

OHIO ETHICS COMMISSION

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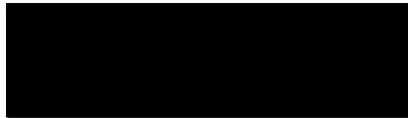
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March 1, 2002

Informal Opinion 2002-INF-0301-2

John W. Monroe
Walter & Haverfield LLP



Dear Mr. Monroe:

In a letter received by the Ohio Ethics Commission on January 16, 2002, you ask for an interpretation of the Ohio Ethics Law and related statutes as they apply to a member of the City of Cleveland (City) Planning Commission, David H. Bowen. Specifically, you ask whether the law precludes either: (1) a development company in which Mr. Bowen has an ownership interest from becoming a part owner of a corporation that will receive a grant from the City; or (2) an architectural firm with which he is employed from providing services in connection with the project funded by the grant.

Brief Answer

As explained more fully below, R.C. 2921.42(A)(3) prohibits Mr. Bowen from occupying a position of profit in a grant authorized by the Planning Commission. If a development company in which Mr. Bowen would have an ownership interest becomes a part owner of a corporation that receives a grant authorized by the Planning Commission, Mr. Bowen would occupy a position of profit in the prosecution of the grant. Therefore, a company in which Mr. Bowen has an ownership interest is prohibited from having an ownership interest in the corporation.

With respect to the work performed by the architectural firm on the project, R.C. 2921.42(A)(4) prohibits Mr. Bowen from having an interest in a grant issued by the city, unless he can meet the exception set forth in R.C. 2921.42(C). If Mr. Bowen does not have an interest in the work being performed by the architectural firm, either because he does not have the kinds of interests described below, or because he can meet the exception in R.C. 2921.42(C), the architectural firm may not be prohibited from providing services in connection with the project. Even if Mr. Bowen can meet the narrow exception under law, there may continue to be an appearance of a conflict of interest under these circumstances if the firm by which he is employed performs services in connection with a grant authorized by the Planning Commission.

Finally, R.C. 2921.42(A)(1) and 102.03(D) and (E) prohibit Mr. Bowen from using his position, in any way, to secure the grant for a project if the company owned by his father and by which he is employed is performing services on the project. Mr. Bowen would be prohibited from voting on, discussing, deliberating about, or taking any other action, formally or informally, with respect to the project. The Commission cautions Mr. Bowen that this relationship is a difficult one, and that he must be diligent in meeting his obligation to withdraw from matters where his employer may receive a benefit.

Facts

You state that Mr. Bowen has been a member of the Planning Commission for the past five years. He is an employee of an architectural firm, Richard L. Bowen & Associates, and owns fifty percent of Ohio First Development & Construction, LLC (OFDC). You state that OFDC has agreed to become a member of KINBESS, LLC, and will own between five and fifty percent of KINBESS.

KINBESS desires to redevelop distressed land within the City into an industrial park, which will be called the Hemisphere Industrial Park (project). KINBESS has applied for a grant from the City to partially fund the land acquisition and demolition, remediation, construction, and improvement for the project. You state that Bowen & Associates will provide engineering, planning and construction management services for the project.

The grant agreement between the City and KINBESS provides that any violation of R.C. 2921.42 is a default of the agreement. The issue is whether the prohibitions imposed by the Ohio Ethics Law and related statutes upon Mr. Bowen, in light of his business and employment interests, preclude KINBESS from receiving the grant from the City.

Profiting From a City Contract—R.C. 2921.42(A)(3)

If OFDC has an ownership interest in KINBESS, the matter you have raised implicates the prohibition in 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, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid.

The term “public official” is defined to include any elected or appointed officer of any political subdivision. R.C. 2921.01(A). A member of a city planning commission is a public official for purposes of R.C. 2921.42. See generally Ohio Ethics Commission Advisory Opinion No. 85-006. The term “public contract” is defined in R.C. 2921.42(G)(1)(a) and (b) as:

- (a) The purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either;
- (b) A contract for the design, construction, alteration, repair, or maintenance of any public property.

A grant issued by a political subdivision in return for community development or other services is a "public contract" for purposes of R.C. 2921.42(A)(4). Adv. Op. No. 85-006. See generally Adv. Op. No. 2001-02.

R.C. 2921.42(A)(3) prohibits a public official, during his term of office and for one year thereafter, from profiting from a contract that was awarded by his board, unless the contract was competitively bid and was awarded to the party that submitted the lowest and best bid. A public official occupies a position of profit in a public contract when he will realize a pecuniary advantage, gain, or benefit that is a definite and direct result of the public contract. Adv. Ops. No. 92-013 and 92-017. The Ethics Commission has held 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. Ops. No. 90-003 and 93-001. The profitability of a corporation's business transactions will definitely and directly affect an owner's return on his invested capital. See generally Adv. Op. No. 93-001.

In the situation that you have presented, Mr. Bowen is a fifty-percent owner of ODFC, which will own between five and fifty percent of KINBESS. If ODFC owns a portion of KINBESS, Mr. Bowen would profit from any grant awarded to KINBESS. See Adv. Op. No. 93-001.

A public official or board 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 in which he serves. Adv. Ops. No. 87-004, 92-008, and 92-012. Therefore, the restriction in R.C. 2921.42(A)(3) would apply to Mr. Bowen for any contract he or the Planning Commission would ordinarily be required to authorize. It would apply for any contract authorized pursuant to the approval of the Planning Commission while he was a member thereof, regardless of whether he abstained from matters before the board involving the authorization of the contract. Adv. Op. No. 2000-02. See also R.C. 2921.42(A)(1) (discussed below).

It is clear from your letter that matters involving the project have been considered by the Planning Commission. You have explained that the Charter for the City of Cleveland requires that any ordinance that comes within the functions of the Planning Commission must be submitted to the Planning Commission for a report and recommendation before it can be adopted by City Council. If the Planning Commission disapproves a matter in this process, City Council can override the

Planning Commission disapproval and approve authorization of the matter by a two-thirds vote. However, the matter must be reviewed by the Planning Commission before it can go to Council.

You have explained that this process, which is called "Mandatory Referral," was utilized in the situation you have presented, and that the Planning Commission did make a report and recommendation about the grant funding for the project. The Planning Commission also reviewed other portions of the project. You state that Mr. Bowen recused himself from any discussions of the project by the Planning Commission.

R.C. 2921.42(A)(3) prohibits Mr. Bowen from profiting from any grant that was authorized by the Planning Commission while he was a member thereof. There is no exception to this prohibition.¹ As stated above, the Planning Commission will be considered to have authorized the grant if it could not have been awarded without the approval of the Planning Commission. City Council cannot approve any ordinance subject to "mandatory referral" until the Planning Commission makes a report and recommendation on the ordinance.

Because of the mandatory referral requirement, it is clear that the grant was authorized by the Planning Commission. Therefore, if OFDC were to have an ownership interest in KINBESS, Mr. Bowen would occupy a prohibited position of profit in the grant to KINBESS authorized by a board of which he was a member at the time of the authorization. Because Mr. Bowen would occupy a prohibited position of profit in the grant, KINBESS would be unable to receive the grant without defaulting on the grant agreement.

Bowen & Associate Providing Services—R.C. 2921.42(A)(3) and (A)(4)

If OFDC does not have an ownership interest in KINBESS, the question is whether Bowen & Associates, of which Mr. Bowen is an employee, can provide services under the grant.

As stated above, R.C. 2921.42(A)(3) prohibits Mr. Bowen from occupying a position of profit in the prosecution of a contract authorized by the Planning Commission that was not let by competitive bidding to the lowest and best bidder. The Commission has explained that an employee of a company, who does not have an ownership or fiduciary position with the company, occupies a position of profit in the contracts of the company where: (1) the establishment or operation of the company with which he serves is dependent upon receipt of the contract; (2) the creation or continuation of the official's position with the company is dependent upon the award of the contract; (3) the contract moneys would be used by the company to compensate the official or as a basis for the official's compensation; or (4) he would otherwise profit from the contract. Adv. Ops. No. 88-008, and 89-006.

¹ The exceptions set forth in R.C. 2921.42(B) and (C) apply to public officials who have a prohibited "interest" in a public contract. R.C. 2921.42(A)(3) prohibits an official from "occupying a position of profit" in a contract. Therefore, the exceptions in R.C. 2921.42(B) and (C) do not apply to R.C. 2921.42(A)(3). Adv. Op. No. 93-001.

R.C. 2921.42(A)(3) does not prohibit Bowen & Associates from providing services on the project, as long as Mr. Bowen does not occupy a position of profit in the grant as a result of the services performed by Bowen & Associates. If Mr. Bowen would benefit from the grant in any of the ways set forth above because of the services provided by Bowen & Associates, he would occupy a position of profit in the grant. If Mr. Bowen would occupy a prohibited position of profit in the grant, KINBESS would be unable to receive the grant without defaulting on the grant agreement.

R.C. 2921.42(A)(4) is also applicable to your question. R.C. 2921.42(A)(4) 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.

