

Anne Arundel County Ethics Commission

Advisory Opinion

00-9

Issue:

Whether a member of the County Board of Appeals may serve on a committee for the Severn River Land Trust, to develop and oversee a management plan for a conservation easement deeded to the Trust on property acquired by Anne Arundel County for that purpose.

Background:

The Severn River Land Trust (SRLT) is a private nonprofit entity committed to preserving the natural areas of the Severn River watershed. According to its website (www.srlt.org), the goals of the entity are:

- to identify and monitor natural areas of the Severn River watershed
- to educate landowners, community leaders, and public officials
- to help guide land use decisions and offer conservation options
- to assist in the stewardship of natural resources

As part of its goals, the SRLT acquires conservation easements which restrict the use and future development of the property in the easement. An easement deeded to the SRLT is a legally enforceable agreement.

The SRLT recently acquired an easement on property that was purchased for that purpose, through a partnership involving the Maryland Environmental Trust, the state's Program Open Space, and Anne Arundel County. The county holds the title to the property, subject to the easement. In order to develop a management plan, the SRLT and the county have created a committee, chaired by the director of the county department of recreation and parks. The members include county citizens, several county employees, a private attorney with a significant practice before the County Board of Appeals, and a member of the board of appeals. This committee will establish the uses of the property, and will manage the property.

The board of appeals member who has been appointed to this committee participated in environmental and community activities involving the Severn River watershed for a long time prior to his appointment to the board of appeals.

Discussion:

A member of the County Board of Appeals (the "board") is an employee subject to the Public Ethics Law. §1-101(f)(1)(ii). The applicable provision of the Public Ethics Law is §3-

105, which prohibits employees from engaging in certain types of secondary employment and other activities.

Section 3-105(c) prohibits an employee from representing or assisting an entity in any matter in which the county has an interest, except in the course of the employee's official duties. (In this instance, no official duty is involved in the committee membership). The ethics commission has interpreted this prohibition to apply only to activities where there are potentially competing or adversarial interests between the county and the entity being assisted or represented by the employee. In this case, the management committee for Brewer's Pond is not competing with, or representing adversarial interests to the county; it is acting on behalf of the county in its role as manager of the easement. Without any factors indicating a contrary interest between the county and the committee, §3-105(c)(1) would not prohibit the board member's assistance to the committee.

Section 3-105(b)(1) prohibits any employment relationship that "would impair the impartiality or independent judgment of the employee." The ethics commission has consistently concluded that membership on the *board of directors* of a private non profit entity creates a fiduciary duty toward that entity, to support and further its goals. See, AO-99-197. It is the fiduciary duty that establishes the employment relationship with the private entity, regardless of whether compensation is paid. Because of this relationship, the ethics commission has also advised that §3-105(b)(2) would generally prohibit a county employee from serving on the board of directors of any entity espousing goals that may conflict with the goals of the employee's agency. The SRLT potentially could have goals that would fit this description.

On the other hand, rank and file members of entities do not have the same degree of fiduciary obligation toward the entity that is owed by a member of the board of directors. Membership in an organization does not require that the member agree with the entity's goals, or that the member act to further those goals. There is simply no duty or loyalty owed, that would give rise to an "employment relationship" within the meaning of the ethics law. For that reason, a county employee would not be prohibited from joining an organization that has goals that may conflict with the county's interests at times.

Membership on a committee of an entity falls someplace in the middle, between simple membership, and membership on the policy-making and managerial board of the entity. In some cases, the type of committee on which service is performed may create a fiduciary responsibility, and in other cases, the service will be less obligatory in nature.

In this particular case, the board member will be serving on an SRLT committee that is limited in scope to concerns about Brewer's Pond. The pond is now part of an easement, and is not subject to further development. The easement will present no issues before the board of appeals. The members of the committee are not obligated to take a position with regard to other SRLT goals or activities. There is no indicia of an employment relationship, and no factors which would indicate that participation on this committee would impair the impartiality or independent judgment of the board member. For this reason, the board member's involvement

with this committee would not constitute secondary employment within the meaning of §3-105(b)(2).

Section 3-105(b)(1) prohibits secondary employment with any entity that is subject to the authority of the employee or the board. Even if membership on this committee constituted "employment", there is no indication that the SRLT has ever been a party or witness to any proceeding before the board. Its goals do not include the rezoning of property or any other activities that would involve the board. Since the SLRT is not subject to the board's authority, the prohibitions of §3-105(b)(1) would not apply to this situation.

The commission notes that the board member participated in environmental and community services involving the Severn River watershed for many years before the member was appointed to the board. The committee appointment no doubt stems from the previous interest and activities and does not trigger the prestige of office provisions of §3-104(a) of the ethics law.

Conclusion:

The ethics commission advises that membership on the SRLT's management committee for the Brewer's Pond conservation easement does not constitute prohibited secondary employment. A member of the County Board of Appeals may sit on this committee without violating §3-105. However, the board member should not participate in any appeal before the board of appeals where property in the neighborhood of Brewer's Pond may be affected. Although this participation may not technically constitute a prohibited interest under §3-101 of the ethics law, there would certainly be an appearance of a conflict of interest that should be avoided. Further, the ethics commission advises that if the SRLT engages in lobbying the county, or becomes actively involved in any land issues that may be appealed to the board or that may conflict with the county's interests, the member should resign from the committee.

Date:

By: the Anne Arundel County Ethics Commission