

**OPINION NO. 91-007****Syllabus:**

1. In the case of a nonprofit corporation established pursuant to R.C. 307.696, and provided that there is no violation of a statutory provision subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08, a board of county commissioners, or the members thereof in their official capacities, may serve as members of the corporation if: (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.
2. In the case of a nonprofit corporation established pursuant to R.C. 307.696, and provided that there is no violation of a statutory provision subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08, the county administrator and/or any other county official or employee other than a county commissioner may legally serve as a trustee, officer, or director of the corporation if: (1) the county has created or participated in the nonprofit corporation; (2) the board of county commissioners formally designates the office or position in question to represent the county; (3) the county administrator or other county official or employee is formally instructed to represent the county and its interests; and (4) there is no other conflict of interest on the part of the particular county administrator or other county official or employee.

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**To: John T. Corrigan, Cuyahoga County Prosecuting Attorney, Cleveland, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, January 11, 1991**

I have before me your request for an opinion pertaining to the corporation that will be established to guide the "Gateway Project" in Cuyahoga County and the City of Cleveland. The opinion request states that Sub. S.B. 188, 118th Gen. A. (1990) (eff. March 20, 1990), authorized the enactment of an additional excise tax by a board of county commissioners for the purpose of constructing sports facilities, and that voters in Cuyahoga County approved a levy for such a tax on May 8, 1990. The request also indicates that plans are underway for the stadium and associated construction, designated the "Gateway Project," and that the following questions have arisen:

(1) In the case of a nonprofit corporation established pursuant to the authority of Ohio Revised Code Section 307.696 (as amended by Sub. S.B. 188, passed and approved March 20, 1990), can a board of county commissioners, or the members thereof, in either [their] individual or their official capacities, legally serve as the members of the corporation?

(2) In the case of a nonprofit corporation established pursuant to the authority of Ohio Revised Code Section 307.696 (as amended), can the county administrator and/or any other county official or employee other than a county commissioner, legally serve as a trustee, officer or director of the corporation?

R.C. 307.696(B), as recently amended by Sub. S.B. 188, states:

*A board of county commissioners of a county that levies a tax under section 307.697, 4301.421, or 5743.024 of the Revised Code may enter into an agreement with a corporation operating in the county, and, if there is a host municipal corporation all or part of which is*

located in the county, shall enter into an agreement with a corporation operating in the county and the host municipal corporation, under which:

(1)(a) The corporation agrees to construct and operate a sports facility in the county and to pledge and contribute all or any part of the revenues derived from its operation, as specified in the agreement, for the purposes described in division (C)(1) of this section; and

(b) The board agrees to levy county taxes and pledge and contribute any part or all of the revenues therefrom, as specified in the agreement, for the purposes described in division (C)(1) of this section; or

(2)(a) The corporation agrees to operate a sports facility constructed by the county and to pledge and contribute all or any part of the revenues derived from its operation, as specified in the agreement, for the purposes described in division (C)(2) of this section; and

(b) The board agrees to issue revenue bonds of the county, use the proceeds from the sale of the bonds to construct a sports facility in the county, and to levy county taxes and pledge and contribute all or any part of the revenues therefrom, as specified in the agreement, for the purposes described in division (C)(2) of this section; and, if applicable

(3) The host municipal corporation agrees to expend the unused pledges and contributions and surplus revenues as described in divisions (C)(1) and (2) of this section for redevelopment and economic development purposes related to the sports facility. (Emphasis added.)

An arrangement under R.C. 307.696 thus begins with an excise tax under R.C. 307.697 (tax on the sale of "spirituous liquor"), R.C. 4301.421 (tax on the sale of beer, wine, and mixed beverages), or R.C. 5743.024 (tax on the sale of cigarettes). If there is a host municipal corporation in the county, the board of county commissioners "shall enter into an agreement" with that host municipal corporation and "a corporation operating in the county." Use of the word "shall" indicates a mandatory requirement that such an agreement be created. *See, e.g., Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971).

In the Gateway Project, the City of Cleveland is the "host municipal corporation." That term is defined in R.C. 307.696(A)(6), as follows:

"Host municipal corporation" means the municipal corporation within the boundaries of which the sports facility is located, and with which a national football league, major league baseball, or national basketball association sports franchise is associated on the effective date of this amendment.

The arrangement surrounding the Gateway Project is consistent with this definition.

R.C. 307.696(A)(2) contains the following definition of "corporation":

"Corporation" means a nonprofit corporation that is organized under the laws of this state for the purposes of operating or constructing and operating a sports facility in the county and that may also be organized under the laws of this state for the additional purposes of conducting redevelopment and economic development activities within the host municipal corporation.

This is the definition that governs the third party to the agreement required under R.C. 307.696(B). The questions under consideration in this opinion relate to the establishment and composition of this corporation. The letter of request indicates that it has been proposed that the members of the nonprofit corporation "would be the City of Cleveland and the County of Cuyahoga, either in their governmental capacities, or through their duly-elected officials (mayor, county commissioners)," and that the county administrator would be designated as a trustee of the corporation.

The questions here under consideration have arisen as a result of prior Attorney General opinions that concluded that county officers and employees could

not, in their official capacities, serve as members for the purpose of incorporating a nonprofit corporation, or as trustees of a nonprofit corporation that contracts with the county. See 1984 Op. Att'y Gen. No. 84-097; 1979 Op. Att'y Gen. No. 79-055. Those opinions were based on ethical principles set forth in statutory provisions and the common law. The principles generally prohibit a public officer from having a private interest in a public contract. See, e.g., *State ex rel. Taylor v. Pinney*, 13 Ohio Dec. 210, 211 (C.P. Franklin County 1902); R.C. 102.03 (restrictions on activities of public officials and employees); R.C. 102.04 (provisions governing the receipt of compensation by a public official or employee for the provision of goods or services); R.C. 305.27 ("[n]o county commissioner shall be concerned, directly or indirectly, in any contract for work to be done or material to be furnished for the county"); R.C. 511.13 ("[n]o member of the board of township trustees or any officer or employee thereof shall be interested in any contract entered into by such board"); R.C. 731.02 and 731.12 (member of the legislative authority of a city or village may not be interested in a contract with the city or village); R.C. 2921.42(A) ("[n]o public official shall knowingly... (4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected..."); R.C. 3313.33 (member of a board of education may not have "directly or indirectly, any pecuniary interest in any contract of the board"); 1990 Op. Att'y Gen. No. 90-037 (finding that statute permitting a township trustee to be a member of a private fire company that contracts with the township sanctions the individual's interest in a township contract); 1989 Op. Att'y Gen. No. 89-037 at 2-164 ("[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"); 1933 Op. Att'y Gen. No. 179, vol. I, p. 214 at 215 (discussing common law principles "that no man can faithfully serve two masters and that a public officer should be absolutely free from any influence which would in any way affect the discharge of the obligations which he owes to the public").

I note that the Ohio Ethics Commission is empowered to render advisory opinions on questions arising under R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43, on matters of ethics, conflicts of interest, or financial disclosure as they relate to positions in public service. R.C. 102.08.<sup>1</sup> I have, therefore, as a matter of general policy, declined to render opinions on those questions, deferring instead to the expertise and authority of the Ohio Ethics Commission. See, e.g., 1990 Op. Att'y Gen. No. 90-005; 1989 Op. Att'y Gen. No. 89-063; Op. No. 89-037; 1989 Op. Att'y Gen. No. 89-022 at 2-101 n. 2; 1987 Op. Att'y Gen. No. 87-025 at 2-179 ("[t]his policy respects the jurisdiction of the Ethics Commission and prevents the possibility that the Attorney General and the Ethics Commission would render conflicting opinions on the same question").

The letter requesting this opinion notes that the Ohio Ethics Commission has concluded, in various instances, that public officials may serve as members or trustees of nonprofit corporations with which their public entities contract. See, e.g., Ohio Ethics Commission, Advisory Op. No. 88-005 (member of city planning commission as trustee of a designated community improvement corporation); Ohio Ethics Commission, Advisory Op. No. 87-003 (member of the Ohio Children's Trust Fund Board as trustee or officer of a nonprofit corporation that receives a grant awarded by the Board or a subgrant from an organization awarded money by the Board or that is part of a coalition receiving moneys from a grant awarded by the Board); Ohio Ethics Commission, Advisory Op. No. 84-001 (city fire chief or other city official or employee as member of the board of a nonprofit corporation created by the city and other jurisdictions to provide contract paramedic services); Ohio

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<sup>1</sup> Prior to August 27, 1976, the effective date of Am. H.B. 1040, see 1975-1976 Ohio Laws, Part II, 3508, 3520-21 (eff. Aug. 27, 1976), the Ohio Ethics Commission had authority to render advisory opinions only with respect to R.C. Chapter 102. Am. H.B. 1040 granted the Commission authority to render advisory opinions with respect to R.C. 2921.42, and the Commission's authority to render advisory opinions with respect to R.C. 2921.43 was granted by 1985-1986 Ohio Laws 3155, 3167 (Am. Sub. H.B. 300, eff. Sept. 17, 1986).

Ethics Commission, Advisory Op. No. 83-010 (city council member as member of the board of a nonprofit research and community development corporation that contracts with the city); Ohio Ethics Commission, Advisory Op. No. 82-004 (city administrator or council member as member of the board of a nonprofit corporation that receives funds through the city under a state litter control grant); cf. Ohio Ethics Commission, Advisory Op. No. 81-005 (city official or employee may not serve as officer or board member of an undesignated community improvement corporation established by the city). Those opinions have set forth four criteria that must be met before it may be determined that a public official who also serves a private organization does not have a prohibited personal interest in a contract between the public entity and the private organization. The relevant criteria are these:

- (1) [T]he governmental entity must create or be a participant in the non-profit corporation;
- (2) any public official or employee connected with the jurisdiction, including a council member, may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointed governing body must formally designate the office or position to represent the governmental entity;
- (3) the public official or employee must be formally instructed to represent the governmental entity and its interests; and
- (4) there must be no other conflict of interest on the part of the designated representative.

Ohio Ethics Commission, Advisory Op. No. 88-005, slip op. at 4 (quoting Ohio Ethics Commission, Advisory Op. No. 84-001).

The Ohio Ethics Commission has, thus, found that, when these four criteria are satisfied, a particular public servant does not have a prohibited personal interest in a public contract. While opinions of the Attorney General have not formally adopted these same criteria, the result reached under these criteria is consistent with the analyses undertaken in various Attorney General opinions considering questions of ethics. See, e.g., Op. No. 89-063; 1988 Op. Att'y Gen. No. 88-041. The Ohio Ethics Commission has, in essence, concluded that an individual does not have a prohibited personal interest in a contract by virtue of serving a nonprofit corporation when his service to the nonprofit corporation is performed in his official capacity, as a formal representative of a governmental entity – for then his interest in the nonprofit corporation is public and official, rather than private; he represents and serves the governmental entity and not his own interests. This conclusion is eminently reasonable and a valid statement of general ethical principles governing participation by public servants in the affairs of nonprofit corporations, and I embrace it wholeheartedly.

As discussed above, I decline to opine on questions under R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43 that are the province of the Ohio Ethics Commission. Related questions may, however, arise under other statutory provisions or general common law principles and, for those questions, I approve and adopt the four criteria adopted by the Ohio Ethics Commission.

I note that those criteria are, in general, consistent with the analyses that have been set forth in opinions of the Attorney General. For example, in Op. No. 84-097 and Op. No. 79-055 it was concluded that there was no statutory authority for the governmental entity to incorporate, or appoint trustees to, the nonprofit corporation, and that the public official's duty as trustee would be to the nonprofit corporation rather than to the governmental entity; it thus appears that the first three criteria were not met in those situations.<sup>2</sup> Certain Attorney General opinions have found it permissible for public officials to participate in nonprofit corporations where the statutory scheme clearly anticipated that their participation would be on behalf of the public entity, rather than to represent personal interests.

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<sup>2</sup> I am not, in this opinion, reexamining or reconsidering the analyses presented or conclusions reached in any particular opinions of the Attorney General, including 1984 Op. Att'y Gen. No. 84-097 and 1979 Op. Att'y Gen. No. 79-055.

*See, e.g.*, Op. No. 88-041 (a county commissioner may serve on the board of directors of a community action agency); 1987 Op. Att'y Gen. No. 87-024 (public officials may serve as members of the governing board of a community improvement corporation, *see* R.C. 1724.10(A)); 1977 Op. Att'y Gen. No. 77-025 (a board of county commissioners may act as a community action agency). *See generally* Op. No. 89-063 (the executive director of a community mental health board may serve as a representative to a regional council of governments, if so provided in the agreement establishing the regional council).

I turn now to the specific questions presented in the opinion request. With respect to the first question, I note that the issue of the propriety of the arrangements surrounding the Gateway Project arises under common law principles and R.C. 305.27 (governing county commissioners), as well as under R.C. Chapter 102 and R.C. 2921.42-43. It is appropriate to contact the Ohio Ethics Commission for an opinion under R.C. Chapter 102 and R.C. 2921.42-43. *See* R.C. 102.08. I note that R.C. 305.27 prohibits a county commissioner from being "concerned, directly or indirectly, in any contract for work to be done or material to be furnished for the county." Under R.C. 305.27 and common law principles, I conclude that, in the case of a nonprofit corporation established pursuant to R.C. 307.696, a board of county commissioners, or the members thereof in their official capacities, may serve as members of the corporation if: (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. Applying the same criteria to the second question, I conclude that, in the case of a nonprofit corporation established pursuant to R.C. 307.696, the county administrator and/or any other county official or employee other than a county commissioner may legally serve as a trustee, officer, or director of the corporation if: (1) the county has created or participated in the nonprofit corporation; (2) the board of county commissioners formally designates the office or position in question to represent the county; (3) the county administrator or other county official or employee is formally instructed to represent the county and its interests; and (4) there is no other conflict of interest on the part of the particular county administrator or other county official or employee.

While no facts have been presented on the question whether the county has created or participated in the nonprofit corporation in question, the authority of the county to undertake such a role is implicit in the statutory scheme. *See* R.C. 307.696. There is, similarly, no question but that the county commissioners may formally designate particular offices or positions to represent the county on the nonprofit corporation and may formally instruct the individuals holding those offices or positions to represent the county and its interests. It is appropriate for local officials, rather than the Attorney General, to make the determination as to whether the necessary actions have taken place, and also the determination as to whether other conflicts of interest exist with respect to a particular individual.

The first question asks about the authority of county commissioners to serve, in either their individual capacities or their official capacities, as members of a corporation established under R.C. 307.696. The proposed arrangement contemplates that the individuals in question would serve in their official capacities, and the discussion set forth above indicates that such participation is permissible under both state law and common law principles. Having reached such a conclusion, I find it unnecessary to consider whether the county commissioners might take such action in their individual capacities.

It is, therefore, my opinion, and you are hereby advised, as follows:

1. In the case of a nonprofit corporation established pursuant to R.C. 307.696, and provided that there is no violation of a statutory provision subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08, a board of county commissioners, or the members thereof in their official capacities, may serve as members of the corporation if: (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.

2. In the case of a nonprofit corporation established pursuant to R.C. 307.696, and provided that there is no violation of a statutory provision subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08, the county administrator and/or any other county official or employee other than a county commissioner may legally serve as a trustee, officer, or director of the corporation if: (1) the county has created or participated in the nonprofit corporation; (2) the board of county commissioners formally designates the office or position in question to represent the county; (3) the county administrator or other county official or employee is formally instructed to represent the county and its interests; and (4) there is no other conflict of interest on the part of the particular county administrator or other county official or employee.