

October 4, 2016

The Honorable Keller J. Blackburn  
Athens County Prosecuting Attorney  
1 South Court Street  
Athens, Ohio 45701

SYLLABUS:

2016-034

1. A person may serve simultaneously as director of a regional planning commission and member of a village legislative authority provided that no contract exists between the regional planning commission and the village. If a director of a regional planning commission is a “State or local ... employee” as defined in 5 U.S.C.A. § 1501(4) and 5 C.F.R. § 151.101(d), and the salary of the director is paid completely, directly or indirectly, by federal loans or grants, a person may serve simultaneously as director of a regional planning commission and member of a village legislative authority only if the person seeks election to the village legislative authority in a nonpartisan election.
2. A person may serve simultaneously as director of a regional planning commission and member of a board of township trustees provided that no contract exists between the regional planning commission and the township. If a director of a regional planning commission is a “State or local ... employee” as defined in 5 U.S.C.A. § 1501(4) and 5 C.F.R. § 151.101(d), and the salary of the director is paid completely, directly or indirectly, by federal loans or grants, a person may serve simultaneously as director of a regional planning commission and member of a board of township trustees only if the person seeks election to the board in a nonpartisan election.
3. A person may serve simultaneously as county planner and member of a village legislative authority provided that no contract exists between the board of county commissioners by whom the county planner is employed and the village. If the salary of the county planner is paid completely,

directly or indirectly, by federal loans or grants, and the county planner is a “State or local ... employee” as defined in 5 U.S.C.A. § 1501(4) and 5 C.F.R. § 151.101(d), a person may serve simultaneously as county planner and member of a village legislative authority only if the person seeks election to the office of member of a village legislative authority in a nonpartisan election.

4. A person may serve simultaneously as county planner and member of a board of township trustees provided that no contract exists between the board of county commissioners by whom the county planner is employed and the township. If the salary of the county planner is paid completely, directly or indirectly, by federal loans or grants, and the county planner is a “State or local ... employee” as defined in 5 U.S.C.A. § 1501(4) and 5 C.F.R. § 151.101(d), a person may serve simultaneously as county planner and member of a board of township trustees only if the person seeks election to the office of member of a board of township trustees in a nonpartisan election.



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October 4, 2016

OPINION NO. 2016-034

The Honorable Keller J. Blackburn  
Athens County Prosecuting Attorney  
1 South Court Street  
Athens, Ohio 45701

Dear Prosecutor Blackburn:

We have received your request whether the position of county planner or director of a regional planning commission (“RPC”) is compatible with service as a member of a village legislative authority or board of township trustees within the same county.<sup>1</sup> Whether two public offices or positions are compatible depends upon the answers to the following seven questions:

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<sup>1</sup> In this instance, the person serving as county planner also serves as the director of a regional planning commission (“RPC”). An RPC may be created by “[t]he planning commission of any municipal corporation or group of municipal corporations, any board of township trustees, and the board of county commissioners of any county in which the municipal corporation or group of municipal corporations is located or of any adjoining county.” R.C. 713.21(A). An RPC shall serve “any region defined as agreed upon by the planning commissions and boards, exclusive of any territory within the limits of a municipal corporation not having a planning commission.” *Id.* The RPC by whom the director is employed was created by the Athens County Board of Commissioners and the Planning Commission of the City of Athens. Athens County Regional Planning Commission (“ACRPC”) Bylaws, Preamble. The RPC serves “all of Athens County exclusive of” certain municipal territory. *Id.* at Art. I.

You advise that the position of county planner was created by, and is subordinate to, the board of county commissioners. The position of director of the RPC was created by, and is responsible to, the RPC. *See id.* at Art. II (members of the ACRPC), Art. VII (authorizing the employment of a director). The members of the RPC include the members of the Athens County Board of Commissioners and various county and municipal representatives. *Id.* at Art. II. Presently, the positions of county planner and director of the RPC are performed by the same person and the duties of those positions overlap in many respects. Nevertheless, these positions are hired by, and responsible to, different appointing authorities and are therefore separate positions. Accordingly, we will consider the position of county planner and the position of director of the RPC separately in evaluating the compatibility of those positions with the office

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.

### **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.<sup>2</sup> 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

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of member of a village legislative authority or board of township trustees. This opinion does not address whether a person may serve simultaneously as a county planner and director of an RPC.

<sup>2</sup> 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.

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”). You advise that the county planner is a member of the unclassified civil service. Pursuant to R.C. 124.11(A)(9), “those persons employed by and directly responsible to elected county officials ... and holding a fiduciary or administrative relationship to such elected county officials” are in the unclassified civil service of the county. The county planner, in this instance, is employed by the board of county commissioners. Therefore, the county planner is “employed by and directly responsible to elected county officials.” R.C. 124.11(A)(9); *see also* R.C. 305.01 (members of a board of county commissioners are elected county officials); *Johnson v. State Dep’t of Admin. Servs.*, 54 Ohio Misc. 7, 10, 375 N.E.2d 1268 (C.P. Montgomery County 1977) (the position of Deputy Director of the Miami Valley Regional Planning Commission is in the unclassified civil service). Whether the county planner holds a fiduciary or administrative relationship to the board of county commissioners within the meaning of R.C. 124.11(A)(9) is a question of fact appropriate for determination by the State Personnel Board of Review, not a formal opinion of the Attorney General.<sup>3</sup> *See* 2B Ohio Admin. Code 124-1-02(C) (“[w]hether one position occupies an administrative relationship to another is a question of fact to be determined by the [State Personnel Board of Review]”); rule 124-1-02(I) (“[w]hether one position occupies a fiduciary relationship to another is a question of fact to be determined by the [State Personnel Board of Review]”); 2009 Op. Att’y Gen. No. 2009-037, at 2-281 (“[w]hether a particular position is fiduciary or administrative for purposes of R.C. 124.11(A)(9) is a question of fact”); *see also* 2B Ohio Admin. Code 124-1-01(B) (“[u]nless exempted from the classified

