

OPINION NO. 2013-002

Syllabus:

2013-002

A person may serve simultaneously as county engineer and member of the board of directors of a conservancy district that has territory in that county. However, as a member of the board of directors of a conservancy district, he may

not participate in deliberations, discussions, negotiations, or votes regarding matters that affect or pertain to the exercise of his duties as county engineer. As county engineer, he may not (1) participate in any review, evaluation, or approval of plans or improvements of the conservancy district or (2) exercise any powers or perform any duties of the conservancy district under an agreement between the county and the conservancy district. (1953 Op. Att'y Gen. No. 3249, p. 631, questioned.)

To: Keller J. Blackburn, Athens County Prosecuting Attorney, Athens, Ohio
By: Michael DeWine, Ohio Attorney General, January 23, 2013

You have requested an opinion whether a person may serve simultaneously as county engineer of Athens County and member of the board of directors of the Hocking Conservancy District, which has territory in Athens County. Subject to the restrictions set forth below, it is our opinion that the two positions are compatible.

The following analysis is used to determine whether a person may serve simultaneously in two public positions:

1. Is either position in the classified service for purposes of R.C. 124.57?
2. Does a constitutional provision or statute prohibit holding both positions at the same time?
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?
6. Are there local charter provisions, resolutions, or ordinances that are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

2009 Op. Att'y Gen. No. 2009-018, at 2-127 to 2-128.

Discussion of R.C. 124.57

The first question of the compatibility analysis asks whether either of the positions is a classified employment within the terms of R.C. 124.57. This statute prohibits, except as provided therein, an officer or employee in the classified service of the state, the several counties, cities, city school districts, and civil service townships from holding partisan political offices and employments. 2009 Op. Att'y Gen. No. 2009-018, at 2-128.

The county engineer, as an elected official, is in the unclassified civil service and is, therefore, not subject to R.C. 124.57. *See* R.C. 124.11(A)(1) (the unclassi-

fied service includes “[a]ll officers elected by popular vote or persons appointed to fill vacancies in those offices”); R.C. 315.01; 1985 Op. Att’y Gen. No. 85-100, at 2-428.

R.C. 124.57’s prohibition also does not apply to members of the board of directors of a conservancy district. Conservancy districts are separate and distinct political subdivisions of the state that are formed to solve a variety of water management problems. *See* R.C. 6101.03(F); R.C. 6101.04. R.C. 124.57 applies to all officers and employees “in the classified service of the state, the several counties, cities, and city school districts of the state, or in the civil service townships of the state.” It does not explicitly refer to officers and employees in the service of a conservancy district. Further, members of the board of directors of a conservancy district are not in the service of a city, city school district, or civil service township. They also are not in the service of the state or any county. *See State ex rel. Bowers v. Maumee Watershed Conservancy Dist.*, 98 Ohio App. 111, 128 N.E.2d 208 (Defiance County 1954) (syllabus, paragraph 1) (“[a] conservancy district is a distinct political subdivision of the state operating as a distinct entity independently of any county, city, or other political subdivision”); 1955 Op. Att’y Gen. No. 6061, p. 689, at 691 (a conservancy district “is an authority separate and distinct from the State of Ohio and the counties which are situated within its geographical limits”); *see also In re Ford*, 3 Ohio App. 3d 416, 419, 446 N.E.2d 214 (Franklin County 1982) (“R.C. 124.01 includes only specified political subdivisions within the definition of civil service, so that employment with all other political subdivisions, such as townships, local school districts, conservancy districts, court districts, and other political subdivisions, whether constituting more than one or only part of one county, are not included within the definition of civil service”). As members of the board of directors of a conservancy district are not in the service of the state or any county, city, city school district, or civil service township, R.C. 124.57 does not apply.

Because R.C. 124.57’s prohibition does not apply to either position, R.C. 124.57 does not prevent a person from serving simultaneously as county engineer and member of the board of directors of a conservancy district.

Applicability of Constitutional Provisions or Statutes, Local Charter Provisions, Resolutions, or Ordinances, or Federal, State, or Local Departmental Regulations

For ease of discussion, we will address the second, sixth, and seventh questions of the compatibility analysis together. Question two asks whether a constitutional provision or statute prohibits a person from holding both positions at the same time. No constitutional provision or statute prohibits a person from serving simultaneously in the positions of county engineer and member of the board of directors of a conservancy district. *Cf.* R.C. 315.02 (“[n]o person holding the office of clerk of the court of common pleas, sheriff, county treasurer, or county recorder is eligible to hold the office of county engineer”); *see also* 1995 Op. Att’y Gen. No. 95-023, at 2-121 (“[t]he provisions of R.C. 6101.01-.99, which govern the organization and operation of conservancy districts, do not prohibit a member of the board

of directors of a conservancy district from either seeking election or appointment to another public position, or serving in another public position”). Question two of the compatibility test, therefore, may be answered in the negative.

Question six considers whether any local charter provisions, resolutions, or ordinances apply. Athens County has no charter. Whether there is an applicable local resolution or ordinance that prohibits a person from holding these two positions is a question for local officials to answer. *See* 2009 Op. Att’y Gen. No. 2009-018, at 2-133. For purposes of this opinion, it is assumed that no such local resolution or ordinance exists.

Question seven asks about the applicability of federal, state, and local departmental regulations. There is no state or federal regulation prohibiting an individual from serving simultaneously in the positions of county engineer and member of the board of directors of a conservancy district. Whether an applicable local departmental regulation bars a person from simultaneously holding these two positions is a question for local officials to answer. *Id.*

Subordination and Control

The third question of the compatibility test asks whether one position is subordinate to, or in any way a check upon, the other. A county engineer is elected by, and responsible to, the county’s electorate. *See* R.C. 315.01. Members of the board of directors of a conservancy district are appointed by the conservancy court, consisting of one common pleas judge from each county having territory in the district. R.C. 6101.10; *see also* R.C. 6101.07. The board of directors generally is not subject to the direct control or supervision of any other office or entity of government. 1995 Op. Att’y Gen. No. 95-023, at 2-122. The positions of county engineer and member of the board of directors of a conservancy district thus operate independently of each other. Neither position is required to assign duties to or supervise the other. Neither position is directly responsible for appointing or removing a person from the other position. Therefore, neither position is subordinate to, or in any way a check upon, the other.

Physical Ability to Hold and Serve in Both Positions

Question four of the compatibility analysis asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best addressed by local officials because they may determine more accurately the time constraints and demands imposed upon the positions in question. *See* 2009 Op. Att’y Gen. 2009-018, at 2-130. In order to serve simultaneously in the positions of county engineer and member of the board of directors of a conservancy district, however, a person must be certain that he will be able to discharge the duties of both positions in a competent and timely manner. *See* 2006 Op. Att’y Gen. No. 2006-047, at 2-451.

Conflicts of Interest

The fifth and final question of the compatibility test asks whether there is a

conflict of interest between the two positions.¹ It is well established that a person may not serve simultaneously in two public positions if he would be subject to divided loyalties, conflicting duties, or the temptation to act other than in the public's best interest in either or both positions. 2003 Op. Att'y Gen. No. 2003-010, at 2-70. To determine whether conflicts of interest exist, we review the powers, duties, and responsibilities of a county engineer and a member of the board of directors of a conservancy district. If the review discloses any conflicts, we examine whether the conflicts may be avoided sufficiently or eliminated entirely, thus allowing the person to hold both positions at the same time. 2006 Op. Att'y Gen. No. 2006-047, at 2-451. The factors weighed in making this determination include 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.*

The powers, duties, and responsibilities of a county engineer are numerous and are described throughout several chapters of the Revised Code. The general duties of the county engineer are set forth in R.C. 315.08, which states, in part, that the county engineer must "perform for the county all duties authorized or declared by law to be done by a registered professional engineer or registered surveyor," with the exception of certain limited duties specifically enumerated therein. While the duties of a county engineer are numerous, they predominantly relate to the construction and upkeep of county roads, bridges, and highways. *See, e.g.*, R.C. 315.08; R.C. 315.13; R.C. 5543.09. The primary responsibility of the office of county engineer is to supervise, undertake, or inspect the construction, reconstruction, improvement, maintenance, or repair of county roads and highways. 1988 Op. Att'y Gen. No. 88-067, at 2-343; *see also* R.C. 315.08; R.C. 5543.01; R.C. 5543.09. The county engineer also has several powers, duties, and responsibilities with respect to ditch and drainage improvements performed under R.C. Chapter 6131 (single county ditches) and R.C. Chapter 6133 (joint county ditches).²

