



OHIO ETHICS COMMISSION

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September 27, 1995

Informal Opinion 1995-INF-0927

James A. Rusnov
Rusnov Equities Group, Inc.

Dear Mr. Rusnov:

In your February 10, 1995 letter to the Ethics Commission, you ask whether the Ohio Ethics Law and related statutes prohibit you, as a member of the Ohio Department of Natural Resources (ODNR) Recreation and Resources Commission, from entering into an agreement with the City of Parma (City) to function as the developer of a proposed major recreational facility that will be funded by a grant from ODNR through The Nature Works Grant Program (Program).

As explained below, the Ohio Ethics Laws and related statutes, specifically the prohibitions imposed by Divisions (D) and (E) of R.C. 102.03 and Division (A)(3) of R.C. 2921.42, prohibit you from functioning as the developer of a proposed major recreational facility that will be funded by a grant from ODNR through the Program.

You have provided the Ethics Commission with information regarding the proposed recreational facility. In summary, the City is planning to develop a major recreational facility, which includes an 18-hole golf course. The City contemplates applying to ODNR for a grant through the Program in order to fund the facility. You state that the ODNR Recreation and Resources Commission was instrumental in developing the guidelines and criteria for the Program. However, you state the ODNR Recreation and Resources Commission has no direct influence on the selection process for funding the Program.

Divisions (D) and (E) of Section 102.03 of the Revised Code, read as follows:

- (D) 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.
- (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 him with respect to his duties.

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The term "public official or employee" is defined to include any person who is appointed to an office of a commission of the state. R.C. 102.01 (B) and (C). Therefore, as a member of the ODNR Recreation and Resources Commission you are a "public official or employee" for purposes of R.C. 102.03 (D) and (E), and are subject to the prohibitions contained therein.

R.C. 1.03 defines the term "anything of value" for purposes of R.C. 102.03 to include money and every other thing of value. R.C. 102.01(G). A definite pecuniary benefit to a person or his business is considered to be a thing of value under R.C. 102.03 (D) and (E). Advisory Ops. No. 80-003, 85-006, and 86-007. A payment from the City to you for the development of the recreational facility falls under the definition of "anything of value."

The Ethics Commission has held that R.C. 102.03 (D) prohibits a public official or employee from using the authority or influence of his official position to secure anything of value, for either himself or his business associate, if the thing of value is of an improper character. Advisory Ops. No. 80-007, 85-006, and 88-004. R.C. 102.03 (E) prohibits a public official or employee from merely soliciting or receiving an improper thing of value, and does not require that he use the authority or influence of his position to secure it. Advisory Ops. No. 86-011 and 89-006.

A thing of value is considered to be of an improper character for purposes of R.C. 102.03 (D) and (E) where the thing of value is secured from a party that is interested in matters before, regulated by, or doing or seeking to do business with the public agency with which the official or employee serves, or where the thing of value could impair the official's or employee's objectivity and independence of judgment with respect to his official actions and decisions for the public agency with which he serves or is employed. Advisory Ops. No. 79-002, 84-010, 89-006, and 92-009.

The Ethics Commission has held that R.C. 102.03 (D) and (E) prohibit a public official from securing a thing of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with the agency with which he serves unless the official or employee has withdrawn from all matters involving the party. Advisory Ops. No. 84-009, 87-006, 88-002, and 89-010.

The Ethics Commission has also held that R.C. 102.03 (D) and (E) prohibit a public official or employee from receiving compensation from a private source for services rendered on projects that he has recommended in his official position. Advisory Ops. No. 84-012, 84-013, and 85-013. Furthermore, R.C. 102.03 (D) and (E) prohibit a public official or employee from participating in a matter upon which his private interests are dependent or contingent. Advisory Ops. No. 76-005, 79-003, 79-008, and 88-005.

In the instant situation, you state that the Recreation and Resource Commission has no direct influence on the selection process for funding from The Nature Works Program. However, you state that the Recreation and Resource Commission was instrumental in developing the guidelines and

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criteria for the Program and that, as a member of the Recreation and Resource Commission, you participated in the process that developed the guidelines and criteria for the Program. Because you have used the authority of your public position by participating in the process that developed the guidelines and criteria for the Program, R.C. 102.03 (D) and (E) prohibit you from accepting future employment, compensation, or anything else of value, in your private capacity, from a party that would build a facility under the Program. Advisory Ops. No. 84-012, 84-013 and 85-013. Therefore, R.C. 102.03 (D) and (E) prohibit you from contracting with the City of Parma to be the developer of the proposed facility that will be funded by a grant from ODNR through the Program.

