



OHIO ETHICS COMMISSION

THE ATLAS BUILDING 1200
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Advisory Opinion Number 88-005
May 12, 1988

Syllabus by the Commission:

(1) Division (D) of Section 102.03 of the Revised Code does not prohibit a member of a city planning commission from participating in discussions or the decision to rezone property owned by a designated community improvement corporation of which he is a trustee, where he has been properly designated by the city to serve as trustee in his capacity as a city official;

(2) Division (D) of Section 102.03 of the Revised Code prohibits a member of a city planning commission from discussing, voting, or otherwise using his official authority or influence, to secure the disapproval of a zoning change for property, where he is interested in purchasing such property, and the planning commission's failure to approve the zoning change will provide the member the opportunity to purchase the property;

(3) Division (D) of Section 102.03 of the Revised Code prohibits a member of a city planning commission from discussing, voting, or otherwise participating in the decision to rezone property owned by a community improvement corporation, where his immediate supervisor in his private employment is the president of the community improvement corporation;

(4) Division (D) of Section 102.03 of the Revised Code does not prohibit a member of a city planning commission from participating in discussions or the decision to rezone property owned by a community improvement corporation, where his daughter's supervisor is the president of the community improvement corporation.

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You have asked whether the Ohio Ethics Law and related statutes prohibit various members of the city planning commission from voting or otherwise participating on the proposed rezoning of a piece of property owned by a community improvement corporation.

By way of history, you state that the city zoning ordinances require that any change in the zoning of a piece of property requires the approval of the city planning commission. The community improvement corporation currently has a request to rezone a piece of property it owns pending before the planning commission, which is composed, by ordinance, of the city commission president, the city manager, and three citizens. The community improvement corporation has approved the purchase of the property by a group of investors; however, the sale is contingent upon the planning commission's approval of the zoning change to conform the

permissible use of the property to the investors' intended purposes. The community improvement corporation is in favor of the zoning change.

The president of the city commission, the city's governing body, and the city manager, the city's administrative head, are required by ordinance to serve as members of the city planning commission. These persons also serve, by virtue of their positions as city officials, as members of the board of trustees of the community improvement corporation. The city manager is also on the executive committee of the community improvement corporation, which is responsible for managing the business affairs of the corporation between meetings of the trustees. You wish to know whether the city commission president and city manager may participate as members of the planning commission in the decision to rezone the property of the community improvement corporation in light of the fact that they also serve on the board of the corporation.

Division (D) of Section 102.03 of the Revised Code reads as follows:

(D) No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his 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 or is an employee of a city. See R.C. 102.01(B) and (C). Therefore, a city commission member, a city manager, and a member of a city planning commission are subject to the prohibitions of R.C. 102.03.

Division (D) of Section 102.03 has been consistently interpreted as prohibiting a public official or employee from participating in any matter that would provide a definite and particular pecuniary benefit or detriment to property in which he has an interest. See, e.g., Ohio Ethics Commission Advisory Opinions No. 85-006 and 88-004. More specifically, the Commission has held that a city official may not discuss or vote to approve a zoning change or variance affecting property in which he has an interest. See Advisory Opinions No. 79-003 and 79-008. Recently, the Commission further concluded in Advisory Opinion No. 88-004 that R.C. 102.03(D) generally prohibits a city council member from participating in any matter that would provide a definite and particular pecuniary benefit or detriment to property in which a business associate has an interest.

Under the reasoning of these opinions, a city official would, as a general matter, be prohibited from participating in any matter that would directly affect the interests of a corporation of which he is a trustee. However, in this instance, the two city officials serve as trustees of the community improvement corporation by virtue of their official positions. The community improvement corporation in question has been designated by the county and the city as the development agency of both political subdivisions, as provided in R.C. 1724.10. Section 1724.10 requires that at least two-fifths of the governing board of a "designated" community improvement corporation be composed of "mayors, members of municipal legislative authorities . . . members of boards of county commissioners, or any other appointed or elected officers of such political subdivisions . . ." Accordingly, the corporation's code of regulations provides that

the board of trustees shall include a representative from the city commission and that four members shall be appointed or elected officials of the county or city. Therefore, the individuals who serve as the city commission president and the city manager have been chosen to serve on the board of trustees of the designated community improvement corporation as the city's representatives. It should be noted that this opinion does not address the situation where a planning commission member serves as a trustee of an undesigned community improvement corporation. See, e.g., Advisory Opinion No. 81-005.

