



Office of the County Attorney  
Montgomery County, Maryland

July 8, 2002

To: Hon. Elizabeth K. Kellar, Chair  
Montgomery County Ethics Commission

Through: Marc P. Hansen  
Chief, General Counsel Division

From: Judson P. Garrett, Jr.  
Principal Counsel for Opinions & Advice

Re: Political Activities of Quasi-Judicial Officials

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We are responding to the Commission's request for legal advice regarding the proper construction of amendments to the Montgomery County Public Ethics Law (the "Ethics Law") that prohibit certain County officials who exercise quasi-judicial authority from engaging in certain political activities (the "Political Activities Law").<sup>1</sup>

We understand that the Commission, in the exercise of its statutory authority to issue advisory opinions addressing the application of the Ethics Law to particular officials or employees,<sup>2</sup> is considering, among others, the following questions:

1. What is an "official's jurisdiction" for the purposes of the Political Activities provisions? Is it limited to the matters that are pending in a quasi-judicial proceeding before the official?
2. Do the Political Activities provisions prohibit "passive" support of a political candidate, *e.g.*, bumper stickers or lawn signs?

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<sup>1</sup> Ch. 23, Laws of Montgomery County 2001 (Bill 11-01) (codified at MONT. CO. CODE, § 19A-16A).

<sup>2</sup> MONT. CO. CODE, § 19A-7.

3. May an official who exercises quasi-judicial authority write to others encouraging support of a particular candidate?
4. May an official who exercises quasi-judicial authority permit a political candidate to include the official's name in a list of supporters?
5. Does either a stockholder or an employee of a corporation have, for purposes of the Political Activities provisions, "an identifiable economic interest [that is] different from that of the general public"?
6. What is an "official's agency" for the purposes of the Political Activities provisions?
7. Do the Political Activities provisions apply to political activity on behalf of candidates in federal elections?

### **THE POLITICAL ACTIVITIES PROVISIONS**

In pertinent part, the Political Activities provisions of the Ethics Law provide:

(a) A County quasi-judicial official<sup>3</sup> must not:

(1) solicit or accept from a person within the official's jurisdiction a financial contribution for any political candidate,<sup>4</sup> political

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<sup>3</sup> For the purposes of this law, "County quasi-judicial official" (hereinafter a "listed official") means: (a) members and alternative members of the Animal Matters Hearing Board, (b) members of the County Board of Appeals; (c) members of the Board of Electrical Examiners; (d) members of Board of Registration; (e) members and alternate members of the Commission on Landlord-Tenant Affairs; (f) voting members of the Commission on Common Ownership Communities; (g) members of the Ethics Commission; (h) voting members of the Fire and Rescue Commission; (i) members of a case review board of the Human Rights Commission; (j) members of the Merit System Protection Board; (k) members of the Sign Review Board; (l) members of the Historic Preservation Commission; (m) members of the Contract Review Committee; (n) the Chief Administrative Office; (o) hearing examiners in the Office of Zoning and Administrative Hearings; and (p) any Public Hearing Officer in the Office of the County Executive.

<sup>4</sup> "Candidate" has the same meaning as in the state election law (*see* MD. ANN.. CODE art 33 § 1-101(i)).

organization<sup>5</sup> or ballot question (other than a ballot question which directly affects the official's agency); or

(2) solicit from a person within the official's jurisdiction an endorsement of or opposition to a political candidate.<sup>6</sup>

For these purposes, "person within the official's jurisdiction" means an individual who:

(a) is registered, or is required to register, as a lobbyist on a matter that is or could be considered by the official;

(b) owns or operates a business that is regulated by the official;

(c) does business with or has a matter pending before the official's agency; or

(d) has an identifiable economic interest, different from that of the general public, that the official may substantially affect in performing the official's duties.

## ANALYSIS

### 1. *Applicable Principles of Statutory Construction.*

A statute is the written will of the legislative body that enacted it. The cardinal rule for interpreting a statute, therefore, is "to ascertain and carry out the real legislative intent,"<sup>7</sup> and the beginning point for divining legislative intent is the language of the law itself.<sup>8</sup> "[W]hat the [legislative body] has written in an effort to achieve a goal

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<sup>5</sup> "Political organization" means, as defined in state law: an "authorized candidate campaign committee" (see MD. ANN. CODE, art. 33 §1-101 (c)); a "partisan organization" (Art. 33 § 1-101 (x)); a "political committee" (art. 33 § 1-101 (z)); a "political action committee" (art. 33 § 1-101 (y)); and (e) a "political party" (art. 33 § 1-101 (aa)).

<sup>6</sup> MONT. CO. CODE 19A-16A

<sup>7</sup> *State v. Pagano*, 341 Md. 129, 133 (1996).

<sup>8</sup> *Morris v. Prince George's County*, 319 Md. 597, 603 (1990).

is a natural ingredient of analysis to determine that goal.”<sup>9</sup> Therefore, “the words used are to be given ‘their ordinary and popularly understood meaning, absent a manifest contrary legislative intention.’”<sup>10</sup>

Nevertheless, ascertainment of the meaning apparent on the face of a statute need not end the inquiry.<sup>11</sup> “Although the words of a statute are the starting point for ascertaining the legislative intent, they must not be read in a vacuum but should be considered in light of other manifestations of legislative intent.”<sup>12</sup> Under Maryland law, “[t]he ‘meaning of the plainest language’ is controlled by the context in which it appears.”<sup>13</sup> “Thus, we are always free to look at the context within which statutory language appears.”<sup>14</sup> “Even when the words of a statute carry a definite meaning, we are not ‘precluded from consulting legislative history as part of the process of determining the legislative purpose or goal’ of the law.”<sup>15</sup> We may consider other “external manifestations” or “persuasive evidence.” These include the cause or necessity of the law;<sup>16</sup> its objectives and purposes;<sup>17</sup> its history;<sup>18</sup> its relationship to earlier and subsequent legislation;<sup>19</sup> prior and contemporaneous statutes;<sup>20</sup> and other material that fairly bears on the fundamental issue of legislative purpose or goal, which becomes the

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<sup>9</sup> *Kaczorowski v. Baltimore*, 309 Md. 505, 513 (1987).

<sup>10</sup> *Privette v. State*, 320 Md. 738, 744 (1990) (quoting *In re Arnold M.*, 298 Md. 515, 520 (1984)).

<sup>11</sup> *Kaczorowski*, 309 Md. at 514.

<sup>12</sup> *In re Douglas P.*, 333 Md. 387, 393 (1994).

<sup>13</sup> *Kaczorowski*, 309 Md. at 514 (quoting *Guardian Life Ins. Co. of America v. Ins. Comm’r*, 293 Md. 629, 642 (1982)).

<sup>14</sup> *Morris*, 319 Md. at 603-04.

<sup>15</sup> *Id.* (citations and footnote omitted).

<sup>16</sup> *Smith v. Higinbotham*, 187 Md. 115, 125 (1946).

<sup>17</sup> *Clark v. State*, 2 Md. App. 756, 761 (1968).

<sup>18</sup> *Welsh v. Kuntz*, 196 Md. 86, 93 (1950).

<sup>19</sup> See n.24, *infra*.

<sup>20</sup> *Department of Tidewater Fisheries v. Sollers*, 201 Md. 603, 611 (1953).

context within which the particular language is read in a given case.<sup>21</sup> “This enables us to put the statute . . . in its proper context and thereby avoid unreasonable or illogical results that defy common sense.”<sup>22</sup>

The rules of statutory construction also teach that laws should not be read so as to render any part a nullity. It is presumed that a legislative body was aware of the words it used and that it did not intend to use them in vain or to leave a part of the law without a sense or meaning.<sup>23</sup>

In addition, the Ethics Law articulates legislative findings and statements of policy<sup>24</sup> and contains a specific direction with regard to its construction:

The Council intends that this Chapter, except in the context of imposing criminal sanctions, be liberally construed to accomplish the policy goals of this Chapter. The Council also intends that this Chapter meet the requirement under state law that the County adopt legislation that is similar to the state public ethics law.<sup>25</sup>

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<sup>21</sup> *Kaczorowski*, 309 Md. at 514-515.

<sup>22</sup> *Adamson v. Correctional Medical Services, Inc.*, 359 Md. 238, 251-52 (2000).

<sup>23</sup> *Jones v. Gordy*, 169 Md. 173 (1935); *Welsh v. Kuntz*, 196 Md. 86 (1950).

