

October 19, 2018

The Honorable James VanEerten  
Ottawa County Prosecuting Attorney  
Ottawa County Courthouse  
315 Madison Street, Suite 205  
Port Clinton, Ohio 43452

SYLLABUS:

2018-024

1. A person may not serve simultaneously as a member of a board of county commissioners and voting member of the board of trustees of a transportation improvement district within the county appointed by the board of county commissioners pursuant to R.C. 5540.02(C)(2)(a).
2. A person may not serve simultaneously as a member of a board of county commissioners and nonvoting member of the board of trustees of a transportation improvement district within the county appointed by the Speaker of the Ohio House of Representatives or the President of the Ohio Senate pursuant to R.C. 5540.02(C)(2)(b) or R.C. 5540.02(C)(2)(c).



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October 19, 2018

OPINION NO. 2018-024

The Honorable James VanEerten  
Ottawa County Prosecuting Attorney  
Ottawa County Courthouse  
315 Madison Street, Suite 205  
Port Clinton, Ohio 43452

Dear Prosecutor VanEerten:

You have requested an opinion whether a person may serve simultaneously as a member of a board of county commissioners and voting member of the board of trustees of a transportation improvement district appointed by the board of county commissioners pursuant to R.C. 5540.02(C)(2)(a). You also ask whether a person may serve simultaneously as a member of a board of county commissioners and nonvoting member of the board of trustees of a transportation improvement district appointed by the Speaker of the Ohio House of Representatives pursuant to R.C. 5540.02(C)(2)(b) or the President of the Ohio Senate pursuant to R.C. 5540.02(C)(2)(c). You explain that the Ottawa County Board of Commissioners is interested in establishing a transportation improvement district pursuant to R.C. 5540.02 and wishes to adopt the governing structure for the district set out in R.C. 5540.02(C)(2). Under this structure, a transportation improvement district is governed by a board of trustees consisting of five voting members appointed by the board of county commissioners and two nonvoting members, one each appointed by the Speaker of the Ohio House of Representatives and President of the Ohio Senate.<sup>1</sup>

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<sup>1</sup> R.C. 5540.02(C)(2) states as follows:

(2) As an alternative to the structure prescribed in division (C)(1) of this section, a board of county commissioners, by resolution, may elect that the transportation improvement district it creates be governed by a board of trustees consisting of the following members:

(a) Five members appointed by the board of county commissioners;

### **Compatibility Test**

The following seven questions are used to determine whether a person may hold two public positions simultaneously:

1. Is either position in the classified service for purposes of R.C. 124.57?
2. Does a constitutional provision or statute prohibit a person from serving in both positions at the same time?
3. Is one position subordinate to, or in any way a check upon, the other position?
4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there an impermissible conflict of interest between the two positions?
6. Are there local charter provisions, resolutions, or ordinances that are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

2014 Op. Att’y Gen. No. 2014-022, at 2-196; 1979 Op. Att’y Gen. No. 79-111, at 2-367 to 2-368. All seven questions must be resolved in favor of compatibility for the positions to be compatible. 2013 Op. Att’y Gen. No. 2013-008, at 2-78. Consequently, if one of the seven questions is resolved against a finding of compatibility, then the positions are incompatible. *Id.* at 2-79.

### **Compatibility of County Commissioner and Voting Trustee of Transportation Improvement District Appointed by Board of County Commissioners Pursuant to R.C. 5540.02(C)(2)(a)**

We first examine the compatibility of the positions of member of a board of county commissioners and voting member of the board of trustees of a transportation improvement district appointed by the board of county commissioners pursuant to R.C. 5540.02(C)(2)(a).

We must determine whether either of the two positions is subordinate to, or in any way a check upon, the other. If one position is subordinate to or a check upon the other, then the two positions are rendered incompatible. The Ohio Supreme Court has stated that

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- (b) One nonvoting member appointed by the speaker of the house of representatives of the general assembly;
  - (c) One nonvoting member appointed by the president of the senate of the general assembly.

[o]ne of the most important tests as to whether offices are incompatible is found in the principle that incompatibility is recognized whenever one office is subordinate to the other in some of its important and principal duties, *or is subject to supervision or control by the other* ... or is in any way a check upon the other.

