



Queen
Anne's
County

The Liberty Building
107 North Liberty Street
Centreville, Maryland 21617

Telephone 410-758-4406
Facsimile 410-758-6913

The Ethics Commission
Robert Mueller, Esquire, Chairman
Kendall Ruffatto, Esquire
Reverend Nanese A. Hawthorne
Benjamin C. Tilghman, Jr.
Harold O. Wilson

Tina Miles, Clerk
Lynn Knight, Attorney

Queen Anne's County Ethics Commission

Opinion in Complaint No. 10-01

This complaint was filed with the Queen Anne's County Ethics Commission ("Commission") under Section 8-10.G. of the Queen Anne's County Public Ethics Law ("Ethics Law") against a member ("Respondent") of the Queen Anne's County Planning Commission ("QACPC"). The complaint alleges that Respondent's historical and current real estate activities in Queen Anne's County present actual and/or apparent conflicts of interest with his service on the QACPC.

After determining that the complaint was not plainly frivolous or legally insufficient, in accordance with Section 8-10.G (3), Ethics Law, the Commission promptly acknowledged the complaint and notified Respondent of the complaint and of Respondent's rights to respond and to counsel. *Id.* The Commission granted Respondent's request for an extension of time to obtain counsel and file a response. Thereafter Respondent's response was received on April 1, 2010.

Upon further review of the complaint as well as the response thereto, the Commission engaged Hogan Lovells US LLP ("Hogan Lovells"), *pro bono*, to conduct an independent investigation. *See* Section 8-10.G(4)(b), Ethics Law. Following receipt of the Investigative Memorandum and dissemination to Complainants and Respondent, the Commission decided to order a closed hearing on the complaint, to be held on November 15, 2010. *See* Section 8-10.G(4)(c)[3], Ethics Law. The hearing was attended by Complainants, Respondent, counsel for Respondent, members of the investigative team and two witnesses subpoenaed by the Commission. *See* Section 8-10.H., Ethics Law. At the hearing, the investigation was summarized, all witnesses testified under oath, and counsel for Respondent was provided the opportunity to examine the witnesses called by the Commission and to call his own witnesses.

Based upon the evidence presented in that hearing, the Investigative Memorandum, the findings of fact and conclusions of law set forth below, and the reasoning explained in this opinion, the Commission concludes, by a preponderance of the evidence, *see* Section 8-10.H(2), that Respondent's and his immediate family members' financial interests in certain business entities whose activities include residential and commercial real estate brokering, consulting, development and

construction projects, and investments that implicate the jurisdiction and responsibility of the QACPC, present actual and apparent conflicts of interest in violation of Section 8-11.A (1) (2) and (7), Ethics Law. The necessary and appropriate remedies for these conflicts will be set forth in detail in the Commission's Order at the conclusion of this opinion. See Section 8-10.H(3) and 8-16, Ethics Law.

Factual Background

Respondent's family has been involved in a variety of real estate business ventures in Queen Anne's County for several decades. Members of Respondent's family and related business entities have been involved in the past with several fairly significant development projects in the County. Changes in local land-use law and capacity strains on public infrastructure in recent years have substantially reduced – possibly even virtually eliminated -- the viability of pursuing developments of a meaningful size as a relatively smaller local developer. Respondent considers himself to be primarily a real estate broker, farmer, and occasional small-scale builder or developer. He views his service on the QACPC as a public service, and his personal and professional experience as an asset to that service.

Respondent and other members of his family conduct, or have conducted, their vertically integrated real estate activities in the County through several business entities. Four of those entities remain currently active: A real estate brokerage company founded by his father several decades ago of which Respondent is currently the President and 50% owner and his parents each owns 25%; a family limited partnership formed by his parents as part of their estate planning, in which the parents together hold a 60% interest and each of their four children (including Respondent) holds a 10% interest (additionally relevant, Respondent holds a Power of Attorney "to handle, perform, conduct and manage all [the] estate, property, and affairs" of his father should his mother be unwilling or unable to do so); a corporation formed by Respondent's father through which he conducts his own personal business activities, including some property ownership, development and mortgage lending; and a living trust created by Respondent and his wife as an estate planning tool which currently owns two properties of reasonably significant size.

