



**ANNE ARUNDEL COUNTY
ETHICS COMMISSION**

December 15, 2009

By Electronic Mail Only

Re: AO-09-79

As a member of the county council, you inquired whether you may participate in the council's appointment of a new, interim council member to fill the vacancy left by another member who resigned mid-term.¹ Among the first issues facing the new appointee will be zoning legislation that will permit the location of video lottery facilities ("slots") in specific locations in the county. The question of your participation arises because you recused yourself from participating in this same legislation. For the reasons set forth in this opinion, the ethics commission advises you that the law does not require you to recuse yourself from participating in the appointment of an interim council member.

The ethics law at issue in this inquiry is §7-5-110(c)(2) which creates a presumption of a conflict of interest where a council member,

[benefits] financially from a close economic association with a person whom the Councilmember knows has an interest in an enterprise or [an] interest which would be affected by the Councilmember's participation in legislative action, differently from other like enterprises or interests.

You have stated that as an attorney, you engage in occasional legal work with or for a person ("A") whom, in concert with others, has expressed an interest in bidding at auction on one of the two properties that is involved in the zoning legislation as a possible location for a slots facility. Since you do therefore, benefit from a close economic association with A, you concluded that your participation in a vote on the zoning legislation could create the appearance of partiality on your part. You made this decision on your own, as it is your right to do.

The findings of the county council, as set forth in §7-1-102(a)(2) of the ethics law, include a statement that the confidence and trust of the people in the impartiality and independent judgment of county officials "is eroded when the conduct of the County's business is subject to improper influence or *even the appearance of improper influence.*"

¹ The Anne Arundel County Charter, [§205](#), requires the remaining council members to fill a vacancy by appointment until the next election.

(*Emphasis added.*) The duty- or in this case, the right - of a public official to make the decision to recuse has been validated by the Court of Appeals, even when the recusal is not absolutely required by law:

Influences which could affect the mind of one in a position of public trust are so subtle and difficult to appreciate, that in the end our decision must be guided by the general principle that no public officer who has a personal or pecuniary interest, direct or indirect, in the outcome of a case should participate in that matter. *Montgomery County Bd. of Appeals v. Walker*, 228 Md. 574, 580 (1962)

In short, your decision to abstain from participating in the slots zoning legislation was your decision to make and one with which the ethics commission has no quarrel.

[I]t is clear that when one accepts a public office, he assumes the responsibility of performing the duties imposed with complete fidelity, and public policy requires that personal or pecuniary interests that would constitute a possible factor of influence in regard to his official actions should be nonexistent. *Montgomery County Bd. of Appeals v. Walker* at 580.

While the ethics commission has on occasion advised an employee to abstain from official participation in a matter based upon the appearance of a conflict of interest,² its first obligation is to consider whether the law *requires* abstention in a particular case.

In this case, the ethics commission had concluded that it does not. Although “A” has expressed an interest in purchasing a specific property for development of a slots facility, A does not have a present legal or economic interest in that property. The law does not presume a conflict if A is merely interested in slots; a conflict would be presumed only if A had an actual legal or equitable interest. See, [AO-02-151](#). Even if A does bid on the property - a possibility that while likely is not certain - it is by no means certain that A’s bid will be successful.³ Even if the bid is successful, it is by no means certain that A will be able to develop a slots facility on the property. There may be legal issues that first must be resolved as to A’s legal right to have an interest in a slots facility. Even if A may hold an interest in a slots facility, the state’s Video Lottery Facilities Location Commission must still determine whether to award a slots license to this location or to A.

² See, e.g., [AO-08-07](#), [AO-07-67](#), [AO-07-02](#). The ethics commission relies upon the standard applied by the Court of Appeals in determining the appearance of a conflict of interest, namely, that “[T]he test to be applied is an objective one which assumes that a reasonable person *knows and understands all the relevant facts....*” *Jefferson-El v. State*, 330 Md. 99, 108, (1993).

³ According to The Baltimore Sun, in an online article dated, December 14, 2009 at 12:02 EST, there are six groups who put in bids on the racetrack property by the deadline.

For these reasons, the ethics commission has concluded that the ethics law did not require you to abstain from participating in the slots zoning legislation. It follows that the commission cannot therefore conclude that you are required to abstain from selecting a new council member who will be voting on the same legislation.

Notably, all the applicants have expressed varying degrees of support for the location of slots in the county, with some indicating a preference for one location over another. This expression does not guarantee a specific outcome. A vote cannot be counted until it is cast and until it is cast, it can be changed.

Of equal importance is the fact that the pending slots legislation is only one matter to be faced by the new county council appointee. While it is an important and controversial one, the appointment of a new council member will presumably be based upon a number of factors, as evidenced by the extensive [questionnaire](#) that the current council required the applicants to submit as part of the application process.

For these reasons, the ethics commission⁴ advises that you are not required by law to recuse yourself from participating in the appointment of a new council member. The commission also concludes that any appearance of a conflict of interest created by your participation in this appointment is so speculative and attenuated as to be unreasonable. In the absence of a conflict of interest or even the reasonable appearance of a conflict of interest, the ethics commission will not advise you to recuse yourself from participating in the selection process. The decision to participate or to abstain must rest with you.

The Anne Arundel County Ethics Commission

/s/

By: _____
Betsy K. Dawson, Executive Director

⁴ Ethics commission member, Richard L. Hillman, did not participate in the review, consideration or deliberation of this inquiry. Mr. Hillman's wife is one of the applicants for the county council position. Upon her decision to apply for the position, Mr. Hillman withdrew from all ethics commission business pending the outcome of the selection process.