ADVISORY OPINION NO. 2015-10

Issued on August 6, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **City Code Enforcement Officer** asks whether the Ethics Act prohibits him from acquiring commercial property in the City in which he enforces building and fire codes.

FACTS RELIED UPON BY THE COMMISSION

The Requester states that he wants to acquire a building which became vacant in 2011 following a fire to a neighboring building. The property is comprised of an apartment building and another nearby property. The owner died, and the beneficiary of the estate wants to give the property away because of the potential liability involved. No money would be exchanged in the transaction.

In his position as full-time Code Enforcement Officer, the Requester inspects commercial and residential property to verify compliance with the city fire and municipal codes. If a property does not conform to these codes, the Requester can declare the building "dilapidated" or "condemned," among other designations, and require that the property be repaired. Property owners who fail to repair these properties may be fined.

As City Code Enforcement Officer, the Requester sent a letter on September 5, 2013, informing the estate beneficiary (now the current owner) that the property would be classified as "dilapidated" within 30 days if certain repairs were not made. The repairs were not made, and the building was subsequently deemed to be "dilapidated."

The Requester states that if he is permitted to acquire the property, he will contact the "President of the West Virginia Building Code Officials" to obtain, at Requester's own cost, a neutral certified West Virginia business code inspector. He will also obtain an inspector from the West Virginia State Fire Marshal's Office to perform the necessary inspections and to issue appropriate certificates.

CODE SECTIONS RELIED UPON BY THE COMMISSION

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. 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.

W. Va. Code §6B-2-5(h)(1) states, in relevant part:

> 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 twelve 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.

> (3) A full-time public official or full-time public employee who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the prohibition contained in subdivision (1) of this subsection.

ANALYSIS

The Ethics Act prohibits full-time public officials and employees from seeking to purchase, sell or lease real or personal property to or from any person who has a matter "on which he or she took, or a subordinate is known to have taken, regulatory action with the preceding 12 months." W. Va. Code §6B-2-5(h)(1)(A). The Ethics Act also prohibits public officials and employees from purchasing property from any person who "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." W. Va. Code §6B-2-5(h)(1)(B).

The reasons for the prohibitions in W. Va. Code §6B-2-5(h) are to protect the reputation of public bodies and public servants from the appearance of impropriety and to protect the public from being coerced into buying or selling property to avoid a public official from taking adverse action against him or her, *i.e.,* threatening fines against a property owner if the property is not sold to the public official. In the instant situation, the Commission has no reason to suspect any coercive conduct by the Requester.

In prior Advisory Opinions, W. Va. Code §6B-2-5(h)(1)(A) was strictly applied to consistently bar county assessors from a variety of different actions, including seeking employment with businesses in their own county (Advisory Opinions 1996-52 and 2013-05), continuing a private real estate business (Advisory Opinion 2011-14), and purchasing, selling or leasing real property in the employing county (Advisory Opinion 2013-51). The reason for these restrictions is that assessors are required to assess, and therefore take "regulatory action" on, all county property *annually* pursuant to W.

Va. Code §11-3-1. This requirement brings assessors under W. Va. Code §6B-2-5(h)(1)(A).

Code Enforcement Officers, though, are not required to take annual regulatory action. The Requester states that he has not "taken regulatory action" on the property he wants to acquire since 2013. W. Va. Code §6B-2-5(h)(1)(A) accordingly does not apply to the Requester since it bars the purchase, sale or lease of property to or from any person who has a matter "on which he or she, or a subordinate is known to have taken, regulatory action with the preceding 12 months."

The next issue to consider is whether W. Va. Code §6B-2-5(h)(1)(B) prohibits the Requester from acquiring the property. According to the Requester, as the Code Enforcement Officer, he is responsible for conducting inspections and enforcing building codes as necessary. If a building appears to violate the fire code or any other municipal code, he must enforce the code. In other words, the Requester is implicitly charged with *continually inspecting* properties so that the condition of the property is *constantly* a matter on which the Requester is "working."

Therefore, the Ethics Commission finds that for purposes of W. Va. Code §68-2-5 (h)(1)(8), the property that the Requester wants to acquire (and all property located within the City) is a "matter before the agency on which he or she is working." The Requester is therefore prohibited from acquiring the property.

The Requester may seek a contract exemption pursuant to W. Va. Code §68-2-5(h)(3). This statute permits the Ethics Commission to grant an exemption upon a proper demonstration that he would be "adversely affected" by the provisions of W. Va. Code §68-2-5(h)(1).

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should contact the Commission for further advice as it may alter the analysis and render this ruling invalid.

This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §6B-1-1, et seq., 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/ Michael Greer, Acting Chairperson
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