

OPINION NO. 2000-018**Syllabus:**

The positions of township trustee and county building, manufactured home and subdivision coordinator and flood plain coordinator are compatible, provided that a person who serves simultaneously in these two positions is appointed township trustee or is elected to that position in a nonpartisan election.

To: Robert Junk, Pike County Prosecuting Attorney, Waverly, Ohio
By: Betty D. Montgomery, Attorney General, March 13, 2000

You have requested an opinion whether the positions of township trustee and county building, manufactured home and subdivision coordinator and flood plain coordinator (building coordinator) are compatible. You have stated that, pursuant to R.C. 307.37(A), the board of county commissioners has enacted a county building code and flood plain regulations pertaining to single-family, two-family, and three-family dwellings. In addition, the county planning commission has adopted pursuant to R.C. 711.10 a plan for the major streets and highways of the county and plat and subdivision regulations. In order to enforce the county building code, flood plain regulations, and subdivision regulations, the board of county commissioners and the county planning commission have established the position of building coordinator. You have stated further that the person serving as building coordinator is not certified under R.C. 3781.10 to enforce the provisions of the Ohio Basic Building Code.¹

¹R.C. 3781.10(E) authorizes the Board of Building Standards to certify local officials for the purpose of enforcing the provisions of the Ohio Basic Building Code.

The seven questions for determining whether two public positions are compatible are as follows:

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 employment in another public position or the holding of another public office?
3. Is one position 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, resolutions, or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

See 1979 Op. Att'y Gen. No. 79-111 at 2-367 and 2-368.

The sixth and seventh questions concern the applicability of local charter provisions, resolutions, ordinances, and federal, state, and local departmental regulations. There are no applicable charter provisions, ordinances, or state or federal regulations. Whether there is an applicable local departmental regulation or resolution is a matter for local officials to determine. It is assumed, for purposes of this opinion, that there is no local departmental regulation or resolution that prohibits a person from serving simultaneously as township trustee and building coordinator.

The first question asks whether either of the positions is a classified employment within the terms of R.C. 124.57. Pursuant to R.C. 124.57, a person in the classified service of a county and civil service township is prohibited from participating in partisan politics other than to vote or freely express his political beliefs. A township trustee, as an elected officer, *see* R.C. 505.01, serves in an unclassified position. *See* R.C. 124.11(A)(1). You have stated that the position of building coordinator is in the classified service of the county. *See* R.C. 124.11(B) (“[t]he classified service shall comprise all persons in the employ of the ... several counties ... not specifically included in the unclassified service”). Prior opinions of the Attorneys General, however, have found 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.

In your letter, you have stated that a person is elected to the position of township trustee in a non-partisan election. Accordingly, the prohibition of R.C. 124.57 does not bar a person from holding simultaneously the positions of township trustee and building coordinator.

The second question asks whether the empowering statutes of either position limit a person from being employed in another public position or holding another public office. Our research indicates that no statute prohibits a person from serving simultaneously in the positions of township trustee and building coordinator. The second question thus may be answered in the negative.

The third question asks whether one position is subordinate to, or in any way a check upon, the other. A township trustee, as an elected official, is accountable to the people who elected him. 1993 Op. Att'y Gen. No. 93-051 at 2-246. The building coordinator is appointed and employed by the board of county commissioners and the county planning commission. The positions thus serve different constituents and are not subordinate to each other. In addition, the positions operate independently of each other, and neither is responsible for assigning duties to or supervising the other. Accordingly, neither position is subordinate to, or a check upon, the other.

The fourth question 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 persons because they may more precisely determine the time demands of each position. 1999 Op. Att'y Gen. No. 99-027 at 2-177. It seems likely, however, that the duties of these two positions can be discharged competently by the same person if there is no direct conflict in the working hours of each position.

The fifth and final question asks whether there is a conflict of interest between the two positions. A person may not hold two public positions simultaneously if he would be subject to divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interest of the public. 1985 Op. Att'y Gen. No. 85-042 at 2-150. Resolution of this question requires an examination of the powers, duties, and responsibilities of the respective positions.

The powers and duties of the building coordinator are prescribed by the board of county commissioners and the county planning commission. As stated in your letter, the building coordinator is responsible for enforcing the county building code, flood plain regulations, and subdivision regulations. In this regard, the building coordinator issues various permits and inspects single-family, two-family, and three-family dwellings within the unincorporated area of the county.

