



## **ADVISORY OPINION 21-01**

Date: January 13, 2021

Decision by Commissioners:

Johanna Bishop, Robert Hicks, Sally Jensen, Robert Ralston, Kellie Tetrick and Charles Toliver

### **Question**

An elected member of County Council asked the Commission about the process to be followed for the rezoning of real property owned by the Council member and located in New Castle County.

### **Conclusion**

Although the review of the proposed rezoning has been completed by administrative entities and boards at both the State and County levels as required by law, and the ordinance on which County Council will vote regarding the rezoning has been drafted, County Council has not yet reviewed or discussed the proposed ordinance at any of its meetings. The Commission concludes that the requester will not violate the Ethics Code in this rezoning process if the requester continues to recuse from all involvement in the steps in the rezoning process, including its consideration by County Council, as set forth in the Code and this opinion. It is important to note that the recusal requirements are necessary even if the rezoning of the property may diminish the current market value of the subject property. In other words, the recusal requirements of the Ethics Code are not limited to situations only where the County official or employee will reap a monetary profit. Considerations other than financial gain can trigger the need for recusal in any given circumstance, and it is incumbent upon every County official and employee to keep that in mind as they perform their governmental duties.

### **Facts**

A member of County Council, the requester, owns real estate which includes a mid-century home which was built in the 1960's. Out of a desire to protect the historic nature of that property, and with the intention of selling the property sometime this calendar year, the requester decided to undergo the process of having an historic overlay added to the residential zoning classification of the property. This process

includes reviews at both the State and County levels, including a review by the County Department of Land Use, the County Planning Board, the County Historic Review Board, and a “PLUS” (preliminary land use service) review by the State of Delaware, Office of State Planning Coordination. The County Land Use Department, not the requester, has appeared at these review or approval meetings or hearings. No negative votes or comments were made on the matter. The next step in the process is for County Council to review and vote on the proposed ordinance, Ordinance 20-089, sponsored by the President of County Council, which would create an historic overlay on the property, if adopted.

The requester has been an advocate in Delaware for the preservation of historic properties for many years. The requester served as the executive director of a nonprofit entity dedicated to preserving properties in this state for historic purposes before becoming a member of County Council. While on Council, the requester has sponsored several pieces of legislation geared toward the expansion of historic preservation of real property in New Castle County including the passage of laws which incentivize the renovation and rehabilitation of historic properties by County residents. Additionally, the requester sponsored legislation which expands the eligible uses of historic overlay district properties, subject to government review and approval. The requester has already renovated the subject property and intends to place it on the market for sale this year but did not request tax credits or other government incentives. When the requester had an appraisal of the property performed in anticipation of placing the property on the market, the appraiser opined that the historic overlay would decrease the property’s value.<sup>1</sup> Nevertheless, because of the requester’s desired goal of protecting the property from “demolition by neglect” or other changes which may substantially alter or negate the character of its historic nature, the requester went forward with the historic overlay process.

Historic overlay districts exist in New Castle County to preserve historical properties and the structures on those properties. It is generally a well-accepted concept that communities benefit from the designation of historic properties and neighborhoods. New Castle County has historic context which extends to periods before the creation of the United States and most of the historic overlay districts in New Castle County designate properties which are 100 years old or more. But this county also has historic properties which are more modern in nature including the only house in

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<sup>1</sup> Whether historic preservation designations cause the value of a property to decrease or increase is a topic which is debated within and among the two worlds of land use planning and real estate marketing. While it is agreed that an historic preservation designation on a property places restrictions on how that property can be used which may make it more difficult to find a buyer, whether those restrictions create an increase or a decrease in the value of the property in fact depends upon other factors such as the timing of the valuation and the details uniquely applicable to that property.

Delaware designed by Frank Lloyd Wright.<sup>2</sup> Once a property is designated as an historic overlay district, the structure on the property is subject to restrictions which are not present in other zoning designations, such as governmental review of any alterations to the exterior. Also, a property designated as an historic overlay district allows the owner to qualify for funds for preservation through grants and low-interest loans and tax credits.

Now that the designation of the requester's property has passed through the review process, the next step is for County Council to consider, discuss, and vote on the ordinance which is being proposed for that purpose. The requester has asked the Commission for guidance on this matter to avoid any Ethics Code issues as the matter moves through the County Council process.

