



OHIO ETHICS COMMISSION

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Advisory Opinion Number 92-013
August 14, 1992

Syllabus by the Commission:

(1) This advisory opinion expressly overrules the holding of Advisory Opinion No. 80-007 that property owners whose property will benefit from infrastructure improvements have an "interest" in a public contract for purposes of Section 2921.42 of the Revised Code. The holding of Advisory Opinion No. 80-007 that Division (D) of Section 102.03 of the Revised Code prohibits a city council member from participating in decisions or voting on improvements made as part of a downtown revitalization project which would benefit his property is not overruled and is expressly affirmed;

(2) A village council member who owns property which will benefit from an infrastructure improvement made by or for the use of his village as part of a neighborhood revitalization program neither has an interest in the profits or benefits of a public contract nor occupies a position of profit in the prosecution of a public contract for purposes of Section 2921.42 of the Revised Code, provided that the benefit to the council member's property is not selective, differential, or in disproportion to the benefit provided to other property in the political subdivision or the portion thereof receiving the improvements;

(3) Division (D) of Section 102.03 of the Revised Code prohibits a village council member from voting, deliberating, participating in discussions, or otherwise using his official authority or influence with regard to village council's payment for infrastructure improvements made as part of a neighborhood revitalization program which would provide a definite and particular pecuniary benefit to his property. This prohibition does not apply if the improvements provide a general, uniform benefit to the entire political subdivision or a large portion thereof, provided that the benefit to the council member's property is not selective, differential, or in disproportion to the benefit provided to other property in the political subdivision or the portion thereof receiving the improvements.

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Your request for an advisory opinion raises the issue whether the Ohio Ethics Law and related statutes prohibit village council members from benefiting from infrastructure improvements made as part of a neighborhood revitalization program, and funded by village moneys and a Community Development Block Grant (CDBG).

You state that the county planning commission administers CDBG funds for the board of county commissioners. The planning commission selected a village within the county to receive

CDBG funds in order to pay for a comprehensive housing and neighborhood revitalization program. Part of these moneys will fund public works projects which include a large drainage project and sidewalk reconstruction. The grant agreement is between the board of county commissioners and the State of Ohio; however, the agreement is for the benefit of the village and the village is contributing \$4,000 toward the \$35,000 cost of the sidewalk reconstruction project.

In Advisory Opinion No. 80-007, the Commission addressed a situation in which downtown property owned by city council members would benefit from a revitalization project through street paving, sidewalk construction, tree planting, and improved lighting. Advisory Opinion No. 80-007 states that property owners in the area had initiated a petition that the city undertake the infrastructure improvements and agreed to be assessed approximately one-half of the cost of the project with the balance paid from general obligation bonds funded by a direct charge against the city's general fund. In analyzing the issue of public improvements, the opinion relied upon Section 2921.42 of the Revised Code, and it is thus necessary to examine the provisions of that Section.

Division (A) of Section 2921.42 of the Revised Code provides in pertinent part:

(A) No public official shall knowingly do any of the following:

(1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest; . . .

(3) During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid;

(4) 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. (Emphasis added.)

The term "public official" is defined in R.C. 2921.01 (A) for purposes of R.C. 2921.42 to include any elected or appointed officer or any employee or agent of any political subdivision of the state. In Advisory Opinion No. 80-007, the Commission applied Section 2921.42 to city council members. A village council member is also a "public official" for purposes of R.C. 2921.42 and subject to the prohibitions therein. See Ohio Ethics Commission Advisory Opinion No. 79-005. An "interest" which is referenced in Divisions (A)(1) and (A)(4) must be definite and direct. See Advisory Opinions No. 78-005 and 81-008.

The term "public contract" is defined for purposes of Section 2921.42 in Division (E) of that Section, which reads:

(E) As used in this section, "public contract" means any of the following:

(1) The purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state or any of its political subdivisions, or any agency or instrumentality of either;

(2) A contract for the design, construction, alteration, repair, or maintenance of any public property. (Emphasis added.)

It is apparent that Divisions (E)(1) and (E)(2) address different types of transactions. A public contract exists for purposes of Division (E)(1) whenever the State or a political subdivision either purchases or acquires property or services, or enters into a contract for the purchase or acquisition of property and services. A public contract exists for purposes of Division (E)(2) whenever the State or a political subdivision enters into a contract for the design, construction, alteration, repair, or maintenance of public property. A transaction may fall within the definition of a public contract for both Divisions (E)(1) and (E)(2). See generally Advisory Opinion No. 80-001 (a political subdivision contracting with a firm for the construction of a municipal building). However, a transaction which is a public contract as defined in Division (E)(1) is not necessarily always a public contract as defined in Division (E)(2) since the definition of "public contract" in Division (E)(1) is broader than the definition in Division (E)(2).

The Ethics Commission held in Advisory Opinion No. 80-007 that infrastructure improvements made by a political subdivision as part of a revitalization project fall within the statutory definition of "public contract" for purposes of Section R.C. 2921.42. Advisory Opinion No. 80-007 quotes both Divisions (E)(1) and (E)(2) but does not specify which statutory definition of "public contract" was relied upon to determine that infrastructure improvements made by a political subdivision as part of an urban revitalization project fall within the statutory definition of "public contract" for purposes of Section R.C. 2921.42. The portion of the opinion which holds that infrastructure improvements are public contracts reads:

[A] project for the revitalization of a downtown area, which involves the design, construction, repair, or other work on city streets and sidewalks in the area is a "public contract" for purposes of Section 2921.42. (Emphasis added.)

It appears from this language that the definition provided by Division (E)(2) was used. However, as discussed below, despite which Division is relied upon, an examination of the respective definitions is necessary to respond to your question.

Advisory Opinion No. 80-007 holds that the affected city council members would have an "interest" in the city's infrastructure improvements for purposes of R.C. 2921.42. This portion of the opinion reads:

[A] person whose property will directly benefit from the project, and who has agreed to a direct assessment of one-half of the cost of the project, is "interested" in the public contract for purposes of this Section. (Emphasis added.)

(The opinion did not, however, address the property owner's "interest" in light of the fact that the property owners who would benefit from the infrastructure improvements, including the

city council members, would be assessed approximately one-half of the cost of the project.) Therefore, the city council members were advised that 2921.42 prohibited them from participating in discussions or voting on the project. The second syllabus paragraph of the opinion reads:

Section 2921.42 of the Revised Code prohibits a city council member from knowingly participating in discussions or voting to approve a public contract for downtown revitalization which would benefit his property. (Emphasis added.)

Although not specifically referenced in Advisory Opinion No. 80-007, it appears from this language that the holding is based upon the prohibition imposed by Division (A)(1) which, as described above, prohibits a public official from authorizing, or using his official authority or influence to secure authorization of, a public contract in which he would have an interest.

However, Advisory Opinion No. 80-007 does not address the effect of the prohibitions imposed by R.C. 2921.42 (A)(4) and (A)(3), as set forth above. R.C. 2921.42 (A)(4) prohibits a public official from merely having 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" even where he has not authorized the public contract or used the authority or influence of his office to secure the public contract for himself. Such interest, however, must be definite and direct, as discussed above. Division (A)(4) was not addressed in Advisory Opinion No. 80-007 even though the opinion held that the council members whose property would benefit from the project were "interested" in a public contract for purposes of R.C. Section 2921.42, and accordingly, applied the prohibition of Division (A)(1) to the actions of the council members.

Also, Advisory Opinion No. 80-007 does not address the effect of the prohibition imposed by Division (A)(3) of R.C. 2921.42. As set forth above, R.C. 2921.42 (A)(3) prohibits a public official from occupying "a position of profit" in the prosecution of a public contract authorized by him or by a legislative body of which he was a member at the time of authorization, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid. A public official who is a member of a legislative body is subject to the prohibition of Division (A)(3), even where he has abstained from deliberating, voting upon, or otherwise authorizing the public contract. See Advisory Opinion No. 87-008. Division (A)(3) was not addressed in Advisory Opinion No. 80-007 even though the opinion determined that the city council members' property would benefit from the infrastructure improvements and city council would be required to adopt a resolution of necessity and vote on legislation in order for the city to proceed with the revitalization project.

Due to the fact that the prohibitions of Divisions (A)(4) and (A)(3) were not addressed and since considerable precedent construing R.C. 2921.42 has been established subsequent to the issuance of Advisory Opinion No. 80-007, it is necessary to re-examine whether public officials are prohibited from benefiting from infrastructure improvements funded by CDBG moneys as part of a neighborhood revitalization program. The issues to be determined afresh are whether infrastructure improvements made by a political subdivision as part of a neighborhood revitalization project are "public contracts" for purposes of R.C. 2921.42 as that term is defined

in either Division (E)(1) or (E)(2), and if so, whether a public official who owns property that would benefit from the improvements would have a definite and direct interest in the public contracts, or would profit from the public contracts.

The Ethics Commission has held that a political subdivision's award of a low-interest loan or grant to property owners within the political subdivision as part of a housing and neighborhood revitalization program falls within the definition of the term "public contract" as defined in Division (E)(1) because housing and community development services are being purchased or acquired by or for the use of the political subdivision. See Advisory Opinions No. 83-005, 84-011, and 85-002. Also, the Commission has held that other methods by which a political subdivision purchases or acquires community development and revitalization and urban renewal services fall within the definition of the term "public contract" as defined in Division (E)(1). See Advisory Opinion No. 88-006 (land reutilization program in which participants purchase vacant lots and agree to construct improvements upon the lots or utilize them for a useful purpose); Advisory Opinion No. 89-008 (a tax abatement to property owners in exchange for the development or renovation of their property); and Advisory Opinion No. 91-011 (the lease or sale of city financed housing units built on city property). The Ethics Commission has further held that a property owner's "interest" in the community development and urban revitalization and renewal grants, loans, or other benefits is definite and direct, and that the property owners directly profit therefrom, such that R.C. 2921.42 (A)(1), (3), and (4) impose restrictions upon officers and employees of a political subdivision who wish to participate in housing and urban revitalization programs which are established by or for the benefit of the political subdivision with which they serve or are employed. See Advisory Opinions No. 83-005, 84-011, 85-002, 88-006, 89-008, and 91-011.

In the instant situation, it is apparent that when a person or firm is paid consideration to provide services related to the construction of drainage and sidewalk projects that a public contract exists for purposes of both Divisions (E)(1) and (E)(2). The village is purchasing and acquiring and entering into a contract to purchase and acquire design and construction services, and it is a contract for the design and construction of public property. The issue thus becomes whether a public official whose property will benefit from an infrastructure improvement has a definite and direct interest in the profits or benefits of this public contract for purposes of R.C. 2921.42 (A)(1) and (A)(4), and whether he would profit from the public contract for purposes of R.C. 2921.42 (A)(3).

The opinion turns first to a discussion of R.C. 2921.42 (A)(1) and (4). As explained above, since a political subdivision acquires or purchases housing rehabilitation and community development services from property owners who participate in a housing rehabilitation loan or land reutilization program, receive a tax abatement, or lease or purchase a housing unit financed and constructed by the political subdivision, these transactions are "public contracts" as that term is defined in Division (E)(1), and the property owners have a definite and direct interest in these "public contracts" and directly profit from these "public contracts." The loan, grant, tax abatement, property, or housing goes directly to the property owner, and the property owner provides the community development service. The property owner has a definite and direct interest in these public contracts. Accordingly, R.C. 2921.42 (A)(1) and (4) impose restrictions upon an officer or employee of a political subdivision who wishes to participate in housing and

neighborhood revitalization programs which are established for the benefit of the political subdivision with which he serves or is employed.

