ADVISORY OPINION NO. 2012-49

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WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Farmland Protection Board** asks what actions are permissible under the Ethics Act when it engages in fundraising.

FACTS RELIED UPON BY THE COMMISSION

The County Farmland Protection Board was established under the Voluntary Farmland Protection Act, W. Va. Code§ 8-24-72. Through this Act, the Legislature declared that agriculture is a unique "life support" industry and that a need exists to assist those agricultural areas of the state which are experiencing the irreversible loss of agricultural land. The Act further authorized the creation of county Farmland Protection Boards, Farmland Protection Programs, and the West Virginia Agricultural Land Protection Authority; detailed the contents and requirements of the Farmland Protection Programs; outlined the powers and duties of the Farmland Protection Boards and the Authority; detailed the methods of farmland protection; outlined the criteria for acquisition of conservation easements; outlined the use of land after a conservation easement is acquired; and outlined potential funding for the Farmland Protection Programs, and the methods to secure such funding.

County Farmland Protection Boards receive funding through a variety of sources. By statute, a portion of the county real estate transfer tax goes to the Boards when the County Commission votes to appropriate the funds from real estate transfer taxes. Further, County Commissions sometimes appropriate money to Farmland Protection Boards for their operations. Additionally, County Farmland Protection Boards and the West Virginia Agricultural Land Protection Authority (Authority) are statutorily authorized to pursue, seek and apply for any and all county, state, federal and private funding available, consistent with the purpose of the voluntary farmland protection programs.

The County's revenue is matched by funding from several partners, including the USDA Natural Resources Conservation Service, the National Park Service/American Battlefield Protection Program, the Nature Conservancy, and other private sources, including donations.

The Requester seeks to solicit private persons, businesses and other entities for contributions. As part of its fund-raising efforts, Requester would like to make follow-up telephone calls and emails to recipients of written solicitations. The Requester states that this is standard practice in fund-raising, and is more effective than following up by additional written correspondence.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

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

(c) *Gifts.* -- (1) A public official or public employee may not solicit any gift unless the solicitation is for a charitable purpose with no resulting direct pecuniary benefit conferred upon the official or employee or his or her immediate family: *Provided,* That no public official or public employee may solicit for a charitable purpose any gift from any person who is also an official or employee of the state and whose position is subordinate to the soliciting official or employee: *Provided, however,* That nothing herein shall prohibit a candidate for public office from soliciting a lawful political contribution. No official or employee may knowingly accept any gift, directly or indirectly, from a lobbyist or from any person whom the official or employee knows or has reason to know:

(A) Is doing or seeking to do business of any kind with his or her agency;

(B) Is engaged in activities which are regulated or controlled by his or her agency; or

(C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his or her official duties.

Title 158, Series 7, Section 7. Manner of Solicitation and Use of Funds reads:

7.1. Public officials, public employees and agencies who regulate individuals or businesses may not orally solicit donations from:

a. Persons under the regulatory control of the agency. A person is under the regulatory control of the public official, employee or agency if the person has a matter pending before the agency or had a matter pending within the past 12 months. This subsection does not apply to purely law enforcement agencies, officials or employees who do not actually regulate or exercise regulatory control over other persons but merely enforce existing laws and rules as to all applicable persons;

b. A vendor which has a contract with the agency, is bidding on a contract or is in the process of soliciting business from the agency.

7.2. A written solicitation to the public or business community at large, even if the targeted group may encompass regulated persons or vendors, is permissible; Provided, That the written solicitation may not be directed solely to persons under the regulatory authority of, or vendors, of the public official, employee or agency. This subsection does not apply to purely law enforcement agencies, officials or employees who do not

actually regulate or exercise regulatory control over other persons but merely enforce existing laws and rules as to all applicable persons.

7.3. Solicitations should be conducted, and acknowledgments made, in a fair and even-handed manner. Each solicitation should contain a statement setting forth that donations are purely voluntary.

7.4. Under no circumstances should anyone soliciting a contribution for a charitable purpose state that contributors will receive some special treatment from a government agency or its employees, or any other sort of quid pro quo as a consequence of making a donation.

W. Va. Code§ 8A-12-1. Legislative findings and purpose.

(a) The Legislature hereby finds and declares that agriculture is a unique "life support" industry and that a need exists to assist those agricultural areas of the state which are experiencing the irreversible loss of agricultural land.

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(c) Further, it is the intent of the Legislature to establish a West Virginia agricultural land protection authority, hereinafter "authority", to assist persons, other entities and counties to obtain funding from any source available to accomplish the purposes of the voluntary farmland protection programs.

W. Va. Code§ 8 A-12-5(f). A farmland protection board has power to "pursue and apply for any and all county, state, federal and private funding available, consistent with the purpose of the voluntary farmland protection programs."

W. Va. Code §8 A-12-6. The duties of each farmland protection board are as follows:

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(d) To seek and apply for all available funds from federal, state, county and private sources to accomplish the purposes of the voluntary farmland protection programs....

W. Va. Code §8 A-12-9(e). The West Virginia Agricultural Land Protection Authority has the power to "pursue and apply for any and all state, federal and private funding available consistent with the purpose of the voluntary farmland protection programs."

W. Va. Code§ 8A-12-10. The West Virginia agricultural Land Protection Authority shall:

(a) Disseminate information regarding agricultural land protection and promote the protection of agricultural land;

(b) Assist county farmland protection boards in applying for and obtaining all state and federal funding available consistent with the purposes of the farmland protection programs;

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(e) Seek and apply for all available funds from federal, state and private sources to accomplish the purposes of the farmland protection programs.

ADVISORY OPINION

The Ethics Act restricts public servants from soliciting funds for non-charitable purposes. One underlying purpose of this provision is to ensure that public servants do not solicit for their own benefit or that of another. Another underlying purpose is that public agencies should not solicit donations to cover their operational costs or to underwrite traditional governmental functions.[1] An equally compelling concern is that potential donors should not feel compelled to donate or face unfavorable treatment, or be led to believe that by donating, they will receive preferential treatment by a government agency.

The West Virginia Ethics Act generally prohibits a public official or public employee from soliciting any gift unless the solicitation is for a charitable purpose with no resulting direct pecuniary benefit conferred upon the official or employee or his or her immediate family. W. Va. Code§ 6B-2-5(c). Although the statute does not define "charitable purpose", the Commission's legislative rules provide that the Commission will make such a determination on a case-by-case basis. 158 C.S.R 7 § 6.2. *See* Advisory Opinion 2005-02 ("As a general guideline, the Commission recognizes two main categories of programs or activities which constitute a charitable purpose: (1) Those which benefit the poor or disadvantaged; and, (2) Those which serve a public purpose or provide a significant public benefit."); and Advisory Opinion 2005-02 ("The overriding purpose of the solicitation must be to provide a benefit to the public as opposed to defraying the internal administrative costs of the [Agency].")

This is distinguishable from those situations where there is express statutory authority for a public entity to solicit private funds. *See e.g.* W. Va. Code§ 18B-2A-4(m); W. Va. Code§ 49-9-1?(b); W. Va. Code§ 5-1E-3(6). *See also* Advisory Opinion 2011-11 wherein the Commission found it was permissible for a public agency that provides housing for veterans to solicit, since its enabling legislation authorizes it. Thus, here the Commission must first determine whether the Requester's enabling legislation authorizes it to solicit.

[1] For example, in A.O. 2007-15 the Commission noted that "[A]n equally important rule limiting solicitations by a government agency is that the government agency may not solicit funds to use for its internal operating expenses." In that opinion, the Commission ruled that a local Solid Waste Authority could not solicit donations to make site improvements for the construction of a recycling facility.

The various legislative provisions cited hereinabove make it abundantly clear that County Farmland Protection Boards and the West Virginia Agricultural Land Protection Authority are expressly authorized to engage in fundraising.[2]

Accordingly, the Commission finds that County Farmland Protection Boards and the West Virginia Agricultural Land Protection Authority may solicit for their respective entities, based on their enabling legislation.[3] Next, the Commission will consider what limitations, if any, apply to such fundraising efforts.

Manner of Solicitation

The Commission's Legislative Rule prohibits oral solicitations of "persons under the regulatory control of the agency" and a vendor which has a contract with or is seeking to contract with the agency. Title 158, Series 7, Section 7.1.(a) and (b).

