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March 10, 2010 Informal Opinion 2010-INF-0310-1

Maria J. Armstrong
Bricker & Eckler LLP



Dear Ms. Armstrong:

On January 7, 2010, the Ohio Ethics Commission received your letter requesting an advisory opinion on behalf of your client Iberdrola Renewables, Inc (Iberdrola). In your letter, you explained that Iberdrola is a worldwide leader in wind power development. The company is developing a project in Van Wert and Paulding counties and is planning a project in another part of the state. You have asked for guidance on the application of the Ethics Law and related statutes where Iberdrola is developing a project and township trustees may have option contracts with Iberdrola for use of their property. Your specific questions are:

- (1) Where numerous properties are part of a wind project in an area, including properties owned by township trustees, their family members, or their business associates, do the Ethics Law and related statutes prohibit a trustee who has a lease option from participating in the consideration or decisions of the township regarding tax abatements for a developer?
- (2) Does the Ethics Law prohibit a township trustee who has a lease option from participating in discussions or decisions of the township regarding "project blind" pre-approval of tax abatements to all wind developers in the region?

Brief Answer

As explained more fully below, where numerous properties are part of a wind project in an area, including properties owned by township trustees, R.C. 102.03(D) prohibits trustees from participating in discussion or consideration of, or voting to approve, a tax abatement to be awarded by the county to a developer in connection with a specific wind development project if: (1) they or their family members or business associates have option agreements with the developer; (2) the properties that are the subjects of the agreements will be part of the project;

and (3) the trustees or their family members or business associates will be affected by the development of the project in a way that is selective, differential, or in disproportion to the affect on other township residents with option agreements with the developer. R.C. 102.03(E) also prohibits trustees from soliciting or accepting, from a developer, benefits for themselves or their family members or business associates that are selective, differential, or in disproportion to the benefits offered to any other township resident with an option agreement.

R.C. 102.03(D) and (E) do not prohibit a township trustee who has a lease option, or whose family members or business associates have lease options, from participating in discussions or decisions of the township, pursuant to the criteria discussed in this opinion, regarding project-blind pre-approvals of tax incentives that apply to all qualified developers in the same way.

Facts

By way of history, you have explained that Northwest Ohio is in a wind corridor that runs from Illinois through western Ohio and into Michigan. The development model in wind corridors begins with collecting wind data and plotting wind resources. Developers identify one or more routes for placement of wind turbines that take advantage of wind resources and best complement the landscape. Developers obtain property rights where wind turbines may be placed. You explained that it is not uncommon for several wind developers to obtain options on all of the land over a large geographical area.

You explained that Iberdrola is one of four wind developers in the process of obtaining lease options from most, if not all, of the property owners in the wind corridor that runs through Van Wert, Paulding, Champaign, and Putnam counties. Some of the property owners who have lease options with Iberdrola and/or other wind developers are public officials, or are family members or business associates of public officials.

You have explained that, once options are secured, the wind developers next seek required state approvals to site the project and economic development incentives. You explained that tax abatements are a pivotal factor in making projects economically viable. If site approvals and economic development incentives are granted, the wind developer can exercise necessary lease options, pay the land owners, and begin construction.

You have explained that the most common economic incentive program in wind project development is the enterprise zone process. Because wind projects are very large, encompassing several counties or even states, numerous local governmental agencies may be involved in establishing enterprise zones. Under Ohio's enterprise zone law, there are two steps to obtaining an incentive. First, the public agency must create an enterprise zone to allow for economic development in the area. R.C. 5709.62-3. The zone is designated by a resolution of the county commissioners. R.C. 5709.63. Township trustees in affected townships must consent to the enterprise zone creation or expansion. Id.

Once an enterprise zone is created, a developer seeking an incentive must apply for a tax abatement within the zone. Although the incentive is actually offered by the county, any political subdivision involved, including townships, municipalities, and school districts, must review and consent to tax abatement for a specific project and at specific amounts.

You have explained that there are several townships in the Ohio wind corridor where at least two of the three trustees, or their family members or business associates, have lease options with a wind developer. If two trustees must withdraw because of conflicts of interest, the incentive cannot be approved. In that case, the wind developer may be required to abandon or reroute the project and the township will lose the economic benefit of having the project sited in the township.

Conflict of Interest Prohibitions—R.C. 102.03(D) and (E)

Township trustees are public officials subject to the general conflict of interest prohibitions found in R.C. 102.03(D) and (E), which read:

- (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.

The award of a tax abatement falls within the definition of "anything of value," as do payments to a property owner from a wind developer when exercising its option to develop the property. R.C. 102.01(G); 1.03. Ohio Ethics Commission Advisory Opinions No. 88-003 and 89-008.

R.C. 102.03(D) and (E) prohibit township trustees from soliciting, accepting, or using the authority or influence of their public positions 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 them with respect to their public duties. The Ethics Commission has stated that R.C. 102.03(D) and (E) prohibit public officials and employees from soliciting or using their public positions to secure a thing of value for themselves, their family members, or their business associates. Adv. Op. No. 89-008.

However, the Commission has explained that there are some circumstances where the benefit to public officials that results from an action of the agency they serve is not of "such a character as to manifest a substantial and improper influence" on the officials with respect to their duties. For example, in Advisory Opinion No. 88-004, the Ethics Commission stated that R.C. 102.03(D) does not prohibit public officials from participating in matters from which the officials

benefit *provided that* the matters result in a uniform benefit to the entire political subdivision, or to a large portion of the political subdivision, they serve. In Advisory Opinion No. 93-016, the Commission concluded that R.C. 102.03(D) does not prohibit a member of a county board of health who is a private business owner from participating in the enactment of a rule that will definitely and directly affect the official's business, provided that the rule affects all businesses of the kind in the same or similar manner. Finally, in Advisory Opinion No. 92-013, the Ethics Commission stated that R.C. 102.03(D) does not prohibit public officials or employees from participating in matters involving infrastructure improvements affecting all or a large portion of the political subdivision they serve, provided that public officials or employees do not receive any benefits from the improvements that are selective, differential, or disproportionate to the benefits received by other affected residents of the political subdivision.

Application to Presented Facts

Your questions involve one specific developer, Iberdrola. However, this opinion applies the law to circumstances involving any wind project developer.

In the circumstances you have described, R.C. 102.03(D) prohibits the township trustees from using their township positions to secure anything of value for themselves, their family members, or their business associates from a wind project developer. R.C. 102.03(D) prohibits township trustees with option agreements with a wind project developer from using their positions to secure the exercise of their options and payments from the developer. R.C. 102.03(D) prohibits township trustees whose immediate family members (such as parents, spouse, children, or siblings) or business associates (such as partners, co-owners of a business, co-members of an LLC, or employers) have option agreements from using their positions to secure the exercise of the options and payments for these related parties from the wind project developer. However, provided that they do not use their public positions to secure the exercise of the option, R.C. 102.03(D) and (E) do not prohibit township trustees from entering into option agreements with a developer.

The consideration of and decision to award a tax abatement to any company or developer is within the authority of the agency awarding the abatement and is not a matter under the authority of the Ethics Commission. However, if the township trustees' decision to approve a tax abatement to a wind project developer would result in a definite and direct benefit to the township trustees who have option agreements with a developer, or to their family members or business associates who have option agreements, the trustees would be prohibited from participating in the approval of the tax abatement. Nonetheless, if the facts show that the township trustees, or their family members and business associates, who have option agreements with the developer are affected by the tax abatement decisions in the same manner as any other person who has an option agreement with the developer, and the decisions on tax abatements do not result in benefits that are selective, differential, or disproportionate to the benefits received by other individuals who hold options, R.C. 102.03(D) does not prohibit the trustees from participating in the township's consideration of the abatements. Provided that the trustees do not solicit or accept any benefits related to the exercise of the option that are selective, differential, or in disproportion to the benefit offered to any other

person in a similar situation, R.C. 102.03(E) does not prohibit any such trustee from participating in the township's consideration of the abatements.

You have proposed three factors that, when present, would indicate that the trustees who are option holders would be affected by a tax abatement decision in the same manner as any other option holder. The Ethics Commission concludes that these factors must be expanded to include factual circumstances where a trustee's family member or business associate is an option holder:

- (1) The properties in the township that are a part of the planned wind development are not predominantly properties owned by public officials, or the family members or business associates of public officials, involved in the abatement process;
- (2) The public officials involved in the abatement process, or their family members and business associates, do not receive any specialized benefit not granted to every other similarly situated land owner; and
- (3) Granting the abatement has a uniform impact, because the circumstances are the same, on all taxpayers in the jurisdiction.

These factors will help the trustees who are option holders, or whose family members or business associates hold options, demonstrate that they are affected by the decision on abatements in the same manner as other option holders. However, the Ethics Commission concludes that the trustee must also demonstrate that:

- (4) The option agreement between the developer and the trustee has the same terms and conditions as option agreements the developer enters into with other land owners throughout the project;
- (5) There is an objective showing that the properties to which the options apply are within the wind corridor and may be developed, should the developer move forward with its project;
- (6) The trustee has no other relationship (such as employment or prohibited investment) with the developer;¹ and
- (7) Before any discussion, deliberation, or vote on the abatement, the trustee discloses:
(a) any option agreement the trustee has with the developer; and (2) any option agreement between the trustee's family members or business associates and the developer, if the trustee knows or has reason to know about the agreement.

Therefore, provided that township trustees who have option agreements, or whose family members or business associates have option agreements, with project developers do not receive

¹ In Advisory Opinions No. 93-001 and 2009-05, the Commission concluded that a public official who owns a minimal amount (under one percent) of the outstanding stock of a publicly traded corporation is not prohibited from participating in contract or regulatory matters that affect the corporation. The Commission concluded that an official who owns a minimal amount of stock would not receive such a definite and direct benefit from the agency's decisions on matters affecting the corporation to affect the official's objectivity and independence of judgment on those matters. This would apply to any person who held stock in the developer's company *prior to* the developer initiating wind development in the area.

any benefits that are selective, differential, or in disproportion to the benefits receive by any other option holders, as a result of the approval of tax abatements to the developer, such trustees are not prohibited from participating in the consideration of the abatements. A trustee who demonstrates the seven factors listed in this opinion can show that such trustee is affected by the abatement decision in the same manner as all other option holders.

Project-Blind Pre-Approvals

In the alternative, you have asked whether township trustees who have option agreements, or whose family members or business associates have option agreements, with wind developers, can participate in a project-blind pre-approval of tax abatements for all wind projects. In a project-blind pre-approval process:

- (a) All stakeholders in the enterprise zone and affected political subdivision or township would meet to negotiate pre-determined incentives that would apply to all wind projects in the same way, *regardless of the developer*, location, route, size, or scope of a particular project;
- (b) While trustees would know all developers are eligible for the tax abatement as an economic incentive for development in the community, the trustees would not know, at the time of negotiation, consideration, and vote to establish the incentive, which developers will move forward with projects or which planned project routes may be used.

Provided that the trustees who have option agreements, or whose family members or business associates have option agreements, with wind project developers can show that they meet the seven factors listed above, R.C. 102.03(D) would not prohibit the trustees from participating in this kind of project-blind pre-approval of tax abatements. Because these project-blind approvals would not apply to any specific project proposal, and would be for the general benefit of any wind developer working in the area, no option holder would benefit in a definite and direct way from the approval. Even in a project-blind pre-approval process, trustees would be prohibited, by R.C. 102.03(E), from soliciting any benefits for themselves, their family members, and their business associates, that are selective, differential, or in disproportion to the benefit offered to any other township resident with an option agreement.

Providing a Thing of Value to a Township Official or Employee—R.C. 102.03(F)

You should also note R.C. 102.03(F), which places restrictions on private companies and any other individuals that provide things of value to public officials or employees. R.C. 102.03(F) provides that 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.

In the situation you have described, R.C. 102.03(F) prohibits any developer from entering into an option contract with a township trustee, or a trustee's family member or business associate, if the terms and conditions of that contract are more favorable than the terms and conditions of an option contract that the company enters into with a landowner that is not a township trustee. R.C. 102.03(F) also prohibits the private company from specifically targeting properties owned by township trustees, or their family members or business associates, for lease options when considering the placement of wind turbines.

Conclusion

As explained above, where numerous properties are part of a wind project in an area, including properties owned by township trustees, R.C. 102.03(D) prohibits trustees from participating in discussion or consideration of, or voting to approve, a tax abatement to be awarded by the county to a developer in connection with a specific wind development project if: (1) they or their family members or business associates have option agreements with the developer; (2) the properties that are the subjects of the agreements will be part of the project; and (3) the trustees or their family members or business associates will be affected by the development of the project in a way that is selective, differential, or in disproportion to the affect on other township residents with option agreements with the developer. R.C. 102.03(E) also prohibits trustees from soliciting or accepting, from a developer, benefits for themselves or their family members or business associates that are selective, differential, or in disproportion to the benefits offered to any other township resident with an option agreement.

R.C. 102.03(D) and (E) do not prohibit a township trustee who has a lease option, or whose family members or business associates have lease options, from participating in discussions or decisions of the township, pursuant to the criteria discussed in this opinion, regarding project-blind pre-approvals of tax incentives that apply to all qualified developers in the same way.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on March 9, 2010. 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