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August 19, 2009

Informal Opinion 2009-INF-0819-2

John C. Chambers, Solicitor
Village of Yellow Springs

Dear Mr. Chambers:

On March 6, 2009, the Ohio Ethics Commission received your request for an advisory opinion on behalf of a member of the Village of Yellow Springs (village) Council. You asked if the Ethics Law and related statutes prohibit the village council member from serving on the board of an undesignated community improvement corporation (CIC).

A “designated” CIC is one that has been designated by a city or village as the agency representing it on industrial, commercial, distribution, and research development matters. R.C. 1724.10. An “undesignated” CIC is created by the same authority of Chapter 1724., but has not been designated as the development agency representing the municipal corporation. R.C. Section 1724.10 specifically provides that no member of the governing board of a designated CIC “shall be disqualified from holding any public office or employment, nor . . . forfeit any such office or employment, by reason of his membership on the governing board . . . notwithstanding any law to the contrary.” There is no similar exception for members of undesignated CICs.

In your letter, you explained that a village council member is currently an ex-officio, non-voting member of the Yellow Springs and Miami Township Community Improvement Corporation (Community Resources), an undesignated CIC supporting economic development in the Yellow Springs and Miami Township area. You have advised the council member that she may continue to serve as an ex-officio member of Community Resources but that there is a significant question regarding whether she may assume full board status. Both the Council and the Community Resources Board would like her to serve as a fully-fledged Board member.

Specifically, you have made the council member aware of Advisory Opinion No. 81-005, in which the Ethics Commission determined that R.C. 2912.42 prohibits a city official or employee from serving as a board member of an undesignated CIC established by the city. While the Commission noted in the opinion that the official served on the CIC in his official capacity, it did not examine any exceptions to the public contract law when it issued the opinion. As you have asked, the Commission will reconsider the issue addressed in Adv. Op. No. 81-005, applying the exceptions discussed in later opinions to the facts you have presented.

Brief Answer

As explained more fully below, the Commission concludes that R.C. 2921.42(A)(4) prohibits the village council member from serving as a board member of Community Resources, or any other undesignated CIC, unless the council member serves in her official capacity or demonstrates that she meets all the requirements of the exception in R.C. 2921.42(C).

If the council member serves on the board in her official capacity, she *would not* be prohibited from participating, as a village official, in any matters before village council affecting Community Resources. If the council member does not serve in an official capacity, but serves because she meets the exception in R.C. 2921.42(C), she *would* be prohibited from participating, as a village official, in any matters affecting Community Resources.

Having an Interest in a Public Contract—R.C. 2921.42(A)(4)

A village council member is a public official subject to the prohibitions in 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 the public official is connected.

R.C. 2921.01(A) and Adv. Op. No. 92-013. A “public contract” is the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of any public entity, including a contract for the design, construction, alteration, repair, or maintenance of public property. R.C. 2921.42(I)(1)(a) and (b). The Ethics Commission has held, and courts have agreed, that a political subdivision’s purchase or acquisition of community and economic development services, or urban revitalization services, through the use of loans, grants, land reutilization programs, or other similar programs or incentives, constitutes a “public contract” regardless of whether the loans or grants are funded through local or federal moneys. Adv. Ops. No. 83-005, 84-011, and 85-002. See State v. Lordi, 140 Ohio App.3d 561, 569 (2000), 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). Therefore, the village’s acquisition of economic development

services from a CIC, whether designated or undesignated, is a public contract.¹ Adv. Op. No. 81-005.

An interest prohibited under R.C. 2921.42 must be definite and direct and may be either financial or fiduciary in nature. Adv. Op. No. 81-003. An officer, chief administrative official, or member of a board of a private corporation has a fiduciary interest in the contracts of the private corporation even if she is not compensated for her service. Adv. Ops. No. 92-004 and 96-005.

Accordingly, in Advisory Opinion No. 81-005, and consistently in later opinions, the Commission has held that a public official or employee who serves on a board of a non-profit corporation has a definite and direct fiduciary interest in any contract between the corporation and the public agency.

Exceptions to R.C. 2921.42(A)(4)

As you noted, in Advisory Opinion No. 81-005, the Ethics Commission did not examine any exceptions to R.C. 2921.42(A)(4). In Advisory Opinion No. 81-008, the next formal opinion in which the Commission considered the issue of a public official serving on a private non-profit board, the Commission pointed out that the exception to R.C. 2921.42(A)(4), found in R.C. 2921.42(C), is applicable to transactions that involve a public agency's purchase of goods or services from a non-profit entity.

In Advisory Opinion No. 82-004, the Commission held that R.C. 2921.42(A)(4) does not prohibit a city official from serving on the board of a non-profit corporation that receives funds through the city under a state grant, if he serves in his official capacity as required under the terms of the grant. The Commission reasoned that, under the guidelines issued by the state agency awarding the grant, the board of the non-profit corporation must include a city official, likely to assure that the funds from the grant are used in the public interest and within the guidelines of the state agency. The Commission distinguished these circumstances from Advisory Opinion No. 81-008, because the public official was required to serve on the board in her official capacity as a representative of the city, the official would not have a prohibited "interest" in a public contract.

In the intervening years since Advisory Opinions No. 81-008 and 82-004 were issued, the Commission has consistently recognized that, in some cases, a public official can serve as a member of the board of a non-profit organization with which her public agency has a contract, if: (1) she is serving in her official capacity as a representative of her public agency; or (2) she meets all of the requirements of R.C. 2921.42(C). See, e.g., Adv. Ops. No. 85-009, 86-005, 87-003, 92-004, and 96-005.

¹ You did not state whether there are any current contracts between the village and Community Resources. However, the village and Community Resources have previously entered into development and funding agreements. See Village of Yellow Springs Resolution 2007-11.

Therefore, R.C. 2921.42(A)(4) would prohibit a village council member from serving on a CIC board that receives funding through or otherwise contracts with the village unless she serves in her official capacity or she can meet the exception in R.C. 2921.42(C). Adv. Op. No. 87-003.

Serving in Official Capacity for a Non-Profit Board

The Ethics Commission has held that whenever a public official also serves on the board of a non-profit organization in her official capacity, there is no dual interest in which considerations of the organization would distract from her serving the public interest. See Adv. Ops. No. 82-004, 94-001, 99-004, and 2001-05. By serving in her official capacity, the public official pursues the interests of the public entity while serving on the board.

The Commission considers a public official to be serving in her official capacity when the following four criteria are met:

- (1) The governmental entity must create or be a participant in the private or public board;
- (2) Any public official connected with the jurisdiction may be designated to serve on the private or public board, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent the governmental entity;
- (3) The public official 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. Op. No. 84-001. See also Adv. Ops. No. 82-004, 83-010, and 88-005.

In Advisory Opinion No. 88-005, the Commission applied the official capacity analysis and decided that two city officials had been chosen to serve on the board of trustees of the designated community improvement corporation as the city's representatives in their official capacity. As a result, R.C. 2921.42(A)(4) did not prohibit the officials from serving and fully participating in matters before the city affecting the CIC. In Advisory Opinion No. 88-005, the Commission specifically noted that its holding did not address the situation where a public official served as a trustee of an undesigned community improvement corporation. You indicated that Community Resources is an undesignated CIC.

One of the differences between a designated CIC and an undesignated CIC, for purposes of the official capacity exception, is the statutory requirement that at least two-fifths of the members of the governing board of a "designated" CIC are "mayors, members of municipal legislative authorities . . . members of boards of county commissioners, or any other appointed or

elected officers” of the political subdivisions represented by the board.² As noted above, R.C. 1724.10 also provides that members of the board of a designated CIC are not barred from holding public office. For these reasons, it is easier for a member of a designated CIC to meet the requirement of the official capacity exception.

Even where the CIC is undesignated, it may be possible for a village council member who wants to serve on the CIC to meet all four of the above requirements and show that her service would be in her official capacity. This is particularly true where, as in the situation you have described, the village council wants the official to serve on the CIC board as its representative. If the council member can show she is serving on the Community Resources board in her official capacity, she would not be prohibited from serving.