Regulated Entities

Thus, in order to avoid the appearance of a *quid pro quo,* the Requester may **not** solicit donations-orally or in writing-from anyone whose application for participation in any of its programs is pending at the time of the solicitation.

The Requester may send a written solicitation to the public at large, even if the targeted group may encompass previous or potential participants in its programs. The Requester may **not** direct such written solicitation solely to previous or potential participants.

As for previous or potential participants, the Requester is permitted to solicit them in writing, but shall include a disclaimer on its solicitation(s) to make it clear that their participation is completely voluntary. To the extent that the Requester has any ongoing role in monitoring the compliance of a potential donor who is a previous participant, the disclaimer should additionally provide that participation in the fund-raiser has no effect on the Requester's action regarding its monitoring of participants for purposes of ensuring compliance with program requirements. Regarding potential or future participants, the Requester's written solicitation shall include a disclaimer to make it clear that their participation in the fund-raiser will have no effect on the Requester's action regarding any future application for participation in any of its programs.

Vendors

The Requester may **not** orally solicit donations from a vendor with which it has a contract, which is bidding on a contract, or is in the process of soliciting business from

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[2] According to the Requester, about half of the County Farmland Protection Boards have obtained 501(c)(3) tax-exempt status from the Internal Revenue Service. The Boards are set up as quasi-governmental organizations, are tax-exempt, and may accept charitable contributions.

[3] The Commission need not analyze whether, pursuant to 158 C.S.R 7 § 6.2., the Requester's solicitation is for a charitable purpose, since it is authorized by statute to solicit contributions.

the Requester. The term "vendor" shall include appraisers, attorneys and consultants who provide compensated services, even in the absence of a written contract.

The Requester may send a written solicitation to the public or business community at large, even if the targeted group may encompass a vendor with which it has a contract, which is bidding on a contract, or is in the process of soliciting business from the Requester. The Requester may not direct such written solicitation solely to a vendor with which it has a contract, which is bidding on a contract, or is in the process of soliciting business from the Requester.

In soliciting businesses or companies, the Requester shall **not** endorse a particular product, company or business. This action would constitute the prohibited use of office for private gain. Should the Requester seek to solicit individuals or entities subject to its regulatory authority, or from a vendor or potential vendor, it must conform its solicitation to the conditions set forth in the Legislative Rule. *See* 158 C.S.R. § 7.7.

General Conditions

The Requester asks whether it may make follow-up telephone calls to potential donors after sending a written solicitation. Given the Legislative Rule's prohibition against oral solicitations of regulated persons and vendors, the Requester may **not** make follow-up telephone calls to anyone whose application for participation in any of its programs is pending at the time of the solicitation; and the Requester may **not** make follow-up telephone calls to a vendor with which it has a contract, which is bidding on a contract, or is in the process of soliciting business from the Requester. In all other instances, the Requester may make follow-up telephone calls to potential donors after sending a written solicitation.

Therefore, the Agency's fundraising efforts must: comply with the conditions herein imposed; conform its solicitation to the conditions more particularly set forth in the Legislative Rule. 158 C.S.R. § 7.7.; and, shall comply with its own statutory requirements. The Ethics Act sets the minimum standard of conduct. When the Legislature or an agency imposes a stricter standard, then public servants must comply with the stricter requirements.

The Requester must abide by the following additional conditions: a public servant may never solicit a contribution from which he or she may personally benefit; a public servant may never coerce a contribution from any source; and, supervisors shall not solicit their subordinates for a contribution.

Finally, if a County Farmland Protection Board or the West Virginia Agricultural Land Protection Authority elects to retain the services of a private individual or entity to conduct its fund-raising activity, that person or company is required to abide by all the foregoing conditions.

Conclusion

This opinion is limited to County Farmland Protection Boards and the West Virginia Agricultural Land Protection Authority who are soliciting in accordance with W. Va. Code § SA-12-1 *et seq.* This opinion may not be relied upon by other public agencies or officials who desire to engage in fund-raising efforts. Instead, they should consult with the Executive Director of the Ethics Commission for guidance.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-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 as hereinabove set forth unless and until it is amended or revoked, or the law is changed.

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