



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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October 15, 2004

I - 04-017

COMPATIBILITY OF OFFICES:
County Board Chairman Elected
At-Large and County Liquor Control
Commissioner; County Board Chairman
Elected At-Large and County Emergency
Services and Disaster Agency Coordinator

The Honorable Stewart J. Umholtz
State's Attorney, Tazewell County
342 Court Street, Suite 6
Pekin, Illinois 61554-3298

Dear Mr. Umholtz:

I have your letter wherein you inquire whether it is permissible for a county board chairman who is elected at-large:

- (1) to serve simultaneously as the county liquor control commissioner and to receive compensation therefor; and
- (2) to serve simultaneously as the county Emergency Services and Disaster Agency coordinator and receive compensation for performing those duties?

As background, your letter states that the chairman of the Tazewell County board is elected at-large by the voters of the county rather than being elected by the members of the county board.

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Because of the nature of your inquiry, I do not believe that the issuance of an official opinion is necessary. I will, however, comment informally upon the questions you have raised.

With regard to your first inquiry, sections 4-2 and 4-3 of the Liquor Control Act of 1934 (235 ILCS 5/4-2, 4-3 (West 2002)) respectively provide, in pertinent part:

The mayor or president of the board of trustees of each city, village or incorporated town, and the president or chairman of the county board, shall be the local liquor control commissioner for their respective cities, villages, incorporated towns and counties, and shall be charged with the administration in their respective jurisdictions of the appropriate provisions of this Act and of such ordinances and resolutions relating to alcoholic liquor as may be enacted[.]

The city council of each city and the president and board of trustees of each village and incorporated town and the county board are authorized to fix and pay compensation to the local liquor control commissioner of the particular city, village, incorporated town or county[.] (Emphasis added.)

It is well established that where the language of a statute is clear and unambiguous, it must be given effect as written. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 426 (2002). Under the plain language of section 4-2 of the Liquor Control Act, the county board chairman is expressly designated to serve as the county liquor control commissioner. The language of the section makes no distinction between a county board chairman who is elected at-large and a county board chairman who is elected by the members of the county board. Therefore, because county board chairmen are required by express statutory provision to serve as county liquor control commissioners, without reference to the manner of their selection, a county board chairman who is elected at-large may serve simultaneously in that capacity.

Further, section 4-3 of the Liquor Control Act expressly provides that the "county board * * * [is] authorized to fix and pay compensation to the local liquor control commissioner." Again, no distinction is made between chairmen elected at-large and those elected by the members of the county board. Construing sections 4-2 and 4-3 of the Liquor Control Act together, it is clear that the county board chairman is eligible to receive additional compensation for serving as the liquor control commissioner. Because the county board chairman serves by virtue of that office as the county liquor control commissioner, however, any compensation provided must be established in accordance with the provisions of section 2 of the

Local Government Officer Compensation Act (50 ILCS 145/2 (West 2002)) (compensation of elected officers of units of local government must be fixed at least 180 days before the beginning of the terms of the officers) and article VII, section 9(b), of the Illinois Constitution of 1970 (which prohibits a change in the salary of an elected officer of a unit of local government that takes effect during the term for which the officer is elected). Consequently, a county board chairman who is elected at-large may receive additional compensation for serving as the county liquor control commissioner, if the additional compensation is set in accordance with the applicable constitutional and statutory provisions.

Your second inquiry addresses the issue of whether a county board chairman who is elected at-large may serve simultaneously as the county Emergency Services and Disaster Agency (ESDA) coordinator. In contrast to the position of county liquor control commissioner, the statutes are silent on the question of whether a county board chairman may also serve as county ESDA coordinator. Under the common law, however, two public offices are deemed to be incompatible where one of the public offices has the power to appoint the incumbent to the other public office. *See Ehlinger v. Clark*, 8 S.W.2d 666, 674 (Tex. 1928) ("It is because of the obvious incompatibility of being both a member of a body making the appointment and an appointee of that body that the courts have with great unanimity throughout the country declared that all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint."); *State v. Thompson*, 246 S.W.2d 59, 61-62 (Tenn. 1952); 1917-1918 Ill. Att'y Gen. Op. 781.

Based upon the foregoing, a county board chairman may not serve simultaneously as the county ESDA coordinator, if: (1) the position of ESDA coordinator is a public office; and (2) the county board chairman appoints the ESDA coordinator. With respect to the latter issue, under the language of subsection 10(i) of the Illinois Emergency Management Agency Act (the Emergency Management Act) (20 ILCS 3305/10(i) (West 2002)), the ESDA coordinator is appointed by the "principal executive officer of the political subdivision," a phrase that is defined to refer to the county board chairman. *See* 20 ILCS 3305/4 (West 2003 Supp.). It must be determined, however, whether the position of county ESDA coordinator constitutes a public office.

In *Midwest Television, Inc. v. Champaign-Urbana Communications, Inc.*, 37 Ill. App. 3d 926, 931 (1976), the appellate court delineated the criteria to be used when determining whether a position constitutes a public office, stating:

The characteristics of a public office are generally agreed upon, although the distinction between an office and employment may be vague in particular fact situations. The characteristics of a public office include: (1) creation by statute or constitution; (2) exercise

of some portion of the sovereign power; (3) a continuing position not occasional or contractual; (4) fixed tenure; (5) an oath is required; (6) liability for misfeasance or nonfeasance; and (7) the official has an independence beyond that of employees.

The court further indicated that "[n]ot all [of] these factors are required in order to determine that a position is an office." *Midwest Television, Inc. v. Champaign-Urbana Communications, Inc.*, 37 Ill. App. 3d at 932. The most important of the factors, however, is the exercise of some portion of the sovereignty of the State. *People v. Brady*, 302 Ill. 576, 582 (1922).

Applying the several indicia of public office to the position of county ESDA coordinator, the position qualifies as a public office. The position of ESDA coordinator is created by a statute, in this case, subsection 10(i) of the Emergency Management Act. A review of the duties of the ESDA coordinators indicates that, among other things, the ESDA coordinators possess direct responsibility for the organization, administration, training and operation of the emergency services and disaster agency, subject only to the direction and control of the county board chairman (20 ILCS 3305/10(i) (West 2002)), and the authority to execute and enforce the orders, rules and regulations as may be made by the Governor under the authority of the Emergency Management Act. 20 ILCS 3305/18(b) (West 2002). In carrying out these duties, the ESDA coordinators exercise a portion of the sovereign power to preserve the public health and the public peace. *See generally* 20 ILCS 3305/2 (West 2002); *People ex rel. Barmore v. Robertson*, 302 Ill. 422 (1922); *City of Chicago v. Chicago League Ball Club*, 196 Ill. 54 (1902). Because counties generally are required to maintain an emergency services and disaster agency (20 ILCS 3305/10(b) (West 2002)) and because the county board chairman is required to appoint the ESDA coordinator (20 ILCS 3305/4 (West 2003 Supp.); 20 ILCS 3305/10(i) (West 2002)), the position of ESDA coordinator is one of continuing existence. It is not occasional or contractual.


Although the Emergency Management Act contains no specified term of office, section 20 of the Emergency Management Act (20 ILCS 3305/20 (West 2002)) requires the filing of a written oath by all persons "appointed to serve in any capacity in * * * an emergency services and disaster agency." The ESDA coordinators also are subject to penalties for misfeasance and nonfeasance to the same extent as other local governmental officers and employees. *See* 20 ILCS 3305/15 (West 2002); 745 ILCS 10/1-101 *et seq.* (West 2002). Finally, a review of the statutory duties of the ESDA coordinators indicates a degree of discretion not generally granted to employees. As previously noted, the ESDA coordinators possess direct responsibility for the organization, administration, training and operation of the emergency services and disaster agency, subject only to the direction and control of the county board chairman, and the authority to execute and enforce the orders made by the Governor.

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When considered as a whole, the position of county ESDA coordinator appears to satisfy the criteria for a public office. The most important of the indicia have been satisfied: the ESDA coordinators exercise a portion of the sovereign power; their positions are created by statute; and they subscribe an oath of office. Because officers who have appointing power are disqualified for appointment to the offices to which they appoint, a county board chairman who is elected at-large may not simultaneously hold the office of county ESDA coordinator. Having resolved your second question in the negative, the issue of whether the county board chairman is eligible to receive additional compensation for serving as the county ESDA coordinator is rendered moot.

This is not an official opinion of the Attorney General. I apologize for the delayed response to your inquiry. If we may be of additional assistance, please advise.

Very truly yours,



LYNN E. PATTON
Senior Assistant Attorney General
Chief, Opinions Bureau



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 21, 2006

I - 06-031

COMPATIBILITY OF OFFICES:

School Board Member and
County ESDA Coordinator

School Board Member and
County Zoning Administrator

The Honorable John H. Vogt
State's Attorney, Stephenson County
Stephenson County Courthouse
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Freeport, Illinois 61032

Dear Mr. Vogt:

I have your letter inquiring whether a school board member may simultaneously serve either as a county Emergency Services and Disaster Agency (ESDA) Coordinator, or as a county zoning administrator. For the reasons stated below, the office of school board member is incompatible with both the office of county ESDA coordinator and the office of county zoning administrator.

