

OPINION NO. 88-033**Syllabus:**

The positions of township trustee and commissioner of a county park district created under R.C. Chapter 1545 are incompatible. (1973 Op. Att'y Gen. No. 73-064 questioned.)

To: Timothy A. Oliver, Warren County Prosecuting Attorney, Lebanon, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, April 21, 1988

I have before me your request for an opinion concerning the compatibility of the offices of township trustee and commissioner of a county park district created pursuant to R.C. Chapter 1545. See R.C. 1545.01 ("[p]ark districts may be created which include all or a part of the territory within a county..."). You have indicated that the township and the park district are in the same county.

Township trustees are elected pursuant to R.C. 505.01 and are given various powers and duties relating to the governance of the township. See R.C. Chapter 505. The board of township trustees constitutes the taxing authority of the

township, *see* R.C. 5705.01(C), and, as such, is authorized both to levy taxes within the ten-mill limitation, *see, e.g.*, R.C. 5705.05-.06, and to submit tax levies in excess of the ten-mill limitation to a vote of the people, *see, e.g.*, R.C. 5705.07; R.C. 5705.19-.191. *See generally* Ohio Const. art. XII, §2 and R.C. 5705.02 (imposing the ten-mill limitation). The board of township trustees is also responsible for adopting annual tax budgets for the township. *See* R.C. 5705.28.

A county park district is created by a probate judge, upon application pursuant to R.C. 1545.02 and following a hearing under R.C. 1545.03-.04. *See* R.C. 1545.04. The commissioners are appointed by the judge and serve, in general, for three-year terms. *See* R.C. 1545.05. The board of park commissioners is a body corporate and politic, R.C. 1545.07, with various powers to govern the park district, *see, e.g.*, R.C. 1545.07-.18. The board is authorized to levy taxes within the ten-mill limitation, subject to certification or modification of the levy by the county budget commission, or to submit a levy to the electors. R.C. 1545.20-.21. The board may also issue notes or bonds. *See* R.C. 1545.20-.211; R.C. 1545.24-.25. A county park district is a taxing unit for purposes of R.C. Chapter 5705, *see* R.C. 5705.01(H), and, accordingly, its board of commissioners is responsible for adopting annual tax budgets. *See* R.C. 5705.28.

Questions of compatibility may be analyzed in light of the seven questions outlined in 1979 Op. Att'y Gen. No. 79-111, concerning such matters as provisions of law limiting the holding of other positions, questions of physical impossibility, and the issue of whether one position is subordinate to another. The question of direct relevance in relation to the positions of township trustee and commissioner of the county park district is whether there is a conflict of interests between the two positions. An analysis of the two positions reveals that a person holding both positions would be subject to divided loyalties and, accordingly, that the positions are incompatible. *See generally, e.g., State ex rel. Hover v. Wolven*, 175 Ohio St. 114, 191 N.E.2d 723 (1963); *Pistole v. Wiltshire*, 90 Ohio L. Abs. 525, 189 N.E.2d 654 (C.P. Scioto County 1961); 1984 Op. Att'y Gen. No. 84-068 at 2-221 ("[t]he common law rule against conflict of interest...prohibits a public officer from holding dual positions if he would be subject to conflicting duties or loyalties..."); 1980 Op. Att'y Gen. No. 80-035 at 2-149 ("[a]n individual who serves in dual public positions faces a situation which poses a conflict of interests when his 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").

There are several respects in which the duties and responsibilities of a township trustee and those of the commissioner of a county park district come into conflict. R.C. 511.37 authorizes a board of township trustees to make contributions to a board of park commissioners established under R.C. Chapter 1545, as follows:

The board of township trustees of any township may make contributions of moneys, supplies, equipment, office facilities, and other personal property or services to any board of park commissioners established pursuant to Chapter 1545. of the Revised Code for the expenses of park planning, acquisition, management, and improvement. The board of park commissioners may accept such contributions without the approval of the terms by the probate judge.

Any moneys contributed by the board of township trustees for such purposes shall be drawn from the general fund in the township treasury not otherwise appropriated. The board of township trustees may anticipate the contributions of moneys for such purposes and enter the amount of such contributions in its annual statement to the county budget commission for inclusion in the budget upon which rates of taxation are based. (Emphasis added.)

An individual serving as township trustee is, thus, in a position of considering, and helping to determine, whether township moneys, supplies, facilities, or services should be contributed to a board of park commissioners. If such individual also served as a park commissioner, he would clearly be placed in a position of divided loyalties. A similar situation was considered in 1985 Op. Att'y Gen. No. 85-006. A statute there under consideration imposed upon a board of township trustees the responsibility of determining whether certain estate tax moneys should be credited

to the general revenue fund of the township or to the board of education of the school district of which the township was a part. Op. No. 85-006 concluded that, because of that statute, the positions of township trustee and member of the board of education were incompatible, stating, at 2-19:

Where...a statute gives a member of a particular public body the authority to participate directly in a determination as to whether that public body or a different public body is to obtain the benefit of certain funds, I believe that it must be concluded, as a matter of law, that an individual may not serve in positions of trust and authority with respect to both bodies. A township trustee who also served as a member of a local board of education would suffer from conflicting loyalties if he were placed in the position, as trustee, of participating in a decision as to whether the township or the board of education should receive funds....

See also 1985 Op. Att'y Gen. No. 85-029 at 2-107 ("[i]t is well established that where one public position has the power to appropriate funds to a second position, one person may not serve in both positions"); 1983 Op. Att'y Gen. No. 83-035.

I reach a similar conclusion with respect to the positions of township trustee and park district commissioner. R.C. 511.37, like the statute under consideration in Op. No. 85-006, authorizes a board of township trustees to make available to a different body moneys that would otherwise belong to the township. The capacity of a trustee to exercise clear judgment on behalf of the township in determining whether the other body should receive the moneys would be drawn into question if the trustee held a position of trust and authority with the other body. You have indicated that the township in question has established a practice of contributing \$10,000 annually to the county park district. It is, therefore, clear that the issue of making a contribution is one that will face the trustee, and that the potential conflict of interests is actual, rather than remote and speculative. See Op. No. 85-006; Op. No. 84-068. See generally Op. No. 79-111. I conclude, accordingly, that the positions of township trustee and commissioner of the county park district are incompatible because of a conflict of interests.

Your letter of request indicates another area in which a conflict of interests occurs. R.C. 1545.14 states in part:

A board of park commissioners may by agreement with the legislative or other public authority in control of parks or park lands either within or without the park district, assume control of all or a portion of any existing parks or park lands or otherwise contract or cooperate with such public authority in connection with the use, development, improvement, and protection of parks or park lands. In such event, such parks or park lands may be developed, improved, and protected as in case of lands otherwise acquired by said board. This section does not authorize said board to acquire or control any park, park lands, parkways, playgrounds, other lands, or boulevards owned or controlled by any other public authority except by agreement as provided in this section. (Emphasis added.)

You have stated that, presumably pursuant to R.C. 1545.14, the township and the county park board share some services. In effect, then, an individual who served as both township trustee and commissioner of the park board would have interests on two sides of a contract. The conflict of interests is clear, and the fact that the contractual relationship currently exists indicates that the conflict should not be considered remote and speculative. See, e.g., 1986 Op. Att'y Gen. No. 86-030 at 2-157 ("[i]f a township and village have entered a contract whereby the village has agreed to provide fire protection to the township, then...the positions of township trustee and village fire chief must be found to be incompatible"); Op. No. 85-029; 1984 Op. Att'y Gen. No. 84-059 at 2-195 ("[t]he authority of the two boards to contract with each other and the actual contracts between the township and water and sewer district in this instance are further indications that one person who served as both township trustee and member of a water and sewer district would be subject to a conflict of interest"). Cf. 1987 Op. Att'y Gen. No. 87-085, slip op. at 7

("since the formation of an inter-county contract is only a remote possibility, and since administration of such contracts is not a primary function of either the township clerk or the clerk of the board of county commissioners, I find that the potential conflict of interest does not, in itself, make the two positions incompatible"). See generally 1982 Op. Att'y Gen. No. 82-085; Op. No. 79-111; Op. No. 80-035.

It is, further, clear that the interests of a county park district and a township in the county may come into conflict with respect to the allocation of tax proceeds. Your letter of request indicates that the county in question presently uses the alternative method provided for in R.C. 5747.53 for apportioning the local government fund, and that both the township and the park district receive moneys from the fund. Pursuant to R.C. 5747.53, the alternative method must be approved by, among others, "a majority of the boards of township trustees and legislative authorities of municipal corporations, located wholly or partially in the county, excluding the legislative authority of the city with the greatest population." Thus, a board of township trustees is in a position of helping to determine the amount of tax proceeds from the local government fund that will be distributed to the county park district. See R.C. 5747.01(Q)(1) (as used in R.C. 5747.50-.55, "subdivision" includes park districts and townships). A township trustee who served as a commissioner of the park district would be subject to divided loyalties in determining the most beneficial distribution of tax proceeds.

As is further noted in your letter, if approval of the alternative method of apportioning the undivided local government fund is not obtained pursuant to R.C. 5747.53, then the fund is allocated pursuant to R.C. 5747.51 and R.C. 5747.52, and both the township and the county park district are given the opportunity to appear before the county budget commission to establish their need for moneys from the fund. R.C. 5747.51 states that, for the purpose of apportioning the undivided local government fund, the budget commission may inquire into the claimed needs of any subdivision as stated in its tax budget and may adjust claimed needs to reflect actual needs. An individual who is responsible for making a presentation to the budget commission on behalf of two different entities may, thus, be in a position of seeking the same funds in two different capacities and, accordingly, be subject to a conflict of interests. See, e.g., 1988 Op. Att'y Gen. No. 88-011; Op. No. 87-085; 1963 Op. Att'y Gen. No. 559, p. 566; 1927 Op. Att'y Gen. No. 2, vol. 1, p. 5. See generally *State ex rel. Baden v. Gibbons*, 17 Ohio L. Abs. 341 (Ct. App. Butler County 1934); 1979 Op. Att'y Gen. No. 79-063.

The county park district and the township may come into additional conflict with respect to the levying of taxes and the submittal of their budgets to the county budget commission. See, e.g., R.C. 5705.31; R.C. 5705.32; R.C. 5705.34. In 1939 Op. Att'y Gen. No. 1575, vol. III, p. 2346, one of my predecessors concluded, in the second paragraph of the syllabus, that "[t]he offices of township trustee and a member of the board of park commissioners of a township...are incompatible." 1939 Op. No. 1575 found incompatibility in the fact that both township park commissioners and township trustees were authorized to levy taxes, stating, at 2349: "in the preparation of annual budgets, the distribution of public moneys as between the township proper and the board of park commissioners, and in the fixing of tax levies, it is manifest that the township trustees and the board of park commissioners might be placed in the position of adversaries." The commissioner of a county park district may, similarly, find himself in conflict with a township trustee with respect to the amounts or timing of tax levies. As was discussed in Op. No. 79-063, the county budget commission has discretion with respect to the certification of a tax levy that is not a mandated levy and, accordingly, may decline to certify a park district tax levied under R.C. 1545.20 without voter approval, or may exercise its discretion in modifying such a levy. See R.C. 1545.20; R.C. 5705.32. The county budget commission may similarly, modify certain township levies that have not been approved by the voters. See, e.g., R.C. 5705.05-.06; R.C. 5705.32. The positions of township trustee and commissioner of a county park district may, thus, be distinctly adversarial on this issue. See Op. No. 88-011; Op. No. 79-063; 1939 Op. No. 1575.

Certain Attorney General opinions have raised a question as to whether the mere fact that two bodies have their budgets reviewed by the county budget commission is sufficient to make membership on the two bodies incompatible. See,

e.g., Op. No. 85-006; 1981 Op. Att'y Gen. No. 81-010. As I noted in Op. No. 88-011, however, "a potential dispute before the budget commission has long been held to be a basis for a finding of incompatibility, since inconsistent loyalties may result." Op. No. 88-011, slip. op. at 4. I find it clear that the positions in question are incompatible, and I find support for that conclusion in the fact that both the township and the park district may seek to levy taxes within the ten-mill limitation that may be subject to reduction by the county budget commission pursuant to R.C. 5705.32. *See* R.C. 1545.20; R.C. 5705.03-.06; R.C. 5705.34; Op. No. 79-063. The fact that the county budget commission may, in certain circumstances, reduce levies of either or both of these bodies makes it clear that persons appearing before the county budget commission serve in adversarial positions, and that one person serving in both positions would be confronted with a conflict of interests. *See, e.g.*, Op. No. 87-085; 1963 Op. No. 559; 1927 Op. No. 2. Additional conflicts of loyalties may exist with respect to voted levies. *See, e.g.*, Op. No. 88-011, slip. op. at 5 ("[i]n a situation in which [two] subdivisions contemplate going to the electorate for a levy or bond issue for additional funds, an individual sitting on the taxing authority of both subdivisions might find himself torn by divided loyalties").

In 1973 Op. Att'y Gen. No. 73-064, my predecessor concluded that "[t]he positions of member of the board of county commissioners and member of the board of commissioners for a park district covering the entire county are compatible," based upon the fact that the board of park commissioners is independent of the board of county commissioners. Op. No. 73-064 did not, however, consider any conflict that might occur between the two bodies with respect to the levying or allocation of taxes, and its conclusion is subject to question on that basis.

It is, therefore, my opinion, and you are hereby advised, that the positions of township trustee and commissioner of a county park district created under R.C. Chapter 1545 are incompatible. (1973 Op. Att'y Gen. No. 73-064 questioned.)