



OHIO ETHICS COMMISSION
8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368

August 20, 1998

Informal Opinion 1998-INF-0820

Kenneth E. Banks, Jr.
Chief Assistant Director of Law
City of Cleveland

Dear Mr. Banks:

In a letter to the Ethics Commission dated October 27, 1997, you ask for an interpretation of the exemption to the public contract law, set forth in Division (D) of R.C. 2921.42, to three separate program elements of the housing program administered by the City of Cleveland's (City) Community Development Department. The three elements of the City's housing program involved in your question are Land Bank Lots, Tax Abatements, and Infrastructure Improvements.

Your request stems from an advisory opinion that the Ethics Commission issued on March 9, 1993, to Carolyn Allen, a city of Cleveland employee, in which the Commission was asked whether Ms. Allen could participate in these same program elements of the Cleveland housing program. The Commission determined that provisions of the public contract law prohibited Ms. Allen's participation in some aspects of the housing programs. In 1994, subsequent to the Commission's opinion issued to Ms. Allen, the General Assembly enacted the exemption to R.C. 2921.42 described in Division (D) of that statute.

You have now asked whether the exemption in R.C. 2921.42(D), which enables public employees to participate in housing programs funded by public moneys, subject to certain limitations, would apply to the three elements of housing program and would alter the Commission's conclusions in its March 9, 1993 opinion to Ms. Allen. Because you generally reference these program elements, but do not highlight any differences in their operation in your October 27, 1997 letter, the Commission assumes that they currently operate in the same manner as they did in 1993 when the advisory opinion was written to Ms. Allen.

This opinion reaches five general conclusions, which are summarized here, and explained more fully below.

- (1) The exemption of R.C. 2921.42(D) applies to a city employee who purchases land directly from the City Land Bank and also applies to a city employee who is otherwise eligible for a property tax abatement.
- (2) The initial prohibition of R.C. 2921.42(A)(4) does not apply to city employees who purchase land from a third-party who has purchased land from the City Land Bank, or to city employees who receive a benefit from infrastructure improvements constructed by the city as part of a housing and neighborhood revitalization program, provided that the benefit is not selective, differential, or in disproportion to the benefit provided to other property in the city. Because the initial prohibition does not apply in these situations, it is unnecessary to address the application of the exemption to that prohibition.
- (3) R.C. 2921.42(A)(3) does not prohibit a city employee, including one who serves on the board that must approve related contracts, from benefiting from infrastructure improvements under a city housing program.
- (4) R.C. 102.03(D) prohibits a city employee from participating or voting in matters that provide a particular and definite pecuniary benefit to property in which he has an interest, but does not prohibit a city employee from benefiting from infrastructure improvements that are uniform and in common with the other houses constructed in the project.
- (5) R.C. 102.03(E) prohibits a city employee from benefiting from infrastructure improvements that are selective, differential, or in disproportion to the same type of benefits provided to the property of other owners in the city, even if the official or employee abstains from voting or otherwise participating in the approval of the contract to a firm which will construct the improvements.

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

The general prohibition that applies to the questions you have asked is the public contract statute, set forth in 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 he is connected.

R.C. 2921.01(A) defines the term "public official" for purposes of R.C. 2921.42 as "[a]ny elected or appointed officer, or employee, or agent of the state or any political subdivision thereof, whether in a temporary or permanent capacity." The statutory definition includes an elected officer and all public employees, including part-time employees. Ohio Ethics

Commission Advisory Opinions No. 83-005 and 84-011. R.C. 2921.42(G)(1) defines the term "public contract" for purposes of R.C. 2921.42 to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by any public entity.

With respect specifically to housing programs, the Ethics Commission held, prior to 1994, that a political subdivision's purchase or acquisition of community development or urban revitalization services, through the use of low-interest loans or grants to property owners, land reutilization programs, and tax abatements constitutes a "public contract" for purposes of R.C. 2921.42, regardless of whether the loans or grants are funded through local or federal moneys. Adv. Ops. No. 84-011, 85-002, 88-006 and 89-008. See also Adv. Op. No. 92-013 (an infrastructure improvement made as part of an urban revitalization project is a "public contract").

An "interest," for purposes of the prohibitions imposed by R.C. 2921.42, must be definite and direct and may be either pecuniary or fiduciary in nature. Adv. Op. No. 81-008. The Ethics Commission further held that a property owner who participates in a political subdivision's urban revitalization project has a definite and direct interest in, and directly profits from, a public contract because the benefit of the project goes to the property owner and the property owner provides the urban revitalization and community development services. Adv. Op. No. 92-013. See also Adv. Ops. No. 83-005, 84-011, 85-002, 88-006 and 91-001. In 1994, in recognition of the Ethics Commission's interpretation of the application of R.C. 2921.42 to housing grants and loans, and other property rehabilitation programs, the General Assembly created a specific exception, directed at public employees participation in housing programs. That exception is central to the questions you have asked.

Exception Provided by R.C. 2921.42(D)

The General Assembly amended R.C. 2921.42 in Sub. H.B. 150, 120th Gen. A. (eff. June 23, 1994), by enacting the exception contained in R.C. 2921.42(D), which reads:

Division (A)(4) of this section does not prohibit participation by a public employee in any housing program funded by public moneys if the public employee otherwise qualifies for the program and does not use the authority or influence of his office or employment to secure benefits from the program and if the moneys are to be used on the primary residence of the public employee. Such participation does not constitute having an unlawful interest in a public contract. (Emphasis added.)

In enacting this exemption to R.C. 2921.42(A)(4), the General Assembly neither modified the definition of the term "public contract," as the Ethics Commission had previously applied it to a political subdivision's urban revitalization projects, nor changed the holdings of the prior opinions of the Ethics Commission, which concluded that these projects were "public contracts" for purposes of R.C. 2921.42.

The Commission had its first opportunity to interpret R.C. 2921.42(D) in Advisory Opinion No. 95-007. In that opinion, the Commission concluded that Division (D) of R.C. 2921.42 applies to public employees. As the Commission noted, the exception does not apply to public officials. Adv. Op. No. 95-007. This exception enables employees to participate in housing programs funded by public moneys if there is an objective showing that the narrow requirements of R.C. 2921.42(D) can be met. Under Division (D), a public employee is not prohibited from participating in housing programs funded by public moneys if he can objectively demonstrate that he: (1) qualifies for the program; (2) does not use the authority or influence of his office or employment to secure benefits from the program; and (3) uses the moneys derived from participating in the program for the benefit of his primary residence.

Application of Exemption

In response to your question, the Commission must apply the exemption of R.C. 2921.42(D) to the three elements of the housing program you have outlined.

Land Bank Lots

You ask whether the exception provided by R.C. 2921.42(D) applies to City employees who propose to build houses on land purchased from the City Land Bank, where the City employee purchases the lot directly from the City. You also ask whether the exemption applies to City employees who propose to build houses on City Land Bank land where the City initially sells the lot to a non-profit corporation and the City employee buys the property from the corporation.

As stated in the advisory opinion issued to Carolyn Allen on March 9, 1993, the City owns an inventory of vacant land that is known as the City Land Bank. The City Land Bank is described as follows:

The City acquires land for the City Land Bank when the County is unable to sell tax delinquent nonproductive properties through sheriff sales. City Land Bank property is available for sale at fair market value to purchasers who are interested in constructing new housing, or otherwise using the land for other productive purposes. The purchaser must comply with a deed restriction which requires that the property be developed in accordance with an approved plan. The City may recover the property if the purchaser does not comply with this requirement.

Further, in a formal opinion issued by the Commission in 1988, Advisory Opinion No. 88-006, the Commission examined the City's Land Reutilization Program. The Commission determined that the City's sale of vacant lots, which had been acquired through real estate tax foreclosure proceedings, to purchasers who agreed to pay a purchase price and construct improvements upon the lots or otherwise utilize the property for a specific and useful purpose, was a "public contract" for purposes of R.C. 2921.42 because the City was acquiring community development and

revitalization services from the purchasers. Prior to 1994, according to Advisory Opinion No. 88-006, a city employee would be prohibited from purchasing land directly from the city from a Land Bank Lot unless he could meet the exception set forth in R.C. 2921.42(C).

In response to your question regarding the City Land Bank, however, the more recent exception to the prohibitions of R.C. 2921.42(A)(4), which is provided by R.C. 2921.42(D), applies to City employees who propose to purchase land directly from the City Land Bank because the purchase is a public contract for purposes of R.C. 2921.42(A)(4). In other words, a city employee is not prohibited from purchasing land directly from the City Land Bank if he meets the exemption in R.C. 2921.42(D). That exemption requires that the public employee must objectively demonstrate that he: (1) qualifies for the program; (2) does not use the authority or influence of his office or employment to secure benefits from the program; and (3) uses the benefit derived from participating in the program for the benefit of his primary residence. Once again, it must be noted that the exception in R.C. 2921.42(D) applies only to public employees, and not to public officials. Adv. Op. No. 95-007.

You have also asked whether the exception applies to City employees who propose to build houses on City Land Bank land where the City initially sells the lot to a non-profit corporation and the City employee buys the property from the corporation. This was the situation discussed in the Allen opinion. In that opinion, a developer constructed new houses in cooperation with a non-profit corporation on a lot that the non-profit corporation purchased from the City Land Bank and sold to the developer.

The Allen opinion held that the purchase of a house constructed on land that the non-profit corporation purchased from the City Land Bank was not a "public contract" for purposes of R.C. 2921.42. The Allen opinion also held that a city employee's purchase of a house from a developer, who had constructed the house on City Land Bank property in cooperation with a non-profit corporation, was not a sub-contract for purposes of R.C. 2921.42. In sum, the opinion concluded that a city employee did not have a definite and direct interest in a public contract for purposes of R.C. 2921.42(A)(4) when the employee purchased a house from a third party who purchased land from the City Land Bank. Because the prohibition in R.C. 2921.42(A)(4) does not apply to such a purchase, the city employee need not demonstrate compliance with any exception to the prohibition imposed by R.C. 2921.42(A)(4), including the exemption in R.C. 2921.42(D).

Tax Abatements

The second aspect of the Cleveland Housing Program to be considered in this opinion is tax abatements. You have asked whether the exception provided by R.C. 2921.42(D) applies to a City employee who is eligible to receive a property tax abatement from the City.

As described in the Allen opinion, a property owner who builds a home in a Community Reinvestment Area is eligible to receive a tax abatement for ten years provided that he meets certain obligations established by the City. The Allen opinion held that the City's grant of a tax abatement

to a homeowner in this program is a "public contract" for purposes of R.C. 2921.42 because it is the purchase of community development and revitalization services by and for the use of the City.

The Allen opinion relied upon Advisory Opinion No. 89-008 in which the Commission held that a city's grant of a tax abatement to a corporation for making capital expenditures for its manufacturing facilities promoted economic and community development within the city falls within the definition of a "public contract" for purposes of R.C. 2921.42. In that opinion, the Commission held:

[A] business or corporation may enter into an agreement with the city to develop or redevelop property within the city, construct facilities or undertake various improvements and thereby improve or maintain employment opportunities, eliminate blight, or provide other community services in consideration for the city's agreement to provide a property tax abatement for a specified number of years. . . . A company's obligations under the agreement are quite specific, and must be met before it receives the benefit of the tax abatement. It is apparent that a tax abatement which is granted by a city in exchange for a company's development or renovation of property, . . . is a "public contract" for purposes of R.C. 2921.42 since it is the purchase of economic or community development, or urban renewal services by the city.

Advisory Opinion No. 89-008 addressed the issue of a city providing a tax abatement to a corporation for making capital expenditures on its manufacturing facilities. The Allen opinion held that the same analysis was applicable to a private citizen who receives a tax abatement for the construction of a house because, in both instances, a political subdivision acquires economic or community development, or urban renewal, services.

Therefore, R.C. 2921.42(A)(4) generally prohibits a city employee, who builds a home in a Community Reinvestment Area, from receiving a tax abatement for ten years even if he meets the obligations established by the City, because the City's grant of a tax abatement is a "public contract," the purchase of community development and revitalization services by and for the use of the City, unless the city employee meets the exception in R.C. 2921.42(C). However, a public employee in this situation can also meet the exception provided by R.C. 2921.42(D) if the employee satisfies the requirements in the exemption. That exemption requires that the public employee must objectively demonstrate that he: (1) qualifies for the program; (2) does not use the authority or influence of his office or employment to secure benefits from the program; and (3) uses the benefit derived from participating in the program for the benefit of his primary residence. The R.C. 2921.42(D) exception, once again, applies only to public employees, and not to public officials. Adv. Op. No. 95-007.