We now turn to the powers, duties, and responsibilities of a member of the

¹ The Ohio Ethics Commission, rather than the office of the Attorney General, is required by R.C. 102.08 to address the application of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. Your request indicates that the Ohio Ethics Commission has already been consulted in regard to this matter. We will, therefore, refrain from interpreting and applying these provisions by way of a formal opinion.

² We recognize that additional duties may be assigned to the county engineer pursuant to an agreement between the county engineer and the board of county commissioners. *See* R.C. 315.14. Under such an agreement, the county engineer may, for example, assume the duties of the county sanitary engineer or agree to administer and enforce local residential building regulations or existing structure codes. *Id.* These are not, however, among the primary duties of a county engineer, and you have not indicated that, in your situation, the county engineer has assumed any such additional duties. Therefore, for purposes of this opinion, we will not ad-

board of directors of a conservancy district.³ Conservancy districts are governed by R.C. Chapter 6101, which was enacted by the General Assembly as a mechanism for flood prevention and control less than a year after Ohio's statewide flood of 1913. Ohio Dep't of Natural Res., *Ohio's Conservancy Districts*, <http://www.dnr.state.oh.us/tabid/4110/default.aspx> (last updated Oct. 19, 2009). Pursuant to R.C. Chapter 6101, conservancy districts may be created at the initiative of local landowners or political subdivisions to address a variety of water management problems. *Id.*; *see also* R.C. 6101.05. A conservancy district may be established for any of the purposes listed in R.C. 6101.04, including preventing floods, R.C. 6101.04(A), providing for irrigation, R.C. 6101.04(D), and providing a water supply, R.C. 6101.04(G). The websites of various Ohio conservancy districts emphasize the following as the primary functions of conservancy districts: flood prevention; drainage assistance; water conservation and quality control; and promotion and development of recreational opportunities. *See* Hocking Conservancy Dist., <http://www.hockingcd.org/> (last visited Jan. 17, 2013); Miami Conservancy Dist., <http://www.miamiconservancy.org/about/index.asp> (last visited Jan. 17, 2013); Muskingum Watershed Conservancy Dist., <http://www.mwcd.org/> (last visited Jan. 17, 2013).

Members of the board of directors of a conservancy district are appointed by the conservancy court to act as the governing body of the district. R.C. 6101.10. Conservancy districts containing territory in less than seventeen counties, like the Hocking Conservancy District, are governed by a three-member board of directors. *Id.* Members of the board of directors of a conservancy district are granted a variety of powers, duties, and responsibilities directed toward attaining the district's primary objective of water management. *See, e.g.*, R.C. 6101.15; R.C. 6101.46; R.C. 6101.53. They are granted the power to "[d]o all things necessary or incident to the fulfillment of the purposes for which the [conservancy] district is established." R.C. 6101.15(O). The board of directors also has primary responsibility for the financial administration of the conservancy district. *See* R.C. 6101.44-.66; 1995 Op. Att'y Gen. No. 95-023, at 2-122. Included among the board's authority in this regard is the power to levy and collect assessments and the power to issue and redeem bonds. *See* R.C. 6101.44-.57.

A review of the powers, duties, and responsibilities of the respective positions discloses that there are instances in which the powers, duties, and responsibilities of a county engineer and a member of the board of directors of a conservancy district may come into conflict. First, an individual who serves on the board of directors of a conservancy district may be required to discuss, deliberate, negotiate, or vote on matters affecting the engineer of a county having territory in the district.

dress any conflicts of interest that may arise if a county engineer assumes additional duties under an agreement with the the board of county commissioners.

