

**Shade Tree Commission
Minutes
June 13, 2018 at 4:00 pm
Athens City Council Chambers**

Meeting Attendees: David Ingram, John Kotowski, Lee Gregg, Nancy Walker, Emilie Wood, also attending Lisa Eliason

1. Review by the Law Director, Lisa Eliason of the Ohio Sunshine Laws. Her presentation is attached to these minutes. The following are some points of note.
 - a. The Shade Tree Commission is a Public Body and its Meetings and actions are subject to the Ohio Sunshine Laws.
 - b. We must ensure that proper notice is given for our meetings. (It was confirmed by Scott Thompson after the meeting that when the chair sends the agenda to him, it is published on the web and to the City's social media sites. This is the same process as used for all of the City's Public Bodies)
 - c. When requested, for example by the Code office to review a Title 37 landscape plan, we may have additional meetings outside our normal schedule as long as we give proper notice.
 - d. If we visit a site and three or more commissioners are to be present we need to give proper notice of our visit and record minutes since this is a meeting for which proper notice must be given and therefore minutes made.
 - e. We must be careful not to discuss items on the agenda by email or other means, which require a formal discussion of the Commission.
 - f. The video recording of the meeting does not constitute the minutes.
 - g. The minutes need to contain all materials considered at the meeting as part of any action taken by the Commission. This includes plans presented to the commission. These need to be retained as per the City's record policy.
2. Title 33: Tree Permit, Right-of-Way Issues, Public Land
There were no Title 33 Issues that came before the Commission today.
3. Title 37: Landscape Ordinance Issues
There were no Title 37 Issues that came before the Commission today.
4. Report by Ron Lucas
 - a. Would like to work with STC on a replacement tree plan for W. State St. near Dalton Field. AEP needs to replace facilities and the pines in that area will need replaced.
 - b. Arbor Day in September or October. Plant a chestnut or two in a public place with the Athens AM Rotary. Have school children involved.
 - c. Tree removals on S. May, Mulligan Rd., N. Congress and Tulane need to happen. I believe these are classified as emergency removals.
 - d. America In Bloom tour will take place from July 25th - 27th.
 - e. Questions for Ron:
 - i. What resources do we have for information sheets?
 - ii. Can the Arbor Day planting be at the Middle School? There have been ashes removed and we have some sites that need to be replanted.

- iii. On W. Union St. where we have some ginkos, can we add some more shade trees?
 - iv. There are some blue marks on trees in the RoW on Old Peach Ridge, why?
- 5. Maintenance of the Tree Canopy
 - a. Email sent by the Chair to the mayor and others regarding the requirement for consultation of the Shade Tree Commission for City projects involving trees. (email is attached, there has been no response)
- 6. Other
 - a. There will be a review of the attendance of past meetings to determine if 4:00 PM on Wednesday is better than 7:00 PM on Thursday.
- 7. Minutes of the May 9th meeting.

These minutes were recommended for approval by Nancy Walker and seconded by Emilie Wood. The Commission unanimously approved the minutes as presented.

Next meeting: July 11th, 2018 at 4:00 pm in the Athens City Council Chambers

Ohio Sunshine Law and Ohio Ethics Law

Lisa A. Eliason, Athens City Law Director
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Ohio Sunshine Law and Open Meetings R.C. 121.22

I. General Requirements for Open Meetings

Ohio is one of several states to have a “sunshine” or open meeting law, requiring, with some exceptions, that meetings of public bodies be open to the public. R.C. 121.22.

Under R.C. 121.22, all meetings of any public body must be open to the public at all times, except to the extent executive sessions are permitted. A member of a public body must be present in person at an open meeting to be considered present, to be a quorum or to vote at the meeting.

Rules may not prohibit the audio and video recording of meetings, but they may require recording equipment to be silent, unobtrusive and self-powered. Ohio Attorney General (OAG) 88-087.

Minutes of regular and special meetings of public bodies must be promptly recorded and open for public inspection. However, minutes for authorized executive sessions need only reflect the general subject matter discussed. State, ex rel. the Fairfield Leader v. Rickets, (1990), 56 Ohio St. 3d 97.

II. Definitions of “Public Body” and “Meeting”

R.C. 121.22(B)(1) and (2) define “public body” and “meeting” as follows:

A) “Public body” means either of the following:

1) Any board, commission, committee, or similar decision making body of a state agency, institution, or authority or board, commission, committee, agency, authority or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution.

2) Any committee or sub-committee of such body as described above.

B) “Meeting” means any prearranged discussion of the public business of the public body by a majority of its members.