<sup>24</sup> “Our system of representative government depends in part on the people maintaining the highest trust in their officials and employees. The people have a right to public officials and employees who are impartial and use independent judgment.

“The confidence and trust of the people erodes when the conduct of County business is subject to improper influence or even the appearance of improper influence.

“To guard against improper influence, the Council enacts this public ethics law. This law sets comprehensive standards for the conduct of County business and requires public employees to disclose information about their financial affairs.”

MONT. CO. CODE § 19A-2 (a) - (c).

<sup>25</sup> MONT. CO. CODE § 19A-2 (d).

## 2. *History of the Montgomery County Political Activities Provisions.*

Prior to 1982, Section 405 of the Charter of Montgomery County broadly prohibited virtually every county employee and officer from participating in a political campaign:

No officer or employee of the County whose salary or expenses are payable in whole or in part from County funds shall participate in any campaign for any political or public office. This prohibition shall not apply to an elected officer, or a person appointed to fill an elected vacancy, or a member of a board or commission unless otherwise provided in the charter.<sup>26</sup>

In 1982, the Charter Review Commission recommended that Section 405 be amended to bring it into conformity with an intervening State law that broadly permitted state and local government employees to participate, as private citizens, in politics and political campaigns.<sup>27</sup> Section 405 was changed, therefore, to provide:

No *officer or employee* of the county shall be prohibited from participating in politics or political campaigns; however, no *employee* shall be obligated to contribute to an election campaign or to render political service.

Several years later, in the wake of a controversy involving the political activities of a member of a County quasi-judicial board, the State law was amended, effective June 1, 2000, to permit Montgomery County to enact laws restricting the political activities of County officers and employees (including, members of County boards and commissions) who exercise quasi-judicial authority,<sup>28</sup> the Charter was amended to permit the County Council to restrict the political activities of County officers and employees who serve in a quasi-judicial capacity,<sup>29</sup> and the “Political Activities” bill was introduced at the

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<sup>26</sup> See MONT. CO CODE (1972).

<sup>27</sup> 1982 Report of the Charter Review Commission, pp. 17 and 30 (citing LAWS OF MARYLAND (1973) ch. 796).

<sup>28</sup> See LAWS OF MD. (2000) ch. 154.

<sup>29</sup> Charter of Montgomery County, § 405 (adopted at the November 3, 1998 general election).

recommendation of the Ethics Commission<sup>30</sup> and, as amended by the Council, was enacted.<sup>31</sup> In the light of this extensive and significant background, the clear purpose of the Political Activities provisions is to prevent the appearance of impropriety and the undermining of the integrity of quasi-judicial adjudication that can occur when a quasi-judicial official engages in the kinds of political activities prohibited by the law.

In a report to the County Council concerning the recommendations of the Council's Management and Fiscal Policy Committee (to which the bill, as introduced, had been referred for consideration and recommendations), the Council's Senior Legislative Attorney stated, in pertinent part:

The bill recommended by the Committee ... would apply the restrictions on soliciting contributions and endorsements ... only to a "person within the official's jurisdiction." That term [would be] defined [in the bill]. This definition is taken almost verbatim from the current County ethics law ....<sup>32</sup>

Most of the comments on [this definition] centered on whether subparagraphs (B) and (D) ... are too broad and how they would apply to a particular quasi-judicial body. The Committee was reluctant to recommend narrower language because virtually identical language is already used for non-political gift solicitations, and the two standards should be consistent. Nevertheless, the Historic Preservation Commission and Common Ownership Commission

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<sup>30</sup> Bill No. 11-01.

<sup>31</sup> Ch. 21, LAWS OF MONTGOMERY COUNTY 2001.

<sup>32</sup> In pertinent part, the Gifts provisions of § 19A-16 (a) provide:

A public employee must not solicit a gift to the employee or another person or organization:

(1) from any business or person who:

(A) is registered or must register as a lobbyist;

(B) does business with the County agency with which the public employee is affiliated;  
or

(C) is, or owns or operates a business that is, regulated by the County agency with which the public employee is affiliated....

raised valid questions about the scope of these subparagraphs. *Because it is difficult to anticipate all the situations in which this law would apply, the Committee preferred to retain this language as drafted, but direct the Ethics Commission, assisted by the County Attorney, to interpret how it would apply to the specific jurisdictions of these Commissions. (The Ethics Commission already has the authority to issue advisory opinions.)*

An alternative would be to limit the subparagraphs (B) and (D) to persons who have a specific matter (or, as the CCOC put it, an “individualized interest”) pending, or about to go, before the given quasi-judicial body, as subparagraph (C) already does. *The Committee concluded that this approach would provide more certainty but could omit many persons who are directly affected by the quasi-judicial body’s actions and thus would be susceptible to improper pressures.*<sup>33</sup>

This report is a significant piece of legislative history or context. First, it confirms that the Council intentionally narrowed the scope of the political activity prohibitions recommended by the Ethics Commission. Rather than broadly prohibiting designated quasi-judicial officials from accepting contributions from or soliciting *anyone*, the Council accepted it’s Committee’s recommendation that the prohibitions be narrowed to engaging in such activities with respect to “a person within the official’s jurisdiction.” Second, the report made clear that paragraphs (A), (B) and (C) of §19A-16A (4)’s definition of the term “person within the official’s jurisdiction” were taken from the “Gifts” provisions of the Ethics Law because the Committee decided that the new Political Activities prohibitions and the existing Gifts provisions “should be consistent.” Third, the Report documents that the Committee considered and rejected the relative merit of limiting two of the four prongs [subsections (B) and (D)] of the definition to persons who have a specific matter or individualized interest “pending, or about to go, before the given quasi-judicial body...., as [proposed] subparagraph (C) already did.” Although the Committee found some merit in that approach, it concluded that such narrowing would go too far. The Committee preferred—and the full Council apparently concurred—that the recommended definition remain as drafted, but that the Ethics Commission, assisted by the County Attorney, interpret how the definition would apply to the listed bodies.

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<sup>33</sup> November 6, 2001 Memorandum from Michael Faden, Senior Legislative Attorney to the County Council, a copy of which is appended to this Advice of Counsel Memorandum. (Emphasis added.)



### 3. *“Official’s Jurisdiction.”*

The term “person within the official’s jurisdiction” is the linchpin of the Political Activities prohibitions. If one is not a “person within the official’s jurisdiction,” the official is not prohibited from soliciting the individual for political purposes. Were this term undefined, it well might reflect a legislative intent that the political activity prohibitions be limited to matters actually pending before a quasi-judicial official. Both the statutory definition of the term and the legislative history of this law, however, clearly preclude that construction. As the legislative history of this law documents, the Committee specifically considered a proposal that the Bill be limited in that fashion, concluded that such a limitation would go too far, reported its decision to the full Council, and the full Council enacted the Bill as recommended by the Committee. This legislative history, therefore, confirms that the political activity prohibitions were intended, at the very least, to apply to every person engaged in any activity that could bring him or her within the quasi-judicial authority of the official. Indeed, the language of the statutory definition of the term “within the official’s jurisdiction” strongly supports the view that the Council intended that the term not even be limited to an official’s quasi-judicial authority.

Except for subsection (c)’s “pending matter” provision, the standards copied from the Gifts provisions and included as four subsections of the Political Activities’ definition of “person within the official’s jurisdiction” do not pertain to quasi-judicial activities. For example, the lobbyist registration requirements that trigger subsection (A) clearly do not apply to attorneys in quasi-judicial proceedings; moreover, they have never been construed, for the purposes of the Gifts provision, to require that a party or witness who urges a particular result in a quasi-judicial proceeding register as a lobbyist. Therefore, unless an “official’s jurisdiction” also includes non-judicial authority that can trigger the lobbying registration requirement, subsection (A) of the definition would be meaningless.

So, too, the “regulation of a business,” which is the basis of subsection (B), and an official’s ability, as articulated in subsection (D), to substantially affect an “identifiable interest different from that of the general public” are broader than the ability to render a quasi-judicial decision are not limited to quasi-judicial functions.

