

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

April 7, 2003

Informal Opinion 2003-INF-0407-3

Italian Village Commission
City of Columbus

Dear Commissioners:

In a letter that the Ethics Commission received on December 2, 2002, you have asked whether the Ohio Ethics Law and related statutes prohibit members of the Italian Village Commission (Village Commission) from participating in matters affecting a developer who has sued them in their individual capacities.

Brief Answer

As explained below, members of the Village Commission are not prohibited from participating in matters affecting a developer who has sued them in their individual capacities.

Facts

Chapter 3327 of the Columbus City Code (Code) creates the Village Commission to maintain the architectural and aesthetic integrity of The Italian Village Historical District (District). The Village Commission is comprised of seven members. The Village Commission reviews applications from landowners and developers for proposed projects in the District. Before beginning any project in the District involving building alteration, construction, demolition, or site improvement, a person must obtain a certificate of appropriateness from the Village Commission. Code 3116.04. The Village Commission determines the appropriateness of the proposed project and either approves or disapproves the applications by using the criteria established by the Code. Code 3116.09(B). The Code establishes a procedure for appeal of the Village Commission's decision if the Village Commission denies an application for a certificate of appropriateness. Code 3116.10.

New Victorians is a developer that is actively involved in projects within the District. You have stated that New Victorians has taken issue with the Village Commission's regulatory decisions regarding the use of vinyl siding by New Victorians. In March 2002, New Victorians sued the Village Commission members in their individual capacities. New Victorians seeks injunctive relief, a grant of mandamus, monetary and punitive damages, and reimbursement of expenses, court costs, and attorney fees. You have stated that the petitioner offered to dismiss his action if the commission, among other things, granted his request for vinyl siding.

After the filing of this lawsuit, the composition of the Village Commission changed and only four of the seven members that were sued continued to serve. Three of the members who were sued resigned from the Village Commission and three new members were appointed to fill the vacancies. On September 16, 2002, legal counsel for New Victorians wrote to the four Village Commission members who are the defendants in the lawsuit. You have stated that this letter asserts that the Village Commission has failed to exercise its duties in a fair and impartial manner. The letter also states that, while the lawsuit is pending, the defendants who remain on the Village Commission "have a duty to recuse" themselves from any applications that New Victorians submits to the Village Commission. The attorney does not refer to any statute, resolution, ordinance, administrative rule, government agency advisory opinion, or common law precedent requiring the Village Commission members to abstain.

Until the Village Commission members, who are defendants in the lawsuit, could determine whether they were in fact required to abstain from matters involving New Victorians, the Village Commission ruled that a quorum did not exist and tabled New Victorians' applications. In response to this action by the Village Commission, New Victorians filed a second lawsuit against the members of the Village Commission, including the three members who were not defendants in the first lawsuit, in their individual capacities. In this second action, New Victorians seeks injunctive relief, a grant of mandamus, monetary damages, and reimbursement of court costs and attorney fees.

The Ohio Ethics Law and Related Statutes—Purpose and Definitions

The Ohio Ethics Law and related statutes consist of Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. R.C. 102.06 and 102.08. These statutes generally prohibit public officers and employees from misusing the authority or influence with which they are entrusted for their personal benefit or for the personal benefit of family members, business associates, and other individuals or entities with which the officers or employees have a close relationship.

While members of the Village Commission are governed by the Ethics Law, the Law does not extend to addressing issues concerning the merits of the Village Commission's regulatory or procedural decisions or other matters that are the subjects of the pending lawsuits outside of issues under the Ethics Law. The only issue before the Ethics Commission is whether the Ohio Ethics Law and related statutes prohibit members of the Village Commission from participating in matters affecting a petitioner who has sued them in their individual capacities.

Use of Authority to Secure Improper Things of Value—R.C. 102.03(D)

Division (D) of Section 102.03 of the Revised Code provides:

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.

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 political subdivision. R.C. 102.01(B) and (C). A member of a city architectural commission that exercises discretionary, decision-making authority is a public official for purposes of R.C. 102.03(D). Ohio Ethics Commission Advisory Opinion No. 96-002. The Village Commission exercises discretionary, decision-making authority. Code 3116.04 and 3116.09. Therefore, the members of the Village Commission are subject to the restrictions in R.C. 102.03(D).

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. 102.01(G). The Ethics Commission has held that the beneficial or detrimental economic impact of a decision by a public entity is a thing of value for purposes of R.C. 102.03. Adv. Ops. No. 85-012, 90-002, and 90-012.

R.C. 102.03(D) prohibits a public official from using the authority or influence of his office to secure a definite and direct thing of value for himself. Adv. Op. No. 88-004. The Ethics Commission has held that, for purposes of R.C. 102.03(D), the thing of value that is secured by the action of the public official must be definite and direct. When the thing of value, in a particular situation, is the economic impact that would occur from a decision of a public entity, the Ethics Commission has held that the prohibition of R.C. 102.03(D) does not apply if the economic impact is speculative and indirect rather than definite and direct. Adv. Op. No. 93-016.

Issue Arising Under R.C. 102.03(D)

You state that you believe that the Village Commission could eliminate or mitigate the personal liability of its members by approving applications that New Victorians brings before the Village Commission. You state that, under the assumption that New Victorians would dismiss the lawsuits or reduce their demands for relief if the members of the Village Commission were to approve their applications, the members are concerned that the potential of decreasing their personal liability is a "thing of value" that could be deemed to be "of such a character as to manifest a substantial and improper influence" upon them with respect to their duties. You refer to Advisory Opinion No. 90-013, in which the Ethics Commission determined that R.C. 102.03(D) prohibited a member of a port authority from participating in port authority decisions that "could directly affect the authority member's private financial interest."

In Advisory Opinion Number 90-013, the Commission was asked about the application of the Ohio Ethics Law to a port authority board member who had filed a lawsuit against the city that created the port authority. In the lawsuit, the port authority member sought to quiet title to a piece of property owned by the city and leased to the port authority. The lawsuit filed by the port authority board member had been dismissed, and the city and port authority were considering filing a lawsuit against the board member, and other similarly situated landowners, to quiet title to the same piece of property.

The Commission determined that the Ohio Ethics Law did not prohibit the individual from continuing to serve on the port authority even though he had been a plaintiff in a lawsuit against the city and may be a defendant in a lawsuit brought by the city or port authority. However, the Commission also determined that any action or decision of the port authority with regard to the lawsuit, or the property that was the subject of the lawsuit, could definitely and directly affect the authority member's private, financial interests. The Ethics Commission explained that this definite and direct benefit or detriment to the authority member's financial interests could impair his objectivity and independence of judgment with regard to his duties and decision-making as an authority member. Any decision of the port authority upon which the member served could directly affect the lawsuit and, thus, also directly affect his private, financial interests. Because he was a member of the port authority, it is obvious that the port authority member could use his official position to influence the other members to decide the dispute in his favor. Therefore, in Advisory Opinion No. 90-013, the Ethics Commission determined that R.C. 102.03(D) prohibits a port authority member from voting, participating in discussions or deliberations of the port authority, or otherwise using his official position, formally or informally, with regard to a potential or pending lawsuit, or the property that is the subject of the lawsuit.

Another opinion that is relevant to your question is Advisory Opinion No. 93-016. In that opinion, the Ethics Commission addressed whether a member of a county district board of health, who had an ownership interest in a business that would be subject to a public smoking regulation imposed by his board, could participate in the enactment of the legislation imposing the regulation. The Ethics Commission held that R.C. 102.03(D) does not prohibit the board member from participating in the enactment of the regulation because it is merely speculative to assert that the financial interests of his business could be affected either positively or negatively by the enactment of the regulation. The Ethics Commission explained that any financial effects that the smoking regulation would have on the board members' businesses depended upon the actions of the general public that would frequent the businesses.

Application of Precedent

The instant situation is more akin to the issue addressed in Advisory Opinion No. 93-016 than to the issue addressed in Advisory Opinion No. 90-013. Any action that could definitely and directly affect the lawsuits pending against the members of the Village Commission, and thus their private, financial interests, would have to be made by New Victorians through their legal counsel—not the Village Commission. A defendant in a lawsuit cannot unilaterally dismiss the lawsuit—a plaintiff can. Therefore, it is merely speculative to assert that the approval of applications that New Victorians brings before the Village Commission could either eliminate or mitigate the personal liability of the members of the Village Commission.

For example, the approval of the applications that New Victorians has before the Village Commission may result in New Victorians dropping its demands for injunctive relief and a grant of mandamus, because these two issues would, of course, be moot. Also, it must be noted that injunctive relief and a grant of mandamus changes the result of the decisions made by the Village Commission, and would not directly affect the requested relief that affects the individual pecuniary interests of the

Village Commission members. However, even after receiving approval of its applications, New Victorians may continue to seek monetary and punitive damages, and reimbursement of expenses, court costs, and attorney fees, from the members of the Village Commission in their individual capacities.

It is merely speculative to assert that the approval of applications that New Victorians brings before the Village Commission would either eliminate or mitigate the personal liability of the Village Commission members. Therefore, R.C. 102.03(D) does not prohibit Village Commission members from participating in matters affecting New Victorians despite the fact that New Victorians has sued them in their individual capacities.

The Ohio Ethics Commission also notes that any other interpretation of the Ethics Law would allow a citizen to use conflict of interest protections in the law to block officials or employees of a public agency from exercising the authority of their public positions by filing legal claims against them. Such a use of the law would obstruct the efficient functioning of a public agency and is ultimately contrary to the interests of the public as a whole.

Conclusion

As explained above, members of the Village Commission are not prohibited from participating in matters affecting a developer who has sued them in their individual capacities. Because of the Commission's answer to your first question, it is unnecessary for the Commission to answer your second question.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 4, 2003. The Commission commends the members of the Italian Village Commission for seeking guidance before taking any action that could be prohibited by the Ethics Law.

This advisory opinion is based on the facts presented. It 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 that reads "John Rawski".

John Rawski
Staff Attorney