

## **Anne Arundel County Ethics Commission**

### **Advisory Opinion 00-65**

#### **Issues:**

1. Whether a member of the Agriculture Preservation Advisory Board ( the "board") may apply to participate in the agriculture preservation program of the county.
2. Whether a member of the board may participate in the board's consideration of that member's application to have property designated as an agriculture district or for the sale of an easement to the county.
3. Whether a board member may continue to sit on the board if that member has property that is a designated agriculture district, or that is subject to a county preservation easement.

#### **Background:**

Pursuant to the state's agricultural preservation program, created by statute in 1977, Anne Arundel County adopted its own agricultural and woodlands preservation program by ordinance in 1990. Anne Arundel County Code, Article 24, §2-101, et seq. The purpose of the county program, which is modeled largely after the state program, is to encourage landowners to preserve existing agricultural and woodland properties. Under the program, a landowner with 50 or more contiguous acres of agricultural or woodland property, may apply to the county for the designation of an agriculture district for that property. Once it is so designated, the property may not be subdivided for commercial or residential uses (except for family conveyances) for a period of ten years. In exchange, a county real property tax credit is given to the landowner.

The most significant benefit of an agricultural district is that the owner of a district may apply to sell an easement of the development rights to the county. If the county purchases the easement, (for 60% of its fair market value), the property owner retains title to the property, and must continue to use it for farming or other permitted uses. The county holds the easement in perpetuity, and the owner may only sell the property subject to the easement.

The county has budgeted approximately \$3,000,000 a year for the purchases of these easements, and has annually received a rural legacy grant from the State of Maryland to add to its purchasing power. The county also participates in the state's agricultural preservation program by providing matching funds (the actual ratio is 60% state/ 40% county) for the state's purchase of easements in Anne Arundel County.

In order to sell an easement to the county, a landowner whose property is either in an agricultural district or being considered for designation as an agricultural district, must file an application with the county. The application is ranked according to various criteria, including land capability, purchase price, size, agricultural and open space designations, proximity to agricultural zone boundary, proximity to developed areas and other easements, and the

possibility of "extraordinary opportunity for preservation". If the county makes an offer to purchase, the landowner may enter into a contract for a lump sum payment, or a 30 year installment contract. The contract acknowledges the right of the county to enforce the easement restrictions and to otherwise monitor the operations on that property.

The county's agricultural preservation program is administered by the Agricultural Land Coordinator, an employee of the Department of Planning and Zoning. The coordinator works with the Agricultural Preservation Advisory Board, (the "board"), an advisory board created by ordinance, pursuant to state law. The board consists of five members, including three members who are owner-operators of commercial farms. Each of these three members must derive at least 50 percent of their income from farming. See, Maryland Code, Agriculture Article, Title 2, §2-504.1, and the Anne Arundel County Code, Article 24, §2-201(2).

The board's responsibilities as set forth in §2-202(a) of the county code, are to:

- 1) advise the county concerning the establishment of county agricultural districts and purchases of easements;
- 2) assist the county in reviewing the status of agricultural districts and easements;
- 3) advise the county concerning priorities for agricultural and woodland preservation;
- 4) to promote preservation of agriculture;
- 5) to make recommendations concerning budget and appropriation requests;
- 6) to recommend appropriate delineations of productive agricultural land;
- 7) to recommend procedures concerning the determination of easement values;
- 8) to review and recommend regulations concerning agricultural districts;
- 9) to prepare and review recommendations concerning county policies and programs for agricultural and woodland preservation;
- 10) to seek the advice of and cooperate with the Agricultural Extension Service, and the Soil Conservation District, and state foresters in carrying out their responsibilities; and
- 11) to perform other duties that may be assigned.

By law, and in actual operation, the board is intimately involved in every aspect of the county's agricultural preservation program. It reviews, considers, and votes on every application

for an agricultural district and every easement application that meets the minimum criteria for consideration. The board also monitors existing districts and easements to insure compliance by the owners of all relevant regulations. The board considers and reviews existing county policies, and suggests changes to those policies.

