ADVISORY OPINION NO. 2010-20

Issued On December 2, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Conservation District** asks whether it may expend public funds to construct a soil conservation project on property owned by an Elected Board Member.

FACTS RELIED UPON BY THE COMMISSION

Conservation Districts were created to conserve land from soil erosion. *See* W.Va. Code § 19-21A-2. The districts have been in existence in some form since 1939 and were originally called "Soil Conservation Districts" until 2002 when their name was changed to "Conservation Districts" [S.B. 417, 2002 Regular Session]. The Requester's Board consists of ten supervisors representing five counties.

A district may consist of land in one or more counties. Land owners in one or more counties may form a district by petitioning the State Conservation Committee. [W.Va. Code§ 19-21A-14 when read in conjunction with 19-21A-5 as amended in 2002].Each county in a district shall elect two non-partisan supervisors. [W.Va. Code§ 19-21A-6. Counties which meet the population requirements shall elect additional supervisors in accordance with this code section. Id.] The majority of the districts con]. Eachf two or more counties.

The districts have the statutory power to conduct surveys relating to the character of soil erosion. [W.Va. Code§ 19-21A-8(1)] The districts may also expend public funds for demonstration projects on land within a district for the purpose of determining which "means, methods and measures" best prevent soil erosion. [W.Va. Code§ 19-21A-8(2)]

The Conservation District in question has a member who, prior to his election to the District, was the recipient of a demonstration project on his property for purposes of alleviating erosion resulting from flooding from a river located next to his property. According to the Requester, after six (6) years it has been determined that the project is not performing as the District intended. Specifically, the Requester states that the fields of the property owner/District Member are continuing to erode.

The District asks whether it may expend approximately $50,000.00 to armor the banks of the property of its Board Member. Based upon information and belief, other properties are located along the same river. It does not specifically state whether it considers this project

part of the original project or whether it considers it a new demonstration project. The affected Board Member recused himself from voting on this matter.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(d)(1) provides in part that ... no elected or appointed public official ... or business with which he or she is associated may be a 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. .. Provided however, That nothing herein shall be construed to prohibit. ..a part-time appointed public official from entering into a contract which the part-time official may have direct authority...

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 ...county... 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 member of a county commission ... or any county or district officer ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such ... member, officer... he may have any voice, influence, or control.

ADVISORY OPINION

Both the Ethics Act, W. Va. Code§ 6B-2-5(d)(1), and a separate criminal misdemeanor statute, W. Va. Code§ 61-10-15, prohibit county officials and employees from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

The Ethics Act

Pursuant to W.Va. Code§ 6B-2-5(d)(1) a public official may not have more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. This prohibition contains an exception for part-time appointed officials. However, there is no exception for elected officials [There is also an exception for contracts which do not exceed $1,000.00 per calendar year. However, based upon the cost of the project, $50,000.00, this exception is inapplicable.]

The Conservation District Member is an elected member and as such, is subject to the prohibitions in West Virginia Code§ 6B-2-5(d). If the Conservation District expends public funds to improve his property, then it constitutes a public contract between the property

owner/District Member and the District. [A different conclusion exists in regard to Farmland Protection Boards who members are part-time appointed board members. The Ethics Act prohibition against having an interest in a public contract contains an exception for part-time appointed board members. *See also* A.O. 2003-07.] The Elected Board Member would have a financial interest in this project. [For purposes of the prohibitions in "d", it is not sufficient for public official to recuse themselves from voting.] Therefore, a Conservation District may **not** expend public funds to construct a demonstration project on the property owned by one of its Members as the Members would have a prohibited interest in a public contract.

An exception to the public contract restrictions in the Ethics Act exists if it is a continuing contract which the governing body entered into prior to the election or appointment of the affected member to the governing body. A.O. 2008-10. Here, the Requester does not state that it has a legal obligation, pursuant to the terms of the original demonstration project, to expend public monies to armor the banks of the property owner/Board Member. In fact, the term demonstration project appears to indicate that it is an "experimental" project which may not abate the problem it seeks to fix. Furthermore, based upon the estimated cost of the project, $50,000.00, it appears that this project is beyond the original scope of the demonstration project constructed six (6) years ago. Hence, the Commission finds that, based upon the facts presented, the project does not fall within the definition of a continuing contract.

Accordingly, based upon the foregoing, the Commission finds that the District may not expend public funds to construct the demonstration project in question as the project costs is over $1,000.00, the limited interest exception in the Ethics Act. The District may construct the project if it seeks and receives a contract exemption to construct the project. In order to obtain a contract exemption, it must demonstrate that imposing this restriction in the Ethics Act will result in excessive cost, undue hardship, or other substantial interference with the operation of the District. W. Va. Code§ 6B-2-5(d)(3).

If the District seeks a contract exemption, as part of this process, the District must demonstrate that there are compelling reasons why the project should be constructed on the property in question, not on other properties located on the same river. If the District seeks an exemption, it must consider this matter during a properly noticed public meeting. The affected Member must continue to recuse himself from consideration of this matter. Further, both during and outside of meetings, he may not attempt to influence the District Members to pursue this project.

Conservation Districts may also construct projects on property owned by its members if the Ethics Act or the Districts' enabling statute is amended to allow their Members to participate in projects wherein public funds are expended. The Ethics Commission takes no position on this issue.

West Virginia Code§ 61-10-15

W.Va. Code§ 61-10-15, a separate criminal statute, contains a stricter standard than the

Ethics Act, and imposes criminal penalties against any "member of a county commission, district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools or any member of any other county or district board or any county or district officer" who are pecuniarily interested, either directly or indirectly, in the proceeds from a public contract over which the public official may exercise voice, influence or control. Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. This provision does not contain a $1,000.00 exception or exceptions for part-time appointed officials.

The Commission must determine whether Conservation Districts are subject to this provision. West Virginia Code§ 61-10-15 was enacted in 1879. There is no Supreme Court case or Attorney General Opinion specifically finding that Conservation Districts fall within the purview of this code section. The Districts are unique to the extent that they are formed with the consent of a State Board, *i.e.* the State Conservation Committee, not by the County Commission. Due to the unique nature of the Districts, and in the absence of clear language in§ 61-10-15 bringing them within its purview, the Commission finds that they are not subject to West Virginia Code§ 61-10-15. *See* A.O. 2010-06 finding that a public library created by the Legislature and funded by two public bodies, a City and a County, was not subject to§ 61-10-15. [This conclusion is also consistent with the Commission's rulings that regional bodies are not subject to W.Va. Code § 61-10-15. *See* A.O. 2000-12.]

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code§ 6B-1-1, *et seq.* and W.Va. Code§ 61-10-15, and does not purport to interpret other laws or rules. In accordance with W. Va. Code§ 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman