

ADVISORY OPINION NO. 92-40-SUPP.

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON NOVEMBER 5, 1992

GOVERNMENTAL BODY SEEKING OPINION

A City Building Commission

OPINION SOUGHT

- a. Is it a violation of the Ethics Act for a City Building Commission to be involved in a construction project when the property to be used as the construction site is owned by a holding company in which the Building Commission's Chairman has a limited interest?
- b. Is it a violation of the Ethics Act for the Chairman of the City Building Commission to participate in the evaluation of financing proposals submitted by his employer?

FACTS RELIED UPON BY THE COMMISSION

The management and control of the City Building Commission is vested in a five member Board appointed by the City Council. Members of the Building Commission receive no compensation for their services, but are reimbursed for reasonable and necessary expenses actually incurred in the discharge of their duties. The members of the Board are responsible for making policy and take official action with respect to contracting for goods or services and other activities where the official action has an economic impact of greater than a de minimis nature on the interest or interests of a person.

The Chairman of the Building Commission is the president of a local bank, is a member of the bank's Board of Directors, and owns .00015% of the outstanding shares of stock of the parent holding company of that bank. In addition to his banking expertise, the Chairman of the Board is a certified public accountant. No other member of the Board of the Building Commission has a financial or accounting background, and it was the hope of the Building Commission that the Chairman's education, experience, skills and abilities could be used in assessing the various financial arrangements of the Building Commission.

The City Building Commission is involved in, or expects to be involved in, three major construction projects in the City. These projects may include a new city hall, a new federal building and a new downtown campus for a public college. Any or all of these projects may be financed in whole or in part by a loan or loans from a local bank or a group of local banks, which would be evidenced by revenue bonds of the Building Commission. The maximum

amount expected to be borrowed for any one project is \$10,000,000. No project and financing will be dependent upon any other project.

The specific details of financing are not firmly established. Although it is the current plan of the Building Commission to finance the new city hall with a loan from a federal agency, local bank financing is contemplated as a backup or alternate source of funding from the federal agency, either through joint financing or as interim construction financing. As an alternative to the issuance of bonds for the federal project, the Building Commission may contract with a private developer that would arrange for financing directly, including a loan or loans from one or more local banks.

In the event borrowing through one or more local banks by the Building Commission is necessary, the Commission intends to solicit proposals from such local bank, individually or as groups, to obtain the most favorable interest rates and other terms available. However, if several banks are required because of the size of the loan, competitive bids may be difficult or impossible to accomplish. Moreover, solicitation of proposals may not be possible in connection with the college facility, whether one or more of the banks fund the loan, because the underlying obligor will not be the Commission. The proposed site of the downtown campus for the college facility is owned by the holding company in which the Building Commission Chairman has a pecuniary interest. However, the Building Commission has no authority regarding the selection of the site.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-1-2(c) states in pertinent part that... local governments have many part-time public officials...serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official..., such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

West Virginia Code §6B-2-5(d)(1) states in pertinent part that...no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which such official or employee may have direct authority to enter into, or over which he or she may have control...Provided, however, that nothing herein shall be construed to prohibit a part-time appointed public official from entering into a contract which such part-time appointed public official may have direct authority to enter into or over which he or she may have control when such official has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

West Virginia Code §6B-2-5(d)(2) states in pertinent part that...an elected...public official...or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having an interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is the contractor on the public contract involved. A limited interest for the purposes of this subsection is:

(A) An interest:

(i) not exceeding ten percent of the partnership or the outstanding shares of a corporation;
or

(ii) not exceeding thirty thousand dollars interest in the profits or benefits of the contract;

ADVISORY OPINION

a.) Pursuant to WV Code §6B-2-5(d)(1) a public official may not have more than a limited interest in the profits or benefits of a public contract over which he has direct authority or control. The Chairman of the Building Commission has only a limited interest in the parent holding company of a lending institution which may conduct business with the City Building Commission. Further, the Building Commission has no authority regarding the selection of the site for the downtown college campus.

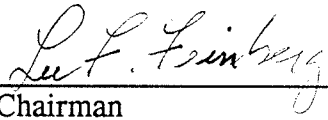
For these reasons, it would not be a violation of WV Code §6B-2-5(d)(1) for the Building Commission to be involved in a construction project when the property to be used as the construction site is owned by a holding company in which the Commission Chairman has a limited interest.

Personal Conflicts

b.) West Virginia Code §6B-1-2(c) provides that a part-time public official should seek to be excused from voting, deciding or otherwise acting on a matter that has become "personal". The Commission considers a matter to be "personal" when the public official has any direct or indirect pecuniary interest in the matter, is affected in a manner which may influence his vote, or would give the appearance of impropriety. The Commission has determined that in order for a public official's recusal to be effective he must disclose his interest and physically remove himself from the room during the discussion and decision making process.

Although the Authority member's potential personal pecuniary interest in the profits or benefits of the public contract is not significant by itself, the Commission has held that it is inappropriate for a public official who is an employee of an interested private party, to vote on the public contract. The Commission considers an employment connection to be a "personal" conflict as that term is used in WV Code §6B-1-2(c).

Therefore, the Commission Chairman should neither discuss nor vote on matters **directly** related to proposed transactions with the Building Commission involving his employer. The Commission notes that this prohibition is limited to the Building Commission's decisions regarding the financing packages available with the Commission Chairman's employer.


Chairman