

# OHIO ETHICS COMMISSION

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February 2, 2005

Informal Opinion 2005-INF-0202

Maria J. Armstrong  
Bricker & Eckler



Dear Ms. Armstrong:

The Ohio Ethics Commission received your request for an advisory opinion on November 8, 2004. In your letter, you ask, on behalf of your client, whether the Ohio Ethics Law and related statutes prohibit a member of Columbus City Council from participating in land-use matters pending before the city that affect a client of his private employer.

## **Brief Answer**

As explained below, the city council member is prohibited from voting, deliberating, or participating in discussions, or otherwise using his official position, either formally or informally, with regard to any matter before the city if his private employer has prepared any work-product for a client on the matter or the law firm has been or is likely to be involved in the matter in the future. Within the cautions stated below, the city council member is not prohibited from participating in decisions affecting a developer merely because the developer is or has been a client of the council member's private employer if his employer is not and will not be involved in the matter that is before the city.

## **Facts**

You state that your client is R.D. Zande & Associates, Inc., and its general counsel, Michael C. Mentel. Mr. Mentel is also a council member for the City of Columbus. The council member is the chair of both the city's zoning committee and the safety and judiciary committee. As the chair of the zoning committee, he meets with parties seeking zoning changes and citizens on matters involving zoning applications. He and his staff work with city departments to assure that zoning issues appear on the city council's agenda.

As noted above, Mr. Mentel is general counsel for R.D. Zande, a company that provides, among other services, land-use planning and engineering services for real estate developers who regularly bring matters before city council and other city departments. As general counsel, he oversees all legal matters and advises the company on legal issues that may affect its operations.

The council member is paid a salary for his services. Neither the volume of the company's business nor the number of projects completed for its clients affect the council member's income. If he were to receive a bonus, it would be based on his performance as general counsel. The council member does not own any shares in the company.

You state that whenever developers desire to annex property, they submit engineering maps and surveys to various city departments to support the developer's annexation request. The city council member's employer does not provide the legal or land-use planning services required for an annexation application; however, the developer hires the city council member's employer to prepare the engineering maps and surveys that the developer submits to the city.

You state that if the city annexes the property, the developer will request that the city zone the property in a specific classification to allow the improvements that they desire to build. The developer hires the city council member's employer to supply information concerning such matters as utility availability, and traffic, noise, and drainage studies to support their zoning request. If city council approves the zoning, the developer will seek to secure building permits from the city. The developer hires the city council member's employer to make certain that the developer's engineering work meets the city's zoning and building requirements.

You state that, in all phases of a development project, the developer meets with various city officials and shepherds its proposed project through the various city departments until its ultimate approval by city council. You stress that neither the city council member nor other employees of his employer appear before city council or city departments. In addition, you state that the payment by the client to the council member's employer is not contingent upon a favorable regulatory decision by the city council or other city departments.

**Securing Improper Things of Value—R.C. 102.03(D) and (E)**

R.C. 102.03(D) and (E) read as follows:

- (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.
- (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.

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 a political subdivision. R.C. 102.01(B) and (C). A member of a city council is a public official for purposes of R.C. 102.03(D). Ohio Ethics Commission Advisory Opinion No. 89-008.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 102.01(G). For purposes of R.C. 102.03(D), the thing of value that is secured by the action of the public official must be definite and direct. The beneficial or detrimental financial impact upon the value of real property, created by a public agency's land-use decision, is a thing of value for purposes of R.C. 102.03(D). Adv. Ops. No. 88-005, 92-019, and 98-002. For example, an increase or enhancement in the value of property, an opportunity or ability to sell property at a profit or for a commission, or other benefit to property is a thing of value. Adv. Ops. No. 79-003, 79-008, and 85-006.

Prior to 1986, R.C. 102.03(D) prohibited a public official or employee from using his official position to secure anything of value for himself "that would not ordinarily accrue to him in the performance of his official duties, which thing is of such character as to manifest a substantial and improper influence upon him with respect to his duties." (Emphasis added.) The Ethics Commission applied this statutory language to prohibit a public official or employee from participating in matters that would benefit the public official's or employee's own financial interests. Adv. Ops. No. 79-003 and 80-007. The Commission also concluded that R.C. 102.03(D) prohibited a public official or employee from acting on matters that affect the financial interests of his spouse or employer, if the official himself would derive some benefit as a result. Adv. Ops. No. 79-008, 80-003, and 84-010. By contrast, the Commission concluded that R.C. 102.03(D) did not "apply to things of value accruing to a family member or business associate, provided the public official does not benefit personally." Adv. Op. No. 86-007.

In Am. Sub. H.B. 300, effective September 17, 1986, the General Assembly amended R.C. 102.03(D) to delete the requirement that the thing of value be for the public official or employee, and broadened the scope of the prohibition imposed by R.C. 102.03(D). Adv. Op. No. 87-004. As a result, the law is not limited in its application to situations where the public official or employee would himself secure a benefit. Adv. Op. No. 88-004. However, in order for the prohibition in R.C. 102.03(D) to apply, the thing of value, whether it is secured for the official or for someone else, must be of such a character as to manifest a substantial and improper influence upon the official with respect to his duties. Id.

In Advisory Opinion No. 93-003, the Commission stated:

R.C. 102.03(D) prohibits a public official or employee from using his authority or influence to secure anything of value, not only for himself, but for members of his family . . . , for his business associates . . . , for a professional organization on which the public official or employee serves as a board member . . . , [and] for his private outside employer. (Citations omitted.)

In the cited opinions, where a definite and direct thing of value accrues, as a result of a public official's or employee's action, to a person or entity that has a close familial, economic, or fiduciary relationship to the official or employee, the thing of value is of such a character as to manifest a substantial and improper influence upon the official or employee with respect to the performance of his duties. Consequently, where a matter is pending before a public agency that

definitely and directly affects the financial interests of a party with a close familial, economic, or fiduciary relationship to an official or employee of the agency, R.C. 102.03(D) prohibits the official from securing anything of value for the related party by participating in the matter.

In addition to amending R.C. 102.03(D) in Am. Sub. H.B. 300, the General Assembly enacted R.C. 102.03(E). R.C. 102.03(E) prohibits a public official or employee from soliciting anything of value for himself and for any other party with whom he has a close familial, economic, or fiduciary relationship, because the thing of value is capable of manifesting a substantial and improper influence upon the official or employee.

### **Application to Specific Facts**

You have asked whether the council member is prohibited from participating in matters before the city that affect a client or customer of his private employer. If a matter before council, a council committee, or any department of the city would definitely and directly affect the council member's employer, R.C. 102.03(D) and (E) would prohibit the council member from participating in that matter. See Adv. Op. No. 90-008 and 91-006.

For example, if the council member's employer is representing a client on a matter before city council, the employer has an interest in council's decision on the matter. An employer holds a position of power and authority over the hiring, compensation, discipline, and termination of its employees. Adv. Op. No. 89-008. A city council member who is in the position to participate in a decision regarding the pecuniary interests of his private employer would have an inherent conflict of interest impairing the council member's objectivity and independence of judgment. Adv. Ops. No. 88-005 and 89-008. In that case, the council member is prohibited from participating in council's consideration and decision-making on the matter. Adv. Op. No. 90-008. He is also prohibited from participating in the matter as the chair of the zoning committee, including meeting with parties requesting zoning changes and supervising any city employees on the matters.

You have explained that the council member's employer does not represent clients on matters pending before council or other city offices. However, the council member's employer does prepare maps, surveys, studies, and other documents for its clients which may be submitted to the city in connection with matters before the city. The firm also performs other services for its clients. Therefore, the question is whether the council member is prohibited from participating in matters before the city where his employer has prepared studies and other documents that are submitted to the city in support of those matters, or has been involved in the matter in any other way.

