

June 11, 2003

Re: IO-03-55

You inquired whether an employee of the department of recreation and parks may sell the development rights in that employee's property to the county as part of the county's agricultural and woodland preservation program. The ethics commission advises that the employee may participate in the program

The county's agricultural preservation program was created by ordinance in 1990, (Anne Arundel County Code, Article 24, §2-101, et seq.). It was modeled after the state's agricultural preservation program, created by statute in 1977. The purpose of the county 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 employee who is the subject of this inquiry owns property that has already been designated as an agricultural district in the state's program.

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, although the proposed budget for the upcoming fiscal year provides only 1.5 million dollars for the program. 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. Because of the potentially limited pool of funds, each 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". It should be noted that the currently pending applications, including the application of the subject employee, were not ranked because it is anticipated that there are sufficient funds to purchase the easements on all four properties.

If the county makes an offer to purchase, the landowner enters into an installment contract for approximately 25 years, with a lump sum payment at the end of the term. The interest payments made to the land owner are tax deductible and the capital gains are deferred until after the lump sum payment is made. The contract acknowledges the right of the county to enforce the easement restrictions and to otherwise monitor the operations on that property.

The preservation ordinance gives the regulatory authority over the program to the planning and zoning office. The planning and zoning *officer reviews* and signs all documents, including the offer letters to successful easement applicants. On a day to day basis however, the program is administered by the Agricultural Land Coordinator, with the assistance of the Agricultural Preservation Board. The coordinator, originally an employee of the office of planning and zoning, is now an employee of the department of recreation and parks. The coordinator's duties include:

1. assisting each landowner applicant in completing the petition to have the property included in a district;
2. reviewing each petition to determine if the land meets the criteria for inclusion in a district, and if there are any illegal lots on the property;
3. accepting and processing the application of a district owner to sell an easement;
4. deter whether the application is complete, meeting with the applicant, and determining if the land is eligible for purchase, either through the state program or through the county program;
5. communicating with the landowner on the progress of the application;
6. ordering the title work and appraisal of each applicant's property;
7. annually reviewing the ratio upon which the purchase price of each easement is based and recommending, along with the ag land board, any proposed changes to the planning and

- zoning officer; and
8. promoting and marketing the program within the county.

The coordinator works in the "parks" side of the department of recreation and parks. The employee who has applied to sell a preservation easement to the county is the recreation administrator, working on the "recreation" side of the department. The employee is not involved in any way in the administration of the preservation program.

Discussion:

The ethics issue arises under §3-105(b)(1) which provides that, "an employee may not be employed by, or have an interest, in an 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 AO-00-65, the ethics commission concluded that,

[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.

The office of planning and zoning (formerly PACE), still has regulatory authority over the agricultural preservation program, but the department of recreation and parks is involved in the regulation of the program as well. These agencies monitor the property owners' compliance with the all the regulations and conditions of the program and engage in periodic site visits.

The employee's contract in this case would be with the county, but would involve both the planning and zoning office and the department of recreation and parks, the employee's own agency. Contracting with one own's agency is prohibited by the ethics law, §3-i05(b)(1).

The state ethics commission has dealt with this issue under its similar law on at least two occasions. In Opinion 90-3, the commission considered the propriety of participation in the state's agricultural preservation and other agriculture programs by an employee of the department of agricultural. In concluding that the employee could participate in the program, the commission found that the employee's job did not involve any responsibility for activities relating to the agricultural preservation program. The commission balanced the importance of discouraging the practice of having "grantees and regulatees on agency payrolls" with the importance of permitting employees to participate in "programs that are intended to be available to the public."

In Opinion 97-09, the ethics commission advised that an area coordinator in the agriculture department could not enter into a land preservation easement agreement with his agency. In this case, the employee's job involved substantial supervision over employees in the soil conservation district offices. Soil conservation district offices play an important role in the application and monitoring processes of the agricultural preservation programs.

In the present case, the property was designated an agricultural district in the state's program 24 years ago. It will probably be converted into a county agricultural district during the process of contracting over the easement. It has only been about two years since the department of recreation and parks became involved in the agricultural land preservation program - prior to this change, the office of planning and zoning had exclusive jurisdiction over property in the county's preservation program. Had the employee sought to sell the easement to this property prior to the program's incorporation into the department of recreation and parks, there would have been no ethics law issue at all.

Section 3-105(b) is a blanket prohibition against contracting with one's own agency. There is not statutory exception to this provision. However, this ethics commission has advised that an exception should be permitted in at least one instance. In AO-OI-41, the commission advised that an employee could engage in secondary employment with an entity that contracted with the employee's agency. The commission determined that it may exercise discretion to make exceptions to

§3-105(b) where there exists only a very remote possibility of a conflict of interest occurring as a result of the employment.

The situation presented by this inquiry is another example of the need for an exception to the prohibition against contracting with one's own agency. The designation of this property as a district preceded the employee's agency's involvement in the program. The criteria for determining eligibility for participation in the easement program are numerous and objective in nature. There are several individuals and groups that judge the eligibility of this property before an offer to purchase the easement is made. The department of recreation and parks, the agricultural preservation board, the office of planning and zoning, and the soil conservation district will all have input into this decision. There are enough funds available to purchase all the easements for which applications are currently outstanding. The recreation and parks employee who has applied to sell this easement does not participate in the administration or management of this program in the recreation and parks department. This program is open to the public and the county's goal is to encourage as much agricultural land preservation as is economically feasible.

For these reasons, the ethics commission has concluded that in this case, it will grant an exemption to the prohibition against contracting with one's agency. Therefore, the recreation and parks employee may pursue the sale of the property's development rights to the county.

Sincerely,

Betsy K. Dawson
Executive Director