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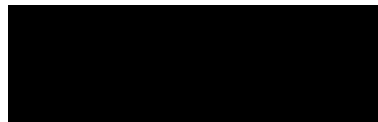
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December 7, 2023

Staff Opinion 2023-STAFF-1207

Renata Ramsini  
Chief Ethics Officer and Director of Campaign Finance



Dear Ms. Ramsini,

On December 7, 2023, the Ethics Commission received your request for an opinion. Prior to receiving this request, Commission staff had discussed this matter by phone with you and Lara Baker-Morrish, Chief Counsel, Deputy City Attorney at the Columbus City Attorney's Office. This staff advisory opinion is based on the information you and Ms. Baker-Morrish have provided.

Your request for an opinion involves three scenarios where a city official would serve on a private non-profit corporation board, on the board of an entity created by statute, or on a non-profit corporation board created by the City for a public purpose. This opinion is limited to the questions from scenarios one and two concerning private, non-profit corporations and regional planning commissions. This opinion does not address the general questions in scenario three concerning city-created, non-profit entities.<sup>1</sup>

### Key Facts

- The Mid-Ohio Regional Planning Commission (MORPC) is a voluntary association of local governments established and operated pursuant to R.C. 713.21. MORPC's core areas of focus include transportation and mobility; community and economic development; and environmental planning and sustainability.
- The Mayor of the City of Columbus appoints City officials to serve on MORPC. City Council sometimes approves these mayoral appointments. However, the appointees are not specifically directed to represent the City of Columbus and its interests while serving on MORPC.
- You provided the following statutory authority:
  - R.C. 713.21(A) states that “[a]fter creation of a regional planning commission, school districts, special districts, authorities, and any other units of local government may participate in the regional planning commission, *upon such terms as may be agreed upon by the planning commissions and boards.*”<sup>2</sup>
  - R.C. 713.21(D) authorizes regional planning commissions to “make agreements with other public or private agencies for the temporary or joint use of staff employees.”

- R.C. 713.32 provides that “[a]ny member of an interstate regional planning commission may hold any other public office, appointive or elective, and may serve as a member of a city, village, or county planning commission, except as otherwise provided in the charter of the city or village.”<sup>3</sup>
- You provided a copy of MORPC’s Bylaws and Articles of Agreement.
- You raise questions about whether the guidance in Ethics Commission Advisory Opinions No. 92-014 and 99-004 aligns with the statutory exemption in R.C. 713.21 and the Ethics Commission’s “official capacity” exception.

### **Questions Presented**

1. Under what circumstances, if any, can a member of MORPC, who is also an elected city official, participate or act upon matters before MORPC that affect the city for which he or she serves as an elected official, and vice versa?
2. Under what circumstances, if any, can a member of MORPC who is also a city employee, participate or act upon matters before MORPC that affect the city in which he or she is employed, and vice versa?
3. If a public official or employee is *not* prohibited from participating in matters before MORPC that affect the city he or she serves, and vice versa, does the Ethics Law prohibit him or her from also serving concurrently on another board or commission that either:
  - a. Does business with the municipality; or
  - b. Does business with the planning commission?
4. Do the prohibitions in R.C. 2921.42 apply to both appointed MORPC member representatives as well as individuals chosen to serve on MORPC committees and subcommittees in their official capacities by virtue of their public employment?

### **Brief Answers**

1. A MORPC member who is also an elected city official is prohibited from participating or acting on matters before MORPC that affect the city unless the elected official serves on MORPC in his or her official capacity.
2. A MORPC member who is also a public employee is prohibited from participating or acting on matters before MORPC that affect the city unless the employee serves on MORPC in his or her official capacity. A city official or employee can serve in his or her official capacity if:
  - MORPC enacts bylaws that would require the city official or employee to represent the interests of his or her city; or
  - The city instructs the city official or employee to represent the interests of the city.
3. If a city public official or employee is designated to serve on MORPC in his or her official capacity, then the Ethics Law does not prohibit the public official or employee from being appointed to serve in his or her official capacity on other boards or commission. However, if the public official or employee is not serving in his or her official capacity, then the public official or employee would be prohibited from participating in matters in his or her public role that affect the other board or commission.
4. The prohibitions in R.C. 2921.42 apply to anyone serving on MORPC in a fiduciary capacity, including as a board member.

