

STATE ETHICS COMMISSION

45 CALVERT STREET, 3RD FLOOR
ANNAPOLIS, MARYLAND 21401
410-260-7770 / 1-877-669-6085

June 21, 2017

TO: Officials, Agents and Applicants

SUBJECT: Prince George's County Zoning Ethics, Disclosure Participation and Contributions Provisions – Md. Code Ann., General Provisions §§5-833 - 5-839

The Public Ethics Law includes special provisions pertaining to Prince George's County zoning matters. These provisions address disclosure, participation and contributions. The State Ethics Commission provides guidance and advice to persons subject to these provisions of the Public Ethics Law.

The Law establishes a four-part program, the general outlines of which are as follows:

- The filing of affidavits by applicants and agents relating to payment/contribution activity;
- A prohibition against payments/contributions during the pendency of an application by applicants and agents to members of the County Council, the County Executive, or a slate that includes the County Executive or a member of the County Council;
- A requirement that ex-parte disclosure forms regarding communications about a pending application be filed by applicants, agents, members of the Council, and the County Executive; and
- A requirement that a member of the Council not vote on a pending application if, within 36 months of the filing of the application, the member or a slate to which the member belongs or belonged has received a payment/contribution from an applicant or agent involved in that application.

The Affidavit Requirement

After filing a zoning application in Prince George's County, an applicant must file an affidavit or affidavits disclosing whether or not any payment or contribution was made to a member of the County Council (including a candidate duly elected or appointed) during the 36-month period before the filing of the application. (Note: The filing requirements also apply to an agent of the applicant, defined as an individual or business entity hired by an applicant for any purpose relating to the land.)

The term "Applicant" includes:

- The individual or entity filing the application, who is the title owner, contract purchaser, trustee or holder of a 5 percent or greater interest with respect to the land;

- An individual or entity when there has been participation in adopting and approving an area master plan or sectional map amendment by appearance at a public hearing, filing a statement in the official record, or other similar communication to a member of the County Council or the Planning Board, where the intent is to intensify the zoning category applicable to the land of the applicant.

The term “Payment” includes payments to:

- A member’s or candidate's treasurer;
- A member’s or candidate's continuing political committee;
- A slate to which the member or candidate belongs or belonged.

The term “Application” includes a request for:

- Zoning map amendments;
- Special exceptions;
- Departures from design standards;
- Revisions to special exception site plans;
- Expansions of a legal nonconforming use;
- Revisions to legal nonconforming use site plans;
- A variance from the zoning ordinance;
- Approvals of a comprehensive design plan;
- Approvals of conceptual site plans;
- Approvals of specific design plans;
- A variance from the zoning ordinance filed as a companion case with an application type that is not listed above.

The term “Application” does **not** include a request or comment made in relation to a functional master plan (Md. Code Ann., Land Use Art. § 21-106 (Repl. Vol. 2014)).

The Ex Parte Communication Disclosure Requirement

In accordance with Section 2–296 of the Prince George’s County Code and Maryland Annotated Code, General Provisions, Section 5–836, communication concerning a pending application between an applicant or the applicant’s agent and a member of the County Council or the County Executive must be disclosed by the applicant/agent and the County Council member and County Executive. Such disclosure is made via an ex parte disclosure form. The form must be filed by each party to the communication within five (5) working days after the communication was made or received.

Affidavits and Forms

The State Ethics Commission has developed affidavits and forms for implementing §§5-833 through 5-839, which are available from the Clerk to the Prince George’s County Council, who may be contacted at (301) 952-3600. The affidavits and forms can also be found on the Commission’s website at <http://ethics.maryland.gov/local-government/forms/>.

The Law requires affidavits to be filed at least 30 calendar days before consideration of the application by the District Council. To ensure affidavits are filed in a timely manner, applicants are strongly

encouraged to submit their completed affidavits to the Development Review Division of the Maryland–National Capital Park and Planning Commission at the time they file their applications, or promptly thereafter with the Clerk of the Council. Affidavits and forms filed with the Development Review Division will be forwarded to the Clerk of the Council as required.

NOTE: Do not submit the affidavits or other forms to the Ethics Commission.

