

## **Contract Exemption 2022-02**

**Issued on September 1, 2022, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

The **Pleasants County Development Authority** requests an exemption for the prior sale of property at a business park to a candy manufacturing business owned, in part, by Pleasants County Commissioner Michael W. Smith, Jr.

### **Facts Relied Upon by the Commission**

The Pleasants County Development Authority (“Development Authority” or “Requester”) 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.<sup>1</sup>

The Pleasants County Commission appoints the members of the Development Authority and designates one of these appointees as its representative.<sup>2</sup> 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 2022, the appropriation was \$15,000.00.

The Development Authority is seeking this exemption because it sold property it owns to Smith Candy, LLC (“Smith Candy”), a manufacturing business in which Pleasants County Commissioner, Michael W. Smith, Jr. has a 50% ownership interest. Mr. Smith is not the Commission’s representative on the Development Authority.

The property which was sold to Smith Candy is located at a Business Park owned by the Development Authority in St. Mary’s, West Virginia. The Business Park consists of approximately four acres and is in its preliminary stages of being developed. In 2018, the Development Authority sold its first parcel in the Business Park, and that parcel now has a Taco Bell™ restaurant on it. The Development Authority divided the remaining parcels of the Business Park into six lots and set the lot prices. The least expensive lot at the Business Park is \$140,000 per acre, and Smith Candy purchased that lot.<sup>3</sup> The most expensive lot at the Business Park is valued at \$200,000 per acre.

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<sup>1</sup> W. Va. Code § 7-12-2.

<sup>2</sup> W. Va. Code § 7-12-3.

<sup>3</sup> The actual size of the lot purchased was 0.88 acre, but the amount paid was \$140,000.

On June 17, 2020, the Pleasants County Development Authority requested a Contract Exemption from the Ethics Commission requesting authorization to lease space at the business park to Smith Candy. In its request, the Pleasants County Development Authority stated that it had 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 stated it “must have a commitment from a manufacturing/industrial company to apply for industrial access road funds.” Since the submission of the 2020 Contract Exemption request, the Development Authority has requested American Rescue Plan Act (“ARPA”) funds to locate a recreation/wellness/public safety center at the Business Park, but this project is also dependent on securing the industrial access road monies.

In the spring of 2020, the U.S. Economic Development Authority (“USEDA”) began offering grants for the construction of multi-tenant buildings to enhance economic development through ARPA funds. 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 USED A grant application to increase the Development Authority’s chances of success in securing the USED A grant. The Development Authority needed a commitment from a company within a specific industry sector, such as manufacturing or information technology, to apply for the USED A grant, and Smith Candy was willing to make that commitment.

On July 2, 2020, the Ethics Commission granted a Contract Exemption to the Pleasants County Development Authority authorizing it to lease space to Smith Candy at the Business Park. In [Contract Exemption 2020-05](#), the Ethics Commission specified the following limitations on the Development Authority’s lease with Smith Candy:

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.

At some point after the Ethics Commission granted Contract Exemption 2020-05, the Development Authority informed Smith Candy that the Development Authority would not be applying for the USED A grant monies. Therefore, the potential lease agreement allowed under Contract Exemption 2020-05 was never executed.

Smith Candy still wanted a new facility and location, so in early 2022, it approached the Development Authority about purchasing an available lot in the Business Park.<sup>4</sup> Around April 2022, Smith Candy decided to purchase a 0.88 acre lot at the Business Park for the preset price of \$140,000. The Mid-Ohio Valley Regional Council<sup>5</sup> approved a loan to Smith Candy for the construction of a new manufacturing facility at the Business Park site. The Development Authority then sold the lot to Smith Candy and financed the transaction. According to the Requester, Smith Candy did not attempt to negotiate a lower price. No other manufacturing facility has approached the Development Authority to purchase a lot at the Business Park.

The Development Authority states that having a manufacturing facility like Smith Candy in the Business Park will allow it to continue to pursue industrial road access funds through the West Virginia Division of Highways and the West Virginia Development Office, and that it cannot afford to undertake that project without those funds. Other non-manufacturing businesses have expressed interest in purchasing a lot in the Business Park, but none have committed to purchasing a lot. The potential business prospects have stated that while they are interested in purchasing property in the Business Park, they do not want to make that commitment until new roads are built to provide better ingress and egress to and from the Business Park. The Requester also states that Smith Candy's acquisition of the property and willingness to undertake the construction of a new manufacturing facility has already resulted in increased inquiries from other parties interested in locating in the Business Park.

The Development Authority finalized the sale of the lot to Smith Candy, and Smith Candy is ready to break ground on its manufacturing facility. It has already ordered building materials and bought a pre-manufactured building to erect on the site. After the Development Authority sold the lot to Smith Candy, the Development Authority realized that it should have first obtained a Contract Exemption. The Development Authority has submitted this request to comply with applicable laws governing financial interests in public contracts.

### **Provisions Relied Upon by the 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

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<sup>4</sup> When the Development Authority determined that it could not pursue the USEDA funds for construction of the multi-tenant facility, the Development Authority had to give up on its immediate plans to construct any type of facility. Smith Candy, on the other hand, needed to find a space to expand. As Smith Candy considered options, it began to look at constructing its own facility. Smith Candy then approached the Development Authority about purchasing a lot in the Business Park on which it could construct its own facility. The Development Authority did not consider offering a lease on the lot as it was not asked to do so.

<sup>5</sup> 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.

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 .... Provided, however, That nothing herein shall prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

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 relevant part:

It is unlawful for any . . . county or district officer 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 relevant 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. 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).

The Development Authority seeks to contract with Smith Candy to purchase a lot at the Business Park. As part-owner of Smith Candy, County Commissioner Smith has a financial interest in Smith Candy's public contract with the Development Authority. Further, pursuant to W. Va. Code § 61-10-15, in his capacity as a County Commissioner 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.<sup>6</sup>

Furthermore, the Development Authority cannot rely on the exemption granted by the Ethics Commission in Contract Exemption 2020-05 to allow it to contract with Commissioner Smith or Smith Candy for the property sale at the Business Park. Contract Exemption 2020-05 was specifically to *lease* property to Smith Candy for a period of time not to exceed four years.<sup>7</sup> Contract Exemption 2020-05 did not authorize the *sale* of property to Mr. Smith or Smith Candy.

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<sup>6</sup> It does not appear that a Contract Exemption is necessary under the Ethics Act's prohibited contracts provision found at W. Va. Code § 6B-2-5(d). See Advisory Opinion 1994-08; see *also* Advisory Opinion 1994-30. Such a conclusion is academic, however, as a Contract Exemption is necessary per the restrictions in W. Va. Code § 61-10-15.

<sup>7</sup>After four years, the Development Authority would have needed a new Contract Exemption to continue *leasing* space at the Business Park to Mr. Smith or 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. Multiple potential buyers have expressed interest in purchasing a lot at the Business Park if existing infrastructure can be upgraded. The Development Authority states it cannot afford to upgrade the Business Park's infrastructure without the infrastructure funds, and the presence of Smith Candy as a Business Park property owner, helps qualify the Development Authority to secure the funds.

The Development Authority is also seeking to obtain ARPA funds to locate a recreation/wellness/public safety center ("recreation center") at the Business Park as a way to diversify economic development prospects at the Business Park. The Development Authority states that the recreation center project will also be dependent on securing the industrial road access monies.

The Development Authority states that Smith Candy is the only manufacturing business to purchase, or even express a formal interest in purchasing, a lot in the Business Park. The Development Authority states that it cannot obtain funds to upgrade infrastructure at the Business Park without commitment from a manufacturing business to locate there, and Smith Candy is the only business which has made that commitment. Given the foregoing, the Ethics Commission hereby finds that prohibiting the Development Authority from selling a lot at the Business Park to Smith Candy will result in excessive cost or undue hardship to the Development Authority by impeding its ability to develop the Business Park and its infrastructure for the purpose of facilitating economic development in Pleasants County.

The Development Authority has stated that the transaction has been at arms length and that Smith Candy did not negotiate a different price for the lot nor did Smith Candy seek or receive any terms or conditions that would not be required or offered to other potential property purchasers with manufacturing projects.

**The Ethics Commission hereby grants a Contract Exemption to the Development Authority for the sale of the \$140,000 per acre lot in the Business Park to Smith Candy. Commissioner Smith may not make, participate in, or in any way attempt to use his office to influence a government decision affecting his financial interest in Smith Candy, including decisions related to the above-mentioned property. W. Va. Code § 6B-2-5(d)(3).**

*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.*



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Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission