



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-95-2

### FACTS:

You are counsel to the Metropolitan Area Planning Council. You seek an opinion concerning whether the council is a state, county, municipal or regional municipal agency for purposes of the conflict law.

The Metropolitan Area Planning Council (MAPC) was established by Chapter 668 of the Acts of 1963 to conduct research and prepare and compile data, maps, charts, tables and plans for the physical, social and economic improvement of the metropolitan area planning district. Under the 1963 Act, the metropolitan area planning district consisted of “each city or town which is a member of the metropolitan sewage district, the metropolitan water district or the metropolitan parks district (Member Municipality),” each city or town which is contiguous to a Member Municipality and which applies to the MAPC to be included, and any other city or town whose application to the MAPC is approved by a majority vote of the representatives on the MAPC. The MAPC was funded by an appropriation of the General Court, “charged as assessments upon the various cities and towns comprising the district,” such assessment to be certified by and paid to the state treasurer. Chapter 668 amended G.L. c. 6, § 17 so as to place the MAPC under the supervision of the Governor.

In 1970, the powers and duties of the MAPC were further defined by Chapter 849 of the Acts of 1970, now codified under G.L. c. 40B, §§ 24-29. Under G.L. c. 40B, § 26, the metropolitan area planning district, is “a public body politic and corporate,” which consists of ninety-eight (98) cities and towns, and any city or town which, in accordance with the statute, applies to and is approved by a majority vote of the council. Such municipalities may leave the MAPC only by legislative act. Three towns have joined the MAPC voluntarily.

The MAPC “shall maintain the fullest cooperation with cities and towns in the district and shall render them all possible assistance in their planning activities, especially where two or more of the municipalities have common problems.” G. L. c. 40B, § 25. It “shall have and exercise the same powers and duties of the” Southeastern Massachusetts Regional Planning District which is established by the executive director of the Massachusetts office of business development pursuant to G.L. c. 40B, §9. *Id.* Thus, among other things, the MAPC is empowered to conduct research and/or studies and to compile information necessary for identifying problems and needs of the district, and for the formulation of goals, objectives, policies, plans and programs in relation to the development and redevelopment of the district’s resources and facilities. G.L. c. 40B, §14. While the MAPC is empowered to approve or disapprove plans for the development or redevelopment of the district or portions thereof, such powers are largely advisory. *Id.*

Pursuant to state statutes, e.g., the Subdivision Control Law (G.L. c. 41, §§81K-81GG) and the Zoning Act (G.L. c. 40A), Massachusetts cities and towns regulate planning locally. For example, subdivision control is regulated exclusively on a town-by-town basis by local planning boards. Decisions to grant or deny zoning special permits and variances are likewise made at the local level by such bodies as planning boards, zoning boards, boards of aldermen, etc. The MAPC’s planning activities do not replace or in any way regulate the activities of these local boards. Neither does the MAPC take over or assume the zoning authority of local legislative bodies. Each MAPC member municipality continues to exercise autonomous planning powers which are neither subject to MAPC control nor controlled by MAPC. The MAPC performs only a state-mandated, regional planning function, which, as noted above, is generally advisory in nature. It conducts its affairs autonomously. G.L. c. 40B, §26. For example, the MAPC is no longer under the Governor or his supervision. See St. 1970, c. 849, § 1. However, the MAPC is required to make annual reports to both member municipalities and the General Court.

MAPC members, who are uncompensated, include one representative from each city and town of the district<sup>1/</sup>, twenty-one gubernatorial appointees, a sufficient number of whom shall represent the viewpoints of minority and low-income groups, and the following officers or their designees who shall be members ex officio: the chairman of the Massachusetts Bay Transportation Authority, the chairman of the Massachusetts Port Authority, the chairman of the Massachusetts Turnpike Authority, the commissioner of public safety, the commissioner of the metropolitan district commission, the chairman of the board of directors of the Massachusetts Water Resources Authority, the commissioner of highways, the executive director of the Massachusetts office of business development, the secretary of communities and development, the commissioner of environmental management, the commissioner of environmental protection, the chairman of the Boston Redevelopment Authority, the commissioner of public works of the city of Boston and the executive director of the Boston Water and Sewer Commission.

The MAPC Executive Committee is composed of individuals elected from among the representatives of the cities, the towns, the gubernatorial appointees and the ex officio members. Pursuant to G.L. c. 40B, §28, this Committee takes action in the name of, and on behalf of, the MAPC and is generally responsible for the conduct of MAPC's affairs. The member municipalities have no veto power in the affairs of the MAPC or its Executive Committee.

