March 19, 2008

The Honorable Kenneth W. Oswalt
Licking County Prosecuting Attorney
20 South Second Street
Newark, Ohio 43055

SYLLABUS: 2008-008

1. As stated in 2007 Op. Att'y Gen. No. 2007-044 (syllabus, paragraph 2): "If a person enters into an ongoing multi-year contract to supply a township with garage storage facilities for a number of years in the future and is subsequently elected to the office of township trustee, the person is prohibited by R.C. 511.13 from serving as township trustee and continuing to have an interest in that preexisting multi-year contract."

2. If the garage owner and the township void the ongoing multi-year contract and replace it with an arrangement under which the garage owner leases the garage to a third party who is expected to and does sublease the garage to the township, and if the garage owner takes office as township trustee, the trustee/owner has not divested himself of all interests in contracts of the township under R.C. 511.13. Rather, even if the lease/sublease arrangement serves to eliminate any direct contractual relationship between the township and the trustee/owner and denies the trustee/owner many of the typical rights of a landlord, the trustee/owner has a prohibited interest under R.C. 511.13 in the township's sublease, which provides for moneys of the township to be paid to rent the trustee/owner's garage and to be channeled to the trustee/owner.

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OPINION NO. 2008-008

The Honorable Kenneth W. Oswalt
Licking County Prosecuting Attorney
20 South Second Street
Newark, Ohio 43055

Dear Prosecutor Oswalt:

We have received your request for a follow-up opinion concerning a situation previously addressed in 2007 Op. Att'y Gen. No. 2007-044. You have raised the following question:

> If a Township Trustee owns a garage that he leases to a third party, and that third party then subleases the garage to the Township, *provided* the lease and/or sublease serve to eliminate any contractual relationship directly between the Township and the Trustee (and indeed provide for the Trustee being denied many of the typical rights of a landlord), does the Trustee continue to have sufficient "interest" in a contract with the board such that this arrangement violates R.C. 511.13?

In response to your earlier request, we recently issued 2007 Op. Att'y Gen. No. 2007-044, which considered R.C. 511.13 and addressed the question whether a person who is elected to office as a township trustee and is party to an ongoing multi-year contract to supply the township with garage storage facilities may continue to benefit from that contract after taking office. The 2007 opinion concluded, in the second paragraph of the syllabus:

> If a person enters into an ongoing multi-year contract to supply a township with garage storage facilities for a number of years in the future and is subsequently elected to the office of township trustee, *the person is prohibited by R.C. 511.13 from serving as township trustee and continuing to have an interest in that preexisting multi-year contract. To avoid the prohibited conflict, the person may* refuse the office of township trustee or, prior to taking office as trustee, *divest*

> *himself or herself of the interest in the contract.* R.C. 511.13 does not impose upon the other trustees the legal duty to take steps to set aside the contract.

2007 Op. Att'y Gen. No. 2007-044 (emphasis added).[1]

You have informed us that following the issuance of 2007 Op. Att'y Gen. No. 2007-044, the newly-elected trustee and the township voided the preexisting multi-year contract for the lease of the trustee's garage storage facilities by the township. The newly-elected trustee entered into a contract with a third party who is not a township employee or officer and leased the garage to that third party. The third party lessee then entered into a contract with the township, subleasing the newly-elected trustee's garage to the township.

In your earlier correspondence, you informed us that the preexisting multi-year contract involved "the expenditure of approximately $2,000 a month from the Township for these [garage storage] services." 2007 Op. Att'y Gen. No. 2007-044, at 2-434. The information you provided about the current lease/sublease arrangement indicates that the township is to pay the third party lessee $2,300 per month under the sublease, and the third party lessee is to pay the trustee/owner $2,200 per month.

You have also informed us that the lease/sublease arrangement serves to deny the trustee/owner many of the normal rights of a landlord, such as the right to enter and inspect. Further, the trustee/owner has no right of approval of the terms of any sublease and in fact waived any right to seek a remedy from the sublessee in the event of any claimed violations. You add that you have advised the board of trustees that the trustee/owner "should abstain from any actions the board may need to make as it relates to the sublease" between the township and the third party lessee. *See* 1949 Op. Att'y Gen. No. 1284, p. 911 (syllabus) ("[a] township trustee is disqualified from voting on a contract to purchase a maintainer, where such trustee is in the employ of the seller as a mechanic, because he would be acting on behalf of a public authority while having an interest in the contract").

