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July 22, 2008

Informal Opinion 2008-INF-0722

John Cranley  
[REDACTED]

Dear Mr. Cranley:

On April 24, 2008, the Ohio Ethics Commission received your request for an advisory opinion. In your letter, you explained that you are a member of the Cincinnati City Council. You are also a member of City Lights Development (City Lights), a limited liability company (LLC) that is pursuing a property redevelopment project within Cincinnati. To facilitate this project, City Lights plans to request the assistance of the Port of Greater Cincinnati Development Authority (port authority).

You have explained that City Lights will ask the port authority to:

- (1) Issue revenue bonds to pay for public improvements in the City Lights development;
- (2) Contract with City Lights to construct the improvements; and
- (3) Repay the money borrowed from the bondholders by obtaining the city's authorization to have the portion of real property taxes that are payable in the area of the City Lights development be authorized to be service payments from a tax increment financing (TIF) district.<sup>1</sup>

City Lights will also request that the Cincinnati Planning Commission rezone the property in the development area. City council, which appoints some members of the port authority, must authorize the service payments from the TIF and will make the final decision regarding the zoning request.

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<sup>1</sup> At the Commission meeting on July 18, 2008, you stated that the area that included the City Lights Development was designated a TIF district in December 2005. You explained that, at the time the TIF legislation was passed, there were no specific development projects planned for the area. You stated that you were a member of council when the TIF legislation was enacted but you did not vote on the ordinance for reasons unrelated to the issues you have raised here.

You stated that, pursuant to your understanding of the Ethics Laws, you have disclosed your interest in City Lights and its development project to the city and the port authority and have completely removed yourself from the LLC's dealings with the city regarding the project. You stated that you will also recuse yourself, as a council member, from any vote related to the project. You asked if the disclosure of your interest in the project and your abstention from related matters is sufficient to comply with the prohibitions of the Ethics Law and related statutes in order for you to continue your council service until the end of your term in 2009.

### **Brief Answer**

As set forth more fully below, disclosure and abstention are insufficient for you to comply with the Ethics Laws if the LLC will seek or receive any financial benefit from the TIF. If the LLC intends to seek service payments from the TIF, you must either step down from your position on city council or end your relationship with the LLC before any authorization is proposed to or made by the city.

If the LLC intends to forego TIF assistance, disclosure of your interest and abstention from matters affecting the project may be sufficient for you to comply with public contract restrictions against your conflict and related to revenue bonds and other port authority contracts, and the prohibitions of the law related to the rezoning of the property. You will also be required to demonstrate that you can meet an exception contained in the public contract law and that you can comply with other restrictions in the Ethics Law and related statutes.

### **Purpose of an Advisory Opinion**

At the outset, it must be noted that the purpose of an Ethics Commission advisory opinion is to provide guidance upon which a public official or employee can rely before he engages in an action that may be prohibited by the Ethics Law. The Commission has explained that its function in rendering an advisory opinion is not a fact-finding process. Ohio Ethics Commission Advisory Opinion No. 94-002. The Commission can render an advisory opinion only in response to a hypothetical question or a question that involves the prospective conduct of the person who requests the opinion. Adv. Ops. No. 75-037 and 94-002. Therefore, this opinion will address only prospective matters and will not reach conclusions on any past actions.

### **R.C. 2921.42(A)(3)—Position of Profit in a Public Contract**

A city council member is a public official subject to R.C. 2921.42(A)(3), which states that no public official shall knowingly:

During the public official's term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by the public official or by a legislative body, commission, or board of which the public official was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

R.C. 2921.01(A); Adv. Op. No. 89-008. A “public contract” is the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for a city. R.C. 2921.01(I)(1)(a). The Ethics Commission has held, and courts have agreed, that a political subdivision’s purchase or acquisition of community and economic development services, or urban revitalization services, through the use of loans, grants, tax exemptions, land reutilization programs, revenue bonds, or other similar programs or incentives, constitutes a “public contract” regardless of whether services are funded through local or federal money. Adv. Ops. No. 84-011, 85-002, 89-008. See State v. Lordi, 140 Ohio App.3d 561, 569 (2000), discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526, 91 Ohio St.3d 1536, motion for reconsideration denied, 92 Ohio St.3d 1422 (2001).

Tax increment financing works by exempting the value of real property improvements from taxes. R.C. 5709.40. The municipality authorizes a TIF by enacting legislation. Id. A taxpayer whose operations are located within a TIF continues to make payments to the jurisdiction in an amount equal to the real property tax liability that otherwise would have been due had the property not been exempted. R.C. 5709.40 and R.C. 5709.42. These payments in lieu of taxes, called service payments, are then used to finance the improvements designated in the ordinance. Id.

The city’s designation of a development as a TIF, which provides an incentive for commercial and residential developers to construct projects that will provide economic growth to the city, is a public contract. See City of Cincinnati TIF Policy and Cincinnati Municipal Code Section 740-3 (“city assistance” means providing a developer with tax increment financing). See also R.C. 5709.40 and Adv. Op. No. 89-008 (a tax abatement which is granted by a city in exchange for a company’s development or renovation of property, or the construction of facilities, is a ‘public contract’ since it is the purchase of economic or community development, or urban renewal services by the city).

A public official occupies a position of profit in a public contract when he will realize a financial advantage, gain, or benefit, which is a definite and direct result of the public contract. See Adv. Ops. No. 92-013 and 92-017. A person with an ownership interest in a business occupies a position of profit in the contracts of the business. See Adv. Ops. No. 90-003 and 93-001.<sup>2</sup> See also Adv. Ops. No. 76-012 and 2006-02 (a “membership interest” in an LLC is a member’s share of the profits and losses of the LLC and the right to receive distribution). As a member of City Lights, you occupy a definite and direct position of profit in the contracts of the corporation.

A public contract is “authorized” by a public official or board if the contract could not have been awarded without the approval of the official, the position that he holds, or the board on which he serves. See Adv. Ops. No. 87-004 and 92-008. The legislative authority of a municipal corporation has the sole authority to enact TIF approving legislation and to authorize the allocation of revenue collected under a TIF to a specific development project. R.C. 5709.40.

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<sup>2</sup> If a person’s interest in a company is limited to owning a fractional amount of stock (under one percent), the person is not considered to occupy a position of profit in the company.

The city does not award the designation of a TIF, or the allocation of resources, as a result of a competitive bid.

Therefore, while you are a city council member and for one year thereafter, R.C. 2921.42(A)(3) prohibits your corporation from receiving any financial benefit from a TIF that is authorized by city council. This prohibition applies even if you disclose your interest and do not take any action on the enactment of the TIF. Adv. Op. No. 2000-02. There is no exception to this prohibition.

If you are on council when the city authorizes that resources from the TIF be used in the City Lights development, R.C. 2921.42(H) may be implicated. R.C. 2921.42(H) provides that any public contract in which a public official or any of the public official's business associates has an interest, in violation of section 2921.42, is void and unenforceable. Therefore, if the service payments from the TIF are authorized for the development while you are still on council, they may be void and unenforceable. However, if you were to resign from your position on council before any financial benefit under the TIF is sought or obtained for the development, R.C. 2921.42(H) would not be implicated.<sup>3</sup>

If the City Lights development can proceed *without* the use of a TIF, the public contract prohibitions of R.C. 2921.42(A)(4) will be implicated when your company contracts with the port authority.

**Having an Interest in a Public Contract—R.C. 2921.42(A)(4)**

A city council member is a public official subject to the prohibitions of R.C. 2921.42(A)(4), which provides that no public official shall knowingly:

Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which the public official is connected.

R.C. 2921.01(A); Adv. Op. No. 89-008. As stated above, the purchase or acquisition of community and economic development services, or urban revitalization services, by or for the use of a political subdivision constitutes a "public contract." A port authority is a political subdivision of the state. See R.C. Chapter 4582. Both the port authority's issuance of revenue bonds to finance the City Lights development project and the authority's contract with City Lights for the construction of public improvements, are public contracts because they are the acquisition of community and economic development services. See Adv. Ops. No. 78-003, 80-006, and 2001-02.

A public official is prohibited from having an interest in a public contract entered into by or for the use of any political subdivision with which he is connected. See Adv. Ops. No. 89-004

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<sup>3</sup> You should be aware, however, that for one year after you leave city council, R.C. 102.03(A)(1), the "Revolving Door," will prohibit you from representing the LLC, or any other person, before the city or another public agency, regarding the TIF, or other matters in which you personally participated as a council member. Adv. Op. No. 99-001.

and 89-012. As a city council member, you are “connected” with the city you serve. However, a public official is, in some situations, connected with *other* political subdivisions. Adv. Ops. No. 89-004 and 89-012.

The word “connected” is not defined in R.C. 2921.42. However, the Ethics Commission has noted, in Advisory Opinion No. 87-002, that “common usage indicates that to be ‘connected with’ something is to be related to, or associated with, that entity.”

The port authority was created jointly by the City of Cincinnati and Hamilton County. The port authority’s jurisdiction includes the territory of the city and the county. The city appoints a portion of the port authority’s board members. The port authority and city have many other existing and potential connections. See R.C. Chapter 4582. and Adv. Op. No. 89-012.

Therefore, as a city council member, you are also “connected” to the port authority created by the city. See Adv. Ops. No. 89-012 (because a port authority and the city creating it are connected or related to each other in several respects, the city’s law director is “connected” with the port authority and is prohibited from having an interest in the port authority’s contracts) and 89-004 (a member of a county board of commissioners is connected the local regional transit authority created by the county). As a result, you are prohibited from having an interest in public contracts entered into by or for the use of the city *and* by or for the use of the port authority. The port authority’s acquisition of community and economic development services for property in the city are public contracts entered into by the port authority for the use of the city.

An “interest” that is prohibited under R.C. 2921.42 must be definite and direct in nature and may be financial or fiduciary. An individual who holds an ownership interest in a business has a financial and fiduciary interest in the contracts of the business. See Adv. Ops. No. 78-006, 81-008, and 92-006. Therefore, R.C. 2921.42(A)(4) prohibits your corporation from contracting with the port authority and/or receiving any benefit from the port authority’s issuance of revenue bonds unless you can meet an exception in R.C. 2921.42(C).<sup>4</sup>

In order to meet the exception in R.C. 2921.42(C), you must show that you meet four requirements. The application of each of the four requirements depends on the facts and circumstances. Adv. Ops. No. 80-003 and 82-007. The burden is on you to demonstrate that you are in compliance with the exception. Adv. Op. No. 84-011. The Commission has explained that the application of the (C) exception must be consistent with the underlying principle in R.C. 2921.42: “[A] public official should not have an interest in a public contract with the governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity.” (Emphasis added.) *Id.*

R.C. 2921.42(C)(1) requires that the services that the official provides are necessary. The Commission has stated that community development services are “necessary services” for a public entity. See Adv. Op. No. 84-011.

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<sup>4</sup> R.C. 2921.42(B) and (D) also provide exceptions to the prohibition of R.C. 2921.42(A)(4), but these exceptions are not applicable to the situation you have presented.

R.C. 2921.42(C)(2) requires that the services provided to the political subdivision with which the official is connected are provided pursuant to a "continuing course of dealing" that began prior to his taking public office or that the services are "unobtainable elsewhere for the same or lower cost" by the political subdivision. Because the funding you are seeking will be awarded after you were elected to council, you cannot show a continuing course of dealing.

The Ethics Commission has determined that there are two methods by which a public official who desires to participate in a community development or revitalization project could demonstrate the "unobtainable elsewhere" requirement:

1. Division (C)(2) can be met where: (a) there are sufficient funds available; (b) all of the qualified applicants in the target area, except the public official or employee, have already received assistance; and (c) the funds will lapse if not used in the target area within a specified period of time; or
2. Division (C)(2) can be met where: (a) a public agency accepts applications for participation in the project throughout the year on a first-come, first-served basis in a fair and open application process in which all interested and qualified applicants have an equal opportunity to be considered; and (b) the public agency can show that sufficient funds have historically been able to meet demand and can reasonably project that sufficient funds are, and will be, available to fully serve all interested and qualified persons, even if an eligible official or employee who serves the public agency is permitted to participate.

Adv. Op. No. 2001-02.

The third part of the exception, R.C. 2921.42(C)(3), requires that a public official provide the same or better services to the political subdivision than he would for any other client in similar transactions. The Commission has determined that public officials who wish to participate in a community development project would have no "customers or clients in similar transactions." See Adv. Op. No. 84-011.

Finally, R.C. 2921.42(C)(4) requires that the transaction be conducted at arm's length, that the political subdivision has full knowledge of public official's interest, and that the public official take no part in the deliberations and decisions of the political subdivision with respect to the contract. See also R.C. 2921.42(A)(1) (discussed below). With respect to the criteria set forth in Division (C)(4), the Commission has concluded that it will assist a public official to demonstrate compliance if the public agency's procedure for designating the area for development, notice to prospective applicants, and selection of qualified applicants is fair and objective with no preference given to public officials or employees. Adv. Op. No. 84-011.

If you are able to meet the exception such that your corporation would not be prohibited from using port authority issued revenue bonds to finance the development project or contracting with the port authority for the construction of public improvements, you must also comply with R.C. 2921.42(A)(1) and R.C. 102.03(D) discussed below. However, even if you can meet the

exception in R.C. 2921.42(C) and comply with R.C. 2921.42(A)(1) and R.C. 102.03(D), you are still prohibited from benefiting from a TIF, or any other public contract, authorized by city council.

### **Other Considerations**

In your letter, you indicated that you would recuse yourself from matters related to the City Lights development project. R.C. 2921.42(A)(1) prohibits a public official from authorizing, or employing the authority or influence of his office to secure authorization of, any public contract in which he, a member of his family, or any of his business associates, has an interest. R.C. 2921.42(A)(1) would prohibit you from exercising the authority or influence of your office to secure contracts, including economic development assistance from the port authority for your corporation. You are prohibited from voting, discussing, deliberating, recommending, or otherwise using your authority or influence, including your authority over other city or port authority officials or employees, to affect the decision-making process regarding the receipt of these contracts. See generally Adv. Op. No. 92-012.

Furthermore, you would be prohibited from participating in any matter or decision that would affect the continuation, implementation, or terms and conditions of the funding. See generally Adv. Ops. No. 82-003, 89-005, and 92-012. These matters and decisions include, but are not limited to, the authorization or approval of payments of the funding, and the renewal, modification, termination, or renegotiation of the funding terms. Adv. Op. No. 92-012.

You should also note that R.C. 102.03(D) prohibits you from using your position to secure anything of value, including public contracts related to community development projects. Adv. Op. No. 91-011. For example, R.C. 102.03(D) would prohibit you from recommending or directing the actions of any city or port authority official or employee regarding matters related to the City Lights development project, or using your position in any way, formally or informally, to secure any greater or different benefit than the benefit that is available to other parties receiving funding.

A change in zoning and other land use decisions are also things of value. Adv. Op. No. 92-019. R.C. 102.03(D) would prohibit you from participating in any matter that would definitely and directly affect the City Lights development project, including requests for rezoning or other issues. However, provided that you do not use your position in any way to secure favorable decisions for City Lights related to any rezoning or other land use matter, the LLC is not prohibited from seeking rezoning or other land use decisions.

R.C. 102.04(C) prohibits an elected or appointed official from receiving compensation, other than from the agency with which he serves, for representing any person on any matter before the agency. There is an exemption to this prohibition, set forth in R.C. 102.04(D), but the exemption does not apply to you because you are an elected official. Therefore, you would be prohibited from accepting compensation to represent the interests of your corporation before any city agency. See generally Adv. Op. No. 93-004.

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You should also be aware that pursuant to R.C. 102.03(B), you are prohibited from disclosing or using, without appropriate authorization, any confidential information that you acquire in the course of your official duties as a city council member. No time limitation exists for this prohibition. Adv. Op. No. 88-009.

Finally, you should seek guidance from the Cincinnati City Solicitor regarding City of Cincinnati Municipal Ordinance Sec. 101-01, which states in pertinent part, "A member of council shall not be interested in a contract with the city and shall not hold employment with the city. A member who ceases to possess any of the above qualifications or removes from the city shall forthwith forfeit the office of council member." (Emphasis added.) This provision may also affect your ability to pursue benefits from a TIF during your service on council.

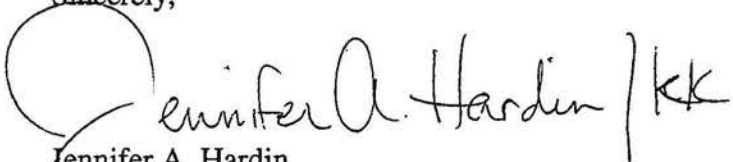
### Conclusion

As set forth more fully below, disclosure and abstention are insufficient for you to comply with the Ethics Laws if the LLC will seek or receive any financial benefit from the TIF. If the LLC intends to seek service payments from the TIF, you must either step down from your position on city council or end your relationship with the LLC before any authorization is proposed to or made by the city.

If the LLC intends to forego TIF assistance, disclosure of your interest and abstention from matters affecting the project may be sufficient for you to comply with public contract restrictions against your conflict and related to revenue bonds and other port authority contracts, and the prohibitions of the law related to the rezoning of the property. You will also be required to demonstrate that you can meet an exception contained in the public contract law and that you can comply with other restrictions in the Ethics Law and related statutes.

The Ohio Ethics Commission approved this informal advisory opinion with changes it made at its meeting on July 18, 2008. The opinion is based on the facts presented. It 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,

  
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