



ADVISORY OPINION 25-05

Date: June 11, 2025

Decision by Commissioners:

Johanna Bishop, Robert Hicks, Sally Jensen, Charles Toliver, IV, and Allan Zaback

Question

Whether it violates the Ethics Code for a County official who serves on a county land use board to concurrently serve on the board of a newly created State of Delaware commission?

Conclusion

Conditionally, no, it will not violate the Ethics Code for the requester to serve as a member of a newly created State of Delaware commission while also serving on a County land use board so long as the requester strictly follows the conditions set forth in this opinion.

Facts

The requestor is a County official and serves as the vice chair of the New Castle County Board of Adjustment. The Board of Adjustment ("BOA") typically meets twice a month. Generally speaking, the BOA hears applications from people who own property in New Castle County who need a variance for their New Castle County property. In the requester's role as the vice chair of the BOA, she presides over its hearings when the chair is not available or must recuse due to a conflict. The BOA members interact with members of the Land Use department and the applicants who come before the board to be heard. Depending on the type and complexity of the application, the applicants' lawyers, engineers, architects, and other real estate professionals also appear before the BOA on behalf of the applicant. Additionally, the BOA hears from anyone who appears in opposition of the application being heard. In sum, the BOA interacts with people from every walk of life in New Castle County.

The governor of the State of Delaware has recently named the requester as the chair of the newly created Delaware LGBTQ+ Commission. The Delaware LGBTQ+ Commission will have nine members and is intended to strengthen ties between the government and LGBTQ+ organizations, help remove barriers to societal participation for LGBTQ+ people and improve the delivery of services to the community in Delaware in

areas such as employment, equality, education, mental health, social services, health, and housing. The Delaware LGBTQ+ Commission will be making recommendations to the governor on unique challenges and needs of LGBTQ+ people. It will be supported and administered by the Delaware Department of State.

Code or Prior Opinion:

Relevant provisions in the definition section of the Ethics Code, Section 2.03.102, include the following:

Appearance of impropriety means conduct which is prohibited by Section 2.03.104A.

Conflict or conflict of interest means conduct which is prohibited by Section 2.03.103.

Recusal means, including but not limited to, withdrawing from sponsorship, deliberation, vote, research, preparation, discussion, negotiation, contract formation, policy making, planning, decision making, and/or implementation of a matter. It also includes a prohibition on conducting, in an official capacity, any private or public discussion of a measure raising a conflict or improper appearance. As soon as a potential conflict or improper appearance arises or is recognized, an official or employee must end direct or indirect participation, advice, input, direction, recommendation, or discussion, as well as refraining from vote, if the person is a not an elected official. Elected officials may choose to avoid recusal and may vote if they follow the alternate process described in Subsection 2.03.103.A.2.

Code of Conduct Provisions

Certain portions of the New Castle County Ethics Code are relevant to this opinion, including Sections 2.03.101.B; 2.03.103.A.1 and A.2; 2.03.104.A:

Sec. 2.03.101. - Purpose of Division.

D. This Division is intended to establish a minimum standard for ethical conduct and financial disclosure. Elected officials may superimpose conduct rules for officials and employees which are more strict, but not less strict, than these minimum standards. The Ethics Commission has jurisdiction to decide whether superimposed rules fall below the minimum standards expressed in this Division.

Sec. 2.03.103. - Prohibitions relating to conflicts of interest.

A. Restrictions on exercise of official authority.

1. No County employee or official knowingly or willfully shall use the authority of his or her office or employment or any confidential information received through his or her holding County office or employment for the personal or private benefit of himself or herself, a member of his or her immediate family or a business with which he or she is associated. This prohibition does not include an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the County official or employee, a member of his or her immediate family or a business with which he or she or a member of his or her immediate family is associated. There will be a rebuttable presumption of a knowing or willful violation of this section if the action benefits the County official or employee, his or her spouse, or his or her dependent children (whether by blood or by law).

2. In any case where a person has a legal and/or statutory responsibility with respect to action or nonaction on any matter where the person has a personal or private interest and there is no provision for the delegation of such responsibility to another person, the person may exercise responsibility with respect to such matter, provided that promptly after becoming aware of such conflict of interest, the person files a written statement with the Commission fully disclosing the personal or private interest and explaining why it is not possible to delegate responsibility for the matter to another person. If the matter is one in which the legal and/or statutory responsibility requires the person to vote upon the issue, the written statement filed with the Commission shall be read into the public record prior to the time the person's vote is cast. Any person choosing to abstain from voting on an issue where or she has a conflict shall state the reasons for his or her conflict on the record; an abstaining voter need not file the written statement with the Commission required when acting on, rather than abstaining from, an issue involving a conflict.

