



OHIO ETHICS COMMISSION

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Advisory Opinion Number 88-003
February 25, 1988

Syllabus by the Commission:

- (1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a county officer, employee, or agent from conveying real property which he owns to the board of county commissioners, where the board seeks to acquire such property by direct purchase or through eminent domain proceedings, unless all of the criteria for the exemption of Division (C) of Section 2921.42 are met; under Division (C)(2) it must be demonstrated that the property of the county official is either the least costly property for the county or is uniquely suited to meet the requirements of the board of county commissioners because of its location, size, or other characteristics;
- (2) Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code prohibit a county officer or employee from voting, deliberating, participating in discussions, or otherwise authorizing or using the authority or influence of his position to secure the acquisition of his property by the county;
- (3) Division (B) of Section 102.03 of the Revised Code prohibits a county officer or employee from using, without appropriate authorization, confidential information acquired by him in his official capacity with regard to the county's plans to construct a public improvement or acquire property in connection therewith;
- (4) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a county commissioner, or other county official who has the authority to acquire property or who serves on a board or commission with such authority, from profiting from the acquisition of real property authorized by him or by his board or commission, where such acquisition is not made pursuant to competitive bidding or is awarded pursuant to competitive bidding but is not the lowest and best bid.

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You asked whether the Ohio Ethics Law and related statutes prohibit a board of county commissioners from acquiring, either by direct purchase or through eminent domain proceedings, real property owned by an employee of the board or by any other county officer or employee.

You have stated, by way of history, that the board of county commissioners is statutorily empowered to acquire real property, either through direct purchase or eminent domain proceedings, for a variety of county purposes, primarily with regard to the construction of county

buildings, roads, and other public improvements. You also state that in planning for such improvements, the board of county commissioners may discover that the property necessary for the improvement is owned by a county officer or employee. You wish to know whether the fact that a county officer or employee owns such property prohibits the board of county commissioners from directly purchasing the property or from instituting eminent domain proceedings to acquire the property.

Division (A)(4) of Section 2921.42 of the Revised Code provides that:

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

(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.

A "public official" is defined for purposes of R.C. 2921.42 to include any elected or appointed officer, employee, or agent of any political subdivision. R.C. 2921.01(A). Therefore, every county officer, whether elected or appointed, county employee, and agent of the county is subject to the prohibitions of R.C. 2921.42.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (E) of that Section to include "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." The direct purchase of real property by a board of county commissioners falls squarely within the definition of a "public contract" for purposes of R.C. 2921.42. See Ohio Ethics Commission Advisory Opinion No. 84-003. Further, the acquisition of property by a board of county commissioners through eminent domain proceedings also constitutes a "public contract" under R.C. 2921.42. Id. Therefore, a county officer, employee, or agent is prohibited from having an interest in the county's acquisition of property, regardless of whether such acquisition is by direct purchase or through eminent domain proceedings. In Advisory Opinion No. 87-002, the Commission emphasized that R.C. 2921.42(A)(4) "prevents a public official connected with a political subdivision from contracting with the political subdivision as a whole and not just with the particular agency, board, or department of the political subdivision with which he serves." All officers, employees, and agents of the county are prohibited from having an interest in the acquisition of real property by the board of county commissioners, regardless of whether they serve with the board of county commissioners or with another board, office, department, or agency of the county.

An "interest" which is prohibited under R.C. 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. See Advisory Opinion No. 81-008. An individual who owns a parcel of real property would clearly have a definite and direct pecuniary interest in the purchase or acquisition of that property by the county. Therefore, R.C. 2921.42(A)(4) prohibits a county officer, employee, or agent, regardless of the county agency, board, department, or office with which he serves, from conveying real property which he owns to the board of county commissioners, where the board seeks to acquire such property by direct purchase or through eminent domain proceedings.

Division (C) of Section 2921.42 does, however, provide an exception to this prohibition, and reads as follows:

(C) This section does not apply to a public contract in which a public servant, member of his family, or one of his business associates has an interest, when all of the following apply.

(1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;

(2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public servant's becoming associated with the political subdivision or governmental agency or instrumentality involved;

(3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;

(4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public servant, member of his family, or business associate, and the public servant takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

Each of the four items enumerated above are issues of fact which, when applied to the circumstances of an individual case, will determine whether a particular transaction fits within the parameters of R.C. 2921.42(C). See Advisory Opinion 82-007. These criteria are strictly applied against the public official, and the burden is on the official to demonstrate that he is in compliance with the exemption. See Advisory Opinions No. 83-004 and 84-011.

It is particularly important that the requirement under R.C. 2921.42(C)(2) that the goods or services are "unobtainable elsewhere for the same or lower cost" be demonstrated by some objective standard. See Advisory Opinion No. 83-004. As Advisory Opinion No. 84-011 states:

[T]he application of the exemption [provided in Division (C) of Section 2921.42] must be consistent with the principle underlying Section 2921.42 of the Revised Code that a public official should not have an interest in a public contract with the governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity. (Emphasis added.)

