

January 7, 1993

OPINION NO. 93-001

The Honorable Stephanie Tubbs Jones
Cuyahoga County Prosecuting Attorney
Courts Tower, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

Dear Prosecutor Jones:

You have requested an opinion regarding the reimbursement or indemnification of attorneys fees incurred and paid by several individual members of a regional planning commission as defendants in a criminal prosecution. According to your letter,

Northeast Ohio Areawide Coordinating Agency (NOACA) is a metropolitan planning organization...consisting of five counties – Cuyahoga, Lake, Geauga, Lorain, and Medina – whose purpose is to secure federal funds to carry out transportation and environmental planning functions within the area. A portion of the agency's operating funds is derived from dues paid by each participating county.

In 1991, three members of the NOACA Governing Board were indicted on charges of forgery, falsification, uttering, and obstruction of official business. On December 11, 1991, after close of the prosecution's case, the trial court directed a verdict dismissing all of the indictments against all three board members.

The three board members have requested indemnification from NOACA for the cost of attorney's fees incurred in the defense of the aforementioned charges. This office has been requested by our county commissioners, all of whom presently sit on the NOACA Governing Board, to solicit your opinion with respect to that Board's legal authority to pay said attorney's fees.

Additionally, your letter notes that several members of the governing board of the Northeast Ohio Areawide Coordinating Agency (NOACA) are board members solely as a result of their positions as county commissioners or township trustees, and "[t]he question arises, therefore, as to the duty and responsibility of the county prosecutor to defend a county commissioner or a township trustee, or for the county or township to provide a defense [for], or indemnify [the attorneys fees of], a county commissioner or a township trustee in actions arising out of his or her discharge of NOACA board duties." Finally, you wish to know whether the political subdivision that a NOACA governing board member represents is responsible, pursuant to R.C. 2744.07, to indemnify that board member, or pay that board member's legal expenses.¹

Legal Representation for County and Township Officers and Boards

A. Legal Representation by the Prosecuting Attorney

You have asked about (1) the duty of a county prosecuting attorney to defend a county commissioner or township trustee in actions prompted by that person's discharge of NOACA governing board duties; (2) the duty of a county or township to provide legal representation to a county commissioner or township trustee in that same situation; and, (3) the duty of a county or township to indemnify a county commissioner or township trustee for attorneys fees incurred in connection with that person's discharge of NOACA governing board duties. R.C. 309.09 addresses the duty of the prosecuting attorney to serve as legal adviser to various governmental officers and boards at the county and township level. R.C. 309.09 provides, in relevant part, as follows:

- (A) *The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards, including all tax-supported public libraries, and any of them may require written opinions or instructions from him in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code.*
- (B) *Such prosecuting attorney shall be the legal adviser for all township officers, unless the township has adopted the limited self-government form of township government pursuant to Chapter 504. of the Revised Code, in which case the township law director, whether serving full-time or part-time, shall be the legal adviser for all township officers. (Emphasis added.)*

¹ R.C. 2744.07, by its terms, is applicable only to civil tort actions. For the purpose of this opinion, it is assumed that these additional questions, unlike your initial inquiry concerning criminal defense attorneys fees, are directed to civil litigation that is instituted and pursued against individual members of NOACA's governing board and the liability that may thereby be imposed against those board members.

Thus, pursuant to R.C. 309.09(A), the prosecuting attorney serves as the legal adviser of all "county officers" and "county boards," and is required to defend all suits and actions to which a county officer or a county board is a party. Pursuant to R.C. 309.09(B), the prosecuting attorney also serves as legal adviser for all "township officers," which may require the prosecuting attorney to defend a suit or action in which a township officer is a party. *See, e.g., Kline v. Board of Township Trustees*, 13 Ohio St. 2d 5, 7-8, 233 N.E.2d 515, 517 (1968) ("the prosecuting attorney of a county is the legal adviser and counsel of a board of township trustees within the county and is required to prosecute and defend any action which may affect such board"). *Cf.* 1989 Op. Att'y Gen. No. 89-083 at 2-391 ("[t]he duty of a county prosecuting attorney to represent a board of township trustees, however, is not absolute, but depends upon such board's authority to participate in a legal proceeding or controversy"); 1988 Op. Att'y Gen. No. 88-088 at 2-423 (same).

B. Legal Representation by Counsel Other Than the Prosecuting Attorney

Provision is also made for the employment by a county or township of counsel other than the prosecuting attorney to represent particular county or township officers and boards. Regarding the employment of such counsel by a board of township trustees, R.C. 309.09(B) reads, in part, as follows:

...When the board of township trustees finds it advisable or necessary to have additional legal counsel it may employ an attorney other than the township law director or the prosecuting attorney of the county, either for a particular matter or on an annual basis, to represent the township and its officers in their official capacities and to advise them on legal matters. No such counsel or attorney may be employed, except on the order of the board of township trustees, duly entered upon its journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund. (Emphasis added.)

R.C. 309.09(B) thus empowers a board of township trustees to employ an attorney other than the prosecuting attorney "to represent the township and its officers in their official capacities."

R.C. 305.14, referred to in R.C. 309.09(A), also addresses the employment by a board of county commissioners of legal counsel other than the prosecuting attorney. Division (A) of R.C. 305.14 reads as follows:

The court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity. (Emphasis added.)

Pursuant to R.C. 305.14(A), therefore, a board of county commissioners, when authorized by the court of common pleas, may employ legal counsel to assist the board or any other "county officer" in the defense of any action or proceeding in which such board or officer is a party or has an interest, in

its official capacity. *See generally State ex rel. Jefferson County Children Services Board v. Hallock*, 28 Ohio St. 3d 179, 502 N.E.2d 1036 (1986); *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981); 1990 Op. Att'y Gen. No. 90-096; 1988 Op. Att'y Gen. No. 88-055; 1986 Op. Att'y Gen. No. 86-036.

Whether the foregoing Revised Code provisions entitle a member of NOACA's governing board to legal representation at either county or township expense will depend upon (1) whether NOACA's governing board is a county board, and (2) whether an individual member thereof is, in that capacity, either a county or township officer. Resolution of those issues requires an examination of the statutory scheme that governs the creation and operation of NOACA.

C.Regional Planning Commissions

The Northeast Ohio Areawide Coordinating Agency is a regional planning commission governed by the terms of R.C. 713.21 and R.C. 713.23. *See* 1989 Op. Att'y Gen. No. 89-082. R.C. 713.21 states that the planning commission of any municipal corporation or group of municipal corporations, any board of township trustees, and the board of county commissioners of any county in which such municipal corporation or group of municipal corporations is located or of any adjoining county may cooperate in the creation of a regional planning commission, which is to encompass any region as agreed upon by such planning commissions and boards, exclusive, however, of any territory within the limits of a municipal corporation that does not have a planning commission. *See generally* R.C. 713.01-15 (providing for the establishment and operation of city and village planning commissions). Thereafter, school districts, special districts, authorities, and any other units of local government may participate in such regional planning commission, upon such terms as may be agreed upon by the constituent planning commissions and boards. R.C. 713.21.

R.C. 713.21 also addresses the appointment of the individual members of a regional planning commission, the apportionment of regional planning costs among the local governmental units that have elected to participate in such regional planning commission, and the appropriation of funds by those governmental units to pay such costs. Pursuant to R.C. 713.21, those matters are to be "determined by a majority of the planning commissions and boards."

The powers and duties conferred upon a regional planning commission are further enumerated in R.C. 713.23. R.C. 713.23(A) provides that the overall mission of a regional planning commission is as follows:

The regional or county planning commission may make studies, maps, plans, recommendations and reports concerning the physical, environmental, social, economic, and governmental characteristics, functions, services, and other aspects of the region or county, respectively. The commission may make such studies, maps, plans, recommendations, and other reports as to areas outside the region or county concerning the physical, environmental, social, economic, and governmental characteristics, functions, services, and other aspects which affect the development and

welfare of the region or county respectively, as a whole or as more than one political unit within the region or county.

The particular activities that a regional planning commission may undertake in accomplishing the foregoing objectives are more specifically delineated in R.C. 713.23(B)(1)-(8).

The provisions of R.C. 713.21 and R.C. 713.23 thus make clear that a regional planning commission such as NOACA is a separate legal entity readily distinguishable from the various planning commissions, boards of township trustees, boards of county commissioners, special districts, and other units of local government that, pursuant to R.C. 713.21, participate in its formation or operation. See 1964 Op. Att'y Gen. No. 1207, p. 2-259, at 2-261 ("a regional planning commission is established as a semi-autonomous entity having an existence apart and in a sense independent of the several subdivisions which joined in its creation"). Thus, neither the governing board nor the individual officers of such a regional, multi-county entity constitute a "county board" or are "county officers" for purposes of R.C. 309.09(A) or R.C. 305.14(A):

While the terms "county board" and "county officers" are not statutorily defined, it has been opined by several of my predecessors that, when a joint-county entity is created, by virtue of the fact that such board or officers may exercise authority over an area exceeding the territorial limits of any one county, such board or officers may not be considered a county board or county officers. For example, in 1979 Op. Att'y Gen. No. 79-019, one of my predecessors concluded that a multicounty felony bureau was not a county board for purposes of R.C. 309.09 and that the director of such bureau was not a county officer for purposes of R.C. 309.09. Op. No. 79-019 states, at 2-69: Moreover, there is ample authority for the proposition that the term "county board" as used in R.C. 309.09, does not apply to any entity established on a multi-county basis. 1975 Op. Att'y Gen. No. 75-014 (joint county community mental health and retardation board); 1964 Op. Att'y Gen. No. 95, p. 157 (joint county airport facility) 1958 Op. Att'y Gen. No. 2736, p. 567 (regional planning commission). Accordingly, I am of the opinion that a Multi-County Felony Bureau is not a "county board" for purposes of R.C. 309.09.

1983 Op. Att'y Gen. No. 83-064 at 2-268 (concluding that a joint board of county commissioners formed pursuant to R.C. 2151.34 and R.C. 2151.65 for the purpose of establishing a multicounty juvenile detention and rehabilitation district is not a county board for purposes of R.C. 309.09(A)). See also 1989 Op. Att'y Gen. No. 89-102 (the board of directors of a joint solid waste management district created pursuant to R.C. 343.01(A)(2), although comprised of the commissioners of those counties that form the district, is not a county board, and the individual members thereof are not county officers, for purposes of R.C. 309.09(A)); 1986 Op. Att'y Gen. No. 86-068 (regional council of governments); 1985 Op. Att'y Gen. No. 85-012 (regional organization for civil defense); 1981 Op. Att'y Gen. No. 81-059 (joint recreation district).

Thus, prior Attorney General opinions have concluded that a regional planning commission is not a "county board," and the persons appointed to serve as members of such commission are not, by reason of such appointment, "county officers" for purposes of receiving legal counsel or representation from the prosecuting attorney pursuant to R.C. 309.09(A). 1961 Op. Att'y Gen. No. 2383, p. 366; 1958 Op. Att'y Gen. No. 2736, p. 567. Similarly, a regional planning commission and individual members thereof cannot be categorized as a township entity and "township officers" entitled to legal counsel or representation from the prosecuting attorney under R.C. 309.09(B) simply because those individual members have been appointed to the commission as representatives of particular townships that have joined in the commission's formation or operation. *See, e.g.*, 1985 Op. Att'y Gen. No. 85-071 at 2-277.

As noted previously, NOACA is a regional planning commission separate and distinct from the individual counties, townships, and other entities that have joined in its formation or operation. Accordingly, NOACA is neither a county board nor a township entity, and the individuals who serve upon its governing board are, in that capacity, neither county officers nor township officers for purposes of receiving legal counsel or representation from a prosecuting attorney pursuant to R.C. 309.09(A) or R.C. 309.09(B) in connection with their duties and responsibilities as members of the governing board. Thus, a prosecuting attorney is not required to provide legal counsel or representation to the individual members of NOACA's governing board. Additionally, boards of county commissioners and boards of township trustees may not employ, pursuant to R.C. 305.14(A) or R.C. 309.09(B), legal counsel to defend, or assist in the defense of, any action or proceeding in which the individual members of NOACA's governing board are parties or have interests, and that arises out of their performance of NOACA duties. Similarly, boards of county commissioners and boards of township trustees may not indemnify members of NOACA's governing board for attorneys fees they may incur in connection with the discharge of their duties and responsibilities as board members.²

² There are, in fact, no provisions in either R.C. Title 3 (counties) or 5 (townships) that expressly authorize a board of county commissioners or a board of township trustees to indemnify or reimburse any county or township officer for attorneys fees that are incurred by such officer as a result of having retained legal counsel to represent such officer in connection with the discharge of his governmental duties and responsibilities. In that regard R.C. 305.14 and R.C. 309.09 are the only provisions that authorize the employment of counsel other than the prosecuting attorney to represent a county or township officer. R.C. 305.14 and R.C. 309.09 also set forth specific procedures that must be followed by a board of county commissioners or a board of township trustees in employing counsel other than the prosecuting attorney to represent a county or township officer. Neither provision addresses the indemnification or reimbursement of attorneys fees incurred by a county or township officer who, on his own initiative, and without prior board approval or participation, has retained private legal counsel in connection with a county or township legal matter. Prior Attorney General opinions, however, have concluded that R.C. 305.14 and R.C. 309.09 cannot be construed to permit such indemnification or reimbursement to a county officer in that circumstance. 1990 Op. Att'y Gen. No. 90-096 at 2-407 and 2-408; 1988 Op. Att'y Gen. No. 88-055 at 2-253 and 2-254.

Defense and Indemnification Provisions of R.C. 2744.07

You have also asked about the responsibility of the political subdivision (*i.e.*, a county or township) that is represented by an individual member of NOACA's governing board to provide for the defense of that member, or indemnify him against liability, in connection with a civil action or proceeding against that member, in accordance with R.C. 2744.07. R.C. Chapter 2744 sets forth provisions that define the scope of tort liability of a political subdivision and its employees, *see* R.C. 2744.02(B)(1)-(5), and the defenses and immunities that may be available to insulate a political subdivision or its employees from liability in civil tort actions, *see* R.C. 2744.02(A)(1); R.C. 2744.03. R.C. Chapter 2744 also prescribes the circumstances in which a political subdivision must provide for the defense and indemnification of an employee in connection with a civil tort action. R.C. 2744.07 reads, in relevant part, as follows:

(A)(1) Except as otherwise provided in this division, a *political subdivision* shall provide for the *defense* of an *employee*, in any state or federal court, in any civil action or proceeding to recover damages for injury, death, or loss to persons or property allegedly caused by an act or omission of the *employee* in connection with a governmental or proprietary function if the act or omission occurred or is alleged to have occurred while the *employee* was acting in good faith and not manifestly outside the scope of his employment or official responsibilities. Amounts expended by a political subdivision in the defense of its employees shall be from funds appropriated for this purpose or from proceeds of insurance. The duty to provide for the defense of an employee specified in this division does not apply in a civil action or proceeding that is commenced by or on behalf of a political subdivision.

(2) Except as otherwise provided in this division, a *political subdivision* shall *indemnify* and hold harmless an *employee* in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the *employee* in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the *employee* was acting in good faith and within the scope of his employment or official responsibilities. (Emphasis added.)

R.C. 2744.08 further permits a political subdivision to purchase insurance with respect to its and its employees' potential liability in actions brought under R.C. Chapter 2744.

R.C. 2744.01 defines various terms used in R.C. Chapter 2744, including the terms "[e]mployee" and "[p]olitical subdivision." R.C. 2744.01(B) and (F) state, in relevant part, as follows:

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of his employment for a political subdivision. "Employee" does not include an

independent contractor. *"Employee" includes any elected or appointed official of a political subdivision....*

....

(F) *"Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code.... (Emphasis added.)*

Further, R.C. 2744.01(C)(1) and (G)(1) provide, respectively, that a "[g]overnmental function" and "[p]roprietary function" mean "a function of a political subdivision" as thereafter specified or that satisfies or conforms to the specific characteristics thereafter enumerated.

R.C. 2744.07(A)(1) thus imposes a duty upon a political subdivision to provide for the defense of an employee, in any state or federal court, in any *civil* action or proceeding to recover damages for injury, death, or loss to persons or property allegedly caused by an act or omission of the employee in connection with a governmental or proprietary function if the act or omission occurred or is alleged to have occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities. R.C. 2744.07(A)(2) further imposes a duty upon a political subdivision to indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained in an action described in R.C. 2744.01(A)(1). As noted above, "[e]mployee," as defined in R.C. 2744.01(B), includes any appointed official of a political subdivision, and "[p]olitical subdivision," as defined in R.C. 2744.01(F), includes a regional planning commission. Accordingly, a regional planning commission, pursuant to R.C. 2744.07(A)(1) and (2), is required to provide for the defense of, and indemnify and hold harmless in the amount of any judgment against, any appointed official of the regional planning commission, in any state or federal court, in any civil action or proceeding to recover damages for injury, death, or loss to persons or property allegedly caused by an act or omission of the official in connection with a governmental or proprietary function of the regional planning commission if the act or omission occurred or is alleged to have occurred while the official was acting in good faith and not manifestly outside the scope of his official responsibilities for the regional planning commission.³

It follows, therefore, that NOACA is the "[p]olitical subdivision" responsible under R.C. 2744.07(A)(1) and (2) for providing for the defense of, or indemnifying, an appointed member of NOACA's governing board, in any state or federal court, in any civil action or proceeding to recover

³ R.C. 2744.07(C) also provides that if a political subdivision refuses to provide an employee with a defense in a civil action or proceeding as described in R.C. 2744.07(A)(1), the employee "may file, in the court of common pleas of the county in which the political subdivision is located, an action seeking a determination as to the appropriateness of the refusal of the political subdivision to provide him with a defense under [R.C. 2744.07(A)(1)]."

damages for injury, death, or loss to persons or property allegedly caused by an act or omission of that board member in connection with a governmental or proprietary function of NOACA if the act or omission occurred or is alleged to have occurred while the board member was acting in good faith and not manifestly outside the scope of his official responsibilities for NOACA. Conversely, such responsibility does not, in that instance, rest with the individual county or township otherwise represented by that particular board member. *Cf.* 1987 Op. Att'y Gen. No. 87-024.

Authority of a Regional Planning Commission to Retain Legal Counsel

You have also asked whether NOACA may reimburse or indemnify several members of its governing board for the attorneys fees those board members incurred when they retained private counsel to defend them against criminal charges relating to the performance of their duties as members of the governing board. You have indicated that a directed verdict in favor of the defendant board members was ultimately granted with respect to all the charges in question following the presentation of the prosecuting attorney's case in chief.

A review of the regional planning commission statutory scheme in R.C. 713.21 and R.C. 713.23 and prior Attorney General opinions that address the provision of legal counsel for regional, multi-jurisdictional entities of local government suggests that NOACA may, in certain circumstances, provide such reimbursement, either in whole or in part, and in such a manner and upon such terms as NOACA considers to be reasonable and appropriate. As discussed above, a prosecuting attorney is not required to provide legal counsel or representation to a regional planning commission such as NOACA or the individual members of the commission. Prior Attorney General opinions have indicated that, in those instances in which a prosecuting attorney is not required to furnish legal counsel to a particular governmental entity, authority on the part of that entity otherwise to hire or retain the services of legal counsel may be inferred from the powers or responsibilities expressly granted to that entity by its controlling statutes. For example, regarding a board of fire district trustees of a joint fire district organized pursuant to R.C. 505.37 and R.C. 505.371, Op. No. 85-071 states as follows at 2-278:

Apart from the limited involvement of the county prosecutor as legal adviser to township trustees who serve on a board of fire district trustees, in matters arising from their positions as township trustees, the Revised Code makes no express provision for a joint fire district to obtain legal advice. A board of fire district trustees is, however, vested with a number of powers which may, in their exercise, create a need for legal advice, as, for example, the power to own, lease, and maintain property, the power to employ firefighters, and the power to levy a tax. *See* R.C. 505.37; R.C. 505.371. It is a general rule that public officials have both such powers as are expressly conferred by statute and such powers as may be reasonably and necessarily inferred from the statutory powers. *See State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940). It follows that when a board of fire district trustees is in need of legal advice in order to carry out its statutory functions, it may employ legal counsel to provide such advice.

See also Op. No. 89-102 at 2-495 ("[a] joint solid waste management district board of directors must also perform a variety of statutory duties and functions that may very well require that the board consult with, or seek the assistance of, legal counsel....In such circumstances one may reasonably infer authority on the part of the joint solid waste management district board of directors to hire legal counsel who will provide the board of directors with the advice and assistance it requires"); Op. No. 83-064 (joint board of county commissioners formed pursuant to R.C. 2151.34 and R.C. 2151.65 for the purpose of establishing a multicounty juvenile detention and rehabilitation district, same).

Similarly, 1958 Op. No. 2736 addressed directly the question of whether a regional planning commission could lawfully hire legal counsel, and expend funds for such purpose, in view of the fact that a county prosecuting attorney does not serve as legal adviser to a regional planning commission. Syllabus paragraph two of 1958 Op. No. 2736 concluded that, particularly in view of the absence of any other statutorily designated counsel, a regional planning commission could employ legal counsel if necessary and if funds for that purpose were available within the amounts agreed upon and appropriated by the various agencies participating in the creation and operation of the regional planning commission.

A regional planning commission may find it necessary to employ legal counsel for the purpose of receiving advice or representation on a wide variety of matters that pertain to the duties and responsibilities of the commission described in R.C. 713.21 and R.C. 713.23, including litigation in which the regional planning commission or individual employees or officials of the commission either appear as named parties or are otherwise interested. As previously noted, a regional planning commission may be required to defend itself or its employees or officials in an action brought pursuant to R.C. Chapter 2744 that seeks to recover damages for injury, death, or loss to persons or property allegedly caused by an act or omission of the regional planning commission or its officials. The employment of legal counsel by a regional planning commission in that instance to represent the interests of the commission itself, or individual members of the commission, would be a proper exercise of the commission's implicit power to hire legal counsel under R.C. 713.21. As a general matter, therefore, it is appropriate to conclude that a regional planning commission may hire legal counsel to represent the commission or any of the individual members of the commission in connection with any litigation that reasonably relates to actions undertaken by the commission or its members in their official capacities. In this regard, the action of a particular public entity or public officer is generally considered undertaken in an official capacity if the facts and circumstances of that action clearly demonstrate that it occurred or was prompted as part of a good faith, well-intended attempt to perform official duties and responsibilities. *See generally, e.g.*, Op. No. 90-096; 1985 Op. Att'y Gen. No. 85-014; 1980 Op. Att'y Gen. No. 80-076; 1954 Op. Att'y Gen. No. 4567, p. 570.⁴ *See*

⁴ A specific question considered in each of the cited opinions concerned the responsibility imposed upon a prosecuting attorney by R.C. 309.09 to provide legal advice or representation to an individual county officer in connection with a civil, *see* 1985 Op. Att'y Gen. No. 85-014; 1954 Op. Att'y Gen. No. 4567, p. 570, or criminal, *see* Op. No. 90-096; 1980 Op. Att'y Gen. No. 80-076, action or investigation. Those opinions concluded that R.C. 309.09 does not, in any instance, impose an absolute obligation upon a prosecuting attorney to furnish advice or representation at county expense

also R.C. 109.362(A) (standards followed by the Attorney General in determining whether to represent and defend a state officer or employee in a civil action); R.C. 2744.07(A)(1).

The authority of a regional planning commission to retain counsel to represent the interests of either the commission itself, or individual members of the commission, may be exercised within both the civil and criminal contexts. While the General Assembly has expressly provided for the defense of commission employees and officials in certain civil actions, *see, e.g.*, R.C. 2744.07(A)(1), your opinion request demonstrates that there may also be occasions in which individual employees or officials of a regional planning commission become subjects of a criminal investigation or prosecution. In such a situation, a regional planning commission, may, on the basis of its examination of the facts and circumstances, determine to retain counsel to advise or represent the affected employee or official. The commission's examination must disclose a reasonable and sound basis for concluding that the conduct of the employee or official that prompted the investigation or prosecution occurred as part of

to a county officer who is a party to, or the subject of, a civil or criminal proceeding or investigation. Rather, R.C. 309.09 has been interpreted as requiring a prosecuting attorney independently to evaluate the facts and circumstances of the officer's conduct in order to determine whether that officer is entitled to representation at public expense:

It will be noted that although [1933 Op. Att'y Gen. No. 1750, vol. II, p. 1603], *supra*, refers to a "duty" to defend the officer there involved, such duty was conditioned upon an evaluation by the prosecuting attorney of the facts and circumstances on which the action was based and a conclusion that there was involved a well intended attempt to perform an official duty by the defendant. In other words, the "duty" exists only if the prosecuting attorney, following such evaluation, concludes that he has such a "duty." It cannot be said, therefore, that there is ever found, in a case of this sort, a *duty* to defend as we normally understand that term. It would be more appropriate to say that the prosecuting attorney in such a case is under a duty to make a careful evaluation of such facts and circumstances and is then authorized to defend the officer concerned if such evaluation indicates that there is involved a well intentioned attempt to perform an official duty on the part of the defendant.

1954 Op. No. 4567 at 573 and 574 (emphasis in original).

Similarly, the conclusion reached in this opinion that a regional planning commission is empowered to hire counsel to represent individual officials of the commission should not be construed as imposing a mandatory obligation upon a regional planning commission in that regard whenever an official of the commission is a party to litigation and requests legal representation. Rather, the decision of a regional planning commission to retain counsel in that situation is entirely discretionary, and, furthermore, may not be made absent a reasonable basis for concluding that the conduct of the commission official in question occurred as part of a good faith, well-intended attempt to perform official duties or responsibilities.

a good faith, well-intended attempt to carry out official duties or responsibilities of the regional planning commission, as set forth in R.C. 713.21 and R.C. 713.23. *Cf. generally, e.g.,* Op. No. 80-076 (syllabus, paragraph one) (pursuant to R.C. 309.09, a county prosecutor has a duty to represent a deputy sheriff who has been charged with criminal assault if the facts and circumstances on which the action is based show that the suit arose out of a well-intended attempt on the part of the deputy to perform duties attending his official position). If such basis exists, then the regional planning commission may, in its discretion, hire or authorize the hiring of counsel for that person.

Reimbursement of Attorneys Fees

Whether a regional planning commission may reimburse a commission official for the attorney fees that official incurred in retaining private counsel in connection with criminal charges linked to that individual's conduct as a commission official presents a somewhat different question. It is presumed for the purpose of this opinion that the individual retained private counsel without the prior approval or concurrence of the regional planning commission. Ordinarily, it would appear that whenever an investigation or prosecution concerns actions of a commission official that may have occurred in an official capacity, the entire commission should be consulted before counsel is retained in order that the commission is afforded an ample opportunity to undertake the examination and evaluation described above. *See, e.g.,* note two, *supra*. However, in the situation you present, the failure of a commission official to consult in advance and receive the regional planning commission's approval before hiring counsel will not preclude the commission from thereafter authorizing reimbursement of all or a portion of that individual's legal fees. First, the authority to furnish reimbursement for those fees appears to be reasonably incidental to a regional planning commission's authority to hire counsel to represent either the commission itself or individual employees or officials of the commission. As noted above, the determinative consideration is whether a reasonable basis exists for concluding that the person's conduct represented a good faith, well-intended attempt to perform a statutory duty or responsibility for or on behalf of the regional planning commission. If the regional planning commission determines that to be the case, then it may, at its discretion, reimburse that person his legal fees, either in whole or in part, even though that individual did not consult with and receive the approval of the commission before hiring counsel.

Thus, NOACA may, in its discretion, determine to reimburse members of its governing board fees incurred and paid by those board members in retaining legal counsel to represent them as defendants in a criminal prosecution related to their actions as members of that board. In order to authorize such reimbursement, NOACA must determine that a reasonable and sound basis exists from which to conclude that the actions of those board members occurred as part of a good faith, well-intended attempt to perform or fulfill official duties or responsibilities for or on behalf of NOACA, as set forth in R.C. 713.21 or R.C. 713.23. In circumstances such as that described in your request, where the decision regarding reimbursement is made subsequent to a final determination of the criminal proceeding, such a basis for reimbursement could not generally be determined to exist if the court found that unlawful conduct had occurred.

Conclusion

In view of the foregoing, you are advised as follows:

1. The Northeast Ohio Areawide Coordinating Agency is not a "county board" for purposes of R.C. 309.09(A).
2. A person appointed to serve as a member of the governing board of the Northeast Ohio Areawide Coordinating Agency is not, by reason of such appointment, a "county officer" for purposes of receiving legal counsel or representation pursuant to R.C. 309.09(A) or R.C. 305.14(A) in connection with his duties and responsibilities as a member of the Agency's governing board.
3. A person appointed to serve as a member of the governing board of the Northeast Ohio Areawide Coordinating Agency is not, by reason of such appointment, a "township officer" for purposes of receiving legal counsel or representation pursuant to R.C. 309.09(B) in connection with his duties and responsibilities as a member of the Agency's governing board.
4. A county is not responsible, pursuant to R.C. 2744.07(A)(1) or (2), for providing for the defense of or indemnifying a member of the governing board of the Northeast Ohio Area Coordinating Agency who is a member of such board by virtue of being an officer of such county in any civil action or proceeding to recover damages for injury, death, or loss to persons or property caused by an act or omission of that board member in connection with a governmental or proprietary function of the Agency.
5. A township is not responsible, pursuant to R.C. 2744.07(A)(1) or (2), for providing for the defense of or indemnifying a person who is a member of the governing board of the Northeast Ohio Areawide Coordinating Agency by virtue of being an officer of such township in any civil action or proceeding to recover damages for injury, death, or loss to persons or property caused by an act or omission of that board member in connection with a governmental or proprietary function of the Agency.
6. Pursuant to its authority under R.C. 713.21, the Northeast Ohio Areawide Coordinating Agency may, in its discretion, reimburse members of its governing board fees incurred and paid by those board members in retaining legal counsel to represent them as defendants in a criminal prosecution related to their actions as members of that board, provided that the Agency determines that a reasonable and sound basis exists from which to conclude that the actions of those board members occurred as part of a good faith, well-intended attempt to perform or fulfill official duties or responsibilities for or on behalf of the Agency, as set forth in R.C. 713.21 or R.C. 713.23.

Respectfully,

LEE FISHER
Attorney General

January 7, 1993

The Honorable Stephanie Tubbs Jones
Cuyahoga County Prosecuting Attorney
Courts Tower, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

SYLLABUS:

93-001

1. The Northeast Ohio Areawide Coordinating Agency is not a "county board" for purposes of R.C. 309.09(A).
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6. Pursuant to its authority under R.C. 713.21, the Northeast Ohio Areawide Coordinating Agency may, in its discretion, reimburse members of its governing board fees incurred and paid by those board members in retaining legal counsel to represent them as defendants in a criminal prosecution related to their actions as members of that board, provided that the Agency determines that a reasonable and sound basis exists from which to conclude that the actions of those board members occurred as part of a good faith, well-intended attempt to perform or fulfill official duties or responsibilities for or on behalf of the Agency, as set forth in R.C. 713.21 or R.C. 713.23.