

OHIO ETHICS COMMISSION

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December 28, 2001 Informal Opinion 2001-INF-1228-2

Marlo B. Tannous
Chief Legal Counsel
Ohio Department of Development



Dear Ms. Tannous:

In a letter received by the Ohio Ethics Commission on November 2, 2001, you have asked whether the Ethics Law and related statutes prohibit individuals who have various connections with companies that receive housing credits, loans, and funds from the Ohio Housing Finance Agency (OHFA) from serving as members of the OHFA board. You have asked the Commission about five scenarios. Two of the scenarios discussed in your request have been answered in a separate advisory opinion. This opinion will answer the remaining three questions.

Your first question involves a potential board member who is a principal of a for-profit development limited liability company that has been doing business with OHFA for several years and has multiple projects developing affordable housing using OHFA funds and programs sponsored by OHFA. Your second question involves a potential board member who serves, without compensation, as the president of the board for a local nonprofit corporation that develops and manages affordable housing projects using OHFA funds and programs sponsored by OHFA. Your final question involves a potential board member who is the president of a development and management corporation that has previously developed affordable housing through programs sponsored by OHFA.

Brief Answer

As set forth more fully below, the individuals in the three scenarios that you have described are prohibited from serving on the OHFA board, because they have interests in OHFA contracts, unless they can meet each of the four requirements of the exception to the public contract prohibition. The individuals in these scenarios must be able to demonstrate, among other things discussed herein, that the services that their companies provide under OHFA contracts or loans are unobtainable elsewhere for the same or lower cost or provided pursuant to a continuing course of dealing.

The individuals in each of the scenarios you have described are prohibited from occupying a position of profit in an OHFA contract, that was authorized during their terms on the board, unless the contract is awarded pursuant to competitive bidding to the lowest and best bidder. Finally, the individuals in each of the scenarios you have described are prohibited from participating, either formally or informally, in matters that affect their personal financial interests or the interests of the companies that they serve as officers or employees.

Facts

In your letter to the Ethics Commission, you explain that OHFA's statutory powers are set forth in Chapter 175. of the Revised Code. As you explain, OHFA administers several programs including the housing credit program, the affordable housing loan program, and the housing development assistance program (HDAP). You state that the OHFA board is responsible for approval of the annual qualified allocation plan (QAP) which determines how housing credits will be allocated to projects. You also state that the OHFA board approves the annual guidelines for affordable housing loans and HDAP funds, and it approves each affordable housing loan request and all HDAP requests that are not required to go before the state controlling board.

You state that Am. Sub. H.B. 94 amended R.C. 175.03 to add two new board members to OHFA. One of the new board members must represent the interests of nonprofit multifamily housing development organizations, while the other must represent the interests of for-profit multifamily housing development corporations. The president of Columbus Housing Partnership has been appointed as the nonprofit representative and a principal with NRP Group has been appointed as the for-profit representative. You explain that, prior to the October 17, 2001 meeting of the OHFA board, you received information concerning the new board members that you thought should be reviewed before the new board members commenced their duties on the Board. Therefore, you have provided the Ethics Commission with the facts associated with the status of the new board members as well as potential scenarios with regard to other candidates who may be asked to sit on the OHFA board. You have asked the Commission to review these scenarios and issue an opinion that sets forth whether the Ethics Law and related statutes prohibit the individual mentioned in each scenario from becoming an OHFA board member.

In the first scenario that you described, a potential board member is a principal of a development limited liability company (Development LLC) that develops affordable housing under the Ohio housing credit program and obtains affordable housing loans and HDAP funds. You state that the Development LLC acts as the developer of the project that is owned and operated by a limited partnership or a limited liability company. You explain that the Development LLC is not typically a party to the project limited partnership or project limited liability company, but that in some instances the Development LLC is such a party. In either instance, you state that the Development LLC receives a fee for being the developer and contractor of the housing project. You indicate that the payment of the development and contractor fees is dependent upon obtaining the housing credits, loans, and HDAP funds. Finally, you state that this Development LLC has been doing business with OHFA for several years and has multiple projects, and intends to continue to submit applications for funding.

