# ADVISORY OPINION NO. 2016-03

**Issued on February 4, 2016, by**

**THE WEST VIRGINIA ETHICS COMMISSION**

## OPINION SOUGHT

A Municipal Board of Zoning Appeals asks whether one of its members may vote on whether to grant a variance to a real estate developer who may receive a letter of support or favorable public comment from a non-profit organization on whose Board the member also serves.

## FACTS RELIED UPON BY THE COMMISSION

W.Va. Code § 8A-8-1 provides that if a governing body adopts a zoning ordinance, then it shall create a Board of Zoning Appeals ("BZA") to hear appeals on zoning issues. W.Va. Code § 8A-8-9 provides that, among other powers, a BZA may authorize variances to the zoning ordinance.

The BZA member is also a member of a non-profit organization whose purpose is to improve the downtown area of the city through revitalization, promotion of the business community and preservation of local architecture and design. In furtherance of these purposes, the non-profit's Board may issue letters of support or favorable public comment to the BZA for projects in the downtown area.

The Requester states that a real estate project developer has requested variance relief from the BZA that would allow the construction of a building that would include commercial spaces and apartments. In order for the building to be constructed in the proposed location, the builder must receive seven variances to the zoning ordinance. For example, the developer must receive variances to allow the building to be closer to the front and rear property lines than is permitted by the zoning ordinance. The non-profit organization may issue a letter of support or favorable comment to the BZA in support of the developer's request for the variances.

The BZA members and the non-profit organization's Board members are not compensated positions. The Requester states that the BZA member himself and his immediate family members do not have personal interests in the profits or benefits of the building project.

## CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

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(b) "Business" means an entity through which business for-profit is conducted ....

W.Va. Code 68-2-5U) reads in relevant part:

(1) Public officials... may not vote on a matter:

(A) In which they... or a business with which they... [are] associated have a financial interest. Business with which they are associated means a business of which the person ... 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.

**ADVISORY OPINION**

The overriding purpose of the voting provision of the Ethics Act 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." Advisory Opinion 2011-12. The Requester states that the BZA member does not have a personal interest in the building project or the variance request. The question here is whether the BZA member **by virtue of his non-profit Board membership** has a financial interest in the variance that would prohibit him from voting on the variance.

The Ethics Act does not prohibit the BZA member from voting on issues concerning the variance or building project. The voting restrictions in W.Va. Code§ 68-2-SU) prohibit public officials from voting on matters in which (1) they, (2) an immediate family member or (3) a "business" with which they are associated has a financial interest.

The BZA member himself and his immediate family members do not have a financial interest in the building project.

Further, although the BZA member is associated with the non-profit organization, it is not a "business" as defined by the Act to which the voting restrictions in W.Va. Code § 68-2-50) apply. Non-profits are not included in the Ethics Act's definition of "business" in W.Va. Code§ 68-1-3(b). In Advisory Opinion 2011-12 the Commission held that, "public officials who are uncompensated board members of a non-profit organization are not required to recuse themselves on any matters related to any contract or other transaction between the governing

body and the non-profit organization."[1] *See also* Advisory Opinions 2014-02 and 2014-05.

**In conclusion, the Ethics Commission holds that the BZA member may vote on whether to grant a variance to a real estate developer who may receive a letter of support or favorable public comment from a non-profit organization on whose board he also serves.**

*This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should 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 at W.Va. Code §§ 68-1-1 through 68-3-11 and does not purport to interpret other Jaws or rules. In accordance with W.Va. Code § 68-2-3, 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/ Robert J. Wolfe, Chairperson***
**Robert J. Wolfe, Chairperson**

[1] For purposes of this Advisory Opinion, the Commission does not need to determine whether the non-profit organization has a financial interest in the variance.