

November 25, 2009

The Honorable Sherrie Bevan Walsh
Summit County Prosecuting Attorney
53 University Avenue, 6th Floor
Akron, Ohio 44308-1680

SYLLABUS:

2009-048

Subject to an abuse of discretion standard, the Ohio Public Works Commission (OPWC), a District Public Works Integrating Committee (DPWIC), the Department of Development (DOD), and other authorized Ohio state and local governmental bodies and officials are permitted, in awarding a grant of public funds under the State Capital Improvement Program (SCIP), the Local Transportation Improvement Program (LTIP), the Community Development Block Grant (CDBG) Program, the Job Ready Site Program, or the Industrial Site Improvement Fund, to take into account whether a community is a party to the *Summit County Intergovernmental Memorandum of Understanding for Job Creation and Retention and Tax Revenue Sharing* or a similar agreement and to implement grant-scoring bonus and penalty provisions applicable to signatory communities.



RICHARD CORDRAY
OHIO ATTORNEY GENERAL

November 25, 2009

OPINION NO. 2009-048

The Honorable Sherri Bevan Walsh
Summit County Prosecuting Attorney
53 University Avenue, 6th Floor
Akron, Ohio 44308-1680

Dear Prosecutor Walsh:

We have received your request for an opinion regarding an agreement entitled the *Summit County Intergovernmental Memorandum of Understanding for Job Creation and Retention and Tax Revenue Sharing*. You have asked the following questions:

1. Does the State of Ohio, through its various Departments/Agencies, have the legal authority to approve a grant award for the State Capital Improvement Program or Local Transportation Improvement Program (SCIP/LTIP), a Community Development Block Grant (CDBG), Job Ready Sites, or Industrial Site Improvement Funding that takes into account whether a community is a party to an agreement such as the *Summit County Intergovernmental Memorandum of Understanding for Job Creation and Retention and Tax Revenue Sharing*?
2. Does being a party to the *Summit County Intergovernmental Memorandum of Understanding for Job Creation and Retention and Tax Revenue Sharing* relate to the criteria and the statutory purposes of the programs at issue, and if not, is the agreement or a provision thereof illegal, void, or voidable?
3. Does legal authority exist to consider in the grant-scoring process a 5% bonus to communities signing the *Summit County Intergovernmental Memorandum of Understanding for Job Creation and Retention and Tax*

Revenue Sharing or do the bonus and penalty systems created violate the Ohio Revised Code and Administrative Code?

Summit County Intergovernmental Memorandum of Understanding for Job Creation and Retention and Tax Revenue Sharing

The *Summit County Intergovernmental Memorandum of Understanding for Job Creation and Retention and Tax Revenue Sharing* (IMOU) is an agreement designed to encourage local subdivisions to cooperate on a regional basis and to refrain from “poaching” businesses from nearby subdivisions—that is, to refrain from offering economic incentives to induce employers to relocate. The IMOU provides for the sharing of income tax revenue between participants in certain circumstances in which a business moves from one community to another.¹ It also provides incentives for participating in the IMOU by assisting signatory communities in obtaining various types of public funding and making it more difficult for those who poach to receive that funding.

You have used the word “community” to describe a body that signs the IMOU, and we understand this term to include the county, municipal corporations, townships, and other bodies that are authorized to seek the public funding about which you have inquired.

For purposes of this opinion, we assume that the county and every other participating community takes appropriate steps and has proper authority to enter into the IMOU. *See* IMOU, Sec. 7 (“[t]his Agreement is subject to the legislative approval of all participating communities including County”). We note that the Attorney General is not able, in a formal opinion, to make findings of fact or to determine the validity of a contract or the rights of particular parties under the contract. Therefore, we must decline to address the portion of your second question asking whether the IMOU, or a provision thereof, is illegal, void, or voidable. A definitive answer to that question may be sought from the courts.² Rather, we consider the questions of law you have presented and provide a general discussion of applicable principles that may be applied to particular circumstances as appropriate.

¹ As provided in the eighth “WHEREAS” clause of the IMOU, revenue sharing provisions do not apply to signatory communities that are “unincorporated areas within the County that are not a partner in a Joint Economic Development District (JEDD).” *See* R.C. 715.69-.83 (joint economic development zones and districts).

² *See, e.g.*, 2009 Op. Att’y Gen. No. 2009-027, slip op. at 4 n.6; 2008 Op. Att’y Gen. No. 2008-025, at 2-260; 2005 Op. Att’y Gen. No. 2005-033, at 2-347 (“[w]e are not able, through the exercise of the opinions function, to make findings of fact or to determine the validity or effect of particular contracts or resolutions. Those matters must be determined in a particular case by the persons involved, or by the courts” (citations omitted)); 2006 Op. Att’y Gen. No. 2006-028, at 2-249 to 2-250; 2006 Op. Att’y Gen. No. 2006-027, at 2-234; 2003 Op. Att’y Gen. No. 2003-017, at 2-129 to 2-130.

Authority of State Departments, in Awarding Grants, to Take into Account Whether a Community Is a Signatory to the IMOU

Whether a community decides to participate in the IMOU, and whether a participating community poaches businesses from other signatory communities, may affect the community's ability to obtain public funding. In this regard, Section 9 of the IMOU states:

The County, in addition to other duties set forth above, will offer *signatory communities* opportunities to score *an additional 5% of total possible points on applications for SCIP/LTIP, CDBG funding, Job Ready Sites, Industrial Site Improvement Funding, and other application mechanisms* that are administered or scored by the County, beginning with Fiscal Year (FY) 2010 projects, providing approval for the same has been granted or given by the necessary grantor agencies. This incentive structure has been approved by the Ohio Public Works Commission for SCIP/LTIP funding.

If a *signatory community* has been determined to have *caused a business or employer to relocate from another signatory community by offering economic incentive(s) or other financial inducements* then a *penalty* on the above development programs shall apply. The community determined to have caused a business relocation will have *a deduction of 5% of the total possible points on each application for the above cited programs which are administered and/or scored by the County*. Said deduction shall last for a period of two (2) years from the final determination that a signatory community offered economic incentive(s) or financial assistance to induce an employer to relocate from another signatory community. (Emphasis added.)

Thus, communities that sign the IMOU may receive additional credit toward certain types of public funding; however, if they poach an employer from another signatory community, they will have credit deducted. A community that does not sign the IMOU is not subject to its provisions and does not have points added or deducted. However, the absence of the possibility of gaining additional points clearly puts nonsignatory communities at a disadvantage.

You have asked whether the State of Ohio, through its various departments and agencies, has the legal authority to approve a grant award that takes into account whether a community is a party to an agreement such as the IMOU. You have also asked whether being a party to the IMOU relates to the criteria and statutory purposes of the grant programs at issue, and whether it is permissible to consider in the grant-scoring process the 5% bonus points that the IMOU promises to signatory communities.

The authority of an Ohio department or agency to approve grant awards on the basis of particular findings depends upon the statutes governing that department or agency and the grant program at issue. This opinion cannot address every department, agency, and program that might be covered by the language of the IMOU. Further, the Attorney General is not authorized to use the opinion-rendering function to exercise on behalf of a public official discretion that has

been reposed in that official. *See* 2006 Op. Att’y Gen. No. 2006-019, at 2-166 (“[t]he discretion to make [certain] determinations in accordance with applicable standards and procedures has, by statute and rule, been given to designated officials. The Attorney General is not empowered, by means of an opinion, to circumvent these procedures or to attempt to prescribe to those officials the manner in which they should exercise their discretion”); *see also State ex rel. Foster v. Miller*, 136 Ohio St. 295, 25 N.E.2d 686 (1940) (syllabus, paragraph 3) (“[i]n an action in mandamus, a court will not substitute its discretion for that of an administrative officer or commission in the exercise of his or its authority”); *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601, 608 (1878) (“[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner”); 2006 Op. Att’y Gen. No. 2006-020, at 2-190.