In this instance, the consideration or benefit is not being provided directly to the property owner and the property owner is not providing the service to the political subdivision or performing the work under the contract. The property owner 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.

Also, the Ethics Commission has held that an individual who has an ownership interest in a business has a definite and direct pecuniary interest in the contracts of the business for purposes of R.C. 2921.42. See Advisory Opinions No. 78-006, 81-008, and 92-006. See also Advisory Opinions No. 85-002 and 85-004 (a person who is a board member, officer, or partner in a business has an interest in the contracts of the business for purposes of R.C. 2921.42). Also, an employee of a business has an "interest" in the contracts of his employer if he would financially benefit from the contracts, and under certain other limited circumstances. See Advisory Opinions No. 78-006, 82-003, 86-005, 89-006, and 89-008.

Therefore, an owner or officer, and perhaps an employee, of the firm that performs the work to install the drainage project and reconstruct the sidewalks would have a definite and direct interest in the public contract. However, you have provided no facts indicating that in this instance village officials own or are employed by the construction firm, or would otherwise have a financial or fiduciary interest in the firm.

Therefore, while the drainage and sidewalk reconstruction programs are public contracts, it does not necessarily follow that the prohibitions of Divisions 2921.42 (A)(1) and (A)(4) will apply to a village officer or employee unless the officer or employee has a definite and direct interest in the public contracts as explained by the examples described above. See Advisory Opinion No. 84-006 (a township trustee who was the owner of a business desired to sell equipment maintenance services to his township). While it is undisputed that property owners in an area of the village that will receive infrastructure improvements may benefit from the infrastructure improvements, see R.C. 102.03 (D) discussed below, and may have an "indirect" interest in the public contracts, no transaction exists between the village and the affected property owners, including the council members, which would indicate that the property owners have a direct "interest" in the public contracts. This is not to say that a public official will never have an interest in a public contract in a situation where consideration is not paid directly to the official by the political subdivision or where the official does not perform services under the contract. For example, a public official will be deemed to have a definite and direct interest in a public contract where he is a subcontractor under the original public contract. See Advisory Opinions No. 87-003 and 88-001. Also, a public official will be deemed to have a definite and direct interest in a public contract where he receives a distributive share of the proceeds paid under the contract but performs no work under the contract. See Advisory Opinions No. 83-002 and 90-007. In these instances, however, the public official is still directly benefiting from the contract. As discussed above, this situation is distinguishable.

The above analysis illustrates that Advisory Opinion No. 80-007 is incorrect in holding that property owners whose property will benefit from infrastructure improvements made by a political subdivision as part of an urban renewal or revitalization project have a definite and direct interest in the public contracts for the improvements. As a consequence, since village council members who own property which will benefit from an infrastructure improvement made by or for the use of the village as part of a neighborhood revitalization program do not have a direct interest in the profits or benefits of a public contract for purposes of Revised Code Section 2921.42, this advisory opinion expressly overrules the holding of Advisory Opinion No. 80-007 that property owners whose property would benefit from infrastructure improvements have an "interest" in a public contract for purposes of R.C. 2921.42. Therefore, R.C. 2921.42 (A)(4) does not prohibit village council members who own property within the village from benefiting from an infrastructure improvement which is part of a comprehensive neighborhood revitalization program administered by the county planning commission and funded, in part, by village funds. But see discussion below of when a public official will be deemed to have an interest in an infrastructure improvement.

