

ADVISORY OPINION NO. 2003-15

Issued On December 4, 2003 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A County Commission asks if certain financial interests of its members disqualify them from voting on or approving a tax increment financing (TIF) district or specific TIF project proposals.

FACTS RELIED UPON BY THE COMMISSION

Amendment One to the WV Constitution, passed by the voters in November 2003, authorized the use of tax increment financing secured by property taxes as a new economic development mechanism. The 2002 Legislature created a legislative framework for establishing TIF districts and approving specific TIF projects within an established district.

The County Commission is considering establishing a TIF district in the county. The spouse of one Commissioner (Commissioner A) is employed by a business which is proposing a district be established within the county and which is expected to submit one or more specific financing proposals if the district is approved. A second County Commissioner (Commissioner B) is a part owner and officer of a corporation which owns a condominium and a separate real estate parcel in the proposed district. Commissioner B is contemplating exempting his company's property from the TIF district.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

WV Code 6B-2-5(b) *Use of public office for private gain.*, provides in part that ... 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.

WV Legislative Rules 158-9-2

2.1 A public official or public employee may not vote on or decide a matter that has become "personal" to that individual.

2.2 For the purpose of this section a matter will be considered "personal" to a public official or public employee when he or she has any pecuniary interest either directly or indirectly in the matter or is affected in a manner which may influence his or her vote or would clearly give the appearance of impropriety.

W. Va. Code § 6B-2-5(d)(1) provides in pertinent part that . . . 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 such official or employee may have direct authority to enter into, or over which he or she may have control. . . .

WV Code 61-10-15 states in part that ... It shall be unlawful for any member ... of any ... county or district board ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such member he may have any voice, influence or control ...

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The requester presents two distinct questions regarding Commissioners A and B. The first question involves whether they are precluded from voting on certain matters. The second question focuses on whether prohibitions in the Ethics Act and W. Va. Code § 61-10-15 against having a private interest in a public contract prohibit certain transactions involving the County Commission.

Voting. The Ethics Commission's Legislative rules on voting say that public servants may not vote on matters which have become personal to them. These rules say that matters become personal to a public servant " ... when he or she has any pecuniary interest either directly or indirectly in the matter or is affected in a manner which may influence his or her vote or would clearly give the appearance of impropriety."

Commissioner A's spouse is employed by a business proposing creation of a TIF district. Therefore, Commissioner A should not vote on a proposal to include property owned by her spouse's employer in a TIF district, or on any specific TIF proposals involving her spouse's employer.

Commissioner B has a business interest in real property which is being proposed for inclusion in the TIF district. Therefore, Commissioner B should likewise not vote on a proposal to include property in which he has a financial interest in the TIF district or on any specific proposal involving that property.

Commissioner B notes that the property in which he holds an interest may be excluded from the TIF district. Assuming that Commissioner B's property may properly be "carved out" of the TIF district, and would no longer be eligible for benefits from TIF treatment, Commissioner B would no longer have a personal financial interest in the matter and could then vote on establishing a TIF district without violating the Ethics Act.

However, the Commission notes that W. Va. Code § 7-11B-13 contains additional stipulations on voting on TIF matters which are more restrictive than the limitations in the Ethics Act. The Commission has no authority to determine whether the votes of Commissioners A and B would be consistent with this statute.

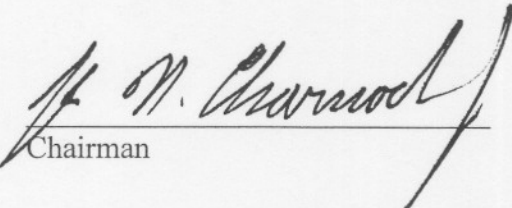
Public Contracts. Both the Ethics Act and W. Va. Code § 61-10-15, a criminal misdemeanor statute, prohibit public servants from having a personal financial interest in a public contract over which their public positions give them control.

Establishing a TIF district does not create a public contract, but approval of a TIF project does. Both prohibitions apply to the County Commission's action in considering and approving TIF projects.

The Ethics Act. The Act's prohibition applies to public servants, their spouses and businesses in which either of them have an ownership interest of more than 10%. Thus, it would be a violation of the Ethics Act for Commissioner A, her spouse or a business in which either of them own more than 10% to be a party to, or have a financial interest in, a TIF project approved by the County Commission. The same would be true for a project involving property owned by Commissioner B.

However, assuming that neither Commissioner A nor her spouse owned 10% of the business by which he is employed, it would not be a violation for the Commission to approve a TIF project involving the spouse's employer, provided Commissioner A does not participate in the decision. The Ethics Act's prohibition does not extend to employers.

W. Va. Code § 61-10-15. This provision applies to certain county personnel, their spouses and businesses with which either of them are associated as employees or owners. This provision applies to Commissioner A, her husband and his employer. The Ethics Commission believes it would be a violation of § 61-10-15 for the Commission to approve a TIF project involving property owned by the business which employs Commissioner A's spouse. The same would be true for a TIF project involving property owned by Commissioner B.


Chairman