September 23, 1997

OPINION NO. 97-045

The Honorable David P. Joyce
Geauga County Prosecuting Attorney
Courthouse Annex
231 Main Street
Chardon, Ohio 44024

Dear Prosecutor Joyce:

You have requested an opinion whether the positions of township trustee and project inspector for the county engineer are compatible. According to information provided the township is located in the county served by the county engineer.

1979 Op. Att'y Gen. No. 79-111 sets forth the following seven questions for determining whether two public positions are compatible:

1.Is either of the positions a classified employment within the terms of R.C. 124.57?

2.Do the empowering statutes of either position limit the outside employment permissible?

3.Is one office subordinate to, or in any way a check upon, the other?

4.Is it physically possible for one person to discharge the duties of both positions?

5.Is there a conflict of interest between the two positions?

6.Are there local charter provisions or ordinances which are controlling?

7.Is there a federal, state, or local departmental regulation applicable?

1979 Op. Att'y Gen. No. 79-111 at 2-367 and 2-368. The sixth and seventh questions raise issues of local concern, and it is assumed, for purposes of this opinion, that there are no local departmental regulations, charter provisions, or ordinances that limit the holding of outside employment by a township trustee or project inspector for the county engineer. There are no applicable federal or state regulations.

Question number one asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits officers or employees in the classified service from

participating in partisan political activity other than to vote or express their political opinions. *Accord* [1996-1997 Monthly Record] Ohio Admin. Code 123:1-46-02 at 598. The position of township trustee is in the unclassified service. *See* R.C. 124.11(A)(1); R.C. 505.01. In your letter, you have stated that the position of project inspector is in the classified service. *See* R.C. 124.11(B). It has been determined, however, that "R.C. 124.57 does not prohibit a classified civil servant from also serving as a township trustee, as long as he is appointed trustee or seeks that office in a non-partisan election." 1988 Op. Att'y Gen. No. 88-020 at 2-76; *accord* 1978 Op. Att'y Gen. No. 78-022. Therefore, if an individual is appointed or elected in a non-partisan election to the position of township trustee, the prohibition of R.C. 124.57 does not bar the individual from holding simultaneously the positions of township trustee and project inspector for the county engineer.

Question number two asks whether the empowering statutes of either position limit outside employment. Our research discloses that no statute prohibits an individual from serving simultaneously in the positions of township trustee and project inspector for the county engineer. Thus, the second question may be answered in the negative.

Question number three asks whether one position is subordinate to, or in any way a check upon, the other. An elected official, such as a township trustee, is responsible to the people who elected him. 1994 Op. Att'y Gen. No. 94-022 at 2-98. A project inspector for the county engineer is employed by, and subject to the control of, the county engineer. *See id.* Accordingly, a township trustee and project inspector for the county engineer serve different masters and are not subordinate to each other. *See id.*

Prior opinions of the Attorneys General, however, have found that various statutes require a county engineer's office and boards of township trustees to interact with respect to the construction, reconstruction, resurfacing, improvement, maintenance, and repair of the roads located within townships. 1993 Op. Att'y Gen. No. 93-016; 1991 Op. Att'y Gen. No. 91-069; 1988 Op. Att'y Gen. No. 88-020. A board of township trustees is authorized to construct, maintain, and repair the roads located within the township. *See, e.g.,* R.C. 5535.01(C) (a "board of township trustees shall maintain all [township] roads within its township"); R.C. 5571.01(A) (a "board of township trustees may construct, reconstruct, resurface, or improve any public road or part thereof under its jurisdiction or any county road, intercounty highway, or state highway within its township"); R.C. 5571.02 (a "board of township trustees shall have control of the township roads of its township and shall keep them in good repair"); R.C. 5573.01 (when a board of township trustees has determined that any road shall be constructed, reconstructed, resurfaced, or improved, such board shall determine "the route and termini of such road, the kind and extent of the improvement, and at the same time shall order the county engineer to make such surveys, plans, profiles, cross sections, estimates, and specifications as are required for such improvement").

Similarly, a county engineer is responsible for the construction, maintenance, and repair of the roads located within a township. *See, e.g.,* R.C. 5541.01 (a county engineer may aid and assist the board of county commissioners in the preparation of blank forms and reports for the use of a board of township trustees in making its report concerning "the relative value of each road in the township in consecutive order as a used highway, the kind of traffic over such road, its length and

present condition, together with such other information as may be desired and requested by the board of county commissioners"); R.C. 5541.03 (upon the application of a board of township trustees and the approval of the board of county commissioners, a county engineer shall make the necessary plans and estimates of cost for the construction, reconstruction, or improvement of any section of highway in the county system); R.C. 5543.01(B), R.C. 5543.09 (a county engineer shall have general charge and supervision of the construction, reconstruction, resurfacing, or improvement of roads by boards of township trustees); R.C. 5543.02 (a county engineer shall make an annual estimate for the board of township trustees of each township that sets forth the amount required by the township for the construction, reconstruction, resurfacing, or improvement of the public roads within its jurisdiction); R.C. 5543.06 (a county engineer shall instruct township officials "as to the best and most economical methods for repairing and maintaining the roads and bridges of the county, so as to provide a uniform system of highway work for such county"); R.C. 5543.10 (a county engineer, upon the order of a board of township trustees, "shall construct sidewalk of suitable materials, along or connecting the public highways, outside any municipal corporation"); R.C. 5549.03 (a county engineer, upon the order of a board of township trustees "may purchase from any public institution within the state any road material, machinery, tools, or equipment, quarried, mined, prepared, or manufactured by such institution"); R.C. 5571.05 (a county engineer shall supervise and direct a board of township trustees or township highway superintendent in the maintenance and repair of roads); R.C. 5575.01 (a county engineer shall prepare an estimate of costs of work when a board of township trustees undertakes the construction or reconstruction of a township road); R.C. 5575.07 (the work of road improvement by a township shall be done under the general supervision and direction of the county engineer).

A review of the statutes pertaining to the construction and maintenance of township roads thus reveals "that a board of township trustees is under the general direction of the county engineer when road maintenance or construction is involved." 1993 Op. Att'y Gen. No. 93-016 at 2-88; *see* R.C. 5543.01; R.C. 5543.06; R.C. 5543.09; R.C. 5571.05; R.C. 5575.07. 1993 Op. Att'y Gen. No. 93-016 examined whether the fact that a board of township trustees is subject to the general direction of the county engineer with respect to road maintenance and construction renders the position of township trustee subordinate to the position of administrative assistant to the county engineer, and concluded as follows:

> Op. No. 88-020 ... concluded that a board of township trustees is under the general direction, but not necessarily the control of, the county engineer when road maintenance and construction is involved. The opinion reasoned that, "township trustees must follow the technical advice of the engineer as to the methods to be used for road repair. The engineer does not have authority to direct the trustees to repair certain roads." *Id.* at 2-77 n.1. The opinion also found that insofar as the statutes relating to the maintenance and construction of roads do not place a township trustee under the control of an employee of the county engineer, the fact that the trustee is an employee of the engineer does not, in itself, result in that employment being a check upon the position of township trustee. *Id.* at 2-77; *see* Op. No. 91-036 at 2-194 and 2-195; Op. No. 85-080 at 2-318.

> In light of the conclusion reached in Op. No. 88-020, and the fact that the position of administrative assistant to the county engineer in question is not delegated the duty of supervising township road and bridge construction and maintenance, it may be concluded that the statutes relating to the maintenance and construction of roads do not place a township trustee in a position subservient to that of the administrative assistant.

1993 Op. Att'y Gen. No. 93-016 at 2-88 and 2-89. Accordingly, the fact that a board of township trustees is subject to the general direction of the county engineer with respect to road maintenance and construction does not render the position of township trustee subordinate to the position of project inspector for the county engineer unless the duties of the project inspector include the supervision of road and bridge construction and maintenance in the township in which the trustee serves.

With respect to your specific inquiry, you have stated that the position of project inspector will not be responsible for inspecting the roads within the township in which he serves as a trustee, supervising township road improvements, or preparing plans and specifications for improvements for townships. Therefore, the fact that a board of township trustees is subject to the general direction of the county engineer with respect to road maintenance and construction does not place the office of township trustee in a position subservient to that of the position of project inspector in question.

Nevertheless, there may be specific instances in which one position acts as a check upon the other, either directly or indirectly. As stated in 1993 Op. Att'y Gen. No. 93-051 at 2-247, which concluded that the positions of township trustee and house numbering coordinator in the county tax map office are compatible:

> The fact that a county employee is subject to the supervision of the county engineer, however, does not, in itself, establish the position of township trustee as subordinate to or a check upon that county employment. *See* Op. No. 93-016; Op. No. 88-020. Rather, the specific duties of the individual as a county employee must be examined to determine whether the position of township trustee is subordinate to, or in any way a check upon, a position under the supervision of the county engineer. *See* Op. No. 93-016; Op. No. 88-020.

Accordingly, resolution of the compatibility issues of subordination of position in the case of a township trustee who wishes to hold an employment position in the county engineer's office requires a factual analysis of the duties and responsibilities assigned to the position within the county engineer's office.

