

January 18, 2006

The Honorable D. Michael Haddox
Muskingum County Prosecuting Attorney
P.O. Box 189
27 North Fifth Street, Suite 201
Zanesville, Ohio 43702-0189

SYLLABUS:

2006-003

1. A person may serve simultaneously as a trustee of a township that has not adopted a limited home rule government pursuant to R.C. Chapter 504 and member of the board of directors of a port authority created pursuant to R.C. 4582.22 when the township has not participated in the creation of, or joined in, the port authority.
2. As a township trustee, the person may not participate in any deliberations, discussions, negotiations, or votes concerning (1) contracts or property transactions with the port authority; (2) township tax levies or bond issues for additional funding when the port authority has placed such a levy or bond issue on the ballot; (3) development or use of the port authority's property, facilities, or services; (4) appropriation of the port authority's land or lesser interests therein; (5) joining the port authority; (6) relocation of a road, railroad, or public facility under R.C. 4582.57; or (7) legal matters involving the township and port authority.
3. As a member of the board of directors of the port authority, the person may not participate in any deliberations, discussions, negotiations, or votes concerning (1) contracts or property transactions with the township; (2) port authority tax levies or bond issues for additional funding when the township has placed such a levy or bond issue on the ballot; (3) appropriation of the township's land or lesser interests therein; (4) participation by the township in the port authority; (5) development or use of port authority property, facilities, or services by the township; or (6) legal matters involving the township and port authority.



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OPINION NO. 2006-003

The Honorable D. Michael Haddox
Muskingum County Prosecuting Attorney
P.O. Box 189
27 North Fifth Street, Suite 201
Zanesville, Ohio 43702-0189

Dear Prosecutor Haddox:

You have requested an opinion whether the positions of trustee of a township that has not adopted a limited home rule government pursuant to R.C. Chapter 504¹ and member of the board of directors of a port authority created pursuant to R.C. 4582.22² are compatible when the township has not participated in the creation of, or joined in, the port authority.³ Based on the

¹ R.C. 504.01 authorizes a township to adopt a limited home rule form of township government under which the township exercises a greater measure of authority, in a greater number of matters, than the authority granted to townships generally by the other provisions of R.C. Title 5. *See, e.g.*, R.C. 504.04(A) (a limited home rule township may, in accordance with R.C. Chapter 504, “[e]xercise all powers of local self-government within the unincorporated area of the township, other than powers that are in conflict with general laws,” and “[a]dopt and enforce within the unincorporated area of the township local police, sanitary, and other similar regulations that are not in conflict with general laws or otherwise prohibited by [R.C. 504.04(B)]”). *See generally* 2002 Op. Att’y Gen. No. 2002-032 at 2-212 (“[i]n addition to the powers granted generally to townships elsewhere in the Revised Code, R.C. 504.04 empowers a limited home rule township to adopt resolutions by which the township exercises powers of local self-government or police power”).

² Port authorities are created under R.C. 4582.02 and R.C. 4582.22. A port authority created under R.C. 4582.02 may operate under R.C. 4582.01-.20 or R.C. 4582.21-.59, *see* R.C. 4582.201; R.C. 4582.202; *see also* R.C. 4582.02, while a port authority created under R.C. 4582.22 may only operate under R.C. 4582.21-.59, *see* R.C. 4582.202; *see also* R.C. 4582.22(A).

³ The port authority in question was created pursuant to R.C. 4582.22 by a municipal corporation and the county in which the township is located. The township did not participate in the creation of the port authority or join the port authority after its creation. *See generally* R.C. 4582.22(A) (a township may create or participate with other political subdivisions to create a

following, it is our opinion that a person may serve simultaneously as a trustee of a township that has not adopted a limited home rule government pursuant to R.C. Chapter 504 and member of the board of directors of a port authority created pursuant to R.C. 4582.22 when the township has not participated in the creation of, or joined in, the port authority.

As a township trustee, the person may not participate in any deliberations, discussions, negotiations, or votes concerning (1) contracts or property transactions with the port authority; (2) township tax levies or bond issues for additional funding when the port authority has placed such a levy or bond issue on the ballot; (3) development or use of the port authority's property, facilities, or services; (4) appropriation of the port authority's land or lesser interests therein; (5) joining the port authority; (6) relocation of a road, railroad, or public facility under R.C. 4582.57; or (7) legal matters involving the township and port authority.

As a member of the board of directors of the port authority, the person may not participate in any deliberations, discussions, negotiations, or votes concerning (1) contracts or property transactions with the township; (2) port authority tax levies or bond issues for additional funding when the township has placed such a levy or bond issue on the ballot; (3) appropriation of the township's land or lesser interests therein; (4) participation by the township in the port authority; (5) development or use of port authority property, facilities, or services by the township; or (6) legal matters involving the township and port authority.

Compatibility Test

The following seven-question test is used to determine whether a person may serve in two public positions simultaneously:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit employment in another public position or the holding of another public office?
3. Is one position subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there an impermissible conflict of interest between the two positions?

port authority); R.C. 4582.26 (a township is permitted to join a port authority after it has been created and is considered to have participated in the creation of the port authority).

6. Are there local charter provisions, resolutions, or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

2003 Op. Att’y Gen. No. 2003-041 at 2-335 and 2-336. *See generally* 2 Ohio Admin. Code 123:1-46-02(F) (“[s]ervice in an appointed or elected position is prohibited when such position is subordinate to or in any way a check upon a position concurrently occupied by a classified or unclassified employee, or when it is physically impossible for one person to discharge the duties of both positions, or if some specific constitutional or statutory bar exists prohibiting a person from serving [in] both positions”).

