

OHIO ETHICS COMMISSION

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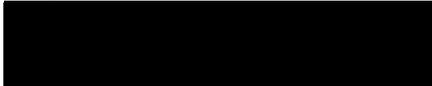
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April 2, 2002

Informal Opinion 2002-INF-0402-2

Les Landen, Law Director
City of Middletown



Dear Mr. Landen:

In a letter received by the Ohio Ethics Commission on March 22, 2002, you have asked whether the Ethics Law and related statutes prohibit an official or employee of the City of Middletown (the City) from participating as a landlord in the Federal Section 8 Housing Program. Your question involves an employee who is not involved in the administration of the Section 8 program.

Opinion Summary

As explained more fully below, the Ethics Law and related statutes do not prohibit officials and employees of the City who have no role in the administration of the Section 8 program from owning property that is leased, in part, by tenants who receive funds from the Section 8 Housing Program. The Ethics Law and related statutes do, however, prohibit an official or employee of the City from using his or her position to secure Section 8 funds for tenants who lease property that he or she owns, and from accepting rent from tenants who receive Section 8 funding if the official or employee used his or her position to secure the funding. Because they may be unable to withdraw from decisions affecting Section 8 tenants, the prohibitions may have the practical effect of limiting the ability of employees and officials who are involved in the administration of Section 8 funding from receiving rent from those tenants.

Facts

In your letter to the Ethics Commission, you explain that, under the Section 8 program, the Federal Government allots certain amounts of money to communities, including the City. The money is then used to provide subsidized housing to moderate and low-income persons. You state that the City operates its program through a contracted agency that handles all applications and determinations under the Section 8 program. You explain that individuals who seek assistance under the Section 8 program file an application with the contracted agency. The contracted agency then makes the appropriate review and determinations with regard to the availability and amount of housing subsidy for that individual or family.

You explain that, under the Section 8 program, tenants are free to find housing units in which they wish to live and then ask the owner or landlord to participate in the Section 8 program. Owners of property that participate in the Section 8 program must sign an agreement with the City in which they state that they will follow certain federal requirements that are applicable to Section 8 landlords.

You state that a City employee wishes to purchase an apartment unit that is presently occupied by several tenants who receive Section 8 subsidies. You explain that the Section 8 tenants have leases that are still in term, and which will not terminate prior to the City employee taking ownership of the property. Further, you state that if the employee enters into the agreement to purchase the property, he will own housing that is leased, in part, to persons receiving Section 8 subsidies, and therefore will be required to sign an agreement with the City regarding compliance with the federal program.

Having a Definite and Direct Interest in a City Contract—R.C. 2921.42(A)(4)

The situation you have described implicates 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 official” is defined, for purposes of the prohibitions of R.C. 2921.42, to include an elected or appointed officer of the state or any political subdivision of the state. R.C. 2921.01(A). Accordingly, an employee or official of the City is a “public official” subject to the prohibitions of R.C. 2921.42. See generally Ohio Ethics Commission Advisory Opinions No. 84-011, 85-002, and 88-006.

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). Previous advisory opinions issued by the Commission have concluded that grants by governmental agencies are “public contracts,” as defined in R.C. 2921.42(G), since a grant is the purchase or acquisition of services by or for the use of the governmental agency. See Adv. Ops. No. 82-004, 85-002, and 87-003. In the situation you have described, the Section 8 funds are provided by the federal government and are distributed pursuant to an agreement entered into by the City. Therefore, in the situation you have described, the Section 8 funds are “public contracts” as defined in R.C. 2921.42(G) since the City is acquiring services through the distribution of the Section 8 funds. See Adv. Op. No. 82-004 (a grant that passes through a city to a non-profit corporation created for the express purpose of promoting community cleanliness and litter control would be a “public contract” for the purchase of services “by or for the use of” the city).

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.

In the situation you have described, the Section 8 subsidy is provided to the tenant, not to the landlord who is a City official or employee. The landlord would be legally entitled to receive

rent from his tenant regardless of whether the tenant receives Section 8 subsidies. Therefore, as long as the landlord does not receive a greater amount of rent or other payment from a tenant who receives Section 8 subsidies than the landlord would receive from a tenant who does not receive Section 8 subsidies, the landlord would not have a sufficiently definite and direct interest in the Section 8 funds to invoke the felony provision of R.C. 2921.42(A)(4). Therefore, subject to the restrictions imposed by R.C. 102.03(D) and (E), as discussed below, the Ethics Law and related statutes do not, per se, prohibit a City official or employee from owning property occupied by a tenant who receives Section 8 subsidies where the City official or employee would not receive a greater amount of rent or other payment as a result of a tenant's receipt of Section 8 subsidies.

Securing or Accepting a Personal Financial Benefit—R.C. 102.03(D) and (E)

A City official or employee who participates in the Section 8 program as a landlord must also adhere to the restrictions imposed as a result of the application of 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.

The term "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). An employee or official of the City is a "public official or employee" subject to the prohibitions of R.C. 102.03. See Adv. Ops. No. 83-005, 92-012, and 97-001.

In the situation you described, R.C. 102.03(D) prohibits a City official or employee from using his position to secure a definite and direct benefit for his or her tenants. Therefore, for instance, a City official or employee who has any role in the administration of the Section 8 program is prohibited from participating in matters involving the distribution of Section 8 subsidies to his or her tenants.

R.C. 102.03(E) prohibits a public official or employee from soliciting or accepting a thing of value that would have a substantial and improper influence upon the public official or employee with respect to his or her duties. Therefore, R.C. 102.03(E) prohibits a City official or employee from accepting any substantial thing of value, including rent from a Section 8 tenant, if the City official or employee has participated in matters involving the distribution of Section 8 subsidies to the provider of the substantial thing of value, such as his or her tenant. A City official or employee who receives rent from Section 8 tenants must withdraw from all matters involving the administration of the Section 8 funding.

Other Applicable Provisions of Law

There may be other provisions of law that restrict a City official's or employee's ability to own property occupied by a tenant who receive Section 8 subsidies. However, the Ethics Commission does not have the statutory authority to apply local charter provisions or other provisions of law outside of the Ethics Law and related statutes to the situation you have described. As law director for the City, you would be the proper authority to provide advice to City officials and employees regarding the application of local charter provisions to the present situation.

You have also asked about the application of provisions of the U.S. Constitution to the situation you have described. You should note that the Ethics Commission has the statutory authority to apply only the Ethics Law and related statutes in a determination of whether the proposed activity is prohibited. See R.C. 102.08. While a particular situation could raise issues under provisions of the U.S. Constitution in addition to those issues that are raised by the application of the Ethics Law, the Ethics Commission cannot provide advice on the application of constitutional provisions to a particular situation.

Conclusion

As explained above, the Ethics Law and related statutes do not prohibit officials and employees of the City who have no role in the administration of the Section 8 program from owning property that is leased, in part, by tenants who receive funds from the Section 8 Housing Program. The Ethics Law and related statutes do, however, prohibit an official or employee of the City from using his or her position to secure Section 8 funds for tenants who lease property that he or she owns, and from accepting rent from tenants who receive Section 8 funding if the official or employee used his or her position to secure the funding. Because they may be unable to withdraw from decisions affecting Section 8 tenants, the prohibitions may have the practical effect of limiting the ability of employees and officials who are involved in the administration of Section 8 funding from receiving rent from those tenants.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 2, 2002. The Commission commends you for requesting prospective guidance on behalf of City of Middletown officials and employees.

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

Very Truly Yours,



Timothy L. Gates
Staff Attorney