



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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I - 06-018

COMPATIBILITY OF OFFICES:
School Board Member and Village
Zoning Board of Appeals Member

The Honorable Louis A. Bianchi
State's Attorney, McHenry County
McHenry County Government Center
2200 North Seminary Avenue
Woodstock, Illinois 60098

Dear Mr. Bianchi:

I have your letter inquiring whether one person may simultaneously hold the offices of school board member and village zoning board of appeals member, where the territory of the school district and the village overlap. For the reasons stated below, it appears that the offices of school board member and village zoning board of appeals member are incompatible.

According to your letter and the supplemental information provided, the Village of Fox River Grove, a non-home-rule municipality, has adopted an ordinance creating a 7-member zoning board of appeals (zoning board): *See Village of Fox River Grove Zoning Ordinance of 1998 art. XI(D)(1) (eff. January 1, 1999)*. Members of the zoning board are appointed by the village president, with the consent of the village board of trustees. Village of

Fox River Grove Zoning Ordinance of 1998 art. XI(D)(1) (eff. January 1, 1999).¹ According to the terms of the zoning ordinance, the zoning board is an advisory body that only makes recommendations on zoning matters to the village board for final action. Village of Fox River Grove Zoning Ordinance of 1998 art. XI(D)(3) (eff. January 1, 1999). Because the zoning ordinance characterizes the duties of the zoning board as advisory only, you have inquired whether one person may simultaneously serve in the offices of school board member and zoning board member.

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 that prohibits one person from serving simultaneously as both a school board member and a zoning board member. See 65 ILCS 5/11-13-2, 11-13-3 (West 2004); 105 ILCS 5/10-10 (West 2004), as amended by Public Act 94-231, effective July 14, 2005. The issue, therefore, is whether the duties of the offices in question may conflict.

The principal duties of school board members are set forth 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, raising revenue by tax levy, hiring teachers, and maintaining 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 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 the zoning board, a school district shall have the right to appear and present evidence concerning any property or part thereof located in the school district. 65 ILCS 5/11-13-20 (West 2004).

¹ Because the population of Fox River Grove was under 5,000 until the United State Census Bureau, 2004 Population Estimates, we assume that a proposition to elect the zoning board was previously submitted to the electors of Fox River Grove as mandated by subsection 11-13-3(d) of the Illinois Municipal Code (65 ILCS 5/11-13-3(d) (West 2004)) and that such a proposition was defeated. Therefore, the zoning board continues to be appointed by the village president with the consent of the board of trustees.

The powers of a non-home-rule municipality to regulate land use through zoning are set out in article 11, division 13 of the Illinois Municipal Code (the Code) (65 ILCS 5/11-13-1 *et seq.* (West 2004); *see also Hawthorne v. Village of Olympia Fields*, 204 Ill. 2d 243, 255-56 (2003)). Section 11-13-2 of the Code (65 ILCS 5/11-13-2 (West 2004)) provides that the corporate authorities of a municipality may, by ordinance, create a zoning commission to recommend the boundaries of districts and appropriate regulations to be enforced therein. All ordinances passed under division 13 of the Code are to be enforced by those officers designated by municipal ordinance. 65 ILCS 5/11-13-3(a) (West 2004). Section 11-13-3 of the Code authorizes the village president and the board of trustees of villages having a population of less than 500,000 to enact an ordinance providing for the appointment of a 7-member zoning board to administer and interpret these zoning ordinances. 65 ILCS 5/11-13-3(c) (West 2004). As previously noted, the Village of Fox River Grove has adopted an ordinance creating a zoning board. Fox River Grove's zoning ordinance provides that the zoning board is an advisory body and has only the power to make recommendations to the village board for final action.²

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. Attorney General Scott concluded that because of potential conflicts of duties regarding zoning decisions, one person could not serve simultaneously 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:

²The Code provides that in all municipalities the zoning board shall "hear and *decide* appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of any ordinance adopted under this Division 13." 65 ILCS 5/11-13-3(f) (West 2004); *see also* 65 ILCS 5/11-13-12 (West 2004). The zoning board is likewise empowered to "hear and *decide* all matters referred to it or upon which it is required to pass under such an ordinance." 65 ILCS 5/11-13-3(g) (West 2004). The zoning board further has the power to conduct hearings on: (1) petitions for variations (65 ILCS 5/11-13-5, 11-13-6 (West 2004)); (2) applications for special use permits (65 ILCS 5/11-13-1.1 (West 2004)); and (3) proposed amendments to the zoning ordinance (65 ILCS 5/11-13-14 (West 2004)).

Fox River Grove's zoning ordinance, however, provides that the zoning board is advisory in nature and has only the power to make recommendations to the village board for final action. Village of Fox River Grove Zoning Ordinance of 1998 art. XI(D)(3) (eff. January 1, 1999). The Code contemplates that the zoning board will be a quasi-adjudicative body, with the power to hear and decide appeals and matters referred to it, not merely to make recommendations to the village board. *See* 65 ILCS 5/11-13-3(f), (g) (West 2004); *Monahan v. Village of Hinsdale*, 210 Ill. App. 3d 985, 991 (1991). As a general principle, because a non-home-rule municipality's power to zone is derived solely from statute, its ordinances cannot deviate from the statutory scheme. *See Geneva Residential Ass'n, Ltd. v. City of Geneva*, 77 Ill. App. 3d 744 (1979); *Martin v. City of Greenville*, 54 Ill. App. 3d 42 (1977). It is not necessary to resolve the issue of whether a zoning board may properly be created as a purely advisory body, however, because regardless of whether the zoning board is advisory or quasi-adjudicative in nature, the offices of school board member and zoning board member are incompatible for the reasons discussed below. Accordingly, for purposes of this response, it will be assumed that the duties of the zoning board are advisory in nature.

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.

Among the duties of the county zoning board of appeals expressly cited by Attorney General Scott as conflicting with the duties of a school board member were the duties to review enforcement decisions of zoning personnel and to advise the county board on zoning variations and amendments. These duties are advisory in nature. Similar duties are imposed upon the Fox River Grove zoning board:

The fact that a public officer has a duty to advise a public body regarding certain matters may be sufficient to preclude him or her from simultaneously serving in another public office. Thus, in opinion No. S-1120, issued July 1, 1976 (1976 Ill. Att'y Gen. Op. 232), Attorney General Scott concluded that the offices of county superintendent of highways (now county engineer) and alderman were incompatible because:

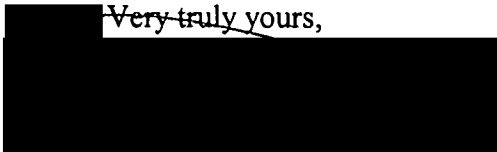
the county superintendent of highways in the present situation might naturally be called upon by the county board for advice [concerning contracts and highway projects] in which the interests of the county and those of the municipality might be opposed to each other. * * * In each of these situations 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.

A school board has the power to seek zoning changes, variations, and special uses for property held or controlled by the school district. For school property located within Fox River Grove, those matters will be reviewed by the zoning board, which will in turn recommend action to the village board. The school district may also be adversely affected by other zoning decisions not directly related to school property. The interests of the village and the interests of

the school district may well be divergent with respect to these zoning matters. Regardless of whether the zoning board is responsible for making a final decision on these issues or merely recommending action to the village board, it is clear that one person cannot fully and faithfully represent the interests of both the municipality and the school district where those interests may be inconsistent. *See also* 1972 Ill. Att'y Gen. Op. 45, 46-47 (office of county board member and city or village zoning board of appeal member are incompatible). Therefore, because of the potential conflicts in the duties of the two offices which could cause a division of loyalties, it appears that the offices of school board member and village zoning board of appeals member are incompatible, and one person may not simultaneously serve in both capacities.³

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
Senior Assistant Attorney General
Chief, Opinions Bureau

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³In your letter you have suggested that a reexamination of the opinions cited above might be required in light of the decision in *People v. Claar*, 293 Ill. App. 3d 211 (1997), *appeal denied*, 177 Ill. 2d 574 (1998), in which it was alleged that the offices of village mayor and director of the Illinois Toll Highway Authority were incompatible. In *Claar*, the Third District Appellate Court affirmed the trial court's dismissal of the complaint on the grounds that the plaintiff failed to "demonstrate that there exists a conflict of duties which prohibits defendant from fully and faithfully performing simultaneously" the duties of the two offices. In *dicta*, the court in *Claar* drew a distinction between conflicts of interest and conflicts of duties, the existence of which our courts have not previously or subsequently recognized. The Supreme Court denied the plaintiff's appeal without addressing the merits of the case. More recently, another panel of the third district distinguished and declined to follow the *Claar* reasoning in another incompatibility case, *People ex rel. Smith v. Brown*, 356 Ill. App. 3d 1096 (2005). Because the court's analysis was not consistent with the recognized law of this State, was not necessary to the decision to affirm the dismissal of the complaint, and has not yet been addressed by the Supreme Court, the *Claar* decision cannot be read as replacing the traditional incompatibility of offices analysis.