One of the members of the board is a property owner who is interested in having some or all of that property considered for inclusion into the preservation program.

**Discussion:**

Sections 3-101 and 3-105 of the Public Ethics Law are applicable to the issues presented here. Section 3-101(a)(1)(i) prohibits an employee from participating in any non-ministerial matter in which the employee has an interest. Section 3-105 restricts secondary employment.

The county Public Ethics Law establishes minimum standards for the conduct of county officials and employees. An "employee" includes a non-compensated member of a county board or commission. §1-101(f)(1)(ii). Although the agricultural preservation program was initiated pursuant to state law, the county's program was created by county ordinance, and operates independently, albeit cooperatively, with the state's agricultural preservation program. The county's Agricultural Preservation Advisory Board is a county board, and its members are employees of the county, subject to the county ethics law. Under §4-101(a)(77), its members are required to file annual conflict of interest disclosure statements.

Participation by a board member in the consideration of an application for designation as an agricultural district is neither administrative or ministerial in nature. Rather, it is a discretionary duty, requiring thoughtful consideration and the rendering of advice. The other duties of board members are equally discretionary and almost all these duties involve the oversight of the county's agricultural districts and easements.

In general, the ethics commission does not interpret the ethics law to restrict the rights of property owners. Property owners who serve the county should have full rights to use their property in ways that are equally available to others similarly situated. The law only seeks to insure that in exercising those rights, a county employee will not have any advantage over any other property owners similarly situated. Since the law presumes that a county employee cannot be impartial with respect to the employee's own property, the law prohibits that employee from participating in any matter officially, where the employee has a legal or equitable interest. §3-101(a)(1)(i). See, AO-00-49; 00-18; 97-42. At a minimum, if the board member does apply for inclusion in the program, that member cannot participate as a board member, in the consideration of that application. This conclusion is also required by Sections 3-101(a)(2)(i) and (ii), which prohibit participation in a matter where, 1) a party to the matter has a business relationship with the employee; or 2) the employee has a "direct financial interest" in an entity that is a party to the matter. Participation in this case includes any discussion, debate, or vote.<sup>1</sup>

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<sup>1</sup> The Howard County Code, Natural Resources Article, §15.518(g) expressly prohibits a

However, it is by no means certain that a board member may or should apply to participate in the program, while that member serves on the board. For example, a member of the board whose property is in an agriculture district or subject to an easement, or whose application is pending, will be continuously involved in matters that may affect that member's interests.

As it is currently administered, there is little interference by the board in the day to day activities of existing districts or easements. However, the county, with the board's assistance as necessary, may monitor districts and easements to ensure compliance with the terms of the agreements creating those districts and easements. If a board member with an easement is alleged to be violating the terms of the easement, the board may need to take action.

As it is currently administered, county and state funds for the purchase of easements may exceed the easements that are available for purchase. It is quite possible that everybody who applies to sell an easement will be extended an offer by the county. However, there may come a time when the purchasing power of the county is not sufficient to satisfy all the applicants for an easement, and the competition for these contracts may be significant.

In other words, the board has the authority to intimately oversee all aspects of the preservation program, from developing the criteria necessary to participate in the program, to recommending approval of potentially competing applications for districts or easements, to requiring regular inspection and strict monitoring of all district and easement activities. The board may never actively exercise this authority. Funds for these easements may always be plentiful. But the ethics law is designed to prevent county employees from conducting business that may affect their own interests. The law seek to prevent those conflicts from occurring, even if the possibilities for conflict are not particularly imminent.

Section 3-105, regulating secondary employment, is also relevant to this discussion.

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member of the county agricultural land preservation board from participating in any discussion, vote, or recommendation as to a member's own proposed easement, and further only permits a member to apply to sell an easement if authorized to do so by the county council.

Section 3-105(b)(1) states that: "an employee may not be employed by, or have an interest, in any entity subject to the authority of the employee or the authority of the County agency, board, or commission with which the employee is affiliated, or any entity that is negotiating or has entered into a contract with that agency, board, or commission."

