

Advisory Opinion 2019-09

Issued on April 4, 2019, by

The West Virginia Ethics Commission

Opinion Sought

A **City Council Member** asks whether he is prohibited from representing a client in a matter before the City's Board of Zoning Appeals.

Facts Relied Upon By the Commission

The Requester, a City Council Member and private attorney, asks whether he may provide legal representation to a private client before the City's Board of Zoning Appeals ("BZA"). The Requester states that neighbors of his client are appealing a City Code Official's issuance of a building permit to the Requester's client, and the Requester wants to represent the client before the BZA in that matter.

The City has adopted a Unified Development Ordinance, effective September 11, 2005, which provides zoning regulations and other land use restrictions, such as requiring permits for building and remodeling structures in the City. The City's BZA is an administrative agency of the City. The duties of the BZA pertinent to this Opinion include that it shall, "[h]ear, review and determine appeals from an order, requirement, decision or determination made by an administrative official or board charged with the enforcement" of the Unified Development Ordinance. W. Va. Code § BA-8-9(1). Decisions of the BZA are not controlled by or appealable to City Council.

City Council, among other duties, appoints the BZA members, approves the hiring of its employees and sets their salaries. W. Va. Code § BA-8-3. The Requester, as a member of the City Council, voted to appoint two of the five sitting BZA members.

Provisions Relied Upon By the Commission

W. Va. Code § 6b-2-5(f) *Prohibited representation.*

No present or former elected or appointed public official or public employee shall, during or after his or her public employment or service, represent a client or act in a representative capacity with or without compensation on behalf of any person in a contested case, rate-making proceeding, license or permit application, regulation filing or other particular matter involving a specific party or parties which arose during his or her period of public service or employment and in which he or she personally and substantially participated in a decision-making, advisory or staff support capacity, unless the appropriate government agency, after consultation, consents to such representation....

W. Va. Code § 6b-2-5(g) *Limitation on practice before a board, agency, commission or department.*

Except as otherwise provided in §BA-2-3, §BA-2-4, or §8A-2-5 of this code:

(1) No elected or appointed public official and no full-time staff attorney or accountant shall, during his or her public service or public employment or for a period of one year after the termination of his or her public service or public employment with a governmental entity authorized to hear contested cases or promulgate or propose rules, appear in a representative capacity before the governmental entity in which he or she serves or served or is or was employed in the following matters:

- (A) A contested case involving an administrative sanction, action or refusal to act;
- (B) To support or oppose a proposed rule;
- (C) To support or contest the issuance or denial of a license or permit;
- (D) A rate-making proceeding; and
- (E) To influence the expenditure of public funds M....

(5) An elected or appointed public official, full-time staff attorney or accountant who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the one year prohibition against appearing in a representative capacity, when the person's education and experience is such that the prohibition would, for all practical purposes, deprive the person of the ability to earn a livelihood in this state outside of the governmental agency. The Ethics Commission shall, by legislative rule, establish general guidelines or standards for granting an exemption or reducing the time period, but shall decide each application on a case-by-case basis.

Advisory Opinion

The Ethics Commission must determine whether the Requester is prohibited by the Ethics Act from appearing before the BZA as a private attorney.

W. Va. Code § 6b-2-5(f) prohibits certain public officials and employees, including the Requester, from representing a client in a contested case or other matter involving his client which arose during his public service and in which he personally and substantially participated in a decision-making capacity. The Requester states that he has not been involved as a City Council Member in the current matter before the BZA. **Therefore, (f) is not implicated.**

W. Va. Code § 6b-2-5(g) prohibits elected officials, such as the Requester, from appearing in a "representative capacity before the governmental entity in which he or she serves or served." This provision is commonly referred to as the "revolving door" prohibition. The purpose of subsection (g) is "to prohibit a public servant from exploiting

the personal prestige he may have established as a former [or current] official in an agency." Advisory Opinion 2005-22. The issue under (g) is whether, as a City Council Member, the Requester also "serves" the BZA. The Requester, as a City Council Member, has statutory duties related to the BZA which include appointing BZA members, setting salaries for BZA employees and appropriating funds to the BZA. Further, the City's Unified Development Ordinance, which is the basis upon which the BZA will adjudicate the appeal at issue, is created by the City's governing body.

However, adjudications made by the BZA are made without any input, approval or review by the City Council. The legislature has instead given BZAs specific authority and duties that are not overseen or controlled by a city council.

Based upon the foregoing, the Ethics Commission finds that the BZA is an independent board of the City Council. **As a result, the Ethics Commission finds that the Requester does not "serve" the BZA pursuant to W. Va. Code § 6B-2-5(g) simply as a result of being a member of City Council. The Ethics Commission therefore holds that W. Va. Code § 6B-2-5(g) does not prohibit the Requester from representing a client before the City's BZA in a building permit dispute.**

This finding is supported by the Commission's previous finding that a planning commission was a separate governmental entity from a BZA for purposes of subsection (g). In Advisory Opinion 2000-22, the Commission held that a BZA member was not prohibited from appearing before the planning commission as a licensed engineer. See also Advisory Opinion 2005-22 (holding that the former general counsel for a cabinet secretary of a state department was not prohibited from appearing before the various agencies within the department, unless he had been specifically assigned to a particular division or entity.)

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, at 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.


Robert J. Wolf, Chairperson
West Virginia Ethics Commission