

ADVISORY OPINION NO. 95-09

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON APRIL 6, 1995

PUBLIC OFFICIAL SEEKING OPINION

Member of a County Redevelopment Authority

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code §61-10-15 for a member of a County Redevelopment Authority to lease or donate land to the Authority?

FACTS RELIED UPON BY THE COMMISSION

A County Redevelopment Authority was created in 1989 to promote economic development and diversify the local economy. It is a financially self-sustaining agency. Its current funding consists of profits from real-estate sales provided from lots purchased by the agency, a five year commitment of \$20,000 per year from a local bank, and a four year commitment of \$25,000 per year from another local company. However, these financial commitments will be ending soon and the Authority is looking to provide long term stability.

A Board Member of the Authority would like to lease a tract of land to the Authority for the consideration of \$1 per year for fifty years, or donate the property to the Authority, with a reverter clause included in either case providing that once the property ceases to generate revenue for the Authority and all assets are liquidated the property would revert back to the Board Member. The requester has stated that this is a valuable piece of property, readily accessible for economic development.

If the Authority is allowed to utilize this property they intend to divide it into five one acre tracts to be used as test plots for growing different types agricultural crops such as grapes, corn, blueberries and apples. There will be no buildings or other type of improvements made to the property.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 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 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...Provided, however, that nothing herein shall be construed to prohibit a part-time appointed public official from entering into a contract which such part-time appointed public official may have direct authority to enter into or over which he or she may have control when such official has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

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

ADVISORY OPINION

The Ethics Act

A Board Member of the Authority would like to lease a tract of land to the Authority for the consideration of \$1 per year for fifty years, or donate the property to the Authority, with a reverter clause included which would provide that once the property ceases to generate revenue for the Authority and all assets are liquidated the property would revert back to the Board Member.

Pursuant to WV Code §6B-2-5(b)(1) a public official may not use his office or the resulting prestige for his own private gain or for the private gain of another. Therefore, the requester may not use his position with the County Redevelopment Authority to secure additions or improvements to this property.

West Virginia Code §6B-2-5(d)(1) prohibits a public official from having more than a limited interest in the profits or benefits of a public contract over which he has direct authority or control.

As a member of the Redevelopment Authority Board, the member would have authority and control over all contracts entered into by the Authority, including the lease of his personal property to the Authority.

However, WV Code §6B-2-5(d)(1) includes a proviso which excludes part-time appointed public officials from the prohibition against having more than a limited interest in the profits or benefits of a public contract over which they have direct authority or control, provided the official is recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

Therefore, it would not be a violation of WV Code §6B-2-5(d)(1) for a member of a County Redevelopment Authority to lease or donate land to the Authority provided he recuses himself from the Authority's decision to execute the lease or accept the gift and no additions or improvements are made to the property.

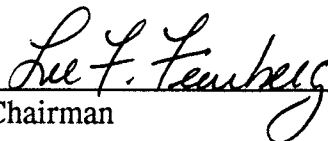
West Virginia Code §61-10-15

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.

However, the West Virginia Supreme Court of Appeals held, in Jordan v. McCourt, 62 S.E. 2d 555 (1950), that there are certain instances where the pecuniary interest in a public contract is so small as to be deemed *de minimis* and although a technical violation of WV Code §61-10-15 may exist, it is not the type of pecuniary interest which triggers the sanctions of WV Code §61-10-15.

In this instance, the Authority member's pecuniary interest in the contract is, at most, \$1 per year for fifty years. The Commission considers this to be a *de minimis* interest in a public contract. Therefore, it is not a violation of WV Code §61-10-15 for a member of a County Redevelopment Authority to lease or donate land to the Authority **provided** his interest remains *de minimis*, i.e. there are no additions or improvements made to the property which would benefit the member upon reversion.

Pursuant to WV Code §6B-2-3, any person acting in good faith reliance on an advisory opinion is immune for the sanctions of section fifteen, article ten, chapter sixty-one, and shall have an absolute defense to any criminal prosecution for actions taken in good faith reliance upon such opinion.


Chairman