There are approximately 45 parcels in Queen Anne's County currently owned by Respondent, his wife, his parents or one of the entities described above. The vast majority of these properties currently are not susceptible to further development in any manner that would necessitate review or direct involvement by the QACPC. Even so, as to certain of these properties, land-use matters may well come before the QACPC in the context of other, unrelated properties of different ownership, in which the decisions of the QACPC reasonably could be predicted to affect the value of Respondent's properties.

There are, however, two groups of relevant properties that will continue to be directly within the scope of discussion and review by the QACPC.

One group is comprised of three separate parcels owned by the family limited partnership in which Respondent currently holds a 10% interest. The potential development of these parcels has been a significant and divisive topic of discussion within the County for the last fifteen years. The relevant growth and annexation area has been identified within the County Comprehensive Plan for mixed use commercial development for years. The properties have one perk test, and therefore cannot be developed without securing access to water and sewer services. Repeated efforts by Respondent's father to pursue annexation by Queenstown so far have been frustrated by

this and other infrastructure issues, but there is no indication that the intention to accomplish development of these parcels through annexation has waned. Respondent has recused himself from two joint sessions of the Queenstown Planning Commission and the QACPC, as well as two other instances in which the Queenstown plan came up before the QACPC. In the hearing before this Commission, Respondent informed the Commission through counsel that he has and will continue to recuse himself from ALL matters coming before the QACPC relating to the Queenstown plan.

The other group is comprised of twenty properties collectively owned by Respondent or his family members or business entities in an area where the County is actively considering the possibility of extending sewer and water service. While many of the decisions associated with the proposal have already been made, there are related issues, including potential amendments to the County Sewer and Water Plan and potential zoning amendments, which could come before the QACPC. In the hearing before this Commission, Respondent informed the Commission through counsel that he will recuse himself from sewer and water matters relating to this area of the County that would come before the QACPC. He made no mention in the hearing of his inclination as to possible recusal in other matters that might come before the QACPC that could directly affect the value of these investment properties.

Relevant Principles of Law

Section 8-11.A(1) of the Ethics Law broadly prohibits county officials, board and commission members, and employees from “[a]cting on behalf of the County in any matter that would, to their knowledge, have a direct financial impact, as distinguished from the public generally, on them or a family member, or on a business entity in which they or a family member have an interest.” Section 8-11.A(2) prohibits the same individuals from “[b]eing employed by or having a financial interest in an entity that is: (a) Subject to the authority of that official or employee or of the governmental unit with which the official or employee is affiliated; or (b) Doing business with that official or employee or with the governmental unit with which the official or employee is affiliated.” Finally, Section 8-11.A(7) prohibits the same individuals from “[i]ntentionally using the prestige of their office, or confidential information acquired in their official County position, for their own private gain or that of another.”

The Ethics Law prohibits not only the fact of a conflict of interest but also the appearance of a conflict of interest. Section 8-4.B. This Commission has articulated the standard for an “appearance” of a conflict of interest to be whether an informed member of the public could reasonably believe that there is a conflict of interest. Such an informed member of the public would be reasonably aware of facts and circumstances that could reasonably cause him to believe that there is an actual conflict of interest or a potential conflict of interest.

Conclusions of Law and Analysis

Section 8-11.A(1), Ethics Law. Respondent's interests in the two groups of properties described above present both actual and apparent conflicts of interest to his service on the QACPC. With regard to the first group, those properties are capable of, and Respondent's family continues to actively pursue, further commercial development that would implicate issues within the scope of the QACPC's authority, whether in the context of the Queenstown Plan or in some other context. In the second group of properties, Respondent personally owns seven properties, his wife owns another four, and the real estate brokerage in which Respondent holds a 50% interest owns another three. Additionally, Respondent's parents and an entity owned and controlled by them own six properties in the area. These properties were acquired as investments, speculating that the County would eventually run sewer and water service to the area. Should any discussion of any of these properties in these two groups come before the QACPC, it would present an actual and/or apparent conflict of interest for Respondent. *See* Section 8-11A(1), Ethics Law.

