May 25, 1999

OPINION NO. 99-032

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 a county prosecuting attorney has a duty to represent a township zoning inspector when a decision of the township board of zoning appeals is appealed to the court of common pleas. In your letter you state that your question arises in light of the analysis set forth in 1998 Op. Att'y Gen. No. 98-025. That opinion concludes that, pursuant to R.C. 309.09(B), which states that the county prosecuting attorney "shall be the legal adviser for all township officers,"[1] a county prosecuting attorney has no duty to represent a township board of zoning appeals when a decision of the board is appealed to the court of common pleas.[2]

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[1] A county prosecuting attorney is not the legal adviser for township officers when "the township has adopted the limited self-government form of township government pursuant to Chapter 504. of the Revised Code and has not entered into a contract to have the prosecuting attorney serve as the township law director." R.C. 309.09(B).

[2] In reaching its conclusion, 1998 Op. Att'y Gen. No. 98-025 relies upon 1992 Op. Att'y Gen. No. 92-080, which concludes that since members of a township board of zoning appeals are not township officers for purposes of R.C. 309.09(B), such board members are not entitled to legal representation by the county prosecuting attorney under that statute, and 1990 Op. Att'y Gen. No. 90-077, which concludes that members of a township board of zoning appeals, members of a township zoning commission, and township zoning inspectors are not township officers for purposes of receiving health insurance benefits under R.C. 505.60.

Initially, we note that, following the issuance of 1998 Op. Att'y Gen. No. 98-025, the General Assembly amended R.C. 309.09(B) by adding language to that statute that grants a county prosecuting attorney the authority to represent township boards and commissions. *See* Am. Sub. S.B. 201, 122nd Gen. A. (1998) (eff. Dec. 21, 1998). As thus amended, R.C. 309.09(B) now provides, in pertinent part, that the prosecuting attorney "shall be the legal adviser for all township officers, *boards*, and *commissions*." (Emphasis added.) This amendment was enacted in response to the conclusion in 1998 Op. Att'y Gen. No. 98-025 that a county prosecuting attorney has no duty to represent a township board of zoning appeals when a decision of the board is appealed to the court of common pleas. This amendment means that a county prosecuting attorney is required to provide legal counsel and representation to a township zoning commission established under R.C. 519.04 and a township board of zoning appeals appointed pursuant to R.C. 519.13.

Let us now address your specific question, which asks whether the county prosecuting attorney has a duty to represent a township zoning inspector when a decision of the township board of zoning appeals is appealed to the court of common pleas. R.C. 519.02 authorizes a board of township trustees to regulate by resolution building and land use "[f]or the purpose of promoting the public health, safety, and morals." For the purpose of enforcing the provisions of R.C. 519.01-.99 (township zoning) and its zoning regulations, a board of township trustees may appoint a township zoning inspector, who is delegated the authority to enforce township zoning laws and regulations on behalf of the board of township trustees. R.C. 519.16; *see* R.C. 519.24.

A board of township trustees or a township zoning inspector is authorized to institute legal actions or proceedings to prevent, enjoin, abate, or remove the unlawful location, erection, construction, reconstruction, enlargement, change, maintenance, or use of a building or land in violation of a provision of R.C. 519.01-.99 or a township zoning regulation. R.C. 519.24. In addition, when a decision made by a board of township zoning appeals is appealed to the court of common pleas, either the board of township trustees or the township zoning inspector may defend the decision of the board of zoning appeals. *Kasper v. Coury*, 51 Ohio St. 3d 185, 555 N.E.2d 310 (1990). Thus, either a board of township trustees or a township zoning inspector may institute a legal action or proceeding to prevent violations of township zoning laws or regulations or may defend a decision of the board of zoning appeals that is appealed to the court of common pleas.

