

Contract Exemption 2020-07

Issued on October 1, 2020, by

The West Virginia Ethics Commission

Opinion Sought

The **Clay County Solid Waste Authority** seeks a Contract Exemption to purchase a building from Gregory Fitzwater, a Clay County Commissioner, for the Authority's office space and a meeting room.

Facts Relied Upon By the Commission

The Clay County Solid Waste Authority (SWA) is currently renting office space for \$250 per month in downtown Clay. The SWA has been looking for new space for its office and meeting room for at least 15 years. The SWA states that its current landlord is not adequately maintaining the building which has become run down with a leaky roof and electrical issues. The SWA also states that the building has black mold which is posing a health risk. The SWA has received complaints from staff and Board members of migraines and coughs that may be resulting from the black mold.

The SWA believes that the most convenient location for the office for the Board members, employees, and the public would be in the town of Clay. In Clay, however, there are only limited options available to rent or purchase office space. The SWA has not used a realtor or procured an appraisal because of its limited options. The SWA states that the property is being sold by owner.

The SWA believes the property located at 104 Main Street, which is owned by Commissioner Fitzwater, is ideal for its needs. The building has 1,875 square feet with two large rooms, two bathrooms, and a utility room. The SWA plans to rent out the front room and use the back room for its offices and meeting space. The SWA can purchase the building for \$38,000, which makes it financially feasible for the SWA. The SWA asserts that other buildings in the area are selling for more than \$100,000.

The SWA asserts that it would be more cost efficient to purchase a building and rent out the store front than it would be to rent space. The building would provide a nice, clean, and safe place. By missing this opportunity, the SWA states it would continue to throw rent away while looking for another building to purchase.

Provisions Relied Upon By the Commission

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

In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, 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 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, 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, in pertinent part:

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. Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. A governing body may however seek an exemption from the Ethics Commission to contract with the official. W. Va. Code § 61-10-15(h).

Here, Gregory Fitzwater, as the owner of the building, has a financial interest in the SWA's purchase of the building pursuant to the Ethics Act and W. Va. Code § 61-10-15, and he exercises voice, influence or control over the SWA's contracts. See Advisory Opinion 1994-08 (finding that "the power of the County Commission to appoint members to the Solid Waste Authority Board, along with the County Commission's responsibility for funding the Solid Waste Authority, is sufficient to give the County Commission some voice, influence or control over the County Solid Waste Authority's contracts.) Accordingly, a Contract Exemption is necessary for the SWA to contract with Commissioner Fitzwater.

Contract Exemption

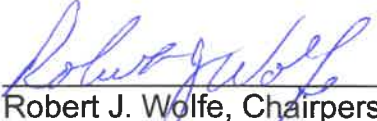
The Ethics Commission may grant an exemption from the prohibitions in the Ethics Act and W. Va. Code § 61-10-15 if the prohibition would result in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or

agency. Here, the SWA has been searching for office space for at least 15 years and cannot find other suitable, affordable office space. Further, it is currently occupying space that is unsuitable for its needs and possibly a health risk to the Board members, its employees, and the public.

Based upon the facts asserted, the Ethics Commission finds that prohibiting the SWA from purchasing the property would result in undue hardship or other substantial interference with the operations of the SWA.

The Ethics Commission, therefore, grants the Contract Exemption to permit the Clay County Solid Waste Authority to purchase the property located at 104 Main Street, Clay, West Virginia, for \$38,000 from Gregory Fitzwater.

The 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