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February 4, 2010

Informal Opinion 2010-INF-0204

Jean Carter Ryan, Executive Director
Columbus-Franklin County Finance Authority



Dear Ms. Ryan:

On September 18, 2009, the Ohio Ethics Commission received your request for an advisory opinion. In your letter, you explained that the Chair of the Board of Directors of the Columbus-Franklin County Finance Authority (“finance authority”) is also a member of the Board of Directors of the Columbus Museum of Art (“museum”).

You explained that the finance authority is organized as a port authority under Ohio law and that the museum is a 501(c)(3) organization. You asked if the Ethics Law and related statutes prohibit the finance authority from providing bond financing to the museum if the board member fully recuses himself from matters regarding any transactions between the museum and the finance authority. You also asked, if a conflict exists, whether there is any way that the finance authority could financially support the museum short of the board member resigning from either or both positions.

The Commission considered a draft opinion answering your question at its meeting on December 2, 2009. At that meeting, the Commission requested additional information about the types of financing the finance authority could provide to the museum. On December 17, 2009, the Commission received your letter with the additional information requested. You explained that the finance authority could provide one of the following kinds of financing to the museum:

1. Conduit financing: With conduit financing, there is no credit risk to the finance authority as the issuer of the bonds. The involvement of the finance authority allows eligible projects to get access to the tax-exempt financing markets. The finance authority has no limit on the amount of bonds that can be issued in a conduit financing deal.

2. Central Ohio Bond Fund (COBF) Financing: The finance authority administers a bond fund program (COBF) where it has credit risk. The COBF allows small and medium-sized businesses to have access to the national capital markets. COBF can support projects from \$1.5 to \$6 million. If a project defaults on a COBF project, the bond holders may be paid from the finance authority's \$10 million reserve fund.

You have explained that it is probable that the finance authority will provide conduit financing to the museum because the COBF's limitations on project size would likely preclude its use. You have, nonetheless, asked the Commission to consider both possible financing types.

Brief Answer

As set forth more fully below, the Ethics Law and related statutes under the authority of the Ethics Commission do not prohibit the finance authority from providing either type of bond financing to the museum. However, if the museum were to receive any financial support from the finance authority, the board member would have an unlawful interest in the financing contract, unless he can show that he meets an exception in the law. If the finance authority were to provide conduit financing to the museum, the board member will likely be able to meet that exception. It may be more difficult for the board member to meet the statutory exception if the museum secures COBF financing.

If he cannot meet the exception, the board member must step down from either his position on the finance authority or the museum board before any authorization of the financing is made by the finance authority in order to avoid a violation of the law.

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

A member of a finance authority board is a public official subject to R.C. 2921.42(A)(4), which states 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); Ohio Ethics Commission Advisory Opinion No. 2001-02. A "public contract" is the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for a city. R.C. 2921.01(I)(1)(a). 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, tax exemptions, land reutilization programs, revenue bonds, or other similar programs or incentives, constitutes a "public contract" regardless of whether services are funded through local or federal money. Adv. Ops. No. 84-011, 85-002, and 89-008. See *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).

Bond financing involves the sale of bonds by a public agency to investors. The public agency must repay the amount borrowed, plus interest, to the investors. Bonds issued by the finance authority cover the construction costs to build and maintain civic projects, such as art and cultural centers. Revenue generated from the improvements repays the bond proceeds. Either COBF or conduit financing offered by the finance authority to the museum would be a public contract for purposes of R.C. 2921.42(A)(4).

A public official is prohibited from having an interest in a public contract entered into by or for the use of any political subdivision with which he is connected. See Adv. Ops. No. 89-004 and 89-012. A member of the finance authority is “connected” with the authority. The finance authority’s acquisition of community development services is a public contract entered into by the finance authority.

An “interest” that is prohibited under R.C. 2921.42 must be definite and direct in nature, but can be either financial or fiduciary. A member of the board of directors of a nonprofit entity has a definite and direct fiduciary interest in the contracts of that entity. Adv. Ops. No. 83-010 and 87-003. See *State v. Urbin* (2003), 100 Ohio St. 3d 1207, 1208, 2003 Ohio 5549 at ¶ 10 (appeal dismissed as improvidently allowed) (Chief Justice Moyer, writing separately, stated that “well-reasoned” opinions of the Ethics Commission “clearly contemplate that intangible benefits, and not just quantifiable financial benefits, are sufficient to demonstrate an improper interest” in a public contract “within the purview of the statute.”).

