

March 28, 2012

The Honorable Anneka P. Collins
Highland County Prosecuting Attorney
112 Governor Foraker Place
Hillsboro, Ohio 45133

SYLLABUS:

2012-008

A person who serves simultaneously as a member of a board of county commissioners and member of a board of township trustees of a township located within the same county confronts a conflict of interest attributable to the competition for tax revenue generated within the ten-mill limitation. This conflict of interest cannot be mitigated or eliminated, and thus these two offices are incompatible. (2011 Op. Att'y Gen. No. 2011-048 and 2011 Op. Att'y Gen. No. 2011-029, approved and followed.)



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

Opinions Section
Office 614-752-6417
Fax 614-466-0013

30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

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OPINION NO. 2012-008

The Honorable Anneka P. Collins
Highland County Prosecuting Attorney
112 Governor Foraker Place
Hillsboro, Ohio 45133

Dear Prosecutor Collins:

You have requested an opinion regarding the compatibility of the offices of member of a board of county commissioners and member of a board of township trustees of a township located within the same county.¹ For the reasons that follow, we conclude these two offices are incompatible.

A seven-question compatibility test is used to determine whether a person may serve simultaneously in multiple public positions. *See, e.g.*, 2011 Op. Att’y Gen. No. 2011-029, at 2-234 to 2-235; 2009 Op. Att’y Gen. No. 2009-018, at 2-127 to 2-128. Pursuant to this test, a person may not hold two public positions simultaneously if he will be subject to impermissible conflicts of interest. 2011 Op. Att’y Gen. No. 2011-048, at 2-382; 2011 Op. Att’y Gen. No. 2011-029, at 2-235. An impermissible conflict of interest exists when the duties of each position subject a person who simultaneously holds those positions to divided loyalties, conflicting duties, or the temptation to act other than in the public’s best interest. 2011 Op. Att’y Gen. No. 2011-048, at 2-382; 2011 Op. Att’y Gen. No. 2011-029, at 2-235.

The impermissible conflict of interest inquiry is well defined:

Whether impermissible conflicts of interest occur between two public positions is ascertained by reviewing the powers and duties of the respective positions. [2011 Op. Att’y Gen. No. 2011-029, at 2-235]. If the review reveals possible conflicts of interest, the immediacy of the conflicts must be considered to determine whether the conflicts may be mitigated or eliminated so as to allow the person to hold both

¹ Your opinion request states that a trustee of a township that has not adopted limited home rule government under R.C. Chapter 504 has taken out petitions to run for county commissioner in a partisan election. The individual in question began his term as township trustee in January 2012 and the election for county commissioner will be in November 2012. Thus, your opinion request raises a traditional compatibility question.

positions at the same time. *Id.* The factors used in making this determination include, but are not limited to, “the probability of the conflicts arising, the ability of the person to remove himself from any conflicts that may arise, whether the person exercises decision-making authority in each position, and whether the conflicts relate to the primary functions of each position or to financial or budgetary matters.” *Id.*

2011 Op. Att’y Gen. No. 2011-048, at 2-382.

The position of county commissioner is a public office. R.C. 305.01-.04. A board of county commissioners is responsible for a wide range of matters relating to the governing of the county. *See generally* R.C. Chapters 305 and 307; 2003 Op. Att’y Gen. No. 2003-006, at 2-33 to 2-34. Among those responsibilities, a board of county commissioners, as the taxing authority of the county, must prepare, adopt, and submit an annual tax budget to the county budget commission. *See* R.C. 5705.01(C); R.C. 5705.28-.32; 2003 Op. Att’y Gen. No. 2003-006, at 2-34.

Similarly, the position of township trustee is a public office. *See, e.g.*, 1981 Op. Att’y Gen. No. 81-078, at 2-308. A board of township trustees is responsible for a host of matters relating to the governing of the township. *See generally* R.C. Chapter 505; 1999 Op. Att’y Gen. No. 99-043, at 2-263. A board of township trustees is the taxing authority of the township and, in that capacity, must prepare, adopt, and submit an annual tax budget to the county budget commission. *See* R.C. 5705.01(C); R.C. 5705.28-.32; 2003 Op. Att’y Gen. No. 2003-006, at 2-34.

A person who serves simultaneously as a member of a board of county commissioners and member of a board of township trustees of a township located within the same county is subject to a significant conflict of interest arising from the competition over tax revenue generated within the ten-mill limitation.² Tax revenue generated within the ten-mill limitation is allocated to subdivisions and taxing units within a county through the submission of annual tax budgets to the county budget commission. *See* 2011 Op. Att’y Gen. No. 2011-048, at 2-383 to 2-384; 2003 Op. Att’y Gen. No. 2003-006, at 2-34; 1999 Op. Att’y Gen. No. 99-043, at 2-264. The county budget commission evaluates the tax budgets, revises and adjusts the estimates of balances and receipts from all sources for funds within the budgets, and, if necessary, adjusts tax levies within the ten-mill limitation. *See* R.C. 5705.31-.32.

² Article XII, § 2 of the Ohio Constitution provides that real property in Ohio may not be taxed in excess of one percent of its true value in money for state and local purposes unless approved by the voters or as provided for by a municipal charter. *See also* R.C. 5705.02 (“[t]he aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing unit shall not in any one year exceed ten mills on each dollar of tax valuation of such subdivision or other taxing unit, except for taxes specifically authorized to be levied in excess thereof”). This is known as the ten-mill limitation, and tax revenue generated within the ten-mill limitation is known as inside millage. *See* 2011 Op. Att’y Gen. No. 2011-009, at 2-71; 2003 Op. Att’y Gen. No. 2003-006, at 2-34 n.4.

A person who serves simultaneously in two positions competing for tax revenue generated within the ten-mill limitation “may experience conflicting duties and loyalties that prevent him from making completely unbiased decisions.” 2011 Op. Att’y Gen. No. 2011-048, at 2-384; *see also* 2011 Op. Att’y Gen. No. 2011-029, at 2-238 (same). This conflict of interest was summarized in 2011 Op. Att’y Gen. No. 2011-048, at 2-383:

Because the amount of tax revenue generated within the ten-mill limitation is finite, the process by which such revenue is allocated creates competition between the governmental entities that are entitled to share in the distribution of the revenue. The competition is extremely intense, especially when the amount of tax revenue generated within the ten-mill limitation diminishes in times of economic distress, and makes governmental entities adversaries of each other.

Thus, “Ohio’s Attorneys General have, for more than 80 years, uniformly advised that a person is subject to a major, recurring conflict of interest when the person annually must directly participate in the competition for tax revenue generated within the ten-mill limitation on behalf of two governmental entities.” *Id.* (citations omitted).

A county competes with every other subdivision in the county for a finite amount of the revenue generated within the ten-mill limitation, and a township is one such subdivision. Likewise, a township competes with every other subdivision in the county, including the county itself, for a finite amount of the revenue generated within the ten-mill limitation. Thus, a conflict of interest exists when a person serves simultaneously as a member of a board of county commissioners and member of a board of township trustees of a township located within the same county.

Having concluded a conflict of interest exists between these two offices, we must now consider the immediacy of the conflict. In this instance, the conflict of interest arising from the competition for tax revenue generated within the ten-mill limitation cannot be mitigated or eliminated. A primary statutory function of both a board of county commissioners and a board of township trustees is the handling of fiscal and budgetary matters for the county and township, respectively, including the preparation of an annual tax budget. Numerous decisions made throughout the year by a board of county commissioners or a board of township trustees affect the tax budget. Thus, discussions, deliberations, and votes about a tax budget and other fiscal matters are regularly undertaken by the members of a board of county commissioners and the members of a board of township trustees, and it would be impracticable for an individual serving simultaneously in both offices to recuse himself from every such matter. In addition, the preparation of the annual tax budget, and the numerous decisions throughout the year that affect the fiscal circumstances of a county or township, require the members of a board of county commissioners and the members of a board of township trustees to exercise independent decision-making authority that is an essential component of the office and cannot be delegated to another individual.

In sum, a person who serves simultaneously as a member of a board of county commissioners and member of a board of township trustees of a township located within the same county is unable to mitigate or eliminate the conflict of interest resulting from the competition for tax revenue generated

within the ten-mill limitation. This conclusion is consistent with several recent compatibility opinions. *See* 2011 Op. Att’y Gen. No. 2011-048, at 2-385 (the conflict of interest arising from the competition for tax revenue generated within the ten-mill limitation cannot be mitigated or eliminated for a person serving simultaneously in the positions of president of a board of health of a combined general health district and member of the board of education of a local school district situated within the health district); 2011 Op. Att’y Gen. No. 2011-029, at 2-239 to 2-240 (the conflict of interest arising from the competition for tax revenue generated within the ten-mill limitation cannot be mitigated or eliminated for a person serving simultaneously in the positions of member of a board of park commissioners, member of a board of health of a combined general health district, and member of a veterans service commission). This conclusion is also consistent with prior Attorney General opinions analyzing the compatibility of various county and township positions. *See* 1999 Op. Att’y Gen. No. 99-043, at 2-265 (the conflict of interest arising from the competition for tax revenue generated within the ten-mill limitation cannot be mitigated or eliminated for a person serving simultaneously in the positions of county administrator and member of a board of township trustees within the same county). Accordingly, the offices of member of a board of county commissioners and member of a board of township trustees of a township located within the same county are incompatible.

Having concluded a person serving simultaneously in these two offices is subject to an impermissible conflict of interest arising from the competition for tax revenue generated within the ten-mill limitation, it is unnecessary to determine whether any other conflicts of interest also bar a person from serving in both offices. *See* 2011 Op. Att’y Gen. No. 2011-048, at 2-387 (“[i]nsofar as we have concluded that a person may not serve simultaneously as the president of the board of health of a combined general health district and a member of the board of education of a local school district situated within the health district because of competition for tax revenue generated within the ten-mill limitation, it is unnecessary for us to determine whether any other conflicts of interest also bar a person from serving in both positions”). Nonetheless, we are aware of, and mention briefly, other conflicts of interest involving a person serving simultaneously as a member of a board of county commissioners and member of a board of township trustees of a township located within the same county.

One such conflict of interest arises from the competition between a county and township for moneys in the undivided local government fund. *See* R.C. 5747.50-.55. Because counties and townships are “subdivisions” for purposes of R.C. 5747.50-.55, both may receive disbursements of money from the undivided local government fund. *See* R.C. 5747.01(Q)(1); 2003 Op. Att’y Gen. No. 2003-006, at 2-34; 2000 Op. Att’y Gen. No. 2000-025, at 2-171. Counties and townships are given the opportunity to appear before the county budget commission to establish their need for moneys from this fund. *See* R.C. 5747.51(B); R.C. 5747.62(B); 2003 Op. Att’y Gen. No. 2003-006, at 2-34 to 2-35; 2000 Op. Att’y Gen. No. 2000-025, at 2-171. In addition, a county may adopt an alternative method of apportioning moneys from the undivided local government fund. An alternative apportioning method, however, must be approved by the board of county commissioners and a majority of the boards of township trustees in the county. *See* R.C. 5747.53; R.C. 5747.63; 2003 Op. Att’y Gen. No. 2003-006, at 2-36; 2000 Op. Att’y Gen. No. 2000-025, at 2-172. Thus, a person who simultaneously serves as a member of a board of county commissioners and member of a board of township trustees of a township located within the same county will confront conflicting duties and

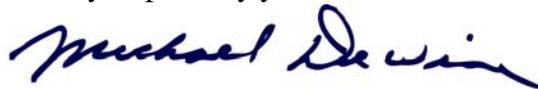
loyalties as a consequence of (1) competing for moneys that comprise the undivided local government fund or (2) participating in the process of adopting a different method of apportioning the moneys in this fund.

Another conflict of interest arises from the competition for tax revenue in excess of the ten-mill limitation. A county and a township are each permitted to place a levy on the ballot for tax revenue in excess of the ten-mill limitation. *See* R.C. 5705.01; R.C. 5705.07; R.C. 5705.19. Prior Attorney General opinions have recognized that the possibility of having competing tax levies on the same ballot is a critical factor for a taxing authority in determining when, or if, to place a request for additional taxes before the electorate. *See* 2011 Op. Att’y Gen. No. 2011-048, at 2-386; 1988 Op. Att’y Gen. No. 88-011, at 2-43. For example, if a township has authorized a levy for additional funds, an individual serving as a member of a board of county commissioners and member of a board of township trustees of a township located within the same county might hesitate to approve placing a county levy on the ballot for fear that the voters in the township would reject the township levy in favor of the county levy, or vice versa. Accordingly, a person holding both offices may find himself subject to divided loyalties that prevent his decisions from being completely objective and disinterested.

Unlike the conflict of interest over the competition for tax revenue generated within the ten-mill limitation, it *may* be possible for a person serving simultaneously as a member of a board of county commissioners and member of a board of township trustees of a township located within the same county *not* to routinely confront conflicts of interest over the competition for moneys in the undivided local government fund or over the competition for tax revenue in excess of the ten-mill limitation. Nonetheless, the competition for moneys in the undivided local government fund and the decision to place on the ballot a tax levy in excess of the ten-mill limitation relate to financial and budgetary matters generally, require the exercise of independent, decision-making authority, and involve essential, nondelegable responsibilities. Thus, while we do not rely specifically on these conflicts of interest, they further support the conclusion that the offices of member of a board of county commissioners and member of a board of township trustees of a township located within the same county are incompatible.

In conclusion, it is my opinion, and you are hereby advised that, a person who serves simultaneously as a member of a board of county commissioners and member of a board of township trustees of a township located within the same county confronts a conflict of interest attributable to the competition for tax revenue generated within the ten-mill limitation. This conflict of interest cannot be mitigated or eliminated, and thus these two offices are incompatible. (2011 Op. Att’y Gen. No. 2011-048 and 2011 Op. Att’y Gen. No. 2011-029, approved and followed.)

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General