November 2, 2016

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
160 High Street N.W., 4th Floor
Warren, Ohio 44481-1092

SYLLABUS: 2016-035

1. The position of administrator of a home rule township is not a "public office," as that term is used in R.C. 713.22(C).

2. A person may serve simultaneously as administrator of a home rule township and member of a county planning commission provided that no contract exists between the county planning commission and the township, and provided that, as a member of the county planning commission, the person abstains from discussing, deliberating, negotiating, or voting on a contract between the commission and the home rule township in which he serves as administrator. An administrator of a home rule township that serves simultaneously as a member of a county planning commission may not present the tax budget of the township to the county budget commission or explain to the county budget commission the financial requirements of the township, as reflected in the township's tax budget.

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OPINION NO. 2016-035

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
160 High Street N.W., 4th Floor
Warren, Ohio 44481-1092

Dear Prosecutor Watkins:

We have received your request whether the position of administrator of a home rule township is compatible with service as a member of a county planning commission within the same county. Whether two public offices or positions are compatible depends upon the answers to the following seven questions:

1. Is either position in the classified civil service of the state, a county, a city, a city school district, or a civil service township as defined in R.C. 124.57?

2. Do any constitutional provisions or the governing statutes of either position prohibit or otherwise limit employment in another public position or the holding of another public office?

3. Is one of the positions subordinate to, or in any way a check upon, the other?

4. Is it physically possible for one person to perform the duties of both positions?

5. Is there a conflict of interest between the two positions?

6. Are there any controlling local charter provisions, resolutions, or ordinances?

7. Does a federal, state, or local departmental regulation prevent a person from holding both positions?

See 2014 Op. Att'y Gen. No. 2014-045, at 2-391 ("[a] seven-question compatibility test is used to determine whether a person may serve simultaneously in multiple public positions"); 2004 Op. Att'y Gen. No. 2004-019, at 2-153 to 2-154 (setting forth the seven-part compatibility test); 1979 Op. Att'y Gen. No. 79-111, at 2-367 to 2-368 (the seven-part compatibility test applies to the simultaneous holding of a public office and a public employment by the same person). All of

these questions "must yield answers in favor of compatibility in order to conclude that two positions are compatible." 2013 Op. Att'y Gen. No. 2013-008, at 2-78.

The third, fourth, and fifth questions of the compatibility analysis comprise the test's common law considerations. *See* 1981 Op. Att'y Gen. No. 81-010, at 2-32 ("[t]he remaining … questions—subordination, conflict of interest, and physical possibility—are part of the common law test of compatibility"); 1980 Op. Att'y Gen. No. 80-047, at 2-197 ("[t]he third and fourth questions are derived from the common law test of compatibility"). When the General Assembly has expressly authorized the simultaneous holding of two positions, these questions need not be considered. *See generally* 2009 Op. Att'y Gen. No. 2009-005, at 2-33 ("pursuant to R.C. 1724.10(A), the General Assembly has authorized a person to serve simultaneously as a member of a city legislative authority and member of the governing board of a community improvement corporation that has been designated pursuant to R.C. 1724.10 as the agency of the city for the industrial, commercial, distribution, and research development in the city even though conflicts of interest may exist between the two positions"); 1999 Op. Att'y Gen. No. 99-023, at 2-156 n.7 ("[w]hen the General Assembly has intended that an individual be permitted to participate in two different capacities that might have prohibited interests, it has expressly so stated"); 1990 Op. Att'y Gen. No. 90-037, at 2-153 ("[b]y enacting R.C. 505.011, the General Assembly has implicitly sanctioned this interest in a township contract. The General Assembly has evidently deemed that the potential conflicts of interest which might arise between a township trustee and member of a private fire company which contracts with the township are outweighed by the need for firefighters"). R.C. 713.22(C) provides, in part, that "[a]ny member of a county planning commission may hold any other public office and may serve as a member of a city, village, and regional planning commission, except as otherwise provided in the charter of any city or village." You ask whether an administrator of a home rule township is a "public office" as that phrase is used in R.C. 713.22(C).[1]

The term "public office" is not defined for the purpose of R.C. 713.22 or more generally for purposes of R.C. Chapter 713 (planning commissions) or R.C. Title 7 (municipal corporations). *See State ex rel. Scarl v. Small*, 103 Ohio App. 214, 215, 145 N.E.2d 200 (Portage County 1956) ("[n]either the Constitution of Ohio nor the Code defines 'public office'"). "The usual criteria considered in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, independence of the functions exercised by the appointee, and character of the duties imposed upon the appointee." 2011 Op. Att'y Gen. No. 2011-021, at 2-173 (citing *State ex rel. Landis v. Bd. of Comm'rs of Butler Cnty.*, 95 Ohio St. 157, 159-60, 115

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[1] If an administrator of a home rule township holds a public office within the meaning of the statute, it is unnecessary to consider questions three, four, and five of the compatibility analysis in determining whether the township administrator may serve simultaneously as a member of a county planning commission. *See* 1977 Op. Att'y Gen. No. 77-034, at 2-123 (recognizing that the portion of the compatibility test derived from common law need not be considered in determining the compatibility of the position of director of a regional planning commission and position of county administrator in the same county).

N.E. 919 (1917)); *see also* 2013 Op. Att'y Gen. No. 2013-008, at 2-78; 2003 Op. Att'y Gen. No. 2003-041, at 2-343. The following characteristics are the most decisive in determining whether a position is a public office: (1) the position requires the individual to exercise independent public duties, a part of the sovereignty of the state; (2) the exercise of these duties are by virtue of the individual's election or appointment to the position in question; and (3) the individual is not subject to the direction and control of a superior officer in the exercise of these duties. *See* 2011 Op. Att'y Gen. No. 2011-021, at 2-174; 1963 Op. Att'y Gen. No. 3548, p. 58, at 61.