The Ohio Supreme Court has ruled that under the provisions of R.C. 519.24, a board of township trustees that opposes a requested variance from the terms of the board's zoning resolution may properly prosecute an appeal from the judgment of a court of common pleas granting the variance. *Kline v. Board of Trustees*, 13 Ohio St. 2d 5, 233 N.E.2d 515 (1968). In support of this ruling the court explained that R.C. 519.24 sanctions the participation and appearance by the board of township trustees "in a matter wherein an attempt is made to interfere with a zoning resolution adopted by [the board]." *Id.* at 8, 233 N.E.2d at 517.

Of particular significance to your inquiry is the court's view of the role of the county prosecuting attorney in representing the interests of the board of township trustees in zoning litigation:

> By Section 309.09, Revised Code, the prosecuting attorney of a county is the legal adviser and counsel of a board of township trustees within the county and is required to prosecute and defend *any action which may affect such board*. The prosecuting attorney appeared in the Court of Common Pleas in opposition to the Kline appeal and represented all those contesting such appeal. In the motion to vacate the unfavorable judgment of the Court of Common Pleas and for a new trial, the prosecuting attorney denoted himself as representing the Board of Township Trustees and in that motion denoted the Board of Township Trustees as the complaining agency. (Emphasis added.)

Id. at 7-8, 233 N.E.2d at 517.

A board of township trustees is given the authority to regulate building and land use "[f]or the purpose of promoting the public health, safety, and morals." R.C. 519.02. In discharging this responsibility, a board of township trustees adopts a zoning resolution, R.C. 519.10, and submits it to the township electorate for their approval, R.C. 519.11. If the township electorate approves the zoning resolution, the board of township trustees is required to appoint a township board of zoning appeals, R.C. 519.13, and may appoint a township zoning inspector, R.C. 519.16. As explained above, a township zoning inspector enforces township zoning laws and regulations on behalf of the board of township trustees. Pursuant to R.C. 519.14(A), a township board of zoning appeals is authorized to hear and decide appeals from requirements, decisions, or determinations made by a township zoning inspector in the enforcement of R.C. 519.02-.25 or any township zoning resolution adopted pursuant thereto.

It is apparent, therefore, that a legal action or proceeding pertaining to the enforcement of township zoning laws and regulations affects a township and its board of trustees. *Kline v. Board of Trustees*. Certainly this is true in the case of an appeal to a court of common pleas from a decision of a township board of zoning appeals upholding and requiring compliance with the terms of the township's zoning laws and regulations. In that situation the township has a legitimate interest in having the court affirm the decision of the board of zoning appeals, thus preserving the efficacy and integrity of the township zoning resolution, as adopted by the board of township trustees and approved by the township electors. *See* R.C. 519.03-.11.

It is thus appropriate for the county prosecuting attorney to represent the township in such an appeal, *see* R.C. 309.09(B); *Kline v. Board of Trustees*, even though the township zoning inspector, rather than the board of township trustees, is the only party named in the appeal. In that situation the township zoning inspector represents the interests of the township as the surrogate of the board of township trustees. In order to ensure the proper representation of the township's legal interests, it is necessary that the county prosecuting attorney represent the

township zoning inspector when a decision of the township board of zoning appeals is appealed to the court of common pleas or to any other court. Accordingly, in such a situation the county prosecuting attorney, when requested by a board of township trustees, is required to represent the township zoning inspector.[3]

Based on the foregoing, it is my opinion, and you are hereby advised that a county prosecuting attorney, when requested by a board of township trustees, is required to represent a township zoning inspector when a decision of the township board of zoning appeals is appealed to the court of common pleas or to any other court.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

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[3] Pursuant to R.C. 309.09(B), when the board of township trustees finds it advisable or necessary to have additional legal counsel it may employ an attorney other than the county prosecuting attorney to represent the township and its officers, boards, and commissions in their official capacities and to advise them on legal matters. Thus, a board of township trustees may employ an attorney other than the county prosecuting attorney to represent the township zoning inspector when an appeal is taken from a decision of the township board of zoning appeals.

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SYLLABUS: 99-032

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