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RE: Contracts and family members

Dear Marion Township Trustees:

You requested a legal opinion on the following issue: May the Grandson of two of the Marion Township Trustees who is also the son-in-law of the township fiscal officer be able to enter into contract with the township. Stated otherwise, may the township government enter into a contract with an individual who happens to be the grandson of two of the township trustees and a son-in-law of the township fiscal officer. The answer is: Yes.

This opinion is based on certain facts, and therefore, is fact driven. One fact is that the "Underwood bidder", hereafter referred to as "bidder", is financially independent of any of the township trustees or the township fiscal officer. In other words, he is not a dependant of them, does not live in their homes, and does not share financial resources. Number two, that open bidding procedures are in place and are being used and there was no favoritism shown, whatsoever. Three, the specifications of the contract that was bid out was followed and no inside information was received by any of the persons bidding.

I have enclosed an Ohio Attorney General Opinion 90-040. If you read this opinion, you will see that this deals with a situation involving a daughter in law, as well as a discussion of a spouse. Summarizing that decision, if there is some connection where the township trustee has a duty to support the other party or is commingling his living expenses, (i.e. husband and wife living together and their monies are being used to pay marital bills) there could be a pecuniary interest issue, which creates the conflict. By the facts given to me, I am assuming this bidder does not reside with any of the township trustees and is not dependant upon them for financial resources and does not commingle his money with them. I am also assuming the same for the township fiscal officer. Therefore, there would not be any conflict that I can see.

Ohio Revised Code §102.08, which I have enclosed for your reading, also states that the officers in question, that being township trustees, are immune from any liability from civil litigation for allowing the contract. However, to have this immunity you must request an advisory opinion from the Ohio Ethics Commission. The Ohio Attorney General's Office as well as my office cannot issue ethics opinions and, therefore, if you wish the immunity for the decision you will be making, you must get an opinion from them. The Ohio Ethics Commission may be found at the following: Ohio Ethics Commission, 8 East Long Street, 10th Floor, Columbus, Ohio 43215. The telephone number is 614-466-7090.

However, on the surface of this, I would advise that there is an "appearance of" impropriety. The better course of action would be not to vote on it. But considering you have to make a decision and you have a three-man board, it takes at least two votes to get the issue on the table for discussion and it takes another vote to make a decision on it. My advice, therefore, would be the following: The

trustees with the problem should not vote on this issue and should “abstain” from voting. I do not think it would be improper for someone to make the motion and someone to second it to put the issue on the table for a discussion in order that a roll call for a vote be taken on whether to or to not award the contract. When it comes to actually taking the vote, it would probably be a better course of action, if the two trustees who may have some sort of appearance problem “abstain” from voting. They should allow just one vote to be made if all three trustees are there. That one vote decision would make the determination. From a parliamentary procedure point of view, an abstaining vote is acquiescing in the decision of the majority and is legal.

In conclusion, I did not see a conflict. Further, if you wish an ethical opinion to obtain immunity, you must contact the Ethics Commission for your opinion that only they can give. Third, I have outlined the procedure, which you might want to follow to avoid any potential problems here because of the appearance issue. Hopefully this helps you in making the decisions you have to make.

Sincerely,

Bradford W. Bailey
Hardin County Prosecutor

enclosure(s) 90-040
§102.08 O.R.C.

Ohio Revised Code § 102.08. Commission may recommend legislation; advisory opinions; education and information program

(A) The Ohio ethics commission, the board of commissioners on grievances and discipline of the supreme court, and the joint legislative ethics committee may recommend legislation relating to ethics, conflicts of interest, and financial disclosure, and render advisory opinions with regard to questions concerning these matters for persons for whom it is the appropriate ethics commission.

(B) When the Ohio ethics commission or the board of commissioners on grievances and discipline of the supreme court renders an advisory opinion 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, the person to whom the opinion was directed or who was similarly situated may reasonably rely upon such 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., section 2921.42, or section 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., section 2921.42, or section 2921.43 of the Revised Code.

(C) When the joint legislative ethics committee renders an advisory opinion that has been publicly sought and that relates to a special set of circumstances involving ethics, conflicts of interest, or financial disclosure under Chapter 102. or section 2921.42 or 2921.43 of the Revised Code, the person to whom the opinion was directed or who was similarly situated may reasonably rely upon such 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 the facts and circumstances covered by the opinion, if the opinion states that there is no violation of Chapter 102. or section 2921.42 or 2921.43 of the Revised Code. When the joint legislative ethics committee renders an advisory opinion that has been publicly sought, the advisory opinion is a public record available under section 149.43 of the Revised Code.

