



## FREDERICK COUNTY GOVERNMENT

### FREDERICK COUNTY ETHICS COMMISSION Office of the County Attorney

Jan H. Gardner  
*County Executive*

*Gwen Romack, Chairman*

#### **Advisory Opinion No. 15-01**

A County Council Member has contacted the Ethics Commission to express his interest in engaging in the competitive bidding process used to award contracts to perform work on County Capital Improvement Projects (CIP). The Council Member notes that as a member of the County Council he has no control or influence over staff in the Executive Branch of the County government who would recommend the award of a CIP contract or inspect the work performed by the Council Member's company. The Council Member noted that prior decisions issued by the Ethics Commission when the County had a commissioner form of government were distinguishable due to the significant changes resulting from Frederick County's adoption of a charter form of government.

The Ethics Commission met with the Council Member and has carefully considered the arguments presented at that meeting. The Ethics Commission has concluded that the Council Member would not be in violation of the conflict of interest provisions in the Ethics Ordinance if he bids on County CIP projects and is the successful bidder. The Commission's reasoning is set forth below. First, however, it is necessary to recognize the major changes brought about by the County Charter and the impact that these changes have had on the Commission's analysis of the Council Member's inquiry.

#### **I. The Commissioner Form of Government**

Until December 1, 2014, Frederick County operated under a commissioner form of government. The County was governed by a Board of County Commissioners, consisting of five elected County Commissioners. The Board of County Commissioners performed both legislative and executive functions.

The Board of County Commissioners, through an appointed County Manager and appointed division directors, was responsible for overseeing the operations of the various County divisions. The County Manager and the division directors all served at the Board's pleasure, meaning that their employment could be terminated at any time. While the Board did not directly supervise the employees in the divisions, the Board had indirect control over the employees by virtue of the fact that the division directors reported to the Board and to the County Manager. Individual County Commissioners were able to have direct contact with County employees as they saw fit.

The Board also established each division's budget. This allowed the Board to determine the number of employees working in each division. The Board also had final administrative authority to rule on appeals from County employees who were disciplined or had their employment terminated.

## II. Charter Government in Frederick County

On November 6, 2012, the voters of Frederick County adopted the Frederick County Charter. Pursuant to the Charter, the former Board of County Commissioners ceased to exist as of December 1, 2014.<sup>1</sup> In its place, the County for the first time has an elected County Executive, who is in charge of the Executive Branch of the County government, and an elected seven-member County Council, which carries out the expanded legislative duties granted in the Charter. Two Council Members represent the County at large, while the remaining five Council Members each represent one of the five Council districts.

There are a number of areas where there are significant differences from the prior system of governance. As some of those differences are critical to the Ethics Commission's decision, they need to be noted in this advisory opinion.

### A. The County Council's Powers and Duties

Under the Charter, legislative authority is vested in the County Council.<sup>2</sup> The Council has the power to enact laws for the peace, good government, health, safety or welfare of the County to the extent allowed by the Maryland Constitution and State law.<sup>3</sup> The County Executive, however, has the authority to veto most legislation.<sup>4</sup> The County Council can override the County Executive's veto by the affirmative vote of five County Council Members.

The County Council is required to act as a single body. Except for special fact finding ad hoc committees, the Charter does not authorize the creation of standing committees or allow County Council functions and duties to be performed by a smaller number of Council Members.<sup>5</sup>

### B. The County Executive's Powers and Duties

The County Executive is the chief executive officer for Frederick County and is responsible for the execution of the County's laws. The County Executive is also responsible for seeing that Executive Branch employees faithfully perform their duties.<sup>6</sup>

The following duties are specifically assigned to the County Executive: (1) supervising and directing offices, agencies and divisions of the Executive Branch and ensuring that County employees as well as County boards and commissions faithfully perform their duties; (2) preparing and submitting the annual County Budget to the County Council; (3) preparing and submitting an annual report on the activities and accomplishments of the County government; (4) providing the Council with any information the Executive deems necessary or information concerning the Executive Branch that the Council requires in order to exercise its powers; (5) recommending legislative action to the Council; and (6) signing on the County's behalf all deeds, contracts, and other instruments.<sup>7</sup>

