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May 28, 2010

Informal Opinion 2010-INF-0528

John P. Curp, City Solicitor
City of Cincinnati

Dear Mr. Curp:

On May 14, 2010, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you are the City Solicitor for the City of Cincinnati (city), and that you are requesting the opinion on behalf of the city.

By way of history, you have explained that the city is involved in a large-scale, intra-urban streetcar transportation project. You question whether the Cincinnati streetcar project ("Streetcar") constitutes a public infrastructure improvement which provides a general and uniform benefit to the residents, workers, and business owners of Cincinnati, sufficient to permit, in the absence of a direct benefit, individual members of Cincinnati City Council to discuss, deliberate, and vote on matters related to the authorization of appropriations or authorization of the issuance of bonds to build the Streetcar pursuant to the Ethics Law.

Brief Answer

As explained more fully below, the Streetcar project constitutes a public infrastructure improvement that may well provide, depending upon factors entirely external to the application of the Ethics Law, a general and uniform benefit to the residents, workers, and business owners in Cincinnati. In the absence of a direct benefit to the council members, their family members, or their business associates, the members of city council are not prohibited from discussing, deliberating about, or voting on matters related to authorization of appropriations or authorization of the issuance of bonds to build the Streetcar.

However, in applying the Ethics Law to the Streetcar matter before city council, a council member who has, or whose family members or business associates have, ownership or development interests in property that is directly adjacent to the route of the Streetcar in the first two phases of the project, which are subject to the power and discretion of city council, will

receive a particular, definite, and direct benefit or detriment from the Streetcar development. For that reason, Ethics Law conflicts of interest sections R.C. 102.03(D) and (E) prohibit such a council member from discussing, deliberating about, voting on, or participating in any other way, in any matters related to the current phases of the Streetcar, including authorization of appropriations or authorization of the issuance of bonds to build it.

Facts

You have explained that the primary purpose of the Streetcar is to provide public transportation to the residents, workers, and visitors of the city. You have explained that the city is considering construction of the first two phases of a city-wide network of streetcar lines. These two phases involve a route from The Banks to Findlay Market (through the central business district of Cincinnati) and from Findlay Market to the Zoo (running through the University district and the Medical Center). The proposed route of the Streetcar will link an intermodal transportation center near the river to the business district, tourist attractions, hospitals, the University of Cincinnati, and over a dozen neighborhoods.

The specific location of Streetcar routes will be determined by the City Manager, in consultation with engineering and technical experts. You have indicated that members of city council do not intend to participate, and the administration will not request the participation of city council, in decision-making regarding the location of the Streetcar route.

Purpose of an Advisory Opinion

R.C. 102.08 statutorily authorizes the Ohio Ethics Commission to render advisory opinions with regard to questions concerning ethics, conflict of interest, or financial disclosure under Revised Code Chapter 102., and Sections 2921.42 and 2921.43. Generally, the Ethics Commission issues advisory opinions in response to questions that are either hypothetical or prospective in nature. Ohio Ethics Commission Advisory Opinion No. 75-037.

The Commission has explained that the rendering of an advisory opinion is not a fact-finding process and it cannot, in rendering an advisory opinion, determine whether a public official or employee has violated a provision of the law that has criminal sanctions. *Id.* Rather, an advisory opinion serves to explain the prohibitions within the Ethics Law and related statutes and sets forth the standards and criteria that a public official or employee must observe in order to avoid violating the law based solely on the facts and circumstances described by the official or employee in his or her request to the Commission. *Adv. Ops. No. 75-037, 90-013, and 92-015.* If an official receives a written advisory opinion from the Ethics Commission, whether a formal, published opinion or an informal or staff opinion, in response to his or her request, and acts in compliance with the guidance in the opinion, the official will have immunity from any civil or criminal action or removal from office based on the facts described in the opinion.

