



OHIO ETHICS COMMISSION
THE ATLAS BUILDING
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April 6, 1989

Informal Opinion 1989-INF-0406-1

Mr. Ben E. Pierce

Dear Mr. Pierce:

The Ethics Commission is in receipt of your request that the informal advisory opinion issued to Anthony J. Zaharieff and Stephen M. Stapleton on July 26, 1988 be supplemented in consideration of additional facts set forth in your letter of March 17, 1989.

The informal opinion of July 26, 1988 concluded that Division (D) of Section 102.03 of the Revised Code would prohibit a city council member from participating in a matter which would provide him with such a definite and particular benefit or detriment that his private interest could impair his independence of judgment or unbiased discretion in making his official decisions and responsibilities. Specifically, the opinion stated:

A member of city council would be prohibited from voting, participating in discussions, or otherwise using his official position with regard to a proposed land use or rezoning change of property adjacent to or near the council member's property if the decision would affect the value of his property, present him an opportunity to sell his property, or if the change would otherwise have a beneficial or detrimental effect upon his property. Again, this is a factual determination, which is dependent upon the circumstances of a particular case. (Emphasis added.)

You have stated that subsequent to the staff opinion issued on July 26, 1988, there have been two proposals for large commercial developments in the City of Beavercreek which require action by city council. One of the proposed developments, the Towne Centre, is immediately across the New Germany-Trebein Road from your property. The other proposed development, the Beavercreek Mall, is located within 1,500 feet from the western edge of your property and is also located on the New Germany-Trebein Road. Public improvements such as the installation of water and sewer lines and road widening would occur in areas adjacent to or near your property as a result of the construction of these developments. You have stated that you will abstain from any action as a city council member involving these public improvements. You wish to know whether you are prohibited from participating in city council's determination whether to approve changes in zoning and land use regulations which would allow construction of the proposed developments.

You also stated that in October, 1988, you obtained a rezoning of your ten and one-half acres which allows you to develop your property for single family residences. The rezoning was at considerable expense to yourself, but resulted in an increase in the value of your property. You propose to construct three single family homes on your property. These homes will be located on the New Germany-Trebein Road across from the proposed Towne Centre, each with a lot size of approximately two acres.

You further stated that you hired a real estate appraiser in order to determine the impact the two proposed commercial developments would have upon your plans to construct single family homes on your property. You have submitted the appraiser's evaluation and various documents with your request that the July 26, 1988 staff opinion be supplemented. Other interested parties have also submitted material which they consider relevant to the issue at hand. Some parties dispute your appraiser's evaluation and the methods which he used.

The Ohio Ethics Commission does not sit as a fact finding body when rendering advisory opinions and interprets pertinent statutory provisions with reference to the facts as presented by the party requesting the opinion. See Ohio Ethics Commission Advisory Opinion No. 75-037. The Ethics Commission does have the authority, pursuant to R.C. 102.06, to investigate and conduct hearings upon allegations of violations of Chapter 102., Section 2921.42, or Section 2921.43 of the Revised Code. During an investigation the Commission staff will attempt to discern all facts relevant to the alleged violation, and a hearing will be held where the facts so warrant. In hearing a case, the Commission receives evidence presented by the Commission staff and by the respondent, and if the Commission finds, by a preponderance of the evidence that the facts alleged in the complaint are true and constitute a violation of one of the statutory prohibitions under its jurisdiction, it shall refer the matter to the appropriate prosecuting authority and the respondent's appointing authority. In rendering an opinion, however, neither the Commission nor its staff can conclude, as a matter of law, that one presentation of a situation has greater merit or is a more accurate or complete portrayal of the circumstances than the other, especially when a factual situation is fairly debatable. This response to your request for an opinion, therefore, is based solely on the information you have presented in your letters of March 17 and 23, 1989 and the attachments thereto. You should be aware, however, that when the Commission conducts an investigation into an alleged violation of the Ethics Law under R.C. 102.06, it will, as discussed above, attempt to discern all facts relevant to the allegation, and is not limited in that effort to consideration of the respondent public official's recitation of the matter. Furthermore, in an investigation and subsequent hearing, the public official will not be insulated from liability by an advisory opinion, to the extent that the Commission finds to be true facts that were not presented in the request for an opinion that would have changed the conclusion of the opinion.

The appraiser's evaluation has stated that there may be an initial detriment to your property as potential purchasers of the three single family homes that you plan to construct on your property across from the proposed Towne Centre "shy away from this area due to the uncertainty of the commercial development (quality) and the typical congestion created by major commercial construction projects along roadways and the general surrounding area," especially "since the City of Beavercreek has many residential housing options regarding vacant land or developed houses available to the public (no significant shortage of developed homes or vacant land available for development)." The appraiser's evaluation also stated that the widening of the New Germany-Trebein Road may cause a temporary detriment to your property by creating temporary congestion and "uncertainty in the mind of the residential buyer." The appraiser's evaluation also stated that the possibility of increased drainage due to the proposed development may have a temporary detriment to your property, since residential property owners have negative viewpoints of any increase in natural drainage on or near their property.

As stated above, Division (D) of Section 102.03 of the Revised Code prohibits a public official from participating in a matter which would provide the public official with such a definite and particular benefit or detriment that his private interest could impair

his independence of judgment or unbiased discretion in making an official decision. See Advisory Opinion No. 88-004. A public official is prohibited from participating in a decision which would affect the value of his property or affect his ability to sell his property. Id.

The appraiser that you hired has determined that if the Towne Centre and Beaver-creek Mall are built the result would be an initial detriment to your property since the potential residential buyers of the three homes which you plan to construct would avoid the area in which your property is located. If Beavercreek City Council voted to reject the zoning changes or changes in land use regulations that are necessary for the construction of the two proposed commercial developments, then any uncertainty or negative viewpoints would be removed from the minds of residential buyers since there would be no reason for residential buyers to avoid the area in which your property is located. Therefore, it is apparent that it is to your benefit that the proposed commercial developments not be built, especially in light of the fact that, as you have stated, you have gone through considerable personal expense to rezone your property to allow construction of additional single family homes. As a member of Beavercreek City Council, you would have an inherent conflict of interest in making an official determination concerning changes in zoning and land use regulations which would allow the construction of the proposed commercial developments adjacent to or near your property such that your independence of judgment could be impaired. This inherent conflict of interest exists even in light of your abstaining from voting on matters involving the installation of water and sewer lines and road widening in the area since such public improvements are an integral part of the proposed developments and would be considered in conjunction with changes in the zoning and land use regulations.

Therefore, you are prohibited by R.C. 102.03(D) from voting, deliberating, or otherwise participating, formally or informally, with respect to the proposed changes in zoning and land use regulations necessary for the construction of the Towne Centre and the Beavercreek Mall and upon the public improvements made adjacent to or near your property that are integral to the proposed developments.

The issue of whether your opposition to a proposed commercial development in an area near your property prior to the time you were elected would now preclude you from participating in matters involving the current proposals for commercial development need not be addressed in light of your inability to vote, deliberate, or otherwise participate in the matter due to the present factual circumstances described above.

As a final matter, a footnote to your March 17, 1989 letter states that total ownership of your property transferred to your wife on March 9, 1989. The Ethics Commission has held that if the relationship between a council member and another individual is such that the council member's objectivity and independence of judgment could be impaired with regard to matters that affect the interests of that individual, then the public official is prohibited by R.C. 102.03(D) from participating in such matters. See Advisory Opinions No. 88-004 and 80-003. The Ethics Commission has specifically held that R.C. 102.03(D) prohibits a city council member from voting on a zoning change affecting real property owned by his wife. See Advisory Opinion No. 79-008. An unexplained transfer of your property at this time to an immediate family member can only serve to create an appearance of impropriety and undermines public trust and confidence in the integrity and impartiality of effective and objective local government; it will have no effect upon the application of R.C. 102.03(D) to the facts and circumstances described above.

Ben E. Pierce
April 6, 1989
Page 4

This opinion is based on the facts which you have presented and was approved by the Ohio Ethics Commission at its meeting on April 6, 1989. This informal opinion 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.

Very truly yours,



John Rawski
Staff Attorney

JR/pg