

ADVISORY OPINION NO. 90-199
ISSUED BY THE
WEST VIRGINIA ETHICS COMMISSION
ON MARCH 7, 1991

GOVERNMENTAL BODY SEEKING OPINION

An Attorney on behalf of a County Redevelopment Authority

OPINION SOUGHT

Whether an individual member of a County Redevelopment Authority is in violation of the Ethics Act or West Virginia Code §61-10-15 if the County Redevelopment Authority enters into a partnership, with the Authority's role being that of the Partnership's general partner?

OTHER FACTS RELIED UPON BY THE COMMISSION

The County Redevelopment Authority is a public body established under West Virginia Code §16-18-4(a). Members of the Authority are part-time public officials appointed by the County Commission.

The Authority plans to comply with the State Legislature's exhortation to "afford maximum opportunity...to the...redevelopment of areas by private enterprise" by participating with individuals in the private sector in County projects.

The Authority will act as the general partner of a Partnership. Partnership assets, consisting of capital investments by limited partners, will be invested in County projects to be managed by the Authority. A member of the Authority has an interest in two of the limited partners of the Partnership.

All activities will be carried out in the name of the Partnership and the Authority will be acting only as its managing partner. Any benefit would result to the Partnership as a whole, including the Authority, and any other actions will be **private contracts** between the Partnership and third parties. No contracts are contemplated between the Authority and the limited partners of the Partnership.

Under the proposed transaction no funds would be paid by the Authority to the partnership. Instead the Authority would be receiving funds for agreeing to act as general partner and operate the Partnership. In return, the Partnership would pay management fees to the Authority, as general partner, and the Authority would have a share in the profits and losses of the Partnership, based on its proposed 1% interest as a general partner.

The only anticipated "public contract" is the agreement of the Authority to act as general partner to the Partnership and to receive fees and other distributions and allocations from the Partnership. The proposed structure is intended merely as a method to provide additional funding to the Authority for use in its general purpose of improving development in the County.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(b)(1) states that a public official...may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person...

West Virginia Code Section 6B-2-5(d)(1) states in pertinent part that...no appointed public official...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...may have direct authority to enter into, or over which he or she may have control...

West Virginia Code Section 6B-2-5(e) states in pertinent part that...no present... public official...may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

West Virginia Code Section 61-10-15 states in pertinent part that...it shall be unlawful for any member of any...County or District Board, or for any County or District officer to become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service, or in furnishing any supplies in the contract for, or the awarding or letting of, which as such member ...he may have voice, influence or control...

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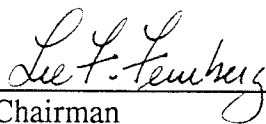
The Commission is asked to declare that West Virginia Code Section 61-10-15 is not applicable to the facts described herein. That section makes it unlawful for any member of any county or district board or for any county or district officer to become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service over which the member or officer may have voice, influence or control. For the purposes of this opinion it is assumed that the Authority member is within the described class of county board member. In the instant matter the Authority member clearly has voice, influence or control and the relevant case law makes clear that recusal from voting does not prohibit prosecution under this section. What is not so clear is whether the Authority member who also has investment interests in the Partnership is receiving

"proceeds" of a contract. Counsel for the Partnership represents that the "only public contract" is the agreement of the Authority to act as general partner and to receive fees and a share of the profits or losses of the Partnership. Furthermore, counsel asserts that no Authority funds will be transferred to the Partnership and, at least by implication, counsel apparently believes that no benefit or profit will be secured by the Authority member by the relationship.

Relying solely on counsel's representation that no benefit will be conferred, the Commission finds that the matter described would not be violative of the provisions of West Virginia Code Section 61-10-15. However, the Commission would be remiss if it did not state that it believes that the use of the word "proceeds" can easily be construed as "benefits" and (1) a sharing of losses which would otherwise be borne by limited partners or (2) management fees which were less than market rate or (3) management decisions of a questionable nature albeit profitable result could easily be construed as conferring the requisite pecuniary benefit on the Authority member.

A similar analysis results when West Virginia Code Section 6B-2-5(d)(1) of the Ethics Act is reviewed except no interpretation of the word "proceeds" is required since that subsection specifically states that a public official may not have an interest in the profits or benefits of a contract...over which such official may have control. Relying solely on counsel's representation that there are no profits or benefits to be conferred upon the Authority member, there would be no violation of subsection 6B-2-5(d)(1) of the Ethics Act; however, if benefit were conferred the provisions would be violated.

The Authority is a public body corporate and politic created by West Virginia Code Section 16-18-4. Subsection (j) of such section prohibits any Authority member from acquiring an interest, whether direct or indirect, in any contract in connection with any redevelopment project or property to be included in such project. Violation of the provisions of the subsection constitutes misconduct in office. The Commission has no jurisdiction to interpret this statute and apply it to the facts in this request but the Commission hereby specifically states that this opinion is not intended to absolve any Authority member of misconduct under this statute.


Chairman