Conclusion

Technical questions regarding zoning should be addressed to the Clerk to the Prince George’s County Council. The Ethics Commission continues to respond to inquiries and provide advice as to application of the Public Ethics Law. This memo is based on staff discussions or consultations with the State Ethics Commission. It is not an advisory opinion of the Commission. The questions and answers that follow were developed in response to prior inquiries. Some of the answers involve interpretation of the State Election Law and the Commission relies significantly on the State Board of Elections and its counsel in addressing these issues. If you plan to take any actions that appear to be inconsistent with the information provided in this memorandum, prior to taking such actions you should ask for specific review by the Commission staff or the Commission.

§§5-833 through 5-839 Questions & Answers

Affidavit Issues

1. Must an applicant or agent file an affidavit as part of the zoning application process?

Answer: After an application is filed, the applicant must file an affidavit stating either that a payment was or was not made by the applicant or one solicited by the applicant during the 36-month period before the filing of the application or during the pendency of the application. This requirement includes payments to a member or candidate’s treasurer, continuing political committee or slate to which the member or candidate belongs or belonged during the 36-month period preceding the filing of the application. In the case of an agent, an affidavit must be filed only if the agent or one solicited by the agent actually made a contribution. An agent need not file an affidavit if no contribution was made.

2. Must the parent corporation of an applicant file an affidavit if it is involved in the land development business in Prince George's County?

Answer: The parent corporation is required to file an affidavit if it has substantive involvement in directing the affairs of the subsidiary with regard to the specific disposition of the land that is the subject of the application or if the parent corporation, as an ongoing business activity, is engaged in substantive activities pertaining to land development in Prince George's County.

3. Is a person or entity “an applicant” if it is neither an owner nor contractor of the land which is the subject of the application but has mineral rights which may be involved in rubble fill or sand and gravel operations?

Answer: The entity may be considered an applicant if it holds the mineral rights and the other requirements of the Law are met.

4. **Does the language providing that “anyone with authority to act on behalf of, and bind the business” may sign for it, abrogate the requirements that all of those with a 5% or greater interest in the subject land file an affidavit?**

Answer: No. If the business files a corporate affidavit and notifies directors, officers and stockholders with a 5% or greater interest of the disclosure requirement, those individuals must file an affidavit if they have made or solicited anyone to make a payment to the treasurer of a candidate or continuing political committee.

5. **In a sectional map amendment or master plan hearing, if the proposal is to “down-zone” the property and the owner requests the status quo, is the application deemed to be one for intensification and, thus, require an applicant's affidavit?**

Answer: The intent of the landowner to retain the status quo would not be considered an application for intensification, and, therefore, the applicant’s affidavit would not be required.

6. **If neighbors or other interested parties appear before the Council to express approval of "up zoning" (intensification) of property held by another, in the context of sectional map amendments or master plan review, would they be required to file affidavits?**

Answer: If they do not otherwise have a qualifying interest or involvement in the property, their appearance before the Council to express their approval would not make them agents or applicants. Therefore, supporters who are merely neighbors or who hold similar status would not be required to file affidavits.

7. **How should situations be handled if an applicant who wants to have a matter considered in sectional map amendment and master plan hearings and has not filed an affidavit in the required 30 days prior to Council consideration?**

Answer: It is the legal responsibility of the applicant to file on a timely basis. While the Ethics Law does not define “consideration”, in a recent opinion, the Attorney General concluded that the District Council “considers” a matter when, as a body, it convenes to hear testimony or deliberate on a matter, not merely when it convenes to render a decision. Proceeding without filing or filing untimely could subject the applicant to enforcement under the Law. The Council should be aware that, where there is non-compliance by an applicant, the action by the Council could be challenged. Serious questions could arise if the affidavit was not filed until after action by the Council. Because of this problem, every attempt should be made to comply with filing requirements in a timely manner. In light of the Attorney General’s opinion on what constitutes consideration, the Commission has directed the Clerk of the Prince George’s County Council not to accept any applications that are transmitted to the District Council from the Planning Board or the Zoning Hearing Examiner if the transmission does not contain the necessary affidavit, to include an indication that it was filed at least 30 days prior to the Clerk’s receipt of the transmission.

8. **Can an agent lawyer sign a corporate affidavit?**

Answer: If an entity must file an affidavit, only a person who is empowered by the entity’s bylaws or equivalent rules or procedures, may sign the affidavit. Often a lawyer agent will not have the power or authority to bind the entity.

9. **The Law states that a supplemental affidavit shall be filed whenever a payment is made after the original affidavit is filed. It does not address any other changes in circumstances. Does an applicant who files an affidavit prior to an election in which one or more new council members are elected, or prior to the appointment of a new council member to a vacant seat, have an obligation to file a supplemental affidavit after the election or appointment, if those new council members would not have been covered by the first affidavit?**

Answer: The Law does suggest the applicant has a duty to file a supplemental affidavit only when a payment (which covers payments or contributions to a candidate's treasurer, political committee or slate) is actually made after the original affidavit was filed. However, the clear purpose behind the affidavit requirement is to disclose when a council member who is expected to consider an application has received a payment as defined in the Law. A payment made, prior to or following the filing of the original affidavit, to an individual who was not a member at the time the affidavit was filed but was subsequently elected or appointed to the council, should be disclosed in a supplemental affidavit. An applicant should presume, in light of the purpose of the disclosure, a supplemental affidavit should be filed any time it is necessary to make known that a payment has been made during the 36-month period before the filing of an application, or subsequent to the filing of an application, to a member who will be considering the application as part of his/her council duties.

Participation Issues

10. **If the Council elects to review a case on its motion or elects to waive its right to review a case, are the motions considered a vote or participation?**

Answer: These actions are participation by the Council.

11. **In a situation in which an applicant or agent, without an intent to subvert the Public Ethics Law, makes a contribution to a member's PAC, how much, if any, of the contribution must be returned to the contributor to enable the member receiving a contribution from the PAC to participate in an application?**

Answer: The timing of the contribution determines if there are actions that can be taken to enable a member receiving a contribution from an applicant or agent to his/her PAC to participate in proceedings on an application. A contribution made during the pendency of the application is prohibited, period, and non-participation is the only option. Where a contribution from an applicant or agent to a member's PAC is made during the 36-month period preceding the filing of the application, the Public Ethics Law provides two options to permit the member to participate in proceedings on the application. The member can return to the PAC the full amount received from the PAC, or in the alternative, the PAC can return the amount contributed by the applicant or agent involved in the application to the applicant or agent. **The member cannot return the PAC's contribution directly to the applicant or agent.**

12. **Can a member participate in matters in which there has been a direct contribution from an applicant or agent, not through a Political Action Committee, if the contribution is returned to the applicant or agent?**

Answer: The Public Ethics Law does not permit a member to vote by returning a direct contribution from an agent or applicant. In these situations, contributions made within the statutory time period require non-participation.

Payment/Contribution Issues

- 13. If an agent signs a letter inviting an individual to attend a meeting to plan a campaign fundraising event to finance the Executive's or member's campaign for public office on behalf of a campaign committee supporting an incumbent County Executive or Council member, is the “signing of the letter” soliciting campaign contributions considered a contribution/payment?**

Answer: The law does not prohibit an agent or applicant from soliciting campaign contributions. The mere signing of a letter in these circumstances would not be considered to be a contribution/payment.

- 14. If an agent or applicant chairs a meeting to plan a fundraising event, would it be considered as a contribution/payment?**

Answer: The agent’s chairing a meeting to plan a fundraising event would not be considered a contribution or payment unless volunteering this service is considered an “in-kind” campaign contribution. Campaign law generally does not consider this limited type of activity a contribution unless the agent is in the business of planning fundraising events.

- 15. An agent or applicant sends tickets to a fundraising event for a member of the County Council or the incumbent County Executive to potential contributors on the agent’s stationery, typed by the agent’s employee, and mailed at the agent’s expense. Is this a payment or contribution?**

Answer: Yes. An agent or applicant may not engage in this activity while an application is pending. Even if this was done while an application was not pending, the contribution or payment activity would be impacted by the 36 month disqualification period as to members.

- 16. An agent or applicant helps with the logistics, or otherwise gives personal time to help conduct a fundraising event or provide other assistance for a member or the incumbent County Executive. Is this a payment or contribution?**

Answer: Volunteer work for a campaign at a time when an application is pending is permissible only to the extent that the activity is not a contribution or payment. Generally, this type of activity is not a contribution or payment unless the activity or service is something that the agent or applicant normally would provide for a fee.

- 17. An agent attends fundraising events as a guest of the campaign committee or as a guest of a purchaser of a ticket, and the purchaser is not an applicant or agent. Is the use of this ticket a contribution or payment to the candidate?**

Answer: No.

- 18. An agent or applicant who is a lawyer gives free legal advice to the campaign of the incumbent County Executive or member without charging a fee. Is this service a contribution or payment?**

Answer: Generally this would be considered a payment or contribution. See Answer No. 15.

- 19. Do the Prince George's County zoning provisions of the Public Ethics Law apply to applicant or agent contributions to a PAC if the PAC later makes a contribution to a member of the County Council?**

Answer: Yes, and the timing of the contribution is important as to its impact. A contribution by an agent or applicant is prohibited if, during the pendency of an application, the applicant or agent contributes to a PAC with the knowledge or understanding that the PAC intends to make a contribution to a member during the pendency period **and** the PAC contribution is actually made. If an applicant or agent has made a contribution to the PAC within the 36-month period preceding the filing of the application and the PAC makes a contribution to the member of the County Council during the 36-month period, the member may not vote on the application unless the money is returned to the PAC or the PAC returns the money to the applicant or agent.

- 20. Does the phrase "anything of value" as used in the definition of "Payment" apply to endorsement of a member of the County Council or an incumbent County Executive by a Political Action Committee?**

Answer: Generally, endorsements are not "anything of value" within the definition of "Payment" in the Prince George's County zoning provisions of the Public Ethics Law.

- 21. Is an endorsement that is subsequently published by the Political Action Committee a contribution or payment?**

Answer: Generally, the mere publication of an endorsement is not a contribution or payment.

- 22. If a member of the County Council or the County Executive is part of a slate, are contributions to the slate subject to the various requirements of §§5-833 through 5-839?**

Answer: Yes. The General Assembly amended the Public Ethics Law in 2011 to expand the prohibitions and disclosure requirements to include slates in which a member of the County Council or the County Executive is or was a member during the 36-month period preceding the filing of an application.

- 23. Does an agent who solicits a payment or contribution for an incumbent County Executive from a non-agent entity while an application is pending violate the prohibition against an agent making a payment or contributions to the County Executive during the pendency of an application?**

Answer: The Public Ethics Law prohibits an agent from personally making a payment or contribution to the County Executive or a member of the County Council during the pendency of the application. However, the Public Ethics Law does not prohibit an agent from soliciting contributions even if the contributions are made by others at a time when the agent could not personally make the contributions. The Law requires agents to comply with disclosure requirements, to include filing an affidavit if the agent has solicited any person to make a payment to a member's or candidate's treasurer, continuing political action committee, or a slate to which the member or candidate belongs or belonged during the 36-month period preceding the filing of the application.

- 24. If an agent or applicant makes a payment/contribution to a State legislator, who later makes a transfer to a County Council member, is such a payment/contribution by the agent or applicant included within Law's prohibitions?**

Answer: No. The Law is very specific about the types of payments/contributions to County Council members that are prohibited. It does not include a payment/contribution made to or by a State legislator, regardless of the source of the funds.

- 25. Does the prohibition on participating in the proceedings on an application, where an applicant made a contribution during the 36-month period before the filing of the application, apply when the contribution was made to an individual who held another elective office at the time the contribution was made but subsequently became a candidate for, and then was elected to, the County Council?**

Yes, the prohibition would apply. The clear intention of the prohibition is to avoid any suggestion that a recipient of a contribution could be influenced by the contribution in the actions he/she takes on the proceedings surrounding an application, and further to avoid even an appearance that such was the case. Given the intent of the law, if a recipient of a contribution from an applicant is subsequently expected to act on an application as a member of the County Council, the status of the recipient at the time the contribution is made is irrelevant.

Ex Parte Disclosure Issues

- 26. Are individuals who are not agents or applicants required to file an ex parte disclosure form under §§5-833 through 5-839 if they approach the District Council regarding an application?**

Answer: Individuals who are not agents or applicants do not have to file the ex parte disclosure form or affidavits required by the Prince George's County zoning provisions of the Public Ethics Law.

- 27. Must a Council member file an ex parte disclosure form when the communications concerning pending applications are between an applicant or agent and a staff aide and not directly with the Council member?**

Answer: Generally, the Law covers only direct communications involving applicants or agents, members and the County Executive. Indirect communication with staff, unless this is part of an intentional act, plan, or scheme to avoid application of the Law, would not require the member to file an ex parte disclosure form.

- 28. Prince George's County already has certain ex parte requirements as part of its own laws. Do the Prince George's County zoning provisions of the Public Ethics Law supersede Prince George's County laws?**

Answer: No. A review of the history of the Public Ethics Law and discussions with staff to the General Assembly indicate that there was no attempt to eliminate these separate requirements. The County provisions concerning ex parte communications can be found in §2-296 of the Prince George's County Code.