TO:  Gus Frangos, President  
FROM: Robert Rink, V.P. Legal Affairs  
DATE: September 18, 2009  
SUBJECT: Applicability of Revised Code Chapter 102 and Chapter 2921 to CCLRC

Facts

The Chair of the Board of Directors (the Board) of the Cuyahoga County Land Reutilization Corporation (CCLRC) has requested preparation of a comprehensive ethics policy for consideration by the Board. If the CCLRC were a “political subdivision” or “governmental entity” or an “instrumentality of the state, county, city, village, or township, the five state retirement systems, or any other governmental entity,”¹ it and its Directors, Officers and employees, to various extents, would be subject to:

(i) Revised Code Chapter 102: Public Officers – Ethics;
(ii) Revised Code Chapter 2921: Offenses Against Justice and Public Administration, and therein,
    a. Revised Code Section 2921.41 -- Theft in office;
    b. Revised Code Section 2921.42 -- Having an unlawful interest in a public contract;
    c. Revised Code Section 2921.43 -- Soliciting or accepting improper compensation; and
(iii) Revised Code Chapter 3517: Campaigns; Political Parties, and therein,
    a. Revised Code Section 3517.13 – Failure to file statements.²

The enumerated Chapter and four sections of the Revised Code are collectively referred to in this Memorandum as the “Government Ethics Laws.” This Memorandum will examine if and to what extent the CCLRC or its Directors, Officers or employees are subject to the Government Ethics Laws. To the extent that any of the Government Ethics Laws do not on their face apply to the CCLRC or its Directors, Officers or employees, provision can be made by the CCLRC and its Directors, Officers or employees for voluntary compliance with ethical standards at least similar, if not identical, to the provisions of the Government Ethics Laws.

Question Presented

Whether the CCLRC or its Directors, Officers and/or employees are subject to the Government Ethics Laws.

¹ See the definition of a “public agency” in Revised Code Section 102.01.
² Revised Code Section 3517.13 is the subject of a separate Legal Memorandum.
Conclusions

The subsequent conclusions should be read in conjunction with the subsection entitled "Voluntary Compliance with Certain State Ethical Policies" that can be found at the end of the section captioned Discussion.

Revised Code Chapter 102

The Directors of the CCLRC, as directors of a county land reutilization corporation organized under Revised Code Chapter 1724, are not subject to the provisions of Revised Code Chapter 102 because pursuant to the express language of Revised Code Section 1724.10(B)(1), their membership thereon does not constitute the holding of public office or employment for any section of the Revised Code. By extension, the officers and employees of a county land reutilization corporation, including the Officers and employees of the CCLRC, should not be subject to the provisions of Revised Code Chapter 102.

Revised Code Sections 2921.41, 2921.42 and 2921.43

The CCLRC and its Directors, Officers and employees should arguably not be subject to the provisions of Revised Code Sections 2921.41, 2921.42 and 2921.43. However, there are other criminal statutes which, to some extent, represent what is best described as a "private sector" counterpart to Sections 2921.41, 2921.42 and 2921.43 with respect to which the CCLRC and its Directors, Officers and employees would be subject.

Revised Code Section 3517.13

Revised Code Section 3517.13, discussed in a separate Memorandum, concluded that the CCLRC is not subject to the provisions of Revised Code Section 3517.13(I) because (a) it is clearly not an "agency or department" of the State of Ohio (the "State"), and (b) there is no legal precedent which supports a conclusion that it should be deemed a "political subdivision" of the State for purposes of Revised Code Section 3517.13.

Discussion

Revised Code Chapter 102 – Required and Prohibited Activities

Revised Code Chapter 102 requires or prohibits from those persons falling within its scope the following:

(i) Certain elected and appointed public officials and candidates for elective public office are required to file annually or, in the case of a candidate, prior to an election in which the candidate will be voted on, a financial disclosure statement with the "applicable ethics commission."6

(ii) A present or former public official or employee is not permitted, during public employment or service or for a period of one or two years thereafter, depending on the office occupied by the public official or employee, to represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval,

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3 As distinguished from their capacity as an elected or appointed public official serving a political subdivision.
4 Revised Code Section 1724.10(B)(1).
5 For example, Section 2921.02 prohibits bribery.
6 See Revised Code Section 102.02.
recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.\(^7\)

(iii) A present and former public official or employee is prohibited from disclosing or using, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.\(^8\)

(iv) A public official or employee is prohibited from participating within the scope of his or her duties as such, except through ministerial functions, in any license or rate-making proceeding that directly affects the license or rates of any person, partnership, trust, business trust, corporation, or association in which the public official or employee or immediate family owns or controls more than five per cent.\(^9\)

(v) A public official or employee is prohibited from participating within the scope of his or her duties as such, except through ministerial functions, in any license or rate-making proceeding that directly affects the license or rates of any person to whom the public official or employee or his or her immediate family, or a partnership, trust, business trust, corporation, or association of which the public official or employee or his or her immediate family owns or controls more than five per cent, has sold goods or services totaling more than one thousand dollars during the preceding year, unless the public official or employee has filed a written statement acknowledging that sale with the clerk or secretary of the public agency and the statement is entered in any public record of the agency's proceedings.\(^10\)