According to information supplied in conjunction with your request for a formal opinion, the general duties of the project inspector are as follows:

> Under general supervision is responsible for performing a variety of sub-professional engineering tasks in the office and in the field.

> ....
> Works on the survey crew and collects traffic data.
> Reduces survey field notes and/or drafts the existing field data.
> Inspects work on subdivisions under the direction of the County Engineer.
> Inspects work on contracts administered by the County Engineer.
> Assists other officials and the general public in the Tax Map Room or in locating and interpreting data of file in the office.
> ....
> An employee in this classification will perform most of the inspection work under the jurisdiction of the County Engineer. He or she is expected to take direction from an engineer and be knowledgeable of most roadway construction work.[1] (Footnote added.)

Upon examination of the duties of the project inspector for the county engineer, it appears that the duties of the project inspector do not place the office of township trustee in question in a position subservient to that of the project inspector or place the project inspector under the control of the office of township trustee. Thus, there is no area in which one position controls the other, either directly or indirectly. The positions of township trustee and project inspector for the county engineer, therefore, are not subordinate to, or in any way a check upon, each other.

Question number four asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best answered by the interested parties because they may more precisely determine the time demands of each position. *See, e.g.,* 1996 Op. Att'y Gen. No. 96-008 at 2-32. It seems likely, however, that these two positions can be filled by the same individual if there is no direct conflict in their working hours.

Question number five asks whether there is a conflict of interest between the two positions. A person is prohibited from holding two public positions if he would be subject to divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interests of the public. 1985 Op. Att'y Gen. No. 85-042 at 2-150.

As noted above, a board of township trustees is authorized to construct, maintain, or repair any public road under its jurisdiction. R.C. 5535.01(C); R.C. 5571.01(A); *see* R.C. 5571.02. Under R.C. 307.15(A), a board of county commissioners may enter into a contract with a board of township trustees, whereby the board of county commissioners is authorized "to exercise any power, perform any function, or render any service, on behalf of the contracting subdivision or its legislative authority, that such subdivision or legislative authority may exercise, perform, or render." A board

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[1] Pursuant to R.C. 5575.07, "[t]he work of road improvement shall be done under the general supervision and direction of the county engineer and he may appoint some competent person to act as inspector during the construction of such improvement." You have stated, however, that an individual employed by the county engineer as a project inspector "is not appointed as a road inspector pursuant to R.C. 5575.07."

of township trustees thus may enter into a contract with a board of county commissioners whereby the county agrees to construct, reconstruct, resurface, or improve a public road within the township.

Additionally, a township and county may enter into a contract concerning payment for the cost of engineering services. Pursuant to R.C. 164.15, a board of township trustees "may enter into a contract with the county engineer under which the board agrees to pay all or any part of the cost of engineering services to be provided to or obtained for the township by the county engineer that are necessary for projects awarded under [R.C. Chapter 164 (aid to local government improvements)]." Also, R.C. 5555.43 authorizes a board of county commissioners and a board of township trustees to enter into a contract, whereby the county and township apportion the costs of a township road improvement. Finally, if the county engineer enters into an agreement with an owner of land pursuant to R.C. 5543.13 or R.C. 5543.17 as to compensation or damages already sustained or to be sustained by the owner of the land, the board of township trustees is required to approve the agreement.

The potential conflicts of interest created by the aforementioned statutes when an individual holds simultaneously the positions of township trustee and employment in the county engineer's office are explained in 1993 Op. Att'y Gen. No. 93-051 at 2-248 as follows:

> If a township and county enter into any of the contracts mentioned above, a township trustee who is employed by the county engineer will be involved in a contract between the township which he represents and the county which employs him. This may present a conflict of interest for that individual. *See* Op. No. 93-016 at 2-90; Op. No. 91-036 at 2-195 and 2-196; Op. No. 88-020 at 2-78. For example, a township trustee's ability to exercise clear and independent judgment on behalf of the township in negotiating or voting upon a contract between the county and township could be called into question because it could be difficult for such individual, as trustee, to set aside his loyalty to his employer, the county engineer. Furthermore, the trustee may not vote in the township's best interest for fear of reprisals, in his position of house numbering coordinator, by the county engineer.

Thus, when an individual simultaneously holds the positions of township trustee and project inspector for the county engineer, several potential conflicts of interest exist because the individual is subject to influences that may prevent him from discharging objectively and in completely disinterested fashion the duties of township trustee.

Two public positions are not incompatible, however, if the potential conflicts of interest are remote and speculative. 1979 Op. Att'y Gen. No. 79-111 at 2-372. Factors used in determining whether potential conflicts of interest are remote and speculative include the following:

> the degree of remoteness of a potential conflict, the ability or inability of an individual to remove himself from the conflict, whether the individual exercises decision-making authority in both positions, whether the potential conflict involves the primary

> functions of each position, and whether the potential conflict may involve budgetary controls.

Id.

Application of these factors to the potential conflicts of interest that result from the simultaneous holding of the two positions with which you are concerned indicates that the potential conflicts are remote and speculative. *See generally* 1994 Op. Att'y Gen. No. 94-022 at 2-100 ("[r]ecent opinions of the Attorney General have applied these factors to the potential conflicts of interest presented when an individual holds simultaneously the positions of township trustee and employee in the county engineer's office, and concluded that, as a general matter, these potential conflicts of interest are too remote and speculative to render the positions of township trustee and employee in the county engineer's office incompatible"). It is only speculative whether a township will enter into a contract with the county concerning the construction, improvement, or repair of roads pursuant to R.C. 164.15, R.C. 307.15, or R.C. 5555.43, and whether a county engineer will enter into an agreement with the owner of land pursuant to R.C. 5543.13 or R.C. 5543.17 as to compensation or damages already sustained or to be sustained by the owner of land. *Id.* Even if a county were to enter into any of such contracts, it would relate to only a small fraction of the duties of each position in question and would not pertain to budgetary matters. *See id.* As such, the potential conflicts do not concern the primary functions of either position or budgetary controls. *Id.*

A township trustee does exercise decision making authority with respect to the making of township contracts, and the approval of agreements between the county engineer and an owner of land as to compensation or damages already sustained or to be sustained by the owner of land. 1994 Op. Att'y Gen. No. 94-022 at 2-100. "Given that such situations are likely to be rare, however, a township trustee should be able to remove himself from any discussions, negotiations, or votes concerning a contract with the county for road construction, improvement, or maintenance, or from any discussions or votes concerning an agreement entered into between the county engineer and the owner of land pursuant to R.C. 5543.13 or R.C. 5543.17." *Id.* Therefore, the above potential conflicts of interest do not render the positions of township trustee and project inspector for the county engineer incompatible.

An additional potential conflict of interest exists in that the individual, as a project inspector for the county engineer, may be required to inspect road improvements or construction made by the board of township trustees on which he sits. Because the individual serves as a trustee of a township located within the county that employs him as a project inspector, the individual, as a project inspector, may be predisposed to conduct his inspection of the road improvements of the township in a way that is favorable to the township. A potential conflict of interest thus exists because the individual, as a project inspector, may be subject to influences that may prevent him from discharging objectively and in a completely disinterested fashion his duties as a project inspector.

As mentioned above, however, you have stated that the position of project inspector in question is not responsible for inspecting the roads within the township in which he serves as a trustee, supervising township road improvements, or preparing plans and specifications for

improvements for townships. Consequently, the potential conflict of interest that would result from the individual, as a project inspector for the county engineer, conducting inspections of the road improvements of the township in which he serves as a trustee does not exist, and, therefore, is remote and speculative. Accordingly, if an individual who holds the positions of township trustee and project inspector for the county engineer does not conduct inspections of the road improvements of the township in which he serves as a trustee, the individual is not subject to an impermissible conflict of interest.

Based on the foregoing it is my opinion, and you are advised that an individual may hold simultaneously the positions of township trustee and project inspector for the county engineer, provided the individual is appointed township trustee or is elected to that position in a nonpartisan election, and further provided that the individual, as township trustee, does not participate in discussions, negotiations, or votes concerning a contract for the construction, improvement, or repair of roads entered into between the county and his township pursuant to R.C. 307.15, R.C. 164.15, or R.C. 5555.43, or an agreement entered into between the county engineer and an owner of land pursuant to R.C. 5543.13 or R.C. 5543.17. In addition, the individual, as a project inspector for the county engineer, may not conduct inspections of the road improvements of the township in which he serves as a trustee.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

September 23, 1997

The Honorable David P. Joyce
Geauga County Prosecuting Attorney
Courthouse Annex
231 Main Street
Chardon, Ohio 44024

SYLLABUS: 97-045

An individual may hold simultaneously the positions of township trustee and project inspector for the county engineer, provided the individual is appointed township trustee or is elected to that position in a nonpartisan election, and further provided that the individual, as township trustee, does not participate in discussions, negotiations, or votes concerning a contract for the construction, improvement, or repair of roads entered into between the county and his township pursuant to R.C. 307.15, R.C. 164.15, or R.C. 5555.43, or an agreement entered into between the county engineer and an owner of land pursuant to R.C. 5543.13 or R.C. 5543.17. In addition, the individual, as a project inspector for the county engineer, may not conduct inspections of the road improvements of the township in which he serves as a trustee.