

CONTRACT EXEMPTION NO. 2012-04

**Issued on December 6, 2012 By the
WEST VIRGINIA ETHICS COMMISSION**

OPINION SOUGHT

The **Brooke County Commission** seeks an exemption to allow it to rent office space from the County Prosecutor to house the Office of the Prosecuting Attorney.

FACTS RELIED UPON BY THE COMMISSION

According to the Requester, the Brooke County Commission has not had available space in the Brooke County Courthouse to accommodate the Prosecutor's Office for more than 30 years. Instead, David B. Cross, who has served as the "part-time" Brooke County Prosecuting Attorney throughout that time period, has provided such office space. Specifically, the Requester states:

In 1997, Mr. Cross purchased and remodeled a building located at 727 Charles Street in Wellsburg, West Virginia. Mr. Cross has utilized that building as the Brooke County Prosecutor's Office since 1997 at absolutely no cost to the Brooke County Commission for either rent or utilities. Since Mr. Cross was, and is, a part-time County Prosecutor, a small portion of the subject building is also utilized for his private law practice. Mr. Cross' building will continue to be utilized as the Brooke County Prosecuting Attorney's Office through the end of 2012 at absolutely no cost to the Brooke County Commission for either rent or utilities.

In January 2012, Mr. Cross announced that he would not seek another term as Brooke County Prosecuting Attorney. The incumbent Brooke County Prosecutor will serve in a full-time capacity. There is no space available in the Brooke County Courthouse. The county seat, the City of Wellsburg, is a small town whose downtown area around the Brooke County Courthouse consists of little more than two (2) blocks. According to the Requester, there is no available cost-efficient space near the Brooke County Courthouse to house the new Brooke County Prosecutor's Office, nor does the Brooke County Commission presently have any funds to purchase or remodel any building or rental space for use as the new Brooke County Prosecuting Attorney's Office.

On October 2, 2012, the Brooke County Commission voted to seek a Contract Exemption from the Ethics Commission to allow it to enter into a lease with the Brooke County Prosecuting Attorney. Further, the County Commission voted to retain the services of a private attorney to handle the lease to avoid any conflict of interest.

The Requester has undertaken a search for buildings near the courthouse, using the services of a local real estate broker and general certified appraiser. The broker has concluded that there are no viable buildings or rental spaces to house the Brooke County Prosecuting Attorney's Office. By contrast, according to the Requester, Mr. Cross' building:

... is already fully furnished with furniture, desks, filing cabinets, and computers, and is already wired for telephone, cable, computer, and intercom service. It is street level and handicap accessible, has more than sufficient space, is within a short walking distance of the Brooke County Courthouse, and is already set up and has been functioning as the Brooke County Prosecutor's Office for the past fifteen (15) years. On January 1, 2013, the new Brooke County Prosecuting Attorney can immediately move in and start to work on Day 1 of his term without the Brooke County Commission spending one dime for remodeling, furniture and office equipment purchases, moving expenses, and/or office set up.

The proposed lease, a copy of which is attached hereto and incorporated herein, is for one (1) year; and, the Brooke County Commission can terminate it at any time upon thirty (30) days written notice, with or without cause. Thus, should better or less expensive space become available in the future, or if the County Commission obtained funding for a new Prosecutor's Office, it can easily terminate its lease with Mr. Cross. Finally, according to the broker, based upon the amount of square footage being leased and the fact that utilities are included, the proposed rent is more than fair considering the market in the Wellsburg and Brooke County area.

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. ...

W. Va. Code § 6B-2-5(d)(1) provides in part that ... no elected ... official ... or business with which he or she is associated may be party to or have an interest in ... a contract which such 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.

W. Va. Code § 61-10-15(a) states in part that ... It shall be unlawful for ... any elected county official ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such ... member ... he may have any voice, influence, or control.

W. Va. Code § 61-10-15(h) further provides:

Where the provisions of subsection (a) of this section would result in the loss of 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 a written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-B of the Code, for an exemption from subsection (a) of this section.

ADVISORY OPINION

Both the Ethics Act and W.Va. Code § 61-10-15 prohibit county public officials from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public officials 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 and W.Va. Code § 61-10-15 would constitute excessive cost, undue hardship, or other substantial interference with governmental operations. Based upon the information provided by the County Commission, the Ethics Commission hereby grants the requested contract exemption to the County Commission without condition.

Indeed, the Ethics Commission commends the Brooke County Commission for its due diligence in seeking ethics advice and requesting this contract exemption. Even though Mr. Cross will no longer be in office at the commencement of the lease, he is a public servant now, was at all times during the negotiation of the lease, and will be when the contract is signed. As a result, the strict prohibitions of the Ethics Act and W.Va. Code § 61-10-15 apply to the proposed transaction. Even though the County Commission hired outside counsel to advise it on the lease, a contract exemption is required.

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.


R. Kemp Morton, Chairperson

LEASE AGREEMENT

THIS LEASE is made and becomes effective as of the 1st day of January, 2013, by and between **DAVID B. CROSS and THERESA J. CROSS**, hereinafter referred to as **LESSORS**, and **THE BROOKE COUNTY COMMISSION**, a legal corporation, hereinafter referred to as **LESSEE**.

WITNESSETH: For mutual consideration the parties hereto agree as follows:

1. PREMISES.

For and in consideration of the rent to be paid by the Lessee, as hereinafter set forth, and the covenants of the parties to be performed, as hereinafter stated, Lessors do hereby lease, let and demise approximately 1,605 square feet on the first floor and 868 square feet on the second floor of the building known as Cross Law Offices located at 727 Charles Street, Wellsburg, Brooke County, West Virginia, hereinafter referred to as "Premises".

2. TERM

The initial term of this Lease shall be for a period of one (1) year commencing on the 1st day of January, 2013 through the last day of December, 2013. After the first term, the Lease shall renew itself automatically on a year by year basis on the same terms and conditions subject to rental increases unless either party chooses to terminate the Lease by giving written notice to the other party not less than thirty days prior to the intended termination of the Lease.

3. TERMINATION

This Lease may be terminated upon thirty days written notice, with or without cause, by Lessors or Lessee. If Lessors, in their sole judgment, determine that continuation of this Lease may interfere with the safety, access or use of any of the remainder of the described building, Lessors or Lessee may terminate this Lease by providing written notification to the other party at any time with thirty days written notice as set forth herein

4. RENT

Lessee shall pay to Lessors, as rent hereunder, the total sum of Two Thousand Seventy Six Dollars Eighty Eight Cents (\$2,076.88) per month which represents rental of the space identified herein and a prorated share of the utility expense on said property. The total annual rental amount shall be the sum of Twenty Four Thousand Nine Hundred Twenty Two Dollars Fifty Six Cents (\$24,922.56). The sum of \$2,076.88 shall be paid on or about the second day of each month commencing with the 2nd day of January, 2013 and continuing thereafter each month. It is understood and agreed that the rent paid by the Lessee herein includes a prorated share of the utility expense due to Mountaineer Gas, Allied Waste, Comcast, MonPower, City of Wellsburg utilities, and Stratus Wave communications:

5. SIGN PLACEMENT

The Lessee herein will be responsible for the cost of creation and placement of any sign or signs to establish its identity as the office location of the Brooke County Prosecuting Attorney.

6. CARE OF PREMISES

Lessee shall commit no act of waste and shall take good care of the premises and the fixtures and appurtenances therein, and shall, in the use and occupancy of the premises, conform to all laws, orders and regulation of the federal, state and municipal government or any of the agencies or departments of the same. The use of alcohol and smoking within the premises is prohibited.

7. RIGHT TO INSPECT AND REPAIR

Lessors may, but shall not be obligated to, enter upon the rented premises at any reasonable time; it being understood and agreed that approximately 467 square feet of the first floor of the building shall be retained by David B. Cross for his personal use. It is understood and agreed that the inspection and repair, replacement or additions in, to, on or about the premises or the building, shall be carried out in the discretion of the Lessors as they determine to be necessary or desirable.