(vi) A public official or employee is prohibited from using or authorizing the use of the authority or influence of his or her office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.\(^11\)

(vii) A public official or employee is prohibited from soliciting or accepting anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.\(^12\)

(viii) A public official or employee, except for the president or other chief administrative officer of or a member of a board of trustees of a state institution of higher education, who is required to file a financial disclosure statement under section 102.02 of the Revised Code is prohibited from soliciting or accepting, and a person is prohibited from giving to that public official or employee, an honorarium. This provision and provisions (vi) and (vii) do not prohibit a public official or employee who is required to file a financial disclosure statement under section 102.02 of the Revised Code from accepting, and do not prohibit a person from giving to that public official or employee, the payment of actual travel

\(^{7}\) See Revised Code Section 102.03(A).
\(^{8}\) See Revised Code Section 102.03(B).
\(^{9}\) See Revised Code Section 102.03(C).
\(^{10}\) Id.
\(^{11}\) See Revised Code Section 102.03(D).
\(^{12}\) See Revised Code Section 102.03(F).
expenses, including any expenses incurred in connection with the travel for lodging, and meals, food, and beverages provided to the public official or employee at a meeting at which the public official or employee participates in a panel, seminar, or speaking engagement or provided to the public official or employee at a meeting or convention of a national organization to which any state agency, including, but not limited to, any state legislative agency or state institution of higher education, pays membership dues. This provision and provisions (vi) and (vii) do not prohibit a public official or employee who is not required to file a financial disclosure statement under section 102.02 of the Revised Code from accepting and do not prohibit a person from promising or giving to that public official or employee an honorarium or the payment of travel, meal, and lodging expenses if the honorarium, expenses, or both were paid in recognition of demonstrable business, professional, or esthetic interests of the public official or employee that exist apart from public office or employment, including, but not limited to, such a demonstrable interest in public speaking and were not paid by any person or other entity, or by any representative or association of those persons or entities, that is regulated by, doing business with, or seeking to do business with the department, division, institution, board, commission, authority, bureau, or other instrumentality of the governmental entity with which the public official or employee serves.\(^{13}\)

(ix) For purposes of provisions (vi) and (vii), the membership of a public official or employee in an organization shall not be considered, in and of itself, to be of such a character as to manifest a substantial and improper influence on the public official or employee with respect to that person's duties. As used in this division, "organization" means a church or a religious, benevolent, fraternal, or professional organization that is tax exempt under subsection 501(a) and described in subsection 501(c)(3), (4), (8), (10), or (19) of the "Internal Revenue Code of 1986." This provision does not apply to a public official or employee who is an employee of an organization, serves as a trustee, director, or officer of an organization, or otherwise holds a fiduciary relationship with an organization. This provision does not allow a public official or employee who is a member of an organization to participate, formally or informally, in deliberations, discussions, or voting on a matter or to use his or her official position with regard to the interests of the organization on the matter if the public official or employee has assumed a particular responsibility in the organization with respect to the matter or if the matter would affect that person's personal, pecuniary interests.\(^ {14}\)

The question then that must be answered is whether the Directors of the CCLRC and the Officers and employees of the CCLRC fall within the definitional scope of "a public official or employee." It should be noted that research\(^ {15}\) disclosed no opinions of the Ohio Ethics Commission addressing the issue of whether a director or the officers or employees of a corporation organized under Revised Code Chapter 1724 fall within the definitional scope of a "public official or employee."

To answer this question, we must analyze the definition of "public official or employee" found in Revised Code Section 102.01. Division (B) of that Section defines a "public official or employee" as:

"any person who is elected or appointed to an office or is an employee of any public agency. Public official or employee’ does not include a person elected or appointed to the office of precinct, ward, or district committee member under section 3517.03 of the Revised Code, any

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\(^ {13}\) See Revised Code Section 102.03(H)(1).

\(^ {14}\) See Revised Code Section 102.03(J).

\(^ {15}\) See Attachment A.
presidential elector, or any delegate to a national convention. ‘Public official or employee’ does not include a person who is a teacher, instructor, professor, or other kind of educator whose position does not involve the performance of, or authority to perform, administrative or supervisory functions.”

With respect to the first phrase (“elected or appointed to an office”), the three elements contained in this definition on which our analysis must focus are: (1) is the person “elected,” (2) is the person “appointed,” and (3) assuming either, is the election or appointment to an “office?”

Before considering the elements of “election” or “appointment,” we will address the element of the “office.” Do the positions of director or officer constitute an “office for purposes of Revised Code Chapter 102?” We assume in this context that “office” means an “office of honor, trust or profit” or more colloquially a “public office?” In answering this question, it is essential to note that our conclusion will apply solely with reference to its use in Revised Code Chapter 102 unless otherwise clearly stated.