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[1] The request upon which 2007 Op. Att'y Gen. No. 2007-044 is based also asked for advice concerning the application of R.C. 2921.42, which is a criminal statute that prohibits a public official from having certain interests in public contracts or from taking certain actions that might favor the official, a family member, or a business associate. Because the authority to interpret R.C. 2921.42 as it applies to township trustees has been given to the Ohio Ethics Commission, 2007 Op. Att'y Gen. No. 2007-044 reached no conclusions regarding the application of R.C. 2921.42 to that situation. *See also* R.C. 102.08; 2007 Op. Att'y Gen. No. 2007-011, at 2-83 n.1; 2006 Op. Att'y Gen. No. 2006-036, at 2-329 n.1. However, 2007 Op. Att'y Gen. No. 2007-044 did conclude in the first paragraph of the syllabus: "R.C. 511.13 is not dependent upon R.C. 2921.42 and must be construed and applied separately. R.C. 511.13 provides a broader prohibition than R.C. 2921.42 but, unlike R.C. 2921.42, provides no criminal sanctions."

You describe the situation as follows:

> The reality of the situation is that the Township has no other readily available garage space of the size and functionality of the garage at issue. With that said, however, the Township hopes to end the current sublease altogether by building a new township-owned garage facility within 18 months (hence the sublease being for an 18-month period). Obviously, at that point, this issue will disappear.
>
> Simply stated: Do you agree with me that this arrangement, while not perfect, does serve to technically "divest" the Trustee of his interest in any contract that exists with the Township such that it complies with R.C. 511.13? In fact, in my opinion, he currently has no contract with the Township, and has no legally recognizable "interest" in the contract the Township has with [the third party lessee].

We are unable to agree that on the facts presented the trustee/owner has divested himself of all interests in contracts of the township for purposes of R.C. 511.13. Rather, even if the lease/sublease arrangement serves to eliminate any direct contractual relationship between the township and the trustee/owner and denies the trustee/owner many of the typical rights of a landlord, the trustee/owner has a prohibited interest under R.C. 511.13 in the township's sublease, which provides for moneys of the township to be paid to rent the trustee/owner's garage and to be channeled to the trustee/owner.

Interpretation and Application of R.C. 511.13

R.C. 511.13 states that "[n]o member of the board of township trustees or any officer or employee thereof shall be interested in any contract entered into by such board." [2] R.C. 511.13

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[2] R.C. 511.13 states in full:

> *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.* No such person shall be individually liable to any contractor upon any contract made under sections 511.08 to 511.17, inclusive, of the Revised Code, nor shall he be liable to any person on any claims occasioned by any act or default of a contractor or anyone employed by him.
>
> This section does not apply where such person is a shareholder of a corporation, but not an officer or director thereof, and owns not more than five per cent of the stock of such corporation, the value of which does not exceed five hundred dollars.
>
> If a stockholder desires to avail himself of the exception provided in this section, he shall, before entering upon such contract, first file with the clerk of the

and its predecessor provisions have long been part of Ohio law and have been construed to prohibit any interest in a contract entered into by the board of township trustees, whether the interest is direct or indirect, except in circumstances directly addressed by R.C. 511.13 or R.C. 505.011. *See* 2008 Op. Att'y Gen. No. 2008-002, slip op. at 8-13.

R.C. 511.13 contains an exception for a person who is a shareholder of a corporation (but not an officer or director) and owns not more than five percent of the stock of the corporation of a value not in excess of five hundred dollars, thereby indicating that the prohibition does apply to any greater ownership interest of a township trustee, officer, or employee, even if that individual does not participate in making the corporation's decision to contract with the township and does not directly enter into a contract with the township. *See* note 2, *supra*. R.C. 505.011 authorizes a member of a board of township trustees to receive compensation as a member of a private fire company that has entered into an agreement to furnish fire protection for the township. The need for this authorization indicates that the prohibition of R.C. 511.13 extends to other instances in which a township trustee, officer, or employee is employed by an entity with which the township contracts. *See* 1990 Op. Att'y Gen. No. 90-037, at 2-152 to 2-155; *see also* 2008 Op. Att'y Gen. No. 2008-002, slip op. at 4. *See generally* Ohio Ethics Comm'n, Advisory Op. No. 91-001, slip op. at 4-5. The existence of these provisions thus indicates that the prohibition of R.C. 511.13 may extend to contracts that are not entered into directly by a township trustee, officer, or employee.

