



## OHIO ETHICS COMMISSION

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Advisory Opinion Number 96-002

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### Syllabus by the Commission:

(1) A Historic and Architectural Preservation Commission of a city, which exercises the sovereign power of the city through discretionary decision-making authority to decide the alteration or repair of property owned by citizens of the city, does not function exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes and is a "public agency" as that term is defined in Division (B) of Section 102.01 of the Revised Code. Accordingly, members of the Commission are subject to the provisions of the Ohio Ethics Law found in Chapter 102. of the Revised Code, and related statutes, that impose restrictions upon them as "public officials and employees" that protect the public against conflicts of interest;

(2) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of a Historic and Architectural Preservation Commission from receiving compensation for rendering a service on a matter that is not pending before the Commission for a client who is interested in matters before, or regulated by, the Commission, unless the member is able to withdraw from all matters pending before the Commission that would affect his client;

(3) Division (C) of Section 102.04 of the Revised Code prohibits a member of a Historic and Architectural Preservation Commission from receiving compensation, directly or indirectly, for personally rendering any service on behalf of a client on any matter pending before the Historic and Architectural Preservation Commission;

(4) Division (C) of Section 102.04 of the Revised Code prohibits a member of a Historic and Architectural Preservation Commission from preparing plans for a private client and submitting the plans to another agency of the same city, unless the member files the required statements describing the services that he would provide on behalf of a client and states that he will disqualify himself for two years from any participation as a board member in any matter involving any public official or employee of the city agency before which the matter is

pending, as required pursuant to the exception contained in Division (D) of Section 102.04 of the Revised Code;

(5) Division (C) of Section 102.04 of the Revised Code does not prohibit a member of a Historic and Architectural Preservation Commission from performing ministerial functions, that include but are not limited to the filing of applications for permits and licenses, on behalf of a private client before his own commission and other agencies of the same city.

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You state that the City of Oxford (City) has created a Historic and Architectural Review Commission (Commission). You ask whether Commission members are subject to the Ohio Ethics Laws and related statutes. Specifically, you ask how the restrictions imposed by R.C. 102.03 and R.C. 102.04 will affect a Commission member who is an architect in private practice.

As explained below, a Commission member is subject to Chapter 102. of the Revised Code, known as the Ohio Ethics Law, because the Commission wields sovereign power through the exercise of discretionary decision-making authority that affects the value of property owned by persons interested in matters before, or regulated by, the Commission. A Commission member is prohibited from receiving compensation for rendering services on behalf of a client on any matter pending before the Commission, unless the service that he would perform for the client is a "ministerial function." A Commission member is prohibited from rendering services on behalf of a client on any matter pending before a City agency other than the Commission, unless he meets the disclosure and disqualification requirement of R.C. 102.04 (D). A Commission member who is an architect in private practice who desires to perform services for a client in a matter that is not pending before the Commission must be able to withdraw from all matters pending before the Commission that would affect his client. A Commission member is also subject to the public contract provisions of Section 2921.42 and supplemental compensation provisions of 2921.43 of the Ethics-related statutes of the Revised Code.

### **The Historic and Architectural Review Commission**

Under the facts presented, the City created the Commission through legislative action. Codified Ordinances of Oxford §1201.03. The Commission is comprised of seven members who are appointed by a majority of City Council. *Id.* All Commission members are required to be City residents, and at least four members are required to own real property in the City. *Id.* The Commission members are required to have an interest and proficiency in historic and architectural preservation. *Id.* Commission

members are not compensated for their services. Id. Codified Ordinances of Oxford §1201.03 reads in part:

One [Commission] member shall be a member of the Oxford Planning Commission. Four of the remaining six members shall be chosen from the following: 1) A registered architect; 2) A real estate broker licensed in the State of Ohio; 3) A person whose education and experience qualifies in building construction; 4) A member of a group fostering or promoting interest in Oxford history; 5) An attorney; 6) A commercial or industrial real property owner; and 7) An owner-occupant of a single-family home.

