Advisory Opinion 2017-19

Issued on August 3, 2017, by

The West Virginia Ethics Commission

Opinion Sought

A **County Planning Commission** asks whether its members, including those on its "sign ordinance" subcommittee, who own businesses that utilize signs may participate in reviewing and making recommendations regarding amendments to the county's sign ordinance.

Facts Relied Upon by the Commission

Planning Commission members must be "qualified by knowledge and experience in matters pertaining to the development of the county" and "must fairly represent different areas of interest, knowledge and expertise, including, but not limited to, business, industry, labor, farming, government and other relevant disciplines. W. Va. Code§ 8A-2-4(b)(2) and (d). Given the required credentials of Planning Commission members, situations may arise where a member may be financially affected by the official actions of the Planning Commission and its subcommittees.

The Planning Commission consists of 15 members who are appointed by the county commission. The Planning Commission is in the process of reviewing and possibly recommending amendments to the county's sign regulation ("sign ordinance') contained in the county Zoning Ordinance. This process is governed by W. Va. Code§ 8A-7-8.[1] The Planning Commission has formed a subcommittee comprised of six Planning Commissioners for this purpose.

The Requester states that some of the subcommittee members may be interested in or financially affected by changes made to the sign ordinance. Specifically, the Requester states that two subcommittee members use signs for their businesses located in the zoned area and two members use signs for their businesses located outside of the zoned area. The Requester additionally states that at least one Planning Commission member who is not on the subcommittee has a business that uses signs in the zoned area.

[1] W. Va. Code§ 8A-7-8 provides, in pertinent part:

> (a) Before amending the zoning ordinance, the governing body [county commission] with the advice of the planning commission, must find that the amendment is consistent with the adopted comprehensive plan. If the amendment is inconsistent, then the governing body with the advice of the planning commission, must find that there have been major changes of an economic, physical or social nature within the area involved which were not anticipated when the comprehensive plan was adopted and those changes have substantially altered the basic characteristics of the area.

The Requester represents that there are hundreds of businesses that use signs within the zoned area and at least one hundred businesses outside of the zoned area in the county that use signs. The Requester states that none of the businesses of the members involved herein would be uniquely affected by changes to the sign ordinance.

The Requester asks whether any of the subcommittee members are prohibited from participating on the sign subcommittee. The Requester additionally asks whether any of the subcommittee or Planning Commission members may participate on the Planning Commission on matters concerning the sign ordinance. Specifically, the Requester asks whether these members may be present or make comments during the time the sign ordinance is under consideration before the Planning Commission.

Provisions Relied Upon by the Commission

W. Va. Code§ 6B-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§ 6B-2-5(j) provides, 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; or

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.

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Recusal is not mandated in every situation in which a decision may benefit a member or member's business. Instead, W. Va. Code§ 6B-2-5(j)(2)(A) states that a "public official may vote ... [i]f 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."

The Ethics Act further states that "a class shall consist of not fewer than five similarly situated persons or businesses." W. Va. Code§ 6B-2-5U)(2)(A).

In Advisory Opinion 2016-13, a planning commission member asked whether she could vote or otherwise participate in matters pertaining to the development of a hillside close to her neighborhood. The Requester stated that she was similarly situated to around 700 other homeowners. She was not in favor of the proposed development of the land which

she thought may cause the residents' properties to flood and the loss of enjoyment of the properties.

In Advisory Opinion 2016-13, the Ethics Commission stated the following:

> The Ethics Commission will now determine whether the Requester may participate in matters related to the development of the subject hilltop given her status as a potentially affected property owner. The Ethics Act, at W.Va. Code 68-2-SU), prohibits a public official from voting on a matter in which he or she has a financial interest. This prohibition does not apply when a public official is part of a class of five or more similarly situated persons.
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> The Commission considered this "class exception" in Advisory Opinion 2004-03, in which a municipal planning commission member asked whether he may vote on a zoning request which involved property adjacent to his own. The Commission declined to apply the class exception there because "the requester's financial interest in this matter is clearly significant, if not unique." In the instant situation, however, the Requester states that she does not have a unique interest in the development of the hilltop, but instead is a member of a class of 700 similarly situated homeowners.
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> Therefore, the Ethics Commission holds that if the Requester is a part of a class of five or more affected property owners, she may vote on and otherwise fully participate in all matters that come before the City and its boards, commissions and committees concerning the development and land use of the hilltop property.

In Advisory Opinion 2004-03, a developer was seeking a zoning change on a tract of land that was adjacent to the requester's property. The requester stated the zoning change would have a negative impact on his residential neighborhood.

The Ethics Commission stated the following:

> [A]s an adjacent property owner to the property being considered, the requester's financial interest in this matter is clearly significant, if not unique. Therefore, the Commission finds that the requester's interest in a proposed zoning change involving this property requires him to be recused from the Planning Commission's consideration of, and vote on, this particular matter.[2]

[2] In Advisory Opinion 2004-19, the Commission provided the following example of the application of the class exception: "[P]ublic school teachers who serve in the Legislature are permitted to vote on a pay raise for public school teachers generally. Being affected only as members of the teaching profession, and to no greater extent than other teachers, they are permitted to vote on the legislation, even though it will benefit them financially."

The Ethics Commission holds that, based upon the Requester's representation that none of the subcommittee or planning commission members' businesses would be uniquely affected by changes to the sign ordinance, the members are members of a class of five or more. Accordingly, they are not required to recuse themselves from and may participate in all matters related to the sign ordinance.

If, on some occasion, a Planning Commission member would be uniquely affected, he or she must fully recuse him or herself from the matters before the Planning Commission and the subcommittee in accordance with W. Va. Code§ 6B-2-5(j)(3). Proper recusal requires a member to physically remove him or herself from the room during the discussion and decision-making process. As such, a member who would be uniquely affected may not make comments or be present during the portion of the meeting dealing with the sign ordinance.

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§§ 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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