

Advisory Opinion 2024-10

Issued on December 5, 2024, by

The West Virginia Ethics Commission

Opinion Sought

A **County Farmland Protection Board Member** asks whether he may participate in a conservation program in which the Board would pay him for a conservation easement on his farmland.

Facts Relied Upon by the Commission

The purpose of the Voluntary Farmland Protection Act, W. Va. Code § 8A-12-1, *et seq.*, is to sustain farming communities, control urban expansion, and protect agricultural land property. The Act allows county commissions to create county farmland protection boards. W. Va. Code § 8A-12-2. These boards are authorized to purchase conservation easements on farmland, which prevent the development of the land for most purposes unrelated to farming. *Id.* Funding for the program comes from local land transfer fees, federal grants, special appropriations, and private donations. *Id.* Landowners may be compensated for the difference between the fair market value of the land and its value for agricultural production.

The Requester is an appointed, unpaid member of a county farmland protection board. The Requester and his uncle own contiguous farmland properties in the County. They have submitted an application(s) for these properties to be considered for a funded conservation easement. The Requester does not reside with his uncle nor do they have any financial dependence upon one another. The application(s) of Requester and his uncle have been tentatively approved but not executed. To date, the Requester has recused himself from all matters related to the application, and he intends, if the transaction is permitted to move forward, to recuse himself from any other related action taken by the Board.

Provisions Relied Upon by the Commission

W. Va. Code § 61-10-15(a) states:

It is unlawful for any member of a county commission, district school officer, secretary of a Board of Education, . . . or any member of any other 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 service 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

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

In addition to the provisions of § 61-10-15 of this code, 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 the official or employee may have direct authority to enter into, or over which he or she may have control: . . . Provided, however, That nothing herein shall be construed to prohibit . . . part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

...
(3) If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection (j) of this section.

W. Va. Code § 6B-1-3 states, in relevant part:

(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.

...
(m) "Relative" means spouse, mother, father, sister, brother, son, daughter, grandmother, grandfather, grandchild, mother-in-law, father-in-law, sister-in-law, brother-in-law, son-in-law, or daughter-in-law.

Advisory Opinion

The Commission must determine whether W. Va. Code § 61-10-15 and the Ethics Act permit the Requester to accept compensation from the Board in return for granting a conservation easement on his property.

W. Va. Code § 61-10-15(a) prohibits county officials, such as the Requester, from having a pecuniary interest, directly or indirectly, in the proceeds of any contract over which he may have any voice, influence, or control. The application of W. Va. Code § 61-10-15(a) is conditioned upon whether the transaction at issue constitutes a contract. In *Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 737 S.E.2d 550 (2012), the West Virginia Supreme Court of Appeals held: "The fundamentals of a legal contract are

competent parties, legal subject matter, valuable consideration and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement.” Syl. pt. 5, *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W. Va. 559, 131 S.E. 253 (1926).

The presence of the essential elements of a contract exist in this easement transaction. Both parties consent to the transaction, the Requester is presumed to be a competent adult, and the Board has legal authority to administer all matters concerning the farmland protection board, subject to the county commission’s final approval of the purchase of the easement. W. Va. Code § 8A-12-2(a).

Finally, valuable consideration is present. In *Young v. Young*, 808 S.E.2d 631, 636 (W. Va. 2017), the West Virginia Supreme Court of Appeals held that “[c]onsideration is a broad term; we have stated that ‘[a] valuable consideration may consist either in some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.’” *Id.* at 636 [internal citation omitted]. Further, in [Advisory Opinion 2021-11](#), the Commission recognized as “consideration,” the obligation of recipients of small business grants to match 25% of the grant total and to use the grant funds for specific purposes. Based on the above rulings, consideration exists here because the Requester stands to receive the monetary difference between the fair market value of the land and its value for agricultural production, and the Board would receive a certain amount of control over the uses of the land.

Therefore, the Commission holds that an easement purchased by the County Farmland Protection Board from the Requester, is a public contract for purposes of W. Va. Code § 61-10-15.

As a farmland owner, the Requester has a pecuniary interest in the easement sale, and as a Board member, he has the requisite voice, influence, or control of the purchase. Normally, this would decide the issue. However, in [Advisory Opinion 2003-07](#), a non-precedential decision, the Commission held that an easement transaction nearly identical to that in the present case was not a contract. Although not entirely clear, it appears that the Commission found that the consideration exchanged as part of the farmland protection program did not amount to a pecuniary interest for purposes of W. Va. Code § 61-10-15. Reconciling the holding in this Advisory Opinion with the plain, unambiguous statutory language is virtually impossible. The Commission is forced to conclude that the reasoning asserted in Advisory Opinion 2003-07 is simply flawed.