The Commission is instrumental in determining sites and areas within the city that are worthy of historic preservation. Codified Ordinances of Oxford §1201.05. The Commission recommends these sites and areas to city council for designation as historic sites or districts. Id. Once city council has approved the Commission's recommendation and designated a site or area as a historic site or district, then an owner of affected property may neither alter nor repair his property unless the Commission has reviewed the plans for the proposed alteration or repair and issued a Certificate of Appropriateness. Id. The Commission has the sole authority to issue a Certificate of Appropriateness. Id. A property owner must have a Certificate of Appropriateness from the Commission before he can acquire a building permit from the City's Building Administrator and make the proposed alteration or repair. Id. As explained below, these city ordinances authorize the Commission to exercise discretionary decision-making authority with regard to matters that affect the property of persons who are interested in matters before, or regulated by the Commission.

### **Individuals Subject to the Provisions of the Ethics Law**

The Ethics Commission is empowered to administer, interpret, and help enforce Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, which are known as the Ohio Ethics Law and related statutes. See R.C. 102.02, 102.06, and 102.08. The Ethics Commission has advised that the Ohio Ethics Law and related statutes are general laws which, as part of the criminal code, establish a uniform standard of conduct for all persons who serve as public officials and employees on the state and local levels. Advisory Ops. No. 83-004 and 89-014; State v. Nipps, 66 Oh. App. 2d 17 (Franklin County 1979). Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code include definitions that determine whether an individual is subject to the prohibitions imposed by the Ethics Law and related statutes. See R.C. 102.01 (B) and (C), and 2921.01 (A) and (B), described below. Because these statutory definitions differ, some individuals performing a public role may not be subject to all of the prohibitions imposed by Chapter 102. and Sections

2921.42, 2921.421, and 2921.43 of the Revised Code. See Advisory Ops. No. 74-004, 77-005, and 93-013.

Some of the statutes found in Chapter 102. apply to "public officials and employees." See R.C. 102.03 (A) thru (J). Another statute found in Chapter 102., R.C. 102.04 (C), imposes a prohibition upon persons who are appointed to an office of, or employed by, a municipal corporation. R.C. 2921.42 imposes prohibitions upon "public officials." The term "public official" includes an elected or appointed officer, employee, or agent of the state or any political subdivision. R.C. 2921.43 imposes prohibitions upon "public servants." The term "public servant" includes a person who is a "public official" for purposes of R.C. 2921.42, as well as others "performing ad hoc a governmental mission."

The first issue to be addressed is whether a member of the Commission falls within the statutory definition of "public official or employee" as defined in R.C. 102.01 (B).

### **Definition of Public Agency**

R.C. 102.01 (B) defines the term "public official or employee" for purposes of Chapter 102. as "any person who is elected or appointed to an office or is an employee of any public agency." (Emphasis added.) R.C. 102.01 (C) defines the term "public agency" as:

[T]he general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a court, city, village, township, and the five state retirement systems, or any other governmental entity. "Public agency" does not include a department, division, institution, board, commission, authority, or other governmental entity that functions exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes; does not expend more than ten thousand dollars per calendar year, excluding salaries and wages of employees; and whose members are uncompensated. (Emphasis added.)

The second sentence of R.C. 102.01 (C) is an exception to the definition of the term "public agency." Accordingly, a governmental entity falls within the exception provided by R.C. 102.01 (C), and therefore is not a "public agency" for purposes of Chapter 102., when all three criteria of R.C. 102.01 (C) are met. The governmental entity must: (1) function exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes; (2) not expend more than ten thousand dollars per calendar year, excluding salaries and wages of employees; and, (3) not compensate its members. The facts and circumstances of each individual situation will determine

whether a governmental entity meets all three criteria and falls within the exclusion provided by R.C. 102.01 (C). Your question presents the opportunity to generally analyze the application of these statutes to the Commission as a city entity similar to public bodies created by other cities.

