified Zoning Plan after the public hearing held in Step #8 of this outline, those changes must be referred to the Zoning Commission for approval. The Zoning Commission will review those proposed changes and take action to either adopt or reject the proposed changes submitted by the Board of Trustees.

J. Public Hearing regarding proposed Changes (Ohio Revised Code §519.09)
If the changes are adopted by the Zoning Commission, another public hearing must be held by the Trustees. A notice of the location and time of the hearing must be published in a newspaper of general circulation in the Township at least ten (10) days prior to the public hearing.

If the Zoning Commission disapproves any changes proposed by the Board of Trustees, the Board may overrule the Zoning Commission and adopt those changes by unanimous vote.

K. Vote of approval by the Board of Trustees post public hearings (Ohio Revised Code §519.10)

Once the Board of Trustees has received the Certified Zoning Plan from the Zoning Commission and the necessary public hearings are held in accordance with Step #8 and, if applicable, Step #10 of this outline, the Board of Trustees shall vote to approve or disapprove the Zoning Plan.

L. Plan submitted to electors (Ohio Revised Code §519.11)

Once the Board of Trustees has adopted the Zoning Plan, final approval must be submitted to the electors of the unincorporated area of the Township at the next primary election, general election, or a special election called for this purpose.

Before submitting to the electors, the Board of Trustees must file a copy of the Resolution adopting the Zoning Plan to the Board of Elections at least ninety (90) days before the election to ensure its place on the ballot. A majority vote of approval from the electors is required to adopt the Zoning Plan.

M. Certification from Board of Elections received upon majority approval (Ohio Revised Code §519.11)

The Zoning Resolution will become effective upon certification from the Board of Elections that a majority of the voters in the unincorporated area of Blendon Township approved the resolution.

N. Filing of Zoning Resolution and Maps with the Regional or County Planning Commission and County Recorder (Ohio Revised Code §519.11)

Once a certification of approval is received, a copy of the Resolution adopting zoning, the Zoning Resolution, and the Zoning Maps must be filed with the County Recorder and the County Planning Commission within five (5) working days of the effective date (the date certification from the Board of Elections is received) of the resolution.

O. Appointment of Board of Zoning Appeals (Ohio Revised Code §519.13)

After approval of the Zoning Resolution and Zoning Maps, the Board of Trustees shall appoint a Board of Zoning Appeals. The Board shall consist of five
(5) members and two (2) alternates. The Board shall determine how and when the alternates shall be utilized. Each member shall be appointed such that the term of one member will expire each year. The members may be compensated for their expenses, or other compensation, or both, as the Board of Township Trustees may approve and provide.

P. Adoption of Schedule of Fees and System of Zoning Certificates (Ohio Revised Code §519.16)

To carry out the approval processes for building and land use in the Township after the Zoning Resolution and Zoning Maps have been approved, the Board of Trustees must adopt a System of Certificates and Schedule of Fees. This System of Certificates should be in accordance with the zoning code and the Schedule of Fees should be reasonable and set bearing in mind the cost the Township will incur to review each Zoning Application associated with the fee.

Q. Hiring of Zoning Inspector (Ohio Revised Code §519.16)

For the purpose of enforcing the newly adopted Zoning Resolution, the Board may establish and fill the position of Zoning Inspector. The Board may also hire assistants for the Zoning Inspector, as they deem necessary, and establish compensation for those positions and appropriate funds as necessary. Per Ohio Revised Code §519.161, the Zoning Inspector must be bonded. It is also important to note that the Township Administrator can be assigned the duties of the Zoning Inspector.

II. OVERVIEW OF ZONING

A. Since a township is a creature of statute, townships have only those powers expressly conferred upon them by statute or those necessarily implied therefrom. Trustees of New London Township v. Miner, 26 Ohio St. 452 (1875).

B. Ohio Revised Code Chapter 519 sets out the powers of townships in relation to zoning.

C. Zoning has been defined as the division of a community into districts and the regulation of buildings and structures according to their construction and the nature and extent of their use, or the regulation of land according to its nature and uses. In other words, zoning is concerned with "land use" as opposed to "land ownership."

D. Zoning is an exercise of the police power, and, accordingly, must be justified on the basis of promoting the public convenience, comfort, prosperity or general welfare.

1. The Ohio Constitution vests the "police powers" of the State in the general assembly.
2. Ohio Revised Code Chapter 519 constitutes a delegation of a portion of those police powers to the township.

E. Since a township's power to zone is a creature of statute, there are many limitations imposed upon this power.

1. Constitutional limitations.
   a. Zoning regulations must be reasonable. Regulations which are found to be unreasonable and arbitrary constitute an unconstitutional taking of property without due process of law.
   b. Since zoning is a "legislative" function, courts traditionally will not question the expediency, advisability, or wisdom of the legislation.
      i. Courts can determine whether zoning regulations are so unreasonable and arbitrary as to be unconstitutional. However, zoning regulations are presumed valid and any illegality must be plain, apparent, and beyond debate. In other words, there is presumption of constitutionality attached to zoning regulations.
      ii. Since zoning regulations are in derogation of property rights, they are strictly construed in favor of the property owners.
   c. The constitutionality of a zoning provision may be challenged in one of two ways.
      i. Whether the zoning provision is clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals or general welfare of the community. (Must be shown “beyond fair debate.”)
      ii. Does the zoning provision deny the property owner of all economically viable use of the land (i.e. taking).