Section 1724.10 provides that no member of the governing board of a designated community improvement corporation "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." Therefore, the board members of the community improvement corporation would not be prohibited from also serving on the city planning commission even though the planning commission is required to consider matters involving property owned by the corporation. Section 1724.10 also provides that membership on the board of a community improvement corporation "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. The Commission held that this provision exempts a county officer from the prohibition of R.C. 2921.42(A)(4), which prohibits a public official from having an interest in a public contract entered into by his political subdivision, but does not provide an exemption from Chapter 102. of the Revised Code, specifically R.C. 102.03(D). The opinion concluded that while a county official is not prohibited by R.C. 2921.42 from serving on the board of directors of a bank that is a depository of public funds, he is prohibited by R.C. 102.03(D) from participating in a decision or authorizing a transaction involving the bank. Similarly, in this situation, R.C. 1724.10 would exempt a city official from the prohibition of R.C. 2921.42, to the extent that he would be permitted to serve on the board of a designated improvement corporation which had entered into a public contract with the city. However, R.C. 1724.10 does not exempt a city official from R.C. Chapter 102., so that the city officials are still subject to the prohibitions of R.C. 102.03(D).

As discussed above, however, the city officials do serve on the board of the community improvement corporation in their official capacities as representatives of the city's interests. In Advisory Opinion No. 83-010, the Ethics Commission considered the issue whether Division (A)(4) of Section 2921.42 of the Revised Code, which, as noted above, prohibits a public official from having an interest in a public contract entered into by his own political subdivision, would prohibit a city council member from serving on the board of a community development corporation that sells goods or services to the city, if the council member serves on the board in his official capacity. The Commission stated that the official designation by the city requiring the council member to serve on the board of the development corporation in his official capacity was "sufficient to demonstrate that the public official does not have a prohibited personal interest in the public contact," and concluded that R.C. 2921.42(A)(4) would not prohibit the council member from serving on the board of a corporation that contracts with the city, "provided that the council member serves on the board in his official capacity as directed by council." Similarly,

the Commission held in Advisory Opinion No. 84-001 that R.C. 2921.42(A)(4) would not prohibit a city officer or employee from serving in his official capacity on the board of a nonprofit corporation which provided contract paramedic services to the city since he was "designated by the municipal government to represent its interests on the board," and, thus, "there would not be a dual interest in which private considerations would detract from his serving the public interest." See also Advisory Opinion No. 82-004. The Commission went on to set forth those criteria which must be met before a public official may be deemed to serve in his official capacity with an organization such that he would not have a prohibited personal interest in a public contract between the public agency and private organization. Those criteria are as follows:

- (1) [T]he governmental entity must create or be a participant in the nonprofit corporation;
- (2) any public official or employee connected with the jurisdiction, including a council member, may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointed 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.

As discussed above, R.C. 102.03(D) would, generally, prohibit a city official from discussing or participating in any matter that would benefit a corporation of which he is a trustee, since the benefit would be of such a character as to manifest a substantial and improper influence upon him with respect to his duties. In this instance, however, the city officials are serving on the board of the community improvement corporation in their official capacity, and are representing the interests of the city on the board. Therefore, any benefit accruing to the corporation from the city, such as the rezoning of the corporation's property, would not be of such a character as to manifest a substantial and improper influence upon the city officials with respect to their duties, since they serve on the board of the corporation as part of their official duties. The rezoning of the corporation's property would not accrue to the city officials' personal benefit or to the benefit of any party with which the city officials are connected in their personal capacities. Rather, the benefit would accrue to an agency which the city officials have been charged to serve as part of their official responsibilities. Therefore, the benefit accruing to the corporation as a result of the rezoning would not be of such a character as to manifest a substantial and improper influence upon the officials with respect to their duties. R.C. 102.03(D) would not prohibit the city commission and city manager from participating as members of the city planning commission in the decision to rezone the community improvement corporation's property. This conclusion is based on the assumption that the city has properly designated the officials to serve in their official capacities on the board of the corporation, and the Commission hereby adopts the criteria set forth in Advisory Opinion No. 84-001 as those requirements which must be met before a public official may be considered to serve on the board of a private agency in his official capacity, such that R.C. 102.03(D) would not prohibit him from participating in matters that would benefit such agency.

It should be noted that R.C. 1724.10 and the code of regulations of the community improvement corporation do not specifically require that the city commission president and city manager serve on the board of the community improvement corporation. The broader interests of

the community may best be served if those city officials who are selected to serve on the community improvement corporation do not include those officials who are required by law to be members of the city planning commission or who otherwise have decision-making responsibilities with regard to the interests of the corporation. Further, the city may determine that the city manager should discontinue from serving on the executive committee of the community improvement corporation, which has charge of the routine management of the business affairs of the corporation, in order to best fulfill his responsibilities as a member of the planning commission.

You have also asked about another member of the planning commission. As discussed above, the sale of the community improvement corporation's property to the group of investors is dependent upon the planning commission's approval to rezone the property for a use that is consistent with the investors' plans. You state that a member of the planning commission and his father bid on the property, but lost to the successful bidder for whom the zoning change is requested. The planning commission member and his father are contesting the sale of the property to the successful bidder on the basis they made a first and better offer for the property. You wish to know whether the member's position as a rejected bidder and potential purchaser would preclude him from participating in the planning commission's consideration and decision to rezone the property.