The issue becomes whether the Commission meets the exclusion set forth in R.C. 102.01 (C) to the term "public agency." As stated above, Commission members are not compensated for their services. Thus, one of the three criteria of the exclusion provided by R.C. 102.01 (C) has been met. To determine whether the exclusion provided by R.C. 102.01 (C) applies, the Commission's duties must be examined to determine whether it functions exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes, or whether in contrast, the city council has delegated to the Commission the ability to exercise sovereign power through the exercise of discretionary decision-making authority over the alteration or repair of property owned by citizens of the city.

The phrase "functions exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes" must be broken into its component parts. The meaning of the words "function" and "exclusively," which are not statutorily defined for purposes of Chapter 102., must be specifically examined. The Ethics Commission, in interpreting statutes containing words that are not statutorily defined, has consistently followed the rule of statutory construction that words used in a statute must be construed according to rules of grammar and common usage. R.C. 1.42; Advisory Ops. No. 75-004, 87-002, and 89-001.

The word "function" is defined in Webster's New World Dictionary, Second College Edition, William Collins + World Publishing Company, Inc. (1976) at 565, as: "To act in a required or expected manner, do its work." The word "exclusive" is defined in Webster's New World Dictionary at 489, as: "[E]xcluding or tending to exclude all others; shutting out of other considerations, happenings, existences, etc.... excluding all but what is specified . . . ."

In Advisory Opinion No. 75-014, the Ethics Commission explained:

The general rule of construction is that an exception in a statute is an affirmation of the application of its provisions to all cases not excepted, and excludes all other exceptions. (Emphasis in original.)

By applying this rule of construction to the exception to the definition of "public agency" contained in R.C. 102.01 (C), if a governmental entity is empowered with the sovereign power of the city to exercise discretionary decision-making authority in matters that extend beyond cultural, educational, historical, humanitarian,

advisory, or research purposes, then the entity does not "function exclusively" for any one or more of these specified six purposes. If the governmental entity does not "function exclusively" for any one or more of these specified six purposes, then the exemption provided by R.C. 102.01 (C) cannot be met and the governmental entity will be deemed to be a "public agency" as defined in R.C. 102.01 (C). Finally, the governmental entity is a "public agency," then its members are subject to the statutes in Chapter 102. that impose restrictions upon individuals who fall within the definition of "public officials and employees" to protect the public against conflicts of interest. As analyzed in the discussion below, city council has delegated to the Commission the ability to exercise discretionary decision-making authority that affects property owned by parties under its jurisdiction, and thus the Commission is a "public agency" as defined in R.C. 102.01 (C).

### **The Commission as a Public Agency**

The Commission in your question does function for cultural and historical purposes. However, §1201.04 (B) of the Codified Ordinances of the City of Oxford also grants the Commission "sole power to issue a Certificate of Appropriateness" to a property owner who desires to alter or repair his property (emphasis added). Unless the Commission issues a Certificate of Appropriateness, the Building Administrator may not issue a building permit to the property owner to make proposed alterations or repairs. §1201.04 (F) Codified Ordinances of the City of Oxford. Because city ordinance empowers the Commission with discretionary, decision-making authority as the sole voice in determining whether a property owner may make proposed alterations and repairs, the Commission does not function "exclusively" for cultural, educational, historical, humanitarian, advisory, or research purposes.

Because the Commission does not meet the second of the three criteria contained in the exception provided by Section 102.01 (C), it is unnecessary to address the third criteria. Since the Commission cannot meet the exemption, the Commission is a "public agency" for purposes of Chapter 102. of the Revised Code, and a Commission member falls within the definition of a "public official and employee" for purposes of the statutes in Chapter 102. that apply to public officials and employees.

The Ethics Commission has consistently held that whenever it interprets a statute, it must, in the same manner as a court, give effect to the intent of the legislature in enacting the statute. Advisory Op. No. 89-001. The Ethics Commission has also followed the standard that when a statute is designed to provide a remedy for a particular problem or mischief, the statutory language must be given a construction to advance the remedy and correct the problem. Advisory Op. No. 94-003. R.C. 1.49; The Iroquois Co. v. Meyer, 80 Ohio St. 676 (1909). A determination that the

Commission is a "public agency" places the members of the Commission under restrictions imposed by the Ethics Law that have been designed to protect the public interest. The public interest is protected by holding that the narrow exception to the term "public agency," provided by R.C. 102.01(C), is not available to members of a Commission that exercises the discretionary decision-making authority of a city that affects property owned by the citizens of that city.

