



OHIO ETHICS COMMISSION

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Advisory Opinion Number 97-002

December 4, 1997

Syllabus by the Commission:

(1) In order to determine whether Division (D) of Section 102.03 of the Revised Code prohibits a city council member from acting on a land use matter that involves the financial interests of his landlord, all of the facts and circumstances in the situation must be examined;

(2) Division (D) of Section 102.03 of the Revised Code prohibits a city council member from participating in land use matters that involve the financial interests of the landlord leasing space to the official or his business, unless: (a) the property that is being leased is not the subject of the land use matter; (b) the rent, terms, or duration of the lease are not changed in consideration for, or recognition of, the actions of the council member; (c) no disputes exist between the council member and the landlord regarding the lease or the leased property; and (d) the rent and other terms and duration of the lease between the council member and his landlord are fixed by contract.

You have asked whether the Ohio Ethics Law and related statutes prohibit a city council member, who also serves as the city council's representative on the city planning commission, from participating in a land use decision involving property that is owned by the landlord of a business owned by the council member.

Generally, you question whether the council member may participate in matters that involve the business interests of his landlord. Specifically, you question whether the official may participate in matters pertaining to a pending application for a conditional use permit. The property that is the subject of the permit application is owned by two individuals who also hold the company that serves as the landlord of the property that houses the private business of the council member.

As explained below, the Ethics Law prohibits a city council member from participating in land use matters that involve the financial interests of his landlord, unless the council member can objectively demonstrate that: (a) the property that is being leased is not the subject of the land use matter; (b) the rent, terms, or duration of the lease are not changed in consideration for, or recognition of, the actions of the council member; (c) no disputes exist between the council member and his landlord regarding the lease; and (d) the rent, and other terms and duration of the lease, are fixed by contract. Under the specific facts that you have described, such an objective demonstration may be made.

Facts

You state that a member of City Council is a one-third owner of an Insurance Agency ("Insurance Agency"). The Insurance Agency is a tenant in a building that is owned by a development company. The Insurance Agency's lease is with a real estate firm ("Real Estate Company") which manages the building on behalf of the development company. The Insurance Agency and the Real Estate Company entered into this lease on or about December 5, 1996, and the lease's term does not expire until January 31, 2000. Both the Real Estate Company and the development company are owned in part (eighty percent and fifty percent, respectively) by two brothers.

In June of 1997, an organization asked the City Council for a conditional use permit (to build an assisted living facility) for a property on which that organization has an option to purchase. This option is dependent upon the grant of the conditional use permit. The property is owned by a development company (different from the one above) which is fully owned by the same two brothers who own the Real Estate Company that is the landlord for the City Council member's Insurance Agency.

R.C. 102.03(D) - Securing Improper Things of Value

Division (D) of Section 102.03 of the Revised Code provides:

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.

A member of a city council is a public official for purposes of R.C. 102.03(D). Ohio Ethics Commission Advisory Opinions No. 88-004, 89-008, and 90-004.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 102.03(G). A definite and direct pecuniary benefit is considered to be a thing of value under R.C. 102.03(D). Adv. Ops. No. 86-007, 88-004, and 89-005.

Specifically, the Commission has held that an increase or decrease in the value of property, or other benefit to property, that results from a change in zoning or other land-use regulation, is a thing of value for purposes of R.C. 102.03(D). Adv. Ops. No. 79-008, 80-007, and 88-004. See also Adv. Op. No. 85-006. In the situation that you have set forth, City Council's grant of the conditional use permit will enable the sale of the property, and is a thing of value for purposes of R.C. 102.03(D).

Relationships Between Public Officials and Landlords

R.C. 102.03(D) prohibits a public official from using the authority or influence of his office to secure anything of value for himself, and also for another person, business, or entity if

the relationship between the official and that person, business, or entity is such that the official's objectivity or independence of judgment could be impaired with regard to matters that affect the interests of that party. Adv. Ops. No. 88-004, 89-015, and 90-007. (Prior to 1986, R.C. 102.03(D) provided that a public official was prohibited from using his official position to secure anything of value for himself that would not ordinarily accrue to him in the performance of his official duties, if the thing is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. R.C. 102.03(D) was amended, effective September 17, 1986, to delete the requirement that the thing of value be secured by the public official for himself, thereby broadening the scope of the prohibition.) Whenever such a relationship exists, the Commission has concluded that the thing of value that is secured for the other person, business, or entity will manifest a substantial and improper influence upon the official with respect to his duties. Adv. Op. No. 89-016, and 90-004.

In Advisory Opinion No. 93-003, the Commission identified some of the relationships that may manifest a substantial and improper influence upon the official:

R.C. 102.03 (D) prohibits a public official or employee from using his authority or influence to secure anything of value, not only for himself, but for members of his family (see Advisory Opinion No. 92-012), for his business associates, (see Advisory Opinions No. 88-004 and 88-005), for a professional organization on which the public official or employee serves as a board member (see Advisory Opinion No. 90-012), [and] for his private outside employer (see Advisory Opinion No. 91-004).

The cited opinions all discuss situations where a thing of value accrues, as a definite and direct result of the public official's or employee's action, to a party that has a close family, economic, or fiduciary relationship with the public servant.

The Ethics Commission has held that the facts and circumstances of each relationship must be examined to determine whether the prohibition imposed by R.C. 102.03(D) applies. Adv. Op. No. 91-004. The Commission has held that some relationships between public officials and other persons, businesses, or entities are not so close that the thing of value that is secured for the other person, business, or entity would manifest a substantial and improper influence upon the official with respect to his duties. For example, the Commission has held that R.C. 102.03 (D) does not generally prohibit a city council member from participating in a matter pending before city council in which a client of the council member's employing firm has an interest, unless the firm itself is representing a client before council on the matter, has provided any services on the matter, or will benefit from the matter, or the council member himself represents the client. Adv. Op. No. 90-008.

The Ethics Commission has also concluded that R.C. 102.03(D) generally does not prohibit a public official from participating in a matter that affects a former client or a customer of his private employer, holding:

In most instances, the relationship between the official and a customer [of the official's employer] would be so remote that the customer's interests would not be of such character as to manifest a substantial and improper influence upon the [official].

Adv. Op. No. 91-004. See also Adv. Op. No. 86-002 (a city council member, who is an officer and shareholder of an insurance agency, is not prohibited from participating in city council's approval of a contract between the city and a client of the insurance agency so long as the agency is not providing insurance services that are specifically connected with the contract and the agency would provide the client with insurance products unrelated to the contract or transaction with the city regardless of whether it receives the city contract).

The issue, then, is whether the tenant and landlord relationship between the member of City Council, through the Insurance Agency, and the brothers, through the property management division of the Real Estate Company, is of such a character as to impair the council member's objectivity and independence of judgment with regard to matters that affect the brothers' business interests.

In order to determine whether a landlord-tenant relationship may be of such a character that a public official is prohibited from participating in matters pending before him that affect the financial interests of his landlord, pursuant to R.C. 102.03(D), it is necessary to examine the facts and circumstances surrounding landlord-tenant relationships.

In general, whenever property is leased, the owner of the property, or lessor, retains the legal title to the property and the property returns to him upon expiration of the lease. Ohio Att'y Gen. Op. No. 71-020. The tenant, or lessee, provides consideration for the exclusive possession and use of the property, without the right of ownership, for the term of the lease. Id. Every lease contract for realty has an implied "covenant of quiet enjoyment," which means that the tenant has a right to the peaceful and undisturbed use of the leased property. Dworkin v. Paley, 93 Ohio App. 3d 383, 386 (Cuyahoga County March 21, 1994). Also, some of the obligations of both lessor and lessee are established by statute. See R.C. 5321.04 and 5321.05.

The Ethics Commission has concluded that a public official is prohibited, by R.C. 102.03(D), from participating in matters that will benefit parties with whom he has a close family, economic, or business relationship because the relationships may impair the public official's objectivity and independence of judgment. A public official who is a tenant has such a relationship with his landlord, because the interests of his landlord may affect the tenant's own financial interests. For example, where a tenant's rent or other lease terms are not fixed, or are being negotiated, actions by the tenant as a public official involving his landlord may influence the rent or terms of the public official's lease. In addition, if the property that is the subject of the lease is also the subject of the matter before council, the council member may be improperly influenced by his desire to preserve his current access to or use of the property. The Commission concludes that the relationship between a lessor and lessee is similar to the other relationships described above, and could be of such a character as to manifest a substantial and improper influence upon a public official. Therefore, R.C. 102.03(D) generally prohibits a public official from participating in matters pending before his public body that affect the financial interests of his landlord.

However, in some situations, a landlord-tenant relationship may not be of such a character as to manifest a substantial and improper influence upon a public official with respect to his duties. Where there is an objective showing that four factors are present, in a particular

landlord-tenant relationship and matter, R.C. 102.03(D) does not prohibit the public official from participating in the matter even though the interests of his landlord will be affected by the decision. The public official must examine the particular relationship to determine whether these factors are present.

The first factor is: The property that is the subject of the official matter pending before the public body the official serves is not the property leased by the official. If the action affects the value of, or encumbers, the property leased by the official, such as additional assessments or the need to conform to more stringent building codes, a pecuniary detriment could result for the lessor. In such an instance, there is also the possibility that, while the landlord takes action to meet new conditions imposed upon him by the public body the official serves, the official's activities at the leased site would be curtailed or operated at a disadvantage.

The second factor is: The rent, terms, or duration of the lease are not changed in consideration for, or recognition of, the actions of the official. If the public official and his landlord were to agree that the actions taken by the official on a particular matter will be rewarded or punished by changes in the rent, or the lease terms and conditions, or if such a change were to take place as a result of the actions of an official, then a public official who is in the position of making an official decision regarding the pecuniary interests of his landlord would have an obvious conflict of interest. In addition, such a result may implicate other criminal provisions of the law outside the Ethics Law.

The third factor is: There are no disputes between the official and his landlord regarding the lease or the leased property. It is recognized that, in any contractual situation, disputes may arise between the parties regarding the performance of their obligations. If these situations exist, the official's use of his authority or influence to secure a favorable decision for his landlord, combined with a resolution of their private dispute in the official's favor, would violate R.C. 102.03(D), and may, once again, implicate other criminal statutes that are outside the scope of the Ethics Commission's jurisdiction. See, e.g., R.C. 2921.02.

The final factor is: The rent and other terms and duration of the lease between the official and his landlord are fixed by contract. If the rent and other terms are not fixed, the official may be particularly vulnerable to the influence of his landlord's interests and, secondarily, his own interests as a tenant. At such a time, the official's objectivity and independence of judgment could be impaired with respect to his landlord.

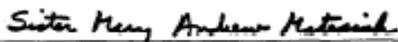
In sum, a public official is generally prohibited, by R.C. 102.03(D), from participating in matters that affect the interests of his landlord, because the relationship between a public official and his landlord is such that his objectivity and independence of judgment may be impaired by his landlord's interests. However, in some situations, where there is an objective showing that certain factors are present, the relationship between a public official and his landlord will not be of such a character as to impair the official's objectivity with respect to matters affecting his landlord.

With respect to this landlord-tenant relationship in particular, as stated above, the lease between the city council member's Insurance Agency and the landlord's Real Estate Company

was entered into six months prior to the filing of the application for a conditional use permit. The lease commits the Real Estate Company to accept consideration at a set rate from the Insurance Agency for the term of the lease, in this instance, until January 31, 2000. The lease binds both parties to meet obligations that have been established by common law and statute. The property that is the subject of the conditional use permit is not the property leased by the city council member. You have not stated whether there are any disputes between the council member and the Real Estate Company with respect to the council member's lease or leased property. Assuming that the city council member can objectively demonstrate that there are no current disputes between the parties and that there is no change in the lease or reduction in the rent that would occur as a result of his actions as a council member, as well as the other factors you set forth, the Ohio Ethics Law does not prohibit the city council member in your question from participating in matters before city council that affect his landlord.

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 opinion of the Ohio Ethics Commission, and you are so advised that: (1) In order to determine whether Division (D) of Section 102.03 of the Revised Code prohibits a city council member from acting on a land use matter that involves the financial interests of his landlord, all of the facts and circumstances in the situation must be examined; and (2) Division (D) of Section 102.03 of the Revised Code prohibits a city council member from participating in land use matters that involve the financial interests of the landlord leasing space to the official or his business, unless: (a) the property that is being leased is not the subject of the land use matter; (b) the rent, terms, or duration of the lease are not changed in consideration for, or recognition of, the actions of the council member; (c) no disputes exist between the council member and the landlord regarding the lease or the leased property; and (d) the rent and other terms and duration of the lease between the council member and his landlord are fixed by contract.


Sister Mary Andrew Matesich, Chair
Ohio Ethics Commission