



MONTGOMERY COUNTY ETHICS COMMISSION

Waiver 23-01-001 January 18, 2023

Mary Marcou Fertig is a Senior Permitting Services Specialist, Grade 26, assigned to the Water Resources Division (WR), Montgomery County Department of Permitting Services (DPS). Ms. Fertig has held the same position in the County for seven years.

Ms. Fertig wishes to enter into an agreement with Bohler Engineering (Bohler), a consulting engineering firm, for employment after she leaves County service. In her capacity as a Senior Permitting Specialist, she has significantly participated in the approval process of plans submitted by Bohler to DPS.

The post-employment prohibition in 19A-13 of the County's Public Ethics Law provides:

- (a) A former public employee must not work on or otherwise assist any party, other than a County agency, in a case, contract, or other specific matter if the employee significantly participated in the matter as a public employee.
- (b) For one year after the effective date of termination from County employment, a former public employee must not enter into any employment understanding or arrangement (express, implied, or tacit) with any person or business if the public employee significantly participated during the previous 3 years:
 - (1) in regulating the person or business; or
 - (2) in any procurement or other contractual activity concerning a contract with the person or business (except a non-discretionary contract with a regulated public utility).

Ms. Fertig seeks a waiver of the application of the prohibition of 19A-13(b) so that she may be engaged by Bohler after she terminates service to Montgomery County. (As discussed further below, the permanent bar of 19A-13(a) does not apply.)

Ms. Fertig is a registered Professional Engineer with a specialty in Land Development. She has been working in the Washington Metropolitan Region since 1980. In her career, she has worked full time for many private design firms and for public sector agencies including Maryland

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**100 MARYLAND AVENUE, ROOM 204, ROCKVILLE, MARYLAND 20850
OFFICE: 240.777.6670 FAX: 240.777.6672**

National Capital Park and Planning Commission, the City of Rockville, and, since 2015, Montgomery County. Her responsibilities and experiences have been broad and have included virtually all aspects of civil engineering: design, land surveying, project management, profit center administration, and compliance review.

As a Senior Permitting Services Specialist in WR, Ms. Fertig reviews plans submitted by design professionals and performs detailed reviews and analyses of sediment control and stormwater management plans for compliance with applicable engineering principles and practices and County, state and federal codes, laws, and policies. The required reviews ensure that designs submitted to DPS for development projects comply with requirements for treatment of runoff (Stormwater Management or "SWM") and prevention of sediment laden runoff from leaving a site during construction (Sediment Control or "SC") as established by Montgomery County.

Once a plan is found to be technically and administratively compliant with County plan and process standards, it is transmitted to the WR manager who performs a final check, again limited to County compliance and process, and the plans are stamped as approved on behalf of the Department. As part of the process, DPS routinely interacts with design professionals answering questions about codes, policies and laws, all of which are published and available to the public. In performing the reviews, DPS specialists utilize the County's electronic plan review and permit tracking software.

The number of reviews a plan goes through is a direct function of the quality, completeness, and approvability for compliance compared to established standards. Again, the submission requirements are well known to the design professionals, and it is in their best interest to produce and submit a quality plan. Better-quality plans will need fewer reviews and will be approved faster. On average Ms. Bohler reviews 389 plans a year for a total of more than 2,600 reviews since joining the County. Almost all plans take more than one review to get approved. Since 2015, Ms. Fertig has performed a total of 33 reviews of plans submitted or resubmitted by Bohler, which, out of 2660 equates to 1.2% of her total review workload.

In the summer of 2022, Ms. Fertig became aware of a job listing for a Quality Control Engineer/Subject Matter Expert on the Bohler website. This position would not be responsible for matters of compliance with specific jurisdictions. The position of Quality Control Engineer performs internal reviews at established internal milestones, the most important being before the full set of land development construction plans are released to the field for construction. Bohler has developed and utilizes internal checklists to perform the internal reviews. The same checklists are used in all their offices, regardless of the governing jurisdiction or a project's location. The checklists focus on constructability, safety, coordination between plans, potential horizontal and vertical conflicts and cover all disciplines – not just SC and SWM.

Bohler has 29 offices and over 800 employees. There is no office located in Montgomery County. This QC Engineer position serves seven offices that comprise Bohler's Mid-Atlantic Region (VA, DC, DE, and MD.) The position is primarily remote but would be connected to

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either the Bowie, Maryland or Herndon, Virginia office. There is no expectation or need for contact with any agencies in any jurisdiction, Montgomery County included, because the position does not consider jurisdictional regulations, policies, codes or procedures for plan approval and permit issuance.

When Ms. Fertig began conversations with Bohler in the summer of 2022, she did not, in executing her County position, have any Bohler plans before her under review. There were two Bohler projects that were subsequently assigned to Ms. Fertig after her conversations began with Bohler. With respect to these projects, Ms. Fertig contacted her manager and requested that these projects be reassigned, and she had no involvement with review of either.

Ms. Fertig has discussed the scope of 19A-13(a) and (b) with her prospective employer. She submits that her proposed terms of employment with Bohler specifically exclude her from working on any projects that she participated in as a County employee that were submitted by Bohler. As a consequence, the permanent bar of 19A-13(a) is not at issue.

However, Ms. Fertig may not accept an offer of employment with Bohler within a year of terminating County service without a waiver from the Ethics Commission of the prohibition of 19A-13(b). Ms. Fertig submits that the proposed terms of her employment with Bohler specifically exclude her from working on any Bohler project located in Montgomery County for one year after her separation from service, regardless of prior involvement or discipline.

There are two bases pursuant to which the Ethics Commission may waive the prohibition of 19A-13(b). 19A-8(c) provides:

After receiving a written request, the Commission may waive the prohibitions of Section 19A-13(b) if it finds that:

- (1) failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees; or
- (2) the proposed employment is not likely to create an actual conflict of interest.

Based on the facts presented to the Commission, the Commission grants a waiver of 19A-13(b) on the basis that the proposed employment is not likely to create an actual conflict of interest.

The Commission cites several factors in granting the waiver. The Commission observes Ms. Fertig's attention to compliance with and avoidance of conflict of interests when she applied for a position with Bohler. Moreover, the Commission notes that the proposed employment contract observes a one-year break on Ms. Fertig's working on Montgomery County matters. That break creates a buffer between Ms Fertig and her former agency for the period established by 19A-13(b). Ms. Bohler's proposed employment with Bohler also will not rely on Ms. Bohler's knowledge of Montgomery County requirements, operations or staff.

The Commission also notes that the Bohler applications were a relatively small percentage of Ms. Fertig's overall County workload. Also, while the Commission makes its waiver decision on the basis that the employment with Bohler does not create an actual conflict of interest, it notes that the nature of Ms. Fertig's County job involves dealing with a broad array of regional landscape design and engineering firms. In this regard, the Commission observes the importance of the County being able to hire persons with specific professional credentials who may be disinclined to join the County if as a result the person would be locally unemployable in the area of the employee's professional expertise after leaving County service.

In issuing this waiver, the Commission has relied on the facts presented by Ms. Fertig.

For the Commission:

A handwritten signature in cursive script that reads "Bruce Romer".

Bruce Romer, Chair