OHIO ETHICS COMMISSION
THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

January 8, 1993 Informal Opinion 1993-INF-0108

Board of Directors
Columbus Municipal Airport Authority
[redacted]

Dear Board Members:

You have asked for an application of the Ohio Ethics Law and related statutes to the following facts.

The Columbus Municipal Airport Authority (Port Authority) is a port authority created by the City of Columbus pursuant to Section 4582.30 of the Revised Code and City Ordinance. The Mayor of the City, with the advice and consent of City Council, appoints the members of the Board of Directors (Board). The Board consists of nine members, and the affirmative vote of five members is required for any action to be taken by the Port Authority.

The Port Authority has determined that additional passenger service should be sought and provided at Port Columbus International Airport (Airport) and that the Airport needs additional gates and related facilities to accommodate the additional passenger service. The Board has endorsed plans to construct and equip nine additional permanent gates and related facilities at the Airport. You state that the facilities were not planned or designated for any particular user. Construction and equipment of the nine permanent gates and facilities will take approximately two to three years to accomplish, and the Board has thus determined to acquire, construct, and equip nine modular gates and facilities to use until the permanent gates and facilities are completed. The Board intends to issue revenue bonds to fund construction of the nine modular gates and related facilities. When the permanent gates and facilities are completed, the nine modular gates could be sold or retained for future use.

The Port Authority is also considering a proposal to lease most of the facilities to be financed by the revenue bonds to an airline (Airline) that is currently leasing other facilities and providing passenger service at the Airport. You have stated that the law does not require that the lease provisions for the use of the aviation facilities be determined by competitive bidding. In accordance with the Port Authority's use agreements with other airlines operating at the Airport and in accordance with federal requirements, the Authority may not charge the Airline a more

. . .

> (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.

The members of the board of directors of the Port Authority are public officials who are subject to the prohibitions of Section 2921.42. See R.C. 2921.01(A); Ohio Ethics Commission Advisory Opinion No. 90-013.

The term "public contract" is defined in Division (E) of Section 2921.42 as follows:

> (1) 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;
>
> (2) A contract for the design, construction, alteration, repair, or maintenance of any public property. (Emphasis added.)

In this case, the Port Authority would lease aviation facilities to the Airline. You have stated that, under the lease, the Airline will undertake certain obligations, such as maintenance and operation of the facilities. It must be determined whether this lease is a "public contract" for purposes of R.C. 2921.42.

In Advisory Opinion No. 91-011, the Ethics Commission was asked if city officials and employees are prohibited by the Ohio Ethics Law and related statutes from lease-purchasing or directly buying housing units in a city financed housing project constructed on city property. The Ethics Commission, in determining whether these purchases or lease-purchases would constitute public contracts, stated:

> The Ethics Commission has held that a governmental entity's lease or conveyance of its property is a contract for the acquisition of services by and for the use of the governmental entity, and thus a "public contract," where the governmental entity is leasing or conveying its property in exchange for some benefit or service. See Advisory Opinions No. 78-003, 86-009, and 88-006. For example, in Advisory Opinion No. 86-009 the Commission addressed the specific question whether a city's lease of its park-land for farming was a "public contract" for purposes of R.C. 2921.42. The Commission

Division (A)(4) if the Port Authority entered into a public contract with Companies A and B, respectively. However, this is not the case here.

In this instance, Companies A and B, the Companies in which Directors A and B have a financial and fiduciary interest, are not contracting with the Port Authority, but would purchase stock in the Airline which would then lease facilities from the Airport. As stated above, an interest which is prohibited under Section 2921.42 must be definite and direct in nature. See Advisory Opinion No. 92-013. Although Directors A and B hold fiduciary positions with Companies A and B, they hold no fiduciary relationship with the Airline. Directors A and B also own fractional shares of stock in their respective companies and those companies may purchase five percent or less of the Airline's stock. While Directors A and B may, as stockholders in their respective companies, have a financial interest in the contracts of businesses in which their companies own stock, it cannot be said that such interest is definite and direct in nature. If Companies A and B were to purchase five percent or less of the stock in the Airline, and the Airline were to lease facilities from the Port Authority and use the facilities to expand its passenger service, any resulting profit or benefit from the lease to Directors A and B, as holders of fractional interests in Companies A and B, would be so speculative and negligible that such interest could be considered, at best, to be indefinite and indirect. The interest would not rise to the level of being definite and direct. Compare Advisory Opinion No. 92-013.

