

Contract Exemption 2020-05

Issued on July 2, 2020, by

The West Virginia Ethics Commission

Opinion Sought

The Pleasants County Development Authority requests an exemption to lease space at a business park to a candy manufacturing business owned by a Pleasants County Commissioner.

Facts Relied Upon By the Ethics Commission

The Pleasants County Development Authority (“Development Authority”) is a governmental agency created by the Pleasants County Commission in accordance with W. Va. Code §§ 7-12-1 through 7-12-16. The purposes of development authorities are, in relevant part, “to promote, develop and advance the business prosperity and economic welfare of the ... county for which it is created, its citizens and its industrial complex” and “to rehabilitate and assist existing businesses and industries” in the county it serves.¹

The Pleasants County Commission appoints the members of the Development Authority Board and designates one of these appointees as its representative.² The County Commissioner who owns the candy manufacturing business is not the Commission’s representative on the Development Authority. The County Commission is not involved in the day-to-day operations of the Development Authority, but it does make an annual appropriation to the Development Authority. In fiscal year 2020, the appropriation was \$15,000.00.

The Development Authority’s Board of Directors is responsible for the management and control of the Development Authority, and the Board employs an Executive Director. The Development Authority may enter into contracts and leases, purchase and develop property, apply for loans and grants, issue revenue bonds, and otherwise raise revenue, among other statutory powers.³

The Development Authority owns approximately four acres in St. Mary’s, West Virginia, at the site of the old St. Mary’s High School which it acquired to build a Business Park. The Development Authority has only sold one parcel so far on which a Taco Bell™ is located.

¹ W. Va. Code § 7-12-2.

² W. Va. Code § 7-12-3.

³ W. Va. Code § 7-12-7.

The Development Authority seeks to utilize the remainder of the Business Park primarily for industrial and manufacturing purposes. As such, the Development Authority has recently applied to the West Virginia Division of Highways and the West Virginia Development Office for \$375,000 in funds to build an industrial access road to the site. The Development Authority states it “must have a commitment from a manufacturing/industrial company to apply for industrial access road funds.”

Few manufacturing/industrial businesses exist in Pleasants County. As explained below, Smith Candy, L.L.C., a small candy manufacturing company which is owned by Pleasants County Commissioner Mike Smith, has expressed interest in locating in the Business Park. Smith Candy has been in business in Pleasants County for 21 years and currently has seven employees. Smith Candy produces candy which it sells to consumers directly and through retail stores. In late 2018 or early 2019, Mike Smith, in his private capacity, approached the West Virginia Department of Commerce, the West Virginia Economic Development Authority and the U.S. Department of Agriculture about finding a new location for Smith Candy’s manufacturing facility to expand its operations.

During the summer of 2019, Smith Candy also began working with the Development Authority to obtain funding from these sources and through the Mid-Ohio Valley Regional Council.⁴ In December 2019, Smith Candy expressed an interest to the Department of Commerce in purchasing a parcel at the Business Park from the Development Authority. In the spring of 2020, the U.S. Economic Development Authority (“EDA”) began offering grants for the construction of multi-tenant buildings to enhance economic development as part of the COVID-19 stimulus plans. As the Development Authority already knew that Smith Candy was interested in relocating to the Development Park, it requested that Smith Candy submit a Letter of Intent for the Development Authority to submit with its EDA grant application to increase the Development Authority’s chances of success in securing the grant. The Development Authority must have a commitment from a company within a specific industry sector, such as manufacturing or information technology, to apply for the EDA grant.

The Development Authority intends to apply for a \$2.5-3 million grant from the EDA and must submit with its proposal a letter of intent from a tenant stating that it is willing to lease space at the building once it is constructed. The Development Authority states “[u]pon information and belief” its “application will be stronger if the application includes a light industrial or small manufacturing tenant as part of its proposal” and “the earlier the application is submitted, the better chance for a successful grant award.”

To recruit other businesses for the future Business Park space, the Development Authority published an advertisement in the paper editions of the St. Mary’s Oracle and the Parkersburg News & Sentinel on June 4, 2020, and on June 11, 2020, requesting that interested businesses submit an Expression of Interest. The advertisements also ran in the online editions of the newspapers.

⁴ The Mid-Ohio Valley Regional Council is a governmental planning and development agency that serves eight counties in west-central West Virginia, including Pleasants County, and provides planning and development support for economic development and infrastructure projects.

Smith Candy was the only manufacturing/industrial business to submit an Expression of Interest to the Development Authority. Rubi's Pizza and Grill submitted an Expression of Interest to rent space for a restaurant at the Business Park. The Development Authority will continue to accept and evaluate other Expressions of Interest it may receive as the project progresses.

The Development Authority has 14 members and its members, along with its Executive Director, will be responsible for negotiating the terms of the lease. The Development Authority has not begun negotiating the lease term or rates because there are still many unknown factors, including whether it will be able to secure funding to construct the building at the Business Park.

Provisions Relied Upon By the Ethics Commission

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

In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee 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 a prohibited financial interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is awarded a public contract. A limited interest for the purposes of this subsection is:

(A) An interest which does not exceed one thousand dollars in the profits or benefits of the public contract or contracts in a calendar year;
....

W. Va. Code § 6B-2-5(d)(3) states, in relevant part:

If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection (j) of this section.

W. Va. Code § 6B-2-5(d)(4) states, in relevant part:

Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

W. Va. Code § 61-10-15(a) states, in pertinent part:

It is unlawful for any member of a county commission to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member he or she may have any voice, influence or control

W. Va. Code § 61-10-15(h) states:

Where the provisions of subsection (a) of this section would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship or other substantial interference with the operation of a governmental body or agency, the affected governmental body or agency may make written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-b of this code for an exemption from subsection (a) of this section.

Opinion

Prohibited Contract

The Ethics Act prohibits a county commissioner from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control unless his or her governing body seeks, and receives, an exemption to contract with the public official. W. Va. Code § 6B-2-5(d).

Additionally, a county commissioner must abide by the stricter prohibitions contained in W. Va. Code § 61-10-15, a separate criminal statute that imposes criminal penalties against county officials who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which those officials exercise voice, influence or control. A governing body may seek an exemption from the Ethics Commission to contract with an official under this statute as well. W. Va. Code § 61-10-15(h). Any person who violates this provision is guilty of a misdemeanor and may be removed from public office.

The Development Authority seeks to contract with Smith Candy to lease space in a multi-tenant building at the Business Park. As sole owner of Smith Candy, County Commissioner Mike Smith has a financial interest in Smith Candy's public contract with the Development Authority pursuant to W. Va. Code § 61-10-15, and he exercises voice, influence or control over the Development Authority's contracts. See Advisory Opinion 2009-01 ("[T]he appointment power of a county commissioner constitutes voice, influence or control over county hospitals and the contracts entered into by the hospital board of trustees"); see *also* State v. Neary, 365 S.E.2d 395, 400 (W. Va. 1987) (holding that the power of a county commissioner to nominate and vote for a public service district board member gave the county commissioner voice, influence and control over PSD contracts). Accordingly, a Contract Exemption is necessary for the Development Authority to contract with Smith Candy.

Contract Exemption

The Ethics Commission may grant an exemption from the prohibitions in the Ethics Act and W. Va. Code § 61-10-15 if the prohibition results in excessive cost, undue hardship or other substantial interference with the operation of a governmental body or agency.

The Development Authority will be ineligible for the West Virginia Division of Highways and the West Virginia Development Office funds in the amount of \$375,000 to build an industrial access road to the site if it does not have a commitment from a manufacturing/industrial company to locate at the Business Park. The county has a limited number of business manufacturers in the County or willing to relocate to the county, and Smith Candy is the only manufacturing business currently willing to commit to becoming a tenant at the Business Park.

Similarly, the Development Authority states that it is seeking from \$2.5 million to \$3 million from the federal EDA to finance the construction of a multi-tenant building at the Business Park, and that its chances for securing the grant will be diminished if it does not have an Expression of Interest from a manufacturing business to lease space at the Business Park. Smith Candy is the only manufacturing company which the Development Authority has been able to recruit to submit an Expression of Interest.

Given the foregoing, the Ethics Commission hereby finds that prohibiting the Development Authority from leasing space at the Business Park to Smith Candy will result in excessive cost or undue hardship to the Development Authority.

The Ethics Commission authorizes the Development Authority to lease space to Smith Candy at the Business Park. The following limitations apply:

First, the terms of the lease must be negotiated at arm's length and at the fair market value for comparable commercial rental space in Pleasants County and the surrounding area.

Second, County Commissioner Smith may not be involved in any County Commission or Development Authority discussions or decisions regarding the efforts of these agencies to secure funding for or to construct the access road to or the buildings at the Business Park.

This Contract Exemption is effective until July 1, 2024, at which time the Development Authority must seek and receive a new Contract Exemption if it wants to continue leasing space at the Business Park to Mike Smith or Smith Candy - - assuming that Mike Smith is still a County Commissioner.

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



Robert J. Wolfe, Chairperson
West Virginia Ethics Commission