April 3, 2002

The Honorable Robert L. Becker
Licking County Prosecuting Attorney
20 South Second Street
Newark, Ohio 43055

SYLLABUS: 2002-012

1. A member of the board of health of a general health district who serves simultaneously as a member of a township board of zoning appeals within the same county is not subject to any impermissible conflicts of interest, provided he abstains from participating in any deliberations, discussions, negotiations, or votes concerning the issuance of orders or enforcement actions by the board of health against the township.

2. A member of a township board of zoning appeals who serves simultaneously as a member of a board of health of a general health district within the same county is not subject to any impermissible conflicts of interest, provided he abstains from participating in any deliberations, discussions, negotiations, or votes concerning enforcement action taken by the township against the board of health, or the issuance to the board of health of a variance from the terms of the township's zoning resolutions or a conditional zoning certificate.

3. A person who serves simultaneously as a member of the board of health of a general health district and member of a township board of zoning appeals should abstain from participating in any deliberations, discussions, negotiations, or votes involving property that is the subject of regulatory or enforcement actions before both boards.

April 3, 2002

OPINION NO. 2002-012

The Honorable Robert L. Becker
Licking County Prosecuting Attorney
20 South Second Street
Newark, Ohio 43055

Dear Prosecutor Becker:

You have requested an opinion concerning the propriety of a person serving simultaneously in two public positions. You have stated that a person currently serves within your county as a member of the board of health of a general health district and member of a township board of zoning appeals.[1] In light of this simultaneous service, you wish to know whether the person is subject to any conflicts of interest that prohibit him from serving simultaneously in these two positions.[2]

The principle is well established that a person may not serve simultaneously in two public positions when he is subject to an impermissible conflict of interest. 1999 Op. Att'y Gen. No. 99-043 at 2-262; 1987 Op. Att'y Gen. No. 87-092 at 2-603. An impermissible conflict of interest occurs when a person's "responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective." 1980 Op. Att'y Gen. No. 80-035 at 2-149.

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[1] R.C. 3709.01 provides that, "[t]he townships and villages in each county shall be combined into a health district and shall be known as a 'general health district.'"

[2] Whether a person is subject to any conflicts of interest when serving simultaneously in two public positions is one of the seven questions that must be addressed when determining whether those two positions are compatible. *See generally* 2000 Op. Att'y Gen. No. 2000-025 at 2-166 and 2-167. You have informed us that you previously determined that these two positions are, on the facts presented, compatible with respect to the other six questions of the compatibility analysis. You have, therefore, asked us to address only the conflict of interest aspect of that analysis.

In order to determine whether an impermissible conflict of interest exists between two positions, we must first review the powers, duties, and responsibilities bestowed upon each position. 1999 Op. Att'y Gen. No. 99-001 at 2-2. This review will enable us to determine whether a person who holds the two positions simultaneously will confront a conflict of interest when he exercises the powers, duties, and responsibilities in either or both positions.[3] *Id*. at 2-2 and 2-3. If this review discloses any such conflicts of interest, we must then determine the immediacy of each conflict. 2000 Op. Att'y Gen. No. 2000-025 at 2-170. Where it can be demonstrated that the conflicts may be sufficiently avoided or eliminated entirely, the person may serve in both positions. *Id*. Factors used in making this determination include the probability of the conflict occurring, the ability of the person to remove himself from the conflict (should it arise), whether the person exercises decision-making authority in both positions, and whether the conflict relates to the primary functions of each position, or to financial or budgetary matters. *Id*.

Let us now review the powers, duties, and responsibilities of the respective positions. A board of health of a general health district is responsible for preserving the health and safety of persons in the district. 1981 Op. Att'y Gen. No. 81-079 at 2-311; *see* R.C. 3701.56; R.C. 3709.21-.22; R.C. 3709.26. *See generally* R.C. 3717.11 (a board of health may license retail food establishments and food service operations); R.C. Chapter 3733 (a board of health may regulate manufactured home parks, marinas, and agricultural labor camps); R.C. 3734.04 (a board of health may "provide for the inspection, licensing, and enforcement of sanitary standards for solid waste facilities"). A board of health is required to abate and remove all nuisances within its jurisdiction, R.C. 3707.01; R.C. 3707.03, control the spread of communicable diseases, R.C. 3707.04-.25; R.C. 3707.29-.32; R.C. 3709.22; R.C. 3709.27, inspect the sanitary condition of all schools and school buildings within its jurisdiction, R.C. 3707.26; R.C. 3709.22, and distribute antitoxin for the treatment of cases of diphtheria, R.C. 3709.25. A board of health may also offer vaccinations, R.C. 3707.27, issue permits for the sale of ice for domestic purposes, R.C. 3707.38, provide nursing care services, R.C. 3709.15, provide infant welfare stations and prenatal clinics, R.C. 3709.18, and provide free treatment for venereal diseases, R.C. 3709.22; R.C. 3709.24. In order to fulfill its various duties, a board of health may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances. R.C. 3707.01; R.C. 3709.21; R.C. 3714.12. *See generally* 2001 Op. Att'y Gen. No. 2001-017.

