

July 7, 2016

The Honorable Timothy J. McGinty
Cuyahoga County Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

SYLLABUS:

2016-022

A person may serve simultaneously as director of acquisitions, dispositions, and development for the Cuyahoga County Land Reutilization Corporation and mayor and member of the legislative authority of the City of Cleveland Heights, provided that, as a member of the legislative authority, she abstains from participating in any deliberations, discussions, negotiations, or votes concerning the Cuyahoga County Land Reutilization Corporation, and absent a finding by officers or agencies of the City of Cleveland Heights or Cuyahoga County that the two positions are incompatible pursuant to Article III, § III-10 of the Cleveland Heights Charter.



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OPINION NO. 2016-022

The Honorable Timothy J. McGinty
Cuyahoga County Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

Dear Prosecutor McGinty:

You have requested an opinion whether the director of acquisitions, dispositions, and development for a county land reutilization corporation may serve simultaneously as a mayor and member of the legislative authority of a city located within the same county.¹ Your question concerns the Cuyahoga County Land Reutilization Corporation (CCLRC) and the City of Cleveland Heights.

A county land reutilization corporation is a nonprofit corporation formed under R.C. Chapters 1724 and 5722 and is subject to the nonprofit corporation provisions of R.C. Chapter 1702, to the extent those provisions are not inconsistent with R.C. Chapter 1724. *See* R.C. 1724.01; R.C. 1724.04; R.C. 1724.08; 2012 Op. Att’y Gen. No. 2012-041, at 2-356 to 2-358; 2012 Op. Att’y Gen. No. 2012-026, at 2-223 to 2-224. R.C. 5722.02-.15 set forth procedures for a county “to facilitate the effective reutilization of nonproductive land situated within its boundaries.” R.C. 5722.02(A). A county may elect, by resolution, to adopt and implement those procedures and form a county land reutilization corporation under R.C. Chapter 1724. R.C. 1724.04; R.C. 5722.02.

¹ In your letter you asked whether the director of acquisitions, dispositions, and development for the Cuyahoga County Land Reutilization Corporation (CCLRC) may serve simultaneously as *vice* mayor and member of the legislative authority of the City of Cleveland Heights. We have been informed that the director of acquisitions, dispositions, and development for CCLRC is now serving as mayor and member of the legislative authority, so we have modified your question accordingly. A member of your staff has approved this modification.

A county land reutilization corporation may be organized for purposes related to returning vacant, abandoned, and foreclosed properties to productive use. Specifically, a county land reutilization corporation may be formed for the purposes of:

- (a) Facilitating the reclamation, rehabilitation, and reutilization of vacant, abandoned, tax-foreclosed, or other real property within the county for whose benefit the corporation is being organized, but not limited to the purposes described in division (B)(2) of this section;
- (b) Efficiently holding and managing vacant, abandoned, or tax-foreclosed real property pending its reclamation, rehabilitation, and reutilization;
- (c) Assisting governmental entities and other nonprofit or for-profit persons to assemble, clear, and clear the title of property described in this division in a coordinated manner; or
- (d) Promoting economic and housing development in the county or region.

R.C. 1724.01(B)(2). A county also may designate the county land reutilization corporation as the agency of the county for the reclamation, rehabilitation, and reutilization of vacant, abandoned, tax-foreclosed, or other real property in the county. R.C. 1724.10(A)(2).

The general powers of a county land reutilization corporation are set forth in R.C. 1724.02. *See also* 2012 Op. Att’y Gen. No. 2012-041, at 2-358; 2012 Op. Att’y Gen. No. 2012-026, at 2-224. A county land reutilization corporation may, for example, borrow money for the purposes of the corporation, make loans, obtain and dispose of real and personal property, engage in code enforcement and nuisance abatement, and exercise the powers enumerated in R.C. Chapter 5722 (land reutilization programs). R.C. 1724.02.

CCLRC has been formed as a nonprofit corporation under R.C. Chapters 1702 and 1724. CCLRC Code of Regulations, art. I, § 1.3. CCLRC also has been designated under R.C. 1724.10 as the agency of the county for reclamation, rehabilitation, and reutilization of vacant, abandoned, tax-foreclosed, or other real property in Cuyahoga County. The board of directors of the CCLRC is composed of nine members, as permitted by R.C. 1724.03(B). CCLRC Code of Regulations, art. III, § 3.1. The officers of the corporation include a president and executive director, a secretary and a treasurer, and one or more vice presidents as deemed necessary. *Id.* at art. VI, § 6.1. CCLRC also employs several additional staff members. Among the staff roles is the position you have asked about—the director of acquisitions, dispositions, and development.²

² The CCLRC’s board of directors, executive officers, and staff are described on the CCLRC website, <http://www.cuyahogalandbank.org/staffBoard.php> (last visited July 7, 2016).

Compatibility Test

The following five questions are used to determine whether a person may hold a public and private position simultaneously:³

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. 2012-041, at 2-358 to 2-359.

The first question of the compatibility test asks whether the public position is a classified employment within the terms of R.C. 124.57. This statute prohibits an officer or employee in the classified civil service of a city from holding a public office that is normally filled by partisan election. *See* R.C. 124.57(A). A mayor and member of the legislative authority of a city, as elected officers, are in the unclassified civil service. *See* R.C. 124.11(A)(1) (the unclassified service includes “[a]ll officers elected by popular vote or persons appointed to fill vacancies in those offices”); R.C. 731.01. The prohibition of R.C. 124.57, therefore, does not apply to the position of mayor and member of the city’s legislative authority and so does not prohibit a mayor and city council member from serving simultaneously as the director of acquisitions, dispositions, and development for a county land reutilization corporation. *See* 2009 Op. Att’y Gen. No. 2009-010, at 2-87.

Question two asks whether a constitutional provision or statute prohibits a person from serving simultaneously in the two positions. No constitutional provision or statute prohibits a person from serving as the director of acquisitions, dispositions, and development for a county land reutilization corporation and mayor and member of the legislative authority of a city located within the same county. *See generally* R.C. 731.02; 2009 Op. Att’y Gen. No. 2009-010, at 2-88 to 2-89 (explaining that R.C. 731.02’s prohibition on a member of a city legislative authority

³ An officer of a county land reutilization corporation does not hold a public office or employment for the purpose of determining the compatibility of two positions. 2014 Op. Att’y Gen. No. 2014-014, at 2-115 n.1; 2012 Op. Att’y Gen. No. 2012-041, at 2-358 n.4; 2009 Op. Att’y Gen. No. 2009-005, at 2-23 n.2.

holding another public office and finding that the prohibition does not apply to a position that is not a public office).

Question three asks whether there are impermissible conflicts of interest between the two positions. Conflicts of interest occur when a person who holds two positions at the same time is subject to divided loyalties, conflicting duties, or the temptation to act other than in the public's best interest. 2012 Op. Att'y Gen. No. 2012-041, at 2-360. We first review the powers, duties, and responsibilities of the positions to determine whether there is a conflict of interest. If potential conflicts may be sufficiently avoided or mitigated, a person may serve in the positions simultaneously. *See id.* The factors considered in making this determination include the probability of the conflicts arising, the ability of the person to remove herself from any conflicts that may arise, whether the person exercises decision-making authority in each position, and whether the conflicts relate to the primary functions of each position or to financial or budgetary matters. *Id.*

We will first examine the powers, duties, and responsibilities of the legislative authority of the City of Cleveland Heights. The Cleveland Heights Charter sets forth some of the responsibilities of the Cleveland Heights Council. Cleveland Heights Charter, art. III, § III-4 (filling vacancies on Council); Cleveland Heights Charter, art. III, § III-6 (appointing a city manager); Cleveland Heights Charter, art. III, §§ III-7 and III-8 (establishing meeting times and other general procedural provisions). The Charter also generally adopts the powers for a city legislative authority established by the Ohio Constitution and General Assembly. Cleveland Heights Charter, art. II ("Cleveland Heights shall have all powers of local self-government now or hereafter granted to municipalities by the Constitution and laws of Ohio, and such further powers as may now or hereafter be granted by the laws of Ohio"). The Cleveland Heights Charter sets forth few additional duties for its Council President, who also holds the title of Mayor. *See* Cleveland Heights Charter, art. III, § III-11. The Mayor of Cleveland Heights "shall preside at all meetings of the Council and shall have a voice and vote in its proceedings, but no veto." *Id.* The Mayor "shall exercise all powers and discharge all duties imposed upon Mayors of municipalities by the general laws of the State, which are not inconsistent with the provisions of this Charter; but nothing herein provided shall be construed as conferring upon him any administrative or executive functions herein conferred upon other officers." *Id.*

The Revised Code confers numerous additional powers, duties, and responsibilities upon a municipal corporation's legislative authority. *See, e.g.*, R.C. Chapter 715. Many of these powers, duties, and responsibilities could intersect or overlap with the work of a director of acquisitions, dispositions, and development for a county land reutilization corporation. *See, e.g.*, R.C. 715.01; R.C. 723.01; R.C. 731.47 (managing and controlling the property and finances of the city); R.C. 715.01; R.C. 715.011; R.C. 723.121 (authority to acquire, hold, possess, and dispose of city property); R.C. 135.14; R.C. 731.56 (authority to invest city moneys); R.C. 133.56; R.C. 5705.03; R.C. 5705.07; R.C. 5705.19 (levying taxes and assessments on real property within the city).

The director of acquisitions, dispositions, and development for CCLRC is a staff position. In other words, the director of acquisitions, dispositions, and development is an employee of CCLRC and not a member of the board of directors of the corporation. The powers, duties, and responsibilities of a director of acquisitions, dispositions, and development for a county land reutilization corporation are not set forth in any statute. The general powers of a county land reutilization corporation are set forth in R.C. 1724.02. A county land reutilization corporation may, for example, borrow money for the purposes of the corporation, make loans, obtain and dispose of real and personal property, engage in code enforcement and nuisance abatement, and exercise the powers enumerated in R.C. Chapter 5722 (land reutilization programs). R.C. 1724.02; *see also* 2014 Op. Att’y Gen. No. 2014-014, at 2-114; 2012 Op. Att’y Gen. No. 2012-041, at 2-358; 2012 Op. Att’y Gen. No. 2012-026, at 2-224. Without additional information about the specific powers, duties, and responsibilities of a director of acquisitions, dispositions, and development for CCLRC, we look to prior opinions concerning county land reutilization corporations.

In 2014 Op. Att’y Gen. No. 2014-014, the Attorney General considered the positions of executive director of a county land reutilization corporation and member of a board of education of a city school district located within the same county. In 2012 Op. Att’y Gen. No. 2012-040, the Attorney General addressed whether a township trustee may serve simultaneously as a member of the board of directors of a county land reutilization corporation, “particularly where township funds may be expended on projects promoted by the corporation within the township.” 2012 Op. Att’y Gen. No. 2012-040, at 2-350. And in 2009 Op. Att’y Gen. No. 2009-005, the Attorney General considered whether a member of a city legislative authority may serve simultaneously as a member of the governing board of a community improvement corporation.⁴ All of these opinions found the two positions compatible.⁵

⁴ A county land reutilization corporation is one type of community improvement corporation. R.C. 1724.01(A)(1).

⁵ R.C. 1724.10(B)(1) lends support to the notion that a person holding a public position also may hold a position with a county land reutilization corporation. *See* R.C. 1724.10(B)(1) (“[m]embership 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.... 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”).

We can conceive of circumstances in which a person who serves as director of acquisitions, dispositions, and development for a county land reutilization corporation and mayor and member of the legislative authority of a city located within the same county could be subject to a conflict of interest. For example, a county land reutilization corporation could be faced with the decision of whether to reclaim vacant or abandoned property owned by or within the territorial limits of the city. Alternatively, a city could be in a position to acquire property from a county land reutilization corporation. If these circumstances were to occur, a person serving simultaneously in these positions may have conflicting duties and loyalties that prevent her from making completely disinterested decisions. *See, e.g.*, 2006 Op. Att’y Gen. No. 2006-034, at 2-315 (“a conflict of interest occurs when a person’s ‘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,’” quoting 1980 Op. Att’y Gen. No. 80-035, at 2-149); *see also* 2014 Op. Att’y Gen. No. 2014-014, at 2-117.

However, we find no direct or immediate conflicts between the duties and responsibilities of a county land reutilization corporation staff member and a mayor and member of the legislative authority of a city located within the same county. The director of acquisitions, dispositions, and development for a county land reutilization corporation, as an employee of the corporation, does not possess the statutory authority of a decision-maker for the corporation. Rather, the statutory powers and duties of a county land reutilization corporation are vested in its governing board. Any circumstance in which a person serving as director of acquisitions, dispositions, and development for a county land reutilization corporation and mayor and member of the legislative authority of a city located within the same county would be subject to a conflict of interest is mitigated because the governing board of the county land reutilization corporation serves as a check upon any action or undue influence by the director of acquisitions, dispositions, and development. Additionally, as mayor and member of the legislative authority of a city, the person could abstain from participating in deliberations, discussions, negotiations, or votes concerning the county land reutilization corporation.

Finally, the fourth and fifth questions ask about the applicability of charter provisions, resolutions, or ordinances, and federal, state, and local regulations. No federal or state regulation bars a person from holding these positions simultaneously. Whether an applicable charter provision, resolution, ordinance, or local departmental regulation bars a person from serving in both positions is typically a question for local officials to answer. *See, e.g.*, 2012 Op. Att’y Gen. No. 2012-041, at 2-360.

The Cleveland Heights Charter provides that “[n]o person shall be a member of Council who holds any employment with the City of Cleveland Heights, the Cleveland Heights/University Heights School District, or the East Cleveland School District, or who holds any elected public office other than that of precinct committee person or State central committee person.” Cleveland Heights Charter, art. III, § III-2. The director of acquisitions, dispositions, and development for the CCLRC thus is not explicitly prohibited from serving as a member of the legislative authority of the City of Cleveland Heights.

The Cleveland Heights Charter also contains a provision concerning an interest in contracts:

No member of the Council, nor the City Manager, nor any other officer or employee of the City shall be directly or indirectly interested in any contract, job, work, or service with or for the City; nor in the profits or emoluments thereof; nor in the expenditure of any money on the part of the City; and any contract with the City in which any officer or employee is or becomes interested may be declared void by the Council.

Cleveland Heights Charter, art. III, § III-10. The language of this charter provision, interpreted plainly, applies to several potential scenarios. The plain language of this provision encompasses a city council member who is an employee of an organization such as CCLRC that contracts with or performs any work or service for the City of Cleveland Heights. *But see* R.C. 1724.10(B)(1); note 5, *supra*. Notwithstanding this plain application of the charter language, we are disinclined to offer an interpretation of a local charter, and we leave that responsibility to the appropriate officers and agencies of the City of Cleveland Heights and Cuyahoga County. *See, e.g.*, 2015 Op. Att’y Gen. No. 2015-028, at 2-280 n.1 (“[t]he interpretation of a municipal charter’s language is not within the opinion rendering function of the Attorney General”); 2007 Op. Att’y Gen. No. 2007-035, at 2-356. For the purpose of this opinion, it is assumed that no local resolution, ordinance, or departmental regulation bars a person from serving simultaneously in both positions.

We conclude that a person may serve simultaneously as director of acquisitions, dispositions, and development for the Cuyahoga County Land Reutilization Corporation and mayor and member of the legislative authority of the City of Cleveland Heights, provided that, as a member of the legislative authority, she abstains from participating in any deliberations, discussions, negotiations, or votes concerning the Cuyahoga County Land Reutilization Corporation, and absent a finding by officers or agencies of the City of Cleveland Heights or Cuyahoga County that the two positions are incompatible pursuant to Article III, § III-10 of the Cleveland Heights Charter.

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