

OPINION NO. 90-055**Syllabus:**

1. R.C. 166.02(B)(1) requires the Governor's approval of each agreement that constitutes an inducement agreement for purposes of that statute.
2. A loan may properly be issued under R.C. 166.07 only if either: (1) the loan agreement itself constitutes an inducement agreement for purposes of R.C. 166.02(B)(1); or (2) a separate inducement agreement is executed, and the loan is part of the inducement agreement package.
3. If a transaction under R.C. Chapter 166 includes both an inducement agreement under R.C. 166.02(B)(1) and a loan that is part of the inducement agreement package, the Governor need not separately approve the loan.
4. The approval required by R.C. 166.02(B)(1) need not be provided in any particular form, at any particular time, or in accordance

with any particular procedure, but may be granted in any reasonable manner.

5. The approval required by R.C. 166.02(B)(1) must be given for each individual inducement agreement, and may not be granted as a general authorization to enter into inducement agreements.

To: Paul R. Leonard, Director, Department of Development, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, August 27, 1990

I have before me your predecessor's request for an opinion relating to the economic development loan program established under R.C. Chapter 166. The letter of request presents the following issues:

1. Whether Section 166.02(B)(1), Revised Code, requires the Governor of the State of Ohio to approve loans issued pursuant to the economic development loan program provided for by Chapter 166 of the Revised Code.
2. Whether the form of approval by the Governor for Chapter 166, Revised Code loans, if required, must be given in any specific form, at any particular time during the loan application process or in accordance with any specific procedure in order to be in compliance with Section 166.02(B)(1), Revised Code.
3. Whether the form of approval by the Governor for Chapter 166, Revised Code loans, if required, must be given for each individual loan which is reviewed, considered and/or approved by the Director of the Ohio Department of Development, or whether said approval may be granted generally for all Chapter 166 loans reviewed, considered and/or approved by the Director of the Ohio Department of Development.
4. If approval is required by the Governor and not provided, with the loan having been otherwise approved and issued, is the Ohio Department of Development or the State of Ohio exposed to any legal or equitable disputes, claims or causes of action[?]

In R.C. 166.02, the General Assembly set forth a declaration of public policy to create or preserve jobs and employment opportunities and to improve the economic welfare of the people of the state. R.C. 166.02 states, in part:

(A) The general assembly finds that many local areas throughout the state are experiencing economic stagnation or decline, and that the economic development program provided for by Chapter 166. of the Revised Code will constitute a deserved, necessary reinvestment by the state in those areas, materially contribute to their economic revitalization, and result in improving the economic welfare of all the people of the state. Accordingly, it is declared to be the public policy of the state, through the operations under Chapter 166. of the Revised Code and other applicable laws adopted pursuant to Section 13 of Article VIII, Ohio Constitution, and other authority vested in the general assembly, to assist in and facilitate the establishment or development of eligible projects or assist and cooperate with any governmental agency in achieving such purpose.

(B) In furtherance of such public policy and to implement such purpose, the director of development may:

(1) *With the approval of the governor*, and after consultation with appropriate governmental agencies, *enter into agreements* with persons engaged in industry, commerce, distribution, or research and with governmental agencies *to induce such persons to acquire, construct, reconstruct, rehabilitate, renovate, enlarge, improve, equip, or furnish, or otherwise develop, eligible projects* and make provision therein for project facilities and governmental actions, as authorized by this chapter and other applicable laws, subject to any required actions by the general assembly or the controlling board and subject to applicable local government laws and regulations;

(2) Provide for the guarantees and loans as provided for in sections 166.06¹ and 166.07 of the Revised Code.... (Emphasis and footnote added.)

See also Ohio Const. art. VIII, §13; R.C. 166.01(B). R.C. 166.02 goes on to grant various other powers to the Director of Development.