R.C. 2921.42(A)(4) prohibits the finance authority board member from having an interest in any contracts or grants awarded by the authority. If finance authority bond financing were to be awarded to the museum, the board member of both would have a prohibited interest in the financing unless he can meet an exception in R.C. 2921.42(C).¹

Exception—R.C. 2921.42(C)

In order to meet the exception in R.C. 2921.42(C), the board member must show that he can meet four requirements. The application of each of the four requirements depends on the facts and circumstances. Adv. Ops. No. 80-003 and 82-007. The burden is on the board member to demonstrate that he is in compliance with the exception. Adv. Op. No. 84-011. The Commission has explained that the application of the (C) exception must be consistent with the underlying principle in R.C. 2921.42: “[A] public official should not have an interest in a public contract with the governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity.” (Emphasis added.) *Id.*

R.C. 2921.42(C)(1) requires that the services that the official provides are necessary. The Commission has stated that community development services are “necessary services” for a public entity. See Adv. Op. No. 84-011. The finance authority member can meet this requirement.

¹ R.C. 2921.42(B) and (D) also provide exceptions to the prohibition of R.C. 2921.42(A)(4), but these exceptions are not applicable to the situation you have presented.

R.C. 2921.42(C)(2) requires that the services provided to the political subdivision with which the official is connected are “unobtainable elsewhere for the same or lower cost” by the political subdivision.² The Ethics Commission has determined that there are two methods by which a public official could demonstrate the “unobtainable elsewhere” requirement in a public financing context:

1. Division (C)(2) can be met where: (a) there are sufficient funds available; (b) all of the qualified projects in the served area, except the one with which the public official or employee is affiliated, have already received financing assistance; and (c) the funds will lapse if not used within a specified period of time; or
2. Division (C)(2) can be met where: (a) a public agency accepts applications for financing throughout the year on a first-come, first-served basis in a fair and open application process in which all interested and qualified projects have an equal opportunity to be considered; and (b) the public agency can show that sufficient funds have historically been able to meet demand and can reasonably project that sufficient funds are, and will be, available to fully serve all qualified projects, even if an official or employee of the agency is affiliated with a potential financing recipient.

Adv. Op. No. 2001-02. In the situation you have described, the board member can use the second method to show that he meets Division (C)(2) where the finance authority acts as a conduit for financing, without committing or incurring any credit risk for the finance authority’s own funds. In that situation, the finance authority must first show that it accepts applications on a first-come, first-served basis where all interested and qualified projects have an equal opportunity to be considered. However, because conduit financing is used, there would be no need for the agency to also show that sufficient funds have historically been available to meet demand for financing.

Therefore, if the museum were to receive conduit financing through the finance authority, the board member can meet the Division (C)(2) requirement. If the museum were to receive COBF financing, it may be difficult, depending on the scope and frequency of the finance authority’s financing activity, for the board member to show that he meets either of these requirements. If the finance authority and museum decide to utilize COBF financing, and there are additional facts suggesting that the board member can meet one of these methods, please contact the Commission if you or the board member would like confirmation that he meets this requirement in the exception.

In order to meet the third part of the exception, R.C. 2921.42(C)(3), the board member must show that the museum will provide the same or better services to the finance authority than it would for any other customer or client in similar transactions. The Commission has

² The board member cannot meet the alternate requirement in R.C. 2921.42(C)(2), which applies if the services are provided pursuant to a “continuing course of dealing” that began prior to the official taking public office.

determined that, because individuals or entities participating in public financing projects would have no "customers or clients in similar transactions," this part of the exception can be met in those projects. See Adv. Op. No. 84-011.

Finally, R.C. 2921.42(C)(4) requires that the transaction be conducted at arm's length, that the finance authority has full knowledge of board member's fiduciary interest as a member of the museum board, and that the board member takes no part in the deliberations and decisions of the finance authority board with respect to the financing agreement. See also R.C. 2921.42(A)(1) (discussed below). With respect to the criteria set forth in Division (C)(4), the Commission has concluded that, if the public agency's procedure for determining whether to provide financing for a particular project, notice to prospective funding recipients, and selection of qualified projects is fair and objective with no preference given to organizations connected with public officials or employees, it will significantly help a public official to demonstrate compliance. Adv. Op. No. 84-011.

If the museum project receives conduit financing through the finance authority, and the board member can show that he meets the other requirements described in this opinion, he will be able to meet the exception in R.C. 2921.42(C). If the museum project receives COBF financing, it will be more difficult for the board member to show that he meets the requirements of the exception. In either situation, if the board member is able to meet the exception, he would not have an unlawful interest in the finance authority's bond financing for the museum. However, he must also comply with R.C. 2921.42(A)(1) and R.C. 102.03(D), as discussed below.

Other Considerations

Your letter indicates that the board member will fully recuse himself from both sides of any and all discussions or activities regarding any transactions between the museum and the finance authority. R.C. 2921.42(A)(1) prohibits a public official from authorizing, or employing the authority or influence of his office to secure authorization of, any public contract in which he, a member of his family, or any of his business associates, has an interest. Because of his fiduciary interest in any museum contract as a member of the board of director, R.C. 2921.42(A)(1) would prohibit the board member from exercising the authority or influence of his public office to secure economic development assistance from the finance authority for the museum. He would be prohibited from voting, discussing, deliberating, recommending, or otherwise using his authority or influence, including his authority over other finance authority officials or employees, to affect the decision-making process regarding any financing assistance for the museum. See generally Adv. Op. No. 87-003.

The board member serves as Chair of the finance authority. R.C. 2921.42(A)(1) would prohibit him from acting as Chair in the finance authority's consideration of financing matters affecting the museum. He would be prohibited from making motions, calling the roll, and otherwise moving the matter forward as Chair.

Furthermore, the board member would be prohibited from participating, after the financing has been awarded to the museum, in any matter or decision that would affect the continuation, implementation, or terms and conditions of the funding. See Adv. Op. No. 87-003. These matters and decisions include, but are not limited to, the authorization or approval of payments of the funding, and the renewal, modification, termination, or renegotiation of the funding terms. Adv. Op. No. 92-012.

As a finance authority member, the board member should also note that R.C. 102.03(D) prohibits him from using his position to secure anything of value, including financing assistance, for the museum. Adv. Op. No. 91-011. For example, R.C. 102.03(D) would prohibit the board member from recommending or directing the actions of any finance authority official or employee regarding matters related to the museum, or using his position in any way, formally or informally, to secure any greater or different benefit than that available to other parties seeking or receiving funding.

R.C. 102.04(C) prohibits an appointed official from receiving compensation, other than from the agency with which he serves, for representing any person on any matter before the agency. Therefore, the board member would be prohibited from accepting compensation to represent the interests of the museum before the finance authority. See generally Adv. Op. No. 93-004. While there is an exception to this prohibition, set forth in R.C. 102.04(D), it would not apply if the board member were representing the museum before the agency he serves.

Finally, R.C. 102.03(B) prohibits the board member from disclosing or using, without appropriate authorization, any confidential information that he acquired in the course of his official duties as a member of the finance authority board. No time limitation exists for this prohibition. Adv. Op. No. 88-009. The board member would be prohibited from using any confidential information he acquired during his board service to assist the museum with its application for financial assistance.

Conclusion

As set forth more fully above, the Ethics Law and related statutes under the authority of the Ethics Commission do not prohibit the finance authority from providing either type of bond financing to the museum. However, if the museum were to receive any financial support from the finance authority, the board member would have an unlawful interest in the financing contract, unless he can show that he meets an exception in the law. If the finance authority were to provide conduit financing to the museum, the board member will likely be able to meet that exception. It may be more difficult for the board member to meet the statutory exception if the museum secures COBF financing.

If he cannot meet the exception, the board member must step down from either his position on the finance authority or the museum board before any authorization of the financing is made by the finance authority in order to avoid a violation of the law.

Jean Carter Ryan
February 4, 2010
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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on February 2, 2010. 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 black ink, reading "Jennifer A. Hardin". The signature is written in a cursive style with a large, looping initial "J".

Jennifer A. Hardin
Chief Advisory Attorney