OHIO ETHICS COMMISSION

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June 22, 2007 Informal Opinion 2007-INF-0622-1

John J. Kulewicz
Vorys, Sater, Seymour & Pease LLP
[redacted]

Dear Mr. Kulewicz:

On May 25, 2007, the Ohio Ethics Commission received your request for an advisory opinion on behalf of Governor and Mrs. Strickland. In your letter, you asked whether there are any circumstances under which they could make an arms' length sale of their condominium to the condominium unit owners' association or a prospective purchaser who also serves as a State of Ohio employee on the First Lady's staff. The employee has known Governor and Mrs. Strickland for a dozen years. She reports to the First Lady's Chief of Staff, who reports to the Governor.

You have stated that the Governor and First Lady recognize and intend to adhere scrupulously to Ohio's Ethics Laws. The Governor and First Lady are seeking guidance from the Commission after a review of the statutes and prior advisory opinions. If the Commission determines that a transaction is not prohibited, you have explained that the Governor and First Lady would strictly observe the applicable ethical standards and appreciate any guidance as to any terms or conditions necessary to assure compliance. Finally, you have explained that, if the Commission determines that conscientious observance by the Governor and First Lady of their ethical responsibilities precludes the proposed transaction under any circumstances, they will not proceed with the proposed sale.

Brief Answer

As explained more fully below, the question you have presented is based on unique facts and circumstances. Given those unique facts, the Ethics Law does not prohibit the Governor and First Lady from selling their condominium, at arms' length, to either the condominium unit owners' association or the state employee, as long as it can be objectively demonstrated that: (1) the property is a one-time equitable exchange under standard real estate terms and conditions and at the fair market value as determined by a qualified and disinterested real estate appraiser; and (2) the employee's continued employment with the state is not dependent upon the sale, and the sale is not dependent upon the employee's continued employment with the state.

Facts

You have explained that, in 2003, the Governor and First Lady purchased a condominium in Columbus. The condominium is subject to the covenants and restrictions set forth in the Declaration of Condominium Ownership and By-Laws of their Condominium Unit Owners' Association. Section 3(k) of the By-Laws requires that, before selling the condominium, an owner must: (1) inform the Association of the identity of the offeror; and (2) offer the unit to the Association at the same price and upon the same terms and conditions contained in the offer. On January 8, 2007, the Governor and First Lady vacated the condominium and moved to the executive residence in Bexley.

You have explained that an individual who is now a state employee has expressed an interest in purchasing the condominium. The potential purchaser worked as a Southern Ohio field representative for Congressman Strickland from 1996 through January 2007. In January 2007, she accepted an unclassified employment position as Project Manager on the staff of the First Lady. The state employee reports to the First Lady's Chief of Staff, who reports to the Governor.

The state employee approached the Governor and First Lady about purchasing their condominium. The Governor and First Lady did not ask for or suggest the purchase. The state employee, who owns and lives on a horse farm in Scioto County, is relocating to Columbus and initiated the purchase proposal for her own convenience. She has indicated that the property is appealing because she is familiar with it, she finds the neighborhood and neighbors compatible, and she can forego the house hunting process.

The Governor and First Lady propose to retain, at their own expense, a qualified and disinterested real property appraiser to value the property. The appraiser will determine a fair market value for the property based on standard valuation factors. The Governor and First Lady would be amenable to accepting an offer, at that price, for possession at closing and with other standard terms and conditions associated with condominium transactions, from the state employee. If the state employee decides not to offer to buy the condominium at that price, the Governor and First Lady plan to retain a realtor and put the condominium on the market at the same price.

If the potential purchaser or any other outside purchaser were to make a bona fide offer, the Governor and First Lady would, as required in the condominium association's by-laws, offer the property at the same terms to the condominium association. If the condominium association chooses to exercise its right to purchase the condominium at those terms, the Governor and First Lady will proceed with a sale to the Association. If the Association chooses to forego its rights, the Governor and First Lady will proceed with a sale to the potential purchaser or other outside party.

