

ADVISORY OPINION NO. 2009-06

Issued On June 4, 2009 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Elected City Council Member** asks if he may vote on a matter or otherwise take action to benefit a church in which he is a member.

FACTS RELIED UPON BY THE COMMISSION

An Elected City Council Member attends a local church and has been approached by various church members about having surrounding streets annulled. The reason for the annulment would be to provide the church with additional room to possibly increase its sanctuary for its growing congregation. These streets exist only on paper, and have not been usable for numerous years.

The City Council Member attends the church in question, but only as an attendee and not a registered member. In addition, he has no participation within the ministry of the church. However, the Council Member does have a father who sits on the church council and is active within the ministry. The father receives no monetary compensation for his services.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code§ 68-1-3(f)

(f) "Immediate family", with respect to an individual, means a spouse with whom the individual is living as husband and wife and any dependent child or children, dependent grandchild or grandchildren and dependent parent or parents.

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

U) *Limitations on Voting.*

(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.

(B) If a public official is employed by a financial institution and his or her primary responsibilities include consumer and commercial lending, the public official may not vote on a matter which directly affects the financial interests of a customer of the financial institution if the public official is directly involved in approving a loan request from the person or business appearing before the governmental body or if the public official has been directly involved in approving a loan for that person or business within the past 12 months: *Provided*, That this limitation only applies if the total amount of the loan or loans exceeds fifteen thousand dollars.

(C) A personnel matter involving the public official's spouse or relative;

(D) The appropriations of public moneys or the awarding of a contract to a nonprofit corporation if the public official or an immediate family member is employed by the nonprofit.

(II) 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

(B) If the matter affects a publicly traded company when:

(i) The public official, or dependent family members individually or jointly own less than five percent of the issued stock in the publicly traded company and the value of the stocks individually or jointly owned is less than ten thousand dollars; and

(ii) Prior to casting a vote the public official discloses his or her interest in the publicly traded company.

(3) 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.

ADVISORY OPINION

The Ethics Act sets forth specific rules regarding when elected and appointed public servants may vote. The overriding purpose of the rules on voting is to ensure that a public official does not vote or take action on a matter in which he or she has a financial interest.

The Requester has no financial interest in the church or property, nor does his relative. As such, there is no prohibition in the Ethics Act against him voting or taking action on matters which affect the church or his membership.

The Legislative findings in the Ethics Act state:

(c) 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-1-2(c)

The Legislative finding recognizes that due to the interrelationships of part-time public

servants with their constituents and communities, oftentimes they may have to vote on matters in which they have a relationship with a party. Indeed, if public servants sought to recuse themselves on every vote because they know one party or the other, government would not function.

The Ethics Act specifically states that "[T]he 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(b). It is not unexpected that those who serve on City Council may be asked to take action by a church or other nonprofit organization. Even if the Council Member is a member of the organization or has a personal, but not financial, interest in a cause supported by the organization, that relationship does not preclude the Council Member from taking action on a request from the church or nonprofit organization. Instead, the Ethics Commission finds that fielding these requests and advancing them through the proper channels constitutes the performance of constituent services, so long as the Council Member or his immediate family members has no financial interest therein.

As the City Council Member is serving his constituency in the capacity of which he is elected, and as there is no language in the Ethics Act which prohibits the Council Member from voting on a matter which affects a church in which he is a member, but has no financial interest, the Ethics Commission finds that the Council Member may vote on matters involving the closure of the streets in question. In the interest of open government, the Ethics Commission does recommend that the council member disclose the fact he attends the church and that his father sits on church council prior to voting or taking any action on the issue.

While the Ethics Act does not prohibit the Requester from voting, there is nothing in the Ethics Act which prohibits the Requester from recusing himself if he believes that he cannot fairly decide the issues presented due to his attendance of the church. The Ethics Commission takes no position on whether he should or should not vote.

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 other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
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