

OPINION NO. 87-024

Syllabus:

1. A community improvement corporation, organized pursuant to R.C. Chapter 1724., is not a "political subdivision" as that term is defined in R.C. 2744.01(F).
2. When a county, township, or municipal corporation

designates a community improvement corporation as its agency pursuant to R.C. 1724.10, both the corporation and the members of the governing board of the corporation are, for purposes of R.C. Chapter 2744., "employees" of the political subdivision that so designated the corporation. Members of the corporation who do not serve on the governing board are "employees" of the political subdivision for purposes of R.C. Chapter 2744. if, pursuant to the organization of the corporation and agreement under R.C. 1724.10, they perform functions on behalf of the political subdivision.

3. Functions involving determinations concerning the issuance of industrial revenue bonds pursuant to R.C. 1724.10(A) are governmental functions for purposes of R.C. Chapter 2744.
4. Pursuant to R.C. 2744.07(A)(1), a municipal corporation, county, or township is required to provide for the defense of a community improvement corporation designated by it under R.C. 1724.10, and members of the governing board of such a corporation, in a civil action to recover damages for injury or loss caused by acts or omissions of the corporation or the members of its governing board in connection with a determination as to the issuance of industrial revenue bonds pursuant to R.C. 1724.10(A), if the acts or omissions occurred or are alleged to have occurred while the corporation and the members of its governing board were acting in good faith and not manifestly outside the scope of their official responsibilities.
5. The duty of a political subdivision to provide for the defense of an employee under R.C. 2744.07 includes the authority to appeal a decision where such appeal is deemed appropriate and to post an appeal bond in order to bring the appeal or to stay execution of the judgment pending appeal.
6. Pursuant to R.C. 2744.07(A)(2), a municipal corporation, county, or township is required to indemnify and hold harmless a community improvement corporation designated by it under R.C. 1724.10, and members of the governing board of such a corporation, in the amount of a treble damage judgment in a federal antitrust case for injury or loss caused by acts or omissions of the corporation or the members of its governing board in connection with a determination as to the issuance of industrial revenue bonds pursuant to R.C. 1724.10(A), if at the time of the acts or omissions the corporation and the members of its governing board were acting in good faith and within the scope of their official responsibilities.
7. The duty of a political subdivision to indemnify and hold harmless an employee in the amount of a judgment under R.C. 2744.07(A)(2) includes the authority to post an appeal bond and to provide

collateral in the amount of the judgment, as may be necessary in order to bring the appeal or to stay execution of the judgment pending appeal, provided that the political subdivision is satisfied that the employee was acting in good faith and within the scope of his official responsibilities.

To: Daniel R. Gerschutz, Putnam County Prosecuting Attorney, Ottawa, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 8, 1987

I have before me your request for an opinion relating to the relationship between the Village of Ottawa and the Ottawa Community Improvement Corporation (Ottawa CIC). The Ottawa CIC was created pursuant to R.C. 1724.01, which states that a corporation not for profit may be organized as provided in R.C. 1702.04 and R.C. 1724.01-.09 "for the sole purpose of advancing, encouraging, and promoting the industrial, economic, commercial, and civic development of a community or area." Pursuant to R.C. 1724.10, the Ottawa CIC was designated by the Village of Ottawa "as the agency of [the Village of Ottawa] for the industrial, commercial, distribution, and research development in [the village]."

The facts surrounding your request were summarized, as follows, in an attachment to your letter:

On December 21, 1981, a suit was filed in the Federal District Court for the Northern District of Ohio, Western Division, Toledo, Ohio, by Riverview Investments, Inc. and Melvin F. Smith against the Ottawa Community Improvement Corporation, the Village of Ottawa, and against Charles Bruskotter, James Beckman, Richard Edelbrock, Thomas Doepker, David Laudick, Richard Laudick and Louis Macke, both in their official capacities and in their individual capacities. The plaintiffs alleged violation of 42 U.S.C. §1983 and 15 U.S.C. §1 and §2. The matter progressed to a point where the defendants moved for Summary Judgment which was ultimately granted. The case was then appealed to the Sixth Circuit Court in Cincinnati, Ohio, where after briefing and argument, the Sixth Circuit Court upheld the District Court on its finding in favor of the defendants under 42 U.S.C. §1983 but reversed the District Court in order that it could hold an evidentiary hearing in connection with the alleged 15 U.S.C. §1 and §2 violations.

After hearing, the District Court found that the Ottawa Community Improvement Corporation and the individuals were not immune from liability under the Sherman Anti-trust Act and thus the matter moved to trial. After a trial to the jury lasting nearly two weeks, the jury rendered a verdict against the Ottawa Community Improvement Corporation and the individuals above named in the amount of \$350,000.00 which judgment was trebled pursuant to the provisions of the Sherman Anti-trust Act, thus resulting in a judgment of \$1,050,000.00.