In Advisory Opinion No. 90-008, the Ethics Commission determined that R.C. 102.03(D) prohibits a public official from reviewing, in his official capacity, work that members of his law firm prepared. The Commission explained, in Advisory Opinion No. 90-008, that if a public official were to review and act upon a matter in which members of his law firm earned client fees, then the official would be subject to an inherent conflict of interest that could impair his

objectivity and independence of judgment in carrying out his official decisions and responsibilities with respect to that matter. See also Adv. Ops. No. 82-001, 83-001, and 89-016.

In this situation, council must decide crucial issues of land-use planning such as utility availability and the detrimental impacts upon public safety by traffic, noise, and drainage by examining and passing judgment upon the findings and work-product of the council member's outside employer. If individuals who are affected by the proposed development challenge the city's land-use decisions through administrative procedures or litigation, then the accuracy and reliability of the findings and work-product of the engineering company will be crucial in determining whether the city officials rendered decisions that were reasonable, and not arbitrary or capricious. Despite the fact that the payment by the client to the council member's employer for its services is not contingent upon a favorable regulatory decision by the city council or city departments, challenges to the city's land-use decisions involving the accuracy and reliability of the findings and work-product of the engineering company may create a burden for the company and strain the relationship between the company and its client.

Therefore, approval of a developer's annexation, zoning, and building permit applications, by city council or other city departments, is a thing of value not only to the developer, but to the engineering company that has, on behalf of its client, prepared the information upon which the city officials must rely to make informed decisions. Thus, where materials prepared by the council member's private employer are before the city in connection with a pending regulatory matter, or where the private employer has otherwise been involved in the matter, the employer is a party that would be "interested in" matters pending before the city. Accordingly, R.C. 102.03(D) and (E) prohibit the city council member from voting, deliberating, participating in discussions, or otherwise using his official position, either formally or informally, with regard to any land-use matters pending before the city that are based upon findings and work-product submitted by the company with which he is privately employed or where his employer is otherwise involved in the matter. As noted above, he is prohibited from participating in the matter while it is before council or a committee of council and while it is before any city department.

However, the mere fact that a developer is a client of the council member's private employer, in and of itself, does not prohibit the council member from participating in any matters before council that affect the developer. It is the relationship between the city council member and his private employer, not the relationship between the council member and the client of his private employer, that creates the conflict of interest under R.C. 102.03(D) and (E).

Therefore, R.C. 102.03(D) and (E) do not prohibit the council member from participating in a matter before council, a council committee, or any other city department, that affects a developer who is a client of his employer, as long as the council member's employer: (1) has had no prior involvement in the matter; (2) does not contemplate providing services in the future on the matter; and (3) has not prepared any findings, work product, or other documents related to the matter. Adv. Ops. No. 90-008 and 91-004. This conclusion assumes that there is no other financial or family relationship between the council member and the client of his employer. If there is a

relationship between the council member and the client of his employer, the Ethics Law may further limit the council member's participation in the matter. See Adv. Op. No. 90-008 (A council member who is an associate of a law firm is not generally prohibited from participating in a matter before council that affects a client of the law firm, where the law firm is not involved in the matter. However, if the council member is the attorney in the law firm who routinely represents the client, or he has some other relationship with the client, he is prohibited from participating in matters affecting the client even if the law firm is not involved.)

### **Conclusion**

As explained above, the city council member is prohibited from voting, deliberating, or participating in discussions, or otherwise using his official position, either formally or informally, with regard to any matter before the city if his private employer has prepared any work-product for a client on the matter or the law firm has been or is likely to be involved in the matter in the future. Within the cautions stated below, the city council member is not prohibited from participating in decisions affecting a developer merely because the developer is or has been a client of the council member's private employer if his employer is not and will not be involved in the matter that is before the city.

In closing, the Commission cautions the council member that he has the burden of remaining informed about the relationships between his employer and its clients on matters that are, or may be, before the city. Finally, the Commission notes that the council member is also subject to the Code of Professional Responsibility, which governs the practice of attorneys in Ohio. For further guidance about the Code of Professional Responsibility, the council member may wish to contact the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 28, 2005. The Commission commends the council member, his private employer, and the City of Columbus for requesting prospective guidance.

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  
Chief Advisory Attorney