

**Note from the Attorney General's Office:**

1952 Op. Att'y Gen. No. 52-1289 was questioned by  
1979 Op. Att'y Gen. No. 79-111.

1289

TOWNSHIP ZONING COMMISSIONER—TOWNSHIP ZONING  
INSPECTOR—OFFICE INCOMPATIBLE WITH OFFICE, JUSTICE OF PEACE.

SYLLABUS.

The office of township zoning commissioner or of township zoning inspector is incompatible with the office of justice of the peace.

Columbus, Ohio, March 26, 1952

Hon. Harold K. Bostwick, Prosecuting Attorney  
Geauga County, Chardon, Ohio

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting my opinion as follows:

“The Munson Township Zoning Commission has asked me to obtain your opinion as to whether one individual holding the dual positions of Member of the Zoning Commission and Justice of the Peace or Zoning Inspector and Justice of the Peace are compatible or incompatible and I would appreciate your opinion at your earliest convenience.

“It is my personal opinion that these offices are incompatible because a case of the Zoning Commission might have to be filed and tried before the Justice of the Peace under Section 3180-23.”

Section 3180-28 et seq., General Code, provides for the creation of a township zoning commission and sets out the duties and powers of such commission. Members of the commission are appointed by the board of township trustees and generally speaking it is the duty of this commission to submit a zoning plan to the board of township trustees. I can find no provision in the Code declaring a member of a township zoning commission ineligible to hold the office of justice of the peace.

The office of justice of the peace is established by Section 1711-1 et seq., General Code, and these sections define the powers and duties of such office. There is no provision in these sections or any other sections of the Code pertaining to such office which prohibits a justice of the peace from becoming a member of a township zoning commission. Finding no statutory prohibition on holding the two positions simultaneously, it is necessary to determine whether such positions are incompatible at common law.

It has been stated that two offices are incompatible at common law whenever one office is subordinate to the other in some of its important and principal duties, or where a contrariety and antagonism would result in an attempt by one person to discharge the duties of both. 32 Ohio Jurisprudence, page 908. I cannot see how the performance of the duties of the two offices with which we are concerned would require the subordination of one of the offices in any way. There is, however, a question of whether the enforcement of a township zoning regulation would occasion a conflict of interest or antagonism between the two positions. Section 3180-48, General Code, makes the violation of a zoning regulation a misdemeanor. That section provides :

“It shall be unlawful to locate, erect, construct, reconstruct, enlarge, change, maintain or use any building or to use any land in violation of any regulation in or any provision of any resolution or any amendment or supplement thereto adopted by any board of township trustees under the authority of this act. Any person, firm or corporation violating any such resolution, regulation, provision, amendment or supplement or any provision of this act shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one hundred dollars. Each and every day during which such illegal location, erection, construction, reconstruction, enlargement, change, maintenance or use continues may be deemed a separate offense.”

In addition, Section 3180-49, General Code, authorizes the institution of an action to enjoin the violation of a zoning regulation or to abate an unlawful construction, etc. In neither case would the township zoning commission be directly involved. In the case of an arrest under Section 3180-48, *supra*, however, a member of the zoning commission acting in his capacity as justice of the peace might have to determine whether the offense had been committed and accordingly discharge the person arrested or bind him over to a court of competent jurisdiction as the case may be. In such a situation his interest in having the zoning regulation enforced as one who participated in its development and his duty as justice of the peace to consider only the facts regarding the violation of the regulation might very well present this justice of the peace-zoning commissioner with conflicting considerations. Because of this possibility it is my opinion that the two offices are incompatible. In reaching this conclusion I have been influenced no little by the fact that a justice of the peace acts judicially and it is the object of all laws pertaining to judicial proceedings to assure an impartial and wholly disinterested tribunal before which such proceedings are instituted.

The fact that a conflict in interest is a mere possibility and not inevitable does not make the two offices any the less incompatible. Thus it was stated in an opinion by one of my predecessors in office, Opinion No. 1288, Opinions of the Attorney General for 1927, at page 2326:

“The question might arise whether or not, when the incompatibility between offices or public employments would not exist except upon the happening of certain contingencies, the positions would be said to be incompatible before the contingencies arise or only after the happening of the occurrences upon which the contingency hinges. I do not find that this question has ever been considered by the courts or text writers.

“It would seem apparent to me, however, that when an officer was elected or appointed for a definite term or an employe was employed by contract for a definite time as are teachers, principals and superintendents of the schools in local districts, if there be a possibility of the contingency arising during the term of office or during the time which the contract of employment covers, which would make a position incompatible, the rule of incompatibility would apply.

“In an early English case, *Rex vs. Tizzard*, 9 B & C 418, Judge Bailey in speaking of incompatibility of offices uses this language:

“I think that the two offices are incompatible when the holder cannot in every instance discharge the duty of each.”

See also Opinion No. 935, Opinions of the Attorney General for 1929, page 442, and *Kobylarz v. Mercer*, 130 N.J.L., 33, 31 A. 2d 208.

You have also made reference to the position of township zoning inspector in your request. This position is created by Section 3180-40, General Code, and is separate and distinct from the position of township zoning commissioner. It is the duty of such inspector to enforce the zoning regulations of the township. A prosecution under Section 3180-48, *supra*, might be instituted on the complaint of the zoning inspector. This complaint in turn might have to be considered by the justice of the peace under Section 13422-2, General Code, and I think clearly a conflict of interest would be present which would render the two offices incompatible.

In specific answer to your question, it is my opinion that the office of township zoning commissioner or of township zoning inspector is incompatible with the office of justice of the peace.

Respectfully,

C. WILLIAM O'NEILL

Attorney General