

January 29, 2018

The Honorable Joel Blue
Guernsey County Prosecuting Attorney
627 Wheeling Avenue
Cambridge, Ohio 43725

SYLLABUS:

2018-003

1. A person may serve simultaneously as a member of the Guernsey County Board of Commissioners and member of the governing board of the Cambridge-Guernsey Community Improvement Corporation, which has been designated pursuant to R.C. 1724.10 as the agency of the county for the industrial, commercial, distribution, and research development in the county.
2. A person may not serve simultaneously as a member of the Guernsey County Board of Commissioners and an *ex-officio*, non-voting member of the Board of Directors of the Cambridge-Guernsey County Visitors and Convention Bureau. (2017 Op. Att’y Gen. No. 2017-036, followed.)



January 29, 2018

OPINION NO. 2018-003

The Honorable Joel Blue
Guernsey County Prosecuting Attorney
627 Wheeling Avenue
Cambridge, Ohio 43725

Dear Prosecutor Blue:

You have requested an opinion whether a person may serve simultaneously as a county commissioner and member of the governing board of a community improvement corporation organized under the provisions of R.C. Chapter 1724. Additionally, you have requested clarification of 2017 Op. Att’y Gen. No. 2017-036, which concluded that a person may not serve simultaneously as a Clermont County Commissioner and member of the Board of Trustees of the Clermont County Convention and Visitors Bureau. In particular, you have asked the following questions:

1. May a member of the Guernsey County Board of Commissioners serve simultaneously as a member of the governing board of the Cambridge-Guernsey Community Improvement Corporation, which has been designated pursuant to R.C. 1724.10 as the agency of the county for the industrial, commercial, distribution, and research development in the county?
2. May a member of the Guernsey County Board of Commissioners serve simultaneously as an *ex-officio*, non-voting member of the Board of Directors of the Cambridge-Guernsey County Visitors and Convention Bureau when the four criteria established in 1991 Op. Att’y Gen. No. 91-007 have not been fulfilled?¹

¹ Your letter asks whether a member of the Guernsey County Board of Commissioners may sit as a non-voting, *ex-officio* member on “boards that do not fulfill all four (4) criteria set out in” 1991 Op. Att’y Gen. No. 91-007. In further conversation with your office, it was clarified that you wish to know whether a member of the Guernsey County Board of Commissioners may serve simultaneously as an *ex-officio*, non-voting member of the Board of Directors of the Cambridge-Guernsey County Visitors and Convention Bureau. We will, therefore, limit our discussion to the question of whether a member of a board of county commissioners may serve

For the reasons that follow, we find the positions of member of the Guernsey County Board of Commissioners and member of the governing board of the Cambridge-Guernsey Community Improvement Corporation, which has been designated pursuant to R.C. 1724.10 as the agency of the county for the industrial, commercial, distribution, and research development in the county, to be compatible. However, for the same reasons discussed in 2017 Op. Att’y Gen. No. 2017-036, we find the positions of member of the Guernsey County Board of Commissioners and *ex-officio*, non-voting member of the Board of Directors of the Cambridge-Guernsey County Visitors and Convention Bureau to be incompatible.

Compatibility Test

The following five questions are used to determine whether a person may hold a public position and private position simultaneously:²

simultaneously as an *ex-officio*, non-voting member of the board of directors of a county convention and visitors’ bureau established under R.C. Chapter 1702.

² A community improvement corporation is a private, nonprofit corporation organized under the provisions of R.C. Chapter 1724. See 2009 Op. Att’y Gen. No. 2009-005, at 2-22 to 2-23 n.2; 1987 Op. Att’y Gen. No. 87-024, at 2-163. Pursuant to R.C. 1724.10(B)(1), membership on the governing board of a community improvement corporation does not constitute the holding of a public office or employment. Accordingly, it is appropriate to conclude that a person serving as a member of the governing board of a community improvement corporation does not thereby 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; R.C. 1724.10; 2012 Op. Att’y Gen. No. 2012-040, at 2-349 n.3.

A community improvement corporation’s status as a private corporation for purposes of determining the compatibility of two positions is not determinative of the corporation’s status as a “public office” or “public body” for purposes of Ohio’s public records and open meetings laws. See 2009 Op. Att’y Gen. No. 2009-005, at 2-22 to 2-23 n.2; 2006 Op. Att’y Gen. No. 2006-037 (syllabus) (“[e]xcept as provided in [R.C. 149.43(A)(1)] and R.C. 1724.11, information kept in the records of a community improvement corporation designated as an agency of a county under R.C. 1724.10 is a public record for purposes of R.C. 149.43”); 1979 Op. Att’y Gen. No. 79-061 (syllabus, paragraph 2) (“[t]he governing board of a community improvement corporation that has been designated an agency of a county, a municipal corporation, or any combination thereof, pursuant to R.C. 1724.10, constitutes a public body for the purposes of R.C. 121.22”). Insofar as the Cambridge-Guernsey County Visitors and Convention Bureau is a private, nonprofit corporation, this opinion addresses the simultaneous holding of a public office (Guernsey County Commissioner) and a private position (*ex-officio*, non-voting member of the Board of Directors of the Cambridge-Guernsey County Visitors and Convention Bureau). This opinion does not determine whether the Cambridge-Guernsey County Visitors and Convention Bureau constitutes

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. 2012-040, at 2-349 to 2-350; 2009 Op. Att’y Gen. No. 2009-005, at 2-22 to 2-23; *see* 2011 Op. Att’y Gen. No. 2011-024, at 2-196 (“[t]he Attorney General has developed the [preceding] five-question inquiry to determine whether a person may hold a public position and private position at the same time”); *see also* 1989 Op. Att’y Gen. No. 89-105, at 2-512. “All of these questions must yield answers in favor of compatibility to support a finding that the two positions are compatible.” 2017 Op. Att’y Gen. No. 2017-034, slip op. at 2.

A Person May Serve Simultaneously as a Member of the Guernsey County Board of Commissioners and Member of the Governing Board of the Cambridge-Guernsey Community Improvement Corporation, which has been Designated Pursuant to R.C. 1724.10 as the Agency for the County for the Industrial, Commercial, Distribution, and Research Development in the County

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 county from participating in certain political activities:

No officer or employee in the classified service of the ... several counties ... 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 ... several counties ... 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.

R.C. 124.57(A); *compare* 2 Ohio Admin. Code 123:1-46-02(A)-(C) (describing the prohibited political activities for employees in the classified civil service of the state). The classified civil service

a public office or public body for the purposes of the Ohio public records law or open meetings law. *See* 2017 Op. Att’y Gen. No. 2017-036, slip op. at 1 n.2.

comprises “all persons in the employ of the ... several counties” unless specifically excluded from the classified civil service or specifically included in the unclassified civil service. *See* R.C. 124.11; *see also* 2017 Op. Att’y Gen. 2017-035, slip op. at 2. Specifically included in the unclassified civil service are “[a]ll officers elected by popular vote or persons appointed to fill vacancies in those offices.” R.C. 124.11(A)(1).

As an elected officeholder, a member of a board of county commissioners is in the county’s unclassified service, rather than the classified service. *See* R.C. 124.11(A)(1); R.C. 305.01. Thus, R.C. 124.57 does not apply to the position of a member of a board of county commissioners and so does not prohibit a county commissioner from serving on the governing board of a community improvement corporation. The first question of the compatibility test is, therefore, resolved in favor of compatibility.

The second question of the compatibility test 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. Indeed, a public officeholder, such as a county commissioner, is expressly authorized to serve on the governing board of a community improvement corporation:³

Not less than two-fifths of the governing board of any economic development corporation designated as the agency of one or more political subdivisions *shall be composed* of mayors, members of municipal legislative authorities, members of boards of township trustees, *members of boards of county commissioners*, or any other appointed or elected officers of such political subdivisions, provided that at least one officer from each political subdivision shall be a member of the governing board. 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. The board of directors of a county land reutilization corporation shall be composed of the members set forth in [R.C. 1724.03]. Membership on such governing boards shall not constitute an interest, either direct or indirect, in a contract or expenditure of money by any municipal corporation, township, county, or other political subdivision. 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.

R.C. 1724.10(B)(1) (emphasis added); *see* 2012 Op. Att’y Gen. No. 2012-040, at 3-350. Accordingly, the second question of the compatibility test may be answered in favor of compatibility.

³ A “community improvement corporation” is either an “economic development corporation” or a “county land reutilization corporation.” R.C. 1724.01(A)(1). The Cambridge-Guernsey Community Improvement Corporation is an economic development corporation for purposes of R.C. Chapter 1724. *See* R.C. 1724.01(A)(2), (B)(1).

The third question of the compatibility test asks whether there are any impermissible conflicts of interest between the two positions.⁴ A person may not serve simultaneously in two positions when a conflict of interest exists between the two positions. 2017 Op. Att’y Gen. No. 2017-014, at 2-130. “[C]onflicts 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. Determining whether a conflict of interest exists between two positions first requires us to examine the “powers, duties, and responsibilities of the respective positions.” *Id.* Then, if our review finds a conflict of interest between the two positions does indeed exist, we will next need to determine whether the conflict may be sufficiently avoided or eliminated entirely. “The factors used in making this determination include, but are not limited to, the probability of the conflicts occurring, the ability of the person to remove himself from any conflicts that may occur, whether the person exercises decision-making authority in both positions, and whether the conflicts relate to the primary functions of each position, or to financial or budgetary matters.” 2004 Op. Att’y Gen. No. 2004-051, at 2-439.