As you noted in your letter, the Ethics Commission issued a staff advisory opinion in June 2009 to one council member regarding the Streetcar based upon the facts presented by the requester. The Commission was not made aware at the time the staff opinion was rendered that you had issued an earlier advisory opinion to the same council member in January 2009 regarding the same question. The council member has acted on matters involving the Streetcar in reliance on the opinion you issued, which presented a reasonable analysis based on the Commission's precedent regarding the uniformity of benefit to all citizens gained from infrastructure improvements.

Your letter provides the Commission with additional facts involving the Streetcar project to those described by the council member in his request for an advisory opinion last year, including several maps of the project. As the City Solicitor, directly involved in the fundamental mechanics of this project, the Commission realizes that the facts you present further enlighten the Commission's understanding of the project. For that reason, the Commission will examine the general question you have raised. This advisory opinion addresses only the prospective matters you have described and does not reach any conclusions regarding matters that may have already occurred.

Conflict of Interest—R.C. 102.03(D) and (E)

All members of city council are "public officials" subject to the prohibitions of R.C. 102.03 (D) and (E), which provide:

- (D) 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.
- (E) No public official or employee shall solicit or accept 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.

R.C. 102.01(B) and (C) (any person who is elected to an office of a city is a public official); Adv. Op. No. 89-008.

The term "anything of value" includes money, goods, any interest in realty, and every other thing of value. R.C. 102.03(G), 1.03. "Anything of value" includes any increase or decrease to the value of property, and any beneficial *or* detrimental economic impact of a decision made by a public body. Adv. Ops. No. 85-012, 90-002, 90-012, and 97-002.

The Commission has explained that R.C. 102.03(D) and (E) prohibit public officials from voting on, deliberating about, participating in discussions, or otherwise using their official authority or influence with regard to any matter that would provide such a definite and particular pecuniary benefit or detriment to property in which they have an interest that their private interests could impair their independence of judgment in making their official decisions. The law also prohibits public officials from soliciting, or using their positions to secure, anything of value for members of their family and for their business associates. The Commission has determined that the relationship between a public official and his or her family members (such as parents, children, spouse, or siblings) or business associates (such as an employer or partner) is so close that the official's objectivity and independence of judgment would be impaired if the official were to make decisions or recommendations, or otherwise take action, on any matter that would result in a definite and direct benefit or detriment to these related parties. See Adv. Op. No. 79-008, 89-008, and 98-002.

As you noted in your letter, the Commission has examined the application of the Ethics Law and related statutes to many situations that include questions of conflicting interests involving infrastructure and other large scale public improvements. In Advisory Opinion No. 88-004, the Commission was asked about the ability of a city council member to participate in infrastructure improvements (specifically, the widening of roads and installation of sewers) that would affect the council member and his business partners. The Commission stated:

[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. (Citations omitted.) 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. (Citation omitted.) 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. . . .

Although an official may not be prohibited from participating in matters which provide a general uniform benefit to citizens of the city, the mere fact that the property of persons other than the council member will benefit from council action does not necessarily mean that, under specific circumstances, he would not receive a definite and particular benefit from the action so as to be prohibited from participating. (Citation omitted.) *The standard in judging such conduct is whether the matter before council would provide such a definite and particular benefit for the council member that his private interest could impair his*

independence of judgment or unbiased discretion in making his official decisions. (Citations omitted.) A council member should refrain from participating in any matter where an affirmative decision would decrease the value of his property, or have some other direct, detrimental effect on his private interests, as well as where an affirmative vote would benefit his property, since his independence of judgment could be impaired in either situation.

Adv. Op. No. 88-004 (underlined text in original; italics added).

In Advisory Opinion No. 92-013, the Ethics Commission considered whether a village council member was prohibited from participating in infrastructure improvements such as neighborhood revitalization through sidewalk improvements in the village. The Commission applied both the public contract restrictions, found in R.C. 2921.42, and the conflict of interest restrictions, found in R.C. 102.03, to the question. As you have correctly noted in your letter, the Commission concluded that individual landowners do not, under the public contract restrictions set forth in R.C. 2921.42, have an interest, or occupy a position of profit, in infrastructure improvements so as to implicate those public contract restrictions.

Therefore, even though public money would be expended and public contracts entered into in order to complete infrastructure improvements, the Commission concluded that R.C. 2921.42(A)(1) and (3) do not prohibit the village council members whose property may be affected by the improvements from participating in matters regarding the commitment or expenditure of public funds. Further, the Commission concluded that, even though their properties may receive the value of the improvements, individual village council members do not have a definite and direct interest in the improvements such that the prohibition against having an interest in a public contract, contained in R.C. 2921.42(A)(4), would be implicated.

This same conclusion involving the public contract law would apply to the situation you have described. Individual property owners in the city would not have a definite and direct interest, or occupy a position of profit, in city council's actions related to the authorization of appropriations or the authorization of the issuance of bonds to build the Streetcar, even though their properties may be directly adjacent to the Streetcar route.¹ For that reason, R.C. 2921.42(A)(1) and (3) do not prohibit the officials from participating in matters affecting the Streetcar.

¹ By contrast, if a business owned by a city council member, or by a council member's family members or business associates, would be providing services to the city in connection with contracts for goods or services related to the construction of the Streetcar, or whose property would be acquired by the city for the Streetcar, would be within the scope of the restrictions in R.C. 2921.42(A)(1), (3), and (4).

However, the Commission did *not* conclude, in Advisory Opinion No. 92-013, that a public official having a particular, definite and direct conflict of interest was always enabled to participate in matters affecting infrastructure improvements as part of a revitalization project. The Commission concluded:

R.C. 102.03(D) *prohibits* a public official from participating or voting in matters which provide a particular and definite pecuniary benefit to property in which he has an interest. . . . However, R.C. 102.03(D) would not prohibit a public official from participating or voting on general legislation which provides a uniform benefit to all citizens within the political subdivision, or a large portion thereof. . . . Applying the reasoning of Advisory Opinions No. 85-006 and 88-004 to the instant situation, a village council member may participate or vote on general legislation which provides a uniform benefit to all citizens within the village, or a large portion thereof, but may not participate in matters which provide a particular and definite pecuniary benefit to property in which he has an interest.

Adv. Op. No. 92-013 (emphasis added.)

Large-Scale Public Improvements

Directly responsive to the key question before the Commission in applying the Ethics Law, you have described the Streetcar project as a large-scale transportation project, and compared it to bus systems. Generally, the Commission has stated, in prior applications of the conflict of interest provisions, that large-scale comprehensive infrastructure improvements are designed for the general and uniform benefit of the entire political subdivision, or a large portion thereof, and thus are the type of action in which public officials may participate even though they, or their family members or business associates, own property that will benefit from the improvements. In such situations, if the Ethics Law prohibited public officials from participating in the governmental entity's decisions regarding improvements, where the officials are among the majority of citizens in the community whose property value will be affected by the improvements, the governmental entity would be unable to move forward with such large-scale development matters.

The application of R.C. 102.03 (D) and (E) is always dependent upon the facts and circumstances for each public official in each situation. See Adv. Op. No. 87-008. When considering the facts and circumstances of each situation, where there is a benefit or detriment to property owned by public officials, a conflict of interest exists. The question is whether the benefit or detriment that results from a public agency's decisions on a matter is: (1) uniform to all, or most, citizens in the community, including individual officials, in which case the conflict of interest *will not* impair the officials' independence of judgment or unbiased discretion in the matter; or (2) uniform to most, but particular, definite, and direct for individual officials, or for their family members or business associates, in which case the conflict of interest *will* impair the officials' independence of judgment or unbiased discretion in the matter.

