ADVISORY OPINION NO. 2012-38

Issued On October 4, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Appointed Member of a Municipal Historical Preservation Review Commission** (Review Commission) asks two questions:

1. When owners of distressed properties appear before the Review Commission, may Members put them in contact with potential buyers?

2. If the Review Commission is unable to assist in facilitating the sale of the distressed property, under what circumstances, if any, may a Member of the Review Commission purchase the property?

FACTS RELIED UPON BY THE COMMISSION

The Requester is a part-time appointed member of a municipal historical preservation review commission. Established pursuant to W. Va. Code§ 8-26A-1 *et* seq., the Review Commission was created to assist in preserving buildings, structures, and sites of historical and architectural significance within the historic downtown district. Appointed by City Council upon recommendation of the City Manager, the members are required to have demonstrated special interest, experience or education in history, architecture, planning, real estate or law. As a result of the membership requirement, some of the members are in the business of rehabilitating distressed properties, or working with other professionals or companies which provide such services. The Requester works for a firm that specializes in architectural services and interior design for commercial and residential properties.

Among its other responsibilities, the Review Commission has the power and authority to establish standards and rules and regulations for the erection, care, modification, alteration, management, and restoration, demolition or removal of any designated historic landmarks or any structure located in the historic preservation district. The Review Commission issues certificates of appropriateness to regulate the construction, renovation, demolition or other action affecting buildings, sites or structures in the historic district. Owners must obtain the Review Commission's approval before taking any such action on the subject property.

The Review Commission is empowered to seek the advice and assistance of individuals, groups, departments and agencies of government who conduct historical preservation programs and coordinate with them.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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(e) provides:

> 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.

W. Va. Code § 6B-2-5(h) reads in relevant part:

(1) No full-time official or full-time public employee may ... seek to purchase, sell or lease real or personal property to or from any person who:

> (A) Has a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months; or,
>
> (B) Has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working.

W. Va. Code§ 6B-2-50) reads, in relevant part,

> (1) Public officials ... may not vote on a matter:
>
> (A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest....

ADVISORY OPINION

The Ethics Act generally prohibits public servants from using their public office for their own financial gain or that of another. This prohibition serves as the cornerstone for the more specific restrictions that govern the Requester's second question.

Although it would violate the Ethics Act's prohibition against the use of public office for the private gain of another for the Review Commission to refer a seller to a specific buyer, the Review Commission may make a general referral. See Advisory Opinion 90-146 (a State Department that regulates public adoptions permitted to compile a list of approved adoptive agencies and licensed social workers to provide to prospective private adoption clients) and Advisory Opinion 2012-12 (Local Board of Health authorized to provide to clients a list of medical doctors who accept referrals). See *also* Advisory Opinion 95-13 (businesses that employ school psychologists may be included on referral lists given to parents so long as there was no attempt to steer the parents to a particular provider).

Municipal ordinance expressly authorizes the Review Commission to seek the advice and assistance of individuals, groups, departments and agencies of government who conduct historical preservation programs and work in coordination with them. Thus, these groups could assist the Review Commission in compiling a list of companies and individuals who are interested in the type of property that is subject to the Review Commission's regulation. The Review Commission may provide the list to each applicant for a certificate of appropriateness and to each other person whose property the Review Commission regulates, but may not recommend a specific person or company or otherwise steer property owners to a particular buyer.

Having answered the first question in the affirmative, the Ethics Commission now considers whether, if the Review Commission is unable to assist in facilitating the sale of the distressed property despite providing a list of prospective buyers, a Member of the Review Commission may purchase the property, and if so, under what conditions.

The members of the Review Commission are part-time appointed officials. In W. Va. Code§ 6B-1-2(c), the Legislature discussed the inherent potential for conflict in part-time government service as follows:

> 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 excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

Consistent with these considerations, the Legislature limited application of the prohibition against buying from regulated persons in§ 6B-2-5(h) to full-time officials and public employees. Accordingly, the Ethics Act does not prohibit a part-time official, such as a member of a municipal historical preservation review commission, from buying

property from persons who have matters on which the member has taken regulatory action during the past twelve months. The Requester may not, however, use confidential information acquired in course of his official duties to further his own personal interests or the interests of another person. W. Va. Code§ 6B-2-5(e)

Other limitations apply. The voting provision of the Ethics Act prohibits a public official from voting on a matter in which he or a business with which he is associated has a financial interest. W. Va. Code§ 6B-2-50)(1)(A). To avoid violating the Ethics Act, the Requester must completely recuse himself from the process at the outset if he has an interest in purchasing any property that comes before the Review Commission. He may not take any official action concerning the subject property, vote or participate in any decision-making capacity regarding the property. Additionally, he may not make informal attempts to influence other members to act in a particular way regarding a property in which he (or his client) is interested.

For recusal to be effective, the Requester must excuse himself from participating in the discussion and decision-making process by leaving the room during the period, fully disclosing his interests, and recusing himself from voting on the issue. W. Va. Code§ 6B-2-5(j)(3). The meeting minutes or other relevant record should reflect your full recusal.

The advisory opinion rendered herein 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 opinion is limited to the analysis of whether the Ethic Act would be violated by the proposed conduct. The Ethics Commission is without authority to determine whether other laws or rules, including the policies of the Requester's government agency prohibit or otherwise restrict the proposed conduct.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 68-1-1, *et seq.* and does not purport to interpret other laws or rules. In accordance with W. Va. Code § 6B-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/Jonathan E. Turak,
Jonathan E. Turak, Acting Chairperson