In reference to the position of a director of the CCLRC, the answer to this question can be found explicitly in Section 1724.10(B)(1) which provides in pertinent part:

“...Membership on the governing board of a community improvement corporation does not constitute the holding of a public office or employment within the meaning of sections 731.02 and 731.12 of the Revised Code or any other section of the Revised Code.” (Emphasis added.)

By the preceding expressed statutory language, membership on the governing board of a community improvement corporation (CIC), i.e. holding the office of director, will not constitute the holding of a public office for purposes of “any section of the Revised Code,” which will include all Sections of Revised Code Chapter 102. Therefore, with respect to directors of the CCLRC, their membership on the board of directors of the CCLRC does not constitute holding “public office.” That said, the issue of whether they are elected or appointed becomes moot.

In reference to the position of an officer or employee of the CCLRC, we believe that the answer to this question can be implied from the language in Section 1724.10(B)(1) explicitly applicable to directors of a CIC. If the intent of the General Assembly in amending Section 1724.10 was to expressly exclude the directors of a CIC, which constitute the governing board of the corporation responsible for the overall exercise of its authority, from the ambit of holding a “public office,” it seems consistent and reasonable to extend the application of the amendment to all officers and employees of the CIC as well, insofar as they are subordinate authorities of the CIC whose status for these kinds of matters is generally no greater than that of their superiors. Such being the case, the officers and employees of the CCLRC should not be considered “public officials” for purposes of Chapter 102.

Therefore, based upon the foregoing, the Directors and Officers and employees of the CCLRC should not be considered “public officials” for purposes of Chapter 102 since under Section

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16 Revised Code Section 102.01(B).
17 It is not uncommon for a word or phrase used in the Revised Code to have a defined meaning that applies solely to the section or chapter in which it is defined. For example, the term “political subdivision” is used in 395 of the 889 Chapters of the Revised Code. Yet the term is statutorily defined in only 34 Revised Code Chapters. And in all such cases “political subdivision” is defined in and solely for the purposes of the particular Chapters in which it is defined.
18 It should be noted that this provision (originally placed in division (A) of Section 1724.10) was an amendment to Chapter 1724 enacted by the General Assembly in response to an opinion of the Ohio Attorney General (1964 Op. Att’y. Gen. No. 882, p. 2-87, at 2-88 and 2-89) which had concluded that membership on the board of directors of a corporation organized under Chapter 1724 did, indeed, constitute the holding of a “public office.”
1724.10(B)(1) they are not “holding public office” in their exercise of their respective roles at the CCLRC. And with this conclusion, the potential issue of whether they are “elected or appointed” to becomes moot.

With respect to the question of whether Directors, Officers or employees of the CCLRC are, or could arguably be, “employees of a public agency,” the foregoing analysis, when applied to this question, should lead to the same conclusion.19

Further, the definition of “public official or employee” includes any employee of a “public agency.” The question then becomes whether any Officers or employees of the CCLRC would fall within the ambit of an “employee of a public agency.” “Public agency” is defined in Section 102.01(C) as the general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, or township, the five state retirement systems, or any other governmental entity. The answer to the preceding question, then, is contingent upon whether the CCLRC is or has been, or could be deemed to be a “public agency” as defined in Section 102.01(C).

For the reasons set forth in the Memorandum addressing whether the CCLRC is subject to the provisions of Revised Code Section 3517.13,20 the CCLRC should not fall within the ambit of a “public agency” as defined in Section 102.01(C). Therefore, employees of the CCLRC, including the Officers thereof, should not be subject to the provisions of Revised Code Chapter 102.

Voluntary Compliance with Certain State Ethical Policies

Notwithstanding the foregoing conclusions, nothing prohibits the elected and appointed public officials sitting on the Board from adopting for themselves and the Officers and employees of the CCLRC an ethics policy based upon the ethical standards and laws set forth in Revised Code Chapters 102 and 2921 that apply to elected officials and employees of a political subdivision in order to avoid even the appearance of impropriety.

Further, if the elected and appointed public officials sitting on the Board of Directors or the officers or employees of the CCLRC want more definitive advice on a specific set of circumstances involving ethics, conflict of interest, or financial disclosure under Chapter 102., Revised Code Section 2921.42, or Section 2921.43, the Ohio Ethics Commission, among other applicable commissions, is authorized to render an advisory opinion. The person to whom the opinion was directed or who was similarly situated may reasonably rely upon such opinion and will 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 Revised Code Chapter 102 and Revised Code Sections 2921.42 or 2921.43.21

19 The pertinent parts in Section 1724.10(B)(1) leading to a similar analysis and conclusion are: “.... Membership on the governing board of a community improvement corporation does not constitute the holding of a public office or employment within the meaning of sections 731.02 and 731.12 of the Revised Code or any other section of the Revised Code.” (Emphasis added.)
20 The reader is referred to the Memorandum, dated August 27, 2009, addressing that issue and contained in Chapter one of the Ethics Policy.
21 See Revised Code Section 102.08.