In the second scenario that you described, a potential board member is the president of the board for a local nonprofit corporation that develops affordable housing using the Ohio housing credit, affordable housing loan, and HDAP programs. You state that the board member serves on the board of the nonprofit corporation without compensation. You explain that the nonprofit corporation is the general partner of the limited partnership that owns the project, or the nonprofit corporation is the managing member of the limited liability company that owns the project. In either instance, you state that the nonprofit corporation receives a fee for the development of the project and often manages the project for an additional fee. You indicate that the payment of the development fee to the nonprofit corporation is dependent upon obtaining the housing credits, loans, and HDAP funds. You explain that the nonprofit corporation has been doing business with OHFA for several years and intends to continue to submit applications for funding.

In the third scenario that you described, a potential board member is the president of a development and management corporation that has previously developed affordable housing under the housing credit program. You state that the development and management corporation was paid a fee for development of the project or is being paid the fee over time as cash flow permits. You also state that the development and management corporation is paid an ongoing management fee based on project rents. You explain that the Internal Revenue Code requires that OHFA monitor compliance with the requirements of the housing credit program and inspect units funded under the program for a period of 15 to 30 years following completion of the project. Finally, you state that the development and management corporation no longer submits new applications for funds.

In a separate advisory opinion, the Commission reviewed the authority of the OHFA board, and determined that it exercises the sovereign power of the state. Further, the Commission has concluded that members of the OHFA board are officers of the state and are subject to the Ohio Ethics Law and related statutes. This opinion will now turn to an application of those statutes to the questions you have presented.

Having an Interest in an OHFA Contract—R.C. 2921.42(A)(4)

The situations you have described implicate R.C. 2921.42(A)(4), which provides that no public official shall knowingly:

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.

The term "public contract" includes any purchase or acquisition of property or services by or for the use of any political subdivision. R.C. 2921.42(G)(1). The Commission has stated that a public agency's acquisition of property or services through its issuance of a grant or a loan is a public contract. Ohio Ethics Commission Advisory Opinions No. 85-002, 87-003, 89-006, and 92-014. Through its issuance of HDAP funds, and funds for affordable housing loans, OHFA acquires the services of the fund recipients towards the development of housing in the state and the facilitation of home ownership by Ohio's citizens. These loans are, therefore, public contracts for purposes of R.C. 2921.42(G)(1).

An "interest" prohibited under R.C. 2921.42 must be definite and direct and may be either pecuniary or fiduciary in nature. Adv. Ops. No. 81-008 and 92-017. R.C. 2921.42(A)(4) prohibits a public official from having a definite and direct pecuniary or fiduciary interest in a public contract with his own governmental agency. Adv. Ops. No. 99-004 (fiduciary interest) and 2000-02 (pecuniary interest).

In Advisory Opinion No. 81-003, the Commission stated that a board member of a private agency has a fiduciary or pecuniary interest in the contracts of the agency, so that he is prohibited from also serving as a member of a county board of mental retardation and developmental disabilities where the private agency and the county board have contractual relationships. The Commission has also stated that an officer or chief administrative official of a private for-profit or non-profit corporation has a fiduciary interest in the contracts of the corporation, and may have a pecuniary interest as well. Adv. Ops. No. 81-008.

Based on the information that you have provided, the individuals in the three scenarios have a pecuniary or fiduciary interest in the private entities that they serve. Therefore, these individuals must meet the four requirements of the exception provided by R.C. 2921.42(C), as set forth below, in order to serve on the OHFA board where OHFA provides loans or funds to the entities that these individuals serve.

In addition, the individual in the second scenario has a fiduciary interest in the limited partnership based on his position as an officer of the non-profit corporation that serves as the general partner to the limited partnership, and must meet the exception provided by R.C. 2921.42(C) in order to serve on the OHFA board where OHFA provides loans or funds to the limited partnership. See Byers v. Schlupe (1894), 512 Ohio St. 3d, 314, 38 N.E. 117, 121 (a partnership is an aggregate of individuals and does not constitute a separate legal entity); Peterson v. Teodosio (1973), 34 Ohio St.2d 161, 171, 297 N.E.2d 113, 121 (in a partnership, the partners of which it is composed owe a fiduciary duty to one another); and Arpadi v. First MSP Corp. (1994), 68 Ohio St.3d 453, 458, 628 N.E.2d 1335, 1339 (in a limited partnership, the general partner owes a fiduciary duty to the limited partners of the enterprise.).

Finally, if any of the individuals, or the entities with which they are affiliated, have other connections to OHFA contracts, they may have interests in those contracts. For example, if the individuals, or the entities with which they are connected, are providing services to a company that have received contracts from OHFA, and the services are directly related to the performance of the OHFA contracts, the individuals may have an interest in the contract as a subcontractor. See Adv. Op. No. 86-009.

Exception to the Prohibition of R.C. 2921.42(A)(4)—R.C. 2921.42(C)

R.C. 2921.42(C) provides the following exception to the prohibition of R.C. 2921.42(A)(4):

- (C) This section does not apply to a public contract in which a public official, 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. (Emphasis added.)

Each of the provisions in Division (C) is a question of fact which, when applied to the circumstances of the individual case, will determine whether a particular transaction fits within the exception. Adv. Ops. No. 80-003 and 88-008. The criteria of Division (C) are strictly construed against the public official, and the official must show compliance with all four requirements in the exception. Adv. Ops. No. 83-004, 84-011, and 88-008. Divisions (C)(2) and (C)(4) are of particular note.

Unobtainable Elsewhere for the Same or Lower Cost—R.C. 2921.42(C)(2)

An OHFA board member can meet the requirements in R.C. 2921.42(C)(2) if he can show by some objective standard that the project management or development services provided by his company are "unobtainable elsewhere for the same or lower cost." He must be able to show, by some objective standard such as a competitive bid, or a fair and open solicitation of other vendors, that the services provided by his company are unobtainable by OHFA for the same or lower cost. Adv. Op. No. 86-002. While a competitive bidding process may provide evidence that a supply or service is unobtainable elsewhere for the same or lower cost, other factors must be considered, such as the availability and adequacy of notice to potential suppliers, the openness and fairness of the bidding process, and the conditions of the market. Adv. Ops. No. 83-004 and 88-001.

Continuing Course of Dealing—R.C. 2921.42(C)(2)

Division (C)(2) can also be met by showing a continuing course of dealing established before the board member became connected with OHFA. In Advisory Opinion No. 82-007, the Commission held that the exception "for services being furnished as part of a 'continuing course

of dealing' applies only to services provided during the term of the existing contract." The contract must be a written contract established prior to the time the official was appointed to his public position. Adv. Op. No. 88-008. Further, there cannot be any modifications or additions to the pre-existing written contract.

Full Knowledge and No Participation—R.C. 2921.42(C)(4)

Division (C)(4) requires that the transaction be conducted at arm's length, that OHFA has full knowledge of a board member's interest in one of its contracts, and that the board member take no part in the deliberations and decision of OHFA with respect to OHFA's acquisition of services from his company. As discussed below, the board member cannot vote, discuss, deliberate, or use his position, in any way, with respect to any contract in which he has an interest, and that is entered into by, or for the use of, OHFA. See also R.C. 2921.42(A)(1).

Other Requirements of R.C. 2921.42(C)

Where a board member can meet the requirements imposed by Divisions (C)(2) and (C)(4), he must, in addition, comply with the other provisions of R.C. 2921.42(C). R.C. 2921.42(C)(1) requires that the services are necessary purchases for OHFA. Division (C)(3) requires that the treatment provided by the board member's business to OHFA is as good as, or better than, the treatment provided by his business to its other clients or customers. If all of the requirements of R.C. 2921.42(C), as discussed in this opinion, are met, the provisions of R.C. 2921.42(A)(4) do not apply to an OHFA contract in which an OHFA board member has an interest.

