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April 5, 2012

Informal Opinion 2012-INF-0405-1

Donald C. Brey, Esquire  
Chester, Wilcox, and Saxbe, LLP

Dear Attorney Brey:

On September 19, 2011, the Ohio Ethics Commission received your request for an advisory opinion on behalf of your clients, two public officials who are married to one another. The two public officials are Jeff McElravy, the Senior Development Officer for the City of Cincinnati (city), and Susan Thomas, the Vice-President of Public Finance for the Port of Greater Cincinnati Development Authority (port authority).

The city and Hamilton County entered into an agreement in 2008 to create the port authority pursuant to R.C. 4582.21, and empowered it to perform duties that enhance, foster, aid, provide, or promote, transportation, economic development, housing, recreation, educational, governmental operations, culture, or research within the jurisdiction of the port authority. Pursuant to the agreement, the port authority is governed by a ten-member board of directors. Five of the directors are to be appointed by the mayor and five are to be appointed by the board of county commissioners.

In your letter, you explained that:

- The city has development projects that receive tax increment financing (TIF) or special assessment bonds issued by the port authority. The port authority is the issuer of TIF debt.
- Ms. Thomas leads the port authority's bond financing activities, including the issuance of revenue bonds, backed by TIF or special assessments, lease revenue bonds, and conduit bonds.
- Mr. McElravy works with commercial real estate developers to construct and redevelop properties for office, light industrial, retail, and residential use. These projects are often financed through bonds issued by the port authority. He may also assume the duties of the city's Development Director after the current Director retires.

- In any development project where the port authority issues TIF debt, the city and the port authority enter into a cooperative agreement that establishes the role of each entity in the financing.
- Both Mr. McElravy and Ms. Thomas have employment responsibilities that involve the negotiation and implementation of these cooperative agreements and participation in the overall development agreement. The city has removed Mr. McElravy from projects in which Ms. Thomas is involved.
- The city and the port authority have also entered into an economic development service agreement. Under the current agreement, or any other agreement, the city will provide additional funding to the port authority and the port authority will have an expanded role in the city's economic development plan.
- Ms. Thomas will be actively involved in the implementation of the work plan developed under the current agreement. Mr. McElravy may be asked to provide input on the annual work plan developed under the current agreement but he will have no decision-making authority.

### **Questions and Brief Answers**

1. Can Mr. McElravy and Ms. Thomas work on development projects in the city where the port authority issues TIF or special assessment bonds for the project, or on the implementation of economic development service agreements between the city and the port authority?

Yes, provided that neither of the public employees receives any personal benefit from the TIF, bonds, or economic development service agreement.

However, if either employee receives a personal benefit from an agreement, the conflict of interest law prohibits his or her spouse from participating in matters that affect the agreement.

2. If Mr. McElravy becomes the Development Director, would the answer to the first question change?

No.

### **Family Member's Employer**

The Commission has previously concluded that, in most situations, a person is not prohibited from serving a public agency because a member of his or her family is employed by an organization that receives funding from, or has contracts with, the public agency.<sup>1</sup> However, the person will have a conflict of interest on any matters definitely and directly affecting his or her family member.

First, the public contract law prohibits a public employee from authorizing, or securing the authorization of, any public contract with his or her family member's employer if the family member has a definite and direct financial or fiduciary interest in the contract. Second, the conflict of interest law prohibits a public employee from participating in matters that affect his or her family member's employer if the employee's family member will receive a definite and direct benefit from the matter. These restrictions protect the public by making sure that a public employee's decisions on a matter are not improperly influenced by any benefit his or her family member receives from the decisions.

**Authorizing a Contract in which a Family Member has an Interest—R.C. 2921.42(A)(1)**

Mr. McElravy and Ms. Thomas are both public officials<sup>2</sup> subject to the restrictions of R.C. 2921.42(A)(1), which provides that no public official shall knowingly:

Authorize, or employ the authority or influence of the public official's office to secure authorization of any public contract in which the public official, a member of the public official's family, or any of the public official's business associates has an interest.

