

Note from the Attorney General's Office:

1974 Op. Att'y Gen. No. 74-039 was disapproved in part by
1979 Op. Att'y Gen. No. 79-111.

OPINION NO. 74-039

Syllabus:

A county commissioner may not at the same time serve as a director of the county agricultural society.

To: Harry A. Sargeant, Jr., Sandusky County Pros. Atty., Fremont, Ohio
By: William J. Brown, Attorney General, May 15, 1974

Your request for my opinion reads as follows:

"In Opinion No. 1603 in 1918, your predecessor, Joseph McGhee, held that the positions of a member of the Board of County Commissioners and a member of the County Agricultural Society were incompatible.

"In 1963, Section 1711.081 of the Revised Code was enacted, stating that: 'The positions of members of the board of directors, officers, and employees of a county or independent agricultural society are not public offices, and persons holding such positions are eligible to hold public office.'

"It does not appear to me that this section of the Revised Code necessarily changes the import of the above-mentioned opinion of your predecessor; however, a recently elected member of our Board of County Commissioners, who is also presently a director of the County Agricultural Society, has been led to believe that this section of the Revised Code now permits a person to hold both of these positions.

"I respectfully request your opinion as to whether or not, in light of the above facts, a person can hold the position of member of the Board of County Commissioners and member of the Board of a County Agricultural Society."

It is first necessary to distinguish between the concepts of incompatibility and conflict of interest. Compatibility of offices is an issue raised by a series of court decisions and opinions rendered by succeeding attorneys general. The common

law rule, as applied today, was set out in State, ex rel. Attorney General v. Gebert, 12 C.C. (N.S.) 274:

"Offices 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 principle operates to preclude the holding of two public offices when such offices are incompatible, but does not apply to situations in which one of the positions is not a public office. Opinion No. 65-150, Opinions of the Attorney General for 1965.

R.C. 1711.081 was enacted in Am. H.B. No. 198, effective October 8, 1963. It provides that directors and other officers and employees of a county or independent agricultural society are not public officers, and, therefore, are eligible to hold public office. The obvious effect of this statute was to make the common law rule on compatibility of offices inapplicable. The conclusion of my predecessors in Opinion No. 1603, Opinions of the Attorney General for 1918, and Opinion No. 198, Opinions of the Attorney General for 1959, that these positions are incompatible was implicitly overturned by the enactment of Am. H.B. No. 198.

It remains to be determined, however, whether a county commissioner, by holding a position as director on the board of the county agricultural society, would have a conflict of interest, such as is prohibited by R.C. 305.27.

R.C. 305.27 reads as follows:

"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.

" * * *

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* * *"

(Emphasis added.)

While this Section appears most readily applicable to situations where a county commissioner has an interest, direct or indirect, in the party with which the county is contracting to provide the materials or services, the scope of its prohibition is broader. In State ex rel. Taylor v. Pinney, 13 Ohio Dec. N.P. 210 (Franklin County Common Pleas, 1902), the court said at p. 211, 212:

"While statutes which are in their nature penal are to be strictly construed, and attention has been called to this rule of construction by defendant's counsel, yet it is also a rule of statutory construction, not to be lost sight

of in construing these and similar statutes enacted to prevent fraud, that they are not to be so construed as to encourage, but to prevent the evil aimed at."

In Opinion No. 73-043, Opinions of the Attorney General for 1973, I had occasion to discuss similar statutes (R.C. 731.02 and R.C. 733.78), which prohibited members of the legislative authority of a municipal corporation from having an interest in any contract with, or any expenditure made on the part of, the municipal corporation. I stated that:

"'Any interest' is broad in its sweeping prohibition. A public officer must be beyond temptation and he should not be in a position to profit from his public office. His position is one of a fiduciary nature to the community which requires that all his public decisions be completely objective."

In the situation in question, the county commissioners must approve expenditures of county funds for the purchase of real estate to be used as the site for a county agricultural society's annual exhibitions, or for the construction of buildings or other improvements thereon. See R.C. 1711.13 and R.C. 1711.16. Where county funds are used for such purchases or improvement, title thereto vests in the county upon dissolution of the county agricultural society. R.C. 1711.23.

Furthermore, when a county agricultural society pursuant to R.C. 1711.25 determines to sell or lease its site in order to purchase another, and the county paid all or any portion of the purchase money for the site to be sold or leased, the society must first obtain the written consent of the board of county commissioners.

It follows from the above that improvements which are made to such sites pursuant to these Sections and paid for by a county in which title will eventually vest, would constitute work done for the county as that term is used in R.C. 305.27. R.C. 305.27 must, therefore, be applied to preclude any interest by a county commissioner in contracts for such work.

A county commissioner who is also a director of the county agricultural society is directly concerned with such contracts and their approval by the board of county commissioners. Under R.C. 1711.07 directors of a county agricultural society are subject to reelection by members of the society. Their continuation in office, therefore, depends on their record in promoting the interests of the society, and such interests would prevent his complete objectivity in making the decisions required of him as a county commissioner under R.C. Chapter 1711.

I must, therefore, conclude that a conflict of interest, such as is prohibited by R.C. 305.27, would exist where a county commissioner is also a director of the county agricultural society in that county. Consequently, a county commissioner may not at the same time serve as a director of a county agricultural society.

In specific answer to your question, it is my opinion and you are so advised that a county commissioner may not at the same time serve as a director of the county agricultural society.