The issue remains whether R.C. 2921.42 (A)(3) prohibits the council members from benefiting from the infrastructure improvements made as part of the comprehensive housing and neighborhood revitalization program. As stated above, this issue was not addressed in Advisory Opinion No. 80-007. R.C. 2921.42 (A)(3), does not require that a public official "[h]ave an interest in the profits or benefits of a public contract," but prohibits a public official from "occupy[ing] any position of profit in the prosecution of a public contract" which he or his legislative body authorized, and which was not let by competitive bidding and not the lowest and best bid. A public official who is a member of a legislative body is subject to the prohibition of Division (A)(3), even where he has abstained from deliberating, voting upon, or otherwise authorizing the public contract. See Advisory Opinion No. 87-008.

The Ethics Commission has adhered to the rule of statutory construction that if a statute uses two different terms, then each term is presumed to have a different meaning. See Advisory Opinion No. 76-008. The General Assembly's use of the words "occupy any position of profit in the prosecution of a public contract" in R.C. 2921.42 (A)(3) specifically distinguishes a different type of situation than having "an interest in the profits or benefits of a public contract." See Dougherty v. Torrence, 2 Ohio St. 3d 69, 70 (1982) (effect must be given to words used in a statute); Dungan v. Kline, 81 Ohio St. 371, 380-81 (1910) (the presumption is that every word in a statute is designed to have effect); Advisory Opinion No. 74-001 ("it is to be assumed that the Legislature used the language contained in a statute advisedly and intelligently and expressed its intent by the use of the words found in the statute").

As explained above, the term "public contract" is statutorily defined; however, the word "profit" is not defined for purposes of R.C. 2921.42 (A)(3). It is a primary rule of statutory construction that words used in a statute which are not defined must be construed according to rules of grammar and common usage. See R.C. 1.42. The word "profit" is defined in The New Lexicon Webster's Dictionary of the English Language as "to obtain financial gain or other benefit" The New Lexicon Webster's Dictionary of the English Language 798 (1988 Edition).

As explained above, an "interest" which is prohibited by Division (A)(4) must be definite and direct and may be either pecuniary or fiduciary in nature. However, the term "profit" connotes only a pecuniary or financial gain or benefit. An "interest" under Division (A)(4) thus identifies a broader prohibition than occupying a "position of profit in the prosecution of a public contract." For example, a public official may be deemed to have an "interest" in a public contract, but not "profit" from the public contract, if his interest is only fiduciary, such as serving as an uncompensated officer or trustee of a nonprofit corporation. Indeed, the previous advisory opinions in which both Divisions (A)(3) and (A)(4) were applicable involved situations in which the public official was determined to have a financial "interest" in the profits or benefits of a public contract for purposes of Division (A)(4) and to "profit" from the public contract for purposes of Division (A)(3). See Advisory Opinions No. 88-003, 88-006, 89-006, 89-008, 90-003, 90-005, 91-011, and 92-002. See also Advisory Opinion No. 88-008.

Thus, it logically follows that if a public official's interest in the profits and benefits of a public contract must be "definite and direct" for purposes of Division (A)(4), then the position of profit which the public official occupies in the prosecution of the public contract must also be definite and direct for purposes of Division (A)(3). See R.C. 2901.04 (A) (Revised Code sections which define offenses or penalties shall be strictly construed against the state and liberally construed in favor of the accused). An "indirect" rather than a definite and direct standard for either Division (A)(4) or (A)(3) would effectively render it difficult for the State or political subdivisions to enter into public contracts or would bar substantial numbers of individuals from public office or employment. See generally Advisory Opinion No. 78-006. See also discussion below.

As explained above, a public official who owns property which will benefit from an infrastructure improvement made by or for the use of his political subdivision as part of a neighborhood revitalization program does not have a direct interest in a public contract for purposes of Divisions (A)(1) and (A)(4). In such a situation, it would be inconsistent with the precedent established in previous advisory opinions to determine that the "position of profit" which a public official would derive from a public contract need not also be definite and direct. Therefore, the prohibition of R.C. 2921.42 (A)(3) will apply whenever a public official realizes an advantage, gain, or benefit, which is a definite and direct result of a public contract which he or a body of which he was a member authorized, and which was not competitively bid and the lowest and best bid.

