

# Contract Exemption 2024-04

Issued on July 11, 2024, by

The West Virginia Ethics Commission

## Opinion Sought

The **Logan County Development Authority** requests an exemption to permit it to donate property at the Ray Tomblin Industrial Park to WV Gear, LLC, a manufacturing business owned by Logan County Commissioner Diana Barnette.

## Facts Relied Upon by the Commission

The Logan County Development Authority (“Development Authority” or “Requester”) is a governmental agency created by the Logan County Commission in accordance with W. Va. Code §§ 7-12-1 through 7-12-16. The purposes of a development authority are, in 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 County Commission appoints the members of the Development Authority and designates one of these appointees as its representative.<sup>2</sup> Diana Barnette is not a member of the Development Authority. The Commissioners are not involved in the day-to-day operations of the Development Authority. The County Commission pays the salary and benefits for the Development Authority’s director position, which totaled \$94,582.57 in 2023. The remaining expenses of the Development Authority are approximately \$300,000 per year and are paid by sources other than the County Commission.

In 2002, the Development Authority created the Ray Tomblin Industrial Park with federal grant money. The Industrial Park consists of approximately 32 acres of buildable land.<sup>3</sup> Since the Industrial Park’s creation, the Development Authority has attempted to find businesses to locate there. For instance, until a couple years ago, the Development Authority advertised the availability of land in the Industrial Park on its website. The website has received no traffic in recent years. The Industrial Park is also promoted by the state Economic Development Office. The director of the Development Authority estimates that over the past 22 years, around 20 businesses have expressed preliminary interest in being located in the Industrial Park. Nonetheless, since the Industrial Park is situated on the top of a long, winding road that is not suitable for most

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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 West Virginia State Southwestern Regional Jail is located on the adjacent property outside of the 32 acres in the Industrial Park. The Development Authority operates the wastewater treatment facility that services both the Jail and the Industrial Park. For this service, the state pays the Development Authority approximately \$300,000. Also, the Park shares its access road with the Jail.

industries to access, none of these businesses have ultimately chosen to locate in the Industrial Park.

The Requester asserts that many mining businesses in Logan County have been dealing with supply chain problems. Commissioner Diana Barnette's business, Mining Repair Specialists, LLC, is one of these businesses. In response to these supply chain problems regarding gears, which are needed to make repairs in the mining industry, Ms. Barnette, the state Department of Economic Development (WVDED), and the Logan County Development Authority have been investigating ways to alleviate the problem. The proposed solution is to manufacture the gears locally. Diana Barnette has incorporated [WV Gears, LLC](#) for this purpose. WVDED has offered WV Gear various business incentives to locate at the Industrial Park. These incentives include an initial capital investment of \$16,481,386. The proposal anticipates the creation of 72 local jobs that pay an average annual salary of \$63,546.67 and include health care and other benefits. The WVDED asked the Requester to donate land in the Industrial Park to further this endeavor.

### **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 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) 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 . . . 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 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” without an exemption from the Ethics Commission.

WV Gear, a manufacturing business owned by Logan County Commissioner Diana Barnette, stands to gain 17 acres of property located in the Industrial Park. Ms. Barnette, therefore, has a pecuniary interest in the Development Authority’s contracts involving the Industrial Park property.

The Development Authority, not the County Commission, would be a party to the property transaction. However, the County Commission created the Authority and appoints the Development Authority members. Therefore, pursuant to W. Va. Code § 61-10-15, Ms. Barnette, in her capacity as a County Commissioner, has voice, influence, or control over the Development Authority’s contracts. See *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). See [Advisory Opinion 2017-02](#), in which the Ethics Commission held that a county commissioner’s company

may not become a subcontractor for supplies and materials for the county parks and recreation commission and public service district projects because the county commission appointed the board members. The Commission also held, in Advisory Opinion 2023-12, that a county commission's appropriations to another public agency constitute the exercise of voice, influence, or control if the appropriation is seven percent or more of the other agency's budget. Here, the County Commission appoints the Development Authority board members and pays more than seven percent of the annual expenses of the Development Authority. Accordingly, a contract exemption from the prohibitions in W. Va. Code § 61-10-15 is necessary for the Development Authority to donate the property in the Industrial Park to WV Gear.<sup>4</sup>

### **Contract Exemption**

The Ethics Commission may grant an exemption from the prohibitions in 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 Requester asserts that denying this exemption would result in undue hardship and substantial interference with the operation of the Development Authority. Since its creation in 2002, no other businesses have agreed to locate in the Industrial Park. WV Gear has committed to creating 72 local, high-paying jobs. The Requester also asserts that WV Gear may serve as an anchor to attract other businesses to the Industrial Park. Such job opportunities would further the mission of the Development Authority to advance the business prosperity and economic welfare of the county, its citizens, and its industrial complex and to assist existing businesses and industries.

**The Ethics Commission hereby grants a contract exemption to the Logan County Development Authority to donate 17 acres in the Ray Tomblin Industrial Park to WV Gear, LLC. Commissioner Barnette may not make, participate in, or in any way attempt to use her office to influence a government decision affecting her financial interests, including decisions related to the above-mentioned property.**

*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

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<sup>4</sup> The Ethics Act is not implicated in the case because of its lower standard of "direct authority" or "control." In Advisory Opinion 1995-24, the Ethics Commission held that a county commissioner does not have a prohibited interest in a sheriff's department's contracts under the lower standard in the Ethics Act public contract provision, W. Va. Code § 6B-2-5(d). Advisory Opinion 2011-02 discusses the distinction.