It is necessary to note that R.C. 2921.42(D) reads in pertinent part, "Division (A)(4) of this section does not prohibit participation by a public employee in any housing program funded by public moneys." The issue is whether a tax abatement to a homeowner is "a housing program funded by public moneys."

By providing a tax abatement to a person who builds a house within a designated area, the City advances its goal of achieving housing revitalization and community development. Whenever a city provides a tax abatement to a property owner for these purposes, it forgoes collection of taxes that it is entitled to receive and, thus, the city's public moneys are reduced accordingly. In other words, a tax abatement has the same effect upon a city's coffers as if the city had provided a direct payment to the property owner. Therefore, a tax abatement to a homeowner is a housing program funded by public moneys.

In response to your second question, the exception provided by R.C. 2921.42(D) applies to a City employee who is eligible to receive a property tax abatement from the City. In other words, a City employee who is otherwise eligible for a property tax abatement is not prohibited from receiving a tax abatement from the City, as a part of the City's housing program, so long as the employee meets the requirements of the exception set forth in R.C. 2921.42(D).

Infrastructure Improvements

The opinion will now consider the final issues you raise, involving infrastructure improvements. You have asked whether the exception provided by R.C. 2921.42(D) applies to a City employee who is eligible to benefit from public infrastructure improvements associated with a housing project. You ask, also, whether the exception applies to a City employee who serves on the board that approves the contracts with the private firms that construct the infrastructure improvements. In addition, you ask whether the exception provided by R.C. 2921.42(D) applies to the prohibition imposed by Division (A)(3) of R.C.2921.42.

As described in the Allen opinion, the City finances public improvements associated with new housing construction within the City through general obligation bonds. The City uses the bond proceeds to contract with private firms for street, utility, public right-of-way improvements, and site acquisition improvements associated with a residential development. The City Board of Control and City Council must approve these contracts.

In Advisory Opinion No. 92-013, the Ethics Commission examined the issue of property owners benefiting from infrastructure improvements and held that a property owner does not have a direct interest in infrastructure improvements constructed by his political subdivision. The Commission held in Advisory Opinion No. 92-013:

The property owner [who benefits from infrastructure improvements] does not have the same kind of interest in a political subdivision's public improvements as he does in a loan, or grant, or tax abatement that is awarded directly to him. The interest of a property owner who will benefit from an infrastructure improvement made by or for the use of his political subdivision as part of a neighborhood revitalization program is not direct for purposes of R.C. 2921.42. (Emphasis in original.)

As explained in the Allen opinion, R.C. 2921.42(A)(4) does not prohibit a City employee from benefiting from infrastructure improvements constructed by the city that he serves, as part of a housing and neighborhood revitalization program, provided that the benefit received is not selective, differential, or in disproportion to the benefit provided to other property owners in the city.

Therefore, R.C. 2921.42(A)(4) does not prohibit a City employee, including a City employee who serves on the board that approves the contracts with the private firms that construct the infrastructure improvements, from receiving a benefit from infrastructure improvements constructed by the City as part of a housing and neighborhood revitalization program, provided that the benefit is not selective, differential, or in disproportion to the benefit provided to other property in the political subdivision or a portion thereof. Because the prohibition in R.C. 2921.42(A)(4) does not prohibit any non-selective benefit, the city employee does not need to demonstrate compliance with any exception to the prohibition, including the exemption in R.C. 2921.42(D).

Infrastructure Improvements—Other Statutory Considerations

Your question on infrastructure improvements also asks for guidance regarding the prohibition imposed by R.C.2921.42(A)(3). It should first be noted that the exception provided by R.C. 2921.42(D) applies only to the prohibition in R.C. 2921.42(A)(4) and does not apply to other provisions of the Ethics Law and related statutes, including R.C. 2921.42(A)(3).

R.C. 2921.42(A)(3) prohibits a public official from occupying a position of profit in the prosecution of a public contract that he, or a board on which he served, authorized, if the contract was not let by competitive bidding to the lowest and best bidder. The term "public official" includes elected and appointed public officials, and all public employees. R.C. 2921.01 (A). A public official who is a member of a board is subject to the prohibition of R.C. 2921.42(A)(3) even where he has abstained from deliberating, voting upon, or otherwise authorizing the public contract. Adv. Ops. No. 87-008, 91-011, and 92-013. The Ethics Commission has held that the position of profit occupied in the prosecution of the public contract must be definite and direct in order to be prohibited under Division (A)(3). Adv. Op. No. 92-013.

