

Note from the Attorney General's Office:

1955 Op. Att'y Gen. No. 55-4893 was overruled by 1990
Op. Att'y Gen. No. 90-077 and 1998 Op. Att'y Gen.
98-025.

4893

1. ZONING APPEALS—TOWNSHIP BOARD—PROSECUTING ATTORNEY—LEGAL ADVISER—SECTION 309.09 RC.
2. LEGAL ADVICE ON SUBJECT—LIMITED TO MATTERS PERTAINING TO EXERCISE OF ADMINISTRATIVE OR MINISTERIAL FUNCTIONS AND PERTAINING TO DECISIONS THE LAW AUTHORIZES TOWNSHIP BOARD TO MAKE—DOES NOT INCLUDE ADVICE ON FACTUAL OR POLICY DETERMINATIONS TO BE MADE BY BOARD OR MATTERS OF JUDICIAL OR QUASI-JUDICIAL NATURE.

SYLLABUS:

1. The prosecuting attorney is, by force of Section 309.09, Revised Code, the legal adviser of a township board of zoning appeals within his county.
2. The legal advice which a prosecuting attorney is required to give a township board of zoning appeals, however, is limited to matters pertaining to the exercise of its administrative or ministerial functions and pertaining to what decisions the law authorizes the board to make, but does not include advice on factual or policy determinations to be made by such board, or like matters of a judicial or quasi-judicial nature.

Columbus, Ohio, February 24, 1955

Hon. Clyde E. Lewis, Prosecuting Attorney
Delaware County, Delaware, Ohio

Dear Sir:

I am in receipt of your request for my opinion reading as follows:

“Revised Code Section 519.13 provides for a Township Board of Zoning Appeals. I would appreciate it if you would advise me as to whether or not the Prosecuting Attorney is the legal advisor of such boards.

“Revised Code Section 309.09 provides that ‘* * * the Prosecuting Attorney shall be the legal adviser for township officers * * *.’”

Section 309.09, Revised Code, to which you refer, provides in full:

“The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections and all other county officers and boards, including all tax supported public libraries, except those organized as a part of a city school district or of a municipal corporation, and any of them may require written opinions or instructions from him in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code.

“Such prosecuting attorney shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney, except on the order of the board of township trustees, duly entered upon its journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund.”

It will be readily seen that under the provisions of the above quoted section the prosecuting attorney of a county is made the legal adviser for all township officers within the county. The problem, then, becomes one of determining whether members of a township board of zoning appeals are township officers within the meaning of Section 309.09.

Under chapter 519 of the Revised Code, a township is authorized to adopt zoning regulations for the unincorporated territory within such township. The procedure for adopting such regulations need not concern us here. Section 519.13, Revised Code, provides:

“In any township which adopts zoning regulations the board of township trustees shall appoint a township board of zoning appeals of five members who shall be residents of the unincorporated territory in the township included in the area zoned. The terms of all members shall be of such length and so arranged that the term of one member will expire each year. Each member shall serve until his successor is appointed and qualified. Members shall

be removable for the same causes and in the same manner as provided by section 519.04 of the Revised Code. Vacancies shall be filled by the board of township trustees and shall be for the unexpired term. The members shall serve without compensation.”

The powers of a township board of zoning appeals are enumerated in Section 519.14, Revised Code, as follows :

“The township board of zoning appeals may :

“(A) Hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of sections 519.02 to 519.25, inclusive, of the Revised Code, or of any resolution adopted pursuant thereto ;

(B) Authorize, upon appeal, in specific cases, such variance from the terms of the zoning resolution as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the resolution will result in unnecessary hardship, and so that the spirit of the resolution shall be observed and substantial justice done.

“In exercising the above-mentioned powers, such board may, in conformity with such sections, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from, and may make such order, requirement, decision, or determination as ought to be made, and to that end shall have all powers of the officer from whom the appeal is taken.”

The organization of a board and the procedure to be followed by it are set out in Section 519.15, Revised Code, wherein it is provided that :

“The township board of zoning appeals shall organize and adopt rules in accordance with the zoning resolution. Meetings of the board shall be held at the call of the chairman, and at such other times as the board determines. The chairman, or in his absence the acting chairman, may administer oaths, and the board may compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board of township trustees and be a public record.

“Appeals to the board may be taken by any person aggrieved or by any officer of the township affected by any decision of the administrative officer. Such appeal shall be taken within twenty

days after the decision by filing, with the officer from whom the appeal is taken and with the board, a notice of appeal specifying the grounds. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

“The board shall fix a reasonable time for the hearing of the appeal, give ten days’ notice to the parties in interest, and decide the appeal within a reasonable time after it is submitted. Upon the hearing, any party may appear in person or by attorney. Any person adversely affected by a decision of a board may appeal to the court of common pleas of the county in which such township is located, on the ground that the decision was unreasonable or unlawful. The court may affirm, reverse, vacate, or modify the decision complained of in the appeal.”

An extended discussion of the characteristics of an office, or public office is, I think, unnecessary here. Opinions of the Attorney General considering this subject are legion. In addition, this subject matter has occasioned numerous judicial pronouncements and text discussions. Suffice it to say that the authorities are in agreement that if the incumbent of a position receives his authority from the law and is clothed with some part of the state sovereignty, or discharges some of the functions of government, he will, in almost all instances, be considered a public officer.

Clearly, the incumbents of the position in question receive their authority from law and they are clothed with a part of the state sovereignty. It would follow that the position in question is a public office and that the incumbents thereof are township officers within the meaning of Section 309.09, Revised Code. The provision in Section 519.13, Revised Code, providing for the appointment of the members of a township board of zoning appeals by the board of township trustees, however, presents serious constitutional question which demands discussion at least in this opinion.

Section 2, Article X, of the Constitution of Ohio, provides :

“The General Assembly shall provide by general law for the election of such township officers as may be necessary. The trustees of townships shall have such powers of local taxation as may be prescribed by law. No money shall be drawn from any township treasury except by authority of law.”

Originally, this provision requiring the general assembly to provide by general law for the election of such township officers as may be neces-

sary, was contained in Section 1, of Article X, and included county officers as well. It was provided therein :

“The General Assembly shall provide, by law, for the election of such county and township officers as may be necessary.”

In *State, ex rel. Godfrey v. O'Brien*, 95 Ohio St., 166, the Supreme Court of Ohio had before it the question of whether assistant township tax assessors and members of county boards of revision were township and county officers, respectively, within the meaning of this constitutional provision. By existing statute the county auditor was authorized to appoint assistant township assessors when he deemed it necessary, to enable an assessor to complete his work within the prescribed time. Members of the county board of revision were appointed by the board of county commissioners. In the course of the court's opinion, per Donahue, J., the following pertinent language is found at page 171 :

“Section 1 of Article X of the Constitution of Ohio requires that ‘the general assembly shall provide, by law, for the election of such county and township officers as may be necessary.’

“If assistant township assessors are township officers and the members of county boards of revision are county officers, these sections are in clear conflict with this provision of the constitution requiring township and county officers to be elected.”

The Court decided in that case that both assistant township assessors and members of a county board of revision were officers within the meaning of this constitutional prohibition and that the act creating these offices was consequently unconstitutional.

The repeal of the original Section 1, in 1933, and the enactment of the county home rule amendment had the effect of removing county officers from any provision requiring that they be elected to office. However, as shown above, this constitutional requirement, which is now found in Section 2 of Article X, still pertains to township officers.

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.

Having concluded that members of a township board of zoning appeals are township officers within the meaning of Section 309.09, Revised Code, it follows that the prosecuting attorney is the legal adviser of a township board of zoning appeals by force of this same section. The legal advice which a prosecuting attorney is required to give these officers, however, is limited to matters pertaining to the exercise of their administrative or ministerial functions.

In large part, a board of zoning appeals acts as a judicial or quasi-judicial body. As shown heretofore, Section 519.44, Revised Code, the board's primary function is to hear and decide appeals from the orders and determinations made by an administrative official, in the enforcement of zoning resolutions. They may, under this statute, in specific cases allow variances from the terms of zoning resolutions when not contrary to public policy and where unnecessary hardship would otherwise result. The disposition to be made of such appeals and the advisability of authorizing a non-conforming use are determinations which are expressly given to the township board of zoning appeals. Factual determinations and matters of policy of this nature cannot be delegated to the prosecuting attorney. For an analogous situation and a similar conclusion, see Opinion No. 208, Opinions of the Attorney General for 1933.

In specific answer to your question, therefore, it is my opinion that:

1. The prosecuting attorney is, by force of Section 309.09, Revised Code, the legal adviser of a township board of zoning appeals within his county.
2. The legal advice which a prosecuting attorney is required to give a township board of zoning appeals, however, is limited to matters pertaining to the exercise of its administrative or ministerial functions and pertaining to what decisions the law authorizes the board to make, but does not include advice on factual or policy determinations to be made by such board, or like matters of a judicial or quasi-judicial nature.

Respectfully,

C. WILLIAM O'NEILL
Attorney General