

OHIO ETHICS COMMISSION

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December 9, 2002 Informal Opinion 2002-INF-1209-1

Marlo B. Tannous
Chief Legal Counsel
Ohio Department of Development

Dear Ms. Tannous:

In a letter received by the Ohio Ethics Commission on August 9, 2002, you have asked about the application of R.C. 175.03 to a member of the board of the Ohio Housing Finance Agency (OHFA). You have posed eight scenarios about one member of the OHFA board, Al Scott, who has been appointed to represent the interests of for-profit multifamily housing development organizations. This opinion will consider seven of the eight scenarios. The remaining scenario, scenario number five dealing with the interests of equity investors, will be considered in a separate advisory opinion.

Brief Answer

As set forth more fully below, R.C. 175.03(B)(3) provides a recent exception from the Ohio Ethics Law and related statutes with respect to OHFA contracts for members of the OHFA Board who represent multifamily housing interests. Mr. Scott is one of those board members. However, in order to comply with the exception, Mr. Scott must abstain from any discussion or voting on a contract if the contract secures a grant or loan that would directly benefit him, a family member, or a business associate. The parties you describe in the first, second, and third fact patterns are Mr. Scott's business associates and, therefore, Mr. Scott may not participate in discussion or voting on any contract that would directly benefit those parties. The parties you describe in the fourth and eighth fact patterns are not Mr. Scott's business associates and Mr. Scott is not barred from participating in discussion or voting on any contract that would directly benefit those parties.

In addition, neither R.C. 175.03(B)(3)(b) nor the Ethics Law prohibits OHFA board members, including Mr. Scott, from setting general guidelines for OHFA programs or participating in general matters that uniformly affect all participants in a project. Therefore, Mr. Scott is not prohibited from participating in the matters described in the sixth and seventh fact patterns, provided that the decisions do not result in a unique or specific benefit to Mr. Scott or his company.

Facts

By way of history, you have explained that Mr. Scott is one of three principals of the NRP Group LLC (NRP), which acts as a developer and contractor on affordable housing projects in Ohio. In some cases, NRP acts as part owner of projects that it develops in Ohio. Normally, each project is owned by a limited partnership with the nonprofit development entity as a general partner. In some cases, NRP also serves as a general partner. The partnerships receive funding through private investment from one of the general partners, or through a capital raising organization, which is a limited partner. You have explained that NRP works with, or on behalf of, the nonprofit development organizations in packaging its application to OHFA, working with OHFA staff on loan and grant requests and submission of necessary documentation to obtain approval at required stages for its low income housing tax credits pursuant to Internal Revenue Code Section 42. You have explained that, while the awards for housing credits do not require individual project approval by the OHFA Board, requests for OHFA affordable housing loans and HOME funds awarded in the HDAP program are each approved by the OHFA Board.

Ohio Housing Finance Agency

OHFA consists of eleven members. R.C. 175.03(A)(1). The director of commerce and the director of development, or their respective designees, are voting members of OHFA. *Id.* Nine members are appointed by the governor with the advice and consent of the senate. *Id.* Of the nine appointed members, the law provides that at least one board member must be employed with an organization that is active in the area of affordable housing development or management and must represent the interests of for-profit multifamily housing development organizations. *Id.* Mr. Scott is the member appointed for that purpose. (There is one other board member appointed to represent the interests of non-profit multi-family housing development organizations. While you have not specifically asked about that board member, the conclusions in this opinion will also apply to him or her.)

With respect to the member who represents multifamily housing interests, R.C. 175.03(B) provides:

- (3) The members of the agency representing multifamily housing interests are not in violation of division (A) of section 2921.42, division (D) of section 102.03, or division (E) of section 102.03 of the Revised Code in regard to a contract the agency enters into if both of the following apply:
 - (a) The contract is entered into for a loan, grant, or participation in a program administered or funded by the agency and the contract was awarded pursuant to rules or guidelines the agency adopted.
 - (b) The member does not participate in the discussion or vote on the contract if the contract secures a grant or loan that would directly benefit the member, a family member, or a business associate of the member.

In an earlier advisory opinion, approved by the Ohio Ethics Commission on June 13, 2002, the Commission concluded that the recent amendment to R.C. 175.03(B) provides that the members of OHFA appointed to represent multifamily housing interests are excepted from the provisions of R.C. 102.03(D) and (E), and R.C. 2921.42(A), with regard to any contract for a loan, grant, or participation in a program administered or funded by OHFA that is awarded pursuant to rules or guidelines adopted by OHFA. However, as part of the exception, R.C. 175.03(B)(3)(b) recognizes and specifically incorporates conflict of interest protections to the extent that each of the two members who serves on the OHFA Board to represent multifamily housing interests is prohibited from participating in any discussion or vote on the contract, grant, or loan that would directly benefit the member, a family member, or a business associate.

