

OPINION NO. 89-105**Syllabus:**

A licensed real estate salesman may simultaneously hold the position of deputy county engineer.

To: Alan W. Foster, Adams County Prosecuting Attorney, West Union, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 29, 1989

I have before me your request for my opinion concerning the compatibility of the position of deputy county engineer (deputy engineer) with that of a licensed real estate salesman. Information provided indicates that the individual as a "deputy engineer would be working in and out of the same tax map office where certain property transfers would be approved by that tax map [office]."

In 1979 Op. Att'y Gen. No. 79-111 at 2-367 and 2-368, my predecessor established a seven question test for determining whether two public positions are

compatible. The test involves a review of the statutory and common law elements of compatibility. The occupation of licensed real estate salesman, however, is a private occupation. As a result, the common law test of compatibility is inapplicable. 1989 Op. Att'y Gen. No. 89-037 at 2-163 ("[s]ince the occupation of bail bonding is a private occupation, however, the common law test of compatibility does not apply"); 1983 Op. Att'y Gen. No. 83-035 at 2-135 ("[b]ecause a director of a county agricultural society holds a private position rather than a public office, the common law analysis of compatibility is inapplicable"). The common law test of compatibility, as set forth in *State ex rel. Attorney General v. Gebert*, 12 Ohio C.C. (n.s.) 274, 275, 21 Ohio C.C. Dec. 355, 356 (Franklin County 1909), reads "[o]ffices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both." The common law test of compatibility is incorporated into the more comprehensive compatibility test of Op. No. 79-111 as questions three and four.

I note, however, that it is still necessary to ascertain whether a conflict of interest exists or whether there are applicable statutes, local ordinances, or regulations which render the positions incompatible. Op. No. 89-037 at 2-163; Op. No. 83-035 at 2-135; *see also* 1970 Op. Att'y Gen. No. 70-168 at 2-335 ("the questions of conflict of interest and self dealing by public officers would apply whether or not the other position...is a public or private office"), *overruled on other grounds*, 1981 Op. Att'y Gen. No. 81-100. Consequently, I have determined "that thoroughness and consistency will be served by expressly adopting the remaining five questions [of the compatibility test of Op. No. 79-111] as the format for analysis between public and private positions." Op. No. 89-037 at 2-163 n. 1.

Accordingly, the determination as to whether the positions of licensed real estate salesman and deputy engineer are compatible requires the consideration of the following five questions:

1. Is the public position a classified employment within the terms of R.C. 124.57?
2. Do statutes governing either position limit the outside employment possible?
3. Is there a conflict of interest between the two positions?
4. Are there local charter provisions or ordinances which are controlling?
5. Is there a federal, state, or local departmental regulation applicable?

Id. at 2-163 and 2-164. *See generally* Op. No. 79-111 at 2-367 and 2-368 (setting forth the compatibility test for two public positions).

Questions number four and five are primarily questions to be determined at the local level. *See* Op. No. 89-037 at 2-164; Op. No. 79-111 at 2-368. I assume, for purposes of this opinion, that there are no departmental regulations, charter provisions or ordinances which prohibit the simultaneous holding of both positions.

Question number one asks whether the public position is a classified employment within the terms of R.C. 124.57, which prohibits classified employees or officers from engaging in partisan political activity other than to vote and express their political views. In a telephone conversation with a member of my staff you stated that the position of deputy engineer is unclassified. In any event, since the position of licensed real estate salesman is not one connected in any way to partisan politics, R.C. 124.57 would not prohibit a deputy engineer from holding the position of licensed real estate salesman even if the former position were classified.

Question number two asks whether the empowering statutes of either position limit outside employment. Deputy engineers are appointed by the county

engineer pursuant to R.C. 325.17, which provides, in part, that "[t]he officers mentioned in section 325.27¹ of the Revised Code may appoint and employ the necessary deputies...for their respective offices." (Footnote added.) See 1960 Op. Att'y Gen. No. 1278, p. 269 (syllabus, paragraph two) ("[s]ection 325.17, Revised Code, authorizes the county engineer to appoint and discharge employees"); 1928 Op. Att'y Gen. No. 3100, vol. IV, p. 2990 (syllabus) ("[c]ounty surveyors [now county engineers]² are authorized by Section 2981, General Code, [now R.C. 325.17] to appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices" (footnote added)). R.C. 325.17, which authorizes a county engineer to appoint deputy engineers, contains no limitations on the outside employment of such deputies.

In Ohio, real estate salesmen are licensed and regulated by R.C. Chapter 4735. *Pearce, Mayer & Greer v. Williams*, 77 Ohio L. Abs. 115, 116, 147 N.E.2d 866, 868 (C.P. Hamilton County 1957); cf. *Manus v. Ohio Real Estate Comm.*, 35 Ohio App. 3d 78, 80, 519 N.E.2d 684, 686 (Cuyahoga County 1987) ("[t]he license granted by the Ohio Real Estate Commission obligates a broker to abide by the statutory duties set forth in R.C. Chapter 4735"); *Alban v. Ohio Real Estate Comm.*, 2 Ohio App. 3d 430, 435, 442 N.E.2d 771, 776 (Franklin County 1981) ("[t]he license granted by the state to individuals acting as real estate brokers imposes a duty to conform to the statutory standards set forth in R.C. Chapter 4735"). R.C. Chapter 4735 is "for the protection of the public, in an attempt to secure honest and fair dealing between the broker, his salesmen and the public." *Pearce, Mayer & Greer v. Williams*, 77 Ohio L. Abs. at 116, 147 N.E.2d at 868. See generally *Seitzer Round Co. v. Loehr*, 30 Ohio N.P. (n.s.) 122, 124 (C.P. Cuyahoga County 1932) ("[t]he General Assembly of Ohio, in the enactment of the real estate brokers act, recognized the necessity of such legislation to protect purchasers of real estate and to correct abuses in the sale thereof"). I find no statutes in R.C. Chapter 4735 or elsewhere in the Revised Code which prevent a deputy engineer or a public employee in general from being a licensed real estate salesman. Thus, the second question may be answered in the negative.

The final question asks whether there is a conflict of interest between the two positions. "A public servant may not simultaneously hold an additional position which would subject him or her to divided loyalties and conflicting duties or to the temptation to act other than in the best interests of the public." Op. No. 89-037 at 2-164; cf. Op. No. 79-111 at 2-371. See generally *State ex rel. Taylor v. Pinney*, 13 Ohio Dec. 210, 212 (C.P. Franklin County 1902) ("[t]he self interest of the public official and the public interests which he represents, must not be brought into conflict"). An examination of the duties of the two positions is required in order to determine whether an individual's private interest as a licensed real estate salesman conflicts with the performance of his duties as a deputy engineer.

¹ R.C. 325.27, provides that:

All the fees, costs, percentages, penalties, allowances, and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of the court of common pleas, *county engineer*, or county recorder, shall be received and collected for the sole use of the treasury of the county in which such officers are elected, and shall be held, accounted for, and paid over as public moneys belonging to such county in the manner provided by sections 325.30 and 325.31 of the Revised Code. (Emphasis added.)

R.C. 325.27 expressly mentions county engineers. Thus, county engineers are authorized to appoint deputies pursuant to R.C. 325.17.

² 1935 Ohio Laws, Part I, 283 (H.B. 97, passed May 15, 1935), which enacted G.C. 2782-1, changed the title of county surveyor to county engineer.

Pursuant to R.C. 3.06, a deputy engineer "when duly qualified, may perform any duties of his principal." See generally 1961 Op. Att'y Gen. No. 2066, p. 132 at 135 (deputy sheriff may perform the duties of the sheriff pursuant to R.C. 3.06). R.C. 315.08 sets forth the general duties of the county engineer:

The county engineer shall perform for the county all duties authorized or declared by law to be done by a registered professional engineer or registered surveyor. He shall prepare all plans, specifications, details, estimates of cost, and submit forms of contracts for the construction, maintenance, and repair of all bridges, culverts, roads, drains, ditches, roads on county fairgrounds, and other public improvements, except buildings, constructed under the authority of any board within and for the county. The engineer shall not be required to prepare plans, specifications, details, estimates of costs, or forms of contracts for emergency repairs authorized under section 315.13 of the Revised Code, unless he deems them necessary.

In addition to the duties and functions prescribed in R.C. 315.08, a county engineer is also responsible for making emergency repairs on roads, bridges, and culverts in the county, R.C. 315.13; inspecting public improvements made under authority of the board of county commissioners, R.C. 315.14; making indexes to records in his office, R.C. 315.27; making, correcting, and maintaining the county tax map, R.C. 325.14, R.C. 5713.09;³ supervising the construction, reconstruction, improvement, maintenance, and repair of bridges and highways under the jurisdiction of the board of county commissioners, and supervising the construction, reconstruction, resurfacing, or improvement of roads by boards of township trustees or by road districts, R.C. 5543.01; preparing estimates of funds required for the activities set forth in R.C. 5543.01, R.C. 5543.02; naming, numbering, and mapping roads in the county, R.C. 5543.04; constructing sidewalks, R.C. 5543.10; and inspecting bridges, R.C. 5543.20. Hence, a county engineer and his deputies have certain responsibilities with regard to the lands and public improvements of the county and for roads and bridges throughout the county. See 1985 Op. Att'y Gen. No. 85-100.

A real estate salesman is "any person associated with a licensed real estate broker to do or to deal in any acts or transactions set out or comprehended by the definition of a real estate broker [contained in R.C. 4735.01(A)], for compensation or otherwise." R.C. 4735.01(C). Thus, a licensed real estate salesman is the agent or employee of a licensed real estate broker "and, as such, is acting for the broker in connection with real estate transactions." 1928 Op. Att'y Gen. No. 3002, vol. IV, p. 2812 at 2813. See generally *Wolf v. Hyman*, 104 Ohio App. 32, 35, 143 N.E.2d 633, 635 (Hamilton County 1957) ("a real estate salesman is given no right to conclude a sale. He is an associate of a licensed real estate broker who, by definition, is the one who sells"). A licensed real estate broker is generally employed to handle the

³ In 1987 Op. Att'y Gen. No. 87-110 (syllabus, paragraph three), I concluded that "R.C. 5713.09 and R.C. 325.14 require the county engineer to make, correct, and maintain the county tax map." My finding that a county engineer must assume responsibility for tax mapping is based on the fact that the language of R.C. 325.14 mandates he assume such duties. Op. No. 87-110 at 2-728 n. 1; 1983 Op. Att'y Gen. No. 83-027 at 2-101 n. 5. See generally *Dorrian v. Scioto Conserv. Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one) ("shall" is generally interpreted as imposing a mandatory duty). Additionally, "[t]he enactment of R.C. 325.14 (formerly G.C. 7181) has been interpreted as repealing by implication that portion of R.C. 5713.09 (formerly G.C. 5551) which authorized the county commissioners to appoint the county engineer (formerly the county surveyor) as the tax map draftsman." Op. No. 83-027 at 2-101 n. 5; accord Op. No. 87-110; 1945 Op. Att'y Gen. No. 181, p. 152; 1923 Op. Att'y Gen. No. 229, vol. I, p. 161.

sale, purchase, or exchange of real estate⁴ for a commission. R.C. 4735.01(A) (defining real estate broker as one who promotes the sale, exchange, purchase, rental, or lease of real estate). See generally Haggins, *Real Estate Brokerage: In a Nutshell*, 19 Clev. St. L. Rev. 126, 126 (1970) ("[t]he real estate broker is the middleman whose duty is to bring the buyer and the seller together"). Accordingly, licensed real estate salesmen are employed to handle real estate transactions for commissions.

From the above review it can be seen that there is no direct conflict involved in holding both positions. However, in 1986 Op. Att'y Gen. No. 86-028 at 2-148 (overruling 1936 Op. Att'y Gen. No. 6120, vol. III, p. 1460), I determined that:

in order to carry out his responsibilities to enter on the tax duplicate an accurate description of the real property offered for transfer and to determine the tax value of such property, *the county auditor has the implied power to require that all deeds and other instruments of conveyance be submitted to the county engineer for a determination as to whether the descriptions contained in said instruments are legally sufficient*, prior to submission to the county auditor for transfer on the tax duplicate. (Emphasis added.)

See *State ex rel. Ballard v. McKelvey*, 20 Ohio Op. 2d 465, 467, 184 N.E.2d 124, 126 (C.P. Monroe County 1961) ("a county auditor may require the approval of the county engineer or his assistant before a deed can be transferred and recorded. Such rule may be necessary and apparently is necessary to enable the county auditor to make up the required tax maps"), *aff'd per curiam*, 89 Ohio L. Abs. 415, 186 N.E.2d 144 (Ct. App. Monroe County 1961); see also *Briggs v. Jeffers*, 36 Ohio Op. 2d 36, 39, 215 N.E.2d 622, 626 (C.P. Monroe County 1965) (determining that "[t]he auditor is required by statute to keep accurate tax maps, and may call upon the county engineer to assist him. Reasonable rules may be promulgated requiring deed descriptions to be in such form and detail as to enable the auditor to perform his duties"). Consequently, a county engineer and his deputies may be required to determine whether the descriptions contained in deeds and other instruments of conveyance are legally sufficient to identify the property to be transferred.

I note that a conflict of interest exists when an individual's duties and responsibilities in an outside occupation are such as to influence the performance of his duties in his public position, thereby resulting in him being exposed to influences which may prevent him from making completely objective decisions. Cf. 1980 Op. Att'y Gen. No. 80-035 at 2-149 ("[a]n individual who serves in dual public positions faces a situation which poses a conflict of interests when his 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"). It could be argued that the potential for such a conflict of interest may exist if, as part of his official duties as deputy engineer, the individual is required to determine the sufficiency of descriptions contained in deeds or other instruments of conveyance of real estate for property sold through him as a licensed real estate salesman.

The possibility of a conflict of interest, however, does not per se render two positions incompatible. 1989 Op. Att'y Gen. No. 89-052; Op. No. 79-111. Rather, each potential conflict of interest should be decided on its particular facts and where the potential conflict is remote and speculative, the conflict of interest rule is not violated. Op. No. 79-111 (syllabus, paragraph three). I do not find that an interest in promoting a transfer of real estate imposes an inherent or predictable threat to a deputy engineer determining objectively whether the description contained in a deed or other instrument of conveyance is legally sufficient to identify the property. I find, accordingly, that the potential conflict of interest does not render the two positions incompatible.

⁴ R.C. 4735.01(B) defines "real estate" to "include] leaseholds as well as any and every interest or estate in land situated in this state, whether corporeal or incorporeal, whether freehold or nonfreehold, and the improvements on the land, but does not include cemetery interment rights."

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Attorney General

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Therefore, it is my opinion and you are hereby advised that a licensed real estate salesman may simultaneously hold the position of deputy county engineer.