

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

January 20, 2009

OPINION NO. 09-02

The Howard County Ethics Commission ("Commission") has received a request in which a Requestor has inquired about acceptance of campaign contributions from persons who have a business interest in entities that come within the regulatory authority of County Government and the recording of gifts received during the legislative session of the Maryland General Assembly. The Commission concludes that: (1) campaign contributions are not regulated by Howard County Ethics Law, although they may become the subject of our Ethics Law, indirectly, under certain circumstances; (2) no issue would arise under 22.204(a) (prohibited participation) in a situation in which, as presented by the Requestor for purposes of this opinion, there was no participation with a business entity, either personally or through the Requestor's role as a supervisor in his agency; (3) based on his new position for Howard County, if the Requestor encounters campaign contributors in the future, the Requestor may face a conflict or the appearance of conflict that may require him to decline participation or otherwise respond to avoid the conflict or appearance of conflict; and (4) gifts received by the Requestor during the General Assembly session also fall within the area of enforcement of Howard County Ethics Law because of Requestor's dual roles and the risk that, without overlapping coverage of state and county requirements, acceptance of gifts in one capacity could influence or be intended to influence service in another.

I. BACKGROUND

1. The Request.

Requestor serves as the Director of Special Projects for the Department of Planning and Zoning ("Department"). Between May 2003 and April 2007, Requestor served as Deputy of the Department. In January 2007, Requestor was elected to political office as a delegate to the Maryland House of Delegates. In his elected office, Requestor serves a district within another county, and with no geographic overlap into Howard County. During the legislative session, Requestor is placed on an unpaid leave of absence with Howard County. He maintains sporadic

communications with the County during that time by email or correspondence and may receive compensatory leave for the time he spends on County business.

Requestor has been the subject of news articles based on his having accepted campaign contributions from a person who is a management level employee of a developer with a pending application for zoning text amendment involving land in the Turf Valley community in Howard County. Requestor thus has sought an advisory opinion from the Commission regarding whether a certain zoning ethics law pertaining to required disclosures of campaign contributions applied to this contribution and whether an ethical conflict arose from his acceptance of it or from his role in the Department. He also inquired whether gifts received as a member of the General Assembly are subject to requirements of Howard County Ethics Law.

On November 12, 2008, Requestor appeared at a meeting of the Ethics Commission and responded to questions. As with all requests for advisory opinion, the Commission relies on the accuracy of the information presented in developing prospective guidance for the Requestor; the Commission is not acting as a fact-finding body with regard to past conduct. Accordingly, based on the Requestor's information, the Commission responds to the specific requests and has highlighted potential areas of conflict, for Requestor's consideration in future dealings on behalf of Howard County.

2. Requestor's Past and Future Roles.

The Department is engaged in various regulatory, fact-finding, and/or advisory roles with regard to land development and zoning in Howard County. For much of the time Requestor has been in County service, he served as the only deputy of the Department. Even when he was the only deputy, based on a division of labor within the Department, certain proposed applications such as applications for zoning regulation amendments ("ZRA's"), did not go through the Requestor, customarily.¹ He may have received a courtesy copy, but technical review would be assigned to a staff member, who would then report directly to the Department's director. The director, in turn, would present the results of the technical review to the planning board. The Department would not decide the ZRA request, but its technical report would be a factor on which the board could rely in reaching its decision. According to the Requestor, at no time did he work on any of several land use issues in the Department related to the Turf Valley community, although because of his leadership position within the Department and high profile nature of these matters, he has been aware of them.

¹ In only a handful of instances over the period of time, when Requestor served in the capacity of acting director and the matter was approaching a statutory deadline did Requestor review a proposed ZRA. This rare occurrence did not arise when the Department considered the Turf Valley ZRA. According to the Requestor, he had no role.