In Advisory Opinion No. 92-013, the Commission held that a property owner realizes a definite and direct advantage, gain, or benefit in exchange for providing community development services when he receives a loan or grant through a political subdivision's housing revitalization program, or a housing unit financed and constructed by the political subdivision; thus the property owner occupies a definite and direct position of profit in the prosecution of these "public contracts" for purposes of R.C. 2921.42(A)(3). See also Adv. Ops. No. 88-006, 89-008, and 91-011. The Commission went on to explain, in Advisory Opinion No. 92-103, however, that when a city enters into a contract with a firm to construct infrastructure improvements, a property owner who benefits from the improvements neither receives consideration for performing these services nor performs work under the contract. Therefore, the Commission held that a property owner's

“position of profit in the prosecution of a public contract” is not direct for purposes of R.C. 2921.42(A)(3) with regard to infrastructure improvements. Id.

In response to your question, R.C. 2921.42(A)(3) does not prohibit a City employee, including one who serves on the board that must approve the related contracts, from benefiting from infrastructure improvements under a City housing program.

However, as explained in Advisory Opinion No. 92-013, R.C. 102.03(D) prohibits a public official or employee from participating or voting in matters that provide a particular and definite pecuniary benefit to property in which he has an interest. Accordingly, R.C. 102.03(D) prohibits a City employee who serves on the board that approves contracts to the firms that construct the infrastructure improvements and who either owns, or plans to purchase property that would benefit from such improvements from participating in the board’s approval of the contracts. Adv. Ops. No. 80-007, 88-004, and 92-013. However, R.C. 102.03(D) does not prohibit a City employee who serves on the board that approves contracts to the firms that construct the infrastructure improvements from benefiting from the improvements, provided that the improvements are uniform and in common with the houses constructed in the project. See also Adv. Op. No. 92-013. In addition, R.C.102.03(E) prohibits a public official or employee from benefiting from infrastructure improvements that are selective, differential, or in disproportion to the benefits provided to other property in the political subdivision or a portion thereof, even if the official or employee abstains from voting or otherwise participating in the approval of the contract to a firm which will construct the improvements. Id. As stated above, the exception provided by R.C. 2921.42(D) applies only to prohibitions imposed by R.C. 2921.42(A)(4), and does not apply to any other provision of the Ohio Ethics Law and related statutes, including R.C. 102.03(D) and (E).

Conclusion

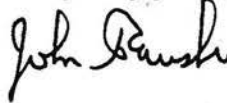
As explained more fully above: (1) The exemption of R.C. 2921.42(D) applies to a city employee who purchases land directly from the City Land Bank and also applies to a city employee who is otherwise eligible for a property tax abatement; (2) The initial prohibition of R.C. 2921.42(A)(4) does not apply to city employees who purchase land from a third-party who has purchased land from the City Land Bank, or to city employees who receive a benefit from infrastructure improvements constructed by the city as part of a housing and neighborhood revitalization program, provided that the benefit is not selective, differential, or in disproportion to the benefit provided to other property in the city. Because the initial prohibition does not apply in these situations, it is unnecessary to address the application of the exemption to that prohibition; (3) R.C. 2921.42(A)(3) does not prohibit a city employee, including one who serves on the board that must approve related contracts, from benefiting from infrastructure improvements under a city housing program; (4) R.C. 102.03(D) prohibits a city employee from participating or voting in matters that provide a particular and definite pecuniary benefit to property in which he has an interest, but does not prohibit a city employee from benefiting from infrastructure improvements that are uniform and in common with the other houses constructed in the project; and (5) R.C.102.03(E) prohibits a city employee from benefiting from infrastructure improvements that are selective, differential, or in disproportion to the same type

Kenneth E. Banks
August 20, 1998
Page 10

of benefits provided to the property of other owners in the city, even if the official or employee abstains from voting or otherwise participating in the approval of the contract to a firm which will construct the improvements.

This informal advisory opinion was approved by the Ethics Commission at its meeting on August 20, 1998. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any further questions, please feel free to contact this Office again.

Very truly yours,

A handwritten signature in cursive script that reads "John Rawski".

John Rawski
Staff Attorney