*State ex rel. Hover v. Wolven*, 175 Ohio St. 114, 116-117, 191 N.E.2d 723 (1963) (quoting 44 Ohio Jur. 2d, Public Officers, Section 37, at 524) (emphasis added); *see also* 2014 Op. Att’y Gen. No. 2014-022, at 2-199 to 2-200. “It is well established that a public officer is disqualified from serving on a board or commission to which he makes appointments, unless a statute authorizes the officer to hold the other position.” 2007 Op. Att’y Gen. No. 2007-020, at 2-209 (questioned, on other grounds, by 2014 Op. Att’y Gen. No. 2014-016); *see also* 1984 Op. Att’y Gen. No. 84-059, at 2-194 (“[i]t is well established that an officer may not serve on a board to which he makes appointments”).

A county commissioner, as an elected or appointed officeholder, is answerable to the voters of his or her county. *See* 2006 Op. Att’y Gen. No. 2006-041, at 2-396. A voting member of the board of trustees of a transportation improvement district, meanwhile, is subject to the control of the board of county commissioners because the member is appointed by the board of county commissioners pursuant to R.C. 5540.02(C)(2)(a). Thus, a person serving as county commissioner may exercise control over the position of member of the board of trustees of a transportation improvement district by virtue of his influence over the appointment of the transportation improvement district trustee. The position of member of the board of trustees of a transportation improvement district is, therefore, subordinate to the position of county commissioner when the board of county commissioners appoints the trustee pursuant to R.C. 5540.02(C)(2)(a), rendering the two positions incompatible. *See* 1996 Op. Att’y Gen. No. 96-022, at 2-78 (“[i]t is a long established principle that a board with authority to make appointments to a particular position may not appoint one of its own members to that position”). Moreover, no statute authorizes a person to serve simultaneously in both positions

Accordingly, the third question of the compatibility test is resolved against a finding of compatibility. Because we have resolved one of the seven questions of the compatibility test against a finding of compatibility, it is unnecessary for us to consider the remaining six questions. 2013 Op. Att’y Gen. No. 2013-008, at 2-79. We conclude that a person may not serve simultaneously as a member of a board of county commissioners and nonvoting member of the board of trustees of a transportation improvement district appointed by the board of county commissioners pursuant to R.C. 5540.02(C)(2)(a) due to the county commissioners’ control over the appointment of the trustee.

**Compatibility of County Commissioner and Nonvoting Trustee of Transportation Improvement District Appointed by Speaker of the House of Representatives or President of the Senate Pursuant to R.C. 5540.02(C)(2)(b) or R.C. 5540.02(C)(2)(c)**

We next turn to the question of whether a person may serve simultaneously as a member of a board of county commissioners and nonvoting member of the board of trustees of a transportation improvement district when the person is appointed to the board of trustees by the Speaker of the Ohio House of Representatives or the President of the Ohio Senate pursuant to R.C. 5540.02(C)(2)(b) or

R.C. 5540.02(C)(2)(c). In answering this compatibility question, we will consider all seven questions of the compatibility test.

The first question of the compatibility test asks whether either public position is a classified employment within the terms of R.C. 124.57, which prohibits an officer or employee in the classified service of the state or a county, among other political subdivisions, from participating in certain political activities:

No officer or employee in the classified service of the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political party or for any candidate for public office; ... nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state be an officer in any political organization or take part in politics other than to vote as the officer or employee pleases and to express freely political opinions.

R.C. 124.57(A); *see also* 2A Ohio Admin. Code 123:1-46-02(A), (C) (2017-2018 Supplement) (describing the prohibited political activities for employees in the classified civil service of the state). The classified civil service comprises “all persons in the employ of the ... several counties” unless specifically included in the unclassified civil service. *See* R.C. 124.11(B). Specifically included in the unclassified civil service are “[a]ll officers elected by popular vote or persons appointed to fill vacancies in those offices.” R.C. 124.11(A)(1). Moreover, R.C. 124.57 applies only to those officers and employees in the classified service of the state, counties, cities, city school districts, or civil service townships, and does not apply to any officer or employee not employed by the state or the enumerated political subdivisions of the state. If a person is an officer or employee of a subdivision not listed in R.C. 124.57, then the person is not in a category of classified civil service employees to which the prohibition in R.C. 124.57 applies. *See* 2016 Op. Att’y Gen. No. 2016-017, at 2-168 (a community college district is its own political subdivision to which the proscriptions in R.C. 124.57 do not apply); *see also* 2000 Op. Att’y Gen. No. 2000-025, at 2-167 (“[b]ecause R.C. 124.57 does not expressly refer to officers or employees in the service of a park district created pursuant to R.C. Chapter 1545, the officers and employees of such districts are not in the classified civil service for purposes of R.C. 124.57 .... The prohibition of RC. 124.57 thus does not apply”) (citations omitted).

