



OHIO ETHICS COMMISSION

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December 16, 1996

Informal Opinion 1996-INF-1216-1

Jeffrey C. Tuomala
City Solicitor
City of Geneva



Dear Mr. Tuomala:

In a letter to the Ethics Commission dated March 8, 1996, the former city solicitor for City of Geneva (City) asked whether the Ohio Ethics Law and related statutes prohibit a city council member who pays income taxes to another municipality from participating in the enactment of an ordinance that would give a one hundred percent (100%) income tax credit to City residents for income tax that they pay to another municipality.

As explained below, a city council member may not participate in matters that provide a particular and definite pecuniary benefit to himself, but may participate and vote on "general legislation" that provides "a uniform benefit" to all City residents citizens, or a large portion thereof. In the instant situation, under the facts presented, the proposed tax credit is the type of general legislation in which the council member may participate even though he is a member of the class of City residents who will receive a pecuniary benefit from the enactment of the proposed ordinance. Any potential benefit to the council member however, may not be selective, differential, or in disproportion to the benefit provided to other City residents or the class thereof who stand to benefit.

Facts

The letter that the former City Solicitor sent to our office states that the City has an ordinance that gives a fifty percent (50%) income tax credit to City residents who pay income taxes to another municipality. The letter also states that City Council has proposed an ordinance that would give a one hundred percent (100%) income tax credit to residents of the City for income tax paid to another municipality.

In a letter dated November 21, 1996, you provided this Office with additional information regarding the number of residents who would realize a pecuniary benefit from this ordinance. You state that, according to the City Tax Administrator, the 1995 City tax returns show that 1,792 City residents work outside the City. Approximately 1,130 of these residents pay income tax to another municipality, in addition to the City, because the City allows only a fifty percent (50%) tax credit. Approximately 660 of the remaining City residents work outside the City in political subdivisions that require no income tax.

Therefore, these 660 City residents pay only City income taxes. Finally, approximately 1,334 additional City residents work within the City and pay only City income tax. You state that these statistics show that over one-third of the total number of City residents who provided 1995 tax returns, which would include the city council member, would benefit from the proposed ordinance.

Prohibition Imposed by the Conflict Interest Provisions of R.C. 102.03 (D) and (E)

Your attention is directed to R.C. 102.03 (D) and (E), which read:

- (D) No public official or employee shall use or authorize the use of the authority or influence of 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 the public official or employee with respect to that person's duties.
- (E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

A "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is elected or appointed to an office of a political subdivision. R.C. 102.01 (B) and (C). A member of city council is a public official for purposes of R.C. 102.03 (D) and (E). Advisory Ops. No. 88-004 and 89-008.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 102.01(G). A definite, pecuniary benefit to an individual is considered to be a thing of value under R.C. 102.03 (D). Advisory Ops. No. 85-011, 86-007, and 88-004.

Participation In General Legislation of Uniform Benefit

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 that directly affects his private, pecuniary interests. Advisory Op. No. 85-006 and 88-004. It is apparent that the enactment of an ordinance that would give a one hundred percent (100%) income tax credit to residents of the City for income tax paid to another municipality would directly affect the private, pecuniary interests of a city council member who pays income taxes to another municipality.

But in Advisory Opinion No. 85-006, the Commission went on to explain:

Of course, the application of the prohibition is dependent upon the facts and circumstances of the particular case. Not all "conflicts of interest" are prohibited by Division (D) of Section 102.03 of the Revised Code, but only those in which a public official has a dual interest that would impair his independence of judgment in making decisions. For example, many general issues before local governmental

bodies would provide a uniform benefit to all citizens in a jurisdiction, including the public officials making the decision. This would include general legislation on such matters as taxes, police and fire protection, schools, zoning, sewer and water services, and parks. In most cases, the benefits derived by the public officials in common with their constituents would ordinarily accrue to them in the performance of their official duties, and would not be of such character as to manifest a substantial and improper influence on them. Furthermore, it is not sufficient merely to identify some indirect or indefinite benefit that a public official may accrue from the performance of an official act. A public official should not be precluded from participating in such decisions that he was duly elected or appointed to make, unless he would secure a particular benefit for himself that creates a conflict or interest.