In its June 13, 2002 opinion, the Commission also explained:

R.C. 175.03 does not define the terms "family member" or "business associate." However, R.C. 175.03(B)(3) exempts the OHFA Board members from the provisions of R.C. 2921.42, including R.C. 2921.42(A)(1), which uses similar terms. Therefore, it is reasonable to conclude that a public official's "family member" or "business associate," for purposes of R.C.175.03(B)(3)(c), is the same as a "member of his family" or "business associate," for purposes of R.C. 2921.42(A)(1).

With respect to the definition of the term "business associate," the Commission stated that the term "business associate" includes any person or entity with whom a public official is engaged in an ongoing business enterprise, including an employer.

The Ethics Commission determined that, if an OHFA Board member who is appointed to represent multifamily housing interests should participate in any discussion or vote on any contract, grant, or loan that would directly benefit himself, his family members, or his business associates, the specific exception set forth in R.C. 175.03(B)(3) would not apply. If the exception in R.C. 175.03(B)(3) does not apply, the Board member will be subject to the restrictions in R.C. 102.03(D) and (E), and R.C. 2921.42(A), with respect to his actions.

You have stated that NRP does business with a wide variety of parties. You have presented eight scenarios, seven of which are considered herein, involving projects on which NRP works as a developer and contractor with a nonprofit organization. In some of the projects, NRP is also a co-owner, co-general partner, or property manager. When NRP is a developer and contractor, NRP staff work directly with OHFA staff on financial issues and other issues of interest to the OHFA Board or controlling board that could impact approval of OHFA assistance.

This opinion will consider the seven fact patterns in two sets. The first set is composed of fact patterns one through four, and eight, which ask whether Mr. Scott can participate in OHFA funding matters involving particular parties. The second set is fact patterns six and seven, which ask whether Mr. Scott can participate in setting program guidelines for programs to which he or his business associates may apply for assistance.

Business Associates

Fact Pattern One

NRP works as a developer and contractor with a nonprofit development organization on a project. NRP is not a co-owner on the project, but does earn fees for its services. The relationship between NRP and the organization is project specific.

Based on the facts you have presented, while NRP is working with the nonprofit development organization on the project, NRP and the organization are engaged in an ongoing business enterprise. Therefore, the organization would be NRP's business associate, and Mr. Scott is prohibited from participating in any discussion or vote on any contract, grant, or loan that would directly benefit the non-profit organization identified, even if it does not involve the project on which NRP and the organization are collaborating.

Fact Pattern Two

NRP works as a developer, contractor, and co-general partner with a non-profit development organization on a project, and earns fees for its services. The partners have a long-term relationship, because the partnership must comply with federal affordability guidelines for 15 years and state affordability guidelines for 30 years. If the project fails to meet these guidelines, the partners can be held responsible by the IRS or OHFA, and tenants may also have the right to sue the partners. However, the parties have no commitment for additional projects.

Based on the facts you have presented, as long as NRP and the nonprofit development organization are co-general partners on a project, the NRP and the organization are engaged in an ongoing business enterprise. Therefore, the organization would be NRP's business associate for the duration of the partnership. Mr. Scott is prohibited from participating in any discussion or vote on any contract, grant, or loan that would directly benefit the organization, for the duration of the partnership, even if it does not involve the project on which NRP and the organization are co-general partners.

Fact Pattern Three

NRP serves as developer and contractor with a nonprofit development organization on a project, but is not a co-owner. You have stated that a management company affiliated with NRP, and with the same identity of ownership as NRP, is contracted to manage the property. Managing the property includes collecting rents, paying expenses, screening tenants to determine that they meet required income limitations and assessing their ability to meet the monthly rent obligations, and doing necessary repairs and maintenance. The management contract is for two years, with an option to renew annually. The management company is not simply selling goods or general services to the organization, but its participation is essential to the operation of the housing property.

Based on the facts you have presented, as long as NRP and the nonprofit development organization are working together on the project, the NRP and the organization are engaged in an ongoing business enterprise. Therefore, the organization would be NRP's business associate. Mr. Scott is prohibited from participating in any discussion or vote on any contract, grant, or loan that would directly benefit the organization, even if it does not involve the project on which the management company is involved.

Fact Pattern Four

NRP works as a developer and contractor, and may be a co-owner, with the nonprofit development organization on a project. The relationship is project specific. NRP helps to obtain loans to finance construction and serve as a long-term mortgage for the project. NRP and its principals are required to guarantee the loans during the construction stage.

The question is whether banks that provide loans to finance construction would be considered business associates of NRP or other owners. The banks are not partners on the projects. Rather, they are creditors of the project and the principals. The business purpose pursued by a bank, when lending money, is to make money from the interest paid on the principal loaned. The bank is not involved in any of the decisions or actions of the company that enable it to be solvent and prosper. Further, while the funds provided pursuant to the loans may be necessary to underwrite the cost of the project, the lenders are not engaged in the project and will be repaid regardless of the success or failure of the project. See Ohio Ethics Commission Advisory Opinion No. 98-001 (a bank is not the business associate of its ordinary customers). The interests of a bank, which lends money for a project, can be clearly distinguished from the interests of an equity investor, for example, which provides capital but is also a limited partner in the project and is, therefore, engaged in the project on an ongoing basis.

Therefore, the banks would **not** be NRP's business associates, and Mr. Scott is **not** prohibited from participating in any discussion or vote on any contract, grant, or loan that would directly benefit the banks that are creditors on NRP projects. This would be true regardless of whether NRP is a co-owner of the project.

Fact Pattern Eight

NRP serves as developer, contractor, consultant, and property manager for a project with a specific nonprofit development organization in a specific area. NRP is a co-owner of the project. NRP staff work directly with OHFA staff on financial issues and other issues of interest to the OHFA Board or controlling board that could impact approval for loans and/or HDAP assistance. You have asked whether Mr. Scott is prohibited from participating in the discussion or vote on an affordable housing project located in the same market area which could be market competition in terms of rents, amenities, or services with the NRP project.

R.C. 175.03(B)(3) provides that the member of the agency representing multifamily housing interests is not in violation of R.C. 2921.42(A), or 102.03(D) and (E), in regard to a "contract [OHFA] enters into" for a "loan, grant, or participation in a program administered by [OHFA]" if the contract "was awarded pursuant to rules or guidelines [OHFA] adopted." R.C. 175.03(B)(3)(b) requires that the member not participate in the discussion or vote on the contract if the contract secures a grant or loan that would "directly benefit the member, a family member, or a business associate." While the limitation on participation specifically spells out the interests of the official, a family member, or a business associate, the overall exception does not. The exception in R.C. 175.03(B)(3) is not limited to contracts that would directly benefit the member, a family member, or a business associate; rather, it applies to any contract into which OHFA enters.

Generally, the Ohio Ethics Law would prohibit a public official from participating in matters that affect the interests of a competitor, if the matters would have a definite and direct impact on his own business. See Ohio Ethics Commission Advisory Opinion No. 90-002. However, because R.C. 175.03(B)(3) applies to any contract OHFA enters into, the exception removes Mr. Scott from the restrictions set forth in the Ethics Law with respect to contracts for affordable housing projects located in the same market area, without the attendant bar set forth in R.C. 175.03(B)(3)(b) on participating in the discussion and voting on those contracts. Therefore, Mr. Scott is **not** prohibited from participating in the discussion or vote on an affordable housing project located in the same market area which could be market competition in terms of rents, amenities, or services with the NRP project. However, although the exception applies, Mr. Scott may wish to abstain from those projects where there is a definite and direct likelihood of competition with a project in which NRP is involved, in order to avoid any appearance of impropriety.

Project Guidelines

Fact Patterns Six and Seven

In fact patterns six and seven, NRP works as a developer and contractor with the nonprofit development organization on a project. Sometimes NRP is, and sometimes it is not, a co-owner. NRP staff works with the development organization to assemble the application and structure the transaction utilizing housing credits, affordable housing loans, and funds from the housing development assistance program.

You ask whether Mr. Scott is prohibited from participating in the approval of the Qualified Allocation Plan (QAP), or of the proposed guidelines for the affordable housing loan program and the housing development assistance program, if NRP intends to submit applications for housing credits or for loans and other funds under these programs.

Applications for the housing credit program are evaluated pursuant to the criteria set forth in the QAP. You have explained that the QAP contains the programmatic rules for the year, and is approved on an annual basis. The QAP is not project specific. OHFA approves the QAP, but does not individually approve housing credit applications.

