March 31, 2006

The Honorable Martin Frantz
Wayne County Prosecuting Attorney
115 West Liberty Street
Wooster, Ohio 44691

SYLLABUS: 2006-015

A person may not serve simultaneously as a township trustee and member of a township zoning commission or township board of zoning appeals within the same township.

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OPINION NO. 2006-015

The Honorable Martin Frantz
Wayne County Prosecuting Attorney
115 West Liberty Street
Wooster, Ohio 44691

Dear Prosecutor Frantz:

You have requested an opinion whether a person may serve simultaneously as a township trustee and member of a township zoning commission or township board of zoning appeals within the same township. Because a township trustee may not hold a position filled by the board of township trustees on which he serves, a township trustee may not serve simultaneously as a member of a township zoning commission or township board of zoning appeals within the same township.

It is a well-settled rule that a person may not serve simultaneously in two public positions when one position is subordinate to, or in any way a check upon, the other. 2002 Op. Att'y Gen. No. 2002-005 at 2-24; *see also State ex rel. Hover v. Wolven*, 175 Ohio St. 114, 118, 191 N.E.2d 723 (1963) ("'[o]ne of the most important tests as to whether offices are incompatible is found in the principle that the incompatibility is recognized whenever one is subordinate to the other in some of its important and principal duties, and subject in some degree to its supervisory power'" (citation omitted)). A corollary to this rule is that an officer is disqualified from serving on a board or commission to which he makes appointments, unless a statute authorizes the officer to hold the other position. *See, e.g., State ex rel. Louthan v. Taylor*, 12 Ohio St. 130, 134 (1861); 2005 Op. Att'y Gen. No. 2005-016; 2001 Op. Att'y Gen. No. 2001-034 at 2-204; 1998 Op. Att'y Gen. No. 98-009 at 2-51; 1996 Op. Att'y Gen. No. 96-022 at 2-78; 1984 Op. Att'y Gen. No. 84-059 at 2-194; 1983 Op. Att'y Gen. No. 83-070 at 2-289; 1979 Op. Att'y Gen. No. 79-086 at 2-277; 1947 Op. Att'y Gen. No. 1526, p. 23, at 24; 1936 Op. Att'y Gen. No. 5408, vol. I, p. 482; 1936 Op. Att'y Gen. No. 5114, vol. I, p. 71, at 75; 1935 Op. Att'y Gen. No. 3865, vol. I, p. 67, at 68. In other words, unless a statute provides otherwise, a clear case of incompatibility is presented when a person wishes to hold a public position, and, at the same time, serve as a member of the board that is the appointing authority for that position. *See generally* 1958 Op. Att'y Gen. No. 1742, p. 93, at 94 ("[t]here can be no doubt that the power to remove is a complete check of one [position] upon the other"). *See generally also* 1979 Op. Att'y Gen. No. 79-099 at 2-308 ("[t]here can be a no stronger case of subordination, and, therefore, incompatibility, than a direct employer-employee relationship").

With respect to your specific inquiry, R.C. 519.04 and R.C. 519.05 authorize a board of township trustees to appoint, remove, and compensate the members of the township zoning commission. Members of a township board of zoning appeals are also appointed, removed, and compensated by the board of township trustees. R.C. 519.13; *see also* R.C. 519.04. The board of township trustees thus is the appointing authority for the members of the township zoning commission and township board of zoning appeals.

Because no statute directly or indirectly authorizes a board of township trustees to appoint one of its own members to the township zoning commission or township board of zoning appeals, it follows, under the general rule, that a member of a board of township trustees may not serve on a township zoning commission or township board of zoning appeals within the same township. *See generally* 1984 Op. Att'y Gen. No. 84-059 at 2-194 ("because the township trustees select the members of the board of trustees of the regional water and sewer district, the township trustees may not themselves serve as members of such board"); 1947 Op. Att'y Gen. No. 1526, p. 23, at 24 (because a township trustee is disqualified from serving on a board to which he makes appointments, it follows that a township trustee may not serve on a township memorial board to which he makes appointments). *See generally also* R.C. 519.05 ("[n]o township trustee shall be employed by the zoning commission of his township").

This conclusion finds additional support in the fact that conflicts of interest inherently exist when a township trustee serves as a member of the township zoning commission or township board of zoning appeals within the same township.[1] *See generally* 2002 Op. Att'y Gen.

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[1] In your letter you have also asked us about the ethical provisions that may apply when a township trustee serves simultaneously as a member of the township zoning commission or township board of zoning appeals within the same township. In this regard, R.C. 2921.42(A)(4) states, in relevant part, that, "[n]o public official shall knowingly … [h]ave an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected." *See also* R.C. 511.13 ("[n]o member of the board of township trustees or any officer or employee thereof shall be interested in any contract entered into by such board"). A township trustee, as an elected officer, *see* R.C. 505.01, is subject to this prohibition. *See* R.C. 2921.01(A) (as used in R.C. 2921.42, the term "[p]ublic official" means "any elected or appointed officer, or employee, or agent of … any political subdivision"). For purposes of R.C. 2921.42, the term "[p]ublic contract" includes "the employment of an individual by … any … political subdivision[]." R.C. 2921.42(G)(1)(a).