A board of township trustees is the governing body of a township. As such, a board of township trustees is delegated by statute various powers and duties related to the government of the township. *See, e.g.*, R.C. 504.04(A) (a township that adopts a limited home rule government may adopt and enforce local police, sanitary, and other similar regulations); R.C. 505.27 (a board of township trustees may provide for the collection and disposal of solid wastes); R.C. 505.37 (a board of township trustees may provide fire protection); R.C. 505.48 (a board of township trustees may provide police protection); R.C. 519.02 (a board of township trustees may regulate building and land use in the unincorporated territory of the township); R.C. 5535.01(C) (a board of township trustees must maintain township roads).

Given the respective duties of the positions, we believe there is no situation in which the duties of the two positions conflict. In fact, the court in *Esler v. Summit County*, 39 Ohio Misc. 2d 8, 530 N.E.2d 973 (C.P. Summit County 1985), determined that the positions of township trustee and chief building inspector, a position similar to the position of building coordinator,² are compatible since the possibility of a conflict of interest is very remote. Therefore, a person who serves as both a township trustee and building coordinator, as that position is described in your letter, is not subject to a conflict of interest.

²*See generally* R.C. 307.38 (for purposes of administering and enforcing the county building code, a "board of county commissioners may create, establish, fill, and fix the compensation of the position of county building inspector").

As a final matter, in your letter you state that 1963 Op. Att'y Gen. No. 109, p. 184 concluded that the positions of township trustee and advisor to the county planning commission were incompatible. The opinion determined that an individual who serves simultaneously in these two positions is subject to divided loyalties. As explained in 1963 Op. Att'y Gen. No. 109, p. 184, at 186:

A township trustee cannot, of course, abandon his responsibilities to the township while acting in an advisory capacity to the county planning commission. As a township trustee he may be required to review matters relating to the location of highways, parks, civic centers and other improvements considered advantageous to the township. He will be required to pass on the advisability of these improvements as a member of the board of township trustees. As an advisor to the county planning commission he may be required to render advice concerning these same matters. In such advisory capacity he could be in a position to influence recommendations either similar or opposed to those of the board of township trustees.

In addition to the above, it should also be noted that as an advisor to the county planning commission, a township trustee could be in a position to influence recommendations as to county improvements directly affecting his township which will be submitted to the board of county commissioners for approval. As a member of the board of township trustees he may be required subsequently to submit recommendations to the board of county commissioners which depart from those of the county planning commission. In such event, as provided by Section 713.25, Revised Code, the board of county commissioners could not, except by unanimous vote, approve the recommendations of the board of township trustees. Consequently, as advisor to the county planning commission, a township trustee could be in a position to influence recommendations which might subsequently interfere with the exercise of his duties as a township trustee.

The rationale utilized in 1963 Op. Att'y Gen. No. 109, p. 184, however, is not applicable to the situation posed in your letter. First, in this instance the building coordinator does not serve in an advisory capacity to the county planning commission. Instead, the building coordinator is responsible for enforcing the county planning commission's subdivision regulations and issuing permits pursuant to these regulations. Accordingly, a person who serves simultaneously as a township trustee and building coordinator employed by a county planning commission would not be subject to the conflicts of interest identified in 1963 Op. Att'y Gen. No. 109, p. 184.

Second, following the issuance of 1963 Op. Att'y Gen. No. 109, p. 184, the General Assembly amended R.C. 713.22 to permit a member of a county planning commission to hold another public office. See 1965 Ohio Laws 253 (Am. S.B. 276, eff. Oct. 6, 1965). Pursuant to this amendment, a township trustee is permitted to serve on a county planning commission even though he would be subject to the same conflicts of interest identified in 1963 Op. Att'y Gen. No. 109, p. 184. Accordingly, we may reasonably conclude that the General Assembly has determined that the potential for these particular conflicts is remote and speculative, and thus insufficient to render the two positions about which you are concerned incompatible. See *generally* 1979 Op. Att'y Gen. No. 79-111 (two positions may be found compatible where the possibility for conflicts is remote and speculative).

Based on the foregoing, it is my opinion, and you are hereby advised that the positions of township trustee and county building, manufactured home and subdivision coordinator and flood plain coordinator are compatible, provided that a person who serves simultaneously in these two positions is appointed township trustee or is elected to that position in a nonpartisan election.

¹We are informed that the township in question has not adopted the limited home rule government form of township government under R.C. Chapter 504. Accordingly, this opinion does not address the powers of a township acting under that chapter.

²The formal opinions process cannot be used to determine the validity or effect of particular contractual provisions. *See, e.g.*, 1996 Op. Att'y Gen. No. 96-051, at 2-192; 1983 Op. Att'y Gen. No. 83-087, at 2-342 (the Attorney General is "without authority to render an opinion interpreting a particular agreement or contract").