

OHIO ETHICS COMMISSION

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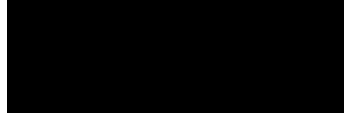


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April 6, 2001

Informal Opinion 2001-INF-0406-3

The Honorable Charlie Luken
Mayor, City of Cincinnati



Dear Mayor Luken:

The Ohio Ethics Commission received your request for an advisory opinion on March 8, 2001. The Commission considered your request today, in its normal course of business, at the next meeting after you submitted your letter, and approved this advisory opinion.

In your letter, you have asked whether the Ohio Ethics Law and related statutes prohibit you, as the Mayor of the City of Cincinnati, from purchasing real property that is subject to a tax exemption that was implemented as a result of an ordinance that was passed by city council in 1984. You have explained that you were a member of city council in 1984, and voted to approve the ordinance. You have explained that you have been the Mayor of Cincinnati since 1999, and that you served as a member of Cincinnati City Council from 1981 to 1984, as Mayor of Cincinnati from 1984 to 1990, and as a member of U.S. Congress from 1990 to 1992.

Opinion Summary

Because of the significant break in your service to the City of Cincinnati, R.C. 2921.42(A)(3) does not prohibit you from taking advantage of a tax exemption under a program that was authorized by city council while you were a member. However, R.C. 2921.42(A)(4) prohibits you from having a definite and direct interest in a tax exemption provided by the City unless you can meet each of the four requirements of the exception provided by R.C. 2921.42(C). It appears, based on the specific situation that you have presented, that you can meet each of the requirements of the exception as discussed herein. If you can meet all of the requirements of the exception, you are not prohibited from having an interest in tax exemptions provided by the City and resulting from construction or improvements made to the property.

Even where you would not be prohibited from having an interest in the tax exemptions, R.C. 2921.42(A)(1) prohibits you from authorizing, or securing authorization of, any public contract, including a tax exemption, in which you would have an interest. Similarly, R.C. 102.03(D) prohibits you from using the authority or influence of your position as Mayor with respect to the tax exemption, or other action, from which you would benefit if you were to own a parcel of real property that is subject to the tax exemption.

Facts

In your letter to the Commission, you state that you wish to purchase a townhouse in the West End of Cincinnati. The house you wish to purchase was built in 1992. You state that you do not know the seller of the property and that the transaction would be at arm's length. You also state that the City would have no involvement in the purchase of the property.

In your letter, you explain that, in 1984, you, as a member of city council, voted for an ordinance that designated an area in the West End as a Community Reinvestment Area. You state that the property that you wish to purchase is within the area designated as a Community Reinvestment Area in the ordinance. A copy of the ordinance was provided to the Ethics Commission by the City Solicitor's Office.

Community Reinvestment Ordinance Approved in 1984

The ordinance provides for tax exemptions for remodeling and new construction of dwellings in the Community Reinvestment Area designated by the ordinance. Remodeling of dwellings containing not more than two family units located within the Community Reinvestment Area upon which the cost of remodeling is at least \$2,500.00 is eligible for tax exemption for a period of ten years upon proper application therefor by the owner and certification thereof by the City's Housing Officer to the County Auditor. Construction of new dwellings or new commercial or industrial structures located within the Community Reinvestment Area are eligible for tax exemption for a period of fifteen years, upon proper application therefor by the owner and certification thereof by the City's Housing Officer. Further, the ordinance provides that if new construction qualifies for an exemption, during the period of the exemption the structure shall not be considered an improvement on the land on which it is located for the purpose of real property taxation. The ordinance also provides that if remodeling qualifies for an exemption, during the period of the exemption the dollar amount by which the remodeling increased the market value of the structure shall be exempt from real property taxation. Finally, the ordinance states that it will continue in full force and effect unless and until city council, by subsequent ordinance, terminates the designation of the Community Reinvestment Area.

Occupying a Position of Profit in a City Contract—R.C. 2921.42(A)(3)

The situation you have presented to the Commission implicates R.C. 2921.42(A)(3), 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, unless the contract was let by competitive bidding to the lowest and best bidder (emphasis added).

The term "public official" is defined in R.C. 2921.01(A), for purposes of R.C. 2921.42, to include "any elected or appointed officer, employee, or agent of . . . any political subdivision" of the state. A city mayor is a public official subject to the prohibitions of R.C. 2921.42. See Ohio Ethics Commission Advisory Opinions No. 85-002 and 93-012.

R.C. 2921.42(G)(1) defines the term "public contract" for purposes of R.C. 2921.42 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. The Ethics Commission has held that a political subdivision's purchase or acquisition of community and economic development services, or urban renewal or revitalization services through the use of grants, loans, land reutilization programs, and other similar programs constitutes a "public contract" for purposes of R.C. 2921.42. See Adv. Ops. No. 83-005, 84-011, 85-002, and 88-006.

In Advisory Opinion No. 89-008, the Ethics Commission addressed the question of whether a city's grant of a tax exemption is a public contract for purposes of the prohibitions of R.C. 2921.42. In that Advisory Opinion, the Commission stated that "[i]t is apparent that a tax abatement which is granted by a city in exchange for a company's development or renovation of property, or the construction of facilities, is a 'public contract' for purposes of R.C. 2921.42 since it is the purchase of economic or community development, or urban renewal services by the city." Under this reasoning, a tax exemption granted by the City of Cincinnati in exchange for remodeling or new construction within the Community Reinvestment Area is a public contract.

There is at least one public contract in the situation that you have presented to the Ethics Commission. The public contract is the tax exemption, awarded by the City, on the property under the terms of the ordinance adopted in 1984. Under those terms, the public contract was formed in 1992, when the person who owned the property applied for the tax exemption on the new home built on the property and the city certified the application. In addition, if improvements were or will be made to the property subsequent to the construction of the property in 1992, any tax exemption applied for and certified on the improvement would constitute a public contract as that term is defined for purposes of the prohibitions of R.C. 2921.42.

Therefore, R.C. 2921.42(A)(3) prohibits you, during your term of office and within one year thereafter, from profiting from a tax exemption that you authorized, or that was authorized by a legislative body of which you were a member at the time of authorization.

Based on the information that you provided to the Ethics Commission, the tax exemption from which you would potentially profit was authorized by city council in 1984. At the time of authorization, you were a member of city council. However, your term of office on city council ended in 1990 after you were elected to the U.S. Congress. Therefore, the one-year prohibition imposed by R.C. 2921.42(A)(3) with respect to the tax exemption authorized in 1984 has expired. You should be aware, however, that you are prohibited from profiting, while you serve as Mayor and within one year thereafter, from any tax exemption that city council authorized or authorizes in your current term as Mayor.

Because of the significant break in your service to the city of Cincinnati, R.C. 2921.42(A)(3) does not prohibit you from taking advantage of a tax exemption under a program that was authorized by city council while you were a member. However, there are other restrictions in the Ethics Law that are applicable to your question.

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

Your attention is directed to R.C. 2921.42(A)(4), 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 he is connected.

As stated above, you, as an elected city official, are subject to the prohibitions of R.C. 2921.42. As is also stated above, the acquisition of services by the City in return for a tax exemption is a public contract.

R.C. 2921.42(A)(4) prohibits a city mayor from having an "interest" in the city's grant of a tax exemption. An "interest" that is prohibited under R.C. 2921.42 must be definite and direct and may be either pecuniary or fiduciary in nature. See Adv. Op. No. 81-008. You would have a definite and direct pecuniary interest in a tax exemption granted by the City as a result of the construction of the property in 1992, or in subsequent tax exemptions granted by the City as a result of improvements made to the property, if you were to purchase the property and thereby directly benefit from the tax exemptions. You would be prohibited from having a definite and direct interest in these tax exemptions unless you could meet each of the four requirements of the exception discussed below.

Exception to the Prohibition of R.C. 2921.42(A)(4)—R.C. 2921.42(C)

R.C. 2921.42(C) provides an exception to R.C. 2921.42(A)(4), as follows:

- (C) This section does not apply to a public contract in which a public official, 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 official'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 official, member of his family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract. (Emphasis added).

Each of the provisions in Division (C) is a question of fact which, when applied to the circumstances of the individual case, will determine whether a particular transaction fits within the exception. See Adv. Ops. No. 80-003 and 88-008. The criteria of Division (C) are strictly construed against the public official, and the official must show compliance with all four requirements in the exception. See Adv. Ops. No. 83-004, 84-011, and 88-008.