### **Official Capacity Exception**

A public agency may create a non-profit corporation, or become a participant in its operation, as a means of acquiring community services.<sup>4</sup> A public official can serve as a member of the board of the non-profit corporation in his or her official capacity as a representative of his or her public agency.<sup>5</sup> The Ethics Commission has opined that when a public official serves on the board of a non-profit corporation in his or her official capacity, “there would not be a dual interest in which private considerations would distract from his [or her] serving the public interest.”<sup>6</sup> In other words, the public official is expected to serve as a representative of the public employer that appointed him or her to the non-profit board position. His or her service with the non-profit board is an extension of that service with the public board.<sup>7</sup>

In its opinions, the Commission has set forth four criteria that must be met in order for a public official to be deemed to serve on the board of a non-profit corporation in his or her official capacity:

- (1) the public agency creates the non-profit corporation or participates in its operation;
- (2) any public official or employee connected with the jurisdiction . . . may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent its interests;
- (3) the public official or employee must be formally instructed to represent his or her public agency and its interests; and
- (4) there must be no other conflict of interest on the part of the designated representative.<sup>8</sup>

The Ethics Commission has explained that, ordinarily, R.C. 102.03(D) and R.C. 2921.42(A)(1) prohibit a public official from recommending, voting on, or otherwise participating in the authorization of a public contract between a non-profit corporation that he or she serves as a board member and his or her public agency. However, a public official serving in his or her official capacity to represent his or her public agency’s interests is not prohibited from participating in matters before his or her public agency that affect the non-profit, unless the official, his or her family members,<sup>9</sup> or his or her business associates<sup>10</sup> have a financial interest in the contract.<sup>11</sup>

In Advisory Opinion No. 99-004, the Ethics Commission applied the official capacity exception to a public official serving on a statutorily created public board. The Commission considered educational service center board members serving on the board of a joint vocational school board.<sup>12</sup> When analyzing the enabling statute for these boards, the Commission found that three elements of the official capacity exception were met, because:

1. The statute required the school board to participate in, or approve of, the creation of the district;<sup>13</sup>
2. The statute required the educational service center board to appoint members of its board to the joint vocational board, which constituted a formal designation; and
3. The statute required members to represent the interests of the educational service center board while serving on the joint vocational board.

Therefore, as long as no other outside conflict of interest was present (the fourth element), then the official capacity exception applied because the enabling statute met the elements of the official capacity exception.<sup>14</sup> The only requirement for the educational service center board was to appoint a member with direct instruction to represent the educational service center board’s interests.<sup>15</sup> However, as discussed below,

the Commission determined that, in contrast, the language in the regional planning commission enabling statute did not meet the official capacity exception.

### **Previously Issued Formal Advisory Opinions on MORPC**

The Commission specifically addressed local officials serving on MORPC in Advisory Opinion No. 92-014. In that opinion, the Commission examined a statutory exemption in R.C. 713.21 that allows city officials to serve on a regional planning commission.<sup>16</sup> The Commission stated that this statutory exemption did not relieve the officials from complying with other requirements of the Ethics Law.<sup>17</sup> For example, although the city officials could serve on MORPC, the officials would be required to abstain from matters affecting their city and also meet the public contract law exception for any contracts between the city they served and MORPC. The Commission noted that this conclusion was consistent with the legislative history that explicitly linked the enactment of this exemption to an Attorney General's Opinion finding that the positions were incompatible.<sup>18</sup> However, in Advisory Opinion No. 92-014, the Commission did not address the application of the official capacity exception to the prohibitions in R.C. 2921.42 and required the members to observe the public contract law and conflict of interest law.<sup>19</sup>

The Commission reaffirmed this conclusion in Advisory Opinion No. 99-004, which examined the statute that created joint vocational school districts. The Commission distinguished joint vocational school districts from regional planning commissions, stating that the regional planning commission statute did not meet the official capacity exception.<sup>20</sup> When applying the four elements of the exception for regional planning commissions, the Commission determined that the statute failed to comply with elements two and three. Specifically, the statute establishing regional planning commission membership did not require the members to be elected officials or employees of participating municipalities.<sup>21</sup> Additionally, the statute did not require officials or employees serving on a regional planning commission to represent the interests of their city or township.<sup>22</sup> Since the members were not required to be city officials or employees and were not required to represent the interests of the appointing authority, then the statute did not require the officials or employees to serve in their official capacity.<sup>23</sup> In contrast, the Commission explained that the statute that creates a joint vocational school district explicitly requires that the members of the joint vocational board represent the interests of their educational service center board while serving on the joint vocational board.<sup>24</sup> Therefore, the Commission did not apply the official capacity to city officials or employees serving as regional planning commission members.