As an elected officeholder, a member of a board of county commissioners is in the county’s unclassified service, rather than the classified service. *See* R.C. 124.11(A)(1); R.C. 305.01. Thus, R.C. 124.57 does not apply to the position of a member of a board of county commissioners and so does not prohibit a county commissioner from serving on the board of trustees of a transportation improvement district. Further, R.C. 124.57 does not apply to a member of the board of trustees of a transportation improvement district because a member of the board is not in the service of the several counties, the state, or the other political subdivisions listed in the statute. Accordingly, R.C. 124.57 does not apply to either a member of a board of county commissioners or a member of the board of

trustees of a transportation improvement district. The first question of the compatibility test is, therefore, resolved in favor of compatibility.

The second question of the compatibility test asks whether a constitutional provision or statute prohibits a person from serving in both positions at the same time. No constitutional provision or statute of which we are aware prohibits a person's simultaneous service as a county commissioner and nonvoting member of the board of trustees of a transportation improvement district. Accordingly, the second question of the compatibility test is resolved in favor of compatibility.

The third question of the compatibility test asks whether one of the two positions is subordinate to, or in any way a check upon, the other position. 2014 Op. Att'y Gen. No. 2014-022, at 2-199 to 2-200. As discussed above, a person may not serve simultaneously in two public positions when one of those positions has the authority to appoint the other position, or influence the appointment of that position. Thus, a county commissioner cannot also serve in one of the five voting positions on the board of trustees of a transportation improvement district organized under R.C. 5540.02(C)(2) because the county commissioner is a member of the board that appoints those positions and can influence the appointments.

The positions of county commissioner and nonvoting trustee of a transportation improvement district are not subject to the same subordination problem. A county commissioner, as an elected or appointed officeholder, is responsible to the voters of his or her county. 2006 Op. Att'y Gen. No. 2006-041, at 2-396. A person appointed as a nonvoting member appointed to the board of trustees of a transportation improvement district, meanwhile, is subject to the control and influence of the person's appointing authority, namely the Speaker of the Ohio House of Representatives or President of the Ohio Senate. R.C. 5540.02(C)(2)(b)-(c). The nonvoting member is not appointed by the board of county commissioners. Accordingly, if a person serves simultaneously as county commissioner and nonvoting member of the board of trustees of a transportation improvement district, the person exercises no control over the appointment of the nonvoting transportation improvement district trustee position. Rather, the Speaker of the House and President of the Senate have the sole authority over their respective appointments. The board of county commissioners has no control over the appointment or removal of the nonvoting members appointed pursuant to division R.C. 5540.02(C)(2)(b) or R.C. 5540.02(C)(2)(c). Accordingly, the positions of county commissioner and nonvoting member of the board of trustees of a transportation improvement district appointed by the Speaker of the House or President of the Senate are not subordinate to or a check upon the other. The third question of the compatibility test may, therefore, be answered in favor of compatibility.

The fourth question of the compatibility test asks whether it is physically possible for one person to serve simultaneously in and perform the duties of both positions. 2017 Op. Att'y Gen. No. 2017-043, at 2-411 to 2-412. Questions of the physical ability of one person to perform the duties of two public positions are generally questions of fact left to local officials to consider. *Id.* at 2-412 (quoting 2004 Op. Att'y Gen. No. 2004-051, at 2-438). We nevertheless note that, as an elected officeholder, a county commissioner is not required to devote a specific number of hours to the performance of his duties, apart from his duty to attend regular and special sessions of the board of county commissioners, including the requirement that a board of county commissioners "shall

conduct at least fifty regular sessions each year.” R.C. 305.06. Similarly, a member of the board of trustees of a transportation improvement district is not required to work a specified number of hours in carrying out the duties of the position. *See generally* R.C. Chapter 5540 (setting out the structure and authority of transportation improvement districts). Accordingly, presuming the physical ability of one person to serve simultaneously as a county commissioner and nonvoting trustee of a transportation improvement district, the fourth question of the compatibility test may be answered in favor of compatibility.

Before turning to the fifth question of the compatibility test, which asks whether any impermissible conflicts of interest prohibit a person from serving simultaneously in two positions, we will address the sixth and seventh questions of the test. The sixth question of the compatibility test asks whether any local charter provisions, resolutions, or ordinances prohibit the holding of the two positions. Whether any local charter provisions, resolutions, or ordinances apply is a matter of local concern. In other words, it is a fact-based question that local officials are best equipped to answer. *See* 2009 Op. Att’y Gen. No. 2009-005, at 2-24 to 2-25. We assume, for the purpose of this opinion, that no local charter provision, resolution, or ordinance prohibits a person’s simultaneous service as a member of a board of county commissioners and nonvoting member of the board of trustees of a transportation improvement district. Thus, the sixth question of the compatibility test may be answered in favor of compatibility.

The seventh question of the compatibility test asks whether any state, local, or federal departmental regulations prohibit a person from serving simultaneously as a member of a board of county commissioners and nonvoting member of the board of trustees of a transportation improvement district. Because there are no state, local, or federal departmental regulations that are applicable to this situation, the final question may also be answered in favor of compatibility.

As noted above, the fifth question of the compatibility test asks whether there are any impermissible conflicts of interest between the two positions.<sup>2</sup> A person may not serve simultaneously in two positions when a conflict of interest exists between the two positions. 2017 Op. Att’y Gen. No. 2017-014, at 2-130. “[C]onflicts of interest occur when a person who holds two positions at the same time is subject to divided loyalties, conflicting duties, or to the temptation to act other than in the public’s best interest.” 2009 Op. Att’y Gen. No. 2009-005, at 2-30. Determining whether a conflict of interest exists between two positions first requires us to examine the “powers, duties, and responsibilities of the respective positions.” *Id.* Then, if our review finds a conflict of interest between the two positions does indeed exist, we will next determine whether the conflict may

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<sup>2</sup> Pursuant to R.C. 102.08, the Ohio Ethics Commission determines the applicability of the ethics and conflict of interest provisions of R.C. Chapter 102, R.C. 2921.42, and R.C. 2921.43. The Attorney General, therefore “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. *See id.*

be sufficiently mitigated or eliminated entirely. “The mere existence of a conflict of interest does not automatically render two positions incompatible.” 2017 Op. Att’y Gen. No. 2017-035, at 2-343 (quoting 2017 Op. Att’y Gen. No. 2017-004, at 2-34). “When the possibility of conflict is remote and speculative and can be mitigated or avoided, the conflict of interest rule is not violated.” *Id.* (quoting 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”). In determining whether a conflict of interest can be sufficiently avoided or mitigated, we consider factors that include, but are not limited to, “the probability of the conflicts occurring, the ability of the person to remove himself from any conflicts that may occur, whether the person exercises decision-making authority in both positions, and whether the conflicts relate to the primary functions of each position, or to financial or budgetary matters.” 2004 Op. Att’y Gen. No. 2004-051, at 2-439.

We will first review the powers, duties, and responsibilities of a county commissioner. County commissioners are elected officeholders responsible for the governance of their respective counties. *See generally* R.C. Chapters 305 and 307 (setting forth the general powers and duties of a board of county commissioners). Their powers, duties, and responsibilities include, among other things, procuring group insurance for county employees, R.C. 305.171, entering into contracts on behalf of the county with other governmental entities, R.C. 307.15, creating a county office of economic development, R.C. 307.07, providing offices for county officers, R.C. 307.01-.02, and providing ambulance, emergency medical, firefighting, or nonemergency patient transport services, *see, e.g.*, R.C. 9.60; R.C. 307.05; R.C. 307.052.