(D) When the joint legislative ethics committee renders a written opinion that has been privately sought and that relates to a special set of circumstances involving ethics, conflicts of interest, or financial disclosure under Chapter 102. or section 2921.42 or 2921.43 of the Revised Code, the written opinion does not have the legal effect of an advisory opinion issued under division (C) of this section. When the joint legislative ethics committee renders a written opinion that has been privately sought, the written opinion is not a public record available under section 149.43 of the Revised Code. The proceedings of the legislative ethics committee relating to a written opinion that has been privately sought shall be closed to the public and records relating to these proceedings are not public records available under section 149.43 of the Revised Code.

The person to whom a written opinion is issued under this division may request the committee to issue the written opinion as an advisory opinion. Upon receiving such a request and with the approval of a majority of the members of the committee, the committee may issue the written opinion as an advisory opinion. If the committee issues the written opinion as an advisory opinion, the advisory opinion has the same legal effect as an advisory opinion issued under division (C) of this section and is a public record available under section 149.43 of the Revised Code.

(E) The joint legislative ethics committee shall issue an advisory opinion under division (C) of this section or a written opinion under division (D) of this section, whether it is publicly or privately sought, only at a meeting of the committee and only with the approval of a majority of the members of the committee.

(F) The appropriate ethics commission shall provide a continuing program of education and information concerning the provisions of Chapter 102. and sections 2921.42 and 2921.43 of the Revised Code and other provisions of law pertaining to ethics, conflicts of interest, and financial disclosure.

History:

135 v H 55 (Eff 1-1-74); 136 v H 1040 (Eff 8-27-76); 141 v H 300 (Eff 9-17-86); 145 v H 492. Eff 5-12-94.

Ohio Attorney General Opinion 90-040,
June 20, 1990

The Honorable David P. Joyce
Geauga County Prosecuting Attorney
Courthouse Annex
231 Main Street
Chardon, Ohio 44024

I have before me your request for my opinion as to whether there is a conflict of interest if a township trustee is related to a member of the zoning commission and both are related to a member of the board of zoning appeals. Information provided indicates that a township trustee is the wife of a member of the zoning commission and daughter-in-law of a member of the board of zoning appeals and that all three positions are with the same township.

I note initially that there are no statutory provisions which expressly prohibit members of the same family from holding the positions of township trustee, member of the township zoning commission, and member of the township board of zoning appeals. *Cf.* R.C. 340.02 ("no person shall serve as a member or employee of the board [of alcohol, drug addiction, and mental health services] whose spouse, child, parent, brother, sister, stepparent, stepchild, stepbrother, stepsister, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law serves as a county commissioner of a county or counties in the alcohol, drug addiction, and mental health service district"); R.C. 5126.03(D) ("no person shall serve as a member or employee of a county board of mental retardation and developmental disabilities if a member of his immediate family serves as a county commissioner of the county served by the board"). There are, however, certain statutes and common law principles which regulate the conduct of public servants.

R.C. 511.13, which prohibits township officers and employees from having any interests in township contracts, provides, in part, that "no member of the board of township trustees or any officer or employee thereof shall be interested in any contract entered into by such board." *Cf., e.g.,* R.C. 305.27 ("no county commissioner shall be concerned, directly or indirectly, in any contract for work to be done or material to be furnished for the county"); R.C. 731.02 (no member of the legislative authority of a city shall be interested in any contract with the city); R.C. 731.12 ("no member of the legislative authority [of a village] shall . . . be interested in any contract with the village"); R.C. 3313.33 ("no member of [a board of education] shall have, directly or indirectly, any pecuniary interest in any contract of the board . . . of which he is a member"). Township trustees, members of the township zoning commission, and members of the township board of zoning appeals are, thus, statutorily prohibited, pursuant to R.C. 511.13, from having any interests in township contracts. *See* 1982 Op. Att'y Gen. No. 82-008 (syllabus) ("the provision of R.C. 511.13 which prohibits members of the board of township trustees and officers or employees of a township from having an interest in contracts entered into by the board of township trustees applies to any contract entered into by such board, unless the interested person meets the criteria for a permissible interest set forth in this section").

As indicated in your letter, all three positions are compensated with township monies. *See* R.C. 505.24 (a township trustee's "per diem compensation shall be paid from the township general fund or from such other township funds in such proportions as the kinds of services performed may require"); R.C. 519.05 (a member of the township zoning commission may be compensated by the board of township trustees); R.C. 519.13 (a member of the township board of zoning appeals may be compensated by the board of township trustees); *see also* R.C. 505.25 and R.C. 5571.03 (setting forth circumstances in which a township trustee is entitled to additional compensation). As a result, the salient questions to be answered are whether a contract exists and if so, whether the individuals, as township officials, are deemed interested in township contracts on the basis that members of their family receive compensation from the township for services performed on behalf of the township.

It is a general rule in Ohio that public officers and public general employees do not hold their positions pursuant to contract. *Fuldauer v. City of Cleveland*, 32 Ohio St. 2d 114, 290 N.E.2d 546 (1972) (syllabus, paragraph three); *State ex rel. Gordon v. Barthalow*, 150 Ohio St. 499, 83 N.E.2d 393 (1948) (syllabus,

paragraph one); *Jackson v. Kurtz*, 65 Ohio App. 2d 152, 154, 416 N.E.2d 1064, 1066 (Ct. App. Hamilton County 1979); *Taylor v. City of Cleveland*, 87 Ohio App. 132, 141-42, 93 N.E.2d 594, 599 (Ct. App. Cuyahoga County 1950); 1952 Op. Att'y Gen. No. 1684, p. 549 at 551. *But see* R.C. 2921.42(E)(1). ** As the Ohio Supreme Court in *State ex rel. Gordon v. Barthalow*, 150 Ohio St. at 509-10, 83 N.E.2d at 397-98, stated:

The principle that a public officer or public general employee does not hold his position *ex contractu* not only rests upon the great weight of authority but upon sound reason and logic. To constitute a valid contract there must be mutuality in the agreement, and yet it is obvious that, if a public officer or public general employee resigns before his term expires, the political subdivision which he served has no recourse against him. *Reiter v. State, ex rel.*, 51 Ohio St., 74, 36 N.E., 943, 23 L.R.A., 681; *Ratterman v. State*, 44 Ohio St., 641, 644, 10 N.E., 678. Likewise, if the relationship between the public officer or public general employee and the public he serves is contractual, the public itself cannot vary the terms of the contract, and yet it is universally held that, in the absence of constitutional or other legal restraint, the terms, emoluments and the duties of the office or employment may be changed or employment abolished without right of redress upon the part of the holder thereof.

** I note that R.C. 2921.42 prohibits a public official from having an unlawful interest in a public contract. For purposes of that section, a "public contract" means "[t]he purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state or any of its political subdivisions, or any agency or instrumentality of either." R.C. 2921.42(E)(1). Consequently, the relationship between a township and its trustees, members of its zoning commission, and members of its board of zoning appeals may be a "public contract," as defined by R.C. 2921.42(E)(1). Whether a particular set of circumstances amounts to a "public contract," pursuant to R.C. 2921.42(E)(1), is a determination which must be made by the Ohio Ethics Commission. R.C. 102.08.

Hence, township trustees, members of the township zoning commission, and members of the township board of zoning appeals do not hold their positions pursuant to contract, but rather *ex lege*, that is, by force of law or as a matter of law.

The language of R.C. 511.13, as stated above, only prohibits a township official from having an interest in a contract entered into by the township. Since there is no contractual relationship between the township and the members of a board of township trustees, township zoning commission or township board of zoning appeals, the individuals in question do not have an interest in a township contract based on the fact that members of their family receive compensation from the township for services performed on behalf of the township. I find, accordingly, that R.C. 511.13 does not prohibit the holding of the positions of township trustee, member of the township zoning commission, or member of the township board of zoning appeals by members of the same family. **

** I assume, for purposes of this opinion, that the individuals in question have no interest in a township contract except that which may arise solely from the employment relationship among the members.

In addition to the specific provisions of R.C. 511.13, I note that R.C. Chapter 102 and R.C. 2921.42 prohibit public officials, in general, from using their positions to secure anything of value which manifests a substantial and improper influence upon them, from having unlawful interests in public contracts, and from authorizing or using their authority or influence to secure authorization of public contracts in which they, family members, or business associates have an interest. Pursuant to R.C. 102.08, the Ohio Ethics Commission is empowered to render advisory opinions on these sections of the Revised Code. Consequently, I will abstain from rendering an opinion with respect to these matters since the Ohio Ethics Commission has statutory authority to render such advisory opinions. *See* 1989 Op. Att'y Gen. No. 89-037 at 2-166 and 2-167; 1989 Op. Att'y Gen. No. 89-022 at 2-101 n. 2; 1987 Op. Att'y Gen. No. 87-025 (syllabus, paragraph three).