The issue, then, becomes whether the council members who own property which will benefit from the infrastructure improvements made as part of the comprehensive housing and neighborhood revitalization program occupy a position of profit in the prosecution of a public contract which is definite and direct for purposes of Division (A)(3).

The Ethics Commission has held that property owners who participate in a housing rehabilitation loan or land reutilization program, receive a tax abatement, or lease or purchase a housing unit financed and constructed by the political subdivision occupy a position of profit in the prosecution of these "public contracts" for purposes of Division (A)(3) since they realize an advantage, gain, or benefit from the loan, grant, tax abatement, property, or housing in exchange for providing the community development service. See Advisory Opinions No. 88-006, 89-008,

and 91-011. It is apparent the advantage, gain, or benefit realized by the property owners is definite and direct. Accordingly, R.C. 2921.42 (A)(3) imposes restrictions upon an officer or employee of a political subdivision who wishes to participate in housing and neighborhood revitalization programs which are established by or for the benefit of the political subdivision with which he serves or is employed. Id.

In an instance where a political subdivision is entering into a contract with a firm to construct infrastructure improvements, the consideration or benefit for performing these services is not being provided to the property owner. Also, the property owner is not providing a service to the political subdivision or performing the work under the contract. In the case of a firm performing the contract, the position of profit which it occupies is a definite and direct result of performing services under a public contract, and receiving payment therefor. However, a property owner does not realize the same kind of advantage, gain, or benefit from a political subdivision's contract with a firm for public infrastructure improvements as he does from a loan, or grant, or tax abatement that is awarded directly to him. Therefore, 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).

The Ethics Commission has also held that an individual who has an ownership interest in a business occupies a position of profit in the contracts of the business for purposes of R.C. 2921.42 (A)(3). See Advisory Opinion No. 90-003. An employee of a business may also occupy a position of profit in the contracts of his employer if he would financially benefit from the contracts, and under certain other limited circumstances. See Advisory Opinion No. 92-002. Therefore, an owner and perhaps an employee of the firm that performs the work to repair the sidewalks or construct the drainage project would have a definite and direct advantage, gain, or benefit in the prosecution of the public contract. However, you have provided no facts indicating that in this instance village officials own or are employed by the construction firm, or would otherwise profit from the firm's work.

Therefore, while the drainage and sidewalk reconstruction programs are public contracts, it does not necessarily follow that the prohibition of Division 2921.42 (A)(3) will apply to any village officer or employee unless the officer or employee occupies a definite and direct position of profit in the public contracts as explained by the examples described above. While it is undisputed that property owners in an area of the village that will receive infrastructure improvements may benefit from the infrastructure improvements, see R.C. 102.03 (D) discussed below, and may "indirectly" realize an advantage, gain, or benefit from the public contracts, no transaction exists which would indicate that the property owners occupy a direct position of profit in the public contracts.

Therefore, R.C. 2921.42 (A)(3) does not prohibit village council members who own property within the village from benefiting from an infrastructure improvement which is part of a comprehensive neighborhood revitalization program administered by the county planning commission and funded, in part, by village funds.

It should be noted that to hold that public officials who own property which would benefit from infrastructure improvements have an interest, or occupy a position of profit, in the

public contracts for the improvements would effectively render it difficult or impossible for a political subdivision to undertake infrastructure improvements. Even if the officials who owned property which would be benefited by the improvements abstained from deliberating, voting upon, or otherwise authorizing the public contracts for the improvements, such a holding would require that whenever a political subdivision widens a road or installs water and sewer lines, it leave a narrow band of unimproved pavement in front of a public official's property or detour a pipeline away from the official's property, or would prevent the political subdivision from making any improvements if property owned by public officials would be benefited. See R.C. 1.49 (the consequences of a particular construction may be considered in interpreting a statute). However, it must be noted that a public official may well be deemed to have an interest in the profits or benefits or occupy a position in the prosecution, of a public contract in circumstances where the benefit to the council member's property is selective, differential, or in disproportion to the benefit provided to other property in the political subdivision or a portion thereof. For example, such a situation would occur if a council member owned a large tract of undeveloped land and was the only landowner in the political subdivision which would receive the improvements. In such a situation, it is apparent that the council member would have a definite and direct interest in, and profit from, the improvements.

The issue remains whether the village council members may participate in actions of village council if they own property which will benefit from the infrastructure improvements, even though the prohibitions of R.C. 2921.42 are generally inapplicable in this instance.

As explained above, the holding of Advisory Opinion No. 80-007 as it pertains to R.C. 2921.42 is incorrect. However, Advisory Opinion No. 80-007 also held that R.C. 102.03 (D) prohibits a city council member from participating in decisions or voting on improvements made as part of a downtown revitalization project which would benefit his property.

R.C. 102.03 (D) reads as follows:

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.

A "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is elected or appointed to an office of any board, commission, or authority of a village. See R.C. 102.01 (B) and (C). A member of village council is a "public official or employee" as defined for purposes of R.C. 102.03, and is, therefore, subject to the prohibitions of that Section.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money, any interest in realty, and every other thing of value. See R.C. 102.01 (G). For example, the Ethics Commission has held that an enhancement in the value of property, an opportunity or ability to sell property at a profit or commission, or other benefit to property is a thing of value. See Advisory Opinion No. 88-004. See also Advisory Opinions No. 79-003, 79-008, 80-007, 85-006, and 88-005.

R.C. 102.03 (D) prohibits a public official or employee from participating, formally or informally, in a particular matter which would result in a definite and particular, personal pecuniary benefit being realized by the official or employee, his family member, business associate, or other party where the official or employee would be subject to a conflict of interest. See Advisory Opinions No. 88-004, 88-005, 89-005, and 89-008.

The Ethics Commission, in Advisory Opinion No. 88-004, recognized that, for purposes of R.C. 102.03 (D), in certain instances a public official will realize a definite and particular personal pecuniary benefit from public infrastructure improvements, holding:

[T]he widening of a road in front of a council member's property or the installation of water or sewer lines which would service a member's property are matters which directly affect the value of the property or provide a definite and particular pecuniary benefit to the property, such that the council member's independence of judgment could be impaired by his personal interests. Therefore, a member of city council may not vote, deliberate, or participate in discussions to widen a road or install water and sewer lines which would serve or benefit property in which he has an interest. This direct and definite benefit to property resulting from the installation of water or sewer lines should be contrasted to the construction of a new water tower or sewer plant, which would provide a uniform benefit to all citizens within the city, and would benefit a particular piece of property only in a general or indefinite manner. (Emphasis added.)

See also Advisory Opinion No. 85-006. Therefore, while Advisory Opinion No. 80-007 incorrectly applied the prohibition of R.C. 2921.42, the Commission believes that Advisory Opinion No. 80-007 is correct in its application of R.C. 102.03 (D). 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. See also Advisory Opinions No. 85-006 and 88-004. 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. See Advisory Opinions No. 85-006 and 88-004. 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.

R.C. 102.03 (D) would however prohibit a village council member from misusing the authority or influence of his office to secure infrastructure improvements even where the improvements are of benefit to the entire village or a large portion thereof if the benefit to the council member's property is selective, differential, or in disproportion to the benefit provided to other property in the political subdivision or the portion thereof receiving the improvements. Also, Division (E) of Section 102.03 prohibits a public official or employee from soliciting or receiving anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties, even if he has not used the authority or influence of his office to secure the thing of value. See Advisory Opinion No. 90-004. Therefore, R.C. 102.03 (E) prohibits a city council member from merely receiving benefits which are selective,

differential, or in disproportion to the benefits provided to other property in the political subdivision or a portion thereof, even if he abstains from voting or otherwise participating in council's decision to provide the improvements.