The situation you have described involves a trustee who owns property that is leased to the township through a lease/sublease arrangement. The lease does not require the lessee to sublease the property to the township, and the lessee owes the trustee/landlord prescribed amounts of rent whether or not there is a sublease. However, the trustee, lessee, and township all know that a sublease to the township was anticipated and has been executed. Under the current lease/sublease arrangement the township pays the third party lessee $2,300 per month, and the third party lessee pays the trustee/landlord $2,200 per month. Thus, the township is in effect paying $100 per month to the lessee, who may in some sense be considered an agent of the trustee/owner, and $2,200 per month to the trustee/owner. The lease/sublease arrangement is a mechanism for distancing the trustee/owner from the township's contract while still channeling proceeds of the township's contract to the trustee/owner's pocket.

The trustee/owner thus has a clear interest in the township's sublease of the garage, and an interest of this nature violates the provision of R.C. 511.13 prohibiting a trustee, officer, or employee of a township from being interested in any contract entered into by the board of township trustees. *See, e.g.,* 2007 Op. Att'y Gen. No. 2007-011, at 2-87 (a literal construction of a statute prohibiting a direct or indirect interest in a contract of a board of education "has been applied consistently to interests in contracts with the board where business operations are

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> board of county commissioners, an affidavit, stating his exact status and connection with the corporation. (Emphasis added.)

concerned and the board member is in a position to benefit financially"); 1971 Op. Att'y Gen. No. 71-020 (syllabus, paragraph 1) ("[s]hould Youngstown State University lease private property while a member of the University's board of trustees retains ownership in the leased property, there would in fact be a conflict of interest").[3]

There are numerous authorities finding that R.C. 511.13 and similar provisions prohibit interests in public contracts even when the individual in question is not a party to the contract. The well-known case of *In re Removal of Leach*, 19 Ohio Op. 263 (C.P. Jackson County 1940), concerned an action for the removal of a school board member for violations of a statute containing provisions similar to R.C. 511.13. In that case, the school board member and another individual were partners in a coal mine operation. The partnership operated one mine and also owned an old abandoned mine. The board of education awarded a coal supply contract to a former employee of that coal partnership to furnish coal at $2.65 per ton. The contracting coal supplier provided the school district with coal from two sources: some coal was purchased for $1.75 per ton from the working mine of the school board member's partnership; other coal, with the permission of the partnership, was taken from the old abandoned mine for no money consideration under an arrangement that permitted the contractor "to go in and remove the pillars left standing if he would prop the mine up with posts as the pillars were taken away." *In re Removal of Leach*, 19 Ohio Op. at 265. Although the school board member was not a party to the contract between the board of education and the coal supplier, the court found "that the defendant [school board member] did have a pecuniary interest in the coal contract. . . . While Leach did not have the direct contract for the sale of the coal, yet, since the coal was furnished from two mines on land of which he owned an interest as a partner, he would have a pecuniary interest in the sale of the coal much more so than would a shareholder in a corporation." *In re Removal of Leach*, 19 Ohio Op. at 267-268.[4]

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[3] It was noted in 2008 Op. Att'y Gen. No. 2008-002, slip op. at 9 n.6, that the Ohio Ethics Commission requires that for purposes of the prohibition of R.C. 2921.42(A)(4) an interest must be definite and direct, but the same requirement does not apply to R.C. 511.13. *See* Ohio Ethics Comm'n, Advisory Op. No. 92-002, slip op. at 4 ("[a]n 'interest' which is prohibited under R.C. 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature"); Ohio Ethics Comm'n, Advisory Op. No. 78-006, slip op. at 2.