Application of R.C. 2921.42(C) Exception

In the three situations you described, the application of the (C)(2) prong of R.C. 2921.42 is critical. In the first two situations, you indicate that the companies with which OHFA board members are connected intend to continue to submit applications to OHFA for funding. With respect to any OHFA funding provided after the board members are appointed, the continuing course of dealing requirement of R.C. 2921.42(C)(2) cannot be met. The board members must be able to show that the project development and management provided by their companies are unobtainable elsewhere for the same or lower cost, as discussed more fully above. In the third situation you have described, the development and management corporation with which the potential OHFA board member is affiliated no longer submits new applications for funds. Therefore, the continuing course of dealing prong of the requirement of R.C. 2921.42(C)(2) can be met with respect to the ongoing contracts, as long as the terms of those contracts are not modified in any way after the board member assumes his position on the board. Also, even where the continuing course of dealing prong of the requirement can be met, the three remaining prongs of R.C. 2921.42(C), as discussed above, must be met. See also R.C. 2921.42(A)(1) and 102.03(D), discussed below.

Profiting from an OHFA Contract—R.C. 2921.42(A)(3)

R.C. 2921.42(A)(3) is also applicable to the situations you have described, and 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.

R.C. 2921.42(A)(3) does not require that a public official “[h]ave an interest in the profits or benefits of a public contract,” but prohibits a public official from “occupy[ing] any position of profit in the prosecution of a public contract,” under specific circumstances. See Adv. Op. No. 92-013. Therefore, the issue is whether any of the individuals in the three scenarios you have described would “occupy a position of profit” in a contract of OHFA.

The Ethics Commission has stated that the position of profit that a public official occupies in the prosecution of a public contract for purposes of R.C. 2921.42(A)(3) must be definite and direct. See Adv. Op. No. 92-013. A public official occupies a position of profit in a public contract when he will realize a pecuniary advantage, gain, or benefit, which is a definite and direct result of the public contract. Adv. Ops. No. 92-013 and 92-017.

The Ethics Commission has stated that a person with an ownership interest in a business occupies a position of profit in the contracts of the business for purposes of R.C. 2921.42(A)(3). Adv. Op. No. 90-003. If any of the individuals in the three scenarios you have described have an ownership interest in the businesses that receive funds from OHFA, or if they would otherwise realize a pecuniary advantage, gain, or benefit that is a definite and direct result of an OHFA contract, then those individuals would be deemed to profit from an OHFA contract for purposes of R.C. 2921.42(A)(3).

A public official is considered to have “authorized” a public contract for purposes of R.C. 2921.42(A)(3) where the public contract could not have been awarded without the approval of the public official, the board of which he is a member, or the position on which he sits. Adv. Ops. No. 87-004, 92-008, and 92-012. Therefore, a member of the OHFA board will be considered to have authorized any contract that was awarded pursuant to the approval of the OHFA board while he was a member thereof, regardless of whether the board member abstained from matters before the board involving the authorization of the contract. R.C. 2921.42(A)(3) prohibits the board member from profiting from any contract that was awarded by the board while he was a member thereof unless the contract is awarded pursuant to competitive bidding to the lowest and best bidder.

Securing a Contract or Other Benefit—R.C. 2921.42(A)(1) and 102.03(D) and (E)

It is also necessary to examine provisions of the Ethics Law and related statutes that impose restrictions on participation in certain matters. R.C. 2921.42(A)(1) prohibits a public official from authorizing, or using his position to secure authorization of, a public contract in which he or a business associate has an interest.

R.C. 2921.42(A)(1) prohibits a public official from voting, discussing, deliberating, or otherwise participating in any part of his public agency's decision-making process with respect to the continuation, implementation, or terms and conditions of a public contract in which either he or a business associate has an interest. Adv. Op. No. 92-003. Furthermore, the prohibition against a public official authorizing, or securing authorization of, a public contract in which he or his 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 decision that would affect the continuation, implementation, or terms and conditions of the public contract. See generally Adv. Ops. No. 82-003, 89-005, and 92-012.

An OHFA board member who provides services directly to OHFA, or who is an officer of a company that receive funds from OHFA, or who performs services under an OHFA contract, is prohibited from voting on, participating in discussion or deliberation about, or making recommendations with respect to OHFA's decisions regarding whether to authorize the provision of funds to him or his company or enter into a contract for the services of him or his company. The OHFA board member is also prohibited from acting with respect to the renewal, modification, termination, or renegotiation of any of the contract's terms.

It must be noted that R.C. 2921.42 also prohibits a public official from employing the "authority or influence of his office" to secure authorization of a public contract in which a business associate has an interest. The prohibition against a public official employing the "authority or influence of his office" to secure a public contract in which his company has an interest bars an OHFA board member from exercising the power and influence inherent in his position as a board member to affect the decisions of other OHFA officers and employees in matters affecting the company that he serves as an officer or his other business associates.

R.C. 102.03(D) and (E) are also applicable to your questions. R.C. 102.03(D) and (E) prohibit a public official from using the authority or influence of his office to secure, and from soliciting, 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 definite and direct pecuniary benefit is considered to be a thing of value under R.C. 102.03(D) and (E). Adv. Ops. No. 79-008, 86-007, and 89-005. The loans or funds that the board members' companies would receive from OHFA, or the proceeds that they would receive from providing services under OHFA contracts, would fall within the definition of "anything of value."

The Ethics Commission has held that R.C. 102.03(D) prohibits a public official or employee from participating in matters before the public agency he serves that will benefit parties with whom he has a close family, economic, or business relationship because the relationships may impair the public official's objectivity and independence of judgment. Adv. Op. No. 98-002. See also Adv. Ops. No. 89-008, 89-015, and 90-008. R.C. 102.03(E) prohibits a public official or employee from merely soliciting or receiving an improper thing of value and does not require that he use the authority or influence of his position to secure it. Adv. Ops. No. 86-011 and 89-006.

In the instant situation, the relationship between a board member and the company that he serves as an officer is such that the board member's objectivity and independence of judgment could be impaired with respect to the interests of the company. Therefore, R.C. 102.03(D), as well as R.C. 2921.42(A)(1), prohibits an OHFA board member from using the authority or influence of his official position with regard to any matter that would provide a definite and direct pecuniary benefit to him or the company that he serves as an officer. These matters include, but may not be limited to, matters involving the provision of funds to his company, decisions regarding the allocation of housing credits to projects in which his company is involved, and decisions to award funds or contracts to a company to perform work on an OHFA project where it is foreseeable, at the time the decision to award the funds or contracts is made, that the board member's company would perform services on that project.

R.C. 102.03(D) also prohibits a public official or employee who engages in private outside employment or business activity from using relationships developed while performing his public duties to secure a favorable decision or action by another public official or employee regarding his private interests or the interests of his business associates. Adv. Op. No. 96-004. A person appointed to the board of OHFA has access to the OHFA board members and other officials and employees which is unique to that enjoyed by individuals who do not serve in such office. R.C. 102.03(D) prohibits an OHFA board member from using his unique position and access, as an appointed member of the OHFA board, and his working relationship with other public officers and employees, to secure an OHFA loan or grant or any other thing of value for him or the company that he serves as an officer. An OHFA board member is prohibited from formally and informally recommending or lobbying for the company that he serves as an officer, and from taking any other formal or informal action to persuade OHFA officials and employees to approve the provision of funding, contracts, or other things of value to him or his company.

Conclusion

As explained more fully above, the individuals in the three scenarios that you have described are prohibited from serving on the OHFA board unless they can meet each of the four requirements of the exception to the public contract prohibition. The individuals in these scenarios must be able to demonstrate, among other things discussed herein, that the services that their companies provide under OHFA contracts or loans are unobtainable elsewhere for the same or lower cost or provided pursuant to a continuing course of dealing. It appears, based on the information that you have provided, that the individual in the third scenario will be able to meet the continuing course of dealing prong of the exception to the public contract prohibition. The individuals in the first two scenarios cannot meet the continuing course of dealing prong of the

exception and thus must be able to demonstrate, among other things, that the services that their companies provide pursuant to an OHFA contract are unobtainable elsewhere for the same or lower cost.

The individuals in each of the scenarios you have described are prohibited from occupying a position of profit in an OHFA contract, that was authorized during their terms on the board, unless the contract is awarded pursuant to competitive bidding to the lowest and best bidder. The individuals in each of the scenarios you have described are prohibited from participating, either formally or informally, in matters that affect their personal financial interests or the interests of the companies that they serve as officers or employees.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on December 14, 2001. The Commission commends you for seeking advisory guidance, on behalf of OHFA board, before any action that could be prohibited by law was taken.

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 questions or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney