



OHIO ETHICS COMMISSION

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August 11, 1995

Informal Opinion 1995-INF-0811-1

Judy A. Gano
Director of Law
City of Wilmington

Dear Ms. Gano:

In your letter to the Ethics Commission, you state that the Review Board of the City of Wilmington (City) is in the process of awarding grants, funded through Community Development Block Grant (CDBG) moneys, to property owners in the City's downtown business area. The grants are part of a downtown revitalization project that will enable owners of downtown business properties to rehabilitate and improve building facades. You ask whether the Ohio Ethics Laws and related statutes prohibit a corporation, which owns a downtown building, from receiving a rehabilitation and facade improvement grant if a member of City Council is the president of the corporation and sat on City Council when the City applied for and was given the grant.

As explained below, if City Council must approve the decision of the Review Board to award the grant of CDBG funds to the Corporation, then R.C. 2921.42 (A)(3) would prohibit the Corporation from receiving financial assistance from the City. If City Council is not required to approve the decision of the Review Board to award the grant of CDBG funds to the Corporation, then R.C. 2921.42 (A)(4) prohibits the Corporation from receiving the rehabilitation and facade improvement grant unless the council member is able to affirmatively demonstrate that he meets the limited exception to the prohibition of R.C. 2921.42 (A)(4) that is provided by R.C. 2921.42 (C). In addition, R.C. 2921.42 (A)(1) and R.C. 102.03 (D) prohibit the council member from participating, formally or informally, in the City Review Board's decision regarding the Corporation's application for a rehabilitation and facade improvement grant.

You have provided this Office with information concerning the proposed grant and the council member.

In summary, the state awards CDBG monies to the City. The City has established a Review Board with the authority to approve or disapprove applications for grants. A downtown building with architectural and historical significance is owned by the Ganesha Corporation (Corporation). The Corporation has applied for a rehabilitation and facade improvement grant. A council member is the

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president of the Corporation and owns more than five percent of the Corporation's outstanding shares of stock. The spouse of the council member is also an active participant in the Corporation. The council member in question was on council when the City applied for, and received, the CDBG funding from the state.

Your question raises the application of four different provisions of the Ethics Law and related statutes. The first addressed is one of several restrictions regarding public contracts, pursuant to Section 2921.42 of the Revised Code.

Prohibition Imposed by R.C. 2921.42 (A)(4)

Division (A)(4) of Section 2921.42 of the Revised Code reads as follows:

- (A) No public official shall knowingly do any of the following:
 - (4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

R.C. 2921.42 (A)(4) prohibits a public official from having an interest in a public contract entered into by or for the use of the political subdivision with which he is connected.

R.C. 2921.01 (A) defines the term "public official" for purposes of R.C. 2921.42 to include an elected or appointed officer of a political subdivision of the state. Therefore, member of city council is a "public official" for purposes of R.C. 2921.42, and is subject to the prohibitions therein. Ohio Ethics Commission Advisory Op. No. 89-008.

R.C. 2921.42 (G)(1) defines the term "public contract" for purposes of R.C. 2921.42 to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by any public entity. The Ethics Commission has held that a political subdivision's purchase or acquisition of community development or urban revitalization services through the use of low-interest loans or grants to property owners constitutes a "public contract" for purposes of R.C. 2921.42, regardless of whether the loans or grants are funded through local or federal moneys. See Advisory Ops. No. 83-005, 84-011, and 85-002. This holding follows Commission precedent that a grant of funds from a public agency is a "public contract," as contemplated by the statutory definition of that term, because a grant is the purchase or acquisition of services by or for the use of the public agency that benefits from the award of the grant. Advisory Op. No. 82-004. Also, the Commission has held that a political subdivision's purchase or acquisition of community development or urban revitalization services through land reutilization programs and tax abatements falls within the definition of "public

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contract" in R.C. 2921.42. See Advisory Ops. No. 88-006 and 89-008, respectively. See also Advisory Op. No. 92-013 (an infrastructure improvement made as part of an urban revitalization project is a "public contract").

An "interest," for purposes of the prohibitions imposed by R.C. 2921.42, must be definite and direct and may be either pecuniary or fiduciary in nature. Advisory Op. No. 81-008. The Ethics Commission has held that a property owner who participates in a political subdivision's urban revitalization and community development loan program has a definite and direct interest in, and directly profits from, a public contract because the loan or grant goes directly to the property owner and the property owner provides the urban revitalization and community development services. Advisory Op. No. 92-013. See also Advisory Ops. No. 83-005, 84-011, 85-002, 88-006 and 91-001. Therefore, in the instant situation, the Corporation will have a definite and direct interest in the rehabilitation and facade improvement grant.

The issue becomes whether the council member would have an "interest" in the proposed grant for purposes of R.C. 2921.42 due to his fiduciary and financial ties to the Corporation.

The Ethics Commission has consistently held that an individual with an ownership interest in a corporation, or who serves as an officer, has a definite and direct pecuniary and fiduciary interest in the corporation's contracts. See Advisory Op. No. 78-006, 81-008, 86-005, 89-006, and 89-008. In the instant situation, the council member not only has more than a five percent ownership interest in, but is also president, of the Corporation. As a result, he will have a definite and direct interest in the rehabilitation and facade improvement grant. Accordingly, R.C. 2921.42 (A)(4) prohibits the Corporation from receiving a rehabilitation and facade improvement grant from the City.

The issue then becomes whether, in the instant situation, one of the exceptions to R.C. 2921.42 (A)(4) can apply and enable the Corporation to receive the grant. Divisions (B), (C) and (D) of R.C. 2921.42 provide exceptions to the prohibition imposed by R.C. 2921.42(A).

Exception Provided by R.C. 2921.42 (B)

The exception provided by R.C. 2921.42 (B) is inapplicable in this situation because it requires that the public official's interest be limited to owning and controlling shares of a corporation, and that the ownership interest be less than five percent of the corporation's outstanding shares of stock. Advisory Op. No. 93-001. In the instant situation, the council member is an officer of the Corporation, owns more than five percent of the Corporation's outstanding shares, and participates in the Corporation's operation.

Exception Provided by R.C. 2921.42 (D)

The General Assembly recently amended R.C. 2921.42 in Sub. H.B. 150, 120th Gen. A. (eff. June 23, 1994), by enacting the exception contained in R.C. 2921.42 (D), which reads:

Division (A)(4) of this section does not prohibit participation by a public employee in any housing program funded by public moneys if the public employee otherwise qualifies for the program and does not use the authority or influence of his office or employment to secure benefits from the program and if the moneys are to be used on the primary residence of the public employee. Such participation does not constitute having an unlawful interest in a public contract. (Emphasis added.)

Division (D) of R.C. 2921.42 provides a limited exemption from the prohibition imposed by R.C. 2921.42 (A)(4) and enables public employees to participate in housing programs funded by public moneys if there is an objective showing that the narrow requirements of R.C. 2921.42 (D) can be met.

In enacting H.B. 150, the General Assembly, did not modify the definition of the term "public contract" as applied to these loans or grants, or change the holdings of the prior opinions of the Ethics Commission, which concluded that a political subdivision's purchase or acquisition of community development or urban revitalization services through the use of low-interest loans or grants constitutes a "public contract" for purposes of R.C. 2921.42. Reenactment or amendment of a statute without modification after administrative or judicial interpretation is an indication of implied legislative approval of such interpretation. See Laufman v. Oakley Building and Loan Company, 408 F. Supp. 489 (S.D. Ohio 1976). See also Seeley v. Expert, Inc. 26 Ohio St. 61 (1971). Rather, in Sub. H.B. 150, the General Assembly enacted a narrow exception to the prohibition imposed by R.C. 2921.42 (A)(4) in order to allow a public employee, who did not participate through the use of his official authority or office, to secure housing program funding for his residence in similar fashion as other citizens. This legislation responded to testimony that a part-time county employee, without decision-making authority, was barred from securing a loan to renovate her home after being notified by the county of deficiencies in her property. Accordingly, the Ethics Commission's holdings, in its previous advisory opinions that concern the prohibitions imposed by R.C. 2921.42 in situations involving community development or urban revitalization services programs funded by public moneys, are still relevant if the exception provided by Division (D) cannot be met.

The exemption provided by Division (D) of R.C. 2921.42 cannot be met in this instance because the grant is not to benefit the primary residence of a public employee. Rather, the grant is to benefit commercial property owned by a corporation to which a city council member serves as President and has an ownership interest.

