

OPINION NO. 85-052**Syllabus:**

An individual may not serve as both member of a township zoning commission and township zoning inspector within the same township.

To: Craig S. Albert, Geauga County Prosecuting Attorney, Chardon, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, August 30, 1985

I have before me your request for my opinion in which you ask whether the positions of township zoning inspector and member of a township zoning commission are compatible. You have informed me that, in the situation with which you are concerned, both positions are in the same township and it is contemplated that one individual might be appointed to both.

A systematic structure for considering questions of compatibility was set forth by my predecessor in 1979 Op. Att'y Gen. No. 79-111 in the form of seven questions, 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 the outside employment permissible?
3. Is one office 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 or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

In order to apply this analysis to the question which you have presented, it is necessary to consider the duties of the two positions.

R.C. 519.04 authorizes a board of township trustees which wishes to adopt a zoning plan to create and establish a township zoning commission, consisting of members appointed by the board to serve for specified terms. Pursuant to R.C. 519.05, the township zoning commission is responsible for submitting to the township trustees a proposed plan for township zoning. R.C. 519.05 states, in part:

The township rural zoning commission shall submit a plan, including both text and maps, representing the recommendations of the zoning commission for the carrying out by the board of township trustees of the powers, purposes, and provisions set forth in sections 519.01 to 519.99, inclusive, of the Revised Code, including additions to territory in which a township zoning plan is in effect.

The commission must hold at least one public hearing before certifying its recommendations to the township trustees, R.C. 519.06, and, if there is a county or regional planning commission, the township zoning commission must submit its proposal to that commission, R.C. 519.07. The township trustees may not make changes in the plan submitted by the commission without submitting the changes to the commission for approval, disapproval or suggestions. R.C. 519.09. After receiving the recommended zoning plan from the commission and following certain public hearing requirements, the board of township trustees must vote upon the adoption of the zoning resolution, R.C. 519.10, and, if it is adopted, must submit it to the electors residing in the area included in the zoning plan. R.C. 519.11.

R.C. 519.12 provides that amendments or supplements to the township zoning resolution may be initiated by motion of the township zoning commission, by resolution of the board of township trustees, or by application of owners or lessees of property. The zoning commission is responsible for providing required notice, holding a public hearing, and making a recommendation to the board of township trustees concerning approval, denial, or modification of the proposed amendment or supplement. The board of township trustees must then hold a public hearing and adopt, deny, or modify the recommendation of the commission. A referendum upon an amendment or supplement to the zoning resolution may be requested by voters residing in the area included in the zoning plan. R.C. 519.12.

R.C. 519.16 authorizes the board of township trustees to hire a township zoning inspector, as follows:

For the purpose of enforcing the zoning regulations, the board of township trustees may provide for a system of zoning certificates, and for this purpose may establish and fill the position of township zoning inspector, together with such assistants as the board deems necessary, fix the compensation for such positions, and make disbursements for them.

R.C. 519.17 provides for implementation of a zoning certificate requirement, to be enforced by the zoning inspector. It states:

No person shall locate, erect, construct, reconstruct, enlarge, or structurally alter any building or structure within the territory included in a zoning resolution without obtaining a zoning certificate, if required under section 519.16 of the Revised Code, and no such zoning certificate shall be issued unless the plans for the proposed building or structure fully comply with the zoning regulations then in effect.

My search of the statutes shows no expressed prohibition against the same individual holding both the position of township zoning inspector and the position of township zoning commission member. It appears, however, that the positions are incompatible because of the potential for conflict of interest between the two, as referenced by the fifth of the seven questions listed above.

A general statement of the basis for finding incompatibility where a conflict of interest occurs between two positions appears in State ex rel. Baden v. Gibbons, 17 Ohio L. Abs. 341, 344 (App. Butler County 1934), as follows:

It has long been the rule in this state that one may not hold two positions of public employment when the duties of one may be so administered and discharged that favoritism and preference may be accorded the other, and result in the accomplishment of the purposes and duties of the second position, which otherwise could not be effected.

Similarly, in 1985 Op. Att'y Gen. No. 85-021, at 2-82, I stated: "One person may not simultaneously hold two public positions if he would be subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the public."

It 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, see R.C. 519.05; R.C. 519.12, and enforcing the provisions of that plan, see R.C. 519.16. The content of the plan will directly affect the duties of the one who enforces it. Changes in the zoning resolution may very well change the extent and nature of inspections that are necessary, the workload of the inspector and his staff, and even the need for the township to have a system of zoning certificates and inspections. See generally 1973 Op. Att'y Gen. No. 73-116 (concerning authority of township zoning inspector to enter upon land for purposes of investigation). I am aware that the township zoning commission does not itself enact the township zoning plan or amendments thereto, but simply makes recommendations to the township trustees, see R.C. 519.05; R.C. 519.07; R.C. 519.12, and that voter approval may be required, see R.C. 519.11; R.C. 519.12. I note, however, that the township trustees are limited in their authority to disregard recommendations of the commission. See R.C. 519.09 (no change in the proposed zoning plan submitted by the commission may be made by the township trustees unless it is resubmitted to the commission for approval, disapproval, or suggestions; if the commission disapproves changes, the favorable vote of the entire membership of the board of township trustees is necessary to adopt them); R.C. 519.12 (the board of township trustees may deny or modify the recommendation of the township zoning commission regarding a proposed amendment or supplement to the zoning resolution only by unanimous vote of the board). I am, similarly, aware that the board of township trustees, rather than the township zoning commission, employs the township zoning inspector, see R.C. 519.16, and that appeals from his decisions are taken to a separate body known as the township board of zoning appeals, see R.C. 519.13-15. It thus appears that, with respect to the positions of township zoning commission member and township zoning inspector, neither is subordinate to the other or a check upon the other, and that the issue of compatibility raised in the third of the seven questions listed above is not a factor in this instance. See State ex rel. Attorney General v. Gebert, 12 Ohio C. C. (n.s.)

274, 275 (Cir. Ct. Franklin County 1909) ("[o]ffices are considered incompatible when one is subordinate to, or in any way a check upon, the other"). It appears, nonetheless, that a conflict exists between the two positions because a township zoning inspector who serves as a member of a township zoning commission is in the position of taking action as a commissioner which may affect his duties as an inspector.

A related situation was considered in 1952 Op. Att'y Gen. No. 1289, p. 257. My predecessor concluded that a township zoning commissioner could not serve as a justice of the peace, who might be in a position of making a judicial determination concerning a violation of a zoning regulation. The facts which you have presented differ from those under consideration in 1952 Op. No. 1289 since a zoning inspector does not serve in a judicial capacity. Nonetheless, I believe that the language which appears in that opinion is appropriate: "In such a situation [the individual's] interest in having the zoning regulation enforced as one who participated in its development and his duty. . .to consider only the facts regarding the violation of the regulation might very well present [him] with conflicting considerations." *Id.* at 259. See generally 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"); 1964 Op. Att'y Gen. No. 64-796 (the director of a regional planning commission may not serve as a consultant to a township zoning commission or board of zoning appeals). See also 1981 Op. Att'y Gen. No. 81-090 (the positions of township zoning commission chairman and board of education member are compatible).

I note that R.C. 519.16 expressly permits the township clerk to serve as both secretary of the township zoning commission and township zoning inspector, in addition to secretary of the township board of zoning appeals, thereby indicating that the General Assembly finds no impermissible conflicts among those positions. I do not, however, believe that such a finding conflicts with the conclusions reached herein, since it appears that the clerk's functions as secretary of the commission would be strictly ministerial and that the secretary would not be in a position to influence the commission in the exercise of its duties.

In light of the fact that I find that a conflict of interest exists between the two positions in question, it is not necessary for me to address the other questions concerning compatibility which are listed above.

Accordingly, in specific response to your question, it is my opinion, and you are so advised, that an individual may not serve as both member of a township zoning commission and township zoning inspector within the same township.