The fact that a city council member, or the member's family or business associates, owns property that will receive a definite and direct benefit as a result of infrastructure improvements does not mean that the improvements cannot be made, or that appropriations cannot be authorized, or bonds issued, in connection with the project. Rather, the Ethics Law prohibits the council member from *participating* in the city's decision-making process in those matters that provide a particular and definite pecuniary benefit to property owned by the council member, or the council member's family or business associates. The council member would be prohibited from voting on, discussing, deliberating about, making recommendations, formally or informally lobbying, or taking any other action, in his or her role as a council member, with respect to the matter. Adv. Op. No. 92-019. The council member would also be prohibited from using his or her influence, as a city council member, over city employees or other city officials, in order to secure any benefit, or avoid any detriment, to the value of the property. Id.

Application of Precedent

In general, the Commission has concluded that the value of property *adjacent to* parcels that are newly developed or restored, or whose uses are substantially changed, will be definitely and directly affected by the development or restoration. See Adv. Ops. No. 92-019 and 98-002. A variety of factors pertaining to the development or revitalization of one property could affect the value of adjacent property. Increased or decreased noise, traffic, and pedestrians, fewer or additional traffic signals and signs, the availability or access to on-street or off-street parking, and changes to the character or use of a property, resulting from development or restoration of the property, can all affect the value of adjacent properties. R.C. 102.03(D) and (E) will prohibit a public official from participating in a public agency's decisions related to the development or restoration of a property if the official, or the official's family members or business associates, own or have development rights for properties adjacent to it.

While the Streetcar project will undoubtedly affect all citizens in Cincinnati, it cannot be argued that its affect on all citizens is "uniform" in manner. The "re-envision Cincinnati" and other maps you provided to the Commission show the proposed route of the Streetcar and most of the city. The first two phases of the Streetcar will serve a small portion of the city. Those individual citizens whose properties are located directly adjacent to the proposed route for the first two phases will be affected by the Streetcar project in a way that is particular, definite, and direct, and do not receive a uniform benefit from the city's action on the Streetcar project.

According to a feasibility study conducted for the city by HDR Engineering, Inc., the proposed alignment of the streetcar route was selected, in large part, to serve and stimulate reinvestment and economic development in planned redevelopment areas. The study team recognized that distance from transit (either walking or linear) is a key variable used in determining the system's effect on property values. For assessment, the team broke the Streetcar development area into three market zones and seven sections along the alignment. The study estimated development and premium effects for the Streetcar corridor, a three block radius around the alignment in those seven sections. The study team conducted a benefit cost analysis

that estimated total increases in values for existing commercial and residential properties in the Streetcar corridor of \$379 million over 30 years attributed solely to the streetcar investment.

Your specific question is whether the Streetcar project is a public infrastructure improvement which is a general and uniform benefit to the residents, workers, and business owners of Cincinnati, sufficient to permit, in the absence of a direct benefit, individual members of Cincinnati City Council to discuss, deliberate, and vote on matters related to authorization of appropriations or authorization of the issuance of bonds to build the Streetcar.

The answer is that the Streetcar project is a public infrastructure improvement that provides a general and uniform benefit to the residents, workers, and business owners in Cincinnati. In the absence of a direct benefit to them, their family members, or their business associates, the members of city council are not prohibited from discussing, deliberating about, or voting on matters related to the Streetcar, including the authorization of appropriations or authorization of the issuance of bonds to build it.

However, a council member who has, or whose family members or business associates have, ownership or development interests in property that is directly adjacent to the route of the Streetcar in the first two phases of the project, which are subject to the power and discretion of council, will receive a particular, definite, and direct benefit from the Streetcar development.² For that reason, R.C. 102.03(D) and (E) prohibit such a council member from discussing, deliberating about, or voting on, or participating in any other way, in matters related to the Streetcar, including the authorization of appropriations or authorization of the issuance of bonds.