2. Statutory limitations.
   a. Since the power of a township to adopt and administer a zoning resolution is a specific statutory grant of authority, a township cannot enact regulations which are in conflict with the applicable statutes.
   b. Ohio Revised Code Chapter 519 limits the ability of a township to regulate certain types of uses:
      i. Townships may not force discontinuance of a "lawful"
nonconforming use (meaning a lawful use existing at the
time of the enactment of the zoning resolution). In
addition, the zoning resolution must provide for the
completion, restoration, reconstruction, extension, or
substitution of nonconforming uses upon reasonable terms.
(519.19)

ii. Zoning resolutions must classify outdoor advertising as a
business use and must permit such advertising in all
districts zoned for industry, business, or trade, or lands
used for agricultural purposes. (Ohio Revised Code
§519.20)

iii. Townships may not prohibit the use of land for
"agricultural" purposes or the construction or use of
buildings or structures incidental to the agricultural land
use on which the buildings or structures are located.
However, townships may regulate "agriculture" in any
platted subdivision or in any area consisting of 15 or more
lots approved under Ohio Revised Code §711.131 that are
contiguous to one another, or some of which are contiguous
to one another and adjacent to one side of a dedicated
public road, and the balance of which are contiguous to one
another and adjacent to the opposite side of the same
dedicated public road. (No authority to regulate
agriculture on lots greater than 5 acres.) (519.21)

iv. In districts zoned for agricultural, industrial, residential, or
commercial uses, townships may not prohibit the use of
any land for a farm market where 50% or more of the gross
income received from the market is derived from produce
raised on farms owned or operated by the market operator
in a normal crop year. However, townships may regulate
factors such as the size of the structure, size of parking
areas that may be required, setback building lines, and
egress or ingress, where such regulation is necessary to
protect the public health and safety. (519.21)

v. Except for telecommunications towers located in an area
zoned for residential use, townships may not regulate the
location, erection, construction, reconstruction, change,
alteration, maintenance, removal, use, or enlargement of
any buildings or structures of any public utility or railroad.
(519.211)

vi. Townships may not prohibit the sale or use of alcoholic
beverages in areas where the establishment and operation
of any retail business, hotel, lunchroom, and restaurant is
permitted. (519.211)

vii. Townships may not prohibit permanently sited manufactured homes. (519.212)

III. NON-CONFORMING

A. What is a nonconforming use?

1. A use lawfully existing prior to enactment of a zoning ordinance and maintained after the effective date of ordinance. Formerly legal, they become illegal under new ordinance.

B. Types.

1. Nonconforming uses of land.
2. Nonconforming buildings, structures, or lots.
3. Nonconforming uses of conforming buildings.
4. Nonconforming uses of nonconforming buildings.

C. Rationale.

1. Nonconforming uses in zoning code were to recognize property owner’s rights under Federal and State Constitutions. Purpose is to allow landowners to keep their old land uses when new zoning laws or amendments change classifications.

2. In City of Akron v. Chapman, 160 Ohio St. 382 (1953), The Ohio Supreme Court held unconstitutional an ordinance which provided that existing undesirable uses could be terminated by city council after a certain period of time. The Court stated: “The right to continue to use one’s property in a lawful business and in a manner which does not constitute a nuisance and which was lawful at the time such business was established is within the protection of Section 1, Article XIV, United States Constitution and Section 16, Article I of the Ohio Constitution, providing that no personal shall be deprived of life, liberty or property without due process of law.”

3. Townships try to balance property rights against planning goals by providing for the continuation of nonconforming uses and at the same time for discontinuance under certain reasonable conditions.

D. Delegation of Authority.

1. Overview.
a. Since a township is a creature of statute, townships have only those powers expressly conferred upon them by statute or those necessarily implied therefrom. *Trustees of New London Township v. Miner*, 26 Ohio St. 452 (1875).

b. Ohio Revised Code Chapter 519 sets out the powers of townships in relation to zoning.

c. Since a township’s power to zone is a creature of statute, there are many limitations imposed upon this power.

i. **Constitutional limitations.** Zoning regulations must be reasonable. Regulations which are found to be unreasonable and arbitrary constitute an unconstitutional taking of property without due process of law.

ii. **Statutory limitations.** Since the power of a township to adopt and administer a zoning resolution is a specific statutory grant of authority, a township cannot enact regulations which are in conflict with the applicable statutes.

Ohio Revised Code Chapter 519 limits the ability of townships to regulate nonconforming use: Townships may not force discontinuance of a “lawful” nonconforming use (meaning a lawful use existing at the time of the enactment of the zoning resolution). In addition, the zoning resolution must provide for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses upon reasonable terms.

Ohio Revised Code Section 519.19 (attached).

E. **Legal Analysis/Issues.**

1. **Existing Uses.**

   a. Key in ability to maintaining a nonconforming use is there must be a legal use at the time of passage of zoning resolution or amendment.

      i. Was use in existence at the time?

      ii. Was it legal? *Petti v. City of Richmond Heights*, 5 Ohio St. 3d 129 (1983) (school board’s use of residentially zoned property as an office was illegal at time of zoning amendment; therefore subsequent purchaser did not have a
right to continue office as a nonconforming use); see also *Pschesang v. Village of Terrace Park*, 5 Ohio St. 3d 47 (1983).

iii. If the use in question is a nuisance, then courts typically will not consider use “legal” for purposes of nonconforming use. *Matthews v. Pernell*, 64 Ohio App. 3d 707 (2nd Dist. 1990) (massage parlor was declared public nuisance and was closed for 1 year; ordinance change making adult entertainment facilities, but not massage parlors, conditional uses; Court held not a valid nonconforming use due to nuisance declarations).