However, Directors A and B also serve in a fiduciary capacity with their respective companies, and these companies may purchase stock in the Airline. Thus, the issue becomes whether Company A and B would have an "interest" in the lease of facilities from the Port Authority to the Airline if the Companies purchased stock in the Airline. Generally, stockholders in a company are deemed to have an "interest" in the contracts of that company for purposes of Section 2921.42. Advisory Opinions No. 79-005 and 93-001. However, Division (B) states that in the absence of bribery or a purpose to defraud, a stockholder shall not be considered as having an interest in a public contract if the interest is limited to owning or controlling five percent or less of the outstanding shares of the corporation. You have stated that Companies A and B would own five percent or less of the stock of the Airline if they decided to purchase such stock. Therefore, Companies A and B would not be considered as having an "interest" in the contract between the Port Authority and the Airline. But see R.C.2921.42(B)(3) (requiring the official or shareholder, prior to the time the public contract is entered into, to file with the governmental agency, an affidavit giving his status in connection with the contractor).

stock in the Airline and the Port Authority were to lease facilities to the Airline.

Division (A)(1) of Section 2921.42 prohibits a public official from knowingly authorizing, or using the authority or influence of his office to secure authorization of, a public contract in which <u>he, a member of his family, or any of his business associates</u> has an interest. As discussed above, the fact that Directors A and B own fractional interests in Companies A and B does not mean that they personally would have a pecuniary interest in the lease of facilities by the Port Authority to the Airline if Companies A and B were to purchase five percent of less of the stock of the Airline. The same would hold true for the family members of Directors A and B who also have minimal stockholdings in Companies A and B. Also, as discussed above, Directors A and B would have no fiduciary interest in the lease of the facilities.

R.C. 2921.42 also prohibits a public official from authorizing a contract in which any of his business associates has an interest. Even if Companies A and B can be considered the business associates of Directors A and B, respectively, <u>see</u> Advisory Opinion No. 92-008, these Companies would not, as discussed above, have an "interest" in the lease. Furthermore, it cannot be said that the Airline itself would be the business associate of Directors A and B under the facts presented. Directors A and B serve with and own small amounts of stock in Companies A and B and these Companies may purchase five percent or less of the stock of the Airline. If the Companies do purchase stock of the Airline, the relationship between the Airline and Directors A and B would be too attenuated and remote to be considered a business association. <u>See</u> Advisory Opinion No. 93-001.

Therefore, Division (A)(1) of Section 2921.42 would not prohibit Directors A and B from participating in the Port Authority's deliberations and decision to lease facilities to the Airline even if Companies A and B purchased five percent or less of the stock of the Airline.

However, Division (D) of Section 102.03 of the Revised Code reads as follows:

> 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.

benefit from the lease of Port Authority facilities to the Airline if they purchased stock in the Airline, or would have a contingent interest in the lease of facilities. The fact that an "interest" in a public contract may not exist for purposes of R.C. 2921.42 does not necessarily mean that an official or his organization may not derive a definite or contingent pecuniary benefit from the contract. See Advisory Opinion No. 92-013.

As discussed above, stockholders and others who have an ownership interest in a company are generally deemed to have an "interest" in the contracts of that company for purposes of R.C. 2921.42. Therefore, Companies A and B, as stockholders in the Airline, would generally be deemed to have an "interest" in the contracts of the Airline, except that Division (B) of Section 2921.42 provides an exemption to the prohibition of Section 2921.42 in cases where the stockholder owns five percent or less of the company's outstanding shares. Stockholders in a company financially benefit from the contracts of that company. It is apparent that the objectivity and independence of judgment of a public official who also serves in a fiduciary capacity with an organization could be impaired with respect to matters upon which the financial interests of the organization are contingent. See generally Advisory Opinions No. 88-004 and 88-005. In this instance, Directors A and B serve in a fiduciary capacity with their respective Companies. If the Companies purchase stock in the Airline, the Companies would derive a definite and particular benefit from the business conducted by the Airline. The lease between the Port Authority and Airline would enable the Airline to expand its passenger service and establish a hub at the Airport. Companies A and B, as stockholders in the Airline, would benefit from this increased business. Therefore, the interests of the Companies are contingent upon the Port Authority's approval of the lease with the Airline. Thus, if Companies A and B purchase stock of the Airline, the lease would be of such character as to manifest an improper influence upon Directors A and B, who hold fiduciary relationships with Companies A and B.