A board of county commissioners is also responsible for the county’s budget and other fiscal matters. For instance, a board of county commissioners is the taxing authority of the county for purposes of Ohio’s uniform public securities law and tax levy law. R.C. 133.01(NN)(1); R.C. 5705.01(C). In its capacity as taxing authority, a board of county commissioners may issue securities for the purpose of providing funds with which to pay one or more final judgments rendered against the county, R.C. 133.14, and may issue securities for the purpose of paying all or any portion of the costs of any permanent improvement that the county is authorized to acquire, improve, or construct. R.C. 133.15. A board of county commissioners also adopts the county’s annual tax budget, R.C. 5705.28, and levies taxes, *see, e.g.*, R.C. 133.25; R.C. 5705.03; R.C. 5705.07; R.C. 5705.19. Finally, a board of county commissioners that establishes a transportation improvement district “may make appropriations from moneys available to [the board] and not otherwise appropriated, to pay costs incurred by the district in the exercise of its functions.” R.C. 5540.02(F).

We will next review the powers, duties, and responsibilities of a member of the board of trustees of a transportation improvement district. “A transportation improvement district is a body both corporate and politic.” R.C. 5540.02(B). A transportation improvement district is established by the board of county commissioners for the county in which the district will be located and is governed by a board of trustees. *See* R.C. 5540.02(A), (C). The primary purpose of a transportation improvement district is to construct, maintain, repair, and operate transportation projects, which include streets, highways, parking facilities, freight rail tracks and necessarily related freight rail facilities, bridges, tunnels, overpasses, interchanges, and other similar projects. *See* R.C. 5540.02(B);



R.C. 5540.01(C) (defining “project”). Through its board of trustees, a transportation improvement district may sue and be sued, R.C. 5540.03(A)(3), issue bonds for the purpose of providing moneys to pay for the costs of a project, R.C. 5540.03(A)(5), and establish and collect tolls or user charges for its projects. R.C. 5540.03(A)(12). A transportation improvement district may “[m]ake and enter into all contracts and agreements necessary or incidental to the performance of its functions and the execution of its powers.” R.C. 5540.03(A)(8). A district may also levy special assessments on benefited property for certain improvements after the board of trustees conducts a hearing. R.C. 5540.031(A), (C). A district may acquire any public or private property that is “necessary, convenient, or proper for the construction, maintenance, repair, or operation of a project.” R.C. 5540.04(A). Such property may be acquired by purchase, lease, lease-purchase, lease with option to purchase, appropriation, or otherwise. *Id.* Finally, a transportation improvement district may “[r]eceive and accept from the federal or any state or local government, including, but not limited to, any agency, entity, or instrumentality of any of the foregoing, loans and grants for or in aid of the construction, maintenance, or repair of any project.” R.C. 5540.03(A)(10).

Review of the powers, duties, and responsibilities of county commissioners and trustees of a transportation improvement district reveals three potential conflicts of interest between the two positions. The first conflict relates to a board of county commissioners regularly facing the question of whether to appropriate moneys to a transportation improvement district within the county. The second conflict arises from the authority of the board of trustees of a transportation improvement district to enter into contracts in which a county commissioner is prohibited from having a direct or indirect concern. The third conflict arises from the authority of the board of trustees of a transportation improvement district to accept grants or loans from a county. Therefore, conflicts of interest exist between the positions of county commissioner and nonvoting member of the board of trustees of a transportation improvement district. Accordingly, we must determine whether the conflicts of interest between these two positions may be sufficiently mitigated or avoided entirely such that the conflict of interest rule is not violated.

The primary conflict of interest between the position of county commissioner and nonvoting member of a transportation improvement district arises from the county commissioner’s authority to appropriate moneys to the transportation improvement district. “It is well established that where one public position has the power to appropriate funds to a second position, one person may not serve in both positions.” 1985 Op. Att’y Gen. No. 85-029, at 2-107; *see also* 1986 Op. Att’y Gen. No. 86-029, at 2-152 (“[t]he power of one body to fund a second body causes a clear conflict of interest between the positions of director of a port authority and commissioner of a county within the authority’s jurisdiction”). A board of county commissioners may adopt a spending plan as part of the county’s annual appropriation measure that “set[s] forth a quarterly schedule of expenses and expenditures of all appropriations for the fiscal year from the county general fund.” R.C. 5705.392(A). R.C. Chapter 5540 authorizes a board of county commissioners of a county that is part of a transportation improvement district to “make appropriations from moneys available to [the board] and not otherwise appropriated, to pay costs incurred by the district in the exercise of its functions under [R.C. Chapter 5540].” R.C. 5540.02(F). Thus, a county commissioner may be required to discuss, deliberate, or vote on appropriations to a transportation improvement district of which the county is a part.

