

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

September 29, 2006 Informal Opinion 2006-INF-0929-2

Matthew J. Kridler
City Manager
City of Springfield
[REDACTED]

Dear Mr. Kridler:

On August 9, 2006, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you are the City Manager for the City of Springfield (city). You asked whether the Ohio Ethics Law and related statutes prohibit you from serving as an *ex officio* member of the governing board of the Healthy City Investments, LLC (the LLC), an Ohio limited liability corporation. You have also asked whether the law prohibits you from serving as Secretary of the LLC.

Brief Answer

As explained more fully below, under the specific facts that you have presented, the Ethics Law and related statutes do not prohibit you from serving as a member of the governing board of the LLC, as long as you serve in that position in your "official capacity." You can demonstrate that you serve on the LLC governing board in your official capacity if:

1. The city created or is a participant in the LLC;
2. You are formally designated by the city commission to serve on the governing board as the city's representative;
3. You are formally instructed by the city commission to act on behalf of the city and its interests; and
4. You have no other conflicts of interest related to your service on the governing board.

However, the Ethics Law prohibits you from serving as an officer of the LLC.

Facts

You are the city manager for City of Springfield, which is a charter city with a city commissioner-manager form of government. Art. I, sec. 2, Springfield City Charter. According to the charter, all powers of the city are vested in the commission. Id. The city manager shall execute the laws and administer the government of the city. Id.

The city commission appoints the city manager, who serves at the pleasure of the city commission. Art. III, sec. 21. The city manager is the administrative head of the municipal government under the direction and supervision of the city commission. Id.

In your letter, you explained that the city is undertaking an urban renewal project in the downtown area pursuant to the Southwest Downtown Urban Renewal Plan (plan) adopted by the Springfield City Commission (city commission). In furtherance of the plan, the city has entered into a redevelopment agreement with the local hospital, Community Mercy Health Partners (hospital), which is a nonprofit entity. The redevelopment agreement covers approximately 50 acres in the northwestern portion of the urban renewal area. The property will be used for the construction of a regional medical complex. The city has already begun to acquire property in the development area.

You explained that the hospital is forming the LLC, with two other local institutions: (1) the Springfield Foundation, which is a nonprofit corporation (foundation) and (2) the Harry and Violet Turner Charitable Trust (trust). The Operating Agreement for the LLC provides that the hospital, foundation, and trust is each a 33 $\frac{1}{3}$ member in the LLC. The operating agreement also provides that the city manager will serve as an *ex officio* member of the LLC with no membership interest in the company. The *ex officio* member will have the right to vote on all matters on which the other members can vote. For most voting purposes, the *ex officio* member's vote shall be considered a 25% membership interest in the LLC.¹

You have explained that the city commission authorized the city to enter into a Site Acquisition and Preparation Cooperation Agreement (site agreement) with the LLC. In accordance with the site agreement, the city will provide \$200,000 each year for site acquisition and preparation in the redevelopment area. Section 1.1. The site agreement also sets forth terms under which the city will purchase real property from the LLC in order for the city to apply for and use state and federal funds to demolish structures, remediate environmental contamination, and arrange for municipal utility service on the property, and then sell the property back to the LLC.

The site agreement will be entered into under the authority provided by the city commission in Ordinance No. 06-207. In Section 6 of Ordinance No. 06-207, the city

¹ There is an exception, set forth in Section 9.5 of the Operating Agreement, with respect to some property transactions. Under the exception, the hospital has a 51% controlling vote on those matters.

commission authorizes the city manager to vote on behalf of the city as an *ex officio* member of the LLC in accordance with the governing documents of the LLC.

You explained that Ordinance No. 06-207 was subsequently amended in Ordinance No. 06-240 to clarify the city manager's function as an *ex officio* member of the LLC. Ordinance No. 06-240 provides that it is ordained by the City Commission of Springfield:

Section 1. That Section 6 of Ordinance No. 06-207 be and hereby is amended to read as follows:

Section 6. That the City Manager, Finance Director, Law Director and other appropriate City officials are hereby authorized to do all things necessary to carryout the herein authorized agreements and the City Manager is further hereby authorized to vote on behalf of the City (i.e., the City Manager shall represent the City and its interests) as an *ex officio* member of Health [sic] City Investments, LLC, in accordance with the governing documents of Health [sic] City Investments, LLC.

You have asked whether the Ethics Law prohibits you from serving as a member of the governing board or the secretary of the LLC.

Public Contract and Conflict of Interest

The public contract (R.C. 2921.42(A)(4)) and conflict of interest (R.C. 102.03(D) and (E)) provisions are both applicable to your questions.

R.C. 2921.42(A)(4) prohibits a public official from having an interest in a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which the official is connected. State v. Pinkney (1988), 36 Ohio St.3d 190. R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting, accepting, or using his position to secure anything of value that is of such a character as to manifest a substantial and improper influence upon the official with respect to his job duties. State v. Lordi (2000), 140 Ohio App.3d 561, 569, discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526, 91 Ohio St.3d 1536, motion for reconsideration denied, 92 Ohio St.3d 1422 (2001).

As the city manager, you are a "public official" for purposes of both R.C. 2921.42(A)(4) and R.C. 102.03(D) and (E). See R.C. 2921.01(A) and 102.01(B) and (C). The site agreement between the city and the LLC, whereby the city agrees to acquire and prepare property that will ultimately be used by the LLC for the construction of a regional medical complex, with the ultimate goal of achieving urban renewal in the area, is a "public contract" for purposes of R.C. 2921.42(A)(4). R.C. 2921.42(G)(1) and (2); Adv. Ops. No. 85-002 and 91-011 (the expenditure of public funds for urban renewal or revitalization purposes is within the definition of public contract). The finances and services provided by the city for the benefit of the LLC in the

development of the property fall within the definition of "anything of value" for purposes of R.C. 102.03(D) and (E). R.C. 102.03(G).

The Commission has explained that R.C. 2921.42(A)(4) prohibits a public official from serving as a member of a board of a for-profit corporation or a nonprofit organization if the public agency he serves has a public contract with the corporation or organization. Ohio Ethics Commission Advisory Opinions No. 88-004 (for-profit director) and 81-008 (nonprofit board member). As a member of the corporation or organization board, the public official would have a prohibited fiduciary interest in the contract between his public agency and the corporation or organization.

A public official is also prohibited from serving in another public position if he would have a fiduciary interest in a public contract between the two agencies he serves. Adv. Op. No. 2001-05. For example, a township employee is prohibited from simultaneously serving as a city council member if the township purchases safety services from the city, because he would have a prohibited fiduciary interest in the contract.

R.C. 102.03(D) prohibits a public official from using his position to secure anything of value for an organization with which he has a fiduciary connection. Adv. Op. No. 87-006. R.C. 102.03(E) prohibits a public official from soliciting anything of value for an organization with which he has a fiduciary connection. Adv. Op. No. 88-005.

As the administrative head of the city in your role as city manager, you would be involved in decision-making related to the urban renewal project as it affects the LLC, including matters related to the site agreement between the city and the LLC. You will sign the site agreement on behalf of the city. The project will result in a benefit for the city, but will also benefit the LLC.

Therefore, unless you can meet the requirements discussed below, R.C. 2921.42(A)(4) would prohibit you from serving as a board member, or officer, of the LLC because of the public contract between the city and the LLC. Further, unless you can meet the requirements discussed below, R.C. 102.03(D) would prohibit you from exercising your authority as city manager with respect to the project if you were a member of the LLC. You would be prohibited from making any decisions related to the project, and from discussing, recommending, or taking any action within the scope of your authority related to the project. R.C. 102.03(E) would prohibit you from soliciting any benefit for the LLC, including using your authority over other officials and employees of the city to direct decisions related to the project.

However, the Commission has explained that, in some situations, a public agency may create or be a participant in a private corporation in order to provide necessary services to the citizens of the community that it could not otherwise provide. In those cases, to facilitate the agency's public services goals, a public official or employee can serve with another organization in a position that would otherwise be considered a conflict of interest, and can fully participate in

both positions, if the public official serves in his "official capacity" as a representative of the public agency. Adv. Ops. No. 83-010 and 84-001.

Official Capacity

Whenever a public official serves on the board of directors of a nonprofit corporation in his official capacity, he continues to pursue the interests of his public entity and, therefore, "there would not be a dual interest in which private considerations would distract from his serving the public interest." Adv. Op. No. 84-001. There are four criteria that must be met in order for a public official to be deemed to serve with a nonprofit corporation in his official capacity:

1. The governmental entity creates or is a participant in the nonprofit corporation;
2. Any public official or employee connected with the jurisdiction may be designated to serve on the nonprofit corporation, but the appointing governing body must formally designate the office or position to represent the governmental entity;
3. The public official or employee must be formally instructed to represent the governmental entity and its interests; and
4. There must be no other conflict of interest on the part of the designated representative.