You are also subject to the restriction imposed by Division (A)(3) of Section 2921.42 of the Revised Code, which reads:

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

As a member of the ODNR Recreation and Resources Commission you are a "public official or employee" for purposes of R.C. 2921.42 and are subject to its prohibitions during your service on the Commission and for one year thereafter. R.C. 2921.01 (A); Advisory Ops. No. 83-005 and 86-011.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (G)(1) of that Section to mean:

- (a) The purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either;
- (b) A contract for the design, construction, alteration, repair, or maintenance of any public property.

Therefore, the service that you desire to render as developer of the proposed facility is a public contract because it is the purchase or acquisition of a recreation facility by or for the use of the City and would also be a contract for the construction of public property.

It must be emphasized that R.C. 2921.42 (A)(3) does not contain language requiring that the public contract from which a public official will profit be entered into by or for the use of the governmental agency or instrumentality with which the official serves or is connected in order for the public official to be subject to its prohibition. Compare R.C. 2921.42 (A)(4). In this instance, you are subject to the prohibition imposed by R.C. 2921.42 (A)(3) and may not profit from a public contract authorized by the ODNR Recreation and Resource Commission despite the fact that the proposed facility is for the use or benefit of the City of Parma and not the ODNR Recreation and Resource Commission.

The Ethics Commission has held that a legislative body, commission, or board will be deemed to have authorized a public contract, for purposes of R.C. 2921.42 (A)(3), where the contract could not have been awarded without the official's or board's approval. Advisory Ops. No. 87-004, 88-003, 88-008, and 91-005. For example, in Advisory Op. No. 91-005, the Ethics Commission held that R.C. 2921.42 (A)(3) prohibits a county commissioner from resigning from the board of county commissioners in order to hold employment as the solid waste program director of a joint waste management district, if the establishment and operation of the joint waste management district was dependent upon the action of the board of county commissioners, and the position of solid waste program director would not have been created but for the board of county commissioners having acted to establish the district. In Advisory Opinion No. 91-005, the agreement among the three counties that created the joint solid waste management district did not deal specifically with the district hiring its own employees, but addressed only the issue of the district reimbursing each of the counties for the services of county employees used by the district. Also, the agreement did not provide for the creation of the position of solid waste program director. See also Advisory Op. No. 87-008 (because individuals are not hired pursuant to competitive bidding, R.C. 2921.42 (A)(3) prohibits a former public official from being employed by his former board where the potential for employment would not have been created but for the action of the former public official's board, even though the former official may possess the best qualifications for the position).

You state that the ODNR Recreation and Resources Commission was instrumental in developing the guidelines and criteria for the Program. Therefore, R.C. 2921.42 (A)(3) prohibits you from occupying any position of profit in the prosecution of a public contract between the City of Parma and yourself as developer of the proposed facility since the public contract could not have been awarded without the action of the ODNR Resources and Recreation Commission in developing the guidelines and criteria for the Program. This prohibition is in effect regardless of whether you specifically contemplated acting as the developer for projects that would be built under the Program at the time that the ODNR Recreation and Resources Commission established the guidelines for the Program, and despite the fact that the ODNR Recreation and Resources Commission has no direct influence on the selection process for funding for the Program. Advisory Op. No. 91-005.

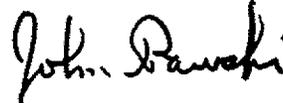
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It must be noted that while R.C. 2921.42 (A)(3) provides an exception to its prohibition if the public contract is competitively bid and the affected public official has tendered the lowest and best bid, this does not provide an exception to the prohibition imposed by R.C. 102.03 (D) and (E) as addressed above. The prohibition of R.C. 2921.42 (A)(3) applies while you serve on the ODNR Recreation and Resources Commission and for one year after you leave public service. R.C. 2921.42 (A)(3).

Therefore, Division (A)(3) of R.C. 2921.42, as well as Divisions (D) and (E) of R.C. 102.03, prohibit you from functioning as the developer of a proposed major recreational facility that will be funded by a grant from ODNR through the Program.

This advisory opinion was approved by the Ethics Commission at its meeting on September 27, 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. Please call me if you have any questions.

Very truly yours,



John Rawski
Staff Attorney