

OPINION NO. 2013-017**Syllabus:**

2013-017

1. Pursuant to R.C. 1724.03(B), a board of directors of a county land reutilization corporation shall include the county treasurer, at least two of the members of the board of county commissioners, one representative of the largest municipal corporation located in the county, and one representative of a township (with certain restrictions) located in the county; other members of the board shall be selected by the treasurer and the county commissioners who are members of the board, and these appointees may be other public officials not explicitly named in R.C. 1724.03(B).

June 2013

2. A board of county commissioners may provide insurance coverage, workers' compensation coverage, vacation leave, sick leave, and other county benefits to county officers and employees or those persons in the offices and departments of county service. Pursuant to R.C. 1724.02(L), no employee of a county land reutilization corporation is an employee of the county solely because the employee is employed by the county land reutilization corporation, and a board of county commissioners may not provide insurance coverage, workers' compensation coverage, vacation leave, sick leave, and other county benefits to that employee.
3. A board of county commissioners may enter into only those contracts for which the board has statutory authority, either granted expressly or necessarily by implication.
4. Neither a county treasurer nor a county auditor may contract with a county land reutilization corporation to provide services to or employees to work for the corporation. A county auditor or treasurer does not have authority to have her employees furnish services to a county land reutilization corporation regardless of the employees' paid or volunteer status. (2012 Op. Att'y Gen. No. 2012-026, syllabus, paragraph 3, approved and followed.)
5. A person who is an "employee," as defined in R.C. 2744.01(B), is subject to the provisions for employees set forth in R.C. Chapter 2744.
6. An employee of a board of county commissioners who also is employed by a county land reutilization corporation may perform work for the corporation only during the hours he is regularly scheduled to work for the corporation. Similarly, during the hours he is regularly scheduled to work for the board of county commissioners, the employee may not perform the work of the county land reutilization corporation.

To: John D. Ferrero, Stark County Prosecuting Attorney, Canton, Ohio

By: Michael DeWine, Ohio Attorney General, May 24, 2013

You have requested an opinion concerning the operations of the Stark County Land Reutilization Corporation (SCLRC). You have asked the following questions:¹

¹ Your letter requesting a formal opinion of the Attorney General set forth a series of 29 questions about various legal issues related to the Stark County Land Reutilization Corporation (SCLRC), including, for example, compatibility of positions, competitive bidding, contracting authority, leave benefits, and immunity and indemnification. Your compatibility questions are addressed in two separate

1. Does the proposed agreement² between the board of county commissioners and SCLRC, as the county's exclusive agency to carry out a land reutilization and reclamation plan, create a public contract as defined by Ohio law?
2. If the agreement is deemed a public contract, is it governed by the same standards as other public contracts?
3. Does the contract create issues of compatibility/conflict of interest if county officials or employees of county officials serve as employees of SCLRC?
4. Because R.C. 1724.08 states that SCLRC is to be treated as a private nonprofit corporation, does the above described arrangement create any potential liability under R.C. 2921.42 for a public official (other than those serving as board members per R.C. 1724.03) who serves as an agent or employee of SCLRC?
5. Are other county public officials not specifically enumerated in R.C. 1724.03 permitted to sit on the board of directors of the corporation?
6. Can the county board of commissioners provide insurance coverage, workers' compensation coverage, vacation, sick leave, or other employment benefits for employees of SCLRC?
7. Can the Board of Directors of SCLRC (a majority of which are county officials) enter into an agreement with the Commissioners (a majority of which serve on the Board of SCLRC) to provide monetary compensation to the county's general fund?
8. If it is impermissible for the county auditor or treasurer to contract with SCLRC for services, is it permissible for them to provide services to SCLRC using county employees (both classified and unclassified) on a volunteer basis?
9. Is a county employee performing work on behalf of SCLRC entitled to immunity/indemnification by the county under R.C. Chapter 2744?
10. Where a county employee is also employed by SCLRC, may they perform tasks on behalf of SCLRC during their regularly scheduled

opinions, 2012 Op. Att'y Gen. No. 2012-040 and 2012 Op. Att'y Gen. No. 2012-041. In this opinion, we consider your remaining questions.

² Your letter states that that the board of county commissioners has "passed a resolution designating SCLRC as [the] exclusive agency designated by the county to carry out a land reutilization and reclamation plan. Pending before the [board] is the land bank plan and agreement." The proposed agreement includes the terms by which SCLRC will operate. These terms are the basis for many of your questions.

work hours? If so, what documentation is required to prevent an audit finding against the public office?

11. May county employees, who are non-FLSA exempt, volunteer to provide services to SCLRC without triggering FLSA overtime requirements?
12. If they are employees of the board of commissioners, auditor, or treasurer, will their service be presumed to be involuntary where the appointing authority also serves on the board of SCLRC?
13. Since SCLRC is a private corporation under the law, the contracts for maintenance, rehabilitation, demolition or sale of the properties obtained by SCLRC are not subject to competitive bidding requirements. Are there issues of conflict/compatibility where a public official has the authority to award such contracts on behalf of the corporation without engaging in competitive bidding?
14. If an elected official is serving as a board member or corporate executive with the authority to enter into contracts, hire individuals, authorize payment for service, or buy or sell land on behalf of SCLRC, must the elected official recuse himself/herself from the decision making process where an individual who has provided political or financial support to the elected official is a party to the agreement or action?
15. If an elected official, employee or fiduciary thereof, is acting as an agent or employee of SCLRC, what steps are required to identify that the individual is acting in a private rather than public capacity?

Background Information

Your questions concern the Stark County Land Reutilization Corporation, a nonprofit corporation formed under R.C. 1724.04. Stark County designated SCLRC pursuant to R.C. 1724.10(A)(2) as the exclusive agency for reclamation, rehabilitation, and reutilization of vacant, abandoned, tax-foreclosed, or other real property in Stark County. Pursuant to R.C. 1724.03(B), SCLRC's board of directors currently consists of five members: the county treasurer, two county commissioners, a representative of the largest municipal corporation located in the county, and a representative of a township with a population of at least 10,000 in the unincorporated area of the township. The officers of the corporation include a president, secretary, treasurer, and one or more vice presidents. SCLRC has no employees at this time.

In order to answer your questions, it is helpful to review the organization and operation of a county land reutilization corporation. R.C. Chapter 1724 governs community improvement corporations, including economic development corpora-

tions and county land reutilization corporations.³ See R.C. 1724.01(A)(1); 2012 Op. Att’y Gen. No. 2012-026, at 2-223 to 2-224. Community improvement corporations, including county land reutilization corporations, are nonprofit corporations and are subject to the general nonprofit corporation provisions of R.C. Chapter 1702, to the extent that those provisions are not inconsistent with R.C. Chapter 1724. See R.C. 1724.01(B); R.C. 1724.04; R.C. 1724.08; 2009 Op. Att’y Gen. No. 2009-005, at 2-22 n.2; 2006 Op. Att’y Gen. No. 2006-037, at 2-340 to 2-341.

A county land reutilization corporation may be organized for purposes related to returning vacant, abandoned, and foreclosed properties to productive use. Specifically, R.C. 1724.01(B)(2) states that a county land reutilization corporation may be formed for the purposes of:

- (a) Facilitating the reclamation, rehabilitation, and reutilization of vacant, abandoned, tax-foreclosed, or other real property within the county for whose benefit the corporation is being organized, but not limited to the purposes described in [R.C. 1724.01(B)(2)];
- (b) Efficiently holding and managing vacant, abandoned, or tax-foreclosed real property pending its reclamation, rehabilitation, and reutilization;
- (c) Assisting governmental entities and other nonprofit or for-profit persons to assemble, clear, and clear the title of property described in this division in a coordinated manner; or
- (d) Promoting economic and housing development in the county or region.

A county with a population of more than 60,000 that elects to adopt and implement the procedures set forth in R.C. 5722.02-.15 may organize a county land reutilization corporation. R.C. 1724.04; R.C. 5722.02. See 2012 Op. Att’y Gen. No. 2012-026, at 2-223. The procedures set forth in R.C. 5722.02-.15 are intended to facilitate the reutilization of nonproductive land situated within the county. R.C. 5722.02(A). A county also may designate the county land reutilization corporation as the agency for the reclamation, rehabilitation, and reutilization of vacant, abandoned, tax-foreclosed, or other real property in the county. R.C. 1724.10.

The composition of the board of directors of a county land reutilization corporation is set forth in R.C. 1724.03(B). The board of directors must consist of five, seven, or nine members. R.C. 1724.03(B). The board members must include the county treasurer, at least two members of the board of county commissioners, one representative of the largest municipal corporation located in the county, and one representative of a township with a population of at least 10,000 in the unincorporated areas of the township if at least two such townships exist in the county. *Id.* Other members of the board of directors may be selected by the county treasurer and the county commissioners who serve on the board. *Id.*

³ County land reutilization corporations are commonly referred to as county land banks. 2012 Op. Att’y Gen. No. 2012-026, at 2-223 n.1.

The powers of a county land reutilization corporation are set forth in R.C. 1724.02. A county land reutilization corporation is authorized, for example, to borrow money for certain purposes, to make loans, to obtain and dispose of real and personal property, to engage in code enforcement and nuisance abatement, and to exercise powers enumerated in R.C. Chapter 5722 (land reutilization programs) on behalf of the county. R.C. 1724.02. Additionally, a county land reutilization corporation may employ and compensate an executive director to “manage the operations of a county land reutilization corporation.” R.C. 1724.02(L).

Several of your questions were answered by the Ohio Ethics Commission in its advisory letter to you. *See* Ohio Ethics Comm’n, Informal Advisory Opinion to John D. Ferrero—September 5, 2012. We will nonetheless address your questions individually and indicate where the Ethics Commission already has provided a response.

Questions One Through Four: Public Contracts

Your first question is whether the proposed agreement between the commissioners and SCLRC, as the county’s exclusive agency to carry out a land reutilization and reclamation plan, creates a public contract as defined by Ohio law. If so, you ask whether such an agreement is governed by the same standards as other public contracts. The Ethics Commission answered this question in the affirmative, indicating that, for purposes of R.C. 2921.42, contracts between SCLRC and the county, under which the county acquires land reutilization services from SCLRC, are public contracts. Ohio Ethics Comm’n, Informal Advisory Opinion to John D. Ferrero—September 5, 2012, at 2. Therefore, the contracts are governed by R.C. 2921.42. *Id.*; *see* Ohio Ethics Comm’n, Advisory Op. No. 89-008; Ohio Ethics Comm’n, Advisory Op. No. 88-006.

Your third question asks whether a contract between the commissioners and SCLRC creates issues of compatibility or conflict of interest if county officials or employees of county officials serve as employees of SCLRC. This question is similar to one we addressed in 2012 Op. Att’y Gen. No. 2012-026, at 2-232 to 2-233. There we stated that the “general nature of your inquiry about compatibility, without identifying specific county land reutilization corporation positions that might be held simultaneously by a county officer, does not permit us to address this topic in a meaningful way for you.” 2012 Op. Att’y Gen. No. 2012-026, at 2-233. Furthermore, the ethical issues that may confront county officers as a result of the various agreements and interactions of the public offices you ask about reach beyond considerations of compatibility:

[i]n previous opinions, the Attorneys General have declined to speak on issues of compatibility when there also are presented issues arising under the ethics laws. (As you are aware, a finding of incompatibility does not bring with it an imposition of civil or criminal penalties. Actions that create an unlawful interest in public contracts have more serious consequences than those presented by issues of compatibility alone.) The Ohio Ethics Commission is empowered to

render advisory opinions on questions arising under the ethics statutes, R.C. Chapter 102 and R.C. 2921.42-.43, concerning matters of ethics, conflicts of interest, or financial disclosure as they relate to positions in public service. R.C. 102.08; 1991 Op. Att’y Gen. No. 91-007, at 2-36. Therefore, it has been our custom to decline to provide advice on compatibility questions when the situation presented also concerns issues under the ethics statutes. 1991 Op. Att’y Gen. No. 91-007, at 2-36. *See, e.g.*, 2011 Op. Att’y Gen. No. 2011-043, at 2-352 n.2 (“[t]he Ohio Ethics Commission, rather than the office of the Attorney General, is required by R.C. 102.08 to address the application of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. We will, therefore, refrain from interpreting and applying these provisions by way of a formal opinion. Questions concerning the interpretation and application of these provisions in your particular situation should instead be directed to the Ohio Ethics Commission” (citations omitted)); 1990 Op. Att’y Gen. No. 90-005, at 2-21; 1987 Op. Att’y Gen. No. 87-025, at 2-179 (“[t]his policy respects the jurisdiction of the Ethics Commission and prevents the possibility that the Attorney General and the Ethics Commission would render conflicting opinions on the same question”). *See also, e.g.*, Ohio Ethics Comm’n, Advisory Op. No. 88-005, slip op. at 3 (R.C. 1724.10, which requires a city official to serve on the governing board of a community improvement corporation designated as an agency by the city, does not exempt the official from the provisions of R.C. Chapter 102).

Id. at 2-232.

Your fourth question asks about liability under R.C. 2921.42. As stated above, the Ohio Ethics Commission is empowered to render opinions on questions arising under the ethics statutes, including R.C. 2921.42-.43. We defer to the Ethics Commission’s response to this question.⁴

⁴ In Ohio Ethics Comm’n, Informal Advisory Opinion to John D. Ferrero—September 5, 2012, at 4, the Ethics Commission’s Staff Advisory Attorney wrote:

the Commission has consistently recognized that, whenever a public official also serves on the board of a non-profit corporation in his or her “official capacity,” there is no dual interest in which private considerations of the non-profit corporation would distract from the official serving the public interest. By serving on the corporation board in an “official capacity,” the public official pursues the interests of his or her public entity. The “official capacity” exception applies in this situation. (Citations omitted.)

Question Five: Composition of SCLRC's Board of Directors

You ask whether county public officials not named in R.C. 1724.03 may serve on the board of directors of SCLRC. R.C. 1724.03(B) provides:

The board of directors of a county land reutilization corporation shall be composed of five, seven, or nine members, including the county treasurer, at least two of the members of the board of county commissioners, one representative of the largest municipal corporation, based on the population according to the most recent federal decennial census, that is located in the county, one representative of a township with a population of at least ten thousand in the unincorporated area of the township according to the most recent federal decennial census, if at least two such townships exist in the county, *and any remaining members selected by the treasurer and the county commissioners who are members of the corporation's board.* At least one board member shall have private sector or nonprofit experience in rehabilitation or real estate acquisitions. (Emphasis added.)

In sum, if there are unfilled positions on the board of directors after the public officials identified in R.C. 1724.03(B) are appointed, the treasurer and county commissioners who are members of the board shall select persons for appointment to those positions. The statute neither prohibits nor authorizes the selection of other public officials for that purpose. Thus, it is within the reasonable discretion of the treasurer and county commissioners on the board of directors to select other persons to serve as members of the board.

Pursuant to R.C. 1724.03(B), a board of directors of a county land reutilization corporation shall include the county treasurer, at least two of the members of the board of county commissioners, one representative of the largest municipal corporation located in the county, and one representative of a township (with certain restrictions) located in the county; remaining members of the board shall be selected by the treasurer and the county commissioners who are members of the board, and such appointees may be other public officials not explicitly named in R.C. 1724.03(B).

Question Six: Provision of County Benefits

You ask whether the board of county commissioners may provide insurance coverage, workers' compensation coverage, vacation leave, sick leave, or other employment benefits for employees of SCLRC. It is firmly established that a board of county commissioners possesses only such powers as are granted to it by statute, either expressly or by necessary implication. *See State ex rel. Shriver v. Bd. of Comm'rs*, 148 Ohio St. 277, 280, 74 N.E.2d 248 (1947); 2006 Op. Att'y Gen. No. 2006-008, at 2-70; 2004 Op. Att'y Gen. No. 2004-005, at 2-44; 2001 Op. Att'y Gen. No. 2001-022, at 2-125; 1995 Op. Att'y Gen. No. 95-004, at 2-15.

We first turn to the relevant Revised Code provisions to examine the authority of the board of county commissioners and the scope and application of each of

the benefits you mention. Insurance coverage for county employees is governed by R.C. 305.171, which reads, in part:

(A) The board of county commissioners of any county may contract for, purchase, or otherwise procure and pay all or any part of the cost of any of the following insurance, coverage, or benefits issued by an insurance company or administered by a board of county commissioners or a contractor, for county officers and employees and their immediate dependents from the funds or budgets from which the county officers or employees are compensated for services:

(1) Group insurance policies that may provide any of the following:

(a) Benefits including, but not limited to, hospitalization, surgical care, major medical care, disability, dental care, eye care, medical care, hearing aids, or prescription drugs;

(b) Sickness and accident insurance;

(c) Group legal services;

(d) Group life insurance.

(2) Any other qualified benefit available under section 125 of the “Internal Revenue Code of 1986,” 26 U.S.C. 125[.]

Workers’ compensation benefits are governed by R.C. 4123.35:

(A) Except as provided in this section, every employer mentioned in [R.C. 4123.01(B)(2)], and every publicly owned utility shall pay semiannually in the months of January and July into the state insurance fund the amount of annual premium the administrator of workers’ compensation fixes for the employment or occupation of the employer, the amount of which premium to be paid by each employer to be determined by the classifications, rules, and rates made and published by the administrator. The employer shall pay semiannually a further sum of money into the state insurance fund as may be ascertained to be due from the employer by applying the rules of the administrator, and a receipt or certificate certifying that payment has been made, along with a written notice as is required in [R.C. 4123.54], shall be mailed immediately to the employer by the bureau of workers’ compensation. The receipt or certificate is prima-facie evidence of the payment of the premium, and the proper posting of the notice constitutes the employer’s compliance with the notice requirement mandated in [R.C. 4123.54].

R.C. 4123.01 defines the terms “employer” and “employee” for purposes of workers’ compensation coverage. The definition of “employer” includes a large spectrum of private and public enterprises. A county is an employer for purposes of R.C. Chapter 4123. R.C. 4123.01(B)(1) (in the category of public enterprises, the statute lists “[t]he state, including state hospitals, *each county*, municipal corporation,

township, school district, and hospital owned by a political subdivision or subdivisions other than the state” (emphasis added)). The definition of “employee” includes, *inter alia*, “[e]very person in the service of the state, or of any county, municipal corporation, township, or school district therein.” R.C. 4123.01(A)(1)(a).⁵

County sick leave and vacation leave benefits are granted and governed by R.C. 124.38 and R.C. 325.19 respectively, and both benefits are granted to those in offices or departments of county service. *See* R.C. 124.38 (“[e]ach of the following shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay: (A) Employees in the various offices of the county, municipal, and civil service township service”); R.C. 325.19(A)(1) (“[e]ach full-time employee in the several offices and departments of the county service, including full-time hourly rate employees, after service of one year with the county or any political subdivision of the state, shall have earned and will be due upon the attainment of the first year of employment, and annually thereafter, eighty hours of vacation leave with full pay”).

Accordingly, a board of county commissioners may provide various types of insurance coverage for county officers and county employees. Similarly, as an employer, the county is required to pay into the workers’ compensation fund on behalf of its employees. And likewise, sick leave and vacation leave benefits are granted to persons employed in the offices and departments of county service. We therefore must consider whether employees of SCLRC are county employees or persons in county service for purposes of R.C. 305.171, R.C. 4123.01, -.35, R.C. 124.38, and R.C. 325.19.

R.C. 1724.02, in setting forth the powers of a community improvement corporation, grants SCLRC the authority to employ an executive director and others as needed for the benefit of the corporation. R.C. 1724.02(L). The provision further directs that “[n]o employee of the corporation is or shall be deemed to be an employee of the political subdivision for whose benefit the corporation is organized solely because the employee is employed by the corporation.” *Id.* Had the General Assembly intended SCLRC and other county land reutilization corporation employees to be county employees for purposes of insurance and leave benefits, it could have enacted language to that effect. *E.g.*, R.C. 343.01(B) (“[e]mployees of the [joint solid waste management] district shall be considered county employees for the purposes of [R.C. Chapter 124] and other provisions of state law applicable to employees”); *see Lake Shore Elec. Ry. Co. v. Pub. Utils. Comm’n of Ohio*, 115

⁵ The definitions of “employer” and “employee” provided in R.C. 4123.01 also include many private employers and their employees. *See* R.C. 4123.01(A)(1)(b)-(d); R.C. 4123.01(B)(2). But, because you have asked whether the county, a public employer, may pay into the workers’ compensation fund on behalf of particular employees, our discussion is focused on whether those employees are employees of the county. SCLRC may be an “employer” for purposes of R.C. Chapter 4123 that is required to pay into the workers’ compensation fund on behalf of those persons who are “employees” of SCLRC.

Ohio St. 311, 319, 154 N.E. 239 (1926) (had the legislature intended a particular meaning, “it would not have been difficult to find language which would express that purpose,” having used that language in other matters); *State ex rel. Enos v. Stone*, 92 Ohio St. 63, 69, 110 N.E. 627 (1915) (had the General Assembly intended a particular result, it could have employed language used elsewhere that plainly and clearly compelled that result).

A board of county commissioners may provide insurance coverage, workers’ compensation coverage, vacation leave, sick leave, and other employment benefits only to county officers and employees or those persons in the offices and departments of county service. Pursuant to R.C. 1724.02(L), no employee of a county land reutilization corporation is an employee of the county solely because the employee is employed by the county land reutilization corporation, and a board of county commissioners may not provide insurance coverage, workers’ compensation coverage, vacation leave, sick leave, and other county benefits to that employee.

Question Seven: Agreements between the Board of County Commissioners and SCLRC

You have asked generally whether the board of directors of SCLRC may enter into an agreement with the board of county commissioners to provide monetary compensation to the county’s general fund. R.C. 1724.02 sets forth several of the numerous powers of a county land reutilization corporation. R.C. 1724.02(O) provides the authority for a county land reutilization corporation “[t]o do all acts and things necessary or convenient to carry out the purposes of [R.C. 1724.01] . . . including, but not limited to, contracting with the federal government, the state or any political subdivision, and any other party, whether nonprofit or for-profit.” This general power, which includes the power to contract, may be exercised in furtherance of the stated purposes of a county land reutilization corporation as set forth in R.C. 1724.01(B)(2). R.C. 1724.02. The authorized purposes include: (1) “[f]acilitating the reclamation, rehabilitation, and reutilization of vacant, abandoned, tax-foreclosed, or other real property within the county for whose benefit the corporation is being organized,” (2) “[e]fficiently holding and managing vacant, abandoned, or tax-foreclosed real property pending its reclamation, rehabilitation, and reutilization,” (3) “[a]ssisting governmental entities and other nonprofit or for-profit persons to assemble, clear, and clear the title of property described in this division in a coordinated manner,” and (4) “[p]romoting economic and housing development in the county or region.” R.C. 1724.01(B)(2)(a)-(d). Thus, pursuant to the terms of R.C. 1724.02(O) and R.C. 1724.01(B)(2), a county land reutilization corporation may contract with any party for the purpose of having that party perform services for the corporation to advance the corporation’s legitimate purposes. 2012 Op. Att’y Gen. No. 2012-026, at 2-224.

A board of county commissioners possesses only such powers as are granted to it by statute, either expressly or by necessary implication. *See State ex rel. Shriver v. Bd. of Comm’rs*, 148 Ohio St. 277, 280, 74 N.E.2d 248 (1947); 2006 Op. Att’y Gen. No. 2006-008, at 2-70; 2004 Op. Att’y Gen. No. 2004-005, at 2-44; 2001 Op. Att’y Gen. No. 2001-022, at 2-125; 1995 Op. Att’y Gen. No. 95-004, at 2-15. We

therefore turn to R.C. Chapter 307 to examine the powers granted to a board of county commissioners. R.C. 307.01, R.C. 307.64, R.C. 307.698, and R.C. 307.78 permit a board of county commissioners to act for the benefit of a county land reutilization corporation. In particular, these statutes authorize a board of county commissioners to (1) “provide offices for or lease offices to a county land reutilization corporation,” R.C. 307.01(D); (2) appropriate R.C. 5705.19(EE) tax levy moneys to “provide for the establishment and operation of a program of economic development,” including, expressly, a county land reutilization corporation, R.C. 307.64; (3) “spend moneys from the general fund for housing purposes, including the housing purposes of a county land reutilization corporation,” R.C. 307.698; and (4) “make contributions of moneys, supplies, equipment, office facilities, and other personal property or services to any community improvement corporation organized pursuant to [R.C. Chapter 1724] to defray the expenses of the corporation,” R.C. 307.78(A). 2012 Op. Att’y Gen. No. 2012-026, at 2-228; *see also* 1991 Op. Att’y Gen. No. 91-071 (syllabus, paragraph 2) (“[p]ursuant to R.C. 307.78, a county has authority to make contributions of public money to a community improvement corporation organized pursuant to R.C. Chapter 1724, in order to defray expenses of the community improvement corporation incurred in connection with its functions under R.C. Chapter 1724”).

While a county land reutilization corporation has the statutory authority to contract with a board of county commissioners, or any party, to fulfill any of the stated purposes of the corporation, a board of county commissioners may enter into only those contracts for which the board has statutory authority, either granted expressly or necessarily by implication. In other words, the board of directors of SCLRC and the board of county commissioners may enter into any agreement that is permitted by law. For example, pursuant to R.C. 307.01(D), a board of county commissioners is authorized to lease offices to a county land reutilization corporation. Pursuant to a valid agreement, a county land reutilization corporation may pay rent for such offices to the county. Similarly, R.C. 1724.10(B)(3) requires that, “[i]f any lands or interests in land conveyed by a political subdivision under this division are sold by the community improvement corporation at a price in excess of the consideration received by the political subdivision from the community improvement corporation, such excess shall be paid to such political subdivision after deducting . . . the costs . . . of the corporation attributable to such land or interests.” In such circumstances, the county land reutilization corporation may make monetary compensation to the county. By contrast, a board of county commissioners may not enter into an agreement with a county land reutilization corporation whereby the county is credited by the corporation for services the board (or another county agency) is not authorized to provide. *See, e.g.*, 2012 Op. Att’y Gen. No. 2012-026 (syllabus, paragraph 3) (neither a county treasurer nor a county auditor may provide services to or employees to work for a county land reutilization corporation).

You have asked about SCLRC entering into an agreement with the board of county commissioners to provide monetary compensation to the county’s general fund. Without more specific information, we are unable to provide you reliable

advice. In order to fully answer your question, we would need to know the character of any goods or services provided pursuant to such an agreement and the authority by which each party enters into the agreement.⁶ The relevant statutes and the nature of the goods or services will ultimately determine where moneys received by the county are deposited—to the general fund or another fund in the county treasury. *See generally, e.g.*, R.C. 307.51(D)(4) (the county law library “shall deposit all fees collected pursuant to this section by any employee of the county law library resources board into the county law library resources fund established pursuant to [R.C. 307.514]”); R.C. 311.42(A) (“[e]ach county shall establish in the county treasury a sheriff’s concealed handgun license issuance expense fund. The sheriff of that county shall deposit into that fund all fees paid by applicants for the issuance or renewal of a concealed handgun license or duplicate concealed handgun license”); R.C. 5705.09 (each subdivision shall establish a general fund, sinking fund, bond retirement fund, a special fund for each special levy, a special bond fund for each bond issue, a special fund for each class of revenues derived from a source other than the general property tax, which the law requires to be used for a particular purpose, a special fund for each public utility operated by a subdivision, and a trust fund for any amount received by a subdivision in trust); *State ex rel. Bd. of Cnty. Comm’rs v. Allen*, 86 Ohio St. 244, 99 N.E. 312 (1912) (syllabus, paragraph 3) (“[w]here funds reach a county treasurer, either by gift or otherwise, that belong to no particular fund, or where there is nothing whatever to show in which fund the money belongs, the board of county commissioners has authority to determine and direct the fund to which such moneys shall be credited”); 1962 Op. Att’y Gen. No. 2955, p. 288 (syllabus) (particular fees should be paid into the general fund of the county unless “a special fund has been established for the deposit of such fees, in which case the fees should be paid into such special fund”).

Questions Eight, Eleven, and Twelve: The Federal Fair Labor Standards Act and County Employees Working for SCLRC

In question eight, you ask whether, if it is impermissible for the county auditor or treasurer to contract with SCLRC for services, the county auditor or treasurer may provide services to SCLRC using county employees (both classified and unclassified) on a volunteer basis. In 2012 Op. Att’y Gen. No. 2012-026 (syllabus, paragraph 3), we concluded that “[n]either a county treasurer nor a county auditor may contract with a county land reutilization corporation to provide services to or employees to work for the corporation.” This conclusion was based upon limitations imposed on the exercise of the express grants of authority found in R.C. Chapters 319 and 321 concerning the county auditor and county treasurer, respectively. While we did not distinguish paid work from volunteer work in 2012 Op. Att’y Gen. No. 2012-026 in arriving at that conclusion, our analysis here is based upon the same principles. County auditors and treasurers have only those powers and duties expressly granted by statute or necessarily implied by such express grants. *State ex rel. Kuntz v. Zangerle*, 130 Ohio St. 84, 89, 197 N.E. 112

⁶ Pursuant to R.C. 9.20, a county is authorized to accept donations. Thus, were SCLRC to make a gift to the county, the county has authority to accept it.

(1935) (“[t]he County Auditor and County Treasurer of a county are creatures of statute. They can exercise only such powers as are expressly delegated by statute, together with such implied powers as are necessary to carry into effect the powers expressly delegated”); 2012 Op. Att’y Gen. No. 2012-026, at 2-230 to 2-231; 2004 Op. Att’y Gen. No. 2004-022, at 2-187; 1994 Op. Att’y Gen. No. 94-066, at 2-324. Thus, a county auditor or treasurer does not have authority to have her employees furnish services to SCLRC regardless of the employees’ paid or volunteer status.⁷

Question 11 concerns the federal Fair Labor Standards Act (FLSA), 29 U.S.C.S. § 201 *et seq.* (LexisNexis 2013). You ask whether county employees, who are non-FLSA exempt, may volunteer to provide services to SCLRC without triggering FLSA overtime requirements. Your question requires a two-part answer. In a general sense, a county employee may volunteer to provide services to a nonprofit corporation. *See* elaws Fair Labor Standards Act Advisor: Public Sector Volunteers, <http://www.dol.gov/elaws/esa/flsa/docs/publicvol.asp> (last visited May 20, 2013) (“[p]ublic sector employees may volunteer to do different kinds of work in the jurisdiction in which they are employed, or volunteer to do similar work in different jurisdictions”). Volunteered services that are truly voluntary—that is, performed without undue pressure or coercion by one’s employer—are not paid services and thus are not subject to FLSA overtime requirements. *See* 29 C.F.R. § 785.44

⁷ This conclusion relies, in part, on the meaning of the term “furnish.” The county may not *require* its employees to volunteer their time—that is, forego their pay—without violating the federal Fair Labor Standards Act (FLSA). 29 C.F.R. § 553.101 defines “volunteer” for purposes of the FLSA:

(a) An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours. Individuals performing hours of service for such a public agency will be considered volunteers for the time so spent and not subject to sections 6, 7, and 11 of the FLSA when such hours of service are performed in accord with sections 3(e)(4) (A) and (B) of the FLSA and the guidelines in this subpart.

(b) Congress did not intend to discourage or impede volunteer activities undertaken for civic, charitable, or humanitarian purposes, but expressed its wish *to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to “volunteer” their services.*

(c) *Individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.*

(d) An individual shall not be considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer. (Emphasis added.)

(“[t]ime spent in work for public or charitable purposes at the employer’s request, or under his direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee’s normal working hours is not hours worked”).

However, there is an exception to this allowance that will likely apply in your particular situation. The FLSA does not permit an individual to perform volunteer service for a public agency when such service involves the same type of work the individual is employed to perform for the same public agency. 29 U.S.C.S. § 203(e)(4)(A)(i)-(ii); *accord* 29 C.F.R. § 553.102(a); *see* 29 C.F.R. § 553.101(d); 29 C.F.R. § 553.103. “Whether two agencies of the same State or local government constitute the same public agency can only be determined on a case-by-case basis.” 29 C.F.R. § 553.102(b). Further, “same type of services” means “similar or identical services”; “[e]qually important in such a determination will be the consideration of all the facts and circumstances in a particular case, including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee.” 29 C.F.R. § 553.103(a).

It is beyond the scope of the formal opinion process for the Attorney General to provide authoritative interpretations of federal law. 2011 Op. Att’y Gen. No. 2011-040, at 2-320; *see, e.g.*, 1999 Op. Att’y Gen. No. 99-007, at 2-55; 1997 Op. Att’y Gen. No. 97-025, at 2-146. How the FLSA applies in particular instances will have to be addressed by local officials or the courts. *See* 1983 Op. Att’y Gen. No. 83-057, at 2-232 (the Attorney General does not serve as fact-finding body). For specific guidance on the FLSA’s application, you may contact the United States Department of Labor. 2012 Op. Att’y Gen. No. 2012-018, at 2-159 n.5; *see also* 1986 Op. Att’y Gen. No. 86-010, at 2-45 (“this office is unable to provide authoritative interpretations of federal statutes” and “I am unable to state which types of conduct may be deemed to fall within the purview of that section” of federal law).

Nonetheless, based on the provisions cited above, we recommend a cautious approach to the FLSA restrictions by limiting the volunteer service of county employees to situations that are unquestionably compliant with the regulations. That is, there should be no question that any service by county employees to SCLRC is voluntary, and such services only may include activities that definitively are not the “same type of services which the individual is employed to perform,” 29 C.F.R. § 553.102(a); *see* 29 C.F.R. § 553.101(d); 29 C.F.R. § 553.103, for the county agency that employs her.

In question 12, you ask whether the volunteered services of employees of the board of county commissioners, county auditor, or county treasurer will be presumed to be involuntary when the appointing authority also serves on the board of SCLRC. If, notwithstanding the limitations described above, a county employee lawfully volunteers for SCLRC, we discern no reason why such service would be presumed involuntary. A county appointing authority may not coerce or pressure its employees to volunteer for SCLRC, either directly or indirectly, and an employee’s services must be offered freely. *See* 29 C.F.R. § 553.101(b),(c); note 7, *supra*; *see also* 29 C.F.R. § 785.44.

Question Nine: Application of R.C. Chapter 2744

Question nine asks whether a county employee performing work on behalf of SCLRC is entitled to immunity or indemnification by the county under R.C. Chapter 2744. The Attorney General answered a similar question in 1987 Op. Att’y Gen. No. 87-024 (syllabus, paragraph 2):

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

See also 2003 Op. Att’y Gen. No. 2003-037, at 2-309 to 2-310. The language above concerns members of the governing board of a community improvement corporation (CIC) and members of the CIC, rather than “county employees performing work on behalf of SCLRC.” You have not described a specific situation wherein a county employee, who is not an employee of the county land reutilization corporation, may perform work on behalf of SCLRC.⁸

R.C. 2744.01(B) defines “employee” to include:

an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer’s, agent’s, employee’s, or servant’s employment for a political subdivision. “Employee” does not include an independent contractor and does not include any individual engaged by a school district pursuant to [R.C. 3319.301]. “Employee” includes any elected or appointed official of a political subdivision.

⁸ One circumstance meeting this general description appears to be addressed by R.C. 307.78(A). R.C. 307.78(A) provides that a board of county commissioners “*may make contributions of moneys, supplies, equipment, office facilities, and other personal property or services to any community improvement corporation organized pursuant to [R.C. Chapter 1724] to defray the expenses of the corporation.*” (Emphasis added.) Pursuant to this authority, the board may provide services to SCLRC. But without identifying the specific positions, type of work, and circumstances involved, we are not able to make a further determination with regard to R.C. Chapter 2744.

We reiterate here that neither a county treasurer nor a county auditor may contract with a county land reutilization corporation to provide services to or employees to work for the corporation. 2012 Op. Att’y Gen. No. 2012-026 (syllabus, paragraph 3).

A person who comes within the language of this definition will be covered by the provisions for “employees” set forth in R.C. Chapter 2744. Local officials will have to determine, on a case-by-case basis, whether a particular county employee meets the requirements to be an “employee” for purposes of R.C. 2744.01(B). A person who comes within R.C. 2744.01(B)’s definition of “employee” is subject to the provisions for employees set forth in R.C. Chapter 2744.

Question Ten: Regular Work Hours and Discretion of the Auditor of State

You ask whether, when a county employee is also employed by SCLRC, the employee may perform tasks on behalf of SCLRC during her regularly scheduled county work hours. If so, you ask what documentation is required to prevent an audit finding against the public office. An employee of the board of county commissioners who is separately employed by SCLRC may perform work for SCLRC only during the hours he is regularly scheduled to work for SCLRC. Similarly, during the hours he is regularly scheduled to work for the board of county commissioners, the employee may not perform the work of SCLRC.⁹ See 2009 Op. Att’y Gen. No. 2009-049, at 2-369 n.3 (“[i]f a member of a county law library resources board who is employed as an assistant county prosecuting attorney is required to attend the board’s meetings during his regular work hours as an assistant county prosecuting attorney, the member must take approved vacation or personal leave or leave without pay for the time he is absent from his duties as an assistant county prosecuting attorney”); 2008 Op. Att’y Gen. No. 2008-020, at 2-213 n.6 (“[i]f the person is required to perform her duties as a secretary for a park district during her regular work hours as a deputy county auditor, the person must take approved vacation or personal leave or leave without pay for the time she is absent from her duties as a deputy county auditor. Similarly, the person should not perform her duties as a deputy county auditor during the hours she is required to perform her duties as a secretary for the park district unless she does so after having been granted appropriate leave time by the board of commissioners of the park district”).

Because we answer the first part of question ten in the negative, we need not consider the second part of the question. Nonetheless, concerning the possibility of an audit finding against the county office, we do not typically advise one public body on the powers and duties of another public body. See, e.g., 2004 Op. Att’y Gen. No. 2004-017, at 2-143; 2001 Op. Att’y Gen. No. 2001-032, at 2-193; accord 2003 Op. Att’y Gen. No. 2003-028, at 2-235 to 2-236; 2003 Op. Att’y Gen. No. 2003-019, at 2-153; 2002 Op. Att’y Gen. No. 2002-025, at 2-169; 1986 Op. Att’y Gen. No. 86-076, at 2-422. The Auditor of State has been given the responsibility of exercising reasonable discretion in his audits of public offices, and we thus defer to the Auditor’s requirements for documentation in particular situations.

⁹ This example assumes that the employee is not assigned to perform work on behalf of SCLRC as part of his duties for the board of county commissioners, pursuant to R.C. 307.78(A). Furthermore, we note here again that neither a county treasurer nor a county auditor may contract with a county land reutilization corporation to provide services to or employees to work for the corporation. 2012 Op. Att’y Gen. No. 2012-026 (syllabus, paragraph 3).

Question 13: Conflict of Interest and Compatibility Issues

You ask whether there are conflict of interest or compatibility issues when a public official has the authority to award contracts on behalf of SCLRC without engaging in competitive bidding. The Ohio Ethics Commission is empowered to render opinions on questions arising under the ethics statutes, and your question pertains to the provisions of R.C. 2921.42. We defer to the Ethics Commission's response to this question:

provided that the county and township officials in this situation are serving on the non-profit corporation board in their official capacities, the prohibitions in R.C. 2921.42(A)(1) and (4) will not apply to them in those roles. In that case, the Ohio Ethics Law does not prohibit the SCLRC and any county or township office from entering into contracts with each other, and does not prohibit the county or township officials serving on the non-profit corporation board from fully participating in decisions related to the contract in either role.

Ohio Ethics Comm'n, Informal Advisory Opinion to John D. Ferrero—September 5, 2012, at 4; *see also* R.C. 1724.10(B)(1) (“[t]he board of directors of a county land reutilization corporation shall be composed of the members set forth in [R.C. 1724.03]. Membership on such governing boards shall not constitute an interest, either direct or indirect, in a contract or expenditure of money by any . . . county, or other political subdivision”); R.C. 1724.10(B)(2) (“[t]he community improvement corporation acting through its officers and on behalf and as agent of the political subdivision shall execute the necessary instruments, including deeds conveying the title of the political subdivision or leases, to accomplish such sale or lease. *Such conveyance or lease shall be made without advertising and receipt of bids*” (emphasis added)); 2012 Op. Att’y Gen. No. 2012-041, at 2-361 n.5 (“R.C. 1724.10(B)(1) authorizes a person to hold a public office and to serve simultaneously as a member of the governing board of a county land reutilization corporation even though conflicts of interest may exist between the two positions”); 2003 Op. Att’y Gen. No. 2003-037 (syllabus, paragraph 2) (in buying, selling, or leasing real or personal property or services, a county land reutilization corporation is not required to follow competitive bidding requirements).

Question 14: Ethics Laws and Elected Officials

You ask whether, if an elected official serves as a board member or corporate executive with the authority to enter into contracts, hire individuals, authorize payment for service, or buy or sell land on behalf of SCLRC, the elected official must recuse himself from the decision-making process when an individual who has provided political or financial support to the elected official is a party to the agreement or action. As stated above, the Ohio Ethics Commission is empowered to

render opinions on questions arising under the ethics statutes, including R.C. 102.03. We defer to the Ethics Commission's response to this question.¹⁰

Question 15: Ethics Laws and “Official Capacity” Exception

You ask what steps are required to identify that an individual is acting in a private rather than a public capacity when an elected official, employee or fiduciary thereof, is acting as an agent or employee of SCLRC. First, for clarification, we note that the law requires the county treasurer, at least two county commissioners, and municipal corporation and township representatives to serve on the board of directors of a county land reutilization corporation. R.C. 1724.03(B). Thus, inasmuch as an elected official's duties are required by statute, those duties are of a public nature. *See* 2013 Op. Att'y Gen. No. 2013-008, slip. op. at 3 (concluding that service as a member of a county board of elections is a public office because the duties and responsibilities of election board members are conferred by statute and constitute an exercise of the state's sovereignty).

Further, the Ethics Commission has advised you that the “official capacity” exception applies to these public officials. Ohio Ethics Comm'n, Informal Advisory Opinion to John D. Ferrero—September 5, 2012, at 4. For purposes of the Ohio ethics laws, the “Ethics Commission has already determined, in two advisory opinions, that public officials who serve on the boards of [community improvement corpora-

¹⁰ In Ohio Ethics Comm'n, Informal Advisory Opinion to John D. Ferrero—September 5, 2012, at 5, the Ethics Commission's Staff Advisory Attorney wrote:

Elected officials and employees are subject to the conflict of interest laws in R.C. 102.03(D) and (E). These laws prohibit a public official or employee from soliciting, accepting, or using his or her public position to secure anything of value, of a substantial nature, including campaign contributions, if it is provided by a source that is doing or seeking to do business with, interested in matters before, or regulated by, the agency that the official serves.

. . . .

[In Advisory Opinion No. 2002-03,] [t]he Commission concluded that the General Assembly's intention [with the exception found in R.C. 102.03(G)] was that most campaign contributions, regardless of any connections between the official and the contributor, ordinarily accrue to the official who receives them in his capacity as a candidate for office. As a result, in the absence of the wrongdoing described in R.C. 102.03(G), a public official is not prohibited from accepting a campaign contribution provided to the official by any person, including a person who is doing or seeking to do business with the public agency he serves.

Therefore, provided that there is no wrongdoing in connection with the contribution, an elected official is not prohibited participating in matters before SCLRC that affect a person or entity that contributed to his or her campaign fund. (Citations omitted.)

tions] created by or serving their public agencies meet the ‘official capacity’ exception,’ as recognized by the Ethics Commission. *Id.*; see Ohio Ethics Comm’n, Advisory Op. No. 88-005. The elected officials in this situation serve SCLRC in their official capacities, and the Ohio ethics law does not prohibit the county or township officials who also serve on the board of SCLRC from fully participating in decisions related to a contract. Ohio Ethics Comm’n, Informal Advisory Opinion to John D. Ferrero—September 5, 2012, at 4.

For other employees of SCLRC, this question cannot be answered by any one particular statute or legal rationale. Rather, its resolution requires a case-by-case examination of the particular positions and circumstances. Without additional information about the positions and circumstances involved, we are not able to provide you guidance on this matter.

Conclusion

On the basis of the foregoing, it is my opinion, and you are hereby advised that:

1. Pursuant to R.C. 1724.03(B), a board of directors of a county land reutilization corporation shall include the county treasurer, at least two of the members of the board of county commissioners, one representative of the largest municipal corporation located in the county, and one representative of a township (with certain restrictions) located in the county; other members of the board shall be selected by the treasurer and the county commissioners who are members of the board, and these appointees may be other public officials not explicitly named in R.C. 1724.03(B).
2. A board of county commissioners may provide insurance coverage, workers’ compensation coverage, vacation leave, sick leave, and other county benefits to county officers and employees or those persons in the offices and departments of county service. Pursuant to R.C. 1724.02(L), no employee of a county land reutilization corporation is an employee of the county solely because the employee is employed by the county land reutilization corporation, and a board of county commissioners may not provide insurance coverage, workers’ compensation coverage, vacation leave, sick leave, and other county benefits to that employee.
3. A board of county commissioners may enter into only those contracts for which the board has statutory authority, either granted expressly or necessarily by implication.
4. Neither a county treasurer nor a county auditor may contract with a county land reutilization corporation to provide services to or employees to work for the corporation. A county auditor or treasurer does not have authority to have her employees furnish services to a county land reutilization corporation regardless of the employees’ paid or volunteer status. (2012 Op. Att’y Gen. No. 2012-026, syllabus, paragraph 3, approved and followed.)

5. A person who is an “employee,” as defined in R.C. 2744.01(B), is subject to the provisions for employees set forth in R.C. Chapter 2744.
6. An employee of a board of county commissioners who also is employed by a county land reutilization corporation may perform work for the corporation only during the hours he is regularly scheduled to work for the corporation. Similarly, during the hours he is regularly scheduled to work for the board of county commissioners, the employee may not perform the work of the county land reutilization corporation.