Advisory Opinion 2017-17

Issued on August 3, 2017, by

The West Virginia Ethics Commission

Opinion Sought

A **County Planning Commission Member** asks whether he may, on behalf of his clients, attend public hearings before the Planning Commission to answer questions if he removes himself from the meeting room prior to the deliberations and vote on the matter.

Facts Relied Upon by the Commission

The Requester is an appointed member of a county planning commission. There are 15 members on the Planning Commission. The county commission appoints the members.

The enabling legislation for planning commissions requires members to be "qualified by knowledge and experience in matters pertaining to the development of the county." W. Va. Code § 8A-2-4(b)(2). There must also be representative members of business, industry and other relevant disciplines on the commission. W. Va. Code § 8A-2-4(d). The Requester is a registered professional engineer.

As part of his engineering business, the Requester, for a fee, performs work for developers on planning and constructing residential subdivision projects. Developers must obtain a permit prior to beginning construction on subdivisions from the Planning Commission.

On residential subdivision projects for which he has been retained as the engineer, the Requester, for purposes of obtaining a permit, submits plans on behalf of his clients to the Planning Commission. Planning Commission staff conducts an initial review of the permit request and makes a recommendation to the Planning Commission to grant or deny the permit.

Prior to rendering decisions on whether to grant a permit, the Planning Commission is required to hold public hearings. W. Va. Code § BA-5-8. At the beginning of public hearings on his projects, the Requester leaves his seat at the Planning Commission meeting table and takes a seat in the audience. The Planning Commission staff presents a detailed description of the project to the Planning Commission and public. The Requester remains in the audience during the presentation to address any questions or issues that may arise about the project, either from the public or the Planning Commission members. Per the Requester, it is normal and customary for either the engineer or developer on a project to attend public hearings on their projects to answer questions.

After the public hearing, the Requester leaves the meeting room while the Planning Commission members deliberate and vote on whether to approve the permit. Other

members of the public are permitted to remain in the room during the deliberation and vote. After the vote, the Requester returns to the room and his seat at the Planning Commission meeting table.

At times, the Requester also represents clients in zoning change requests. The Planning Commission similarly holds public hearings before issuing a decision on the requests. For these proceedings, the Requester takes the same steps outlined above for permit approval hearings.

Provisions Relied Upon by the Commission

W. Va. Code§ 68-1-3(b) provides, in relevant part:

> "Business" means any entity through which business for-profit is conducted including a corporation, partnership, proprietorship, franchise, association, organization or self-employed individual.

W. Va. Code§ 68-1-2(c) provides, in relevant part:

> The Legislature finds that the state government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official or public employee from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official or public employee, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

W. Va. Code§ 6B-2-5(b)(1) provides, 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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in *de minimis* private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

W. Va. Code § 68-2-5(9) provides, in relevant part:

> *Limitation on practice before a board, agency, commission or department.* -- Except as otherwise provided in section three, four or five, article two, chapter eight-a 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;
> (8) 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.
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> (2) As used in this subsection, "represent" includes any formal or informal appearance before, or any written or oral communications with, any public agency on behalf of any person ….

W. Va. Code§ 68-2-50)(3) provides, in relevant part:

> 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 be reflected in the meeting minutes.

W. Va. Code§ 8A-2-4(f) provides, in relevant part:

> The Legislature finds that there are persons willing to serve on planning commissions who may also own interests in businesses who regularly conduct business in front of or with planning commission staff. Such persons may have experience and expertise which would be valuable assets to a planning commission. For those reasons, notwithstanding any other provisions in this code to the contrary, any person employed by, owning an interest in or otherwise associated with a business that regularly conducts business in front of or with planning commission staff may also serve as a member of a planning commission and shall not be in violation of subsection (g), section five, article two, chapter six-b of this code if the member recuses himself or herself from any vote, discussion, participation or other activity regarding the conflicting issue: *Provided,* That such members do not constitute a majority of the members of the planning commission at the same time.

Advisory Opinion

The Ethics Act, at W. Va. Code § 6B-2-5(g), generally prohibits elected or appointed public officials and full-time staff attorneys or accountants from appearing in a representative capacity during their public service before the governmental entity on which they serve or are employed in various matters, including matters relating to the issuance of a license or permit.[1] The limitations on appearing include a "formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." W. Va. Code§ 6B-2-5(g)(2).

The Ethics Act, however, contains an exception for planning commission members which authorizes them to appear in a representative capacity before a planning commission. W. Va. Code§ 6B-2-5(g); W. Va. Code§§ 8A-2-3 through 5. The Legislature added the exception in 2006.[2] The language reads, in relevant part:

> [N]otwithstanding any other provisions in this code to the contrary, any person employed by, owning an interest in or otherwise associated with a business that regularly conducts business in front of or with planning commission staff may also serve as a member of a planning commission and shall not be in violation of subsection (g), section five, article two, chapter six-b of this code if the member recuses himself or herself from any vote, discussion, participation or other activity regarding the conflicting issue ....

W. Va. Code § 8A-2-4(f).

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[1] The restriction also extends "for a period of one year after the termination of his or her public service or public employment ..." *Id.*

[2] See 2006 W. Va. Acts c. 176. Prior to the 2006 legislation, the Ethics Commission had issued several Advisory Opinions analyzing restrictions in the Ethics Act on planning commission members.

In Advisory Opinion 1995-08-B, the Ethics Commission held, based upon W. Va. Code§ 6B-2-5(g}, that a member of a planning commission may not "appear in a representative capacity before the Planning Commission staff on behalf of a project he has worked on for a fee(,]" even if he did "not take part in the vote or discussion on the project by the Planning Commission members."

In Advisory Opinion 2005-07, a potential appointee of a planning commission owned a business engaged in the development of residential building lots and the construction of buildings. The Ethics Commission held "if the [individual] elects to accept an appointment to the Planning Commission, he will be precluded from appearing before the Planning Commission regarding matters concerning his business activities, either personally and directly or indirectly through employees, company officers or other agents." *Id.* The Opinion cited Advisory Opinion 1997-17 in which the Ethics Commission held that a board of health member may not represent his company by communicating with board of health staff regarding his company's projects.

The Legislature has not expressly granted the Ethics Commission authority to administratively interpret W. Va. Code §§ 8A-2-3 through 5.[3] Nevertheless, the Ethics Commission is unable to decide the issue before it in a vacuum and therefore must take into consideration other provisions in the Code. *See* Advisory Opinions 2009-02 and 2016-09.

The Commission must determine whether W. Va. Code § 8-2-4(f) permits a planning commission member to appear on behalf of his clients as an audience member in public hearings before the planning commission. Specifically, W. Va. Code§ 8A-2-4(f) states a planning commission member does not violate W. Va. Code§ 6B-2-5(g) "if the member *recuses* himself or herself from any vote, discussion, participation or other activity regarding the conflicting issue **"** (emphasis added).

Neither W. Va. Code§ 8A-2-4(f) nor W. Va. Code§ 68-2-5(9) defines recusal. As such, the Ethics Commission may consider the meaning normally given to this term.[4] Black's Law Dictionary defines recusal as: "Removal of oneself as judge or policy-maker in a particular matter, esp. because of a conflict of interest." *Recusal,* Black's Law Dictionary (9th ed. 2009). Additionally, the Ethics Act states:

> 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.

W. Va. Code§ 6B-2-5U)(3).

The Requester admits that he must recuse himself from public hearings involving projects for which he is associated. Indeed, to come within the exception contained within W. Va. Code § 8A-2-4(f), the Requester must "recuse himself from any vote, discussion, *participation or other activity* regarding the conflicting issue ...." W. Va. Code§ 8A-2-4(f) (emphasis added). The Requester states that he "recuses" himself at the opening of the public hearing by taking a seat in the audience where he remains to address any questions or issues from the public or Planning Commission members that may arise

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[3] Therefore, if a court of law or other government agency authorized to interpret this Code section issues an opinion, then the Ethics Commission would give it deference to the extent required by law.

[4] The West Virginia Supreme Court has held: "[S]tatutory construction is necessary to ascertain the meaning of undefined words and phrases. 'In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.' Syl. pt. 1, *Miners in Gen. Group v. Hix,* 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee-Norse Co. v. Rutledge,* 170 W. Va. 162,291 S.E.2d 477 (1982)." In re Clifford K., 217 W. Va. 625,633,619 S.E.2d 138, 146 (2005).

about the project. Afterward, the Requester leaves the room while the County Planning Commission deliberates and votes.

The Ethics Commission finds that Requester removing himself from his seat at the Planning Commission table and taking a seat in the audience does not constitute effective recusal for purposes of W. Va. Code§ 8A-2-4(f). When recusal is required, the Ethics Commission declines to permit a public official to nonetheless remain in the room. Consistent with the provisions of the Ethics Act, the Commission holds that for recusal to be effective under W. Va. Code§ 8A-2-4(f), it is necessary for a planning commission member to physically remove him or herself from the room during "any participation or other activity regarding the conflicting issue," including public hearings.

Next, the Ethics Commission will determine if the phrase "recuses himself or herself from any vote, discussion, participation or other activity regarding the conflicting issue" in W. Va. Code§ 8A-2-4(f) encompasses communications with planning commission staff. The Ethics Commission finds that it does not.

First, the Legislature expressly envisioned that businesses of planning commIssIon members will "regularly conduct business in front of or with planning commission staff' while members continue to serve on the planning commission. W. Va. Code§ 8A-2-4(f) ("The Legislature finds that there are persons willing to serve on planning commissions who may also own interests in businesses who regularly conduct business *in front of or with planning commission staff.")* (emphasis added). To this end, the Legislature expressly permitted planning commission members to appear in a representative capacity before the planning commission staff so long as members properly recuse themselves when required to do so. *Id.*

Second, the Commission finds that communicating **with** planning commission staff does not constitute an instance in which a planning commission member is acting as a "judge" or "policy-maker" for which recusal is necessary. *Black's Law, supra.* As opposed to a public hearing where the Requester has the "obligation of acting as a [planning commission member] charged with deciding or acting on a matter[,]" there is no such obligation when submitting required documentation or otherwise communicating with planning commission staff. W. Va. Code§ 6B-1-2(c). The Commission finds that this is the type of activity that W. Va. Code § 8A-2-4(f) seeks to permit.

Finally, to conclude that W. Va. Code§ 8A-2-4(f) prohibits communications with planning commission staff defeats its very purpose. W. Va. Code § 8A-2-4(f) allows planning commission members to appear in a representative capacity before their planning commission's staff so long as members properly recuse themselves. Finding that W. Va. Code § 8A-2-4(f) prohibits communications with planning commission staff is tantamount to finding that W. Va. Co de § 8A-2-4(f) places the same limitations on planning commission members as W. Va. Code§ 6B-2-S(g). The Ethics Commission declines to interpret W. Va. Code§ 8A-2-4(f) in this fashion.

The Ethics Commission thus holds that W. Va. Code § 8A-2-4(f) does not ban the Requester, in his or her private capacity, from communicating with Planning Commission staff, outside of meetings and public hearings, regarding a project with which his or her business is associated.

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 §§ 68-1-1 through 68-3-11, and does not purport to interpret other laws or rules.*

In accordance with W. Va. *Code§ 68-2-3, 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, Chairperson
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