b. **Burden of Proof.**
   
i. An owner has burden to show legal nonconforming use.
   
ii. In criminal proceedings, government must establish violation; burden shifts to defendant to prove legal nonconforming use.

c. **Practical Pointers.**
   
i. **Maintenance of Records (Amendments/Zoning Resolutions).**
   
ii. Record keeping/List of nonconforming uses.
   
iii. **BZA proceedings/Appeal of Zoning Inspector Determination.**
   
iv. **ORC 2506 Appeal.**

F. **Vested Rights.**

1. **Nature and Extent of Use.**
   
a. **Vested Right.** There is a particular point, fixed by law, at which a landowner gains the right to use the land for a particular purpose.
   
b. The Ohio Supreme Court has placed limitations on what can be considered a “vested right.” In *Smith v. Juillerat* (1954), 161 Ohio St. 424, the Court stated: “The rule seems to be that where no substantial nonconforming use has been made of property, even though such use is contemplated, and money has been expended in preliminary work to that end, a property owner has acquired no vested right to such use and is deprived of none by the operation
of a valid zoning ordinance denying the right to proceed with his intended use of the property.”

c. The court again limited what can be considered a vested right in *Torok v. Jones* (1983), 5 Ohio St.3d 31, 5 OBR 90, 448 N.E.2d 819. Similar to its holding in *Juillerat*, the court in *Torok* held the “[a] property owner fails to acquire a vested right to complete construction and fails to establish a nonconforming use under a township zoning resolution where there has been no substantial change of position, or expenditures, or no significant incurrence of obligations in reliance upon the zoning permit.”

d. In applying these principles, Ohio courts have found it “[unnecessary] for a person to substantially complete a structure in order to have a vested right to complete the structure.” *Donrey Outdoor Advertising*, 1999 WL 731376, at *4; *Warren Cty. Bd. Of Commsrs. v. Nextel Communications* (April 26, 1999), Warren App. No. CA98-09-115, 1999 WL 247163, at *12-14. In other words “the court’s focus is not solely upon whether the property owner has started actual construction upon the property, but the court must also inquire as to whether the owner has changed his position, expended significant time, effort or money, or incurred significant obligations.” *Nextel Communications*.

2. Permits/Plats.

   a. Typically, submission of building permit prior to enactment of zoning change is sufficient to vest a right to nonconforming uses.

   b. *Gibson v. City of Oberlin* 171 Ohio St. 1 (1960), the Court held a building permit for a 12-unit apartment building could not be denied because of a pending zoning change that would make use unlawful.

   c. If permit has expired, then no nonconforming use. See *Torok v. Jones*. Even if permit has been issued, must still take steps by actually building on site. See *O’Brien v. City of Columbus*, 1990 WL 9273.

   d. Preliminary approval of developer’s plat not sufficient to establish nonconforming use. See State, ex rel. *Bugden Development v. Kiefaber* (1960) (Montgomery County), 113 Ohio App. S23. But see *Negin v. Board of Building and Zoning Appeals of City of Mentor* 69 Ohio St.2d 492 (1982) (adding where a lot has been platted and held in single ownership since before an ordinance establishing minimum area and frontage requirements, a valid
nonconforming use has been established with regard to these factors.)

G. Limitations on Use/Modification.

1. Change/Substitution of Use.

a. O.R.C. 519.19 provides that townships must allow for the “completion, restoration, reconstruction, extension, or substitution” of nonconforming uses.

b. O.R.C. 519.19 authorizes restrictions “upon such reasonable terms as are set forth in the zoning resolution.”

c. Many municipalities, despite the requirement of substitution, have prohibited such based upon a substantial relationship to the protection of public health, safety, morals or general welfare. See Northern Ohio Sign Contractors Ass’n v. Lakewood (1987), 32 Ohio St.3d 316; Gates Co. v. Housing Appeals Bd. (1967), 10 Ohio St.2d 48; Dublin v. Finkes, supra; Booghier v. Wolfe (Clark Cty. 1990), 67 Ohio App.3d 467.

d. If the proposed use is sufficiently similar to the current use, courts generally uphold that no change has occurred.

i. Racing of stock cars on dirt race track located in residential district didn’t constitute substantial alteration of valid nonconforming use of property as a track for racing midget cars. Deerfield Twp. v. Deerfield Raceway, LLC 2008 WL 3270951.

ii. Court upheld valid non-confirming use of property when owner switched outside display of garden tractors and lawn mowers to automobiles. Court held, except for size and object being sold, there was no material difference. See Stewart v. Pedigo (1965), 2 Ohio App.2d 53.


e. Change in intensity of the same use is not necessarily a change in use.

i. Court holding that obtaining a liquor permit at party center not a change in use. See Bd. Of Rootstown Twp. Trustees v. Epling 1997 WL 750793.
ii. Court held change occurred when owner went from selling 6 to 7 used tractors per year to a new tractor franchise with large building. See Carver v. Deerfield Twp. Bd. of Zoning Appeals 1999 WL 689748.

2. Expansion and Extension.

a. Again, O.R.C. 519.19 provides that townships shall provide for extension of nonconforming uses.

b. Despite O.R.C. 519.19. Courts in Ohio have upheld total prohibitions against expansions or extensions of nonconforming uses.

i. In Coy v. Clarksfield Township BZA, 1997 WL 221121, the Court held extensions could be completely prohibited. See also, Beck v. Springfield Township, 88 Ohio App. 3d. 443, stating O.R.C. grants government officials discretion to provide or not for an extension.

ii. Other courts have held the opposite. Outright prohibition on expansions is not permitted.

i. Where zoning ordinance does not provide any authority for extension of nonconforming use, such ordinance is in violation of O.R.C. 519.19 and therefore invalid. See Deerfield Twp. v. Buckeye Fireworks Mfg. Co. 1982 WL 5824; see also Board of Trustees of Suffield Twp. Trustees v. Rufener, 2011 WL 2638195.

d. Balanced approach is to provide for reasonable restrictions on expansion. Expansion may be denied where there is a reasonable basis for denial.

e. A property owner has right to use property in a nonconforming manner only to the extent to which it was used at time it became nonconforming.

i. Courts can find a portion of a lot to have nonconforming use but find it doesn’t extend to another portion of lot. See Randolph Twp. Trustees v. Portage Cty. Agricultural Soc., 1992 WL 192443 (where owner of quarry owned one tract of land divided into two parcels, nonconforming use could not be extended from one parcel to other).

ii. No absolute right to extend a nonconforming use from one part of building to another. See Whitacre v. Max & Erma's
1974 WL 184363. Zoning Resolution may provide for such expansion.

f. Enlargement, replacement or alteration of buildings wherein a nonconforming use is located is treated the same by courts as expansions of use itself.

3. Repair and Reconstruction.
   a. Routine repairs should be permitted.
   b. O.R.C. provides no guidance; however courts have upheld a certain percentage of reconstruction value when substantial repairs are involved.
      i. 50% or more is typical (value should include use and building).
      ii. Complete reconstruction within certain time frames.
      iii. Nuisance.
      iv. Financing may be an issue.

   a. O.R.C. 519.19 states any nonconforming use that is “voluntarily discontinued for two years or more” must thereafter be used in conformity with applicable zoning.
      i. Townships may not provide for shorter period. See State v. Crawford 2002 WL 1299810.
   b. Standard for Abandonment.
      i. Must be voluntary.
      ii. Intent to abandon (express or implied).
      iii. Overt act or failure to act evidencing that use has discontinued.
   c. Burden of proof on Township.
   d. No voluntary discontinuance of the nonconforming use of property as a junkyard occurs for a two-year period by either the property owner or his estate where the junkyard usage merely becomes less frequent subsequent to the owner’s illness and death.
e. Evidence supported determination that landowners’ nonconforming use of their jointly owned property, which was allegedly engaging in sale of satellite receivers for a period of time, followed by sale of various machines, engines, and related parts, was voluntarily discontinued for two years or more, and thus that they were not protected by nonconforming use exception under local zoning ordinance, as necessary to support conviction for violation of statute prohibiting noncompliance with local zoning resolution; evidence indicated that no customers had been seen on property for a number of years, and that for approximately the last 30 years landowner worked for his father. State v. Crawford, 2002 WL 1299810.


IV. ROLE AND LEGAL AUTHORITY OF TOWNSHIP ZONING INSPECTORS

A. O.R.C. 519.16 - Enforcement of zoning regulations - township zoning inspector.

For the purpose of enforcing the zoning regulations, the board of township trustees may provide for a system of zoning certificates, may establish and fill the position of township zoning inspector, together with assistants as the board deems necessary, may fix the compensation for those positions, and may make disbursements for them. The township fiscal officer may be appointed secretary of the township zoning commission, secretary of the township board of zoning appeals, and zoning inspector, and the fiscal officer may receive compensation for the fiscal officer’s services in addition to other compensation allowed by law.

B. O.R.C. 519.17 - Zoning certificate required.

No 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.

C. Court Interpretations.

1. The role of a township zoning inspector in the issuance of zoning permits is ministerial in nature, and actions that exceed zoning authority are deemed invalid and unenforceable. R.C. 519.17 imposes a statutory duty
not to issue or to revoke a zoning permit that does not fully comply with the zoning resolution. A zoning inspector acts beyond his/her authority in permitting a known violation of a zoning resolution to continue. *Jeffrey Mann Fine Jewelers v. Sylvania Twp. Bd. of Zoning Appeals*, 2008 Ohio 3503; 2008 Ohio App. LEXIS 2935 (6th Dist. 2008).

2. O.R.C. 519.24 does not explicitly or implicitly authorize a board of township trustees or a township zoning inspector to appeal a decision of the board of zoning appeals. A board of township trustees or a township zoning inspector may have standing to defend a decision of the board of zoning appeals; however, neither township trustees nor zoning inspectors may attack a decision of the board of zoning appeals." *Kasper v. Coury* (1990), 51 Ohio St.3d 185, 188.

D. Permits.

1. **O.R.C. 519.16.** For purposes of enforcing the zoning regulations, the board of trustees may provide for a “system of zoning certificates.”

2. **O.R.C. 519.17.** No person shall construct a structure without obtaining a zoning certificate, “if required under Section 519.16 of the Revised Code.” A zoning certificate shall not be issued unless the proposal complies with the zoning regulations.

   a. Single or multiple
   b. Temporary or permanent

4. Permit Fees.
   a. Board schedule or zoning resolution

V. RIGHTS OF ENTRY

A. **Authority to inspect.**

1. R.C. §519.16 authorizes a township zoning inspector to conduct inspections on private property. 1973 Op. Att'y Gen. No. 73-116, based upon the decision of the United States Supreme Court in State ex rel. Eaton v. Price, 364 U.S. 263 (1960). The Eaton Court affirmed the constitutionality of a Dayton ordinance authorizing a housing inspector to enter, examine, and survey any property at any reasonable hour. The Eaton Court reasoned that the rights of a homeowner should be subordinate to the general health and safety of the community.
B. **Limitations on authority.**

1. The Ohio Attorney General has clarified that the right to enter property is limited by the fourth amendment of the United States Constitution in stating that: “… a township zoning inspector may not enter and inspect private property without a search warrant where the owner or occupant of the property does not give consent, unless there is an emergency, the property is open to the public, or the industry conducted on the property has a history of government oversight such that no reasonable expectation of privacy exists.” 1998 Op. Att’y Gen. No. 1998-018.