Accordingly, Commission members are subject to the provisions of the Ohio Ethics Law and related statutes that apply to "public officials and employees." One of these statutes is R.C. 102.03. The Ethics Commission has determined that the general conflict of interest restrictions of R.C. 102.03 (D) and (E) impose limitations upon public officials and employees who engage in private outside business. In response to your questions, and as explained below, the prohibitions imposed by R.C. 102.03 (D) and (E) will affect the Commission member who is an architect in private practice and represents clients before agencies of the city other than the Commission.

### **R.C. 102.03 (D) and (E)**

R.C. 102.03 (D) and (E) read 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.

(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 him with respect to his duties.

R.C. 1.03 defines the term "anything of value" for purposes of R.C. 102.03 to include money and every other thing of value. R.C. 102.01(G). A definite pecuniary benefit to a person or his business is considered to be a thing of value under R.C. 102.03 (D) and (E). Advisory Ops. No. 79-008, 85-006, and 86-007. A client's payment to a Commission member who is an architect in private practice for rendering architectural services falls under the definition of "anything of value."

### **Prohibition Imposed by R.C. 102.03 (E)**

Division (E) of Section 102.03 of the Revised Code was enacted as part of Am. Sub. H.B. 300, 116th Gen. A. (1986) (eff. September 17, 1986) to supplement the prohibition imposed by R.C. 102.03 (D). Prior to the enactment of Am. H.B. 300, Division (D) of Section 102.03 prohibited a public official or employee from using the

authority or influence of his office or employment to secure a thing of value for himself that would not ordinarily accrue to him in the performance of his duties if the thing of value was of such character as to manifest a substantial and improper influence upon him with respect to his duties. In its application of Division (D), before the enactment Division (E), the Ethics Commission held that a public official or employee was prohibited from using the authority or influence of his public position to solicit or receive consulting fees from a party that is interested in matters before, regulated by, or doing or seeking to do business with his public agency. See Advisory Ops. No. 79-002, 79-006, and 86-008. See also Advisory Op. No. 88-004 (due to the broadening of the prohibition imposed by R.C. 102.03 (D) by Am. Sub. H.B. 300, a public official or employee may not secure anything of value for himself, or for another person or entity if his relationship with that person or entity could impair his objectivity and independence of judgment as a public official or employee.)

R.C. 102.03 (E) does not require that the public official or employee use the authority or influence of his office or employment to secure an improper thing of value, rather it prohibits a public official or employee from merely soliciting or accepting an improper thing of value. See Advisory Op. No. 90-004. The Ethics Commission has held that the controlling factor, for purposes of determining whether a party is an improper source for purposes of R.C. 102.03 (E), is whether the relationship between the public official or employee and the source of the thing of value is such that the public official's or employee's objectivity and independence of judgment could be impaired with regard to his official decisions and responsibilities regarding the party. See Advisory Ops. No. 87-008, 89-006, and 90-004. Therefore, the Ethics Commission has held that R.C. 102.03 (E) prohibits a public official or employee from soliciting or accepting anything of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with his own public agency. Advisory Ops. No. 87-006, 87-009, and 89-006.

The application of R.C. 102.03 (D) and (E) are dependent upon the facts and circumstances of each individual situation. See Advisory Ops. No. 90-004 and 91-002. The Ethics Commission has held that, in certain situations, a public official or employee may withdraw from consideration of matters that would pose a conflict of interest. Advisory Ops. No. 89-006, 89-010, and 90-009. A public official's or employee's withdrawal from consideration of issues concerning parties who are interested in matters before his public agency may be accomplished only when such a withdrawal: (1) does not interfere with the official's or employee's performance of his assigned duties; and (2) is approved by the appropriate officials at his employing agency. Advisory Ops. No. 89-006, 89-010, and 90-002. See also Advisory Op. No. 90-010.

Therefore, in the instant situation, a Commission member who is an architect in private practice who desires to perform services for a client must be able to withdraw from all matters pending before the Commission that would directly affect his client's interests even if the matter pending before the Commission is unrelated to the services that he would perform for the client.

For example, if a person owned two parcels of property within the city and one parcel was subjected to review of the Commission because of its location within an historic district, then that person would be deemed to be regulated by, or interested in matters before, the Commission. A Commission member who is an architect in private practice may not receive compensation for performing architectural services for the person on the property that is not located in the historic district unless he withdraws from all matters pending before the Commission that will directly affect the property owner. It must also be noted that if the work that the Commission member would perform for the client involves personally rendering architectural services on behalf of the client before another instrumentality of the City, other than the Commission, then prior to rendering the services on behalf of his client he must file a 102.04 (D) Statement as is described later in this opinion.

### **Prohibition Imposed by R.C. 102.03 (D)**

Division (D) of Section 102.03 of the Revised Code, as highlighted briefly above, prohibits a public official or employee from using the authority or influence of his position to secure anything of value for himself, family members, business associates, or others where there is a conflict of interest. See Advisory Ops. No. 87-006, 87-009, and 89-006. Division (D), unlike Division (E), requires that some action or inaction by a public official or employee result in the securing of the thing of value.

Generally, the Ethics Commission has held that the fees that a public official or employee secures from engaging in private outside employment or business activity, may be of such a character as to manifest a substantial and improper influence upon him with respect to his duties. The Ethics Commission has held that this occurs whenever the fees result from the direct use of official authority or when receipt of the fees could impair the performance and independence of the public official on behalf of the public interest, to the benefit of his own personal interests. Accordingly, the Ethics Commission has identified restrictions that R.C. 102.03 (D) imposes upon a public official or employee who engages in a private outside business.

Specifically, in conducting any private business activity, a Commission member is prohibited from: (1) using his official position, or his authority or influence with other Commission members, to secure any benefit or favorable decisions for his private practice or clients; (2) recommending to property owners who have matters

pending before the Commission that his private practice be patronized; (3) using City time, facilities, or resources to operate his private practice; (4) using his Commission title or position in advertising, marketing, or operating his private practice; (5) receiving outside compensation for services or projects that he has recommended in his official capacity; or (6) refraining from performing his official duties, or otherwise performing his official duties, in order to secure patronage for his practice. Advisory Ops. No. 84-012, 85-014, and 92-006. In addition to those described previously, R.C. 102.03 (D) and (E) impose prohibitions upon a public official or employee who engages in private outside employment from receiving compensation for performing private services for parties that are interested in matters before, regulated by, or doing or seeking to do business with his public agency.

### **R.C. 102.04 (C)**

Some of the statutes found in Chapter 102. of the Revised Code apply to individuals who fall within the statutory definition of "public official or employee." However R.C. 102.04 (C) imposes a prohibition upon a person who is appointed to an office of a municipal corporation. R.C. 102.04 (C) provides in pertinent part:

Except as provided in division (D) of this section, no person who is elected or appointed to an office of or employed by a . . . municipal corporation, . . . shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the entity of which he is an officer or employee. (Emphasis added.)

The Ethics Commission, in Advisory Opinion No. 77-003, recognized that R.C. 102.04 (C) does not use the term "public official or employee" and applies a prohibition upon a person who is appointed to an office of a municipal corporation. In Advisory Opinion No. 77-003, the Ethics Commission states:

Am. H.B. 1040 of the 111th General Assembly amended the definition of "public official or employee" in Section 102.01 (B) of the Revised Code . . . but retained [in R.C. 102.04] the distinction between a person "elected or appointed to an office," and a person who is "an employee of any public agency."  
(Emphasis in original.)

