OPINION NO. 98-025

Syllabus:

1. Pursuant to R.C. 309.09(B), 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. (1992 Op. Att'y Gen. No. 92-080, followed; overruling of 1955 Op. Att'y Gen. No. 4893, p. 89, affirmed (*see* 1990 Op. Att'y Gen. No. 90-077).)

2. A county prosecuting attorney, acting in an official capacity, is not permitted to provide legal representation to a township board of zoning appeals.

To: Thomas L. Sartini, Ashtabula County Prosecuting Attorney, Jefferson, Ohio
By: Betty D. Montgomery, Attorney General, August 24, 1998

We have received your request for an opinion on the question whether a county prosecutor has a duty to represent a township board of zoning appeals when a decision of the board is appealed to the common pleas court. You have asked also, if the county prosecutor does not have a duty to provide representation in those circumstances, whether the prosecutor may voluntarily provide such representation.

The facts you have presented are that your county is a rural county, with twenty-seven townships that rely on the prosecutor's office for essentially all their legal work. You have stated that requiring the local boards of zoning appeals to hire outside counsel when a decision is appealed to common pleas court could present a financial hardship.

As your letter indicates, your question was previously addressed in 1992 Op. Att'y Gen. No. 92-080. That opinion states: "Since members of the township zoning commission and members of the township board of zoning appeals are not township officers for purposes of R.C. 309.09(B), the county prosecuting attorney has no duty to act as their legal adviser or representative." 1992 Op. Att'y Gen. No. 92-080 (syllabus).

The analysis set forth in 1992 Op. Att'y Gen. No. 92-080 is that the prosecutor is designated as the "legal adviser for all township officers," R.C. 309.09(B), but has no statutory duty to advise or represent a township commission or board. The opinion concludes that members of a township board of zoning appeals are not township officers under Ohio Const. art. X, § 2[1] because they are appointed rather than elected, and they are not township officers under Ohio Const. art. II, § 20 and § 26[2] because their compensation is determined by the board of township trustees, rather than being set by the General Assembly on a uniform, statewide basis. *See* R.C. 519.13.[3] For these reasons, the 1992 opinion

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[1] Ohio Const. art. X, § 2 states, in part: "The general assembly shall provide by general law for the election of such township officers as may be necessary."

[2] Ohio Const. art. II, § 20 states: "The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished." Ohio Const. art. II, § 26 requires that "[a]ll laws, of a general nature, shall have a uniform operation throughout the state."

[3] A township board of zoning appeals is created pursuant to R.C. 519.13. It consists of five members, appointed by the board of township trustees, who serve for prescribed terms and are removable for cause. R.C. 519.13; *see also* R.C. 519.04. The members may be allowed expenses or compensation, or both, as approved and provided by the board of township trustees. R.C. 519.13. A township board of zoning appeals is an administrative body. R.C. 519.14-.15; *see also Kasper v. Coury*, 51 Ohio St. 3d 185, 555 N.E.2d 310 (1990); *Essroc Materials, Inc. v. Poland Township Bd. of Zoning Appeals*, 117 Ohio App. 3d 456, 690 N.E.2d 964 (Mahoning County 1997), *discretionary appeal not allowed*, 78 Ohio St. 3d 1516, 679 N.E.2d 311 (1997). Such a board is authorized to hear and decide appeals relating to actions taken by administrative officials in the enforcement of township zoning. R.C.

concludes that members of a township board of zoning appeals are not township officers for purposes of R.C. 309.09(B) and, therefore, that the county prosecutor has no duty to advise or represent them. *See State ex rel. Godfrey v. O'Brien*, 95 Ohio St. 166, 115 N.E. 25 (1917).

Your letter requests that we reconcile 1992 Op. Att'y Gen. No. 92-080 with 1955 Op. Att'y Gen. No. 4893, p. 89. The 1955 opinion considered the same question as the 1992 opinion but reached a contrary conclusion, stating: "The prosecuting attorney is, by force of [R.C. 309.09], the legal adviser of a township board of zoning appeals within his county." 1955 Op. Att'y Gen. No. 4893, p. 89 (syllabus, paragraph 1).

The 1955 opinion was overruled by 1990 Op. Att'y Gen. No. 90-077, which concludes that members of a township board of zoning appeals are not township officers for purposes of receiving health insurance benefits pursuant to R.C. 505.60. 1992 Op. Att'y Gen. No. 92-080 relies heavily upon that 1990 opinion and quotes the following portion:

> Although each member [of a township zoning commission] serves a term, one of the indicia of public office, such members serve by appointment, not election. As stated in [*State ex rel. Godfrey v. O'Brien*, 95 Ohio St. 166, 115 N.E. 25 (1917)], [Ohio] Const. art. X, § 2 (formerly at Ohio Const. art. X, § 1) requires that township offices be filled by election, not by appointment. Further, R.C. 519.05 states in part: "Members of the zoning commission may be allowed their expenses, or such compensation, or both, *as the board may approve and provide.*" (Emphasis added.) Thus, the compensation of zoning commission members is determined solely by the board of township trustees in the exercise of its discretion. Since, as discussed in *O'Brien*, Ohio Const. art. II, § 20 requires that the compensation of officers be set by the General Assembly and Ohio Const. art. II, § 26 requires that laws of a general nature operate uniformly throughout the state, I must assume that the General Assembly acted in accordance with these constitutional mandates in providing for the appointment and compensation of zoning commission members, and did not intend to confer the status of officers upon the members of the zoning commission.

1992 Op. Att'y Gen. No. 92-080, at 2-333 (quoting 1990 Op. Att'y Gen. No. 90-077, at 2-330). Both the 1990 and 1992 opinions apply the same analysis to township boards of zoning appeals. They conclude, on the basis of *State ex rel. Godfrey v. O'Brien*, that members of a township board of zoning appeals are not township officers under constitutional provisions and, therefore, cannot be township officers for purposes of R.C. 309.09.

In contrast, the 1955 opinion concluded that members of a township board of zoning appeals should be considered township officers for purposes of being represented by the county prosecuting attorney because they meet the standard criteria identifying an officer. That is, they receive their authority from law and are clothed with a part of the state

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519.14(A). The board may authorize variances or grant conditional zoning certificates. R.C. 519.14(B), (C). It may revoke an authorized variance or conditional zoning certificate for the extraction of minerals, if any condition of the variance or certificate is violated. R.C. 519.14(D). A township board of zoning appeals must follow prescribed notice and hearing requirements. R.C. 519.14-.15. The board may reverse, affirm, or modify the action appealed from. It "may make such order, requirement, decision, or determination as ought to be made, and to that end has all powers of the officer from whom the appeal is taken." R.C. 519.14.

sovereignty. *See* note 3, *supra*. The 1955 opinion recognized that members of a township board of zoning appeals were not elected township officers under Ohio Const. art. X, § 2, but did not find that they therefore could not be township officers for purposes of R.C. 309.09. Rather, the opinion noted that members of a township board of zoning appeals were appointed pursuant to R.C. 519.13 and stated:

> It must be presumed that the legislature was aware of the provisions of Section 2, Article X, at the time it enacted Section 519.13, Revised Code, but found nothing in this statute which offended this constitutional provision. In any event, in addressing myself to the question before me, I am mindful of the fact that it is not within the scope of my office to pass upon the constitutionality of legislative enactments. Until a court of competent jurisdiction has passed upon the constitutionality of this act providing for the creation of a township board of zoning appeals, then, I can but give it full force and effect in my determination.

1955 Op. Att'y Gen. No. 4893, at 93-94. Therefore, rather than finding that members of a township board of zoning appeals could not be township officers because they were not elected, the 1955 opinion concluded that they were township officers and did not attempt to resolve the constitutional questions raised by that conclusion.

1992 Op. Att'y Gen. No. 92-080 and 1955 Op. Att'y Gen. No. 4893, p. 89 thus reach opposite conclusions and it does not appear that they can be reconciled. The 1992 opinion, however, follows the law of Ohio as set forth by the Ohio Supreme Court in the *Godfrey* case and construes the statutory scheme in a manner that is consistent with the Ohio Constitution. In accordance with that opinion, we are persuaded that the constitutional restrictions imposed upon township officers by Ohio Const. art. X, § 2 and Ohio Const. art. II, §§ 20 and 26 compel the conclusion that members of a township board of zoning appeals cannot be considered officers and, therefore, are not township officers for purposes of representation by the county prosecuting attorney under R.C. 309.09.[4] *See* 1992 Op. Att'y Gen. No. 92-080; *see also* 1993 Op. Att'y Gen. No. 93-055, at 2-260 n.2; 1992 Op. Att'y Gen. No. 92-032, at 2-121 to 2-122; 1990 Op. Att'y Gen. No. 90-077 (overruling 1955 Op. Att'y Gen. No. 4893, p. 89). Pursuant to R.C. 309.09(B), therefore, 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.