2. Thus, a township zoning inspector may not enter upon private property for inspection of the property unless:

   a. The owner of such property consents to the entry, or

   b. The inspector has received an administrative search warrant, or

   c. An exception applies:

      i. Emergency.

      ii. Property is open to the public.

      iii. No reasonable expectation of privacy exists because activity conducted on the property has a history of government oversight.

3. **Court interpretations.**

   a. Township zoning inspector has a statutory privilege to go upon property in order to inspect it for zoning violations, “so long as the entry is not done for personal reasons or in bad faith.” A zoning inspector's presence on the property in order to abate a nuisance under R.C. §505.86 is privileged where the township trustees declare by resolution that an emergency exists on the property. Chalker v. Howland Twp. Bd. of Trustees, 74 Ohio Misc. 2d, 685 N.E.2d 335 (11th Dist. 1995).

**VI. DECISION TO ENFORCE**

A. **General Principals.**

1. Such lawsuits pursuing and defending zoning enforcement involve the efforts of a local zoning authority to compel compliance with a zoning resolution or code, where it is thought that an owner or occupant is violating such laws.
2. Few statutes directly authorize, structure, or govern zoning enforcement litigation. In a recent enforcement case which our firm pursued on behalf of a township, the defendant argued that nothing in O.R.C. Chapter 519 allows for a notice of violation or citation process at all. This argument proved to be unsuccessful, although it did help to emphasize an important area of issue.

3. In all zoning enforcement cases, it is essential to examine and establish or attack (as the case may be) the authority of the enforcement authority to legislate or enforce with respect to the specific issues which are disputed. As noted above, principles of statutory construction and case determinations often favoring “the free use of property” limit the ability of a zoning inspector or board of zoning appeals to favorably interpret vague zoning resolutions for the benefit of objecting or complaining property owners.

4. The starting point for analysis of any enforcement matter is always the following: Since zoning regulations deprive property owners of uses of their property, and are thus “in derogation of the common law”, such regulations must be strictly construed, and construed in favor of free use. *State ex rel. The Synod United Lutheran Church v. Joseph* (1942), 139 Ohio St. 229, quoting from *State ex rel. Ice 7 Fuel Co. v. Kreuzweiser, Inspector*, (1929), 120 Ohio St. 352, 356. Zoning resolutions imposing restrictions upon the use of private property must be strictly construed, and always construed in favor of the free use of property. *State ex rel. Spiccia v. Abate* (1965), 2 Ohio St. 2d 129.

5. In *In re University Circle, Inc.* (1978), 56 Ohio St. 2d 180, the Ohio Supreme Court held as follows:

   [Z]oning ordinances are in derogation of the common law. They deprive a property owner of uses of his land to which he would otherwise be entitled. Therefore, where interpretation is necessary, such enactments are ordinarily construed in favor of the property owner.

6. It is true that Courts are instructed to initially presume that legislation (including zoning ordinances) is valid and reasonable. In a zoning enforcement case, the defendant landowner or user will have the burden of overcoming this presumption. Often, this will be accomplished by identification of an ambiguity, followed by articulation of the rule of interpretation described above.

B. **Value of Office Procedures Manual.**

1. Consistency
2. Fairness
3. Voluntary Compliance

C. Notice of Zoning Violation.
   1. List all owners
   2. Certified mail
   3. Be clear – what violations exist, time to abate, final notice
   4. Include appeal language
   5. Sample attached

D. Consequences of Issuing Notice of Zoning Violation.
   1. Appeal period
      a. O.R.C. 519.15 – 20 days
      b. Res judicata – when a township filed a complaint against a
         property owner to enjoin a zoning violation, it was held that the
         property owner’s arguments with respect to zoning violation were
         barred by doctrine of res judicata, in that property owner filed
         appeal the zoning officer’s decision to BZA. Prairie Township
         Board of Trustee v. Hay, Franklin County App. No. 01-AP-1198,
      c. Failure to exhaust administrative remedies

E. Decision by Zoning Inspector.

VII. APPEALS

A. A BZA is authorized to hear and decide appeals from the administrative official
   in charge of the enforcement of the zoning resolution.

B. Section 519.14 provides that appeals to the BZA must be taken within 20 days
   after the administrative officer’s decision by filing, with the officer and with the
   board of zoning appeals, a notice of appeal specifying the grounds.

   1. Appeals may be taken by any person “aggrieved.”

   2. The BZA is required to decide the appeal within a reasonable period of
      time.
3. The BZA is required to give at least ten days prior written notice of the hearing to the “... parties in interest.” Notice by publication is also required.

C. Conditional Zoning Certificates.

1. Conditional zoning certificates (oftentimes known as conditional uses) are not “permitted” uses. Rather, conditional uses are uses which may be permitted, subject to the issuance of a special permit. A use is typically categorized as a conditional use in recognition of the impact such use may have upon the surrounding area.

2. A township board of zoning appeals’ power to grant conditional zoning certificates is no greater than that vested in it by the township’s zoning resolution. Stated differently, if a zoning resolution does not provide for conditional uses, then a board of zoning appeals is without authority to grant them.

3. The decision whether or not to grant an application for a conditional use permit is administrative in nature. Consequently, such a decision is made in an adjudicatory, as opposed to a legislative, setting.

4. If an applicant’s request for a conditional use permit meets all technical requirements of the zoning resolution, the application may still be denied. See Laurie Sue Groff-Knight, et al. v. Board of Zoning Appeals of Liberty Township (2004), Delaware County App. No. 03 CAH 08-042 (unreported).

D. Variances.

1. Definition – in Nunamaker v. Board of Zoning Appeals (1982), 2 Ohio St.3d 115, 118, the Supreme Court provided the following definition of a variance:

A variance authorizes a land owner to establish or maintain a use which is prohibited by the zoning regulations. Thus, a variance results in a deviation from the literal impact of the ordinance or resolution and may be granted upon the showing of practical difficulties or unnecessary hardship.

Stated differently, a variance seeks permission (or, in some cases, forgiveness) to do something which is prohibited.

2. Types – there are two types of variances: a use variance and an area variance.
a. A use variance permits property to be used in a way not expressly or implicitly allowed by the applicable zoning code.

b. An area variance provides relief from the area requirements contained within a zoning code, such as setbacks, lot size, height, structure size, and the like. In theory, area variances do not involve uses, but rather structural or lot restrictions.

c. In the case of either a use or area variance, the applicant bears the burden of proving that the variance should be permitted.

3. Use Variance.

a. As previously noted, a use variance permits property to be used in a way not expressly or implicitly permitted by the applicable zoning code. When determining the merits of a request for a use variance, the test is whether the particular zoning code creates an “unnecessary hardship” with respect to the use of the property. An unnecessary hardship exists where the hardship is unique to a particular property, and where the uses permitted by the zoning ordinance are not economically feasible. A demonstration that the property could be put to a more profitable use, standing alone, is insufficient to establish unnecessary hardship. The “unnecessary hardship” standard for use variances is a much more stringent standard than those for area variances. The rationale for the distinction is that “. . . when the variance is one of area only, there is no change in the character of the zoned district and the neighborhood considerations are not as strong as in a use variance.” Kisil v. Sandusky (1984), 12 Ohio St.3d 30, at 32-33.

b. The factors to be considered in determining whether or not “unnecessary hardship” exists in the case of a use variance are varied. However and unlike the practical difficulty standard, failure to comport with any one standard established for a use variance will be fatal. When reviewing use variances, courts have utilized the following standards:

i. Is the property unsuitable for any of the uses permitted by the zoning resolution? Simply because property may be put to a more profitable use does not, in and of itself, establish an unnecessary hardship where less profitable alternatives are available within the zoning resolution.
ii. Does the variance result from conditions unique to the property in question and not as a result of actions by the property owner? This is the so-called “self-imposed hardship rule.” Generally speaking, a person who purchases land with knowledge of the zoning restriction is said to have created his own hardship and is not entitled to a use variance to relieve such a condition.

iii. Other factors include whether the variance is the minimum necessary to obviate the offending condition; whether the variance would be inconsistent with the spirit and intent of the zoning resolution; and whether the variance is substantial.

c. Although there is little question as to the authority of municipalities to grant use variances, there is an issue as to whether or not counties and townships have this same authority. However, in North Fork Properties v. Bath Township, 2004 WL 57564 (Ohio App. 9th Dist.), the Bath Township Zoning Resolution contained a provision prohibiting use variances. Upon appeal, the court struck down the offending provision claiming that it was inconsistent with the statutory scheme set forth in Ohio Revised Code Section 519.14.

d. A variance does not encompass the ability to change zoning schemes or correct errors of judgment in zoning laws. This action is within the purview of a rezoning. Despite this pronouncement, the distinction is sometimes blurred. In Brady Area Residents Ass’n v. Franklin Township Zoning Board of Appeals (December 11, 1992), 11th Dist. No. 92-P-0034, 1992 Ohio App. LEXIS 6216, the court determined that a request for 70 area variances affecting virtually every lot within a proposed subdivision was invalid because the variances effectively rezoned the property. Following this decision, the applicant filed suit against the township which resulted in a settlement agreement that conditioned the applicants filing of a plat upon obtaining eight separate variances affecting 29 proposed lots, with these variances being approved by the board of zoning appeals. The homeowners’ association again appealed. In Brady Area Residents Ass’n v. Franklin Township Zoning Board of Appeals, 2003 WL 21437019 (Ohio App. 11th Dist.), the court upheld the board of zoning appeals decision granting the variances and rejected the argument that the variances were the functional equivalent of a rezoning. In
distinguishing its previous decision, the court noted that the board of zoning appeals granted “... only eight separate variances to an allotment consisting of twenty-nine lots.” (emphasis added.) In the court’s opinion, the case did not resemble an across the board grant of variances which would result in a rezoning. Instead, the court stated its belief that the applicant was attempting to comply with already existing zoning resolutions through “... a minimal amount of variances.”

4. Area Variance.

a. In 1984, the Ohio Supreme Court established two separate legal standards for variances. The Supreme Court noted that the standard for granting a variance which relates solely to area requirements should be a lesser standard than the unnecessary hardship standard applied to use variances. For area variances, it is sufficient to show “practical difficulties.” The court justified the distinction by noting that when “... the variance is one of area only, there is no change in the character of the zoned district and the neighborhood considerations are not as strong as in a use variance.” The court went on to note that the self-imposed hardship rule will not necessarily preclude the granting of an area variance under the practical difficulty standard.

b. In 1986, the Supreme Court outlined the factors to be considered in determining whether or not a property owner has encountered practical difficulty with respect to an area requirement.

While existing definitions of “practical difficulties” are often nebulous, it can safely be said that a property owner encounters ‘practical difficulties’ whenever an area zoning requirement (e.g., frontage, setback, height) unreasonably deprives him of a permitted use of his property. The key to this standard is whether the area zoning requirement, as applied to the property owner in question, is reasonable. The practical difficulties standard differs from the unnecessary hardship standard normally applied in use variance cases, because no single factor controls in a determination of practical difficulties. A property owner is not denied the opportunity to establish practical difficulties, for example, simply because he purchased the property with knowledge of the zoning restrictions.

The factors to be considered and weighed in determining whether a property owner seeking an area variance has
encountered practical difficulties in the use of his property include, but are not limited to: (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage); (5) whether the property owner purchased the property with knowledge of the zoning restriction; (6) whether the property owner’s predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.

c. The factors listed by the Supreme Court are **non-exclusive**.

**VIII. CONDUCTING THE HEARING**

A. **Call meeting to order.**

B. **Ground Rules.**

1. Order of presentation.

2. Formality.

   a. Recording.

   b. Podium.

   c. Court Reporter.

3. Multiple meetings.

C. **Administering Oath.**

1. Individual vs. Mass swearing in of witnesses.

D. **Appropriate Evidence.**

1. Relevant testimony.

2. Exhibits.
3. Personal comments or speculation.

4. Order of testimony.

E. Problems with poorly worded zoning resolutions.

F. Res Judicata
   1. Multiple variance applications – “change in circumstance.”
   2. Failure to appeal.

G. Establish a record including, findings of fact and conclusions of law.

H. Reconsideration – applicant doesn’t show up. Deny w/out. Must reconsider within 30 days.
   1. A BZA has the inherent authority to reconsider its own decision. This ability only exists until the actual institution of a court appeal or until the expiration of the time for appeal.

I. Judicial Review.
   1. Chapter 2506 – appeal to common pleas court.
   2. Limitation on scope of review. Important issues attendant to the initial filing of the appeal include the following:
   3. Time for Appeal. O.R.C. §2505.07 requires that, "After the entry of a final order of an administrative officer, agency, board, department, tribunal, commission, or other instrumentality, the period of time within which the appeal shall be perfected, unless otherwise provided by law, is thirty days." The underlined portions of this provision are important, for a local body can prescribe a different time for an appeal, and many cases have litigated the question of when an administrative agency has "entered" a "final order." O.R.C. § 2505.02 contains a definition of "final order", but the definition uses terms and concepts that are subject to debate. Generally, orders are not considered final until minutes are prepared and approved, but several cases have held that notice of a decision to an applicant commences the running of the time limit.
   4. Notice of Appeal. O.R.C. §2505.04 requires that a notice of appeal be "filed with" the administrative agency that made the decision within the stated time limit. Often, this is more difficult than it would appear, because local zoning boards often have no established filing office, and can be hard to contact. Section 2505.05 contains special requirements for the type of notice of appeal to be used in these appeals, for they must designate whether or not, "the appeal is on questions of law or questions
of law and fact." Section 2505.04 establishes a bond requirement that is similarly confusing, and difficult to interpret.

Several of the technical requirements for the perfection of an appeal of an administrative determination have been decided to be jurisdictional. Under these circumstances, a mistake can be fatal. It is important for counsel to fully consider the applicable statutes and comply with the requirements as early as is possible, for surprises and difficulties do arise. Give yourself enough time to resolve the problems that you may encounter before the time for perfection of your appeal expires.

5. **The Transcript or Record.** When an appeal is filed with an administrative body, a praecipe requesting the preparation of a transcript must also be filed. Arguably, O.R.C. §2506.02 establishes a duty to prepare and file a record upon the agency, but it does require a praecipe. It is often useful and advisable to list the items required for the complete transcript and record in a praecipe, for often records that are incomplete and disorganized are filed. The truth is that administrators are not always knowledgeable with respect to the requirements of a proper record in an administrative appeal.

O.R.C. §2506.02 provides that the record is to be filed within 40 days after the filing of the notice of appeal. The statute provides that the cost of transcription is to be taxed as a cost in the appeal. Notably, there is no express requirement that a copy of the record be served upon the appellant.

6. **Adjudication Considerations.** O.R.C. § 2506.03 requires that a hearing in an appeal of an administrative decision be "confined to the transcript" unless one of a list of exceptions is shown to apply. Generally, additional hearings and submissions are prohibited unless a litigant can show that some significant due process right was not provided before the administrative agency.

Where it is shown that a transcript deserves to be supplemented, the Court is obligated to hear the evidence. In such cases, the issues are in fact re-tried, and the court given the ability to effectively substitute its judgment for the judgment of the local agency.

O.R.C. § 2506.04 provides the standard for review by a common pleas court. This statute provides,

> The court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.

Under this standard, the common pleas courts do examine and review
the evidence, and judge the appeal on the basis of such a review. Case law provides that trial courts must begin by presuming that the action of the local board is reasonable and valid, and instruct that courts are not to blatantly substitute their judgment for the judgments of the agencies, who are presumed to have expertise. The form of review applicable in appeals of administrative decisions has been described as a "hybrid" form of review by the Ohio Supreme Court. *Dudukovich v. Loraine Metropolitan Housing Authority* (1979), 58 Ohio St.2d 202. Reviewing courts are required to review and evaluate the whole record, and weigh the evidence in deciding whether or not it was made with adequate support.