We will first review the powers, duties, and responsibilities of a county commissioner. County commissioners are elected officeholders responsible for the governance of their respective counties. *See generally* R.C. Chapters 305 and 307 (setting forth the general powers and duties of a board of county commissioners). These powers, duties, and responsibilities include, among other things, procuring group insurance for county employees. R.C. 305.171. They also include entering into contracts on behalf of the county with other governmental entities, R.C. 307.15, creating a county office of economic development, R.C. 307.07, providing offices for county officers, R.C. 307.01-.02, and providing ambulance, emergency medical, firefighting, or non-emergency patient transport services, *see, e.g.*, R.C. 9.60; R.C. 307.05; R.C. 307.052. Notably, a board of county commissioners may make contributions of moneys, supplies, equipment, office facilities, and other personal property or services to a community improvement corporation organized under R.C. Chapter 1724. R.C. 307.78.

A board of county commissioners is also responsible for the county’s budget and handling other fiscal matters. *See, e.g.*, R.C. 135.33 (designates eligible institutions as public depositories for the keeping of the county’s active moneys); R.C. 135.34-341 (establishes the county’s investment policy). A board of county commissioners is the taxing authority of the county for purposes of Ohio’s uniform public securities law and its tax levy law. *See* R.C. 133.01(NN)(1); R.C. 5705.01(C). In its capacity as taxing authority, a board of county commissioners may issue securities for the purpose of providing funds with which to pay one or more final judgments rendered against the county, R.C.

⁴ Pursuant to R.C. 102.08, the Ohio Ethics Commission determines the applicability of the ethics and conflict of interest provisions of R.C. Chapter 102, R.C. 2921.42, and R.C. 2921.43. The Attorney General, therefore “refrain[s] from interpreting and applying [those] provisions by way of a formal opinion.” 2011 Op. Att’y Gen. No. 2011-008, at 2-60 n.1. For a determination of whether those provisions apply to the positions at issue in this opinion, we recommend that you contact the Ohio Ethics Commission. *See id.*; *see also* Ohio Ethics Comm’n, Advisory Op. No. 88-005, slip op. at 3 (“R.C. 1724.10 does not exempt a city official from R.C. Chapter 102”).

133.14, may issue securities for the purpose of paying all or any portion of the costs of any permanent improvement that the county is authorized to acquire, improve, or construct, R.C. 133.15, adopts the county's annual tax budget, R.C. 5705.28, and levies taxes, *see, e.g.*, R.C. 133.25; R.C. 5705.03; R.C. 5705.07; R.C. 5705.19.

We will next review the powers, duties, and responsibilities of a member of the governing board of a community improvement corporation. A community improvement corporation is a nonprofit corporation organized under the provisions of R.C. Chapter 1724 and is subject to the general nonprofit laws under R.C. Chapter 1702 to the extent they are not inconsistent with R.C. Chapter 1724. *See* R.C. 1724.01; R.C. 1724.08. A community improvement corporation is formed by the filing of articles of incorporation with the Secretary of State. R.C. 1724.04; *see* R.C. 1702.07. A community improvement corporation may be organized to advance, encourage, and promote the industrial, economic, commercial, and civic development of a community or area. R.C. 1724.01(B)(1). Such a corporation may receive contributions of money and other material from a board of county commissioners that the corporation can use to "defray the expenses of the corporation." *See* R.C. 307.78. Such a corporation may also be designated by a board of county commissioners as the agency for the industrial, commercial, distribution, and research development in the county. *See* R.C. 1724.10(A)(1). With your letter, you have included Resolutions passed by the Board of Commissioners of Guernsey County, which designate the Cambridge-Guernsey County Community Improvement Corporation as the agency of the county for the industrial, commercial, distribution, and research development in Guernsey County. These Resolutions are dated October 30, 1972, and November 1, 1972 ("1972 Resolutions").

In carrying out the objectives of R.C. Chapter 1724, a governing board of a community improvement corporation may contract with governmental entities, including a board of county commissioners. *See* R.C. 1724.02(A)(15). The governing board may also borrow money, issue bonds and notes, make loans, acquire and sell real and personal property, and contract with third parties such as the federal government, the state, or any political subdivision of the state. *See* R.C. 1724.02(A)(1)(a); R.C. 1724.02(A)(2)-(3). In addition, the governing board may acquire, construct, operate, sell, or lease industrial plants or business establishments and may acquire, hold, or dispose of stocks, bonds, notes, and other securities in private businesses. R.C. 1724.02(A)(4)-(5).