Applications for the affordable housing loan program and the housing development assistance program are evaluated pursuant to guidelines approved by the OHFA Board. If the project is submitted in conjunction with a housing credit application, the project is only reviewed for additional funding if it has been successful in the housing credit competition. Those projects seeking affordable housing loans and HOME funds from the housing development assistance program are approved on an individual bases by the OHFA Board. Projects in the housing development assistance program receiving Ohio Housing Trust Funds are approved by the state controlling board. The OHFA Board often approves guidelines for these programs after applications have been submitted for projects seeking multiple forms of OHFA funding in conjunction with housing credits.

Both of these questions involve participation in setting general guidelines for programs. R.C. 175.03(B) provides that the Board member is not in violation of division (A) of section 2921.42, division (D) of section 102.03, or division (E) of section 102.03 of the Revised Code in regard to a "contract the agency enters into," so long as he complies with the provisions of the exception. While the decisions on the QAP and other program guidelines set forth program rules for OHFA programs under which contracts are entered into, the QAP and the program guidelines are not contracts. Therefore, the exception in R.C. 175.03(B) does not apply.

Because the exception in R.C. 175.03(B) does not apply, it is necessary to turn to the Ohio Ethics Law to determine whether Mr. Scott is prohibited from participating in these matters. R.C. 102.03(D) and (E) prohibit a public official or employee from using the authority or influence of his official position with regard to any matter that would provide a definite and direct pecuniary benefit to him or a company that he serves as an officer. Adv. Op. No. 88-005. However, R.C.102.03 (D) and (E) do not prohibit public officials or employees from acting upon general matters which have a uniform result upon all individuals affected by the official's or employee's actions, including the officials or employees themselves, provided that the official or employee does not realize a direct personal pecuniary gain or benefit from his actions. Adv. Op. No. 92-009.

Therefore, R.C. 102.03(D) and (E) do **not** prohibit Mr. Scott from participating as an OHFA board member with respect to the approval of the QAP if the rules contained in the QAP will have a uniform result upon all applicants, including projects in which NRP is involved either as a developer and contractor, or as a developer, contractor, and co-owner. R.C.102.03 (D) and (E) also do **not** prohibit Mr. Scott from participating as an OHFA board member with respect to the approval of the guidelines for affordable housing loans and housing development assistance program funds if the guidelines will have a uniform result upon all applicants, including projects in which NRP is involved either as a developer and contractor, or as a developer, contractor, and co-owner.

In either of these cases, if approval of the QAP or OHFA guidelines will result in a definite and direct benefit for NRP, which is in some way unique from the benefit that all other applicants will receive, R.C. 102.03(D) would prohibit Mr. Scott from participating in the discussion or approval of those guidelines. Adv. Op. No. 92-009. Further, R.C. 102.03(D) and (E) prohibit Mr. Scott from using his position in any improper way to solicit or secure a benefit from himself or his business.

Conclusion

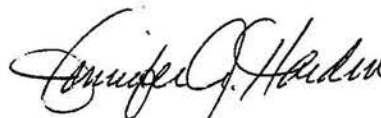
As set forth more fully above, R.C. 175.03(B)(3) provides a recent exception from the Ohio Ethics Law and related statutes with respect to OHFA contracts for members of the OHFA Board who represent multifamily housing interests. Mr. Scott is one of those board members. However, in order to comply with the exception, Mr. Scott must abstain from any discussion or voting on a contract if the contract secures a grant or loan that would directly benefit him, a family member, or a business associate. The parties you describe in the first, second, and third fact patterns are Mr. Scott's business associates and, therefore, Mr. Scott may not participate in discussion or voting on any contract that would directly benefit those parties. The parties you describe in the fourth and eighth fact patterns are not Mr. Scott's business associates and Mr. Scott is not barred from participating in discussion or voting on any contract that would directly benefit those parties.

In addition, neither R.C. 175.03(B)(3)(b) nor the Ethics Law prohibits OHFA board members, including Mr. Scott, from setting general guidelines for OHFA programs or participating in general matters that uniformly affect all participants in a project. Therefore, Mr. Scott is not prohibited from participating in the matters described in the sixth and seventh fact patterns, provided that the decisions do not result in a unique or specific benefit to Mr. Scott or NRP.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on December 9, 2002. The Commission commends you and Mr. Scott for seeking advisory guidance before taking any action that could be prohibited by law.

The 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. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney