

Advisory Opinion 2019-08

Issued on April 4, 2019, by

The West Virginia Ethics Commission

Opinion Sought

A **Mayor** asks whether he may vote on matters affecting a proposed hotel development project near properties he owns, and whether the Town Council may require his recusal or exclude him from discussions and votes concerning the project.

Facts Relied Upon by the Commission

The Requester serves as the Mayor of a Town which, according to the most recent census, has a population of fewer than 300. The Requester states that the Town has approximately 150 houses.

A private business wants to build a hotel in the Town on property which the business owns ("Hotel Project Site"). Prior to the Requester's election in June 2017, the Town Council and Planning Commission created a special zoning district which overlays the Hotel Project Site. Pursuant to the Town's ordinances and its Planning Commission regulations, the hotel construction must be confined to the special zoning district. Several streets serve as the dividing line between the special zoning district, which contains the Hotel Project Site, and a nearby neighborhood.

The Hotel Project Site is predominately surrounded by lots owned by the business or an affiliated company. (These lots are hereinafter collectively referred to as the "Company Owned Lots.") The Company Owned Lots consist of rental houses and several vacant parcels and are in a residentially zoned neighborhood that abuts a small portion of the Hotel Project Site. The Hotel Project Site is also abutted by three private residences and a church.

The Requester and his spouse also own houses in this neighborhood; they live in one house and rent out another. The Requester's property abuts the Company Owned Lots, but not the Hotel Project Site. Two other private residences, which are located near the Requester's properties, also abut the Company Owned Lots. The number of property owners, including the Requester, which have property that abuts the Hotel Project Site or the Company Owned Properties, is at least seven.

The Requester states that approximately 11 years ago, he had communications with a Hotel Project Site business representative when the business representative approached the Requester and approximately nine other area property owners to discuss buying their properties. The Requester did not sell his property to the business, but some other property owners did.

During the same time period, the business representative asked the Requester if his employer, a construction business, would be interested in performing work for the Hotel Project Site business on construction projects in other states. The Requester states that thereafter, at the request of his employer, he forwarded his resume and information about his employer's construction business to the Hotel Project Site business, but that neither he nor his employer performed work for the Hotel Project Site business.

The Requester left the employment of the construction business approximately nine years ago and has not had contact with it since, nor has he had subsequent contact with the Hotel Project Site business about performing private work for it. Similarly, he has not had further discussions with the Hotel Project Site business or any of its affiliates about selling his home or his other property.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-1-3 (h)

“Person” means an individual, corporation, business entity, labor union, association, firm, partnership, limited partnership, committee, club, or other organization or group of persons, irrespective of the denomination given such organization or group.

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

A public official or public employee may not knowingly and 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 R. § 158-6-10 (2017), states:

The Ethics Act sets a minimum standard of conduct. When the Legislature or a public agency impose stricter standards, then public officials and public employees must comply with the stricter standards.

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

(h) *Employment by regulated persons and vendors.* -- (1) No full-time official or full-time public employee may seek employment with, be employed by, or seek to purchase, sell or lease real or personal property to or from any person who:

(A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding 12 months; or

(B) Has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working.

(C) Is a vendor to the agency where the official serves or public employee is employed and the official or public employee, or a subordinate of the official or public employee, exercises authority or control over a public contract with such vendor

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

(1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter:

(A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

(2) A public official may vote:

(A) If the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses. A class shall consist of not fewer than five similarly situated persons or businesses.

. . . .

(3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue. The recusal shall also be reflected in the meeting minutes.

Advisory Opinion

Voting

Pursuant to the Ethics Act, public officials may not vote on or participate in deliberations on a matter in which they have a "financial interest." W. Va. Code § 6B-2-5(j). Even if a public official has a financial interest under W. Va. Code § 6B-2-5(j), recusal is not mandated when the public official is affected as a member of a class of five or more similarly situated persons or businesses. W. Va. Code § 6B-2-5(j)(2)(A).

The Ethics Commission finds that the Requester has a financial interest in matters affecting the Hotel Project Site project as he owns two properties, a residence and a rental home, in the area of the Hotel Project Site. The Commission must therefore consider whether voting on matters related to the Hotel Project Site would affect him uniquely as opposed to affecting him as a member of a class of five or more similarly situated persons or businesses which own properties in the area.

In Advisory Opinion 2004-03, the Ethics Commission held that a municipal planning commission member may not vote on a zoning request which involved a tract of land that was adjacent to the planning commission member's neighborhood and contiguous to his property. The Opinion does not provide any other information concerning the proximity of other properties to the tract of land.¹

In Advisory Opinion 2016-13, the Ethics Commission found that a city council member, who also served on the planning commission, did not have a unique interest in the development of the hillside near her home because she was similarly situated to approximately 700 other homeowners. The Ethics Commission held that she could vote on and fully participate in all matters relating to development of the hillside as a member of a class.

In Advisory Opinion 2018-09, the Ethics Commission held that a city council member could vote on the city's proposed purchase of property that was adjacent to the council member's residence because approximately 28 other residences were also adjacent to the property.

In the present case, at least seven property owners, including the Requester, have properties which abut the Hotel Project Site or the Company Owned Lots. Moreover, the Requester's property does not abut the Hotel Project Site, but only the Company Owned Lots. Pursuant to the Town's ordinance and its Planning Commission regulations, the hotel construction must be confined to the special zoning district which overlays the Hotel Project Site.

The Commission finds that the Requester is a member of a class of five or more similarly situated persons and therefore he may vote on matters relating to the proposed hotel development or Hotel Project Site. If a matter arises which uniquely affects the Company Owned Lots or other property adjacent to his property, then he should contact the Ethics Commission for further advice.²

¹ The Commission did not address whether other property owners in the area were situated in the same or similar manner as the planning commission member. This Opinion pre-dates the 2008 amendment to the Ethics Act which defines a class as five or more similarly situated persons or businesses.

² The Requester has also indicated that approximately 11 years ago he had discussions with the Hotel Project Site business concerning the potential purchase of his house and employment opportunities for him or the construction business by which he was employed. There is no provision in the Ethics Act which requires the Requester's recusal based upon past communications with the business, mainly because they occurred more than a decade ago.

Required Recusal

The Requester asks whether the Town Council may require his recusal from matters affecting the hotel development project and/or exclude him from discussions and votes.

In Advisory Opinion 2005-06, the Commission held that “for a [c]ity to require a member to vote, when the member believes that his or her action in casting the vote may arise to a violation of the Ethics Act, constitutes a direct conflict with the applicable law governing voting under the Act.” The Commission concluded that the city council member may not be required to vote in those circumstances.

The Requester is asking a related but different question than that addressed by the Ethics Commission in Advisory Opinion 2005-06. **The purpose of the Ethics Act is to eliminate actual conflicts of interest, but it does not cover all legal issues which may arise in the administration of a public agency. The Ethics Commission has considered the provisions in the Ethics Act and finds that no provision in the Act dictates whether a public agency may require the recusal of one of its members or exclude him or her from discussions and votes.**

The Ethics Act sets a minimum standard of conduct. When the Legislature or a public agency imposes stricter standards than those contained in the Ethics Act, then public officials and public employees must comply with the stricter standards. W. Va. Code R. § 158-6-10 (2017).

The Requester should direct his question to the Town’s attorney for an opinion on whether other laws, including the Town’s charter or ordinances, require his recusal or authorize the Town to exclude him from discussions and votes.

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, 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 public servants and other persons unless and until it is amended or revoked or the law is changed.

/s/ Robert J. Wolfe
Robert J. Wolfe, Chairperson
West Virginia Ethics Commission