Local funding of MAPC is made via an assessment voted by MAPC, with no review by the individual municipalities. The MAPC's budgetary decisions are not subject to local control. Significantly, the General Laws give the MAPC direct taxing authority and the per capita assessments voted by MAPC are collected by the State Treasurer through the "cherry sheet" issued annually to each city and town under G.L. c. 59, §20. Municipal payments are made to the State Treasurer and credited to the MAPC fund. G.L. c. 40B, §29. The MAPC may also accept funding "by gift, grant or contract from any source including grants, bequests, gifts, or contributions made by any individual, corporation, association, public authority, or agency or subdivision of the federal or state governments." *Id.*; see also G.L. c. 40B, § 14.<sup>2/</sup> It may sue and be sued "upon the same conditions that a town may sue or be sued." G.L. c. 40B, §14.

The MAPC has spent the last seven years developing MetroPlan 2000, which is a regional plan for the development of the infrastructure of Eastern Massachusetts. The MAPC has also conducted regional studies concerning the impact of the Central Artery/Third Harbor Tunnel project. Currently, pursuant to its Workprogram for 1994-1995, the MAPC is, among other things, coordinating with state and other agencies in the development of the Regional Transportation Plan and the State Implementation Plan, and with state water resource policy forums, including the MWRA Wastewater Advisory Committee, the Water Resources Commission, and the Massachusetts Bays Program, regarding regional water systems planning.

#### **QUESTION:**

Is the MAPC a state, county, municipal or regional municipal entity for purposes of the conflict law?

#### **ANSWER:**

The MAPC is a state agency and its members, who are uncompensated, are "special state employees."

#### **DISCUSSION:**

Clearly, the MAPC is a government instrumentality. It is created by statute as "a public body politic and corporate." G.L. c. 40B, § 26. Its members are chosen by government officials and perform essentially governmental functions, and its receives and expends public funds. See *EC-COI-94-7; 89-24; 89-1*. Thus, we are left to consider whether the MAPC is a state, county, municipal or regional municipal entity. The focus of such analysis is on "the level of government to be served by the agency in question." *EC-COI-90-2*, quoting Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U. Law Rev. 299, 310 (1965). Previously, we have considered which level of government funds and oversees the entity, and whether the entity carries out functions similar to those of a particular level of government. See, e.g., *EC-COI-90-2; 83-74; 82-25*. For example, in *EC-COI-83-74*, we concluded that a local private industry council (PIC) is a municipal

agency because municipal elected officials played a role in the selection of PIC members and, together with the PIC, in the implementation of the federal job training act. In *EC-COI-82-25*, we concluded that a school district was a municipal agency because it carried out the municipal function of providing public education.

Having reviewed the enabling legislation for the MAPC, we conclude that, although the MAPC has certain local characteristics, it is a state agency for purposes of the conflict law. This conclusion rests on the fact that the MAPC performs a state regional planning function that is separate and distinct from each of its member municipalities' local planning bodies. The MAPC, and not the member municipalities, exercises exclusive control over the MAPC's affairs. With regard to funding, member municipalities make their contributions to the MAPC through the State Treasurer but play no role in the formulation or implementation of the MAPC's budget. Member municipalities are not the MAPC's sole funding source, however. Rather, the MAPC is empowered to accept funds from other levels of government (e.g., federal and state agencies or authorities) and from private individuals, corporations and associations. Further, although each member municipality elects a representative to the MAPC, approximately one quarter of MAPC members and ex-officio members are selected by the Governor or are employees of state agencies and authorities. Lastly, our review of the history of the MAPC's enabling statute persuades us that this entity originally existed as a state agency. St. 1963, c. 668. Although the MAPC's structure was changed as a result of St. 1970, c. 849, §3, nothing in that Act evinces a legislative intent to make the MAPC an agency of a county, city or town.

To the extent that *EC-FD-79-2* and *EC-COI-81-48* reach a different result, we decline to follow these opinions.