³ The Hocking Conservancy District was established on December 13, 1963. Hocking Conservancy Dist., <http://hockingcd.org/hocking/history/> (last visited Jan. 17, 2013). Therefore, for purposes of this opinion, we will not consider provisions of law that only apply to conservancy districts organized prior to that date.

See, e.g., R.C. 6101.15(I) (construction of works or improvements of the conservancy district over public highways or land belonging to the county); R.C. 6101.17 (exercise of the district's dominant right of eminent domain over the county); R.C. 6101.19(A)(2) (rules or regulations affecting the manner of building county bridges or roads); R.C. 6101.20-.21 (removal or change of bridges or other structures belonging to the county); R.C. 6101.23 (an agreement or contract between the conservancy district and the county); R.C. 6101.24 (leasing, selling, or granting permission to use the district's water or watercourses to the county); R.C. 6131.14 (review of maps, profiles, or plans prepared by the county engineer in connection with county ditch improvements when the proposed improvement will affect lands or streams of the conservancy district).

However, a review of the powers, duties, and responsibilities of a member of the board of directors of a conservancy district discloses that matters affecting the county engineer do not regularly come before the board for deliberation and decision. As explained above, conservancy districts are established to address water management problems. Therefore, the primary functions of the board of directors relate to water management, and the bulk of the board's time is spent addressing water management problems. The county engineer is primarily concerned with construction and upkeep of county roads, bridges, and highways. While the duties of a member of the board of directors of a conservancy district and county engineer may overlap at times, the primary objectives of the respective positions are not so interrelated that the powers, duties, and responsibilities of the positions will come into conflict on a regular and consistent basis. It is only speculative whether a member of the board of directors of a conservancy district will be required to discuss, deliberate, negotiate, or vote on any of the matters enumerated here that may affect a county engineer's exercise of his responsibilities. Of the examples listed above, the only matter that relates to a conservancy district's primary objective of water management is the sale or lease of the district's water or watercourses to the county. *See* R.C. 6101.24. The other matters affecting the county engineer that could confront the board of directors do not directly relate to any of the purposes under R.C. 6101.04 for which a conservancy district may be established. Because these matters do not relate to a conservancy district's primary objective of water management, the possibility of them coming before the board for discussion, deliberation, negotiation, or a vote is remote and speculative.

Additionally, while the sale or lease of water or watercourses relates to a conservancy district's primary objective of water management, the sale or lease of water or watercourses to a county, in particular, does not. Any person or public corporation desiring to secure use of the district's water or watercourses may apply to the board of directors of a conservancy district for lease, purchase, or permission for such use. R.C. 6101.24. Counties are not required to lease, purchase, or request permission to use waters or watercourses belonging to a conservancy district. Therefore, occasions requiring a member of the board of directors of a conservancy district to discuss, deliberate, negotiate, or vote on leasing, selling, or granting permission to use the conservancy district's water or watercourses to a county should also be infrequent.

Furthermore, should a circumstance arise in which a member of the board of directors of a conservancy district is required to discuss, deliberate, negotiate, or vote on a matter affecting or pertaining to the county engineer's exercise of his statutory duties, the member of the board of directors may avoid the conflict by abstaining from participating in those deliberations, discussions, negotiations, or votes. *See* 2009 Op. Att'y Gen. No. 2009-018, at 2-131 (if a person serving in two positions "is able to remove himself from the conflict [of interest] by abstaining from participating in deliberations, discussions, negotiations, or votes pertaining to the conflict, the person may serve in both positions at the same time"). The board of directors of a conservancy district is capable of performing its statutory duties when one of its members abstains from a matter. *See* R.C. 6101.11 ("[a] majority of the board constitutes a quorum, and a concurrence of the majority in any matter within the board's duties is sufficient for its determination").⁴ Hence, the positions of member of the board of directors of a conservancy district and engineer of a county having territory in the district are compatible provided that the person, as a member of the board of directors, abstains from participating in deliberations, discussions, negotiations, or votes regarding matters that affect or pertain to the exercise of his duties as county engineer.⁵