I turn now to common law principles governing conflicts of interest. In 1970 Op. Att'y Gen. No. 70-168 at 2-336, *overruled on other grounds*, 1981 Op. Att'y Gen. No. 81-100, one of my predecessors stated:

Any public officer owes an undivided duty to the public. It is contrary to public policy for a public officer to be

in a position which would subject him to conflicting duties or expose him to the temptation of acting in any manner other than the best interest of the public.

See Halliday v. Norfolk & Western Railway Co., 44 Ohio Law Abs. 208, 213, 62 N.E.2d 716, 719 (Ct. App. Franklin County 1945) ("[a] public office is a public trust and the prosecution of such a trust must always be consonant with the fiduciary and confidential relationship that the office imposes"); *State ex rel. Taylor v. Pinney*, 13 Ohio Dec. 210, 212 (C.P. Franklin County 1902) ("[t]he self interest of the public official and the public interests which he represents, must not be brought into conflict"); 1973 Op. Att'y Gen. No. 73-043 at 2-167 and 2-168 ("[a] public officer must be beyond temptation and he should not be in a position to profit from his public office. His position is one of a fiduciary nature to the community which requires that all his public decisions be completely objective"). There is no question that a public officer is subject to the temptation of acting in a manner inconsistent with the best interests of the public where he has a direct pecuniary interest in a matter. Consequently, it has become "an established principle that public officers are disqualified from voting on a matter coming before the agency in which they serve if they have a direct, pecuniary interest in the matter in question." 1969 Op. Att'y Gen. No. 69-084 at 2-181; *see Oliver v. Brill*, 14 Ohio App. 312, 317, 32 Ohio C.C. (n.s.) 129, 132-33 (Ct. App. Guernsey County 1921) ("[m]embers of a legislative body or municipal board are disqualified to vote therein on propositions in which they have a direct pecuniary interest adverse to the state or municipality which they represent" (quoting *Board of Supervisors of Oconto County v. Hall*, 47 Wis. 208, 2 N.W. 291 (1879) (syllabus, paragraph one))).

There are at least two instances in which a township trustee, who is the wife of a member of the township zoning commission and daughter-in-law of a member of the township board of zoning appeals, may have a direct pecuniary interest in a matter coming before the board of township trustees. First, pursuant to R.C. 519.05 and R.C. 519.13, the compensation for members of the township zoning commission and the township board of zoning appeals is determined by the board of township trustees. Second, both the members of a township zoning commission and township board of zoning appeals are subject to removal by the board of township trustees. *See* R.C. 519.04 (members of the township zoning commission shall be removed from office by the board of township trustees); R.C. 519.13 (the members of a township board of zoning appeals are removed for the same causes and in the same manner as provided by R.C. 519.04). Hence, it is necessary to determine whether a township trustee has a direct pecuniary interest in either the compensation or the removal of her spouse as a member of the township zoning commission or her father-in-law as a member of the township board of zoning appeals.

With respect to the type of interest a township trustee has in the compensation or the continued employment of her spouse as a member of the township zoning commission, I note that in 1989 Op. Att'y Gen. No. 89-030 I had the opportunity to discuss the issue of one spouse's interest in the earnings of the other. In that opinion, I concluded that:

although R.C. 3103.04 explicitly recognizes a spouse's right to keep separate property from control or use by the other spouse, the Ohio Supreme Court implicitly acknowledges that such property, especially earnings or profits generated during a marriage, may be treated as "marital property" subject to an equitable division between the spouses. To the extent that separate property of one spouse is used or made available to meet the expenses of either spouse, a benefit is bestowed on the other spouse because that other spouse need not meet that duty of support to the extent the expenses are already met. While it is clear that R.C. 3103.04 permits separate property completely beyond the control of the other spouse, when separate property is expended within the marriage to meet a marital obligation to support either spouse or to meet an obligation of the board member to support another dependent, the expenditure bestows a pecuniary benefit on the board member.

R.C. 3103.04, by expressly providing for spousal separate property, makes it possible for the member of the board of education to have no pecuniary interest in the earnings of the spouse, if none of the earnings are used to discharge the marital support obligation.

Op. No. 89-030 at 2-126 and 2-127. A township trustee, thus, has a direct pecuniary interest in the compensation or the removal of her spouse as a member of the township zoning commission, if any of the earnings are used for the support of the trustee or the spouse or another dependent of the trustee. Consequently, the township trustee must not vote upon either the compensation to be awarded to, or the removal of, her

spouse as a member of the township zoning commission, if any of the earnings are used for her support, her husband's support or that of another dependent. Whether, in a given case, separate property is applied to marital support obligations is a question of fact, which cannot be answered by means of an opinion of the Attorney General. *See* 1989 Op. Att'y Gen. No. 89-057 at 2-242; Op. No. 89-030 at 2-127; 1988 Op. Att'y Gen. No. 88-008 at 2-27; 1983 Op. Att'y Gen. No. 83-057 at 2-232.

With regard to the type of interest a township trustee has in the amount of compensation or the continued employment of her father-in-law as a member of the township board of zoning appeals, I am of the opinion that no direct pecuniary interest exists. A daughter-in-law does not, pursuant to marriage, acquire such a relationship to the father of her spouse so as to have a direct pecuniary interest in his earnings. A father-in-law has no legal duty to support his daughter-in-law. *Cf., e.g.,* R.C. 3103.03(A) ("[t]he husband must support himself, his wife, and his minor children out of his property or by his labor. If he is unable to do so, the wife must assist him so far as she is able"). Consequently, the township trustee does not have a direct pecuniary interest in her father-in-law's earnings as a member of the township board of zoning appeals.

Moreover, absent special circumstances, a father's duty to support his son and a son's interest in his father's earnings terminate when the son reaches the age of majority. *See* R.C. 3103.03; *see also* 1931 Op. Att'y Gen. No. 3200, vol. I, p. 624 at 625 ("[a]s a general rule, there does not exist a pecuniary interest between a father and son except where the son is a minor and the father is charged with the duty of his support. Even though the son may be a minor, it is well settled in this state that if the son is emancipated there exists no financial interest on the part of the father in the son"). Since you have not indicated any special circumstances which would indicate that either party has an interest in the earnings of the other, I will assume, for purposes of this opinion, that no such circumstances exist.

As a final matter I note that, in the situation you pose, all three positions are concerned with the adoption, implementation, and enforcement of the township zoning plan. *See generally* R.C. Chapter 519 (setting forth the procedures whereby a township adopts a zoning plan and enforces that plan). I realize that there exists the possibility for abuse in a situation such as you describe. *See, e.g.,* R.C. 519.10 ("[a]fter receiving the recommended zoning plan from the township zoning commission and holding the public hearing provided for by section 519.08 of the Revised Code, the board of township trustees shall consider such recommendations and vote upon the adoption of the zoning resolution"); R.C. 519.14 (the township board of zoning appeals may "[h]ear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of sections 519.02 to 519.25 of the Revised Code, or of any resolution adopted pursuant thereto"). However, I must assume, in the absence of evidence to the contrary that all the individuals in question are acting in good faith, and in accordance with the law. 1983 Op. Att'y Gen. No. 83-037 at 2-141; *see State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 12, 112 N.E. 138, 141 (1915), *aff'd sub nom. State of Ohio on Relation of Davis v. Hildebrant*, 241 U.S. 565 (1916); *Probasco v. Raine*, 50 Ohio St. 378, 392, 34 N.E. 536, 539 (1893); 1985 Op. Att'y Gen. No. 85-099 at 2-421; *see also State ex rel. Corrigan v. Hensel*, 2 Ohio St. 2d 96, 206 N.E.2d 563 (1965).

Therefore, it is my opinion and you are hereby advised that:

1. There is no conflict of interest if the spouse of a member of a township board of trustees serves as a member of that township's zoning commission, provided that, if any of the zoning commissioner's earnings are used for the support of the township trustee, the zoning commissioner or another dependent of the township trustee, the township trustee does not vote upon either the compensation to be awarded to, or the removal of, the zoning commissioner, and further provided that there is no violation of a statutory provision subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08.
2. There is no conflict of interest if a member of the township board of trustees is the daughter-in-law of a member of that township's board of zoning appeals, provided that there is no violation of a statutory provision subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08.
3. There is no conflict of interest if a member of the township zoning commission is the son of a member of

that township's board of zoning appeals, provided that there is no violation of a statutory provision subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08.