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<sup>3</sup> A fiduciary relationship exists when an employee’s position “connotes special confidence and trust” and is a superior position within the office. 2015 Op. Att’y Gen. No. 2015-032, at 2-309 (quoting *Davis v. Jones*, No. 93 CA 06, 1993 WL 405486, at \*5 (Hocking County Sep. 28, 1993)); *see also* 2B Ohio Admin. Code 124-1-02(I) (“[f]iduciary relationship’ generally means a relationship where the appointing authority reposes a special confidence and trust in the integrity and fidelity of an employee to perform duties which could not be delegated to the average employee with knowledge of the proper procedures. These qualifications are over and above the technical competency requirements to perform the duties of the position”). An administrative relationship exists when “an employee has substantial authority to initiate discretionary action and/or in which the appointing authority must rely on the employee’s personal judgment and leadership abilities.” Rule 124-1-02(C).

service by statute, all positions in the service of ... the counties ... are in the classified service. The [State Personnel Board of Review] has jurisdiction to determine whether any position, not specifically exempted, falls within the general exemptions set forth in [R.C. 124.11(A)]”. Nevertheless, for the purpose of this opinion, we will presume that the county planner holds a fiduciary or administrative relationship to the board of county commissioners within the meaning of R.C. 124.11(A)(9) and is therefore a member of the unclassified civil service, as you advise. Accordingly, in this circumstance, R.C. 124.57 does not prohibit a county planner from participating in partisan political activity.

The prohibition in R.C. 124.57 also does not apply to a director of an RPC, a member of a village legislative authority, or a member of a board of township trustees. 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.”<sup>4</sup> An RPC is separate from the counties, townships, or municipal corporations that join in its creation. 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”). An employee of an RPC, therefore, is not an employee of the state or one of the political subdivisions enumerated in R.C. 124.57(A).

R.C. 124.57(A) also does not prohibit an officer of a village or a township that is not a civil service township from participating in partisan political activity. *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, a trustee of a township that is a civil service township is excluded from the prohibition in R.C. 124.57(A) by R.C. 124.11(A)(1). *See* 2011 Op. Att’y Gen. No. 2011-034, at 2-266 (“[a]s an elected public officeholder, a township trustee is not in the classified service”). R.C. 124.11(A)(1) explicitly excludes “officers elected by popular vote” from the classified civil service. A township trustee is an officer elected by vote in a general election. *See* R.C. 505.01. Accordingly, the first question of the compatibility analysis may be answered in favor of compatibility.

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<sup>4</sup> “‘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).

**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”). A member of a village legislative authority is prohibited by R.C. 731.12 from holding “any other public office.” Therefore, if a person employed as a county planner or director of an RPC holds a public office, the county planner or director may not, under R.C. 731.12, serve simultaneously as a member of a village legislative authority.<sup>5</sup>

The term “public office” is not defined for the purpose of R.C. 731.12 or more generally for purposes of R.C. Chapter 731 (organization of municipal government) 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 N.E. 919 (1917)); *see also* 2013 Op. Att’y Gen. No. 2013-008, at 2-78. 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.

Neither the position of county planner nor the position of director of an RPC is a public office. The position of county planner is created by, and responsible to, the board of county commissioners. The position of director of an RPC is created by the RPC. *See* R.C. 713.21 (authorizing an RPC to employ necessary employees). In this instance, the bylaws of the RPC authorize it to assign duties to the director and set the director’s compensation. *See* Athens County Regional Planning Commission (“ACRPC”) Bylaws, Art. II. Neither the county planner nor the director of the RPC gives bond for the faithful performance of her duties nor does a person serving in either position exercise independent, sovereign authority in executing her

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<sup>5</sup> A village that adopts a charter pursuant to Article XVIII, § 7 of the Ohio Constitution may include a provision in the charter that establishes qualifications for serving as a member of the village legislative authority that differ from those in R.C. 731.12.

responsibilities.<sup>6</sup> *See generally* 2001 Op. Att’y Gen. No. 2001-036, at 2-217 (sovereign functions include continuing, independent, political, or governmental functions). 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). Based upon the nature and characteristics of the positions of county planner and director of an RPC, we conclude that in this instance, neither position is a public office for the purpose of R.C. 731.12.

R.C. 731.12 also prohibits a member of a village legislative authority from having an interest in any contract with the village. R.C. 511.13 imposes the same prohibition upon a member of a board of township trustees, stating that “[n]o member of the board of township trustees ... shall be interested in any contract entered into by such board.” An impermissible interest in a contract with a village or township exists within the meaning of R.C. 731.12 and R.C. 511.13 when a person serving as a member of a village legislative authority or board of township trustees is employed by an entity that has entered into a contract with the township or village. *See* 2008 Op. Att’y Gen. No. 2008-002 (syllabus, paragraph 2) (“[a] trustee ... of a township who is employed by an entity with which the township enters into a contract has an interest in the contract for purposes of R.C. 511.13, regardless of whether it can be demonstrated that the trustee ... has a direct pecuniary or personal interest in the contract”). *Cf.* 1973 Op. Att’y Gen. No. 73-043, at 2-167 to 2-168. The person’s abstention from any discussions, negotiations, decision-making, or votes regarding the contract prior to its execution does not affect the application of R.C. 511.13 and R.C. 731.12 once a contract has been reached. *See* 2008 Op. Att’y Gen. No. 2008-002, at 2-12 to 2-13. When the township or village in which the person serves as a member of the board of township trustees or member of the village legislative authority enters into a contract with an entity in which the person also is employed, the person has an impermissible interest in the contract within the meaning of R.C. 511.13 or R.C. 731.12 notwithstanding whether she abstained from the discussions, negotiations, decisions, and votes pertaining to the contract prior to its execution. *Id.* Thus, a county planner or a director of an RPC that serves simultaneously as a member of a village legislative authority or board of township trustees has a prohibited interest in a contract with the village or township, as proscribed by R.C. 731.12 and R.C. 511.13, if the board of county commissioners or RPC, respectively, enters into a contract with the village or township.