An examination of the statutes that govern the employment, duties, and responsibilities of an administrator of a home rule township leads us to conclude that this position is not a public office. An administrator of a home rule township is appointed by the board of township trustees and serves as "the administrative head of the township." R.C. 505.031(A)(2); *see also* R.C. 504.01(A)(1)(c). The salary of a township administrator is fixed and paid by the board of township trustees, and the township administrator does not give bond for the faithful performance of his duties. *See* R.C. 505.031(C). Perhaps most significantly, a township administrator does not exercise independent, sovereign authority in executing his responsibilities.[2] A township administrator performs his duties "*under the direction and supervision* of the board [of township trustees]" and "hold[s] office *at the pleasure* of the board." R.C. 505.031(A)(2) (emphasis added); *see also* R.C. 505.032 (a township administrator shall carry out his responsibilities "under the direction of the board of township trustees"). As recognized by one Ohio appellate court, "[i]f the individual is an employee, as indicated by an employment contract or by being subject to the direction and control of someone else, then the person does not hold a public office." *See State ex rel. Grenig v. Cuyahoga Cnty. Bd. of Mental Retardation*, 93 Ohio App. 3d 98, 100, 637 N.E.2d 954 (Cuyahoga County 1994). Therefore, we conclude that an administrator of a home rule township is not a public office for the purpose of R.C. 713.22(C).[3] As a result, we shall consider all questions of the compatibility analysis in

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[2] A township administrator is responsible for, among other things, assisting in the administration of township policies, R.C. 505.032(A), attending township board meetings, R.C. 505.032(C), and preparing and submitting a budget for the township for the next fiscal year, R.C. 505.032(F). "The board of township trustees may assign to such township administrator any office, position, or duties under its control … to be performed under the direction and supervision of the board." R.C. 505.032.

[3] R.C. 505.031 describes the position of township administrator as a "township office." *See* R.C. 505.031(B) ("[i]n the event that the township administrator is absent from that office … the chairperson of the board" or other qualified individual "shall … perform all duties of such township office"); *see also* 1977 Op. Att'y Gen. No. 77-037, at 2-132 ("R.C. 505.031 … indicates that a township administrator occupies a township office"). The term "office" is subject to a variety of meanings. A "ministerial office," for example, is "[a]n office that does not include authority to exercise judgment, only to carry out orders given by a superior office, or to perform duties or acts required by rules, statutes, or regulations." *Black's Law Dictionary* 1190 (9th ed. 2009). Accordingly, the description of the position of township administrator as a

determining whether the position of administrator of a home rule township is compatible with service as a member of a county planning commission.

Question One: Classified Civil Service

The first question of the compatibility analysis asks whether either of the two positions in question is in the classified civil service of "the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state" within the meaning of R.C. 124.57.[4] R.C. 124.57(A); *see also* 2006 Op. Att'y Gen. No. 2006-041, at 2-394. R.C. 124.57(A) states that an officer or employee in the classified civil service of "the state, the several counties, cities, … city school districts … or the civil service townships of the state," shall not "be an officer in any political organization or take part in politics other than to vote … and to express freely political opinions." R.C. 124.57(A) "'prohibits an officer or employee in the classified service from seeking election or appointment to, or holding, a partisan political office, or engaging in other partisan political activities, and it prevents a partisan political officeholder from serving simultaneously as an officer or employee in the classified service.'" 2006 Op. Att'y Gen. No. 2006-041, at 2-394 to 2-395 (quoting 2003 Op. Att'y Gen. No. 2003-041, at 2-336).

The classified civil service comprises "all persons in the employ of the … several counties" unless specifically excluded from the classified civil service or specifically included in the unclassified civil service. R.C. 124.11(B); *see also* R.C. 124.11(A)(32) ("[t]he unclassified service shall comprise … [e]mployees placed in the unclassified service by another section of the Revised Code"). The prohibition in R.C. 124.57 does not apply to a member of a county planning commission or an administrator of a home rule township. R.C. 124.57(A) restricts partisan political activity for only those employees in the classified civil service "of the state, the several counties, cities, and city school districts …, or the civil service townships of the state."[5]

"township office" in R.C. 505.031, while relevant, is not conclusive in determining whether an administrator of a home rule township holds a "public office" within the meaning of R.C. 713.22(C).

[4] The civil service in Ohio is divided into the classified and unclassified service. R.C. 124.11; *see also* Ohio Const. art. XV, § 10. An individual employed in the classified civil service possesses a statutory claim of qualified entitlement to continued employment, *see* R.C. 124.23, R.C. 124.34, whereas an individual employed in the unclassified civil service may be dismissed without cause, provided that the dismissal is not otherwise unlawful. *See* 1996 Op. Att'y Gen. No. 96-040, at 2-154.

[5] "'Civil service township' means any township with a population of ten thousand or more persons residing within the township and outside any municipal corporation, which has a police or fire department of ten or more full-time paid employees and which has a civil service commission established under [R.C. 124.40(B)]." R.C. 124.01(G).

A county planning commission is a stand-alone entity, separate from the county in which the commission functions. 1994 Op. Att'y Gen. No. 94-034, at 2-173 (a "county planning commission … is an entity separate from the county"); *see also* R.C. 2744.01(F) (a county and a county planning commission are included within the statute's definition of "political subdivision" as separate entities). *Cf.* 2007 Op. Att'y Gen. No. 2007-013, at 2-123 n.5 ("[a] regional planning commission established under R.C. 713.21(A) is a governmental entity apart from the subdivisions that join in its creation"); 1993 Op. Att'y Gen. No. 93-001, at 2-5 ("a regional planning commission … is a separate legal entity readily distinguishable from the various planning commissions, boards of township trustees, boards of county commissioners, special districts, and other units of local government that, pursuant to R.C. 713.21, participate in its formation or operation"). A member of a county planning commission, therefore, is not an officer or employee of the state or one of the political subdivisions delineated in R.C. 124.57(A).

R.C. 124.57(A) also does not restrict the actions of an administrator of a home rule township that is not a civil service township, as the statute's prohibitions apply only to civil service townships. *See* 2013 Op. Att'y Gen. No. 2013-034, at 2-344 (recognizing that R.C. 124.57 does not apply to the positions of village police chief and village administrator); 2003 Op. Att'y Gen. No. 2003-041, at 2-337 ("[R.C. 124.57] does not apply … to officers and employees in the service of a township that is not a civil service township"). Further, an administrator of a home rule township that is a civil service township is excluded from the prohibition in R.C. 124.57(A) by R.C. 124.11(A)(3). R.C. 124.11(A)(3) explicitly excludes from the classified civil service "[e]mployees appointed to administrative staff positions for which an appointing authority is given specific statutory authority to set compensation." An administrator of a home rule township is the "administrative head of the township." R.C. 505.031(A)(2). R.C. 505.031(C) confers specific statutory authority upon a board of township trustees to "fix the salary of the township administrator." Accordingly, the first question of the compatibility analysis may be answered in favor of compatibility.