In your request, you point out that the guidance in Advisory Opinions No. 92-014 and 99-004 does not appear to align with the statutory exemption in R.C. 713.21 that allows city officials and employees to serve on a regional planning commission and the purpose of interagency collaboration. Further, you cite to R.C. 713.21(D), which allows for agreements between public or private agencies for joint use of staff, and R.C. 713.32, which allows a regional planning commission member to serve as a city official.<sup>25</sup>

The legislative history of R.C. 713.21 makes clear that the statutory change was designed to overturn an Attorney General's opinion finding that the positions were incompatible.<sup>26</sup> Additionally, the text of the statute does not address the Ethics Law in any way and these statutes were in place, and have not substantially changed, since the time that the Commission issued Advisory Opinions No. 92-014 and 99-004. Finally, a subsequent Attorney General's opinion supported the Commission's conclusions in these two opinions, stating, "a person who serves simultaneously in the positions of township trustee and county planning commission member should abstain from participating in any deliberations, discussions, negotiations, or votes concerning matters in which the person has a conflict of interest that is prohibited by applicable statutes

governing conflicts of interest.”<sup>27</sup> In fact, the Attorney General’s opinion cited to Advisory Opinion No. 92-014 in the analysis.<sup>28</sup> Therefore, the official capacity exception is not automatically available based solely on the language in R.C. 713.21.

In your request letter, you point to R.C. 713.21(A), which states that “[a]fter creation of a regional planning commission, school districts, special districts, authorities, and any other units of local government may participate in the regional planning commission, *upon such terms as may be agreed upon by the planning commissions and boards.*” (Emphasis added) This provision appears to require enactment either through agreement between the regional planning commission and its members or through the planning commission’s bylaws. However, it appears that MORPC’s Bylaws and Articles of Agreement do not require a city official or employee to serve the interest of their city.

The Commission has not considered the application of the official capacity exception implemented through an act of the City or through the bylaws of MORPC, rather than applied by a statute.

### **Applying the Official Capacity Exception to MORPC**

The Ethics Commission did not prohibit the application of the official capacity exception in Advisory Opinions No. 92-014 and 99-004. Rather, the Commission only addressed whether R.C. 713.21 intrinsically applied the official capacity exception to MORPC members. While the statute does not, on its terms, apply the official capacity exception, that does not preclude MORPC or the City of Columbus from utilizing the official capacity exception.

If the City appoints its officials or employees to MORPC following the official capacity exception guidelines as set forth by the Ethics Commission, then City officials or employees serving on MORPC in their official capacity would not be prohibited from participating in matters affecting MORPC in their roles with the City. For example, R.C. 102.03(D) and R.C. 2921.42(A)(1) ordinarily would prohibit a public official from recommending, voting on, or otherwise participating in the authorization of a contract between MORPC and the City, if the City official also served on MORPC. However, if the City official serves in his or her official capacity to represent the City’s interests, then he or she is not prohibited from participating in a contractual matter between the City and MORPC.<sup>29</sup> There are two potential routes to utilizing the official capacity exception either through the actions of MORPC or the City of Columbus.

#### *MORPC’s Bylaws and R.C. 713.21(A)*

MORPC could modify its bylaws to require members to represent the interests of their cities and satisfy the requirements of the official capacity exception. Currently, the first element of the official capacity exception is satisfied because the City is an active participant in MORPC. However, elements two and three, which require the official or employee to serve the interest of his or her agency, are not met.

MORPC has the statutory authority under R.C. 713.21(A) to set the terms of participation for its members.<sup>30</sup> These terms could include a requirement that board members must represent the interests of the appointing public agency. For example, if MORPC were to amend its bylaws to require City officials who are appointed to MORPC’s board to represent the interests of the City, then this would utilize R.C. 713.21(A) to meet the elements two and three official capacity exception. If no other conflict of interest on the part of the designated official or employee existed, then the city official would meet the terms of the official capacity exception.

### *Appointing City Officials or Employees Utilizing the Official Capacity Exception*

The City of Columbus also could appoint City officials or employees to MORPC following the guidelines in the official capacity exception.<sup>31</sup> The City is already an active participant in MORPC, which satisfies the first element of the official capacity exception. To satisfy the remaining elements of the exception, the City can appoint an official or employee to MORPC through the following steps:

1. The City must formally designate the official or employee to serve on MORPC to serve the City's interests;
2. The City must formally instruct the official or employee to represent the City's interests; and,
3. There must be no other conflict of interest on the part of the designated official or employee.

The Commission has stated that either a legislative authority or appointing governing body can establish these criteria in an appointment,<sup>32</sup> so either City Council or the Mayor could appoint MORPC members with these instructions and designations. Following these steps helps ensure that public officials and employees have clear direction on how to act in their roles and prevents potential conflicts of interest.<sup>33</sup>

### **Serving on Multiple Boards Utilizing the Official Capacity Exception**

You also asked whether a City official or employee who also serves on MORPC's board can also be appointed to another board or commission that does business with the City or does business with MORPC. In that case, the city official or employee would have his or her position with the city, MORPC Board, and service on another organization's board. The theory underlying the official capacity exception is that a public official or employee's service with another organization is an extension of his or her service with the public agency.<sup>34</sup> As long as the City official or employee is serving in his or her official capacity for each organization, then the Ethics Law does not prohibit serving in multiple official capacity roles. Regardless of the number of roles, the City official or employee is tasked with representing the City's interests and does not face a conflict of interest. For example, if a city official served on MORPC's Board and on the Central Ohio Transit Authority Board, then the official would not have a conflict of interest as long as the official served on both boards in his or her official capacity.

The Commission reviewed your request for an opinion at its meeting on December 7, 2023, and directed staff to issue this staff advisory opinion in response. This opinion represents the views of the undersigned, based on the facts presented and the precedent of the Commission. It is limited to questions arising under Chapter 102 and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. Please contact this office again if you have any other questions or if you wish to request reconsideration of this opinion under OAC 102-3-07.

Sincerely,



Paul M. Nick  
Executive Director

Enclosure (via email only): Advisory Opinion No. 92-014  
Advisory Opinion No. 99-004  
Informal Opinion 2008-INF-1002-1  
Informal Opinion 2008-INF-1223

CC (via email only):

Lara Baker-Morrish, Chief Counsel and Deputy City Attorney, Columbus City Attorney's Office  
Shawn Hufstedler, Chief Operating Officer, Mid-Ohio Regional Planning Commission

The Ohio Ethics Commission Advisory Opinions referenced in this opinion are available on the Commission's Web site: [www.ethics.ohio.gov](http://www.ethics.ohio.gov)

<sup>1</sup> The Commission has addressed similar questions in previously issued informal advisory opinions. These opinions are attached for your reference. Please contact the Commission if you have further questions regarding a specific city-created non-profit entity.

<sup>2</sup> R.C. 713.21(A) (Emphasis added).

<sup>3</sup> R.C. 713.32 applies to interstate planning commissions, not regional planning commissions, but is substantially similar to the language in R.C. 713.21 that governs regional planning commissions.

<sup>4</sup> See Ohio Ethics Commission Advisory Opinions No. 83-010 (community development), 84-010 (paramedic services), and 92-012 (hospital services). See also 1979 Ohio Atty.Gen.Ops. No. 79-055.

<sup>5</sup> Adv. Op. No. 84-001.

<sup>6</sup> See Adv. Ops. No. 2001-05, 84-010, 84-001, and 83-010 (a public official who serves in his or her "official capacity" on a non-profit corporation's board to represent the interests of his or her public agency is not prohibited from participating in matters before his or her public agency that affect the corporation). See also 1991 Atty.Gen.Ops. No. 91-007 (stating that the Ethics Commission's "official capacity" exception is "eminently reasonable and a valid statement of general ethical principles governing participation by public servants in the affairs of nonprofit corporations").

<sup>7</sup> Adv. Op. No. 2001-05.

<sup>8</sup> See also Adv. Ops. No. 82-004, 83-010, 92-002, and 93-012; 1991 Atty.Gen.Ops. No. 91-007.

<sup>9</sup> See Adv. Op. No. 2010-03 (the definition of "member of a public official's family" includes parents and step-parents; grandparents; a spouse; children and step-children, whether dependent or not; grandchildren; siblings and any other individual related to a public official by blood or marriage if the individual lives in the same household with the official).

<sup>10</sup> See Adv. Op. No. 86-002 (business associates are parties that conduct a common business enterprise). See also Adv. Op. Nos. 79-001, 84-014, and 85-004.

<sup>11</sup> Adv. Ops. No. 96-005 and 99-004.

<sup>12</sup> Adv. Op. No. 99-004 ("An elected municipal or township official who also serves on a regional planning commission is prohibited, by R.C. 102.03(D) and 2921.42(A)(1), from acting on matters that affect the municipality or township for which he is an elected official. However, this situation can be distinguished from the one in 92-014.")

<sup>13</sup> Adv. Op. No. 99-004 citing R.C. 3311.18.

<sup>14</sup> Adv. Op. No. 99-004.

<sup>15</sup> *Id.* ("So long as the joint vocational board member is instructed, as part of his appointment, to serve and represent the interests of the ESC, the third criterion of the "official capacity" exception is satisfied.")

<sup>16</sup> Adv. Op. No. 92-014 ("The exemption in R.C. 713.21 allows public officers and members of city, village, or county planning commissions to serve as regional planning commission representatives despite the fact that the regional planning commission may have awarded a grant to the governmental agency they serve.")

<sup>17</sup> *Id.* ("However, R.C. 713.21 does not allow public officers and members of local planning commissions to participate in matters before the planning commission affecting the other governmental agency he serves.")

<sup>18</sup> 1965 Am.S.B. No. 276 (as Reported by the Senate Urban Affairs Commt.) ("A recent Attorney General's opinion held the positions of members of a city planning commission and of a county planning commission to be incompatible. This bill would permit such dual membership.")

<sup>19</sup> Adv. Op. No. 92-014 ("A MORPC representative who is a board member, planning commission member, or elected or appointed officer or employee of a political subdivision receiving a grant from MORPC, must observe the prohibition of Division (A)(1) of Section 2921.42 of the Revised Code.")

<sup>20</sup> Adv. Op. No. 99-004 ("An elected municipal or township official who also serves on a regional planning commission is prohibited, by R.C. 102.03(D) and 2921.42(A)(1), from acting on matters that affect the municipality or township for which he is an elected official. However, this situation can be distinguished from the one in 92-014.")

<sup>21</sup> *Id.* (“The statute that enables a regional planning commission does not require that its membership be composed of elected officials from the townships and municipalities that participate in the planning commission.”)

<sup>22</sup> *Id.* (“Thus, the statute did not envision that municipal or township officials would be required to represent the interests of their municipality or township while serving on the regional planning commission.”)

<sup>23</sup> *Id.* (“The statute that enables a joint vocational school district does require that the members of the joint vocational board represent the interests of their ESC board while serving on the joint vocational board.”)

<sup>24</sup> *Id.*

<sup>25</sup> R.C. 713.32 applies to interstate planning commissions, not regional planning commissions, but is substantially similar to the language in R.C. 713.21 that governs regional planning commissions.

<sup>26</sup> 1965 Am.S.B. No. 276 (as Reported by the Senate Urban Affairs Commt.) (“A recent Attorney General’s opinion held the positions of members of a city planning commission and of a county planning commission to be incompatible. This bill would permit such dual membership.”); *see* Adv. Op. No. 94-003 (“The Ethics Commission has held that, in the same manner as a court, its interpretation of a statute must give effect to the intent of the legislature in enacting the statute.”)

<sup>27</sup> 2003 Op. Att’y Gen. No. 2003-041.

<sup>28</sup> *Id.* (“[P]rior opinions of the Attorneys General and Ohio Ethics Commission have advised that it is inappropriate for a person who serves in two public positions to participate in a matter that results in a violation of the ethics or conflict of interest provisions of R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43. Ohio Ethics Comm’n, Advisory Op. No. 92-014...”)

<sup>29</sup> Public officials and employees are prohibited from participating in matters involving a contract between the City and MORPC if, the official or employee, family members, or business associates have a financial interest in the contract. Adv. Ops. No. 86-002, 84-014, 85-004, 96-004, and 99-004.

<sup>30</sup> R.C. 713.21(A).

<sup>31</sup> In Adv. Op. No. 88-005, the Commission recognized that a city council member could serve on a community improvement corporation in his or her official capacity because the statute required it. In Inf. Adv. Op. No. 2009-INF-0819-2 (Chambers), the Commission did not prohibit village council members from serving in their official capacity on undesignated community improvement corporations, even though there was no statutory authority explicitly requiring the member to serve in his or her official capacity.

<sup>32</sup> Adv. Op. No. 84-001 and 99-004.

<sup>33</sup> Adv. Op. No. 99-004 (“The theory that allows a public official to serve in a fiduciary position with a non-profit agency, in his official capacity, is that there is no dual interest such that the official’s private considerations would distract from his serving the public interest.”)

<sup>34</sup> Adv. Ops. No. 99-004 and 2001-05.