

**OPINION NO. 2012-040**

**Syllabus:**

2012-040

1. A person may serve simultaneously as a township trustee and member of the board of directors of a county land reutilization corporation.
2. A person may not serve simultaneously as county auditor and treasurer of a county land reutilization corporation.

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**To: John D. Ferrero, Stark County Prosecuting Attorney, Canton, Ohio**

**By: Michael DeWine, Ohio Attorney General, November 30, 2012**

You have requested an opinion regarding the following:<sup>1</sup>

1. May a township trustee serve simultaneously as a member of the board of directors of a county land reutilization corporation, particularly where township funds may be expended on projects promoted by the corporation within the township?
2. May a county auditor serve simultaneously as the treasurer of a county land reutilization corporation?

Your questions concern the Stark County Land Reutilization Corporation (SCLRC), a nonprofit corporation formed under R.C. 1724.04. The SCLRC 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 Stark County. Pursuant to R.C. 1724.03, the SCLRC's board of directors currently consists of five members: the county treasurer, two county commissioners, a representative of the largest municipal corporation located in the county, and a representative of a township with a population of at least 10,000 in the unincorporated area of the township. The officers of the corporation include a president, secretary, treasurer, and one or more vice presidents. The SCLRC has no employees. It is anticipated that the SCLRC will receive most of its operating moneys from the county's delinquent tax and assessment collection funds. The SCLRC also plans to seek out federal, state, local, and private grant funding.

In order to answer your questions, it is helpful to review the organization and operation of a county land reutilization corporation. R.C. Chapter 1724 governs community improvement corporations, including economic development corporations and county land reutilization corporations.<sup>2</sup> See R.C. 1724.01(A)(1); 2012 Op. Att'y Gen. No. 2012-026, at 2-223 to 2-224. Community improvement corporations, including county land reutilization corporations, are nonprofit corporations and are subject to the general nonprofit corporation provisions of R.C. Chapter 1702, to the extent that those provisions are not inconsistent with R.C. Chapter 1724. See R.C. 1724.01(B); R.C. 1724.04; R.C. 1724.08; 2009 Op. Att'y Gen. No. 2009-005, at 2-22 n.2; 2006 Op. Att'y Gen. No. 2006-037, at 2-340 to 2-341.

A county land reutilization corporation may be organized for purposes related to returning vacant, abandoned, and foreclosed properties to productive use.

<sup>1</sup> Your letter requesting a formal opinion of the Attorney General sets forth a series of 29 questions about various legal issues related to the Stark County Land Reutilization Corporation, including, for example, compatibility of positions, competitive bidding, contracting authority, leave benefits, and immunity and indemnification. In this opinion, we consider only the compatibility questions set forth above. Your remaining questions will be addressed in separate opinions to be issued at a later date.

<sup>2</sup> County land reutilization corporations are commonly referred to as county land banks. 2012 Op. Att'y Gen. No. 2012-026, at 2-223 n.1.

Specifically, R.C. 1724.01(B)(2) states that 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 [R.C. 1724.01(B)(2)];
- (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.

A county with a population of more than 60,000 that elects to adopt and implement the procedures set forth in R.C. 5722.02-.15 may organize a county land reutilization corporation. R.C. 1724.04; R.C. 5722.02. *See* 2012 Op. Att'y Gen. No. 2012-026, at 2-223. The procedures set forth in R.C. 5722.02-.15 are intended to facilitate the reutilization of nonproductive land situated within the county. R.C. 5722.02(A). 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 composition of the board of directors of a county land reutilization corporation is set forth in R.C. 1724.03(B). The board of directors must consist of five, seven, or nine members. R.C. 1724.03(B). The board members must include the county treasurer, at least two members of the board of county commissioners, one representative of the largest municipal corporation located in the county, and one representative of a township with a population of at least 10,000 in the unincorporated areas of the township if at least two such townships exist in the county. *Id.* Any remaining members of the board of directors may be selected by the county treasurer and the county commissioners who serve on the board. *Id.*

The powers of a county land reutilization corporation are set forth in R.C. 1724.02. A county land reutilization corporation is authorized, for example, to borrow money for certain purposes, to make loans, to obtain and dispose of real and personal property, to engage in code enforcement and nuisance abatement, and to exercise powers enumerated in R.C. Chapter 5722 (land reutilization programs) on behalf of the county. R.C. 1724.02.

A county land reutilization corporation may receive operating moneys from the county treasurer's delinquent tax and assessment collection (DETAC) fund. In each county, R.C. 321.261(A) requires the creation of the treasurer's DETAC fund and the prosecuting attorney's DETAC fund within the county treasury. Two and

one-half percent of all delinquent real property, personal property, and manufactured and mobile home taxes and assessments collected by the county treasurer is deposited in the treasurer's DETAC fund. R.C. 321.261(A). An additional two and one-half percent of such delinquent taxes and assessments is deposited into the prosecuting attorney's DETAC fund. *Id.*

Under R.C. 321.261(A)(2), the county treasurer may allocate money from the treasurer's DETAC fund to support the county land reutilization corporation. R.C. 321.261(B) provides for additional funding for a county land reutilization corporation:

During the period of time that a county land reutilization corporation is functioning as such on behalf of a county, the board of county commissioners, upon the request of the county treasurer, may designate by resolution that an additional amount, not exceeding five per cent of all collections of delinquent real property, personal property, and manufactured and mobile home taxes and assessments, shall be deposited in the treasurer's delinquent tax and assessment collection fund and be available for appropriation by the board for the use of the corporation. Any such amounts so deposited and appropriated under this division shall be paid out of the treasurer's delinquent tax and assessment collection fund to the corporation upon a warrant of the county auditor.

#### **Compatibility Test**

The following five questions are used to determine whether a person may hold a public position and private position concurrently:<sup>3</sup>

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?

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<sup>3</sup> As noted previously, a county land reutilization corporation is organized as a nonprofit corporation. Pursuant to R.C. 1724.10(B)(1), service as a board member of a county land reutilization corporation is not a public office or employment. Additionally, prior opinions have concluded that a community improvement corporation is not a political subdivision and have recognized that such corporations are organized as private, nonprofit corporations. *See* 1987 Op. Att'y Gen. No. 87-024, at 2-163. Therefore, it is appropriate to conclude that a person serving as a member of the board of directors of a county land reutilization corporation or as an officer of such a corporation does not hold a public office or employment for the purpose of determining the compatibility of two positions. *See* R.C. 1702.04; R.C. 1724.01; R.C. 1724.08; 2009 Op. Att'y Gen. No. 2009-005, at 2-22 to 2-23 n.2.

5. Is there a federal, state, or local departmental regulation applicable?

2009 Op. Att’y Gen. No. 2009-005, at 2-22 to 2-23.

**A Township Trustee May Serve Simultaneously as a Member of the Board of Directors of a County Land Reutilization Corporation**

We first address whether a township trustee may serve simultaneously as a member of the board of directors of a county land reutilization corporation, particularly where township funds may be expended on projects promoted by the corporation within the township. The first question of the compatibility test asks whether the public position is a classified employment within the terms of R.C. 124.57, which prohibits an officer or employee in the classified service of a civil service township from holding a public office that is normally filled by partisan election. As an elected public officeholder, a township trustee is not in the classified service. *See* R.C. 124.11(A)(1); R.C. 505.01. For that reason, R.C. 124.57 does not apply to a person holding the office of township trustee and so does not prohibit a township trustee from serving as a member of the board of directors of a county land reutilization corporation.

The second question asks whether a constitutional provision or statute prohibits a person from serving in both positions at the same time. No constitutional provision or statute prohibits the service in question. Further, R.C. 1724.10(B)(1) explicitly authorizes a public officeholder to serve on the board of directors of a community improvement corporation.

Membership on the governing board of a community improvement corporation does not constitute the holding of a public office or employment within the meaning of [R.C. 731.02 and R.C. 731.12] or any other section of the Revised Code . . . No member of such governing boards shall be disqualified from holding any public office or employment, nor shall such member forfeit any such office or employment, by reason of membership on the governing board of a community improvement corporation notwithstanding any law to the contrary.

Accordingly, the second question may be answered in the negative.

The third question 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 to the temptation to act other than in the public’s best interest. 2009 Op. Att’y Gen. No. 2009-005, at 2-30. Your question specifically raises the possibility of a conflict of interest that may be created where township funds may be expended on projects promoted by the county land reutilization corporation within the township.

The General Assembly has approved a person serving simultaneously as township trustee and as a director of a county land reutilization corporation. R.C. 1724.10(B)(1) explicitly states that a member of the governing board of a community improvement corporation shall not be disqualified from holding “any public office” by reason of membership on the corporation’s governing board. The posi-

tion of township trustee is a public office. *See, e.g.*, 2012 Op. Att’y Gen. No. 2012-008, at 2-53; 2003 Op. Att’y Gen. No. 2003-041, at 2-343; 1981 Op. Att’y Gen. No. 81-078, at 2-307 to 2-308. Previous opinions have explained that the language in R.C. 1724.10(B)(1) “‘is rather obviously intended to eliminate problems regarding conflicts of interest and incompatibility of office.’” 2009 Op. Att’y Gen. No. 2009-005, at 2-33 (quoting 1979 Op. Att’y Gen. No. 79-061, at 2-206).

Because the General Assembly has authorized a person to serve simultaneously as a township trustee and member of the governing board of a county land reutilization corporation even though conflicts of interest may exist between the two positions, we do not find it necessary to consider whether any conflicts do in fact exist between the positions of township trustee and board member of a county land reutilization corporation. Accordingly, the positions of township trustee and member of the board of directors of a county land reutilization corporation are not rendered incompatible because of the possibility of conflicts of interest between the two positions.

Finally, 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 prohibits a person from serving simultaneously as township trustee and member of the board of directors of a county land reutilization corporation. Whether an applicable charter provision, resolution, ordinance, or departmental regulation bars a person from holding these two positions at the same time is a question for local officials to answer. *See* 2009 Op. Att’y Gen. No. 2009-005, at 2-24 to 2-25. 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.

We thus conclude that a person may serve simultaneously as a township trustee and member of the board of directors of a county land reutilization corporation.

#### **A County Auditor May Not Serve Simultaneously as the Treasurer of a County Land Reutilization Corporation**

Your next question asks whether a county auditor may serve simultaneously as the treasurer of a county land reutilization corporation. Under the compatibility test set forth above, two positions are incompatible if a person holding the positions is subject to impermissible conflicts of interest.<sup>4</sup> *See* 2012 Op. Att’y Gen. No. 2012-008, at 2-53. An impermissible conflict of interest exists when the duties of each

<sup>4</sup> As previously discussed, R.C. 1724.10(B)(1) authorizes a person to hold a public office and to serve simultaneously as a member of the governing board of a county land reutilization corporation even though conflicts of interest may exist between the two positions. Your second question, however, does not ask whether a county auditor may serve on the board of directors of a county land reutilization corporation. Rather, the question asks whether a county auditor may serve as treasurer of such a corporation. A treasurer of a county land reutilization corporation is an officer of the corporation and is not a member of the board of directors.

position subject a person who holds those positions simultaneously to divided loyalties, conflicting duties, or the temptation to act other than in the public's best interest. *Id.*

Whether an impermissible conflict of interest exists between multiple positions is determined by reviewing the powers, duties, and responsibilities of each position. *Id.* If the review discloses any conflicts of interest, we next consider the immediacy of the potential conflict to determine whether the conflict may be sufficiently avoided or eliminated so as to allow a person to serve in the positions simultaneously. *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.*

A review of the duties of a county auditor and treasurer of a county land reutilization corporation discloses an impermissible conflict of interest between the positions. The conflict of interest occurs because of the responsibilities exercised by a county auditor and a treasurer of a county land reutilization corporation in the transfer of county funds to the corporation.

As previously explained, a county land reutilization corporation may receive moneys for its operation from the county treasurer's DETAC fund in the county treasury. R.C. 321.261(A)(2), (B). Moneys in the DETAC fund are collected by the county treasurer and are held within the county treasury. R.C. 321.261. Before moneys in the county treasury may be disbursed, the county auditor must issue warrants on the county treasury authorizing the disbursements. R.C. 307.55; R.C. 319.16; R.C. 321.261(A)(2), (B).

R.C. 319.16 defines the responsibility of the county auditor to issue warrants against the county treasury:

The county auditor shall issue warrants . . . on the county treasurer for all moneys payable from the county treasury, upon presentation of the proper order or voucher and evidentiary matter for the moneys, and keep a record of all such warrants showing the number, date of issue, amount for which drawn, in whose favor, for what purpose, and on what fund. The auditor shall not issue a warrant for the payment of any claim against the county, unless it is allowed by the board of county commissioners, except where the amount due is fixed by law or is allowed by an officer or tribunal . . . . If the auditor questions the validity of an expenditure that is within available appropriations and for which a proper order or voucher and evidentiary matter is presented, the auditor shall notify the board, officer, or tribunal who presented the voucher.

R.C. 321.261 also states that moneys may be paid from a county DETAC fund to

Consequently, the foregoing authorization of R.C. 1724.10(B)(1) does not apply in the case of a public officeholder who serves as treasurer of a county land reutilization corporation.

the county land reutilization corporation only “upon a warrant of the county auditor.” R.C. 321.261(A)(2), (B).

Based on the facts provided to us for purposes of this opinion, it is our understanding that the treasurer of a county land reutilization corporation serves as the fiscal officer of the corporation and is responsible for all of the corporation’s fiscal affairs. Consistent with the requirement set forth in R.C. 1724.03(A), the SCLRC has adopted a Code of Regulations for the government of the corporation, the conduct of its affairs, and the management of its property. According to section 6.3.2 of the SCLRC’s Code of Regulations, which sets forth the authority and duties of the SCLRC’s treasurer, the treasurer must, among other duties, prepare an annual budget for the corporation, open bank accounts for the funds of the corporation, receive and deposit all money belonging to the corporation, and accurately account for moneys of the corporation.

Prior opinions have advised that a county auditor may not hold or serve in another position where the second position or office receives or pays out funds of the county and where the second position requires the person to receive or expend moneys of the county. Although these opinions addressed a county auditor serving in another *public* position, the conclusions and rationale expressed in those opinions is equally applicable where, as here, a county auditor wishes to serve as the treasurer of a nonprofit corporation that receives county moneys disbursed from the county treasury. These opinions have concluded as follows:

The office of county auditor is incompatible with any and all offices or employments which receive or pay out funds of the county, or where such offices or employments make a certificate to the county auditor for the payments of claims, and the county auditor cannot fill a second position when the duties of said second position or office require the incumbent to account for, receive or expend moneys or funds of the county, or to certify claims to the county auditor for payment.

1949 Op. Att’y Gen. No. 963, p. 610 (syllabus, paragraph 1); *see also* 1920 Op. Att’y Gen. No. 1778, vol. II, p. 1280 (syllabus, paragraph 1). As explained more recently, “the county auditor is a check upon any official of [a county agency] who is responsible for depositing, disbursing, managing, or accounting for the moneys of the agency.” 2002 Op. Att’y Gen. No. 2002-005, at 2-25.

A county auditor is required to issue warrants in order for moneys to be paid from a county treasurer’s DETAC fund in the county treasury to the county land reutilization corporation. The treasurer of the county land reutilization corporation is responsible for receiving and accounting for those moneys. A person serving simultaneously in these positions may have conflicting duties and loyalties that prevent him from making completely disinterested decisions when transferring county moneys from the county treasury to the county land reutilization corporation and thereafter accounting for those moneys. *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,”” quoting 1980 Op. Att’y Gen. No. 80-035, at 2-149).

A review of the immediacy of the conflict of interest arising from the disbursement of moneys from the county treasury to the county land reutilization corporation indicates that the conflict cannot be sufficiently avoided or eliminated. Significantly, the conflict relates to financial and budgetary matters. It also relates to the primary responsibilities of both a county auditor and the treasurer of a county land reutilization corporation. Further, the conflict is not one that would occur only on an infrequent basis. A county auditor has an ongoing duty to issue warrants for the disbursement of funds to a county land reutilization corporation, and the treasurer of a county land reutilization corporation has an ongoing duty to oversee receipt of those funds and to accurately account for the corporation’s moneys. Because the conflict cannot be eliminated entirely or sufficiently avoided, a person holding the positions of county auditor and treasurer of a county land reutilization corporation is subject to an impermissible conflict of interest.

This conclusion is supported by the importance placed on the duty of a county auditor to issue warrants. A county auditor’s duty to issue warrants requires the exercise of discretion; it is not simply a ministerial duty. *See Kloeb v. Mercer County Comm’rs*, 4 Ohio C.C. (n.s.) 565, 569 (App. Mercer County 1903) (a county auditor “does not act as a mere machine, without consciousness, duty, or responsibility, only to place his signature to warrants which will cause public moneys to leave the public treasury; he is not a mere automaton, there for the purpose of writing his signature to warrants on the public treasury when the button is touched”); 2009 Op. Att’y Gen. No. 2009-033, at 2-218 to 2-219; 2003 Op. Att’y Gen. No. 2003-029. The auditor has “a duty to deny issuance of a warrant if these standards are not met.” 2003 Op. Att’y Gen. No. 2003-029 (syllabus, paragraph 1). *See also* 2009 Op. Att’y Gen. No. 2009-033, at 2-219 to 2-220. We have further emphasized that the “paramount objective” of a county auditor in performing his duties, including the duty to issue warrants authorizing disbursement of moneys from the county treasury to a county agency, is to “accurately and independently” account for the moneys of the county agency and to ensure that moneys of a county agency are “correctly deposited” into the appropriate fund and “legally disbursed therefrom.” 2002 Op. Att’y Gen. No. 2002-005, at 2-25.

Accordingly, we conclude that the positions of county auditor and treasurer of a county land reutilization corporation are incompatible.<sup>5</sup>

<sup>5</sup> You also ask, if a county auditor serves as treasurer of the county land reutilization corporation, whether there are any conflict of interest or compatibility issues if the county auditor contracts with the county land reutilization corporation to assume some or all of the corporation’s financial and clerical duties. 2012 Op. Att’y Gen. No. 2012-026 (syllabus, paragraph 3) advised that a county auditor may not contract with a county land reutilization corporation to provide services to, or employees to work, for the corporation. Based on this conclusion, we do not need to address whether any conflict of interest or compatibility issues may arise if the

**Conclusions**

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. A person may serve simultaneously as a township trustee and member of the board of directors of a county land reutilization corporation.
2. A person may not serve simultaneously as county auditor and treasurer of a county land reutilization corporation.