Question Two: Constitutional or Statutory Provisions that Prohibit or Limit Employment in another Public Position or Holding of another Public Office

The second question of the compatibility analysis asks whether there are any constitutional provisions or statutes applicable to either position that prohibit or otherwise limit employment in another public position or the holding of another public office. *See* 2A Ohio Admin. Code 123:1-46-02(E) ("[e]mployees in the unclassified service of the state, are not prohibited from engaging in political activity unless specifically precluded by federal or state constitutional or statutory provisions"). R.C. 511.13 prohibits an employee of a board of township trustees from being "interested in any contract entered into by such board." An employee of a board of township trustees violates R.C. 511.13 when the employee also serves as a board member of an entity that has entered into a contract with the board of township trustees. A member of a governing board has a fiduciary interest in a contract of the board. *See generally* Ohio Ethics Comm'n, Advisory Op. No. 92-017, slip op. at 4 (acknowledging that a board member of a labor organization would have a fiduciary interest in the organization's collective bargaining agreement). R.C. 511.13 does not limit or define the types of interests the statute

prohibits. Prior opinions of the Attorney General have recognized that language such as that in R.C. 511.13 is intentionally broad so as to prohibit any interest in a public contract, including an interest that is fiduciary, personal, or pecuniary in nature. *See* 2000 Op. Att'y Gen. No. 2000-015, at 2-85 (a statutory prohibition on having an interest in any contract includes "a direct or indirect … fiduciary interest of any sort, however slight"). Thus, an administrator of a home rule township that serves simultaneously as a member of a county planning commission has a prohibited fiduciary interest in a contract entered into by the board of township trustees, as proscribed by R.C. 511.13, if the board of township trustees enters into a contract with the county planning commission.[6]

In this matter, we are not aware of any existing contracts that implicate R.C. 511.13 and thereby prohibit a member of a county planning commission from serving as a township administrator within the same county. Nevertheless, if, at a later date, the county planning commission enters into a contract with the home rule township in which a member of the county planning commission also serves as township administrator, the person serving simultaneously in the positions of member of a county planning commission and township administrator will find himself in violation of R.C. 511.13. *See* 2007 Op. Att'y Gen. No. 2007-044, at 2-440 to 2-441 ("if a person enters into an ongoing multi-year contract to supply a township with garage storage facilities … and is subsequently elected to the office of township trustee, the person is prohibited by R.C. 511.13 from serving as township trustee and continuing to have an interest in that … contract…. Although some statutes that prohibit interests in public contracts specify the consequences that follow if public officials have an interest in contracts of the public bodies they serve, R.C. 511.13 does not specify the consequences of having an interest in a contract in violation of R.C. 511.13. Because no consequences are prescribed by statute, the trustees, county prosecuting attorney, and courts may have some discretion in determining how to address" a situation in which a township trustee has an interest in a contract in violation of R.C. 511.13).[7]

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[6] In 2003 Op. Att'y Gen. No. 2003-041, at 2-341 n.15, the Attorney General observed that a person serving simultaneously as a member of a township board of zoning appeals and a member of a county planning commission "would have no interest in procuring or maintaining any contracts between the township and planning commission in order to maintain his position on the board of zoning appeals or planning commission." The prohibition in R.C. 511.13 is not limited to circumstances in which a person's interest in a contract concerns the maintenance of that person's position with one of the contracting parties. A person has a prohibited interest in a contract under R.C. 511.13 when the person's interest in the contract is of a fiduciary nature. *See* 2000 Op. Att'y Gen. No. 2000-015, at 2-85.

[7] A person is not able to avoid a violation of R.C. 511.13 by abstaining from any discussions, negotiations, decision-making, or votes regarding the contract. *See* 2008 Op. Att'y Gen. No. 2008-002, at 2-12 to 2-13.

No other constitutional or statutory provisions limit the outside employment of an administrator of a home rule township or a member of a county planning commission. Therefore, the second question of the compatibility analysis may be answered in favor of compatibility.

Question Three: Subordination and Control

The third question of the compatibility analysis asks whether one of the positions is subordinate to, or in any way a check upon, the other. A member of a county planning commission is either a member of a board of county commissioners or appointed by a board of county commissioners.[8] R.C. 713.22(A) ("[a] county planning commission shall consist of the members of the board of county commissioners, or their alternates … and eight other members appointed by the board"). Members of a county planning commission are paid by the board of county commissioners and perform the duties imposed upon county planning commissions by statute. *See* R.C. 713.22-.23.

An administrator of a home rule township is appointed by the board of township trustees and subject to its direction and control. *See* R.C. 505.031; R.C. 505.032. A township administrator operates independently of a member of a county planning commission. A township administrator is not accountable or subordinate to a member of a county planning commission, nor is a member of a county planning commission accountable or subordinate to a township administrator. A township administrator is not responsible for assigning duties to, or supervising the activities of, a member of a county planning commission. A member of a county planning commission is not responsible for assigning duties to, or supervising the activities of, a township administrator. Accordingly, question three of the compatibility analysis may be answered in favor of compatibility.

Question Four: Physical Possibility

The fourth question of the compatibility analysis asks whether it is physically possible for one person to perform the duties of both positions. "Whether an individual is physically able to adequately perform the duties of both positions is a question of fact which is best answered by the parties involved." 1993 Op. Att'y Gen. No. 93-016, at 2-89. In 2004 Op. Att'y Gen. No. 2004-019, at 2-157 to 2-158, we offered the following guidance for determining whether a person is physically able to perform the duties of both positions:

> [I]n order to serve simultaneously [in both positions], a person must be certain that he will be able to carry out the duties of both positions in a competent and

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[8] There is no indication from the materials provided to us that the member of the county planning commission about whom you inquire is a member of the board of county commissioners. Accordingly, we presume for the purpose of this opinion that the member of the county planning commission is either an alternate for a member of the board of county commissioners or one of the other members appointed by the board pursuant to R.C. 713.22.