Therefore, applying the principle that no part of a law should be construed so as to render it a nullity, and in light of the clear legislative intent that these provisions have the same meaning as in the Gifts provision, we advise that the term “officer’s jurisdiction” should be read to include not only quasi-judicial authority or jurisdiction, but also any other

authority or jurisdiction (legislative, executive, or quasi-legislative) of a listed body or official who is subject to the Political Activities provisions. Thus, for example, if a listed body or official also has quasi-legislative authority (*i.e.*, rulemaking authority), those officials may not solicit a political contribution from a person who is required to register as a lobbyist because the person is seeking to influence the body or the official in the adoption or amendment of a regulation. So, too, a listed body or official that also has contract authority or responsibility may not solicit a political contribution from one who does business with or has a contract with the body, the official or the official's agency. If, however, a listed body or official's authority is quasi-judicial only, then the only persons within their jurisdiction are those come within the scope of subsection (C) or (D) because they do business with or have a matter pending before the official's agency or have "an identifiable economic interest, different from that of the general public, that the official may substantially affect in performing the official's duties."

By thus reading the Gifts provisions and the Political Activities provisions as conterminous, the Commission will be carrying the Council's legislative intent, expressed in the legislative history of the Political Activities law, that these standards be consistent. Moreover, both listed officials and the Ethics Commission can be guided, on a case by case basis, by the Gifts provisions in determining the scope of the Political Activities provisions. If a particular official is prohibited from soliciting a gift or accepting an unsolicited gift from a person, that official may not solicit a political contribution or endorsement or support from that person.<sup>34</sup>

#### 4. *Bumper Stickers and Lawn Signs.*

The Political Activities Law does not generally restrain a listed official's otherwise permissible general expression of his or her political views, support, or opposition.<sup>35</sup> Rather,

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<sup>34</sup> Of course, if a majority of the Council determines that this construction is too broad, the Council certainly may amend the law to narrow its application.

<sup>35</sup> State law prohibits all county officials employees from "engaging in political activity while on the job during working hours." MD. ANN. CODE, art. 24, § 13-105 (1). Furthermore, County Law prohibits, with certain exceptions that are not applicable to political activity, the use of any County facility, property, or work time for personal use or for the use of another person...." MONT. CO. CODE § 19A-14 (c). Thus, for example, quite aside from the restraints of this Political Activities Law, expressions of political preference, support or opposition are exceedingly improper while an official is performing quasi-judicial duties, *e.g.*, during a hearing, a scheduling conference, a status conference or any

the Political Activities Law only prohibits listed officials from engaging in any of the following three kinds of activities: (i) soliciting certain political contributions (*i.e.*, soliciting from a person who is subject to the official's authority a financial contribution for any political candidate, political organization or ballot question other than a question that directly affects the official's agency (hereinafter "*soliciting contributions*"); (ii) accepting certain political contributions (*i.e.*, accepting a financial contribution from such a person (hereinafter "*accepting contributions*"); and (iii) soliciting certain political endorsements or opposition (*i.e.*, soliciting from such a person an endorsement of or opposition to a political candidate (hereinafter "*soliciting endorsements or oppositions*").

Bumper stickers and lawn signs are directed at the public in general, not at particular individuals. Moreover, they are not necessarily solicitations. Rather, they may be merely a public statement of an individual's support of or opposition to a candidate or ballot question. For these reasons, we advise that the Political Activities Law does not prohibit the listed officials from using, on their own property, political bumper stickers or lawn signs that merely state, as a private citizen, their support of a particular candidate or their support of or opposition to a particular ballot question.

#### 5. *Letters.*

Unlike a bumper sticker or a lawn sign, letters present the precise mischief the legislation is designed to proscribe if the individual or organization to whom the letter is sent is within the official's jurisdiction. Therefore, we advise that the law should be construed to prohibit a listed official from sending to a person within the official's jurisdiction a letter that solicits "a financial contribution for any political candidate, political organization or ballot question (other than a ballot question that directly affects the official's agency)" or solicits "an endorsement of or opposition to a political candidate."

#### 6. *Lists.*

Being included in a list of those who endorse or oppose a political candidate or ballot question does not necessarily constitute *soliciting* a contribution or *soliciting* an endorsement or opposition. It is the purpose for which the list is used that will determine whether it constitutes an impermissible solicitation or a permissible endorsement or opposition.

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other permissible contact between an adjudicator and one who is a party, counsel, or witness in a pending proceeding.

The law should not be construed to prohibit an official from permitting his or her name to be included in a list that is to be used solely for demonstrating the individual's personal support or opposition. Officials may not, however, permit their names to be used, even as private citizens, on a list or otherwise, in connection with a *solicitation* of either "a political financial contribution" or "a political endorsement of or opposition" from a person subject to the official's authority.

#### **7. *Stockholders and Employees.***

The statutory definition of "person within the official's jurisdiction" includes, among others, "an individual who ... has an identifiable economic interest different from that of the general public, that the official may substantially effect in performing the official's duties."<sup>36</sup> As in the Gifts provision,<sup>37</sup> which served as a model for this definition, so, too, for the purposes of the Political Activities Law, a stockholder or an employee of a corporation has "an identifiable economic interest [that is] different from that of the general public." Therefore, if a listed official may substantially affect that identifiable economic interest, that official may not solicit "a financial contribution for any political candidate, political organization or ballot question (other than a ballot question that directly affects the official's agency)" or "an endorsement of or opposition to a political candidate" from that person.

For these purposes, there are two determinative factors: (1) the economic interest must be significant enough to distinguish it from the general interest of the public; and (2) the authority of the official must be capable of substantially affecting that economic interest.<sup>38</sup> This prohibition applies only if both factors are present.

#### **8. *"Official's Agency."***

The statutory definition of "person within the official's jurisdiction" also includes, among others, "an individual who ... does business with or has a matter pending before the

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<sup>36</sup> § 19A-16A (D).

<sup>37</sup> See § 19A-16 (c).

<sup>38</sup> For example, the interest of a holder of 1 share of stock (valued at \$100) in a corporation that has 1 million shares outstanding is not going to be "substantially affected" by any action of most, if any, of the listed officials.

official's agency...."<sup>39</sup> The term "official's agency" was taken from the Gifts provision of the Ethics Law, and it, too, was intended to have the same meaning in the Political Activities provision as it has in the Gifts provision.

There are no prior opinions of this Commission specifically addressing the meaning of "official's agency" for the purposes of the Gifts provision. However, in a June 10, 1998 advisory opinion, this Commission advised a member of the Montgomery County Energy and Air Quality Committee that the provision of the Ethics Law that prohibits a public employee (including a citizen member of a committee) from owning more than one percent of any business that negotiates or contracts with his or her County agency<sup>40</sup> did not prohibit the requester or his law firm from responding to a request for proposals issued by the Department of Public Works and Transportation for services to assist the County in addressing electric industry restructuring. In this Commission's view:

because the Committee will play no part in the award or administration of the consultant contract, the requester would not be an employee of a "business" that contracts with the County agency with which the requester is affiliated as a public employee....

We also have reviewed the advisory opinions of the State Ethics Commission, which can provide guidance because of the relationship between the State Ethics Law and the County Ethics Law. Unfortunately, that Commission has rarely had occasion to address the meaning of this term as used in the State Law's Gifts provision. Indeed, the only State Ethics Commission opinion we have found is Opinion No. 81-43, in which the State Commission concluded that professors at the University of Maryland could not, without an exception [*i.e.*, waiver], attend a seminar sponsored and fully funded by an entity doing business with the University "[e]ven though these particular faculty do not appear to have contract responsibilities that would be expected to impact on [the company's] economic interests...."<sup>41</sup> Furthermore, following precedent set by the former State Board of Ethics under a former Code of Ethics, the State Ethics Commission has applied, in several cases, an "indivisible entity" rule in determining what is the "agency" of an official or employee for the purposes of other provisions of the State Ethics Law, *e.g.*, the provision that prohibits an official from

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<sup>39</sup> § 19A-16A (C).

<sup>40</sup> Mont. Co. Code § 19A-12(b).

<sup>41</sup> XVIII COMAR 360,362 (December 1, 1981).

being employed by or having an interest in an entity that has a contract with the official's agency or is subject to the authority of the official's agency.

In 1980, for example, the State Ethics Commission was asked whether a geologist who was the president of a private consulting firm that had a contract with the State of Maryland through the Maryland Environmental Services (MES) of the Maryland Department of Natural Resources (DNR) was prohibited from serving as a public member of the State Board of Well Drillers (the Board), which also was located in DNR. As the Commission put it, "The question is whether the firm's contractual dealings are with [the geologist's] agency: [I]s his agency the Board of Well Drillers or the Department of Natural Resources?" The Ethics Commission advised:

This issue was addressed by the [former] Board of Ethics under the [former] Code of Ethics; it adopted the general position that in situations involving transactions with the employee's agency that prohibition applied to State agencies as "individual entities."<sup>[42]</sup> In one exception to this principle, the Board held that Boards within the Department of Licensing and Regulation were separate agencies, since "there is a large degree of autonomy and independence with respect to the functions and operations of separate units within this Department."<sup>[43]</sup> This opinion did not address similarly autonomous boards organizationally located in other agencies, though we believe the rationale set forth there could apply to such situations.

We do not believe these two approaches of the Board of Ethics need be viewed as inconsistent. *Most of the situations where the primary Departments were viewed as "indivisible entities" involved regular employees of subunits of integrally interrelated Departments, where there was some actual or potential connection between their State and private activities. Independent boards and commissions such as those in Licensing and Regulation are less likely to have these substantive connections but are related to each other only for organizational purposes.* This same rationale could apply to boards, such as to the

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<sup>42</sup> Citing "Title 19 COMAR, Opinions No. 7, 35, 36 and 108."

<sup>43</sup> Citing Opinion No. 57.

Board of Well Drillers, that are in other agencies but which exercise similar autonomous authority. *These boards also have a part-time membership which could be viewed as less likely to be involved in the other operations and activities of the parent agency.*<sup>44</sup>

Following the rationale of the former Board of Ethics, the State Ethics Commission concluded that because of the apparently autonomous regulatory authority of the Board of Well Drillers, the nominee's firm's contract with the MES would not result in a prohibited relationship. In other words, for the purposes of that prohibition, a Board member's "agency" was the Board of Well Drillers, not the Department of Natural Resources.<sup>45</sup> The same State Ethics Commission, however, decided that a member of the State Roads Commission, who thereby was an *ex officio* member of the Maryland Transportation Authority, was affiliated with the Motor Vehicle Administration because his position on the Maryland Transportation Authority enabled him to advise the Secretary of Transportation about matters affecting Motor Vehicle Administration policy formulation and implementation.<sup>46</sup>

State Ethics Commission Opinion No. 80-13 involved an employee of the Capital Programs Administration (CPA) of DNR who wanted to establish a part-time business that assisted applicants for State wet-lands licenses and permits. Although the final licensing authority was the State Board of Public Works, permit and license requests were filed with the Wetlands Division of DNR's Water Resources Administration (WRA), which had significant responsibility and authority for the process. The Commission acknowledged "that there are circumstances where an entity—such as an autonomous regulatory board—within an agency could be viewed as a separate agency for conflict of interest purposes." However, the Commission also noted that WRA and CPA "are sub-units composed of regular employees of an integrally interrelated Department," "both deal with natural resources problems that may be expected to relate to the same subject matter (as is the case here where both have responsibilities for protection of State and private wetlands), and "[b]oth are in the direct chain of authority answerable to the same Departmental management on matters of both substance and administration." "Further, in addition to common personnel and policy-making at upper management levels, interaction between these sub-units at the staff level would also be expected. The Commission concluded, therefore, that the Department should

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<sup>44</sup> Opinion No. 80-13, XVIII COMAR 209-10 (June 27, 1980) (emphasis added.).

<sup>45</sup> *Id.*

<sup>46</sup> Opinion No. 80-11, XVIII COMAR 203 (June 13, 1980).

be viewed as the employee's agency for the purposes of a provision that prohibited a State employee from having an interest in an entity subject to the authority of his agency.<sup>47</sup>

And in Opinion No. 82-56, the State Ethics Commission concluded that the provision that prohibits an official from entering into a contract with an agency with which he is affiliated prevented the Chairman of the Maryland Historical Trust in the then Dept. of Economic and Community Development (DECD) from negotiating and procuring a loan from the Maryland Housing Rehabilitation Program (MHRP) in DECD, absent an "exception" (*i.e.*, waiver) by the Commission:

We have generally treated cabinet departments as single indivisible entities ... The [Maryland Historical] Trust and the MHRP report to the same Assistant Secretary, and ... interact with each other; they are both involved in housing and property generally. We thus do not believe that the Trust is sufficiently autonomous and separate from the workings of the Department [of Housing and Community Development] to justify departure from our 'indivisible entity' rule.

Since the MHRP loan is thus viewed as a contract relationship with the Chairman's agency, we believe the prohibition [against entering into a contract with one's agency] applies.<sup>48</sup>

In our view, the State's integrally-related independent agency principle is an appropriate application of the Gifts and other prohibitions to the regular employees of an integrally interrelated Department, and its exception in favor of citizen members of boards, commissions and committees that are not involved in the operations and activities of a "parent" agency is entirely consistent with the June 10, 1988 advisory opinion of your Commission, the legislative history of the Political Activities Law, and the need for a bright line to guide the Commission and the quasi-judicial officials in the application and observance of these new restraints on political activities. Therefore, we recommend that the Political Activities provisions be limited to: (1) those matters that could come before a listed board, commission or committee; and (2) in the case of a member who serves on a listed board, commission or committee in an *ex officio* capacity or as a representative of another

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<sup>47</sup> XVIII COMAR 224 (September 10, 1980).

<sup>48</sup> XVIII COMAR 542, 544 (December 15, 1982).



public agency to those matters that involve the member's primary agency. Therefore, in the first instance an official's agency means only the listed board, commission or committee. However, in the second instance, the official's agency includes both the board, commission or committee and the member's primary agency:

Tested under this standard, and against the general legislative policy that the Ethics Law be liberally construed to accomplish its policy goals, we recommend that the Ethics Commission view the agencies of the officials listed in the Political Activities provision to be as follows.

a. *The Animal Matters Hearing Board.*

The Animal Matters Hearing Board is a regulatory board, consisting of five citizen members appointed by the County Executive and confirmed by the County Council. The Board includes a veterinarian or veterinary technician; a representative of the Montgomery County Humane Society; and 3 public members, including a representative of licensed animal fanciers. There is a qualified alternate for each member, who votes in place of the member when the member is absent. The Board elects its Chair each year from among its members.<sup>49</sup> The Chief Administrative Officer provides the services and County facilities that are reasonably necessary for the Board to perform its duties, and the County Attorney must provide legal counsel to the Board.<sup>50</sup> The Board is an independent, autonomous unit of County government. For the purposes of the Political Activities Law prohibition, therefore,

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<sup>49</sup> The Board decides complaints and appeals under the Animal Control Ordinance; recommends standards to maintain regulated facilities, reviews the annual proposed budget for the animal shelter and makes budget recommendations for the shelter to the Executive and the Council, and reports annually to the Executive and Council on the Board's activities and any recommendations for improving animal control laws, regulations, and programs. The Board may order the Animal Control Director to seize, impound, destroy, or take any other action the Board decides is necessary regarding an animal that is suffering cruelty, dangerous or potentially dangerous, or causing a public nuisance or other violation of the Animal Control Ordinance, specify conditions under which an owner may keep an animal that the Board finds has suffered cruelty, is dangerous or potentially dangerous, or caused a public nuisance or other violation of this Chapter, require an owner to forfeit an animal to the County or prohibit the owner from harboring an animal in the County, impose conditions on an owner harboring other animals in the County, revoke or suspend a facility's license, appoint a person to mediate a case if the owner and each complainant agree, and order the owner of an animal to pay actual damages (including medical or veterinary expenses) not exceeding \$1,000 to a person injured or aggrieved by the animal's actions or behavior.

<sup>50</sup> See MONT. CO. CODE, § 5-104.

a Board member's agency is the Board.

b. *The County Board of Appeals.*

The County Board of Appeals is a quasi-judicial board of five citizen-members who are recommended by the County Executive and appointed by the County Council for four-year terms. The Board hears and decides certain land use issues including special exceptions for uses permitted only by special exception in a particular zone, variances from the development standards of the Zoning Ordinance, and administrative appeals from various actions of the County Government as specified by the County Code.<sup>51</sup> The Board of Appeals is an independent, autonomous unit in the Legislative Branch of County government. For the purposes of the Political Activities Law prohibition, therefore, a Board member's agency is the Board of Appeals.