We can, however, outline the analysis for determining if participation in an agreement such as the IMOU may be reasonably be included as a factor for consideration under a particular funding program. Your request refers to several public funding programs—the State Capital Improvement Program (SCIP), the Local Transportation Improvement Program (LTIP), the Community Development Block Grant (CDBG) Program, the Job Ready Site Program, and the Industrial Site Improvement Fund. These funding programs are mentioned in Section 9 of the IMOU, which also refers to “other application mechanisms that are administered or scored by the County, beginning with Fiscal Year (FY) 2010 projects, providing approval for the same has been granted or given by the necessary grantor agencies.”

We will address your questions with regard to each of the programs you have named. For the reasons set forth below, we conclude that, under appropriate statutory provisions, participation in the IMOU or a similar agreement may be included among factors considered in awarding a grant of public funds, subject to an abuse of discretion standard. *See Hocking Valley Ry. Co. v. PUCO*, 92 Ohio St. 362, 110 N.E. 952 (1915) (a court will not substitute its judgment for that of an administrative body, but determinations made by such a body are subject to judicial review for abuse of discretion); 2005 Op. Att’y Gen. No. 2005-008, at 2-86.

SCIP and LTIP Funding

SCIP and LTIP are administered by the Ohio Public Works Commission (OPWC) created under R.C. 164.02. R.C. Chapter 164 governs programs for the allocation of funds made available to finance public infrastructure capital improvement projects of local subdivisions³ through issuance of general obligations of the State of Ohio under Ohio Const. art. VIII, §§ 2k, 2m, and 2p. R.C. 164.03, .08-.09; 1994 Op. Att’y Gen. No. 94-037. The state is divided into nineteen districts, with Summit County constituting District Eight. R.C. 164.03. Funds are allocated to each district, and each district has a District Public Works Integrating Committee (DPWIC) consisting of members appointed by various public officials. R.C. 164.04, .08, .14.

³ For purposes of R.C. Chapter 164, “[l]ocal subdivision” means “any county, municipal corporation, township, sanitary district, or regional water and sewer district.” R.C. 164.01(B).

The DPWIC receives proposals for improvement projects from subdivisions within the district, determines if the proposals meet requirements, and submits proposed projects to the Director of OPWC. Grants of SCIP or LTIP moneys are made to subdivisions after projects are approved by the DPWIC and OPWC. R.C. 164.05, .06, .14; 2 Ohio Admin. Code Chapter 164-1.⁴

In considering which requests for SCIP assistance to submit to the Director, the DPWIC is instructed to give priority to capital improvement projects for the repair or replacement of existing infrastructure that are unlikely to be undertaken without SCIP assistance and to consider ten factors pertaining to the needs of the district and the nature of the project. R.C. 164.06(B); *see also* 2 Ohio Admin. Code 164-1-11. The SCIP criteria that pertain to your question concern the overall economic health of a particular local subdivision and factors considered relevant to a particular project. R.C. 164.06(B)(8), (10).

Rule 164-1-11 of the Ohio Administrative Code requires that a DPWIC submitting a SCIP project application to the Director include “a detailed explanation of its rationale in selecting the project application in light of each and every criterion” in R.C. 164.06(B). 2 Ohio Admin. Code 164-1-11(A). Further, rule 164-1-11 prohibits the committee from considering unrelated criteria, including: (1) a preproject application determination that certain subdivisions (because of population or any other reason) are entitled to awards up to a fixed dollar amount; (2) selection of projects contingent upon an applicant’s financial or other support for the operating expenses of the committees, staff, or agents of the district; or (3) a district-wide formula allocating funding entitlement among subdivisions on a per capita basis, except as authorized in R.C. 164.05(G).

In submitting requests for LTIP assistance to the Director, the DPWIC is required to include every project that it approves. R.C. 164.14(F). Approval is based upon consideration of ten factors pertaining to the needs of the district and the nature of the project. R.C. 164.14(E). The LTIP criterion that pertains to your question concerns factors related to the safety, orderly growth, or economic development of the district or local subdivision. R.C. 164.14(E)(10).

