

HOWARD COUNTY ETHICS COMMISSION
3430 Courthouse Drive
Ellicott City, Maryland 21043

April 18, 2012

OPINION NO. 2012-05

The Howard County Ethics Commission (“Commission”) has received a request in which the Requestor has inquired prospectively about a potential conflict if she is elected to serve on the Columbia Association (“CA”) Board of Directors. The Commission finds that the Requestor’s elected service on the CA Board is not in conflict with her County employment as long as she abides by the restrictions as set forth in the conclusion.

I. BACKGROUND

The Requestor is employed as a Community Liaison, Administrative Analyst II, a classified position funded through the Department of Public Works (“DPW”). The Requestor reports to the Chief of Administrative Services. Her appointing authority is the Director of Public Works. In this position, the Requestor is responsible for serving as a liaison for citizens and County government, providing linkages to County services. The essential duties and responsibilities, as listed on her job description, include:

1. Provides public information regarding access to appropriate and available County services and resources. Communicates using email and phone. Conducts outreach to community and home owner associations. Represents DPW and the County through various public appearances in the community.
2. Responds to complaints and concerns, including contacting the appropriate DPW staff personnel for assistance in implementing a solution or answer inquiries. Communicates with the County Council, village managers, community association leaders, and citizens regarding issues. Works with community associations and neighborhood groups to proactively address potential issues and jointly work on community solutions.
3. Analyzes complex issues and follows up informational or technical needs with DPW resources. Coordinates responses that may require multiple inputs for resolution. Facilitates interdepartmental collaboration to resolve complex constituent and community concerns. Maintains contact with parties involved to ensure communication is ongoing and coherent.

Prior to becoming employed with Howard County in May, 2011, the Requestor served as a member of the Wilde Lake Village Board. She disclosed her participation to her supervisor and it was decided that she would refrain from being involved with issues pertaining to Wilde Lake Village. Instead, her supervisor assumed responsibilities for constituent services involving residents of Wilde Lake Village and the Requestor agreed to abstain from voting on a Wilde Lake Village Board issue if there was a conflict with the County. The Requestor currently serves North Laurel, Savage, Laurel, Maple Lawn, and Columbia in her constituent services capacity.

The Requestor is running unopposed for a volunteer position on the CA Board of Directors. If elected, she will represent Wilde Lake Village on the Board. She has proposed to recuse herself from voting if there is a conflict between County employment and her participation on the Board.

The CA is a non-profit organization governing the villages that comprise Columbia, Maryland. Functioning in some ways like a homeowner's association, CA serves for the well being of the Columbia community. It receives assessments and other monies to spend for the benefit of the community. Within Columbia, the Howard County Government provides a government role that is wholly separate from the CA. Specifically, the County provides traditional services such as road maintenance, snow and trash removal, police and fire protection, libraries, and public schools.

There are four Board committees comprised from the CA Board of Directors. Those include the Board of Operations Committee, the Planning and Strategy Committee, the Strategic Implementation Committee, and the External Relations Committee. Of importance here is the last committee, which is primarily responsible for CA's relationship with the community and other external stakeholders.

II. THE LAW

Sec. 22.201. - Statement of purpose and policy.

- (a) Howard County, recognizing that our system of representative government is dependent in part upon the people maintaining the highest trust in their public officials and employees, finds and declares that the people have a right to be assured that the impartiality and independent judgment of public officials and employees will be maintained.

Sec. 22.204. - Prohibited conduct and interests.

- (a) *Participation Prohibitions.*

- (1) Except as permitted by Commission regulation or opinion, an official or employee may not participate in:
 - (i) Except in the exercise of an administrative or ministerial duty that does not affect the disposition or decision of the matter, any matter in which, to the knowledge of the official or employee, the official or employee or a qualified relative of the official or employee has an interest.
 - (ii) Except in the exercise of an administrative or ministerial duty that does not affect the disposition or decision with respect to the matter, any matter in which any of the following is a party:
 - a. A business entity in which the official or employee has a direct financial interest of which the official or employee may reasonably be expected to know;
 - b. A business entity for which the official, employee, or a qualified relative of the official or employee is an officer, director, trustee, partner, or employee;
 - c. A business entity with which the official or employee or, to the knowledge of the official or employee, a qualified relative is negotiating or has any arrangement concerning prospective employment;
 - d. If the contract reasonably could be expected to result in a conflict between the private interests of the official or employee and the official duties of the official or employee, a business entity that is a party to an existing contract with the official or employee, or which, to the knowledge of the official or employee, is a party to a contract with a qualified relative;
 - e. An entity, doing business with the County, in which a direct financial interest is owned by another entity in which the official or employee has a direct financial interest, if the official or employee may be reasonably expected to know of both direct financial interests; or
 - f. A business entity that:
 1. The official or employee knows is a creditor or obligee of the official or employee or a qualified

relative of the official or employee with respect to a thing of economic value; and

2. As a creditor or obligee, is in a position to directly and substantially affect the interest of the official or employee or a qualified relative of the official or employee.

