



## OHIO ETHICS COMMISSION

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August 11, 1995

Informal Opinion 1995-INF-0811-3

Robert Wilkinson  
Village Administrator  
Village of Canal Fulton

Dear Mr. Wilkinson:

In your letter to the Ethics Commission, you state that the Ohio Department of Transportation has awarded the Village of Canal Fulton (Village) a grant of \$226,512 to construct an historically authentic canal wharf on property adjacent to the Village's business district. You ask whether the Ohio Ethics Laws and related statutes prohibit two members of council and the law director from participating in matters regarding the proposed project due to their ownership and leasehold interests in business district property.

As explained below, R.C. 102.03 (D) prohibits the law director from discussing, deliberating, voting, or otherwise participating, formally, or informally in the decisions which involve the proposed project because he and his business associate own property which would be definitely and directly affected by the proposed project. R.C. 102.03 (D), generally, would not prohibit the two city council members from voting or otherwise participating in deliberations regarding the proposed project, unless under the facts and circumstances, the council members anticipate the receipt of a definite and direct pecuniary personal benefit from the consummation of the project.

It must be initially noted that your request for an advisory opinion cites Advisory Opinion No. 80-007 which holds that infrastructure improvements fall within the definition of a public contract for purposes of R.C. 2921.42, and that a council member who owns property that benefits from an infrastructure improvement has an "interest" in a public contract for purposes of R.C. 2921.42 (A)(4). The Ethics Commission overruled this holding, in part, in Advisory Opinion No. 92-013. However, Advisory Opinion No. 92-013 expressly reaffirmed the holding of Advisory Opinion No. 80-007 that R.C. 102.03 (D) prohibits a council member from participating in decisions or voting on improvements made as part of a downtown revitalization project that would benefit his property. The prohibition imposed by R.C. 102.03 (D) is applicable in this situation.

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### **The Ohio Canal Restoration Project**

You have described the proposed project and the property in which the officials have an ownership or leasehold interest. In summary, the project is intended to benefit the downtown business area and, at least indirectly, all Village residents by enhancing pedestrian facilities and landscaping adjacent to the canal in accordance with the Village's Master Plan for the Downtown and Central Business District. In order to complete the project, the Village will have to appropriate \$25,000 to cover the cost of a portion of the engineering and design fees. The property owners in the area affected by the project will not pay assessments for the infrastructure improvements which will be adjacent to their property. The Village may have to obtain easements from owners whose properties are next to the canal. However, the need for easements will be known only after the site is surveyed and the wharf designed.

### **Affected Village Officials**

The law director, Shawn Kenney, is one of two owners of a building at 209 South Canal Street. Mr. Kenney has a law office in this building. The other owner of the building at 209 South Canal Street is a former council member, Mark Stephan. Mr. Stephan has an insurance office at this location. A council member, Thomas Messenger, owns a residential/commercial building at 102-106 South Canal Street. Mr. Messenger resides in a second-floor apartment at this address. Another council member, Pamela Moore, rents living quarters in a building at 118 North Canal Street. Ms. Moore is employed as the executive director of the Canal Fulton Chamber of Commerce. The Chamber of Commerce rents office space in this building.

### **Prohibition Imposed by R.C. 102.03 (D)**

The instant situation implicates the prohibition imposed by R.C. 102.03 (D), which reads:

No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his duties.

The council members and the law director fall within the definition of "public official or employee" for purposes of R.C. 102.03 and are subject the prohibition imposed by Division (D). R.C. 102.01 (B) and (C); Ohio Ethics Commission Advisory Ops. No. 92-013 (council member) and 93-006 (solicitor).

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 102.03 (G). The Ethics Commission has held that a land-

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use decision that either beneficially or detrimentally affects the value of property is a thing of value for purposes of R.C. 102.03. Advisory Op. No. 88-004. See also Advisory Ops. No. 79-003, 79-008, 80-007, and 85-006.

The Ethics Commission has held that R.C. 102.03 (D) prohibits a public official or employee from participating, formally or informally, with respect to land-use decisions affecting property bordering, or near, the public official's or employee's property where the decisions will have a definite and direct beneficial or detrimental financial impact upon the official's or employee's property. See Advisory Ops. No. 88-004, 88-005, 92-013, and 92-019. Also, the Ethics Commission has held that R.C. 102.03 (D) prohibits a public official or employee from using his authority or influence, formally or informally, to secure anything of value for a business associate, unless the official can demonstrate that, under the specific facts and circumstances, his independence of judgment in making official decisions could not be impaired by his business associate's interests. See Advisory Op. No. 88-004 (if an official and an individual are shareholders in a closely held corporation, then the relationship between the two may be such that the official could not objectively decide a matter affecting that individual, but if an official is a shareholder in a large corporation, that fact would be insufficient to show that the official could not impartially fulfill his duties with regard to a matter affecting the interests of another shareholder). See also Advisory Ops. No. 88-005, 90-002, and 93-016.e

