February 4, 1994

ADVISORY OPINION 94-1

By written correspondence, the inquisitor asks the Ethics Commission to provide an advisory opinion on the potential existence of a conflict of interest. The inquisitor asks whether he is precluded from serving as an appointee to a steering committee for the City of College Park because, as an owner of rental property, he is regulated as defined by the Ethics Code and therefore barred from participating. The inquisitor also poses a broader question concerning the effect, if any, on his participation as the result of being regulated as a citizen through the panoply of City rules, e.g. housing, parking, litter, refuse.

By way of background, the inquisitor states that he serves on a Steering Committee related to the activities of the City's Advisory Planning Commission and Visioning Process. The Mayor and Council have charged the Planning Commission to provide direction and oversight for a comprehensive plan of the City, e.g. neighborhood plan, business plan, community relations plan, etc. The Committee serves in an advisory capacity, primarily to the Mayor and Council. It does not have decisionmaking jurisdiction.

I. Is the Inquisitor Covered by the Ethics Code?

In his letter, the inquisitor provided the Commission with a description of his work on the Steering Committee. § 38-2 of the Ethics Code identifies those persons who shall be subject to its terms:

> The provisions of this chapter shall apply to all City of College Park officials, employees, members of appointed boards, commissions, committees and authorities...

We believe that the broad sweep and application of this language was intended to be inclusive. We, therefore, conclude that the inquisitor, as a member of a Steering Committee for the City, is subject to the terms of the Ethics Code.

Having so decided, it is the Commission's opinion that this inquisitor as well as all who serve in City governance must conform to a code of ethical conduct and accountability as set forth in

the Ethics Code at §38-9. This section enumerates 10 standards of ethical conduct aimed at assuring both the integrity of City officials and the processes by which decisions in the City are made. The overarching purpose for these particular standards and for the Code of Ethics, in general, is to promote public confidence and trust in both City officials and the machinery of City government.

Having determined that the Ethics Code applies to this inquisitor, the Commission then must determine which provisions, if any, of the Ethics Code apply to the Inquisitor's private interests, namely his rental property. §38-B of the Ethics Code directs that no persons [City officials] shall,

> Hold or acquire an interest in a business entity that has or is negotiating a contract of one thousand dollars ($1,000.00) or more with the city or **<u>is regulated</u> by any city body,** except where such interest was disclosed to and exempted by the Commission pursuant to §38-13 of this Chapter. (our emphasis)

The Inquisitor holds an interest in a business entity, e.g. his rental property, as defined by §38-3 *Definitions of the Ethics Code*.

II. Is the Inquisitor Regulated Under the Meaning of the Ethics Code?

Is this Inquisitor regulated, or in other words, as an owner of rental property, is the inquisitor directly or indirectly subject to regulation within the meaning of the Ethics Chapter, §38-B?

The Ethics Code lacks a definition of "regulated" or regulation to guide our debate. However, in applying common word usage, the Commission can only conclude that this Inquisitor is a person who is regulated within both the letter and spirit of the Ethics Code. [1] As the owner of rental property, the Inquisitor is subject to City regulations, including those regulations involved

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1 If the Mayor and Council would want to narrow the application of the word "regulated", it should set forth a definition in the Ethics Chapter.

with the issuance of Occupancy Permits, under §144-1 through §144-8, and Housing Regulations under §125-1 through §125-31, and others from the City Code. These regulations go to the heart of the inquisitor's business enterprise, e.g. residential rental property. Consequently, we conclude that the inquisitor clearly holds an "interest in a business entity [rental property] that ... is regulated by any city body [Office of Public Services]", as is recognized in §38-B.

III. What Issues Should be Considered and Balanced in Applying Conflict of Interest Standards?

Because of the number of City committee members who are likely to be affected by this opinion, the Commission considered and weighed a number of factors. These included, i.) the nature and function of the inquisitor's Committee, ii.) whether the inquisitor's private interest which is subject to regulation, (e.g. rental property), poses a direct conflict with his public responsibilities on the Steering Committee, iii.) whether the inquisitor's participation may more favorably affect his own financial interest as compared to the financial interest of the public in general, and iv.) the City's need to find qualified public servants to serve on City committees. Each, in turn, will be considered briefly.

i.

In applying the Ethics Code, the Commission debated whether any distinction should be drawn between advisory and decisionmaking committees. In inquisitor's case, his committee is clearly advisory in nature, with no final decisionmaking authority.

Obviously, certain City committees have direct decisionmaking power. Their decisions directly affect citizens, e.g. Ethics, Noise, Housing and Hygiene, and Election Supervisors, etc. Other City committees have budgets from which to conduct their business, e.g. Recreation, Cable Television Committee, and the Better Environment Committee, etc. Consequently, these committees need to be particularly scrupulous in the conduct of their business since City revenues are involved in their process. Furthermore, even purely advisory committees to the Mayor and Council may be able to greatly influence and direct the public debate and the final outcome. Such considerations present equally persuasive public policy reasons to include these committees within the ambit of the Ethics Code.

Consequently, the Ethics Commission concludes that it is

difficult to draw rational distinctions between various City committees in order to exempt certain committees from the reach of the Ethics Code.

ii.

In certain instances, a private interest which gives rise to a potential conflict may be mollified or eliminated by the nature and scope of a particular committee's public responsibilities and duties. For example, it may never be prudent for the Mayor or Council to appoint to the City's Board of Housing Hygiene a resident who owns rental property and who engages in such an enterprise in his/her regular course of business. At the same time, no such conflict or an appearance of a conflict would exist if the Mayor or Council elected to appoint the same person, with the identical private interests, to a committee like Better Environment since it does not have as its primary public charge the oversight of rental property. Consequently, the public duties of a committee may not inherently conflict with any private interests of a committee member. In the former example, a person may be making public pronouncements or decisions on housing issues for ulterior or private reasons. Regardless of good intentions and good faith, however, it is our opinion that even an apperance of a conflict of interest may make an appointment undesirable.

The key, however, in all instances is full disclosure. Disclosure comes in two parts. First to the Ethics Commission, as the inquisitor has done by his correspondence. The Ethics Commission then can exercise its discretion, and if necessary grant modifications and exemptions as allowed under §38-13. When such modifications or exemptions are justified, a Committee member then can freely and fully participate subject only to transactional disclosure and recusal (e.g. removing oneself if a particular issue comes to a Board which clearly presents a conflict of interest as identified in the Code of Ethics).

The second and equally important component of full disclosure consists of divulging pertinent information, namely the private or regulated interest subject to the Ethics Code, to the committee on which the member serves. This disclosure is important to the integrity of the process insofar as it allows other committee members to weigh and evaluate the opinions and positions of the participant with the full knowledge of private interests and influences. If he has not already done so, we will expect this inquisitor to inform both the Commission Chair and other committee members of his ownership of rental property and the fact that it is subject to City regulation.

iii.

In certain situations a person may be absolved from recusing themselves from serving when his/her financial interest is not affected differently from the public's financial interest. Otherwise, §38-9A precludes participation in City governance when such participation would advantage a participant financially as distinguished from the benefit to the public in general. Whether this is so in the instant case is difficult for us to determine based on the information before us. Furthermore, the Commission need not make this decision since the inquisitor potential conflict falls under §38-B of the Ethics Code.

iv.

With its vast number of committees, the City has a clear interest in encouraging citizens to serve who come from diverse backgrounds and who represent different interests. The Ethics Commission takes note that this particular steering and planning commission was established with the goal of including a diverse and representative sample of City residents and interests. Undoubtedly this may include individuals who, like inquisitor, own rental property in the City. Any advisory group is likely to be better served by having a broad representation from a cross-section of City residents and interests, included in their membership and deliberations. This should lead to a more balanced process and an informed outcome.

Finally, as to the inquisitor's question about being regulated in other ways, we believe that the Ethics Code expressly covers business entities which are regulated by the City. Further, inquisitor in his capacity as a private citizen is situated similarly with other residents and exposed to similar regulations.

IV. Opinion

While we gave consideration to the above factors and other countervailing issues in addressing inquisitor's inquiry, the Commission concludes that its overriding obligation is to ensure that the City, at all levels, will conduct its business in a scrupulously forthright and truthful manner, free of even an appearance of conflict of interests. It is the only way to assure the public trust and confidence. Any action, public or private, by any City official, whether at the highest or lowest level of City governance, will always be subject to positive or negative interpretation. As such, it is our opinion that the City's code of ethical conduct must deal not only with bald impropriety, but

also with the *mere appearance of impropriety or conflicts of interest*. Without such effective and high standards of conduct, the City undoubtedly will lose the trust and confidence of its citizens.

In view of the steering committee's public responsibilities, its intended makeup of diverse segments of the City's population, its advisory capacity, and the disclosures which the inquisitor has and will make in the future, we believe that the inquisitor's continued participation to be in the public interest. Therefore, the Commission decides that the most appropriate action is to grant the inquisitor a modification from complete recusal from his Steering Committee. We believe that such a modification is not contrary to the purpose of the Ethics Code and satisfies the criteria set forth in §38-13. However, if in the future the inquisitor's private interests create a conflict with his public duties on the Steering Committee, we recommend that he recuse himself on a transactional basis.

The inquisitor's inquiry raises important issues affecting City business and the City's many committees. We appreciate the inquisitor's ethical circumspection and the opportunity to respond to his inquiry.

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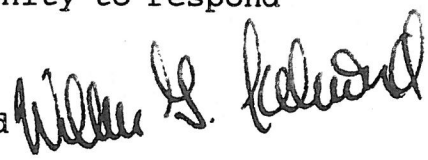

The Ethics Commission