In order to show that she is serving in her official capacity, the council member would have to show:

- (1) The village is a participant in Community Resources. This could be established through a council resolution and agreement from the board of Community Resources, provided that the village’s service on the board is consistent with Community Resources’ bylaws and articles;
- (2) It must be clear that the village selects its own representative and that the council formally instructs the person to represent the village’s interests as a member of the Community Resources board. The village council can, but is not required to, select the village council member who currently serves on the board to represent its interests as a member of the Community Resources board. Again, this could be established through a council resolution;
- (3) The council must formally instruct the council member to represent the village and its interests on the Community Resources’ board; and
- (4) The council member must show that she has no personal conflicts of interest that would impair her ability to serve on the board. For example, the council member would have a conflict of interest prohibiting her service on the Community Resources Board if her spouse or other family member serves as the Executive Director of the Board. See Adv. Op. No. 80-001.

² Section 1724.10 also provides that membership on the board of a designated CIC “shall not constitute an interest, either direct or indirect, in a contract or expenditure of money by any municipal corporation ... or other political subdivision.” In Advisory Opinion No. 85-007, the Ethics Commission construed an analogous provision, R.C. 135.38, which provides that an officer, director, or employee of a public depository of public funds shall not be deemed to be interested, either directly or indirectly, in the deposit of such public moneys.

Exception to the Public Contract Law—R.C. 2921.42(C)

If the council member cannot show that she serves on the Community Resources board in her official capacity as a representative of the village, she may still be able to serve if she can meet the exception in R.C. 2921.42(C). (A public official serving in her official capacity would not have to show that she also meets the exception in R.C. 2921.42(C).)

R.C. 2921.42(C) provides that R.C. 2921.42(A)(4) (prohibiting a public official from having an interest in a public contract) does not apply to a public contract in which an official has an interest if the official can affirmatively demonstrate that she can meet all four requirements in the R.C. 2921.42(C) exception. The application of each of the four requirements depends on the facts and circumstances. Adv. Ops. No. 80-003 and 82-007. These criteria are strictly construed against the public official who must show compliance with them. Adv. Ops. No. 83-004 and 84-011. R.C. 2921.42(C) provides:

- (1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;
- (2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official's becoming associated with the political subdivision or governmental agency or instrumentality involved;
- (3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;
- (4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of the public official's family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

R.C. 2921.42(C)(1) requires that the services that Community Resources provides the village are necessary. The Ethics Commission has held that a political subdivision's purchase or acquisition of community and economic development services, or urban renewal or revitalization services, are necessary services for a political subdivision. Adv. Op. No. 2001-02.

R.C. 2921.42(C)(2) requires that the council member can show that the services Community Resources provides to the village are "unobtainable elsewhere for the same or lower

cost.”³ Adv. Op. No. 92-008. The council member must be able to objectively demonstrate that Community Resources offers its services to the village for the lowest price as determined by some fair and impartial process utilized by the village in which the village uses an objective selection process and provides adequate notice to other suppliers of the same development services. It must be clear that the council member is not involved, in any way, in identifying or contracting with providers, or using her relationship with other village officials or employees to secure information about other suppliers or to influence the selection or decision on the acquisition of the services in question. See also R.C. 2921.42(C)(4), 2921.42(A)(1), and 102.03(D) and (E) (discussed below).

The Commission has stated that the underlying principle of the requirement of Division (C)(2) is to permit a public official to have an interest in a public contract in limited situations where the contract is the “best or only alternative available” to the governmental entity. The Commission has stated that, in some rare instances, a public official or an organization in which she has an interest may be uniquely qualified to provide services to the official’s own public agency. See Adv. Op. No. 88-001. For example, if Community Resources is the only provider of economic development services available to the village, the council member may be able to meet this part of the requirement. However, if there are other suppliers of these services to the village, and all providers, including Community Resources, would receive the same amount of funding, the council member will be unable to meet the requirement.

The third requirement in R.C. 2921.42(C)(3) is that the treatment that Community Resources provides to the village is the same as, or better than, that it provides to others.