School Board Member and County ESDA Coordinator

Your first question concerns whether a school board member may serve simultaneously as Stephenson County's Emergency Services and Disaster Agency (ESDA)

Coordinator.¹ These positions both constitute public offices.² The common law doctrine of incompatibility of offices precludes simultaneous tenure in two public offices if the constitution or a statute specifically prohibits the occupant of either office from holding the other, or if the duties of the two offices conflict so that the holder of one cannot, in every instance, properly and faithfully perform all of the duties of the other office. *People ex rel. Fitzsimmons v. Swailes*, 101 Ill. 2d 458, 465 (1984); *People ex rel. Smith v. Brown*, 356 Ill. App. 3d 1096, 1098 (2005); *People ex rel. Myers v. Haas*, 145 Ill. App. 283, 286 (1908).

There is no constitutional or statutory provision prohibiting one person from simultaneously holding the offices of county ESDA coordinator and school board member. The issue, therefore, is whether the duties of either office are such that the holder of one cannot fully and faithfully discharge all of the duties of the other.

The duties of school board members are set out, generally, in article 10 of the School Code (105 ILCS 5/10-1 *et seq.* (West 2004)). The school board exercises the corporate powers of the school district. 105 ILCS 5/10-20.1 through 10-23.12 (West 2004). These powers relate exclusively to the administration of schools within a particular district and include supervising the education of children within the district, the raising of revenue by tax levy, the hiring of teachers, and the maintaining of schools. *See* 105 ILCS 5/10-20.1 through 10-23.12 (West 2004); *see also* Ill. Att'y Gen. Inf. Op. No. I-94-030, issued June 8, 1994; Ill. Att'y Gen. Inf. Op. No. I-89-066, issued December 5, 1989. In connection with emergency preparedness issues, section 10-22.35 of the School Code (105 ILCS 5/10-22.35 (West 2004)) provides that it is the duty of the school board:

To make school buildings available for use as civil defense shelters for all persons; to cooperate with the Illinois Emergency Management Agency, local organizations for civil defense, disaster relief organizations, including the American Red Cross, and federal agencies concerned with civil defense relative thereto, including,

¹Although referred to by ordinance as the "Director of Emergency Management and Planning," it is clear from the supplemental materials that you have provided that this title refers to the statutory position of county ESDA coordinator. *See* 20 ILCS 3305/10(i) (West 2004), as amended by Public Act 94-733, effective April 27, 2006; *see generally* Stephenson County Code, §5-1 *et seq.* Accordingly, the statutory title will be used in this opinion.

²Informal opinion No. I-04-017, issued October 15, 2004, concluded that one person could not hold the positions of county board chairman (elected at-large) and county ESDA coordinator simultaneously. In reaching this conclusion, it was necessary to determine whether the position of county ESDA coordinator was a public office. Applying the several indicia of public office to the position of county ESDA coordinator, it was determined that the position does constitute a public office. I am enclosing a copy of informal opinion No. I-04-017 for your reference.

but not limited to, making space available for the stocking of shelters with food and other provisions; *and to cooperate with such agencies and organizations in the use of other resources, equipment, and facilities*, and to cooperate with such agencies and organizations in the construction of new buildings to the end that the buildings be so designed that shelter facilities may be provided. (Emphasis added.)

In addition to serving as civil defense shelters, school buildings may be used for other purposes during an emergency situation, such as a site for members of the public to receive vaccinations, medications, or treatments. School equipment and resources might be needed to respond to an emergency situation; for example, school buses could be used for transportation during an evacuation of a county's population.

In carrying out the Illinois Emergency Management Agency Act (the Emergency Management Act) (20 ILCS 3305/10(i) (West 2004), as amended by Public Act 94-733, effective April 27, 2006), each "political subdivision," a term that includes counties (20 ILCS 3305/4 (West 2004), as amended by Public Act 94-334, effective January 1, 2006), may enter into contracts and incur obligations necessary to place it in a position to combat disasters, to protect the health and safety of persons, to protect property, and to provide emergency assistance to victims of disasters. 20 ILCS 3305/10(j) (West 2004), as amended by Public Act 94-733, effective April 27, 2006. Pursuant to this grant of authority, a county may enter into contracts and intergovernmental agreements for various disaster response activities. If the county board is unable to meet during a disaster, by local ordinance, the county ESDA coordinator, with the advice and consent of the county board chairman or chairman of the public safety committee of the board, is authorized to procure the services, supplies, equipment, or materials described in section 10(j) of the Emergency Management Act. *See* Stephenson County Code sec. 5-10 (Ord. of 8-10-76, §10).

It has long been established that one person cannot adequately represent the interests of two governmental units when those units contract with one another. 1991 Ill. Att'y Gen. Op. 188, 189; 1975 Ill. Att'y Gen. Op. 37, 43-47; Ill. Att'y Gen. Inf. Op. No. I-05-002, issued January 31, 2005; Ill. Att'y Gen. Inf. Op. No. I-05-003, issued January 31, 2005. Although a county ESDA coordinator would not ordinarily be a party to a contract or intergovernmental agreement between the county and the school district, he or she may nonetheless influence the making of the contract. In *Peabody v. Sanitary District of Chicago*, 330 Ill. 250 (1928), the Supreme Court held that a contract between the board of trustees of a sanitary district and a contractor was void because the treasurer of the district had a business relationship with the contractor and an interest in the contract. The Court noted that because the treasurer's duties included serving as financial advisor to the trustees, he might have been called on to act on the

letting of the contract by advising the board as to the financial status of the bidders. For that reason, the Court held that the conflict of interest statute (*see* Cahill's Stat. 1927, ch. 102, par. 3) was violated.

Based on *Peabody*, Attorney General Scott concluded in opinion No. S-1120, issued July 1, 1976 (1976 Ill. Att'y Gen. Op. 232), that the offices of county superintendent of highways (now county engineer) and city alderman were incompatible. Attorney General Scott stated therein:

Like the treasurer in *Peabody*, the county superintendent of highways in the present situation might naturally be called upon by the county board for advice in these situations in which the interests of the county and those of the municipality might be opposed to each other. The maintenance which is the subject of the agreement authorized in section 5-410 would come under the supervision of the county superintendent of highways. Similarly, the improvements contracted for pursuant to section 5-502 are to be planned by the county superintendent of highways. With regard to the deletion of highways from the county system it should be noted that the county superintendent of highways is responsible for supervising the construction and maintenance of all county highways within the county. (Ill. Rev. Stat. 1975, ch. 121, par. [5-] 205.5 [now codified at 605 ILCS 5/5-205.5 (West 2004)].) In each of these situations there is the possibility that the county board might ask for the advice of the county superintendent of highways. In that case, the county superintendent's duty to advise the county board as to the best interest of the county might conflict with his duty as alderman to act for the best interest of the city. 1976 Ill. Att'y Gen. Op. at 233-34.

In light of the county ESDA coordinator's statutory duties (*see* 20 ILCS 3305/10 (West 2004), as amended by Public Act 94-733, effective April 27, 2006), it is foreseeable that the county ESDA coordinator could be called on to assist in negotiating or reviewing the terms of any contracts or intergovernmental agreements or to advise the county board with regard to the same. A school district is a likely participant in such agreements. If one person were to serve as both a county ESDA coordinator and a school board member, and those governmental entities were to enter into a contract or agreement relating to emergency preparedness, he or she would be placed in the untenable position of ensuring that the best interests of both the county ESDA and the school district would be served.

Because of the potential conflicts in the duties of these offices, a person who serves simultaneously as both a county ESDA coordinator and a school board member would not be able to represent the interests of both entities adequately, fully, and faithfully. Therefore, the two offices are incompatible, and one person cannot simultaneously hold both.

School Board Member and County Zoning Administrator

Your second question is whether a school board member may serve simultaneously as the county zoning administrator.³ There is no constitutional or statutory provision that prohibits one person from serving simultaneously as both a school board member and a county zoning administrator. As in your first question, the issue, therefore, is whether the duties of either office are such that the holder of one cannot, in every instance, fully and faithfully discharge the duties of the other.

Division 5-12 of the Counties Code (55 ILCS 5/5-12001 *et seq.* (West 2004)) authorizes a county to enact a zoning ordinance. Section 5-12008 of the Code (55 ILCS 5/5-12008 (West 2004)) provides:

All ordinances or resolutions passed under the terms of this Division shall be enforced by such officer of the county as may be designated by ordinance or resolution. The ordinance or resolution * * * may vest in the officer designated to enforce the ordinance or resolution, the power to make orders, requirements, decisions and determinations with respect to applications for such permits and with respect to the enforcement of the terms of the ordinance or resolution.