Signal Publishing Co. v. Northwest Bd. Of Ed. (CP, Stark, 9-1-88), No. 87-1116-OT-3, the Common Pleas Court of Stark County held that a

memorandum circulated to a board of education recommending that nothing be done about an asbestos problem and concluding “let me know if you have a different opinion” constituted a meeting in violation of the statute.

White v. King, 2014 Ohio 3896, 2014 Ohio App. LEXIS 3816. A claim for a violation of the Sunshine Law must set forth the existence of the following elements: 1) pre-arranged, 2) discussion, 3) of the public business of the public body in question and 4) by a majority of its members.

C) The Open Meetings Act would not apply to a social or ceremonial gathering. Nor would it cover a conference or similar event that a majority of members happen to attend, so long as they did not use the event as an excuse to deliberate or discuss the public business without an open meeting.

III. Committees of Public Bodies

Sub. HB 111 by the 120th General Assembly resolved the issue of committees and subcommittees by stating regardless of whether they are decision-making or not, committees and sub committees are specifically included as a public body. R.C. 121.22(B)(2).

IV. Statutory Exceptions to Open Meetings Law

The open meetings law does not apply to grand juries, an audit conference conducted by the auditor of state or independent certified public accounts (pre-engagement, post audit), the organized crime investigations commission and certain hearings of adult parole authority, the state medical board, the state nursing board and the executive committee of the emergency response commission.

Executive Session is also a statutory exception:

Executive Session is a conference between members of a public body from which the public is excluded.

The public body may invite anyone it chooses to attend an executive session.

The public body may take no formal action in an executive session; any formal action taken in an executive session is invalid.

Only matters specifically identified in R.C. 121.22(G)(1) through (8) may be discussed and executive session may be held only at regular and special meetings: 1. Certain personnel matters, 2. The purchase of property of any sort, 3) to discuss a pending or imminent court actions with the public body’s attorney, 4). To prepare for, conduct, or review a collective bargaining strategy, 5) To discuss matters required to be kept confidential by federal law, federal rules, or state statutes, 6) to discuss matters of

security arrangements and emergency response, 7) to discuss trade secrets of a county hospital, a joint township hospital, or a municipal hospital, 8) Confidential information of an applicant for economic development assistance or negotiations with another political subdivision regarding economic development assistance, 8) other intertwined issues may be discussed only if they have a direct bearing on the permitted matter.

22770 W. Trowbridge v. Allen Twp. Zoning Appeals, 2013-Ohio-722, Court of Appeals Sixth Appellate District, Ottawa County. The fact that the zoning board went into an executive session to discuss the application for a conditional use permit did not violate the Open Meetings Act. The Sunshine Law did not apply to such deliberations on such an application. The action in reviewing an application for a conditional use is a quasi-judicial function.

V. Notice Requirements

R.C. 121.22(F) requires that the following kinds of notices must be given under rules established by each public body:

A) Notice of the time and place of all regularly scheduled meetings;

(B) Notice of the time, place and purpose of all special meetings. A special meeting may not be held unless at least twenty-four hours advance notice is given to the news media that have requested notification. In the event of an emergency requiring immediate official action, the member or members calling the meeting must notify the news media (that have requested notification of special meetings) immediately of the time, place and purpose of the meeting. R.C. 121.22(H) provides that violation of these notice requirements invalidate actions of the public body.

C) The rules must provide that any person, may, upon request and payment of a reasonable fee, obtain reasonable advance notification of all meetings at which any specific type of public business is to be discussed. Provisions for advance notification may include, but are not limited to, mailing the agenda of meetings to all subscribers on a mailing list or mailing notices in self-addressed, stamped envelopes provided by the person.

VI. Enforcement and Remedies

A) Civil Liability

If any person believes a public body has violated or intends to violate the Open Meetings Act, that person may file suit in common pleas court to enforce the law's provisions.

Courts reviewing alleged violations will strictly construe the Open Meetings Act in favor of openness.

The type of court action is called an injunction.

An action for an alleged violation must be brought within two years.

If granted by the court, an injunction compels the members of the public body to comply with the law by either refraining from the prohibited behavior or by conducting their meetings in accordance with law where they previously failed to do so.

Once an injunction is issued, members of the public body who later commit a "knowing" violation of the injunction may be removed from office, through a court action that may only be brought by the county prosecutor or the Ohio Attorney General.

Once a violation is proven, the court must grant the injunction, regardless of the public body's intervening or subsequent attempts to cure the violation.

Where a public body is found to have violated the law on repeated occasions, courts have awarded a \$500 civil forfeiture for each violation.

If the court issues an injunction, it will order the public body to pay all court costs and the reasonable attorney's fees of the person who filed the action. Under R.C. 121.22(H), a resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body.

B) Criminal Liability

A criminal charge of dereliction of duty could be filed against public officers under R.C. 2921.44(E). Violation of this section is a misdemeanor of the second degree and conviction is punishable by imprisonment of up to 90 days in jail and a \$750 fine. There do not appear to be any cases of criminal liability.

VII. Miscellaneous Court Cases

Manogg v. Stickle, 1998 Ohio App. LEXIS 1961 (Ohio Ct. App., Licking County Apr. 8, 1998). Where township trustees, by actions of whispering and passing documents among themselves, intentionally prevented the audience from hearing or knowing what business was being conducted at their meeting, they were properly held to have violated R.C. 121.22.

Holeski v. Lawrence, 85 Ohio App. 3d 824, 621 N.E.2d 802, 1993 Ohio App. LEXIS 1891 (Ohio Ct. App., Geauga County 1993). The sunshine law

is not intended to prevent a majority of a board from being in the same room and answering questions or making statements to other persons who are not public officials, even if those statements relate to the public business. The sunshine law is instead intended to prohibit the majority of a board from meeting and discussing public business with one another. Where the minutes are eventually filed, any noncompliance is moot in the absence of repeated, intentional violations.

Haverkos v. Northwest Local Sch. Dist. Bd. of Educ., 2005 Ohio 3489, 995 N.E.2d 862, 2005 Ohio App. LEXIS 3237 (Ohio Ct. App., Hamilton County 2005). School board member's e-mail to two other board members was not "pre-arranged" meeting for purposes of the Ohio Sunshine Law, R.C. 121.22 as the e-mail was unsolicited by the other members and was not responded to by the other members; further, the e-mail was not a discussion as the law did not include electronic communication.

Ohio Sunshine Law and Public Records R.C. 149.43

I. Public Records in general:

Are defined as "records kept by a public office..." Records kept by a board or commission would therefore be public records subject to a records retention schedule.

The Ohio Public Records Act, R.C. 149.43, must be construed liberally in favor of broad public access, and any doubt must be resolved in favor of disclosure of public records. State ex rel. Rocker v. Guernsey Cty. Sheriff's Office, 126 Ohio St.3d 224, 2010-Ohio-3288, 932 N.E.2d 327.

R.C. 149.43(A)(1) excludes certain information from disclosure as a public record. All public offices are therefore permitted to conduct a legal review of responsive records and to redact exempted materials appropriately. State ex rel. Morgan v. Strickland, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105; State ex rel. Warren Newspapers, Inc. v. Hutson, 70 Ohio St.3d 619, 1994 Ohio 5, 640 N.E.2d 174 (1994).

The public office possesses the burden of proving that the records or redacted parts are exempt from disclosure. The court is to resolve all doubts in favor of disclosure. State ex rel. White v. Watson, 8th Dist. Cuyahoga No. 86737, 2006-Ohio-5234; State ex rel. Broom v. Cleveland, 8th Dist. Cuyahoga No. 59571, 1992 Ohio App. LEXIS 4548 (Aug. 27, 1992).

II. • Electronic Communications as Public Records

Emails, texts, chat room transcripts, etc. created in your official capacity can be public records even on your personal device or in your personal account. It doesn't matter where you keep a public record, where you receive it or how you send it. If it is on your personal device it can be a public record.

State, ex rel. Glasgow v. Jones (2008), 119 Ohio St. 3d 391, 2008 Ohio 4788, a suit was brought to compel a state representative to provide copies of e-mail messages, text messages, and correspondence she sent or received over a period of time in her official capacity as a representative of the Ohio General Assembly, including from her personal devices. The Supreme Court found that email messages and correspondence are "documents, devices, or items" under the first prong of the definition of "records." More specifically, email messages constitute electronic records under R.C. 1306.01(G) because they are records "created, generated, sent, communicated, received, or stored by electronic means." R.C. 149.011(G) includes "an electronic record as defined in section 1306.01 of the Revised Code" as a "document, device, or item" within the definition of "record."

Since electronic messages are records, you must retain and/or dispose of them appropriately and in accordance with a record retention schedule which addresses electronic records.

State ex rel. Toledo Blade Company v. Seneca County Board of County Commissioners (2008), 120 Ohio St. 3d 373, 2008 Ohio 6253, the Board of County Commissioners, at their own expense, was required to recover emails which the Court concluded has been improperly deleted, including from a personal computer.

Ohio Ethics Law

I. The Ohio Ethics Law and the Ohio Ethics Commission

The Ohio Ethics Commission was created by the state in 1973. The commission gives advice on ethics issues, provides ethics education, performs confidential criminal investigations of violations of the Ohio Ethics Law and is the repository for financial disclosure statements required of elected officials and certain other employees of the state. There are approximately 600,000 employees in the State of Ohio subject to the Ohio Ethics Law.

The Ohio Revised Code controls the law of ethics in the State of Ohio. Violation of the Ohio Ethics Laws is punishable as a misdemeanor and in the case of nepotism as a felony of the fourth degree.

II. Conflicts of Interest

R.C. 102.03(D)

Conflict of Interest Law prohibits a public employee from using his or her authority or influence to secure something of value. Anything of value would include money, goods, chattels, future employment, interest in realty and “every other thing of value.”

A public official has a “conflict of interest” when his or her ability to be an objective decision-maker is impaired by:

His or her own interests
Interests of family members
Interests of business associates

Influence may arise from approving, voting, deciding, recommending, advising, investigating or exercising any other substantial administrative discretion.

A public employee must advance the public interest and not his own interest. Conflicts will happen. The issue is how the public employee responds. When the objective decision making of the public employee is impaired then a conflict of interest arises.

When a conflict of interest arises, the public employee should recuse himself and abstain from any voting, discussion, review and investigation.

II. Gifts

R.C. 102.03(E)

The Ohio Ethics Law and the related statutes prohibit an official from soliciting, or using the authority of his public position to secure a gift, meal entertainment or other thing of value if it is of a substantial nature and is provided by someone that is regulated by, interested in matters before, or doing or seeking to do business with the agency he serves.

The Ohio Ethics Law also prohibits a public official from accepting anything, regardless of its value, if the item is provided to the official as compensation for the performance of his public duties.

Prohibited gifts include, but not limited to, the payment of a debt, trip, expenses, money or something more tangible like season tickets, discounts on major consumer items and lodging.

The question is whether the item has a substantial influence on the public official in the performance of his duties.

Small gifts such as a book, a promotional item, coffee, popcorn, a mousepad, plate of cookies or anything of nominal value are not prohibited. However, it is best to avoid even an appearance of impropriety.

The issue is not bribery. An absence of bribery does not mean that a violation of the Ethics Law has not occurred. If the gift/thing is of substantial value it doesn't matter that it was not of influence. The point is that it could be of influence.

The prohibition of accepting a substantial gift includes someone seeking to do business with the agency.

However, the agency can accept a gift such as a swing set to the public park or paper when a printer is purchased. The key is whether the gift stays at the agency or ends up in someone's home.

Winning a door prize of substantial value at a conference from a vendor or potential vendor of the agency and then taking the gift home would be a violation. The employee could decline the gift or accept on behalf of the agency.

Winning a 50/50 raffle at a conference would be considered to be supplemental compensation and is thus prohibited.

IV. Post-Employment Restrictions/ Representation/Revolving Door

R.C. 2921.42 and R.C. 2921.43

The Ohio Ethics Law and related statutes prohibit an official from soliciting or using his position to get a job from any person that is regulated by his public agency; doing or seeking to do business with his public agency; or interested in matters before his public agency.

The prohibition includes board members seeking employment with the board he serves. This applies to both elected and appointed boards. For example, a city council member is prohibited from seeking employment with the city.

The revolving door prohibition on a public official includes representation during public service and for one year afterwards.

There is a lifetime prohibition on disclosure of confidential information both during and leaving public position.

V. Public Contract Restraints

R.C. 2921.42, R.C. 102.04

A public official shall not authorize or use authorize to secure a public contract for himself, a family member, or a business associate.

A public official shall not have an interest in profits or benefits or a public contract entered into by a public agency with which his is connected. Connect means being related to or associated with.

A public official shall not profit from a public contract he approved or that was authorized by a body of which he was a member unless the contract was competitively bid and awarded to the lowers and best bidder.

A public official is any elected or appointed officer, or employee or agent of the state or any political subdivision.

VI. Nepotism

R.C. 2921.42 and R.C. 2921.43

The Ohio Ethics Law and related statutes prohibit an official from authorizing the employment of a family member and using the authority or influence of his public position to secure authorization of a family member.

Violating of this provision is a 4th degree felony.

In most situations, the Ohio Ethics Law and related statutes do not prohibit family members from being employed the same public agency, so long as no official has secured a job, or job-related benefits, for his or her family member. However, one family member cannot supervise another. If one family member is promoted, the other family member must be supervised by someone else.

Family members include: husband or wife; child or grandchild of any age, regardless of whether dependent; parent or grandparent; brother or sister; and step-child or step-parent. Also included is any other person who is related to the official by blood or by marriage (uncle, aunt, cousin, niece, nephew and in-laws) and who live in the same household with the official. One note of caution, is this includes seasonal work.

The key is that the official cannot hire or use their public position to influence hiring.

Nepotism can also occur in the area of public contracts. This includes nominal purchases with no written contract. The public official cannot authorize or influence the public contract involving a family member and must in fact recuse himself or herself.

VII. Common Sense Wrap-Up

A public employee cannot:

Authorize a contract or use authority to secure authorization of a contract for self, family or business associates.

Cannot solicit or accept things of value.

Cannot disclose or use confidential information.

Cannot receive additional compensation for the performance of official duties.

Cannot represent parties on matters in which public servant is involved.

Cannot participate in matters where public servant has a conflict of interest-where something of value will result for self, family members or other.

When in doubt avoid the appearance of impropriety. If you have questions you can contact me at (740) 592-3332 or by email at leliason@ci.athens.oh.us. You can also contact the Ohio Ethics Commission for information guidance at www2.ethics.ohio.gov, by telephone at (614) 466-7090 or by email at ethics@ethics.ohio.gov.

Lisa A. Eliason
Athens City Law Director

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

December 23, 2005

Garry E. Hunter, Director of Law
City of Athens
Suite 301, Law Administration Building
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Dear Mr. Hunter:

On December 6, 2005, the Ohio Ethics Commission received your request for an advisory opinion. In your letter, you ask whether the Ohio Ethics Law and related statutes prohibit four of the members of the Athens City Council from participating in the approval of a planned unit development (PUD) retirement village on land that is owned by Ohio University (OU). The three members of Council are employed by, and one member is a graduate student at, OU. You have also asked how a majority vote is to be determined when the Ethics Law prohibits multiple members of city council from participating in a specific matter due to a prohibited conflict of interest.

Purpose of an Ohio Ethics Commission Advisory Opinion

The purpose of an Ethics Commission advisory opinion is to provide guidance upon which a public official or employee can rely before he or she engages in an action that may be prohibited by the Ethics law. In *State v. Urban* (2003), 100 Ohio St.3d 1207 (dismissed, *sua sponte*, as having been improvidently allowed), Chief Justice Moyer took the opportunity, while concurring in the dismissal of an individual's appeal of his conviction for a violation of the Ethics Law and related statutes, to "review and validate the authority of the Ethics Commission." In paragraph 13, the Chief Justice stated that the Commission is:

[S]tatutorily empowered to render "advisory opinions," including opinions "relating to a special set of circumstances involving ethics, conflict of interest, or financial disclosure under Chapter 102, section 2921.42, or section 2921.43 of the Revised Code." R.C. 102.08(A) and (B). The statute further provides that persons who seek advisory opinions from the Ethics Commission shall be immune from criminal prosecutions, civil suits, or actions for removal from office based on facts and circumstances covered by the opinion, if the opinion states that there is no ethics violation. R.C. 102.08(B). Ethics Commission advisory opinions have been incorporated into Ohio Jury Instructions. 4 Ohio Jury Instructions (2003), 599-600, Section 521.42. *While they are not binding on the courts, these opinions are entitled to weight by the courts, and Ohio courts have found commission opinions useful in applying and interpreting the law.* (Citations omitted. Emphasis added.)

Garry E. Hunter
December 23, 2005
Page 2

However, the Commission can render an advisory opinion only in response to a hypothetical question or a question that involves the prospective conduct of the person who requests the opinion. Adv. Ops. No. 75-037 and 94-002. In contrast to its statutory authority to investigate alleged violations of the Ethics Law, the Commission's function in rendering an opinion is not a fact-finding process. Adv. Op. No. 94-002.

This opinion is based on the Ethics Law, court opinions, and the Commission's past advisory opinions. Of note and in direct response to your request, the Commission has not had the opportunity to consider, to date, whether there are significant differences in the application of the Ethics Law under the specific facts you present regarding city council members who are, variously, a university administrator, a tenured faculty member, or a contract employee under the circumstances that have been described.

In order for the Commission to consider that question, the matter would have to be presented to the Commission at a meeting. Your letter was received by the Commission on December 6, 2005. (As noted in the facts, the process for the approval of the PUD was begun in the summer of 2004.) The Commission last met on November 28, 2005, and will next meet on January 13, 2006. You have explained that the City would like to schedule a special meeting before the end of this year to consider the legislative matter you have described. This opinion has been issued at your request, based upon prior precedent, in order to assist the City to address this issue within the time frame you have stated.

Brief Answer

As explained below, the three city council members who are employees of OU are prohibited from voting, deliberating, participating in discussions, or otherwise using their official positions, as city council members, either formally or informally, in matters concerning the legislation to approve the planning commission's recommendation involving their employer.

The council member who is a graduate student at OU is not prohibited from voting, deliberating, participating in discussions or otherwise using his or her official authority or influence with regard to matters concerning the legislation to approve the planning commission's recommendation unless he or she will personally benefit from the legislation or has some other interest in the legislation.

The question of how a majority vote is to be determined is an issue for your determination as the city law director because it is outside the advisory jurisdiction of the Ohio Ethics Commission. However, court decisions on similar issues that may be helpful to you have been enclosed for your reference.

Facts

You state that four members of the city council have relationships with OU. One council member is the Associate Vice President for Finance & Administration for OU. One council member is a member of the OU faculty. One council member is employed at OU as a research technician. One member is an OU graduate student.

The issue before council is whether to approve a planned unit development (PUD) retirement village on land that is owned by OU. The Commission understands that the process for the approval of the PUD was begun in the summer of 2004. In June 2004, OU leased the property to a private organization that will develop the property. The city planning commission has recommended approval of the project. City council must approve or reject the planning commission's recommendation by a majority vote. R.C. 705.15. You state that in a statutory city with seven council members, a majority vote is four council members.

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

Conflict of interest prohibitions contained in Divisions (D) and (E) of Section 102.03 of the Revised Code 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.

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 member of city council. R.C. 102.01(B) and (C). A member of city council is, therefore, subject to the prohibitions of R.C. 102.03(D). Ohio Ethics Commission Advisory Opinion No. 76-005, 79-008, and 89-008.

The term "anything of value" is defined for purposes of R.C. 102.03 to include money and "every other thing of value." R.C. 1.03, 102.01(G). The beneficial or detrimental economic impact of a decision by a public entity is a thing of value for purposes of R.C. 102.03. Adv. Ops. No. 85-012, 90-002, and 90-012. Any beneficial or detrimental financial impact to OU from the city council's action involving land that is owned by OU is a thing of value for purposes of R.C. 102.03(D) and (E).

R.C. 102.03(D) prohibits a public official from using the authority or influence of his or her office to secure anything of value for the official. The law also prohibits the official from using his or her authority or influence to secure anything of value for another party if the relationship between the public official and the other party is such that the benefit to the other party will have a substantial and improper influence upon the official such that his or her objectivity or independence of judgment is impaired. Adv. Ops. No. 88-004, 88-005, and 89-005. A public official is prohibited from taking any action within his or her official capacity on matters that would result in a definite and direct benefit, or would avoid a detriment, for any person or entity with whom the official has a close family, economic, business, or fiduciary relationship. Adv. Op. No. 97-002.

For example, R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting, or using his or her position to secure, a benefit for any person or entity by whom the official or employee is employed. Adv. Op. No. 91-004. An employer holds a position of power and authority over the hiring, compensation, discipline, and termination of its employees. Adv. Ops. No. 89-008 and 91-006. A city council member who is in the position of making an official decision regarding the pecuniary interests of his or her outside employer would have an inherent conflict of interest impairing the council member's objectivity and independence of judgment. Adv. Ops. No. 80-003 and 89-008.

In Advisory Opinion No. 91-006, the Ethics Commission considered whether a city council member, who was also employed by a local school district as an administrator (elementary school principal), could participate in certain matters that would affect the interests of the district. The Commission considered whether the employer-employee relationship between the council member and the school district was such that a benefit to the district would have a substantial and improper influence on the council member with respect to the performance of his duties. The Commission concluded:

The Ethics Commission has held that R.C. 102.03 (D) prohibits an individual who serves the public in two capacities from using the authority or influence of one position to benefit either himself or the entity he serves in his other public capacity. (Citations omitted.) Also, as discussed above, R.C. 102.03 (D) prohibits a public official from participating in any matter which definitely and directly affects the interests of *his outside employer*. (Emphasis added.)

In an informal advisory opinion issued in July 2003, the Commission considered a similar question as it applied to a village council member who, rather than serving as an administrative employee of a school district, was employed as a teacher in a local school district. Informal Opinion to Thompson, July 18, 2003. In that opinion, the Commission advised the village council member:

Garry E. Hunter
December 23, 2005
Page 5

R.C. 102.03 (D) prohibits you from voting, discussing, deliberating about, recommending, or taking any other formal or informal action, on a tax abatement matter, pending before village council, that will result in a definite and direct measurable benefit or detriment for your employer, the school district. R.C. 102.03(E) prohibits you from using your unique access to other village officials, and village employees, to solicit a benefit related to the tax abatement for the school district. The fact that you do not have a definite and direct personal interest in the tax abatement matter does not change the application of the Ohio Ethics Law. (Emphasis in original.)

Copies of Advisory Opinion No. 91-006 and of the informal advisory opinion are attached to this opinion for your information.

Application of R.C. 102.03(D) and (E)—OU Employees

You have explained that three of the Athens city council members are employees of OU. The approval of the planning commission's recommendation appears to definitely and directly affect the value of the land owned by OU, whether that affect will be positive or negative. The Commission also understands that OU will work closely with the retirement community in many ways. In a letter from Gary Neiman, Dean of OU's College of Health and Human Services (quoted in the Athens News, December 12, 2005), the Dean explained that a facility of the type planned in the PUD will offer OU students an opportunity to gain experience working hands-on with elderly individuals. The Dean stated that it is in the interest of the university to be closely aligned with a facility of the kind contemplated for the PUD. He also stated that there are a number of areas where OU could work with, and benefit by working with, such a retirement center. Further, in its resolution regarding the land lease agreement to the developer of the PUD, the OU Board of Trustees concluded "the Ohio University Board of Trustees continues to find that the development of the retirement center will be a significant benefit to Ohio University, for Athens, and regional communities."

The definite and direct impact on the value of OU's property, along with the other benefits to OU that would accrue from the proposed PUD, are within the definition of "anything of value" that is of such a character as to manifest a substantial and improper influence upon the council members employed by OU with respect to their ability to exercise their authority independently on behalf of all citizens of the City. Therefore, R.C. 102.03(D) and (E) prohibits the three city council members who are employees of OU from voting, deliberating, participating in discussions, or otherwise using their official positions, as city council members, either formally or informally, in matters concerning the legislation to approve the planning commission's recommendation.

It should be noted that, as the Commission stated in its informal opinion, the Ethics Law does not create some vague or arbitrary prohibition upon a public official with any type of relationship to a private sector party from participating in matters that affect the party. Where a matter before a public agency definitely and directly affects the financial interests of a party with a close familial, economic, or fiduciary relationship to an official or employee of the agency, whether in a positive or detrimental manner, R.C. 102.03(D) prohibits the official or employee from *using his or her authority to secure* anything of value for the related party, such as an employer, by participating in the matter. R.C. 102.03(E) likewise prohibits the official or employee from using his or her unique access to other officials and employees of the agency he or she serves to *solicit* anything of value for the related party, such as an employer. The protections in the Ethics Law and related statutes ensure that the public is not left to wonder whether it was the merits of a particular proposal, as opposed to the fact that the proposal would affect a public official or his or her business associates or family, that led to its success.

Application of R.C. 102.03(D) and (E)—OU Graduate Student

The final conflict issue is whether the city council member who is a graduate student at OU can participate in matters concerning the legislation to approve the planning commission's recommendation. The application of R.C. 102.03(D) and (E) to a public official or employee is dependent on the facts and circumstances presented. Adv. Ops. No. 87-007 and 89-003.

As noted above, a public official or employee is prohibited from participating in a matter before his or her public agency if the matter will result in a definite and direct benefit or detriment to the official or any party with whom the official has a close family, economic, business, or fiduciary relationship. A public official is generally not prohibited, by R.C. 102.03(D) and (E), from participating in a matter that affects the interests of a party with whom he or she has other, more indirect, kinds of relationships. Adv. Op. No. 89-008. For example, a public official is not normally prohibited from participating in matters that affect a union or other association of which he or she is a mere member, or clients of his or her private law firm, unless the specific facts demonstrate that the official has a more direct relationship with the union or the clients. Adv. Ops. No. 89-005 and 89-008 (union) and 90-008 (clients).

The relationship between a student and the university that he or she attends is not an employer-employee or "business association" relationship. A student and the school that he or she attends is not acting together for a common business purpose. *Id.* Further, a university does not exercise the same kind of control or influence over the students who matriculate at the university as it does over the individuals it employs.

Therefore, R.C. 102.03(D) and (E) do not prohibit a council member whose relationship with OU, at the time of the vote, is merely that of a student, from voting, deliberating, participating in discussions or otherwise using his or her official authority or influence with regard to matters concerning the legislation regarding the PUD. If, however, the specific facts were to suggest that the council member would personally benefit, or would have some other

Garry E. Hunter
December 23, 2005
Page 7

interest in the proposed development, the council member would be prohibited from participating in legislation PUD. For example, if the council member is also an officer in student government and has assumed a particular responsibility therein related to the proposed development, the council member would have an interest that would limit his or her ability to participate in council's consideration of the matter.

Determination of a Majority

You have also asked how a majority vote is to be determined when the Ethics Law prohibits multiple members of city council from participating in a specific matter. As set forth above, the city planning commission has recommended approval of the project and city council must approve or reject the planning commission's recommendation by a majority vote. You state that in a statutory city with seven council members, a majority vote is four council members.

The question of how a majority vote is to be determined is outside the advisory jurisdiction of the Ohio Ethics Commission and is an issue for you as the law director to advise the city. R.C. 102.08. However, in your analysis of the issue, you may wish to consider the case of Gitlin v. Berea (Feb. 15, 1990), 8th Dist. No. 58062, in which the court addressed an issue similar to the one raised here.

The facts in Gitlin involve five of eleven members of a city planning commission who had conflicts of interest such that they were prohibited from participating in a specific land-use matter. The Court held that, when members of a city planning commission were disqualified *due to a conflict of interest*, their absence from the vote created vacancies on the commission. Therefore, in a well-reasoned decision, the Court stated that the planning commission consisted of the six members who were qualified to act, excluding the five members with conflicts from the original eleven. The Court state that when four of these six qualified members voted in favor of the land use proposal, the resolution passed by the necessary margin. See also State ex rel. DiCarlo v. Clermont Cty. Bd. of Elections, Clermont App. No. CA2003-09-077, 2003-Ohio-5716 at ¶ 16 (citing Gitlin with approval for the proposition that, where a member of a local legislative body is disqualified due to interest, the disqualification is treated as a vacancy, and the number of members of the body is reduced accordingly.) See also 1999 Ohio Atty. Gen. Ops. No. 4.

Conclusion

As explained above, the three city council members who are employees of OU are prohibited from voting, deliberating, participating in discussions, or otherwise using their official positions, as city council members, either formally or informally, in matters concerning the legislation to approve the planning commission's recommendation involving their employer.

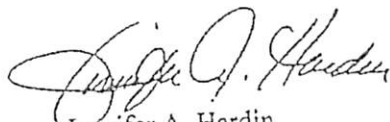
Garry E. Hunter
December 23, 2005
Page 8

The council member who is a graduate student at OU is not prohibited from voting, deliberating, participating in discussions or otherwise using his or her official authority or influence with regard to matters concerning the legislation to approve the planning commission's recommendation unless he or she will personally benefit from the legislation or has some other interest in the legislation.

The question of how a majority vote is to be determined is an issue for your determination as the city law director because it is outside the advisory jurisdiction of the Ohio Ethics Commission. However, court decisions on similar issues that may be helpful to you have been enclosed for your reference.

This staff advisory opinion represents the views of the undersigned, based on the facts presented and the precedent of the Ethics Commission. 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 further questions or desire additional information, please contact this Office again.

Sincerely,


Jennifer A. Hardin
Chief Advisory Attorney

Enclosures: Advisory Opinion No. 91-006
Informal Opinion to Bruce Aaron Thompson (July 18, 2003)
Gitlin v. Berea (Feb. 15, 1990), 8th Dist. No. 58062
State ex rel. DiCarlo v. Clermont Cty. Bd. of Elections, Clermont App. No.
CA2003-09-077, 2003-Ohio-5716



David Ingram <d3ingram@gmail.com>

Swimming Pool trees

1 message

David Ingram <d3ingram@gmail.com>

Tue, May 29, 2018 at 9:41 AM

To: Ron Lucas <rucas@ci.athens.oh.us>

Cc: Steve Patterson <spatterson@ci.athens.oh.us>, Paul Logue <plogue@ci.athens.oh.us>, Peter Kotses <pkotses@athenscitycouncil.com>, astone@ci.athens.oh.us

Bcc: David Ingram <d3ingram@gmail.com>

Dear Ron

I am very disappointed with the trees planted at the swimming pool parking lot.

Dogwoods are not shade trees. The swimming pool parking lot had several shade trees that were providing shade for that parking lot. All have been removed. In my lifetime I will never again be able to park my car in the shade in that parking lot again. I will now return to a car whose temperature will be extremely high. I will now use more energy than I used to use cool the car down. Never mind the increase in the heat-island effect of the city that the loss of the shade trees around the parking lot will cause. Indeed, there is likely to be further major renovation of the pool and its parking lot in the next thirty years it will take for any shade trees we now plant to produce significant shade for that lot, and those dogwoods will certainly not do it. I can only hope that future renovations will not destroy trees we now plant.

If this city is to be credible when it comes to it claims to act sustainably, to be green, it needs to follow through, to walk-the-walk. It needs to plan to conserve the trees it has as well as planting shade trees to increase the tree coverage. The Shade Tree Commission, under Title 33 in section 01.02 (C), is expected by City Council "To assist the properly constituted officials of the City of Athens, Ohio, as well as the council and citizens of the city in the dissemination of news and information regarding the selecting, planting and maintaining of trees within the corporate limits, whether the same be on private or public property, and to make such recommendations from time to time to the council as to desirable legislation concerning the tree program and activities for the municipality;".

This process of consultation rarely happens. We have never seen a copy of the plans for the swimming pool. The engineers and architects should have consulted with us, on behalf of the city, just as they would do for a private developer. We also have never seen the plans for East State St. despite landscapes being removed that we had been consulted about during the widening of East State St.

We need to change the culture to acknowledge the benefits of trees, to recognize the time it takes to achieve those benefits, and to also recognize how long (100+ years) those benefits can last for.

David

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