




MEMORANDUM

LEGAL OPINION NO. 2017-04

TO: DOUGLAS ADKINS, CITY MANAGER
AMY SCHENCK, CLERK OF CITY COUNCIL

FROM: LESLIE S. LANDEN, LAW DIRECTOR 

DATE: NOVEMBER 28, 2017

RE: ETHICAL ISSUES RE CONTRACTS WITH CITY COUNCIL ELECT

I. BACKGROUND

In the 2017 municipal elections, Ami Vitori was elected as a member of Middletown City Council. Vitori has not previously served on City Council. Vitori is a principal in Torchlight Pass LLC (hereinafter TLP), a local business entity. In 2016, TLP entered into a Community Redevelopment Area (CRA) agreement with the City of Middletown. The CRA agreement provides a one hundred percent (100%) tax abatement for a twelve (12) year period for certain real property owned by TLP. In addition, TLP has pending before Middletown Moving Forward (MMF), a Community Improvement Corporation, serving as the designated economic development representative of the City of Middletown, the closing of a business loan in the amount of \$80,000.00. The application process for the loan was started prior to her candidacy for Middletown City Council. An offer of terms for the loan by MMF was made on September 27, 2017, prior to the November election. Closing of the loan is pending. An issue has been raised whether the CRA agreement or the pending loan would violate the prohibitions of either Ohio Rev. Code Section 2921.42(D) or Article III, Section 18 of the City Charter because Vitori would have an interest in a public contract with the City of Middletown. It is the opinion of the Law Department that the CRA agreement violates neither state law nor the Charter. It is further our opinion

that if the loan contract is fully consummated prior to January 1, 2018, the first day of Vitori's term in office, it would not violate either prohibition.

II. ANALYSIS

Ohio Rev. Code Section 2921.42(A) (4) 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 the public official is connected.

Article III, Section 18 of the City Charter provides in part that "No member of City Council or any officer or employee of the City shall be interested in the profits or emoluments of any contract, job, work or service for the City." As a general rule, a city council member cannot have an interest in a public contract with the City of Middletown. As of January 1, 2018, Vitori will be a member of City Council. Both the CRA and the loan contract would be considered public contracts and therefore subject to the prohibitions in both the state law and the City Charter. FN 1. At first glance, it would appear that Vitori's past conduct with the City would either prohibit her from taking office, or in the alternative, require her to withdraw from those contracts.

Subsection (C) of the state statute creates an exception to this general rule where there is a "continued course of dealing". The Ohio Ethics Commission has, through a letter opinion, held that a contract, fully executed prior to a city council-person taking their seat on city council, can be completed after the council-person was on council. A copy of that letter opinion is attached hereto as Exhibit "A". For this exception to apply, four prerequisites must be met.

First, Vitori must show that the services involved are necessary. City Council established the CRA process for areas of the City. In addition, City Council established MMF as the economic development agent for the City with the power to provide loans to aid economic development. These

actions are a testament to the value of these programs and their necessity to promote development in the City.

Second, Vitori must establish the continuance course of dealing that began prior to taking office. The CRA contract was fully executed and in place well before January 1, 2018. In order for the loan contract to meet this requirement, it must be closed prior to the end of this calendar year. If the loan is not closed, both the statute and the Charter would prohibit its completion. While this may suffer from the appearance of impropriety, it is important to review the timing of the loan process. The application for the loan was made in late 2016 or early 2017, well before the municipal election in November, 2017. More importantly, MMF tendered an offer of loan terms in September, 2017, which is not only prior to Vitori taking office, but is also before the November, 2017 election. The formality of closing is left to complete the transaction. MMF's tender of offer anticipated an October closing. These facts mitigate against an appearance of self-dealing, the evil both the state statute and the Charter provision are designed to prevent.

The third requirement is that the services are unobtainable elsewhere at the same or lower costs. This portion of the exception does not fit cleanly on all public contracts. However, the nature of these development incentives are of such a nature that the benefits to be gained by them related to the development of specific property in the city are not available if the parties are changed. Further, these contracts do not deprive another person of seeking the same benefits in a similar arrangement with the City or MMF. There is nothing to suggest that Vitori is getting "a better deal" than another qualified applicant would receive.

Finally, the fourth part of the exception is met because Vitori did not participate in the award of these contracts as a member of City Council. Both the CRA contract and the loan contract were reviewed and approved in an arm's length transaction by governing bodies of which Vitori was not a

member. Vitori had no special leverage by her position and the City knew who they were dealing with at the time of the commitment. As a caveat, Vitori cannot take part in any future City Council deliberations or decisions related to either of these contracts after she takes office.

Our discussion to this point has focused on an exception set forth in the state statute. This exception is not specifically included in the City Charter. As such, does the Charter recognize or incorporate this exception as part of its application to this situation? In 1995, my predecessor opined that the statutory exception was grafted onto the City Charter as a matter of logic, and applied to employee participation in the Section 8 housing program. Opinion No. 1995-15. Over the next twenty-two years, the author of this opinion has agreed with this general proposition and has expanded it to conclude that this exception is fully included in a fair and logical interpretation of our Charter. Opinion No. 2000-04. This conclusion is premised on the identity of purpose of the state statute and the Charter provision. Based on this history of interpretation, the statutory exception is merged into a logical interpretation and application of the Charter. Hence, the exception, as discussed above, applies to the Charter provision and permits Vitori's interest in these two contracts to withstand inspection and not serve as an impediment to her serving as a member of City Council.

III. SUMMARY

In conclusion, it is the opinion of the Law Department that Ami Vitori may serve as a member of Middletown City Council and maintain her CRA contract entered in 2016 and a loan contract with MMF which is fully executed and closed prior to the close of business on December 31, 2017.

FN1: The proceeds of the pending loan contract are not tax revenues, but rather are garnered from contributions and/or loans made to MMF to promote economic development incentives in the community. This could raise an issue as to whether this is a public contract. In keeping with construing ethics laws in a manner to promote protection of the public interest, we find the loan contract with MMF to be a public contract for purposes of this opinion.

EXHIBIT "A"

Merom Brachman, *Chair*
Maryann B. Gall, *Vice Chair*
Bruce E. Bailey
Betty Davis
Michael A. Flack



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Paul M. Nick
Executive Director

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March 23, 2012

Garry E. Hunter, Esquire
Nelsonville City Attorney
211 Lake Hope Drive
Nelsonville, Ohio 45764

Dear Attorney Hunter:

On January 5, 2012, the Ohio Ethics Commission received your letter in which you requested, in your capacity as the Nelsonville city attorney, an advisory opinion on behalf of a new city council member.

In your letter, you explained that:

- In 2010, the city sought a contractor to construct a shelter in a city park;
- In July 2010, a contractor submitted a \$10,000 bid to construct the shelter;
- The city verbally awarded the contract to the contractor although there was no written contract between the parties;
- The grant funds to pay for the project did not become available until after the 2010 construction season had ended;
- Construction did not take place in 2011 because the Ohio Department of Natural Resources required the city to conduct soil testing prior to allowing the construction; and
- The grant funds were extended and are expected to become available in 2012.

The contractor was elected to council in November 2011 and sworn in on December 1.

Question and Brief Answer

Can the city council member perform these construction services for the city?

Yes.

Selling Goods or Services to or for the Use of Political Subdivision

The Ethics Law prohibits a public official from selling goods or services to or for the use of the political subdivision he serves unless he can meet an exception in the law. The applicable statute is 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 the public official is connected.

This restriction applies to all public officials, including a city council member.¹ The application of R.C. 2921.42(A)(4) is dependent on the facts and circumstances of each situation.²

A public contract includes any purchase or acquisition of goods or services by the city.³ A public contract can be a bid or unbid, written or oral agreement.⁴ A public official is prohibited from having a definite and direct financial or fiduciary interest in his political subdivision's contracts.⁵

R.C. 2921.42(A)(4) prohibits the contractor, who is now a council member, from selling construction services to the city.

Exception—R.C. 2921.42(C)

However, there is an exception to this prohibition. Based on the information you have provided, it appears that the council member can meet the exception.

The exception has four parts, and the official must show that he meets all of them.⁶

In order to meet the first part, the council member must show that the services he will provide to the city are necessary.⁷ This requirement can be demonstrated if city council has made an official decision that the park shelter is necessary.

In order to meet the second part, the council member must show either that the services are provided pursuant to a "continuing course of dealing" that began prior to his taking office or that the products or services he will provide are "unobtainable elsewhere for the same or lower cost."⁸

Because the city verbally awarded the contract to the contractor before he took office, the "continuing course of dealing" exception applies even though the contract was not signed and will not be performed until after he took office.

Because there is a "continuing course of dealing," the council member does not have to show that the services he will provide are "unobtainable elsewhere for the same or lower cost."⁹

However, you have stated that contractor submitted a \$10,000 bid to construct the shelter. If this bid was the lowest or only bid in a competitive bidding process, he can also show that his services are unobtainable elsewhere for same or lower cost.¹⁰

In order to meet the third part, the council member must show that he would treat the city the same as, or better than, any other customers or clients in similar transactions.¹¹

The fourth part can be met because the city has full knowledge of the council member's interest in the contract and he was not a council member when the city awarded the contract.¹² The council member must not take part in any council deliberations or decisions on the contract.

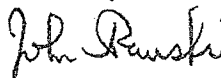
Other Restrictions

Although, the council member can meet the exception and can perform the construction services, he is prohibited from using his public position, in any way, to secure:

- the extension of grant funds to pay for his construction services¹³; and
- any other thing of value, including any payments for his services, from the city.¹⁴

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.¹⁵ I have attached additional information on public officials selling goods or services to their own political subdivisions. If you have any other questions or need additional information, please contact this Office again.

Sincerely,



John Rawski
Advisory Staff Attorney

Enclosure: Information Sheet No. 2

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

¹ R.C. 2921.01(A)(1); Ohio Ethics Commission Advisory Opinion No. 2000-02.

² Adv. Op. No. 2000-02.

³ See R.C. 2921.42(I)(1)(a). See also Adv. Op. No. 90-003.

⁴ Adv. Op. No. 87-002.

⁵ Adv. Ops. No. 81-008 and 89-004.

⁶ Adv. Op. No. 2009-06.

⁷ R.C. 2921.42(C)(1).

⁸ R.C. 2921.42(C)(2).

⁹ Adv. Op. No. 92-008.

¹⁰ Adv. Op. No. 84-006.

¹¹ R.C. 2921.42(C)(3).

¹² R.C. 2921.42(C)(4).

¹³ R.C. 2921.42(A)(1).

¹⁴ R.C. 102.03(D).

¹⁵ See also R.C. 731.02 and Nelsonville City Charter Section 11.09 which apply to city council members. The Commission does not have jurisdiction over those restrictions and this opinion does not reach any conclusions about them.