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Elizabeth E. Tracy



OHIO ETHICS COMMISSION
William Green Building
30 West Spring Street, L3
Columbus, Ohio 43215-2256
Telephone: (614) 466-7090
Fax: (614) 466-8368

Paul M. Nick
Executive Director

www.ethics.ohio.gov

May 1, 2015

Kevin M. Butler
Director of Law
City of Lakewood
12650 Detroit Avenue
Lakewood, Ohio 44107

Dear Mr. Butler:

On April 27, 2015, the Ohio Ethics Commission received your letter requesting an advisory opinion. You asked whether several city officials are able to participate in matters affecting the closing of Lakewood Hospital and the opening of a family health care clinic.

Key Facts

In your letter and a subsequent e-mail you explained the facts pertaining to the institutions and individuals involved in the matter:

The City, the Lakewood Hospital Association, and the Lakewood Hospital Foundation

- The Lakewood Hospital Association (LHA) was created pursuant to R.C. Chapter 140 as a nonprofit hospital agency for the purpose of operating a community hospital.
- The City of Lakewood (city) owns Lakewood Hospital's land and building. Since 1987, the city has leased the land and building to the LHA.
- The city's lease agreement with the LHA establishes that LHA is governed by a board of trustees with the mayor and two city council members serving as *ex-officio* members of the LHA board.
- The Cleveland Clinic Foundation (Cleveland Clinic) is the only corporate member of the LHA.

- The Lakewood Hospital Foundation (foundation) is a nonprofit corporation that was formed in 1956 to aid the development of Lakewood Hospital. The foundation's articles of incorporation grant it the ability to acquire, hold, and dispose of financial assets for the purpose of supporting the Lakewood Hospital.

The Letter of Intent

- The LHA has signed a non-binding letter of intent with the Cleveland Clinic that contemplates closing Lakewood Hospital and opening a family health care clinic. City council will make the final decision in the matter.
- It is uncertain what will happen to the foundation if the terms in the letter of intent are approved. But because the Lakewood Hospital would no longer exist, its future would be in question. The foundation is currently receiving advice on that question from its outside counsel.

The Member of Council and the Law Firm

- A city council member, Ryan Nowlin, is a partner in a law firm that represents the foundation on general matters.
- The law firm is not advising the foundation regarding its future if Lakewood Hospital is closed or any other matter that may go before city council regarding the closing of Lakewood Hospital and the opening of a family health care clinic.
- A partner in the law firm, Joseph Gibbons, serves as an unpaid trustee on the board of the LHA. Mr. Gibbons is not an elected official.
- An associate attorney in the law firm serves as an unpaid trustee on the board of the foundation.

The Mayor, His Wife, and the Foundation Board

- The Mayor's wife serves as member of the foundation's board of trustees.

Questions and Brief Answers

1. Can the mayor and the two city council members who serve as *ex-officio* members of the LHA participate in decisions regarding the closing of Lakewood Hospital and the opening of a family health care clinic?

Any city official serving as an *ex-officio* member of the LHA, in the absence of any other conflict under the Ethics Laws, is not prohibited from participating in decisions regarding the closing of Lakewood Hospital and the opening a family health care clinic.

2. Can the council member who is a partner in the law firm participate in decisions regarding the closing of Lakewood Hospital if: (a) a partner serves on the board of the LHA and (b) an associate attorney in the firm serves on the board of the foundation?

Because the council member's law partner who serves on the board of the LHA has a fiduciary interest in the public contract that would result in the city acquiring health care services for the benefit of its residents, the council member cannot participate in decisions regarding the closing of Lakewood Hospital and the opening of a family health care clinic. It is unnecessary to examine the associate's connection with the foundation.

3. Can the mayor participate in decisions regarding the closing of Lakewood Hospital if his wife serves on the board of the foundation?

If the proposed agreement with the Cleveland Clinic would result in the dissolution or alteration of the foundation from its present form, the mayor cannot participate in decisions regarding the closing of Lakewood Hospital.

The Mayor and Council Members Serving as *ex-officio* members of the LHA

Commission Precedent—Official Capacity

R.C. 102.08 provides that, if the facts and circumstances in a particular situation are substantially similar to the facts and circumstances addressed in another Ohio Ethics Commission advisory opinion, the public official or employee in the newly occurring situation can rely on the other opinion.¹ Enclosed with this opinion is formal Advisory Opinion No. 93-012 and an informal advisory opinion issued to Cathy C. Godshall that the Commission approved at its meeting on February 11, 1997. The facts and circumstances that you have described regarding the mayor and council members serving as *ex-officio* members of the LHA are similar to the circumstances described in these opinions. This advisory opinion will note the key elements of these two opinions but their entire reasoning and conclusions are embodied in this opinion as if fully restated.

The Ethics Commission explained in Advisory Opinion No. 93-012 that an agreement between a city and a hospital that involved the city providing a payment to a hospital in exchange for a permanent interest in the hospital and its management, and sub-leasing property to the hospital was a public contract because the city was purchasing or acquiring hospital services for the benefit of its residents.

Advisory Opinion No. 93-012 explained that the prohibition of R.C. 2921.42(A)(4) against a public official having an interest in a public contract with his or her own political subdivision does not apply whenever the official serves on the board of directors of a nonprofit corporation

that has entered into a public contract with his political subdivision in his "official capacity" as a representative of his political subdivision in order to represent its interests.² The Ethics Commission set forth four criteria which must be met in order for a public official to be deemed to serve in his official capacity:

- (1) The governmental entity must create or be a participant in the non-profit corporation;
- (2) Any public official or employee connected with the jurisdiction ... may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent the governmental entity;
- (3) The public official or employee must be formally instructed to represent the governmental entity and its interests; and
- (4) There must be no other conflict of interest on the part of the designated representative.

The Commission explained in Advisory Opinion No. 93-012 that because of the agreement between the city and a hospital that involved the city providing a payment to a hospital in exchange for a permanent interest in the hospital and its management, R.C. 2921.42 (A)(4) did not prohibit the mayor and president of council from serving on the hospital's board of directors in their "official capacity" to represent the city's interest in the hospital and its management.

Accordingly, a city official serving as an *ex-officio* member of the LHA, in the absence of any other conflict under the Ethics Laws, is not prohibited from participating in decisions regarding the closing of Lakewood Hospital.³

The Council Member and the Law Firm

You have asked if a council member who is a partner in the law firm can participate in decisions regarding the closing of Lakewood Hospital and the opening a family health care clinic if an associate attorney in the firm serves on the board of the foundation and a partner serves on the board of the LHA. You stated that the law firm represents the foundation on general matters but it is not advising the foundation regarding its future if Lakewood Hospital is closed or any other matter that may go before city council regarding the closing of Lakewood Hospital.

The city council member is subject to R.C. 2921.42(A)(1),⁴ which prohibits a public official from authorizing or using his authority or influence to secure authorization of a public contract in which a business associate has a definite and direct financial or fiduciary interest.⁵

A "public contract" is defined to include "[t]he purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of . . . political subdivisions."⁶ The proposed agreement with the Cleveland Clinic that contemplates closing

Lakewood Hospital and opening a family health care clinic is a public contract because its fruition would result in the city acquiring health care services for the benefit of its residents.

Partners and associates in a law firm are "business associates" for purposes of R.C. 2921.42(A)(1).⁷ An uncompensated board member of a nonprofit corporation has a fiduciary interest in its contracts.⁸ R.C. 2921.42(A)(1) does not prohibit business associates of a public official from having an interest in contracts entered into by the political subdivision that the official serves. However, a public official is prohibited from discussing, deliberating, voting, or otherwise using the authority or influence of his public position, either formally or informally, to secure, renew, modify, renegotiate, or otherwise authorize a public contract that would affect the interests of a nonprofit corporation in which his business associate serves as a board member.

The Partner Serving on the Board of the LHA

The council member's law partner who serves on the board of the LHA has a definite and direct personal, pecuniary or fiduciary interest in the public contract that would result in the city acquiring health care services for the benefit of its residents. Accordingly, the council member cannot participate in decisions regarding the closing of Lakewood Hospital.

The Associate Serving on the Board of the Foundation

As explained above, the council member cannot participate in decisions regarding the closing of Lakewood Hospital. Therefore, it is unnecessary to examine how the associate's connection with the foundation affects your question.

The Mayor and His Wife

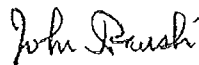
You have also asked if the mayor can participate in decisions regarding the closing of Lakewood Hospital and the opening of a family health care clinic if his wife serves on the board of the foundation. A spouse is a "family member"⁹ for purposes of R.C. 2921.42(A)(1).

As you stated, the mayor serves as an *ex-officio* member of the LHA. The informal advisory opinion to Cathy C. Godshall explained that an official serving a non-profit organization in his official capacity would have a conflict of interest if the official, his family members, or a business associate has a definite and direct personal, pecuniary or fiduciary interest in the public contract.

As you stated, it is uncertain what will happen to the foundation if the terms in the letter of intent are approved. If the proposed agreement with the Cleveland Clinic would result in the dissolution or alteration of the foundation from its present form, the mayor cannot participate in decisions regarding the closing of Lakewood Hospital.

This staff advisory opinion represents the views of the undersigned, based on the facts presented and the precedent of the 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 other questions or need additional information, please contact this office again.

Sincerely,



John Rawski
Staff Advisory Attorney

Enclosures: Formal Advisory Opinion No. 93-012.
Informal Advisory Opinion issued to Cathy C. Godshall (February 11, 1997).

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

¹ See R.C. 102.08(B) (when the Ethics Commission renders a written formal or staff advisory opinion relating to a special set of circumstances under Chapter 102: "[T]he person to whom the opinion was directed or who was similarly situated may reasonably rely upon the opinion and shall be immune from criminal prosecutions, civil suits, or actions for removal from his office or position of employment for a violation of Chapter 102. or section 2921.42 or 2921.43 of the Revised Code based on facts and circumstances covered by the opinion, if the opinion states there is no violation of Chapter 102. or section 2921.42 or 2921.43 of the Revised Code."

² See Ohio Ethics Commission Advisory Opinions No. 82-004, 83-010, 84-001, and 96-005. See also 1991 Ohio Atty.Gen.Op. No. 91-007 (applying the official capacity analysis of the Ethics Commission).

³ You referred to a provision of the Lakewood City Charter that addresses conflicts of interest. The Commission has no authority to interpret a city charter. As the city law director, you are the appropriate person to interpret city charter provisions.

⁴ R.C. 2921.01(A).

⁵ Adv. Op. No. 89-008

⁶ R.C. 2921.42(I)(1)(a)

⁷ Adv. Op. No. 83-002 (a partner or an associate in a law firm is the "business associate" of the firm and its partners).

⁸ Adv. Op. Nos. 89-006, 89-011, and 91-001

⁹ Adv. Op. No. 85-015.