Under section 13.02 of the Stephenson County Code, a copy of which you have provided, Stephenson County has established the office of county zoning administrator to administer and enforce the county zoning ordinance. Section 13.02 additionally provides that the county zoning administrator shall, among other things: examine and approve applications pertaining to the use of land or structures when the application conforms with the provisions of the zoning ordinance; issue zoning certificates and sign permits; issue occupancy certificates; supervise inspections of structures and uses of land to determine compliance with the terms of the county zoning ordinance, and where there are violations, initiate action to secure compliance; decide or make recommendations on all other matters under the zoning ordinance upon which the

³You have referred in your letter to the position of "Director of Planning and Zoning." Based on the supplemental materials provided, it appears that the title "Director of Planning and Zoning" refers to the office of county zoning administrator. Accordingly, the office is referred to herein by its generic title.

zoning administrator is required to act; initiate, direct, and review, from time to time, a study of the provisions of the zoning ordinance and make reports of his recommendations to the zoning board of appeals, the county planning commission, and the board of supervisors at least annually; and assist the State's Attorney in developing proposed amendments to the zoning ordinance.

As previously noted, under article 10 of the School Code, a school board exercises the corporate powers of the school district, including those related to the administration of schools within a particular district and the maintaining of schools. With regard to zoning issues, a school board is empowered to seek zoning changes, variations, and special uses for property held or controlled by the school district. 105 ILCS 5/10-22.13a (West 2004). In any hearing before a zoning commission or board of appeals, a school district has the right to appear and present evidence concerning any property or part thereof located in the school district. 55 ILCS 5/5-12019 (West 2004).

In opinion No. S-1367, issued June 29, 1978 (1978 Ill. Att'y Gen. Op. 127), Attorney General Scott addressed the analogous question of whether the offices of county zoning board of appeals member and school board member were incompatible. Relying on various sections of "AN ACT in relation to county zoning" (Ill. Rev. Stat. 1977, ch. 34, pars. 3154, 3156, 3158, now codified at 55 ILCS 5/5-12009, 5-12011, 5-12014 (West 2004)), which set forth the powers of a county zoning board of appeals, Attorney General Scott concluded that because of potential conflicts of duties regarding zoning decisions, one person could not simultaneously serve as a county zoning board of appeals member and school board member. Attorney General Scott explained the interests of school boards in zoning matters as follows:

The school board is interested in the character of the neighborhood surrounding its schools. It also is concerned with the number and type of residential units within its district since this will affect student enrollment. * * * Basically, zoning decisions determine the character of the development in * * * [school] districts. Development determines the tax base and demand for services on each district. A person holding a position on the county board of appeals and * * * [the school board] could not in every instance properly and faithfully perform all the duties of both offices. 1978 Ill. Att'y Gen. Op. at 128-29.

It is clear that potential conflicts in the duties of these offices could prevent one person from faithfully discharging the duties of each office simultaneously. By allowing a school district to appear and present evidence in any hearing regarding any property within the school district, the Counties Code recognizes a school district's interest in county zoning. 55 ILCS 5/5-12019 (West 2004); 1978 Ill. Att'y Gen. Op. at 128-29. A county zoning administrator, in

exercising the duties granted to that office under the Counties Code and the county zoning ordinance, may be called on to take action or make recommendations with regard to zoning matters in which the school district is interested, while simultaneously representing the interests of the district. These respective interests may well be inconsistent. Therefore, one person cannot fully represent the interests of both governmental entities. *See also* 1982 Ill. Att'y Gen. Op. 53, 54-55 (office of city alderman and county zoning administrator incompatible). Consequently, the offices of school board member and county zoning administrator are incompatible, and one person may not hold both positions simultaneously.

Legal Consequences of Holding Incompatible Offices

You have also inquired regarding the legal consequences of holding incompatible offices. First, I note that mere abstention from voting or otherwise acting on matters will not resolve the inherent conflict between incompatible offices. *See People ex rel. Teros v. Verbeck*, 155 Ill. App. 3d 81, 84 (1987), *appeal dismissed*, 115 Ill. 2d 550 (1987); Ill. Att'y Gen. Op. No. 96-042, issued December 4, 1996. Rather, it is well settled in Illinois that the acceptance of a second, incompatible office by the incumbent of another office constitutes an *ipso facto* resignation of the first office held. *See Brown*, 356 Ill. App. 3d at 1101; *Haas*, 145 Ill. App. at 287; 1991 Ill. Att'y Gen. Op. 177, 178; 1981 Ill. Att'y Gen. Op. 47, 48; 1980 Ill. Att'y Gen. Op. 81, 84; 1972 Ill. Att'y Gen. Op. 45, 47.

Applying the common law doctrine of incompatibility of offices to the specific facts in your inquiry, upon qualifying for and assuming the second incompatible office, the dual officeholder will be considered, as a matter of law, to have resigned from the first public office held. This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Very truly yours,

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Enclosure