



Rushern L. Baker
County Executive

Robin Barnes-Shell
Executive Director

THE PRINCE GEORGE'S COUNTY GOVERNMENT BOARD OF ETHICS

The Honorable Covette Rooney, Chair
Cassandra Burckhalter, Member
Curtis Eugene, Member
Anne Magner, Esq., Member
Sharon Theodore-Lewis, Esq., Member

BOARD ADVISORY OPINION

October 19, 2016

Case# AO-17-0021

The Board of Ethics received an inquiry¹ regarding potential ethical issues with individuals seeking to do business with Prince George's County, Maryland ("County") who are also appointed to represent the public interest in zoning matters. Specifically, whether there is a conflict of interest when a County Official's private business entity is seeking to do business with the County.

Correspondence was sent to Rushern L. Baker, III, the County Executive of Prince George's County ("County Executive") and Derrick L. Davis, the Chair of the County Council ("Chair"), requesting a \$5 million loan from the Economic Development Incentive Fund ("EDI Fund") for their company, hereinafter referred to as HBV. HBV is a private business that is organized in the State of Maryland². A County Official is the general counsel and managing member of HBV. The business is a minority business enterprise ("MBE") that is based within the County.

In the correspondence the County Official explained they were seeking the loan from the EDI Fund because MGM National Harbor ("MGM") "publically announced the Aspire Holdings, LLC investment program to offer equity participation to County residents and/or Prince George's County MBEs...." MBEs or County residents could purchase LLC units from Aspire Holdings LLC prior to September 2, 2016. However, one requirement is the MBEs or County residents must pay twenty-five (25%) of the total investment prior to September 2nd. The County Official and HBV intended to purchase "\$5 million of the Class A-2 LLC units of Aspire Holdings, LLC."³ The \$5 million dollar investment would require a \$ 1.25 million deposit by September 2, 2016.

The County Executive and the Chair wrote a joint letter in response to the County Official's request on behalf of themselves and HBV for \$5 million. The letter stated that the request did not meet with the statutory and stated requirements of the EDI Fund, to expand the County's

¹ The identity of the requestor of an Ethics opinion remains confidential and cannot be disclosed without the consent of the requestor.

² Maryland Department of Assessments and Taxation states that the business was formed in the State and is in good standing.

³ The \$5 million investment would allow HBV to obtain 12.5% equity ownership in the Aspire Holdings, LLC investment program for the MGM National Harbor Casino.

commercial tax base and create new jobs. The loan would appear to solely “benefit HBV and its investors but few others.” The joint letter further stated that even if there were no legal impediments to the loan request, the Economic Development Corporation (EDC) and FSC First would have to determine and approve that the proposed use of the funds would expand and strengthen opportunities for County residents. Based upon the August 1st correspondence and application, the purpose would solely benefit HBV and the “County would assume 100% of the risk of this investment and receive none of the reward.”

Subsequently, the Board received this request regarding an ethics opinion. Specifically, the request stated, “[A]t issue is whether the exercise of the duties of [the County Official’s] new position with HBV, which is seeking to do business with the County, legally conflicts, or has the potential or appearance of a conflict, with the duties of [the County Official’s] long held County position.”

The Board of Ethics has determined that the County’s conflict of interest and improper influence laws are implicated and that the activity is prohibited under the Prince George’s County Ethics Code. Therefore, the County Official should not do business with the County while still employed with the County.

The Prince George’s County Charter

The People’s Zoning Counsel is defined in the Prince George’s County Charter and Prince George’s County Code. The Prince George’s County Charter (“Charter”) Section 712 states:

The County Executive shall appoint one or more attorneys, who are members of the bar of Maryland and are experienced in zoning law and procedure, to serve as People’s Zoning Counsel. Their compensation shall be contained in the annual budget, and they shall be provided such clerical and other assistance as may be determined by the annual budget. They shall be subject to the provisions of Sections 709⁴, 1001⁵, and 1002⁶ of this Charter. It shall be the duty of the People’s Zoning Counsel to appear at all hearings on zoning cases, whether before the Council or a hearing examiner, for the purposes of protecting the public interest and insuring the compilation of a full and complete record. The People’s Zoning Counsel may summon, examine and cross-examine witnesses, introduce documentary evidence into the record, file exceptions, and make such

⁴ Charter Sec. 709 discusses conflict of interests and states that all public officials must file a statement disclosing certain interests including but not limited to interests in corporations or interests in land held in the County.

