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INFORMATION SHEET: ADVISORY OPINION NO. 2018-02
PUBLIC INFRASTRUCTURE IMPROVEMENTS AFFECTING A WARD

What is the question in the opinion?

When can a city council member elected by the residents to represent a ward participate in matters involving public infrastructure improvements that affect properties only in his or her ward, including property in which the council member has an interest?

What is the general rule?

If public infrastructure improvements affect only a ward in the city, a council member elected by the residents to represent that ward is prohibited from voting, deliberating, participating in discussions, or otherwise using his or her official authority or influence with regard to public infrastructure improvements which would provide a definite and particular financial benefit to his or her property interests.

What is the exception?

This prohibition does not apply to public infrastructure improvements which provide a general, uniform benefit to all or a large portion of the property in the ward and the benefit to the council member's property interests is not selective, differential, unique, or in disproportion to the benefit provided to other affected property in the ward.

When did the conclusions in this opinion become effective?

The opinion became effective upon acceptance by the Commission.

For More Information, Please Contact:

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ADVISORY OPINION NO. 2018-02 IS ATTACHED.**

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Advisory Opinion
Number 2018-02
October 31, 2018
**Participation in Public
Infrastructure
Improvements that Affect
Only a Ward**

Syllabus by the Commission:

If public infrastructure improvements affect properties only in a city ward, Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a council member elected to represent that ward from voting, deliberating, participating in discussions, or otherwise using his or her official authority or influence with regard to public infrastructure improvements which would provide a definite and particular financial benefit to his or her property interests, unless the improvements provide a general, uniform benefit to all or a large portion of the properties in the ward, and the benefit to the council member's property interests is not selective, differential, unique, or in disproportion to the benefit provided to other affected property in the ward.

* * *

The Ohio Ethics Commission has been asked to clarify when a city council member elected to represent a ward can participate in public infrastructure improvements that affect properties only in his or her ward, including property in which the council member has an interest.

Soliciting or Using Position to Secure a Thing of Value—R.C. 102.03(D) and (E)

The question before the Commission raises issues under R.C. 102.03(D) and (E), which provide:

- (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.

A city council member is a "public official or employee" subject to restrictions in R.C. 102.03(D) and (E).¹

The term "anything of value" is defined to include money and every other thing of value.² A definite benefit or detriment to a person's financial interests is considered to be a thing of value under R.C. 102.03(D), including a benefit to property in which the person has an interest.³

R.C. 102.03(D) prohibits a public official from using his or her authority or influence to secure anything of value where the thing of value could impair the official's objectivity and independence of judgment.⁴ This provision applies when a decision on a matter that is before the official would provide a definite and direct financial benefit or detriment to his or her private interests.⁵ In that situation, the thing of value is of such a character that it could bias his or her discretion and judgment if he or she were to participate in the matter.⁶ As a result, a public official is required to refrain from participating in discussions, deliberations, or otherwise using his or her official position, formally or informally, with regard to any matter before the official's public agency that will directly affect his or her private financial interests.⁷

R.C. 102.03(E) prohibits a public official from merely soliciting or accepting anything of value for him or herself, even if the official does not use the authority or influence of his or her public position to secure it, if the thing of value is of such a character as to have a substantial or improper influence on the official. Therefore, a public official may be prohibited from simply accepting or asking for a thing of value depending on the specific facts.

However, the Commission has explained that there are some circumstances where the benefit to a public official that results from an action of the agency he or she serves is not of "such a character as to manifest a substantial and improper influence" on the official with respect to his or her duties.⁸

For example, in Advisory Opinion No. 88-004, the Ethics Commission stated that R.C. 102.03(D) does not prohibit a public official from participating in matters from which the official receives a benefit *provided that* the matters result in a uniform benefit to the entire political subdivision or to a large portion of the political subdivision that the official serves.

In Advisory Opinion No. 93-016, the Commission concluded that R.C. 102.03(D) does not prohibit a member of a county board of health who is a private business owner from participating in the enactment of a rule that will definitely and directly affect the official's business, provided that the rule affects similar businesses in the same or similar manner.

Finally, in Advisory Opinion No. 92-013, the Ethics Commission stated that R.C. 102.03(D) does not prohibit a public official or employee from participating in matters involving public infrastructure improvements⁹ affecting all or a large portion of the political subdivision he or she serves, provided that the public official or employee does not receive any benefits from the

improvements that are selective, differential, unique, or disproportionate to the benefits received by other affected residents of the political subdivision.

The application of R.C. 102.03(D) and (E) is always dependent upon the facts and circumstances for each public official in each situation.¹⁰ When considering the facts and circumstances of each situation, where there is a benefit or detriment to property owned by public officials, a conflict of interest exists. The question becomes whether the benefit or detriment that results from a public agency's decisions on a matter that affects a public official's property interests is: (1) uniform to all or a large portion of the properties in the community, including property in which an individual official has an interest, in which case the conflict of interest will not impair the official's independence of judgment or unbiased discretion in the matter; or (2) uniform to a large portion of the properties in the community, but having a particular, definite, and direct impact on an individual official's property interests, in which case the conflict of interest could impair the official's independence of judgment or unbiased discretion in the matter.¹¹

Application to Public Infrastructure Improvements that Affect a Ward

Some cities have a ward plan of government or a hybrid of at-large representation and wards. Ward elections are a system in which a municipality is divided into relatively equal voting districts.¹² Residents can vote for city council candidates within their ward. If elected, a candidate represents and remains accountable to the electors within their home ward. Under R.C. 705.73, "Any member of the council, elected from wards, who, at the time of his election was a resident of the ward which he represents, shall forfeit his office if he removes from such ward."

If public infrastructure improvements affect only a ward in the city, a council member elected by the residents to represent that ward is prohibited from voting, deliberating, participating in discussions, or otherwise using his or her official authority or influence regarding the improvements which would provide a definite and particular financial benefit to his or her property interests. These restrictions apply to both residential and business properties.¹³

However, R.C. 102.03(D) and (E) do not prohibit a ward council member from participating in the city's consideration of a public infrastructure improvement that affects all or a large portion of the property in the ward, including property in which the council member has an interest, if the facts show that:

- The council member's property will be affected by the infrastructure improvement in the same manner as any other affected property in the ward;
- The decisions on the infrastructure improvement do not result in benefits for the council member's property that are selective, differential, unique, or disproportionate to the benefits received by other affected properties in the ward; and
- The council member does not solicit or accept any benefits for his or her property that are selective, differential, unique, or in disproportion to the benefits offered to any other affected property in the ward.

The presence of several of the following factors in a particular situation could help a council member demonstrate that the benefit he or she will receive as a result of an infrastructure improvement is not unique or of “such a character as to manifest a substantial and improper influence” on the official with respect to his or her duties:

- There is an objective showing that the council member’s property is within the public infrastructure improvement designated area;
- The properties in the ward that are affected by the infrastructure improvement are not predominantly properties owned by the council member, his or her family members, or business associates;
- The council member has no relationship (such as employment or a prohibited investment) with any vendors hired to perform the improvements;
- The public infrastructure improvement has a uniform impact on all affected properties in the ward because the circumstances are the same (such as a city-wide street maintenance program where all or a large portion of the city streets will be repaired in stages);
- The public infrastructure improvement is made in compliance with a court order or mandate from a state or federal regulatory agency;
- The council member’s property does not receive any specialized benefit not granted to every other similarly situated property; and
- Before any discussion, deliberation, or vote on the infrastructure improvement, the council member discloses all properties he or she has an interest in that will be affected by the improvement.

For example:

A city is making public infrastructure improvements in compliance with a court ordered consent decree. A ward council member has disclosed to council that she is one of many other ward residents that owns a house in the infrastructure improvement designated area. Neither she nor any of her family members or business associates owns any other property in the designated area.

Because the improvements are being made pursuant to a consent decree, the council member could show that her objectivity and independence of judgment in making the compulsory infrastructure improvement decisions would not be impaired by her private property interests. In that case, the council member would not be prohibited from participating in the infrastructure improvement decisions provided that she does not solicit or accept benefits that are not provided for in the consent decree or benefits that are not offered to other affected properties in the ward.

Conclusion

Therefore, it is the opinion of the Commission and the Commission advises that: If the public infrastructure improvements affect properties only in a city ward, Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a council member elected to represent that ward from voting, deliberating, participating in discussions, or otherwise using his or her official authority or influence with regard to public infrastructure improvements which would provide a definite and

particular financial benefit to his or her property interests, unless the improvements provide a general, uniform benefit to all or a large portion of the properties in the ward, and the benefit to the council member's property interests is not selective, differential, unique, or in disproportion to the benefit provided to other property in the ward.

Merom Brachman

Merom Brachman, Chairman
Ohio Ethics Commission

The Ohio Ethics Commission Advisory Opinions referenced in this opinion are available on the Commission's Web site: www.ethics.ohio.gov

¹ A "public official or employee" is "any person who is elected or appointed to an office or is an employee of any public agency." R.C. 102.01(B). A "public agency" is "the general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, or township, the five state retirement systems, or any other governmental entity." R.C. 102.01(C).

² R.C. 102.03(G); R.C. 1.03.

³ See Ohio Ethics Commission Advisory Opinions No. 80-007, 85-006, 88-004, 92-013, and 92-019.

⁴ Adv. Ops. No. 87-006, 89-006, and 90-013.

⁵ Adv. Op. No. 88-004.

⁶ *Id.*

⁷ *Id.* The official cannot make a decision that affects his or her own interests and cannot delegate his or her decision-making authority on the matter to a subordinate official or employee. Adv. Op. No. 2011-02.

⁸ Adv. Op. No. 85-006 (not all "conflicts of interest" are prohibited by R.C. 102.03(D) and (E), but only those in which a public official has a dual interest that would impair his or her independence of judgment in making decisions).

⁹ Infrastructure is the term for the basic physical systems of a municipality— transportation, communication, sewage, water and electric systems are all examples of infrastructure. See R.C. 5709.40 ("public infrastructure improvement" includes, but is not limited to, public roads and highways; water and sewer lines; the continued maintenance of those public roads and highways and water and sewer lines; environmental remediation; land acquisition, including acquisition in aid of industry, commerce, distribution, or research; demolition, including demolition on private property when determined to be necessary for economic development purposes; storm water and flood remediation projects, including such projects on private property when determined to be necessary for public health, safety, and welfare; the provision of gas, electric, and communications service facilities, including the provision of gas or electric service facilities owned by nongovernmental entities when such improvements are determined to be necessary for economic development purposes; and the enhancement of public waterways through improvements that allow for greater public access). See also R.C. 122.19(E), R.C. 122.23(H), and R.C. 122.951. These systems tend to be vital to a political subdivision's economic development and prosperity. R.C. 5709.40.

¹⁰ See Adv. Op. No. 87-008.

¹¹ Adv. Op. No. 92-013. See also Adv. Op. No. 76-005 (the Commission has explained that it is unnecessary that the thing of value actually has a substantial and improper influence on the official provided that it is of such a character that it could have such influences).

¹² R.C. 705.73.

¹³ See, for example, Adv. Ops. No. 92-013 and 92-016.