Respondent contended during the investigation as well as in the hearing before this Commission that nothing distinguishes him in the context of these properties from any other property owner in the area. We disagree. Ownership of twenty properties acquired and maintained as undeveloped investment lots, admittedly in speculation upon the very issue of whether the County will provide sewer, is meaningfully distinct for these purposes from ownership of, for example, a single built-out parcel maintained as the owner's residence. The nature of his property ownership in the area demonstrably distinguishes him from that individual owner by imbuing him with dramatically multiplied *financial* interests in the very questions of if, when, and how the County should extend sewer and water service – different in both type and scope. *See* Ethics Com'n Opn. On Complaint No. 10-2.

This Commission's concern as to these two groups of properties, however, is not limited to matters coming before the QACPC that specifically and directly relate to and involve these properties. As well, as to both of these groups of properties, other, more general, land-use questions might well come before the QACPC in the ordinary course of its doing business, which might reasonably be seen by an informed member of the public to directly financially impact the investment value of these properties for Respondent and his immediate family, as distinguished from the financial impact on the public generally. *See id.*

As mentioned earlier, Respondent has asserted to this Commission that he has recused himself, and will continue to recuse himself, from all matters before the QACPC involving the Queenstown plan, and he has submitted a willingness to recuse himself from all water and sewer issues that may come before the QACPC relating to the second group of properties. These are critical first steps. Additionally, however, if recusal is to be an adequate remedy, it is imperative that Respondent remains constantly vigilant and sensitive to both the actual and apparent conflicts of interest as to these groups of

properties that may be inherent in ANY particular land-use question that comes before the QACPC.

Section 8-11.A(2), Ethics Law. Complainants argue that 8-11.A(2) sets forth an absolute prohibition against service on the QACPC by an individual who holds a financial interest in an entity that is subject to the authority of the QACPC. This argument begs the question of what it means to be “subject to the authority” of the QACPC, and we do not need to address that question here. Apart from that lingering issue, we do not agree with Complainant’s contention regarding the nature of the available remedy for a violation of this section. Consistent with fundamental principles of statutory and regulatory construction, this provision should be construed in the context of the whole statute, and with common sense and logic as to the statute’s purpose. Each member of the QACPC is expected to bring his own experiences, beliefs and philosophies to inform their service. *See* Opn. On Complaint No. 10-2, *supra*. On its face, there is no sensible reason to construe the language of this provision to be any more restrictive than the language of other provisions in this section regarding the availability of accommodating remedies. To that end, it would be unreasonable and illogical to construe this provision to disqualify every developer, *carte blanche*, from service on the QACPC without looking at the extent and nature of the holdings and the reasonably foreseeable actual or apparent conflicts of interest. *See generally id.* (Ethics Law does not proscribe bias or strong personal views and, in some instances, officials actually are expected to act according to their stated pre-existing views; rather, focus of the Ethics Law is on *money* – financial gain flowing from a conflict of interest with the County position).

What we wrote, above, as to the scope of necessary recusal actions regarding Section 8-11.A(1) applies with equal force to violations of this section. This Commission has recognized that in a relatively sparsely populated county such as Queen Anne’s, it is often difficult to attract qualified members for various commissions and boards. This occasionally results in situations where, at first look, there is a significant potential for conflicts of interest such as plumbers serving on the Plumbing Board. In these situations members of the various boards and commissions, who are appointed specifically because of their knowledge of the business, are expected to understand and embrace the spirit as well as the letter of the Ethics Law, and to recuse themselves from any specific situations that would result in an appearance of, or actual, conflict. *Cf.* State Ethics Commission official guidance in COMAR 19A.04.02.04(C) (effectiveness, particularly in smaller local government areas, of strong disclosure and disqualification standards); State Ethics Commission Advisory Opn. No. 80-19 (no conflict where individual serving on a tax assessment appeals board had an interest in a partnership that owned a trailer park that would be subject to the board’s authority, but partnership was not expected to take any actions that would require attention from the board – no automatic disqualification).

Were this the case here, the remedy would be straightforward. However, the basis of the complaint is that the Respondent’s personal holdings and those of his family members, as defined in Section 8-6 of the Ethics Law, are so pervasive that any decision regarding real estate, development, or construction has the potential for financial impact

on the Respondent or his family members -- which is far more significant than the impact on the average citizen of Queen Anne's County. See Section 8-11.A(1), Ethics Law.

In the case of this complaint, as discussed earlier, Respondent's and his family's holdings in a location requiring sewer service are a clear example where the ownership of one lot would not necessarily require recusal, but ownership in twenty would. Respondent's contention that his property rights in this regard are exactly the same as those of any other citizen is beside the point. Without finely parsing the nature of Respondent's general "property rights", suffice to say that we are unaware of any legal principle that devolves upon Respondent or any other citizen a property right and, at the same time, a "right" of some nature to sit and actively participate on a governmental body that has the authority and responsibility to make decisions that could substantially impact the value of that property right. The scale of Respondent's property ownership in the area, as well as that of other family members, dramatically multiplies the financial interests and, thus, is meaningfully distinct from someone owning a single built-out parcel as a residence

Section 8-11.A(7), Ethics Law. The foregoing discussion and analysis ineluctably leads to a conclusion that the circumstances described in this opinion provide an informed member of the public ample basis to reasonably believe that Respondent could use his office on the QACPC or confidential information acquired from that office for his own private gain or that of another. This appearance of a conflict of interest can be cured by recusal only if that remedy is invoked by Respondent in a generous fashion to any situation in which an informed member of the public could reasonably reach this conclusion -- whether or not Respondent himself believes the conclusion is reasonable.

Remedy

In recognition of the need for citizens possessing technical knowledge to serve on the Planning Commission, the Ethics Commission cautiously agrees that, with a rigorous application of the Ethics Law to each decision in which Respondent participates and recusal where appropriate to prevent the appearance of, or actual, conflict of interest, Respondent may continue to serve on the Planning Commission. *But cf.* Advisory Opinion of January 29, 2010. The Commission is not entirely sanguine that this rigorous application of recusal actually will consistently occur, based upon Respondent's posture on various matters during the investigative and hearing processes. While ultimately agreeing to the propriety of recusal in certain instances, his agreement was more limited than we now find will be necessary and also, in our opinion, seemed to be marked by a certain level of reluctance.

In the end, it is Respondent's responsibility, and his alone, to grapple with whether any matter brought before the Planning Commission would affect his financial interests or those of his family members, or whether an informed member of the public reasonably could believe the matter would have such an effect. His responsibility in this regard is no different from that of any member of any County board or commission.

However, if he is to avoid the quagmire of possible conflicts of interest that may arise in the future under factual contexts that we cannot know now, it will be important for Respondent to grasp that, while his responsibility to avoid these conflicts is no different from others', the uncommon scope and nature of his personal and family business enterprises present a challenge to him that others may not confront.

Order

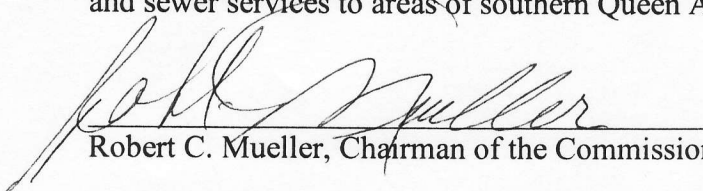
On the basis of the preceding findings of fact and conclusions of law and the ensuing analysis, it is hereby

ORDERED:

That Respondent shall cease and desist, by recusing himself, from any discussion, decision, or any other activity on any other matter before the Queen Anne's County Planning Commission, the decision on which will have, or reasonably could be believed by an informed member of the public to have, a direct financial impact, as distinguished from the public generally, on Respondent or a member of his family or on a business entity in which he or a member of his family has an interest, *see* Section 8-11.A(1), Ethics Law; or in which an informed member of the public reasonably could believe that Respondent used the prestige of his office on the Planning Commission or confidential information acquired by virtue of his office on the Planning Commission for his own private gain or that of another, *see* Section 8-11.A(7), Ethics Law. Section 8-16.A., Ethics Law.

That Respondent shall cease and desist in any activity as a member of the Queen Anne's County Planning Commission that relates to the Queenstown Comprehensive Plan; and

That Respondent shall cease and desist in any activity as a member of the Queen Anne's County Planning Commission that relates to the issue of extending County water and sewer services to areas of southern Queen Anne's County along Route 8.


Robert C. Mueller, Chairman of the Commission

December 6, 2010
Date