As stated above, a member of the city planning commission is a public official, and a community development grant is a public contract. Therefore, R.C. 2921.42(A)(4) prohibits a member of a city planning commission from having an "interest" in a community development grant issued by the city with which he is connected.

The Ethics Commission has held that an "interest" under R.C. 2921.42 must be definite and direct, and may be pecuniary or fiduciary in nature. See Adv. Ops. No. 78-005 and 81-008. The Commission has stated that an employee of a company has an interest in the company's contracts if: (1) he is a director, trustee, or officer of, or has an ownership interest in, his employing company; (2) his responsibilities at his employing company include preparing, submitting, or negotiating the contract or involve the administration or execution of the contract; (3) his tenure, compensation, or other benefits received from the company would be based or directly dependent upon the granting of the contract; or (4) the facts indicate otherwise that he would have a definite and direct pecuniary or fiduciary interest in the contract as a result of his employment with the company. Adv. Op. No. 89-008.

R.C. 2921.42(A)(4) does not prohibit Bowen & Associates from providing services on the project. The law does prohibit Mr. Bowen from having an interest in the grant awarded by the city in any of the ways described above. If Mr. Bowen would also have a prohibited interest in the grant, KINBESS would be unable to receive the grant without defaulting on the grant agreement.

There is an exception to the prohibition in R.C. 2921.42(A)(4), set forth in R.C. 2921.42(C). As noted above, the exception in R.C. 2921.42(C) does not apply to the restriction in R.C. 2921.42(A)(3). Assuming that Mr. Bowen does not occupy a position of profit in the prosecution of the grant, as prohibited by R.C. 2921.42(A)(3), he may be able to meet the provisions of the exception such that he could have an interest in the grant.

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

R.C. 2921.42(C) provides an exception to R.C. 2921.42(A)(4), as follows:

- (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.

The Ethics Commission has held that with regard to the first and third criteria of Division (C), community development services provided to a city are "necessary services" for the city, and officials who wish to participate in the community development programs would have no "customers or clients in similar transactions." Adv. Ops. No. 84-011 and 91-011.

The transaction would be conducted at "arm's length" for purposes of the fourth criterion of Division (C), where the city official is not responsible for determining who receives tax abatements or grants for community development and takes no part in city deliberations or decisions on the matter. See also R.C. 2921.42(A)(1) and (A)(3). You have stated that Mr. Bowen has recused himself from any discussions at the Planning Commission with respect to the

project and will not have any discussions with any other members of the Planning Commission with respect to the project. See also R.C. 2921.42(A)(1) (discussed below). The city must also have full knowledge of the official's interest in the tax abatement or grant. Adv. Op. No. 91-011. You have stated that Mr. Bowen's role in the project was fully disclosed to all relevant City officials from the inception of the project. A city official who wishes to receive development grants or tax abatements from the city must, of course, meet all applicable qualifications for the redevelopment assistance.

In order to meet R.C. 2921.42(C)(2), the city official must show that the supplies or services he is offering to the city are "unobtainable elsewhere for the same or lower cost" or that the contract is part of a "continuing course of dealing" established prior to the city official becoming associated with the city. Adv. Ops. No. 84-011 and 88-008.

The Ethics Commission has stated 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 official, 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 provided that there is not a material change in the contract after the official becomes associated with the political subdivision. Adv. Ops. No. 82-007 and 88-008. It appears that there was no grant between the City and KINBESS before Mr. Bowen became a member of the Planning Commission. Therefore, the continuing course of dealing requirement cannot be met in this instance.

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

In order to comply with the requirement of Division (C)(2), Mr. Bowen must demonstrate by some objective criteria that the community development services KINBESS is offering the city are "unobtainable elsewhere for the same or lower cost." As stated in Advisory Opinion No. 84-011:

[A] public official should not have an interest in a public contract with the governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity. . . . The criterion that the goods or services be "unobtainable 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 [public official] must receive preference.

The Commission explained in Advisory Opinion No. 84-011 that the requirements of Division (C)(2) were met in a community development program which provided grants where: (1) there were sufficient funds available; (2) all of the qualified applicants have received grants, except the city employee; and, (3) the funds would have lapsed if not used within a specified period of time. The Commission modified this holding in Advisory Opinion No. 2001-02 by stated that if the public agency accepts applications for the community development program on a continuing

basis, the "unobtainable elsewhere" requirement in R.C. 2921.42(C)(2) may be met by a showing that the applications are considered in a fair and open process, and that it can be reasonably projected that the development program can and will fully support financing of all interested and qualified applicants, including the official connected with the grant issuing agency. Adv. Op. No. 2001-02.

The general principle in applying the exception of Division (C)(2) to community development is that if the demand by persons who are not city officials for the resources furnished by the city exceeds supply, then the "unobtainable elsewhere" exception of Division (C)(2) cannot be met by a city official. However, if the supply of resources furnished by the city exceeds demand, then the "unobtainable elsewhere" exception provided by Division (C)(2) may be met. A city official may receive grants and tax abatements for community development if resources remain available after all qualified and interested applicants who are not city officials have been served and if all other requirements of Division (C) have been met.

Therefore, Mr. Bowen may be able to meet the "unobtainable elsewhere" requirement in R.C. 2921.42(C)(2) in one of two ways. If the grants in the Neighborhood Development Investment Fund are issued on an annual or other time-limited basis, KINBESS can receive the funds if all other applicants have been served and resources are still available in the program fund. Adv. Op. No. 84-011. If the City accepts applications for grants under the Neighborhood Development Investment Fund on a continuing basis, KINBESS can receive the funds if the applications are considered in a fair and open process, and it can reasonably be projected that the City can and will fully support financing of all interested and qualified applicants, including KINBESS. Adv. Op. No. 2001-02.

Use of Authority to Secure a Public Contract or Anything of Value—R.C. 2921.42(A)(1) and R.C. 102.03(D) and (E)

If Mr. Bowen is able to meet the requirements in R.C. 2921.42(A)(4), such that he is not prohibited from having an interest in a grant awarded by the City, and provided that he would not occupy a position of profit in the grant, he is also bound by the provisions of R.C. 2921.42(A)(1). R.C. 2921.42(A)(1) provides that no public official shall knowingly:

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 Mr. Bowen from voting, discussing, deliberating, formally or informally lobbying, or otherwise using his authority or influence as a member of the Planning Commission to secure authorization of a city contract, including a grant, in which he has an interest. See Adv. Op. No. 89-008.

Mr. Bowen should also be aware of the restrictions imposed by R.C. 102.03(D) and (E), which provide the following:

- (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 city, and thus includes a member of a city planning commission. See R.C. 102.01(B) and (C); Adv. Op. No. 89-016.

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. See R.C. 102.01(G). A definite and particular pecuniary benefit is a thing of value under R.C. 102.03(D) and (E). See Adv. Ops. No. 79-008, 88-004, and 89-005. A grant falls within the definition of "anything of value." See generally Adv. Op. No. 92-013.

R.C. 102.03(D) prohibits a public official from using the authority or influence of his office to secure anything of value for himself or his business associates, including an employer or company with which he has an ownership interest. See Adv. Ops. No. 85-006 and 88-004. R.C. 102.03(E) prohibits a public official from soliciting anything of value for himself or for a business associate. Therefore, R.C. 102.03(D) and (E), as well as R.C. 2921.42(A)(1), prohibit Mr. Bowen from voting, deliberating, participating in discussions, or otherwise using his official position, either formally or informally, with regard to a grant from which he, OFDC, or Bowen & Associates, would receive a definite and direct benefit.

Conclusion

As explained more fully above, R.C. 2921.42(A)(3) prohibits Mr. Bowen from occupying a position of profit in a grant authorized by the Planning Commission. If a development company in which Mr. Bowen would have an ownership interest becomes a part owner of a corporation that receives a grant authorized by the Planning Commission, Mr. Bowen would occupy a position of profit in the prosecution of the grant. Therefore, a company in which Mr. Bowen has an ownership interest is prohibited from having an ownership interest in the corporation.

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With respect to the work performed by the architectural firm on the project, R.C. 2921.42(A)(4) prohibits Mr. Bowen from having an interest in a grant issued by the city, unless he can meet the exception set forth in R.C. 2921.42(C). If Mr. Bowen does not have an interest in the work being performed by the architectural firm, either because he does not have the kinds of interests described below, or because he can meet the exception in R.C. 2921.42(C), the architectural firm may not be prohibited from providing services in connection with the project. Even if Mr. Bowen can meet the narrow exception under law, there may continue to be an appearance of a conflict of interest under these circumstances if the firm by which he is employed performs services in connection with a grant authorized by the Planning Commission.

Finally, R.C. 2921.42(A)(1) and 102.03(D) and (E) prohibit Mr. Bowen from using his position, in any way, to secure the grant for a project if the company owned by his father and by which he is employed is performing services on the project. Mr. Bowen would be prohibited from voting on, discussing, deliberating about, or taking any other action, formally or informally, with respect to the project. The Commission cautions Mr. Bowen that this relationship is a difficult one, and that he must be diligent in meeting his obligation to withdraw from matters where his employer may receive a benefit.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on March 1, 2002. The Commission commends your client for requesting guidance before taking any actions that could be prohibited by law.

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