Finally, a community improvement corporation that has been designated under R.C. 1724.10 as the agency of a county for the industrial, commercial, distribution, and research development in the county may exercise various types of authority in furtherance of the purposes of R.C. Chapter 1724. In particular, the Guernsey County Board of Commissioners has authorized the Cambridge-Guernsey Community Improvement Corporation to perform the following actions, among others:

1. Recommend to the County actions to be taken that aid the industrial, commercial, distribution, and research development in the county;
2. Make loans to private persons and businesses;
3. Acquire and sell real and personal property;

4. Solicit, receive, and use donations or commitments or money or other property of any kind from private corporations, firms, or organizations; and
5. Sell or lease any lands or interests in lands owned by the County that the County determines is no longer required for the County's purposes, which the County has conveyed to the Corporation after determining that such conveyance of lands or interests in land "will promote the welfare of the people of the County, stabilize the economy, provide employment and assist in the development of industrial, commercial, distribution and research activities to the benefit of the people of the County and provide additional opportunities for their gainful employment."

See 1972 Resolutions, §§ 7, 10, 12, and 13; *see also* R.C. 1724.10(B).

Review of the powers, duties, and responsibilities of the respective positions reveals that a board of county commissioners may enter into agreements with, make contributions of public moneys and property to, and finance projects to implement a plan for industrial, commercial, distribution, and research development recommended by a community improvement corporation. *See* R.C. 1724.10; 2009 Op. Att'y Gen. 2009-005, at 2-31 to 2-32; 2003 Op. Att'y Gen. No. 2003-037, at 2-312 to 2-314; 1991 Op. Att'y Gen. No. 91-071 (syllabus, paragraph 2) ("[p]ursuant to R.C. 307.78, a county has authority to make contributions of public money to a community improvement corporation organized pursuant to R.C. Chapter 1724, in order to defray expenses of the community improvement corporation incurred in connection with its functions under R.C. Chapter 1724"). A county commissioner might well be required to deliberate, discuss, negotiate, or vote on agreements that concern the contribution of public moneys and property to, or the financing of projects recommended by, the community improvement corporation. A county commissioner might find it difficult to perform his or her public duties and exercise discretion in a completely disinterested manner because of the commissioner's position on the governing board of the community improvement corporation.

Therefore, conflicts of interest may exist between the position of county commissioner and member of the governing board of a community improvement corporation designated pursuant to R.C. 1724.10 as the agency of the county for the industrial, commercial, distribution, and research development in the county. Notwithstanding these potential conflicts of interest, however, the General Assembly has expressly authorized a county commissioner to serve simultaneously as a member of the governing board of a community improvement corporation:

Not less than two-fifths of the governing board of any economic development corporation designated as the agency of one or more political subdivisions shall be composed of mayors, members of municipal legislative authorities, members of boards of township trustees, members of boards of county commissioners, or any other appointed or elected officers of such political subdivisions, provided that at least one officer from each political subdivision shall be a member of the governing board. 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. The board of directors of a county land reutilization corporation shall be composed of the members set forth in [R.C. 1724.03]. Membership on such governing boards shall not constitute an interest, either direct or indirect, in a contract or expenditure of money by any municipal corporation, township, county, or other political subdivision. *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.*

R.C. 1724.10(B)(1) (emphasis added).

A previous opinion read the above statutory language to mean that a member of a municipal legislative authority may serve simultaneously as a member of the governing board of a community improvement corporation. *See generally* 2009 Op. Att’y Gen. No. 2009-005 (syllabus).⁵ In that opinion, it was noted that the reference to R.C. 731.02 and R.C. 731.12 in R.C. 1724.10(B)(1) was “clearly intended to permit officials of municipal corporations to serve both their municipalities and appropriate community improvement corporations.” *See id.* at 2-32 to 2-33; *see also* 1979 Op. Att’y Gen. No. 79-061, at 2-206 (“[R.C. 1724.10(B)(1)] is rather obviously intended to eliminate problems regarding conflicts of interest and [incompatibility] of office”).⁶ Although 2009 Op. Att’y Gen. No. 2009-005 determined that a member of a municipal legislative authority may serve simultaneously as a member of the governing board of a community improvement corporation, the opinion’s analysis and conclusion also apply to the position of county commissioner.

R.C. 1724.10(B)(1) expressly authorizes a county commissioner to serve simultaneously as a member of the governing board of a community improvement corporation. Although conflicts of interest might exist between the two positions, the General Assembly has chosen to permit a person to serve simultaneously as a county commissioner and a member of the governing board of a community improvement corporation designated pursuant to R.C. 1724.10 as the agency of the county for the industrial, commercial, distribution, and research development in the county. *See generally* 2000 Op. Att’y Gen. No. 2000-015, at 2-86 n.2 (“[i]n some cases, the General Assembly has expressly permitted an individual to serve in two positions that might involve conflicting interests. *See, e.g.,* R.C. 715.70(G) (membership on the board of directors of a joint economic development district ‘shall

⁵ 2009 Op. Att’y Gen. No. 2009-005 examined the language of former R.C. 1724.10(A), which contained the same operative language as the current R.C. 1724.10(B)(1). The General Assembly amended the statutory provision in 2009, after the opinion of the Attorney General was issued, and re-numbered the code provisions in R.C. 1724.10. *See* Sub. S.B. 353, 127th Gen. A. (2008) (eff. Apr. 7, 2009).

⁶ 1979 Op. Att’y Gen. No. 79-061 also examined the language of former R.C. 1724.10(A), which was later re-numbered as R.C. 1724.10(B)(1).

not constitute an interest, either direct or indirect,' in a contract with a political subdivision and the member shall not forfeit or be disqualified from holding any public office or employment; [R.C. 1724.10(B)(1)] (same for membership on governing board of community improvement corporation”); *see generally also* 1999 Op. Att’y Gen. No. 99-023, at 2-156 n.7 (“[w]hen the General Assembly has intended that an individual be permitted to participate in two different capacities that might have prohibited interests, it has expressly so stated”).

Given the language of R.C. 1724.10(B)(1), we find it unnecessary to examine whether any conflicts of interest do, in fact, exist between the positions of county commissioner and member of the governing board of a community improvement corporation or whether those conflicts of interest may be sufficiently avoided or eliminated entirely. *See* 2017 Op. Att’y Gen. No. 2017-014, at 2-134; *see also* 2012 Op. Att’y Gen. 2012-040, at 2-351 (“[b]ecause 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 two positions]”). Accordingly, we conclude that question three of the compatibility test may be answered in favor of compatibility.⁷

The fourth question of the compatibility test asks whether any local charter provisions, resolutions, or ordinances prohibit the holding of the two positions. Whether any local charter provisions, resolutions, or ordinances apply is a matter of local concern. In other words, it is a fact-

⁷ R.C. 305.27 generally prohibits a county commissioner from having a direct or indirect concern with a contract for work to be done by a county and states, in relevant part:

No county commissioner shall be concerned, directly or indirectly, in any contract for work to be done or material to be furnished for the county. For a violation of this section, a commissioner shall forfeit not less than two hundred nor more than two thousand dollars, to be recovered by a civil action, in the name of the state, for use of the county. Such commissioner shall also forfeit, in like manner, any compensation he may have received on such contract.

Despite R.C. 305.27’s prohibition against a county commissioner having a direct or indirect concern in a contract for work to be done or material to be furnished for the county, the General Assembly has authorized a person to serve simultaneously as a county commissioner and member of the governing board of a community improvement corporation. *See* R.C. 1724.10(B)(1) (“[m]embership [on the governing board of a community improvement corporation] shall not constitute an interest, either direct or indirect, in a contract or expenditure of money by any ... county, or other political subdivision”); *see also* 1990 Op. Att’y Gen. No. 90-037, at 2-153 (under R.C. 505.011, the General Assembly has “implicitly sanctioned” a township trustee serving simultaneously as a member of a private fire company with which the township contracts notwithstanding that R.C. 511.13 prohibits a township trustee from having an interest in a contract entered into by the board of township trustees).

based question that local officials are best equipped to answer. *See* 2009 Op. Att’y Gen. 2009-005, at 2-24 to 2-25. We assume, for the purpose of this opinion, that no local charter provision, resolution, or ordinance prohibits a person’s simultaneous service as a member of a board of county commissioners and member of the governing board of a community improvement corporation. Accordingly, the fourth question may be answered in favor of compatibility.

The fifth and final question of the compatibility test asks whether any state, local, or federal departmental regulations prohibit a person from serving simultaneously as a member of the Board of Commissioners of Guernsey County and a member of the Cambridge-Guernsey Community Improvement Corporation. Because there are no state, local, or federal departmental regulations that are applicable to this situation, the final question may also be answered in favor of compatibility.

Accordingly, having answered all five questions of the compatibility test in favor of compatibility, a person may serve simultaneously as a member of the Guernsey County Board of Commissioners and member of the governing board of the Cambridge-Guernsey Community Improvement Corporation.

A Person May Not Serve Simultaneously as a Guernsey County Commissioner and an *Ex-Officio*, Non-Voting Member of the Board of Directors of the Cambridge-Guernsey County Visitors and Convention Bureau

Your second question asks whether a Guernsey County Commissioner may serve simultaneously as an *ex-officio*, non-voting member of the Board of Directors of the Cambridge-Guernsey County Visitors and Convention Bureau.⁸ Under the compatibility test set forth above, a

⁸ The Cambridge-Guernsey County Visitors and Convention Bureau is a private, nonprofit corporation organized under the provisions of R.C. Chapter 1702. A board of directors is vested with the authority to conduct the affairs of the Cambridge-Guernsey County Visitors and Convention Bureau. *See* R.C. 1702.30(A) (“[e]xcept where the law, the articles, or the regulations require that action be otherwise authorized or taken, all of the authority of a corporation shall be exercised by or under the direction of its directors”); *see also* R.C. 1702.01(K) (“[d]irectors’ means the persons vested with the authority to conduct the affairs of the corporation irrespective of the name, such as trustees, by which they are designated”). A nonprofit corporation may, through its articles of incorporation or by regulation, appoint certain directors to serve as *ex-officio* directors who are presumed to be non-voting directors of the corporation. *See* R.C. 1702.27(A)(4) (“[t]he articles or the regulations may provide that persons occupying certain positions within or without the corporation shall be *ex officio* directors, but, unless otherwise provided in the articles or the regulations, such *ex officio* directors shall not be considered for quorum purposes and shall have no vote”).

The Latin phrase *ex officio* means “by virtue or because of an office.” *Black’s Law Dictionary* 696 (10th ed. 2014). Although Ohio nonprofit corporation law presumes *ex-officio* directors will be non-voting directors of their respective corporations, *see* R.C. 1702.27(A)(4),

public and private position are incompatible if a person holding the positions is subject to an impermissible conflict of interest (the third question of the compatibility test). 2012 Op. Att’y Gen. No. 2012-040, at 2-350. “[A] conflict of interest exists when a public servant is subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the public.” 2017 Op. Att’y Gen. No. 2017-014, at 2-130.

Whether a conflict of interest is impermissible, such that it would render two positions incompatible, depends upon several factors:

[i]f our review discloses such conflicts, we must next 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 simultaneously in both positions. The pertinent 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.

2006 Op. Att’y Gen. No. 2006-010, at 2-86 to 2-87.

In posing your second question, you have also requested clarification of a recent opinion, 2017 Op. Att’y Gen. No. 2017-036. In that opinion, we determined that a Clermont County Commissioner may not serve simultaneously as a member of the Board of Trustees of the Clermont County Convention and Visitors Bureau due to an impermissible conflict of interest between the two positions.⁹ 2017 Op. Att’y Gen. No. 2017-036 (syllabus).

the term *ex officio* is not synonymous with “nonvoting.” See *Black’s Law Dictionary* 696. An Ohio public officeholder, for instance, may be a member of a particular board by virtue of the fact that he holds a particular public office, and still be afforded voting privileges as a member of that board. You have indicated that you wish to know specifically whether a Guernsey County Commissioner may serve as a *non-voting* member of the Board of Directors of the Cambridge-Guernsey County Visitors and Convention Bureau. Thus, we will focus our analysis on the compatibility of a county commissioner serving simultaneously as a non-voting member of the board of directors a county convention and visitors’ bureau.

⁹ In 2017 Op. Att’y Gen. No. 2017-036, to be consistent with the designation in the Articles of Incorporation and the Bylaws of the Clermont County Convention and Visitors Bureau, the governing board of the Clermont County Convention and Visitors Bureau was referred to as the “Board of Trustees.” R.C. Chapter 1702 uses the term “directors” to refer to the persons who have the authority to manage the affairs of a county convention and visitors’ bureau. See R.C. 1702.01(K) (“[d]irectors’ means the persons vested with the authority to conduct the affairs of the corporation irrespective of the name, such as trustees, by which they are designated”). For the purpose of this opinion, to be consistent with the designation in R.C. Chapter 1702, we will

The opinion noted that the primary conflict faced by a county commissioner who also serves as a member of the board of directors of a county convention and visitors' bureau concerns the commissioner's annual responsibility to prepare and adopt a tax budget and appropriation measure. *See id.*, slip op. at 4-6. Namely, as part of the county's annual appropriation measure, a board of county commissioners may adopt a spending plan that "set[s] forth a quarterly schedule of expenses and expenditures of all appropriations for the fiscal year from the county general fund." R.C. 5705.392(A). In its spending plan, a board of county commissioners may provide money to a county convention and visitors' bureau. R.C. 307.693 ("[a] board of county commissioners may appropriate moneys from the general fund to make contributions to convention and visitors' bureaus operating within the county"). If a county commissioner serves simultaneously on the board of directors of a county convention and visitors' bureau, that person "may be inclined to discourage appropriations for entities or purposes unrelated to the Bureau" so that the person may "ensure that county moneys are available for appropriations benefiting the Bureau." 2017 Op. Att'y Gen. No. 2017-036, slip op. at 5. "A county commissioner who also serves an entity that may receive an appropriation of county moneys may find himself subject to divided loyalties when he tries to balance the interests of that entity against the financial needs of the other county entities entitled to share in county general fund moneys." *Id.* This situation presents an impermissible conflict that is immediate, relates to a primary function of both positions, and cannot be avoided or eliminated. *See id.* at 6-7; *see also* 1985 Op. Att'y Gen. No. 85-029, at 2-107 ("[i]t is well established that where one public position has the power to appropriate funds to a second position, one person may not serve in both positions").

2017 Op. Att'y Gen. No. 2017-036 highlighted other potential conflicts of interest between the positions of county commissioner and member of the board of directors of a county convention and visitors' bureau. First, a board of county commissioners may levy a hotel lodging excise tax not to exceed three per cent on transactions by which lodging by a hotel is to be furnished to transient guests. R.C. 5739.09(A)(1). Revenue from the excise tax that remains after returning a percentage of the tax to applicable municipal corporations and townships, "shall be deposited in a separate fund and shall be spent solely to make contributions to the convention and visitors' bureau operating within the county." *Id.* A county commissioner may be required to deliberate, discuss, and vote on a resolution to increase the rate at which the hotel lodging excise tax rate is levied in the county. A commissioner who also serves on the board of the county convention and visitors' bureau may find it difficult to be completely objective when deciding whether to raise the excise tax rate in light of the commissioner's simultaneous service and loyalty to the convention and visitors' bureau. These divided loyalties may influence the commissioner's exercise of his public duties as county commissioner, presenting a potential conflict of interest.

Second, a board of county commissioners is authorized to enter into agreements directly with a county convention and visitors' bureau. For example, a board of county commissioners may enter into an agreement with a county convention and visitors' bureau for the bureau to build a convention center in the county by which the bureau agrees to devote certain tax revenues it receives under R.C.

refer to the governing board of the Cambridge-Guernsey County Visitors and Convention Bureau as the "Board of Directors."

5739.09(A) to the convention center. R.C. 307.695(B)(1). Under such an agreement, a board of county commissioners may acquire and lease real property to the bureau as the site of the convention center. R.C. 307.695(E). When negotiating these agreements, a county commissioner who also serves as a member of the board of directors of a county convention and visitors' bureau may be tempted to act in the interests of the county convention and visitors' bureau, rather than the interests of the county. *See* 2017 Op. Att'y Gen. No. 2017-036, slip op. at 8-9. This situation presents another potential conflict of interest between the positions of county commissioner and member of the board of directors of a county convention and visitors' bureau.¹⁰

To summarize, in 2017 Op. Att'y Gen. No. 2017-036, we determined that a Clermont County Commissioner may not serve simultaneously as a member of the Board of Trustees of the Clermont County Convention and Visitors Bureau in light of the impermissible conflict of interest that arises from the possibility that the Clermont County Board of Commissioners may appropriate general fund moneys of the county to the Clermont County Convention and Visitors Bureau. *Id.* (syllabus). Other potential conflicts of interest, described above, also exist between the two positions. *See id.* at 7-9.

Returning to your second question, the status of a county commissioner as an *ex-officio*, non-voting member of the board of directors of a county convention and visitors' bureau does not alter the analysis in 2017 Op. Att'y Gen. No. 2017-036. The impermissible conflict of interest that a county commissioner faces when he serves simultaneously as a member of the board of directors of a county convention and visitors' bureau does not stem solely from the person's status as a *voting* member of the board of directors; rather, the impermissible conflict of interest stems also from the person's membership on the board of directors itself. By virtue of membership on both the board of county commissioners and the board of directors of a county convention and visitors' bureau—even if the person is a non-voting member—the person will be subject to divided loyalties. On the one hand, as a county commissioner, the person's loyalty rests with serving the people of the county; on the other hand, as a director of the convention and visitors' bureau, the person's loyalty rests with advancing the interests of the bureau. Abstaining, as a member of the board of directors of the county convention and visitors' bureau, from votes, or even deliberations, related to the receipt or expenditure of county moneys, does not sufficiently mitigate the conflict of interest or divided loyalties the person may have as a county commissioner. *See* 2017 Op. Att'y Gen. No. 2017-034, slip op. at 7 (“a member's abstention from any discussions or decisions regarding the Bureau's receipt or expenditure of county moneys does not adequately eliminate or mitigate the conflict of interest that arises when the member serves simultaneously as Clermont County Auditor. Even if the person, as member or Treasurer abstains from discussions or decisions that relate to the receipt or expenditure of county moneys, the person, as Clermont County Auditor, will continue to be subject to influences derived from his loyalty to the Clermont County Convention and Visitors Bureau”).

¹⁰ R.C. 1724.10(B)(1) permits a county commissioner to serve simultaneously as a member of the governing board of a community improvement corporation. However, no statute permits a person to serve simultaneously as a county commissioner and member of the board of directors of a county convention and visitors' bureau.

Moreover, R.C. 305.27 states that a county commissioner shall not have a direct or indirect concern in a contract for services or material to be furnished for the county. *See* note 7, *supra*. In 1991 Op. Att’y Gen. No. 91-007, the Attorney General advised that a county commissioner will not violate R.C. 305.27 (and thus be permitted to sit on both the board of county commissioners and board of the nonprofit corporation in question) if the following four criteria are met: (1) the county has created or participated in the nonprofit corporation; (2) the board of county commissioners formally designates the offices in question to represent the county; (3) the county commissioners are formally instructed to represent the county and its interests; and (4) there is no other conflict of interest on the part of a particular county commissioner. *See* 2017 Op. Att’y Gen. No. 2017-036, slip op. at 9 n.6; 1991 Op. Att’y Gen. No. 91-007, at 2-38. Even assuming, *arguendo*, that the first three criteria are met, the fourth criterion remains unsatisfied for a person serving simultaneously as a county commissioner and member of the board of directors of a county convention and visitors’ bureau.¹¹ The fourth criterion is unsatisfied because, as discussed above, a county commissioner is subject to an impermissible conflict of interest, wherein the commissioner is annually faced with the question of whether to appropriate county general fund moneys to the Cambridge-Guernsey County Visitors and Convention Bureau.

Although a person serving in both positions might refrain from voting on contracts between Guernsey County and the Visitors and Convention Bureau, and might even abstain from discussions regarding such contracts, the person’s status as *ex-officio*, non-voting member on the Board of Directors of the Cambridge-Guernsey County Visitors and Convention Bureau does not cure the failure to satisfy the fourth criterion of the test set forth in 1991 Op. Att’y Gen. No. 91-007. An impermissible conflict of interest between the two positions remains. Regardless of whether the person serves as a voting or non-voting member of the Board of Directors of the Cambridge-Guernsey County Visitors and Convention Bureau, that person is still subject to divided loyalties between the person’s duties as a Guernsey County Commissioner and the person’s loyalty to the Visitors and Convention Bureau.

Insofar as the four criteria set forth in 1991 Op. Att’y Gen. No. 91-007 are not met, in the event that a contract exists in which a Guernsey County Commissioner is directly or indirectly concerned due to his service as a member of the Board of Directors of the Cambridge-Guernsey County Visitors and Convention Bureau, that person will have a prohibited concern in a contract under R.C. 305.27. 2017 Op. Att’y Gen. No. 2017-036, slip op. at 9. A Guernsey County Commissioner who is also a non-voting, *ex-officio* member of the Cambridge-Guernsey County Visitors and Convention Bureau, under those circumstances, may nevertheless violate R.C.

¹¹ Your second question asks us to presume that the four criteria established under 1991 Op. Att’y Gen. No. 91-007 are not met as those criteria are applied to the Board of Directors of the Cambridge-Guernsey County Visitors and Convention Bureau, and asks whether a person may nevertheless serve simultaneously as a Guernsey County Commissioner and *ex-officio*, non-voting member of the Board of Directors of the Cambridge-Guernsey County Visitors and Convention Bureau.

305.27 because “[r]efraining from participation in any discussions, deliberations, negotiations, or votes regarding contracts in which a county commissioner is directly or indirectly concerned does not negate the county commissioner’s prohibited concern in a contract, once that contract is executed.” *Id.* A violation of R.C. 305.27 renders the two positions incompatible.

Accordingly, the positions of member of the Guernsey County Board of Commissioners and *ex-officio*, non-voting member of the Cambridge-Guernsey County Visitors and Convention Bureau are incompatible.

Conclusion

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

1. A person may serve simultaneously as a member of the Guernsey County Board of Commissioners and member of the governing board of the Cambridge-Guernsey Community Improvement Corporation, which has been designated pursuant to R.C. 1724.10 as the agency of the county for the industrial, commercial, distribution, and research development in the county.
2. A person may not serve simultaneously as a member of the Guernsey County Board of Commissioners and an *ex-officio*, non-voting member of the Board of Directors of the Cambridge-Guernsey County Visitors and Convention Bureau. (2017 Op. Att’y Gen. No. 2017-036, followed.)

Very respectfully yours,

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

MICHAEL DEWINE
Ohio Attorney General