ADVISORY OPINION NO. 2016-13

Issued on October 6, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **City Council member** who serves on the City's Planning Commission asks whether she may vote or otherwise participate in matters pertaining to the development of land that a neighborhood association of which she is a member opposes.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a City Council member who serves as the Council's representative on the City's Planning Commission. In her private capacity, she is a member of an unincorporated neighborhood association. Before she took public office, she served as a steering committee member for the Association. The purpose of the Association is to protect the interests of residents' homes in two neighborhoods which are located within the Requester's voting ward. The Requester owns and resides in a home in one of these neighborhoods.

The Requester states that a development company had been conducting commercial timbering operations on a hilltop that overlooks the neighborhoods without proper zoning exceptions or approval from the City. The operations have included building access roads, burning debris, excavating soil with heavy equipment and stripping the hilltop of much of its covering. The Requester states that these operations have caused annoyance and inconvenience to the neighborhood residents, *e.g.,* increased traffic and mud on the roads.

Prior to the Requester's election to City Council, the City ordered the development company to cease and desist from further development activity until it receives City approval of the company's site plan application. The City stated in the letter, "The concerns expressed from the community and the scope of the potential impact the activity or development -- be it occurring, planned or potential -- is far reaching and beyond typical." The development company has not submitted a site plan application or requested approval from the City to develop the hilltop.

The Requester states that the development company, despite the City's cease and desist order, continued its development of the hilltop. Prior to the Requester's election to City Council, the Association filed a lawsuit in circuit court seeking an injunction to stop further development of the hillside until the development company secured proper approvals from the City's Planning

Commission and Board of Zoning Appeals. The City is not a party to the lawsuit. The lawsuit alleges that, in addition to its timbering operations, the developer has stated that he intends to remove more of the hilltop to quarry the natural resources and to build a mall. The lawsuit further alleges that the operations have caused great inconvenience and worry about the effects on the property in the neighborhoods and possible diminution of their property values.

Prior to holding public office and while serving as a steering committee member for the Association, the Requester signed a verification for a Verified Amended Complaint on behalf of the Association in the lawsuit. The Rules of Civil Procedure do not require that civil complaints be verified by a plaintiff or the plaintiff's representative.[1] The verification provides that the Requester "avers and says that the facts and allegations ... are true or ... upon information and belief ... believes them to be true."

The Requester is no longer acting as a representative of the Association in the lawsuit or in any other forum. She is simply a member of the Association. The Requester states that she has not and will not represent the Association before the City Council or any of its commissions, boards or committees.[2]

Neither the Requester nor the Association is seeking monetary damages; however, in the same lawsuit, one homeowner and his wife who live on property that adjoins the hilltop are seeking monetary compensation for property damage and for an alleged illness caused from burning the debris from the timbering operation.

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[1] Rule 11 of the W.Va. Rules of Civil Procedure provides:

Signing of pleadings, motions and other papers; representations to court; sanctions

1. **Signature.** - Every pleading, motion and other paper shall be signed by at least one attorney of record in the attorney's individual name, or if the party is not represented by an attorney shall be signed by the party. Each paper shall state the signer's address and phone number, if any, and The West Virginia State Bar identification number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit ....

[2] Therefore, the following provision of the Ethics Act, at W.Va. Code§ 6B-2-5(f), is not triggered:

> (f) *Prohibited representation.* -- No present ... appointed public official ... shall, during or after ... her public ... service, represent a client or act in a representative capacity with or without compensation on behalf of any person in a ... license or permit application... or other particular matter involving a specific party or parties which arose during his or her period of public service... and in which he or she personally and substantially participated in a decision-making, advisory or staff support capacity. A staff attorney, accountant or other professional employee who has represented a government agency in a particular matter shall not thereafter represent another client in the same or substantially related matter in which that client's interests are materially adverse to the interests of the government agency, without the consent of the government agency ...

The Requester states that her home is in close proximity to the hillside but is not contiguous with the hillside and that, due to the location of her home, she is similarly situated to around 700 other homeowners.

The circuit court in which the lawsuit is pending granted the Association's request for a preliminary injunction and ordered the development company to stop further development of the land until it receives the City's approval.

Therefore, the Requester anticipates that the development company may appear before City Council and its Planning Commission and Board of Zoning Appeals to obtain the City's approval to develop the hilltop. She further anticipates that the development company's proposed development plan will not align with the Association's and her own best interests. For example, the development of the land may cause the residents' properties to flood and may cause the loss of enjoyment of their properties.

In the event the developer seeks licenses, permits, zoning changes and/or other permission from the City to develop the land in a manner that may affect these neighborhoods, the Requester seeks guidance on whether the Ethics Act prohibits or places limitations on her participation as a Council member and/or City Planning commission member. She further asks whether she may serve on other City committees, such as the finance, development, public works and parks and recreation committees.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> 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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in *de minimis* private gain does not constitute use of public office for private gain under this subsection. 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.

W.Va. Code§ 6B-2-5(j) provides, in relevant part:

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

(II) A public official may vote:

> (A) If the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than, any other member of a profession, occupation, class of persons or class of businesses. A class shall consist of not fewer than five similarly situated persons or businesses.

ADVISORY OPINION

Association member

The question here is two-fold because the Requester is both a member of the neighborhood Association and the owner of property that may be affected by the development of the hilltop. The first relationship does not bar her participation in the City's possible actions regarding the development of the hilltop. Although the Act at W.Va. Code § 68-2-SU) prohibits a public official from voting on matters concerning a for-profit business with which they are associated, the Act permits them to vote on matters concerning a not-for-profit organization with which they may be associated. Advisory Opinion 2011-12.

In Advisory Opinion 2016-03, the Ethics Commission held that a municipal board of zoning appeals member may vote on whether to grant a variance request by a real estate developer who received a letter of support from a non-profit organization on whose board he also served.

Therefore, the Requester's status as a member of the Association and her past action of signing the verification for the Association's lawsuit against the development company does not prohibit her from participating and voting as a member of City Council. She likewise is not prohibited from participating and voting, as a member of any of the City's commissions, boards or committees, on matters concerning the development and land use of the hilltop property which may come before these City bodies.

Property owner

The Ethics Commission will now determine whether the Requester may participate in matters related to the development of the subject hilltop given her status as a potentially affected property owner. The Ethics Act, at W.Va. Code 6B-2-5U), prohibits a public official from voting on a matter in which he or she has a financial interest. This prohibition does not apply when a public official is part of a class of five or more similarly situated persons.

The Commission considered this "class exception" in Advisory Opinion 2004-03, in which a municipal planning commission member asked whether he may vote on a zoning request which involved property adjacent to his own. The Commission declined to apply the class exception there because "the requester's financial interest in this matter is clearly significant, if not unique." In the instant situation, however, the Requester states that she does not have a unique interest in the development of the hilltop, but instead is a member of a class of 700 similarly situated homeowners.

Therefore, the Ethics Commission holds that if the Requester is a part of a class of five or more affected property owners, she may vote on and otherwise fully participate in all matters that come before the City and its boards, commissions and committees concerning the development and land use of the hilltop property.

Since the Requester may vote pursuant to the class exception, the Commission need not determine whether she has a financial interest as contemplated by the Ethics Act in the development of the subject hilltop.

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 Ethics 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* laws *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
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