The sixth and seventh questions concern the applicability of charter provisions, resolutions, or ordinances, and federal, state, and local regulations. No federal or state regulation prohibits a person from serving simultaneously in the positions of township trustee and member of the board of directors of a port authority. Whether there is an applicable local charter provision, resolution, ordinance, or departmental regulation which prohibits a person from concurrently holding these two positions is a question for local officials to answer. For the purpose of this opinion, it is assumed that no such local charter provision, resolution, ordinance, or departmental regulation exists.

Discussion of R.C. 124.57

The first question asks whether either of the positions is a classified employment within the terms of R.C. 124.57. This statute prohibits officers and employees in the classified service of the state, or of a county, city, city school district, or civil service township, from taking part in a variety of activities that occur as part of the regular political process and are partisan in nature.⁴ Specifically, “R.C. 124.57 does the following: it prohibits an officer or employee in the classified service from seeking election or appointment to, or holding, a partisan political office, or engaging in other partisan political activities, and it prevents a partisan political officeholder

⁴ R.C. 124.57 reads, in relevant part:

No officer or employee in the classified service of the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political party or for any candidate for public office; ... nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state be an officer in any political organization or take part in politics other than to vote as the officer or employee pleases and to express freely political opinions. (Emphasis added.)

from serving simultaneously as an officer or employee in the classified service.” 2003 Op. Att’y Gen. No. 2003-041 at 2-336; *see* rule 123:1-46-02(C).

We must initially determine whether the position of township trustee or member of the board of directors of a port authority is one that is subject to R.C. 124.57’s prohibition. R.C. 124.57 regulates the partisan political activities of officers and employees of “the state, the several counties, cities, and city school districts of the state, [and] the civil service townships of the state.” It does not apply to officers or employees of port authorities created pursuant to R.C. 4582.22. *See* 1990 Op. Att’y Gen. No. 90-084 at 2-362; *cf.* 2000 Op. Att’y Gen. No. 2000-025 at 2-167 (R.C. 124.57 does not apply to officers and employees of a park district created under R.C. Chapter 1545 since R.C. 124.57 does not explicitly refer to such officers and employees). *See generally Fort Hamilton-Hughes Mem’l Hosp. Ctr. v. Southard*, 12 Ohio St. 3d 263, 265, 466 N.E.2d 903 (1984) (“[i]t is a basic doctrine of [statutory] construction that the express enumeration of specific classes of persons in a statute implies that the legislature intended to exclude all others”).

The position of township trustee is in the unclassified service because, *inter alia*, it is an elected position. *See* R.C. 124.11(A)(1); R.C. 505.01. *See generally* 2003 Op. Att’y Gen. No. 2003-041 at 2-337 and 2-338 (since R.C. 124.57 only applies to officers and employees in the service of civil service townships,⁵ R.C. 124.57 does not apply to a township trustee in the service of a township that is not a civil service township, and since the classified service of a civil service township is limited to persons employed by civil service township police and fire departments, R.C. 124.57 does not apply to a township trustee in the service of a civil service township). Accordingly, the prohibition of R.C. 124.57 does not apply to the positions of township trustee and member of the board of directors of a port authority, and, as such, does not operate to prevent a person from holding both of these positions simultaneously.

Statutes Prohibiting the Holding of Another Public Position

The second question asks whether the empowering statutes of either position limit a person from being employed in another public position or holding another public office. Also, a constitutional provision may prohibit a person from holding two public positions at the same time.

⁵ As used in R.C. Chapter 124, the term “[c]ivil service township’ means any township with a population of ten thousand or more persons residing within the township and outside any municipal corporation, which has a police or fire department of ten or more full-time paid employees, and which has a civil service commission established under [R.C. 124.40(B)].” R.C. 124.01(G). *See generally* R.C. 124.40(B) (“[t]he board of trustees of a township with a population of ten thousand or more persons residing within the township and outside any municipal corporation and which has a police or fire department of ten or more full-time paid employees may appoint three persons who shall constitute the township civil service commission”).

No constitutional provision or statute prohibits a person from holding simultaneously the positions of township trustee and member of the board of directors of a port authority. Question two thus may be answered in the negative.

Subordination and Control

The third question asks whether one position is subordinate to, or in any way a check upon, the other. The members of the board of directors of a port authority created pursuant to R.C. 4582.22 are appointed and removed by various officials of the political subdivisions that created or joined the port authority, R.C. 4582.27, and are accountable to those officials. In this instance, the township has not participated in the creation of, or joined in, the port authority, and, as such, the person, as a township trustee, is not responsible for appointing or removing members of the board of directors of the port authority. Further, township trustees, as elected township officers, R.C. 505.01, serve and are responsible to the township's electorate. The positions thus serve different constituencies and are not subordinate to each other. Moreover, the positions operate independently of each other, and neither is required to assign duties to, or supervise, the other. Accordingly, neither position is subordinate to, or in any way a check upon, the other.

Physical Ability to Hold and Serve in Both Positions

The fourth question asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best resolved at the local level since officials of the township and port authority may more precisely determine the time constraints and demands imposed upon the person as a township trustee and member of the board of directors of the port authority.

It should be noted, however, that a township trustee, as an elected township officer, is required to perform duties imposed by statute and, where the nature of such duties requires the trustee to be present at a particular time or place, or act in a particular manner, the trustee must be able to do so. *See generally* 1965 Op. Att'y Gen. No. 65-70 at 2-146 (“failure to attend to the duties of an office may be sufficient ground for the removal of a township trustee under [R.C. 3.07]”). A member of a board of directors of a port authority may also be required to attend a meeting of the board at the same time he is required to perform his duties as a township trustee or risk being removed from his position on the board. *See generally* R.C. 4582.27 (“[t]he board of directors by rule may provide for the removal of a director who fails to attend three consecutive regular meetings of the board”).

Thus, in order to serve simultaneously in these two positions, a person must be certain that he will be able to carry out the duties of both positions in a competent and timely manner. 2003 Op. Att'y Gen. No. 2003-041 at 2-339. This means that there may not be a direct conflict between the times when the person is needed to perform duties on behalf of the township and port authority. *Id.*

Conflicts of Interest

The fifth and final question of the compatibility test asks whether there is a conflict of interest between the two positions.⁶ It is a long-standing principle that a person may not hold two public positions at the same time if he will be subject to divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interest of the respective political subdivisions he serves. 2003 Op. Att’y Gen. No. 2003-041 at 2-339 and 2-340.

We must now review the powers, duties, and responsibilities of a township trustee and a member of a board of directors of a port authority so as to determine whether there are any conflicts of interest between these two positions. This review will enable us to determine whether the person will confront impermissible conflicts of interest when exercising the powers, duties, and responsibilities in either or both positions. If the review discloses such conflicts, we must then determine the immediacy of the conflicts to see whether the conflicts may be sufficiently avoided or eliminated entirely so as to allow the person to serve in both positions at the same time. The factors used in making this determination include, but are not limited to, the probability of the conflict, the ability of the person to remove himself from the conflict (should it arise), whether the person exercises decision-making authority in both positions, and whether the conflict relates to the primary functions of each position, or to financial or budgetary matters. *Id.* at 2-340.

Let us first review the powers, duties, and responsibilities of a township trustee. A board of township trustees is responsible for governing the township. As such, the board is delegated by statute various powers and duties related to the government of the township. *See, e.g.*, R.C. Chapter 505 (setting forth the general administrative powers and duties of a board of township trustees); *see also, e.g.*, R.C. 504.04 (authorizing the trustees of a township that adopts a limited home rule government to exercise certain home rule powers). The board also handles the township’s finances and budget, *see, e.g.*, R.C. 135.04(C); R.C. 135.14; R.C. 5705.28; R.C. 5705.34, and is designated as the township’s taxing authority for purposes of R.C. Chapters 133 (uniform public securities law) and 5705 (tax levy law), *see* R.C. 133.01(NN)(7); R.C. 5705.01(C). In addition, the board performs certain duties relating to the township’s enactment and enforcement of township zoning regulations. *See, e.g.*, R.C. 519.03 (adopts a resolution

⁶ The Ohio Ethics Commission is authorized under R.C. 102.08 to render advisory opinions regarding the application of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. Because of this specific statutory grant of authority, the Attorney General will refrain from interpreting and applying these provisions by way of a formal opinion. 1987 Op. Att’y Gen. No. 87-033 (syllabus, paragraph three). Accordingly, questions concerning the interpretation and application of these provisions in the situation in which a person serves simultaneously as a township trustee and member of the board of directors of a port authority created pursuant to R.C. 4582.22 should be addressed to the Ohio Ethics Commission.

declaring its intent to proceed with zoning); R.C. 519.04 (creates and establishes a township zoning commission); R.C. 519.10 (votes upon the adoption of a zoning resolution); R.C. 519.12 (votes to adopt amendments to the zoning resolution); R.C. 519.13 (appoints a township board of zoning appeals); R.C. 519.16 (provides “for a system of zoning certificates, [and] may establish and fill the position of township zoning inspector”).

We will now turn to the powers, duties, and responsibilities of a member of the board of directors of a port authority created pursuant to R.C. 4582.22. The board of directors of this type of port authority has the powers and jurisdiction enumerated in R.C. 4582.21-.59,⁷ and is responsible for the administration of the port authority and the operation and maintenance of the authority’s facilities. *See* R.C. 4582.22(A); *see, e.g.*, R.C. 4582.31(A)(4) (a port authority board may “[a]cquire, construct, furnish, equip, maintain, repair, sell, exchange, lease to or from, or lease with an option to purchase, convey other interests in real or personal property, or any combination thereof, related to, useful for, or in furtherance of any authorized purpose and operate any property in connection with transportation, recreational, governmental operations, or cultural activities”); R.C. 4582.31(A)(5) (a port authority board may “[s]traighten, deepen, and improve any channel, river, stream, or other water course or way which may be necessary or proper in the development of the facilities of a port authority”); R.C. 4582.31(A)(9) (a port authority board may “[a]pply to the proper authorities of the United States pursuant to appropriate law for the right to establish, operate, and maintain foreign trade zones and establish, operate, and maintain foreign trade zones and to acquire, exchange, sell, lease to or from, lease with an option to purchase, or operate facilities, land, or property therefor”); R.C. 4582.31(A)(13) (a port authority board may “[p]romote, advertise, and publicize the port authority and its facilities; provide information to shippers and other commercial interests; and appear before rate-making authorities to represent and promote the interests of the port authority”); R.C. 4582.31(A)(17) (a port authority board may “[e]xercise the right of eminent domain to appropriate any land, rights, rights-of-way, franchises, easements, or other property, necessary or proper for any authorized purpose⁸” (footnote added)); R.C. 4582.31(A)(23) (a port authority board may “[c]harge, alter, and collect rentals and other charges for the use or services of any port authority facility as provided in [R.C. 4582.43]”). *See generally* R.C. 4582.22(A)

⁷ In certain instances, the powers granted to the board of directors of a port authority may be restricted. R.C. 4582.22(B). Additional powers may be granted to a board of directors of a port authority that has had its powers restricted, so long as the powers granted do not exceed the powers permitted pursuant to R.C. Chapter 4582. R.C. 4582.22(C).

⁸ As used in R.C. 4582.22-.59, the term “[a]uthorized purposes” or “[p]urpose” means “[a]ctivities that enhance, foster, aid, provide, or promote transportation, economic development, housing, recreation, education, governmental operations, culture, or research within the jurisdiction of the port authority” or “[a]ctivities authorized by Sections 13 and 16 of Article VIII, Ohio Constitution.” R.C. 4582.21(B).

(the exercise by a board of directors of a port authority created pursuant to R.C. 4582.22 of the “powers conferred upon it shall be deemed to be essential governmental functions of this state”).

The board of directors of a port authority is also responsible for preparing the authority’s budget and handling other fiscal matters. *See, e.g.*, R.C. 4582.31(A)(7) (a port authority board may “[i]ssue bonds or notes for the acquisition, construction, furnishing, or equipping of any port authority facility or other permanent improvement that a port authority is authorized to acquire, construct, furnish, or equip, in compliance with [R.C. Chapter 133]”); R.C. 4582.31(A)(8) (a port authority board may issue port authority revenue bonds beyond the limit of bonded indebtedness provided by law); R.C. 4582.39 (a port authority board prepares the authority’s annual budget); R.C. 4582.40 (a port authority board may levy a tax to provide for necessary expenses and is the port authority’s taxing authority under R.C. 133.10 and R.C. 5705.01).

A review of the powers, duties, and responsibilities of the respective positions discloses that there are several potential conflicts of interest between the two positions. First, a potential conflict exists because of the competition for tax moneys in excess of the ten-mill limitation.⁹ As taxing authorities for partially coextensive subdivisions,¹⁰ *see* R.C. 133.01(NN)(7), (9); R.C. 4582.40; R.C. 5705.01(C), the board of township trustees and board of directors of the port authority are permitted to place levies on the ballot for taxes in excess of the ten-mill limitation, R.C. 5705.07; R.C. 4582.40; *see, e.g.*, R.C. 5705.19, and to submit to the electors bond issues, *see, e.g.*, R.C. 133.18; R.C. 4582.31(A)(7). Where both the township and port authority contemplate asking the voters for a tax levy or bond issue for additional funding, a person who serves at the same time as a township trustee and member of the board of directors of the port authority might find himself subject to divided loyalties. *See* 2004 Op. Att’y Gen. No. 2004-025 at 2-227; 1998 Op. Att’y Gen. No. 98-017 at 2-88; 1988 Op. Att’y Gen. No. 88-011 at 2-42 and 2-43. For example, if the township has authorized a tax levy for additional operating funds, *see, e.g.*, R.C. 5705.07; R.C. 5705.19, the person, as a member of the board of directors of the port authority, might be apprehensive about placing a port authority levy on the same ballot for fear that the township levy may be rejected in favor of the port authority levy. *See* 2004 Op. Att’y Gen. No. 2004-025 at 2-227; 1998 Op. Att’y Gen. No. 98-017 at 2-88; 1988 Op. Att’y Gen. No. 88-011 at 2-43. Similarly, if the port authority has authorized a tax levy for additional operating

⁹ Under Ohio Const. art. XII, § 2, no property may be taxed in excess of one percent of its true value in money for all state and local purposes, except when approved by the voters or provided for by a municipal charter. 1999 Op. Att’y Gen. No. 99-015 at 2-115 n.2. This is known as the “ten-mill limitation.” 2001 Op. Att’y Gen. No. 2001-019 at 2-107 n.1; *see* R.C. 5705.02; R.C. 5705.03; R.C. 5705.07. For the purpose of paying the current operating expenses of the subdivision, the subdivision’s taxing authority is authorized to levy property taxes within the ten-mill limitation. R.C. 5705.03(A); 2001 Op. Att’y Gen. No. 2001-019 at 2-107.

¹⁰ The jurisdiction of the port authority in question includes the county in which the township is located. *See* note three, *supra*.

funds, *see* R.C. 4582.40, the person, as a township trustee, might be apprehensive about placing a township levy on the same ballot for fear that the port authority levy may be rejected in favor of the township levy. “Questions of competing concerns before the electorate may be critical to determining whether or when a board might consider bringing requests for additional taxes before the voters.” 1988 Op. Att’y Gen. No. 88-011 at 2-43.

We believe, however, that this conflict of interest is insufficient to render the positions of township trustee and member of the board of directors of a port authority incompatible. It is unlikely that both the township and port authority will have a tax levy or bond issue on the same ballot every election. Thus, deliberations, discussions, or votes by the board of township trustees or the board of directors of the port authority concerning the placement of a tax levy or bond issue for additional funding on the ballot when the port authority or township, respectively, has previously placed such a levy or bond issue on the ballot will be infrequent.

In addition, when the board of township trustees or the board of directors of the port authority considers placing a levy on the ballot for taxes in excess of the ten-mill limitation or submitting to the electors a bond issue, the person as a township trustee or member of the board of directors of the port authority is able to remove himself from any deliberations, discussions, or votes on the tax levy or bond issue because both the board of township trustees and board of directors of the port authority are capable of functioning and performing their statutory duties when one of their members abstains from participating in a matter. *See* 2004 Op. Att’y Gen. No. 2004-025 at 2-228. *See generally State ex rel. Gretick v. Jeffrey*, 12 Ohio St. 3d 55, 56, 465 N.E.2d 412 (1984) (a county commissioner who is a principal at a high school may refrain from voting on a matter involving school property assessments and avoid a conflict of interest); *State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604 (1965) (“[i]n the absence of a statute to the contrary, any action by a board requires that a quorum participate therein, and that a majority of the quorum concur”). *See generally also* R.C. 4582.27 (“[n]o vacancy in the membership of the board [of directors of a port authority] shall impair the rights of a quorum to exercise all the rights and perform all the duties of the port authority”). It is also well established that, in a matter in which a public officer is exposed to influences that may prevent him from making completely objective and disinterested decisions, the officer should refrain from participating in the matter. 2004 Op. Att’y Gen. No. 2004-025 at 2-228; 1994 Op. Att’y Gen. No. 94-079 at 2-394.

Moreover, the fact that a township trustee or member of a board of directors of a port authority holds an additional employment with a port authority or township, respectively, that competes with the township or port authority for tax moneys generated in excess of the ten-mill limitation is, in and of itself, an insufficient reason to find that the trustee or member of the board of directors is subject to impermissible conflicts of interest. *See* 2004 Op. Att’y Gen. No. 2004-051 at 2-443; 2004 Op. Att’y Gen. No. 2004-025 at 2-228; 2003 Op. Att’y Gen. No. 2003-006 at 2-35; 2000 Op. Att’y Gen. No. 2000-025 at 2-172; 1999 Op. Att’y Gen. No. 99-027 at 2-183; *see also State ex rel. Corrigan v. Hensel*, 2 Ohio St. 2d 96, 99, 206 N.E.2d 563 (1965). If this reason were deemed sufficient, a person would not be permitted to hold a public position with two different political subdivisions that compete with each other for tax moneys generated in excess

of the ten-mill limitation. *See* 2004 Op. Att’y Gen. No. 2004-051 at 2-443; 2004 Op. Att’y Gen. No. 2004-025 at 2-228; 2003 Op. Att’y Gen. No. 2003-006 at 2-35; 2000 Op. Att’y Gen. No. 2000-025 at 2-172; 1999 Op. Att’y Gen. No. 99-027 at 2-183.

Hence, a township trustee who serves as a member of the board of directors of a port authority should abstain from participating in deliberations, discussions, and votes on a township tax levy or bond issue for additional funding when the port authority on which he serves has already placed such a levy or bond issue on the ballot. *See* 2004 Op. Att’y Gen. No. 2004-051 at 2-444; 2004 Op. Att’y Gen. No. 2004-025 at 2-228. Similarly, a member of a board of directors of a port authority who serves as a township trustee should abstain from participating in deliberations, discussions, and votes on a port authority tax levy or bond issue for additional funding when the township on which he serves has already placed such a levy or bond issue on the ballot. *See* 2004 Op. Att’y Gen. No. 2004-051 at 2-444; 2004 Op. Att’y Gen. No. 2004-025 at 2-228. In light of the foregoing, we believe that the potential conflicts of interest that arise from the competition over tax moneys generated in excess of the ten-mill limitation do not render the positions of township trustee and member of the board of directors of a port authority incompatible, provided the person, as a township trustee and member of the board of directors, does not participate in deliberations, discussions, or votes on tax levies or bond issues for additional funding that occur after the port authority or township, respectively, has placed such a levy or bond issue on the ballot. *See generally State ex rel. Gretick v. Jeffrey*, 12 Ohio St. 3d at 56, 465 N.E.2d 412 (“[p]ossibility of conflict of interest is insufficient to oust a duly elected public official from office”); *State ex rel. Corrigan v. Hensel*, 2 Ohio St. 2d at 99, 206 N.E.2d 563 (“[t]he law does not punish an officeholder for what he ‘could do’ or where there was a ‘possibility’ or opportunity to commit some wrongful act”).

Conflicts of interest may also arise because the township and port authority may enter into contracts or property transactions with each other. *See, e.g.*, R.C. 505.432 (a township and port authority may enter into a contract whereby the township provides police protection services to the port authority); R.C. 4582.31(A)(15)(c) (a port authority may, in regard to any interests in any real or personal property, “[s]ell to, exchange with, lease, convey other interests in, or lease with an option to purchase the same or any lesser interest in the property to the same or any other person or governmental entity”); R.C. 4582.38 (a board of township trustees may convey or lease to or from, lease with an option to purchase, or exchange with, any port authority or any port authority may convey or lease to or from, lease with an option to purchase, or exchange with, a township any personal or real property, or any interest therein); R.C. 4582.43 (a port authority and governmental agency¹¹ may enter into contracts concerning the use, acquisition, or construction of port authority facilities or use of the services of port authority facilities); R.C. 4582.431(A) (a port authority and township may enter into contracts “as may be necessary or convenient for the exercise of the powers granted by [R.C. 4582.21-.59]”); R.C. 4582.431(B)

¹¹ For purposes of R.C. 4582.22-.59, the term “[g]overnmental agency” includes townships. R.C. 4582.21(C).

(“[a] port authority may enter into an agreement with one or more contracting subdivisions,¹² whereby the port authority or any contracting subdivision undertakes, and is authorized by the port authority or any contracting subdivision, to exercise any power, perform any function, or render any service, on behalf of the port authority or a contracting subdivision, which the port authority or the contracting subdivision is authorized to exercise, perform, or render” (footnote added)). A township trustee who serves as a member of the board of directors of a port authority may be required to deliberate, discuss, negotiate, or vote on both sides of a contract or property transaction between the township and port authority. By participating on both sides of a contract or property transaction, a person who serves as a township trustee and member of the board of directors of a port authority would be exposed to conflicting loyalties and to the potential temptation of acting in a manner not in the best interest of the public. *See* 1994 Op. Att’y Gen. No. 94-013 at 2-61; 1981 Op. Att’y Gen. No. 81-027 at 2-101.

Nonetheless, it is our opinion that these conflicts of interest may be avoided. No statute mandates that a township and port authority contract for any purpose or conduct property transactions with each other. Therefore, the occasions in which a person who serves as a township trustee and member of the board of directors of a port authority would be required to discuss, deliberate, negotiate, or vote on a contract or property transaction between the township and port authority should be infrequent.

Even when a contract or property transaction is contemplated by the township and port authority, the person will be able to remove himself from any deliberations, discussions, negotiations, or votes on the contract or property transaction. As stated above, both the board of township trustees and the board of directors of the port authority are capable of functioning and performing their statutory duties when one of their members abstains from a matter. *See* 2003 Op. Att’y Gen. No. 2003-006 at 2-37. Further, in a matter in which the objectivity of a person who serves as a township trustee and member of the board of directors of a port authority is impaired, the person has a duty to abstain from participating in the matter. *Id.* at 2-37 and 2-38. Accordingly, the potential conflicts of interest that may arise because the township and port authority may enter into contracts or property transactions with each other do not prohibit a person from serving simultaneously as a township trustee and member of the board of directors of a port authority, provided the person does not participate in either position in any deliberations, discussions, negotiations, or votes concerning such contracts or property transactions.¹³ *See id.* at 2-38.

¹² A township is a contracting subdivision for purposes of R.C. 4582.22-.59. *See* R.C. 4582.21(K)-(L).

¹³ It must be noted that R.C. 511.13 provides, in part, that, “[n]o member of the board of township trustees ... shall be interested in any contract entered into by such board.” *See also* R.C. 2921.42(A)(4) (“[n]o public official shall knowingly ... [h]ave an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or

Additional conflicts of interest may arise because matters related to the appropriation of land or lesser interests in land and the township joining the port authority may come before both the board of township trustees and the board of directors of the port authority. A board of trustees of a township that has not adopted a limited home rule government pursuant to R.C. Chapter 504 may appropriate land or lesser interests in land under various statutes for a variety of governmental purposes, *see, e.g.*, R.C. 505.37; R.C. 511.04; R.C. 517.01; R.C. 517.13; R.C. 5573.02, while a board of directors of a port authority may appropriate land or lesser interests in land for any authorized purpose pursuant to R.C. 4582.31(A)(17). Thus, a board of township trustees may appropriate port authority land or interests therein, while a port authority may appropriate township land or interests therein. If a person who serves as a township trustee and member of a board of directors of a port authority were required to deliberate, discuss, negotiate, or vote on the appropriation of land or lesser interests therein owned by the port authority or township, respectively, it might be difficult for the person to perform his duties and exercise his discretion in a completely objective and disinterested manner because of his dual service to the township and port authority. *See* 2003 Op. Att’y Gen. No. 2003-006 at 2-39.

Also, both the board of township trustees and board of directors of the port authority may have to vote on whether to allow the township to join the port authority. R.C. 4582.26 states that a township, acting by ordinance or resolution, may join an existing port authority, provided the board of directors of the port authority agrees to the township joining the port authority. Thus, a person who serves as a township trustee and member of a board of directors of a port authority is subject to influences that may prevent him from making completely objective and disinterested decisions with regard to the township joining the port authority. *See* 2003 Op. Att’y Gen. No. 2003-006 at 2-36 and 2-37.

For the reasons that follow, the conflicts of interest arising in appropriation proceedings involving the township and port authority and proceedings to include the township in the port

governmental agency or instrumentality with which he is connected”). Whether a contract exists between the township and port authority or whether, if such a contract does exist, the person has a prohibited interest in the contract are questions of fact that must be determined on a case-by-case basis at the local level. *See generally* Ohio Ethics Comm’n, Advisory Op. No. 91-001, slip op. at 4 (a township trustee who serves as a full-time paid employee of a fire company that contracts with the township does not have an interest in that contract unless (1) he has an ownership or fiduciary interest in the company, (2) he takes part in contract negotiations on behalf of the company, (3) his salary is based on the proceeds of the contract, (4) he receives a share of the contract’s proceeds in the form of a commission or fee, (5) his responsibilities as an employee include participation in the administration or execution of the contract or he serves in a management position with the responsibility to oversee execution or administration of the contract, (6) the establishment or operation of his employing agency is dependent upon receipt of the contract, or (7) his tenure is dependent upon his employer receiving the award of the contract).

authority can be avoided. As stated previously, a township trustee and member of the board of directors of a port authority not only is able to remove himself from deliberations, discussions, negotiations, or votes in which his objectivity might be impaired, but has a duty to do so. *See* 2003 Op. Att’y Gen. No. 2003-006 at 2-39. A person who is a township trustee and member of the board of directors of a port authority thus may abstain from deliberations, discussions, negotiations, or votes in appropriation proceedings involving both the township and port authority and proceedings to include the township in the port authority. Therefore, this potential conflict of interest does not prohibit a person from serving as a township trustee and member of the board of directors of a port authority at the same time, provided the person does not participate in any deliberations, discussions, negotiations, or votes concerning the township joining the port authority or the appropriation of township or port authority land or lesser interests therein by the port authority or township, respectively.¹⁴

Other conflicts of interest may exist because a person who serves as a township trustee and member of the board of directors of a port authority may be required to deliberate, discuss, negotiate, or vote on matters that relate to the development or use of port authority property, facilities, or services by the township. R.C. 4582.31(A) empowers a board of directors of a port authority to do the following:

(6) Make available the use or services of any port authority facility to one or more persons, one or more governmental agencies, or any combination thereof;

....

(15) Do any of the following, in regard to any interests in any real or personal property, or any combination thereof, including, without limitation, machinery, equipment, plants, factories, offices, and other structures and facilities related to, useful for, or in furtherance of any authorized purpose, for such consideration and in such manner, consistent with Article VIII of the Ohio Constitution, as the board in its sole discretion may determine:

(a) Loan moneys to any person or governmental entity for the acquisition, construction, furnishing, and equipping of the property;

...

(c) Sell to, exchange with, lease, convey other interests in, or lease with an option to purchase the same or any lesser interest in the property to the same or any other person or governmental entity;

¹⁴ This opinion does not address the compatibility of the positions of township trustee and member of the board of directors of a port authority when the township has joined an existing port authority pursuant to R.C. 4582.26. *See generally* 1986 Op. Att’y Gen. No. 86-029 (syllabus) (the positions of county commissioner and member of the board of directors of a port authority created under R.C. 4582.01-.20 or R.C. 4582.21-.59 are incompatible when the county participated in the creation of the port authority).

- (d) Guarantee the obligations of any person or governmental entity.

If a person who serves as a township trustee and member of a board of directors of a port authority were required, in either capacity, to deliberate, discuss, negotiate, or vote on matters related to the development or use of port authority property, facilities, or services by the township, it might be difficult for the person to make fair and impartial decisions that are in the best interest of the public. *See* 2004 Op. Att’y Gen. No. 2004-051 at 2-444 and 2-445.

Again, this is a conflict of interest that may be avoided by the person. When matters relating to the development or use of port authority property, facilities, or services by the township come before either the board of township trustees or the board of directors of the port authority, the person will be able to remove himself from deliberations, discussions, negotiations, or votes on such matters without impairing either board’s ability to discharge its duties with regard to those matters. By abstaining from participating in such matters, the person accedes to the general rule requiring a public officer or employee to abstain from participating in a matter in which his objectivity might be impaired. *See id.* at 2-447. Accordingly, conflicts of interest that may occur with regard to the development or use of port authority property, facilities, or services by the township do not render the positions of township trustee and member of the board of directors of a port authority incompatible, provided the person does not participate, in either position, in deliberations, discussions, negotiations, or votes in such matters.¹⁵

¹⁵ A person who serves at the same time as a township trustee and member of the board of directors of a port authority may, as a member of the board of directors, participate in deliberations, discussions, negotiations, or votes concerning a matter that affects the development or use of port authority property, facilities, or services when the matter does not relate to the township’s development or use of such property, facilities, or services, but rather establishes standard and uniform rules, procedures, restrictions, or other criteria pertaining to the development or use of port authority property, facilities, or services by governmental entities. Similarly, the person, as a township trustee, may participate in deliberations, discussions, negotiations, or votes concerning matters, such as zoning and road construction, that may affect or have some bearing upon the general development or use of port authority property, facilities, or services. *See generally* 2004 Op. Att’y Gen. No. 2004-015 at 2-130 (“to the extent that a member of a county rural zoning commission who serves as township trustee acts for the good of the county, there is no prohibition against the commission member participating in deliberations, discussions, and votes that may affect the use of real property owned by the township”). *See generally also* *Hamilton v. Bd. of Comm’rs of Hardin County*, 108 Ohio St. 566, 141 N.E. 684 (1923) (syllabus) (“[t]he fact that a county commissioner owns real estate within the assessable area of an improvement to be taxed by a special assessment for the construction of a road does not of itself disqualify him to act as a county commissioner in proceedings relative to laying out and making a road under [G.C.] 6906” (now R.C. 5555.02)); *Goodwin v. Comm’rs of Van Wert County*, 41 Ohio St. 399 (1884) (ownership of land crossed by a ditch did not disqualify a county

A conflict of interest may also exist because both a township and port authority created pursuant to R.C. 4582.22 are bodies corporate and politic which may sue and be sued. R.C. 503.01; R.C. 4582.22(A). As a result, a township and port authority may become involved in legal actions or proceedings against each other. In such a situation, a person who serves at the same time as a township trustee and member of the board of directors of a port authority may be required to participate in deliberations, discussions, negotiations, or votes concerning legal matters between the township and port authority, and, as such, may be subject to divided loyalties. *See* 1999 Op. Att’y Gen. No. 99-027 at 2-180.

For the several reasons expressed above, this conflict of interest does not render the positions of township trustee and member of the board of directors of a port authority incompatible. As a general matter, it is unlikely that litigation will ensue between the township and port authority. In addition, the person is able to remove himself from deliberations, discussions, negotiations, or votes concerning a legal matter between the township and port authority without impairing either board’s ability to pursue a favorable legal resolution to the matter. Such abstention allows the person to adhere to the basic principle that a public officer or employee not participate in a matter in which his objectivity might be impaired. *See* 2004 Op. Att’y Gen. No. 2004-051 at 2-447. The foregoing conflict thus does not render the positions of township trustee and member of the board of directors of a port authority incompatible, provided the person as a township trustee and member of the board of directors does not participate in any deliberations, discussions, negotiations, or votes concerning legal matters involving the township and port authority.

The final conflict of interest that exists between the positions concerns a board of township trustees’ authority to choose the new location for a road, railroad, or public utility facility when a port authority finds it necessary to change the location of a road, railroad, or public utility facility under the jurisdiction of the township. R.C. 4582.57 states:

When a port authority finds it necessary to change the location of any portion of any public road, state highway, railroad, or public utility facility in connection with the construction of a port authority facility, it shall cause it to be reconstructed at such location as the division of government having jurisdiction over such road, highway, railroad, or public utility facility finds most favorable.

Accordingly, if a township trustee who serves a member of the board of directors of a port authority were required to consider the new location of a road, railroad, or public utility facility under R.C. 4582.57, it would be difficult for the trustee to set aside his loyalty to the port

commissioner from participating in voting upon the order authorizing the ditch); *State ex rel. Huffman v. Shuff*, 20 Ohio App. 432, 152 N.E. 300 (Knox County 1925) (syllabus, paragraph one) (“[a] county commissioner is not disqualified to act in a matter of the improvement of a public highway merely by reason of the fact that he has farm property which will be increased in value by the improvement”).

authority when deliberating, discussing, negotiating, or voting on the new location of the road, railroad, or public utility facility because of his service on the port authority's board of directors. *See* 2004 Op. Att'y Gen. No. 2004-051 at 2-447.

As the previous conflicts of interest, however, this one may also be avoided. When matters relating to the relocation of a road, railroad, or public utility facility under R.C. 4582.57 come before the board of township trustees, a township trustee is able to abstain from participating in deliberations, discussions, negotiations, or votes on such matters without impairing the board's ability to perform its duty under R.C. 4582.57. This means that the trustee is able to follow the general rule requiring a township trustee to abstain from participating in a matter in which he is subject to influences that might impair his objectivity. *See* 2004 Op. Att'y Gen. No. 2004-051 at 2-447. Therefore, the conflict of interest that may arise under R.C. 4582.57 does not render the positions of township trustee and member of the board of directors of a port authority incompatible, provided the person, as a township trustee, does not participate in deliberations, discussions, negotiations, or votes on matters relating to the relocation of a road, railroad, or public utility facility under R.C. 4582.57. *See* 2002 Op. Att'y Gen. No. 2002-013 at 2-76.

Although we have concluded that a person may serve simultaneously in the positions of township trustee and member of the board of directors of a port authority that is not created by the township when the person refrains from participating in various matters and proceedings, we would be remiss if we failed to advise you that given the number and nature of the potential conflicts of interest it may be impractical for the person to hold both of these positions at the same time. *See generally* 1941 Op. Att'y Gen. No. 3869, p. 445 (syllabus) (“[t]he office of mayor of a village is not per se incompatible with the position of chief clerk in the office of the county engineer, but may become so if the duties of each are so numerous or arduous as to render unlikely a proper execution of both”). In some situations, there may be little interaction between a port authority and township because the port authority has few, if any, facilities in the township. On the other hand, a township and port authority may have extensive dealings with each other. This may occur because the port authority has many facilities and offers numerous services within a township.

When the latter is the case, it follows that the chance for conflicts of interest between the positions of township trustee and member of the board of directors of a port authority increases. If the increase is such that a person who serves simultaneously in these positions is continually removing himself from potential conflicts, the township's and port authority's dealings with respect to each other may, in general, suffer or go unattended. In addition, the person may not perform the duties entrusted to him in both positions in a competent and timely manner. It is even conceivable that the situation could reach the point where both the board of township trustees and board of directors of the port authority are spending an inordinate amount of time determining whether the person has a conflict of interest in particular matters. In light of these practical concerns, we strongly urge you and the other local officials involved to carefully consider the multitude of potential problems that may occur when a person serves simultaneously as a trustee of a township that has not adopted a limited home rule government

pursuant to R.C. Chapter 504 and member of the board of directors of a port authority created pursuant to R.C. 4582.22.

Conclusions

In sum, it is my opinion, and you are hereby advised as follows:

1. A person may serve simultaneously as a trustee of a township that has not adopted a limited home rule government pursuant to R.C. Chapter 504 and member of the board of directors of a port authority created pursuant to R.C. 4582.22 when the township has not participated in the creation of, or joined in, the port authority.
2. As a township trustee, the person may not participate in any deliberations, discussions, negotiations, or votes concerning (1) contracts or property transactions with the port authority; (2) township tax levies or bond issues for additional funding when the port authority has placed such a levy or bond issue on the ballot; (3) development or use of the port authority's property, facilities, or services; (4) appropriation of the port authority's land or lesser interests therein; (5) joining the port authority; (6) relocation of a road, railroad, or public facility under R.C. 4582.57; or (7) legal matters involving the township and port authority.
3. As a member of the board of directors of the port authority, the person may not participate in any deliberations, discussions, negotiations, or votes concerning (1) contracts or property transactions with the township; (2) port authority tax levies or bond issues for additional funding when the township has placed such a levy or bond issue on the ballot; (3) appropriation of the township's land or lesser interests therein; (4) participation by the township in the port authority; (5) development or use of port authority property, facilities, or services by the township; or (6) legal matters involving the township and port authority.

Respectfully,



JIM PETRO
Attorney General