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<sup>6</sup> The county planner is responsible for coordinating strategic planning in the county by, among other things, studying and reporting various characteristics of the county, engaging in floodplain management, evaluating land use, coordinating with other governmental and private entities on planning issues, and performing other duties assigned by the board of county commissioners. The bylaws of the RPC authorize it to employ a director who “shall administer the day to day functions of [the] [R]PC,” may supervise other RPC employees, and may administer “contracts for professional services being provided to the [R]PC.” ACRPC Bylaws, Art. II.



In this matter we are not aware of any existing contracts that implicate R.C. 731.12 and R.C. 511.13 and thereby prohibit a county planner or director of an RPC from holding the office of member of a village legislative authority or board of township trustees. Nevertheless, if, at a later date, the board of county commissioners by whom the county planner is employed enters into a contract with a village or township in which the county planner also serves as a member of the village legislative authority or board of township trustees, the person serving simultaneously in the positions of county planner and member of a village legislative authority or board of township trustees will find herself in violation of R.C. 731.12 or R.C. 511.13. *See* R.C. 731.12 (“[n]o member of the legislative authority [of a village] shall ... be interested in any contract with the village.... Any member who ceases to possess any of such qualifications ... shall forfeit the member’s office”); 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). Similarly, if, at a later date, the RPC enters into a contract with a village or township in which the director of the RPC also serves as a member of the village legislative authority or board of township trustees, the person serving simultaneously as director of an RPC and member of a village legislative authority or board of township trustees will find herself in violation of R.C. 731.12 or R.C. 511.13.

No other constitutional or statutory provisions limit the outside employment of a member of a village legislative authority, a member of a board of township trustees, a county planner, or a director of an RPC. Therefore, the second question of the compatibility analysis may be answered in favor of compatibility.

### **R.C. 713.21 Authorizes a Director of a Regional Planning Commission to Hold Any Other Public Office**

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”). These questions ask whether one of the positions is subordinate to, or in any way a check upon, the other; whether it is physically possible for one person to perform the duties of both positions; and whether there is a conflict of interest between the two positions. 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. 713.21 provides, in part, that “[a]ny member of a regional planning commission may hold any other public office and may serve as a member of a city, village, or county planning commission, except as otherwise provided in the charter of any city or village.” In 1977 Op. Att’y Gen. No. 77-034 (syllabus), the Attorney General applied this language to a director of an RPC, concluding that “[p]ursuant to R.C. 713.21 the position of director [of an RPC] and the position of county administrator in the same county are not by operation of law incompatible.” The Attorney General reasoned:

As an employee of a[n] [RPC], the director may exercise only those powers and duties conferred upon him by the [RPC]. It is clear that the director cannot exercise any greater power than that granted to the members of a[n] [RPC]. It follows that since the members of the [RPC] are specifically authorized to hold other public office or serve on other planning commissions, a director employed by such a commission may also so serve.

*Id.* at 2-123. The Attorney General’s interpretation of R.C. 713.21 rendered “the traditional tests of incompatibility ... inapplicable.” *Id.*

Since the issuance of 1977 Op. Att’y Gen. No. 77-034, the General Assembly has amended R.C. 713.21 on two separate occasions. *See* Sub. S.B. No. 115, 125th Gen. A. (2004) (eff. Apr. 15, 2005); Am. H.B. No. 355, 116th Gen. A. (1986) (eff. Aug. 29, 1986). Neither amendment altered the language of R.C. 713.21 in a way that questions the conclusion reached in 1977 Op. Att’y Gen. No. 77-034. “In interpreting the meaning of legislative language, it is not unimportant that the General Assembly has failed to amend the legislation subsequent to a prior interpretation thereof.” 2010 Op. Att’y Gen. No. 2010-014, at 2-96 (quoting *Seeley v. Expert, Inc.*, 26 Ohio St. 2d 61, 72-73, 269 N.E.2d 121 (1971)). Similarly, no judicial or administrative tribunal has questioned the validity of 1977 Op. Att’y Gen. No. 77-034 or interpreted R.C. 713.21 in a way that undermines the Attorney General’s reading of the statute.

We find no compelling reason to depart from the reasoning reached in 1977 Op. Att’y Gen. No. 77-034. Therefore, we follow 1977 Op. Att’y Gen. No. 77-034 and conclude that R.C. 713.21 authorizes a director of an RPC to hold any other public office, including the office of member of a

village legislative authority or board of township trustees, notwithstanding the outcome of the common law portions of the compatibility analysis. Our conclusion makes a consideration of questions three, four, and five of the compatibility analysis unnecessary. *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).

**Questions Three, Four, and Five: Compatibility of the Position of County Planner and Office of Member of a Village Legislative Authority or Board of Township Trustees**

The General Assembly has not authorized the simultaneous holding of the position of county planner and office of member of a village legislative authority or board of township trustees. Therefore, it is necessary to consider questions three, four, and five of the compatibility test in evaluating the compatibility of those positions.

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 village legislative authority and member of a board of township trustees are elected public officeholders. R.C. 505.01; R.C. 731.09. As elected officials, a member of a village legislative authority and member of a board of township trustees are responsible to their respective electorates, and perform the duties imposed upon them by Ohio law. *See* 2014 Op. Att’y Gen. No. 2014-032, at 2-279 (“[a] township trustee, as an elected official, is responsible to the township’s electorate”); 1989 Op. Att’y Gen. No. 89-069, at 2-317 (“[a] village council member as an elected official, R.C. 731.09, is directly responsible to the people who elected him”).

The county planner is appointed by the board of county commissioners and subject to its direction and control. The county planner is appointed or elected by a different authority or body than a member of a village legislative authority or member of a board of township trustees. The county planner operates independently of a member of a village legislative authority or board of township trustees. The county planner is not accountable or subordinate to a member of a village legislative authority or board of township trustees, nor is a member of a village legislative authority or board of township trustees accountable or subordinate to the county planner. The county planner is not responsible for assigning duties to, or supervising the activities of, a member of a village legislative authority or board of township trustees. A member of a village legislative authority or board of township trustees is not responsible for assigning duties to, or supervising the activities of, the county planner. Accordingly, question three of the compatibility analysis may be answered in favor of compatibility.

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 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 county planner and the duties of a member of a village legislative authority or board of township trustees.

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.’”<sup>7</sup> 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). Whether a person who serves simultaneously as a county planner and a member of a village legislative authority or board of township trustees 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.