R.C. 2921.42(A)(4) thus prohibits a township trustee from knowingly having an interest in the profits or benefits of any person's employment, or a contract for the employment of any person, by the township. *See generally* Ohio Ethics Comm'n, Advisory Op. No. 99-002, slip op. at 3 ("[t]he Ethics Commission has held that R.C. 2921.42(A)(4) prohibits an elected officer of a political subdivision from simultaneously holding compensated employment with his own political subdivision because an employment relationship between a political subdivision and a

No. 2002-039 at 2-249 ("a person may not serve simultaneously in two public positions when he is subject to an impermissible conflict of interest"). R.C. Chapter 519 establishes a comprehensive system for adopting and amending a township zoning resolution for all or any part of the unincorporated territory of the township. Under this system, the board of township trustees and the township zoning commission are required to review and comment upon the work of the other on the township zoning resolution or any amendments thereto. *See, e.g.*, R.C. 519.09 (if a board of township trustees determines that changes must be made to a township zoning plan prepared by the township zoning commission, the board resubmits the plan to the commission for approval, disapproval, or suggestions; after reviewing the board's changes, the commission resubmits the plan to the board along with its recommendation); R.C. 519.10 (following the required public hearings and recommendations, a board of township trustees votes upon the adoption of the township zoning resolution); R.C. 519.12 (the board of township trustees must, upon receipt of the township zoning commission's recommendation on a proposed amendment to the township zoning resolution, adopt or deny the recommendations of the commission, or adopt a modification of the recommendations). Similarly, there will be instances in which the township board of zoning appeals will be required to determine when a person is required to comply with, or is exempt from, the provisions of the township zoning resolution prepared by the board of township trustees and township zoning commission. *See, e.g.*, R.C. 519.14 (a township board of zoning appeals may authorize variances from the terms of a zoning resolution, grant

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public employee is a 'public contract' for purposes of R.C. 2921.42"); Ohio Ethics Comm'n, Advisory Op. No. 91-002 (a city council member is prohibited from holding compensated employment with the city's fire department). *See generally also* Ohio Ethics Comm'n, Advisory Op. No. 92-012, slip op. at 2 ("[t]he Ethics Commission has consistently held that an employment relationship between a political subdivision and an employee is a 'public contract' for purposes of R.C. 2921.42 since the political subdivision is purchasing or acquiring the services of the employee"). A township trustee who violates R.C. 2921.42(A)(4) is guilty of having an unlawful interest in a public contract, a misdemeanor of the first degree. R.C. 2921.42(E).

If it were determined that a township trustee who serves as a member of a township zoning commission or township board of zoning appeals has an interest in a public contract for purposes of R.C. 2921.42(A)(4), the trustee could be prohibited from holding both positions. *See* 2002 Op. Att'y Gen. No. 2002-039 at 2-252 n.4. The determination whether a township trustee has an interest in a public contract for purposes of R.C. 2921.42(A)(4) is one that must be made by the Ohio Ethics Commission. *Id.*; 1990 Op. Att'y Gen. No. 90-040 at 2-161 n.1. *See generally* R.C. 102.08 (the Ohio Ethics Commission is authorized to issue advisory opinions concerning the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43). It is, therefore, recommended that you contact the Ohio Ethics Commission for guidance and advice regarding the application of R.C. 2921.42(A)(4) in the situation in which a township trustee wishes to serve simultaneously as a member of the township zoning commission or township board of zoning appeals within the same township.

conditional zoning certificates for the use of land, buildings, or other structures, and revoke authorized variances or conditional zoning certificates granted for the extraction of minerals).

In any of the foregoing situations, a person who serves as a township trustee and member of the township zoning commission or township board of zoning appeals may be subject to influences that may prevent him from making completely unbiased decisions or recommendations when performing his duties with respect to township zoning matters. *See generally* 1985 Op. Att'y Gen. No. 85-052 at 2-193 ("[i]t is not improbable that an individual holding the positions of zoning inspector and zoning commission member simultaneously might be caught between competing loyalties. An individual who served simultaneously in both capacities would be in the position of both making recommendations as to what the township zoning plan should say and enforcing the provisions of that plan" (citations omitted)). A 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; *accord* 2002 Op. Att'y Gen. No. 2002-039 at 2-249.

Conflicts of interest thus inherently exist between the positions of township trustee and member of a township zoning commission and the positions of township trustee and member of a township board of zoning appeals. While the existence of conflicts of interest between two positions does not per se render the positions incompatible, *see* 1979 Op. Att'y Gen. No. 79-111 at 2-372, the inevitability of such conflicts arising in your particular situations and the statutory duties vested in each of the respective positions lends additional support for our finding that a township trustee may not serve simultaneously as a member of a township zoning commission or township board of zoning appeals within the same township. *See* 2004 Op. Att'y Gen. No. 2004-051 at 2-450 ("[a]lthough we have concluded that a full-time fireman employed by the City of Tiffin and holding the rank of captain may also serve as a Seneca County commissioner when he refrains from participating in various matters, we would be remiss if we failed to caution you that given the number and nature of the potential conflicts of interest it may be impractical for the person to hold both of these positions at the same time"); 1941 Op. Att'y Gen. No. 3869, p. 445 (syllabus) ("[t]he office of mayor of a village is not per se incompatible with the position of chief clerk in the office of the county engineer, but may become so if the duties of each are so numerous or arduous as to render unlikely a proper execution of both"); *cf.* 1985 Op. Att'y Gen. No. 85-052 (syllabus) ("[a]n individual may not serve as both member of a township zoning commission and township zoning inspector within the same township"); 1966 Op. Att'y Gen. No. 66-034 (syllabus) ("[m]embers of the township zoning commission may not also serve on the township board of zoning appeals").

Based on the foregoing, it is my opinion, and you are hereby advised that a person may not serve simultaneously as a township trustee and member of a township zoning commission or township board of zoning appeals within the same township.

Respectfully,

JIM PETRO
Attorney General