In this case, the board member owns commercial farming property from which income is derived. A commercial farm is a "business entity" under §1-101(b) of the ethics law, in which the owner-operator has both an employment relationship and an ownership interest. *See*, State Ethics Commission Advisory Opinion 86-31, COMAR, Title 19A. If that business entity is designated as an agriculture district, or becomes subject to a county easement, that landowner will have an employment relationship with, and an ownership interest in, an entity that has a contract with the county (administered by PACE staff and the board), and is subject to regulation by the board.

In a case involving the Maryland Agricultural Land Preservation Foundation, the State Ethics Commission, in the opinion above-cited, concluded that members of the Foundation Board of Trustees were prohibited from having either a preservation district or easement. The State Ethics Commission said,

The landowner whose property is subject to a preservation easement has a continuing responsibility to comply with restrictions, and also may have certain continuing and reserved rights to develop family residential units. All of these are subject to the substantive scrutiny and monitoring of the Foundation and its staff, which is hired subject to the approval of and reports to the Foundation's Board. Moreover, the Foundation staff indicate that the primary focus of the Board of Trustees' exercise of its discretion is in developing policy in the context of regulatory action and proposed legislation, any of which could impact on landowners with easements. The Board also acts in making decisions regarding exclusions or implementation of particular monitoring or other policies, and defines the ranking criteria that are followed by staff. *Id.* at 1139-1140.<sup>2</sup>

Section 3-105(b)(1) constitutes an absolute bar to participation. It effectively prohibits a person from serving on the board if that person had either an employment relationship, or an ownership interest, in an agriculture district. If that landowner plans to sell, or has sold, the development rights of that district's property to the county (or the state), that owner has an

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<sup>2</sup> The county ethics commission is aware that the state Foundation has more powers than the county advisory board, and that the county preservation staff person is not appointed by the board, or serving at its pleasure. However, the duties of both the Foundation and the county advisory board are similar. Both bodies are involved in developing policy and other matters that resulted in the State Ethics Commission's conclusion.

interest in an entity that is ". . . negotiating or has entered into a contract with that agency, board, or commission. . . "

Section 3-105(d) provides an exemption from this prohibition for any "employee who is appointed to a regulatory or licensing authority pursuant to a requirement that persons subject to the jurisdiction of the authority be represented in appointments to that authority". Assuming, without deciding, that "authority" refers to boards and commissions, the exemption does not apply in the present case. The state statute requires only that three members of the advisory board ". . . shall be owner-operators of commercial farms who earn 50 percent or more of their income from farming". There is no requirement that appointees to the board be owners of agriculture districts or conservation easements that are subject to regulation by the board.

It may well be that the intention of the legislature is to encourage owners of property that are part of an agriculture district or that are subject to conservation easements to serve on the Agriculture Preservation Advisory Board. Board members who are participants in the program may be a better position to actively promote the benefits of the program and to set an example for other landowners. However, under the ethics law, it is simply not permitted. It is up to the legislature to amend the Agricultural Land Preservation ordinance to expressly permit the type of activity that the ethics law prohibits. In fact, after the opinion of the State Ethics Commission was rendered, the state legislature did amend the law to permit service on the Foundation, "even if prior to the appointment the person sold an easement in the person's agricultural land to the Foundation." Agriculture Article, §2-503(a)(3).

### **Conclusion:**

The ethics commission advises that the Public Ethics Law, §3-105(b)(1) prohibits a board member from participating in the district or easement opportunities available through the county's agricultural and woodlands preservation program. Although technically, a member of the board may apply for inclusion of that member's property into the program, the member may not participate in an official way, in the application process, under the prohibitions of §3-101(a). Once the property is accepted as a district, or the offer of purchase of an easement is made, the member is prohibited from continuing to serve on the board, under §3-105(b)(1) of the Public Ethics Law. In effect, a member of the board must choose whether to continuing serving on the board or whether to resign from the board in order to participate in the county's preservation program.

Date: June 12, 2000

By: the Anne Arundel County Ethics Commission