Let us turn now to the question whether the county prosecuting attorney may voluntarily provide representation to a township board of zoning appeals when there is no duty to provide such representation. The office of county prosecuting attorney is created by statute, and the prosecutor has only the powers, either express or implied, that are granted by statute. *See State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940). The prosecutor is designated pursuant to statute as the legal adviser and representative of certain

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[4] It is of interest that in *State ex rel. Wilson v. Gulvas*, 63 Ohio St. 3d 600, 602, 589 N.E.2d 1327, 1329 (1992), the Ohio Supreme Court made express reference to a position on the township board of zoning appeals as a "nonelective" township office. That case, however, involved a quo warranto action under R.C. 2733.06, which is applicable generally to a "public office." It did not discuss the restrictions imposed upon officers of townships by Ohio Const. art. X, § 2 and art. II, §§ 20 and 26. The *Gulvas* case concluded that R.C. 503.24 and R.C. 503.241 are limited to elective township officers, and it is not inconsistent with the *Gulvas* case to conclude that R.C. 309.09 is also limited to elective township officers. *See also* R.C. 503.22; R.C. 503.25.

officials and entities and is permitted to enter into contracts to serve as legal adviser or representative in other instances. *See, e.g.*, R.C. 309.09; R.C. 343.01(E); R.C. 504.15; 1989 Op. Att'y Gen. No. 89-015. When the prosecutor is not designated pursuant to statute as legal counsel and is not authorized by statute to enter into a contract to serve as legal counsel, it has been found that the prosecutor lacks authority to serve as legal counsel. On this point, an earlier Attorney General opinion states:

> I am not aware of any statutory provision which would authorize a prosecuting attorney to enlarge the scope of his duties. Then, too, there might be a possibility of conflict of interest arising between a board which is not entitled to call upon the prosecuting attorney as legal counsel and one which the prosecutor has a legal duty to represent. I could not say that a prosecuting attorney may volunteer to represent in his official capacity a board which he has no duty to serve as legal adviser.

1964 Op. Att'y Gen. No. 1297, p. 2-322, at 2-324.[5]

In the instant situation, there is no duty for the county prosecuting attorney to serve as legal counsel for a township board of zoning appeals, for the reasons discussed above. Similarly, there is no authority for the prosecutor, acting in an official capacity, to take on that task voluntarily, thereby devoting public resources to a function not delegated to the prosecutor by statute. *See, e.g.*, 1994 Op. Att'y Gen. No. 94-035.

Instead, the township board of zoning appeals is authorized, within the limits of the money appropriated by the board of township trustees, to "employ such executives, professional, technical, and other assistants as it deems necessary." R.C. 519.13. Pursuant to that provision, the township board of zoning appeals can hire its own attorney to provide representation when one of its decisions is appealed to the common pleas court. As noted above, the county prosecuting attorney does not have authority in an official capacity to accept employment with the board for such purpose.

Thus, the county prosecuting attorney is not empowered to enlarge the scope of the duties of the office of prosecuting attorney by providing legal representation other than as authorized by law. Therefore, a county prosecuting attorney, acting in an official capacity, is not permitted to provide legal representation to a township board of zoning appeals.

You have explained that the townships in your county rely on your office for essentially all their legal work, and it is with regret that we conclude that existing law does not permit you to provide representation for the township boards of zoning appeals. Members of a township board of zoning appeals act not as individuals, but as representatives of the township. In making decisions on matters appealed to it, a township board of zoning appeals is carrying out the governmental duties of the township and exercising the sovereignty of the state. Therefore, it would be appropriate for the prosecuting attorney to represent the board

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[5] It was suggested in one earlier opinion that, when there is no legal obligation upon the prosecuting attorney to represent a particular public entity, "it would not be improper for the county prosecutor or his assistants to undertake such representation on a private basis, provided, of course, that such representation does not conflict with the duties imposed by statute upon the office of prosecuting attorney." 1979 Op. Att'y Gen. No. 79-019, at 2-70 (with reference to a "Multi-County Felony Bureau"); *see also, e.g.*, 1994 Op. Att'y Gen. No. 94-035. Your question, however, contemplates representation of the township board of zoning appeals by the county prosecuting attorney in an official capacity.

on legal challenges. Concluding that the prosecuting attorney cannot provide representation could be costly to a township, or could even paralyze it, if the township is prevented by a lack of money from defending the decisions of its board of zoning appeals.

The conclusion that the prosecuting attorney is not permitted to represent a township board of zoning appeals, however, is compelled by the language of R.C. 309.09, construed so as to be consistent with Ohio Const. art. X, § 2 and Ohio Const. art. II, §§ 20 and 26. *See* 1992 Op. Att'y Gen. No. 92-080. Although it may be argued that this interpretation offends the intent of the law, we are constrained to apply the law as written. While we are sympathetic to your expressed concerns, this is a matter that cannot be resolved by means of an Attorney General opinion but, instead, must be addressed directly by the General Assembly.

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. Pursuant to R.C. 309.09(B), 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. (1992 Op. Att'y Gen. No. 92-080, followed; overruling of 1955 Op. Att'y Gen. No. 4893, p. 89, affirmed (*see* 1990 Op. Att'y Gen. No. 90-077).)

2. A county prosecuting attorney, acting in an official capacity, is not permitted to provide legal representation to a township board of zoning appeals.