You have explained that, at the time of the sale, there will be no ongoing financial relationship between purchaser and the Governor and First Lady. Rather, there will be a one-time simultaneous equivalent transfer of the ownership of the condominium and the funds representing the purchase price.

<u>Conflict of Interest Provision—R.C. 102.03(D) and (E)</u>

Conflict of interest restrictions contained in R.C. 102.03(D) and (E) 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.
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> (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.

Ohio's conflict of interest law protects the public by prohibiting a public official from using his or her position to secure a benefit, or from accepting a benefit, in situations where it is difficult or impossible for the official to exercise the authority of the position he or she holds in an unbiased and impartial manner. Whenever a public official is contemplating a private economic relationship with a person who is doing or seeking to do business with, regulated by, or interested in matters before the public agency the official serves or, as in this case, is a subordinate public employee, the potential for conflict of interest arises. Depending on the facts, the Ethics Law will either limit or prohibit the private relationship. Throughout your letter, you have indicated that the Governor and First Lady fully intend to abide by the guidelines in the law.

The term "anything of value" is defined to include money and every other thing of value. R.C. 1.03, 102.01(G); Ohio Ethics Commission Advisory Opinions No. 82-002 and 89-003. Proceeds from the sale of property would be considered anything of value. Adv. Op. No. 88-003.

R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting, accepting, or using his or her position to secure a thing of value <u>if</u> the thing of value is of such a character as to manifest a substantial and improper influence upon the public official with respect to his or her duties. A thing of value manifests a substantial influence on a public official or employee if it could impair his or her objectivity and independence of judgment in matters affecting the source of the thing of value. Adv. Ops. No. 91-010 and 95-001. R.C. 102.03(D) prohibits a public official or employee from using his or her position to secure these things of value; R.C. 102.03(E) prohibits a public official from soliciting or merely accepting these things of value even where the official has not used his or her authority to secure them. Adv. Op. No. 96-002.

The application of R.C. 102.03(D) and (E) is dependent upon the facts and circumstances of each individual situation. Adv. Ops. No. 86-011 and 87-008. Both the <u>nature</u> and the <u>source</u> of the thing of value are examined to determine whether R.C. 102.03(D) and (E) prohibit a public official or employee from using his or her position to secure or accept it. Adv. Op. No. 2001-04.

As noted above, a party that is doing or seeking to do business with, regulated by, or interested in matters before the agency with which an official serves is an improper source of anything of value to a public official or employee if the thing of value will have a substantial influence on the official or employee. Adv. Ops. No. 91-010 and 95-001. In the situation you have described, the thing of value is the proceeds the Governor and First Lady would realize from the sale of the property. The possibility of conflict arises because the potential purchaser is a state employee who serves on the First Lady's staff and is a subordinate to the Governor. As such, the potential purchaser is regulated by and interested in matters that will be before the Governor. For example, the employee would be subject to the Governor's discretion, and First Lady's recommendations, on matters such as raises, promotions, discipline, benefits, performance evaluations, and other matters that affect the terms and conditions of her employment with the State.

The Governor and First Lady propose that the sale price will be set by an independent real estate appraiser who would establish the fair market value of the condominium based on standard valuation factors. If the potential purchaser offers the fair market value for the condominium, the Governor and First Lady have indicated that they will accept the offer. In such a case, the purchase would be an equitable exchange, where the purchaser makes a payment of the fair market value for the property and receives a real property interest of the same value. As in other ordinary real estate transactions, the sellers will transfer their property interest in the condominium and receive the fair market value of the property from the purchaser.

In this situation, the condominium association has the right of first refusal on the property before it could be sold to any other purchaser, including the state employee. If the state employee chooses not to purchase the property, the Governor and First Lady have proposed to list it for sale on the open market at the same price. If they were to receive an offer from any other purchaser, they would once again be required to offer it to the condominium association on the same terms and conditions.

Based on this combination of facts and circumstances, the money the Governor and First Lady would receive for the condominium is <u>not</u> of such a character as to manifest a substantial and improper influence upon the Governor and First Lady in violation of the Ethics Law. In a limited, one-time equitable exchange, the Governor and First Lady would receive an item of equivalent value to the property and would not secure any additional benefit. <u>See generally</u> Adv. Op. No. 96-003. (A public official who pays the "fair market value" for an item provided to him or her has not received a "gift" from the person and is not required to disclose the person as the source of a gift on his or her financial disclosure statement.). Therefore, within the parameters you have described, R.C. 102.03(E) does not prohibit the Governor and First Lady from selling the property either to the condominium association or to the state employee who is the potential purchaser.[1]

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[1] Because he no longer resides in the condominium, the Ethics Law does require that the Governor disclose the property as a real estate interest on his financial disclosure statement for 2007 (to be filed in 2008). R.C. 102.02(A)(4). If the property is sold in 2007, the Governor will not be required to disclose the condominium as a real property interest in any filing made after 2008. Further, if the proceeds of the sale are "gross income" as defined in the Internal Revenue Code, the Governor will be required to disclose the purchaser as a source of income.

By contrast, if the proposed transaction were to be of a continuing nature, such as a land contract or lease, where the Governor and First Lady would have an ongoing economic relationship with a state employee in a directly subordinate position, the proceeds the officials would realize from the transaction could be of such a character as to manifest a substantial and improper influence upon them. The employee's ability to meet her obligations to the Governor and First Lady under a long-term contract could be dependent upon or subject to her continued employment with the state. It is improbable that the Governor's discretion could be impaired by the one-time equitable exchange described in your letter, with safeguards that objectively demonstrate that it is at arms' length and unrelated to the purchaser's employment. Any ongoing economic relationship, or other circumstances not presented in the request but associated with the sale or with any out-of-the-ordinary treatment of the employee otherwise related to the transaction, would raise more significant issues for the parties under the Ethics Law.

Again, because the proposed sale you have described is a one-time equitable exchange, R.C. 102.03(D) will not prohibit it from proceeding. If the Governor, First Lady, and state employee were contemplating a more prolonged financial relationship, such as a lease agreement or land contract, R.C. 102.03(D) would prohibit the transaction.

Providing a Thing of Value—R.C. 102.03(F)

R.C. 102.03(F) is also relevant:

> No person shall promise or give to a public official or employee 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.

Both the condominium association and the state employee in your question are "persons" subject to the restrictions in R.C. 102.03(F). Adv. Op. No. 90-001.

R.C. 102.03(F) applies to the giver of a substantial thing of value. You have explained that the fair market value of the condominium will be set by an independent real estate appraiser, based on standard valuation factors. R.C. 102.03(F) does not prohibit the condominium association or the state employee from paying the Governor and First Lady the fair market value of the condominium where the buyer will receive real property rights of the same value in return. However, R.C. 102.03(F) would prohibit the state employee from giving the Governor and First Lady any other thing of substantial value.

Conclusion

As explained more fully above, the question you have presented is based on unique facts and circumstances. Given those unique facts, the Ethics Law does not prohibit the Governor and First Lady from selling their condominium, at arms' length, to either the condominium unit owners' association or the state employee, as long as it can be objectively demonstrated that: (1) the property is a one-time equitable exchange under standard real estate terms and conditions and at the fair market value as determined by a qualified and disinterested real estate appraiser; and (2) the employee's continued employment with the state is not dependent upon the sale, and the sale is not dependent upon the employee's continued employment with the state.

The Ohio Ethics Commission issued this informal advisory opinion at its meeting on June 22, 2007.

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,

Jennifer A. Hardin

Jennifer A. Hardin
Chief Advisory Attorney

cc: David E. Freel
Executive Director