

# OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

April 7, 2003

Informal Opinion 2003-INF-0407-1

Marlo B. Tannous  
Chief Legal Counsel  
Ohio Department of Development

Dear Ms. Tannous:

In an advisory opinion issued by the Ohio Ethics Commission on December 9, 2002, the Commission provided guidance to you and Al Scott, a member of the Ohio Housing Finance Agency (OHFA), about the application of R.C. 175.03 to Mr. Scott. In that opinion, the Commission answered seven of eight questions you posed about Mr. Scott, who had been appointed to represent the interests of for-profit multifamily housing development organizations.

At the request of Mr. Scott, the Commission deferred consideration of the remaining question dealing with equity investors. The Commission offered Mr. Scott the opportunity to provide additional factual information to clarify the business relationship between him and those equity investors. The application of the Ohio Ethics Law to that remaining fact pattern will be considered in this advisory opinion.

## Brief Answer

R.C. 175.03(B)(3), discussed in the December 9, 2002 advisory opinion and herein, provides an exception to the Ohio Ethics Law and related statutes with respect to OHFA contracts for members of the OHFA Board who represent multifamily housing interests, including Mr. Scott. In order to comply with the exception, the OHFA board member 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.

As more fully discussed below and based on the factual information provided, an equity investor that owns 99%, or any other significant percentage, of the limited partnership as a limited partner in a project is Mr. Scott's business associate when his company, NRP Group LLC (NRP), is an owner, partner, or co-general partner, or is working as a developer or contractor, on the project. In order to qualify for the exception in R.C. 175.03(B)(3), Mr. Scott must abstain from any discussion or voting on any contract that would directly benefit the equity investor in those circumstances. The failure to qualify for the exception by abstaining from these matters subjects the board member to the prohibitions and sanctions in the Ohio Ethics Law and related statutes.

**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. The governor, with the advice and consent of the senate, appoints nine members. 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 multifamily 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) was amended to provide:

- (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 advisory opinion approved by the Ohio Ethics Commission on June 13, 2002, the Commission considered the recent amendment to R.C. 175.03(B). The Commission concluded that the amendment provides an exception from R.C. 102.03(D) and (E) and R.C. 2921.42(A) for the members of OHFA who are appointed to represent multifamily housing interests. The exception applies 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, R.C. 175.03(B)(3)(b) specifically incorporates clear conflict of interest protections. R.C. 175.03(B)(3)(b) provides that each of the two members who qualify for the exception 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.

R.C. 175.03 does not define the term "business associate." Due to the reference to R.C. 2921.42 in R.C. 175.03, the Commission determined that it was reasonable to conclude that a "business associate," for purposes of R.C.175.03(B)(3)(c), is the same as a "business associate" for purposes of R.C. 2921.42(A)(1). Since 1985, the Commission has construed the term

“business associate” to include any person or entity with which a public official is engaged in an ongoing business enterprise, including an employer. See Ohio Ethics Commission Advisory Opinions No. 85-004, 87-003, and 89-008.

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 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. This allows OHFA to benefit from the knowledge and experience of a member who is an active recipient of contracts from OHFA while protecting OHFA, the public, and the Board member from any possibility of, or perception that, the member is actively using his authority to improperly benefit himself, his family members, or his business associates.

### Facts

As noted in the December 9, 2002 advisory opinion, you have explained that Mr. Scott is one of three principals of the NRP Group LLC (NRP). NRP works as a developer and contractor with a nonprofit organization on affordable housing projects in Ohio. Normally, each project is owned by a limited partnership with the nonprofit development entity as a general partner. In some of the projects, NRP is also an owner, as either general or co-general partner, of projects that it develops. NRP’s relationship is project specific with no commitments for additional projects.

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, the Board does approve requests for OHFA affordable housing loans and HOME funds awarded in the HDAP program.

With respect to equity investors, NRP works with investors to obtain an equity investment in the project. You have explained that the equity investor owns 99% of the limited partnership as a limited partner. You have stated that, even though the equity investor is a limited partner, it does exercise some oversight of the property and the property’s compliance with affordable housing rules and regulations. You have asked whether an equity investor who is a limited partner in an affordable housing project partnership is NRP’s business associate such that Mr. Scott is prohibited from voting on matters that affect the equity investor.

In order to answer your question, it is necessary to consider the role of the limited partner equity investor in an affordable housing project. To thoroughly consider this question, the Ethics Commission asked Mr. Scott to provide additional information about the relationships between a

developer like NRP and an equity investor. C. David Paragas, counsel for Mr. Scott, sent correspondence to the Commission providing some information about the role of equity investors in affordable housing projects. Rita Parise, Director of Planning, Preservation and Development for OHFA, also provided information to the Commission. Ms. Parise prepared a chart contrasting the rights and responsibilities within a limited partnership that owns and operates affordable housing. Ms. Parise noted that these rights and responsibilities are based on Ohio Revised Code guidelines and can be altered by partnership agreements. Ms. Parise also included three sample partnership agreements.

### **Limited Partners**

According to R.C. 1782.01(G), a "limited partner" is a person who has been admitted to a limited partnership as a limited partner in accordance with a partnership agreement. A "partnership agreement" means any valid written or oral agreement of the partners regarding the affairs of the partnership and the conduct of its business. R.C. 1782.01(K). The rights of the limited partner are controlled by the limited partnership agreement. R.C. 1782.19(E).

The equity investor in an affordable housing project is a limited partner and owns an interest in the project. R.C. 1782.29 provides that the profits, losses, income, and other similar items of a limited partnership will be allocated among the partners as provided in the partnership agreement. See also R.C. 1782.31 (a partner is entitled to distributions from the limited partnership upon withdrawal to the extent described in the agreement). A limited partner can also transfer his interest in a project. R.C. 1782.40 provides that, unless the partnership provides otherwise, a limited partner has the right to assign or transfer his partnership interest.

A limited partner has some involvement in the operation of the partnership. A partnership agreement can provide, in writing, for the participation of the limited partner in certain matters.<sup>1</sup> Each of the three sample agreements provided by OHFA contains a provision that the general partner cannot take a number of significant actions involving the partnership and, by extension, the project, without the consent of the limited partner. For example, sample partnership agreement C provides that the general partner cannot take any of the following actions (among others) without the prior consent of the limited partner: (1) sell any partnership property; (2) lease any partnership property, except in the normal course of business; (3) acquire any real property in addition to the partnership property; (4) incur debt in the ordinary conduct of business in excess of \$10,000; (5) change the nature of the partnership's business; (6) voluntarily file a bankruptcy petition on behalf of the partnership; (7) dissolve the partnership; and (8) prepay any mortgage notes. Two of the sample partnership agreements provide that the limited partner can remove, for reasons listed in the agreement, any agent engaged by the partnership to manage the project.

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<sup>1</sup> R.C. 1782.19(A) provides that a limited partner is not liable for the obligations of the partnership unless the limited partner participates "in the control of the business." However, R.C. 1782.19(B) provides that a limited partner is not participating "in the control of the business" by taking actions specified in that section, including acting or causing the taking or refraining from taking any action, including proposing, approving, or disapproving, on matters stated in writing as may be subject to the approval or disapproval of limited partner.

Further, a limited partner has the authority to participate in determining the composition, continuation, and dissolution of the partnership. Each of the sample partnership agreements gives the limited partner the authority to remove any general partner for reasons listed in the agreement. As noted above, a limited partner can assign or transfer his property interest, unless that right is limited by the partnership agreement. R.C. 1782.40. R.C. 1782.431 provides that a limited partner has a vote in any merger or consolidation of the partnership. Finally, R.C. 1782.44 provides that the limited partners in a partnership can consent to the dissolution of the partnership or, within ninety days of the withdrawal of a general partner, select a new or additional general partner in order to continue the partnership.

In his correspondence, Mr. Paragas asserted that equity investors are similar to banks, which the Commission has concluded are not "business associates" of Mr. Scott solely because they loan money to a project of which he is an owner. In his March 5, 2003 letter, Mr. Paragas explained:

The investors provide the funds necessary for the affordable housing project and, despite the fact they are limited partners, they do not exercise any oversight over the property. They provide the capital to fund the projects without any involvement in how the project should be run.

Mr. Paragas also noted: "The three sample partnership agreements sent to you by Rita Parise . . . illustrates that the limited partners can not participate in the operation, management or control of the partnership."

While an equity investor who is a limited partner on an affordable housing project may not participate in the day-to-day operation, management, or control of the project, a limited partner does have a significant role, guaranteed by statute and clarified in the partnership agreement, in the partnership itself. Contrary to Mr. Paragas's assertion, it is clear that an equity investor who is a limited partner on an affordable housing project has a much different relationship to other parties involved in the project than a bank that loans money to the project. Further, you have stated that a limited partner in an affordable housing project does exercise some oversight of the property and the property's compliance with affordable housing rules and regulations.

For these reasons, an equity investor who is a limited partner on an affordable housing project is a "business associate" of all of the other partners on the project and of any company that is acting as a developer or contractor on the project. See Adv. Op. No. 85-004 (partners are business associates regardless of whether they are general or limited partners). Therefore, an equity investor that owns 99%, or any other significant percentage, of the limited partnership as a limited partner in the project is Mr. Scott's business associate when NRP is an owner, general partner, or co-general partner on the project and when NRP is acting as developer or contractor for the partnership or the general partner on the project. In such a case, Mr. Scott is prohibited, in order to comply with the recent exception contained in R.C. 175.03(B)(3), from participating in any discussion or vote on any contract, grant, or loan that would directly benefit the equity

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investor, even if it does not involve the project of which NRP is an owner, partner, co-general partner, developer, or contractor.

### Conclusion

R.C. 175.03(B)(3), discussed in the December 9, 2002 advisory opinion and herein, provides an exception to the Ohio Ethics Law and related statutes with respect to OHFA contracts for members of the OHFA Board who represent multifamily housing interests, including Mr. Scott. In order to comply with the exception, the OHFA board member 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.

As more fully discussed above and based on the factual information provided, an equity investor that owns 99%, or any other significant percentage, of the limited partnership as a limited partner in a project is Mr. Scott's business associate when his company, NRP Group LLC (NRP), is an owner, partner, or co-general partner, or is working as a developer or contractor, on the project. In order to qualify for the exception in R.C. 175.03(B)(3), Mr. Scott must abstain from any discussion or voting on any contract that would directly benefit the equity investor in those circumstances. The failure to qualify for the exception by abstaining from these matters subjects the board member to the prohibitions and sanctions in the Ohio Ethics Law and related statutes.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 4, 2003. The Commission commends you and Mr. Scott for seeking advisory guidance before any action that could be prohibited by law was taken.

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