

# OHIO ETHICS COMMISSION

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February 25, 2003

Informal Opinion 2003-INF-0225-1

Matthew R. Vekasy  
[REDACTED]

Dear Mr. Vekasy:

In a letter received by the Ethics Commission on December 12, 2002, you ask for an explanation of the restrictions that the Ohio Ethics Law and related statutes would impose upon you if you were appointed to the City of Columbus's (City) Board of Zoning Adjustment (BZA).

You state that you own a development company that builds projects in the City. You state that you have appeared before City Council and the BZA, and have engaged the law firm of Smith and Hale for legal expertise, to obtain zoning changes for your projects. You also state that you are a commercial real estate agent marketing industrial, office, and retail properties for Taggart Management & Real Estate Service, LLC (Taggart). You state further that you are a former employee of Casto Communities (Casto).

In your request, you present four main questions concerning your potential ability to serve, and another six subquestions. Based upon these varied questions and their facts, the application of the Ethics Law below is necessarily more complex.

## Brief Answer

As explained below, the Ohio Ethics Laws and related statutes do not prohibit you from serving on the City BZA. However, these protections against personal and business conflicts of interest place significant restrictions upon your participation in matters that directly and definitely affect your financial interests or the financial interests of parties in business with you if you were to serve. The Ohio Ethics Laws and related statutes are criminal laws, and failure to comply with the restrictions discussed in this opinion can result in criminal penalty. The application of these restraints varies depending on the facts and circumstances in each of the many fact patterns you have raised.

### **Questions Pertaining to Participation**

You have asked whether the Ohio Ethics Laws and related statutes prohibit you, if you are appointed to the City BZA, from participating in matters that affect six parties. To more easily explain the response, the Commission has rearranged your questions and applied the Ethics Law to the parties you have identified in this order: (1) your private development company; (2) partners of your private development company; (3) your private employer (Taggart); (4) your former employer (Casto); (5) a law firm that your private company engages for legal advice and assistance; and (6) partners of your private development company who are employees of your former employer (Casto).

### **Conflict of Interest Provisions—R.C. 102.03(D) and (E)**

All of these questions implicate 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.

The term "public official and employee" is defined to include any person who holds an appointed city office. R.C. 102.01(B) and (C). A member of a city's board of zoning adjustment is a public official for purposes of the prohibitions set forth in R.C. 102.03(D) and (E).

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. 102.03(G). A definite and direct pecuniary benefit, or the avoidance of a detriment, is considered to be a thing of value under R.C. 102.03(D) and (E). Ohio Ethics Commission Advisory Opinion No. 88-004 and 92-019. The Ethics Commission has also determined that the beneficial or detrimental financial impact upon the value of real property, created by a public agency's land-use decision, is a thing of value for purposes of R.C. 102.03(D). Adv. Ops. No. 88-005, 92-019, and 98-002. For example, an increase or enhancement in the value of property, an opportunity or ability to sell property at a profit or for a commission, or other benefit to property is a thing of value. Adv. Ops. No. 79-003, 79-008, and 85-006. The application of R.C. 102.03(D) and (E) is dependent upon the facts and circumstances of each individual situation. Adv. Ops. No. 87-007 and 89-003.

Changes in the Ohio Ethics Law that broadened its coverage are important in responding to your questions. Prior to 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.) The Ethics Commission applied this statutory language to prohibit a public official or employee from participating in matters that would benefit the public official's or employee's own financial interests. Adv. Ops. No. 79-003 and 80-007. The Commission also concluded that R.C. 102.03(D) prohibited a public official or employee from acting on matters that affect the property, business, or other financial interests of his spouse or his employer, if the official himself would derive some benefit as a result of his actions. Adv. Ops. No. 79-008, 80-003, and 84-010. By contrast, the Commission concluded that R.C. 102.03(D) did not "apply to things of value accruing to a family member or business associate, provided the public official does not benefit personally." Adv. Op. No. 86-007. However, the Commission also cautioned that it would create the appearance of impropriety for a public official or employee to participate in discussions or vote on a matter concerning a business owned by a family member or business associate even if he had no personal financial interest in the matter. Adv. Op. No. 86-007.

In Am. Sub. H.B. 300, effective September 17, 1986, the General Assembly amended R.C. 102.03(D) to delete the requirement that the thing of value be for the public official or employee, and broadened the scope of the prohibition imposed by R.C. 102.03(D). Adv. Op. No. 87-004. As a result, the law is not limited in its application to situations where the public official or employee would himself secure a benefit. Adv. Op. No. 88-004. However, R.C. 102.03(D) still requires that the thing of value, whether it is secured for the official or for someone else, have a concrete and direct effect such that it is of a character as to manifest a substantial and improper influence upon him with respect to his duties. Id.

In Advisory Opinion No. 93-003, the Commission stated:

R.C. 102.03(D) prohibits a public official or employee from using his authority or influence to secure anything of value, not only for himself, but for members of his family (see Advisory Opinion No. 92-012), for his business associates, (see Advisory Opinions No. 88-004 and 88-005), for a professional organization on which the public official or employee serves as a board member (see Advisory Opinion No. 90-012), [and] for his private outside employer (see Advisory Opinion No. 91-004).

It should be noted that the Commission has not applied the law in a vague or arbitrary fashion to any person with any type of relationship to a public official or employee. In the cited opinions, where a definite and direct thing of value accrues, as a result of a public official's or employee's action, to a person or entity that has a close familial, economic, or fiduciary relationship to the official or employee, the thing of value is of such a character as to manifest a substantial and improper influence upon the official or employee with respect to the performance of his duties. Consequently, where a matter is pending before a public agency that definitely and directly affects the financial interests of a party with a close familial, economic, or fiduciary relationship

to an official or employee of the agency, R.C. 102.03(D) prohibits the official or employee from securing anything of value for the related party by participating in the matter.

In addition to amending R.C. 102.03(D) in Am. Sub. H.B. 300, the General Assembly enacted R.C. 102.03(E). R.C. 102.03(E) prohibits a public official or employee from soliciting anything of value for himself and for any other party with whom he has a close familial, economic, or fiduciary relationship, because the thing of value is capable of manifesting a substantial and improper influence upon the official.

The prohibitions imposed by R.C. 102.03(D) and (E) serve the public interest in effective, objective, and impartial government by preventing situations where public officials and employees are influenced by things of value secured or solicited for themselves or other parties with whom they have a close tie or nexus. This tie impairs the objectivity and independence of judgment of a public official or employee, which the public reasonably expects, and subsequently erodes the effectiveness of the public agency he serves. Adv. Ops. No. 89-014 and 90-002. These statutes further support public confidence that the decisions of a public board, like a BZA, are being made by individuals who do not have any distinct link to the parties before the board.

#### **Your Development Company**

In Advisory Opinion No. 85-006, the Ethics Commission explained that a member of a city planning commission, who was employed as a realtor, was not prohibited from serving on the planning commission, but that R.C. 102.03(D) prohibited him from participating in matters that would affect his real estate interests. The Commission cautioned that a realtor serving on a city planning commission should review each matter coming before the commission to determine whether he, his firm, or his immediate family had a private, pecuniary interest in the public agency's land-use decision that may conflict with his public duties.

Therefore, if you are appointed to the City BZA, R.C. 102.03(D) will prohibit you from voting, deliberating, participating in discussions, or otherwise using your official position, either formally or informally, with regard to zoning matters that would affect the interests of your private development company. R.C. 102.03(E) will prohibit you from soliciting anything of value for your development company. Among other things, R.C. 102.03(E) prohibits you from advocating matters involving your development company before the BZA or with BZA members or staff.

You have stated that your development company has built all of its projects in a specific area of Columbus and ask if you are prohibited from participating in matters affecting all projects that are located in this area. You state that after the BZA decides a matter involving property in this area, your development company could desire to purchase and develop this property.

If you are appointed to the City BZA, R.C. 102.03(D) will prohibit you from participating in matters affecting property in the specific area of the City where your development company builds projects if you fairly and reasonably anticipate that your company could receive a definite and direct benefit from the decision of the BZA. As explained below, these decisions could benefit your development company either by making it desirable for your company to acquire the property that is the subject of the BZA decision or by altering the value of property bordering or near property that is owned by, or produces income for, your development company.

For example, in Advisory Opinion No. 76-006, the Ethics Commission determined that a city council member is prohibited from voting to secure the city's purchase of real estate if he is aware that the seller of the real estate will invest a portion of the proceeds of the sale in the council member's private business. R.C. 102.03(D) does not prohibit you from purchasing a piece of property simply because the BZA has considered a matter involving the property in the past. However, R.C. 102.03(D) prohibits you from participating in matters affecting properties in the area of the City that is of interest to your company if you reasonably foresee that your company will purchase the property and the BZA decision would make the property desirable for acquisition.

R.C. 102.03(D) also prohibits a public official or employee from participating in land-use decisions affecting the value of property bordering or close to his property. The Ethics Commission explained that a land-use decision affecting property bordering or near the official's or employee's property could have a definite and direct beneficial or detrimental financial impact upon the value of his property. Adv. Ops. No. 88-004, 92-013, and 92-019. For example, in Advisory Opinion No. 92-019, the Ethics Commission held that R.C. 102.03(D) prohibited a city council member from participating in actions of the city council regarding a proposed road extension that would be located approximately 150 feet from his property. Therefore, R.C. 102.03(D) prohibits you from participating in land-use matters before the BZA that directly affect the value of property bordering or near property that is owned by, or produces income for, your development company.

### **Partners of Your Development Company**

As explained above, R.C. 102.03(D) prohibits a public official or employee from participating in matters that would secure a thing of value for any of his business associates. Adv. Op. No. 88-004. R.C. 102.03(E) prohibits a public official or employee from soliciting anything of value for a business associate. The Ethics Commission has stated that a public official's or employee's business associates are parties who are acting with the public official or employee for a common business purpose. Adv. Ops. No. 85-004, 86-002, and 88-004. The Commission explained that the word "business" is defined, in Black's Law Dictionary, as "[employment, occupation, profession, or commercial activity engaged in for gain or livelihood]" and "[activity or enterprise for gain, benefit, advantage or livelihood." Black's Law Dictionary 179 (5th ed. 1979). Adv. Op. No. 93-003. For example, the Ethics Commission has stated that: (1) a private employer is the business associate of his employee (Adv. Op. No. 89-008); (2) a firm is the business associate of its representatives or agents (Adv. Op. No. 84-013); (3) law partners are business associates (Adv. Op. No. 90-007); and (4) business partners are business

associates (Adv. Op. No. 85-004). All of these are examples of parties involved in common business endeavors.

Therefore, if you are appointed to the BZA, R.C. 102.03(D) will prohibit you from voting, deliberating, participating in discussions, or otherwise using your official position, either formally or informally, in a land-use matter before the BZA that would result in a definite and direct benefit to the financial interests of your business partners. R.C. 102.03(E) will prohibit you from soliciting, as a member of the BZA, any direct and definite benefit for your business associate. These prohibitions extend to all matters before the BZA regarding a land-use issue in which one of your partners has a financial interest despite the fact that your development company is not involved in the particular project.

#### **Present Employer—Taggart**

In Advisory Opinion No. 89-008, the Ethics Commission explained that an employer holds a position of power and authority over the hiring, compensation, discipline, and termination of its employees. See also Adv. Ops. No. 80-003 and 88-005. A public official or employee who is in the position of making an official decision regarding the pecuniary interests of his private employer would be using his position to secure a thing of value for his employer that could manifest a substantial and improper influence on the official or employee with respect to the performance of his duties.

If you are appointed to the BZA, R.C. 102.03(D) prohibits you from participating in zoning matters that would affect the interests of Taggart. R.C. 102.03(E) prohibits you from soliciting, as a member of the BZA, any benefit for Taggart.

#### **Former Employer—Casto Communities**

As stated above, you are a former employee of Casto Communities. The issue is whether a former employer of a public official or employee is a party with a relationship to the public official or employee that is similar to the relationships the Commission has identified as likely to result in a substantial and improper influence on the public official or employee.

In Advisory Opinion No. 90-011, the Ethics Commission considered whether R.C. 102.03(D) prohibited a council member who is also an attorney from participating in a matter before council involving a former client and concluded that generally it did not. The Commission stated:

The possibility that a council member would have a conflict of interest merely because a party appearing before council had formerly been a client of his law firm or law partner is, however, much more remote [than the possibility of a conflict involving a party who is currently represented by his law firm or partner on the matter]. Advisory Opinions No. 88-005 and 88-009. Therefore, the council member is not prohibited by R.C. 102.03(D) from participating in a matter presented to council by a former client of his law firm or law partner.

Adv. Op. No. 90-011. The Ethics Commission cautioned, however, that the relationship must be absolutely and enduringly severed. The Commission explained that there must be: (1) no ongoing relationship between the party before the public agency and the official; (2) no understanding that a relationship will be resumed in the future; and (3) no review, approval, or action based upon work previously performed by the official. Id. See also Adv. Op. No. 92-004 (a county sheriff or deputy sheriff may do business with a nonprofit corporation and professional organization immediately after ceasing to serve as an officer or director of the Association).

You severed your employment relationship with Casto in 1998. Therefore, if you are appointed to the City BZA, then R.C. 102.03(D) and (E) do not prohibit you from participating in matters affecting the interests of your former private employer provided that the severance of the employer-employee relationship is absolute and enduring. There must be: (1) no ongoing relationship between yourself and Casto; (2) no understanding that the employer-employee relationship will be resumed in the future; and (3) no action taken as a BZA member based upon work that you previously performed as an employee of Casto.

#### **Law Firm Used by Your Development Company**

As stated above, your development company has engaged the law firm of Smith and Hale for legal expertise to obtain zoning changes for your projects. You also state that Smith and Hale represents up to 25% of the parties bringing matters before the BZA.

The fact that both your development company and a party with matters before the BZA may be clients of the same law firm generally creates no definite and direct relationship between your development company and either Smith and Hale or the other development companies that are clients of Smith and Hale to constitute a prohibited conflict. Therefore, R.C. 102.03(D) and (E) do not prohibit you from participating in matters before the BZA solely because parties involved are also clients of Smith and Hale.

If, however, you are actively involved in a legal matter upon which you are represented by Smith and Hale, R.C. 102.03(D) and (E) prohibit you from participating in matters before the BZA on which Smith and Hale is representing clients. R.C. 102.03(E) would obviously prohibit you from soliciting or accepting any kind of discount or other financial benefit from Smith and Hale as a result of, or related to, your participation in matters involving the law firm's clients.

#### **Partnership with an Employee of Casto**

You ask whether you could participate in matters affecting Casto if you, in the future, became a partner of a Casto employee. As set forth above, R.C. 102.03(D) and (E) prohibit a public official or employee from participating in matters that would affect his business associate's interests and from soliciting or securing a benefit for a business associate, including his employer. Your partner would be your business associate. See Adv. Op. No. 85-004 and discussion above.

Whether you are prohibited from participating as a BZA member regarding Casto, if an employee of Casto is your partner, depends on the facts and circumstances of the individual situation. At this time, you have not formed a partnership with a Casto employee. If you do form such a partnership, you should contact the Commission to communicate the specific facts and circumstances so that the Commission can consider the application of the Ohio Ethics Law at that time.

### **Other Considerations**

In addition to the limits on participation discussed above, other provisions of the Ethics Law will condition your service on the BZA. These provisions will apply to you while you serve on the BZA and for one year after you leave that position.

### **The Revolving Door Prohibition—R.C. 102.03(A)**

As set forth above, you state that you have appeared before the City Council and BZA to obtain zoning changes for your projects. R.C. 102.03(A) restricts the actions of a public official or employee who desires to appear before public agencies, while serving as an official or employee and for one year after leaving public service or employment. R.C. 102.03(A)(1) provides:

No present or former public official or employee shall, during public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

The Franklin County Court of Appeals upheld the “Revolving Door” prohibition as constitutional. State v. Nipps, 66 Ohio App.2d 17 (1979).

R.C. 102.03(A) prohibits a present or former public official or employee from representing, or acting in a representative capacity for, any “person.” A “person,” for purposes of R.C. 102.03(A)(1), includes governmental agencies, individuals, corporations, business trusts, estates, trusts, partnerships, and associations. See R.C. 1.59(C) and Adv. Ops. No. 82-002 and 89-003. In your situation, your private development company is a “person” for purposes of R.C. 102.03(A)(1).

The prohibition in R.C. 102.03(A) applies to any “matter” in which the official or employee personally participated. The term “matter” includes such concrete items as a specific occurrence or problem requiring discussion, decision, research, or investigation, a legal proceeding, an application, and a settlement of a dispute or question. Adv. Op. No. 99-001. “Matter” also includes such abstract items as a dispute of special or public importance and a controversy submitted for consideration. Id. In the instant situation, any land-use issue that comes before the BZA is a “matter” for purposes of R.C. 102.03(A). R.C. 102.03(A) defines



“personal participation” to include “decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.”

