ADVISORY OPINION NO. 2013-29-NP

Issued On November 7, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

[NOTE: THIS IS A RECONSIDERATION AND REVISION OF AN EARLIER ADVISORY OPINION 2013-29 ISSUED OCTOBER 3, 2013. THIS OPINION IS INTENDED TO REPLACE THE EARLIER OPINION.]

OPINION SOUGHT

A **County Floodplain Manager,** who is also the County Surveyor, and who owns a private surveying company and land, and whose father owns land and mineral rights, poses three questions:

> 1. Is there a conflict between being the County Surveyor and being employed part-time by the County Commission as the County Floodplain Manager?
> 2. Is there a conflict for the County Floodplain Manager to perform private land surveys which designate whether an area is in a floodplain?
> 3. Is it a conflict for the County Floodplain Manager to perform Floodplain Manager duties when natural gas companies submit applications to work in the designated floodplain?

FACTS RELIED UPON BY THE COMMISSION

The Requester is the elected County Surveyor. The Handbook of Elected Officials for County Government, published by the West Virginia Association of Counties, contains this job description for a County Surveyor.

> Each county elects a surveyor every four years, but the office carries no official duties and no salary. It is an office required by the West Virginia Constitution and the county must provide office space. Many counties do not have a surveyor. In counties with surveyors, they are compensated for the work performed such as providing documents for property tax sales or assisting in property disputes and boundary locations.

The Requester also works part-time as the County Floodplain Manager, and is charged with enforcing the County's floodplain ordinances, as well as the issuance of permits for construction in a floodplain. He oversees flood mitigation projects, which typically include: (1) Acquisition and demolition (e.g. county acquiring a flood prone structure and demolishing the structure); (2) Elevation (e.g. raising a structure out of the flooding hazard while ensuring the lower part of the structure will allow for the unobstructed flow

of water); (3) Relocation (e.g. physically moving a structure out of the hazard area); and (4) Flood-proofing (e.g. making a structure more resistant to the effects of flooding).

In his private capacity, the Requester owns a private surveying company, and often performs FEMA elevation certificate surveys in the same county. It is possible that the land of one or more clients of his private business may be located in a designated floodplain, but that fact is unknown **before** the survey is performed.

Additionally, the Requester states that he performs many types of land surveying in his private capacity, the bulk of which is related to boundary surveying. The Requester states that only ten percent of his private survey business involves floodplain or elevation surveys. This includes the retracement of already existing boundary lines and creating new lots or parcels of land. These surveys have nothing to do with FEMA or the duties/jurisdiction of the County Floodplain Manager.

Further, the Requester and his father own land and mineral rights in the same county. According to the Requester, he has no financial interest in his father's land or mineral rights, but he is his father's sole heir.

The Requester's county is in the middle of a huge Marcellus Shale natural gas drilling boom involving multiple gas companies. One of the companies holds the lease under the Requester's house lot. His father owns fractional mineral royalties under thousands of leased acres in the county, thus dealing with virtually all of the gas companies operating in the county.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-1-2(c) reads:

> The Legislature finds that the state government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official or public employee from the responsibility of voting or deciding a matter; **however, when such conflict becomes personal to a particular public official or public employee, such person should seek to be** ... **relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.**

(Emphasis supplied)

W. Va. Code§ 6B-2-5(b) reads 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.

> 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(d)(1) prohibits public officials and public employees from being a party to or having an interest in the profits or benefits of a contract over which the official or employee has direct authority or control.

Finally, W. Va. Code§ 61-10-15(a) reads, in pertinent part:

> It is unlawful for ... any ... county ... officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract if ... he or she may have any voice, influence or control....

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Both the Ethics Act and W. Va. Code§ 61-10-15 prohibit public servants from having a financial interest in a public contract over which their public position gives them control. Neither poses a problem in this situation, since the County Commissioners who employ the Requester as County Floodplain Manager do not have a financial interest in the compensation paid the County Surveyor and the County Surveyor has no official voice, influence or control over any of the County Commission's contracts.