The Ethics Commission reaffirmed the holding of Advisory Opinion No. 85-006 in Advisory Opinion No. 88-004, wherein the Commission considered whether R.C. 102.03 (D) prohibited a city council member from participating in issues such as widening roads and installing water and sewer lines where the improvements would benefit or serve property in which he had an interest, as well as other property in the same area. The Commission held in Advisory Opinion No. 88-004:

Applying the reasoning of [Advisory Opinion No. 85-006], therefore, a city council member may participate or vote on general legislation which provides a uniform benefit to all citizens within the city, or a large portion thereof, but may not participate in matters which provide a particular and definite pecuniary benefit to property in which he, or, as discussed below, certain other parties, have an interest. For example, a council member may participate in enacting a general zoning code for the city, but may not discuss or vote to approve a zoning change or variance affecting property in which he has an interest. See Advisory Opinion No. 79-003, 79-008, and 85-006. The Commission has also held that council members may not participate in discussions or vote on matters regarding a downtown revitalization project which would benefit their property. See Advisory Opinion No. 80-007. The revitalization project consisted of street paving, sidewalks, tree planting, and lighting, although one official was held to be precluded from participating even though the building in which he had an interest was to receive only improved lighting. Id. (Emphasis in original.)

Advisory Opinions No. 85-006 and 88-004 are enclosed for your reference.

Application of Precedent

Applying the holdings of Advisory Opinions No. 85-006 and 88-004 to your question, a council member may not participate in matters that provide a particular and definite pecuniary benefit to himself, but may participate and vote on general legislation that provides a uniform benefit to all City residents citizens, or a large portion thereof.

As Advisory Opinions 85-006 and 88-004 reiterate, the application of the restrictions of R.C. 102.03 (D) and (E) are dependent upon the facts and circumstances of each case. You have provided statistics that show that over one-third of all City residents, including the city council member, would be affected by the proposed ordinance. Though there is no mathematical formula that will determine whether a particular ordinance benefits "a large portion" of City residents, you have provided statistics that show that, in this situation, the council member is one individual in a class of City residents that numbers over 1,000. Therefore, due to the large number of City residents in the class that will be affected by the proposed ordinance, the proposed tax credit is the type of general legislation in which the council member may participate even though he is a member of that class. Under these facts, R.C. 102.03 (D) would not prohibit a city council member who pays income taxes to another municipality from participating in the enactment of an ordinance that would give a one hundred percent (100%) income tax credit to City residents for income tax that they pay to another municipality.

R.C. 102.03 (D) would prohibit a city council member from misusing the authority or influence of his office to secure a particular and definite pecuniary benefit to himself even where the legislation benefits all City residents, or a large portion thereof, if the benefit to the council member is selective, differential, or in disproportion to the benefit provided to other City residents or the portion thereof that stands to benefit. Advisory Op. No. 92-013. Division (E) of Section 102.03 also prohibits a public official from receiving anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties, even if he has not used the authority or influence of his office to secure the thing of value. Advisory Ops. No. 90-004 and 92-013. Therefore, R.C. 102.03 (E) prohibits a city council member from receiving benefits that are selective, differential, or in disproportion to the benefits that are realized by all other City residents or a large portion thereof, even if he abstains from voting or otherwise participating in council's decision to enact the ordinance. Advisory Op. No. 92-013. Under the facts you have presented, the council member's pecuniary benefit would not be selective, differential, or in disproportion to the benefits that are realized by the one-third of the City residents.

As described above, the application of R.C. 102.03 (D) and (E) is dependent upon the facts and circumstances of each individual situation. Advisory Ops. No. 87-008 and 92-013. It must be noted that under certain facts and circumstances, a city officer could realize a significantly disproportional benefit than other residents within the class that would be affected by the ordinance, despite the fact that he is a member of that class. See Advisory Op. No. 92-013. (Addressing infrastructure improvements made as part of a neighborhood revitalization program that would benefit property owned by a village council member). The Commission's function in rendering an advisory opinion is not a fact-finding process. Advisory Ops. No. 75-037, 90-013, and 92-013. An advisory opinion explains the prohibitions imposed by the Ethics Laws and related statutes and sets forth the standards and criteria that must be observed to avoid a violation of the law. Advisory Ops. No. 90-013 and 92-013.

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Conclusion

As explained above, a city council member may not participate in matters that provide a particular and definite pecuniary benefit to himself, but may participate and vote on "general legislation" that provides "a uniform benefit" to all City residents citizens, or a large portion thereof. In the instant situation, under the facts presented, the proposed tax credit is the type of general legislation in which the council member may participate even though he is a member of the class of City residents who will receive a pecuniary benefit from the enactment of the proposed ordinance. Any potential benefit to the council member however, may not be selective, differential, or in disproportion to the benefit provided to other City residents or the class thereof, who stand to benefit.

This informal advisory opinion was approved by the Ethics Commission at its meeting on December 16, 1996. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, 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: Advisory Opinions No. 85-006 and 88-004