Another conflict may arise between these positions because in certain cir-

⁴ A member of the board of directors of the Hocking Conservancy District is able to abstain from a matter even though the board of directors of the Hocking Conservancy District is composed of three persons. While abstention by one board member leads to the possibility of deadlock, deadlock may arise anytime a member of a board abstains from voting, regardless of the size of the board. Recent Attorney General opinions have advised that a member of a three-member board may avoid a conflict of interest through abstention. *See, e.g.*, 2012 Op. Att'y Gen. No. 2012-005, at 2-35 (board of county commissioners and sewage treatment system appeals board); 2006 Op. Att'y Gen. No. 2006-003, at 2-27 (board of township trustees); 2004 Op. Att'y Gen. No. 2004-051, at 2-443 to 2-444 (board of county commissioners); 2002 Op. Att'y Gen. No. 2002-013, at 2-76 (board of township trustees).

⁵ 1953 Op. Att'y Gen. No. 3249, p. 631 found the positions of city engineer and member of the board of directors of a conservancy district incompatible because of impermissible conflicts of interest. We believe that the analogous conflicts that may arise between the positions of county engineer and member of the board of directors of a conservancy district are insufficient to render the two positions incompatible. The 1953 opinion found the positions of city engineer and member of the board of directors of a conservancy district incompatible because of potential conflicts arising from the fact that a city may lease, purchase, or request permission to use water or watercourses belonging to the conservancy district and may also file objections to the creation of a conservancy subdistrict. The 1953 opinion does not address the immediacy of these potential conflicts or the possibility of eliminating or avoiding the conflicts. Thus, we question that opinion's conclusion that the positions of city engineer and member of the board of directors of a conservancy district are incompatible. The analogous conflicts that may arise between a county engineer and member of the board of directors of a conservancy district do not involve the

cumstances a county engineer may be required to review, evaluate, or approve plans or improvements of a conservancy district. First, the county engineer may be required to evaluate bridges constructed by a conservancy district under the authority of its board of directors. *See* R.C. 6101.15(G) (the board of directors of a conservancy district may “[c]onstruct or enlarge any bridges that may be needed in or out of the district”); *see also* R.C. 6131.47 (when removal or alteration of a culvert, bridge, fence, or floodgate is necessary to the progress of a county ditch improvement, the county engineer shall cause notice to be given to the owner, which may include a conservancy district, within seven days in advance of the removal or alteration). A related conflict may arise because a county engineer may be required to review and approve a conservancy district’s plan for a new single span bridge if, in connection with one of its improvements, the district seeks to construct a single span bridge that would limit the future deepening of a public watercourse. *See* R.C. 6131.631. If a county engineer who also serves on the board of directors of a conservancy district is required to review, evaluate, or approve that district’s bridge or plan for a bridge, he may, as county engineer, have difficulty setting aside his loyalty to the conservancy district. *See* 2004 Op. Att’y Gen. No. 2004-051, at 2-449 (city fireman who also serves as county commissioner may have difficulty setting aside his loyalty to the county if required to examine county buildings or structures for fire and safety hazards). Such a predisposition of loyalty could prevent the person from making completely objective and disinterested decisions or result in preferential treatment being accorded to the conservancy district. *See id.*

Additionally, a conflict of interest may arise if a county engineer is assigned the powers or duties of the conservancy district under an agreement between the county and the conservancy district. R.C. 307.15 authorizes a board of county commissioners to enter into an agreement with a conservancy district whereby the board of county commissioners is authorized to exercise any power, perform any function, or render any service on behalf of the conservancy district that the conservancy district may exercise, perform, or render. If the agreement does not state otherwise, the board of county commissioners may assign powers and duties under the agreement to the county engineer. *See* R.C. 307.15(A)(2). Thus, under such an agreement, the county engineer could be responsible for carrying out powers or duties of the conservancy district.

These conflicts, however, are remote and speculative and can be sufficiently avoided. First, as conservancy districts are not required to construct bridges, it is only speculative whether a county engineer would be required to evaluate a conservancy district’s bridge or plan for a bridge. Likewise, because no statute mandates that a county and conservancy district contract with each other for services, property, or any other reason, it is also speculative whether a conservancy district would ever enter into a contract whereby a county would exercise any of the district’s powers, perform any of the district’s functions, or render any of the district’s services. It is equally speculative whether a county engineer would be assigned powers or duties of the conservancy district under such an arrangement.

primary functions of either position and are remote and speculative. Accordingly, we conclude that these conflicts do not render the positions incompatible.