> timely manner. This means that there should not be a direct conflict between the times when the person is needed to perform duties on behalf [of both positions].

Without any evidence to the contrary, we will presume for the purpose of this opinion that one person is physically able to perform simultaneously the duties of administrator of a home rule township and the duties of a member of a county planning commission.

Question Five: Conflicts of Interest

The fifth question of the compatibility analysis asks whether there is a conflict of interest between the two positions. A person may not hold two public positions simultaneously if a conflict of interest exists. 2012 Op. Att'y Gen. No. 2012-040, at 2-351. A conflict of interest exists if the duties and responsibilities of one position are of such a nature as to influence the duties and responsibilities of the other position, "'thereby subjecting [the person] to influences which may prevent [the person's] decisions from being completely objective.'"[9] 2006 Op. Att'y Gen. No. 2006-041, at 2-397 (quoting 1980 Op. Att'y Gen. No. 80-035, at 2-149); *see also* 1993 Op. Att'y Gen. No. 93-016, at 2-89; 1979 Op. Att'y Gen. No. 79-111, at 2-371. As explained in 1979 Op. Att'y Gen. No. 79-111:

> [O]ne in the public service "owes an undivided duty to the public. It is contrary to public policy for a public officer to be in a position which would subject him to conflicting duties or expose him to the temptation of acting in any manner other than the best interest of the public."

1979 Op. Att'y Gen. No. 79-111, at 2-371 (quoting 1970 Op. Att'y Gen. No. 70-168, at 2-336).

The mere existence of a conflict of interest, however, does not automatically render two positions incompatible. When "the possibility of conflict is remote and speculative" and can be mitigated or avoided, "the conflict of interest rule is not violated." 1993 Op. Att'y Gen. No. 93-016, at 2-91; *see also* 2004 Op. Att'y Gen. No. 2004-019, at 2-158 ("[w]here it can be demonstrated that the conflicts may be sufficiently avoided or eliminated entirely, the person may serve in both positions"). The factors considered in determining whether the conflict of interest rule is violated include, without limitation:

> "the probability of the conflict[] arising, the ability of the person to remove himself 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."

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[9] The Ohio Ethics Commission has issued an advisory opinion that addresses the applicability of R.C. Chapter 102, R.C. 2921.24-.43, and R.C. 102.08 to the situation you present. As it is the responsibility of the Ohio Ethics Commission to interpret and apply these ethics and conflict of interest provisions, the Attorney General shall not consider the application of these provisions in this opinion. *See* 2011 Op. Att'y Gen. No. 2011-008, at 2-60 n.1.

2011 Op. Att'y Gen. No. 2011-048, at 2-382 (quoting 2011 Op. Att'y Gen. No. 2011-029, at 2-235).

Whether a person who serves simultaneously as an administrator of a home rule township and a member of a county planning commission is subject to a conflict of interest requires an examination of the duties and responsibilities of each position. *See* 2004 Op. Att'y Gen. No. 2004-044, at 2-380. A township administrator performs duties that "are analogous to and derivative of those of the office of township trustee." 1977 Op. Att'y Gen. No. 77-037, at 2-132. R.C. 505.032 sets forth the responsibilities of a township administrator, in pertinent part, as follows:

> The township administrator shall, under the direction of the board of township trustees:
>
> (A) Assist in the administration, enforcement, and execution of the policies and resolutions of the board;
>
> (B) Supervise and direct the activities of the affairs of the divisions of township government under the control or jurisdiction of the board;
>
> (C) Attend all meetings of the board at which his attendance is required by that body;
>
> (D) Recommend measures for adoption to the board;
>
> (E) Prepare and submit to the board such reports as are required by that body, or as he considers advisable;
>
> (F) Keep the board fully advised on the financial conditions of the township, preparing and submitting a budget for the next fiscal year;
>
> (G) Perform such additional duties as the board may determine by resolution.

A board of township trustees is responsible for the management and governance of the township. *See generally* R.C. Title 5 (townships); 1994 Op. Att'y Gen. No. 94-013, at 2-60 ("[t]ownship trustees are statutorily vested with various powers and duties associated with the government of the township"). A board of township trustees of a home rule township has the authority to "[e]xercise all powers of local self-government within the unincorporated area of the township," R.C. 504.04(A)(1), and to adopt and enforce regulations or resolutions that pertain to police and sanitary matters or matters authorized in R.C. 503.52 and R.C. 503.60, R.C. 504.04(A)(2), (4). A board of township trustees has the authority to enter into contracts on behalf of the township, *see, e.g.*, R.C. 9.60; R.C. 307.15; R.C. 505.37; R.C. 505.50, acquire and dispose of real and personal property, *see, e.g.*, R.C. 505.10; R.C. 505.26, and construct and maintain buildings for township purposes, *see, e.g.*, R.C. 505.26. The board of township trustees has the authority to pass resolutions, *see, e.g.*, R.C. 504.04; R.C. 505.371; R.C. 519.02, and to levy taxes upon the real and personal property in the township for the benefit of the township electorate, *see* R.C. 5705.01(C); R.C. 5705.03(A). As the taxing authority for the township, the board of township trustees is responsible for adopting the township's tax budget. R.C. 5705.01(C); R.C. 5705.28(A). A board of township trustees also possesses various powers and duties concerning the implementation and enforcement of township zoning regulations. *See* R.C.

Chapter 519 (township zoning). A board of township trustees may construct, repair, or otherwise improve public roads within its jurisdiction. R.C. 5571.01; R.C. 5573.01; 1987 Op. Att'y Gen. No. 87-046, at 2-302 ("authority to construct, repair, maintain and improve roads and highways within a township is conferred upon a board of township trustees by R.C. Chapters 5571 and 5573").