In this instance, Companies A and B would purchase five percent or less of the Airline's stock. As discussed above, Division (B) of Section 2921.42 provides an exception to the prohibition of Division (A)(4) with respect to such smaller stockholdings. Division (D) of Section 102.03 contains no such exception for smaller stockholdings, and provides no specific minimal amount below which a matter will not be considered to have an improper influence on the public official. See Advisory Opinion No. 93-001. Division (D) does, however, require that the thing of value be of such character as to manifest a substantial, as well as improper, influence upon the public official or employee. Id. For example, the Commission, in analyzing whether a public official or employee may accept travel, meal, and lodging expenses or gifts, informally, to secure the lease for the Airline, or with respect to any other matter involving the interests of the Airline. The prohibitions of R.C. 102.03(D) also extend beyond the initial approval of the lease, and prohibit Directors A and B from participating in any matter or decision which would affect the continuation, implementation, or terms and conditions of the lease, or payment thereunder.

Director G

Director G owns .0001 stock of Company A and his spouse is the beneficiary of a trust that owns .00006 of Company A. Director G does not have a fiduciary relationship with Company A.

Under the analysis set forth above, Director G would neither have a definite and direct pecuniary interest in, nor occupy a position of profit in the prosecution of, the public contracts of the Airline for purposes of R.C. 2921.42, if Company A were to purchase five percent or less of the Airline's stock. Furthermore, Director G does not have a fiduciary relationship with the Airline or Company A. Therefore, Director G would not have an improper interest in, or improperly profit from, the lease between the Airline and the Port Authority for purposes of Divisions (A)(4) and (3) if Company A were to purchase stock in the Airline.

For purposes of Division (A)(1) of Section 2921.42, Director G does not, as discussed above, have an interest in the Airline. Similarly, his spouse has no "interest" in the Airline for purposes of Division (A)(1) of Section 2921.42. However, Division (A)(1) also prohibits a public official from authorizing, or using the authority or influence of his position to secure authorization of, any public contract in which any of his business associates has an interest. The issue remains, therefore, whether any business associates of Director G would have such an interest in the contracts of the Airline so as to prohibit Director G from participating in the Port Authority's decision to lease the facilities.

The term "business associate" is not defined by statute for purposes of R.C. 2921.42. In Advisory Opinion No. 93-001, the Commission held that a person whose sole relationship to a corporation is that of a stockholder is not a "business associate" of the corporation, unless the facts otherwise indicate that the official and corporation act together to pursue a common business purpose. Thus, Director G and Company A are not considered to be "business associates" for purposes of R.C. 2921.42(A)(1).

Even if Company A were the business associate of Director G, Company A would not, as discussed above, have an "interest" in the contracts of the Airline, since Company A would purchase five

However, Director F is also a member of the board of directors of Company B, and as discussed above, R.C. 102.03(D) would prohibit him from participating in the Port Authority's deliberations and decision to lease facilities to the Airline and other matters involving the interests of the Airline, if Company B purchases stock of the Airline.

Director D

Director D is President and CEO of Company DD, which is a wholly-owned subsidiary of Company D. Company D is contemplating purchase of Airline stock. Director D owns .000014 of the stock of Company D and holds options on up to .00019. Director D's spouse owns .000003 of the stock of Company B.

Under the analysis set forth above, the mere fact that Director D's spouse owns .000003 of the stock of Company B imposes no restrictions under R.C. 2921.42 or 102.03(D) upon Director D, even if Company B purchases stock of the Airline. Similarly, the fact that Director D owns .000014 of the stock of Company D would, in and of itself, impose no restrictions upon Director D if Company D were to purchase five percent or less of the outstanding shares of stock of the Airline.

However, as noted above, Director D is also the President and CEO of Company DD, which is a wholly-owned subsidiary of Company D. Company DD is not contemplating the purchase of stock in the Airline. Company D may purchase stock in the Airline. Company D owns all of the stock of Company DD, and thus would have a financial interest in the contracts of Company DD. However, Company DD, as Company D's subsidiary, would not conversely have a definite and direct interest in the contracts of Company D. Although it may be said that a subsidiary may have an indirect interest in the contracts of its parent company, such interest is not definite and direct. Therefore, the fact that Director D is the President and CEO of Company DD would not mean that Director D would have an improper interest or position of profit in the lease for purposes of R.C. 2921.42(A) if Company D purchased Airline stock. Furthermore, if Company D purchases five percent or less of the Airline stock, then Company D would have no interest in the Airline's contracts for purposes of R.C. 2921.42(A)(1), even if Company D could be considered Director D's business associate.