The additional information you provided did not change the opinion rendered last year for the individual council member who sought guidance. However, the other members of council can proceed on the Streetcar project in reliance on this opinion, and will be afforded the immunity for their actions described in R.C. 102.08

Comparison to an Existing Transit System

Your request notes concerns about the comparison between streetcars and other transit systems. Without attempting to address all transportation systems in all communities, the Commission would note several factual distinctions between the Metro Bus System in Cincinnati and the Streetcar project.

² While the feasibility study identified a Streetcar corridor that will be affected by the Streetcar development, the Commission is concluding only that those properties adjacent to the proposed route will receive a definite and direct enough benefit or suffer a definite and direct enough detriment for purposes of the application of R.C. 102.03(D) and (E). The Commission does not conclude or suggest that other properties will not be affected, only that those properties most definitely and directly affected are the adjacent properties.

First, the Metro Bus System is an established system that has been in existence for many years and provides services to the *entire* Cincinnati Metropolitan area throughout Hamilton County and into adjoining counties. By contrast, the Streetcar project is a fledgling development which, should the first two phases be completed, will serve a significantly smaller portion of the city.

Second, the Metro Bus System is not operated by the city, but is under the control of a separate political subdivision, the Southern Ohio Regional Transit Authority (SORTA). A council member may ask SORTA to consider changing the way it operates the Metro, but cannot effectuate those changes as a part of his or her public authority. According to its Website, SORTA receives funding from a variety of sources, including three-tenths of one percent (.3%) of the earned income tax paid to the city by individuals who live or work in the city. While the city provides a significant portion of the funding for SORTA, the source and amount of that funding is established by the city's charter, approved by the citizens of the city, and not subject to the discretion of council. Cincinnati City Charter Art. VIII, Sec. 6c.

Finally, the characters of these two public transportation systems are fundamentally distinct. In general, a bus system operates on public roads and streets, and its routes can be altered at any time without significant infrastructure investments. By contrast, the routes of a streetcar, once constructed, can be altered only by moving both tracks and systems of power lines.

Therefore, in Cincinnati, the Ethics Law does not prohibit a city official from voting to authorize the transfer of funds from the city to SORTA, or participate in other matters that involve SORTA, regardless of the proximity of a Metro bus line to property in which they, a family member, or a business associate has an interest. If the city did control the Metro bus system in Cincinnati, the restrictions discussed earlier in this opinion would apply to council members in matters regarding the bus system.

Conclusion

As explained more fully below, the Streetcar project constitutes a public infrastructure improvement that may well provide, depending upon factors entirely external to the application of the Ethics Law, a general and uniform benefit to the residents, workers, and business owners in Cincinnati. In the absence of a direct benefit to the council members, their family members, or their business associates, the members of city council are not prohibited from discussing, deliberating about, or voting on matters related to authorization of appropriations or authorization of the issuance of bonds to build the Streetcar.

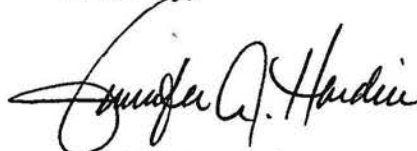
However, in applying the Ethics Law to the Streetcar matter before city council, a council member who has, or whose family members or business associates have, ownership or development interests in property that is directly adjacent to the route of the Streetcar in the first two phases of the project, which are subject to the power and discretion of city council, will

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receive a particular, definite, and direct benefit or detriment from the Streetcar development. For that reason, Ethics Law conflicts of interest sections R.C. 102.03(D) and (E) prohibit such a council member from discussing, deliberating about, voting on, or participating in any other way, in any matters related to the current phases of the Streetcar, including authorization of appropriations or authorization of the issuance of bonds to build it.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on May 25, 2010. 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,

A handwritten signature in black ink, appearing to read "Jennifer A. Hardin". The signature is written in a cursive style with a large initial "J".

Jennifer A. Hardin
Chief Advisory Attorney