The position of County Executive is a full-time position. Unlike the members of the County Council, who are not full time, the County Executive is not permitted to have any other employment.<sup>8</sup>

After the move to charter government, the County Executive became responsible for supervising the various County divisions and agencies. The County Executive has the power to appoint directors to head each division and agency, subject to confirmation by the County Council. These directors all serve at the pleasure of the County Executive.<sup>9</sup>

C. Non-interference with County Employees

The Charter makes the County Executive responsible for supervising employees in the Executive Branch. Neither the County Council as a body nor any County Council Member individually has the power to appoint, dismiss or give direction to an Executive Branch employee, except as otherwise provided by State law or the Charter.<sup>10</sup>

D. Adoption and Approval of the County Budget

Both the County Executive and the County Council have well-defined roles with regard to the adoption of a budget. The initial responsibility rests with the County Executive, who must submit a detailed proposed budget to the County Council by April 15 each year. The County Executive is required to hold at least two public hearings on the budget before it is sent to the County Council.<sup>11</sup>

Once the County Council receives the proposed budget, the Council must hold its own public hearing on the budget.<sup>12</sup> With limited exceptions, the Charter does not permit the Council to increase items in the Executive's proposed budget, nor does it allow the Council to alter revenue estimates. Discussions and votes on the budget take place in open meetings. Members of the public may attend these meetings, which are also televised and available for review on the County's website. If the County Council fails to adopt the budget by May 25, the County Executive's proposed budget becomes law.<sup>13</sup>

The Charter also delineates the ability of the County Executive and the County Council to make changes to the Operating and Capital Improvement Budgets throughout the year. In the event that additional appropriations are necessary during the fiscal year, the Council is authorized to make supplemental appropriations, but only upon the recommendation of the County Executive.<sup>14</sup> The County Executive has some authority to transfer funds within the same department and fund during the year, but if transfers between departments (but still within the same fund) are needed, the Council can approve the transfer, but only after it receives a recommendation to do so from the County Executive.<sup>15</sup> If the County Executive recommends amendment of the CIP budget to provide funds for a new project, the County Council can amend the approved budget, subject to certain Charter limitations.<sup>16</sup>

### III. The Competitive Contract Award Process

The competitive contract award process is managed by the Executive Branch of the County government. Prior to the award of a contract for work on a capital improvement project, the division responsible for overseeing the project may need to hire an engineering consultant to develop the plans and specifications for the project. Once the plans and specifications for the contract are prepared, the Department of Procurement and Contracting reviews the information provided and initiates the bid process. Those contractors who are interested in placing a bid on the contract can learn of the new bid opportunity by preregistering with the Department of Procurement and Contracting to receive bid notifications. Information about the contract bid opportunity is also made available on the County's website.

The Department of Procurement and Contracting receives the bids and makes a recommendation to the County Executive for the contract award. In most cases, the lowest bidder is awarded the contract. In order to award the contract to someone other than the lowest bidder, the County would need to have a basis for concern that the lowest bidder would not be able to perform the work required under the contract. This has rarely, if ever, happened. Should such a situation occur, the contract would be awarded to the second lowest bidder. It should also be noted that under the County Procurement Rules, unsuccessful bidders have a right to protest the contract award. Once the contract is approved, the County Executive signs the contract on behalf of the County.

Once the Department of Procurement and Contracting opens the bids, limited information about the bids is posted online. The Department limits the information it publishes at this time, so as to avoid giving any bidder an unfair competitive advantage if the Department subsequently asks bidders for a "best and final offer." When the Department is ready to make a recommendation on the award of a contract award, the Department prepares a staff report to the County Executive explaining the basis for its recommendation. That staff report is a public record, as is the executed contract. In addition to the information routinely made available by the Department of Procurement and Contracting, additional information related to the bids and the contract award may be available to interested persons through the Maryland Public Information Act.

### IV. Inspection of the Contractor's Work

Depending on the size of the project, the County may enter into contracts with inspectors to monitor and approve the work as it is performed. If the project is relatively small, the County may use inspectors who are County employees. It is also possible that third-party inspectors who are not hired or employed by the County will be used.

The Ethics Commission is aware of the fact that the water and sewer regulations controlling the inspection process used for projects on water and sewer facilities is under review and may be changed by the County Executive. One of the proposals would have the County become a party to any contracts with third party inspectors. This would enhance the County's ability to monitor the quality of the inspections and the work performed under the contract. The

County Executive directed the Division of Utilities and Solid Waste Management to hold outreach meetings with the public on the proposed changes. The County Executive may suggest changes to the regulations, which would then go to the County Council for approval. The proposed changes would be discussed in at least one public hearing before any changes are adopted.

V. The Ethics Ordinance's Conflict of Interest Provisions

The Conflict of Interest provisions in the Ethics Ordinance are found in Section 1-7.1-5 of the County Code. The restrictions on outside employment are found in Subsection 1-7.1-5(D)(1), which states as follows:

(D) *Employment and financial interest restrictions.*

- (1) Except as permitted by regulation of the Commission when the interest is disclosed or when the employment does not create a conflict of interest or appearance of conflict, an official or employee may not:
  - (a) Be employed by or have a financial interest in any entity:
    - (i) Subject to the authority of the official or employee or the County division, agency, or board or commission with which the official or employee is affiliated; or
    - (ii) That is negotiating or has entered into a contract with the division, agency, or board or commission with which the official or employee is affiliated; or
  - (b) Hold any other employment relationship that would impair the impartiality or independence of judgment of the official or employee.

The Ordinance also contains some exceptions to these restrictions, none of which are applicable here.

VI. Discussion

The questions before the Ethics Commission are whether a company owned by a County Council Member can bid on County CIP contracts and, if awarded a contract after participating in the competitive bidding process, whether the company can perform work on the project without violating the conflict of interest provisions in the Ethics Ordinance.

The Ethics Commission has previously considered the potential conflicts of interest that could have resulted from allowing a business owned by a County Commissioner to enter into contracts with the County or to engage in work that would be subject to inspection or monitoring on a regular basis by inspectors employed by the County. The Commission's earlier opinions largely focused on the extent to which a County Commissioner could directly or indirectly influence County decisions related to the approval of contracts benefitting the Commissioner's company and the inspection of work performed by that company under these contracts and the resulting creation of a perception of undue influence or favoritism. The major differences under Frederick County's Charter form of government have alleviated those concerns as they might apply to County Council Members.

Under Charter government, the Executive Branch controls the competitive bidding process for contracts to perform work on capital improvement projects and it is the County Executive who approves the contract awards and signs the contracts. Similarly, Executive Branch employees monitor the work performed under each County contract. Under the non-interference provision in Charter Section 212, a County Council member may not give direction to Executive Branch employees in the performance of these duties. The only role for the County Council in this process is through the decisions that the Council makes as a body when adopting a budget and approving changes to that budget during the year. In most respects, the County Council takes budget action only upon a recommendation made by the County Executive and the Charter limits the Council's ability to increase the budget submitted by the Executive. The process for adopting a budget and making changes to the budget is a public process, providing for transparency as to how those decisions are made.

The Ethics Ordinance does not require a Council Member who is interested in bidding on one or more capital improvement projects to recuse himself from voting to approve or modify the CIP Budget as a whole. However, to the extent that the matter before the Council is limited to a specific project or projects on which the Council Member would like to submit a contract bid or has already submitted a bid, the Council Member should recuse himself and not participate in the Council's discussion of those matters or any Council votes taken.

Under the Charter, County Council Members are part-time legislators. As such, they will frequently have other employment to supplement the \$22,500 annual salary they receive as Council Members. The Ethics Commission sees no need to take an unduly restrictive approach to the Council Member's request that he be permitted to take part in the competitive bidding process for a contract award to allow his company to perform work on capital improvement projects. Not only are there sufficient checks and balances in place to avoid any undue influence, but the Council Member would only receive a contract to perform work for the County after a competitive process in which his company has been determined to be the lowest responsible bidder and the reasons for the contract award will have been explained in a public record before the County Executive approves the contract award.

The Ethics Commission is also mindful of the impact that a contrary decision could have on the willingness of other Frederick County residents with business interests in the County to run for election to the County Council in the future, knowing that their businesses could be adversely affected in their ability to bid for County contracts should they be elected. Where the bidding process is subject to some level of public scrutiny, the contract is only awarded after a competitive process has taken place, and the Council Member is restricted in his ability to interfere with the Executive Branch employees who are involved in oversight of the contract, the Ethics Commission believes that there are sufficient protections in place to guard against the appearance of impropriety or a conflict of interest under the Ethics Ordinance.

IV. Conclusion

For the reasons stated, the Ethics Commission advises the County Council Member that the Ethics Ordinance does not preclude him from submitting bids on behalf of his company to perform work on competitively bid County capital improvement projects. If the Council Member's company is awarded a contract at the conclusion of the competitive bidding process, the Ethics Ordinance would not preclude his company from performing work under that contract.

The fact that the Council Member may want to bid on capital improvement projects would not preclude the Council Member from voting on the CIP Budget as a whole. The Council Member should, however, recuse himself from participating and voting in the event that a specific project on which he wishes to bid or has already bid comes before the County Council.

The Ethics Commission thanks the County Council Member for seeking the Commission's guidance on the applicability of the Ethics Ordinance.

May 12, 2015  
Date

/s/  
Gwen Romack, Chair

## Endnotes

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<sup>1</sup> **Charter Section 802. Time Certain Articles Become Effective.** Except as expressly provided in this Article, the provisions of this Charter shall become operative on the date the first County Executive and County Council, elected pursuant to this Charter, take office, Monday, December 1, 2014.

**Charter Section 808. Office of the County Commissioner Abolished.** At the Effective Date of the Charter, the Office of County Commissioner shall cease to exist and all reference to the Office and the Board of County Commissioners in the Maryland Constitution or in any law, ordinance, rule, or regulation shall be construed to refer to the Office of Council Member or the Council and/or the Office of the County Executive or the County Executive whenever the construction would be reasonable.

<sup>2</sup> **Charter Section 202. Powers.** All the legislative powers which the County may exercise under the Maryland Constitution and laws of the State are vested in the Council, subject to those powers retained by the people of the County as set forth in Section 308 of this Charter [Referendum].

<sup>3</sup> **Charter Section 301. Legislative Powers.**

In accordance with Section 202 of this Charter, the Council may enact public local laws for the peace, good government, health, safety or welfare of the County and on all subjects that have been delegated to the County under the Maryland Constitution and by the laws of the State. The Council may repeal and amend the local laws for the County heretofore enacted by the General Assembly as provided by law.

<sup>4</sup> **Charter Section 306. Executive Veto.**

(a) Except as otherwise provided in this section, within ten business days after the passage of any legislation, the Council shall deliver the legislation to the Executive for approval or veto. If the Executive takes no action to approve or veto the legislation within ten business days after receipt, it shall be deemed approved as if the Executive had approved it.

(b) If the Executive approves the legislation, it shall take effect as provided in this Charter.

(c) If the Executive vetoes the legislation, the Executive shall return it to the Council together with reasons for the veto stated in writing. Not later than the next legislative session immediately following the receipt of the vetoed legislation, the Council may override the veto by the affirmative vote of five members of the Council.

(d) The Executive may not veto the Annual Budget and Appropriation Ordinance or the ordinance appointing a Compensation Review Commission provided in Section 207 of this Charter.

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<sup>5</sup> **Charter Section 203. Council to Act as a Body.** In all functions and deliberations, the Council shall act as a body. It shall have no power to create standing committees or to delegate any of its functions and duties to a smaller number of its members than the whole. The Council may, however, appoint special ad hoc committees solely for the purpose of inquiry and fact finding.

<sup>6</sup> **Charter Section 401. Composition.** The executive branch of the County government shall comprise the County Executive and all officers, agents, and employees under the supervision and authority of the Executive.

<sup>7</sup> **Charter § 402. County Executive Powers and Duties.** There is a County Executive, who shall be the chief executive officer of the County and shall faithfully execute the laws. All executive power vested in the County by the Constitution and laws of Maryland and this Charter shall be vested in the Executive. The Executive shall see that the affairs of the executive branch are administered properly and efficiently, and that employees of the executive branch faithfully perform their duties.

The duties and responsibilities of the Executive shall include:

(a) Supervising and directing offices, agencies and divisions of the executive branch and ensuring that County employees as well as County boards and commissions faithfully perform their duties;

(b) preparing and submitting to the Council the annual County Budget;

(c) preparing and submitting to the Council and the public within six months after the close of the fiscal year, an annual report on the activities and accomplishments of the County government, including a comprehensive annual financial statement;

(d) providing the Council with any information the Executive deems necessary or, as the Council in writing may request, information concerning the executive branch which the Council may require for the exercise of its powers;

(e) recommending to the Council such measures for legislative action that the Executive may consider to be in the best interests of the County; and

(f) signing or causing to be signed on the County's behalf all deeds, contracts, and other instruments.

<sup>8</sup> **Charter Section 405. Qualifications of the County Executive.** ... The Executive shall devote full-time to the duties of the office. The Executive may not participate in any private occupation for compensation. During the term of office, the Executive may not hold any other office of profit.

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### <sup>9</sup> **Charter § 412. Appointment and Removal of Department Heads and Others.**

(a) The Executive shall appoint an individual to head each principal operating department, agency or office under the control of the Executive, subject to confirmation of the Council. Individuals appointed under this subsection shall serve at the pleasure of the Executive.

(b) Except as provided in subsection (c) of this section or prescribed by law, the provisions of this Charter or by ordinance, the Executive shall appoint all members of boards and commissions. All members shall be subject to confirmation by the Council. Individuals appointed under this subsection shall serve at the pleasure of the Executive, unless otherwise provided by law, the provisions of this Charter or by ordinance.

(c) The membership of boards and commissions that are established exclusively to advise the Council shall be appointed and removed by the Council, at the Council's discretion, unless such matters are prescribed by law, the provisions of this Charter or by ordinance.

(d) If the Council fails to take action within thirty days upon an appointment made by the Executive pursuant to this section, the appointment shall become effective.

### <sup>10</sup> **Charter Section 212. Non-interference.**

(a) Neither the Council nor any of its members shall appoint, dismiss, or give directions to any individual employee of the Executive Branch of the Government, except as may be provided by State law or this Charter.

(b) Notwithstanding subsection (a) of this section, it shall be the duty of the Executive to provide any information that is requested by the Council in writing for the purpose of introducing and evaluating legislation or to engage in the review and monitoring of Government programs, activities, and policy implementation.

### <sup>11</sup> **Charter Section 503. Preparation of the County Budget.**

(a) Not later than April 15 of each year, the Executive shall prepare and submit a proposed Budget to the Council for the ensuing fiscal year. The proposed Budget shall present a complete financial plan for the Government reflecting anticipated revenues from all sources, expenditures, and any surplus or deficit in the general or special funds of the Government.

(b) During preparation of the Budget, the Executive shall hold at least two public hearings to receive public comment. One hearing shall be held in December to receive proposals for inclusion in the Budget. The other shall be held in March to receive comments on budget requests. The Executive shall provide sufficient notice of the public hearings and shall cause to be published in at least one newspaper of general circulation in the County a notice of the date, time and place of each public hearing. If the Executive determines that no such newspaper exists in the County, the Executive shall use whatever media it deems most suited to satisfy the public

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notice requirements of this section. The Executive shall prepare a draft Budget and make it available to the public prior to the March hearing date.

(c) The proposed Budget shall be reproduced and made available to the public.

<sup>12</sup> **Charter Section 505. Public Budget Hearing.** Upon submission of the proposed Budget, the Council shall cause to be published in at least one newspaper of general circulation in the County, a notice of the date, time and place of at least one public hearing on the Budget by the Council. If the Council determines that no such newspaper exists in the County, the Council shall use whatever media it deems most suited to satisfy the public notice requirements of this Section. No final budget action may be taken by the Council until after a public hearing has been held, and then only in open, public session.

<sup>13</sup> **Charter Section 506. Action on the Budget by the Council.**

(a) After a public hearing, the Council may decrease or delete any items in the Budget, except those required by State law, by provisions for debt service on obligations then outstanding or for estimated cash deficits. The Council shall have no power to change the form of the Budget as submitted by the Executive, to alter revenue estimates, or to increase any expenditure recommended by the Executive, unless expressly provided in State law and except to correct mathematical errors.

(b) Except as provided in subsection (c) of this section, any change in the proposed Budget to decrease or delete an item in the Budget made pursuant to subsection (a) of this section shall constitute a change of substance requiring compliance with the public hearing, notice and publication requirements of a newly enacted Bill pursuant to Section 305 of this Charter.

(c) A decrease or deletion of one or more items in the Budget may not constitute a change of substance in the proposed Budget if the decrease or deletion constitutes less than a one percent change in the total Budget or less than a fifty percent decrease in any one line item in the Budget.

(d) The adoption of the Budget shall be by the affirmative vote of not less than four members of the Council in a law enacted not later than May 25, which shall be known as the “Annual Budget and Appropriations Ordinance of Frederick County.” If the Council fails to adopt the Budget by May 25 pursuant to this subsection, the proposed Budget as submitted by the Executive shall become law.

<sup>14</sup> **Charter Section 510. Supplemental Appropriations.** On the recommendation of the Executive, the Council may make supplemental appropriations from any contingency appropriations in the Budget; from revenues received from anticipated sources but in excess of budget estimates; or from revenues received from sources not anticipated in the budget.

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<sup>15</sup> **Charter Section 509. Transfer of Appropriations.**

(a) The Executive may transfer unencumbered appropriations in the Operating Budget within the same department, agency, or office and within the same fund. On the recommendation of the Executive, the Council may transfer unencumbered appropriations in the Operating Budget between departments, agencies and offices within the same fund.

(b) A transfer may not be made between the Operating Budget and Capital Budget appropriations. On the recommendation of the Executive, the Council may transfer appropriations between Capital Projects within the same fund provided the Council neither creates nor abandons any Capital Projects except in accordance with Section 512 of this Charter.

(c) Notwithstanding any provisions of this section, the Council may provide by law for inter-fund cash borrowing in the same fiscal year to meet temporary cash requirements. Nothing contained in this section may be construed to prevent reimbursement among funds for services rendered.

<sup>16</sup> **Charter Section 513. Amendment to Capital Budget after Adoption of the Budget.**

Upon recommendation of the Executive and after a public hearing and an affirmative vote of at least four council members, the Council may amend the Annual Budget and Appropriations Ordinance to provide funds for a Capital Project not previously appearing in the Capital Budget for the fiscal year. The amendment may not increase the total amount of appropriations for the fiscal year, unless such increased appropriations shall be funded from revenues received in excess of those budgeted or from unanticipated revenues not previously budgeted in the Annual Budget and Appropriations Ordinance for the fiscal year.