

**ADVISORY OPINION NO. 94-37**

**ISSUED BY THE**

**WEST VIRGINIA ETHICS COMMISSION**

**ON JANUARY 5, 1995**

**GOVERNMENTAL BODY SEEKING OPINION**

A County Area Development Corporation

**OPINION SOUGHT**

Do either the Ethics Act or WV Code § 61-10-15 prevent or disqualify persons from serving as part-time Directors on the Corporation's board because they serve in other public positions or have private financial interests in companies which do business in the county?

**FACTS RELIED UPON BY THE COMMISSION**

The County Area Development Corporation is a nonprofit membership corporation formed by the County Commission to foster and encourage economic development within the County. The County Commission, the Corporation's sole member, made the initial capital contributions to the Corporation and appointed the members of its first Board of Directors.

The Corporation's Board members ( Directors ) serve part-time and several have private business interests in local companies. The Directors recognize that companies with which they are associated as employees, officers, directors or shareholders can not contract or do business with the Corporation. An exception, discussed below, permits the publication of required legal notices.

The Directors are concerned to establish that neither their other public positions nor their association with private companies doing business in their county business area disqualify them from serving on the Corporation's Board or expose them to potential violations of the WV Governmental Ethics Act or WV Code § 61-10-15.

The Directors also want to be sure that companies with which they are financially associated may do business with other persons or companies that contract with the Corporation or are otherwise involved in a Corporation project.

One of the Directors of the Corporation is the Chairman and CEO of a county bank and owns and operates a local car dealership. This Director is also the chairman of the County Redevelopment Authority. His bank and car dealership will probably do business with persons and companies that contract with the Corporation or are otherwise involved in its projects.

Another Director is the president and publisher of an area newspaper - the only newspaper in the County. His paper carries legal notices and advertisements for the Corporation. Another Director owns a retail furniture store located in the County. This Director also serves as president of the County Commission. His store may do business with persons and companies that contract with the Corporation or are otherwise involved in its projects. The remaining Director is a State employee with no private business interests.

### **PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION**

West Virginia Code §6B-2-5(b)(1) states in pertinent part that...a public official...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. 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.

West Virginia Code §6B-2-5(e) stated in pertinent part that...no present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

West Virginia Code §61-10-15 states in pertinent 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 or service or in furnishing any supplies in the contract for, or the awarding or letting of, which as such member he may have any voice, influence or control...The provisions of this section shall not apply to publications in newspapers required to be made by law.

### **ADVISORY OPINION**

The Ethics Commission's authority and responsibility for advising public servants is limited, with only one exception, to the provisions of the Ethics Act. The one exception is WV Code § 61-10-15, a statute which applies to certain county officials and employees. WV Code § 61-10-15 applies the Corporation's Directors and figures prominently in the issues raised by their request for an advisory opinion.

On the question of disqualification, the Commission finds that neither the Ethics Act nor WV Code §61-10-15 prevent or disqualify any of the Corporation Directors from serving because of their private business interests, occupations or other public positions they hold.

**Contracts with the Corporation.** It is important to recognize, however, that both the Ethics Act and WV Code § 61-10-15 prohibit public servants from having a private financial interest in any contract, purchase or sale of their agency over which their position gives them authority or control. Both prohibitions are a recognition that some situations have historically proven to create problems or at least the appearance of impropriety. Outright prohibitions such as these are established in sensitive situations in order to keep public servants out of harm's way.

Therefore, except for the newspaper's legal advertisements, neither the Corporation's Directors, nor the businesses with which they are associated may contract with, sell to, or buy from **the Corporation** - even if a Director were recused from considering or voting on the matter which affected him or her.

WV Code § 61-10-15 specifies that it "... shall not apply to publications in newspapers required to be made by law." The Director's recusal from considering and voting on the Corporation's news publication decisions relieves him from the Ethics Act's prohibition against private interests in public contracts. That prohibition does not apply to the private interests of **part-time appointed officials** who have been recused.

**Contracts with Corporation clients.** Neither the Ethics Act nor WV Code §61-10-15 would prevent private companies with which the Directors are associated as employees, officers, directors, or shareholders from doing business with persons or companies that contract with the Corporation or are otherwise involved with its projects. There would be no violation if such business were transacted.

The Commission relies upon the representation of the requester that no Authority Member or any of the employees, officers or directors, will require any third party entity to deal with any Board Member or a business with which the Board Member is associated as an employee, officer, director or shareholder. Any such relationship would be voluntary on the part of the third party entity.

**Contracts between the Corporation and other public entities.** Neither the Ethics Act nor WV Code §61-10-15 would prevent the Corporation from transacting business with other public agencies with which the Directors may be associated as members, directors or employees. No provision of the Ethics Act would prevent such transactions and the Commission finds nothing in WV Code §61-10-15 or the decisions of the WV Supreme Court of Appeals to suggest that WV Code §61-10-15 is intended to apply to public contracts between a county agency and another public entity.

Therefore, it would not be a violation of WV Code §61-10-15 if the County Commission, of which one Director is a member, were to contract with the Corporation. Nor would it be a violation for the Corporation to contract with either the County Redevelopment Authority, of which another Director is a member, or the State agency by which another Director is employed.

Finally the Commission notes that it would be improper for the Directors to use the influence of their positions with the Corporation or any nonpublic information gained from working with the Corporation to give themselves or businesses with which they are associated an unfair advantage in securing business with persons who contract with the Corporation or are otherwise involved with its projects. Such conduct would be a violation of the Ethics Act's prohibitions against the use of office for private gain and its prohibition against the misuse of confidential information.

  
Chairman