



## OHIO ETHICS COMMISSION

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January 30, 1998

Informal Opinion 1998-INF-0130-2

Janis Bobb

Dear Ms. Bobb:

In a letter received by the Ohio Ethics Commission on July 16, 1997, you ask whether the Ohio Ethics Law and related statutes prohibit you from participating as a member of the Board of Trustees of Plain Township in matters pertaining to the creation of a water and sewer district that would include the township. You also ask whether the Ohio Ethics Law and related statutes prohibit you from participating in matters regarding John Albers, an attorney who the township has hired to perform legal services.

As explained below, you are not prohibited from participating in matters pertaining to a water and sewer district that would include the township. You are also not prohibited from participating in matters affecting payments to John Albers for legal services that he rendered to the township.

### **Facts**

You were appointed to fill a vacancy on the board of trustees in 1997. You then ran for election to the position in November of 1997 and were elected to a new term beginning January 1, 1998. You state that you and your husband are members of a political action committee (PAC) that is intervening in a court case that would establish a water district in Plain Township. Your husband serves as the PAC's president. You state that the intervention is to obtain more information about the water district and its cost to township residents.

You state that the township has hired John Albers to represent Plain Township since 1984. In 1993, your husband purchased real estate with John Albers' wife and brother. The property is located in the municipality of New Albany. Additionally, the board of trustees of Plain Township has an issue before it regarding the payment of an outstanding fee for services to John Albers.

Your question regarding the water and sewer district will be addressed first.

### **R.C. Chapter 6119.-Water and Sewer Districts**

In order to address your question, it is necessary to review the state statutes that govern the creation and operation of a regional water and sewer district.

A regional water and sewer district is created pursuant to a procedure set forth in R.C. Chapter 6119. and is a political subdivision of the state. R.C. 6119.04. A water and sewer district is formed when the legislative authority of a political subdivision, or several political subdivisions, petition a court of common pleas to establish the district. R.C. 6119.02. While deciding whether to create the district, the court of common pleas holds a preliminary hearing on the petition for the establishment of the district. R.C. 6119.04. Any person residing within the area affected by the organization of the proposed district may file an objection to the granting of the requests made in the prayer of the petition. Id. See also R.C. 6119.04(A)(4) and 6119.051(C) (addressing the right of any person residing within the area affected by the organization or operation of the district to file objections with the court of common pleas to plans for the operation of the district or modification to the original petition).

If the court decides that the district is probably necessary, and will probably be conducive to the public health, safety, convenience, or welfare, it will issue a preliminary order declaring the district to be organized as an independent political subdivision of the state with a corporate name. R.C. 6119.04(A). However, if the court finds that the proposed district is unnecessary, will not be conducive to the public health, safety, convenience, or welfare, or is not economical, fair, or reasonable, then it is required to dismiss the proceedings. R.C. 6119.04(D).

#### **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 "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 of a political subdivision. R.C. 102.01(B) and (C). A member of a board of township trustees is a public official for purposes of R.C. 102.03(D). Ohio Ethics Commission Advisory Opinion. No. 92-008.

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. 102.01(G). The Ethics Commission has held that the beneficial or detrimental economic impact of a decision by a public entity is a thing of value for purposes of R.C. 102.03. Adv. Ops. No. 85-012, 90-002, and 90-012.

Specifically, the Commission has held that a decision of a public entity that results in an increase or decrease in the value of property, or provides a definite and direct benefit to property, 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.

R.C. 102.03(D) prohibits a public official or employee from participating in any matter, or securing a thing of value, where the official would have an inherent conflict of interest such that her objectivity and independence of judgment with regard to her official decisions and responsibilities could be impaired. Adv. Op. No. 91-004. The prohibition imposed by R.C. 102.03(D) serves the public interest in effective, objective, and impartial government by preventing the creation of a situation that may impair the objectivity and independence of judgment of a public official or employee, and, therefore, the effectiveness of the political subdivision with which she serves. Adv. Ops. No. 89-014 and 90-002. The application of R.C. 102.03(D) is dependent upon the facts and circumstances of each individual situation. Advisory Ops. No. 87-007 and 89-003.

The Ethics Commission has held that, for purposes of R.C. 102.03(D), the thing of value that is secured by the action of the public official must be definite and direct. When the thing of value, in a particular situation, is the economic impact that would occur from a decision of a public entity, the Commission has held that the prohibition of R.C. 102.03(D) does not apply if the economic impact is speculative and indirect rather than definite and direct. Adv. Op. 93-016.

In Advisory Opinion No. 93-016, the Ethics Commission addressed whether a member of a county district board of health, who had an ownership interest in a business that would be subject to a public smoking regulation imposed by his board, could participate in the enactment of the legislation imposing the regulation. In that opinion the Commission held that R.C. 102.03(D) does not prohibit the board member from participating in the enactment of the regulation because it was merely speculative to assert that the financial interests of his business would be affected either positively or negatively by the enactment of the regulation.

In the instant situation, as in almost every situation involving decision-making by public officials, controversy exists. Township residents and officials disagree on issues regarding the water district. Some township residents believe that the proposed water and sewer district is necessary, and will be conducive to the public health, safety, convenience, or welfare. Other township residents believe that the water and sewer district would be unnecessary, would not be conducive to the public health, safety, convenience, or welfare, and would not be economical, fair, or reasonable.

In light of this controversy and disagreement, the instant situation is akin to the situation addressed in Advisory Opinion No. 93-016. The issue of whether there would be a definite and direct financial impact upon persons residing within the area affected by the organization of the proposed district from the creation of the proposed district, or whether the impact would be a

benefit or a detriment, is a question of fact that cannot be determined by the Ethics Commission in an advisory opinion.

Furthermore, even if it were possible to determine that the establishment of the proposed water and sewer district is a definite and direct thing of value for purposes of R.C. 102.03(D), the district would encompass all of the unincorporated area of Plain Township and would affect all township residents in a uniform manner.

In Advisory Opinion No. 85-006, the Ethics Commission addressed the issue of whether a public official could participate in general issues that would affect the official in the same manner as all other persons within the official's jurisdiction.

Of course, the application of the prohibition is dependent upon the facts and circumstances of the particular case. Not all "conflicts of interest" are prohibited by Division (D) of Section 102.03 of the Revised Code, but only those in which a public official has a dual interest that would impair his independence of judgment in making decisions. For example, many general issues before local governmental bodies would provide a uniform benefit to all citizens in a jurisdiction, including the public officials making the decision. This would include general legislation on such matters as taxes, police and fire protection, schools, zoning, sewer and water services, and parks. In most cases, the benefits derived by the public officials in common with their constituents would ordinarily accrue to them in the performance of their official duties, and would not be of such character as to manifest a substantial and improper influence on them. Furthermore, it is not sufficient merely to identify some indirect or indefinite benefit that a public official may accrue from the performance of an official act. A public official should not be precluded from participating in such decisions that he was duly elected or appointed to make, unless he would secure a particular benefit for himself that creates a conflict or interest. (Emphasis added.)

The Ethics Commission reaffirmed the analysis of Advisory Opinion No. 85-006 in Advisory Opinion No. 88-004, wherein the Commission considered whether a member of city council was prohibited from participating in issues such as widening roads and installing water and sewer lines where the improvements would benefit or serve property in which he had an interest, as well as other property in the same area. The Commission held in Advisory Opinion No. 88-004:

When Advisory Opinion No. 85-006 was rendered, R.C. 102.03(D) prohibited a public official or employee 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, which thing is of such character as to manifest a substantial and improper influence upon him with respect to his duties." Am. Sub. H.B. 116th Gen.A. (1986) (eff. September 17, 1986) deleted the requirement that

the thing of value not ordinarily accrue to the public official or employee in the performance of his official duties, thereby broadening the scope of the prohibition. This deletion does not, however, affect the analysis or conclusions of Advisory Opinion No. 85-006. Applying the reasoning of this opinion, therefore, a city council member may participate or vote on general legislation which provides a uniform benefit to all citizens within the city, or a large portion thereof, but may not participate in matters which provide a particular and definite pecuniary benefit to property in which he, or, as discussed below, certain other parties, have an interest. For example, a council member may participate in enacting a general zoning code for the city, but may not discuss or vote to approve a zoning change or variance affecting property in which he has an interest. See Advisory Opinion No. 79-003, 79-008, and 85-006. The Commission has also held that council members may not participate in discussions or vote on matters regarding a downtown revitalization project which would benefit their property. See Advisory Opinion No. 80-007. The revitalization project consisted of street paving, sidewalks, tree planting, and lighting, although one official was held to be precluded from participating even though the building in which he had an interest was to receive only improved lighting. Id. (Emphasis in original).