c. *The Board of Electrical Examiners.*

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<sup>51</sup> (1) The Board of Appeals has extraordinarily broad jurisdiction. For example, it functions as the board of zoning appeals of the regional district in Montgomery County, decides petitions for special exceptions, and decides appeals taken from a decision made by the Department of Permitting Services under the County building code; appeals concerning licenses for hospitals, sanitariums, nursing homes and care homes; appeals concerning licenses for private educational institutions; appeals from orders directing the removal of garbage, ashes, rubbish and weeds; appeals from orders directing removal of diseased trees; appeals from orders directing removal of obstructions to vision along highways; appeals from orders concerning restaurant permits; appeals concerning individual water supply and sewage disposal systems; appeals from orders regarding uninhabitable or dangerous buildings; appeals concerning licenses for riding schools and stables; appeals concerning licenses for child care homes; appeals concerning licenses for places of amusement and amusement enterprises; appeals concerning the hotel license law; appeals concerning the plumbers and gas fitters license law and the plumbing and gas fitting code; appeals concerning the electrical contractors license law; appeals concerning rent supplement and assistance program law; appeals governing mobile home parks; appeals concerning agricultural land preservation; appeals concerning air quality control; appeals from orders concerning fire safety; Appeals concerning deficiency correction orders issued to group residential facilities; appeals concerning historic area work permits; appeals concerning building or occupancy permits related to moderately-priced dwelling units; appeals concerning massage establishment licenses, and registration of massage practitioners and technicians; appeals concerning rat control; appeals concerning commercial campgrounds; appeals concerning inspection of slaughterhouses; appeals concerning vendor's licenses; appeals concerning permits for grading and construction of roads, sidewalks, and curbs; appeals concerning swimming pool licenses, permits, and registrations; appeals concerning tanning facilities; appeals concerning denial, revocation, or suspension of a license for a transient lodging facility; appeals from orders involving weed removal; appeals concerning violation of housing and building maintenance standards; and other appeals as authorized by law. See MONT. CO. CODE § 2-112; MONT. CO. ZONING ORDINANCE §59A.

The Board of Electrical Examiners is a statutory board composed of five voting members, residents of the county, constituted as follows: one member is the holder of a valid, current Montgomery County master electrician's license; two members are active at the time of their appointment or shall have had previous experience as an electrical contractor, electrical contractor limited, or shall otherwise be technically qualified to determine proficiency in the electrical field; one member represents the general public; and one member is a professional engineer, duly registered and licensed in accordance with the requirements of Maryland state law and who has training and experience in electrical engineering. In addition, the Director of the Department of Permitting Services assigns, as *ex officio* nonvoting members of the Board, members of the Department of Permitting Services as to ensure coordination with fire inspection and prevention and electrical inspection activities conducted by the department. The voting members are appointed by the county executive, subject to the confirmation of the council, for 3-year terms.

The Board advises the Director on the issuance of licenses for journeyman electricians, master electricians and master electricians limited and shall ascertain by appropriate examination the qualifications and capabilities of all persons who desire such licenses. The Board also advises the Director regarding the revocation or suspension of an existing electrician's license or the disapproval of any application to renew such license; prior to recommending revocation or suspension, the Board must afford the licensee an opportunity for a hearing before the Board to show cause why the license should not be suspended or revoked or renewal denied. In the case of electricians' licenses, the director shall obtain the concurrence of the Board before proceeding with such actions. In the case of business licenses, the director shall consider the advice and recommendations of the Board, if any. The Board also advises the County Executive on the adoption of proposed rules and regulations to govern the placement, installation and operation of electrical conductors, appliances, apparatus or construction upon or about buildings and structures of all types throughout the county.

Under our recommendation, the Board alone would be the agency of the voting members of the Board, while the agency of each *ex officio* nonvoting member would be both the Board and the department they represent.

d. *The Board of Registration.*

The Board of Registration is a statutory board that consists of five members appointed by the County Executive and confirmed by the County Council for three year terms. No

more than two members of the Board may be active in the residential construction field at the time of their appointment. The Board is a unit in the Department of Housing and Community Services. The Director of that Department maintains a register for the Board of all applicants and licenses, and provides staff to the Board.

The Board reviews applications for licenses to engage in the business of constructing new homes or act in the capacity of a building contractor in Montgomery County, certifies to the Director whether the applicant and the organization of the applicant are qualified to comply with the building code and laws of the County and State and fully perform building contracts, and should be licensed. After giving a builder the opportunity for a quasi-judicial hearing, the Board may deny, suspend, refuse to renew, or revoke the license of the builder, if the Board makes certain findings.<sup>52</sup>

Under our recommendation, the Board and not the Department would constitute a board member's agency for the purposes of the Political Activities Law.

*e. The Commission on Landlord-Tenant Affairs.*

The Commission on Landlord-Tenant Affairs is a statutory entity that has 12 members and 3 alternate members, all of whom must be County residents. Four members and one alternate member each must be an owner of rental housing located in the County; a manager,

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<sup>52</sup> The statute authorizes the Board to take such action if it finds that the builder: made a misstatement of material fact in the application for license or renewal; committed fraud in connection with any building activity conducted under the requirements of the Chapter 31C (the New Home Warranty and Builder Licensing Law); committed gross negligence in connection with any building activity conducted under the requirements of Chapter 32; violated the building code or laws of the County or State; did not provide the new home warranty required by County law; did not correct or settle a claim arising out of a defect that is covered by the required warranty; did not file an amendment to a license application within 30 days of any material change in the information provided in the most recent application or amendment; incurred an excessive number of awards against the New Home Warranty Security Fund; aided, abetted, or knowingly combined or conspired with an unlicensed person with the intent to evade the Chapter 31; abandoned or willfully failed to perform, without justification, a contract for construction of a building that is to be used as a residence; willfully deviated from or disregarded plans or specifications in any material way without consent of the owner; did not comply with Chapter 31 in any material way; diverted funds or property that were received for the completion of a construction project, and used the funds or property for another project, operation, obligation, or purpose, with intent to defraud or deceive creditors or the owners; or served as an officer, Director, or stockholder for a builder whose license was revoked or suspended under Chapter 31.

or an employee of a manager, of rental housing located in the County; or an attorney who primarily represents owners or managers of rental housing; or nominated by an organization that represents owners or managers of rental housing located in the County. Four other members and one other alternate member each must be a tenant of rental housing in the County, or an attorney who primarily represents tenants of rental housing; or nominated by an organization that represents tenants of rental housing located in the County. The remaining four members and one alternate member must be selected from the public at large. Members are appointed by the County Executive and confirmed by the County Council for a term of three years.

The Commission has quasi-judicial, quasi-legislative, and advisory powers and responsibilities. It hears and decides apartment license revocation appeals and landlord-tenant disputes; it may adopt regulations necessary to carry out the Landlord Tenant Law; and it may enforce that Law through any appropriate means, including: (1) providing any services available through the Department of Housing and Community Affairs; (2) awarding money damages against a landlord or tenant for the benefit of either, as provided in the Law; (3) ordering repairs by a landlord or tenant; (4) investigating and conciliating any violation of or complaint filed under that Law, and investigating any matter relating to a license to operate a rental housing; and (5) imposing a monetary penalty against a landlord or tenant when a penalty is specified in a law enforced by the Commission, including an award up to three times the amount of any part of a security deposit withheld by a landlord without a reasonable basis. The Department must provide staff support to the Commission, and, in addition to any other duties, the Director of the Department must assist the Commission in carrying out its duties and implementing Commission regulations. The Commission also makes recommendation to the Director regarding the selection of staff to carry out the responsibilities of the Department under the Landlord Tenant law, and the Director is statutorily directed to consider the recommendations of the Commission. The Commission also makes recommendations to the County Executive regarding a budget to carry out the Landlord Tenant law.

The Landlord Tenant law requires that the Commission, the Department, and all County governmental agencies concerned with housing and real property cooperate in the administration of that Law. The Commission and Department may, subject to the approval of the Chief Administrative Officer, use employees and facilities of other County departments in carrying out this Chapter, and these departments must make their resources available to the Commission and Department as approved by the Chief Administrative Officer.

Applying the test we recommend, the Commission, but not the Department, would constitute its member's agency for the purposes of the Political Activities Law.

f. *The Commission on Common Ownership Communities.*

The CCOC is a statutory body that has executive, quasi-legislative, quasi-judicial and advisory authority. Each common ownership community must register with the Commission annually, and identify its elected leadership and managing agents, on a form provided by the Commission. In addition, the Commission: may adopt regulations as necessary to carry out the purposes of the Common Ownership Communities Law; must decide disputes between or among owners, governing bodies, and occupants of a dwelling unit in a common ownership community; and must advise the County Executive and County Council on ways to handle issues associated with the common ownership of property in communities. The Commission also is required to promote public awareness of the rights and obligations of living in common ownership communities, and to work to eliminate disputes and maintain property values.

