

OPINION NO. 92-080**Syllabus:**

Since members of the township zoning commission and members of the township board of zoning appeals are not township officers for purposes of R.C. 309.09(B), the county prosecuting attorney has no duty to act as their legal adviser or representative.

To: William F. Schenck, Greene County Prosecuting Attorney, Xenia, Ohio
By: Lee Fisher, Attorney General, December 30, 1992

You have requested an opinion as to whether the county prosecuting attorney has a duty to advise and represent a township zoning commission and a township board of zoning appeals.

Duty of County Prosecuting Attorney to Advise Township Entities

As a creature of statute, the county prosecuting attorney has those powers and duties imposed upon him by statute. *State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940); *State ex rel. Doerfler v. Price*, 101 Ohio St. 50, 128 N.E. 173 (1920). Thus, whether the prosecuting attorney must advise the township entities about which you ask depends upon whether any statute imposes such a duty upon that officer.

R.C. 309.09 describes the duties of the prosecuting attorney with regard to county and township officers and entities, in part as follows:

(A) The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers

and boards.... He shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party....

(B) Such prosecuting attorney shall be the legal adviser for all township officers [with certain exceptions]....(Emphasis added.)

Although R.C. 309.09(A) designates the county prosecutor as the legal adviser and representative, not only of county officers, but also of county boards, nothing in R.C. 309.09 imposes upon the prosecutor similar advisory or representative duties with respect to township boards. Thus, while the county prosecutor has no duty to advise or represent a township commission or board, if the members of township zoning commissions or township boards of zoning appeals were determined to be township officers by virtue of their membership on such commissions or boards, R.C. 309.09(B) would require the prosecuting attorney to act as legal adviser for such members, but only in their capacities as township officers.

Nature of Positions of Township Zoning Commission Member and Township Board of Zoning Appeals Member

1990 Op. Att'y Gen. No. 90-077 addressed the nature of the positions of members of township zoning commissions and township boards of zoning appeals in determining whether such members qualified as township officers for purposes of R.C. 505.60, governing health insurance benefits for township personnel. The opinion concluded that the statutes governing the appointment and compensation of zoning commission members reflected the General Assembly's intent that such members not be township officers. Specifically, Op. No. 90-077 stated, at 2-330:

Although each member serves a term, one of the indicia of public office, such members serve by appointment, not election. As stated in [*State ex rel. Godfrey v. O'Brien*, 95 Ohio St. 166, 115 N.E. 25 (1917)], Const. art. X, §2 (formerly at Ohio Const. art. X, §1) requires that township offices be filled by election, not by appointment. Further, R.C. 519.05 states in part: "Members of the zoning commission may be allowed their expenses, or such compensation, or both, *as the board may approve and provide.*" (Emphasis added.) Thus, the compensation of zoning commission members is determined solely by the board of township trustees in the exercise of its discretion. Since, as discussed in *O'Brien*, Ohio Const. art. II, §20 requires that the compensation of officers be set by the General Assembly and Ohio Const. art. II, §26 requires that laws of a general nature operate uniformly throughout the state, I must assume that the General Assembly acted in accordance with these constitutional mandates in providing for the appointment and compensation of zoning commission members, and did not intend to confer the status of officers upon the members of the zoning commission.

Op. No. 90-077 also concluded for similar reasons that members of township boards of zoning appeals are not township officers for purposes of R.C. 505.60. *See generally* R.C. 519.13 (board of township trustees appoints and fixes compensation of members of board of zoning appeals).¹ The General Assembly did not provide that the term "township officers," as

¹ 1989 Op. Att'y Gen. No. 89-083 considered, in part, the duty of the prosecuting attorney to provide representation to a township fire chief in an action seeking the fire chief's

used in R.C. 309.09(B), was intended to refer to positions other than those that possess the constitutional criteria for township offices. Accordingly, in order to qualify as a township officer for purposes of R.C. 309.09(B), a person must hold a position that meets the constitutional criteria established for township officers. Since, as determined in Op. No. 90-077, the positions of township zoning commission member and township board of zoning appeals member are not established in accordance with the constitutional criteria for township offices, such members are not township officers for purposes of R.C. 309.09(B).

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that, since members of the township zoning commission and members of the township board of zoning appeals are not township officers for purposes of R.C. 309.09(B), the county prosecuting attorney has no duty to act as their legal adviser or representative.

removal. The opinion concluded that, although a township fire chief is a township officer, R.C. 309.09(B) does not require the county prosecutor to represent the fire chief in such situation, since a removal action is maintained against a person in his personal capacity, and the prosecutor's duty to represent township officers extends only to matters in which such officers are sued in their official capacity. In light of the opinion's conclusion that the township fire chief was not entitled to representation by the prosecutor, although for a reason other than his failure to qualify as a township officer, it is unnecessary to reconsider that opinion at this time.