The Ethics Commission has held that, with regard to the criterion of Division (C)(1), a political subdivision's purchase or acquisition of community and economic development services, or urban renewal or revitalization services, is a necessary purchase or acquisition for a political subdivision. See Adv. Ops. No. 84-011, 85-002, and 88-006. Likewise, under the criterion of Division (C)(3), a political subdivision's officers and employees who wish to participate in the programs have no "customers or clients in similar transactions." Adv. Op. No. 84-011.

The Ethics Commission has held that a grant of funds to participants in community and economic development services, or urban renewal or revitalization services must be conducted at "arms length" in order to meet the criterion of Division (C)(4). A public official may generally participate in urban renewal or revitalization programs operated by his political subdivision provided that the public official is not responsible for determining who is eligible to be a participant in the program or does not otherwise exercise any participation in the decision-making with regard to the applications made by prospective participants. Adv. Ops. No. 84-011, 85-002, and 88-006. In addition, the political subdivision must have full knowledge of the public official's interest. Id. See also R.C. 2921.42(A)(1) and R.C. 102.03(D), set forth below. The Commission has also held that the political subdivision's procedures must be fair and objective with no preference given to the political subdivision's officers and employees. Adv. Op. No. 2001-02.

R.C. 2921.42(C)(2)—"Unobtainable Elsewhere for the Same or Lower Cost"

The most crucial criterion for purposes of your question is R.C. 2921.42(C)(2), which requires that the supplies or services that are being furnished to the governmental agency are "unobtainable elsewhere for the same or lower cost."

While the exception is most readily applied to direct purchases of goods or services, the same principles are applicable to other public contracts, such as the tax exemptions. However, the application of the exception 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 for the governmental entity to acquire the goods or services it requires. The question, in this instance, is whether the services that are the subject of the contract, community development obtained through remodeling or new construction within the Community Reinvestment Area, are unobtainable elsewhere for the same or lower cost.

The Commission has set forth two methods under which public officials and employees who wish to participate in community and economic development programs operated by the public agency they serve have been able to demonstrate that they meet the "unobtainable elsewhere for the same or lower cost" requirement in R.C. 2921.42(C)(2) .

The first method was set forth by the Ethics Commission in Advisory Opinion No. 84-011. The Commission stated that the requirements of Division (C)(2) were met where: (1) there were sufficient funds available; (2) all of the qualified applicants in the target area had received grants or loans, except the city employee; and, (3) the funds would have lapsed if not used in the target area within a specified period of time. Adv. Op. No. 84-011. The Commission also noted that the city employee met the criteria for the grant and would have been unable to rehabilitate his property without the grant, so that the city would have been unable to achieve its goal of rehabilitating all homes in the target area, unless the city employee received the grant. Id.

The second method is described in Advisory Opinion No. 2001-02. The Commission concluded that if a public entity accepts applications for participation in urban revitalization programs throughout the year on a first-come, first-served basis, in a fair and open application process in which all interested and qualified applicants have an equal opportunity to be considered, then the requirement of Division (C)(2) can be met. Adv. Op. No. 2001-02. However, the public entity must be able to demonstrate that sufficient funds have historically been able to meet demand and to reasonably project that sufficient funds are, and will be, available to fully serve all interested and qualified persons, even if all eligible and interested public officials who serve the entity are permitted to participate. Id.

Application of the Precedent

In the instant situation, Ordinance No. 81-1984 provides that construction of a new dwelling within the Community Reinvestment Area shall, upon proper application by the owner and certification by the City Housing Officer, be eligible for tax exemption for fifteen years from the date of construction. Cincinnati Ordinance No. 81-1984, Sec. 3(C). The Ordinance provides that new construction that qualifies for an exemption will not be considered an improvement on the property. Id., Sec. 3(D). Therefore, in return for neighborhood revitalization in a defined area, the city is providing each owner of new construction with an equivalent benefit: a property tax amount based on the unimproved value of the real property he or she owns. Under the tax

exemption program established under Ordinance No. 81-1984, the benefit is the same regardless of who owns the property that is subject to the tax exemption.

Because the city provides tax exemptions to all owners of new construction on the same basis, and all owners receive an equivalent benefit, it is clear that the city cannot obtain the neighborhood revitalization services provided by each owner of new construction in the Community Reinvestment Area from any other source for the same or lower cost. No one owner gets a tax exemption that costs the city more to acquire the neighborhood revitalization services from that owner than from any other owner.

If you were to purchase a home in the defined area, and were to benefit from the remaining years of the tax exemption awarded to the original owner of the property, you would not be acquiring a benefit that would be more costly to the city than the tax exemption it awarded to any other owner of property built in the target area. The amount of the tax exemption is fixed: it is the difference between the tax on the unimproved and the improved values of the real estate in question. The extent of the tax exemption is fixed: it is fifteen years from the date the original application for the exemption was certified, which in this case was 1992.

Therefore, so long as you can show that the city has accepted applications for the tax exemption through the seventeen years since the program's inception on a first-come, first-served basis, and approves those applications in a fair and open process in which all interested and qualified applicants have an equal opportunity to be considered, you can meet the requirements in Division (C)(2) that the neighborhood revitalization services you would provide to the city are unobtainable elsewhere for the same or lower cost. However, it must be clear that the city has historically been able to meet demand for the tax exemptions and you can reasonably project that the program will fully support all interested and qualified applicants for tax exemptions.

Despite the fact that you may be able to meet all of the provisions of R.C. 2921.42(C), such that R.C. 2921.42(A)(4) does not prohibit you from having an interest in the tax exemptions, you are still bound by additional provisions of the Ethics Law.

Authorizing a Public Contract—R.C. 2921.42(A)(1)

Even where R.C. 2921.42(A)(3) and (4) would not prohibit you from benefiting from tax exemptions provided by the City, you still must adhere to the restriction of R.C. 2921.42(A)(1), which provides that no public official shall knowingly:

Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

R.C. 2921.42(A)(1) prohibits you from voting, discussing, deliberating, formally or informally lobbying, or otherwise using your authority or influence as Mayor to secure authorization of a city contract, including a tax exemption, in which you have an interest. See Adv. Op. No. 89-008.

Using Public Position to Secure a Definite and Direct Thing of Value—R.C. 102.03(D)

You should also be aware of the restriction imposed by R.C. 102.03(D), which provides the following:

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.

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 city, and thus includes a city mayor. See R.C. 102.01(B) and (C). See also Adv. Op. No. 91-008.

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. See R.C. 102.03(G). A definite and particular pecuniary benefit is considered to be a thing of value under R.C. 102.03(D). See Adv. Ops. No. 79-008, 88-004, and 89-005. A diminution in the amount of property tax imposed upon a resident's property located within the Community Reinvestment Area would provide a definite and direct pecuniary benefit to the resident. Therefore, a tax exemption falls within the definition of "anything of value."

R.C. 102.03(D) prohibits a public official from using the authority or influence of his office to secure anything of value for himself. See Adv. Ops. No. 85-006 and 88-004. Therefore, R.C. 102.03(D), as well as R.C. 2921.42(A)(1), prohibits you from voting, deliberating, participating in discussions, or otherwise using your official position, either formally or informally, with regard to a tax exemption in which you would have a definite and direct interest. R.C. 102.03(D) also prohibits you from using your position as mayor, in any way, to secure a lower price, or more favorable contract terms, with respect to the purchase of the real estate that is the subject of your question, than any other buyer would receive.

Conclusion

Because of the significant break in your service to the city of Cincinnati, R.C. 2921.42(A)(3) does not prohibit you from taking advantage of a tax exemption under a program that was authorized by city council while you were a member. However, R.C. 2921.42(A)(4) prohibits you from having a definite and direct interest in a tax exemption provided by the City unless you can meet each of the four requirements of the exception provided by R.C. 2921.42(C). It appears, based on the specific situation that you have presented, that you can

meet each of the requirements of the exception as discussed herein. If you can meet all of the requirements of the exception, you are not prohibited from having an interest in tax exemptions provided by the City and resulting from construction or improvements made to the property.

Even where you would not be prohibited from having an interest in the tax exemptions, R.C. 2921.42(A)(1) prohibits you from authorizing, or securing authorization of, any public contract, including a tax exemption, in which you would have an interest. Similarly, R.C. 102.03(D) prohibits you from using the authority or influence of your position as Mayor with respect to the tax exemption, or other action, from which you would benefit if you were to own a parcel of real property that is subject to the tax exemption.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 6, 2001. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, 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 contact this Office again.

Sincerely,

A handwritten signature in black ink, appearing to read "David E. Freel", with a stylized, looping flourish at the end.

David E. Freel
Executive Director