

## Anne Arundel County Ethics Commission

### Advisory Opinion

99-26

#### Issues:

1. Whether a member of the county council may participate in legislative matters involving the Tipton Airport, or the Anne Arundel County Tipton Airport Authority, if clients of the member's accounting business are seeking to do business with the Authority on projects with Tipton Airport.
2. Whether the councilmember may participate as an investor, in a joint venture or other business entity with these clients, in projects for which bid proposals may be submitted to the Tipton Airport Authority.

#### Background:

One of the members of the county council owns and is employed by, a certified public accounting firm. Two clients of the member's accounting firm are considering joining together to pursue business opportunities that may develop with the Tipton Airport Authority. The council member may be interested in investing in this joint venture or other entity that may be formed to pursue these opportunities.

The Anne Arundel County Tipton Airport Authority was created by ordinance and codified as Article 2, Title 12 of the Anne Arundel County Code. The Authority was created to acquire, construct, maintain and operate the Tipton Airport. It performs an essential government function, §§12-101(f) and 12-218, and is an instrumentality of the county, §12-202(b). To effectuate its purposes, the Authority is vested with the powers to acquire and transfer property, retain professional services, set, charge and collect rates and fees, borrow money, issue bonds, enter into contracts, and other powers necessary to manage the airport facility.

Although the Authority is in many ways, independent of county oversight, there are several ongoing connections between the Authority and the county. The members of the Authority are appointed and can be removed for cause by the county executive. The director of the department of public works serves as an advisor to the authority. §12-204. The county executive, upon the recommendation of the Authority, appoints the airport manager. §12-208. The Authority may accept grants from the county. §12-210. The county executive, with the approval of the county council, may provide money from the county's general fund to cover any Authority deficit in its debt service obligations. This advance is to be repaid, and cannot exceed \$25,000.00. §12-101(h). The Authority must prepare an annual capital and operating budget in accordance with specified procedures and shall present both its proposed and final adopted budget to the county executive and the county council. §12-211. Certain county officials, including the auditor, may examine the books, accounts, and records of the Authority. §12-217.

In the last three fiscal years, the county has appropriated funds for the operations of the Tipton Airport. For each of these fiscal years, the county council approved appropriations of \$180,000 covering primarily salaries and contractual services. The Authority is expected to request up to \$250,000 in operating costs for fiscal year 2000. It is expected that the Authority will be dependent upon the county for operating funds for another three to five years. The county has also appropriated over one million dollars in the capital budget for improvements to the Tipton Airport. The Authority is expected eventually to finance some of these improvements, and roughly 70-90% of the county appropriations may be reimbursed by the federal government or from other non-county sources.

The Authority is also required to establish a competitive bidding process for all airport project contracts where the estimated cost exceeds \$10,000 except for emergency purchases, professional services, and non-competitive types of materials and equipment.

**Discussion:**

Section 3-105(c) states that an employee, including a member of the county council, ". . . may not be employed by any person or undertake on behalf of any person to assist or represent that person in connection with a matter in which the County has an interest, except in the course of the employee's official duties." This section does not merely limit an employee's participation in certain matters in which there may be a private interest. It absolutely prohibits an employee from assisting a person - whether financially or by other means - in any matter in which the county has an interest.

As an instrumentality of the county that is performing an essential government function, it is clear that the county has an interest in all matters concerning contracts with the Tipton Airport Authority. The county's interest is enhanced by its authority over the capital and operating budgets of the Authority at this point in time. If the council member were to invest in any joint venture or other entity negotiating, bidding on, or entering into a contract with the county, or with the Tipton Airport Authority, that council member would be providing financial support to the entity. The issue is whether that financial support constitutes the type of assistance prohibited by §3-105(c). The commission believes that it does not. The type of assistance contemplated by this section involves some sort of action - advocacy - or some other proactive involvement in a process that could affect the county's interests. A simple financial investment, without any additional involvement, does not therefore, constitute the type of assistance to an entity, that is prohibited by §3-105(c). However, the council member should be advised that any active participation on behalf of the private entity in negotiating or pursuing a contract with the Tipton Authority or with the county, would trigger the prohibitions of §3-105(c).

Section §3-105(b)(1) prohibits an employee from having an interest in an entity that is negotiating or has entered into a contract with the employee's agency. In this county, contracts are made with Anne Arundel County, not with a named agency. To determine if this provision

applies in a given situation, the commission considers the extent to which the employee's agency manages, regulates, supervises, or otherwise administers the contract between the entity and the county. In this case, the county council has budgetary oversight of Tipton Authority contracts, as well as legislative authority over the Tipton Airport Authority ordinance. The council does not exercise any regulatory, supervisory, or managerial authority over the day to day operation of airport or authority contracts. In general, the commission believes that general budgetary and legislative authority, by itself, does not trigger the prohibitions of §3-105(b)(1), because the connection between the county council and the contractor is very limited. See, AO-97-164. Therefore, this section would not prohibit the council member from having an interest in an entity that is negotiating or entering into a contract with the Tipton Airport Authority.

However, the commission would also advise that although this investment is not prohibited by the ethics law, there are issues of appearances of conflict of interest that the council member should consider. The legislative intent of the Public Ethics Law is to insure that the impartial and independent judgment of county officials will be maintained. Section 1-102(a)(2) states that the confidence and trust of the people in government is eroded ". . .when the county's business is subject to improper influence or even the appearance of improper influence."

There are several reasons why an appearance of impropriety might be created by the council member's investment in an entity that contracts with the Authority/county. The interests of the county and its contractors are not always identical. The possibility of adversarial or competitive relationships between county and contractor, resulting from contract disputes for example, could easily lead to a conflict of interest between the councilmember's public and personal interests. Additionally, the council member may acquire or have access, through official channels, to information relative to the needs and plans for the Tipton Airport, which information is either confidential or not readily available to the public. This information could be used to benefit the member's private interests. Certainly the council member's access to information would appear to place the member in a position of advantage over other potential contractors seeking to do business with the Tipton Airport Authority.

The probability that contracts will be competitively bid does not eliminate the possibilities for a conflict of interest. The initial development of specifications for requests for proposals often requires input from potential bidders or other interested entities. In these cases, "insider information" can be invaluable. For these reasons, the council member should be cautious of the appearance of impropriety that may be created by investments with entities seeking to do business with the county or the airport Authority.

If the council member continues to provide accounting services to clients who are seeking to do business with the county or with the Authority, §3-102 would apply to prohibit the council member from participating in any matter involving the Authority. This result occurs regardless of whether the member invests in a business entity created by these clients.

Section 3-102 prohibits a council member from participating in any legislative activity if that member has a personal interest in the matter that conflicts with the public interest. The

legislation at issue involves the budget appropriation for the Tipton Airport Authority. A conflict of interest is presumed to exist when the council member benefits financially from a close economic association with a person who has a direct interest in an enterprise that would be affected by the council member's vote on proposed legislation, differently from other like enterprises or interests. §3-102(b)(2)(ii).

The councilmember has a close economic association with clients of the accounting firm because they employ the member to perform professional services. §3-102(b)(1)(i). The clients have - or plan to have - a direct interest in an enterprise that would contract with the Tipton Airport Authority or the county, subject to the council's appropriations for the contracts. Therefore, unless the presumption of a conflict of interest can be rebutted by the council member, §3-102(a) prohibits the member from participating in any legislative activity involving Tipton Airport or the Tipton Airport Authority. In view of the applicability of §3-102 to this situation, it is not necessary to review the applicability of §3-101 to the facts presented here.

**Conclusion:**

The commission advises that the county council member may invest in a joint venture or other entity that will seek to do business with the Tipton Airport Authority, although the member should be aware of serious appearance of impropriety issues that may be raised by such activity. Additional participation in the joint venture, beyond that of a mere investor, may trigger the prohibitions of §3-105(c). Even if the council member does not invest in this enterprise, the member may not participate in any legislative activity involving the Tipton Airport, or the airport authority, including budget legislation, where the member has clients in a private accounting business that are seeking to do business with the airport and the authority.

Date: \_\_\_\_\_

By: The Anne Arundel County Ethics Commission