### **Code or Prior Opinion:**

#### ***Relevant Ethics Code Provisions and Case Law***

In Section 2.03.102, the following relevant terms are defined by the Ethics Code, as follows:

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

*Authority of office or employment* means the actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular County office or position of County employment.

*Commission* means the County Ethics Commission established by this Code.

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

*County official* means any person elected or appointed to any County office, board, commission or the New Castle County Council Audit Committee provided, however, that for purposes of Sections [2.03.103.B.2](#), [2.03.103.C](#), and [2.03.104.C](#). "County official" does not include any member of a board or commission which operates solely in an advisory capacity, and whose members are not compensated, other than reimbursement for expenses.

*Financial interest* means any interest representing more than five (5) percent of a corporation, partnership, sole proprietorship, firm, enterprise, franchise,

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<sup>2</sup> The Dudley Spencer house, named "Laurel" by Frank Lloyd Wright, is located on Shipley Road, Wilmington, DE, near Rockwood Museum.

organization, holding company, joint stock company, receivership, trust, or any legal entity organized for profit.

*Governmental body* means any department, authority, commission, committee, council, board, bureau, division, service, office, official, administration, legislative body, or other establishment in the executive, legislative or judicial branch of a state, a nation or a political subdivision thereof or any department performing a governmental function.

*Governmental body with which a County official or County employee is or has been associated* means the governmental body within County government by which the County official or employee is or has been employed or by which the County official or employee is or has been appointed or elected and subdivisions and offices within that governmental body.

*Immediate family* means ... a spouse, child whether by blood or operation of law, parent, step-parent, spouse's parent or child, or sibling of the whole or half blood of a County official or employee.

*Income* means any money, thing of value or other pecuniary benefit received or to be received in return for, or as reimbursement for, services rendered or to be rendered. The term does not include gifts; governmentally mandated payments or benefits; retirement, pension or annuity payments funded totally by contributions of the County official or employee; or miscellaneous, incidental income of minor dependent children.

*Private enterprise* means any activity conducted by any person, whether conducted for profit or not for profit and includes the ownership of real or personal property. Private enterprise does not include any activity of the federal, State or local government or of any department, authority or instrumentality of the federal, State or local government.

*Real property* means buildings and other structures attached permanently and directly to the land, as well as the land itself.

*Reasonably foreseeable* means an event which should be expected or anticipated based upon credible past and present facts known to a reasonable observer or participant at the time a decision is made or an action taken.

*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.

The New Castle County Ethics Code recognizes that public office, that is, employment by the County, is a public trust, and a violation of that trust by a County official or employee for personal gain or profit may cause serious harm as such a violation will undermine the confidence of the public in its government.<sup>3</sup> For this reason, the Code requires, among other things, public disclosure of financial interests of certain County officials, employees, and candidates for office, so that the public may be assured that their financial interests do not conflict with the public trust.<sup>4</sup> The Code further recognizes that because the public confidence in County government is best secured by assuring the impartiality and honesty of their County officials and employees, the Ethics Code sets forth minimum standards for ethical conduct and that the Code should be liberally construed to promote complete public financial disclosure, and official and employee conduct, which is deserving of the public's trust.<sup>5</sup>

It is important that the Code also recognizes that County officials are citizens which bring to their office their knowledge and concerns for issues facing the ordinary citizen.<sup>6</sup> The Code is not intended to cause County officials or employees to disengage

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<sup>3</sup> New Castle County Code, Section 2.03.101.A:

It is hereby declared that public office is a public trust and that any effort to realize personal financial gains through public office other than compensation provided by law is a violation of that trust. It is further declared that the people have a right to be assured that the financial interests of holders of or nominees to or candidates for public office do not conflict with the public trust. Because public confidence in government can best be sustained by assuring the people of the impartiality and honesty of public officials, this Division shall be liberally construed to promote complete financial disclosure as specified in this Division. Furthermore, it is recognized that clear guidelines are needed in order to guide public officials and employees in their actions. Thus, this Division intends to define as clearly as possible those areas which represent conflict with the public trust.

<sup>4</sup> Id.

<sup>5</sup> Id. See also New Castle County Code, Section 2.03.101.D, which states:

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.