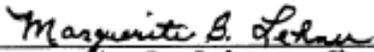
You state that officials from the county planning commission discussed the CDBG grant with the village's mayor and village manager and appeared before village council to provide information. The county planning commission requested that the village council indicate its support for the program. Accordingly, the village council passed a resolution declaring that the village council supports the county planning commission's proposed grant application. You have stated that village council will certify that it will set aside \$4,000 for its share of the \$35,000 sidewalk reconstruction project.

You described the drainage project as "large." The Ethics Commission has held that generally, 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. However, the application of R.C. 102.03 (D) and (E) is dependent upon the facts and circumstances of each individual situation. See Advisory Opinion No. 87-008. Also, the Ethics Commission's function in rendering advisory opinions is not a fact-finding process. See Advisory Opinions No. 75-037, 90-013, and 92-003. An advisory opinion explains the prohibitions imposed by the Ethics Law and related statutes and sets forth the standards and criteria which must be observed in order to avoid a violation of the law. See Advisory Opinion No. 90-013. Therefore, this opinion cannot determine whether the drainage project would be of general and uniform benefit but will explain the standards to which a council member who owns property which will benefit from infrastructure improvements is subject.

You described the sidewalk reconstruction as "minor." This suggests that the project only encompasses a small portion of the village rather than a large-scale comprehensive infrastructure improvement. Therefore, if a village council member owns property which would benefit from the sidewalk reconstruction, then R.C. 102.03 (D) would prohibit him from participating in village council's appropriation of the \$4,000 for its share of the project despite the fact that CDBG funds will pay for most of the project's cost. See Advisory Opinion No. 80-007. However, the fact that a village council member's land would benefit from an infrastructure improvement does not mean that R.C. 102.03 prohibits the village from making the improvement, or requires that the village leave a narrow band of unimproved pavement in front of a public official's property, unless the benefit to the council member's property is selective, differential, or in disproportion to the benefit provided to other property in the political subdivision or the portion thereof receiving the improvements. See Advisory Opinion No. 88-004. Rather, Advisory Opinion No. 88-004 holds that R.C. 102.03 (D) prohibits a public official from participating in the decision-making process of his political subdivision in matters which provide a particular and definite pecuniary benefit to his property.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) This advisory opinion expressly overrules the holding of Advisory Opinion No. 80-007 that property owners whose property will benefit from infrastructure improvements have an "interest" in a public contract for purposes of Section 2921.42 of the Revised Code. The holding of

Advisory Opinion No. 80-007 that Division (D) of Section 102.03 of the Revised Code prohibits a city council member from participating in decisions or voting on improvements made as part of a downtown revitalization project which would benefit his property is not overruled and is expressly affirmed; (2) A village council member who owns property which will benefit from an infrastructure improvement made by or for the use of his village as part of a neighborhood revitalization program neither has an interest in the profits or benefits of a public contract nor occupies a position of profit in the prosecution of a public contract for purposes of Section 2921.42 of the Revised Code, provided that the benefit to the council member's property is not selective, differential, or in disproportion to the benefit provided to other property in the political subdivision or the portion thereof receiving the improvements; and (3) Division (D) of Section 102.03 of the Revised Code prohibits a village council member from voting, deliberating, participating in discussions, or otherwise using his official authority or influence with regard to village council's payment for infrastructure improvements made as part of a neighborhood revitalization program which would provide a definite and particular pecuniary benefit to his property. This prohibition does not apply if the improvements provide a general, uniform benefit to the entire political subdivision or a large portion thereof, provided that the benefit to the council member's property is not selective, differential, or in disproportion to the benefit provided to other property in the political subdivision or the portion thereof receiving the improvements.



Marguerite B. Lehner, Chair
Ohio Ethics Commission