The Ethics Commission, in Advisory Opinion No. 74-007, reviewed existing case law and recognized factors that established a test to determine whether one is "appointed to an office." These are, whether the person: (1) is appointed; (2) has a

title; (3) exercises a function of government concerning the public; and (4) is not subject to a contract of employment. The Ethics Commission modified this test in Advisory Opinion No. 75-004 when it determined that whether the person exercises the "sovereign power" of government, as explained in case law, is an additional and essential criterion for determining whether one is "appointed to an office."

The Commission explained "sovereign power" in Advisory Opinion No. 75-004:

The concept of sovereign power originates with the idea that the office is created by public authority, be it executive order, the Constitution or some statute. Furthermore, it has been held that "if a man is placed in a position which is continuous and permanent and has certain powers which, under the law, only he can exercise; then he has sovereign power delegated to him." Shaw v. Jones, 40 O.N.P. 372 (1897).

In Advisory Opinion No. 77-004, the Commission held that a part-time village engineer who exercises sovereign power is a "public official." The Ethics Commission held:

Sovereign power includes the exercise of a duty entrusted to one by virtue of statute or some other public authority, a duty that is not merely clerical, but that involves discretionary, decision-making qualities.

The Commission quoted from the Ohio Supreme Court case of State ex rel. Landis v. Butler, 95 Ohio St. 157 (1917), in Advisory Opinion No. 85-005, as follows:

If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with the independent power in the disposition of public property or with the power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.

The Commission emphasized that no one of the indicia controls, and combinations of factors will determine whether a person is deemed to hold an office. Advisory Op. No. 75-004.

As an example of the application of these factors, the Ethics Commission determined, in Advisory Opinion No. 85-005, that the Technical Advisory Committee to the Coal Development Office of the Department of Development does not exercise

sovereign power since its statutorily authorized function is exclusively to provide non-binding advice on research and development projects to the Coal Development Office, and not to exercise final, discretionary decision-making authority. Accordingly, the Ethics Commission held that members of the Technical Advisory Committee are neither "officers" nor "appointed to an office" of the state and are not subject to the prohibitions of Chapter 102. or Section 2921.42 of the Revised Code. Advisory Op. No. 85-005.

In the instant situation, as explained above, the Commission's duty to issue a Certificate of Appropriateness extends beyond the mere rendering of non-binding advice and involves discretionary, decision-making qualities. It is further apparent that City Council has established the Commission as an official agency of the City through which individuals involved in certain matters are required to act. Thus, the Commission exercises "sovereign power." Also, the Commission members: (1) are appointed; (2) have a title; (3) exercise a function of government concerning the public; and (4) are not subject to a contract of employment. Accordingly, a member of the Commission is "a person who is . . . appointed to an office of . . . a municipal corporation" and is subject to the prohibition imposed by R.C. 102.04 (C).

#### **Prohibition Imposed by R.C. 102.04 (C)**

R.C. 102.04 (C) prohibits a person who is appointed to an office of a municipal corporation from receiving compensation, directly or indirectly, from a private client for services rendered by him personally on any case, proceeding, application, or other matter before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the municipality with which he serves. See Advisory Op. No. 92-020 (the use of the word "agency" in R.C. 102.04 (C) denotes a legislative intent that the word "agency" means something different than the political subdivision as a whole). See also Advisory Ops. No. 79-007, 83-001, and 89-016.

Therefore, R.C. 102.04 (C) prohibits a Commission member who is engaged in a profession where he would represent clients, such as an architect in private practice, from submitting documents, or plans, that he has personally prepared for a client to any instrumentality of the City, even if the Commission is not required to act on the matter.

#### **Exception Provided by R.C. 102.04 (D)**

Division (D) of Section 102.04 of the Revised Code provides an exception to the prohibition of R.C. 102.04 (C) for public employees and persons who are appointed to a non-elective office. R.C. 102.04 (D) and (E) reads:

(D) A public official who is appointed to a nonelective office or a public employee shall be exempted from division (A), (B), or (C) of this section if both of the following apply:

(1) The agency to which the official or employee wants to sell the goods or services or before which the matter that involves the rendering of his services is pending, is an agency other than the one with which he serves;

(2) Prior to rendering the personal services or selling or agreeing to sell the goods or services, he files a statement with the appropriate ethics commission, with the public agency with which he serves, and with the public agency before which the matter is pending or that is purchasing or has agreed to purchase goods and services.

The required statement shall contain the official's or employee's name and home address, the name and mailing address of the public agencies with which he serves and before which the matter is pending or that is purchasing or has agreed to purchase goods or services, and a brief description of the pending matter and of the personal services to be rendered or a brief description of the goods or services to be purchased. The statement shall also contain the public official's or employee's declaration that he disqualifies himself for a period of two years from any participation as such public official or employee in any matter involving any public official or employee of the agency before which the present matter is pending or to which goods or services are to be sold. The two-year period shall run from the date of the most recently filed statement regarding the agency before which the matter was pending or to which the goods or services were to be sold. No person shall be required to file statements under this division with the same public agency regarding a particular matter more than once in a calendar year.

(E) No public official or employee who files a statement or is required to file a statement under division (D) of this section shall knowingly fail to disqualify himself from any participation as a public official or employee of the agency before which a matter for which he rendered personal services was pending or of a public agency that purchased or agreed to purchase goods or services.

In the instant situation, because a Commission member is appointed to a non-elective office, a Commission member is capable of meeting the exception to the prohibition of R.C. 102.04 (C) provided by R.C. 102.04 (D), only if the instrumentality of the City before which he will be representing a client is a City agency other than his own. See generally Advisory Op. No. 89-010 (describing the ability of a state employee to meet the exception provided by Division (D) to the

prohibition of R.C. 102.04 (B)). Therefore, the Commission member may avail himself of the exception provided by R.C. 102.04 (D) and may receive compensation from a client for personally rendering architectural services on behalf of the client before an instrumentality of the City, other than the Commission, if, prior to rendering the services on behalf of his client, he files a 102.04 (D) Statement with: (1) the Ohio Ethics Commission; (2) the public agency with which he serves, in this case the Commission; and, (3) the instrumentality of the City before which the matter is pending. The 102.04 (D) Statement must describe the personal services that he will render on behalf of the client, and state that he will disqualify himself for a period of two years from participation in any matter involving any public official of employee of that particular City agency. Advisory Ops. No. 89-006 and 89-010.

It must be stressed that R.C. 102.04 (D) does not provide an exception to the prohibition against a Commission member who is an architect in private practice from receiving compensation, directly or indirectly, for personally rendering services on behalf of a client on matters pending before the Commission, unless, as explained below, the activity that the Commission member would perform in his private capacity for a client is a "ministerial function" as described below. See generally Advisory Ops. No. 78-002 and 93-004.

### **Ministerial Function Exception Provided by R.C. 102.04 (F)**

R.C. 102.04 (F) also provides an exception to the prohibition of R.C. 102.04 (C). R.C. 102.04 (F) reads:

This section shall not be construed to prohibit the performance of ministerial functions including, but not limited to, the filing, or amendment of tax returns, application for permits and licenses, incorporation papers, and other documents.

The Ethics Commission, in Advisory Op. No. 75-017, applied the definition of the term "ministerial function," found in Trauger v. Nash, 66 Ohio St. 612 (1902), and held that for purposes of R.C. 102.04 "ministerial functions" are:

[F]unctions which are performed in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of personal judgment upon the propriety of the act being done.

The "ministerial function" exception of R.C. 102.04 (F) is an exception to the prohibition imposed by R.C. 102.04 (C) and refers to the activity performed by a person, who holds a public office or employment, in his private capacity with regard to the matter for which he is receiving compensation from a private client. Advisory

Ops. No. 75-006 and 83-001. The "ministerial function" exception does not refer to the matter described in R.C. 102.04 (D) and (E), which is pending before the public officer's or employee's own agency and from which he must abstain. Id.

Therefore, if the services which a Commission member would render before the Commission as an architect in private practice on behalf of a private client consist of filing applications for permits or licenses or other acts which may be properly described as "ministerial functions," then a Commission member may meet the exception to the prohibition of R.C. 102.03 (C) provided by R.C. 102.04 (F). Advisory Op. No. 84-004. In an instance where the exception provided by R.C. 102.04 (F) does not apply, R.C. 102.04 (C) will prohibit a Commission member from receiving compensation for rendering services on behalf of a client by preparing and submitting plans as a private architect to the Commission. In addition, if an action on behalf of a client before the Commission requires the Commission member to exercise his personal judgment, then the action would not be a "ministerial function." The member would then be prohibited from receiving compensation for rendering services on behalf of a client by preparing and submitting plans, as a private architect, to the Commission.

### **Other Prohibitions**

As explained above, the Ethics Commission has jurisdiction over R.C. 2921.42, 2921.421, and R.C. 2921.43. Generally, R.C. 2921.42 imposes restrictions upon "public officials" in matters pertaining to public contracts, and R.C. 2921.43 imposes restrictions upon "public servants" receiving unauthorized compensation. The terms "public official" and "public servant" are defined by statute. Members of the Commission would be subject to R.C. 2921.42 and 2921.43. Your question does not raise any issues that would arise under R.C. 2921.42 and R.C. 2921.43 and, therefore, these statutes need not be addressed. However, if a Commission member desires to sell supplies or services to the City, prior Advisory Opinions of the Ethics Commission may apply, or you could contact this Office for further advice.

### **Conclusion**

The Ethics Commission understands that volunteer commissions are created to provide expert advice and assistance for advancement of the overall public interest. The members of these commissions are appointed due to their professional expertise and often are uncompensated for their public effort. It is also understandable that such knowledgeable individuals will have outside private business interests. As described above, the applicable provisions of the Ohio Ethics Law and related statutes will restrict the private business activities of volunteer commission members, not excepted by law. However, all individuals who serve on public commissions that exercise the

sovereign power of the city through discretionary decision-making authority that affects the value of property owned by citizens of the city must accept necessary restrictions to avoid any possible conflict of their personal financial interests with their public responsibilities and duties. See Advisory Ops. No. 89-010, 90-009, and 90-012. If a city, however, wishes to receive the input of these individuals without subjecting them to the restrictions on their outside business interests, the city is free to narrow the purpose of their function to those listed by the exemption of R.C. 102.01, which include purely advisory duties.

This advisory opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, 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) A Historic and Architectural Preservation Commission of a city, which exercises the sovereign power of the city through discretionary decision-making authority to decide the alteration or repair of property owned by citizens of the city, does not function exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes and is a "public agency" as that term is defined in Division (B) of Section 102.01 of the Revised Code. Accordingly, members of the Commission are subject to provisions of the Ohio Ethics Law found in Chapter 102. of the Revised Code, and related statutes, that impose restrictions upon "public officials and employees" that protect the public against conflicts of interest; (2) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of a Historic and Architectural Preservation Commission from receiving compensation for rendering a service on a matter that is not pending before the Commission for a client who is interested in matters before, or regulated by, the Commission, unless the member is able to withdraw from all matters pending before the Commission that would affect his client; (3) Division (C) of Section 102.04 of the Revised Code prohibits a member of a Historic and Architectural Preservation Commission from receiving compensation, directly or indirectly, for personally rendering any service on behalf of a client on any matter pending before the Historic and Architectural Preservation Commission; (4) Division (C) of Section 102.04 of the Revised Code prohibits a member of a Historic and Architectural Preservation Commission from preparing plans for a private client and submitting the plans to another agency of the same city, unless the member files the required statements describing the services that he would provide on behalf of a client and states that he will disqualify himself for two years from any participation as a board member in any matter involving any public official or employee of the city agency before which the matter is pending, as required pursuant to the exception contained in Division (D) of Section of Section 102.04 of the Revised Code; and (5) Division (C) of Section 102.04 of the Revised Code does not prohibit a member of a Historic and Architectural Preservation Commission from performing ministerial

functions, that include but are not limited to, the filing of applications for permits and licenses, on behalf of a private client before his own commission and other agencies of the same city.

  
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Jack Paul DeSario, Chair  
Ohio Ethics Commission