Courts are also required to consider constitutional issues during an administrative appeal. Often, this is the first body that will seriously consider constitutional arguments, for many local boards find that they have no power to consider constitutional issues.

In Chapter 2506 appeals, the trial courts have the power to, affirm, reverse, vacate or modify" the order being appealed, and also have the power to remand the matter with instructions. O.R.C. §2506.04. This author has experienced confusion with such orders of remand. Does the matter go back to the administrative appeal level, or does it go back to the agency that made the initial decision? Unfortunately, the statute does not provide adequate guidance upon this question.

IX. ENFORCEMENT

A. Authorization.

1. Get organized:
   
a. Review files (photos, applications, decisions)

2. Board of Trustees approval

B. O.R.C. 519.24 - Actions instituted to prevent violations of zoning regulations.

In case any building is or is proposed to be located, erected, constructed, reconstructed, enlarged, changed, maintained, or used or any land is or is proposed to be used in violation of sections 519.01 to 519.99, inclusive, of the Revised Code, or of any regulation or provision adopted by any board of township trustees under such sections, such board, the prosecuting attorney of the county, the township zoning inspector, or any adjacent or neighboring property owner who would be especially damaged by such violation, in addition
to other remedies provided by law, may institute injunction, mandamus, abatement, or any other appropriate action or proceeding to prevent, enjoin, abate, or remove such unlawful location, erection, construction, reconstruction, enlargement, change, maintenance, or use. The board of township trustees may employ special counsel to represent it in any proceeding or to prosecute any actions brought under this section.


Whoever violates sections 519.01 to 519.25 of the Revised Code shall be fined not more than five hundred dollars for each offense.

D. Criminal vs. Civil Enforcement Efforts.

1. Ohio zoning enabling statutes and most local zoning codes provide for penalties, in the form of fines, for violations of the property use restrictions which they impose. In addition, our zoning enabling statutes provide, for example, that where a violation exists, "such board (here, a township Board of Trustees) in addition to other remedies provided by law, may institute injunction, mandamus, abatement, or any other appropriate action or proceeding to prevent, enjoin, abate, or remove such ... use." O.R.C. §519.24.

2. It is the experience of this author that in most situations, the more direct and effective action for obtaining continuing compliance is the civil injunction approach. Permanent injunctions are enforceable by the many remedies available for contempt, and can and have been used even to levy penalties sufficient to force foreclosure, in extreme problem situations. From a litigation perspective, the civil injunction approach enjoys many substantive and procedural advantages over a "criminal law" approach. These advantages include the following:

   a. In an injunction case, the burden of proof is "clear and convincing" evidence, where in a criminal proceeding the prosecution must prove its case "beyond any reasonable doubt."

   b. There is no right to a jury in a case seeking a civil injunction.

   c. A defendant has no Fifth Amendment right in a civil injunction case. Accordingly, the facts can frequently be established by admissions.

   d. The remedies are permanent, having recently been described (by a chronic zoning violator) as "having me tethered on a permanent leash." In a criminal case, an offender can pay a fine and the case is concluded.

   e. Public and private nuisance theories can be added to a civil
complaint, to address problems which are not clearly or specifically addressed in a zoning code.

f. Private rights of action generally exist.

3. One additional factor must be considered before accepting our preference for proceeding. That factor is purely a local factor. In some jurisdictions (particularly those without a court like the Environment Court in Franklin County), civil injunction cases are assigned to the busy and relatively slow common pleas courts. In certain counties, a criminal or "ticket" initiated enforcement effort will go to a municipal court, where the docket moves quickly. Cost may also prove to be a factor.

E. Alternatives to Zoning Enforcement.

1. Unsafe Structures.
   a. O.R.C. §505.86
   b. O.R.C. §505.73 (PMC)
   c. O.R.C. §3707.01 et seq. (Board of Health)
   d. O.R.C. §3781.11 (Building Code)
   e. O.R.C. §3737.41 (Township Fire Code)
   f. O.R.C. §3767.13 (Nuisance)
   g. O.R.C. §3767.41 (Nuisance)
   h. O.R.C. §3929.86 (Fire Loss)

2. Junk Vehicles.
   a. O.R.C. §505.73 (PMC)
   b. O.R.C. §3707.01 et seq. (Board of Health)
   c. O.R.C. §505.87 (Nuisance-weeds, vegetation and other debris)
   d. O.R.C. §4513.63-4513.65 (State Motor Vehicle Regulations)
   e. O.R.C. §505.173 (Regulation of Junk Motor Vehicle Storage)
   f. O.R.C. §505.871 (Removal of Junk Motor Vehicle)
3. Noise
   a. O.R.C. §505.17 (Regulation of motor vehicle noise)
   b. O.R.C. §4513.221 (Regulation of motor vehicle noise)
   c. O.R.C. §955.221 (Dog control-barking)
   d. O.R.C. §505.172 (Noise control at premises with D Permit or in areas zoned for residential use)

   a. O.R.C. §505.73 (PMC)
   b. O.R.C. §505.87
   c. O.R.C. §5579.05
   d. O.R.C. §5579.04
   e. O.R.C. §5571.14 (Road ROW)
   f. O.R.C. §5543.14
   g. O.R.C. §971.33
   h. O.R.C. §3707.01 (Board of Health)

5. Other vegetation.
   a. O.R.C. §505.73 (PMC)
   b. O.R.C. §505.87
   c. O.R.C. §3707.01 (Board of Health)
   d. O.R.C. §5571.14 (Road ROW)
   e. O.R.C. §5543.14