The position description provided to us indicates that the county planner is responsible for performing various planning functions for, or in cooperation with, the board of county commissioners and the RPC. The county planner is responsible for coordinating strategic planning in the county by cooperating with other units of government, engaging in hazard

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<sup>7</sup> As the Ohio Ethics Commission is authorized to determine the applicability of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-43, R.C. 102.08, the Attorney General “refrain[s] from interpreting and applying [those] provisions by way of a formal opinion.” 2011 Op. Att’y Gen. No. 2011-008, at 2-60 n.1. For a determination of whether those provisions apply to the positions at issue in this opinion, we recommend that you contact the Ohio Ethics Commission. *Id.*

mitigation planning and management, coordinating research, engaging in floodplain management, and reviewing, evaluating, and making recommendations on projects that affect development within the county. The county planner supervises subdivision activities such as plat map technical assistance, coordinates county grant applications and administration, develops county planning studies, and manages the county park department.

A member of a village legislative authority or board of township trustees is responsible for the management and governance of the village or township. *See generally* R.C. Title 7 (municipal corporations); 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”); 1991 Op. Att’y Gen. No. 91-036, at 2-191 (“[i]n general, members of the legislative authority of a village perform duties related to the government of the village”). A village legislative authority or a board of township trustees has the authority to enter into contracts on behalf of the village or township, *see, e.g.*, R.C. 9.60; R.C. 307.15; R.C. 505.37; R.C. 505.50; R.C. 701.07; R.C. 715.02; R.C. 717.01(A), (V); R.C. 731.14; R.C. 5549.04, acquire and dispose of real and personal property, *see, e.g.*, R.C. 505.10; R.C. 505.26; R.C. 719.01; R.C. 721.01; R.C. 723.121; R.C. 743.01, and construct and maintain buildings for village or township purposes, *see, e.g.*, R.C. 505.26; R.C. 717.01(B), (F), (K), (O), (S)(1), (AA); R.C. 715.16(A). The legislative authority of a village or the board of township trustees has the authority to pass ordinances or resolutions,<sup>8</sup> *see, e.g.*, R.C. 504.04; R.C. 505.371; R.C. 519.02; R.C. 731.17; R.C. 755.14, and to levy taxes upon the real and personal property in the village or township for the benefit of the village or township electorate, *see* R.C. 5705.01(C); R.C. 5705.03(A). As the taxing authority for the village or township, the village legislative authority or board of township trustees is responsible for adopting the village’s or township’s tax budget and submitting the tax budget to the county budget commission in accordance with the provisions in R.C. Chapter 5705. R.C. 5705.01(C); R.C. 5705.28(A).

A member of a village legislative authority or board of township trustees also possesses various powers and duties concerning the implementation and enforcement of village or township zoning regulations. *See* R.C. Chapter 519 (township zoning); R.C. 713.01-.15 (municipal planning and zoning). A village legislative authority may establish and maintain streets within the village limits and a board of township trustees may construct, repair, or otherwise improve public roads within its jurisdiction. R.C. Chapter 723; R.C. 5571.01; R.C. 5573.01; *see also* 2015 Op. Att’y Gen. No. 2015-006, at 2-64 n.7 (“[a] municipal corporation’s authority to establish and maintain its streets ‘has been long established and recognized as a ‘power of local self-government’ under Ohio Const. art. XVIII, § 3, a power exercised in conjunction with the authority conveyed to the municipal corporation under R.C. Chapter 723” (quoting 1982 Op. Att’y Gen. No. 82-012, at 2-40 n.1)); 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”).

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<sup>8</sup> A municipal corporation may enact ordinances and adopt resolutions, but a board of township trustees may only adopt resolutions.

A review of the duties and responsibilities of a county planner, a member of a village legislative authority, and member of a board of township trustees discloses several potential conflicts of interest. First, a conflict of interest may arise for a person serving simultaneously in the position of county planner and the office of member of a village legislative authority or board of township trustees if the county planner makes planning recommendations that affect the development of the village or township in which she serves as a member of the village legislative authority or board of township trustees. *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, the county planner may make planning recommendations that are incorporated into a regional plan adopted and certified by an RPC pursuant to R.C. 713.23-.24. A village planning commission to which a regional plan is certified has authority to adopt a regional plan on behalf of the village. R.C. 713.25. A board of county commissioners may adopt a regional plan “so far as it relates to nonmunicipal territory.” R.C. 713.25. A county planner, in coordination with an RPC, 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 regional or zoning plan adopted by a village planning commission, board of county commissioners, or board of township trustees, would have a direct bearing upon the construction and maintenance of village or township buildings, streets or roads, and other improvements. A village legislative authority or board of township trustees is responsible for approving the construction of village or township buildings, maintaining streets or roads, and other public improvements. *See* R.C. 505.26; R.C. 717.01(B), (F), (K), (O), (S)(1), (AA); R.C. 715.16(A); R.C. Chapter 723; R.C. 5571.01; R.C. 5573.01. Accordingly, a county planner who also serves as a member of a village legislative authority or board of township trustees may be unable to make disinterested planning recommendations when those recommendations affect the development of the village or township in which she 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 member of a village legislative authority or board of township trustees who also serves as a county planner may find it difficult to remain disinterested when reviewing, discussing, deliberating, and voting upon matters of zoning or planning that relate to or otherwise impact the planning recommendations made by her as county planner.

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 used in making this determination include, but are not limited to, “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.”

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

Upon a consideration of the foregoing factors, we conclude that the foregoing conflict of interest is remote and speculative and can be sufficiently mitigated so as to avoid incompatibility.<sup>9</sup> A county planner has no authority to make final decisions about the

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<sup>9</sup> In 1963 Op. Att’y Gen. No. 63-109, p. 184, the Attorney General concluded that substantial 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, the General Assembly amended the statutes that govern the creation of county and regional planning commissions. *See* Am. S.B. No. 285, 108th Gen. A. (1969) (eff. Nov. 18, 1969). The legislature amended R.C. 713.22 to state 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.” The legislature amended R.C. 713.21 to authorize a member of an RPC to hold any other public office or serve as a member of a city, village, or county planning commission.

The Attorney General relied upon those amendments in 1977 Op. Att’y Gen. No. 77-034 (syllabus) to conclude that a person serving as a director of a regional planning commission may simultaneously hold any other public office. R.C. 713.21 explicitly permits the holding of any public office by a member of an RPC. The Attorney General reasoned that if a member of an RPC may hold any other public office, an employee of an RPC (who would exercise no greater power than that granted to the RPC’s members) also may hold any other public office. 1977 Op. Att’y Gen. No. 77-034, at 2-123.

The reasoning set forth in 1977 Op. Att’y Gen. No. 77-034 reflects a policy that encourages intergovernmental cooperation on planning matters and calls into question the

incorporation or adoption of plans or regulations within the county. A county planner serves as an advisor to the board of county commissioners, and in this instance, the RPC. The authority to incorporate, adopt, and implement plans and regulations within the county or region rests with the county commissioners and the RPC. Further, the responsibilities of the county planner to coordinate and engage in planning and to make planning recommendations do not relate to financial or budgetary matters.

Depending upon the organizational structure of a village or township, a village legislative authority or board of township trustees may have final decision-making authority with respect to village or township planning or zoning matters. For example, a village legislative authority may adopt a plan for the streets and other public grounds within the village if the village does not have a village planning commission. R.C. 711.09(B)(1). A board of township trustees that has chosen to regulate building and land use within the unincorporated portions of the township pursuant to R.C. Chapter 519 has the authority to approve a township zoning plan. R.C. 519.10.<sup>10</sup>

Although a member of a village legislative authority or board of township trustees may be directly responsible for making decisions that relate to village or township planning and zoning matters, a member of a village legislative authority or board of township trustees who also serves as a county planner is able to abstain from participating in deliberations, discussions, or votes on such matters when they conflict with her duties and responsibilities as county planner. A village legislative authority or board of township trustees 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. 505.01 (a board of township trustees is composed of three members); R.C. 731.09 (the legislative authority of a village is composed of six or five 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”); 2001 Op. Att’y Gen. No. 2001-036, at 2-220 (recognizing that when presented with a conflict of interest, a member of a village legislative authority may remove himself from any deliberations, discussions, negotiations, or votes related to the conflict); 1999 Op. Att’y Gen. No. 99-004, at 2-23 (two township trustees constitute a quorum that is qualified to take action on behalf of the board). Moreover, if a member of a village legislative authority or board of township trustees is not able to abstain from discussing or making decisions about matters that conflict with her duties as county planner, any undue influence that a member of a village legislative authority or board of township trustees might exert may be mitigated by the role that the other members of the village legislative authority or board of township trustees play in the process. 2011 Op. Att’y Gen. No. 2011-008, at 2-65 to 2-66; *see also generally State ex*

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conclusion reached in 1963 Op. Att’y Gen. No. 63-109. Therefore, we are not inclined to consider or rely upon the determinations made in the 1963 opinion in our analysis here.

<sup>10</sup> A township zoning plan shall be submitted to the electors of the township for approval prior to the plan’s implementation. R.C. 519.11.



*rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (syllabus, paragraph 10) (there is a presumption that a member of a village legislative authority or board of township trustees will perform his duties in a regular and lawful manner in the absence of contrary evidence). Therefore, this conflict of interest does not render the position of county planner incompatible with the office of member of a village legislative authority or board of township trustees.

A second conflict of interest may arise with respect to a county planner's management of the county park department. R.C. 301.26 authorizes "[t]he board of county commissioners" to "acquire, construct, improve, maintain, operate, and protect parks, parkways, and forests, and provide an agency for their administration." A village legislative authority or a board of township trustees has the authority to establish and maintain village or township parks. R.C. 505.26; R.C. 505.261; R.C. 511.32; R.C. 715.21; R.C. 735.27; R.C. 755.12. Pursuant to R.C. 755.16(A), a county may agree "to jointly acquire, construct, operate, or maintain parks" with a village or township.

A member of a village legislative authority or board of township trustees who also serves as a county planner may find it difficult to hold disinterested discussions, deliberations, or votes related to the establishment or maintenance of village or township parks. For example, a decision by a village legislative authority or board of township trustees to enter into an agreement with a county to construct and maintain a park pursuant to R.C. 755.16, may affect the county planner in her management of the county park department.<sup>11</sup> In such a circumstance, a member of the village legislative authority or board of township trustees who serves simultaneously as county planner may not be able to remain impartial in discussing, deliberating, or voting on this or similar matters on behalf of the village or township.

This conflict of interest also is insufficient to render the office of member of a village legislative authority or board of township trustees incompatible with the position of county planner. First, the county planner has no authority to make final decisions with respect to the construction and location of parks or to determine whether the county should construct a park in conjunction with another political subdivision. The board of county commissioners is responsible for entering into agreements on behalf of the county and for acquiring land and receiving money for the acquisition, construction, improvement, maintenance, operation, and protection of county parks. R.C. 301.26.

A village legislative authority or board of township trustees makes final decisions with respect to the establishment of village or township parks or whether the village or township should construct a park in conjunction with another political subdivision. However, a member of

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<sup>11</sup> If the board of county commissioners by whom the county planner is employed enters into a contract with a village legislative authority or board of township trustees of which the county planner is a member, R.C. 511.13 and R.C. 731.12 render the position of county planner incompatible with the office of member of a village legislative authority or board of township trustees.

a village legislative authority or board of township trustees who also serves as a county planner is able to abstain from participating in deliberations, discussions, and votes on village or township matters when those matters conflict with her duties and responsibilities as county planner. *See* 2001 Op. Att’y Gen. No. 2001-036, at 2-220; 1999 Op. Att’y Gen. No. 99-004, at 2-23. Further, even if a member of a village legislative authority or board of township trustees is not able to abstain, the participation of the other members of the village legislative authority or board of township trustees mitigate any undue influence that the conflicted member might exert. 2011 Op. Att’y Gen. No. 2011-008, at 2-65 to 2-66; *see also generally State ex rel. Speeth v. Carney*, 163 Ohio St. 159 (syllabus, paragraph 10). Therefore, this conflict of interest does not render the position of county planner incompatible with the office of member of a village legislative authority or board of township trustees.

