

## Maryland Judicial Ethics Committee

**Opinion Request Number:** 2007-06

**Date of Issue:** May 30, 2007

■ Published Opinion     Unpublished Opinion     Unpublished Letter of Advice

Retired Judge Eligible for Recall May Not Serve on County Planning Commission

**Issue:** May a retired judge, eligible for recall, accept appointment to, and serve on, a county planning commission?

**Answer:** By accepting appointment to a county planning commission, a retired judge becomes ineligible for recall during the term of service on the commission.

**Discussion:** The planning commission in the requesting judge's jurisdiction is established by the county charter. Its members are appointed by the executive and legislative body. They serve for three-year terms without compensation.

Duties of the planning commission include:

Preparing a master plan

Recommending to the county legislative body rules and regulations governing zoning and subdivision of land, and

Administering those regulations as adopted.

The creation and function of local planning commissions is authorized, in the first instance, by Maryland Code, Article 66B, §3.01. Thus, the planning commission is a creature of both the county charter and the Maryland Legislature.

The independence of the Judiciary is the fundamental precept which governs the conduct of judges. Canon 1 starts with the sentence: "An independent and honorable judiciary is indispensable to justice in our society." The provisions of the Code of Judicial Conduct are established to preserve the "[i]ntegrity and Independence of the Judiciary." *Id.*

Article 33 of the Maryland Declaration of Rights holds that "the independency and uprightness of Judges are essential to the impartial administration of justice...." It provides specific measures to insure that independence, among them that "[n]o Judge shall hold any other office...."

The Court of Appeals considered what factors are applicable in determining whether a position is an *office of profit* within the meaning of Article 35 of the Maryland Declaration of Rights in *Moser v. Bd. of County Comm'rs*, 235 Md. 279 (1964). That case involved a member of a county metropolitan commission who accepted an appointment and qualified as a notary public. The issue was whether the office of notary public is an office of profit. Article 35 holds that "no person shall hold, at the same time, more than one office of profit...." Reviewing prior decisions, the Court of Appeals identified five indicia of an office of profit:

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1. The position was created by law and casts upon the incumbent duties which are continuing in nature and not occasional;
2. The incumbent performs an important public duty;
3. The position calls for the exercise of some portion of the sovereign power of the state;
4. The position has a definite term for which a commission is issued, a bond required and an oath required;
5. The position is one of dignity and importance.

*Id.* at 281.

The determination as to whether an office is one of profit depends on the facts and circumstances in each case and upon the nature and effect of the particular provision of law by which the office was created.

In 1970, the Court of Appeals considered whether the position of teacher in a public school system was an office for which the incumbent was entitled to governmental immunity. *Duncan v. Koustenis*, 260 Md. 98 (1970). Citing earlier cases in which it had developed the above-cited indicia of an office, the Court noted that even in those instances where most of the indicia did not apply, an office had been considered to be a public office when it consisted largely of exercise of the sovereign power of government. *Id.* at 106.

The Maryland Attorney General considered whether membership on a planning commission was an “office” under Article 35 of the Declaration of Rights. 64 Md. Op. Att’y Gen. 255 (1977). While the members of that planning commission were apparently entitled to compensation, unlike the planning commission in the requesting judge’s jurisdiction, the subject of the opinion was the interpretation of the term “office” and “public office.” The Attorney General concluded that membership on a planning commission was an office because the office was created by state and local law and because incumbents served definite terms performing continuing duties. Most important, planning commission members exercise the sovereign power of the government in preparing recommendations as to legislation and administering those regulations. While the opinions cited herein interpret the term “office of profit,” the Committee finds that the principles also apply to the term “office” in Article 33, and that a member of a local planning commission holds an office.

The authority of this Committee is limited to rendering opinions as to the application of the Code of Judicial Conduct; it does not extend to interpretations of the Maryland Declaration of Rights. Nonetheless, the prohibition of Article 33 against judges holding any other office guides an inquiry as to the intent of the Court of Appeals in adopting the Code of Judicial Conduct, specifically the provisions of Canon 1, with regard to the independence of the Judiciary.

Judges may be recalled for temporary assignment as long as they meet standards established by the Court of Appeals. Maryland Code, Courts and Judicial Proceedings Article, §1-302(b)(3).

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The Court of Appeals has provided that retired judges are subject to the Code of Judicial Conduct, other than certain provisions of Canon 4, if they are approved for recall. Canon 6C.

A retired judge is free to accept appointment to a planning commission, but in doing so, occupies an office as contemplated in Article 33. By accepting such appointment, the judge would relinquish eligibility for recall during the term of that office. While holding the office of planning commission member, the judge would be limited to that office and could not be recalled to serve as a judge.

**Application:** The Judicial Ethics Committee cautions that this opinion is applicable only prospectively and only to the conduct of the requestor described in this opinion, to the extent of the requestor's compliance with this opinion. Omission or misstatement of a material fact in the written request for opinion negates reliance on this opinion.

Additionally, this opinion should not be considered to be binding indefinitely. The passage of time may result in amendment to the applicable law and/or developments in the area of judicial ethics generally or in changes of facts that could affect the conclusion of the Committee. If you engage in a continuing course of conduct, you should keep abreast of developments in the area of judicial ethics and, in the event of a change in that area or a change in facts, submit an updated request to the Committee.