Adv. Ops. No. 84-001 and 96-005.

The Ohio Attorney General's Office has also recognized and agreed with the Commission's analysis of "official capacity." In Advisory Opinion No. 91-007, the Attorney General wrote:

The Ohio Ethics Commission has . . . found that, when these four criteria are satisfied, a particular public servant does not have a prohibited personal interest in a public contract. While opinions of the Attorney General have not formally adopted these same criteria, the result reached under these criteria is consistent with the analyses undertaken in various Attorney General opinions considering questions of ethics. *See, e.g.*, Op. No. 89-063; 1988 Op. Att'y Gen. No. 88-041. The Ohio Ethics Commission has, in essence, concluded that an individual does not have a prohibited personal interest in a contract by virtue of serving a nonprofit corporation when his service to the nonprofit corporation is performed in his **official capacity**, as a formal representative of a governmental entity - for then his interest in the nonprofit corporation is public and official, rather than private; he represents and serves the governmental entity and not his own interests. This conclusion is eminently reasonable and a valid statement of general ethical principles governing participation by public servants in the affairs of nonprofit corporations, and I embrace it wholeheartedly. (Emphasis in original.)

In prior opinions, the Commission has considered situations where a public official or employee is serving with a nonprofit organization as a representative of the public agency by which he is employed. In the situation you have described, you would be serving with a private LLC, rather than with a nonprofit entity. The LLC was created by the three nonprofit entities as part of a collaborative effort to assist the city in reaching its urban renewal objectives. While the operating agreement among the parties spells out the distribution of profits at the end of the agreement's term, and for disbursements during the term for the purpose of any tax liability, the purpose of the LLC appears to be to facilitate development rather than to be a profit-making venture for the three nonprofit members. Therefore, within the facts you have outlined, as long as all four elements establishing "official capacity" are present, you would not be prohibited from serving on the governing board of the LLC.²

Elements of "Official Capacity"

The first element is that the governmental entity creates or is a participant in the corporation. In this situation, while the city did not create the LLC, it has adopted Ordinance No. 06-207, amended in Ordinance No. 06-240, authorizing the city manager to enter into the site agreement with the LLC to develop the property. By enacting the ordinance and entering into the site agreement, the city has become a participant in the corporation and the first element is demonstrated.

The second element is that the public official or employee connected with the jurisdiction is formally designated by the governmental entity to represent it. In this case, the operating agreement for the LLC states that the city manager will be an *ex officio* member of the LLC, with 25% voting privileges on most matters. This action of the LLC, in its operating agreement, is not sufficient to meet the requirement of this element. When a public official is appointed to a private board by any mechanism other than an action of the public agency he serves, the official would not be considered to be acting in his "official capacity" as a member of the private board.

However, in Ordinance No. 06-207, the city commission empowered the city manager to act as an *ex officio* member of the LLC, in accordance with the operating agreement. Ordinance No. 06-240. Because of city commission's formal action in enacting the ordinance, the city has designated you to represent it as an *ex officio* member of the LLC and the second element is demonstrated.

The third element is that the public official is formally instructed to represent the governmental entity and its interests. In Ordinance No. 06-207, the city commission authorized the city manager to "do all things necessary" to carry out the authorized agreements and the city manager is further authorized "to vote on behalf of the City (i.e., the City Manager shall

² The Commission emphasizes that its conclusion in this opinion applies only to these unique facts. The law generally prohibits a public official from serving as a board member of a for-profit enterprise that is doing business with the public agency, and the official capacity exception would not apply unless there were exceptional facts such as those in this situation.

represent the City and its interests) as an *ex officio* member of" the LLC in accordance with the governing documents of the LLC. (Parenthetical in original.) Because of city commission's formal action in enacting the ordinance, the city has formally instructed you to vote on behalf of the city and represent its interests, and the third element is demonstrated.

The final element is that there must be no other conflict of interest on the part of the designated representative. This element is more difficult to assess from the information you have provided, and depends on the specific facts. A conflict of interest would be present if you, a family member, or a business associate would have a personal interest in the matters being considered by the LLC. For example, if one of your family members owns real property that would be purchased by the LLC in the area that is being redeveloped, you would have a conflict of interest. You would also have a conflict of interest if you were to personally benefit from the actions of the LLC in any way.

Assuming that you would not have a conflict of interest, and because the other three elements of "official capacity" have been demonstrated, R.C. 2921.42(A)(4) does not prohibit you from serving on the LLC board as an *ex officio* member representing the interests of the city. Further, R.C. 102.03(D) and (E) do not prohibit you from acting, within the scope of your service as city manager, on matters related to the redevelopment project, even though the LLC may receive a benefit as a result of your actions.

However, if the facts change such that any of these four elements can no longer be demonstrated, the Ethics Law would prohibit you from serving on the board and from acting as city manager on matters affecting the project and LLC. For example, if the city commission should determine that it does not want the city manager to represent it as a member of the LLC, and rescinds its ordinance designating you as its representative, you would no longer be able to serve on the LLC in your official capacity, even though the operating agreement of the LLC states that the city manager will be a member representing the city.

Serving as Secretary

You have also asked whether the law prohibits you from serving as secretary of the LLC. Paragraph 9.5 of the LLC's operating agreement provides:

The Members may elect such officers and the Members determine to be appropriate for the operation of the Company's business. All officers shall serve at the pleasure of the Members and may be removed at any time without cause. The officers, if any, shall have such duties and responsibilities as the Members shall determine. *The Company may pay officers reasonable compensation for their services and shall reimburse each of them for all reasonable expenses incurred in connection with the Company's business including expenses of attending Member meetings.* (Emphasis added.)

Because you are serving on the LLC board as a representative of the city, you are performing your public duties while serving. R.C. 2921.43(A) prohibits you from receiving any additional compensation, from any other party, for the performance of your public duties. The law does not prohibit you from serving on the LLC, but it does prohibit you from accepting anything of value from the LLC, including compensation or any payments or reimbursements for expenses to attend meetings. R.C. 102.03(D) and (E). If you were to receive anything of value from the LLC, you would have a prohibited personal interest in the city's contract with the LLC, and would have a conflict of interest that would negate your service in your official capacity.

Even if you were to waive any compensation or expenses payments from the LLC, your proposed service on the board is in an *ex officio* position, which means that you are serving because of an office you already hold. While the Ethics Law does not prohibit you from serving as an *ex officio* voting member of the LLC, in order to represent the city's interests, you cannot also serve as an officer of the LLC. You are appointed to the LLC by the city commission to represent the city's interest; officers are elected by the members to serve the interests of the LLC. If you were to be elected by the members to serve as an officer of the LLC, your allegiance would be divided between the LLC and the city.

The purpose of allowing a public official to serve on a private board in his official capacity is to allow the official to fully represent the interests of the public agency. Therefore, the Ethics Law prohibits you from serving as secretary, or in any other office, of the LLC.

Provisions Outside the Ethics Law and Other Matters

The Ethics Commission does not have the authority to consider or apply any provisions of other state or federal laws, or local ordinances or policies, to the facts you have presented. This opinion is limited to a review of the Ohio Ethics Law and related statutes, and does not make any determinations as to the legality or advisability of these agreements or other steps the city has taken to pursue its redevelopment goals.

Finally, the Commission noted that, because the city is a member of the LLC, there should be full disclosure to the city of all of the LLC's business dealings, particularly if any would result in conflicts of interest for the LLC's other members. Further, as the city's representative, you have a responsibility to be vigilant about any conflicts or other issues that arise in the operation of the LLC that could negatively affect the city or hinder the achievement of the city's objectives in the project.

Conclusion

As explained more fully above, under the specific facts that you have presented, the Ethics Law and related statutes do not prohibit you from serving as a member of the governing board of the LLC, as long as you serve in that position in your "official capacity." You can demonstrate that you serve on the LLC governing board in your official capacity if:

1. The city created or is a participant in the LLC;
2. You are formally designated by the city commission to serve on the governing board as the city's representative;
3. You are formally instructed by the city commission to act on behalf of the city and its interests; and
4. You have no other conflicts of interest related to your service on the governing board.

However, the Ethics Law prohibits you from serving as an officer of the LLC.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 29, 2006. The Commission commends you and the City for requesting guidance before taking any actions that could be prohibited by law.

The 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 feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney