

March 17, 2014

The Honorable Sherri Bevan Walsh
Summit County Prosecuting Attorney
53 University Avenue, 6th Floor
Akron, Ohio 44308-1608

SYLLABUS:

2014-014

The positions of executive director of a county land reutilization corporation and member of a board of education of a city school district located within the same county are compatible.



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

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

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

March 17, 2014

OPINION NO. 2014-014

The Honorable Sherri Bevan Walsh
Summit County Prosecuting Attorney
53 University Avenue, 6th Floor
Akron, Ohio 44308-1608

Dear Prosecutor Walsh:

You have requested an opinion whether the executive director of a county land reutilization corporation may serve simultaneously as a member of a board of education of a city school district located within the same county. Your question concerns the Summit County Land Reutilization Corporation (SCLRC) and a member of the Board of Education for Akron Public Schools.

A county land reutilization corporation is a nonprofit corporation formed under R.C. Chapters 1724 and 5722 and is subject to the nonprofit corporation provisions of R.C. Chapter 1702, to the extent those provisions are not inconsistent with R.C. Chapter 1724. *See* R.C. 1724.01; R.C. 1724.04; R.C. 1724.08; 2012 Op. Att’y Gen. No. 2012-041, at 2-356 to 2-358; 2012 Op. Att’y Gen. No. 2012-026, at 2-223 to 2-224. R.C. 5722.02-15 set forth procedures for a county “to facilitate the effective reutilization of nonproductive land situated within its boundaries.” R.C. 5722.02(A). A county with a population of more than 60,000 may elect, by resolution, to adopt and implement those procedures and form a county land reutilization corporation under R.C. Chapter 1724. R.C. 1724.04; R.C. 5722.02; *see also* 2012 Op. Att’y Gen. No. 2012-041, at 2-357.

A county land reutilization corporation may be organized for purposes related to returning vacant, abandoned, and foreclosed properties to productive use. Specifically, a county land reutilization corporation may be formed for the purposes of:

- (a) Facilitating the reclamation, rehabilitation, and reutilization of vacant, abandoned, tax-foreclosed, or other real property within the county for whose benefit the corporation is being organized, but not limited to the purposes described in division (B)(2) of this section;
- (b) Efficiently holding and managing vacant, abandoned, or tax-foreclosed real property pending its reclamation, rehabilitation, and reutilization;
- (c) Assisting governmental entities and other nonprofit or for-profit persons to assemble, clear, and clear the title of property described in this division in a coordinated manner; or

- (d) Promoting economic and housing development in the county or region.

R.C. 1724.01(B)(2). A county also may designate the county land reutilization corporation as the agency of the county for the reclamation, rehabilitation, and reutilization of vacant, abandoned, tax-foreclosed, or other real property in the county. R.C. 1724.10.

The general powers of a county land reutilization corporation are set forth in R.C. 1724.02. *See also* 2012 Op. Att’y Gen. No. 2012-041, at 2-358; 2012 Op. Att’y Gen. No. 2012-026, at 2-224. A county land reutilization corporation may, for example, borrow money for the purposes of the corporation, make loans, obtain and dispose of real and personal property, engage in code enforcement and nuisance abatement, and exercise the powers enumerated in R.C. Chapter 5722 (land reutilization programs). R.C. 1724.02.

The SCLRC has been formed as a nonprofit corporation under R.C. 1724.04. The SCLRC also has been designated under R.C. 1724.10 as the exclusive county agency for reclamation, rehabilitation, and reutilization of vacant, abandoned, tax-foreclosed, or other real property in Summit County. The board of directors of the SCLRC consists of seven members, as required by R.C. 1724.03(B). The officers of the corporation include an executive director, a secretary, and a treasurer.

Compatibility Test

The following five questions are used to determine whether a person may hold a public and private position simultaneously:¹

1. Is the public position a classified employment within the terms of R.C. 124.57?
2. Does a constitutional provision or statute prohibit a person from serving in both positions at the same time?
3. Is there an impermissible conflict of interest between the two positions?
4. Are there local charter provisions, resolutions, or ordinances that are controlling?
5. Is there a federal, state, or local departmental regulation applicable?

2012 Op. Att’y Gen. No. 2012-041, at 2-358 to 2-359.

¹ An officer of a county land reutilization corporation does not hold a public office or employment for the purpose of determining the compatibility of two positions. 2012 Op. Att’y Gen. No. 2012-041, at 2-358 n.4.

The first question of the compatibility test asks whether the public position is a classified employment within the terms of R.C. 124.57. This statute prohibits an officer or employee in the classified service of a city school district from holding a public office that is normally filled by partisan election. R.C. 124.57(A). A member of the board of elections of a city school district, as an elected official, is in the unclassified service. R.C. 124.11(A)(1) (the unclassified service includes “[a]ll officers elected by popular vote or persons appointed to fill vacancies in those offices”); R.C. 3313.02 (election of members of board of education of a city school district); R.C. 3505.04 (nonpartisan ballot for election to the office of member of a board of education). The prohibition of R.C. 124.57, therefore, does not apply to the position of member of a board of education of a city school district and so does not prohibit a member of the board of education of a city school district from serving simultaneously as executive director of a county land reutilization corporation. *See* 2011 Op. Att’y Gen. No. 2011-043, at 2-351 to 2-352; 2006 Op. Att’y Gen. No. 2006-018, at 2-158.

Question two asks whether a constitutional provision or statute prohibits a person from serving simultaneously in the two positions. No constitutional provision or statute prohibits a person from serving as executive director of a county land reutilization corporation and member of a board of education of a city school district. *Cf.* R.C. 3313.13 (prohibiting a prosecuting attorney, city director of law, or other official acting in a similar capacity from being a member of a board of education); R.C. 3313.70 (prohibiting a member of a board of education in any district from being appointed to the position of school physician, school dentist, or school nurse during the period for which he is elected or appointed). Similarly, the fourth and fifth questions ask about the applicability of charter provisions, resolutions, or ordinances, and federal, state, and local regulations. No federal or state regulation, ordinance, or departmental regulation bars a person from holding these positions simultaneously. Whether an applicable charter provision, resolution, ordinance, or departmental regulation bars a person from serving in both positions is a question for local officials to answer. *See, e.g.*, 2012 Op. Att’y Gen. No. 2012-041, at 2-360. For the purpose of this opinion, it is assumed that no local charter provision, resolution, ordinance, or departmental regulation bars a person from serving simultaneously in both positions.

Finally, question three asks whether there are impermissible conflicts of interest between the two positions. Conflicts of interest occur when a person who holds two positions at the same time is subject to divided loyalties, conflicting duties, or the temptation to act other than in the public’s best interest. 2012 Op. Att’y Gen. No. 2012-041, at 2-360. We first review the powers, duties, and responsibilities of the positions to determine whether there is a conflict of interest. If potential conflicts may be sufficiently avoided or mitigated, a person may serve in the positions simultaneously. *See id.* The factors considered in making this determination include the probability of the conflicts arising, the ability of the person to remove himself from any conflicts that may arise, whether the person exercises decision-making authority in each position, and whether the conflicts relate to the primary functions of each position or to financial or budgetary matters. *Id.*

The duties and responsibilities of a member of the board of education of a city school district are prescribed primarily in R.C. Chapter 3313. The members of the board of education of a city school district are granted various powers and duties related to the administration of the public schools in that district. For example, pursuant to R.C. 3313.47, a city school board possesses the authority to

manage and control all the schools it operates throughout the district. In exercising this authority, a city school board shall adopt rules for “its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises,” R.C. 3313.20(A), and may, among other things, acquire property for school purposes, R.C. 3313.37, appropriate land, R.C. 3313.39, and dispose of real and personal property of the district, R.C. 3313.41.

For the purpose of this opinion, we have examined the duties of the executive director of the SCLRC. The duties and responsibilities of the SCLRC’s executive director are set forth primarily in section 6.3.1 of the SCLRC’s Code of Regulations.² The executive director is responsible for “carrying out the directions and policies of the Board of Directors” for “the general management and administration of the daily operations and affairs of the Corporation” and for performing “any other duties or functions that may be necessary in the best interests of the Corporation within limits established by the Board of Directors.” The executive director also has authority, subject to a few restrictions, to execute contracts on behalf of the SCLRC. SCLRC Code of Regulations, Section 9.4. Finally, the executive director prepares an annual budget that is presented to the Board of Directors. SCLRC Code of Regulations, Section 9.3.

Given the respective duties of the positions of executive director of a county land reutilization corporation and a member of a board of education of a city school district located within the same county, we find no direct or immediate conflicts between the duties and responsibilities of the two positions. We can, however, conceive of circumstances in which a person who serves in both positions could be subject to a conflict of interest. For example, a county land reutilization corporation could be faced with the decision of whether to reclaim vacant or abandoned property owned by a city school district. *See* R.C. 1724.01; R.C. 1724.02 *see also* SCLRC Code of Regulations, Article II. Alternatively, a city school district could be in a position to acquire property from a county land reutilization corporation. *See* R.C. 1724.01; R.C. 1724.02; R.C. 3313.37. If these circumstances were to occur, a person serving simultaneously in these positions may have conflicting duties and loyalties that prevent him from making completely disinterested decisions. *See, e.g.*, 2006 Op. Att’y Gen. No. 2006-034, at 2-315 (“a conflict of interest occurs when a person’s responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective”) (quotations omitted).

We believe that these potential conflicts of interest are insufficient to render the positions incompatible. No provision of law requires dealings between a county land reutilization corporation and the board of education of a city school district. For example, it is only speculative whether a county land reutilization corporation will reclaim vacant or abandoned property owned by a city school district. It also is speculative whether a city school district would want to acquire property from a county land reutilization corporation. Even if dealings arose between a county land reutilization corporation and the board of education of a city school district, a person serving as a

² The Summit County Land Reutilization Corporation has adopted a Code of Regulations for the government of the corporation as required by R.C. 1724.03(A).

member of the board of education of the city school district will be able to remove himself from any conflict by abstaining from deliberations, discussions, or negotiations concerning the county land reutilization corporation. Similarly, because it is speculative whether there would be any dealings between a county land reutilization corporation and the board of education of a city school district, it is likely that the executive director of the county land reutilization corporation could abstain from participation in matters related to the board of education of the city school district of which he is a member. Further, even if the executive director is not able to abstain, the executive director's decisions are subject to the direction of the board of directors of the county land reutilization corporation. Accordingly, it is possible for the board of directors to serve as a check upon any undue influence that the executive director who also serves on the board of education of a city school district might exert.

An additional potential conflict may exist because of the competition for tax moneys in excess of the ten-mill limitation.³ As a taxing authority for purposes of R.C. Chapter 5705, Ohio's uniform tax levy law, the board of education of a city school district may place a levy on the ballot for taxes in excess of the ten-mill limitation. R.C. 5705.01(C); R.C. 5705.194. A levy in excess of the ten-mill limitation also may be placed on the ballot by a board of county commissioners for the payment of the operation and expenses of a county land reutilization corporation. R.C. 307.64; R.C. 5705.19(EE). Again, however, we believe this potential conflict of interest is insufficient to render the positions incompatible. It is unlikely that a city school district and the board of county commissioners, in order to pay for the expenses of a county land reutilization corporation, will have a tax levy on the same ballot every election. *See* 2011 Op. Att'y Gen. No. 2011-008, at 2-66 to 2-67. Further, the county land reutilization corporation does not decide whether to place a levy on the ballot for taxes in excess of the ten-mill limitation. The board of county commissioners makes that decision. *See* R.C. 307.64; R.C. 5705.19(EE). Because the executive director of the county land reutilization corporation does not exercise decision-making authority and because this is not a primary duty of the executive director, the potential conflict of interest regarding competition for tax money in excess of the ten-mill limitation is avoided. Therefore, the fact that a member of a board of education of a city school district holds an additional position with an entity that indirectly competes for tax moneys in excess of the ten-mill limitation is insufficient to find the positions of executive director of a county land reutilization corporation and a member of a board of education of a city school district located within the same county incompatible. *See* 2011 Op. Att'y Gen. No. 2011-008, at 2-67.

³ In Ohio, property may not be taxed in excess of one percent of its true value in money for state and local purposes unless approved by the voters or as provided for by a municipal charter. Ohio Const. art. XII, § 2; R.C. 5705.02-.03; R.C. 5705.07; 2006 Op. Att'y Gen. No. 2006-034, at 2-313 n.5. This is known as the "ten-mill limitation." 2006 Op. Att'y Gen. No. 2006-034, at 2-313 n.5; *see also* R.C. 5705.02. A subdivision's taxing authority may levy property taxes within the ten-mill limitation for the purpose of paying the current operating expenses of the subdivision. R.C. 5705.03(A); 2006 Op. Att'y Gen. No. 2006-034, at 2-313 n.5.

Finally, we presume that a person will perform his duties in a regular and lawful manner in the absence of evidence to the contrary. *See State ex rel. Speeth v. Carney*, 163 Ohio St. 159 (1955) (syllabus, paragraph 10). It is therefore reasonable to presume, in the absence of evidence to the contrary, that a person who serves as the executive director of a county land reutilization corporation and a member of a board of education of a city school district located within the same county will perform his duties in a regular and lawful manner.

Based on the foregoing, it is my opinion, and you are hereby advised that the positions of executive director of a county land reutilization corporation and member of a board of education of a city school district located within the same county are compatible.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a large, prominent initial "M".

MICHAEL DEWINE
Ohio Attorney General