

ADVISORY OPINION NO. 94-30
ISSUED BY THE
WEST VIRGINIA ETHICS COMMISSION
ON NOVEMBER 3, 1994

GOVERNMENTAL BODY SEEKING OPINION

A County Commissioner

OPINION SOUGHT

Is it a violation of the Ethics Act for a County Commissioner, who is also a realtor, to have a pecuniary interest in the profits or benefits of a real estate contract between the County Development Authority and a client of her real estate company?

FACTS RELIED UPON BY THE COMMISSION

Every County Commission is authorized to create and establish a public agency to be known as a development authority. The purpose of the development authority is to promote, develop and advance the business prosperity and economic welfare of the county, its citizens and industrial complex. The management and control of the county authority, its property, operations, business and affairs is the responsibility of a board whose members are appointed by the county commission.

The requester is an elected County Commission member who owns and operates a real estate company. A client of this company is interested in purchasing industrial development property owned by the County Development Authority. If the sale of the property is completed the County Commissioner will gain financially through a sales commission paid by the Development Authority. Sales commissions are normally paid to the realtor by the seller. The requester stated that if this arrangement would constitute a conflict of interest the client of her real estate company may be willing to pay the sales commission.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-2-5(b)(1) states in pertinent 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.

West Virginia Code §6B-2-5(d)(1) states in pertinent part that...no elected...public official...or business with which he...is associated may be a party to or have an interest in the profits or benefits of a contract which such official...may have direct authority to enter into, or over which he...may have control...

West Virginia Code §61-10-15 states in pertinent part that...It shall be unlawful for any member of a county commission...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.

ADVISORY OPINION

The Ethics Act

The requester is an elected County Commission member and owns and operates a real estate company. A client of this company is interested in purchasing industrial development property owned by the County Development Authority. The County Commission appoints all of the members of the County Development Authority. If the sale of the property is completed the County Commissioner will gain financially through the receipt of a sales commission.

Pursuant to WV Code §6B-2-5(d)(1) a public official may not have more than a limited interest in the profits or benefits of a public contract over which he has **direct** authority or control. The sales agreement between the client of her real estate firm and the County Development Authority is one in which the County Commission member has a direct pecuniary interest. However, neither the requester nor the other County Commission members have direct authority or control over the award of contracts let by the County Development Authority.

Therefore, it would not be a violation of WV Code §6B-2-5(d)(1) for a County Commission member to have a pecuniary interest in the profits or benefits of a real estate contract between the County Development Authority and a client of her real estate company.

WV Code §6B-2-5(b)(1) provides that a public official may not use his public office or resulting prestige for his own private gain or for the private gain of another. Therefore, the requester should not use her position as a County Commission member to influence, obtain, increase, or promote her personal interests as a real estate agent.

West Virginia Code §61-10-15

West Virginia Code §61-10-15 provides that it is a criminal violation for any county officer to be pecuniarily interested, directly or indirectly, in the proceeds of any contract or service when he may have voice, influence or control over the letting of such contract. Any person who violates this provision is guilty of a misdemeanor and subject to removal from office.

As previously noted, the County Commission member, as a real estate agent would have a pecuniary interest in the profits or benefits of a real estate contract between the County Development Authority and a client of her real estate company. The County Commission appoints all of the board members of the Development Authority.

Although the Commission determined that the requester does not exercise **direct** authority and control over the County Development Authority, WV Code §61-10-15 requires only that a county official exercise voice, influence or control over the contract.

The Ethics Commission finds that the power of the County Commission to appoint the members of the County Development Authority, along with the authority to make contributions from general funds and transfer and convey property to the Authority, is sufficient to give the requester some voice or influence over the Development Authority's contracts. Consequently, the requester's position as a County Commissioner does give her the degree of control contemplated by WV Code §61-10-15. This finding is consistent with previous opinions (see Advisory Opinions #93-05 - Public Service District, #94-08 - County Solid Waste Authority, and #94-22 - County School Board) issued by the Ethics Commission.

Therefore, it would be a violation of WV Code §61-10-15 for the requester to have a pecuniary interest in the profits or benefits of a real estate contract between the County Development Authority and a client of her real estate company.

The fact that the requester's client, and not the County Development Authority, may agree to pay the sales commission does not affect the outcome of this opinion. In fact, the possibility that the requester could arrange for the client to pay the sales commission further demonstrates the degree of voice or control that he has over the contract.

The Commission notes that it is without authority to grant exemptions to WV Code §61-10-15.


Chairman