

OPINION NO. 81-090**Syllabus:**

If it is physically possible for one person to hold both positions and if the holding of both positions is not prohibited by local law, the positions of township zoning commission chairman and board of education member are compatible.

To: John A. Pfefferle, Erie County Pros. Atty., Sandusky, Ohio
By: William J. Brown, Attorney General, December 16, 1981

I have before me your request for my opinion concerning the compatibility of the positions of chairman of a township zoning commission and board of education member. It is my understanding, based on information provided by your office, that the individual involved serves as a member of the board of a local school district which is located in the same township as the zoning commission of which he is chairman.

In 1979 Op. Att'y Gen. No. 79-111, I set forth the seven questions which form the basic compatibility analysis. Those seven questions read 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 [im]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 for the positions at issue to be compatible, each of the seven questions must receive a negative response. If even one question must be answered in the affirmative, the positions are incompatible.

The first question deals with the ban contained in R.C. 124.57 against participation by a classified civil servant in certain specified types of political activity. Neither the position of chairman of a township zoning commission nor that of board of education member is a classified employment. Therefore, R.C. 124.57 does not apply to either of the positions at issue and the first question may be answered in the negative.

The second question concerns the limiting effect of the empowering statutes governing either position. An examination of the relevant Revised Code statutes indicates that the sections governing a township zoning commission and those governing a board of education do not restrict outside employment. See generally R.C. Chapter 3313; R.C. Chapter 519. The second question, therefore, may also be answered in the negative.

The third question is derived from the common law test of compatibility. That test, as expressed in State ex rel. Attorney General v. Gebert, 12 Ohio C.C. (n.s.) 274, 275 (Cir. Ct. Franklin County 1909), states that "[o]ffices are considered incompatible when one is subordinate to, or in any way a check upon the other." I have been unable to ascertain any way in which a chairman of a township zoning commission would be subordinate to or a check upon a member of a board of education. Within their respective subject areas, zoning and education, each body acts independently and neither has supervisory power over the other. Although the decisions of the township zoning commission are subject to review, it is the township board of zoning appeals, not the board of education, which performs this function. R.C. 519.14. Thus, I conclude that neither position is subordinate to or a check upon the other and that the third question may be answered in the negative.

The fifth question deals with the possibility of a conflict of interest between the two positions. This test is designed to protect an individual in the public service from experiencing divided loyalties which might affect the performance of his official duties. A resolution of this question involves an examination of the duties required to be performed in each capacity. A township zoning commission is responsible for regulating the "location, height, bulk, number of stories, and size of buildings and other structures. . .percentages of lot areas which may be occupied, set back building lines, sizes of yards, courts, and other open spaces, the density of population, the uses of buildings and other structures. . .and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of such township." R.C. 519.02. A board of education is required to supervise the functioning of the school district under its control. "Each. . .board of education shall have the management and control of all the public schools of whatever name or character in its respective district." R.C. 3313.47.

I have been able to locate only one area in which the possibility of a conflict of interest exists. This potential conflict would arise as a result of the regulation

by the township zoning commission of buildings or land under the supervision of the board of education. The fact that such a potential conflict exists does not, however, necessarily render the positions incompatible. Before such a finding of incompatibility can be reached, a further inquiry into the immediacy of the conflict must be made. "[W]here possible conflicts are remote and speculative, the common law incompatibility or conflict of interest rules are not violated." 1979 Op. Att'y Gen. No. 79-111 at 2-372. It is my belief that the conflict presented by this situation is remote and speculative. Clearly, the township zoning commission will not be dealing with school property on a regular basis. Moreover, in those instances in which school property is the subject of concern on the part of the zoning commission, the individual in question may withdraw from the discussion, permitting the remainder of the commission members to reach a decision on the appropriate course of action. See generally 1981 Op. Att'y Gen. No. 81-079. Because I have concluded that the potential conflict is remote and speculative, question five may also be answered in the negative.

The issue of whether it is physically possible for one person to adequately perform the duties of both positions is the subject of question four. A resolution of this issue is one which has traditionally been left to local officials in the belief that they are more familiar with the time requirements of each position and, thus, are better equipped to reach an informed conclusion. Consequently, for the purposes of this opinion, I am assuming that question four will, after consideration by your office, also be answered in the negative.

Questions six and seven concern the effect of federal, state and local laws which might prevent the individual in question from serving in a dual capacity. I am not aware of any federal or state statute or regulation which would prohibit one individual from being both a chairman of a township zoning commission and a member of a board of education. The applicability of local charter ordinances or department regulations is an issue which can be more adequately addressed by local officials who work with these provisions on a daily basis. For the purposes of this opinion, I will, therefore, assume that local law does not prevent one person from holding the positions in question. As a result, questions six and seven may also be answered in the negative.

As the above discussion indicates, each of the seven questions has been answered in the negative. Therefore, it is my opinion, and you are advised, that if it is physically possible for one person to hold both positions and if the holding of both positions is not prohibited by local law, the positions of township zoning commission chairman and board of education member are compatible.