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.”<sup>12</sup> *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 village, township, and other subdivision within the county, including the county itself, is required to “adopt a tax budget for the next succeeding fiscal year.” 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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<sup>12</sup> 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.

As the taxing authority for a village or a township, a village legislative authority or a board of township trustees is responsible for adopting and submitting a tax budget on behalf of the village or township. *See* R.C. 5705.01(C). A board of county commissioners is the taxing authority for a county. *Id.* The annual budget estimates of all county departments and agencies, including a county park department established pursuant to R.C. 301.26, are included in the tax budget of the county. R.C. 5705.29(A)(1). The costs associated with the position of county planner also may be 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. 5705.29(A)(1). The tax budgets submitted by the county and all of the villages or townships within the county compete for the limited inside millage available. Accordingly, a county planner who also serves as a member of a village legislative authority or board of township trustees may find it difficult to maintain objectivity in completing the competing budgetary tasks required of her in either of those positions.<sup>13</sup>

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 county planner incompatible with the office of member of a village legislative authority or board of township trustees. An annual budget estimate for a county park department is included in the overall tax budget for the county. 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"). Therefore, even if a county planner is responsible for submitting the county park department's budget estimate to the board of county commissioners, the county planner "does not exercise independent decision-making authority in the preparation and presentation of" the county's annual tax budget. 2011 Op. Att'y Gen. No. 2011-008, at 2-65. Accordingly, any undue influence a county planner might exert in preparing the annual budget estimate for a county park department may be tempered by the actions taken by a board of county commissioners in compiling and adopting the tax budget that is submitted to the county budget commission for examination. *Cf. id.* ("[t]he board of county commissioners ... has the opportunity to counter any undue influence that [a director of a county department of job and family services] may have exerted in preparing the county department of job and family services' tax budget estimate").

Adopting a village or township tax budget is one of the primary duties of a village legislative authority or board of township trustees. *See* 1990 Op. Att'y Gen. No. 90-083, at 2-358. It is not practical for a member of a village legislative authority or board of township trustees to abstain from discussing or making decisions about the compilation or adoption of a

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<sup>13</sup> We do not know whether, in this instance, the county planner is responsible for compiling and submitting an annual budget estimate for the county park department to the board of county commissioners. For the purpose of this opinion, we will presume that the county planner possesses this responsibility.

village or township tax budget. In the course of addressing the compatibility of a member of a board of township trustees and a member of a city board of education, a prior opinion of the Attorney General recognized:

[t]he potential conflicts of interest over competition for tax moneys and possible budget decisions would arise each year, since budget and funding matters come before both the board of education and the board of township trustees on an annual basis. Since there are only three members of the board of township trustees ... and five members of the city board of education, ... it would, as a practical matter be laborious for the person in question, to remove himself from the conflicts by abstaining from taxing and budgetary matters.

1990 Op. Att’y Gen. No. 90-083, at 2-358; *see also generally* R.C. 505.01 (a board of township trustees is composed of three members); R.C. 731.09 (a village legislative authority is composed of five or six members).

Nevertheless, any undue influence that a member of a village legislative authority or board of township trustees might exert in compiling and adopting a village or township tax budget may be mitigated by the role the other members of the village legislative authority or board of township trustees play in the process. *Cf.* 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*, 163 Ohio St. 159 (syllabus, paragraph 10). Further, a tax budget adopted by a village or township is subject to further review, adjustment, and approval by the county budget commission. 2011 Op. Att’y Gen. No. 2011-008, at 2-66. A village legislative authority or board of township trustees does not have the final power to determine the amount of inside millage that the village or township will ultimately receive.<sup>14</sup>

Accordingly, based upon the foregoing mitigating factors, we conclude that a county planner may serve simultaneously as a member of a village legislative authority or board of township trustees notwithstanding that the job duties of those positions may require a person to

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<sup>14</sup> “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 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.

discuss, compile, or adopt tax estimates or budgets that compete for tax moneys generated within the ten-mill limitation.<sup>15</sup> *Cf.* 2011 Op. Att’y Gen. No. 2011-008, at 2-66.

A fourth potential conflict exists with respect to competition for tax dollars in excess of the ten-mill limitation. Pursuant to R.C. 5705.19(H) and (M), when “the amount of taxes that may be raised within the ten-mill limitation will be insufficient to provide for the necessary requirements of the” county, the board of county commissioners may levy a tax in excess of the ten-mill limitation “[f]or parks and recreational purposes” or “regional planning.” A village legislative authority or board of township trustees, as the taxing authority of a village or a township, is authorized to place levies on the ballot for taxes in excess of the ten-mill limitation and to submit bond issues to electors when the amount of money generated by taxes levied within the ten-mill limitation will be insufficient to fund the purposes of the village or township. 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 park department or pay the salary of the county planner, and a village legislative authority or board of township trustees within the same county contemplates asking the voters for additional funding, a person serving simultaneously as a member of the village legislative authority or board of township trustees and county planner may find it difficult to remain objective and disinterested in contemplating whether to submit a village or township tax levy to electors, for fear that the county levy may be rejected in favor of the village or township levy. *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. As we recognized in 2011 Op. Att’y Gen. No. 2011-008, at 2-67 (quoting 1988 Op. Att’y Gen. No. 88-011, at 2-43), “[q]uestions of competing concerns before the electorate may be critical in determining whether or when a board might consider bringing requests for additional taxes before the voters.”

We conclude that this conflict of interest also does not render the positions of county planner and member of a village legislative authority or board of township trustees incompatible. The instances will be rare in which a board of county commissioners places an issue on the ballot to fund the operations of a county park department or to pay the salary of a county planner at the same time a village or township in which the county planner also serves as a member of the village legislative authority or board of township trustees places a tax levy or bond issue for additional funding on the ballot. 2011 Op. Att’y Gen. No. 2011-008, at 2-67 (“it is unlikely that

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<sup>15</sup> 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). A county planner who also serves as a member of a village legislative authority or board of township trustees within the same county should not be designated by the county or by the village or township to present the tax budget for the county, village, or township to the county budget commission. Presenting a tax budget to the county budget commission that competes with another subdivision’s tax budget is a significant conflict of interest that would render the position of county planner and office of member of a village legislative authority or board of township trustees incompatible. *Cf.* 2011 Op. Att’y Gen. No. 2011-008, at 2-66.

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, a county planner does not exercise decision-making authority with respect to levying a tax pursuant to R.C. 5705.19. The officers responsible for determining whether to levy such a tax are the county commissioners. *See* R.C. 5705.19 (authorizing the taxing authority of any subdivision to levy a tax in accordance with that section); *see also* R.C. 5705.01(A) (defining “subdivision”); R.C. 5705.01(C) (defining “taxing authority”). Although a member of a village legislative authority or board of township trustees is directly responsible for authorizing levies in excess of the ten-mill limitation on behalf of a village or a township, a member of a village legislative authority or board of township trustees who also serves as a county planner is able to abstain from participating in deliberations, discussions, and votes on a village or township tax levy or bond issue for additional funding when the county has already placed a tax levy on the ballot to fund the operations of a county park department or pay the salary of the county planner. 2011 Op. Att’y Gen. No. 2011-008, at 2-67; 2004 Op. Att’y Gen. No. 2004-025, at 2-228.

A person serving simultaneously as a county planner and member of a village legislative authority or board of township trustees may be subject to conflicts of interest. The conflicts of interest, as discussed above, are remote and speculative. In the event conflicts of interest do arise, the conflicts can be sufficiently mitigated or avoided. Accordingly, question five of the compatibility analysis may be answered in favor of compatibility.

### **Questions Six: Local Charters, Resolutions, and Ordinances**

Question six of the seven-part compatibility test ask whether any local charter provisions, resolutions, or ordinances limit the holding of outside public employment by a county planner, a director of an RPC, member of a village legislative authority, or member of a board of township trustees. 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. There is no provision in the bylaws of the RPC, in this particular instance, that prohibits the director from serving in another public position. 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 county planner or director of an RPC and the office of member of a village legislative authority or board of township trustees.

### 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 county planner, director of an RPC, member of a village legislative authority, or member of a board of township trustees. There are no state or local departmental regulations applicable. With respect to federal law, the federal Hatch Act may apply in this instance. 5 U.S.C.A. §§ 1501-1508.

The Hatch Act prohibits a “State or local ... employee” from being “a candidate for elective office” “if the salary of the employee is paid completely, directly or indirectly, by loans or grants made by the United States or a Federal agency.”<sup>16</sup> 5 U.S.C.A. § 1502(a)(3). The Hatch Act defines “State or local ... employee” as “an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by” federal loans or grants.<sup>17</sup> 5 U.S.C.A. § 1501(4); *see also* 5 C.F.R. § 151.101(d). A “State or local agency” includes “the executive branch of a ... political subdivision of a State, or an agency or department thereof.” 5 U.S.C.A. § 1501(2); *see also* 5 C.F.R. § 151.101(a)-(b).

A board of county commissioners may be the executive branch of a county. *See Reddick v. Coshocton Cnty. Reg'l Airport*, Coshocton App. No. 04CA017, 2005-Ohio-2169, at ¶14 n.1 (“[w]e are unable to definitively determine whether a county board of commissioners is the functional equivalent of the executive branch or the legislative branch of the government, or potentially a combination of both”); *see also generally* 2011 Op. Att’y Gen. No. 2011-040, at 2-320 (“[i]t is beyond the scope of the formal opinion process to render authoritative interpretations of federal law”). A regional planning commission may be an agency of the executive branch of a political subdivision of the State of Ohio. *Cf. Special Counsel v. Suso*, 26

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<sup>16</sup> Division (a)(3) of 5 U.S.C.A. § 1502 does not apply to “an individual holding elective office.” 5 U.S.C.A. § 1502(c)(4). Therefore, if an individual holds an elective public office and is subsequently hired for a position that makes her a “State or local ... employee” and the employee’s salary is paid completely, directly or indirectly, by federal loans or grants, that individual does not have to resign her office, but may not seek reelection to that office while holding that position. *See* United States Office of Special Counsel, Hatch Act: Frequently Asked Questions, <https://osc.gov/Pages/HatchAct-FAQs.aspx> (choose “I am a State ... or Local Employee;” then choose the “+” sign next to the question, “If I hold a partisan elected office, does the Hatch Act prohibit me from accepting a position within State ... or local government where my salary is entirely federally funded?”) (last visited Oct. 3, 2016) (“[w]hile the Hatch Act prohibits a state, D.C., or local government employee whose salary is entirely federally funded from running for partisan political office, it does not prohibit the employee from holding partisan elective office”).

<sup>17</sup> Title 5 U.S.C.A. § 1501(4), divisions (A) and (B)(i)-(iii) provide exceptions to the definition of “State or local ... employee.” *See also* 5 C.F.R. § 151.101(d)(1), (2)(i)-(iii). Those exceptions are not relevant to your inquiries.

M.S.P.R. 673, 677 (Merit Sys. Prot. Bd. 1985) (determining that a four-county regional planning and development organization organized as a regional council of governments under Ohio law was a “State or local agency” under 5 U.S.C.A. § 1501(2)). Further, a board of county commissioners or regional planning commission may receive financial assistance from the federal government. *See, e.g.*, R.C. 303.37(E) (a board of county commissioners may apply for and accept federal grants or other forms of financial assistance for the purposes of R.C. 303.26-.56, which govern county rural zoning and the renewal of slums and blighted areas); R.C. 713.21 (a “regional planning commission may accept, receive, and expend funds, grants, and services from the federal government or its agencies”); R.C. 4561.09 (a county may accept federal funds for the establishment of an air navigation facility). Therefore, a county planner or a director of an RPC may be a “State or local ... employee” within the meaning of the Hatch Act if the board of county commissioners or RPC is a “State or local agency” under 5 U.S.C.A. § 1501(2) and the principal employment of the county planner or director of an RPC is in connection with an activity which is financed in whole or in part by federal grants or loans. If a county planner or director of an RPC is a “State or local ... employee” and the salary of the county planner or director of the RPC is paid completely, directly or indirectly, by federal grants or loans, the county planner or director is prohibited from being a “candidate for elective office.” 5 U.S.C.A. § 1502(a)(3).