Sec. 2.03.104. - Code of conduct.

A. No County employee or County official shall engage in conduct which, while not constituting a violation of Subsection 2.03.103.A.1., undermines the public confidence in the impartiality of a governmental body with which the County employee or County official is or has been associated by creating an appearance that the decisions or actions of the County

employee, County official or governmental body are influenced by factors other than the merits.

Case Law and Commission Precedent

The New Castle County Ethics Code prohibits conduct on the part of County officials or employees which either creates the appearance of impropriety even where no direct conflict of interest is present. Specifically, conduct which creates an appearance of impropriety is prohibited by Section 2.03.104(A) of the New Castle County Code. To determine if an appearance of impropriety exists, the Delaware courts have stated that “[t]he test is... if the conduct would create in reasonable minds, with knowledge of all relevant facts, a perception that an official’s ability to carry out [his or] her duties with integrity, impartiality and competence is impaired.” *Hanson v. Delaware State Public Integrity Com’n*, 2012WL3860732, at *16 (Del.Super. 2012), *aff’d*, 69 A.3d 370 (Del.Super. 2013); and “[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the [official’s] ability to carry out [the official’s] responsibilities with integrity, impartiality and competence is impaired.” *In re Williams*, 701 A.2d 825, 832 (Del.Super. 1997). The courts have advised the Commission to look at the totality of the facts presented, and this Commission has historically applied this standard when reviewing the conduct of County officials and employees.

In Advisory Opinion 17-06, a Land Use department employee asked the Commission whether it would violate the Ethics Code if he served as a volunteer, unpaid member of the City of New Castle Planning Commission. The Commission determined that under the facts presented, the requester could proceed with his appointment to the City of New Castle Planning Commission. The requester, however, was required to disclose the potential areas of conflict or improper appearance to both the Planning Commission and any appropriate New Castle County governmental entity, and the requester had to recuse himself from any activities which could cause the appearance of conflict, including policy making, promotion, giving of advice, or other activity concerning the Planning Commission’s potential interaction with the County. The requester was required to clearly disclose to all relevant parties that his actions on the Planning Commission were, at no time, actions on behalf of New Castle County. Similarly, the requester was required to clearly disclose to all relevant parties that his actions while working for the County were, at no time, actions on behalf of the Planning Commission.

In Advisory Opinion 10-11, a County employee sought advice from the Commission as to whether he may accept a position on the board of a nonprofit given that his department made recommendations on grants to members of a larger community which the nonprofit represented. In its opinion allowing the employee to serve on the board, the Commission noted that the “[b]oard’s purpose is limited to making advisory

operational recommendations regarding a division in the requester's department but those recommendations are not made to the department but to a separate County entity...which has discretion to support, change or ignore [the recommendations]." This service on the board, however, was conditioned upon the employee's recognition and knowledge that he must recuse himself from any matters which involved either the County or the nonprofit or any recommendations made to his department by the board.

In Advisory Opinion 15-09, the Commission was asked whether a County employee of the Department of Community Services could serve as an uncompensated member of a nonprofit that advocated on housing issues. While the Commission advised that the County employee may serve on the board of the nonprofit advocacy organization, it cautioned the employee against engaging in any conduct that was or could be perceived as a conflict of interest by recusing herself from any County process that involved the nonprofit and ensuring that both the County and the nonprofit were made aware of her requirement to recuse from any matter with potential conflict.

In Advisory Opinion 15-03, the Commission was asked whether an appointed official could serve as a member of a nonprofit board which has occasionally received federal funds that are administered by the official's department. In concluding that the official may join the board of the nonprofit, the Commission required the official to disclose potential areas of improper appearance to both the nonprofit and the appropriate County authority and to recuse him or herself from any activities which may cause the appearance of conflict, including policy making, promotion, or other activities concerning the nonprofit's relationship with the County.