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[3] R.C. 102.08(A) authorizes the Ohio Ethics Commission to issue advisory opinions concerning the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. In light of this grant of authority, we believe it proper to refrain from interpreting such provisions by way of a formal opinion. 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three). It is, therefore, recommended that you contact the Ohio Ethics Commission for advice and interpretations concerning these provisions in the situation in which a person serves simultaneously as a member of a township board of zoning appeals and member of a board of health of a general health district.

A township board of zoning appeals' duties relate to the use and development of land pursuant to a comprehensive township zoning plan adopted under R.C. Chapter 519. *See* R.C. 519.02 (authorizing a board of township trustees to regulate building and land use in the unincorporated territory of the township through zoning). Specifically, a board of zoning appeals is responsible for determining when a person is required to comply with, or is exempt from, the statutes or township resolutions pertaining to zoning. In this regard, a board of zoning appeals is authorized to hear and decide appeals when it is alleged that an administrative official has made an error in the enforcement of R.C. Chapter 519 or zoning resolutions adopted pursuant thereto. R.C. 519.14(A). The board may also grant variances from the terms of zoning resolutions, grant conditional zoning certificates, and revoke an authorized variance or conditional zoning certificate granted for the extraction of minerals. R.C. 519.14(B)-(D).

In light of the foregoing, we believe that a person who serves simultaneously as a member of a general health district and member of a township board of zoning appeals within the same county may face several conflicts of interest. A member of the board of health may have to participate in deliberations, discussions, negotiations, or votes concerning the issuance of orders to compel a township to perform or refrain from performing an activity, or the commencement of a civil action against the township. For instance, R.C. 3707.01 authorizes a board of health to issue orders to "compel the owners, agents, assignees, occupants, or tenants of any lot, property, building, or structure to abate and remove any nuisance therein, and prosecute such persons for neglect or refusal to obey such orders." *See generally* R.C. 3709.22 (a board of health may "provide for the inspection and abatement of nuisances dangerous to public health or comfort, and may take such steps as are necessary to protect the public health and to prevent disease"). If an order made by a board of health pursuant to R.C. 3707.01 "is not complied with in whole or in part, the board may petition the court of common pleas for an injunction requiring all persons to whom such order of the board is directed to comply with such order." R.C. 3707.021.

Similarly, R.C. 3709.21 authorizes a board of health of a general health district to make orders as are necessary for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances. If an order of a board of health made pursuant to R.C. 3709.21 "is not complied with in whole or in part, the board may petition the court of common pleas for injunctive or other appropriate relief requiring all persons to whom such order of the board is directed to comply with such order." R.C. 3709.211.

Accordingly, if a township owns real property, *see* R.C. 9.20; R.C. 503.01; R.C. 505.10; R.C. 511.11, a member of a board of health could be required to participate in deliberations, discussions, negotiations, or votes concerning the issuance of an order against the township pursuant to R.C. 3707.01 or the commencement of an enforcement action against the township pursuant to R.C. 3707.021. *See generally* 1956 Op. Att'y Gen. No. 7436, p. 819 (the jurisdiction of a board of health of a general health district extends to property and buildings of a county and municipal corporation located within the territory of the district). Also, a member of a board of health could be required to participate in deliberations, discussions, negotiations, or votes concerning the issuance of an order against the township pursuant to R.C. 3709.21 or the commencement of an enforcement action against the township pursuant to R.C. 3709.211. In

such situations, it may be difficult for a member of a board of health of a general health district who is a member of a township board of zoning appeals to perform his duties with respect to such matters in a completely objective manner because of the position he holds with the township. *See* 2001 Op. Att'y Gen. No. 2001-027 at 2-157.

We believe, nonetheless, that this potential conflict can be sufficiently avoided or mitigated. First, it seems unlikely that a board of health will find it necessary to consider the issuance of orders against the township or the bringing of enforcement actions against the township. Thus, such matters will generally be something that the board of health will have to consider infrequently. Further, when such a matter does come before the board of health, a board member who also serves as a member of the township board of zoning appeals will be able to remove himself from any deliberations, discussions, negotiations, and votes in the matter since the board of health is capable of carrying out its duties when one of its members abstains from a matter. 2001 Op. Att'y Gen. No. 2001-040 at 2-246; *see* R.C. 3709.02 (the board of health of a general health district shall consist of five members and a majority of the members of the board constitutes a quorum). *See generally State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604, 605 (1965) ("[i]n the absence of a statute to the contrary, any action by a board requires that a quorum participate therein, and that a majority of the quorum concur"). In addition, a member of a board of health, as a public official, has a duty to abstain from participating in any matter that would impair his objectivity. 2001 Op. Att'y Gen. No. 2001-040 at 2-246. *See generally* 1981 Op. Att'y Gen. No. 81-010 at 2-33 ("[i]f an actual conflict of interest should arise between [two] positions, a person serving in both positions would be expected to appropriately remove himself from the matter"). Finally, the conflict does not involve financial or budgetary matters.

Thus, the potential for this conflict of interest will not prohibit a member of the board of health of a general health district from serving simultaneously as a member of a township board of zoning appeals within the same county, provided he abstains from participating in any deliberations, discussions, negotiations, or votes concerning the issuance of orders or enforcement actions by the board of health against the township. *Cf.* 1997 Op. Att'y Gen. No. 97-026 (a person may serve simultaneously as president of the legislative authority of a non-charter city and member of the board of health of a general health district, provided that the person, as a member of the board of health, abstains from any votes that affect the exercise of his duties or responsibilities as president of the legislative authority).

Let us next consider a conflict of interest that a member of a township board of zoning appeals may confront in conjunction with his service as a member of the board of health of a general health district within the same county. Pursuant to R.C. 519.14, a board of zoning appeals may hear and decide appeals in which it is alleged that an administrative official has made an error in the enforcement of R.C. Chapter 519 or zoning resolutions adopted pursuant thereto, grant variances from the terms of zoning resolutions, and grant conditional zoning certificates.

Because a board of health of a general health district may own real property within a township, R.C. 3707.55(A), a board of health is subject to the land use and zoning regulations of the township. As such, there may be instances in which the township may take action against the board of health to enforce its land use and zoning regulations. *See* R.C. 519.16. In such instances, the board of health may appeal to the township board of zoning appeals the enforcement action taken by the township, or request the township board of zoning appeals for a variance from the terms of the township's zoning resolutions or a conditional zoning certificate. *See* R.C. 519.14.

If a board of health were to take a matter before the township board of zoning appeals, the members of the board of zoning appeals could be required to discuss, deliberate, negotiate, or vote upon the matter. In such situations, it could be difficult for a member of the board of zoning appeals who is also a member of the board of health to perform his duties with respect to the matter in a completely objective and disinterested manner because of his responsibilities as a member of the board of health. *See* 2001 Op. Att'y Gen. No. 2001-040 at 2-245.

As in the case of the previously addressed conflict that occurs when a member of the board of health participates in deliberations, discussions, negotiations, or votes concerning enforcement actions against a township, we believe the occasions will be few in which a member of a township board of zoning appeals will be required to participate in deliberations, discussions, negotiations, or votes concerning enforcement actions against a board of health. Further, a member of the township board of zoning appeals may easily remove himself from any such deliberations, discussions, negotiations, or votes. *See* R.C. 519.13 (a township board of zoning appeals shall consist of five members). Also, a member of a township board of zoning appeals has a duty to remove himself from any matter in which his objectivity might be impaired. *See* 2001 Op. Att'y Gen. No. 2001-040 at 2-246. Finally, this conflict of interest does not relate to financial or budgetary matters.

Accordingly, the potential for this conflict of interest does not prohibit a member of a township board of zoning appeals from serving simultaneously as a member of a board of health of a general health district within the same county, provided he abstains from participating in any deliberations, discussions, negotiations, or votes concerning enforcement action taken by the township against the board of health, or the issuance to the board of health of a variance from the terms of the township's zoning resolutions or a conditional zoning certificate. *Cf.* 1997 Op. Att'y Gen. No. 97-026 (a person may serve simultaneously as president of the legislative authority of a non-charter city and member of the board of health of a general health district, provided that the person, as president of the legislative authority, abstains from any votes that affect the functions, obligations, or operation of the general health district).