A member of a county planning commission carries out the functions of the commission in conjunction with the commission's other members. *See generally* R.C. 713.22(A) (members of a county planning commission shall include the board of county commissioners or their alternates and at least eight other members). A county planning commission is authorized by R.C. 713.23(A) to "make studies, maps, plans, recommendations and reports concerning the physical, environmental, social, economic, and governmental characteristics, functions, services, and other aspects of the … county." Such studies, maps, plans, recommendations, and reports may include, without limitation, standards and policies intended to realize particular goals and objectives, R.C. 713.23(B)(1)(a), recommendations about the use of land, water, air, utility, and communication systems, R.C. 713.23(B)(1)(c)-(d), maps or recommendations related to the locations of public and private works or areas for natural resource development, R.C. 713.23(B)(1)(e)-(f), administrative and regulatory measures designed to implement regional plans, R.C. 713.23(B)(2), recommendations on public facility and land use projects, R.C. 713.23(B)(5)-(6), and "other studies, planning, programming … found necessary in the development of plans for the … county." R.C. 713.23(B)(7). A county planning commission may hire employees, make necessary purchases, and may accept, receive, and expend federal or state funds, or funds from other political subdivisions, including other planning commissions.[10] R.C. 713.22(D).

A review of the duties and responsibilities of a member of a county planning commission and administrator of a home rule township discloses several potential conflicts of interest. First, a conflict of interest may arise for a person serving simultaneously as township administrator and member of a county planning commission if the county planning commission is faced with making planning recommendations that affect the development of the township in which a member of the commission serves as the township administrator. *Cf.* 2003 Op. Att'y Gen. No. 2003-041, at 2-342 (recognizing a similar conflict between the position of member of a county planning commission and the office of member of board of township trustees). For example, a county planning commission may create a county plan pursuant to R.C. 713.23 and R.C. 713.24. A board of county commissioners may adopt the county plan "so far as it relates to nonmunicipal

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[10] A county planning commission also may assume the powers and duties of the office of economic development created under R.C. 307.07. R.C. 713.23(B)(8). We have received no information that indicates the county planning commission, in this instance, is assuming these powers and duties. Accordingly, this opinion does not consider any conflicts of interest that may arise between a member of a county planning commission and an administrator of a home rule township when the county planning commission assumes the duties of the county office of economic development.

territory." R.C. 713.25. After a board of county commissioners adopts the county plan, "no public building, roadway, bridge, viaduct, or other public improvement or utility … whose construction or location would constitute a departure from the plan, shall be constructed or authorized by the board [of county commissioners] except by unanimous vote." *Id.* A county planning commission also may make planning recommendations with regard to a township zoning plan. *See generally* R.C. 519.05-.11. A board of township trustees may vote to adopt a township zoning plan on behalf of the township. *See* R.C. 519.10.

A county or zoning plan created or recommended by a county planning commission might have a direct bearing upon the construction and maintenance of township buildings, streets or roads, and other improvements. A board of township trustees is responsible for approving the construction of township buildings, maintaining streets or roads, and other public improvements. *See* R.C. 505.26; R.C. 5571.01; R.C. 5573.01. As the administrative head of the township, a township administrator may advise or assist a board of township trustees in these endeavors. *See* R.C. 505.032. Accordingly, a member of a county planning commission who also serves as an administrator of a home rule township in the same county may be unable to make disinterested planning recommendations or remain objective in creating county or township zoning plans when those recommendations or plans affect the development of the township in which he also serves. *Cf.* 2003 Op. Att'y Gen. No. 2003-041, at 2-342 ("[b]ecause township trustees are responsible for the construction of township buildings, roads, and other public improvements … and approving township zoning plans and amended plans, … a member of a county planning commission who is also a township trustee may be subject to divided loyalties when preparing plans or making suggestions or recommendations on plans affecting the development of the township which he serves as a trustee"). Further, a township administrator who also serves as a member of a county planning commission may find it difficult to remain disinterested when advising a board of township trustees on matters of zoning or planning that relate to or otherwise impact the plans or recommendations made by the county planning commission.

In 1963 Op. Att'y Gen. No. 63-109, p. 184, the Attorney General concluded that similar conflicts of interest between the office of member of a board of township trustees and the position of advisor to a county planning commission rendered those positions incompatible. The Attorney General acknowledged that an advisor to a county planning commission may be required to render advice that relates "to the location of highways, parks, civic centers, and other improvements," and that a board of township trustees has authority to improve roads in the unincorporated portions of the township. *Id.* at pp. 184-85. The Attorney General opined that "it would not be possible for the township trustee to render impartial advice" "[i]n instances where county and township interests" regarding such matters "do not coincide." *Id.* at p. 186.

Two years after the Attorney General issued 1963 Op. Att'y Gen. No. 63-109, p. 184, the General Assembly amended the statutes that govern the creation of county and regional planning commissions to explicitly allow a member of a county or regional planning commission to hold any other public office. *See* 1969-1970 Ohio Laws, Part I 797 (Am. S.B. No. 285, eff. Nov. 18, 1969); R.C. 713.21; R.C. 713.22(C). The Attorney General recognized that these amendments "reflect a policy of encouraging intergovernmental cooperation" in the context of planning

functions. 1977 Op. Att'y Gen. No. 77-034, at 2-123. Since the enactment of Am. S.B. No. 285, opinions of the Attorney General have found a variety of public offices or employments compatible with positions related to planning. *See, e.g.*, 2016 Op. Att'y Gen. No. 2016-034 (syllabus, paragraphs 1, 2, 3, and 4) (finding that a person may serve simultaneously as director of a regional planning commission or county planner and member of a village legislative authority or board of township trustees); 2003 Op. Att'y Gen. No. 2003-041 (syllabus, paragraphs 1 and 2) (concluding that a person may serve simultaneously as a township trustee or member of a township board of zoning appeals and member of a county planning commission); 2000 Op. Att'y Gen. No. 2000-018 (syllabus) ("[t]he positions of township trustee and county building, manufactured home and subdivision coordinator and flood plain coordinator are compatible"); 1977 Op. Att'y Gen. No. 77-034 (syllabus) (a person serving as a director of a regional planning commission may simultaneously hold any other public office). The Attorney General recognized the abrogation of 1963 Op. Att'y Gen. No. 63-109, p. 184 in 2000 Op. Att'y Gen. No. 2000-018, at 2-115, departing from the reasoning set forth in the 1963 opinion to conclude that a member of a board of township trustees may serve simultaneously as a county building, manufactured home, and subdivision coordinator and flood plain coordinator.