⁵ Charter Sec. 1001 stated that there is a Code of Ethics and it is applicable to all elected and appointed officers, employees of the County, and individuals appointed to serve on boards and commissions.

⁶ Charter Sec. 1002 defines a conflicts of interest and discusses prohibited actions and generally discusses the applicability of this Section.

argument to the hearing examiner or the Council as the law and the evidence in the case may warrant.

The Prince George's County Code ("Code") Subtitle 27 Subdivision 4⁷ defines and set out the duties and qualifications of the People's Zoning Counsel. Section 27-136 states:

Informed public actions on land use matters require a full exploration of often complex factual and legal issues. An independent People's Counsel can protect the public interest and promote a full and fair presentation of relevant issues in administrative proceedings in order to achieve balanced records upon which sound land use decisions can be made. In addition, a People's Counsel who provides technical assistance to citizens and citizen organizations will encourage effective participation in, and increase public understanding of and confidence in, the County land use process.

The Prince George's County Code Sec. 27-139.01 states in part:

To protect the public interest and achieve a full and fair presentation of relevant issues, the People's Zoning Counsel shall have the right to appear on behalf of the interests of the public in general, to defend any duly enacted General Plan, Master Plan, or comprehensive zoning maps as adopted by the District Council, and in any matter involving zoning reclassification or any Special Exception... The People's Zoning Counsel may prosecute an application before any state or federal court for injunctive or other relief incidental thereto, to enjoin violation of any zoning map or Master Plan or as specifically authorized by the District Council.... The People's Zoning Counsel shall have in each appearance all rights of counsel for a party of record, including, but not limited to the right to file and prosecute an appeal to the courts as an aggrieved party to promote and protect the health, safety, and welfare of the community...

The County has a Code of Ethics that is intended to govern the actions of elected, appointed officials, and employees. The Code of Ethics⁸ is contained in Subtitle 2 Division 17⁹ of the County Code. The Code of Ethics states:

The Prince George's County Council, recognizing that our system of representative government is dependent in part upon the people maintaining the **highest trust in their public officials and employees**, finds and declares that the people have a right to be assured that the **impartiality and independent judgment** of public officials and employees will be maintained. It is evident that this **confidence and trust** is eroded when the conduct of the County's business is subject to

⁷ These are Secs. 27-136 through 27-139.03 of the County Code.

⁸ Division 17 may be cited as the Prince George's County Code of Ethics.

⁹ The applicable sections are 2-289 through 2-297 of the Prince George's County Code.

improper influence and even the appearance of improper influence.

For the purpose of guarding against improper influence, the County Council enacts this Code of Ethics to require County elected officials, officials, employees, and individuals appointed to boards and commissions to disclose their financial affairs and to set minimum standards for their conduct of local business. It is the intention of the Council that this Division, except its provisions for criminal sanctions, **be liberally construed to accomplish this purpose.** (emphasis added).

The stated purpose of the Code of Ethics is to ensure and maintain the highest trust in government and its public officials and employees. The Code of Ethics seeks to ensure that trust is not eroded and that there is no improper influence, actual or the appearance thereof, in County Government. The Code of Ethics goes on to define how to comply with the purpose of the Code.

For the following reasons, the Board of Ethics concluded that there is a conflict of interest and the dual roles¹⁰ would impair the impartiality or independence of judgment of the County Official.

The Code of Ethics Sec. 2-293 (b)(1)(A)(ii) provides that “an official or employee may not hold any other employment relationship which would impair the impartiality or independence of judgment of the official or employee.” Sec. 2-293 goes further by stating that the employment or financial interest cannot create a conflict of interest or even the *appearance* of a conflict of interest.¹¹ The specific language regarding impartiality and conflict of interest makes abundantly clear the intent of these provisions of the Code of Ethics. The provisions were intended to be broad and capture any actions that maybe viewed as questionable or unethical. Additionally, the stated purpose of the Code of Ethics is to maintain trust in government, people are assured that there is impartial and independent judgment that is free from improper influence. Further, the Prince George’s County Charter Sec. 712 which created the position of the People’s Zoning Counsel specifically states that this position is subject to the Code of Ethics and the conflict of interest laws.

Here, the People’s Zoning Counsel, is also the managing member and *general counsel* for HBV, who is seeking to obtain a \$5 million loan from Prince George’s County EDI Fund. In his role as counsel and managing member advice could include zoning matters; in that situation the zoning counsel would owe a duty both to the people of Prince George’s County and the financial stakeholders in HBV. The personal financial interest in HBV makes it less than clear which duty the County Official would uphold; that is the epitome of a conflict of interest. Minimally, the official’s role as managing partner and general counsel of a business “doing business with the County” gives rise to the appearance of a conflict of interest.

The People’s Zoning Counsel has advised, testified and weighed in on zoning matters specifically relating to MGM. On July 14, 2016¹², Counsel provided an overview of the oral argument presented and spoke to the legalities of the case regarding MGM Detailed Site Plan

¹⁰ The dual roles are managing member and general counsel at HBV and the People’s Zoning Counsel for Prince George’s County

¹¹ Code of Ethics Sec. 2-293(b) (1)(B)(iii)

¹² See the District Council Approved Minutes for July 14, 2014.

("DSP"). Also on July 14th, Zoning Counsel testified again and provided an overview of the oral argument and its legalities regarding MGM's Departure from Design Standards ("DDS"). Zoning Counsel has access to information and the decision-makers on zoning matters. This access gives them the ability to persuade decision-makers and this is solely by virtue of his position as the People's Zoning Counsel. Accordingly, the Board opines that: (1) dual employment as People's Zoning Counsel and general counsel for a limited liability company seeking to do business with the County and obtain a loan from the County's Economic Development Incentive Fund to invest in a Prince George's County business, Aspire/MGM, creates the appearance of a conflict of interest and an actual conflict of interest; and (2) attempts to directly invest and obtain a financial interest in Aspire/MGM when, in the role of People's Zoning Counsel, they were a direct participant in the hearings and decisional processes that led to zoning approvals for MGM create the appearance of a conflict of interest and an actual conflict of interest.

The County's Code of Ethics is to be liberally construed to accomplish the policy goals set forth under the law. This policy includes the avoidance of improper influence or even the appearance of improper influence. The Board of Ethics believes that there is a potential for improper influence and conflict of interest or the appearance of both. The People's Zoning Counsel is counsel for the people of Prince George's County regarding zoning matters. They are to protect the public interest and achieve a full and fair presentation of relevant issues. This role is incompatible with position as general counsel (and managing member) to HBV, an entity seeking to obtain a financial interest in Aspire Holdings, LLC and ultimately in MGM. As stated above, those two interests may collide and oppose each other and it is the Board's opinion that these roles create the appearance of and actual conflicts of interest. Accordingly, the Board of Ethics hereby issues this Advisory Opinion, pursuant to County Code § 2-292(h), and states that there is the appearance of and an actual conflict of interest when the People's Zoning Counsel: (1) also serves as general counsel to a limited liability company seeking to do business with the County and obtain a loan from the County's Economic Development Fund to invest in a Prince George's County business, Aspire/MGM; and (2) attempts to directly invest and obtain a financial interest in Aspire/MGM when the People's Zoning Counsel was a direct participant in the hearings and decisional processes that led to zoning approvals for MGM.

It should be noted that Code of Ethics states, "Any official or other person subject to the provisions of this Division may request an advisory opinion from the Board concerning the application of this Division. The Board shall respond promptly to these requests, providing interpretations of this Division based on the facts provided or reasonably available to the Board within 60 days of the request. Copies of these interpretations, with the identity of the subject deleted, shall be published and otherwise made available to the public in accordance with any applicable State or Prince George's County law regarding public records. The Board may adopt additional policies and procedures related to the advisory opinion request process


Covette Rooney
Board Chair