In *Young v. State*, 241 W. Va. 489, 826 S.E.2d 346 (W. Va. 2019), the West Virginia Supreme Court of Appeals held, "The primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature." Syl. pt. 8, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953). “We have long recognized that ‘[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but

to apply the statute.” Syl. pt. 5, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959).

In applying the plain language standard above to W. Va. Code § 61-10-15(a), the Commission notes that the statute prohibits all degrees of pecuniary interests, i.e. “direct or indirect,” and the statute’s prohibition is not limited to public contracts. All contracts are subject to the prohibition, except for those contained in the enumerated exceptions, which are not applicable here.¹

In *Fisher v. Jackson*, 107 W. Va. 138, 147 S.E. 541 (W. Va. 1929), the West Virginia Supreme Court of Appeals described the purpose of the precursor to W. Va. Code § 61-10-15, stating that “the purpose of the statute is to safeguard the public purse. **It extends to all contracts or service in which a member ‘may have any voice or control...’**” (Emphasis added) Likewise, in *Summers County Citizens League, Inc. v. Tassos*, 179 W. Va. 261, 367 S.E.2d 209 (1988), the West Virginia Supreme Court of Appeals explained the purpose of W. Va. Code § 61-10-15 by stating:

It forbids a pecuniary interest by a member of the board of education in any contract with the board ... our Legislature very wisely forbade members of boards of education from having a pecuniary interest directly or indirectly in any sort of a contract with a board of education of which they were a member.

...
The prohibition of W. Va. Code, 61-10-15, as amended, was therefore designed ... to protect the public from the mistakes, as well as the connivance, of its officers. ... **If that policy is to be limited by exceptions, it is usually the function of the legislature, and not of this Court, to spell out such exceptions.** *Mississippi Valley Generating*, 364 U.S. at 561, 565, 81 S.Ct. at 315, 317, 5 L.Ed.2d at 295, 297.
(Emphasis added)

Based on the analysis above, the Commission will not follow its non-precedential holding in Advisory Opinion 2003-07 to the extent it held that the type of a contract or financial interest in the conservation easement is “not the type that W. Va. Code § 61-10-15 intends to prohibit.” This previous holding conflicts with the plain statutory language itself and the public policy reasons previously declared by the West Virginia Supreme Court of Appeals.²

The present advisory opinion is in accord with [Advisory Opinion 2013-25](#), in which the Commission held that a conservation district may not reimburse landowner expenses

¹ 'In the interpretation of statutory provisions the familiar maxim expressio unius est exclusio alterius, the express mention of one thing implies the exclusion of another, applies.' Syl. Pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984)." *State v. Folse*, 896 S.E.2d 689 (W. Va. 2023)

²In [Advisory Opinion 1996-39](#), the Commission noted that W. Va Code § 61-10-15 “contains no recusal provision which would permit a person to avoid the prohibition by taking no action in considering or deciding a matter in which they have an interest.” See *Fisher v. Jackson*, 107 W.Va. 138, 147 S.E. 541 (1929)

for the purchase of lime where the provider of the lime is a member of the conservation district board. In response to this opinion, the legislature created an exception to permit such reimbursements by amending [W. Va. Code § 19A-21A-4a](#) shortly after issuance of Advisory Opinion 2013-25. If it is desirable to permit members of a county farmland protection board to participate in its programs, the Legislature may likewise craft such an exception to W. Va. Code § 61-10-15 to permit such transactions.

The Commission holds that W. Va. Code § 61-10-15 prohibits a member of a county farmland protection board from participating in a conservation program in which the Board would pay him for a conservation easement on his farmland.

As for the Ethics Act, a detailed analysis of the application of W. Va. Code § 6B-2-5(d) to the facts of this Opinion is not required given the prohibition of the transaction by W. Va. Code § 61-10-15(a). However, the Commission notes that Requester would qualify for the part-time appointed official exception in W. Va. Code § 6B-2-5(d)(1), above. Accordingly, the transaction at issue would not violate the Ethics Act, so long as the specified conditions in W. Va. Code § 6B-2-5(d)(1) were and continue to be observed.

As for the Requester's uncle, the Commission finds that neither W. Va. Code § 61-10-15 nor the Ethics Act prohibit him from receiving compensation from the Board in exchange for granting a conservation easement, to the extent that his application is severable from the application of the Requester because the Requester does not have a financial interest in his uncle's farmland and is not a relative or immediate family member of his. Further, the Requester may participate in the Board's actions and votes on his uncle's application.

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 Ethics Commission for further advice as it may alter the analysis and render the Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, 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/ Robert J. Wolfe
Robert J. Wolfe, Chairperson
West Virginia Ethics Commission