Exception Provided by R.C. 2921.42 (C)

Finally, there is the exception provided by R.C. 2921.42 (C), which reads as follows:

- (C) This section does not apply to a public contract in which a public servant, member of his family, or one of his business associates has an interest, when all of the following apply:
- (1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;
 - (2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official's becoming associated with the political subdivision or governmental agency or instrumentality involved;
 - (3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;
 - (4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of his family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

These criteria are strictly applied against the public officer or employee and the burden is upon the public officer or employee to demonstrate his compliance with the exception. See Advisory Ops. No. 84-011 and 87-003. Therefore, in order for the Corporation to receive a CDBG grant from the City, all four parts of the exception provided by Division (C) of Section 2921.42 must be met. See Advisory Ops. No. 84-011 and 88-006. See also Civil Service Personnel Ass'n v. Ohio Ethics Comm'n, No. 84-4-1065, (Summit County C.P. 1984), a copy of which is enclosed.

The Ethics Commission has held that, with regard to the first criterion of Division (C), community development services are provided to a city by participants in a CDBG funded community development program are "necessary services" for the city. Likewise, under the third criterion of

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Division (C), city officers and employees who wish to participate in the programs have no "customers or clients in similar transactions." Advisory Opinion No. 84-011.

The Ethics Commission has held that a city's grant of CDBG funds to participants in community development or urban revitalization programs is a transaction that is conducted at "arms length" for purposes of the fourth criterion of Division (C), where the city officer or employee is not responsible for determining who is eligible to be a participant in the program, or does not otherwise exercise a decision-making role with regard to the award of grants through the program. The city must have full knowledge of the officer's or employee's participation. *Id.* See also R.C. 2921.42 (A)(1) and R.C. 102.03 (D), set forth below. The Commission has also held that the city's procedure for designating the area to be rehabilitated, notice to prospective applicants, and the selection of qualified applicants must be fair and objective with no preference given to city officers or employees.

Division (C)(2)

Division (C)(2) requires that a city officer or employee show that the supplies or services to be offered to the city by participation in the program are "unobtainable elsewhere for the same or lower cost," or that the contract is part of a "continuing course of dealing" established prior to an individual becoming associated with the city. See Advisory Opinions No. 84-011 and 88-008, respectively.

Continuing Course of Dealing

With regard first to the "continuing course of dealing" portion of the exception, the Ethics Commission has held that if a public contract exists between an individual and a political subdivision prior to the time the individual becomes associated with the political subdivision as an officer or employee, then the requirement of Division (C)(2) is met by a showing of a "continuing course of dealing" and the performance of the contract may be completed. See Advisory Opinions No. 82-007 and 88-008. Because this is a new grant, the "continuing course of dealing" exception is inapplicable in the instant situation.

Unobtainable Elsewhere

Division (C)(2) may be met if the officer or employee is able to show that the services being offered to the political subdivision through participation in the CDBG-funded program are "unavailable elsewhere for the same or lower cost." The Ethics Commission has recognized that the "unavailable elsewhere" requirement of Division (C)(2) can be met, in order for city officers and employees to participate in the city's community development or urban revitalization programs, by a demonstration that all qualified applicants who are not city officers or employees have been served and funds are still available.

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The Ethics Commission applied this standard in Advisory Opinion No. 84-011 where the Commission explained:

The criterion that the goods and services be "unobtainable elsewhere for the same or lower cost" requires that a public official or employee be at a disadvantage when attempting to do business with his governmental entity, and that an equally qualified applicant who is not a city employee must receive preference. Thus, it is only when all qualified persons who are not city employees have received grants or loans and funds are still available that the rehabilitation of the city employee's property is "unobtainable elsewhere for the same or lower cost." (Emphasis in original.)

The Ethics Commission concluded in Advisory Opinion No. 84-011 that the requirements of Division (C)(2) were met where: (1) there were sufficient funds available; (2) all of the qualified applicants in the target area had received grants or loans, except the city employee; and, (3) the funds would have lapsed if not used in the target area within a specified period of time. The Commission also noted that the city employee met the criteria for the grant and would have been unable to rehabilitate his property without the grant, so that the city would have been unable to achieve its goal of rehabilitating all qualified homes in the target area unless the city employee received the grant. See also agreed entry in Civil Service Personnel Ass'n v. Ohio Ethics Comm'n, No. 84-4-1065, (Summit County C.P. 1984).

The Ethics Commission addressed a second method of meeting the "unobtainable elsewhere for the same or lower cost" standard in an informal advisory opinion, responding to questions about the Ethics Law to the Director of the City of Cleveland's Department of Community Development, which the Ethics Commission approved at its meeting on June 15, 1988. The informal opinion explains that if a city accepts applications for participation in urban revitalization and community development programs throughout the year on a first-come-first-serve basis, then the requirement of Division (C)(2) can be met if the city can show that sufficient funds have historically been available to meet demand and can reasonably project that sufficient funds are, and will be, available to fully serve all interested and qualified persons even if all eligible and interested city employees are permitted to participate. (A copy of the opinion is enclosed; the section to which I refer is on page five.)

In the instant situation, therefore, the Corporation is eligible to receive the rehabilitation and facade improvement grant pursuant to the exception, provided that: (1) all other persons in the downtown business area who are interested in, and eligible for, the grant have received moneys from the rehabilitation and facade improvement grant, and sufficient funds are available, and the funds would lapse if not used in the target area within a specified period of time; or (2) the city can show that sufficient funds are available to meet demand, and can reasonably project that sufficient funds are, and will be, available to fully serve all interested and qualified persons even if the Corporation is permitted to participate.

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Prohibition Imposed by R.C. 2921.42 (A)(3)

Your attention is directed to R.C. 2921.42 (A)(3), which provides that no public official shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

The Ethics Commission has held that a public contract will be deemed to have been "authorized" by a public official, legislative body, board, or commission for purposes of R.C. 2921.42 (A)(3), where the public contract could not have been awarded without the public official's or entity's approval. See Advisory Ops. No. 87-004, 88-006, 89-008, 91-011, and 92-013. See also R.C. 2921.42 (A)(1) (discussed below).

A public official who is a member of a legislative body is bound by the prohibition imposed by R.C. 2921.42 (A)(3) even if he, as a member of the legislative body, abstains from deliberating, voting upon, or otherwise authorizing the public contract. See Advisory Ops. No. 87-004, 87-008, 88-006, 88-008, 89-008, 91-011, and 92-013. See also R.C. 2921.42 (A)(1) (discussed below). A person who receives a housing revitalization loan occupies a definite and direct position of profit in the prosecution of the public contract for purposes of R.C. 2921.42 (A)(3). See Advisory Ops. No. 88-006, 91-011, and 92-013.

You have stated that the City Review Board will authorize the grant of CDBG funds to the Corporation. If when the Review Board authorizes the grant of CDBG funds, City Council has been required to approve the decision of the Review Board, then R.C. 2921.42 (A)(3) would prohibit the council member, during his public service and for one year thereafter, from occupying a position of profit in a specific grant of CDBG funds awarded by the City to the Corporation. Cf. Advisory Op. No. 88-006 (R.C. 2921.42 (A)(3) prohibits a city officer or employee who must approve the sale of property under a land reutilization program, or who serves on a legislative body, board, or commission that must approve the sale, including the board of control, from purchasing the property where there is no competitive bidding).

You should note that if City Council must approve the decision of the Review Board, R.C. 2921.42 (A)(3) would prohibit the Corporation from receiving financial assistance from the City through a grant authorized by the Review Board despite the fact that the council member abstained from deliberating or voting upon the action of City Council to approve the decision of the Review Board. However, if the City Council is not required to approve the decision of the Review Board to grant CDBG funds to the Corporation, then the prohibition of R.C. 2921.42 (A)(3) will not apply to the council member in this situation.

If the City Council is not required to approve the decision of the Review Board to grant CDBG funds to the Corporation, and if the criteria for the exemption of Division (C) can be established so that the Corporation may receive a rehabilitation and facade improvement grant, the council member is still subject to the prohibitions imposed by R.C. 2921.42 (A)(1) and R.C. 102.3 (D).

Prohibition Imposed by R.C. 2921.42 (A)(1)

Your attention is first directed to R.C. 2921.42 (A)(1), which reads:

- (A) No public official shall knowingly do any of the following:
 - (1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

R.C. 2921.42 (A)(1) prohibits a public official from authorizing, or employing the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest. See Advisory Ops. No. 78-002, 85-015, and 92-008, respectively.

In the instant situation, the council member has an interest in the public contract. In addition, the Corporation is the council member's business associate for purposes of R.C. 2921.42 (A)(1). Also, it must be noted that since the council member's spouse is an active participant in the Corporation, she may have an interest in the Corporation's contracts for purposes of R.C. 2921.42 (A)(1).

R.C. 2921.42 (A)(1) limits the exercise of a public official's authority with regard to a public contract in which he, a family member, or a business associate has an interest. R.C. 2921.42 (A)(1) prohibits a public official from either "authorizing" a public contract, or employing the "authority or influence of his office" to secure authorization of a public contract, in which he or a business associate has an interest. The Commission has explained that, even if a public official abstains from participating and voting in official proceedings, R.C. 2921.42 (A)(1) still prohibits the official from discussing, deliberating, recommending, or otherwise using the authority or influence inherent in the position and prestige of his office, including any power over other public officers or employees, to affect the decision-making process regarding a public contract in which he or his business associate has an interest. See generally Advisory Op. No. 92-012.

Furthermore, the prohibition against a public official "authorizing" a public contract in which he or a business associate has an interest, or employing the "authority or influence of his office" to secure authorization of a public contract in which he or a business associate has an interest, extends beyond the initial award of the public contract and prohibits a public official from participating in any matter or

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decision that would affect the continuation, implementation, or terms and conditions of the public contract. See generally Advisory Ops. No. 82-003, 89-005, and 92-012. These matters and decisions include, but are not limited to, the authorization or approval of payments to the business associate, and the renewal, modification, termination, or renegotiation of the contract's terms. Advisory Op. No. 92-012.

Prohibition Imposed by R.C. 102.03 (D)

In addition, the award of a public contract in which a public official or his business associate has an interest also implicates R.C. 102.03 (D), which provides:

No public official or employee shall use or authorize the use of the authority or influence of his office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

The term "public official or employee" is defined for purposes of R.C. 102.03(D) to include any person who is elected or appointed to an office or is an employee of any public agency. R.C. 102.01 (B) and (C). The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money, a promise of future employment, and every other thing of value. R.C. 102.01 (G). A member of city council is a public official or employee for purposes of R.C. 102.03 (D). Advisory Ops. No. 80-001 and 89-008. A grant of CDBG funds is a thing of value for purposes of R.C. 102.03 (D).

The Ethics Commission has held that R.C. 102.03 (D) prohibits a public official or employee from participating, formally or informally, in any matter which directly affects the private pecuniary interests of himself or any other party, if the relationship between the official and the other party is such that the official's objectivity and independence of judgment could be impaired. See Advisory Ops. No. 88-004, 89-005, and 89-008. Thus, the Commission has held that R.C. 102.03 (D) prohibits a public official from participating in any matter that would provide a definite and pecuniary benefit for a business associate, unless the official can demonstrate that, under the specific facts and circumstances, his independence of judgment in making official decisions could not be impaired by his business associate's interests. Advisory Op. No. 88-004. See also Advisory Ops. No. 88-005 and 89-008.

Furthermore, R.C. 102.03 (D) prohibits a public official or employee from using the authority or influence of his office, formally or informally, to influence the decisions or actions of other public officials or employees in matters which would affect a business associate's financial interests. In this instance, the relationship between the council member and the Corporation is such that the objectivity of the council member could be impaired with respect to the interests of the Corporation in the award by the City's Review Board awarding a rehabilitation and facade improvement grant.

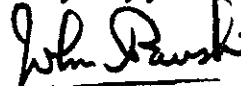
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Conclusion

If City Council must approve the decision of the Review Board to award the grant of CDBG funds to the Corporation, then R.C. 2921.42 (A)(3) would prohibit the Corporation from receiving financial assistance from the City. If City Council is not required to approve the decision of the Review Board to award the grant of CDBG funds to the Corporation, then the Corporation cannot receive CDBG block grant moneys from the City, due to the council member's position as the president and his ownership of more than five percent of the Corporation's stock, unless he can meet the exception to the prohibition of R.C. 2921.42 (A)(4) that is provided by R.C. 2921.42 (C). In addition, R.C. 2921.42 (A)(1) and R.C. 102.03 (D) prohibit the council member from participating, formally or informally, in the City Review Board's decision regarding the Corporation's application for a rehabilitation and facade improvement grant.

This informal advisory opinion was approved by the Ethics Commission at its meeting on August 11, 1995. The opinion is based on the facts presented and 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. If you have any further questions, please feel free to contact this Office again.

Very truly yours,



John Rawski
Staff Attorney

Enclosures

Civil Service Personnel Ass'n v.
Ohio Ethics Comm'n No. 84-4-1065.
Letter dated June 15, 1988 to Vincent Lombardi