Existing statutes and rules do not mention an agreement such as the IMOU. Whether it is proper for the DPWIC and OPWC to consider such an agreement depends upon whether the agreement comes within the criteria set forth in R.C. 164.06 and R.C. 164.14.

⁴ In addition, the Ohio Small Government Capital Improvements Commission (OSGCIC) approves requests from townships and villages for financial assistance for capital improvement projects from amounts allocated to small governments. The DPWIC is required to appoint a subcommittee of its members to represent the interests of villages and townships and to review and select capital improvement projects to submit to the Administrator of the OSGCIC. R.C. 164.02(D), .051, .06(D), .08(B)(1).

You have informed us that the District 8 Public Works Integrating Committee has incorporated in its Project Evaluation Form for both SCIP and LTIP a criterion that pertains to the IMOU, as follows:

15. Other factors relevant to a particular project. Has the applicant entered into the County of Summit Economic Development and Job Preservation Agreement?

12- Yes

0- No

(-12)- Applicant (signatory community) found to have provided economic incentive(s) or other financial assistance to employer or business from another signatory community (poaching). Applicant will be penalized 12 points (or 5% of the total possible points) on their applications for this year and for the next year.

Correspondence attached to your opinion request indicates that this criterion has been approved by the OPWC for the past two program years. *See* Letters from Michael Miller, Director, OPWC, to Russell Pry, Chair - District 8 PWIC (Sept. 10, 2008; June 9, 2009) (approval of the methodology submitted by the District 8 Public Works Integrating Committee). In his letter of June 9, 2009, the Director of OPWC added: “I would like to thank you and the district committee for your continued support of the Commission’s programs. Your efforts help make our state and local partnership a success.”

Thus, OPWC has considered and approved the inclusion of participation in the IMOU as one factor among many to be considered in determining whether to provide SCIP or LTIP moneys for particular projects. OPWC has been given statutory responsibility for making grants under SCIP and LTIP and has discretion to administer its statutes in any reasonable manner. *See* R.C. 164.02, .06, .14; *see also* R.C. 164.05(B) (when the Director of OPWC conditionally approves or disapproves projects, the decisions and reasons shall be made in writing and the written decisions are “conclusive for the purposes of the validity and enforceability of such determinations”); *Northwestern Ohio Bldg. and Constr. Trades Council v. Conrad*, 92 Ohio St. 3d 282, 287, 750 N.E.2d 130 (2001) (“[a] court must give due deference to the agency’s reasonable interpretation of the legislative scheme”); *Jewett v. Valley Ry. Co.*

In interpreting and applying R.C. 164.06 and R.C. 164.14, OPWC has exercised its discretion to permit the District 8 PWIC, in connection with SCIP and LTIP funding, to consider a community’s participation in the IMOU and to implement the grant-scoring bonus and penalty provisions. This action reflects OPWC’s finding that participation in the IMOU, and application of the bonus/penalty system in the grant-scoring process, bear sufficient relationship to the criteria and purposes of SCIP and LTIP to be incorporated into the administration of these programs.

The degree of effect given to participation in the IMOU in the current situation is limited. The total number of points possible for SCIP (including discretionary points) is 252, and the total

number of points possible for LTIP (including discretionary points) is 242. Thus, the twelve points that may be added or deducted under the IMOU is approximately 5%, which is a comparatively minor component of the funding determination.

The statutory factors prescribed for consideration in connection with SCIP and LTIP funding expressly include issues concerning the economic status of the applicant and of the larger community. With regard to SCIP, R.C. 164.06(B)(8) requires consideration of the “overall economic health of the particular local subdivision.” That economic health may be affected by participation or lack of participation in the IMOU.

The introductory “WHEREAS” clauses of the IMOU set forth the understanding of the participating communities that “it is imperative to cooperate and collaborate with each other for the economic benefit of the region and its resident-taxpayers in order to attract and retain businesses and jobs,” that “cooperation is necessary for regional prosperity and enhancement of the local tax base and to successfully compete in global markets,” and that “active attempts to relocate businesses from other local communities has a negative effect on economic development and growth in the region.” The IMOU thus is intended to affect the economic climate of the region through the cooperation of local subdivisions. If a participating subdivision has less development than surrounding areas, the IMOU may make it difficult for the subdivision to level the playing field by attracting businesses from nearby communities. The IMOU may also impact the amounts of income tax a subdivision receives. Thus, participation in the IMOU relates to the “overall economic health of the particular local subdivision” as set forth in R.C. 164.06(B)(8).

Further, division (10) of R.C. 164.06(B) includes among criteria relevant to SCIP funding “[a]ny other factors relevant to a particular project.” A subdivision’s cooperation with neighboring subdivisions through participation in the IMOU (including the grant-scoring bonus/penalty system) may be relevant to a project for which SCIP moneys are sought, and to the state/local partnership mentioned by Director Miller in his letter of June 9, 2009.

With regard to LTIP, R.C. 164.14(E)(10) requires consideration of “[a]ny other factors related to the safety, orderly growth, or economic development of the district or local subdivision that the district public works integrating committee considers relevant.” The existence of the IMOU, and a subdivision’s participation or failure to participate, clearly may affect the economic development both of the district and of particular subdivisions within the district. Thus, participation in the IMOU and its bonus/penalty system relates to the criteria and purposes of LTIP and may be considered under R.C. 164.14(E)(10).

Existing statutes and rules thus permit the DPWIC and OPWC to conclude that using the funding application for SCIP and LTIP to reward communities that do not attempt to poach businesses from their neighbors and penalize those that do assists in the stabilization of the region and supports the economic health of local communities. Grants of SCIP and LTIP moneys assist the communities in creating infrastructure to attract industry and support additional development, and OPWC has discretion to consider the IMOU or similar agreements in determining which projects to fund.

Community Development Block Grant (CDBG) Program

You have asked also about application of the IMOU to grants made from Community Development Block Grant (CDBG) funds. These funds are made available under a federal program that provides moneys to the states for distribution to local governments for the establishment and maintenance of viable urban communities. CDBG funds can be used to provide housing, suitable living environments, and expanded economic opportunities, principally for persons of low and moderate income. *See* 42 U.S.C.A. §§ 5301-5321 (West 2003 & Supp. 2009); 24 C.F.R. Part 570 (2009); 2004 Op. Att’y Gen. No. 2004-016. Your request letter mentions specifically that “[a]lthough the County has received verbal indication from the Department of Housing and Urban Development that the bonus penalty provisions are appropriate to CDBG funds, no written approval has been obtained to date and the bonus and penalty process will not be applied to CDBG funding until such has been received.”

The Department of Housing and Urban Development (HUD) is an agency of the federal government, and the Ohio Attorney General has no authority to advise HUD with regard to the exercise of its discretion to approve the use of a community’s participation in the IMOU as a factor in determining whether to approve a grant of CDBG funds. *See* 2009 Op. Att’y Gen. No. 2009-005, at 2-24 n.3; 2000 Op. Att’y Gen. No. 2000-036, at 2-228 n.11 (quoting 1999 Op. Att’y Gen. No. 99-029); 1999 Op. Att’y Gen. No. 99-034, at 2-226 n.7 (“[t]he Ohio Attorney General does not have authority to make definitive decisions concerning questions of federal law”). The analysis set forth above in connection with SCIP and LTIP indicates that participation in the IMOU or a similar agreement may be relevant to a CDBG program that has economic development as a factor, and the grant-scoring bonus/penalty system may also be found appropriate, as suggested by the verbal indication received from HUD, provided that written confirmation is received from HUD with regard to grants of particular funds.

Job Ready Site Program

The Job Ready Site Program, administered by the Ohio Department of Development (DOD), provides grants to pay for allowable costs of eligible applicants (including political subdivisions) for eligible projects, consisting of sites and facilities intended for commercial, industrial, or manufacturing use. R.C. 122.085(C) and (D), .086, .0820. The grants are awarded through two separate processes—the annual competitive process and the discretionary process. R.C. 122.086. If the Controlling Board approves a grant under either process, the Director of Development and the applicant enter into an agreement setting forth the terms of the grant. R.C. 122.0814; 2 Ohio Admin. Code 122:20-1-03(I) (“subject to approval of the state controlling board, the decision of the director in selecting eligible projects for the job ready site program is final and not appealable”).

Under the competitive process, the DPWIC accepts applications for grants and the DPWIC’s executive committee (or the full committee or a working group) evaluates the applications, prioritizing those that meet the requirements of R.C. 122.0815 and submitting up to three projects each year to DOD. R.C. 122.086, .088, .0810. The information required in the

application includes an explanation of the need for the project and its predicted economic impact, copies of resolutions or ordinances related to the project (including resolutions or ordinances adopted by the political subdivision with jurisdiction over the geographic area in which the project is located), a marketing plan, and any information the Director of Development requests. R.C. 122.089(B)(2), (G), (H), (I). The DOD evaluates the applications forwarded by various DPWICs, and the Director of Development asks the Controlling Board for approval to make grants for selected projects, taking into consideration the geographic diversity of awards. R.C. 122.0811. In determining a priority order for projects under the competitive process, the DPWIC's evaluating body and DOD are directed to apply various factors, including the potential economic impact of the project along with its potential impact on economic distress, the need for the project, the level of financial need and availability of other funding, the strength of the marketing plan, and any other factors the Director of Development deems appropriate. R.C. 122.0816; *see* 2 Ohio Admin. Code 122:20-1-01 to -1-05.

The discretionary process for the Job Ready Site Program follows guidelines established by the Director of Development and applies in situations defined by the Director, including those in which the timing of a project makes the competitive process unsuitable. R.C. 122.0816, .0812. The Director receives and evaluates applications and, if they are complete and meet statutory requirements (including compliance with any criteria the Director finds necessary), asks the Controlling Board for approval to make discretionary grants. R.C. 122.0813, .0815.

Like SCIP and LTIP, the Job Ready Site Program provides for consideration of the economic circumstances of a community, and participation in an IMOU or similar agreement may affect those circumstances. R.C. 122.0812, .0813, .0816; *see also* R.C. 122.0817 (annual report of Director of Development includes the amount of grants awarded for projects in economically distressed areas and the impact of the grants). Further, the Job Ready Site Program permits the Director of Development to establish criteria to be considered in making grants. R.C. 122.0812, .0813, .0815(A)(5), .0816(G).

Thus, DOD may determine, in the reasonable exercise of discretion, that participation in the IMOU or a similar agreement is relevant to a determination of the priority order of eligible projects under the Job Ready Site Program, and may incorporate that factor into the scoring of the applications. The DPWIC's evaluating body would be empowered to implement the scoring criteria in the DPWIC's evaluations and submissions to DOD in a manner consistent with any such DOD determination. 2 Ohio Admin. Code 122:20-1-03(E).

Industrial Site Improvement Fund

Grants from the Industrial Site Improvement Fund are made by the Director of Development to eligible counties for the purpose of acquiring commercial or industrial land or buildings and making improvements to commercial or industrial areas, upon a determination that the grant may create new jobs or preserve existing jobs and employment opportunities. R.C. 122.951; *see* R.C. 122.95, .952. Eligible counties may submit applications to the Director or may designate a port authority, community improvement corporation, or other economic

development entity in the county to apply for a grant. R.C. 122.951(B), (D). The application must include a detailed description of how the grant would improve commercial or industrial areas and lead to the creation or preservation of jobs and must also include other information required by the Director. R.C. 122.951(B).