In Advisory Opinion 13-02, a County employee wanted to serve as an unpaid volunteer to advise a nonprofit on its budgetary and fiscal matters. Because the requester would serve in a volunteer capacity, with no financial benefit to himself or his family, the Commission approved the request on the condition, however, that the requester recuse himself from involvement in any matters associated with issues of change in valuation policy by the County that may affect the nonprofit.

In Advisory Opinion 15-12, the requestor, an elected County official, asked the Commission whether he may serve on the advisory board of a local nonprofit heritage association. The Commission decided that, conditionally, the requestor may serve in that capacity, as long as he recused himself from participation in all County matters that involved the nonprofit organization and that he took the steps necessary to inform the public and County employees and officials of his involvement with the nonprofit association.

Analysis

The Commission commends the requestor's desire and willingness to serve the State of Delaware and her community in this manner. The Commission further commends the requestor for recognizing the need to bring this matter before the Commission in the form of a request for an advisory opinion prior to accepting the commission position.

Section 2.03.104.A.1 prohibits the creation of an impression in the reasonable mind of a member of the public that an official or employee's official action is affected by personal interests which impairs her competence, integrity and honesty, or that the department in which she serves will look as though it is showing partiality in a given matter. The Ethics Code makes it clear that it is important that the requestor's service in this manner must not "undermine the public confidence in the impartiality of a governmental body with which the County employee or County official is or has been associated by creating an appearance that the decisions or actions of the County employee, County official or governmental body are influenced by factors other than the merits," as prohibited in Ethics Code Section 2.03.104.A. In other words, to avoid violating the Ethics Code, the requester will be required to diligently keep separate her work for the County as a member of the BOA from her service on the State commission. The scenario which must be prevented is one where a member of the public believes that someone is or may be receiving special treatment from the County BOA because of the requester's service on the State commission. Another scenario which must be avoided is one where a member of the public believes that because of the requester's service on the State commission, someone associated with the BOA (or the County, in general) is receiving special treatment from the State commission because of the requester's service on the BOA.

To avoid those potential scenarios, the requester must do as much as reasonably possible to prevent possible confusion which may be caused by her simultaneous service to both New Castle County and the State of Delaware. In her work for the County, the requester is likely to come into contact with the same people that the State commission has been created to assist. As such, it is imperative for the requester to very carefully keep separate her role as a County official on the BOA from her role as a member of the State commission. Beyond that, the requester must do what she can to assure that the people she interacts with at the County, and the people she interacts with at the State, all are very much aware of the fact that in order to avoid New Castle County Ethics Code problems, she must keep those two roles exceedingly separated.

To serve on the State commission while also serving on the BOA without violating the County Ethics Code, the requester must remain vigilant in her awareness of actual or potential conflicts and she must recuse herself from any issues regarding the varied work

of the State commission. It is not anticipated that the State commission, itself, will need to appear before the BOA but that is not outside the realm of possibility. And it is very possible that members of the State commission or other people associated with it may come before the BOA for County relief. To diminish the potential for actual or potential conflict, the requester must inform County departments, boards, and commissions with which she interacts of her involvement with the State commission. In addition, the requester must inform the State commission that, in the event that the requester's involvement with the State commission requires her to engage in any activity or issue that involves the New Castle County government or any entity closely aligned with New Castle County government, she must recuse herself from any participation in such activity or issue.

As the requester's service on the State commission proceeds, should she have specific questions about how the Ethics Code may apply, the requester is encouraged to again consult with the Ethics Commission.

Finding

Under the facts presented, the requester may proceed with her appointment to the State commission. The requester must disclose the potential areas of conflict or improper appearance to both the State commission and the New Castle County government. Further, the requester must recuse herself from any activities which may cause an actual conflict or the appearance of conflict concerning the State commission's potential or actual interaction with the County. The requester must clearly disclose to all relevant parties, with respect to her participation and activities with the State commission, that, at no time, is she acting or speaking on behalf of New Castle County. Similarly, the requester must clearly disclose to all parties, with respect to her participation and activities with the County, that, at no time in her County service, is she acting on behalf of the State commission. The two realms of activities must be kept entirely separate.

In rendering this advisory opinion, this Commission has applied the New Castle County Ethics Code, which establishes the minimum level of ethical conduct required of County officials and employees.

BY AND FOR THE NEW CASTLE COUNTY ETHICS COMMISSION

ON THIS 11TH DAY OF JUNE 2025

Robert I. Hicks, Jr., Chairperson
New Castle County Ethics Commission

