

OPINION NO. 73-127**Syllabus:**

The positions of county treasurer and member of a township board of zoning appeals are incompatible.

To: John D. Martin, Fairfield County Pros. Atty., Lancaster, Ohio
By: William J. Brown, Attorney General, December 12, 1973

Your request for my opinion asks whether the office of county treasurer is compatible with membership on the township board of zoning appeals.

Although R.C. 3.11, 315.02 and 319.07 place specific limitations on the other offices a county treasurer may hold, none of these Sections prohibit him from serving on a board of zoning appeals. Nor can I find any other statutory or constitutional prohibition of such a dual role.

In the absence of controlling constitutional or statutory provisions, reference must be made to the common law rule of incompatibility. As Judge Killits stated in State, ex rel. Wolf v. Shaffer, 6 Ohio N.P. (n.s.) 219, 221 (1906):

* * * [W]e have several sections dealing with specific offices prohibiting the holders thereof

from holding any other offices of trust or profit in the state. But as to all offices not within these special prohibitions, the rules of the common law unquestionably obtain, and, in this particular the issue here is governed wholly by the common law.

The common law test of incompatibility must be applied to this case because both the position of member of a township board of zoning appeals and the position of county treasurer are public offices. That test prohibits the holding of two public offices if one of them is subordinate to or in any way a check on the other. State, ex rel. Attorney General v. Gebert, 12 Ohio C.C.R. (n.s.) 274, 275 (1909); State, ex rel. Hover v. Wolven, 175 Ohio St. 114 (1963).

In order to determine whether the position of county treasurer is subordinate to, or in any way a check on the township board of zoning appeals, we must inquire into the interrelationship of the two offices.

R.C. 519.13, which provides for the appointment and compensation of township zoning board members, reads 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 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 may be allowed their expenses, or such compensation, or both, as the board of township trustees may approve and provide.

The board of zoning appeals may within the limits of the moneys appropriated by the board of township trustees for the purpose, employ such executives, professional, technical, and other assistants as it deems necessary. (Emphasis added.)

R.C. 519.14 then goes on to define the powers of the board. These provide no basis for any possible subordination or check on the county treasurer. However, the potential impediments to the dual role resulting from R.C. 519.13 are not so easily dismissed. The difficulty arises from the fact that board members or their employees are paid by the township trustees who procure the funds from the county treasurer.

The county treasury receives township taxes because of the interaction of the taxing provisions of the Revised Code (R.C. 5705.03; R.C. 5705.05 and R.C. 5719.02) with its provisions for collection and allocation of the taxes (R.C. 321.31 and R.C. 321.34). R.C. 5705.05 grants a township power to levy a 10 mill property tax for its general operating expenses. Expenses for the zoning board would be paid from the levy. The tax is paid into the county treasury as part of the general property tax bill under R.C. 5719.02.

To recover its share of these funds, a township ordinarily presents a warrant received from the county auditor and demands the amount due, R.C. 321.31 and 321.34. The treasurer's duty to pay over this money is ministerial and he is subject to mandamus upon refusal. In Ratterman v. State, 44 Ohio St. 641, 643-644 (1887), the Court said:

The law (see sections 1115 to 1128, Revised Statutes) [R.C. 321.24 to 321.38] makes it the duty of the county treasurer on or before the 15th day of February, and on or before the 10th day of August of each year, to settle with the auditor for all taxes collected at the time of making such settlement, and immediately after each settlement, on demand and presentation of proper warrant, pay to the township treasurer, city treasurer, or other proper officer, all moneys in the county treasury belonging to any township, city, village, hamlet, or school district. [R.C. 321.31.] And when the local authorities so request, the auditor may draw, and the treasurer shall pay, on such draft to township or city treasurers, any sum not exceeding two-thirds of the current collection of taxes for such local authorities respectively, in advance of the semi-annual settlement. [R.C. 321.34.] If the treasurer fails to make any settlement required by law, or to pay over any money at the time and in the manner required by law, suit shall be instituted against him and his sureties for the amount due and ten per cent penalty, and the commissioners may then forthwith remove such treasurer and appoint some person to fill the vacancy.
* * *

See also State, ex rel. Brickell v. Frank, 129 Ohio St. 604 (1935), and Arnold v. Board of Education, 20 Ohio Law Abs. 220 (1935).

Thus the duty to pay over funds to townships involves no discretion on the part of the treasurer. As a result, the treasurer, in this capacity, does not serve as a check on the township.

However, because of the statutory relationship between the two offices, I am satisfied that the zoning board is, in at least one respect, subordinate to the county treasurer. The treasurer is, by virtue of his office, a member of the county budget commission, and under R.C. 5705.31 and 5705.32, the budget commission has authority to review and to adjust the township's annual tax budget.

The Supreme Court has held that the exercise of this authority rests within the discretion of the budget commission. Board of Education v. Evatt, 136 Ohio St. 283 (1940); State ex rel. Dayton v. Patterson, 93 Ohio St. 25 (1915). The budget commission can reduce the township's budget. Consequently, this puts the treasurer, as member of the budget commission, in a position where he can check on a township budget in which, as a member of the zoning board, he has a pecuniary interest.

In Opinion No. 24, Opinions of the Attorney General for 1957, one of my predecessors held that the offices of county treasurer and member of a county board of elections were incompatible. In the course of the opinion he said:

It is thus to be seen that the individual concerned, as a member of the board of elections will have some voice in the preparation of the

budget and its presentation to the budget commission, and in the normal situation could be expected to appear before the budget commission to defend or justify the expense items therein included. Having done this, he would then be under the duty, as a member of the budget commission, to participate in the approval or revision of such budget under authority of section 4705.32, Revised Code. Such a situation, in my opinion, presents such a definite point of subordination of one office to the other so as to render the two offices incompatible.

In Opinion No. 1995, Opinions of the Attorney General for 1921, the then attorney general held that offices of county treasurer and township clerk were incompatible, since the clerk could be asked by the township trustees to be an advocate for township budgets at the same time he was, as county treasurer, acting as a member of the budget commission. See also Opinion No. 2999, Opinions of the Attorney General for 1953.

In specific answer to your question it is my opinion, and you are so advised, that the positions of county treasurer and member of a township board of zoning appeals are incompatible.