R.C. 102.03(D) would not prohibit Director D from participating in the lease of facilities to the Airline since Company DD, which he serves in a fiduciary capacity, would not benefit from the lease. Furthermore, under the analysis set forth above, the fact that Director D owns a fractional interest in the stock of Company D and his spouse owns a fractional interest in the stock of Company B would not be of such character as to manifest a

R.C. 2921.42. The fact that Company E is owed less than one percent of the Airline's indebtedness, taken together with the fact that Company E would own five percent or less of the stock of the Airline does not mean, as a matter of law, that Company E would have a definite and direct interest in the lease. However, this could easily change if the amount of indebtedness or stockholding increases at any point, and the Commission should be contacted again if the facts with regard to Company E should change. The Commission is cognizant of Division (B) of R.C. 2921.42, which provides that a party will not be deemed to have an interest in the contracts of a corporation when the interest of such party is limited to owning or controlling shares of the corporation <u>or</u> being a creditor of the corporation, and the shares owned or controlled do not exceed five percent of the shares of the corporation, and the amount due the party as creditor does not exceed five percent of the total indebtedness of the corporation. In this instance, the amount of stock purchased would not exceed five percent, and the amount owed to Company E by the Airline does not exceed five percent. However, Company E would not be eligible for the exemption of Division (B) since the exemption is available only to those persons who are <u>either</u> a stockholder <u>or</u> a creditor. It is not available to a party who is both, regardless of the amount of stock owned or debt owed.

Under the analysis set forth above, Director E would be prohibited by R.C. 102.03(D) from participating in the Port Authority's deliberations and decision with regard to the lease of facilities to the Airline and other matters involving the Airline if Company E purchases stock of the Airline, since Company E's financial interests, as a stockholder in the Airline, would be contingent upon and benefit from approval of the lease, and in light of the fact that Director E holds a fiduciary relationship with Company E, Director E and his family own stock, perhaps a substantial amount of stock, in Company E, and Company E is a creditor of the Airline. Also, if Company E continues to do business with the Airline, it must be assured that Company E would have no interest in the lease. For example, R.C 2921.42(A)(4) would prohibit Company E from providing services to the Airline to maintain the facilities, once they have been leased from the Port Authority. R.C. 102.03(D) and (E) would also impose restrictions on Director E with respect to the manner in which he conducts business with the Airline. <u>See</u>, <u>e.g.</u> Advisory Opinions No. 89-006, 89-010, 89-013, and 89-014.

<u>Directors C and I</u>

You have provided no facts which would indicate that Directors C and I have a potential conflict of interest. Under the facts presented, they would not be prohibited from participating in the

<u>may</u> have acted in contravention of R.C. 102.03(D), depending on the particular facts and circumstances. Therefore, a Director who participates to approve the lease and whose Company then purchases stock in the Airline may violate R.C. 102.03(D).

This is not to say that the Companies can <u>never</u> purchase stock in the Airline, without creating liability for the Directors under R.C. 102.03(D). <u>See</u> <u>generally</u> Advisory Opinion No. 87-008. For example, if a sufficient time has passed after the Port Authority's approval of the lease to indicate that the Director had not, by voting on the lease, used the authority or influence of his position to secure something of value for his Company, then the Company may purchase stock without creating liability for the Director. <u>Id</u>. However, this will be a very fact-specific issue, and the Ethics Commission should be contacted again if this issue should arise in a particular context.

<u>Other Provisions of the Ethics Law</u>

The members of the Port Authority should also be aware of R.C. 102.04 (C), which prohibits a public officer from receiving compensation for personally rendering services on a matter pending before his own governmental agency, and R.C. 102.03(A), which prohibits a public official, during his public services, and for one year thereafter, from representing any person before any public agency on any matter in which he personally participated while in public service.

As a final matter, the directors are also subject to Division (B) of Section 102.03, which reads:

> 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.

The directors are prohibited from disclosing confidential information, which they acquired in their official capacity, to their Companies, the Airline, or any other party, or from using such information, without appropriate authorization. <u>See</u> Advisory Opinion No. 89-006. This limitation is applicable during each