In Advisory Opinion 2001-37, a County Commission and County Surveyor asked if the County Commission could pay the County Surveyor for time spent on, or in preparation for work on, county projects. The Ethics Commission stated,

> No provision of the Ethics Act disqualifies the County Surveyor from consideration for employment by the County to work on county projects. So long as the County Surveyor is qualified to perform the activities he is paid to perform, it would not be a violation of the Ethics Act for the County Commissioners to pay him or for him to accept payment.

The County Surveyor has no statutory duties. Thus, as to the first question, the Requester may continue to be employed as the County Floodplain Manager and continue to serve as the elected County Surveyor. This conclusion is academic, however, due to the conflicts of interest related to the Requester's private business, addressed below in response to the remaining questions.

The second question posed limits the Requester's ability to perform the duties of the County Floodplain Manager. Due to the nature of surveys required for FEMA elevation certificates, he will not know until **after** performing the survey whether a potential

customer is subject to his regulatory authority as County Floodplain Manager.[1] This situation results in divided loyalty between his private business and public duties. In Advisory Opinion 2012-17, the Commission considered whether a Presiding Officer of a house of the West Virginia Legislature may be retained to provide legal services to an Association that is actively engaged in lobbying on behalf of its members. The Commission concluded that he could not do so, and stated:

> While, the private gain prohibition provides an exception for "the performance of usual and customary duties associated with the office ... or [performance of] constituent services", the Ethics Act expressly limits the exception to those duties performed without compensation. Here, the Commission finds that in applying this provision to the facts presented, it is impracticable, if not impossible, to craft limitations that clearly and fairly demarcate his public job duties, the interests of the Association, and the interests of his constituents ....

Thus the Requester is prohibited from performing any elevation or floodplain surveys in his private capacity while serving as the County Floodplain Manager.

He may, however, continue to perform other private survey work unrelated to his duties as County Floodplain Manager, such boundary surveying since those surveys do not have anything to do with FEMA or otherwise come under the Floodplain Manager's jurisdiction. Restrictions apply. The Requester may not perform any duties in his capacity as the County Floodplain Manager on any properties in which he has conducted private survey work within the preceding six months or six months thereafter. Additionally, if the Requester has performed any actions relating to his public position on a piece of property, he may not perform any private survey work on the same property for the following six months. *See generally* Advisory Opinion 2012-07 in which the Commission prohibited a Mayor from presiding over any judicial matters involving customers of his private business when the transaction occurred within the preceding six months.

Instead, any other county official authorized to act in that capacity must perform those duties when the Requester has such a conflict of interest. Upon information and belief, one of the County Commissioners is also certified to perform the duties of Floodplain Manager. If and when that occurs, however, the County Commissioner is required to recuse himself from any appeal of any actions in the performance of such duties.

Additionally, as to the third question, the Commission hereby finds that the Requester may not be involved as the County Floodplain Manager in any matters involving the gas company that holds the lease under his house lot, or any other gas company with an interest in his father's land or mineral rights. Although he does not have a financial interest in his father's land or mineral rights, as his father's sole heir, this situation creates an unavoidable conflict of interest resulting in an impermissible use of office, or the prestige thereof, for private gain.

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[1] As a part-time employee, the Requester is not subject to the provisions of W. Va. Code § 6b-2-5(h).

As a result of the foregoing, the Commission hereby finds:

1. The Requester may continue his part time employment as County Floodplain Manager and continue to serve as the elected County Surveyor.
2. The Requester may continue his part-time employment as County Floodplain Manager while continuing to operate his private surveying business in the same county so long as he does not conduct any floodplain-related surveys and does not conduct perform private and public surveys on the same property within six months.
3. The Requester may **not** perform the duties of his part time employment as County Floodplain Manager for any gas company in the county that has an interest in his or his father's land or mineral rights.

The Commission commends the Requester for seeking this opinion, but concludes that the County Commission should select someone else to serve as County Floodplain Manager. Due to the difficulty the County Commission may encounter in finding a competent qualified replacement, the Commission hereby delays the effective date of this opinion for ninety (90) days from the date hereof.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.* and W. Va. Code § 61-10-15, and does not purport to interpret other laws or rules. Due to the unique facts and situation presented, this opinion has no precedential effect and may not be relied upon in good faith by others.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman