

**CONTRACT EXEMPTION NO. 2012-03**

**Issued on August 2, 2012 By the**

**WEST VIRGINIA ETHICS COMMISSION**

**OPINION SOUGHT**

The **City of Sistersville** seeks a contract exemption to purchase property from its Mayor for the construction of a pump station for a sewer extension project.

**FACTS RELIED UPON BY THE COMMISSION**

This contract exemption request has been submitted by the City of Sistersville, by and through its attorney. In its contract exemption request, the City provided various documents in support of its request. The contract exemption request from the City's attorney reads:<sup>1</sup>

In August, 2011 the City was notified by the West Virginia Department of Environmental Protection that it was eligible for funding "...to construct a wastewater collection system extension to connect the unserved residents in the Hanford City area of Tyler County". Hanford City is outside of the Sistersville city limits, but lies directly adjacent thereto. The residents of Hanford City have no sewer system and forty-five residences discharge sewage directly into the Ohio River. The sewer extension project is intended to protect the water quality of the Ohio River and promote public health and safety.

The engineers for the sewer extension project, S & S Engineers, Inc., were responsible for the selection of land to be acquired for a pump station as part of the sewer extension project. At my request, they detailed in a letter dated June 28, 2012, their efforts to identify an appropriate location for the pump station. In that letter the engineers explained that their first choice location was abandoned due to:

- (1) The owner's refusal to sell the property;
- (2) The questionable legality of eminent domain proceedings; and,
- (3) Concerns raised by the West Virginia Division of Culture and History.

Due to the unavailability of other lots suitable for the pump station, and the quantity of land owned by David B. Fox, Mayor of Sistersville, the engineers identified Lot 21 of Hanford City, owned by Mayor Fox, as the most suitable and available land for the pump station. The engineers have also determined that this selection has the added benefit of reducing the length of the force main

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<sup>1</sup> In its request, the City references as exhibits the documents it enclosed in support of its contract exemptions. These references/exhibit numbers have been omitted from the synopsis of the request.

[pressurized main pipe] by 1,200 feet resulting in an estimated cost savings of \$30,000.

In an effort to ascertain the value of Lot 21, the City obtained an appraisal from David L. Shreve, of Wetzell Valley Agencies, New Martinsville, West Virginia, a licensed real estate appraiser. The property was valued at \$8,000.00. Please note that no contract has been entered into with Mayor Fox and no price has been agreed upon.

Consequently, the Sistersville City Council requests a waiver of the pecuniary interest prohibitions in §6B-2-5(d) and § 61-10-15 and a contract exemption to purchase Lot 21 of Hanford City from David B. Fox, Mayor of Sistersville, for a sum not to exceed \$8,000.00. The Council urges that a denial of the contract exemption will result in unfair hardship by burdening the project with an inferior site, assuming an alternative can be located, and excessive cost incurred by construction of a longer force main.

The Requester notes in its contract exemption that the Mayor was recused from the discussion and vote relating to the contract exemption. The Requester attached a letter from the engineering firm which is in charge of the project. In regard to other available property, the letter from the engineering firm further set forth that other empty lots are not suitable due to their topography or being located in the floodplain.

#### **CODE PROVISIONS RELIED UPON BY THE COMMISSION**

W. Va. Code § 6B-2-5(b) reads:

*Use of public office for private gain.* – (1) A public official or public employee may not knowingly or 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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in *de minimis* private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

W. Va. Code § 6B-2-5(d)(1) provides, in part:

[N]o 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 the official or employee may have direct authority to enter into, or over which he or she may have control...

W. Va. Code § 6B-2-5(d)(3) provides that where the provision of subdivision (1) of this subsection would result in excessive cost, undue hardship, or other substantial

interference with the operation of a municipality the affected government body may make written application to the ethics commission for an exemption from subdivision (1) of this subsection.


**ADVISORY OPINION**

The Ethics Act, W. Va. Code § 6B-2-5(d)(1), prohibits public officials from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

As with all contract exemptions, the Requester must demonstrate that the prohibitions of the Ethics Act would constitute excessive cost, undue hardship, or other substantial interference with governmental operations.<sup>2</sup> Based upon the information provided by the Requester, including information from the engineering firm, the Commission finds that the Requester has demonstrated that prohibiting it from buying the subject property from the Mayor will result in excessive cost, undue hardship and other substantial interference with governmental operations as there does not appear to be other suitable property which is available for this purpose.

The appraisal report places the value of the property at \$8,000.00. The City seeks an exemption to purchase the property at a price not to exceed \$8,000.00. Accordingly, the Ethics Commission hereby grants a contract exemption to allow the City to purchase the property at a price not to exceed \$8,000.00.

The Commission notes that exemptions must be granted on a case-by-case basis. Therefore, this opinion is limited to the facts and circumstances of this particular case, and may not be relied upon as precedent by other persons.

  
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Jonathan E. Turak, Acting Chairperson

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<sup>2</sup> W.Va. Code § 61-10-15 is inapplicable as this provision only governs County Officials, not municipal officials.

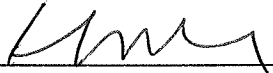
has a grievance, a Council Member or other City Official, e.g. Recorder, not the Mayor, must serve as the City's liaison in the grievance process.

Additionally, the Mayor may not be involved in any other personnel matters which uniquely affect his father as opposed to affecting him as a class of five (5) or more similarly situated employees. W.Va. Code § 6B-2-5(j). For example, if Council is contemplating a pay raise for the father/employee, the Requester may not be involved in this process. If matters relating uniquely to his father come before Council, then the Mayor must recuse himself.

Under the Ethics Act, in order for a public official's recusal to be effective, it is necessary to excuse him/herself from participating in the discussion and decision-making process by physically removing him/herself from the room or executive session during the period when the item is being discussed or decided, fully disclosing his/her interests, and recusing him or herself from voting on the issue. W. Va. Code § 6B-2-5(j)(3). Additionally, the minutes/record of the meeting must reflect the basis for the recusal and that the public official left the room during all discussion and vote on the item under consideration.

In regard to the father being a member of the employee union, the same rules of law outlined above apply. The Requester may serve on the City's collective bargaining agreement committee. If a matter arises which affects his father uniquely, as opposed to affecting his father as a class of five or more employees, then he may not be engaged in negotiating the terms of such provision. Nevertheless, in regard to discussing and approving the collective bargaining agreement when it comes before City Council for approval, he may participate. If there is a provision in the collective bargaining agreement which uniquely affects his father, and if the City Council challenges or discusses that particular provision, the Requester must recuse himself from the discussion and vote on that particular matter. Once it has been resolved, he may vote on the collective bargaining agreement in its entirety. See A.O. 2010-13 wherein the Commission discussed the rules governing voting on a budget when a public official's spouse is employed by the governing body where he or she serves.

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. In accordance with W. Va. Code § 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

  
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Jonathan E. Turak, Acting Chairperson