A "public contract" includes any purchase or acquisition of property or services by a port authority or a city, and any contract for the design, construction, alteration, repair, or maintenance of any public property.<sup>3</sup>

A political subdivision's purchase or acquisition of community and economic development services, or urban renewal or revitalization services through the use of grants, loans, land reutilization programs, and other kinds of financing constitutes a "public contract."<sup>4</sup> A public contract can exist between two public agencies.<sup>5</sup> The TIF, bonds, and economic development service agreements between the city and the port authority are public contracts.

R.C. 2921.42(A)(1) prohibits each of the public employees from authorizing, or using his or her public position to secure authorization of, these contracts if his or her spouse "has an interest" in the contract.

An employee of a public agency has a prohibited interest in the agency's contracts if he or she has a definite and direct interest in the contract that is of either a financial or fiduciary nature.<sup>6</sup> In this situation, neither of the employees receives any definite and direct financial benefit from the contracts between their public employers. They have no financial interest in the contracts.

However, they are both management employees who exercise significant authority on behalf of their public employers. They are involved in the negotiation and administration of the contracts between the two agencies. They may execute the contracts on behalf of their employers.

However, a determination of whether an employee has an interest in his or her employer's contracts depends on all of the facts and circumstances.<sup>7</sup> Two relevant considerations, in this situation, are the creation and composition of the port authority and the nature of the contracts between the city and the port authority.

First, the port authority was created in a mutual agreement to which the city and the county are parties. Pursuant to the agreement:

- Half of the ten members of the port authority's board are appointed by the city mayor;
- The city provides annual financial support for the operating expenses and activities of the port authority; and
- The port authority must:
  - Obtain approval of city council before exercising its power of eminent domain over any property located within the city's corporate limits;
  - Provide written notice of and invitations to attend all of its meetings to the mayor or city manager and make an annual report of its activities to the city; and
  - Establish policies that stimulate economic inclusion and ensure equal opportunity that are not less than the city's own minimum standards.

These provisions demonstrate that, while the port authority is a public agency separate from the city, the two public agencies are intended to work cooperatively on economic development in the community.

Second, the TIF, bonds, and economic development service agreements are not simple agreements under which one party sells, and the other acquires, services. Rather, they are collaborative agreements under which both the city and the port authority agree to work together to promote development in the community. The agreements create a funding stream and economic development opportunities for the communities over which the two agencies have jurisdiction. The agreements extend and serve the cooperative purpose for which the port authority was created.

Therefore, because the interests of the two agencies are aligned, the fiduciary interests of its employees are also aligned. Based on these facts, the city employee and port authority employee are not prohibited from acting, in their respective public positions, on these kinds of collaborative contracts between the city and the port authority.

However, the officials will be subject to the conflict of interest restrictions in R.C. 102.03(D).

**Conflict of Interest—R.C. 102.03(D)**

Mr. McElravy and Ms. Thomas are both public employees<sup>8</sup> subject to the conflict of interest restriction in R.C. 102.03(D), which provides:

No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

"Anything of value" includes money and every other thing of value.<sup>9</sup>

The Commission has previously stated that R.C. 102.03(D) prohibits a public employee from using his or her position to secure anything of value for an individual with whom the public employee has a close family relationship, including the employee's spouse.<sup>10</sup>

The Commission has concluded that, when a public employee's family member receives a definite and direct benefit or detriment in a matter before the employee's public agency, the public employee's objectivity and independence of judgment when reviewing the matter will be impaired.<sup>11</sup> Therefore, if a matter before a public agency affects the *employer* of a public employee's family member, and the family member receives a definite and direct benefit or detriment from the agency's decision on the matter, R.C. 102.03(D) prohibits the employee from participating in the agency's decision-making on the matter.<sup>12</sup>

Therefore, if Ms. Thomas would receive a definite and direct benefit or detriment from the city's decision on any matter affecting her employer, the port authority, R.C. 102.03(D) would prohibit Mr. McElravy from participating in the decision. If Mr. McElravy would receive a definite and direct benefit or detriment from the port authority's decision on any matter affecting his employer, the city, R.C. 102.03(D) would prohibit Ms. Thomas from participating in the decision.

The Ethics Commission has held that whenever R.C. 102.03(D) prohibits public employees from participating in matters, they must withdraw from those matters.<sup>13</sup> The public employee cannot participate in the decision-making, deliberations, or formal or informal discussions on the matter. Any such matter must be handled by an individual who can act independently of the official on that matter.<sup>14</sup> Either of the two employees in this situation must withdraw from matters before his or her public agency that result in a definite and direct benefit or determine for his or her spouse.

If either of the public employees is required to withdraw, he or she should notify a supervisor and chief legal counsel for the agency. The supervising official is responsible for reassigning the matter to another official or employee at the agency.

For example, if the city is considering altering its agreement creating the port authority, its decision will result in a definite and direct benefit or detriment to the employees of the port authority. In that situation, R.C. 102.03(D) would prohibit Mr. McElravy from participating, in any way, in the city's consideration or decision on the matter. Also, if either public employee

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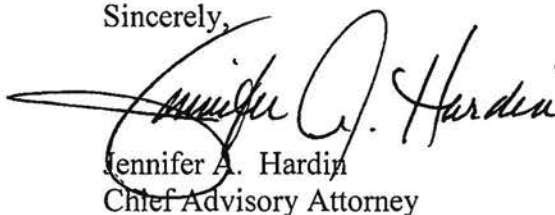
receives a fee or bonus that is definitely and directly based on his or her work on a particular matter involving the other public agency, R.C. 102.03(D) prohibits his or her spouse from taking any action on that matter.

### **Development Director**

The conclusions in this advisory opinion will apply to Mr. McElravy in his current public position and if he becomes the Development Director. In either position, he is required to withdraw from any matter before the city if his wife would receive a definite and direct benefit or detriment from the matter. However, he would not be barred from serving as Development Director unless there are so many matters before the city that result in a definite and direct benefit to his spouse that he would be unable to effectively perform the duties of his office.<sup>15</sup>

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 5, 2012. This 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. It does not purport to interpret other laws or rules. If you have any questions or need additional information, please contact the Ethics Commission again.

Sincerely,



Jennifer A. Hardin  
Chief Advisory Attorney

cc: Maria Armstrong, Bricker & Eckler  
John P. Curp, Cincinnati City Solicitor  
Joseph T. Deters, Hamilton County Prosecuting Attorney

The Ohio Ethics Commission Advisory Opinions referenced in this opinion are available on the Commission's Web site: [www.ethics.ohio.gov](http://www.ethics.ohio.gov).

<sup>1</sup> Ohio Ethics Commission Advisory Opinion No. 2009-02.

<sup>2</sup> R.C. 2921.01(A).

<sup>3</sup> R.C. 2921.42(I)(1).

<sup>4</sup> See Adv. Ops. No. 83-005, 84-011, 85-002, and 88-006.

<sup>5</sup> Adv. Op. No. 2009-02.

<sup>6</sup> Adv. Op. No. 2009-06.

<sup>7</sup> Id.

<sup>8</sup> R.C. 102.01(B) and (C).

<sup>9</sup> See R.C. 102.03(G).

<sup>10</sup> See Adv. Op. No. 98-003.

<sup>11</sup> See Adv. Ops. No. 2009-02 and 89-009. The law applies whenever matters before an official affects his or her close family members. See generally Adv. Ops. No. 79-008 (spouse), 88-005 (children), and 98-002 (siblings).

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<sup>12</sup> Adv. Op. No. 89-008.

<sup>13</sup> Adv. Op. No. 89-010.

<sup>14</sup> Adv. Op. No. 90-010.

<sup>15</sup> Adv. Op. No. 92-004.