The Commission consists of fifteen voting members, appointed by the County Executive subject to confirmation by the Council. Six of the voting members should be selected from residents of self-managed and professionally managed condominiums, self-managed and professionally managed cooperative housing corporations, and self-managed and professionally managed homeowners' associations, and may include members or former members of governing boards; three voting members should be selected from persons involved in housing development and real estate sales; and the remaining six voting members should be selected from persons who are members of professions associated with common ownership communities (such as attorneys who represent associations, developers, housing management or tenants) or investor-owners of units in common ownership communities, including at least one person who is a professional community association manager. In addition, designees of the County Council, Planning Board, Department of Environmental Protection, Department of Permitting Services, Department of Public Works and Transportation, and Department of Housing and Community Affairs are *ex-officio* nonvoting members of the Commission. Each voting member serves a 3-year term.

The Department of Housing and Community Development may investigate facts and assemble documents relevant to a dispute filed with the Commission, and may summarize the issues in the dispute. The Department may notify a party if, in its opinion, a dispute was not properly filed with the Commission, and may inform each party of the possible sanctions.

If the Department, after reviewing a dispute, finds that, assuming the truth of all facts alleged by the party that filed the dispute, there are no reasonable grounds to conclude that a violation of applicable law or any association document has occurred, it may so inform the Commission. Furthermore, the Department, *in consultation with the Commission*, must: (a) research, assemble, analyze and disseminate pertinent data and educational materials about activities and programs which assist common ownership communities; plan and conduct educational and other programs, meetings and conferences to promote the operation of common ownership communities; (b) maintain a master roster of homeowners' associations, condominiums, and cooperatives, their leadership, and their professional management companies if applicable; (c) develop and maintain an information and referral system for all services in the County related directly to common ownership communities, and recommend other services when needed; (d) maintain a collection of common ownership community association documents for use as a model and for reference; (e) provide technical assistance to association governing bodies on matters such as transition, elections, rules adoption and enforcement, selection of association managers, storm water management and other services; (f) develop and maintain a manual for the mutual benefit of common ownership communities and government agencies; (g) develop and maintain an operations manual which will serve as a guide on operations to common ownership community leadership; (h) advise common ownership communities and professional association managers of changes in the laws and regulations that affect their communities or operations; (i) operate a dispute resolution process to furnish mediation and administrative hearings; and (j) assist the Commission in carrying out its duties and in implementing Commission dispute decisions. Finally, in selecting staff to carry out the Department's responsibilities under the Common Ownership Communities Law, the Director must consider the recommendations of the Commission.

Under our recommendation, the Commission alone would be the agency of each of the voting members, while both the Commission and the agency that designated them would be the agency of the non-voting members.

*g. The Ethics Commission.*

The Ethics Commission is, as you well know, is a statutory commission of five citizens, appointed by the County Executive and confirmed by the Council, that administers the Ethics Law. The Commission exercises executive, quasi-legislative and quasi-judicial authority. It issues advisory opinions, must approve outside employment by county employees, receives, adjudicates complaints of violations of the Ethics Law, is authorized to waive provisions of the Ethics Law under certain circumstances, is the repository for Financial Disclosure Statements and Lobbying Disclosure, and is authorized to adopt regulations to implement the Ethics Law.

The Commission is allocated merit system staff appointed or assigned by the Chief Administrative Officer after receiving a recommendation from the Commission. Subject to the general supervision of the CAO, assigned staff serve at the direction of the Commission to perform duties assigned by the Commission.

The Commission performs its duties as an independent, autonomous unit of County government. It alone, therefore, is the agency of its members for the purposes of the Political Activities provisions.

*h. The Fire and Rescue Commission.*

“The Montgomery County fire and rescue system is a public-private partnership, acting through the Fire and Rescue Commission and the Montgomery County Fire and Rescue Service.”<sup>53</sup> “The Montgomery County Fire and Rescue Service is a department of County government ...”<sup>54</sup> that “consists of the Division of Volunteer Fire and Rescue Services, which includes the local fire and rescue departments,<sup>55</sup> and the Division of Fire and Rescue Services.<sup>56</sup>

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<sup>53</sup> MONT. CO. CODE § 2-39A(a).

<sup>54</sup> MONT. CO. CODE § 2-39A(b).

<sup>55</sup> As defined in MONT. CO. CODE Ch. 21.

<sup>56</sup> “The local fire and rescue departments and their volunteer members are an essential element of the Montgomery County Fire and Rescue Service because under Chapter 21 they furnish direct fire, rescue, and emergency medical services in conjunction with the Division of Fire and Rescue Services.” MONT. CO.



The Fire and Rescue Commission is a statutory commission composed of seven voting members appointed by the County Executive and confirmed by the County Council. Two members are County career fire/rescue personnel, two are volunteer local fire and rescue department personnel, and three must have no personal, family, or business connection with the County volunteer or career fire and rescue services. Each member must be a resident of the County. In addition to the seven voting members, the Fire Administrator serves *ex officio* as the non-voting chair of the Commission. The Chief of the Division of Fire and Rescue Services and the Chief of the Division of Volunteer Fire and Rescue Services are statutorily ineligible to serve on the Commission.

The Commission has executive, quasi-legislative and quasi-judicial authority. It is responsible for developing effective, efficient and equitable fire, rescue, and emergency medical services County-wide, and providing the policy, planning, and regulatory framework for all fire, rescue and medical service operations. Among other things, the Commission: advises the County Executive and the County Council on any matter relating to fire, rescue and emergency medical services, and reviews the performance of the County Fire and Rescue Service; adopts County-wide policies, standards, procedures, plans, and programs applicable to all fire, rescue and emergency medical service operations—including, for example, an integrated emergency command structure (IECS), applicable to all IECS certified providers of fire, rescue and emergency medical services, on all emergency incidents; reviews and recommends changes in the fire and rescue disaster plan, including establishing an integrated chain of command; recommends to the Executive regulations for adoption; establishes communications and dispatch procedures for emergency communications centers; establishes guidelines for curriculum and programs of the public service training academy and other training programs for Fire and Rescue Service employees and volunteers; recommends to the County Council a benefits program to provide financial protection for volunteers and their families if a volunteer becomes disabled or dies in the line of duty; may conduct performance audits of any local fire and rescue department for the purpose of making budget, management, or legislative recommendations; assigns fire stations when built or acquired to a local fire and rescue department or, with the concurrence of the County Executive and County Council, to the Fire and Rescue Service; establishes procedures governing all purchases and contracts made by the local fire and rescue departments and financed in whole or in part with tax funds; adopts training requirements to be met by all active fire, rescue, and emergency medical services personnel; adopts a code of ethics and on-duty personal conduct; and, after consulting the Fire Administrator and the Fire Board,

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CODE § Sec. 2-39A(c).

adopt policies and programs to recruit and retain volunteers. To enable the Commission to carry out its duties and to ensure equitable and effective compliance with its policies and regulations, local fire and rescue departments, as a condition of their authority to provide fire and rescue services in the County and to receive County funds, and the Division of Fire and Rescue Services are required by law to furnish any information requested by the Commission on operations, administration, volunteer participation or other aspects of fire, rescue, or emergency medical services.

The Montgomery County Fire Administrator, as the non-uniformed department head of the Montgomery County Fire and Rescue Service, must implement the policies of the Commission and effectively administer all fire and rescue services provided in the County. In addition, the Fire Administrator must submit to the Commission a unified Montgomery County Fire and Rescue Service budget that includes the budgets of the local fire and rescue departments, the Divisions of Fire and Rescue Services and Volunteer Fire and Rescue Services, and staff and compensation for the Commission. The Commission must forward the Administrator's proposed budget, together with a summary, an analysis of County-wide implications and relationships to applicable fire service master plans, and its recommendations on the proposed budget, to the County Executive for review and submission to the County Council as required by the County Charter.

The Commission also has significant quasi-judicial authority. It hears and decides appeals filed by a local fire and rescue departments concerning any action of the Fire Administrator in carrying out a County law or regulation or Commission policy; and by employees of the Fire and Rescue Service or a local fire and rescue department, volunteer firefighter or rescuer, or other aggrieved person concerning any adverse action of the Administrator or a local fire and rescue department in carrying out a County law or regulation, Commission policy, or order of the Administrator.<sup>57</sup>

For the purposes of the Political Activities Law, we recommend that the agency of the members be limited to the Commission, except that the career fire fighters and the volunteer firefighters' agency also include their respective departments, and the Montgomery County Fire and Rescue Service also constitute an agency of the Fire Administrator.