Requestor testified that he voluntarily has adopted a practice not to accept campaign contributions from persons he knows does business with Howard County Government, or whom he believes are likely to do such business. Although developers may not do business with the County, they may have pending land use matters before Howard County agencies. Requestor also has adopted a voluntary practice not to accept contributions from developers he knows have projects in Howard County. Requestor does accept campaign contributions from constituents. One such constituent and his wife contributed to several campaigns run by Requestor, dating back even before Requestor was a County employee. This donor is not the developer himself, but he is a management level employee for the entity with the proposed development project in the Turf Valley community, for which the entity is seeking a ZRA. Requestor disclosed the contributions of the individual and his spouse on his campaign financing reports.

Since his reassignment to the role of director of special projects, Requestor's role in the Department has become more ad hoc in nature. Thus, for any given assignment whether or not there is a connection between Requestor's role on any project and campaign fund-raising he engages in as a candidate for public office will depend on the circumstances.

3. Gifts.

From time to time during the legislative session of the General Assembly, Requestor is invited to social events or receives gifts of food or drinks. Normally, donors are registered lobbyists, and there are state laws restricting and otherwise regulating these gifts from these persons. Among other things, they must be offered to other members of a committee or delegation as a whole. Occasionally, Requestor receives small gifts of minimal value (such as a drink or a cup of coffee) from non-lobbyists during the session. The latter gifts may be offered only to the Requestor, as opposed to an entire committee or delegation. Requestor has inquired about the obligation, if any, to report gifts of either type on Howard County disclosure forms.

II. THE LAW

The principal provisions of the Ethics Law, which define prohibited conduct of employees are the "Participation Prohibitions" are set forth in Section 22.204. The "Participation Prohibitions" are set forth in 22.204(a) and the "Employment Prohibitions" are set forth in Section 22.204(b). Section 22.204(c) "Solicitation/Acceptance of Gifts or Compensations" prohibits the solicitation and acceptance of certain gifts; Section 22.204(d) "Use of Prestige of Office" prohibits the use of the prestige of one's public office or employment for private benefit, and Section 22.204(e) "Disclosure of Confidential Information" prohibits the use of confidential information gained by virtue of public employment for private gain.

In pertinent part, Section 22.204(a) of the Ethics Law, "Participation Prohibitions" provides that County officials or employees shall not:

- (1) Except in the exercise of an administrative or ministerial duty which does not affect the disposition or decision with respect to the matter, participate on behalf of the County in any matter which would, to their knowledge, have a direct financial impact as distinguished from the public generally, on them, their spouse, parent, child, sibling or upon any business interest with which they are affiliated;
- ...
- (3) Except in the exercise of an administrative or ministerial duty which does not affect the disposition or decision with respect to the matter, participate in any matter involving a business entity with which they, their spouse, parent, child or sibling are negotiating or have an arrangement concerning prospective employment.

Section 22.204(b) of the Ethics Law, "Employment Prohibitions", provides that:

Except as exempted by the County Council pursuant to Section 901(b) of the Howard County Charter or when the employment or interest does not create an actual or apparent conflict of interest, officials and employees shall not:

- (1) be employed by:
 - (i) Any entity subject to their official authority;
 - (ii) Any entity subject to the authority of the Howard County agency, board or commission with which they are affiliated;
 - (iii) Any entity which is negotiating or has entered into a contract with the Howard County agency, board or commission with which they are affiliated.

Section 22.204(c), "Solicitation/Acceptance of Gifts or Compensation", reads as follows:

No employee or official shall solicit any gifts. No employee or official shall accept any gift or compensation, directly or indirectly from any person that he/she knows or has reason to know, has financial interests, distinguishable from the interest of the public, that would be affected by the actions of the employee or official.

Section 22.204(d), "Use of Prestige of Office", reads as follows:

No county officials or employees subject to this subtitle shall intentionally use the prestige of their office for their own gain or that of another. The performance of usual and customary constituent services without additional compensation does not constitute the use of prestige of office for an official or employee's private gain or that of another.

Section 22.204(e), "Disclosure of Confidential Information", reads as follows:

Other than in the discharge of official duties, officials or employees may not disclose or use, for their own gain or that of another, confidential information acquired by reason of public position and which is not available to the public.

Section 901 of the Howard County Charter sets forth the following series of prohibitions:

Prohibitions. No officer or employee of the County, whether elected or appointed, shall in any manner whatsoever be interested in or receive any benefit of the profits or emoluments of any contract, job, work, or service for the County. No such officer or employee shall accept any service or thing of more than nominal value, directly or indirectly, from any person, firm or corporation having dealings with the County, upon more favorable terms than those granted to the public generally, nor shall he or she receive, directly or indirectly, any part of any fee, commission or other compensation paid or payable by the County, or by any person in connection with any dealings with the County, or by any person in connection with any dealings with or proceedings before any branch, office, department, board, commission or other agency of the County. No such officer or employee shall directly or indirectly be the broker or agent who procures or receives any compensation in connection with the procurement of any type of bonds for County officers, employees or persons or firms doing business with the

County. No such officer or employee shall solicit or accept any compensation or gratuity in the form of money or otherwise for any act or omission in the course of his or her public work; provided, however, that the head of any department or board of the County may permit an employee to receive a reward publicly offered and paid for, for the accomplishment of a particular task.

III. ISSUES

1. Is there a conflict of interest under Howard County Ethics law arising from an employee's acceptance of campaign contributions from an individual employed in a managerial capacity with an entity subject to the regulatory authority of the employee's agency when the contribution predates the entity's interaction with the agency, and the employee does not participate in the matter?
2. Does the Requestor's role as an elected officeholder in another jurisdiction pose conflicts with his current service for the County?
3. Are gifts received by an employee who is a member of the General Assembly while on leave of absence from County employment regulated by Howard County Ethics law?

IV. DISCUSSION

A. Preliminary Matters

Preliminarily, there are two issues presented by this request. The first involves the subject matter of the inquiry. To the extent Requestor's inquiry involves consideration of campaign contributions, the Commission is mindful of an exclusion of political campaign contributions under Howard County Ethics law. In particular, Section 22.202(f) excludes from the definition of gift "solicitation, acceptance, receipt or regulation of political campaign contributions." Furthermore, as a general proposition, regulation of solicitation and acceptance of political campaign contributions is left to State election law, and under certain circumstances State or federal criminal law may apply. Nevertheless, Howard County Ethics Law still applies to *relationships* that arise when an employee is acting as a non-elected employee of County government, on County business, and in the County's name, regardless of the nature of benefits he or she receives from those conducting business with his or her agency. As set forth more fully below, the Ethics Commission believes Howard County Ethics Law may apply to the Requestor when he acts as an elected official in another jurisdiction, even though the subject of the benefit is a campaign contribution.

The second issue is whether the conduct of an employee, when he is on leave of absence with the County during the legislative session of the General Assembly, may be regulated under Howard County Ethics Law. Under the precise issue presented, the Commission concludes that it may properly provide guidance to the Requestor regarding the acceptance of gifts (not political campaign contributions) during the ninety-day legislative session because of the temporary nature of the leave of absence and the ready knowledge of a prospective donor of Requestor's ongoing position in Howard County Government. The Commission sees nothing inconsistent with requiring that Requestor comply with Howard County law regarding gifts and the duty of Requestor to comply with State law.

B. Acceptance/Disclosure of Campaign Contributions on An Application for ZRA

The Commission has previously concluded that Md. Code Ann. State Gov't §15-848 and the affidavit requirement set forth in Section 15-849 do not apply to text zoning amendments because an application under Section 15-848(c) is defined as a zoning map amendment or participation in a comprehensive zoning plan, and a ZRA is neither. See Letter to Courtney Watson, former Chairperson of the County Council from Executive Secretary of the Commission, dated December 10, 2008. In addition, Section 15-848 would not apply to the matter raised by the Requestor since it covers only political contributions to enumerated Howard County elected office holders or candidates for specific Howard County offices. See Section 15-848(e). Requestor is statewide office holder. He does not hold any of the Howard County offices set forth by statute.

As for whether Requestor's role in the Department raises a conflict or potential conflict on applications for ZRAs, even when the disclosure requirements of 15-848 do not apply, the key facts upon which the Commission expressly relies are: that the contributions of the individual originally predated the application by his employer for the ZRA; the normal division of labor within the Department such that, with rare exceptions, (which will not arise at all in the future, now that Requestor has been reassigned), Requestor would not participate in ZRA applications; and he did not actually participate in the matter in question. (*See supra* at 2-3.) Under these circumstances, the Commission does not discern a conflict under the Howard County Ethics law in the areas of participation, prohibited employment, gifts, prestige of office, or confidential information, encompassed by that law.

C. Future Dealings of the Requestor

As Requestor engages in future projects assigned to him in his role as Director of Special Projects, there may be instances in which he encounters persons who are and potentially could be contributors to his campaign organization. It is not possible for the Commission to provide hard

and fast rules, because each situation will depend on the facts; nevertheless, some guidance may be gleaned from Howard County Ethics Law and from previous opinions of the State Ethics Commission.

Section 901 of the Charter contains general prohibitions against conflicts of interest. One form of conflict prohibited by Charter is acceptance of any “service or thing of more than nominal value, directly or indirectly, from any person, firm or corporation having dealings with the County, upon more favorable terms than those granted to the public generally.” Similarly, the Charter prohibits acceptance of a fee, commission, compensation or “gratuity” in any form “for any act or omission in the course of his or her public work.” *Id.*

Section 901(b) mandates that the provisions of the Charter “be broadly construed and strictly enforced” to prevent covered persons “from securing any pecuniary advantages, however indirect, from their public associations, other than their compensation provided by law.” Thus, to the extent there is a *quid pro quo* for a person’s County service tied to a particular act or omission, a conflict arises under Howard County law, even though the subject of the “service or thing of more than nominal value” is a campaign contribution, which the Commission does not regulate. *See* 22.202(f).

Furthermore, a payment in the form of a campaign contribution and which is intended to be a bona fide campaign contribution, rather than a payment for an “act or omission in the course of . . . public work,” still may have the appearance of a conflict and be a prohibited use of prestige of office under Section 22.204(d). For guidance, we frequently look to State Ethics Law in our opinions, in part, because local ethics law is required to be substantially similar to State Ethics Law. *Seipp v. Baltimore City Board of Elections*, 377 Md. 362, 833 A.2d 551 (2003). From time to time, the State Ethics Commission has considered whether an elected office is inconsistent employment or otherwise presents a conflict as a use of prestige of office. (*See, e.g.* State Op. 80-2, 88-3, 00-2, 00-03.) In Opinion 00-2, the State Ethics Commission recognized the general rule that there is no strict prohibition against a State employee running for political office (and by extension, continuing to serve as an employee holding separate political office). But it also recognized the reality that “political fundraising and campaigning has to be presumed when elected office is involved.” *2. Thus, the State Ethics Commission had to work through several issues raised by elected office and its impact on State employment on a case-by-case basis to determine when there is a conflict between the two roles. Some areas of potential conflict that it has examined may prove helpful to the Requestor even though here, unlike in State Opinion 00-2, Requestor’s political representation occurs in a different jurisdiction than the appointed position, which, to some degree, lessens potential conflict. The State Ethics Commission has examined:

situations where there is fundraising and constituent service activity that might suggest conflicts between the state service and the elected office, particularly where the constituencies of both positions are pervasive and overlap. With regard to political campaigning and fundraising, in particular, the Commission has advised individuals of the continuing application of the prestige and information provisions of the Law and the need to avoid circumstances where a person's position may figure in private campaigning, or where information (such as mailing lists) available in the state position is used as a part of a campaign plan. Individuals are consistently advised to take care in campaign activities about soliciting campaign funds or assistance from individuals who are subject to the agency's authority or that are vendors or likely vendors to the individual's agency employer. *2.

In his role as Director of Special Projects, Requestor should be particularly mindful of these relationships (regulatory, vendor) in future dealings on behalf of the County. Requestor voluntarily has avoided taking campaign contributions from developers whom he recognized as Howard County-based or from persons or entities he knows does business with Howard County, and the Commission advises he should continue to do so. Depending on the circumstances, and in order to avoid the appearance of a conflict, he may also have to avoid participating on behalf of the County when, merely because of his position, he may be seen to be engaged in private campaigning or when the position of campaign donors within their respective organizations raises a potential conflict because those entities are subject to the Department's authority or are vendors or likely vendors to the County. If there are specific areas of conflict or potential conflict, it is incumbent upon the Requestor to take reasonable steps to recognize them and, if necessary, to seek further guidance from the Commission.

D. Gifts Received as a State Legislator

As previously indicated, during the legislative session, Requestor receives gifts of food and drink from time to time. He is obligated to follow State law with regard to acceptance of those gifts and report them on the State disclosure form, as appropriate. Howard County Ethics Law also regulates receipt of gifts. Section 22.204(c) prohibits an employee or official from accepting any gift or compensation, directly or indirectly from any person that he or she knows or has reason to know has financial interests, distinguishable from the interests of the public, that would be affected by the actions of the employee or official. A gift is defined as "[t]he transfer of anything with an economic value regardless of the form, without lawful consideration."² Section 22.205(c)(4) requires a covered employee or official to report gifts in excess of \$50.00 in value or in the aggregate of \$100 from any one person. Section 22.205(c)(4)(2) excludes unsolicited gifts of nominal value. The gifts described by Requestor appear to have economic

² The Charter provision in Section 901 uses the term "nominal."

value. (*See supra* at 3.) The value of certain meals or social events could exceed the \$50.00 reporting threshold.

Although these gifts are offered and accepted during the legislative session, when the Requestor is on a leave of absence from County service, the Commission believes they are regulated both by State and local law. Requestor's position with Howard County is visible, particularly to persons who have an economic connection to land use in Howard County. Moreover, the duration of the legislative session is well known. A donor would understand that the Requestor, at the end of the legislative session, would return to active service for Howard County. This situation creates a potential for a gap in the coverage between the two respective ethics laws, when, in fulfillment of their purposes, both should apply. Although he is on a leave of absence during the time that the General Assembly is in session, Requestor remains an employee or official of Howard County. Under the provision of Section 22.204(c), he is obligated not to solicit gifts and not to accept gifts or compensation from persons he knows or has reason to know has financial interests distinguishable from the interest of the public that would be affected by his actions as a County employee or official. Moreover, even if the gift is not prohibited under Section 22.204(c), if the value of the gift exceeds \$50.00 individually or \$100.00 in aggregate from any one person, Requestor must include a disclosure of the gift on his Howard County financial disclosure form.

V. CONCLUSION

The Commission believes no issue arises under Howard County Ethics law when a covered employee accepts campaign contributions from a high-ranking employee of an entity applying for a ZRA amendment, because the contributions originated before the covered employee's County service, the covered employee did not regularly review such applications and did not participate in any manner in the particular application at issue. The Commission recommends that in future dealings Requestor must consider areas of overlap between political campaigning and fundraising and service to the County, and, among other things, should continue efforts to separate the activities that Requestor has already undertaken voluntarily. Finally, the Requestor should adhere to Howard County Ethics law on gifts, including those accepted during his service as a state legislator.

HOWARD COUNTY ETHICS COMMISSION

Laurence C. Aaronson, Chairperson

Gayle M. Fink, Vice Chairperson

Robert D. Pearce

Kristen Perry