[4] The court in *In re Removal of Leach*, 19 Ohio Op. 263, 268 (C.P. Jackson County 1940), stated that a business enterprise whose member is a member of the board of education cannot contract to provide materials to the board, and if the contract is already in existence and the business member is elected to the board of education, the business member cannot legally qualify for a position on the board. The court went on to find that Leach's interest in the coal contract (along with a pecuniary interest in the employment of his minor son as a janitor) was a violation of a criminal statute that constituted malfeasance so that Leach was guilty of misconduct in office under G.C. 10-1, the predecessor to R.C. 3.07, and was required to forfeit his office. *See generally* R.C. 3.07; 2007 Op. Att'y Gen. No. 2007-044, at 2-441 to 2-444; note

The court found that Leach assisted in weighing, loading, making out slips and bills, and unloading the coal. In contrast, you have described a situation in which the trustee/owner has delegated duties relating to the garage to a lessee. Nonetheless, it is clear in the instant case that the trustee/owner is aware of the sublease and that it is anticipated that amounts paid by the township to the lessee will, in turn, be paid to the trustee/owner. Hence, a trustee who is the owner of property leased to a township on the facts you have described has an interest in the sublease between the lessee and the township under the analysis set forth in the *Leach* case, and that interest is prohibited by R.C. 511.13.

Various opinions of previous Attorneys General support this conclusion. For example, 1959 Op. Att'y Gen. No. 51, p. 29, considered a situation in which a township trustee leased his land to a gravel company on a royalty basis, receiving a certain sum for each ton of gravel sold. The opinion found that if the board of township trustees entered into a contract to purchase gravel from that gravel company, the trustee would have an interest in the township's contract, stating:

> Since he is to profit to the extent of eight cents per ton for all gravel removed from his farm, it is hard to believe that he would not have an interest in seeing to it, so far as possible, that purchases of gravel made by the township should be made from his lessee. It is true that he is not a part of the gravel company, and he is not himself selling the gravel directly to the township, but I cannot resist the conviction that he has a very direct interest in the contract of purchase. It is conceivable that such purchases of gravel by the township might be trivial and occasional. On the contrary, they might amount to a very large sum and result in a substantial enrichment of the trustee in question.

1959 Op. Att'y Gen. No. 51, p. 29, at 31.

Like the township trustee in the 1959 opinion, the trustee here at issue is not dealing directly with the township. Nonetheless, the trustee has an interest in having the township sublease his garage because, through the lease/sublease arrangement, the trustee will be the recipient of moneys spent by the township to acquire use of the garage. *See also, e.g.*, 2000 Op. Att'y Gen. No. 2000-015, at 2-85 ("[i]n general, a direct or indirect interest in a contract includes a pecuniary or fiduciary interest of any sort, however slight"); 1915 Op. Att'y Gen. No. 139, vol. I, p. 267 (when a board of education let a contract for school construction and the contractor wished to procure brick from a company with which the president of the board of education was involved as a director and stockholder, the board president had an interest in the contract that violated the prohibition against having a direct or indirect pecuniary interest in a contract of the board).

5, *infra*. As discussed in note 1, *supra*, the question before us concerns only R.C. 511.13 and we do not consider any possible criminal violation.

On the facts presented, if the garage owner and the township void the ongoing multi-year contract and replace it with an arrangement under which the garage owner leases the garage to a third party who is expected to and does sublease the garage to the township, and if the garage owner takes office as township trustee, the trustee/owner has not divested himself of all interests in contracts of the township under R.C. 511.13. Rather, even if the lease/sublease arrangement serves to eliminate any direct contractual relationship between the township and the trustee/owner and denies the trustee/owner many of the typical rights of a landlord, the trustee/owner has a prohibited interest under R.C. 511.13 in the township's sublease, which provides for moneys of the township to be paid to rent the trustee/owner's garage and to be channeled to the trustee/owner.

This conclusion is required because a contrary finding would permit a township trustee to do indirectly that which he cannot lawfully do directly. It is clear on the facts you have described that the lease/sublease arrangement is intended to allow the township to lease the trustee's garage and to allow the trustee/landlord to receive rent for the use of the garage. Although the arrangement does not require the lessee to sublease to the township, it is understood that the township is the intended sublessee and thus that amounts of rent paid by the township will be channeled to the trustee. The arrangement is thus structured to allow the use of a middleman to distance the trustee from the township's contract while permitting the trustee to benefit from the arrangement. To find that the use of a middleman removes all prohibited interests in contracts would conflict with the manner in which R.C. 511.13 has been interpreted and applied. In addition, such a finding might well encourage the creation of various devious mechanisms intended to allow a township trustee, officer, or employee to benefit indirectly from township contracts in contravention of the prohibition imposed by R.C. 511.13. Accordingly, we must reject this construction of R.C. 511.13. *See State ex rel. Kitchen v. Christman*, 31 Ohio St. 2d 64, 67, 285 N.E.2d 362 (1972) ("this court looks through the form to the substance of the proposed transaction"); *Teale v. Stillinger*, 95 Ohio St. 129, 115 N.E. 1010 (1916) (syllabus, paragraph 1) ("[a] county treasurer . . . cannot . . . do indirectly during his term of office what he is prohibited from doing directly"); *Taylor v. Comm'rs of Ross County*, 23 Ohio St. 22 (1872) (syllabus, paragraph 2) ("[w]hat the general assembly is . . . prohibited from doing directly, it has no power to do indirectly"); 1998 Op. Att'y Gen. No. 98-034, at 2-201 ("[i]t is clear that the Department [of Development] cannot do indirectly what it cannot do directly – that is, use a private enterprise to acquire interests in stock for or on behalf of the state"); 1985 Op. Att'y Gen. No. 85-016, at 2-64 n.3 ("a county may not do indirectly that which it may not do directly").[5]