“Elective office means any office which is voted upon at an election ..., but does not include political party office.” 5 C.F.R. § 151.101(i). An election, as used in the foregoing definition, “includes a primary, special, and general election.” 5 C.F.R. § 151.101(f). A member of a board of township trustees is nominated by petition and stands for election to that office on a nonpartisan ballot, “unless a majority of the electors of such township have petitioned for a primary election.” R.C. 3513.253; *see also* R.C. 3505.04; R.C. 3513.01; 2011 Op. Att’y Gen. No. 2011-034, at 2-267 n.4 (“[c]andidates for the office of township trustee are nominated by petition, rather than in a primary election.... When a township does not conduct a primary election for the office of township trustee, the candidates for such office appear on a nonpartisan ballot”); 1978 Op. Att’y Gen. No. 78-022, at 2-52. A member of a village legislative authority in a village with a population of less than two thousand also is nominated by petition and stands for election to that office on a nonpartisan ballot unless a majority of the electors of the village files a petition with the board of elections requesting a primary election. R.C. 3513.01(C) (“[p]rimary elections shall not be held for the nomination of candidates for election as officers of ... any municipal corporation having a population of less than two thousand, unless a majority of the electors of any such ... municipal corporation ... files with the board of elections of the county within which such ... municipal corporation is located ... a petition signed by such electors asking that candidates for election as officers of such ... municipal corporation be nominated as candidates of political parties”); R.C. 3513.251 (“[n]ominations of candidates for election as officers of a municipal corporation having a population of less than two thousand ... shall be made only by nominating petition and their election shall occur only in nonpartisan elections, unless a majority of the electors of such municipal corporation have petitioned for a primary election”); 1982 Op. Att’y Gen. No. 82-085, at 2-239 (“[c]andidates for council in villages with a population of less than two thousand persons are nominated by petition, rather than in a primary election, unless a majority of electors files a petition with the board of elections requesting a



primary.... The nominated candidates then seek election on a nonpartisan ballot”). Accordingly, the Hatch Act does not prohibit a “State or local ... employee” as defined in 5 U.S.C.A. § 1501(4) and 5 C.F.R. § 151.101(d), whose salary is paid completely, directly or indirectly, by federal grants or loans from serving simultaneously as a member of a board of township trustees or member of a village legislative authority when the township trustee or member of the village legislative authority is nominated by petition and elected after appearing on a nonpartisan ballot.

The election of a member of a board of township trustees or member of a village legislative authority transforms from nonpartisan to partisan when township or village electors petition for a primary election or when the candidate seeks election to a village legislative authority in a village with a population of two thousand or more persons. R.C. 3513.251; R.C. 3513.253; *see also* 1978 Op. Att’y Gen. No. 78-022, at 2-52 (“R.C. 3513.253 requires that a primary election be held upon petition of a majority of the electors in the township. Where such a primary is held the ensuing general election becomes partisan, with partisan ballots in use”). In those circumstances, the Hatch Act prohibits a “State or local ... employee” as defined in 5 U.S.C.A. § 1501(4) and 5 C.F.R. § 151.101(d), whose salary is paid completely, directly or indirectly, from federal loans or grants, from seeking election to the office of township trustee or member of a village legislative authority.

The final question of the compatibility analysis may be answered in favor of compatibility so long as the salary of a county planner or director of an RPC is not paid completely, directly or indirectly, by federal loans or grants. If the salary of a county planner or a director of an RPC is paid completely, directly or indirectly, by federal loans or grants and the county planner or director is a “State or local ... employee” as defined in 5 U.S.C.A. § 1501(4) and 5 C.F.R. § 151.101(d), the final question of the compatibility analysis may still be answered in favor of compatibility so long as the person that serves as county planner or director of an RPC seeks election to the office of member of a board of township trustees or member of a village legislative authority in a nonpartisan election.

### **Conclusions**

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

1. A person may serve simultaneously as director of a regional planning commission and member of a village legislative authority provided that no contract exists between the regional planning commission and the village. If a director of a regional planning commission is a “State or local ... employee” as defined in 5 U.S.C.A. § 1501(4) and 5 C.F.R. § 151.101(d), and the salary of the director is paid completely, directly or indirectly, by federal loans or grants, a person may serve simultaneously as director of a regional planning commission and member of a village legislative authority only if the person seeks election to the village legislative authority in a nonpartisan election.

2. A person may serve simultaneously as director of a regional planning commission and member of a board of township trustees provided that no contract exists between the regional planning commission and the township. If a director of a regional planning commission is a "State or local ... employee" as defined in 5 U.S.C.A. § 1501(4) and 5 C.F.R. § 151.101(d), and the salary of the director is paid completely, directly or indirectly, by federal loans or grants, a person may serve simultaneously as director of a regional planning commission and member of a board of township trustees only if the person seeks election to the board in a nonpartisan election.
3. A person may serve simultaneously as county planner and member of a village legislative authority provided that no contract exists between the board of county commissioners by whom the county planner is employed and the village. If the salary of the county planner is paid completely, directly or indirectly, by federal loans or grants, and the county planner is a "State or local ... employee" as defined in 5 U.S.C.A. § 1501(4) and 5 C.F.R. § 151.101(d), a person may serve simultaneously as county planner and member of a village legislative authority only if the person seeks election to the office of member of a village legislative authority in a nonpartisan election.
4. A person may serve simultaneously as county planner and member of a board of township trustees provided that no contract exists between the board of county commissioners by whom the county planner is employed and the township. If the salary of the county planner is paid completely, directly or indirectly, by federal loans or grants, and the county planner is a "State or local ... employee" as defined in 5 U.S.C.A. § 1501(4) and 5 C.F.R. § 151.101(d), a person may serve simultaneously as county planner and member of a board of township trustees only if the person seeks election to the office of member of a board of township trustees in a nonpartisan election.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE  
Ohio Attorney General