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September 26, 2011

Informal Opinion 2011-INF-0926-2

J. Drew McFarland
YouthBuild Columbus Community School
[REDACTED]

Dear Mr. McFarland:

On July 15, 2011, the Ohio Ethics Commission received your e-mail and letter requesting an advisory opinion. In your letter, you explained that:

- You are legal counsel for the YouthBuild Columbus Community School (community school). The community school is a dropout recovery high school that allows students to work towards a diploma while learning residential construction or nursing skills;¹
- Students in the YouthBuild construction program build and rehabilitate houses;
- The properties that the students work on are eventually offered for sale;
- In previous years, these properties were developed and owned by YouthBuild Columbus, a non-profit Community Housing Development Organization (CHDO). YouthBuild Columbus CHDO is not the same entity as the community school;
- This year, the properties will be developed and owned by the community school; and
- A community school board member, who is also a real estate broker, listed and sold the properties for Youth Build Columbus CHDO. The board member would now like to act as the listing/selling broker for the community school.

Purpose of an Advisory Opinion

Although your question is about future activity, your letter describes activities that have occurred in the past. The purpose of Ethics Commission advisory opinions is to provide guidance to public officials or employees upon which they can rely before engaging in actions

that may be prohibited by the Ethics Law. For that reason, the Commission can render an advisory opinion only in response to a question that involves the prospective conduct of the person who requests the opinion.

The board member's sale of broker services to YouthBuild CHDO may have raised issues under the Ethics Law. However, in order to consider the past activity, the Commission would have to conduct an investigation. This opinion does not reach any conclusions about actions that may have been taken in the past.

Question and Brief Answer

Can a community school board member act as a listing/selling real estate broker for the community school?

No. The community school's acquisition of the board member's broker services is a public contract. The board member is prohibited from profiting from or having an interest in a contract entered into by or for the use of the community school *regardless* of whether he or she participates in the board's decisions regarding the contract.

Profiting from a Public Contract—R.C. 2921.42(A)(3)

Although community schools are nonprofit organizations, R.C. 3314.03(A)(11)(e) requires that community school governing board members, officials, and employees shall comply with Chapter 102, and section 2921.42 of the Revised Code.² Therefore, the community school governing board member is subject to the public contract restriction in R.C. 2921.42(A)(3), which provides that no public official shall knowingly:

During the public official's term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by the public official or by a legislative body, commission, or board of which the public official was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

A "public contract" is defined to include the purchase or acquisition of services by or for the use of a public agency.³ The community school's acquisition of the board member's services to list or sell its property is a public contract.

A public contract is authorized by an official or legislative body if the contract could not have been awarded without the approval of the official or the board of which he is a member.⁴ The restriction in R.C. 2921.42(A)(3) applies to all public contracts that are authorized by a public official *or* a board of which he is a member, *regardless* of whether the official participated in the board's authorization.⁵

The prohibition of R.C. 2921.42(A)(3) will apply whenever a public official profits from a contract of his public agency. A public official profits from a contract of his agency when he realizes a financial advantage, gain, or benefit that is a definite and direct result of a public contract authorized by the public official or by a legislative body of which he is a member.⁶

In the absence of competitive bidding, there is no exception to R.C. 2921.42(A)(3).⁷ Professional services, such as real estate broker or salesperson services, are generally not sold through competitive bidding. For example, an RFP is not a competitive bidding process. While an RFP process has some competitive aspects, it is not a competitive bid. See *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.* (1994), 73 Ohio St. 3d 590, 600 (“The RFP method of procurement is not competitive bidding.”) See also Adv. Op. No. 88-006 (distinguishing between ‘competitive bidding’ and a political subdivision’s ‘selection process’ for purposes of the public contract provisions of the Ethics Law). The “competitive bidding” exception does not apply to these contracts.

Therefore, R.C. 2921.42(A)(3) prohibits the community school governing board member from receiving a commission, fee, or any other payment for providing broker services to the community school if the governing board authorizes the school’s acquisition of those services. This is true regardless of whether the board member participates in matters before the board related to the listing/agency agreement or the sale of the property.

Having an Interest in a County Contract—R.C. 2921.42(A)(4)

The community school board member is also subject to the public contract restrictions in R.C. 2921.42(A)(4),⁸ which provides that no “public official” shall knowingly:

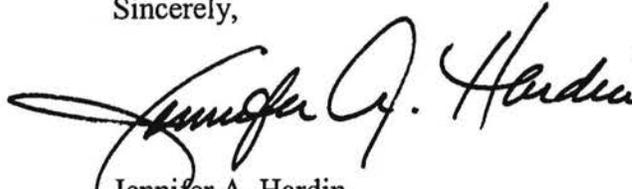
Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which the public official is connected.

A community school governing board member is prohibited from having a definite and direct financial or fiduciary interest in a contract entered into *by or for the use of* the community school. The community school’s acquisition of the services of a real estate broker to list or sell its property is a public contract. If the community school governing board member receives a commission, fee, or any other type of compensation for performing these services, the board member would have a prohibited financial interest in the community school’s acquisition of the services.

Therefore, R.C. 2921.42(A)(4) also prohibits a community school governing board member from receiving payment to performing broker services for the school. There is an exception to this prohibition, set forth in R.C. 2921.42(C). However, because R.C. 2921.42(A)(3) (discussed above) expressly prohibits the board member from benefiting from the sale of broker services to the school unless the services are competitively bid, it is unnecessary for the Commission to further review the exception in R.C. 2921.42(C).⁹

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 26, 2011. 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

Enclosure: Local Public Official Selling to Local Agency: Information Sheet No. 2
Advisory Opinion No. 96-004

The Ohio Ethics Commission Advisory Opinions referenced in this opinion are available on the Commission's Web site: www.ethics.ohio.gov.

¹ www.youthbuildcolumbus.info.

² Ohio Ethics Commission Advisory Opinion No. 2010-01.

³ R.C. 2921.42(I)(1)(a); Adv. Ops. No. 85-009 and 90-003.

⁴ Adv. Op. No. 87-004 and 87-008.

⁵ Adv. Op. No. 87-008.

⁶ Adv. Op. No. 89-006.

⁷ Adv. Op. No. 92-014.

⁸ See R.C. Chapter 3314 and Adv. Op. No. 2010-01 (R.C. 3314.03(A)(11)(e) requires that community school governing board members, officials, and employees shall comply with Chapter 102. and section 2921.42 of the Revised Code.).

⁹ See Adv. Op. No. 84-002 (the Commission held that "[i]t would be extremely difficult to demonstrate that legal services [provided by a firm in which a public official has an interest] would be 'unobtainable elsewhere for the same or lower cost.'). See also Adv. Ops. No. 78-001 ("the legal services [to be provided by a law partner of a city council member] are probably obtainable elsewhere for the same or lower cost") and 90-007 ("[i]t may be difficult to demonstrate that legal services provided by the prosecuting attorney's partner would be 'unobtainable elsewhere for the same or lower cost.'). See also Adv. Op. No. 95-004. See Adv. Op. No. 95-006 (it appears unlikely that the auditor can meet the burden of establishing that her professional appraisal services are "unobtainable elsewhere for the same or lower cost.').