

OHIO ETHICS COMMISSION

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April 2, 2002 Informal Opinion 2002-INF-0402-1

Patrick J. Murphy
Director of Law
City of Euclid

Dear Mr. Murphy:

In a letter received by the Ethics Commission on March 6, 2002, you ask whether the Ohio Ethics Law and related statutes prohibit the President of Council (Council President) of the City of Euclid (City) from participating in land use decisions that affect his landlord.

Brief Answer

As explained below, the Council President is prohibited from participating in land use matters that affect the financial interests of his landlord because the property that is the subject of the land use matter is the property that the Council President is leasing.

Facts

You state that a Tax Increment Financing District (TIFD) has been established along the City's lakefront for the purpose of advancing development. You state that a local developer, Coastline Investments, Ltd. (Coastline), is interested in developing property within the TIFD. You state that Coastline has purchased several properties located within the TIFD, including the Council President's former residence, and is attempting to purchase an adjoining 735-unit apartment building. You state that it is foreseeable that the City will have a continuing role in lakeshore development by providing resources to promote the TIFD.

You state that the Council President now leases his former residence from Coastline. You provided detailed information regarding the sale of the residence and the terms and conditions of the lease. The Commission notes that there are several significant distinctions between the usual landlord/tenant relationship, and the relationship at issue in this situation.

First, the lease agreement between the Council President and Coastline (Exhibit C) differs considerably from the leases Coastline has entered into with its other tenants (Exhibit D). For example, the lease between the Council President and Coastline requires that the Council President pay the total rent of \$33,750, covering the entire term of the lease, in advance. Second, the Commission notes that the Purchase Agreement between the parties provides that Coastline will pay the Council President \$353,000, and that \$72,000 will be paid to the home pursuant to a note that is payable at the end of the lease term.

Therefore, it is clear from the information you have provided that Coastline is the Council President's landlord, and that the relationship between Coastline is not a typical landlord/tenant relationship. It is also clear that Coastline is interested in developing land within the TIFD, which includes the property being leased by the Council President.

Soliciting and Using Public Position to Secure Anything of Value—R.C. 102.03(D) and (E)

Your question implicates R.C. 102.03(D) and (E), which provide:

- (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 or is an employee of any public agency. R.C. 102.01(B). A member of a city council falls within the definition of "public official or employee" for purposes of R.C. 102.03 and is subject to the prohibitions imposed by Divisions (D) and (E). R.C. 102.01(B) and (C). Ohio Ethics Commission Advisory Opinion No. 88-004.

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 direct, pecuniary benefit to the financial interests of an individual, business, or entity, either private or public, is considered to be a thing of value under R.C. 102.03(D) and (E). Adv. Ops. No. 88-005 and 89-008. Specifically, the Commission has held that an increase or decrease in the value of property, or other benefit to property, that results from a change in zoning or other land-use regulation, is a thing of value for purposes of R.C. 102.03(D). Adv. Ops. No. 79-008, 80-007, and 88-004. See also Adv. Op. No. 85-006.

The Ethics Commission has held that a determination of whether a thing of value could manifest a substantial and improper influence upon a public official or employee with respect to that person's duties is dependent upon the facts and circumstances of each individual situation. Adv. Op. No. 87-008. In order for R.C. 102.03(D) and (E) to prohibit a public official or employee from participating in a matter, the thing of value that results from a decision of his public body must be of a "substantial" nature. Adv. Ops. No. 86-011 and 92-014. The word "substantial" means "of or having substance, real, actual, true; not imaginary; of considerable worth or value; important." Adv. Op. No. 89-014 (quoting Adv. Ops. No. 75-014 and 76-005). You state that the TIFD includes sixty-nine parcels of property and that Coastline has purchased, and is negotiating to purchase, properties in the area in order to participate in the TIFD. Therefore, it is apparent that the financial interest that Coastline has in developing the property with the TIFD is a "substantial" thing of value for purposes of R.C. 102.03(D) and (E).

Benefit to the Council Member

In your letter, you state that the land use matters before the council could benefit Coastline, the Council President's landlord. However, you also state "because of the closed and restrictive nature of the lease agreement, there would be no benefit transferred back to the tenant/public official." For this reason, you argue that R.C. 102.03(D) should not prohibit the Council President from participating in the land use matter.

Before it was amended in 1986, R.C. 102.03(D) prohibited a public official or employee from using his official position to secure anything of value for himself "that would not ordinarily accrue to him in the performance of his official duties, which thing is of such character as to manifest a substantial and improper influence upon him with respect to his duties." (Emphasis added.) However, when the General Assembly amended R.C. 102.03(D), it removed the requirement that the thing of value be secured by the official or employee for himself, thereby broadening the scope of the prohibition. The Ethics Commission explained the impact of the amendment to R.C. 102.03(D) in Advisory Opinion No. 88-004:

[I]t is no longer necessary to demonstrate that a public official or employee would himself derive a personal, pecuniary benefit from his participation in an official matter in order to show a violation of R.C. 102.03(D). However, R.C. 102.03(D) still requires that the thing of value, whether it is secured for the official or for someone else, be of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

In its current form, R.C. 102.03(D) prohibits a public official from using the authority or influence of his office to secure anything of value if the thing of value could have a substantial and improper influence upon the official with respect to the performance of his duties. R.C. 102.03(E), which was not discussed in Advisory Opinion No. 88-004, prohibits a public official from soliciting anything of value if the thing of value could have a substantial and improper influence upon the official with respect to the performance of his duties. The prohibitions are not limited to situations in which the official is soliciting, or using his position to secure, anything of value for himself.

The Ethics Commission has concluded that whenever a public official or employee has a close family, business, fiduciary, or economic relationship with another person, business, or entity, then the thing of value that the public official or employee solicits or secures for that person, business, or entity may impair the official's objectivity or independence of judgment, and therefore be of such a character as to manifest a substantial and improper influence upon the official with respect to his duties. Adv. Op. No. 89-015, 89-016, and 90-004. Therefore, the central issue is not whether the Council President will receive any derivative benefit from actions of City Council that affect his landlord. The issue instead is whether the Council President has a close family, business, fiduciary, or economic relationship with his landlord such that a thing of value accruing to his landlord as a result of council decisions would be of such a character as to have a substantial and improper influence upon the Council President with respect to matters that affect his landlord.

Precedent of Advisory Opinion No. 97-002—Tenant and Landlord Relationships

In Advisory Opinion No. 97-002, the Ethics Commission explained that R.C. 102.03(D) prohibits a city council member from participating in land use matters that affect the financial interests of his landlord, unless the council member can objectively demonstrate that he meets four requirements. The requirements are that: (a) the property that is being leased is not the subject of the land use matter before the city; (b) the rent, terms, or duration of the lease are not changed in consideration for, or recognition of, the actions of the council member; (c) no disputes exist between the council member and his landlord regarding the lease; and (d) the rent, and other terms and duration of the lease, are fixed by contract.

Application of Precedent to the Council President

In the instant situation, under the facts that you have stated, the residential property that is being leased is a subject of land use matters before the City that affect the financial interests of Coastline. In your request for an advisory opinion, you describe the TIFD in detail and state, "[o]ne of the four (4) residential parcels of property [within the TIFD] is the one previously owned and currently occupied by [the Council President]." In your request, you go on to state: "[I]t is contemplated that the City of Euclid, through its City Council, will have some continuing role in lakefront development. . . . It is foreseeable that the City would provide certain resources to promote the TIFD." Of note to this issue is the purchase agreement between the parties, which you attach to the letter as Exhibit A. In the agreement, one of the contingencies is that Coastline "shall endeavor to utilize the house in its development plan."

Therefore, it is clear that decisions by City Council involving development activity within the TIFD will have a financial impact upon developers who are owners of real estate within the TIFD, including Coastline. Further, it is clear that the property that the Council President leases from Coastline will be affected by land decisions made by the City Council related to the TIFD. The Council President is unable to meet all four of the requirements set forth in Advisory Opinion No. 97-002

The purpose of the restrictions in R.C. 102.03(D) and (E) is to protect the public from situations where a public official could be influenced, when making decisions in the course of his public service, by his own interests, or the interests of his family members, business associates, or other parties with whom the official has close relationships, regardless of whether the official receives some distributive economic benefit from the transaction. Adv. Ops. No. 89-008, 92-012, and 98-002. In the interest of insuring impartial and objective decisions, the Ethics Law prohibits public officials from participating in matters where the interests of those parties would be affected by the decision. The Council President is prohibited from voting on, discussing, deliberating, formally or informally lobbying his fellow council members about, or taking any other action within his authority as Council President with respect to these matters.

In your letter, you detail a number of steps the Council President has taken to resolve any potential for conflict of interest. The Commission commends the Council President for taking these steps. You also state that the council member may be prohibited from leasing the residence if he participates in matters that affect the TIFD. The Ethics Law does not preclude the Council President from continuing to lease property from the landlord as described in your letter. However, the Ethics Law does prohibit the Council President from participating in council actions on a matter that affects the financial interests of his landlord. In this case, the restriction would apply to all decisions by City Council involving development activity within the TIFD, or related to the TIFD as a whole, as well as any decisions that specifically affect the property owned by Coastline and rented by the Council President.

Conclusion

As explained above, the Council President is prohibited from participating in land use matters that affect the financial interests of his landlord because the property that is the subject of the land use matter is the property that the Council President is leasing.

As a final matter, one of the contingencies to the purchase agreement between the parties, which you attach to the letter as Exhibit A, is that "[t]his agreement is subject to approval or modification by the Ohio Ethics Commission." It should be noted, first, that until the purchase agreement was included as an attachment to your letter, the Commission was not informed of this contingency. However, the Ethics Commission's statutory authority to render advisory opinions to guide the future actions of public officials does not include the power to either approve or modify private contracts.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 2, 2002. The Commission commends the Council President for requesting guidance before taking any actions that could be prohibited by law.

Patrick J. Murphy
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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 contact this Office again.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer A. Hardin". The signature is fluid and cursive, with the first name being the most prominent.

Jennifer A. Hardin
Chief Advisory Attorney

cc: Daniel G. Hilson
Ed Gudenas