

April 10, 2019

To: Chairman Christopher A. Galloway
JEDD Administrator, Rita A. McMahon

From: Michael C. Lucas, Legal Counsel

Re: Compatibility of Offices and Positions

Memorandum

You have requested a legal opinion as to whether Christopher A. Galloway, who currently serves as Chairman for the Board of Directors of Concord Township-City of Painesville Joint Economic Development District ("JEDD"), may continue to serve in that position while concurrently now serving by recent appointment in the position of Lake County Auditor.

For the reasons set forth below, Chairman Galloway may serve simultaneously as a member of the Board of Directors and Chairman for the JEDD and as Lake County Auditor.

I.

Historically, the Ohio Attorney General has provided a series of factors for analysis as to whether two (2) positions are considered incompatible when a person holding two (2) positions is subject to impermissible conflicts of interest. See 2012 Op. Atty. Gen. No. 2012-008 at 2-53. In general, an impermissible conflict of interest exists when the duties of each position subject to the person who holds those positions simultaneously to divided loyalties, conflicting duties, or the temptation to act other than in the public interest.

Whether an impermissible conflict of interest exists between multiple positions is determined by reviewing the powers, duties and responsibilities of each position. If the review discloses any conflicts of interest, the next consideration is the immediacy of the potential conflict to determine whether the conflict may be sufficiently avoided or eliminated so as to allow a person to serve in the positions simultaneously. The factors considered in making this determination include the probability of the conflicts arising, the ability of the person to remove himself from any conflicts that may arise, whether the person exercising decision-making authority in each position, and whether the conflicts relate to the primary functions of each position or to financial or budgetary matters.

A review of the duties of the County Auditor and a member of the JEDD Board of Directors, respectively, does not ultimately disclose an impermissible conflict of interest between these two (2) positions.

Prior opinions from the Ohio Attorney General's Office have established that a county auditor may not hold or serve in another position where the second position or office receives or pays out funds of a county and where the second position requires the person to receive or expend monies of a county. Although these positions addressed a county auditor serving in another *public* position, the conclusions and rationale expressed in those opinions is equally applicable as a means of guidance here where a county auditor wishes to concurrently serve on the JEDD Board.

A. (County Auditor)

In reviewing the relevant two (2) positions herein, there are no county monies paid out to the JEDD. At no point in time does the JEDD Board of Director's position require the incumbent to account for, receive, or expend monies or funds of the county, or to certify claims to the County Auditor for payment.

To determine any potential conflict of interest, a preliminary examination of the duties and responsibilities of each position is required. "[A] county auditor is responsible for maintaining the financial records of the county, certifying monies into the county treasury, and issuing warrants for all monies payable from the county treasury." 2002 Op. Atty. Gen. No. 2002-005 at 2-25. R.C. 319.13 requires a county auditor to "certify all monies into the county treasury," (except as to monies collected on the tax duplicate) "specifying by whom to be paid, what fund to be credited," and to "charge the treasurer with such monies."

In addition, a county auditor accounts for monies deposited into the county treasury by, among other things, preparing a monthly statement of the county's finances pursuant to R.C. 319.15. The monthly financial statement must include "the amount of money received to the credit of each fund and account, the amount disbursed from each, the balance remaining to the credit of each, and the balance of money in the treasury and depository." 2002 Op. Atty. Gen. No. 2002-005 at 2-24, quoting R. C. 319.15. R.C. 319.16 requires a county auditor, "when issuing a warrant on a county treasury that authorizes the disbursement of county monies, to keep a record of such warrants, showing the number, date of issue, amount for which drawn, in whose favor, for what purpose, and on what fund." See 2002-Op. Atty. Gen. No. 2002-005 at 2-24 ("[b]efore monies in a county treasury may be disbursed, the county auditor must issue warrants on the county treasurer authorizing the disbursements.").

B. (JEDD Board Director)

The duties and responsibilities of a member of the JEDD were established in accordance with the then-controlling R.C. 715.70(F) which specifically provided:

The contract shall enumerate the specific powers, duties, and functions of the board of directors of a district, and the contract shall provide for the determination of procedures that are to govern the board of directors.

The relevant JEDD contract was established on August 22, 2008, by and between the Township of Concord ("Township"), and the City of Painesville (the "City").

Section 8 of this original JEDD contract and in accordance with then-existing and controlling R.C. 715.78(A), identified the manner and composition of the Board of Directors, including the Chairman position now held by Chairman Galloway. The members of the Board serve without compensation.

Section 9 of the JEDD contract is captioned "Powers, Duties and Functions of the Board." Relevant to the position of Chairman for the JEDD Board of Directors, the JEDD contract provides that the Chairman shall preside over and conduct the meetings of the Board in accordance with its Bylaws or other procedures adopted by the Board. In addition:

. . .The Chairman may call special meetings of the board by giving 24- hour written notice of such meeting to each member delivered to his or her residence or place of business. Any two members of the Board may also call a special meeting by providing the same notice.

Section 9 of the JEDD contract then specifically authorizes the following: the adoption of annual budget for the District, the estimation of revenues and expenses of the District within that budget, and the establishment of the appropriate procedure to provide for payment of the operating expenses of the District, and the distribution of income tax revenues in accordance with Section 10 hereof. This section further authorizes the Board to take any necessary and appropriate actions or establish such programs as facilitate economic development in the District.

Section 9 of the JEDD contract then states the following:

The Board, on behalf of the District, may:

- (1) purchase, receive, hold or the lease, or otherwise acquire and sell, convey, transfer, lease, sublease, or authorize dispose of real and personal property, together with such rights and privileges as may be incidental and appurtenant thereto and the use thereof, including but not limited to, any real or personal property acquired by the District from time-to-time in the satisfaction of debts or enforcement of obligations, or otherwise;
- (2) acquire, purchase, construct, reconstruct, enlarge, furnish, equip, maintain, repair, sell, exchange, lease or rent to the others, lease, or rent from others, or operate facilities for the District;
- (3) make available the use of services of any District facility to one or more persons, one or more governmental agencies, or any combination thereof;
- (4) apply to the proper authorities of the United States pursuant to appropriate law for the right to establish, operate, and maintain foreign trade zones within the area of jurisdiction of the District and to establish, operate and maintain such foreign trade zones;

- (5) establish and maintain such funds or accounts as it deems necessary, either of its own or in conjunction with or through the City or Township;
- (6) promote, address, and publicize the District and its facilities, provide information relating to the District and promote the interest and economic development of the District, the City, and the Township, the County and the State;
- (7) make or enter into all contracts and agreements and authorize one or more officers to sign all instruments necessary or incidental to the performance of its duties and the execution of its powers under this Contract;
- (8) employ managers and other employees and retain or contract with consulting engineers, financial consultants, accounting experts, architects, attorneys and such other consultants and independent contractors as are necessary in its judgment to carry out the purposes of this Contract, and fix the compensation thereof, which shall be payable from any available funds of the District;
- (9) receive and accept from any federal agency, state agency or other person, grants for or in aid of the construction, maintenance or operation of any District facility, for research or development with respect to the District facilities or for programs or other projects of the District, and receive and accept aid or contributions from any source of money, property, labor or other things of value, to be filed, used and applied only for the purposes for which such grants, aid or contributions are made;
- (10) purchase fire and extended coverage and liability insurance for any District facility and for the office of the District, insurance protecting the District and its Board, Officers and employees against liability for damage to property or injury to or death of persons arising from its operation, and any other insurance that the Board may determine to be reasonably necessary; and
- (11) the Board shall have no other powers beyond those enumerated herein unless, prior to the exercise of such powers, the City and Township have approved of such additional powers.

Thereafter, Section 9 provides that the Board may enter into an agreement with the Township for the Township to administer and implement employment and discharge of, and salaries, benefits and work roles established for employees of the District. All costs of employment are to be paid from revenues of the District. Both the City and the Township are specifically excluded as the employer and shall have no liability for any costs of employment.

The JEDD contract further authorizes the Board to adopt a resolution to levy an income tax within the District under the then-existing R.C. 715.74 and Section 10 of the JEDD Contract.

Ultimately, a review of the duties and responsibilities of the County Auditor in comparison to the duties and responsibilities of a member of the Board of Directors of the JEDD do not reveal an impermissible conflict of interest that renders the office of the Lake County Auditor incompatible with position of service as Chairman of the Board of Director for the JEDD. Of significance impact, there is no conflict relating to financial and budgetary matters.

Lastly, a person that serves simultaneously as Lake County Auditor and a member of the Board of the Directors of the JEDD will not be subject to influence that may induce the person, as County Auditor, to act in a way other than in the County's best interest.

II.

Even assuming *arguendo* that there is a conflict of interest which may exist between the position of Lake County Auditor and the member of the governing Board of Directors of a JEDD-which there is not-the Ohio General Assembly has already weighed in expressly authorized a member holding a public office, i.e., Lake County Auditor, to serve simultaneously has a member of the governing Board of Directors for a JEDD.

Under R.C. 715.70 (G), which governs the contract creation of a Joint Economic Development District, the Ohio General Assembly specifically provided:

Membership on the board of directors does not constitute the holding of a public office or employment within the meaning of any section of the Revised Code or any charter provision prohibiting the holding of other public office or employment, and shall not constitute an interest, either direct or indirect, in a contract or expenditure of money by any municipal corporation, township, county or other political subdivision with which the member may be connected. No member of a board of directors shall be disqualified from holding any public office or employment, nor shall such member forfeit or be disqualified from holding any such office or employment, by reason of the member's membership on the board of directors, notwithstanding any law or charter provision to the contrary.
(Emphasis supplied)

Such legislative language reflects a clear and unequivocal intent to permit public officials of a county, i.e., County Auditor, to serve both the county and simultaneously serve as a member of a JEDD Board of Directors. The foregoing and above-quoted language is clearly intended to eliminate problems regarding conflicts of interest and incompatibility of offices. Stated otherwise, R.C. 715.70(G) expressly

authorizes a County Auditor to serve simultaneously as a member of the governing Board of Directors for a JEDD. Whatever conflicts *arguendo* may exist between the two positions (and as noted in Section I above, there are none), the Ohio General Assembly has chosen to permit an individual to serve simultaneously as a County Auditor and a member of the governing Board of the JEDD.

When the Ohio General Assembly has intended that an individual be permitted to participate in two different capacities that arguable might have prohibitive interests, it is expressly so stated. As such, this issue of compatibility is further resolved by legislative edict.