Finally, R.C. 2921.42(C)(4) requires that the entire transaction is conducted at arm’s length, that the village has full knowledge of the council member’s interest in the CIC’s contracts, and that the council member take no part in the decision of the village regarding the contracts.⁴

Participating in Matters Affecting the Board

The village council member can serve on the board of Community Resources or another undesignated CIC if she: (1) serves in her official capacity; or (2) can meet all the requirements of R.C. 2921.42(C). Whether she can participate, as a council member, in matters affecting Community Resources while she serves on the board depends on the basis for her service.

³ R.C. 2921.42(C)(2) can also be shown if the contract is a continuing course of dealing established before the official was connected with the public agency. If there was an existing contract between Community Resources and the village before the council member became a village official, she can meet this requirement provided that the contract has not been modified, extended, or otherwise changed since she became a council member.

⁴ In an arm’s length transaction: (1) both parties act voluntarily, without compulsion or duress; (2) the transaction occurs in an open market; and (3) both parties act in their own self-interest. *Walters v. Knox Cty. Bd. of Rev.* (1989), 47 Ohio St.3d 23, 25. An “open market” is one in which any buyer or seller can trade, with prices and availability determined by free competition. *Mildred Hine Trust v. Buster*, Franklin App. No. 07AP-277, 2007-Ohio-6999, ¶ 21.

If the council member is able to serve on the Community Resources board in her official capacity, the village council member *would not* be prohibited, by any provision in the Ethics Law or related statutes, from participating in matters before the village that affect Community Resources. Adv. Op. No. 96-005. In that situation, the village council member is representing the interests of the village through her service on the board. Any benefit that would accrue to Community Resources does not accrue personally to the council member or to an organization with which she has a personal relationship.

If the council member does not serve on the board of Community Resources or another undesignated CIC in her official capacity, but serves because she can meet all of the requirements of R.C. 2921.42(C), she *would be* prohibited from participating in matters before the village that affect Community Resources. The Commission has recognized that when one person serves as an official of a public agency and as a fiduciary of a non-profit organization that has a contract with the agency, the person has a dual interest that creates a situation "in which there is a risk that private considerations may detract from serving the public interest." Adv. Op. No. 81-008.

R.C. 2921.42(A)(1) prohibits a public official from authorizing or using the authority or influence of her public position to secure authorization of a public contract in which she has an interest. If the council member does not serve on the board of Community Resources in her official capacity, but serves because she can meet the requirements of R.C. 2921.42(C), R.C. 2921.42(A)(1) would prohibit the council member from participating, in any manner, formally or informally, in the consideration, recommendation, or authorization of the village's contracts with Community Resources.

Additionally, the conflict of interest laws (R.C. 102.03(D) and (E)) prohibit a public official or employee from accepting, soliciting, or using her position to secure anything of value for an organization with which she has a fiduciary connection. If the council member does not serve on the board of Community Resources in her official capacity, but serves because she can meet the requirements of R.C. 2921.42(C), R.C. 102.03(D) and (E) would prohibit the council member from participating in matters before the village in which Community Resources has an interest. The council member would be prohibited from using her influence, formally or informally, with other village officials or employees to secure a contract, funding, or any other benefit for Community Resources.

Conclusion

As explained more fully above, and consistent with Advisory Opinion No. 81-005, the Commission concludes that R.C. 2921.42(A)(4) prohibits the village council member from serving as a board member of Community Resources. However, the council member may be able to serve on the Community Resources board if she serves in her official capacity or all the requirements of the exception in R.C. 2921.42(C) can be met.

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If the council member can serve on the board because she is serving in her official capacity, she *would not* be prohibited from participating, as a village official, in any matters before village council affecting Community Resources. If the council member can serve on the board because she meets the exception in R.C. 2921.42(C), she *would* be prohibited from participating, as a village official, in any matters affecting Community Resources.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on August 19, 2009. 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,

A handwritten signature in cursive script that reads "Karen R. King". The signature is written in black ink and is positioned above the printed name.

Karen R. King
Advisory Staff Attorney