ADVISORY OPINION 2015-16

Issued on October 1, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commission** asks if there is any conflict of interest for a developer, who also serves as a Member of the County Building Commission, to purchase and develop property owned and managed by a County Urban Renewal Authority.

FACTS RELIED UPON BY THE COMMISSION

Requester states that the County Building Commission has the responsibility of building structures for the county. According to the Order Establishing the County Building Commission, the Building Commission is comprised of three members. One of the Commission members (hereinafter "Member") is also a residential and commercial developer. Requester states that the Member, in his/her private capacity as a developer, recently completed the purchase of property located in a business and residential park which is owned and managed by the County Urban Renewal Authority. The Member plans to build several houses on the property.

Requester states that neither the County Urban Renewal Authority nor the County Building Commission may oversee one another's operations. Accordingly, the County Urban Renewal Authority need not seek approval from the County Building Commission to sell or lease real property in the business and residential park it owns and manages. Furthermore, Requester states that the County Building Commission and the County Urban Renewal Authority do not have a working relationship unless the county were to build a county-owned facility in the business park. In that instance, Requester states that the relationship between the two would be that of a buyer and seller of real property.

The County Building Commission already owns one building located in the park that serves as the County 911 Center. Requester states that no member of the County Building Commission filled any role in the building of that facility other than that associated with their membership on the County Building Commission. Requester asks whether, given the above, there is any conflict of interest in the Member continuing to serve on the County Building Commission.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code§ 6B-2-5(b)(1) provides:

> 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 ... The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent seNices, without compensation, does not constitute the use of prestige of office for private gain.

W. Va. Code§ 6B-2-5(d)(1) reads in relevant part:

> [N]o 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[.]

Finally, W.Va. Code§ 61-10-15(a) reads, in pertinent part:

> It is unlawful for any member of a ... county or district board or any county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or seNice or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control ....

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Both the Ethics Act, W. Va. Code § 6B-2-5(d)(1), and a separate criminal misdemeanor statute, W. Va. Code § 61-10-15, prohibit county officials from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public seNants away from inherently questionable situations. Pursuant to W. Va. Code § 6B-2-5(b), a public official may not knowingly and intentionally use his office for his own private gain or that of another person. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety. *See* A.O. 2013-13.

Public Contracts

The Ethics Act prohibits public servants from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. W. Va. Code§ 6B-2-5(d)(1). Based on the facts provided, a County Building Commission Member does not have direct authority or control over the letting of a public contract by the County Urban Renewal Authority. Furthermore, the County Urban Renewal Authority needs no approval from the County Building Commission in order to sell real property. *See* W. Va. Code§ 16-18-5(d) (granting urban renewal authorities the power "to sell, lease ... or otherwise encumber or dispose of any real or personal property or any interest therein"). **Consequently, since the Member in this situation has no direct authority or control over the approval of public contracts by the County Urban Renewal Authority, it would not be a violation of W. Va. Code§ 6B-2-5(d)(1) for the Member to purchase real property from the County Urban Renewal Authority.**

W. Va. Code§ 61-10-15 applies a similar, but more stringent, standard to the degree of official involvement a public servant may have in a public contract. W. Va. Code§ 61-10-15 provides in relevant part:

> It is unlawful for any member of a ... county or district board . . . to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, ... he or she may have any voice, influence or control.

The Member in this case is a member of a county board and thus subject to the limitations set forth in W. Va. Code § 61-10-15. It is also without question that the Member is pecuniarily interested in a contract to purchase real property from the County Urban Renewal Authority so that the Member, as a private developer, may build several houses on said property. With these two elements satisfied, the Commission must next determine whether the Member "may have any voice, influence or control" over the letting of the contract.

The Commission finds that the Member does not exercise any voice, influence or control over the letting of public contracts by the County Urban Renewal Authority. While the County Building Commission owns a County 911 Center within the County Urban Renewal Authority's residential and business park, there are no facts demonstrating that, as a result, the County Building Commission has any voice or influence over the County Urban Renewal Authority's future sale of real property. Accordingly, the Commission finds that the Member's purchase of real property from the County Urban Renewal Authority does not violate W. Va. Code§ 61-10-15.

Private Gain

The Ethics Act, at W. Va. Code§ 6B-2-5(b), prohibits public officials from using their office or the prestige of their office for their own private gain or that of another person. W. Va. Code § 68-2-5(b)(1). **Given this prohibition, the Member may not use his or her official position on the County Building Commission to obtain, influence or promote business for his or her own benefit, or that of a private business with which he or she is associated. It does not appear, based on the facts provided, that the Member used his or her public position in this manner. Accordingly, the Commission finds no violation of W. Va. Code§ 68-2-S(b).**

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 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, et seq., and does not purport to interpret other laws or rules. In accordance with W.* Va. *Code § 6B-2-2, this Opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended, revoked or the law is changed.*

/s/ Jack Buckalew
Jack Buckalew, Acting Chairperson