8. REMOVAL OF PROPERTY

Lessee shall not make structural changes in said premises without the prior written consent of the Lessors. All improvements made by the Lessee to the premises which are so attached to the premises so that they cannot be removed without material damage to the premises shall become the property of Lessors upon installation. Not later than fifteen (15) days after the termination of said Lease, Lessee shall remove all of its personal property and improvements made by Lessee which have not become the property of the Lessors; repair all damage done by, or in connection with, the installation or removal of such property and improvements, and surrender the premises in as good condition as it was at the beginning of the term, reasonable wear and tear excepted. All property remaining after the fifteen (15) day period shall be conclusively deemed abandoned and may be removed by Lessors. Lessee shall reimburse Lessors for the cost of such removal.

9. SAFETY

Lessee shall not conduct or omit any act or thing to be done to or on the premises which might be deemed by Lessors in any manner to create a hazard to or endanger the premises or endanger other property of the Lessors nor have, omit or permit any use, activity, equipment or structure on the premises which might be deemed by Lessors to create a hazard to Lessors or others or which may interfere with Lessors' operations.

10. MAINTENANCE AND REPAIR

Lessee shall maintain in good condition the rented premises and shall be responsible for routine and/or preventive maintenance. Preventive maintenance includes cleaning and replacing any fixtures and keeping fixtures and equipment in good repair. Lessors shall furnish water, heat, cooling, sewerage and electricity for the premises at the expense of Lessors. Lessee shall pay all charges for telephone and other services used by Lessee upon the premises. Lessors shall perform common maintenance including lawn care and snow removal.

11. INSURANCE

It is understood and agreed between the parties hereto that should the premises be destroyed by fire or other casualty and thereby rendered unfit for occupancy during the time hereof, then this Lease shall terminate and no longer be binding upon the parties hereto. Lessee shall maintain and keep in force insurance against loss to the contents of the premises, including but not limited to Lessee's property, as a result of fire, theft or other insurable casualties and occurrences in adequate amounts and Lessee shall further maintain and keep in force a policy of public liability insurance against claims for personal injury, death and property damage occurring in or about the premises or arising out of the use or occupancy thereof with Lessors being shown as additional insured on such policy. The amount of liability insurance coverage shall be agreed upon by the parties hereto.

12. ASSIGNMENT AND SUBLEASE

Lessee shall not assign nor sub-let this Lease, in whole or in part, without the prior written consent of Lessors.

13. DEFAULT AND SURRENDER OF PREMISES

In the event Lessee is in default of any covenant or agreement herein contained to be kept or performed by Lessee and has not initiated action reasonably calculated to cure such default within a period of thirty days, including failure to make payment due hereunder, after written notice of said default by Lessors to Lessee, then Lessors may, at Lessors' option declare this Lease terminated, and immediately, without notice, enter and retake possession of the premises and evict Lessee therefrom without waiving any rights or remedies accruing to Lessors by law and under this Lease or as provided by law. Waiver by Lessors of any such default or breach by Lessee, or the non-exercise of any right by Lessors shall not be construed as changing or affecting the terms and force of the Lease in relation to any other default or breach.

14. NOTICES.

Any notice under this Lease shall be in writing and shall be sufficiently given or served if delivered in person or if sent by registered or certified mail to Lessors or Lessee, as the case may be at their following address, which shall prevail until notice of change is given:

Lessors: 727 Charles Street, Wellsburg, WV 26070
Lessee: Brooke County Commission
201 Courthouse Square, Wellsburg, WV 26070

Times shall be computed from the delivery in person or the mailing of the notice, as the case may be. Time shall be computed by excluding the first day and including the last; if delivery date is a Saturday or Sunday or a Holiday, that day shall also be excluded.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by authorized representatives of the day and year first above written.

David B. Cross, Lessor

Witness

Theresa J. Cross, Lessor

Witness

BROOKE COUNTY COMMISSION

BY: _____
Commissioner

Commissioner

Commissioner

ATTEST:

Brooke County Clerk