R.C. 166.07 governs the issuance of loans from the facilities establishment fund. See R.C. 166.03. The questions addressed in this opinion relate to loans made under R.C. 166.07, which states:

(A) *The director of development, with the approval of the controlling board and subject to the other applicable provisions of this chapter, may lend moneys in the facilities establishment fund to persons for the purpose of paying allowable costs of an eligible project if the director determines that:*

- (1) The project is an eligible project and is economically sound;
- (2) The borrower is unable to finance the necessary allowable costs through ordinary financial channels upon comparable terms;
- (3) The amount to be lent from the facilities establishment fund will not exceed seventy-five per cent of the total allowable costs of the eligible project;
- (4) The eligible project could not be achieved in the local area in which it is to be located if the portion of the project to be financed by such loan were instead to be financed by a loan guaranteed under section 166.06 of the Revised Code;
- (5) The amount of the loan from the facilities establishment fund to be repaid will be adequately secured by a mortgage, lien, assignment, or pledge, at such level of priority as the director may require.

(B) *The determinations of the director under division (A) of this section shall be conclusive for purposes of the validity of a loan commitment evidenced by a loan agreement signed by the director.*

(C) Fees, charges, rates of interest, times of payment of interest and principal, and other terms, conditions, and provisions of and security for loans made from the facilities establishment fund pursuant to this section shall be such as the director determines to be appropriate and in furtherance of the purpose for which the loans are made. The moneys used in making such loans shall be disbursed from the facilities establishment fund upon order of the director.

(D) The director is authorized to take such actions as may be necessary or appropriate to collect or otherwise deal with any loan made under this section.

(E) The director may fix service charges for the making of a loan. Such charges shall be payable at such times and place and in such amounts and manner as may be prescribed by the director. (Emphasis added.)

The first issue to be considered is whether R.C. 166.02(B)(1) requires the Governor of the State of Ohio to approve loans issued pursuant to the economic development loan program provided for by R.C. Chapter 166 – *i.e.*, pursuant to R.C. 166.07. R.C. 166.02(B)(1) does not expressly mention loans under R.C. 166.07; it refers, instead, to "agreements...to induce...persons" to take certain types of actions with respect to eligible projects. The approval of the Governor is required with respect to such inducement agreements. See R.C. 166.02(B)(1).

The statutory provisions governing the issuance of loans under R.C. Chapter 166 do not expressly require approval by the Governor. R.C. 166.07(B) indicates that such a loan agreement will be signed by the Director of Development, and states that the Director's determinations on stated criteria are conclusive for purposes of

¹ R.C. 166.06 governs the issuance of loan guarantees. I am not directly addressing that provision in this opinion.

the validity of a loan commitment. R.C. 166.07(A) states that approval of the Controlling Board is required. Issuance of a loan is also made subject to other applicable provisions of R.C. Chapter 166. See R.C. 166.07(A). Therefore, if a loan agreement entered into pursuant to R.C. 166.07 constitutes an inducement agreement under R.C. 166.02(B)(1), then the Governor's approval is required with respect to that loan agreement. See R.C. 166.02(B)(1).

It does not appear that a loan may properly be issued under R.C. 166.07 unless either: (1) the loan agreement itself constitutes an inducement agreement for purposes of R.C. 166.02(B)(1); or (2) a separate inducement agreement is executed, and the loan is part of the inducement agreement package. R.C. 166.07 sets forth criteria that must be satisfied before a loan may be issued. One such criterion is that the project must be an "eligible project," defined as follows:

"Eligible project" means project facilities to be acquired, established, expanded, remodeled, rehabilitated, or modernized for industry, commerce, distribution, or research, or any combination thereof, the operation of which, alone or in conjunction with other facilities, will create new jobs or preserve existing jobs and employment opportunities and improve the economic welfare of the people of the state. For purposes of this division, "new jobs" does not include existing jobs transferred from another facility within the state, and "existing jobs" includes only those existing jobs with work places within the municipal corporation or unincorporated area of the county in which the eligible project is located.

R.C. 166.01(B). To be eligible, a project must "create new jobs or preserve existing jobs and employment opportunities and improve the economic welfare of the people of the state." It does not appear that the Director of Development can determine whether a particular project is an eligible project without assurances by the recipient of the loan that receipt of the loan will induce the recipient to undertake appropriate actions and provide required results. It is, thus, a required element of any loan under R.C. 166.07 that either the loan agreement itself or a separate inducement agreement set forth the assurances of the loan recipient that make the project eligible for a loan under R.C. Chapter 166. It follows that either the loan agreement must include provisions that make it qualify as an inducement agreement under R.C. 166.02(B)(1), or else there must be a separate inducement agreement. Any document that constitutes an inducement agreement comes within the requirement of approval by the Governor under R.C. 166.02(B)(1). If, however, a transaction under R.C. Chapter 166 includes both an inducement agreement and a loan that is part of the inducement agreement package, it does not appear to be necessary for the Governor to separately approve the loan.