In keeping with recent opinions of the Attorney General, we conclude, in this instance, that the foregoing conflict of interest is remote and speculative and can be sufficiently mitigated to avoid incompatibility. A county planning commission does not have final authority to decide whether a county or township shall incorporate or adopt a county or township zoning plan. *See Holiday Homes, Inc. v. Butler Cnty. Bd. of Zoning Appeals*, 35 Ohio App. 3d 161, 520 N.E.2d 605 (Butler County 1987) (syllabus, paragraph 3) ("[a] county planning commission does not possess the authority to prevent or overrule a decision by a county board of zoning appeals on the granting of a conditional use permit, for the county planning commission's role in zoning is limited to such things as planning, gathering pertinent information, and making recommendations based thereon"). The authority to incorporate, adopt, and implement such plans rests with the board of county commissioners or the board of township trustees. Further, the responsibilities of the county planning commission to coordinate and engage in planning and to make planning recommendations do not relate to financial or budgetary matters.

An administrator of a home rule township also does not possess final decision-making authority with respect to township planning and zoning matters. Any assistance or advice provided to a board of township trustees by a township administrator in relation to such matters is subject to the approval and action of the board of township trustees. Therefore, this conflict of interest does not render the position of administrator of a home rule township incompatible with member of a county planning commission.

A second conflict of interest may arise for a person serving simultaneously in the position of administrator of a home rule township and member of a county planning commission if the county planning commission seeks to enter into an agreement with the township in which the township administrator is employed. *Cf.* 2011 Op. Att'y Gen. No. 2011-008, at 2-62 (addressing this conflict of interest with regard to the position of director of a county department of job and family services and a member of a charter city council). A township administrator that serves

simultaneously as member of a county planning commission may find it difficult to maintain objectivity in advising or assisting the board of township trustees about an agreement that may affect the county planning commission for whom he also serves. Similarly, a member of the county planning commission may be unable to remain objective in discussing, deliberating, negotiating, or voting on a contract between the commission and the township with which he is employed.

We find that this conflict of interest also is not sufficient to render the position of administrator of a home rule township incompatible with the position of member of a county planning commission. No statute requires a county planning commission to enter into a contract with a board of township trustees, and vice versa. Thus, the possibility that a township will enter into any agreements with a county planning commission is merely speculative. *Cf.* 2011 Op. Att'y Gen. No. 2011-008, at 2-62 ("it is only speculative whether a city and a county department of job and family services will enter into any such agreements"). Furthermore, a township administrator does not have final decision-making authority with respect to whether the township shall enter into an agreement with a county planning commission. Only a board of township trustees may execute contracts on behalf of the township. Therefore, any action undertaken by a township administrator is merely administrative, and subject to the control and direction of the board of township trustees. R.C. 505.031-.032. Moreover, there is a presumption that public officers and employees perform their duties in a regular and lawful manner in the absence of any evidence to the contrary. *See State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (syllabus, paragraph 10) ("[i]n the absence of evidence to the contrary, public officials, administrative officers, and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully").

A member of a county planning commission has final decision-making authority with respect to agreements entered into by the county planning commission. However, a member of a county planning commission who also serves as a township administrator may avoid an impermissible conflict of interest between the two positions by abstaining, in his role as member of the county planning commission, from any deliberations, discussions, negotiations, or votes concerning an agreement between the county planning commission and the township in which he is employed. *Cf.* 2011 Op. Att'y Gen. No. 2011-008, at 2-62 to 2-63 (recognizing that a city council member who serves as director of a CDJFS will be able to refrain from participating in deliberations, discussions, negotiations, or votes concerning an agreement between the city and department). A county planning commission is capable of functioning and performing the duties conferred upon it by statute when one of its members abstains from a matter. *See* R.C. 713.22(A) (a county planning commission is composed of eleven members); *State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604 (1965) ("[i]n the absence of a statute to the contrary, any action by a board requires that a quorum participate therein, and that a majority of the quorum concur"). Therefore, this conflict of interest does not render the position of

administrator of a home rule township incompatible with member of a county planning commission.[11]

A third conflict of interest may arise with respect to competition for tax dollars derived from taxes levied within the ten-mill limitation, commonly referred to as "inside millage."[12] *See generally* 2016 Op. Att'y Gen. No. 2016-012, at 2-120 ("[r]evenue derived from taxes levied within the ten-mill limitation is commonly referred to as inside millage"). The taxing authority of each township and other subdivision within the county is required to "adopt a tax budget for the next succeeding fiscal year."[13] R.C. 5705.28(A); *see also* R.C. 5705.01(A) (including any county, municipal corporation, or township within the meaning of "subdivision" as used in R.C. Chapter 5705). *But see* R.C. 5705.281 (a county budget commission, by majority vote, may waive the requirement that a subdivision adopt a tax budget). A tax budget estimates each subdivision's anticipated expenditures and receipts, including the amount of money each subdivision will require from the general property tax. *See* R.C. 5705.29 (listing the information each taxing unit shall include in its tax budget); *see also* R.C. 5705.09 (requiring each subdivision to establish certain funds into which tax revenues may be deposited and from which expenditures may be made). The county budget commission reviews each tax budget and adjusts the amounts each tax budget estimates will be required from the general property tax so as to bring the tax levies required therefor within the ten-mill limitation and other limitations specified in R.C. 5705.01 to R.C. 5705.47. *See* R.C. 5705.32(A). The amount of money required by each subdivision, as shown in each subdivision's tax budget, affects the amount of inside millage that will be allocated to each subdivision in the county. *See* 2011 Op. Att'y Gen. No. 2011-008, at 2-64. The amount of inside millage allocated to each subdivision dictates the amount of money that will be available for use by the subdivision's various departments, agencies, and offices.

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[11] We caution, however, that in the event a county planning commission enters into a contract with a home rule township in which a member of the county planning commission serves as the township administrator, the position of member of a county planning commission is incompatible with the position of township administrator under R.C. 511.13. *See* R.C. 511.13 (prohibiting an employee of a board of township trustees from being "interested in any contract entered into by such board").