In *EC-FD-79-2*, we were asked to consider whether the MAPC is a "governmental body" subject to the financial disclosure requirements of General Laws Chapter 268B. Section 1(h) of Chapter 268B defines a governmental body as "any state or county agency, authority, board, bureau, commission, council, department, division, or other entity, including the general court and the courts of the commonwealth."<sup>3/</sup> The Commission concluded that "the MAPC is a hybrid agency, having both state and local characteristics. However, its membership, control, responsibilities and objectives are primarily local, rather than state-wide or county-wide, in nature. For these reasons, MAPC is not a 'governmental body' as that term is defined in Chapter 268B. The 'multi-municipal' character of the MAPC renders it a 'special district' under Section 21 of that Chapter."<sup>4/</sup> In *EC-FD-79-2*, however, we declined to express an opinion "as to the appropriate characterization of the MAPC under any other statute."

In *EC-COI-81-48*, we ruled that the municipal exemption contained in §4 of Chapter 268A prevented a state employee, who was also a municipal representative to a planning council, from voting on matters within the purview of his state agency. The municipal exemption was applicable, we reasoned, because as a city's representative to the planning council, the state employee held "an appointive office in a district within the meaning of Section 4."

Our thinking regarding the character of "districts" has evolved since 1981, particularly in light of the Appeals Court's decision in *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421 (1992). Prior to *McMann*, this Commission had been of the view that a regional district is an independent municipal agency and is not a "municipal agency" within the meaning of G.L. c. 268A, §1(f).<sup>5/</sup> This view was rejected by the Appeals Court, which in *McMann* concluded that a regional school committee is an "instrumentality" of each of its member municipalities. "In reaching this conclusion the Court considered the ordinary and approved use of the word 'instrumentality' in the statute; the formation, operation and purpose of a regional school district; and the purpose of G.L. c. 268A. *Id.* at 425-428. The Court found that the municipalities' use the school district as a means to fulfill their statutory obligation to provide education and that the municipalities played a substantial role of the creation of the district and the district's financial matters. *Id.* at 427." *EC-COI-92-26*.

Applying these considerations to the MAPC, we do not find that the MAPC is an "instrumentality" of its member municipalities. The MAPC was created by the state legislature, not by the member municipalities in their discretion, to perform a state-mandated regional planning function. The MAPC's enabling legislation designates which municipalities shall be members of the MAPC. Member municipalities may leave the MAPC only by act of the Legislature. Moreover, membership on the MAPC is not limited to the cities and towns, but includes twenty-one gubernatorial appointees, and eleven *ex officio* members from state agencies or authorities.

The MAPC does not act as the means by which the member municipalities perform mandated local planning functions. Rather, each MAPC member municipality continues to exercise autonomous planning powers which are neither subject to MAPC control nor controlled by MAPC.

The local funds contributed to the MAPC are determined by vote of the MAPC; such assessments are not subject to local review. Once transferred out of the member municipalities' custody, the contributed funds are not subject to local control through oversight of the MAPC's budget or otherwise.

Finally, the individual member municipalities exercise no control over the activities of the MAPC, which is an autonomous body.

In short, to the extent that the MAPC operates as a means to carry out a governmental function, that function is a state rather than a municipal one. Thus, we conclude that the MAPC is a "state agency" as it is an instrumentality thereof. G.L. c. 268A, §1(p). Accordingly, members of the MAPC, who are uncompensated, are "special state employees."<sup>6/</sup>

**DATE AUTHORIZED:** April 11, 1995

<sup>1/</sup>The city and town representatives "shall be appointed by the mayor or, if the city has a manager, by the city manager and in the case of a town, by the board of selectmen or, if the town has a manager, by the town manager..." G.L. c. 40B, §24.

<sup>2/</sup>According to its 1994-1995 Workprogram and Budget: "Almost two thirds of the [MAPC's] budget each year is drawn from outside resources that the [MAPC] receives under contract with other agencies."

<sup>3/</sup>"State agency" is not a defined term in Chapter 268B. Chapter 268A, §1(p) defines "state agency," as "any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town."

<sup>4/</sup>The reference to "Section 21 of that Chapter" in fact refers to §21 of St. 1978, c. 210 which inserted G.L. c. 268B. Section 21 of Chapter 210 provides, in relevant part: "The state ethics commission established by chapter 268B of the General Laws, inserted by section 20 of this act, is hereby authorized and directed to prepare legislation establishing financial disclosure requirements for officials and employees of cities, towns, and *special districts* of the commonwealth."

<sup>5/</sup>"Municipal agency," any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder. G.L. c. 268A, §1(f).

<sup>6/</sup>"Special state employee," a state employee:

(1) who is performing services or holding an office, position, employment or membership for which no compensation is provided, or

(2) who is not an elected official and

(a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or

(b) in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special state employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation. G.L. c. 268A, §1(o).