(b) *Employment and Financial Interest Restrictions.*

- (1) Except as permitted by regulation of the commission when the interest is disclosed or when the employment does not create a conflict of interest or appearance of conflict, an official or employee may not:
 - (i) Be employed by or have a financial interest in any entity:
 - a. Subject to the authority of the official or employee or the County agency, board, commission with which the official or employee is affiliated; or
 - b. That is negotiating or has entered a contract with the agency, board, or commission with which the official or employee is affiliated; or
 - (ii) Hold any other employment relationship that would impair the impartiality or independence of judgment of the official or employee.
- (2) The prohibitions of paragraph (1) of this subsection do not apply to:
 - (i) An official or employee who is appointed to a regulatory or licensing authority pursuant to a statutory requirement that persons subject to the jurisdiction of the authority be represented in appointments to the authority;
 - (ii) Subject to other provisions of law, a member of a board or commission in regard to a financial interest or employment held at the time of appointment, provided the financial interest or employment is publicly disclosed to the appointing authority and the Commission;
 - (iii) An official or employee whose duties are ministerial, if the private employment or financial interest does not create a conflict of interest or the appearance of a conflict of interest, as permitted and in accordance with regulations adopted by the Commission; or
 - (iv) Employment or financial interests allowed by regulation of the Commission if the employment does not create a conflict of

interest or the appearance of a conflict of interest or the financial interest is disclosed.

...

(e) *Use of Prestige of Office.*

- (1) An official or employee may not intentionally use the prestige of office or public position for the private gain of that official or employee or the private gain of another.
- (2) This subsection does not prohibit the performance of usual and customary constituent services by an elected official without additional compensation.

III. ISSUE

Does the Requestor's proposed participation on the Columbia Association's Board of Directors present a conflict or an appearance of a conflict under the Ethics Law?

IV. DISCUSSION

A. Preliminary Discussion

In providing advice on this matter, the Commission has examined the issue exclusively as one of a potential violation of Howard County Ethics Law. It expresses no opinion as to the lawfulness of a dual appointment or the application of the doctrine of incompatibility of office.

B. Employment Prohibition:

The Ethics Code precludes simultaneous employment for an official with an entity that is subject to official authority of the covered employee or the authority of the Howard County agency, board or commission with which the Requestor is affiliated. To be consistent with prior Opinions of the Commission, the term "employment" is construed broadly to effectuate the purposes of the ethics law. (See Opinion Nos. 07-04, 06-01, 01-00 and State Opinions 02-02, 87-01, 86-16).

On multiple occasions, this Commission has construed the employment provision broadly to include affiliation that does not result in monetary compensation. Volunteer service on management or operational boards of charitable organizations or professional associations has been analyzed as an employment interest. (Opinions 06-01 and 01-00).

In this situation, the non-compensated service on the CA Board of Directors constitutes an employment relationship under our prior opinions. Based on the Requestor's description of the activities of the Association, there will likely be areas of overlap between the Association and the Requestor's official duties.

The fact that employment is non-compensated is immaterial, if the employee holds a "position of trust." The Commission looks to the substance of the employee's relationship with the outside entity rather than to the existence or amount of compensation. If the employee holds an office, directorship, or other position of trust with an entity subject to the authority of, or having contractual dealings with the employee's agency into which she would reasonably be expected to have a personal loyalty or commitment to the goals of that entity, then holding the position will be prohibited by the ethics law.

Given the responsibilities of the CA Board, there is no question that an elected board member would hold a "position of trust." Members of the CA Board have a fiduciary responsibility to the CA Board, including oversight and approval of the CA budget and review of CA financial statements. Board Members are one of eleven members of a decision making body which may decide to enter into contracts, acquire or own property, sue and be sued, etc. In addition the CA Board is required to abide by its own Code of Ethics, which includes conflicts of interests and confidentiality policies.

Properly treated as employment in a position of trust, the prospective appointment may be prohibited employment under the ethics law, if the CA is subject to the authority of the Department of Public Works, the County agency in which the Requestor is employed. This factor is not present in this inquiry, however, the absence of an overall bar does not end the inquiry. There may be specific areas of conflict arising in the course of the Requestor's fulfillment of the dual roles.

C. Prohibited Participation

Section 22.204(a)(1) prohibits an official from participating officially, except in a non-ministerial or administrative way, in any matter in which would to his knowledge, have a direct financial impact as distinguished from the public generally, on himself or certain relatives or upon any business interest with which they are affiliated. "Matter" includes any decision, proceeding, application, submission, request for ruling or other determination, contract, claim, case or such particular matter that would involve some discrete and particularized impact on the employee or official, or which involves as a party an entity with which the official or employee or certain relatives are affiliated. (*See* Opinion Nos. 07-04, 06-01, 01-00, 96-03, 97-03, and 97-04.)