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<sup>57</sup> The Commission does not, however, hear appeals under this Section if the appellant has a right to appeal the action to an employee grievance process or the Merit System Protection Board under any other law, regulation, or collective bargaining agreement.

i. *The Case Review Board of the Human Rights Commission.*

The Human Rights Commission is a statutory commission composed of fifteen members, appointed by the County Executive and confirmed by the County Council, for three year terms. The Commission has executive, quasi-legislative and quasi-judicial authority. It's statutory duties include researching, analyzing, and disseminating information about activities and programs to eliminate prejudice, intolerance, bigotry, and discrimination; conduct educational and other programs to promote equal rights and opportunities of all persons regardless of race, color, religious creed, ancestry, national origin, sex, age, marital status, disability, sexual orientation, genetic status, presence of children, or source of income; promote goodwill, cooperation, understanding and human relations among all persons; cooperating with interested citizens, racial, religious, and ethnic groups; and community, business, professional, technical, educational, and civic organizations; cooperate with the County Executive and all governmental agencies on matters within the Commission's jurisdiction; studying and investigating, through public or private meetings, conferences, and public hearings, conditions that could result in discrimination, prejudice, intolerance, or bigotry because of race, color, religious creed, ancestry, national origin, sex, age, marital status, disability, sexual orientation, genetic status, presence of children, or source of income; advising county residents, the County Council, the County Executive, and the various departments of County, State, and federal governments about racial, religious, and ethnic prejudice, intolerance, discrimination, and bigotry and recommend procedures, programs, and laws to promote and protect equal rights and opportunities for all persons, regardless of race, color, religious creed, ancestry, national origin, sex, age, marital status, disability, sexual orientation, genetic status, presence of children, or source of income; working to eliminate discrimination, prejudice, intolerance, and bigotry in housing, recreation, education, health, employment, public accommodations, justice, and related matters; initiating and receiving complaints of discrimination, prejudice, intolerance, and bigotry from any person or group because of race, color, sex, age, marital status, religious creed, ancestry, national origin, disability, sexual orientation, or genetic status that deprives that person or group of equal rights, protection, or opportunity in employment, real estate, and public accommodation. The Commission must: approve any conciliation agreement before the agreement is enforceable as an order of the Commission; appoint a case review board to consider and decide a complaint certified to the Commission; and take any other action necessary to resolve a complaint under this Article and any other applicable law. If the County Executive does not object, the Commission may conduct additional programs to relieve group tension or adverse intergroup actions resulting from causes other than race,

color, sex, religious creed, ancestry, national origin, age, marital status, disability, sexual orientation, genetic status, presence of children, or source of income. The Commission is authorized to issue regulations necessary to carry out the provisions of the Human Rights Law.

The Executive Director of the Commission, a merit system employee, heads the Office of Human Rights, and assists the Commission in implementing the Human Rights Law. The County Executive is authorized to assign additional staff to assist the Commission, and the Commission, with the approval of the County Executive, may engage the services of volunteer workers and volunteer consultants. The Director or the Director's designee receives, investigates, and, in some cases, conciliates complaints alleging violations of the County's Human Rights Laws. Based on the investigation, the Director must determine whether reasonable grounds exist believe that a violation has occurred, and must send that determination to the complainant and the respondent. If the Director determines that there are reasonable grounds to believe that a violation occurred, the Director must attempt to conciliate the matter. If conciliation has not occurred within 90 days after the Director found reasonable grounds, or the Director decides at any time that conciliation would be fruitless, the Director must promptly certify the complaint to the Commission, which must appoint a care review board to consider and decide the complaint. (At the discretion of the Case Review Board, a hearing is held by either that Board or a hearing officer.)

Each member of a case review board must be a member of the Commission when appointed to the board. After finding a violation of this article, the case review board may order the payment of damages (other than punitive damages) and any other relief that the law and the facts warrant, *e.g.*, compensation for reasonable attorney's fees, property damage, personal injury, unreimbursed travel or other reasonable expenses, up to \$5,000 for humiliation and embarrassment, based on the nature of the humiliation and embarrassment, including its severity, duration, frequency, and breadth of observation by others, and interest on any damages from the date of the discriminatory act; equitable relief to prevent the discrimination and otherwise effectuate the purposes of this Chapter; consequential damages, such as lost wages from employment discrimination or higher housing costs from housing discrimination, for up to 2 years after the discrimination, not exceeding the actual difference in expenses or benefits that the complainant realized while seeking to mitigate the consequences of the discrimination (such as income from alternate employment or unemployment compensation following employment discrimination); any other relief that furthers the purposes of this Article or is necessary to eliminate the effects of any discrimination prohibited under this Article. In addition to any damages awarded to any

person under this article, the case review board may require any person, except the County, who has violated this article to pay to the County certain specified civil penalties. The board also may order the respondent to pay to the complainant interest on a damage award at 6 percent per year of any money that was unavailable to the complainant as a result of the act of discrimination, from the date of the discriminatory act to the later of the date of the Commission or judicial order. After judgment, the rate of interest on the judgment is 10 percent per year.

We recommend that, for the purposes of the Political Activities Law, the Commission be the sole agency of the Commissioners.

*j. The Merit System Protection Board.*

The Merit System Protection Board, a creature of the County Charter, is composed of three members who are qualified voters of the County appointed by the County Council. The Board serves as an appeal body on personnel actions, conducts periodic studies and audits of the County's merit and retirement pay systems, and is required to comment on any proposed change in the merit system law or regulations in a timely manner as provided by law. Board members serve three-year terms with compensation.

Any employee under the merit system who is removed, demoted, or suspended has, as a matter of right, an opportunity for a hearing before the Board, which may assign the matter to a hearing examiner to conduct a hearing and provide the Board with a report and recommendations. If the Board assigns the matter to a hearing examiner, any party to the proceeding may, as a matter of right, present an oral argument on the record before the Board prior to a final decision. The Board is authorized to establish procedures consistent with law for the conduct of its hearings.<sup>58</sup>

The Merit System Protection Board appoints and removes its executive secretary, and the executive secretary appoints and removes other staff to the board.

We recommend that the Ethics Commission treat the Board as its members' agency for the purposes of the Political Activities law.

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<sup>58</sup> CHARTER OF MONT. CO. § 403.

k. *The Sign Review Board.*

The Sign Review Board is a three member board composed of an architect with a State license, a business member, and a member of the general public appointed by the County Executive, subject to the confirmation of the Council. The Board reviews applications for sign permits, provides a recommendation to the Director of Department of Permitting Services as to whether an application for a permit meets the requirements or needs a variance, and hears and decides applications for a variance from the sign ordinance regulations. Members serve three-year terms with compensation.<sup>59</sup>

The Director must provide staff to enable the Sign Review Board to conduct its business in a timely and efficient manner, and resources that enable the Board to perform its functions in an autonomous setting.

We recommend that the Ethics Commission treat the Sign Review Board as the agency of its members for the purposes of the Political Activities Law.

1. *The Historic Preservation Commission.*

The Historic Preservation Commission is a statutory commission that consists of nine members appointed by the County Executive with the confirmation of the County Council. Each member must be a resident of the county. Each of the four fields of history, architecture, preservation and urban design are represented by at least one member qualified by special interest, knowledge or training. The remaining members are, to the extent possible, selected to represent the geographical, social, economic and cultural concerns of the residents of the county.

The Commission exercises executive, quasi-legislative and quasi-judicial powers and duties. They include researching historic resources and recommending to the Planning Board that certain of them be designated as historic sites or historic districts on the master plan for historic preservation and, hence, subject to the provisions of the Historic Resources Preservation Law; recommending to the Planning Board, as needed, any update to the inventory of historic resources which is contained in the "Locational Atlas and Index of Historic Sites in Montgomery County;" acting upon applications for historic area work permits and other matters; appointing members to local advisory panels to assist and advise the Commission on the performance of its functions; recommending programs and

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<sup>59</sup> MONT. CO. CODE § 59-F-10.2 (a).

legislation to the Council and the Planning Board to encourage historic preservation in the Maryland-Washington Regional District; reviewing legislation and proposals affecting historic preservation, including preparation of master plans, and to make recommendations on such legislation and proposals to appropriate authorities; serving as a clearinghouse for information on historic preservation for county government, individuals, citizens' associations, historic societies and local advisory committees; to provide information and educational materials for the public; and to undertake activities to advance the goals of historic preservation in the county; employing or hire consultants or other temporary personnel, consistent with county contract provisions, as deemed necessary to assist the commission in the accomplishment of its functions; such consultants or other personnel shall be compensated as may be provided for in the county budget; administering an historic preservation easement program and any revolving funds or grant programs to assist in historic preservation; advising the Planning Board, in the event of subdivision of land containing an historic resource, on the appurtenances and environmental setting necessary to preserve it; delineating the extent of appurtenances and environmental setting associated with an historic site or resource. There are appointed and assigned to the Commission such employees as are necessary or appropriate for the proper performance of its duties.

We recommend that the Ethics Commission view the Historic Preservation Commission as the agency of its members for the purpose of the Political Activities Law.

m. *The Contract Review Committee.*

The Contract Review Committee, which is authorized by statute<sup>60</sup> and created by Executive Regulation,<sup>61</sup> is composed of three or four voting members (a County employee designated by the CAO, the Director of Procurement, the Director of the Office of Management and Budget or his or her designee, the Director of the Staff of the County Council or designee, when a County Council procurement action is considered, and a County employee designated by the CAO to act in the place of a CRC member listed above, if that member is disqualified, absent or otherwise unable to participate in any matter before the CRC. In addition, there are two advisory non-voting members: The County Attorney or designee, who becomes a voting member in the case of a disqualification or absence of a voting member, if the CAO has not designated another member as provided above, and a

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<sup>60</sup> MONT. CO. CODE § 11B-7 (“A Contract Review Committee may be established.”)

<sup>61</sup> MONT. CO. CODE, Appendix D, §§ 15.2.1 and 15.2.2 (the Procurement Regulations).

using department representative designated by the CAO.

The CRC performs executive and quasi-judicial functions. It is responsible for administrative review and approval of procurement actions as set forth in regulations, laws and other policies of the County. These procurement actions include: approval of sole source procurements valued above the threshold for an IFB or RFP; approval of an Open Solicitation Plan; approval of all change orders or amendments to a contract valued above the threshold for an IFB or RFP, unless the Director determines that the change in compensation results from a mechanical application of an established cost indexing provision or other contract option which pre-determines price; approval of every extension of a contract beyond its original term, except: an extension authorized in the original contract, or a single extension of the original term by 12 months or less; consideration of procurement matters referred to the CRC by the CAO, the County Attorney, the Director or a Using Department Head; consideration of other procurement matters contained in these regulations, including hearing and deciding solicitation appeals. The CRC also may undertake special investigations or studies and render reports as directed by the CAO.

In addition to sitting as a voting member of the CRC (except on bid protest appeals), the Director of Procurement provides staff for the CRC who is responsible for the preparation of meeting agendas and minutes.

We recommend that the Ethics Commission consider both the Office of Procurement and each member's assigned agency and as being their agency for the purposes of the Political Activities Law.

n. *The Chief Administrative Officer.*

The Chief Administrative is a professionally qualified administrator who is appointed by the County Executive, subject to confirmation by the County Council, and serves at the pleasure of the County Executive, subject to the approval of the Council.<sup>62</sup> Subject to the direction of the County Executive, the CAO supervises all departments, offices, and agencies of the Executive Branch, advises the County Executive on all administrative matters, and performs such other duties as may be assigned by the County Executive or the Charter.<sup>63</sup> For

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<sup>62</sup> CHARTER OF MONT. CO. § 210.

<sup>63</sup> Id. § 211.



example, the CAO has quasi-judicial responsibilities in both the personnel and the procurement process. Indeed, the Charter requires that the Council prescribe by law a centralized system of purchasing and contracting for all goods and services used by the County, and that that system be administered under the professional supervision of the CAO, subject to the direction of the County Executive. For the purposes of the Political Activities provision of the Ethics Law, the Ethics Commission should consider the Executive Branch to be the CAO's agency.

*o. The Office of Zoning and Administrative Hearings' Hearing Examiners.*

The County Council, by a majority vote of Councilmembers in office, may appoint one or more hearing examiners of the Office of Zoning and Administrative Hearings, and designate a hearing examiner or the Council Staff Director as Director of the Office. The hearing examiners are not merit system employees. The Staff Director appoints and supervises the merit system employees of the Office.

Because the Office is a subunit of the Office of County Council, we recommend that the Ethics Commission view the hearing officer's agency as the Office of County Council for the purposes of the Political Activities Law.

*p. The Public Hearing Officer in the Office of the County Executive.*

The hearing examiner in Office of the County Executive is a merit system employee who is hired by the CAO, and available for the purpose of conducting quasi-judicial proceedings throughout the Executive Branch. For these purposes, his or her agency should be the Executive Branch.

Finally, the "regular" agency of any member of any board or commission who is an *ex officio* member or represents another county agency on the board or commission also should be treated as an agency of that official for the purposes of the Political Activities Law.

## **9. Federal Elections.**

The Political Activities provisions of the Ethics Law defines the term "candidate" to have "the same meaning as in the state election law."<sup>64</sup> The State Election law, in turn,

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<sup>64</sup> MONT. CO. CODE § 19A-16A (b) (3).

defines the term “candidate” to mean “an individual who files a certificate of candidacy for a public office or party office;”<sup>65</sup> it also defines the term “election” to mean “the process by which voters cast votes on one or more contests under the laws of this State or the United States.”<sup>66</sup> Therefore, the County Political Activities provisions apply to the political activities of County quasi-judicial officials on behalf of candidates in both State and federal elections in Maryland.<sup>67</sup>

## SUMMARY

In summary, we recommend that the Commission, in the exercise of its statutory advisory opinion authority, construe the Political Activities Law as follows:

1. The term “officer’s jurisdiction” includes not only quasi-judicial authority, but also any other authority (legislative, executive, or quasi-legislative) of a quasi-judicial official who is subject to the Political Activities Law.
2. Quasi-judicial officials who are listed in the Political Activities Law are not prohibited from using stickers and lawn signs on their private property.
3. A listed quasi-judicial official may not, by letter or otherwise, solicit “a financial contribution for any political candidate, political organization or ballot question (other than a ballot question that directly affects the official’s agency)” or “an endorsement of or opposition to a political candidate” from

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<sup>65</sup> MD. ANN. CODE art. 33 § 1-101 (i).

<sup>66</sup> MD. ANN. CODE art. 33 § 1-101 (p) (1).

<sup>67</sup> This Office has previously advised (with the subsequent concurrence of the Attorney General of Maryland) that neither the Federal Election Campaign Act nor the Federal Hatch Act preempts the County's ability to prohibit members of its quasi-judicial boards and commissions from soliciting funds for partisan political campaigns and to restrict other political activities that conflict with a compelling county interest such as the proper performance of quasi-judicial duties. See \_\_\_ *Op. Att’y Gen.* \_\_\_ (Opinion No. 98-003), 1998 Md. AG LEXIS 1 (January 28, 1998) (to which our December 10, 1997 memoranda to Laurie Horvitz, Chair, Montgomery County Ethics Commission is appended). We and the Attorney General also advised that such an enactment would not offend either the free speech guarantees of the Constitution of the United States or those of Maryland's organic law. *Id.*

anyone within the official's jurisdiction.

4. The Political Activities Law does not prohibit a listed quasi-judicial official from permitting a political candidate to include the official's name in a list of supporters. However, listed officials should advise those whom they permit to use their name in such a list that the official is not and may not consent to the use of his or her name used in connection the *solicitation* of either "a financial contribution for any political candidate, political organization or ballot question (other than a ballot question that directly affects the official's agency)" or "an endorsement of or opposition to a political candidate" from a person within the official's jurisdiction, quasi-judicial or otherwise.

5. A stockholder or an employee of a corporation has "an identifiable economic interest [that is] different from that of the general public." Therefore, if a stockholder or corporate employee is within a listed official's jurisdiction (quasi-judicial or otherwise) and the official can, in the performance of his or her duties, substantially affect the individual's economic interest as a stockholder or corporate employee, then the official may not solicit from the stockholder or corporate employee either "a financial contribution for any political candidate, political organization or ballot question (other than a ballot question that directly affects the official's agency)" or "an endorsement of or opposition to a political candidate."

6. For the purposes of the "official's agency" provision of the Political Activities Law, we recommend that the Ethics Commission treat the listed boards, commissions, committees as the sole agency of their "regular" members. As to the other members, *i.e.*, those who serve in an *ex-officio* or representative capacity, both their "parent" agency and their listed board, commission or committee should be viewed as their agency for these purposes.

7. The Political Activities provisions apply to the political activities of County quasi-judicial officials on behalf of candidates in federal elections.

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We trust that this opinion is fully responsive to the Commission's request and of assistance. As always, we are available to address any further questions regarding this matter.