<sup>6</sup> New Castle County Code, Section 2.03.101.B:

It is recognized that many public officials are citizen-officials who bring to their public offices the knowledge and concerns of ordinary citizens and taxpayers. They should not be discouraged from maintaining their contacts with their community through their occupations and professions. Thus, in order to foster maximum compliance with its terms, this Division shall be administered in a manner that emphasizes guidance to public officials and public employees regarding the ethical standards established by this Division.

from their contacts in their communities. However, the Ethics Code prohibits the disclosure of confidential information gained as a result of a County official or employee during their official duties.<sup>7</sup> For these reasons, the Commission strives to provide guidance to County officials and employees regarding the application of the Ethics Code to their actions taken as County officials or employees in a manner which best promotes compliance with the Ethics Code.<sup>8</sup>

The New Castle County Ethics Code prohibits conduct on the part of County officials or employees which 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.<sup>9</sup> 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). Delaware court decisions must be interpreted such that the Commission must 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.

The Code of Conduct part of the Ethics Code further prohibits any County official or employee from using their government position to receive preferential treatment or anything which would not otherwise be provided to them if they were not a County official or employee.<sup>10</sup> County officials and employees are paid by their employer for the County-related work which they perform and no County official or employee may otherwise profit from their government position, on a monetary or other basis.

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<sup>7</sup> New Castle County Code, Section 2.03.104.F:

No County employee or County official shall, beyond the scope of such public position, disclose confidential information gained by reason of such public position nor shall such employee or official otherwise use such information for personal gain or benefit.

<sup>8</sup> *Id.*

<sup>9</sup> New Castle County Code, Section 2.03.104.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.

<sup>10</sup> No County employee or County official shall use such public office to secure unwarranted privileges, private advancement or gain. New Castle County Code, Section 2.03.104.D.

The Ethics Code, in its Code of Conduct section, contains directive related to solicitation.<sup>11</sup> A County official or employee may not solicit from any entity which does business with the County or is regulated by the County.<sup>12</sup> The only exception to this prohibition is when a written policy covering such solicitation has been issued by the authorized person representing the County government's interest which states that such solicitation is in the best interests of the public.<sup>13</sup> A County official or employee may not solicit personal donations from other County subordinates including subordinate County officials or employees or members of their respective immediate family.<sup>14</sup> Further, on the subject of solicitation, the Code states that County elected officials are permitted to set "office-wide, non-coercive" solicitation policies which benefit charities or charitable events, so long as that policy does not violate the Ethics Code by creating a conflict of interest or an appearance of impropriety, or any other section of the Ethics Code.<sup>15</sup>

Additionally, the Code recites prohibitions on County officials concerning their involvement with outside interests which interact with the County government. Section 2.03.103.B.2 prohibits the official from representing or assisting any private enterprise with respect to any matter before the County. This restriction extends to non-profit organizations as well as private businesses or private concerns.<sup>16</sup> Further, the Code restricts the ability of a County official or employee to "represent or otherwise assist" any private or non-County entity in connection with any matter which comes before the County department or division with which the County official or employee is associated or employed.<sup>17</sup> Importantly, the Ethics Code expressly does not prohibit a County official

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<sup>11</sup> New Castle County Code, 2.03.104.J: Solicitation.

1. Solicitation from entities which do business with or are regulated by New Castle County are prohibited unless such solicitation is pursuant to New Castle County written policy decision and for the benefit of the public.

2. Personal solicitation of donations by County officials and County employees, or by their agents, spouses or minor children, from subordinates of the County official or employee is prohibited.

3. Elected Officials may set office-wide, non-coercive solicitation policies intended to benefit charitable entities or events if the policy does not create a conflict of interest or appearance of impropriety and does not violate Subsection J.2.

<sup>12</sup> See New Castle County Code, Section 2.03.104.J.1, fn. 10.

<sup>13</sup> *Id.*

<sup>14</sup> See New Castle County Code, Section 2.03.104.J.2, fn. 10.

<sup>15</sup> See New Castle County Code, Section 2.03.104.J.3, fn. 10.

<sup>16</sup> New Castle County Code, Section 2.03.103.B.2, and 3:

2. No County official may represent or otherwise assist any private enterprise with respect to any matter before the County. This prohibition is to be considered personal to the County official and is not, for purposes of the New Castle County Ethics Code only, deemed to impact other members of a firm, business, or other employer by which the County official is employed.

<sup>17</sup> New Castle County Code, Section 2.03.103.B.1:

No County employee or County official may represent or otherwise assist any private enterprise with respect to any matter before the County department with which the employee or official is associated by employment or appointment.

or employee from appearing before the County or assisting a non-County entity on a matter in the exercise of his or her official County duties.<sup>18</sup>

Also, one or more of the Advisory Opinions cited below reference Code Section 2.03.103.C, which states:

No County official or County employee his or her spouse, child, parent, step-parent or sibling of the whole or half-blood or any business with which the County official or County employee or his or her spouse, child, parent, step-parent or sibling of the whole or half-blood is associated or who has a legal or equitable ownership of more than five (5) percent (more than one (1) percent in the case of a corporation whose stock is regularly traded on an established securities market) shall enter into any contract with the County (other than an employment contract) or any subcontract with a County contractor unless such contract or subcontract was made or let after public notice and competitive bidding. Such notice and bidding requirements shall not apply to contract not involving more than five hundred dollars (\$500.00) per year if the terms of such contract reflect arms' length negotiations, if the subcontractor is a sole source provider, or if there are exigent circumstances. There will be a rebuttable presumption of a knowing and willing violation of the section only if the contract or subcontract is awarded to a spouse or child of the County employee or official.

### ***Prior Commission Opinions***

In Advisory Opinion 06-06, the Commission was asked whether an elected official could vote on a land use measure which affected the community in which he lived without violating the Ethics Code. The Commission concluded that if the measure being voted on had no beneficial or detrimental effect on the requester's financial interests, those of the requester's family or an associated business, and surrounding circumstances did not otherwise create an appearance that the requester is biased or cannot act impartially, the requester's vote would not violate the Ethics Code. In that opinion, the Commission also stated that the Commission presumes that County

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<sup>18</sup> New Castle County Code, Section 2.03.103.B.3:

3. This subsection shall not preclude any County employee or County official from appearing before the County or otherwise assisting any private enterprise with respect to any matter in the exercise of his or her official duties.



officials and employees act with integrity and good faith unless circumstances show otherwise.<sup>19</sup>

In Advisory Opinion 94-04, the Commission was asked whether a County Council member may vote on an ordinance which would affect the value of land conveyed by that member's father, a portion of which was later reconveyed to the father's estate to satisfy a debt to that estate. The Commission concluded that voting on that legislation would violate the Ethics Code as a prohibited conflict of interest and instructed the Council member to recuse from the vote and publicly announce and disclose the nature of the Council member's interest in the matter.

In Advisory Opinion 07-06, the Commission was asked for guidance by an elected County official, who had outside employment as an executive director and chief operating officer of a non-profit agency, about whether the non-profit could lease space to a County agency. The Commission found that an Ethics Code violation could be avoided only if the notice and bid provisions of Code Section 2.03.103.C were observed for any contract between the County and the non-profit. The Commission determined that the substitution of another signer to the contract or a recusal on the part of the official would prevent the creation of an appearance of impropriety because of the high standing of the official as the chief operating officer of the non-profit. The Commission found that absent the use of the notice and bid procedure, a reasonable member of the public would conclude that the contract was awarded to the non-profit because of the official's relationship to County government, and not as a result of the merits of the proposed landlord-tenant relationship. In this Opinion, the Commission stated:

This ... rule [in Section 2.03.103.C] has two primary purposes: it prevents a County official or employee from using the authority of their office to unfairly advantage a private entity associated with them or their family, and it assures the public that a contracting County department has exercised impartial judgment in the expenditure of County funds. These public purposes are enhanced by the Code provision at Section 2.03.103.G which permits a County Department to void any contract entered in violation of the provision.

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<sup>19</sup> In Advisory Opinion 08-03, the Commission stated that it “does not believe inquiry into how an elected official formulates their opinions on pending legislation or with whom they discuss such matters are within its jurisdiction without some objective evidence of misuse of official authority. Such an interpretation protects ‘the integrity of the legislative process by insuring the independence of the individual legislator,’ citing *U.S. v. Brewster*, 408 U.S. 501, 507 (1972).

An additional restriction on the conduct of a County official is Code Section 2.03.103.B.2's prohibition on representing the interest of a private enterprise before any agency of the County, other than in the exercise of official County duty. That provision prevents an official from participating in contract formation with the County on behalf of a private enterprise.

Finally, the Ethics Code's conduct rules in Section 2.03.104(A) recite prohibitions affecting the exercise of County authority by an official even when financial conflict is not the issue. That subsection prohibits exercise of official authority which creates an appearance that the decisions or actions of a County official or their department are influenced by factors other than the merits of the matter for decision. This prohibition exists because such conduct undermines public confidence in the impartiality of the governmental body with which the employee or official is associated. Just as an official may not exercise County authority regarding their outside employer without violating the conflict of interest rules, no County official may enter into a contract on behalf of the County which violates the appearance prohibition of the conduct rules.

In Advisory Opinion 99-01, the Commission was asked whether a County official could vote upon a matter in which a client of the official's law firm had a financial interest. The Commission concluded that a conflict of interest existed, and the County official must recuse themselves from voting upon a matter if their client or a client of their law firm had a financial interest in the matter, if the official or the law firm represented the client on the same matter upon which the County official was voting. The Commission further decided that even if the official or the law firm represented the client in a matter unrelated to the one before Council, if that client is involved in any matter being voted on, the official must recuse from voting to prevent the appearance of impropriety.

In Final Order C05-04, the Commission concluded that a County official created an appearance of impropriety by failing to recuse themselves from a vote on a matter which benefited the official's spouse's client. The Commission stated that the official must recuse themselves when the official's spouse has an association with a private beneficiary in a matter before the County official. The Commission also found that the official attempted to avoid an ethical violation and did not knowingly or willfully violate the Ethics Code. The Commission ruled that, in the future, if the official elected not to

recuse themselves in matters concerning clients of the official's spouse, the Code required that the official notify the Ethics Commission in advance in the manner described in New Castle County Code Section 2.03.103.A.2 so that the public would be on notice and the Commission could have an opportunity to offer guidance to prevent a similar or repeat violation.

In Advisory Opinion 05-21, the Commission was asked whether it would violate the Ethics Code if a high-ranking County employee exercised their vote as an elected official of a local government in a matter involving annexation of County land by that local government. The Commission ruled that to avoid the creation of an appearance of impropriety, the employee must either remove themselves from any County employment which provided access to confidential information regarding land use or redevelopment policy affecting the local government's annexation authority or recuse themselves from involvement as an elected local government official in any aspect of planning, execution or decision making regarding the annexation of County land, including voting upon such requests.

### **Analysis**

The facts of this matter present the potential for the violation of the Ethics Code as it involves an unambiguous conflict of interest per Code Section 2.03.103, as well as the potential for the appearance of impropriety under Code Section 2.03.104. As such, consulting the Ethics Commission was the right action to be taken by the requester. The Ethics Commission wants to make clear that financial profit does not have to be part of the fact pattern for a conflict of interest to exist.

The mere existence of a conflict of interest is not a violation, by itself, of the Ethics Code. Conflicts of interest are a part of the life of every government official or employee, and they can occur without warning and through no fault of anyone. Conflicts of interest are not inherently wrong, but they can cause a situation which involves Ethics Code violations if ignored (either deliberately or negligently). For government positions which have duties that bring the official or employee in contact with many different aspects of County dealings, steps should be taken on a regular basis to make sure that conflicts are avoided or handled according to the Ethics Code. When the inevitable conflict of interest arises, it is a signal that the County official or employee must stop and take all steps necessary to recuse and remove themselves entirely from the situation per the Ethics Code and Ethics Commission decisions. If the official or employee cannot legally delegate their duties associated with any aspect of the conflict on interest situation, the official or employee should contact the Ethics Commission immediately and before any further actions are taken for guidance to prevent actions which are Ethics Code violations.

Life in New Castle County is enhanced by many actions taken by the County government including the preservation of historic structures by the imposition of historic overlay zoning districts on certain properties. The designation of the subject property as an historic overlay district involves a process which has many steps and one of them includes a vote by County Council. This matter has come before the Ethics Commission only because the applicant for the historic overlay and the owner of the subject property is a member of County Council. The requester owns property in this County and service as a member of Council does not negate the requester's right to apply to the County Land Use Department per the land use planning laws of the State of Delaware and New Castle County. The requester's status as a Council member requires that the requester comply with the County Ethics Code in all matters involving the County even when the requester is not acting as a Council member in matters involving New Castle County government. For that reason, the Commission views favorably the fact that the requester has not appeared personally in the processes thus far in the requester's quest to protect the subject property with an historic overlay. Such distancing on the part of the requester from the matter must continue as the it continues its path as it is taken under consideration and voted upon by County Council.

Unlike the fact patterns involved in prior opinions issued by the Commission where the relationship between the County official or employee is indirect to the proposed official act or the subject matter of the proposed official act, in this matter, there is a direct relationship between the issue at stake between the requester/County official and the subject matter of proposed Ordinance 20-089. The subject of the proposed ordinance is an asset (real property) which belongs to the requester who is a County Council member, and the requester's desired historic overlay designation for the property cannot be achieved without a favorable, majority vote by County Council. It is fair to say that a reasonable member of the public with knowledge of the facts would view this situation as one which presents a clear conflict of interest to the requester regardless of whether the overlay increases or decreases the market price of the subject property. It presents a conflict of interest because the desired result of the requester/Council member is a favorable, majority vote on a proposed ordinance whose only subject is the historic overlay of the requester's own real property. Monetary profit is not required to exist to create a conflict of interest. In this instance, the benefit, or gain, to the requester which causes the conflict of interest is the requester's desired result of the process, that is, the vote by County Council which designates the requester's property as an historic overlay district.

The Ethics Code requires that every County official or employee, when presented with a situation where a real or perceived conflict of interest may be present, that County official or employee must do everything possible to remove themselves from the situation. If a County official or employee's actions or decision-making creates a conflict

of interest, is the product of a conflict of interest, or creates what appears to a reasonable person to be a conflict of interest, the County employee or official may not perform that action without running the risk of violating the Ethics Code. Whenever questions arise on this topic, it is advisable for the County employee or official to consult the Ethics Commission, and the Commission commends the requester for contacting the Commission for advice on this matter.

If this matter involved a contract, the Commission would instruct the requester to follow the requirements set forth in Code Section 2.03.103.C. Close adherence to that Code section can ameliorate the potential of a result without merit and violative of the Ethics Code by providing additional transparency of the matter through public notice and competitive bidding of the contract. Here, the issue involves the potential adoption of an ordinance, not a government contract. All proposed County ordinances are publicly noticed, and the public is given at least two opportunities to receive more information and to be heard on the matter by attending either or both a publicly noticed Council committee meeting or a publicly noticed Council hearing, at which a public vote will be held by Council. Nevertheless, the Commission finds that in addition to the public notice requirements which Council normally observes when considering the adoption of a proposed ordinance, the requester must state on the public record at any Council meeting or hearing during which proposed Ordinance 20-089 is noticed and/or discussed that the subject property is owned by the requester and that the requester has not taken and will not take part in any discussion, public or otherwise, with Council members or Council staff, or other government official or employee, about any aspect of proposed Ordinance 20-089, except for the very limited purpose of providing any factual information, as the applicant, without which the matter cannot proceed and which cannot otherwise be ascertained from public documents or documents supplied for the application and/or ordinance.

Further, the Commission, by copy of this Opinion to the Clerk of Council, requests that with respect to public notice of proposed Ordinance 20-089 on a Council committee agenda, that it be placed on no Council committee agenda except the Land Use Committee agenda, so that finding information about this matter will be easily found by members of the public who are interested in this land use matter before County Council.

If the requester or any other person has any questions about the specifics on moving forward with this matter, they are encouraged to contact the Ethics Commission. Consultation with the Ethics Commission as early in a process as possible works best.

## Finding

The Commission finds that a conflict of interest exists for the requester, a member of County Council, in connection with proposed Ordinance 20-089, per the facts outlined above, and the requester must recuse from any discussion and vote on the proposed ordinance and that the requester must state on the public record at any Council meeting or hearing during which proposed Ordinance 20-089 is noticed and/or discussed that the subject property is owned by the requester and that the requester is recusing from all Council consideration of the matter. Further, the requester will not take part in any discussion, public or otherwise, with Council members, Council staff, or any New Castle County official or employee, about any aspect of proposed Ordinance 20-089, except for the very limited purpose on the public record of providing Council or any other County government official or employee with any factual information, as the applicant, without which the matter could not proceed and which cannot otherwise be ascertained from public documents or documents supplied for the application and/or ordinance.

The Commission, by copy of this Opinion to the Clerk of Council, requests that with respect to public notice of proposed Ordinance 20-089 on a Council committee agenda, that it be placed on no Council committee agenda except the Land Use Committee agenda, so that members of the public will be able to find notice of any opportunities to be heard or to learn about this matter as easily as possible.

BY AND FOR THE NEW CASTLE COUNTY ETHICS COMMISSION

ON THIS 13<sup>th</sup> DAY OF JANUARY 2021

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Paula Jenkins-Massie, Chairperson  
New Castle County Ethics Commission

Decision: 6 – 0 (Jenkins-Massie, not voting.)