

ADVISORY OPINION NO. 2005-12

Issued On July 14, 2005 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Planning Commission Member** asks for guidance on voting on matters regarding customers of his business.

FACTS RELIED UPON BY THE COMMISSION

The Planning Commission Member owns a business which manufactures precast concrete products, including such items as sewer manholes, catch basins, septic tanks, concrete pipe and cattle guards. From time to time, developers or their contractors and subcontractors purchase some of these items from the requester's business.

Ordinarily, when a developer comes before the Planning Commission seeking "preliminary approval" of a subdivision, the developer submits information concerning the proposed lot sizes, road locations and the size of pipe and culverts. These plans usually do not specify if metal, plastic or concrete products will be installed.

Subsequent to receiving "preliminary approval" from the Planning Commission, the contractor employed by the developer may obtain bids from the requester for certain concrete products to be installed in the subdivision. Whenever his business is selected as a supplier for a particular project, the requester refrains from voting on "final approval" of that subdivision.

After the subdivision has received "final approval" from the Planning Commission, the requester may sell septic tanks to individuals or their contractors who have elected to build homes in the development. The requester makes no distinction between customers in developments where he voted on approval and developments where he was recused from voting.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

The WV Ethics Commission Legislative Rules on Voting, 158 C.S.R. 9, provide:

2.1 A public official or public employee may not vote on or decide a matter that has become "personal" to that individual.

2.2 For the purpose of this section a matter will be considered "personal" to a public official or public employee when he or she has any pecuniary interest either directly or indirectly in the matter or is affected in a manner which may influence his or her vote or would clearly give the appearance of impropriety. An interest is not

"personal" if the interest of the public official or public employee in the matter is affected as a member of, and to no greater extent than any other member of, a profession, occupation or class.

2.3 For a public official's or public employee's recusal to be effective, it is necessary for the official or employee to excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during that period, fully disclose his interest, and recuse himself from voting on the issue.

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The requester, a part-time appointed official, seeks to verify that his actions are consistent with the requirements of the Ethics Act. In W. Va. Code § 6B-1-2(c), the Legislature discussed the inherent potential for conflict in part-time government service as follows:

The Legislature finds that the state government and its many public bodies and local governments have many part-time public officials and public employees 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 or public employee from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official or public employee, 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.

Consistent with these considerations, the Legislature limited application of the prohibition against selling to regulated persons in § 6B-2-5(h) to full-time officials and public employees. Accordingly, a part-time official, such as a County Planning Commission Member, may sell real or personal property to persons who have matters on which the Member has taken regulatory action during the past twelve months.

The requester has not been voting on the final approval for subdivisions where he is doing business with the developer directly or a contractor working for the developer. He has requested guidance on whether he may vote in other circumstances involving a previous, current or potential customer. The Commission's Legislative Rule on voting was developed to address these situations.

It is necessary for the requester to be recused from those decisions where he is currently supplying the developer or a contractor for a particular subdivision, or is currently bidding on such a matter, as he may be considered to have at least an indirect financial interest in the outcome of such matters. Otherwise, the requester is not prohibited from voting on matters when approval may or may not lead to business with the developer, a contractor working for the developer, an individual home builder, or contractor working for a home builder.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1, *et seq.*, and does not purport to interpret other laws or rules. Pursuant to W. Va. Code § 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked.


Chairman