Under the facts you have presented, the board of county commissioners wishes to purchase real property as part of the proposed construction of a public improvement. The board has the discretion, within all pertinent constitutional and statutory restrictions, to construct necessary public improvements and to purchase or appropriate such property which possesses

those characteristics that will best meet the county's needs in constructing a particular public improvement. See Giesy v. Cincinnati Wilmington, & Zanesville Railroad Co., 4 Ohio St. 308, 327 (1854); Board of Education v. Holding Corp., 29 Ohio App. 2d 114, 123-125 (1971). However, in order to meet the requirements of Division (C)(2), the board must be able to demonstrate that it has acted objectively and reasonably in determining whether to construct a particular public improvement, so as not to favor the private interests of a county officer or employee. See generally Advisory Opinions No. 84-011 and 88-001. The county must also justify objectively through appropriate documentation that the property of the county official is either the least costly property for the county or is uniquely suited to meet the needs of the board of county commissioners in constructing the improvement because of the property's location, size, or other characteristics. See generally Advisory Opinions No. 87-003 and 88-001. See also Advisory Opinion No. 83-004 (open and fair competitive bidding may help to demonstrate compliance with the requirement of Division (C)(2), although it is not determinative). It should also be emphasized that Division (C)(4) requires that the county be aware of the officials ownership of the property.

Assuming that the criteria of Division (C) can be established so that a county may properly acquire real property from a county officer, employee, or agent, the prohibitions of Division (A)(1) of R.C. 2921.42 must be observed. R.C. 2921.42(A)(1) prohibits a public official from authorizing or employing "the authority or influence of his office to secure authorization of a public contract in which he, a member of his family, or any of his business associates has an interest." Thus, R.C. 2921.42(A)(1) would prohibit a county official from voting, discussing, deliberating, or otherwise using his official authority or influence, formally or informally, to secure the acquisition of his property by the county. See also R.C. 2921.42(C)(4) (set forth above).

This conduct would also be prohibited by Division (D) of Section 102.03 of the Revised Code, which provides:

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 or is an employee of any department, division, institution, board, commission, authority, bureau, or other instrumentality of a county. R.C. 102.01(B) and (C). Therefore, all county officers and employees are subject to the prohibitions of R.C. 102.03(D).

R.C. 1.03 defines "anything of value" for purposes of R.C. 102.03 to include money and every other thing of value. See R.C. 102.01(G). Payments received by an individual for property acquired by the county fall within the definition of "anything of value." Thus, a county officer or employee may not authorize, or otherwise use his official position, authority or influence, either formally or informally, to secure the acquisition of his property by the county. It is incumbent

upon every county officer or employee to refrain from exercising his influence or authority to secure the acquisition of his property by the county.

Division (B) of Section 102.03 of the Revised Code provides as follows:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

Therefore, a county officer or employee is prohibited from using, without appropriate authorization, confidential information acquired by him in his official capacity in order to purchase property or to otherwise benefit himself with regard to the county's plans to construct a public improvement or acquire property in connection therewith.

County commissioners and other county officers and employees who are authorized to acquire property or who serve on boards or commissions which are so authorized, are also subject to Division (A)(3) of Section 2921.42, which provides that no public official shall knowingly:

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.

R.C. 2921.42(A)(3) would, therefore, prohibit a county commissioner or other official who has the authority to acquire property, or who serves on a board or commission with such authority, from profiting from the acquisition of property authorized by him or by his board or commission, where such acquisition is not made pursuant to competitive bidding or, is awarded after competitive bidding but is not the lowest and best bid. A county commissioner or other board or commission member is bound by this prohibition, regardless of the fact that he does not deliberate, vote upon, or otherwise authorize the acquisition. See Advisory Opinion No. 87-008.

This advisory 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, and does not purport to interpret other laws or rules.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a county officer, employee, or agent from conveying real property which he owns to the board of county commissioners, where the board seeks to acquire such property by direct purchase or through eminent domain proceedings, unless all of the criteria for the exemption of Division (C) of Section 2921.42 are

met; under Division (C)(2) it must be demonstrated that the property of the county official is either the least costly property for the county or is uniquely suited to meet the requirements of the board of county commissioners because of its location, size, or other characteristics; (2) Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code prohibit a county officer or employee from voting, deliberating, participating in discussions, or otherwise authorizing or using the authority or influence of his position to secure the acquisition of his property by the county; (3) Division (B) of Section 102.03 of the Revised Code prohibits a county officer or employee from using, without appropriate authorization, confidential information acquired by him in his official capacity with regard to the county's plans to construct a public improvement or acquire property in connection therewith; and (4) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a county commissioner, or other county official who has the authority to acquire property or who serves on a board or commission with such authority, from profiting from the acquisition of real property authorized by him or by his board or commission, where such acquisition is not made pursuant to competitive bidding or is awarded pursuant to competitive bidding but is not the lowest and best bid.


Paul F. Ward, Chairman
Ohio Ethics Commission