

## **Advisory Opinion 2018-09**

**Issued on July 12, 2018, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

A **City** asks whether a Council Member may vote on the City's proposed purchase of property that is adjacent to the Council Member's residence.

### **Facts Relied Upon by the Commission**

A City is considering whether to purchase approximately 40 acres of private property ("Property") that is currently undeveloped and being used by the public for recreational activities, such as biking and walking. The Requester states that if the City purchases the Property, the City plans to preserve the current uses of the property. If the City does not purchase the Property, the Requester states that the current owner plans to develop portions of the Property into single-family homes and townhomes.

The Council Member's residence is adjacent to a portion of the Property. According to a property map provided by the Requester, approximately 28 other residences are also adjacent to the Property.

The Requester states that the Council Member has no ownership interest in the Property nor any business or personal relationship with the owner of the Property. The Requester does not know the value of the homes planned for development by the current owner, the purchase price that the City may pay for the Property or the effect, if any, on the value of the adjacent properties if the Property is developed by the current owner.

### **Provisions Relied Upon by the Commission**

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

(1) In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control.

...

(3) If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in

any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection (j) of this section.

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.

...

### **Advisory Opinion**

#### **Public Contract**

Although the Requester has asked whether the Council Member may participate in the deliberation and vote on the City's proposed purchase of the Property, the Commission must first examine whether the purchase is a prohibited public contract under W. Va. Code § 6B-2-5(d).

Pursuant to the Ethics Act, at 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. The Commission has previously determined that a city council member has direct authority and control over a city's property contracts. (See Advisory Opinion 1995-35 and W. Va. Code R. § 158-8-2).

The Requester states that the Council Member does not have an ownership interest in the Property and would not be a party to the contract. The Council Member therefore would not have an interest in any "profits" of the purchase of the Property.

## Benefits of a Public Contract

The issue that the Commission must determine is whether the Council Member has an “interest” in the “benefits of the contract.” The Commission has not had occasion to determine the scope of the word “benefits” for purposes of determining the type of benefits that would create a prohibited interest in a public contract.

The Commission recognizes that the Council Member could gain certain benefits (or detriments) from the City’s purchase of the Property, such as an increase in his property value which could result from the Property not being developed and remaining available for recreational use. The Commission also recognizes that the other adjacent property owners would be affected in the same way and that the public may also be affected by a change in use of the Property.

Not all benefits, however, create a prohibited interest in a public contract. To hold that a public body is prohibited from purchasing property because it would benefit a public official or employee under any and all circumstances would be unreasonable. For example, such an interpretation would render it unworkable for a public body to make comprehensive improvements to much of its existing public property and infrastructure. The Ohio Ethics Commission illustrated the absurdity of such an interpretation:

[s]uch a holding would require that whenever a political subdivision widens a road or installs water and sewer lines, it leave a narrow band of unimproved pavement in front of a public official's property or detour a pipeline away from the official's property, or would prevent the political subdivision from making any improvements if property owned by public officials would be benefited.

Ohio Ethics Commission Advisory Opinion Number 92-013, p.10. The Ohio Ethics Commission also described the type of benefit to a public official that would be prohibited:

However, it must be noted that a public official may well be deemed to have an interest in the profits or benefits . . . of a public contract in circumstances *where the benefit to the council member's property is selective, differential, or in disproportion to the benefit provided to other property in the political subdivision* or a portion thereof. For example, such a situation would occur if a council member owned a large tract of undeveloped land and was the only landowner in the political subdivision which would receive the improvements. In such a situation, it is apparent that the council member would have a *definite and direct interest in, and profit from, the improvements.*

*Id.* (emphasis added).

This Commission agrees with the Ohio Ethics Commission's reasoning and conclusions above. **The Ethics Commission therefore holds that for a public official or public employee to have an interest in the benefits of a public contract pursuant to W. Va. Code § 6B-2-5(d), he or she must have a definite and direct interest in the benefits of the public contract. Since the benefit to the City Council Member is not selective, differential or in disproportion to the benefit provided to the other 28 property owners, the Council Member does not have a definite and direct interest in the public contract. The City's purchase of the Property therefore would not be prohibited under W. Va. Code § 6B-2-5(d).**

## **Voting**

The next issue is whether the Council Member may deliberate and vote on the City's proposed purchase of the Property. A public official may not vote or participate in deliberations on a matter in which he or she has 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 individuals or businesses. W. Va. Code § 6B-2-5(j)(2)(A). For example, 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 near her neighborhood. The planning commission member stated that she was similarly situated to around 700 other homeowners. The Ethics Commission found in Advisory Opinion 2016-13 that because the planning commission member did not have a unique interest in the development of the hillside, she could vote on and fully participate in all matters relating to development of the hillside as a member of a class.

**The Ethics Commission holds that the City Council Member would not be uniquely affected as he is similarly situated to the 28 other property owners; therefore, he is a member of a class of five or more similarly situated persons and he may deliberate and vote on whether the City purchases the Property.**

*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/ Betty S. Ireland  
Betty S. Ireland, Acting Chairperson  
West Virginia Ethics Commission