

42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)
42 IAC 1-5-10 Benefiting from confidential information
42 IAC 1-5-11 Divulging confidential information

The President of IEDC took a leave of absence from the day-to-day operations of his company in anticipation of his appointment to the agency; however, the company was involved in a prospective development project in Ft. Wayne that may eventually lead it to seek tax credits from the IEDC. IEDC proposed a screen to avoid any potential conflict of interest that would involve notifying the manager of the tax credits of the issue and directing any related decisions to the Secretary of Commerce and CEO of IEDC. SEC approved the proposed screen and further advised the President to be mindful of the ethics rules regarding confidential information.

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The Indiana State Ethics Commission (“Commission”) issues the following advisory opinion concerning the State Code of Ethics (“Code”) pursuant to I.C. 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

A state employee is the President of the Indiana Economic Development Corporation (“IEDC”). He was appointed to this position by the Governor on January 14, 2013. In anticipation of his appointment, the President took a leave of absence from the day-to-day operations of his company Domo Ventures LLC (“Domo Ventures”). Domo Ventures is an Indiana-based company owned jointly in a 50/50 partnership by the President and Scott Sorensen of Ada, Michigan. Domo Ventures is a minority partner in Domo Development LLC (“Domo Development”), Steeplechase at Parkview LLC (“Steeplechase”), Sterling Fund 1 LLC (“Sterling Fund”), and Sterling Capital Management LLC (“Sterling Capital”).

Parcel I: Domo Development is an Indiana LLC based in Carmel, Indiana. Domo Development is owned 50% by Domo Ventures, 25% by John Hennessey, and 25% by Site Solutions LLC. The purpose of Domo Development is to develop an approximately 46 acre parcel of land in Fort Wayne, Indiana. Domo Development sold roughly 26 acres of that parcel to Steeplechase. Domo Development has entered a contract with a single-family housing developer to purchase all of the lots in one transaction in June 2013. Domo Development sold the remaining seven acres to another developer immediately upon acquisition of the original 46 acre parcel.

Steeplechase is an Indiana-based company formed for the purpose of developing a market-rate, multi-family housing community consisting of 12 building on the 26 acres referenced above. No state or local tax incentives are involved in the development. Steeplechase is 80% owned by Rob Troxel and 20% owned by Domo Development. Steeplechase has entered into a General Contracting agreement with Sunstone Construction LLC to build the project. Sunstone Construction entered into an agreement with Domo Ventures for consulting services that were performed and completed in 2012. Sunstone Construction continues to pay Domo Ventures a monthly fee for these consulting services based on this contract. In 2013, the President will continue to receive income from Domo Ventures for the consulting work performed in 2012. All

new projects that develop during the President's leave of absence will be handled by Scott Sorensen, as the managing member partner of Domo Ventures.

Sterling Fund and Sterling Capital formed an Indiana-based General Partnership for the purpose of raising capital to acquire market-rate, multi-family housing in the southeastern U.S. Sterling Group based in Mishawaka, Indiana, is majority owner of Sterling Fund. Sterling Group is owned by Larry and Lance Swank. Domo Ventures is a minority partner. Sterling Capital is a 50/50 partnership between Domo Ventures and Sterling Group.

Parcel II: Domo Development and Domo Ventures (together, hereinafter referred to as the "Partners") have a potential interest in a development opportunity on a parcel of land in downtown Fort Wayne that is located adjacent to a Community Revitalization Enhancement District ("CReED"). The Partners have no ownership interest in this parcel. Fort Wayne currently has purchase options on this property and is going through the process of obtaining appraisals. Should the appraisals be acceptable, the Redevelopment Commission could vote to exercise the options and purchase the property. During the purchase phase, the Redevelopment Commission could potentially issue a Request for Proposal ("RFP") for a development on this property. If the RFP is issued, the Partners intend to form a new LLC and respond to the RFP.

It is possible that the CReED district will be amended to include this adjacent parcel of land. If that were to happen, it also is possible that the City of Fort Wayne would file a joint application with the chosen developer to obtain a CReED tax credit for investment within the amended CReED district. By statute (I.C. 6-3.1-19-2), a qualified investment must first be approved by the IEDC before a CReED tax credit can be claimed. While speculative, it is possible that the Partners would be the chosen developer. The President could face a potential conflict of interest based on his role as President of the IEDC and the IEDC's approval of qualified investments for CReED tax credits. Should these unlikely events occur, the President would recuse himself from the decision-making process at the IEDC for CReED tax credits and the IEDC would implement measures to screen the President from involvement in the matter.

ISSUE

Would a conflict of interest arise for the President under I.C. 4-2-6-9 if the Partners are chosen as the developer of the parcel of land in downtown Fort Wayne, the CReED is amended to include the parcel, and CReED tax credits are sought from the IEDC?

RELEVANT LAW

42 IAC 1-5-10

Benefiting from confidential information

Sec. 10. A state officer, employee, or special state appointee shall not benefit from, or permit any other person to benefit from, information of a confidential nature except as permitted or required by law.

42 IAC 1-5-11

Divulging confidential information

Sec. 11. A state officer, employee, or special state appointee shall not divulge information of a confidential nature except as permitted by law.

I.C. 4-2-6-9 (42 IAC 1-5-6)

Conflict of economic interests

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:

(1) The state officer, employee, or special state appointee.

(2) A member of the immediate family of the state officer, employee, or special state appointee.

(3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a trustee, a partner, or an employee.

(4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

(b) A state officer, an employee, or a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:

(1) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or

(2) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.

(c) A written determination under subsection (b)(2) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under

ANALYSIS

The President's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to confidential information and conflicts of interest. The application of each provision to the President is analyzed below.

A. Confidential Information

The President is prohibited, under 42 IAC 1-5-10, from benefitting from or permitting any other person to benefit from information of a confidential nature except as permitted or required by law. Similarly, 42 IAC 1-5-11 prohibits the President from divulging information of a confidential nature except as permitted by law. The term "person" is defined in I.C. 4-2-6-1(a)(13) to encompass both an individual, such as the President, and a corporation, such as Domo Ventures, Domo Development, and the various entities identified above. In addition, the definition of "information of a confidential nature" is set forth in I.C. 4-2-6-1(a)(12). In this case, it would appear that the President has access to confidential information. While it would be a violation of 42 IAC 1-5-10 for the President or any other person to benefit from information of a confidential nature to which he has access, it would also be a violation under 42 IAC 1-5-11 for

him to even divulge any such information, regardless of whether it is used to that person's benefit.

B. Conflicts of Interest

I.C. 4-2-6-9(a) prohibits a state employee from participating in any decision or vote if he has knowledge that various persons may have a "financial interest" in the outcome of the matter, including himself or a business organization in which the state employee is serving as an officer, a director, a trustee, a partner, or an employee. The term financial interest as defined in I.C. 4-2-6-1(a)(10) includes an interest involving property or services. However, the term does not include an interest that is not greater than the interest of the general public or any state officer or any state employee.

Regarding a conflict of interest, it appears the President may be required to participate in decisions or votes regarding the approval of qualified investments for CReED tax credits. The President is, at least in part, owner of Domo Ventures and Domo Development. A potential conflict of interest would arise for the President if the Partners are chosen as the developer of the parcel of land in downtown Fort Wayne, the CReED is amended to include the parcel of land, and IEDC would be required to approve qualified investments for CReED tax credits, due to his ownership interest in Domo Ventures and Domo Development. If all of these events were to occur, the President would be required to observe the provisions of I.C. 4-2-6-9(b).

I.C. 4-2-6-9(b) provides that a state employee who identifies a potential conflict of interest shall notify the person's appointing authority and seek an advisory opinion from the Commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. In this case, while not a potential conflict at the moment, the President requested an advisory opinion from the Commission as provided in the rule. He also notified his appointing authority.

I.C. 4-2-6-9(b)(1) further provides that when a potential conflict of interest arises, the Commission may, with the approval of the appointing authority, assign the matter to another person and implement all necessary procedures to screen the employee from involvement in the matter. Should the potential conflict of interest arise, the President would be screened from consideration of tax credits at the IEDC. Specifically, the Secretary of Commerce and CEO would be responsible for any approvals that the President would have otherwise been responsible for and ensure that the President does not participate in such approvals. Also, the Vice President/General Counsel and Ethics Officer will implement a system within their databases that flags involvement and inform the CReED manager of the screen that has been implemented.

CONCLUSION

The Commission finds that a potential conflict of interest arise for the President under I.C. 4-2-6-9 if the Partners are chosen as the developer of the parcel of land in downtown Fort Wayne, the CReED is amended to include the parcel, and CReED tax credits are sought from IEDC. Accordingly, the President must be screened from consideration of tax credits at IEDC according

to the screening proposed screening procedure set forth in this opinion should the potential conflict of interest arise.