There is no question that in this situation a “matter” would include any participation between the CA and DPW or the Requestor’s appointing authority. As under the employment provision, the Commission has consistently construed the relationship with the business entity to include a non-compensated interest when the official holds a position of trust. The official participation of the Requestor would be as one of eleven members of the CA having the ability to make managerial and policy decisions on behalf of Columbia. Thus, participation would not be merely ministerial or administrative. As previously indicated, when the position is one of trust, it is the substance of the relationship, rather than the existence of compensation or financial benefit that generates the conflict. *See, e.g.*, at 07-04; State Op. 02-02.

The Ethics law is to be construed liberally to effectuate its purpose and policy, including “promot[ion] [of] the continued trust and confidence of the citizens of Howard County in the impartiality and independent judgment of public officials and employees” (*See* Section 22.201(a)). Thus, in focusing on the substance of the Requestor’s prospective relationship with CA, participation would be barred under Section 22.204(a)(1) in those instances in which the Requestor, in her role as community liaison, had involvement or the necessity to collaborate or otherwise be involved with the CA.

D. Disclosure of Confidential Information

Section 22.204(e) prohibits officials from disclosing or using for their own gain or that of another, confidential information acquired in fulfillment of their public role. It will be necessary for the prospective Requestor to avoid both affirmative and inadvertent disclosure of confidential information. Obviously, the Requestor would not be free to discuss matters brought to her attention as a community liaison to the CA Board, nor could she discuss confidential CA matters with her appointing authority or other County employees.

The obligation to maintain confidentiality extends to less obvious situations in which a person may be able to use confidential information without necessarily disclosing it. In the capacity of a CA Board Member, the Requestor would be privy to confidential CA business.

The Requestor must take care in not inadvertently disclosing any such information in the course of serving as a CA Board Member. If the confidential information obtained in one role is material to the participation in the other, and use of it cannot be avoided without impairing Requestor’s functioning, the Requestor must avoid participation, even though the precise matter is not one under which non-participation is

required under Section 22.204(a).

As we previously have observed, “Ethics Law plays an important role in ensuring the faith that the citizens of Howard County have in their local government . . . [T]he avoidance of actual or apparent conflicts of interests are of great import.” Op. No. 04-02, at 3.

E. Appearance of Conflict/Inconsistent Employment

Under prior decisions of the Ethics Commission, we will consider an appearance of conflict a use of prestige of office prohibited under the Ethics Law. Section 22.204(d). *See also* Op. No. 07-05; 04-02. One type of appearance of conflict is deemed “inconsistent employment.” Inconsistent employment arises when a situation raises clear and serious conflict of interest issues, but in which specific authority or contractual affiliations set forth in 22.204(b) are not present. Op. No. 07-05. Even if the connection between the Requestor’s County Employment and her volunteer service on the CA Board is not deemed an “affiliation,” barring the official’s employment under 22.204(b)(1)(iii), it is, at a minimum, employment that has the potential for creating an appearance of a conflict.

The Ethics Commission typically looks to the following non-cumulative list of factors to determine whether a relationship is inconsistent employment:

- (1) How the employment was acquired;
- (2) Whether the employment was obtained on County time;
- (3) How the subject matter of the activity relates to County duties;
- (4) Whether outside activity derives from work performance or relationships that occur in connection with County responsibilities;
- (5) Whether some aspect of the County job would be impacted by the employment relationship; and
- (6) Whether the employer would feel pressured or perceived an advantage in County dealings because of its hiring of the County employee.

See., Op. No. 07-05.

In considering the first factor, the Requestor stated that she is interested in

community relations and has a desire to serve her community. The first factor does not suggest an appearance of a conflict.

In considering the second factor, the Requestor found out about the CA position through her affiliation with the Wilde Lake Village Board. There are no facts to suggest that her running for the CA Board is in any way related to, or arose from her job with the County. The second factor does not suggest an appearance of a conflict.

Factors three, four, and five, are more problematic. Both positions involve the fostering of community relationships. One of the Requestor's job responsibilities as a community liaison is to "represent the Department and the County through various public appearances in the community." One of the Requestor's job responsibilities as a CA Board Member is to "attend special events and functions of the CA Board and Villages, as well as community-wide CA events."

Second, the Requestor's job duties as a community liaison are to respond to complaints and concerns. One of her responsibilities as a CA member is to "communicate with residents; articulate CA's goals, accomplishments, programs and policies, and obtain input from residences." Board members are expected to spend time on the telephone talking with, and corresponding with, residents in their Village and around Columbia.

Admittedly, there could be overlap between the Requestor's community liaison position and her volunteer position on the CA Board of Directors. The contacts and relationships fostered in each role will be similar.

In regard to the fifth factor, the Commission considered whether the employment relationship between the County position and the CA volunteer position create a perception that County government has an advantage in dealings with the CA. Arguably, her volunteer position has no impact on her County employment because the Requestor is not in a policy making or managerial role with the County. She is not involved in policy decisions that implicate or involve the Columbia Association specifically, nor is she involved in the institutional relationship between CA and County government. For example, she is not involved in grants or funding for CA; DPZ or Planning Board approval of the proposed redevelopment of Symphony Woods; or agreements with Recreation and Parks for Wine in the Woods. Finally, County officials do not generally deal directly with CA board members, but rather with the appropriate staff. (The Executive, for example, may occasionally interact with the President of CA).

With regard to the final factor, the Commission considered whether the CA has a perceived advantage in County dealings due to the Requestor's Board membership.

There is a continuing risk that citizens, particularly those who reside outside of Columbia, would perceive an advantage to residents of Columbia due to the Requestor's position with the County. It is this perception that is problematic to the Commission.

Ordinary citizens would see no difference between the subject matters of the two services; namely fostering community relationships and resolving community conflict. There is likely to be a public perception of a connection between the two positions. It also places the Requestor in an untenable situation because she is being asked to wear two hats simultaneously. For example, when she is approached by a member of the general public she has to decide whether she is responding in her capacity as the public liaison for the County or as a CA Board member elected by residents of her village center.

If the CA decided to contract for the purchase of land, the CA would deal directly with the County, including the Department of Public Works, Planning & Zoning, *etc.* Thus, to members of the public, it may appear that, due to the Requestor's dual role, the CA has an "inside advantage" to resources and contacts from within the County.

F. The Elimination of the Conflict

The Commission appreciates the Requestor's dedication to the community. Her willingness to serve as a volunteer with the CA Board is commendable. Nevertheless, based on the law, and our prior decisions, there is a perception of a conflict. The Commission is mindful that it is difficult to get qualified individuals to serve on volunteer Boards and Commissions. Having qualified individuals in these positions benefits the public. For these reasons, the Commission has considered whether the perception of a conflict would be eliminated if the County could restructure her job position to exclude Columbia. Alternatively, the Commission has considered whether the perception of a conflict would be eliminated if, in the course of carrying out her volunteer duties, she recused herself from any matter in which she had substantial involvement as the County's community liaison.

Ideally, to eliminate any potential for a conflict, the Requestor's job duties should be restructured so that she does not serve as a liaison to Columbia. The community liaison position, however, is her full-time employment and she was hired, based on her education, experience, and skills to specifically cover Columbia. The Requestor's job responsibilities with the County are limited to community relations. She does not have the authority to make or regulate policy, nor is she involved with legislation, grants, or the appropriation of County resources or funds. Further, the Commission does not believe it has the jurisdiction or authority to require the County to restructure the

Requestor's duties.

If, in attempting to avoid potential conflicts, the Requestor were to avoid participation on *all* issues affecting Columbia, this may negatively impact her employment with the County. She has, after all, delivered effective and efficient constituent services since May, 2011 and has established relationships with community members while in that position. The Commission has confirmed with the County Administration that restructuring the Requestor's job to remove all Columbia constituent matters from the Requestor's purview would be problematic. The Administration is willing to structure her work so that the Requestor will not be involved in any matters where the Columbia Association is a party or likely to be a party. By way of example, the Administration explains that the Requestor would facilitate resolution of a citizen's complaint about street light outages, police patrols, *etc.*, in any Columbia address, but would not be involved if the complaint pertained to flooding in a citizen's back yard because of a stream in CA open space.

On balance, the Commission has determined that membership on the CA Board will only create a conflict with her County employment if a specific matter in which she had substantial involvement is an issue upon which she is required to vote or take action in relation to her volunteer duties as a CA Board Member.

V. CONCLUSION

For the reasons stated, the Requestor's elected service on the CA Board is not in conflict with her County employment, with the following restrictions: 1) She must not participate in any specific CA matter to which she substantially participated as the County's community liaison; 2) Requestor will not be involved in any County matters where the Columbia Association is a party or likely to be a party; 3) She must avoid disclosing confidential information, and if confidential information is integral to the deliberations before the CA board, the participation must be avoided in order to guard against an appearance of impropriety; and 4) She declines membership on the CA's External Relations Committee, which is primarily responsible for CA's relationship with the community and other external stakeholders.

HOWARD COUNTY ETHICS COMMISSION
Laurence C. Aaronson, Chairperson
Kristin Perry
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Deb Poquette¹

¹ Deb Poquette did not participate in the decision on this Advisory Opinion.