The Ethics Commission has held that R.C. 102.03 (D) does not prohibit a public official or employee from participating or voting on general legislation that provides a uniform benefit to all citizens of the political subdivision, or a large portion thereof, including the public official or employee who participates or votes on the general legislation. Advisory Op. No. 88-004. For example, in Advisory Opinion No. 88-004, the Commission explained that R.C. 102.03 (D) does not prohibit a city council member from participating in the enactment of a general zoning code, but does prohibit him from participating in the consideration of a zoning change or variance affecting property in which he has an interest. The Commission has cautioned that each situation must be examined on its own facts in order to determine whether a public official is prohibited from participating in a matter. See Advisory Op. No. 87-008.

As stated above, the proposed project is intended to benefit the downtown business area and, at least indirectly, all Village residents by enhancing pedestrian facilities and landscaping adjacent to the canal. The issue is whether the two members of council and the law director would realize a definite and direct financial benefit or detriment to property in which they have an ownership or leasehold interest, which would prohibit them from participating in matters regarding the project.

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### Law Director's Property

The law director's situation will be addressed first. As stated above, Mr. Kenney is the law director and is one of two owners of a building at 209 South Canal Street. He has a law office in this building. Mr. Kenney's property borders upon the proposed project site. The project includes sidewalks adjacent to the south and west borders of his property. In this situation, it is apparent that the proposed project could enhance the value of adjacent property in the downtown business district. See Advisory Op. No. 80-007 (R.C. 102.03 (D) prohibits a city council member from participating in matters relating to a downtown revitalization project consisting of street paving, sidewalks, tree planting, and lighting because the building in which he had an interest was to receive improved lighting). In addition, the possibility that the Village may have to obtain an easement from the law director is an additional factor which could be either be a benefit or detriment to the value of his property.

Also, as explained above, R.C. 102.03 (D) generally prohibits a public official or employee from using his authority or influence, formally or informally, to secure anything of value for a business associate. In the instant situation, Mr. Kenney and Mr. Stephan, as owners of the building at 209 South Canal Street, are business associates for purposes of R.C. 102.03 (D). See Advisory Ops. No. 85-004 and 90-008. Therefore, because the law director and his business associate own property which would be definitely and directly affected by the proposed project, R.C. 102.03 (D) prohibits Mr. Kenney from discussing, deliberating, voting, or otherwise participating, formally, or informally in the decisions which involve the proposed project.

The individual who serves as legal counsel for a statutory village is a contractual official or employee of the village. Ohio Ops. Att'y Gen. No. 89-007 and 69-039. See also R.C. 733.48; Advisory Opinion No. 93-006. The Revised Code does not establish the duties of the individual who serves as legal counsel to a village. However, the Ethics Commission has recognized that a village's legal counsel would be asked to prepare village ordinances and provide opinions about the legality and form of ordinances. Advisory Op. No. 93-006. See also Advisory Op. No. 91-008. The Commission held, in Advisory Opinion No. 93-006:

[A]lthough the village solicitor does not participate in the enactment of village ordinances, he may exercise significant discretionary authority with regard to village ordinances.

In the instant situation, R.C. 102.03 (D) would require that the preparation of Village ordinances and provision of opinions about the legality and form of ordinances relating to the proposed project be handled by disinterested legal counsel. Also, the law director's potential participation in official matters that would affect his personal financial interests may raise issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. The Code is not within the Ethics

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Commission's jurisdiction, questions concerning its application may be referred to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

### Council Member Messenger's Property

A council member, Thomas Messenger, owns a building at 102-106 South Canal Street which is used for residential and commercial purposes. Mr. Messenger resides in a second-floor apartment at this address. Mr. Messenger's property does not border upon the proposed project site. The project site is a block from his property.

R.C. 102.03 (D) does not specify a certain proximity that would indicate when a public official or employee may or may not participate in a land-use decision. Whether property values are affected by a land-use decision that affects an area near to the official's or employee's property cannot be determined by linear measurement. Rather, the nature of the land-use decision must be examined. In Advisory Opinion No. 92-013, the Ethics Commission held:

[G]enerally, 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 the village council members may participate even though they own property that will benefit from the improvements. e

The facts and circumstances of each situation will determine whether a project is "large-scale." It is apparent that, what may be a large-scale project for a village or rural township would have only a small or local effect in a large city such as Columbus or Cincinnati.

Because of the small size of the Village, a grant of \$226,512 from the Department of Transportation to the Village is proportionally a large-scale improvement for the Village's entire downtown business district, and indirectly the Village itself. Therefore, in the instant situation, legislative matters that pertain to the proposed project are the type of general legislation in which a Village official and employee may participate even though the official or employee owns property within the business district, provided, of course, that the property is not definitely and directly affected by the improvements or burdens associated with the project. Therefore, R.C. 102.03 (D), generally, would not prohibit Mr. Messenger from voting or otherwise participating in deliberations regarding the proposed project.

However, if Mr. Messenger anticipates the receipt of a definite and direct pecuniary personal benefit from the consummation of the project, then R.C. 102.03 (D) will prohibit him from voting or participating in deliberations or discussions regarding the proposed project. Such a situation could result, for example, where a business enterprise has offered to lease space in Mr. Messenger's

commercial building and the lease is contingent upon the construction of the wharf and the enhancement of pedestrian facilities and landscaping adjacent to the canal. Advisory Op. No. 76-005 (a city council member is prohibited from voting to secure the city's purchase of real estate if he is aware that the seller will invest a portion of the proceeds of the sale in the council member's business). See also Advisory Ops. No. 79-008 and 88-005.

Furthermore, it must be stressed that R.C. 102.03 (D) prohibits Mr. Messenger from misusing the authority or influence of his official position to benefit his property. For example, during deliberations concerning the proposed project, R.C. 102.03 (D) prohibits him from recommending that the pedestrian facilities and landscaping be extended to areas adjacent to his property. If others raise this issue, he is prohibited from voting or participating in the discussions or deliberations. Certainly, if Mr. Messenger desires to remove all appearances of benefit to himself or his property because of his position as a member of council, he may abstain from participating and his vote may not be counted as a vote for or against the matter. See Gitlin v. Berea, No. 58062 Cuyahoga County February 15, 1990 (where a member of a legislative body is not present for discussion or passage of a resolution due to a conflict of interest, his absence is treated as a vacancy in matters in which he is disqualified and only a majority of the qualified members is needed to pass a resolution).

#### Council Member Moore's Residence

Another council member, Pamela Moore, rents living quarters in a building at 118 North Canal Street. Ms. Moore is employed as the executive director of the Canal Fulton Chamber of Commerce. The Chamber of Commerce rents office space in this building. You have correctly identified, as an issue, whether Ms. Moore, as a tenant, is in a position to be financially affected by the proposed project. All of the previous opinions issued by the Ethics Commission have addressed situations involving an ownership interest in the property that would be affected by a public improvement.

Generally, whenever property is leased, the owner of the property, the lessor, retains the legal title to the property with the right of reversion upon expiration of the term of the lease. Ohio Att'y Gen. Op. No. 71-020. The tenant, or lessee, provides consideration for the exclusive use of the property, without the right of ownership, for the term of the lease. Id. Therefore, as a tenant without any right of ownership, Ms. Moore will not realize a definite and direct beneficial or detrimental financial impact from the proposed project. Rather, the owner of the property, the lessor, will realize any financial impact from the project.

Ms. Moore's situation need not be addressed further since her residence and workplace does not border upon the proposed project site and is, in fact, further from the project site than Mr. Messenger's property. Therefore, the same principles which applied to Mr. Messenger's situation

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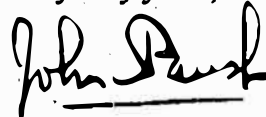
would also govern Ms. Moore's conduct. Accordingly, R.C. 102.03 (D) does not prohibit her from voting or otherwise participating in deliberations regarding the proposed project.

As a final matter, your request for an advisory opinion also asks whether the Village council members acted properly in voting to authorize the grant application, committing Village funds to the project, and authorizing payment of bills in preparation of the grant application.

You are asking that an advisory opinion be rendered upon actions that have already occurred. Generally, an advisory opinion from the Ethics Commission is written in response to a question which is hypothetical or prospective. Advisory Ops. No. 75-037 and 94-002. The Commission has explained that its function in rendering an advisory opinion is not a fact-finding process and it cannot, in an advisory opinion, determine whether a public official has violated the law. Id. An advisory opinion explains the prohibitions imposed by the Ethics Law and related statutes, and sets forth the standards and criteria which a public official must observe in order to avoid violating the law in a given set of circumstances. See Advisory Ops. No. 75-037, 90-013, 92-003, 92-015, and 94-002. If a question is raised with regard to activity which has already occurred, the Ethics Commission can only act through its confidential investigative authority to determine whether there are facts indicating that the Ethics Law may have been violated and to refer those matters for prosecution. Advisory Ops. No. 92-003 and 94-002.

This advisory opinion was approved by the Ethics Commission at its meeting on August 11, 1995. This 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. The Commission apologizes for the delay in responding to your request, and regrets any inconvenience this delay may have caused. Please call me if you have any questions.

Very truly yours,



John Rawski  
Staff Attorney