The individual defendants were all members of the Ottawa Community Improvement Corporation which voted against recommending industrial revenue bond financing for a project initiated by the plaintiffs. Charles Bruskotter, Richard Edelbrock, Thomas Doepker, David

Laudick and Louis Macke were all village officials who were serving on the Community Improvement Board as part of the statutory requirement that at least 40% of the Community Improvement Corporation Board be appointed or elected officials. The Ottawa Community Improvement Corporation was the duly designated agent of the Village for industrial revenue bond financing pursuant to Chapter 1724 of the Ohio Revised Code. The Ottawa Community Improvement Corporation itself was formed under Chapter 1702 of the Ohio Revised Code and Chapter 1724 of the Ohio Revised Code. There was no allegation during the litigation that the corporation was improperly created or operated. During the course of the litigation, both the Village and the Ottawa Community Improvement Corporation paid attorney's fees for the defense of the law suit. There are remaining legal fees to be paid and there is the matter of the judgment.

Your specific question is whether, in these circumstances, the Village of Ottawa may post an appeal bond on behalf of the defendants.

R.C. Chapter 2744., which defines the scope of tort liability of political subdivisions of the state, also prescribes the circumstances in which such subdivisions must provide for the defense and indemnification of employees. R.C. 2744.07 states, in part:

(A)(1) Except as otherwise provided in this division, a political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding to recover damages for injury, death, or loss to persons or property allegedly caused by an act or omission of the employee in connection with a governmental or proprietary function if the act or omission occurred or is alleged to have occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities. Amounts expended by a political subdivision in the defense of its employees shall be from funds appropriated for this purpose or from proceeds of insurance. The duty to provide for the defense of an employee specified in this division does not apply in a civil action or proceeding that is commenced by or on behalf of a political subdivision.

(2) Except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of his employment or official responsibilities.

....
(C) If a political subdivision refuses to provide an employee with a defense in a civil action or proceeding as described in division (A)(1) of this

section, the employee may file, in the court of common pleas of the county in which the political subdivision is located, an action seeking a determination as to the appropriateness of the refusal of the political subdivision to provide him with a defense under that division. (Emphasis added.)

R.C. 2744.07(A)(1) thus requires a political subdivision to provide for the defense of an employee in a federal court in a civil action or proceeding to recover damages for injury or loss to persons or property allegedly caused by an act or omission of the employee in connection with a governmental or proprietary function, if the act or omission occurred or is alleged to have occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities. The Village of Ottawa is a political subdivision for purposes of R.C. Chapter 2744. See Ohio Const. art. XVIII, §1 (classifying municipal corporations into cities and villages); R.C. 2744.01(F) (defining "political subdivision" to include "a municipal corporation"). The action that you have described is a civil action brought by private persons in a federal court to recover damages for injury or loss allegedly caused by actions of the Ottawa CIC and certain individuals serving on the governing board of the Ottawa CIC.¹ See 15 U.S.C. §§1, 2, 15; Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); Herald Company v. Harper, 410 F. 2d 125 (8th Cir. 1969). The action in question is, therefore, the type of action in which the Village of Ottawa is required by R.C. 2744.07(A)(1) to provide a defense if: (1) the defendants are "employees" of the political subdivision for purposes of R.C. Chapter 2744.; (2) the injury or loss was allegedly caused by acts or omissions of the defendants in connection with a governmental or proprietary function; and (3) the acts or omissions occurred or are alleged to have occurred while the defendants were acting in good faith and not manifestly outside the scope of their employment or official responsibilities.

I consider, first, the issue of whether the defendants in question are employees of the Village of Ottawa for purposes of R.C. Chapter 2744. R.C. 2744.01 defines "employee," in part, as follows:

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of his employment for a political subdivision. "Employee" does not include an independent contractor. "Employee" includes any elected or appointed official of a political subdivision. (Emphasis added.)

The defendants named in the suit in question are the Ottawa CIC and seven individuals who served as members of the governing board of the Ottawa CIC. As discussed above, the

¹ R.C. 2744.09(E) exempts from the provisions of R.C. Chapter 2744. "[c]ivil claims based upon alleged violations of the constitution or statutes of the United States," but contains the exception "that the provisions of [R.C. 2744.07] shall apply to such claims or related civil actions."

Ottawa CIC is a nonprofit corporation created pursuant to R.C. Chapters 1702. and 1724. Such a corporation serves the public purpose of advancing, encouraging, and promoting industrial, economic, commercial, and civic development. See R.C. 1724.01. See also Ohio Const. art. VIII, §13. It is required to submit an annual report and audit to the Director of Development. See R.C. 1724.05. It thus "possesses certain characteristics that are suggestive of a public status." 1979 Op. Att'y Gen. No. 79-061 at 2-204. Nonetheless, the fact that a community improvement corporation is organized as a private nonprofit corporation compels the conclusion that it is not, in itself, a public body and that it is not a "political subdivision" for purposes of R.C. Chapter 2744. See R.C. 2744.01(F);² Op. No. 79-061 (finding that a community improvement corporation is not, in itself, a public body for purposes of the open-meeting provisions of R.C. 121.22).

