



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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June 21, 2006

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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
15 North Galena Avenue
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

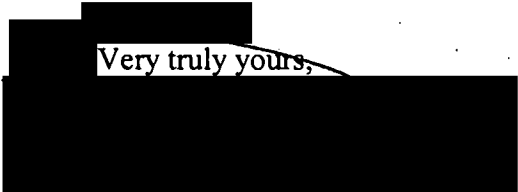
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exercising the duties granted to that office under the Counties Code and the county zoning ordinance, may be called on to take action or make recommendations with regard to zoning matters in which the school district is interested, while simultaneously 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,

LYNNE E. PATTON
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Chief, Opinions Bureau

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Enclosure