A person who serves simultaneously as a county commissioner and nonvoting member of the board of trustees of a transportation improvement district may be inclined to discourage appropriations for entities or purposes unrelated to the district so that the person may ensure that more county moneys are available for the district. *See* 2017 Op. Att’y Gen. No. 2017-036, at 2-357 (“[a] county commissioner who also serves an entity that may receive an appropriation of county moneys may find himself subject to divided loyalties when he tries to balance the interests of that entity against the financial needs of the other county entities entitled to share in county general fund moneys”); 2002 Op. Att’y Gen. No. 2002-022, at 2-145 (“in the execution of his duty as county commissioner to adopt the county’s annual appropriation measure, an individual who was also director of the county’s children services board would be subject to divided loyalties, trying to balance the needs of the county board of which he is director against the competing financial needs of other entities entitled to participate in county funds”) (footnote omitted). “[P]otential conflicts involving budgetary controls are of particular concern,” and we have previously noted that

[w]here ... a statute gives a member of a particular public body the authority to participate directly in a determination as to whether that public body or a different public body is to obtain the benefit of certain funds, ... an individual may not serve in positions of trust and authority with respect to both bodies.

1985 Op. Att’y Gen. No. 85-006, at 2-19; *see also* 1988 Op. Att’y Gen. No. 88-033, at 2-149 (a person may not serve simultaneously as a township trustee and park district commissioner when the board of township trustees is authorized to appropriate moneys to the park district).

The conflict presented by a county commissioner’s authority to participate in the decision to appropriate moneys to a transportation improvement district cannot be avoided or eliminated entirely. A board of county commissioners is required annually to adopt an appropriations measure and, therefore, must decide at least once a year whether to appropriate moneys to the transportation improvement district for the county. In other words, the conflict is not remote or speculative, as it arises every year. The conflict involves the exercise of decision-making authority by the board of county commissioners and, because the conflict involves financial and budgetary matters of both the board of county commissioners and board of trustees of the transportation improvement district, it is a primary function of both boards. *See* 2006 Op. Att’y Gen. No. 2006-041, at 2-405. Accordingly, it is impractical for a county commissioner to continually abstain from discussing, deliberating, or voting on matters related to appropriations of county moneys. *Id.* Therefore, this situation presents an impermissible conflict of interest that relates to a primary function of both positions and cannot be avoided or eliminated, rendering the two positions incompatible.

The nonvoting status of the member of the board of trustees of a transportation improvement district appointed by the Speaker of the House or President of the Senate does not cure the impermissible conflict of interest. The nonvoting trustee still retains all the other powers and privileges that arise from the member’s status on the board of trustees. For example, the member may still discuss and deliberate on all matters before the board of trustees and use his influence to persuade other members, including the five voting members appointed by the board of county commissioners. Moreover, a person serving as nonvoting trustee still owes a fiduciary duty to the

board of trustees of the transportation improvement district. Meanwhile, as an elected county commissioner, the person owes a fiduciary duty to the people of the county. 1984 Op. Att’y Gen. No. 84-097, at 2-331 (a county commissioner “has a fiduciary duty as an agent of the people of the county”). In annually deciding whether to appropriate moneys to the transportation improvement district, therefore, the person would face divided loyalties and a temptation to act other than in the public’s best interests. See 2018 Op. Att’y Gen. No. 2018-003, at 2-29 to 2-30 (an individual’s status as a nonvoting member of one body does not cure an impermissible conflict of interest); see also 1989 N.Y. AG LEXIS 79, at \* 3 (opinion of the New York Attorney General concluding that the inability of the occupant of two positions to vote does not remove the incompatibility of the two positions because the individual “would possess every other power of a member including the authority to provide input and fully discuss any matter”).

Although the impermissible conflict of interest caused by the authority of a board of county commissioners to appropriate moneys to a transportation improvement district within the county renders the positions of county commissioner and trustee of the transportation improvement district incompatible, we note at least two other potential conflicts of interest between the two positions. First, the board of trustees of a transportation improvement district is authorized to “[m]ake and enter into all contracts and agreements necessary or incidental to the performance of its functions and the execution of its powers.” R.C. 5540.03(A)(8). However, R.C. 305.27 prohibits a county commissioner from having a direct or indirect concern in a contract for work to be done for a county and states, in relevant part:

No county commissioner shall be concerned, directly or indirectly, in any contract for work to be done or material to be furnished for the county. For a violation of this section, a commissioner shall forfeit not less than two hundred nor more than two thousand dollars, to be recovered by a civil action, in the name of the state, for use of the county. Such commissioner shall also forfeit, in like manner, any compensation he may have received on such contract.

Previous opinions have adopted the following definition of “concern”: “[t]o pertain, relate, or belong to; be of interest or importance to; have connection with; to have reference to; to involve; to affect the interest of.” See, e.g., 2017 Op. Att’y Gen. No. 2017-036, at 2-361; 1984 Op. Att’y Gen. No. 84-097, at 2-327 (quoting *Black’s Law Dictionary* 262 (5th ed. 1979)). If the board of trustees of a transportation improvement district entered into a contract for material or work to be furnished for the county, the county commissioner serving on the board of trustees would have a prohibited concern in a contract under R.C. 305.27 by virtue of his membership on the board of trustees. See 2017 Op. Att’y Gen. No. 2017-036, at 2-361; see also 2000 Op. Att’y Gen. No. 2000-015, at 2-91 (a prohibition against having an interest in a contract “establishes a standard that cannot be met simply by abstaining from participating in particular matters”)

Another potential conflict arises if the board of trustees of a transportation improvement district accepts a loan or other aid from the county. The board of trustees is authorized to “[r]eceive and accept from the federal or any state or *local government*, including, but not limited to, any agency, entity, or instrumentality of any of the foregoing, loans and grants for or

in aid of the construction, maintenance, or repair of any project.” R.C. 5540.03(A)(10) (emphasis added). A person who serves simultaneously as county commissioner and trustee of a transportation improvement district could, therefore, be on both sides of a loan or grant transaction if the board of trustees accepted a loan from the county, subjecting that person to a conflict of interest. *See* 2006 Op. Att’y Gen. No. 2006-003, at 2-29 (“[b]y participating on both sides of a contract or property transaction, a person who serves as a township trustee and member of the board of directors of a port authority would be exposed to conflicting loyalties and to the potential temptation of acting in a manner not in the best interest of the public”). Thus, in addition to the impermissible conflict of interest presented by the annual question faced by a county commissioner of whether to appropriate moneys to a transportation improvement district, other potential conflicts of interest arise when the board of trustees of the transportation improvement district enters into a contract that affects the interest of the county or when the board of trustees accepts a loan or other aid from the county.

The fifth question of the compatibility test is resolved against a finding of compatibility. Thus, having answered one of the seven questions of the compatibility test against a finding of compatibility, we conclude that a person may not serve simultaneously as a member of a board of county commissioners and nonvoting member of the board of trustees of a transportation improvement district appointed by the Speaker of the Ohio House of Representatives or President of the Ohio Senate pursuant to R.C. 5540.02(C)(2)(b) or R.C. 5540.02(C)(2)(c).

### **Conclusions**

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. A person may not serve simultaneously as a member of a board of county commissioners and member of the board of trustees of a transportation improvement district within the county appointed by the board of county commissioners pursuant to R.C. 5540.02(C)(2)(a).
2. A person may not serve simultaneously as a member of a board of county commissioners and nonvoting member of the board of trustees of a transportation improvement district within the county appointed by the Speaker of the Ohio House of Representatives or President of the Ohio Senate pursuant to R.C. 5540.02(C)(2)(b) or R.C. 5540.02(C)(2)(c).

Very respectfully yours,



MICHAEL DEWINE  
Ohio Attorney General