

OPINION NO. 66-034

Syllabus:

Members of the township zoning commission may not also serve on the township board of zoning appeals.

To: David F. McLain, Trumbull County Pros. Atty., Warren, Ohio
By: William B. Saxbe, Attorney General, February 10, 1966

You request my opinion on the following question:

"May members of the township zoning commission also serve on the township board of zoning appeals?"

The relevant part of Section 519.04, Revised Code, is as follows:

"The board of township trustees of any township proceeding under sections 519.01 to 519.99, inclusive, of the Revised Code, shall create and establish a township zoning commission. The commission shall be composed of five members who reside in the unincorporated area of the township, to be appointed by the board, * * * Where there is a county or regional planning commission the board may appoint qualified members of such commission to serve on the township zoning commission. * * *"

The relevant part of Section 519.05, Revised Code, is as follows:

"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. * * *

* * * * *"

Sections 519.06 through 519.12, Revised Code, state all required steps to be taken to put such zoning plan, often referred to as a resolution, adopted by such zoning commission, including possible amendments thereto, into effect for enforcement by the board of township trustees. In none of such sections is there any provision for any duty to be performed by or any participation whatever by the township board of zoning appeals or by any of the members thereof.

The relevant part of Section 519.13, Revised Code, is as follows:

"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 following is quoted from Section 519.14, Revised Code:

"The township board of zoning appeals shall have the following powers:

"(A) To 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) To 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;

"(C) To grant conditional zoning certificates for the use of land, buildings, or other structures if such certificates for specific uses are provided for in the zoning resolution.

"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."

Section 519.15, Revised Code, provides as follows:

"The township board of zoning appeals shall organize and adopt rules in accordance with the zoning resolution. Meetings of the board of zoning appeals 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 of zoning appeals may compel the attendance of witnesses. All meetings of the board of zoning appeals shall be open to the public. The board of zoning appeals 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 of zoning appeals 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 of zoning appeals, a notice of appeal specifying the grounds. The officer from whom the appeal is taken shall forthwith transmit to the board of zoning appeals all the papers constituting the record upon which the action appealed from was taken.

"The board of zoning appeals shall fix a reasonable time for the public hearing of the appeal, give at least ten days' notice in writing to the parties in interest, give notice of such public hearing by one publication in one or more newspapers of general circulation in the county at least ten days before the date of such hearing and decide the appeal within a reasonable time after it is submitted. Upon the hearing, any person may appear in person or by attorney."

The relative portion of Section 519.16, Revised Code, is as follows:

"* * * The township clerk may be appointed secretary of the township zoning commission, secretary of the township board of zoning appeals, and zoning inspector,
* * *"

I have found no express statutory provision which would authorize members of the township zoning commission to also serve as members of the township board of zoning appeals. On the contrary the Legislature has provided for each of them by a separate section and with separate and distinct powers and authority, and has expressly only authorized the same person to serve as secretary for both of them (Section 519.16, supra) and members of the county or regional planning commission to serve as members of the township zoning commission (Section 519.04, supra). Thus, the maxim "expressio unius est exclusio alterius" is applicable by reason of the obvious legislative intent and would prohibit the simultaneous holding by the same persons of the two positions in question.

Then, too, the positions in question are incompatible. The authority and duties of the township zoning commission, as provided in Sections 519.05 through 519.12, supra, are clearly quasi legislative. On the contrary the authority and duties of the township board of zoning appeals, as provided in Sections 519.14 and 519.15, supra, are quasi judicial.

The quasi judicial function of such board of zoning appeals is evidenced by the second paragraph of the syllabus and the final paragraph of the decision in Mentor Lagoons, Inc. v. Zoning Board of Appeals of Mentor Township, 168 Ohio St., 113, as follows:

"2. In order to reverse a decision of a township board of zoning appeals in refusing to authorize a variance from the terms of a zoning resolution, it is not necessary for the Common Pleas Court to find that the board abused its discretion but it is sufficient if that court finds that the decision of the board in refusing to authorize the requested variance represents an unreasonable exercise of that discretion. (Section 519.15, Revised Code, construed.)"

Final paragraph, page 122:

"The judgment of the Court of Appeals is therefore reversed and the cause is remanded to the board of zoning appeals for further proceedings in accordance with this opinion."

Constitutionally and by common law the legislative and judicial branches in the same jurisdiction involving the same subject matter are independent of and a check upon each other and therefore incompatible.

The rule of such incompatibility is stated in The State of Ohio, ex rel., Attorney General v. Frank Gebert, 12 C.C. (N.S.) 274, at page 275, as follows:

"Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both."

The incompatibility of such two positions of public trust, one quasi legislative and the other quasi judicial, is manifest from the following quotation from State ex Baden v. Gibbons, 17 Ohio Law Abs., 341, at page 344:

"* * *To countenance such practice, would but make it possible for one branch of government or one individual to control the official act and discretion of another independent branch of the same government or of interlocking governments which are constructed so as to operate in conjunction

with each other. If the possible result of the holding of two positions of public trust leads to such a situation, then it is the rule, both ancient and modern, that the offices are incompatible and are contrary to the public policy of the state."

It is, therefore, my opinion that the township zoning commission and the township board of zoning appeals are checks upon each other and so intended to be by the statutes of Ohio; therefore, members of the township zoning commission may not also serve on the township board of zoning appeals.