Finally, in an opinion you provided to the township in this matter, you stated the following:

> It seems there could be instances where the Board of Health might cite a property and the township may not or vice versa. In both capacities, the

> individual in question would be in a decision making capacity on the … board of health and on the zoning appeals board. While the decision of one entity to pursue or not pursue a person for a violation of its rules does not prohibit or control the other entity's ability or capacity to do so, it seems that preconceived ideas may form at one board level or another which may influence the individual to act accordingly while functioning on the other board and also create a potential for attempting to assert the position of one board upon the other board.

See generally 1991 Op. Att'y Gen. No. 91-018 (syllabus, paragraph three) ("[v]arious statutory provisions may be available to remedy problems arising from the storage of junk motor vehicles on residential or agricultural property within a township. Among them are nuisance provisions, such as R.C. 505.87, R.C. 3707.01-.02, and R.C. Chapter 3767; … and local zoning provisions adopted under R.C. Chapter 519"); 1988 Op. Att'y Gen. No. 88-051 (syllabus, paragraph two) ("[l]and that has been approved by a county board of health as a site for the commercial disposal of septage, remains subject to applicable township zoning regulations"). *See generally also Atwater Township Trustees v. B.F.I. Willowcreek Landfill*, 67 Ohio St. 3d 293, 617 N.E.2d 1089 (1993) (a township anti-nuisance zoning resolution does not conflict with R.C. Chapter 3734 because R.C. 3734.10 expressly reserves the rights of a "person," which is defined to include any political subdivision or local body, R.C. 3734.01(G), to bring an action to suppress nuisances against the operator of a solid waste disposal site).

Although both a board of health and a board of township zoning appeals are concerned with the health and safety of the public, the duties of each board are not interrelated or interdependent. As explained previously, a board of health is primarily concerned with the prompt diagnosis and control of communicable diseases; the inspection of sanitary conditions in public buildings, places where food is manufactured, handled, stored, sold, or offered for sale, and solid waste facilities; and the abatement and removal of all nuisances within its jurisdiction. In contrast, a board of township zoning appeals' duties relate to controlling the patterns of land use and development. Consequently, an enforcement action by a board of health involving a building, structure, or tract of land that was or is the subject of an enforcement action before the township board of zoning appeals will not involve the same issue presented to the board of zoning appeals. Likewise, an enforcement action by a township board of zoning appeals involving a building, structure, or tract of land that was or is the subject of an enforcement action before the board of health will not involve the same issue presented to the board of health.

While the jurisdiction of each of these boards encompasses different areas of regulation, we agree with your assessment that a person who serves as a member of both boards may yet be subject to improper influence when the same property is the subject of regulatory or enforcement actions by both boards. As we have already stated, a person who serves simultaneously as a member of a board of health and a member of a township board of zoning appeals is required to abstain from participating in any matter in which his objectivity might be impaired. 2001 Op. Att'y Gen. No. 2001-040 at 2-246. Therefore, a person who serves as a member of a board of health and member of a township board of zoning appeals should abstain from participating in

deliberations, discussions, negotiations, or votes involving property that is the subject of regulatory or enforcement actions by both boards.

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. A member of the board of health of a general health district who serves simultaneously as a member of a township board of zoning appeals within the same county is not subject to any impermissible conflicts of interest, provided he abstains from participating in any deliberations, discussions, negotiations, or votes concerning the issuance of orders or enforcement actions by the board of health against the township.

2. A member of a township board of zoning appeals who serves simultaneously as a member of a board of health of a general health district within the same county is not subject to any impermissible conflicts of interest, provided he abstains from participating in any deliberations, discussions, negotiations, or votes concerning enforcement action taken by the township against the board of health, or the issuance to the board of health of a variance from the terms of the township's zoning resolutions or a conditional zoning certificate.

3. A person who serves simultaneously as a member of the board of health of a general health district and member of a township board of zoning appeals should abstain from participating in any deliberations, discussions, negotiations, or votes involving property that is the subject of regulatory or enforcement actions before both boards.

Respectfully,

BETTY D. MONTGOMERY
Attorney General