[12] The total amount of state and local taxes levied on real property may not exceed ten mills on each dollar of the property's true value in money, except for those taxes that have been specifically authorized to be levied in excess thereof. Ohio Const. art. XII, § 2; R.C. 5705.02; *see also* 2005 Op. Att'y Gen. No. 2005-043, at 2-449 ("[t]axes levied by various taxing units may include both taxes within the 10-mill limitation (unvoted taxes) and taxes outside the 10-mill limitation (taxes authorized by the voters)"). A mill is a tenth part of one cent. *Black's Law Dictionary* 1008 (7th ed. 1999). This rule is known as the "ten-mill limitation." *See* R.C. 5705.02.

[13] A county planning commission is not a "subdivision" for the purpose of R.C. Chapter 5705 and therefore does not submit a tax budget.

As the taxing authority for a township, a board of township trustees is responsible for adopting a tax budget on behalf of the township. *See* R.C. 5705.01(C). It is the responsibility of the township administrator to "[k]eep the board [of township trustees] fully advised on the financial conditions of the township" and to "prepar[e] and submit[] a budget for the next fiscal year." R.C. 505.032(F). A township tax budget includes any allocations made by the board of township trustees to pay the salary of the township administrator. *See* R.C. 505.031(C) ("[t]he board shall fix the salary of the township administrator and cause the same to be paid").

A board of county commissioners is the taxing authority for a county. *Id.* The annual budget estimates of all county expenditures, including any allocations made by the board of county commissioners to a county planning commission, are included in the tax budget of the county. *See* R.C. 307.152 (a board of county commissioners may pay the costs associated with planning from the county general fund); R.C. 713.22(D) ("[t]he compensation and expenses of the appointive members of a county planning commission and the compensation of planning commission employees shall be paid from appropriations made by the board [of county commissioners]"); R.C. 5705.29(A)(1). The tax budgets submitted by all of the subdivisions in the county, including all townships within the county and the county itself, compete for the limited inside millage available. Accordingly, an administrator of a home rule township who also serves as a member of a county planning commission may find it difficult to maintain objectivity in completing budgetary tasks for the township, knowing that the amount of inside millage eventually allocated to the township may affect the amount of money allocated to the county, and ultimately, the county planning commission. Conversely, a member of a county planning commission may be unduly influenced in his management of commission expenses if a decrease in those expenses would decrease the amount allocated to the commission by the board of county commissioners and thereby potentially increase the amount of inside millage available to the township in which the member serves as township administrator.

Although this conflict of interest relates to financial and budgetary matters, we conclude that this conflict of interest also is not sufficient to render the position of township administrator incompatible with the position of member of a county planning commission. *Cf.* 2016 Op. Att'y Gen. No. 2016-034, slip op. at 17. The causal link between the actions of a member of a county planning commission in managing commission expenses or of a township administrator of a home rule township in completing budgetary tasks for the township and the amount of inside millage allocated to a county or a township by the county budget commission is too attenuated to prohibit a person from serving in both positions. The overall tax budget for the county includes an estimate for allocations to a county planning commission. R.C. 5705.29(A)(1). The compilation and adoption of the county's tax budget is completed by the board of county commissioners. R.C. 5705.01(A) (defining "subdivision" to include a county); R.C. 5705.01(C) (defining "taxing authority" to mean, in the case of a county, the board of county commissioners); R.C. 5705.28(A) (requiring the taxing authority of each subdivision to "adopt a tax budget for the next succeeding fiscal year"). Although a member of a county planning commission may make decisions that affect the expenses of the county planning commission, a member of a county planning commission does not exercise any decision-making authority in the preparation and presentation of the county's annual tax budget. *Cf.* 2011 Op. Att'y Gen. No.

2011-008, at 2-65. Furthermore, any undue influence a member of a county planning commission might exert in an effort to affect allocations to the commission by the board of county commissioners may be tempered by the other members of the county planning commission. *Cf.* 2011 Op. Att'y Gen. No. 2011-008, at 2-63.

Preparing and submitting a township tax budget to the board of township trustees is one of the primary duties of a township administrator.[14] R.C. 505.032(F). Nevertheless, any undue influence that a township administrator might exert in compiling and submitting a township tax budget may be mitigated by the role that the board of township trustees plays in the budgeting process. *Cf.* 2016 Op. Att'y Gen. No. 2016-034, slip op. at 18; 2011 Op. Att'y Gen. No. 2011-008, at 2-65 to 2-66 (the city's "annual tax budget must be approved by the entire council, of which the person who also serves as director of the [CDJFS] is only one voting member"); *see also generally State ex rel. Speeth v. Carney* (syllabus, paragraph 10). The authority to adopt a township tax budget rests with a board of township trustees, not a township administrator. Further, after its adoption, a tax budget is subject to further review, adjustment, and approval by the county budget commission. 2016 Op. Att'y Gen. No. 2016-034, slip op. at 18; 2011 Op. Att'y Gen. No. 2011-008, at 2-66. Neither a township administrator nor a board of township trustees has the final power to determine the amount of inside millage that the township will ultimately receive.[15] Accordingly, based upon the foregoing mitigating factors, we conclude that this conflict of interest is not sufficient to render the position of member of a county planning commission incompatible with the position of administrator of a home rule township.

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[14] Before the county budget commission makes final determinations with respect to the tax budgets, representatives of each subdivision may appear before the commission to explain the subdivision's financial needs. R.C. 5705.32(E)(2). An administrator of a home rule township who also serves as a member of a county planning commission within the same county should not be designated by the township to present the township tax budget to the county budget commission. Presenting a tax budget to the county budget commission that competes with another tax budget in which the individual presenting also has an interest is a significant conflict of interest that would render the position of administrator of a home rule township and member of a county planning commission incompatible. *See* 2016 Op. Att'y Gen. No. 2016-034, slip op. at 19 n.15; 2011 Op. Att'y Gen. No. 2011-008, at 2-66.

[15] "R.C. 5705.31(D) … requires a county budget commission to approve a minimum levy within the ten-mill limitation for the current expense and debt service of each subdivision or other taxing unit that existed during the last five years the fifteen-mill limitation was in effect (the period of 1929 through 1933)." 2016 Op. Att'y Gen. No. 2016-012, at 2-122. If any inside millage is left unallocated after the county budget commission approves the minimum levy and other mandated levies as required by R.C. 5705.31(A)-(E), the county budget commission—not the taxing authority of any subdivision—"has broad discretion to allocate the non-mandated, or 'free' millage among the subdivisions." 2016 Op. Att'y Gen. No. 2016-012, at 2-122 n.9.

A fourth potential conflict exists with respect to competition for tax dollars in excess of the ten-mill limitation. R.C. 713.22(D) states that "[t]he compensation and expenses of the appointive members of a county planning commission and the compensation of planning commission employees shall be paid from appropriations made by the board [of county commissioners]." When "the amount of taxes that may be raised within the ten-mill limitation will be insufficient to provide for" these expenses, R.C. 5705.19(A) authorizes a board of county commissioners to "levy a tax in excess of the ten-mill limitation" and use the proceeds thereof to meet the expenses set forth in R.C. 713.22(D). *See* 1957 Op. Att'y Gen. No. 1123, p. 508 (syllabus) ("[a] board of county commissioners, acting under authority of [R.C. 5705.19], may submit the question of a tax levy, outside the ten-mill limitation, for current operating expenses, and if such levy is approved may use the proceeds thereof to meet the expenses of a county planning commission as authorized by [R.C. 713.22]").

An administrator of a home rule township advises a board of township trustees "on the financial conditions of the township" and prepares the township's tax budget. R.C. 505.032(F). If the amount of money generated by taxes levied within the ten-mill limitation will be insufficient to fund the purposes of the township, the board of township trustees, as the taxing authority of a township, may place levies on the ballot for taxes in excess of the ten-mill limitation and submit bond issues to the electors. R.C. 133.18; R.C. 5705.01(C); R.C. 5705.07; R.C. 5705.19. If a board of county commissioners has placed a tax levy on the ballot to fund the operations of the county planning commission or to compensate the commission's members, a member of the county planning commission who also serves as an administrator of a home rule township within the same county, may find it difficult, as township administrator, to remain objective and disinterested in advising the board of township trustees of the financial conditions of the township, for fear that the county levy may be rejected in favor of a township levy, should one be considered. *See* 2011 Op. Att'y Gen. No. 2011-008, at 2-66 to 2-67; 2007 Op. Att'y Gen. No. 2007-023, at 2-241.

We conclude that this conflict of interest also does not render the positions of member of a county planning commission and administrator of a home rule township incompatible. The instances should be infrequent in which a board of county commissioners places an issue on the ballot to fund the operations of a county planning commission or to compensate the members of the commission at the same time a township in which a member of the county planning commission also serves as the township administrator places a tax levy or bond issue for additional funding on the ballot. 2016 Op. Att'y Gen. No. 2016-034, slip op. at 19; 2011 Op. Att'y Gen. No. 2011-008, at 2-67 ("it is unlikely that a city and county will both have a tax levy or bond issue on the same ballot every election"); 2007 Op. Att'y Gen. No. 2007-023, at 2-241 ("[i]t is unlikely that both the village and township will have a tax levy or bond issue on the same ballot every election. Thus, deliberations, discussions, or votes by the legislative authority of the village concerning the placement of a tax levy or bond issue for additional funding on the ballot when the township has previously placed such a levy or bond issue on the ballot will be infrequent").

Moreover, an administrator of a home rule township does not exercise decision-making authority with respect to adopting a township tax budget or levying a tax on behalf of the township. The officers responsible for adopting a tax budget or levying a tax are the township trustees. *See* 2016 Op. Att'y Gen. No. 2016-034, slip op. at 17. Although the administrator of a home rule township is involved in the preparation of the township tax budget and advises the board of township trustees on the financial conditions of the township, any undue influence the administrator might exert is tempered by the final decision-making authority of the board of township trustees to adopt a budget on behalf of the township and determine whether to levy taxes on behalf of the township in excess of the ten-mill limitation.

A person serving simultaneously as a member of a county planning commission and administrator of a home rule township may be subject to conflicts of interest. The conflicts of interest, as discussed above, are remote and speculative and able to be sufficiently mitigated and avoided in the event they arise. Furthermore, R.C. 713.22(C) explicitly authorizes a member of a county planning commission to hold any other public office, which includes the office of member of a board of township trustees. The duties and responsibilities of a township administrator are derivative of those of a member of a board of township trustees, and any actions taken by a township administrator are subject to the board's direction and control. It would be illogical to conclude that a person may not serve simultaneously as an administrator of a home rule township and member of a county planning commission, while at the same time acknowledging that a person may serve simultaneously as a member of a board of township trustees of a home rule township and member of a county planning commission. Accordingly, based upon the policy reflected in R.C. 713.22(C) and the mitigating factors discussed above, question five of the compatibility analysis may be answered in favor of compatibility.

Question Six: Local Charters, Resolutions, and Ordinances

Question six of the seven-part compatibility test asks whether any local charter provisions, resolutions, or ordinances limit the holding of outside public employment by a member of a county planning commission or an administrator of a home rule township. Whether any local charter provisions, resolutions, or ordinances apply is a matter of local concern. *See* 1996 Op. Att'y Gen. No. 96-062, at 2-252; 1993 Op. Att'y Gen. No. 93-016, at 2-85; 1979 Op. Att'y Gen. No. 79-111, at 2-368. We therefore presume, having received no information to the contrary, that no local charter provisions, resolutions, or ordinances prohibit one person from holding the position of member of a county planning commission and administrator of a home rule township.

Question Seven: State, Federal, or Local Departmental Regulations

Question seven of the compatibility analysis asks whether any state, local, or federal departmental regulations limit the holding of outside public employment by a member of a county planning commission or an administrator of a home rule township. There are no federal, state, or local departmental regulations applicable. Accordingly, the final question of the compatibility analysis may be answered in favor of compatibility.

Conclusions

It is our opinion, and you are hereby advised that:

1. The position of administrator of a home rule township is not a "public office," as that term is used in R.C. 713.22(C).

2. A person may serve simultaneously as administrator of a home rule township and member of a county planning commission provided that no contract exists between the county planning commission and the township, and provided that, as a member of the county planning commission, the person abstains from discussing, deliberating, negotiating, or voting on a contract between the commission and the home rule township in which he serves as administrator. An administrator of a home rule township that serves simultaneously as a member of a county planning commission may not present the tax budget of the township to the county budget commission or explain to the county budget commission the financial requirements of the township, as reflected in the township's tax budget.

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General