The second issue presented in the letter requesting this opinion is whether approval by the Governor under R.C. 166.02(B)(1) "must be given in any specific form, at any particular time during the loan application process or in accordance with any specific procedure." R.C. 166.02(B)(1) does not specify the form, time, or procedure for the granting of such approval. Compare R.C. 166.02(B)(1) with, e.g., R.C. 1523.05 ("before becoming binding obligations on the state, they [certain contracts or leases] shall be approved by the governor by his written indorsement thereon"). See generally *State ex rel. Cope v. Cooper*, 122 Ohio St. 321, 171 N.E. 399 (1930). The approval may, accordingly, be granted in any reasonable manner. See generally, e.g., *State ex rel. Copeland v. State Medical Board*, 107 Ohio St. 20, 140 N.E. 660 (1923); *Jewett v. Valley Railway Co.*, 34 Ohio St. 601 (1878); 1983 Op. Att'y Gen. No. 83-023 at 2-86 ("[i]t may be inferred that, in the absence of specific statutory provisions regarding the method of approval to be used..., any reasonable method is proper").

The third issue presented is whether the approval required by R.C. 166.02(B)(1) must be given for each individual loan that is "reviewed, considered and/or approved" by the Director of Development, or whether the approval may "be granted generally for all Chapter 166 loans reviewed, considered and/or approved" by the Director. As discussed above, the approval requirement applies to inducement agreements and, accordingly, is directly applicable to a loan only when that loan itself constitutes an inducement agreement. R.C. 166.02(B)(1) does not state

expressly that each inducement agreement must be approved by the Governor. Instead, it refers to agreements in the plural, authorizing the Director of Development, with the approval of the Governor and after consultation with appropriate governmental agencies, to enter into inducement agreements.

The approval language of R.C. 166.02(B)(1) is susceptible of at least two different interpretations. The first, and the one you propose, is that the approval of the Governor provides general authorization for the Director of Development to enter into agreements of the sort described in R.C. 166.02(B)(1), but that it is not necessary for each individual agreement to be approved. The second interpretation is that the Director may enter into a particular agreement under R.C. 166.02(B)(1) only if the Governor approves that particular agreement. These two different interpretations turn upon the meaning that is given to the word "approval," as used in R.C. 166.02(B)(1).

The word "approval" has a variety of meanings, depending upon the context in which it is used. *See, e.g., 6 C.J.S. Approval* at 126 (1975). Ordinarily, the word "approve" means "to give one's consent to; sanction; confirm...to be favorable toward; think or declare to be good, satisfactory, etc." *Webster's New World Dictionary* 68 (2d college ed. 1978). "Approve" may occasionally be used in the sense of authorizing something to be done in the future, but it more frequently carries with it the concept of examining and exercising discretion with regard to individual matters. *See, e.g., Apfel v. Mellon*, 33 F.2d 805, 807 (D.C. Cir. 1929) ("the term [approval] plainly implies the exercise of consideration, judgment, and discretion..."), *cert. denied*, 280 U.S. 585 (1929); *Gustafson v. Wethersfield Township High School District 191*, 319 Ill. App. 255, 259-60, 49 N.E.2d 311, 313 (1943) ("[t]o approve means to pronounce good or proper....The very act of approval implies the exercise of judgment and discretion and final affirmative action, unless otherwise limited by the context of the statute"); *Broderick v. City of New York*, 295 N.Y. 363, 371, 67 N.E.2d 737, 740 (1946) ("'approval' means that the board itself must first be satisfied with each separate transfer order made by the budget director"); *Black's Law Dictionary* 102 (6th ed. 1990) (defining "approval" to mean "[t]he act of confirming, ratifying, assenting, sanctioning, or consenting to some act or thing done by another. 'Approval' implies knowledge and exercise of discretion after knowledge" (citation omitted)); 6 C.J.S. *Approval* at 126 (1975) ("[g]enerally, the word [approval] implies favorable conviction manifested by affirmation concerning a specific matter submitted for decision" (footnote omitted)); 1988 Op. Att'y Gen. No. 88-030. Used in this sense, "approval" of an agreement can occur only after a particular agreement has taken shape, and cannot be granted prospectively. *Black's Law Dictionary* 102 (6th ed. 1990) takes note of this distinction, setting forth the following definition of "approve":

To be satisfied with; to confirm, ratify, sanction, or consent to some act or thing done by another. To sanction officially; to ratify; to confirm; to pronounce good; think or judge well of; admit the propriety or excellence of; be pleased with. *Distinguishable from "authorize," meaning to permit a thing to be done in future.* (Emphasis added.)

See generally Brown v. City of Newburyport, 209 Mass. 259, 261-66, 95 N.E. 504, 505-07 (1911) (language that "the City Treasurer is hereby authorized and directed to borrow from time to time, with the approval of the Committee on Finance, a sum or sums..." "does not manifest an intention to confer a perfunctory commission to be exercised once for all at the beginning of the year. That would be an idle ceremony, and would accomplish none of the results which the use of the language imports"; rather, approval implies reflection and discretion as to each loan proposed); 6 C.J.S. *Approve* at 128 (1975) ("[the word 'approve'] is seldom construed as requiring a mere ministerial act, but rather embraces both direction and confirmation" (footnotes omitted)).

The question to be addressed in construing R.C. 166.02(B)(1) is whether the required approval is of particular inducement agreements, or whether the required approval is a general granting of authority to enter into the agreements. The latter interpretation may be urged upon a literal reading of the statute; it may be argued that "the approval of the governor" is required to authorize the "enter[ing] into" of agreements, rather than the agreements themselves. R.C. 166.02(B)(1). *See generally Broderick v. City of New York*, 295 N.Y. at 374-79, 67 N.E.2d at

742-45 (Thacher, J., dissenting) (considering the language: "The director of the budget...shall, with the approval of the board of estimate, have power during any fiscal year to transfer an appropriation..." and arguing that "the approval contemplated by this language is not of any specific act but of the budget director having 'power during any fiscal year to transfer an appropriation'" and that this language requires "the approval of the grant of power, not of its exercise").

This interpretation does not, however, appear to be consistent with related statutory provisions or to carry out the intention of the statutory scheme.² Such an interpretation would involve mere perfunctory action by the Governor in indicating that the general program outlined in R.C. 166.02(B)(1) may be carried out, and would render the approval requirement virtually meaningless, for the General Assembly has indicated that the policy outlined in R.C. 166.02 is to be implemented. See R.C. Chapter 166. Further, where the General Assembly has intended that action of the Governor should be necessary to authorize an official to enter into an agreement, it has expressly so stated. See, e.g., R.C. 3701.87 ("[t]he governor may authorize the department of health to enter into an agreement on behalf of the state with the United States secretary of health, education, and welfare whereby the department may serve as the agency for review of proposed capital expenditures by health care facilities..."). See generally *In re Appropriation of Property by Director of Natural Resources*, 4 Ohio Misc. 227, 212 N.E.2d 95 (P. Ct. Columbiana County 1964). Use of the word "approve," rather than "authorize," in R.C. 166.02(B)(1) suggests that the intent was to use "approve" in its ordinary sense of requiring the exercise of discretion with regard to each contract that is executed.

It appears, therefore, that the better interpretation of R.C. 166.02(B)(1) is that approval is required of each inducement agreement entered into pursuant to R.C. 166.02(B)(2). This interpretation is supported by the context in which the provision appears. R.C. 166.02(B)(1) provides for the Director to enter into such agreements "[w]ith the approval of the governor, and after consultation with appropriate governmental agencies." It is clear from the variety of subjects that such an agreement may address that the consultation with appropriate governmental agencies must be done on a case-by-case basis, depending upon which governmental agencies are involved in a particular situation. It appears to be appropriate, correspondingly, for the approval of the Governor be obtained on a case-by-case basis. Further, the reading of R.C. 166.02(B)(1) proposed herein permits the Governor to have knowledge concerning a particular agreement before he approves it and is, thus, consistent with the general meaning of the word "approval." See generally *State ex rel. Daly v. Henderson*, 199 Ala. 428, 431, 74 So. 951, 952 (1917) ("the court deems it best to assign to the phrase 'approved by the Governor' that meaning which it carries to the common understanding, viz., that it was intended...to evoke the Governor's official sanction of the expenditure, his commendation and judgment that it was for the public good"); *State v. Duckett*, 133 S.C. 85, 93, 130 S.E. 340, 342, (1925) ("[a]pproval implies knowledge and, in this case [approval of a loan], the exercise of discretion after knowledge. To approve beforehand would be without knowledge and without the exercise of discretion").

² R.C. 1.49 sets forth factors that may be considered in the construction of ambiguous statutes, as follows:

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The object sought to be attained;
- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.

The conclusion reached in this opinion appears to be consistent with these factors.

It appears, in addition, that other statutory provisions requiring the approval of a specified governmental official require the approval of each individual transaction, rather than general approval to enter into transactions. *See, e.g.*, R.C. 1723.07 (repealed in Am. Sub. H.B. 111, 118th Gen. A. (1989) (eff. July 1, 1989)) ("[t]he director of administrative services upon the approval of the governor and attorney general indorsed thereon in writing, may enter into leases or agreements..."). *See generally* R.C. 329.02 ("[t]he [county] director [of human services], with the approval of the board of county commissioners, shall appoint...employees...") and 1956 Op. Att'y Gen. No. 6316, p. 152 (by virtue of R.C. 329.02, the power to appoint employees has been granted jointly to the director and the board of county commissioners; the board's approval is a partial exercise of the executive power of appointment, rather than an act of a legislative nature) (followed in Op. No. 83-023, 1984 Op. Att'y Gen. No. 84-076, and 1986 Op. Att'y Gen. No. 86-027); R.C. 4141.06 ("[t]he [unemployment compensation] board [of review], subject to [R.C. Chapter 124], and the approval of the governor, shall appoint such referees as are necessary") and 1949 Op. Att'y Gen. No. 1196, p. 824 (finding that, under statute as then in effect, it was necessary for the Governor to approve the appointments and salaries of referees appointed by the Unemployment Compensation Board of Review). The interpretation proposed in this opinion is consistent with the sense in which the General Assembly has commonly used the word "approval." *See generally* 1983 Op. Att'y Gen. No. 83-034 at 2-130 (the independent nature of the authority of the Director of Development to act on some matters, including certain general power to contract, *see* R.C. Chapter 122, contrasts with those instances in which gubernatorial approval is required).

I conclude, accordingly, that the approval required by R.C. 166.02(B)(1) must be given for each individual inducement agreement. Such approval may not be granted as a general authorization to enter into inducement agreements.

The fourth issue raised in your request is whether the Ohio Department of Development may be exposed to any legal or equitable disputes, claims, or causes of action if approval of the Governor is required and not provided and a loan is otherwise approved and issued. It is apparent that if a required action is not taken, a disgruntled person may bring a claim or cause of action or raise a dispute. An analysis of the possible grounds on which such disputes, claims, or actions might be based are fact dependent and exceed the scope of the opinion-rendering process.

It is, therefore, my opinion, and you are hereby advised, as follows:

1. R.C. 166.02(B)(1) requires the Governor's approval of each agreement that constitutes an inducement agreement for purposes of that statute.
2. A loan may properly be issued under R.C. 166.07 only if either: (1) the loan agreement itself constitutes an inducement agreement for purposes of R.C. 166.02(B)(1); or (2) a separate inducement agreement is executed, and the loan is part of the inducement agreement package.
3. If a transaction under R.C. Chapter 166 includes both an inducement agreement under R.C. 166.02(B)(1) and a loan that is part of the inducement agreement package, the Governor need not separately approve the loan.
4. The approval required by R.C. 166.02(B)(1) need not be provided in any particular form, at any particular time, or in accordance with any particular procedure, but may be granted in any reasonable manner.
5. The approval required by R.C. 166.02(B)(1) must be given for each individual inducement agreement, and may not be granted as a general authorization to enter into inducement agreements.