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[5] We are, of course, unable to predict the manner in which a court might interpret or apply R.C. 511.13 in light of particular facts, such as the practical concerns you have described. *See* 2006 Op. Att'y Gen. No. 2006-038, at 2-361 ("[w]e cannot predict . . . how the courts would receive such an argument, given a specific set of facts"); 2004 Op. Att'y Gen. No. 2004-021, at 2-182 ("we cannot predict whether a court may determine, upon examination of the totality of such a venture, that the operation of such venture constitutes a violation" of a particular statute); *see also* 2008 Op. Att'y Gen. No. 2008-002, slip op. at 15 ("[i]t may be argued that the standards

You have acknowledged that the current arrangement is not perfect and have described various factors that make it difficult for the township to make other arrangements for acquiring garage space. While we recognize your concerns, we find that the lease/sublease arrangement at issue grants the trustee/owner an interest in a contract of the township that is prohibited by R.C. 511.13.

Conclusions

For the reasons discussed above, it is my opinion and you are advised as follows:

1. As stated in 2007 Op. Att'y Gen. No. 2007-044 (syllabus, paragraph 2): "If a person enters into an ongoing multi-year contract to supply a township with garage storage facilities for a number of years in the future and is subsequently elected to the office of township trustee, the person is prohibited by R.C. 511.13 from serving as township trustee and continuing to have an interest in that preexisting multi-year contract."

2. If the garage owner and the township void the ongoing multi-year contract and replace it with an arrangement under which the garage owner leases the garage to a third party who is expected to and does sublease the garage to the township, and if the garage owner takes office as township trustee, the trustee/owner has not divested himself of all interests in contracts of the township under R.C. 511.13. Rather, even if the lease/sublease arrangement serves to eliminate any direct contractual relationship between the township and the trustee/owner and denies the trustee/owner many of the typical rights of a landlord, the trustee/owner has a prohibited interest under R.C. 511.13 in the township's sublease, which provides for

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set forth in R.C. 511.13 are too strict to be applied literally. However, this is the established law of the State of Ohio, and we find no basis for changing it even though, in certain circumstances, it may prevent a township from entering into a contract with favorable terms"); 1999 Op. Att'y Gen. No. 99-023, at 2-160 (it may be that a less stringent rule would be more equitable in some circumstances, and it may be appropriate for the General Assembly to consider whether additional exceptions should be included); 1938 Op. Att'y Gen. No. 2854, vol. II, p. 1596, at 1597 ("where legislative intent is clearly and definitely expressed, this office is bound to give effect to it and cannot, however liberal it may wish to be, nullify, change or amend by its rulings the express provisions of a statute"). *See generally In re Removal of Leach*; R.C. 3.07 (forfeiture of office for misconduct in office); R.C. 2733.01 (a civil action in quo warranto may be brought in the name of the state against, *inter alia*, a person who unlawfully holds or exercises a public office or a public officer who does or suffers an act that by law works a forfeiture of the office); 2007 Op. Att'y Gen. No. 2007-044, at 2-441 to 2-444 (possible consequences resulting from the violation of R.C. 511.13); 1959 Op. Att'y Gen. No. 51, p. 29; 1915 Op. Att'y Gen. No. 139, vol. I, p. 267.

moneys of the township to be paid to rent the trustee/owner's garage and to be channeled to the trustee/owner.

Respectfully,

MARC DANN
Attorney General