The Ethics Commission has consistently held that a public official is prohibited by R.C. 102.03(D) from participating in a decision upon which a benefit to his private interests is dependent or contingent. For example, Advisory Opinion No. 76-005 concluded that R.C. 102.03(D) prohibited a city council member from voting in favor of the city's acquisition of a parcel of property where he knew the seller of the property intended to invest a portion of the purchase price in the council member's business. Advisory Opinion No. 79-003 concluded that a member of a township zoning commission was prohibited from voting to approve a zoning variance for property where the sale of such property was dependent on the variance, and he stood to earn a commission on the sale of the property. In Advisory Opinion No. 79-008, the Commission concluded that a city council member was prohibited by R.C. 102.03(D) from voting on a zoning change affecting real property owned by his wife where the change would enable his wife to sell the property at a substantial profit. See also Advisory Opinion No. 86-002.

Under the facts you have presented, the proposed sale of the improvement corporation's property will fail if the planning commission disapproves the zoning change. If the proposed sale fails, the planning commission member and his father, who wish to purchase the property, will have an opportunity to do so. The acquisition of the property is of such a character as to manifest a substantial and improper influence upon the planning commission member. See R.C. 1.03 and 102.01(G) (including money and any interest in realty within the definition of "anything of value!" for purposes of R.C. 102.03). Therefore, the member of the planning commission is prohibited from discussing, voting, or otherwise using his official authority or influence to secure the disapproval of the zoning change for the property owned by the community improvement corporation.

Your last questions involve a member of the planning commission who is an employee of a bank where his immediate supervisor, the executive vice-president of the bank, is the president

of the community improvement corporation, and the fifth member of the planning commission whose daughter works at the same bank, where the individual who serves as the president of the improvement corporation is her supervisor, but not her immediate supervisor.

In Advisory Opinion No. 80-003, the Commission held that a public official or employee is prohibited from using his official position to secure a contract or payments thereunder for purchases by his public agency from his private employer. In Advisory Opinion No. 88-004, the Commission recently held that a city official is prohibited by R.C. 102.03(D) from using his official authority or influence with regard to any matter that would affect property in which a business associate has an interest, unless the official's independence of judgment could not be impaired by his business associate's interests. The private employer of a public official or employee may be considered to be his business associate. Cf. Advisory Opinions No. 78-006 and 80-001 (concluding that a public official's employer is his business associate for purposes of R.C. 2921.42(A)(1), which prohibits a public official from authorizing, or using his authority or influence to secure authorization of a public contract in which any of his business associates has an interest).

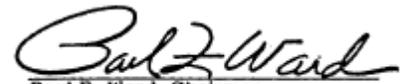
In the first instance, it is the immediate supervisor of a planning commission member who has an interest in the property to be voted upon by the planning commission. The closeness of the working relationship between the two individuals, coupled with the fact that the individual who serves as the president of the community improvement corporation stands in a position of authority over the planning commission member indicates that the commission member's independence of judgment with regard to voting upon the zoning change could be impaired. Therefore, the member of the planning commission is prohibited from discussing or voting upon the zoning change.

In the final instance, the planning commission member's daughter works for the bank where the individual who serves as the president of the community improvement corporation is employed as the executive vice-president. The relationship between the planning commission member and the president of the community improvement corporation is so remote that the president's interest in the zoning change would not be of such a character as to manifest a substantial and improper influence upon the planning commission member. Therefore, the planning commission member is not prohibited from participating in the discussion or vote to rezone the property.

This advisory opinion is based on the facts presented and 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.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (D) of Section 102.03 of the Revised Code does not prohibit a member of a city planning commission from participating in discussions or the decision to rezone property owned by a designated community improvement corporation of which he is a trustee, where he has been properly designated by the city to serve as trustee in his capacity as a city official; (2) Division (D) of Section 102.03 of the Revised Code prohibits a member of a city planning commission from discussing, voting, or otherwise using his official authority or influence, to secure the

disapproval of a zoning change for property, where he is interested in purchasing such property, and the planning commission's failure to approve the zoning change will provide the member the opportunity to purchase the property; (3) Division (D) of Section 102.03 of the Revised Code prohibits a member of a city planning commission from discussing, voting, or otherwise participating in the decision to rezone property owned by a community improvement corporation, where his immediate supervisor in his private employment is the president of the community improvement corporation; and (4) Division (D) of Section 102.03 of the Revised Code does not prohibit a member of a city planning commission from participating in discussions or the decision to rezone property owned by a community improvement corporation, where his daughter's supervisor is the president of the community improvement corporation.


Paul F. Ward, Chairman
Ohio Ethics Commission