A community improvement corporation may, however, be designated by a political subdivision to serve as the agency of the subdivision for certain developmental purposes. R.C. 1724.10 states:

A community improvement corporation may be designated by a county, one or more townships, one or more municipal corporations, two or more adjoining counties, or any combination of the foregoing as the agency of each such political subdivision for the industrial, commercial, distribution, and research development in such political subdivision when the legislative authority of such political subdivision is to promote the health, safety, morals, and general welfare of its inhabitants through the designation of a community improvement corporation as such agency. Such designation shall be made by the legislative authority of the political subdivision by resolution or ordinance. Any political subdivision which has designated a community improvement corporation as such agency may enter into an agreement with it to provide any one or more of the following:

(A) That the community improvement corporation shall prepare a plan for the political subdivision of industrial, commercial, distribution, and research

² R.C. 2744.01(F) states:

"Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes a county hospital commission appointed under section 339.14 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, and regional councils of political subdivisions established pursuant to Chapter 167. of the Revised Code.

development, and such plan shall provide therein the extent to which the community improvement corporation shall participate as the agency of the political subdivision in carrying out such plan. Such plan shall be confirmed by the legislative authority of the political subdivision. A community improvement corporation may insure mortgage payments required by a first mortgage on any industrial, economic, commercial, or civic property for which funds have been loaned by any person, corporation, bank, or financial or lending institution upon such terms and conditions as the community improvement corporation may prescribe. A community improvement corporation may incur debt, mortgage its property acquired under this section or otherwise, and issue its obligations, for the purpose of acquiring, constructing, improving, and equipping buildings, structures, and other properties, and acquiring sites therefor, for lease or sale by the community improvement corporation in order to carry out its participation in such plan. Any such debt shall be solely that of the corporation and shall not be secured by the pledge of any moneys received or to be received from any political subdivision.... Not less than two-fifths of the governing board of any community improvement corporation designated as the agency of one or more political subdivisions shall be composed of mayors, members of municipal legislative authorities, members of boards of township trustees, members of boards of county commissioners, or any other appointed or elected officers of such political subdivisions, provided that at least one officer from each political subdivision shall be a member of the governing board. Membership on the governing board of a community improvement corporation does not constitute the holding of a public office or employment within the meaning of sections 731.02 and 731.12 of the Revised Code 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 his membership on the governing board of a community improvement corporation notwithstanding any law to the contrary.

Actions taken under this section shall be in accordance with any applicable planning or zoning regulations.

Any agreement entered into under this section may be amended or supplemented from time to time by the parties thereto.

A community improvement corporation designated as the agency of a political subdivision under this section shall promote and encourage the establishment and growth in such subdivision of industrial, commercial, distribution, and research facilities.

(B) Authorization for the community improvement corporation to sell or to lease any lands or interests in lands owned by the political subdivision determined from time to time by the legislative authority thereof not to be required by such political subdivision for

its purposes, for uses determined by the legislative authority as those that will promote the welfare of the people of the political subdivision, stabilize the economy, provide employment, and assist in the development of industrial, commercial, distribution, and research activities to the benefit of the people of the political subdivision and will provide additional opportunities for their gainful employment....

(C) That the political subdivision executing the agreement will convey to the community improvement corporation lands and interests in lands owned by the political subdivision and determined by the legislative authority thereof not to be required by the political subdivision for its purposes and that such conveyance of such land or interests in land will promote the welfare of the people of the political subdivision, stabilize the economy, provide employment, and assist in the development of industrial, commercial, distribution, and research activities to the benefit of the people of the political subdivision and provide additional opportunities for their gainful employment, for the consideration and upon the terms established in the agreement, and further that as the agency for development the community improvement corporation may acquire from others additional lands or interests in lands, and any lands or interests in land so conveyed by it for uses that will promote the welfare of the people of the political subdivision, stabilize the economy, provide employment, and assist in the development of industrial, commercial, distribution, and research activities required for the people of the political subdivision and for their gainful employment....(Emphasis added.)

See also R.C. Chapter 165. (governing the issuance of industrial development bonds by a county or municipal corporation which has designated a community improvement corporation as its agency under R.C. 1724.10).

R.C. 1724.10 and related provisions implement Ohio Const. art. VIII, §13, which states, in part:

To create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, to control air, water, and thermal pollution, or to dispose of solid waste, it is hereby determined to be in the public interest and a proper public purpose for the state or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, to acquire, construct, enlarge, improve, or equip, and to sell, lease, exchange, or otherwise dispose of property, structures, equipment, and facilities within the State of Ohio for industry, commerce, distribution, and research, to make or guarantee loans and to borrow money and issue bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement, or equipment, of such property, structures, equipment and facilities. Laws may be passed to carry into effect such purposes and to

authorize for such purposes the borrowing of money by, and the issuance of bonds or other obligations of, the state, or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, and to authorize the making of guarantees and loans and the lending of aid and credit, which laws, bonds, obligations, loans, guarantees, and lending of aid and credit shall not be subject to the requirements, limitations, or prohibitions of any other section of Article VIII, or of Article XII, Sections 6 and 11, of the Constitution, provided that moneys raised by taxation shall not be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to laws enacted under this section.

....
The powers herein granted shall be in addition to and not in derogation of existing powers of the state or its political subdivisions, taxing districts, or public authorities, or their agencies or instrumentalities or corporations not for profit designated by any of them as such agencies or instrumentalities. (Emphasis added.)

See State ex rel. Burton v. Greater Portsmouth Growth Corp., 7 Ohio St. 2d 34, 218 N.E.2d 446 (1966); Stark County v. Ferguson, 2 Ohio App. 3d 72, 440 N.E.2d 816 (Stark County 1981). See generally 1984 Op. Att'y Gen. No. 84-032.

When a community improvement corporation is designated by a political subdivision pursuant to R.C. 1724.10, that corporation becomes the agency of the political subdivision and, as an agent, falls within the definition of "employee" appearing in R.C. 2744.01(B), provided that the corporation "is authorized to act and is acting within the scope of [its] employment" for the political subdivision. R.C. 2744.01(B); see Ohio Const. art. VIII, §13; State ex rel. Burton v. Greater Portsmouth Growth Corp., 7 Ohio St. 2d at 40, 218 N.E.2d at 451 (upholding the constitutionality of R.C. 1724.10 and stating that R.C. 1724.10 "in general provides that a county or municipality may designate a community improvement corporation as its agent for the industrial, commercial and research development of the area"); Op. No. 79-061 at 2-206 (a community improvement corporation designated under R.C. 1724.10 "is quite literally an agency of a county or a municipal corporation" and is a public body for purposes of the open-meeting provisions of R.C. 121.22).

Since a community improvement corporation acts through its governing board, see R.C. 1702.30(A) ("[e]xcept where the law, the articles, or the regulations require that action be otherwise authorized or taken, all of the authority of a corporation shall be exercised by or under the direction of its trustees"); R.C. 1724.08 (stating that the provisions of R.C. Chapter 1702. are applicable to corporations organized under R.C. Chapter 1724. to the extent that they are not inconsistent with R.C. Chapter 1724.), it follows that members of the governing board of a community improvement corporation that has been designated under R.C. 1724.10 are "employees" for purposes of R.C. 2744.01(B) when they are acting within the scope of the

designation by the political subdivision. See, e.g., R.C. 1724.10(B) ("[t]he community improvement corporation acting through its officers and on behalf and as agent of the political subdivision shall execute the necessary instruments, including deeds conveying the title of the political subdivision or leases, to accomplish such sale or lease"). See generally State ex rel. Corrigan v. Seminatore, 66 Ohio St. 2d 459, 464, 423 N.E.2d 105, 110 (1981) (where an action was brought against members of a county board of mental retardation, both individually and as members of the board, "to recover from them for actions which they performed in their official capacity as members of the board of mental retardation in furtherance of the public functions of said board, rather than personally for their own benefit," the issue was the authority of the board to act and the board members were, under R.C. 309.09 and R.C. 5126.01 [now R.C. 5126.02], entitled to representation at public expense); 1985 Op. Att'y Gen. No. 85-014; Op. No. 79-061.

I note that R.C. 1724.10(A), quoted above, states that not less than two-fifths of the governing board of a community improvement corporation designated as the agency of one or more political subdivisions must be composed of appointed or elected officers of the subdivisions and also states that "[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 731.12 or "any other section of the Revised Code." R.C. 731.02 and 731.12 relate, respectively, to qualifications of members of city and village legislative authorities and, with certain exceptions, prohibit such members from holding other public office or employment with the city or village. The reference in R.C. 1724.10(A) to R.C. 731.02 and 731.12 is clearly intended to permit officials of municipal corporations to serve both their municipalities and appropriate community improvement corporations. Related references in R.C. 1724.10(A) to interests in contracts and disqualification from holding public office make it clear that the intent of R.C. 1724.10 was to address concerns about compatibility and conflicts of interest, and not to determine questions of who may be considered an "employee" for other purposes. See Op. No. 79-061 at 2-206 (stating that the reference in R.C. 1724.10 to R.C. 731.02, 731.12, and other sections of the Revised Code, "is rather obviously intended to eliminate problems regarding conflicts of interest and [incompatibility] of office"). Notwithstanding the statement in R.C. 1724.10(A) that membership on the governing board of a community improvement corporation does not constitute the holding of a public office or employment, I conclude that when such a corporation has been designated as the agency of a political subdivision pursuant to R.C. 1724.10, a member of the governing board of the corporation is an "employee" of the political subdivision for purposes of R.C. Chapter 2744.

In the situation with which you are concerned, the Ottawa CIC was designated by the Village of Ottawa pursuant to R.C. 1724.10 and thereby became the agency of the village. By designating the Ottawa CIC as the agency of the Village of Ottawa, the legislative authority of the village in effect designated the governing board of the Ottawa CIC to carry out certain functions on behalf of the village. Both the Ottawa CIC and the members of the governing board of the Ottawa CIC are, therefore, "employees" of the Village of Ottawa, as that

term is defined in R.C. 2744.01(B).³ Accordingly, the village is responsible for defending both the Ottawa CIC and members of its governing board in circumstances that come within R.C. 2744.07.

I turn now to the issue of whether the injury or loss in the case under consideration was allegedly caused by acts or omissions of the defendants in connection with a governmental or proprietary function. It is my understanding that after the Village of Ottawa designated the Ottawa CIC as its agency pursuant to R.C. 1724.10, the village and the community improvement corporation entered into an agreement of the sort authorized by R.C. 1724.10(A). Pursuant to such an agreement, a community improvement corporation prepares a plan of industrial, commercial, distribution, and research development for the political subdivision that has designated it. The plan provides the extent to which the community improvement corporation shall participate as the agency of the political subdivision in carrying out the plan, and the plan must be confirmed by the legislative authority of the political subdivision.

The attachment to your letter indicates that the Ottawa CIC was designated as the agent of the Village of Ottawa for industrial revenue bond financing pursuant to R.C. Chapter 1724., and that the failure of the Ottawa CIC to recommend industrial revenue bond financing for a project initiated by the plaintiffs formed the basis for the action in question. It is, therefore, necessary to decide whether determinations made

³ I am aware that, in rendering the judgment that is currently the subject of appeal, the federal court concluded that the Ottawa CIC is not protected under the doctrine of state action immunity applied in antitrust cases because the Ottawa CIC is a private, nonmunicipal party, the Ottawa CIC made the effective decision to reject plaintiffs' bond application, and the Ottawa CIC was not actively supervised by the State of Ohio in making that decision. Riverview Investments, Inc. v. Ottawa Community Improvement Corp., No. C81-774 (N.D. Ohio Jan. 20, 1987) (Findings of Fact and Conclusions of Law Re: Applicability of State Action Immunity). I do not find these conclusions, made under federal antitrust law, to be determinative of the interpretation of "employee" to be applied for purposes of R.C. Chapter 2744. I am also aware that in Portage County Commissioners v. Schwab (unreported), No. 1518 (Ct. App. Portage County May 17, 1985) it was concluded that an individual who was employed by a community improvement corporation that was organized under R.C. Chapter 1724., operated under the auspices of the county, and funded entirely by federal grants, was not an employee for purposes of the civil service provisions of R.C. Chapter 124. The definitions appearing in R.C. Chapter 124. are different from those appearing in R.C. Chapter 2744., see R.C. 124.01, and the determination in the Schwab case turned on the source of funding. See In re Ford, 3 Ohio App. 3d 416, 446 N.E.2d 214 (Franklin County 1982), motion to certify the record overruled, No. 82-1127 (Ohio Sup. Ct. Sept. 22, 1982). The Schwab case is, therefore, not determinative of the question here under consideration.

by a designated community improvement corporation or members of the governing board of a designated community improvement corporation with respect to the issuance of industrial revenue bonds pursuant to R.C. 1724.10(A) constitute acts or omissions "in connection with a governmental or proprietary function" for the purposes of R.C. 2744.07.

The term "governmental function" is defined in R.C. 2744.01 as follows:

(C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare, that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons, and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

(s) The issuance of revenue obligations under section 140.06 of the Revised Code;

(Emphasis added.)

This definition references "proprietary function," which is defined in R.C. 2744.01, as follows:

(G)(1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies all of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons. (Emphasis added.)

R.C. 2744.01(C)(1) and (G)(1) require initially that, to constitute either a "governmental" or a "proprietary" function, a function must be "a function of a political subdivision." As noted above, a community improvement corporation is not, in itself, a "political subdivision" for purposes of R.C. Chapter 2744. Thus, functions that belong solely to such a corporation--as, for example, internal organizational activities of the corporation--cannot qualify as "governmental" or "proprietary" functions. Where, however, the functions in question are performed by a community improvement corporation designated under R.C. 1724.10 to carry out an agreement made

pursuant to R.C. 1724.10(A), the community improvement corporation acts as the agency of the political subdivision and has such powers as are authorized by statute or agreed upon by contract to carry out activities on behalf of the political subdivision. If an agreement made under R.C. 1724.10(A) gives a community improvement corporation the authority to make determinations concerning the issuance of industrial revenue bonds, the corporation performs such function on behalf of the political subdivision and as its agent. The community improvement corporation is, thus, performing a function on behalf of a political subdivision when it undertakes actions pursuant to an agreement under R.C. 1724.10(A). See generally 1985 Op. Att'y Gen. No. 85-024.

It must, next, be determined whether the function so performed may be categorized as "governmental" or "proprietary" for purposes of R.C. Chapter 2744. Determinations concerning the issuance of industrial revenue bonds under R.C. 1724.10 are not specifically listed as governmental functions under R.C. 2744.01(C)(2) or as proprietary functions under R.C. 2744.01(G)(2). It is, however, clear that the issuance of such bonds "promotes or preserves the public peace, health, safety, or welfare," as those words are used in R.C. 2744.01(C)(1)(c) and R.C. 2744.01(G)(1)(b). See Ohio Const. art. VIII, §13; R.C. 1724.10. The function here under consideration thus comes within the general definition of a governmental function set forth in R.C. 2744.01(C)(1)(c), provided that it "involves activities that are not engaged in or not customarily engaged in by nongovernmental persons"; if the activities are customarily engaged in by nongovernmental persons, the function is a proprietary one. See R.C. 2744.01(G)(1)(b).

R.C. 1724.10 authorizes certain political subdivisions and community improvement corporations designated by them to make determinations concerning the issuance of industrial revenue bonds pursuant to that section. Only community improvement corporations designated pursuant to R.C. 1724.10 may contract and act under R.C. 1724.10(A). It is, thus, clear that functions performed pursuant to R.C. 1724.10(A) are not customarily engaged in by persons other than those who serve community improvement corporations designated as agents under R.C. 1724.10. See generally Op. No. 85-024. The fact that persons who are not connected with a governmental agent in such a manner do not perform such functions indicates that the functions are not proprietary ones.

It appears, rather, that the making of decisions concerning the issuance of industrial revenue bonds pursuant to R.C. 1724.10(A) constitutes a "governmental function" within the definition set forth in R.C. 2744.01(C). The issuance of such revenue bonds parallels the issuance of revenue obligations under R.C. 140.06, which is expressly designated by R.C. 2744.01(C)(2)(s) as a governmental function. See R.C. 140.06(A) (authorizing a public hospital agency to issue revenue obligations to pay the cost of hospital facilities). Further, R.C. 2744.01(C)(2)(f) expressly includes legislative functions as governmental functions, and determinations concerning the issuance of industrial revenue bonds have been judicially recognized as legislative functions. See Perrydale, Inc. v. Fisher Foods, Inc. (unreported), No. 9-274 (Ct. App. Lake County Sept. 23, 1983) (finding that action by a board of county commissioners authorizing the issuance of industrial development revenue bonds, following consideration of the proposal by a community improvement corporation, constituted a

legislative act and the commissioners acted within the scope of their authority). Cf. Stark County v. Ferguson, 2 Ohio App. 3d at 77, 440 N.E.2d at 821 (considering a situation in which a community improvement corporation had been designated as the agency of a county under R.C. 1724.10, had prepared a plan under R.C. 1724.10(A), and held responsibility for determining whether proposed projects were in accordance with the plan, and stating that the "determination of whether the authorization of [industrial development bonds under R.C. Chapter 165.] should be made in the public interest is essentially a political question, properly decided by the legislative and executive branches of government, not the judiciary"). I find, therefore, that functions involving determinations concerning the issuance of industrial revenue bonds pursuant to R.C. 1724.10(A) are similar to the activities listed as governmental functions in R.C. 2744.01(C)(2) and are included within the general definition of "governmental function" appearing in R.C. 2744.01(C)(1)(c).

The third issue necessary to a determination of the question whether R.C. 2744.07(A)(1) is applicable to your situation is the issue of whether the acts or omissions upon which the action is based occurred or are alleged to have occurred while the defendants were acting in good faith and not manifestly outside the scope of their employment or official responsibilities. In the case of a community improvement corporation designated as the agency of a political subdivision pursuant to R.C. 1724.10, the issue would be whether the corporation was acting in good faith to carry out functions under R.C. 1724.10 and agreements made pursuant to that section. In the case of persons serving as members of the governing board of such a community improvement corporation, the issue would be whether such persons were acting in good faith to carry out such functions. These issues involve determinations of fact that can more appropriately be made by persons involved in the situation than by members of my staff. See generally, e.g., Op. No. 85-014; 1980 Op. Att'y Gen. No. 80-076; 1971 Op. Att'y Gen. No. 71-080; 1965 Op. Att'y Gen. No. 65-205. I note, however, that R.C. 2744.07(A)(1) uses the words "not manifestly outside the scope of his employment or official responsibilities," thereby indicating that a defense should be provided for an employee who acted in good faith even if there may be some question as to whether his acts were strictly within the scope of his responsibility. See generally State ex rel. Flagg v. City of Bedford, 7 Ohio St. 2d 45, 218 N.E.2d 601 (1966) (syllabus) ("[a] municipal corporation will not be enjoined from expending funds as and for a public purpose in authorizing additional compensation for the defense of its mayor in a libel action...where it does not appear as a matter of law that the mayor's statements were beyond the scope of his employment" (emphasis in original)).

Based upon the foregoing, I conclude that, pursuant to R.C. 2744.07(A)(1), a political subdivision is required to provide for the defense of a community improvement corporation designated by it under R.C. 1724.10, and members of the governing board of such a community improvement corporation, in a civil action brought in federal court to recover damages for injury or loss caused by acts or omissions of the corporation or the members of its governing board in connection with a determination as to the issuance of industrial revenue bonds pursuant to R.C. 1724.10(A), if the acts or omissions occurred or are alleged to have occurred while the corporation and the members of its governing board were acting in good faith and

not manifestly outside the scope of their official responsibilities. The duty of the political subdivision to provide a defense includes the authority to make the determination as to what legal action is appropriate at each stage of the proceedings and the authority to appeal a decision where such appeal is deemed appropriate. See generally R.C. 309.09; Kline v. Board of Township Trustees, 13 Ohio St. 2d 5, 233 N.E.2d 515 (1968); State ex rel. McMinn v. Office of the Ohio Public Defender, 26 Ohio App. 3d 16, 497 N.E.2d 1382 (Franklin County 1985); Op. No. 85-014; Op. No. 80-076; Op. No. 71-080; Op. No. 65-205. Where it is necessary to post an appeal bond to bring an appeal on behalf of an employee under R.C. 2744.07(A)(1) or to stay execution of the judgment pending appeal, the posting of that bond is the responsibility of the political subdivision that provides for the employee's defense.

It is my understanding that, in the case with which you are concerned, the posting of an appeal bond may involve both the payment of a certain sum to an insurance company and the provision of collateral in an amount sufficient to cover the amount of the judgment. If the appeal should be unsuccessful, the plaintiffs could look to the collateral to satisfy the judgment. See generally R. Fed. App. Proc. 7, 8; R. Fed. Civ. Proc. 62. You have asked whether the Village of Ottawa may provide such collateral.

Your question is answered by R.C. 2744.07(A)(2), which states that, except as otherwise provided, a political subdivision "shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages" that is obtained against the employee in a federal court and is for damages for injury or loss caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of his employment or official responsibilities. In contrast with the language of R.C. 2744.07(A)(1) requiring the provision of a defense if the action was "not manifestly outside" the scope of official responsibilities, R.C. 2744.07(A)(2) requires indemnification only if the action was "within the scope" of the employee's official responsibilities. See generally State ex rel. Flagq v. City of Bedford; Op. No. 85-014; Op. No. 71-080. With that exception, the analysis set forth above is applicable.

Acts or omissions of a community improvement corporation or members of its governing board in connection with a determination as to the issuance of industrial revenue bonds pursuant to R.C. 1724.10(A)(1) are acts or omissions in connection with a governmental function of the political subdivision that designated the corporation as its agency under R.C. 1724.10. If the corporation and the members of its governing board were acting in good faith and within the scope of their official responsibilities, they are entitled to be indemnified and held harmless in the amount of any judgment, other than a judgment for punitive or exemplary damages. While it is clear that treble damages in an antitrust case serve both punitive and exemplary functions, the most recent decision of the United States Supreme Court on the subject indicates that they are primarily remedial.⁴ In American Society of

⁴ The need to determine whether an award of treble damages in an antitrust case constitutes punitive damages

Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556 (1982), the Court considered the argument that treble damages for antitrust violations are punitive so that, under traditional agency law, they should not be imposed upon a principal for the acts of its agents. The Court rejected that argument, stating, at 575-76:

It is true that antitrust treble damages were designed in part to punish past violations of the antitrust laws. See Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S., at 639. But treble damages were also designed to deter future antitrust violations. Ibid. Moreover, the antitrust private action was created primarily as a remedy for the victims of antitrust violations. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-486 (1977); see Illinois Brick Co. v. Illinois, 431 U.S. 720, 746-747 (1977). Treble damages "make the remedy meaningful by counterbalancing 'the difficulty of maintaining a private suit'" under the antitrust laws. Brunswick Corp., supra, at 486, n. 10, quoting 21 Cong. Rec. 2456 (1890) (remarks of Sen. Sherman). Since treble damages serve as a means of deterring antitrust violations and of compensating victims, it is in accord with both the purposes of the antitrust laws and principles of agency law to hold ASME liable for the acts of agents committed with apparent authority. See Restatement §217C, Comment c, p. 474 (rule limiting principal's liability for punitive damages does not apply to special statutes giving triple damages).

See also Fishman v. Estate of Wirtz, 594 F. Supp. 853, 892 (N.D. Ill. 1984), modified on other grounds, 609 F. Supp. 982 (N.D. Ill. 1985) ("[r]ecent Supreme Court decisions...have made clear that the primary purpose of treble damages is remedial and not punitive" (citations omitted)).

It appears, therefore, that, pursuant to R.C. 2744.07(A)(2), a political subdivision is required to indemnify and hold harmless a community improvement corporation designated by it under R.C. 1724.10, and members of the

for purposes of R.C. 2744.07(A)(2) may, in effect, have been rendered moot by the enactment of the Local Government Antitrust Act of 1984, 15 U.S.C. §§34-36, which prohibits the recovery of such damages, interest on damages, costs, or attorney's fees from "any local government, or official or employee thereof acting in an official capacity." 15 U.S.C. §35(a). See also 15 U.S.C. §36(a) (prohibiting the recovery of damages, interest on damages, costs, or attorney's fees "in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity"). See generally R.C. 2744.05(A) (prohibiting the award of punitive or exemplary damages in an action against a political subdivision to recover damages for injury, death, or loss caused by an act or omission connected with a governmental or proprietary function; pursuant to R.C. 2744.09(E) this provision does not apply to civil claims based upon alleged violations of the constitution or statutes of the United States).

governing board of such a corporation, in the amount of a treble damage judgment in a federal antitrust case for injury or loss caused by acts or omissions of the corporation or the members of its governing board in connection with a determination as to the issuance of industrial revenue bonds pursuant to R.C. 1724.10(A), if at the time of the acts or omissions the corporation and the members of its governing board were acting in good faith and within the scope of their official responsibilities. It appears, further, that the duty to indemnify and hold harmless an employee in such circumstances includes the authority to post an appeal bond and to provide collateral in the amount of the judgment, as may be necessary in order to bring the appeal or to stay execution of judgment on the employee's personal assets pending appeal, provided that the political subdivision is satisfied that the employee was acting in good faith and within the scope of his official responsibilities.

You have also raised a question concerning a community improvement corporation known as the Putnam County CIC. Your question is whether the members and trustees of the Putnam County CIC are agents or employees of the county for purposes of R.C. Chapter 2744., and whether their voting on applications for the issuance of industrial revenue bonds is a governmental function within the meaning of R.C. 2744.01(C).

The analysis set forth above answers the portion of your question that relates to members of the governing board of a community improvement corporation. R.C. 1724.10, which authorizes a village or other municipal corporation to designate a community improvement corporation as its agency and to contract with the corporation for functions relating to the issuance of industrial revenue bonds, provides the same authority to a county and also to a township. It is concluded above that, when a village designates a community improvement corporation as its agency pursuant to R.C. 1724.10, both the corporation and the members of the governing board of the corporation are employees of the village for purposes of R.C. Chapter 2744. It must similarly be concluded that when a county designates a community improvement corporation as its agency pursuant to R.C. 1724.10, both the corporation and the members of its governing board are employees of the county for purposes of R.C. Chapter 2744. Likewise, it is determined above that actions of the members of the governing board of a community improvement corporation involving determinations as to the issuance of industrial revenue bonds constitute a governmental function for purposes of R.C. Chapter 2744., where the actions are taken pursuant to agency designation and agreement under R.C. 1724.10. This conclusion is applicable whether the community improvement corporation acts as the agent of a village, a county, or a township, provided that the corporation has been designated under R.C. 1724.10 and has entered into an appropriate agreement.

Whether the conclusions set forth above with respect to members of the governing board of a community improvement corporation apply also to members of the corporation who do not serve on the governing board depends upon the organization of the corporation and the nature of the agreement entered into between the political subdivision and the corporation under R.C. 1724.10. See generally, e.g., R.C. 1702.14; R.C. 1702.20; R.C. 1702.30; R.C. 1702.34; R.C. 1724.08; R.C. 1724.10. If the corporation performs functions on behalf of the political subdivision through actions of members other than those

comprising its governing board, then those members would appear to be employees for purposes of R.C. Chapter 2744. Cf. R.C. 1724.10(B) ("[t]he community improvement corporation acting through its officers and on behalf and as agent of the political subdivision shall execute the necessary instruments..."). See generally Op. No. 85-014. Functions of such employees involving determinations concerning the issuance of industrial revenue bonds under R.C. 1724.10(A) are, as discussed above, governmental functions for purposes of R.C. Chapter 2744.

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

1. A community improvement corporation, organized pursuant to R.C. Chapter 1724., is not a "political subdivision" as that term is defined in R.C. 2744.01(F).
2. When a county, township, or municipal corporation designates a community improvement corporation as its agency pursuant to R.C. 1724.10, both the corporation and the members of the governing board of the corporation are, for purposes of R.C. Chapter 2744., "employees" of the political subdivision that so designated the corporation. Members of the corporation who do not serve on the governing board are "employees" of the political subdivision for purposes of R.C. Chapter 2744. if, pursuant to the organization of the corporation and agreement under R.C. 1724.10, they perform functions on behalf of the political subdivision.
3. Functions involving determinations concerning the issuance of industrial revenue bonds pursuant to R.C. 1724.10(A) are governmental functions for purposes of R.C. Chapter 2744.
4. Pursuant to R.C. 2744.07(A)(1), a municipal corporation, county, or township is required to provide for the defense of a community improvement corporation designated by it under R.C. 1724.10, and members of the governing board of such a corporation, in a civil action to recover damages for injury or loss caused by acts or omissions of the corporation or the members of its governing board in connection with a determination as to the issuance of industrial revenue bonds pursuant to R.C. 1724.10(A), if the acts or omissions occurred or are alleged to have occurred while the corporation and the members of its governing board were acting in good faith and not manifestly outside the scope of their official responsibilities.
5. The duty of a political subdivision to provide for the defense of an employee under R.C. 2744.07 includes the authority to appeal a decision where such appeal is deemed appropriate and to post an appeal bond in order to bring the appeal or to stay execution of the judgment pending appeal.
6. Pursuant to R.C. 2744.07(A)(2), a municipal

corporation, county, or township is required to indemnify and hold harmless a community improvement corporation designated by it under R.C. 1724.10, and members of the governing board of such a corporation, in the amount of a treble damage judgment in a federal antitrust case for injury or loss caused by acts or omissions of the corporation or the members of its governing board in connection with a determination as to the issuance of industrial revenue bonds pursuant to R.C. 1724.10(A), if at the time of the acts or omissions the corporation and the members of its governing board were acting in good faith and within the scope of their official responsibilities.

7. The duty of a political subdivision to indemnify and hold harmless an employee in the amount of a judgment under R.C. 2744.07(A)(2) includes the authority to post an appeal bond and to provide collateral in the amount of the judgment, as may be necessary in order to bring the appeal or to stay execution of the judgment pending appeal, provided that the political subdivision is satisfied that the employee was acting in good faith and within the scope of his official responsibilities.