I have enclosed Advisory Opinions No. 85-006 and 88-004 for your reference.

If the Ethics Commission had held, in Advisory Opinions No. 85-006 and 88-004, that R.C. 102.03(D) prohibits public officials from participating in general legislation that provides a uniform benefit to all citizens or a large portion of the constituency in a jurisdiction because the public official making the decision also had an affected financial interest, then no board of township trustees could ever petition a court of common pleas to establish a water and sewer district pursuant to R.C. Chapter 6119, because they could be affected by their own decision.

It is interesting to note that the controversy in the instant situation is reversed from the situations addressed in Advisory Opinions No. 85-006 and 88-004. Instead of questions of a conflict of interest because you are a trustee and support general legislation for the establishment of a district that would provide water and sewer services to your property, the question presented is whether you have a conflict of interest because you oppose legislation that was made by the board of township trustees before you became a member of the board.

Applying the reasoning of Advisory Opinions No. 85-006 and 88-004 to your question, a township trustee may participate in the decision-making process or vote on general legislation that provides a uniform benefit to all citizens within the township, or a large portion thereof, but may not participate in matters that provide a particular and definite pecuniary benefit to property in which he has an interest. In the instant situation, actions taken by the board of township trustees with regard to the establishment of a water and sewer district is general legislation that will affect all township residents in a uniform manner. Accordingly, R.C.102.03(D) would not prohibit any

township trustee from participating in deliberations regarding the proposed water and sewer district, even though they will be affected by the establishment of the district.

### **Membership in the PAC**

The next issue is whether the prohibition imposed by R.C. 102.03(D) is applicable because, prior to your appointment as a trustee, you became a member of a PAC that opposed the creation of the water and sewer district by filing an objection, pursuant to R.C. 6119.04, to the granting of the requests made in the prayer of the petition for the establishment of the water and sewer district. As stated above, R.C. 6119.04 provides that any person residing within the area affected by the organization of the proposed district may file an objection to the establishment of a water and sewer board.

The Ethics Commission has held that R.C. 102.03(D) prohibits a public official from using the authority or influence of his office to secure a definite and direct thing 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. Whenever such a relationship exists, the Commission has concluded that the definite and direct 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 relationships that may manifest a substantial and improper influence upon a public official or employee:

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 address instances where a definite and direct thing of value accrues, as a result of the public official's or employee's action, to a party that has a close familial, economic, or fiduciary relationship with the public official or employee.

The issue is whether a PAC is a party with a familial, economic, or fiduciary relationship to a public official who is a member of the PAC, which would then be of the same character as those relationships included by the Commission in construing the restrictions of Revised Code Section 102.03(D).

A political action committee is defined in R.C. 3517.01(A)(8) as "a combination of two or more persons, the primary or incidental purpose of which is to support or oppose any candidate, political party, or issue, or to influence the results of any election, and that is not a political party, a campaign committee, or a legislative campaign fund."

In the instant situation, the PAC consists of persons residing in the area affected by the organization of the proposed district, including yourself and your husband, who serves as the PAC's president. The PAC opposes the creation of the water and sewer district and, pursuant to R.C. 6119.04, filed an objection to the establishment of the proposed district.

As explained above, any action regarding the district will uniformly affect all township residents, including members and officers of the PAC. There is nothing to suggest that any decision by the board of township trustees, or any other public entity, regarding the district will affect the PAC, its officers, or its members in a manner that is not uniform to the financial benefit or detriment that may be realized by all other township residents, including those who do not belong to the PAC, or those who oppose the PAC's views.

It is apparent that township residents will support township officials, and candidates for elected office, who have voiced opinions that are similar to theirs. This is the nature of representation through elected officials. Based upon local attention to the question presented to the Commission, it appears that the electorate knew of your position when they voted you to a full term of office as trustee in the November 1997 elections.

It is significant to note the provisions of R.C. 102.03(J), despite the fact that it is not applicable to you as a member of the PAC. R.C. 102.03(J) provides that, for purposes of R.C. 102.03(D), (E), and (F), the membership of a public official or employee in a church, religious, benevolent, fraternal, or professional organization that is tax exempt under specified Internal Revenue Code provisions shall not be considered to be of such a character as to manifest a substantial and improper influence upon him with respect to his duties unless he serves the organization as an employee, trustee, director, officer, or in a fiduciary relationship, or has assumed a particular responsibility in the organization with respect to the matter pending before his public agency, or if the matter would affect his personal, pecuniary interests. See generally Adv. Op. 90-012. The provisions of R.C. 102.03(J) evidence a recognition by the General Assembly that the relationship between a public official or employee and an organization in which he is a mere member will generally not subject him to an impairment of objectivity or independence of judgment with regard to matters that affect the interests of the organization.

The provisions of R.C. 102.03(J) are not applicable in the instant situation because a PAC is not a church, religious, benevolent, fraternal, or professional organization that is tax exempt under the Internal Revenue Code. However, the instant situation is analogous to the conditions set forth in R.C. 102.03(J). Your personal relationship to the PAC as a member does not create a

relationship that subjects you to an impairment of objectivity or independence of judgment with regard to matters that affect the interests of the PAC.

Because you, or a party with which you have a close familial, economic, or fiduciary relationship, would not receive a definite and direct financial benefit or detriment that is not uniform with all other township residents affected by the organization of the proposed district, R.C. 102.03(D) does not preclude you from participating in such decisions that you were duly elected or appointed to make as a member of the board of trustees of Plain Township. Accordingly, R.C. 102.03(D) does not prohibit you from participating as a member of the Plain Township Board of Trustees in matters pertaining to a water and sewer district that would include the township.

Any decisions regarding the petition to the court of common pleas for the organization of a water and sewer district, and how strongly to pursue its organization, is a decision to be made by you and other elected representatives of the residents of the township that would comprise the district. A determination of whether a water and sewer district is "best" for the township's residents is one to be made by the judge of the court of common pleas after hearing objections to the creation of the district by any person affected by the organization of the district.

#### **Matters Pertaining to John Albers**

Finally, you ask whether you may participate in matters pertaining to the payment of John Albers for legal services that he rendered to the township in light of the fact that your husband is a co-owner of real estate, located in the municipality of New Albany, with John Albers' wife and brother. Neither you nor John Albers have an ownership interest in the property.

As explained above, the Ethics Commission has held that R.C. 102.03(D) prohibits a public official from using the authority or influence of his office to secure a definite and direct thing 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. In the instant situation, neither you nor your husband have a familial or business connection with John Albers. Any possible business relationship that arises from a shared interest in real property is between your husband and the wife and brother of John Albers.

The Ethics Commission has explained that, because the contractual interests of spouses are independent, a public official is not deemed to have a definite and direct interest in the financial interests of his or her spouse, absent additional facts that would indicate otherwise. See generally Adv. Op. No. 91-004. See also R.C. 3103.05 (a spouse is statutorily empowered to contract in his or her own right as if unmarried) and R.C. 3103.04 (the earnings of a married person constitute his or her separate property). The Commission has explained that a public official may have an indirect interest in the financial interests of his or her spouse. However, a person is not generally considered to have a definite and direct interest in the financial interests of his or her spouse solely



because his or her spouse holds the financial interest. Adv. Ops. No. 88-007, 89-005, and 92-017. Therefore, a decision by the board of trustees pertaining to the payment of John Albers for legal services would not have a definite and direct effect upon the financial interests of your husband that arise from his having a shared interest in real property with the wife and brother of John Albers.

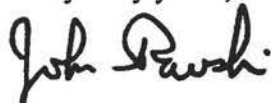
Therefore, absent facts to indicate otherwise, you do not have a definite and direct interest in the property that your husband owns with John Albers' wife and brother such that you are prohibited, by R.C. 102.03(D), from participating in matters affecting the payment of John Albers for legal services that he rendered to the township.

### Conclusion

As explained above, you are not prohibited from participating as a member of the Plain Township Board of Trustees in matters pertaining to a water and sewer district that would include the township. You are also not prohibited from participating in matters affecting payments to John Albers for legal services that he rendered to the township.

This informal advisory opinion was approved by the Ethics Commission at its meeting on January 30, 1998. The opinion is based on the facts presented and 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. If you have any further questions, please feel free to contact this Office again.

Very truly yours,



John Rawski  
Staff Attorney

Enclosures:

Advisory Opinions No. 85-006 and 88-004