

ADVISORY OPINION NO. 2004-25

Issued On January 6, 2005 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A City asks for an exemption to permit it to contract for a "property for property transfer" with an elected City Council Member.

FACTS RELIED UPON BY THE COMMISSION

A City is upgrading its water treatment plant and distribution system. As part of the upgrade, an existing water storage tank will undergo extensive restoration. Heavy machinery must be transported to the site for the restoration project.

The City has determined through engineering studies that the most effective route of ingress and egress to the water storage tank is over a parcel of property which is owned by an elected City Council Member. The City Council Member owns two parcels of property. The parcels are separated by a portion of property owned by the City. The strip of land owned by the City is approximately one hundred fifty feet (150) in length and twenty (20) feet in width. While the strip owned by the City is a potential route of ingress to the water storage tank, due to the steep grade and rocky terrain, it is not conducive to being used as a roadway. The construction of a road over this land would result in significant costs to the City.

Over the years, to gain access to the water storage tank, the public work crews have used a route of travel which passes over the property owned by the City Council Member. The City Council Member has permitted the City to utilize this route without charge. If the City acquires this property, then the route will be further improved to support the transportation of heavy construction equipment. The City wants to legally acquire the property before expending public monies on the improvements.

The City attorney has recommended a "property for property transfer." The agreement would consist of the City exchanging its strip of land, for the parcel of property which is owned by the City Council member. No monetary compensation would be paid to either party.

The properties are comparable in value and size. If the transfer is completed, then the new property will be designated as a public street.

The proposal was referred to City Planning and Zoning Commission. The Planning and Zoning Commission inspected the properties and held a public hearing to consider land use issues relating to the proposed transfer. There was no opposition voiced by any member of the public.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

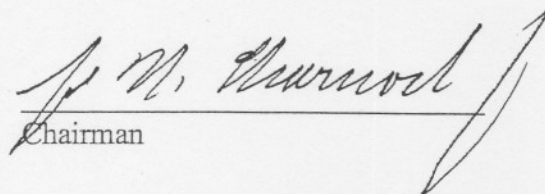
W.Va. Code § 6B-2-5(d)(1) *Interests in public contracts*, provides in part that ... no elected or appointed official or employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in ... a contract which such official or employee may have direct authority to enter into, or over which he or she may have control ...

WV Code § 6B-2-5(d)(3) Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a ...municipality...the affected government body or agency may make written application to the ethics commission for an exemption from subdivisions (1) and (2) of this subsection.

ADVISORY OPINION

The Ethics Act prohibits public servants from being a party to or having a financial interest in a public contract which they have the power to award or control. However, the Ethics Commission has the power to grant a municipality an exemption from this prohibition where it appears that the prohibition would result in excessive cost to the public body or undue hardship.

Based upon the facts presented, the Commission finds that prohibiting the City from exchanging the property would result in excessive cost and undue hardship. If the City is not permitted to acquire the property owned by the City Council Member, then it will need to make extensive improvements to the strip of land it currently owns. Due to the condition of the land, excessive costs will be incurred. Therefore, the Ethics Commission grants the City an exemption from the prohibition of W.Va. Code § 6B-2-5(d) to allow it to transfer the property.


Chairman