

Anne Arundel County Ethics Commission

Advisory Opinion

99 - 87

Issue:

Whether a member of the county council may participate in, and vote on, comprehensive rezoning legislation that proposes rezoning for parcels of property immediately adjacent or close to property owned by the member and used for a commercial enterprise.

Background:

A member of the county council is the joint owner of a parcel of property located in the member's councilmanic district. This property is zoned RA (Agricultural Residential), but is used by the member's spouse for the operation of a professional clinic under the terms of a special exception granted in 1993. Prior to that time, the residential dwelling located on the property had been used by the spouse for a professional office; the special exception permitted the expansion of the practice to include an associate. By its own terms, the special exception will automatically expire when the spouse ceases to operate the professional clinic or upon transfer of the ownership of the property.

The county council will soon be considering comprehensive rezoning legislation, during which time the zoning designations of the various geographic areas of the county will be the subject to review and modification by the council. As part of this legislative process, property owners may file applications to rezone their properties. These individual rezonings are often sought to preserve or improve property values in the face of changes to the neighborhood, or to obtain the authority to operate a new business or expand an existing one. These "prefiles", as the applications are called, are reviewed by the Department of Planning and Code Enforcement (PACE), and then by the Planning Advisory Board, which recommends the maps that are sent to the county council for consideration as part to the comprehensive rezoning ordinance. The council can propose amendments to the maps and after public hearings, will vote on the legislation, with whatever amendments to the maps have been added. Regardless of whether the prefiles have been adopted as part of the administration's proposed ordinance, the individual property owners have an opportunity to appear before the county council to pursue their requests. The council may propose amendments to the legislation that will include these rezoning requests.

One of the geographical areas under consideration will be the area in which the council member's commercial property is located. In this area, twenty-four prefiles have been submitted, seeking legislative rezonings. Of these twenty-four prefiles, fourteen of them are for properties in the immediate vicinity of the property owned by the council member. Specifically, these fourteen requests are located along the same road, within one mile, of the council member's property. In every case, the application is for a zoning change from residential (mostly RA, but

in one case R5) to commercial (from C1 to C4).

Discussion:

According to §3-102(a) of the Public Ethics Law, Article 9, Anne Arundel County Code, a council member cannot participate in legislative activity if the member has a "personal interest" in the legislation that "tends to impair the Councilmember's independence of judgment". The law creates a *presumption* of impairment in the following circumstances:

1. the member has a direct interest, distinct from that of the general public, in an enterprise that *would be affected* by the member's vote on proposed legislation; [§3-102(b)(2)(i)]
2. the member benefits financially from a partnership with a person who has a direct interest in an enterprise or interest that *would be affected* by the member's vote on proposed legislation, *differently from other like enterprises or interests*; [§3-102(b)(2)(ii)] or,
3. the member or the member's spouse has an interest that *would be affected* by the member's vote on proposed legislation.¹ [§3-102(b)(2)(iv)]

The first of these presumptions is not applicable in the present case, because the member does not have a "direct interest" in the spouse's professional operation. Although the member may benefit from the spouse's income, the commission does not generally consider the spouse's employment interest to be an interest of the individual employee, absent some evidence of control or other involvement in the employment.

The second and third presumptions may be applicable, if the council member's interest in the real property, or the spouse's interest in the professional enterprise, *would be affected* by the council member's vote on the proposed legislation. In the past, the commission has considered the effect that legislation might have on the financial or fair market value of a council member's property interest or enterprise. See AO-97-42. In that advisory opinion, the specific property

¹ Obviously, some legislation affects the interests of members of the county council in the same ways it affects all county citizens, or large segments of the public. It is not generally required that a council member abstain from participation in legislative activity that affects the member's interests to the same extent and in the same manner as it affects the interests of the public.

was being developed for resale by a council member and was in a neighborhood that was likely to be specifically impacted by the outcome of the legislation. Because of the possibility that the property values would be affected by the outcome of the legislation, the commission advised the council member to abstain from participation. In another opinion, the commission advised a council member to refrain from participating in any legislative activity that would impact the member's business enterprise in the same way as other similar business enterprises, regardless of whether the impact would be favorable or unfavorable. See AO-97-164.

Because the comprehensive rezoning legislation has not yet been introduced, the ethics commission has considered two possible scenarios that may confront the council member with the introduction of the anticipated legislation. In the first scenario, the county council will be considering legislation that recommends the rezoning of an area that includes the council member's property. In that case, the member's property, along with a few others, will be proposed for an upzoning from residential to commercial. Rezoning property from residential to commercial generally increases its fair market value. Under this scenario, the council member's property would be affected, perhaps significantly, by the member's vote on the legislation. If the legislation rezones the property to commercial, the spouse's enterprise may also be affected because it may no longer be required to operate under the constraints of the special exception granted in 1993.

In the second scenario, the member's property will not be part of the recommended rezoning, but adjacent or nearby properties will be proposed for commercial rezoning, either as part of the administration's proposed ordinance or through the council's consideration of individual rezoning requests. Zoning changes to nearby properties would not affect the spouse's business enterprise, which is not dependent on the zoning designation of those properties. However, changes to neighboring properties could affect the resale value of the council member's underlying property interest. A credible argument can be made that residentially zoned property may decrease in value when it is located adjacent or close to commercially zoned property.

Additionally, the member's participation in legislative rezonings of property in such close proximity to the member's own property could create the public perception of a conflict of interest. The ethics law is designed to avoid even the "appearance of improper influence." §3-102(a)(2). Zoning issues deserve particular consideration, according to the Maryland Court of Appeals which has said that:

It is the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest. . . . The modification of zoning regulations. . . whether it be denominated legislative or quasi-judicial, should command the highest public confidence, since zoning restrictions limit a person's free use of his real estate in the interest of the general public good. Anything which tends to weaken public confidence and to undermine the sense of security of individual rights which a citizen is entitled to feel is against public

policy.

Montgomery County Board of Appeals v. Walker, 228 Md. 574, 580-581(1962), citing Mills v. Town Plan and Zoning Commission, 134 A.2d 250 (Conn. 1957).

Conclusion:

The ethics commission advises that the council member cannot participate in the consideration of that portion of the map proposed by the administration, or in any amendments thereto, that would rezone any of the properties adjacent or in close proximity to the council member's own property. Any changes from residential to commercially zoned property in this area could affect the member's own property in a significant way. The member's personal interest in this property creates a presumption of a conflict of interest, under §3-102(b)(2)(iv). However, since the rezoning map for the area will effectively rezone the entire area, and not just the area that may affect the member's interest, the council member may participate and vote on the final version of the comprehensive rezoning ordinance.

Date:

By: the Anne Arundel County Ethics Commission