R.C. 102.03(A) prohibits you, during your service as a member of the BZA and for one year after you leave your public position, from representing your development company before BZA or any public agency on any matter in which you participated as a member of the BZA through decision, recommendation, investigation, or other substantial exercise of administrative discretion. Adv. Ops. No. 87-001 and 91-009. For example, as set forth above, you state that you anticipate that your development company could desire to purchase property after the BZA decides a matter involving the property in a manner that would make the property desirable for your company to acquire it for development. Because you would have participated in the BZA decision involving the property, R.C. 102.03(A) prohibits you, during your service as a member of the BZA and for one year after you leave your public position, from representing your development company before the City Council, BZA, or any public agency to obtain zoning changes regarding the your company’s development of this particular piece of property.

**Receiving Compensation of Services Rendered—R. C. 102.04(C)**

Your attention is directed to R.C. 102.04(C), which reads:

Except as provided in division (D) of this section, no person who is elected or appointed to an office of or employed by a county, township, municipal corporation, or any other governmental entity, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the entity of which he is an officer or employee.

As a member of the BZA, you would be a person appointed to an office of a municipal corporation and therefore you would be subject to the prohibitions imposed by R.C. 102.04(C).

As set forth above, you state that you have appeared before the City Council and BZA to obtain zoning changes for your projects. If you are appointed to the BZA, R.C. 102.04(C) will prohibit you from receiving “compensation” in the form of proceeds from the operation of your development company for personally rendering any service in any case, proceeding, application, or other matter which is before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the City. The personal rendering of service would include your preparation of plans or proposals to be submitted to any agency of the City, including but not limited to the BZA. It does not include the performance of ministerial functions such as the filing of applications for permits and licenses, and other documents. R.C. 102.04(F).

Division (D) of R.C. 102.04 provides an exception to this prohibition for public officials who are appointed to a nonelective position and reads as follows:

- (D) A public official who is appointed to a nonelective office or a public employee shall be exempted from division (A), (B), or (C) of this section if both of the following apply:
- (1) The agency to which the official or employee wants to sell the goods or services, or before which the matter that involves the rendering of his services is pending, is an agency other than the one with which he serves;
  - (2) Prior to rendering the personal services or selling or agreeing to sell the goods or services, he files a statement with the appropriate ethics commission, with the public agency with which he serves, and with the public agency before which the matter is pending or that is purchasing or has agreed to purchase goods or services.

The statement required by R.C. 102.04(D) must contain the official's or employee's name and address, information about the two public agencies involved, and a brief description of the pending matter and of the personal services to be rendered. The statement must also contain the official's or employee's declaration that he disqualifies himself for a period of two years from any participation as a public official or employee in any matter involving any public official or employee of the agency before which the matter is pending

Because you would be serving in a nonelective position if you were to be appointed to the BZA, the exception provided by R.C. 102.04(D) would apply. You are not prohibited from receiving compensation for services rendered for your development company on matters before city agencies, other than the BZA, if you file the appropriate statements required by R.C. 102.04(D). You can obtain a form for this purpose, and more information about the filing requirement, from the Commission.

### **Conclusion**

As explained above, the Ohio Ethics Laws and related statutes do not prohibit you from serving on the City BZA. However, these protections against personal and business conflicts of interest place significant restrictions upon your participation in matters that directly and definitely affect your financial interests or the financial interests of parties in business with you if you were to serve. The Ohio Ethics Laws and related statutes are criminal laws, and failure to comply with the restrictions discussed in this opinion can result in criminal penalty. The application of these restraints varies depending on the facts and circumstances in each of the many fact patterns you have raised.

On a final note, the Ethics Commission has held that the withdrawal of a public official from matters that create a conflict of interest may be detrimental to the functioning of his public agency. Adv. Op. No. 99-002. Further, such a situation may create the appearance of impropriety. These are factors you must consider when contemplating accepting an appointment to a public board that is entrusted with deciding matters that would affect your personal business interests and the business interests of parties with which you are closely connected. This advisory opinion does not reach a conclusion on the advisability of your proposed appointment.

If other members of the BZA were also required to withdraw from the same matters due to similar conflicts, then the BZA could be unable, or find it difficult, to act on a particular matter. See Att'y Gen. Op. No. 99-004 (Where all but one member of a board are required to abstain because of conflicts of interest, the one member, acting alone, cannot take an action that requires a "unanimous" vote of the board.). In addition, in such a situation, citizens may feel that they are being denied representation because you have placed your personal interests above the interests of the city.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on February 21, 2003. 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 cursive script, appearing to read "Jennifer A. Hardin".

Jennifer A. Hardin  
Chief Advisory Attorney

cc: Ty Marsh, Chief of Staff of the Mayor's Office