The Industrial Site Improvement Fund was established to benefit counties that are located in the Appalachian region or in distressed areas of the state and counties that have suffered certain kinds of job losses. R.C. 122.95(B), .952. Grants are made with the goal of creating or preserving jobs or employment opportunities, and applications must specify how this will occur. R.C. 122.951(A), (B). Economic factors are thus at the heart of this grant process, and participation in an IMOU is an economic factor that may be relevant. Further, as with SCIP, LTIP, and the Job Ready Site Program, the person in charge (here the Director of Development) is authorized to require that applications include prescribed information. R.C. 122.951(B). The Director, within the reasonable exercise of discretion, might thus include participation in the IMOU or a similar agreement as a factor to be considered in evaluating an application for a grant from the Industrial Site Improvement Fund. In turn, officials or bodies that administer the grant process would be permitted to implement the policies and practices adopted by the Director, including consideration of participation in the IMOU and application of the grant-scoring bonus/penalty system. *See* R.C. 122.951(B), .952.

Exercise of Discretion

This opinion concludes generally that, under appropriate statutory provisions, participation in the IMOU or a similar agreement may be included among factors considered in awarding a grant of public funds, subject to an abuse of discretion standard. This means that, subject to the same abuse of discretion standard, in appropriate circumstances the decision may be made to exclude participation in the IMOU or similar agreement from the factors considered in awarding a grant of public funds. The administrators of a particular grant program, in the reasonable exercise of their discretion, might find that criteria like the IMOU are inconsistent with, or outweighed by, broader program and administrative goals. For example, if a local ranking process feeds projects into a statewide pool for evaluation and approval, it might be determined that, for consistency, all local or regional evaluators must use the same scoring criteria.

The nature and purposes of a grant program may affect the proper exercise of discretion. In some instances, a public grant program may seek a primary outcome that is not economic in nature, and consideration of economic factors such as the IMOU or a similar agreement may be beyond the scope of the administrators' authority. If, for instance, CDBG funds are used for a water or sewer project intended primarily to address the health needs of residents in a low-income neighborhood, there might be no economic development purpose and a proper exercise of discretion might require the conclusion that participation in the IMOU or similar agreement is not relevant to the purpose of the grant or is counter to the purpose of the grant. Especially when matters of public health or safety are involved—as may be the case in areas such as funding for environmental hazards—it might constitute an abuse of discretion in some circumstances to

require that grant-scoring bonus and penalty provisions be applied to penalize an application that presents a strong case of achieving the primary program goal. As discussed above, the body with authority to administer a particular program is entrusted with the responsibility of determining whether, and to what extent, participation in the IMOU or a similar agreement may be considered.

We are aware that some communities may not wish to participate in the IMOU or similar agreement and that, under the conclusions reached in this opinion, nonparticipation may have a negative impact on their ability to access public grant moneys. While there are evident advantages to promoting development on a county or regional basis, there may also be disadvantages to some communities. This opinion does not address the wisdom of the IMOU or similar agreements, or of the policies adopted by the OPWC, nor does it purport to advise state or federal bodies with regard to the determination of matters that are entrusted to their discretion. If a different governmental framework is desired, legislative changes may be sought. *See Bd. of Educ. v. Fulton County Budget Comm'n*, 41 Ohio St. 2d 147, 156, 324 N.E.2d 566 (1975); 2009 Op. Att'y Gen. No. 2009-006, at 2-47.

Conclusions

For the reasons discussed above, it is my opinion, and you are advised, that, subject to an abuse of discretion standard, the Ohio Public Works Commission (OPWC), a District Public Works Integrating Committee (DPWIC), the Department of Development (DOD), and other authorized Ohio state and local governmental bodies and officials are permitted, in awarding a grant of public funds under the State Capital Improvement Program (SCIP), the Local Transportation Improvement Program (LTIP), the Community Development Block Grant (CDBG) Program, the Job Ready Site Program, or the Industrial Site Improvement Fund, to take into account whether a community is a party to the *Summit County Intergovernmental Memorandum of Understanding for Job Creation and Retention and Tax Revenue Sharing* or a similar agreement and to implement grant-scoring bonus and penalty provisions applicable to signatory communities.

Respectfully,



RICHARD CORDRAY
Ohio Attorney General