Furthermore, even if any of these conflicts do arise, they can be avoided. Pursuant to R.C. 325.17, a county engineer may appoint and employ necessary deputies. These deputies may perform any duties of the county engineer. *See* R.C. 3.06. Therefore, should a situation arise in which a county engineer is required to review, evaluate, or approve plans or improvements of the conservancy district or to perform any powers or duties of the conservancy district for which he serves, any such conflict can be avoided if the county engineer abstains from the matter and directs one of his deputies to act in his place. Accordingly, these conflicts do not render the positions incompatible.

In addition to the foregoing conflicts, there are potential tax and budgetary conflicts of interest that may arise between the positions of county engineer and member of the board of directors of a conservancy district. First, a conflict of interest may exist between these two positions because of indirect competition for moneys generated within the ten-mill limitation.⁶ While conservancy districts do not have independent statutory authority to levy taxes,⁷ they do have authority to levy assessments against public corporations. *See, e.g.*, R.C. 6101.25; R.C. 6101.48; R.C. 6101.53. These public corporations, in turn, are authorized to levy a property tax in order to provide the funds necessary to pay the annual assessment levied by the conservancy district. R.C. 6101.61. Thus, a conservancy district's assessment against a county may be indirectly levied as a uniform tax on all taxable property in the county. *See* R.C. 6101.01(C) (as used in R.C. Chapter 6101, "political subdivision" includes counties); R.C. 6101.61 (the governing or taxing body of each political subdivision assessed by the conservancy district "shall levy and assess a tax at a uniform rate upon all the taxable property within the political subdivision so as to provide sufficient funds for the payment of the annual levy after deduction of any portion of the levy paid from other sources"). A county engineer also has an official interest in moneys generated within the ten-mill limitation. A county engineer's an-

⁶ 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. This is known as the "ten-mill limitation." *See* R.C. 5705.02-.03; 2006 Op. Att'y Gen. No. 2006-047, at 2-453 n.11.

⁷ Although a conservancy district is defined as a "taxing unit" under R.C. 5705.01(H), we have found no independent statutory authority for a conservancy district to levy a tax. Prior to September 21, 2000, various provisions of R.C. Chapter 6101 referred to a conservancy district's authority to levy taxes or to levy "taxes and assessments." Thereafter, the General Assembly eliminated from R.C. Chapter 6101 language stating that a conservancy district has the power to exercise the right of taxation, together with all references to "taxes." *See* 1999-2000 Ohio Laws, Part III, 6991 (Sub. H.B. 617, eff. Sept. 21, 2000); *see also* Ohio Legislative Serv. Comm'n, Final Analysis, Sub. H.B. 617, 123rd Gen. A., at 14 (as passed by the General Assembly). A conservancy district is, however, still included as a "taxing unit" under R.C. 5705.01(H) because it has authority to issue bonds that constitute a charge against the property of the district. R.C. 6101.50; *see also* R.C. 5705.01(H).

nual estimate of funds necessary for maintenance, repair, or construction of county roads, bridges, or culverts is used by the board of county commissioners in preparing the county's annual tax budget. *See* R.C. 5705.28(C)(1); R.C. 5543.02; R.C. 5555.91. This estimate can be used in levying a tax on all taxable property in the county at a rate not exceeding two mills. R.C. 5555.91. A person who serves as both a member of the board of directors of a conservancy district and engineer of a county within the district will thus be subject to a conflict of interest arising from indirect competition over tax revenue generated within the ten-mill limitation.

A related tax and budgetary conflict exists because of indirect competition for tax moneys in excess of the ten-mill limitation. In order to provide the necessary funds to pay the conservancy district's annual assessment, a county may place a levy on the ballot for taxes in excess of the ten-mill limitation. *See* R.C. 5705.07; R.C. 5705.19(A); R.C. 5705.191. Likewise, a county may place a levy on the ballot for taxes in excess of the ten-mill limitation in order to fund construction, reconstruction, resurfacing, and repair of county streets, roads, and bridges. *See* R.C. 5705.07; R.C. 5705.19(G); R.C. 5705.191. Where the county contemplates asking the voters for additional funding for both of these purposes, a person serving simultaneously as county engineer and member of the board of directors of a conservancy district might find himself subject to divided loyalties. If the county has decided to place a levy on the ballot for purposes of paying the conservancy district's assessment, a county engineer may be apprehensive about promoting a tax levy for construction or repair of streets, roads, and bridges, for fear that the conservancy district levy will be rejected in favor of the other levy. Likewise, if the county has placed a tax levy on the ballot for purposes of constructing or maintaining county streets, roads, and bridges, a member of the board of directors of the conservancy district may be reticent about levying an assessment against the county, for fear that the county will place a competing tax levy on the ballot in order to provide funds to pay the assessment.

We are of the opinion that these tax and budgetary conflicts are remote and speculative and can be sufficiently avoided. First, any competition for moneys generated within or in excess of the ten-mill limitation is indirect. Second, neither position exercises independent decision-making authority in the budget process of its respective governmental entity. The county engineer does not prepare or adopt an annual tax budget that is submitted to the county budget commission. Rather, the board of county commissioners, as the county's "taxing authority," *see* R.C. 5705.01(C), is responsible for adopting the county's annual tax budget. R.C. 5705.28. The county engineer prepares only an "estimate" of funds needed for maintenance, repair, or construction of county roads, bridges, or culverts. R.C. 5543.02; *see also* R.C. 5705.28(C)(1). This estimate is used by the board of county commissioners in preparing and adopting the county's tax budget. R.C. 5555.91; *see also* R.C. 5705.28(C)(1). In preparing the county's tax budget, the board of county commissioners may make changes and modifications to the county engineer's estimate as it deems proper. R.C. 5555.91. The board of county commissioners, therefore, has an opportunity to counter any undue influence that the county engineer may have exerted in preparing the estimate.

Additionally, the annual tax budget submitted by the board of county commissioners is subject to the review, adjustment, and approval of the county budget commission. *See, e.g.*, R.C. 5705.31; R.C. 5705.32. It is the county budget commission that actually allocates the tax proceeds within the ten-mill limitation. R.C. 5705.32. Similarly, the county engineer 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 is responsible for that decision. *See* R.C. 5705.01(C); R.C. 5705.07; R.C. 5705.19. Because the county engineer does not exercise independent decision-making authority in the preparation of an annual tax budget, the potential conflicts of interest regarding indirect competition for tax moneys generated within or in excess of the ten-mill limitation are avoided. Therefore, the fact that a county engineer holds an additional position with a political subdivision that indirectly competes for tax moneys generated within or in excess of the ten-mill limitation is an insufficient reason to find that the county engineer is subject to impermissible conflicts of interest. *See* 2004 Op. Att’y Gen. No. 2004-051, at 2-443 (the fact that a county commissioner holds an additional employment with a city that competes with the county for tax moneys generated within the ten-mill limitation is an insufficient reason to find that the county commissioner is subject to impermissible conflicts of interest).

Similarly, a member of the board of directors of a conservancy district does not exercise independent decision-making authority in the levying of assessments. Decisions to levy assessments are made by vote of the entire board of directors of the conservancy district. *See* R.C. 6101.11. Further, the rate of the assessment is determined on the basis of benefits appraised by the conservancy district’s board of appraisers, not the board of directors. *See* R.C. 6101.28; R.C. 6101.31; R.C. 6101.48; R.C. 6101.53. Assessments levied under R.C. 6101.48 by the board of directors also must be submitted to the conservancy court for confirmation. R.C. 6101.48. Therefore, the court has an opportunity to counter any undue influence that a member of the board of directors may have exerted in levying assessments made under R.C. 6101.48.

Furthermore, a conservancy district assessment levied against a county will not necessarily reduce the amount of revenue generated within the ten-mill limitation or result in a tax levy on the ballot. While a county may pay the annual assessment of the conservancy district by levying a uniform property tax, the county may also pay the annual assessment from other sources. *See* R.C. 6101.61. If the county chooses to pay the full amount of the assessment from other sources, the assessment will not affect the amount of revenue available within the ten-mill limitation or result in a competing tax levy on the ballot.

Even assuming that the conservancy district assessment will affect the amount of revenue generated within the ten-mill limitation or result in a tax levy on the ballot that competes with another levy on the ballot for county street, road, or bridge funding, we will presume that the 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, 126 N.E.2d 449 (1955) (syllabus, paragraph 10) (“[i]n the absence of evidence to the contrary, public officials . . . will be

presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully”). Finally, if these tax and budgetary conflicts were deemed sufficient to render the two positions incompatible, a member of the board of directors of a conservancy district would be prevented from holding any employment or office with any political subdivision that is benefited, and thus assessed, by the conservancy district. Given the indirect nature of the competition for revenues generated within or in excess of the ten-mill limitation in such cases, we think this result is unnecessary.

A related tax and budgetary conflict exists between these two positions because, as illustrated by the previously discussed conflict, there are a number of circumstances in which a board of directors of a conservancy district will be responsible for levying assessments against a county, as well as circumstances in which a county engineer will be responsible for estimating assessments to be charged to a conservancy district. *See, e.g.*, R.C. 6101.48 (board of directors shall, when necessary, levy assessments on all real property and on all public corporations upon which benefits have been appraised to pay the cost of executing the district’s official plan); R.C. 6101.53 (board of directors may levy conservancy maintenance assessment upon each tract or parcel of land and upon each public corporation within the district); R.C. 6131.15 (county engineer shall estimate the benefits accruing to public corporations, including conservancy districts, from improvements under R.C. Chapter 6131 and prepare a schedule of assessments).

The occurrence of such situations is not sufficient to prevent a person from serving as county engineer and member of the board of directors of a conservancy district. *See 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)); 2006 Op. Att’y Gen. No. 2006-003, at 2-32 to 2-33 n.15; 2004 Op. Att’y Gen. No. 2004-015, at 2-129 to 2-131. As mentioned above, a member of the board of directors of a conservancy district does not exercise independent decision-making authority in levying assessments. Other members of the board participate in levying the assessments, which are based on appraisals made by the conservancy district’s board of appraisers. *See* R.C. 6101.28; R.C. 6101.31; R.C. 6101.48; R.C. 6101.53. Assessments levied under R.C. 6101.48 also must be submitted to the conservancy court for confirmation. R.C. 6101.48. Therefore, any undue influence that the director who also serves as county engineer may have exerted in levying the assessments may be countered by the roles that others play in the process. *See* 2011 Op. Att’y Gen. No. 2011-008, at 2-63. Similarly, the schedule of assessments prepared by a county engineer under R.C. Chapter 6131 may be amended and corrected by the board of county commissioners before it is approved. R.C. 6131.22. The board of county commissioners, therefore, has the opportunity to counter any undue influence that the county engineer may have exerted in preparing the schedule of assessments. *See* 2011 Op. Att’y Gen. No. 2011-008, at 2-63. Finally, although a person serving simultaneously in these two positions may be

involved in levying assessments on the other public entity for which he serves, it is unlikely that the person would use less than his best judgment in carrying out his responsibilities in this regard. *See State ex rel. Speeth v. Carney*, 163 Ohio St. 159 (syllabus, paragraph 10).

Conclusion

In summary, it is my opinion, and you are hereby advised that a person may serve simultaneously as county engineer and member of the board of directors of a conservancy district that has territory in that county. However, as a member of the board of directors of a conservancy district, he may not participate in deliberations, discussions, negotiations, or votes regarding matters that affect or pertain to the exercise of his duties as county engineer. As county engineer, he may not (1) participate in any review, evaluation, or approval of plans or improvements of the conservancy district or (2) exercise any powers or perform any duties of the conservancy district under an agreement between the county and the conservancy district. (1953 Op. Att’y Gen. No. 3249, p. 631, questioned.)